Oral History of
HONORABLE FRANK Q. NEBEKER
Fourth Interview
May 19, 2004

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 the Honorable Frank Q. Nebeker, Senior Judge, District of Columbia Court of Appeals, and the interviewer is David W. Allen. The interview took place on May 19, 2004. This is the fourth interview.

Mr. Allen: Today is May 19, 2004. This is the fourth session of the oral history of Judge Frank Nebeker. It's a cloudy day in Washington, D.C., and to put a little bit of historical context, the 17-year cicadas are back with us. They aren't much in evidence in the downtown area, but I gather in the suburbs they are very much so. Do you have them around you?

Judge Nebeker: Oh, we have them all over. Those exoskeletons adhering to the brick wall on every side of the house.

Mr. Allen: I've seen maybe half a dozen of them on Capitol Hill.

Judge Nebeker: We've got thousands and thousands of them just around our yard, because our yard is overstoried by about a dozen huge oak trees.

Mr. Allen: Are they noisy?

Judge Nebeker: Oh, yes.

Mr. Allen: Wow. I should go out just to see them.

Last time, on November 20th, we finished up with discussion of the *Gaskins* case and the modifications in the rules to provide for transcripts and we've agreed that the *Willie Stewart* case will be a separate session, but otherwise,

you have completed your discussion of your tenure in the U.S. Attorney's Office culminating with your time as Chief of Appeals and now the next events are that you've become appointed to the bench for the first time and along about that same time period, around the early '70s, we have judicial reform for the D.C. courts and reorganization. So, wherever you want to begin.

Judge Nebeker: Well, let me start by going back a few years while I was Chief of the Appellate Division. There was an interim period when we did not have a United States Attorney. David Bress, who had been nominated and was awaiting his confirmation by the Senate – the office was in dire straits because of a number of resignations, and we were very understaffed – so David Bress appointed the three chiefs of Sections; Civil, Criminal and Appellate as an ad hoc committee to begin interviews to fill some of the vacancies that existed. In the course of that exercise, I interviewed, among others, a man named Donald Santarelli, and he was very impressive. So the three of us decided that we recommend that he be hired, and he was hired. Don went through the office, including some time in Appellate with me. Then came the election in which Richard Nixon won. Don had left the office a little earlier than that and gone to the House Judiciary Committee to work for a Congressman McCullough. After the election, he moved onto other things in the upcoming administration, and then became Associate Deputy Attorney General working with Kleindienst and Mitchell.

Well, all right. I was continuing to appear in both courts of appeals as Chief of the Appellate Division and I get a telephone call one day from Don Santarelli, who is now at the Department of Justice, who wants to know would I be interested in a General Sessions judgeship. There was a vacancy at that time. I immediately responded that trial work is not my forte and I just didn't see that I was equipped for it, so I thanked him, turning him down. About three weeks later, Don called again because of the vacancy that occurred on the D.C. Court of Appeals, which at that point was an intermediate appellate court, and I accepted his offer to be available in the event that the Attorney General wanted to recommend to the President that I be put on the court.

Mr. Allen: This would have been in 1969?

Judge Nebeker: This would have been in 1969, about February and March. Because I was nominated by Nixon in April.

Mr. Allen: This was very early in the first Nixon administration.

Judge Nebeker: Yes. I have tried at the Nixon Library to ascertain whether I was his first judicial appointment or not. It was very early in the administration, but the library didn't have any of those papers on computer and I just did not have the time to go back and try to pour through everything to find out if there was some other commissions for judicial positions before mine. But in any event, it was very early in the Nixon administration, and so I came to the court and like all new judges who are well-advised, promptly took a

vacation. Of course, I had no backlog or anything to worry about, but my wife and I took our children and went to visit friends in Southern Mexico for a while.

So, I came back and I began sitting. My first case, I suppose I could get a name out of my book on published opinions on it, but it involved snow guards on a church roof. I'll never forget it, because here I was specializing in criminal work, but I was recused from any criminal case that had a criminal number on it which came while I was in the U.S. Attorney's Office. So I was recused from criminal cases for about a year, which meant I cut my teeth on a lot of these civil cases that I professed to know nothing about.

