

The Relationship Between Chemistry and Law

Interviewer

Okay, today is November the 18th. We are at West Point at the studio of the Center for Oral History with Judge Loretta Preska, the Chief Judge of the District Court for the Southern District of New York.

Loretta Preska

Exactly.

Interviewer

Could you spell your name for the transcriber? Just want to make sure we have it accurately.

Loretta Preska

Certainly. L-O-R-E-T-T-A, middle initial A, Preska, P-R-E-S-K-A.

Interviewer

Now is that a "what is the"

Loretta Preska

Lithuanian.

Interviewer

Lithuanian "wow. Shortened, or is that the way it was?"

Loretta Preska

My father thinks that the S and the K were reversed, and it was Preksa.

Interviewer

A "very interesting. So, let's begin by asking "I'll ask just what we always do, where you come from and how you ended up in the law in this case. And then we'll eventually get to discussing the subjects that have more direct relationship with West Point and the story of the soldier.

Loretta Preska

Certainly. I was born in Albany, New York, and grew up outside of Albany in Delmar. My father built our house on his family's farm property. I went to schools in the area and attended the College of Saint Rose in Albany on a scholarship. I was a chemistry major at Saint Rose and very well served by it. In the summer before my senior year in college, I received a National Science Foundation grant to do what I thought I wanted to do, which was organic chemistry research. And I did that all summer at Union College " had a great time, but didn't think I could get up and do chemistry for the rest of my life. So spent senior year, first semester, thinking about what I did want to do, which made me ask myself what I liked to do.

Loretta Preska

And part of the answer to that was talk, and I had some debating experience and some speaking experience through the Girl Scouts, so decided to go to law school—knowing nothing about it—and so far, so good.

Interviewer

What was law school like, and where did you go?

Loretta Preska

I went to Fordham Law School beginning in the fall of 1970, so I went from living at home and going to an all-girls college, to living in the city of New York and going to a law school where there were eight women in my section of 100.

Interviewer

Where did you live in New York?

Loretta Preska

I lived at the end of the D train, at 204th Street and Webster Avenue in the Bronx, and was roundly laughed at the night before my first class when I asked the assembled multitudes what time the subway ran, so I should be sure I wouldn't be late for class. But Fordham was wonderful. I have to say, I was treated very well by everyone: by professors, by students. Loved Fordham—Fordham remains a wonderful law school, so

Interviewer

Any particular classes or professors who inspired you while you were there?

Loretta Preska

Professor Gus Katsoris, who taught tax and accounting for lawyers, inspired me greatly, but gave me my lowest grades. I also had John Sprizzo as a professor, who at that time was a practicing lawyer, and who went on then to join the Southern District [of New York] bench, and with whom I served as a colleague. He was a wonderful professor.

Interviewer

As you got into law school, did you imagine yourself being a practicing attorney, a judge, a law professor—what did you think you would—where your career would take you?

Loretta Preska

I certainly thought only in terms of being a practicing attorney, and indeed, had some thoughts about perhaps being a patent lawyer, to use the chemistry experience. As it turned out, I had an interview—one of many interviews with law firms and went to a law firm the summer after second year, and then continued in the law firm vein—certainly no thought of being a judge.

Interviewer

What attracted you to the law, finally? I mean you say you went there because you wanted to talk, but when you got into it, you have to love the law to study the law, at least—or you're putting yourself through some pretty difficult torture, I would say, right?

Loretta Preska

Well, indeed. But going in, I didn't know anything about the law. I read that section in the catalog that says "Torts" "A Civil Wrong," and I had no idea what they were talking about. But it was very interesting work"maybe because of the chemistry training, I don't know. But it really appealed to me"it was lots of fun.

Interviewer

What's the relationship between chemistry and the law when you say that?

Loretta Preska

I think logical thinking, and that's the best I can do. But I found it very interesting, liked doing it"and, of course, because I knew nothing about it, I was scared, so I worked particularly hard.

Interviewer

So you went to work in a law firm.

Loretta Preska

I went to work in a law firm. I spent some years at a large law firm, doing commercial litigation. I then went to a"

Interviewer

In New York City?

Loretta Preska

In New York City"the Cahill"

Interviewer

Which firm was that?

Loretta Preska

Cahill Gordon & Reindel. I then went to a smaller firm in New York City, continued doing commercial litigation.

