ORAL. HISTORY OF STANLEY L. TEMKO

Interview #1

Mr. Neuchterlein: This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit Court. The interviewee is Stanley L. Temko. The interviewer is Jonathan Neuchterlein, Justice Department, Office of The Solicitor General. The interview took place at the offices of Covington & Burling on the 16'' of September 1999.

Stanley, I guess I should start by just asking you where you are from, where you grew up, what your family circumstances were like.

Mr. Temko: Well, I can go to that and how it ties into Washington. I grew up in a town called Weehawken, New Jersey which, at that time, was a sort of a suburb opposite New York. And you went to New York on a ferry from Weehawken to 42nd Street in Manhattan. Now, if you go past Weehawken, it is pretty much all bridge and tunnel approaches to New York. But I grew up in Weehawken, New Jersey, then I went to college at Columbia College in New York and also went to law school at Columbia. So, after I graduated from high school in Jersey, I spent, in effect, almost seven years living at Morningside Heights.

Mr. Neuchterlein: When did you first get the inkling that you might want to be a lawyer?

Mr. Temko: I don't think I ever got one of these really strong career choices. First of all, when I finally went to law school it was at a time when I knew I was probably going to go in the service either right after I finished law school or before I did. And I guess I went to law school to some degree by a process of elimination. I knew I didn't want to be a doctor or an engineer, and the two crafts or professions that appealed to me most were law or journalism and I

opted for law, but I have always thought highly of journalists. In fact, I think the journalists are every bit as smart as the top lawyers and they just don't seem to be compensated the same way.

Mr. Neuchterlein: I see you were a managing editor at the Columbia newspaper.

Mr. Temko: In college, I was managing editor of the *Daily Spectator,* which was a pretty good college paper and I liked newspaper work. But, as I say, I turned out going to law school.

Mr. Neuchterlein: Now, were there any lawyers in your family?

Mr. Temko: One of my cousins and an uncle were lawyers, but my father was not a lawyer. He had been in the shoe business.

Mr. Neuchterlein: How did he react to your decision to go to law school?

Mr. Temko: Oh they, my mother and father, would have been happy if I had gone to med school, law school or any other choice. Law school was pretty much my choice and they encouraged me in it. Something that is an aside on this. I have three children: two are lawyers and one is a journalist, and my wife was a lawyer. Any number of people would just say, nothing pejorative, just saying, well, I guess you encouraged all your children to go to law school and so forth. Nothing was farther from the truth. Just as no one told me I had to be a lawyer, we never told the kids what they had to do and two of them decided to go to law school; one never went to graduate school, he is the journalist. A story that is an aside is typical of this fellow. He called from Williamstown. I guess he was a junior or something and talked to my wife and said he wasn't even going to take the law school aptitude test cause he obviously would do so well that there would be pressure on him to go to law school. At which point my wife hung up on him.

Mr. Neuchterlein: That was appropriate. Well, you hear so many stories about

the first year of law school, particularly in those times; how competitive it could be. What memories stand out for you?

Mr. Temko: Well, actually you hear about law schools. I have always heard that Harvard was very competitive and Columbia was always competitive. The general feeling we had was that Yale seemed to be a more gentlemanly or ladylike place. In my first year, because I entered in the fall of 1940, and for most of that year, our class was intact. So we had a full-sized class and some very smart people in it. Bill Feinberg was in the class; any number of top-flight people. By the tine of the second year, it thinned out a bit. I was there because I'd been in an auto accident. It was sort of competitive, but I never thought it was something troublesome or difficultand I made out very well. So I never really felt badly about the competitiveness of it.

Mr. Neuchterlein: You said that the law school class thinned out after the first year was out because people got low grades?

Mr. Temko: No, no. Not so much low grades. In 1940 a few people were going into military service, such as people in the ROTC, but for most of the people in the class, it wasn't until Pearl Harbor in December 1941 that you had a real exodus.

Mr. Neuchterlein: But you knew the war was coining?

Mr. Temko: We knew the war was coming, so I entered in the fall of '40 and finished the first year in the spring of '41. In 1941 people started leaving for the service. I had been in an automobile accident. I wasn't driving; I was just in the rear seat. I had a summer job at some camp in '39 and I wacked up one leg pretty badly. I knew it would heal in time, but as a result of that I was deferred from going in the service and didn't go into the service until late '43 or early '44. I was able, by accelerating my last year, to finish law school. A lot of the people

who started with me came back after the war to finish, like Bill Feinberg, the Second Circuit judge and Bill Colby, who later became CIA director. We had a lot of very able people there.

Mr. Neuchterlein: Did you become close with any professors while you were in law school?

Mr. Temko: I was friendly with a number of professors. Everyone says that law school is pretty impersonal and so forth, but Columbia had a group of really teaching professors. They taught in the classes and the simple fact is that, if you really had done well and you were on the law review and so forth, you frequently got to be fairly friendly with people.

Mi. Neuchterlein: I will note for the record that Stanley finished first in his class in Columbia and was editor-in-chief of the law review. That presumably helped you.

Mr. Temko: That helped. But let me say, for example, to get ahead of the game a little. Well, let me go right on, but people, friends of mine on the faculty, were instrumental in my getting a Supreme Court clerkship. What happened, and to go ahead, Harlan Fiske Stone was still the Chief Justice and he always took a Columbia clerk. We had other Columbia graduates on the Court, but Douglas, for example, was not friendly to Columbia. So Stone was about the only one who was locked into Columbia the way Frankfurter always had his Harvard clerks and so forth. So I was selected to be Stone's clerk when I graduated; it would have been the end of '43.

Mr. Neuchterlein: How many law clerks did each Justice have?

Mi. Temko: At that point, the Chief Justice, that was Stone, had two. The other Justices had one. There has been proliferation in that sort of thing.

Mr. Neuchterlein: Yes, sir.

Mr. Temko: But I knew that, while I was going to have a month or two, I wouldn't be able to finish the term with Stone and I told him that I was going into the Army. He asked me if I could recommend a suitable clerk and I found Ed Friedmen, who had been editor-in-chief of the *Columbia Law* ***Review*** a year or two earlier, and was classified 4F in the draft. He became Stone's clerk. Then, I was less sophisticated in those days than I would Like to think I am now, I joined the Army. I was *2%* years or so overseas and I never gave a thought to trying to keep in contact with Stone. But I gather Walter Gelhorn or Herb Wechsler, both of whom were Columbia professors and ex-Stone clerks and both of whom were friendly with me, kept in touch for me. I got a letter while I was still in Europe just saying, "Dear Lieutenant Temko – I understand you will be getting out of the Army and I would be delighted to have you clerk for me starting this summer." So that sounded fine.

Mr. Neuchterlein: R.S.V.P. regrets only?

Mr. Temko: So I got back in this country in January of '46 and I was going to start with Stone in July, I worked for a few months in New York at Root Clark which was a firm I had worked for one summer. Lo and behold, the Chief Justice literally dropped dead on the bench in April. So I figured that was the end of it. The idea of being a Supreme Court clerk wasn't going to be and I stayed at Root Clark, which had by then turned into Root Ballentine. I was there for about a year at which point I got a call again from Walter Gellhorn saying that they would like to get some. Columbia clerk back on the Court and Justice Wiley Rutledge was a possibility. Rutledge, who didn't have any binding obligation that he had to take someone from Iowa, Indiana or any of the other schools that he taught at, agreed to consider a Columbia clerk because he didn't have to take one from those schools unless there was some superstar. Gellhorn

indicated, quite clearly, that Rutledge would be glad to take me. And that is how I ended up clerking for Rutledge.

Mr. Neuchterlein: I am going to ask you some questions about what it was like to clerk for him, but I want to make sure we don't skip over your wartime experience. I see that, after graduating from Columbia in 1943, you went over to Europe and apparently began as a private, which is to me counter-intuitive for someone who just finished first in his class at Columbia Law School.

Mr. Temko: Well, let me say, even though I was deferred because of my knee, I tried to get a commission in the Navy Reserve, but I was color-blind and rejected. By the time I was in effect drafted, which was I guess late '43 – I am a little vague on that – the only Officer's Candidate School which was open, and even that wasn't very open, was infantry. In retrospect, I was pretty lucky that it wasn't open because most infantry lieutenants at that time were sent as replacements in the Bulge and so forth. I couldn't be commissioned in the JAG corps because you had to be 28 to be – it may still be the rule – to be commissioned in the Judge Advocate Corps. Generally you had to be 28, and in '43 I was 23. So the thing that was open, it was sort of funny, was something called the Army Specialized Training Corps. It took people who had fairly good educational background and spoke, say, French or German and sent them to learn Russian or Hungarian or some of the East European languages. I got into that and I was sent to Indiana University where it was going on for a while, but I had been in school so long this sort of paled on me. By a fairly intricate effort on his part, Bill Colby's father, whom I knew fairly well and was a regular Army officer, arranged to have me sent over to Europe. I was a PFC and assigned to First Army headquarters where he was the deputy chief of G-5, the civil affairs-military

government staff section. It was amusing at that time because I think you could be selected individually to come from the United States to a European Command only if you were a rank of major or above and I was a PFC. So what was done was they sent me on the way to Europe and, I guess, let the First Army know where I would be and, luckily, they found me. So that's how I got there and I was in the First Army Headquarters and it was quite interesting. I got to be a sergeant. Then I transferred, still as an enlisted man, to something called the branch office of the Judge Advocate General.

Mr. Neuchterlein: How long did it take you to be elevated from private to sergeant?

Mr. Temko: Oh, let me say, I went through infantry basic training and all that stuff, so I was probably, I think, a private, or maybe a corporal, but I think a private when I got to First Army headquarters. And then I got promoted in a couple of months.

Mr. Neuchterlein: And then you had men under your command?

Mr. Temko: Not really there because I was in a headquarters. One of the people in the unit I was in is now Senator Strom Thurman of South Carolina.

Mr. Neuchterlein: How old was he then?

Mr. Temko: Let's see. He is 90 now. That was 50 odd years ago.

Mr. Neuchterlein: He was middle aged.

Mr. Teinko: He was a major. Even then he was working on a political career. I had good work there. Let me say, that something in an Army headquarters is very much like

lawyers servicing corporations. They can talk a lot, but if someone has to put something down on paper, they don't have a hell of a lot of people that want to do it. I did all the stuff. I wrote up people for medals and I had a good time. And, as a result of that sort of thing, I got to France on, I guess, D plus 4 on Omaha Beach in Normandy. This was close enough to see the carnage, but you wouldn't get killed unless you were unlucky. After the First Army broke out from St. Lo, there was little German opposition. I was in Paris the day it was liberated. I remained in Paris for a month, then went on with the First Army. I was in Spa, Belgium, when the Ardennes breakthrough by the Germans occurred.

Mr. Neuchterlein: Were you involved in Ardennes?

