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Oral History of Distinguished American Judges

HON. GERARD E. LYNCH
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

with former law clerks
Hon. Arun S. Subramanian
Margaret S. Graham

May 30, 2024

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1 [START RECORDING]

2 00:00:18 SUBRAMANIAN:¹ Judge Lynch, born in Brooklyn, lifelong New
3 Yorker. You clerked for two of the nation's greatest jurists,
4 Judge Wilfred Feinberg² of the Second Circuit and Justice
5 William J. Brennan Jr.³ of the Supreme Court of the United
6 States.

7 You have taught for nearly half a century at Columbia Law
8 School, training decades of lawyers who have gone on to private
9 practice, government service, public interest work, and the
10 judiciary. You've prosecuted cases on behalf of the
11 government, defended the rights of the accused, and for the
12 last 23 years, you have served as a judge, first on the
13 Southern District of New York, and then on the Second Circuit
14 Court of Appeals.

15 00:00:59 You have a wonderful family, including two beautiful
16 grandchildren, and still make time for your love of the arts,
17 theater, ballet, and even the study of birds. So, our first
18 question, how did you do all of this, and do you have any tips
19 for the rest of us?

20 JUDGE LYNCH: Well, I don't get a lot of sleep; that's part of

¹ Arun S. Subramanian serves as a judge on the U.S. District Court for the Southern District of New York. He clerked for Judge Lynch (2006-2007) while on the District Court for the Southern District of New York, for Judge Dennis Jacobs (NYU Law '73) on the U.S. Court of Appeals for the Second Circuit, and for Justice Ruth Bader Ginsburg on the Supreme Court of the United States. He also practiced law for over fifteen years focusing in commercial law and bankruptcy.

² [Judge Wilfred Feinberg](#) served on the Second Circuit Court of Appeals from 1966 to 2014.

³ [Justice William J. Brennan, Jr.](#) served on the Supreme Court of the United States from 1956 to 1990 after having served on the New Jersey state intermediate appellate and state supreme courts. Justice Brennan is also an alumnus of [IJA's New Appellate Judges Seminar](#) 1959.

21 it. But mostly, I've just been very lucky in my life to have
22 jobs that I like doing. In retrospect, I can look back at
23 myself, even as far as high school, and say, oh, I was working
24 pretty hard, but it never felt like that. It felt easy,
25 because I was doing things that I like doing. So, if you like
26 00:01:37 doing one thing, you like doing something else, and you can
27 find a way to combine them both, good. That's pretty much all
28 there is to it. Plus, I come from a union family, and we value
29 job security. So, one life-tenured job has never been enough
30 for me. I like having two.

31 00:01:57 GRAHAM:⁴ And the two life-tenured jobs are your professorship
32 at Columbia and your judgeship.

33 JUDGE LYNCH: Right, exactly.

34 GRAHAM: Great. You've spoken movingly about your family and
35 your childhood, and how it shaped you as a person and a judge,
36 including at the Law Day Dinner in 2016, when you received the
37 Learned Hand Award⁵. Tell us more about your parents.

38 JUDGE LYNCH: Well, my father was a mechanic for Trans World
39 Airlines for most of my life, until his retirement. He dropped
40 out of high school during the Depression to help support his
41 family. He didn't have any skills, really. World War II, he
42 00:02:38 was in the Army Air Corps, and he learned how to fix airplanes.
43 So, he then had a skill, but after the war, there were no jobs

⁴ Margaret S. Graham is a partner at Latham & Watkins in New York. Prior to joining the firm, she clerked for Judge Lynch from 2012 to 2013 and served for eleven years as an Assistant U.S. Attorney for the U.S. Attorney's Office for the Southern District of New York. She had also taught a prosecutorial externship at NYU Law.

⁵ In 2016, the Federal Bar Council awarded Judge Lynch with the [Learned Hand Medal for Excellence in Federal Jurisprudence](#) at their Annual Law Day Dinner.

44 for that. There really wasn't much of a civil aviation in the
45 United States in the late '40s, early '50s. So, I think we
46 must have been pretty poor for the first few years of my life.
47 I wouldn't have known about it. I wouldn't have known the
48 difference.

49 But then he was able to get the job at the airport, and it was
50 a union job. There were good benefits. The pay was
51 reasonable. We lived comfortably by my standards. He was a
52 very kind and mild-mannered guy, very devoted to the family.

53 00:03:30 He worked most of his life on the midnight shift. It probably
54 paid like three cents an hour more or something, but it was
55 worth it to him to have the extra income, although it must have
56 been a hardship. So, that was him.

57 My mother was a homemaker, full-time mom. She should have been
58 00:03:51 a feminist, but she wasn't. Why I say she should have been is
59 because she really resented the fact that her family didn't
60 have enough money to send her to college. They only had enough
61 money to try one of their children, and the money went to her
62 brother, who didn't graduate; she would have. But she didn't
63 see that as some kind of structural thing. It was just this
64 sort of resentment that she had, and I think I became the
65 vehicle for her thwarted ambitions in the academic sphere.

66 I always say she was the kind of mother that if I got a hundred
67 on an exam, she would say, "Weren't there any extra credit
68 questions?" The standard was set very high. I could read by
69 00:04:41 the time I went to kindergarten because she sat with flashcards
70 and taught me to read. So, she set a very high standard, and

71 she made me what I am, I guess, in a lot of respects.

72 GRAHAM: Tell us about your father's education.

73 JUDGE LYNCH: Well, he didn't have any. He dropped out of high
74 school, and later I remember him studying algebra. I don't
75 know why I remember the algebra in particular, at the kitchen
76 table to get his GED. I always thought he did it to please my
77 mother. That's why I did homework, so that must be what he was
78 doing. But I'm pretty sure that he needed the
79 00:05:26 diploma to get the job, and that was probably why he was doing
80 it.

81 GRAHAM: You've told me on prior occasions that your parents
82 frequently told you not to get a swelled head. Why do you
83 think that is?

84 00:05:38 JUDGE LYNCH: Well, they were both religious people. I was
85 raised Catholic, and their attitude was that whatever gifts one
86 had, whatever talents one had, were basically gifts from God,
87 and what mattered was what you did with it. The fact that you
88 had a high IQ was not anything that made you better than
89 anybody else or anything that you could boast of, because that
90 was God's gift. So, you shouldn't be arrogant. You shouldn't
91 think too well of yourself or be too self-important. Humility
92 was a virtue.

93 I still believe that, in probably a more secular version. Which
94 is, so you get good genes, you win the lottery of having two
95 00:06:31 loving parents who are supportive of education. This isn't a
96 virtue on your part. This is the luck of the draw. This is
97 the privilege. You're a male. The girls in my neighborhood

98 didn't have the same educational opportunities that I did.
99 I have a friend from grammar school who's a very successful
100 lawyer, but she was like five years behind me in getting to law
101 school because she didn't have encouragement to go ahead in
102 that. We were the exceptions in our neighborhood. But I
103 always thought that one of the things about being male and
104 white, frankly, is that nobody noticed right away, instantly
105 when they saw me, that I didn't fit in. I often felt that I
106 00:07:28 didn't fit into various privileged situations, Ivy League
107 schools and so on. But I felt like I was traveling incognito,
108 in a way.

109 GRAHAM: In what way did you feel like you didn't fit in in
110 privileged situations?

111 00:07:41 JUDGE LYNCH: I was a working-class kid. I didn't have
112 educated people in my background. My mother had one cousin who
113 went to college. He went to Wagner College and played football
114 on Staten Island, and he was sort of a kind of role model for
115 me, but I didn't know many educated people. I didn't have any
116 idea of what lawyers did. So, I was kind of just feeling my
117 way into a new world for much of my teenage and post-teenage
118 years.

119 GRAHAM: You went to Regis High School⁶. Your wife, Karen,
120 recently called it the most important influence in your life.
121 Tell us about that.

122 00:08:22 JUDGE LYNCH: Well, so I'm an outer borough guy. The

⁶ [Regis High School](#) is a private Catholic school located in Manhattan in New York City.

123 neighborhood I grew up in was on the border of Brooklyn and
124 Queens. I always thought we lived in Brooklyn, because that's
125 what our post office address was. But it actually was on the
126 other side of the border, I didn't even know. So, kind of
127 mixed outer borough heritage. It was an ethnic neighborhood,
128 largely German. So, it's a very closed world. I've always
129 been good at school. I did well in school. The nuns in my
130 grammar school told my parents there is a school in Manhattan,
131 and they, of course, wanted me to go to a Catholic high school,
132 but they mostly cost money. This one didn't, it was free, and
133 00:09:11 you got in by taking a test. So, they encouraged me to take
134 the test. I did.

135 But this was a very big step for a number of reasons. One, it
136 was in Manhattan. So, my father taught me how to ride the
137 subways. We took what is now the L train from my neighborhood
138 00:09:29 to Union Square, and then changed to the Lexington Avenue line.
139 My first question was, you know, "Okay, here we are at 14th
140 Street. The school is at 84th Street. Do I go uptown or
141 downtown?" I was that much of a fool, right? He laughed and
142 told me, if the numbers go up, you go uptown.

143 So, I started commuting. My base of life shifted. I was
144 usually at the school from 8:00 in the morning. I'd go to mass
145 before classes some mornings. I'd be there until 5:00 at night
146 until they closed the building down, doing mostly speech and
147 debate after class, and it was a commute. So, I had that
148 change in my life.

149 00:10:20 But also, now suddenly I was in this very intellectualized

150 environment. The teachers were smart. They were dedicated.
151 They opened me up to all kinds of new worlds. So, it really
152 changed my trajectory of what might be available to me in life.
153 Four days a year, you got sort of the day off, but it was to do
154 some cultural thing. You had to go to a museum or a matinee on
155 Broadway or something and then report back on it afterwards. I
156 got to experience a little more of life in New York. So, it
157 was a pretty big deal in terms of shifting my perspective.
158 Just even in a matter of colleges, it was not many years before
159 I went there that they would finally agree to send
160 00:11:15 transcripts to something other than a Catholic college. So, it
161 was still new for people from Regis to go to Ivy League
162 schools. Besides that, I later met the admissions director at
163 Columbia, I worked for him for a while when I was in college,
164 and he had taught in a Catholic high school. He claimed to be
165 00:11:33 the first admissions director of an Ivy League school to
166 recruit at places like Regis. So, it was a convergence of the
167 church opening up a bit and people no longer thinking that
168 Catholic kids were some sort of backwater.
169 But still, the guidance counselor suggested two places for me
170 to go to college. One was Xavier [University] in Cincinnati,
171 [Ohio], and one was Gonzaga [University] in Spokane,
172 [Washington]. I had no idea where Spokane was. Now that I
173 know, I'm even more horrified. But I did fly out to Cincinnati
174 only to learn, and this is in 1967, mind you, that they had
175 mandatory ROTC. I went to the priest who was recruiting me. I
176 said, "Father," this is like New York street

177 00:12:22 kid imitation. "Father, we all know there's mandatory, and
178 then there's mandatory. And this is only mandatory, right?
179 There's got to be some way around it." His response was, "I
180 guess, but why wouldn't you want to?"
181 Okay, so I flew back to New York. Fortunately, one of the lay
182 teachers pulled me aside and said, "Lynch, what's this I hear
183 about Xavier?" I said, "Well, don't worry about it, I'm not
184 going." He said, "You shouldn't even be applying to places
185 like that. You should apply to places like Yale and Columbia."
186 So, I applied to Yale and Columbia. So, in a lot of ways, it
187 just sort of primed me for the next level.

188 00:12:59 GRAHAM: Regis' motto is famously "Men for others."

189 JUDGE LYNCH: "Men for others," right.

190 GRAHAM: How has that shaped you?

191 JUDGE LYNCH: Well, you can take the boy out of the church, but
192 you can't take the church out of the boy; that shaped me.

193 00:13:11 Again, it goes back to my parents. It's what you do for
194 others, what you make of your life, that has to be socially
195 constructive, for want of a better word. You're not in it for
196 how much money you can make, or the famous saying of some
197 millionaire that it's not the money that you do it for, money
198 is just how you keep score. It's the game. But that was not
199 the game for the Jesuits. It was not about how you could
200 advance yourself in society. It was about what you could do
201 for other people.

202 SUBRAMANIAN: So, after Regis, you went on to Columbia College
203 and then Columbia Law School. You finished first in your class

204 00:13:58 at both, but you decided not to join the Law Review. Can you
205 tell us a little bit about that?

206 JUDGE LYNCH: Well, yeah. Well, this is because I didn't know
207 anything. So, I had always aspired to be a teacher, basically,
208 as soon as I had any basis for aspiring to anything. It was
209 because teachers were the people who exemplified the kind of
210 education, erudition, intelligence that I aspired to have.
211 When I first went to college, I was planning to major in
212 history. I guess I already had a little bit of something else
213 in mind, because I remember the role model was Arthur
214 00:14:45 Schlesinger, Jr.⁷, who was a history professor, but was also an
215 advisor to President Kennedy. So, this seemed like you could
216 combine worldliness with teaching; that sounded good. But I
217 sort of fell into majoring in Greek and Latin instead, because
218 I had had three years of Greek and three of Latin in high
219 00:15:06 school. I liked it. I took a course in Greek to satisfy the
220 language requirement, because I could take an advanced course
221 and place out. But I liked it, so I kept doing it, and I sort
222 of continued with that through college.

223 At different times, I thought I would teach. I went through
224 this Paul Goodman, Edgar Z. Friedenberg⁸ phase of the way to
225 change the world is to reach children. So, I was going to be
226 like a preschool teacher. Thank God I didn't follow up on

⁷ [Arthur Schlesinger, Jr.](#) was a well-known historian and professor at Harvard University. Schlesinger was also involved in politics and became special advisor to President John F. Kennedy.

⁸ [Paul Goodman](#) and [Edgar Z. Friedenberg](#) were both American scholars focused on education and activism.

227 that. I wouldn't be good at that at all. I always thought
228 maybe a high school teacher, had this college professor notion,
229 which grew more as I advanced in school. But it was a time of
230 00:15:57 war and turmoil and protest, and gradually, I started to think,
231 well, I really should be--what am I going to do for the world
232 by teaching Greek in college?

233 So, I guess I had Thurgood Marshall⁹ in mind. Not that I
234 aspired to be him, of course. But just that kind of public
235 interest lawyer seemed like a thing that one could do, where
236 you didn't have to be a pre-med, and you didn't have to deal
237 with blood. So, okay, be a lawyer. So, I applied to law
238 school. Why Columbia for all these things? I remember when I
239 was a senior in college, eventually I did go to visit Yale,
240 because my teacher said Columbia and Yale.

241 00:16:48 So, I went up to Yale, and they gave a tour, and the guy said,
242 "One of the great things about this is it's so close to New
243 York. You can get out of here on the weekends and go down to
244 the city and enjoy New York." I thought, well, I can do better
245 than that. So, that was why Columbia. So, I stayed. I liked
246 00:17:08 it.

247 But anyway, so I showed up in law school, and the first day,
248 there were all these people in suits. I thought, there's a
249 dress code. I didn't know the dress code. Well, there wasn't
250 a dress code. It was just these were the upper-class students

⁹ [Thurgood Marshall](#) was a renowned civil rights activist who argued *Brown v. Board of Education*, and served as an associate justice of the Supreme Court of the United States from 1967 until 1991.

251 who were doing interview week with law firms. I thought, oh,
252 law firms. What is that? I went and looked at the board, and
253 they had letters from all the different law firms that were
254 recruiting, and they said their starting salary. Which at that
255 time was, I believe, \$15,000 a year. I almost fell over. I
256 thought, you can make that much money? That was as much as my
257 00:17:43 father ever made. I can make that in the first year out of
258 here? That's interesting.

259 So, I really didn't know anything about any of this, and I had
260 never heard of a law review until they announced there's a
261 writing competition. Oh, a competition. I do that. They look
262 at your grades. They have the writing competition, something
263 you compete for; I'm in. So, I did the writing competition. I
264 got an invitation to join the Law Review. I said, "Well,
265 great, fine. What do I have to do?" They said, "Well, you
266 have to be here July 1 to work full time on the law review." I
267 said, "I can't do that. I have a job lined up. I have to eat.
268 I can't
269 00:18:28 do that." They said, "Well, you have to do that." I said,
270 "Well, okay, thank you very much, but I can't do that." Then
271 the storm hit. The editor-in-chief told me, "You know you're
272 taking a spot away from somebody?" I said, "What do you mean?
273 Get somebody off your waiting list." He said, "We don't have a
274 waiting list." I
275 00:18:45 said, "Maybe you should have a waiting list." Some professor
276 called me and said I was ruining my life by not doing the Law
277 Review. This is the wrong thing to say to me at that stage in

278 life. I had a little chip on my shoulder. So, I'm like, oh,
279 yeah, try me. Watch me.

280 Now, with the benefit of hindsight, well, on the one hand, I
281 would like to say to that professor, see, it worked out. I did
282 all right. But I think it was a mistake. I think the people
283 who were my classmates, who are my friends who did the Law
284 Review had much closer relationships from that. It was a
285 bonding experience. I think they learned a lot from doing it.

286 00:19:30 It would have been a good thing to do. I could have borrowed
287 money. My father abhorred debt. He had a mortgage and a car
288 loan. He didn't have a credit card until much later in his
289 life.

290 It just seemed to him that--he once told me that paying for
291 groceries with a credit card was shameful. I think what he had
292 in mind was his family had to get groceries and put it on the
293 tab because they couldn't afford to pay for them, and he
294 associated credit cards with that, and that was going into
295 debt. So, fortunately, this was an era when education costs
296 were much lower in real dollars than they are now. I had
297 00:20:12 scholarships. I had grants that covered the tuition, even gave
298 me some cash back. Then for the rest, I was supporting myself,
299 so I graduated with essentially no debt. I borrowed \$1,000
300 when I was an undergraduate on a student loan. \$500 of it
301 stayed in the bank, \$500 of it I bought a stereo.

302 00:20:35 As soon as I got a job that paid money, or I guess not really,
303 because you were deferred while you were a law clerk. So, when
304 I came to the end of the Supreme Court term, I would have to

305 pay back the debt. I just wrote a check for the \$1,000 and was
306 free of it. So, it was a different era. But that's the story
307 of the Law Review.

308 SUBRAMANIAN: You mentioned that it was a different era, and
309 you mentioned that it was a time of war and turmoil when you
310 were in college and law school. That was during the time of
311 the Vietnam War. Could you tell us a little bit about that?

312 JUDGE LYNCH: Oh, it was the best of times and the worst of
313 00:21:10 times. To be young was very heaven. It was amazing. Because
314 everything seemed desperately important. Whether you went to
315 class or were on strike it was like some moral dilemma, and it
316 was very exciting to be around that kind of ferment. So, it
317 contributed to one's education, actually. You were learning
318 about the world, learning about politics, talking ideas. As
319 Dylan says, "There was music in the cafés at night and
320 revolution in the air."¹⁰ That was sort of the atmosphere.

321 SUBRAMANIAN: Right now, as we're taping this interview, we're
322 in a time when there are campus protests, and we have a war
323 going on in Gaza¹¹. Did your time in college and law school
324 00:22:13 during the Vietnam War give you any perspective on what's going
325 on today?

326 JUDGE LYNCH: Oh, yeah, sure, though so has the rest of my life
327 since. I can look back and say that my generation made a lot
328 of mistakes, and I see some of those being replicated now.

¹⁰ BOB DYLAN, TANGLED UP IN BLUE (Columbia Records 1975)

¹¹ During the time of this interview, there is an [ongoing conflict](#) between Israel and Palestine taking place in the Gaza strip.

