Oral History of
HONORABLE FRANK Q. NEBEKER
Second Interview
August 19, 2003

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 August 19, 2003. This is the second interview.

Mr. Allen: After our first interview on August 12, 2003, which covered your early life and early legal career, we are now at the point of beginning to describe your continued tenure at the U.S. Attorney's Office now on the appellate staff. Is that correct?

Judge Nebeker: Yes, that's correct. I was transferred to the Appellate Division where I brought a case with me. While I was in the Misdemeanor Section, because I guess, of my understanding of automobiles, I became the focal prosecutor on repair fraud and indeed there was a woman named Miriam Ottenberg who got a Pulitzer Prize of some sort – I don't know now exactly what – for having written an article about the same time on automobile repair fraud here in the District of Columbia.

Mr. Allen: Was she a newspaper reporter?

Judge Nebeker: Yes.

Mr. Allen: For the *Post* or the *Star*?

Judge Nebeker: One, I'm just not sure which. She was a relative of the Ottenberg Bakery people. This case that I had tried involved a soldier who had been

defrauded of a considerable amount of money in the repair of his old car. For instance, the repair people billed him for new shock absorbers; all they did was take the old ones off, clean and paint them and put them back on. They charged him for certain engine repairs which had not been done. The reason we were able to prosecute the case is that the mechanic who was doing the work for this garage came with the soldier to the Misdemeanor Section to complain. And I issued warrants for their arrest and charged two of them. They were named Avant and Hughlett, and I charged them both with false pretenses.

Mr. Allen: False pretenses was a crime?

Judge Nebeker: Yes. False pretenses is a crime. The case was tried non-jury before Judge Edward Beard, more affectionately known as Buddy Beard.

Mr. Allen: When would this have been, what year?

Judge Nebeker: This would be 1959. In any event, Judge Beard gave an instruction, not solicited by me, that recklessness was tantamount to knowledge in a false pretense case and when the two defendants appealed, Beard, having given both of them about 180 days in jail, when it was appealed to the Municipal Court of Appeals, that court reversed on the ground that that instruction was error. At that juncture I was being transferred to the Appellate Division and I convinced Carl Belcher that we should write to the Solicitor General seeking permission to seek an appeal in the D.C. Circuit.

Mr. Allen: And at this time, the D.C. Circuit was an appellate court that sat above the Municipal Court of Appeals?

Judge Nebeker: Yes, the D.C. Circuit, aside from its federal responsibilities, had the local responsibilities of the highest court of the District of Columbia. That meant that all ordinary felonies from the District Court were appealed directly to the Circuit Court. The cases that were in the municipal system went to the Municipal Court of Appeals and only by, in effect, a grant of certiorari, were the appeals allowed beyond the Municipal Court of Appeals for the D.C. Circuit.

Mr. Allen: So the Circuit had discretion to take a case or not.

Judge Nebeker: That is correct. I convinced Carl Belcher and subsequently the Solicitor General that this was a case of significant importance dealing with this rather esoteric crime of false pretenses and we got permission to appeal. I was assigned to the case to handle it by Carl and I argued the case there a number of months later and the particular law that the Municipal Court of Appeals had declared in its opinion was reversed, but nonetheless the Court found in their wisdom, that there should be a second trial for both these individuals. So, I am now in the Appellate Division. Nobody wants to try the case over in the Misdemeanor Section, so Ed Daly (later, Judge Daly), who was then the Chief of the Municipal Court Misdemeanor Section, assigned it to me and just kept on top of it as it wended its way back to the calendar on the trial court. There came a point at which I called to inquire

of the Clerk when the case could be calendared for retrial because I was prepared to try it. I had the witnesses still available and documents.

Mr. Allen: And they had counsel?

Judge Nebeker: Oh, yes. As a matter of fact, Avant had Kenny Wood as his lawyer, Kenneth Wood. Hughlett had Jack Bonner as his lawyer. They were both very fine lawyers. Jack Bonner is long dead and I think Kenny Wood is perhaps still alive living in Florida. I'm just not positive, but he has lived a long life. In any event, I was informed by the Clerk's Office, "Oh, these two defendants entered a plea of guilty and have already been sentenced." I was totally taken aback by this because there had been no notice given and a reporter for the press was interested in covering the retrial. He called around that period of time and wanted to know when were we going to trial and I told him what happened, and he said, "Did you know anything about it." The answer is, No, I didn't. Well I recall there was a headline in the paper reporting this particular incident that said something like, "Prosecutor Finds Cogs of Justice Slipped." And, indeed they had I suppose. Avant and Hughlett who I said had received 180 days from Judge Beard, wound up being given a minor fine by Judge Scally.

Mr. Allen: And this was ex parte as far as the government was concerned.

Judge Nebeker: There had been no prosecutor present at the time of the entering of the plea and of the sentence.

Mr. Allen: Isn't that irregular?

Judge Nebeker: I thought so, but it's not unknown to have happened back in that period of time. In any event, I continued on in the Appellate Division and had a number of cases assigned to me that were of extreme interest. One I'll comment on at this point. I think in my earlier tape I had referenced to coming over to the U.S. courthouse to watch Edward Bennett Williams try the Jimmy Hoffa case.

Mr. Allen: That was your real introduction to the U.S. Attorney's Office.

Judge Nebeker: And to the courthouse, that's correct. Well, I wound up being assigned by Carl to a case called *Hucks v. United States*. Sally is her first name. As I recall, she was a clerical employee in the union headquarters.

Mr. Allen: For the Teamsters?

Judge Nebeker: For the Teamsters. There had been numerous telephone calls made and telephone slips recorded of those calls by Sally Hucks. She was accused of having obstructed justice by burning them when they were, I gather, either under subpoena or about to be put under subpoena. It was a rather protracted trial handled by an attorney at the Department of Justice, but they apparently didn't want to handle the appeal in their Appellate Division at the Department so it got farmed off to the U.S. Attorney's Office.

