

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

**United States Courts
District of Columbia Circuit**



The Honorable Lloyd N. Cutler

**Interview conducted by:
Professor Susan Low Bloch**

May 20, 1992

TABLE OF CONTENTS

Preface	i
Oral History Agreements	
Honorable Lloyd N. Cutler	ii
Professor Susan Low Bloch	iv
Biographical Sketches	
Honorable Lloyd N. Cutler	vi
Professor Susan Low Bloch	vii
Oral History Transcript of Interview on May 20, 1992	1
Index	A1

NOTE

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

The contents hereof and all literary rights pertaining hereto are governed by, and are subject to, the Oral History Agreements included herewith.

© 1996 Historical Society of the District of Columbia Circuit.
All rights reserved.

PREFACE

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

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

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

Schedule A

Tape recording(s) and transcript resulting from _____
interviews conducted by Professor Susan Low Bloch
on the following dates: May 20, 1992
_____.

DRAFT: December 15, 1993

Historical Society of the District of Columbia Circuit

Interviewer Oral History Agreement

1. Having agreed to conduct an oral history interview with Lloyd Carter for the Historical Society of the District of Columbia Circuit, Washington, D.C., I, Susan L. Bloch, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings and transcripts of interviews, as described in Schedule A hereto, including literary rights and copyrights.

2. I authorize the Society, to duplicate, edit, publish, or permit the use of said tape recordings and transcripts 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, and that I will then use such information only if and to the extent permitted by the Society.

Susan Low Bloch 6/16/94

Interviewer

Date

SWORN TO AND SUBSCRIBED before me this 16th day of June, 1994.

[Signature]

Notary Public

My commission expires 7/31/97

ACCEPTED this 23rd day of March, 1994 by Daniel M. Gribbon, President of the Historical Society of the District of Columbia Circuit.

[Signature]
Daniel M. Gribbon

DRAFT: December 15, 1993

Schedule A

Tape recording(s) and transcript resulting from one
interviews of Lloyd Cutler (number)
(interviewee)
on the following dates:^{1/}

May 20, 1992 - one tape, 27-page transcript

^{1/} Identify specifically for each interview, the date thereof and (1) the number of tapes being conveyed, and (2) the number of pages of the transcript of that interview.

May 2, 1995

LLOYD N. CUTLER

Lloyd N. Cutler was born in New York City. He has been a partner in the Washington, D.C., law firm of Wilmer, Cutler & Pickering and a predecessor firm from 1946 to 1979 and from 1980 to 1990. In 1991 he became Counsel to the firm and is now Senior Counsel. In 1979-80, he served as Counsel to the President of the United States. From March through September 1994 he served as Special Counsel to the President of the United States. He has also served as Special Counsel to the President on Ratification of SALT II Treaty, 1979-1980; President's Special Representative for Maritime Resource and Boundary Negotiations with Canada, 1977-1979; Senior Consultant, President's Commission on Strategic Forces (Scowcroft Commission), 1983-1984; as a member of the Quadrennial Commission on Legislative, Executive and Judicial Salaries, 1985, and as Chairman, 1989; Member, President's Commission on Federal Ethics Law Reform, 1989.

He is a graduate of Yale College (B.A., 1936) and Yale Law School (LL.B., 1939) and was awarded a Yale honorary degree as Doctor of Laws in 1983. He was also awarded an honorary degree as Doctor of Laws from Princeton University in 1994. He was a founder and Co-Chairman of the Lawyers Committee on Civil Rights Under Law. He has served as Chairman of the Board of the Salzburg Seminar, Co-Chairman of the Committee on the Constitutional System, a member of the Council of the American Law Institute, a trustee emeritus of The Brookings Institution and a member of its Executive Committee, and an Honorary Bencher of the Middle Temple. He has also served as a director of a number of national business corporations.

SUSAN LOW BLOCH

(O) Georgetown Univ. Law Center (H) 4335 Cathedral Avenue, N.W.
600 New Jersey Avenue, N.W. Washington, DC. 20016
Washington, D.C. 20001 (202) 363-7979
(202) 662-9063

EDUCATION

Law School: J.D. - University of Michigan, 1975
Summa Cum Laude;
First in class (GPA = 4.26; 4.0=A)

Honors: Michigan Law Review, Note & Comment; Editor 1974-75;
Associate Editor, 1973-74; Order of the Coif - March
1975; Daniel H. Grady Prize Award - 1975 (Highest
standing through the full course of studies in the law
school); Henry M. Bates Memorial Scholarship - 1975
("Outstanding Seniors in Law School"); Class of 1908
Memorial Scholarship - 1975 (Highest scholastic average
at beginning of senior year); Maurice Weigle
Scholarship Award - 1973 (Outstanding achievement in
freshman year); American Law Book Company Book Award
for "Most significant contribution toward overall legal
scholarship" - first year, 1973; second year, 1974;
third year, 1975; West Publishing Company Award for
Highest Scholarship Average in the Class - first year,
1973; second year, 1974; third year, 1975.

Graduate School: University of Michigan
Ph.C. - Computer and Communication Sciences - August 1972;
Master's Degree - Computer and Communication Sciences - May
71';
Master's Degree - Mathematics - December 1970.
Honors: National Science Foundation Fellow, 1970-72;
Teaching Fellowships, 1969-72.

