ORAL HISTORY OF MILTON V. FREEMAN

My name is Phyllis Hurwitz and I am here with Milton V. Freeman of the law offices of Arnold & Porter in Washington, D.C. Today is May 18, 1995, and the time is 2:50 p.m. Thank you for participating in the oral history project of the D.C. Circuit. The purpose of these oral histories is to give listeners years from now an idea of how the federal courts in the District of Columbia progressed and how practitioners interacted with judges of those courts and generally how they felt about practicing in the Nation's Capital.

I'd like to begin though by going back to your childhood if you wouldn't mind giving us some background.

Q: Where were you born?

A: I was born in the City of New York on November 16, 1911.

Q: Were both of your parents from New York?

A: Well, no, they were living in New York at the time but they were immigrants from Russia. They had lived somewhere near the Crimean Sea, Odessa. I had an older brother and a sister who were born in Russia. My father served in the Army of the Czar in the Japanese War where the Russians were roundly defeated. He came back from the war and my mother decided that she had not enjoyed his absence, particularly since there were pogroms in which she had to hide with the two children. They decided that it would be good if he came to the United States and earned some money and brought her and my brother and

sister over. He set out, he did that and they came to the United States -- he came in 1906, she came in 1908. I was born in 1911. I had a younger sister who was born here. In New York City we lived in Manhattan, then in the Bronx, New York City was a lovely place to grow up -- quiet, everything was cheap or free. There was no crime except the liquor traffic and the normal citizenry was not involved in it. And, of course, there was corruption in the City Hall, but otherwise, it was a lovely place to live and grow up -- quiet, nice, green, tennis courts.

Q: What did your parents do. Did they work?

A: No. My mother did not work, she was Chief Executive Officer of the house. My father was a carpenter. He did very well and we moved to the Bronx and had our own house.. Until the Depression came.

Q: Then what happened?

A: We had no income from the man who had been supplying income all his life. Fortunately my older brother had become an Accountant and he had a job and was able to see to it that we had our rent paid and had food. Both my sister and I went to college, of course. My sister went to N.Y.U., which was expensive. I went to City College for which there was no fee except that every six months you had to register which would cost you 50 cents.

Q: As compared to the cost now which I'm sure has risen.

A: Well, in addition to which, I had a university scholarship which was $100 a year -- that was a lot of money then.

Q: So you received a scholarship to go to college?

A: Yes. New York was a great place, until the Depression came along, then it was a bad place because nobody had money. But if you were a kid it was all right.

Q: Did you have to work before you went to college?

A: Well, I tried to but there weren't many choices. I had some jobs. For example, I was an elevator operator in the fur district. But mostly there wasn't really any opportunity. I used to get paid a dollar per week by the New York Times for reporting high school baseball games.

Q: Did you play baseball?

A: No, I was the official score keeper of the Evander Childs High School baseball team.

Q: When did you go to college -- in what year?

A: Twenty-seven to thirty one. I was there when the Depression hit.

Q: What did you major in in college?

A: Well, I remember once explaining this to a professor who interviewed me. The subject was what I wanted to do. I said I wanted to read as much of the literature of the world as I could, in the original language. He offended me by writing down as my objective the word "culture."

Q: There was no such course then as "Great books"?

A: Oh no. That was before "Great books." If so, they didn't do it like that. You just picked. I took English literature, I took French, Latin, liberal education of the sort that was usual at the time.

Q: Did you gain a culture?

A: I don't know offhand, other people will have to say.

Q: So you graduated in 1937 from City College

A: 1931.

Q: Oh '31, I'm *sorry.* Did you go straight to law school or did you take time off after?

A: No, what happened is, I graduated in three and a half years. It was January and I went looking for a job . . . and just a couple of years ago we were at our 60th reunion at City College and there were 30-40 people there. Everybody got up and was asked what happened to them. They all started with the same first sentence: "When I graduated from City College in the year 1931, I couldn't find a job anywhere." So there I was. I couldn't find a job and so I registered for some more courses at CCNY but it was boring when I wasn't going for a degree. Not having anything else to do I applied for a scholarship to Columbia Law School, which was on the same subway line or elevated line that I used to get to City College. Just go down a couple of stations and there you were at Columbia. So I went to law school.

Q: So nothing higher drove your decision to go to law school?

A: No. It was something to do and I didn't know whether I would like it. In fact I liked it very much from the beginning. It was a fine law school, nice people, it was great fun and it was the kind of thing that I liked to do.

Q: Did you have any exposure to lawyers prior to and during law school?

A: No.

Q: ***So*** you saw this just as an extension of schooling. Did you think it would perhaps lead to employment afterwards?

A: I think the answer is that I had no idea what was going to happen. In 1931, I was going to be **20** years of age. I had no idea what was going to happen. I had no world view of the nation, the world, the economy, or any such thing. I didn't know whether I would ever find a job or what kind it would be. It was something to do.

Q: Which were your favorite courses in law school?

A: Oh, I liked them all. I think we had very interesting teachers and some of them were nice guys and some of them were not. The relationship between the faculty and the student body was not very good. It was more or less openly hostile.

Q: Why?

A: Well, I don't know. The class before ours, the Editor in Chief of the Law Review, later to become a justice of the Massachusetts Supreme Judicial Court, was an extremely bright fellow. He got on the nerves of some of the professors and they got on his nerves. So the year before us the law review graduated by a vote of **8** to ***6*** from the faculty. (laughter) Six of the professors of the fourteen felt that they were such an annoying crowd that they shouldn't be given the two points necessary for graduation.

Q: So that poisoned the well for your class?

A: Well, I think they felt relieved that we were a little bit better but they didn't like us very much (laughter). Besides, when we got on the Law Review, it was a point of pride not to go to class. We had gone to class sometimes the first year but after that, there was only one course we had to show up for because the professor had no sense of humor about attendance.

Q: Which class was that?

A: Constitutional law.

(break in recording)

Q: Well did that become your favorite class?

A: No. (laughter). It was a nice course and he was a nice man but that was one we had to go to and graduate.

Q: Were you on the Law Review?

A: Yes.

Q: Did you hold an editorial position?

A: Yes. I was the Decisions Editor.

Q: What did that entail?

A: You put out a law review and the Decisions Editor was in charge and would write up court decisions. There were sections. There were Articles, Notes, and there were Decisions. I was in charge of decisions. One of my friends was the Note Editor. He came to me at one point and said "There's a new law, the Securities Act of **1933,** and Professor Frankfurter from Harvard and Arthur Dean, a young partner from Sullivan and Cromwell have each written a piece in

"Fortune" magazine taking opposite sides on the legislation." He said to me "it sounds to me like it might be a good thing for you and me to write a note for the review." And I said "sure." **So** we wrote a note.

Q: What was that note titled?

A: "The Securities Act of **1933."**

Q: Did you simply summarize and critique the Act?

A: Yes, right. If you want the citation for us it's **33** Columbia Law Review 1220.

Q: Has it been widely cited?

A: Well, I don't know, but copies of that Law Review were placed on the desk of every commissioner of the Federal Trade Commission which administered the Securities Act. I always claimed that that article doubled the circulation of the law review. (laughter).

Q: Did Mr. Frankfurter see a copy of the article -- Professor Frankfurter?

A: I don't know, he didn't write me about it. The net result of that article was, when we got out of law school in **1934,** my colleague and I got an interview with the Securities Division of the Federal Trade Commission in Washington. I couldn't find a job in New York City. The one place that I did get an interview, the partner that was interviewing me wanted another partner to see me. I thought this was a sign that maybe he'd be interested. When I told him that I had been down to Washington to talk to the Federal Trade Commission, he told his partner, "don't bother to come in."

Q: Which law firm was this?

A: Hayes, Wolf.

Q: Are they still in existence?

A: They actually went out of existence five to eight years ago.