Mr. Allen: And that would have been someone in the Criminal Division here in Washington?

Judge Nebeker: Yes, that's correct. There's an Appellate Section within the Criminal Division over at the Department of Justice. This was unusual, I believe, to

have had a case transferred from the Justice Department's primary responsibility to the U.S. Attorney's Office after a conviction had been obtained and an appeal had been noted.

Mr. Allen: Do you know was there a reason for their lack of enthusiasm for the case?

Judge Nebeker: I don't know. I never did inquire about it. Obviously, the attorney who tried the case would not have handled the appeal.

Mr. Allen: Because they had a separate –

Judge Nebeker: They had a separate Appellate Division just as the United States Attorney's Office had a separate appellate shop to handle the cases. In any event, this was a huge record, and I went through it making notes and wound up dictating a first draft of the counterstatement of the case, the facts of the case because it was just impossible for me to do it in any other way. Well, in going through the record, I discovered that this prosecutor had, on cross-examination of Hucks and perhaps one other witness, inquired into prior bad acts that had not amounted to a conviction.

Mr. Allen: Of the defendant?

Judge Nebeker: Of the defendant, Sally Hucks, she having registered in a hotel somewhere under a false name with another man. I recognized right away that this was error and could perhaps be reversible error. There were other issues, there were myriad issues, but this one was not brought out.

Mr. Allen: Do you suppose this could be part of the reason for the lack of enthusiasm for the case on appeal at Criminal Division? They could have wondered if

they were going to go down on appeal, let someone at the U.S. Attorney's Office –

Judge Nebeker: Well, there is that possibility, although I don't know to what extent the Appellate Section in the Criminal Division over at DOJ had access to the transcript before a judgment was made to farm the case to the U.S. Attorney's Office. It's possible that they recognized the error, but I don't think so because the preparation of the transcript took some considerable time.

Mr. Allen: And this had been a case that had been tried here in D.C.?

Judge Nebeker: Tried right here in D.C. I've forgotten the trial judge at this point. I suppose I could look that up and add it to the history (Edward A. Tamm).

Mr. Allen: It might be good to know.

Judge Nebeker: It won't take but a minute to do it. I'll refer back to it as we find it. In any event, I was troubled because I found under the Code of Professional Conduct I was required to invite this to the attention of the court even though the appellant had not raised the issue. And I finally hit upon putting it into a footnote, I believe with an argument that said, "Well, if it was error, it was harmless error, given all the other circumstances of the case." And I felt pretty good about it. The government ultimately was sustained on appeal in the case and this issue, which could have been a time bomb, simply didn't impress anybody. They just passed right over it as the case was being decided.

Mr. Allen: Now at that stage, you were assigned the case. For all purposes, you wrote the brief and did the argument?

Judge Nebeker: Correct.

Mr. Allen: And the brief would have been reviewed by Carl Belcher?

Judge Nebeker: By Carl Belcher.

Mr. Allen: Anyone else?

Judge Nebeker: No. Often, Carl Belcher would confer with Oliver Gasch, the United States Attorney, in the evening about the assignment of cases to those in the Appellate Division, but I was unaware of any instance in which after the brief was written, Oliver Gasch got involved in its content. I know that would happen once in a while in a big case where there was a confession of error by the government, but in a case of this kind, albeit big, was rather routine. It didn't involve serious violent felonies and things like that. I have a reason to be convinced that Carl was the only one to have reviewed the brief before it was filed.

Mr. Allen: So, the routine then was all the appellate work was really – the lawyer on the case and his reviewer.

Judge Nebeker: That's correct, and quite frankly, as Carl got to know his people, we became pretty autonomous.

Mr. Allen: So, there would be some briefs you'd write that wouldn't require review at all?

Judge Nebeker: Wouldn't require a review at all. I did go to Carl about this potential unassigned error, and consulted with him about how best to handle it, but I don't have any distinct recollection that he would review the briefs before they were filed. If there were questions, they were raised prior to the writing of the brief or during the writing of the brief, and he would participate at that level. We were so few in the Appellate Division.

Mr. Allen: How many people were there?

Judge Nebeker: It was under a dozen.

Mr. Allen: I think you earlier said there were 48. You made 49 and 50 with special detail in the whole office.

Judge Nebeker: That's right. There were not that many folks in the Appellate Division at that time.

Mr. Allen: And the responsibilities of the office were, and I think this is probably something that people less familiar with the District of Columbia might not realize, in addition to the local federal practice that a U.S. Attorney's Office has as being the Attorney General's lawyers in town, you had the whole local criminal and civil law enforcement activity of the municipal government. Is that right?

Judge Nebeker: Well, not too much the civil. The Corporation Counsel's Office would handle a lot of that.

Mr. Allen: But the criminal work was really done by the U.S. Attorney's Office.

Judge Nebeker: Yes. The division between prosecuting authority of the U.S. Attorney's Office and the Corporation Counsel by statute was, if an offense was punishable by a fine or imprisonment or both – it's the "or both" that's important – then it was in the prerogative of the United States and U.S. Attorney's Office to prosecute. If, on the other hand, it was a fine or imprisonment, it was a petty offense, such as traffic and whatnot, and those offenses would be prosecuted by the Corporation Counsel, which also had an Appellate Division that was responsible for filing briefs in both the Municipal and the D.C. Court of Appeals and in the D.C. Circuit.

Mr. Allen: But the U.S. Attorney's Office here has always had a local criminal law responsibility that is in addition to what most U.S. Attorney's Offices have.

Judge Nebeker: I think no other U.S. Attorney's Office, unless some of them in the islands or the territories, would have common law jurisdiction, common law crime jurisdiction as well as the purely Title 18 U.S. Code violations. Indeed, the Appellate Division in the U.S. Attorney's Office when I was working there with Carl Belcher and later when I became a Chief, we would handle about two-thirds of the total argument calendar of that court every day.

