ORAL HISTORY OF
ALAN ROSENTHAL

Fourth Interview – May 9, 2011

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Alan Rosenthal and the interviewer is Judy Feigin. The interview took place at Alan Rosenthal's apartment in the King Farm subdivision in Rockville, Maryland, on Monday, May 9, 2011. This is the fourth interview.

MS. FEIGIN: Good morning.

MR. ROSENTHAL: Good morning, Judy.

MS. FEIGIN: So Alan, we had barely scratched the surface of your career at DOJ, but before we get into all the details of it, I just want to get a sense of it. Can you give us an idea of how many arguments you did while you were in the Appellate Section?

MR. ROSENTHAL: I was in the Appellate Section exactly twenty years, almost to the day, and my estimate is that I argued something in the order of 225 cases in that period of time, nine of them in the Supreme Court, the balance in all of the Courts of Appeals, the Court of Customs and Patent Appeals, and I had I think five arguments in state courts of last resort. So the bulk of my arguments obviously were in the federal courts of appeals.

MS. FEIGIN: And I guess we should just say for those who may not know the timing of this, there was no Eleventh Circuit Court of Appeals then, correct?

MR. ROSENTHAL: No. There was the District of Columbia Circuit and ten other circuits. It was after I left that they broke up the then Fifth Circuit, and now what was

the Fifth Circuit is partially in the Fifth Circuit and partially in the new Eleventh Circuit.

MS. FEIGIN: Given that vast number of arguments, which is really quite extraordinary, can you recall your first?

MR. ROSENTHAL: I recall it very well. It was in a Federal Tort Claims Act case in the Second Circuit in New York City, and it being my debut so to speak, my family, specifically, my parents and sister, all of whom lived in New York, came down to listen to my maiden voyage in appellate advocacy [laughter]. The panel in the case included the two Hands – Learned Hand and Augustus Hand, his cousin, plus Jerome Frank. I knew Jerome Frank because he taught a course in the Yale Law School in fact-finding. It was a seminar in the afternoon. He came up from New York once a week to New Haven to offer it. It was a fairly small class, so he got to know the students in it, including myself. So that was a rather formidable panel.

The case, as I say, involved the Federal Tort Claims Act, which in many respects applied state law. It had certain, however, statutory exclusions from its operation, but we had won the case on state law grounds in the District Court up in Plattsburg, New York, I think it was, way upstate. The Section Chief told me that, in arguing this case, he wanted me to focus my attention on an issue of statutory construction. This despite the fact that, as just noted, we had won the case on the basis of New York State law which was imported into the Tort Act. So I said

well, okay, I would do that. Obviously as a neophyte I was to going to follow the orders of my Section Chief. So I stood up before the court and I started to argue the statutory construction point. I got through about one sentence, and Learned Hand interrupted and said, "Well, Mr. Rosenthal, was that the ground of decision in the District Court?" I said, "No, the District Court had decided the case in the government's favor on a state law ground." He said, "I assume that you're abandoning that ground." I said, "Well, no, Your Honor." He said, "I suggest that you get right to it." So I think I got maybe six additional sentences out of my mouth when all of a sudden Judge Hand says, "*Jones v. Smith*," or something like that.

MS. FEIGIN: This is still Learned Hand?

MR. ROSENTHAL: Learned Hand. Augustus seemed to be asleep during most of the argument [laughter]. "*Jones v. Smith.*" And I'm thinking my goodness, is that a case that I somehow overlooked? At this point, I hear the rustling of papers behind me, and it suddenly occurs to me that *Jones v. Smith* was the next case [laughter]. So my oral argument in that case consumed I might say probably no more than four minutes [laughter]. Well, all I can say is my sister thought, gee, this is a great job you've got [laughter]. You come up from Washington, you've got the whole day in New York. Actually I'd flown up the night before. And all of this is for four minutes or thereabouts of work. So I had to assure her that this was not likely to be my experience throughout my career as an appellate lawyer [laughter], and

obviously it wasn't, but that was it.

I was somewhat surprised at this abrupt end because as a law clerk the prior year for a judge on the District of Columbia Circuit, I sat in on a number of the arguments, and when the court thought they had heard enough, they would say to the lawyer, "Well Mr. Jones or Ms. Jones, I think we've heard enough." It wasn't simply abruptly calling the next case [laughter]. But that was the way Learned Hand apparently operated.

