

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

**United States Courts
District of Columbia Circuit**



JOSEPH E. diGENOVA, ESQUIRE

**Interviews conducted by:
Carl Stern, Esquire
September 30, November 11, December 18, 2003**

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were 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 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 E. Barrett Prettyman United States Courthouse, **333** Constitution Avenue, N.W., Washington, D.C. Inquiries may be made of the Circuit Librarian as to whether the transcripts 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 (in WordPerfect format) are in the custody of the Circuit Executive of the U.S. Courts for the District of Columbia Circuit.

INTERVIEWEE ORAL HISTORY AGREEMENT

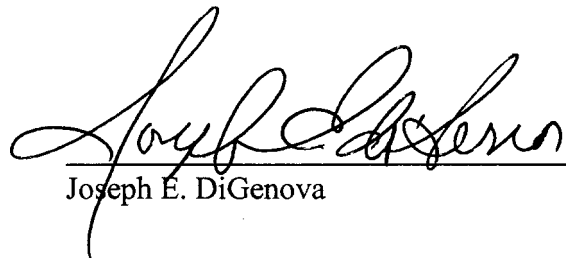
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Oral History Agreement of Joseph E. DiGenova

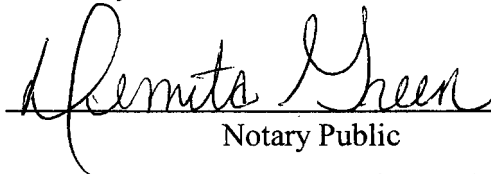
1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Joseph E. DiGenova, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, transcripts and computer diskette of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the tapes, transcripts and diskette are subject to the same restrictions herein provided.

2. I also reserve for myself and to the executor of my estate the right to use the tapes, transcripts and diskette and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

3. I authorize the Society to duplicate, edit, publish, including publication on the internet, or permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties fi-om such use.

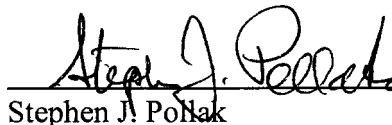
 3-17-05
Joseph E. DiGenova Date

SWORN TO AND SUBSCRIBED before me this 17 day of MARCH, 2005.


Notary Public

My Commission expires 9/14/09

ACCEPTED this 20th day of April, 2005, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.


Stephen J. Pollak

Schedule A

Tape recording(s) and transcript(s) resulting from 3 interviews of
(Number)
Joseph E. DiGenova on the following dates:
(Interviewee)

<u>Date (Month, Day, Year) & Title</u>	<u>Number of Tapes</u>	<u>Pages of Transcript</u>
September 30,2003	1	59
November 12,2003	1	66
December 18,2003	1	32

The transcripts of the 3 interviews are contained on 1 diskette(s).

INTERVIEWER ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Carl Stern

1. Having agreed to conduct an oral history interview with Joseph E. DiGenova for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Carl Stern, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings, transcripts and computer diskette of interviews, as described in Schedule A hereto, including literary rights and copyrights.

2. I authorize the Society, to duplicate, edit, publish, including publication on the internet, or permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

Carl Stern 11/29/04 CA
Date 7/13/04

SWORN TO AND SUBSCRIBED before me this
29 day of November, 2004

[Signature]
Notary Public

My Commission expires 6/30/2005

ACCEPTED this 2nd day of December, 2004, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak
Stephen J. Pollak

Schedule A

Tape recording(s) and transcript(s) resulting from 3 interviews of
(Number)
Joseph E. DiGenova on the following dates:
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**Oral History of
JOSEPH E. diGENOVA
FIRST INTERVIEW - SEPTEMBER 30,2003**

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Joseph E. diGenova, former United States Attorney for the District of Columbia, and the interviewer is Carl Stern. The interview took place on Wednesday, September 30,2003. This is the first interview.

Mr. Stern: I think it is fair to say that Joe diGenova has sort of a tenacious, sort of bulldog style of litigating. I can't imagine anything ever frightens you. Are there any judges in the District that you really didn't want to come up against in their courtrooms?

Mr. diGenova: I think back in the '70s actually, when I was a young assistant U.S. attorney practicing in Superior Court, the newly coined Superior Court at that point. It had just become enacted into law by Congress when they did the court reorganization. We had several local judges in Superior Court who, it wasn't a question of fear, it was a question of being – their performances were so intolerably offensive to many lawyers, both prosecutors and defense attorneys, that appearing in front of them became a matter of importance. And records were made of it because, as you know, we have the Judicial Tenure and Disability Commission, and we were making records to file complaints against these two judges. One was Harry Alexander, whose performance on the bench left many of us speechless. The other was Charlie Halleck, Judge Charles Halleck, who started out as a right-winger and ended up as a left-winger, and engaged in a series of diatribes against the U.S. Attorney's Office because he didn't like their performances. So appearing in front of the two of them was always a challenge because you never knew what was going to happen. And it had nothing to do with the law.

Mr. Stern: You were representing the government?

Mr. diGenova: Yes. I was a young Assistant U.S. Attorney at the time.

Mr. Stern: It's possible to be arrogant and arbitrary but still quite learned in the law as you started to suggest.

Mr. diGenova: It is indeed. It is possible to be all of those things and some might say that Gerhard Gesell fit that description of being arrogant and smart and overwhelmingly learned in the law over in U.S. District Court. And in fact, I was about to say, in addition to that unfortunate situation over in Superior Court, over in U.S. District Court, there was never that sort of environment with the judges. It was a wonderfully dignified and respectful thing. But there were great judges on that court, in U.S. District Court at the time. It was really the time of giants. Gerhard Gesell, for example, comes to mind to me not as someone you would be afraid of, but actually you would enjoy appearing in front of because he knew what he was doing. He was going to challenge anything the government said or anything that the defense attorney said. You had to be prepared. You had to know the law. You had to know your facts. And appearing in front of him was actually thrilling because he knew what he was doing. He knew all about his cases. He knew the law forwards and backwards, whether it was civil or criminal and he loved making lawyers know that they had to be prepared in front of him. And he loved peppering them with questions and he loved making sure that they all knew that this was his courtroom. No matter how much they wanted to say they were going to take control, if you were in front of Gerhard Gesell, he was always in control.

Mr. Stern: Given the size of the D.C. Bar and the importance of the matters that are handled here, one would think that the judges in the District at every level would be quite at the top.

Mr. diGenova: Actually I think we had a very good bench in the District and we still do. I think that the process by which people were chosen and confirmed by the Senate was a process which served us very well. The fact that there may have been a couple of people on the Superior Court bench who were difficult to deal with did not indict the system of selection or the people who were selected. I mean in any judicial system you are going to have a couple of people who really shouldn't be on the bench. This has happened in Utah with some very famous judges. It has happened in the Eastern District of Virginia, and it has happened in New York, where from time to time you will find people on the federal bench who really after a period of time lose it. Not only did they get cabin fever, but they get a kind of imperious quality that makes them really unfit to serve.

Mr. Stern: But with respect to local judges are you suggesting that the system of electing judges does not produce the same caliber?

Mr. diGenova: I don't think there's any question that electing judges is a terrible system. I think the notion of campaigning, campaign contributions – which Texas, Alabama, Mississippi, and a number of other states have – those judiciaries locally in those states are corrupt. West Virginia is the same way. You cannot litigate cases in those states unless you know someone who has either run a campaign for one of the judges that you are appearing in front of. Those states – Pennsylvania, Texas, Alabama, Mississippi – are disgraceful states at the state level. I'm talking about state-elected judges.

Mr. Stern: So one respect in which the D.C. courts are different is that the judges here are not elected.

Mr. diGenova: I don't think there is any question that our system in the District

of Columbia which uses a judicial selection commission which sends three names to the president for selection for Superior Court and the D.C. Court of Appeals, the local court of appeals, is a vastly superior system to any states which have elected judges systems. We have an opportunity here through a vetting process with the local judicial selection commission to find really well-qualified people. The process really weeds out people who shouldn't be on the bench, for the most part. Occasionally people are going to get through because it's just the nature of the process. Some people look like they are going to be great, and then when they get on the bench and they can't make a decision, they are not analytical, they don't work hard – and there are several of those on the D.C. Superior Court right now – but by and large our system has worked exceptionally well and we have ended up with a very fine local judiciary both at the trial level and at the appellate level. Of course our federal judicial bench here is spectacular.

Mr. Stern: I asked you whether any of the judges frightened you. What about the lawyers, opposing counsel. Anybody that you can think of that you really didn't want to come up against?

Mr. diGenova: Actually, lawyers that I have a lot of respect for, who I thought tried a magnificent case, one of them was actually somebody I actually ended up indicting, who I thought was one of the finest defense lawyers I had ever appeared against, and that was John Shorter. A magnificent local lawyer who had a way with juries and a knowledge of the law and an ability to present a defense case that was really impressive. John was eventually indicted for income tax evasion because he never filed tax returns and didn't do a whole bunch of other things, but as a lawyer, I thought he was probably the best lawyer I appeared against in court. I appeared against him in a couple of murder cases. He beat me both times. I thought Shorter was

just spectacular in court. Of course, then there is Jake Stein, who was really a wonderful, wonderful lawyer in so many ways, tried a lot of different cases. I actually never appeared against Jake in a case, but I did watch Jake in several cases as a young Assistant U.S. Attorney and as the U.S. Attorney I saw Jake appear. He was a marvelous lawyer with a terrific knowledge of the law and, of course, he was respected by the judges. He and his partners had written some law books which were common stock in people's libraries. There were a lot of very fine lawyers appearing in Superior Court as well as United States District Court that no one knew anything about. They were just lawyers doing their jobs every day. For the most part, the bar of the court, and I include in this Fifth Streeters, so-called Fifth Streeters, who I think did a marvelous job of representing indigent clients, were all very talented and extremely knowledgeable because they were there every day in the courthouse talking to clerks, talking to jurors, talking to judges, knowing what was going on in people's heads, and really knowing the lay of the land, really fascinating. But other than John Shorter, who I thought was a terribly, terribly fine lawyer, I really didn't care who I was up against. And my trial career was relatively short, you know. It lasted a number of years and nobody tries cases anymore, you know, rarely. Most people either plead out or there aren't even any civil trials to speak of. They are mostly settled or dismissed on motions. I think the quality of lawyering though in both courts from the time that I arrived in 1972 as a young Assistant United States Attorney until I left in 1988 and then, of course, since then, since I've been in private practice since 1988, I think the quality of lawyering here has just really been excellent in our District.

Mr. Stern: You would have wanted Jake Stein as a co-counsel in a case, right?

Mr. diGenova: Absolutely. Jake was really, and remains, just a respected representative of what the bar should be about. I would have loved to have tried a case with Jake. He was an independent, of course, as you know as well so Jake had both experiences.

Mr. Stern: You went to law school here. After leaving the University of Cincinnati where you took your undergraduate education, you then went to Georgetown Law School. You decided to stay in Washington. You are actually a native of Wilmington, Delaware. Why did you stay in Washington?

Mr. diGenova: I decided to stay in Washington because, first of all, I had studied political science at the University of Cincinnati and international relations. I had really loved politics and the art of politics and the science of politics and had a very keen interest in international relations. So when I came here to go to law school, I enjoyed the city so much that I decided to stay and there just wasn't even any question I was going to stay here. My native instincts were to become involved somehow in politics and eventually I did and ended up working for Senator Charles Mathias of Maryland, and as a result I was on the judiciary committee during the years of some of the great battles on civil rights and the confirmation of Griffin Bell, which was one of the great confirmation processes of all time.

Mr. Stern: Why do you say that?

Mr. diGenova: As you know, Griffin Bell was Jimmy Carter's nominee to be Attorney General. Even though the Democrats controlled the Senate at that time, as they had for many years, Judge Bell's nomination from the Fifth Circuit caused a fire storm when an investigation showed that he had been the chief of staff to the governor of the State of Georgia during massive resistance, and had in fact apparently, according to stories in the *Atlanta*

Constitution, counseled in favor of massive resistance to the integration orders. This caused an incredible uproar, as you might imagine, even among some Democrats, and it became a lengthy and contentious hearing. I remember being up at all hours of the night working with Mike Clipper, who is a respected member of the bar, who was one of the senator's counsels on the committee, along with me. Mike is now an intellectual property lawyer here in town. We discovered over in the archives – this was about four o'clock in the morning and an issue had arisen about whether or not then-Judge Bell had played a role in the governor's decision and initially the Carter administration had denied that he played any such role – and there we were over in the microfiche section of the Library of Congress at four o'clock in the morning and bingo, front page of the *Atlanta Constitution*, they are quoting Griffin Bell saying that I've recommended to the governor that he not obey this order, cannot do all these things. We ran back and the hearing lasted a few more days after that, and obviously Judge Bell, who I think understandably resented the confirmation process very much, later as you know, was confirmed, and became one of our best Attorneys General, and he said that while he didn't like the confirmation process, he actually felt that he benefitted from it. Of course, unlike Miguel Estrada, he got confirmed.

Mr. Stem: Other than by breaking and entering, how do you get into the Library of Congress at four o'clock in the morning?

Mr. diGenova: As you know, the Library of Congress is open 24 hours a day to members of Congress and when you are conducting confirmation hearings, the chairman calls up – and at that time it was James Eastland from Mississippi – there was never any doubt that when big hearings like this were going on, there were people on duty 24 hours a day at the Library to

service the members of the committee who had questions. This little bit of research must be credited to Mike Clipper. The discovery of this article was actually an amazing piece of information because it threw the entire hearings into a tail spin and it caused the administration at that time to sort of revamp their confirmation strategy. The judge did very well, though. He handled himself very well during the process.

Mr. Stem: I can see that you still tingle with excitement thinking about it. Are you sure you didn't want to be a probate lawyer or a domestic relations lawyer in Wilmington?

Mr. diGenova: (laughs) No, no. Actually, I decided – once I left Wilmington, Delaware, and went to the University of Cincinnati, which was a great school and had a wonderful political science department which is why I went there. I actually had a chance to study under Hans Morgenthau who was spending a sabbatical from the University of Chicago at the University of Cincinnati. I had **an** opportunity to study under Hans Morgenthau who was a great, great writer about communism. (pauses to answer phone)

Mr. Stern: We were interrupted by a phone call. Let's pick it up. You were talking about studying political science at the University of Cincinnati.

Mr. diGenova: I loved politics. So when I came here to go to law school, I mean it was a natural combination of being able to study law, watch the political process and, of course, as I watched it, you know you read the **New York Times** and the *Washington Post* everyday and then the *Washington Star* which was a great newspaper, you couldn't help but want to stay here. Thinking of going back to Wilmington, Delaware, and appearing in chancery court with all of the qualities that that brings to it, I didn't want to be a corporate lawyer, which is what

Delaware is all about, and happily so for Delaware. So staying here was actually a very easy call and I have never regretted it. I have been here since 1967, 36 years.

Mr. Stern: You had a whole career on the Hill. You were the Chief Counsel and Staff Director of the Senate Rules Committee, Judiciary, Governmental Affairs.

Mr. diGenova: And Intelligence.

Mr. Stern: Intelligence Committee. You were a Legislative Director, an Administrative Assistant for Senator Mathias who you mentioned. Are you a creature of the Hill? Would you have stayed there?

Mr. diGenova: No. Actually I would not have stayed at the Hill for a very good reason. You can only do so much on the Hill. You reach a certain point and a level of knowledge – and it's a very comfortable life, being a senior staffer on the Hill, especially if your party is in the majority. If your party is in the minority, it's not as much fun.

Mr. Stern: Not much fun?

Mr. diGenova: Well, actually, in many ways, because there's not much to do. But it is not as much fun as being in the majority and setting the agenda and really making the decisions. But the Hill, for people, for some people, certainly – I think it's a five- or six-year job for anybody who is interested in learning the process. I mean I really enjoyed learning the legislative process. I went back years later to become Special Counsel to the House Education and Labor Committee to investigate Ron Carey's teamsters at that time and that was a fascinating experience on the House side which is, to say the least, a different animal than the Senate. But both of those experiences were wonderful in the Senate and the House. I think that anybody that wants to be a Washington lawyer has to spend some time on the Hill, either as a counsel or a

legislative aide learning that whole process and, in fact, it has become extremely important to me as a lawyer in Washington to have served up there, to know people. Because part of my practice at our law firm includes lobbying, both executive branch and legislative lobbying and to have been there and experienced that process and have a sense of the courtesies, the etiquette of how you conduct yourself up there is something you cannot learn about by reading a book, no matter how good the book is. You know, *Mr. Smith Goes to Washington* is a great movie, but that's not the life in Washington, D.C. I love that process and I love having that lobbying as part of our legal practice because solving problems sometimes happily does not involve litigation but involves legislation and/or regulation, or relief of some kind which involves the petitioning for redress of grievances. And to me, that whole package of necessary skills makes the practice of law in Washington, I think, the premier place to practice law in the country, except for commercial litigation, because there is none here.

Mr. Stem: Well, it certainly makes it different. Do you recall anyone who had a particular skill at this among D.C. lawyers.

Mr. diGenova: You mean legislative?

Mr. Stern: A D.C. lawyer who did a bit of lobbying on the Hill – lawyers move back and forth sometimes as you have, between working on the Hill and pursuing their private practice. Is there anyone who comes to mind who was particularly skillful, other than yourself, of course, at this?

Mr. diGenova: I think people move in and out of government from time to time at various levels because they want to; they enjoy the process and Washington allows you to do that without ending your career. I'm trying to think of someone that fits that criteria. An

interesting commentary is that you know, thirty years ago you had to decide what you were going to do. You were either going to be in government, or you were going to be in private practice. Those days are over. People go back and forth between government and private practice, government and industry all the time now. Now some people say that's a bad thing. I say it's a good thing, because people bring knowledge of problems; they understand the process from both sides, about how difficult it is to get something done when you are in government, how difficult it is to get something done when you are out of government, and they understand the perspective of the fox as well as the hound. For those of us who have been prosecutors, for example, I think it's extremely important for someone to be a defense attorney as well and to have a sense of both sides so that you have some understanding of what's wrong with the process and why it doesn't work well sometimes. And why sometimes the system can get out of kilter and can be the advantage of one side or the other which is simply not healthy. Even though Edward Bennett Williams would not be considered a lobbyist, he was in fact a great lobbyist. He never touted himself as a lobbyist. He was also a great litigator. He was also a builder of institutions. He built a great law firm. He ran a great hotel, the Jefferson. In fact, the woman that he had run it for him, Rose Narva, I'll never forget. Edward Bennett Williams' line on Rose Narva – he said, "I gave her an unlimited budget and she exceeded it." Edward Bennett Williams built a baseball team, bought it for \$16 million, sold it for a \$140 or \$150 million. Williams was the kind of guy who moved in and out of everything. In and out of politics, in and out of the lives of presidents, and their aides, in and out of courtrooms, and in and out of Congress. He represented people on Capitol Hill. I actually saw Williams as a model, not for his great litigation skills, which were well renowned, but he was a power broker. He was really one of the first great power brokers in

this town who got his phone calls returned. The number one thing in this town is you have to get your phone calls returned, whether you are a lawyer or a lobbyist or whatever. Everybody always returned Edward Bennett Williams' phone calls. And he was a great believer that there should be no conflict of interest rules. His great story was, "If I represent people on both sides, this thing would be settled relatively quickly." (laughter) I actually agree with that in some instances, but the ethics rules have changed now since those days and you can't do that anymore. But he's actually to me sort of a model because he was not just a litigator. Edward Bennett Williams was a power broker, and I think he played a vital role in a lot of things that people don't know anything about and learned about later. Everybody always points to Clark Clifford as sort of the lawyer of choice, you know. The famous story about the guy, when Clark Clifford sends him a bill, the guy says you made one phone call and it cost me \$10,000. Clifford then sent him another bill for \$20,000 and said that's for the second call. Actually, I think Clark Clifford was sort of overrated in that sense. To me, Edward Bennett Williams was the superstar of the bar for all the reasons I've given, which was he moved in and out effortlessly, although apparently fitfully if his biography is any indication. A man dogged by his earlier years as a child and his upbringing. But nonetheless, a man of great talent and tremendous imagination in dealing with problems and fearless to the point of just you know not – he'd do anything necessary to help his clients. There are a lot of people at very high levels who move in and out in government and then it's sort of the next level down, but generally down below at the career level, people stay in and they are out and then they are gone. That's it. So there's not a lot of that movement. But at the higher levels, there's lots of movement back and forth in and out of government and I think that's a very, very good thing. I mean I encourage people to go back into government for a while

and then leave, get out of the way.

Mr. Stern: I expect that your elevation to U.S. Attorney in 1983 was promoted in part by Senator Mathias, for whom you had worked.

Mr. diGenova: Very much so.

Mr. Stern: He is a wonderful person who I guess returned to practice law?

Mr. diGenova: He still does. He practices at Jones Day.

Mr. Stern: What have you learned from him?

Mr. diGenova: He was a gentleman. He was a scholar. He was not one of these people who insisted upon issuing a press release every four minutes to tout something that he had done. He spent a lot of time working on problems and I give as my best example the Chesapeake Bay. He also spent a lot of time working on foreign policy problems behind the scenes. He worked overseas, visited capitals, talked to people. Didn't talk about it a lot when he came back. And as a result, when things needed to be done, he was frequently called on to serve as a intermediary quietly. He was on the Senate Foreign Relations Committee. He was on Judiciary and he was on Appropriations. He got fabulous assignments. Working for him was a treat because you were in the middle of everything. The Panama Canal treaty, nominations for judgeships, it was just a marvelous office to be in. What I learned from him was that it mattered whether or not you were honest in government. He was a man of great integrity. He hated campaigning. He hated raising money. He was a great supporter of public financing of congressional and presidential campaigns. He felt that the process was so corrupt, inherently because of the nature of raising money and then passing legislation and responding to requests for help from people who have been donors. But he also understood the rough and tumble of

politics and he was very, very good at it, but he was very subtle about the way he put knives in. It was always done gentlemanly, bleeding occurred thereafter, but I mean he was just a wonderful guy to work for because you could talk to him and he demanded a great amount from his staff, but not in a way that was draconian or rude. He was a real gentleman. He treated his staff with respect and, in fact, we have lunch with him once every two months, his former senior staffers, five of us. We have been doing that for years, since he left the Senate. Every two months we have a luncheon. We sit down, we talk about politics, the current president, whoever that might be, what the prospects are for the Senate and the House, governors' races, legal issues that are pending. It's a wonderful continuing relationship which I dare say very few people have with their former member that they have worked for. So, for those of us who worked for Senator Mathias, we have a lifelong relationship.

