# THE HONORABLE GERHARD A. GESELL

## U.S. District Court for the District of Columbia

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

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**The Historical Society of the District of Columbia Circuit**

**United States Courts**
**District of Columbia Circuit**

# The Honorable Gerhard A. Gesell

## U.S. District Court for the District of Columbia

**Interviews conducted by:**
**John G. Kester, Esquire**

December 27, 1991

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# NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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

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# PREFACE

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

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

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

The oral history interview of Judge Gerhard Gesell, conducted in December 1990, covers his career up to the time of his appointment and confirmation to the United States District Court for the District of Columbia.

Included as appendices to the oral history are several short memoranda written by Judge Gesell as background material for a history of the Courts of the District of Columbia Circuit. Many of these documents have been included in Judge Gesell's collection of papers, which have been donated to the Library of Congress.

Also attached as appendices are a copy of "My Jealous Mistress, 1932-1984," written by Judge Gesell in l984, a copy of the transcript of the presentation of the Edward J. Devitt Distinguished Service Award to Judge Gesell on May 16, 1990, and several additional documents from Judge Gesell's collection of papers.

Historical Society of the District of Columbia Circuit

Agreement

1. In consideration of the preservation of the Narrative Prepared by the late Judge Gerhard A. Gesell and tapes of the December 27, 1991 interview by the Historical Society of the District of Columbia Circuit, Washington, D.C. (hereinafter "the Society") on which the Narrative was based (hereinafter "the materials"), the undersigned, as both executor and a residuary beneficiary of the estate of the late Gerhard A. Gesell, does hereby grant and convey to the Society, its successors and assigns, the ownership of the materials except as otherwise provided herein. The undersigned grants and conveys to the Society all right, title, and interest in the materials and their content, including literary rights and copyrights.

2. These rights have not been previously conveyed, assigned, encumbered or impaired by the undersigned.

3. It is agreed that access to the materials shall be in accordance with the direction and control of the Society and subject to terms to be set by the Society. The Society is hereby authorized, subject to the above and to any exceptions contained herein, to duplicate, edit, publish, or permit the use of the materials in any manner that the Society considers appropriate, and any claim to royalties from such use is hereby waived.

4. The undersigned reserves for herself and her children, Patricia P. Gesell and Peter G. Gesell, the right to use or authorize the use of and access to the materials and their content as a resource for any book, pamphlet, article or other writing by any person designated by the undersigned or either of her said children.

Date: 31 May 1994

Marion P. Gesell
Marion P. Gesell

ACKNOWLEDGED before me this 31st day of May, 1994.

Mabel S. Angelos
Notary Public

My commission expires 12-14-94

ACCEPTED:

Date: 5/13/96

President
Historical Society of the
District of Columbia Circuit

## Schedule A

Tape recording(s) and transcript resulting from 1 (number)
interviews of Gerhard A. Gesell (interviewee) on the
following dates: December 27, 1991

Historical Society of the District of Columbia Circuit

Agreement

1. In consideration of the recording and preservation of the oral history memoir, prepared by Gerhard Gesell and me, by the Historical Society of the District of Columbia Circuit, Washington, D.C., its employees and agents (hereinafter "the Society") I, John G. Koster do hereby grant and convey to the Society, its successors and assigns, the ownership of the tape recordings and transcripts of interviews as described in Schedule A hereto. I also grant and convey to the Society all right, title, and interest I might have in such tapes, transcripts and their content, including literary rights and copyrights. All copies of the tapes and transcripts are subject to the same restrictions.

2. I have not previously conveyed, assigned, encumbered or impaired my rights and interest in the tapes, transcripts and their content referred to above.

3. It is agreed that access to the aforementioned tape recordings and transcripts shall be in accordance with the direction and control of the Society and subject to terms to be set by the Society. I authorize the Society, subject to the above and to any exceptions contained herein, to duplicate, edit, publish, or permit the use of said tape recordings and transcripts in any manner that the Society considers appropriate, and I waive my claim to any royalties from such use.

Date: May 20, 1994

DISTRICT OF COLUMBIA ) ss.:

ACKNOWLEDGED before me this 20th day of May, 1994:

Notary Public

ACCEPTED:

Date: March 23, 1995

President
Historical Society of the
District of Columbia Circuit

# Gerhard A. Gesell

Judge Gesell was appointed U.S. District Judge for the District of Columbia in December 1967. He graduated from Yale Law School in 1935. He was employed by the Securities and Exchange Commission from 1935-1941 in various legal capacities, including Special Counsel for the Temporary National Economic Committee of the Congress and Technical Advisor to the Chairman. In 1941 he left the Commission to become a partner at Covington & Burling, where he remained until his appointment to the Court. While at the law firm, he also served as Chief Assistant Counsel for the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack (1945-1947), and Chairman of the President's Commission on Equal Opportunity in the Armed Forces (1962-1964). Judge Gesell died on February 19, 1993.

# JOHN G. KESTER

John G. Kester was born in Oshkosh, Wisconsin on June 18, 1938. He was educated in the public schools of that city and received the B.A. degree in 1959 from the University of Wisconsin, where he was elected to Phi Beta Kappa. The following year he studied in France at the Universite d'Aix-Marseille as a Fulbright Scholar. In 1963 he was graduated magna cum laude from the Harvard Law School, where he was President of the Harvard Law Review.

From 1963 to 1965 Mr. Kester served as Law Clerk to the late Associate Justice Hugo L. Black of the Supreme Court of the United States. In 1965 he entered active military service in the U.S. Army Judge Advocate General's Corps and served as Assistant to the General Counsel of the Army until 1968. In 1968 he also was Visiting Lecturer in Law at Duke University Law School. From 1968 to 1969 he taught constitutional law as Assistant Professor of Law at the University of Michigan.

Returning to government service in 1969, he was appointed Deputy Assistant Secretary of the Army for Manpower and Reserve Affairs, and remained in that office until joining the Washington, D.C. law firm of Williams, Connolly & Califano in 1972.

In January, 1977 Mr. Kester was appointed by Secretary of Defense Harold Brown to be The Special Assistant to the Secretary and the Deputy Secretary of Defense. In 1979 he again became a member of the firm of Williams & Connolly. In 1981, Mr. Kester was appointed by President Jimmy Carter to the Board of Visitors of the U.S. Air Force Academy. He was also appointed by the Secretary of the Navy to the U.S. Naval Academy Academic Advisory Board and by the Secretary of Defense to the Defense Science Board Committee to Review the Environmental Impact of Basing the MX Missile. He was a Senior Adviser to the U.S. Senate Democratic Conference Strategy Group on National Security Policy.

In 1985 Mr. Kester was appointed by President Ronald Reagan to the President's Chemical Warfare Review Commission. In 1986 he was appointed to the Advisory Committee of the Nancy Reagan Drug Abuse Fund. He also served on the Philadelphia Regional Selection Panel of the White House Fellows program.

Mr. Kester from 1982 to 1988 was a member of the Legal Ethics Committee of the District of Columbia Bar. He is a member of the bars of the District of Columbia, the Supreme Court of the United States, the U.S. Court of International Trade, the U.S. Court of Military Appeals, and many other federal courts. He is also a member of the Council on Foreign Relations, the Federalist Society, the Acquisitions Committee of the Supreme Court Historical Society, the American Society of International Law,

and the American Bar Association sections on litigation and administrative law. He is a Director of the Historical Society of the District of Columbia Circuit, and a Fellow of the American Bar Foundation.

His writings on legal topics include "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice" (Harvard Law Review, June, 1968); "Constitutional Restrictions on Political Parties" (Virginia Law Review, May, 1974); "12 Great Moments of Washington Law" (Washingtonian, September, 1981); "An Un-Supreme Court" (New York Times, Sept. 30, 1982); "The Law Clerk Explosion" (Litigation, Spring, 1983); "Are Lawyers Becoming Public Enemy Number One?" (Washingtonian, February, 1984); "Faculty Participation in the Student-Edited Law Review" (Journal of Legal Education, March, 1986); "State Governors and the Federal National Guard" (Harvard Journal of Law and Public Policy, Winter, 1988); "Some Myths of United States Extradition Law" (Georgetown Law Journal, April, 1988); "Bush's Court" (Washingtonian, March, 1990); "No Holds Barred" (Washingtonian, April 1991); and "Nowhere To Hide" (Washingtonian, January 1993).

Mr. Kester's writings on military subjects include "The Future of the Joint Chiefs of Staff" (AEI Foreign Policy & Defense Review, February, 1980); "Do We Need the Service Secretary?" (Washington Quarterly, Winter, 1981); "Designing a U.S. Defense General Staff" (Strategic Review, Summer, 1981); "Revamp the Joint Chiefs of Staff" (Wall Street Journal, May 8, 1982); "Politics and Promotions" (Parameters, December 1982); "Strengthening Defense Without Breaking the Budget" (with Walter Slocombe) in Center for National Policy, Budget and Policy Choices 1983; "America's Strongest Military Officer" (New York Times, Nov. 19, 1983); "Thoughtless JCS Change Is Worse Than None" (Armed Forces Journal International, November, 1984); "The Role of the Joint Chiefs of Staff" in Kaufman et al., eds., U.S. National Security (1985); "The Office of the Secretary of Defense With a Strengthened Joint Staff System" in Blechman and Lynn, eds., Toward a More Effective Defense (1985); "The Reasons To Draft" in Bowman et al., eds., The All-Volunteer Force After a Decade (1986); and "The Chemical Warfare Review Commission -- Two Years Later" in Center for Strategic and International Studies, Chemical Warfare Policy (1987).

Mr. Kester has been awarded the Department of the Army Decoration for Distinguished Civilian Service, and the Department of Defense Medal for Distinguished Public Service. He has three sons and resides in Alexandria, Virginia.

## Forward

Commencing in 1991 the Historical Society of the District of Columbia Circuit has interviewed various judges and lawyers on tape in what is known as an Oral History Project. In December 1991, John G. Kester, a partner of Williams & Connolly, spent a full day with me covering events up until my nomination to the Court. An able lawyer, he proved also to be an excellent prompter and got me going.

This narrative was then prepared, aided by a transcript of the tape. Anyone who reads a taped transcript of any length is surprised and often shocked to learn the awkward way what originally appeared to be coherent and well stated turns out to be. The spoken word loses many inflections and pauses and the continuous stream of words, as transcribed, somehow becomes unusually clumsy as the transcriber attempts to figure out where sentences begin and end. Moreover, I found the transcript necessarily contained some inaccurate recollections, exaggerations and could be made more useful if repetitions were eliminated and some further recall added.

What follows is the result.

G.A.G.

August 1992

## Yale College

My mother and father were each Phi Beta Kappa college graduates, and my indifference to grades and often poor marks must have been puzzling. After Phillips Andover, Yale seemed dull. Few courses were interesting and none helped me decide what I should do to make a living. I read almost constantly -- anything I could get my hands on -- and wanted to write.

I signed up the first year at Yale with a professor named Benny Nagel. He had what was called a daily theme course. You were to be taught how to write. At the first session of the class, everybody was asked to write a theme. At the next session of the class, as I came in, he said, "Well, Mr. Gesell, please come up here at the end of class." I went up. He said, "Get out of this course. I can't teach you anything." So that was the end of my formal training.

Yale was reaching out to students all over the country from public high schools. I had had wonderful training in English at Andover under Claude Moore Fuess and felt further along than many of my classmates.

Later I competed for the Yale Daily News and led the competition in writing skills but was a total flop because I got the fewest advertisements. Finally, along with a good friend, Johnny Moore, I earned money as a stringer for the New York Times covering sports. Our biggest moment was the Yale-Georgia football game when we sat in the press box at the Yale Bowl and ran a play-by-play account over direct open wire to Atlanta.

My major was, of course, English with emphasis on American literature. In fact, I came to the point where it seemed a good idea perhaps to become an English teacher. Professor Stanley Williams, a specialist in American literature, an excellent teacher who became a friend, guided me in this direction as I concentrated on his field. He made books come alive by relating

them to the political and social conditions of their time. The more research-oriented English courses, picking Shelley, Keats, *et al.* apart, left me cold. They seemed to concern matters that probably had never occurred to these esteemed poets.

In spite of setbacks, I felt I could write fairly well and this plus my experience with Professor Williams kept my interest in English teaching alive. A final event ended this fantasy. I tried out for the Henry Fellowship, which was a very desirable fellowship that would have given me, I think it was two years, in one of the British universities -- Cambridge or Oxford. I wrote a learned piece on the influence of Coleridge upon Poe, and reached the conclusion that Coleridge did not influence Poe, but that Coleridge and Poe both read the same books. I lost out to a classmate named Norman Pierson, who became a very distinguished professor of English at Yale. He has been a hell of a lot better one that I would have been. At the time I thought he had the unfair advantage because someone had given him a stack of unpublished letters of Longfellow. So he had it made. But, in any event, I'm awfully glad in retrospect I didn't win and equally pleased in retrospect that he did. He has been a real figure at Yale and won the fellowship fair and square.

Job prospects in 1932, when I was to graduate, were few, particularly for the son of a college professor like me who had no business contacts. My grandfather, Jefferson Chandler, had been a distinguished Washington lawyer but I never knew him. I knew no one who was a lawyer and actually had only the vaguest idea of what a lawyer did. Many of my friends from Andover and Yale were going to law school for want of anything better to do, and I tagged along. It seemed a profession that offered a variety of opportunities and taught one how to use your mind. Ability to write would help.

I squandered many intellectual opportunities at Yale. There seemed to be no important challenges. It was too easy to get passing marks in routine classes, hang around my fraternity, meet some girls and embrace the endless leisure. I had never been made to stretch my mind. During the summers I tutored one of John Foster Dulles' sons, taught kids to sail and was paid handsomely for sharing the pleasures of Oyster Bay, Long Island, where there was still a debutante party once or twice a week and all the lavish living of pre-Depression days. That many fathers of girls I met were rich lawyers didn't escape my notice. Looking back, I am amazed I was not more concerned about the future, but I wasn't. When I chose law school it put off the evil day. I still didn't know what I really wanted to do. Anyway, the world was coming apart and the University was a good place to hide a little longer.

**Yale Law School**

Between college and law school I spent another summer walking in Europe, most of the time in Germany, joining up with friends from time to time along the way. We went up the Rhine in the mail boat, constantly stopping at small towns to deliver mail and test the local wine, followed by two weeks or so in Munich to combine the opera and the beer halls. Finally, a walk back through the Black Forest, sleeping in youth hostels.

Hitler was just coming into power and won his first seat in the Reichstag that year. There were perhaps twenty-six political parties in Germany. His was the only party that wasn't collecting money on the street corners. Many businessmen were supporting him. He was contending that the Communists were going to take over the dye factories and destroy the industrial economy of Germany. Everywhere I walked there were kids carrying broomsticks as guns, marching and saying “Sieg Heil” or “Heil Hitler.” It seemed ominous.

I saw Hitler several times at the opera or making a speech and once at a beer hall where his gang congregated. He had a strident voice that made my hair curl. Goebbels and Goering were with him at the beer hall when a young man ran in saying the Communists had attacked him. His white shirt was smeared with red. Everyone ran out to throw stones at the intruders. I read the New York Times. They made fun of Hitler, like they later made fun of Dewey, a little man on a wedding cake, who wouldn't amount to anything. And they said he was just a flash in the pan, forget him, he wasn't going to go anywhere. I wrote a letter to the Times saying something to the effect that, "You better send someone over here who knows what they are doing. This guy is a dangerous fellow." And I recounted one or two of the experiences I had where Hitler impressed everyone as he spoke dramatically in his strident voice. Of course the New York Times never published the letter. I always thought they made a reporting mistake. I was so worked up; that is one of the few times I have ever written a letter like that. I came back worried about him and what a demagogue could do to turn people onto their heads. I thought he was bad news, and my concern sharpened my reading.

That summer, of course, I was thinking more seriously about law school and tried to figure out what the profession was all about. I took along two books to carry in my knapsack: The Nature of the Judicial Process and The Growth of the Law, both by Cardozo. I carried these two books with me while walking in Germany, and elsewhere. They are on my library shelves now, full of underlines and marginal notes of things that hit me as important. I still read them from time to time. They are particularly helpful to me in my present job and have influenced my understanding of what the law can do, what the law is, and the ways a social system created by laws can adjust to the times and the needs of people in a changing world. Those two books gave

me a good slant and guided my interests during law school, perhaps more than any faculty member.

The physical transition from college to law school was simple. I was assigned a room in the law school dormitory just two blocks from where I had lived during my senior year. About half the class of 100 were classmates from Yale, many of whom I knew. Some were among my best friends. Many of the group, like myself, were staying in school because there were no jobs and the Depression was apparent everywhere. If there had not been an admission preference given Yale college graduates at that time, I probably would not have been admitted. Because I had some kind of faculty scholarship and earned money in the summers, I was able to live in the dormitory rather than at home.

Law school put me on fire. I had an intellectual experience at law school, which I had never had at Yale College -- probably my own fault. I wasn't stimulated by college the way I was almost immediately at the law school. I grew up mentally at law school.

The law school faculty, at least many of the professors, were developing a more realistic concept of how the law should develop and were pointing out how it had often been misused to benefit special interests in the past. These men were involved in events of current interest and were teaching by examples taken from practical affairs. The case method took the place of treatises, and decisions were analyzed with a skeptical attitude to reveal, it was suggested, results that the judge because of his background or leanings achieved by playing available precedents to reach predetermined results. The outrage that trickled down from conservative legal quarters simply whetted the faculty's appetite for more. There was plenty to argue about and especially exciting to find oneself revising premises you had accepted with complete satisfaction during

college. Contact with faculty was informal and easy. The atmosphere was exhilarating.

This was a time when banks were failing. Wall Street was in as much of a mess as it is now. I had several classes with William O. Douglas, who had a series of seminars under such titles as Public Control of Business. He would recount his investigations of protective committees and reorganizations that benefitted insiders, leaving investors dry. He was spending considerable time in Wall Street investigating and taking testimony concerning corporate reorganizations and methods of refinancing. We learned about what are now called golden parachutes and things of that kind.

Douglas dealt with the nature of corporations, corporate responsibility, and corporate rights of minority shareholders. He knew a great deal about these matters, not only because he was head of a committee appointed to investigate such things as scandals emerged, but because of his early work as a lawyer in Wall Street with the Cravath firm.

Myer McDougall was another stimulating professor. I learned a lot from him, too. I really don't remember what he taught so much as the way he taught. He would stand you up and put you through a very rigorous questioning about why you believed certain things. He made you think. I became one of his prize butts for some reason. He had several in the class. I was one of them. He had me on my feet time and again defending positions. I didn't like it at the time, but I learned a lot from him.

Harry Shulman was teaching torts and labor law. I remember him as another professor, like Douglas, who really got me excited.

And, of course, there was Thurman Arnold, a brilliant teacher and a great character. I remember these professors particularly.

Arnold had courses called Procedure I, II and III -- we called them Thurman Arnold I, II and III. He covered much more than procedure, often very practical matters. He was a fascinating man. At that time he was writing those two famous books of his, The Symbols of Government and The Folklore of Capitalism. Arnold had been a trial lawyer. He had been a mayor of a town. And when he began to talk about procedural matters, he was talking about actual use of procedural rules to defend or to take advantage. And he made you think.

I learned a valuable lesson in his first class the first year. He came in and drew a jackass on the blackboard. It had three legs. He then went down row after row getting different students to say what was wrong with the picture -- only three legs; two dimensional; eyes disproportionately large; ears bad -- you know, all the different things students could think of. Then he ended the class by saying, “Well, that shows how many different ways you can look at a subject.”

And I still do that today as I did practicing law. I look at a problem. I say, ”Well, what is this jackass?” (Namely, the case I've got.) “Is it really a tort case, or contract case, or what is it?” I used to find it very helpful in dealing with clients when I was practicing law. What is the man's problem? What name do you give it? How do you fit it into something so you can get some relief for him? It seems like a simple thing, and it is, but I still carry it in the back of my head today.

All the courses with these professors touched matters of then current concern, as opposed to, let's say, a course that was given by a fellow named Underhill Moore that dealt with bills and notes. Or a course by an old-fashioned, very fine gentleman named Vance, who taught evidence. You could learn evidence from hornbook, and he didn't have any experience that gave life to the

rules. It was just a drill course. I was watching evidence being applied down at the local courthouse. But he was a Germanic, a kind of courtly gentleman who drilled us in the hearsay rule and things of that kind. Practice and theory were far apart. So those courses seemed pedestrian courses or far-out kinds of courses. Underhill Moore was far-out on new theories of bills and notes. And I didn't think I would ever see a bill or note in my life anyhow.

Or take another course that I took with Fred Rodell on taxation. I think taxes are boring, except when you have to pay them. And I never intended to be a tax lawyer. He was an interesting guy, and full of fire. But he taught taxes. There wasn't anything that I particularly wanted to do less than understand enough to get through with the course.

During the second year I wanted to get out of law school into the real world. I stopped going to some classes, if I could. There was a city agency called the New Haven Legal Aid Bureau. Yale Law School students could participate. However, it was not organized in any way as clinical programs are these days. I went down to help and eventually became by far the most active student until I was spending around at least 30 to 40 hours a week working with the clients of the organization, on top of my law student work. There was no academic credit for this, but there was much that needed doing. The clients were people who had been thrown out of their homes, or weren't getting paid, or had their money attached under an archaic Connecticut statute, etc. The Bureau had about 1800 clients. I gave each client I met a number because I couldn't pronounce their names. Most of them were Italians. I even worked full-time, without pay, helping with the case load for two summers. It was my law office, in effect, while I was at law school. At the end of my second year I said, "I've got to get out of law school and do something useful."

I was very touched by what I saw at the Legal Aid Bureau and what was happening to ordinary people down on their luck. I was able to help a lot of families. One of my first cases, to show you the desperateness of the people then, was when an Italian family came in and said the grandmother had died. They wanted to know what member of the family should get the gold out of her teeth. I had to sit with the whole family and negotiate what would happen to the gold, and how it would be divided when the grandmother was buried.

I remember a lady who was owed money by a bartender who had an illegal bar next to the railroad station where all the conductors drank. He wouldn't pay her until I finally forced a deal out of him where I would go down there every Friday and collect her back pay for her a bit at a time. She would come to meet me at the office and I would give her the money. That went on for, I guess, four months or so, until I got all the money she had coming to her. There were many similar experiences that affected me deeply. I started doing this toward the end of the first year, and into the second and some in the third. Young people today don't realize how desperate things were. In New Haven the poor stormed the mayor's office and broke down the door of the mayor's office because they wanted food. Homeless men needing some kind of protection from the cold would drink Aqua Velva shaving lotion, on the Yale Green, and it would just absolutely make them stiff as a board. The police would lift them up and put them under protective warmth somewhere. It was a bad time. And I found myself touched by it and working with it and relating what I was learning at law school to what I might be able to do to help when I left school.

I wrote an article in the Connecticut Law Journal attacking an atrocious statute that allowed a creditor to attach everything the debtor owned so the debtor couldn't even use

something for food. Then I peddled it around up in Hartford to various people who took it up and somebody thought I was right, and a bill went through changing the law. I have forgotten all the details, but the law was changed and my article was printed in the official proceedings and all that kind of thing, so, of course, I claimed credit for it.

I would go to court often. I never stood up. There was one lawyer who had been designated by the mayor for the Legal Aid Bureau. He was the real head of the Bureau. He took serious rape and other kinds of cases like that to court. I'd go to court with him when I could. And sometimes I would drop into court and just sit and watch what was happening. But I didn't do any court work. There were criminal as well as civil matters. I learned a little about what not to do, which is the real trick of being a good trial lawyer. So it was at the end of my second year, I said to myself, “I've got to get out of here and do something useful.”

I came down to Washington and the New Deal, and I went to see James Landis, who at the time was chairman of the SEC. I told him I wanted to drop out of law school, go to night school to get my degree and go immediately to work. I had an introduction to him from an uncle of mine named Matthews. I had never met Landis. But he said, “Don't do that. Don't do that. Come back. I want to take you to lunch.” When I went to lunch with him he said, in effect, “It would be the worst mistake. I'll tell you, though, if you'll go back and finish law school, you come back, and you've got a job at the SEC.” That's the most I got out of him. He convinced me it was a jackass idea, and I guess it was. So I went back and finished up at Yale.

Law School was a pleasant place for me, partly because of Corby Court. This was the only fraternity in which about 20% of each class became members. If you were fortunate enough to be chosen -- and it was Yale-dominated, so I was chosen, because I knew a lot of people there

-- you really had a wonderful time. We ate all our meals at Corby Court, many of the faculty members came to play bridge there in the evening or to pick up fellows to go to the movies. This made life at Yale Law School very pleasant. I had a lot of friends there, friends I've still kept to today, those who are still alive, that is.

When I left Yale Law School I had very spotty marks. I got what you now would call honors in the subjects that interested me. In the subjects that didn't interest me, I got quite conventional marks. But I got through. And I immediately took the Connecticut bars and passed them. This was a two-day affair. It was a lot of pressure because the law school put no emphasis on passing bar exams.

Yale Law School has remained one of my lasting loves. I went back there to teach seminars -- still do from time to time. I recently was there as the Anderson Fellow and spent a week with the faculty and students. Fascinating week. I was, first of all, on the Executive Committee and then I was chairman of the Executive Committee for several years. After that I became the Law School representative on the Yale University Council that met with President Brewster on the planning of the future of the Law School and other departments. I represented the Law School there for five years.

My portrait hangs in the Law School. The school has become my strongest allegiance of all the different institutions that I've had something to do with, directly or indirectly through my wife or kids. I think it is an extraordinary place. I remained extremely active in the Law School, far beyond simply carrying out formal positions, up until the time I went on the Court.

I've raised money for the Law School and obtained material for the Library. I co-chaired a Special Gift Capital Funds Campaign and served on special committees. When we organized

the Yale Law School Association of Washington, D.C., I think I was the second president of that outfit.

I've learned a lot from the Law School long after I left it. For instance, during the Anderson Fellowship I lived on the campus for a week. I taught in five different class sessions. I met at dinners and lunches with individual faculty members, talking about their plans and their ideas and what could be done or should be done to improve the Law School. I've been a counselor to some of the deans who became close personal friends and talked to me about aspects of the Law School.

I had something to do with making sure that the Law School wasn't bled too much because of its prosperity by diverting funds to units in the University that weren't doing too well financially. I helped to establish clinical programs and participated in them. I've been involved in almost every way you can imagine. Almost all of my law clerks have come from Yale, with just a few exceptions.

It is difficult to put into words my debt to Yale Law School. I grew up while at the school. It taught me to think. My contacts there following graduation have widened my experience, kept me in contact with coming generations and filled me with ideas. It is a jewel in the midst of Yale that has supported public service and high professional standards. My whole life came into focus because of what the school taught and represents. If I've done anything useful since I left, I give the school the credit.

**Securities and Exchange Commission**

When I started law school I was still wondering whether I really wanted to be a lawyer. As I have enunciated, I had come to realize that a lawyer could help people, and I was more

conscious of how many people needed help. Signs of the Depression were all around us in New Haven, and I was curious about what a beginning lawyer or politician could do about it in real life.

I knew I had a vague promise from Landis that I was sure he had probably forgotten. My first thought was that I wanted eventually to be a senator from Connecticut. I thought I had better practice in Connecticut. Hartford seemed the best place to start, so I went to Hartford. It was not an easy time to get a job. It's difficult to realize that many in my law school class never practiced law. They became policemen. They became investigators for insurance companies. The only law jobs were jobs where your dad was a good client of the firm, or if your dad was a practicing lawyer, you could get yourself a job with him. But there were few jobs advertised.

I went up to a firm, Robinson & Cole or something like that, and I talked to a senior partner and he hired me. I was surprised and excited. I thought I was about to get married, although the same lady actually kept me waiting a year, and with a job I could go ahead. As I got up to leave I said, “By the way, what's the pay?” He was a very nice man but looked at me and said, “We don't pay anything.”

Since my father was a college professor, there wasn't a lot of money running around. In my egotistical way I said, “Well, supposing someone does an outstanding job the first year, what could he expect the second year?” Well, he looked out the window a long time and then said, “We have one person that we are paying $50.00 a month in his second year.” And I said, “Well, I think you'd better give this job to a more deserving person.” I walked out and went on down to the SEC.

So that's the reason I came down to Washington for what I planned to be only an

experience of a few months. Of course, I had a great interest in the New Deal, a desire to see at first hand how the country would address the social problems caused by the Depression, but I still had in mind going back to Connecticut.

