ORAL HISTORY OF JUDGE CHARLES RICHEY

On behalf of the Oral History Project of the District of Columbia Circuit, the interviewee is District Judge Charles Richey, the interviewer is Daniel Singer. This sixth interview took place in the chambers of Judge Richey in the United States Courthouse on January 23, 1996.

[Preceded by discussion of Robert Putnam, Bowling Alone.]

Judge Richey: Why Richey?

Mr. Singer: [Laughter]

Judge Richey: Because I was so darned inquisitive and asked always for an explanation of: Why is this? Why is that? Why do you do this? Why do you that?

Mr. Singer: I think it's a wonderfully fair question for a guy like Putnam.

Judge Richey: It is. It is. And you say he blames his... his thesis is that it's...

Mr. Singer: Yeah. He blames in large part on television...

Judge Richey: Well. Leon Higginbotham was at our house for dinner a couple of years ago in conjunction with a program sponsored by Ruth Ginsburg and Jim Buckley and I were the only three judges here that agreed to it but it was some international exchange program where we had foreign judges. And they asked us to entertain a group. Leon was in our group.

Mr. Singer: Foreign judges meaning judges from other circuits...

Judge Richey: No. Other countries.

Mr. Singer: Other countries.

Judge Richey: Foreign countries.

Mr. Singer: Leon doesn't qualify?

Judge Richey: Well, true. But anyhow, he came.

Mr. Singer: Yeah.

Judge Richey: With some relative of his wife's. Nice lady. I guess it was his mother-in-law. He brought her. He was a judge on the Supreme Court of New Hampshire; at that time Souter was up for confirmation, whenever that was. A judge from Papua New Guinea. I forget where the other judge was from. But Leon and his mother-in-law came first and I had the television news on. And Leon knows me very well and he immediately lights into me for watching the tube. And proceeded to tell me that he was director of the National Geographic which raised my eyebrow a little bit. I tried to restrain myself as a good host. And he said they're having difficulty competing with the electronic age and therefore they had diverted a lot of their resources to meet that kind of competitive need.

Mr. Singer: Uh Huh.

Judge Richey: And he said people like you Chuck, are responsible for a lot of this. You're not reading anymore; you're watching the news on TV. Well, I don't think watching the news on television is that bad. I don't know whether it was in jest, in part or not. But, he did say that. I think he's right. This Putnam is correct.

Mr. Singer: Well, you've got to read it first.

Judge Richey: Well, if... based on what you tell me... I will read it. I thank you very, very much.

Mr. Singer: OK. Let me... Let's...

Judge Richey: Now I had Jeffrey get out this awful...

Mr. Singer: My request was to find maybe three or four of them [laughter] that we could ramble through. Let me just tell you Jeffrey also gave me Peter Gerhardt's telephone number...

Judge Richey: Oh. Good.

Mr. Singer: Because I will be getting in touch with him concerning the nature of the Deed of Gift and the Grant and whatever...

Judge Richey: Well. I'll give you a copy of it if you want.

Mr. Singer: No. No. No. I don't need your deed to him..

Judge Richey: It's right up there on the wall.

Mr. Singer: Oh. OK. But basically what you said to us last time... the last time we got together on this we talked a little bit about this and it may be toward the end of this you mentioned something like twenty-five years. But, I will go through here and pick up what you said...

Judge Richey: It is twenty-five years after my demise...

Mr. Singer: Right.

Judge Richey: That my papers will be made available to the public.

Mr. Singer: Right. And you indicated that that's the same kind of constraint that should govern these tapes.

Judge Richey: Exactly.

Mr. Singer: Right. Right. OK. Actually what prompted my finding the...

Judge Richey: Article.

Mr. Singer: The article was this talk about how to be nice. It's not quite how to be

civil but it's... it's not quite the same but it uses the same kind of words about civil discourse, civil society and...

Judge Richey: Well. The Bar, headed by one of my former clerks Andrew Marks and Joanne Doddy Fort, is doing a study for the District of Columbia Bar in which they've enlisted the support of the Superior Court judges and our judges and I believe it's been approved by the D.C. Bar Board of Governors on the subject of civility in the practice of law. Andy is a former clerk, called me up when he found out I had done...well, before that, last summer, those green papers up there on my shelf represented a compendium of everything that's been written on civility and race, gender and sex bias in the courts.

Mr. Singer: Right.

Judge Richey: And I got it on the agenda last September for our court's executive session and then was taken off at the last minute because nobody knew that the Bar was doing the same thing. I put civility in there and stated explicitly that it was based on Marvin Aspen's report for the Seventh Circuit.

Mr. Singer: Right.

Judge Richey: And, Andy called me up and said "We're going to be charged with a conspiracy."

Mr. Singer: [Laughter] It wouldn't be the first time.

Judge Richey: But, in any event, it was a, you might say, a quote, a "political mistake", but I did it consciously thinking that that would soften the impact about the stuff that you see in that pamphlet now.

Mr. Singer: Uh Huh.

Judge Richey: But it didn't work and it's before the Implementation Committee now if I can ever get them to read it. I've told them repeatedly they will only have to read for about twenty minutes and a simple resolution approving of it. But, I just can't... if you just... you have no idea of how hard it is to push and get things done unless you have the authority to do it yourself.

Mr. Singer: Ahhhh. Yes

Judge Richey: Particularly in a judicial atmosphere. It makes me believe I'm in the right place rather than on an appellate court.

Mr. Singer: One of the questions in your list of questions we asked...

Judge Richey: Certainly.

Mr. Singer: Plays... moves nicely into using those volumes, I think, because the question recalls that... what were your three to five most interesting or important cases and interesting and important are different. May be different on this assumption.

Judge Richey: That's correct.

Mr. Singer: Cases that most fully signaled your view in the role of courts and judges or which were to have the most lasting impact on the development of law or the conduct of real people, ordinary folks. And did you realize the extent of that impact at the time of decision? Say, when you were working on the cases, were you able to predict and did you write with a view that this is an important case and what I write down is going to have some kind of a life beyond the covers of the law books.

Judge Richey: In the span of the last twenty-five years, I've had so many cases. It's very, very difficult. I'm often asked the question to separate out the ones that you've just described. And, I'm often asked the question, "What is the most important case you've ever tried or presided over?" And, I often answered that, generally answered it. Every case I have tried. And it really is true. The individual before the court, whether it be in a civil or criminal context. That is the most important thing on their minds.

Mr. Singer: Yeah, but, generally, let me take that. Do you think that the immediate litigants, those before you whether it's a public agency, a private individual, or a corporation, or two private entities. Do you think they care much about anything beyond the way in which the case impacts on them? The judge has a broader function, clearly.

Judge Richey: Yes. But you have ideologues who are lawyers who will represent the government of the United States. Let me give you an example. There are approximately seventeen lawyers that came before me at the end of the Reagan Administration that ultimately resulted in my decision which the government had finally accepted after two appeals. That e-mail is a federal record, and in some instances a Presidential record, but mostly a federal record and therefore must be preserved and is the property of the United States. Those individuals are still representing the President of the United States, even though he is of a different political party and with the same vigor, the same ideology that they did and urged when representing Reagan, George Bush and now President Clinton. They were very

emotionally involved. Perhaps because they were representing the President and the Executive Office. But, it was interesting and still is to see the same people in the same case.

