Oral History of
HONORABLE FRANK Q. NEBEKER
Ninth Interview
October 25, 2006

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 October 25, 2006. This is the ninth interview.

Mr. Allen: Last time we talked about the Office of Government Ethics, and this time we've planned to talk about the Court of Veterans Appeals.

Judge Nebeker: Subsequently, it became the United States Court of Appeals for Veterans Claims. When it got started, it was called the Court of Veterans Appeals, CVA.

Mr. Allen: Well perhaps we should begin at the beginning when you were still in the Office of Government Ethics. You were Director of the Office of Government Ethics from 1987 to 1989, so it was in 1989 that you received your appointment to the Veterans Court. So can you describe the circumstances of your receiving that appointment?

Judge Nebeker: Well, in 1989, I was Director of the Office of Government Ethics. We had become a totally independent, stand-alone agency. As a result of that, we moved from 1625 K Street to New York Avenue, 12th Street, and the entire office was there. Why I'm going into this is because Wade Burger, the son incidentally of Chief Justice Warren Burger, had been an employee of the Office of Personnel Management and transferred over to the General

Services Administration. That Administration, the General Services Administration, was charged with the task of assisting the court, to find adequate space for it. Well, I had worked with Wade Burger in moving OGE to the New York Avenue address, and being a stand-alone agency, we had to find someone to take care of setting up our payroll. It was Wade Burger who suggested that OGE not go with GSA but rather to go with the National Finance Center, a ministerial-type agency headquartered in the Department of Agriculture –

Mr. Allen: (Checking machine)

Judge Nebeker: with its headquarters in New Orleans. So OGE became a client of the National Finance Center.

When I received a telephone call from someone at the White House asking if I would be interested in being Chief Judge of the Veterans Court of Appeals, I didn't know anything about the court. I asked for an opportunity to look into it, and I went to the library at OGE and found in the U.S. Code, pocket part, the creation of a new court. I read the statute through and called back to the White House and said, "Yes, I would be very interested in it." I didn't know at the time that it was the sixth or seventh time in the history of the United States that a judicial tribunal had been created out of whole cloth, with no antecedent at all. I later learned that of course the Supreme Court was the first, and then there were other courts that were created by Act of Congress under Article III as well as Article I. Of

modern-day significance, a court which preceded Veterans Court as being one created with no antecedent, what is now known as the United States Court of Appeals for the Armed Forces; the Court of Military Appeals at the time was created in 1951. In any event, the Veterans Court is the last court, thus far, to be created by Congress under Article I or under Article III of the Constitution. Well, I was invited to be interviewed by Secretary Derwinski and after that interview, I received a call reporting that apparently he reported favorably through the folks at the White House, and I was nominated to that court; I might add, much to the chagrin of the chairman of the Government Operations Committee of the Senate, Carl Levin. He had presided over my confirmation to be the Director of OGE for a five-year term.

Mr. Allen: I take it Senator Levin would have preferred that you stay at OGE?

Judge Nebeker: He did. He preferred that I stay at OGE. As a matter of fact, when I went to be Director of that Office, its pay was at the executive level, but the lowest level. I have forgotten now whether that's a Level 5 or a Level 1. I don't know which way they counted, up or down. But in any event, the cabinet officers were the opposite end of that executive level pay schedule. They held a hearing and invited me to attend. And what I discovered was that they were talking, among other things, about raising the salary of the director two steps, or two grades, within that executive category. I said to Chairman Levin that that's fine, but I agreed to take it at the lower level, and

as far as I was concerned, if they wanted to do that, to raise that pay, they should make it effective with my successor. Well, Senator Levin didn't pay any attention to that, and I wound up with a nice pay raise just a few months after I had taken over as Director of the Office of Government Ethics. I do all this by way of segue into the court because there's sort of a tie between the two. I was director until I was confirmed and appointed, but in the process, as soon as I was confirmed, I could see that I needed to find headquarters for the court. I contacted GSA and said that I now am confirmed, the court is off and running, and we will soon have the other judges nominated and confirmed, and therefore I need to have space. Again, it was Wade Burger who told me how to deal with these folks at GSA. They soon reported that they had a place to headquarter the court – at Buzzard Point. Well I had been to Buzzard Point a number of times when I was Assistant United States Attorney and at the Office of Government Ethics, and I immediately turned down that offer because of its location, and the neighboring area. You couldn't possibly ask court staff to work there in the wintertime when they had to drive through the neighborhood they would have to drive through in order to get to work. So I categorically refused to take that and thought we could find something else. It was a few weeks later that they reported they had nothing else. And at that juncture, I was able to say, "Oh yes you do." This was the regional director here in the Washington area. He said, "What do you mean? Do you know where there

is a place?" I said, "Yes, OGE just vacated 1625 K Street. We had one floor, the third floor, and I know that it is not occupied and it is not leased. I'll take it." So that's how we wound up with the court initiating its first hearing and its clerk's office at 1625 K Street.