Q: Can I go back for a second to law school? I would assume that you had had interaction with law students while you practiced privately. In your estimation have law students changed now? Do they have a different outlook than you might have had?

A: Oh, of course. First of all, there's nothing like a Depression. Let me tell you about one of the professors. There was a fellow named Julius Goebel, he was a professor that taught legal history, which was a first year course. Sometime in the second year, I was walking by his classroom and he came out doubled over with laughter, so I said, "What's so funny?" He said "Boy, did I have them going in there, in the classroom! Nobody understood a word I said." (laughter) That will give you a little flavor.

Q: That was a point of pride?

A: Uh-huh.

Q: Are law students more serious now?

A: Well, in the first place, I don't know. In the second place, I had a lot of fun there. Our class was a great crowd. We didn't take life very seriously. Nobody was sure that he would have a future or that there would even be one. It was not like Harvard as described in Scott Turow's book. . .

Q: Is that "One L"?

A: Yes, and it was nothing like that because he described a Harvard Law school class where everybody was fighting everybody else to get ahead, to get a good job. Well, nobody in our class thought about getting a job (laughter). We didn't know whether there would ever be a job that you could get. So we were very relaxed! And we went to class, or we didn't go to class, except when you were on the law review, you were not allowed to go to class more than a few times without losing your social status! (laughter).

Q: So you were extremely popular?

A: Oh yes, I was elected vice president of my class.

Q: Do you keep in touch with law school colleagues?

A: Yes.

Q: Have they gone on to do great things in the law?

A: Well, a number of them, sure, guys who were on the law review with me became famous. Well, one of the guys in the class behind me, he became head of TWA. One of my classmates became head of a big company. The fellow who wrote the article with me, Schneider, went to work with a small law firm, Moses and Singer. Mr. Singer was the founder of banks in New York and he now, I'm talking about my classmate, is trustee of the estate of Mr. Moses' widow. And his widow passes out many, many millions of dollars to charitable institutions. By and large, a worthwhile life. One is a leading partner in Fried, Frank, and one fellow in the 1933 class became a judge on the Second Circuit, and I mentioned

the one who became a judge on the Supreme Judicial Court of Massachusetts. **A** lot of them were professors at various law schools.

Q: Relatively successful.

A: Oh yes, absolutely, and a lot of 'em just have careers that I don't know about.

Q: In **1934** you decided to come down to Washington?

A: No, I didn't. I had an offer of a job with the Federal Trade Commission at $1800 a year and I jumped at it. (laughter). It was the first time that anybody had offered me any money for anything. So I came down to Washington and of course I started sending money home to my family.

Q: Were you married at the time?

A: No.

Q: Ok, this was to your parents?

A: I couldn't get married because I had no money to support a family. You young people don't understand anything (laughter). So I was telling this story for somebody in my living room a few years back and my younger son was in the room. I said I had this job at $1800 a year and I came to Washington and I started sending money back to my family in New York. My son, then thirty five, said "Why would you want to do that?" (laughter). So I know that it's a different world. And it's even more different now.

Q: You were working for the Federal Trade Commission at the time. Were you a litigator, or what role did you play?

A: I just went to work as a clerical employee because I wasn't a member of the bar yet. Had I been admitted to the bar, I would have gotten the same $1800 a year. That was because, although it was listed as a $2000 a year job, because of the Depression, Mr. Hoover, as President of the United States had decided that the way to solve the Depression was to cut the salary of government employees fifteen percent. And so when I got there it was only down 10%, so I had $1800. I got admitted to the bar and then I had a professional job, a "P-1," professional, first grade also at $1800.

Q: Which bar exam did you take?

A: New York. I took the New York bar. After I took the bar I came down. It was regarded as a nice idea for me to get admitted to the New York bar as soon as possible, so I asked somebody who was a member of the New York bar and who was working at the Federal Trade Commission with me to move me for admission to New York. We expedited my admission so that I got to be a P-1 instead of a CF-5 (laughter). As I said I came to work at the Federal Trade Commission in its Securities Division. By that time the Securities Exchange Act of 1934 had been passed which created the Securities and Exchange Commission which was to take over the administration of the 1933 Act on September 1. So in the interim period I worked in the Securities Division. Mostly we'd write letters of interpretation as to what the Act meant. People would write us letters and we'd tell them "you have to register; you don't have to register." And that wasn't so interesting so I went to the Director of the Division, "Why don't I have something more interesting

to do?" He said "O.K., the General Counsel of the new Commission's coming down Monday. I'll assign you to him." So down came Judge John J. Burns of Massachusetts who had been a classmate of Tommy Corcoran. You've probably never heard of Tommy Corcoran.

Q: I've heard the name.

A: O.K., they were on the 1925 Board of the Harvard Law Review, which was very prominent. The Chairman of the SEC was Joseph P. Kennedy, whom you know because of his children. (laughter). And the other Commissioners were James Landis, a professor from Harvard, who later became dean of the Law School there, Judge Robert Healy who was a member of the Federal Trade Commission and a former judge of the Supreme Court of Vermont, George Matthews who was a former member of the Wisconsin Public Utilities Commission and Ferdinand Pecora who was Chief Counsel for the Senate Committee that ran the investigation that resulted in the Securities and Exchange Act in 1934. John Burns was an Irish Catholic. His father had been a trainman on the transportation system in Boston. In spite of what in those days were considered as great handicaps at Harvard, he was asked to be a member of the Harvard Law School faculty. He may well have been the first such faculty appointment. When Burns had been on the faculty for a short while, the politicians in Massachusetts, said "John J. Burns, a Harvard professor with the map of Ireland all over his face, is perfect for judicial office." So at a very early age, Burns became a judge of the

trial court in Boston. He was a wonderful, bright, lively guy. I was his whole staff when he came down.

Q: What was your formal title? "Staff member"?

A: "P-1." (laughter). And I was still on the payroll of the Federal Trade Commission until September. And he talked to me about giving up his judgeship, a lifetime job, $12,000 a year in Massachusetts, to take a political job at *$9,000* a year in Washington. He had three children, he admired Kennedy very much. And he ended up having a lot more children than that. And he didn't know whether he was doing the right thing or not. On the other hand, he said "you know if you could keep your job with the government, and if you got paid reasonably, it wouldn't be a bad life because you're always on the side of the angels, even when you're wrong."

Q: Did you agree?

A: Well, (laughter), I always remembered that and I have told people that. It sometimes shocks some of the younger employees when I tell them that, because to suggest to government employees that they might sometimes be wrong, it's alien to them.

Q: Did you feel a strong affiliation to the administration at that time?

A: Oh yes. That was the case even before I came down. I'm Jewish, my family had a labor background, a more or less socialist background. My parents would read the "Forward," which was the socialist Jewish paper and I grew up in a political atmosphere. For example, in the 1920s, there were five socialists that

were elected to the New York State Legislature. The Legislature refused to seat them and the former Secretary of State, Charles Evans Hughes, Jr., later Chief Justice of the United States, acting pro bono tried to get them seated. He didn't succeed. When Franklin Roosevelt ran for president I was a week too young to vote, but if I voted I don't think I would have voted for Roosevelt because all Roosevelt did in his campaign was to say "Hoover's cutting the budget, I'm going to cut the budget more than he is." He never said anything except "I'm not Herbert Hoover."

But on the day he came into office he made a speech about "the only thing we have to fear is fear itself." The whole country had been in a state of absolute, not only economic depression, but mental depression because the President of the United States who was Hoover, (he actually was a very nice man) told the people, "This is economics. It's like a disease. You have to live through it. There's nothing you can do about it." And everybody said "We're having a terrible time." Unemployment was rampant, highly educated people were standing on street corners trying to sell apples to people who didn't have a nickel to buy them. It was a bad time.

