ORAL HISTORY OF
ALAN ROSENTHAL

Fifth Interview – May 23, 2011

This interview is being conducted on behalf of the Oral History Project 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 the King Farm subdivision in Rockville, Maryland, on Monday, May 23, 2011. This is the fifth interview.

MS. FEIGIN: Good morning.

MR. ROSENTHAL: Good morning, Judy.

MS. FEIGIN: When we left off, you had had well over 200 appellate arguments, and I wanted to ask you, given the gamut of arguments, if ever you felt you were called upon to defend the indefensible.

MR. ROSENTHAL: Yes, unfortunately, on several occasions that was necessary. Now, I have to say that the Department of Justice had control over what it argued, what it would pursue or defend in the courts, but it had to recognize that it had captive clients who could not go elsewhere, and that had to be taken into account. In addition, when the government won a case in the District Court, it was very difficult to persuade the agency involved to throw in the towel on the appellate level, to confess error, as the term goes.

One case that I have in mind particularly originated in the District Court in New Hampshire, and it seems that the Coast Guard had come to the conclusion that a particular vessel was responsible for an oil spillage on a particular river in New Hampshire and had arrested the vessel and did

not release it until it had paid a very substantial amount of money. Well, the vessel owner sued in the District Court in New Hampshire claiming that it could not possibly have been responsible for the oil spillage. The case went to trial in the District Court, which for some reason, despite the fact that the evidence clearly indicated that the oil spillage could not have come from this vessel, found for the government. The vessel owner took an appeal, and in the Court of Appeals for the First Circuit in Boston, the vessel owner made a very persuasive case for that proposition. Well I got up and I said to the court, "The District Court's finding in the government's favor was not clearly erroneous," whereupon the presiding judge, who was Bailey Aldridge, said, "Yes, Mr. Rosenthal, you're quire right. The finding was not clearly erroneous, it was grossly erroneous." [Laughter] And the argument went downhill from there.

I think I can say that there were not too many cases where our position really bordered on the frivolous. There were a number of cases where I think we were probably on the losing side, or should have been on the losing side, but that case in the First Circuit is an example of one where we never should have defended the position, but the Coast Guard was adamant. After all, it had won the case in the District Court and so we had to go through the appeal. And I have to say that at that point I was an Assistant Chief of the section and therefore in a supervisory position, but I would not have allowed one of the junior lawyers to go up to Boston to

argue that case. I felt that if somebody had to take the beating, it should be a supervisor.

MS. FEIGIN: How often do you think the oral argument makes a difference?

MR. ROSENTHAL: I'd like to say in a lot of cases, but my guess is in a very small percentage of cases. I think in the vast majority of cases, the court has made up its mind before the argument, except if we're talking about the Tenth Circuit, because as I think as I mentioned in the previous session, the Tenth Circuit does not – or didn't then – read briefs in advance of argument, so in that circuit, it may well be that the oral argument played a significant role in the court reaching a decision. But my surmise is that in the circuits where the court is pretty well prepared in advance of argument that the argument doesn't make that much difference.

MS. FEIGIN: You mentioned last time that included in your 200+ arguments, there were 9 Supreme Court arguments. I'd like to discuss those with you. When did they start?

MR. ROSENTHAL: The first one was in the fall of 1956 and the last one of the nine was in the fall of 1969, so they were all in a 13-year period. I might say that this was an era when the Solicitor General assigned oral arguments to lawyers in the appellate sections of the various Divisions, and that's how I happened to get nine arguments in that relatively short period. Today it's my impression that it's very rare, if ever, that a lawyer in the Appellate Staff of the Civil Division will get an argument; that the arguments seem to be

all presented by – or virtually all presented by – lawyers on the Solicitor General's own staff.

MS. FEIGIN: Can you tell us what it's like to argue before the Supreme Court? How you prepared.

MR. ROSENTHAL: Preparation involved spending a good deal of time, obviously familiarizing myself with all aspects of the case and then trying to conjure up all of the questions that might possibly be asked by the Justices. Then I would go through a moot court with usually five or six of my peers participating, and they would throw at me every question that they thought might possibly be asked of me. It happened that at I think all of the nine arguments I got at least one question, and sometimes several, that neither I nor my peers who participated in the moot court had thought of. For me it was a pretty nerve-wracking experience getting up before those nine Justices. I would have to say that I don't think it was much less nerve-wracking on number nine than it was on number one [laughter]. In each instance, it was an interesting experience.

