Oral History of
HONORABLE FRANK Q. NEBEKER
Third Interview
November 20, 2003

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 November 20, 2003. This is the third interview.

Mr. Allen: It's Thursday, November 20th and this is a continuation of the oral history of Judge Frank Nebeker. We have begun the discussion of Judge Nebeker's tenure as Chief of the Appeals Section in the U.S. Attorney's Office, and we are continuing with the description of the Office and the people in it. Judge Nebeker, I think it's important that you give us time periods for the tenure and then in the Office as Chief of Appeals, who your staff was, who the judges were at that time that you appeared before, and then I think we'll talk about some cases.

Judge Nebeker: All right. I was transferred from the Misdemeanor Section to the Appellate Division in 1960. The Appellate Division at that time was headed by Carl Belcher. He had all of about eight or ten assistants in the Appellate Division. I served there for a while as a line assistant and handled such cases as *Sally Hucks v. United States*. She had been an egregious volunteer for Jimmy Hoffa and had been accused of burning a number of telephone slips and was thus charged, I believe, with obstruction of justice. It had been tried by attorneys at the Justice Department who, in my view, lacked

sufficient experience. Thus, among other things, they committed almost the unpardonable of bringing out prior bad acts of Sally Hucks, such as liaison with a man clandestinely, as one with a man registering at a hotel overnight and that sort of thing. And I remember the difficulty of the case was that that was quite extreme, but yet I felt that the Court of Appeals had evidenced as far as I could tell and others of us, that they were constantly on a quest to find error in any criminal conviction. I tried to figure out how to handle this particular problem even though it had not been raised by Sally Hucks' attorneys. And I wound up in writing the brief putting the whole matter of the prior bad acts into a footnote and I believe to this day the government's candor in that regard persuaded the court, and as I remember it, Chief Judge Bazelon presided at that time, persuaded – no he didn't. He was on the panel, but he was not Chief Judge at that point – persuaded them to go ahead and deal with the merits of the case and ignore what the prosecutor had brought out by way of the sexual liaison. In any event, I served as a line assistant with Carl Belcher until after the Kennedy election and I believe that is 1962, isn't it?

Mr. Allen: Well, the election was '60 and Kennedy's administration would have begun in '61.

Judge Nebeker: 1961. So it was about 1962 that Charles Duncan, who was a Principal Assistant U.S. Attorney under David Acheson, asked if I wanted to go to the Felony Trial Section, and believe it or not, I turned him down. I just didn't

feel that trial work was what I was comfortable doing. Within about a month, Charlie asked me if I would like to go to the Civil Division, and I said, "Yes, I would indeed." So I went to the Civil Division for about two years, less than two years by a few months, handling quite a number of cases on summary judgment. One or two civil trials. I was working there for Joe Hannon, who was Chief of the Civil Division, and a man named Gil Zimmerman who was there along with Ellen Lee Park, a man named Arnold T., but known as Skip Aikens, and in any event, I worked there handling among other things a case of dishonorable discharge of a female Air Force officer who was accused of being a lesbian. There was to be a deposition out in California at Edwards Air Force Base and so I got permission to attend that deposition by contacting Sal Andretta who was the Assistant Attorney General in charge of administration, and he gave me permission to travel out there, even though funds were tight. I returned home from that deposition, opened the front door of the house and the telephone was ringing. I answered without even putting my suitcase down and it was David Acheson and he asked me if I would take over the position of Chief of the Appellate Division. I had felt all along, and Carl Belcher had felt all along, that that was the kind of law that I was better at, and so I was indeed flattered at his offer, immediately accepted it. And I might add that at that point, the Chief of the Appellate Division was Nathan J. Paulson and he had gone up to be the Clerk of the U.S. Court of Appeals for the D.C. Circuit.

He took with him Al Stevas, who had headed the Grand Jury Section in the U.S. Attorney's Office for a good number of years. The Section was terribly understaffed. I think we were down to about seven or eight Assistant U. S. Attorneys. The morale was absolutely at a low end, and Acheson knew it and suggested that that was going to be one of the major problems that I would have is try to bring the morale of the office of the Section back up and indeed it was quite a chore.

Mr. Allen: The date of this would have been probably 1962?

Judge Nebeker: 1962. Yes. I was able to get some more Assistant U.S. Attorneys assigned to the Division, but still we did not exceed eleven. I think we probably had eleven toward the end of that crucial period. Indeed, the Section was making almost weekly appearances before the then-Municipal Court of Appeals and almost daily appearances before the Circuit Court. Indeed, we had for a good number of years been two-thirds of the calendar of oral arguments in the Circuit Court. There would be two criminal cases on every morning and then one civil case or agency case about which the Appellate Division had no responsibility.

Mr. Allen: But you had the criminal cases?