Mr. Allen: It must have felt like homecoming.

Judge Nebeker: It was. I was familiar with it. Marlene Davis, who was my right arm throughout this entire transition from the D.C. Court, OGE, and then to the Veterans Court, we felt right at home. We had to do some remodeling on that floor, but fortunately Congress was very generous in giving us sufficient money to get set up. We had to reconfigure the office on the third floor for the court, including a little makeshift courtroom which was in a small room. We elevated the bench about one riser, about eight inches, and the only division we had between the spectator section and the well of the court and the bench was a couple of these velvet ropes on statues that demarked the place where the well of the court was and the spectator section might be, probably ten seats or less. I guess I got ahead of myself a little bit. When Marlene and I knew we were going to have to find headquarters, the next question became how do we get on what payroll.

Mr. Allen: A little déjà vu.

Judge Nebeker: So now the question became how do we get the court started. How do I turn this fountain on? I called a friend in the Treasury Department with whom I had dealt – he was Assistant Secretary in charge of something – and I asked

him, "What do I do next?" Well, fortunately, he knew. He said first thing you have to do is get a Treasury Warrant. I never heard of a Treasury Warrant. I'm sure some of the green eyeshade bean counters at the federal government know what a Treasury Warrant is, but I certainly didn't know. Nor did I know where to get it. It turns out that right across the street from Gonzaga College High School on North Capitol Street was a nondescript building leased by the Treasury Department, and I was directed to go there and go to one of the floors, and go into the Warrant Office. I drove over there, and Marlene ran up to the Warrant Office. We called to announce that we were coming, so they were ready for us. She tells me quite unceremoniously they just handed her an envelope with a Treasury Warrant. She came back out and got in the car, and we went back to OGE headquarters because we still hadn't found an office. With that Treasury Warrant on file, we were capable now of drawing funds for purposes of renting space, salary – mine and hers, to begin with – and for furniture. Again, I called on Wade Burger. How do we wind up getting furniture? We're going to need a lot because OGE took its furniture with it when we went to New York Avenue. Wade said, "Well, there's a warehouse in Alexandria, a GSA warehouse, and there's a lot of used furniture out there. You can get that right away. You can't get new furniture right away because it takes some time to order and have it made. So Marlene and I drove to this warehouse out in Alexandria, and it was big. We looked

around and we saw some stuff that had obviously been broken up and wasn't worth much, and then there was an area where furniture had been repaired by the prison industry, and it looked as though it was new, so we ordered a whole bunch of furniture, enough for the clerical staff and for the chief judge. I was back in the same office where I was director, and we were able to move in then to 1625 K Street. That was in April. May and June we got to move in. This is in 1989. Then on October 16, 1989, Judges Farley and Kramer were sworn in. I had called Chief Justice Rehnquist and asked if he would be kind enough to preside with me over the convocation of the court. He agreed. I did no adjudicating on the court when I was alone, just getting a court set up. So now we had at least one panel that was capable of adjudicating cases. And so I called the Chief Judge in U.S. District Court and asked if I could borrow the ceremonial courtroom on the 6th floor of the U.S. courthouse. He said, "Of course." So we had a convocation at which Sonny Montgomery, House Committee Chairman, and Senator Cranston, chairman of the Veterans Affairs Committee, from California, came and spoke, as did Secretary Derwinski, and we had quite a ceremony. The Chief Justice made very nice, appropriate comments, and both Judges Farley and Kramer took their oath of office, and we were a court.

Mr. Allen: An exciting moment.

Judge Nebeker: It was. It was very exciting. The reason I remember the date is because it's the same day as my wife's birthday, so I guess maybe the convocation helps me remember her birthday rather than the other way around. It was a great day. We then went back to 1625 K Street, and we had two cases that we heard argued. But before that happened, I asked Judge Kramer if he would spend time working on the rules. The statute provided that the court could adopt its own rules of procedure so I suggested that what we do is use the Federal Rules of Appellate Procedure as a template to build our own rules. The court needed some different rules in a number of respects. First of all, the court by statute was able to sit as a single-judge, panels of three or a panel of seven. And incidentally, the President had the authority to appoint as few as three and as many as seven to the court. The White House asked how many judges I thought the court would need. The general counsel of the VA during the formative legislative process had testified before on the Hill – and they were not enthusiastic about having a court created; in fact, I think they opposed it – and the general counsel was Don Ivers, later to become a judge on the court. Don Ivers had testified before the Senate Committee, or House Committee, one of them, that they anticipated between 5,000 and 6,200 cases. I used that figure to tell the White House that I thought we would really need all seven judges. They readily agreed, and we ultimately had six associate judges appointed to the court. But at its formative stage, we didn't. It was quite a while, actually probably six,

