

**Oral History of
FRANK Q. NEBEKER
Tenth Interview
July 9, 2008**

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 the Honorable Frank Q. Nebeker, Senior Judge, District of Columbia Court of Appeals, and the interviewer is David W. Allen. The interview took place on July 9, 2008. This is the tenth interview.

Mr. Allen: Today is July 9, 2008. This is the continuation of the oral history of Frank Q. Nebeker. We have covered in previous sessions the Judge's life history and pretty much all of his professional career, including the various courts on which he has served, his stint as Government Ethics Officer, and the creation of the Veterans Court and his return to senior status at the D.C. Court of Appeals, and the Judge has asked to have one more session to kind of go back and pick up anything he'd like but in particular to focus on the line of cases that led to the Supreme Court decision in *Pulliam v. Allen* in 1984 and the aftermath of that decision and Judge Nebeker's activities with respect to the fallout of that decision and the possible liability of events that occur in their courtrooms. I think that's probably enough introduction. Judge, why don't you take it over.

Judge Nebeker: All right. As I think I've discussed previously in this oral history, I spent about 28 years with the Appellate Judges Conference Seminar Series and as a result became quite well acquainted with the majority of the appellate judges in the United States, plus many in Canada and Australia. During the

course of preparing the seminars, I met a man named Joseph R. Weisberger. He was a Justice on the Rhode Island Supreme Court and subsequently became its Chief Justice and, I might add, with a sterling performance unlike many of his successors or predecessors on that court. I say that by way of preface because when *Pulliam v. Allen* was decided, and what it held was that there was no judicial immunity to bar prospective injunctive relief against a judicial officer acting in his or her own judicial capacity, and that was quite a shock. It came about as a result of Magistrate Pulliam, a Virginia magistrate who had a practice of setting bail even in non-jailable offenses, petty offenses. These two people, Allen being the initial plaintiff, brought declaratory judgment and injunctive relief action against Pulliam under 1983 Civil Rights Act. The District Court in Virginia enjoined the practice. The Fourth Circuit Court of Appeals affirmed. The case went to the Supreme Court and it affirmed, holding that there was no judicial immunity for prospective injunctive relief against a judicial officer. Then the issue of attorneys' fees was broached in the case. That is, attorneys' fees under Section 1988 of the Civil Rights Act because Allen and his associate had succeeded in prevailing in their injunctive action and so the Federal District Court and the Fourth Circuit agreed that under Section 1988, the Magistrate was personally liable for attorneys' fees, of, if I recall correctly, they were in the neighborhood of four figures, somewhere in the thousands of dollars.

Mr. Allen: Something like \$7,000.

Judge Nebeker: \$7,000. The Supreme Court sustained that action and Magistrate Pulliam was held personally liable. As an aside, I might add, I've been informed that the state paid the fee rather than her personally, but still the judgment was a personal liability judgment against her. And thus began an effort by the Appellate Judges Conference, mainly through Chief Justice Weisberger to have Section 1988 amended to overturn this decision on personal liability for attorneys' fees. Justice Weisberger testified a number of times before the Senate Judiciary Committee on this matter for years, a good ten years or more. It never saw the light of day. The bill would be introduced, would never be reported out. Well, during the last two years of the Clinton administration, you recall that the Congress became controlled by the Republicans. I was Chief Judge of the U.S. Court of Appeals for Veterans Claims and I had asked if I could see Senator Thurman about some matters respecting the Veterans Court. He was gracious. I went to his office and we dealt with the problems of the Veterans Court. He then said – I won't forget it – he then said, "Well gentlemen, if that is all," and he stood preparing to escort us out. I said, "Well, Mr. Chairman, there is one other matter that has nothing to do with the Veterans Court." And I started to explain to him about *Pulliam v. Allen*. He remembered it, and he turned to his legislative assistant who was in the room at the same time, and said, "Whatever happened to that bill?" The legislative assistant was nonplussed; he didn't

know. It was a surprise to him that we were talking about this. I said, "Well Mr. Chairman, I can tell you what happened. Your colleagues, Senators Kennedy and Biden, wouldn't let it see the light of day." He turned to his legislative assistant and he said, "Let's get that bill out and get it introduced." Well that happened, and when it was introduced, I contacted the legislative aide and said, "Gee, this thing is a stand-alone bill all by itself, it's sure going to run into trouble isn't it?" And his aide said, "Well, don't worry about it. We'll take care of it." At the end of that congressional session, on a consent calendar, was the Federal Courts Improvement Act of 1996, I believe it was, and it passed the dark of night, was signed by the President, and in it contained the amendment to Section 1983 protecting the independence of judiciary – state judiciary mainly – by exempting them from personal liability in the event there was a successful injunctive action against them in their official capacity.

Mr. Allen: And Clinton signed it?

Judge Nebeker: Clinton signed it. What I do recall specifically about the effort was that Justice Weisberger reported to the Appellate Judges Conference on numerous occasions that there had been other actions filed against other state judicial officers throughout the United States and that there was a real concern for judicial independence because of the potential personal liability of the judge. So that explains that it was more than just *Pulliam v. Allen* at stake in this legislative endeavor. And as I say, I was happy to report to

Joe Weisberger that this little-known provision in that Federal Courts Improvement Act was there, and he was so pleased. He credits me with it but really I think it was his efforts that made it possible for Senator Thurman to take the ball and run with it. And I thought that that might be an appropriate episode, to include in this oral history.

Mr. Allen: Oh absolutely. I think it characterizes very much your career in a lot of ways. My overall impression from these sessions is that it's been a lovely thing, so your personal reflections on the large issues as well as people, and some of them behind the scenes of people you never hear about, some as famous as Chief Justice Burger and members of his family whom you knew, as well as putting the court together, throughout a concern with the process, so I think this is an example of all that. The record is still open, and I think that's great.

Judge Nebeker: I've tried to edit some of the transcripts thus far. I haven't been too successful at it. But I'll definitely finish it, and if I've left out anything that I should've included, it's probably a good idea because this is a long enough history.

Mr. Allen: [turned off recorder, but tape is still going – balance of Side A and Side B are blank]