329 00:22:32 Some of them I knew at the time were mistakes; others, I
330 didn't. But for example, if you're trying to end a war that
331 you think is unjust, you don't really have to admire the other
332 side in that war. It's not politically good to be chanting "Ho
333 Chi Minh" when the people that you're trying to reach with your
334 message about the war are the parents of young men who are
335 being shot at by the Viet Cong¹². So, it's a political mistake.
336 But it's also a moral mistake. You can say the United States
337 had no business being there. I think that has sort of stood up
338 to the test of time, that insight. But that doesn't mean that
339 the other guys were heroes. Okay, they were nationalists, they
340 00:23:31 believed in what they were doing, but there were other people
341 who were fighting against them who thought they were horrible.
342 Indeed, when they took over the whole country, it was pretty
343 horrible for a lot of people in the South.
344 So, life is not as black and white, and I think a lot of--when
345 you're young and idealistic, for a lot of people, that seems
346 like compromise or not being fully committed to the cause or
347 something, and you see a lot of that. The sort of extremist
348 folks tend to be the leading edge of a lot of what happens at
349 protests. I was never good at chants, just as I was never good
350 at signing petitions, joining amicus briefs as a law professor.
351 00:24:20 I was always like, yeah, well, okay, I'm sort of in agreement
352 with your general ideas. But look at what's in this. I

¹² [Ho Chi Minh](#) was the leader of the Vietnamese nationalist movement and the president of North Vietnam during the Vietnam War. The Viet Cong fought under his direction against South Vietnam and the United States.

353 wouldn't say that. So, I don't want to sign this. So, I guess
354 I always had a certain independent streak about it, and I can't
355 say that I understood all of those things. I did know that the
356 00:24:43 people who mostly went to prep schools and came from rich
357 families who were talking about the alliance of Black, Latin,
358 and white working-class people, that was kind of the mantra of
359 the time, did not know the white working class as I did. But
360 there were other things that I drank some of the Kool-Aid too,
361 I'm sure.

362 SUBRAMANIAN: So along similar lines, what advice would you
363 have for high school students today, college kids who are
364 navigating during this complicated time that we live in and are
365 looking for some message of hope?

366 JUDGE LYNCH: Well, the message of hope is it'll get better,
367 00:25:25 and then it'll get worse, because that's what happens in life.
368 Things go through cycles. If the arc of history is bending in
369 any particular long-range direction, it's hard to see. It's
370 hard to see it in the short run, because the arc of history is
371 very, very long. What you mostly see is cycles. Things may
372 seem very despairing at a particular moment in time, but the
373 winds shift. There become opportunities to make the kind of
374 change that you want. You can have successes in that. Then
375 the winds shift in another direction, and when you've lived
376 long enough, you've seen a couple of those, and you see that
377 it's not a straight line. Some things, many things, in fact,
378 00:26:16 in American society are so much better than they were circa
379 1955. Other things, not so much, and the progress hasn't been

380 enough. If you look at the history of Reconstruction or the
381 history of our own time, you see that progress is often
382 followed by backlash and regression. That's the way life is.
383 00:26:40 So, I don't know if that's a message of hope, except for the
384 first part. Don't despair, because you'll get your shot. But
385 I'm not an optimist in that sense, that everything's always
386 going to continue on some straight line, getting better. We
387 were in the 1960s, and the reason we were, and by we, I mean
388 sort of the people who were relatively privileged in society,
389 people could get arrested. It wasn't like--you could always
390 get a teaching job sooner or later. Everything was getting
391 better, had been getting better. We were going to be richer
392 than our parents. Things were headed in this particular
393 direction, and they did for a while, they did. But I don't
394 00:27:31 know that that straight line is ever destined, certainly not
395 predestined in some way that you're guaranteed some kind of
396 future; things change.

397 SUBRAMANIAN: So, speaking of your path after Columbia Law
398 School, you clerked for two of the nation's most revered
399 judges, Judge Wilford Feinberg on the Second Circuit and
400 Justice Brennan on the Supreme Court. We'll talk a little bit
401 about them. But first, how did you come to be hired by those
402 two judges?

403 JUDGE LYNCH: Well, this story is--my story is one of being
404 very lucky and getting help. I am not a person who thinks that
405 00:28:23 everybody has a fair shot, and you can pull yourself up by your
406 own bootstraps and look at me. First of all, you can't. Have

407 you ever tried pulling yourself up by your bootstraps? The
408 whole point of that saying originally was, that's impossible.
409 You can't; gravity, et cetera.

410 00:28:41 But I'm always rather annoyed at the people who claim to be
411 self-made, because I'm not self-made. People were very
412 generous to me at various critical points. The guy who told
413 me, apply to Yale and Columbia. Well, the next guy in that
414 line was Professor Abe Sofaer, who is now at the Hoover
415 Institute in Stanford¹³. He was my property teacher. He had
416 clerked for Justice Brennan. In the beginning of my second
417 year in law school, he pulled me aside and said, "What are you
418 going to do after you graduate?" I said, "Good question. I
419 don't know. I don't have any ideas." He said, "Would you be
420 interested in going to Washington?" I said, "I guess for the
421 00:29:23 right thing, sure." He said, "Okay, I'll get back to you."
422 And a couple of weeks later, he came back and said, "How would
423 you like to clerk for Justice Brennan?"
424 I wasn't that stupid, that naïve. I said, "That would be
425 great, sure. That would be wonderful." He said, "Well, you
426 got it. The year out from graduation, you'll be clerking for
427 Justice Brennan." Now, that was the last I heard of that for
428 quite a while. So, I went through an application process to
429 get hired by Judge Feinberg to fill in the intermediate year.
430 I went through my second year, through my third year in law

¹³ Before joining the Hoover Institute, [Abraham D. Sofaer](#) served as a United States district judge for the Southern District of New York and was a professor at Columbia Law School.

431 school, went to work for Judge Feinberg. I'm starting to
432 wonder, did I
433 00:30:05 dream this thing with Professor Sofaer? Did this really
434 happen?
435 Another professor, Peter Strauss¹⁴, who also had clerked for
436 Justice Brennan, was in Washington on leave. He was general
437 counsel to the Nuclear Regulatory Commission at the time, and
438 00:30:20 he called me up in chambers. He said, "So I was having
439 breakfast with Justice Brennan this morning, and he said, 'I
440 think I have someone from Columbia coming next year, but I'm
441 not sure who it is.'" And Peter knew who it was, and he told
442 me, "You should write to Justice Brennan and introduce
443 yourself." Think about writing that letter. What do you say?
444 Dear Justice Brennan, I am hereby applying for the job that I'm
445 told I have. What do you do? I figured out something, and it
446 wasn't a dream. I did go to work for Justice Brennan.
447 I didn't meet him at all until about October, or late September
448 of the year that I was clerking. I started on the job in July.
449 00:31:04 But he went away for the summer. Famously, Justice Brennan did
450 not participate in the so-called cert pool, where the justices
451 pool their law clerks. The law clerks write memos about the
452 certiorari petitions, the people trying to get their cases
453 heard by the Supreme Court. He did it all himself. He said,
454 "Look, I know what I'm looking for. I can do it much faster.
455 There's no point in you guys working and writing a whole big

¹⁴ [Peter Strauss](#) began teaching at Columbia Law School in 1971. Strauss is the Betts Professor of Law Emeritus, specializing in administrative law.

456 memo to tell me something I can tell by looking at the first
457 five pages of the petition that this is not a case that's
458 suitable."

459 So, he would--his messenger, who was a staff guy, who was sort
460 00:31:45 of an all-around gopher person, would bring in a shopping cart
461 filled with all the week's cert petitions, and he would take
462 them out and put them on the justice's desk. And the justice
463 would sit there, and he had a pencil in his hand, and he would
464 read as much as he needed to read of the cert petition. He
465 would write "D"

466 00:32:00 in the corner and toss it back in the shopping cart. A couple,
467 he'd write "G" and put them aside.

468 But in the summer, we were supposed to write memos to him. He
469 didn't do that work over the summer. But they were short. He
470 only wanted like a page on anything. So, I talked to him on
471 the phone a couple of times, sent him packages of, you know, if
472 there was FedEx, then we FedExed them or mailed them to him in
473 Nantucket[,MA]. Then when he came back for the term, it was
474 the first time I actually met the man. So, that was not
475 typical even then of the justices of the Supreme Court. But he
476 had a kind of patronage system where his former clerks who were

477 00:32:45 professors or judges that he trusted who had law clerks that
478 they would recommend to him, and he would hire people that way.
479 SUBRAMANIAN: Before you started your clerkship, you clerked
480 for Judge Feinberg on the Second Circuit, who has been called
481 "the kind of jurist the Founding Fathers must have had in mind

482 when they bestowed life tenure on federal judges.”¹⁵ High
483 praise.

484 JUDGE LYNCH: Yes.

485 SUBRAMANIAN: How was your time working with Judge Feinberg?

486 JUDGE LYNCH: Well, I’d have to agree with that. That was
487 written by Professor Maury Rosenberg of Columbia, who was a
488 00:33:17 good friend of the judge, so he’s a little bit biased. But he
489 was right. I think Judge Feinberg had an enormous influence on
490 me in terms of what I thought judges could be and should be.
491 He had a great respect for the craft.

492 He took each case extremely seriously, did his best to both
493 00:33:45 figure out what the law required but also within whatever
494 discretion and limits he would have or whatever ability he
495 would have to come to a just outcome in the case. He was a
496 meticulous craftsman and a very thoughtful judge, had very high
497 standards for us but was also very kind to us all the time, and
498 I thought if I could be like this guy, this would be a good
499 thing to be.

500 So, that left a big mark, in some ways bigger than Justice
501 Brennan, because Justice Brennan, the year that I clerked for
502 him, his wife was dying of cancer. Justice Brennan was a very
503 gregarious guy. If you read biographies of him, it’s all about
504 00:34:37 his friendships with other judges and people in Washington.
505 But we didn’t see that very much because he would come in very
506 early in the morning and leave by around 3:00 in the afternoon

¹⁵ Maurice Rosenberg, *Chief Judge Wilfred Feinberg: A Twenty-Fifth Year Tribute*, 86 COLUM. L. REV. 1505 (1986).

507 to spend as much time as possible with his wife. So, we
508 experienced him. I mean, we had breakfast with him every
509 morning, fortunately at 9:00. He would get there at, like,
510 7:00 or something. But fortunately, breakfast was at 9:00,
511 because I'm not a morning person. So, I would get there just
512 in time to have breakfast, and we'd talk about the cases and
513 the work.

514 Like Professor Strauss, various other of his former clerks who
515 were in town would come by. One that I remember particularly
516 00:35:29 was Richard Arnold, who was later a judge on the Eighth
517 Circuit.¹⁶ But then he was, I think the--if I'm not mistaken,
518 he's from Arkansas. He was the chief of staff to I think
519 Senator Fulbright, but to one of the Arkansas senators anyway.¹⁷
520 So, he was active in Congress, and he would come by pretty
521 00:35:47 frequently, and he was a very impressive character. But so
522 were a lot of the others, but he was one who really stood out
523 in my mind. So, we had a lot of professional contact with the
524 justice, but it wasn't, his mind was elsewhere a lot of that
525 year.

526 SUBRAMANIAN: In terms of Judge Feinberg's and Justice
527 Brennan's impact on your career as a judge, are there any
528 particular things in those judges that you've sought to emulate
529 or replicate?

¹⁶ [Judge Richard Arnold](#) served as a United States district judge in Arkansas from 1978 to 1980. In 1980, Judge Arnold began serving on the Eighth Circuit Court of Appeals until 2004.

¹⁷ Judge Arnold worked for Senator Dale Bumpers of Arkansas in various roles from 1973 to 1978.

530 JUDGE LYNCH: Well, I think I've already mentioned about
531 Judge Feinberg. Justice Brennan was very different. He's been
532 00:36:25 accused of being result-oriented and there's a lot of truth in
533 that. He was very focused on the individual cases, on the
534 people in those cases. Normally, in my experience, the way the
535 federal judiciary works is that district judges, and you'll see
536 this in your career, you're probably already seeing it, are
537 very close to the facts. They're very close to the--they see
538 the people sometimes, the actual parties. They see the lawyers
539 extensively in cases.

540 If there's a trial, you see the witnesses, you have a firsthand
541 take on what the actual facts are in a way that is even deeper
542 than what you need to decide the case. You just see the whole
543 00:37:15 thing. And I think there's inevitably a skew towards, let's
544 get this right for these people. When the case, if it does
545 ever go to the Court of Appeals--most cases don't, that's why
546 district judges are the most important people in the system for
547 most cases--but the cases that do go to the Court of Appeals,
548 00:37:39 we have a somewhat different function because what we write is
549 precedential. We're making law to some degree by what we
550 decide. It's very important to understand we don't make law
551 because we get to just decide what the law should be. We make
552 law because we decide the particular case.

553 Then the rule is if another case comes along that is similar,
554 just in the interest of fairness, you have to decide it the
555 same way. So, the precedent becomes a kind of law, but it's
556 because you're deciding the particular case. But you're still

557 always aware that what you are saying and how you are deciding
558 this case is going to have an impact on more than just those
559 00:38:23 litigants.
560 By the time you get to the Supreme Court, it seems to me from
561 what I saw there and from even more what I've seen since of the
562 way the court operates, they've totally lost track of the
563 individual case. They take cases because they want to decide a
564 particular issue. If they get halfway through the case and it
565 turns out that maybe that issue isn't quite presented by this
566 case, half the time they just decide it anyway. They're not in
567 the business of deciding the individual cases. They're in the
568 business of deciding abstract questions of law for the most
569 part.

570 00:38:55 Justice Brennan wasn't quite like that. I remember one case in
571 particular.¹⁸ It was one of the series of sex discrimination
572 cases involving the Social Security Act. The Social Security
573 Act was written in the 1930s.¹⁹ There was no notion that women
574 were a major factor in the workforce. So, there were things
575 00:39:17 called "widow's benefits" in the Social Security Act because
576 the assumption was that the people who were earning the
577 benefits by working were men and if they died, then someone
578 needed to take care of the woman that they might have been
579 supporting. So, there were widow's benefits. There were no
580 widower's benefits.

581 Well, a guy named Goldfarb from Brooklyn didn't think that was

¹⁸ See [Califano v. Goldfarb](#), 430 U.S. 199 (1977).

¹⁹ Social Security Act, as amended, 42 U.S.C. § 402(c)(1)(C)(1935).

582 fair and he got Ruth Ginsburg or somebody to argue his case and
583 brought to the Supreme--carried it all the way to the Supreme
584 Court to argue that was unconstitutional.²⁰ His pitch was, my
585 wife worked, she earned benefits, and for me, I should get
586 00:40:00 the benefit not because they're for me, for her, it's fair to
587 her that she should have earned what a man would earn in the
588 way of benefits for her family, and she won--he won by a five-
589 to-four vote.²¹

590 I guess to appreciate the story, you have to understand that
591 Justice Brennan got lots of mail. Some of it was fan mail,
592 some of it was the opposite. As a Catholic who had voted for
593 Roe against Wade, he was not popular with a lot of people.²² He
594 got a lot of nasty stuff, second only to Justice Blackman who
595 wrote the opinion.²³ He got lionized and criticized by law
596 professors and pundits and whatever. Never heard him refer to
597 00:40:48 that. He didn't care about that stuff. Whether it was praise
598 or blame, he did what he thought was right.

599 But when that case came out and the New York Times reported on
600 it, there was a little sidebar where some enterprising reporter
601 went out and talked to Mr. Goldfarb in Brooklyn and Mr.
602 00:41:06 Goldfarb told the reporter, "I always had trust in the court
603 system. I had trust that if we took this case to the Supreme
604 Court, they would see that I was right, that I had the right on

²⁰ See *Califano*, 430 U.S. 199.

²¹ See *id.*

²² See [Roe v. Wade](#), 410 U.S. 113 (1973) (referring to Justice Brennan's vote in support of protecting a woman's right to choose whether to have an abortion).

²³ See *id.* (referring to Justice Blackmun authoring the majority opinion in support of protecting a woman's right to choose).

605 my side and see this does it, right?"

606 That day, I had worked on that opinion with the justice. He

607 came into my office and he had this newspaper and he put it on

608 the desk in front of me and he said, "See that, see that?

609 That's what we do this for. That's what we do this for. It's

610 for the Mr. Goldfarbs of the world and to vindicate their trust

611 that there's justice to be had." So, I mean, that sticks with

612 you. There are real people that are affected by these cases

613 00:41:50 and you want to keep that in mind.

614 I guess the other thing about Justice Brannan is people said he

615 made the Constitution conform to his values. I know for a fact

616 he didn't see it that way. He thought that every bit of his

617 values came from the Constitution. He was an enormous patriot.

618 He thought-- Henry Monaghan at Columbia Law School wrote an

619 article once called "*Our Imperfect Constitution*," and it was

620 sort of making the point that the Constitution comes out of

621 politics.²⁴ It created a system that was feasible by the people

622 who wrote it, and they had their interests, and it's not a

623 divinely inspired document where if

624 00:42:37 you decide the case according to the Constitution, justice will

625 result, because it's not designed for that; it's an imperfect

626 document.²⁵ That's not how Justice Brennan saw it. He thought

627 that we had the best system in the world, that one of the

628 things that was good about it was that we had constitutional

629 00:42:55 rights and liberties, and it was his job to protect them and

²⁴ Henry P. Monaghan, [Our Perfect Constitution](#), 56 N.Y.U. L. REV. 353 (1981).

²⁵ See *id.*

630 enforce them.

631 So, but yeah, I think he wasn't that interested in doctrine.

632 He was a very smart guy, but-- another case, maybe even related

633 to the same one, I don't remember, but there was another case

634 where we had-- he was assigned to write a majority opinion in a

635 case that had been like five to four or six to three in

636 conference, but wrote the draft, sent it around, got the votes

637 back. We got three justices joining the opinion, and four

638 justices, Justice Rehnquist drafted a dissent, and he got four

639 votes. We were waiting for Justice Stevens. Waited, waited,

640 00:43:48 waited. We wondered, what are we waiting for? I thought he

641 was solidly on our side. He wound up sending in an opinion

642 concurring in the result. So, we won, but our opinion didn't

643 have five votes.

644 And I went to the justice, I said, "Look, we can fix this. We

645 make a few tweaks. He's not that far from us. We could

646 redraft this a little bit and get his vote, I'm sure," and he

647 looked at me like I was from Mars. He said, "We have five

648 votes now. We're not going to mess with it." He said, "I

649 don't even understand why he bothered. He's really on the same

650 side as we are, isn't he? I mean, this is basically the same

651 thing."

652 00:44:28 Well, he was sort of right. It's not that he didn't understand

653 what Stevens' point was and where he wanted to diverge a little

654 bit from what we had said. What he didn't understand was, why

655 would you make a big deal out of this?

656 I'm morally certain that if Justice Stevens had come to him at

657 00:44:47 the beginning and said, "I'm with you, but I'd like to make
658 sure that you write it this way," he would have done it. He
659 was a great compromiser, but not when you're sitting there on
660 the verge of--you're not going to risk anything when you have
661 the five votes. So, that was kind of how he was.

662
663 SUBRAMANIAN: Today, most Supreme Court law clerks get eye-
664 popping six-figure bonuses from law firms. I'm sure it wasn't
665 the same when you were clerking, but you mentioned the salaries
666 that some people in your law school class were getting from law
667 00:45:34 firms. But you chose to go into teaching. Why?

