Oral History of Abe Krash  
Third Interview  
October 16, 2013

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 Abe Krash, Esquire, and the interviewer is Stuart Pierson, Esquire. The interview took place on October 16, 2013. This is the third interview.

Mr. Pierson: Today is October 16, 2013. We are here at the offices of Arnold & Porter. I am Stuart Pierson and Abe Krash is across the table from me. This is our third session of the interview and as usual Mr. Krash is ready and running to go. Abe it is all yours.

Mr. Krash: When we adjourned our last session in August, I was describing my coming to Arnold, Fortas & Porter in March 1953 as a temporary associate to take Patricia Wald's place while she was having a baby. At the end of the last session, I briefly spoke about Judge Arnold, with whom I worked a great deal after I came here. I thought I would also say a few words about Abe Fortas and Paul Porter, who were the senior partners at the time when I arrived. When I arrived at the firm, Abe Fortas was 42 years old. He was one of the three senior partners. By all measures, he was the dominant figure in the firm. He was a very complex and enigmatic person. I worked with Abe Fortas from the time I came in the summer of 1953 until he left the law firm to become an Associate Justice of the Supreme Court in the summer of 1965. Thus, I worked with him for about a decade. I have met and known many very able lawyers in my life time, but I count Fortas as the most able lawyer I have ever met. He was an exceptionally competent person. There is a biography about him by
Laura Kalman, which was written in the 1990s. I think it is quite good, though I don't think it really fully captures the way he was, and I disagree with some of her judgments about various things that happened during his life. However, it is a good biography about him. He was an extremely demanding task master. Anything he assigned to you, he insisted be comprehensively done and that you look at every nook and corner, and that it be written with care and precision. When I come into his office, he insisted that I have a pad with me. He would ask me something and he would say if you don't know, just tell me you don't know and that's OK. But don't guess. He wanted you to be certain of any answer you gave him. He was very impatient with work that he thought was shoddy or incomplete or didn't meet his exacting standards. He was a superb counselor and advisor to people in all kinds of legal matters. He functioned in many areas of the law. He was an excellent securities lawyer. He had been at the SEC. He was also active in the antitrust area. He advised people who had legislative problems; he would counsel people about international law problems. He was also an exceptionally good appellate advocate. Justice Douglas, who was on the Supreme Court for 34 years, said in his autobiography that Fortas's oral argument in the Gideon case was the best single argument during his time on the court. Douglas and Fortas were very good friends so you have to discount that a bit. Nevertheless, it is a high tribute. Fortas was not a trial lawyer. In the trial courts, he would argue motions, but he didn't try cases during the entire time I was at the firm. He was personally responsible for many of the firm's major clients. He was on the board of various organizations. His life was basically his work. He and his
wife did not have any children. He was very much devoted and dedicated to 
working for his law firm.

Mr. Pierson: Where had he been before he came to Arnold, Fortas and Porter?

Mr. Krash: He grew up and went to college in the Memphis area. I'm not sure, I think it 
was Southwestern College. He then went to the Yale Law School and 
graduated around 1932. He was the editor-in chief of the *Yale Law Journal*. 
Immediately after graduation, he was offered a position on the faculty, which 
is a very great tribute indeed. He taught briefly, and then he came to 
Washington. He worked at the SEC with William Douglas and at the 
Agriculture Adjustments Administration with Jerome Frank, who was later a 
judge on the Court of Appeals for the Second Circuit. Fortas was the Under 
Secretary of the Interior under Harold Ickes when he was 32 years old. There 
were a lot of very distinguished lawyers in the New Deal, to put it mildly, but 
Fortas was one of the stars. He left the government after the end of World War 
II. At that time he was the Under Secretary of Interior under Ickes, and he left 
to start the law firm with Judge Arnold, who had left his seat on the bench on 
the Court of Appeals. Arnold had been one of Fortas's teachers at Yale. The 
two of them started the law firm, and then they were joined a couple of years 
later by Paul Porter; they then became Arnold, Fortas & Porter. I will describe 
various cases and matters I worked on with Fortas. I had previously, in my last 
session, talked about my experience with him in the *Durham* case and perhaps 
i can say a little about the Gideon case a little later and some of the other cases 
i worked with him on. I learned a great deal from him. He was not a hale 
fellow well met. Sometimes when I travelled with him, as I did to various 

-75 -
cities where we had matters, he would speak quite openly about his background and events in his life, but generally speaking, he was very secretive about his life and experiences. As I said in our last interview, the first matter I worked with him on was this brief we wrote for the Court of Appeals in *Durham v. US*, where he was appointed by the Court of Appeals. After that I worked with him on many matters. I helped him write briefs, memoranda, draft speeches and so forth. The third senior partner when I arrived was Paul Porter. He was from Kentucky and he had varied experiences in the government. He had been an Ambassador to Greece. He was the head of the Office of Price Administration. He had been the Chairman of the Federal Communications Commission. I think he was the Chairman of the Democratic National Committee when Roosevelt ran in 1944. So we had very wide governmental experience and contacts. He was a superb raconteur. He would tell wonderfully funny and interesting tales. He complemented the two others, Arnold and Fortas, in an important way in that he had greater experience in the government than any of them. Arnold was head of the Antitrust Division and Fortas had been on various jobs, but Porter gave an added dimension to the two of them in terms of his wide-spread contacts with many people. He had basically a communications practice involving the problems of radio and television stations. He also did other things. He was a very good appellate advocate. I did not work nearly as much with him as I did with Judge Arnold and Fortas; I didn't do much communications work. I did a lot with both Arnold and Fortas, but much less with Porter. As I previously mentioned, I was hired to work on a major antitrust case which the firm had. We were
representing Lever Brothers. The Government of the United States had brought a suit against Procter & Gamble, Lever Brothers, Colgate, and the soap association, claiming that they were parties to a conspiracy to restrain and monopolize the soap and detergent trade in violation of the Sherman Act.

Mr. Pierson: So who were your clients?

Mr. Krash: Our client was Lever Brothers. The team consisted of Fortas who was in charge of all Lever Brothers' matters for the firm, and working under him in charge, running this case was Bill McGovern, who had been in the Antitrust Division and who was then a young partner in his late 30s. I was the third man on the team. My work was basically with McGovern.

Mr. Pierson: So a major antitrust case with two partners and one associate. Those were the good old days.

Mr. Krash: Those were the good old days. That was basically the team. Once in a while we would bring in some other associates when there was a big flurry of things.

This case dragged on for many years in the United States District Court in Newark. Finally, the government dropped the case in the late 1950s because by that time the detergent industry had been transformed by the dominance of Procter & Gamble. What happened was that after World War II ended, Procter & Gamble introduced a synthetic detergent made from a petroleum derivative. It was called Tide and caught the two other principle competitors flat-footed.