Interviewer

What does commercial litigation mean, for our listeners"what is that?

Loretta Preska

It generally"litigation, of course, means court cases, and commercial means dealing with business matters. So I dealt with contracts, antitrust"I had the great benefit of working with Floyd Abrams at the Cahill Gordon firm, and doing"

Interviewer

Big First Amendment specialist, right?

Loretta Preska

And doing a lot of First Amendment work.

Interviewer

Did you work on any cases together with him?

Loretta Preska

Of course. We tried a case representing a CIA agent who had written a book, and whose book the CIA had redacted very heavily.

Interviewer

That was a very—what was the name of that? That was a very famous case.

Loretta Preska

Yes, it was.

Interviewer

What was the name of the CIA agent who did that—do you recall?

Loretta Preska

It—come to me—that old.

Interviewer

Pardon me?

Loretta Preska

—that old.

Interviewer

Oh. [Laughter] I remember that very well, because it was a very controversial book, right?

Loretta Preska

Absolutely, but it was such fun. The trial was fun. Fourth circuit appeal was fun. We did not prevail to any great extent, but it was wonderful experience. I was able to do a good deal of libel work, generally for the New York Times but for other entities as well. Argued a libel case in the New York Court of Appeals, which is a wonderful court to argue in.

Interviewer

This is what, the Second Circuit, or you mean New York State?

Loretta Preska

New York Court of Appeals in Albany.

Interviewer

In Albany, right.

Loretta Preska

It's a beautiful courtroom with carved wood, and you're very intimate with the judges.

My First Trial Entirely
Interviewer

So how did you end up a judge in the District Court?

Loretta Preska

Well, after a Fordham event one night, I was with some Fordham friends, perhaps having a libation or so, and someone suggested that "we were doing what lawyers do all the time, and that's gossip about judges, of course. And someone suggested that I would be a good judge, and that was the first time I ever thought about it.

Interviewer

And what came from that?

Loretta Preska

Asked around, found out how one does it—which, of course, there is no one answer to. But some number of years later, I made application to Senator D'Amato's committee, and as you

Interviewer

Senator D'Amato was one of the two U.S. senators from the State of New York at the time?

Loretta Preska

That's right, which is a very common occurrence in most states—the senators do recommend candidates to the President.

Interviewer

To the federal bench.

Loretta Preska

Yes. And the process is you fill out an application, which generally mirrors the application you would be required to fill out for the senate, and it's massive. So you fill it out, send it in—the senator's committee reviews the applications. Eventually the committee holds interviews with candidates they like, and then after that, I ended up meeting the senator, and was called one night and told that President Bush—George Herbert Walker Bush

Interviewer

The first Bush.

Loretta Preska

The first Bush would be calling me the next day to tell me that he was going to nominate me. It turned out to be at my parents' home in Delmar, New York policed everybody off the phone all day, because in those days, of course, everybody had one phone line and one hard-wire phone.

He called on a Friday night after 5

00, and it was so apparent that all of the heavy work of the day had been done, and so he was going to make some of these calls, which were good news calls to people. So he was intensely gracious. I told him I was going out with my parents afterward, and we would have a toast in his honor. He allowed as how he and Barbara were going out to the movies "you have to get out of the White House once in a while" and he was going to have a nice evening also. But he was very gracious.

Interviewer

Yeah, so you went directly from being a practicing attorney to being a federal judge.

Loretta Preska

Yes, sir.

Interviewer

Is that a common path for judges, or usually you go through the state system first? Or
[Crosstalk]

Loretta Preska

Some of each. Some of each. It's probably less than half of the federal bench served on the state bench, but it's not at all uncommon. So it's pretty common to go from being a practicing lawyer to being a judge.

Interviewer

Now, who were you replacing?

Loretta Preska

Judge Robert Ward, who had taken senior status at that time.

Interviewer

And what was the first case you heard?

Loretta Preska

The first trial I heard was an admiralty trial, which had to do with whether or not certain axles had been packed properly for the cross-Atlantic voyage when they encountered a storm in "I forget" maybe February. The lawyers in the case were extremely gracious, as admiralty lawyers usually are, and they said, "Why, Judge, how nice that this is your first admiralty case." I did not feel the need to tell them it was my first trial entirely.

On the Fundamentals of the American Legal System

Interviewer

Now, for those watching, let's explain a little bit about the federal system. So the District Court that you sit on is the trial court, the actual trial court, right?