668 JUDGE LYNCH: Well, several reasons. One, the life of big law
669 was not that appealing to me. It seemed like it was quite a
670 grind, and it wasn't sort of what I got into this for. It was
671 very fortunate, in a way, to have grown up with not a lot of
672 money, because I was a success to my family because I went to
673 college. Everything else was kind of gravy. When I had my
674 first job as a law clerk, by then, I think the law firm salary
675 was like \$25,000. I was making \$17,000, I think, as a law
676 clerk. That was more money than my father had ever made in a
677 year.

678 Although my mother did say something like-- "I don't quite
679 00:46:28 understand this." She had a friend whose son had also gone to
680 law school. And she said, "So-and-so, he would give his arm to
681 have the job that you have, but he makes so much more money
682 than you. How does that work?" So, I tried to explain, but I
683 don't know if I was that successful. But so, really, I mean,

684 00:46:46 the money wasn't the thing. Now, there's money, and there's
685 money. I'm pretty certain that if the money had been the kind
686 of like \$300,000 or more just handed to you, like you were a
687 high school pitcher who had a flamethrower for an arm, and you
688 were a bonus baby from the--they called them that in the '50s--
689 they just give you money to sign the contract on top of the
690 fact of how much money you would make, I don't know that I
691 would've been able to resist, but it wasn't like that then.
692 The disparity between the law professor's salary and the law
693 firm's salary didn't seem that dramatic.
694 Of course, the numbers were all smaller because the currency
695 00:47:31 wasn't worth as much, so it didn't seem as great. It may have
696 been almost as great as--it probably wasn't as great as it is
697 now, but it seemed even less, because like \$8,000 or whatever,
698 that didn't seem like that much money. So, that was one thing.
699 I didn't really want to do that. And they invited me, Columbia
700 invited me to go back and teach, and that was stupid, but they
701 did it, and they did it at Columbia, not infrequently. I
702 suspect they did it at other law schools, too, but they had
703 probably stopped right around that time. I was one of the last
704 to get this kind of treatment.
705 But it was like, if you were first in the class, they would,
706 00:48:10 and they liked you, they would say, "Why don't you come back
707 and teach?" And then they would say, and I remember the
708 meeting with the dean, he said, "Look, everybody gets tenure,
709 don't worry about that. Act like you're already a tenured
710 member of the faculty. Participate in governance, you have

711 nothing to
712 00:48:25 fear. You're a member of the community." But really, school
713 was the only thing I--I'd always wanted to be a teacher.
714 School was the only thing I knew how to do. I knew I was good
715 at it. I could keep doing it. That was easy. So, I went back
716 and did it. It wasn't that well thought out, I'm afraid.
717 Then I did it for a few years, and two things, or three,
718 happened. One was, they asked me to teach criminal law. After
719 my first year, I inherited Herb Wechsler's section of criminal
720 law.²⁶ Herb Wechsler, who drafted the model penal code, wrote
721 the rationale of the law of homicide in the 1930s, preeminent
722 criminal law scholar, and now I'm filling his shoes with half
723 00:49:10 the first-year class. But that's how they did things in those
724 days. It was sort of, yeah, you took the course, you can teach
725 it. So, I was getting into criminal law. It was very
726 interesting. That was one thing.
727 Another thing that happened was, it did seem progressively
728 weirder that I was doing this, I was teaching people about law
729 when I had never done law in any meaningful way, or in any way
730 that was like what most of them were going to do when they
731 graduated. My first class, I was assigned to teach contracts,
732 and I went into the class, it was a small section, and sitting
733 in the front row was one of my college classmates, and he was
734 00:49:55 also a Greek major. There were only six of us. This is not
735 like somebody who just happened to be a classmate in a class of

²⁶ [Herbert Wechsler](#) was a prominent legal scholar, professor at Columbia Law School, director of the American Law Institute.

736 700. He was somebody I knew, and I'm his teacher, and it was
737 either right before or right after my 26th birthday, and there
738 I am, standing in front of a class. I mean, this is absurd.
739 00:50:13 Also, it wasn't that socially comfortable. I was almost 10
740 years younger than the sort of cohort of next youngest people.
741 10 years is a lot, and if you're thinking this is the 10 years
742 difference between starting college in 1958 and starting
743 college in 1968, there's a revolution in the middle, and it's
744 very different. So, I wasn't that comfortable, so I thought,
745 okay, I should do something else for a while, and I tried to
746 decide what am I going to do. I don't want to go in a law
747 firm. I still didn't think that was a very good life, and my
748 classmates were now about five years into doing that. Some of
749 them loved it, a lot of them didn't.

750 00:51:03 But it had happened that a lot of people in my class had gone
751 to the U.S. Attorney's Office and become federal prosecutors,
752 and they all loved it. To a person, they were all having the
753 time of their lives. So, oh, this is great. If I can persuade
754 them to hire me. Everybody seems to like doing it. I am
755 interested in criminal law, and it kind of fits. So, I can tell
756 the dean--remember, I like the job security angle, I wasn't
757 going to quit. We could call this a leave. I'm not sure what
758 a leave from a non-tenured job actually means, but they were
759 willing to call it that, and they would give me three years,
760 which is what the commitment was at the time for the office,
761 00:51:45 and then I had to persuade them to hire me, and somehow did.
762 It was the bravest thing I ever did. I was good at one thing.

763 I didn't know that I'd be good at anything else, but I was
764 willing to try.

765 The great Bob Fiske²⁷, one of the great U.S. attorneys of all
766 00:52:07 times, a legend in the office, was nearing the end of his time
767 there, and he hired me. I remember somebody asked me in the
768 course of all the interviews, like, "Well, you're this
769 intellectual egghead guy. How are you going to talk to agents
770 and cops and ordinary people who are witnesses?" And I said,
771 "You know where I grew up?" This was not going to be a problem
772 for me to relate to people who didn't have an Ivy League
773 education, but again, that's still a very different thing than
774 saying I would know what to talk to them about, or how to
775 investigate something, or how to do the tasks that a prosecutor
776 did, so I
777 threw myself in, and it worked. I was okay. I did all right.

778 00:52:56 SUBRAMANIAN: Not to lavish you with all of the accolades that
779 you got at Columbia, but you received, I think, every award for
780 teaching that Columbia Law School has.

781 JUDGE LYNCH: Yeah, I got a couple of them. Yeah.

782 SUBRAMANIAN: In particular, the awards that are given that are
783 chosen by the students.

784 JUDGE LYNCH: By the students, yeah. I was like the second, I
785 was actually the first, when they instituted that prize, the
786 first guy who got it was Paul Shechtman,²⁸ whom you may know,

²⁷ [Robert B. Fiske, Jr.](#) served as U.S. Attorney for the Southern District of New York from 1976 to 1980 and is currently senior counsel at Davis Polk & Wardwell LLP.

²⁸ [Paul Schechtman](#) is lecturer of law at Columbia Law School, and served as an

787 who was really only a part-time teacher, a sort of a snub to
788 the regular faculty, but he is a great teacher. But I was the
789 00:53:33 second one to get it, and I was the first actual member of the
790 full-time faculty to get it, so I was very proud of that.

791 SUBRAMANIAN: Because a lot of people think, when they think of
792 a law professor as someone who's sitting in the back room
793 writing these pieces, and not really someone who can interface
794 00:53:50 with students, you were that professor.

795 JUDGE LYNCH: Yeah, I wasn't that good at that other part,
796 actually. I mean, I got by. I had to write something to get
797 tenure, I did. I think it was pretty good, but it was pretty
798 painful also. It was a very long process, sort of a book-
799 length article about the racketeering statute.²⁹ But I wasn't
800 that motivated, because it always seemed to me, if I could
801 figure this out, so could anybody else, really, at least
802 anybody reasonably smart with some training.

803 So, I didn't know that I had any great insight that other
804 people didn't have, and I was interested in problems. I could
805 00:54:36 figure out the answer to something and think, oh, that's good,
806 I've figured that out. But then, why would I want to spend a
807 year writing that up into, blowing it up into a 60-page article
808 with 400 footnotes? Most people wouldn't read it, and the
809 people who did read it would probably skim it, and mostly
810 they'd look at the syllabus at the beginning, where they--

assistant U.S. attorney from 1981 to 1985.

²⁹ Gerard E. Lynch, [RICO: The Crime of Being a Criminal Parts I & II](#), 87 COLUM. L. REV. 661 (1987).

811 didn't have those, even, in law reviews in those days. They'd
812 just sort of boil it down to sort of an incorrect version of
813 the idea that I had when I started. And to what end? I could
814 be figuring out more interesting stuff instead of doing that.
815 I was very selfish. I liked ideas for the sake of ideas. I
816 00:55:20 didn't like it for the sake of advancing human knowledge,
817 because most of these ideas weren't all that important, anyway,
818 that people were writing about. So, I wasn't that good at that
819 part.

820 But I was pretty good at relating to students and pretty good
821 00:55:35 at figuring out ways of making things comprehensible. Over
822 time, because I was thrust into it, I mean, I was told, here,
823 you have a class of 150 people, teach them criminal law. Well,
824 when you're teaching 20 people or 30 people, I had models for
825 that. I could think of how to make that work. But when you're
826 teaching 150 people, this is a different thing. You are
827 putting on a show. You have to go big, and you have to figure
828 out a way to go big. You have to talk louder. You have to do
829 bigger gestures. You have to figure out, can you put things on
830 a screen behind you to sort of keep people's attention. How do
831 you make a show for a lot of people? And I got good at that.

832 00:56:19 I got pretty good at that.

833 SUBRAMANIAN: And this is how much you love teaching. As a
834 present to yourself, you asked Columbia College whether you
835 could teach a course on literature. Why did you do that, and
836 what was the most memorable part of that experience?

837 JUDGE LYNCH: Well, first of all, it's not a course in

838 literature. It is the required first-year course in the core
839 curriculum called Literature Humanities, and everybody at
840 Columbia takes this. It's not like I got to teach this to all
841 the students. It's taught in small sections, so they need a
842 lot of people to teach it, and they teach it in groups of
843 00:56:54 18 or 20 students. So, I got a piece of this, and I knew who
844 taught most of the sections, especially now. Just by the luck
845 of the draw, I got the chair of the Classics Department for my
846 Literature Humanities section when I was a freshman. But you
847 didn't see that many people who were department chairs and
848 00:57:19 tenured professors teaching this course anymore, and they had a
849 lot of people who were graduate students in one thing or
850 another.

851 So, first I had to persuade the dean of the law school that she
852 should continue to foot a very small salary because judges were
853 only allowed to make a certain amount of money for teaching--
854 active judges are only allowed to make a certain amount of
855 money by teaching, and it was way less than the law school
856 would have paid me for what I was doing for the law school.
857 But I was doing something for the law school, and now I was
858 going to be doing something for much of my time that was not
859 00:57:51 for the law school. But it was very little money, and I paid
860 my dues, and she said, sure.

861 So, then I had to go and convince the chairman of the
862 Humanities Department that this old guy who had been a law
863 professor was okay to do this. Maybe beggars can't be
864 choosers. They needed a lot of people to staff the sections.

865 But basically, my pitch was, the people who are doing this are
866 me 50 years ago. They're the people who would be like first-
867 year graduate students. I could have been that. I came this
868 close to being that, in fact.

869 So, I said I only want to do the first semester because I could
870 00:58:37 only do so much. I was going to do a four-point course, which
871 is very demanding. The course was like a book a week. And I
872 said look, I don't know about the second half. The second half
873 was sort of the New Testament to Toni Morrison. The first half
874 was kind of Homer to Virgil. As a classicist, I thought that
875 00:58:58 was the right proportion. Most people might not agree. But I
876 said "I've read most of these things in the original. I know
877 the works. You can put this in my hands." And they let me do
878 it, and it was great for a number of reasons. There was a
879 weekly seminar where the instructors would get together with
880 somebody who was a legitimate expert in the particular book
881 that was coming up the next week. That was a wonderful
882 experience. I learned a lot.

883 The students were great. They were very young. I was reminded
884 quickly that none of them know how to write. It is an Ivy
885 League school. But when I was in elementary school, it was a
886 00:59:43 grammar school. They taught you grammar. I used to start my
887 criminal law classes, which is, as you know, a very statutory
888 field so you're doing a lot of reading of statutes. I would
889 say, "How many of you know how to diagram a sentence?" The low
890 point was less than 50%. It sort of fluctuated. Well, it
891 started to come back a little towards the end of my teaching

892 career, so I was gratified. But most of the students didn't
893 have that kind of deep background.

894 So, I had them write a paper every other week, just a three-
895 page paper on whatever. I think I actually set topics a lot of
896 the time. And then I would give that back to them. Now, my
897 01:00:29 wife would be tearing her hair out because I'd be spending the
898 whole weekend working on these papers, giving feedback. She'd
899 say, "You can't do this. This is like, you're making this into
900 your life. You cannot do this." I said, "No, but this is what
901 they need." So, usually, there would be three pages of their
902 01:00:48 writing and four pages of my commentary on what they wrote. I
903 would warn them, don't get all upset, but we're going to talk
904 about how you make an argument, how you state a proposition,
905 how you make the sentences work and make them tight.

906 What Judge Feinberg used to do at the end, after we sort of had
907 gotten to a pretty much final draft, he would have a session
908 with the law clerk where he would sit, and you would sit next
909 to him. You would bring in on a library cart all the books
910 that you cited in the draft, and we would read through the
911 opinion line by line. The thing that pleased him most was if
912 he could find a way of taking a sentence and making it two
913 01:01:36 words shorter. Or he'd get to a sentence, and he'd say, "We
914 have this sentence, we state this proposition, but there's no
915 citation to authority to support that. Do you have a case for
916 that?" I said, "Well, it's just common sense really, isn't
917 it?" Very often, his response would be, "Well, actually, we
918 could do without that sentence. Strike it." Sure enough, it

919 would turn out that, yeah, it worked just as well without that
920 sentence as with it. So, I developed a taste for concision.
921 So, we did that with the students, and it was just great
922 introducing people to these wonderful books. I read to them a
923 01:02:24 little bit in Greek and a little bit in Latin just so they
924 would hear what it sounded like in the original, and it was
925 great. But, I mean, the law school was paying for this, so I
926 had to--really, it was my 65th birthday present to me because
927 it was the road not taken. It was to see what I could have
928 been maybe
929 01:02:51 doing with my life and it was fun.
930 I should go back to when I was a senior in college. Halfway
931 through the year, after I'd already been accepted in law
932 school, so I had this kind of existential panic. What am I
933 doing? I'm an intellectual. I should be doing graduate
934 school. And I went to the same guy that taught me freshman
935 humanities, the chair of the department in classics, and I
936 said, "Look, I know I missed the deadline. I know I didn't
937 take the GREs, but you know I've been taking graduate courses
938 in this department for the last two years. If I want to come
939 to the PhD program, you'd take me, right?"
940 01:03:30 And he sat back and said, "Well, maybe, but let me ask you a
941 question. Suppose I said no. Could you imagine an alternative
942 life for yourself?" I said, "Well, yeah, I've already had one
943 lined up." He said, "Well, then do that, and don't do this."
944 And he was right. It's like being an artist, really. You have
945 to be driven to do that. It has to be your life because there

946 isn't a lot of social impact. There isn't a lot of money.
947 There is not a lot of respect. The humanities are, he couldn't
948 foresee all of this, or maybe he did, but have been shrinking
949 in universities, sadly. So, I think he was right that I was--I
950 made the right choice.

951 01:04:20 GRAHAM: You mentioned that in 1980 you joined the U.S.
952 Attorney's Office, which is really, as the first job in your
953 practice of law, jumping into the deep end, right?

954 JUDGE LYNCH: Oh, it was, it was. I mean, again, remember, I
955 have to always have a paycheck. So, it was sort of timed. I

956 01:04:41 was going to start on like July 1, because that was when the
957 Columbia paycheck from the previous year would run out, and
958 fortunately, they were able to start me then. I had a one-
959 month-old child. This was perfect, actually. There was no
960 such thing as paternity leave. There probably wasn't even much
961 of a thing of maternity leave in those days, but there
962 certainly wasn't anything for fathers. But it worked out. I
963 had my exams graded and whatever, and now we had the baby, and
964 okay, I had this very nice month at home.

965 Then I had a couple of months of very much not being at home,
966 because I'm starting this new job, and like in practically the

967 01:05:13 first week, the Chief of General Crimes came to me and said,
968 "We have a problem. There's a guy who's supposed to start a
969 trial in two weeks, and his wife is having a baby." He was
970 Scott Muller, who later became General Counsel of the CIA and a

971 partner at Davis Polk, I believe.³⁰ So, I know exactly when
972 Scott's Christopher was born; it's like a couple of months
973 after my Christopher was born.

974 The great Judge Weinfeld³¹, before whom this trial was going to
975 be had, I don't think he was necessarily of the who's-having-
976 this-baby-anyway school of thought, but he was very much of the
977 view that assistant U.S. attorneys are fungible. You, for
978 01:05:57 whatever reason, want to be with your wife when she's having
979 this baby, great. That doesn't mean we have to adjourn the
980 trial and screw up my schedule. Get somebody else to try the
981 case. The somebody else was me.

982 So, this was not--I mean, a typical general crimes case in
983 01:06:11 those days, I tried a case that was two counterfeit \$20 bills.
984 I tried a case of a guy who stole from the mail, meaning he was
985 walking down the street, and a letter carrier had left his bag
986 with the mail in it outside the building while he was bringing
987 mail into the building. That's a no-no, you're not supposed to
988 do that. The guy reached in and grabbed a bunch of stuff and
989 ran off, that was the case. It was an acquittal; it was the
990 only case I lost in the time I was in the U.S. Attorney's
991 Office. But that's another story.

992 Anyway, so I have to now get ready. I have to learn how to try
993 a case. I had seen one jury trial, fortunately, because I had

³⁰ [Scott W. Muller](#) was general counsel for the CIA from 2002 until 2004. Muller was partner at Davis Polk & Wardwell LLP from 1985 to 2002 and 2005 to 2014 before becoming senior counsel.

³¹ [Judge Edward Weinfeld](#) served as a judge on the United States District Court for the Southern District of New York from 1950 to 1988.

994 01:06:46 been a juror in the week between my last exam and my law school
995 graduation. So, I had seen at least one state court
996 misdemeanor trial, and I'm going to try this SBA (Small
997 Business Administration) loan fraud case.
998 The defendant had gotten a loan from the Small Business
999 Administration on the pretense that he was going to use it to
1000 buy a radio advertising agency. I think the idea was a company
1001 that would buy blocks of time on different radio stations and
1002 sell them to advertisers. He took the money and speculated on
1003 commodities and lost it all. So, he was charged with fraud.
1004 It was moderate--it was not a tough case, but it was much more
1005 01:07:35 complicated than two counterfeit bills where there's an
1006 undercover officer buying the two counterfeit bills, and you
1007 have a tape. So, okay, so we're going to do this. So, I'm at
1008 the office all hours of the day or night.
1009 I remember one night, Karen is home with the baby, in
1010 01:07:53 sweltering New York heat in July and there's no air
1011 conditioning. In fact, worse still, they're scaffolding and
1012 screening over the windows because they're jackhammering all
1013 the ornamental stonework off the building because a piece of it
1014 had fallen off and killed somebody. This was the origin of the
1015 facade law in New York. So, she's home all day with the baby
1016 in these conditions, and at 10:00 one night, I got a call
1017 saying, "You're coming home now," in a tone of voice that said
1018 to me, I am coming home now. I had to close up, I'm just out
1019 the door. I have to be home. But it was that kind, it was--I
1020 was trying to figure all this stuff out. Then try this case in

1021 01:08:39 front of the Dean of the Southern District Bench who had a
1022 number of famous quirks. Like he always started court at 9:00
1023 and at two minutes to 9:00, he would be standing behind the
1024 door from the robing room, waiting for the bells of St.
1025 Andrew's Church to ring, and then he would open the door and
1026 come out on the bench. If you were supposed to be there and
1027 you weren't, that didn't matter. He would come out and sit on
1028 the bench and everyone who was there would sit and wait. So, I
1029 was alert to this, so of course I was going to be there, but
1030 not all the jurors were clued in to this, that 9:00 meant 9:00.
1031 But if you were the last juror to arrive and you walk in the
1032 01:09:23 door and everybody's sitting there bored out of their minds,
1033 you would never be late again.
1034 So, it was a stern--as my second chair said, he creates a good
1035 atmosphere for convictions. You got to take this seriously.
1036 It's not a joke what's going on in this room. But I had to
1037 01:09:41 cross-examine the defendant who took the stand. It was a
1038 pretty challenging experience, and I got through it, and it
1039 worked out.
1040 GRAHAM: And you then became Chief of Appeals in the office.
1041 JUDGE LYNCH: Yeah, yeah. I was typecast, and it was certain
1042 by the time that opportunity came up, I was thinking, well,
1043 should I really do this. But it was very good with a child at
1044 home because you could do a lot of work at home. We didn't
1045 have computers in those days. But if you had a typewriter and
1046 you could bring some of the materials home with you. You could
1047 go home for a reasonable hour, have dinner with the family and

1048 01:10:25 then work all night. So, you could do that, which you couldn't
1049 do the same way with trials.

