ORAL HISTORY OF
ALAN ROSENTHAL

Third Interview – April 20, 2011

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Alan Rosenthal and the interviewer is Judy Feigin. The interview took place at Alan Rosenthal's apartment in King Farm, Rockville, Maryland, on Wednesday, April 20, 2011. This is the third interview.

MS. FEIGIN: Good morning.

MR. ROSENTHAL: Good morning, Judy.

MS. FEIGIN: So, Alan, when we left off, you were in the midst of your clerkship.

MR. ROSENTHAL: Yes, well there are just a few additional items that might be of possible interest. The first is that in my time all of the judges were white males, all of the law clerks were white males, all of the secretaries were white females, and all of what they called the messengers – these were individuals who served the judges in rather a menial capacity – were African-Americans, so that in each class, everybody was of the same gender and race.

The messenger that Judge Edgerton, for whom I worked had, was a man in his middle 60s named William, and William was quite diligent at doing the various chores that were assigned to him, such as making certain that the water pitchers were filled at the beginning of the day, but he wasn't terribly bright. One of the things that he did was to declare on his income tax return an aunt who in point of fact was not a dependent, and

the Internal Revenue Service at some point came up with this fact and summoned William to their offices to have a chat about it. William returned and he was in a state of terror. Apparently the agent or whoever it was that interviewed him told him that if he did not come up immediately with the total amount that was owing in terms of taxes, penalties, interest, and all of that, he was going to be crushing rock in a federal penitentiary for some years. He was absolutely terrified. Well, when he told this to the judge, the judge, who was very fond of William, was not too pleased with this kind of treatment. I was delegated to go over to the Revenue Service and to make it clear that they were to immediately correct the erroneous impression that William had as to what could be done to him. My first words when I got over to talk to the agent were, "I am the law clerk to Circuit Judge Henry W. Edgerton, and I'm here at his direction." Needless to say, in very short order it was agreed that William would be told that there was no threat of imprisonment and that arrangements would be made to have him repay the money that he owed the Revenue Service in very small increments. But that I think was a stratagem that the IRS employed quite frequently then in dealing with people like William who were essentially ignorant.

Another aspect of my clerkship that might be of interest is that I've always thought, and still think, that the value of a clerkship as an educational experience is totally dependent upon the quality of the judge

for whom you're clerking and the manner in which the judge uses his clerk. That brings to mind the story of Judge Wilbur K. Miller, one of the D.C. Circuit judges at the time. Judge Miller came from Kentucky, and in selecting his clerks, he had only one requirement, well actually two: that they come from Kentucky and that they be very amiable, they be very good companions. And this was important because Judge Miller did not use his clerk for anything apart from companionship.

For eleven months of my clerkship, the District of Columbia Circuit was still in a building on the corner of 5th and E Streets, the building which today I think is the Court of Military Appeals. It was only the Court of Appeals in that building and indeed the building was not large enough to accommodate nine judges. So the junior judges at that point had their chambers elsewhere. Of course, they would come to the building at 5th and E for oral arguments. In September, the courthouse that's now occupied by both the Court of Appeals and the District Court, at 3rd and John Marshall Place or something like that, was completed, so the Court of Appeals moved into it. In any event, in the old building at 5th and E, the judges' chambers consisted of, among other things, a very large room for the judge and a considerably smaller room but nonetheless spacious enough, for the law clerk. In Judge Miller's chambers, the judge occupied the law clerk room, and the law clerk occupied the much more spacious room that was allotted to the judge [laughter]. Why he did that I don't

know, but the story was that the judge preferred to work in somewhat more confined quarters. But here was the law clerk sitting in this enormous room doing essentially nothing, and I would have to say that I do not think in the year that I was there I saw the Miller clerk in the library even once. Now one of the things that he did do was in the summertime during the baseball season. We had a daily pool and the clerk, since he had nothing else to do with his time, was assigned to run the pool, which he did quite efficiently. At the end of his year, my recollection is that the clerk went back to Kentucky, I think he went to Frankfurt, to work as an Assistant Attorney General of Kentucky, and I'm sure that they were impressed down there with the fact that he had been a law clerk for a judge on the federal Court of Appeals for a year [laughter], and what they didn't know is that in terms of it being an educational experience, it was nothing at all.

MS. FEIGIN: Just to remind everybody, what was the year?