Mr. Allen: That's interesting. The caselog flow is moving fast enough that cases that would have been in the Office would have gone through the system in a year.

Judge Nebeker: It took about a year.

Mr. Allen: There's hardly a court of appeals in the country that could boast it going that fast.

Judge Nebeker: Well, at that time, when we were an intermediate appellate court and the caseload was not that heavy, the *Gaskins* thing had just been decided and the effort to get trial transcripts there was in its early state. As a matter of fact, the court had no appropriation for this sort of thing, so the best that could be done was the United States would order the transcripts saying we

needed them for the criminal appeal. Well, of course that's a little odd because the appellant bears the burden. But because of this *forma pauperis* situation that we had, I felt, and the Department of Justice agreed with me, that we had a due process obligation to provide the transcripts, so we ordered them at the expense of the United States and they were paid for out of appropriated funds for the Justice Department. That didn't last very long because, in the meantime, the D.C. budget was being considered and there was plenty – I shouldn't say plenty – there was money then put in the court's budget for purposes of these transcripts.

Well, after about a year in which I handled civil cases, it was possible for me then to begin sitting on regular calendars with the other judges. This would have been about early 1970.

Mr. Allen: I'm not sure you stated the name of the court. The intermediate court was the District of Columbia —

Judge Nebeker: It was the District of Columbia Court of Appeals.

Mr. Allen: As it is now?

Judge Nebeker: As it is now. It was the Omnibus Crime Control and Safe Streets Act of 1968, which changed the name of the court and added two more judges to it. There were three and now there were five in 1968. It had been known as the Municipal Court of Appeals from its inception in 1942, and so they changed the name to the D.C. Court of Appeals and it has retained that name throughout. But in 1970, we knew that court reorganization was being

considered. As a matter of fact, Don Santarelli was active in the drafting of the legislation as was Carl Rauh and Earl Silbert. And there's another person, I can't remember his name right now. I hope I don't insult him by not remembering it, but they were working with Kleindienst to come up with court reorganization. And I might add, that during Nixon's campaign, to my knowledge probably the first campaign in which the President got actually involved in the crime rate and the need as he perceived it to overhaul the nation's capital judicial system. That was probably the impetus behind the effort to have court reorganization.

Well, I became involved in drafting the legislation, although I can't lay claim to a lot of credit for its provisions.

Mr. Allen: This was while you were still in the U.S. Attorney's Office, or —

Judge Nebeker: No. This was while I was on the bench.

Mr. Allen: Okay.

Judge Nebeker: And I recall that we on the Court of Appeals didn't like the idea that there would be a Joint Committee on Judicial Administration which was, as it is today, made up of three trial court judges and two appellate court judges, the Chief Judges being the two permanent members. It was an anomaly to have the trial court with the authority over the administration of a system. The Supreme Courts have this authority and often it rests with the Chief Justice. But we went to Kleindienst – Judge Curran and I went to Kleindienst and tried to convince him that it ought to be the other way. We were

unsuccessful primarily because of the dynamic personality of Judge Harold Greene, who in contrast to Chief Judge Hood, was the individual that Kleindienst thought ought really to have the administrative power ordinarily possessed by the Chief Justice or the Supreme Court of the state. So nonetheless, despite our efforts, the Joint Committee on Judicial Administration to this day is three to two in favor of the trial court, and it's worked. It's not been that difficult a situation.

Mr. Allen: Let me back up and see if I can – Harold Greene was, certainly most of his judicial career was on the U.S. District Court.

Judge Nebeker: No. He was on the General Sessions and its successor, the Superior Court, for a good long time.

Mr. Allen: Okay, so he was on Superior Court before going to the District Court.

Judge Nebeker: Yes. He was an Associate Judge and the Chief Judge on the Superior Court for a good long time.

Mr. Allen: And this was prior to his appointment to the District Court bench.