The moment that Roosevelt spoke that first day, he galvanized the whole country. In substance, his speech said "you don't have to take it lying down, there is something you can do about it. I will do something about it." The people didn't know whether to believe him or not, but he gave them a ray of hope. And they all said, "well let's see what we can do." He galvanized everybody and people started

running around. He did this and he did that. Some of the things did go wrong, some of the things were right but everybody started moving. So before I came down to Washington, I was already a convinced New-dealer, no question about that. The Securities Act was just one of the things he did. As far as my own view is concerned, it's based on what happened to my family. The most important thing is for people to have jobs, for industry to be working and for there to be goods produced and delivered and consumed and that's what I think government is about. Whatever else anybody talks about, that's fundamental, I think there's a lot of other things, but this is one thing that I know. My father lived through a devastating time. So . . . Yes, I was a New-dealer before I got the job with the federal government.

Q: Why did you decide to leave the government?

A: Oh, well that's a long time later. I came in **1934.** It was eleven and a half years later before I left. I enjoyed myself at the SEC. I had a wonderful time. I did everything. I wrote letters of interpretation. I drafted rules and regulations. I drafted this, that, and the other thing. I investigated violations of the law. I litigated matters in court.

The war came. The SEC was banished to Philadelphia because it wasn't an essential war agency and there was a reorganization of the office and there was a Solicitor instead of the General Counsel's office and I was Assistant Solicitor in charge of appellate litigation. I liked that. That was fun. The SEC was a wonderful place to work. There wasn't any formality and bureaucracy about it.

Great people came through. Bill Douglas went on to the Supreme Court of the United States. Bill Douglas was the Chairman. First, it was Kennedy, then there was Landis, then after Landis there was Douglas as Chairman of the Commission. Douglas went from the Commission to the Supreme Court. The next Chairman was Jerome Frank. Jerome Frank went on to be on the Second Circuit. Then there was Ganson Purcell who ended up here in practice. There was Ed Eicher a former Congressman who became Chief Judge of the U.S. District Court of the District of Columbia.

Q: Did you work with each of these individuals?

A: Oh yes, sure.

Q: When they went on to become judges, did you practice before them?

A: Well, the answer I suppose is no, except for one case I argued much later when I was in private practice in which Douglas wrote the opinion. But mostly, for example, when I was at the SEC, Douglas would not sit on any case which the SEC had been a part of. In SEC cases, he would ask us at the SEC "did I have anything to do with this" and we would say "no." He would still disqualify himself. He was very very careful about that.

And when I was with the SEC Jerry Frank wouldn't sit on any SEC cases, so when I had cases at the Second Circuit, and we had a lot of them, (in those days, they didn't tell you who the judges were going to be on your case) but I said "I have to know because I'm in Philadelphia. **As** out-of-town counsel I'm entitled to a day certain for the argument and I don't want to come up from Philadelphia

and find Jerry Frank on the panel, so you've got to set cases on a date Jerome Frank will not be on the panel."

I did go visit him occasionally. That was a very fine fellow. He was lonesome. I can understand that. He'd had an active law practice, then he'd been General Counsel of the Agriculture Adjustment Administration, and Chairman of the SEC and he got to be a judge. And so he went and taught at the Yale Law School in addition (laughter).

Q: Did you keep in touch with Justice Douglas?

A: Oh yes. Well, did I keep in touch with him? Yes, I saw him from time to time. But when he was Chairman of the Commission I was President of the Securities and Exchange Commission Union. We had negotiations with him. We got an agreement with him that if there were vacancies, the vacancies would be posted. People inside the Commission would have priority over outsiders getting the job. We had parties where we invited the Chairman. It was a friendly place. The quality of the people was absolutely fantastic for many reasons. (1) It was a depression; (2) even if you weren't Jewish there weren't that many jobs available; **(3)** even non-Jewish friends received salaries that were very modest; and (4) Government salaries were sometimes much better than what the New York firms paid to young lawyers so the government could get all kinds of first rate people.

Q: Did you experience discrimination inside the government?

A: No. Of course, anti-Semitic feelings were not abolished but it wasn't any longer respectable to say you wouldn't hire Jews. This was great progress of

course, but hiring personnel were frequently cautious. For example, Bill Douglas was Director of the Protective Committee Study, a division of the SEC before he became a Commissioner, then Chairman, then Supreme Court Justice. He wanted to hire a young lawyer whose first names were Israel Saul. He decided to send his recommendation to the Commission as a recommendation to hire "I.S. ____ ."

Q: When you decided to leave the SEC was there discrimination among or within the law firms in Washington, D.C.? or were they different from New York?

A: I was in Philadelphia and the reason I decided to leave had nothing to do with discrimination. Roosevelt had died and he was my President and it wasn't the same. Truman was a fine man, . . .

[change tape]

. . . , but I didn't feel as happy about where I was working. It wasn't part of the New Deal anymore, and, so I decided I would like to leave. I was sounding out various places and I had had at least a nibble from one of the big New York law firms but I did not want to go there.

Q: Which law firm was that?

A: I'm not going to tell you, because it's a very fine law firm and I have had good dealings with them over the years, but I didn't want to go to New York. One of my friends who had worked at the SEC told me that he had heard that Abe Fortas was going to practice with Thurman Arnold. He said "why don't you give Abe a call?" So I called him up and I went over to see him sometime in November or December of 1945. He said "Thurman Arnold and I are going into practice in

the next month or so and we'd love to have you come along. And I know you're getting a big salary, $8 100 a year. (Federal judges were getting $10,000). If you come with us we will pay you only $500 a month." For your own information that is like a 35% or 40% cut. I didn't hesitate and immediately said "you are on." (laughter). And he said "I have to go to England to do something about the United Nations. When I come back I'll tell you when we're ready to go." He came back, he called me up and I went and told the Solicitor, my boss, Roger Foster. They gave me a farewell party and my wife and I went down to look for housing.

We couldn't find anything to rent, so we bought a house. When you buy a house, if you're a poor fellow, you get a savings & loan to give you a mortgage, and then you call up your brother-in-law (laughter). And by that time, we already had one child. We bought a house and believe it or not, six years later we sold it at a loss. We repeated the process on our second house (laughter). Now we're on our third house. I don't think we could sell that at a loss, but the others, on the first two we succeeded. (laughter).

Q: At the time you joined the law firm, were attorneys specializing or were attorneys considered to be general practitioners?

A: Well, we weren't specializing. When I came down, I told you I had a union background. One of the union things that I had been doing was Federal Workers Union, the United Federal Workers of America which was the CIO union. We thought that federal employees were being deprived of their rights as citizens to engage in political activity by the provisions of the Hatch Act. I was at the SEC

then in Philadelphia. We got a bunch of plaintiffs in Philadelphia who did various kinds of jobs -- Navy yard workers, a roller in the mint, people in office jobs. I don't think we had any lawyers. We prepared a complaint which said, "We want to engage in political activity but we are being threatened by big signs saying 'Warning', if you engage in political activity and the Civil Service Commission will bounce you out of your job." We got out the complaint. I did it all with the help of some other federal employees at the SEC.

Q: Where did you file it?

A: In the United States District Court in the District of Columbia in front of a three judge court that hears constitutional challenges.

I didn't put my name on it because although in my judgment it was perfectly proper in all respects for me as a federal employee to participate in litigation against the government that has denied him constitutional rights, I knew that people wouldn't understand that. In those days federal employees were supposed to be subservient and behave themselves or else.

Q: Except for the plaintiffs in your case.

