

ORAL HISTORY OF  
ALAN ROSENTHAL

Sixth Interview – June 6, 2011

This interview was 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 the King Farm subdivision in Rockville, Maryland, on Monday, June 6, 2011. This is the sixth interview.

MS. FEIGIN: Good morning.

MR. ROSENTHAL: Good morning, Judy.

MS. FEIGIN: So, Alan, when we left off, you were getting ready to leave DOJ, just about to, and I wonder if you have any final thoughts about that part of your career.

MR. ROSENTHAL: Yes, I have a few. First, as I think I might have previously mentioned, when I came to the Appellate Section, or as it was then known the Supreme Court Section, in the fall of 1952, there were a total of twelve members in that section, myself included.

MS. FEIGIN: The top people included as well?

MR. ROSENTHAL: Absolutely. The Section Chief, the Assistant Section Chief, and there were ten Indians, myself being the most junior one. When I left, there were approximately twenty-two. Then, so I'm informed, the staff has been steadily increased since then, and the total number currently is around sixty. In other words, five times the number in 1952. At the same

time, so I'm informed, these days the section is not able to handle nearly the percentage of cases in the courts of appeals that were handled within the section in the twenty years that I was there. Stated otherwise, there are a large number of cases that in my time would have been handled on appeal by section lawyers that now have to be farmed out to the U.S. Attorneys, and what that indicates is the enormous proliferation of litigation in the federal courts of appeals. So that I think is one interesting factor.

A second interesting factor is that when I left the Appellate Section in 1972, there remained only one of the eleven others who had been there when I arrived. In short, except for Morton Hollander, who was the Chief of the section at the time I left, everyone else had gone. Now this is in sharp contrast to the situation today. I've been gone from Civil Appellate for the better part of 39 years, and believe it or not, there are I think five or six of the lawyers that were in the section when I departed who are still there.

MS. FEIGIN: Do you have any theory as to why that would be the case now as opposed to —

MR. ROSENTHAL: To the contrary, what surprises me is that for me at least the years that I was in the section were years that were much more pleasant than the working situation is in the section at present. I noted I think at the end of the last session that I was never called upon during my twenty years there,

up until my encounter with John Dean a month or two before I left, with a request that I take or refrain from taking action for partisan political reasons. Today, in the Civil Division, there are a number of political deputies to the Assistant Attorney General in charge of the Division, and indeed, the Appellate Staff, as what used to be called the Appellate Section is now known, has its own political deputy. I have to think that that means that there's much more of a political overtone, if I may put it that way, with regard to the Civil Division's activities than was the case during my twenty years there.

MS. FEIGIN: Do you know when this change occurred?

MR. ROSENTHAL: I do not know precisely. Obviously it was after I left, and my understanding, but it might not be correct, is that it was within the last 10 to 15 years. I think there were political deputies in the Clinton administration as well as in the second George Bush's administration, and they continue in the now-Obama administration. So that's something I frankly state I would not have liked. I would not have liked to have worked in that section with a political deputy looking over my shoulder. And yet, as I say, there's this group of lawyers that have remained there for more than 38 years, and what was of concern to me apparently is not of concern to them, or is not of sufficient concern that they have felt the need to seek other employment. So basically I think that's it. I would only add that I think that the most satisfying aspect of my twenty years at DOJ was

the high quality of the people with whom I was associated. From top to bottom, they were a first-class group, and that included, I might say, you, Judy, who came in in the very late stages of my time there.

MS. FEIGIN: Thank you.

MR. ROSENTHAL: It was a very, very solid crew, and it was a great pleasure to have worked with them. I think that we can all agree that in any work environment, collegial work environment, it's extremely important how good and how decent the people are with whom you are working, and all the way through the twenty years, they were a great group. So I think with that, I will conclude my twenty years at the Department of Justice and move on.

MS. FEIGIN: Well you did move on, and you went to what was then known, I believe, as the Atomic Energy Commission, and I'm wondering how it happened that you went there, especially in light of the fact that you had never done a case with them.