eight, ten months before the others were nominated and appointed, and there incidentally was a reason for that. Of course the statute, like the one for the Court of Appeals for the Armed Forces, said that there can only be a bare majority from one political party. So, it was obvious that I was a Republican. Judge Kramer, who was a Republican, as a member of Congress from Colorado, and Assistant Secretary of the Army before he came to court; Judge Farley was a civil servant so he was not affiliated with any party. Well, as you can see, this led to two Republican vacancies for a majority of four. And then the other three had to be either Democrat or, again, nonpolitical. Well, the one who wanted on court was John Steinberg who had been Chief Counsel of the Cranston Veterans Affairs Committee. When I was interviewed initially by John Steinberg in his office on Capitol Hill, he informed me that had George H.W. Bush not been elected, he would be sitting in my seat as Chief Judge of that court, and that's probably true. But he still wanted to be appointed to the court. The White House was ambivalent about it, to say the least. But the other nominations that had been sent up were going to go south. Cranston said they wouldn't hold hearings. And that was Ivers, Holdaway, who was a retired JAG General and probably of no political affiliation, and Judge Mankin. Judge Mankin died after being in office a short period of one or two years. Pancreatic cancer.

Mr. Allen: You were describing why it took so long to get everyone appointed.

Judge Nebeker: Yes, well the reason it took so long is the White House was very reluctant to nominate John Steinberg. But finally, Cranston prevailed and Steinberg was nominated. As it turned out, the other nominees' commissions were signed by the Secretary of State before John Steinberg's was, so he became instead of a chief judge the junior judge on the court and he served in that capacity until well after my retirement. I was succeeded by Judge Kramer as Chief Judge. Judge Kramer served in that capacity for two or three years before his time was up, and then Don Ivers succeeded him and was chief judge for less than a year. When his term as chief had expired, John Steinberg became Chief Judge of the court from close-of-business on a Friday to midnight Sunday. And during that Saturday-to-Sunday period, he entered some orders as Chief Judge and then he turned into a pumpkin, and at that juncture Bill Greene became the Chief Judge the next day and continues to be.

Mr. Allen: How is it that Ivers ceased to be chief? Greene was senior?

Judge Nebeker: No. Ivers' 15-year term expired and Greene was next in seniority to Steinberg, but Steinberg fit in that weekend, that was all. Actually Steinberg was senior for two days. Having digressed a bit, I'll now return to the adoption of rules for the appellate procedures of the court. It was Judge Kramer that put a draft of the rules together for Farley and me to edit, take a look at. In the meantime, we decided that, well, we can wait until the entire board of judges was available because we were getting along by just

applying the Federal Rules of Appellate Procedure for the few cases that were maturing enough to be decided by the court. Incidentally, when we first created the clerk's office of the court, I hired a young woman who had clerked for Judge Stan Harris, and her name is Melanie Dorsey. There was obviously some concern on the Hill about my selection of her as clerk. They wondered what had she done, she had been clerk for Judge Harris, and why are you naming her? I said, well because, she's more than just a clerk to Judge Harris. She's a very fine lawyer who has mastered the appellate process in her very few years of experience, and besides that, she's the granddaughter of Omar Bradley, who was the first administrator of the VA after World War II. That seemed to ease their minds a bit, and Melanie took over and did a very fine job setting up the clerk's office. She helped in the drafting of the rules of procedure, and then, fortunately for her but unfortunately for the court, she decided to have a child, and that was almost unheard of for a woman in her condition because she had Crohn's Disease as well. She surmounted both and has gone on to be a very fine healthy woman and mother. I think she's doing some law practice, but I've lost track of her. There is another interesting bit of history. I mentioned earlier when talking about my early days on the D.C. Court how Al Stevas became Clerk of the Court and how Chief Justice Burger took him from the court to be Clerk of the Supreme Court. Well Al had retired from that position and so I prevailed on him to assist the Veterans Court in setting up the Clerks