I fell in love with Washington, and there was a lot of work to keep me very, very busy. The thought of going back to Connecticut disappeared from my mind, although I'm still a member of the Connecticut Bar in good standing. I've been a member for more than fifty-five years now. I never appeared in any of the state courts there but have appeared in the Federal District Court.

My first job as a lawyer was with the General Counsel's Office of the SEC. In those days you had to be a member of the Bar to be hired by the government as a lawyer, no matter at what level. Mine was the lowest level. I was paid $2,000 a year. I started out in the Fall of 1935 and stayed with the Commission until the end of l940. It was a rich experience, varied and almost always I found myself in roles of ever-increasing responsibility, pushing me to the limit. The Commission was a very congenial place to work. The staff was young and eager. Unlike long-established government agencies, there was not an entrenched bureaucracy suspicious of the New Dealers and against change, which they viewed as standing in the way. Long hours, informality and a minimum of supervision were the order of the day. If you didn't stumble too often, there was no end of opportunity.

When I went to work in the General Counsel's Office of the SEC, I was the only Yale man there, surrounded by Harvard graduates and thus immediately suspect. There were a bunch of brilliant Harvard graduates in charge. Johnny Burns was General Counsel. The SEC was without doubt considered the best legal shop in the government at that time. The office was

writing statutes and dealing with businesses. It was a very active, interesting place. But I was a maverick because I came from Yale.

My first job was to draft opinion letters. In those days lawyers for financial institutions would write asking for interpretation of a rule or statute as it applied to their particular fact situation. We would write the kind of letter that said, "Assuming these facts are true and complete, this is what it means --." For a short time I wrote draft opinion letters that would then be looked at by the more experienced lawyers there, and obviously edited. It was a good start. I remember I finally came to the moment where I thought I should dictate. I had never dictated to a secretary in my life. I wrote out what I was going to dictate and propped it up on a book in front of me and called for a secretary to come up from the "pool." This young lady came up with her note pad, and I started to read slowly to her as though I were dictating it to her. And she said, "OHHHHHH." Her eyes rolled up and she fainted dead away. It turned out that she had never taken dictation before! That was sort of the way I got started.

Soon I wanted to get out of writing opinions and was assigned to the enforcement area. This involved straight prosecuting work, development of facts for presentation to grand juries, unraveling stock frauds, and filing civil cases in court, in addition to helping in criminal trials and representing the Commission before the agency itself.

When I started out I was teamed up with two experienced enforcers -- Jack Flynn and Big Tim Callahan of Yale football fame. Detroit was considered the center of security swindlers; and we went out to clean it up, aided by Postal Inspectors. There were several "bucket shops" going at full blast, full of men selling securities by telephone, securities they didn't have, on an installment basis and rigging the market to attract buyers and then dropping market support to

wipe the customers out. We conducted raids, got injunctions and initiated criminal prosecutions.

Early on, when this cleanup effort was just starting, I found a note under my door from Flynn relating to a particular case, saying, "My mother is ill. I've gone to New York. File a complaint tomorrow in Federal Court." Callahan was elsewhere. I was on my own, but I had never drafted or filed a complaint in my life. I had met one of the U.S. District Court judges. I wrote out a complaint and saw the judge in chambers, explaining my inexperience. He agreed to look it over. This saved my life for the moment because, with a twinkle in his eyes he simply said, "It looks O.K. to me but don't you think it would be a good idea to say what ruling you want?" Talk about learning by doing!

As Detroit straightened out I was assigned to what proved to be a major criminal case. We indicted 21 men for a scheme that involved selling Stutz stock by telephone over a ten-state area. Customers signed up to buy various securities with 50% down on assurances the stock would go up. After a large number were on the hook, the telephone calls began to tout Stutz, then selling around $3 a share. By matched sales the price was made gradually to go up. When it reached about $12 a share, customers were switched to Stutz and then "the plug was pulled" and the stock fell back to $3, wiping out everyone who had put 50% down. Several times the entire capital of Stutz had been "sold." It was a $10 million swindle. I put the investigation together, wrote the report and got Justice Department approval. Indictments were returned at Gainesville, Georgia; and Peg and I went down to live for a couple of months in Atlanta, when the case was tried. Neil Andrews, a fine trial lawyer, tried the case. My job was to line up the witnesses, "horse shed" them and turn them over to Andrews each day. The Judge was E. Marvin Underwood, and former Governor Slayton was for the defense. We convicted the main

defendants, after a long trial of what became known as *United States v. Kopold Quinn*. It was a big win for the Commission because this type of fraud could only have been uncovered by federal authorities. The states had been bamboozled by false documentary material indicating the stock sold was being held elsewhere.

Roosevelt was running for reelection in 1936, and the Republicans were claiming that overregulation of security markets by the SEC was stifling business. This angered me. In my spare time after the trial I wrote a small 160-page book entitled Protecting Your Dollars, documenting what the Commission was doing and how people were being swindled and needed protection. Over 50,000 copies were sent out, and it brought me some attention. I was paid nothing, used no government facilities and paid for the typing. It sold for fifty cents and was part of a General Welfare Series printed by the Home Library Foundation.

Then I had a stroke of great luck. I was assigned to lead the entire investigation of Richard Whitney. This turned out to be the major financial scandal of the era and brought about Whitney's downfall, along with a total reorganization of the New York Stock Exchange. It has been written up in several books, and the entire transcript of the hearings I conducted in New York and Washington is printed and accompanies the Commission's final report. My name was in the news every day as what proved to be a front-page story, and I gained recognition, working under great pressure.

Whitney was a real scoundrel. He had been the leading opponent of the SEC, trying to prevent federal legislation from being enacted by saying it wasn't necessary, that the Exchange could monitor its own business. He did all the business of J.P. Morgan & Co. He got overextended by investing in securities in a company known as Florida Humus, which had some

grandiose idea about making a lot of money out of decayed material that would be scraped up in Florida. He couldn't meet his commitments, so he first stole all of his wife's securities from her account, then he stole from other customers. He stole from the Stock Exchange Gratuity Fund, which was the pension fund for the employees of the Stock Exchange. He was treasurer of the New York Yacht Club, so he then stole the funds of the New York Yacht Club. And then he went around and borrowed or tried to borrow from members of the Exchange who were not on the inside, some of whom were quite taken with the fact that Morgan's broker had come to them for a little money. He'd touch them for $100,000 at a time.

One thing I learned was what a great lawyer can do. I never forgot it during my later practice. One day at the Links Club, which is a small bridge and social club in New York, Whitney was there; and a partner of J.P. Morgan was there, named Bartow. Bartow was playing bridge. He was not a man who had become a Morgan partner because of wealth and family, but out of sheer ability, and was highly respected. I don't mean that others didn't have the ability, but he made it the hard way.

Richard Whitney came up to him at the Links Club and said, “When you're dummy, I'd like to talk to you at the bar for a minute.” So when Bartow was dummy, he went over and said, “What's on your mind, Dick?” or words to that effect. And Whitney said, “I need a lot of money.” And Bartow said, “What is the trouble? Are you temporarily embarrassed?” But Whitney said, “It's worse than that.” Bartow immediately said, “Come with me.”

They got into a cab and went down to John W. Davis's office at Davis, Polk. Whitney spilled the beans for the first time to John W. Davis, who was counsel for Morgan. They got in a car and they went out to Great Neck, Long Island, where old man Morgan lived. I had the old

man on the stand later; he was a keen gentleman. After describing what Richard Whitney had said, Davis said, “If you loan a penny to this man, it will be the end of the House of Morgan.” Morgan accepted this advice, Whitney went under when they rang the Stock Exchange bell on him the next day, and he was thrown out of the Exchange. That was very wise advice from an experienced corporate lawyer. He earned much more than his fee, as it turned out.

When the investigation started, it developed that Richard Whitney's brother, George, had been helping him to the tune of around $2 million with his own money. But nobody knew about this. And the business advisory counsel, and all of the other officials of the Exchange who were supposed to check people's accounts, either hadn't caught it or winked at rumors. From the SEC's point of view, this was classic proof of the need of federal regulation of the Exchange; and Douglas, who was Chairman, made the most of it.

I was the chief counsel for the SEC in all the Whitney hearings, both public and private. Some were held in Washington and some in New York. Morgan did not want to come to Washington for health reasons. He was in frail health and I questioned him in New York and I had one or two of the other witnesses in New York. But most of the hearings were down in Washington. Davis, Polk and all kinds of law firms were running around representing these people who were in trouble. It was a fascinating account of skullduggery.

The SEC's New York office gave financial men, who did the auditing and traced the stolen securities. I had a couple of other people who were investigators. The hearings were all before an SEC trial examiner (now called a trial judge) named Sam Clark, brother of Judge Charles E. Clark, former Dean of the Yale Law School.

In the middle of the investigation Whitney pled guilty to a state charge arranged by his

lawyers with Tom Dewey behind our backs, took a five-year plea bargain and went to Sing Sing, where he played first base on their prison baseball team. I had a few days to complete his testimony, until midnight on a particular day. At midnight they were to take him to jail. I was trying to catch up and get everything I needed to know from him out of him, a big session, right up to midnight.

I finally came to the final question, asking, "Now, Mr. Whitney, when was the first time you realized you were insolvent?" He always dressed perfectly with a stiff collar and his Porcellian pin -- a beautifully tailored man. He looked at me with contempt and said: "I am not insolvent." I was flabbergasted. I burst out, "What do you mean?" He said, "I can still borrow money from my friends." I said, "Take him away."

Many prominent persons on Wall Street testified: Whitney's brother, George, J. P. Morgan, Lamont, and many others, including officers of the New York Stock Exchange. Dean Acheson of Covington & Burling represented the Exchange and I came to know him fairly well, riding back and forth to New York in the club car of the Congressional, a crack train in those days.

Finally, it came to an end. The report was out and legislation in the works. Bill Douglas and the SEC were riding high and I was doing odds and ends, expecting a new assignment.

I got a call from Douglas's office. "Come to the Chairman's office immediately. Come in the back way." So I went upstairs and went into the Chairman's office. Douglas said, "You've just agreed to be special counsel to the Temporary National Economic Committee." I said, "What the hell is that, Bill?" He said, "Just shut up and sit down." I sat down. He said, "Show Mr. Corcoran in."

Tom Corcoran, well known for his handling of political chores for FDR, was outside and he had with him a fellow named Bill Youngman, who later became Corcoran's partner, and was an experienced insurance lawyer. He had brought Youngman over to introduce him to Bill and to ask Bill to make him special counsel to the insurance investigation of the Temporary National Economic Committee, which had been delegated to the SEC by Congress. So I'm sitting there, and in comes Corcoran and Youngman. Corcoran said, "Hi, Gerry." And Youngman, who I knew slightly, said "Hello." Then Bill said, "Tom, before we get started on your business, you'll be delighted to know that Gerry here has just agreed to be SEC special counsel to the Temporary National Economic Committee."

That job took about two years of my life. It was a big job. I got a pay raise with it. I had a staff of thirty-five people. It was also my first real administrative job. I learned how to run an office and widened my trial experience.

The Temporary National Economic Committee (TNEC) was a joint congressional committee created to study the growing economic power of business. Its chairman was Senator Joseph Mahoney of Wyoming. Various industries were assigned to different agencies for investigation, and the heads of these agencies were also committee members. The SEC was assigned insurance, and we concentrated on life insurance. Metropolitan Life had some $5 billion of assets, and its size attracted criticism. There was no federal regulation of insurance. This was the first national inquiry into life insurance affairs since the investigation by Charles Evans Hughes in 1905.

The job had two facets. I was primarily responsible for guiding the investigation, conducting hearings before the committee in the big Senate Caucus Room and helping with the

reports. Ernest Howe was the financial man who developed searching questionnaires and striking bits of useful information from the extensive reports filed by life insurance companies with the state regulatory agencies. We got out two reports, TNEC Volumes #2 and #28. Number 28 developed aspects of economic power of insurance companies through their holdings, interlocking relationships with major concerns whose securities they owned that were represented on their boards of directors, etc. It traced how those relationships were used.

Volume #2 was a study of families and their life insurance, which is, I believe, still an amazing social document. It reflected our analysis of nickel-and-dime burial insurance as sold by Metropolitan Life and Prudential, then the two largest life insurance companies, through door-to-door collections for burial insurance by weekly payments, mainly in the impoverished sections of large cities. Michael Cardozo, one of my friends and classmates at law school, came down to work on this project along with a savvy statistician and sociologist named Davenport. We used it as the prime example of abuse of economic power when we put on our first hearing before the committee.

Metropolitan and Prudential were both mutual companies. They boasted that they were managed by officers chosen by the insured by open election. This was false but effective. We disclosed the truth. The insurance agents were asked each year to get policyholders' signatures on a "Hitler" ballot that listed only the existing management, and the companies took pride in affirmative responses of over 90 percent for each election. The catch was that these agents knew their clientele was suspicious of signing anything, so they regularly forged signatures to please the management and to avoid losing an account. I called agent after agent of Metropolitan Life who told the story. It was a sensation that gave the committee a prime example of what they

suspected. Prudential, knowing we were about to make a similar showing with their agents, stipulated the truth; and we were on our way. Report #2 details the full effect of this wasteful form of burial insurance that deprived many of their savings with often no benefit.

A mass of information was developed but the committee labored over it and in the end the lobbies and growing concern over developments abroad resulted in nothing very concrete.

Back at the SEC it was obviously time for me to move on if I was going to practice law. I was made Technical Advisor to the Chairman and stayed awhile working with Douglas and then with his successor, Jerome Frank. This involved drafting opinions and other miscellaneous duties, along with some administrative hearings. Then I resigned late in 1940 to join the law firm of Covington & Burling.

Looking back on my five SEC years, I cannot help but be impressed with the vigor, dedication and effectiveness of the agency in those early days. The staff was young. It was a privilege to be a public servant, not spokesman for something dubious that had to be explained. There was no shortage of work, and responsibility was everywhere for those who could handle it. The atmosphere reflected quiet, tolerant but highly knowledgeable leadership of two Chairmen who set the goals and high standard by which they were expected to be achieved with cooperation of other hard-working commissioners.

**William O. Douglas**

My job at the SEC began before Douglas arrived, but I already knew him fairly well because of participation in several of his small seminars at Yale Law School. It was exciting to work for him, as I have already noted, and I got to know him better. It was fortunate I was not a Harvard man fresh out and the only recent Yale Law graduate around.

Bill Douglas carried no Wall Street baggage. He had worked for Cravath and knew much about how it functioned. But it was not for him. He hated New York, having slept in doorways and struggled for food when he first came there on the rails from out West. He knew the investor needed protection. He was salty, direct, uncompromising and a good administrator. If you performed, he left you alone. If you stumbled, watch out! He didn't pontificate or "worry the bone" but carried those in his circle with him in an effort always to reach a defined objective.

In those early days Bill was my idol. There was talk of his running for President. Many of us thought he was perfect for the job. He had an ability to talk with cowhands, botanists or corporate moguls. He was genuine.

I was in his office when the President called him and said he had sent his name up to the Hill for the Supreme Court and was absolutely devastated. He seemed too young to become an old man like the other Justices. A lot of us had been talking about how he ought to run for President. Of course, he knew the nomination was coming, but this was the official call from the White House that his name had gone up. I said, "Oh, for God's sake, Bill, why are you doing that?" He said, "I need the money." I never learned the true reason.

I think it was partly a pay raise. I don't know how many obligations he had -- I guess he had at least one wife he was already supporting at that time. But I don't know. I don't think that money was the whole reason. He was being talked of a lot for the presidency then and it continued even after he went on the Court, particularly in 1939.

After SEC days his personal affairs got him adrift, he often became taciturn to a fault and certainly the Court soon proved routine and dull. We drifted apart but kept in touch. Sometimes I met up with him walking on the C&O Canal or I went to one of the cocktail parties he liked to

have in his chambers at the Supreme Court. And I read his books, every one of them, which reported his wide travels, his youth and his notions of how the Constitution should be applied for the benefit of the ordinary citizen. He was unique. He seemed to me to be missing a good fight and to believe he was somehow unfulfilled.

The dismal last days' visits to his home were short. He wanted to do things but couldn't. As his health failed, Justices Brennan and Burger and Judge Skelly Wright and some of us from the SEC days were frequent visitors. He lay on a cot on the first floor.

**Jerome Frank**

When Jerome Frank succeeded Bill, my role at the Commission was different. Under Douglas I was always handling a trial load or special chores. With Frank I was involved more in the day-to-day functioning of the Chairman's office.

Frank was a New Dealer. He had come down from Columbia where he was on the law school faculty and he had served at the Department of Agriculture. He was an intense, bright, inquisitive man who loved to write. He loved gossip and overflowed with ideas. One of my first jobs was to assist him immediately after Christmas. The day after Christmas we went to the office and arranged to return all the presents. "You were kind to send me a bottle of Jameson's Scotch, which I am sending back." "Thank you for the basket of apples. I have sent them to Children's Hospital." The most minor kind of thing -- everything was returned.

We were all very strict about such matters in those days. We would never let anybody buy us lunch. Wall Street lawyers or other people would come down. Sometimes I'd have lunch with them. I would always pay for my own lunch. They would think it was absolutely silly, you know, but the atmosphere was one of avoiding any kind of appearance of influence or conflict.

Here is another example of working with him. One day he brought me a draft opinion. My recollection is that it was about 110 pages long. He said he wanted me to look at it and see what I thought of it. After reading it over I said, “Jerry, this thing is way too long. There are a lot of good points in it, but you have lost some of those points because it is so discursive.” I continued, “Here, I have boiled it down, taking your own language, but I've boiled it down, and here is a 30-page thing that you really ought to look at.” He said, “I'll look at it.” I was hopeful. Soon he called me and said, in effect, “You've done a wonderful job. I'm going to use it just as is and have attached it as a preface.” You couldn't win!

Frank gave me my first opportunity to argue before a court of appeals. To show you how diabolical he was, the SEC had a case in the Fourth Circuit -- *Houston Natural Gas*, I can remember the name. I don't remember what the case was about. The problem was that the Circuit had decided a case on all fours against the position the Commission was taking. In addition, SEC Commissioner Haley thought that the Commission's opinion was wrong, and he insisted on writing a brief opposing the SEC brief.

Nobody wanted to go near the Fourth Circuit on that one. It was my first experience with appellate practice. I went down to the Fourth Circuit, which is a wonderful circuit to argue before, wonderful. I went down there, and I had Haley's brief saying I didn't know what I was talking about, and I had their opinion that was dead against me. So I was stumbling around trying to weave my way, as you do, through all the intricacies and distinctions. One of the Judges, I think it was Judge Parker, finally said, “Counsel, as I listen to you, you think we're all wet.” I said, “Yes.” He said, “Well, say so. Get on with your argument.” They all laughed. The court ruled against me. They came down into the well of the court afterwards, the way they

do, and we shook hands. You can understand why I, as a young lawyer, got the chance to argue it. Nobody else wanted to argue that case. But jumping at things like that is the way you get experience. And I still remember that experience. Later, I argued other cases in the Fourth Circuit, a number of cases for the Southern Railway.

By the time I left the SEC the key legislation was well in place as far as the Stock Exchange was concerned. The Commission was in a more defensive posture elsewhere. The Public Utility Holding Company Act had stirred up increasing antagonism. Frank held things steady. He was persuasive in Commission meetings, and his insistence on maintaining the course we were on was quietly effective. The staff knew it would not be sold down the river. But conditions were changing.

**New Deal Washington**

Until the District of Columbia was affected by the events of World War II, it was a glorious place to live and practice law. It was beautiful, clean and tolerant. Except for some cave dwellers and the social life of the diplomats, both of which were easily avoided, the town was full of interesting people, including many drawn to the city by the New Deal. Best of all, most of Covington's clients lived elsewhere, and there was not the country club social pressures to meet and to please clients typical of the practice in some other cities.

In those early days there was no imperial presidency surrounded by rude Secret Service details, no daily sense of racial tension, no notable crime, no lack of work, no contempt for privacy, and no wallowing in commercial violence over TV. One felt useful, safe and challenged. Nobody was worried about assassinations until Truman's presidency. Many of us never locked our doors. Peg and I had an apartment on California Street for $60 a month. I

bought a second-hand Ford for $246, drove to Atlanta in it and back, and we hired a maid for $9 who worked three times a week. Movies and things like that were cheap, like the five-cent candy bar; fifty cents for the movies. Peg and I lived well on $2,600 a year. The tempo was slow. There was a fine street car system that took you out where you could walk and picnic.

Some fail to realize that Roosevelt had no real staff. I imagine now the staff of the White House is close to a thousand. The first big step was when FDR got six anonymous assistants. There was also one person, an usher: if you wanted to see the President, you went and asked to talk to the usher. I remember a man in town then with a great long white beard and shaggy hair who called himself God. And he liked to talk to Roosevelt. He would go to the usher, and the usher might say, well, God, the President is busy now, but he'll see you next Thursday at 2:30. And he'd come back and FDR would talk with him.

When my great friend, Jim Rowe, who was one of the six anonymous assistants, went to work one day, the President was still in bed, as he was most mornings, doing business, but in bed because of his crippled condition. The President had the morning paper. He said, “Jim, I've just seen an article that said that you were at a cocktail party. If I see that again, you're fired.” Anonymous assistants didn't go out and talk to people where there was drinking, or cater to the press. Now what do we have? All those guys are on talk shows every living hour of the day and night, and sometimes twice a day on Sunday. It was a different atmosphere.

Nowadays few realize how simple government affairs were in those days. Speaking of Jim Rowe, one morning while I was at the SEC the telephone rang and Jim said the President is going to make a statement about the 1935 Investment Trust Act. Would I write up something for him? I said, “Sure.” So I sat down and wrote him a page about what the Investment Trust Act

was. I knew very little about it myself. But I knew its general idea, and I wrote that up and sent it over to Jim.

The next day the President read it publicly without changing a word. There were no public relations people. I didn't clear it with anybody at the SEC. It comes back from Jim with a note saying: From GAG to JR to FDR to JR to GAG, or something like that!

Of course, the city was segregated. No blacks were allowed in most theaters, hospitals (except Children's Hospital), department stores, libraries, restaurants used by the whites; and schools were racially divided. Old Washington families and the diplomats ruled the social scene. The infusion of New Dealers manning the alphabetical agencies that came about almost overnight were resented. The latter had their own gossipy cocktail parties, consumed with political energy and hopes. The two groups saw little of each other, and neither focused on the blacks. There was a sense of excitement for us newcomers. Government was important. FDR had a reception every year for government lawyers and even low-ranking beginners like me were invited. It was easy to make acquaintances and to share experiences. But we were not concerned with the city. Most of us planned eventually to leave.

In retrospect, it is almost unbelievable that the New Deal and what it stood for could ignore the problems of the black citizens. Not only was the city a totally segregated town but often in early days while walking to work, as I did for years, a black gentleman coming toward you might step off the curb, take his hat off as you walked by, and say “Good morning.” Most of us, a thing to be ashamed of, were really not conscious of the degree of isolation that existed for blacks. We were wrapped up in matters that appeared to be of great national concern. Roosevelt did not address black discrimination until very late in his presidency, when he did take some

halting steps in the military.

Black women were servants. They were wonderful people who would work in one's home. They brought up many a white child. We had a lady from Meridian, Mississippi, who helped bring up our kids, and who was just like a member of the family, in the old southern kind of tradition. Blacks tolerated whites but they weren't sharing much in the economy. They were rarely in government, and you didn't run into any blacks socially, except on the rarest occasions. Peg and I were blackballed from a well-known club because we had entertained blacks in our home on occasion.

We lived mostly in Georgetown. There were blacks living all around. I bought the house I am still living in by going to a man who lent money to individuals on their face, and I signed five notes. The bank where Covington & Burling had its account and where I was a partner wouldn't lend me any money.

Where we lived earlier there were blacks in the alley. If we wanted a sitter, we'd open the window and say, “Who wants to sit?” And everybody would race to the house. The first one who got there was the sitter. Our kids played together. They were wonderful people, and I see some of them still. A great chance to avoid what happened later was missed.

To indicate the flavor of those early days, I remember being at a People's Drug Store, sitting at the counter having a Coke or something. A young southern woman driving north, obviously going, I guess, to the Cape or somewhere, had her black nanny with her and some kids. She left them in the car and came in to get sandwiches for them. While she was getting the sandwiches, a black man came in. At that time the blacks couldn't sit at the counter, but they could come to the take-out counter. He came to the take-out and got a sandwich and went out. I

remember her saying, “I declare! You let them come in this way? If I had known that I could have stayed in the car and I could have sent nanny in to get food, couldn't I? Maybe we ought to do that down home.” Unbelievable to think of today. But I remember that and many similar incidents. It took World War II to finally shake us out of our magnolia tree lethargy and to energize more blacks to have the courage to speak out.

**Covington & Burling**

As I mentioned earlier, I had been thinking about leaving the government because I didn't want to become a full-time government worker, and five years was about it.

Peg and I had been wondering what to do. We both wanted to stay in Washington. So when I was approached by Dean Acheson and Eddie Burling asking whether I'd be interested in going to Covington & Burling, I quickly said yes.

The offer from the Covington firm was another lucky break. The firm was losing Acheson to the State Department; and he was the partner handling a series of major antitrust problems involving the DuPont Company, one of the firm's then principal clients. Several younger partners who might have been available were in the Naval Reserve or likely to be called up. I had gotten to know Acheson and Eddie Burling three years earlier during the Whitney matter and had been taken to Mr. Burling's cabin on several occasions later for his famous Sunday rum drink lunches where Peg and I had met other partners and famous guests like Learned Hand. There was work waiting for me, and I liked the members of the firm I had met. It was easy to say yes, although I had little idea what might lie ahead. After all, I had never practiced law.

When I accepted, we never discussed pay. We never discussed status. I just said, sure.

And I set a date and left the SEC and went over to Covington & Burling one morning. They were in the old Union Trust Building at 15th and H Streets, N.W., on the southwest corner. I was asked to help Tom Austern, one of the partners, who was working on a bunch of facts for trial; and then I did some things with Howard Westwood. But I wasn't getting paid any money. I didn't worry too much at first because I was still receiving accumulated earned sick leave from the SEC. In those days when you left the government you really didn't officially leave until you got paid benefits you hadn't used.

The first thing that happened that cheered me up was that Paul Shorb, one of the senior partners of the firm -- a superior fellow, a tax lawyer -- came into my room and said, "I just wanted to come down and meet you," he said. "I always like to meet my new partners." That was the first time I knew I was going to be a partner. We shook hands and had a little visit.

But the firm was still silent about money. Then one day Mr. Burling said he wanted me to come up and see him in his office. So I went up to the office and he hemmed and hawed a little bit, and said, "Now, you know, you're just coming into the partnership, and Charlie Horsky, who has been here a long time, is being made a partner at the same time. We think you both should get the same pay and we've talked it over." I didn't know who he meant by "we." I supposed he and Judge Covington and Shorb had talked it over. There wasn't any firm agreement or anything formal in those days that I ever heard about. "And," he finally said, "we have decided that we'll make it $12,500 a year."

He looked at me with his cocked eye and for some reason that I can't explain, though I have often thought about it, I said, "I won't take it." "Well," he said, "what's that all about?" I said, "That's too much money." I said, "I don't know anything about practicing law. That's more

money than my father ever made in his life." And he smiled and said, "What is your idea?" I said, "I know that I am worth $7,500 because that is what I've been earning at the SEC. I want to come in at $7,500 with one understanding and that is that you'll pay me what I'm worth." He got up, and he walked around his desk and put out his hand and said, "It's a deal." We shook hands.

Well, I did better than $12,500 that year. And I never regretted that entry into the firm. I really didn't know what a lawyer did. I'd not come fresh from law school to a law firm and had never been an associate. I knew something generally about what happens in court, but I didn't know what people did in law firms. I didn't know anything about dealing with clients. I'd never had a paying client except Uncle Sam. So that's the way I got started.

When I talked with Mr. Burling I also told him I didn't want to do law business with the SEC. I said something like this: "Mr. Burling, I'll tell you what's going to happen. All kinds of people are going to want me to do that because of people I know. Ganson Purcell is one of my best friends in town. He is Chairman. My name is associated with the Commission, I know the key people and how the SEC operates." Mr. Burling said, "Thank God, we've got enough business. You will be busy on the DuPont work. You don't have to worry about it." Sure enough, all kinds of people came. I wouldn't have wanted to represent any of them. I never went back, until I had one SEC case many years later for Alex Brown & Sons. I went back and won the case. By then I didn't know a soul who was there. They didn't know who I was because it was at least fifteen years after I had left.

