

ORAL HISTORY OF BRUCE TERRIS

III. COUNSEL FOR THE UNITED STATES

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Steve Steinbach, and the interviewee is Bruce Terris. The interview took place in Bruce Terris's office on Thursday, December 4, 2014. This is the third interview.

MR. STEINBACH: Good afternoon, Bruce.

MR. TERRIS: Good afternoon.

MR. STEINBACH: We had just taken your story up to the end of your days in college and your graduation from Harvard Law School, and I want to start with a big-picture question. When you got out of law school, did you have a sense of what your career might be like, what you might do with your law degree?

MR. TERRIS: No, except I wasn't really interested in going to a big law firm and making a lot of money. I had signed up with, of all people, Cravath after my second year of law school. As it happened, I got very sick at the end of the second year of law school, and so I didn't ever go to Cravath. I was just sort of trying to find out, if I'd gone there, probably why I didn't like it. I wasn't really thinking that's what I wanted to do. So when I was getting out of law school, I basically was looking at two places. I tried to get a clerkship, and I also applied to the Department of Justice. They had something called then the Honors Program; I think they still do. I felt quite confident that I was going to get a job there. I had done well in law school, so I was trying to get a clerkship.

MR. STEINBACH: We talked last time that in the end, in lieu of a clerkship, you took the position with the Honors Program.

MR. TERRIS: I was looking at a very narrow spectrum, which was Supreme Court Justices, and a couple of the best Court of Appeals judges in the country, and I didn't get those, so I was happy to go into the Honors Program.

MR. STEINBACH: So it's the Fall of 1957. You apply, and you're accepted. The Honors Program, was that a one-year commitment back then?

MR. TERRIS: No, it was becoming a lawyer in the Department of Justice without any particular commitment.

MR. STEINBACH: Did you have any choice where you were assigned at the beginning?

MR. TERRIS: Yes. They asked where you wanted to be assigned. I went into something that my liberal friends consider a grave deficit on my resume [laughter]. I went into the Internal Security Division, which, of course, its main purpose, although not only purpose, was in the efforts to deal with Communism in the country. The reason I went there was really because I wanted to be involved in constitutional law, so I didn't want to go in the Civil Division which has a scattering of all kinds of stuff, or the Criminal Division, which handles various kinds of criminal things. I really wanted to deal with constitutional law, and that's what the Internal Security Division did, so I went into the Appellate Section of the Internal Security Division.

MR. STEINBACH: This part of the Department of Justice was established, I think, in the Eisenhower Administration.

MR. TERRIS: Correct.

MR. STEINBACH: What was the purpose? You mentioned briefly dealing with Communists inside the United States. What was the purpose of the Internal Security Division that you thought when you got there?

MR. TERRIS: The purpose was the country believed that it had a very serious problem of Communist infiltration in a variety of different kinds of places. It had a number of statutes and it had investigations by Congress. There was some actual spying going on by the Soviet Union. It handled those kinds of cases. It also handled some other kinds of things like enforcing whatever that's called now – the Foreign Agents Registration Act, I believe it is. It's been a long time since I've dealt with that. So it did some other things too.

MR. STEINBACH: When you were in law school, did you have any interest or take any classes relating to internal security issues?

MR. TERRIS: No. I doubt there were any.

MR. STEINBACH: Why did it interest you? Why did you pick that as one of the places in DOJ that you would like to work, and in fact ended up working?

MR. TERRIS: Really because I wanted to deal with constitutional issues. There was no Civil Rights Division, I believe, at the time. Or maybe it was just being started, I can't remember. I don't believe it existed. But in any event, [the Internal Security Division] seemed like the place where I would be most likely to get constitutional issues and not be diverted with other things which I really didn't want to do.

MR. STEINBACH: And you ended up in the Appellate Section, so were you ever involved in doing the actual underlying investigations in the Internal Security Division?

MR. TERRIS: No. It was all litigation. I think some of it actually was in district courts, but a lot of it was appellate, and even though I was fresh out of law school, I got to argue one or two cases. It was, as it turned out, a tremendous place to be because there was a guy there, I can remember to this day his name, Philip Monahan, who did the reviewing of everything. I used to turn into him twenty pages of nicely typed-up material on white paper, and I would get back from him a pile of yellow paper. It was entirely in his handwriting. The only thing left of my white paper were the block quotes that he had cut out and stapled onto it, and I learned how to write a brief.

MR. STEINBACH: As a government lawyer, he was your main teacher?

MR. TERRIS: He was my main teacher, and he was terrific.

MR. STEINBACH: Would you have had any contact at all with J. Edgar Hoover and all the FBI folks who were doing all the internal investigations?

MR. TERRIS: No.

MR. STEINBACH: Do you regret not having that kind of exciting contact?

MR. TERRIS: That would have been interesting to have had some contact like that, but I was just the lawyer who's handling what comes out of the pipe.

MR. STEINBACH: So these cases are investigated and tried and either won or lost, and then it's just handed to you to win the appeal.

MR. TERRIS: Right.

MR. STEINBACH: Do you remember what kind of cases you handled on appeal for the Internal Security Division?

MR. TERRIS: I really don't. A little later, I guess, we'll come to what I did in the Solicitor General's Office on this subject, because I handled essentially all the cases that came to the Solicitor General's Office of that kind, and we can talk about how that happened to occur.

MR. STEINBACH: Okay. So do you remember anything while you're still in the Internal Security Division where you had to take a position or argue about the Smith Act or the Subversive Control Act or any of the statutes that the government was enforcing back then?

MR. TERRIS: I don't really have any recollection. This was a long time ago, but my recollection is that I didn't really handle the big cases like when I was in the Solicitor General's Office; what I handled in the Internal Security Division was much more routine, ordinary cases.

MR. STEINBACH: The Internal Security Division was run by this famous guy at the time, Tommy Tompkins. Do you remember him? Any contact with him at all?

MR. TERRIS: I don't remember any contact.

MR. STEINBACH: And there was a famous case during the time period, a prosecution of a Soviet spy whose American name was Rudolf Abel. Any connection with that?

MR. TERRIS: I handled that case when I was in the Solicitor General's Office.

MR. STEINBACH: Later on and after he had lost and appealed its way up?

MR. TERRIS: That's correct.

MR. STEINBACH: What do you remember about that story, even if it's a little ahead of the chronology?

MR. TERRIS: It was just an interesting case. In other words, nothing very unusual happened in my work on that case, but it was a big case.

MR. STEINBACH: So you're at the Internal Security Division for about a year before you transfer over generally to the Solicitor General's Office.

MR. TERRIS: Almost exactly.

MR. STEINBACH: Did the Internal Security Division linger on during the Kennedy years?

MR. TERRIS: It did linger. I have now forgotten when it got abolished. I don't think it got abolished that promptly. An interesting thing, because you won't ask a question about this – years later, when Robert Kennedy was a Senator from New York, I got a call. I can't now remember if it was from him personally or from his office, I think it must have been from his office. Would I like to run a study of whether it made any sense at that point – this is now in the mid-1960s – to continue all these legal efforts to deal with Communism in the United States? I was asked how much [the study] would cost. I made some guesstimate, and that's certainly all it was, and I never heard back. It showed Kennedy was wondering too whether all this made much sense, at least at that point. Maybe it made sense at an earlier point, but not at that point.

MR. STEINBACH: What was your assessment at the time – I know we have 50 years of reflection on this in the meantime, but at the time, when you were in the Eisenhower days – what was your assessment of the significance of the Communist or the subversive threat to the country?

MR. TERRIS: Well I certainly thought it was exaggerated. I'll give you an illustration that I gave to people at that time. I believe it was the Communist party in Montana, but it might have been Wyoming. It had, I remember reading in legal papers in my litigation work, three members. Two of them were FBI informants. So they had three people who were mostly spending their time informing on each other, because of course they didn't know who was an informant. That was to a considerable degree what I thought that this was about. That in other words, it was exaggerated. It was people getting themselves worked up where I certainly thought attention should be paid to it, but that it was too much and certainly to some degree was distorting legal principles that we had in the country. On the other hand, I didn't completely agree with the liberal position, at least of some liberals, that this was all nonsense, that it really didn't matter who was a Communist and who wasn't and that these were just people with concern for the poor and for minorities and what have you. That was not something that I accepted, and I still don't. Communism was a terrible doctrine, and the fact that many people in this country had sympathies for it for good, moral reasons, did not make it any less a terrible doctrine.

