ERWIN N. GRISWOLD, ESQUIRE

Oral History Project
The Historical Society of the District of Columbia Circuit

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United States Courts
District of Columbia Circuit

Erwin N. Griswold, Esquire

Interview conducted by:
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NOTE

The following pages record an interview conducted on the date indicated. The interview was electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the U.S. Courts of the District of Columbia Circuit, and judges' spouses, lawyers and court staff who played important roles in the history of the Circuit. The Project began in 1991. Most interviews were conducted by volunteers who are members of the Bar of the District of Columbia.

Copies of the transcripts of these interviews, a copy of the transcript on 3.5" diskette (in WordPerfect format), and additional documents as available – some of which may have been prepared in conjunction with the oral history – are housed in the Judges' Library in the United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. Inquiries may be made of the Circuit Librarian as to whether the transcript and diskette are available at other locations.

Such original audio tapes of the interviews as exist as well as the original 3.5" diskettes of the transcripts are in the custody of the Circuit Executive of the U. S. Courts for the District of Columbia Circuit.

INTERVIEW OF ERWIN N. GRISWOLD

This interview was conducted on January 13, 1992 at the law offices of Jones, Day, Reavis & Pogue of Washington, D.C.

Q: Could you tell us what your full name is, sir?

A: Well, the full name is Erwin Nathaniel Griswold. My full signature is Erwin N. Griswold. I'm called various other things, but most frequently "The Dean."

Q: That's certainly the way I learned who you were. Could you tell us the date and place of your birth?

A: I was born in East Cleveland, Ohio on July 14, 1904, at least so I have been told by my parents.

Q: And, I gather you consider yourself a third-generation American. Where did your ancestors come from?

A: I'm a tenth-generation American through the Griswold line and probably eighth through the Erwin line, but my mother's mother was born in England in the Lake Country and brought here at the age of eight in 1856, and through her I am third-generation, and we still have cousins in England with whom we keep some contact.

Q: What were your parents' names?

A: My father was James Harlen Griswold, and my mother was Hope Erwin Griswold.

Q: And what was your father's line of business?

A: He was a lawyer. He and I have been tacking members of the Bar of the State of Ohio for 91 years. He became a member of the Ohio Bar in 1901, and lived until 1960. I became a member of the Ohio Bar in 1929 and still am.

Q: How would you describe your family's politics?

A: That's a little hard to say -- liberal Republican, which in the early part of this century meant something.

Q: What did it mean?

A: Well, Theodore Roosevelt, the Progressive Party, was basically Republican, and I always regarded the Republicans as those who believed in progress but not

too fast. And my family and with me, the chief obstacle to being a Democrat was the relation with the solid South and with restrictions on voting throughout the South, white primaries, and also a number of characters who held important public office in the South like Senator Bilbo and various others. We all preferred to be associated with people like Charles Evans Hughes -- the first candidate I really knew anything about. I've stayed a liberal Republican all my life. There are only two of us left -- the other one is Senator Mathias who is now a partner of mine.

Q: Given your birthdate, do you recall what the impact of World War I was on your family and your community?

A: Oh, yes, very much. I was in high school during World War I. We were in uniform and were drilled every day. I was the oldest son, so my family had nobody who was actually in service. My mother's family were Quakers and were very much concerned about war and sought to do everything possible to encourage peace. Many of our neighbors had sons in the war. I remember one who was killed on the 9th of November 1918, and I remember when the news came and how terribly upset my mother was, my father too, but mother -- I happened to overhear her talking on the telephone with the person who gave her the news. But that was over in 1918 when I was 14 years old.

Q: Did any members of your family take a role in protesting the war, given their Quaker background?

A: I didn't have any close relatives who -- well, I had a cousin, my father's older brother, and the older brother had a son, Francis Griswold, who lived in Youngstown and who was in the Navy, but I think only from early 1918 on, and he did not see any -- he was in the Navy, but he did not get into any combat or any other operations.

Q: What was your family's religion?

A: That's hard to define. My father was brought up in the Episcopal Church. I think to him it was the Church of England. The family had come from England to Connecticut in 1639 and had apparently always had a connection with the Church of England which became the Episcopal Church. My mother was a Quaker. She strongly disbelieved in form and ceremony, and I was never a party to any discussion. All I know is that by the time I came along, they were members of the Presbyterian Church. One reason could well have been

that it was just down the street from our house and very convenient. Actually, my father was quite active in the church. He was an elder and became a trustee of Wooster College, which was a Presbyterian-operated college in Ohio. They spelled it W-0-0-S-T-E-R.

Q: Different from the city.

A: And so I became a member of the Presbyterian Church. I was baptized there. I remember my mother thought that she ought to tell her father that I had been baptized. The Quakers didn't believe in baptism, and it was reported to me that her father's response was, "Well, it won't hurt him any."

Q: And I gather you lived in Ohio for your entire childhood?

A: I expected to spend my life in Ohio.

Q: And this was in Cleveland?

A: I was in Ohio through high school and then went to college for four years in Ohio at Oberlin College, then went to Harvard Law School, and for practical purposes never really lived in Ohio after 1925. My family still did, and I came there for vacations and things like that. But I went to a boys' camp in New Hampshire, and then I traveled in Europe extensively in other summers. After I graduated from law school, I came back to Cleveland and enrolled myself in the Cuyahoga County (that's C-U-Y-A-H-0-G-A) County Common Pleas Court, but I only stayed three months because I got an offer to join the staff of the Solicitor General's Office, which I thought would be good experience. I took it for two years and stayed five, then I had an offer to join the faculty of the Harvard Law School, and I took that for one year to see if I would be any good at it and would like it, and stayed 33 years. Then I was asked to be Solicitor General and was six years in that office, and then I was invited to be a partner in Jones, Day in 1973, and that would be 19 years next June 30.

Q: Well, let's go back over each of them a little more slowly. How was it that you ended up going to Oberlin College?