Undergraduate: Smith College
B.A. Major: Mathematics; Minor: Economics
Honors: Graduated "With Distinction" (Top 10 students);
Phi Beta Kappa (Junior Year); Sigma Xi; House President

PROFESSIONAL EXPERIENCE

Law: Professor, Georgetown University Law Center 1982 - present
Wilmer, Cutler & Pickering; 1978 - 82
Judicial Clerkship - U.S. Court of Appeals, D.C. Circuit -
Judge Spottswood W. Robinson, III - 1978-76
Judicial Clerkship - U.S. Supreme Court
Mr. Justice Thurgood Marshall - 1976-77

Other Fields:

University of Michigan Computing Center, Summer 1970

Bell Telephone Laboratories - Department of Computer
Graphics and Economics - 1968 - 1969

Radio Astronomy Observatory, University of Michigan -
Assistant Research Mathematician - 1966 - 1967

COMMUNITY AND PROFESSIONAL SERVICES

Editorial Advisor to "**Justice**"--Journal of the Department of Justice; Board of Institute for Public Representation (since 1985); Worked with the GULC Street Law Clinic on "Lawyer-Teacher Partnership" for Washington, D.C.; D.C. Bar Ethics Committee--1990-1993; D.C. Bar Administrative Law Section Nominating Committee ; D.C. Bar Committee to Celebrate the Bicentennial of the Constitution (1986-1991); Organized and participated in series of symposia on the Constitution--Winner of "Best Bar Project for 1987"; United States Court of Appeals for the District of Columbia Circuit Judicial Conference--Arrangements/Program Committee (1994; 1990; 1986); American Civil Liberties Union Nominating Committee (1985); Committee of **Visitors** for the University of Michigan Law School (1978-present); Smith College Reunion Committee (1986-1991); Volunteer - Upward Bound (1970-1972).

PROFESSIONAL MEMBERSHIPS

District of Columbia Bar; United States Court of Appeals for the District of Columbia Bar; United States Supreme Court Bar; Women's Bar Association; Women's Legal Defense Fund; American Civil Liberties Union; American Bar Association; Washington Council of Lawyers.

LECTURES AND PANEL DISCUSSIONS

Participant, Gruter Institute Conferences
1993 "**The Rule of Law, Human Nature, and the New Russia,**" The Brookings Institute, Washington, DC;
1991 "**An Interdisciplinary Approach to Environmental Regulation,**" Tauberbischofheim, Germany;
1990 "**Law and Biology,**" Squaw Valley, California;
1989 "**Law and Biology: A Sense of Justice,**" Monterey, California
Interviews on Constitutional Law and the Supreme Court for CNN, NBC, ABC, NPR (including some interviews in Spanish), and newspapers;
Moderator for "**The Role of Attorney General**" with B. Civiletti--GULC, October 1988;
Panel participant on "Independent Counsel: Lawful or Not?--GULC--March 1988;
"**Celebrating** the Bicentennial of the Constitution--Can It Serve Another 200 Years?," Organizer and Moderator June 30, 1987;

Participant in various "Press Briefings on the Supreme Court" at GULC;
Tribute to Chief Judge Spottswood Robinson, United States Court of Appeals for the D.C. Circuit, Judicial Conference, May, 1987;
Presentation to the Legal History Section of the AALS, "John Marshall's Misuse of History," New Orleans, LA., January 1986;
Panel participant on Role of the Supreme Court--GULC.

PUBLICATIONS

- Susreme Court Politics: The Institution and Its Procedures, with co-author Thomas Krattenmaker, West Publishing Co., 1994
Foreword, "Do What You Can With What You Have," Okla. L. Rev. 1994
Remembering Justice Thurgood Marshall," 1 Journal on Fighting Poverty 9 (1993)
The Supreme Court Justices, Illustrated Biographies 1789 - 1993, Supreme Court Historical Society (ed. Clare Cushmen) (Contributer) 1993
Foreword, "Thurgood Marshall: Courageous Advocate, Compassionate Judge," 80 Geo. L.J. 2003 (1992)
"The Privilege of Clerking for Justice Thurgood Marshall," 1992 Supreme Court Historical Society Yearbook
"The Evolution of American Environmental Regulation: The Impact of Political Structure and Culture on the Substance of the Law," Proceedings of the Conference on the Interdisciplinary Approach to Environmental Regulation, held in Tauberbischofheim, Germany, 1993
Contributor to the Oxford Companion to the Sulsreme Court of the United States, 1992
"The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism," 1989 Duke L.J. 561
"Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation," 76 Geo. L. J. 59 (1987)
"John Marshall's Selective Use of History in Marbury vs. Madison," 1986 Wisc. L. Rev. 301; reprinted in Supreme Court Historical Society Yearbook 1987 and in Los Angeles Daily Journal, Sept. 1988 (coauthored with M. Marcus)
"Can Congress Prohibit Public Broadcasters From Editorializing?," 16 Preview 281 (1984)
"Discriminatory Membership Policies in Federally Chartered Non-Profit Corporations," 72 Mich. L. Rev. 1265 (1974)

Interview with Lloyd Cutler on May 20, 1992

BLOCH: Lloyd, when and where were you born?

CUTLER: I was born in New York in 1917. I attended Yale College, and then Yale Law School. I started working in the Cravath office just before World War II. I had clerked one year for Judge Charles Clark on the Second Circuit. He had been the Dean of the Yale Law School and I was his first law clerk after he became a judge. And then right after Pearl Harbor, like so many others, I wanted a job in Washington as part of the war effort, and I came down. A number of my friends from law school were at the Lend Lease Administration and I got hired at the Lend Lease Administration, in February 1942. I then went, after several months, to North Africa as the Deputy Chief of the Lend Lease mission serving under the former president of one of the General Motors subsidiaries, and it was one of those typical wartime operations that mushroomed from two to 150 professionals. We were part of what was called the North African Economic Board. After that, I came back to Washington to enlist in the army.

BLOCH: When was this, Lloyd?

CUTLER: This was toward the end of 1943. I ended up (it's not relevant to anything you're doing) but anyway I ended up in the military intelligence group that read the

Japanese and German coded message traffic and wrote them up into intelligence materials.