MS. FEIGIN: Can you give us some flavor of it? Tell us about some of the Justices and how it was to appear before them.

MR. ROSENTHAL: My recollection is that Justice Frankfurter, before whom I appeared several times, had the habit if he didn't like the answer that he received from a particular question and wasn't too sympathetic with that party's case to begin with, he would turn his chair around and give counsel the

benefit of his back, which I thought was rather rude. I saw that happen on more than one occasion.

MS. FEIGIN: For the remainder of the argument?

MR. ROSENTHAL: No, no. He was just displaying his irritation, displeasure, whatever, and then he would flip his chair around again. He did this on more than one occasion. I found most of the Justices that I appeared before courteous. I found the questions that they asked for the most part were pertinent. Some of them, at least the ones obviously that I had not anticipated, I felt were somewhat afield [laughter]. If I recall correctly, I think Justice Minton was still sitting at the time of my first case; he seemed to be perplexed. As I think back upon it, there was nothing that I found remarkable about the Justices and the questions that they asked apart from the little trick that Justice Frankfurter played.

MS. FEIGIN: Did you appear before Justice Fortas?

MR. ROSENTHAL: Oh yes. Justice Fortas, I think, though my memory on this is a bit dim, actually might have written the opinion in our favor in one of the six of the nine cases in which the government prevailed.

MS. FEIGIN: When you argued, you argued in full morning coat?

MR. ROSENTHAL: Yes. That was expected of government lawyers. There was a cynical comment made by somebody that the government was expected to wear morning coats so that the Justices would have in mind which side was the government [laughter]. Very few of the lawyers that appeared for private

clients appeared in morning coats. I only know of one who did that. I came in full regalia.

Now there was an interesting story that preceded my arrival at the Justice Department by a year. There was a lawyer in the Solicitor General's Office who was making his final appearance in the Supreme Court as a member of the Solicitor General's staff, and he thought that this business of morning coats was a bunch of nonsense, so without telling anybody he was going to do this, he appeared in a very conservative dark business suit. The following day, so I'm told, the Solicitor General received a note from Mr. Justice Burton in which Justice Burton called attention to what he characterized as a deplorable breach of tradition [laughter] and requested, indeed I would say demanded, that the Solicitor General see to it that there was not a repetition of that very unfortunate incident. Certainly in my time there, to my knowledge, there was not a repetition of the deplorable breach of tradition.

MS. FEIGIN: Did you own a morning coat?

MR. ROSENTHAL: No. I rented them. In those days, they could be rented for $8 [laughter]. I might say, however, that I was aggrieved because up until I think the time of my last argument the General Accounting Office took the position that these were not reimbursable expenses, and this was because, after all, we didn't have to argue in the Supreme Court [laughter]. We were doing it

essentially as the GAO saw it, as a volunteer. The $8, that was a fair sum in those days, but not that great a sum today.

MS. FEIGIN: In looking over your arguments, I believe that a couple of them you argued over two days. Why was that?

MR. ROSENTHAL: That was because in those days, it's changed now, the Supreme Court sat from noon to 4:00, and if at the stroke of 4:00 the argument had not been completed in a particular day, the court adjourned and the argument was resumed the following morning. Indeed, the argument in *Brown v. Bd. of Education*, which we'll talk about later, on the question of relief in 1955, if I recall correctly, that went over three days.

MS. FEIGIN: My understanding now is when the time is up, it is over. It wasn't as strict then?

MR. ROSENTHAL: The point was they would start an argument, let's say at 3:30, and at 4:00, wherever the argument was at that point, the court cut it off and it resumed the following noon.

MS. FEIGIN: I'm not sure they resume now. Perhaps they do. So that happened to you twice?

MR. ROSENTHAL: I think so.

MS. FEIGIN: Let's talk about *Brown*. That was a huge case and you were involved with it early on. Tell us how that came to be.