A: Both my father and my mother had gone to Oberlin. It was 35 miles away. It was not very expensive, and there was some talk about my going to Yale because many Griswolds had gone to Yale. But I think I was a little frightened of the east and the clubs, and we were a

very abstemious family. I didn't want to get into situations where there was heavy drinking, in Prohibition times, which would have been the situation at Yale. It just seemed more comfortable to go to Oberlin where I got a very good education.

Q: What did you major in?

A: Political science and mathematics both.

Q: That's an interesting combination. You were interested in mathematics?

A: Yes, I was a first-class follower in mathematics.

Q: What does that mean?

A: I could understand what other people had done, and I wouldn't get lost in class and in dealing with problems in the field which had been taught, but I came to the conclusion that I was no innovator. To be a great mathematician, or to be an excellent mathematician, you had to be able to come up with new solutions and new answers, and I didn't feel that I was first-class in that.

Q: Have you found that mathematical training or frame of mind has been helpful in the law?

A: I'm pretty sure it has, or at any rate, the qualities of mind which made me tolerably good in mathematics were very useful in legal work -- careful use of words, precise thinking. But I don't want to have this printed in the newspaper, but I have a very fine wife, but I think one of the points of friction occasionally is that she doesn't use words very clearly, frequently does not use words very precisely. I try to pin her down, and she doesn't like to be pinned down, and the net result is I don't quite understand what she means by what she says. I think people who have had legal training are more careful in their use of words.

Q: That's probably true of mathematical training.

A: She went to Stanford and graduated with distinction, so she isn't dumb by any means. I suppose -- take a poet. Most poets don't use words very precisely.

Q: And that's what makes their poetry good, the lack of precision.

A: They paint pictures . . .

Q: Impressions . . .

A: So, there are various ways of doing it. I just happen to like the precise way.

Q: How was it that you decided to go to law school?

A: I had the catalogue, of both the Harvard Astronomy Department and the Harvard Law School on my desk throughout my senior year. I had taken quite a bit of physics at Oberlin and I became quite fascinated with what is now called astrophysics, and I thought that I might do that. On the other hand, my father was a lawyer, and I liked the political science courses I had. Although most of them were descriptive, American government, European government, things like that, although I did take one course in international law in college where we used a casebook, and I found it quite fascinating to study the facts of an actual case and how they were used in decisions. I think the real answer is that I concluded that I would probably be able to make a living better at the law than in astrophysics, or to put it another way, that I doubted that I would be a really top astrophysicist for the same reason I said about mathematics. As a matter of fact, a man named Donald Menzel was appointed to the Harvard faculty on the same day I was, effective September 1, 1934 in physics, and he became a very distinguished astrophysicist. He was, among other things, the man who developed a system for putting a black screen in a telescope to block out the sun's disk, so that you could in effect observe an eclipse when there wasn't an eclipse. We were very good friends with the Menzels, and I often used to look at him and wonder if I could have been as good as he was and was quite satisfied that I could not. So I went to law school. My father had graduated from Western Reserve Law School in Cleveland, had wanted to go to Harvard and couldn't afford it, and he always made it plain to me that if I wanted to go to Harvard he could and would finance it. At that time, there was no problem about getting in. There were no -- the only admissions requirement was that you had gone to an approved college of which there were 250, and that you have a check for the first half-year's tuition and that you sign the book.

Q: Really? There were no other admission requirements?

A: No. Except the graduation from the approved college.

Q: What year did you graduate from Harvard Law School?

A: 1928.

Q: And you did extraordinarily well at the law school, I gather.

A: Better than I expected to. I went with considerable trepidation. I had done well in college and I was fearful that I would let the old school down, that I wouldn't be able to compete against all these Harvard, Yale and Princeton boys of whom there were 75 or 100 in the first year class. But I did all right and actually, I was second in the class my first year. The first in the class was Nathan Jacobs who later became a judge of the Supreme Court of New Jersey and who had not gone to Harvard, Yale or Princeton either. I think he went to Rutgers. And we became very good friends, and he had a very distinguished career.

Q: And you both served on Law Review.

A: Oh, yes.

Q: What was the Law Review like back then?

A: Well, I have here the December issue -- excuse me, the January issue of the Harvard Law Review. They always send me an advance copy because I hold them to getting it out by the 10th of the month, and the Harvard Law Review is the only one which always appears more or less on time. This is the present membership of the board of the Harvard Law Review, which I think is about 85 people.

Q: It looks about that amount.

A: We had 32 or 33 in my time, and I can't figure out either (a) where they put all 85, or (b) what they do. The whole law, the whole legal system, the whole writing about law has become so vastly more complicated than it was when I was on the Law Review that it must be quite overwhelming in trying to deal with things. They write very long articles about very narrow points now --

Q: True. With a lot of footnotes.

A: -- with 300 footnotes to the article. I used to try to regard 30 to 35 pages as the proper length for an article and not too many footnotes, but those times have gone.

Q: Would you say that the articles were more philosophical back then?

A: No. I think that, and this is one thing I complain about, a very high proportion of the articles today, not only in Harvard but elsewhere, are one professor talking to three others, and the number of articles which are of any use to practitioners has been much less than it was in my day. Now, in addition to getting this prompt copy, I always write them a letter about each issue, and the two articles in this issue are just wonderful from my point. They are too long but the first one is about mootness. Well, mootness is a question I've had constantly coming up and, you know, could never figure out whether it's moot or not. The full title is: "Deconstitutionalizing Justiciability." Now those are two big words, the example of mootness. And the argument is that this mootness ought to be taken out of the "case or controversy" constitutional place, and should be treated as a prudential matter and not made constitutional law. Anybody who has mootness is going to have a wonderful review of cases, previous articles, and so on. It would be an excellent place for an associate to start work on a draft of a brief in a case involving mootness. Now the other one again had too ponderous a title: "Discrete and Relational Criminal Representation: The Changing vision of the Right to Counsel." But the question of representing Joe Doakes or representing six defendants in an antitrust conspiracy where they all had different roles and the possibility of conflict within is considerable. Yet on the other hand, if you insist on having every one have his own counsel, you make the cost enormous, you make the confusion intense, you add much to the time involved, and if some way could be found out . . . . Well, Brandeis used to call it "counsel for the situation," and that is talked about, and I think that is a very practical consequence, and yet both of these articles are scholarly, high-level and . . . .