MR. ROSENTHAL: That's right [laughter]. That was one of the very few government agencies with which I had zero contact during my Department of Justice years. I was sitting at my desk at DOJ in June of 1972, when my secretary informed me that there was a Mr. X – I don't recall now his name – on the telephone, and he introduced himself as the legal assistant to Atomic Energy Commissioner William Doub, and he stated that Mr. Doub would like to have an audience with me. I said, "Well, would you mind telling me what he wants to talk to me about?" "I think I will leave that to the

Commissioner,” and he said, “while the Commission is basically housed in Germantown, it does have an office at 1717 H Street, Northwest, in the District, and he would appreciate it if you would come up to that office to meet with him.” Well needless to say, I agreed. Also needless to say, I was enormously curious to see what he might possibly have in mind.

I turned up at the appointed hour at 1717 H Street, Northwest, and the Commissioner informed me that I was under consideration for the position of Chairman of the Atomic Safety and Licensing Appeal Panel of the AEC, and he was interested in knowing whether I wished to be further considered. Well, you can rest assured this was a bolt out of the blue, again recognizing my absolute lack of prior contact with this particular agency. Mr. Doub went on to explain that I had been heavily recommended for this position by a lawyer named Anthony Roisman who had been involved in a fair amount of AEC litigation, and in whom Mr. Doub had a great deal of confidence. Well, I had had no professional contact with Tony Roisman, but it so happened that his then wife Florence had been on the staff of the Appellate Section of the Civil Division, and I had had a good deal of professional contact with her, and a certain amount of social contact with Tony as well, and I can only assume that Florence had recommended me to her husband who in turn had given my name to Commissioner Doub.

The AEC operated on a principle that assigned specific areas of

responsibility to particular commissioners, and the responsibility for obtaining a chairman for this appeal panel had been put at the doorstep of Commissioner Doub. Well, obviously, I was interested in getting a lot of further details as to what this involved, and at the end of the session I asked Doub if I could have a week to think about whether I wanted to be a serious candidate, and after giving it that week's additional thought, I called him up and informed him that, yes, I would be willing to be a candidate for the position. Well a week or two passed and I heard nothing, and then I received a phone call from him in which he asked me to go to Germantown – again, which was the headquarters of the Atomic Energy Commission – to meet with the then chairman James Schlesinger, who at different times occupied other positions, including Secretary of Defense, and James Ramey. Ramey was another lawyer-commissioner and had been on the AEC for many, many years.

They very kindly sent a car to pick me up at the Department of Justice, and I was driven out to Germantown, the AEC headquarters, and I first met with Jim Ramey who seemed a little chilly, I must say, and then was ushered into the office of Chairman Schlesinger. Schlesinger said to me, “What are you doing here?” [laughter] And I said, “Well, Mr. Chairman, Commissioner Doub had suggested that I meet with you.” “Well,” said Schlesinger, “I don't know why my time is being taken up with this meeting. It's my understanding you've already been chosen.”

[Laughter] Well that was the first that I had heard of that, but in any case, my session with Schlesinger came to an almost immediate end, and I was returned to the Department of Justice by the AEC driver, whereupon I called Doub and inquired as to just where did the matter stand. He laughed and said, "Well, the fact of it is that you're the prime candidate, but," he said, "I think the chairman may have been a little premature in announcing that you were definitely it." Well, I waited a few weeks and heard nothing, and then Helen and I went on vacation at the beginning of August to Capon Springs, West Virginia, where we spend a week every summer for God knows how many years at a resort there. I had been there two days of the week when I received a phone call from Doub that indeed I had been selected, and for the record, did I accept the position, and I said, "Yes, I did."

There's an interesting footnote to that. My appointment was, of course, subject to a security clearance. Whatever clearance I had received coming into the Department of Justice, which as you recall had that problem associated with it, was not good enough. I needed what's characterized as a Q clearance. So before coming on board, I had to wait for the security clearance to be completed. I'm happy to report that the same difficulties I encountered with the Department of Justice clearance were not repeated [laughter], and in the latter part of September, I received a phone call from a woman in what was then called Personnel – now I

gather it's always Human Relations – named Helen Washington. I remember her name to this day. Ms. Washington said, "I'm happy to inform you that I'm in a position to offer you the position of Chairman of the Atomic Safety and Licensing Appeal Panel." I said, "Well, Ms. Washington, I thought that the position had been offered to me by Commissioner Doub some six weeks ago." "He had no authority to offer the position to you. [Laughter] The formal offers must come from somebody in Personnel." I said, "Well, excuse me."