MR. ROSENTHAL: I stress at the outset, I did not argue *Brown*; it was not one of the nine. I came to the Department of Justice in the Civil Division's Appellate

Section, as I previously indicated, in the fall of 1952, October 1 of that year to be specific. I had been there approximately 18 months. We're now in the spring of 1954. On May 17 of that year, the Supreme Court rendered its decision holding that public school segregation was unconstitutional. That was *Brown v. Bd. of Education* and a number of combined cases. At that time, the Court set the case down for further argument on the question of relief; in other words, on the question of what remedy should it provide based upon its conclusion that school segregation was unconstitutional. Within days of that decision on May 17, the Assistant Attorney General in the Civil Division received a phone call from the Solicitor General himself requesting the assignment of one of the Civil Division appellate lawyers to the Solicitor General's Office for the purpose of assisting in the preparation of the government's brief to be filed on the question of what relief should be provided. The government, of course, was a participant as a friend of the Court. It was not a party directly to the proceeding. For some reason I was tapped, and I was directed to report to the Solicitor General, then Simon Sobeloff, to receive my marching orders. I was informed by Judge Sobeloff that I would be working with one of his staff members, Phil Elman, and that it would be our joint responsibility to come up with a draft of a brief for filing in the fall on behalf of the United States on the question of relief.

My immediate assignment was to study the history of school

segregation in states where there had been previous segregation but that segregation had been eliminated. And this included, in particular, areas of the states of New Jersey and Indiana. In New Jersey, the schools were segregated up until 1947 from somewhat north of Camden down to, I guess, it's Cape May, at the bottom of the state. Indeed, that portion of the state was known at the time as the Georgia of the North. In or about 1947, as I recall, the New Jersey constitution was amended to specifically outlaw segregation in the state's public schools, and the school systems that were then segregated were informed that they had a relatively brief period of time to desegregate or else they were going to lose all state aid. So needless to say, they did desegregate, and there was a good deal of written material respecting how this was accomplished, which I was called upon to study. In addition, the schools in some southern portions of Indiana were segregated up to a particular time, I don't recall when, and then were desegregated and there, too, there was a good deal of historical material involving how they accomplished this. So I spent a good deal of time in researching the literature pertaining to the desegregation of the schools in those two states. In addition, Baltimore and the District of Columbia decided to desegregate their school systems effective the fall of 1954 without waiting for the Supreme Court's determination as to the remedy that should be accorded the plaintiffs. So I spent a fair amount of time over the course of the summer in both Baltimore and in the administrative

offices of the D.C. public school system seeing how they were planning to move forward with the desegregation of their schools as of the end of that August. So that was the way I spent a good deal of the summer, in that kind of research.

Well around the first of September, I got down to preparing the first draft of the brief; this was obviously with a good deal of input from Phil Elman. Not at that point anything particularly from the Solicitor General or the Attorney General or the Assistant Attorney General and head of the Office of Legal Counsel, all of whom became involved in this. In any event, I came up with a draft. Elman went over the draft, and then it was submitted for examination by Attorney General, Solicitor General, and Assistant Attorney General, Office of Legal Counsel. When this was all completed, the brief was personally carried over to the White House by Solicitor General Simon Sobeloff and delivered to Eisenhower, who was then president of the United States.

The following day, Sobeloff received a phone call from the White House asking that he come and pick the brief up, which as I recall he did personally. He would not send a messenger [laughter]. In any case, the brief comes back and there are all kinds of pencil comments on it, written in hand by Eisenhower. Well we had taken a fairly tough position in the draft brief. Eisenhower would have had it considerably weakened. His comments were to the effect that the Court had to take into consideration

the fact that for over a half a century, since the Supreme Court's decision in *Plessy v. Ferguson*, the southern states had acted in the good faith belief that school segregation was constitutional and that was a consideration that had to be taken into account in fashioning the remedy. Well, giving the Attorney General, who was then Herbert Brownell, a good deal of credit, the Eisenhower comments were ignored. And the brief that was filed took an even stronger position than the draft that had been submitted to Eisenhower. I'm sure Eisenhower never subsequently had occasion to look at the brief, so I'm equally confident that he did not know that what he had to say was essentially ignored.