MR. STEINBACH: And meanwhile there were people like Abel who were actual Soviet agents.

MR. TERRIS: Absolutely. He was in a different category. Certainly the country had to deal with people of that kind.

MR. STEINBACH: So you were somewhat skeptical, you just said, while you were in DOJ. Do you remember any tension or struggle between the skeptics and the true believers?

MR. TERRIS: No, but I can't say that I became a dissident, so to speak. But there's no doubt that the other people, most of the other people in the Division, had a considerably more aggressive attitude than I did, and probably most of them came to the Division because they had an aggressive attitude, just like I would have been gone into the Civil Rights Division if there had been one. Ultimately when [the Civil Rights Division] was created, that's the kind of people that went into it.

MR. STEINBACH: But this was three years, when you joined, three years passed since the fall from grace of McCarthy and the Supreme Court had started to cut back on the government's sort of broader prosecutions. Times had changed a little bit when you first got involved in it. Did you get to do any constitutional issues in that Division?

MR. TERRIS: I'm sure I did, but the cases I handled there were not really big deal cases. My guess is that the more important cases didn't go to a guy who just walked out of law school.

MR. STEINBACH: You've kind of hinted that you've taken some flack over the years from your liberal friends for this first career start. What do you think about that now, and what do you say to them?

MR. TERRIS: As I said to you a moment ago, my basic attitude was that a considerable amount of the attention to Communism was appropriate. Obviously people

like McCarthy and some of the other people in Congress who ran the House Un-American Activities Committee, I didn't agree with them then and I don't agree with them now. However, dealing with Communism then was a much more complicated question than the way I think it got posed very frequently between people like McCarthy, who didn't care a bit about civil liberties of anybody and were not at all careful about the facts, and people who said, well there's nothing to this at all, the country shouldn't be paying any attention to it, it's a terrible violation of civil liberties to be even inquiring about this kind of thing. I think that discussion was not a good discussion, and I think it was a legitimate question for the country to be investigating, but on a more intelligent basis than often was occurring.

MR. STEINBACH: Did you have the sense that the Eisenhower people had their eye, at least in part, on the preservation of civil liberties?

MR. TERRIS: I did. I thought that when I was in law school, and I thought that later on as well. Certainly Eisenhower was not a McCarthyite, and I think he saw it as serious problem about the line the country should take.

MR. STEINBACH: You mentioned a few minutes ago that even after you left the Internal Security Division, some of Internal Security matters got transitioned over to you.

MR. TERRIS: When I came to the Solicitor General's Office – I really need to tell you what happened in going into the Solicitor General's Office because then you can put it into some context.

MR. STEINBACH: Alright. Go ahead.

MR. TERRIS: I got chosen to go to the Solicitor General's Office out of the blue, not to be an Assistant to the Solicitor General, but to be the personal assistant to the Solicitor General, J. Lee Rankin. J. Lee Rankin for a year had had somebody who was his personal assistant, and he was supposed to help on speech writing, research into speeches, and things like that, not to be a regular member of the Solicitor General's Office. That's what I was asked to come and do. Oscar Davis, the First Assistant to the Solicitor General, a wonderful man and a wonderful lawyer, chose me because he and I had the same grades at Harvard College. That's what I was told later on. Not law school, Harvard College. Even though I was not going to be an Assistant to the Solicitor General, that still seemed to me a wonderful opportunity. It was a one-year job. After I got there, I did a lot of fooling around, putzing around I would say, and helping the Solicitor General on speeches he was going to give. I can remember I did an elaborate research job into the inadequate assistance of counsel in criminal cases. J. Lee Rankin was the kind of Republican that doesn't seem to exist much today – meaning he was an excellent, fine person, not a great lawyer, but a perfectly adequate lawyer, but certainly not a great lawyer, excellent ideals and ethics and all those kinds of things. So I helped him for a while, and then it became clear that there really wasn't a job there. There wasn't a full-time job, so they started giving me minor stuff to edit, which was the main job of the Solicitor General's Office, to edit materials that come out of the various divisions of the Department of Justice. So I started editing oppositions [to certiorari] in habeas corpus cases,

prisoners who were filing papers in the Supreme Court. And so I did that for a while, and I guess somebody in the Solicitor General's Office thought I wasn't such a terrible lawyer, even though I wasn't an Assistant to the Solicitor General, so they made me an Assistant to the Solicitor General. The office was made up, although I never asked this question, of all liberals, and they were getting these cases that came out of Internal Security. None of them wanted to handle these cases, so they said Bruce Terris, he's an expert, right? He spent a year in the Internal Security Division, so we'll give him all these cases, and that's what happened. I think for a number of years every one of these cases that came in the office, I was the editor of the brief, and I argued some of them.

MR. STEINBACH: So this became your bailiwick, like it or not, for the rest of your SG years?

MR. TERRIS: Well, no. First of all, it tapered off, just because the cases weren't there. I don't know what my percentage in a year would be, I would guess 15% or something like that. I did the regular work in the office, but this little slot they figured they could dump on me.

MR. STEINBACH: What was Solicitor General Rankin's background?

MR. TERRIS: He came from Nebraska, and I think he was in private practice. He was a very decent guy.

MR. STEINBACH: So you served as his personal assistant, wrote speeches, not that much to do, they gave you other briefs to edit. Anything else during that one year when you were his personal assistant that you can recall?

MR. TERRIS: Not really. As I said a moment ago, there wasn't a job really there. The guy before me, I don't know what he was doing for a year, but there certainly wasn't enough work for me. So I can remember when I first came there I worked on the inadequate assistance of counsel, but after that, that was a big project, but after that, I really didn't have much to do. So I think that's when it began to dawn on people that this was not a good arrangement.

MR. STEINBACH: So in 1959 you become an Assistant to the Solicitor General, and that's the title you retain until you leave the Justice Department in 1965, is that right?

MR. TERRIS: Right.

MR. STEINBACH: Before we get a little specific about all the administrations and your particular cases you argued, just talk about the duties and responsibilities of being an Assistant to the Solicitor General. What was it like then?

MR. TERRIS: It was a tremendous place to work for somebody of any age, but for somebody my age, it was an absolutely marvelous place to work. Of course the people, it was a small office then – not like now, it has close to thirty lawyers now. I believe we had nine then, and I can't remember if that included the Solicitor General or not. A very small group. Everybody ate lunch together; one or two people might have something else to do; not the Solicitor General, but everybody else went to lunch together. We talked law during lunch, people talked about their cases, so it wasn't just my cases that I was working on, I was listening to what people were saying about the other cases. I can still remember our vehement conversations about the sit-in cases a little bit later and how people would formulate an argument for the sit-ins.

There was a lawyer there by the name of Wayne Barnett, he was a phenomenal lawyer about tax matters and had a tremendous ability to think through those matters, and I can remember at lunches talking about those cases. It was an enormously valuable learning experience.

MR. STEINBACH: All men?

MR. TERRIS: Of course. There were almost no women in the profession at the time.

MR. STEINBACH: So even by 1965, still all men in the Solicitor General's Office?

MR. TERRIS: All men.

MR. STEINBACH: Was the SG's Office viewed then, as it is now, as the Tenth Justice – did it have that stature that it currently does?

MR. TERRIS: Well the people there thought that, let's put it that way [laughter]. It had tremendous stature, and its stature certainly grew when Archibald Cox came in to be the Solicitor General. Archibald Cox was the best oral advocate I have ever seen.

MR. STEINBACH: Leaving aside personalities for now and specific cases for now, what was the day-to-day job like for you during those six years?

MR. TERRIS: A brief would come to me, sometimes it would be a brief on the merits, and it would be 40 or 50 pages long.

MR. STEINBACH: Written by whom?

MR. TERRIS: It comes out of the Division, the Appellate Section of the Division. It comes up, probably in most instances went through the Assistant Attorney General in the Division. I don't know how much they touched it. It probably depends on the personality of those people. And then it would come to the

bottom of the Solicitor General's Office – me. I would edit it, sometimes talking to the author, sometimes not if I didn't need to. So I would edit. It would then go to the First Assistant or the Second Assistant to the Solicitor General, depending what the category of case it was, and then it would go to the Solicitor General. Usually there were not a tremendous amount of changes made in the later process, so the editing was really done by me and people at my level.