In any case, the next thing that happened was that I was supposed to report to the Commission on October 1, which would have been the 20<sup>th</sup> anniversary of my arrival at Justice. It would have been twenty years to the day. Well, my arrival was delayed for some two weeks because, in the interim, I had an operation to remove a part of my thyroid that had what turned out to be a non-malignant tumor, but I did turn up right after Columbus Day, and it was quite a formal ceremony. Indeed, the day after Helen Washington formally appointed me to this position, I received a phone call from somebody in the AEC secretariat who asked me whether I intended to produce my own Bible for the swearing in ceremony or whether I would be satisfied with a government-issued one. I said I thought that the government issued one would do just fine. Well, he said, I have a second question. Are there specific individuals that you would like invited to the swearing-in ceremony? I couldn't think of anybody

particularly other than the two employees of the AEC with whom I was acquainted. One of them was the Mayor of Kensington who lived a couple of blocks from me, and the other was the Deputy Controller who I met previously because we had had friends in common. I mentioned those two, but I couldn't think of anybody else. So the day comes and I report to Germantown for the swearing in. My office, however, was downtown at the H Street building, and lo and behold I'm ushered into this quite substantial conference room and there are all five commissioners plus half a dozen other reasonably high functionaries in the AEC, and I am administered the oath of office before this crowd – hand on the government-issued Bible [laughter]. Never before and never since, have I been involved personally in anything remotely resembling that swearing in, but I have to say, that's the way the AEC functioned. After the swearing-in ceremony ended, I then was driven back to the District to my new quarters in the Matomic building, that was the name of the H Street building, and I got to work.

MS. FEIGIN: Who swore you in?

MR. ROSENTHAL: I think it was the Secretary of the Commission. When they asked me whether I was going to supply my own Bible or not, I had an idea that this might be something modestly out of the ordinary, but I certainly did not expect this rather large turnout of AEC functionaries, including, as I say, the entire five Commissioners.

MS. FEIGIN: Before we get to the AEC and your life there, you said when you were first approached about the job, you said let me have a week to think about whether I want to be considered. What made you feel this was the job you wanted or the time to leave DOJ?

MR. ROSENTHAL: I don't recall whether I mentioned at the last session that I'd begun to have feelings about departure, probably around the middle of the 1960s.

MS. FEIGIN: You mentioned a couple of other opportunities.

MR. ROSENTHAL: None of those panned out. At this point, in 1972, I thought the time had really come to leave. Unlike these people who stayed for over 40 years, I felt that as great as my years at DOJ were, the time definitely had come to move on. With respect to this job in particular, I concluded that it would represent a definite challenge, considering my total previous AEC non-involvement, and at the same time, also would provide an opportunity to play judge, and I felt that after having spent 20 years catering to judges [laughter] that maybe there was something to be said for now having lawyers catering to me. I think there was something of that in it as well. I have to say that while accepting the position with no reservations, at the same time I was a little nervous departing for this quite different position, in an area that was totally unfamiliar to me.

MS. FEIGIN: Before we talk about how the AEC was structured, can you tell us the nature of the cases that the AEC handled?

MR. ROSENTHAL: Yes. For most of my time at the AEC – then NRC – I think I should state at this point that the AEC in 1975, a little more than two years after I arrived, was divided into two parts. The regulatory part became the Nuclear Regulatory Commission. The promotional part, promoting the use of atomic energy, became ERDA, the Energy Research and Development Administration, which subsequently was factored into the Department of Energy when that department was created. So the part of the AEC that I was involved with was responsible for the regulation of all civilian uses of atomic energy, and it had its source in the Atomic Energy Act which I think was enacted in 1946, and more particularly, the Atomic Energy Act of 1954, which still remains the source of the Commission's regulatory authority.

Now what we were regulating was in large measure commercial nuclear power plants. When I arrived on the scene, there were applications for either construction permits or operating licenses for a very substantial number of nuclear power plants all over the country. So the grist of the adjudicatory mill was in the area of the applications for construction permits or operating licenses. Virtually every one of those applications was vigorously opposed by, for the most part, local groups in the area of the proposed facility who were dead set against the construction in their territory of a commercial nuclear power plant. We'll get into it a little later, but some of their concerns were legitimate, others

were fanciful. I can't tell you how many people believed that a nuclear power plant was just like an atomic bomb; it could blow up, which, of course, was not the case.