MR. ROSENTHAL: I started the clerkship in the fall of 1951 and concluded the clerkship at the end of September of 1952. Now, as I mentioned before, in my year there were no women or African-American law clerks. To my knowledge, in the District of Columbia Circuit at least, there had been no women or African-American clerks before my time. After my time, two years after I concluded my clerkship, in other words, beginning in the fall of 1953, Judge Edgerton took a woman clerk. I think she was the first one, and he

kept her for five years, and indeed she only gave up the clerkship when she had a child. As a side point, this woman now resides in the same retirement community in which I live. And then a few years thereafter the same judge, Henry Edgerton, took what I think was the first African-American law clerk employed in that court.

You have to remember that Washington at that time was a pretty southern community, and it was during the period of, I think it was 1950-1951, that the District of Columbia Circuit rendered a decision in what was known as the *Thompson Restaurant* case which dusted off a D.C. law going back to the 1870s, I think, which had been essentially ignored and which precluded racial discrimination in places of public accommodations such as restaurants. And indeed until that decision came down, most of the restaurants in the District of Columbia were segregated. In fact, when I lived here in the 1940s, the only restaurants in and about D.C. that were integrated were those at Union Station and the Washington National Airport. The *Thompson Restaurant* case did open up things. I have to say that when William, the judge's messenger, heard about this decision, he was most disapproving. He was most disapproving because in his view, Negroes should not go where they're not wanted. He was an African-American definitely of the old school. So those are essentially my additional recollections of the clerkship which concluded for me at the end of September.

I'll add one more thing. In those days, the court did not sit in the months of July, August, or September, at all. The judges were required to be "on call" for one of those three months. The other two months they could do what they pleased, and in point of fact Henry Edgerton, my judge, left town for two months of the three, and it left me with relatively little to do, and even on the month that he was on call, that just meant that if there was some kind of emergency matter that came before the court he had to be available to sit on it. I would have to say that the dockets of the courts of appeals in those days were a lot slimmer than today so that the judges were able to indulge in that kind of vacation schedule.

MS. FEIGIN: Do you think that was also partly because it was pre-air conditioning era and so it was uncomfortable?

MR. ROSENTHAL: I don't know whether that was a factor. Certainly it was plenty hot in D.C. Although my recollection is, now that you raise the matter, that we were air conditioned, so I don't think that could have been it. I think it was simply that their docket was such that this kind of vacation schedule was permissible, which I doubt it would be today. The Supreme Court justices still go off for a couple months [laughter], but as I understand it, their docket is not that weighty these days either.

MS. FEIGIN: Less than it used to be. By the way, just to make this clear, I assume when you say there were no blacks and there were no women, that would include any other minorities, no Asians, no Hispanics, others?

MR. ROSENTHAL: That's right. I don't think the Hispanics were that much of a factor in the population of the District of Columbia as Hispanics are today.

MS. FEIGIN: You finished your clerkship. When did you take the bar exam?

MR. ROSENTHAL: I took the bar exam in New York in July of 1951. This was early July. This was, incidentally, before the multistate examination. In those days, the New York bar was in two parts over two days. The first part dealt with substantive issues, seven hours I think, and the following day there were five hours devoted to procedural matters and evidence. Now, I took the New York bar even though I was headed in the fall to a clerkship down here because it was my intention to return to New York at the end of the clerkship. In other words, when I applied for Judge Edgerton's clerkship, it was not because of the location of the clerkship, it was because of the judge. That determination was sufficiently firm that when I became engaged to Helen in the spring of 1951, and we decided to get married before I started the clerkship, she transferred from Yale not to a District of Columbia law school but to Columbia, and so that's where she started in the fall. We had at that point a commuter marriage, and she was in New York attending Columbia, and I was in D.C. on my clerkship. Well I got into the clerkship I think about a month, we're now talking about October of 1951, when I decided that I really didn't want to return to New York after all, that what I wanted to do was to both stay in Washington and if possible get a job in the Department of Justice, and my

eye was particularly on what was then known as the Supreme Court Section of the then Claims Division. The Supreme Court designation was a misnomer because while the lawyers in that section did indeed draft pleadings for filing in the Supreme Court, the vast majority of its work was in connection with the Courts of Appeals.

MS. FEIGIN: Before we get to DOJ, let me ask you one question about the bar exam. In those days, were there these big bar review courses? How did people prepare for the bar?