Mr. Stem: I think of trustworthiness as one of the characteristics of Senator Mathias. To what extent have you been able to trust the lawyers in the D.C. Bar that you've dealt with over the years?

Mr. diGenova: I think for the most part, almost invariably all the lawyers that I have dealt with I have never had a problem with anyone not keeping their word. There have been instances, I won't mention what they are, when those things happen, people tend not to forget that and that word gets around pretty quickly about a lawyer that his or her word is not his or her bond. That is something that once that happens, it's pretty difficult to **fix**. Washington is a small southern town. Make no mistake about it. This is not a northern town, it is not a middle-Atlantic state town. It is a small southern town. Sixty-two square miles of gossip. Nothing that happens here goes unknown for a very long period of time. People's reputations are easily sullied. That's

why people saying things that are incorrect about people is a big mistake. It is just the nature of a small southern town that when somebody breaks their word, if it happens once, people can understand somebody made a mistake, but when it happens consistently, people know that about somebody and they defensively relate to that person or they don't deal with them at all. By the way, the same thing is true about police officers. There are certain police officers that had a reputation for being unreliable or untrustworthy and the assistants knew that. They had great difficulty dealing with them and always made sure there was corroborating evidence for everything that they did or didn't use them. And the same is true of lawyers. For the most part, I really can't think of anyone that I've ever dealt with that I had that type of problem with here. I've had problems – especially in the criminal bar. You are more likely to find problems with lawyers on the other side in the civil bar where the stakes are really higher rather than someone's life or liberty and that's where I think a lot of the unethical conduct occurs. Actually, since I've been in private practice, the one area where I've had regrettable things occur has been with members of the civil bar.

Mr. Stern: When you became U.S. Attorney in 1983, you had not been involved with the criminal law?

Mr. diGenova: Yes. I had been an Assistant United States Attorney in the early '70s.

Mr. Stern: How many years?

Mr. diGenova: Three and a half as a trial lawyer.

Mr. Stern: Because the work of the U.S. Attorney's office is primarily criminal, is that fair to say?

Mr. diGenova: It is in most states. In our office here in D.C., we have a huge civil division, which involves the defense of regulatory agencies as well as a large number of civil cases involving National Park Service regulations for Lafayette Park, first amendment cases, demonstration cases. It is some of the great case law involving the protection of the embassies, the one thousand foot rule at the embassies, demonstrating in Lafayette Park, the famous “Is sleep speech?” case which was during our watch. All of the great cases.

Mr. Stern: Don’t go too quickly over that. Explain that case.

Mr. diGenova: Well, this is where people decided they were going to sleep in the park as a protest against government policies, and their position was that the National Park Service could not prevent them from sleeping in Lafayette Park, that sleeping was in fact speech of a unique kind.

Mr. Stern: Symbolic expression?

Mr. diGenova: That’s right, symbolic expression. Well, the courts eventually ruled that sleep was not speech and that the Park Service was correct in saying that they could be thrown out of the park. It actually ended up in the Supreme Court if my memory serves me correctly. It was the Community for Creative Nonviolence versus whoever the current head of the Park Service was at that time. But actually our civil division had some of the more interesting and fascinating cases because of the demonstrations here and because of the case law surrounding first amendment rights to petition Congress. So I actually enjoyed the work for the civil division almost as much as the work on the criminal side – and I spent a lot of time with the civil division. As U.S. Attorney, I met regularly with not only the line attorneys but the supervisors in lots of cases and knew an awful lot of what was going on in the civil division,

probably more than most U.S. Attorneys ever did. That was because the White House was actually more interested in the civil cases involving demonstrations and government policy about regulations and the FDA or environmental regulations than they were about the criminal stuff. They figured that would take care of itself. But the policy stuff, the stuff related to government regulation, government policy, the White House and other people took a great interest in that and if they didn't that was great. We were happy to talk through the Justice Department with them – we were delighted they were interested in public policy.

Mr. Stern: I have a hunch, though, that you prefer criminal law to civil.

Mr. diGenova: I do. Just as a matter of interest.

Mr. Stern: It is sort of a perversion. In most parts of the country, law schools turning out people well educated in the civil law, they expect that only a fraction of them will end up in that more demeaning part of the practice, criminal law.

Mr. diGenova: Well, criminal law is just sort of something you – I think if you are the slightest bit interesting as a person, you are drawn to the criminal law because of its inherent drama and the – you know, its David and Goliath, the State versus Man, juxtaposition. That to me – but also, the fact is that some people like public service and they view being a prosecutor for at least a while as a good way to pay their dues. My own view of this is I wanted to be a prosecutor because I thought it was a fascinating way to do public service, but I also wanted to try cases. I knew the best way to get to try cases was to become an Assistant U.S. Attorney and so actually – I had actually clerked for a judge on the D. C. Court of Appeals, Judge George Gallagher and a great teacher. He had been actually one of the lawyers in Internal Security at the Justice Department during the communism cases during the 1950s and had

become a judge when Lyndon Johnson became president. He was just fantastic and still is on the court. He still hears cases as a retired judge. He taught me so much about writing and about legal analysis, and when I wanted to become an Assistant U.S. Attorney, he was kind enough to make a call to the Justice Department for me and arrange an interview, and I was eventually made an Assistant U.S. Attorney in April of 1972. I have always been grateful to him for that.

Mr. Stem: Becoming a U.S. Attorney is a political position.

Mr. diGenova: Very much so.

Mr. Stem: Is that a good thing?

Mr. diGenova: I think, generally speaking, the process by which United States Attorneys are selected is good. I think the process by which they are supervised by the Justice Department is bad. I think that the confirmation process, if it is run correctly, should weed out those who should not be federal prosecutors, U.S. Attorneys or judges for that matter. I think for the most part it does that. The problem comes later when the Justice Department historically has taken the position that because the U.S. Attorneys are nominated by the president after recommendations from the senators in the state, usually sometimes the governor, that they tend to let the U.S. Attorney sort of run their own shop with minimal supervision except for some general guidelines in the United States Attorneys Manual. The fact is that the more you travel around the United States and the more you look at how various U.S. Attorneys Offices are run, you do have concerns about uniformity and about temperament of people and about the quality of some of the people as Assistant U.S. Attorneys and as United States Attorneys. I think that the one thing I would like to be is – what would you like to be? Would you like to be a judge? The last thing in the world I would ever want to be is a judge. I cannot conceive of being a judge.

But I would love to be Attorney General for long enough to take control of the United States Attorneys around the country and enforce rules of behavior, conduct, charging. I have seen things over the last fifteen years since I left being United States Attorney, in the conduct in the United States Attorneys Offices around the country and the lack of supervision of Assistant U.S. Attorneys that lead me to believe that there are some injustices occurring which are easily controllable but which are widely ignored by supervisory authorities in the Department and in U.S. Attorneys Offices and that is unacceptable. At the right time, I may even write a book about it. I must say that I'm very disappointed by some of the behavior I have seen since I left the government.

Mr. Stem: What are you talking about, overzealousness?

Mr. diGenova: Oh, absolutely. Overzealousness. I think actually I must say in relating back to one of your earlier questions, one of the things that has disappointed me most since leaving government has been that in the area that you asked me earlier about, people that I don't trust. Unfortunately, the largest majority of them have been Assistant United States Attorneys, not private practitioners. And that to me is a sign of a system in which supervision is lacking and control at main Justice is even more lacking. Now, as you know, recently the Attorney General, John Ashcroft, issued a memo which requires U.S. Attorneys now to charge the most serious offense and to take a plea to only the most serious offense except in the rarest of circumstances. That is not the type of control that I am talking about. That is the wrong kind of control, I think. I think that's bad policy and I'm hoping it is going to be more honored more in the breach than in the obeisance. But I do think that there is long overdue at the Justice Department, a systematic look at ethical control of the behavior of prosecutors all over the

United States. It is too lax. It is not uniform, and the Office of Professional Responsibility which has this job is too small, That Office does not have enough authority, and now that there is an Inspector General, some of that may change. As you know, the Department fought the Inspector General for years and finally had one imposed on it over their objections. This issue of the ethical behavior of federal prosecutors is a very important question. The reason is when you make the prosecutor the fundamental decision maker in the criminal justice system, in other words, by charging he decides the sentence because of the Sentencing Guidelines which are not guidelines. They are mandatory minimum sentences. Calling them guidelines is fraud. These are not guidelines. The Federal Sentencing Guidelines require, with the exception of minor variances, from left and right, up and down, a mandatory minimum sentence in almost every federal offense, without a mandatory minimum statute. The fact that the prosecutor makes that decision, the charging decision, because the Attorney General now says it has to be the most serious offense and therefore the most serious punishment and the longer prison term, without the kind of supervision necessary to ensure that those judgments are being made for the right reasons, I think is a big mistake in our society. I think Congress has blundered over the last few years. They did it again with this Feeney amendment on sentencing recently where they allowed – they are now going to track federal judges all over the country to see whether or not they are sentencing correctly. I think the process is now out of whack and it's out of whack in the wrong way, both in terms of power in the hands of the prosecutor and lack of accountability of the prosecutor at the same time. This is a big deal. It will not be addressed because for years we went too far the other way, where we were pounding on prosecutors and allowing *goofy* things to happen and then we went the other way. Now we've gone obviously too far with regard to

authority and sentencing and I think eventually the public will wake up to that and there will be some reordering of priorities and some moderation in this, but that will take a very long time because politically it's a bad thing.

Mr. Stem: Your concern, your alarm about these Assistant U.S. Attorneys, are you suggesting these are misjudgments that are being made, or are we talking about bad faith?

Mr. diGenova: I think for the most part the overwhelming majority of the Assistant U.S. Attorneys that I have dealt with are people of good will and they are very professional. However, there are an increasing number of people who become Assistant U.S. Attorneys I think too young who have not had any experience as a defense attorney or, if so, very little. There is not enough training that goes on either in the offices or at main Justice about what their ethical responsibilities are and how they must appreciate the power that they have at their disposal. I tell students when I lecture to them at law schools that the power to investigate is the power to destroy. Very few young federal prosecutors understand the power that they have at their disposal. Very few of them are given Robert Jackson's admonition as Attorney General from the **1940s** when he said that this is a great power. It must be wielded carefully. It must be insulated from local politics. The U.S. Attorneys must wield this power with great discretion and restraint. The nature of law enforcement has changed since the 1950s. We have a different type of criminal. We have a different type of criminal enterprise. There are vicious murders out there that have to be dealt with. There are gangs. There are drug lords from all over the world. There are terrorists. All of that being said, there is also a very important responsibility that in the course of wielding this great power, there is an understanding of what it can do to people. Guilty

as well as innocent. What it can do to people and to their families. And that I fear is missing from this process and it is something about which Congress cares nothing.

Mr. Stern: Confine it for a moment to the District of Columbia. Is this problem, what you have just outlined, does it, in your judgment, apply to D.C.?

Mr. diGenova: Well, I must tell you that there are very few highlightable criminal cases here in the white collar crime area. There is not much going on. I have not had any recent experiences with this office which would lead me to believe it was a problem. When I was there, we had a very good training system. People went through it both in the civil division and the criminal division. And they were sent to main Justice, which of course is right up the street, to go to the Attorney General's Institute and the Trial Advocacy Institute there. There is a tremendous amount of time that went into training. When I was a young Assistant in 1972, I went to lectures. I had to go and listen to Victor Caputy who was the great training director, not only about how to try a case, but how to conduct yourself as an Assistant United States Attorney, what your ethical responsibilities were. There was an amazing amount of time spent on that back in the 1980s and we were sent to main Justice to training sessions on trial advocacy as well as professional responsibility and ethical duties. I've seen no indication that the U.S. Attorneys Office for the D.C. has a problem. I've had a couple of things come up with young Assistants who I think are classical examples of young Assistants who want to overreach or sort of strut their stuff. For the most part, you can cure that with a call to a knowledgeable and wise supervisor simply admonishing them that they need to keep their eye on this young person before the office gets in trouble. Most supervisors in offices will be glad to receive a call like that unless they are cheerleaders and nobody is very long in their office, in which case they are not

doing their jobs because the truth is the government is wrong and it's wrong a lot. And the difference is the government can fix it when it is wrong and the job is to make sure that the government knows that it has that duty and does it and does fix it when they make a mistake.

Mr. Stern: In 1987, Marion Barry, the Mayor of the District of Columbia, said of a U.S. Attorney that he had abused the subpoena power in a way I have not witnessed in 40 years. That is sort of the matter you are raising here?

Mr. diGenova: Right.

Mr. Stern: Of course, he was referring to you and the investigations that were being conducted with respect to the mayor's drug habit and matters having to do with city contracts and so on. What do you say? It seems to me that people who are the targets of inquiries are always saying that the prosecutor is abusing his power.

Mr. diGenova: Absolutely. The mayor's complaints were not surprising given his situation. Here we had the mayor of a major city who was using his police detail to protect him while he was engaged in illegal activity which he subsequently admitted to and was convicted of by a D.C. jury. He was the chief law enforcement officer of the city, running a police department, thankfully he was not running the prosecutor's office. He had decided that it was okay for him to use drugs, notwithstanding all the bad things that flow from the use of illegal drugs by citizens. In the process, he didn't have the slightest problem corrupting the police department, as well as people around him who knew very well that he was using drugs and showing up at work in various states of stupor. The mayor didn't like the fact that he was being investigated and I wouldn't have liked it either if I were he. The difference is he had the ability to solve the problem which was to stop using drugs which he chose not to do until after he was

arrested at the Vista Hotel by my successor, Jay Stephens. The mayor actually created an atmosphere in town which was regrettable because he used the only tactic he knew how to use at the time which was he claimed racism and abuse of power. I remember having a demonstration against me at Freedom Plaza of all places, led by Walter Fauntroy –

Mr. Stern: In front of the District Building.

Mr. diGenova: Yes. And I always remember back because the two people who were leading that were eventually convicted of crimes, Walter Fauntroy of his evasion of his financial disclosure forms and Marion Barry of drug use. All that aside, the truth is, it wasn't surprising that the mayor was going to complain about an investigation in which subpoenas were issued and of course three deputy mayors pleaded guilty to various crimes involving fraud and corruption. The city at that point was at its lowest point of municipal management. It was a mess. It wasn't delivering services. It was stealing from people. We had a middle management system which persisted to stay, although the successive mayors have done what they can to widdle it out. It was a very bad local government and it needed to be investigated and it was. It's a good thing there was a U.S. Attorney there at the time. And there were trials. Some people pleaded guilty and, in fact, in one of the cases about which the mayor complained, there were acquittals. Everybody was acquitted in a couple of the cases. Should those cases have been brought? Absolutely. The evidence was overwhelming that there were corrupt contract negotiations of all kinds going on. The city actually benefitted from that because when all was said and done, when the mayor was arrested at the Vista Hotel, it was actually with a great sigh of relief in the city that finally the great debate had been ended. He was forced to admit that he had a drug problem and he had had one for many years and had been doing all sorts of things. I

certainly never wished him any ill, but he was a public official that was setting an extremely horrific example for the young men and women of this city who are already steeped in problems related to law enforcement in their local communities.

Mr. Stern: Your successor obtained a conviction after a sting operation, but I have a hunch during the previous time when you were conducting investigations it was pretty frustrating. The *Washington Post* said the following, that you had “dispatched FBI agents who sorted through the mayor’s American Express bills, staked out his house, examined his signature on city contracts, checked his tax returns, analyzed his bank accounts, verified his campaign contributions, even subpoenaed two pairs of shoes he denied receiving from a federal contractor, yet failed to break through Barry’s insulation, the barrier of friendship, power and racial pride that surrounded the former civil rights leader.” I mean this all sounds very, very frustrating.

Mr. diGenova: Actually it wasn’t frustrating. I think it was frustrating for the *Post*. The *Washington Post* had an approach of avoidance of conflict about Marion Barry. They had created this monster – and I’m talking about the editorial page. I’m not talking about the news part of the paper. The *Washington Post* has two heads. There’s the news section and then there’s the editorial section and they don’t talk to each other they tell us and I believe that they really don’t. The news people were interested in news – they are the ones that actually wrote all the stories that led to the investigations. The editorial page, because they created Marion Barry and got him elected, did everything they could to protect him. The *Washington Post* was worried about advertising and the view of them in the African-American community. When we began to do our investigations, there was ample evidence for them that was all later verified by the subsequent events. We suffered from being Republicans, obviously. The *Post* historically has

not liked Republicans and they certainly didn't like conservative Republicans. Even though I had worked for Mac Mathias, I was a conservative Republican. I was a conservative in the Office. I was the House conservative for Senator Mathias, but I was also a law enforcement person. I had been an Assistant U.S. Attorney before I went to the Hill, and the *Post*, I think, was more frustrated than I was that we were serious about doing the investigations of the mayor and the people around him. When people started pleading guilty, like deputy mayors, Ivanhoe Donaldson and others, the *Post* began to wonder aloud whether or not there wasn't some sort of problem at City Hall, and this was the silliest exercise. The *Post*, along with about 75 percent of the population in the District of Columbia knew what Mayor Barry was doing and yet they engaged in this diatribe against the U.S. Attorney's Office and me, personally, for doing our duty. There was so much evidence that there was illegal activity going on in the government, let alone the mayor's personal use of illegal drugs, that it would have been irresponsible not to investigate. Now what the *Post* wanted, the editorial part of the *Post* wanted, they wanted resolution. They wanted this over. This was not good for the city. This was bad for the city's image. Well, there was a very good way for it to stop and that was for the mayor to stop doing what he was doing. But, of course, he decided not to. He decided to use his police detail to protect him from – and indeed, what they wrote was very true, that he was insulated from accountability by loyalty. It could have been racial loyalty, political loyalty, people didn't like a prosecutor looking at the mayor's activities, blah, blah, blah, all very true. But, that's not the way the system works.

Mr. Stem: I read this as being somewhat sympathetic to your plight. What I'm asking you personally, were you frustrated at being unable to break through this insulation?

Mr. diGenova: No. Actually, we weren't frustrated at all. We all understood

that any time you investigate any public official, whether it's Buddy Cianci in Rhode Island. I mean people stonewalled the FBI agents against Buddy Cianci in Rhode Island and it wasn't until they put a wire on somebody and had him go in and had people talking and were able to turn people that they were able to make a case against the mayor up there in Rhode Island. The same thing is true here. The only difference was that this was a city that was very racially divided and that had a history of that type of division, which was coupled with the home rule issues and trying to get more voting rights and that sort of stuff, and we certainly could not have walked away from that stop.

Mr. Stern: Well you also had a Karen Johnson problem.

Mr. diGenova: Oh, yes.

Mr. Stern: Which is a shorthand way of saying that reportedly in **1984**, you were close to indicting the mayor who supposedly had obtained drugs from a public works department employee by the name of Karen Johnson, but she refused to testify against the mayor. She was adjudged guilty of contempt. She went to jail, but she protected the mayor. Later she supposedly said that she had received \$25,000 in payment from some minority contractors who were doing business with the city, but you were unable to prove that and the mayor's associates all denied that it was so. Again, it must have been the most difficult time for you.

Mr. diGenova: Actually, for people looking from the outside in who were reading the papers and thinking that this was like the be-all-end-all, it certainly wasn't a happy time because you always like this stuff to come to resolution. Also during that time, we were arresting Jonathan Pollard, one of the worst spy cases in the history of the United States. The John Hinckley case had gone on. We were engaged in very interesting work. That problem with

Karen Johnson was a problem that was a function of classic law enforcement. Would it have been better if everything had gone the way of any great investigation – sure. It would have been wonderful. It actually may have helped the city in the long run, had things been resolved earlier rather than at the time that the mayor was arrested at the Vista Hotel in a sting operation. The city had to go through the ignominy of having that video tape played all over the world in the capitals. We were in Europe when that went down and it was on the front page of the *London Times*. It was in the *International Herald Tribune*. For those who were worried about what investigations were being conducted by me, my God, look what that did to the city around the world. That was the worst thing in the world.

Mr. Stern: I'll get to some of the other cases you mentioned in a moment, but it is an unusual situation where the city's chief executive is pitted against the federal government's chief representative in that city as you were when you were locked in this spider dance with Marion Barry.

Mr. diGenova: Absolutely. That happens, you'll see that play out sometimes in major cities where a U.S. Attorney is investigating, but Buddy Cianci up in Rhode Island, or the mayor of Chicago, or the big congressman from Chicago, or the mayor of Los Angeles. Anytime the federal government is investigating a local official, there is this horrible conflict of politics.

Mr. Stern: And in fact Marion Barry sued you.

Mr. diGenova: He did.

Mr. Stern: Twice, I believe.

Mr. diGenova: He did. And lost both times.

Mr. Stern: Well, this was a fairly large event in the history of the city of

Washington.

Mr. diGenova: He sued to prevent the investigation from going forth because he said that the investigative power was being abused and there were leaks, et cetera, et cetera and of course the judges eventually disagreed with him and threw out all those cases.

Mr. Stem: You did get convictions of two deputy mayors. You mentioned one, Ivanhoe Donaldson. The other, Alfonso Hill, on corruption charges and then, of course, you were accused of conducting a racial vendetta of some kind. How did you handle that? After all, the city is majority minority.

Mr. diGenova: First of all, there is no way to handle that. When people use race as a defense to allegations of corruption, that is I think the really truly the last refuge of a scoundrel. But when that's all you have, that's what you do. When you are in law enforcement and you have these jobs, you realize that that can happen and that's part of the thing that you accept – that you are going to be accused of those things. Now, it doesn't mean that you can't defend yourself. It does mean, however, that you must be careful about the way you pick your investigations, to make sure that they are well founded, that there are reasons for this. And in all of these cases, there just wasn't any question that to have ignored the existing evidence would have been a folly and would have been a disrespect to federal law enforcement. Not pleasant to be called a racist, but over the period of time, I must say, I have had many, many people from the District come up to me and thank me for those years of hard work because it was the beginning of a process of cleansing city government and it isn't done yet. But the city government is much better off than it used to be. It still has pockets of corruption and penny ante schemes like the deal with the Department of Motor Vehicles. There is always going to be something. But the

kind of systemic corruption from the top down, which the Barry administration represented, is now gone from the District government, and it is gone in large part because those investigations were conducted and people began to think twice about engaging in corrupt activities, and they began to worry about the fact that the federal government might investigate those activities. To me, the best legacy of all is that there was a lesson learned by the local government, and that lesson was that those laws exist for a reason, to protect the people from abusive government power. The way it was being done at that time, the city government was a mess. It is better today – first of all, the mayor is a wonderful mayor. He doesn't have any of the problems that Mayor Barry had, and a succession of mayors has come who have not had his problems. I think if Mayor Barry were candid, he would admit if he'd changed his life at that point, he would have been a lot happier guy. And he may yet make the political comeback, run for Council and even be mayor again. And if he does, I hope he is successful and is healthy and continues to lead a long and healthy life.