Loretta Preska

Right. I sit in the Southern District of New York, which runs from lower Manhattan up to Newburgh and Poughkeepsie, roughly. There are 3 other districts in the State of New York, and 94 geographic districts in the country, so that's the trial level. The next level up are the Courts of Appeals, so decisions from my court would go to the Second Circuit Court of Appeals—its geographic area is the State of New York, State of Vermont, State of Connecticut. And when the case gets there, three judges preside over the case. To the extent the litigants are still unhappy they may appeal to the Supreme Court of the United States, where, of course, as you know, nine justices hear the case.

Interviewer

Now, when the case is appealed from the trial court to either of these appellate courts—the Circuit Court or the Supreme Court—it's tried on the law itself, the application of the law, isn't that right? Not on the merits, not on the actual—

Loretta Preska

That's right.

Interviewer

Can you explain what that means?

Loretta Preska

Well, the trial in the trial court takes evidence. You hear witnesses. So either I as the fact finder or a jury as the fact finder make determinations of credibility and the like. So a decision or a verdict is entered, one way or the other. Up at the appellate level, no new evidence is taken, and credibility findings are generally respected, having been made below. The job of the appellate court is to determine whether there were errors of law—and similarly for the Supreme Court, of course.

Interviewer

So when it reaches the appellate level, the judges only hear from the attorneys on both sides—is that right?

Loretta Preska

Exactly so. They're not listening to witnesses or otherwise taking any new evidence.

Interviewer

So even though those judges may not be aware of the actual evidence of the trial, they're going to look at whether the law was properly applied.

Loretta Preska

True. They are aware of the actual evidence in the trial.

Interviewer

“I’m sorry” but they can’t add to the evidence.

Loretta Preska

But they can’t add to the evidence that’s right.

Interviewer

Alright. And what determines—and you should keep your eyes on me rather than on the camera here.

Loretta Preska

Okay.

Interviewer

What determines whether the trial is heard by a jury, or decided by a jury, or decided by the judge?

Loretta Preska

Sometimes a statute will prescribe trial by jury.

Interviewer

A statute is a law, right?

Loretta Preska

A law. A law might prescribe whether it’s tried by a judge or a jury. In the absence of a statute, then we go back to the common law, and we ask whether or not in England these matters were heard by juries or judges. For example, a contract case—breach of contract—would be heard by a jury. If the applicant was seeking what then was referred to, now is referred to as equitable relief—an accounting or a preliminary injunction—that was tried to the court in England, to the chancellor. So that would be tried to me sitting as a judge.

Loretta Preska

An example of a change was in the discrimination laws, which, when the federal discrimination laws were initially passed, those cases were tried to the court. And eventually there was an amendment by which Congress determined that those cases should be tried to a jury.

Interviewer

Now, explain also just a little bit—and then we’ll get off our law class here to go further—but you referred to the common law, and the U.S. system of laws is based upon the common law, with the exception of Louisiana, isn’t that right?

Loretta Preska

Which is a civil law state.

Interviewer

And the rest of the world is basically civil law states, aren't they? What is the

Loretta Preska

But for Britain.

Interviewer

Right, correct. What is the difference? What did we mean by "the common law"?

Loretta Preska

The common law is governed by precedent by the cases that have gone before, which build one upon each other. And there is a great tradition of that. You always go back and see what the case before did on this topic. In the civil law countries, they're much more statutorily inclined, and it's just written down, and that's what you do. Now, because of the increase in laws in our country, of course, this is a very important tool that we have and also a different method of proceeding.

And I wanted to go back to one other of your earlier questions

you talked about the federal court, and I guess we should mention that because of what the [American] Constitution tells us, federal courts may hear cases arising out of the Constitution of the United States, the laws of the United States. So that would be both the criminal laws

Loretta Preska

And so the thought was that a Virginian, having been sued in New York, might not get such good treatment in the state courts of New York. And so the framers determined that those cases could go to these new federal courts to these national courts.

Interviewer

And most of the criminal law is state law, right?

Loretta Preska

The vast majority of the criminal cases are state cases.

Interviewer

Now, what about military tribunals and military courts? What is the distinction between military courts and civil courts? What do we mean by that when we're talking about it?