A: Yes, but they weren't lawyers. If I, as a lawyer, put my name on the complaint people wouldn't understand. So I didn't put my name on the complaint. I got the General Counsel's office of the CIO to handle the case. Lee Pressman was the General Counsel. He was a very capable fellow. [He later admitted he was a Communist and he would name some of his fellow communists, but in the first place, I didn't know that. Second, I didn't care. (laughter). I had no secret

information - I had no need to support or not support this political orientation.] I wanted him to argue the case, a task for which he was thoroughly qualified. He did argue the case. I remember the argument in the District Court. The government in those days usually argued, "there's no standing to complain." Accordingly, the Civil Service Commission which was sued as a federal commission said "we don't enforce the Hatch Act." Yet there were big warning signs about the Hatch Act under the Civil Service Commission logo. Chief Judge Groner was sitting on the panel. He said to government counsel, "you know, if the Civil Service Commission does enforce the Hatch Act and they come here and say they don't, that would be unconscionable, wouldn't it?" So we won on that point, but lost on the main contention as to constitutionality. The Court held that the Hatch Act was a reasonable effort to deal with the dangers of possible political coercion over federal employees by their supervisors. We took it up to the Supreme Court. When we took it up to the Supreme Court, Pressman argued the case there. And Bill Douglas was on our side. Frankfurter and some of the other Justices said, "no, you don't understand, you have no standing here. Of course if you go out and violate the law, you'll have standing, because then you'll be fired. But you have no standing now." One plaintiff was a roller at the mint and had actually been a member of a political committee so the majority held the Act did apply and was constitutional as to him. I don't know exactly what a roller at the mint is, but it's a manual job. He was not a supervisor of any other employees. But since he admitted that he was a member of a party committee, so far as he was

concerned, they held the statute was constitutional. **So** far as the rest of the people who wanted to become politically active but hadn't yet done so, the Court wouldn't tell them.

Q: What was the citation on that case?

A: United Federal Workers against Mitchell. Mitchell was Chairman of the Civil Service Commission. Maybe the Union had changed its name by then to United Public Workers, I don't remember. Where was I?

Q: At this point, you were still with the SEC?

A: Right.

Q: You were leaving?

A: I was still with the SEC. I joined Arnold and Fortas on January 21, 1946. You asked me was I specialized. Well, when I came down here I had a client waiting for me, Two fellows who were from the United Cafeteria Workers -- the president and the business manager of the Cafeteria Workers. Their workers were being paid $10/week and they'd been authorized to have an arbitration to see if they could get more. They wanted me to represent them, and I did and I believe I got them $14 a week. I don't believe we got paid! Fortas said to me, "if you bring in any business and you handle it yourself, you will get one half of the fee. Some friend from out in Oregon called me up about a food and drug case. I called a Washington friend who knew something about Food and Drug law who helped me and I handled the matter. When it was completed, I came into Fortas' office and said "I have got the problem solved, and I think the fee should be $250." He

said "why don't you charge him $500?" So I charged him $500. I got $250, and the firm got $250.

Q: That was different from the government where you were salaried straight.

A: Right, sure. We had a lot of Plaintiffs anti-trust cases. I drew up the complaints.

Q: Were you litigating mainly before the D.C. Federal Courts at that time? or all over the country?

A: All over the country. We had a tax case. When we had been here for about a year or so we got Lever Brothers as a client. We had a tax case involving local District of Columbia taxes. We did that before the local tax board. There were price controls at the time. Paul Porter was Administrator of the Office of Price Administration. He was an enemy. He would not give our client Coca-Cola the sugar they needed, but he would give Pepsi Cola the sugar they wanted.

Then he went away to become Ambassador to Greece, on what was called the Point Four program of U.S. aid to Greece and Turkey. And after he came back, we forgave him and took him on. Then it became Arnold, Fortas, and Porter. The only time the name changed after that was when Abe Fortas left to go on the Supreme Court the firm was called Arnold & Porter, as it is to this day. Our managing partner Bud Vieth when he read about Abe's nomination on an airplane, had an immediate concern. "Think of all that new stationery we'll have to reprint!" (laughter).

Q: Very early on, after you joined the firm, you started to litigate loyalty cases before the D.C. Courts -- the first one was Friedman v. Schwellenbach, is that right?

A: That last one had been handled by other people. I knew Morton Friedman and his lawyer was Morton Stavis, a well known civil rights leader. He'd been in the government and I'd known him. The case was lost in the Court of Appeals. I don't believe I had anything to do with it. It came to us after a petition for certiorari had been denied in the Supreme Court. I talked to Abe Fortas about it. He was excited about it, and he wrote a terrific petition for re-hearing which predicted accurately all the evils that were going to happen on the loyalty front if the decision below was allowed to stand. It didn't do any good. The Court denied the petition for re-hearing.

Roosevelt had a kind of minor loyalty program for the Civil Service Commission that said they could look into you to see if your thoughts and opinions were similar to those of the Communist party. That was really what the Friedman case was about. Later when Truman gave in to pressure and adopted a loyalty program, I thought, "we just got out of the government in time." All of our friends, and the friends of our friends, were being called up. It was really a terrible time. The program was like so -- if the FBI receives anything that is derogatory, for example, if I wrote, "The Dean of the Harvard Law School is an anti-Semitic, communist bomb-thrower," they just put it in the file. Then, under the loyalty program, if the Dean should be employed by the State Department or

the Labor Department, the FBI would just send the allegation over to the agency, but they wouldn't say where it came from. They'd send over whatever anybody said, anything! A lot of this stuff couldn't be challenged because you're talking about Communists.

Of course, in fact the FBI quite frequently knew who were Communists! I suspect a very substantial portion of them were on the payroll of the FBI. So they could have said, "yes, I know the Dean is not one of those." But they didn't say that, they would just send the allegation over to the employee's agency unevaluated. And they sent it over to a bunch of people in the various agencies who were politically unsophisticated and inclined to accept anything sent to them by the FBI even though they couldn't have had the faintest idea who made the derogatory allegations. One accused, Dorothy Bailey, was a friend of mine. She was widely known and respected at the Labor Department and elsewhere. She was the kind of person that if she had been a Communist, she would have never concealed it. We took that case up. I tried it before the Loyalty Board and Paul Porter and I tried it before the Loyalty Review Board. At no time was any information as to the source or validity of the allegations against her supplied. The Review Board Chairman said in response to a request by Paul Porter for the identity of the persons making the allegations against Mrs. Bailey, "I haven't the slightest idea of who they were or how active they have been in anything." We thought condemnation and dismissal on secret allegations by persons unknown to the respondent and the judges was a violation of due process. We took it to court.

Arnold and I argued it in the lower courts where we lost with a powerful dissent in the Court of Appeals by Judge Henry Edgerton. Then we went to the Supreme Court. Certiorari was granted and Arnold and Porter argued it. Before the Supreme Court, the decision was 4-4 and the lower Court's adverse decision stood and our client was out of her job. I was out of town when the Supreme Court came down with its decision. Dorothy had been working for a university and they fired her when the decision was announced. When I came back from out of town, Arnold, Fortas & Porter had hired Dorothy and she became our office manager. I was very proud of them.

Q: Were the lower courts here in D.C. at all sympathetic to arguments?

A: Yes, indeed, as a matter of fact I remember the argument before Judge Holtzoff. I went to the motions clerk and I said "we want to get this case up to the Supreme Court. "Well, what's the hurry? It's summertime!" I said, "well, she's a government employee, she's been fired from her job, she wants to get back." She said, "Holtzoff is sitting. You don't think he's gonna put her back in!" (laughter) So I said, "we'll see." We went before Judge Holtzoff, Arnold and I argued. Holtzoff had been counsel to the FBI when he was in the Justice Department. He listened, and then he said to the Assistant Attorney General, Graham Morrison who was arguing for the government, "I want you to come back here tomorrow and tell me what you have against this woman." He was very much upset. They came back the next morning and said "we're not going to tell you." He swallowed it and he decided in favor of the government although he was

very much concerned. The Executive Order says "on evidence," but there wasn't any evidence, only allegations from unidentified sources.

There were other cases we had where the allegations could affirmatively be shown up as groundless. I had a case where a fellow was brought up on charges. His defense was "folks, here are all these anti-Communist articles that I have published in Hearst publications. I was against Communism before you fellows ever even heard of it." (laughter).

Q: What evidence did they cite for his case?