Judge Nebeker: Yes. As a matter of fact, Harold Greene had been in the Civil Rights Division and probably possessed one of the pens used by Lyndon Johnson to sign the Civil Rights Act of 1964. So shortly thereafter, Johnson put Harold Greene on the Superior Court and then he became Chief Judge after Judge – it was either John Lewis Smith – I'm pretty sure it was John Lewis Smith – was promoted from the Municipal Court to the District Court. I could be wrong on that. It could have been Len Walsh. I'm just not positive at this

point. Both of them were put on the District Court from being Chief Judge of Municipal Court. In any event, Harold became the Chief Judge and was in that position for a good long time before I believe it was Jimmy Carter who put him on the District Court.

Mr. Allen: That could be.

Judge Nebeker: Well, in any event, a number of cases came along, one of which I will talk about. It's a case called *Crews v. United States*, and this court decided the case in 1977 and *en banc* in 1978. The citation is 389 A.2d 277. It subsequently was decided by the Supreme Court which is the purpose for my telling this story. I had been on the division along with Judge Harris and whoever else who was on it, and we sustained the denial of a motion to suppress in this context. A woman had been yoked and her pocketbook snatched around the Washington Monument. She reported it to the Park Police. So the Park Police staked the area out a few days later and found a young man loitering around in the same vicinity. He looked like he was a juvenile out of school. They took him down to Park Police headquarters, took his picture and told him to go home. They showed the picture in an array of photographs to the victim. She immediately identified him and on that basis they obtained an arrest warrant and he was charged with the robbery. He moved to suppress her in-court identification of him because of the fact that the police had no probable cause to arrest him and take his picture and therefore, arguing from the *Wong Sun* poisonous tree doctrine,

the theory went that she could not identify him but for this photograph array, made possible by the illegal arrest, the whole thing was tainted, and her testimony should be suppressed. Well, we made short shrift of that but on petition for rehearing *en banc* – a majority of the judges decided that the panel was wrong. And we did not have at that point a courtroom capable of handling nine judges, so we borrowed the courtroom of the then-Military Court of Appeals, now known as the U.S. Court of Appeals for the Armed Forces. It's a beautiful courtroom.

Mr. Allen: And that's across the street?

Judge Nebeker: Yes, on 5th and E. And we had a conference in their conference room after the argument in which a majority of the court voted to reverse the trial court and require the granting of the motion to suppress. Walking back to our building from the Military Court of Appeals building, I was walking with Judge Ferren. We were just conversing about the case, and he was assigned to write it, and I said, "John, if you write it that way, the Solicitor General is going to take that case to the Supreme Court," and I believe the way I put it, "and rub your nose in it." Well, that didn't impress John very much. Obviously the odds of that happening were pretty slim. So, time passed. I had dissented along with Judge Harris and so I received a call from someone that I had known for a long time in the Criminal Division at the Department of Justice and he informed me that the Solicitor General had approved filing a petition for a writ of certiorari in the Supreme Court in the *Crews* case. I

said thank you very much. I called John Ferren on the phone and said, "John, strike one." "What do you mean?" he said. I said, "Well the Solicitor General has authorized a petition for cert in *Crews*." And his reaction was, "Well, they'll never grant it." So time passed, and I get a call from this friend again. The Supreme Court has granted the petition for cert. I said that's very interesting. He said, "You might be interested in the number they gave it. It's number has four sevens in it, 7777." So I called John Ferren again and I said, "Strike two, John, and are you a gambling man?" "Why?" he responded. I said, "Because they've granted cert in *Crews* and the number is four sevens, and in my parlance that's a winning throw of the dice or a winning poker hand." So, at this point, there was no further discussion that I can recall and time did pass. Eventually, I got a telephone call from this friend who said, "the Supreme Court has just reversed your *en banc* court in *Crews*, and you will be interested to know that it was eight to nothing, Justice Rehnquist recusing himself primarily because he was in the Department of Justice when the matter of cert was no doubt discussed.

Mr. Allen: And this decision would have been then in about 1976 or so? 1980, 445 U.S. 463.