Loretta Preska

Well, we're talking about the justice system and the laws and the rules that are applicable. We know, for example, in civilian courts, we know what the federal laws are. We have the rules of evidence. We have rules of procedure the federal rules of civil procedure.

Loretta Preska

So those all apply in civilian courts. In the military commissions that we are discussing so much these days in connection with the terrorism cases, military commission were used back as far as the Revolutionary War, and have been used in wartime throughout our

history. There's the famous story, of course, of the [Nazi] invaders during World War II who landed by submarine off of Long Island, and when captured, prosecuted in a military commission, and in two months had been executed "a very"

Interviewer

Pretty much in secrecy, too.

Loretta Preska

Pretty much in secrecy "very well known story. The military commissions have been developing and have developed through each war, really to address the exigencies of that war. Lately, there have been reforms made, as there have been throughout "there was big change in the '50s. More recently, in 2006 and 2009, the Military Commission Act made various changes to the procedures. Procedures develop mostly through statute, through law, but are sometimes affected by Supreme Court cases.

Interviewer

But what's the "it's time of war, and I capture these German saboteurs, for instance. Why are they not prisoners of war?

Loretta Preska

It depends on their status, but they're coming into our country, and they obviously have violated the rules of war in some manner. And I should say that in military commissions, one is not applying the civilian law "one is applying the law of war, the law of armed conflict, which all of our friends here at West Point know so much more about.

Interviewer

And how is the law of war determined? Who enacts the law of war?

Loretta Preska

We would have to address that to the law department here.

The Forward Looking Nature of the War on Terror

Interviewer

Okay "we will. So you have been on the federal bench since 1991, is that right?

Loretta Preska

'92, thank you.

Interviewer

'92. And that means that "were you there during the First World Trade Center bombing, in that case?

Loretta Preska

I was. I was.

Interviewer

Did you sit on that case?

Loretta Preska

I did not. Kevin Thomas Duffy of our court tried that case—it was a very lengthy trial.

Interviewer

Can you describe that story, and the resulting trial that came from it? Just summarize it.

Loretta Preska

Well, these individuals were indicted on several different charges—you know, conspiracy to blow up buildings and the like. They were tried—

Interviewer

I should stop to say that this is during—this is the first bombing of the World Trade Center, which—

Loretta Preska

In 1993.

Interviewer

Right—which did not result in the kind of damage that the second one resulted in—that was—

Loretta Preska

Right. It resulted in six deaths, and, of course, a good deal of damage to the World Trade Center. It was a lengthy trial. I believe it—under the name of United States against Salameh, and these individuals received very severe sentences. One of the great stories of that case: judges are assigned to cases randomly. Indeed, there—there's a bingo wheel with cards in it with the names of our judges, and the story—

Interviewer

Literally a bingo wheel.

Loretta Preska

Literally—in the criminal side. You know, civil side, now everything—computers. But even now, in the criminal side, there is a wheel. And the story that was reported in the New York Times was that all the lawyers together, both sides, went down for the drawing of the judge's name. And the card was pulled out, and the name was Kevin Thomas Duffy. Both sides groaned.

Loretta Preska

Fast forward—the decision by the Court of Appeals affirming the convictions of those individuals was several hundred pages long, and continually gave Judge Duffy kudos, approbation, applauded him for the very fair trial in which he gave these defendants.

Interviewer

Now, when we come to the War on Terror, one of the big debates is, is it a war—are these acts of war, or are they acts of crime? And, of course, if they are acts of war, then we would treat them with the military tribunal approach, and if they are acts of crime, then they end up in the civil courts. Can you just briefly outline that debate? Because it's so contemporary—it's so much of our time.

Loretta Preska

It is, and there are elements of the criminal side, as you point out, and elements of the war side. Criminal law, as you know, is basically backward-looking—we look at what crimes have been committed, and then we look to punish those who are convicted of those past acts. To a certain extent, the War on Terror, if you will, is in part forward-looking. I mean there are certainly the backward-looking aspects: punishing the World Trade Center bombers.

Loretta Preska

But it is also forward-looking in that national security concerns require us to investigate and to try to keep the nation safe, and the first obligation of any nation is keeping its citizens safe and warding off attack. So terrorism is a little different in that, in a way, we are forward-looking—for a start. Want to keep going?

Interviewer

Sure—absolutely. So in the case of trials that would come before your court for terrorist actions, would you be looking to treat them as crimes, and if they went before a military tribunal, they would be looked upon as acts of war, is that right?