Mr. Temko: Only in a small way, because I was not in an infantry unit. On one day we were living in fairly good shape in Spa. In fact, it was pretty much like the present day Spa. There was a casino and officers' clubs. And the German attack came and First Army headquarters retreated. The retreat was such a screwup. Broken-down trucks and traffic jams on the roads. We didn't have any good place to go so we went back to Spa. Next day, the place where we were living was now a prisoner of war clearing place for a battalion. In other words, it was a different war. Then, after the Ardennes straightened out, our unit went on to Aachen. But then I got a call, I don't know how that happened, someone must have mentioned me to the Judge Advocate General for the European theater. He was a West Pointer who had gone to Columbia Law School named General McNeil. A great man. And he had me requisitioned, so I went back from the First Army to Paris where I served as the law clerk for the Board of Review Number One for the European theater. During the war, if a death sentence or a life sentence was imposed in a court-martial, the case had to be reviewed by the Judge Advocate General who is in

Washington. But, with all the activity in Europe, they established what was called the branch office of the Judge Advocate General. So General McNeil, in effect, acted as the Judge Advocate General for anything in the European theater. And he had a number of very good, experienced lawyers in his unit – people who later ran for the U.S. Senate and were prominent at the bar. And I was a law clerk to them

Mr. Neuchterlein: So your docket was entirely cases of people who were convicted of various offenses?

Mr. Temko: Major offenses. Like life imprisonment, or sentenced to death. But every death penalty case, almost all of them were commuted, went to this board of review.

Mr. Neuchterlein: What sort of death penalty cases were there?

Mr. Temko: Well –

Mr. Neuchterlein: Desertion?

Mr. Temko: Some were desertion. There is a famous book that appeared, *The Execution of Private Slovak,* or something. This was the one –

Mr. Neuchterlein: I think they made a poor TV movie about that.

Mr. Teinko: – poor kid who was executed for desertion "to be made an example." But most of the cases would be murders, rapes, a lot of murders, a lot of desertions where they would say life, but usually they commute them and send them back. But –

Mr. Neuchterlein: So, were the people representing these defendants actually lawyers or were there some –

Mr. Temko: Yes, but now –

Mr. Neuchterlein: See, the reason I ask that is because my father was in Europe after the war and he is not a lawyer, never has been, and was assigned to represent an American serviceman who was accused of rape. And, in fact, did represent this man.

Mr. Temko: In the Army?

Mr. Neuchterlein: In the Navy.

Mr. Temko: Court-martials. Let me say, the people who represent the defense counsel are not required to be lawyers. I think more so maybe in the Navy than in the Army. Sometimes they are not. But, this, of course, where I was, was at the appellate level and these cases would come up on the record. Say a fellow committed a murder and was in the stockade. He would be court-martialed at his unit or division level. If convicted, a sentence would be imposed. It was then reviewed by the unit commander, and sent to the next level. The case would go from the division to the corps; then from the corps to the commanding general of the Army group. It would go to the judge advocate general for final review in this thing. So all of the cases we had were reviewed on a record just the way you would have an appellate record in a criminal case. Usually, if it was a serious case, the defense counsel would be lawyers. But they didn't have to be.

Mr. Neuchterlein: And you were a law clerk there for how long?

Mr. Temko: I was there for several months. I still couldn't be commissioned in the Judge Advocates Corps because I wasn't 28. I had a chance to get a commission in what they then called Military Government. And so I got a direct commission and went into Military

Government. The first assignment I had was in Frankfurt where I joined the unit that had the responsibility for not only Frankfurt, but the whole surrounding area. I was assigned as junior legal officer, but it turned out there was no senior legal officer. The I. G. Farben headquarters in Frankfurt was an officer's club and I was there one night and I ran into a Colonel Lovejoy. I don't know if you remember this, he was a Columbia University official, but also wrote the popular *Lovejoy's College Guide*. Are you too young for that?

Mr. Neuchterlein: I have seen those, yes

Mr. Teinko: The Lovejoy books were the definitive guide to colleges. Lovejoy had been a hero in the first war and I had known him at Columbia mainly because, when I was a senior in Columbia College, I received a prize called the Class of 1917 Room. The class of '17 had set up an award to give a deserving senior a very nice room in the dorm rent-free. So I had the Class of '17 Room and Lovejoy knew I had been an editor of the college daily, *The* ***Spectator.*** He asked what was I doing. I said I was the junior legal officer at the Military Government office and he said, well, you know, there was supposed to be a public relations officer in the Military Government office and the officer who had the job was being transferred to Berlin. Lovejoy asked if I would like to be the public relations officer. I said fine, so I transferred from being the junior legal officer to the PR officer and, since the guy who had had it before me was a lieutenant colonel, I inherited a Mercedes car and quite a few other perks. So I finished there as a public relations officer.

Mr. Neuchterlein: Was that your last position in the Army before -

Mr. Temko: I returned to the U.S. in January 1946.

Mr. Neuchterlein: And that was before Justice Stone died. Is that correct?

Mr. Temko: That's right.

Mr. Neuchterlein: Okay. And then –

Mr. Temko: He died in April of '46.

Mr. Neuchterlein: And then they arranged for you to clerk for Justice Rutledge?

Mr. Teinko: But not until the –

Mr. Neuchterlein: Oh, that's right, you said you went back to your firm.

Mr. Temko: Went back to the firm. So I clerked for Rutledge from '47 to '48.

Mr. Neuchterlein: Now, in those days, as I understand it, people usually did not have a clerkship before they worked in the Supreme Court. I guess you were special in that you, in fact, had had a clerkship. But, of course, these days you would normally clerk on the D.C. Circuit.

Mr. Teinko: Well, I hadn't had a real clerkship. I had only the Army thing. In those days many of the Supreme Court clerks came right from law school. You didn't have the sort of baseball farm system that you served on a lower court and a good judge recommended you to a Supreme Court Justice. Most of the fellows I knew when I clerked had not served on the court of appeals. One thing was a bit different in my year. A number of the clerks were older because they had been in the Army or the Navy, as I had been, and had lost 3, 4, 5 years. But the Harvard clerks, most of them I think came direct from Cambridge. A couple of them may have clerked in the Second Circuit.

Mr. Neuchterlein: I suppose after you came back from the war in Europe, the people who had come to the court straight from law school must have seemed pretty young.

Mr. Temko: Well, the fellows when I was there were mostly veterans. In other words, there weren't – there may have been a couple – but almost everyone in my bunch of clerks had been in the Army or Navy. Each of the Justices had a right to two clerks and I guess the Chief may have already gotten to three. My co-clerk was John Paul Stevens.

Mr. Neuchterlein: Oh! Uh-huh.

Mr. Temko: He is still a good friend.

Mr. Neuchterlein: So you met him at the Supreme Court?

Mr. Temko: At the Supreme Court.

Mr. Neuchterlein: What are your memories of now Justice Stevens?

Mr. Temko: Oh, just he was going to be something special. I think he is one of the smartest and nicest people I have ever known. I'm biased, but to me he is the best Justice on the present Court. I think the year after John and I left, I think Phil Tone was the next Rutledge clerk. Do you know him?

Mr. Neuchterlein: I have heard his name, but I don't know him

Mr. Temko: Well, Phil Tone was also on the Court of Appeals for the Seventh Circuit and when John was appointed to the Supreme Court, both Stevens and Tone were sponsored by Senator Percy. John had the fust call on it and so Tone didn't make the Supreme Court. There were about four or five finalists, two of whom were Stevens and Tone. And Tone

stayed on the Seventh Circuit for a while but then just resigned.

Mr. Neuchterlein: Is he –

Mr. Temko: I think the other Rutledge clerk with Tone was Lou Pollack who was on the Federal District Court in Pennsylvania.

Mr. Neuchterlein: And Pollack clerked for Rutledge too?

Mr. Temko: Yes.

Mr. Neuchterlein: And that was the year after you?

Mr. Temko: Yes.

Mr. Neuchterlein: I take it Stevens had been in the war, hadn't he?

Mr. Temko: Yes, he was in the Navy.

Mr. Neuchterlein: **A** book has come out recently describing what it is like to be on the Supreme Court now – what it is like to be a law clerk on the Supreme Court now?

Mr. Temko: It is a controversial book.

Mr. Neuchterlein: It was a very controversial book.

Mr. Temko: I haven't read it.

Mr. Neuchterlein: And I am happy to say that I have played no part in providing any background.

Mr. Teinko: When did you clerk?

Mr. Neuchterlein: 1991 and '92.

Mr. Temko: You were for?

Mr. Neuchterlein: Souter.

Mr. Temko: Souter. He was relatively new then, wasn't he?

Mr. Neuchterlein: It was his second year on the Court.

Mr. Temko: Well, who was the fellow who wrote the book?

Mr. Neuchterlein: His name is Ed Lazarus.

Mr. Temko: Yes. He is considered a pretty smart man.

Mr. Neuchterlein: He clerked for Justice Blackmun in '89.

Mr. Temko: I haven't read the book, but I gather he has gotten everyone unhappy.

Mr. Neuchterlein: Well, he did – part of the reason – I am not sure that the book is quite as inaccurate as people say. It may be quite accurate. I haven't read the whole thing. I think what upsets people is that it just divulges a lot of confidences. That is something that hadn't happened since *The* ***Bretheren*** was published. What was the job of a law clerk like in the '40s? These days it's widely understood that law clerks draft opinions, which may then be heavily edited or redrafted by the Justices. But did you in fact get involved in the drafting of opinions?

Mr. Temko: Oh, yes. I don't think that the job would have changed that much from the '40s to now except that now there are many more clerks and there is more division of work. Even in the '40s there were big differences depending on which Justice you were working for. The majority of clerks prepared draft opinions, which, depending on the Justice and the

importance of the case, some would find their way, without a lot of revision, to be the final opinion. Other drafts were pretty much scrapped and the Justice used little of the draft. But it differed among Justices. Some wrote most of their opinions. Now, I could be wrong on this, because he had excellent clerks, but I think Jackson penned a lot more of his own stuff and it was very good. The biggest job for almost every clerk, was to prepare a memo on the cert. petitions. We had two clerks so we split them in half.

Mr. Neuchterlein: How many cert petitions were there at that time?

Mr. Temko: I forgot, but there were plenty. I started in July and Justices had different interests in how the cert. petitions were handled. One Justice, I forgot which one, said the clerks memos should never be more than a page. Justice Rutledge, and also most of the other Justices, wanted you to come out with a pretty direct recommendation. Grant. Deny. Put on a dead list. This was hard work. In other words, you come in, you could have eleven to do in a week or something and different things. I started reviewing the petitions in July or August over the summer and I remember the first few petitions I worked on made me fear the task was impossible. I felt these petitions are the toughest things to decide, and I didn't really know where I wanted to come out on these things. But I made definite recommendations. It turned out that the two or three that were giving me the most trouble were about the hardest ones presented during the term. They gave a lot of trouble to the court because they were taken and they were very close, difficult decisions. You then found out that a lot of the petitions could be handled very easily.

Mr. Neuchterlein: Did the same criteria serve Rutledge then as are now applied?

Mr. Temko: Yes.

Mi-. Neuchterlein: So the existence of the circuit conflict I suppose would be important?

Mr. Temko: Well, circuit conflict was the same idea, although, as you know, there are relatively few square conflicts. In other words, a lot of people come up and claim conflicts, but the cases are often distinguishable. You still may want to take the case, but you still needed four votes. I remember that I had heard that at some point there was a sort of a noblesse oblige; if you had three hard votes to grant, someone would say, "Okay, I'll give you the fourth." In our time you needed four votes. Sometimes you had a case that some of the Justices thought was wrongly decided, but they didn'tvote to grant certiorari because they thought their views would lose. So they would just as soon leave the case in the circuit and not do anything. But you needed four votes to grant.