Mr. Stem: The paradox is that the Marion Barry matter in which you did not seek or obtain a conviction is probably the highlight of your public service as U.S. Attorney rather than the Jonathan Pollard matter or the John Hinckley matter where you were to a large measure successful. In any event, let me ask about Jonathan Pollard.

Mr. diGenova: Let me say something about that. The funny thing about that is that everyone thinks that I was responsible for the conviction of Mayor Barry and his arrest at the Vista Hotel when in fact it was my successor Jay Stephens, who authorized the sting operation and authorized the arrest and obtained a conviction, although it was only one count out of I think eight or nine, but the jury accidentally convicted apparently. I think what's funny is that people

attribute that conviction to me because of the several years of investigations. Now there is one thing about that that is important, People say, “Why didn’t you indict the mayor? You know, you clearly had enough evidence to do X, Y and Z.” I said to them, “Putting aside the question of whether or not that is true, it is very important that when a federal prosecutor brings a case against a public official, that it is a case that number one is based on overwhelming evidence, and that you are convinced that a jury will convict on.” I could not say that under any set of circumstances during the time that Marion Barry was mayor, and I think it would have been a terrible mistake to have formally charged him, assuming for the sake of argument that there was such evidence, which I’m not conceding that there was, and then let the jury decide, quote unquote. That would have been a terrible mistake. I think the arrest at the Vista Hotel and everything that followed from that was clearly an obvious decision that was made that I support. I think that you couldn’t let something like that go.

Mr. Stern: Well, ethically, if you don’t think you could – if you’re not confident you can secure a conviction, you shouldn’t be charging.

Mr. diGenova: That’s exactly right.

Mr. Stem: Let me ask about Jonathan Pollard, simply because to this day, I think you are still angry at Jonathan Pollard who is still in prison. His spying activities were for Israel, which is not an adversary of the United States. So why do you still feel so strongly about that case?

Mr. diGenova: Well, actually, I’m asked about it. I feel strongly about all the cases that I brought in which either convictions were obtained or weren’t obtained. In this particular case, the reason I have continued to respond is that over the years, his supporters have

attacked the prosecution team for various activities, all of which have been refuted by federal courts, both trial courts and circuit courts, The truth is Mr. Pollard engaged in one of the most damaging cases of espionage in the history of the country. He, in spying for Israel, compromised at a minimum, hard intelligence which included technical data, human intelligence, and documents and photographs and other things, manuals of various types, which would fill a room ten feet by ten feet by six feet. This material was actually taken from classified libraries, delivered to an apartment that was set up on Connecticut Avenue at Van Ness, where a special duplicating room was set up by the Israeli spies; it was duplicated and then returned to him in the same suitcase; and then he would return it to the classified library where he got it. Eventually, this was discovered as a result of some work by the Naval Intelligence Service and we prosecuted the case and he pleaded guilty. The case is remarkable not so much for the spying which was grotesque in its scope and nature, but for the efforts made by the – Pollard’s wife’s family at the time, Ann Henderson Pollard – the Pollard family from South Bend, Indiana, were really quite quiet about all this. They were very nice people. He’s a professor and remains on –

Mr. Stern: At Notre Dame.

Mr. diGenova: At Notre Dame. A very, very nice man. And we do not visit upon the parents the sins of their children. The Hinckleys are very nice people. They are not responsible for their son and what he did. God bless them. And the same thing with the Pollards. In the case of Pollard’s wife, however, her father, Bernard Henderson, was a sometime public relations person from New York. As you know, she subsequently divorced Pollard and he subsequently remarried someone while he was in prison who lives in Israel. And he was subsequently made an Israeli citizen quickly, although privately he had been made one years ago

while he was spying. Ann Henderson Pollard's father decided that they were going to go over the head of the judge and they were going to go to the American people and to the American political community and decide that he should not receive a sentence. Once he pleaded guilty, we worked out a plea agreement. They both pleaded guilty, and they waited I think almost nine months for sentencing while damage assessment was done, presentence reports were provided. He remained locked up. She was out pending sentencing. A very interesting thing happened, *60 Minutes* contacted Ann Henderson Pollard and her father and wanted to do an interview before the sentencing. The reason I know this is I spoke with Mike Wallace who was the interviewer after it had all occurred. I didn't know about this at the time, but it happened I found out later from talking to Mike Wallace from *60 Minutes*. They conducted an interview of Ann Pollard and the agreement was that it would not be shown on *60 Minutes* until the sentencing was over so it wouldn't affect the sentencing. And everybody was happy with that and *60 Minutes* was very happy they told me. A week before the sentencing, two weeks before the sentencing, Bernard Henderson apparently called *60 Minutes* and said we changed our minds, we want her interview to be broadcast before the sentencing because we think it will have an effect on the judge and on the American people. And of course *60 Minutes*, not one to miss an opportunity, said great, when can we run it and they said, well you know, the Sunday before the sentencing. So they ran the interview. Of course, we all watched and it was devastating. She basically said that if we had a chance to do it again, we would do it again and we have no remorse for what we did, blah, blah, blah, blah. Well, of course, if you are the sentencing judge and you hear this from one of the co-defendants in the case, what are you going to do? Are you going say, "Nicely done, thank you very much.?" It was a devastatingly stupid thing to do. It was done without the

knowledge of the two lawyers in the case, Dick and Jim Hibey, the two brothers who represented the Pollards. They were, subsequently I learned, just absolutely flabbergasted to learn that this had been done. They weren't aware of the interview and they weren't aware that this agreement had been done until it was actually broadcast. Well, of course, by the time they got to the courtroom, the judge who was a veteran of the Korean War, Judge Aubrey Robinson, an African American who they have absolutely smeared since his death by being critical of him, listened very quietly to the presentations and imposed a life sentence. Now interestingly enough, he imposed the life sentence under the then-existing federal law, which is a life sentence, but you are eligible for parole after ten years. Mr. Pollard has never applied for parole. Ever. He has continued to seek clemency and political redress, which is fine. As a result, I'm always called and asked what I think, and I say he should remain in prison. And the truth is, I think if he had handled himself differently and if his lawyers had handled themselves differently, I mean the new lawyers, not the lawyers at the time of the plea and the sentencing, but a group of lawyers subsequently has made all of these assertions about government misconduct, none of which are even remotely true and various attacks on Casper Weinberger and Judge Robinson who was the sentencing judge in the case as well as the person who took the guilty plea. I think they would have been a lot better off with different tactics. But this has always been a political thing for Mr. Pollard and his supporters and it has, so far, failed miserably.

Mr. Stern: You supervised the prosecution of John Hinckley for the shooting of President Reagan, James Brady and others. He was found not guilty by reason of insanity. Is that a win (laughter) or a loss?

Mr. diGenova: Oh, I don't think there is any question that we were all stunned

by the verdict. I remember I was over in Arlington, Virginia, at a cocktail party awaiting the verdict and I got a telephone call saying that the verdict was in. And I drove to the courthouse. I sat there when the verdict was returned and I just couldn't believe it. We knew because Judge Barrington Parker had allowed an incredible amount of testimony which many of us believe was inadmissible, but it didn't matter. Once it's in, it's in. We thought we'd probably get a hung jury on the question of insanity, but it didn't happen. I mean, the jury concluded that he was not guilty by reason of insanity and he was committed to St. Elizabeth's. Now interestingly enough, that commitment to St. Elizabeth's was illegal because he was not tried under the D.C. Code. He was tried under the federal code at the time, which didn't have a commitment procedure. He was convicted – the government in that case, interestingly enough, under federal law had to prove sanity beyond a reasonable doubt as part of its case in chief. There was no burden on the defendant other than to produce some evidence of insanity and then the government had to counter that he was – so that was an impossible burden, but that was the system. He was then committed under the D.C. Code which had not applied in the case at all. There was no federal commitment statute at that point. There is one now. Subsequent to the *Hinckley* case there were amendments to the federal sentencing laws and among them were amendments to federal insanity law. There was no insanity law in the federal statutes. Everything was based on an 1879 case.

Mr. Stern: I was going to say, it produced more than changes in the D.C. structure. They also produced a large congressionally mandated change –

Mr. diGenova: And it created one of the worst instances in Senate history in which members of the Hinckley jury were called before a Senate Judiciary Committee panel and asked to testify about their deliberations, which I considered to be one of the most outrageous

and incredibly stupid things that any United States Senate has ever done.

Mr. Stem: Because?

Mr. diGenova: I was disappointed, not offended, by the verdict. I was very, very disappointed by the verdict. Now you talk about being disappointed. You asked me earlier about Marion Barry. Nothing compares to how disappointed we all were with the Hinckley verdict. And Roger Adelman who ran the case and Dick Chapman who were the trial lawyers were devastated.

Mr. Stern: Well the jurors weren't called on the carpet, were they?

Mr. diGenova: Yes they were. Oh, my God. It was one of the worst things I have ever seen. There were these Senators sitting up there, Republicans and Democrats. Now this was bipartisan awfulness, questioning the jurors in a notorious case about their deliberations, about what went on, about why they did what they did. It was absolutely awful. About the only good thing that you can say about it is that the Congress finally addressed the Federal Criminal Code which had been pending – the revision of the Federal Criminal Code had been pending since the 1970s when the famous Brown Commission, Governor Pat Brown of California, had done the recommendations to revise the Federal Criminal Code and update it. Now of course what happened – this is very interesting about how the dynamics and the drama of the *Hinckley* case changed everything. The Senate passed the Comprehensive Crime Control Act of 1988, 98 to 1. The one vote was Senator Charles Mathias against it. It then went to the House where it went into what was then known as the Bermuda Triangle, which was the House Judiciary Committee, where all criminal law proposals went and never came out. They disappeared forever. Peter Rodeno made it very clear that what went in there would never see the light of

same thing on this bill after it was voted out 98-1. And then, something very interesting happened. Without any hearings, because Peter Rodeno was not going to hold any hearings on the Comprehensive Crime Control Act because he was against revising the Federal Criminal Code, a young Congressman from California named Dan Lungren, who subsequently became California State Attorney General and then lost for governor against Gray Davis, got a petition of discharge drafted to take that bill fi-om the House Judiciary Committee, strip it of jurisdiction, and send it directly to the House floor. He got over 300 signatures. The bill came to the floor. It passed the House and was signed by the president in unbelievable record time. For those of us who think that criminal laws ought to be carefully scrutinized, this was a disaster, but Peter Rodeno is responsible because of his total opposition to any amendment of the Federal Criminal Code, is single-handedly responsible for the Federal Sentencing Guidelines, which were in that bill. The complete revision of federal criminal law and the brand new federal insanity defense which was included in that legislation along with a number of other things involving asset forfeiture, all new powers, the first money laundering laws. It was a gigantic – of federal criminal law and the House did nothing but vote on it.

Mr. Stern: Do you know why Senator Mathias voted against it?

Mr. diGenova: Senator Mathias believed that the revision of the laws in a single package was a mistake, that not enough time had been devoted to analyzing the implications of the changes. His position was very defensible. He remains today convinced it was the right vote and, in fact, looking at the Sentencing Guidelines, that was reason enough to have voted against the bill. The Guidelines remain a very, very troubling aspect of federal criminal law.

Mr. Stern: But with respect to the change in the insanity defense, is this an

instance of all's well that ends well?

Mr. diGenova: I don't think that there is any question that the end result was a very important public policy debate about the insanity defense. There was a very important final decision by the Congress on the lack of federal insanity law; the creation of civil and criminal commitment statutes for the first time in federal criminal law, and a general look-see at insanity defenses all over the United States. Now the irony is, of course, that the insanity defense has never been very successful.

Mr. Stern: But the change that occurred as a result of the Hinckley decision was what? The cognitive and volitional prongs all –

Mr. diGenova: Well, as you know, for years the D.C. Circuit had been, under the Bazelon court, we used to call him Dr. Bazelon, the well-known psychiatrist and Chief Judge –

Mr. Stern: A mental disease or defect?

Mr. diGenova: Well the D.C. Circuit had been in the forefront of rewriting the insanity defense. The *Durham* case, all these various cases, creating new law by case law rather than statute on the area of the defense of insanity.

Mr. Stern: The *Durham* case?

Mr. diGenova: It was one of the famous cases. It was a first degree murder case and there were all sorts of issues raised about his sanity. But, the bottom line was that the D.C. Circuit had been in the forefront of writing new types of insanity defenses. Irresistible impulse, picking up old cases from California, looking around, trying to get away from the cognitive defense which was the old *McNaughton* rule. The federal law then was the *McNaughton* rule. They resisted irresistible impulse – they said all this other stuff. It's out. Did he know right from

wrong. Did she know right from wrong and were they able to make that distinction. The control test of the prong was gone. Putting aside the question of whether or not that's good psychiatry or good medicine given the level of psychiatry as a science, I'm not sure anybody can ever answer that question. That circuit had historically been where all of this law was discussed and then the *Hinckley* case came along and it sort of changed – it was like an earthquake when the verdict came in. It was almost like the *O.J. Simpson* verdict for different reasons. People were waiting, they watched and then said, how can this be?

Mr. Stem: They had expectations.

Mr. diGenova: Well, they assumed that a jury – because everybody saw him take out the gun, saw him shoot the president, saw him shoot Mr. Brady, saw him shoot Agent McCarthy, and saw him shoot Officer Delehanty. There was no question that he had performed the act. And of course, Williams & Connolly who defended him, Vince Fuller, his defense attorney, they did a great job. They had a trial judge in Barrington Parker who was fine in the morning but very tired in the afternoon, and as you know he had had a very serious injury. He was struck by a car and was on medications that he had to take to control pain. This was an extremely long and difficult case and they played this case very very well at Williams & Connolly. They did a great job of marshaling their defenses and using the atmospherics in the courtroom and understanding the judge they were in front of to get where they wanted to get and they won a great case. And interestingly enough, they never challenged his commitment to St. Elizabeth's Hospital, even though it was illegal. His commitment to St. Elizabeth's is completely illegal. In fact, I don't to this day know why it hasn't been challenged. At any rate, bottom line is, the atmospherics of that exploded into a public policy debate about the insanity

defense which led to changes in the law, not only in the federal government, but in states all over the United States. I suppose that was a very good thing.

Mr. Stern: Just as the Bazelton court, if you wish, had made much of the law of insanity for the United States, so the *Hinckley* case took it another step.

Mr. diGenova: It did. There was a salutary effect from the decision in the case which was a re-evaluation of the insanity defense. A very intense and very interesting public policy debate that went on for almost a year. The only part of it that I disagreed with was calling the jurors, the *Hinckley* jurors, up on Capitol Hill. I think it was a terrible mistake. I think it was a dark moment in Senate history. In fact, people look back on it now and can't believe that it happened. But it did, and you know I think it was more a circus than it was enlightening.

Mr. Stern: But it is another instance of District litigation, if you will, that is important to the entire country.

Mr. diGenova: It was historic. There's no question that the *Hinckley* case and the verdict were historic in the sense that they were a surprise. The verdict was certainly a surprise to most of us. But then what followed was a very intense and important public debate about a very important public policy question, which is accountability in the criminal law and how do we write that into our laws. I think what came from it was actually very, very good.

Mr. Stern: We are going to go just another few minutes before I go onto my next question. I put on my mental tool bar something you said about 20 minutes ago – that you would never want to be a judge. At that point, it was not opportune to ask you why, but let me do that before our tape runs out.

Mr. diGenova: Well, I think it takes a certain type of personality to be a judge. I

think you have to enjoy the sedentary life. I think you have to enjoy working alone a lot. I think you really – and let me just say this – that having worked on the confirmation of a number of federal judges, including Supreme Court nominees, during my time in the Senate and since then having helped on nominees, there are a lot of people that shouldn't be judges that are judges, but that's not the way the system works. My own view is that it takes a certain temperament, which I don't have. I'm certainly much more restrained than I used to be. But I'm an advocate and while I think I can be fair in making judgments both for my clients and others, that's different than sitting in judgment regularly and sitting there and listening to bad arguments by bad lawyers and good arguments by good lawyers day in and day out and thinking you're enjoying it. I've seen too many judges get cabin fever, get what I call robe-itis, where they become imperious and dictatorial and part of it is they just sit there all the time and that's their life. It's a very confining life and I have great admiration for people who are willing to make what I consider a great sacrifice to be judges, because I think it is a great sacrifice. I think it is an extremely difficult job. It's not a job that, as I said, I would want. I think it takes a particular type of personality. In addition, I think it's actually good that people actually leave judgeships and do something else when they are done. A lot of people are now doing that. They are going out and becoming arbitrators and doing things like that. I think you can be a judge too long. I think there are some people, however, who grow in those jobs. I mean, I must tell you that I remember arguing in the D.C. Circuit when I was a young Assistant United States Attorney in front of those great panels with Edward Tamm and Bazelon.

Mr. Stern: Skelly Wright.

Mr. diGenova: Skelly Wright and Roger Robb and Harold Leventhal, who, to

my mind, was the single most brilliant jurist I ever appeared in front of. Leventhal was a mind in search of a problem. He was so analytical. He wrote so beautifully. He was such a gentleman in the arguments, but he was very biting and piercing, not in a rude way, I mean his questions were so – the intellectual power behind Harold Leventhal’s thinking was just beyond belief. When you were there and he was on one of those panels, if he asked you a question, you knew that something had gone into this question that was beyond your ability to cope with and he was devastating. Bazelon would sit there and ask questions once in a while.

Mr. Stem: Just had a hope he was thinking something favorable to your cause.

Mr. diGenova: Leventhal was. Of course, he died, sadly, very, very young. He was a towering figure on the court. And he was respected by prosecutors, not because he ruled their way, because he didn’t rule their way a lot, but Leventhal was an intellectual giant. He wasn’t a partisan. He wasn’t an ideologue. He was an intellectual giant. And boy, when people went to argue, they actually hoped they got Leventhal, because Leventhal was just an intellectual motor. You know you couldn’t get anything by him. This guy, every case, he knew everything that was in that record and you weren’t going to get by him – I mean the other judges were wonderful. We had a spectacular circuit court at that time. We may have found some of them ideologically a little too lefty, but from an intellectual standpoint, these were really – Bazelon was wonderful.

Mr. Stern: Has there been a decline?

Mr. diGenova: No. I don’t think so at all. I think what’s happened is – I think it’s just a different era. I think the intellectual – we had Starr. We have Bork. We have Judith

Rogers. The array of judges up there is really wonderful. Ray Randolph, all the people up there now are wonderful. That was a particularly interesting time because of the nature of the cases that were going up there. All these insanity cases were going up there. Some of the big cases on standing to sue were during that era. Members of Congress had the right to sue. All of this stuff about the standing of these various interest groups. You know, the Wilderness Society, all of these – how did you create – those issues of standing which were the meat and potatoes of public policy debate at that time were the most important cases in the country. Far more important issues than the stuff that was in the Supreme Court were happening in the D. C. Circuit. Their civil docket on regulatory issues and the right to sue, the standing to sue, ripeness to sue, that was the most important stuff happening in the United States.

Mr. Stern: First amendment?

Mr. diGenova: Oh my gosh, the first amendment stuff, the regulatory stuff.

Mr. Stern: Civil rights, civil liberties?

Mr. diGenova: Yes. And that circuit was just – you know, young lawyers from all over the United States wanted to clerk on that court. That was the court. Not the Second Circuit, not Boston, not the First Circuit, the D.C. Circuit. That's where the clerks wanted to be.

Mr. Stern: When I interviewed you in 1985 for a bar publication, you were proud that the District served as a laboratory for a number of crime control measures, some of which we have mentioned already. One of them, for example, I'm thinking of, is pretrial detention. Congressional control over the District does permit that possibility. Is that another thing that is unique about the District of Columbia?

Mr. diGenova: Which thing?

Mr. Stem: The fact that Congress can write laws for the District that perhaps a more representative process wouldn't permit?

Mr. diGenova: First of all, under Article I, Clause VII, Congress has plenary jurisdiction over what is called the seat of government, which is the District of Columbia. It used to be a couple of square blocks. Now it is the whole District. People can differ over whether or not that is a good idea or a bad idea. I don't think there is any question that the District has largely benefitted from the fact that Congress has been here and helped as a matter of fact bail it out from its incredible bad fiscal management.

Mr. Stem: I was going to ask you next whether it's a good idea or bad idea.

Mr. diGenova: And I do think that the unique situation of having Congress legislating for the District obviously has problems associated with it because if you don't pay attention when you legislate, then you don't necessarily get good legislation. I think for the most part, the history of it has been that, with the exception of the appropriations process where there's haggling over how much the money the city needs, the intervention by Congress has been mostly benign. There have been some obviously political differences. But in the criminal law area, the ability of the District to serve not necessarily as a laboratory but as a place for legislation which was really quite modernizing in the 1970s, when they created Superior Court out of the old Court of General Sessions, reorganized the criminal law into a code and of course instituted the insanity provisions which were later replicated for the entire federal judicial system in the legislation that was passed in the late 1980s. I think the city has been an experimental place for Congress, and I think for the most part the city has benefitted from that. Whether those are the things that the people of the District of Columbia would have supported through a legislature, I think for the

most part the answer is they would not have supported those things.

Mr. Stern: Yes, that was the basis of my question.

Mr. diGenova: I think they would not have.

Mr. Stern: So that's the difference in D.C. as opposed to a state. Well, I asked you about pretrial detention, now you are a defense lawyer, not a prosecutor. Do you still feel that pretrial detention was a good thing?