It's all been settled except for one isolated instance involving whether the National Security Agency is an agency for purposes of the APA and thus subject to judicial review and whether the Freedom of Information Act applies to it. I wrote one opinion back that I knew of no judge in the United States of any persuasion who would not uphold one of the exemptions in the FOIA statute such as the conduct of foreign policy, foreign affairs, intelligence activity and that sort of thing. And that's happened. I've applied those exemptions. But, they presented an executive order to President Clinton, notwithstanding the fact that it had been in existence, FOIA regulations for twenty years, they had processed FOIA requests in many instances in released documents. He, in that executive order, abolished the status as an agency and in an order subject to FOIA, per his executive order which I ruled was impermissible. And that in the federal appeals now after a prelude about how he believed in openness and government and so on and so forth. But that's what he said and it was put before him. I've no direct knowledge, but I know by these same lawyers who'd been doing all his work for the Archivist of the United States and this subject for the White House. So that's an example of lawyers' emotion rather than the client's emotions. Maybe the clients got emotions involved too.

Mr. Singer: Right.

Judge Richey: But, other cases going back to the early seventies, such as *NRDC v. the SEC* which was a case involving the rule-making of that Commission where they refused...

Mr. Singer: The Commission refused...

Judge Richey: The Commission refused. It refused to require the 10-K statements to include claims for violation of the Civil Rights Act statutes and environmental concerns by ethical investors. My first opinion was not appealed. It was remanded to the agency. And I'll never forget, a dear friend of mine called me up after reading about it in the papers and said, "Chuck, I applaud your decision, but I'm gonna tell you something." "What's that?" "The agency is going to do it over again, and they're gonna come out the same way." And I'm... that's exactly what happened. And I didn't know until the case came back to me after they had done it over again, coming out the same way, that my dear friend that I didn't know at that time, Arthur J. Goldberg, Supreme Court Justice, among many other things, testified in that second hearing. God bless his soul, and said "Members of the Commission, you should adopt the rule as urged by Judge Richey." And his opinion is among the finest I've ever read, including my own, as a Justice of the Supreme...

Mr. Singer: This was a submission that Goldberg made to the...

Judge Richey: In the record. I examined the record, I had to in order to rule a second time. But I made up my mind... when I read that by Arthur J. Goldberg,

whom I'd always admired from a distance, that I was going to get acquainted with him and I did. And went on for years thereafter until he died. I talked to him about a week before he passed away and it was a marvelous friendship, Dan. And I think it resulted in a lot of good. He invited me to seder dinners...

Mr. Singer: There was a very famous seder, the Goldberg Seder.

Judge Richey: Oh. None like it! Have you ever been to one?

Mr. Singer: I never got to one, but my partner, Max Kampelman usually was...

Judge Richey: Oh, he wasn't there the night I was there, but... I'll never forget it. I'll never forget it. It was fascinating and typically Arthur Goldberg. I will never forget it. At one part he would describe something and then asked his guest questions. "Where did that come from?" And I remember the correct answer to one of the questions was, "FDR".

Mr. Singer: Well, he wrote... if I remember correctly the stories I heard, he wrote a kind of a homemade, the name of the book in Hebrew is *Haggadah*, and he...

Judge Richey: Well, he wrote his own *Haggadah*.

Mr. Singer: He wrote his own service.

Judge Richey: He did.

Mr. Singer: Yeah. It was very famous.

Judge Richey: And you know you contrast that with somebody like, uhhh, more, not orthodox but reformed, like Irving Schiller where you pretty much did things according to tradition. But again, with the presiding host's annotations but totally unlike Arthur's.

Mr. Singer: For a long time, he was a very special guy.

Judge Richey: It's too bad. I regret that you didn't get to know him because he would have liked you and you would have liked him.

Mr. Singer: I knew his younger partners. People like Jerry Anker, Steve Schlossberg, and those people.

Judge Richey: Did you know Mrs. Gilbert, his long-time secretary?

Mr. Singer: No. I didn't know her.

Judge Richey: She's still around. I haven't seen her or talked to her in two or three years. My, but what a lovely human being. Now, let me think of some other cases. Obviously, the Nixon tapes and papers case. That one I knew I was writing for history because when I wrote that, it was about 108 pages and in those days we didn't have computers.

Mr. Singer: [Laughter] You really had to work.

Judge Richey: I remember sitting in the chair to your left at the corner of the desk, about 11:30 one night, pushing myself as hard as I could push to get the opinion done. Writing. And some law clerk said, "A Motion just came in. You might read it, Judge." And I just pushed him off and put it aside. It was a Motion to convene at 3-Judge Court because Congress had, in the last previous twenty-four hours, passed a law saying that this should be handled by a 3-Judge Court. I didn't read it. And of course, that was a fatal mistake and caused the matter to be sent back and then Congress did it, amended the law on its own. But I knew I was writing for history because the only thing in the way of a precedent were the papers from the

Lewis and Clark expedition sponsored and funded by the government in major part if not entirely. And the only opinion was regarding their papers and their work in that expedition by the Eighth Circuit, the only one in the United States. And my position was that, borrowing from that case and the traditions of the common law, that work generated in the course of public officials' duties and with the use of public funds, required that the property so produced belonged to the United States of America and its people. Not a President, a Supreme Court Justice, a trial judge or anybody else. That's what I held. Well, that's subsequently been rejected on remand by the chief judge of our circuit. I don't have the capacity to understand it but he's referred the matter back to reverse and remanded Judge Penn, Chief Judge Penn, on a theory that what the government did in President Nixon's case was a taking and violation of the Fifth Amendment. Judge Penn has the responsibility to determine how much. That came down two or three years ago. I don't know what's happened since. Nothing in the press. So I assume Judge Penn hasn't decided it. I just don't know. I know he's a very busy guy who has all these administrative tasks, the Grand Jury and the other things.

Mr. Singer: The Chief Judge sits or supervises the Grand Jury, is that so?

Judge Richey: Oh, yes. We do not do that. When Judge Sirica was Chief Judge for the period of plus years that he was Chief Judge, they had a tradition when I came here that the Chief took all the pleas pre or immediately after an indictment and he came to me one day shortly after I came here, within a

week or so, and said, "Chuck, I'm tired of sending people to jail, and I don't like to take these pleas. Would you do it for me?" And I said, "Yes." So, in the last twenty-five years, I've sentenced more people than any other judge of the entire court who served in the last twenty-five years. Because for three plus years I did that. Now when George Hart became Chief Judge he took that responsibility back which was fine with me. I remember one month in December of 1971, I got twenty... I mean forty-two pleas in one month. Took forty-two pleas.

Mr. Singer: Because they thought you were a piece of cake?

Judge Richey: Who knows? That was a record though for the Court. Jim Davey then the Clerk came and told me. Plus all the other work I was doing. Ahhhhh, let's see. Another case of tremendous importance... I didn't realize it at the time. Again the NRDC brought an action charging the Nixon White House with political interference with the IRS.

Mr. Singer: This is the Enemies List? That kind of thing?

Judge Richey: That's what it turned out to be. I didn't know it at the time. But obviously the plaintiff's move for discovery. They didn't get it in violation of my orders. And so in…

Mr. Singer: The materials being discovered were in the hands of the White House?