MR. STEINBACH: This might depend on a specific case, but would you get involved in decisions about what the government's position should be in front of the Supreme Court?

MR. TERRIS: Yes and no. Most of the time, the position was pretty obvious. Most cases don't raise real issues as to the Government's position. I told you in detail about how in the reapportionment cases the issue of one man, one vote was decided by Robert Kennedy. That was certainly an unusual event, that elaborate a method for determining the government's position, but occasionally it occurred. I can give you an example. A case involving the head of the Communist Party in the United States came to me. I don't think certiorari had been granted by the Supreme Court. The government did not want to allow him out of the country. He had cancer, and it was believed to be terminal. I'm not sure what the exact motion was, before the Supreme Court. The question was raised whether to allow him to leave the country. He wanted to go to the Soviet Union where they would give him free

treatment. The issue came to me and I went to the Solicitor General about this.

MR. STEINBACH: Do you remember which administration you were in?

MR. TERRIS: I believe it would have been under Cox, but I'm not entirely positive. I pointed out to people that our basic attitude seemed to be about Communists if they wanted to stay in the country, we deported them, and if they wanted to leave, we didn't let them leave. And that did not seem to me like much of a policy, particularly with a man who is apparently dying of cancer and what possible reason did we have to not let him go? I ended up winning on that proposition. Once in a while you get situations in which the issue was should the government confess error, and that would happen from time to time, and there would be real debate in the Solicitor General's Office about those kinds of cases.

MR. STEINBACH: So you'd edit briefs, and ultimately those would go to the Supreme Court.

Who would, in general, determine who argued the cases?

MR. TERRIS: I don't know the answer to that [laughter]. I assume that the First Assistant, maybe the Second Assistant, would talk to the Solicitor General about that. I would think that probably the First and Second Assistants had the big voice. Obviously the Solicitor General would have first choice. Archibald Cox used to argue two cases a Supreme Court session. In a two-week session, he would argue two cases. My guess is, and I'm almost positive, J. Lee Rankin didn't do that, and probably no other Solicitor General has, that's an enormous burden. So he would clearly get first choice, and then somehow a

decision was made, to divide up the others. We had so few people there in the Solicitor General's Office, each of us would argue about three cases a term.

MR. STEINBACH: You're in the SG's Office for six years. How fun a job was that?

MR. TERRIS: Seven years, six years as Assistant Solicitor General, one other in this lesser position. It was a tremendous job. When I was there, I thought I was going to spend the rest of my career there, and I can explain to you why that didn't happen a little later.

MR. STEINBACH: But while you were there you loved every minute of it, is that fair?

MR. TERRIS: It's got to be one of the great legal jobs in the world. It's a fantastic place to work. It's not only the [work was] important, the intellectual atmosphere was at such a high level. I mean you have so much you can learn from these other people. Oscar Davis, Philip Elman was the Second Assistant. Having lunch with them every day, talking law, I mean it was fascinating.

MR. STEINBACH: How hard did you work?

MR. TERRIS: Not terribly. I mean I didn't goof around, but I basically worked eight hours a day. It was rare that I needed to work into the evening. It occurred once in a while, but essentially we had enough people in the office to do the work in the office. Supreme Court briefs are rarely emergencies. I know now there are all these death row cases, but when I was there, there weren't emergencies for the most part, so you did your work.

MR. STEINBACH: You, Bruce, have probably a pretty unique position in terms of the SG's Office history as being someone who worked in three different

administrations. Now maybe there are other people in the history of the country who have done that, but that's pretty unique to have served in the SG's Office under Eisenhower, and then under John Kennedy, and then under Lyndon Johnson's administration. So what I would like to do is sort of take you through each one and get your perspective on not just the SG's Office, but the Justice Department under Eisenhower, the Justice Department under Kennedy, the Justice Department under Johnson. So maybe if we can start with the Eisenhower administration. Big question: When you got there and when you worked there, what did you think of the Eisenhower Justice Department?

MR. TERRIS: I didn't really have a perspective, because of course I hadn't seen what the Department of Justice was like under any other administration. I didn't [have much of a perspective on the] Justice Department because the Solicitor General's Office was really a thing of its own. As I said, all those people who were in the Solicitor General's Office, I'm sure, were liberal Democrats. The Eisenhower administration had done nothing to try to load up even this very important office with people that were Republicans or conservatives or anybody else in particular. They let it run itself.

MR. STEINBACH: How did that happen?

MR. TERRIS: In the year 2014 that seems utterly impossible, but it didn't seem impossible then, that [was the way] the government was supposed to run. Oscar Davis and Phil Elman continued to be enormously influential, the First and Second Assistants, and J. Lee Rankin certainly was not going to load it up [with

Republicans]. He couldn't tell them that they shouldn't hire this kind of a person who had terrific credentials, so there was just no effort to turn the office around into some kind of quasi-political entity.

MR. STEINBACH: So the SG's Office seems not very ideological at the time.

MR. TERRIS: No. Not at all.

MR. STEINBACH: Would you say that was true of the Eisenhower Justice Department as a whole, not as ideological as DOJ nowadays would be?

MR. TERRIS: Oh absolutely. I never had the feeling that politics was really involved.

MR. STEINBACH: Again back to the whole Eisenhower Justice Department, I guess you arrived right when the Attorney General was Herbert Brownell, maybe he was leaving as you were arriving.

MR. TERRIS: It was Rogers.

MR. STEINBACH: So William Rogers the whole time you were there?

MR. TERRIS: I'm almost sure it was William Rogers. Let me bring up a point that answers your earlier question a little better. *Baker v. Carr* went to the Supreme Court at the end of the Eisenhower Administration. J. Lee Rankin was enthusiastic about the notion that the government should support [the position] that the federal courts had jurisdiction over reapportionment. Archibald Cox had enormous doubt about that.

MR. STEINBACH: I remember you said that. So there's a deep irony there.

MR. TERRIS: Yes. Isn't that a tremendous irony?

MR. STEINBACH: Is that because, if you know, Rankin just thought that way, or did he have to take it up the chain of command and get the Eisenhower Administration's blessing for that position?

MR. TERRIS: He might have had to go up the chain of command, I really don't know that. But I don't think it was such a difficult thing. I mean Rogers was certainly no extreme right-winger. So even if he went up the chain of command, I don't think he probably would have had any problem with it. Archibald Cox really embodied in many ways the ideology of Harvard Law School. Harvard Law School in many ways embodied the philosophy of Felix Frankfurter, so it's not too surprising that Cox had that attitude. I don't know if I said this to you in our earlier session, when he came out of arguing *Baker v. Carr*, he said to Tony Lewis, who was *The New York Times* correspondent – talked to him about it and how he felt about the decision when *Baker v. Carr* came out, and he said he felt awful.

MR. STEINBACH: Intellectually awful, I guess.

MR. TERRIS: Yeah, right.

MR. STEINBACH: The late 1950s in the Eisenhower Administration are deeply concerned with desegregation and the aftermath of *Brown* and Little Rock, the *Brown II* [349 U.S. 294 (1955)] litigation. Any involvement personally in any of that?

MR. TERRIS: I don't remember that much in the Eisenhower Administration. It was certainly at fever pitch in the early days of the Kennedy Administration. As I mentioned before, the sit-in cases were a very prominent, enormously difficult legal issue, intellectually. Everybody in the Solicitor General's

Office was strongly on the side of the sit-ins, but putting together a legal argument was enormously difficult. That was debated very hotly within the Office, how that was going to be done. People in the Office were also involved – I was not involved – in things that were happening in the South, at least on some of the emergency things. These were emergency-type things that were occurring. I think some of the people in the office may even have gone to the South. I have a vague feeling that Steve Pollak, who got us together on these interviews, was involved in that, but I'm not sure.

MR. STEINBACH: Well we can give him the credit for that if it's all right with you.

MR. TERRIS: I'm almost sure he was involved in the civil rights issues.

MR. STEINBACH: You've mentioned a couple of times that the sit-in cases posed challenges for the Justice Department. First of all, why is that a federal issue, and second, what were the challenges, and how did they get resolved?