Judge Nebeker: The third call to John Ferren was, "Strike three, you're out." "What do you mean?" I said, "The Supreme Court has reversed your decision in *Crews* and the most unkind cut of all from your viewpoint is that your good friend

Bill Brennan wrote it." Well, that's enough of that story. It's a true story. John admits it. It came down this way. The upshot of the decision was that the woman could identify this kid from having seen him at the time he yoked her, and therefore, you cannot suppress the independent ability of a prosecution witness from identifying the defendant. If the only ability to identify the defendant comes from a bad pretrial lineup or a bad pre-arrest photo array, then the idea that the witness who may not independently identify, but identify solely through the suggestivity of the pre-arrest police procedure, very well may give rise to suppression of identification testimony. *Crews* stands for the proposition when the witness has his or her own ability to identify based upon matters independent of any police misconduct, the testimony is admissible.

Mr. Allen: So, the rule doesn't then necessarily validate any use of the identifying photograph based on the lack of probable cause, but it essentially breaks the chain in the presumption that her identification would have been in some way tainted if she cannot independently at trial say I recognize him. He's the man.

Judge Nebeker: That's correct. There's an interruption if you will of the primary taint. Of course, in *Crews*, the issue was not a bad photo array. The issue was the photo array became possible, the fruit of an illegal arrest because they did not have probable cause to arrest him at all. They may have had a slight description from her, and probably did. Anyway, the assumption was that

there was no probable cause for the arrest, therefore the photograph was poisoned. But that poison tree did not taint her own ability independently to identify Crews as the culprit.

Well, that's just one of a number of cases that – well, not many cases that I recognized from the beginning that just smelled of Supreme Court stuff. I had begun, shortly after going on the bench, a career as an avocation with the Appellate Judges Conference Seminar Series. So I was constantly updating on Supreme Court decisions, and had been, of course, when I was in the U.S. Attorney's Office. So I had some sense of the kinds of cases that the new Burger Court, if you want to call it that, would be interested in. I did feel *Crews* was such a case and it turned out that I was correct.

About that same time as I was getting my legs on the Court of Appeals, Judge Hood appointed me to a Building Committee because we recognized the need for a new courthouse.

Mr. Allen: Now was Judge Hood Chief Judge of the Court of Appeals at the time?

Judge Nebeker: Court of Appeals at that time, yes. He asked me and John Kern to serve on this Building Committee. Chief Judge Greene put Judges Bill (Turkey) Thompson and Fred McIntyre on the committee along with us.

Mr. Allen: Three and two again.

Judge Nebeker: Again three to two, but of course that made sense because fully 80 percent of the building would be occupied by Superior Court and its functions.

Mr. Allen: Now, has judicial reorganization occurred by this time?

Judge Nebeker: Yes.

Mr. Allen: Then we should probably go over what the reorganization accomplished. How things were before it and how things became after it.

Judge Nebeker: The court reorganization added in two phases. I think with 10 or 12 judges in each phase to the Superior Court and it made the D.C. Court of Appeals a nine-judge court all at once. The jurisdiction was transferred in stages. Civil with unlimited amount involved, then came criminal, and then came probate and a few other associated court functions.

Mr. Allen: So that the Court of Appeals becomes a final appellate.

Judge Nebeker: Yes. We became the highest court **of** the District of Columbia in the Court Reorganization Act. I say "of" with emphasis because obviously it could not be "in" since there happens to be one court a little bit higher.

Mr. Allen: Yes, there are a couple of others.

Judge Nebeker: No, but the federal courts are all of limited jurisdiction. At that juncture, we had obtained additional funding for temporary construction to house the new judges. The Superior Court judges were housed in the old Pension Building, and another building on G Street. There was some massive remodeling to accommodate the judges' chambers and the courtroom.

Mr. Allen: I remember actually appearing as a witness before Judge Halleck in a small room off the side of the Pension Building that was serving then as a courtroom.

Judge Nebeker: Yes. They were small courtrooms and they preserved as much of the historic nature of that building that they possibly could. For instance, the old fireplaces were preserved and I think they are still there and are preserved in a structure today. We also had judges over on G Street in a particularly unattractive building. It's now gone. So we had judges in robes walking from A Building and B Building and the old juvenile court building to the Pension Building and this G Street building in order to conduct court. Likewise, we had marshals escorting prisoners on the public streets to get them to the courtrooms. Indeed, I recall Judge Nunzio telling me once years ago that he walked over to the G Street building with his robe on going up the elevator when the marshal got on the elevator with the defendant who was to appear before him. Well, this was recognized by everybody as an absolutely intolerable situation for any period of time, so the effort was made to get the Congress to appropriate money to build a new building. We tried to get the site on Pennsylvania Avenue, where the Canadian Embassy is now, but ran into a stone wall, obviously because even at that time, thought was being given to a higher and better use for that property, and it is a beautiful building.