Q: Both are a good example of what a Law Review article should do.

A: Yes. So, I'm going to compliment those two articles in very high terms.

Q: I'm sure they will look forward to getting your letter on that. Do you think that during your law school years you came to develop a legal philosophy or, at the very least, an ideological orientation.

A: I don't know whether it changed very much. I would say that my philosophical orientation has long been, in college, law school, and practice, some variety of pragmatism. I don't know all the philosophical terminology. Pragmatism is undoubtedly divided into 34 subcategories, but I have a very practical outlook: can we find some way to make this work? For example, I think one of my complaints about the Supreme Court is that it frequently decides cases in such a way that extensive litigation is required as a result. I remember a tax case where Justice Cardozo said, "Life in all its fullness must provide the answer to the riddle." Well, if you're going to have to put life in all its fullness in every case that's in this area . . . . Now that particular case involved the congregation of a church making a substantial payment to its minister when he retired, whether that's income or not. It seems to me it would have been very helpful for the Court to have said to you that it is or isn't . . . .

Q: The answer is no.

A: Recognizing that this is on the fringes where it would make some difference. But there was decided, almost at the same time, a case of an automobile dealer and a man referred a purchaser to the dealer and the dealer sold a super-fancy Cadillac to him, and the dealer then sent a check for $1,000.00 for the referral. The question was whether that was income or not. Now, there had been no agreement. It could well have been that the lawyer, I think it was a lawyer who referred it, hoped that the dealer would have some law business and he might think of it and bring him in. But I don't see how you can really apply life in all its fullness to that particular one. I have talked frequently with Justice Brennan about this, because I think Brennan is one of those who doesn't give any particular weight to the question whether this decision will work as a practical matter in the law offices where the overwhelming proportion of the decisions are actually made.

Q: Has he given you a response to that concern?

A: No, no, he just smiles. I know what he has in mind. You have to be careful. You make it too specific, you lose a vote. If you lose a vote maybe you lose a majority, and all that. There's this journal of Supreme Court history I was reading over there the other night, and it dealt with Justice Harlan and Justice Brennan and there was a case where there were three votes for certiorari and Brennan did not vote for

certiorari. If he had been a fourth vote they would have granted it, and some of Harlan's law clerks -- the article is about Harlan, that's right -- some of Harlan's law clerks had a luncheon that Brennan had for all the law clerks. They asked, "Why didn't you vote for certiorari on that case?" And Brennan sat back in his chair and smiled and said, "Where would I get the fifth vote."

Q: It only takes four to grant cert. It takes five to . . . .

A: He then would have established a precedent against what he wanted, and that's the kind of thing that the justices have to keep in mind that the outsiders don't always naturally think about, which is never recorded in anything public.

Q: Right. We only see the cases as they are granted or denied.

A: Yes.

Q: You described two cases there, one in particular is a tax case. Is that something you remember from your initial days in the SG's office after graduating from law school?

A: No. That case was decided while I was at Harvard teaching taxation.

Q: Let me move along in your history here. I gather straight out of law school you went back to Cleveland?

A: I spent a fourth year at Harvard and got an S.J.D. degree during which I was what we would now call a law clerk to Professor Austin W. Scott who was working then on the Restatement of Trusts which was his background work for his treatise on trusts. That was a very valuable year for me. The system was that I sat right in his office while he dictated to Miss Lee and if I thought he'd made an egregious blunder, I would speak up or as frequently happened, he would say, what do you think of that. And I'd say, well, it would be better if you use this word or if you added another sentence.

A: Frequently he would send me out to the library to write a memorandum on a point, or ask me to bring a list of every case on this -- which is not always an easy task because sometimes you can find it in the digest, but sometimes a case will really involve this point and for some reason or other will never get in the digest or

treatises and things like that. I tried very hard not only to make it complete, but to pick out passages in the opinions which were pertinent, and that was very excellent training for starting out as a bottom associate in the Solicitor General's office.

Q: And so it was only then that you went to Cleveland for, what, a month?

A: Then I went to Cleveland. I went to Europe again in the summer of 1929 and went to Cleveland in September, and thought I was starting my career practicing law in Cleveland. But in late October, I received a letter from the Solicitor General, which, incidentally, was the result of Austin Scott, Professor Scott. At that time, Charles Evans Hughes, Jr., was the Solicitor General, and he had been a student in law school when Scott started to teach. He wrote to Scott and said do you have in mind any promising recent graduate who might be a good person to come to the Solicitor General's Office. Apparently Scott wrote a very strong letter for me, and Hughes wrote me and asked me if I would be interested. I thought I wouldn't. I was about to turn it down because I pictured the Solicitor General's office as a great bureaucracy, with a hundred lawyers and I'd be just off here writing memorandums. My father said, well you better go there and talk to them. And I went down and found there were only six lawyers altogether at the Solicitor General's Office, that I would be immediately working with the senior, who was actually handling the case, that I would be basically responsible for the briefs as soon as I showed I could, and so I said I'd take it for two years for experience. The experience got better and better, until it got worse under the first year in the New Deal when a nice, kindly, friendly, honest, decent man was made Solicitor General who was utterly unqualified for the job, by the name of J. Crawford Biggs of North Carolina. I, still under 30, was in effect in charge of the office and I thought that was more responsibility than I ought to be taking. Dean Pound called me on the telephone and asked me if I'd be interested in coming to the Harvard Law School faculty. I had never thought of it but I went, stayed 33 years.

Q: Let me ask you something, during those momentous years in the midst of the Depression, you left and went into the SG's Office --

A: I had my salary cut by 10 percent when Roosevelt came in, as everybody else in government employ, except judges.