Another story about Learned Hand was he took great interest in making certain that the margins on the briefs that were submitted to the court were of the appropriate length. Indeed, I did see him during the argument that immediately preceded mine – mine was not the first case on – I saw him sort of looking, measuring the margins on the briefs before him [laughter]. So that seemed to be one of his idiosyncrasies.

That was a very interesting way of embarking upon my career as an appellate advocate [laughter]. For his part, Jerome Frank I think recognized me; he simply smiled. But that was it.

The only other amusing thing about that experience was my opponent, who came from the northern reaches of New York State. This might well have been his first appearance in the Court of Appeals, I don't know, but as we were leaving the courtroom together he said to me, "Well Mr. Rosenthal, we'll just have to see how it comes out." Now bearing in mind, I was the appellee, and it was just four minutes or so of argument,

there was little doubt in my mind as to how it was going to come out, and indeed, within a matter of a few weeks, a very brief decision came out which affirmed on state law grounds the District Court decision. So the statutory construction argument that my Section Chief wanted me to address never got decided.

MS. FEIGIN: When you talk about his telling you what to do, how did you prepare for these arguments? Were there moot courts?

MR. ROSENTHAL: Absolutely. There were always moot courts, and the moot courts were particularly thorough in the instance of the Supreme Court arguments. For the Court of Appeals arguments, there might be two other members of the section in addition to either the Section Chief or Assistant Section Chief sitting on the moot court. In the case of the Supreme Court arguments, there were generally at least five or six, and the endeavor, of course, was to raise every question that the Supreme Court Justices could possibly have in mind. Needless to say, I did not have one Supreme Court argument in which there were not several questions posed to me that had not been anticipated by the individuals conducting the moot court [laughter].

MS. FEIGIN: Having argued in all the circuits, can you give us a thumbnail description of the differences among the circuits?

MR. ROSENTHAL: There were enormous differences. In that day and age, in the Fifth Circuit based in New Orleans, but they also sat in other locations – in Florida,

Alabama, and Texas – it was rare that you got out more than "May it please the Court," before the judges were on you, and they were thoroughly prepared. I was amazed and actually welcomed that because it seemed to me that the principal virtue of an appellate argument from the standpoint of the lawyers presenting it, is that it provides, or should provide, an opportunity for the advocate to learn what is troubling the court, if anything, and to provide an opportunity to endeavor at least to satisfy the court that its concern regarding some aspect of the advocate's position is not substantial.

Now in contrast to the Fifth Circuit which was, as I say, invariably prepared, the Tenth Circuit was never prepared [laughter]. The Tenth Circuit was a court that was based in Denver and covered several additional states like Oklahoma and New Mexico and Wyoming. I may have missed a state or two. When the clerk of the court called the case name, let's say *United States v. Jones*, those judges apparently did not know at that point whether it was, for example, a Mann Act criminal prosecution or a Federal Tort Claims Act case. As far as I could see, none of them had picked up a brief or had their law clerks brief them on what the nature of the issues were. It was, I must say, extremely frustrating to have to start at Square One and to provide a total education as to what the case was all about.

The Eighth Circuit, however, was even more frustrating. The

Eighth Circuit was St. Louis-based. I had, I would say in the 1950s and 1960s, probably eight cases in that circuit. I went out from Washington to St. Louis on those eight occasions or so to present arguments. In the total of eight cases, I was given a total of three questions [laughter], and those three questions all related to whether something was or was not in the record of the District Court proceeding. In those days the Eighth Circuit allotted an hour for oral argument.

MS. FEIGIN: Each side?

MR. ROSENTHAL: Each side. Today you're lucky I think to get more than 15 minutes a side in most cases. They never interrupted you. They sat there taking copious notes, and you just went on for as much of the hour as you saw fit to devote to your case. Now, I thought to myself after several of these experiences, "What am I doing taking the time to go all the way out from Washington to St. Louis; why don't I simply send a tape of my oral argument?" [Laughter]