Within a decade, I would say certainly by the mid-50s, they were by far the dominant firm, with perhaps half the market. Lever Brothers, which was almost equal in market share with Procter & Gamble in the 1940s, fell far
behind. It became clear that it was senseless to pursue the case, and I think the government came to that realization and they dropped the case. In one matter, the case went to the Supreme Court, where there was a question about access to grand jury transcripts. Over the years, the various motions and conferences in the case were in Newark, and I was very much involved in this with Bill McGovern. As time went on Fortas faded out more or less. He always kept a hand in it and watched over it. But really it was McGovern and me who were the active lawyers in the case by and large. When there were important motions, Fortas would come to Newark and argue them. Another thing that was going on at the time I arrived at Arnold, Fortas & Porter in 1953 was that the firm had become involved in representing employees who were involved in the Government Loyalty and Security Program, which was started by President Truman, I believe, around 1948 or 1949. He issued an executive order requiring in substance that all government employees could be challenged on grounds of loyalty or security. It lead to administrative hearings. It was a very bizarre period in American history because what was going on was that government employees were being charged for being disloyal on the basis of associations they had back in college, or because of magazines they read in college, or groups they had joined years before. One feature of the program, which was very troublesome and problematic, was that these loyalty boards refused to allow the employee to confront witnesses against them. The Boards themselves frequently did not see the witnesses. They had FBI or other investigators talk to parties, and the Board relied on memoranda of these conversations. The employee didn't have a chance to confront his accusers. It
was a Star Chamber type of procedure. It was alien to the American tradition. Many of these government employees were people of modest means. The law firm, Arnold, Fortas & Porter, provided counsel in the late 1940s or 1950s to a number of employees. This had to be done *pro bono* because these were people without means. The three senior partners felt very keenly about this. They thought this was wrong, that it was a deprivation of freedom of speech and civil rights. Fortas was the driving force behind this, but he didn't appear publicly as much as did Arnold and Porter. Two of the cases in this area we handled went to the Supreme Court. One was *Bailey v. Richardson*, which is a case decided before I came to the office. It was decided by the D.C. Court of Appeals and then appealed to the Supreme Court. At the Supreme Court, it was 4 to 4. They didn't really deal with it. We were challenging basically the denial of the right of employees to confront adverse witnesses and the standards that were applied, which were so vague and subjective. Then, when I arrived there was a case in the firm involving Dr. Peters, a professor at the Yale Medical School, who was a consultant to a government agency. He had been charged with being disloyal. In any event, we drove that case to the Supreme Court. I helped write the briefs. I remember going to the oral argument. I sat at the counsel table. The members of the Court were arguing tremendously back and forth. Following the argument, the court asked for supplemental briefs dealing with a question that we had tried to finesse. We had in our briefs challenged the constitutionality of this program and in particular the procedures being followed by the loyalty boards which we said denied due process to the employees involved and were in violation of the First Amendment. We wanted
those questions decided. At the oral argument, the court became preoccupied
with the procedures of the loyalty board. What happened in this case was that
Peters had been cleared by the departmental loyalty board, and then an
appellate loyalty review board reviewed the case and ruled against him. The
Supreme Court asked for supplemental briefs on this issue of whether the
Loyalty Review Board had jurisdiction to review a case which a Departmental
Loyalty Board had decided favorably for the employee. We briefed the case,
and the Supreme Court decided the case on the grounds that the Loyalty
Review Board had no jurisdiction to hear a case involving a favorable decision
to the employee by departmental loyalty board. We won the case on a
procedural point, but we lost the case on what we really had fought the case to
decide. We wanted a decision from the Supreme Court that this was an
unconstitutional kind of procedure and program. As I said, I worked on the
supplemental brief together with Judge Arnold.

Mr. Pierson: Was McCarthy acting in this case:

Mr. Krash: No, by 1953 or 1954 McCarthy had begun to lose altitude. There were Senate
hearings relating to the Army. He had lost a great deal of altitude by the time
of the Peters case. There was another major loyalty and security case which I
worked on, which was called the _Fort Monmouth_ cases. There were a number
of employees at Fort Monmouth in New Jersey who were discharged as loyalty
and security risks. We fought those cases, and we won all of those cases. The
employees were all reinstated. This representation by the law firm of these
government employees became widely known. It took a lot of guts to take on
these loyalty and security cases because people would say you must be

-80 -
sympathetic to communist if you are representing these kinds of people. Many lawyers were unwilling to take these cases because of apprehension that their clients would terminate their relationship. Arnold, Fortas & Porter stood their ground. They fought these cases, and the firm became famous as a place that would stand up for civil liberties. There were a lot of things written about the firm at that time. Fortas was very much a key influence in these cases. He believed passionately that this was wrong. The firm also represented a Owen Lattimore, who was a professor at Johns Hopkins and a specialist in Far East matters, who had been denounced as a Soviet agent of some sort. There were extensive congressional hearings in which Fortas represented Lattimore. The Justice Department then indicted Lattimore on grounds of perjury. The case was thrown out by Judge Luther Youngdahl. He was an exceptionally decent person. We successfully represented Owen Lattimore. The proceeding went on for a number of years. I was not personally involved in the Lattimore proceedings. Basically Judge Arnold, and before that, Fortas, and Bill Rogers, then an associate in the firm, who is now deceased, worked a lot with Arnold on the Owen Lattimore case. I personally was not involved. I was involved at a number of these loyalty security cases, particularly in the Peters case and the Fort Monmouth cases. I later read a book about the loyalty and security cases by John Lord O'Brien, a lawyer at Covington. He wrote a book about some of these things, that I reviewed. My review was published in The Harvard Law Review. In any event, I spent a lot of time in the earlier years I was in the firm working on various aspects of these cases. The first case I worked with Fortas on was the Durham case, which was in the
summer of 1953. As I previously mentioned, the Court of Appeals in that case rejected the existing insanity rule in criminal cases and applied a new rule.

Fortas asked me to draft a brief. He basically wrote it, but I wrote drafts of it, and he argued it. I subsequently became very much interested in the judicial administration of the insanity defense. There were many decisions by the Court of Appeals in the 1950s in the District of Columbia, mainly driven by the interest of Judge Bazelon, who was very much interested in psychiatry and the law. A number of people at that time had the idea that psychiatrists could be a very significant factor in the administration of criminal justice. I think people over estimated what psychiatrists knew and could do as well the resources that were available. In my opinion, the insanity issue is not a suitable vehicle for dealing with much of the administration of criminal justice. It relates to the most extreme kind of cases and not the typical cases. There is a lot of mental illness, God knows, among criminal defendants, but the insanity defense is not the way to deal with it. In the mid-905s I wrote an article describing the various decisions in this area by the Court of Appeals; there were many decisions involving pretrial standards, trial standards and post-trial standards. I wrote a lengthy article describing what was going on that was published in The Yale Law Journal. Sometime in the mid-50s Judge Bazelon called me and invited me to be his law clerk. But by that time, I was five or six years out of law school, and I just felt it was too late for me to do that. At any rate, I remained at the law firm. We were doing a lot of exciting and interesting things. I also just got married about that time or was about to get married. Around 1955, I met my wife, Joan. We got married in February of 1957. She grew up in the New
York City area and lived later briefly in the Colorado area, and she then came to Washington, DC. She was working for The Journal of Commerce. She was a reporter there. She attended George Washington University. She studied economics there, and I met her, and we were married in February of 1957. We subsequently had two daughters. We had my daughter, Jessica, who was born in 1959 and my daughter, Carla, who was born in 1961. Jessica became a professional musician. In our neighborhood there was a famous piano teacher at the time when Jessica was growing up. Her name was Ylda Novik. Her house was just two blocks away from us. We took Jessica to meet her, and she finally accepted Jessica as a student. To make a long story short, Jessica was greatly influenced by her and became a first class pianist. Later she went to Harvard, studied at MIT, at the Julliard School of music, and she got her Doctorate at Maryland and became a piano teacher and composer. She just had her second record out consisting of pieces she composed and played. She is a music professor at George Washington University. My other daughter, Carla, lives in Philadelphia. She was named after my high school principal, whose name was Karl Winchell and who greatly befriended me. Carla went to the Rhode Island School of Design in Providence. She is very artistic. She pursued a career to some extent in clothing design. She is not doing that any more. She lives in Philadelphia. Jessica is here in Washington.

I have been greatly enriched by my wife. I like to say that she has been a life force. She greatly encouraged me to do many things I might not otherwise have done. She was very supportive. We've been married for 56 years.

In the 1950s, I became heavily involved in the D.C. Bar Association. When I
was a young lawyer in the early 1950s, it was a segregated organization. Black lawyers were not admitted. A number of young lawyers in town who were members of the Bar Association observed this, and were very troubled by it; we felt it was unjust and immoral. So a group of young Turks in town got together and we presented motions to the Bar Association to abandon this segregation. We fought it. There was a great meeting of the Bar Association in 1956 or 1957 at the Mayflower Hotel to consider this issue. We rounded up a lot of the young men in town, and we won. We got the Bar Association to drop this rule and to admit black lawyers. There were many, many guys who joined together in that movement in town here. A whole group of us were just deeply offended by this, and we really fought it hard. I remember that some of the older members of the Bar Association urged the Association to continue to exclude. But the majority of the Bar Association voted to repeal the rule and so black lawyers were then admitted to the bar association.