Judge Richey: Justice and IRS. Treasury and IRS. I think they were also in the custody of the Tax Division of Justice. And I'll tell you why if you remind me. And so I imposed Rule 37 sanctions and held the allegations of the complaint true. Great shock waves went all through Washington and the

country I guess. But I... they submitted four documents in camera. I wish I'd Xeroxed them. For historical purposes. And I placed them in the safe. Obviously told somebody else to do it and forgotten about it until the Watergate hearings began. One afternoon I was out in the courtroom here and the late Bert Jenner of Jenner & Block from Chicago was minority counsel and he walked in my courtroom, into the well of the court and sat down. While we were waiting for somebody to be called to the witness stand or something, he stepped up to the lectern and said, "Your Honor, may I address the Court?" I said, "Certainly, Mr. Jenner." J-e-n-n-e-r.

Mr. Singer: Yeah. I know who that is.

Judge Richey: He said, "As you know, I'm Minority Counsel of the House Judiciary Committee and we have reason to believe you have certain documents that we'd like to have." I said, "I do? What are they?" And he described the documents produced for in camera inspection in this case. I said, "Well, Mr. Jenner, I have no idea whether I have them or not. I remember them, but I don't know where they are. But if you will come back tomorrow afternoon, I'll look. But, since they were submitted to me in camera, I can't give them to you unless you get the consent of the attorneys for the Department of Justice." And I thought very quickly and said to myself, "Richey, make sure you get Jenner in contact with the right person in the Department of Justice." And I quickly recalled, I think it was God's grace that did it, the name of a man named Dick Roberts who was a career

person in the Tax Division who had been there during the processing of that case. And I said, Mr. Jenner, you call Dick Roberts in the Tax Division and if you can get his consent, the Committee may have the documents and be back here at 2:00 tomorrow afternoon. Meanwhile, I left the bench and they were in my safe and Roberts gave his consent on the record and those documents were turned over to the House Committee. Then after the hearings were over a year and a half or so, there was fellow named Mezvinsky who was a Democratic Congressman from Iowa and a member of that Impeachment Committee and we sat in our host dining room, oh, maybe two hours, next to each other. I didn't know who he was except his name, what he did. He didn't know what I did. After dinner we went into the living room or parlor as they say, and he said, "By the way, what do you do?"

Mr. Singer: He says to you?

Judge Richey: Yeah. And I said, "I'm a federal judge." "Where?" "Here in Washington." "Oh. What is your name again?" I said, "Charles Richey."

Mr. Singer: [Laughter] The joy went out of his life.

Judge Richey: And I said, "What do you do?" "Well, I'm a member of Congress." "What committee are you on?" "House Judiciary Committee." He said, "Let me tell you something, Sir. You have made a greater impact upon history than you will ever imagine."

Mr. Singer: Umhmmmm.

Judge Richey: He said, "When Jenner went over there to you your court and you made it possible for us to gain access to those documents, you have no idea what was the status of the deliberations at that time." I said, "No, I certainly don't." Whereupon he said to me, "The Southern Democrats and all of the Republicans were solidly lined up against impeachment and impenetrable block until they saw those documents with people's names and what they were trying to do with them." Which was the Enemies List. And it was all done at the behest of John Dean.

Mr. Singer: The creation...

Judge Richey: All of it. He wrote letters and so on. He's dumb. The guy put it in writing. And so he, former Congressman Mezvinsky, went on to explain to me that when the Southern Democrats and the Republicans saw those papers, they realized they had something serious. And he said to me, "Your opinion in *Center for Corporate Responsibility vs. Schultz*, together with those documents, became the basis for the second article of impeachment and it changed the whole complexion of those proceedings and from there on it was easy going."

Mr. Singer: Ummhmmm. That's really interesting.

Judge Richey: That's a fact. That's fact. Go ask him. His wife later became a Congressman a couple of years ago from Philadelphia in a...

Mr. Singer: Yeah. Marjorie Mezvinsky.

Judge Richey: Margolis. Margolies Mezvinsky.

Mr. Singer: Margolies Mezvinsky. Right. My daughter was a great admirer of hers.

My daughter teaches math at Haverford, Pennsylvania and was a great admirer of hers and worked very hard for her to defeat Arlen Specter which she...

Judge Richey: Oh, that's a mistake. That's a mistake. I'll forgive her for it because she's a...

Mr. Singer: [Laughter]

Judge Richey: ...a Singer but, I love Arlen Specter and I don't care what you think or anybody else. I like him and he should have been elected and he was. Maybe he ought to be president.

Mr. Singer: Well…

Judge Richey: Too late now. He's withdrawn.

Mr. Singer: Yeah. He would not have made it, I'm afraid.

Judge Richey: I don't think so, but, nevertheless, he performed a use for public service by getting in the race.

Mr. Singer: I think so. And I think I was very disappointed. Well, I want to put it a different way. You don't... I gather you do not think that his conduct in the Clarence Thomas hearings was... I don't want to say fatal, that's not the right word. You thought it was within the bounds of appropriate conduct...

Judge Richey: I didn't say that at all.

Mr. Singer: OK. Well, then...

Judge Richey: You're attempting to... you're inferring that because of my statement that I liked Arlen Specter and wished him well and so on...

Mr. Singer: Well, and that he should be president.

Judge Richey: Yes. I said that. He would have made a good president. He's got a wonderful background. He made a mistake in that case in his colloquy with the... whoever the witness was and Senator Kennedy. But I forgive him for that. That wasn't perjury. But in the tense moments wherein those statements were made, I can understand it if you want to be objective about it.

Mr. Singer: Do you think... I don't know whether you know him or not, but do you think he regrets his conduct in that...

Judge Richey: Oh, of course, he said so, many times. And his opponent was that woman, Yeakel, who was the daughter...

Mr. Singer: … it was Yeakel he ran against. It was...

Judge Richey: Who is the daughter of a former Byrd machine Democrat from Virginia.

Mr. Singer: I had it wrong.

Judge Richey: You ought to know your political history. You come to your Uncle Chuck and I'll tell you about it!

Mr. Singer: [Laughter] I come to Uncle Chuck, believe me.

Judge Richey: And while she posed as a great liberal and so on and so forth, look at her background. If you want to look at her background objectively, you'll come to the conclusion that, what is the old expression, "a horse never changes its color?"

Mr. Singer: The apple, and in that case it's appropriate. The apple doesn't fall far from the tree.

Judge Richey: That's it. A leopard never changes its color. That's it.

Mr. Singer: Harry Byrd was very much an apple grower and it was...

Judge Richey: That's more appropriate in that case. But I remember her father and I remember seeing her as a youngster being courted around the Capital with her dad and pleasantly pleased with his association with the Southern Democrats and so on and then she goes to Philadelphia and marries wealth and becomes a great do-gooder. Oh, that's all right. I like that but, you know, the sins of one's past come to haunt them.

Mr. Singer: That's for sure. That's the purpose of this whole... [Laughter]

Judge Richey: But you see here, Dan, my liberal friends, when it comes to Specter's candidacy. They thought he should be defeated, as you probably do, because of what he did in that hearing by calling whoever it was, I guess Anita Hill a perjurer...

Mr. Singer: Yeah, he really took Anita...

Judge Richey: Well, of course he did. But don't forget Arlen was an ex-prosecutor and you would say, "Well, therefore, he should have known better" maybe.

Mr. Singer: It’s old habits die hard.