A: They didn't . . . He belonged to one of the listed organizations. How he did that was he was a veteran and the head of the local American Legion Post said to him "this other crowd seems to be good at gettingjobs for their people. We need jobs for our people. Go over there and find out how they do it. He went over there and they said, "well, we're willing to talk to you if you become a member." So he gave them $1 and became a member and his name went on the list!

There was one case where an employee was charged by his agency because they said, "your name is on the list of 25 Communists!" So I said "who made up the list? Why should you believe it?" The reply I received was "the FBI is a dynamic fact-finding agency." So they were ready to rule against him. Fortunately, my client's wife was working in another government agency. When I went to the wife's government agency and said "why don't you find out who made up the list?," unlike the other agency they agreed. They asked the FBI. The FBI asked their source "where did you get the list?" He replied, "I'm the personnel

director of a shipping line, and we're having labor trouble. The AFL and the CIO are having a dispute as to who should represent the employees. I came into my office one morning and there on my desk was the list of twenty five communists. They were all CIO names so I assumed the AFL had put it there." "But," he said, "this particular guy, the one you're asking about, his name must have been put on there by mistake. His brother is a CIO guy, but the government employee doesn't work at the company at all. They must have meant his brother and put his name on by mistake." The wife's agency cleared her, and I then went to the husband's agency and said, "I know where this came from. Would you be interested?" And they said "yes." So I immediately and in the presence of the husband's Loyalty Board called up the other agency and said, "can I tell the other agency what you have discovered?" They of course said "yes." And I passed it on. But the husband's agency was ready to throw my client out on the basis of that kind of thing if he hadn't been lucky enough to have a wife in another government agency. So, it was a terrible time. It was just a matter of luck as to whether you could find somebody on the Loyalty Board who would say "I don't believe all of this stuff without some evidence."

Q: Did any of the judges on the courts here take a stand against this activity?

A: In the Bailey case, in the Court of Appeals, it was a **2-1** decision. Judge Edgerton wrote a wonderful dissenting opinion, and we attached his opinion to our petition for certiorari.

Q: The four dissenters in the Bailey case . . .

A: Not dissenters, four and four.

Q: Did those four cite this dissent from the lower court?

A: Four and four so there's no opinion in that case.

It just so happened that there was another case in which the Supreme Court of the United States said it was unconstitutional to list organizations without due process. It was odd that at the same time the court said that because Dorothy Bailey was an individual, she could be fired without due process because she was only a federal employee, but organizations like the Communist party or the American League for this and that, would be entitled to due process. In the opinion in the organization case, Justice Douglas wrote a tremendous opinion in support of due process rights and discussed the Bailey case in great detail, arguing that due process rights should be given to individuals also.

Q: Which is this case -- the subsequent case about the lists -- what's the citation on it?

A: It wasn't a subsequent case, it was an argument at about the same time. The Joint Anti-fascist Committee was listed by the Attorney General as a bad organization and if you had any information that anybody was in that then you reported it secretly and the employee could be dismissed said 4 members of the Court. But you couldn't do that to even the most radical organization. To us it was incredible. (laughter) Because Arnold testified up on the Hill at a later time. He said "This is the same kind of procedure on which Nazi judges were condemned by the Nuremberg Courts." (laughter).

Q: Did the Supreme Court ever have the opportunity to overturn Bailey?

A: Oh yes, we gave it to them in the Peters case.

Q: Did they take the opportunity?

A: Oh no, no. A couple of professors from Yale Law School came to us with the case. Peters was the Dean of the Yale Medical School. He was on a panel of consultants for the Secretary of Health, Education and Welfare, and the Loyalty Board brought a proceeding to remove his name from the panel because he was disloyal. After a hearing the Loyalty Board said he was alright. Then it went up to the Loyalty Review Board. The Review Board said he was not alright. So we sued for him and expedited the lower court proceedings by conceding the Bailey case governed and we could win only if we could get the Supreme Court to reverse Bailey. We got up there and Chief Justice Warren said "Look, this guy was cleared the first time around. How about we should let him off on that ground?" Warren Burger argued the case. Before that he was Assistant Attorney General in charge of the Civil Division. Simon Sobeloff, who was Solicitor General, refused to sign the government's brief. **As** a matter of fact, he had gone to the Attorney General Brownell and said to him, "We ought to confess error." And Brownell said "yes." But Richard Nixon, then Vice President of the United States, came rushing in and Brownell changed his mind. Then Sobeloff said, "If you do this, you will do it without me. I will not sign this brief." So the Attorney General signed the brief. At the end of oral argument in the Peters case, the Chief Justice said "We want both sides to write briefs on this point: whether the fact that he was cleared

first is enough to let him loose and the Review Board could not reverse and find him disqualified." And both sides filed a brief in which they agreed that the case should be decided on the merits. Both sides said "if this is unconstitutional, people ought to know. If it's constitutional, the people ought to know it. [laughter] There's no reason for ducking such an important issue." But the Supreme Court refused to decide the issue and decided for Peters only on the ground that he'd been cleared first before the lower board and the Review Board couldn't change that. It was frustrating to all counsel.

Q: If these cases had been argued today and initiated in the federal courts today, would the outcome have been different?

A: Oh, very much so. I have no question at all that . . . As a matter of fact, shortly after the Peters case, Arnold had a case of some people who had been fired out of the government. I didn't work on the case, but he argued to the court, and he said, "Look, the Supreme Court has twice, in the Bailey case and the Peters case, refused to decide the basic issue here of whether it's a violation of due process to throw people out of government office with a stamp of disloyalty without evidence but on secret allegations from unknown informants. It is perfectly clear from the Peters case that they're not going to say 'the government can do it without due process.' The only question we have here before the court of appeals is on what ground are you going to decide in favor of the plaintiffs here and clear them from these dismissals. Here are four possible theories, and pick whichever one you think most acceptable. Because if you decide against the

employees, the Supreme Court sure as anything is going to reverse you. And what they're not going to decide is that it's unconstitutional."

Q: Eventually though they dropped the program altogether?

A: Oh yes. Well, before that we went through the whole McCarthy period. McCarthy didn't start this. It was in the end his downfall. McCarthy was foolish enough to continue this thing after the "respectable" people in his party had stopped encouraging him. He continued it against the Defense Department even after Eisenhower became President. He, himself, then became the object of an investigation. It was really a very dramatic moment on T.V. when he was called to the witness stand. He knew that he was suffering the fate that he had imposed on many others. Once he was on the witness stand before an investigating committee, he was destroyed.

Q: Recently, McNamara has kind of issued a mea culpa for Viet Nam. Do any of the judges that decided the loyalty cases that you argued ever comment later on their decisions?

A: No, not that I know of.

[break]

Q: Well, we were speaking about the loyalty cases and how they would be decided differently today and you . . .

A: I have no question that the atmosphere of paranoia about Communists -- I think that unless you lived through that time it was a . . . it's impossible to believe now, the strange feeling of fear. The Communists I'm sure, have always

been a very small group of the population. Some of them undoubtedly engaged in espionage, e.g. Kim Philby. But I'm sure most of them were decent people who said "You've got to treat blacks right, you've got to treat women right and you got to be all right with the unions as Americans." In fact, my best friend in Law School, Al Bernstein is the father of Carl Bernstein, of Watergate Journalism fame. And Carl has written a book called Loyalties in which he says even though his father and mother joined the Communist party, they were loyal Americans. And they were persecuted by the FBI. The FBI, for example, took down all the license plates of people who attended Carl's bar mitzvah. As I said, of course there was espionage and some people were spies because they were Communists and some were spies because they were paid. And the question whether somebody is a spy or not doesn't necessarily have any relation to whether they had radical political views.

Q: Were you scared that you would be targeted?