MR. ROSENTHAL: There were indeed bar review courses, and the one in New York City that I took, and virtually all of my classmates who were taking the New York bar took, might have been under the auspices of the Practicing Law Institute or some like organization. The class met at the then Stuyvesant High school in downtown Manhattan five nights a week, Monday through Friday, and again on Saturday morning. There were a couple of enterprising gentlemen who decided that they could make some money by having – this was the prior year – a professional stenographer attend the cram course and take verbatim notes on the lectures. What they then did was had the notes transcribed, mimeographed, and in my year, they were sold to us. And every one, I think, of my classmates joined me in purchasing them. Because this way, we didn't need to sit there taking notes. I could put the mimeograph thing before me, and if there was any kind of change, I would just make a note. The advantage of this was that I

did not get writer's cramp. Well, the existence of these notes came to the attention of the man who ran the cram course, and he accosted the entrepreneurs who were still law students themselves and told them that, if they did not, not only cease and desist but offer to give everybody their money back, he would personally see to it that they were never admitted to the bar, and he made the point that this was a violation of copyright, et cetera, etc. And he reported all of this to us and he took the high road and he said this was being done for our benefit because there had been some changes in the law and we would not be aware of them, because we were relying on these notes from the prior year. Well, of course, that was nonsense because what we did was, again, we had the purchased material before us as the lecture proceeded, and if there was some kind of change, we would note it. In any event, that brought this to a screeching halt while under compulsion the entrepreneurs offered to return our money. I can say that to my knowledge nobody asked them to do that. As far as we were concerned we had gotten what had been promised and what was of considerable value. And the other thing was, we didn't have to study from a lot of scrawled notes taken in class. We had this very nice printed verbatim account of the lectures, even though from the prior year. Indeed, it wasn't very much changed from year to year. Most of those transcribed lecture notes from the prior year still were totally valid.

MS. FEIGIN: Do you remember how you learned you passed the bar? In my day it was in the newspaper.

MR. ROSENTHAL: As it happened, the results were coming out a few days after Helen and I were married on the 8th of September of 1951, and I was aware of that fact. We were going to be on our honeymoon so I told my father only to contact me if I passed [laughter]. Well I knew that he would contact me either way. I got a phone call from him that it had appeared in *The New York Times* and, yes, that was the way he learned about it and then he passed it on to me.

Now the one thing about the New York bar was, as I say, it was in two parts and you could pass one and flunk the other, and in that circumstance, you only had to take over the part that you had failed. Happily, I did get by both parts.

The New York University Law School, located then, as now, at Washington Square, but in a different building, was fairly close to the Stuyvesant High School, which was where the bar review course was taking place. The NYU Law School made its library available to all persons who were studying for the bar and taking the cram course, whether or not they had gone to NYU, and so I had gone down every morning about 9:00 and spent the day in that library and then went on around 4:30, 5:00 to Stuyvesant for the cram course. Now a number of the students that were doing the same thing that I was doing, utilizing the

NYU library, were graduates of what were euphemistically referred to as three-year cram courses [laughter]. I won't identify the schools, but I think you probably have some idea what I have in mind. Well, I would take a 10-minute break to go out into the lobby for a cigarette – I was still a smoker in those days – and out there would be students from these schools arguing over whether it was Section 126 of the New York Practice Act or Section 294 that covered this, that, or the other thing, and I must say I found that a little intimidating, given the fact that the Yale Law School did not have a course specifically devoted to the New York Practice Act. But in any case, the bar exam was something that one had to get through.

They gave it in New York City, in Manhattan, in three locations, and one of them was a big auditorium, un-air conditioned. The second one was in a much smaller facility, also un-air conditioned, and the third was in a nice air conditioned building. You were arbitrarily assigned to one or another of the three locations, and I got the intermediate one, but I felt that they didn't provide an even playing field [laughter]. In July it was very hot.

MS. FEIGIN: So getting back to your interest in the Supreme Court Section. How had you learned about the section?

MR. ROSENTHAL: I assume I learned about it at an early stage in my clerkship. There were lawyers that were arguing appeals before the District of Columbia Circuit

that came out of that Supreme Court Section, Claims Division. I imagine that's the way I learned about it. In any case, I went over in the late fall, maybe early winter, to talk to the then chief of the section, a man named Paul Sweeney, and subsequently he indicated to me that he had a place for me in the section, subject, of course, to my passing the security/loyalty investigation.

MS. FEIGIN: And we're in the McCarthy era now?

MR. ROSENTHAL: This was definitely the McCarthy era, and in any case, things went on and I submitted whatever I was required to submit in connection with the security/loyalty investigation, and I thought everything was proceeding smoothly. I had a reporting date of I think it was October 1, 1952, my clerkship officially terminating on September 30.