Judge Nebeker: We had the criminal cases and a few civil cases. While I was Chief of the Appellate Division, David Acheson and I went to the Assistant Attorney General in charge of the Civil Division, Department of Justice, because of my lament that the Civil Division was taking and assigning to their own

people all the good civil cases that came out of Joe Hannon's shop and leaving the Appellate Division with the rather mundane civil service discharge cases, which gave no Assistant U.S. Attorney a whole lot of experience or ability to claim that he really handled some important material, important cases in the D.C. Circuit. And after all, these young men and women were simply climbing the professional ladder and the U.S. Attorney's Office was a very fine place to build their vitae, but to be stuck with those kind of cases didn't do much for them. So, I convinced Acheson to go to the Assistant Attorney General and believe it or not within a very short period of time we began to get more of the big cases than we could handle.

Mr. Allen: Who was AAG for Civil . . . ?

Judge Nebeker: Oh, boy. Um. I don't recall.

Mr. Allen: Okay.

Judge Nebeker: We'll have to check the U.S. Government manual back in that period of time.

Mr. Allen: But this would have been 1963 or '64 or there about, that period of time?

Judge Nebeker: Yes.

Mr. Allen: During the Johnson administration?

Judge Nebeker: That was during the Kennedy administration, before he was assassinated. I'm pretty sure it was because David Acheson was still U.S. Attorney, and I

don't think Dave Bress took over for him until after the assassination. I have to double-check that.

Mr. Allen: Robert Kennedy would have been Attorney General.

Judge Nebeker: Robert Kennedy was Attorney General.

Mr. Allen: Well, that's a matter of record. I would think your recollection isn't _____. In any event, you began to get more civil cases, and the civil cases then began to be a burden of some such.

Judge Nebeker: Well, it did in the sense that we were also inundated with the criminal cases. I wound up, having been in the Civil Division for some time, handling a lot of the civil cases myself, but I tried to pass them out so that the Assistants who were there could at least lay claim to having handled a civil case of note at the appellate court level. I remember Gerald A. Messerman was there at the time. John Terry came in and was an Assistant in the Appellate Division, Carol Garfield, now Carol Garfield Freeman, who was one of the finest lawyers that I had run across – incidentally, I appointed her as my Deputy Chief and she remained in that position for quite some time and was a very helpful person. At that time, it became almost impossible for the Chief of the Division to go over each brief that the Assistant had prepared. We were turning out too many motions to extend time and so it became necessary to rely on the ability of these Assistant U.S. Attorneys to file the proper brief, and my approach was, "Look, you're smart enough, now you have been around here long enough to know if there's problem. If there's a

problem, you come to me and we'll discuss it during the time you are writing the brief. But otherwise, you've got the necessary autonomy to represent the government." I didn't allow brand new Assistants who came to the Division to do that, but those that were seasoned I was fortunate enough that I was able to rely on them, and Carol Garfield would go over the briefs and if she saw a problem, she'd come to me. Otherwise, we went up with the brief as drafted and filed by the Assistant assigned to it.

I remember there was a time, I guess it was before I became Chief, when Anthony Amsterdam was assigned to the Appellate Division. David Acheson had hired Tony after he had clerked in the Supreme Court, I think for Justice Frankfurter, and it became apparent within a very short period of time that there was one of the most brilliant legal minds that ever walked, and I became acquainted with him, helped him, walked him through the processes that we did in the Court of Appeals. For example, at that time the Court of Appeals had a rule that they would have a Joint Appendix and it would be printed. So that entailed an Assistant U.S. Attorney before the briefs were even filed – no, after the brief was filed by the appellant – to go up and read the transcript and literally mark in red or blue in counter-designation to what it was that the appellant wanted in the record, reproduced from the record into the Joint Appendix, we would mark the transcripts and I remember having Tony do that. A task well beneath his abilities, but he was very good about it and he did it along with everybody

else. It was a tough job, but we were operating always on a Joint Appendix, and as you can see, that would have been quite extensive printing costs. At that point, there was no Criminal Justice Act. The Court of Appeals was conscripting lawyers in criminal cases. Well, I can recall one insanity case in which Robert Scott had been selected to represent the appellant. He later became a Superior Court judge. I, of course, was at every oral argument. We used to call it riding shotgun.

Mr. Allen: You sat in on every one?

Judge Nebeker: Yes. Carl Belcher started that – no, I guess it wasn't Carl. I believe it was Lew Carroll, who was I believe the first Chief of the Appellate Division. At least he was the one that was antecedent to Carl Belcher and he started that idea because you had these young assistants, inexperienced, dealing with the D.C. Circuit and somebody had to be there to ensure that they weren't chased off the lectern by a hot court. By a hot court I mean a court that was prepared, that knew what the record was, that knew what the issues were. And most appellate courts to this day are hot courts, but back then, most appellate courts, particularly state courts, were what you'd call "cold courts." They didn't know the first thing about the case until the lawyers started telling them about it. But the D.C. Circuit was a hot court. I think very definitely.