Mr. Allen: The appellate staff did.

Judge Nebeker: Yes.

Mr. Allen: The U.S. Attorney's Office appellate staff?

Judge Nebeker: That's correct. It was a rarity that you'd have someone from the Department of Justice come over to argue a case that they had handled and

excluded the U.S. Attorney's Office from handling. When I say two-thirds, I do the math this way. The court would schedule three cases for argument each morning, Monday through Friday. There would be two criminal cases or a criminal and a civil case involving the U.S. Attorney's Office, because we did have some civil matters that were appealed as well either by us or by the other side, and so we would have two of the three cases. The third case would ordinarily be some agency case, either the FTC or the Federal Power Commission I think it was known as back then, and that of course was the other side of the Circuit Court's jurisdiction and a big side. Those cases were huge, but they had so many of these criminal cases that it almost eclipsed any other type of case that the court had to handle.

Mr. Allen: So the D.C. Circuit has always been unique in some ways in the flow of cases it has because of the local law enforcement function in the District of Columbia that is so much federal?

Judge Nebeker: That is correct.

Mr. Allen: And the other side of it is it has a special agency administrative review function?

Judge Nebeker: And the other purely federal matters that are brought before it.

Mr. Allen: I imagine what it has rather less of is the kind of private dispute coming up under the diversity jurisdiction that other circuits have because the District is a single city rather than a larger territory.

Judge Nebeker: True, but there were some civil actions brought under the diversity jurisdiction because of the proximity of Maryland and Virginia and often you would have that kind of a case, a tort case involving the May Company, the Hecht Company, where there had been some tort committed perhaps in Virginia, but they bring suit in the District of Columbia because May Company was doing business in the District of Columbia and the D.C. resident didn't want to file suit in Virginia. So there were instances – well I'll turn that around – and sometimes the plaintiff, a Virginia or Maryland resident, would want to sue in the District of Columbia.

Mr. Allen: Wanting to choose which circuit you wind up in perhaps for choice of law or other kinds of considerations.

Judge Nebeker: Well, of course, if it was brought in state courts, it wouldn't go to a circuit, but if you can bring it in on diversity, then it goes to the federal courts here and you had the opportunity to have it go to the juries here and to the D.C. Circuit. But in the main, the D.C. Circuit's diet at that point was the common law crimes and that became obvious because of the changing tide of the criminal law about this same time, in the early to mid-'50s on through the '60s, and it was during that period that *Mallory* was decided. *Mallory* came out of the D.C. Circuit. He was known as the "Bad Man of Swampoodle." He apparently had quite a reputation and criminal record. There were other significant cases that were being born —

Mr. Allen: Do you recall the year of the *Mallory* decision in the D.C. Circuit and then it went to the Supreme Court did it not?

Judge Nebeker: Yes. It ultimately went to the Supreme Court and I believe Judge Bryant handled *Mallory* at least in the Supreme Court, but I believe also in the D.C. Circuit.

Mr. Allen: This was during your tenure at U.S. Attorney's Office.

Judge Nebeker: Yes. Well I'm not sure. It must have been about 1959. Again, it is one of the things we are going to check on the editing of this tape. It was 1957. There was the decision in 1954 of *Durham v. United States* and that changed the common law defense of insanity from irresistible impulse and the so-called inability to know right from wrong. I guess they sometimes referred to it as the "wild beast" test, if you were of such derangement that you were a wild beast, couldn't know the difference between right and wrong, you had an insanity defense. Well, the D.C. Circuit, without going *en banc*, which ordinarily would have been the way they would have, changed the law. After all, the Supreme Court had decided this question in a case called *Dusky* and had applied the old common law definitions of insanity as a defense, so, along came the *Durham* decision authored by Judge Bazelon. Then he was an associate judge and it held as I recall it that if there was some evidence of insanity, the burden shifted to the government to prove sanity beyond a reasonable doubt, and insanity was defined as a mental disease or defect that produced the criminal act. Well, it was a landmark

decision I think as everyone in the field recognized then and even today. It spawned a tremendous amount of appellate litigation in these criminal cases, instructional questions were posed. I recall one of the trial judges gave an instruction to the jury, "If you find the defendant suffered from a mental disease or defect that produced the crime, then you must acquit him by reason of insanity." The vice of that instruction? If you find "insanity," put the burden of proof on the defendant.

Mr. Allen: So this essentially created a presumption that was irrebuttable?

Judge Nebeker: Well, it wasn't irrebuttable.

Mr. Allen: But in this instruction, it sounds like it was.

Judge Nebeker: Well the instruction, all it said was, in effect, the accused had the burden of demonstrating insanity, and the accused did not have the burden of demonstrating insanity to the satisfaction of the jury. That rule came much later after there was considerable confusion and dissatisfaction here with the *Durham* rule and my recollection is it was not adopted anywhere else. There might have been some states, but I don't think so. I know the federal circuits did not adopt *Durham*. They stuck with the old *Dusky* definition. Indeed, if I fast forward, when Hinckley shot President Reagan, the Congress followed what had been done in *Oregon* (*Oregon* v. *Hass*), for at least one state, and legislated the insanity defense, putting the burden upon the accused to carry the insanity defense by a preponderance of the evidence. So, it completely redid the *Durham* thinking, but, of course,

before the *Durham* holding, before Congress got around to this in light of *Hinckley*, there had been tremendous acrimony on the court particularly respecting the insanity defense, and Judge Burger championed the criticism of the *Durham* rule and wrote many, many dissents and slowly, but surely, the tide began to shift again with respect to the *Durham* rule. While it applied --

Mr. Allen: Do you recall when Judge – this is Warren Burger, who eventually became Chief Justice – do you remember when Judge Burger came on the bench in D.C.? It would have been subsequent to the *Durham* rule, I believe.