I realized I had to become a member of the D.C. Bar, a member of the U.S. District Court. I was a member of the Connecticut Bar, a member of the Court of Appeals Bar and the Supreme Court Bar. But I wasn't a D.C. lawyer. Judge Covington said, "When I was Chief Judge of the

U.S. District Court, I wrote the regulations." He said, "Just fill out this application and file it."

So I filled out an application saying that I had been five years out handling cases in federal court. Five years was one of the requirements to be admitted on motion, subject to character check. Everything was fine. I sent it over. They turned me down. They said that representing the United States for five years was not practicing law, and therefore I'd have to take the written bar exam.

Well, Judge Covington went through the roof. He said, "Those damn fools over there. I drew that rule. I'll go over personally and get them to agree." So he took my application and went over to the court. But he lost -- by one vote. So I had to take the bar exam. Well, by then everybody in the firm was chuckling, and secretly hoping, I guess, that I'd flunk or something. When I went to take the bar, there sitting next to me, up one, the way the seats were staggered, was James Landis, former Dean of the Harvard Law School and my first SEC boss. He wasn't a member either, and he was taking the bar exam!

I remember one question on the bar exam that I heard later I got 50% on. They asked what the statutory provision was about, or some such thing. And I wrote, "I do not know what the statutory provision is, but even if I thought I did, I'd have enough sense to read it before I gave any advice to a client." In that fashion I got through, I passed.

Years later I learned that Judge Covington, who didn't know me, had said, "What are we doing taking this young New Dealer in here? I think I had better check him out." Someone said, "How?" And he said, "Well, George Whitney is on the Board of General Motors, a client of ours, he's on the Board at Kennecott, and he's on the Board of DuPont, and those three are our biggest clients." He said, "I'll hop up to New York and see what George thinks." He came back

and reported to the firm, I'm told, the following. He said to George Whitney, “We're thinking of taking young Gesell into the firm and want to know what you think about him.” George Whitney was kind enough to say, “He's a damn good lawyer. You are lucky. But you ought to get rid of that fellow Acheson.” Dean had represented the Stock Exchange. Judge Covington felt happy, but I doubt that he ever told Dean Acheson.

Now comes the time to talk about my activities at the firm. The reason there are few solid biographies of lawyers discussing the practice of law is obvious. If you respect the lawyer-client relationship in its true sense and you have regard for the privacy of your partners, there is nothing left to talk about, only matters already on the public record. While some lawyers obviously disagree and parade intimate details about clients and their problems, I feel constrained. Covington & Burling gave me every possible opportunity, its standards were the highest, and I had a glorious time working with an exceptional group of talented lawyers for quality clients. Although my narrative of this era will be brief, I treasure my association with the firm and am proud to have played a role in its development to the premier position it maintained in the professional life of Washington, following standards laid down long before I got there by Mr. Burling and Judge Covington. Thus I will give but a brief summary of 27 years practicing law.

There was plenty of work to do. The firm lost several younger partners when they were called up by the Naval Reserve. The firm was short-handed. On the other hand, the Justice Department had launched an attack on international cartels, claiming that several large concerns had divided international markets and fixed prices. DuPont, because of its arrangements with British, French and German chemical concerns, was a prime target. Grand juries subpoenaed

masses of documents; and more than 15 civil and criminal antitrust cases naming DuPont, among others, were soon in progress at various stages of development in different jurisdictions. The firm was defending, and I was given the lead assignment. The legal and factual issues were complex. I traveled frequently to Wilmington, Delaware, and to New York City, where counsel from the larger firms were located and attorneys for other defendants met for strategy sessions and to exchange information about co-defendants. Our instructions from DuPont were to fight hard, and we did. The trials were drawn out and publicized. I won some big cases early on and became fairly well-known among business lawyers and general counsel of sizeable companies, particularly after several victories in the Supreme Court.

Soon I had developed a more or less national practice. I tried cases in New York, Trenton, Wilmington, Indianapolis, Grand Rapids, Chicago, Tampa, Baltimore and Washington, D.C., and was consulted by companies in many other cities, particularly Detroit, Kalamazoo and Cincinnati. None of this would have happened if Covington & Burling was not there and backed me up to the hilt. My activities were for a blue-ribbon list of clients. I was retained, along with the firm, for Scott Paper, Upjohn, IBM, Procter & Gamble, Parke-Davis, W.R. Grace, White Motor, PanAmerican-Grace Airways, General Electric, Bank of America, *The Washington Post*, Transamerica, Southern Railway, and the National Football League. The work took me to London, Montreal, Rome and South America. I also did considerable administrative work before the Federal Trade Commission, the Civil Aeronautics Board and the Federal Reserve Board, argued cases in the U.S. Supreme Court and several Courts of Appeals and the Court of Claims.

Some of these matters involved antitrust laws. These cases were much more varied and challenging than some may realize. Whether criminal or civil, they were always fact-oriented.

Most of the legal principles were carved out, and New Deal judges naturally tended to give the government its way in this area. Sometimes the issues generated interest on the Hill, and on two occasions Senate committees sought to try the cases by holding hearings before trial. I remember having rather explosive confrontations with Senator Kefauver over a General Electric price-fixing case and with a Senator from Washington state over a DuPont dye cartel case. These were both high-profile matters that caused considerable publicity. Both Senators were publicity seekers of the worst kind.

One of our advantages came from mastering the underlying business facts. To get my hands on some Scott Paper Company case I spent several days with salesmen in the field, calling on supermarket customers, observing the competition and learning how to get shelf space. While trying a cellophane monopoly case for DuPont, which involved alleged patent abuses, I took the Judge, along with government counsel, to a cellophane plant to demonstrate the patent coverage; and later we went to a packaging show at Atlantic City to see how cellophane faced competition from other flexible packaging materials. We documented cross-elasticity of demand with these materials at great expense and ultimately won a split decision in the Supreme Court by using physical exhibits imaginatively arranged in booklets devised by my extraordinary, able secretary, Doris Brown.

Finally, to illustrate the factual nature of the cases, consider the antitrust alibi defense which served me well to exonerate a vice president of General Electric, without trial, and to keep him out of prison where several of his colleagues later resided for a while.

We represented General Electric when they were caught by the government in the damndest bunch of price-fixing cases you can imagine. The company pled guilty. I refused to

represent the individual officers. They had separate counsel and several pled guilty. But there was one vice president who said, “I didn't have anything to do with price fixing. And I simply won't plead.” The government wouldn't take a guilty plea from the company without a guilty plea from this top vice president, who was the highest ranking official that they thought they had caught. So we were facing a trial we wanted to avoid and were certain to lose on the corporate side.

I decided we had to see what we could do to get this vice president off. The evidence against him came from three men who worked for General Electric in Philadelphia. They said that this vice president had come down from New York and instructed them to go to Westinghouse and fix the price of turbines and that, thereafter, a turbine price deal had gone through and they had been fixing and rigging the price of turbines. The three men fixed the conversation within a three-month period and said it occurred in the company's Dining Room B at Philadelphia when all three were present and the vice president came down from New York. Well, my partner Bob Owen and I set out to prove that this didn't happen.

First of all, we found the days when the dining room was closed due to repainting, or something. Then we found when all three people were not present in Philadelphia by looking at their travel because some of them were on business trips from time to time. So we limited it down to the days during a week when all three men could have been in Philadelphia and lunching in Dining Room B. The three men had passed lie detector tests with the FBI. The FBI said they were all telling the truth, which didn't help. And what made it more difficult was: this vice president loved to fly. One of his duties was that he was in charge of the fleet of GE airplanes and he could order up a plane at any time and fly anywhere and he usually did, short distances,

long distances, anywhere.

We went through all the logs and there was no trip to Philadelphia that matched. We were able to prove he hadn't gone by airplane. Therefore the question was the time it would take to drive or go by train. We decided to see if we could prove where he had lunch on each crucial day. Well, he had signed some chits in the company dining room in New York City. That took care of some dates. He signed some other chits at his New York club. And he had had speaking engagements and other matters out of town on several occasions. So we got down to a handful of dates. And then we really began to sweat because we had to cover these.

Finally, we got clear documentary evidence that kept him in New York and not down there in the crucial time of lunch, except one. And, I thought to myself, "That's the date." He would look at me and say, "I can't explain it. I don't understand." It was right on the money in terms of time and everything else. One day at home he was bemoaning about this date with his wife. And she said, "Dear, could that possibly have been the day that you asked me to come to town and we went to the bank together and went to the safe deposit box and got out those deeds?" Bingo! They had gone to the bank and, sure enough, the bank had stamped the date and time.

Then I went over to the Antitrust Division. There was a fellow named Biggs who was head of it. A fair but highly skeptical man. And I said, "Now you've got to let this guy go. There's nothing else you can do about it." I went there at about 9:00 p.m., as I remember, and talked to Biggs, along with some of his staff, until about midnight. He was interested in it personally. He had his staff there, you know, and they went over it carefully. He said, "We'll investigate it, we'll get back to you."

Well, in about ten days the telephone rang. It was Biggs. He said, “We’ve got you.” I said, “Oh, my God. Have those fellows lied to me?” He said, “They sure have lied to you.” I said, “What's the trouble?” He said, “There is another plane he didn't tell you anything about; we've gone to the C.A.B. and there's another General Electric airplane, and, of course, that is the plane he came down on.”

I called up the general counsel. Oh, I was steaming. And he said, “Well, let me look into it. We weren't pulling any tricks on you.” It turned out the plane was a wooden one-seater airplane used for testing radar equipment in New Jersey. This vice president couldn't pilot an airplane anyhow. So eventually the government dismissed the vice president and General Electric pled guilty. That was an alibi defense!

Of course, like most clients, the vice president turned to me and said, “I knew they had nothing on me anyway!”

Senator Kefauver heard about the result and was so sore that he had a hearing on how it was the vice president had gotten off. This was in a big hearing room on the Hill. So I went up there with the vice president and Kefauver berated us. I gave the Senator a learned memorandum indicating that lie detectors weren't any good and weren't accepted by the courts and that they were unreliable. But then Kefauver turned to this vice president, who was a pretty smart guy, and asked why he wouldn't take a lie detector test to settle the whole thing. My client said, “You know, if those fellows passed it, I don't believe in it.” It was a good answer. Kefauver was furious.

Another aspect of antitrust practice was the extent to which lead counsel in major cases necessarily sometimes became involved with top management of major companies. These

officers had to consider the risks, the possible effects of a loss and wished to have a voice in tactics, so counsel could do his best to protect vital business concerns. Thus, more and more I was brought into high-level conferences, sometimes with other partners; and we were alerted to litigation pitfalls and asked to guide acquisitions or other major corporate initiatives to avoid litigation in the future. Often one could have a prophylactic effect. I became intimately involved in such matters, for example, in the affairs of the National Football League after winning, with Hamilton Carothers, a major suit brought by a legal rival, the American Football League; with *The Washington Post's* acquisition of its major competitor; and in work done by the government to eliminate Nazi pilots from South American national airlines, through PanAmerican-Grace Airways as the instrumentality.

When the attack on Pearl Harbor came so abruptly in December 1941, I was loaded with cases, including a trial for DuPont. I did not volunteer. Peg was pregnant and I decided to wait a bit. Then it was too late. My draft number came up much later and the next day after being drafted, FDR said people of my age could not be drafted. I had tried for the Marines, who wanted trial lawyers to interview returning pilots, but was turned down for health reasons; and the Red Cross refused to consider me for a chance in China because I was 1-A in the draft. I was looking for active service, not a desk job, but never served. Working as a civilian to help as an air raid warden and waiter for troops on leave at the USO facility in the old Belasco Theater didn't amount to much, but I felt I was doing something. It was difficult holding the firm together during the war, and those of us who stayed were stretched to the limit. When the war was over everyone who had left came back, and the firm grew rapidly because of the clients I have mentioned and many others who came for tax advice, international matters involving the

United Nations and a growing general business practice.

Covington & Burling, during my time with the firm, was unstructured, informal; and we found the practice fun. When I started there were only about 30 lawyers. Mr. Burling no longer took any share of the earnings. He had become wealthy by shrewd investments. He loved the firm, came in every day, reached out always for talent and encouraged initiative. This was not a place where partners claimed clients as their own. We all knew the firm had much to do with why any of us had business come our way. Business brought in was discounted and the money went to those who did the work. We were all well taken care of financially and allowed to find our own ways. Whether a client would like what one of us got tangled up in made no difference. We fought McCarthy, did considerable civil rights representation and took roles outside without seeking permission of anyone. We pitched in and helped each other, and all in all it was a very happy place. Standards were high and there was great emphasis on quality work. There were no pressures to join country clubs, entertain client's wives or compete with other lawyers socially. One could make his own way, seek out the people he wanted to and live an independent life away from the office. All of this engendered great loyalty and *esprit de corps*. Those who left usually left on request and were helped to relocate. The firm grew by advancement from within rather than by acquiring big names as "rainmakers."

Not much business brought me before the U.S. District Court for D.C. I tried several libel cases for *The Washington Post*, an antitrust civil case for Parke-Davis, which went to the U.S. Supreme Court, and was called down for appointed cases a number of times. Some of these matters were before Judge Tamm, who was then a District Judge, Judge Keech and Judge Holtzoff, primarily, but I had motions or preliminary matters before several other Judges. Since

Covington & Burling's practice was not focused locally and its clients were encountering their principal problems elsewhere, I was in no way a daily practitioner in District of Columbia courts and knew the judges much less than many outstanding local lawyers, like Nubbie Jones of Hogan & Hartson, Dick Galiher, David Bress or Spencer Gordon of Covington, whose work was concentrated in Washington.

The local Bar was very close-knit and resented outsiders. Covington's phenomenal success and growth was resented by many local lawyers, and the firm remained aloof for a long time.

Of course, there have been immense changes in the legal profession, particularly in Washington law practice, since the 1940's. Many new firms have come to town. Covington & Burling no longer has the same dominant role, many other top firms are involved in governmental practice for out-of-town clients, and the volume of law work has grown into a roaring flood of business.

My years with the firm, 1940-1967, were tumultuous years. Changes in the practice reflected changes in the role of the Capital. Pearl Harbor ended the New Deal, and the city became the arsenal of democracy. Then FDR died, the atom bomb ended the war with Japan, Russia threatened from behind the Iron Curtain, followed by the Communist witch hunt, Korean Conflict, and economic Cold War, amidst growing racial tensions at home. Dissension and riots mounted, reflecting the murders of two Kennedys and Martin Luther King, Jr. and frustrations with still another war in the Far East over Vietnam. History was being made almost every day. It was an exciting and often discouraging time.

* * *

While at Covington & Burling I served, among other things, on various school and charity boards. (Beauvoir, St. Alban's, Madeira, Children's Hospital, Community Chest.) But there were only three outside involvements of sufficient interest which perhaps should be described more fully. I continued to practice but, at the same time, acted as Special Counsel to the Joint Congressional Committee Investigating the Pearl Harbor Disaster, later as Chairman of the President's [Kennedy] Committee on Equal Opportunity in the Armed Forces, and, finally, as Chairman of the D.C. Circuit's Advisory Committee for Reorganization of the Local Court System. These were all non-compensated activities. A brief word about each follows.

**Pearl Harbor**

When the Japanese attacked, a sketchy report was prepared by Justice Roberts at FDR's request but, necessarily, security considerations masked the full truth because the fact that we had broken the Japanese highest secret Code was still a secret and unknown to the Japanese. After Pearl Harbor, the United States continued to read the Japanese messages that aided the war effort every day. After the Japanese surrendered, a congressional inquiry was inevitable. The inquiry awakened old controversies. America Firsters saw a chance to be vindicated, and Republicans hoped to tag FDR with the blame for allowing the attack to occur. William D. Mitchell, a Republican and former Attorney General and Solicitor General, was named Chief Counsel of the congressional investigation. He asked me to be his first assistant. I guided the day-to-day investigation and questioned many of the witnesses at the long hearings in the Senate Caucus Room that followed. Mr. Mitchell wanted to start at the point where a possible attack was imminent and known in Washington and then to work up, event-by-event, to a final confrontation on the witness stand with the two commanders, Admiral Kimmel and General Short. That was

our plan. Throughout, some Republican members persisted in trying to divert us into a review of how FDR got us into the war and to turn attention away from who was responsible for failing to intercept the Japanese planes when they attacked Pearl Harbor.

I had never met Mr. Mitchell. He said that he had been to the Supreme Court and asked for names, and my name was given to him by several of the Justices. Based on this he walked into my office at Covington & Burling one day and asked me to help after talking to my partner, John Lord O'Brian. Mr. O'Brian and I were very close, and I have always felt that Mr. O'Brian had much to do with it, and that Mr. Mitchell just checked me out with some Justices, but I don't know.

We hired a staff and we started out building the story from the ground up. We released all the pertinent intercepted Japanese code traffic immediately, and I personally read all the FDR correspondence and material at the White House concerning the President's contacts with Churchill. As we got nearer and nearer to taking the testimony of the commanding officers, some members of the committee became increasingly restive because the net was tightening. There were many people who felt that Admiral Kimmel, the Navy Commander, was being unfairly accused of dereliction of duty and that the real dereliction of duty was on the part of General Marshall, Admiral Stark and Franklin D. Roosevelt, who had not given adequate warning.

It got to be quite a political brawl. Senator Alben Barkley was chairman. The committee functioned on a rule that provided that any member could have any witness called that he wanted, and if the committee failed to hear some requested testimony or failed to go into some line of inquiry, all the committee would let it happen, regardless of relevance. Senator Homer Ferguson,

who had been selected, in spite of his limited capacity, because he had been a one-man grand jury in Michigan, kept trying to take over the investigation almost from the beginning. He was an America Firster and totally self-centered. The other agitator was a fellow named Keefe, a Congressman from Wisconsin.

Books have been and are still being written about the attack, and there is no point in discussing what we developed. Information later obtained from the Japanese confirmed much of it. However, the political controversy still continues unabated.

For my part, I had a lot of fun listening to Keefe when he took on General Marshall one day and fell flat on his face. It was really very humorous. There was a message that had been sent out to Hawaii shortly before the attack, and it had been written by Secretary Stimson. Usually, such military messages had been gone over by Marshall, who had an office next door to Mr. Stimson, to be sure the message was in militarese language and perfectly clear. But Marshall was out of town that day.

So Keefe asked him, didn't he think that a better worded message could have been sent if he, Marshall, had been there? Marshall was a very laconic, but honest man. "Yes," he said, "I think it could have been improved."

So Keefe began: "Now, where were you, General?"

"Well," he said, "I was on maneuvers."

"Oh, you were on maneuvers, were you? Were you down in Carolina?"

"We were having maneuvers there."

"And I suppose you had a good time?"

Marshall said, "I had a very good time."

Keefe said, “At night you saw a lot of your old buddies that you've known for a long time?”

“Yes,” answered Marshall.

“You sat around and drank?”

“Well, I guess I had a drink after dinner. But I went to bed pretty early. But I had a very good time.”

“How long were you down there?”

“Oh, three days.”

“Wouldn't it have been better for the country for you to be up next to Stimson who is getting along in age, and you could have helped write a more proper warning message?”

“Well, in retrospect, maybe it would have been.”

But Keefe didn't stop there.

Keefe said, “Now General, let me ask you this one final thing. (I was sitting right next to General Marshall.) Can you think of a single good thing that came out of those maneuvers that you accomplished?”

I saw a twinkle in Marshall's eye.

Marshall said, “Yes.” The big caucus room was full of people, including many reporters. Keefe was stuck.

“Well, what was that, General?”

“Well,” Marshall said, “I saw a major who performed well with tanks and I promoted him on the spot and sent him overseas.”

There was a silence. Keefe had to ask, who was it, and he did.

Marshall said, “A fellow named Patton.”

The audience stood up and clapped and cheered and yelled, and all the press laughed. Keefe got redder and redder and redder in the face, and soon he walked out of the hearing room.

Then we later had a very momentous, historical occasion involving that bumbler, Senator Ferguson. It has never been written up and I believe it ought to be known.

One morning out of the blue Senator Ferguson came in and said on the record, “I've just learned the most terrible thing.” He said, “I have just learned that the man who is responsible for breaking the Japanese code has not received even a measly medal from President Truman. I want that man here tomorrow so we can give him the thanks of the nation.”

Well, the true story was that the man who broke the code had broken it by computer techniques unknown anywhere else in the world, aided by IBM. United States authorities had put out a story that our people had broken into the Portuguese embassy of the Japanese and stolen the code. The Japanese believed this and had simply changed the formula in the code, but not the code itself. As a result, the United States continued to read the highest Japanese traffic all during the battle of Midway, and probably won the battle of Midway because of it, and continued to read it all the way when MacArthur was going into Japan itself.

Now this guy Ferguson was about to bring out what had really happened. President Truman called Barkley, I assume, or somebody did. And Barkley scheduled an emergency early morning Executive Session of the committee for the day this code fellow was to appear. I had met him. He was a kind of brilliant, odd fellow, like many of those guys are. He could probably see a freight train go by and add all the numbers on the freight cars and take the square root in his head, but might not always know how to get on a bus to get home because his mind was

concentrating elsewhere. He and others who worked with him made a great contribution.

Anyway, General Marshall appeared at the Executive Session in full uniform with a letter from President Truman and said that we were reading the Russians, we were reading the Germans, we were reading the Italians, we were reading the French, as well as continuing to read the Japanese traffic, all by this same decoding method, and that if this man was called, we would lose everything that we had found so useful in post-war military and diplomatic intelligence.

Senator Ferguson stood up and said, “I'll not sit in the same room with this traitor.” He pointed his finger at George Marshall, and walked out of the room.

Barkley said, “I can't do anything. We have this understanding. We've got to go ahead with it.” We went to the hearing room. The guy was sitting there. He had been subpoenaed. Barkley nods at Mr. Mitchell. Mr. Mitchell shook his head. Barkley nodded then at me. I shook my head. Neither of us wanted to ask him a question. So Senator Ferguson has to bring it all out himself. He did. Various countries changed their codes by nightfall. That was a pretty bad show, in my opinion, dishonorable and immoral.

After this episode Mr. Mitchell correctly felt we had lost control of the proceedings. Supporters of Admiral Kimmel were claiming the Admiral should be heard before we were ready. Senator Ferguson was riding high and there seemed to be more political agitation than a search for the truth at work. Mitchell and I resigned.

When we left, the committee appointed Admiral Kimmel's lawyer as Mitchell's successor, a fellow named Richardson, who practiced law in Massachusetts. Soon the committee came out with a wishy-washy report.

The effort to vindicate Admiral Kimmel, which still continues, is understandable.

Admiral Kimmel was an outstanding naval officer and a great leader of men. If he hadn't had that responsibility at Pearl Harbor, he probably would have been one of the great heroes of the war. Indeed, I believe, any Navy commander who had that job at the time would have had the same thing happen to him. The climate at the time was that the attack just couldn't happen. For example, shortly before the attack, Admiral Kimmel turned to Admiral Halsey, who was at Pearl Harbor in charge of the aircraft carrier Enterprise. Kimmel asked, "What should I do? Should I send all the ships to sea if there is to be an attack or should I bring them all into the harbor?"

Admiral Halsey said, "Bring them into the harbor. Put a net across." That's what Kimmel did. That decision caused much of the trouble because these Navy officers had failed to realize that the Japanese had learned from the Italians to mount their torpedoes from aircraft with a different kind of fin so torpedoes would take effect after a very short run. And, of course, the Japanese also made a lucky hit when they dropped a shell down the smokestack of the Arizona.

When the attack came, Halsey, coming into Pearl, flew the cream of our naval aviators into Diamond Head. As they approached the island, all unarmed in the plane, they flew into the face of the attack, they were shot down and killed. This occurred, even though the Command had even war-gamed the attack. It would come on Sunday. It would come from the north. Exactly the way the Japanese did and it was what the Navy had war-gamed and expected, if it ever happened.

Consider the following. On November 28, 1941, a message went out to the Panama Canal Zone, the Philippines, Hawaii and San Francisco saying, something like this: "This is a war warning. Expect enemy attack. Effect necessary reconnaissance." San Francisco put everybody down on the docks with iron hats, guns ready, everything they could do. The Panama

Canal Zone took every precaution for protection of the Canal Zone. From the Philippines, General MacArthur indicated, we would do very well in the first wave. Our pilots could shoot down a large number of Japanese. "But," he said, "we'll be destroyed on the ground. We don't have enough fuel. We'll come back to refuel and they will eliminate us. But we'll do our best."

In Hawaii, they went and played golf. It was the climate of the times, a lack of imagination. But I think it was endemic to the Navy at that time. The Navy was not as superior as it believed.

I think any commander would have been cashiered, and probably any commander would have made similar mistakes. Where to put the blame -- I don't think it was fair to blame, but you had to blame the commanders. It wasn't just Admiral Kimmel's fault. It was the fault, in my judgment, of the inability of the military, the Navy in particular, to recognize its vulnerability or to realize that we were no longer necessarily the masters of the Pacific. The Japanese were very clever. They sent all kinds of ships down by Indonesia, publicized a fake attack that was not to go on down there. The Japanese papers are fascinating about the planning of this attack. They really knew what they were doing. But it certainly wasn't Marshall's fault, or Nellie Stark, or Short or the Army commanders' fault or Admiral Kimmel, the Navy Command's fault alone. We were, in a sense, victims of overconfidence and tended to discount intelligence information accordingly.

The Pearl Harbor investigation was unsatisfactory. This was caused by the inability of some members of the Joint Committee to forsake political opportunity and personal advantage. Two Republicans, Senator Homer Ferguson from Michigan and Congressman Frank B. Keefe from Wisconsin, sought to turn the inquiry into vindication of the America First movement that

had worked to keep us out of the war. Their contention was that FDR and General Marshall had known the attack was coming and had allowed it to happen because FDR had long before committed us to aid the British without the knowledge and approval of the Congress or the public. From the outset, Ferguson sought to take over the investigation, demanding, unsuccessfully, access to all the staff work as it developed. Admiral Kimmel and his ardent supporters contended they had been kept in the dark and not allowed to see the intercepted Japanese diplomatic messages. This heaped fuel on the fire. Mitchell had insisted, and I fully agreed, that we should work up the facts in chronological form, ending with the commanders. As the hearings progressed, the noose tightened as circumstances indicated how clearly Kimmel and Short had been alerted to the danger of attack. General Marshall had left a slight gap. He could not remember where he was the night before Pearl Harbor. He declined to speculate and was pictured as conspiring at the White House with FDR, although there was no record he had been there. He was returning from retirement to accept a presidential mission to Communist China, and the two obstructive members implied he was about to perform another act against the interests of the country. Two incidents reflect the vicious effort to impinge the integrity of the great man.

[Inserts re incidents not found.]

Left with no further ammunition, the Committee insisted that Mitchell call witnesses out of order so that the America First attitude of Ferguson and Keefe which, by this time, Kimmel perhaps unconsciously shared in his search for self-justification could be presented by Kimmel and others before all the chronological proof was in. Mitchell and I resigned, and Kimmel's lawyer was put in charge of the investigation. A mild, incompetent, slanted report issued. No

commander who is surprised can ever be exonerated. But, as time has passed, the public has, I believe, come to recognize that the U.S. Navy and U.S. Army were unable to appreciate the might and zealous dedication of the Japanese and overestimated our superiority. Kimmel would have been a public hero and a fine commander in the war that followed had he not been in command when Pearl Harbor was attacked. Many books have been written since continuing to argue the basic political argument the Committee reflected. This hindsight has not changed the basic fact -- our country was unprepared, overconfident and unsophisticated. It took the war to wake us up.

## President's Committee for Equal Opportunity in the Armed Forces

President Kennedy appointed me chairman of this significant committee, which included key black leaders and well-known figures like Abe Fortas. Judge Fahy, before he became a Judge, had headed a similar committee under President Truman, and this was to follow on as an update. The committee was given offices at Lafayette Square. I employed some young lawyers, and we reviewed voluminous records and conducted limited field investigations, sending teams around the country and to Europe to look at the situation, particularly in Germany, where many troops were then stationed. We published two reports that still make interesting reading today. The first concerned opportunities for blacks for advancement from within the Services and the second dealt with treatment of blacks by the local communities (stores and real estate renters) where bases were located and their families lived. Secretary of Defense McNamara gave full support, and our work had some affirmative effects and resulted in several important changes.

It proved to be a lot of work to get the Services to disclose the true facts, and for a long

time I was at the committee offices most mornings giving things a push, scheduling interviews, and the like. It was soon apparent that the Army was doing the best job, the Navy much less so, and the Marines were dragging their feet. They even selected a striking red-headed, blue-eyed junior officer as my contact, but it didn't work.