Judge Richey: Exactly. But he said repeatedly throughout the campaign then and when he ran for president. He regretted it. He learned from it. His wife is on the City Council of the City of Philadelphia where the majority of the population is African-American. I don't know much about her ward or district or what but she'd served there with distinction and so has he served in the United States Senate with distinction. And I hope I'm not offending

anybody, but I think we need Jews in the Republican Party and we need Jews in the United States Senate. And he's... it would have been a tragedy to lose him. That's my view.

Mr. Singer: Uhhuh.

Judge Richey: I'm not saying that from a political point of view. Please don't misinterpret me.

Mr. Singer: I understand. Should we turn to those in the books and see whether it refreshes your important cases or cases where...

Mr. Singer: This is Howard Baker from...

Judge Richey: Tennessee. So one night, about 2:30 in the morning, a case had been going along, I couldn't figure it out, I didn't believe the lawyers from either side were telling me all of the facts that I needed to know, and so I got up and went into the library and I had a new program that the court had given me called PCAnywhere.

Mr. Singer: Yup. I have it at home. The firm gives it to...

Judge Richey: And I started to look at that program on my computer and it said "Job Orders" and then I tried to print out some of the faxes I'd sent and quickly discerned it didn't have that material on the top of the page on faxes sent or faxes received. And I obviously knew that that pertained with equal force to e-mail. So I typed an order and faxed it to the office here directing the lawyers to appear before me two days hence. Whereupon I sprung that on them. And that was the decisive moment in the case. Oh, both sides were stunned that I had discovered this.

Mr. Singer: Both sides knew this and were...

Judge Richey: Well, I don't know whether they knew it or not. I can't say that but they sure were doing a good a job, at least the government, of disguising it. And when they found this out, this hard copy business certainly wasn't sufficient for me and I wrote to that effect and was upheld. Now e-mail are, in all government agencies, considered federal records. And there's a book that just came out by a fellow named Blanton. I don't know who he is, praises the decision and traces the history of the case. A former law clerk brought it to me. $14.95. It's entitled *White House E-Mail: The Top Secret Computer Messages the Reagan-Bush White House Tried to Destroy* and it's a fascinating exposé. I knew I was writing for history on that occasion.

Mr. Singer: I was going to ask you...

Judge Richey: I knew I was writing for history when I made that discovery because it involved the highest echelons of the government of the United States and the leader of our nation, but that made no difference to me but it did emphasize the importance of the preservation of archival material. And I guess my knowledge and my interest in political history enabled me to recall quickly Senator Baker's admonition and repeated questioning during the Watergate hearings, "What did you know and when did you know it?" That was a very good question. And I had the same question. I told the lawyers I had the same question and that the public had the same question. Therefore, in my view they were public records within the meaning of the

statute. You look at the statute and you look at the regulations, they talk about electronic messages but no, not for the government. Not for these lawyers in the Federal Programs Branch of the Civil Division. They're an island unto themselves. Impenetrable.

Mr. Singer: Now do you really... it is quite clear because we've had an opportunity to talk of these guys before, you really have a thing about the Federal Program Division.

Judge Richey: If you don't believe me, go over there and talk to the Attorney General, the Assistant... the Deputy Attorney General.

Mr. Singer: Jamie Gorelick.

Judge Richey: Or others. And ask them how much control and influence they've had over that branch. Which has tremendous power and influence over the conduct of federal litigation involving federal questions, constitutional questions. Now, neither one of them, I've never talked to either of them about it, Reno or Gorelick, but I've talked to others in the division. The wife of one of my former clerks. She tells me that division is… you can't do anything about it. I don't know why, but these people haven't been able to...

Mr. Singer: Well, bureaucracy is a funny thing if they have all...

Judge Richey: Well, it proves my theory. If we elect a new president every four years and if we elect a new one instead of retain one, the same... they appoint about thirty-five hundred people and they come in in high level policy positions, thinking they are going to change the world and hopefully they

will. But, the same bureaucrats are going to be there and they're the ones that make the decisions and they get into the option papers for cabinet officers, assistants, principal assistants to the cabinet, the vice president, the president of the United States, and it's almost impossible to overcome.

Mr. Singer: Probably no one feels that more keenly than the people above them. Directly above them.

Judge Richey: Yes. Well. It's a cultural shock to them.

Mr. Singer: Yes.

Judge Richey: I remember a person who was one of the high staff persons in the Carter Administration. I don't remember what title he had in the White House, but one of the very top. And I sat next to him at a dinner where Judge Bazelon was receiving an award over here at the L'Enfant Plaza Hotel. There were about 3,000 people there. And he was lamenting the fact that he was having such a great time, it was exciting, it was thrilling, it was the beginning of the Carter Administration, and I said, "Sir, I am enjoying your pleasure. But let me just tell you as a long-hand in Washington that all of this is going to end and it will probably end sooner than you think. And if you remember that as you go through the process, you may come out a little less disappointed." And that's true.

Mr. Singer: Yes. That's certainly true. It's absolutely true. Without question.

Judge Richey: I knew I was writing for history there too. I hope I don't have to write any more, but I may.

Mr. Singer: These are all cases that you've described in which the federal government

in one form or another is the other party. The papers case is a Federal Records Act case as to whether the NSC is an agency and then there's the SEC case.

Judge Richey: Right.

Mr. Singer: What about in the, what I'll call the private jurisprudence, the private sector cases?

Judge Richey: To some extent, the private sector cases have loomed large on the horizon at the time. But you've got to understand a medical malpractice case or other kinds of diversity cases we in the government courts get don't have the substantial across-the-board impact. They're affecting the individuals concerned and maybe their insurance carriers or something like that. But they don't have the impact the big question of public law has. Therefore, you know you've got to do it well. Be fair and honest, apply the law. But they don't have the cross-the-board impact. One of my first cases involved, my goodness gracious, *NRDC v. Morton* in 1971 where the Interior Department headed then by an old friend of mine, Rogers C. B. Morton, entered into oil and gas leases off the outer continental shelf of Louisiana. Multi, multi, multi, multi-millions of dollars' worth of leases and this public interest law firm, which I later learned Arthur Goldberg was one of the principal benefactors of and they used, would you believe, the Rockefeller Foundation to get a lot of money to finance it.

Mr. Singer: I would believe that.

Judge Richey: Well, I was surprised that he had that influence with the Rockefellers, but

he did.

Mr. Singer: The Rockefellers, well.

Judge Richey: And, sought an injunction to enjoin the sale on the ground that the government had not prepared an Environmental Impact Statement. First time such a claim had been brought. 1971. I issued the injunction from the bench.

Mr. Singer: You had just gotten here

Judge Richey: I know.

Mr. Singer: I didn't think you'd do such a thing.

Judge Richey: From May 'til early…late November, early December. And all hell broke loose because I skimmed through the so-called EIS and it was a couple hundred pages as I recall. And in the middle of it, it discussed the alternatives to this leasing program. And it was triple-spaced. The other was double-spaced or single-spaced. And I said, "For goodness gracious, this doesn't discuss the alternatives adequately." And therefore I issued the injunction. I did not fix a bond that day, blazing headlines all across the country. I remember a judge on the Court of Appeals called me and said, "I just had a call from Louisiana. May I get a copy of your Opinion?" I said, "Certainly, but I want to tell you I relied in part on your Calvert Cliffs decision."

Mr. Singer: Guess that's right.