Mr. Neuchterlein: That's all the same as it is now.

Mr. Temko: Frankfurter never had his clerks prepare cert. memos. He reviewed the petitions himself and I hear that John Paul Stevens doesn't have cert. memos written. He reportedly reviews the petitions himself

Mr. Neuchterlein: Yeah, I think he has his law clerks winnow through them He is actually the only member of the Court who is not now in what is called the cert. pool.

Mr. Temko: Oh, you mean you –

Mr. Neuchterlein: Yeah. You see, even though the number of clerks has doubled

since you were there, it is still considered too onerous for the clerks in any one chamhers to read all of the petitions, so, it is actually eight chambers pool the 32 clerks among them to divide up into 32 parts the petitions that come in.

Mr. Temko: But don't some of your Justices still want you to review the petition for them? For example, a Rehnquist clerk writes the memo. I could see that a couple of Justices would not be completely happy with Rehnquist's views, and would want the matter reviewed independently.

Mr. Neuchterlein: Justice Souter never asked any of us to second guess the pool writer. In some chambers that does happen, but it is usually on a case specific basis. It is usually a case that the Justice perceives is close and then he asks his clerk to look at it.

Mr. Temko: Not only did most of the Justices, and I think it was everyone except Frankfurter, require the cert. memos, but some of the Justices, including Rutledge and Burton, wanted bench memos on the cases that were granted and were being heard on the merits. **A** bench memo was to contain a pretty good analysis of contentions, some idea whether the case's precedents were being properly presented. That entailed a lot of work. And I remember in some cases you would be finalizing the memo and rushing it to the Justice about five minutes before the curtains opened. **A** number of the Justices didn't require bench memos, but several did. Do they still have that now?

Mr. Neuchterlein: It depends on the chamhers again.

Mr. Temko: That's a lot of work.

Mr. Neuchterlein: It is a lot of work. Did they read the briefs before argument in

those days?

Mr. Temko: The Justices?

Mr. Neuchterlein: Yes.

Mr. Temko: Justices?

Mr. Neuchterlein: Some did and some didn't. I read somewhere that Justice Frankfurter once made fun of somebody for actually reading all the briefs before argument.

Mr. Temko: Frankfurter, you know, almost all the clerks, even those who were far more liberal, almost all liked Frankfurter. I adored him He was so nice – you know, he went out of his way to cultivate the clerks and made no bones about it that he proselytized you. He was always telling me how can your Justice really take a certain position, but he was great fun. Great fun and he was, of course, a great chum of our partner, Dean Acheson. I remember when I was made a partner here, I received a very sweet note from Frankfurter. He was a real politician.

Mr. Neuchterlein: Other than Rutledge and Frankfurter, did you get to know any of the other Justices on the Court?

Mr. Temko: Yes. The one I didn't get to know at all really, and in those days some said even his own clerks didn't get to know him, was Douglas. Even though he was a very liberal man and he was considered, you know, for high political office – President, Vice President – he was a pretty tough guy to get to know. Almost all the others were nice and approachable, but, at least for me, it was your own Justice and Frankfurter who was sort of walking the halls and looking for someone to discuss a case.

Mr. Neuchterlein: What are your memories of Rutledge? What sort of man was he?

Mr. Temko: He was a lovely man. Judge Ferren recently asked me about him and I couldn't give him nearly as much detail as I *think* he was looking for. Ferren was thinking of writing a book about Rutledge.

Mr. Neuchterlein: Yeah, I have heard of him

Mr. Teinko: John Ferren. He is back now on the D.C. Court of Appeals. Ferren took a leave of absence to serve as D.C. Corporation Counsel. He was thinking, and may still be, of writing a book on Rutledge and he had obviously talked to all kinds of people about Rutledge. Rutledge died of lung cancer when he was about 57 or 58. He smoked Old Golds from morning 'tilnight. And, as I say –

Mr. Neuchterlein: They were fdters?

Mr. Temko: What?

Mr. Neuchterlein: They were fdters?

Mr. Temko: No fdters. They were Old Golds. **A** very nice man. Quite able. I mean not the sort of scintillating intellect that Frankfurter had, but a very sound man. He taught at a number of law schools and then was on the Federal D.C. Circuit here. The story he told me was that he had not met President Roosevelt when he was nominated to the Supreme Court, but when he was brought in to meet Roosevelt, *the* President said to Rutledge, "Wiley, you have got a lot of geography." You see Rutledge had been dean or professor at about five different

midwestem law schools and, by appointing Rutledge, you were satisfying Iowa, Indiana, and so forth

Mr. Neuchterlein: You clerked on the Court, I guess, less than 10 years after the famous switch in time. Did you get the sense that you were – that a sort of intellectual revolution had just taken place on the Court?

Mr. Temko: No, the famous Court packing plan was already history. Rutledge, Murphy, Douglas and Black, I guess, were the liberal wing of the Court. I would be glad – I don't think for this project – I would be glad to have lunch with you another time and talk to you about the Supreme Court and Rutledge and so forth. He was a very nice man and it was just a tragedy that he died so early. I don't think he would have ever been though of as the leader of the Court, but he was certainly a very sound jurist and a very right-thinking man.

Mi. Neuchterlein: So you finished your clerkship in 1948 and then what did you – did you come straight to Covington or what?

Mr. Temko: No. At that point, my wife had been born in New York City and grew up there and I had been working in New York. I was, in effect, on a leave-of-absence from Root Ballantine. The firm expected me to return. Incidentally, the only Root Ballantine matters that came up during my clerkship were a couple of cert petitions. The other clerk handled these. I had assumed we were going to go back to New York right at the end of the term, probably in June. My wife said that Washington is a pleasant place to live and let's stay here. So I told Root Ballantine that we liked Washington and were going to stay here.

Mr. Neuchterlein: In June of 1948?

Mr. Temko: Yes. I had never really wanted to practice in a small firm. Of course, Washington firms were a lot smaller then, and the best and biggest firm in Washington was Covington & Burling. So I visited Covington and was interviewed by our late partner, Charlie Horsky, who asked where the devil had I been. Covington had hired seven people that year, and Horsky said the firm could not hire another associate that year. Horsky offered his help in getting me a job in any number of places. I told him I would have liked to work at Covington, but I thought I could take care of myself in finding a job elsewhere. The Economic Cooperation Administration, which ran the Marshall Plan, had just gotten underway. The ECA General Counsel was Alec Henderson, a Cravath partner on leave. I didn't know him, but a Columbia tax professor named Roswell McGill was also a Cravath partner. And I knew him fairly well. McGill called Henderson and I was hired. I had a wonderful time at ECA and was enjoying myself immensely. Then I was called by Covington to come over. I said how about letting me stay at ECA one more year and they gave me the same spiel that is so common, namely that there was an opening now but the fmn doesn't know what it will be doing in another year, and that I should come then. So I came. And I have been at Covington ever since.

Mr. Neuchterlein: Well, how old were you at the time?

Mr. Temko: When I came, I was young for all the stuff I had done. In 1948, I was 28.

Mr. Neuchterlein: Washington obviously has a lot of law firms now and it's a very interesting place to practice law. I guess maybe I should begin by asking how big a law firm Covington was in 1948. How many lawyers worked there then?

Mr. Temko: My guess would be about 70.

Mr. Neuchterlein: How many partners; about 35?

Mr. Temko: Less than that. No, at that point, I guess there were about 25 partners.

Mr. Neuchterlein: And it was the largest law firm in town at the time?

Mr. Temko: Yes.

Mr. Neuchterlein: What were some of the other prominent law firms?

Mr. Temko: Arnold Fortas and Porter was just starting. There were only about a dozen lawyers there. I believe I could have had a job there, but it was still a small firm. I guess Hogan and Hartson was well known. In retrospect, I doubt whether any other Washington firm measured up to Covington.

Mr. Neuchterlein: What were the criteria that people used when they made judgments like that?

Mr. Temko: What?

Mr. Neuchterlein: That Covington was the number one firm. What did it excel at?

Mr. Temko: Well, from my point of view, it had an outstanding reputation for having a very good practice and getting very, very good people.

Mr. Neuchterlein: What sort of practice was it? Was it the kind of regulatory/administrative evolved Washington-oriented practice then that I suppose it still is

now?

Mr. Teinko: Well, more things now. But it was centered, I guess, when the firm was founded by Harry Covington and Mr. Burling the elder, it was to concentrate on regulatory work with some emphasis on tax issues which were just rising to the fore. It was Washington regulatory practice, with some appellate practice and trial practice, not only local but around the U.S.

Mr. Neuchterlein: When was it founded?

Mr. Temko: 1919. And in the early days, it had very top people as the partners, but a lot of the clerks were young men from the local law schools. As I remember, Paul Shorb, a leading tax lawyer, attended a local law school. Some of the early partners started as law clerks. As I understand it, Dean Acheson was the leader in suggesting that the firm look to the leading law schools and, in particular, to law review editors and other outstanding students. I guess Tommy Austern was one of the first hires reflecting this policy. In the '40s as I recall, the firm had either three or four presidents of the *Harvard Law Review* join as young associates. Charlie Horsky, John Sapienza and Graham Claytor were *Harvard Law Review* presidents who came during this time. The firm was getting very, very good people. And, as I say, it seemed clear to me that Covington, when we decided to stay in Washington, was where I wanted to practice.

Mr. Neuchterlein: And you were attracted, I imagine, to the regulatory practice?

Mr. Temko: Oh, yes.

Mr. Neuchterlein: Forgive me for not knowing this, but when was the APA enacted?

Mr. Temko: I believe in the late '30s.

Mr. Neuchterlein: I thought it was in the late – I thought it was right after the war.

Mr. Temko: Was it after the war or no? I just don't remember. You were obviously seeing a blossoming of government agencies, the work was getting more important. And it was a regulatory practice. But there are other things around here. The firm did at that point all of the libel work for *The Washington Post;* and they represented some of local businesses. I think the major business practice from the start was national. One of Judge Covington's frst clients was DuPont, and so there was a national practice right from the start.

Mr. Neuchterlein: Well, tell me a little bit about your first couple of years here. What sort of work did you do?

Mr. Temko: Well, this was the biggest firm, but it wasn't the sort of situation that you have today, where Covington and several other firms are much larger and you have increased specialization. Now, for example, if you do broadcast work, you frequently do just that. When I came to Covington, you could practice in a number of areas. That was one of the things I enjoyed. I did a fair amount of antitrust work in those days because I did a lot of work for Austem and he had many antitrust clients.

Mr. Neuchterlein: Was that litigation?

Mr. Temko: I had litigated over the years. Let me interrupt myself here. The way Covington operated, if you worked on a matter that involved advice, or negotiation, but later evolved into litigation, you could try the case yourself. In other words, we didn't have a corps of barristers, or a litigation section. In the first few years, I had a few arguments in the courts of

appeals. I didn't try any large cases. I was involved in important proceedings involving the Department of Justice or the Federal Trade Commission that were settled in one way or another. The longest trial I was involved in in those years, and it must have been in the mid-'50s, was the Department of Justice antitrust case against the Swiss and American watch industries.

Mr. Neuchterlein: That was up in New York, wasn't it?