Office. We actually contracted with him for something like 60 or 90 days. That's when a man came to me whom I had hired as my executive assistant. His name is Robert Comeau. He was also a retired JAG officer, having served with Judge Holdaway in Europe and here in the States as an immediate subordinate to Judge Holdaway who was Chief Judge of that court. I think Bob Comeau had argued cases and then was a judge on the Army Court of Appeals with Holdaway. In any event, I had asked him if he would be my deputy assistant, and he did so, and was very good at it. When Melanie resigned, he came and asked if I would have him as clerk of court. I had had an experience on the D.C. Court of Appeals with the selection of a clerk when Al Stevas was wooed away from the court to become Clerk of the Supreme Court by Warren Burger. It became necessary for the court to appoint a new clerk. Judge Newman was Chief Judge at the time, and he presented a candidate to the court to appoint as clerk. A number of us took the position that that was not the prerogative of the Chief Judge, that he was, after all, clerk of the whole court, and therefore the court would get together and have a say about who to hire as clerk. And we ultimately did, and we hired a clerk. But having learned that lesson, I told Bob Comeau that he would not be appointed by me to be clerk of the court, that it would be up to the board of judges to appoint the clerk. He was happy with that. I brought the other judges in and proposed that Bob Comeau be appointed as clerk. They knew him and they had seen how he functioned with me, and they

were unanimous in appointing Bob as clerk of the court. He stayed on as clerk of the court for about a year after I retired in 2000.

The court, as I said earlier, was by statute capable of sitting as a single judge, as panels of three or *en banc*. When I was asked by Sonny Montgomery on the House side if I would submit a punch list of things that needed to be taken care of in the Neighboring Act, I included quite a number of things, such, for instances, as the ability of the judges to administer the oath. If you don't have some of that kind of authority, you're not much of a court. There were other things, I don't recall now, but I think there were about 15 or 20 little items that needed to be taken care of by supplemental legislation. And one of them was this idea of sitting as a single judge. I'd been informed that there wasn't much contact between the Judiciary Committee and the Veterans Affairs Committee when it came time to drafting and enabling of the court. They had indeed looked at the Tax Court. The Tax Court is a court that sits as a single judge in panels or *en banc,* as large as it is. So I suggested that an appellate court is a collegial court. You don't just have single judges deciding cases, and therefore they should strike that from the statute. Well, they adopted everything that I had recommended except that provision. They left it intact.

Mr. Allen: Maybe I should interrupt just to make clear, this history, where do the cases come from?

Judge Nebeker: Oh sure. The cases come only from veterans who have been denied benefits, either a partial denial or a complete denial, by the regional office. It's decentralized throughout the country. If the regional office denies a claim – it can be any kind of claim – disability, educational benefits claim, surviving spouse claim – anything that has to do with veterans benefits – the appeal is then to the Board of Veterans Appeals, which is an independent tribunal within the VA. It acts in the name of the Secretary, and it can review the denial of benefits from the regional office. Then the statute provided that an appeal to the Veterans Court would lie on an adverse final decision of the Board of Veterans Appeals.

Mr. Allen: So it's like the lower court?

Judge Nebeker: It is like the lower court, albeit that it is in the Executive Branch of government, in the Department of Veterans Affairs.

Mr. Allen: So that your function is a permanent conditional review function over the Veterans Affairs filing decisions in the same sense that a tax court is a court to review IRS decisions?

Judge Nebeker: That's correct. Or for that matter, any administrative agency that there's judicial review provided for under the APA. They did not put the Veterans Court under the APA, although a lot of the provisions in its enabling act are mirror images of what's in the Administrative Procedure Act.

Our cases were beginning to mature to the point where they needed disposition. It became obvious in the early stages that veterans were

appealing adverse decisions by the board simply because we were there. They were pro se, there was no representation. No lawyers really knew how to represent in that court. Many were interested in learning. One of the greatest tributes I can pay is to Jim McKay, who was senior partner at Covington & Burling, and retired, and he volunteered to represent, and took training offered by the veterans service organization, the NVLAP. The court's Bar was beginning to grow, but very slowly. Jim McKay was one of the first to volunteer his services.

But a lot of the cases that we had, the veteran didn't want a lawyer, couldn't get a lawyer, and he just complained to us and what was a substitute for a brief that he was improperly denied benefits. We have a secretary through its General Counsel in Group 7, which is the group that was formed after the court was formed, within the general counsel's office to represent the deputy secretary before the court.