1050 I remember, I was second seat to the U.S. attorney when he
1051 personally tried the Chairman of the New York State Democratic
1052 Party at the time. Three consecutive Bronx Chairs, including
1053 him, he had risen to the State Chair, went to prison for
1054 various acts of corruption. But this was an income tax case.
1055 So, I had this IRS agent, and one of my commitments was, this
1056 was before I was in appeals, I would always pick up Chris from
1057 daycare on one day a week, and for some reason I remember it
1058 being Tuesdays.

1059 01:11:11 That particular Tuesday, I came home with an agent. We picked
1060 up Chris from daycare, fed him and bathed him while I'm
1061 prepping the agent for his testimony.

1062 GRAHAM: This is a federal law enforcement agent.

1063 JUDGE LYNCH: Yeah, yeah, an IRS special agent. So, you made
1064 01:11:31 accommodations to do these things. But the other thing about
1065 the Chief of Appeals, excuse me, it was kind of a job that I
1066 had once wanted. I remember being a law clerk in the Second
1067 Circuit, and the Chief of Appeals then was Larry Pedowitz, who
1068 later became a big law firm partner, great lawyer³². He was
1069 Chief of the Criminal Division eventually. And I thought, this
1070 is a great thing, he gets to come in. Somebody else is arguing
1071 the case. The assistant who tried the case is arguing it. But
1072 obviously, this person has shaped that and he's coming to court

³² [Lawrence B. Pedowitz](#) is Of Counsel at Wachtell, Lipton, Rosen & Katz.

1073 every day and sitting in the Second Circuit and soaking up the
1074 stuff that's going on there, which is pretty fascinating, and I
1075 01:12:14 thought that would be a pretty good job.

1076 Now, by the time it was available to me, I had this other great
1077 thing going of trying cases. But they asked me to do it. It
1078 came with a raise, and it came with an electric typewriter of
1079 my own. Basically, in those days, if you had a complaint, you
1080 wrote it out and the secretarial pool would type it. That's
1081 how we rolled. But the Appeals Unit, everybody had a
1082 typewriter in their office. That was pretty good. So, it was
1083 a fun time doing that too.

1084 GRAHAM: So, your three years come up. You mentioned you'd
1085 negotiated that, a leave of three years with Columbia. Did you
1086 01:12:54 think about staying longer?

1087 JUDGE LYNCH: No, because the program was to go back. I had
1088 done my experiment. I had tried myself against a challenge. I
1089 had pretty much succeeded, I thought. This was good. So, I
1090 went back to teaching and went back to that life. But some
1091 01:13:20 people knew me. I got occasional offers to write a brief on
1092 the defense side. I did some of those. So, I developed some
1093 connections to people in the defense bar. So, I was keeping a
1094 finger in the life of the Bar during that time.

1095 GRAHAM: So, you were at Columbia from 1983 until 1988 when you
1096 served as--

1097 JUDGE LYNCH: [interposing] No, until 1990. What you're about

1098 to ask about is the Iran-Contra gig³³?

1099 GRAHAM: Yeah.

1100 JUDGE LYNCH: Do you remember two things about me? I don't

1101 easily give up tenured jobs, right?

1102 01:13:59 GRAHAM: Right.

1103 JUDGE LYNCH: And the other thing is about the Ethics in

1104 Government Act³⁴. This law that provided for independent

1105 counsel to investigate people who were close to the President

1106 of the United States was like full employment for ex-

1107 prosecutors in law firms and professorships who could consult

1108 and do these things on a part-time basis. Some people would go

1109 and do it full-time, of course, if they were going to be trying

1110 the case or doing the major bulk of the investigation. But I

1111 was brought in to basically do the motion practice.

1112 Now, there are people who are perfectly capable of doing that

1113 01:14:46 on the staff, but Lawrence Walsh³⁵, who was the independent

1114 counsel for Iran-Contra, was the epitome of white-shoe, old-

1115 school, big-firm practice. And the idea that if some people

1116 were trial lawyers, okay, that's fine, they're going to be the

1117 trial lawyers. There are people who help out with that, and

1118 01:15:10 there are people who would be associates.

1119 But he needed like a partner guy to do the actual supervision

1120 and argue the case in court, and he needed somebody special.

³³ [Judge Lynch](#) served as Associate Counsel to the prosecutor of the Iran/Contra investigation from 1988 to 1990.

³⁴ [Ethics in Government Act of 1978, 5 U.S.C. § 13101 \(1978\)](#).

³⁵ [Lawrence Walsh](#) was Independent Counsel to the Iran-Contra investigation from 1986 to 1993.

1121 So, two of the members of the trial team had been AUSAs when I
1122 was Criminal Division Chief³⁶, and so they were used to coming
1123 to me for legal advice and whatever, so they recommended me. I
1124 went down to interview with Judge Walsh, and I think the main
1125 theme of the interview was he was figuring out if I was old
1126 enough to be a partner at Davis Polk, and I was, so I got the
1127 job. So, I did most of the defensive motions, and since
1128 Colonel North was being defended by Williams and Connolly,
1129 01:16:02 there were a lot, a lot, a lot of motions³⁷. But we had, but we
1130 had a lot, a lot, a lot of staff, including Jeff Toobin³⁸, who
1131 became famous as a legal commentator on TV, and Jeff Berman³⁹,
1132 who became the U.S. Attorney in the Southern District of New
1133 York. These were all kids at the time, who were like the
1134 junior associate people. So, I had a lot of people to do
1135 drafts and prepare stuff, and I sort of supervised the whole
1136 response.
1137 We did it as a kind of crash program, because another point of
1138 pride of Judge Walsh was, we do not ask for extensions. So,
1139 Williams and Connolly had like months to write all these
1140 01:16:42 motions, and then we had whatever the time limit was in the
1141 Federal Rules or something. We actually did ask for an
1142 extension of a day, I think, to get--do the final production
1143 work. But we really turned this thing around in like a couple

³⁶ Judge Lynch meant to say "Chief Appellate Attorney" rather than "Criminal Division Chief".

³⁷ United States v. North, 910 F.2d 943 (1990).

³⁸ [Jeffrey Toobin](#) is the chief legal analyst for CNN.

³⁹ [Geoffrey S. Berman](#) served as U.S. Attorney for the Southern District of New York and is currently a partner at Fried Frank LLP.

1144 of weeks. It was a great project.

1145 01:16:58 GRAHAM: And one of the things you did was you argued before
1146 the D.C. Circuit.

1147 JUDGE LYNCH: Yeah, yeah.

1148 GRAHAM: In the appeal of Oliver North's conviction⁴⁰, what was
1149 the main issue on appeal, and how did the argument go?

1150 JUDGE LYNCH: In the normal situation, which is relatively
1151 abnormal anyway, when somebody's going to be prosecuted who
1152 receives immunity, there's a separate team of prosecutors who
1153 are insulated from the testimony, which takes place in secret
1154 in a grand jury. You just don't--they don't see that. But
1155 even as an extra level of insulation, often what the
1156 01:17:28 prosecutors who are responsible for the prosecution will do is
1157 they will put their case against this person into a different
1158 grand jury. So, all of the evidence that they're going to use
1159 is sort of certified as we already had this. It wouldn't
1160 matter if somebody did find out something because everything
1161 that's going to go before the trial jury and the prosecution
1162 could not possibly be the product of anything that the person
1163 said in his testimony.

1164 So, that's what they did. They put all the evidence in the
1165 grand jury in a sort of frantic rush. They managed to get
1166 Congress to hold off before holding the hearing so that they
1167 01:18:07 could put all the evidence in the grand jury. The prosecutors
1168 on the case were sort of locked in hotel rooms and wore

⁴⁰ See *North*, 910 F.2d 943.

1169 headphones and never listened to any testimony. They kept a
1170 meticulous log of things like, I was in a taxicab and the cab
1171 driver was listening to the hearings and I asked him to turn it
1172 01:18:26 off. That was kind of the--any possible contact was--so, that
1173 was the argument that we made. It was kind of a tribute to how
1174 well they did, that the Court of Appeals had to reach a little
1175 bit to try to say what the influence might have been. And it
1176 was kind of, well, you couldn't control the witnesses that even
1177 if they had already said ABC facts to you in the grand jury,
1178 they might testify about it with more confidence if they knew
1179 that North wasn't going to deny that particular fact. Or they
1180 might reshape their story a little bit if they heard what he
1181 said so that they could account for what they expected his
1182 defense to be. There was no evidence that any of that actually
1183 happened,
1184 01:19:11 but it was theoretically possible. So, it was a little bit of
1185 a stretch, but I think it sort of confirmed what a lot of
1186 people might have thought was going to be a fatal problem from
1187 the very beginning.
1188 The argument was amazing. It went on for a very long time. I
1189 was up for over an hour fielding questions, mostly from Judge
1190 Laurence Silberman⁴¹, who was pretty hard on me, and it was a
1191 great challenge. We had this constant back and forth for much
1192 of the time. When I went back after being done, I sat down and

⁴¹ [Judge Laurence H. Silberman](#) served on the United States Court of Appeals for the D.C. Circuit from 1985 to 2022. See Judge Silberman's IJA Oral History interview conducted by former U.S. Solicitor General Paul Clement [here](#).

1193 my second chair there was Mike Bromwich, who was later
1194 Inspector General of the Justice Department⁴². He had been one
1195 01:19:54 of the trial team. He said, "Well, we're going to lose, but I
1196 think he's going to ask you out on a date." Because we had
1197 just had this thing going, and it was a great challenge. I
1198 went back later to the office and talked to Judge Walsh about
1199 it, and when he wrote his memoir of the Iran-Contra thing, he
1200 had
1201 01:20:19 this whole, like several pages on how terribly Judge Silberman
1202 had behaved⁴³. He thought it was very unfair and very
1203 argumentative, and you shouldn't be that way on the bench. And
1204 fortunately, he did include that he had talked to me after. His
1205 sentence was, "Lynch did not complain of this, however⁴⁴."
1206 So, I was very glad not to have it seem that I had thought that
1207 the judge had been abusive in some way, because I didn't, I
1208 enjoyed the experience. And I told my wife, I want that on my
1209 tombstone. "Lynch did not complain." I like to think or
1210 pretend that I don't complain about a lot of stuff. She will
1211 tell you that's not really true, but it is my self-image, and I
1212 01:21:05 now have it in print, I can--that Lynch did not complain.
1213 GRAHAM: That's wonderful. So, in 1990, you went back to the
1214 U.S. Attorney's Office.
1215 JUDGE LYNCH: Yeah.

⁴² [Michael R. Bromwich](#) was a special prosecutor during the Iran-Contra investigation and is currently Senior Counsel at Steptoe LLP.

⁴³ LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP (W Norton & Co. Inc., 1st ed. 1997)

⁴⁴ See *id.*

1216 GRAHAM: This time as the Chief of the Criminal Division.

1217 JUDGE LYNCH: Yeah.

1218 GRAHAM: How did that come about?

1219 JUDGE LYNCH: That was another thing that fell into my lap.

1220 I'm sitting in an office at Columbia, and I got a call from

1221 Mark Pomerantz, who's now sort of famous for having worked--

1222 well, he's famous for a lot of things⁴⁵. He had a great career

1223 01:21:34 as a defense lawyer, and was in the office, was Criminal

1224 Division Chief eventually, had been Chief of Appeals. But we

1225 knew each other all the way back to the Supreme Court. He had

1226 clerked for Stewart the year that I was there. Rudy Giuliani

1227 had left as U.S. Attorney, and his successor was going to be

1228 01:21:55 Otto Obermeier, who was a defense lawyer in the city⁴⁶. Mark

1229 called me and said, "I was talking to Otto. We had breakfast

1230 or lunch, and I asked him what he had in mind for a Criminal

1231 Division Chief, and he said, a Jerry Lynch type would be good."

1232 I said, "You call him right back and tell him he doesn't have

1233 to settle for the type. He can get the original." So, I

1234 eventually wound up meeting him, and he offered me the job, and

1235 that was a great, great, great job.

1236 GRAHAM: Why was it great?

1237 JUDGE LYNCH: Well, I mean, for one thing, I mean, it wasn't

1238 like I had this vast amount of trial experience. But just as

⁴⁵ [Mark Pomerantz](#) is a well-known trial lawyer and is Of Counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP.

⁴⁶ Otto G. Obermaier was the U.S. Attorney for the Southern District of New York from 1989 to 1993. Prior to becoming U.S. Attorney, he was an assistant U.S. attorney, and entered private defense practice in 1970.

1239 01:22:35 with teaching criminal law, I had taken the course. I had done
1240 this for a while, and I did know more than most of the younger
1241 members of the staff, so I could give them advice and teach
1242 them. It was a great kind of teaching experience to do that.
1243 You got in on a lot of important decisions. Otto had a very
1244 restrained management style. His job was setting policy, and
1245 my job was running the cases.

1246 Part of my job was keeping him briefed. That was a very
1247 interesting thing. I'd never done something like that before,
1248 but I became aware pretty quickly that my job was making sure
1249 he was never taken by surprise by anything. So, I would have

1250 01:23:17 to figure out all the things that are going on. When we have a
1251 morning meeting of the brass of the office, what do I have to
1252 have on my agenda to make sure that Otto knows about it? We
1253 got along very well in that. So, for quite a few years after

1254 that, if I had any kind of work-ish dream, I was always Chief
1255 01:23:39 of the Criminal Division in the dream. It was a great, great
1256 job.

1257 GRAHAM: When you returned to Columbia in 1992, you also began
1258 working part-time for the small litigation boutique of Howard
1259 Darby & Levin, now Covington & Burling. What led you there?

1260 JUDGE LYNCH: Well, I mean, after that time as Chief of the
1261 Criminal Division, I knew that I would not be happy if I didn't
1262 have a very active role in the legal profession, not just in
1263 the academy. So, I thought, Columbia had a rule that you could
1264 do one day a week of what was called lucrative consulting,
1265 which meant anything that was above the government rate. If it

1266 01:24:24 was public service, you could do whatever you wanted, but
1267 they're trying to control people really devoting too much of
1268 their time to lucrative consulting.
1269 So, I started looking around and most of the firms that had any
1270 interest sort of wanted me for appellate work. One very
1271 prominent firm that I talked to and was very favorably
1272 impressed by was even saying, you don't even have to come here
1273 because they had offices in different places and the appellate
1274 practice was in Washington. But you don't have to be there,
1275 you can just do it all from your office at Columbia, and that's
1276 exactly what I didn't want to do was to be still stuck in my
1277 01:25:05 office at Columbia.
1278 So, Aaron Marcu⁴⁷ and Sarah Moss⁴⁸, who were friends of mine
1279 from the office in different iterations, were partners in this
1280 small firm, and they suggested I talk to them. I said, "Well,
1281 do you want me to do appeals or do you want me to participate
1282 in the
1283 01:25:25 white collar practice?" And they said, "Oh, whatever you want.
1284 You want to participate in the practice, you can." So, that's
1285 what I chose to do. In fact, I'm sure the most money I ever
1286 made for the firm was on an appeal, one in particular, and I
1287 did some appellate work, but I also represented people who were
1288 under investigation. I represented witnesses in

⁴⁷ [Aaron Marcu](#) is a former Assistant United States Attorney for the Southern District of New York. Marcu is currently senior counsel for Freshfields Bruckhaus Deringer LLP.

⁴⁸ Sara Moss was Vice Chairman of The Estée Lauder Companies from 2019-2023, having previously served as the company's Executive Vice President and General Counsel since 2003.

1289 investigations, and it was very, very gratifying work.

1290 GRAHAM: How has your time as a defense attorney and
1291 specifically your time representing individuals influenced you
1292 as a judge?

1293 JUDGE LYNCH: Well, I mean, I wanted to represent
1294 01:26:03 individuals, not corporations, partly because that's in some
1295 ways--in certain ways, more interesting. But it's also that
1296 it's the experience of having a client, a real person who is
1297 under threat and in difficult circumstances, and you're trying
1298 to help them navigate this crisis in their lives, and that was
1299 an important experience.

1300 I think it's really very good for even senior prosecutors to
1301 have spent some time on the other side of the V to know what it
1302 feels like to show up in court and not be representing the
1303 United States. The first time I ever appeared in court [as a
1304 defense lawyer], it was back earlier, I'd been retained to do
1305 an appeal. The

1306 01:26:59 defendant, who was like a mob connected heroin trafficker, for
1307 reasons unfathomable to me wanted me to do the sentencing as
1308 well as the appeal. So, I did, and I went to the Eastern
1309 District of New York to represent him at sentencing.

1310 I was somewhat concerned that as a recent former prosecutor
1311 01:27:17 with no active defense experience, maybe I would sell him short
1312 or I wouldn't--because I couldn't think of that much to say. I
1313 mean, really the pitch that I came up with was, he's not as bad
1314 as the other guy in the same case.

1315 So, I went to court, and it was Judge Costantino in the Eastern

1316 District, and I made the pitch that he's not as bad as the
1317 other guy, which was true. And you would have thought that I
1318 asked the judge to award him the Medal of Honor. The judge
1319 started tearing into me with what a terrible guy my client was.
1320 I was thinking like, I used to get respect in courtrooms. How
1321 am I being treated this way?

1322 01:27:57 Of course, the answer is, when you represent the government,
1323 there's a certain deference that a lot of judges will give you.
1324 But when you're representing the mob connected heroin dealer,
1325 you don't quite get the same treatment. So, it's good for
1326 people to know that, and it's good for judges especially to
1327 understand what people are going through who are being
1328 prosecuted. So, I think that's a valuable experience, just as
1329 it's a valuable experience to be on the other side.

1330 But when you have only done the one thing--I mean, all of your
1331 experiences in life shape you as a judge, and to whatever
1332 extent your experience is limited, particularly to something as
1333 01:28:43 important as one side of the divide in criminal cases, it gives
1334 you certain leanings, and it's good to have something to
1335 counterbalance that.

1336 GRAHAM: You spoke of the threat your clients were under. What
1337 does the force of the U.S. government feel like when you're on
1338 01:29:01 the defense side?