Mr. Teinko: That was up in New York and it was an extended trial. I have never, in all my years of practice, had a jury case. I was never primarily a litigator. I tried matters in the Federal District Courts, mainly for drug companies. But, as I say, still to this day, I haven't had a jury trial and I never spent the bulk of my time in trial matters. One of the things I enjoyed so much was the wide variety of areas I covered. I was involved in all kinds of matters and issues. **As** I said, I did a fair amount of antitrust work. I started fairly early to represent leading pharmaceutical companies and that grew to be a major part of my practice.

Mi. Neuchterlein: Who were some of the drug clients that you had?

Mi. Temko: Well, I myself worked for Lilly, Merck, Smith-Kline, Upjohn and several other m j o r pharmaceutical companies.

Mi. Neuchterlein: Did you help them with legislation, or did you work on court cases?

Mr. Temko: The big drug companies had a pretty easy time of doing what they wanted, until the time of the Kefauver hearings that led to the Drug Amendments of '62. That was the first legislation dealing with proof of safety and efficacy. The industry had been beaten up pretty badly in the hearings and in opposing the legislation. Our firm had done some drug

work – drug approval work involving the Food and Drug Administration – before then. Gerry Gesell, who was one of our top litigators, was hired by all the leading companies, through the Pharmaceutical Manufacturers Association, to challenge certain provisions of the 1962 Act. A few of our challenges went to the Supreme Court. Gerry argued all of the issues, but I did the major portion of the briefmg and got to know a number of lawyers and executives of these companies. That led to my continuous involvement with several of the companies.

Mr. Neuchterlein: And what year was that?

Mr. Temko: This must have been the mid-'60s.

Mr. Neuchterlein: And by that point you had been a partner for about 10 years?

Mr. Temko: I was made a partner in 1955. So I had been a partner about 10 years.

Mr. Neuchterlein: So, you sort of gradually developed a specialty.

Mr. Temko: Yes. It was, in effect, as much a subject matter specialty because they had antitrust cases, they had all kinds of problems, and I spend a major portion of my time on their issues and they have always been excellent clients. They're still good clients of the firm. As I mentioned, I started at Covington in '49 after I came from the Economic Cooperation Administration. I worked on a variety of matters and then the Steel Seizure litigation came along.

Mr. Neuchterlein: Well, I want to ask you about the Steel Seizure case.

Mr. Temko: That was a very interesting time, and an exciting case to be involved

in. Another important case was brought to the firm to seek Supreme Court review. That matter involved the Texas City disaster. Unfortunately, while we prevailed in the Steel Seizure case, we lost Texas City in a 4 to 3 vote. The Texas City decision has since been essentially overruled on the discretionary act exemption that protects the government. I guess, at the time, holding the government responsible for blowing up Texas City was too much for Chief Justice Vinson. Also, around the '50s, I became a paper pusher for Dean Acheson who had returned after serving as Secretary of State. I reviewed papers that came to him and these were a series of matters involving cert. petitions and other issues.

Mi. Neuchterlein: You say you were a paper pusher, you mean he assigned to you tasks like briefs –

Mr. Teinko: When things came in to Acheson, I was sort of a screener. I reviewed incoming requests for assistance and other papers. Before Acheson had gone off to be Secretary of State, this function was performed by Graham Claytor. But, Graham Claytor, by the time Dean Acheson came back to the firm, Graham was already an important lawyer in his own right and this was work that would be a little below his station.

Mr. Neuchterlein: But you managed Dean Acheson's clients?

Mr. Temko: Let me say, there was a man who made his own decisions, but I got to help on the cases that came to him. Beyond working with Acheson, I felt lucky in that my practice continued to be varied and exciting. I recall that I had just finished briefmg, I believe, the Texas City case, and I was home on a Saturday morning when Gerry Gesell called me from the *Washington Post* offices. Gerry told me to pack a bag and come down to the *Post*. So I

packed a bag and went to the *Post* offices. Everyone was there from Mr. Eugene Meyer on down; the room was filled with executives and lawyers. This was when the *Post* was buying *The Times Herald* from Colonel McCormack. Since there was a concern that the government might seek to enjoin the purchase on antitrust grounds, the plan was to immediately dissolve *The Times Herald* as soon as word came from Chicago, on an open telephone line, that Colonel McCormack has signed the contract. *The Times Herald* would be dissolved and its printing presses would be immediately shipped out of Washington. If the government brought any action, the presses would be hard to find. It was something that could form the basis for a class B movie. Colonel McCormack had agreed to sell *The Times Herald* to Meyer and *The Washington Post.* McCormack's niece, Daisy McCormack, was extremely conservative and did not want him to sell *The Times Herald* to *Washington Post* leftists. She was fighting to get her uncle to sell *The Times Herald* to her, but she had divorced her husband and Colonel McCormack was down on her. She was fighting to the last and I was sent out with a vice president of the *Post* company, the executive who headed the *Post's* broadcast interests, with the contract and a cashier's check for a million and a half dollars to –

Mr. Neuchterlein: You don't want to lose that.

Mr. Temko: I should have gone off with the check. I remember we went to Chicago overnight on the 20'' Century Limited. We were not supposed to talk to anyone on the train. In the morning, even as I presented the contract to Colonel McCormack to sign, his niece had Dean Manion, the right-wing dean of the Notre Dame Law School, trying to convince Colonel McCormack not to sell to the *Post.*

Mr. Neuchterlein: He is no relation to Daniel Manion is he?

Mr. Temko: I think it's his father. I am not sure. But Daniel Manion is on the Seventh Circuit, isn't he?

Mr. Neuchterlein: Yes.

Mr. Temko: But this was, as I say, sort of a movie script. The plan went through without a hitch. They started sending all *The Times Herald* presses out of town. Normally, I guess the rule of thumb in a newspaper acquisition is that the acquiring paper initially would keep about a third of the acquired paper's circulation. Since *The Times Herald* had all the great comics and a number of other features, the new merged *Post* started selling like mad. They had to reverse the decision on the printing presses and retain them because they needed them to print the increased circulation.

Mr. Neuchterlein: So, there were how many major papers at that time?

Mr. Temko: After *The Times Herald* disappeared, there was *The Star.*

Mr. Neuchterlein: Just *The Star* and the *Post?*

Mr. Temko: Yes.

Mr. Neuchterlein: And, before *The Times Herald* went, which was considered the paper that you most likely have read?

Mr. Temko: I would have read the *Post.*

Mr. Neuchterlein: The *Post?*

Mr. Teinko: Yes.

Mr. Neuchterlein: How would you characterize the difference between the *Post* and *Times Herald* in those days?

Mr. Temko: Well, *The Times Herald* was sort of a Hearst paper. It had great comics because it had the rights to all the King Feature comics. It was sort of jingoistic in its editorial policy. The *Post* was a liberal paper and better written. Of course, it was not the *New York Times*, but for that matter, it is still not the *New York Times*. *The Star* was a good paper, but *The Star*, as I recall, was always an afternoon paper.

Mr. Neuchterlein: Yes.

Mr. Temko: I think I read both of them the *Post* and *The Star*.

Mr. Neuchterlein: I can remember when –

Mr. Teinko: After *The Times Herald* acquisition, I spent more than six months working out *The Times Herald* contracts for the comics and the columnists. The antitrust laws had gotten to the point that, if you had the King Feature comics, which was the best collection of comics, you had to use them or make them available to other papers.

Mr. Neuchterlein: Which were they?

Mr. Temko: Oh, I didn't read many of them, but they had Barney Google, almost all of the traditional big comics. If you didn't run or use them yourself, you couldn't just suppress them You had to make them available to other papers. *The Star* and the *Post* didn't have any of the King Features comics. I think the *Post's* best strip was "Steve Canyon" and *The Star's* best one was Pogo. We had to figure out which of *The Times Herald* strips they wanted to use in the

Post and which ones would be made available to other papers. There was a similar task in dealing with the columnists. *The Times Herald* had a couple of very reactionary columnists and the *Post* had one of its own. There were other op-ed overlaps. We had to figure out whtch ones the *Post* wanted to retain and which to terminate. It was an interesting 6 months. Phil Graham, whom I came to know at this time, offered me a job, but I decided I wanted to stay at Covington.

Mr. Neuchterlein: So you had another opportunity to get back into journalism if you –

Mr. Temko: Yes.

Mr. Neuchterlein: Did you think about that seriously?

Mr. Temko: Well, I think he wanted me to do legal or executive work. He wasn't thinking of making me an editor of the paper. W e it was an interesting offer, I still wanted to practice at the firm. I've always had a varied practice. For many years, I guess, the bulk of my work was with the pharmaceutical companies. Then I got involved in tobacco. It started with a small association client that was brought to Tommy Austern, The Tobacco Institute. The association was just being formed. One requirement for counsel to the Institute was that the firm not be the regular counsel to any of the major cigarette companies. You could have done work for them, but you couldn't be the primary counsel. The work was mainly antitrust monitoring to ensure that they didn't get into any antitrust difficulties. It started as a very small client. Austern did it and Burke Marshall assisted.

Mr. Neuchterlein: Interesting –

Mr. Temko: And then Burke went down to be an Assistant Attorney General.

Mr. Neuchterleiu: Yes. He was a professor at Yale when I was a law student there.

Mr. Temko: Did you take any of –

Mr. Neuchterlein: I didn't take any of his courses, but he was very well regarded as a professor.

Mr. Temko: Very nice guy. Very smart. And so, when he left, I took the thing over. Austem was still the nominal poobah. I did some work for the Institute, and it was a minor client. It then mushroomed and mushroomed into a major client, until a few months ago when it had to be dissolved as **part** of the agreement between the states and the tobacco companies. A large number of our lawyers worked on Institute matters. We still do a lot of work for the tobacco companies.

ORAL HISTORY OF STANLEY L. TEMKO

Interview #2

Mr. Neuchterlein: This is John Neuchterlein and it is part two of my interview with Stanley Teinko. Stanley spent his career at Covington & Burling and I am going to finish up the interview that I began a couple of weeks ago. Stanley, we have talked a little bit informally about the Steel Seizure case and it strikes me as a case that is rich in anecdotes about how the lawyers prepared the case and how there was almost literally a race to courthouse. I was wondering whether you could expand some on your memories of that.