BLOCH: Where were you, in this country?

CUTLER: I was in the Pentagon. I served for a while in the Philippines. My only other interesting wartime adventure was when the eight Nazi saboteurs landed by submarine on a beach in Long Island in 1942. The general counsel of Lend Lease in those days, Oscar **Cox**, was also the Assistant Solicitor General in the Justice Department, which is now the same post that is called the Office **of** Legal Counsel, and he got tagged to work on that case. He found me on a Sunday afternoon and I spent three months **as** part of the trial team in the prosecution **of** the eight saboteurs before a military commission up in the FBI part **of** the Justice Department.

BLOCH: What was the outcome?

CUTLER: Naturally they were all sentenced. It was all very interesting because the FBI had seized these fellows and made it appear to the public as if they had been detected landing on the beach or coming into New York, where they were to make contacts with various Americans. **In** fact, two of them had decided on the way over that they were going to defect. They all landed and disappeared into the American landscape without being detected, but these two fellows went to the Mayflower Hotel in Washington, called up the FBI, and

because, by mistake they had called the D.C. FBI rather than the national FBI, it took four hours before anybody arrived to collect them.

BLOCH: Then, they revealed the location of the other guys?

CUTLER: They knew the locations of the other guys and the FBI was able to round them all up.

BLOCH: But only two were defecting? What were the others doing?

CUTLER: They had all been trained at a German sabotage school. They had been given contacts, mostly German-Americans, to find over here and they were in the process of establishing those contacts.

BLOCH: So they ultimately were a threat.

CUTLER: Oh they were saboteurs. They were planned saboteurs.

BLOCH: But had two not defected, we might not have survived?

CUTLER: They were German saboteurs, not our saboteurs. We sent lots of people like that into Europe, of course, also. And the most interesting part of all of that is that that case ended up in the Supreme Court and Francis Biddle was the head of our team and argued the case and, in his opening statement to the Supreme Court, he kept referring to the "war of law" instead of the "law of war." That case did go through the Court of Appeals but on a very fast track.

BLOCH: And the Supreme Court upheld their convictions?

CUTLER: The Supreme Court upheld their convictions.

BLOCH: What made you decide to be a lawyer? What made you go to law school?

CUTLER: That's easy. My father was a lawyer and, after I wanted to be a trolley car motorman, the next thing I wanted to be was a lawyer.

BLOCH: And how did you choose Yale?

CUTLER: Well I had always been interested in Yale and in those days -- that is Yale as an undergraduate -- in those days it was very easy to go to law school. All you needed was your AB degree and your father's checkbook. I think even at Yale the admissions ratio couldn't have been any higher than 1.1 to 1, or some such thing, and we were literally recruited. The law school professors would come over to the college and urge us, anyone interested in the law, to go to the Yale Law School.

BLOCH: What did you major in in college?

CUTLER: I majored in history and economics.

BLOCH: Was that common then -- to do a joint major?

CUTLER: Yes. But now I wish it had been in literature.

BLOCH: Well you can go back.

CUTLER: At the end of the war, four of us who had been in the Lend Lease Administration legal staff and had also come from New York law firms decided we would start a law firm in Washington, instead of returning to New York. That firm was called Cox, Langford, Stoddard, and

Cutler. Everyone in that firm was a partner. We had no associates at the beginning.

BLOCH: And what year was this, Lloyd?

CUTLER: This was 1946.

BLOCH: And so you started with just four people?

CUTLER: We started with four. We grew to 18 or 19 by 1962, and the bulk of us merged with the firm Wilmer and Broun, which had its own history as the local branch of the Cravath office before it started as a separate firm after the war. In '62 we merged with them, and I think our total complement in '62 was 19 or 20 people.

BLOCH: When you formed Wilmer, Cutler and Pickering, how many did you say you were?

CUTLER: We were 19 or 20 when we began.

BLOCH: Did you have a distinctive philosophy for the firm? Why did you merge?

CUTLER: I would say we merged really for diversification and growth. Within Cox, Langford, some of us had had a disagreement with Oscar Cox, our senior partner, about growth and recruiting more people, more bright young people, Supreme Court law clerks and so forth, and promoting them rapidly. And I think that was my motivating factor.

BLOCH: You wanted to expand and to recruit more?

CUTLER: That's right, and John Pickering, who was one of the partners at Wilmer and Broun, was my close friend going

back to the Cravath days and all during the war, and in talking to him, I found they were interested in the same thing. *So*, after rejecting some other invitations, one of which was from Paul Weiss to become their Washington office, we decided to start this firm.

BLOCH: Judge Oberdorfer was with Paul Weiss at that time?

CUTLER: Lou Oberdorfer was with us. He had been a young lawyer at Paul Weiss but then he had come over to Cox, Langford, Stoddard and Cutler.

BLOCH: Prior to the merger?

CUTLER: Right, before the merger.

BLOCH: **Do** you think it was easier to start a law firm in those days than it would be today?

CUTLER: **No**, I really don't. I think there is always room in Washington for a good young firm. Take a firm like Jack Miller's firm, Miller, Cassidy. Because of their small size, they can sometimes recruit people we would like to have, young Supreme Court law clerks for example, because they are a small firm. There are always significant penalties to growth. There are rewards from growth. You do become an all-purpose law firm. You are no longer as heavily dependent on any single client. You can fortify one another. There's a great deal more security for retirement, pensions, illness, everything else. You become much more

diversified as to your specialties, but you pay a penalty for growth because the bigger you are, the less opportunity for collegueship there is. You finally get to this ridiculous point of the law firms with a thousand lawyers and 300 or 400 partners. That's an oxymoron; that's a contradiction in terms -- to be a partner with three or four hundred other people. We're already up to 80 ourselves.