Mr. diGenova: I don't think there's any question that it was. In terms of violent crime and dangerous crimes, pretrial detention, which is mostly what it's for, big drug cases and things like that and terrorism cases, now they are trying to have it apply to that, was a good thing. I think pretrial detention, which of course involves a hearing and involves a judge and involves an opportunity for evidence to be presented, I think, has generally proven to be a very good thing. Generally it is used for people who have very lengthy criminal records, rarely used with someone who is in the system for the first time. I do think that it's good to regularly review the use of these things to determine whether or not they are being used fairly. Anyone who is against that, really doesn't understand the dangers of legislating at all and things do go wrong. Legislative bodies don't always get it right. I think for the most part the management of pretrial detention by federal judges all over the country as well as Superior Court judges has been very, very good. For the most part now, given the type of crime that the District has suffered from in recent years, if anything, I think the people in the District have become more conservative and more pro-law enforcement, even though they are very disappointed in their police department right now and with good reason. I think for the most part the people of the District only have become very supportive of pretrial detention and a lot of the laws that were in that package that people didn't

like when it was initially enacted by Congress. In fact, the D. C. City Council has become more conservative on law enforcement issues over the years and indeed more critical of law enforcement and even the U.S. Attorney's Office for not doing more, for not being tougher. We are really seeing a fascinating change in the attitude of the City Council which back in the '70s was very anti- any of this stuff and really lobbied against the reorganization of the court system.

Mr. Stern: Have the courts and the prosecutors' offices made inroads against crime? Is it really much different now than it was 20 years ago?

Mr. diGenova: You know, I don't know if it is possible to measure – I think what has happened is crime has changed. The types of gangs have changed. We now have a diverse group of gang organizations running the gambit from Hispanic and Latin gangs to Nigerian gangs, Dominican gangs, Jamaican gangs. We even have some Asian organized crime in town. Crime is a never-ending problem and dealing with it is an never-ending challenge. On the question of whether or not the District is safer, I think certain parts of the District are safer than they were. I think other parts of the District are no better off than they were 15 years ago. I think the continuing challenge of young men and now increasingly young women who come from households which are not families anymore, creates an incredible dilemma for a city, for police, for prosecutors, and for politicians who have to try and make things work. I think the city is generally better off. I think the police department has gone down hill tremendously since the late 1980s.

Mr. Stern: Because of what, leadership problems, budget problems, manpower?

Mr. diGenova: I think for the most part, I would say that the biggest problem has

been hiring. They have done a very bad job of hiring recruits.

Mr. Stem: Screening?

Mr. diGenova: Getting people. The screening process has been very lax. This was particularly so in the late 1980s when large numbers of unscreened individuals were brought in and we got a large number of corrupt police cases. Much more so than had ever been the case before. The department has suffered from leadership problems over the last –beginning in the mid-1980s. I think that really is something that is going to be a long-term problem. I know that Chief Ramsey, who came in from Chicago, he was faced with a daunting task. He had inherited a police department that was in disarray. And it remains in disarray to this day, notwithstanding herculean efforts by him and Deputy Chief Gainer. It is going to take a number of years to rework the D.C. Police Department to reconstitute it as a truly professional organization. It's just one of those sad stories.

Mr. Stem: We are about out of time. If I can get a quick answer – do you think the closing of the Lorton facility and the transfer of the responsibility for prisoners to the federal government makes any difference?

Mr. diGenova: Well, it certainly makes a budgetary difference for the District. It means that they don't have to pay for a prison system and I think that it was inevitable that the Lorton facility would be closed. There was simply no political constituency for it. If anything, there was a political constituency against it. I do think that one of the side problems with that is, is that people get sent to federal institutions that are away from the District of Columbia, which is difficult on the families of prisoners, which means if you want that problem solved, you have to have a prison in the District of Columbia, which nobody wants to build. As I've said for those

who want to have local prosecution authority, if you are going to have prosecution authority, you have to have a prison. If you don't want to build a prison in your jurisdiction, then don't ask for prosecution authority because you can't convict people and then send them to Chicago.

Mr. Stern: This ends recording number one, our Oral History Project interview with Joseph diGenova recorded on September 23, 2003.

**Oral History of
JOSEPH E. diGENOVA
SECOND INTERVIEW - NOVEMBER 11,2003**

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Joseph E. diGenova, former United States Attorney for the District of Columbia, and the interviewer is Carl Stern. The interview took place on November 11,2003. This is the second interview.

Mr. Stern: In our first discussion, you said the D.C. Bar is unlike the bench and bar elsewhere. Can you tell me again what makes it different or unique?

Mr. diGenova: Well I think just as New York's Second Circuit in the Southern District are sort of the home of financial and big business litigation, the District of Columbia bench and bar is the center of government litigation. This is where government litigation happens, although of course there are cases all over the United States in federal courts involving governmental functions in run-of-the-mill cases, the cases that matter, the cases that really speak to the regulatory function of government congressional standing cases from the 1970s. You name it. They were all here because this is where venue rests for these issues, because the Congress is here and the Supreme Court is here and the White House is here. And as a result, this is not a commercial litigation center because there is no commerce in the District of Columbia, save for the commerce of government. So our bar is a different bar in the sense that we're people and our bar – with the exception of private injury plaintiffs' lawyers and a few other isolated areas – the bar of this city is about the business of government and always has been. Regulation and the FTC, the regulating of industries, the granting of licenses, the pursuit of government contracts. All of those things are the meat and potatoes of the federal government, and since this is the seat of government, our litigation, our bench and our bar, reflect that. That

certainly has been the case in the past.

Mr. Stern: I imagine there is more press attention than there might be in other cities?

Mr. diGenova: Well, the secondary effect of all of this is given the stakes, which some would say are very low, others would say very high, the press becomes extremely interested in what happens here. And, of course, since the Supreme Court sits in the District of Columbia, the highest Court in the land and the Court that tells us what the constitution means on any given day, it makes this truly a unique city in that sense and in fact it is wonderful and we are a town in which there are lawyers who do nothing but practice in the Supreme Court of the United States, and a few of the appellate courts in the country. It's a remarkable – Erwin Griswold, Ken Starr, all of these people who have spent years litigating in the high courts, Ted Olson, who was a Supreme Court litigator before he became Solicitor General. It is a unique bar in that sense and a bar that has a different type of comradery.

Mr. Stern: Considering the importance of the issues that are litigated here, is the quality of the bar higher than in a run-of-the-mill litigation city?

Mr. diGenova: Well, we always tell ourselves that it is because that's the nature of lawyers. And lawyers all over the country will tell you that they have the best bar in the country. I think generally speaking, the bar in this town is at a very, very high caliber and certainly with regard to federal litigation, I don't think there's any question that on any given day you can walk into the United States Court of Appeals or the Supreme Court or U.S. District Court here and see some really fine litigating going on. But just like any other bar, we have our kickers, both on the bench and in the bar. But I think overwhelmingly, the quality of

representation and adjudication is very, very high.

Mr. Stern: I'm sure you remember when there was what we referred to the "Fifth Street Bar." Is there –

Mr. diGenova: It still exists.

Mr. Stern: Well, that's what I wanted to ask you.

Mr. diGenova: Well, the Fifth Street Bar which refers to the lawyers who practice criminal law in the District of Columbia and go and get court-appointed cases in what is now called Superior Court, it used to be called the Court of General Sessions before Congress reorganized it in the early 1970s and created a court of general jurisdiction. It is a very good bar. The quality of representation there for the most part is excellent. And these are people who try cases every day in the local court. See juries, talk to them, select those juries, present evidence. They have a remarkable knowledge of the jurors of the District of Columbia, the judges and the process. I think given the number of cases that go through the system down there, the level of representation I think is absolutely superb. What is the real problem for the court is not the lawyering or the judging, although the Superior Court does have some problem judges, it is the support services of the court which have come under the most scrutiny. Child welfare, juvenile court, juvenile justice, certainly the provision of foster care, things of that nature, which are all branches of the court now, are things that have come under scrutiny. But in fairness to the District of Columbia, also all over the country, New Jersey, other states have had terrible, terrible problems with juvenile and foster care problems witness this recent case involving this horrible thing involving children in New Jersey. In that sense, I think the District of Columbia generally speaking has had a very good bench and bar, both locally and federally, and particularly by the

way, the local bench in Superior Court has been helped immensely by the fact that when Congress reorganized the D.C. judicial and criminal justice system it created the Superior Court and made those judges confirmable by the United States Senate through a selection process which involves a Judicial Nominating Commission made up of residents of the District of Columbia. That process has proved to be very successful in selecting generally very qualified people for the bench.

Mr. Stern: So there's another difference between this jurisdiction and any other jurisdictions?

Mr. diGenova: Yes, absolutely. We have, of course, this incredible federal presence, which is borne out of the constitutional experience in Philadelphia. As you well know, there was to be no seat of government but unfortunately the governor of Pennsylvania decided he was going to allow a group of renegade unpaid militia men to surround the continental Congress and in the course of doing – the constitutional convention rather, when that happened, Ben Franklin and all the boys said, this is never going to happen again. We're going to have a seat of government and thus the seat of government was born in Article I.

Mr. Stern: Go back one second. The rap on court-appointed lawyers is that the first time they meet their client is two minutes before they have to appear in court.

Mr. diGenova: Well, that's generally true when they are appointed at the beginning of the case because that is where they get their cases. People are arrested. The lawyers are in court waiting to be assigned cases. The judges assign them. And of course they meet their client for the first time at the arraignment, or in the cell block prior to the arraignment, because that is the nature of that particular type of case. The case doesn't exist for that lawyer

until they show up in the courtroom. These are not clients who generally have a lawyer on their payroll.

Mr. Stern: Right, but are they going to plead out in the next ten minutes?

Mr. diGenova: Well, sometimes pleading out in the next ten minutes may be a brilliant stratagem. Sometimes it avoids even worse consequences because prosecutors have responsibilities to move cases and dispositions are things that are devoutly sought.

Mr. Stern: Well you've heard about assembly line justice, the mill – do we have a mill here?

Mr. diGenova: We have no more of a mill than any other major city in the United States and perhaps ours is a little better, because there is much more scrutiny of what goes on in Superior Court than there is in other major cities. The other thing is, this is not a big city. People tend to think of Washington as a big place. This is a small southern town. Its judicial system in Superior Court reflects that mentality. It is not a big court, it is a busy court. It is a court full of litigants, witnesses, judges and cases. But it is clearly a manageable calendar, although there has been some problem in managing the calendar in Superior Court. I don't think it has anything to do with the volume so much as it has to do with the kind of management that has existed in the court over the last ten years and that's why Congress has become so much interested in family court, cases involving abused children because it has observed what is going on there and has not liked what it's seen. By the way, neither has the public, so Congress has not been heavy-handedly overseeing this. It has been doing something it should have done a long time ago, which is take more of an interest in the court. Now, as you know the court has been totally federalized. The budget is paid for by Congress as a result of the inability of the District

of Columbia government to right its finances. When the financial control system went into place, the Congress decided that the federal government should pay for the courts, spend more time overseeing it, take all D.C. prisoners into federal prisons as Lorton was closed down. A series of very, very important public policy decisions was made during the Clinton administration which I think to the surprise of many, many Democrats, led to basically a diminution in local authority, not only over its judicial system, but its criminal justice system and certainly its prison system which basically doesn't exist anymore.

Mr. Stern: This quasi-independent local system of courts and judges had its origin did it not in home rule which came to the District in the early 1970s?

Mr. diGenova: Actually, it had its origin in two things. Part of it was home rule, which happened during the Nixon administration which, as you know, President Nixon supported during the time of his impeachment and potential impeachment during Watergate. But it was preceded by the Court Reorganization Act, which established Superior Court. That happened way before home rule and that is really a fascinating part of the District's history. How the Court of General Sessions, which was this sort of sloppy local court was built into what now exists, which is a full scale Article I court system. Because, as you know, all local cases both civil and criminal of all local varieties used to be in United States District Court. Automobile accidents, construction disputes over buildings in D.C., and of course, local crimes were all tried in United States District Court, except for some minor offenses which were tried in General Sessions. When Congress reorganized the court system in D.C., it stripped all that jurisdiction away from the federal courts, the Article III federal courts, and moved it across the street to what became known as Superior Court. And what we had then was basically a free standing equivalent of a

state court system with courts of general jurisdiction. That was good because while the judges were nominated by the president and confirmed by the Senate, a local judicial selection committee determined who the three people were that the president got to choose to be judges out of any given nomination. So there was a home rule element as part of that which was very, very good. And then it was followed, of course, by the Home Rule Act, which created what they called the District Council and an elected mayor.

Mr. Stern: I believe a court reorganization occurred in the late 1960s, which certainly would precede home rule.

Mr. diGenova: Late '60s, early '70s. I think the Court Reorganization Act may have been around '72.

Mr. Stern: I came here about 35 years ago. It seems to me we had blue ribbon juries? Is that right? Is that before your time?

Mr. diGenova: That predates me. My interest in the District of Columbia started in 1970 when I clerked for George Gallagher on the D.C. Court of Appeals.

Mr. Stern: In any event, the D.C. bench and bar would have been a lot smaller then. Has it lost its clubbiness?

Mr. diGenova: Well, there's no question about that. I mean this is a bar with tens of thousands of members all over the United States. Everybody wants to be a member of the D.C. Bar, and for years it was very easy to waive in if you were a member of any other bar in the United States. They've since changed the rules a little bit, although I don't know what they are. I took the D.C. Bar and passed it the first time and I encouraged my friends to waive in while they could from all over the United States. It's a very big bar, but it still is – all of those people

from around the country who pay their active member dues really don't participate in the bar. The people that do participate in the bar are a relatively small number of local practitioners. It still is. Most people do know the active members of the bar, certainly in their particular area and the bar elections themselves are really quite local and interesting and I must say highly energetic, some of the more recent bar elections for president have been somewhat reflective of the change in national politics. Pretty aggressive stuff fi-om time to time. So, I think it is still a very small southern town with a very small bar in terms of its active members who participate in the committees and things like that.

Mr. Stern: It seems to me that another difference though is that D.C. attracts a large number of young people and not-so-young people, you might be a case in point, who come to the District from elsewhere in the country to participate in government or government agencies or political office and then after a certain number of years, leave government service and join a firm here or open their own shop. The number of ex-senators and congressmen, for example, who have stayed on here as lawyers, I suppose the number is truly in the hundreds.

Mr. diGenova: This is true. In that sense it is different.

Mr. Stem: Is that good, by the way?

Mr. diGenova: I think it's very good. I think it's good for people to be in government. I think it's even better for people to leave government, because I think people who have been in government can bring something very, very good to the private sector and to private practice and to lobbying, understanding –

Mr. Stern: But these rainmakers, the senators who have –

Mr. diGenova: That's no different than any other enterprise. There are

rainmakers in the automobile industry, in the medicine industry, in the pharmaceutical industry. The business of this city is government and government includes legislation and regulation and litigation. Our constitution recognizes a first amendment right to petition the government for redress of grievances. That's why the regulation of lobbying has always been a sticky wicket for Congress and the Supreme Court has made it very clear that while it can certainly control corrupt activity, you can only go so far, and lobbying is a legitimate function of both government and the private enterprise. Obviously there are people who do it sometimes who bring it credit, and there are some people by the way they conduct themselves, bring discredit upon the profession and upon the function. But that's no different from any other business in the country.

Mr. Stern: What do you think of these somewhat hyphenated lawyers who are attached to law firms but who in fact are part of a lobbying arm, the legislative representation arm of the firm? Is that a good thing? To be hyphenated?

Mr. diGenova: Sure it is. Well, what do you mean? I'm not sure what you mean.

Mr. Stern: Well, they are not really practicing law.

Mr. diGenova: Well, I think they are. I think lobbying is practicing law. I think if you are a lawyer in a law firm – there are certainly pure lobby shops that do nothing but lobby that are not law firms and they are performing a function which is separate and distinct, but it's also no different than the lobbying that goes on at law firms. Law firms have done that because it is a big business. And it makes money. And it's a good business.

Mr. Stern: You don't regret that it's happened?

Mr. diGenova: I don't regret it one bit at all. In fact, I'm glad that it's happened.

I think it's opened up opportunities for people. It's educated people about the process. Our firm does lobbying. We enjoy it. It is a wonderful part of our practice. We like the work. We like the issues. We like dealing with Congress on issues where you have to be persuasive not to a jury of 12, but to a jury of 535. Certainly 50 percent of each at a minimum, forget the filibuster in the Senate, the notion of having a client that has a legislative or regulatory problem that needs to be solved with the government is really challenging and involves different types of skills that a lot of people simply don't possess. There are a lot of lawyers in this town that can't stand lobbying. They don't want anything to do with it, and I'm delighted. That means there is more work for the rest of us who do it. We do both litigation and lobbying. We've always enjoyed that combination because it allows you a variety of work and it gives you a chance – litigation is fundamentally a very debilitating experience for everyone involved in it. There's nothing pretty about litigation, and it solves very little, by the way. It is a big waste of time for the most part. It makes a lot of money for lawyers. It doesn't solve very many problems. Costs people a lot of money. The legislative process may cost people a lot of money, but generally it does solve problems. And it may even solve them faster than litigation, even though a piece of legislation takes about five years from start to finish to get through Congress. We've been involved in cases involving emergency legislation. We're involved in a project right now, a major, major project involving legislation, what we're working for and working on is fascinating. It is also fascinating for our young clerks and the people in the firm who learn something about the governmental process, who really get into an issue and understand how government functions. That can't happen any other place. Now it's true – there are legislative legal lobbying practices in the state capitals of every state in this union – Sacramento, Albany – and those practices are very much

like what we do here. The difference is the issues are just different.

Mr. Stem: But certainly a very significant number of lawyers are attracted to public service because they know when the constituents turn them out, they likely can stay. Now, sometimes they catch what is it, Potomac Fever? I'm not sure.

Mr. diGenova: Sure, and they want to stay. I came here in 1967 to go to law school. I graduated from Georgetown and I decided to stay. I enjoyed it immensely. It was during my three years here. I was always – I was a political science major and my emphasis was on international relations. I enjoyed Washington. I had no intention of being a lawyer. I was going to teach political science. I decided to go to law school and I enjoyed it immensely. And after I graduated, I clerked and eventually became an Assistant U.S. Attorney. Washington to me was really the perfect storm for somebody interested in the law and politics and governmental policy and international relations. There was no better place to be. If you had an interest in politics and political science and how government functions, both good and bad, there was no other game in the United States except to be in Washington, D.C. And in 1967, it was even a smaller southern town than it is now. It is still geographically very small. It's a lot bigger economically and I think you are absolutely right that the lobbying class has certainly grown along with the chattering class in this town.

Mr. Stern: Well isn't it the second largest market for lawyers?

Mr. diGenova: Yes. It is. And it is why all these law firms from around the United States want to have a Washington office, even though they don't know how to run it, they never know how to have it function. I've watched law firms have Washington offices. They try to run them like they run an office in Chicago, New York, Boston or Philadelphia, and of course

this is not that market. It doesn't work that way. There is no commercial litigation here. The stakes here are different. The players are different. The way you approach problems is different and that's why so many of their Washington offices are not profitable because they don't understand why they are here. They want to be here as a marquis issue and they end up basically running a loss leader.

Mr. Stern: This might be a good point to back up and let me get some biographical information from you. I believe you were born in Wilmington.

Mr. diGenova: Wilmington, Delaware.

Mr. Stern: Okay, on what date?

Mr. diGenova: February 22, 1945. Senator Edward Kennedy and I share the same birthday.

Mr. Stern: Well, okay then, we'll send you both a cake (laughter) as appropriate. Tell me about your childhood family. Your mother, father. What sorts of things did they do?

Mr. diGenova: My mother is still alive. In fact, today she celebrates – today, November 12th – she celebrates her 91st birthday. My father died four years ago. He was in his mid-80s. He was an opera singer and a professional singer and that's how we were raised with what I called circus people. All the people in the business of opera and musical comedy in New York and elsewhere.

Mr. Stern: And he supported the family on his singing?

Mr. diGenova: He did. He was a really a thorough professional and a wonderful guy and really a delightful human being.

Mr. Stern: What name did he perform under?

Mr. diGenova: His real name. His name was – he went by Eddie diGenova, but his real name was Egidio diGenova, which is Italian for Giles. That's my middle name. And he performed all of his life and had a wonderful life and a great life and he was loved and beloved in his community. He was the person that everyone had to sing at their wedding or their funeral.

Mr. Stern: Why Wilmington?

Mr. diGenova: Well, he was born and raised there. My grandfather and all of our grandparents on both sides came from Italy and settled in Wilmington, Delaware, which was a great settlement area in the teens.

Mr. Stern: What part of Italy?

Mr. diGenova: All over. Some from Naples, some from Sicily, some from Calabria, some from Abruzzi. Different personalities, different approaches to life, to food. Mostly different approaches to food.

Mr. Stern: Did you have siblings? What do you remember about your childhood?

Mr. diGenova: Well, actually, I must say, when you are living in an Italian household, your life is a pretty good one. Rudimentary rules – of course, we were all raised in the Roman Catholic Church and the rules of behavior were established early, not only by the church, but by the family hierarchy. There was lots of discipline, Lots of love and lots of food, lots of music.

Mr. Stern: How many were in your household?

Mr. diGenova: There was just my brother and I. My brother's name is Ennio.

Mr. Stern: And what does he do?

Mr. diGenova: He is a musician. He is a really fine musician. And he is a hair stylist. A wonderful, wonderful professional hair stylist and professional musician and he owns a dinner theater in Wilmington, Delaware, outside of Wilmington in a small art village. He runs the orchestra, as well as performs. He writes and composes music and is an orchestrator and conductor. He is what you call a keyboard man. He is also **an** organist and other things. He is really a wonderful guy.

Mr. Stern: That musical background was not lost on you. **As** I recall, you sing and you have a recording that the Smithsonian put out.

Mr. diGenova: I do. Several, actually.

Mr. Stern: Tell us about that.

Mr. diGenova: Well, my father, as I said, was an opera singer and I was raised with that and genetically I acquired his lungs and his vocal chords and from a very early age I had the talent of singing and being able to sing and as a result for my entire life I have sung and have enjoyed it particularly throughout high school and college and after that. I've done a lot of professional and semi-professional singing. It's been a great part of my life and something which I have always been thrilled to have had a part of my life. I think music is one of the great things for people to experience. In my case, I was so lucky to have a father whose life was devoted to music.

Mr. Stern: Do you play an instrument?

Mr. diGenova: I play the piano. I'm not an accomplished pianist; enough to make myself happy.

Mr. Stern: Did you have professional voice training?

Mr. diGenova: From my father. My father trained me from high school through college and I must say he was really a good voice coach.