Mr. Temko: It was a tremendously interesting case in many ways, quite aside from its historic importance. From the time the case was filed until an actual final decision on the merits in the Supreme Court, spanned 2 or 3 months as I recall. This must be almost an all-time record for that type of case, maybe not for a stay of a death penalty, but to have a major piece of litigation go through three courts and an argument and a decision in the Supreme Court in so short a time was quite remarkable. It was a period of intensive activity and some of it was pretty funny. Our firm, Covington, represented U.S. Steel, along with Davis Polk. U.S. Steel was represented by John W. Davis and Ted Kendall of Davis Polk, our Covington partner, John Lord O'Brian, Governor Miller, the ex-governor of New York, Howard Westwood of our firm, a couple of in-house lawyers, and so forth. The way I can illustrate the depth of representation, our brief on the merits in the Supreme Court for U.S. Steel had, I think, seven or eight names on it. I think my partner Westwood was the bottom name. I had written most of the brief and my name was not on the brief. I am not complaining. One of the things about large firm law practice is in

your early years you write briefs and some seniors put their names on them Now a lot of people do the work and put my name to it. In the Steel Seizure case, all of the major steel companies were parties. Practically every towering figure at the U.S. bar was involved. Luther Day of Cleveland, Bruce Bromley of Cravath, Mr. O'Brian, and John W. Davis. The way it worked out, all of the companies had their say. Many of the lawyers participated in oral argument before the district court. Then, in the court of appeals on procedural matters, Westwood was allowed to argue for the group. To avoid having a foul-up in the Supreme Court, and I think Westwood was instrumental in suggesting this, it was agreed that Mr. Davis would argue for everyone. Since he was fairly old and not in the best physical shape, the only qualification on that was that, when he was arguing or just before he was supposed to argue, he had some physical problem that made it impossible to argue, then Bruce Bromley was going to take his place. All the others agreed to this. So it was agreed that Mr. Davis would make the Supreme Court argument and he, in fact, did so. I think a big surprise to students of the law, was that District Judge Pine went to the merits. We went in hoping to get an injunction against any change in the wages and so forth. If you followed conventional jurisprudence, the district court would never have gone to and decided the merits of the controversy. But Pine went right to it. I have always thought that – one reason he felt encouraged to hold the seizure illegal – he might have done it anyway because he was a pretty strong-willed and tough judge – was the way the government briefed the case. There had been the Sewell Avery case, involving the Sears executive, concerning the executive war powers. That case had gone to the court of appeals and the government briefs in the case contained all the arguments on the merits on executive power. The Department of Justice lawyers, in writing their brief for the district court in the Steel Seizure case, included the major part of the argument on

the merits from the Sewell Avery brief. In their position, I would have put in something on the merits, but the brief was far more than just saying the government was right and no injunction should be granted. They included pages upon pages of the argument from the Sears case that could lead the district court to get to the merits, which it did. So, from then on it went right up to the court of appeals and, I forgot, it was 5 to 4, I think, in the court of appeals, but all we wanted --

Mr. Neuchterlein: It was heard on the bench initially?

Mr. Temko: What?

Mr. Neuchterlein: It was heard on bench?

Mr. Temko: Yes. All we wanted to do was to be sure that while the case was going on that the labor agreement couldn't be changed until it was resolved by the Supreme Court. We were, in effect, the successful party in the court of appeals, and then, as you know, under the Supreme Court Rules, the successful party could petition for certiorari. John Pickering, who was working for Bethlehem, and I had been talking about this. Bromley, who was probably the head guy in Washington at the time, said if Pickering and I think it is a good idea, go prepare a cert. petition. Pickering and I went back to the Covington offices, which I think were still in the Union Trust Building at 15th and H, and stayed up all night working on the cert. petition. They had arranged for the barber shop at the Hotel Carlton to be open. Pickering and I went over and got ourselves a shave. Then Bromley, Pickering and I went up to the Supreme Court to file the petition. We did surprise the government by filing about an hour in advance of the government. John Pickering may have said to me once that we met someone from the Solicitor

General's office going up the Supreme Court stairs as we were coming down, but I don't think it was quite that close.

Mr. Neuchterlein: Well, we have a picture of you coming downstairs and I don't see anybody from –

Mr. Temko: Well, I'll tell you the story on that. Bromley was the senior among the seniors of all the people around at this point. He was a leading Cravath partner and he represented Time-Life. There was a lot of coverage of the case in the papers and magazines. Bromley must have said we were going to fde this petition and Time Life and the big newspapers said they wanted to cover it with a photographer. Bromley, who didn't have to do this, said to Pickering and me that since you two guys wrote this petition, come up with me. Sure enough there were pictures of us standing in front of the Supreme Court coming down the steps, and pictures like the one on the wall appeared in the *New York Herald Tribune.* I don't think there was a picture in *The New York Times.* There were pictures on the front page of papers all across the country because I got notes from fellows I hadn't seen in years. It was just the thoughtfulness of Bruce Bromley that included Pickering and me.

Mr. Neuchterlein: You got your picture in the press, but not your name on the brief.

Mr. Temko: That is right.

Mr. Neuchterlein: So, was the reason you tried to fde first that you thought it was a strategic advantage to be able to fde a reply brief on the merits and then –

Mr. Teinko: You know, I don't know whether we focused on that at that point, I

think the reason we fded was to keep up the momentum. We wanted this thing to go fast and we were doing well.

Mr. Neuchterlein: Did you know the government was going to be filing a cert petition that same day?

Mr. Temko: We assumed that the government would be filing a cert petition, but I don't remember at the point that we fded that we were thinking let's get in there first because it will give us the right to open and close. We may have, but the way that came to a head was that, under the rules then, by being the petitioner, we did have the right to open and close and the government, the Solicitor General, wrote and said this shouldn't be. He said the government should have that right. He was turned down. Later on, the Supreme Court rules were changed so that it wasn't who fded first, but who was the real petitioner.

Mr. Neuchterlein: Uh-huh.

Mr. Temko: But they wrote a letter –

Mr. Neuchterlein: To tell you the truth, I wasn't aware that the prevailing party could fde the cert. petition anyway.

Mr. Temko: Oh, you could do that

Mr. Neuchterlein: What do you say in a cert. petition when you are the prevailing party that we expect the other side will challenge this?

Mr. Temko: I think we just, I have it around here someplace, what you do is say this is a case that is clearly is likely to go to review, that it is clearly rightly decided, and that we

would like to have it expeditiously resolved. And it was going to the Supreme Court. The government wasn't going to give up on what had happened in the court of appeals. To the best of my recollection, and I haven't reviewed this stuff recently, Mr. Davis saved a little time for reply, but didn't use it because he was pretty happy with what had transpired. And, now the funny thing was –

Mr. Neuchterlein: Of course, you did get the power of filing a reply brief as a result of applying first.

Mr. Temko: Uh –

Mr. Neuchterlein: I assume you did, unless you elected not to file on –

Mr. Temko: I don't know whether we did or not. I am not sure we did. I mean, it went so fast.

Mr. Neuchterlein: That is funny. You know, I think the reply briefs are everything. It is just sort of a foregone conclusion that you will file one now. I think that they were much more optional in the past.

Mr. Temko: Well, the thing now is I guess they don't hold up the circulation of the papers.

Mr. Neuchterleiu: Right. They do hold up cert. petitions. Well, also for the reply brief now. Believe it or not, they give the petitioner extra time to reply to –

Mr. Temko: Well, you know more about this than I do.

Mr. Neuchterlein: That's a recent development.

Mr. Temko: But now, let me go on one other point. Westwood was in effect the chief of staff in the Steel Seizure case. There were all these companies involved, and he came up with the idea that Mr. Davis, who was sort of the king among kings of the appellate bar, should argue in the Supreme Court. In preparation for the Supreme Court argument, a few of us went to New York to work on papers and to be available to Mr. Davis for any questions he had. Mr. Davis worked by himself and had one of the younger Davis Polk lawyers run errands and pick up books for him. Every now and then he would lunch with us and ask a few questions. I forgot the name of the case – there is a famous Supreme Court case in which the Supreme Court upheld the right of the President to seize or to keep from having to sell Navy land on which oil had been discovered. There were obviously oil riches and the govemnent wanted to keep the land. And the government won that case.

Mr. Neuchterlein: Was that federal land?

Mr. Temko: Yes. I forgot the name of the case, but Mr. Davis had been Solicitor General at the time and he had argued the case upholding the govemment power. We had a lot of talent around the lunch table, and Mr. Davis was asking what should he say about the case. There were all kinds of ideas about how to handle the case and everyone recognized it was a problem for our side. Our position was that the executive branch had no inherent power and the Supreme Court had certainly upheld the executive branch's right to hold on to the Navy's land. There was a good deal of talk and Mr. Davis never really said whether a view expressed was a good idea or not. Sure enough, at the argument, Justice Frankfurter asked Mr. Davis about the case. Mr. Davis responding that he was sitting there as Solicitor General when the decision was announced and he received a note from the bench. I forgot which Justice sent the note, but it

asked how a Jeffersonian democrat could have been the party to this. Frankfurter thought that was very funny and Mr. Davis never received a follow-up question.

Mr. Neuchterlein: I wish I could get away with that.

Mr. Temko: Well, you have to –

Mr. Neuchterlein: Refusing to answer the hard questions.

Mr. Temko: Well, you have to know what you are doing and, of course, it helps to be John W. Davis.

Mr. Neuchterlein: I amjust curious, how had he accumulated the tremendous reputation that he had then?

Mr. Temko: Well, he had been Solicitor General, he was a very polished oral advocate; and he also had been the Democratic candidate for President. The Democratic Party Convention, I have forgotten which one it was, either 1920 or 1924, was deadlocked and had gone to 128 ballots. Davis was a compromise candidate.

Mr. Neuchterlein: He was the democratic candidate for President?

Mi. Temko: Yes. In 1920 or 1924.

Mr. Neuchterlein: Wow, I guess he was young then.

Mi. Temko: What?

Mr. Neuchterlein: He must have been pretty young then.

Mr. Temko: I guess so, but he has been dead for some time. He was considered

right at the pinnacle of the American bar.

Mr. Neuchterlein: The Steel Seizure case came a few years before *Brown* v. *Board* of Education?

Mr. Temko: Yes. Let me tell you one other thing about the Steel Seizure case, which is an aside, but I'll tell it to you anyhow because I mentioned it in a talk I recently made to our firm. We were coming back from the argument in the district court. Almost all of the ornaments of the American bar had argued. Charles Tuttle, who was then a senior partner at Breed Abbott and Morgan, had been Solicitor General, and was a very important New York lawyer. He was known as the Republican Al Smith. He argued for one of the companies. The Covington & Burling offices were still at 15'' and H and Mr. O'Brian, Bruce Bromley, Westwood, and I were walking to lunch. And Mr. O'Brian, who was a very proper, wonderful gentleman said, turning to Bromley, "You know Bruce, I have known Charlie Tuttle for more than 40 years and I really think that is the best argument I ever heard him make. He was really superb." Bromley, not to be outdone, said he also had known Charlie Tuttle for a long time and Bromley agreed with Mr. O'Brian that Tuttle's presentation was excellent. Then they turned to Westwood and they asked, "Howard, did you know Mr. Tuttle?' And Howard said, ''Yes, he was my father-in-law.'' Which was true and which ended the conversation. That, as you know, was more than 40 years ago, but every time I think of the incident I laugh at it because it just stopped the conversation dead. Westwood had married Tuttle's daughter, who had attended Columbia Law School during the same period as Westwood, and they had been divorced, but they had been married for several years. But, I just go on. What were you –

Mr. Neuchterlein: Well, I was going to make a little diversion of my own. John W. Davis argued *Brown v. Board of Education* a few years later and I suppose in retrospect it was a controversial assignment for him to have undertaken. Do you recall what the bar's reaction was?

Mr. Temko: Well, I think there was some controversy or views on it but he was essentially a man of the south.

Mr. Neuchterlein: Where was he from?

Mr. Temko: Oh, from Virginia, I think. And I think he went to Washington and Lee.

Mr. Neuchterlein: But he chose to live in New York?

Mr. Temko: Yes. Oh, he came up there and he was the head of Davis Polk but he was clearly a Virginia gentleman. Some people said that he should not have taken the assignment, but I would not have been surprised from his background that he was going to do it. Of course, in those days, even when you had some things where people would say, well, why would you do that, you still had the argument that I think had more currency than it may have today that you are only the lawyer, you're not necessarily agreeing with every case you are arguing.

Mr. Neuchterlein: Although, I mean some law firms, I guess, do sometimes, after pressures are imposed upon them, decide not to represent a particular client.