One occasion was particularly frustrating. This was a case which involved the question of the appropriate rail tariff rate for shipments of government materials. The railroad was claiming that a particular provision of the tariff applied. The government was claiming that a different tariff provision applied, which, of course, called for a lower rate. In the District Court, the government prevailed. So in the Court of Appeals, I needless to say argued that the District Court was clearly right

in applying tariff provision X, and the railroad lawyer argued that the District Court was clearly wrong, that tariff provision Z applied. Down comes the decision of the Eighth Circuit several weeks later. By a 2 to 1 vote, the court held that the question was one of reasonableness of rates and therefore within the primary jurisdiction of the Interstate Commerce Commission, that it was not simply a matter of tariff construction. Therefore the matter was remanded to the District Court with instructions to send it to the Interstate Commerce Commission to determine the issue of reasonableness. During the course of the argument, not once was there a suggestion on the part of any one of the three judges that there might be a reasonableness issue involved which would put the matter in the primary jurisdiction of the ICC. So this was extremely frustrating [laughter].

Another occasion in the Eighth Circuit, this was an appeal from the District Court in Minneapolis, District of Minnesota, the issue being whether the Federal Reserve System was unconstitutional [laughter], with the consequence that the Federal Reserve notes that were being issued were all about as good as counterfeit money. Needless to say, this was a frivolous suit to begin with, and an even more frivolous appeal from a decision of the District Court to the effect that obviously the Federal Reserve System was constitutional. Yet the Eighth Circuit allowed this rabble-rouser, if I may put it that way, from Minneapolis to orate for a full hour on the subject of the unconstitutionality of the Federal Reserve

System. The court didn't say a word, just let him talk. At the end of the hour, I got up and I said if the court had no questions [laughter], I would submit on our brief. The court had none; they never had any questions, but on this occasion they particularly had no questions [laughter]. And that brought the argument to the end.

When I left the courtroom, in the vestibule, the lobby outside of it, opposing counsel was getting the adulation of a large number of adherents of his view who had come down from Minneapolis to hear the argument, and they were saying to him, "You did a magnificent job" and "It was obvious that you had done a magnificent job because the government had no response." [Laughter]

There was a good deal of difference in the way the various circuits conducted their business. I will make reference to only one other circuit, which was the Fourth. The Fourth Circuit at that time had only three judges. John Parker was the Chief Judge and had been on the court for a long time. In fact, I think in 1930, he was a Hoover nominee to the Supreme Court, and his nomination was rejected by the Senate. He was not confirmed because, as I recall it, he had rendered a decision on the Court of Appeals that had been extremely unpopular politically. If I recall correctly, it dealt with yellow-dog contracts or something of that order. In any event, Parker was the Chief Judge. The other two judges were Morris Soper, who came from Baltimore, and Armistead Dobie,

previously the dean of the University of Virginia Law School who came from Charlottesville. That's all there were, just those three judges. They sat on virtually all cases except when a district judge was brought up to sit on a particular week by designation. They were an interesting trio.

They had one practice which I thought was very good. I think it's still being followed in the Fourth Circuit, but I don't think it's been adopted by any other Court of Appeals. After each argument they would come down off the bench and shake the hands of counsel and exchange a few words. Well, I had one encounter with that practice that made me a bit nervous in advance. I had argued a test case. It involved an issue, again, of which tariff applied to government rail shipments. This was a test case covering a very large number of other cases. We lost in the District Court and appealed to the Fourth Circuit and we lost in the Fourth Circuit. What we then did was to take another one of these cases where the facts were a little bit different and we ran it up the pole again, and when I got to the Court of Appeals, Parker said, "Well Mr. Rosenthal, haven't we heard you on this before, and didn't we reject your position?" "Well yes, Your Honor, but we think that this case is a little bit different factually." Well, we lost it again, in an opinion that said in effect we've already decided this issue previously, why are you bothering us with it again. This time we took it to the Supreme Court. The Supreme Court reversed the Fourth Circuit, remanded it to the Fourth Circuit for further

consideration. So I appear again. Well, Parker was absolutely livid [laughter]. He accused me of having mousetrapped the court and all of this kind of thing. It was a very, very unpleasant time. I think it was probably 45 minutes or so – I think the Fourth Circuit allowed 45 minutes a side, and he had me up there for the full 45 minutes. And finally the argument was over, and, of course, they're going to come down off the bench, and what kind of reception am I going to get? Well, he greets me, "Mr. Rosenthal, it is always a pleasure to see you again." [Laughter] That was a very interesting court.