MS. FEIGIN: No break?

MR. ROSENTHAL: No break, although I had a considerable break during the summer because, as I indicated, the judge had a considerable amount of time off and there wasn't that much for me to do, so I cannot say that I was going to move from the one position to the other in a state of total exhaustion. In any case, I'm assuming everything is in order when, on or about September 10, maybe three weeks before I'm due to report for duty, I receive a phone call from Mr. Sweeney who tells me that the Assistant Attorney General of the Division, a man named Holmes Baldridge, wanted to see me. "What about?" Well he didn't know, or more accurately he

wouldn't tell me because he probably did know.

In any case, at the appointed date and time, I appear in the office of Assistant Attorney General Baldridge of the then Claims Division. In his office with him is a gentleman who he introduces as on the staff of the Deputy Attorney General. "Well," says, Mr. Baldridge, "I'm afraid, Mr. Rosenthal, that there have been some questions that have arisen in the course of your security investigation." I said, "Okay, what might they be?" "Well," he said, "I think I'll allow Mr. X, representative from the Deputy Attorney General's Office, to go into that matter." I don't recall this man's name. In any event, he said, "Well for one thing, we have discovered that in 1940 your father was a member of the National Citizens Political Action Committee in which, it is our understanding, there were Communists." I said, "Well, I can assure you that, while that well may have been true, my father certainly was not a Communist; indeed, he was a capitalist." "Well we're not saying that he was a Communist, but there were Communists in that organization and that gives us some pause." Then the gentleman goes on, "In 1942 your father was a member of" – and he identified some other organization, the name of which currently escapes me, – "it too had Communists in it and that is also a matter of concern to us." I was dumbfounded. I said, "Well, gentlemen, for one thing, I thought that I am the applicant for this position, not my father. For a second, I find this very strange because in 1945, as a member of the

United States Army Air Force, I had a top secret clearance that allowed me to attend the cryptographic technicians school."

At this point the gentleman from the Deputy Attorney General's Office starts leafing through this stack of papers before him which I assumed consisted of the FBI report on the investigation, and he's looking through these papers in stony silence. After about a minute, I said, "Do I assume correctly that that fact is not to be found in any of the papers that you have before you?" A long pause. He didn't say a thing. I said, "I assume that the answer to that question is there is nothing in those papers that disclosed the top secret clearance that I had obtained several years after my father's membership in these organizations that you find troublesome." I then stood up and said, "Gentleman, this interview is terminated. I'm sorry but I'm not going to sit here any longer and listen to this kind of questioning." Obviously the FBI was much more interested in what my father belonged to than in what I had done and what I had obtained by way of a security clearance.

I walked out, and I went back to the Section Chief's office. I said, "Well Mr. Sweeney, this is what happened." I explained it to him and I said obviously we are not going to be colleagues, and I left the building. I went back and I reported this to Judge Edgerton who was livid. He called in Judge Bazelon with whom he was very close and asked me to tell Judge Bazelon what had transpired, which I did, and Judge Bazelon said

he'd be very happy to intervene. I said, "No I don't want you to. I don't want you to be involved in this at all. We'll just see how it plays out." Two days later, I get a phone call from Paul Sweeney, "You've been cleared, so we'll expect to see you here on October first."

I suspect what happened is they were so concerned that if they turned me down that I would go public with this whole thing about what was in the FBI report and what was not, and it was so embarrassing that they decided that the better course was simply to clear me. When I tell this story to people who didn't live at the time, at least not as adults, and thus were not cognizant of the impact of Joseph McCarthy, they just don't believe something like this could happen. But it did. And one of the things that was interesting was what Sweeney told me later. He said, "You know there have been several people the last couple of years that I have wanted to take on here and I've been told, 'no dice,' that they just haven't passed their security test. And I've never been given an explanation beyond that. Nor have any of them been given, as you were, the opportunity to meet with the Assistant Attorney General and the Deputy Attorney General's representative." I found this experience incredible.

MS. FEIGIN: How do you explain your being invited to meet with them?

MR. ROSENTHAL: I don't know. It may be that they thought – again, this was my father that they were pinpointing, not me, and again, they were not claiming that he

actually was a Communist, a claim which would have been farcical. They might have felt that in that circumstance they had to bring me in. I don't know. But the other thing I think that should be kept in mind is we're not talking here about a Republican administration. These were the dying days of the Truman administration. That Assistant Attorney General was a Democrat; the guy coming from the Deputy Attorney General's Office I think was probably political and therefore also was a Democrat, so this couldn't be put on the shoulders of Joe McCarthy's Republican Party.