Mr. Allen: Many of us that have been appellate advocates have experienced both kinds.

Judge Nebeker: And a hot court is better.

Mr. Allen: Oh, absolutely.

Judge Nebeker: A hot court is much better. You can get to the nub of the thing and not waste time spinning wheels with minutia. In any event, I would be there. Oh, I do recall one time when Chief Judge Bazelon asked the Assistant if the court could conclude that the sentence was excessive and unreasonable. Did the court have the authority to reduce the sentence? And inexperienced as he was, he said, not wishing to say no to the court, "Well, yes." And I immediately stood from my chair and said, "No. That is not the position of the government."

Mr. Allen: Has to be remanded, I think.

Judge Nebeker: The position of the government is that there is no appellate review of sentence so long as it is within the limit set by the legislature. Well, I must say I saw a smile on Bazelon's face. He tried to get a concession from the government and I wouldn't let him do it and he knew why I stood as I did. In any event, that era of my career, about seven years as Chief of the Appellate Division, brought a number of cases that were of moment and probably are to this day —

Mr. Allen: Before we get to that. It might make a little, be a little closer to the subject since we've talked about workloads and your riding shotgun and the amount of work there was, if you'd tell the story of you yourself arguing three in a single day.

Judge Nebeker: Yes, there is an article reproduced, but it's not quite readable, out of *The Washington Post* by – what was the reporter's name, do you recall?

Mr. Allen: I'm sorry, we can supply that later.

Judge Nebeker: Jack Landau.

Mr. Allen: That's right.

Judge Nebeker: Jack Landau, who went on to greater things in the journalistic field, but he was the courthouse reporter at the time. I didn't have on the staff anyone who was really versatile, conversant I should say, about the insanity defense. And this was in an era when it was going from *Durham*[1] to what Warren Burger championed as the capacity for choice and control – the knowledge between right and wrong and the capacity for choice and control. And we had these three cases that had been ordered *en banc*. The Assistant U.S. Attorney who had briefed them was gone, and not retrievable, and so I finally decided there was only one way to do it and that was to argue all three of them myself. I won't characterize whether I did a good or bad job on it, but I do recall –

Mr. Allen: Did you win?

Judge Nebeker: Yes, I believe we did. In fact, I know we did on one because they had put it *en banc* and there was no reason for it to be *en banc* and when I stood to argue that case, I informed them of this portion of the record which seemed to moot out the issue they had gone *en banc* on. It came as a great surprise

1- *Durham v. U.S.*, 94 U.S. App. D.C. 228 (1954).

to them, I can recall that. That case was then disposed of with no moment at all. The article that Jack Landau wrote doesn't show the names of the cases and I don't now recall them. It would be a considerable research job through the computer to try and come up with three cases argued all in the same day with Nebeker as the lead counsel.

Mr. Allen: They were all criminal cases?

Judge Nebeker: They were all criminal insanity cases.

Mr. Allen: And they all involved the same issue, so the court --

Judge Nebeker: No, they involved different insanity issues.

Mr. Allen: But the court had apparently decided to hear *en banc* three cases that related to the same rule—

Judge Nebeker: That's correct.

Mr. Allen: —kind of a signal to everyone involved that they were going to resolve some things.

Judge Nebeker: Well, as I say, this was a year in which the *Durham* decision, which was 1954, had caused great consternation, both at the trial court level and in the public. It became a ruling that was very difficult to apply, and it literally, as I saw it, gave the ultimate control over whether you were guilty or not guilty by reason of insanity, to the psychiatrists. Indeed, there had been one insanity case argued by Tony Amsterdam. That's before this argument of the three *en banc* cases, and Tony stood and informed – I wasn't Chief at the time – Tony stood and informed the court that they had made a great

error in the *Durham* line of cases by allowing the psychiatrists from St. Elizabeth's Hospital or the defense psychiatrists to testify to the ultimate question, and I think the court had not really looked at the idea that an expert witness doesn't testify as to the ultimate question, that is give opinion on the ultimate question. That's for the jury to decide. Well, this likewise, of course, was very difficult. How do you examine witnesses in an insanity case, a criminal insanity case, and not get to the ultimate test of a mental disease or defect which produced the act, the crime, at the time. That was the *Durham* test in a nutshell. You always had, of course, an examination to determine present competence to stand trial, but that is a totally different inquiry than the post-hoc inquiry of whether the accused suffered from a mental disease or defect that produced the act. A mental disease, by the way, was the American Psychiatric Association's OSM definition. It defined a mental disease as something that was treatable, and a mental defect as something that was permanent and was not treatable. Sociopathy at that point was deemed not treatable. It was called a defect. So, the *Durham* rule had to have both involved in it. And then the question became, well, did it produce the act? Well, how do you ask a psychiatrist whether an identified mental condition produced the act 8, 10, 12 15 months ago? It was pretty hard to do without getting to the ultimate question. The jury must decide.