MR. TERRIS: I didn't handle the cases, but I was part of a lot of discussions about them. In order to find that the sit-in convictions could be overturned, you had to find state action, but what was occurring was classic non-state action. It was private people saying they didn't want to have Blacks in their restaurant. The state action didn't start until the police came and removed the sit-ins because the owners of the restaurant said they were trespassing. You go to court, they get convicted, that's a state action. The trouble with that argument is that it converts essentially everything that's private action into state action. Somebody walks into my house and I say you have to leave and they won't leave, and I call the police department and they arrest him, is that state

action? What if I'm a prejudiced person and the reason that I have that view is that I don't like Black people? Well generally in this country we assume that that's not illegal in the absence of a statute. Maybe terrible, but it's not illegal. So that's the debate, how are you going to work it out? I can't remember how the Solicitor General's Office worked it out, but it did [laughter]. And the Supreme Court did too.

MR. STEINBACH: So the 1950s are fading away. There's an exciting election in 1960 involving Eisenhower's Vice President. Did you have any connection or involvement at all with Richard Nixon when you were in the SG's Office?

MR. TERRIS: No.

MR. STEINBACH: So he runs against John Kennedy in 1960, and Kennedy wins, obviously, and you stay on in the Solicitor General's office. Is that pretty normal?

MR. TERRIS: That's totally normal.

MR. STEINBACH: And the fact that he got elected didn't change what you wanted to do in your job?

MR. TERRIS: No.

MR. STEINBACH: Okay, so we get a new Solicitor General, who you've told us a little bit about, Archibald Cox, and he's the SG all the Kennedy years.

MR. TERRIS: Right, and more.

MR. STEINBACH: And even into the Johnson early years. And we have an obviously new Justice Department run by the President's brother. How did things change between the Eisenhower Justice Department and Bobby Kennedy's Justice Department, in general?

MR. TERRIS: In reality, you wouldn't feel any change. You wouldn't feel a change unless the Justice Department starts taking positions that people would feel were really wrong. There was a change, though. The appointment of Robert Kennedy was regarded in the Department of Justice as horrible, absolutely horrible. I gave a talk yesterday to people here in the office about John and Robert Kennedy, and in doing so I looked up some quotes from John Kennedy, and one wonderful quote of John Kennedy was, people had obviously been criticizing him for appointing his brother as the Attorney General, and his response was, "Well, I thought that it would be a good thing if Robert learned a little bit about the law before he went into private practice" [laughter]. Well that's sort of what the position in the Department was, it was thought to be terrible. The prestige of the Department depends at least to some degree on who the Attorney General is. If the President thinks it is perfectly appropriate to have the head of the Department of Justice to be somebody who's totally unqualified, which he certainly was, the effect on the morale and the attitude was I think fairly serious. Now what happened over the next three-plus years: I think by the end he was regarded as a tremendous Attorney General. I regard him as probably the best Attorney General in my lifetime, and I think lots of people do. But he certainly didn't have the qualifications to become that kind of an Attorney General.

MR. STEINBACH: How did he go from unqualified to the best Attorney General in your lifetime?

MR. TERRIS: Well first of all, the people he appointed at the top levels were excellent. He was a man who was not the slightest bit afraid of other people being smarter than he was. He obviously thought that listening to people who are smarter than you is a pretty smart thing to do. He was enormously serious in what he did in the decisions he made. I gave an illustration before on a decision about reapportionment, done in a very serious way. He certainly was not politically motivated [as to criminal] prosecutions. He prosecuted Democratic politicians across the country. He went after Jimmy Hoffa – there's a lot of debate about whether he went too far, he was too aggressive, but that was certainly not political, going after one of the most powerful, if not most powerful, labor union leader in the country. I just think he impressed people that he was a very, very serious man who wasn't playing politics.

MR. STEINBACH: How did people get over the fact, if they did, that he was the President's brother, and for that reason alone shouldn't have been the AG?

MR. TERRIS: I'm not sure in a funny way whether they ever got over that. In a sense they would say, it's still the wrong decision because it looks bad, but we were wrong, and the President was right. He was qualified. He did have the ability to do this. It sure didn't look it. There was nothing in his record that proves it, but he proved it by doing the job.

MR. STEINBACH: It sounds like there was a lot of rumbling in the Justice Department when he was first nominated. Nowadays that would be all over the news, and the

opposition in the Senate would use it. Was this all kind of kept quiet, or did it become public?

MR. TERRIS: I don't know. I can't remember that. But I think the general thought that Robert Kennedy wasn't qualified certainly was public. It was so obvious. I don't know how much people went around with an ear to the ground in the Department of Justice. But I guess you were kind of suggesting how did that change. I met Robert Kennedy in February 1961. There was a knock on my door. He walked into my office. He said he was going through the Department to talk to the people and meet the people that he was going to work with. That went a long way, I think for most of us. That was pretty impressive. This guy who is the Attorney General, cares enough. He didn't spend much time in my office because he was going to go through the building.

MR. STEINBACH: That's remarkable. So you had personal interactions with him on the reapportionment cases, and then later we'll talk about even getting involved in the Robert Kennedy campaign.

MR. TERRIS: I had other interactions too.

MR. STEINBACH: But at Justice, any other specific matters where you and Bobby Kennedy interacted?

MR. TERRIS: I was at some meetings where he met with young attorneys and that kind of thing, but putting that kind of thing aside, which had no real substance, although certainly people appreciated it. And I probably told you this, I prepared him for his only argument in the Supreme Court. I should be very

careful about the word “prepared,” because I don’t think I did him any particular good. I don’t know how he prepared, but he seemed to have done a very good job of preparing. All I did was talk with him. I don’t get the credit for his oral argument.

MR. STEINBACH: There’s a lot of excitement in the Justice Department during the Kennedy years with civil rights, and there’s the March on Washington, and the whole Cuban Missile Crisis. Did any of that atmosphere of excitement permeate the SG’s Office? Do you remember anything about that?

MR. TERRIS: I think my short answer to you is it permeated the country. That’s partly what I talked about yesterday when I talked to my colleagues here in my office, that for people of my generation, that was an extraordinary time in the country. The feeling that the country could solve its problems, that as a community we could work together and solve problems, I think was enormous. Especially for people my age. When John was assassinated, I was 30. So we’re talking about my late 20s, and I know in my own life how exciting it was. I was doing community organizing on the street in one of the poorest sections of Washington, and the excitement in the country made it so much more thrilling to be doing that kind of work, to be having the feeling you were making some kind of a contribution to your country. And in John Kennedy’s great statement about not asking what your country can do for you but what you can do for your country, to me encapsulated what that period was like.

I asked Robert Kennedy to dedicate our little community center in a poor area of Washington that we had set up. He came and gave a little talk, and it was truly remarkable, and of course even more remarkable when I compare it to what seems to me [the atmosphere in] the country today, which is so pessimistic, such a feeling of inability to solve problems. That doesn't mean, of course, there were no problems then. That's a different matter. Civil rights issues were an enormous problem obviously, and not easy to solve by any means, but it still was just a really marvelous time in the kind of public sense, community sense.

MR. STEINBACH: Did you ever have any interaction yourself with President Kennedy?

MR. TERRIS: No. The only time I was ever in his physical presence was three weeks before his assassination, I was invited to a reception at the White House, but I didn't talk to him. I didn't have enough nerve to march up to the President and start chatting.

MR. STEINBACH: How about Vice President Johnson before he became President?

MR. TERRIS: I happened to [be] with him for a few minutes when he was Majority Leader.

MR. STEINBACH: This was back in the 1950s then?

MR. TERRIS: It had to have been late in the 1950s.

MR. STEINBACH: Do you remember what that was about?

MR. TERRIS: I do remember. I was given the assignment of escorting the Lord Chancellor of England around Washington, and one of the things that they gave him to do was to see Lyndon Johnson. So I went with him to see Lyndon Johnson, and there were about ten or twelve people in the room, and I had never seen

anything like it. It was one of the most amazing things I ever saw. Lyndon Johnson went around to those twelve people, and I would say in five to ten minutes, he made every one of them think that he loved them, that he was the closest friend of theirs they had ever had, that he would remember them for the rest of their life, and it was just fabulous that he was meeting these people. When he was finished, you said to yourself, “This man is capable of becoming President.” Amazing.