1339 JUDGE LYNCH: It feels pretty scary, and there are situations
1340 where, for example, you have a client who might benefit from
1341 cooperating. But one of the things that I would always tell
1342 clients is, you have to understand what this involves. A lot

1343 of people will say, "Oh, well, if I turn state's evidence, as
1344 it were, I get to not go to jail, right?" I say, "Well, not
1345 necessarily, but probably in this situation, yes. But you have
1346 to understand what this is going to involve. You have to
1347 understand that, like, all your friends are going to hate you.
1348 You're going to be under a lot of pressure professionally."

1349 01:29:49 If you're a lawyer-- I once had a client who had already
1350 cooperated, and I was representing him in disciplinary
1351 proceedings in the Bar, and he had a miserable many years. He
1352 had to testify in public. He lost a job, he had--you know,
1353 it's not an easy thing, even in that circumstance. Plus, in
1354 this particular case that I'm thinking of, it was a sort of
1355 marginal case. It was not clear that the government would
1356 actually proceed. So, the tension, it's a literal prisoner's
1357 dilemma. If you go in, you can make the case for them, and
1358 you'll be fine vis-à-vis the government, but with all these
1359 collateral consequences. If you hold out and nobody else goes
1360 01:30:40 in, you escape completely, right? So, doing that timing and
1361 monitoring things like, the assistant doing the investigation
1362 is on trial for the next five weeks. Okay, good. We can
1363 breathe a sigh of relief for a while.

1364 Then you sort of hope that after that trial, maybe that
1365 01:31:02 assistant will go away and go into private practice, and maybe
1366 the case won't have the legs to get picked up by somebody else
1367 who's not as interested in it. In fact, we didn't go in, and
1368 the government never pulled the trigger on the case, and maybe
1369 because nobody else cooperated. But it's a very tense--and

1370 that's in a case where you're not indicted, you're not in
1371 official trouble yet.

1372 But even like a grand jury witness, one of the things you learn
1373 quickly is people's memories are not great. So, if you have
1374 somebody tell you a story, they tell you a story, and it may be
1375 that they're hiding something from you, which is one problem
1376 01:31:50 when you're representing somebody who doesn't want to admit to
1377 you that he did anything that could possibly be construed as
1378 wrong. So, maybe they don't tell you quite everything, and
1379 that's dangerous. Or maybe they just don't remember things,
1380 even if they're just talking about other people, really.
1381 They're not really in much jeopardy. But if they say, this
1382 person wasn't at the meeting, and it turns out that he was, and
1383 that is the key thing about whether that person had knowledge
1384 of whatever scam was going on, you look like a co-conspirator.
1385 You can be indicted for perjury or obstruction of justice.
1386 So, you get the story, and then you get all the diaries and all
1387 01:32:30 the records and anything that the government may be willing to
1388 share with you, so that you can then go back to the client and
1389 say, "Well, wait, there's all this evidence that maybe he was
1390 there. What's the deal? Do you not remember that, or how does
1391 all that get reconciled?" Because you don't want this person
1392 01:32:50 who is starting out as a sort of neutral witness to suddenly be
1393 in the bad graces of the government. So, there's a lot of the
1394 pressure on the people who are in these various situations.
1395 Again, I'm talking mostly about these white-collar-type cases,
1396 where people are represented during that stage of proceedings.

1397 It's very challenging to them and to their lawyers, so it's
1398 good to understand that.

1399 SUBRAMANIAN: So, you were nominated to be a district judge for
1400 the Southern District of New York in 2000 by President Clinton
1401 on the recommendation of the then-junior senator from New York,
1402 Charles Schumer⁴⁹. Senator Schumer praised you during your
1403 01:33:34 confirmation hearing as having "the rare combination of
1404 intelligence, practical experience, judicious temperament,
1405 fairness, and a devotion to hard work that make for truly great
1406 judges." Why did you decide to become a district judge, and
1407 could you tell us a little bit about the time when you were
1408 tapped through your confirmation?

1409 JUDGE LYNCH: Yeah, this was another one of those things. I
1410 was getting restless again. I'd been eight years out of public
1411 service, having a very interesting and financially rewarding
1412 bit of private practice, and teaching, and happy, but maybe
1413 there could be something else. And I immediately ruled out
1414 01:34:25 anything on the federal side because I didn't want to go to
1415 Washington. I don't like living away from New York.
1416 And I--the next steps, logical jobs, after being criminal
1417 division chief are either U.S. attorney or district judge, and
1418 those require senatorial patronage. I didn't know any
1419 01:34:48 senators. I didn't have any political connections, so I said,
1420 okay, I can't do that. Maybe there's something on the state
1421 side, and I started looking into things like there was going to

⁴⁹ [Charles Schumer](#) has been a United States Senator from New York since 1999 and is currently serving as the Senate Majority Leader since 2021.

1422 be a new attorney general in New York, and maybe the job of
1423 solicitor general of the state would be available, and I did
1424 some conversations about that.

1425 But then I got a call from Judge Feinberg one summer, and he
1426 said, "Well, Jerry, have you ever thought about being a judge?"
1427 And I said, "Well, the thought has crossed my mind, but I don't
1428 know any senators. I don't have any patronage. I'm not even
1429 sure I could afford that. I have a son in college, and so it's
1430 01:35:31 not really something I think is doable." And he said, "Okay."
1431 The very next day, I got a call from another Feinberg clerk,
1432 who was a friend of mine who had clerked for Justice Marshall
1433 when I was with Brennan. He had been the year before me with
1434 Feinberg, Dave Barrett, who's a partner at Boies Schiller. One
1435 thing I didn't know about my friend, which he told me, was that
1436 he actually was Chuck Schumer's college roommate, and he was on
1437 Schumer's merit selection panel. I said, "What's that?" I
1438 should have known about things like this, but I really didn't.
1439 He said, "Well, why don't you apply?" Dave started the
1440 conversation, "I hear you want to be a judge." I said, "I know
1441 01:36:12 where you heard that," and I told him the whole story. That's
1442 not what I said. So, he said, "Why don't you apply?" I said,
1443 "Well, okay, I'll apply." I figured, again, my New York street
1444 smart thing was saying, okay, it's a merit selection panel, but
1445 there's got to be somebody who's in line for the next vacancy,
1446 01:36:32 right?

1447 So, if I apply, I won't get it, but maybe they'll like me, and
1448 maybe sometime down the road, I will be the guy who's in line

1449 because there's nobody else who's up for it or whatever. So, I
1450 did fill out all the forms. I went to the interview. I
1451 thought, oh, very great. I got an interview, and then I looked
1452 at the list at the law firm of the people being interviewed,
1453 and it was like, it seemed like they must have interviewed
1454 everybody who applied. So, that was okay. I did the
1455 interview.

1456 Then, this must have been 1999, in the summer, and around--I
1457 01:37:16 know it was Halloween because Mark O'Donoghue⁵⁰ was the chair of
1458 the committee, and I went to his house for a further sort of
1459 skeletons in the closet interview, and his kids were in
1460 costumes while I was there. So, he and Dave said, "Well, we'd
1461 like to send your name to the senator." And I said, "Oh, well,
1462 how many people are you sending to the senator?" And they
1463 said, "Well, you." They did not say, "And a couple of other
1464 people." I know a couple of other people who were interviewed
1465 in that cycle, but anyway, they said, "Well, you." I thought,
1466 well, that sounds pretty good.

1467 And it was kind of a hurry up and wait, you know, like, oh,
1468 01:37:53 he's very busy. You may have to go to his apartment in
1469 Brooklyn. I thought, okay, I'll go on a weekend to Brooklyn.
1470 That's no big deal. But it wound up being, I saw him in his
1471 Manhattan office quite a couple of weeks later, and it was--the
1472 problem with the interview was he was late getting back from

⁵⁰ [Mark O'Donoghue](#) is currently senior counsel for Curtis, Mallet-Prevost, Colt & Mosle LLP. O'Donoghue remains the Chairman of Senator Schumer's Judicial Screening Panel.

1473 01:38:13 Washington. He sort of said at the outset, "Well, we can only
1474 talk for like a half an hour, and then I have to go have a
1475 meeting, and it'll only be like another 20 minutes, and I'll
1476 come back, and we'll finish up." Well, it turned out it was
1477 much longer than that, and when he did come back, he said,
1478 "Well, I have to go to a fundraiser downtown, a dinner thing.
1479 Can you come in the limo with me, and we'll finish the
1480 interview in the car?" Okay, fine.
1481 But I was thinking, well, how much of an impression can I make
1482 under this sort of broken-up circumstances? But I think we
1483 actually hit it off pretty well, and there were a couple of
1484 01:38:47 moments that--he knew--he knows everything there is to know
1485 about politics in Brooklyn, and I think I got on his good side
1486 by remembering who my congressman was when I was a kid in
1487 Ridgewood, and so I had the right answer to that.
1488 And he asked something about, "Is there any Supreme Court case
1489 you think was very wrong?" And I hit the jackpot. I said,
1490 "*Buckley against Valeo*."⁵¹ And he said, "Why?" I said, "Because
1491 they took a statute and declared half of it unconstitutional
1492 and left a skeleton, which isn't what anybody wanted, and this
1493 is a subject about which members of Congress know what they're
1494 talking about, about campaign finance reform." I thought they
1495 01:39:31 should have been more cautious and deferential, and if they
1496 were going to strike it down, they should have struck down the
1497 whole thing because you can't leave bits and pieces because

⁵¹ [Buckley v. Valeo](#), 424 U.S. 1 (1976).

1498 that wasn't what the deal was in Congress. And he liked that.
1499 So, there were a couple of nice things about the interview, but
1500 01:39:50 I thought, all right, well, that was a good experience.
1501 Then somewhat later I got a call saying, "Well, we're sending
1502 your name to the White House." So, the first thing I did was
1503 look at--well, then you go through this whole thing with the
1504 Justice Department, Office of Legal Policy, or somebody handles
1505 those things, or did then, White House counsel. But I'm
1506 looking at the Senate Judiciary Committee⁵², and they've got
1507 like a whole ton of people who have been nominated. This was
1508 the last year of the Clinton administration. The Republicans
1509 controlled the Senate. I know enough about politics to know
1510 that come the summer there's not going to be any more
1511 01:40:33 confirmations, and they're never going to get to me. I
1512 thought, that's okay. President Gore will probably re--
1513 Schumer will submit my name again, and then I'll get nominated,
1514 and that's fine.
1515 But luckily for me, since that didn't happen, I hadn't reckoned
1516 on the fact that Senator Schumer was on the Judiciary
1517 Committee. It's not like a queue. It's like whoever the
1518 members of the Committee want to take up, and Senator Schumer
1519 cares about the judiciary. I think he also cares about his
1520 patronage. It's a point of honor that if he wants somebody to
1521 go through, he wants to get them through, and so I was sort of
1522 01:41:13 rushed to a hearing.

⁵² The [Senate Judiciary Committee](#) oversees the beginning of the confirmation process for the President's nominations for federal judges.

1523 So, I had a hearing within like a couple of months after I was
1524 nominated by the White House. Then, sort of, you're talking--
1525 I'm talking to a guy on his staff regularly about what's
1526 happening, and it was kind of, well, we're trying--there's
1527 01:41:36 something in the works that there's going to be a deal that
1528 will allow a dozen Clinton judicial nominees to have a vote,
1529 and we're trying to get you on the list. You never know; it's
1530 12 now, it could become eight, it could become six. We're
1531 going to get you on the top half of the list so that you'll for
1532 sure be part of this deal. Okay, well, that sounds good.
1533 Meanwhile, I went to Israel. I was teaching at Hebrew
1534 University for a month. This is May of 2000. Then I start
1535 getting calls about, "Well, you know, there's a little bit of
1536 opposition happening, and we don't think this is going to be
1537 really a problem, but, you know, you're going to get a vote."
1538 01:42:20 This is interesting. But I wasn't really that much in touch.
1539 And then, I don't even remember if I was, I think I was told
1540 when the vote was going to be. But I was in Israel, I couldn't
1541 follow it. And I got a call, it was midnight in Jerusalem, and
1542 we were going to go the next day to Petra in Jordan. So, we
1543 were going to fly south in Israel and cross the border, and so
1544 we were just about going to bed.
1545 I got a call from Aaron Marcu, and he said, "Well, I've been
1546 sitting here with Chuck Ruff, who's a partner at Covington, and
1547 we've been watching C-SPAN, and it was a close thing, but
1548 congratulations." It turns out there was a floor debate. I
1549 01:43:07 have never read it. My son did. He told me he did not know

1550 whether he recognized me less in the speech of Senator
1551 Sessions, Jeff Sessions⁵³ was the spokesman for the opposition,
1552 or in what Senators Schumer and Moynihan⁵⁴ had to say on my
1553 behalf.

1554 01:43:28 But one way or the other, there was a vote. Nick Garaufis,
1555 who's on the Eastern District, sort of went through this
1556 process with me. So, he was one of the same group. He was a
1557 Moynihan nominee. He said his mother called him and said she
1558 was watching C-SPAN and, "Didn't you tell me they were going to
1559 vote on you? But the whole thing was about this guy Lynch.
1560 And then he got voted in. What happened to you?" And Nick
1561 said, "Well, Mom, you remember when they had the vote to table
1562 the motion to table the nomination? That was us going
1563 through." So, of the 12, 10 had a voice vote. This is not the
1564 way it is now in the Senate. It was less partisan then than it
1565 is now.

1566 01:44:17 But 10 people had a voice vote, and two of us, who were both
1567 Brennan clerks, had roll calls. Senator Sessions, I later
1568 learned, that's another story from later, did not care for
1569 Justice Brennan and his jurisprudence, and that was probably
1570 the key thing there. On the other hand, all the way through
1571 the process, people in the White House were asking me, "How
1572 many Republican senators do you know?" I said, "I don't know
1573 any senators, and I live on the Upper West Side of Manhattan.

⁵³ [Jefferson Sessions III](#) was a United States Senator for Alabama at the time of Judge Lynch's confirmation. Sessions later served as United States Attorney General in 2017 to 2018.

⁵⁴ [Daniel Moynihan](#) was a United States Senator from New York from 1976 to 2001.

1574 I do not know any Republicans either. So, there's a null set
1575 that you're asking me about. I know no Republican senators."
1576 01:45:01 But it did turn out, oddly enough, that the one Republican
1577 senator that I wound up being like two degrees of separation
1578 from was Orrin Hatch⁵⁵, who was the chair of the Judiciary
1579 Committee, and there were at least three people who could call
1580 him up, call him by his first name, and say I was all right.
1581 01:45:22 One was Louis Freeh, former head of the FBI and federal judge
1582 for a while in the Southern District, a guy I had worked with
1583 in the U.S. Attorney's Office. One was a guy named Mike Young,
1584 who had been on the Columbia Law Faculty and happened to be a
1585 Mormon bishop, and he went on to be the president of either
1586 Brigham Young or the University of Utah.⁵⁶ The third was a
1587 classmate of mine, who had gone back to Salt Lake and was the
1588 lead partner in a prominent firm, and I met him at a reunion
1589 and he said he would be happy to endorse me and it might matter
1590 because he was Senator Hatch's campaign finance chair. So,
1591 that's pretty good. So, Senator Hatch did eventually vote for
1592 01:46:13 me, as did a number of other Republicans, and I think I had 36
1593 'no' votes in total. So, I had like 18 Republicans voted for
1594 me. So, then I became a judge.
1595 SUBRAMANIAN: Now, a lot of people think that the Southern
1596 District of New York only handles cases that are ripped from
1597 the headlines.

⁵⁵ [Orrin Hatch](#) was a United States Senator from Utah from 1977 to 2019. Hatch served as the chair of the Senate Judiciary Committee during the time of Judge Lynch's confirmation, from 1995 to 2001, and again from 2003 to 2005.

⁵⁶ Michael Young served as president of the University of Utah from 2004 to 2011.

1598 JUDGE LYNCH: Yeah, all my friends think that. Yeah.

1599 SUBRAMANIAN: And they would be surprised to know that most of
1600 the docket is filled with cases that are smaller cases that
1601 maybe only the litigants themselves really have an interest in.
1602 Can you tell us a little bit about doing justice in
1603 01:46:50 those everyday cases?

1604 JUDGE LYNCH: Yeah, I mean, it's almost a poor people's court.
1605 I mean, relative to other courts, we have Wall Street. And so,
1606 there's a lot of big-time civil litigation with lots of zeros
1607 in the amount of controversy. There are big white collar
1608 01:47:08 criminal cases. But most of the criminal cases, criminal
1609 defendants are not usually rich or whatever riches they have
1610 are not legally earned and are squirreled away somewhere.
1611 There are a lot of employment discrimination cases. Some of
1612 those are kind of glass ceiling cases, but most of them are
1613 ordinary workers.

1614 There is a lot of--with the diversity jurisdiction, you have
1615 your car accident cases and your medical malpractice cases and
1616 your smaller scale business disputes. They can't be too small
1617 because it doesn't pay. It's too expensive to litigate in
1618 federal court for really small contract cases. But modestly-
1619 01:47:56 sized cases that the Wall Street Journal or the Business Page
1620 of the New York Times are not going to be interested in are a
1621 lot of the docket. A lot of intellectual property, a lot of
1622 pro se cases, as in every court, certainly every federal court.
1623 So, you're dealing with a lot of the ordinary stuff of people's
1624 disputes, and that's what the courts do.

1625 When people are asked in public opinion polls, what's your
1626 opinion of the judiciary, almost exclusively, people who are
1627 not lawyers and not actively involved in litigation are
1628 thinking about the Supreme Court. So, the judiciary is getting
1629 poor marks these days because a lot of people disagree with the
1630 01:48:45 decisions that the Supreme Court is making, and some of the
1631 ethical controversies that are there. They're not thinking
1632 about the ordinary stuff of litigation.

1633 But that stuff is not political, it's not ideological. It's
1634 ordinary disputes between people. It's ordinary kinds of
1635 01:49:11 criminal behavior. I have a friend who's retired from
1636 litigation practice who often can give you a very long list of
1637 things that are wrong with the system, and he always ends it by
1638 saying, but at the end of the day, it's better than having
1639 people fight it out in the street with sticks.

1640 Now, this is a very low bar. We aspire to better than that.
1641 But that is the minimum, and it's not true in every country
1642 that the judicial system is trusted enough by people that they
1643 will bring their disputes to a civil forum where the dispute
1644 they're reasonably confident will be adjudicated fairly.

1645 That's the bedrock minimum that a judicial system has to
1646 01:49:57 provide. Because otherwise, people--look at what happens among
1647 drug dealers, right? They can't go to court if somebody stiffes
1648 them for the price of the goods, or somebody betrays them, or
1649 somebody violates the non-compete clause and goes into business
1650 for himself or goes to work for somebody else. It's not a
1651 lawsuit. It is fought out not with sticks, either, with guns.

1652 If the whole society was doing that, we'd be in anarchy. So,
1653 the judicial system has to have that kind of respect, that
1654 people are prepared to see that it's fair, and that's our job,
1655 is to make sure that it's as fair as it can be, and that
1656 everybody gets a fair hearing. They may not like the result.

1657 01:50:47 Somebody's always not going to like the result if the case
1658 actually gets litigated and not settled. Often, people just
1659 get tired because it is expensive and it is time-consuming to
1660 do litigation. And often, some litigation is just brought
1661 because somebody wants to negotiate, but the other side won't
1662 01:51:03 listen, so they hit them with a brick to get their attention,
1663 and the brick is a lawsuit. So, the case comes to court, and
1664 then eventually, they do work it out. But if anything has to
1665 be settled by the court, one side is going to be happy and one
1666 side is going to be less happy. But if they feel they were
1667 treated fairly, that's what we have to do.