Q: And I gather that during your time there you, in fact, argued some cases in the D.C. Circuit, some tax cases, as I recall.

A: Yes, I argued in the D.C. Circuit.

Q: Was it usual to do arguments in the lower courts?

A: For a junior it was. What I did was -- I wanted to get some experience arguing cases. At that time, they enforced the three-year rule for admission to the Bar of the Supreme Court quite rigidly, so I could only hope to argue in lower courts. I went around to the various assistant attorneys general and said, "Look, you may have somebody get sick sometime or you may have somebody who gets assigned two cases on the same day in different courts, and if you were willing to call on me in such a case even on short notice, I would be glad to take it." And the result was that I got quite a sizeable number of cases to argue in the Courts of Appeals, some of which were in D.C.

Q: Do you have any recollections of cases in the D.C. Circuit?

A: Not very much.

Q: It was a long time ago.

A: It was. I argued a case in 63 F.2d 822, Kaiwiki Sugar Company v. Commissioner. I don't remember what it was about except it was a tax case. I argued Commissioner v. South Penn Oil Company, 68 F.2d 420, and from that point on I had a steady list of Supreme Court cases. I argued two in the D.C. Court of Appeals in May 1934 which were New York, Chicago and St. Louis Railroad Company v. Commissioner, 71 F.2d 956 and B.F. Shaw Printing Company v. Commissioner, 72 F.2d 187. And then I don't think I was ever there again until I argued the Pentagon Papers case in 1971, on very short notice. Those were all tax cases. There is one other case which I did not argue which I think might interest you. The case is George Otis Smith v. United States, 286 U.S. 6 (1932). George Otis Smith of Pennsylvania was nominated by President Hoover to be a member of the Federal Trade Commission. He was confirmed by the Senate in December and the President was notified of the confirmation, and the President issued a commission and Smith was sworn in. Congress had a recess from late December to January. When they came back in January, somebody filed a motion to reconsider in the

Senate and that was voted up, and the motion to reconsider included a request to the President to return the notice of confirmation. The President sent a polite message saying that he had received the notice from the Senate, he had acted on it, that Smith had been appointed and that the President declined to return the notice. The Senate got very excited about this and they adopted a resolution directing that a proceeding in quo warranto be filed in what was called then the Supreme Court of the District of Columbia, which is what we now call the United States District Court for the District of Columbia. You remember that for 56 years they followed here the New York terminology under which the trial court was the Supreme Court and the Court of Appeals was like the Court of Appeals of New York. The Senate retained John W. Davis to represent it. George Otis Smith retained George Wharton Pepper of Philadelphia, who for a while was senator from Pennsylvania. Attorney General William D. Mitchell represented President Hoover or technically the United States in the case. I was Mr. Mitchell's young man. And Charlie Poletti, a law school classmate of mine, who for three or four weeks was actually Governor of New York because he was elected Lieutenant Governor, and then when, I think -- not Javits, somebody else, who was governor of New York was elected to the Senate, he resigned three weeks before the end of his term and Charlie became governor for three weeks. And then a young man in Philadelphia in Pepper's office, who later was chancellor of the Philadelphia Bar Association, which is the oldest bar association in the country, was young man for Pepper, and we three young fellows ran the case. I don't mean to say that we took things in our own hands, but we built up the record. It was agreed between the seniors that the record would be an agreed record and we made surveys at the White House through all the old records of nominations, any nomination that had been reconsidered and when we found one we would go to the department that was involved. I remember in particular uncovering in the Treasury Department a memorandum to the Secretary of the Treasury, written in longhand: "We seem to be in hot water in the so-and-so matter, let me have your views. T.R." Which of course, was Theodore Roosevelt. I wish I had had nerve enough to snitch that. It was just a chit. And we prepared this tabulation of 150 instances in history where there had been reconsideration. And it is referred to in the opinion of the Court. Then we all attended when the argument was made by those of that time the giants of the bar. The Court held that the President was right, that the Senate could not reconsider, as I always

thought they would. Well, in the process, the Senate became very impatient at the delays involved. Nothing much happened in the district court, partly because we were out compiling this record which was going to be the record in the district court. We filed it there, and an appeal was taken to the District of Columbia court of appeals. The three senior lawyers, primarily Mr. Mitchell because he was closest to the scene, decided that this was a case that ought to be certified to the Supreme Court, a very rarely used procedure.

Q: This was before any decision was rendered in the Court of Appeals?

A: That's right. Well, the motion to certify was filed coincidentally with the appeal. But Mr. Mitchell was very skittish about -- it was too much pressure on the Court of Appeals to have the Attorney General, so he assigned me, still under 30, to go down and see Chief Judge Hitz and to present a draft of the certificate and tell him that the Attorney General thought it would be appropriate if the court would file the certificate in the Supreme Court. He was very huffy, he didn't like it, but he was very kind to me. He recognized that I was there under direction. He recognized the whole picture and he sort of huffily said that we will take it under advisement. Incidentally, I went there without any of the other counsel.

Q: I was just going to ask.

A: Although they all knew about it. And they wanted it.

Q: They too wanted it.

A: Yes. But we sort of thought that bringing -- they agreed that bringing in -- certainly bringing in the other seniors, the two big guns, and bringing in the juniors really didn't add much. And about four days later they filed a certificate in the Supreme Court and the result was the case was argued that spring and we got a decision before the end of the term, and that was a very interesting experience. The only one I had, so to speak, inside the Court of Appeals. Now, I -- Billy Hitz of course was an uncle of Harold Burton. Harold Burton is Harold Hitz Burton. Other judges on the Court of Appeals were D. Lawrence Groner; Martin was on the Court of Appeals. It wasn't very big at that time. There may have been five judges. I came to know Groner fairly well and things were much less formal then than they are now and my wife and I had several times been invited to Cardozo's, he was a bachelor, for tea which

was quite elaborate. We finally got up our nerve to invite him to dinner, although we knew he never accepted Washington society social invitations.