MS. FEIGIN: So, you get accepted. Tell me about the section that you walked into. What was it like?

MR. ROSENTHAL: I walked into the section and the total number of members of the section, including me, was twelve.

MS. FEIGIN: Including the supervisors, everybody?

MR. ROSENTHAL: Everybody. Twelve bodies.

MS. FEIGIN: Including secretaries?

MR. ROSENTHAL: No. Twelve lawyers. The Section Chief was Paul Sweeney, the Assistant Section Chief was Sam Slade, and ten Indians of various levels of seniority. With the exception of Sweeney, a Georgetown graduate, and a fellow that came in just before I did, John Laughlin, who was a GW Law graduate but was coming in off a clerkship with a judge on the Tenth Circuit, everybody else – in other words, 10 of the 12 – were either Harvard, Yale, or Columbia, so that there was definitely a bias in hiring in

favor of graduates of those three schools. To my knowledge, however, none of the ten, apart from John Laughlin, who came in with me off the Tenth Circuit clerkship, none of them had had clerkships with an appellate judge. I think only John and myself. But there were twelve of us. The section was colloquially referred to as Sweeney's Synagogue in that the majority of the lawyers in the section were Jews [laughter].

MS. FEIGIN: And Sweeney was not?

MR. ROSENTHAL: Sweeney was not. Sam Slade was not, but there were a number of them that were. Now one of the things that I found somewhat interesting when I arrived on the scene, or I learned very shortly thereafter, was the two most senior nonsupervisory lawyers shared an office. At that point the only persons that had their own offices were the Chief and the Assistant Chief, of which there was just one at that point, and everybody else, men – they were all men, I might say.

MS. FEIGIN: All white males?

MR. ROSENTHAL: All white males. Previously there had been a woman lawyer in the section and she apparently didn't stay very long. Paul Sweeney said he was never going to have another woman lawyer because apparently he and she did not get along at all, so he definitely was discriminating against women lawyers at the point I came in. I hadn't been there very long when I discovered that the two most senior line lawyers who shared this office didn't speak to one another. Their secretary also was in the office with

them, and one time I was in that office talking to one of them. The other one had been out of the office. He returned, and the lawyer to whom I was speaking said to the secretary, "Dorothy, will you tell Mr. X that so-and-so had called." They literally did not speak. And I thought to myself what am I getting into here? I mean these are the two most senior staff lawyers acting as children. I'm thinking am I really in kindergarten?

MS. FEIGIN: Can you tell us, because I think people down the road will have no context, what a secretary did for lawyers in those days.

MR. ROSENTHAL: Well, those were the days, number one, before word processors, and number two, before lawyers were expected to type their own stuff. The lawyers wrote out their drafts on yellow pads and the secretaries typed them up. Now, today, with the word processor, in drafting anything, you're continually making changes because the changes can be put in very readily. In those days what was typed up was done on a typewriter with carbon paper, and let me tell you, you prepared a draft and that was it because you did not go to the secretary, who had just typed it using four, five, six carbon sheets, and say, "Well, Dorothy, I'm afraid there will have to be some changes made here." You just didn't do it. I am not certain that the products were any worse than when they were dispatched to the courts or, if they were memoranda, to the Solicitor General's Office, than they are today when people slave over them and make all these changes. In any case, that was a completely different world.

MS. FEIGIN: And the secretaries were all women?

MR. ROSENTHAL: They were all women, and they were all white. The Administrative Section of the Division was headed by a woman who had a Georgia accent you could have cut with a knife, and she had total control over who was employed as a secretary in the Division, and it was clearly a matter of no African-American need apply because her thesis was that if one African-American secretary were employed, thirty white secretaries would resign in protest. That, of course, was nonsense, but she had that control, and it was some years thereafter before an African-American was employed in the Division as a secretary, and surprise, surprise, to my knowledge, not a single one of the white secretaries resigned in protest.

You have to bear in mind that the whole Department at that point was segregated basically. There were only white lawyers roaming the halls. The only blacks that I saw in my early years there were the messengers or people who occupied equally menial positions. There were no black lawyers, no black secretaries. As a practical matter, the Justice cafeteria was segregated. Not legally segregated. I didn't often eat in that cafeteria because it was down in the basement of the building and it wasn't very attractive, but on the few occasions that I did turn up there, I observed that the black employees – and again, these were essentially menials – were off eating in one area. There was a time before that when the Justice Department cafeteria I think was officially segregated. This

was a southern town, and the southern mores still were in play to a very large extent.