The most interesting part for me were the visits I made with Whitney Young, the black leader and member of the Commission whose name is now on one of Washington's bridges. He was a tremendous man, large of size and vision. We got to know each other well while riding around in an Air Force plane as emissaries of President Kennedy. I remember telling him one time early on that I really disliked some blacks. He stuck out his big hand and shook my hand and said to me: “So do I -- brother, you are emancipated.” We got along fine and worked in tandem.

I remember, particularly, a couple of incidents. We went down to a Navy base near Jacksonville. The way we would approach a field trip was that I would go see the whites and Whitney would go see the blacks. He told the blacks, among other things, that I was O.K. I told the whites that Whitney was O.K. Then we would meet with everyone, having hopefully quieted fears we were acting on preconceptions or coming from different philosophies.

Down at this base, we sat with a fine commander, a pro, the kind of fellow you were glad was in the Navy, defending the country, and all that. A real experienced officer. We said to him, first of all, why is it that there has never been a black assigned to the gate as a sentry to control who comes and goes? We had heard there had never been a black at this visible post. He said, “That's not true.” He looked around at his young aides, and they all said it was true. He blew up. He didn't know anything about it. Right then and there he issued orders correcting the situation.

Then we said that we had a more serious problem. We had been out around the base and noted that all of the new quarters on one side of the high railroad tracks were occupied by whites, and the very old, dilapidated quarters were occupied by black sailors and black pilots. He again said that it couldn't be so. We said, “Get in the car; we'll show you.” We got in the car and we took him out and showed him.

When I got back to Washington I sent him a wire and said that I was about to report to the President and I would like to know, within twenty-four hours, what solution he had arrived at with respect to the housing. I remember there came back a wire telling me that the old housing had all been destroyed and that he had arranged to place the blacks who were there, along with some whites, in the area that had been occupied only by the whites.

On a different occasion, we went to a base in one of the Carolinas where the commanding officer, this was an Army base, had been trying and trying to stop segregation in town. The taxis would not take blacks to and from the base. Blacks were excluded from the stores, even the Army-Navy store. These were soldiers defending the country! The Colonel in charge had really done everything he could to change local attitudes because it was bad for morale. In fact, it was bad for everything. He hadn't been able to do much because the Army is trained to keep out of civilian affairs. Our presence was known all through the town right away, of course. I had been invited to go down to a meeting of the board of commerce, or whatever they called it, for lunch. I said I'd thought I'd go down, and that I was going to give them a message. The Colonel backed me up when I mentioned my plan. The military guys were all with me but felt that the military should not interfere in local affairs. They had been trained that way.

At lunch, while I was talking about the Committee they asked what I thought of the base

and what I observed. "Well," I said, "it looks to me like a pretty efficient base." I remarked, "Of course, it's going to be on the list to be closed." Boy, did they wake up. They said, "What do you mean? We hadn't heard it was going to be closed." I said, "No, but you understand the country is retrenching after the war. And one of the things our group is doing is seeing what bases ought to remain open; and obviously, a base that has the degree of segregation that you've imposed on the troops will be one that I don't think President Kennedy would put up with." "Well, how long are you going to be in town?" I said, "We are leaving in less than twenty-four hours."

By that time, I got a message that the situation was changing; and it did change. They changed it almost overnight. They opened up the stores. They opened up the whole thing. It's just amazing when you think of it now. It just needed a bunch of b.s. from me. That's what it was. But you have to do something to break some of those old traditions and attitudes. I got a nice letter from the commander. He said that he wanted to thank me, that morale was much better on the base. Sure. Of course, it would be much better on the base. Can you imagine, if you were black, when leave time comes and you would go out looking for a cab and they would only pick up the whites and leave you stranded outside of town. Today there would be riots.

We got off a couple of good reports. Perhaps the most important step taken based on the committee's work was to establish a firm policy, accepted by all branches of the military service, that if there was segregated housing near a base, whites as well as blacks could not rent for themselves or their families. We also succeeded in integrating the National Guard, which had remained segregated in several states, north and south.

As I write this account focusing on my personal experiences, I find it difficult to tell what

happened because it may appear that I exaggerate my importance, which is not my purpose. This rather prosaic reference to the committee's "off base" recommendation is a case in point. Thirty years ago it was a bombshell that stirred up violent personal attacks and much public comment, mostly adverse. Inevitably, as happens often, the committee's work and the endorsement by Secretary McNamara all became known as the "Gesell Report." Some prominent southern senators and congressmen loaded the Congressional Record with a mounting attack, attempting to justify these claims by drawing me, through public correspondence and challenges, into a personal debate. I ignored it all, particularly a very persistent rogue from Louisiana who led the attack on the House floor. Every possible theme was played to exhaustion. Traditionally, the military was trained to stay out of politics and social affairs. I was pictured as attempting to make each serviceman a political agent beating the drums for blacks. It was claimed this ignored military needs, weakened national defense, interfered with states' rights, would cost taxpayers money, involved the military in the segregation battle, weakened enlistments, denigrated men in uniform, and resulted in closing southern bases so skillfully and strategically placed at the invitations of Senators Stennis and Vinson. This twaddle is difficult to believe.

Today, integrated off-base housing and facilities near bases is accepted as obviously desirable for the communities involved as well as the servicemen.

Gradually the attacks receded. Legislation to set aside the proposals failed in both Houses. It was not pleasant to be on the receiving end of the tumult, but I simply grinned and kept my mouth shut and it finally went away. A thumbs-up from Whitney Young was worth the unsought prominence. The loudest and most unfair attack came from senators and congressmen in the Deep South, but it should be noted that when my confirmation came before Senator

Eastland he never mentioned this facet of my career four years later.

**Judicial Council Committee**

At the time President Johnson nominated me to the court and for about two years before, I had been spending a great deal of time assisting on various plans to reorganize the D.C. Court system in my role as chairman designated by the Circuit to provide input from the Bar.

Originally Chief Judge Bazelon called me over and asked me if I'd do the job. While I was talking with him about it he said to me, in effect, "You know, if you take this job, I'll hate you before its over."

"Why is that," I asked.

"Well," he said, "I'll get angry, I'm sure, with you and we'll have a lot of rows."

I went back and thought about it and wrote him a letter saying I would not take the job unless I was the unanimous selection of the entire Judicial Council.

This helped me. Judge Tamm told me later that was a smart way to start. There was a wonderful bunch of people who agreed to help at my request. Many of them are now judges: Pat Wald, June Green, Tom Flannery, Barrington Parker (deceased), Paul McArdle (deceased), and others. They worked on various studies and were members of the committee. Later the Council met, and I was unanimously asked to be chairman. We had meetings with many practicing lawyers who gave us the benefit of their specialized experience and pitched in to do some of the work. Gradually we sketched out the general direction that we thought the reorganization ought to take.

There was a mess over at the local courts. Aubrey Robinson was judge for the juvenile court, which consisted of three judges, but they would not even all talk to each other at once.

Each of the other judges would talk to Aubrey, a sensible, talented leader, but the other two would not talk to each other. We urged that this court be abolished, along with some other special courts, and that greater jurisdiction be given elsewhere. We worked out some of the provisions for transition. Joseph Tydings, who was in the Senate then, was very active in trying to bring this about, as was Ramsey Clark, the Attorney General. Clark worked very closely with us. By the time I left to become a judge, we had finally broken down the problems and, after examining various state courts around the country, we came up with two basic recommendations.

One was that the United States District Court should give up the master calendar and go on the individual calendar, which is, I think, the biggest single internal administrative change made in that court for many years. The other was to free the U.S. District Court of much of the purely local business and thus to make it a more truly federal court.

We felt we needed to get an outside outfit to come in and pull together a lot of the material we had gathered during our studies -- get the statistics and information as to how the business ought to be divided between courts and the mechanics of transition. We had started raising that money, and after I left the money was raised. The committee continued and the report was finally accepted in all respects.

And that was a very interesting project. We met with judges, almost every judge in one way or another, all over the city. We talked to many practicing lawyers. We would have sessions related to juvenile justice, divorce, the nature of the business of the District Court, night court, all those different things. We met every week. I found it time-consuming, but worked hard because it was very important. This project was the most active thing I did in terms of the local Bar. I was also active in the early organization of the American College of Trial Lawyers

and one of its original D.C. members.

**Personalities**

Before being nominated to the court, it was my special fortune to become involved over the years with some of the leading personalities of the time. While I can add nothing of consequence about these extraordinary men, my contacts will suggest how informal and exciting it was to be part of Washington in the days before Pearl Harbor. There were three such men in particular who influenced and heightened my continuing concern with public affairs and desire to be involved: Dean Acheson, Felix Frankfurter and Louis D. Brandeis, all Harvard lawyers at the beginning of their careers.

Dean Acheson became a close friend as we were brought together in common undertakings at the firm over the years and before. I admired him and reveled in his company whenever he let me behind his outward aloofness and sometimes haughty manner. Inside he was a warm and caring person, full of fun, perceptive, with an eye for the bizarre and he loved to "undress" stuffed shirts with his penetrating wit and control of the English language. We were on opposite sides in the Richard Whitney matter but shared a common view of Whitney and his ilk. Riding back from New York on the fast evening train, the Congressional, we would sit together, have a drink while we laughed over the doggerel he would compose summarizing the day's events.

When we, much later, became partners, we often walked home together, and there were many enjoyable lunches at his Maryland farm where he gardened and made beautiful furniture in his shop. I met many interesting people at Dean's house. We lived near each other and sometimes he had me drop in for a drink on the way home. Usually others were there, including,

often, Felix Frankfurter, who loved to banter with Dean, or one of the bright Acheson children.

I met Felix Frankfurter under unusual circumstances and came to know him as a person as time went on, through Dean, by personal contacts, and as a Justice sitting on cases I argued or worked on before the Supreme Court. He was a firecracker of a man, and I could never figure him out. That he was complex, volatile, egotistical and far from a shrinking violet is apparent from the many conflicting glimpses of his extraordinary personality released since his death. For my part, I enjoyed being around him as he expatiated, but often winced when he sat on one of my cases.

When I was working for the SEC on the Whitney case, the telephone rang one day and I picked it up in the office. A voice said, "This is Felix Frankfurter. I wonder if you'd have lunch with me?" At first I couldn't remember who Frankfurter was. I had forgotten. I had read one or two of the articles he had written on federal jurisprudence and on Sacco and Venzetti. When I kind of paused, he said, "I'm a professor at Harvard Law School. I want to talk to you." I said, "Fine."

So I met him at what was then the Powhatan Hotel, which later became the Roger Smith Hotel across from the SEC offices at 19th Street and Pennsylvania Avenue. We were in an old building that has since been torn down. So I just went across the street.

When he got to the point, he said, "I'm teaching evidence at Harvard Law School. I have been reading in the New York Times the verbatim transcripts of your questioning in the Whitney case. I called up Thurman Arnold at Yale and I said, 'Who's this fellow Gesell?' And Arnold told me that you were just a "C" student and just a typical Yale Law student, there wasn't anything very special about you at all. I can't understand where you learned to question a witness

so succinctly and how you get at the subject matter without getting rattled or taken off the track by the answers."

I said I didn't know. Nobody taught me that. That's just the way I ask questions.

He said, "I've got to find out about it, because I think we've got to get people up at Harvard to learn how to do that."

I said, "Well, I don't know. I can't help you."

We got to be friendly and chatted. Then he said, "By the way, how would you like to meet Brandeis?"

I jumped at the chance, saying, "God, I'd love it." As a result, I got invited with some regularity, Peg and myself, to the Brandeis teas.

I had another very special relationship with Frankfurter. Naturally, some of his clerks wanted to go back to Harvard to teach. He would land on them with both feet and say, "You've got to spend a year with Gerry Gesell before you do it. You won't be any good as a teacher if you don't know something about the trial practice." He had always felt he had learned a great deal from being an Assistant U.S. Attorney.

So, Covington was in a situation where we would take one of his clerks, and they would work with me for about a year and a half, and then go on to Harvard. Al Sachs worked for me for a year and a half. So did Abe Chayes. Frankfurter was curious and would follow up and ask, "How are they doing? Are they making any sense? Are you giving them a real chance?" All this kind of stuff.

I used to be in his chambers occasionally. He dictated right to the typewriter. The typewriter was on wheels. He rarely made carbons. He would write, I guess, ten, fifteen letters a

day --notes, little things, like, saw about you in the New York Times. And I was down there several times and saw that process. I can't remember why I was there.

As I have indicated, he was a pain in the neck sometimes when you were arguing a case. He could lose a case for you quicker than anybody by agreeing with you too much during argument. I was arguing a case up there one day in the Supreme Court and he agreed with me one hundred percent. And he kept rubbing it in until he alienated several of the Justices. He never ceased being a teacher and did many kindnesses for young people, as he did for me.

I came to know Brandeis quite well later when I was doing insurance work for the Temporary National Economic Committee. He had been the person who had developed Savings Bank Life Insurance in Massachusetts and, of course, was a man who was against bigness in any form. We were directing our attention to the bigness of the Metropolitan and Prudential life insurance companies, particularly because they were then considered enormous. Metropolitan was five billion dollars of assets, and I think that Prudential was about four billion -- examples of concentration of economic power.

When I had succeeded in displaying how that power was obtained through salesmen forging ballots, this tickled Brandeis to death. And he wrote me letters about it, and I'd go out and see him and he would chuckle about it and we'd talk about how the hearings were progressing.

I remember telling Brandeis how I sent the investigators up to Metropolitan Life at the beginning. The company had a beautiful, big building up in New York. I told Brandeis the story of what happened when the investigators arrived, which he thought was very funny.

Company officials greeted my crew and cordially said, “Now, is there anything we can do

for you? This is an extraordinary building and we're very proud of it. We have a big conference room. Would you like to see that? It's where the directors meet. We also have the largest kitchen and dining facility of any building in New York City."

And my fellow, Blumquist, who was the chief investigator, said, "Well, I'd like to see that kitchen. I cook for my wife, and I'd like to see the kitchen."

They couldn't find it. They didn't know what elevator to take to get to it. And all these vice presidents suddenly were running around and calling their offices, saying, "What floor is the kitchen on, and where is the dining room?"

Well, I told Brandeis that. He really thought that was funny.

At the teas I met people who became my life-long friends. Two of my partners were Brandeis clerks, in addition to Dean, and that is where I met Joe Rauh, for example. My acquaintances expanded enormously with the kind of people at the teas because almost nobody was coming down to Washington from Yale, and I didn't know many people. This really opened up friendships for me and I also met several interesting people, including Henry Wallace, Ma [Frances] Perkins. Although the cookies were terrible and the tea cold, the teas were always a high point never to be missed.

Brandeis was getting feeble but he was still an advocate for his points of view and very interested and informed about what was going on everywhere -- full of questions, many of which I couldn't answer. He had a great curiosity. Although he was in his declining years, he was still very influential. My limited contacts were a very special experience I will never forget.

## Politics

My father was a Wilsonian Democrat, and my instincts seem to have always put me on the side of the Democrats. Indeed, for a while I was a member of the Democratic Central Committee for D.C., after being elected, until defeated a few years later. When Averell Harriman and Hubert Humphrey campaigned for D.C. delegates, I was actively supporting their campaigns with both routine work and some money.

My principal local concern was to try to get the citizens of D.C. a vote. A small committee, headed by Walter Washington, who later became Mayor, and Mrs. Marshall Hornblower was formed and as one of several lawyers in the group I met at night at the Hornblower home or at the old Occidental restaurant for lunch. We drafted proposed legislation, helped to develop strategy on the Hill and some of us (not me) lobbied vigorously. Eventually we won, but I can take little credit because my practice kept me on the road.

Nationally, I was an advance man for Stevenson during his second campaign and traveled on the campaign plane from Portland, Oregon, down through California and on to Phoenix and then to Boston. After tutelage from Oscar Chapman and Jim Rowe, the wise, old campaign men, I spent a week in Portland, Oregon, setting up the visit. No help. No sleep. Too much to do. Bobby Kennedy came in on the campaign plane, undoubtedly learning what to do and, mostly, what not to do. Months later I set up a big rally in Los Angeles for Stevenson on another trip West.

I had nothing to do with the Kennedy campaign. My sympathies were with Humphrey. When Johnson ran, Jim Kellogg, Chairman of the New York Stock Exchange and a close friend, and I were asked to line up “Intellectuals for Johnson.” This was to offset the false claim that

Johnson was simply a country hick. We wrote out a full-page ad and solicited signatures of support from college presidents, Nobel prize winners, and the like. Whether it got a single additional vote I, of course, have no way of knowing. Somebody must have been pleased because I became chairman of the Credentials Committee at the Inauguration after Johnson won. I had an office and staff for a short time and controlled the sale of souvenirs along the parade route. This earned me a seat in front of the White House to watch the parade close to the stand where the President took greetings from everyone passing by.

These experiences gave me a chance to see politicians at work, to learn how complicated the election process is, and to respect those who succeed in the very controversial, sometimes even violent context in which they practice their art. It greatly broadened my acquaintance with varying ranks of people, high and low, and convinced me irrevocably that I never wanted to run for office.

This was the last of my politicking, except for some interesting contacts with President Kennedy, Bobby Kennedy and President Johnson.

My relationship with the Kennedy Administration was mixed. The record of John and Bobby did not impress me. I was working for Humphrey and bitter over the way the Kennedys stole the key West Virginia vote. In spite of this, when Kennedy was elected (he then lived directly across the street from me, but I didn't know him), the cabinet search committee, consisting of Sargent Shriver and Harris Wofford, had me listed toward the top as possible Attorney General. No one ever spoke to me about this idea, but it leaked out to the New York Times. Harris Wofford was an old friend and although there was nothing to it, Peg and I were watching the appointment process because Kennedy was making all the appointments on the

front steps right across from our house. Peg would call me at the office and say, he just appointed McNamara, let's say, the head of Defense. I'd hurry over to the Metropolitan Club for lunch where everybody was wondering who was going to be Secretary. Well, I'd opine it's a tough thing, but my sources tell me it's going to be McNamara. Soon I would be confirmed in an early edition of the Washington Star. After a while, I was considered quite a guru, so much so that Arthur Krock even came up and asked me how I had found out so much.

In any event, we were all waiting for his announcement about the Attorney General, not believing it was going to happen, but yet it was dangling out there. Then all of a sudden the President decided that instead of sending Bobby to be McNamara's right-hand assistant, that he needed some legal experience and he was going to be Attorney General.

I had met Bobby because he rode the Stevenson campaign plane when I was advance man, but I didn't know him. He kept very much to himself then. After he became Attorney General he asked for my advice about the post of Assistant Attorney General for Civil Rights, and I talked with him about Burke Marshall. Several friends went to work for Bobby, including two of my other partners, John Douglas and John Jones. President Kennedy telephoned me and offered me the job of Assistant Attorney General, Criminal Division; and I said no immediately, remarking that I didn't want to play “cops and robbers.” I did not say more but I was suspicious of Bobby with his McCarthy connections and unconstitutional vendetta against that bum, Hoffa. Later, Bobby asked me to prosecute U.S. Steel for price-fixing and I said no, telling him Roger Blough, the president of U.S. Steel, was a friend; we had worked together closely at Yale in alumni affairs. Still later when the President made me chairman of the Committee on Equal Opportunity in the Armed Forces, Bobby called me over asking me to lay off integration of the

National Guard for political reasons. I told him I worked for his brother, not for him.

I'm sure I misjudged Bobby and that he reached a taller stature later, but we didn't mesh. He was a complex, sensitive man who grew with experience.

**Nominated and Confirmed**

When President Johnson nominated me a U.S. District Judge for the District of Columbia, our paths had crossed only in a couple of ways. Sometime in the early '40s, I had had dinner with him and Lady Bird at Ganson Purcell's house, just the six of us. Ganson Purcell, later head of the SEC, knew him well because Purcell had been staff counsel to the Senate and had come to know Johnson in that connection. Johnson was then a young congressman. He wasn't even in the Senate. It was just a pleasant evening, nothing of any consequence.

Then when Kennedy was killed, after a reasonable interval had passed, I called up Bill Moyers at the White House and said I wanted to come over to see whether the President wanted me to continue as chairman of the Committee on Equal Opportunity in the Armed Forces. I didn't know Moyers, but I thought from what I had read in the paper he was the guy to see. He was sort of, at that time, the administrative assistant to Johnson in the White House.

When I got over there, Moyers said, “Mr. Gesell, the President wants to see you.” I was surprised and pleased. I hadn't expected to see the President. After a few minutes, President Johnson came out and put out his hand, “Well, Gerry,” he said, “how the hell are you?” He was one of those Jim Farley types, who never forgets anybody's first name. He remembered it all the way from having met me once at Purcell's. He may have heard my name because I had worked in his campaign. Whether he ever knew I had anything to do with the campaign I don't know. He asked me to continue as chairman and wrap it up.

I had one other rather extraordinary meeting with him before I was nominated. He was having a meeting of black leaders in the Oval Office and he wanted me to be present. Of course, I went over to the White House. Burke Marshall was there, and Whitney North Seymour, the father, the real Whitney North Seymour, was also there. All around the oval table were black political leaders from Chicago, Texas, New York, Kansas City, various parts of the country. There must have been ten of them. I didn't know what the meeting was about at first but it was soon apparent.

When President Johnson came in he said, “Now, the purpose of this meeting is to explain to all of you why I haven't appointed more black judges.”

He said, in effect, to put it right on the table, its your fault. You've been sending me the most outrageous names that I couldn't possibly get one of them through on the Hill. You've got to get out and get some decent candidates so I can appoint them.

The President didn't have a note in front of him. He was all alone, except for a photographer who hovered around.

One fellow spoke up, I remember, and said, “Well, I sent you [so-and-so].”

“Yeah,” and he said, “you know what the FBI told me?” Johnson reeled off three or four devastating facts about this fellow's past.

Then he picked on a fellow from Texas. And he said, “You're sending me tripe up here. You don't realize what a job I had to get a Jew on that court down there.”

And he went all around, berating each one. They were obviously beginning to get kind of angry with him because the tone had gotten sort of antagonistic to blacks. Johnson wasn't. He was simply talking dirt politics. I began to wonder what I was doing there. I had nothing to do

with the whole problem.

Then he pointed his finger at me, and said, “Do you hire any blacks in your law firm?” I said, “No.” I said, “Do you want to know why?” He said, “Yes.” I said, “We won't take anybody that we don't think will be a partner. We're not going to have token blacks in our law firm. As soon as we get our hands on someone that we think can make the partnership, we're going to take him.” Whitney North Seymour said, “That's our view.” We both said we were looking very hard.

He turned to the other fellows and said, in effect, you see, you've got to send me lawyers or bankers with law degrees. People who amount to something. You can't just send me somebody who is going around passing stuff out at voters' doors and expect that I am going to appoint them to be a federal judge.

Then he said something to Burke, who headed the Civil Rights Division at the Justice Department. And Burke, in a quiet way, said, “Well, I think there are people in all of these cities, and I'd be willing to be helpful in identifying them.” So then Johnson began, and said, “Well, we're moving along.” And Burke said, “You have appointed some blacks.” Burke was being helpful. “Yes,” he said. And he remembered a couple. Burke said, “And you appointed Spottswood Robinson.” President Johnson looked at him straight faced and said, “I didn't know he was a black.”

Well, that went on awhile, then it began to get kind of humorous. Everybody got the message. We were breaking up. As he was leaving, he stopped at the door, saying, “And, by the way, I forgot. I put Marshall on the Supreme Court. Oops!” And he walked out. Of course, he hadn't sent his name up yet. Classic Johnson!

Then I received the most important telephone call in my life. One evening I'm at home packing to go to Los Angeles for Procter & Gamble, one of the clients I was working with. I was going to go out to Dulles and get a night flight. The telephone rang and Peg said it was the White House. The President was soon on the telephone. He said, "Gerry, how the hell are you?" And I said, well, I was fine. He said, "How would you like to be a judge?" I hadn't applied for any judgeship anywhere. I kind of stopped and blurted out, "What court are you talking about?" And he said, "The D.C. United States District Court." And I said, "Well, I don't know. I guess so. I guess it would be all right," or something like that. I was utterly dumbfounded. He said, "Don't be surprised, then, if a lot of FBI agents are sneaking all around asking about you." I said, "Thank you very much, Mr. President."

I didn't tell anybody at the firm. First of all, I didn't know if Johnson meant what he'd said or anything else. And I knew that you had to keep your mouth shut with Johnson because if he had something planned and it became prematurely public, he would get very angry about it. So I didn't tell my partners. I didn't tell anybody. And I went on that night flight out to Los Angeles.

Well, it turns out that our neighbor had been a secretary for Johnson at one time and had married a congressman from Texas, who was living down the block. She telephoned a few days later, saying, "The other night the President called me and he wanted to know whether you have any wild parties going on in your back yard, and what kind of a fellow you are." And she said, "I figured something was up. I told him, no, that you weren't a drunk and that things went along all right at your house. He seemed reassured," she said. Mine was truly a personal presidential appointment.

I have since found out what happened. At least, I believe it's correct, but I can't prove it. Ramsey Clark was Attorney General. He recommended me to be Solicitor General. He sent over to the President a full presentation about my qualifications for Solicitor General. I didn't know about it. He never talked to me about it. I didn't know Ramsey Clark, except during the Judicial Council study. But I think everybody understood, from the kind of life I'd lived, that Solicitor General would be something that any trial lawyer in a similar situation would seriously think about.

Johnson then called in Clark Clifford, so I'm told, and said, “What do you think about this fellow Gesell for Solicitor General?” And Clark Clifford said, “Well, he's a good lawyer. He's a damn good lawyer. But you ought to get somebody of distinction.” Which was a perfectly proper “put down” comment on his part. I wasn't a person of distinction.

And Johnson asked, “Like who?”

He said, “Like the dean of a law school.”

So Johnson said, “Well, what's the best law school?”

Clifford apparently said Yale right then was considered the best law school.

They looked up the dean of the Yale Law School, who is now a judge up in Philadelphia. Johnson quickly found out that he was against the Vietnam War. That was the end of that. His opportunity to be Solicitor General disappeared down the drain. Then he came to Griswold, the Harvard Dean. Griswold accepted. He'd been very active before the Supreme Court and was a very distinguished man. Griswold got the appointment.

What I understand then happened was that there was a vacancy on the U.S. District Court in D.C. There had developed a lot of hard bickering between different Senators who wanted to

put somebody there. Apparently Johnson didn't like to hurt anybody's feelings unnecessarily and he wanted to make an appointment that would be generally acceptable to put an end to this thing. And here was this fellow Gesell. He had all this write-up about him from Ramsey Clark. He sounded like a good one to be a judge. So he decided. He never talked to Ramsey Clark about it. I never received a recommendation from the Justice Department. It was the President's own personal choice. And so he decided to put Gesell in that job, telephoned and did it.

All this just came out of the blue as far as I was concerned. I had a good friend, Jim Rowe. Jim was close to Johnson. I'm sure that Jim in some way or another was consulted at some stage. But I never told Jim or anybody else to help me be a judge. That is how it happened. And so I never had to go around and talk to members of Congress or discuss how I would decide something.

I went down before Senator Eastland's subcommittee. I had raised Cain down in Eastland's district with the Equal Opportunity in the Armed Forces inquiry. They had Leander Perez down there. It was a bad situation for blacks locally. Many whites thought I was having the military take over private life, and there had been personal attacks on me in the newspapers and on the committee. So I didn't know what was going to happen. I didn't have any sponsor. I didn't know any senator well enough to ask him to say a good word for me. So I asked Mr. O'Brian, my partner, to go down with me because I had to have somebody down there with me. I went down to the confirmation hearings with O'Brian and Peg, not knowing quite what to expect.

It turned out there was a list of several people up for confirmation. Eastland sat there. He had his cigar in his mouth, most of it chewed up, you know. The first guy that got up was a nice looking guy. He had four redheaded kids with him and a redheaded wife. And he came from

upper New York State. And he looked like a fine person. I'm sure he was. Eastland looked at him and said, "What do you know about the civil rules of procedure?" Obviously he was in a testy mood.

Then the fellow gave some answer that indicated that he didn't have much practical experience. And before it was over, it was perfectly clear that fellow was in trouble. I believe he never did get confirmed at that time.

Next somebody else stood up and Eastland was at the same old business. Well, let me see what the Bar Association says about you. I began to think, God, what am I doing here, I didn't know what was going on.