A: I didn't have sense enough. (laughter) No, I suppose if I had stayed in the government I certainly would have been targeted because, when Mr. Dies denounced one of the organizations, I immediately said "I know the people in that, I'll join up." And I so testified before a Congressional Committee. The Congressional Committee didn't care about my political views except that I wrote proxy rules which required the disclosure of salaries of executives of corporations. They thought that was terrible -- probably came out of Stalin's Code of Corporations. (laughter). I was in the government and I was in charge of

receiving the comments on proposed proxy regulations which would disclose the salary of high corporate officials, but only if they made more than $20,000 a year! (laughter). As a result, the Washington Post wrote an editorial directed at me by name and entitled "Bureau Crazy." (laughter) It's a very much different world. Not only in appearances, but in the tolerances and intolerances there are on various subjects.

Q: What do you think your hardest case was to litigate before the federal courts here in the District of Columbia?

A: Well, I suppose the one that I'm the most disappointed about because it's the Bailey case, but in the District of Columbia, let's see -- well, there was the Hatch Act case. (silence)

Q: Maybe I should ask you the reverse question -- What was the easiest case to litigate in terms of the greatest pleasure?

A: Oh, well, there were a lot of cases. I had a lot of cases in the Court of Appeals from when I came in to practice. SEC cases came a little later, but I would have SEC cases and the SEC would say "we order this broker put out of business." Your appeal would be to the Court of Appeals. You would file your brief showing that the record did not support the SEC's findings or that they took into account matters they were not allowed to take into account for one reason or another. You wouldn't win that case because the SEC would say "If you will withdraw your appeal we'll let your client go back to business." (laughter) **So** it wouldn't be on their record, they didn't lose any cases. That would be some of

them. Well, I think one of the cases I'm happiest about the outcome is the Schneider case. . .I'd been going to Germany for German clients -- business organizations. One of my friends who was helping out was a Professor at Georgetown University named Heinrich Kromstein whose son is now a partner at our firm. And Heinrich was a refugee from Germany, he knew good guys and bad guys, so he was a great help. But one of the things that he was concerned with was in the McCarran Act, so called because it was sponsored by Senator McCarran of Nevada. It provided that naturalized citizens would lose their citizenship if they lived outside the United States for three years in the country of origin or five years in any foreign country or countries. And this had a very substantial impact on refugees from Germany, Jewish and non-Jewish. Under the reparations law in Germany, to make up for Nazi injustices property seized from Jews or other people was returned to their previous owners. So refugees who were now American citizens had businesses in Germany restored to them. But they would be very careful to spend at least half the year in the United States even if the factory in Germany was on fire because the last thing in the world they wanted was to give up their American citizenship. That was very unfair in many ways, and Heinrich and I believed that it was unconstitutional. But the problem was to find somebody who would be willing to challenge it. I said I was willing to take the case on a pro bono basis if we could find a proper plaintiff.

There was a friend of mine who was a lawyer in Dusseldorf who was theoretically working for a New York law firm. And he would have been a great

subject but he was a refugee; he wasn't Jewish but he was a refugee. If he sued and lost the case he would lose his American citizenship, and lose his membership in the New York bar and so on. So, the stakes were too high for him. But it turned out that a New York lawyer for whom he was working was the uncle of a young lady whose father was an anti-Nazi poet who prudently left Germany with his wife and child, went to Switzerland and then to Havana and then to New York where his brother-in-law was practicing law.

[break in recording]

Q: So you were saying that Angie Schneider was a very bright young woman . . .

A: Yes, she graduated from the city schools and she went to Smith College. After her graduation, she got a scholarship to study in Italy or Switzerland, and afterwards got a scholarship to also study in Paris. But before she left for Europe, her uncle had a farewell party for her. At the farewell party there was a young lawyer from Germany named Dieter Schneider who was in New York on a Fulbright. And Dieter and Angie, they liked each other. And he said "well, I'm going to be back after my Fulbright to Cologne, and if you're finished you know maybe we could meet each other." So they said fine; they exchanged addresses and she went off. And after about a year, when she was going from Switzerland or Italy to Paris, she went by way of Cologne, they met again and he started going to Paris. And so they get married on the fourth of July. He was practicing law in Cologne, a firm in which he became a senior partner. They started having

children. They had two children. After three years in Germany, the **U.S.** consulate in Dusseldorf said, "please surrender your passport. Your American citizenship has been forfeited by residence in Germany for three years." So she sent in her passport with her picture and those of the two children. And they crossed out her picture but they left the two children in it because they were American citizens. And she and her husband came up to Dusseldorf where I was staying with on business with my friend, the employee of the New York lawyer who was her uncle. We discussed the case. So then I said to her, "you could of course easily get your German citizenship any time you wanted to. Why do you not want to do that?" She said, "I'd feel foolish with a German passport."

Q: Why was that?

A: I'd feel foolish with a German passport. That's what she said.

Q: Did she explain why?

A: No, I didn't ask her! It was sufficient for me -- I said I'll be glad to take your case. **So** I took the case. First, well, we had to appeal to the State Department and they said, no, of course. Then we filed suit in the District of Columbia, and the district court threw the case out.

Q: Which judge determined, or were there three judges?

A: It's in the file someplace -- I'll get it. Then, we went up to the Court of Appeals and they decided against us, and we took it to the Supreme Court of the United States. They took it up and we were about to argue and they said "a constitutional challenge needs a three judge court." **So** we went down to the three

judge court. And, on the three judge court was Charlie Fahy, who had been Solicitor General and judge for the Court of Appeals, and we lost that two to one, with Fahy on our side. Then, we took it up to the Supreme Court. I argued the case in the Supreme Court, and we won it, 5 to 3. It was a good win. A lot of people breathed easier -- refugees included people who had property restored, didn't have to worry about spending time in Germany. Their American citizenship was secure. The opinion was written by Justice Douglas. And it was one of these typical Douglas opinions, clear, direct, straight, strong. Tom Clark, John Harlan and somebody else dissented. But I had a lot of trouble with the Chief Justice on argument. The Chief Justice was off on a war of his own. There was a case which had been decided over his dissent holding that if you voted in a foreign election you lost your citizenship. That was the Perez case. And he was offended by that case and he was fighting to get the case overruled, which ultimately he did. When I was arguing the Schneider case and he said, "Mr. Freeman, you keep saying no matter what happens in the Perez case, we should hold for you. I would like you to tell the court. . . Do you want us to decide the case on the ground that the Perez case is correct, or on the ground that the Perez case is incorrect?" He wanted to get me on his side. *So* all I had to do then if I went on his side was to offend the majority who had decided against him in Perez. (laughter). *So* I said "Mr. Chief Justice, it would make me very happy indeed if this Court would decide this case in favor of my client on any basis on which it can agree!" (laughter). And

one of them says "he just wants to win the case!" (laughter). That's right! It was of course the only reason I was there.

Q: ***So*** that case received significant media attention? The Schneider case?

A: Well, it was on the front page of the New York Times, with my name. (laughter). And so, when I was in New York on some corporate business -- a directors' meeting, the Chief Executive of the company said, "is that you?" I said yes. And he said congratulations. All kinds of people including many lawyers congratulated me.

Q: Was there significant opposition to that case as well?

A: Where? On the Court, we lost three judges.

Q: Among the American people as well?

A: Oh, I don't know about the American people -- as a matter of fact, a funny thing about that is that right after the decision Angie was coming from Germany to attend her tenth reunion at Smith College. It got in the papers. One evening I was sitting at home and some official from the State Department called me up. He said "you know just because you won the case, there's no reason for her to rush in here. You know we have time to petition for rehearing." I said to him, "first, you're not going to petition for rehearing. Second place, she's not coming here to make a noise, she's coming to her class reunion." ***So*** he said "oh," then paused a while, and said "congratulations." (laughter) He was a very good guy. At one point, the Solicitor General's office called me up and said, "what would your client say if we gave her her passport before the argument?" I said "I'll let you know." I

called her up and she said, "I don't want my passport sneaked to me, I want to know if I'm an American citizen and I want to know where I stand." So I called up the S.G.'s office and I said "we won't accept it." So the S.G. fellow said, "you know, the court's going to throw it out on mootness." I said "that isn't the question you asked me yesterday." And I think the reason they didn't moot the case was because the fellow from the State Department said to the S.G.'s office, "I don't want to issue a passport to avoid a decision, I want to know if we have a law that we have to enforce or if it's unconstitutional." So in my opinion, that's the official who said to me "congratulations."