The Supreme Court, when it came down in its decision on the question of relief the following spring, used the now famous "with all deliberate speed" dictum. The dictum that we had in our brief, or the suggestion we had in our brief; we didn't use those words but we made it abundantly clear that the government was not advocating giving the southern states a good deal of slack because they had for 50 or more years operated in the good faith belief that segregation was constitutional. There's one aspect of the oral argument that took place, again in the spring of 1955, that has stuck in my mind to this day.

MS. FEIGIN: You were there?

MR. ROSENTHAL: I was there. Again, I was not up there arguing. Solicitor General Sobeloff argued for the United States. The plaintiffs in this case included one or

more children who were in the Prince Edward County's school system in southern Virginia, and so that school system was a defendant, and it was represented by the then Attorney General of the state of Virginia, a gentleman named Lindsay Almond. He got up and said to the Court, "I would like to present you with some statistics." And he presented statistics on the number of illegitimate births that had taken place in the Commonwealth of Virginia in a particular year and the percentage of those illegitimate births that were attributable to African-Americans, and it was a high percentage. And then he set forth statistics on the number of recorded venereal diseases in the Commonwealth of Virginia, and the percentage of those venereal diseases that were attributable to African-Americans, and that too was a relatively high percentage, and he said to the Court, "Now you understand why the white parents in my state will not stand still for having their children go to school with Negroes." The Court simply listened to this, not a word from any of the Justices. That is the absolutely only thing that more than a half a century after that oral argument that I recall.

MS. FEIGIN: Wow. Well, one thing that strikes me is you mentioned that the Attorney General was involved in the brief. Was that unusual?

MR. ROSENTHAL: Very unusual. The Attorney General rarely signed briefs filed in the Supreme Court. The senior official signing the brief was almost invariably the Solicitor General, but this was, of course, a reflection of the

importance that the Attorney General and the administration attached to this particular case. There are five signatures: Herbert Brownell, Attorney General; Simon Sobeloff, Solicitor General; J. Lee Rankin, Assistant Attorney General, Office of the Legal Counsel, and then Philip Elman and Alan Rosenthal.

MS. FEIGIN: How do you look back on your involvement on this case?

MR. ROSENTHAL: I look back on it in this way: This is the only thing that I have done in a legal career that has now extended sixty years, or close to it, that has sort of been attached to me. A lot of people know me or know of my legal career only in that, "Yes, he had been involved in *Brown v. Bd. of Education*." This was, from my standpoint, certainly an important part of my career, but certainly, in my perhaps immodest view, not the only thing that I have done of any significance.

MS. FEIGIN: That is certainly a fair statement.

Was it apparent at the time how important this case would be?

MR. ROSENTHAL: Absolutely. There was no doubt in my mind that it was going to be enormously important in its effect. I had thought in my naiveté that desegregation of the public schools in the south would be accomplished much more rapidly than turned out to be the case, but it certainly has had an enormous impact on the American civilization, more so I would say than any other decision that I can think of offhand in the 20th century.

MS. FEIGIN: You mentioned earlier that at some point you became Assistant Chief in the Appellate Section.

MR. ROSENTHAL: I became one of two, and this was in February, I think, of 1958, I was unofficially designated Assistant Chief and became one officially I think later that year. And this was because basically of attrition. A number of the lawyers that were more senior to me left the section and I suddenly obtained a relatively senior status in the section, and I became an Assistant Chief. I don't think it was because of any particular remarkable attainments, accomplishments up to that time.

MS. FEIGIN: As Assistant Chief, your responsibilities changed?

MR. ROSENTHAL: Yes. I no longer prepared the initial drafts of the briefs or the initial drafts of the memoranda to the Solicitor General recommending for or against appeal or seeking Supreme Court review. They were drafted in the first instance by the line lawyers and I then would review the briefs or memoranda before they were filed. In a number of cases, I revised them to some extent.

MS. FEIGIN: Your manner of review was, I believe, with the line attorney, right? You reviewed it in the presence of the line attorney. It wasn't that you reviewed it and handed it back?

MR. ROSENTHAL: No, but I would go over it without the line attorney being present. Then after I went over the brief, I would meet with him or her and go over the brief in some detail.

MS. FEIGIN: How did you manage to have so many arguments after you no longer were writing briefs?