Judge Richey: And that was the end of that. But then a couple of days later an application was made pursuant to Rule 65 for a bond. And I determined

that since it was a public interest group that brought the action and didn't have public, large resources and public funds, that on that basis I would fix the bond at $100 surety. Now if you want to do some historical research, go look at *NRDC vs. Morton* in 1971 which was affirmed on appeal and see how many cases the courts all over this land have followed that precedent of a $100 bond for a public interest group. I made not only the law about the reasonable alternative doctrine as Leventhal called it, but also about the matter of bond so people like that could bring these cases.

Mr. Singer: Did you sense at the time that this was a very special kind of ruling? Not that it was special but that this would address and open up a new avenue...

Judge Richey: No, no I did not. To be honest with you I had no idea of the impact. I had not dealt with the National Environmental Policy Act before, either as a lawyer or as a judge. This was a case of first impression on both grounds. EIS and the matter of the bond. And I'll tell you a sidelight. It's a true story. The late Chief Judge George Hart used to have a Christmas party down the end of this hall and it was kind of a command performance. Everybody went. I went late on that occasion in 1971, just before Christmas and I was standing over in the corner drinking a Coke. I don't know whether I was talking to anybody or not, but in comes Judge Leventhal and he pointed a finger and asked me to come over to see him. And he said, "Chuck, you know what I've been doing all afternoon?" "No, Harold." "Well, I've been in the ceremonial courtroom listening to a packed house of oil and gas lawyers." "Oh." I immediately said, "Well,

I know the case." And he kinda turned and as he walked away he turned back to me and he says, "All I've got to say to you, Chuck, is that you sure have a lot of courage." Those were his exact words. And walked away. I thought, well that's a telescope that I'm gonna get reversed. But thank God for Harold Leventhal who did the right thing. My friend George McKinnon dissented, but it never went to the Supreme Court and that was the end of it. Now it is generally accepted. That established the reasonable alternative doctrine.

Mr. Singer: Umhummmm.

Judge Richey: And as I say, very importantly, also the matter of bond. How much the bond should be for public interest groups? And I'm proud of that. Very proud of it. If I hadn't been there, it wouldn't have been done, I don't think. Why do you laugh?

Mr. Singer: No. No, what I'm trying to think on is, where does someone get the kind of resources, internal resources, to do that kind of thing. I mean you were on the bench, what, six months at that time?

Judge Richey: Yes.

Mr. Singer: That's pretty gutsy

Judge Richey: That's what Harold Leventhal said. You've got a lot of courage.

Mr. Singer: Right. You're looking right down the barrel at, probably what was then the most powerful array of lawyers in the country.

Judge Richey: No question about it. And do you know what those SOBs did to me? I told you that two days after I issued the injunction, I had the hearing on the

question of bond, was it 1:30 or 2:00 in the afternoon. My courtroom was packed with oil and gas lawyers and their lobbyists. My children went to Sidwell Friends School here in Washington and one of their friends was a little girl whose father happened to be an oil and gas lobbyist for one of the major oil companies. Where did he sit but in the front row. It did not affect my decision but it made me very very angry. I've never spoken to that man since.

Mr. Singer: And you're convinced obviously that this was no accident. It wasn't because he got there first and got...

Judge Richey: Oh, absolutely not. And this summer when I was in San Diego speaking for the American Law Institute, I had dinner with that man's assistant who was a college classmate of mine. And I told him about that experience and do you know what his response was? That sounds like Harold. That sounds like Harold. Who was his boss at the time. So, there are other cases that... you know, I had a criminal case some years ago. There were three defendants, two of whom were members of the D.C. Liquor Board and one was an outside person from Iran who was a...

Mr. Singer: Said made some...

Judge Richey: *Bruton*. B-r-u-t-o-n, based on the *Bruton* case in the Supreme Court of the United States, that were incriminatory of the other defendants made outside of their presence. That was the basis of their request for a severance. And so I inquired, the government opposed the severance motion. I don't know how they could do it in good conscience but they

were very vigorous. I finally asked the question: "How many witnesses will this involve?" Well, the gentleman to whom the defendant made the statement in Atlantic City. Anybody else, other than the defendant himself, if he takes a stand. No. They had told me that this was going to be, if I granted severance, two back-to-back six week trials. It probably would have been two months' trials in the old days when I practiced. And so, I decided there was a rational basis to impanel two juries to hear the same case. And when the young drug addict, to whom the incriminatory statement had been made, I excused one jury, the main jury, as to that individual defendant who heard that statement, and that was the end of it. But when I impaneled two juries, you would have thought that the world had come to an end and that I was just off my rocker. And those two juries, I had all kinds of problems with that. That same defendant picked up a juror on the way to court during the trial and offered her a ride to the courthouse and she accepted. You have no idea of what problems a trial judge faces in the management of a high profile trial. That was just one little example. You know, we had to voir dire her and then I had to voir dire the other members of the jury to see what she'd told them, what they knew about it and so on and so forth. Well, anyhow, it went on. The two juries did not agree as to the two gentlemen who were employees to the D.C. Liquor Board, they were convicted of the federal conspiracy count. The other defendant was acquitted on the federal conspiracy counts but convicted on the D.C. conspiracy counts. That's a matter

peculiar to our court here...

Mr. Singer: Is that a right result... I mean, is that...

Judge Richey: Oh, of course it was a right. It was all right.

Mr. Singer: Yeah.

Judge Richey: It went to the Court of Appeals and based on the fact that I had impaneled two juries, the principle that where one is acquitted of a count requires that all be acquitted who were charged with a conspiracy. There is law to that effect. It used to be the prevailing view. Judge J. Skelly Wright, that great jurist held because of two juries here, that was not fatal and the convictions were upheld.

Mr. Singer: OK. So,...

Judge Richey: I remember being outside the hall here and Judge Gerhard Gesell, bless his soul, was there one evening, it was about 6:30 or 7:00 at night, and I said, "Gerry, want to go in and see how I set up the courtroom?" "I don't want to see it and I don't want to have a darn thing to do with it." He was angry that I had done this. And obviously one of those, many, probably the majority who was very critical. The down side was that the prosecutor had to make two successive opening statements, back to back. Two successive closing arguments back to back. The instructions were the same.

Mr. Singer: Right.

Judge Richey: And it worked like a charm. Had to have some extra marshals, but it worked. Oh, let me think of some other cases that might... I tried Tony

Boyle, the President of United Mine Workers. He was convicted for accepting illegal campaign contributions in the 1968 campaign. Properly convicted. I didn't think I was doing anything special at the time except my job. But I recall some interesting things happening. During the final arguments there was lawyer here named Al Scanlon with Shea & Gardner. Great lawyer. He was making his final argument to the jury and the court reporter named Joan Blair, who had been a court reporter in the Canadian Parliament, got all upset and screamed right out loud in front of God and everybody, you'd hear it a block from where she sat. "I can't stand it anymore!" Whereupon I had to excuse the jury, get another court reporter, it was on a Saturday morning about 11:00. But for the grace of God, I got through the case. Only with the help of the grace of God. Then it came time for sentencing. But between the conviction and the sentencing of Mr. Boyle, I got a suspicion that he might have been secreting his funds in the National Bank of Washington and perhaps transferring his assets to his wife or somebody in his family. He was convicted on thirteen counts.

Mr. Singer: That's plenty.