Mr. Pierson: Was Jake Stein involved in that?

Mr. Krash: I can't recall whether Jake was involved. I wouldn't be surprised if he was.

Bear in mind, this occurred about three or four years after the Supreme Court’s decision in *Brown v. Board of Education*. Washington was still a very segregated community. For example black persons rode in the back of street cars; schools were segregated; many restaurants were segregated; theaters were segregated. There was a lot of segregation in Washington, which troubled many of us. But we fought this thing with the Bar Association, and we won.
There were almost no young black lawyers in the law firms. When I came to Arnold, Fortas and Porter, which was one of the principal law firms in town, there were no black lawyers. The law firms in town didn't hire them. They didn't give them a chance. During the 1950s our firm was among the first to hire women. There was an enormous amount of prejudice in the 1950s against black lawyers. They were shut out. There was also a great deal of prejudice against women. There were very few women at law firms that I can remember. We were very lucky to have Patricia Wald as an associate. Carol Agger, who was Abe Fortas's wife, came to our firm around 1960 when we acquired the Paul Weiss Office in Washington. She was a partner in that office. It was very rare in Washington at that time to have women as a partner. I remember going to the local District Court to argue a case before a woman judge. That was very rare too. There was just a great deal of prejudice and discrimination. With respect to Jewish lawyers, there was a lot of discrimination still against Jewish lawyers. In the late 1950s, it began to break down. I think several things happened to account for that. One was that many men who had been in the War together with Jewish fellows rose up and became partners in their law firms and it was not acceptable to them to exclude Jewish men from their ranks. They were friends. The second thing was that clients began to raise questions about this. The discrimination began to break down quite a bit in the late 1950s and early 1960s when you began to see change. But the prejudice and discrimination against black persons continued, and the prejudice against women continued long after that, I would say into the 1970s and 1980s. As a matter of fact, there are still some aspects of discrimination against women
lawyers. Today, I would say that there is relatively little discrimination with respect to the hiring of young black lawyers, but they still experience difficulty in rising up in the law firm. Very few rise up to the top ranks of the firms, although a few do. We hire many women at Arnold & Porter. I teach at Georgetown and half of the students in my class are women. Women now have much more opportunity. I would say that the playing field is still not even in some ways. For example, you see very few women occupying positions in the executive committees of law firms. However, more and more opportunities are opening up.

Going back to what's going on in my law firm in the 1950s, I was being given an opportunity because it was a very small firm. Arnold, Fortas & Porter had less than 15 lawyers in the 1950s. I was given an opportunity to go to court and argue motions and to take depositions. Sometime around 1956, we were retained to represent a company in an antitrust suit against the United Fruit Company involving the distribution of bananas. There was an antitrust suit in the District Court in New York. Judge Arnold was in charge of this, and he took me with him to New York. We tried this case in New York, and it was there really that I began to have a lot of opportunity to do trial work, particularly working closely with Judge Arnold and to learn the art of being a trial lawyer. That occurred sometime around 1957 and 1958. It was a terrific experience.

Mr. Pierson: When you were trying this case in New York, did you have an office in New York?
Mr. Krash: I don't think we did. The firm had an apartment in New York. We didn't have an office. I think we may have leased some offices or had some offices with co-counsel. Today, Arnold & Porter, LLP has an office in New York, a branch office with over a 100 lawyers but we didn't in 1953. There was co-counsel we had in New York and we worked there with them. This case went on for several months, and I had a chance to get a lot of experience as a trial lawyer.

Mr. Pierson: How did the case turn out?

Mr. Krash: The jury was hung. Finally it was settled as I recall. Another thing I did in the 1950s was I was invited to teach at the George Washington Law School. I taught a course in domestic relations to a big class there and that really grew out of some experience I had working with Fortas on a domestic relations case, which went to the Supreme Court, called the Granville case. Anyway, I did teach this course for one or two years at GW and that was the first time I had taught anything. As I have stated, during the period of the 1950s I was being given a lot of opportunity to do different things. One of the things that is very different now is that the practice today is very specialized. A client who has an environmental problem wants an environmental lawyer; if they have a securities problem they want a lawyer experienced in securities matters; if they have an antitrust problem, they want somebody who has worked in that area. But in the 1950s, we were generalists. We handled many different types of problems. There was not nearly the degree of specialization of the bar that is true today. So I got to work in a lot of different areas, and to do a lot of different things. The notion was we can learn anything if you give us a chance to do it. We were not nearly so compartmentalized or so specialized, as is true
today.

So here we are now in the late 1950s and the law firm is still a relatively small firm, with 15-16 lawyers, and I am working closely with Abe Fortas and with Judge Arnold. I’m learning a great deal from both of them. I became very close friends with Bill McGovern who was an excellent lawyer and a very fine person. I also became good friends with some of the other younger men in the firm, including a man by the name of Bud Vieth, who later became the Chairman of the firm. There was a partner by the name of Norman Diamond. We were very good friends, we would frequently have lunch together. Arnold, Fortas & Porter was characterized by great deal of camaraderie and collegiality, and there was a lot of affection and good will among the people at that time. My view is that much of that atmosphere was created by Judge Arnold, who was a person of great generosity of spirit, and who was regarded with great affection and respect by all the lawyers in the firm. He was just very good-willed. If you won a case, he was the first to cheer you. If you lost a case, he was the first to console you and encourage you. Abe Fortas was the manager and a key guy in terms of our practice. It was a small firm with a lot of collegiality.

Mr. Pierson: Are you going to get to Gideon today?

Mr. Krash: Yes, I’ll get to Gideon. That was in 1963. There are a couple of other things about the 1950s I should mention before I leave that decade. We were retained at one point, the firm was, to represent Playboy magazine which was then just started and had been denied second class mailing privileges. That was
practically a death sentence for a magazine, if you didn't have second class mailing privileges. We succeeded in getting them mailing privileges. Their privileges were restored.

Mr. Pierson: This was in the 1950s?

Mr. Krash: Yes, This was in the 1950s. The Post Office gave the magazine the permit. If it hadn't been for that, *Playboy* probably would never have survived. In connection with that, there was a case in the Supreme Court, called the *Roth* case, which was the first obscenity case in the Supreme Court. We were retained by a publisher of a magazine called Greenleaf Publishing Company to write an *amicus* brief. You have to bear in mind that there had been no obscenity cases in the Supreme Court before that. This was the first case. This is in the mid-50s. We wrote this *amicus* brief. There was an associate in the firm at the time whose name was Charles Reich, who was a graduate of the Yale law school. He had clerked for Justice Black. I got to know him a little bit and to make a long story short, he came to our law firm as an associate in the mid-50s. He and I principally, together with Bill McGovern, wrote this *amicus* brief in the *Roth* case. No one had ever really thought much about obscenity and the First Amendment at this point. One of our principle points in the brief was that obscenity is a very subjective idea. In order to demonstrate that we inserted four pictures of scantily clad young ladies in this magazine, which we were representing as the *amicus*. The Post Office had objected to two of the pictures but not to the two others. It was impossible we thought rationally for anybody to say why two of the pictures were objectionable and two were not. We wanted to make the point to the court that obscenity is subjective and
Charles Reich had the idea that we should insert the four photographs into the brief and point out to the court how irrational all of this was. The magazine came out in kind of a news print, but when we got the pictures for insertion in the brief, that were done by a firm out of town, they were glossy, they would knock your eyes out. Well any way, we inserted them in this amicus brief. The brief was filed on Friday at the Supreme Court. I got a call at about 3:30 p.m. from Fortas's secretary saying that he wanted to see me right away. I went down to his office, his office was on the 2nd floor of our building. He had the brief on his desk. His name was at the top of the list of counsel. The brief was signed by Abe Fortas, Bill McGovern, me and Charles Reich. Fortas asked me who had authorized putting these pictures into this amicus brief? I replied that I thought you knew all about it. It was my impression that somebody had mentioned it to him. He said, I did not authorize it. He said very emphatically, "I want those damn pictures taken out of the brief." I told him the brief had been filed at the Supreme Court earlier in the day. Fortas said, I don't care. You get those pictures out of there. I remember the incident vividly. I raced out of our office; it was almost 4:00 p.m. and the Supreme Court clerk's office closed at 5:00 p.m. It was a Friday afternoon with a lot of traffic. I got a taxi and I raced up to the Supreme Court to the clerk's office. I got there about 4:30 p.m. and I asked the clerk of the Supreme Court if our brief had been distributed to the Justice. He said no they have not yet been circulated. I said, there has been an error in our briefs and I have to correct it. He said fine. He gave me the copies of the briefs. I sat there at a desk while the clerk looked at me in amazement as I took a pair of scissors and I cut out the four pictures
from each brief. One of the briefs was already gone. I understand it went to Justice Douglas's office. They were not all there. There were about 38. I went through every brief and with a pair of scissors and cut out these pictures. Bear in mind, this is a brief with respect to censorship. That's what we're talking about censorship. So, in a brief on censorship, I censored our brief by cutting out all of these pictures.