Judge Nebeker: Yes, he was appointed by Eisenhower, I believe, in 1956. He had been from Minneapolis and active in some fashion in the Eisenhower campaign. So, he came here and was put on the D.C. Circuit. Oh, I can remember he wrote a case called *Coleman*, and there were a number of others. Perhaps, we could do a whole session on the insanity defense, where I can do some research.

Mr. Allen: That might be useful, I'll try to find —

Judge Nebeker: Some of these cases.

Mr. Allen: Read some of them so that I can be an intelligent participant.

Judge Nebeker: I know that one of the things Judge Burger did was bring back to the philosophy on the approach of criminal insanity the notion that individuals have free will. And, so, he worked the productivity element of the insanity defense back to a question of free will. In other words, if you suffered from

a mental disease or defect, when it produced the conduct amounting to a crime, he got it around to where it was, in effect, you didn't have free will. Well, look how this comes back to either the irresistible impulse test or the incapacity to differentiate between right and wrong. And, so, there was this constant give and take, depending upon the panel you got for the insanity defense. And it became pretty obvious to us in the U.S. Attorney's Office, when you'd go up and sit at the counsel table and the court would convene, you had an insanity issue, you looked at the panel and you knew which way the case was going to go.

Mr. Allen: Because the court was so divided at the time.

Judge Nebeker: The court was so divided and the rule was so hard of application that the trial judges really would have a terrible time instructing and going about what evidence should be admitted. I do recall there was one insanity case being argued by a man named Anthony Amsterdam, who had come to the U.S. Attorney's Office from a clerkship in the Supreme Court. I believe with Felix Frankfurter. And Tony came up with an argument that had not been made before. Bear in mind you have to have expert witnesses, psychiatrists and psychologists, testifying on both sides of the issue and they would ultimately be asked, "Well, in your opinion, Doctor, was this defendant at the time of the crime suffering from a mental disease or defect that produced the act?" And Tony Amsterdam made the argument, "Wait a minute. That's the ultimate question, one for the jury, not for the expert

witness to testify to." He can testify to his findings, his opinion as to the mental condition, but the ultimate question of, "Was there a mental disease or defect that produced the act," was for the jury to decide. And my recollection is that that was again another one of the earthmoving cases that began to temper the way in which insanity was tried in the District Court. We didn't have anything like insanity over in the Misdemeanor Court at all. Who would want to raise insanity in the misdemeanor where the most you could get is a year in jail, and if you were not guilty by reason of insanity, you went to the hospital at that juncture until you were certified as no longer dangerous.

Mr. Allen: Yes, it was not to your advantage to be sent away to St. Elizabeth's for a long time in a misdemeanor case.

Judge Nebeker: That's correct. But, in any event, the insanity thing was perhaps first or second only to confessions, because about this time, as I said, *Mallory* was decided and *Mallory* meant that before an accused could be interrogated, he had to be presented before a magistrate and warned of his right not to incriminate himself and of his right to counsel. Well, reeling under the impact of *Mallory*, the U.S. Attorney, Oliver Gasch, set up a process, and I became a part of it as did each Assistant U.S. Attorney, who was over in the Municipal Court Section at the time. The police would arrest for a serious offense, homicide, robbery, perhaps some assaults, and in the beginning they would interrogate despite the fact that the U.S. Attorney's Office was

trying to instruct the police not to interrogate. So, Gasch set up a system whereby in these cases a police officer would contact a senior felony Assistant U.S. Attorney by telephone even at night. And, if that assistant felt that a presentment was immediately necessary in order to make the confession admissible, and how this could work I don't know. When you obtained the confession first and then have the presentment second, it didn't seem to make sense, but nonetheless that assistant would then give the name of the misdemeanor assistant to the police officer, and he would call that assistant. I got called sometimes at 2:00 in the morning and would have to get dressed and drive down to the old A Building over there at 5th and E, and in the meantime a judge would be contacted.

Mr. Allen: There was no night court sitting all the time?

Judge Nebeker: No, no special night court sitting.

Mr. Allen: So, you'd have to round up all of the necessary —

Judge Nebeker: You'd have to round up a marshal, the clerical people and the police would arrive, they would bring the accused, and an assistant would be there, and the officer would hand the assistant a police incident report, which would for the first time familiarize the prosecutor with the case. They would put the police officer on the stand and he would testify sufficiently to establish probable cause to hold the accused. In the meantime, the trial court would give the accused his – what we now know as *Miranda*-type warnings, Fifth Amendment and right to counsel. Well, there was no counsel at that hour of

the morning, and so the accused would be stepped back into the cell block and ultimately to the custody of the United States marshal until the next morning when we would have the ordinary court session going and lawyers present who could be assigned to represent the accused. Of course, in the meantime the police had access to him, and he'd often be interrogated again after having been warned of his rights. Some of them would refuse to talk, others said, "What the heck I've already told the officer what I did," so they'd repeat it after the warnings, and again this all became a question of, Were these sort of confessions admissible ultimately when you got to the U.S. District Court?" And some weren't and some were, and it depended again on the panel you had. If you had Burger, Bastian, Danaher, you'd pretty well get the confession sustained, whereas, on the other side, each case was a challenge to find a refinement that would apply the exclusionary rule. And, of course, as you can see, we were starting from sort of a bad spot or negative spot to begin with because (and it ultimately turned out that they would hold that anything obtained prior to the warnings would not be admissible under *Mallory*, and anything obtained afterward, in the absence of counsel, would be the product of the earlier unlawful interrogation and would, therefore, likewise fall) this whole area of confession law, like insanity, was adrift at the time, and you never knew for sure which way your case was going to go when you got it into court.

Mr. Allen: So, there were two battleground areas of substantive law at that time – one, I guess, was more procedural and the other, substantive. And this was while you were in the Appellate Division of the U.S. Attorney's Office, a staff of about twelve people, still headed by Carl Belcher?

Judge Nebeker: Close. It was under twelve attorneys, substantially under twelve attorneys, I believe, maybe eight, ten, something like that. And then we had a secretarial staff besides, because they would do the briefs on mimeograph paper and then crank them out on a mimeograph machine.