Now there is an interesting sidelight to Armistead Dobie. As I said, he was the dean of the University of Virginia Law School, and before getting on the Fourth Circuit, he was a district judge in the Western District of Virginia, and Roosevelt promoted him to the Fourth Circuit, and supposedly this was a matter of gratitude for the fact that he hadn't thrown one of Roosevelt's sons out of the law school for misconduct [laughter]. Whether that's true or not, I don't know. In any case, one of my Fourth Circuit arguments, the argument ahead of mine, involved a case where a woman was suing her former husband for having maliciously had her incarcerated in a mental institution where she had remained for two weeks or so before she got herself out. Well, the jury in that case – this was a diversity of jurisdiction case – had awarded her a very large sum of money. On the appeal taken by the former husband, the main point that

his lawyer was making was that the award was grossly excessive, and it was obvious that he was making considerable headway with the judges on that issue of the excessiveness of the damage award. Well this was appreciated by the lawyer for the wife, and when he stood up, he opened his argument by saying, "Your Honors, I can appreciate the fact that you might think that this award was very generous, but you should take into consideration that any amount of time spent in a mental institution, no matter how short, places a blot on one's reputation that is never removable." "Well," says Judge Armistead Dobie, "for your information, I spent several weeks myself in a mental institution [laughter], and whatever blot there may have been put on my reputation, I think was removed when I was appointed to the federal bench." This poor lawyer [laughter]. That shows what comes of not making a close enough study of the background of the judges before whom you are going to appear. I learned later that Dobie had had a mental breakdown at some point in his early career and he had indeed spent some time in a sanitarium.

MS. FEIGIN: When you say that shows the problem of not studying enough about the judges, how did you prepare these arguments? Did you study the backgrounds?

MR. ROSENTHAL: Oh no, but I was fortunate enough never to have encountered that kind of a response [laughter].

MS. FEIGIN: You've given a snapshot of several circuits, but this is an oral history for the D.C. court, so I'd like you to, if you could, give us a sense of the D.C. Circuit as it was when you argued, and that is different from being a law clerk.

MR. ROSENTHAL: I think I might have mentioned this when I was talking about my year as a law clerk there, but for many years it had nine judges, four conservatives, four liberals, and Judge Prettyman who was sort of in the middle. I argued a number of cases obviously in the D.C. Circuit, and with many of them, I wanted a conservative bench, and unlike today where apparently you know in advance who's going to be sitting on a particular case – I understand that is now the practice in the District of Columbia Circuit, to reveal that in advance – in those days you didn't know who was going to be sitting until the curtains parted. Well the official word was that the judges were assigned by lot, that the Chief Judge of the court had nothing to do with who was assigned and what the clerk would do was find out what judges would be available to sit at a particular time, and then there would be a by lot assignment of those judges.

During a good part of my time arguing before the District of Columbia Circuit, David Bazelon was the Chief Judge, and lo and behold, maybe this was all by lot, but on the cases where it really mattered whether a majority of the panel were conservatives or liberals, when those curtains parted, I saw two liberal judges and a conservative judge, and this

was almost invariably the case. Well one day when I was coming up there, I said to the clerk, Nate Paulson at the time, "Nate, you know who's assigned to this panel, I don't, but," I said, "I will bet you $10 right now that when the curtains part, I'll see two liberals up there." Needless to say, he did not take the bet, and needless to say, when the curtains parted, yes, there were two liberals up there. In the cases that I had in that court where it really didn't make a difference what might be the particular persuasion of the participating judges, then I might get two conservatives or I might get two liberals, or I might get three conservatives or even three liberals.

MS. FEIGIN: In your time there as a clerk, did you have a sense of any of that going on?

MR. ROSENTHAL: No I did not, because the Chief Judge was Harold Stephens at that time who was one of the conservatives. It was only subsequently, mainly in the Bazelon days.

On another subject, when I appeared before it, I found the judges of that court invariably well prepared. I would have expected that because certainly in my time as a law clerk, all the judges got at the very least briefing from their law clerks before they got on the bench even if they hadn't taken the time to read the briefs themselves in advance of the argument.

It was a little stressful appearing before Henry Edgerton. He did not disqualify himself in cases in which I was involved, but he made it abundantly clear that I was getting no favors [laughter] from him based

upon my previous service as his law clerk. I found the D.C. Circuit to be a perfectly acceptable court to appear before.