Mr. Temko: There is more of that now and I think there are a number of instances

where law firms for one reason or another won't represent particular clients. There were some people who, as I recall at the time, said they wish that John W. Davis hadn't taken the case because he was at the pinnacle at the bar. I wasn't surprised because, while he was at Davis Polk up in New York, he had always been from Virginia. I think he had gone to Washington and Lee; he may have been their most distinguished graduate. The closest I even got to himreally was when we met in preparation for the Steel Seizure case. I heard him argue a few times and he was an exceptionally good oral advocate. A real gentlemen. But then I think we were talking about going from there – are there pressures not to represent some people?

Mr. Neuchterlein: Right.

Mr. Temko: There are always some pressures and I think in some ways attitudes have evolved from the time of *Brown v. Board of Education.* There always have been some lawyers or law firms that just didn't want to represent certain kinds of people or issues. The traditional view – that you don't tar the lawyer with the views or sins of the client – enabled the lawyer, as long as he acted honorably, to represent almost any type of client on any issue. While that is still the view held by many, firms think a lot more closely before they take on certain types of causes. And I am not talking just about taking care of criminal defendants, but of politicized causes, for example, resisting Holocaust reparations. In law partnerships now, which are larger and more democratic, if there is something that a number of partners don't like, they say so, and firms in many instances won't accept a client in that event. One thing, it isn't just that there are higher standards of morality, I think one of the factors is, if you take on a cause that really is universally condemned in the law schools or condemned by a large group of law students, it can run into your recruitment very badly. People say well I just don't want to work for the firm that

represents "X". As I recall, Ralph Nader picketed Wilmer Cutler one time on some auto representation. They were out there walking back and forth and picketing Lloyd Cutler. There have been recent instances – the various types of cases involving slave labor, the confiscation of German-Jewish bank accounts, the stealing of German-Jewish *art.* There have been questions raised about firms that have represented some of the Swiss banks and some of the German and Swiss industrial combinations, even though they were regular clients of the firms.

Mr. Neuchterlein: Well, do you think it is a good development or a bad development that law firms are starting to discriminate among the clients and causes that they represent?

Mr. Temko: I guess in my own way, there are certain things that I would just as soon the firm I am in didn't represent. But they are few and far between. And I think there is something to the point that if you start just leaving everything up to, pretty much, do we like these people or not, then I think we can be in considerable trouble.

Mr. Neuchterlein: Why is that?

Mr. Temko: Because, while I have always been dubious of the concept of the slippery slope – if you say you are going to represent "X', but I don't want you to represent "Y" – you will always have some people who are going to be against or not happy with one or more of the type of clients that the firm has.

Mr. Neuchterlein: I guess this is a bigger problem with large law firms than it would be for small ones.

Mr. Temko: Oh, yes.

Mr. Neuchterlein: It is a lot easier for a five-lawyer practice to –

Mr. Temko: That's right. A five-lawyer practice in a way has a little different problem First of all, a lot of five-lawyer practices are people who don't want to be in a mega-finn and want to do a certain kind of work, so it wouldn't be much of a problem for them Although, one of the other aspects of that is some people say they don't want to practice at a large firm, because they don't want, in effect, to be a cog and not have any freedom But they don't recognize that if you are in a small finn of three, or five, or seven people, in many cases you will be dependent, your whole practice will be dependent, on two or three clients and you're a good deal more circumscribed and have less freedom than a partner in one of the larger firms. In other words –

Mr. Neuchterlein: Is that because you don't have the resources to take on large cases?

Mr. Temko: Not so much the resources, but that, if for some reason you have a falling out with a major client in a small firm, your practice can be half gone. Now, I don't want to go into detail of it, but at one point I was working with others for a major corporate client. The client wasn't taking our advice to the degree that we thought necessary. It was, of course, an important client, but I was a young lawyer then and the partner in charge said well this is ridiculous because we are doing the best we can in advising them and, if we can't get through to them, there is no reason to continue representation. So we just quit. Now a lot of firms wouldn't have done that.

Mr. Neuchterlein: Of course if the company is paying you for the advice that they

don't take, then what is the disadvantage of continuing to advise them?

Mr. Temko: Well, this was as much frustration and the partner in charge who was a very bright individual concluded that even though they paid us for the advice, he didn't want to spend his time trying to figure out answers to questions, and having them not followed. I have been on cases throughout my career where we are asked for advice by a large organization and we tell them here is something you can do, and absolutely no question can be raised about it, here are some things that can raise legal questions but are possible solutions, and here are some things that we certainly don't think you ought to do because you would have to be very lucky not to get into serious legal trouble. And, on some occasions, after you explain this all to the client, they go right ahead and do the thing you tell them not to. And the word I was given, when I sometimes expressed frustration at this when I was a younger lawyer, was we do the best we can. If they are foolish and don't follow our advice, that's their decision. But there was this one case I mentioned – it was just too frustrating to continue and the head of our group said let's knock this off and we did.

Mr. Neuchterlein: Do you think that a lawyer has, I mean, I have heard some people say that an important part of being a lawyer is a willingness to take on virtually any client For a lawyer to be essentially view point neutral when asked to take on representation. Do you think that is an important part of being a lawyer?

Mr. Temko: Well, this isn't that simple. I am talking about mainly as a lawyer in a big Washington firm, it could be in a big New York firm or other city that is in the business of representing large corporate clients. Many of such clients, even though they are doing things that

are clearly legal, are doing things that some people personally don't like. One thing, I represented drug companies for the principal portion of my career and a lot of people think that drug companies charge too much for their drugs. Now, I can see where some people would say that you ought not represent drug companies, or environmental polluters or some such thing. Usually I adhere to the view that you shouldn't inerge the lawyer with the client, and you ought to take the representation. I can see that inroads are being made on that to some degree. On the question should a lawyer in effect represent anyone, in other words that he is not the one who has committed a misdeed, I still feel strongly that this policy should apply in pro bono work or in any kind of representation of people who are under-served now and can't get adequate representation. I think the best traditions of the bar are served generally by representing anyone. I think this is being modified to some degree. There are some extreme situations – representing, for example, South African entities supporting apartheid or representation of banks involved in some of the current controversies dealing with Holocaust reparations. I think more and more people are questioning whether a firm wants to represent them or not.

Mr. Neuchterlein: You mentioned to me a few minutes ago that you were the chairman of the management committee for a tune?

Mr. Temko: Yes, our firm had a five-person management committee which, in effect, ran the firm. But we changed a little bit recently because we just in the last week acquired a New York firm and will probably put some of those people in some management positions. For most of the time when I was a share-partner, our governing body was a management committee of five partners. It was pretty much self-perpetuating with staggered terms and one person's term coming up every year. And the management committee itself would elect its

chairman. Now if, there was something –

Mr. Neuchterlein: How was the membership of the management committee determined?

Mr. Temko: By a vote of the partnership. It was set up in a way that one person came up for a vote each year and that would be someone nominated by the management committee As long as the management committee made a selection, it routinely would be approved.

Mr. Neuchterlein: It was self-perpetuating.

Mr. Temko: And in the old days, some of us stayed on for protracted periods.

Mr. Neuchterlein: How long were you on?

Mr. Temko: I was on, I think, 11 years.

Mr. Neuchterlein: When did you begin?

Mr. Teinko: I am trying to think.

Mr. Neuchterlein: Was it in the '80s?

Mr. Temko: You could no longer be on the management committee when you reach your 65th birthday. So, I am just trying to figure something. I must have been on sometime from the early '70s until the mid-'80s.

Mr. Neuchterlein: And you were the chairman for a while?

Mr. Temko: I was chairman for about 3 or 4 years.

Mr. Neuchterlein: So, what was it like for you professionally to be on the management committee after, I suppose, 20 years of being a lawyer in the firm? How did your perspective on the firm's practice change?

Mr. Temko: Not a lot. One thing that has changed, certainly through my time and a little afterwards, most of the people on the management committee still carried on a pretty heavy practice of their own. And we didn't spend that much time in the management coinmittee so that it was nice to be "one of the leaders of the finn," but it didn't interfere that much with your practice. I think as the firms get bigger, and more complicated, you have to spend more and more time on management committee matters.

Mr. Neuchterlein: Well, I suppose how much time you spend depends on a number of variables including saliently whether compensation is discretionary with the management committee.

Mr. Teinko: Well, many factors can affect the amount of time involved. I should say at the outset that there really aren't that many important day-to-day decisions in a law firm. That may sound peculiar, but it is a fact. There are: (a) the election to partnership; (b) allocation of shares or remuneration; and (c) which can be troublesome – the resolution of conflicts. We have an exhaustive examination and review of the lawyers coming up for partnership. There is a partnership advisory committee that interviews everyone and prepares extended analyses. It then goes to the management committee and then is voted on by the partners. Similarly with remuneration; happily, fighting over money has never been a big deal at Covington. I guess it started with Mr. Burling who took hardly any remuneration and we, over the years, had had very

few episodes with people saying they weren't paid enough. So that falls into line.

Mr. Neuchterlein: Well, many Washington firms had a lock-step policy for a long time and I think Wilmer still does.

Mr. Temko: Wilmer may have changed it

Mr. Neuchterlein: With some modifications, I think the –

Mr. Temko: Wilmer started that mainly because I think it followed the Cravath traditions. The original Wilmer partners came from Cravath and Cravath may still be in a lock-step system. Covington was in modified lock-step for a while. In other words, we don't inake invidious comparisons for lawyers just a few years into the partnership. I think going in lock-step is now far less common than it used to be. I think even a place like Wilmer, I suspect, has changed that a bit.

Mr. Neuchterlein: So it is largely merit based here?

Mr. Teinko: Yes, to some degree. It also goes on seniority to some degree, what you are doing in your practice, your work on firm matters and your pro bono work.

Mr. Neuchterlein: I am going to ask Mr. Teinko now general questions about his perception of how practicing law in Washington has changed since he was a young man and I guess maybe I can begin by asking you how you think the relations with clients have changed since the early days. You know, some lawyers claim that they are under much more pressure from clients than they used to be. That clients are much less loyal to the law firms; that they watch the bottom line much more than they used to. What's your reaction to that?

Mr. Temko: I don't think I would be much help on that but, let me see if I can answer it this way. First of all, I amnot nearly as active a practitioner now. I do some things, but there is no client at this point where I am responsible for talking to the chief executive officer. Every now and then I will go to a meeting and I find that the executives I dealt with are two or three generations back and the whole company is run by people who weren't even there when I was actively practicing. I think in many ways our practice is still the same. There will always be Covington lawyers who will know the company's top executives. Maybe there are more instances where the top dog is more removed from the legal problems than they would have been 15 or 20 years ago. Companies, like the government and other institutions are layered more. You can have a very heavy hitting senior vice president and general counsel who really may be, for all intents and purposes, the guy who is calling all the legal shots. Some years back there would be a general counsel, but frequently the chief executive officer would really be more involved himself. I really don't think our practice has changed that much in that respect. On this question about being more interested in the bottom line, there clearly is some of that. An interesting development is that a lot of companies use more than one or two law firms. Now there is the other extreme, they don't want to use 200 or 300 law firms, but they want to pick firms, and individual lawyers for assignments. If you go back 20 or 30 years ago, there would be frequent examples where one of the bigger law firms was, in effect, the general counsel to a major corporation. Examples were Inco and Sullivan Cromwell, Bethlehem Steel and Cravath. Davis Polk had, you know, a number of such encompassing representations. The Chadbourne firm was the counsel to American Tobacco. Today, even if you have a firm that has a very close and satisfactory relationship with a corporation, you will find that the company may go out and

retain other firms for different things. Even aside from hiring people with certain specialties, a company with major litigation in a certain court may decide it wants to get "X" even though he is not in its regular law firm. Companies now focus in more instances on who would be the best guy to represent it in a particular court or before a particular judge or jury.

