Alan S. Rosenthal Recalls *Brown v. Bd. of Ed.* and Some Notable Solicitors General

by Judy Feigin

Alan Rosenthal's 60-plus year legal career began with a clerkship for Judge Henry Edgerton on the D.C. Circuit Court of Appeals in 1951. At that time, the city was largely segregated and the court docket was so limited that the court did not sit during the months of July, August and September. Rosenthal's most striking memory of his clerkship year was the en banc argument in *Youngstown Steel and Tube Co.*, challenging President Truman's seizure of the steel companies. He vividly recalls the judges' negative reaction to the preening and posturing of Solicitor General Philip Perlman who made it clear that he was deigning to appear in a court of appeals. (Oddly, the Supreme Court assumed jurisdiction before the Court of Appeals issued a decision. Hence, there was no appellate opinion.)

During his long government career, Rosenthal was involved in, and witness to, events involving several landmark cases. The most notable was *Brown v. Board of Education II*.

As a relatively new attorney in the Department of Justice, Rosenthal was asked to work with the Solicitor General's office on the government's brief to the Supreme Court dealing with how to implement the ruling in *Brown v. Board of Education*. Rosenthal spent a summer studying how various states had managed integration and prepared the first draft of the government's brief urging prompt desegregation. After the brief was reviewed and edited within the Department of Justice, Solicitor General Simon Soboloff personally delivered the draft to the White House for review by President Eisenhower.

The president was not persuaded. His extensive penciled comments indicated his view that the government should weaken its position. As the president saw it, the states had acted in good faith in relying on *Plessy v. Ferguson*, and that should be taken into account in fashioning a remedy. According to Rosenthal, Attorney General Herbert Brownell simply ignored the President's suggestion.

While Rosenthal did not argue *Brown v. Board of Education II* before the Supreme Court, he was present in the courtroom. He recalls Virginia's Attorney General presenting a statistical argument claiming that a large percentage of students in Virginia were African Americans born out of wedlock. Moreover, he claimed, a significant percentage of persons with venereal disease in Virginia were African American. These "facts", he urged the Court, explained why white parents would not tolerate integration of Virginia schools. The justices were silent in the face of this argument.

Solicitor General Soboloff, who argued *Brown v. Board of Education II* before the Court, figures heroically in Rosenthal's memory. Rosenthal, who himself stood up successfully to McCarthy era harassment about his security clearance, recounts Soboloff's refusal to sign the government's Supreme Court brief in *Peters v. Hobby*, a case in which the government had unjustifiably removed security clearance from a government employee. Rosenthal reports that the "price" Soboloff paid for that act of independence was appointment to the Fourth Circuit, rather than to the D.C. Court of Appeals which he wanted and expected.

Rosenthal himself argued nine cases before the Supreme Court and describes how different arguments were in the 1950s. Justice Frankfurter could be noticeably rude; he would turn his chair and give his back to a litigant during a portion of an argument that irritated him. Also in those days, unlike today, arguments were in the afternoon. Arguments could spill over two days as those which were not completed at the appointed hour were often carried over to the next morning.

Toward the end of his time at the Justice Department, Rosenthal found himself in the midst of a political tussle with the Nixon White House. White House counsel John Dean called Rosenthal and asked him to urge rehearing or rehearing en banc in a D.C. Circuit case involving a challenge to milk marketing order prices. The Circuit had remanded the case to the district court for a trial. Dean made clear the White House wanted to delay the trial until after the 1972 election. Rosenthal replied that he could not and would not honor Dean's request. In order to file a petition for rehearing there had to be a good faith belief that it was justified and a certification that it was not filed for purposes of delay. However, because the ultimate decision on an en banc petition belongs to the Solicitor General, Rosenthal passed the request along. Solicitor General Erwin Griswold refused to allow the filing. About a year later, Griswold was summarily fired. He confided to Rosenthal his belief that the firing was due to his denial of John Dean's request.