MS. FEIGIN: You say you made the bet with the clerk before the panel appeared. Can you tell us about your relationship with clerks of court?

MR. ROSENTHAL: I made a concerted endeavor to become acquainted with, and if possible to obtain the a friendship of, the clerks of all of the courts of appeals and the Court of Customs and Patent Appeals. I found it inured to my benefit. For example, when I had an argument coming up in the Court of Appeals for the Ninth Circuit and the argument was almost certainly going to be heard in San Francisco as opposed to Los Angeles or Seattle, I would usually want to have the argument on a Tuesday so I would go out the prior Friday night, visit friends of mine over the weekend, and Monday, of course, would be the travel day. So when an oral argument was coming up in that circuit and I thought I was going to San Francisco, I would call the clerk and I would say if at all possible, would you put the argument down for a Tuesday, and almost always that was very possible, and almost always that happened.

I had an acquaintance, a man named Melvin Welles. Mel was a lawyer with the National Labor Relations Board who argued dozens of appeals every year. He was an avid rooter of the New York Yankees and took pride in the fact that, over the course of 15 years or so, he never once missed a game when the New York Yankees were playing the then

Washington Senators in Washington. He would, at the beginning of the year, get the schedule and determine when the Yankees would be playing at Griffith stadium in D.C. He would then look over his list of cases and decide what cases might come up for argument when the Yankees were in D.C. And what did he do? He would call the clerks and say please do not set an oral argument for, and he would list the particular days, and it was my understanding that these clerks were all very accommodating, with the consequence that Mel Welles never missed a Yankee game [laughter].

MS. FEIGIN: And they understood that was the reason?

MR. ROSENTHAL: I don't know whether he gave them that as the reason or not. He may well have. In any event, his request that they not be set to coincide with a Yankee game here was always met. Now in my case, in addition to the courtesy that was extended to me by the Ninth Circuit clerk, with my older three kids, I took them with me short of their fifth birthday when they could travel on the train for nothing – nobody could ever accuse me of being a spendthrift [laughter] – I would take them on the train to an oral argument, in two cases to Cincinnati and one case to Chicago. In all of these three occasions, while I was in the courtroom, my kid was in the clerk's office being entertained by the clerk's office staff.

MS. FEIGIN: Really? How nice.

MR. ROSENTHAL: That was the kind of thing that went on in those days. They couldn't have been nicer. I recall with my daughter, who I took to the Sixth Circuit in

Cincinnati, when I went back to the clerk's office after the argument to pick her up, she was busily drawing pictures and they were putting the court seal on them [laughter]. So that was just something that I found that was very helpful. I found, without exception, that the court clerks in those days were extraordinarily accommodating.

MS. FEIGIN: Tell me about the Mel Richter argument in the Fourth Circuit.

MR. ROSENTHAL: That was unbelievable. Mel had a very complicated case. I don't now recall what the specific issue was, but it had a voluminous record of several thousand pages. It was set for argument on a particular day in the Fourth Circuit in Richmond, the headquarters, and four or five days before the argument, Mel's mother died in Springfield, Massachusetts. Well Mel was a moderately observant Jew, but even had he not been so, obviously there would have been a period of at least a week when he would have been up in Springfield on the occasion of his mother's death. When Mel reported this to the Section Chief and said he was about to leave for Massachusetts, the Section Chief got on the telephone with the then clerk of the Fourth Circuit and said that obviously the argument should be postponed. The clerk's response was, "You'll have to take this up with Judge Parker, but I can tell you that when my wife died, I was back at work the next day." Unbelievable. In any case, the next thing that happens is the Section Chief calls Judge Parker down in Charlotte, North Carolina, which was where he was based, and explains the situation.

Parker said, "Well you'll just have to get somebody else to argue the case." The Section Chief at the time, Sam Slade, said, "Judge Parker, this case has a voluminous record, a number of complex issues, it would just be impossible for somebody else to come adequately prepared to present this argument in the space of a few days." "Well," Parker said, "in that circumstance, I'm afraid Mr. Richter will have to do his mourning in court. We don't postpone arguments. Once they are set for a particular day, they are held on that day."