Loretta Preska

Certainly anything that came before us would be treated as a crime. That's the only thing we know how to deal with. The military tribunals would have charges as well, so there would be an accusatory instrument. But the rules and the statutes, if you will—the laws of war that are being applied—would be different. For—go ahead.

Interviewer

The rules of evidence.

Loretta Preska

The rules of evidence are lucent. For example, the Fourth Amendment—the Sixth Amendment requires that accusers be brought into court to make their accusatory statements right there, to the defendant's face. And obviously, there are a lot of reasons for that, just making that happen. They have to do it under oath, so that there is more danger if they lie—they'll be subject to a perjury charge.

Interviewer

And this is actually in the Constitution.

Loretta Preska

Yes, sir.

Interviewer

The idea that you have the

Loretta Preska

The defendant

Interviewer

Opportunity to confront your accuser.

Loretta Preska

The defendant shall have the right to confront his accuser. Also, having the accuser here in court and subject to cross-examination allows the jury to judge the credibility of that witness. So rather than someone saying, "Joe Blow told me that he saw John blow up the World Trade Center," John has to come in and say, "whoever it is" somebody the witness who actually saw it has to say, "I saw you, the defendant, blow up the World Trade Center."

Interviewer

Now in a military tribunal that is not true.

Loretta Preska

In the military tribunal, one may introduce what's called hearsay. You could have the witness say, "Mr. Witness told me that he saw the defendant blow up the World Trade Center." The judge has more discretion, and of course, there is a need for corroboration, and it has to sound like it's credible evidence. But in a civilian court, that hearsay statement "the secondhand statement" would not be permitted.

Interviewer

Other differences?

Loretta Preska

Other differences "the Fifth Amendment says that the defendant may not be compelled to testify against himself, and so that means that not only can you not be beaten and made to testify against yourself, but also coerced statements can't come in for you. So we've all seen the Miranda warnings on TV, right? If you don't have your Miranda warning, your lawyer will make a motion to keep that statement out. Now, obviously, there are exceptions to this, but again, it's a lesser, more relaxed standard in the military courts. Search and seizure "as we all know" the Fourth Amendment bars unreasonable searches, and searches without a search warrant that specifically describes what the officers are looking for, where it's supposed to be, and why they think it's going to be there. No such strict requirement on the military side. There was a ruling, however, by the Second Circuit Court of Appeals, saying that the requirement to obtain a warrant does not apply to searches by United States agents out of the country, and that was in the first embassy bombing case that that holding was made. It hasn't been ruled on by the Supreme Court yet, but the Court of Appeals has stated

The Case of Ahmen Ghailani

Interviewer

Now, recently "in fact, this week" we've had a verdict in a case that was before your

court.

Loretta Preska

Indeed. It was the prosecution of Ahmed Ghailani. He was one of the embassy bombers. There had been a previous embassy bombersâ€™ trial in which all of the defendants were convicted. Ghailani was a fugitive at the time. Ghailani was eventually picked up, I believe by the Pakistanis, turned over to the CIA. He was put in the CIAâ€™s interrogation program for two years. He was then turned over to the Department of Defense, where he was detained for three years at Guantanamo Bay. His name, however, was on the earlier indictment, from I think 1998, 2001â€™I forgot nowâ€™but it was on the earlier indictment. And then it was only in about 2009â€™it was in 2009 that he was brought to the Southern District of New York for prosecution.

Interviewer

Now, this case was particularly well-watched, because of the Obama administrationâ€™s interest in bringing some of the cases at Gitmo to the civil courts as in their judgment, and something the President actually campaigned on, a more constitutionally sound way to apprehend the War on Terror.