In addition to those cases involving opposed applications for construction permits and operating licenses for commercial nuclear power plants, there were cases involving violations of the terms of AEC, then NRC, licenses. When the Commission staff determined that there was a violation of a license, the usual outcome was the imposition of a civil penalty. In extreme cases perhaps suspension or even revocation of the license, and the licensee was, of course, given an opportunity to challenge the punitive action taken by the staff. So we had a certain number of those cases.

In addition to that, there was the occasional case involving the decommissioning of sites on which activities under a nuclear license had been conducted. These sites would generally contain some radioactive material, and there was always the question of how was the licensee going to deal with that material, and they were required under Commission regulation to come up with a decommissioning plan. The decommissioning plan was frequently challenged by some of the folks in the area where the activity had taken place.

Finally, believe it or not, we had a few antitrust cases. As difficult as it might be to believe, there were competitors of the proposed nuclear

power plant who believed that, as a result of economies of scale, these large nuclear power plants would have a competitive advantage over the smaller systems. Now what were these smaller systems? In large measure they were rural electric cooperatives that generated electricity that was then sold through distribution co-ops. In the case of Cleveland, it was a municipal electric power company, and Cleveland at that time might have been the only city in the United States where there were two separate electric lines going down every block. One line that of the Cleveland Municipal System, the other one of the investor-owned Cleveland Electric Illuminating Company. Every individual, every homeowner, had the option of buying electricity and having it delivered to his door by the Municipal system or instead by the Cleveland Electric Illuminating Company. So there was this feeling on the part of the Cleveland Municipal system, as in the case of the electric co-ops, that the grant of a construction and then operating license to one of these big electric companies would put them at a competitive disadvantage, and so they would challenge the grant of the license on antitrust grounds as indeed was permitted by the Atomic Energy Act. In most cases what they wanted at the end of the day was to be given a portion of the nuclear facility. Now this is all ironic, because it turned out that the belief that there was going to be an enormous advantage because of relative size proved to be not the case. And indeed we had, I think, just three antitrust cases over the years,

and those were all in the 1970s, and by the early 1980s, nobody was claiming that there was an antitrust problem because of economy of scale.

MS. FEIGIN: Did you have to get up to speed on all the scientific background?

MR. ROSENTHAL: That gets into the question of what was the adjudicatory structure. Now in most of the federal agencies, the adjudication of the issues coming before the agency must be conducted by an administrative law judge, and the administrative law judges are appointed by what was then the Civil Service Commission, now the Office of Personnel Management. They're appointed to a roster, and they're assigned to specific agencies, and the theory is that an administrative law judge should be able to handle the adjudication of any agency. In point of fact, I think that almost all of the administrative law judges end up in one agency and that's where they remain for their entire career.

The Atomic Energy Act of 1954 provided the Atomic Energy Commission with an exemption from the requirement of the Administrative Procedure Act that administrative law judges be used to conduct the agency's adjudication. The AEC was authorized to employ, instead, licensing boards that consisted of three individuals drawn from a panel. In the case of the AEC, and this was carried over by the NRC, still true today, there is a licensing board panel consisting of a certain number of lawyers and a much larger number of technically trained individuals – nuclear physicists, nuclear engineers, geologists, seismologists, health

physicists, you name it. Some of the technical members are full-time. Many of them, however, are part-timers called upon to serve on boards as needed. Some of the part-timers come from industry, from university faculties. Many of them are retired, but many of them are not and just fit in their service on licensing boards with their other occupational responsibilities.

The typical licensing board, from day one to today, consists of one lawyer who serves as its chairman and two technical members. They're drawn from this large panel, and they're assigned to the particular case by the Chief Judge, Chief Administrative Judge, of the licensing board panel. Now my panel was the appeal panel.

MS. FEIGIN: Let's just go back one minute to the licensing panel. I assume it's not random, that it's assigned based on skill sets?