MS. FEIGIN: Tell me about the work of the section.

MR. ROSENTHAL: The section's work consisted of the drafting of Supreme Court briefs on the merits, Supreme Court petitions for certiorari, and Supreme Court briefs in opposition. It consisted of writing briefs for filing in the Courts of Appeals, occasionally in a state court of last resort, and it consisted of writing of memoranda recommending for or against appeal in cases which the Division had lost in the District Court and for or against certiorari in cases in which the Division had lost in the Court of Appeals. The major portion of the work, I would say probably 75%, related to Court of Appeals briefing and appeal memoranda on cases lost in the District Court. The Supreme Court work was not that significant a part overall of the section's operations with the consequence that when the Eisenhower administration came in, in early 1953, one of the first things that happened was that the name of the Division was changed from Claims to Civil and the name of the section was changed from Supreme Court to Appellate.

MS. FEIGIN: Did anything change substantively in what you did?

MR. ROSENTHAL: Not a thing. It was purely a name change. I think it more accurately reflected what the Division did on the one hand and what the section did more particularly. My first assignment when I arrived was to write a memorandum recommending against appeal in some case. The second

assignment I got was to draft a brief in a case in which we were amicus curiae in the Supreme Court and invited by the Court to file an amicus brief. It was a case that involved maritime rights in connection with a ship that had gone down off the Australian coast during World War II. What I found was that it was necessary in connection with preparing the draft to go up into the stacks in the Department of Justice library and pull down some reports from the Queen's Bench, in other words, English reports of the 1800s because in this case there was a lot of the law involved that was derived from the British admiralty law, and I think I was lucky not to have come down with some serious lung disease like the coal miners get [laughter]. I can assure you that these books that I was taking off of the shelves had not been looked at previously probably for a hundred years, if then. When the term stack dust was invented, they had in mind these books.

MS. FEIGIN: I think we should say for people reading this history that this was way before the era of Westlaw. Everything was done in the library.

MR. ROSENTHAL: Oh yes. All of the research was done going to the books. At that point Westlaw, Lexis, all of those things I don't think were even a figment of anybody's imagination. This was just like the matter of typing the briefs. This was an era where there was no computerized anything, either processors or research tools such as Westlaw and Lexis. I have to say that, in the years as a drafter of briefs, I spent a considerable amount of time in

the library. Fortunately, the Department library was very complete. I never had a need to go to the Library of Congress looking for something.

MS. FEIGIN: Just to explain how the Department was set up, when you say you drafted briefs on the merits for the Supreme Court, there still was a Solicitor General's Office.

MR. ROSENTHAL: Yes there was. Just to give some perspective, the Civil Division itself had in it seven or eight sections. All of the sections but Appellate operated on the trial level. There was a Torts section, there was a Court of Claims section that represented the government in suits brought against it in the Court of Claims. There was a Frauds section, there was a General Litigation section, there were all these trial-level sections. The Appellate Section was superimposed on top of them. When a case was lost in a District Court, the section in the Civil Division that had responsibility for that case, and it might have been tried by the Assistant U.S. Attorney, but there would be some lawyer in the Trial Section who had supervisory responsibility for the case, would transfer it to the Appellate Section. The Appellate Section then would write a memorandum recommending for or against appeal after obtaining the recommendation of the agency whose case it was. If a case was won at the trial level and an appeal was taken by the opposing party, then that case came to our section. Memoranda recommending for or against appeal or for or against seeking Supreme Court review in cases lost in the courts of appeals, would go to

the SG's office and the Solicitor General would make the ultimate determination as to whether an appeal should be taken or certiorari should be sought. The Solicitor General's Office at that time I might say was considerably smaller than it is today. I don't think they had more than 10, 12 lawyers, if that number. It was just like the Civil Division Appellate Section which had 12 when I came to it, and today has 60 or thereabouts.

When it came to matters where either the Solicitor General had authorized an appeal from a decision against us in the District Court or an appeal was taken by the adversary from a decision that was in the government's favor in the District Court, we would decide whether we would handle the appeal ourselves or would farm it out to the United States Attorneys. At that time, we almost invariably handled the appeal ourselves if we were the appellant, if it was our appeal. If it was an appeal taken against us, we would then decide whether the issues were sufficiently significant to warrant our keeping the case or instead farming it out to the United States Attorney's office for handling.