BLOCH: 80 partners, and how many total?

CUTLER: We're about 210 or 220, something like that.

BLOCH: Have you sort of stabilized, or is it still growing?

CUTLER: No, it's still growing. It probably grows at a 5 to 10% a year level.

BLOCH: Does it have to? Is that the nature of law firms today?

CUTLER: Well, I think, no, of course it doesn't have to. Now there are law firms that are shrinking, as you know. But I think in order to provide rapid opportunities for your very bright youngsters you need to expand to some degree. They are not going to be satisfied just waiting around until some old partner's place is available to be filled. It's not like a bank, where there are just so many positions. You have to keep growing in order to fulfill the natural aspirations of the younger people.

BLOCH: And, as you add more partners, you have to add more associates.

CUTLER: That's part of the economics of a law firm, but our partner/associate ratios are much lower in that we have fewer associates per partner than the New York firms. That's one reason why the New York firms make more money. You can call it exploiting the young people or whatever you want to call it. But it's true, as a partner you make more money on your younger people. The more you have that you can keep busily employed, the more money you'll make.

BLOCH: Let me ask you what were some of your favorite cases that you brought in the D.C. Circuit.

CUTLER: The cases I have enjoyed the most have not been D.C. Circuit cases. I've had several through the D.C. Circuit that got to the Supreme Court.

BLOCH: That's a D.C. Circuit case.

CUTLER: I guess you could call that a D.C. Circuit case. I was involved, along with John Pickering, in the Younustown case which of course was a great battle.

BLOCH: Whom did you represent?

CUTLER: Well, John was representing Bethlehem Steel. I was sort of coaching on the sidelines, in the course of that.

BLOCH: Did either of you argue it?

CUTLER: We were much too young in those days.

BLOCH: You were one of those lowly associates.

CUTLER: We were involved in a number of the auto safety cases that had different parts of them go through the D.C. Circuit like the airbag cases. They were partly in the Sixth Circuit and partly right here. And they went through the D.C. Circuit. I suppose the most interesting case I had was the Gramm-Rudman case which strictly speaking was not a D.C. Circuit case because it went through a 3-judge court directly to the Supreme Court.

BLOCH: The statute provided for that?

CUTLER: That's right. But the 3-judge court included Judge Scalia.

BLOCH: What happened in the airbag case?

CUTLER: We were also involved in Powell against McCormack, the Adam Clayton Powell case which went through this circuit also. Well, in the airbag case, we were counsel for the auto company. Several iterations of the airbag regulation were thrown out, ones that the auto companies resisted and finally in the Republican days there was one which the auto companies supported and that got thrown out also. The cases went on for 15 or 16 years.

BLOCH: What period?

CUTLER: It's roughly 1965 or so, all the way through 1987; the last one I think was only about five years ago.

BLOCH: What was your least favorite case?

CUTLER: My least favorite cases are almost always reviews of an administrative record, as you know. I've had several appointed cases back in the days when the D. C. Circuit did criminal appeals.

BLOCH: But you mean those to be your least favorite, or just additional cases?

CUTLER: No, I think I've helped let one or two criminals out of jail.

BLOCH: Has the profession changed significantly in the time you've been practicing?

CUTLER: Well, I think the practice of law has changed very significantly, but sticking to the courts for a while, I don't think the appellate process has changed very significantly, other than this growing mountain of cases that you have and the reduction in time for oral argument which, I think, is too bad.

BLOCH: Do you see changes in the Court of Appeals for the D.C. Circuit in the time that you've seen it in operation?

CUTLER: Yes, I suppose the Court of Appeals changes that I see have more to do with quality of judges than anything else.

BLOCH: What do you mean?

CUTLER: And there is a lack of intimacy in the court. The court itself is so much bigger and the court now sees and hears many more lawyers than it ever did before.

Apart from the government lawyers, most other lawyers make fewer and fewer appearances in the Court of Appeals. The same thing is true of course in the Supreme Court. Apart from a very few people like Larry Tribe, it's quite rare for anyone in private practice to have argued more than a dozen Supreme Court cases in their whole career. I think I'm up to 10 or 11 or something like that. I haven't had one myself for the last three years.

BLOCH: Do you see a change in the quality of the judges at the Court of Appeals level?

CUTLER: Well yes. I think there is a change, both in the quality of the judges and certainly of course in what you might call the politics of the judges. But remember this was a court of people of the stature of Harold Leventhal and Skelly Wright and Barrett Prettyman. There is a natural tendency of course to think that the judges who were older than you were, were greater than the ones who are younger than you are. That's inevitable. But even allowing for that, I think the great days of this court were 10, 15, 20 years ago. There is no Carl McGowan on this court today. There is no Harold Leventhal on this court and I'm not disparaging anyone. I think Pat Wald is a wonderful judge. I think there are other good judges on the court, but the general quality is quite

different from what it was then. However, in my view the same thing is true **of** the Second Circuit; the same thing is true of the Supreme Court; and as I said it's a natural tendency to feel that your contemporaries or your seniors were better than your juniors.

BLOCH: **Do** you think that the nature of the appointment process could be changed, **or** it is just a question **of** who is appointing?

CUTLER: Well, at least part **of** it is that being a judge is a career choice that fewer and fewer top quality lawyers are willing to make.

BLOCH: **Do** you think people are turning it down?

CUTLER: A lot of people are not willing to get into the process.

BLOCH: Because they don't want to be a judge, **or** they don't want to go through the process, or both?