MR. STEINBACH: That force of personality.

MR. TERRIS: Amazing. He just occupied the entire space, he just totally occupied it.

MR. STEINBACH: And then he becomes Vice President and sort of disappears. We’re about to get to the Johnson years.

MR. TERRIS: He’s the absolute opposite of Robert Kennedy’s personality.

MR. STEINBACH: Before we get to Johnson, one other large question. There’s been a lot of negative commentary over the past several decades about the Kennedy Justice Department, about the Kennedy years. What’s your reflection on that?

MR. TERRIS: I guess I don’t even know what this negative commentary is.

MR. STEINBACH: We’ll leave that out then. Sum up what the Kennedy Justice Department was like in the Kennedy years from your perspective.

MR. TERRIS: My perspective: they were highly professional, excellent people running the Divisions. None of the things that I saw indicated politics intruding on what should be professional, legal decision-making. I had a feeling of tremendous morale. After they got over the beginning that we talked about before –

about how could Robert Kennedy possibly be qualified to be Attorney General, but it became clear that he was qualified. Who knows how he got to be qualified. The people had a great feeling of morale. I really don't have any feeling of how anybody would have a contrary view.

MR. STEINBACH: To be more specific, and I'm not suggesting my view, but there's been criticism that the Kennedy folks dragged their feet on civil rights, and it was in the end Johnson who saved the day. Any perspective on that?

MR. TERRIS: I don't think it's accurate. Today you imagine that the civil rights revolution was so obviously the right thing for the country to do, that you somehow read back from today and say, the President of the United States should have proposed on Day One sweeping legislation, sweeping orders. Yes, I suppose, in a certain sense that's right, but that isn't the way government works. What you're reading back is later history into an earlier time. There is no question that the Kennedy administration was very worried about how you do this. In many ways, the power in Congress was in the hands of Southerners, and if you didn't do something with Southerners, you were going to have a terrible time getting legislation through Congress. Somehow you had to meld the Republicans, who again were a heck of a lot better than they are today on these kinds of issues, and to meld them with the Northern Democrats, but to get around enormous power that's in the Southern Democrats, and also you have an enormous sociological problem. A democracy, even when it's doing the right thing, can't do it at the end of a bayonet. So there's no question about they were not prepared to just go full-tilt, put your head down, we're

going to jam this through. I knew the priest that was in a sense the chaplain for the Robert Kennedy family, a marvelous man, Father [Richard] McSorley. He told me a conversation that he had with Robert Kennedy about segregation and the Catholic Church in the South and how vehement Kennedy was that this was outrageous. So it wasn't where the Kennedys were coming from, it's how you get to where you want to go.

MR. STEINBACH: That's good.

One more recollection from the time, August 1963, Martin Luther King's March on Washington. Were you here? Do you remember it?

MR. TERRIS: I was there.

MR. STEINBACH: You went to the March? What do you remember about it?

MR. TERRIS: I remember how far away I was from the stage [laughter].

MR. STEINBACH: Did you have the sense at the time that this would be something that people would be talking about forever in American history?

MR. TERRIS: Oh yeah. And I was involved – I wasn't an important person involved – but I was involved in this. There was something called the Coalition of Conscience here in Washington. Marion Barry, who, of course, just died, was in the Coalition of Conscience. Walter Fauntroy was the head of it, and I was a member, and everybody there who was much more important than I was. We worked on Home Rule and civil rights issues and poverty issues. I was doing community organizing in the Shaw neighborhood. I was deeply involved in all that. During the Kennedy years, there was, again, that's part of the feeling that people had, you felt you could go out and do something.

You weren't going to change the world by yourself, but you and millions of other people might.

MR. STEINBACH: When you did this Coalition of Conscience and your community organizing, was that as a Department of Justice detail or in your private capacity?

MR. TERRIS: Totally private.

MR. STEINBACH: Okay, we'll come back to that maybe in the next session.

We talked last time about President Kennedy's assassination, where you were, what you remembered.

MR. TERRIS: Nobody forgets that.

MR. STEINBACH: Then suddenly there's a new President, and you end up working for that new President for almost two more years. Tell us about the Johnson Justice Department to the extent that differed from the Kennedy Justice Department.

MR. TERRIS: Well it really didn't. First of all, for the first part Robert Kennedy was still Attorney General. Archibald Cox was still the Solicitor General. There might have been one or two changes in the personnel of the ordinary people in the office, the top people in the office weren't changing, so the job really didn't change. I've told people, for me, that was the end of my youth – the assassination of John Kennedy was horrendous. So for me it was very important, but as far as the job was concerned, it really didn't change other than the kind of feeling I think lots of people had of this marvelous opportunity that occurred under John Kennedy was over.

MR. STEINBACH: Tell us more why you define that as the end of your youth.

MR. TERRIS: Because the feeling that I indicated before. I just felt the country was on such an upward course, and to have an assassination – it's one thing to lose in an election, or both terms are over and you get a new President who may be entirely different, but to have it end in the way it ended was just so shocking to the system, shocking as a person. The assassination itself probably had a greater effect on me than any death that I've ever had. I was very close to my mother and father, but their deaths did not affect me nearly as much. They were old, their deaths were much more expected. But this had an effect. The three days after the assassination, my wife and I sat immobilized looking at the television set and watching this stream of people walking past the casket, and it was just such a shock. Which of course later on became even worse in 1968 with both King and Robert Kennedy being shot down, but 1963 was bad enough.

MR. STEINBACH: So you have those three days of national trauma. What's it like to go back to the Justice Department after that?

MR. TERRIS: Well I can't really remember exactly. I'm sure it affected myself and everybody else, but, besides what it did to the people's psychology, the Department of Justice really wasn't enormously affected. The same people were there, the same people took their job very, very seriously, and in essentially the same way. And certainly Lyndon Johnson, when he came into office, until his term was blighted by the Vietnam War, people felt very good about a lot of things that he did. Without the Vietnam War he probably

would be considered a near-great President. In that category. He did some phenomenal things.

MR. STEINBACH: The Vietnam War doesn't really kick in during your Justice Department years. So you're there during the push for the Civil Rights Act of 1964, Johnson's reelection, the Voting Rights Act of 1965, the beginning of the Great Society. What's your role, the Department of Justice's role, in those big efforts?

MR. TERRIS: I don't think I had really any direct involvement when I was at the Department of Justice. The Great Society, the War on Poverty, was my next job, but the Department of Justice was essentially a continuation of my prior work. I was still working on reapportionment. Even after Robert Kennedy left, there was another problem with Archibald Cox about whether he was going to support one man, one vote in another state, I think it may have been Colorado. Nicholas Katzenbach, who was the new Attorney General – I think it was when he was Attorney General, not Deputy Attorney General, but it was after the assassination, I'm fairly sure – called me in to ask me about whether there was going to be a problem with Archibald Cox. I really didn't know much about it at that point. Cox hadn't said anything to me. That worked its way out. Cox did do what the administration wanted. I don't know if I said before, the [Kennedy] Administration on this issue was the President actually because he had written an article on this subject, so he personally had a position.

MR. STEINBACH: Tell us about Katzenbach.

MR. TERRIS: I didn't have an enormous amount of contact with him. He was also a smart man, a good guy, and what [contact] I did have I was impressed by. There were a lot of good people running the Department.

MR. STEINBACH: I think Archibald Cox stayed on as Solicitor General through about the same time as you were in the Office and left.

MR. TERRIS: I think he stayed somewhat later because he's the guy that got rid of me [laughter].

MR. STEINBACH: A story yet to be told. You have no overlap with Thurgood Marshall, who becomes the next Solicitor General.

MR. TERRIS: No.

MR. STEINBACH: Did you know him or ever have any professional work with him?

MR. TERRIS: No.

MR. STEINBACH: Any other recollections, thoughts, interactions about Archibald Cox? You've told us about his work on the reapportionment cases, his brilliant background from Harvard Law School. Any other interactions?