When Sam got off the telephone, I understand that he was apoplectic. In any case, he went down to the front office and reported this to the Assistant Attorney General in charge of the Division who said "I will call Parker myself." About half an hour later, the Assistant Attorney General – I don't recall whether this was Warren Burger or whether it was his successor after Burger went on the Court of Appeals – but in any case, a half an hour or so later, the Assistant Attorney General called Sam Slade and said, "Judge Parker has reluctantly agreed to postpone the argument." Then what do you think Parker did? He set it down for a Saturday for a special session. Now fortunately Mel was not that religious that this presented a problem for him, but there was obviously an element of malice involved in that.

MS. FEIGIN: Wow.

Speaking of Warren Burger being head of the Civil Division, since he

went on to the D.C. Circuit and then renown as Chief Justice, did you have a lot of interactions with him? Can you tell us something about him?

MR. ROSENTHAL: I had a modest amount of interaction with him. Fortunately the Assistant Attorneys General in my time did not involve themselves to any great extent in the doings of the Appellate Section, so my dealings with him were relatively modest. I have, however, a great Burger story. When Burger was nominated, we're now talking about the spring of 1956, nominated for a seat on the District of Columbia Circuit, his nomination was assigned to a subcommittee of Senate Judiciary, chaired by then Senator Joseph O'Mahoney of the state of Wyoming. Well the nomination is no sooner assigned to his committee, the subcommittee, than five former lawyers in the Civil Division informed Senator O'Mahoney that they are prepared to testify that Warren Burger is anti-Catholic war veteran. And how do they know this? Well it seems that all five of them had been lawyers in what was then called the Claims Division when Burger arrived on the scene as Assistant Attorney General in early 1953, and one of his first acts had been to fire all five of these gentlemen. What better proof could there be that he was anti-Catholic war veteran? They were all Catholic, all war veterans. Well Senator O'Mahoney thinks that he's really got an issue there, but the Senate, it was a presidential election year – the Senate recesses for the year before it gets to Burger's nomination, whereupon Eisenhower gives him a recess appointment.

We're now in January of 1957. Eisenhower has been duly reelected, up goes Burger's name again, and O'Mahoney is scheduling hearings, and he gets a message from J. Howard McGrath. J. Howard McGrath had been Attorney General during the Truman administration. He was not Attorney General at the end of it. But he also at one point was a United States Senator from Rhode Island. J. Howard McGrath said that he has heard about this claim being made by these five former Justice Department lawyers and he wanted O'Mahoney to know that if they were allowed to testify, he, J. Howard McGrath, will appear before the committee and testify that, when he was Attorney General, he had tried to fire all five of them and had been blocked from doing so by their patron who was a senator from Massachusetts. Somehow this whole Irish Catholic war veteran matter got dropped, and as we know, Burger was then confirmed and eventually, of course, ended up as Chief Justice of the United States. That's the main story I have about Warren Burger.

The only other thing I might mention about Burger is in those days, the Divisions each had one political assistant to the Assistant Attorney General in the Division. Today I understand in the Civil Division there are a number of political deputies to the Assistant AG, but there was just one in those days. Well Burger comes on board and in the position of the political deputy was a career employee and Burger was perfectly satisfied with him. But the Republicans are coming in after

twenty years of Democratic rule and there are some people up on the Hill that learned of the fact that there is a Democratic holdover occupying this political position and they sent word to the Attorney General, that was passed on to Burger, that he had to get a political deputy of Republican stripes. Burger said, "Well, okay, supply one. I'm not going to be very active in the search for a replacement," and the Attorney General, who was Herbert Brownell at the time and came from the New York legal establishment, came up with a gentleman who was an associate at the time at Cravath, Swaine & Moore and was not going to be made partner. Of course, the Cravath firm was noted for the fact that it was a good employment agency for its associates who were not going to be made partner. Apparently somebody at Cravath had served this guy up to Brownell, and Brownell passed him on to Burger, and Burger took him. Well he turned out to be an absolute disaster, but he occupied that position for the entire eight years of the Eisenhower administration.

So Burger wasn't that much really of a political animal in terms of the Division. I think he ran it quite competently on a non-partisan basis. But actually the Civil Division, unlike, for example, Antitrust or Civil Rights, was really not very much affected by changes of administration. That's because what the Civil Division really didn't have very much of a policy flavor to it. We were regarded as the country's largest general law

practice, and there wasn't really the same kind of policy issues coming up that would arise in, particularly, Civil Rights or Antitrust.