MR. ROSENTHAL: To some extent, but at the time they're assigned, it often – I would say most frequently – is not known precisely what are going to be the technical issues that come up in a case. Now, the theory is that even though these technical members have a specific discipline, they're supposed to be Renaissance men and women, and I'm going to get into that a little more when I talk about the appeal panel. They're supposed to be willing and able to familiarize themselves with enough of other disciplines as might be required to adjudicate the technical issues arising in the particular case. Now, on the other hand, it might be readily

apparent at the very threshold when a case arrives and it's necessary to make the assignment that the principal issues will deal with the impact of the proposed nuclear facility on the water – these nuclear facilities are all located close to bodies of water, which is necessary in order to provide cooling water. If it thus appears that water quality issues will be at the forefront, I would suspect that the Chief Judge would look at his roster for somebody who has special expertise in that specific sphere, but a lot of the times, they're selected on the basis of availability, which is a more important consideration generally than is the matter of the specific discipline of the member.

MS. FEIGIN: Now tell me about the appellate panel.

MR. ROSENTHAL: The appeal panel no longer exists, having been assassinated in 1991, but that's for next week or next session. When I arrived as chairman to replace the chairman who had retired, there were on the appeal panel a full-time nuclear physicist who was the vice chairman of the panel and one other technical member who served part-time. His principal occupation was dean of the School of Engineering and Applied Sciences at the University of Virginia, and he came up as needed. So there were those two technical members, one full-time, one part-time, and there was just one other lawyer besides myself, full-time. I immediately determined that given the caseload the appeal panel was confronted with, that was grossly inadequate, and I made that view known to the Commission which

immediately authorized me to take on several additional people.

In that day, the procedure for selecting members of the appeal panel was quite different than the procedure that exists now for appointing people to the licensing board panel. Officially, the appointment was made by the Commission, but, in fact, it was made by me; all that I needed to do was to determine who I wanted for the particular vacancy, send that person's name up. Appointed. Now today that's not the way it functions. If there's a vacancy on the licensing board panel – again there's no longer an appeal panel – there is a formal vacancy announcement put out, applications are collected, there's a screening panel that interviews the candidates, rates them A, B, C, and D, or I don't know, and then the A candidates names are sent up to the Commission and generally interviewed by the commissioners who accept or reject particular candidates. So in point of fact, the current chief administrative judge of the licensing board panel has relatively little to say about who ultimately is tapped for his panel.

MS. FEIGIN: How did you go about it?

MR. ROSENTHAL: Well the first vacancy I had, while I was just beginning the process of deciding who I might select for this position, I had lunch with a former Justice Department colleague named Mike Farrar. Mike was one of our stars in the Appellate Section. He came to it about 1967 from a clerkship with a district judge in New Orleans. He was I think number one in his

class at the Notre Dame Law School. He actually had gone to Notre Dame also as an undergraduate. He was a seven-year Golden Domer, as they're called. In any case, in 1970 Mike had been with us a couple years, a stellar performer.

Bill Ruckelshaus, who was then the Assistant Attorney General of the Civil Division, becomes the Administrator of the newly created Environmental Protection Agency, and he appoints somebody as general counsel and instructs him to come up with a first-class staff, and he apparently said to the general counsel, "You might want to go over to the Civil Division, Appellate Section, and see who you can raid." In any event, that's exactly what the general counsel did, and we lost three of our very best lawyers, Robert Zener, Dan Joseph, and Mike Farrar, to EPA. Well this didn't sit too well with me, and I put in a phone call to the EPA deputy general counsel who I was told had been really the architect of this raid, and I told him, I could understand why he was looking to build up a first-class staff, but I thought that he might have distributed the raiding a little more equally among the various departments and agencies. It seemed to me that taking three of our very best lawyers was a little much. Bear in mind, this was a staff of just about 21 or 22; this wasn't a several hundred lawyer staff. His response was, "I didn't point a gun at the head of anybody" [laughter]. Which, of course, was true, but I found was a very unsatisfactory response.

In any case, at the time I was faced with the decision as to who to anoint as my first appointee, I had lunch with Mike Farrar, and it became readily apparent to me that he wasn't overwhelmingly happy over in EPA. What he was, he was the Assistant General Counsel of the office that dealt with pesticides, and he was a fighter of DDT and some of the other pesticides which were supposed to be carcinogens or to cause other ailments. So I said to Mike, "Any chance that you might be interested in coming over and joining me?" Well, he said he would think about it, and in a week or two thereafter, I think it was, he came back and said yes, he thought he would like to join me. And so after the deputy general counsel of EPA had raided him from Justice, I in turn raided him from the EPA. So Mike was the first one that joined the staff.