Mr. Stem: Are you available for weddings and bar mitzvas? (laughter)

Mr. diGenova: Not anymore. (laughter) Only for fhends. I just sang at a wedding recently. A fhend of mine got married for the second time in Cincinnati, Ohio, and he insisted that I come out and sing in his wedding, which I did and it was really a wonderful experience. I do that from time to time.

Mr. Stem: And when did you decide that you weren't going to be a professional musician or singer?

Mr. diGenova: In college. I was actually asked to do some work at WAW in Cincinnati, which had a huge production facility for local television shows. That was the biggest outside of Chicago, they had the biggest production facility in the midwest. Someone had seen me sing at one of the University of Cincinnati shows which were really spectacular. We had several proscenium arch theaters on campus, because as you know the Cincinnati Conservatory of Music is there. Had marvelous orchestras, great ballets. Because we had people studying acting and theater and music there as well as voice, and I was in all of those shows, even though I was not in the theater –

Mr. Stem: But is that why you chose to go to Cincinnati?

Mr. diGenova: No, no. I went there for a whole host of other reasons. Mainly because they had a great political science department and Hans Morgenthau was teaching there from the University of Chicago for a couple of years on a sabbatical leave and I got a chance to

study communism under Hans Morgenthau, and for me that was a great opportunity because I was a very, very heavy duty political science student in high school. It was a big deal to me.

Mr. Stern: Did you hold class office in high school?

Mr. diGenova: I did not. I think maybe I was vice president of some class, but that was enough. I think I decided not to delve into that much further. Cincinnati was a great town. In fact, I go back from time to time. It is a great city with a great music history. We did three shows a year in Cincinnati and that was great. What was so great about that music was that we had these wonderful orchestras from the conservatory. These student orchestras that were like singing with the National Symphony. When we did shows, we did shows. They were spectacular.

Mr. Stern: But it was never a problem for you to decide which road you wanted to take.

Mr. diGenova: No, because you couldn't make a living in music. Many are called but few are chosen. You could spend your life singing in dives all over the United States and working the toilets, as Lenny Bruce used to say, but it's not a fun way to make a living. What you want to do is have music as an avocation, as an add-on to your life. That you move in and out of at your pleasure without having some slug run your life because there a lot of slugs in the music industry and you just have to watch television to see that. Just look at the people that run CBS for example, and the mini-series about the Reagans. Those are real slugs. (laughter)

Mr. Stern: Hans Morgenthau attracted you to the University of Cincinnati. What attracted you to the Georgetown Law School?

Mr. diGenova: It is really fascinating. I had a chance to go to the University of

Pennsylvania, or Georgetown, or a couple of other places, Fordham, and I picked Georgetown because I just felt it was far enough away from Wilmington that I could really be away, but I had been in Cincinnati for four years and that was just a little just too far away from my family. That was a seven and a half, eight hour car ride then or a train ride to Paoli, Pennsylvania, then a car or bus ride from Paoli to Wilmington. First of all, Georgetown was a great law school. It had a terrific reputation. It was a little more conservative than it is now. Now it is kind of interesting sort of left-wing think tank, but then – and it still has a very good reputation, notwithstanding that. I decided it was a great school, that it was close enough that I could get back to my family when I needed to and see them regularly, but far enough I could have an independent life and have my privacy. And it was the center of government and I had just graduated with a degree in political science with a major in international relations. **So**, here was the obvious choice and it was a decision I never regretted. I haven't left since 1967.

Mr. Stem: How did you do in law school?

Mr. diGenova: I did very well. I made *Law Review* and decided that that was a waste of time and decided not to do *Law Review* after I was appointed, got into it a little bit and thought I think I'd rather do other things like go out and work in government and I did clerkships at agencies and things like that which I thought was just great.

Mr. Stem: And, of course, your background in performing helped you a little bit as no difficulty in hearing you. You speak up loud and clear. Do you think that was aided by your operatic training?

Mr. diGenova: I don't think that there is any question that if you have performed in front of an audience as I did starting in high school, audiences of 12 and 1500 people and for

singing in theaters where you are responsible for moving from A to Z in a production and selling something musically and dramatically and theatrically – that that is a great training certainly for people who do advocacy work of any kind, whether it’s in the courtroom, up in Congress, on a stage, whatever it would be, or in politics. Because the notion of convincing people that they should agree with you or at least not oppose you is all about the art of advocacy and that type of training in theater and music is absolutely indispensable.

Mr. Stern: Do you acknowledge having a little bit of “ham” in you?

Mr. diGenova: Well, I would call it theatrical guile. (laughter) I wouldn’t call it “ham.”

Mr. Stern: Presence. How about that?

Mr. diGenova: Yes. I like that. I like presence.

Mr. Stern: So, you completed your Georgetown Law Center education in

19–

Mr. diGenova: –70. At the height of the Vietnam war.

Mr. Stern: And then what? Were you draft deferred?

Mr. diGenova: I was actually 1-Y. I’m partially blind in my left eye, which I thought was idiotic because I always thought they could put me behind a desk somewhere in DaNang, but these idiots – the doctor in Philadelphia. I’ll never forget it when I was drafted I went to Philadelphia. I did my induction physical and did my eye test and I couldn’t read the chart. And the guy says why can’t you read the chart and I told him I had this eye thing. He said he had never heard of it and then he did an eye exam. He had one of these eye doctors come. He says the kid’s not lying. He’s got an eye problem. So he says that’s it, you are 1Y and I said

well, you mean I'm not going to be drafted? He says no, you think we're going to pay you for the rest of your life for your eye problem? I mean, that was the decision. It was just totally idiotic decision. I could have been put behind a desk somewhere and done a perfectly good job and they didn't want to pay for my VA medical benefits, 25 years down the road. I mean, it was just idiotic.

Mr. Stem: Well, you ended up working for the government anyway, but simply in a different place.

Mr. diGenova: But I did get student deferments as well because they were available and since I was 1Y and theoretically if everybody else was dead I could be drafted. I, of course, took student deferments like everybody else, which by the way is one of the reasons I would never run for public office, because like a lot of people who went to Vietnam I think that those of us who didn't go to Vietnam for whatever reason, I think you have to think very seriously about since you didn't serve, particularly at a time of war whether or not you should ever seek public office when you didn't serve, when you had a chance to. Even though I was 1Y, I've always felt that that was a reason not to run for elective office.

Mr. Stem: Okay. Well, you finished law school and you presumably believed you were unemployable, right?

Mr. diGenova: Oh, absolutely.

Mr. Stem: #at did you do?

Mr. diGenova: I did as many people do. I applied for a clerkship and got one with Judge George Gallagher on the District of Columbia Court of Appeals, which had just gone through the reorganization and become the primary court of primary jurisdiction at a very

important time in the city's history and it was a marvelous experience. Judge Gallagher is, he's alive, God bless him. He is a wonderful man. He had been a Justice Department litigator. He was appointed by President Johnson to the bench. He was an absolutely superb jurist and taught me so much about the law. I will never ever be able to repay him for his tutelage.

Mr. Stern: I don't want to put you on the spot, but can you remember something that you learned from that experience that has remained with you?

Mr. diGenova: Facts. Stick to the record. I want to know what the law is, not what you would like it to be. You just tell me what the law is, then we'll sit down and discuss the case, but get the facts straight. I want this record. I want you to know this record cold. What's not in the record, I'm not concerned about. He's in appellate court. What is in the record I am concerned about? If something is missing from the record, I'm concerned about that and the law, and then we'll talk about the case. He was a real stickler for the facts and what the law is. And he was a gentleman about it throughout the process and very, very knowledgeable, just terribly intelligent and decent guy and wonderful to work with.

Mr. Stern: How much writing did you do?

Mr. diGenova: A lot. But he wrote all of his opinions. We would do memos and occasionally and I think generally we would take a shot at draft opinions, but they never looked like that when they got done. He was really good at what he did.

Mr. Stern: You are saying "we."

Mr. diGenova: Well, there would be law clerks all at the same time. There were usually two of us for each judge. Many of the judges did not write their own opinions. He wrote his opinions. We did memos. We did sometimes drafts, but nothing that we wrote ever looked

like what was published because he sat down and he really wrote his opinions.

Mr. Stern: These were largely civil cases?

Mr. diGenova: Civil and criminal. No, because these were appeals from the new Superior Court and appeals from the old Court of General Sessions, which were still pending at the time the conversion took place to the D.C. Court of Appeals.

Mr. Stern: Clerkships only last so long.

Mr. diGenova: A year. Each of those lasted one year.

Mr. Stern: Okay. Now what?

Mr. diGenova: Well, I took a year off after that to sort of clear my head and decide what I wanted to do. So, I went back to the University of Cincinnati where I volunteered to be the Executive Director of a community program based at the University of Cincinnati with a friend of mine named Dave Altman who is a very, very well-known environmental lawyer now in Cincinnati. We had been both very politically active during college on the school newspaper writing columns. He was the editor-in-chief and I was a political columnist and wrote columns about the Vietnam war and race and all that sort of stuff. And I went back to spend a year with him to work on drug treatment programs, environmental programs and things like that, just as a way to sort of stop working. I took a year off. I had saved some money. I went there and lived in an apartment with him and a couple of other people. We had a house and we just sort of tried to make ends meet and I took a year off, and then as I did that for a year, after a year of that, well I thought I knew what I wanted to do. I wanted to be an Assistant U.S. Attorney. I wanted to litigate and I called Judge Gallagher who had been my judge and I asked him if he could get me some interviews. He did. He called Don Santarelli at the Justice Department who was then head

of LEAA, or about to become head of LEAA and Don, I think, was a Deputy Assistant Attorney General at that point. I went and I interviewed with Don. He called Harold Titus, who was then United States Attorney. Harold interviewed me. I got interviewed by three or four people and I was hired about two months later to be an assistant. And I took my oath the first week of April 1972 and I stayed for three and a half years.

Mr. Stern: What is the first case you handled?

Mr. diGenova: I'll never forget it. It was in front of Judge Korman. It was a petty larceny case. It was one of these things, you know, where you pick up 15 jackets in the morning. You go over to court. You've never seen your witnesses. There just isn't time. Judge Korman was a stickler for evidence and he put me through my paces on that day about how to ask a non-leading question that was just terrific and I'll never forget it. It was a great experience because no one could teach you better than a sitting judge in a case where the stakes weren't very high about why you weren't as good as you thought you were. I was up against a very seasoned defense attorney who objected to almost every question I was asking.

Mr. Stem: The form of the question?

Mr. diGenova: Yes. And the judge was sustaining the objections and I was standing there trying to reformulate the questions. So I went back after that and had along chat with folks in the office and I had just begun my training because they had a really fantastic training program to deal with things like this because they don't teach you any of this in law school.

Mr. Stem: In the U.S. Attorney's Office or just Main Justice?

Mr. diGenova: Yes. In the U.S. Attorney's Office and then Main Justice had the

beginnings of the Attorney General's advocacy institute as it came to be known. And of course, I eventually learned how to ask a question properly and laid foundations and things like that, but that was great. And Judge Korman was appropriately sarcastic with me as he sustained all the defense objections to my lines of questioning. By the end of the day, I had a pretty good idea of what he wanted.

Mr. Stern: What don't they teach in law school that you need to know?

Mr. diGenova: Well, I think – I don't know anything about law school now. I went to law school from 1967 to 1970. I have no idea what they do or do not do in law school other than engage in uber-politics now of the most unbelievable varieties in all of them and the places have become nightmares of ideological idiocy and all you have to do is look around the country and watch some of these fruitcakes on television and you just see how bad it is. That aside, I don't know what they teach in law school.

Mr. Stern: They are more clinical work.

Mr. diGenova: I guess so. And that's helpful. I think it's important for people to get a sense of the real world, but I also think it's important for them to learn some fundamentals and some of them aren't learning that. For example, I think it's really important for people to know how to write, and an amazing number of people who graduate from law school today cannot write. They cannot write, and that is a failing of not only the law school, but our colleges and our high schools. It is amazing how many people come to work at law firms who cannot write. Forget advocacy. They just can't write. Forget proving a point. It is remarkable. And it is an embarrassment to the profession – you know, some people could care less because writing is not important to them, but I would say that the writing skills of the general

graduate of law schools are so poor that they are well below what they were thirty years ago and that's because we just push people through the system. The clinical stuff, I think, probably they know a little bit more about how to find the right building, but don't ask them to write a long letter or an advocacy piece because they can't do it.

Mr. Stern: In your three and a half years as an Assistant U.S. Attorney, do you recall the sting, the lash of having your ears pinned back.

Mr. diGenova: Oh, absolutely.

Mr. Stern: What do you recall?

Mr. diGenova: I remember having my ears pinned back by a very wonderful man who was the head of training. His name of Victor Caputy and he was widely respected. He was one of the great trial lawyers that the office ever produced. He retired from litigation because he had a severe heart condition and he became a great teacher and he would go watch people in trial, then he would have conversations with them. And he was watching me try a second degree murder case against **John** Shorter who was a brilliant trial lawyer, very, very effective advocate, and he just, while the jury was out, he ripped me to shreds. So Victor Caputy came and he just reviewed with me while we were waiting for the jury and took me aside and we went out into a stairwell and he was furious with me about my cross-examination, about my closing argument, that I hadn't been aggressive enough, that I was too soft, vocally soft, I wasn't trying to convince the jury that I believed in my case. I mean, it was an interesting criticism, because what I had tried to do in that case was to try to not counter the defense so much because **John** Shorter was a very mellow, low key quiet guy and I was very much afraid of the contrast that would come from a bombastic prosecutor. And Victor was a great believer in righteous indignation as the format

for prosecutors and he, for the most part, was absolutely correct about that. That's what people wanted to see in a prosecutor, even if they ultimately disagreed with the prosecutor and acquitted, they wanted to see a prosecutor who believed in his or her case. And he felt that I had not projected that image correctly. He was wrong in this case. I did win, but it was one of these classic District of Columbia barroom murders with all witnesses who had very, very long criminal records and none of them were believable on either side.

Mr. Stem: Young lawyers have to develop a tolerance for disappointment. I'm sure there were times when you felt that an injustice had occurred and you wanted to quit and go do something else. Was there such an occasion? Is there something you are still angry about after all these years? Something you lost, you should have won?

Mr. diGenova: I wouldn't call it indignation. I must say, I always felt that the Hinckley verdict was a tragedy in many, many ways.

Mr. Stem: Not guilty by reason of insanity.

Mr. diGenova: Yes, and not so much because of the verdict by the jury, which I could understand in many ways, but because of the manner in which the trial was conducted by the trial judge. I thought it was one of these things where – this was a judge, Judge Barrington Parker, who as you know had been in an automobile accident years before, very severely injured, and was on medication. You would have one trial in the morning and then he would be a different judge in the afternoon and he would reverse his rulings. And the defense, to their credit, Williams & Connolly, knew that and they played it like a symphony.

Mr. Stem: What when wrong in your judgment as a result?

Mr. diGenova: Well, I think what happened was evidence was admitted that

never should have been admitted, lines of questioning were permitted which never should have been permitted. And I think what happened was that the verdict was a reflection of the management of trial by the judge. I don't criticize the defense attorneys and I don't criticize the prosecutors. And the judge and the judge, God bless him, he was there. He was at a point in his career where I think he should not have been hearing cases, but he was and he got a very important case and I think for the most part, it was a pretty rough experience.

Mr. Stern: Are you saying he permitted more psychiatric testimony than was appropriate?

Mr. diGenova: Oh certainly he did, absolutely. He permitted all kinds of psychiatric testimony which should not have been admitted. And that was the subject of all types of motions and pleadings and both sides did a very, very good job. But remember, I was a prosecutor at the time. Here is someone who tries to kill the president of the United States and wounds a whole bunch of people including the president. We felt very strongly about the case and I do not fault the jury. I think the jury heard what it heard and made their decision. I do fault the management of the trial by the judge. I think the trial was not managed very well. But, that's the nature of the game. It's really the only case in the office about which I've ever had any really strong feelings, including cases that I tried personally. I did not try the *Hinckley* case personally. Obviously, that was Roger Adelman and Dick Chapman who did a magnificent job. Two really fine lawyers. Dick is still in the office, I believe. Roger is out in private practice now. We occasionally do some work with Roger.

Mr. Stern: In a sense, I would think that you won that case. I mean, Hinckley is still confined 20 years later –

Mr. diGenova: He may be let out, too.

Mr. Stern: Well, okay, but he still has served, if you will, served – I realize it's at Saint E's or wherever a substantial period of time and it did bring about a change in the law that I suspect you welcome.

Mr. diGenova: It certainly did. In fact, both I and my wife wrote a number of *Law Review* articles about the insanity defense after the *Hinckley* case and as a result, of course, as you know, the Comprehensive Crime Control Act was enacted into law by Congress which included the first revamping of the federal insanity law since 1897, and it was a long overdue thing. That doesn't mean good didn't come from it. You were asking me did I ever have a reaction to a case and my reaction was to the *Hinckley* case which was, I thought, a deeply-felt reaction as to the quality of justice which had been – not a criticism of the jury. I may very well have decided what they had decided based on the evidence that I heard. My question dealt with what they heard and why they heard it and how we got there and I thought in that sense it was a disappointment to me. But, other than that, there are very few things in the office – I mean, you go into this understanding that the system is there for the public to make a judgment about cases and prosecutors can be upset or angry about results, but the truth is once you've gone through that system and you appreciate it for what it is, which is I think the best judicial system in the world, then you have to be happy about the result no matter what it is in the general sense of the word. Are you satisfied with the quality of justice that was meted out? Even though in individual cases it may be imperfect, it may be a result you're dissatisfied with. To me, it's whether or not the process worked.

Mr. Stem: A former Assistant U.S. Attorney now a law professor here in

D.C. has suggested in a Yale *Law Review* article that juries here should acquit minorities who are engaged in property crimes – sort of a social statement that a disproportionate number of blacks are being incarcerated and so on. I suspect that raises your pique.

Mr. diGenova: Well, I think it's a silly notion, obviously. And it's **an** invitation to anarchy, and it's an invitation to asking jurors to simply ignore the law, nullify the law and acquit on the basis of illegitimate factors. What is interesting is that jurors in the District of Columbia disagree with it violently.

Mr. Stern: I was going to say, isn't it happening? Do you think not?

Mr. diGenova: I think there are some cases in which jurors ignore the law and the facts and try to make a point when they don't like a particular type of prosecution. They may not like a particular type of prosecutor. They may not like a judge. There have been periods where there have been a number of acquittals. For example, after the pardoning of Richard Nixon, there were a huge number of acquittals in Superior Court because jurors felt that that was unfair that the former president should have been held accountable legally for his conduct during the –

[TAPE ENDS]

Mr. Stern: – Nixon's pardon. You said that was a serious problem for the U.S. Attorney's Office?

Mr. diGenova: Yes. It had gone on for several months with jurors simply refusing to convict young felons of just about anything. In fact, it was a very serious problem. It went away. But the proposal to have jurors ignore the law and the facts and acquit people accused of crimes because of poor socio-economic conditions has been around since the 1920s

when anarchists and all sorts of other crazy people wanted to fight the system and make America “better.” And one of the ways you did that was by nullifying verdicts. That happens from time to time, but it’s not a problem in the District of Columbia that I’m aware of. There are some cases where people don’t like particular types of crimes being prosecuted, but I think for the most part – and there are episodes where certain sets of juries will come in – different jury panels come in and you’ll get a group of people who are anti-government or anti-law enforcement. That happens everywhere. But I don’t think it is a serious problem in the District of Columbia. I think the jurors convict every day based on the evidence, or acquit based on the evidence.

Mr. Stern: Well, is it an appeal to racial identity – event occur too frequently in the District?

Mr. diGenova: I wouldn’t know. I don’t try a lot of cases in Superior Court. I try no cases in Superior Court in fact. I have no knowledge of what goes on in Superior Court other than what I read in the newspapers and it sounds as if from time to time that occurs but that it’s not from what I understand to be a pervasive problem. That is, by the way, up to the judges to control. Some judges know how to do it and some don’t. And if judges don’t want to do it, there’s nothing you can do about it.

Mr. Stern: Okay. University of Cincinnati undergraduate. Georgetown Law Center graduate. That brings us up to – well, you had taken a year off actually.

Mr. diGenova: Right. And then Assistant U.S. Attorney for three and a half years.

Mr. Stern: Assistant U.S. Attorney for three and a half years. Now what?

Mr. diGenova: Then I went to work on Capitol Hill for the first time. I was

approached by a former Assistant U.S. Attorney who worked for Howard Baker. We were at a softball game. A former Assistant U.S. Attorney softball game which used to be held in those days – I slid into second base and the guy who was playing second base was a guy named Mike Madigan and Mike said to me, I want to talk to you. We’re looking to bring some lawyers up to work on the Church Committee which was investigating scandals in the FBI and the CIA and NSA and so I called him up the next day and I went up and I interviewed with Howard Baker and John Tower and the staff and they offered me a job and went into see Earl Silbert the next day and told him I was leaving in two weeks to go up to the Hill to work on the Senate Select Committee on Intelligence, what was then known as the Church Committee. I spent a wonder year or so up there and was involved actually in the investigation that went into the assassination plots by the CIA to assassinate Castro and other government leaders.

Mr. Stem: Are you satisfied looking back that the committee did useful things?

Mr. diGenova: Absolutely. There isn’t any question about it.

[short break]

Mr. Stem: I was asking you whether you thought the Senate Select Intelligence Committee, the Church Committee, had accomplished anything useful with respect to the excesses of the FBI and the CIA over the years.

Mr. diGenova: Well, I don’t think there’s any question that the Church Committee served a very valuable purpose in enlightening the American people and the Congress about things that were known certainly by a few members of the House and Senate in the old clubby manner in which oversight occurred. But that was the manner in which Congress wanted

it to occur. Congress had made a choice a long time ago that it didn't want to know certain things were happening. Purposely decided that it didn't want to know certain things. And that situation led to, particularly in the case of J. Edgar Hoover, excesses of the most unbelievable variety. I think J. Edgar Hoover will go down in history as one of the single most dangerous government officials who ever held public office. In the beginning of his career, he served a very useful purpose in helping people to understand the nature of crime and the necessity to organize effectively to deal with it. But in fact over time, he accumulated so much power that he was able to literally threaten sitting Presidents with exposure and extort from them a continuation in his job. And I think the cowardice of a series of presidents in dealing with him is one of the great blemishes on the American Presidency.