Loretta Preska

This defendant was the first, and so far, only Guantanamo detainee to be tried in a civilian court. â€ There were 285 counts in the indictment, the large number explained by the number of individuals killedâ€™I think 245.â€ So there was one count for each of them, and then there were a variety of other charges. â€ There were two very significant rulings in that case. â€ One was on the speedy trial. â€ The Constitution also says that a defendant is entitled to a speedy trial. â€ Thereâ€™s a statute, applicable in civilian courts, conveniently called the Speedy Trial Act, which requires essentially that a person be brought to trial within 70 days of being charged. â€ There are exceptions, of course, and that was the basis of the motion. â€ Ghailani moved to dismiss the indictment because he had not been tried speedily. â€ Now, the Constitution doesnâ€™t say what speedy is, and even if youâ€™re past the 70 days under the statute, the judge may still balance a variety of factors in determining whether the delay was reasonable. â€ Generally, the factors are the length of delay, and in reviewing this motion, Judge Kaplan said, â€œWell, you know, five years of delay is a pretty long time, but itâ€™s not the longest that has been found to be reasonable.â€ â€ Then he went to the reasons for the delay, and whether or not the delay prejudiced Ghailani in his trial preparation. â€ As for the reasons for the delayâ€™

Interviewer

By â€œprejudiced,â€ you mean what? â€ Explain that more.

Loretta Preska

Make more difficult.â€ For example, are there witnesses who are no longer available, is there evidence that is no longer available, that wouldâ€™ve been available to me way back then, or otherwise had some bad effect for the defendant.â€ So Judge Kaplan said, â€œLooking at the reason for the delay, letâ€™s start with the two years of CIA detention.â€â€ He said, â€œThe reason there was he was being questioned in order to get information, to get intelligence, to help defend our country.â€â€ And he did note that even throughout the period, he was a valuable intelligence source, so as to that period, Judge Kaplan said, â€œFair enoughâ€™thatâ€™s reasonable.â€

Loretta Preska

Then he said, "As to the Guantanamo period," he said, "that's a closer question. Part of the time there was involved with the military commission's investigation of Ghailani, and they had begun their initial prosecution of Ghailani at that time." Now, meanwhile, this other indictment is sitting out there, so he said, "Well, you know, that's a little shakier." "But," he said, "let me look at the other factors." "Let's look at the prejudice." He said, "Ghailani has not shown me any evidence that's missing that we would've had before hasn't shown that there are any witnesses he would've called that are now unavailable." So he wasn't really prejudiced in his trial preparation. Also, Judge Kaplan found he was not prejudiced in terms of his freedom, because he would have been held all this time as an unlawful enemy combatant anyhow. And therefore, Judge Kaplan denied the motion to dismiss for an un-speedy trial.

Interviewer

Now, in this case, I believe I read that the prosecution was impaired because there were not witnesses that there had been available many years ago—is that right?

Loretta Preska

That's probably true.

Interviewer

But that was not significant to the motion.

Loretta Preska

That's correct. Yeah. Yeah, there's no "sauce for the goose, sauce for the gander" at all here.

Interviewer

Right. But now, there was a determination that Judge Kaplan made a few weeks ago that was significant for this case.

Loretta Preska

Right. The second big motion in the case was the motion to suppress certain evidence that had been obtained through Ghailani's statements—supposedly coerced statements. This was in the CIA period. The evidence that had been obtained was, Ghailani told them the name of a guy who says "the guy says" that he sold Ghailani the explosives used to blow up our embassy. The guy's name was Abebe. And so he was arguing that evidence should not be allowed because it was the result of coercion, violation

Interviewer

What would be "how was he determining to be coercion in this case?"

Loretta Preska

Well, there was no determination, because the government conceded, for the purpose of that motion only, that during the period of his CIA custody, Ghailani had been coerced to

make statements.

Interviewer

By their definition.

Loretta Preska

By their definition. "They didn't tell"

Interviewer

Whatever that means.

Loretta Preska

Whatever that means. "But they said, "Look, you may assume for these purposes that it was coerced." The government argued, however, that Abebe's testimony was sufficiently attenuated from anything that Ghailani said that it should be permitted. For example, they said, "Abebe just came in, and Abebe says he'll testify." He's volunteering. He's under no coercion to do it." He's just going to volunteer." And Judge Kaplan rejected that "made certain credibility findings and said, "No, Abebe's testimony is not sufficiently attenuated from Ghailani's statements so that it isn't tainted the same way his statement out of his mouth was."

Interviewer

So now, if the

Loretta Preska

And so the government didn't get to use that witness.

Interviewer

Yes. "Now, if the statement had been a statement from Ghailani himself, coerced, as opposed to Ghailani giving them the name of someone who then made a statement, it clearly would've been determined to be"

Loretta Preska

Certainly in our

Interviewer

Inadmissible.

Loretta Preska

That's right.