Q: You took a number of criminal cases by assignment in front of the D.C. federal courts. How did you end up taking those cases?

A: I didn't end up taking them. Some days I would come into my office and find an order on Court of Appeals stationery saying "David Bazelon, Chief Judge. It is hereby ordered that Milton V. Freeman is appointed to represent the defendant in such and such a case." And of course, I could have said no. (laughter). But, when I was ordered by the Chief Judge of the Court of Appeals for the District of Columbia Circuit I didn't say no. And I took all of the cases in which that happened. And they were moderately interesting -- mostly. They were hopeless cases. There were a couple of cases which were not hopeless and were affirmed anyhow.

In the first place, you didn't get paid anything at all -- you were ordered to do this, you did it at your own expense. You printed anything that you wanted to

print at your own expense, and the court, when they affirmed it they would put in the text or in a footnote, "Milton V. Freeman was assigned to this by order of this court and it was done pro bono in the highest tradition of the bar." That was what you got instead of money.

Not only that, they also made it difficult for you. There was one case I remember, I said "you want me to represent this fellow -- I want to have a transcript of the case so I can decide what arguments to make." "Oh," they said, "you can't get the transcript of the record unless there is a reasonable grounds for appeal." I replied, "How would I know if there is ground for appeal if I don't have the record?" "Well, that's what the rule is," they said. So, I dug into the firm treasury and paid $100 for the transcript. Then I found a reasonable basis for appeal. And then we argued the case and it was affirmed and then we got our $100 back! (laughter). I wasn't the only fellow so blessed. There were other fellows in the firm similarly treated, so we decided that the Clerk of the Court was responsible. When he saw us with a presumably paying client he would tell the Chief Judge and a pro bono appointment would follow. So we invited the Clerk of Court to lunch at our office and we fed him and toasted him as our principal client. We then asked him politely to take it a little easier on such honorary appointments!

Q: Did they?

A: Sometimes. Then I guess that it wasn't too much later that they found they could pay people and they didn't have to impose on us anymore. People assumed us to be affluent, even though we weren't.

Q: Can you remember other instances when you had a difficult time with the federal courts here -- with particular judges or experiences in courtrooms that disarmed you somewhat?

A: They didn't disarm me. I'm still angry at something that happened twenty-five years ago. I had a case up there which involved a matter of no urgency. Some Chicago firm had asked me to argue an appeal at the Court of Appeals for the District of Columbia Circuit, and I filed the briefs and was ready. I was involved in a large meeting that was going to be held in Paris between the Germans, the Americans and lawyers and this that and the other. And there were going to be 30 people present. I was the only one on the German side who was native American who talked English to the other people and my presence was absolutely essential. And the meeting was set at the date the Court announced for the argument in the Chicago firm's case.

So I asked the Court of Appeals to postpone the argument for one week. They said absolutely not. And I was very annoyed about that. I couldn't ask the young fellow who had helped me on the briefs to do it because the client wouldn't understand that a young fellow should argue the case. In desperation I went to Paul Porter and said "will you argue the case?" And he said, sure, that he'd do it. Then it was reported to me by the partner of the Chicago firm, "a young partner

came in and said to me 'we've been betrayed, Milton Freeman is not going to argue the case. Someone named Porter is going to argue it. Isn't that terrible?' He says, 'Porter, is that Paul Porter?' 'Yes.' 'Oh, then that's all right.'"

But I think it was a terrible thing the Court had done. There was absolutely no reason why they couldn't have postponed it. And I know why they did it, that's why I'm so mad. They just don't think it was important to consider the convenience of counsel; if they put down a case why, they might have read the brief and then maybe they wouldn't sit on it. It would be inconvenient for them. I've heard some of the judges talk like that. I think -- it only happened to me once but I . . .

Q: Are they more considerate now?

A: They always were considerate, it just happened once . . . I think it just happened that it was very important to me and my practice and if I didn't have a backup of Paul Porter I would have been in trouble with the client.

Q: Thinking back to some of the cases that you litigated in the federal courts here, who might have been your toughest opponent?

A: I don't know -- There are . . . The government is always a tough opponent. Early on we had a big SEC case where we were representing a brokerage house that was accused by the 'SEC of misconduct in connection with an offering of stock by Kaiser Frazer which was an automobile company. The SEC was all over us and it was a complicated result. They sued two lawyers to reveal their communications with the client. And we said in defense -- confidential

communication. They said, "all right but this is in pursuit of attempt to defraud, in which case it is not covered." So this was another one of these due process cases where they dumped the record of an ex-parte hearing in front of the judge. The judge decided that he would accept the record, even though it was not subject to cross-examination, but he decided in our favor on the merits. And then there were subsequent proceedings in New York; a private case. And there was litigation all over the place -- we had a couple of things in the Court of Appeals but that was very satisfactory because we won all the way! And it took 6 years of litigation, SEC litigation, SEC administrative proceedings, a private suit in New York. A quasi-public organization the NASD also brought proceedings. It was a tremendous mess. And we had proceedings not only here but in the Second Circuit in New York. We had lost the private suit in the District Court. On appeal, Fortas made one of the great arguments of all time. He said to me, "we're going to have only 45 minutes. When 40 minutes have gone by just pass along a piece of paper -- it doesn't have to say anything." So I passed along a piece of paper that says "you've got five minutes." And Fortas said to the Court, "I understand that I have only five minutes." By that time the court was eating out of his hand. Augustus Hand presiding said to him "proceed Mr. Fortas." He talked for an hour and a half! (laughter) Nobody stopped him. The poor other guys had to go on the next day. They were in trouble! (laughter) And of course we won the case. The private party paid our costs and the SEC held hearings to find out why they had mishandled the matter so badly.

Q: Looking back on some of the cases that we've spoken about, would you still take these cases to court today?

A: Oh, sure, why not? First place, government cases we didn't take them to court. The government brings you into court. Or they do something which requires you to go into Court as in the Schneider case. The SEC cases, you've got here the Wachovia Bank, that's a civil proceeding.

There was an SEC enforcement proceeding against the distinguished New York law firm of White and Case, I'm very proud that they decided that once they were sued by the SEC, they would like us to be their lawyers. It went on for a long time and it was one of the cases that very rarely comes, where I was sure we were going to win the case.

I do not mean that I had any confidence that the very good judge in charge of the case in the District of Columbia [Barrington Parker] was going to decide the issue in our favor on the merits without guidance. In fact, I had serious doubts that he would do so unaided. However, I believed that sophisticated members of the bar would be overwhelmingly on our side on the basic issue in the case.

I accordingly assembled a group of expert witnesses. These included the leading professors of securities law at four universities, including one dean, and also four prominent securities practitioners, including three former commissioners of the SEC. They all agreed that in their judgment as experienced practitioners, the action taken by the accused partner of White and Case was reasonable under

the circumstances in the light of the state of the law as they understood it at the time.

With this overwhelming body of expert opinion, I thought that the Judge would be most unlikely to disregard their views and to say that the conduct of the partners of White and Case was so far out of line that it should be sanctioned. Indeed, at a later stage in a related private action, which was also settled, Judge Parker found my recitation in a status conference of the list of our expert witnesses and their proffered testimony "very impressive."