Mr. Allen: This was before Xerox machines. Xerox machines were maybe just --

Judge Nebeker: Oh, yes we didn't have Xerox machines at all. They'd be done that way and filed, but then we'd send them to the printer because at that point there was a printing requirement, and so the government's brief, by the time it was submitted to the court for decision, the government's brief had been printed. And my recollection is always, well, shouldn't say always, but when we were the appellee, it was a red-covered volume, and I always felt that the government had an advantage, pretermitting any predeterminations by the judges or their own philosophical approach to cases. I always felt the government had an advantage because their brief was printed, and you could see it was smaller and it was easier to read and the court, sitting even on the bench, would pick up the government's briefs. That's the brief they were reading. They weren't reading the mimeographed brief filed by the court-appointed lawyer. There was no money at that point to print those briefs, so

the court's rules permitted them to file in mimeographed form. But, in any event, we —

Mr. Allen: There was also an advantage in being the government, no doubt.

Judge Nebeker: Well, I think so, although there were some divisions up there where it was a distinct disadvantage, and we recognized that fact.

Mr. Allen: Who else was in the office? Do you recall any of your colleagues?

Judge Nebeker: Well, Tony Amsterdam was there for a while. Abbott Leban was there, Don Smith was there – he became a Superior Court judge after court reorganization. Alan Kay was in the Appellate Division there for a while, Walter Bonner, Eddie O'Connell was there, Lou Kaplan was another, John Terry, whose now on this court, came in and was among my first assistants or deputy chiefs. There was Carol Garfield, now Carol Garfield Freeman, one of the first women to come in the section and she became my primary assistant before she went on, as did most of them, to trying felony cases. It seemed at that point the rotation within the office was, you'd come into the Municipal Court Section, you'd cut your teeth on that sort of thing where you learned to make judgments and think the proper legal process as you did. Then you'd move to appellate for a while, and many of them didn't like appellate, so they were champing at the bit to get out and go out to the grand and glorious road of felony prosecutions.

Mr. Allen: Doing trials.

Judge Nebeker: Once in a while someone would go from the Appellate Division to the Grand Jury Section or to the Special Proceedings Section. During that period of time that was quite a section. Oscar Altshuler was the chief of it. He only had one or two people working for him, but he handled all the collateral attacks under § 2255 of Title 28, and there were myriad of those because of the rate of criminal prosecutions and convictions in the District Court.

Mr. Allen: Is this the same thing as seeking *habeas corpus*, it's a total injunctive proceeding to attack the --

Judge Nebeker: Yes, it was, in effect, a *habeas corpus* without the jurisdictional requirement that the custodian be within the jurisdiction of the court. You see, you had federal prisoners from all over, from being tried in various district courts and then when they were incarcerated, they would be sent beyond the jurisdiction of that district court. And so there had to be some way of allowing for collateral attack and it was through § 2255. Now, there's the similar provision, in fact I think it's identical, 2310, Title 23 § 110 of the D.C. Code is a replicate of the 2255 provision in the federal Code. At least it was in the beginning. I don't know whether the recent amendments to 2255 and federal *Habeas Corpus* 2254 have been carried over into the 23-110 provisions of the D.C. Code. That's a totally different issue and one that would require me to do some research, but many of the assistants in the Appellate Division would go into felony trial, and there came a point after

John F. Kennedy was elected President that David Acheson became the United States Attorney, and he brought with him Charles Duncan, Charles T. Duncan, and we all knew him as Charlie, a wonderful man. He's still around the city, became quite prominent in private practice of law. Charlie came in as chief of the Appellate Division when Carl Belcher left to go to the Criminal Division of the Department of Justice, and Charlie needed a lot of help because he had no experience in this area before having come from private practice. And I can remember that he relied on a number of us, including myself, to help him get acquainted with the operations of that section. That was strictly an interim appointment by Acheson because Charlie was awaiting clearance at the Department of Justice to be named Principal Assistant U.S. Attorney. Well, in the meantime, I was asked if I wanted to go to the Felony Trial Section, and I declined because I recognized that that's not my specialty, my forte. I just knew I wasn't that good at trying cases, cross-examination and whatnot. So, I declined. Well, a couple of weeks later Charlie came back to me and said, "Well, how would you like to go to the Civil Division." And I said I'd take it in the drop of a hat.

Mr. Allen: Civil Division of the U.S. Attorney's Office.

Judge Nebeker: Of the U.S. Attorney's Office.

Mr. Allen: I think we may be close to the other side of the tape. Resuming with Side 2. It's still August 19, with Judge Nebeker, and you just described Mr. Duncan

asking you if you wanted to go to the Civil Division of the U.S. Attorney's Office.

Judge Nebeker: Which I accepted readily. I had handled a number of civil cases on appeal. Parenthetically, at that point the Appellate Division handled both civil and criminal cases, primarily at my insistence because I felt if these Assistant U.S. Attorneys needed to build up a background, if you will, *a curriculum vitae*, they needed to be able to say they've had some civil experience. Just doing criminal cases is not nearly as attractive to a prospective law firm as if you had some civil work. So, we handled a lot of civil cases. I did. Carl Belcher had assigned me many civil cases.

Mr. Allen: Let's see if I understand the division. There were criminal trial people and there were civil trial people, but the appellate people did both.

Judge Nebeker: At that time the appellate people did both, and that was an interesting aside, which I will briefly take. All criminal stuff was primarily and initially assigned to the U.S. Attorney's Office, unless there was an extremely important case, such as espionage, where there was a unit at the Department of Justice that had the expertise to try it. But the ordinary stuff was automatically given, whether it was federal crime or local crime, to the U.S. Attorney's Office. On the other hand, on the civil side, the Civil Division of the Department of Justice would at the initial stage decide whether the case was going to be tried by or litigated on motions by their own attorneys at the Department of Justice or be assigned to the U.S. Attorney's Office Civil

Division to be tried. And, so, many of the cases were handled by the Civil Division's trial lawyers down at the Department of Justice, and then they'd farm off to the Appellate Division of the U.S. Attorney's Office for purposes of the appeal. I'd handled many of those kind of cases, including a couple of Textile Fiber Product Identification Act cases. I've forgotten whether I mentioned that earlier the other day or not.