We decided that a lot of these cases were so simple of disposition. They were governed by – I can't say they were governed by any precedent of the court, we didn't have any precedent. But they were governed by clear statutory or regulatory language. So rather than have these cases consume the time of three judges, we decided that we would use the single-judge authority that we had. Of course it became necessary to lay out the ground rule, the rules for a single-judge action. I authored one of the first opinions in the court to deal with this process, called *Frankel v. Derwinski*, and in it I

sort of followed what the D.C. Court of Appeals had done when it decided that it would have a summary and a regular calendar. That's a little different. The D.C. Court of Appeals, like most other courts, didn't have one, but we would have a regular calendar for those cases that required full-fledged oral argument and were not so simple to dispose of. But the simple cases, we would send through a summary panel. The standards for eligibility for summary calendar just sort of grew, and I used those standards as a basis to announce in *Frankel* the cases that would be disposed of by a single judge. That's not to say – and here again is where we had to divert greatly from the Federal Rules of Appellate Procedure – that is to say that the single-judge decision was planted. We adopted in the Rules and in *Frankel* the criteria for single-judge actions and the process to seek review of single-judge actions by the losing party. Most of the time – not always – but most of the time, it would be the veteran who would lose because the Board was clearly correct in disposition. But it was possible for the Secretary to lose in a single-judge action, really because a single judge would then refer the case to a panel, which was going in reverse. But what we did is we adopted a rule of procedure that said if in a single-judge action the loser wants to petition for review to a panel, they must do so within x number of days after the mailing of the single-judge action ruling. That judge would sit on the panel, along with two others selected by lot, and the three judges would then – the other two judges would then take a look at the

single-judge action, and if they deemed it imminently correct or not suitable for precedent, they would deny panel review.

Mr. Allen: So essentially it was like a cert process?

Judge Nebeker: It was exactly like a cert process.

Mr. Allen: The discretionary process to decide whether to uphold the single judge?

Judge Nebeker: That's right. I used the New Hampshire Supreme Court's mechanism as an example. In New Hampshire at the time, cases would come before a single judge; there were five judges, and the court would issue a pre-briefing order that the lawyers for plaintiffs were supposed to outline exactly what the issues were and how they were going to win. Then if they couldn't – if it was obvious to the single judge that this was a sufficiency of the evidence case, and there were the witnesses and so on – and therefore an appeal was not going to result in a reversal, he would circulate such advice to the other four members of the court, and if they decided they didn't want to hear it, it would be disposed of summarily. Well, I thought that's sort of like the appeal of right versus the discretionary review, and they were exercising discretion after the appeal of right to come to the court, it would not be given treatment that other cases might be given. So you're right. This was strictly a discretionary exercise after the exercise of right to appeal.

Mr. Allen: And the principle of all this was set out in *Frankel*?

Judge Nebeker: It was all set out. And the case had to be of relative simplicity. It had to be clearly governed by either relevant regulations, statutes or precedent. And

incidentally, when the court first started issuing opinions, we were told that the Board of Veterans Appeals was not going to pay any attention to anything except the case itself. We remanded a case for Reason A or B or C, all right, they would do what the mandate of the court said, but they were not going to consider that decision as precedent for other cases. So it became necessary for the court to disabuse the board of that fact, and they eventually decided they had to govern their review of other cases to be consistent with precedent that we were beginning to establish. So that was an interesting aspect of creating a court with no antecedent. The tribunal below didn't know what to do.

Mr. Allen: It's a little like nonacquiescence that sometimes happens to federal agencies when they have lost a case in one circuit and they have the same issue in other circuits, they decide not to acquiesce in the other case to try to get a conflict, which is, I think, in the federal system appropriate.

Judge Nebeker: That's right. But of course with the board they didn't have that opportunity. They didn't have the opportunity to create a conflict because they had to decide the cases consistent with the precedent that we had set. We were the only tribunal. They didn't have an opportunity to shop for another forum. We were the only forum.

Mr. Allen: Perhaps we should note this. The *Frankel* case was a case appropriate for you to announce that rule because it itself had those elements of simplicity and clarity of issues.

Judge Nebeker: Yes, it definitely did. As I remember, it was a widow seeking widow benefits and maintaining that the divorce that separated them was not a valid divorce for some reason or other.

Mr. Allen: You asked me to read the case. I did read it, and I recall, she was insisting that because there had been a religious as well as a civil marriage, that the civil court was not sufficient to dissolve the marriage.

Judge Nebeker: That's right.

I reminded Sonny Montgomery that since they had not acquiesced in doing away with single-judge authority of the court, and the letter simply said to forget it, it's the best thing for appellate courts since sliced bread. That was the oral message I gave on the phone and I sent a formal letter.

Mr. Allen: He was Chair of the House Committee on Veterans Affairs?