MS. FEIGIN: Were there any McCarthy Era cases?

MR. ROSENTHAL: Definitely. The most notorious of them all was a case called *Peters* against *Hobby*, and this involved Dr. Peters who was a consultant to the then Department of Health, Education & Welfare, and he had passed the security inquiry of an outfit within HEW.

The Civil Service Commission had its own security operation, and it flunked Dr. Peters on grounds that were outrageous. Well, Peters took it to court, and it eventually ended up in the Supreme Court, and that case, as a number of others of its ilk, was within the purview of the Appellate Section for the drafting of the brief in the Supreme Court. I had told the Section Chief at the very outset that there were very few things that I was not prepared to work on as a matter of conscience, but that line of cases was one of them. Fortunately there was then a lawyer on the staff who relished working on cases like *Peters v. Hobby*, so he had no reluctance at all in taking on those assignments. Now the interesting thing about the *Peters* case was the Solicitor General at that time was Simon Sobeloff who had formerly been the Chief Judge of the Court of Appeals of Maryland, the highest court in Maryland. Soboloff informed the Attorney General that he would not sign the brief in support of what had been done to Dr. Peters. As a consequence, the brief that was filed in the Court bore the

signature of the Attorney General and, I think, that of the Assistant Attorney General Office of Legal Counsel, but the Solicitor General's name was conspicuously absent. You can rest assured that that was something that was not lost on the Supreme Court justices. Well, Sobeloff paid a price for that independence. He was very anxious to get a seat on the District of Columbia Circuit. He was very close, I might say, to Judge Bazelon, who was then the Chief Judge of the court. The Eisenhower administration was very anxious to get rid of him, but there was no way that it was going to put him on the D.C. Circuit given the nature of the cases that come before that circuit, so what it did was dumped him on the Fourth Circuit. Being from Maryland, of course, that was an equally appropriate place to put him, so he had to settle for the Fourth Circuit, when he really wanted to be on the D.C. Circuit.

MS. FEIGIN: Was there any problem in saying I won't handle a certain kind of case? Was that acceptable?

MR. ROSENTHAL: I don't think there were many occasions in which anybody in the Civil Division Appellate Section ever requested not to be assigned a particular type of case. I'm certain that several of my colleagues in the section were very, very relieved when Ben Forman indicated not only a willingness, but I think a desire, to handle that kind of case. Now whether they had indicated to the Section Chief that they would not be willing to handle that kind of case, I don't know.

MS. FEIGIN: What cases – there may be more than we can do today – but what were your appellate cases? We'll get to your Supreme Court cases next time. Of your appellate cases, what stands out for you?

MR. ROSENTHAL: It's hard to say. I had a wide variety of experiences that led me to remember some of my arguments more than others. One that I particularly recall, not that this was a terribly significant case. It was a Federal Tort Claims Act case, again in the Fourth Circuit. What had happened in that case was a young man, a merchant seaman, his vessel had docked at some port in Alaska, where in order to get into town, you had to go through a military reservation, and he had gone through the reservation into this town and he was returning to his ship, again through the reservation, and he was carrying a package. He was stopped at the sentry gate and was asked what was in the package, and instead of disclosing that it was laundry, which it turned out to have been, he took off and ran into the reservation, and when he wouldn't respond to a warning shot, he was shot and killed. His parents, I guess it was, brought a suit and lost in the District Court and took this appeal to the Fourth Circuit. Well the lawyer for the plaintiff/appellant made what I thought was the dreadful mistake of bringing his client, the mother of the deceased, to the oral argument. During my entire argument, in the background were sobs. My point, of course, was that this young man had brought this on himself by his reckless conduct, not stopping and disclosing to the sentry what was in

this package he had. I found that very disconcerting. But it's very hard to say. My arguments obviously covered a very wide range of topics.

The great attraction, from my standpoint, of Civil Appellate, was that the number of different issues that we dealt with was enormous. It covered virtually every area of civil litigation apart from tax or civil rights, or things that were assigned to the other more specialized Divisions. That was really the appeal of the Section. So it's fairly hard right off hand to think of what, on the appellate level, really stood out. There were many very good experiences and there were many very frustrating ones, particularly when I encountered what I thought to be a very dense judge. I thought a judge was dense when he didn't both see and agree with my position, needless to say [laughter]. The quality, I would have to say, of the Court of Appeals judges that I encountered over a twenty-year span, varied widely, trying to view them objectively. And I guess that is to be expected. Virtually all of these judges got on the courts of appeals because of political connections, and it is very understandable therefore, that they are going to be of varying quality.