There was another very difficult issue at that time. At that time, the burden was on the government, the minute some evidence of insanity was introduced to disprove insanity, beyond a reasonable doubt, and there were a number of cases in which the trial judge would instruct the jury, "If you find the accused suffered from a mental disease or defect and that it produced the act, then you must find the defendant not guilty by reason of insanity." Well, that instruction was error. Why? Because it said to the jury they had to find that there was a mental disease or defect that produced the act. That wasn't the burden of proof. The burden of proof was on the government to disprove that insanity produced the act. Of course, the conservative wing of the court at that time was totally against the *Durham* rule.

I might give you an insight as to how the *Durham* decision came about. I know Judge Bazelon authored it, and the panel included Edgerton and Washington. There was a rule that the panels of the court were bound – it still is a rule here as well as there – the panels are bound by the decisions of the court that had been rendered beforehand and that only the court *en banc* can overturn them.

Mr. Allen: That's pretty universal.

Judge Nebeker: That's pretty universal. Well, how then does a panel decide *Durham* because before that, we had had the *Dusky* rule, which was a rule out of the Supreme Court that applied, if you will, the old common law irresistible impulse or "wild beast" test. The language was refined, but as I recall, that

was what the Supreme Court had held in *Dusky* and the Circuit Court had followed it for years in their own opinions. Now, all of a sudden, you had *Durham*, and the question became, :How did the panel get authority to overturn precedent?" and the answer was they had the votes. Obviously a petition for rehearing *en banc* was filed making this argument, and by a 5-4 vote, the *Durham* rule decision by the panel, was allowed to stand. In other words, the court —

Mr. Allen: The rehearing was denied.

Judge Nebeker: The rehearing was denied, which had the effect of allowing the panel decision to remain extant. Otherwise, if you grant rehearing, then the panel decision is vacated and then the court, on rehearing, either re-adopts the panel decision as its own or modifies it in some way. So in any event, there was disquietude on the court. We had Burger, Walter Bastian, John Danaher – I'm trying to think of who else was there at the time – George T. Washington was on the court, Charlie Fahy was on the court. Fahy, incidentally, had been Solicitor General of the United States, and in World War I flew the British Handley Page and the Italian Caproni as a fighter pilot. And, I digress for a moment because it's worth noting, that there was a meeting later on in the years with Joe Ryan and Charlie Fahy and then an Air Force member of the Joint Chiefs of Staff, and here were three pilots that covered the entire time. From the first fighter planes to modern day jets. That's a digression that's maybe worth noting. It may not.

Mr. Allen: Well, I think it's good to note.

Judge Nebeker: I was present at that meeting and it was quite a moving thing because I appreciated the aviation aspects of World War II, particularly. All right, where were we?

Mr. Allen: You were on the *Durham* rule. I think we touched a little on the *Durham* rule last time, but it's a central subject obviously. The insanity defense continues to be very important today. I think this is all sort of an explanation of the three-in-one-day arguments all on the insanity defense. Did that day resolve important issues?

Judge Nebeker: No, it really did not. It was, as I recall, much later that Burger was able in a case called *Blocker*, if I'm not mistaken, to begin to steer the court from the *Durham* test to the one he championed which was an abnormal mental condition that deprived the individual of the capacity for choice and control. In other words, Burger – and he wrote interestingly on the concept of free will, and this abnormal mental condition had literally to obliterate the free will of the individual, the capacity to choose what he wanted to do and to control what he did. That amounted to a leveling off of the insanity defense, and the interesting thing is when *Durham* was around for a long time, not guilty by reason of insanity verdicts were commonplace. And then it seemed as how the jurors were getting a bit jaundiced to the whole idea and they were rejecting the insanity defense. In the meantime, Warren Burger's decision, his philosophy became the majority philosophy on the court and

Durham began to fade. In the meantime – well no, it was much later on, we can get into that later where Hinckley was found not guilty by reason of insanity in his attempt to assassinate Reagan and how the Congress at that point then adopted the Oregon statute which the Supreme Court had held constitutional in *Oregon v. Hass,* which is the present law that we have today, *i.e.*, the burden is now on the accused to establish by a preponderance of the evidence, I believe that's right, yes, by a preponderance of the evidence, that his abnormal mental condition deprived him of the capacity to choose and control.

Mr. Allen: So this is really Warren Burger's formulation, is now the law?

Judge Nebeker: It was a marvelous essay on free will and the nature of man, which to me showed that Burger was quite a philosopher.

Mr. Allen: Would it be worth going over any of the other activities of the Appellate staff? Who else was on the staff, how things changed over the – you were there as Chief for, I think you said, seven years. Was the Office significantly different when you left it from when you began, it was larger?

Judge Nebeker: It was a little bit larger, but I'm proud to say the morale of the folks was greatly improved. Their productivity went up. But it basically didn't change that much. The work was the same and the cases were coming along of interest.