Subsequently, I took on another alum of Civil Appellate, Dick Salzman, who later took a demotion and became a D.C. Superior Court judge [laughter]. And then in 1980, it was interesting. Mike had four daughters that he had to educate. He decided that the private sector was a greener pasture insofar as financing their college educations, so he departed. Well I had a vacancy then, and I had as it turned out two superlative candidates. One of them was James Asselstine, who had been my first law clerk. I hired him in 1973 upon his graduation from the University of Virginia Law School, and he stayed with me for the two years, the term of my clerks, then remained in government and eventually

ended up on the staff of the Joint Committee of Atomic Energy, which no longer exists, but was a very formidable committee at that time.

MS. FEIGIN: Congressional committee?

MR. ROSENTHAL: Yes. Well, Jim expressed an interest in joining the panel, and even though out of law school just seven years, I regarded him as very viable. He was absolutely superlative. At the same time, I received a phone call from a lawyer who I knew very well and had a great deal of respect for his judgment. He had learned that I had this vacancy, and he recommended, very highly, a woman named Christine Kohl, who at the time was the staff counsel to the District of Columbia Circuit. I invited Chris over to meet with me and was extremely impressed with her, just from that meeting. I was so impressed that I did something I never did before and I never did again. I sent both of their names to the Commission and said, in effect, "Take your pick." Well, the Commission chose Chris. I suspect, without knowing, that the gender factor came into play, and thus poor Jim Asselstine had to settle, a couple of years later, for a much less prestigious position within the agency. He became an NRC Commissioner [laughter]. Apparently, again, he was working for the Joint Committee on Atomic Energy, and as I understand it, his mentor on that committee saw to it he got appointed. Well I think it worked out well for them both. Jim was an excellent Commissioner. He served only one term. At the end of the term, he decided that he wanted to make a little more

money than working for the government allowed. He went up to one of the investment banking firms in New York and became their guru on all kinds of nuclear energy matters, and I understand he made a ton of money.

On the other hand, Christine was with the appeal panel until its abolition. The last few years she was its chairman, replacing me at the time I retired in 1988. When the appeal panel was abolished in 1991, at my urging, she applied for a position in the Civil Division, Appellate Section, Appellate Staff as it's now known. I told Bob Kopp that if he did not take her, he would be making the largest mistake that he could possibly make.

MS. FEIGIN: Bob Kopp, Chief of the Appellate Staff?

MR. ROSENTHAL: Bob Kopp, yes, the Director of the Appellate Staff. And I will state as I've said on many occasions, that there is no lawyer that I've encountered in my 60 years at the Bar – and they are 60 years this year – for whom I have a higher regard than Christine Kohl. She is absolutely magnificent. As I say, it worked out well for me. I think it worked out well for Chris. I'd like to think so. And it certainly worked out well for Jim Asselstine. I think next month Chris will have been in Civil Appellate 20 years, and it will exactly equal the time that I was there. Whether she remains there for 20 years is another matter.

MS. FEIGIN: I notice that when you mention the people you appointed, they were all lawyers. Did you not appoint —

MR. ROSENTHAL: I appointed the technical people as well. Obviously I employed a completely different procedure in their case. What I essentially did was I got recommendations from people in the technical world for whom I had respect, and I acted upon mainly those recommendations. One thing that I was very interested in and is something that came up a short while ago was the matter of the Renaissance man and woman concept, particularly with the appeal panel where any case that we got could – and usually did – involve a wide range of technical issues. It was imperative that the technical members be prepared to suit up on the disciplines which were not their primary one as the need arose. And I would have to say that, with one exception, all of them met the challenge. I had a health physicist who is now long deceased who unfortunately was magnificent in dealing with health physicist issues but he just couldn't come to grip with the issues that came up before the board that were in other areas, and particularly in – the most difficult I think of the issues that we faced were those in the area of seismology. Again, I had to use a different approach with respect to the technical members, but on the whole, it worked out well.

MS. FEIGIN: How many people sat on an appellate board?