1668 You don't get recognized in the street a lot if you're a judge.
1669 Until relatively recently, Supreme Court justices wouldn't be
1670 recognized in the street. They didn't get on TV. They weren't
1671 public figures. That's changed. But I would say you have just
1672 the right degree of fame because the only people who will
1673 01:51:51 recognize you in public are lawyers, and they have an incentive
1674 to be nice.

1675 So, it's a pretty good level of fame. You don't have
1676 paparazzi, and you don't have people throwing tomatoes, by and
1677 large. But one time, I was coming out of a subway station, and
1678 somebody came up behind me, and he said, "Hey, are you the

1679 judge?" I thought, "Boy, who wants to know?" And he said,
1680 "Yeah, yeah, yeah. You had my mother's case." And I knew
1681 immediately who he was talking about. It was a woman who was
1682 one part of a four-defendant trial of a drug organization. She
1683 was like the head of the organization. There were multiple
1684 murders involved

1685 01:52:29 in the case. She eventually was convicted and had a mandatory
1686 life in prison sentence. I didn't have a choice, but it was a
1687 pretty fair sentence, given what had occurred. And he said,
1688 "Yeah, yeah. You were really fair."

1689 I think I know what he meant, which is, this was a woman who
1690 01:52:52 had some legitimate mental health issues, some of which may
1691 have been exaggerated a little bit for purposes of the trial.
1692 But she was a troubled person, but you still, if you treat
1693 everybody with respect, this is what most people want in the
1694 system. Of course, they'd like to win. But what they need is
1695 to understand that they've been heard, and so you treat people
1696 a certain way in the courtroom, and so I was very pleased with
1697 that. I said, "Thank you very much, but I have--I'm going
1698 somewhere. See you around." And, you know, I got away. But
1699 that was a sort of good encomium.

1700 SUBRAMANIAN: Well, that's a great lead-in for the next
1701 01:53:42 question, which is, how would you describe your judicial
1702 philosophy?

1703 JUDGE LYNCH: Yeah, I've thought about this, in part in
1704 preparation for this interview, because I don't like to think
1705 of myself as having a judicial philosophy. I'm very skeptical

1706 of anything that has -ism at the end of it. I think that part
1707 of the problem is that, that we have at the moment, is that
1708 there's a lot of fairly dogmatic ways that some judges think
1709 about what they do. I guess I would say that, like Judge
1710 Feinberg, I try to respect the craft. I try to do what lawyers
1711 traditionally have done in thinking about what the law is.
1712 01:54:33 I try to be humble, and I'm less activist than I probably was
1713 as a law clerk for Justice Brennan, where I thought I knew the
1714 answers to a lot of things. Now I'm not so sure I know the
1715 answers to things. Chief Judge Livingston⁵⁷ of our court told
1716 me when I first joined the Court of Appeals that what she was
1717 most
1718 01:54:57 surprised by was that a lot of what we do is not so much
1719 deciding the merits of things, it's more deciding, like, who
1720 should decide. Is this really a question for the jury? Is
1721 this really something that the district judge should be
1722 deferred to? Is this something that an administrative agency
1723 really should be responsible for? So, we kind of are traffic
1724 cops of who should be deciding things, and there's a lot of
1725 truth to that.
1726 Also, a lot of the cases come to us on appeal where the issue
1727 isn't, was the plaintiff discriminated against? It may be
1728 something like, did the defendant waive the waiver issue when
1729 01:55:38 the plaintiff didn't raise a particular argument, but the
1730 defendant didn't say that they couldn't make that argument?

⁵⁷ [Chief Judge Debra Ann Livingston](#) was appointed to the Second Circuit Court of Appeals in 2007 and became Chief Judge in 2020.

1731 It's sort of third order removed procedural questions because
1732 that's what you can appeal. You appeal saying the district
1733 judge screwed up somehow. It's not that we're redoing the
1734 decision of who's right and who's wrong. Does the losing side
1735 get a do-over most of the time? Not so much get a reversal
1736 that now they're going to win when they lost below, but do they
1737 get a do-over because of some alleged mistake that the district
1738 court made? And there are procedural rules about how things
1739 get done and those are important, and they have to be enforced.

1740 01:56:25 So, if some lawyer didn't follow some rule, well, maybe then
1741 this issue doesn't even get decided. So, they become fairly
1742 arcane technical disputes, and how do you decide those things?
1743 Well, let's take textualism as an example. I don't like the -
1744 ism, but of course, the first stop if you're interpreting a
1745 01:56:48 rule or a statute is what does the rule or the statute say.
1746 You go right to the text. There are a lot of legal questions
1747 that you look at it and you know the answer. Most of those
1748 don't wind up in court. Most legal questions get answered in
1749 some lawyer's office. The client comes in and says, "Is this
1750 deductible? If I do that, will I get in trouble? Can we
1751 structure the merger this way?"

1752 And the lawyer says, "Yes, no, yes," about whatever the answer
1753 is by looking it up in a book and seeing, well, this is what it
1754 says. And it's pretty clear that the answer is, yeah, that is
1755 deductible, or no, it isn't, and then people live accordingly.

1756 01:57:39 Sometimes the answer is, "Yeah, if you do that, you'll get in
1757 trouble." And the guy goes, "Oh, well, I did it. Well, now

1758 what?" Then maybe you're going to get sued or worse still, you
1759 may get indicted. So, then the lawyer is in the game of, well,
1760 is there some, what layman would call a loophole, is there some
1761 wiggle room in the statute that looked to me in the first place
1762 like the answer was no, but maybe we can work with it. Maybe
1763 we have some kind of defense. But again, even if there's some
1764 ambiguity, very often a wise lawyer is going to be telling
1765 clients things like, "Look, there's an argument that we could
1766 make that this is deductible, and we could try that and see if
1767 01:58:23 you get away with it. But if you get audited, it's going to be
1768 very time consuming, very expensive. You're going to be paying
1769 me a lot of money to defend you and things. The IRS isn't
1770 going to like it. The odds are, at the end of the day, we'd
1771 lose, maybe we'd win. But why is this worth it to you? It's
1772 01:58:37 not worth what it would cost to fight this thing." So, the
1773 effective answer is no, don't do it.
1774 These are answers that lawyers can give, and thank goodness,
1775 right? I mean, what the law is, to a very considerable degree,
1776 is an effort to control people's future behavior by the use of
1777 words. We say, "Don't murder people." We also have rules that
1778 are addressed to judges. If somebody does murder somebody,
1779 this is what the sentence should be, right? I mean, there are
1780 all these sort of rules that are trying--and even contracts.
1781 When parties get together and negotiate a contract, they're
1782 trying to foresee, well, what are the things that can go wrong
1783 01:59:18 here, and what should we do if that happens, and they write
1784 clauses to cover the things that they can anticipate. They're

1785 trying to say, "This is what's going to happen if X, Y, Z." And
1786 so, they're trying to write language that will tell you the
1787 answer to that problem. There was some phase in recent years
1788 when people on the sort of left of the legal academy were
1789 saying, "Oh, law's always radically indeterminate because
1790 language is radically indeterminate." Well, it's not. It's
1791 malleable, it's manipulable. Sometimes it's genuinely
1792 ambiguous, but sometimes it's clear enough. It's clear enough
1793 that there either is no doubt, or at least you can say, well,
1794 02:00:07 99% of lawyers would tell you that this is what it means, even
1795 if there's some argument you can make. If you did make that
1796 argument, 99% of judges would say, that's nonsense. And if it
1797 weren't that way, no one could order their business, right?
1798 You'd have to be able to trust in the language that's there.
1799 02:00:25 So, text is important.
1800 The problem with sort of textualism as a dogma is that people
1801 don't always do such a good job of writing the language. It's
1802 no offense to Congress and state legislators, but they can't
1803 foresee everything. They don't always appreciate that saying,
1804 "Thou shalt not do X" -- well, in the law, it's very important
1805 to say whether that means, "Thou shalt not do anything that
1806 turns out to be X," or, "Thou shalt not intentionally do
1807 something that you know is X." And if you don't use that
1808 language, there's a sort of built-in ambiguity, a built-in
1809 issue of whether there is a so-called mens rea element to the
1810 crime. That's just a
1811 02:01:15 simple example. But non-lawyers, non-criminal lawyers don't

1812 always think about that. They're responding to there's been a
1813 wave of carjackings or whatever. So, they write some statute
1814 that'll up the penalties for a certain category of crime, and
1815 they just will neglect to include a mens rea element. Does
1816 that mean there isn't one?

1817 Well, there usually is in criminal law. It's usually important
1818 that people are knowingly doing the wrong thing, but they
1819 haven't thought about it, and they didn't put that in. Does
1820 that mean that you just take it literally and say, well, there
1821 isn't one? Well, that would be very peculiar. You might not

1822 02:01:47 want to do that. You might not want to live in a world where
1823 that becomes the law, where people sort of accidentally become
1824 liable for serious criminal consequences because they did
1825 something that they didn't realize at the time was whatever.

1826 There's always a context. There's always a purpose to the
1827 02:02:08 legislation. Now, some of these things are the result of not
1828 foreseeing something you should have foreseen. Some of them
1829 were the result of not foreseeing something that nobody could
1830 have foreseen, and so they didn't allow for that possibility
1831 happening. Or, they wrote language that perfectly gives the
1832 answer to the question that they had in mind that led to this
1833 legislation, but then new facts come along, new circumstances
1834 happen, and somebody wants to interpret that statute to cover
1835 it, and they weren't thinking about that one, so they didn't
1836 make a rule that as clearly fits that set of facts.

1837 Now, if you're just going to read these things literally and
1838 02:02:51 say, well, this is where the grammar leads you, it seems to me

1839 you're often going to wind up in the wrong place. In a place
1840 that nobody wants to be, except whatever side is pushing that
1841 argument, but where most reasonable people are not going to
1842 want that to be the case.

1843 Justice Scalia⁵⁸, it seems to me, who did a real service in
1844 reminding people about starting with the text and not being too
1845 quick to overlook what Congress actually wrote. And sometimes
1846 they make a compromise, and it's not that the compromise is a
1847 clear, you get half and I get half. The compromise is to write
1848 a language that both sides can go back and tell their
1849 02:03:34 constituents they got it all, because it is genuinely
1850 ambiguous. And that rarely gets fixed by the legislature,
1851 because they did the Environmental Protection Act last year.
1852 This year, they're on to worrying about something else, they're
1853 not on to--there's not a lot of political capital to be gained
1854 02:03:54 by having the law that fixes all the glitches with last year's
1855 statute that have come to light since. That doesn't happen
1856 very often, so the glitches tend to stay, and courts tend to
1857 have to interpret them. Justice Scalia didn't like things
1858 where judges had to use their own judgment. I think that's
1859 what judges are for. That's why they call them that. They're
1860 supposed to use their judgment about what makes sense and what
1861 doesn't, where there isn't a clear answer. He didn't like the
1862 use of legislative history.

⁵⁸ [Justice Antonin Scalia](#) served as an associate justice on the Supreme Court of the United States from 1986 to 2016. Justice Scalia is often associated with textualism and originalism.

1863 I understand that sometimes legislative history, something that
1864 appears in a congressional report, was written by a lobbyist
1865 02:04:36 and maybe nobody paid attention to it. Maybe that's not what
1866 the members of Congress thought. That's a possibility. On the
1867 other hand, is my late colleague Bob Katzmann, who wrote a book
1868 about statutory interpretation⁵⁹, but who, unlike legal
1869 philosophers, worked in Congress. He said, "Well, actually,
1870 most of the members of Congress read the report, not the
1871 statute." And why wouldn't they? They're very busy. Statutes
1872 are written in very dense language, and you need somebody to
1873 explain to you, what are we trying to accomplish with this and
1874 why are we doing, what does this mean. So, that's what you're
1875 going to be voting for if you vote for this. I think it's
1876 02:05:19 crazy not to pay attention to that as a source of information.
1877 People sometimes say, "Well, as a judge, if you did it this
1878 way, or just in general, aren't you imposing, or doesn't it
1879 give you an opportunity to impose your views on things rather
1880 than what the law actually is?" What I usually say is, "Look,
1881 most of the
1882 02:05:47 cases that come before me, I don't have any views." I don't
1883 know anything about admiralty law. I actually know some things
1884 about admiralty law now. After 25 years on the bench, you'll
1885 learn a lot of stuff. But I didn't come with a set of ideas
1886 about how admiralty law should be, and if I did have any, even
1887 where I do have views in areas where I had taught, like

⁵⁹ ROBERT KATZMANN, *JUDGING STATUTES* (Oxford University Press, Reprint Ed. 2016)

1888 criminal law, the kinds of issues that come up are often things
1889 you've never thought about before. And most of the time, I'm
1890 looking for any port in the storm. Give me--if the text is
1891 ambiguous, does anybody have a case? Is there a precedent
1892 somewhere, maybe in some other circuit, where somebody's
1893 interpreted this before,

1894 02:06:28 and I can sort of see what other judges are thinking about
1895 this? Is there a legislative history? I don't want to be
1896 deciding this just by what I think would be a good idea.
1897 That's not what judges are supposed to do, and besides, I don't
1898 know enough to know what would be a good idea about some aspect
1899 of copyright law or something like that. So, I want to get all
1900 the information I can to make a judgment about what does this
1901 really mean. And I think that's what judges are supposed to do,
1902 and sometimes you just run out. You've looked at everything,
1903 and nothing really tells you clearly what the answer is. So,
1904 I'd start by saying most legal questions have right answers.

1905 02:07:18 The right answers would be agreed on by almost anybody who
1906 looks at the materials. Those aren't mostly the cases that get
1907 litigated.

1908 If it were that simple, you'd be crazy to be wasting your money
1909 fighting the case in court. By the time you get to the Supreme
1910 02:07:34 Court, you've got the residue of the most difficult cases that
1911 there are. Not all of them, by the way. There's a sort of
1912 undercard in the Supreme Court of disputes that are not quite
1913 so difficult. But there's a circuit conflict or something, and
1914 they have to resolve it, and nobody really cares, and it's not

1915 on the front page of the New York Times. They just decide the
1916 case, and often unanimously. But the hard cases are hard for a
1917 reason. They're hard because it's not clear from the text, or
1918 even if the better grammatical reading of the text looks one
1919 way, there are good reasons to think that that's not what
1920 Congress meant, and good reasons to think that would be not
1921 02:08:17 really so good for society.

1922 What do you want people to do in that circumstance? You
1923 certainly don't want them to say, "Well, I think this is, as a
1924 policy matter, the better answer, so I'm going to decide it the
1925 other way." Right? That would be nuts. So, of course, there
1926 are going to be some cases where the judge is left with nothing
1927 much more to go on than what makes sense. Maybe that's what
1928 makes sense from a policy standpoint, or maybe it's not quite
1929 that. Maybe it's what makes sense in light of the way the
1930 legal system kind of works. It may not be what I would want as
1931 a voter, but that's what fits better with the way this whole
1932 02:09:04 area of law is put together, or that is what works better in
1933 terms of our traditions or our legal institutions, and then
1934 that's probably where you should go.

1935 But those are exercises of judgment. They're inescapably
1936 exercises of judgment, it seems to me. If you have some
1937 02:09:20 dogmatic, there is a right answer, it has to be one way, I
1938 think that's not right. I talked about this in a lecture that
1939 I gave here at NYU a few years ago, a Madison Lecture that was
1940 about, there is a sort of jurisprudential philosophical debate

1941 about is there a right answer to every legal question⁶⁰.
1942 Judicial--jurisprudential scholars have talked about this and
1943 tried to analyze it from sort of first principles. Ronald
1944 Dworkin⁶¹, who was a professor here as well as at Oxford,
1945 famously argued that there was a right answer, and somehow it
1946 always seems that the right answer that he got to was a sort of
1947 good liberal answer. It was obviously what Dworkin wanted it
1948 02:10:07 to be.
1949 But apart from that, I guess my experience in dealing with
1950 these things all the time tells me that there isn't actually a
1951 definitive right answer to a lot of things. I also think it's
1952 better for the system to some degree that all of those
1953 questions, cumulatively, don't always get answered in the way
1954 that would make conservatives happy or the way that would make
1955 liberals happy. It's actually better, and actually, this tends
1956 to be the way, if the case gets resolved, sub the Supreme
1957 Court, because we sit in panels, because there's a lot more
1958 turnover in the Court of Appeals than there is in the Supreme
1959 02:10:54 Court, so that every president gets to appoint a fair number of
1960 Court of Appeals judges. So, you can get a mixture of
1961 different answers coming out to different kinds of questions,
1962 and sometimes the employer wins and sometimes the employee
1963 wins.

⁶⁰ Judge Lynch gave NYU School of Law's [51st Madison Lecture](#) in 2019 on judicial restraint and ambiguity. See Lynch, [Madison Lecture: Complexity, Judgment and Restraint](#), 95 NYU L.Rev 621 (2020).

⁶¹ [Ronald Dworkin](#) was a jurisprudential scholar and a law professor at NYU School of Law, Yale Law School, and Oxford.

1964 02:11:10 This particular issue goes one way, and then once it's gone
1965 that way, then there is a right answer. There's a right
1966 answer because there's a precedent right on point to that
1967 question the next time it comes up and a lawyer will be able to
1968 tell you, "No, you can't sue because the employer wins in that
1969 situation." But there's another issue where it got decided by
1970 a panel with a different complexion and it came out the other
1971 way and the employee won, and now there's a definitive answer
1972 to that. But it's not like the same factions, the same
1973 ideologies always win.

1974 At the Supreme Court, unfortunately, it doesn't seem to always
1975 02:11:49 work that way. I think one might say, "Okay, here's a
1976 reconstructed liberal who used to be with Justice Brennan and
1977 the liberals were winning everything and they were perfectly
1978 fine being judicial activists then, but now suddenly they've
1979 found the virtue of judicial restraint." And that's a fair
1980 point.

1981 But in some sense, you asked me before about 'is there hope?'
1982 and 'what should students be thinking about the future', and I
1983 said, 'Well, it'll probably run in cycles.' If there's any
1984 wisdom to that, the wisdom is, be careful when you have
1985 majorities, because you're not always going to, and you want to
1986 conduct

1987 02:12:40 yourself in a way, as a judge, that does not encourage a view
1988 that this is a partisan endeavor. Because if it gets to be
1989 that way, you may win today, but you're not necessarily going
1990 to win next year. You're not necessarily going to win after

1991 the next election, and if the law gets to be a football that
1992 02:13:07 way, that things are going to change radically depending on
1993 who's in power--I mean, there's plenty of ways it will change,
1994 right? Elections have consequences. Congress makes the rules.
1995 They're changing over with the election, and if the Democrats
1996 win, you'll get one set of laws, and if the Republicans win,
1997 you'll get another set of laws.
1998 But what we do, we're looking at the law. You look in the
1999 statute books. It's got the residue of what a whole bunch of
2000 Democratic administrations did and a whole bunch of Republican
2001 administrations did. It doesn't necessarily make coherent
2002 sense. Dworkin wanted you to figure out what makes sense in
2003 02:13:45 light of the whole system. The whole system doesn't make
2004 sense. There's a lot of contradictory stuff in there, in the
2005 precedents, in the statutes, and maybe that's just as well.
2006 Maybe it's just as well that it's not totally coherent because
2007 that's kind of totalitarian ultimately.
2008 Maybe it's better that there's a mixture of outcomes and that
2009 this case you have to decide in a way that you're thrilled with
2010 because you think that that's totally just. This case you may
2011 have to decide another way, and you're not so sure that that's
2012 the best thing for society, but it's what the legal materials
2013 tell you the answer has to be.⁶²
2014 02:14:21 So, I don't know if that's a philosophy exactly. I guess it is

⁶² The ideas Judge Lynch expresses here are presented more systematically in his 2024 Hallows Lecture at Marquette Law School: Lynch, Hallows Lecture: [Complexity and Contradiction in American Law](#), 107 Marq. L. Rev 299 (2023).