MR. TERRIS: I can tell you a little bit about him as an oral advocate. I've never seen anybody in the Supreme Court do this, and I'm not sure anybody ever has. He transferred from Harvard Law School to the Supreme Court. He lectured students like me at Harvard Law School, and he lectured the Supreme Court. He of course had a posture that was absolutely straight up and down, and so he would stand there straight up and down telling some people that didn't know as much about law as he did what the law was, and he got away with it. It would have been hard not to get away with it. It would have been hard for

a Supreme Court Justice to have dealt with him. He was very smart, he was very well-prepared, and it would have been difficult, and I didn't see too many Justices doing it. They didn't always of course vote the way he wanted them to, but he was in command, and that's not easy in the Supreme Court.

MR. STEINBACH: Let's jump ahead when he was Special Prosecutor. Did you have any interaction at all then?

MR. TERRIS: None.

MR. STEINBACH: So tell us the story – this is ahead of the game but you brought it up – about his involvement with your leaving the Solicitor General's Office.

MR. TERRIS: Well one weekend, it probably was in April 1965, I got a call from Steve Pollak. At this point he was the Deputy General Counsel of the Office of Equal Opportunity. He said to me that Sargent Shriver was in the process of setting up a national program of legal services for the poor, and the two people that he had working with him to do that, Edgar and Jean Camper-Cahn, had been setting it up, and they had been the great driving force of this, they had quit. They'd had some kind of a dispute with Sargent Shriver, and they had simply quit. He was trying to set up a national meeting, I believe for June, it might have been July, of all kinds of major political figures, legal figures, with later-Justice Powell involved, he was the President of the American Bar Association at the time, and so this was in cooperation with the ABA.

Well, Steve called me undoubtedly because he thought I knew a lot about poverty and community organizing. But anyway, I cared about these

issues, and he wanted simply to find out whether I would run this program. Well, I told him – this was on a Friday, I believe, or it may have been a Saturday – that I would work on it over the weekend. There were about two months to get this thing done. But I said that Sargent Shriver had personally to go to Archibald Cox on Monday to ask him that I could do this and I could return to the Solicitor General's Office. The Solicitor General's Office isn't doing much at this time. All the briefing is finished for the term. All the arguments were finished for the term. There's some work, but it's the low point of the year. Not even the new briefs for the new term were coming in. So I thought it was perfectly reasonable, and if this was so important to the Administration, that that would work. I worked that weekend. Monday came. I'm told that Shriver did go to Archibald Cox and that Archibald Cox said no. I've often wondered why he said no. I hadn't had any real run-ins with him during my time in the office. I always wondered whether that session in which he was sitting outside of Robert Kennedy's office for half an hour, 45 minutes while I was talking to Kennedy [about Kennedy's Supreme Court argument] had really bothered him. In any event, he said no. So then of course the question was, was I going to go back to the Solicitor General's Office, and I thought about it, and I decided that this work was too important to leave it. In retrospect, it was certainly too important to leave it. I didn't of course know that this was going to grow into the size program that now exists in the country.

I got a guy from Georgetown Law School to help me, and the two of us put together this program, and it was a terrific program. We got a person that you may have heard of (I'm joking), Pat Wald. There were really no good documents on legal services for the poor in existence at that time. We went to Pat Wald, I think she had four or five children, and asked her – I don't know why we thought she was capable of doing this, in a sense nobody was capable of doing it – whether she could put together a small book on legal services for the poor, and in a period of three or four weeks, she wrote a book on legal services for the poor. So I'm not at all surprised the amazing things she has done since, because that was probably more amazing than most of the things she's done since.

MR. STEINBACH: That sounds great. Let's defer the whole post-DOJ activities that you're engaged in until next time. Any going-away conversation with Archibald Cox?

MR. TERRIS: No. Never even saw him. I believe I saw Archibald Cox only once again in my life after that, and that was when [Ken] Gormley's book about him came out. That's years later.

MR. STEINBACH: Let's back you up then to your Solicitor General's career. It's my understanding, and I think this is from your resume, that you were involved in maybe seventy Supreme Court briefs, give or take, writing and or reviewing.

MR. TERRIS: All reviewing. The only brief that I can remember the Solicitor General's Office ever produced by itself – there may have been more, but I certainly

never heard of them – was Archibald Cox’s own version of that reapportionment brief, and he wrote it himself. In fact, I have the page proof here, and on the front of it, it basically says, “Bruce, here’s the brief; don’t touch it.” Short form of exactly what he said.

MR. STEINBACH: At least you could go home early that day.

MR. TERRIS: [Laughter]. And I didn’t touch it. I wasn’t that dumb.

MR. STEINBACH: But you did significant editing on other briefs that would come up from below.

MR. TERRIS: Of course. That was my job.

MR. STEINBACH: Dozens over the course of your career. And I also understand that you argued, I think, sixteen times to the Supreme Court directly yourself while you were in the SG’s Office.

MR. TERRIS: Correct.

MR. STEINBACH: Do you remember your first Supreme Court argument?

MR. TERRIS: No.

MR. STEINBACH: Do you remember being scared or anything about your first Supreme Court argument?

MR. TERRIS: It’s a funny thing. In fact I just said something to a colleague, I think it was this morning actually. I was in synagogue and the guy who’s frequently there asked me whether I wanted to have this particular participation in the service. I had told him that I never wanted to have it, it’s a fairly minor thing that you have to do, and I had told him no, I don’t want to, it makes me nervous to do it because I have such a poor command of Hebrew. I said to

him this morning, you know I don't get nervous when I argue in the Supreme Court, but if you ask me to say something in Hebrew in synagogue, I'm not going to do it.

MR. STEINBACH: Now you can't say that you never got nervous from the very beginning, or did you find this a place where you were at ease?

MR. TERRIS: You get nervous in a sense. I'm not saying I'm not thinking about it. Of course, I'd be crazy if I said that. But when you're finished with the first two sentences in the Supreme Court, you're not really nervous anymore. You're so focused on what you're doing that you're really not nervous. I think that's the way baseball players playing in the World Series feel. That's their job. Once they're into it, they can't think of anything else. And I think that's the way I felt in the Supreme Court. And of course I had a great advantage. I had seen a lot of Supreme Court arguments before I ever got up because I was in the Solicitor General's Office and I saw all these very good people arguing in the Supreme Court. I had a tremendous advantage.

MR. STEINBACH: But like a baseball player, there's a lot of practice before the game.

MR. TERRIS: We didn't have moot courts.

MR. STEINBACH: You did not have moot courts?

MR. TERRIS: I hate moot courts. You ask if I'm nervous, I'm nervous at a moot court. But you get to the Supreme Court, you have got too much to think about.

MR. STEINBACH: Was that a standard, I guess, non-practice in the SG's Office, to never have rehearsals?

MR. TERRIS: I can't remember the people that were in the Solicitor General's Office having a rehearsal. I can remember, strangely enough, a rehearsal for Abe Chayes, a professor at Harvard Law School, who later became the top lawyer at the State Department, he was making an argument, and we had a moot court for him. But I don't remember any moot court when I was in the Solicitor General's Office, for me or anybody else [in the Office]. I don't know if that's smart or not. I'm pretty sure of it.

MR. STEINBACH: So like any lawyer representing any client, you'll have your own personal views that sometimes aren't the same as your client's. Do you remember any instances where you argued in front of the Supreme Court and thought to yourself, "I'm wrong," or "I think we're on the wrong side"?

MR. TERRIS: Let me tell you something. That almost never happens. Not to Bruce Terris, not to anybody. If you can't get yourself into believing in your argument – now, it depends on how you phrase it. If you phrase it, "When you sit down, Bruce Terris, and when you decide how you would decide this as a judge," express it that way, I might say "I will come out against the position I'm in," but that's not the sequence. The sequence is, you get the case, you get the brief, you edit the brief, you then study the cases [cited in the brief] in preparation, you draft the argument. You really never ask that question, how would I decide the case if I were completely separate from representing this client. So in my whole history of 50-odd years of being a lawyer, I don't think I can say to you that that's ever occurred.

MR. STEINBACH: So as an advocate, you become a believer.

MR. TERRIS: It doesn't mean what you would do if somebody the next day said you are now appointed as a judge, if I got that same case, now I might look at it completely differently, but as an advocate, I never really ask that question.