MR. ROSENTHAL: Three. Unlike the licensing boards, where, as I noted, you had a lawyer and two technical members, on the appeal boards, two lawyers and one technical member, and in the antitrust cases, three lawyers. So it was just

the opposite. Now, the appeal boards had two powers that most appellate tribunals lack. First, we had the power to take evidence ourselves. And if on an appeal from a licensing board decision, we decided that the record needed enlargement on some issue, without exception we took the evidence ourselves rather than remand the matter to the licensing board to take the additional evidence. We knew precisely what the deficiency was, at least the perceived deficiency was, and thought, therefore, that it would be more expeditious if we took the evidence ourselves rather than remand it.

The other respect in which we differed from the technical appellate tribunal is that we were required to review on our own initiative every licensing board decision that was not appealed to us. In the trade, it's known as *sua sponte* review.

There's a very amusing story in that regard. The second case that I sat on after coming to the AEC involved an initial decision on a construction permit application for a proposed reactor in the state of Michigan. No appeal was taken by the intervener who had challenged the application before the licensing board. But nonetheless, following the Commission's directive that we conduct a *sua sponte* review in the absence of an appeal, we took a close look at the licensing board decision and decided that it was defective in one respect. It didn't involve taking additional evidence, however, and so we remanded the case to the

licensing board to take whatever action was necessary to cure the defect. The day after the decision issued – our decision – my secretary buzzes me and informs me that the lawyer who represented the utility in that case wanted to talk to me and was in the office. I couldn't imagine what he wanted, but I said, "Okay, have him come in." So he comes in. Right out of the barn, "Judge Rosenthal, I can't imagine what you thought you were doing when you remanded this case to the licensing board. [Laughter] The intervener had no problem with the licensing board decision, what possible justification did you have for sticking your nose into it?" And it was almost in those terms. Well it was probably two minutes before I recovered from the shock, and I said to him, "Well, Mr. X, to begin with, you have no business being in my office." But, I said, "Apart from that, if you have a complaint, you're addressing it to the wrong forum. You might want to go up and talk to the five commissioners because in reviewing that decision *sua sponte*, we were acting under a direct instruction from the commissioners." He turned around and walked out. I couldn't believe that exchange. I can tell you that at no point in the years following that incident did I encounter anything remotely approaching it.

MS. FEIGIN: Were your decisions themselves appealable?

MR. ROSENTHAL: Our decisions were not appealable as a matter of right. The licensing decisions were appealable as a matter of right to the appeal boards. The appeal board decisions were reviewable by the Commission at its

discretion. In other words, in the Supreme Court terms, certiorari jurisdiction. A disgruntled party could file a petition for review with the Commission. In the overwhelming majority of cases, the petition was denied. Then our decisions, if not reviewed by the Commission, became the final Agency action and reviewable in the federal Court of Appeals under the Hobbs Act. If the Commission reviewed our decision, then its decision was reviewable in the Court of Appeals.

MS. FEIGIN: Your appellate work sat at H Street?

MR. ROSENTHAL: We were only at H Street for a year, fortunately. I used to refer to the Matomic Building as being the cockroach palace. Not that much of an exaggeration. Actually, when I signed on board with the AEC, it was with the understanding that the adjudicatory boards would be moving to Bethesda very shortly, and that was another attractive feature given that I lived in Kensington, and in point of fact, we did move to Bethesda in the fall of 1973 and remained there.

MS. FEIGIN: Were these adjudicatory boards set up like the courts of appeals that we are familiar with in the judicial sense? Did you have reporters? Did you sit in robes?

MR. ROSENTHAL: No, no. Not only did we not sit in robes, we didn't use the term "judge." There's a story about that as well. When I arrived, we were all "Mr." or "Dr." And then when Christine Kohl arrived, it was "Ms." Some time in the early 1980s, the licensing board panel acquired a new chairman, and

the first thing – or one of the first things – that he did was to decide that his troops should henceforth be referred to as judge. They too up to that point were Mr., Dr., or Ms. They did have one or two women members. Well he came down to me and told me of his intent and he said, “What do you plan to do?” So I said, “Well, I’ll poll my gang and see what their preference is.” The lawyer members said they could not care less. The technical members said “Not on your life. We are Dr., and insofar as we’re concerned, the term “doctor” is vastly superior to the term “judge.” [Laughter] So to the day of the abolition of the appeal panel in 1991, we were Mr., Dr., Ms.

MS. FEIGIN: Well on that note, we should end today’s session, and next time we can talk about some of the substantive cases in which you were involved.

MR. ROSENTHAL: Very good.

MS. FEIGIN: Thank you again.