Needless to say, I could not address the fact that that brief referred to these pictures that were in there. But I did get the pictures out. I still have a copy of that brief with the original pictures. This is kind of a legendary incident at our law firm. People become convulsed with laughter over this. I will show them the brief and people laugh about it when I tell them what happened. Let me tell you, I didn't laugh about it at the time.

Mr. Pierson: I think they had not been served on the opposing parties.

Mr. Krash: No, they hadn't been served yet. Second thought, we probably did serve them the opposing party by mail. At that time you served by certified mail. But they hadn't been delivered to members of the court. The Roth case became famous as the point where the Supreme Court started to look at the obscenity issue. I became interested in that subject too. I subsequently wrote a review about the trial involving Lady Chatterley's Lover, the novel by D.H. Lawrence. There was a great controversy about the book in England. I wrote a review for The Harvard Law Review about the obscenity issue. It was based, in large part, on my experience in helping to write the amicus brief in the Roth case. This is the late 1950s now. I'm married and a young associate in Arnold. Fortas & Porter. In 1960, I was named a partner in the law firm, together with several
other men, including a man by the name of George Bunn who later left the firm and became Dean at the University of Wisconsin Law School. He and I were made partners. I'm a young, busy Washington lawyer. Sometime in the late 1950s, the Lever Brothers Company purchased from Monsanto Company the trade mark ALL. Monsanto is a chemical company, and they developed and manufactured the product, ALL, a synthetic detergent that was the first major detergent used in dish washing machines. What made ALL unique was that other detergent products had a lot of suds, whereas ALL did not, and you didn't want a lot of suds in your dish washer. The chemists at the Monsanto Chemical Company had crafted this product to work in dish washers; dishwashers were just becoming more wide-spread and popular at that time. This was a unique product. Monsanto was a chemical company, and it was not good at marketing the product, whereas that was Lever Brothers' forte. They were great marketers. So to make a long story short, Lever Brothers entered into an agreement with Monsanto Company whereby Monsanto transferred the trademark ALL to the Lever Brothers Company and Lever Brothers in turn agreed to buy from Monsanto the synthetic detergent, that is the ALL product itself. The government then pounced upon Lever and Monsanto under Section 7 of the Clayton Act, claiming that this was a transaction that would restrain competition. The suit was filed in the United States District Court in New York. Abe Fortas was the responsible partner for Lever work in our firm. Bill McGovern and I were assigned to represent Lever in this case. We were supervised by Fortas. This was a major case in our office. I went with McGovern to New York, and we tried the case before Judge Archie Dawson.
Early in the case, we made a decision to emphasize to the court the key role that Procter & Gamble played in the detergent industry and that Lever was a relatively minor player by this point and accordingly the transaction was pro-competitive. To prove our point, we had to go after Procter & Gamble's financials and other data. They fought us like a tiger.

Mr. Pierson: There wasn't enough evidence in public to disclose?

Mr. Krash: No, No, We wanted to show how profitable they were and that Lever was a relatively minor player struggling at this point. We wanted to show that Procter & Gamble was far more successful than Lever. There was no chance that competition would be adversely affected given their dominance. What we were trying to prove was that Lever didn't have the marketing muscle to restrain competition in the detergent industry. We went after Procter & Gamble and then after some really fierce engagements with them, we subpoenaed their data, and I went out and argued the motion in Cincinnati. The local judge rejected my arguments. I went back to Judge Archie Dawson and Dawson issued a trial subpoena, which he had the power to do under the antitrust laws; he could subpoena parties anywhere in the country. He ordered Procter to produce the documents showing their profits on detergents. They really resisted it, but we were able to show how enormously successful they were. Procter & Gamble was a highly competent organization and very successful, particularly in the detergent field at this point.

Mr. Pierson: Who represented Procter & Gamble?
Mr. Krash:  As I remember the Dinsmore & Shol firm in Cincinnati represented them. Anyway we tried the *ALL* case, and we won the case. Judge Dawson decided the case in our favor. The government then was going to appeal. Under the controlling statute, the government could appeal the district court's judgment directly to the Supreme Court. Fortas, McGovern and I met with the Solicitor General, Archibald Cox, and we urged him not to appeal, making much of the same arguments we made to Judge Dawson. He accepted our views, and the Government did not appeal the case. We won that case. The result of the case was that it saved Lever's position in the detergent business. Today, fifty years later, Lever is out of that business altogether. But for many years, *ALL* was its principal detergent product. That was a big case in our office, and once again I had an opportunity to appear in court, to examine witnesses to make arguments and so forth.

That brings us to 1962. At this point let me say I am a young partner now at Arnold & Porter and I am working closely with Fortas in a lot of matters. He represented Lever Brothers, Federated Department Stores, and other clients. I was one of the lawyers in the firm he asked to assist him in writing briefs, memos and things of that sort. Then, one June day in 1962, Fortas called me to his office, and he said I have been appointed by the Supreme Court to represent an indigent petitioner by the name of Clarence Earl Gideon. He said I want you to supervise the research and to help me write the brief on behalf of Gideon. I vividly remember the conversation a half a century later. Fortas said to me that he didn't know much about the case; he just had been appointed by the court. The case involved the right to counsel, he said. He
said to me, I want to know everything about the right to counsel since the invention of money. He meant it. There wasn't a day that passed that he didn't call me and say I want a memo on this point or that point relating to the right to counsel. We had the obligation as Gideon's counsel from day one to make every argument we could on his behalf that would be supported by the record. However, Fortas made clear to me at the first meeting that he wanted to get the Supreme Court to rule in this case that every indigent person in this country tried for a felony is entitled to the assistance of a lawyer. Two people were assigned to help me with the research and to write the brief. One was a fellow by the name of Ralph Temple, who was an associate at the firm. He later left the firm to become the Chairman of the American Civil Liberties Union office in Washington, DC. The other person assigned to me was a third-year law student at the Yale Law School, who came to our firm that summer as a summer law clerk. His name was John Hart Ely. I asked him if he would write a memorandum on some aspect of the case. I didn't know what a third-year law student would be able to do. He gave me the memo to me about a week later as I recall. I remember that as soon as I read it, I realized at once that Ely was an exceptionally gifted person of remarkable ability. I was right. He later became a professor at Yale, author of *Democracy and Distrust*, and at Harvard, Dean of the Stanford Law School, and the author of a book called which is a classic in constitutional law. He was one the leading legal scholars in the country during the last quarter of the twentieth century. He was greatly respected and a highly regarded person. Sadly, he died about a decade ago. Any way, he was assigned to help me. We treated this matter in
the same way as if we had been retained by a major client for an important project. That is the way we approached any pro bono matter. It was given the same energy, commitment, and dedication. We worked the whole summer preparing and writing memos for Fortas discussing all kinds of issues that he was raising for us, and writing drafts of the briefs. There were two great problems we had to deal with, one relating to an issue of precedent and the other to a problem of federalism. As of 1962, there was a fundamental difference as a matter of constitutional law between the right to counsel in the federal courts and the right to counsel in the state courts. In the federal courts, the Supreme Court had decided in the mid-1930s in a case called Johnson v. Zerbst, that in every criminal prosecution, regardless of its nature, that if the defendant was indigent, the court had a duty to appoint a lawyer under the Sixth Amendment to assist him. If the court didn't do that, the judgment was void. In the state courts the rule was quite different. In a state court, the rule was that in a capital case, cases involving the death penalty, the court was required as a matter of constitutional law to appoint counsel for an indigent defendant. That doctrine was derived from the Scottsboro Brothers case, Powell v. Alabama, decided in 1933. But in all other felony cases, that is in all non-capital cases, there was no constitutional obligation on the part of the state courts to appoint counsel for an indigent individual. That principle was confirmed by the Supreme Court in 1952 in a case called Betts v. Brady, which was a Maryland prosecution for robbery. The defendant didn't have a lawyer, and the Supreme Court held that the state court was required to appoint counsel only if there were "special circumstances." "Special
circumstances" were such that in this particular case, the court could conclude that the failure of the defendant to have a lawyer denied him a fair trial. So it was that many defendants, as of the time the Gideon case was decided, were being prosecuted for felonies and convicted in the state courts, and sent to jail without a lawyer. There were no "special circumstances" in the Gideon case. Gideon's petition involved a plain vanilla case which raised precisely the issue as to whether or not in an ordinary felony case, in a state court, not involving the death penalty, if the accused was indigent, did the state have a duty to provide a lawyer for him. That was the issue.