Mr. Allen: We had in our preliminary discussions before we began tape recording you told me about the textile fiber cases. You also had an amusing story that I hope we don't forget about – the *Watered Ham* case.

Judge Nebeker: Yes, we'll get into those cases that I handled later, but right now let me do a transition —

Mr. Allen: We need to get some dates here, too, Judge. David Acheson came with the Kennedy administration, so it must have been 1961.

Judge Nebeker: Correct.

Mr. Allen: And Charles Duncan came with him, same time. And it was shortly after that, that Duncan asked you to go to the Civil Division?

Judge Nebeker: That's correct.

Mr. Allen: So, it's likely to be 1961, 1962.

Judge Nebeker: 1961, 1962. And at that point John Doyle was the Assistant U.S. Attorney in charge – and had been in charge of the Civil Division prior to that, of course, and I'd handled a couple of these cases, the *Courtalls* case and a number of others while he was chief of the Civil Division. So, I went to

work there. About the same time Joe Hannon was named chief of the Civil Division by David Acheson, John Doyle having left the office because of the transition, although I was never aware of any politics entering into decisions by the U.S. Attorney to release or discharge Assistant U.S. Attorneys. It was pretty much a career path if you wanted it. Nobody with a change of administration was thrown out.

Mr. Allen: I think that's been my understanding of the tradition pretty well nationwide. When I was in the Civil Rights Division, and later when I was in other government offices, the U.S. Attorney's Offices usually understood that the U.S. Attorney himself was a political appointee, but --

Judge Nebeker: And his Principal Assistant.

Mr. Allen: And Principal Assistant, perhaps, but the rest of the staff was pretty much career.

Judge Nebeker: That's right. John Doyle left of his own accord. He wasn't invited out. And, in any event, David Acheson appointed Joe Hannon, who had been one of the senior felony trial assistants and so, when I went to the Civil Division, I was working for Joe Hannon, and we became very good friends. Indeed, as time went on, he was like a brother to me, and I'd like to think that I was like a brother to him. But, in any event, I worked there in that Civil Division handling quite a number of cases, a few trials, of which I won't claim any stardom, and a fairly good-size motions practice, motions to dismiss and for summary judgment, all, I think most, involving agencies

of the federal government, but there were a few tort actions. I remember one involving the Banneker Swimming Pool, where some poor little kid dived into it and was electrocuted because there was a malfunctioning circuit that supplied below surface light.

Mr. Allen: Oh, dear.

Judge Nebeker: And we couldn't possibly win that case. Our electrical expert was not an expert at all. He tried to demonstrate how it would happen and it would blow up in his face, and he just couldn't understand how it happened, one of those mysteries of electricity that you can't solve. In any event, the current was going from the light to the metal drain at the bottom. This young kid dove into the pool at a place where he went through the electric field and he never came up. We had a lot of tort actions, but much of it was agency of one kind or another. And one of the cases I was assigned was an Air Force major female, who was accused, I shouldn't say accused, but thought to be lesbian, and at that point the military was automatic in discharging. And, so, I wound up having to go because she filed suit to enjoin her discharge. I had to go to California for a deposition and while I was in the West, I took an opportunity to take a few days' leave and have a vacation with my mother and sisters and my wife's parents who lived in Utah. And strangely, I went fishing with one of my wife's relatives in the Wind River Mountains of Wyoming while I was there, and we were way up out of sight of everybody in the mountains, having hiked up there, when a horseback

excursion went by and one of the guides came over, saw us fishing, and said, “Are you Frank Nebeker?” And I said, “Well, yes, I am.” And he said, “You’ve got a telephone call down here at the Rangers’ station and you’re supposed to call your office.” So, we abandoned fishing for the day, and I went back and we found a pay phone along a deserted portion of the highway, and I called my office, and I was called back to California for another deposition in the same case. So, eventually, I went home, flew home, my wife was staying in Utah. As I opened the door to the house, I heard the telephone ring and I hurried and answered it, and it was David Acheson. Apparently, he knew I was due home some time that day. And he said he wanted me to run the Appellate Division for him. Well, I couldn’t have been more elated. I enjoyed working with Civil Division and with Joe Hannon and Ellen Lee Park and Gil Zimmerman, and they were quite a group of people there who were very, very capable of handling almost any kind of civil litigation. In any event, I said, “Thank you. I appreciate the fact that you think I could do the job. I’ll accept.” And, so, I went down to the office the next day and the administrative officer of the office came to me – his name was Joseph Gillespie and he was not a lawyer but he was an administrative type, you’d almost say a bean counter, but he was very helpful, always was very helpful to me and he said, “I’ve cut the paperwork at the request of the U.S. Attorney for a pay raise commensurate with your

new responsibilities." Well, that was 1962, and for the first time my pay exceeded five figures, just over $10,000 a year.

Mr. Allen: Well, I can tell you I entered the Civil Rights Division at the Department of Justice in 1969 and it was about $11,000.

Judge Nebeker: It was terrible pay back then.

Mr. Allen: It actually seemed like quite a lot.