We did run into a problem with the U.S. Attorney's Office in the Southern District of New York. They were of the impression that there were no lawyers in the entire United States government that were of equal quality to the Assistant United States Attorneys in the Southern District of New York and therefore it was their belief that there was no circumstance in which an appeal in a case that originated in the Southern District of

New York should not be handled by them. So we were in constant battle with them over that.

MS. FEIGIN: Who resolved those battles?

MR. ROSENTHAL: They were resolved by us in the final analysis. However, I had a case in the Second Circuit that involved the doctrine, which might no longer apply, that a government employee or former government employee who was complaining of having been unlawfully fired had to bring the suit challenging the firing in the District of Columbia. This was because it had been held that the Civil Service Commission was an indispensable party to such a suit and obviously the Civil Service Commission is located in D.C.

This was a case in which an employee, I think he was in the Veterans Administration located in New York City, was discharged and he brought suit in the federal District Court in Manhattan; in other words, the Southern District of New York, challenging that removal. Well, the United States Attorney's Office refused to file a motion to dismiss the complaint for the failure to have joined an indispensable party because it believed that that rule was rubbish. That a prior employee should be entitled to bring a suit challenging his or her removal where she or he lives. Somebody in Washington, in the appropriate trial section in the Division, filed the motion which was granted. Then the ex-employee filed a notice of appeal to the Second Circuit which has jurisdiction over the Southern District of New York, and we said to the U.S. Attorney's Office

in New York, the Southern District, "You handle this." They said, "We won't" [laughter]. This was exactly the reverse of their usual demand to be allowed to handle the appeal. They didn't believe in this rule, they thought it was outrageous; they weren't going to defend it. Okay, so it was briefed in the Appellate Section. I go up to New York to argue the appeal. Presiding on the Second Circuit panel was J. Edward Lumbard, who formerly had been the United States Attorney for the Southern District of New York. Lumbard says to me, "Mr. Rosenthal, what are you doing here?" I said, "Your Honor, I'm here to argue this appeal." "Well," he said, "will you tell me why this appeal is not being argued by lawyers in the Southern District of New York?" I said, "I'd be happy to tell you. We offered it to them and they refused to take it" [laughter]. Lumbard was speechless at that point, and I thought that that was a modest bit of revenge that we got. This was a continual hassle. But in the final analysis, we had the final word, and if the United States Attorney himself or herself complained, I'm happy to say that our Assistant Attorney General, no matter who it was at the time, would back us up, so complaints from the U.S. Attorney to the Assistant Attorney General invariably proved unavailing.

MS. FEIGIN: I just want to make this clear. When the office drafted briefs on the merits for the Supreme Court, that was a draft for the Solicitor General's Office, right?

MR. ROSENTHAL: Yes, the draft would be sent to the Solicitor General's Office where one of the staff members there, Assistants to the Solicitor General they were known as, would go over the brief, would make revisions, and there would then sometimes be some kind of discussion between that Solicitor General's Office member and the member of the Appellate Section who had drafted the brief as to the changes. Sometimes they were just made and the brief was filed. But there was something considerably different in that era from the era today and that is, as I will go into in greater detail at later stages of my recitation of my DOJ career, I had a total of nine Supreme Court arguments. These were assigned to me by the Solicitor General. Today, a lawyer on the Appellate Staff, as they call it today – it was the Appellate Section – his or her chances of getting a Supreme Court argument are about the same as that person's chances of being on the moon. This shift occurred just before I left the Department in 1972, and this was due in large measure to an enlargement of the staff of the Solicitor General's Office, and obviously the lawyers who join the Solicitor General's Office reasonably expect to have a number of Supreme Court arguments. So in order to accommodate the much larger staff of that office today, and indeed over the last thirty years or so, the Appellate Section lawyers are frozen out. They just don't get it.

MS. FEIGIN: Might it also have something to do with the fact that now the number of Supreme Court arguments is diminished?

MR. ROSENTHAL: I think that's a factor also; there are fewer of them. I had my first argument in the fall of 1956, and the last of the nine I think was in 1969, three years before I left. I was getting them routinely. Now, when the arguments came to an end, as I say, that was shortly before I left the Division, I said to the then First Assistant to the Solicitor General, Dan Friedman, I said, "You know, Dan, if we're not getting any oral arguments, I don't see why we should be writing any briefs." It seemed to me that if these arguments were going to be presented by nothing other than SG staff members, that those are the folks that ought to be writing the briefs. Needless to say, that suggestion did not receive a very favorable reaction [laughter]. Obviously over the years we had a very close relationship with the Solicitor General's Office and the staff members there in connection with, again, the memoranda on appeal or on certiorari and also with respect to the petitions for cert, briefs in opposition, and briefs on the merits that are drafted in the Division and then sent up to the SG's office for further review and filing.