Judge Nebeker: Yes. A powerhouse in the veterans field. So, in any event, the court has been saved from being overrun by having authority to sit as a single-judge court. And they said there were a lot of people who didn't like the single-judge court, particularly veterans service organizations. They just felt it should not be a one judge decision. After all, a complete three members of Board of Veterans Appeals decides cases and therefore they should have three judges, at least, on the Veterans Court. Well, I had to explain that a petition for panel review would involve two more judges and besides, if the single judge is wrong, his decision would be vacated, and then the panel would issue a decision. Now we didn't have a lot of oral arguments in the

beginning, particularly because the veteran, or if he had a lawyer, could hardly afford to travel to come to Washington where the court is, but they became I think pretty well satisfied. They got three-judge review in an expedited matter, and it was a whole lot better than having a terrible backlog. And as I say, I recommended to intermediate appellate courts throughout the United States that they consider the alternative to a huge backlog by using a system similar to the Veterans Court. But of course most state courts were all created by statute and they had to amend those statutes in order to have the court sitting as single judges. But as a practical matter, we, in a seminar series, recognized that in the very busy courts, you basically have one-judge decisions in those cases that are fairly simple because you just can't expend the judicial resources to have two or three judges comb the records and then make an elaborate judgment on a case where one judge has written a short unpublished opinion and it's obvious it stands upon its own two feet and is unassailable. And so you begin to wonder, and the Bar I'm sure has wondered as well, "is this really a single-judge decision, did the other two judges read it and say yes it looked right to me and let it go out as a panel decision?" There's a tendency in that direction driven by huge backlog. At least in the Veterans Court provided for by law and it was open and aboveboard and everybody knew exactly what happened.

Mr. Allen: It seems to me in a way, and being one of the lawyers who sometimes sees the other side of that question, sometimes you wonder, it's like coming in the front door versus coming in the back door. Come in the front door, you know that there will be one judge who's going to look at it and essentially one to submit his view of the case to others who will be assigned, as opposed to the back door which is to argue the case to the other two, but because of the backlog, you know that in the conference they will divvy up the workload, assign the case, and one to write and the other to look at it and without much of their effort it's going to be a panel decision. It's one way or the other, you get essentially the same result.

Judge Nebeker: Probably. After being around the appellate process for a while, you begin to recognize the cases that are not that controversial, not that difficult. But, of course, if you have a very difficult case, then you're going to have all three judges in it, and still see the sense, that's indicative of a healthy court because you're not just rubberstamping what each of you do. And there's a lot of compromise even where there is no dissent. But it's quite true with the caseload you have in the appellate courts throughout the United States, the record will be read not entirely by the judge, but selectively, by the law clerk, or any other judges because there isn't time in a lifetime to read every word in every record that comes across a judge's bench. And briefs are likewise read differently at times throughout the process. You might read the brief from cover-to-cover the first time through before you hear oral

argument, or you just might read the summary of the argument in question and know what the case is about and then confer with your law clerk and ask questions what the record shows about this, that, or the other thing. You will have pretty well read the record and got maybe a bench memorandum. But certainly by the time you get around to the oral argument, and the cases that are argued generally are significant cases, the ones that warrant considerable deliberation before they are decided. And you read the brief, parts of the brief, as you're reading parts of the brief the issues to be presented, you don't just try to read the brief all along, but you look through, what's the argument on this point, what's the argument on that point, so that you characterize the argument properly and then decide the issue. But in any event, getting back to the Veterans Court, it performs the function of the appellate court, just like any other. It incidentally is an intermediate court because by virtue of the enabling statute, certain decisions of the court can be reviewed by the U.S. Court of Appeals for the Federal Circuit. Not those cases that turn on facts, but those cases, those decisions, where the Veterans Court is interpreting the Constitution, statutes, or regulations as a matter of law. And those decisions can be reviewed on notice of appeal to the Federal Circuit. There are quite a number of them. The Federal Circuit has quite a body of veterans law as well as the Veterans Court. And there is some move on the court today, although I don't know whether it's going to the Hill, to do away with the

Federal Circuit's review. The thesis being that it just protracted the benefits process to a point where veterans are dying because they grow old trying to prosecute their claims, and the Veterans Court has now been around long enough to have the expertise to be able to adjudicate these cases without the intermediate review by the Federal Circuit.