MR. ROSENTHAL: Well we had a great number of cases, and the review officer had the [laughter] ability to choose which ones he would argue himself and which ones he would pass on to the line lawyer. But I would have to say that despite the fact that I obviously took a number of cases myself, I don't think any of the line lawyers were particularly aggrieved. They seemed all to have enough arguments themselves.

There is actually a funny story about that, if I may digress. The Appellate Section obtained from the lawyers it hired a three-year commitment. We indicated that we expected them to remain for at least three years. Well, in the case of one lawyer who shall remain nameless, he came to us after one year and said he was thinking about departing. I reminded him of the three-year commitment. But not that long thereafter I had a phone call from Abner Mikva, who was subsequently both a congressman and a judge on the District of Columbia Circuit. At that time, he was a partner in a large Chicago law firm, and he asked me about this gentleman. I said, "Well, if I were called upon to consider him for employment elsewhere, I would turn him down in a minute." And there was a moment of silence. Then he said, "Would you mind giving me the reason?" And I said, "Not at all. This gentleman has been with us a year, he made a commitment to stay for three years, and I believe that a lawyer

is no better than his word, and this gentleman's word doesn't seem to be very good." "Well thank you," said Mr. Mikva, "but would you mind telling me what you thought of the quality of his work?" I said, "The quality of his work was excellent. He came to us number one in his class at the University of Chicago Law School, we expected very high things of him and he made good." I said, "Now Mr. Mikva, I have a question for you. What reason has he assigned for wanting to leave?" He said, "He doesn't feel he's getting enough responsibility." I said, "Not getting enough responsibility. Well, Mr. Mikva, he has been here a year, he's already had one appellate argument in a federal Court of Appeals, I think he's got four or five other cases assigned to him where he's very likely to get the oral argument in at least one or two of them. Now tell me, if he goes with your firm, how many court appearances is he likely to get in, shall we say, the next five years?" Another pause [laughter]. "Well I get your point." Well the fact is that the following day this gentleman comes in and says he's leaving us for Mikva's firm. I learned later on that he only stayed there for about two years.

I did obviously take a number of the arguments in cases in which I did not prepare the initial draft, but still, we had an enormous number of cases, so the line lawyers were certainly given their fair share.

MS. FEIGIN: I noticed when you talked about the reviewers, you used the male gender, and yet I do know there came a time when women came to the section,

although you told us Mr. Sweeny had said "No more." Can you tell us a little bit about that?

MR. ROSENTHAL: Yes. The first woman lawyer that came to the section after I arrived was Sandy Slade, a Yale Law graduate who had been in my wife's class at Yale, and the Section Chief at that point who hired her was Sam Slade. Within two or three years, Sam and Sandy were married, at which point the Assistant Attorney General insisted that Sandy be transferred out of the Appellate Section. In that Assistant Attorney General's view, there should not be someone working in a section in the Division under the supervision of his or her spouse. So Sandy got transferred to the Court of Claims Section. Well subsequently, a lawyer in the Court of Claims Section named Katherine Baldwin was transferred to the Appellate Section, and subsequent to that, this was after I left, she became the first woman Assistant Section Chief in Civil Appellate. So there were women eventually.

The fact that there were no women prior to Sandy Slade in my time there was again due to Paul Sweeney. Curiously enough, after Paul Sweeney left, there was another woman who was hired by Civil Appellate and curiously her name was Sweeney and she happened to be Paul's daughter [laughter].

MS. FEIGIN: Speaking of women being hired, could you tell us about women in the Solicitor General's Office?

MR. ROSENTHAL: In the Solicitor General's Office, during most of my time in the Department, indeed up to the summer of 1972 when I was getting ready to leave, there had never been a woman Assistant to the Solicitor General. That was the title that these folks had. And I learned that lo and behold a woman had just been hired. Her name was Harriet Shapiro, and Harriet happened to have been a college classmate of my wife at Wellesley, but her real claim to distinction was she was editor-in-chief of The *Columbia Law Review*. I thought the first woman editor-in-chief, but it turns out that she was the second one. In any event, I thought this was great, and I called Danny Friedman who was then the First Assistant in the Solicitor General's Office to compliment him on having broken the gender barrier with such a competent woman. "What gender barrier?" was Dan's response [laughter]. I said, "Well, Dan, perhaps I'm mistaken, but I don't recall there having been a woman in your office during the twenty years that I have been here at Justice." "Well that's true, but that's because we've never had a qualified one apply" [laughter]. I thought that was interesting.