But one of the terrible things is that, if you have a client, the client decides. At their request, I had found out the terms on which the SEC was willing to settle the case, and it involved basically dropping the case against the firm but also "voluntary" agreement by a junior partner not to practice before the SEC for six months. White and Case asked my opinion as to whether they should accept the settlement. I replied "I'm not going to tell you. One, I think you are going to win the case. It's a very strong case, and I don't ordinarily say this, I'm not excluding the possibility of losing'but, for the following reasons, [which I won't explain here] it seemed to me we have a strong case. But I can't tell you what to do. . . The only thing that I can tell you is how long it's going to take, how much it is going to cost, and you have to decide!" Someone said, "well, don't you have a recommendation? I mean, I'd ask a doctor would you do this operation if it was your wife?" I said, "all I know is, I'll give you a judgment as to how much it's going to cost, I'll give you a judgment of what's going to happen and you have to

decide the consequences for yourself. I have no idea what is in the best interest of the firm. All of your partners can and must decide on the basis of your own opinion of what is best for you." They decided to settle and we worked out terms which allowed the SEC to say they won, and the law firm got to say they won. A German lawyer said to me something that's, I think, appropriate here.

Q: What's that?

A: We had a big deal in Germany and in the end we settled the matter. He said, "I'm always in favor of settlement and I always regret the terms!"

Q: Did you ever think of entering the judiciary yourself?

A: No, I thought of other careers -- not the judiciary. I mean, I like judiciary power. I have done arbitrations where you had -- where you're a king by yourself and you decide the fate of others, and it is kind of heady -- but it's too sedentary. As a matter of fact, I'll tell a story! Thurman Arnold was on the Court of Appeals. He was there for two years. We had a young fellow out at the house -- a tall, distinguished looking older fellow who was taking coats out at our house. And I said, "you look very familiar to me." "Yes," he said, "I've seen you up at the courthouse." He says, "I'm Judge Prettyman's messenger. You're a partner of Judge Arnold. He used to be up with us, but it was too quiet for him up there!" (laughter). Arnold tells the story that after he got off the bench, he had a case in Pennsylvania Railroad involving the Pullman Company. Opposing counsel was a very distinguished Pennsylvania man who'd been a Senator. And he asked Arnold, "Judge, why did you get off the bench?" Arnold says, "Let me turn that

around." He says "you've had a very distinguished career yourself, you must have had many opportunities to go on the bench. Why didn't you take them?" The Pennsylvanian said "Well, you're absolutely right," he said, "as a matter of fact, quite early in my career I had an opportunity to have a really good judicial appointment. Right then I had to make up my mind whether I wanted to make a living listening to a bunch of damn fools or talking to a bunch of damn fools!"

Q: Do you remain in contact outside of court with any of the judges that are here in D.C.?

A: I don't think so. Let me see -- Well, you know we have this mediation thing and the judges every so often run a little party for us. Occasionally you get invited down to the judicial conferences, Gerry Gesell was my old friend -- He was my roommate at the **SEC,** so I used to see him, but. . . Well, when I appear in court, I see them sitting up there.

Q: You've practiced before that court for nearly 50 years, have you noticed changes in the tenor of the court; in the court?

A: Oh, sure, sure, sure, Sure. Look, first place, by and large in my judgment they're not necessarily always right. I remember one time at the SEC, we went down there with a case where some utility company was appealing from one of our orders. And there were three very conservative judges sitting up there. And the case that was being argued was the case before ours. So we were looking very glum. And then after that case was over the three judges walked out and three liberal judges came in. We smiled at the utility fellows, whose faces fell! But of

course there are a lot of people that know what the law is. They worry themselves about whether the judges decide what the law is, or what their personal preferences are! Well, I never thought of it that way. I think liberals, conservatives whatever they are, they decide what the law is, and they think they are right. There are not only differences of underlying views, liberal or conservative, there are differences of style or philosophy, of the future of a court. I remember once a Harvard professor, perhaps urged on by Justice Frankfurter, wrote a piece in the Harvard Law review critical of Bill Douglas' judicial methods. He said that Douglas worked too fast. It is true that Douglas would, in short order, have a tidied up short opinion. Whereas Frankfurter would sit around and think and write long opinions. And the complaint Frankfurter and his Harvard colleague had was that Douglas didn't allow for a "maturing of collective thought." So Thurman Arnold wrote a piece in the Harvard Law Review in response to the journal article by Henry Hart of Harvard Law School. He said "you know, this maturing of collective thought is a wonderful idea but it is not necessarily true that if two people take more time they will arrive at the same conclusion." Arnold wrote "if you took Justice Frankfurter and Justice Black, and you put them in a room until, by a maturing of collective thought they came to an agreement, it would be a life sentence for both of them!"

Q: **Can** you think of an instance in which a particular judge who has been on the federal courts here for a while has matured over time?

A: I'm sure they mature over time. All of them do. It may be some fellow who is sufficiently impervious to events that he never changes, but I don't know any.

Q: Are you impressed by the courts here?

A: Certainly, I'm always impressed by a court! People of various abilities, various outlooks and take their jobs very seriously, as they should. I have respect for the courts as an institution. I tend to agree with people who agree with the position of my clients, but I think that's normal. Want to hear another story?

Q: Sure!

Well, I was at some bar association meeting in the midwest and I was sitting next to a very able lawyer who was telling me about a case he had in downstate where there was this terrible judge that didn't understand the law. SO I said to him, "I'm sorry you lost the case." He replied, "How did you know I ost the case?"

Q: Well, is there anything else that you'd like to tell me about your experiences here in D.C.?

A: Well, let's see. You know about the Weisbrod case down here.

Q: Tell me about the Weisbrod case.

A: Well, I got a call from somebody out in Chicago who says "I hear you're a friend of federal workers." **So** I said, "that's right." He says "I'm a federal worker I'm an assistant counsel in the Chicago office of the Housing Agency, and I make $22,000 a year, and I'm going to be 70. And there's mandatory retirement at 70. And if I'm mandatorily retired at 70 instead of getting $22,000 a year, my social

security will be $6,000 a year and I don't know how my wife and I are going to live on that." So I said, "I've never heard of it, but send me some papers." So he sent me the papers and it sounded to me like it was a good idea. So, I filed a lawsuit to have it declared unconstitutional. It got thrown out in the District Court. We went to the Court of Appeals and they said, "it is a constitutional issue, it must go to a three judge court." We got a three judge court. They threw us out, so we went by appeal to the Supreme Court. They didn't even hear argument and they threw us out. But when we were in the Supreme Court the American Medical Association wrote a brief amicus curiae in our favor, saying mandatory retirement is a very bad thing. If an employees wants to retire that's all right, but if you make him retire, if he's strong and healthy, it's bad for his health.

Q: When was this, what date was that?

A: Jimmy Carter was President and the year after the Supreme Court decided against us, Congressman Pepper, former Senator Pepper, got a bill passed that eliminated mandatory retirement for federal employees. So that was sometime between 1977 and 1980.

Q: Do you feel that the D.C. District and D.C. Circuit here have played a central role in the D.C. legal community?

A: I didn't get the question.

Q: Do you feel that the D.C. federal courts here have played a central role in developing the D.C. legal community?

A: Well, I don't know if that question means -- I don't know how I can answer it.

Q: Is there a difference in these federal courts and federal courts in other circuits?

A: Oh yes, because these are . . . The federal courts here are really the central place where you have issues relating to federal law. There are concentrations -- in New York, you get commercial, securities litigation. But this is where administrative agencies are governed and it is therefore a very consequential place. And that's, I think that except for certain areas, I guess water rights in the Tenth Circuit, if it's Wall Street, the Second Circuit, but otherwise this is the place where federal issues come to a boil.

Q: And having come from New York so many years ago, this is the place where you wanted to be?

A: Oh yes, I didn't know I wanted to be here until they offered me a job here, but after I decided I didn't want to stay in the government. So when I was in Philadelphia, I was considering New York; I wasn't considering it happily. I joined Abe Fortas and Thurman Arnold, had no hesitation whatsoever. Of course, it was economic insanity but it ended up not too badly.

Q: Well, I thank you Mr. Freeman for your time today.

A: Right, it was a pleasure.