Judge Richey: So in those days, we didn't have the guidelines and the Sentencing Reform Act of 1984, so we had a lot of discretion. And what I did based on the rules, I'd given him probation on some of those counts but as a special condition of probation, he'd pay a substantial fine of 189 or 88 thousand dollars. Something like that. And I knew that he had it because the FBI

had discerned that he had, in fact, transferred his money to his wife's name between conviction and sentencing. And so under the Criminal Rules at the time, apparently had not been used up to then, according to some of my judicial colleagues, I as a condition of probation made him pay the fine immediately. And I also had the power under the then existing Criminal Rules, to make what was called, "a committed fine." In other words, you must pay the fine today as a condition of your appeal. That was the rule.

Mr. Singer: That's heavy duty.

Judge Richey: And the marshal told me later, that he... I asked Mr. Boyle if he had anything to say before I imposed sentence and he said "No." As he got to cell block, he asked the marshal, "Am I going to jail?" Whereupon the marshal said to him, "Yes, you are. Until you pay the fine as the judge ordered." He got two new lawyers that day and one of them was Plato Cacheris. By 4:30 in the afternoon the fine was paid to the taxpayers of the United States. End of inquiry. And the conviction, as you know, was upheld. That led to his indictment for murder in Philadelphia by a fellow named Sprague who was District Attorney. Same job Senator Specter had.

Mr. Singer: Let me shift gears for just a second. I'd love to hear other cases of note. Are the courts suffering under the constrained financing in any serious way?

Judge Richey: Oh. By the end of this week, if something doesn't happen by the 26th of January, we may be out of business and required to dismiss all the

indictments that violate the Speedy Trial Act.

Mr. Singer: That's…

Judge Richey: Oh, you and the members of the public have no idea of the severe consequences. The Chief Justice, the Director of the Administrative Office have written letters, copies to all of us, to Gingrich, Gephardt, Dole, Daschle, President Clinton, asking to please disengage us from the State Justice, whatever else appropriations bill. I don't know what the response has been but I assume a lack thereof. And I want to tell you something, if this Congress and this President don't get together on this much, this will be the biggest issue to confront the country. When people charged with crime, who run….both parties are now running against crime. When they find out that all these criminals by law are being discharged without a trial, without a prosecution...

Mr. Singer: And without…

Judge Richey: Without any supervision or anything else...

Mr. Singer: Oh, yeah. If there is not going to be a prosecution.

Judge Richey: No. Yeah. Their indictments will be dismissed.

Mr. Singer: Right.

Judge Richey: Period. With prejudice.

Mr. Singer: Yeah. Well, that's...

Judge Richey: What is the reaction of the general public? John Q. Public who knows nothing about this now? It's going to be very substantial. We can't pay jurors. We can't pay the marshal service. Because they are under the

Justice Department appropriations. We can't pay our courthouse personnel. I don't know whether even judges are going to get paid. We've been running since the first shut-down on fees paid by litigants. Filing fees and that sort of thing. Run out the 26th of this month according to the communiqués we've received...

Mr. Singer: Those funds don't go into the general revenue? Covered from the general revenue...

Judge Richey: Do you mean fees for filing fees and things like that?

Mr. Singer: Yeah.

Judge Richey: Oh, they...

Mr. Singer: They stay in the Judiciary where...

Judge Richey: I think they do. They must because that's what they told us they were operating on.

Mr. Singer: I see. Because when some…some agencies can do that. I mean I think the Comptroller of the Currency is supported by the fees they charge to the banks for examinations.

Judge Richey: Yes. There are some agencies. You're correct. I don't know whether the Comptroller...

Mr. Singer: I didn't realize it was...

Judge Richey: There is an article about it in this morning's paper and the controversy between Rubin, the Secretary of the Treasury and the Congress. All the shenanigans he's had to employ and the resources to keep the government operating without legislation to exceed the debt limit. Terrible. Oh, let

me see. Some other civil cases that may have had a substantial non-government. About fifteen years ago, I decided that with the case load enhancing every year, it was high time some new techniques in trial management, case management be employed to reduce the time that a judge was on the bench. Or it took for a given trial. So one of the techniques I developed was to require both sides to prepare on behalf of the witnesses within their control a written narrative statement of their direct testimony. In 1983 I wrote an article which was published in the *Georgetown Law Journal* and I've used it ever since in cases against the government under the Federal Tort Claims Act, in the private sector and in each instance there has been great resistance by the lawyers but after they have gone through it, there has never been a dissent that it hasn't worked beautifully and has actually enhanced the cause of justice. The principle objection is, this destroys the spontaneity of the Q & A Question and Answer form of lawyer to witness and thus to the jury to enable them to better judge credibility, etc. etc. That's not true.

Mr. Singer: How do you feel about that?

Judge Richey: I know it from empirical data. I've got about seventy-five juror questionnaires which I myself designed proving it. Plus the lawyers who've gone through it. And it makes the trials much more efficient, it enables the lawyers and their witnesses to put their best foot forward in a succinct narrative form, conversational way. And you never tried a case, Dan Singer, that you didn't prepare your witnesses. And if you're doing

that as thoroughly and I know you would as a competent lawyer or your partner Eisenberg...

Mr. Singer: He knows all about that.

Judge Richey: You would have done what I did. Namely prepare your witnesses. And I learned this from regulatory proceedings in my private practice. They work like a charm. I knew in advance what the witness was going to say. I could read fifty pages in probably fifteen minutes and so it was easy. That's been something I've done. That's never been controverted on appeal yet. The Ninth Circuit has approved of the practice. Bill Schwartz, the former director of the Federal Judicial Center wrote a year ago when I got my law school's medal, the sixth person in the 103-odd years of its history to receive it, wrote a letter and said Judge Richey has inaugurated many practices since he became a judge that were considered revolutionary at the time but are now commonly accepted. If you read the *Manual on Complex Litigation, Third Edition,* you'll see the reference to that practice noted with approval.

Mr. Singer: We adopted it in a major arbitration, you'll be pleased to know.

Judge Richey: Oh, God bless you. Good.

Mr. Singer: There were 57 or 59 arbitral days that case and then it would have been 800 if it hadn't been for the use of written testimony.

Judge Richey: Surely. Nobody was impaired. This brought full cross examination. You let the witnesses supplement their answers, correct their narrative statement if there is something wrong with it, right in the presence of the

jury.

Mr. Singer: They don't like to do that, but that's...

Judge Richey: Well they do it often. Now I did have one instance on the negative side where a plaintiff in an employment discrimination case, whose lawyers didn't like to do this, wrote a narrative statement that went way beyond the length necessary to accomplish her objective and it droned on and on and on and on. And I couldn't figure out a way to cut it off without jeopardizing the fairness of the trial. But that's the only instance where a lawyer has taken advantage of me and they weren't the most ethical lawyers in the world anyhow. They thought they were doing the right thing, but they were...

Mr. Singer: These were plaintiffs' counsel.

Judge Richey: Yes. Another innovation. In a bench trial, civil bench trial requiring lawyers to exchange proposed findings of fact seven days in advance of trial. When they get their opponents', they underline that which they dispute.

Mr. Singer: Yeah.

Judge Richey: Put in parentheses that which they admit. Leave blank that which they admit but deem irrelevant.

Mr. Singer: I'm laughing because in the...

Judge Richey: Why, did I do this to you or you or did you appear before me?

Mr. Singer: No. No. But... I'm involved, and I think I mentioned to you in the mediation, where I am Special Mediation Counsel for the District of

Columbia. It's a class action pending before one of your colleagues who has also adopted that process.