Q: This was Justice Cardozo?

A: Justice Cardozo. And he accepted our invitation, and so we invited Groner who was a widower at that time, and Charlie Wyzanski -- ever hear of him?

Q: I have. First Circuit?

A: Who was a young man and later became a U.S. District Judge in Massachusetts and was not married then, and then me and my wife was the only lady present. Cardozo appeared to have a very nice time and he followed the Washington routine which was de rigueur in those days, and two or three days later there was left at our apartment Justice Cardozo's card. You had to leave cards after an invitation. If you came in person when you left the card, you bent the corner down. His card was left by a messenger and didn't have the corner turned down. But we were several times invited to receptions at the White House, and my wife after those receptions -- there was no barred gate or guards -- she used to drive our second-hand Model A Ford into the White House driveway, up to the front door, and a factotum would come down the steps with a silver tray and she would put our cards with the corners turned down. Incidentally, there were two cards for her, one for the President and one for Mrs. Hoover and one card for me because I only called on President Hoover, but the corners were turned down, and then she drove out the gate and that was the --

Q: And this was as a thank-you for the tea.

A: And that was acknowledging the invitation, and that was the practice until World War II.

Q: That's a lovely courtesy and gesture. When was it that you went back to Harvard to teach?

A: 1934.

Q: And you were there for 22 years.

A: Thirty-three years. I was Dean for 21-1/3 years. I became Dean in 1946 and I left in 1967.

Q: How did World War II impact law school?

A: It demolished it -- the buildings were taken over by military activities of one kind or another. What we called the Treasure Room was blacked out, that is wooden things were installed over the windows, everything was painted black. There was, like in a planetarium, a projector which projected the stars against this black and they trained naval aviators for night flying, and they would project particularly southern constellations because much of the Navy work was in the southern hemisphere. They of course had never seen that, they had to learn that. But that is what they had to use for directions and so on for night flying. That was not the Treasure Room then, it was just a part of the library reading room. When the war was over, Jim Landis, who was still Dean, got the bright idea since it had to be redone, that it should be made a Treasure Room and that it should have outside the memorial tablets we have to graduates of the school in both World War I and World War II. And that it be used for law books published before 1800, and for particular paintings and so on. The law school, because of the market having gone so high, the law school's art collection is worth millions and became a concern to me just seeing to it that it was protected -- not merely against being stolen but against somebody slashing it and that sort of thing. But we have one painted by one of the great 18th Century American painters, a man named Feke. It is a portrait of Isaac Royall and his family by Feke. Isaac Royall was the donor of the first fund for the Harvard Law School, and he gave his money -- incidentally, he was a Loyalist who left the country, but he gave his money to found a school of law or of physics, which would mean chemistry I think as of now, and the Harvard Corporation in 1817 voted to use it to establish a law school.

Q: In your years as Dean there, what do you think your greatest achievement was?

A: Well, I think my first achievement was simply to get us through the immediate post-war years -- I always regarded that as my war service -- and provide an opportunity for legal education to the men who had lost that opportunity because of war service. In fact, although I knew we could get the Harvard Corporation to let us admit women, I deliberately postponed it until 1948 because I didn't think it was decent to keep anybody who had been in service from getting a chance for a Harvard education. When the women -- there were lots of first-class law schools they could get into and lots of them did. For example, Pat Wald applied the last year we did not admit women and she jokes with me

about it once in a while, and that's why she went to the Yale Law School. And I maneuvered the admission of women which took some doing at that time in late 1948, and got the faculty's vote which we then transmitted to the Harvard Corporation. They approved it in the spring of 1949, but we couldn't actually admit women until 1950 because that meant that applications would be received in the fall of 1949 and they would be treated like every other one during '49-'50 to come to the school in 1950.

Q: So that was the first entering class.

A: Yes. I used to tell the young women who came through here, patting myself on the back, that I was the Dean who brought about the admission of women to the Harvard Law School. But I soon learned their response was, "Well, why didn't you do it sooner?," and again I say it took some doing at the time and . . .

Q: There was still some opposition to the admission of women at that time?

A: Yes. At our first meeting I would say one-third of the faculty was opposed to it, and that was too big an opposition to seek to force it through and so we laid it on the table, not to reject it but literally to consider it further. I brought Mark Howe into action, and he was particularly helpful in talking with people. I think we ended up with four negative votes of whom Bull Warren was one -- he said he would have to revise all his notes, which some people thought was a good idea.

Q: Well, I don't want to skip over those years, but let's go to your experiences in the Solicitor General's office.

A: You asked about what I did at the law school. We greatly built up international legal studies and I think made the law school the leading place of legal education in the world, not just in the United States. I traveled a great deal, I spent a lot of time visiting other law schools, helping other law schools. For example, we contributed a sizeable number of books to the University of Berlin around 1949 or 1950 to replace . . . . These were out of our duplicate collection, people give us books, and one of the librarians' jobs is to keep those in order, sell them when we can, but have them to give if there's an appropriate place to give. For example, when the Villanova Law School started about 1950, I think we gave 1,500 books to

their library. Actually, I think we sold them but at $1.00 per volume, at far less than they would have had to pay on the market. We frequently had complete sets of the Federal Reporter and so on which were really important for a library. This was because graduates would die and their executors or widows . . . they didn't have any lawyers in succession. If they'd been practicing alone, the books were a nuisance to them, they didn't know what to do with them and we would get letters saying, would you be willing to accept a gift of my husband's law library, and we always were.

Q: When was it that you were contacted about becoming Solicitor General? Who made the initial contact?

A: It was late in September 1967.

Q: And who was it that called you?

A: Ramsey Clark, the Attorney General. Although many of my dealings after that were with Warren Christopher, the Deputy Attorney General.

Q: Did you say yes right away? Was it something you had always wanted?

A: I told the faculty that I took 15 anxious seconds and said yes. Yes, I had always wanted it. It was a remarkable experience to start as a junior and to end up as the head man in an office which I had closely followed -- which I had been in for five years and had closely followed for 33 years after that. I knew all the Solicitors General, I knew all the types of business they were doing, and so on.