As I said, we had two problems. The first was how do we deal with Betts v. Brady, because there were no special circumstances in Gideon's case. He was a 50-year-old man, he was not illiterate, he was mentally competent, he was not inexperienced in criminal cases. In order to win, we had to persuade the court to overrule the Betts decision. As of 1962, 45 states furnished a lawyer to indigent defendants in non-capital felony cases, but they didn't do so pursuant to the U.S. Constitution. They did so pursuant to state constitutions, state court decisions, and state court rules. There were five outlier states, of which Florida was one, which did not supply counsel to an indigent defendant in a non-capital case. So our first problem was how to deal with Betts v. Brady. We urged the court to reject Betts v. Brady, to overrule it. When the court granted certiorari in the Gideon case, it specifically asked counsel to brief whether Betts v. Brady should be reconsidered. That was a clear signal to us that the court was considering abandoning the Betts v. Brady rule.

Problem number two that faced us, a central problem, was federalism,
because if the Supreme court were to decide, as we were urging, that the states had a duty to provide a lawyer for defendants in all felony cases, that would be an intrusion by the Supreme Court to the administration of justice by the states, requiring states to appropriate the money to pay for defense counsel. We had to address the federalism issue. It was very touchy. You have to remember a bit of constitutional history and bear in mind that as of this time, 1962, there was a tremendous argument going on within the Supreme Court as to whether the various procedural provisions of the Bill of Rights were applicable to the states. It was called the incorporation controversy. I need to take a little detour here. The Supreme Court had decided in the 1830s, in *Barron v. Baltimore*, that the Bill of Rights applied only to the national government, and did not limit the states. That was true as a general matter even as of 1962. It was still accepted doctrine that the Bill of Rights, as a general rule, applied only to the national government and not to the states. There had been a few exceptions as of the time we were briefing the *Gideon* case. The Supreme Court had decided that Freedom of Speech and Freedom of Religion, guaranteed by the First Amendment, are protected against state infringement by the due process clause of the Fourteenth Amendment. The Supreme Court also decided that if there was an unreasonable search and seizure in violation of the Fourth Amendment, that the due process clause of the Fourteenth Amendment made this right applicable in state courts. But all the other provisions of the Bill of Rights, all these procedural provisions, were then not deemed applicable to the states. Justice Black wrote a dissenting opinion in 1948 in *Adamson v. California*,
where he said the Fourteenth Amendment was designed to make all the Bill of Rights applicable to the states. But the majority of the court didn't agree with him. In any event, we had to decide how to deal with this federalism issue. In other words, the question was, is the right to counsel guaranteed by the Sixth Amendment, applicable to the national government in the federal courts, applicable under the due process clause of the Fourteenth Amendment to state courts. We had endless discussions in our office about how to deal with this issue. We knew that the Supreme Court was very deeply divided. At the end, Fortas's decision was to argue that Gideon had a right to the assistance of counsel pursuant to the due process clause of the Fourteenth Amendment, standing alone, on its own bottom so to speak, without reference to the Sixth Amendment. In other words, we finessed it. We did not argue that the Sixth Amendment is incorporated in the Due Process Clause of the Fourteenth Amendment, because we were afraid we would get caught up in a cross-fire between different justices on the Supreme Court. That's how we presented it. Fortas had a very brilliant insight on this federalism issue. In many cases tried in state courts where an indigent defendant didn't have a lawyer, after he was convicted, and his conviction was affirmed, a lawyer would file a petition on his behalf in a United States District Court for *habeas corpus* claiming that it was unconstitutional for his client to have been tried and convicted without the assistance of counsel. That meant that the federal district courts were reviewing state court convictions. Fortas said they're doing this *ad hoc*, that is a by case without any clear governing rule, and secondly they were doing so *ex post facto*, that is after the cases were tried. In
other words, he said that what was going on in the five states, where there was no counsel provided in ordinary felony cases, the federal courts were supervising the state courts by *habeas corpus*, which was a real intrusion into the states’ rights. The rule that we were proposing which was that a lawyer should be appointed in every case would be much less intrusive. The state would be free to devise any method they wanted to provide counsel, but they would have to provide counsel. In any event, we wrote drafts of this brief. Fortas then took our drafts of this brief. I can tell you we just went through numerous revisions and changes. He was never satisfied. He took it himself, and he substantially revised and rewrote it. That was the brief we filed in the Supreme Court. It was an elegant brief. It was a superlative piece of work. We really poured a lot of effort into it. There is an interesting event which happened after we had written the brief. I was sitting in my office with the page proofs and going over them when Fortas came to my office. Our office was then in the red brick house on 19th Street. My office was on the 4th floor. He didn’t come to my office very often. He said he would like to see the page of the brief where the signatures of counsel are; and I showed it to him. The brief showed Abe Fortas, Counsel Appointed by the Supreme Court. On the left hand side, it said "Of Counsel," and listed Abe Krash and Ralph Temple. Fortas looked at the brief and he said I notice that John Hart Ely's name is not mentioned. I replied that Ely is not a member of the bar, and you can't sign a Supreme Court brief as counsel if you're not a member of the bar. Fortas nodded his head and he said let me think about that for a moment. He then said, I have an idea. You see where it says "Of Counsel" on the left hand
side? He said, I want you to put an asterisk there, and we’ll drop a footnote, and the footnote will state in substance that Counsel for the Petitioner wishes to acknowledge the excellent contribution to this brief by John Hart Ely, a third year student at the Yale Law School. That is how a third-year law student's name was inserted into this famous brief. Fortas wanted to give recognition to the excellent contributions made by John Hart Ely. He was a brilliant fellow, and he contributed significantly. At any rate, the *Gideon* case was orally argued when I was in New York trying the *ALL* case so I didn't get to go to the argument in the Supreme Court. This year, I've been invited to all kinds of events commemorating the fiftieth anniversary of the *Gideon* decision. The three other lawyers with whom I worked who are named in the brief, Fortas, Temple, and Ely, sadly are now dead. I am the only survivor, the last of the Mohicans so to speak. When folks throughout the country were having these commemorative events and looking for some speaker, I was called upon. I've gone to many places in the past year describing my experience in the *Gideon* case. I spoke at the Yale Law School, and in Reno, Nevada, where they have a college for judges. I was in Charlestown, SC recently speaking at a daylong conference on the right to counsel. Last week, I was in New York at a Bronx Public Defenders event. So I've made a lot of talks and written a lot regarding *Gideon* over the years. People frequently ask me at these meetings whether we appreciated at the time how significant or great the case was going to be. The answer is no, we did not. It was obviously important. The Supreme Court receives hundreds of petitions from prisoners, and they picked out Gideon's petition, so it was clearly important. It turned
out to be a very important case, not only in respect to the right of indigent defendants to counsel, but also this was the case that opened the floodgates for incorporating the rest of the Bill of Rights against infringement by the state. One of the things the Warren Court wanted to do was to improve the administration of criminal justice in the state courts with respect to poor people and African Americans. The technique the Court used was to invoke the provisions of the Bill of Rights against the states. That is, the right against self-incrimination, double jeopardy, cruel and unusual punishment, and so on were made applicable to the states. The *Gideon* case was a key step in that process because the court decided in that case that the right to the assistance of a lawyer protected against infringement by the national government pursuant to the Sixth Amendment, is also applicable to the states pursuant to the due process claim of the Fourteenth Amendment.