MS. FEIGIN: It is indeed. You talked about the Attorney General signing on to the *Brown* brief which leads me to ask you, in all those years, did you ever feel that political considerations were brought to bear on how you handled a case?

MR. ROSENTHAL: I got, believe it or not, to two months before I left the Department, and actually a little under two months, before I was ever asked to do something or to refrain from doing something, for a partisan political reason. Now this was in part because I was in the Civil Division, which basically did not deal with cases that were of partisan political significance. I'm sure that lawyers in the Antitrust Division or the Civil Rights Division could not have made a similar claim, but I got almost to the end of August of that year, 1972, before being asked to do something for a partisan political reason.

MS. FEIGIN: Can you tell us about it?

MR. ROSENTHAL: I thought you were going to ask [laughter]. I was at my desk, this was very late in August, and I received a phone call from John Dean, who identified himself as being a counsel or something like that at the White House. I had never previously heard of John Dean. I heard a lot about him later.

MS. FEIGIN: We should say why for people down the road.

MR. ROSENTHAL: He was heavily involved in *Watergate* business later in that year. Dean said that he understood that I was handling a case that had been recently decided by the District of Columbia Circuit involving a challenge to some milk marketing order prices that the Secretary of Agriculture had set. I said, "Yes, the District of Columbia Circuit had just decided that case." "Well," he said, "I understand that the court had reversed the decision of

the District Court that had granted summary judgment in favor of the Secretary and had remanded the case to the District Court for a trial." I said, "That's right." He said, "Well, we don't want that trial to take place before the election." This was 1972. Nixon was up that November for reelection. "Therefore," he said, "I want you to file a petition for rehearing, preferably *en banc*, so that way the case won't get back to the District Court until late in the fall and there will be no decision in the District Court, probably no trial, before the election." I said, "Mr. Dean, as far as I'm concerned, and I think I speak for the entire section, the Court of Appeals decision is clearly correct. There is no basis upon which we can file any petition for rehearing." "That's not the point," he said. "The point is we don't want a trial in this case, particularly not a decision, before the election." I said, "I'm sorry, Mr. Dean, but in order to file a petition for rehearing, you have to have a good-faith belief that one is justified, and indeed you have to certify in the petition for rehearing, that it is not being filed for purposes of delay." "But," I said, "you did mention rehearing *en banc*, and rehearing *en banc* cannot be sought unless authorized by the Solicitor General, so I'll pass your request on to his office." So I called the same Dan Friedman, the First Assistant, and passed on to him what Dean was requesting, and he said Dean Griswold, who was then the Solicitor General, was up at his summer place, somewhere in New England on vacation; he was not planning to get back

until Labor Day, which was probably then a week or so off, and he, Dan, thought it could wait until Dean Griswold came back. Well the upshot of it was Griswold told Dean to fly a kite. No petition for rehearing *en banc* was filed, and the case went back to the District Court as soon as the mandate came down which was probably sometime in September.

The footnote to this story is that a year or so later, by this time I was in the Atomic Energy Commission, Griswold was summarily fired, and there was a reception for him in the Great Hall in the Department of Justice, and I came down from my AEC office to attend the reception. Griswold took me aside at one point and told me that while he couldn't be absolutely certain about it, it was his assumption that it was his turning John Dean down that brought about his dismissal as SG.

MS. FEIGIN: Speaking of figures of stature in the Department, we talked last time about your dealing with Warren Burger. Were there other Assistant Attorneys General of note who should be mentioned in this history?

MR. ROSENTHAL: Well I thought that the best Assistant Attorney General in my twenty years there was John Douglas, who was appointed by Jack Kennedy and was the son of Senator Paul Douglas of Illinois. John Douglas came to the Department as Assistant AG from Covington & Burling, which is where he was a partner. I thought some of the other ones were good, but not as good as John Douglas. There were one or two of them that I thought didn't measure up to what I thought would have been the standard.