Mr. Stem: You left the committee when it completed its work. Then what?

Mr. diGenova: I went to work for Edward Levi who was then the Attorney General in the Ford administration. As you know, Ford had become president when Nixon resigned. Ed Levi became the Attorney General from the University of Chicago and he instituted an intelligence review board whose job was to look at the investigations which were being conducted by the FBI and determine whether or not they had exceeded lawful authority and then to design guidelines to control the domestic intelligence function of the FBI. For about a year, I worked there with Mary Laughton, the great intelligence lawyer, some people from the FBI and a couple of other people to draft domestic intelligence guidelines. It was a very, very interesting experience in the post-Church Committee era. Then after that, I went and worked for Senator Charles Mathias where I stayed for six years. That was a great experience working for Mac.

Mr. Stem: Okay. That takes us up to what year? You left the six years of

service with –

Mr. diGenova: This would be 1976 when I go up to work on the Church Committee, then go to work for – '75, '76, then go to work for Levi, then I start to work for Mathias in 1977.

Mr. Stem: Okay, so now we are up to 1983 roughly. Now what happens?

Mr. diGenova: In 1982, of course, Reagan is elected in 1980, and the Republicans take over the Senate. This is an earthquake. This is a catastrophic event for the Democrats. And then there comes this great experience of the Republicans organizing the Senate for the first time in 45 years. Senator Mathias was the Chairman of the Rules Committee which had responsibility for the reorganization of the Senate. Senate rules, and then everything from that to the most picky things like the assignment of parking spaces and office space – well, of course, on Capitol Hill, perks are everything. And there I sat, astride the Capitol with control of parking spaces and rooms. And all of a sudden, Russell Long's wife wanted to call me and take me out to lunch and know who I was and I was a very important person in their eyes, not mine. And I must say, –

[short break]

Mr. Stem: Okay, you were running the U.S. Capitol.

Mr. diGenova: That was a great time, by the way. It was a great period of time because the Republicans didn't know what they were doing, as you might imagine after 45 years wandering in the desert, all of a sudden they are in charge of everything. And it was a really fascinating time to be on the Hill to see this great transition going on and to see the shift in power. And, of course, the shift in budgets, and the shift in rooms. Just the notion of what

happens when an institution which has been run one way for 45 years then has to stop on a dime and be run a different way by an entirely different group of people. I'll never forget it. I came in – I was a staff director of the Rules Committee and the General Counsel. And one of the funny things was the guy who was the staff director was a guy named Bill Cochran, great old guy from North Carolina. Had been there forever. And he just called me and he says well listen, why don't we just switch the names on the doors. You know, the minority office can become the majority office and the majority office can become the minority office. I said Bill, listen, I'm really appreciative of your effort to save us the trouble of moving, but we'll be taking over your offices. That's what transition is about. We will be taking over the majority offices. You will be taking over the minority suites. We can make this very efficient and very painless. We'll be happy to take as much time as you guys need to get organized. And I advised all the Republicans to do this. If you are going to take over, you have to take over. This is not just some minor thing. You have to have the trappings of authority. You must take the rooms that have for 45 years been designated the majority rooms. Now what happened was very fascinating. What the Democrats did at that point – I give them a lot of credit for thinking on their feet – they refused to accept the minority denomination and they had "Democrat Staff" put on their doors. They would not accept the signage that was on those rooms and that had been there for 45 years; they would not accept the "minority" staff designation. They had every one of the signs replaced and it said "Democratic Staff." That was actually the beginning. That predated the Bork hearings. But it was the beginning of a very partisan period. Democrats didn't like being in the minority and they found out what it was like to be in the minority. And they don't like it even more now and it is why many, many Democrats are leaving the Senate and House. That's why Sam Nunn left. Sam

Nunn didn't leave because he wanted to spend more time with his family, which is what they always say – Sam Nunn left because he didn't want to not be Chairman anymore of the Armed Services Committee. It was beneath him to be in the minority. And many, many Senators and House members who had been in the majority for so long decided because they knew what it was like, they knew how they had treated people in the minority. They didn't want to be treated that way and they quite smartly left. So that process really took about a year and then we go through 1981 and all that is going on. And then in 1982, they didn't name a U.S. Attorney for an exceedingly long period of time. I was a candidate along with Paul Friedman, who is now a federal judge. And eventually they picked Stanley Harris from the D.C. Court of Appeals who I had known when I was up there on the court. The selection went very well. Stan was confirmed. He asked me if I would be Principal Assistant U.S. Attorney and I said I really don't want to do that. A delegation of assistants came from the office after the rumor got out that I turned it down and a fairly good size delegation of senior assistants begged me to come in and be principal assistant. I thought that was a pretty impressive request, so I rethought it. Called Stan and asked him if the offer was still open and he said it was. I accepted and then I was principal for about 18 months and then President Reagan nominated me to be U.S. Attorney in late 1983. And with the very gracious assistance of Joe Biden who was then chairman. Actually he was ranking minority member, excuse me, at that time, because the Republicans had taken over the committee and I was from Delaware, that's my home state, Biden decided he was going to take me under his wing and got me through along with the help of Senator Thurman in nine days from the time I was nominated until I was confirmed by the Senate, which I think was the shortest period of time for any nominee for U.S. Attorney in the history of the Senate.

Mr. Stern: A number of people who were your assistants went on to become judges and distinguished servants. Can you think of a few?

Mr. diGenova: Well, Royce Lamberth was the chief of my civil division and actually I was asked if I wanted to be a federal judge and I said no, I don't want to be a federal judge. This was when I was U.S. Attorney. But I said I think I have somebody who does want to be a federal judge. And I said I think Royce Lamberth. They said you know you are the second person that's recommended him. Stan Harris did. So, Royce was eventually nominated and confirmed and I think has been an outstanding federal judge. A lot of the people that worked in the office went on the Superior Court bench and eventually the federal bench. John Bates, who I made chief of the civil division when Royce became a federal judge, also became a federal judge. Then a lot of people became Superior Court judges. Reggie Walton, just loads and loads of other people. Many, many assistants. I was always very happy to help people become judges and I still do it today. I've helped both Republicans and Democrats because I think it's very important that the selection of judges be about merit and about quality and the truth is there is a great bunch of candidates in both parties to sit on the bench and I was always happy to support them. During the Clinton administration I supported many of President Clinton's nominees for the circuits and district court judgeships because I thought it was very important that quality people get a vote, which is why I'm so angry about the treatment of Miguel Estrada and others like him by the Senate's Democrats because for those of us who worked hard to help President Clinton get nominees through who were worthy, to see this process working itself out I think has been unnecessarily divisive and I don't think it has helped the Democrats one bit politically.

Mr. Stem: During the years you were U.S. Attorney, which would be 1983

to 1988, I'm trying to think of some of the large issues at that time. For example, preventive detention. Congress enacted authorization for preventive detention –

Mr. diGenova: In the Comprehensive Crime Control Act of 1983 or whatever it was.

Mr. Stem: And it seems to me that that was first used in the District.

Mr. diGenova: It had been used in a separate local statute. It was when Congress reorganized the courts and created Superior Court, it also completely rewrote the D.C. Criminal Code.

Mr. Stem: But it also undid the Bail Reform Act of '72–

Mr. diGenova: That's right. It replaced it with – as part of the comprehensive reorganization of the criminal laws, it repealed the Bail Reform Act and created the Bail whatever it was called Act which included provisions on pretrial detention and other forms of detention, including personal recognizance and bonds. It really formalized the law in a different way.

Mr. Stem: Well, it made it possible for authorities to hold people without bail and under the circumstances; they couldn't before.

Mr. diGenova: That's correct. Danger and violent crimes.

Mr. Stern: Has that worked out usefully?

Mr. diGenova: I think, for the most part, people are very, very sanguine and happy with the way the reorganization of the bail law worked. I think people believe that pretrial detention has been a good addition to the options available to a judge. It has been a superb tool that responsible judges and prosecutors could use. I certainly don't – there is no evidence,

especially since there have been no studies that I've seen at all from this very liberal local bar which has criticized the use of pretrial detention. In fact, it has been interesting to watch our police department become more interested in using it over the years. Obviously they were great fans of it, but I think what has happened is that people have come to understand it. Its process has become routinized, the proof and the proceedings required around it. It's also all been done in the open, which obviously makes it easier to analyze and I think, for the most part, I have – I mean I must say, I have heard very few complaints about it after the initial huge public debate about its constitutionality, and that, of course, was eventually decided by the Supreme Court in that very famous case from the Southern District of New York involving La Cosa Nostra.

Mr. Stern: Salerno.

Mr. diGenova: Salerno. To me, that's sort of an issue which is now sort of over and I think people have come to believe that it was a wise decision to have pretrial detention and I don't think anybody believes it has been overused.

Mr. Stern: The other big issue that I recall from your tenure – and we talked about it in our first interview session – was of course setting the stage so to speak for the prosecution of Marion Barry that followed your departure from the U.S. Attorney's Office.

Mr. diGenova: Right.

Mr. Stern: Do you regret that you weren't able to bring that to culmination during your tenure?

Mr. diGenova: Not at all. I think the most important thing is to do things right and that the right thing to do at the time I was U.S. Attorney was not charge the mayor because we didn't have sufficient evidence that would have made a credible case in a court, and nothing

would have been worse than to have charged the mayor on flimsy evidence or evidence that, while it was legally sufficient, not sufficient to obtain a conviction. I think when you prosecute somebody who is a public figure, your case has to be better than it might otherwise be for a whole host of reasons, including practicable ones, which is jurors are going to want more. When they have faith in somebody or believe something has gone wrong. But I have no regrets whatsoever about not bringing a case against the mayor, and no regrets whatsoever about conducting the investigations which led to the decision not to indict the mayor, because the mayor was engaged in a series of acts and engaged in conduct incompatible with his role as the chief law enforcement officer for local government.

Mr. Stern: Well, when you go after the king, though, you have to kill him, isn't that what the saying goes?

Mr. diGenova: Well, if you decide to prosecute, you better have the goods and we decided not to prosecute.

Mr. Stern: I also seem to recall from that period, although I don't recall a specific case, some dust-ups that involved foreign diplomats and the question of their immunity for acts in the District?

Mr. diGenova: Yes. There were a series of demonstrations at the South African embassy in which literally hundreds of demonstrators a day wanted to be arrested for demonstrating within 500 feet of an embassy and the police arrested them all and I dismissed all the cases.

Mr. Stern: Because?

Mr. diGenova: Because that's what they wanted. They wanted to be prosecuted

and we were not going to tie up the courts of the District of Columbia with 500 protestors a day. They were issued citations. They decided they didn't want to pay the fines and they all wanted trials. So, we dismissed the cases.

Mr. Stern: Of course, that's another unique quality –

Mr. diGenova: And the mayor, I'll never forget. The mayor was complaining about the fact that the U.S. Attorney, Mayor Barry was complaining that the U.S. Attorney would not prosecute these cases. It was one of the few instances I had ever heard him complain about cases not being brought.

Mr. Stern: I was about to say that's another illustration of a difference about the practice of law in the District of Columbia. You have to take into account the activities of foreign diplomats, embassy staff members and so on. They are a large component of this community.

Mr. diGenova: And for the most part, yes, the presence of the diplomatic community is very important because what we do is – and our decision not to prosecute was done in conjunction with the South African government.

Mr. Stern: I mean there are special problems –

Mr. diGenova: Yes, well, one of the problems and I'm about to explain it is one of the things we did was take into consideration the wishes of the foreign government. For example, if the South African government had demanded that all those cases be prosecuted, we would have given more thought – we would have considered leaning toward prosecution. But the South African government was not interested in having those cases prosecuted, and therefore, in terms of reciprocal relations between the United States and other foreign governments, one of

the things you have to do as a prosecutor is you have to worry about American diplomats overseas and how prosecutors there are going to treat our diplomatic personnel in situations similar to ours. So, of course, we consulted through the State Department with the South African embassy. They were totally disinterested in prosecution and since they were, that was certainly one factor we considered in deciding not to prosecute any of those cases. The question of diplomatic issues is always present. It is particularly present when diplomats commit crimes, and of course, they are immune and frequently and sometimes the United States will ask that their diplomatic immunity be waived so they can be prosecuted. This happened in the case of the incident in which a gentleman was severely injured when he was struck by a diplomat from a Pacific island republic who was absolutely drunk as a skunk when he hit this young man. Eventually it was all worked out with some financial payments to the young man. But that issue has come up recently in the case of the Russian diplomat who hurt someone and was actually prosecuted here and eventually sent back to Russia. All of those issues are different. They tend to happen in places where there are consulates like Chicago, Los Angeles, New York and Washington. It is much bigger here because this is where the State Department is and there are more embassies here than there are in any other place in the United States.

Mr. Stem: Well, it is also a place of course where more people assemble to petition government. Lafayette Park – tell me about Lafayette Park.

Mr. diGenova: Well, Lafayette Park during my tenure was the center of a tremendous amount of civil litigation over the rights of people to do whatever they wanted to do in Lafayette Park. The ultimate case was people who wanted to sleep in Lafayette Park and the constitutional question which eventually went to the Supreme Court was “Is Sleep Speech?”

And of course the Supreme Court said no, it's not.

Mr. Stem: Well, the park is the Park Service, right?

Mr. diGenova: Run by the National Park Service, and it's patrolled by the Park Police who in conjunction with the Civil Division of our office which was then run by Royce Lamberth, would design strategies for demonstrations and mass demonstrations which would of course work through legal permits for people who wanted to have marches and demonstrations which could be reasonably limited in time, space and manner to control not only the access of the demonstrators, but the public at large to the same space and so we went through a series of very big cases involving, because Lafayette Park, of course, is right across the street from the White House. It is where demonstrators really love to gather and yell at the president through bull horns, and therefore a series of cases culminated in the *Community for Creative Non-Violence* case which was about sleeping in the park.

Mr. Stern: Was your office part of the planning for large demonstrations, let's say involving abortion or Klu Klux Klan marches?

Mr. diGenova: Oh, everything. The Civil Division of the U.S. Attorney's Office would meet regularly not only with the leaders of the demonstrations but with the police department, the FBI, the United States Park Police, directors of the people from the Park Service, to try and set the ground rules for permits, what could be done, what was within the law, etcetera. It was a very important part of maintaining order in these large demonstrations and for the most part, it worked very, very well and we had very, very few incidents to speak of where the rules were not abided by.

Mr. Stem: To what extent was main Justice looking over your shoulder?

Mr. diGenova: Well, the Civil Division at main Justice would be in communication with our civil division regularly about these things. They generally didn't want to get involved. They had enough to do. The litigating divisions at main Justice didn't really – if our office could handle it, they were happy as clams over there. They weren't looking for work. And for the most part, after the Vietnam War, the demonstrations were all quite manageable. There was very little that came after that that was of any moment in comparison to those demonstrations.

Mr. Stern: Do you recall the White House ever attempting to influence the process?

Mr. diGenova: No. Not during that period of time. I don't know about Vietnam. That was a different period of time. But during my tenure as U.S. Attorney, people generally stayed away. They figured we knew what we were doing. No one certainly ever tried to interfere in a criminal case. If they had, it would have been the last thing they had ever done. And for example, in the *Pollard* case, nobody ever tried to interfere in that, except one minor time where one guy in the Justice Department didn't want me on television talking about the *Pollard* case on a particular Sunday. And I accommodated him, but that didn't help him any.

Mr. Stern: Is that the biggest case during your tenure?

Mr. diGenova: It was certainly one of the biggest. The *Pollard* case was certainly one of the biggest. A case that was a very big case at the beginning of my tenure was the largest insider trading case up to that time, up until recent years, was a very embarrassing case for the administration. We indicted Deputy Secretary of Defense Paul Thayer on a huge insider trading case involving Anheuser Busch and a big railroad deal. He resigned as a result of

that. He pleaded guilty and that was a very, very big case at the time. It's long since been forgotten, which is fine. The *Pollard* case, however, lingers on because Pollard still is seeking the executive clemency although he has never sought parole which he is entitled to under his sentence.

Mr. Stern: All right. We talked a little bit about it in our first recording session. Most of the spy –

Mr. diGenova: And the *Hinckley* case obviously was a very, very big case.

Mr. Stern: Most of the spy cases were handled in other jurisdictions, right?

Mr. diGenova: Yes. There was one in Baltimore. There was, of course, the *Pelton* case, which was a huge very, very damaging case which was handled in Baltimore, He was an NSA employee. Pollard was a naval intelligence civilian, naval intelligence officer. And then there were cases in Virginia. Most of them were –

Mr. Stern: Was Walker during your watch?

Mr. diGenova: No.

Mr. Stern: No. That was after.

Mr. diGenova: No. Walker was after me. Actually, you know what? I'm not sure about that. I have to go back. They may have been simultaneous.

Mr. Stem: I haven't checked.

Mr. diGenova: I'm not sure. I don't know the answer to that but I know they are always compared because Pollard's defenders are always saying Walker did more damage.

Mr. Stern: So is it fair to say that your tenure as U.S. Attorney was the most exciting period of your legal career?

Mr. diGenova: Oh, I don't think there is any question. It was certainly the most exciting, the most enjoyable, the most challenging, just a great time to be U.S. Attorney, particularly during the decade of spies. You know, we were really having problems at that time and we were discovering in our midst some of the most incredible scoundrels and traitors. It was really a fascinating time to be a federal prosecutor, it really was.

Mr. Stern: Today you practice law with your wife, Victoria Toensing. Are there other members of the family?

Mr. diGenova: Our son, Brady Toensing, practices with us. He is now a partner. He was made a partner last year and the three of us, plus a bunch of law clerks, a couple of secretaries. We have a grand time.

Mr. Stern: How do you manage being half of a team with a high profile, high voltage lawyer like Victoria Toensing?

Mr. diGenova: Oh, it's a lot of fun. We have a great time. We really enjoy the practice of law together and it has been a – we are in the eighth year of our little firm and it has been – I have never been more pleased with a decision which she drove. I mean, this was Vicki's idea to set up our own firm and she was a right as rain and it's been a great experience.

Mr. Stern: When a client walks through the door, how do you decide which one of you is going to talk to the client or do you do it jointly?

Mr. diGenova: Well, it depends. Sometimes each of us will have clients that come to us separately, but we always sit down and talk with them together so that they understand what we do and how we do it and the manner in which we provide representation, and it's a very interesting process to have a small firm. And of course, we then, if we need

bodies or something in a larger matter, we hook up with other smaller law firms and other people that we've worked with in the past to bring in people to work with us if we need people, but for the most part, we are able to handle most of what we do and our work includes criminal, obviously white collar crime defense, civil litigation, both plaintiff and defense work. We do lobbying. We do a tremendous amount of work in the lobbying area for both American trade associations, individuals and sometimes foreign government. And all sorts of other things. Problem-solving in Washington. If you're here, you really should be doing that work because that's what you are here for. You should bring to bear your experience and both of us have been in Justice Department. Both of us have worked – Victoria was chief counsel for Barry Goldwater on the Senate Intelligence Committee as well as having done many, many other things such as being an Assistant U.S. Attorney and Deputy Assistant Attorney General, so we actually put to work in use all the experience that we gained in government and what I think is a positive way for the benefit of our clients. Understanding when to fight, when not to fight. That's a pretty important decision to make. Know what your cards are.

Mr. Stern: Private practice, though, is considerably different than government work. You are on your own. You've got to meet the payroll. Has it lived up to your expectations and what are the differences from government work?

Mr. diGenova: Well, first of all, government is extremely confining. You really cannot have any opinions in government. You just have to shut up, that's basically what it boils down to and I think that's okay for a while and I think that's the way it should be, other than doing your job and having an opinion about the substance of your work, which is important for people. The challenges of government and the great cases that you get to do are a tremendous

benefit and of course, you know, you can make a decent living in government and people do and they have comfortable, happy lives here with great health insurance. This region lives today because of government employment.

Mr. Stem: Well, there is a system in place to provide support for you when in private practice you've got to go out and get that yourself.

Mr. diGenova: Well, I think the thing about it is you have to be able to get business in private practice which is something that a lot of government lawyers don't understand and can never do. The longer they are in government, the longer they wait for that in-box to fill up. Well, that doesn't happen in private practice. You've got to go out and fill up that in-box and getting business and learning how to get clients and learning how to manage clients and learning how to send bills and collect money and have a line of credit and not use it, run a business, win cases, keep clients, get them to recommend you to other clients, is really something that not everybody can do. We've been very lucky. We are very grateful. We consider ourselves to have been blessed to have had an opportunity because we had a lot of clients and when we started our firm to keep them all and to keep them all happy for the most part over the last eight years.

Mr. Stern: You and your wife do a certain amount of public appearances on television shows, talk shows, news shows, etc. There are those who wonder whether active lawyers should be that involved in public media. How do you respond to that?

Mr. diGenova: I don't know who wonders about that. They must not do anything for a living that requires them to sell themselves or to educate the public. For example, one of the reasons to do television is to dispel some of the silly notions about the legal system. A

day doesn't go by that I don't see some lawyer on television saying something absolutely stupid and wrong about the legal system. I think it's absolutely appalling that they get away with it. And so, whenever we are asked to do something, we calculate whether or not it is something worthy of our time and then we go do it and we do it right. We always make sure that what we are talking about is accurate about the law. We certainly understand the facts. And we certainly don't mind talking about other cases. We generally do not go on television about our own cases because unless it is part of the strategy, which it was in the case of representing Jack Quinn, who as you know was the lawyer for Mark Rich and the pardon matter that exploded into a huge post-Clinton scandal. Using television to represent Mr. Quinn was an important part of our legal strategy because it involved Congressional hearings as well as the federal criminal investigation in New York. But that was a designed strategy to deal with a particular client. We go on television to talk about legal issues because, first of all, it is enjoyable. It is fun to talk about legal issues, especially when you know you can inform the public truthfully about what the law is and help to dispel notions which are created by a lot of lawyers who come on television and fake it until they make it, which is really an embarrassment to me as a lawyer and I've seen so much of it. And people are not stupid. Television viewers know when lawyers are coming on television and lying to them. It's just like they know when anybody on television comes and lies to them. The great lie detector is what television is. We've enjoyed that. We started doing that way before the *O.J. Simpson* trial. When we were in government, we did a lot of television to explain for example, the Comprehensive Crime Control Act back in the 1980s. A lot of television appearances about the criminal law, how it worked, and that continued throughout our private practice thing and what we have discovered about that is if you do it well, if you are

professional about it on television, first of all as I said, it is enjoyable. You help educate the public about the legal process but you also from time to time do pick up an interested person who might want to hire you as a lawyer. They see you on television. They think you are a professional and responsible and they say, I think I'd like to talk to that law firm.