Judge Richey: One of my colleagues has adopted it?

Mr. Singer: I believe so.

Judge Richey: Good.

Mr. Singer: And my co-counsel who was a full-time employee of the...

Judge Richey: Corporation Counsel.

Mr. Singer: Corporation Counsel as well as the lawyers on the other side when they were obviously struggling to try to settle this case and I think one of the reasons is that they find the process of pre-trial preparation somewhat daunting.

Judge Richey: They do.

Mr. Singer: ... on both sides. It's not a bad result. I'm not suggesting...

Judge Richey: No. It isn't.

Mr. Singer: But it is, in both cases, driving the parties together within the limits of what's really possible by way of settlement. And it's...

Judge Richey: Well, even if it doesn't result in a settlement, let me tell you what it does. You might not realize this off the top of your head. When I first came to the court with this gargantuan two-judge case load that they foisted upon me, I knew I was desperate, I had to devise ways and means quickly and this underlining thing was one of the first I did. But I issued an order directing the parties to meet and confer *in person* with their adversaries before every motion. Not by telephone. Do you know what? In 1993

that practice was put in the Federal Rules of Civil Procedure and it's in most of the local rules throughout the country under the Civil Justice Reform Act, otherwise known as the Biden Bill. B-i-d-e-n. That's another innovation.

Mr. Singer: That must have made you feel pretty good.

Judge Richey: Oh. It's all in a day's work.

Mr. Singer: [Laughter] That's something. It really makes you feel good and it should. It should make you feel good.

Judge Richey: I have another theory that I've done. If you turn around there, I don't know, there must be twenty books, the red books up in the upper right-hand corner. Those are my published opinions up to a couple years ago. There are many that don't have this practice, but if I have the time, I insist on doing it. I write a legal opinion like a lawyer should write a brief with headnotes that don't say "discussion" "facts" "background". It proceeds from A to Z with a headnote of what follows so that the lazy reader doesn't have to read anything but the headnotes if he or she doesn't have time. And most people don't have time to read everything that's coming out. Particularly in 1996. And I never will forget when I first came here in 1971, that's the way I did my first or second opinion and a law clerk came to be and said, "Judge," can you imagine? "This isn't the way you write legal opinions."

Mr. Singer: This is what the law clerk is telling you.

Judge Richey: Yup. I said, "You know...

Mr. Singer: Is his picture or her picture out there?

Judge Richey: Yes. It is. I'll tell you who it is. He... I said you know, I have a personal friend whose name is Justice Byron White of the Supreme Court of the United States and he tells me that he will let his law clerks argue with him, criticize him, until he signs off on the opinion. And from that point forward, however, "You're my boy." That's an exact quote.

Mr. Singer: Umhumm.

Judge Richey: And so I said to this young man. I don't mind your suggestion, but this is my opinion, not yours, and until you get an Article III commission on the wall with your name on it, it's going to be my way of doing it.

Mr. Singer: Right.

Judge Richey: More and more and more; came up last week here in my chambers. Judges are doing that. Not like they should. Not as much as I do, but every important opinion has got headnotes in it. I don't whether you've looked at enough of them, but you'll see..

Mr. Singer: I've read *Armstrong*...

Judge Richey: Well, I think...

Mr. Singer: And I didn't have any trouble following it at all...

Judge Richey: I think you told me or asked me one time how do you make things complicated so simple, or something like that.

Mr. Singer: Well, what I asked you was whether the case was really as simple as you made it.

Judge Richey: It was to me.

Mr. Singer: And you said yes.

Judge Richey: But it was a struggle to get there. But you know what Charles Evans Hughes, the former Chief Justice of the United States once said? "There was no problem of human endeavor so complicated that the lowest common denominator of our society can't understand." Therefore, the jury system, for all kinds of complex cases of any complexity, science, physics, mathematics, you name it. A juror, a jury can be made to understand it.

Mr. Singer: Last time we were together, I think one of your clerks stopped by. One of your former clerks stopped by or you were on the phone with him and the two of you shared your upset about David Tatel's opinion in the ABC case. Something about dealing with default judgments. No? Maybe I had it wrong.

Judge Richey: No. Uhhhh.

Mr. Singer: And I went back and I read the case and I said why was he so upset?

Judge Richey: Well, David Tatel is one of our best judges.

Mr. Singer: Absolutely. And you and I have talked about David.

Judge Richey: Well, I love him.

Mr. Singer: Absolutely. But it's a case involving ABC and I think the production or failure...it involved...

Judge Richey: Was it one of my cases?

Mr. Singer: No. No. No. It was a case that came from the court...

Judge Richey: OK. I was just discussing it with this law clerk.

Mr. Singer: Right.

Judge Richey: What's wrong with it? What did I say was wrong with it? Or do you have any idea?

Mr. Singer: I didn't really know because I had no baseline reference.

Judge Richey: Uhhuuh.

Mr. Singer: It was a question of the standards to be applied in upsetting a district court's dismissal or entry of a default judgment.

Judge Richey: Well, I wish I could help you, but...

Mr. Singer: OK. I may have had it wrong.

Judge Richey: I know nothing yet that I can possibly criticize that David Tatel has written. On the contrary.

Mr. Singer: Besides, I thought this was, you know, a pretty persuasive opinion

Judge Richey: I'm sure it is. I don't know. Everything that I've read from David Tatel so far is right on the button.

Mr. Singer: Case in the court with Shepherd against ABC.

Judge Richey: I have no idea. Let me see that a minute. Who was the...

Mr. Singer: I don't know who the district judge was.

Judge Richey: He's got some pretty powerful lawyers there. On both sides.

Mr. Singer: Well, that's the American Broadcasting Company and I think somebody...

Judge Richey: Yeah. Wait a minute. I bet you that's Judge Lamberth's case. Just a minute.

Mr. Singer: The District Court was reversed.

Judge Richey: Oh. There is some ground for criticism in this opinion. Because David

Tatel pulled out from nowhere, a standard of clear and convincing evidence as distinguished from a mere preponderance which he held to be insufficient.

Mr. Singer: Right.

Judge Richey: There is no…I take back what I said. Not. I don't want to be critical of Judge Tatel because he's a marvelous judge and a marvelous human being. But the clear and convincing evidence standard that he used in part.

Mr. Singer: Yes.

Judge Richey: ... to reach his result is wrong.

Mr. Singer: I see. [Laughter]

Judge Richey: But there is no authority for it. That's what you must have heard. And that's right. Read it. Go back. Listen. You owe me a luncheon if you can't get David Eisenberg to say that it's...

Mr. Singer: Milton.

Judge Richey: Milton Eisenberg to say that it's wrong also.

Mr. Singer: OK.

Judge Richey: But he's not to be foretold.

Mr. Singer: I won't chill the bidding...

Judge Richey: I just... you ask... ask Sargent Shriver, your other partner or...

Mr. Singer: You don't ask Sargent Shriver law questions.

Judge Richey: Well, maybe you're right. But you ask some of the litigators in your office. I know. Where did David Tatel get this clear and convincing standard? That's wrong. It's been discussed a lot. I know the case

now. Otherwise, it's a good opinion.

Mr. Singer: [Laughter] OK.

Judge Richey: And, Dan, look. That doesn't make me say I don't respect David Tatel.

Mr. Singer: No. No. And it certainly wasn't what I... but you and your former clerk...

Judge Richey: Oh. It probably was Jeff Liss.