CUTLER: Well, I think it's a little bit **of** both. A lot **of** it, in my view, has to do with the relatively low compensation **of** judges compared to what lawyers can earn. Part of it, is the asceticism of being a judge, the fact that you don't get many phone calls, not too many people call you up and invite you to lunch. There is a lot more glamour to an active Washington law practice than there is to a career on the Washington bench.

BLOCH: And yet that part -- the asceticism -- was always true.

CUTLER: Of course, that hasn't changed. But I think it was one thing when being a judge brought you a decent salary. Now I was chairman of one of the quadrennial commissions and I was a member of an earlier quadrennial commission and what judges have to go through, especially if they become judges in their 40's and 50's, while they are still raising a family and sending them off to universities, is terrible. It's even true that judges from impoverished minority groups find that they can't afford to stay on the bench. You should listen to Leon Higgenbotham up on the Third Circuit, who was one of our very best witnesses at the time of the last quadrennial commission. He said he cannot provide his children with the educational opportunities that he had, and he grew up as a poor kid. You don't want to use up all your tape on this issue, but I do think fewer top flight lawyers with the capacity to be top flight judges are interested anymore. I also think there is a sense that quality doesn't count as much as political service or political reliability as judged by whoever the appointing President is. The D.C. Circuit, as you know, over the last years has been used to place people who have no real connection with the practice of law in the District at all.

BLOCH: That was not true though with President Carter, was it?

CUTLER: Well it was always true to a degree in the sense, for example, that Skelly Wright was put on this circuit although he had **no** previous background in the Washington law practice. That's always been true to a degree.

BLOCH: That was to get him out of the South?

CUTLER: I think it was part of a deal between Senator Eastman and the administration of those days, and it **also** had to do with getting some other judges' appointments approved. You should talk to Nick Katzenbach about that; I think he knew about it at the time. But the tendency has been to pick people who are either in the administration -- in the Justice Department -- or to pick people from other parts of the country and put them on the Court of Appeals here because there was no vacancy or no room anyplace else.

BLOCH: And no Senator here to object.

CUTLER: And of course the control that Senators have over the District Court appointments outside Washington, and around the rest of the country, is virtually complete. As long as they pick somebody who didn't steal money and has at least a decent reputation at the bar, he'll be taken.

BLOCH: **Is** it your impression that that has changed over the years **or** has that always been true as far as you know?

CUTLER: I think it's getting worse. Carter fought that much more. I mean Carter was **so** determined to increase the number of blacks and women that he often fought what the Senators wanted to do.

BLOCH: Didn't he set up a different system?

CUTLER: Well he had a Court of Appeals review commission. He had a review commission right here which he unfortunately put in the hands of -- what's the name of that fellow who later got convicted on a bribery charge, the one who was involved in bribing the judge in Florida? He was the chairman of Carter's commission to pick judges for the local D.C. courts. (I should remember his name, Borders, I think, something like that.) But I do think that there is a difference in quality and, as you know, there has been a lot of really serious infighting among the judges of this court,

BLOCH: At the appellate level.

CUTLER: Their collegueship could be improved, to say the least.

BLOCH: Can you think of ways we could improve the judiciary? You said one, raise the salary.

CUTLER: Well, raising the salary is one. Certainly, opening the field on merit is another. It's almost inconceivable today, for example, that an outstanding Washington lawyer who had not been of political service

to the administration and who is a middle of the roader politically, would be picked for this court.

BLOCH: And that's probably true nationwide, don't you think, or more *so* here?

CUTLER: It's probably true nationwide. Nationwide there is more *of* a chance because a Senator might back a particular outstanding lawyer and get him through even though he had not been of great service to the administration.

BLOCH: Is there anything you could change if *you* could in the appointment method or the confirmation process?

CUTLER: Well, I was involved in the Carter appointment method. I'm not sure ours was much better, but I think what it takes more than anything else is real interest on the part of the Attorney General and the White House Counsel in finding first class people, regardless of and removing, the element of political service.

BLOCH: And the only way you could do that is urge them, right, there's no right procedural mechanism?

CUTLER: That's right. I guess it's true that when it comes to Supreme Court appointments, the President has or should have a minimum standard of quality and pay a great deal *of* personal attention to the person he selects. But the president is hardly involved in the selection of court of appeals judges; it's done at a relatively lower level. And if the Attorney General himself is passive

or if the white House counsel is passive, it tends to fall along political lines.

BLOCH: Would you want to see a system where the Senate sort of floated names, not that the President would be bound by them?

CUTLER: **No**, I don't think I would. I think essentially I would leave the Supreme Court selection system alone. Let the Senate raise serious objections when they think there is someone they think is unqualified. When we get a run of 12 Republican years and two presidents as disinterested in legal principle as the last two presidents, you are going to have some bloopers and we have, and when you have divided government -- a Republican President and a Democratic Senate -- you are going to have some big fights, but on the whole I think it has worked out all right. I was for Bork. I think, in hindsight, Bork would have been better than other Reagan possibilities. There was more of a chance that Bork would have done some original things on that court, I think.

BLOCH: I think that's right.

CUTLER: Let's not discuss Judge Thomas. I did argue a case in front of Judge Thomas in the Court of Appeals and he was perfectly competent in that case, and we won that case.

BLOCH: **So** that's why he's competent.

CUTLER: But I do regard that as a very cynical appointment.

BLOCH: who have been your favorite judges, the judges you respect the most, on the Court of Appeals'?

CUTLER: Can I go to the past?

BLOCH: Sure.

CUTLER: Certainly I would guess McGowan, Leventhal, Skelly Wright, Prettyman would be the four that I would respect the most.

BLOCH: Why? What are the characteristics that you think most important in a judge?