Q: Did you come to the office with a perceived role that you wanted to create there?

A: I wanted to be a first-class Solicitor General.

Q: How would you describe that. What kind of characteristics does it take to be a first-class Solicitor General?

A: Well, I spent a lot of pages in that book dealing with that and of course I had special problems in the Nixon Administration. But it was always perfectly clear to me that although my office was political and although I could be removed by the President at any time, his commission is up here and it says "during the pleasure of the President" on it, I had never taken an oath to support and defend the President of the United States.

My oath was to support and defend the Constitution of the United States.

Q: You said you had particular problems with the Nixon Administration. what were they?

A: Yes. Oh, well, that would take hours to go through. I've dealt with it at length in my book.

Q: There were more political pressures during that Administration?

A: Yes.

Q: Tell me about the Pentagon Papers case and what was involved with that.

A: I have a whole chapter on that. I think we better not duplicate.

Q: That's fine. It is my understanding that you did argue that in the D.C. Circuit.

A: Yes. Without ever having seen the inside of the papers at all. It was a terrible mistake by both the D.C. Circuit and the Supreme Court that they insisted on ramming that case through, although the newspapers had held the papers for three months before they started out to print them and had detailed examinations and had edited them extensively. But the actual fact was the case which we fought before the D.C. Court of Appeals was not the case that was actually before the D.C. Court of Appeals in that the great bulk of the materials of which we were legitimately concerned had never been given to the newspapers.

Q: And I gather wasn't even before the Court.

A: Weren't before the Court, and this was largely because Judge Gesell in the trial court had said, "Well, we don't have time to go through all these papers, we will assume that the papers before the Court are the same as the Pentagon Papers held in the Pentagon Building," and that's the way the case proceeded. My argument turned on certain items I felt would gravely and adversely affect the legitimate interest of the United States. I learned only a year ago, in April 1991, that most of those items had never been given to the newspapers. I learned it at a meeting put on at the Kennedy School of Government where Ellsberg was a participant and he said that. He said he never gave them so-and-so, moreover he said what I learned for the first time that what he

gave to the newspapers, he had, I'll say whitened out, he put a blank piece of paper over all the footnotes, and the footnotes were the things that gave time, place and names.

Q: And you hadn't known that?

A: I didn't know it because I never could see them. I tried to settle the case with The Washington Post on the ground that there were certain items I just didn't think they wanted to publish and I said if you will let me see the papers I will show you which one. "Oh, we couldn't do that, that would disclose our sources." Well at that moment I knew the source. Mr. Hoover had told me it was Ellsberg but said there was another person, a man named Russo that they were still trying to locate and it was very important that I not use Ellsberg's name because that would tip Russo off and they wouldn't be able to get him. So I didn't dare tell Mr. Bradlee of the Post that I knew the sources, and the result was I couldn't see it and therefore I never knew that though I had by this time seen the Pentagon Papers with extensive footnotes with names, dates and places, but what they had didn't have this.

Q: And so the entire case . . .

A: All this is spelled out in the book.

Q: So the entire case goes up in the court system on a hypothetical . . .

A: That is right. Now, Judge MacKinnon voted in dissent in the D.C. Court of Appeals in which he said he thought it was very unfortunate that this case was pushed through the court so fast. He said that just last evening, The Washington Post filed a paper with the Court saying it would not print certain of the items. Well, when that opinion came along after the event, that was the first I ever heard of it. Now, I don't want to blame either The Post or its counsel for that because in the D.C. Court of Appeals the case was technically Mr. Mardian's case. He was head of the Internal Security Division and the Solicitor General didn't get control of the case until it came to the Supreme Court, and it could be that that thing from The Post was served on Mardian or some member of his staff. I've never checked on it. I just never heard it. I just never heard it.

Q: It never reached you.

A: I never heard of it until I saw it in MacKinnon's opinion. By that time, the Supreme Court had decided the case and, for example, Senator Gravel of Alaska gave all the papers to the Unitarians in Boston and they printed the whole lot and people had said, well, why didn't you find it out when they printed them, and you know, the water was all over the dam by then. I never looked at the Beacon Press, the Unitarian edition of it, because there was nothing I could do about that and I had plenty of other things to do.

Q: What was your perception of the Supreme Court during the time you were the Solicitor General?

A: I admired the Court generally and thought that the level was very high and that there was good diversification. There were people like Black, who was pretty rigid-minded, there were, well you could go right down the list. I was there under both Warren's and Burger's Chief Justiceship and I had great admiration for John Harlan, of course Justice Frankfurter had been my teacher, Brennan was my friend. I never liked Douglas and never trusted him, not in the sense that he would take bribes or things like that. I never trusted his intellectuality. Put it that way. I knew it was great, but I thought he used it for his purposes which I didn't feel were quite judicial.

Q: Had you formed friendships with any of the judges of the D.C. Circuit during this period?

A: Oh, I've known lots and lots of them. Carl McGowan was a very good friend for a long time. I was never close to Bazelon. I always thought he was a little out, if I could put it that way. But there was a time when I knew the Court of Appeals judges very well. Indeed, I was on President Carter's selection committee which recommended four of the judges, Pat Wald, Edwards --

Q: Judge Ginsburg.

A: -- Ginsburg and Mikva, all those four. I had known Mikva before when he was in Congress and Ginsburg had been a student of mine in Harvard Law School. Edwards had taught at Harvard Law School.

Q: Tell me about the selection committee.

A: Well, President Carter tried to break away from the senators really making the appointments, and he established these committees in each circuit, maybe in each district, I don't know. Our committee covered

both the D.C. Court Of Appeals and the district court, and he established excellent committees, men and women, white and black, lay and lawyers. We had interviews with candidates and made recommendations.

Q: Who else served on this committee?