Interviewer

Correct. "But the fact that it was removed by one generation, in a sense"

Loretta Preska

Right. A A A A A A

Interviewer

Made it debatable. Â Â Â Â Â

Loretta Preska

Â So that was the second significant ruling that cameâ€”

Interviewer

Now, you think the government was surprised by that ruling?

Loretta Preska

I think they thought it was even betâ€”who knew? Â Â We donâ€™t know which way itâ€™s going to come out.

Loretta Preska

But donâ€™t forget that Ghailani was originally indicted without the governmentâ€™s knowledge of this guy Abebe, so the government mustâ€™ve thought, way back when they indicted, that they had sufficient evidence to prove to a jury beyond a reasonable doubt that Ghailani was guilty.

Interviewer

Now, that indictment was all by a hearing before you, isnâ€™t that right?

Loretta Preska

No.

Interviewer

Explain that you actually sat Ghailani forâ€”

Loretta Preska

I arraigned Ghailani because on the day that he wasâ€”that he arrived for arraignment, the assigned judge was not available.

Interviewer

I see. Â Â Now, so continue with the story of this case. Â Â So Judge Kaplan thenâ€”

Loretta Preska

So the caseâ€” Â Â Â Â

Interviewer

It was a jury trial, though.

Loretta Preska

It was a jury trial.

Interviewer

And why was this a jury trial?

Loretta Preska

The Sixth Amendment says that in criminal cases, the defendant is entitled to a trial by jury, and of course, this was a reaction to Britain, where the king's judges made those decisions. So you were entitled to a jury of your peers, so that the people would be doing it.

Interviewer

And just to remember then, this was being tried in the conspiracy to bomb the embassies in Tanzania and Kenya.

Loretta Preska

Tanzania, and in Kenya.

Interviewer

Right in 1998.

Loretta Preska

That's right.

Interviewer

So how did the jury decide, and why did they decide as they did?

Loretta Preska

Now, there's the \$64,000 question. What they decided was the jury found Ghailani guilty of only one of the 285 counts. That count accused him of conspiring to blow up our embassies. In response to a specific question on the verdict form, "Was that conduct intended to cause death," the jury said, "Yes." So that's all they found him guilty of. They did not find him guilty of all of the deaths.

Interviewer

Which seems inconsistent.

Loretta Preska

It sure does. The only way now, we're all in speculation now, and the only thing that we know is that on Monday of this week, a juror wrote a note saying that she felt she was being pressured by other jurors, and she had a view and she wasn't going to change her mind. The defense asked for a mistrial. The court denied the mistrial, told the jury they hadn't been deliberating long enough, and

Interviewer

The defense asked for a mistrial based upon this juror.

Loretta Preska

Based on this juror's note. The judge reread the very standard portion of the charge which, of course, he had already read talking about a juror's obligation to deliberate, but also saying that you're not obliged to give up your strongly held views. So they went back and deliberated. There was another note Tuesday, and the verdict came in Wednesday night sometime around five-ish and was read at 5:45. So some people, in the press and otherwise, have been speculating that this might've been a compromise that if that juror was for not guilty on all counts, and the other jurors were for guilty on all counts, that perhaps it was a compromise. We have no way to know.

Interviewer

Now, when a judge charges a jury as I assume Judge Kaplan must've here

Loretta Preska

Absolutely.

Interviewer

Would he not have or is he not allowed to make the obvious connection between various charges from counts, that is? That if there is intent to bring about death, death, counts of the death of the others, would it naturally link?

Loretta Preska

He wouldn't say that. Generally, what one does in a charge there are usually three sections. There's a general section talking about the procedures applicable to all criminal trials: talk about findings of credibility, the burden of proof, things like that. Then the center section talks about the charges at issue, and the court tells the jury what elements the jury must find in order to convict the defendant of this charge. Now, as to this charge, you must find these, and explains all of those elements. And then the last, very brief portion talks about the procedure that they may use: they have to elect a foreperson, or you appoint a foreperson, or whatever.

Interviewer

But then I guess what I'm saying is that if the judge made those the list of what they must find in order to find for this count, and this count of intent to create death, that then the death would be the same

Loretta Preska

One would've thought.

Interviewer

Yes uh-huh. How large is this jury?

Loretta Preska

It's 12.

Interviewer

1.