Finally he called my name. I stood up. He said, "Mr. Gesell, you have the best FBI report that I have ever seen in this job. Welcome to the federal judiciary." And then he said to the staff, "Let me see that Bar Association rating." And they handed him up the D.C. Bar rating. Well, the D.C. Bar had been a little mediocre about me. After all, I came from Covington & Burling. "No," he said, "I want to see the ABA." He holds it up and it says, "Exceptionally well qualified." He read it out. He gave it back to the clerk, "Welcome, again."

I went through the subcommittee, the full committee and the Senate all in one day. They were about to adjourn. Somebody put it on the fast track. Eastland, or the President, or somebody. I had no waiting around or anything else. Eastland gave me no trouble. There were two other members of the committee. One was a Florida Senator, George Smathers. I knew Smathers because I had been chairman of the board of St. Alban's School, and he was a member. So he gave a flowing speech about what a wonderful person I was. He didn't know anything about me, really. The third Senator was a Republican, Hruska, who had been on the Kefauver

committee. He never said a word. When I got outside, he came up to me and said, “I was all for you, Gesell, but you know, I am a Republican, I thought I'd better keep my mouth shut.” So I had a very easy confirmation. My commission was signed December 7, 1967; and I took the oath of office that day.

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Appendix 1

September 1990

# THE INDIVIDUAL CALENDAR

The Master Calendar system for assigning cases in multi-judge courts was used by most federal trial courts until the 1960's. It served the purposes of the District Court well during the period it acted as primarily a state court with limited federal business. Divorce, landlord/tenant, juvenile and probate cases crowded its docket and dominated its basic federal business under the Master Calendar system. Judges came to work each day and were given the day's assignment by an Assignment Commissioner, who tried to even the load of each judge while giving some judges the kind of cases the judge preferred wherever possible. The system had its faults. Often a case was not ready and if nothing else was available a judge might leave in disgust or to play golf. A single case passing through the process might come before six or eight judges prior to trial who disposed of many motions or other key issues. As the case neared, trial lawyers jockeyed for position. A knowledgeable attorney could manipulate assignments to get repeated continuances or the judge he wanted. Criminal matters awaited the pleasure of the U.S. Attorney.

The basic inefficiency of the Master Calendar led to backlog because delay was readily achieved. The Assignment Commissioner and a couple of Pretrial Examiners made minimum efforts to hasten the flow of work, and the judges asserted no case control.

As special minor courts were created to take on some of the local cases and civil litigation became more complex due to the growth of the city and governmental initiatives, the federal role

of the court grew and the weaknesses of the Master Calendar system came under scrutiny in the District of Columbia and elsewhere.

The focus was on various forms of calendar controls under which criminal and civil cases would be assigned to a single judge from the outset of the case, remaining that judge's responsibility through all phases of pretrial and trial. Several federal district courts in major cities began testing the idea with varying success and encountered the typical resistance to change which all too frequently hampers progress in judicial administration. No matter how fashioned, an individual calendar system made individual judges more accountable, and for some it meant more work. Elements of the Bar who enjoyed the flexibility of the Master Calendar system and feared judicial control of the calendar also objected. The Bar was no exception. Many attorneys acted as local counsel in matters being handled by outside firms and enjoyed steering cases through the Master Calendar process to get "the right judge at the right time."

Nonetheless, backlogs were mounting, particularly on the dockets of federal district courts based in major urban areas. The creation of a truly local court for the District of Columbia in the 1960's stimulated an already rising demand for change. The United States District Court for the District of Columbia had one of the worst records, if not the worst, for delayed disposition of both civil and criminal cases. Congress, the Attorney General and the Federal Judicial Center were each suggesting ways of dealing with the problem nationally and, as always, looking to the U.S. District Court for the District of Columbia to create a workable model.

The Judicial Council of the Circuit made its move in response to these pressures in March 1966 by appointing a committee of practicing lawyers to make recommendations on all aspects of the evolving new court system and to aid in carrying out of the proposed restructuring. Judge

Gerhard A. Gesell, then a senior partner of Covington & Burling, was designated Chairman. The committee came to be known as the Gesell Committee because of its ponderous name. It was officially known as the Committee on the Administration of Justice of the Judicial Council of the District of Columbia Circuit.

The Individual Calendar was but one of many issues studied by the Gesell Committee. However, it was high on the agenda from the outset. The Committee, in a preliminary Memorandum dated January 6, 1967 to the Liaison Chairman of a supporting D.C. Circuit Court of Appeals committee selected by the Council (Judge Leventhal), suggested a two-year experiment; but there was little enthusiasm for the idea, which was promptly vetoed by Judges Curran, Sirica and Jones of the District Court. The Committee then decided that a detailed management study was necessary before the plan could get serious attention. A study was finally initiated after obtaining Ford Foundation financial support, and work went forward to review various practices of both the United States Court of Appeals and the United States District Court for the District of Columbia Circuit, including the feasibility of the Individual Calendar approach.

Gesell became a Judge of the United States District Court for the District of Columbia Circuit in December 1967, and the Committee continued under the chairmanship of Newell W. Ellison, then one of Gesell's partners. The Committee became known as the Ellison Committee. Ellison continued to push the management study forward with vigor and became a strong supporter of the Individual Calendar.[1]

[1] It is interesting to note that the Committee included among its members at various times Wald, Pratt, Flannery, June Green, Parker and McArdle, each of whom later became a judge.

In January 1969, without any prior discussion, Ellison and Gesell each acted to give the Individual Calendar another push. Ellison wrote a strong letter to Judge Hart, Chairman of the Court's Executive Committee, again recommending use of an Individual Calendar. Ellison and Hart were long-time friends, and this letter struck home. Gesell separately urged that pending receipt of the management study the Court should take full control of the criminal calendar away from the U.S. Attorney in order to clean up court congestion and remedy other causes for delay of criminal work.

In late January, the broad outlines of Gesell's proposal were approved by the Executive Committee. The criminal calendar was in particularly bad shape. The U.S. Attorney controlled the scheduling and many cases languished. Twelve judges were concentrating on it under the Master Calendar system. After taking control they began to terminate more cases. Gesell's plan worked. He held a calendar call of the 200 oldest cases, and many fell by the wayside when it developed that key witnesses were unavailable, a defendant had skipped or been convicted solidly for another crime, or the cases proved for some reason not triable. The support of Judges Gasch and Corcoran, who had both had prosecutor experience, was vital to this beginning shift toward calendar control of criminal cases.

By June 1969 the Court's Executive Committee (Hart, Jones and Corcoran) recommended that a detailed Individual Calendar plan be developed. Gasch, Robinson and Gesell drew up a plan; and on June 16, 1969, the Court voted 8-7 after long debate to initiate an individual calendar for criminal cases only. Eight judges "volunteered" -- Walsh, Gasch, Bryant, Smith, Robinson, Gesell, Pratt and June Green. A detailed plan developed under the chairmanship of Gasch was circulated and approved, with some modifications. The first criminal trial under the

new system was held in October 1969. The eight judges worked under the new system for about seven months. It was a great success. Criminal business moved. Calendar calls got rid of old cases. A defendant indicted at the same time for separate offenses came before the same judge. Prosecutors were assigned to individual judges so they were always available to the Court. The judges took control, and the U.S. Attorney was obliged to take positions on the merits of the cases.

On April 23, 1970, the whole Court, including the seven original dissenters who had been handling the civil cases for the Court, recognized the value of the new system and, led by Judge Hart, graciously threw in their full support. Civil cases went on the Individual Calendar assignment on April 29, 1970. Thereafter, each judge became individually responsible for his or her share of both civil and criminal cases.

In May 1970, the final management report from the Ellison Committee issued setting forth in clear, unequivocal terms the value of the Individual Calendar which the Court, in its own halting, tentative way had come to recognize.

In retrospect, this now well-accepted process was the spark that transformed the District Court into true federal status. Judges felt they were now truly [federal] judges. They could determine the cases needing attention and guide their preparation for trial and be held solely accountable for the result. No longer were they plagued by the uncertainties of the old Master Calendar, which often held them accountable for work of other judges they could not understand and often found inconsistent with their view of how a case should be shaped for trial. The trial judge himself pursued dispositive pretrial motions; issues for trial were more clearly defined, and scheduling conflicts became less severe. Because they were free to regulate their own activities,

they were not chained to the bench. This, in turn, sparked an ever-increasing list of opinions and more careful rulings that became the mark of the Court's vital role in developing federal precedent for the cutting issues of the day.

In order to put the Individual Calendar into effect, Court rules were hastily devised to accommodate the new regimen. The precise plan and rule changes were worked out by a committee consisting of Gasch, Robinson and Gesell. Experience soon necessitated minor changes; and the inadequacy of the Court's Rules, which had developed in a patchwork fashion, became more apparent.

The Court authorized preparation of a new set of Rules, which proved to be a difficult task. Gesell chaired a committee and designated three former District Court law clerks[2] then practicing in the District of Columbia to prepare a new working set. This committee has continued to function ever since as rule changes became necessary and in recent years has been chaired by Judge Harold Greene. A system has emerged by which proposed Rule changes are publicized in advance for comment, and a model set has been created that rivals the best in the country.

[2] William Jeffress, Jr. (Gesell); John Aldock (Youngdahl); Robert Higgins (Corcoran).

## Some Comments

The side effects of the Court's shift to an Individual Calendar system were not planned. Apart from taking control of our own business and achieving more efficient disposition of the work, other effects were soon noted:

(1) Each month every judge received a statement showing the state of every judge's calendar. The number of dispositions by each judge, civil and criminal, was tallied, along with a breakdown of the age of his or her remaining cases. Thus, every judge was quietly confronted with how effectively he or she had been in comparison with his or her peers. A healthy but gentle competition emerged. The monthly statement was not publicly released, but it was occasionally referred to in the press.

(2) The new system placed a premium on a judge's skill as a manager. Those judges who kept close tabs on inventory of motions and the stage of each case moving toward trial [or disposition by motion] made the most significant gains against backlogs. There was considerable experimentation, and successful techniques were passed along to fellow judges at the judges' lunch table. Gesell was asked by the Federal Judicial Center to prepare a tape for general distribution illustrating case control techniques. This is reviewed by law clerks and some judges of the Circuit and elsewhere, particularly for indoctrinating new judges.

(3) A judge with a well-managed calendar had more time in chambers to read and to write, and the notion that a judge was loafing if the courtroom was dark gradually disappeared.

(4) When Watergate and other major litigation developed, the Individual Calendar system provided two essential ingredients. First, it assured that a single judge would manage each step of the proceedings, a continuity that would have been absent under the Master

Calendar. Second, the Court's Rules allowed the Chief Judge, who was not in the assignment draw, to assign a protracted matter specially, either to himself or another judge. The monthly statements enabled the Chief Judge at a glance to identify those judges most readily available for special assignment because of the status of their already assigned duties. Chief Judge Hart, Chief Judge Sirica and Chief Judge Robinson took full advantage of this process from time to time.

**RE: CHRONOLOGY OF DISTRICT COURT INDIVIDUAL CALENDAR REFORM**

**March 15, 1966** Gesell designated chairman of The Committee on the Administration of Justice of the Judicial Council of the District of Columbia Circuit. General concern existed over delays in criminal cases. U. S. District Court for the District of Columbia in bad shape. Congress and Federal Judicial Center active. Department of Justice also. This Court has especially poor statistics.

**January 6, 1967** Preliminary memorandum to Judges' Liaison Committee indicated need for two-year experiment with individual calendar. (Circuit Judge Leventhal Chairman of the Liaison Committee.)

Thereafter, Ford Foundation grant obtained and management study of the Circuit Court of Appeals and the District Court got underway. Individual calendar was but one of many issues. Judge Leventhal and Judge McGowan in continuous contact.

District Court not receptive (Judges Curran, Sirica, Jones). Bar also unenthusiastic - manipulating Master Calendar. Controversial issue in other district courts.

**December 1967** Gesell becomes United States District Judge and Newell Ellison [his former partner] continues work of the Committee, including court management study, as Chairman.

**January 1969** Gesell Memorandum to Executive Committee of the Court urging Court control of docket. [at Library of Congress]

**January 23, 1969** Executive Committee of Court approved Gesell's proposal that District Judges take calendar control away from U.S. Attorney in criminal cases and move business by Calendar Calls. Chief Judge Curran gives his O.K. Gesell conducts test calendar call of [200] oldest [criminal] cases.

Ellison again recommends use of the Individual Calendar in letter to Judge Hart.

**June 6, 1969** Court's Executive Committee (Judges Hart, Jones, Corcoran) recommend time to prepare <u>detailed</u> plans for Individual Calendar.

Burger becomes Chief Justice of Supreme Court and immediately urges more current case loads.

**June 16, 1969** Executive Session of Court decided (8-7), after long debate, to start with criminal Individual Calendar only. Judges Gasch, Robinson and Gesell to prepare plan. The eight Judges voting favorably on the idea were assigned to the first Individual Calendar because they volunteered: Judges Walsh, Gasch, Bryant, Smith, Robinson, Gesell, Pratt and June Green. [Note, the last three Judges had been active on the Committee on the Administration of Justice appointed by the Judicial Council.]

**August 6, 1969** Judge Gasch's committee circulates proposed Criminal Individual Calendar Plan developed by the committee.

**September 8, 1969** Above plan approved at the Executive session of Court.

**October 1, 1969** Criminal Individual Calendar Plan in effect and the first trial held that month. Individual Calendar an immediate success. Control taken early by calendar calls of all pending criminal cases assigned to the eight judges carried on at approximately the same time.

**April 29, 1970** Individual Calendar approved for civil cases as well, effective May 1, 1970.

**May 1970** Ellison Committee's formal report setting forth advantages of Individual Calendar issued in printed form.

Senior Judges at the time, Pine, Youngdahl, Keech and McGarraghy, had expressed preference not to participate when queried in January and February 1970, and their wishes were honored. Thereafter, new senior judges accustomed to the Individual Calendar continued on this basis but with reduced draw of cases.

G.A. Gesell
June 26, 1990

Note. I have assembled most of the basic materials to make available at any time. These include most of the key internal Court memoranda and some statistics. G.A.G.
[at Library of Congress]

Appendix 2

## STUDENT RIOTS

In the early months of l969, and during the mid-sixties before I became a Judge, Washington was the scene of frequent political riots, some severe, some mild protests exacerbated by a few trying to make trouble. The Weathermen and opponents of involvement in Vietnam were strident.

Martin Luther King's assassination touched off looting and fierce protests. Howard University was hard hit. Buildings were burned, classes could not be held, and the school administration had completely lost control. There were also protests, far less violent, involving the campus of George Washington University. Chief Judge McGuire enjoined further rioting but nothing happened and the U. S. Attorney joined forces with school authorities to have the orders enforced. In May 1969, new on the bench, I was motions judge and the problem fell into my lap. The press had been notified and were milling around. Everybody was demanding an immediate answer. After taking evidence concerning conditions at Howard University during a brief hearing, I ordered the United States to enforce Judge McGuire's order and asked, toward the end of a hectic day, that the government present an appropriate order to me in chambers that day.[1] Around 5:00 p.m., Deputy Attorney General Kleindienst and Assistant Attorney General Ruckelshaus (sp?) came to chambers and handed me a brief form of order finding the rioters in contempt and directing the injunction be implemented. There were no details. I turned to Kleindienst and asked, "How is this Order going to be enforced?" He looked me straight in the eyes and said, "Most respectfully, that is none of your business." I was shocked and immediately suspicious. In reply, however, I simply

[1] Howard University is federally incorporated. It receives some federal funds, and the United States has a representative on its Board of Directors.

said firmly, "You may be right, but if I don't know I won't sign the Order." Kleindienst got red in the face, talked quietly to Ruckelshaus, who seemed more relaxed, and then told me his horrendous scenario. The students were to be given a midnight ultimatum. Stop, or face arrest at 12 midnight. U.S. Marshals had been ordered in from other cities. The National Guard was alerted to come in if necessary. Hundreds of police were to surround the campus. I was certain in my mind that this was stupid, unnecessary and guaranteed a violent confrontation with serious risk to life. A similar approach had led to injuries on the Howard campus. Washington newspapers had noted various outsiders coming toward Howard to incite the situation. Thus Kleindienst confirmed in justification of his plan when I objected, larding his presentation with words about Reds, scum, etc. I said I would not sign the Order and it looked for a moment that the Justice Department men might leave, but Ruckelshaus calmed Kleindienst down, with the latter protesting that he had orders from Attorney General Mitchell, who had been to the White House. Finally, they asked what I would suggest. I said:

1. U.S. Marshals for the District of Columbia would handle.

2. Disband the alerted National Guard.

3. Pull back the Metropolitan D.C. Police.

4. Broadcast [on radio and by flyers distributed in the area] to D. C. parents to get their kids home because there might be trouble.

5. Cancel the [don't impose a] midnight deadline.

6. Have U.S. Marshals for D.C. in small numbers enter the campus and arrest the ringleaders after making it clear over radio that the injunction meant what it said.

It began to rain a bit. They agreed, after much talk. A group of 20 made the decision to represent the protesters and stay on campus and be arrested if the Marshals came in.

The ringleaders were tried before me after their arrest. The riot was over. No one was hurt.

Students at George Washington University, represented by the Arnold & Porter law firm, were counseled. The leaders pled guilty to contempt and were sentenced, like those from Howard U., to light, lenient punishment.

There is no record of these events [meeting in chambers with Kleindienst and Ruckelshaus] in any court records. There was no transcript, no press statement by anyone.

Howard University v. Abell, et al., Civil Action No. 1169-69.

Arrests at Howard University, Misc. Nos. 32-69, 34-69, 35-69, 37-69, 42-69, 44-69, 45-69, 48-69, 51-69.

George Washington U. v. Mann, et al., Civil Action No. 1318-69.

Appendix 3

## LORTON YOUTH CENTER II

The Youth Corrections Act was a progressive example of much needed penal reform. Young offenders who appeared to be likely candidates for rehabilitation were committed for indefinite terms, usually six years, and could be paroled at any time they had accomplished education and other goals and were believed ready to return to a life without dependence on crime.

Alsbrook had been put in this program by me, but I was advised there was no room available in the special Youth Center facility and that he would have to be placed in the adult facility at Lorton. This was obviously not an isolated case; and it appeared that the Mayor, Walter Washington, was compelled for bureaucratic reasons to give the Youth program short shrift. More significantly, it was, in effect, an executive challenge to judicial authority and an indirect local repeal of the Youth Corrections Act.

I ordered the Mayor to build a new Youth Center, deciding that it was an occasion to start vindicating the Third Branch, which had been hampered in recent months by fund cutbacks and staffing restrictions.

Mayor Washington was an outstanding public servant whose common sense and understanding of the city played a major role in getting Home Rule off to a good start. We were friends. I had eaten many luncheon sandwiches with him as a lawyer working with a small group for Home Rule. He sent Gil (Gilbert) Hahn, Chairman of the City Council, to see me. We talked in chambers. Gil said the city could not find the money and the Center could not be built. I kept a straight face and said, "I'm very sorry for the Mayor." Gil looked startled and asked why. I said, "An

order is an order. You know that. You're a good lawyer. Contempt is how orders are made to work." He left somewhat upset. A few days later he came by again and simply said, "Judge, you'll be pleased. We found the money." Youth Center II was built.

Someday this precedent may prove useful.

United States v. Alsbrook, 336 F.Supp. 973 (1971).

Appendix 4

## HOUSE COMMITTEE ON INTERNAL SECURITY

In October 1970, the House Committee on Internal Security [UnAmerican Affairs Committee "HUAC"] was on its last legs and almost forgotten. Congressman Ichord was Chairman. Suddenly I was faced with a complaint attacking the Committee that was difficult to believe. Plaintiffs provided documentary proof that the Committee had assembled a long list of individuals it believed were Communists or otherwise out to destroy the country by spreading their allegedly un-American beliefs. HUAC proposed to send the list to the officials and leading alumni of colleges and universities asking that persons listed be prevented from speaking on the campuses to student groups or faculty. The complaint asked that the Committee be enjoined from carrying out this obvious intrusion on First Amendment values, attempted in the hope of stemming subversion. I could not believe HUAC was seriously undertaking such a brash step, but it was soon clear Mr. Ichord planned to go full speed ahead. I felt something had to be done. Obviously a United States District Judge could not enjoin a committee of the House of Representatives, but HUAC had instructed the Public Printer to run off its implementing Resolution and the list for wide mailing. I enjoined the Public Printer from doing so.

The first reaction from the Hill was Ichord's rage. He had an issue! By speeches on the floor and elsewhere he sought to draw me into a debate. I did nothing. HUAC backed him up, but it needed approval of the House before the Public Printer could be directed to ignore my order. HUAC failed. First, it watered down the Resolution to meet criticism and finally the project was abandoned.

This was not immediate and my action had stirred up the old Martin Dies, Nixon-type of Red

baiters. Some nasty telephone calls and letters came in and for a while we were threatened by a man with a gun who came to my farm in Virginia on several occasions when I was not there, saying he was going to kill me. We took some precautions and the Loudoun County Sheriff ran him off.

This early small experience indicated that a deeply entrenched fear of alien ideas still remained in the minds of some people, and I was to learn how easy it was to play on these fears for political purposes as more serious cases came my way during the Nixon period. Indeed, looking back on the episode involving the Howard University riot, which resulted in my confrontation with Deputy Attorney General Kleindienst, it became more likely that his proposals for quelling the turmoil were more shrewdly political and less stupid than I had come to believe.

Hentoff v. Ichord, 318 F. Supp. 1175 (1970).

Appendix 5

**PENTAGON PAPERS**

The Pentagon Papers case was really two cases proceeding through two Circuits toward a final ruling by the Supreme Court in June 1971. The New York Times, and The Washington Post, close behind, had portions of the papers and were proceeding to publish a series. The Department of Justice sought to enjoin publication. In New York a brand new judge, Judge Gurfine, sitting in motions, had the application for a temporary restraining order aimed at the Times, and I was randomly assigned the case in the District Court in D.C. in which the United States was seeking a temporary restraining order aimed at The Washington Post "off the wheel" by our random selection process.

The complaint against the Post named the paper and about eight top managers and newspaper reporters, including Kay Graham and Chalmers Roberts. During the following days I held court often to meet new developments with the constant pressure of publication deadlines on the one hand and the effort of the Department to block whatever was going to come out each day. There was no time to write. Rulings were oral and, of necessity, almost immediate. At every stage, without fail, I refused to enjoin the Post and refused even short "stays" of an hour or two as appeals followed. Every other Court enjoined publication for brief intervals. (The U.S. District Court for the Southern District of New York, both circuit courts and the Supreme Court.)

Judge Gurfine issued a temporary restraining order after calling me and learning that I was going to do the opposite. When the ten decisions of the Supreme Court Justices came down, I had no complaints! The only point of these notes is to mention events not found in my papers to illustrate the extreme tactics employed by the Nixon Administration to prevent publication. A

deliberate program of deception, misrepresentation and meanness was used to sway the result.[1] Having gone through it and the earlier encounters with Kleindienst during the student riots, when Watergate came along the excesses then revealed seemed almost normal.

I denied the TRO and refused a stay. Almost immediately the Court of Appeals sent the matter back to me for further consideration and stopped the Post's presses. This was on a Friday [Saturday a.m.] and I was directed to act by 5:00 p.m. on Monday. The courthouse was closed that weekend for some repairs, and I asked counsel to come to my house to arrange the Monday hearing. Government lawyers came in force and prepared. The Post had a lawyer from New York who seemed somewhat bewildered but ably assisted by a bright younger man who was far more aware of the issues.

We got off to a rocky start. Assistant Attorney General Mardian, who headed the government team, had persuaded me it would be necessary to hold some of the Monday hearing in camera because of the sensitive security issues supposedly present. At the outset he said, "Of course, it will not be proper for any of the defendants to be present." I was flabbergasted. When I expressed surprise he indicated his position had been cleared at the highest level. I replied that as far as I was concerned the United States of America was not Russia and that I would dismiss the complaint unless his orders were rescinded. I told him to use the telephone in my upstairs study. He made a call, I presumed to the White House, and said the defendants could attend when he came down. To focus the issues I suggested that the government should present its ten most sensitive examples at

[1] Solicitor General Griswold has recently (1991) revealed that even he was misled into making false representations to the Court of Appeals for the D.C. Circuit and the U.S. Supreme Court.

the closed hearing to demonstrate why prepublication restrictions were necessary. This was agreed and a set of the papers was left with me at my request as the lawyers left.

In a few minutes, while I was thumbing through the papers, there was a sharp knock on the front door. Opening the door I found three large men in military uniform with white bands across their chests and side arms who said they had come for the papers. I said no. They insisted, saying I had no security. I was angry and told them to buzz off or stand around outside, that I had security because the papers would be hidden under a sofa pillow. They left. Clearly somebody was playing hard ball.

Monday's hearing resulted in my again denying injunctive relief and up the case went again to the Court of Appeals which, after issuing a stay, affirmed by a split vote. The transcript of the in camera proceedings, now unsealed, is among my papers. What it does not reveal is the Administration's effort to discredit the Court. During the closed hearing the national press, now fired up by the threat of government censorship, was milling around outside. A group of Defense Department public relations types were spreading the word that I was about to release our country's most secret war contingency plans and that lives were somehow threatened. A Chicago paper took the bait and ran a scare story that morning. Calls to chambers sought confirmation. It was a wild morning. But there were no facts presented at the hearing to support this canard. The government's witness on this point was a former CIA man detailed to the Pentagon who said certain material constituted these vital war plans. I smelled a phony and asked to hear from a knowledgeable General familiar with the subject. A General promptly appeared and said the planning paper was so out of date he hoped our enemies would think it was the real thing, or words to that effect, as I now recall.

The Justice Department tried another false ploy that fell flat. At one moment I was set back

to learn from the government that a document revealed the name of a Canadian diplomat who it showed was assisting our people from his post in the Far East. Counsel noted that this was a form of treason that violated the British Security Act and that disclosure might result in his execution. Here, indeed, was cause to reflect. I noticed one of the defendant's, Chalmers Roberts, taking a book to the Post's counsel who shortly rose to read into the record the text of several books which had carried the Canadian's name and revealed his useful service to this country.

To this day I don't know what got the White House so excited. The papers held few secrets. Nothing earthshaking. All code references, precise dates of transmission and similar notations of intelligence value were not involved. Indeed, the material was boring. Ellsberg, who released some of the material, was a sharp critic of the Nixon Administration; and they tried to compromise him later, as Watergate inquiries disclosed, but it is unlikely he participated in the almost violent effort to keep the Pentagon Papers secret. Perhaps it was a mixture of hatred of the press and a legitimate concern expressed by Macomber that foreign governments would hesitate to share intelligence and diplomatic confidences with us if we couldn't control the leakage. Censorship via legislation such as the British Security Act cannot be squared with the First Amendment, but it was a closer call than many realize. It is easy to mislead judges and the Solicitor General in this murky intelligence area, and this experience stiffened my resolve on a number of occasions when comparable considerations were pressed by the Bush Administration during the case of United States v. Oliver North.

It was apparent that the Administration felt no restraint and was willing to twist facts to gain advantage.

Publication of the Pentagon Papers hurt the United States, not because our security was undermined or vital national defense activity was disclosed. The serious consequence of publication

was the fact that foreign governments were given a chance to question the wisdom of secret diplomacy when so many confidential discussions with our representatives became public. President Nixon's trip to China was being explored through third country channels, and a leak would have been disastrous. I learned later that there was genuine concern at the Department of State that disclosure of our inability to honor confidential diplomatic discussions might chill future plans like this then underway.

But the cat was out of the bag. Our government had failed to keep its secrets secret. It, not the press, was at fault.

## WATERGATE

Chief Judge Sirica took on the original Watergate case. This was a major undertaking that earned him national and international recognition. But Watergate could not be confined to the original break-in. Many cases and novel legal problems followed. As different matters came up Judge Sirica farmed them out to different Judges, but primarily to me.

My involvement covered a variety of different matters in 1974, including the following.

(1) The indictment and trial of Ehrlichman, Colson, Liddy, Barker and Martinez. (Cr. No. 74-116)

(2) The indictment and trial of Dwight Chapin. (Cr. No. 990-73).

(3) The indictment and guilty plea of Donald Segretti (Cr. No. 828-73).

(4) The indictment and guilty plea of Egil Krogh. (Cr. No. 857-73).

(5) A civil suit arising out of Judge Sirica's case, United States v. Mitchell, by NBC, ABC, CBS, et al., to obtain and broadcast Nixon tapes in evidence in the criminal case. (Misc. No. 74-128). 386 F.Supp. 639 (1975). Subsequent Order of Judge Sirica on 4/4/75 reversed me, and then the 10/26/76 Court of Appeals decision reversed Judge Sirica.