Mr. Allen: It is a gorgeous building.

Judge Nebeker: So, we were relegated to the site we are on now. At that time, it had a couple of little white buildings and a police warehouse where they used to hold auctions for recovered or abandoned property. Pretty shabby-looking

structures. The Building Committee went to the Congress with a proposal that we build a building for $90 million. That was the product of a study done that we had commissioned to determine what size structure we needed. They did a population projection, which turned out to be wrong, but concluded that we needed a building large enough to not be obsolete when it was first constructed. Chairman Natcher of the House District Committee who was a friend of Chief Judge Hood, —

Mr. Allen: From South Carolina.

Judge Nebeker: – from South Carolina, told Judge Hood that he wanted the Building Committee to be actively involved in the design and construction of the building. That was one of the reasons that Hood asked me to serve. He knew that I had a reputation for working with my hands in construction and so forth. I was remodeling my house about this time. In any event, I've had those who say well he put me on the Building Committee because I worked better with my hands than my head. I will demur to that one. But in any event, we had to be active on the Building Committee. Well with this proposal of $90 million, Natcher choked because he was a very frugal man, as was Chief Judge Hood. We were ultimately told we have to build it for $45 million and no more. Well we had retained the firm of Hellmuth Obata and Kassabaum, a St. Louis architectural firm to make preliminary designs. And they were pretty nice designs. Then we had to commission them to

come back and redesign it and ensure that it could be built for $45 million. They did that and our next task was to convince the Congress, particularly Natcher, that the money had to be appropriated in one appropriation because that was the only way, they said, to build it for that amount of money. They said to do it on what was then called the fast-track system, which meant you built and designed as you went along. You also had to project major capital items such as steel and contract for it early, not wait until the design phase is through and the hole is begun to be dug. Why? Because inflation increases and causes cost overruns.

Mr. Allen: And this was the period from the 1970s when inflation was pretty severe.

Judge Nebeker: Yes. We convinced Natcher and his Committee that that was the best way to go. So they did, in fact, appropriate $45 million all at once. Otherwise, you have the problem of well you've spent this much money that's been appropriated last year, then construction stops and then you have to pick up again after you get the next appropriation which was an intolerable way to do it. With the fast-track system it made it much cheaper. Incidentally, Gia Obata was the design architect for the Air and Space Museum, and if you look at the two buildings together, you see his signature in the atrium structures. They are both very much alike with the piping and the skylights.

Mr. Allen: I'll have to check that out.

Judge Nebeker: So he submitted a design that is what we have today. In the meantime, we had hired a construction management company and that's the other aspect of

fast-track system. If you hire a general contractor, he has an inherent conflict of interest. On the one hand, his fee has got to be paid for out of construction money. So, the general contractor is sorely tempted to go with cheaper materials. With the construction manager system you contract for a flat amount and he does all the subcontracting and he is not in that conflict of interest position. So we were able to convince the Congress that that was the way to go and we broke ground. The building was built on time and on budget, just as the Air and Space Museum had been built on time and on budget. I was informed at the time that they were the only two government buildings in the city that had been brought in without cost overrun. But there's a little more to the story than that. In the meantime, Don Santarelli had become the Assistant Attorney General in charge of the Law Enforcement Assistance Administration. We were able to persuade Don that some of his grant money should go into the construction of this courthouse. The major portion of it was to put conduits into the concrete flooring while it was being built in order to accommodate future computerization within the courtrooms and in the chambers.

Mr. Allen: Wow. That was great foresight for the 1970s.