Mr. Neuchterlein: I recall that when I was in private practice I wondered whether clients were really doing the right thing when they approached litigation that way because my view is that the best lawyers are intellectually so flexible that they can learn a subject area very quickly and represent the client as well if not better than someone who spends his whole career focused only on that subject area. What is your reaction to that?

Mr. Temko: Certainly in an appellate argument, you ought to be able to bring someone in who can master the case in a limited amount of time. I think it is harder to bring in a new firm or lawyer in a major trial that evolves from years of discovery. I would think that in many of these cases where they bring in another counsel, it is frequently more politics than law. The thought that "X" would do better down in Atlanta, or "Y" should be well received in the Second Circuit. If they bring new people in, it's frequently the fact that they think somehow it will give them a leg-up and I think in most cases they can do a good job. On the other hand, we have had cases where the other side brought in a big name in the Supreme Court and he wasn't very well prepared. But to go back to what we were talking about before, I think there is more of a pattern of firms having multiple representation.

Mr. Neuchterlein: So we were talking about the tendency of clients to pick lawyers for more specialized tasks.

Mr. Teinko: Well, there is the reverse of that in some cases. Major corporations which have all kinds of litigation throughout the country, particularly product liability, suddenly sit down and say we have 240 different law firms representing us. This makes no sense at all and we are going to sit down and take that list of 240 and get it down to about 15 firms, either geographically or by subject. That has been done by a number of corporations. I am not as close to it as I was, but we still pretty much represent people in the way we did, still pretty much charge on the basis of time. I mean we will make special arrangements or some such thing, but happily we've never overloaded cases. We never had enough people, some of the New York firms, if you start something, have 10 people writing memos right off. It runs right up. So we normally are pretty lean in the way we staff a case and I think usually we get paid for our time and its usually been satisfactory.

Mr. Neuchterlein: Do you find that your relationship with other law firms is now more competitive than it used to be. The word on the street is that a particular law firm would have a long tenn institutional client and that client would normally rely on that law firm to help them But that now law firms tend to compete more for the business of that client. Do you find that that's true?

Mr. Temko: Well, 1would say two things. One, there is no doubt that there are lawyers out there who would be glad to take any business from anyone. That is going on. So, sure we have people who are sort of competing against us and I think, particularly in the younger groups, and younger to me is people up to say 45 or 50, there is a more entrepreneurial spirit. Lawyers will see an article in a newspaper about a new case and ask whether we have contacts with the companies involved. **A** relatively new development is "beauty contests" where a

company has a major problem and it will have three or four law firms make pitches for the assignment. And we participate in some of those.

Mr. Neuchterlein: Now are you happy about that development?

Mr. Temko: I don't think it comes down to whether you are happy or unhappy because it's just a fact of life now. I would answer in this manner. That is the way life is now and I think all firms have to be more entrepreneurial than they were. In the early days, and I have been here in this firm 50 years, we always had rainmakers. You always have in any big law firm, there will be some people who just attract business for a variety of reasons. And we had rainmakers, but a large part of our business just came flowing to us: (a) because of the reputation of some individuals in the group; and (b) because Covington & Burling was the number one act in Washington. A lot of business just came. Now some work still comes in that manner. We still have clients that we had, gosh knows how long. There is no doubt, however, that a firm, in many instances, has to go out and look for business. If all the younger partners simply rely on some partners bringing assignments for them, a firm is going to go downhill. This is old-fashioned, but I do not like some recent developments. One, I don't like the idea of law firms just going out and merging, merging, and merging, picking up people all the time. That is, however, a trend that appears here to stay. I am not personally enamoured with the other side of that coin which are lawyers, some of whom are tremendously competent, who literally stay at a place for one year and then move again. This is no exaggeration. It isn't as though they stay at a firm for 10 years and then move. Now, a fellow can be in four firms in 5 years.

Mr. Neuchterlein: Just time for a little extra money.

Mi. Temko: Just a little extra money. They always have an euphemism involved saying, I'm changing because the firm wasn't as compatible as I anticipated or it turned out in my practice I ran into conflicts with some other things, but most of it is just to make more money. Most big firm lawyers certainly make enough money in whatever firm they are that they should be happy with their practice. I think there is now a view, I have heard it expressed sometimes, saying why should investment bankers in New York make more money than I do.

MI. Neuchterlein: Well, I think there really is not much you can do about that if you [not decipherable].

Mr. Temko: As I say, I was never happy with expanding by simply picking up firms all over and I didn't like the concept of people changing firms so often. I think I am a minority there and it's a vanishing type of thing. Once I came to Covington I assumed I would spend my professional career at Covington and most of my partners felt the same way. Just a few weeks ago we actually acquired a 60-lawyer New York firm They dissolved the New York firm and, as of October 1, just the past couple of weeks, the partners in the firm became partners in Covington and the associates in the firm became associates at Covington. And their firm, which I think was called Howard, Smith and Levin, went out of existence. But we always thought that in the next century we would need a presence in New York and the more we thought about it, there wasn't any easy way to just do it by either sending lawyers from Washington or getting laterals from other places. This small New York firm, which had a very good reputation, seemed to like us and we liked them, so there we are.

Mr. Neuchterlein: A lot of your comments point to a change in the style of legal

practice over the years and you mentioned a few minutes ago, the tendency of partners, perhaps less so in Covington than other places, but in general the tendency of partners to, the willingness, the increased willingness of partners to consider a move to other firms. What do you think has contributed to that change in attitude?

Mr. Temko: I would think, one, that it just, the situation that has developed so that these moves are more common and a lawyer who wants to move doesn't have to suddenly say, "Gee, I'm the only person who has ever gone and left the firm" But to me, it's principally an aspect of law becoming more of a business and less a profession.

Mr. Neuchterlein: Why is it more of a business now than it was?

Mr. Temko: Principally because they are more interested in money.

Mr. Neuchterlein: But is there a larger societal reason for that? Are there other changes in the economy that would make lawyers more like businessmen today than they used to be?

Mr. Temko: I think it has developed that way. Well, look at financial practice and mergers and acquisitions. If you're a lawyer in mergers and acquisitions you are working next to the investment bankers in New York. You see some of the things they do, how much money they make, how they jump ship and so forth all the time, and you sort of start doing it. I don't –

Mr. Neuchterlein: Well, why wasn't, why didn't that effect people back in the '50s and '60s?

Mr. Temko: I think just that law was more of a profession. But I realize that, when you say that, it makes you sound that you're saying they don't cobble shoes the way they used to. But, law practice has changed. Mauy people have said this and I think it is true, that law is much more of a business and less of what, and people used to laugh at this, but we were in a learned profession.

Mr. Neuchterlein: If you were 21 now, would you go to law school?

Mr. Teinko: I think that there would still be a good chance that I would because of the same reasons that I went to law school in the first place. I clearly was never going to go into medicine; the last thing I wanted to see was blood in a hospital. The things that appealed to me in those days would still appeal to me. One, I always had a thought of maybe going into journalism, or, if I had the aptitude, which I don't, I would have loved to have been an architect. I know you don't have to be Picasso to be an architect, but I didn't have the talent. Journalism, I might go for that, but I would probably go into law anyhow. It seems to me that, with a minority of exceptions of people who are on all the talk shows, journalists, by and large, are as smart as any group of people I know, but don't get any of the recognition that you do if you are a successful lawyer. Both financially and otherwise.

Mr. Neuchterlein: Well, what about the lucrative professions like investment banking or venture capitalism?

Mr. Temko: I guess I might go into that. In the days that I graduated from college aud law school, I was going in the Army in any event. But the concept of everyone desiring to be a Harvard MBA wasn't that big of a deal. There is the pull of being tied into the thrill of venture

capital and the opportunity to make a pot full of money, but I would say that by and large that being a lawyer to me would be just as or more satisfying. I have never regretted being a lawyer. The only decision, in retrospect, that I might have done differently, would have been to spend some more time in a government position. I had all kinds of chances to be a professor if I wanted to and I didn't want to. And I never sought to be a judge. The one thing, in retrospect, about the time the Kennedys came in, a lot of my contemporaries went into the government and I didn't. I had chances to go in then. I think if you go in at a decent level – I would have been about 40 years old, you can get to be an Assistant Attorney General or Assistant Secretary of Defense and stay in for a few years and then go back into practice. Then when you are 55 you can either have someone put your name in, or you put your name in yourself, to be a cabinet officer or some other senior appointee. In retrospect, I might have gone into the government in mid-career for a while. And then, I guess if you do, maybe you get the thought that you want to be a judge. I never pursued that course and I have always been, as I say, happy practicing law. It is sort of chauvinistic, but I have always thought Covington was a good place to practice law and I have always had an interesting practice and good people to practice with. I think the law has become much more of a business. It is even somewhat more of a business in Covington although we have managed to avoid most of this stuff, having people leave us and raiding other firms. But, some of the D.C. firms, it sounds almost ridiculous when you talk about it, have procedures set up to determine compensation where you have factors, how many hours you work, what you brought in, how many people you are keeping working and so on.

Mr. Neuchterlein: My wife worked at a major Washington law firm where every year there would be a meeting of the partners and people would basically humiliate themselves in

front of the group, pleading for more money, or expressing their outrage that they weren't sufficiently appreciated and every year they would go through the same motions. There are probably disadvantages in having a firm that is that democratic because I think that in that firm all the partners every year had to ratify the compensation decisions. And everybody knew what everybody else was making, and –

Mr. Temko: Well, here, you know, the other extremes, there have been a couple of New York firms where the only people who really knew the total compensation was either the chairman of the firm or one other person, and the other partners literally never knew anything. Now, that is one extreme. Here, we don't have everyone come in and sing for their supper, but we have, of course, the accountant's report at the end of the year and anyone can get a copy of that and see what is going on. But, I am happy to say that, over the years, we never really got into a mode where it was sort of dog-eat-dog. And I think that is pretty good. As I say, I'd also be happier if there weren't these acquisitions leading to global law firms with 1,200 or more lawyers, but I think that's going to go on. You can't do anything about it. But, the thing I enjoyed particularly, retracing steps a bit, I guess when I started here, there were probably about 70 lawyers. And, while I guess even then tax lawyers were sort of specialized, you could do almost anything you wanted. And, over the years, I participated in all different kinds of matters so it was very interesting. Now it is harder to do that now. So, I guess it is the same thing that you have in medicine where, while they want to go back to sort of a general practitioner or internist, if you are going to do hip replacements, you really have to focus on hip replacements. You can't also just spend your time with a kid who has a cold. Here, if you really want to be at the cutting edge of communications law, it is pretty hard to do everything else. But I did all kinds of things.

I had a lot of variety.

Mr. Neuchterlein: As it turns out, I am the person in my office who is supposed to be the expert in telecommunications.