(6) A civil action to set aside the discharge of Archibald Cox as Special Prosecutor that questioned the legality of the firing by Robert Bork. (Nader v. Bork, Civil Action No. 1954-73. 366 F.Supp. 104 (1973)). Court of Appeals Order 8/20/75 dismissing appeal as moot.

Other cases were assigned to Judge Hart and Judge Bryant. We were all in the center of a

growing storm under ever-demanding press attention and called on to confront difficult constitutional problems in the face of ever-changing facts. The parallel proceedings on the Hill affected our own timing and certainly intruded on efforts to maintain an atmosphere of judicial calm and thoughtful deliberations. For example, Senator Ervin, Chairman of the Senate Select Committee inquiring into Watergate, in a rush for headlines sought to subpoena tapes[1] from President Nixon which were vital to Judge Sirica's criminal case and pertinent to the Ehrlichman criminal case before me. This would have compromised the trials and increased pretrial publicity to some defendants' prejudice. Judge Sirica asked me to handle the subpoena, which Nixon resisted; and with tongue somewhat in cheek, I sustained President Nixon's claim of Executive Privilege (see Letter from President Nixon to me dated February 6, 1974) to keep the judicial proceedings before Judge Sirica on track. Similarly, the managers of the House Committee considering possible impeachment of President Nixon were concerned with our work but more considerate. They were willing to delay a bit if the Ehrlichman matter could be moved to a conclusion rapidly, and I gave assurances to the lawyers for the Majority and Minority that the Ehrlichman trial would be done by about the end of June -- I hoped.

The only defendant in the Ehrlichman case assigned to me who attempted an excessive defense was Ehrlichman himself. Colson pled guilty. Liddy offered no excuses. Barker and Martinez correctly claimed they had acted to protect the security of the United States on White House orders from Hunt, Colson, et al. It was Ehrlichman's defense that brought me into a sharp

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[1] Senate Select Committee on Presidential Campaign Activities, et al. v. Richard M. Nixon, individually and as President of the United States, Civil Action No. 1593-73, 370 F.Supp. 521 (1974), affirmed, 498 F.2d 725 (1974).

confrontation with President Nixon during pretrial discovery.

The trial itself was more or less routine once a jury had been selected. The defense was feeble and arrangements worked out with the press went fairly smoothly. Pretrial was a different matter. The course of the trial depended on whether or not President Nixon was personally involved and whether claims of national security or the suggested right of the President to withhold White House materials needed by the defense were sustained. Rumors were flying around. I did not want the trial to start unless it could be finished. It was necessary to pin the President down and settle the merits of any obstacles presented.

Initially Ehrlichman suggested he had acted on orders from President Nixon to protect national security. He made elaborate requests for papers from the Defense Department, CIA and Justice Department. The President denied any advance knowledge of the break-in into the offices of Ellsberg's doctor or his staff's participation in the planning in an April 29, 1974 letter. However, he made a broad attempt to protect White House and agency documents on the ground that it was his overriding responsibility to protect national security. I struck down this obstacle in a long opinion, United States v. Ehrlichman, 376 F.Supp. 29 (1974), 546 F.2d 910 (1976). The way was still open for Ehrlichman to press his claim to examine government records of various security agencies, but he made no effort to do so, making it crystal clear that his claim that he acted for reasons of national security was merely a ploy.

The really bitter confrontation concerned Ehrlichman's request to see his own papers. They had been taken from him and sealed in a White House vault when he was fired by the President. Informal requests for access for himself and his lawyer had been denied. I held a hearing and supported Ehrlichman's demands, indicating that any secret or irrelevant material could first be

screened by me in camera. The White House still resisted. Obstacle after obstacle emerged. Ehrlichman could look at the papers alone but could not copy them or make notes. Then when I said he could make notes and have a lawyer, observers would be required to be present to overhear lawyer-client talks. Hours were limited. No table or chair would be provided. Counsel for the President, James D. St.Clair, a respected, experienced Boston trial lawyer, insisted he was following presidential instructions. I hinted in open court that this intransigence could lead to dismissal of the indictment against Ehrlichman, but the White House refused to budge.

On June 10, 1974, I finished an opinion directing the President to show cause why he should not be held in contempt or the indictment dismissed. This opinion is in my papers, but never was issued. I realized that if it issued, President Nixon would, in all probability, be impeached. Perhaps I had somehow failed to impress the White House with my hints that dire action would be taken and given the national consequences of my proposed action, I decided to make a final effort.

I asked St.Clair and Ehrlichman's lawyer and the prosecutor to come to chambers, and after repeating my clear demands for release of Ehrlichman's files, I appealed to St.Clair's sense of fair play. I had been involved in several antitrust cases as a lawyer and knew he was a successful attorney in this area. I said, "You must make it apparent to the President that he is being unfair. Imagine how you would feel if the U.S. sued one of your clients for criminal antitrust violations and the Department of Justice refused to show you papers its people had taken from your client's files and there were no other copies." He said he would take my message to the White House. The President gave in, probably never realizing how close he came to disaster -- or did he know?

Finally, it was necessary to get the President's sworn testimony before the jury. His letter to me of April 29, 1974 was not enough. The Jefferson and Burr controversy and Marshall's ruling

were the only genuine precedent. I decided to try interrogatories, drafted a short, precise set, boiling down Ehrlichman's lawyer's long-winded, mostly irrelevant efforts, sent it to the White House and the sworn responses were read to the jury.

There was in this unusual case always the unexpected until the very end. When we reached the day for final argument, the Courthouse was an armed camp. The cellblock had been seized by armed convicts and my courtroom was closed. I arranged to have the sequestered jury taken to the old courtroom used by the D.C. Court of Appeals where there still was an ancient jury box and held forth there, sharing Chief Judge Reilly's chambers. An old friend, he was most helpful and handed me a short nip of bourbon when the verdict finally came down.

The various letters from the President are in my papers and may take on more meaning against this background. The Watergate scandals would never have occurred if the many lawyers involved had remained true to their profession; but their failure did not, in the end, undermine the rule of law.

# SIRICA - WATERGATE

A high-visibility case places enormous pressure on the trial judge. This is especially the situation when a matter of wide national interest is filed in the U.S. District Court for the District of Columbia because Washington, D.C., harbors an experienced, cynical, widely varied national press corps, foreign and domestic: TV, newsprint, columnists, magazines; and when a high-visibility story develops, they never stop reporting, even when there is nothing in particular to write about.

Judge Sirica handled the intense press attention of Watergate like a pro. There were often press meetings as he started from his home to court in the morning and he seemed always available for questions. He became an enormously popular public figure during the turmoil of Watergate.

Within the Court, he turned over the day-to-day affairs of the Chief Judge to Judge Hart and exercised his prerogative as Chief Judge to assign and control the ever-increasing volume of Watergate-related matters. He sent many key cases to me; campaign contribution matters to Judge Hart; and some other matters to Judge Bryant.

Judge Sirica and I were not involved away from the courthouse. Our friends and interests were different. During Watergate we worked together intimately and without friction, often seeing each other daily.

The pressures of the trial itself on Judge Sirica seemed to grow. It was obvious that his entire judicial career would be largely remembered by how he handled the major Watergate trial, which he had assigned to himself and cleared his decks to handle. There were many novel issues; some novel defense motions had no precedent. He hated graft in government and wanted the truth to come

out, but because he had come to the bench through local Republican politics he sensed every ruling he made favorable to the defense would be looked at by those who didn't know him with "cover-up" suspicion. He wanted to be fair to both sides, and the pretrial motions made it more difficult to handle. He could not sleep too well, would pace up and down the corridors and often checked difficult decisions with former Chief Judge McGuire and other judges he might find available.

Judge Sirica's chambers and mine were on the same floor. I was also deeply involved in Watergate cases. Both of us were very early risers and usually the first two judges arriving at the courthouse. He often came and talked with me in my chambers before he opened court in the morning; and sometimes his law clerk, following his suggestion, would check his way of expressing a ruling with me. He could ignore advice as readily as he would accept it and always did what he thought best. I felt I helped him a bit more often than not, but not always. Once when I ruled that the press could have access to tapes received in evidence in his case, when the issue came up in a collateral matter he turned over to me, he promptly took the matter back, ruled the other way and only much later the United States Supreme Court agreed with my view.

There were times, on the other hand, when I was successful in reworking the text of a ruling he proposed to make and helped to clarify the point he wanted to make. He had a short temper on occasion, and I would counsel him to keep his legitimate anger over some of the legal theatrics to himself.

He was very excited but cautious when McCord's famous letter came to him sealed. He speculated it might contain a confession, a bribe, or perhaps a wholly irrelevant scandal, designed to hurt the President or someone else. When the letter was finally opened in the presence of the FBI and interested attorneys, he knew the case had broken wide open and what followed is history.

When Congress later turned to the Independent Counsel problem and began to fashion a permanent statute, some on the Hill had the idea it would be desirable to put the appointing power in the United States District Court for the District of Columbia. Judge Sirica and I wrote a letter turning the proposal down after consulting the full Court. None of us had any enthusiasm for the idea.

The strong support Judge Sirica received from the Court of Appeals, which, at that time, recognized the difficulties under which he had labored, and his own strong stance and excellent public relations, all combined to make him a national hero. People trusted him and he helped to bring influence and prestige to the District Court and the federal bench generally.

4/10/91 Gerhard A. Gesell

## THE STATUTE OF LIBERTY JULY 3, 1986 NATURALIZATION PROCEEDING

Once a month our Court holds special naturalization proceedings to swear in about 50 or more new citizens. Unlike some other neighboring United States District Courts, our proceedings are bit more elaborate. There is a special speaker chosen by the Bar Association, the Marine Color Guard advances the Colors, the presiding Judge makes some remarks, and there is a coffee reception afterwards under the auspices of the Daughters of the American Revolution and other patriotic groups. It is simple but impressive. On occasion we have held these special proceedings at the Archives in conjunction with anniversaries of hisrorical events. Once when I presided, Ross Perot gave a very moving talk, and all four pages of the Constitution and the Magna Carta were on display.

1986 was the year to celebrate the one hundredth anniversary of the Statute of Liberty and elaborate festivities were scheduled in New York City stretching over several days during the July 4th holiday, with everything from the magnificent tall ships to Elvis Pressley "look-alikes." Since I happened to be the Morions Judge in early July, I became unexpectedly embroiled in the unusual series of events summarized below.

It all started with a March 12, 1986, letter from the Immigration and Naturalization Service of the Department of Justice, the body responsible nationwide for processing applications for citizenship, whose duty it is to make certain that all technical formalities have been satisfied. The letter

advised that on July 3rd there would be a national swearing-in ceremony to be broadcast by ABC television from Ellis Island, with similar judicial ceremonies tied in by satellite from Los Angeles; St. Louis: Washington, D. C.; Miami: Independence, Missouri; Boston and Philadelphia. The letter stated that "The Chief Justice of the Supreme Court is scheduled to swear in applicants at each hearing *via* the televised hookup." "The TV production will be in good taste and will respect the dignity of court proceedings. President Reagan and the Chief Justice would not be involved had they not exacted such a promise from Wolper [the producer]. "

We heard that as many as 15,000 new citizens would be taking the oath from the Chief Justice. It was suggested we hold our normal full naturalization ceremony on the steps of the Jefferson Memorial and that ABC would take shots of our ceremony during the televised portion emanating from New York. This seemed like a good idea, considering the assurances and high sponsorship, but details were lacking and many practical questions that arose could not be answered when we asked questions.

Unfortunately, there was nobody in charge. Wolper, a Hollywood producer, was in charge, but all detailed arrangements were in the hands of AEC. Uncertainties continued. Finally a meeting was set up at the Jefferson Memorial. I went with a Deputy U. S. Marshal and court personnel. Park Service, Naturalization, and Bar Association people were on hand. We were told the program should be so arranged that the Chief Justice would give the oath by TV monitor precisely at 9:07 p.m., but no

thought had been given to the formal court proceedings that, by law, had to precede this event. After much discussion the various functionaries took heed of this fact and tentative arrangements were made. We needed at least 125 chairs, tables, parking spaces, a rainy day alternative because there was no shelter, and it looked as though the normal tourist traffic could not be held back. Still no one was in charge. With the aid of the Park Service and the Bar Association, some of these gaps were filled but the Naturalization and Immigration people offered no help and we broke up with little nailed down.

I went off to Maine the middle of June for a week thinking that everything might nonetheless fall into place. When I returned I found that ABC had finally supplied more details about its plans. Someone had told them the new citizens would sing two songs after taking the oath -- America the Beautiful and This is My Country -- and immediately after the oath was given by the Chief Justice a commercial would be televised during the two-and-one-half minute lull when the Chief Justice would fly by helicopter from Ellis Island to join the President on Governor's Island. I was told that when the Court staff objected to the songs, pointing out it would be dark and the group might not know the words, ABC confidenrly had replied they would "dub in" sound and "pan" *from* a distance. In other words, they would fake it if need be! It had further developed that the Chief Justice's oath would be purely symbolic and wirhout legal effect because he could only administer a binding oath to those in his immediate presence on Ellis Island. I was very troubled.

This all seemed most unfortunate. I couldn't believe the Chief Justice was aware of what was going on and I could not allow show business gimmicks to take over the court proceedings. I reported my information and concerns to the Chief Justice's personal staff and public relations people, made several calls, but never heard a word. The Supreme Court was still in session, the Chief Justice had just resigned, and impeachment proceedings involving a judge of another Circuit had arisen. These and other matters naturally had higher priority. I simply couldn't get through.

After waiting a week I told Chief Judge Aubrey Robinson I thought our participation should be dropped. A few telephone calls indicted that some judges in other cities chosen to be involved in the affair were becoming concerned and one had already cancelled, saying "the Courts are not in the entertainment business."

We decided to cancel and I wrote the Immigration and Naturalization Service saying I felt arrangements were not in good taste, as promised, and that we were not going along because the Court proceedings were being turned into a pageant over which I had no control. Because various newspaper reporters, rival broadcasters and some members of the public had been asking questions about our court's program and some had planned to cover or participate, we released the letter, without comment, to the public and the other members of our Court.

The response was varied. ABC said it wouldn't lose any money, thus emphasizing its narrow focus. David Wolper, the impresario who had directed and designed the Liberty Week-end,

however, was angry. He pleaded with me over the telephone but to no avail, He was crude and vulgar. Soon the Commissioner of Immigration and Naturalization, with his lawyer, met with Chief Judge Aubrey Robinson and me for a full hour, putting on every kind of persuasion, but we stood our ground. We assumed Wolper had agitated someone at the White House. False rumors floated around that I had been disciplined by the Chief Justice and was changing my mind and it was apparent that Wolper was pulling every string. This increased the publicity until this rather simple decision became a national news event kicked off by a front page story in the New York Times on June **28, 1986,** headed "Judge Citing Commercials, Drops TV Citizenship Oath." This was followed by another piece in July **4, 1986,** headed "Judge Gesell Has it His Way, Without TV." The telephones rang off the hook. I must have had a dozen requests for interviews on talk shows and the press built things up in their usual fashion.

I avoided getting involved in any way and turned to arranging our own program €or 4:00 p.m. on July 3, in the Ceremonial Courtroom at the Courthouse. The Immigration and Naturalization people remained unresponsive and our own people had to write or telephone many prospective new citizens to be sure all were aware of the change of plans for fear belated written notices from Immigration and some of their half-hearted calls might be insufficient.

Immediately I had my own TV problem. While the federal courts have strict rules against TV *or* radio or photographers in court, ceremonial occasions may nonetheless be opened to these media in the discretion of the presiding judge. ABC had

negotiated an exclusive with Wolper for Liberty Week-end and NBC and CBS were mad. They asked to have their cameras at our courthouse. Public TV and radio, Time Magazine and others also wanted to cover. By this time there appeared to be considerable interest in what a normal naturalization ceremony was like and I thought if the public could see and hear what we were going to do the contrast with the artificiality of New York would make a point. Accordingly, I opened the proceedings to the media with the following strictures.

(1) No commercials to interrupt proceedings would be shown.

(2) Only one stationary TV camera would be allowed -pooled coverage.

(3) No lights in eyes of audience or Court.

(4) Two still photographers to remain stationery and pool pictures.

(5) One small radio microphone.

The press fully cooperated in every way. There was no disturbance or intrusion. The 99 new citizens and many others filled the Ceremonial Courtroom to capacity and all went smoothly. After my remarks,[1] I went down and shook hands with some of the new citizens. To placate the still grumbling Naturalization people I told the new citizens they could take another symbolic oath from the Chief Justice on the Jefferson Memorial steps at 9:00 p.m., but only twelve went. I didn't.

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[1]See copy, attached.

This was our first experiment with full TV-radio mass press coverage of a court proceeding and fortunately it went well.

Our decision not to allow commercials in the midst of a court proceeding struck an unexpected response. There were a number of favorable editorials and wide press coverage. Members of the public call chambers indicating strong approval. The mail was very heavy -- all favorable. A few samples are excerpted below and give the tone of the unanimous reaction that came my way. A judge is so used to hate mail that these often thoughtful letters carried a double significance. In a small way, perhaps, respect for the Federal Courts was enhanced.

Here are samples[2] from letters received:

> Just a word to let you know how much your highly unusual (in these days) move was, and how much your personal decision as a judge, has done for many of us. I'm sure there are many more of us than you will hear from.

* * *

> Thank you for understanding that becoming a naturalized citizen of the United States is a decision made with much thought and feeling.
>
> Thank you for understanding that a landmark in my life was not for the benefit of commercial television, just as it should not have been in July, 1986.

* * *

> To introduce commercialization into such ceremonies is to reduce, if not desrroy, the dignity and significance of the naturalization process, and the office which you hold.

* * *

[2]None of these excerpts are from letters written by friends or acquaintances, although many in this category also wrote.

I want to tell you how much I admire you for deciding not to participate in a "spectacle." As an immigrant myself becoming a citizen is a wonderful special spiritual experience - not to be commercialized.

Congratulations for your courage and integrity. It is not easy to go against the "tide."

* * *

My thanks to you for emphasizing the serious commitment of citizenship by refusing to make it part of a commercial entertainment. The dignity of the Court should not be seen as part of the "fun."

Many of us are grateful for your stand.

* * *

Please accept the gratitude of one citizen for your action in refusing to participate in a lowering of the dignity of 'the U.S. courts.

I hope, with modest expectation of fulfillment, that your refusal to join in a televised, commercial-sponsored administering of the oath to new citizens on July 3, that this will be educational for some of our fellow Americans. I fear the act may be lost in our national hoopla. But better this than acquiescing in a demeaning scene.

* * *

Please accept my deep thanks for your wisdom, sobriety, dignity and good taste in withdrawing from the Statue of Liberty gala in the manner that you did.

I am happy that there is someone like you, who refuses to surrender our values to the show business managers of our country.

* * *

Please accept my congratulations for your having resisted the attempts to make your official duties a part of the circus that will be televised next weekend.

* * *

I agree with you completely -- a naturalization ceremony is not commercial entertainment. Keep the hucksters out of it!

* * *

Thank you for having the courage to speak out.

* * *

Perhaps your welcome quiet exercise of judicial prerogative will help reverse an ugly and destructive trend. In any event, it was heartening and inspiring to find someone in public office willing to stand and say, "No farther."

* * *

The quiet dignity of a court room is the proper place to officially welcome our immigrant friends. A judge whose solemn duty is to administer the oath should not be discarded or replaced by a voice and picture on TV. New citizens deserve personal attention not an Orwellian 1984 substitute.

* * *

May I congratulate you on the courage and the wisdom you showed in refusing to make a naturalization proceeding a part of a television show. You have shown that even in this entrepreneurial age not everything is to be measured by the bottom line.

* * *

We read of your refusal to participate in the July Fourth parody of patriotism and your decision to swear in the new citizens on July 3rd. We support your decision with enthusiasm. This country stands to lose all of its values to commercialism. Your stand helps to slow that process.

* * *

It is heartening to know that one voice survives with the courage to speak out against the nauseating cheapening of the high standards on which our country was based.

* * *

I applaud your decision to abstain from participation in the commercialization of the statute of liberty. I only wish that there were more leaders of integrity and taste.

* * *

My parents were immigrants who arrived in Boston years ago. In their lifetime they instructed and were sponsors €or many "new citizens" in the Northampton/Hadley, Massachusetts area. The induction of these people was a solemn and most often moving occasion. It was done with

dignity. I hope if they were alive today, they would be saddened by the carnival atmosphere of today's Liberty celebration.

The fact that everything went so smoothly and many possible mistakes were avoided was due to the interest and dedicated work, under pressure, of LeeAnn Flynn and the naturalization team in the Clerk's Office.

Gerhard A. Gesell

October, 1986.

Remarks at the Naturalization Ceremony
July 3, 1986, by
Gerhard A. Gesell
United States District Judge

This formal court proceeding is required by law. Congress has for many years placed upon United States District judges like myself the pleasant responsibility to complete the process that brings you into full citizenship. Every month naturalization proceedings like this are held here and elsewhere throughout the country under prescribed rules and procedures. It is traditional for the presiding judge to make a few remarks at this point to emphasize the significance of the oath you have just taken.

This nation has had a long-standing and continuing willingness to welcome and accept men and women from all lands who seek citizenship here. The Statute of Liberty being honored in ceremonies today symbolizes that commitment. We have liberalized uniform rules of naturalization, always recognizing, as Chief Justice Marshall declared in 1824, that a naturalized citizen becomes a member of the society, possessing all the rights of the native citizen and standing in the view of the Constitution on the footing of a native." [Osborne, 22 U.S. 827.]

By accepting citizenship today you are now a part of a great experiment in government which has relied heavily on the talents and energies of its naturalized citizens. Indeed, if you think about it a moment, you will realize we are a nation of immigrants trying to make a unique experiment work -- an experiment whose ideals are so forcefully stated in the

Declaration of Independence and embodied in our Constitution. Our government is unlike that existing anywhere else in the world. Ours is not a government originating in takeover and fraud, or one imposed by designing individuals for their personal advantage. Nor is this a country of military dictators, hereditary rulers or one governed by a self-chosen rich elite who control the destiny of the poor.

Our experiment in government has a system to assure that the will of the people, not the will of its officials, shall decide what is best for the public good. We seek to perfect a society where those who live here have the right to be left alone, to speak out for what they believe is best for the good of the whole, and to worship as they choose. We want to live and work in peace, free from molestation, subject to rules set out in laws chosen by us as the most appropriate for our general welfare. This was and is a new, radical and daring experiment.

Remember, this is a very young country. In many countries of the world, people trace their heritage back hundreds of years to relatives who lived in the same town **or** village and worked in the shadows of the same ancient church or buildings. Not so here. This is a nation of immigrants, like yourselves, and the children, grandchildren, and great-grandchildren of immigrants who have preceded *you.* **As** recently as when my grandfather came here from Germany, he went to the far West and was wounded by an Indian arrow. The land was vast, our

population was relatively small, and the country was still opening up.

As life has become more crowded and complex, our experiment in government demands more than ever that each citizen get involved in the process of government to assure that it continues to serve the best interests of us all. This is your high responsibility that comes with the privilege of citizenship. Do not take our form of government for granted. It will prosper only if those born into citizenship and those, like you, who are sworn into citizenship, remain vigilant and participate to keep our form of government working. It must not be allowed to wither because the people for whom it was created simply don't care enough.

There are some who mistakenly believe that the civil liberties guaranteed by our Constitution authorize them to impose their own private views and moral standards upon everyone else. These people are sometimes strident, excessively demanding and well financed. They would interfere with religious beliefs and practices of others, or dictate what we or our children can read, or control intimate family affairs and other aspects of individual personal lawful conduct. We should be wary of these people and examine carefully what underlies their vehement assertions. Some special interests may not always be as concerned with our welfare as they purport to be. They may well be peddling forms of bigotry and intolerance in disguise and, if

so, they must be thwarted to assure that the basic principles underlying our unique form of democracy are preserved.

We have moved ahead as a nation because we strive €or something better. This land of opportunity and promise will not continue to prosper if we become smug, self-satisfied and think only of ourselves. We have not been willing to allow inequities to continue simply because things are that way. We have in the past worked to correct deep-rooted societal problems such as poverty, racism and sex discrimination. These and other problems, such as illiteracy, housing, unemployment, concerns for the aged and drug addiction, continue to challenge ingenuity.

We must not give up, but continue to learn and improve, using the talent and experience that people like yourselves bring when they come into our citizenship from other lands.

In short, do not be willing to leave government to others -- participate. Demand competence in your leaders. Ours must be a vital, not a complacent, conforming, wholly materialistic society.

You can help in some way. Seek out the good, shun the bad. Vote, work, help others, be useful, obey the law, speak out against intolerance, get involved. Use your minds, not your fists. Your voice will be heard. If you do this your citizenship will be especially valuable and will remain a precious tool by which you can gain the good life you sought by coming here and our radical experiment in government will continue to flourish.

# McCABE

On an occasion when I was early on the bench, it fell to my lot to call the calendar of ancient criminal cases to see what could be done, if anything, to lighten the docket load of our overburdened Court. A case came up a bit out of the ordinary -- a forgery case, itself ordinary enough, but the circumstances were unusual. A defendant serving time for check irregularities in Virginia was lodged in the D.C. Jail to stand trial on two forgery and uttering indictments arising out of a prolific check kiting scheme, the modus operandi by which bad checks follow bad checks to cover balances in banks initially created by deposit of bad checks, all to the end of creating larger withdrawals from nonexistent funds. The details are of no account. He was guilty and readily admitted same. But the defendant's affairs were complicated, for other charges emanating from other alleged forgeries were pending in a number of jurisdictions. It seemed best to bring all outstanding federal offenses within one jurisdiction and, with due care, work out a single disposition which would place defendant one with society and after sufficient time in the penitentiary hopefully somewhat rehabilitated. He was a likeable chap, as indeed many confidence men are; educated and not without family advantages. The D.C. Jail authorities liked him and, sorely pressed for funds under miserly congressional appropriation, he had moved to a position of some consequence handling records at the institution.

Having received assurance that the court was sincerely interested in his future, having changed lawyers a number of times, and having set the stage to his liking, defendant pled guilty and some three weeks of technical proof tracing checks through many banks and gullible tellers was avoided. The Probation Office was asked for a detailed report, a troublesome docket problem was

resolved, and justice at least appeared to be moving in the right direction.

Soon a Probation Officer sought to interview the miscreant only to be informed that the defendant had been released and had gone his way. It soon developed that a master forgery unique in the annals of jurisprudence in the District of Columbia had occurred.

Working from his position of advantage at the D.C. Jail, defendant had drawn a spurious order in convincing legalese absolving himself of all debts to society and directing his immediate release. The paper he executed was almost flawless -- signed by the Assistant U.S. Attorney, defendant's lawyer, and the Judge. It was made even more authoritative by stamp, clerk's signature and other indicia of total regulatory. But, in fact, it was a total, albeit a highly imaginative, fraud. Lacking only a proper seal, the forged order had cleared unsuspecting jail authorities who wished defendant well and sent him unencumbered on his way.

Few forgers can equal this distinction for most forgeries are more materialistic, and money motivates the work so painstakingly done. Forgers have pride in their work. This cannot be questioned. Not so long ago a man accused of forgery was acquitted by a jury when, putting his constitutional rights to one side, he took the stand to advise the jury that he was a superior forger with many convictions but could not possibly have been responsible for the crude, makeshift forgery of which he was then being accused. This pride in work done earned him at least temporary freedom.

The instant case can only evoke admiration for a daring job well done. Imagine the thought and care that went into it. It's sublime bravado. And, of course, the feeling of accomplishment and amusement which accompanied him as he walked to freedom one day after pleading guilty. He will return, for the FBI will not smile on such conduct. Retribution will be sought, but his moment will

not be forgotten.  Unfortunately his combination of skill and personality will no longer be sought in the jail's record office -- or will it?

# INTERVIEW BY KAREN AVERAGE AND LISA DOUGLAS OF JUDGE GESELL FOR CIRCUIT NEWSLETTER FEB. 1991, AS EDITED BY JUDGE GESELL

Judge Gerhard A. Gesell is an active and illustrious member of the District Court bench, as well as a devoted, longtime resident of Washington, D.C. At the same time, he maintains a farm in Loudoun County, Virginia, contributes his time and expertise to legal and educational programs, and manages to escape, for rare moments of peace, to an island retreat in Maine.