Incidentally, I think there have been probably two or three cases go to the Supreme Court. The only one I can remember is one I wrote. The veteran, one John W. Akins, had been partially blinded in 1933 but was accepted in the service in 1944, and when the case came across my desk, having been briefed, it became apparent that the Board of Veterans Appeals, way back, right after the war, had looked at subsection 1 and subsection 3 of the relevant regulations, and there was subsection 2 right in between, and it clearly applied, and they hadn't applied it. As a result, I wrote to reverse and remand to apply subsection 2 of the regulation. And it meant six figures of back benefits. We had a number of those cases where there had been an injustice years before. *Gardner*, I guess, would be another one. The *Gardner* case is a landmark case. It was one involving a veteran in the Veterans Hospital who was injured and was made worse during hospitalization. The administrator that adopted a regulation saying if injury or disability was created during hospitalization, it will be treated as service-connected, but it's got to be, in effect, medical malpractice, negligence, on the part of the hospital staff. Well, Gardner's case came along and it

became obvious one of three veterans statutes and the regulation were 180 degrees opposite. The Secretary had no authority to impose liability on himself only where there was negligence or malpractice in a hospital. I wrote the decision for the *en banc* Veterans Court. It went, by the Secretary's appeal, to the Federal Circuit, and it was affirmed by three judges on the panel of the Federal Circuit. So that meant 11 judges agreed that the regulation was invalid. The Secretary was apoplectic because he anticipated it was going to cost millions of dollars to compensate all these veterans who were made worse for one reason or another while being hospitalized and that he had held back the fog by having this regulation adopted, and that we should all defer to his expertise because he's the one who administers the entire process and the regulation should be held valid. The Solicitor General, with considerable pressure from the White House, I was told, agreed to petition for cert and I assumed Rehnquist thought that they ought to put the Veterans Court on the map, so they granted cert and they decided the case and affirmed the Federal Circuit and the Veterans Court. Well, I don't think the world has come to an end the way the Secretary was saying it would, but in any event, Mr. Gardner got a substantial amount of money because it had been many a year. The claim was being litigated for many years in the VA and ultimately through the courts. And as a matter of fact, the Senate Committee had a ceremonial

hearing in which Mr. Gardner was presented with the VA's check for his back benefits.

Mr. Allen: It's a great story.

Mr. Nebeker: It is a great story. It took many a year. As a matter of fact, the man who represented Gardner had been my law clerk at the D.C. Court of Appeals, Michael Hannon. He's the son of Joe Hannon who was a Superior Court judge. After Mike clerked, he went on to practice law at a firm in town, a small firm. And I called the senior partner of that firm when *Gardner* crossed my desk and said, "Would you mind if I appointed Mike Hannon to represent Gardner in this Court?" He said, "No. Mike agreed to take the case. Well, then he found out he had a bear by the tail because he couldn't get rid of it. He had to argue in the Federal Circuit, and when the petition for cert was granted, he argued it before the Supreme Court. I don't know that Mike has ever argued another case before the Supreme Court. He did a fine job, and he won. I think he did it pro bono. There was no share in the recovery. Many of these lawyers worked pro bono.

And I made earlier mention that there was a time when we didn't have much of a Bar. There is now quite a Bar throughout the United States. As a matter of fact, there is an effort going on right now to eliminate a disability that was imposed upon a veterans right after the Civil War. You've heard of the $10 limit on legal fees that was imposed at the time of the Civil War. Subsequently, the Supreme Court upheld the limit, not that many years ago,

upheld the $10 limit as constitutional. Well then, of course, came the effort to create the court and what were they going to do about having counsel there. The statute that was ultimately adopted said that it was a misdemeanor to hire – to pay or receive a fee – until after a final decision by the Board of Veterans Appeal. So that meant that after a final decision, the veterans could retain a lawyer to prosecute a case before the Veterans Court or the Federal Circuit. Or perhaps to go back and try to reopen the case at the regional office level. The effort now is to eliminate that particular provision and permit veterans to retain counsel just like everybody else can retain counsel before an administrative tribunal of the U.S. Some veterans service organizations support it, and some veterans service organizations have staked out their own turf with nonlawyer representatives and are opposing this. The Senate passed the legislation, and it's now pending before the House. It may not get a hearing at all. My understanding is that the House does not favor what the Senate passed. So we'll see what happens. Eventually, I think, it's going to pass that a veteran can hire a lawyer to begin with. There are lawyers now who know veterans practice. And they're subject to professional discipline, whereas the nonlawyer representatives are not. They don't have any sort of a discipline or system to regulate their actions. Veterans complain they don't get contacted by the representative for years. So all in all, I hope that I live to see the day that a veteran, like anybody else, can hire a lawyer.

Mr. Allen: How long were you on the Veterans Court?

Judge Nebeker: I served there for eleven years, from 1989 to 2000. I qualified for the Rule of 80 for retirement from that time. And I kind of longed to get back to D.C. Court of Appeals.

Mr. Allen: Rule of 80 was what?

Judge Nebeker: The Rule of 80 was a combination of ten-year minimum of service and age. So I had eleven years and I was 69.