**Mr. Pierson:** So Justice Black took the step beyond the process.

**Mr. Krash:** He took the step that we didn't take. That's right.

**Mr. Pierson:** Was there ever a discussion as you were doing the brief of your memory of Crosskey as it pertains to the Fourteenth Amendment?

**Mr. Krash:** Yes. But you see, Justice Black had written this *Adamson* opinion in 1948. All through the years Justice Black had been fighting this incorporation argument. Justice Black never referred to Crosskey after his book came out in the early 1950s. The reason Crosskey was not cited, I believe, was because he was so controversial, and he probably didn't want to deal with that. If he were cited, other Justices others would invoke the critics who denounced Crosskey. We
knew when we were writing the *Gideon* brief that we had four Justices, that is Chief Justice Warren, Black, Douglas and Brennan, on our side. It was clear from cases decided in the two years before *Gideon* that these Justices were prepared to vote to overrule *Betts v. Brady*. But the opinion in *Gideon* was unanimous. Justice Harlan wrote a concurring opinion and Justice Clark and Justice Douglas did also. Another question people frequently ask me is whether any of us ever met Gideon. The answer is no. He was in state penitentiary in Florida. There is a long letter by Gideon to Fortas describing his life experience and background, which he sent to Fortas in the fall of 1962. Fortas had sent Gideon a letter asking him to describe his life. Gideon replied with this long letter, which is reproduced in its entirety in Anthony Lewis's book, *Gideon's Trumpet*. The letter is a dozen pages or more. Neither Fortas nor I ever met him. At any rate, the *Gideon* case was a memorable experience.

I have learned a lot at the conferences that I have attended about the right to counsel. Many of the participants were public defenders who are in the trenches and can tell me what is going on. I listened to people talk about current practices. The Gideon case was certainly among one of the highlights of my career, no doubt about that.

**Mr. Pierson:** Were there cases during the 50s and 60s where you look back and said, there is something that could have been better or we made a mistake here or there where lessons were to be learned.

**Mr. Krash:** That's a very good question. One of the things in looking back is that we were trailblazing in various cases. The *Durham* case was a trailblazing case. We
were trailblazing in the *Gideon* case, and in the *Roth* case and we were doing so in our antitrust work. We urging courts in antitrust cases to look at economics. Let me say that the notion that the courts in deciding an antitrust case, should consider what economists had to say was a novel idea. We probably could have done better. You must remember we were sort of fumbling our way through the dark. I'm sure we made mistakes.

Mr. Pierson: Something about the Supreme Court.

Mr. Krash: Yes, well you know, I was a young lawyer and certainly had enough questions at the time so I wouldn't go down the wrong alley and make mistakes. I was learning the ropes as it were.

Mr. Pierson: Did you try other cases besides the one in New York?

Mr. Krash: Oh yes, I was involved in the *Banana* case, I tried the *ALL* case. I was not lead counsel. I was still just a junior partner, but I was given a lot of responsibility and opportunity. The *ALL* case was a major antitrust case. I was given a lot of tasks which young lawyers today rarely get to do. Again, you have to keep in mind that we were a small firm, and we were getting these significant and exciting things to do. The volume of work was such that the older partners gave the young guys a chance to do these things. I was given a whole lot of opportunities to do these things which was really quite wonderful. The *Gideon* case was decided in March 1963. President Kennedy was assassinated in November, 1963, and that event had a profound impact on our law firm. Abe Fortas had been a trusted advisor to Senator and then Vice President Lyndon Johnson prior to President Kennedy's assassination. That relationship
developed in the late 1930s or 1940s. You must remember that Washington was then a small town. Fortas got to know President Johnson in Congress when he was working with the Department of Interior. How he got to know him, I don't know the story about that. But there is a famous story involving the race for the Senate seat in Texas of 1948. Lyndon Johnson was running for the Senate; his opponent in the Democratic primary was a man by the name of Coke Stevenson, who had been Governor of Texas and who was a very popular person. There were charges of fraud in the Democratic primary that Johnson won by a small number of votes. The District Court judge issued an injunction barring Johnson from appearing on the General Election ballot. Johnson was surrounded by a group of Texas lawyers who were advising him. They were very able people. The story is described by Robert Caro in his biography of Johnson. Johnson asked Fortas to come to Texas and meet with these Texas lawyers. The issue they were debating was how to proceed following this District Court's injunction, which if the Court of Appeals sustained would have kept Johnson off the ballot, and he would have never been elected as a senator. The Texas lawyers were urging that the preliminary injunction which barred Johnson from the ballot should be appealed to a Court of Appeals judge who they felt would be favorable to Johnson. They were arguing about who might be the most favorable judge for them in the Court of Appeals. Fortas, to their surprise, argued that they should go to the judge who would be the least favorable. In other words, he urged they should go to a judge who was likely to affirm the District Court's injunction. Fortas advised that they could then appeal that order to the Supreme Court, that is to the individual justice for this
Circuit, who happened to be Justice Hugo Black. After much debate, Fortas's advice was accepted. The appeal was taken from the District Court's order. The Court of Appeals judge to whom it was assigned promptly affirmed it. Fortas immediately filed an appeal from that order with the United States Supreme Court. The matter was brought before Justice Black on an emergency basis urging him to vacate the injunction. Fortas did so, knowing that Black was opposed to federal courts intervening in state elections. Fortas argued this matter in chambers before Justice Black and Black vacated the injunction. Johnson was elected to the Senate. I believe that event cemented the relationship between Fortas and Johnson, which is described magnificently in Robert Caro's *Biography of President Johnson*. I think it is in volume 2 of his biography of Johnson. There are four volumes as I recall, this is in volume 2. He tells of this incident and describes it very vividly. The point I'm trying to make is that I think from that day forward, Lyndon Johnson greatly valued Fortas's counsel and advice. During the Presidency of Kennedy, Fortas was not involved with the Kennedy Administration. As I recall, his name is not even in the index to Arthur Schlesinger's lengthy biography of Kennedy.

I was having lunch on November 22, 1963 at a restaurant on Connecticut Avenue when a bulletin was broadcast on the radio saying President Kennedy has been shot. I immediately left the lunch I was having with colleagues. I rushed back to the office because I knew that Fortas and I were scheduled to meet that afternoon with Bobby Baker, who was Johnson's right hand man and who had been involved in some matters alleged to be illegal. I was the one who told Fortas that Kennedy had been shot. By night fall, I believe, Johnson was in
touch with Fortas, and Fortas was at the White House the next day. A day or so later, Johnson was working on the speech that he gave the following week before the Congress. Fortas worked on that speech. From November 22, Fortas's life was also changed, and our law firm was changed. You have to appreciate the fact that Fortas was the principal partner at Arnold, Fortas & Porter. He was responsible for many of our major clients and for generating a good deal of the firm's practice. He was the firm manager. He was then being called upon by President Johnson for all kinds of matters. I would be in Fortas's office, for example, and his secretary would say to him that there is a call from the White House. Fortas became deeply engaged in advising the President in all kinds of matters.