Judge Nebeker: The other major aspect was to get a grant in order to be able to reproduce trial transcripts through computer-aided machinery. As a result, they were built into the building and then cables laid to have a central recording studio for trial transcripts. That unfortunately has not worked too well, but it

looked like a good idea at the time. In any event, we were able to get about $3 million out of LEAA to augment the $45 million that we had imposed upon us. When we had a formal dedication of the building, Chairman Natcher was invited and came down and we took him through the building and it was during that tour of the building that I confessed to him that we had succeeded in getting a little bit more money for the building, but he didn't seem to be bothered by that because it was not appropriated funds that had been apportioned to his subcommittee on finances. Obviously it came from a different subcommittee and so it was money that was available and we told him why we had done it and he seemed rather pleased that we had that kind of foresight.

So, we ultimately moved into this building and —

Mr. Allen: This would have been what year then?

Judge Nebeker: 1977. I believe we moved in January or February of 1977. Incidentally, another thing that Chairman Natcher insisted upon is that we not go out and buy all brand new furniture. Rugs he'd tolerate but furniture we had to bring our old stuff over and we did. Some of it is still here in the building today.

Mr. Allen: That's interesting.

Mr. Allen: We are back on with the tape rolling and we've had a brief interlude. We've talked about some historical context and we've decided that among the things we'll take for another time will be a discussion of your experience

in the U.S. Attorney's Office during the Martin Luther King riots in 1968. We've decided that you should deal a little bit more with judicial reorganization and its effects on the jurisdiction of the courts here.

Judge Nebeker: Yes. As I said before, the jurisdiction was transferred in stages. Obviously necessitated by the fact that there weren't enough judges to take all at once and so we had simply to schedule the transfer of jurisdiction after the judges had come aboard.

As I said, the first was the transfer of civil jurisdiction. Then about a year later, the criminal jurisdiction. Civil jurisdiction I believe had gone up to $10,000 in the General Sessions Court before reorganization. So, the first transfer probably came nine months, I've forgotten, after the Act became effective. About a year later, criminal jurisdiction. Ultimately the Registrar of Wills and that function was transferred from the U.S. District Court to what became the Superior Court as a result of court reorganization.

Mr. Allen: Many of these functions which are pretty local had been under the jurisdiction of the U.S. District Court.

Judge Nebeker: Yes. The U.S. District Court and the U.S. Court of Appeals for the D.C. Circuit sort of wore two hats. They were a general jurisdiction court for the District of Columbia except on the small claims and the other stuff that had been assigned to the Municipal Court and then the General Sessions Court. At that time, review as a matter of right was in the Municipal Court of Appeals or the D.C. Court of Appeals from judgments of the trial court. In

the meantime, of course, the common law felonies were being prosecuted in the U.S. District Court and civil matters, including divorce, were handled in the U.S. District Court, and appeals therefrom went as a matter of right to the Circuit Court.

Mr. Allen: So it made the U.S. District Court for the District of Columbia unlike any other because it had a very local and what we think of strictly state-law kind of stuff.

Judge Nebeker: Correct. Plus, of course, its diet of federal litigation. And there was a lot of that, too, because you had constant review of administrative action of U.S. administrative agencies and the like, so the federal District Court had a potpourri diet, and it had to be very interesting at the time.

Then the appeal taken of right to the Municipal Court of Appeals or the D.C. Court of Appeals was reviewable on a certiorari-type process by the U.S. Court of Appeals for the D.C. Circuit.

Mr. Allen: So now the reorganization resulted in that the Superior Court is now the trial court for a much wider range of original jurisdiction, and the D.C. Court of Appeals is the only appellate court for most of those cases, and it's no longer the case that on a criminal or other conviction you can get to the D.C. Circuit from the D.C. Court of Appeals. Is that right?

Judge Nebeker: Yes.

Judge Nebeker: Let me go on to another case. It's a case called *Bouknight v. United States*, 305 A.2d 524. It's a 1973 decision which I wrote. I'll give you the

background. The Bail Reform Act of 1966 favored release without money bond and it was a tough law to live with in the District of Columbia because we have the common law crimes and they were running rampant. But we had to live with the Bail Reform Act of '66 until 1970, when the Court Reorganization Act was passed. I mentioned earlier that the crime rate had become a political issue in the presidential election.

Mr. Allen: A big issue in '68.