For instance, there was a case of *Washington v. Clemmer*. Clemmer was the Commissioner at the time. Now, I guess known as the magistrate judges.

But the issue was whether a subpoena could issue to the victim of a rape case to appear for a preliminary hearing to be cross-examined by the defendant's counsel. Let me tell you in detail the story.

I had gone to lunch on this particular day, I think it was a Friday, and I had stopped in at Louie's on D Street. It was a cut-rate men's clothing store –

Mr. Allen: Knew it well.

Judge Nebeker: – where all the FBI agents would buy their dark blue suits.

Mr. Allen: I can tell you so did lawyers in the Civil Rights Division of the Justice Department.

Judge Nebeker: Oh, yes. Well, I was there looking for a suit and who was there but Judge Warren Burger. He was buying a suit for his son who was going away to medical school. We talked for a little while, and he introduced me to his son and then I left, not being able to afford a suit, and went back to my office and the secretaries were running around trying to find me. There was an emergency hearing before the D.C. Circuit Court and I was to be there. I didn't know the first thing about why I was to be there, but I went and discovered that there was a representative of the Legal Aid Agency there to argue a case, and I had the papers put on my table in front of me, and as I'm listening to counsel argue the case, because they are the appellant, I learn what the case is all about. As it turned out, they had gone to the Magistrate and issued or asked for the issuance of a subpoena for the complaining witness in the rape case. He turned it down. They went to Chief Judge

Curran, and he turned it down. So they noted an appeal and asked for an immediate hearing and they got it. I stand to argue the case to say that the government's position is that the probable cause for preliminary hearing can be made on the basis of hearsay – that was well established law – and that therefore, there was no right to bring the complaining witness. But their argument was that she will testify she cannot positively identify the accused. Anyway, my position was positive identification is not the test for probable cause. Well, all right, the case was submitted and I went back down to my office and lo and behold, about 4:30 in the afternoon, down came an order. The preliminary hearing was to be had on Monday morning at 10:00 o'clock, at which the complaining witness would be present. I called Bea Rosenberg, who was in the Criminal Division, Appellate Section, at DOJ and told her what had happened, and said that I needed to have permission from the Solicitor General to file a petition for rehearing *en banc*. By the way, that was Saturday morning that I called her. When I explained to her what the situation was, she said she would contact the SG and get back to me. Well, believe it or not she did within just a very short period of time and I was authorized to go ahead. I called my secretary and I went down to the courthouse using the old Bar Association Library there on the third floor, I put together a petition for rehearing *en banc* –

Mr. Allen: This was still Saturday?

Judge Nebeker: This was Saturday. Incidentally, the order that went down, of course, transmitted the mandate forthwith, so I filed a motion to recall the mandate and for rehearing *en banc* and another motion for immediate hearing or decision, because we were due there at 10:00 in the morning, on Monday morning. There's a little known provision in the Federal Rules of Appellate Procedure that says the Clerk's Office is open for business 24 hours a day. I called Nate Paulson, who was the Clerk, and said I'm going to use that provision to file these things Sunday morning, my secretary typing them up Saturday afternoon. He said call Al Stevas, who was the Chief Deputy Clerk. I did because Al lived not far from where I do in Arlington, and he said he would pick them up Sunday morning on his way to church by stopping at my house, which he did. So I literally filed the papers with the Clerk in my living room. Al then said, "I'm going to church. How are you going to get these to the judges?" And at that juncture I said, "Well, I guess I'll do it myself." I had made sufficient copies planning to give them to Al and let him distribute them. He didn't quite see how he wanted to do that. So, I took off that morning in my car and the first place I went was to Warren Burger's house because he was just less than two miles from me in Arlington. He had a huge house. It was a magnificent place. It has now been torn down and row houses are there, but I knocked on the door, probably 11:00 that morning, and Mrs. Burger came to the door and I identified myself and I said, "I need to see Judge Burger. I have some

papers I must leave with him." She graciously said, "Well, wait," and invited me in. I stood by the front door and I heard him say from the kitchen or the back room, "What in the world for?" and in just about that tone of voice, and I could appreciate why. It was a Sunday morning. But he came out in his robe and he was very gracious. And the first thing he said to me is, "Is this about that panel decision respecting a preliminary hearing?" I said, "Yes, sir. It is." And I'll never forget his next comment. It was, "I wondered how that Division got put together." Well, that didn't mean anything to me at the time, but as I tell the saga, it will become obvious how important or significant that comment was.