MR. STEINBACH: I ask that because in several instances – and it's not just you, but the SG's Office at the time in the Kennedy years, seemed to be pushing a certain position, and the Warren Court takes that much further, much more liberally, much broader. That must have been an interesting dynamic for the government to be asking for "x," and the Supreme Court giving you "x plus."

MR. TERRIS: That's an interesting illustration that you just said. Of course that happened, I wouldn't say much further, but somewhat further, in the reapportionment cases. The interesting thing is that when the Solicitor General's Office – and I'm obviously talking about my stay there – when the Solicitor General's Office formulates its position, it's doing several things at the same time. It's trying to predict the best argument it can make to get all or most of what the administration wants, what the government wants. So it's trying to predict what's going to be a persuasive argument, what can win. It's also separate from that, trying to decide what the administration's position ought to be. Forget about whether you're going to win or lose, what's our position? And the way the Solicitor General's Office operated, at least at that time, was truly an attempt to argue what is good for the country. And you're also arguing the administration's position. At times the Solicitor General's Office might say, that isn't maybe the best for the country. When I was there, probably half of those Communist cases, most of the people in the Office

would have hoped they were going to come out the other way. So it's a very tricky on how you formulate positions.

At Harvard Law School when I was there, the ideology was the majesty of the law. There's the law. It's not just how you use the law for your political purposes, there's such a thing as "the law." At Yale, it was a place where, at least many of the professors were using the law for what they regarded as good purposes. A lot of people in the Solicitor General's Office (they weren't all from Harvard) had that kind of majesty of the law ideology. There is "the law" that we have to be faithful to. We don't just do good and use the law to do good. So that too goes back to your thing about what we would argue and then sometimes the Warren Court would go beyond us because, in effect, our own sort of inner feelings about the law limited how far we were comfortable in arguing.

MR. STEINBACH: So as someone who has argued – at least, well even then in the SG's Office, sixteen times and then later on before the Supreme Court and in other courts – you have lawyers in your office now, or maybe you get invited to the SG's Office and you're meeting with people who have never done it: tell them how to be a good appellate lawyer.

MR. TERRIS: Hah. Well the one thing I tell them is you've got to attempt to tell a story. That's true of brief-writing too. You've got to tell a story. What I say to people is, you basically want to tell a story in which there are no exits. Once you start with me, you're going to end up with me, and the exits from the path that I'm going to tell, the story I'm going to tell, I'm going to have to

cut off those exits, so that there are no exits. You start with me, you've got to end up with me. So that's a big part, I think, of how you persuade people in a court. In terms of oral argument, you've got to obviously simplify. I have a trait that I think is good for an oral advocate. My wife says, if she says "x," I'm going to say "maybe not quite x," so that my immediate reaction is kind of a caveat, a response. That's maybe bad at home [laughter], but it's good in a courtroom. In other words, when I'm asked something or a judge says something, my mind operates in response very, very quickly, very quickly translating it into how it fits into my story. And I think that's a trait that's a very valuable one. I don't know how much of it can be taught and how much of it is innate. At least those are a couple of things that I tell people.

MR. STEINBACH: How do you deal with a hot bench where you utter a sentence and you get a thousand questions?

MR. TERRIS: They're all hot now. If you're in an appellate court, where you have three people or more, they're all hot. When I first started arguing, it was not nearly as hot, even the Supreme Court wasn't nearly the way it is now. There's no argument today in the Supreme Court. In many ways, you don't get anything out of your mouth. You're asked questions or get speeches from them, and then you have to react to their speeches. And that's true of all the appellate courts that I've been in for years now. District court is a little different because one guy can't think of so many questions probably one after the other, bam, bam, bam. But appellate courts, you answer questions.

MR. STEINBACH: If you had the power to tell the Supreme Court how to behave, should they go back to the old days and let the lawyers talk more, or is what they do now better?

MR. TERRIS: That's an awfully good question. I think they should do a little more of the way it used to be. I don't think it's appropriate to essentially use the argument time not to deal with the lawyer but to deal with their compatriots. What they're really doing is talking not to the lawyer but to the guy down at the end of the bench. They've got time to do that. They have meetings to do that. I think one of the problems judges generally, and Supreme Court Justices in particular have, they have too much confidence that they know the case. They don't know the case the way the lawyer knows the case. They never do, even though they are smart, and certainly there are many very, very smart Justices and judges, but they don't [know the case]. They almost never [let the lawyers argue. This is particularly bad when they do not let] good advocates [argue] – and most of the lawyers in the Supreme Court are awfully good advocates, there are not a lot of poor advocates in the Supreme Court, especially these days because now for the first time [there is] a professional bar of Supreme Court advocates that did not exist before. So I think that's a mistake. They should ask real questions, if it's unclear what the person is saying, definitely ask the question, but I think to some extent they want to hear themselves talk.

MR. STEINBACH: When you argued in front of the Supreme Court during your SG days, do you remember any adversaries, any lawyers who argued against you in the Supreme Court who really impressed you?

MR. TERRIS: Not really. That doesn't mean that there weren't people that were good advocates on the other side when I argued, but I really can't remember. For the most part I can't remember who they were at all. The one I do remember is in the Communist cases, a guy by the name of [Leonard] Boudin, who happens to be the father of the judge. I'm amazed that guy ever became a judge.

MR. STEINBACH: First Circuit.

MR. TERRIS: Right. How he [Michael Boudin] ever became a judge after that, given what his father's position was. I think it's a great thing for this country.

MR. STEINBACH: Let me broaden the question. You've talked a bit about Archibald Cox's ability as an oral advocate. Any others, not that you were necessary against them, any other people you saw argue that you thought were tremendously good?

MR. TERRIS: The top people in the Solicitor General's Office were awfully good. Ralph Spitzer was there, he was never the First or Second Assistant. He became a law professor at Pennsylvania later. I can remember an argument that he made in a tax case that involved an enormous amount of money, and on the other side was Erwin Griswold, Dean of Harvard Law School. Spitzer wiped him out. It was terrible. I remember at the time, it doesn't sound like an enormous amount of money anymore, but I remember we were told that

Griswold had been paid \$100,000 for this argument, and it was pitiful in comparison. Spitzer was just so much better. But there were other people too, Philip Elman and Oscar Davis. There were a lot of people in the Solicitor General's Office who were really awfully good.

MR. STEINBACH: I noticed in the briefs that you worked on Boudin's name, but I also noticed Thomas Emerson, he was on the other side of a case that you were involved in.

MR. TERRIS: I don't remember.

MR. STEINBACH: I think he was connected with Yale Law School.

MR. TERRIS: It sounds right.

MR. STEINBACH: We have previously talked about, or I've sent you, several Supreme Court cases that you worked on, and I just wondered about any recollections you might have. Several of them have to do with internal security issues.

MR. TERRIS: As I said, when it came time to assigning those cases, I think the powers that be said to themselves – first of all, he is very junior, and so he's willing to accept these cases and the rest of us don't want to be tainted with this stuff, so that's how I ended up with them. I handled a couple of cases [involving] the House Un-American Activities Committee. I once joked to people, there was a time that I thought I had lost more federal statutes being held unconstitutional than anybody in American history, because there were two minor provisions in the Immigration and Naturalization Act that I lost. Up until recently it was very unusual for federal statutes to be held unconstitutional. About fifteen years ago, I noticed that in one week there

were three federal statutes held unconstitutional, so I can't claim this great distinction anymore, if it ever was true. It may not have been. But I'm sure I was given those cases because there wasn't a lot of clamor for other people to argue them.

MR. STEINBACH: In the internal security cases, the blockbuster, at least it seems to me, a case argued by Rankin at the very end of the Eisenhower years, the *Communist Party v. Subversive Activities Control Board* [367 U.S. 1 (1961)]. You're on the brief, and this is a 5-4 decision written by Frankfurter that required the Communist party to register. What do you remember about that?

MR. TERRIS: Gee, I've forgotten that there was actually a case on that side that was won in the Supreme Court. I lost all my cases 5 to 4. I don't really remember about the Smith Act case. I can remember, and you might be interested in this, I remember, one of the cases involving the House Un-American Activities Committee, that Frankfurter was so irritated with my argument that he took his chair and swiveled it. The wall of the Supreme Court is very close to the back of the Justices, so he swiveled his chair and he was facing the back wall. His face must have been six inches or a foot away from the wall. He was so irritated about the argument I was making. Of course what I was doing, I was looking for a fifth vote. I wasn't looking for his vote. I knew where his vote was. I had that vote, and I was looking for a fifth. Of course I didn't get a fifth. There was no chance that I was going to get one of the five, and that may also have been why I got the assignment. No one in the world believed that the case is going to come out anything other than 5 to 4.