Judge Nebeker: And the reason that it was, was because of recidivism. All these defendants were now out on pretrial personal recognizance. So when the Bail Reform Act was superseded by local legislation, that legislation took into account the terrible experience we had under the Bail Reform Act. It permitted conditions of release to be imposed to ensure the safety of other persons or the community, whereas the Bail Reform Act of '66 required the release of anybody unless it was determined that he would likely flee, in which event non-monetary conditions of release had to be imposed. Well we had somewhat the same situation with respect to the amended statute and one of the features in both statutes was pretrial third-party custody. It wasn't used very much. The idea was to have some people like – and it was called Bonabond at the time – who would take third-party custody of these defendants and try to keep them from violating the law again. And Bonabond was a very nice thing to have had tried, but of course it would not have too much success. So, we got this *Bouknight* case. It was on a pretrial

bond appeal. What you have with respect to pretrial bail is this. If a trial court orders somebody committed in lieu of bail, money bail or conditions of release, whatever, an appeal can be taken. Earlier in the criminal law history, the only way you could get relief from excessive bail, which is as you recall, a constitutional prohibition, was to file habeas corpus, but Justice Douglas wrote an opinion called *Stack v. Boyle* and in it he held that the extraordinary remedy of habeas corpus, (1) was not available readily, and (2) not a proper remedy. So, he concluded that the collateral order exception doctrine, which is a doctrine for interlocutory appeals in civil cases, could apply equally to pretrial detention orders because for each day you incarcerate the person you can't give it back, so it's a daily final order, and subject to review on direct appeal. You have to expedite those appeals. This guy was obviously dangerous – and I wrote in the opinion that the trial court ought to consider third-party custody, 24 hours a day, one custodian for each eight-hour segment; to be somebody that is approved by the trial court judge, not just somebody brought in by the accused such as his brother, and his uncle and his wife. The court agreed; my panel agreed that the opinion should be published, and so it was. I don't know to what extent it was used. I've had anecdotally been told that some judges did, in fact, impose that condition, and as a result they could not get out because they couldn't find three custodians with the acceptable level to ensure that the accused would not constitute a danger. The purpose behind these bail Acts

was that you couldn't use money bond to ensure community safety. But we've come a long way in the bail law. We've come back basically to where the bail law is as it was before the Bail Reform Act of 1966. Albeit that there's some personal recognizance being used, but I see evidence of a lot of money bonds again. Not as much as it used to be. The bondsmen used to flourish around 5th Street.

Mr. Allen: Right. It was an industry.

Judge Nebeker: It was an industry, and it's not that bad anymore, but still we've come a long way toward ensuring safety of the community by detention orders and rapid appeals, from outright orders of detention, not just imposing conditions of release that can't be met.

Mr. Allen: This must result in quite a lot of rapid appeal traffic to the Court of Appeals then.

Judge Nebeker: It used to. Oh, we used to get them all the time. We don't get bail stuff anymore. Well, I shouldn't say anymore, but I had been on motions a lot in the last few years here, and I haven't seen any bail appeals.

Mr. Allen: Is that because the law has simply gotten resolved as to what standards are, and no one tries to --

Judge Nebeker: Yes, and in particular on bail pending appeal. The trial judge has got to decide, similarly to your motions for stay in a civil case, that there's a likelihood of success on appeal and that balancing the equities, they won't be a danger to the community, the standard for stays in civil cases. And it's

basically the same. The idea of likelihood of success on appeal in a civil matter has now been imported into the bail law and the trial judge – they just don't say, oh, yeah, I committed error, you're going to win on appeal. And so, there's almost automatic incarceration where there isn't probation imposed. If there's a jail time sentence imposed, it's automatic and by the time we get the appeal, he is serving his sentence. Rarely do we get bail pending appeal requests.

Mr. Allen: So as an example of the law kind of getting settled.

Judge Nebeker: Yes.

Mr. Allen: And Justice Douglas' idea of comparing it to the right to appeal from the injunction –

Judge Nebeker: From *Stack v. Boyle*, which is the name of the collateral order exception bail holding.

Mr. Allen: Really is said kind of at the heart of this change.

Judge Nebeker: Yes.

Mr. Allen: And it really winds up with the kind of balancing of equities you do in the preliminary injunction, kind of a balancing of considerations of the safety of the community.

Judge Nebeker: That's right.