MS. FEIGIN: Who stands out at the top of the range?

MR. ROSENTHAL: Well I would have to tell you that two of the Court of Appeals judges for whom I had the highest regard were the two judges that supposedly were the finalists when President Ford had a Supreme Court appointment, namely John Paul Stevens, who actually was appointed to the Supreme

Court, who was a Seventh Circuit judge at the time, and Arlen Adams, who was a judge on the Third Circuit. I appeared before both of them more than once. I might say before Stevens, in one of the most important cases I had and I lost, but I think I lost justifiably. I felt those two were outstanding.

There were a number of other excellent judges. On the District of Columbia Circuit, I thought Judge Bazelon was first-rate and I thought Judge Washington was first-rate. I thought Judge Fahy was as well, although quite frankly I think he stayed on the court beyond the time when he probably should have retired. Needless to say I had the highest regard for my employer, Henry Edgerton.

MS. FEIGIN: What made you say these are the outstanding judges? Was it the level of preparedness, the kinds of questions they asked? What was it that make them stand out in your mind?

MR. ROSENTHAL: I thought that it was a combination of their level of preparation, their objectivity, their analytic skills being brought to bear on the issues at hand, and also I put into the mix the matter of courtesy. I have always thought that one of the cardinal sins that can be committed by one in an adjudicatory capacity is to be overbearing and rude because obviously the lawyers appearing before the judge cannot respond in kind.

One story, I don't know whether it's apocryphal or not, involved actually the District of Columbia Circuit, although I don't know what

judge it was, but this judge had supposedly given a lawyer an extremely hard time, not letting him get a word out without being all over him, and finally, so the story went, the lawyer said to him, "Well, Judge X, I'll concede your vote if you'll allow me to address my argument to your two colleagues." Now again, that's told as a true story. Whether it's apocryphal or not, I really don't know. But I think that's a very important ingredient. One of my colleagues in the Appellate Section went out to deliver an argument in the Tenth Circuit before Judge Murrah and Judge Murrah said to her, "I see that you are here from Washington." He added, "I have to tell you that I have yet to hear a single argument presented by a government lawyer coming from Washington that was worth a damn."

I never encountered that, but what I did encounter was a judge in the Fifth Circuit, his name was Ben Cameron from Mississippi, and the story went that Judge Cameron never decided a case in favor of the government unless it was either a criminal case or involved some African-American being done in. He was an absolute horror. Well I had an argument before a panel in the Fifth Circuit on which Cameron was sitting, and we were the appellee and we were clearly right. It was a case in which there was little doubt that we were going to prevail. Well my opponent presented his topside argument, as appellant. As I stood up, Cameron left the room; he left the bench. I thought well maybe he has an

urgent call of nature [laughter]. In any case, the second that I sat down, and my opponent got up to deliver rebuttal, Judge Cameron reappeared. He was clearly delivering a message.

MS. FEIGIN: I know one other thing that is really important to you is the crafting of words. You're a master at it. And I know you value it. Among the judges before whom you appeared, are there any that you look back upon as being particular word craftsmen of note?

MR. ROSENTHAL: I would say there's one outstanding judge in that regard, and his opinions were a delight to read, and that was John R. Brown, who was on the Fifth Circuit; indeed for a number of years was the Chief Judge of the Fifth Circuit. One of the things I never knew, of course, was the extent to which these opinions were being written by the judge or being written by his or her law clerk. I did see with some of these judges a considerable difference in their writing style from one year to another [laughter] which led me suspect that they might be relying quite heavily on their law clerks to draft their opinions.

MS. FEIGIN: Do you have any thoughts about that as a practice?

MR. ROSENTHAL: I don't have any problem with that. I think I do have a problem if the law clerks are deciding the cases, but if the judges want to rely on their clerks to draft their opinions, that does not give me heartburn.

MS. FEIGIN: Well why don't we end on a note where you don't have heartburn [laughter], and we will continue again next time. And thank you again for a fascinating session.

MR. ROSENTHAL: Thank you.