CUTLER: Well, I think any one of them would have made a very distinguished member of the Supreme Court; maybe that's one way to say it. But they all had high intellectual quality, and a great sense of fairness. I think I would add Judge Fahy to the list too; he was a marvelous man. They were totally objective, much more so say than David Bazelon. They wrote beautifully. We still go back and cite their opinions and if they wrote an opinion you don't say: "as the court held;" you say "as Judge Leventhal held." There's a wonderful story about Fahy that Acheson has told that ought to get in this history someplace: Fahy would argue without notes in the Supreme Court, when he was Solicitor General, the way Hugh Cox did and to some extent Larry Tribe does today. There was a case, according to Acheson, in which Fahy was asked by one of the justices the real

\$64 dollar question on the case, and his response was:
"Mr. Justice, many is the time I have asked myself that question and I have no really satisfactory answer. But the answer that satisfies me the most is this," and he then proceeded to give his answer. As Acheson put it, from then on Fahy and the Justices were walking down the garden path, hand-in-hand, searching for the truth.

BLOCH: That's great.

CUTLER: He had the capacity to admit the weaknesses in his own argument, which is to me the essence of good advocacy.

BLOCH: And that ability served him when he was a judge as well?

CUTLER: Well, as a judge, he showed the same capacities. I don't sit in the conferences, but I suppose a judge needs that capacity in the conferences. He had the intellectual qualities and the openness of mind to write wonderful opinions and make very good decisions.

BLOCH: Who have been some of your favorite judges on the District Court?

CUTLER: Judge Gesell, Judge Oberdorfer, Aubrey Robinson. I think I'll stop right there. Oh, I like John Pratt, I've always liked John Pratt.

BLOCH: What qualities do they have that you admire?

CUTLER: Gesell, of course, is a litigator, as you know. He might lack the necessary patience to be a really good

judge, but he disposes of things very quickly. He's got a great capacity to simplify. I remember a class action antitrust case in which he was dealing with a public interest lawyer who insisted on filing requests for admissions. Gerry just said to him, "Mr. Brodsky, or whatever his name was, "you don't really want to file this demand for requests for admissions." He said, "By the time these very good lawyers on the other side have finished, you not only won't get any answers, you'll be sorry you asked the questions." And he talked this fellow out of it and moved him on to summary judgment.

BLOCH: What is your idea of what makes a good lawyer?

CUTLER: That's very hard, but the qualities are not very different. It's openness of mind, quick study, soundness of judgment, ability to persuade, ability, as I said, to admit the weaknesses in your position, capacity to be seductive, certainly honesty and integrity.

BLOCH: Do you think legal education has changed over the years and if *so* which way? What's your view of it?

CUTLER: Well, I am not that familiar with legal education today. I have taken a couple of teaching sabbaticals, one at Yale and actually two at Oxford. I've done some teaching, and I go up and lecture in law school classes from time to time. But I don't think it's changed that

much and, on the whole, I think it is very satisfactory.

BLOCH: Are the kids you see coming out here well trained?

CUTLER: They are very well trained. I think more suffer today than was true 20-30 years ago from an inability to write clearly, which to me means inability to think clearly, but part of it is basic pre-law school education and literature, and logic and sentence structure and such things. It's remarkable how many very bright people, very articulate on their feet, don't write well.

BLOCH: How would you remedy that if you had the ability, the power?

CUTLER: Well, we used to have a Yale course, a freshman course, called Daily Themes, in which we would literally have to write something everyday -- one page, two pages. I think the class met three times a week, and the professor -- these were very good full professors of literature, I mean they were not teaching assistants or anything else -- would then mark it up and give it back to you. Then in the class they would read out somebody's piece and they and the whole class would tear it apart. Of course, they wouldn't say whose piece it was, but when that happened to your piece, it taught you a lot about writing.

BLOCH: And they would tell you what to write on? They would give you a theme for the day?

CUTLER: No, you had to think up your own.

BLOCH: As well as write it, you had to create it.

CUTLER: Apart from that, I think law school education is as rigorous and as mind-grabbing as it ever was. I can still remember many classroom events in law school, better than I can remember college days. I do think the urge to do good in the world, to be a full service well rounded citizen, has fallen off. The 80's generation, even the kids coming out of law school, were very much a "me," "what about me" generation, rather than a public service generation. Part of that again is that at least federal government public service became unattractive to a lot of people who thought they had missions in life because of the attitude of the last three administrations.

BLOCH: Do you see any change now at all in the other direction, or does it look the same?

CUTLER: No, not much. I think we will see a change again. It used to be, 10-15 years ago, that we would be -- of course these were the days when everyone was scrambling to recruit young lawyers -- we would be questioned very rigorously about our pro bono programs. Now hardly anyone asks. **And** we're the ones who insist we're going

to put at least five, I think we put seven percent, of our time in pro bono work.

BLOCH: Are you unusual in that?

CUTLER: I think we lead the country. The good old "American Lawyer" has, in addition **to** their charts about how much money people make, they have one on public service in which by their rating system we came out number one.

BLOCH: Would you favor a required service of all lawyers, an ABA requirement on something? I don't know how you would enforce it.

CUTLER: Yes, I've spoken about, although I don't know how you would enforce it. It could only be a goal I think. And this law firm -- we had our 30th anniversary a couple of weeks ago as you know -- and the firm gave scholarships in John's name [John Pickering] to Michigan and in my name to Yale. We put into the requirement for eligibility for the scholarship that the recipient has to commit to devote at least **10%** of his/her future career **to** pro bono and public service work. It's a good thing to keep in youngsters' minds.

BLOCH: I remember when I was recruiting and being recruited, that was the big question. I guess one reason why students might not be asking it now is either they don't care, or they're **so** anxious to get the job, they're afraid to ask.