I then proceeded to go to the other judges' places, Bastian, Danaher, Wright, Miller, Fahy, Washington, and McGowan. Bazelon was not home, so I left the pleadings under his front door or between the storm door and his door. And then I went to Judge Wright's home. A gracious man he was. He invited me in. We had a long talk about the weather and everything else, and he asked me if I'd have coffee and so forth, and I left the papers with him and went home. Obviously they had to have a telephone conference on Sunday. By Monday morning at 9:00, an order emanated from the D.C. Circuit, modifying the order to have the preliminary hearing at 10:00, until further order of the court. The rest is history and I rather put it together by pulling the opinions of the judges afterward. But that – even Burger in writing why he voted to deny *en banc* limited the holding of the case so

much that he said he wasn't concerned about it. And then, of course, Bazelon chimed in with a footnote that said commentary by non-panel members don't say what the holding of the panel is. That's up to the panel to say. Well, in any event, that began a period of time during which the question of whether Rule 5, the preliminary hearing rule, could be used to depose the government witnesses. And there were a number of other cases that dealt with that issue. *Blue v. United States* was one of them. In any event, there had been in the meantime the Judicial Conference of the United States drafting amendments to the Federal Rules of Criminal Procedure and I was asked to comment on some of the drafts. Well, it was right at this time that we were going through this business of *Washington v. Clemmer* and so I wrote a rather lengthy memorandum on the vice of permitting that sort of thing to happen, and the ultimate upshot of it was the 1972 Rule 5 [Rule 5 that was ultimately adopted at that time, and I don't think it has changed that much] says, in effect, that the preliminary hearing is not to be used for depositional purposes. And of course, we know the Supreme Court has adhered to that in the Florida case, *Gerstein v. Pugh*[2] in which it said that preliminary hearing under the Constitution may be determined by hearsay only and indeed that case says it can be done ex parte by affidavits. So the whole idea of converting a preliminary hearing into a minitrial, which is California's way of doing things was then —

2 420 U.S. 103 (1975).

Mr. Allen: Let's identify this: This is Side 2 of November 20, 2003, continuing the oral history of Frank Nebeker. We were talking about the ultimate adoption of Rule 5 of the Criminal Rules that clarifies that the preliminary hearing cannot be turned into a testimonial deposition process. You were commenting on California doing —

Judge Nebeker: Well, I just mentioned that my understanding was and is that California's process at a preliminary hearing is somewhat of a minitrial and that is not the rule under the federal system, though the effort was made here in the District of Columbia to do so.

Mr. Allen: Okay, and this all transpired while you were still Chief?

Judge Nebeker: That's correct.

Mr. Allen: It would have been prior to 1969?

Judge Nebeker: Oh, yes. This went on between '64 and '67, somewhere in there. The exact date in which that amendment to the Federal Rules was adopted I do not recall, but it was during that period [it was in 1972]. It was a two- or three-year period that we had this issue crop up every now and again.

Let me fast-forward for a moment, because I would like to put in context my comment I made a moment ago about Warren Burger saying to me, "Is this that case about the preliminary hearing and I wondered how that Division got constituted?" Later on, when I was appointed to the D.C. Court of Appeals, I went over to see Walter Bastian and John Danaher who were retiring, just to pay my respects to them. And I had a long conversation

with John Danaher. And we got around to discussing this particular problem in *Washington v. Clemmer*, just reminiscing about it, and he told me that he had received a call from the Clerk's Office that day, because he was on a motions panel, that he may be needed for an emergency hearing. Danaher said that he would be available and later he got a call that said he didn't have to be, that they had a substitute who would sit. He didn't think too much about it at the time he told me, but it turned out that the substitute was, I believe, Judge Wright. He told me he learned that Judge Wright had cancelled a flight to California to sit on that panel. So, I was able to sort of put two and three together and come up with five because it had been apparent to me that the Legal Aid Agency had prepared their pleadings well in advance of their appearance before the D.C. Circuit. They knew, they had engineered this case and I'm sure they wanted to, because they knew that they could not otherwise get to the complaining witness for examination and thus possible impeachment purposes at trial unless they could subpoena the individual. So, it became apparent to me that this had been planned well in advance. The Circuit Court was indeed able to react very quickly because it did so within an hour of Legal Aid's filing their pleadings in the appellate court, so Warren Burger's comment to me, which at the time was not particularly significant became rather significant. Here was a regular member of the motions panel who somehow or another was sidetracked and a substitute run in, and, of course, the panel was definitely in favor of ruling

the way they did and so it took the full court to try and blunt the effort, but it was a long fight before the issue was finally resolved.

Mr. Allen: Did this lead to any changes in the procedure for assigning motions panels do you know?

Judge Nebeker: Not to my knowledge, but apropos of that question, Walter Bastian had earlier, during the *Durham* period, and I might add also at the same time it was during the *Mallory* period on confessions – All right, he – all right, I'll go into this for a minute. Back then when the accused was convicted of a crime and he was *in forma pauperis*, he had to petition for leave to proceed on appeal *in forma pauperis*. There was a Supreme Court case called *Coppedge v. United States*, which set out the procedure by which such could be done. The pro se defendant had to ask the trial judge for permission to appeal *in forma pauperis*. The litigant, the defendant, would have to show under 28 U.S.C. § 1915 that the appeal was not frivolous or taken for delay. Well, there were darn few trial judges who would say that in an ordinary criminal case the appeal was nonfrivolous, *i.e.*, that there was a possibility that the trial judge had committed an error. So, it became impossible, virtually, for these *in forma pauperis* appellants to get off the launch pad to go to the Court of Appeals.