Judge Nebeker: Well, it did. Here I was within $5,000 of what the Municipal Court trial judges were making. They were making about $15,000. And I thought, Well this is pretty good, and it did ease the financial burdens around the house substantially. But, in any event, that was really one of the highlights of my professional career, being able to take over as the chief of the Appellate Division, and I felt comfortable doing it. I adopted the same administrative approach that Carl Belcher had and immediately began to document the number of cases, the number of appeals that we would have and the number of assistants and how many cases they had in backlog and so forth. And through the efforts of David Acheson we were able to get new assistants through the Administrative Division at the Department of Justice. But, what we were able to do was to recruit attorneys in other agencies of the federal government who were willing to write briefs and get some experience in appellate litigation, which they otherwise would hardly get. I wound up with at least a half a dozen or more attorneys who were not assigned to the Division as Assistant U.S. Attorneys but were made Special

Assistant U.S. Attorneys for purposes of writing a government brief and arguing a case.

Mr. Allen: And, so, this was an innovation during your tenure as —

Judge Nebeker: During my tenure and David Acheson's tenure.

Mr. Allen: Well, that continued. One of my colleagues in the Civil Rights Division, Don Pailen, who eventually became Corporation Counsel for the City of Detroit, shortly after coming to work in the Civil Rights Division got detailed to the U.S. Attorney's Office, and I think worked in the U.S. Attorney's Office, basically to come help out. I don't recall if he did appeals, but he did a variety of —

Judge Nebeker: Well, there were two different ways of detailing people. As I said in the earlier tape, that's the way I came to the U.S. Attorney's Office – was being detailed from DOJ. So, that was interdepartmental, I could just be transferred over.

Mr. Allen: This was taking people from other agencies?

Judge Nebeker: But this was taking people from other agencies and they would come for the *ad hoc* purpose of writing the brief. They were not doing other duties. They were continuing with their own duties —

Mr. Allen: They wouldn't argue the case.

Judge Nebeker: And they would argue the case.

Mr. Allen: They would argue the case, get the appeal.

Judge Nebeker: Yea, they'd get the whole appeal, and I'd work with them and we'd have moot courts, not only for them, but for any assistant who's going up the next day for an argument. We would have a moot court conducted by three of the other assistants in the office, and if it was a big case I would be there, too. And those assistants who would act as mock judges would literally try to emulate the hostile questions that were anticipated from the bench the next morning. We had Dean Determan, who was then Sally Determan's husband if I'm not mistaken, who came from somewhere in Civil Rights area. .

Mr. Allen: Sounds like a familiar name, but could have been before my time.

Judge Nebeker: Oh, I'm sure it was. I don't right now recall others that we had. We had others from the Department of Justice, for instance, Julia Cooper Mack was working for Bea Rosenberg in the Criminal Division of the Department of Justice appellate shop. Well, they seemed to have a little spare time on their hands, at least enough that some of their attorneys would take cases in my shop, and that's how I got acquainted with her. She handled a rape case that carried at that point the death penalty.

Mr. Allen: This is Sally Cooper Mack.

Judge Nebeker: Julia Cooper Mack.

Mr. Allen: Julia Cooper Mack.

Judge Nebeker: Julia Cooper at the time. And she wrote the brief, but at that point rape was a capital crime and she had scruples about it and would not argue the case to

sustain the capital verdict. So, I wound up taking the case and arguing it myself, and I can't remember whether we won or lost. We probably lost because I don't think there had been any executions for rape let alone murder in the District of Columbia during my tenure as an Assistant U.S. Attorney. So, it was obviously lost in some fashion and perhaps compromised at a later date with assault with intent to rape or something and wound up with a life imprisonment or a substantial period of incarceration. I can't for the life of me remember some of the other specials who came in, but we had a number because we had to relieve the pressure on these regular assistants who were just up to their ears in briefs and they kept coming.

Mr. Allen: And that's really a product as well, of course, of the dual jurisdiction of having both the Title 18 business and the common law.

Judge Nebeker: That's correct. And that Division, the Appellate Division, before I took over as chief and subsequently also handled cases before the Municipal Court of Appeals, now the D.C. Court of Appeals, this court.

Mr. Allen: Did anyone ever do a study that compared the staffing of the U.S. Attorney's Office here with the local D.A. function in a comparable size U.S. city?

Judge Nebeker: Not to my knowledge.

Mr. Allen: It would be an interesting study.

Judge Nebeker: Well, it would be.

Mr. Allen: There would be apples, oranges in the comparison.

Judge Nebeker: I think there would have been a lot of apples, oranges in the comparison, but I suppose if you looked at a state that had fifty prosecutors in it, eight or ten of them devoted to doing appellate work, by counting those who were doing the appellate work in the Attorney General's office you might be able to extrapolate that we were understaffed. That was a foregone conclusion that we were understaffed and it was all budget that made it impossible to really enlarge the office. I believe that while the office did increase incrementally during those years after I was in the U.S. Attorney's Office and went on the bench, it really didn't start to increase until *Hinckley* and after *Hinckley*. Under Judge Harris, who was the U.S. Attorney, the office grew very quickly and I don't know how many hundreds of Assistant U.S. Attorneys they've got.

Mr. Allen: And that was because the *Hinckley* case focused attention on the U.S. Attorney's Office.

Judge Nebeker: Correct.

Mr. Allen: And local D.C. prosecution became something that Congress was interested in.

Judge Nebeker: Well, that happened during the campaign of Richard Nixon. Who was his running mate, Spiro Agnew, right?

Mr. Allen: Running against Hubert Humphrey, in 1968.

Judge Nebeker: It's 1968. He made crime a presidential political issue and particularly he was able to point to the District of Columbia because it was pretty bad here. And, so, when he became President, the pressure to increase the size of the U.S. Attorney's Office began in greater earnest, and I'm sure it increased substantially during that period of time but I know after *Hinckley*, there was a marked increase in the size of the U.S. Attorney's Office. They occupy, I think, almost all of 555 Fourth Street, the building that was just across from where the D.C. Court of Appeals used to sit before this building was built. I think they occupy virtually all that building now, and that's a seven- or eight-story building as I recall.

Mr. Allen: At this point we decided off the record it would be interesting to have a little description of the physical premises of the U.S. Attorney's offices during the times while you were there, and I've made the observation that I've always thought of the U.S. Attorney's Office as primarily being in the U.S. courthouse.