CUTLER: I think they care, or some care, but also they need the jobs, they need the money, and remember most of them have probably gone \$40,000-\$50,000 in debt by the time they are out of law school. And, of course, when they join a big firm they want to get ahead in the firm and they don't identify doing public service work in the firm as a way to get ahead. You [the firm] have to work hard on that in the firm and make clear to everybody that if you get assigned to a pro bono case it's just as important as a paying case.

BLOCH: Do you think that associates here at Wilmer understand that?

CUTLER: I hope so.

BLOCH: What was your experience as White House Counsel like?

CUTLER: People would say to me, are you having a good time? And I would say "no, but I wouldn't have missed the experience." And it was fascinating -- it was only 16 or 17 months. You are *so* close to the center of decisionmaking and you can have an impact on the decisions. I would rather be the White House Counsel than the Attorney General.

BLOCH: Why?

CUTLER: Because you are closer to the President and because you are at a preventive stage. I mean the Attorney General may never hear about a legal issue unless it's brought to him after the fact. The White House Counsel can

spot it and say this is something that has to be resolved because he's sitting there, if he's used properly, in the policy meetings. When I was asked to come in, the President said to me, I want you to play a Clark Clifford role, so I literally got that in writing. Every time that I was left out of something or wasn't invited to a meeting, I'd go to Hamilton Jordan or I'd go to the President and I'd say: "Harry Truman would have invited Clark Clifford to this meeting." Nobody there of course remembered what had really happened in the Truman Administration. Clark has embellished it so much by this time that I was able to get into anything I wanted to get into.

CUTLER: Do they want us to talk about the Washington law practice? I thought you really wanted to know more about the Court of Appeals.

BLOCH: They seem to want to have a general picture of practice in Washington. Who were your favorite teachers at Yale? Most inspiring?

CUTLER: I go back pretty far. It was Arthur Corbin, Harry Schulman, Myres McDougal.

BLOCH: Did they influence you in ways that, if you had not had them, things might have been different?

CUTLER: Well, Corbin was not only a wonderfully open, smiling, gentle person but he had a wonderful analytical mind and he loved to play his way through the whole class.

We had the man climbing up the flagpole for days. If you climb to the top **of** the flagpole I'll give you \$100, and he's 3/4 of the way up, and the fellow down at the bottom says "I revoke". Is there a contract or isn't there a contract? Then we would go on through that for hours. I can still remember a number **of** those sessions. Schulman was a wonderful man too. He was our torts professor. I don't think that has changed. The quality of the present people is every bit as good.

BLOCH: And do you have any comments or criticism of some of the law and humanities, law and sociology, law and literature trend? The criticism is, I guess, that people coming out can't think like a lawyer.

CUTLER: Well, I don't think that matters much really. It really doesn't matter what you study in law school. I would favor a mandatory first year -- I mean, torts, contracts -- because they are **so** analytical and logical, but other than that it doesn't really matter. It doesn't matter whether you have taken evidence or not, it doesn't matter whether you've taken tax law or not. It's the ability to analyze and think and write that really counts. I do wish there were more law and humanities courses, a lot of lawyers are non-readers, as you know, or non-visual, or not perceptive of their own **or** other people's feelings.

Index

- Acheson, 18-19
Airbag cases (Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983)), 9
American Lawyer, 23
Anecdotes:
 Biddle, Francis, 3
 Fahy, Charles, 18-19
 Gesell, Gerhard R., 19-20
Attorney General, role in judicial appointments, 16-17
Bazelon, David L., 18
Bethlehem Steel, 8
Biddle, Francis, 3
Borders, **Mr.**, 15
Bork, Robert H., 17
Bowsher v. Synar, 478 U.S. 714 (1986) (Gramm-Rudman case), 9
Carter, President, 13-14, 15, 16, 25
Clark, Charles, 1
Clifford, Clark, 25
Corbin, Arthur, 25-26
Cox, Hugh, 18
cox, Oscar, 2, 5
Cox, Langford, Stoddard, and Cutler, 4-6
 see also under Cutler, Lloyd N., Legal career
Cravath **firm**, 1, 5-6
Cutler, Lloyd N.:
 Cases:
 favorite cases:
 airbag cases (Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983)), 9
 Gramm-Rudman case (Bowsher v. Synar, 478 U.S. 714 (1986)), 9
 Powell v. McCormack, 395 U.S. 486 (1969), 9
 Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), 8-9
 least favorite cases, 10

Early life, 1
 careerplans, 4

Education:
 Yale College, 1, 4
 "Daily Themes" writing class, 21-22
 Yale Law School, 1, 4, 22
 favorite teachers, 25-26

Legal career:
 Cox, Langford, Stoddard, and Cutler:
 formed, 4-5
 merged with Wilmer and Broun, 5
 Cravath firm, 1, 5-6
 Lend Lease Administration, 1, 4
 North African Economic Board, 1
 quadrennial commissions, 13
 teaching sabbaticals, 20
 U.S. Court of Appeals for the 2nd Circuit:
 clerk to Judge Charles Clark, 1
 White House Counsel:
 "Clark Clifford" role, 25
 role of, 24-25
 Wilmer, Cutler and Pickering:
 formed, 5-6
 pro bono work, 22-24
 scholarships given, 23
 size of, 5, 7-8

Legal philosophies:
 appellate process, changes in, 10
 judges:
 judges on D.C. Circuit courts, lack of connections with District of Columbia, 13-14
 qualities of good judges, 18-19
 quality of the bench:
 Supreme Court, 12
 U.S. Court of Appeals for the 2nd Circuit, 12
 U.S. Court of Appeals for the District of Columbia Circuit, 11-12, 18
 salaries, size of, 12-13, 15
 judicial appointments:
 Attorney General's role in, 16-17
 improvements needed in nomination of judges, 15-17
 political influence on, 13-17
 review commission set up by President Carter, 15
 senatorial control of, 14-15