I longed to get back to D.C. Court of Appeals, and I had been a senior judge for a short period of time in the fall of 1987 before I went to OGE. But under the District statute, I could keep the window open and become a senior judge by going over four years before the Commission on Judicial Disabilities and Tenure and to be certified by them, and then through the acquiescence of the Chief Judge, I could be certified as a senior judge even though I wasn't serving on a court at that time. So I did that until, I think it was in 2000, I had to go again, and they asked how long was I going to continue to be Chief Judge at the Veterans Court, and I said within this four-year period I would be back to the D.C. court. I contacted Chief Judge Wagner and said that was my desire and asked, "Did she have room for me?" She was gracious about it and said, "Yes," and so I announced my retirement, came back to this, and have been sitting here since the fall of 2000.

Mr. Allen: And I take it you're pleased to be back?

Judge Nebeker: I am pleased.

Mr. Allen: As a senior judge, the caseload is the same, not the same? How is it different?

Judge Nebeker: Well there are now a grand total of eleven senior judges. Now we don't work full time. Some judges work longer than others, like Judge Belson. We probably work the equivalent of eight months out of the year. Some of the other judges work four months out of the year. So all in all, I guess you'd say that eleven judges amount to four-to-five full-time judges on the court. We will inform the Chief Judge of when we will all be available to sit on a monthly basis, and she sets the calendar. And we'll sit on regular calendar cases and summary calendar. I guess, all told, I have about nine cases a month. A lot of them are summary calendar cases, but three of them, at least three, and sometimes six, there will be two sittings, three cases each, and they will be on a regular calendar before a regular panel. And then I'm unavailable January, February, and March because I'm in Florida. But when I come back, I'm sitting basically the rest of the year, except for occasional travel to Europe, things like that. Basically, I'm available for the months between April and the end of the year.

Mr. Allen: So public service continues to appeal to you?

Judge Nebeker: It does. I enjoy it. I don't know what I'd do if "every other day was Saturday." I'd have to find something. But let me recap, let me digress, to one of the tapes where I mentioned, or talked about, my service as a Chief of

the Appellate Division in the United States Attorney's Office. Through the good work of some of my law clerks, they were able to come up with the three cases that I argued as Chief of the Appellate Division on one day before the D.C. Circuit.. There were three of them. They were each an insanity case, that is, a problem of criminal responsibility. They scheduled these three cases on the same morning, and for one reason or another, the assistants that handled the cases were not available to argue; either they left the office or were assigned elsewhere. And of course the *en banc* process was quite a long time after the panel action. And so I had the responsibility of arguing three cases, back-to-back, on one morning before the United States Court of Appeals. They were all *en banc*.

Mr. Allen: Just for curiosity, how many judges were sitting on the court at the time?

Judge Nebeker: I believe it was nine. One of the cases may have only had seven, but I don't know why there may have been recusals, but two of the cases were both involving the same individual. *Green v. United States*. And the cite is to 349 F.2d 203 and 351 F.2d 198. They're both 1965 decisions. And the third case, my recollection is very dim, but the third case seemed to have been put *en banc* improperly, that, is it was not that important a case, or that difficult a case, and easily disposed of. I think I simply made that argument to the court, and I remember we were surprised because that was, in fact, the case. So they disposed of that case by some sort of unpublished order, probably de-*en banced* it and then let the panel decision stand. But there

were three cases argued that morning, and I argued all three of them. And some time in the summer of 1965, Jack Landau, a staff reporter for *The Washington Post*, did an article captioned, "Never a Dull Day for Appellate Chief Lawyer," and it was the story of my arguing that case. They ran my picture. I have an old Xerox of the article. I don't even know the date, it was preserved, but I do remember, and I can see from the Xerox of the article Jack Landau who wrote it, he was a pretty well-known staff reporter for *The Washington Post* and he went on to the editorial board of *The New York Times*. I imagine by now Jack is retired. In any event, he was quite a courthouse lawyer. He stuck around the U.S. courthouse quite a bit in his early days as a staff reporter. And that's how he learned of this particular oral argument. He came to me and said, "Let me talk about it because I'd like to write a column about it. I don't know of anyone else that has argued three cases back-to-back before the *en banc* Circuit Court."

Mr. Allen: I believe there was a discussion earlier about Landau, and so now we have the case citation.

Judge Nebeker: Yes. I might add the article starts out "Frank Q. Nebeker doesn't normally drink during working hours, but the other day he took his wife to lunch and had a Manhattan." [laughter]

Mr. Allen: I think we've covered the territory. I think we have yet to get all the tapes transcribed and had a chance to edit them.

Judge Nebeker: I'm going to take them to Florida.

Mr. Allen: Let's try to be realistic and by the end of the year to see if we can have all of that done.

Judge Nebeker: Next spring.

Mr. Allen: Next spring.