Mr. Singer: I think it was Jeff Liss. He talked with considerable energy about this and I think, gee, I really want to find out what he said that sent Richey over the edge on this.

Judge Richey: Well. It not only sent Richey, but you don't know it but every trial judge that I've ever talked to about it doesn't understand it.

Mr. Singer: Well, I mean... it's out of the world...

Judge Richey: And circuit judges don't understand it.

Mr. Singer: Right. And this is a point you've made many, many times about the disconnect between the real world and what the circuit judges see. We talked about this in... we had a conversation about how do you react when you are reversed. And...

Judge Richey: I react more harshly when my colleagues are reversed. Not because it's a colleague but when they're wrong, just like this.

Mr. Singer: Yeah.

Judge Richey: You won't find any real scholarly basis for that standard.

Mr. Singer: But it seems that frequently it's because of your belief that there's a disconnect between the perception of what really goes on in a trial and

what the Court of Appeals...

Judge Richey: Oh, absolutely. There is a disconnect.

Mr. Singer: Yeah.

Judge Richey: There is a disconnect. You know...

Mr. Singer: That's... I think there will be people who are interested in that.

Judge Richey: Well, let me tell you. The Fourth Circuit requires every new district judge to spend, I think six weeks, before they begin to sit on the Court of Appeals in Richmond in the Fourth Circuit.

Mr. Singer: You'd have it the other way around.

Judge Richey: No question. And we did. Before I came here, the year before I came here, four judges of the Court of Appeals, Warren Burger, later Chief Justice; Harold J. Leventhal, Circuit Judge; two others. Four of them were assigned to sit during the three months of their, four months, or whatever it was of the summer recess. Only one lasted the four months.

Mr. Singer: Sit as district judges.

Judge Richey: Sit as district judges. Trying cases, and that was Warren Burger.

Mr. Singer: He was the only one left?

Judge Richey: Only one of the four. Two of them quit at the end of the first day. Never showed up again. Leventhal tried one case and quit. I don't know what happened to the fourth one.

Mr. Singer: That's interesting.

Judge Richey: We've never been able to get them to come back. Now, Silberman did try a case with Hogan... two cases with Hogan's help. Pat Wald has promised

me since 1978 when she came here -- no way. But David Tatel, God bless him, has said to me, "Chuck, I want to sit with you when you try your first drug case." Well, do you know what? I haven't had a drug case since David Tatel came here.

Mr. Singer: Uh huh. But you have it in mind. You just have to tell him.

Judge Richey: I sure do. And he will come.

Mr. Singer: Sure.

Judge Richey: I know he will come. Right now, the last six months, most of the criminal cases are resulting in pleas.

Mr. Singer: Isn't that interesting?

Judge Richey: Very simple. Do you know why? Not complicated.

Mr. Singer: They are pleading to misdemeanors?

Judge Richey: No sir. Felonies. Took one today for a ten-year felony. Gun offense. He's a criminal history category five because of his long record of other guns, robberies, this and that.

Mr. Singer: Yeah. But how does... how do "three strikes" impact on that?

Judge Richey: Well, that isn't law yet. That's just the President's proposal. That's a political statement.

Mr. Singer: Ahhh. It's only... but it is the law in California.

Judge Richey: It is the law in some of the states. They've picked up on what the President said in his State of the Union message.

Mr. Singer: OK fine. Now I'm fine. I mean, I think it's terrible policy but...

Judge Richey: Oh, of course you do. I hope.

Mr. Singer: I mean, its impact in California is they may never try a civil case again because of the... everybody... nobody's going to plead guilty.

Judge Richey: Well, the reason they're pleading guilty now is because they're facing these mandatory minimum sentences prescribed by Congress, independent of the Sentencing Commission guidelines. There's only one way out, to turn informer for the government.

Mr. Singer: I see.

Judge Richey: And then get, what we call a 3553 (e) and a 5-K-1 letter from the government which allows us to depart downward even to probation. And there's a new statute. The Congress finally got a little wisdom and passed for first-time offenders, what we call a safe harbor provision that gives us some discretion. They added 3553 (f), small f as in frank, and that allows us to depart. So, we're getting more pleas because of the escape valve due to cooperation. But that's terribly dangerous for the offender. To go out and squeal on somebody and then get shot or be a marked person for the rest of their lives.

Mr. Singer: Right.

Judge Richey: But that's the only alternative they've got because we abolish parole in 1984 with a Sentencing Reform Act and the Comprehensive Crime Control Act which should never have been passed and wouldn't have but for Ted Kennedy's joining with Strom Thurman and asking for it. But, do you see, the Sentencing Guidelines were enacted in the first go-around without reference to mandatory minimum sentences. Then the Congress pulled,

due to political reasons, and enacted this whole host of mandatory minimum sentences and the guidelines had to be changed to take that into account. Now if you talk to most judges, most criminal defense lawyers, they'll tell you the guidelines are awful and very unfair. I'm not one of those judges that is a vigorous advocate against the guidelines.

Mr. Singer: UhHuhh.

Judge Richey: I feel like a regulatory agency. I'm bound by the rules promulgated by higher authority but the question is, how do you apply them to achieve a just result? And if you are creative, interested in justice as mandated by Rule 2 of the Criminal Rules, highest quality of justice, least amount of time, lowest possible cost, deterrence and punishment and rehabilitation, even though the statute took rehabilitation out in 1984. There are all kinds of ways to achieve justice. Today, this day, January 23, 1996, I had a conference with the prosecutor and the defendant and they came in and told me the United States Attorney's Guideline Committee had rejected an offer of cooperation and a departure. And I said to the lawyers, federal public defender, a wonderful young woman and this young prosecutor, I said, "Let me tell you something. Read Chapter 3 of the Guidelines." "What do you mean?" "Read Chapter 3," I said, "of the Guidelines and look at the section dealing with minimal role in the offense which authorizes my departure downward by three offense levels." Well, to make a long story short, they wanted to plead to a five-year sentence. With my creativity, it came out with a 63-month sentence. Three months

as against the 10-year maximum. And you know what happened? The defendant took it. 'Cuz he was guilty.

Mr. Singer: No.

Judge Richey: And they were just so happy that this old judge was able to do their thinking for them. That happened this afternoon.

Mr. Singer: And you weren't embarrassed at all by it either.

Judge Richey: Naw. I said it in such a way that it wasn't intended to embarrass them.

Mr. Singer: That's good.

Judge Richey: I didn't mean to do that.

Mr. Singer: Let me ask you again. We've been at this now for a bit. We got a late start and we still haven't gotten to those wonderful...

Judge Richey: Well, you're.....

Mr. Singer: But I can't hold you and I can't hold myself long enough to begin on that so I...

Judge Richey: I haven't looked at it since they were created.

Mr. Singer: Right. And my question to you really is….We agreed kind of last time that we would have one more session in which you…..

Judge Richey: I thought it was two, but I don't know.

Mr. Singer: OK. If it's two, then we should try to figure out when the next one is and start right with those.

Judge Richey: All right. If you want to, that's perfectly all right.

Mr. Singer: I mean, this is too good a resource. You're too good a subject for us not to take advantage of that kind of resource. And one might say that those

are going to survive in a sense, forever. And anybody can go scrambling, but what I'm interested in is in your reactions, not having looked at them for years.

Judge Richey: That's correct.

Mr. Singer: In the creation to go back fifteen or twenty years and see...