- to Supreme Court, 16-17
- White House Counsel's role in, 16-17
- law firms:
 - economics of, 8
 - large compared to small, 6-7
 - reasons for growth, 7-8
- lawyers:
 - judiciary as career choice, 12-13
 - qualities of good lawyers, 19, 20
 - Supreme Court, making few appearances before, 11
- legal education:
 - changes needed in, 21-22, 26
 - quality of, 20-22
 - quality of teachers, 26
- practice of law, changes in, 10
- pro bono work, need for, 22-24
- U.S. Court of Appeals for the District of Columbia Circuit:
 - best judges, 11, 18
 - changes in, 10-11
- Scholarship honoring, 23
- U.S. Army service:
 - in military intelligence, 1-2
 - Nazi saboteurs* case (*Ex parte Quirin*, 317 U.S. 1 (1942)), 2-3
 - at the Pentagon, 2
 - in the Philippines, 2
- "Daily Themes", 21-22
- Eastman, Senator, 14
- Ex parte Quirin*, 317 U.S. 1 (1942) (*Nazi saboteurs* case), 2-3
- FBI, 2-3
- Fahy, Charles, 18-19
- Gesell, Gerhard R., 19-20
- Gramm-Rudman* case (*Bowsher v. Synar*, 478 U.S. 714 (1986)), 9
- Higgenbotham, Leon, 13
- Jordan, Hamilton, 25
- Justice Department, U.S., 14
 - Attorney General, role in judicial appointments, 16-17
 - FBI, 2-3
 - Office of Legal Counsel, 2
 - Office of the Solicitor General, 2
 - Fahy, Charles, 18-19
- Katzenbach, Nick, 14
- Lend Lease Administration, 1, 4
 - see also under* Cutler, Lloyd N., Legal career

Leventhal, Harold, 11, 18
Mayflower Hotel, 2
McDougal, Myres, 25
McGowan, Carl, 11, 18
Michigan, University of, 23
Miller, Jack, 6
Miller, Cassidy firm, 6
Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983) (*airbag cases*), 9
Nazi saboteurs case (Ex parte Quirin), 317 U.S. 1 (1942):
 FBI, Germans defect to, 2-3
 Prosecution team, 2-3
 in Supreme Court, 3
Nazis, 2-3
North Africa, 1
North African Economic Board, 1
 see also under Cutler, Lloyd N., Legal career, Lend Lease Administration
Oberdorfer, Louis F., 6, 19
Office of Legal Counsel, 2
Oxford University, 20
Paul Weiss firm, 6
Pearl Harbor, 1
Philippines, 2
Pickering, John, 5-6, 8, 23
Powell, Adam Clayton, 9
Powell v. McCormack, 395 U.S. 486 (1969), 9
Pratt, John H., 19
Prettyman, E. Barrett, 11, 18
Quadrennial commissions, 13
Reagan, President, 17
Review Commission, U.S. Court of Appeals, 15
Robinson, Aubrey E., Jr., 19
Scalia, Justice, 9
Scholarships:
 Honoring Cutler, Lloyd N., 23
 Honoring Pickering, John, 23
Schulman, Harry, 25-26
Solicitor General's Office, 2, 18-19
Supreme Court, U.S., 18-19
 Appointments to, how to improve, 16-17
 Cases:
 airbag cases (Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company), 463 U.S. 29 (1983), 9

Gramm-Rudman case (Bowsherv. Synar, 478 U.S. 714 (1986)), 9
Nazi saboteurs case (Ex parte Quirin, 317 U.S. 1 (1942)), 2-3
Powell v. McCormack, 395 U.S. 486 (1969), 9
Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), 8-9
 Changes in, 11
 Justices:
 Scalia, 9
 Thomas, 17-18
 Quality of justices, 12
 Thomas, Justice, 17-18
 Tribe, Larry, 11, 18
 Truman, Harry, 25
 U.S. Army, 1-3
 see also Cutler, Lloyd N., U.S. Army service
 U.S. Court of Appeals for the 2nd Circuit:
 Clark, Charles, 1
 Quality of judges, 12
 see also under Cutler, Lloyd N., Legal career
 U.S. Court of Appeals for the 3rd Circuit:
 Higgenbotham, Leon, 13
 U.S. Court of Appeals for the 6th Circuit, 9
 U.S. Court of Appeals for the District of Columbia Circuit:
 Judges:
 Bazelon, David L., 18
 Bork, Robert H., 17
 Fahy, Charles, 18-19
 Leventhal, Harold, 11, 18
 McGowan, Carl, 11, 18
 Prettyman, E. Barrett, 11, 18
 Scalia, Antonin, 9
 Thomas, Clarence, 17-18
 Wald, Patricia M., 11
 Wright, J. Skelly, 11, 14, 18
 Quality of judges, 11-12, 18
 Tensions among judges, 15
 U.S. District Court for the District of Columbia:
 Judges:
 Gesell, Gerhard R., 19-20
 Oberdorfer, Louis F., 6, 19
 Pratt, John H., 19
 Robinson, Aubrey E., Jr., 19
 Wald, Patricia M., 11

White House Counsel, 24-25
 Role in judicial nominations, 16-17
 see also under Cutler, Lloyd N., Legal career
Wilmer and Broun, 5
Wilmer, Cutler and Pickering, 5-8, 22-24
 see also under Cutler, Lloyd N., Legal career
World War II, 1-3
Wright, J. Skelly, 11, 18
 Politics in judicial appointment, 14
Yale College, 1, 4, 21-22
Yale Law School, 1, 4, 20, 23, 25-26
Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952), 8-9