The result of all this was because of his many time-consuming commitments and involvement with the President, Fortas pulled back from practice. The work had to be delegated to other lawyers. I was thrust more and more into roles that became my primary responsibility. In the spring of 1965, Fortas called me to his office and said that I need to make some recommendations to the President about a successor to Justice Arthur Goldberg who was leaving the Supreme Court for the UN. I remember suggesting many people to him. I think one of the people that I suggested was Ed Levi, President of the University of Chicago. Anyway, at the conclusion of the discussion in his office, I said to him, well Abe, what about you? He said I can have the appointment if I want it, but I don't want it. He mentioned various commitments he had in the law firm. We left it at that. This would have been around May of 1965. I thereafter went off on a vacation. I was in Holland in July and I picked up a copy of the
International Herald Tribune and there was a big story about the appointment of Fortas to the Supreme Court. President Johnson had summoned Fortas to his office and told him I'm going to make an announcement, I'm sending the troops to Viet Nam and you're going to be my nominee to the Supreme Court to replace Arthur Goldberg. I knew from our conversation that Fortas did not want to go to the Supreme Court at that point. I remember vividly that conversation. I knew Fortas greatly enjoyed the role of advising the President, and he wanted to continue to do so. I came back from my vacation and had to go to San Francisco to try a case. I was therefore, not around during his confirmation proceedings. He was confirmed in the Senate by a substantial majority. In the fall of 1965, Fortas left our firm to become an Associate Justice on the Supreme Court. The firm name, of course, was immediately changed to Arnold & Porter. That event also profoundly affected my life because now the major figure of the firm was gone. I was given the responsibility for some of our major clients. I also became deeply involved in the management of the firm, which really had been pretty much handled by Fortas. We set up a Policy Committee, and some of the younger attorneys took over the management, such as Bud Vieth, who became a major figure. I was immediately elected to the Policy Committee, and at this point I was also made a full partner. I am now in a situation where my responsibilities and role are greatly expanded. As I said, Fortas was very busy working with President Johnson and so I was placed in a role of being the principal contact day by day with Philip Morris who retained Fortas late in 1963. At that time there were six cigarette companies, R.J. Reynolds, American Tobacco, Brown & Williamson, Liggett & Myers,
Lorillard and Philip Morris, which was the sixth ranking and a relatively small company. The lawyers for the different companies were engaged in almost continuous meetings here in Washington because of significant problems that this industry had in Washington, particularly with the Surgeon General and with the FTC. Since Fortas was no longer available, I became the lawyer responsible for much of the Philip Morris matters. I sat in on the meetings with the various company lawyers and other counsel as the lawyer for Philip Morris. Within that group of lawyers, I became more and more involved. Philip Morris had a cigarette called Marlboro, which was originally marketed to women. Some persons at Philip Morris had the idea of putting a cowboy in Marlboro advertisements and history was made. Marlboro became the most successful cigarette brand in the world. Philip Morris rapidly ascended to become the leading firm in the cigarette industry. I became deeply involved in counseling Philip Morris. In the late 1960s, they acquired Miller Beer, and I became the lawyer in our office in charge of Miller Beer matters. In those days, they were major clients in our firm. Philip Morris remains so to this day, it is now called Altria. I haven't worked on their matters for many years. The point I'm trying to make is that Fortas departure affected the internal structure and operations of the law firm. Fortas had a very large practice and his clients were largely shifted to younger attorneys. Two of major clients were Lever Brothers and Federated Department Stores. Bud Vieth became the responsible partner for those clients, but I was deeply involved in various matters for those two clients. In addition, my role was really greatly expanded with respect to the internal administration of the firm.
One day in the early 1960s, the McKesson and Robbins Company, a drug wholesaler, came to our firm and said that they had been cut off by American Cyanamid and by Pfizer, another drug manufacturer, who refused to supply their drug products to McKesson any further because McKesson was coming out with an antibiotic drug product under its own label. McKesson was a wholesale drug company which distributed its drugs to retailers; it got the drugs it distributed from drug manufacturers, like Pfizer and American Cyanamid, but these companies cut off McKesson. We advised McKesson to file an antitrust suit in Philadelphia against American Cyanamid and Pfizer. I was the lawyer in charge of that case. We were seeking a mandatory injunction requiring them to sell to us which was hard to get. We tried the case in Philadelphia on a motion for preliminary injunction. I was the guy in charge. Bill McGovern played a role, but I was essentially responsible for the team of lawyers at our firm. The District Court judge granted the injunction.

Mr. Pierson: What was the judge's name?

Mr. Krash: Davis, I believe. I also learned something about practicing law as an out of town lawyer. We were in Philadelphia, and we hired as local counsel a lawyer by the name of Winnett who was a partner in a Philadelphia firm and who also had been a state court judge. The first day I was standing up making the arguments before the District Court Judge. He looked at me and he said, where is Judge Winnett? Why isn't he here? I had told Judge Winnett he would just be sitting in court with nothing to do, so he need not come. At lunch time, I ran out of the court room, and I called him up and I said, I would appreciate it if you would come down and sit with us as counsel. I gave up my seat as a lead -110 -
counsel and put Judge Winnett in that seat. From that time on, the District Court judge beamed down at me and smiled at me. I learned that if you're an outside lawyer, from Washington, going into a court in another city, and you retain a local counsel, make sure that that local counsel has a prominent position. I had to learn the hard way, but I learned it, believe me, sitting there that day, by bringing in the local lawyer; who was a very nice fellow, but who knew nothing about our case I just asked him to say a few words and he did. The District Court judge could not have been nicer to me thereafter. The judge ultimately ruled in our favor. That was a learning experience for me. This case became a celebrated event at the firm because it was an unusual result and McKesson then became a client of ours. Another case in which I was involved that became well known in our firm was representing the Superior Oil Company, an oil company located in Texas. They had bid for leases on off-shore oil properties. They lost the bid to another company, but the company which won the bid failed to sign its bid. The government, nevertheless, awarded the lease to the company whose bid not signed. They were the highest bidder, but they didn't sign it. I looked at it and I said wait a minute. How can they accept a bid that isn't signed? There is something wrong here. I advised Superior to bring a suit in the District Court for a restraining order and TRO and a preliminary injunction. I urged that the government can't accept an unsigned bid. To make a long story short, we won a TRO, and then a preliminary injunction, and then we won a permanent injunction. I argued it three times. We were talking about very valuable properties during this time.

Mr. Pierson: Was the case in Texas?
Mr. Krash: The case was here in the United States District Court. In any event, we then met with the Solicitor General. The question was whether he would appeal the case to the Supreme Court. I talked to lawyer in his office and I said this is an unsigned bid, and it should not have been awarded. You've got a losing point here, and we are right about this. They reviewed it, and the case was settled. They agreed to give the lease to Superior, if we would agree to vacate the ruling. We won the case for Superior, and for many years afterwards we were their counsel. They greatly appreciated that we succeeded in doing that and as I say, it was a case which created a lot of amusement and discussion within the firm, because it was kind of a far out case but when we won and came back each time from going to court and said we won that, people didn't quite believe it.

Mr. Pierson: Who was the judge here?