Mr. Stern: In the Jack Quinn matter that you mentioned, you were defending his handling of the matter involving the pardon of Mark Rich, etcetera. You were defending him on television, but your reason for doing so was you were hoping to influence the Congressional inquiry?

Mr. diGenova: Well, no. Actually, Mr. Quinn had a reputation which had been assaulted by various statements made by people on Capitol Hill and by columnists and I was asked to go on *Meet the Press* and appear and discuss Mr. Quinn's role in the pardons and I did so, and I defended him gleefully, heartily, and with gusto. Tim Russert, to his credit, allowed me an opportunity to explain my client's position which was he was a lawyer. He was doing his job. He was hired to get Mr. Rich pardoned. He did that. He didn't break any laws doing it. He was an advocate. If there was a problem with the pardon, talk to the president. He's the guy that issued the pardon and not only that, the president's pardon power is unreviewable. There was no evidence that any untold activity had occurred and there was all this – understandably by the way – all of this criticism falling down on President Clinton. Not because of the Rich pardon, that was part of it, but there were all these other horrible people who got pardoned during that process. My job was to demonstrate that Mr. Quinn had acted honorably as a lawyer and we were successful in doing that. And one of the ways you do that is by having someone who is a lawyer, who has played a public role in holding accountable the bad guys, come on and defend

you, and Jack was a great lawyer who did a terrific job for his client.

Mr. Stem: So you were attempting to influence what?

Mr. diGenova: Public opinion about Mr. Quinn, Congressional opinion about Mr. Quinn and the opinion of anybody who cared. But most important, to honestly and categorically deny some notion that he had done something wrong when all he had done was act as a brilliant advocate for his client. And that was important to help explain the role of a lawyer in this particular system on pardons. Pardons don't happen by accident. They happen because people seek them.

Mr. Stem: Some lawyers would regard using television in this manner as inappropriate.

Mr. diGenova: How? I don't understand how.

Mr. Stem: [inaudible]

Mr. diGenova: Well, I'm sure they would and someday they may have a client. I don't know who they are. I've never heard one bit of criticism from anybody. I can certainly tell you that my client was thrilled with it and, indeed, it would have been malpractice not to have publicly defended Mr. Quinn because first of all he didn't do anything wrong. He acted in the highest traditions of good legal advocacy on behalf of his client. He didn't do anything wrong. He did exactly what he needed to do to get his client a pardon and he was being pummeled unmercifully by people who didn't know anything about the process and this was not a trial. We weren't in a criminal trial. We weren't trying to influence jurors here and Mr. Quinn was never accused of any wrongdoing other than publicly and so the process of the Congressional hearing where you are made mincemeat of – and by the way, Mr. Quinn went up and testified openly

three times in public hearings. Never took the Fifth, produced all of his documents and in a situation like that where you have a client who is capable of doing that, when you have no problem exposing for the public to view and Congress, what the nature of his conduct was, television is an inescapable ingredient in restoring the good name of the person. You know, Ray Donovan said, "Where do I go to get my name back?" Well, one of the places you go is television because that's where people get their information. Now that doesn't mean that you go on television for every case and about every issue. It does mean, however, that there are cases where using television appropriately, professionally, with dignity is very helpful. I couldn't think of a better show to be on to make my point than *Meet the Press*. And I must stay, again, Tim Russert is a tough questioner, very fair.

Mr. Stern: You're an advocate. What about judges? Should they be explaining their rulings on television?

Mr. diGenova: Absolutely not. The exact opposite. They explain their rulings in written opinions, that what judges do. Judges should never be forced to explain their opinions. They shouldn't be asked to explain their opinions. I think they should be quiet. I think it is the role of the bar to defend judges when they are attacked. I think it's the role of the bar to – if judges are, especially if judges are unfairly attacked. I mean, judges are attacked all the time and the American people have come to accept that. It rolls off their backs. Unless judges do something that's terribly wrong in which case they are going to be subject to criticism, but I think judges should not defend themselves. I think they should have people represent them, lawyers who defend them publicly. I think it's a terrible mistake for judges to go on the record defending their conduct and I don't think they should be asked about their cases publicly at all. And I

certainly don't think they should ever respond. Now, if you're in a confirmation hearing and you are being elevated to another court, you've written opinions, well, you know, judges have to decide how much of that they are willing to go beyond the bounds of.

Mr. Stern: In our discussion, you've mentioned on a few occasions judges and lawyers whose performance disappointed you. Are you satisfied that the review and disciplinary processes of the bar in the District of Columbia are adequate to deal with that problem?

Mr. diGenova: I think they are. I think the District of Columbia bar is very, very good about this. I think our bar may be one of the best in the country in terms of holding people accountable. I was the chairman of the Grievance Committee of U.S. District Court for a number of years under both Norma Holloway Johnson, Aubrey Robinson and Tom Hogan and I must say we took our work very seriously. I'm happy to say that there were very few serious complaints in U.S. District Court about lawyers' conduct, but when there were, they were dealt with. We worked very closely with the bar counsel and the District of Columbia Bar. They have a very professional process. The D.C. Court of Appeals and the District of Columbia Bar do a very good job. I think, generally speaking, the lawyer discipline function in the District of Columbia is right where it should be. It's not heavy handed. It's not over zealous. It holds people accountable. It imposes punishments and it does so I think in a professional and dignified way. I think for the most part it is very, very well done in D.C. I don't know about the rest of the country. I can't tell, but in terms of the District of Columbia, I think it's excellent.

Mr. Stern: Is there sufficient disclosure when complaints are brought to the grievance committee and matters are being investigated?

Mr. diGenova: Well, by rule and by law the grievance process is confidential until a decision is reached. That's for the benefit of the people making the accusations and the benefit of the lawyer who is being accused. The disciplinary function of the bar, however, if something happens, it is public. It's published. It's put in the bar news. It's put in the bar magazine and the press knows all about that. It's put on the websites of the court and of the bar so, there is about as much publicity as there can be in the process, I mean because there's also not that much interest in it.

Mr. Stern: Well, but the normal citizen or political figure doesn't have that protection to show you if you wish from embarrassment –

Mr. diGenova: That's right. And all that has to be done for people who don't like it is to get the law changed and make all disciplinary proceedings public from the time of the complaint. By the way, people can publicize their complaints, they're just not going to get a comment publicly from the Grievance Committee or the bar because they are not allowed to comment.

Mr. Stern: And you support that decision?

Mr. diGenova: If the legislative bodies want to make those disciplinary proceedings public from the get go, if that's the law, that's the law. I don't have any objection to that.

Mr. Stern: We're not yet ready to do **an** obituary here.

Mr. diGenova: Thank you.

Mr. Stern: (laughter) Looking back at the whole thing, are you satisfied you made the right choices along the way?

Mr. diGenova: Absolutely. I'm delighted I became –

Mr. Stern: Become an opera singer?

Mr. diGenova: But I didn't give up music. Music has remained a very large part of my life. As you know, I'm a member of the Gridiron Club, which every year roasts the president of the United States musically in one of the great rituals of this city. I've continued to sing in concert from time to time with some wonderful musicians like John Eaton, the great local jazz pianist and American popular song artist. I have my dear friend Bill Marx out in California, the son of Harpo Marx that I perform with out in California from time to time. My great friend, Joe Pesci, who is a great musician and singer whom I spend time with. He is, of course, a great academy award-winning actor. I have always maintained part of my life related to art, artistry and music and show business because it is a wonderful counterpoint to the sometimes dower aspects of the practice of law. And I am delighted with the choices I made. The most important choice was marrying Victoria Toensing. I mean, you can't ever – all the other decisions in life pale in comparison to being lucky enough to find the right woman to be married to and I was a pretty lucky guy.

Mr. Stern: Both of you in fact have been high profile personalities on the Washington scene. Your names are frequently mentioned in the papers in one regard or another. Do you enjoy that or is it something you would prefer not happen, what?

Mr. diGenova: It's just a question of do you enjoy doing what you do. And we enjoy doing what we do. We enjoy television. We enjoy practicing law. We enjoy travel. We enjoy the theater. Certainly people who do things in a society like this where people focus on people who do things from time to time you will receive some notoriety. I mean, the question is

what do you do with it and how do you manage it? I think we manage it pretty well and I certainly don't have any regrets about having done some things publicly, and to me engaging in the public discourse of a democracy, whether it's law or politics or public affairs, is one of the great treats of living in America and I think not to participate in it if you have a desire to is crazy.

Mr. Stern: The average Joe can't hire Joe DiGenova to represent him or her. Are we providing sufficient legal resources in the District for average people?

Mr. diGenova: Well, I think not as much as we should, but you know, there is only so much you can do. I think this is a quandary about the provision of legal services to the middle class. These larger organizations that have come around the country that do not only personal injury work but do social security stuff and all that, people that specialize and do this kind of work and I think they are important. I think getting a lawyer is getting easier for people, especially since there are more lawyers out there than ever before. Could we be doing a better job? I don't think there's any doubt about that.

Mr. Stern: Thank you. That will conclude our second session, one to go. This is Carl Stern I've been talking with Joseph DiGenova as part of the Oral History series of the Historical Society of the D.C. Circuit. This is the 11" of November 2003.

**Oral History of
JOSEPH E. diGENOVA
THIRD INTERVIEW - DECEMBER 18,2003**

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Joseph E. diGenova, former United States Attorney, and the interviewer is Carl Stern. The interview took place on December 18, 2003. This is the third interview.

Mr. Stern: This is the 18th of December 2003. This is Carl Stern. I am interviewing Joe diGenova. This is the third of three recordings for the Historical Society and we will begin.

Let me divide the first question into two parts. I wanted to ask you to what extent do you believe the legal system works. I would like to divide that into the first for parties in civil litigation. Are you satisfied that our system works?

Mr. diGenova: Well, it works in a sense, and that is that there is a procedure in place and that we have a method short of physical combat for resolving disputes between private parties or between the government and private parties in civil litigation. The problem with that civil litigation is that it is costly. It is lengthy. It is a process that devolved into a battle of paperwork and motions. It is by and large unrelated to the search for the truth. It is a system that is broken, but it is nonetheless a system. It is something that the average American should with all of their might seek to avoid because you never know who is going to win or why they are going to win. But it is as good a system I think as the world enjoys, but it is clearly broken and all of the efforts to solve the problems of it by the American Bar Association and the judiciary and everybody else have been, I would consider, a miserable failure.

Mr. Stern: What is the remedy? Should judges impose constraints on the

amount of pretrial skirmishing and discovery?

Mr. diGenova: Well, you know, I think what has happened is simple lawsuits no longer exist. They are rare. The complicated lawsuit is the order of the day. Large amounts of discovery, huge amounts of paper, electronic discovery, e-mails, complicated laws creating new and very important rights, may I say. This is not a question about are there are too many rights. It's a question that there may be – that there's too much process to enforce those rights. Too few judges willing to dismiss cases early on in the process because they are afraid to be overruled by courts of appeals. Too many judges unwilling to impose Rule 11 sanctions on frivolous lawsuits and outrageous conduct by plaintiffs' lawyers and similar conduct by defense attorneys seeking to hide legitimate evidence from legitimate lawsuits by plaintiffs. I would say that generally that the regulation of civil litigation is, for the most part, a problem and I think that's why people are turning to alternative dispute resolution because people know that if you go to court you have already lost.

Mr. Stern: Pretrial motions have to be heard and considered by the court. That seems to be where most of the wheel spinning is occurring. Why not simply limit the number of motions?

Mr. diGenova: Well, I think judges already have the authority to do that. They simply don't exercise it. And that is really the problem here with judges who really need to take control of their dockets and their courtrooms and their litigation. And I think they have used civil litigation as a sort of a thing that the lawyers and maybe even the magistrates can handle and that the discovery process that goes on between lawyers with minimal supervision by courts is really what that process is about. I don't necessarily know there's anything that can be done

about that. I think the litigation genie was opened up in the '60s. It hasn't changed or turned around at all since then. Class actions, of course, I think are the most outrageous example of what happens when a litigation technique gets out of control. What was conceived of as a way to help the small victim, blend their resources together and aggregate, has become nothing more than a money machine for plaintiffs' lawyers. Very few aggregated victims get anything out of class action and that is, of course, something that Congress has stayed away from because the interest of the plaintiffs' bar has prevented that from happening. But that's our system. But we must understand where we are in that system and where we are is a very bad place.

Mr. Stern: Does it reflect a lack – these class actions, does it reflect a lack of action by the government?

Mr. diGenova: Well, I think Congress can control class actions.

Mr. Stern: That isn't what I mean. Does it result from the fact that there is less vigorous federal going after the bad guys?

Mr. diGenova: Oh, no, no. Listen, these plaintiffs' lawyers would file lawsuits – if the federal government goes after a bad guy, all the plaintiffs' lawyers do is glob onto the government's work, so that's not the problem. The problem is not state or federal government not doing their job. It's the plaintiffs' bar that is out of control, not being regulated by courts, and a plaintiffs' bar that is not being regulated by Congress because there are conflicting interests about what should be done about class actions lawsuits. But I think anybody who looks at this and thinks that these aggregated victims are somehow being helped by class actions simply doesn't understand what is going on. This is about money for lawyers. That is what these suits are about.

Mr. Stern: What did you make of the recent statistic showing that fewer than two percent of civil case filings actually resulted in trial.

Mr. diGenova: I made of that the realization that litigation is costly, lengthy, unfair and that people prefer to settle to get rid of something – and that’s not a bad idea by the way, as long as the settlement is not something that is beyond the cost of doing business, and as long as people aren’t being gouged by class action lawyers to pay large sums of money for attorneys’ fees. I mean it does show that there isn’t litigation to resolve conflicts and the reason there isn’t litigation is the things I said earlier. It’s complicated; it’s costly; it’s nasty; there is no civility in the civil bar. People think that conflicts between defense attorneys and prosecutors are bad, they ought to get involved in some civil litigation where the stakes are high on each side. The conduct of attorneys in some of those cases is absolutely outrageous, and the courts don’t control it. They pretend to control it, but they do not.

Mr. Stern: Could the figure reflect at least in part that judges are ruling summarily summary dispositions of cases?

Mr. diGenova: I don’t know the answer to that. I would love to see the backup on that statistic. I think what’s happening is you’re seeing lots of settlements. I’d like to know how long it took to settle those cases for example.

Mr. Stern: What about the criminal system? I asked you whether you thought the legal system was working. We’ve talked a little bit about this before in our previous recordings. Are you satisfied with respect to criminal suspects and defendants that justice is being done?

Mr. diGenova: Well, again I think we are where we are. It’s just as in the civil

cases. I think our system is the best system in the world. Is it flawed? The answer is yes. It's certainly not perfect. I think there is no governmental or private system that is perfect. I think there are definitely problems with the representation of indigent defendants, which is quite serious. I don't know the answer to that. It would involve huge amounts of public money to properly pay legitimately trained and properly supervised public defenders. But clearly we need to move in that direction. Court-appointed lawyers are not paid enough to do their jobs. The courts know that and everybody else knows it. Regrettably many judges who sit on the bench have not practiced law in private practice, don't understand what it takes to defend a case, don't understand the costs involved in defense. Certainly with regard to the capital system, and I mean by that the death penalty cases, it is quite obvious that the level of representation is inadequate and has been for a long time in many states. And that's why these various projects which are out there such as the Innocence Project to use **DNA** to prove the innocence of people at any time in a legal proceeding, even years after conviction, is so important. So, all I'm saying is I think our system is superb and it works, but it needs to be improved and I think we need to pay a lot of attention to that and I think we are beginning to. I do think for example, that the one great thing about **DNA** is that it really has made people focus on the proof system and what prosecutors are doing and what defense attorneys are doing. I will say I have been extremely disappointed at the level of unprofessional conduct by prosecutors in the state system in these death penalty cases. When you go back and look at things that were done in Illinois in particular – I was not a fan of the blanket pardons and clemency issued by Governor Ryan, but the fact is the underlying problems with the capital system in Illinois were real and the integrity of their system was completely undercut by the conduct of prosecutors and police officers. I don't know how a

system could have been so broken with so many people involved in it and nothing being done about it. Now, talk about the absence of a judiciary doing its job. There, apparently in Illinois, nobody did their job except some journalists and some defense attorney who were the true people trying to find out what went on in these cases. I believe in capital punishment, but because I believe in capital punishment, I believe that the system has to be almost perfect in order for it to function. And when you look at some of these cases, you cannot imagine that prosecutors who have sworn to uphold the law would be involved in some of these cases in the way they were. And I'll tell you what else I find appalling is in Virginia, where people in Virginia in the Attorney General's Office have refused to concede that proof of innocence should be available at any time. They say it's got to be within a time frame. I can't imagine a prosecutor who would ever want proof of innocence to be kept fi-om a court of law or the public. If there is evidence that someone was wrongfully convicted, that evidence should be admissible at any time. Now, obviously there's always trouble with people who are changing their stories and that is something the legislature can regulate. But, when you are talking about DNA evidence or scientific evidence, there ought to be a no-nonsense rule that at any time if there is generally validly accepted scientific evidence which tends to show that a person was wrongfully convicted, that evidence should be available to a court at any time.

Mr. Stem: The other side says we need finality in this system.

Mr. diGenova: Well, we don't need finality that's wrong. We need finality that's right. If there is evidence that someone was wrongfully convicted, finality is not a goal in and of itself. Finality is a goal only if the process is working correctly and an injustice is not being done, particularly in the case of the death penalty. I mean, finality is fine, but it is not the

bronze god that people make it out to be. Finality can be an injustice.

Mr. Stem: You suggested a moment ago that judges don't have enough trial experience in some instances to run their courtroom appropriately.

Mr. diGenova: And assess payment for lawyers. They think the lawyers are overpaid or charging too much. These guys and gals obviously in most instances have never done a case if they think lawyers who are defending indigents are overpaid. I mean this is ludicrous.

Mr. Stem: Well, that's what I wanted to nail down. Many of the judges that I know do have considerable civil litigation experience when they come to the bench. Are you saying there are too few judges being selected from the criminal defense bar?

Mr. diGenova: I guess what I'm saying is that I'm seeing things happening in courts and I was originally talking about the compensation that these court-appointed lawyers get, where judges seem to think that the lawyers are being overpaid, which is I mean it's just nonsensical. But I am concerned that a larger number of people who have extensive civil and criminal experience are not being appointed to the bench. This is vitally important that people who have tried cases civilly and criminally, people who have been prosecutors and defense attorneys, as well as civil litigators, get a chance to be on the bench because they understand the system. They know what happens in the process.

Mr. Stern: Well, you raise an interesting question. I know many of the recent appointees to the court. Some come from a background in prosecution and I don't know if I can think of any judge at the moment, there must be one but I can't think of one, who came from the criminal defense bar.

Mr. diGenova: Well, I can't think of one either.

Mr. Stern: Is that bad?

Mr. diGenova: Yes it is bad. Let's put it this way. If someone has been a prosecutor and has also been a defense attorney, that is a good thing. To have the blend of those experiences to know what it is to defend someone is very important. People who have never played that role of a defense attorney lack a fundamental skill, I believe. Now maybe they can acquire it on the bench. Maybe as a result of watching government behave and watching defense attorneys behave and watching cases play out before them, they grow in that role. I would prefer that they understand it and have that experience before they take the bench. But first and foremost, we have to have people who are intelligent, fair, honest and have at least enough experience in the law that they are going to be able to manage their courtroom and their calendars. I would say that generally the quality of federal judges has been terrific over the last – both the Clinton and Bush administrations appointed very good people. I was happy to support many of them, particular in circuit positions around the country and help them with a Republican-controlled committee. And I think the Bush administration has for the most part selected very competent people. My concerns are that I want people on the bench who are mature. I prefer older people on the bench as opposed to younger people because I believe that younger people, while they may be very bright and very knowledgeable, there is simply no substitute for experience and having been through the wringer a few times and have some judgment and some restraint learned over years that you are not perfect as a litigator.

Mr. Stern: So, one weakness in our D.C. court system may be that judges are not being appointed from the criminal defense bar, do we agree on that?

Mr. diGenova: Well, I think they are few and far between. I think the last one I can remember was Gladys Kessler and Gladys was a civil litigator. I actually should not – I’m trying to go back in my mind. By the way, John Bates who was recently appointed was wonderful. Royce Lamberth who I supported was my –

Mr. Stern: That was on the civil side.

Mr. diGenova: I actually don’t know of any members of the defense bar that have made it through the process. Now, some of them have gotten on the Superior Court, but even the Clinton administration, which you might have thought might have been more predisposed to this, didn’t reach into that bar. It reached into the civil bar, which by the way is fine. I mean, I think that is a great bar to reach into. There are a lot of very qualified people there. But I do wish there were some criminal defense bar lawyers getting onto the federal bench.

Mr. Stern: Are jurors competent to handle the complexities of today’s cases. You mentioned that earlier. Putting aside constitutional issues, do we really need juries? I mean if the constitution didn’t require it, do we really need juries?

Mr. diGenova: Well, you know, I think this issue of “Can the modern juror handle the complex case?” is a matter about which a lot of thinking is being done. Given our constitutional system, I don’t think there’s much that can be done about it, absent waivers by the litigants. I think it’s a legitimate question to ask. Have the types of cases the jurors are hearing where they rely on this amazing amount of complex, expert testimony about values and medical testimony, it may very well be that we are engaged in a sophisticated riverboat gamble in civil litigation in complex cases. And I don’t think it’s wrong to ask the question, “Is that the best

way to do it?” Would it be better to have three judge panels hearing these cases? I would certainly love to have three judge panels, experienced litigators. Judges who have heard many cases, listening to questions of complex fact and opinion and scientific evidence. I would be much, much more satisfied with that, than I would be with the traditional twelve men and women tried and true, now sometimes six or fewer, I can’t remember the federal rule for the minimalist jury, I think it’s six. I think it’s a good question to ask and I think it’s a question worth pursuing. I have always believed myself that three judge panels in complex cases would be a better way to handle those types of very, very complicated issues. I still continue to believe that and I think we probably should try to figure out how to do that.

Mr. Stern: In non-complex cases, do you still prefer to trust the collective wisdom of a jury?