A: The younger Tydings was chairman of it. The lady who was superintendent of schools here in the District of Columbia, we call them blacks, she wasn't very black, a very ponderous and pompous lady, but a very good citizen. I said that we ought to be looking for people with high ability and real strength like Judge Gesell. Oh, she was not a lawyer. She and all the other ladies and all the other lay people, oh they thought that was terrible. "He has no compassion," they said. Well, anyhow, we didn't get people like Judge Gesell into the committee.

Q: What characteristics were you looking for?

A: All of us were looking for different ones, but we actually handled it very skillfully and we were pretty much unanimous in the whole thing in our recommendations. We didn't start out unanimous. There was a black lady, very young then, on the George Washington University Law School faculty who was a member of the committee and it was the first time that I really heard this. She talked with me quite a bit because affirmative action got into it now and then, and she talked to me in some distress because she said that she was aware of the fact that she had got various advances, including the appointment at George Washington as a part of affirmative action, and that left her in real doubt as to whether she was really entitled to the place. I never really thought of it in those terms. My approach had been entirely different, which is what I call the long-range approach. My feeling is we've got to get more and more blacks into high level posts until it is taken for granted that they will be there, and when that comes about then blacks and whites and Armenians will be judged on their merits. But we're never going to get a sizeable number of people, considering the inadequate education and the prejudice there has been, into, I don't necessarily mean the pinnacle point, but into law offices, doctors, business, unless we give them a little advantage in the process that's going on. I still feel that very strongly. The young black lawyers who come into this office -- I feel there has been tremendous progress already. I can remember the Department of Justice when there was not a single black lawyer in the whole

department, including all the U.S. Attorneys' offices all over the country. The only black people in the building were the elevator operators and the cleaning people and the man who came around twice a week to shine your shoes for a dime.

Q: And when was this?

A: In the early thirties. And that continued until the sixties. Bill Hastie was the first black appointed a judge, first in the Virgin Islands and he was appointed governor of the Virgin Islands. He was appointed to the Third Circuit Court of Appeals, and he was the first black to be appointed to a constitutional -- to an Article III court, just as Florence Allen was the first woman to be appointed to a constitutional court. I knew her quite well because my mother had managed her campaign for Congress and she had been elected to the Ohio Common Pleas Court and then to the Ohio Supreme Court. But she was appointed by President Roosevelt to the Sixth Circuit Court of Appeals and was the first woman there. Now we have women all over the lot and take it for granted, but it took a good deal of pioneering to be taken seriously in many quarters.

Q: It certainly did. And now we have Judge Wald, Ginsburg,.....

A: But no woman recently in the past several appointments.

Q: Karen Henderson.

A: When was that?

Q: Last year or two I believe.

A: I don't know. Part of my trouble, the last four or five appointees I don't know.

Q: And they have -- a large number have been appointed in the last several years. So many more of them.

A: That's right. Incidentally, I had lunch today with Malcolm Wilkey which was very interesting.

Q: Oh, how is he?

A: Well, he's fine. He lives in Chile now.

Q: Does he really?

A: He was Ambassador to Uruguay and his wife is a Chilean, with whom -- he married her when he was General Counsel of Kennecott Copper Company whose main operation was in Chile. But he has been up here several times because he was a member of an arbitration panel to fix the damages in the Letelier case and their result was just announced in the papers.

Q: I read it.

A: He's finished with that now and he's going off to California for a week with no immediate responsibilities. He was also one of my students. I knew him well and thought very highly of him on the Court of Appeals.

Q: Did you follow at all the development of different factions on the Court of Appeals, the liberals versus the conservatives?

A: Oh, yes, oh, yes. Everybody knew that. In fact, I have said in public a number of times, and this is relevant to what you're talking about, there was a considerable period, most of ten years, when they did not announce who the panel was until the curtain parted and they walked in and you could, at that moment, tell certainly how the case would be decided. And I always thought that was very unfortunate and wrong, and I understand now at least they list the panelists in advance and that gives you a chance to know to some extent where you must focus your argument, which is relevant. I mean, if you know you've got one of the votes, one is sure to be against you and Joe Doakes is the one that's really crucial if you don't put your foot in your mouth, then you can focus on Joe Doakes. Well, I thought it was -- it offended my sense of justice that you could tell how the case was going to be decided when you saw who came through the curtains.

Q: What do you think about the --

A: Let me just pick that up a little bit. In the days up to ten or fifteen years ago when almost every case involving a conflict and a great many cases where the decision was egregious in some way would be reviewed by the Supreme Court, well, that was all right. Then you were going to get a court which, as it had 9 members and so on, and because of its tradition was really quite independent. But they've now got to the place where they don't review the egregious cases at all and they do not by any means review all of the acknowledged sphere of conflicts, and I think that is a bad way to

administer justice. I spent 40 years trying to get established an intermediate Court of Appeals or some other system. What I really would like to have is several Courts of Appeals primarily established by subject matter, Tax Court of Appeals and an economic regulation including an Antitrust Court of Appeals. I would keep the geographical ones for criminal cases which would make them less attractive, but we would eliminate most of the conflicts. Now, to me it's perfectly plain that a major cause of the increase of cases in the appellate courts is the fact that no decision of an appellate court amounts to anything except to the parties in that case. There is no feeling of obligation to follow it in that case, particularly by a different panel. The courts are so big that you're almost sure to get a different panel, and the result is a lawyer advising a client has to say, well, there's only one case on the books and it's against you, but it's in the Seventh Circuit and we might be able to get a conflict here in D.C. and maybe then we could go to the Supreme Court. It is almost impossible for a lawyer in a case that involves a large sum, as they often do, to advise, well, you lost in the district court and there's really no hope for you, and you better save your money. It's almost malpractice not to take it to the court of appeals, which is more cases, more petitions for certiorari . . .

Q: More work for the circuit court judges.

A: -- and more work for the lawyers and cost to the clients.

Q: Do the oral arguments still serve as a function to the judges?