Mr. Allen: And the safety of the community is one of them. Well, that's an interesting development.

Judge Nebeker: It took a long, long time for the bail law to go from the revolution of 1966 to where it is today, and it was a settling down process. I recall that right after the Act was passed, a professor who was at Yale, I believe, Dan Freed, he came as Assistant Deputy Attorney General or something. He was commissioned to come over and lecture at a session of the U.S. Attorney's Office on the new bail law. Well, the old war horses like Vic Caputy and Freddy Smithson and Tom Flannery, Tom O'Malley (his son is now Governor of Maryland), Joe Hannon, they were absolutely livid that this Bail Law had passed. They swore it would never work in D.C., and they literally wanted to laugh this Dan Freed right out of the building. It was a very hostile presentation and reaction, that ultimately proved right. The Bail Reform Act of 1966 just would not work in the District of Columbia. I served on the Judge Hart Committee that studied the impact of the 1966 Act on the District of Columbia and we came up with recommendations that the law be changed and it ultimately was consistent with the Hart Committee recommendations.

Mr. Allen: Let's see. It's about 11:00 a.m. Let me suggest one thing that I think we probably do and is one of my duties to make sure that we are being complete. Could we get a rundown, the best you recall, of who were the other judges, who was the clerk of courts, who were the people when you came on the bench in 1969.

Judge Nebeker: When I came on the D.C. Court of Appeals bench in 1969, a man named Newell Ellison had been the Clerk for years. The judges on the Court then were Hood as Chief Judge, Judge Myers. There was Judge Kern and Judge Kelly and Judge Gallagher, and Judge Fickling; we were the six. Incidentally, this will take me into a story I wanted to tell and it fits right in with what you just asked. Judge Hood came to me and said, Newell Ellison is going to retire and who do you think we should get as a Clerk of the Court. Well, I had worked with Al Stevas when he was Chief of the Grand Jury Section and then he went up to be the Chief Deputy Clerk for Nate Paulson when he was Clerk of the D.C. Circuit, and so my recommendation was that we ask Al Stevas. Hood said, "Well why don't you talk to him." So I called and made arrangements to have lunch with Al and I approached the subject over in that judges'dining room on the sixth floor of the federal courthouse. And eventually he said yes, he'd like the job, and he took it and the court hired him and he did a magnificent job for us for about ten years. We moved into this building, and I was still an active judge, and I went around to see Al about a matter as I was wont to do. He's a tremendous lawyer and I always consulted with him. I was sitting there in his office when his secretary interrupted and said the Chief Justice wants to talk with you. And so Al took the call and said, "Yes, okay, that's fine, yes, I'll be there," and he hung up. And the way I like to tell the story is I heard the sound of chickens coming home to roost right then and there because I had

been responsible for wooing Al Stevas away from the D.C. Circuit while Burger was serving on it. And he was not happy with losing Al and I can understand why because Al was an absolutely invaluable Clerk of Court. So, I told this to Chief Justice Burger later on that I had heard the sounds of chickens coming home to roost because I knew exactly what he was doing and it turned out I was right. And that's what happened and Al went up there to be Clerk of the Supreme Court for a good number of years. Al is now retired, still living in his same home. As a matter of fact, I talked to him not so long ago. He's in his 80s. He's quite physically active, and he seems to be in pretty good health.

Mr. Allen: Good.

Judge Nebeker: Should we quit?

Mr. Allen: Well, it's a little bit after 11:00. If this is a reasonable stopping place, it is for me.

Judge Nebeker: It is. I have a couple of motions I have to get to before I leave.

Mr. Allen: Okay. This is the end of our session on Wednesday, May 19, 2004, and we will continue at another time. We've gotten well into your initial tenure on the court.

Judge Nebeker: We have. There are a few other cases I can talk about. The matter of *Osborne*, the health care case, *Neuman v. Neuman*, a procedural case that's very interesting. I think it's worth going into. The *Arnold* case doing away

with need for corroboration in a rape cases. And I'll talk about the *Gregory Washington* case. I haven't talked about that I don't believe.

Mr. Allen: We have a lot of ground to cover yet and we have plenty of time. So that's it for this fourth session.