Judge Gesell was born in Los Angeles in 1910 and raised in New Haven, Connecticut; his father was a professor at Yale University and an eminent physician and child psychologist. Judge Gesell graduated from Phillips Academy, Andover, and returned to New Haven to attend Yale. He continued his education at Yale Law School and received his J.D. in 1935. Judge Gesell spent his summers earning part of his college and law school tuition by sailing boats. He took time to visit and "walk across Europe" as well. At Yale Law School, he directed the Legal Aid Bureau; during those years of widespread financial adversity, over 1800 clients received assistance.

Upon graduation, Judge Gesell moved to Washington, D.C. for "six months experience...I haven't decided if I've had six months experience yet," he quips. He accepted a position at the Securities and Exchange Commission, where he worked in various legal capacities for five years. In 1936, Judge Gesell married Peggy Pike. He now says, "We are still married...our golden wedding was some time ago." Judge Gesell comments: "I haven't done much shifting around," in reference to his years of residence in Washington, D.C. and his enduring marriage.

In 1940, Judge Gesell left the SEC to join Covington & Burling as a partner. He remained at the firm until his appointment to the Court in December 1967. During his years at Covington & Burling, Judge Gesell was a litigator, and now admits he occasionally misses the excitement a trial lawyer experiences in a hard-fought case. He also served as Chief Assistant Counsel for the Joint Congressional Committee on the Investigation of Pearl Harbor Attack (1945-1947) and Chairman of the President's Commission on Equal Opportunity in the Armed Forces (1962-1964). Judge Gesell notes, "I have had 27 years of public service and 27 years of private service," and has operated in all branches of the government. Judge Gesell credits Doris Brown, his secretary, for her skill in helping the management of his cases and who takes full blame for his mistakes. Doris worked with him for fifteen years at Covington & Burling, and accompanied him to the courthouse when he was appointed to the bench.

Judge Gesell enjoys the atmosphere of the courthouse; he has long held an "interest in the court system" and in the "history of the Circuit." He recalls the restructuring of the D.C. Court system in the 1960's. As chairman of the judicial conference committee monitoring the reorganization, he recalls working with Judge Wald, Judge Pratt, Judge Flannery, Judge June Green

and Judge Parker, among others, who were then leaders of the Bar. "The people who were brought together on that committee" worked together on the bench as well; they shared "interest in the court system, and the reorganization brought several of us to this Circuit."

An active member of the community before coming to the bench, Judge Gesell made a particular contribution in the area of education. "I've had a lot to do with education all my life," he remarks. Judge Gesell has taught classes at the University of Virginia Law School and lectured at Yale Law School. In addition, he served as Chairman of the Board of Saint Alban's School for Boys and on the board of the Madeira School for Girls. Judge Gesell also served on the board of Children's Hospital.

Judge Gesell considers Washington, D.C. his home. His grandfather practiced law in the District, and he himself has been a member of the Bar for over fifty years. "I love Washington," he says, and asserts he has long been and continues to be an advocate of Home Rule.

Nevertheless, Judge Gesell does not neglect his Virginia farm. He and his wife raise cattle and hogs, and grow soybeans, corn, hay and wheat. Those who enjoy honey can sample some of Judge Gesell's special brand; he is a beekeeper and tends to sixteen hives.

While not at work as a judge or a farmer, Judge Gesell enjoys spending time with his wife, Peg, and their two children Peter Gerhard Gesell and Patricia Pike Gesell. Peter is a political figure in Cambridge, Massachusetts, and has long worked with the mentally handicapped. Peter has three children: Sabina, who attends Vassar College; Alexander and Justine, who are students in Germany. Patsy lives in New York and works for a computer company.

Judge Gesell is an avid reader; he recently completed Hedrick Smith's The New Russians and Thomas L. Friedman's From Beirut to Jerusalem, and enjoys Tony Hillerman's detective novels as well. When asked about his hobbies, Judge Gesell notes "three hobbies I don't have: I don't talk to newspapers, I don't give speeches, and I don't write articles."

## COMMENT

The dilemma federal trial judges face today recalls Socrates' struggle to reconcile a wrong done the individual citizen under the law of the state. Most federal trial judges in criminal cases today are forced by the law to impose sentences which too often are grossly unfair, given the individual circumstances of the particular offender. Their judicial experience and knowledge of the individual's background tell them this, but the law mandates an unfair result. The defendant is free to protest but those charged with the duty to enforce the law find this no solution. Some judges, a few, have chosen to resign rather than perpetuate the tyranny imposed under current legislated formulae. But this is no solution. Their place in the present circumstances of this republic will be taken, in all probability, by judges of less conscience and experience. As in so many matters of public consequence, and this is but one, the willingness and ability of the press to make the effort to focus the issue for public discussion must be approached. Public attitudes are hostile. But constitutional values are eroding and we are saddling our urban generation with broken homes, increasing welfare rolls, and enormous expense, without making any appreciable deterrent of the crime rate. One only has to read the situation outlined in the Fatal Shore to learn that when England faced comparable concerns, resort to Draconian sentencing was self-defeating. We must question our legislative premises more sharply and turn down a different road.

G.A.G.

# JUDGE GESELL'S LAW CLERKS

| | |
|---|---|
| Jan.-June 1968 | John N. McBaine, Jr.<br>Boalt |
| July | |
| 1968-69 | Alan Dranitzke<br>Yale |
| 1969-70 | John F. Dienelt<br>Yale |
| 1970-71 | William H. Jeffress, Jr.<br>Yale |
| 1971-72 | Timothy W. Bingham<br>Yale |
| 1972-73 | Michael C. Devorkin<br>Yale |
| 1973-74 | Roger W. Fonseca<br>Yale |
| 1974-75 | E. Donald Elliott, Jr.<br>Yale |
| 1975-76 | Mark I. Levy<br>Yale |
| 1976-77 | Scott Blake Harris<br>Harvard |
| 1977-78 | Seth P. Waxman<br>Yale |
| 1978-79 | Eric B. Amstutz<br>Yale |
| 1979-80 | James J. Brudney<br>Yale |

| | |
|---|---|
| 1980-81 | Peter A. Barnes<br>Yale |
| 1981-82 | John D. Echeverria<br>Yale |
| 1982-83 | Lynn A. Stout<br>Yale |
| 1983-84 | John C. Millian<br>Yale |
| 1984-85 | Patrick A. Malone<br>Yale |
| 1985-86 | Michael E. Tankersley<br>Harvard |
| 1986-87 | Kenneth Chesebro<br>Harvard |
| 1987-88 | Kevin Czinger<br>Yale |
| 1988-89 | Elizabeth Cavendish<br>Yale |
| 1989-91 | David Halperin<br>Yale |
| 1991-92 | Scott Siff<br>Harvard |
| 1992-93 (Feb.) | Dorothy Ames Jeffress (Amy)<br>Yale |

## COURT CRIERS

| | |
|---|---|
| 1968-79 | Edwin Roan |
| 1979-93 | Roy Smith |

## SECRETARY

| | |
|---|---|
| 1953-93 | Doris P. Brown |

# MY
# "JEALOUS MISTRESS"

## 1932 - 1984

*by*

## Gerhard A. Gesell

For Private Reading Only

MY

# "JEALOUS MISTRESS"

**1932-1984**

by

**Gerhard A. Gesell**

For **Private Reading** Only

## Preface

" . . . The lawyer writing about his own career is unobjective to a degree that few other professions have the skill to attain,"*/

A sign of approaching old age is the urge to put down on paper an account of your life. I've often marveled, however, at the willingness of some, as old age creeps in, to lay out for public consumption intimate details of strained family relationships and the human frailties of friends, clients and colleagues. Memoirs of this type may be a necessary catharsis, but they are surely in bad taste and perhaps written more for mercenary reasons than for anything else. While I have to admit that the urge to put something down is upon me, (although I won't admit approachinq old age), I'm going to confine this account to my professional life as a trial lawyer and judge. Were I to attempt to unburden more personal recollections, it would be of little interest, for there's nothing more boring than an account of a long and happy marriage, with loving children, an untroubled youth with supportive parents, and friends and associates who never interfered but gave help along the way. Yet, fortunately, such has been my fate.

The reader should also be warned that I have no startling disclosures to make, nor gossip to peddle. While I have never held a position of major national importance, many challenging

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*/ M. Boudin, Stanford Law Rev. Vol. 35, No. 3 at p.626.

professional opportunities came my way during a changing significant period of our history. I venture to hope that family and close friends will enjoy this rambling account, which records the joy and excitement of a legal career in the nation's capital during those interesting times.

G.A.G.

## GETTING HOOKED

1928–1935

When I went to Yale as an undergraduate in 1928, I had little sense of what I wanted to do with my life. Some who came down with me from Andover had it all worked out. They would be doctors or they would be engineers and straightaway went to that strange offshoot of Yale called Sheff. A few were headed into family businesses, but most of us had no idea what we were going to do. So we took liberal arts with a vengeance. One thing I know I wanted to do. I wanted to write, so I majored in English. But Yale was a disappointment in this regard.

The fates were against me from the start. In high school, before Andover, I had lost the writing prize to an ingenious classmate who had copied an excellent article from the National Geographic. At Andover, where I went for an extra year of high school, I was too busy trying to meet the demands of the first formidable teachers I had ever encountered. They insisted on quality not mere attendance at class and there was no time to write.

Coming down to Yale I eagerly signed up for Prof. Benny Nangel's daily theme course. Naturally, the first day we were each asked to write something terse and pithy, which we all attempted to do. When the next class convened, Professor Nangel announced, "Will Mr. Gesell please see me after class," which I did with some fear and trepidation. To my surprise,

and, in retrospect, to his discredit, he said, "Your piece was excellent. I can teach you nothing. Get into some other kind of course." There were no other options.

Somewhat later I went into the competition for the Yale Daily News. I was first in writing at the end of the competition, but lost out under a system that gave credit for getting advertisements as well as writing. Unlike some of my competitors whose businessmen fathers had useful connections, I was not able to do much on the advertising side. Another fellow and I commiserated (he also had lost out) about the world in general, and decided that we'd had enough of Yale. We called up a man named Beebe at 1:00 a.m., woke him from a sound sleep in New York and said we wanted to go with him to the Pacific, where the newspapers had reported he was going to do some underwater exploratory experiments accompanied by a group of gorgeous girls. It looked intriguing. He was cordial, but firm. He said we couldn't go.

Later, when Johnny Moore and I were working for The New York Times as runners, we had a moment or two of glory as sports writers. We gave a play-by-play description from the Yale Bowl press box of the first game between Yale and Georgia. But my writing ambitions were never satisfied.

I thought I wanted to be a professor of English. My professor, Stanley Williams, was an inspiring teacher, and with his encouragement I set out again *to* write a paper to see if I could win a Henry Fellowship, which would take me to

England for a year preparatory to corning back to teach English. My composition had to do with the influence of Coleridge on Poe, and I concluded that there was absolutely no influence at all, only that each of them had read the same books! Quite properly, although I got second place and an "A", I lost to my fellow classmate, who wrote about some recently-discovered Longfellow letters. At the time, I felt he had gotten a special advantage. Norm Pierson won the prize, and came back to Yale and became a distinguished professor of English,' Losing the Henry, I felt, condemned me to nonacademic pursuits. It was very sad at the time, but in retrospect, this was a very lucky loss. I would have been a lousy English professor; Norm was a great one.

*So* much for Yale undergraduate life. I was never seriously challenged intellectually. I got mediocre marks except when I could write a long paper. Most of my courses were boring. It seemed to me I wasn't headed anywhere in particular. It was a time, I suppose, of growing up. I read and read and read; often with little understanding. More and more I turned to biography, history, personal accounts of historical events. I learned a lot, but I had no focus.

Actually, my good friends were few. My resources were negligible, and I had no consuming interests. During summers I worked as a camp counselor, as tutor on Long Island, or traveled on foot, usually alone, around Europe. As

graduation approached, reality loomed. The country was in a deep, deep depression by 1932. I doubt that there were many jobs. At least, no one came knocking on my door, and I didn't even know where to look.

So I decided to go to law school. I didn't really know much about what lawyers did or what law school was all about. It was a way to escape from more difficult decisions, and in a vague way I had an impression that law was the key to political success and public service. It seemed a good gamble.

The summer after graduation, before law school, I tramped around Europe, mostly in Germany. In my knapsack I carried Cardozo's two books of essays: The Nature of the Judicial Process and The Growth of the Law. These books are on my study shelves today. I read them over still at least once a year. They are full of underlinings and questions which I indicated in the margins as I read them that summer. They sunk in deep. They gave me a vision of the function of the law, its role in an ordered society, and its creativeness in relation to societal needs.

I entered law school; excited, a bit wary, but very eager. For the first time in my life, I soon felt challenged and stimulated intellectually. I knew I was on the right track. The law school opened up vistas I had never suspected, raised issues I had never sensed, and gave me a feeling of purpose and commitment. There had been no lawyers in my

immediate family, and nothing in my growing up had involved lawyers. My grandfather on my mother's side, Jefferson Chandler, had been a distinguished lawyer, but I never knew him. He was in his time a member of the elite Supreme Court Bar practicing in Washington, D.C., at the turn of the century arguing about a hundred cases in that Court. He was President McKinley's lawyer, and almost a Supreme Court justice.

While my mother and father constantly read books and discussed ideas, their own attention was directed more to literature and science than to the world of business and governmental affairs. There was a latent strain of liberalism in our family, however, that ran pretty deep, and law school soon awoke it in me. My father's father had left Germany as a young orphan in his teens after firing off the village cannon stuffed with copies of a tabloid called The Free Thinker into the face of the approaching constables. My mother's mother was the daughter of an Irish revolutionary who, like Emmet before him, had fled from Ireland. My mother and father were both liberal minded and occasional discussions of politics at the dinner table always tended that way. I don't remember much of the talk. My father admired Wilson and La Follette. Mother was a leader in the Vote for Women movement in Connecticut. I well remember the time when Dad returned home after being one of the two men who walked in the Vote for Women's parade. He was smeared with rotten tomatoes thrown at him by the people along the way and laughing heartily, well pleased with his performance.

We were aware of Dad's German heritage. He recalled how native-born Germans were hauled in cages through the streets of Madison, Wisconsin, and ridiculed by the populace during the First World War. As a result German was never spoken in the home, but I sensed the discrimination and anti-German prejudices of that time. As in any university community there was also constant talk of academic freedom at the table. These and many other issues fell into clearer focus at law school.

Yale Law School was a stimulating place. It had few rules. Nothing there was particularly sacred. You were tossed up against many harsh realities from the beginning. I drank it in. From the outset it was not for me a matter of getting good grades, but getting involved. I took the exciting courses. When a particular project interested me, I got A's. On some matters that I was required to take as compulsory courses, I treated the subjects with indifference. I got indifferent marks. Thurmond Arnold, William O. Douglas, Harry Shulman, and later Mc Dougal were my heroes. The old-time professors; Vance, Corbin and Lorenzan, all superior scholars and men of distinction, seemed less interesting and I paid less attention to their teaching.

The New Deal was underway. The country was concerned with immediate and different problems. My faculty heroes were the ones that were in the thick of things. Douglas's several

small seminars in the area of public control of business were amazingly exciting. He brought into the classroom case studies of corporate machinations and drew on his experiences in Wall Street. He aroused my first interest in the pioneer work of the SEC. Arnold, who was then writing the Folklore of Capitalism and Symbols of Government, taught procedure with a flair and almost daily made fun of our naive preconceptions. Shulman knew the realities of the labor struggle, and brought them into the classroom with accounts of current events based on his work as a labor arbitrator. These men had little regard for custom. They worked hard, they had high standards, and contempt for fools. They played hard, sometimes drank hard, had rollicking humor and were fun to be around. I was intrigued by their involvement in current events, and anxious to get into the fray as they relayed the latest Washington gossip.

The New Haven Legal Aid Society, which gave legal assistance to the poor, was practically unmanned but swamped with pressures generated by the deepening Depression. I volunteered and soon almost left classroom activity entirely to handle the flood of "clients." Few students had shown any sustained interest. On the other hand, I stuck with it. I practically had the place to myself, handling about 1,200 "clients," which took about 40 hours a week during law school when it was in session. Much of my vacations and all of two Summers were spent at the Legal Aid Office, "practicing law."

There I saw the life of the poor in all of its tragedy as the Depression literally overwhelmed New Haven's somewhat antiquated economy. Evictions, family support, marital problems, wage claims, injuries, were matterg--of daily concern. I still remember seeing a group of starving people storm the mayor's office demanding bread, and the large family that wanted to dig up their father to get the gold from his teeth. I've never forgotten those people who were so desperate. I worked very hard to help them, 50 to 60 hours a week in the summer. I came to see firsthand the unfair rules and indifferent legal system that had grown up for resolving some of the day-to-day problems of these people. In an article I sought to get the Connecticut law of attachment for debt changed. And all this, plus what I read in the newspapers, led me to become a confirmed and dedicated follower of Franklin Delano Roosevelt.

My interest grew until at the end of the second year I tried to land a job with the SEC, planning to complete law school at night in Washington while working for the Commission. James Landis, then Chairman of the SEC, gave me an interview, and when I told him what I had in mind, asked me to hang around because he wanted to take me to lunch. At lunch he talked me out of my harebrained scheme. He told me that he had done the same thing and always regretted it. He got so worked up that he made, for me, the fortunate mistake of saying that if I'd go back to Yale and finish up, he would

guarantee me a job at the Commission when I graduated. I went back and stayed the course.

As law school was winding down, the harsh fact emerged that I had to get a job. We all knew there were no jobs. Some classmates ended up policemen or went into some other work and were never lawyers. Some were lucky because they could go to family firms or to Wall Street, which was taking a few top-ranking students, which I was not. New York, in any event, wasn't for me. I toyed with the thought of practicing in Connecticut and becoming a senator in due course.

With this in mind, I drove to Hartford* and had an interview with a leading law firm there. To my great surprise, I was offered a job. I was about to be married, at least I hoped so, and the idea of actually going to work as a lawyer in Hartford had me in a state of absolute bliss. As I got up, having sealed the deal, I casually asked, "By the way, what is the pay?" I was quickly told that the firm paid nothing the first year, and in my somewhat egotistical manner I asked, "Well, supposing I do exceptionally well, what will I be paid the second year?" I was told that they had one person who was making in his second year $50 a month. I told them that I thought they should give the job to a more deserving person, and walked out.

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*/ On January 1, 1933 I had become the proud owner of a 1929 Model A, 4 cylinder, Ford roadster for $40.

## THE SEC YEARS

1935-1940

At this point, it was clear what I was going to do. I would have to call Landis on his raincheck and join the **SEC**. The fact my uncle, Bud Mathews, was a member of the Commission didn't hurt, and I got a job. I took the Connecticut Bars, proposed to Peg, my wife-to-be, midway in the preparation, passed the Bars, and went to Washington to go to work for the Commission at $2,000 per annum in the fall of 1935.

When **I** arrived at the SEC as the most junior attorney, I was fortunate to join a very superior law office staffed by a group of talented men. The General Counsel, Johnny Burns, was a savvy Irishman who ran his overworked staff, small as it was, by a very simple expedient. He dumped responsibility on everyone willing and able to take it. If you survived, you got more to do. If you didn't, you shuffled papers in a back room. We were literally writing laws, then interpreting them, and then implementing and enforcing them by regulations and lawsuits. At the same time, we were figuring out what additional laws were necessary to make the security markets work. It was a night and day and weekend business. The General Counsel's office was busy every night, often to midnight and beyond. There was much to be done. The "esprit de corps" was high, and of course the opportunities, particularly for a young lawyer, unlimited.

As I have already suggested, **I** had found the girl I wanted to marry, but Peg was keeping me dangling from Detroit

for about a year. I had no ties to anyone else, only the job at hand. I ate it up, and welcomed the law as the "jealous mistress" she has remained ever since.

I started out writing drafts of opinion letters. The General Counsel's office was staffed with a group of very bright Harvard Law School graduates, well trained in legal disciplines by their work on the Harvard Law Review. These fellows were consummate draftsmen, and once they had a law in place breathed life into it by writing carefully designed interpretive opinions in response to the many questions that came in from Wall Street. There was much to learn about drafting that law school had never taught me. It was sink or swim, and I managed barely to keep afloat at the beginning.

I had never dictated anything. We used "secretaries" from a pool. My first attempt was a fiasco! I prepared a carefully written opinion letter that I was going to read to the secretary, pretending it was dictation, and covertly propped my pad up against a book and rang for someone from the pool. She arrived, crossed her pretty legs, and poised pencil and pad. At the first words I spoke, she fainted dead away. She had never taken dictation before! We were all beginners.

Matters progressed. Soon I was in the enforcement area,*/

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*/ My first argument in a Court of Appeals was in the 4th Circuit where I had the hopeless task of trying to get the Court to ignore its own precedent and to make matters worse I was obliged to file a brief for the other side expressing the view of one of the SEC commissioners. I was treated with all the great courtesy of that fine Court and lost. Houston Natural Gas Corp. v. Securities and Exchange Commission, reported at 100 F.2d 5 (1938) incorrectly reports I was only on the brief.

the trial work of the office, where I definitely wanted to be. I traveled with Big Tim Callahan, Jack Flynn, and seasoned postal inspectors hunting down interstate stock racketeers. There were few regulatory controls. Stock fraud was rampant. Backed by our administrative subpoena power and where possible with grand jury authority, we grabbed books and records, closed down "bucket shops," filed civil injunction suits, developed cases for criminal prosecution and if indictments resulted, we aided assistant U.S. Attorneys at trial. Talk about experience! I was over my head in it from the moment I started. In no time, I was taking testimony, drafting court papers, preparing witnesses to testify, presenting prosecution reports to the Department of Justice, and was often in court. We had to ferret out the facts and then present them. There was a bit of law in it, but mostly I was learning how to make facts work. How to prove them, what they were, and which facts were useful.

In the middle of 1936 I was part of a team that went in to clean up the city of Detroit. It had become the center of stock swindling typical of what was going on throughout many parts of the country. The Detroit Better Business Bureau and others sought SEC assistance when it became apparent that matters were out of hand as far as the effectiveness of state regulatory authorities was concerned. I went to Detroit with a "flying squad." In a short period, after we moved in, we brought nine indictments and a large number of civil actions.

As I recall it, indictments naming some 51 defendant were lodged and in 18 injunction suits we covered a wide spectrum of the security business. Convictions resulted, fines were collected, and many injunctions were obtained.

During the Detroit clean-up the SEC's activities were on the front page almost every day. State legislative inquiries were initiated, the Better Business Bureau became more involved, some prominent financial figures were arrested and our commission was praised editorially.

Our efforts brought about a great deal of publicity. We were in the local headlines almost every morning and night. The Michigan governor called upon the Bar to conduct an investigation of the Security Commission, and the headlines ran in bold letters across the top page of the paper night after night, "Huge Stock Fraud Bared," "Boilerroom Tactics Aired," "Fifty Driven Out in SEC Quiz," "Brokerage Firm Enjoined by Federal Court," "Public Loses $350,000," "U.S. Indicts Seven Brokers in Oil Stock Sales Here," and so forth. It was a very busy time, and we were very successful in the effort.

The work was exhausting, satisfying and exciting. The fact Peg, my bride-to-be, lived in Detroit didn't make the assignment any less attractive, but I got little sleep. Because of leads developed in Detroit, along with Jack Flynn and, finally, alone, I became responsible for an investigation which ended up in a substantial mail fraud trial in Atlanta,

Georgia known as United States vs. Kopald-Quinn, et al. We worked up the facts, got indictments and the principals were convicted.

The scheme to defraud was simple, but devastating. The swindlers sold various stocks by telephone, 50 percent down against promises to the customer that they would never have to pay the additional 50 percent because the stock would rise. They purported to hold the stocks against future delivery. Orders for stock were obtained in large quantities until the boilerroom salesmen had literally thousands of people on the hook for 50 percent down waiting for their particular securities to rise. In the meantime, the swindlers jiggled the stock of Stutz Motorcar Company, manipulating it up and up and up while gradually calling the attention of all of their customers to this rapidly rising security. At the crucial moment, they turned the telephone boiler rooms loose and switched **all** of their customers to Stutz stock, still at 50 percent down. They sold Stutz in amounts more than four **to** five times the total capitalization of the company. Then they "pulled the plug" and allowed the stock to sink to practically nothing and wiped out all their customers, pocketing all the proceeds to the tune of millions of dollars.

This was a very shrewd, wide scaled operation, which escaped state security attention because of phony options which the swindlers concocted to show stock was available from phony companies located in different states when in fact it

wasn't. The prosecution went forward in Atlanta, Georgia, against the entire group and in spite of some difficulty with the judge, we got convictions for the major offenders after several months of trial. I helped the U.S. Attorney, testified and was at the trial table throughout. Talking with one of the chief defendants on one occasion during the trial, he said the best sucker list was a list of doctors who had been swindled once before. There is no doubt that the public is gullible, and these bucket shop salesmen took full advantage of human frailties until the Commission stepped in and stopped operationq of this kind.

In March 1938 I got a big break. I was put in charge of the Richard Whitney investigation when his firm was suspended from the New York Stock Exchange for insolvency. Whitney was J. P. Morgan & Co.'s broker, recent past president of the Exchange and long active in the management of the Exchange. He was the spokesman for Wall Street in its violent opposition to everything the SEC was attempting to do, and appeared frequently before congressional committees in a pious manner to insist that the government should keep its hands off. His firm's insolvency was a major financial event.

William O. Douglas, then chairman of the SEC, quickly saw the implications of Whitney's difficulties. He had long been convinced that the Exchange ran like a private club, overly tolerant of a members' questionable conduct, and unconcerned with what he perceived to be the public interest in a fully

open, well-regulated public security market place. A thorough review of what had occurred might well demonstrate these failings and lead to more adequate regulation of the Exchange to assure the fairness of the markets which the SEC was responsible for in so many ways. That was my assignment.

Rumors were flying everywhere. "Sell 'em" Ben Smith had told Gay, the president of the Exchange, that Whitney was broke and borrowing all over lower New York. Gay did nothing. Whitney's friends and acquaintances, from whom he had borrowed large amounts on ah'unsecured basis, had kept silent. Some were proud the great man had come to them; others were afraid to ask questions. The House of Morgan, it was said, had protected him. He was not just insolvent, some claimed he was a thief. So it went. Some of these rumors were true, some were false, no one knew the details. The investigation I conducted was designed to uncover the truth and lay the foundation for reform.

Many responsible people in the financial world, including some members of the SEC itself, were, however, against a public investigation. They were confident that nothing was wrong, and they were concerned that what might be brought to light would result in some kind of undefined market panic. Douglas wanted to plow ahead with public hearings.*/ My preliminary

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*/ I was sound asleep at my parents' home in New Haven when he telephoned on a Saturday night about 2 A.M. to ask how I stood on the issue!

look into the matter convinced me there should be a full public airing of the scandal. Ganson Purcell, the able head of the Trading and Exchange Division of the Commission agreed. Others did not. It was necessary first to hold limited private hearings behind closed doors before we had full approval to go ahead with a public airing of the scandal. The private hearings made it clear that the management of the Exchange had protected Whitney, that it could have uncovered the burgeoning scandal at an early date and indeed could have prevented much of the disaster that eventually occurred.

The public hearings were high drama. I conducted all the examinations of the witnesses and received enormous publicity, much of it favorable and some even flattering. For example, under the heading, "Rah! Rah! Yale," Raymond Clapper wrote in part:

> "Never in the whole lifetime of most lawyers does such a conspicuous professional opportunity, or fat part, come. In private practice, where opportunity is supposed to be so much greater than in Government service, a youngster three years out of law school would never be heard of in public. He might be a good man but his job would be the drudgery of working **up** the case so that one of the big shots in the firm could pick his brains, take the case second-hand, and relying on a combination of his own wits plus the prompting of his anonymous young assistant, grab the glory, the prestige, the headlines and the pictures in the papers--and, oh, yes, of course, the fat fee.
>
> "There are not fat fees in the Government legal service but who can say there is no opportunity? Young Gesell was taken green out of law school and has been working for SEC three years. He was competent and he developed rapidly. He handled the Detroit bucket-shop case

and worked up the big Atlanta fraud case. When SEC began investigating the Whitney affair, he was assigned to the job. He prepared himself with extreme care and thoroness. In addition to that he had a gift for compact, succinct questioning. He worked with economy of effort, avoiding useless questions, and handled his witnesses with a cool, sure touch, but calmly and without browbeating, revealing skill that most lawyers are years in acquiring."