Mr. Krash: Judge John J. Sirica, I think (The same as the Watergate case). In thinking back what my professional life was like in the late 1960's, I was a young lawyer with lots of opportunities and responsibilities. We had acquired the Washington Office of the Paul, Weiss firm around 1960. The office consisted of tax lawyers. That's when Carol Agger and several other tax lawyers came to our firm. Over the years, we also kept recruiting young lawyers. At the time when Abe Fortas left the firm in 1965 to become an Associate Justice, Arnold, Fortas & Porter was a firm of about 35 lawyers. In the next five years, we doubled our size. We developed a very diverse and interesting practice. I rarely saw Fortas when he was on the Supreme Court. In the spring of 1968, President
Johnson nominated Fortas to succeed Earl Warren who was retiring as Chief Justice. Johnson did two things. He called his friend, Senator Dirksen, a Republican and Minority Leader in the Senate, and he asked him to support Fortas, which Dirksen agreed to do. President Johnson also met with Senator Russell of Georgia, who was an enormously influential senator. He was a very able person, and he was the leader of the Southern Democrats in the Senate. At the nod of his head, he could command the votes of 13 to 14 Southern senators. Senator Russell was a very good friend and ally in many ways of Johnson for a long time, and he agreed at first to support Fortas. Without going into all the details, what happened was that a group of Republicans led by a senator from Michigan decided to oppose the Fortas nomination on the grounds that Johnson had previously announced that he was not going to run again for President. They took the position that the nomination of Chief Justice should be made by the man who was elected President in November 1968. As I recall 18 of 19 Republican senators signed a petition to that effect. Then I think, unbeknown to either President Johnson or Fortas, Senator Russell told the leader of the Republican group that he would join with them and oppose the nomination. Why Senator Russell changed his mind still remains somewhat of a mystery. I believe that what happened was that a person Russell wished to have appointed as a District Court Judge in Georgia was not being pushed forward by the Justice Department, and Senator Russell came to think they were holding that nomination up in effect as a hostage to get him to support Fortas. He was offended by that. Also, I think it is probable that a number of the southern senators who were opposed to the Warren Court because of its decisions in
racial matters, came to Senator Russell and urged him to oppose Fortas, who was closely identified with the Warren court. At any rate, once you had a coalition of the 18 or 19 Republicans and 13 southern Democrats, who Senator Russell commanded, there was a sufficient number to filibuster the nomination and to defeat it. During the summer, while the nomination was pending, there was a newspaper story that Fortas had received $15,000 fee to teach a class at American University, and that this money was raised from Fortas's former clients. This story injured Fortas's prospects of confirmation. However, in my view, the nomination was dead for political reasons within a week or two after it arrived at the Senate because of the coalition between the senate Republicans and the Southern Democrats led by Senator Russell. At any rate, there was a heated debate in the senate about the nomination over the summer and the fall. It became clear that there would not be sufficient votes to confirm. In September, Fortas asked President Johnson to withdraw the nomination. He remained on the court as an Associate Justice. Chief Justice Warren continued in his position until his retirement. I had nothing to do with the confirmation battle. I was never consulted about it.

I should mention a couple of other things that occurred in my life during the 1960's to make the story complete. In 1966, President Johnson established the District of Columbia Crime Commission to investigate the problem of crime in the District. I was appointed to this Commission. There were nine of us on the Commission. To the best of my knowledge, my appointment came about because a couple of my friends in the Department of Justice who had a role in advising who should be picked as members of the Commission, put my name
forward. The Commission had a number of meetings and hearings. One of the key staff persons was a fellow by the name of Howard Willens, who later became a very good friend of mine. Patricia Wald was also a key staff member. In any event the Crime Commissioner issued an elaborate study of the crime issues in the District of Columbia. We made all kinds of recommendations for trying to improve the police force, community relations, and the administration of criminal justice. Regrettably nothing much resulted from this excellent study. I spent a couple of years going to meetings and writing memos and participating in this. I learned a lot, and it was an interesting and significant experience. At this stage in my life, I was busy representing Philip Morris, Miller Beer and other clients in all kinds of matters. I did work for Federated Department Stores. I was counsel for Unilever, which had been one of Fortas's clients. Another matter I became involved in related to the Bendix company. Bendix was a major manufacturer of automobile parts. They acquired FRAM, a company that made and sold automotive filters. The Federal Trade Commission challenged the acquisition as a violation of Section 7 of the Clayton Act. The FTC said it would lead to a diminution of competition in the making and sale of automobile filters. We tried this case before an administrative law judge. That case was tried here in Washington over a period of many weeks. The judge ruled in our favor. Then the commission reviewed the case and reversed the judge's decision; it held the acquisition illegal. The theory of the Commission was that in lieu of making this acquisition of FRAM, a leader in the auto filter business, Bendix should have entered the filter industry by acquiring and expanding a small filter company; that is, it
should have made a "toehold" acquisition. No one had ever advanced that theory when we tried the matter. This was something that the Commission sprung on us when they decided the case. We appealed the Commission's ruling to the Court of Appeals for the Six\textsuperscript{th} Circuit. I felt the Commission's action was wacky. This case was being decided against us on the basis of a theory we never had a chance to refute, or rebut or to present evidence about, and this made no sense at all. In short, I said this was procedurally unfair. I argued this before the Court of Appeals in Cincinnati and the Court of Appeals agreed with me on this point and unanimously reversed the Commission's decision.

Mr. Pierson: Do you remember who the panel was?

Mr. Krash: I don't. I can find out. They did not decide the case on antitrust grounds, but rather there was a violation of the administrative procedure act, and that as a matter of fairness, Bendix should have been apprised of this particular theory. Bendix succeeded in acquiring FRAM. Bendix became a client and we represented it in various matters. Then they were taken over by another firm about a decade later. I was privileged in having a number of exceptionally capable young lawyers working with me on the \textit{Bendix} case. One of the principal ones was Daniel Rezneck. He came to our firm at the time of the \textit{McKesson} case, and he worked together with me for about 25 years. He closely collaborated with me on many matters. He is an extremely able lawyer, and I greatly valued his assistance. There were other younger lawyers who were assigned to me because I was in charge of a lot of matters, and I couldn't possibly do these things alone. I needed people to assist me so many of the
young lawyers worked with me. The firm remained a very collegial place. We did not have any people who became super partners. We were equal regardless of how much business we generated for the firm. We were able to attract to the firm very good young persons who were eager to come to work for us.

In the spring of 1969, Abe Fortas resigned his seat on the Supreme Court. *Life* magazine became aware of the fact that Fortas had made an arrangement beginning in 1965 with a man by the name of Louis Wolfson, who owned the Transit Company here. Fortas became a member of the Board of Directors of a public interest foundation established by Wolfson. He entered into an arrangement whereby he would be paid $25,000 annually. *Life* magazine published this story. Wolfson had become entangled with SEC in various matters. The question *Life* raised was what is a justice doing being involved with a guy like Wolfson. In May of 1969, Fortas resigned from the Court. No one to this day know why he resigned. In any event, there were discussions among the partners about his coming back to the firm. Laura Kalman describes these discussions in her biography of Fortas. The end result was that he didn't come back. He joined a Chicago law firm, and he had an office in Georgetown. Fortas died in 1982 as a result of a ruptured aorta. I rarely saw him from the time he left the Supreme Court until he died. The rejection of his nomination to be Chief Justice and his subsequent resignation were severe blows to those of us in our firm. I regard Fortas as a tragic figure. Various people disagree with me about his characterization. The feel he brought about his own down fall. He was perhaps not tragic in the sense that the Greeks would define tragedy, that is to say a man of noble birth who experiences a great misfortune as a result of a
defect of character. He was tragic, I believe, in the sense that he was a person of enormous ability who never fulfilled the expectations people held of him, or fully realized his great gifts. He was an exceptionally able person. He was one of the most able persons I have ever met. His rejection as Chief Justice and his resignation were traumatic events. Fortas was a very sensitive man, and I'm sure that those things caused him a great deal of anguish. I should point out that it has never been shown that Fortas acted illegally or that he violated then existing ethical standards. Carol Agger, his wife, remained with the firm as a significant partner in charge of our tax practice. As I previously mentioned, Fortas died in 1982, and she died about a decade or so later, in the 1990s. What we have been talking about today is my experience at Arnold & Porter from 1953 to around 1970. I had great opportunities. The firm was and is a very exciting place to be. I was a lucky fellow to have had a chance to work with two extraordinary figures, Abe Fortas and Judge Arnold. I learned a great deal from each of them and from other partners. I enjoyed the friendship of younger lawyers at the firm. I was supported by a cast of exceptionally talented younger lawyers whom the firm was able to attract, and they gave me tremendous, important assistance. It was an exciting and interesting period in my life.