MS. FEIGIN: Let me ask you a couple of questions about things that I think were different then from the way they are now at DOJ. At the time when you began, the FBI was in the same building.

MR. ROSENTHAL: Yes it was. I saw J. Edgar Hoover frequently in the elevator. I was on the third floor and if I got on the elevator and J. Edgar Hoover was already in

it, the elevator immediately went up to the fifth floor. It did not stop on any intermediate floors [laughter].

MS. FEIGIN: How did that happen? You weren't allowed to press the button?

MR. ROSENTHAL I don't remember how that happened, but it did. Director Hoover never suffered the indignity of having an elevator stop at a floor before it reached his floor.

MS. FEIGIN: The FBI lab was there as well, is that correct?

MR. ROSENTHAL: I think so, and the firing range I think also was there.

MS. FEIGIN: Did you have any interaction, aside from the ride on the elevator, with the FBI?

MR. ROSENTHAL: Oh absolutely. I had one particularly notable experience. This was when Ramsey Clark was the Attorney General, so I guess that was sometime in the 1960s. I was called upon to represent two FBI agents who were sued personally in a state court in Nevada for allegedly having bugged the hotel suites of some gangsters down in Vegas, and the defense that we were putting up was that they could not be sued for anything done in their official capacities. We filed a petition for a writ of mandamus in the Nevada Supreme Court seeking to get that court, on the basis of that principle, to get the state trial court to throw the suit out. A day or two before I'm making my first appearance in the Supreme Court of Nevada on this mandamus petition, an Assistant Director of the FBI shows up at my door. "Mr. Rosenthal, it is my understanding that you are going to be

going to Carson City in two days to appear before the Supreme Court of Nevada in this matter." I said, "Yes, Sir." "Well," he said, "the Director wants you to file a motion to disqualify Mr. Justice X." I said, "He does? On what ground?" "Mr. Justice X is in league with these gangsters who are the plaintiffs in this suit. Indeed, they have provided him at no cost with a swimming pool." I said, "Well that's very interesting, but what authority do you have for that proposition?" Well it turned out, of course, a confidential informant. So I said, "There's absolutely no way in which I am going to seek to disqualify a justice of that court on the basis of the statement of a confidential informant." "You don't understand, Mr. Rosenthal, the Director wants that" [laughter]. I said, "Well, the Director might want it, but he's not getting it from me. He can go to the Attorney General if he wishes, and if the Attorney General decides that that's to be done, I suppose it will be done, but it's not going to be done by me. I value my license to practice law too greatly." He huffed and he puffed and he left. Well, that was, I think, basically my only contact with the higher levels of the FBI during my time there.

MS. FEIGIN: I assume the motion was never filed.

MR. ROSENTHAL: Absolutely not. What did happen, though, was this was a matter in which the Attorney General, Ramsey Clark, took a personal interest, and so I got a call from his office the day before I was due to go out to Nevada in which I was told that the Attorney General was having second thoughts

about the position that we were going to advance in the court. So I said, "It's a little late in the game for second thoughts. Not only have we filed papers setting forth this position that these agents could not be sued personally because these were acts within the course of the performance of their official duties, but I'm scheduled to go out in 24 hours and argue this position." "Well," he said, "perhaps you'd better come up and see Mr. Clark." So I go up to see him and he's having some very substantial doubts as to whether we should continue with this position. He wanted to sleep on it overnight. I said, "I will be leaving at 5:00 tomorrow afternoon for Reno and I obviously have to know before then what you want me to do." He said, "Come back tomorrow." So I went back to his office and literally at 1:30 that afternoon I didn't know what he was going to decide should be done. I kept telling him you have to reach a decision. Finally at 3:00 or so, which was about an hour before I was leaving for the airport, he said, "Okay, go ahead." This case was the only matter in my twenty years in DOJ that I had any direct involvement with the FBI, and the only occasion in which I had any direct dealings with an Attorney General. I obviously had plenty of dealings with the Solicitors General over the years.

MS. FEIGIN: This might be a good place to stop. We'll pick up on more of your cases and your career at DOJ. Thank you again for a very interesting session.