Mr. Temko: Well, there you are.

Mr. Neuchterlein: But it is only ten percent of my portfolio. It is hard to do that. Well, this is, this interview is supposed to be in part about the D.C. Circuit, I suppose, so I am going to have –

Mr. Temko: That's right, we haven't done much on it.

Mr. Neuchterlein: We haven't talked much about the D.C. Circuit, but you were friends with a couple of D.C. Circuit judges, Judges Leventhal and McGowan.

Mr. Temko: Yes.

Mr. Neuchterlein: Both of them figure prominently in the history of the D.C. Circuit and I wanted to ask you a little bit about your friendship with those two.

Mr. Temko: The Supreme Court Justice I clerked for – Wiley Rutledge – had been on the D.C. Circuit.

Mr. Neuchterlein: How long was he on that court?

Mr. Temko: I think a couple of years. Just a couple of years. I don't know whether I mentioned the story to you, he had, when he was nominated to be Justice of the Supreme Court, and I could be a little off on this, I think he told me he had never met President Roosevelt before then. But Rutledge told me that, when he first met Roosevelt, Roosevelt said,

"Wiley, you sure have a lot of geography." Rutledge had been a dean or a professor at about four or five mid-western state law schools, Iowa, Indiana and so forth, so that from a political point of view his was an appointment you could make that was a lot of help politically. He enjoyed the work on the court of appeals and, of course, his work on the Supreme Court was cut short. I knew a couple of the others who had been on the court, but on the court of appeals the two judges whom I knew the best were Carl McGowan and Harold Leventhal. I knew them mainly around town and socially, although I think I had an argument before McGowan one time, happily it went my way. Both of them had gone to Columbia Law School and I got to know them that way, but then I just, around towu, I saw both of them a good deal socially and I followed their work a bit. I thought they were both outstanding judges. I was quite shocked when Harold died. He certainly wrote some excellent opinions.

Mr. Neuchterlein: I remember, he died playing tennis, didn'the?

Mr. Temko: He may have had an attack there. He played tennis. He was, I don't think he was 70 yet when he died. Carl was older than that, but I think he had cancer. And, as I say, I didn'treally know them as a barrister before the court who appeared a good deal. They were both quite intellectual.

Mr. Neuchterlein: Yeah, Leventhal is sometimes described as the father of administrative law.

Mr. Temko: Well, some other people might take issue with that. I guess people would say that Walter Gelhom could have been the father of administrative law. Even though he was never a judge. But, no, Leventhal wrote a lot of really important opinions on administrative

review.

Mr. Neuchterlein: Was [not decipherable]?

Mr. Temko: Leventhal wrote a whole series of important decisions. Carl, who might not have impressed someone offhand as being that intellectual, was also a serious student of the law. Every now and then I would be talking with Judge McGowan and he would like to discuss legal issues and what was going on.

Mr. Neuchterlein: Who appointed McGowan?

Mr. Temko: Gee, I don't know. The thing I remember most is that McGowan was very close to Adlai Stevenson. I think he was counsel to Stevenson when he was Governor of Illinois. I don't know who appointed Carl, but one of the funny things was he also –

Mr. Neuchterlein: Like Kennedy or Johnson?

Mr. Temko: Beg pardon?

Mr. Neuchterlein: I said it would be Kennedy or Johnson.

Mr. Temko: I guess. Carl was a pretty good friend of Dean Acheson and the fact was Dean Acheson had rather serious misgivings about Mr. Stevenson and Carl tried to broker the differences. Carl was a very nice guy. His wife is now married to Warner Gardner. You know Warner Gardner?

Mr. Neuchterlein: Is that the Gardner of Shea and Gardner?

Mr. Temko: Yes.

Mr. Neuchterlein: In fact, he came to give a talk to people in the S.G.'s office a

couple of weeks ago.

Mr. Temko: Well, he was in the S.G.'s office for some time.

Ivlr. Neuchterlein: Right. He showed us a picture of the group of people who were there during the New Deal era. Quite a few stars there.

Ivfr. Temko: Oh, yes.

Ivfr. Neuchterlein: And then one villain. I am blanking on his name. The person accused of espionage in the Nixon –

Mr. Temko: Hiss?

Ivfr. Neuchterlein: Yeah, Alger Hiss was there. He was at the S.G.'s office during that time.

Mr. Temko: I didn't know he was in the S.G.'s office. I knew he was in the State Department and so forth.

Mr. Neuchterlein: Notorious [not decipherable].

Mr. Temko: His father was a partner of ours, Donald Hiss.

Mr. Neuchterlein: Huh.

Mr. Temko: And Donald Hiss had been, he was one of Holmes's last clerks.

Mr. Neuchterlein: Uh-huh.

Mr. Temko: I never knew Alger Hiss at all; I knew Donnie pretty well.

Mr. Neuchterlein: It must have been pretty hard on –

MI. Teinko: Yes, but the firm stayed very, very, supportive and he kept practicing here. I think, well, there is a quote that Dean Acheson said he was not going to turn his back on Alger Hiss. But, no, sure it was hard on Donnie. The stuff that is coming out in the papers yesterday and today on the declassifying the grand jury transcript of Nixon's appearance. It seems quite clear that Nixon was instrumental in a clever way in getting the grand jury to indict – it was fascinating. I read all the books on the Hiss case at the time and –

MI. Neuchterlein: I think that, I mean with the release of some documents in the Soviet archives that, I think that it is becoming increasingly apparent that he really was a spy.

Mr. Temko: Yes. But, now I don't know many of the judges but, just as an onlooker, it seems to me that the D.C. Circuit is increasingly divided, more so than it was in some of the earlier incarnations. I should have mentioned Wald as well. I believe she has said that despite their differences, it is really a congenial court. It sure doesn't give you that impression. And some of the judges seem to be almost intemperative in the way they act.

Mr. Neuchterlein: Yeah, well that was the case when I clerked there, too. I clerked there in '90 and '91.

Mr. Temko: For whom was that?

Mr. Neuchterlein: Judge Williams. Stephen Williams.

Mr. Temko: Oh, now he is conservative.

Mr. Neuchterlein. He is a libertarian.

Mr. Temko: But he doesn't seem to go off the deep end personally as much as

some of them do like Silberman. I would never say some of the things that they say. There were, 20 or 30 years ago, conservatives or liberals, but the court didn't seem so polarized.

Mi. Neuchterlein: I think there is more partisan feeling generally in this city than there used to be.

Mi. Temko: Oh, right now I would agree with you on that completely. The one other thing, as I say, it is nice of you to interview me, but I amnot the person who can tell you the ins and outs of the D.C. Circuit, although, as I say, I knew McGowan and Leventhal well and I have known Wald for 30 some years, and know some of the others casually, and I think that in all my career, I probably had about two or three arguments in the circuit.

Mi. Neuchterlein: Uh-huh.

Mr. Temko: That's about all. Not that I had thousands elsewhere, but it is certainly an important court. On the practice of law, which we were talking about, and this is a refrain that you get from a lot of older lawyers, I do feel that the practice of law has become less professional, more of a business and, while it didn't have to keep the mores of 1900, I think it was a friendlier type of milieu for the practice of law 20 or 30 years ago.

Mr. Neuchterlein: So, if your grandchild were thinking of going to law school next year, I guess I really had a two-part question. One is would you encourage him to do so and the second part really is, if he becomes a lawyer, particularly in this city, what advice would you have for him?

Mr. Temko: Well, I may not have the right answer for you here. I have to start really with my own children. Both my wife and I never told our sons what they ought to do. The

people would say, obviously, with both mother and father lawyers, the children were encouraged, even told that they had to be lawyers. Nothing could be farther from the truth And I think two of our sons went to law school because they weren't quite sure what they wanted to do and they decided they would go to law school. If a kid came, if a grandson, I guess my oldest grandson is only about 14 or 15, but if he came to me and said that he was thinking of going to law school, I would certainly say, 'Well, you have got to make up your own mind, but I think it is a pretty good thing to do." That's what I would say.

Mr. Neuchterleiu: And, ok, let's say that –

Mr. Temko: If he then came to practice here, I'll tell you there again, you have a problem I never had a problem in the sense of where to practice in this sense. I never had any desire at all of practicing in a small firm. I wanted to practice in a big firm and just assumed I would; and I started off briefly before the war, at what was then Root Clark in New York and then down here I ended up at Covington because it was not a giant firm, but it was the biggest firm, and I think generally considered the best firm here. I suspect that if I had a grandson who was getting out of law school, there are a couple of things I would tell him to do. One, I think, if you can, it is good to clerk for a judge. It is a useful thing, not so much just for the prestige, but I think clerking gives you a wonderfully broad experience. You get a different type of learning, depending whether you clerk at the trial level, or at the court of appeals or the Supreme Court, but it's an opportunity at any of those levels to get a far broader look at the law than you would just going right into a firm or the government.

Mr. Neuchterlein: Uh-huh.

Mr. Teinko: From the Supreme Court clerkship, I think the broadest view I ever got of all aspects of the law was doing the cert. memos because you are going to get something of everything there, be it patents, or – there is no part of the law that you don't get to see. If you are clerking for a district judge and he is one of the judges that lets you sit in the court a bit, you can pick up an awful lot about trial stuff quicker than any place else. And, in a good court of appeals, you get a pretty decent cross-section of cases. I believe that you ought to try to be a clerk. I would still think that I would suggest going into a bigger law firm, although they are different kinds of things now. First, of all, one of the funny things, if you are talking to someone who wants to be in financial sort of things, you can go to Harvard Business School, but the investment bankers are just as hot to hire people out of law schools as they are to hire people from Harvard Business School.

Mr. Neuchterlein: Why is that?

Mr. Temko: Because lawyers are smart, they can write, and while they may not have had Harvard Business case studies, they are pretty knowledgeable people. I think one of the things that favors good young lawyers and why you can have lawyers get so much responsibility is more and more people can't write a literate sentence and usually a lawyer can put something down on paper quicker and better than a lot of these people who come out of college. So they just are a talented group.

Mr. Neuchterlein: I think that is true of Washington lawyers who practice in the prestigious Washington firms. I must say that I see a lot of illiterate briefs.

Mr. Temko: Oh, yes. But what I am saying is, you don't have to be the president

of the *Harvard Law Review,* but if you have been on the *Harvard Law Review* or have a decent academic record, you are probably able to do the work figuring out stuff for J. P. Morgan or Morgan Stanley just as well as business school graduates. But, then there is some other career. I think a number of very talented young lawyers want to go down to the district attorney's office pretty early and get 2 or 3 years where they are really trying cases. They clearly, even if they are in a firm that has a great deal of litigation, will get more exposure to actual litigation in the U.S. Attorney's Office than they will in a firm. And, we have it here, and in other firms, where people work in the D.A.'s office for a few years and then go into practice with a pretty good head-start in litigation. So there are all kinds of career openings. Another thing that is much broader, if you are a young person who wants to travel or likes to be in a foreign country, you always had a few firms that had small foreign offices. Now, a person says I want to practice law, but I would like to get to the Far East, or South America, or to London or Paris or Brussels for a while. There are any number of firms that say fine. We can put you in London or elsewhere. So, there are all kinds of career choices for young people. And I think it is still a pretty good profession. But maybe that is because I am getting older.

Mi. Neuchterlein: [laughter] I think that is probably an appropriate note on which to close.