2015 a philosophy. But it's not an -ism. I think Justice Breyer⁶³
2016 calls something like this pragmatism. I'm not sure that's a
2017 good term for it actually, though, because it's not like you're
2018 kind of sitting there figuring out, well, pragmatically, what's
2019 02:14:37 going to make the most sense, and I don't think that's what he
2020 means by it either. So, I don't like that word particularly.
2021 And besides, it's another -ism as opposed to just this is what
2022 lawyers do. This is what judges do. This is the craft, and if
2023 we're going to have people have the trust in the system, they
2024 have to have the trust that you're going to try and fairly
2025 interpret the materials, and that's what you're trying to do,
2026 and it involves judgment. It involves a certain eclecticism
2027 about sometimes the text says this. That seems to be the best
2028 reading of it. I don't particularly like how that comes out,
2029 but there's no really good reason to think that that's not what
2030 02:15:22 Congress really wanted. Other times you'll say, well, wait a
2031 minute, that's not--that can't be--sometimes you think that
2032 can't be what anybody really wanted. Other times you know that
2033 they didn't want that because they told you what they wanted in
2034 some of the background materials, and I think one should look
2035 at those things, as I said. So, that's kind of the how I do
2036 it, whether that's a philosophy or not.

2037 SUBRAMANIAN: One of the toughest things that district judges
2038 do is sentence defendants in criminal cases. What are your

⁶³ [Justice Stephen G. Breyer](#) served as an associate justice on the United States Supreme Court from 1994 to 2022. Justice Breyer's judicial philosophy is often associated with pragmatism. See Justice Breyer's IJA Oral History [here](#).

2039 thoughts on sentencing and is there any way we can make the
2040 system better?

2041 02:16:01 JUDGE LYNCH: Well, I think we have made the system better at
2042 great cost and with great turmoil. But we now have a system
2043 where there are guidelines. I don't always like where the
2044 guidelines come out, but there are guidelines, but they are
2045 guidelines. Judges can use their judgment in light of the
2046 02:16:25 statutory purposes of sentencing to decide whether the
2047 guideline sentence makes sense or doesn't.

2048 I think that's much better than a system that has no
2049 guidelines, and I think it's better than a system that we had
2050 from 1987 when the 1984 Sentencing Reform Act⁶⁴ went into effect
2051 through 2005 when the Supreme Court changed the game⁶⁵, when the
2052 guidelines were mandatory and you had this formula that you
2053 applied. I don't think that's very good because I don't think
2054 we can foresee everything about particular cases and turn it
2055 into an algorithm. Again, I think judgment is required. When
2056 judgment is required, that will inevitably lead to some
2057 02:17:07 disparity. Your judgment may be different than mine in dealing
2058 with a particular case. But I think we are better for having
2059 judges use their judgment and see what they think makes sense
2060 in particular cases. So, I think that's okay as far as
2061 systems.

2062 But it's very painful. I didn't like doing it. Particularly

⁶⁴ Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (1984).

⁶⁵ [United States v. Booker](#), 543 U.S. 220 (2005) (ruling that the guidelines in the Sentencing Reform Act of 1984 were not mandatory, but merely advisory).

2063 when the guidelines were mandatory, the sentences were almost
2064 always more than I thought was appropriate. But at the same
2065 time, I appreciate the fact that these are democratic
2066 judgments. The Congress wanted certain things to happen, and
2067 they have a right to dictate that. One thing you can't do--
2068 02:17:54 I mean, it's one thing to say--you and I may each look at a
2069 particular set of facts and say, well, this person deserves a
2070 little leniency, and maybe I might think not. But the one
2071 thing we can't have is like, in your courtroom there's a war on
2072 drugs, but in mine there's not. I think Congress tells you
2073 02:18:13 whether you want to have a war on drugs. Now that still leaves
2074 a lot of room for just how many bombs you're going to drop on
2075 people in the war. How far do you take this?
2076 But if the democracy comes to the conclusion that selling drugs
2077 has to be treated at a certain level of severity, generally
2078 speaking, I never thought that I had the right to say, "Nah, I
2079 don't think that's a good idea, and so I'm going to be
2080 extremely lenient in these cases."
2081 So, I always thought that we had these guidelines, for example,
2082 that should be respected. You should pay attention to that.
2083 It doesn't mean that that should be the sentence for everybody,
2084 02:18:57 and maybe that particular number shouldn't be the sentence for
2085 anybody, but you still have to be somewhere in that ballpark.
2086 You still have to be thinking of the democracy has made a
2087 choice here, and if I didn't like that choice, that's just too
2088 bad. I can either go with it or I can quit the job, but I
2089 can't just say I'm going to undermine what the democracy

2090 decided here.

2091 SUBRAMANIAN: Shifting to the civil side, there's the case of

2092 Bell Atlantic versus Twombly⁶⁶.

2093 JUDGE LYNCH: Yeah.

2094 SUBRAMANIAN: You dismissed the complaint in that case. The

2095 02:19:35 Second Circuit reversed you, but then the Supreme Court

2096 reversed the Second Circuit and revived the complaint, and in

2097 doing so, changed the standard for pleading for civil cases in

2098 federal court. Could you tell us a little bit about that case?

2099 JUDGE LYNCH: Yeah. Well, Justice Scalia used to give a

2100 02:19:55 metaphorical award as sort of a Galileo Award for the district

2101 judge who sort of muttered under his or her breath that,

2102 "Whatever you say, it still moves." The Earth does go around

2103 the Sun, but if you're going to make me teach something else

2104 because you're the pope, okay. And he gave that award to a

2105 district judge who got "vindicated" by the Supreme Court. I

2106 never thought of it that way. I always thought, as a district

2107 judge, you do the best you can with something. If it gets

2108 appealed, it gets appealed. You never know what's going to get

2109 appealed or on what ground it's going to be appealed.

2110 If you have a trial, you make a million decisions, and some

2111 02:20:37 smart appellate lawyer will figure out, ah, this is one where

2112 we can make something of. You never thought that was like the

2113 big deal in the case.

2114 Maybe the government is going to argue to the Court of Appeals

⁶⁶ [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544 (2007).

2115 and save you if you got it wrong by arguing that it wasn't a
2116 big deal in the case, it was waived or it was harmless error or
2117 something. But you never know what's going to go up. If
2118 something goes up, you get reversed. You can have one of three
2119 reactions. Sometimes, rarely, you think, "Ah, yes, I blew it.
2120 Of course they're right. Why didn't I see that?" Sometimes,
2121 more frequently than the first, but not that frequently, you
2122 02:21:20 think, "What's wrong with these people? I'm obviously right."
2123 I don't know, I mean, I remember one case where I got reversed
2124 on one of the rare cases where the Court of Appeals actually
2125 applied the rule about arbitration that if the arbitrator acts
2126 in manifest disregard of the law⁶⁷, that's almost never invoked,
2127 02:21:43 and they did. I thought, 99 panels out of 100, I would have
2128 been reversed if I did the other thing, that I affirmed the
2129 arbitrator's judgment and I got reversed. This is freaky that
2130 this happened. It was a two-to-one vote, and the dissent was
2131 very good, and I thought, "They're just wrong."
2132 Most of the time, what you think is, "Okay, I have my opinion,
2133 you have yours, reasonable people can disagree, and you're the
2134 general, I'm just the corporal here, so I have to follow the
2135 rules that you laid down. That's fair." I may disagree, but
2136 it's not like I think the Court of Appeals are a bunch of
2137 idiots.
2138 02:22:23 Now, so to go back to this particular case⁶⁸, there was a very,

⁶⁷ *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2003) (explaining that vacating an arbitral award for manifest disregard of the law is extremely limited).

⁶⁸ See *Twombly*, 550 U.S. 544.

2139 very good lawyer defending an antitrust case which involved the
2140 way that the different regional telephone companies that
2141 evolved out of the breakup of Ma Bell, once upon a time
2142 American Telephone and Telegraph, ran the whole telephone
2143 system for the whole country, and that got broken up. The
2144 regional companies tended not to compete against each other in
2145 their regions, and if they agreed not to compete, that would be
2146 an antitrust violation. If you looked at a map and saw that
2147 none of them were competing, there would be a kind of natural
2148 inference that they must have--if five different companies with
2149 02:23:18 no history suddenly found themselves in a position where one
2150 controlled the Northeast and one the Southeast and one the
2151 Midwest and one the Southwest and one the West Coast, you'd
2152 say, that doesn't happen by accident. But these companies had
2153 a history, they existed. They were broken up when they
2154 02:23:34 already were that way. They were given those territories, and
2155 there were a lot of good reasons why none of them might think
2156 it was advantageous to go do something else.
2157 Well, they were sued on the theory that they were probably
2158 conspiring, and the old pleading rule⁶⁹ on paper said, if you
2159 can imagine a state of facts in which that allegation could be
2160 true, the case should go forward to discovery. This was really
2161 the way the Federal Rules of Civil Procedure were written back
2162 in the 1930s. They were written in a time when the caseloads
2163 were lower, the cases were simpler. Having a lot of cases

⁶⁹ See [Conley v. Gibson](#), 355 U.S. 41 (1957). The FED. R. CIV. P., 8 covers General Rules of Pleading.

2164 decided by trials was probably more possible. Everybody should
2165 02:24:14 get their day in court, have the discovery, figure out what
2166 really happened, and move on. Don't dismiss the case at the
2167 beginning, and the pleading standard was very much in that
2168 line, that if you said that this happened, that was your
2169 allegation.

2170 Again, the standard from a case called *Gibson and Conley*⁷⁰ was,
2171 if you as the judge can imagine a state of facts where that
2172 might be true, the case should go forward at least until you
2173 find out, and maybe a summary judgment would go the other way
2174 once the record had been made and the facts explored. But this
2175 case⁷¹ seemed like this is just bogus. You can see exactly why

2176 02:24:57 this would have happened. So, I wrote an opinion dismissing
2177 the case, and I thought we were going out on a limb. My law
2178 clerk at the time was saying, "Well, what we can do is we can
2179 take a bunch of summary judgment cases and say this is what
2180 they're going to have to prove, so maybe they should have pled
2181 02:25:17 something like that or they shouldn't be allowed to go

2182 forward." Well, it was no great surprise that the Second
2183 Circuit reversed. We took a shot. We thought that would be a
2184 fairer way for this case to be resolved than making these
2185 companies spend an enormous amount of money litigating the
2186 case.

2187 So, okay, there were other motions to dismiss. We'd take a
2188 look at those and start doing the work. Apparently, defense

⁷⁰ See *infra*, footnote 69

⁷¹ Referring to *Twombly*.

2189 counsel called Chambers and said, "You might not want to get to
2190 work on these things because we're going to go to the Supreme
2191 Court with this." I thought, "Oh, come on, really?" This was
2192 just a routine application by the Court of Appeals of a routine
2193 02:25:55 pleading rule, and, okay, we probably were wrong.

2194 But then there was like an article in the Wall Street Journal,
2195 an editorial in the Wall Street Journal about the case saying,
2196 "How dare this panel of the Second Circuit"--which, by the way,
2197 the author of the opinion was Judge Sack, who used to be the
2198 counsel for the Wall Street Journal--"How could this panel
2199 reverse this distinguished district judge?"

2200 Now, I was not so distinguished, and certainly not in the eyes
2201 of the Wall Street Journal. And I thought, something's going on
2202 here that's deeper than I know. Sure enough, the Chamber of
2203 Commerce and everybody else made this full court press to
2204 02:26:29 change the pleading standard, and the Second Circuit got
2205 reversed. I did not feel particularly vindicated. I felt like
2206 they changed the rules, and maybe that's a good thing, maybe
2207 it's a bad thing. I thought it was a good thing for that case,
2208 but I understood it.

2209 02:26:48 Two justices dissented. It's an antitrust case. One dissenter
2210 was John Paul Stevens⁷², who probably knew more about antitrust
2211 law than anybody else on the court. The other was Ruth
2212 Ginsburg⁷³, who probably knew more about civil procedure than

⁷² [Justice John Paul Stevens](#) served as an associate justice of the United States Supreme Court from 1975 to 2010. Before joining the Court, Justice Stevens specialized in antitrust law.

⁷³ [Justice Ruth Bader Ginsburg](#) served as an associate justice on the Supreme Court

2213 anybody else on the court. I did not feel particularly
2214 vindicated to have the other seven come out my way.
2215 But I'll tell you what they did. I think a lot of judges were
2216 already applying a stricter standard in some or all cases.
2217 There was a sort of practical bottleneck. There are a lot of
2218 cases. I don't know how it is now, Arun, but when I was a
2219 district judge, you would get about 30 new civil cases every
2220 02:27:33 month. Now, think about that. That means for your docket to
2221 not grow exponentially over time, 30 cases have to close every
2222 month. That's just for you to stay even. That's not for you
2223 to work down the 400 cases that you've already got when those
2224 show up on your doorstep. That's just to keep that level. How
2225 is that going to happen?
2226 Of course, most cases are going to settle, but they're usually
2227 not going to-- some will settle just because they'll settle.
2228 But others have to settle only after you do some work and
2229 decide some motions and make some legal rulings and give the
2230 parties a framework of how this looks like it may go, and then
2231 02:28:14 they can sort of use that as a basis for estimating what's a
2232 fair settlement. But that's a lot of work. You certainly
2233 can't try 30 cases in a month. You can't try three cases in a
2234 month most of the time. You may have a criminal trial that
2235 will take you three weeks or a month or longer. I've prided
2236 02:28:32 myself on not letting them go very long, but that's another
2237 story. They could be long, and then what's happening with all

of the United States from 1993 to 2020. Before joining the Court, Justice Ginsburg was a professor of civil procedure and prominent advocate for gender equality.

2238 the rest of your docket? So, there has to be some way of
2239 weeding cases out.

2240 The way the rules of civil procedure were written, summary
2241 judgment was not expected to be a big deal. It was for, like,
2242 a case where somebody sued on a promissory note that was a
2243 document that was signed, sealed, no real dispute. The Supreme
2244 Court in the 1960s sort of closed that--opened up the summary
2245 judgment practice, made it easier to grant summary judgment,
2246 and the reason clearly is that there are too many cases.

2247 02:29:15 There has to be a way for judges to weed out the weaker ones,
2248 and evidently the Supreme Court decided, and maybe correctly,
2249 that we had reached the point where some cases had to be weeded
2250 out even sooner, and so the pleading standard had to be
2251 tightened up. You have to have more actual facts at your
2252 disposal before [you file] your case. You can't just say,
2253 "They've done me wrong." You have to explain exactly what they
2254 did in a way that is--the catchword is "plausible." I'm not
2255 sure exactly what it means. It doesn't mean what plausible
2256 means in ordinary English. There's a whole body of case law
2257 now about that.

2258 But the point is, cases get weeded out sooner, and that's the
2259 02:29:55 story of *Twombly*. But it's not like I did something great that
2260 the Court of Appeals didn't recognize, but the Supreme Court
2261 did. It was caught up in a vortex.

2262 SUBRAMANIAN: In 2009, you were nominated to serve on the
2263 Second Circuit by President Obama, again on the recommendation
2264 02:30:13 of the then Senior Senator Schumer. This time, Senator Schumer

2265 praised you as having "an unimpeachable record of moderation,
2266 consistency, intelligence, and dedication to exploring all
2267 facets of complex legal questions." Why did you make the move
2268 to the Second Circuit?

2269 JUDGE LYNCH: Because they asked me, is the short answer.
2270 Actually, when Senator Schumer called to give me this news, I
2271 said, "Can I think it over?" Because I enjoyed very much the
2272 job I had. But the famous story of Arthur Goldberg⁷⁴ who was on
2273 the Supreme Court, and Lyndon Johnson wanted to get him off so
2274 he
2275 could appoint somebody else to the seat. Johnson told Goldberg
2276 02:30:59 that he needed to go to the United Nations where he could be an
2277 ambassador to the U.N. and sort of solve the--negotiate a
2278 settlement to the Vietnam War. And Justice Brennan, as Justice
2279 Brennan told the story, he and Earl Warren sat Goldberg down
2280 and said, "You're crazy, you can't do that." And Goldberg
2281 said, "Well, when the President wants you to do something for
2282 the country, you have to do it."
2283 I didn't feel that bad about it. I thought it would be
2284 interesting to be on the Court of Appeals, and in retrospect, I
2285 definitely made the right choice for me because it's a little
2286 easier. The older you get, the harder I think it is to be an
2287 02:31:37 effective district judge because it takes so much out of you.
2288 I like sitting in panels. I like having my views tested

⁷⁴ [Justice Arthur J. Goldberg](#) served as an associate justice on the Supreme Court of the United States from 1962 to 1965. Justice Goldberg resigned at the request of President Lyndon B. Johnson.

2289 against colleagues and corroborated sometimes, which makes me
2290 feel more comfortable with a decision.

2291 On the district court, if you kind of think this side is
2292 02:31:54 probably right, then they win. Here, this side is probably
2293 right. Well, maybe my colleagues are very confident that
2294 they're right; that feels good. Or they go the other way, and
2295 I think, well, I was only a little bit leaning this way;
2296 they're probably right. It's good to have your judgment
2297 checked by other people. So, there are a lot of good things
2298 about being on the Court of Appeals. But basically, it's--I
2299 mean, I know that the human being, Barack Obama, has no idea
2300 who I am. I'm morally certain he didn't know who I was then.
2301 Some people in the White House Counsel's Office did. One of
2302 them being a former dean here, Trevor Morrison, another being a
2303 02:32:35 good friend from the Supreme Court days, Daniel Meltzer, the
2304 late Daniel Meltzer, who was a great professor at Harvard Law
2305 School and a wonderful person. I think they had as much to do
2306 with it, frankly, as Senator Schumer. But the President of the
2307 United States does not typically worry that much about who's
2308 going to be on the Second Circuit.

2309 But still, if notionally the President of the United States
2310 wants you to do a job that's an honorable public service job,
2311 what am I going to say, "I would prefer not to?" So, yeah, so,
2312 good, fine, put me on the Second Circuit. Then you realize,
2313 oh, wait, that means I have to go through another Senate
2314 02:33:11 confirmation process? Turned out it was a little easier this
2315 time. I only got three negative votes. I had a personal

2316 interview with Senator Sessions, and we talked for half an
2317 hour, and about halfway through, I thought, wait a minute,
2318 what's going on here? Is he not looking for some way to--is he
2319 02:33:29 looking for some way to not vote against me? And whatever, I
2320 have no idea what caused that. It probably isn't that he
2321 became aware of what a great judge I was, but whatever it was,
2322 it turned around, and there were only three "no" votes for that
2323 appointment.

2324 SUBRAMANIAN: What opinion during your time as a judge on the
2325 Second Circuit are you most proud of, and why?

2326 JUDGE LYNCH: Well, the answer I gave when you guys asked me
2327 this in a sort of rehearsal session was whatever I'm working on
2328 now, because I don't remember anything from the last week or
2329 last month or last year. There's a lot of truth to that,
2330 02:34:14 because you rule and roll, as the district judges like to say.
2331 You make your decision, you do the best you can with it, and
2332 then you go on to the next thing, and you don't sit around
2333 thinking about your legacy or your greatest hits or something
2334 like that.