I would say this, that my twenty years in Justice covered both Republican and Democratic administrations. I came in at the tail end of a Democratic administration, there was eight years of Eisenhower, then there was eight years of Kennedy/Johnson, and then there was Nixon, and in my view, the quality of Assistant AGs Civil Division and the quality of the Solicitors General during that period did not depend upon party affiliation. I saw good Democratic Assistant AGs, good Democratic Solicitors General, and I saw poor ones of both of those political parties.

MS. FEIGIN: When we talk about Assistant AGs, this may have been slightly after your time but perhaps you can shed some insight on it. There came a time when I believe it was Barbara Babcock as Assistant Attorney General had plans for the Appellate Section, and I wonder if you could talk about that.

MR. ROSENTHAL: I might say I knew Barbara Babcock because she was a law clerk for the same judge that I clerked for, some years after I was there, so I had encountered her at reunions of the judge and his clerks. When Barbara Babcock decided – this was, it must have been in the early stages of the Carter administration, because she was a Democrat – to reorganize the Division, one of the things that she planned to do was to eliminate the Appellate Section. Henceforth there would be no strictly appellate lawyers. The appeals would be handled by the Trial Section lawyers who had been responsible for the cases on the trial level.

Well, the one thing that I had been persuaded from day one is that

just as there's a distinction in the medical profession between neurosurgeons and dermatologists, there is a distinction in the legal profession between the conduct of appellate litigation and the conduct of trial litigation. Indeed, I might say I think I would have been one of the worst trial lawyers possible even though I thought I was at least respectable on the appellate level. This belief was shared by a number of other alums of Civil Appellate and we all embarked upon a letter-writing campaign to the Attorney General, then Griffin Bell, in which we said we thought this was the height of absurdity. Well, as it happened, Bell also got a similar message from the then Chief Judge of the Fifth Circuit with whom he had sat before he had become Attorney General. Before Bell came to the Attorney General position, he had been a judge on the Fifth Circuit. The upshot of it was that the Attorney General told Barbara Babcock "no way," that there still was going to be a separate appellate operation.

Well, Ms. Babcock apparently was very unhappy about that result and also felt that the alums, including yours truly, had no standing to be raising objections to her plan, and maybe she was right about that. But in any case, the Appellate Section became the Appellate Staff. Its name was changed, but it remained, and still remains, as a separate entity within the Civil Division responsible for the conduct of appellate litigation.

There's a story going around, and I don't know whether this is true

or not, that it cost Barbara Babcock a seat on the District of Columbia Circuit, a seat that was instead awarded to Patricia Wald. So the story goes, the Attorney General was very irritated at being blindsided by all of those letters. It appears that Babcock had mentioned her plan to eliminate the Appellate Staff to somebody in the Attorney General's Office, but the word apparently had not gotten to Griffin Bell. Now again, that's just hearsay. I don't know whether that, in fact, occurred, but it certainly is possible.

MS. FEIGIN: Did you get a lot of powerful people to write letters?

MR. ROSENTHAL: Basically these were simply alumni of the section. None of us I think would have been described as that powerful at the time, but I'm sure that when Griffin Bell got the letter from his former colleague, the Chief Judge of the Fifth Circuit, he paid a lot of attention to that, probably more so than to our letters. I'm sure he also, I mean, after all, he had been an appellate judge, that is Bell, and I'm sure that he appreciated himself that trial lawyers do not necessarily make good appellate advocates. And one of the things in that regard is, at least my experience was, that it was very difficult for the lawyers in the Civil Division's Trial Sections to really look at a case objectively which they'd lost. It's always the view, "What an injustice, let's go forward." The Appellate Section lawyers, of course, who don't have the same stake in a particular case, can look at it more objectively.

MS. FEIGIN: When you modestly say you wouldn't have made a great trial lawyer – I suspect you would have – but when you talk about different skill sets, how would you define the skill sets that you need as an appellate attorney as opposed to a trial attorney.

MR. ROSENTHAL: The trial attorney, if as is very frequently the case – less so probably in government litigation – is confronting a jury, has to be an actor, and I think most of the successful trial lawyers are actors of the first rank. That's the last thing you want to be before an appellate tribunal. They don't want to hear the kind of emotional presentation that is commonly presented to jurors. Also, obviously, there is a much, I think, greater need for the kind of analysis that's involved in presenting appellate arguments than is possessed, I think, by a lot of trial lawyers.