Loretta Preska

Generally, in a long trial, you would choose 18 jurors, so youâ€™d have jurors plus alternates.Â Â But then when the time for deliberation comes, the 12 jurors deliberate.Â Â And another interesting thingâ€™if, for example, that juror who sent the note on Monday had refused to deliberateâ€™had sat in the corner and said, â€™œlâ€™m not talking to you people any moreâ€™the judge could have dismissed her and permitted the jury to go on with 11.Â Â But apparently that was not the gist of the note.

Interviewer

There are no alternate jurors in this case.

Loretta Preska

What sometimes one does is when you dismiss the alternates, you say, â€™œl would like you to continue to follow the rules youâ€™ve been following during this trial.Â Â Do not speak to anyone about the case.Â Â Do not allow anyone to speak to you about the case.Â Â Do not read anything about the case.Â Â Do not do any research about the case.Â Â And when there is a verdict, we will tell you that you are then free to do whatever you want.â€™Â Â What happens there is, letâ€™s say you do lose a couple of jurorsâ€™letâ€™s say two of them get run over by a bus. You can pull back the alternates, who have heard all of the evidence, but then you must tell the jury that they must restart their deliberations.

The Nature of this Conflict

Interviewer

Now, there are a lot of people who have questioned the policy of trying these cases in the civil courts. What is your opinion on it?

Loretta Preska

Iâ€™m not paid to have an opinion on it. The considerations, thoughâ€™thereâ€™s really no good answer. The question is, what interests are you trying to serve? You know, the interests of national security might counsel military commissions. Itâ€™s a lot easier to manage classified information there. What about domestic opinionâ€™what about world opinion? That might counsel a different answerâ€™we donâ€™t know. There isâ€™ and we talked about this today at the faculty colloquium. There is a protocol issued July â€™09 by the Attorney General [Eric Holder], which talks about how these decisions of which forum to try the case in will be made.

Loretta Preska

It says that a team of lawyers from the Justice Department, including the National Security Division, will be joined by a team of lawyers from the Department of Defense, including from the Office of Military Commissions. That team will consider each case, and will make recommendations to the attorney general as to where to prosecute the case. The attorney general, then, in consultation with the secretary of defense, will make the determination.

Loretta Preska

The protocol says the presumption will be [for] trials in civilian courts, but then it recognizes that other compelling reasons may counsel trials in military commissions. And then it enumerates a bunch of factors to be used in making the determination, and itâ€™s all the

things we've been talking about and more: protection of intelligence sources and methods, evidentiary concerns, problems of trying multi-defendant cases. Where did the act occur? Who were the victims of the act? How was it investigated? What about efficiency? What about resources? And so we haven't seen this used much, but the only thing we've seen is the announcement in November 2009 that the KSM cases would be coming to New York.

Interviewer

KSM stands for?

Loretta Preska

Sorry—Khalid Sheikh Mohammed and his codefendants, who are supposed to be the masterminds behind 9/11. Although the attorney general wasn't very explicit, it seems that the facts that this was a civilian target, that civilians were killed, that it was in the domestic United States, counseled under the protocols that this be a civilian trial. At or about the same time, the attorney general decided that the alleged bombers of the U.S.S. Cole would be tried in a military commission. It was a military target, military personnel were killed, it took place overseas. So those are the only two examples we have of this protocol and how it's been used.

Interviewer

It's a very contemporary question, though, isn't it? I mean it's a very twenty-first century notion here, because you have this definitional thing: what is a war, what is a crime? You have this definitional thing of where the laws of the state—meaning in a broad sense, the state—get applied. Do they go wherever the flag goes, or must they change because of the nature of the location of the crime, as you say? I mean these are tough questions, aren't they?

Loretta Preska

It is. The thing we should remember I guess, though, is that both systems are historic. You know, we've been using them for hundreds of years. I think probably the military commission system has changed more to reflect the nature of each war, and the statutes have changed. But they've both been used for decades—for hundreds of years. The reason this is such a debate now is because of the nature of this conflict. In conflicts past, we've been talking about soldiers in uniform with a chain of command, et cetera. That's not what we have here, and that's what's making it very difficult. But we seem to have the tools in both systems to do what we have to do.

Interviewer

You think justice can be served in both systems.

Loretta Preska

I think justice can be served in both systems—sometimes it's more difficult in one than in the other.

Interviewer

Okay. Thank you very much.

Loretta Preska

It's been a pleasure—thank you.