2335 Now I think I do have a kind of answer, because it's a question
2336 that you, a case you wanted to ask me about that was
2337 particularly interesting. But really, I came up blank when I
2338 was first asked that question, because it's just not the way I
2339 think. One of my mental powers, which is also a bad thing in a
2340 lot of ways, but it's also a good thing, is a power of
2341 02:34:59 concentration. I work on what I'm working on, and if I'm
2342 working on a draft or something, and one of my clerks comes in

2343 and asks me about another case, I will often say, "Wait a
2344 minute, what are you talking about?" It may be something that
2345 we had talked about, he and I or she and I, yesterday. But
2346 02:35:15 now, it's not on my mind. I'm working on the thing I'm working
2347 on. So, I really didn't have an answer when you first asked
2348 it.

2349 SUBRAMANIAN: Well, let's talk about the case that we were
2350 going to ask you about, which is *Zarda v. Altitude Express*⁷⁵, a
2351 case that went en banc, and you ultimately dissented from the
2352 decision of the en banc court. Tell us a little bit about
2353 *Zarda*.

2354 JUDGE LYNCH: Yeah. The issue in the case was whether when
2355 Title VII of the Civil Rights Act⁷⁶ prohibited discrimination in
2356 employment on the grounds of sex that included that it made
2357 02:35:51 illegal discrimination on the grounds of sexual orientation.
2358 The opinion that I wrote started out saying, if I woke up one
2359 morning and you told me that Congress the day before had
2360 abolished discrimination on the basis of sexual orientation, I
2361 would have been the happiest person in the world.

2362 In fact, I've been a strong supporter of gay rights from the
2363 time I went to college, and there's a long story about that in
2364 my high school experience, but I won't bore you with that. But
2365 if I woke up one morning and you told me that in 1964, Congress
2366 had abolished discrimination on the basis of sexual
2367 orientation, I would say you're insane. They didn't. We all

⁷⁵ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

⁷⁶ Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1964).

2368 02:36:39 know they didn't. They didn't intend that. That's not what
2369 they meant. That isn't what a reasonable construction of
2370 discrimination on the basis of sex would mean. So, I have to
2371 dissent from this decision where the court decided by a
2372 lopsided vote, including a lot of judges who would be
2373 02:36:57 characterized as conservatives, that that is indeed what the
2374 law did.
2375 Then the Supreme Court actually--*Zarda* went up, but the case
2376 was decided under the name of *Bostock*⁷⁷, which is a different
2377 case that was consolidated with it. The Supreme Court said the
2378 same thing. And partly they did it because Justice Gorsuch⁷⁸,
2379 who is a rigid textualist, said, well, literally, if I have two
2380 employees and you, Margaret, are allowed to marry a man, but
2381 you, Arun, are not, or I'll fire you, that's clearly
2382 discrimination on the basis of sex. You can marry men, but you
2383 can't. Okay, yeah, but really, is that what is going on here?
2384 That's not what's going on here. What's going on here is
2385 02:37:49 discrimination on the basis of people disapproving of
2386 homosexuality, whether it's two men or two women. That's what
2387 people are bigoted about. That is bigotry in my view. It
2388 would be good if Congress abolished it. I'm happy that now
2389 discrimination on that basis is illegal, thanks to the Supreme
2390 Court, but I don't think that that's a proper interpretation of
2391 the law. It isn't really what they meant.

⁷⁷ [Bostock v. Clayton Cnty.](#), 590 U.S. 644 (2020).

⁷⁸ [Justice Neil M. Gorsuch](#) is serving as an associate justice of the Supreme Court of the United States since 2017.

2392 Now, again, this is a somewhat complicated judgment. After
2393 all, there are a lot of things they probably didn't know they
2394 were doing when they passed that law⁷⁹. The primary focus was
2395 on racial discrimination. Sex was a bit of an afterthought,
2396 but
2397 02:38:39 they did abolish discrimination on the basis of sex, and there
2398 was a movement to do that. There was a feminist movement at
2399 the time. It wasn't as strong or as visible as the movement
2400 for Black civil rights, but Eleanor Roosevelt and others were
2401 02:38:57 very big on lobbying Congress to include that. It wasn't just,
2402 as some people think, that this was thrown in by Southern
2403 whites to sort of-- abolishing sex discrimination would be so
2404 far out there that the whole law would fail and the prohibition
2405 of racial discrimination in employment would fall with it.
2406 That's not quite what happened.
2407 But they didn't really think. I don't think that Congress
2408 thought that this was changing the "Mad Men" culture⁸⁰. "Mad
2409 Men," was it, the TV show? The culture of sort of sexual
2410 harassment in the workplace was going to fall because they were
2411 saying that women had to be hired on an equal basis with men.
2412 02:39:40 But that is kind of a logical consequence. You can't say that
2413 a workplace in which women are abused is an equal workplace on
2414 the basis of sex, and that has to follow, whether Congress
2415 thought of that or not.
2416 But it seemed to me that discrimination against gay people was

⁷⁹ Referring to the Civil Rights Act of 1964, *supra* note 71.

⁸⁰ *Mad Men* (AMC Television Broadcast 2007-2015).

2417 just a different category. There's a whole different history.
2418 We did a lot of interesting research that's in that opinion⁸¹
2419 about how the gay rights movement, where it was in the early
2420 1960s. I guess I'm proud of that mostly because it's a pretty
2421 good example of a case where you feel that integrity requires
2422 you to decide a case in a way that doesn't lead to the outcome
2423 02:40:28 that you would typically like.

2424 GRAHAM: Judge Lynch, you're a big fan of the arts, notably
2425 theater and dance, and when we were preparing for this
2426 interview, you said that you considered being conversant in the
2427 arts to be part of your work. What did you mean by that?

2428 02:40:47 JUDGE LYNCH: Well, I don't think I meant it in the first
2429 instance as narrowly about my work as a judge, though I think
2430 it is relevant to that. I always thought, maybe because I was
2431 bamboozled in a way by the humanities culture and the kind of
2432 college education I had, to think that this is what educated
2433 people are supposed to do. You're supposed to be civically
2434 alive. You're supposed to pay attention to politics. You're
2435 supposed to pay attention to ideas in the world. You're
2436 supposed to be attentive to the arts. This is what one does.
2437 I have never thought of it as like a hobby. I always thought,
2438 I don't have any actual hobbies. But some people think of it
2439 02:41:29 that way. It's like, yeah, some people are interested in that,
2440 and some people aren't.
2441 I always thought of it as part of my responsibility, and I make

⁸¹ See *Zarda*, 883 F.3d 100 (Lynch, J., dissenting).

2442 time for it. It's a sort of funny thing because I enjoy it,
2443 just like my real job. I enjoy it, so it doesn't feel like
2444 work. But at the same time, it's part of--I set aside time. I
2445 have to read certain things and certain periodicals and keep
2446 abreast of the culture. But I also think it's relevant, as
2447 everything else is, to the work of a judge. You have to
2448 understand something about the culture that you're in. What is
2449 our society about? What are people talking about? What are
2450 02:42:11 the ideas?
2451 The arts, I mean, especially theater and novels, literary arts,
2452 are often ways of expanding your experience. You read books by
2453 African American authors talking about their experience, or
2454 maybe talking about something completely else but that somehow
2455 02:42:36 is shaped a little bit by who they are, and you see a different
2456 world than you saw from your own narrow perspective.
2457 So, this always seemed to me a very important project to be
2458 engaged with. Some things, not so much. I don't know. Dance,
2459 I think, it's like certain aspects of the visual arts, it's
2460 just a pleasure, but it's an important one. It's one that
2461 uplifts in important ways. So, that's always part of it.
2462 That's part of what it means to be a New Yorker, actually, is
2463 that-- why live here? Well, one reason is because it is a
2464 world cultural capital. You see things, you hear ideas
2465 discussed that you wouldn't hear in some other place, and that
2466 excites
2467 02:43:27 me, and that seems to me to be relevant to who I am and what I
2468 bring to the table in this particular role.

2469 GRAHAM: And you actually have lived in New York City your
2470 entire life with the exception of one year in D.C. when you
2471 were clerking.

2472 JUDGE LYNCH: Yeah, that's just about right. I mean, my
2473 parents lived for a couple of years just over the border into
2474 Nassau County, and I was already in high school in Manhattan,
2475 so I don't count that. I had already made the move, in effect,
2476 from where I was born to the real New York. I don't know if I
2477 said this before, but when I was a kid, if you went to
2478 Manhattan in my neighborhood, you'd say, "I'm going to New
2479 York."

2480 02:44:10 You'd say, "I'm going to the city." We didn't think of
2481 ourselves as living in that world, and we didn't. I mean, in
2482 my neighborhood, it wasn't a world cultural capital. Now it's
2483 kind of hip. It's still not a world cultural capital, but it's
2484 gentrified in certain ways. But then we didn't think of it
2485 02:44:30 that way.

2486 GRAHAM: And you've spoken about the cultural capital piece.
2487 What else does being a New Yorker mean to you?

2488 JUDGE LYNCH: There's also--I think I've alluded a couple of
2489 times to situations where I kind of reacted in a sort of
2490 skeptical way to something. There's a certain grit that New
2491 Yorkers have, and that does include people from the outer
2492 boroughs. That's actually almost a different thing than the
2493 elite cultural world. But there's a kind of--there are certain
2494 ways in which living in this city is a little bit tough, and
2495 you have to put up with certain things.

2496 02:45:18 But you're also--you've got an edge, I think, both in the sense
2497 that you have an advantage over people in the rest of the
2498 world, but also in the sense that you're kind of edgy. There's
2499 a--you're nobody's fool, or at least that's the way we think of
2500 ourselves here, and I think that's part of it.

2501 GRAHAM: One more theater question. Which plays capture
2502 something true and meaningful about justice to you?

2503 JUDGE LYNCH: I think the one that most occurs to me is
2504 Antigone⁸², which is the Greek tragedy about the daughter of
2505 Oedipus, who after Oedipus is thrown out of the city or leaves
2506 the city in disgrace, his two sons sort of fight a war and

2507 02:46:09 bring the city to civil war and chaos. One in particular has
2508 enlisted sort of outside forces to attack the city and support
2509 his claim. He loses, and he kills his brother in the meantime;
2510 they both die. The successor king says, no one can bury this
2511 man, this betrayer of the city, which was sort of a terrible
2512 02:46:36 sentence in Greek religion, that you had to be buried, this was
2513 a very important thing. And his sister, Antigone, defies the
2514 law, and I think when young people first encounter this, they
2515 tend to be very much pro-Antigone.

2516 GRAHAM: And were you?

2517 JUDGE LYNCH: Yeah, of course. She's the heroine. She's the
2518 one who's doing the right thing in defiance of the law. But
2519 she's not a very nice person. She tries to enlist her sister,
2520 and her sister says, "Oh, no, I don't think we should do that."

⁸² SOPHOCLES, ANTIGONE.

2521 And then when her sister later comes around, she says, "Well,
2522 you weren't with me from the beginning." So, effectively, screw
2523 02:47:15 you. I'm not going to let you help me. She's very stiff-
2524 necked and very righteous, and the way people often are who
2525 think they're right and the system is wrong. Creon, the king,
2526 is an idiot, really. I mean, he gets backed into a corner
2527 where he has to go--it's really his tragedy as much as anybody
2528 else's. He winds up losing his wife and his son to suicide in
2529 the way the thing all plays out because he couldn't back down.
2530 He couldn't give in. He had to have--because he's the law, and
2531 if he backs down, all anarchy will break loose.

2532 But, over time, you come to see there are two sides to this,
2533 and it's sort of tragic on both sides, and like many things,
2534 02:48:07 the law has its claims, justice has its claims. Some people
2535 will feel that they have to abide by a higher law, religious or
2536 otherwise, based on their conscience, and that's a terrible
2537 conflict when society reaches that point.

2538 GRAHAM: Judge, as a final question, as you look back on your
2539 02:48:28 career, which is, of course, still ongoing, but as you think
2540 about looking back, especially your time as a judge, what do
2541 you hope your legacy will be?

2542 JUDGE LYNCH: As I said, I don't think that--I don't think that
2543 way. We do what we do. We try to do it well. We try to do it
2544 fairly. We try to do it in a way that is in service to
2545 society, and I guess I hope that people will look at parts of
2546 my career and say I tried to do that. But then you're dead, so
2547 what is it all? It doesn't mean anything to me what people

2548 will think of me in some period in the future, because the most
2549 [likely] answer is they won't.

2550 02:49:19 This is an ephemeral business in a certain way.
2551 Notwithstanding the originalists and other -ism on the Supreme
2552 Court, the fact is in most of our business it is rare to cite a
2553 case that was decided before 2000. Most of the cases you cite
2554 are the ones that would--because the issues that come up are
2555 the issues that are coming up now, and the precedents are the
2556 ones that were recent that you're most concerned with, because
2557 the other things--maybe those issues are settled or maybe those
2558 issues stopped mattering to anybody over time. That's on an
2559 appellate court where you're writing opinions.

2560 The art of the trial judge is like ballet. It's a performance
2561 02:50:01 art, and no one will even know whether you were--you may have a
2562 legend, like Judge Weinfeld has this legend, but who really
2563 remembers--some of us do who--I tried my first case before him.
2564 It was very late in his career. So, there aren't many people
2565 who are still living who saw him at his peak. It's just gone.

2566 02:50:24 It's not even on video. Dancers, at least these days, there
2567 are videotapes or films of people performing that you can look
2568 at on YouTube.

2569 But you can't look at trial judges, and you wouldn't understand
2570 it anyway, because what is the subtlety of running a trial? If
2571 you're not intimately involved with it, you don't even know
2572 what's going on. I try not to read press accounts of what's
2573 happening in the trial of the century of this week, because how
2574 will I--the reporters don't know what's really going on,

2575 because they haven't seen the case from the inside. They may
2576 be a proxy for what the jury might be thinking. But the sort
2577 02:51:06 of typical trial headline is, "Witness delivers hammer blows
2578 against defendant on day one." And day two is, "Witness
2579 revealed to be perjurer and psychotic liar on cross-
2580 examination." Well, both sides knew that that's what was going
2581 to happen. The defense knows that this witness is--what this
2582 witness is going to say.

2583 So, what really counts is, well, how well did he say it, and
2584 only the lawyers, and maybe not even both lawyers, know how he
2585 was expected to do. Then when the cross happens, the
2586 prosecutor knows perfectly well what the negative side of him
2587 is going to be. The question is, well, how did that play out
2588 02:51:50 compared to expectations? Only the people who are in the trial
2589 have any idea whether the witness ultimately delivered what the
2590 prosecutor hoped for. The witness needed to score a 6 out of
2591 10. It didn't need to be a 10.

2592 SUBRAMANIAN: Judge Lynch, you've now had over two decades of
2593 02:52:09 law clerks. First, tell us a little bit about how you view the
2594 role of a clerk, and then tell us the role of your law clerk
2595 family in your life.

2596 JUDGE LYNCH: Well, I mean, the easiest way to talk about the
2597 law clerk role is just to, again, focus on the demands of the
2598 job. Every sitting, if it's a full five-day sitting, will have
2599 like 25 cases. I have to read all those briefs and think about
2600 all those cases. There's a certain sense in which I can only
2601 do so much on each case. There's a kind of bird's-eye view. I

2602 can't read everything there is to read that would be useful in
2603 deciding the case.

2604 02:52:55 So, I'm sort of focused on what are the arguments that the
2605 lawyers are making, what makes sense to me based on my
2606 knowledge of the law, what do they--they're telling me a lot
2607 about the law, is what they're telling me seem like it's right
2608 or not seem like it's right. I may spot-check the key
2609 precedents. I'll certainly look at the language of statutes
2610 and rules or contracts. But for the most part, I'm sort of
2611 seeing whose argument sounds stronger, and I'll write something
2612 up about that.

2613 But I have had, as a pretty much full-time active judge, as a
2614 pretty much full-time senior judge, I've had four law clerks.

2615 02:53:44 So, each of them is only responsible for a quarter of the
2616 cases, which ideally means that they can put four times as much
2617 time into each one of those cases as I can, and so they can
2618 tell me, they can delve into the entire record. They can delve
2619 into all of the case law. They can tell me, "You need to read
2620 02:54:04 this." Or, well, "I see what you're saying, but here's why
2621 you're wrong because you're not taking into account this
2622 particular fact about the case or this particular piece of case
2623 law," or whatever. So, they're really vital to getting that
2624 work done correctly.

2625 But at the end of the day, this is where the buck stops. I'm
2626 the one with the signature of President Obama on a commission
2627 on my wall. I have to make the decision. But again, the nice
2628 thing about the Court of Appeals is there are three of us. I'm

2629 only one-third of a judge, as they say, and that's some comfort
2630 that there are three pairs of eyes. The tradition on the
2631 02:54:51 circuit is we don't discuss the case until after the oral
2632 argument with each other. So, there are really six pairs of
2633 eyes, three judges and three law clerks, and the three judges
2634 are all arriving at their decisions or their tentative views
2635 independently. So, it's a pretty good system for checking.
2636 But the law clerks are critical to it.

2637 As to the law clerk family, when I hire law clerks, there are a
2638 lot of people who are very smart who apply. So, there are a
2639 lot of people who could do the job, and it's very hard to even
2640 select from among the applicants a group of people to
2641 interview. Once I'm interviewing, I'm kind of looking for
2642 02:55:34 people that I will like because besides their importance to the
2643 enterprise, other than my wife, there is nobody else that I see
2644 every day during the year that the clerks are there except
2645 those four people and my judicial assistant. It's a small
2646 team, and there's nobody else that I interact with at the same
2647 02:55:57 level of intensity over a period of a year. So, you get to
2648 know them, hopefully, and then you have a bond of a kind of
2649 filial affection that comes from this. It's a sort of strange
2650 thing.

2651 It's pretty well known that law clerks usually have a higher
2652 opinion of their judge than anybody else does. There are
2653 judges that lawyers hate that their law clerks love them
2654 because of the nature of the relationship and the sort of
2655 mentorship that's involved in this. And you'll see, I mean,

2656 when judges die, their law school may have an in-memoriam, and
2657 it's usually some law clerk who writes the piece about them.

2658 02:56:44 The memorial service at the court will always involve a law
2659 clerk speaker who will say what a great experience it was.
2660 The flip side, I mean, fortunately, you don't have occasion to
2661 write obituaries for your law clerks. That would be rare, and
2662 it would be like losing a child. That's not the way the world
2663 is supposed to work, right? They're supposed to bury you. So,
2664 you don't see that, the affection that the judges have for the
2665 clerks, in these published writings and things like that, but
2666 you feel it. You pay attention to their careers. Now I have
2667 people who are getting pretty long in the tooth in their legal
2668 careers who clerked for me 23 years ago.

2669 02:57:35 And maybe that's a kind of legacy, that you see those people
2670 and the way that they advance in the profession or not or do
2671 something else. I have a law clerk who's an aspiring
2672 screenwriter. People don't all stick with the law. They find
2673 other things to do, but they are interesting people who do
2674 02:57:57 interesting and accomplished things.

2675 I now have two federal district judges among my alumni, and
2676 you're [referring to Judge Arun Subramanian] one of them. I
2677 have people who are responsible for a big chunk of important
2678 cases in the U.S. Attorney's Office. My first law clerk is
2679 sort of the White House point person on the Middle East because
2680 he was recruited to go to Iraq with the invasion and help write
2681 a constitution. He didn't know anything then, but that was a
2682 long time ago, and now he knows a lot, and he's taken on a very

2683 important public policy role. You see these people doing these
2684 things, and you have pride in them.

2685 02:58:45 SUBRAMANIAN: Well, Judge Lynch, it has been a real pleasure.
2686 On behalf of the IJA and the NYU School of Law, thank you for
2687 sharing your time today.

2688 JUDGE LYNCH: Well, thank you. It's been fun.

2689 [END RECORDING]