MS. FEIGIN: You mentioned that you ultimately left to go to the Atomic Energy Commission, but before we get to that, which I think we'll discuss in our next session, during the twenty years, were there times when you considered leaving the Department?

MR. ROSENTHAL: Yes, toward the end. After about the 17th year arrived, I thought at that point that maybe the time had come to look at some other possibilities. At about that point, I was recommended – this would have been I guess more than three years, this was about 1967, it was still in a Democratic administration – I was recommended by a lawyer who had previously been in the section to the then head of the Equal Employment Opportunity

Commission, who was Clifford Alexander at that time. I was recommended to him for the position of General Counsel, and I went up and talked to him, but I decided that that office was much too political for my taste, so I withdrew my application. I don't know whether I would have gotten the job or not. I was also considering a position that had opened in the Congressional Legislative Reference Service – I don't know its precise name – at the Library of Congress. This is the office that does all the research on a wide variety of subjects for the Congress, and there was an opening as the head of the office that dealt with legal issues, I can't remember what the title was. Well I went up and spoke to the senior man on board at the time and learned that a good deal of what that office seemed to be doing was research papers for the children of members of Congress [laughter].

MS. FEIGIN: Really?

MR. ROSENTHAL: Yes. The congressmen would request a particular document, a particular piece of research, and there was no way of knowing whether this was something that the congressman or congresswoman needed in the dispatch of his or her duties. Obviously, the congressmen were not supposed to be using that office for personal purposes, but that sort of turned me off. There were other things I explored, but the AEC, we'll talk about next session, but that was the first one that came up that I decided was worth my leaving the Department.

MS. FEIGIN: Had you ever argued a case on behalf of the AEC while you were at the Department?

MR. ROSENTHAL: No. This was a curious thing about that, I think of all of the departments and agencies that were represented by Civil, and that was an enormous number, I think at one time or another during my time at Justice I represented virtually every one of them other than the AEC [laughter]. But that might have been a good thing because I was going into completely new territory.

MS. FEIGIN: Before we leave DOJ, is there anything else you want to add about that?

MR. ROSENTHAL: I wanted to mention one thing about my first Supreme Court argument. It was in a case called *United States v. Bergh*, and this was in the fall of 1956, and the issue was whether blue-collar government workers were entitled to double pay for holidays that they worked in World War II. Now for the white-collar workers, there was no question. They didn't get extra pay for working on government holidays during a war, but these blue-collar workers were claiming that by reason of a particular legislative resolution, they were entitled to this extra holiday pay for the days they worked during World War II. Well they persuaded the Court of Claims that their claim was meritorious, and of course, this was a test case involving just Mr. Bergh and perhaps a couple of others.

We filed a petition for certiorari in which we represented that there was $750 million involved in this case. This was the General Accounting

Office's estimate. Now that, of course, would have been the case only if every possible claimant was still alive and filed a claim. But that is what we said. $750 million. We represented that as being one of the reasons why the court should take the case. In the brief in opposition, the lawyer for these former employees didn't challenge that figure at all. What he said was simply, "It doesn't make any difference how much money is involved, the Court of Claims decision is clearly right and therefore there is no reason for the Court to take the case." Well the Supreme Court did take the case, and by a vote, I think it was of 6 to 3, reversed the Court of Claims decision.

In those days, *The Washington Post* had a Federal Diary column dealing with government employee issues, written by a guy named Jerry Klutz. Two or three days after the Court's decision comes down, Klutz's column quotes the lawyer for Mr. Bergh as saying, "The only reason that the government won that case is that it lied to the Supreme Court as to the amount that was involved." I was, needless to say, rather displeased at that [laughter] and I sent a note to Mr. Klutz in which I called attention to the fact that the lawyer had not challenged that figure in his brief in opposition, and Klutz, of course, didn't respond either by note to me or in his column.

The other cases there was nothing particularly remarkable about them. They covered a very wide range of issues. They came from a wide

range of different government agencies and departments. This was understandable given the range of the Civil Division's operations.

MS. FEIGIN: Thank you again. When we pick up next time, we'll start with the next phase of your career.

MR. ROSENTHAL: Very good.