Judge Nebeker: Well, I think it was. The Misdemeanor Section was located in A Building at 5th and E Streets on the first floor on the west side of the building. It was a room with a counter in it and citizens could come there and complain, seek warrants --

Mr. Allen: And that's where the counter was --

Judge Nebeker: That's where the counter was. That's correct. The corresponding counter on the east side of the building, right there at the same E Street end of the

building, was the Corporation Counsel's Office with its very similar operation. Aside from that, the U.S. Attorney's Office was physically located on the third floor of the U.S. courthouse. The Felony and Civil Divisions were located on the west side of the third floor and around on the Constitution Avenue a little bit. There was a library, a good library, there on the Constitution Avenue side and then east of that library was the Principal Assistant U.S. Attorney's office. Then the chief of the Criminal Division was there also because he needed access to the U.S. Attorney, who had his office on Constitution Avenue side.

Mr. Allen: With a view of the Capitol Building.

Judge Nebeker: Well —

Mr. Allen: Look out the window and crane your neck a little.

Judge Nebeker: You'd have to crane your neck a little bit. I don't think that the Capitol was in view there, but it certainly was in the Appellate Division. My office could look right out on it.

Mr. Allen: You must have been on the east side of the building.

Judge Nebeker: We were on the east side of the building, well half the east side of the building from middle on to C Street was the Appellate Division.

Mr. Allen: I had a view of the Capitol very briefly in my eleven-story office in the Todd Building in the 1970's and then they built the FBI Building and blocked my view.

Judge Nebeker: Well, at the time I was there, the magnolia tree did not obstruct the view. We were on the third floor and that tree was just about reaching the third floor, but I noticed that as time went on after I came on the court that magnolia tree got high enough that from that particular office you could not see the Capitol dome anymore. That tree is now gone because of the construction of the annex to the federal courthouse that is going on --

Mr. Allen: It's going on right now —

Judge Nebeker: On the Third Street side, yes, —

Mr. Allen: Quite an impressive building.

Judge Nebeker: I've seen the architectural renderings and it looks like it's going to fit rather nicely into that dull facade the U.S. courthouse has. I don't know why it couldn't have been, well, I guess I shouldn't get into it, but there were too many spoons in the pot being stirred both at the time of the construction of that building in the late '40's and 1950 and '51 and this building, and there was no room for a different kind of architecture, so you got basically a sandstone facade with vertical windows in each building, and they "relate" to each other as the chairman of the Pennsylvania Avenue Planning Commission said when he finally approved the plans for this building.

Mr. Allen: I think it was a period when they built the U.S. courthouse of functional architecture.

Judge Nebeker: It was.

Mr. Allen: And because it was already functional, when they built this building later they wanted to have it relate —

Judge Nebeker: It "communicated" with the police headquarters, the District Building immediately to the east of this building. I know the architect came in with grandiose plans and they didn't fly very long.

Mr. Allen: Because they didn't relate.

Judge Nebeker: That's right. Communicate. That was another word.

Mr. Allen: Communicate. Yes.

Judge Nebeker: They didn't communicate. Okay, so they didn't communicate. Well, I guess we digressed a bit.

Mr. Allen: Then when you were in the Civil Division, when you were in the Appellate Division you were on the third floor of the U.S. Attorney's Office, the third floor office in the U.S. courthouse.

Judge Nebeker: Correct.

Mr. Allen: Then, you said later on when the criminal focus increased on local matters after the *Hinckley* case, the U.S. Attorney's Office is now in the building on Fourth Street. Is that —

Judge Nebeker: Yes. What happened is there was pressure within the U.S. courthouse for that space on the third floor. Parenthetically, also on the third floor were three grand jury rooms, two of them were on the main corridor, and one of them was back on the southwest corner of the building serviced by an elevator there, and it was used as the security-type grand jury room, where

witnesses could be brought in and out without being exposed in the public corridors. There were these three grand jury rooms and then there was the D.C. Bar library, which occupied a substantial portion of the C Street side, the north side of the building, and it was the library that the Assistant U.S. Attorneys used all the time, albeit it was the D.C. Bar Association library, and that's where most of our research was done. The pressure to expand into the third floor from the other courts was enormous and so that's how the U.S. Attorney's Office was moved. And it moved into this building to a great extent. What had been in A Building and the Grand Jury Section were all housed in this building on the first floor until the pressure here grew, and in the meantime, of course, that building – and it's known incidentally as the "triple nickel" because of its address "555" Fourth Street – and eventually the pressure from both courts at different times forced the U.S. Attorney's Office almost completely out of the courthouses. Well this seemed to those of us who grew up with the U.S. Attorney's Office juxtaposed to the court seemed like a kind of inconvenient thing to do because it was so much easier. If you got a call from a judge, and it would often happen, I want to see you in my chambers right away. Well, you just hopped the elevator and you'd go up. Now, if you've got to go see a judge in the U.S. courthouse or in this courthouse, of necessity you have to walk outside. You're not as immediately accessible, and those judges back then liked the accessibility, but they ultimately caved into the pressure that they needed more space, and

so they got it, and the U.S. Attorney's Office moved along with the Bar Association library. I think the Bar Association sold that library to the D.C. Bar, and it's located where the D.C. Bar headquarters is now.

Mr. Allen: And that's downtown.

Judge Nebeker: I believe on H Street downtown, if I'm not mistaken. Where do you want to go from here?

Mr. Allen: Well, your tenure as chief of the appellate staff, I think, has you – you've introduced the subject, but we've had some digressions, maybe if there are – and we've described the process of making raids on other government agencies to find help and we've had some discussion of important case law of the *Durham* rule and how it was treated in *Mallory*. I guess it's up to you as to what subjects you want to take up that make sense for your tenure as chief. It's now 11:25. Shall we take a break and discuss what comes next.

Judge Nebeker: Let's do.