A: Well, I think so. Again, in my book I list two cases, where it's perfectly plain that the oral argument changed the . . . . There is one case where we now know that it had been decided against my position. Then that case became moot and a new case came along involving exactly the same facts and I was brought into it, and I presented an argument which had not been put into it before and it was decided 6 to 3 in favor of my position, although the opinion the other way had actually been written before the case went moot.

Q: So it obviously made a difference.

A: So it obviously made a difference. And I just learned of another case where it made a difference but they decided the case against me, so I can't --

Q: Well, for example, in the appeals court the arguments are so short these days, they only allow you 15 minutes . . . .

A: Well, I think it's shocking to have these ten-minute arguments.

Q: Right, ten, fifteen minutes in some cases.

A: I sat through a session of the California state court of appeals because I had a case, which after we got there we found was the last of about ten they were going to hear that day. They gave two minutes in the typical criminal case, and finally they got to our case and they never did come to understand it, and I thought the whole performance was shocking, yet that's what everybody tells me is the practice in the California court of appeals.

Q: You are now in private practice, for almost 20 years now.

A: Yes, 19 years next September -- next June.

Q: How was your transition from academic and public service to private practice?

A: It was very easy. In the first place I had always expected to be a practicing lawyer. In the second place, I was on the government side. I had considerable experience in court. I had argued 30 cases before the Supreme Court when I went to Harvard Law School. In fact, I argued all the tax cases for the government for several years. Then I had six arguments for private clients when I was on the faculty of the Harvard Law School. And then I came back and argued 80-some as Solicitor General. But I always regarded being Solicitor General as being the head of a law office, and I didn't find it much different here from what it was, except this office is much bigger than the Solicitor General's office, and in this office not all the cases are in the Supreme Court. No, I had no difficulty at all. I think I'm not as much of a go-getter for getting business and so on, as some of the practicing lawyers are, even as some people thought I ought to be, but that's because I have a rather old-fashioned notion of the role that lawyers ought to play.

Q: Do you think that for most people that notion has changed?

A: It is clear to me that for some people it has changed.

Q: With too much of an emphasis on getting business and making money?

A: That's right. And it gives me concern. Again, I've dealt with that in the book.

Q: What do you think of the quality of the young graduates you're seeing these days?

A: I think they're just as good as they were in my time. I almost always have a young associate assigned to me on any matter I am working on and I would say two-thirds to three-fourths of them are first-class. Occasionally you'll get a real lemon, and in between you'll get people who do a good job but not outstanding. But that is as high a proportion of first-class as there was in my day.

Q: Do you think over the extraordinary number of years you have been in legal practice that your philosophy of law has changed and evolved, or do you think it has pretty much stayed the same over the years with the experiences you have had.

A: I think it's stayed pretty much the same except that the subject matter has enormously changed. The law today is vastly more complex than it was when I was a student. The Internal Revenue Code was a pamphlet and now it has thousands of pages, it has sections that are pages long that are impossible for me to comprehend, and if they are impossible for me to comprehend how in the world are students in law school and the young lawyers going to comprehend them, I don't know. There are areas like ERISA where I don't even try to keep up. We have ERISA people and if I get a case involving it, I simply call up somebody there and say, I have a case for you. All the areas that are really active in law offices today, environmental protection, clean air, clean water just didn't exist. The SEC, the Federal Communications Commission in substance -- there was a Federal Radio Commission beginning in 1928 but cases were rare and were not above and beyond the comprehension of an ordinary practitioner.

Q: What do you think -- what kind of impact has that had an the judges who are asked to decide these cases? Do you think that certain areas of the law have become too complicated for the judges we go to for decisions on appeal?

A: Well, I have some feeling that way and that is one reason I would like to have courts of appeals organized on a subject matter basis rather than on a geographical basis. I see no reason why a judge couldn't be a first-class judge in the business regulation area and not know anything about tax law, or particularly its intricacies. Well now it's wonderful to say that all judges of courts of appeals are generalists and know everything about everything, but we can't possibly do it. The other great change that's happened in the last ten years is the capture of the law offices by electronic equipment and that I think is going to have an impact in the next ten years, even greater than it has had so far. I hope it won't mean that lawyers will become word processing operators and punch buttons.

Q: I notice no computer in your office.

A: No, but my secretary has one and she is very good at it. This is remnants of the manuscript of the book, and she put it all on the word processor and then ran off copies. To my amazement, when it came time to send it to the publishers, she sent one disk, that's the whole blamed book. I can't comprehend it. And she has a printer on her desk. You know, I know how an electric refrigerator works and I know how an automobile works, I know there's a carburetor, there are spark plugs and a diesel engine doesn't have them but the pressure makes enough heat so that the gas explodes, but I haven't the slightest idea what happens in that printer out there and I cannot comprehend what it is that enables it to have the lines the right length and stop in the middle of a word at the right syllable point and she can put in a word and it will do the page all over again just like that. That, of course, is a tremendous advantage and many times in the old days as I was reading a finished letter to sign, I would think, oh gee, it would have been better if I had used this word, but I wouldn't make the change because it involved typing the whole thing over. Well, now I just put in the word and in 25 seconds she is back here with the new page.

Q: So the ever-advancing technology has been a change for the better in your view?

A: Unless it isolates the lawyers too much from their product. The same secretary used to be terribly good at what we called the cut-and-paste. She would make drafts usually on just a little more than half a page and then I would write stuff down below and put

balloons around them and put it in up there and she would cut out the portions that weren't changed and then she would type in the part that I had added and then she would follow it with something that wasn't changed and she could do that quite quickly and with xerox you could make it come out so it didn't -- when she did it carefully, it didn't show that it wasn't just on one page. I think in some ways the xerox machine has been the biggest time saver for me as a practitioner in that I can get copies, I don't have to labor through the six carbon paper copies. I wish I was going to be around for another 30 years because I would like very much to see what the impact of all this is going to be, and I have an idea that there will be many new things in the next ten years after which there may be a lull for a while.

Q: Probably things you and I cannot dream of yet. I think that about covers what I wanted to do this afternoon. Thank you for all of your time.