Mr. Allen: Because they need to get a – it's kind of like getting a judge to stay his own ruling.

Judge Nebeker: Correct. And so, then the accused would note an appeal from the denial of the *forma pauperis* request and take that to the Court of Appeals. Well, now how in the world does the Court of Appeals, depending upon who has the burden in any event, how does the Court of Appeals decide the appeal is nonfrivolous? It doesn't have a transcript.

Mr. Allen: Right.

Judge Nebeker: And so the court began to order transcripts prepared at its own expense in criminal cases. Then, with the transcript, the United States could oppose the Petition for *Forma Pauperis* and it depended on the panel you got whether the appeal was allowed or whether it was disallowed on the question of, was the issue frivolous or not. Well, the term frivolous or nonfrivolous went through an interesting metamorphosis during this time. What was nonfrivolous to some judges was totally frivolous to others. Why? Because there was plenty of precedent to say that this issue has been decided and is now a frivolous issue. But of course, along with the use of confessions, you had the insanity defense, and no case involving insanity presented a frivolous issue. That pretty well was foregone. The confessions, you had plenty of precedent that a confession is admissible but then you had precedents going the other way. And so depending upon the panel, they would allow or disallow the *forma pauperis* appeal. Well, of course, all that now has been ironed out in a totally different way and the appeals are virtually automatic in all criminal cases. It's a much easier practice,

although it produces an awful lot of frivolous or near-frivolous criminal appeals. The Supreme Court then had to deal with that later on in a case called *Anders v. California* – do you remember it?

Mr. Allen: I don't.

Judge Nebeker: The lawyer appointed by the court for the appellant could file an *Anders* brief, and we get them to this day here, in which he says he's combed the record, can find no nonfrivolous issue to raise. The appellant himself wants this and this and this raised, but in his judgment, there's nothing to it. That motion to withdraw is not served upon the United States, but is sent to the appellant. And so the court makes an independent evaluation of whether the appeal is frivolous and if they conclude that it is, then they grant the motion to withdraw and summarily affirm the judgment of the lower court. The *Anders* case out of the Supreme Court was a product of the liberalization of the right of a criminal defendant to appeal his conviction. I often thought that what it had really done was to have done away with the presumption of validity of a trial court judgment because, as you recall, the appellant always has the burden of demonstrating error and prejudice, if there is error. That's because a trial court judgment is presumed valid until error is disclosed. Well, why do you presume, at least sufficiently presume, that the appeal is nonfrivolous when you order the transcript, but that's the way we do things today. It's probably a better way to do it in criminal cases because you have an automatic direct appeal. That eliminates to a very great extent an awful

lot of collateral attacks, albeit we're still getting plenty, but with the recent legislation and Supreme Court decisions on collateral attacks, particularly from state court convictions, we got it down to where the collateral attack mechanism is pretty well systematized and is corralled to a point where it's not being abused to a great extent. It's still burdening the federal appellate courts and federal trial courts with collateral attacks. I suppose there's no way you can get away from that, but at least they are easier to decide than they used to be. And the major catalyst is the fact that there's already been a direct appeal and everything that could possibly be wrung out of it by way of error has been done.

Mr. Allen: I'm not enough of a criminal lawyer. Most collateral attacks come up in the federal habeas attacks on the state?

Judge Nebeker: Well, there are two ways. Federal habeas corpus is available under 28 U.S.C. § 2254 from a state conviction. Section 2255, however, is the noncustodial equivalent of habeas corpus, *i.e.,* instead of having to bring your collateral attack where the prisoner is being held against the warden, the prisoner may file the 2255 collateral attack in the jurisdiction where he was convicted, and that makes sense. That's where the record is. That's where everything is, so you don't have a federal trial judge out in Illinois wondering what the heck happened in the District of Columbia. It makes great sense to have done it that way. Incidentally, I might add, in court reorganization in 1970, the Congress adopted what was then 2255 verbatim

for the D.C. court system, but since that time 2255 has been amended in a number of ways, very significant ways, limiting what can be raised when, what must be raised and what must be asserted, *i.e.,* cause and prejudice. If you could have raised it earlier and didn't, cause and prejudice must be shown. Our 23-110 equivalent of 2255 has not been amended and it would seem to me that it would make common sense for the Congress or the D.C. Council to do so.

Mr. Allen: To make the D.C. rule conform to the federal rule.

Judge Nebeker: Conform to the federal rule, yes. Anything else you want to go into?

Mr. Allen: I think it makes sense. It is now quarter to eleven. We have been going since about 9:30. If we try today to get the best of your recollections from your legal career prior to going on the bench if that makes sense to you.

Judge Nebeker: We can do that.