Mr. diGenova: I don’t know how you cut that cake, but I do believe that it’s something that needs to be looked at. I don’t think we should eliminate civil trials with juries. But I think there ought to be a core and a type of case that because of their complexity need to be handled a different way.

Mr. Stern: For that matter, do we really need local bars? I mean, this is the computer age. Shouldn’t a lawyer be able to practice anywhere in the country without being admitted at the practice there? We can look up cases in what the law requires at any state in the union.

Mr. diGenova: Well, I don’t think we should change that. I think it’s very important to have that, but as you know, in federal court lawyers practice all over the United States because all they have to do is be admitted to one bar and then they get admitted pro hac

vice in individual cases or with local counsel with them. So, in essence, in the federal system we have that right now, where lawyers practice all over the United States even if they don't have an office in the jurisdiction in which they appear. That seems to work well, but it does help to know the community in which your judges and juries sit and indeed I think most people would feel uncomfortable for the most part, except in the most impersonal types of cases going into a jurisdiction where they didn't have competent local counsel. We certainly never do that.

Mr. Stem: What do you think of the D.C. Bar Association, the American Bar Association? Do these kinds of organizations live up to their potential to do useful things?

Mr. diGenova: Well, I think the local bar associations tend to do a lot better job of servicing their members than the ABA. The ABA has become a huge trade association with its Xanadu facility in Chicago. Thousands of staff members, tens of million dollars in budget, huge conventions, thousands of people attending. I'm not quite sure what, if any, good comes from all of that. Maybe some good does and standards and things like that are published but it's basically a trade association that has grown so large and so cumbersome in the manner in which it conducts its business that you – in this modern age where people must move quickly to preserve rights and do things, instantaneous communication, these lumbering organizations are sometimes way behind the curve. They catch up a year or two later with something and then you have to say to yourself, why didn't this happen sooner –

(short break)

Mr. diGenova: All right, back to –

Mr. Stern: Well, let me move on. What do we have what, 50,000 plus lawyers in the District of Columbia, and I guess up to a million nationwide. Is it time perhaps to

impose some kind of constraints on how many lawyers we have?

Mr. diGenova: No. There is a marketplace out there. Most of these lawyers don't practice law. They work for corporations. They do other things. Many of them are accountants. Some of them are doctors who get two degrees. So, I think for the most part we certainly have enough lawyers. I don't think there is any shortage of lawyers. We have a shortage of doctors, not lawyers, and that will work itself out and the marketplace will control the number.

Mr. Stern: Are you proud to be a lawyer?

Mr. diGenova: Oh, I am indeed. In fact, I must say, when I decided to become a lawyer, I thought it would be enjoyable and fun and challenging and it has been all of that. I must say my public service was fascinating. Twenty years of being in the federal government doing different jobs, just really, really wonderful. And that doesn't mean that there aren't other things that would have been better for me to have done, but the truth is I have had a great time being a lawyer and enjoying the practice of law and my government service and I wouldn't change a thing.

Mr. Stern: Have you ever figured out though why so many people despise lawyers?

Mr. diGenova: I think it's very obvious why people despise lawyers. Because lawyers have assisted in creating an image of lawyers that is the antithesis of what people think the legal process should be about. People believe that the legal process should be about finding the truth. Lawyers view their role as preventing that from happening for the most part if their client is going to be injured by it. And thus, the treading dance of moving the cape and trying to

make sure that your client is never hit by the bull and that image of lawyers – and of course, there are notorious cases of lawyers doing awful things and bringing crazy lawsuits. It doesn't help, for example, when some goofy lawyer files a lawsuit against McDonald's saying that his client weighs 400 pounds because McDonald's makes a tasty but overly fat hamburger. People look at that and they think that that lawyer really ought to be – something should be done to him. But we have the American legal system and the American judicial system are not getting rid of cases like that in a timely and fast fashion. That has helped create an image that every single thing that is wrong with America can be settled by a lawsuit and that is a big mistake. And while we all want to have – we don't want to have self-help. We don't want to have people engaging in mortal combat to settle disputes. We also don't want the legal system to become a joke and to become a place where people go unnecessarily to resolve disputes. And again, as I say, the turning to arbitration and alternative dispute resolution is an example of just how frustrated Americans and American business and others are with the judicial process which is uncontrolled.

Mr. Stern: What aspect of lawyering do you like best?

Mr. diGenova: I like the problem solving. Obviously it's always interesting to be in a case where there is an exciting investigation and you have an interesting client and there are complex legal issues. That's really fun; that's really good. Also the solving of problems and negotiating of a resolution to something, and particularly when you can do it in an atmosphere of civility with the other side is really enjoyable and a lot of fun. Much of the work that we do, for example, involves legislative work, and the crafting of a solution with some trade association in helping them solve a complex problem involving medicare or something like that. We represent hospitals, for example, with just an amazing number of issues that involve how you solve a

problem for an industry that is so heavily regulated. All of that stuff, whether it's criminal, civil, legislative, the solving of the problems and the hunt for the solution and the creativity that can come into play with that, is really just a lot of fun, as long as it is a civilized discourse, which unfortunately isn't always the case.

Mr. Stern: And what do you least like to do? What makes you grind your teeth?

Mr. diGenova: When things get nasty, unnecessarily nasty. When government officials act with arrogance and are almost despotic in their ignorant use of their power. You know, I always felt that the people who have all the power don't have to act like they have it, because they have it. There's no need for a show. What there is need for is thought and the reasonable and just use of that power. It is the arbitrariness sometimes of people in government who really make no effort to try and understand what it is that the problem is or to solve it. That is something that requires management at the top of agencies which for the most part doesn't exist, and that's a sad thing. It's the kind of thing where you say, you know, I'd love to be the head of that agency for one year to **fix** it.

Mr. Stern: I would think that the most frustrating part of your career was that chunk when you were a prosecutor. You can put some bad guys away, but a crime is always with us. It doesn't seem to be reduced substantially.

Mr. diGenova: Well, you know, you can't ever worry about the plight of man. I mean, that is – man's state is to be for the most part in conflict with his government. This is the way life is and there has always been a criminal element. There will always be a criminal element, and the ability to control that in any given time we've learned has much more to do with

demographics than it does with crime control or anything else. Look at the numbers. They go up and down based on the age of the population and those numbers for the most part – it's like genes. Genes control health in people for the most part. Serious illnesses controlled by genetics. Crime is controlled by demographics.

Mr. Stem: So, I'm mistaken. You were the happy warrior? You were never frustrated?

Mr. diGenova: No. I wasn't frustrated. It wasn't my fault that there was crime. I was just doing my job. (laughter)

Mr. Stern: Okay. Supposedly we have the longest prison sentences in the civilized world yet it doesn't seem to have a great deal of impact. Prison sentences about right now?

Mr. diGenova: No. I think prison sentences are too long. I think we are putting too many people away for too many things for too long. Particularly in the federal system, where judges no longer have sentencing discretion where the "guidelines" which are nothing more – they are not guidelines. The federal sentencing guidelines are in fact mandatory minimum sentences by another name. And recent changes in federal sentencing laws like the Feeny Amendment further reducing the authority of federal judges to depart downward are a terrible mistake. I repeat we are locking up too many people for too long for the wrong things. We should be reducing our criminal population, both state and federal, focusing on the most dangerous repeat violent offenders and figuring out ways to divert people out of the system, make them productive members of society, but all along making sure that we take care of the really dangerous people. Like this predator who kidnaped this young woman recently and

apparently killed her and raped her. This guy who spent **23** years in prison. There needs to be a way to deal with things like that. If we weren't spending so much time dealing with other things, we could spend more time focusing on how to track these people, how to make sure that they don't commit crimes. But there's just no doubt that right now the federal sentencing system is out of control.

Mr. Stem: You discussed the deficiencies as you see them of judges, of Congress, some lawyers. We haven't talked about law school at all. Are there things that the law schools should be doing?

Mr. diGenova: Well, you know law schools are sort of going through a change themselves. Many of them have become advocacy centers. They are no longer teaching the trade of the basics, the fundamentals. They have become places where law professors become advocates for styles of law, for philosophies of law. My old law school, Georgetown, has become just a left-wing bastion with a rather anti-prosecutorial bent. I went to an event there about two years ago where I was asked to speak and sat through some of the earlier panels. I've never heard such vitriol from professors about the prosecution function in my life. In fact, it was ignorant. It was so off the wall it bespoke a profound ignorance of the prosecution function. You know, just really derogatory things being said about all prosecutors. That's no way to teach young law students respect for the system by derogating everybody involved in one part of it. I mean, clearly there are prosecutors who don't do a good job. We all would admit that, but there are certainly some unethical defense attorneys out there, as well. I think what's happening in law schools is it's the battle for the hearts. You know, the American people are separated 50/50, Republican and Democratic, conservative and liberal, just about. It's **48** percent, you know,

whatever it is. Law schools appear to being run the same way. It's ideology and I think they are missing the boat in terms of fundamental education of young lawyers. This is shown by the fact that many people who come out of law school can't write. They graduate from high school, they can't write. They go to college they can't write. They go to law school, they can't write, and you end up as a lawyer teaching law clerks how to write. You would think by the time they had gone through law school that they could figure out how to be an advocate, how to be analytical, and the fact is, they are not taught that.

Mr. Stern: What I had in mind was, whether there are any subjects that are short-changed.

Mr. diGenova: (laughter) Oh, you mean I answered the wrong question? *Sorry.*

Mr. Stem: No, you did fine, but I want to pursue –

Mr. diGenova: Well, you know there's all sorts of trendy stuff. There is this study and that study and you know, law schools are like market-to-marketplace. They are out there trying to sell themselves. They are trying to get the best students, and so they think they have to have things on their website that show that they are very trendy. And so there are all these new courses out there, doing all sorts of things. Whether or not students are learning anything of value is of course, another question and only time will tell.

Mr. Stern: You said the nation is divided half-and-half conservatives and I guess liberals. I think it's fair to put you in the conservative camp.

Mr. diGenova: I'm conservative on national security and criminal law issues. I would consider myself moderate on social policy and other things, but on foreign policy, national security and criminal law, I'm pretty conservative.

Mr. Stem: I'm just curious if you have ever figured out for yourself why you're conservative.

Mr. diGenova: For example, I'm pro-choice. That would be inconsistent with many of my conservative friends are pro-life and I'm pro-choice and that's the way I am.

Mr. Stem: Okay, but you agreed with some respects, that you are a conservative. I'm curious if you have ever figured out for yourself why you are so inclined.

Mr. diGenova: Because it's the only right position.

Mr. Stem: (laughing) Beyond that.

Mr. diGenova: Well, the answer is I think people become what they see around them when they grow up. I think you come from a culture, a household, you learn things, you're taught things. Sometimes you rebel against that, sometimes you accept it and it just depends upon your circumstances. And in many instances it depends upon some of your teachers, what you were exposed to, whether or not someone was particularly impressive early in life about their ability to think through a problem and convince you that you were wrong or they were right or whatever. And I think all sorts of influences. I was deeply influenced by my father who was a terrific reader, thinker, but a man who went all sorts of different directions on issues. We were constantly discussing politics, music, literature. He was what I would call a moderate Democrat. My mother and father were both Democrats, always voted for Democrats. Voted for Eisenhower; they liked him. They voted for Reagan. But I think it's really an experiential thing.

Mr. Stem: If I can overcome your sense of modesty, I'm curious to what do you attribute your success? You are a successful, colorful figure in the District bar. How come?

Mr. diGenova: Well, I really don't know the answer to that. I've always been

myself, and to the extent that – and I’ve never tried to be anybody else but who I am. I’ve always felt that public discourse and debate was very important. I have felt that people don’t talk about things enough, don’t engage in debate, allow too many things to happen that would otherwise not happen if people just talked about things. I’ll never forget Jean Kirkpatrick when she went to the U.N. She got up and gave a speech where she said we’re not going to do this, this and this anymore. We’re not going to do this, this, and a bunch of these *goofy* ambassadors at the U.N. came up to her and said gee, if you told us before, we would have gone along – we didn’t know you cared so much. And to me, it was an example of the important of discourse, the importance of discussion. Not controversy, but discussion. The difference of opinion. You know, what happens is people live in a community, particularly Washington. Washington is a very liberal Democratic community, and for years the marketplace of ideas was just shut closed. I mean, the media was controlled by the liberals, Congress was controlled – then all of a sudden a paradigm shift, and there were different ideas being discussed. New think tanks were coming into being, money was being poured into conservative thought and all of a sudden there was a battle of ideas. And I must say for the better, the marketplace of ideas has – the Cato Institute, now there’s the Libertarian branch of conservatism which is now out there fighting the Heritage Foundation. Brookings has sort of said, “You know maybe we need to look at some of these ideas.” All of that is an example of when people start to discuss ideas, good things happen. Nothing bad happens from people having their stage of ideas. I’ve always believed that it was better to have discourse and since I enjoy discourse, and have been involved in politics since college, to me that role of public discourse has always been something I thought was important. Maybe that’s – and of course, I’ve never been afraid to talk about those things either on television or at public

gatherings and maybe that's different, Maybe that was something different that people hadn't seen before. But my view was, I think, if you are going to be a public official, you better make sure people know what you think.

Mr. Stern: Do you sometimes wish that you were sort of a cool technician of the law rather than sort of the crusader that you have been?

Mr. diGenova: Well, I don't know that I'm a crusader. I certainly believe that people ought to talk about problems, but I'm very happy and where I am and where I've been.

Mr. Stern: Let me switch for just a second.

Mr. diGenova: There are times I wish I was Ted Olson, who is my favorite lawyer in the world, next to my wife.

Mr. Stern: Do you believe the District will ever have voting representation in Congress?

Mr. diGenova: Well, look at it today. It could become part of Maryland or Virginia and have two senators and an appropriate congressman right away, so it's not a problem. What I think will not happen is that the District will not become a state and it shouldn't. It's too small. It doesn't have any economic base other than government and I think that the notion that you are going to create a state out of a 62-square-mile area that has nothing except government at its base is a mistake. It just shouldn't happen. And for people who are concerned about the deprivation of representation in Congress, the sophistry of their position is shown that they reject the notion of a retrogression of the physical property, either to Maryland or Virginia. That solves the problem. The people who want two senators for the District and a congressperson are really the enemies of representation, because the District could have two senators and an appropriate

congressman tomorrow with retrogression to Maryland. My view is that this is – I understand the reason that people want it and I think they should have it and I think the way to get it is retrogression to Maryland.

Mr. Stern: Do you really expect that that would ever happen?

Mr. diGenova: I have no idea, but I can tell you this. The District is not going to be a state. It's never going to happen.

Mr. Stem: Does Maryland wish to acquire the District of Columbia?

Mr. diGenova: Only time will tell.

Mr. Stern: Well, it's been speculating for a while.

Mr. diGenova: By the way, who knows. There could come a national consensus that the District should be a state and if that were the will of the American people, so be it. That would be great. I was making a judgment about the political likelihood that it would become a state. I don't think it will. I don't think it's possible. Even the Democrats when they controlled both Houses of Congress and the White House, never gave the District voting representation. The irony of this is that Bill Clinton didn't do didley about voting representation for the District and controlled the White House for eight years. I find that ironic,

Mr. Stern: The bar has attempted to put rather strict limits on public comment by lawyers involved in pending litigation for fear of prejudicing the proceeding. Do you think that concern is overstated?

Mr. diGenova: No. I think that lawyers can say and do things in cases that are detrimental to the process of deciding if it involves a jury. I don't think lawyers should be restricted talking about things that are in front of judges. I think judges ought to be able to

handle anything that is said publicly by the litigants. But when there's a jury involved, or a potential jury, then I think the judicial system has a vitally important role to play in controlling the public comments of lawyers which might tend to influence a future jury or a sitting jury. I think that's a perfectly proper thing and I think lawyers ought to be able to function within that quite nicely. But, in fact, all you have to do is watch what is happening in California and Colorado in these cases involving Kobe Bryant and Michael Jackson to see a level of incompetence on the part of prosecutors, number one who are I think dismally incapable of dealing with their public responsibilities, and a performance by defense attorneys which is equally appalling.

Mr. Stern: No one seems to review the professional competence of lawyers publicly the way we review restaurants, theaters, and so on. Do we need something like that? Would that help?

Mr. diGenova: (laughing) Well, you know, the notion of citizen review of professionals is something that is frequently talked about. We have citizen review panels for police departments which generally don't function very well. I think we have professional groups which try to monitor the behavior of people. We have grievance committees. We have bar associations. We have ethics committees. We have a delicate balance between the first amendment rights of lawyers to represent their clients and their duties to the bench and bar as officers of the court. Striking that balance has never been easy. Sometimes we do it well. Sometimes we don't do it well at all. I mean, we all know what happened in the O.J. Simpson trial with a judge who couldn't control his courtroom and the extra-judicial statements that were made by people before, during and after that case. We all learned a lot from that, but apparently

it was short-lived. Now what's happening in these two cases in California and Colorado are an example of what – I think there's something in the air in Colorado – I'm not quite sure what it is, but every prosecutor I've seen from Colorado doesn't seem to know what he or she is doing.

Mr. Stem: Is there a weakness in our system when the competence of judges, prosecutors, lawyers, is seldom commented upon publicly?

Mr. diGenova: Yes. People are afraid to do it because they have to appear back in front of these people. That's why public commentary by judicial watchers, people who sit and do – people like Stuart Taylor and others who make a life out of watching judges, lawyers, prosecutors, that type of stuff by competent people is very important. Let me, by the way, commend the *New York Times* and the *Wall Street Journal* for over the years having spent a lot of time editorially talking about those subjects as opposed to very few other news organizations. Both have done a very good job. Sometimes from different perspectives, ideologically, but the *New York Times* and the *Wall Street Journal* have been absolutely fantastic in this area of the law and being worried about competence, the performance of the key players. They deserve a lot of credit for staying on top of it.

Mr. Stem: The public's perception of lawyers and judges is probably molded more by what they see on television, the fictional depictions.

Mr. diGenova: *Law and Order*, *Judge Judy*, you name it. Whatever it is, *Homicide*, all of these shows – and that, by the way, you are absolutely right, because what happens is, people begin to think in 60-minute segments. Beginning, conflict, resolution, all within sixty minutes. Thus, lowering the attention span of the future witness, future juror, future judge, whatever. And people begin to think that that's the way it is in real life. That the way it

happens on *Law and Order* and the way it happens on all these shows is the way it happens in real life. Well, of course – and of course, they watch in every case, DNA, scientific testimony, certitude, the witness breaking down on the stand, confessing to the crime on the old *Perry Mason* thing, you know, every show. People learn that stuff. And that's the way they think the system works. Well, of course, it doesn't work that way. It's much messier.

Mr. Stern: I'm going to flip the tape over at this point. I have just two or three questions remaining, but I want to make sure we don't run out.

Mr. diGenova: Great.

Mr. Stern: This is the second part of our December 18, 2003, interview with Joe DiGenova. In life as we gain experience, we develop certain guidelines, rules, principles, things that we impose upon ourselves and discipline. Do you have any that you want to pass along that you have adopted for yourself?

Mr. diGenova: Yes. I deeply believe in the evening meal, family meal. I have always believed in it that it is a very important thing, that dining is a civilizing influence. And by that I mean getting people together and my wife and I try to do that when the kids are here and earlier when the children were younger, that was a very important thing. I think all of these family functions if you have a family, if you're married obviously are things that are vitally important. I think you need to take time away from what you do. I think it's very important to vacation, to get away. Sometimes that's very difficult for people who have pressure jobs. I think it's important to have another life. I think it's important to be able to divert your attention away from troubled professional problems and to do things. I think it's important to have an interest in music, literature, art, sports, all these things. I took up golf because I was worrying too much

about my work and it was the best thing I ever did.

Mr. Stern: How proficient did you become?

Mr. diGenova: I'm a pretty good golfer. I shoot mostly in the 90s, but sometimes I shoot in the 80s, and I love golf. I will play golf anytime. I just found a new golfing friend out in California and we – he comes here, I go there. We play golf all over the place. It's really been a lot of fun.

Mr. Stern: With respect to lawyering, are there any rules you try to impose upon yourself?

Mr. diGenova: I think you try to do the things you do well and stay away from the things that you don't do well. You try to make sure that you keep your practice within the bounds that you have set for yourself and don't try to grab off too much. And to enjoy what you are doing. To try to make sure that in practicing law, you are doing things that you want to do, that you're interested in. That's not always possible, but we have been remarkably successful in being able to enjoy a practice which does follow what we want to do and it's been very, very enjoyable. I do think it's important to work as hard as you can and then to stop and to do something else so that you don't lose your edge, so that your judgment is not affected a constant repetitive problem-solving momentum that gets you into a thing where you lose that edge. Because the one thing people expect from you is your judgment, and if you are too tired or too worn out or too frazzled to not have that, then you are not worth anything to a client.

Mr. Stern: Lastly, you have been responding very cooperatively to my questions. Maybe there's something that you have been itching to get in that I didn't ask about or some message for posterity.

Mr. diGenova: No. Actually, you have really covered the water. I'm not leaping out of my chair to say anything. I've nothing additional to say.

Mr. Stern: Life as a lawyer in Washington, D.C. has been a pretty good life. Is that about it?

Mr. diGenova: It's been wonderful, and you know one of the things that's great about a Washington practice is this is the seat of government and here sits Congress and the Supreme Court and all the executive agencies and regulatory agencies and so if you practice here, you have the opportunity to do things in every one of those forums and I'm happy to say that our practice has included us doing everything in every one of those venues, regulatory agencies, trying to solve a problem in the Executive Branch, litigating in federal and state courts, going up to the Hill to try and solve a problem, doing lobbying. That really is, to have that kind of federal practice, it allows you to do all of those things has really made this just a fascinating – and we have represented foreign governments, we've done things for companies overseas. We've gone overseas on cases; we've been in the Middle East; we've been in what we used to call Asia Minor; we've been to the Far East on cases; we've been all around the United States. To me, really the fun thing has been if you're in a town like Washington at the intersection of law and politics, many interesting cases can come your way. We were involved in the Mark Rich pardon case. We've been involved in the *Hinckley* case when I was in government. When you are able to look back and look at the type of practice and the experience that you get here, Washington is a wonderful, wonderful place if you take advantage of it in your law practice. And that's what we've tried to do and I couldn't be happier about what we've done.

Mr. Stern: Thank you.

Mr. diGenova: Thank you, Carl. It's been enjoyable.

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