MR. STEINBACH: That sounds familiar from nowadays. When you went up there – let's generalize about all sixteen of your cases at once. Could you count the noses even before you started most of the time?

MR. TERRIS: Well in those kinds of cases you could. I can't remember now some of the other cases that I argued that were a little less politically affected, so there may have been others. There were after all a few cases that I won, so they may be the ones that you couldn't do the count before you went up there. Like the two Immigration and Naturalization Act statutes, I think I pretty well knew how they were coming out, and most of the Communist cases the same thing is true.

MR. STEINBACH: One of the immigration cases – would *Schneider v. Rusk* [377 U.S. 163 (1964)] be one of those cases? The issue was whether the government can take away someone's citizenship who returns to the country of their birth for a period of time and then comes back to the United States. Does that sound right?

MR. TERRIS: I think you had to do something more there, like vote or something. I think it's usually tied to doing something. I think one of the cases may have involved serving in a foreign army, and the other one maybe voting.

MR. STEINBACH: And you argued that it was rational for Congress to have distinguished between [native-born] citizens and others who went back to their home country, and you lost five to four.

MR. TERRIS: Correct [laughter].

MR. STEINBACH: The *New York Times* said in an article I noticed about the case that more than 40,000 citizenships had been taken away under that law before the Supreme Court struck it down.[‡] Any other recollections about that particular case?

MR. TERRIS: No. I've blotted them out, given the result [laughter].

MR. STEINBACH: Then you have another immigration and naturalization case before the Supreme Court. Anything to add?

MR. TERRIS: No.

MR. STEINBACH: And there were a couple where people testified in front of Congress or refused to testify.

MR. TERRIS: House Un-American Activities Committee. Those were the cases that [Leonard Boudin] argued. In fact I believe there were five cases in a row in the Supreme Court, and I argued two of them and other people argued the others. Not in the Solicitor General's Office; other people.

MR. STEINBACH: It looked like for various reasons the Supreme Court figured out a way each time to rule against Congress.

MR. TERRIS: Exactly.

MR. STEINBACH: How about any other Supreme Court decisions that you remember? Obviously, setting aside reapportionment.

MR. TERRIS: I really don't remember my other ones. A little bit strange I guess, but I don't.

[‡] Lewis, Anthony. "High Court Rules the Naturalized May Live Abroad." *New York Times*, May 19, 1964.

MR. STEINBACH: Let's talk about the Court in general, the Warren Court. There's somewhat of a turnover while you were in the SG's Office, but a pretty core group remains. Black and Frankfurter leave and get replaced later on, but let's start with the large question about your reflections on the Warren Court, from your personal perspective.

MR. TERRIS: As you would expect, it's kind of a mixed bag. The Justice I admired the most, and still do, from that Court is Justice Harlan. The reason I admired him the most was because I believe that he frequently voted against his political views, and to me, that's really one of the most important things that a great Justice should do. It isn't a place to be simply translating what you would do in Congress into a legal arena, and I think most of the Justices wouldn't have voted any differently if they had been sitting in Congress than as they were on the Supreme Court. He certainly was also very intelligent, and his demeanor was wonderful on the Court. He did not act like he was superior to the people who were arguing in front of him.

Earl Warren was, I think it's fair to say, not smart enough to be the Chief Justice of the United States. I probably agreed with most of his political views. On the other hand, *Brown v. Board of Education* and getting that done as a unanimous decision was very impressive. Of course that's probably where his skills most played out, as a very good politician, and getting that decision out that way probably took the skills of a politician more than the skills of being a great legal scholar.

I was never enormously impressed with Tom Clark. Justice Black

I thought was a very smart man, a good Justice. Douglas was also a very smart man but not a very good Justice.

MR. STEINBACH: Because?

MR. TERRIS: I don't think he really took it with the seriousness that the job demands, and that the public has a right to expect, to do the research that's needed. I had a case long after this, in which I think I lost 5-4 too, which I represented the plaintiff, Cesar Chavez, and every bit of Douglas's background would tell you that he would have voted for me almost knee-jerk. He didn't. I lost five to four. I had the feeling he wasn't even paying attention, even to figure out where his political views were.

MR. STEINBACH: It sounds like you tussled with Justice Frankfurter from time to time.

MR. TERRIS: And Frankfurter, of course, was a very smart man. Very smart. Tough to deal with at oral argument. He didn't give really any ground. And I thought Justice Stewart was a very good Justice, pretty smart, pretty fair. I don't know who I missed.

MR. STEINBACH: Did you have any interaction while you were in the Justice Department with Byron White?

MR. TERRIS: No.

MR. STEINBACH: So he went from the DOJ to the Supreme Court without you knowing him personally. Did you know any of the Justices personally or outside of professional work?

MR. TERRIS: No.

MR. STEINBACH: What was your sense – this would have been the very tail end of your SG days – of Justice White or Justice Goldberg?

MR. TERRIS: I'm not sure I ever argued in front of Goldberg. I think I didn't. I knew Justice Goldberg because he was involved, this was a later time, on setting up the Center for Law and Social Policy, which I and Charlie Halpern set up, so I knew him. Justice White certainly wasn't one of the great Justices, but he was a solid man.

MR. STEINBACH: So now it's just obvious looking back how profoundly significant the Warren Court was in American legal history. Was that clear at the time, or was it just one case after another they decided?

MR. TERRIS: I think it was fairly clear. It was dealing after all with civil rights, really very basic issues of civil rights. There were of course other issues, reapportionment is awfully important. It's hard to figure what would have happened today if we hadn't done something about reapportionment at that time. Certainly there were other issues, but I think the civil rights issues by themselves are critical. Theoretically, you can imagine the Johnson civil rights laws being held unconstitutional. If you imagine that for a moment, now it seems like that's so impossible. It was possible.

MR. STEINBACH: In the meantime there's all these rights for criminal defendants coming down the chute, much more expansive interpretation of the First Amendment for the press. . . .

MR. TERRIS: That's right. They probably weren't as important as the others, but they were very, very important.

MR. STEINBACH: When we pick up next time, you will have left the Justice Department and be on to the next phase of your career. Look back on joining the Justice Department and the eight years you spent there. Reflections on your public service career up to that point?

MR. TERRIS: It was very, very rewarding. I had a great feeling about the things that I did in terms of how I made a contribution. It was fun. I don't know if I said this to you before, but I've said it to a lot of people: I can never remember in my entire career going to the office that I didn't look forward to it. I know that's just fantastic, but it is true, and it's certainly was true of that period. I learned an awful lot about law. I learned an awful lot about how to think and act and what have you. I'm not sure whether I have said this to you or not: the start of it really though is Harvard Law School because Harvard Law School taught me how to think. I had gone to Harvard College, and you say, did they teach you how to think? The answer is no. They would ask a question and I would give them back everything I knew. They would ask, what's the cause of the Civil War? If you asked me that on an exam, I would write furiously for an hour, and everything would come out. Suddenly at Harvard Law School – and I'm an enormous believer in this – they used the Socratic method, in which they never told me. They never told me anything. What's the law? Tell me the law, and I'll write it down. I had to think it through. That was an enormous experience, and then the years after that associated with these tremendous people in the Solicitor General's Office, it was just really wonderful.

MR. STEINBACH: Would I be right in concluding that when you look back over your Justice years, by far your proudest accomplishment is the reapportionment cases?

MR. TERRIS: That's right in the sense – that's the biggest thing, the thing that somebody wrote a book about recently. But everything else I did was wonderful too. The other briefs I handled, briefs on the merits in the Supreme Court, almost all of them had some considerable importance, maybe not as important as reapportionment, but they were intellectually challenging. So even if something wasn't the most important thing in the world, it was a challenge to do it right.

MR. STEINBACH: Good. Well we have plenty more to cover, starting with the War on Poverty when we next meet. Bruce, thank you very much, and we'll reconvene shortly.