Mr. Allen: Although, keep in mind, we have essentially unlimited time. Sir, your decision to do this where so long as you're tolerant of overdoing it over a number of months.

Judge Nebeker: Oh, I am. There's a corollary that I might discuss if we got enough tape left there.

Mr. Allen: We probably do.

Judge Nebeker: While I was Chief of the Appellate Division and dealing with this *Coppedge* question and how do you appeal, we had misdemeanor convictions sought

to be appealed to the Municipal Court and then to the D.C. Court of Appeals while it was still an intermediate appellate court. And there were no transcripts over there. Unless you could hire a court reporter, you didn't have a transcript and so the way it would be handled under then-Rule 10 was on a statement of proceedings and evidence and the trial assistant who tried the misdemeanor case would have to be present at a meeting with the trial judge and have a statement of proceedings and evidence approved. The accused would come with his statement as to what the evidence was, and the government would come with its statement. Well, you can guess which statement the trial judge adopted.

Mr. Allen: If he's convicted, he is going to adopt the government's.

Judge Nebeker: He's going to adopt the government's in 90 percent of the cases.

Mr. Allen: And these are all going to be post-trial meetings?

Judge Nebeker: Correct.

Mr. Allen: So a trial judge is now being told that the defendant is appealing so there's going to be this meeting on what happened.

Judge Nebeker: On what the record should disclose.

Mr. Allen: Right.

Judge Nebeker: Well, you had to depend on the integrity of the Assistant, the way he wrote it up, and the integrity of the trial judge. But nonetheless, the appellant didn't stand much of a chance in getting his version of what happened approved. So, that was the way it was done for the longest time and the

government could literally bat 1,000 on criminal convictions. I will go into one in which we couldn't. I have gone into one in which we couldn't and that was *Avant and Hughlett*. I think we've discussed it. The automobile repair case, but there, of course, there was a transcript because the defendants had money and they could get a reporter to come in. So, what happened. I began to realize as Chief of the Appellate Division that this was just like shooting fish in a barrel and it didn't bode well for the integrity of the system. So, I contacted the Department of Justice and got authority to order transcripts where there had been a reporter, and they were very, very few. I went to Judge Wright because he and I served on a panel appointed by the court to recommend what to do about the absence of transcripts in the General Sessions Court, and came up with a plan and I filed the necessary pleadings in a case called *Gaskins v. United States* [265 A.2d 589 (1970)] and as a result of that case and the indulgence of the Administrative Office of the United States Attorneys, which agreed to foot the bill for these transcripts in the early days, so that the United States was in a position to defend itself, to defend the judgment of conviction. Wright wrote this decision in *Gaskins* setting out the process to be utilized at that point to get transcripts. In the meantime, a budget had been provided to hire court reporters. So we brought that misdemeanor court system out of the dark ages where, in effect, that statement of proceedings and evidence was the modern equivalent of a bystander's bill. But a bystander's bill, I think, had

a great deal more objectivity to it than these statements of proceedings and evidence, which had to be approved by the trial judge. By the time court reorganization had come around, those concerned, the Congress and the Bar, could be fairly well at ease that the court system was out of the dark ages. And it was, in effect, basically what we had in the federal District Court.

Mr. Allen: Did that amount to a transcript in every – or a court reporter present at every hearing?

Judge Nebeker: Yes.

Mr. Allen: And that's really a sizeable increase in the expenses for the courts.

Judge Nebeker: It was, it was. And the government footed the bill until the budget system on the Hill could be adjusted so that the courts could take it up. As you see, in the meantime, along came the Criminal Justice Act, 18 U.S.C. § 3500, and it provided for the compensation of counsel and I'm not sure it provided for the transcripts. I think that was provided separately.

Mr. Allen: So, there's really a significant modernization in the criminal practice in this period in terms of process and the court's leading the way with their writings and opinions and then Congress adopting some of them to –

Judge Nebeker: I am proud that I had a part in doing that.

Mr. Allen: Sounds like you had a significant part.

Judge Nebeker: It just was unbecoming for any court system, let alone one in the nation's capital, to have that kind of an antiquated and unjust way of, in effect, making a conviction final without appeal.

Mr. Allen: That's a credit to you. Would it make sense for us to discuss court reform and since we touched on the subject and how it happened, when it happened, because it seems to me it's roughly contemporaneous with the time that you went on the bench.

Judge Nebeker: Yes it is roughly that time. Do you want to get into it at all today?

Mr. Allen: It's your pleasure. It's just about 11:00, or just about. Do you want to hold it for the next time?

Judge Nebeker: Yes, let's hold it for the next time.

Mr. Allen: Okay. I think that makes sense. We are probably at the end of number 3 in the oral history of Frank Nebeker and have concluded for the day and will take up as the next subject, unless Judge Nebeker thinks of more to recall about the U.S. Attorney's Office for next time, but next time we'll take up court reform and the beginning of the Judge's judicial career.