And another headline read, "Yale Man Outstanding Example of Young Government Careerist." Some of this was because I was a freak from Yale, not a "Frankfurter hot dog" from Harvard. Some perhaps because of the way things had gone. There was much more; for example:

"The Securities and Exchange Commission lawyer who has been doing such a suave and effective job in uncovering the ramifications of the Richard Whitney scandal is a 27-year-old youngster, and this is his first big case.

"His name is Gerhard A. Gesell. Born in California, he was brought to New Haven, Conn., as a boy, and lived in the shadow of Yale University until he joined the SEC about two years ago. One of his teachers at Yale was Prof. William Douglas, now SEC chairman.

"Tall, stocky, with streaks of gray running through his curly black hair, Gesell looks older than 27, though his manner and smile are youthful. Unlike most prosecutors, Gesell does not storm and glower at witnesses, but acts calmly confident.

"He is polite and quiet spoken, but stands for no monkey business. The presence of the mighty tycoons of J. P. Morgan and Company neither awed nor disturbed him. He was courteous, but firm--as Thomas W. Lamont, veteran Morgan partner and sharp-tongued legal fencer, learned when he attempted high-hatting tactics."

I had to stop reading much of this stuff in order to keep a cool head.

The leaders of Wall Street; J. P. Morgan himself, and George Whitney, Richard Whitney's brother, a partner of J. P. Morgan, all testified. Many of the witnesses were forthright and honest. Some were very evasive. Some were casual, some lied, others were nervous. I remember, for example, the chairman of the Business Conduct Committee of the Exchange, a meticulously-groomed man, sitting in the witness chair breaking one by one the links in his platinum watch chain and putting the links in his pocket to control his obvious tension while he testified, and tried to bait me with references to my 28 years of age, to the laughter of some 10 Davis Polk partners assisting him.

But the facts were overwhelming.*/ Richard Whitney had stolen securities from his wife, from his clients, from the New York Yacht Club where he was treasurer, from the gratuity fund of the Stock Exchange itself, for which he was responsible, and from others. He had borrowed from everyone including his brother without revealing the true state of his affairs in order to get more money to send after bad money he had already unwisely invested in various Florida ventures. The managers of the Exchange had ample reason to suspect that things were going awry, but had done nothing.

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*/ In the Matter of Richard Whitney, et al., Vol. 1, Report on Investigation 11/1/38, Vols. II and IV hearings and exhibits, Before the Securities and Exchange Commission, U.S. Printing Office.

In the middle of the investigation, while we were attempting to develop a thorough case to include all who were involved, Tom Dewey pushed himself into the act. He was then State's Attorney General. He indicted Whitney, who pled guilty the same day, and Whitney was off to Sing Sing before anybody could say boo. Under the arrangements this made necessary, I had Whitney on the witness stand in the SEC proceedings up to midnight. As I ended his interrogation, I saw before me a tall, still well-groomed man; with a stiff collar wearing thk Porcellian Club charm on his watch chain, arrogant and calmly insolent. He had bawled me out when I was five minutes late for the evening session. In response to my last question, when I asked him to tell me when he first knew he was insolvent, he replied, "I am not insolvent. I can still borrow money from my friends." With that absurdity, I turned him over to the New York State sheriffs, and he went off to prison. He was first baseman on the prison baseball team, but never did anything else of consequence--a traitor to his class!

Naturally, the press and those with populist leanings had a hue and cry against J. P. Morgan & Company. Morgan had been fair game in the past during securities investigations. The firm for many reasons, was vulnerable. George Whitney, Richard Whitney's father, was a partner of the firm and had lent Richard Whitney a large sum of money. Richard Whitney & Company acted as the Morgan broker on the floor of the Exchange. I refused to join the hunt and treated Morgan like

any other witness.*/ The proof showed how a great lawyer had acted at time of crisis. It made a deep impression on me.

John W. Davis was counsel for Morgan. The evidence showed that shortly before Richard Whitney was declared insolvent and the Exchange rang the bell suspending him from the Exchange, Richard Whitney had gone to a Morgan partner, Bartow, who was playing cards at the Links Club, and asked for financial help for his firm. When Bartow found Whitney was not simply "temporarily embarrassed," but was in deep trouble, he took him from the Links Club and went directly to Davis Polk to confer with Davis. Davis quickly gleaned the essential facts and said, "We must go immediately to see Mr. Morgan." The three men drove out to Great Neck, Long Island, and told Morgan in a succinct manner that Richard Whitney was over his head and insolvent. He wanted money. Morgan asked what to do. Davis said, "If you lend this man a cent, it will be the end of the House of Morgan." Morgan said he would loan nothing, and Richard Whitney & Company went under the next day. Davis's shrewd advice demonstrated what a skillful experienced, foresighted corporate lawyer, thoroughly familiar with public attitudes, can do to rescue a client if he speaks with candor at a moment of difficulty.

After the hearings were over, Stock Exchange reforms followed, but I had little part in these for reasons that will

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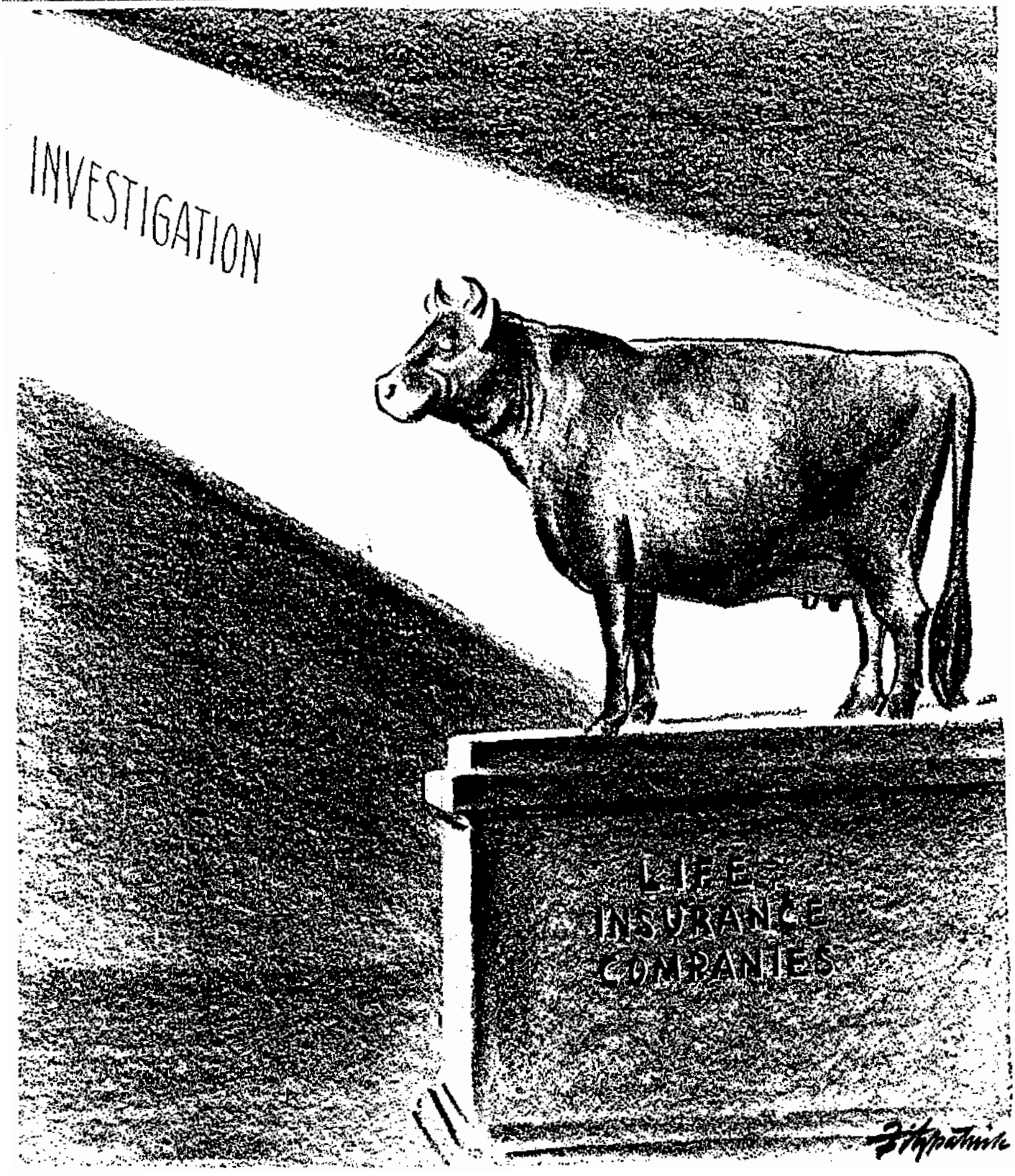
*/ When he testified before Congress years earlier someone put a midget in his lap!

soon be apparent. I should mention, however, that throughout the hearings the New York Stock Exchange was represented by Covington & Burling. The work was being done by Dean Acheson, who was assisted by Mr. Burling's son, Eddie. The hearings were held both in Washington and New York, and we rode back and forth together frequently on the evening Congressional, gravitating naturally after a hard day to the club car for a drink. We became friendly enemies. I enjoyed immensely Dean's ability to pick up a pad and spin off doggerel, making fun of the witnesses or the events of the day. More of this later, but this was, as it turned out, an important contact in my life.

Soon after I finished Whitney and settled into the routine of administering hearings and daily events, I received a call one morning from Douglas's secretary who said, "The chairman wants to see you right away. Come up quickly and go in the back door." Of course, that's what I did. Douglas looked at me and said, "Gerry, you've just agreed to be Special Counsel for the Temporary National Economic Committee." I said, "What the hell is that? And he said, "Don't ask any questions.'' He buzzed for his secretary and said, "Show Mr. Corcoran in." In came my friend, Tommy the Cork, with a friend of his, Bill Youngman, who he was pushing for the TNEC Special Counsel job. Bill Douglas said, "Tom, I know you know Gerry Gesell. You'll be interested to know he's just agreed to be Special Counsel for the Commission at the




LIGHT ON THE **SACRED COW.**

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TNEC insurance hearings." Tom looked somewhat abashed, and after a short conversation he left.

The result of this was that for 18 months I ran the insurance investigation which the Securities and Exchange Commission conducted before the Temporary National Economic Committee of the Congress. This involved managing a staff of some 35 to 40 people along with a wonderful guy named Ernie Howe, assisting with the preparation of two important monographs, and conducting lengthy hearings before the committee in the large Senate Caucus Room. To go into the details of this hard work I fear would be boring, but we did a great deal to bring forward an understanding of the extraordinary economic power of the life insurance companies.*/ Again the publicity was enormous and again I was in the eye of the storm. Here is an indication of the publicity taken from cartoons. They showed Gesell as David in a lion skin attacking the insurance company Goliath armed with a sword labeled legal talent. Uncle Sam giving the insurance companies a cleaning up in a tub. A statute of a complacent cow, the insurance companies, with a bright light shining on it. A building housing colossal mutual insurance companies with seven trustees marching in wanting business for their banks, law firms, oil, etc. The industry mounted a campaign

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*/ Investigation of Concentration of Economic Power - Temporary National Economic Committee Monographs 2 and 28. Testimony Parts 4, 10,a, 10, 12, 13, and 28. U.S. Printing Office.

claiming the government was about to socialize the companies and take over. Both parties had planks in their platforms antagonistic to any effort at federal regulations, and I was attacked as a hatchet man by some and praised by others as an infant prodigy and near genius.

For me, the most interesting part of the investigation, apart from the important experience gained from administering a staff and conducting congressional hearings under intense public exposure, were my contacts with retired Justice Louis D. Brandeis. They cape about this way.

Before the hearings started, I received a telephone call from a man who said, "This is Felix Frankfurter." I had no idea who Frankfurter was, other than I recognized he was some kind of a professor at Harvard Law School. He said, "I want to have lunch with you," and we went to lunch. He had been reading the transcript of the Whitney investigation, which had appeared verbatim, full page, in The New York Times, and said that he was teaching a class in evidence at Harvard Law School based on my questions. He wanted to know where I, a Yale man, had learned to ask questions that were so effective. I joshed with him. I couldn't figure why he was talking to me. We had a friendly luncheon, and that was the end of the matter.

When the TNEC insurance study got going, however, he called me again and said that Brandeis wanted to see me. Brandeis, of course, had a fetish against bigness. One of the

MEETING OF THE TRUSTEES.

things he had done in his life which he felt was perhaps as important a5 anything he had accomplished was to have created the system of savings bank life insurance in Massachusetts. This system had been very successful. It provided 'sound, inexpensive insurance by eliminating the enormous expense of agent solicitation. I went to see Brandeis with Frankfurter, and thereafter I saw Brandeis frequently. Peg and I were also occasionally invited for Sunday teas to Brandeis's stark apartment on California Street. He followed the insurance proceedings very clodely, sending me notes of encouragement and commented on the events as they went forward.

Apparently what had particularly caught his interest was my initial presentation which opened the insurance hearings in the large Senate caucus room. We demonstrated that boards of directors of the Metropolitan Life Insurance Company and the Prudential Insurance Company, the two largest mutual life insurance companies at that time, were self-perpetrating, not the choice of their respective policyholders. These companies both sold door-to-door "nickel and dime" burial or death insurance, as it was sometimes called. Company agents testified they had forged ballots with the policyholders' names in order to present to the management the appearance of overwhelming support for the management which put out a Hitler-type slate each year and then advertised the ostensibly large but fictitious vote of support received in this dishonest manner. They thus deceived many into believing they

were really mutual life insurance companies run and controlled by the policyholders. Brandeis thought this testimony exquisite, and he referred to it many times. He read the transcript of my hearings each day, and commented on developments by a note or a suggestion when I should come out for a talk. He kept in touch even when he left for a summer at Cape Cod. He hoped for more significant reform than occurred and he was very disappointed when the government did not take over the life insurance business or alternatively come forward with legislation breaking up what was then believed to be mammoth concentrations of economic power reaching $5 billion assets. But World War II was creeping into reality and Congress had no taste for new approaches.

As time went on, I was less on the road and more in Washington, and Peg and I made many friends. Until World War II, Washington was a gentle southern city. The influx of people to man the new alphabet soup agencies that blossomed under FDR and his New Deal made housing scarce, but left the city basically unchanged. Blacks, who were in those days referred to as Negroes or colored people, were sharply segregated and excluded from much of the life of the city. They could not enter the theatres, the hospitals, the libraries, and indeed were actually excluded from many of the drug stores. They went to the back of the bus or trolley. Concern for this discrimination was not in the focus of the New Deal of those days. Many blacks were of the old school.

Polite as Pullman porters and frequently obsequious. It was not unusual, walking to work, for a black to step off the street and tip his hat as I went by. The women worked as domestics primarily, or as nannies, the men labored in construction or menial jobs.

The angry ferment then generating at Howard University was never given much attention at first. Old Washington families took particular blacks under their wing in the southern manner and resented the growing migration of other blacks from the South. They ignored the occasional "uppity" black who in frustration spoke his mind. The lines between blacks and whites were strictly drawn. I was later blackballed from membership in the Chevy Chase Club because Peg and I had entertained some blacks in our home. All this, of course, changed with the war.

Most of us coming to town had little interest in city affairs. We were interested in party politics. The District of Columbia didn't even have a vote. Our attention was on the national scene. The government itself was small and informal. High officials actually were at home on particular afternoons to entertain any visiting tourists who might drop in for tea. You left your calling cards with people that you wished to get to know better, including the White House. Mrs. Frankfurter, I recall, was at home one afternoon a week. Indeed, Peg frequently poured tea for her on those very simple occasions and sometimes the Justice would drop in.

The White House was more a home than the office of the President. FDR had only a handful of assistants. Practically everyone in the government service, including myself then only a $2,600-a-year attorney, was invited at least once a year to a White House reception where FDR shook everyone's hand and Eleanor moved us all along the line with pleasant effective formality. The White House grounds were open and if you were in a hurry to cut through to get to the Occidental restaurant, for example, you did just that. It didn't matter. Congress was also less obtrusive. In those days sessions were curtailed, many Congressmen went home to test the sentiment of their constituents and to avoid the summer heat. There was little or no air conditioning. The District Court itself, as I remember, shut down for sixty days each summer. Social life was simple. Rarely did you hear anything but shop talk at cocktail parties or Sunday lunch. At the SEC we were all embroiled in the work at hand, working long hours and weekends.

On my salary, which was all we had, we rented a small, comfortable apartment on California Street for $60 a month. We had a part-time maid for $5 a week, and we traveled in a second-hand Ford that cost us only $245, but which did have a leaking roof that required Peg to raise an umbrella when we took it out in the rain. Gasoline was 14¢ a gallon!

The SEC offices, at the beginning, were in an old World War I temporary building on the Mall. This was wholly

inadequate in all respects, particularly in the summer. Sometimes the heat was so bad we had to close down. Later the SEC moved to Pennsylvania Avenue in a building opposite what was then the old Powhatan Hotel, where the work was much easier to handle in the splendor of that building. But there were never any frills or perquisites with the job.

I ended up at the SEC with the fancy title of Technical Assistant to the Chairman, which meant in simple terms that I was a senior person and no one knew quite what to do with me, there being no key spot open after I finished the TNEC inquiry. By this time, Douglas had gone, albeit rather reluctantly, to the Supreme Court, saying he didn't want to go but he needed the money, and Jerome Frank had become chairman. I don't remember anything in particular about this last job. It involved work on Commission opinions and policy matters. I do recall that after every Christmas we sent back apples, whiskey and other presents the chairman had received. I found him a delightful but sometimes difficult man to work with. He was very wordy. On one occasion, he had written an all-too-lengthy and somewhat confused opinion, and I suggested that it could be written in a much shorter space and boiled it down to twelve pages. Frank was delighted. He said, "Exactly what I needed. I'll put it as a preface, at the beginning of the opinion." I felt both frustrated and amused.

During this period I became annoyed with all the attacks on FDR from the Republicans who kept harping about how the

President was undermining free private enterprise using the sinister SEC regulators as his tool. So I wrote a book in 1940 for laymen called Protecting Your Dollars which described how the SEC worked, why it came into being and what it was accomplishing. I wrote at night, completing the text in about three weeks, found a publisher and thousands of copies went out to libraries, politicians and curious buyers. The book did no harm, helped some in the political campaign and was fun to write. It was, however, never nominated for a Pulitzer Prize!

I had been with the Commission five years, and at age 30 it was apparent that if I wanted to practice law, I'd have to get out of government and go to work in a a law firm. I knew little about law practice, as such, and indeed was not sure whether I could stay in Washington or would have to go to New York City. Peg and I had talked it over, and we were particularly keen on staying in Washington. As luck would have it, Eddie Burling came in and asked whether I would be interested in coming to Covington & Burling. Following up on that, I talked with Dean Acheson and a bit with Mr. Burling, Sr., whom I had gotten to know slightly in a social way, having gone out to his cabin on occasion for Sunday lunch. I accepted.

In a letter of thanks from the chairman, he said, among other things: "In your Richard Whitney investigation and your insurance study you leave personal monuments which will stand

and be admired for many years not only as extremely important achievements in and of themselves, but as tokens of the opportunities which await young men in government." While any monuments have long since crumbled, his latter comment hit the mark. It was a good time to have been young and to have entered public service. I was lucky to be involved in what Lady Bird Johnson correctly called a "yeasty, exciting time."

## COVINGTON & BURLING YEARS

## 1940-1967

Covington & Burling was the largest and best-known law firm in Washington at this time. It already had a national reputation. Judge Covington, a former Congressman, and later Chief Judge of the United States District Court on which I was later to serve, was an urbane, cultured and respected lawyer with wide connections throughout the business world. Mr. Burling was a shrewd and exceedingly bright westerner who had come to Washington in the First World War to be counsel for the Shipping Board. Covington and Burling were friends, and they formed the partnership shortly after World War I and were soon joined by Rublee, a civil libertarian, who didn't much like the law but enjoyed taking on leisurely foreign assignments of a legal nature.

When I accepted the job there had been no discussion of status, pay or the type of work I would be doing. When I got to the firm, there were about 30 lawyers. Many of them had

come down from the Harvard Law School and had clerked for the Second Circuit or for the Supreme Court. Three had clerked for Brandeis. I was the first Yale man. Mixed in were some unusually able, less spectacular personalities of sound judgment and expertise in taxes, estates, administrative law, and plain old fashioned litigation. The firm was a loosely run collection of talented lawyers all prizing their independence. The practice was growing, reflecting both the high quality of the work being done and the fact that the firm was the first in the nation's capital to seize the opportunity to develop a nonlobbying practice for out-of-town clients.

When I went to work, the firm had its offices in the Old Union Trust Building, and I started out on simple assignments for Thomas Austern and Howard Westwood. I was beginning to wonder a bit about money, because I had not yet had any discussion of compensation. Paul Shorb, who was an outstanding tax lawyer, dropped in to my office one day and said he wanted to meet me because he always liked to meet any new partner of the firm. This was the first indication I had that I was going to be a partner! Later Mr. Burling sent for me to discuss money. He went through a rather elaborate analysis of what other people in the firm were getting and my limited experience, et cetera, et cetera, and said he thought the proper starting pay should be $12,500. I said I wouldn't take it, that I'd been making $7,500 at the SEC, and I wanted to start at $7,500, because I knew I was worth that much,

provided he would guarantee me one thing. He was interested, and I said I wanted him to promise that he would pay me what I was worth if I could prove my mettle. We shook hands on this, and I started at $7,500, but was well above that figure before the year was out. I did make one other condition. I told Mr. Burling that I did not want to have anything to do with the SEC, that I knew too many people there, and I didn't want to appear to be trading on my influence. He was delighted with this, because the last thing in the world he wanted was more business at that time. My hunch proved to be sound, because several questionable characters came in wanting me to handle something for them at the Commission, and I was pleased to send them on their way.

It was soon apparent why I had been asked to come to C&B. Dean Acheson was the senior partner, involved in complicated trials. Spencer Gordon, who was a very experienced and competent trial lawyer, kept away from long administrative hearings and from trials that focused more on economic issues than the law. He was a leader in the local courts, but matters like the Stock Exchange representation which I mentioned earlier fell to Dean Acheson. The antitrust division of the Department of Justice at this time was launching a major attack on cartels and patent abuses, and E. I. du Pont de Nemours & Co., C&B's then principal client, was the major target. This work would have naturally fallen to Dean Acheson, but he was leaving the firm for the State

Department. Qthers who could have handled the work had been called up by the Navy Reserve for duty or were too busy with other firm business. Actually, although the number of lawyers in the firm was diminishing because of the threatened war, law business was booming, and there were not sufficient competent men available to do the firm's business.

Thus, somewhat surprisingly, almost as soon as I arrived at the firm I got the chance to handle C&B's major account at a time when that client was in deep, deep trouble. Before long there were some fifteen antitrust investigations going forward more or less simultaneously involving almost every aspect of du Pont's business. I tackled the work with enthusiasm, and it kept me in court off and on for long periods during the next eight or ten years. Du Pont gave me a free hand and accepted advice willingly. It was prepared to pay the freight and give its counsel the tools to do the best job possible. No lawyer could have had a better client or a better opportunity. We were shorthanded, extremely busy and the days for me were long.

Although I had been a member of the Connecticut Bar for five years and often in courts, the admissions committee of the D.C. Bar took a narrow view of New Deal government lawyers. My application for admission from Connecticut was denied on the ground I had not practiced law. Judge Covington was outraged. He had drawn the court rule governing admission by motion when chief judge, and felt it was being distorted.

He filed a petition on my behalf and took it to each of 15 judges but only 7 agreed with him and I had to take the exam. When I passed, praise the Lord, I went for my character interview. I had listed Justice Douglas as a reference. When the examiner asked how well I knew the Justice, I laid it on pretty thick. Then he said, "That's too bad, because he's a communist." I took him on and gave him my views with force. He must have decided I was a good advocate even if a fellow traveler, because I was soon sworn in. Feelings ran high in those days, and the cave dwellers of Washington were putting up a staunch stand against all us intruders. I should have emphasized my grandfather's Washington practice and how my mother grew up playing in Dupont Circle and attending Georgetown Visitation Convent.

When the war broke out, I was at a Redskin football game, and learned from the taxi driver after leaving the stadium that the "Japs" had attacked Pearl Harbor. Peg was pregnant at the time, and for that reason, I guess, among others, I didn't immediately enlist. Later it became impossible to do so because of my age. I was an associate deputy air raid warden (No. 7019) and used to march the streets of Georgetown at night, wearing a helmet, to enforce blackouts. Also during the war I helped Arthur Godfrey put on projects to raise funds for the war effort and one or two nights a week I would go down to the Belasco theatre on Lafayette Square to be a waiter serving GIs who came in for a bit of relaxation.

The work for du Pont grew. There were both civil and criminal cases to be tried for du Pont: The titanium and ICI cases in the Southern District of New York, a criminal case in Newark naming high officials of the company involving a plastic named methyl methacrylate, and the Cellophane case which was tried at Wilmington and eventually went to the Supreme Court. There was also a General Motors case and a paint case which I initially handled but which were tried by my partner Hugh Cox, because there was simply too much for one lawyer to handle'. Cox was very talented and an excellent litigator. There were other matters. I remember eight criminal acid cases out in Indianapolis, and it seems to me there were proceedings of various kinds in Wisconsin. In all of these cases I played a substantial role. Initially in the early cases in New York the firm was teamed up with Root, Ballantine in one instance and Cravath in another. The Cellophane case I handled entirely on my own all the way to the Supreme Court and won it. These were busy, challenging days, and I was frequently at Wilmington, sometimes several weeks in a row.

It was prestigious business, and success attracted other clients to the firm. I found myself involved with a wide range of work for clients who came for help including Scott Paper Company, Procter & Gamble, Upjohn, Parke-Davis, General Electric, IBM, and Pan American Grace Airways. In addition, there was a wonderful client that came in, the National Football League. I handled litigation against the new

American Football League successfully up to the Supreme Court. In addition, I did considerable banking work, having become involved in the bank holding field through representation of Transamerica, which was then in the hands of an extraordinary man, Mario Giannini, a hemophiliac and a difficult but interesting client who later was succeeded by an equally remarkable man Frank Belgrano who became a good friend.

There was also considerable libel work for The Washington Post, an old client of the firm, which for a while kept me in various aspects of the paper's business, including a very exciting merger in 1954 which the Post pulled off with its leading competitor The Time Herald.*/ Much of this business came directly to me, but it was all because of the extraordinary reputation of the firm and the knowledge that clients had that the firm was well staffed in depth.

After days of preparation the unexpected slip of tongue of a key witness, the failure of an opponent to seize an opportunity when it arose, or the joy of watching a tactic pay off -- such are the things that few can appreciate unless they have been through the mill. But there is not space here to reconstruct trials, and, strangely, descriptions never equal the real thing. Even if you read Carson's cross-examination of Oscar Wilde for example, as I have done many times, only a

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*/The Post soon afterwards went to other lawyers when its owner became mentally ill.

small bit of the high drama comes through. Reading transcripts of trials is always dull. Someday television coverage of a trial will catch much that is lost in the printed word, but the press as constituted today seems incapable of doing anything approaching adequate coverage of courtroom drama.

Lawsuits have brief moments of triumph or excitement, but trials are hard work. There are long nights, unrewarding preparations, and often well-laid plans go amiss when a witness fails to come through as expected or the Court misses the point you have so carefully presented. To put the exciting moments into focus too much background must be developed and the reader yawns. I cannot hope to give a true picture of how emotions were affected by a judge's statement he was going to jail some leading American businessmen when the jury came in and the jury then disappointed him by announcing a not guilty verdict. How my defense of the prosecutor's conduct while in a judge's chambers made me a pariah with counsel for my client's co-defendants who were playing dirty pool. How a British solicitor came to my room before breakfast to tell me he was going to flush a document "down the johnny" and I said' I'd report him to the judge. How a decision on the spot not to cross-examine a libel plaintiff led to violent objections from the client but won the case. How we lost a case because the judge got a new law clerk. How an objection to the authenticity of a clearly authentic

document irritated a judge but was sustained and the case won by the testimony of the authenticating witness. How it was necessary to roll the dice by presenting a witness without knowing what he would say, etc., etc. This was all-grist for the mill and kept excitement high. There is a seasoning from these experiences which adds to the effectiveness of business advice, and one finds profit in the next case from the lessons learned in the cases that went before.

Here is one more detailed recollection which will give some flavor. General Electric was caught in a massive price fixing mess. Top men just below the rank of senior officers in response to management's persistent drive for better profits and the lure of big bonuses had, contrary to company policy, agreed on prices with major competitors. Some communicated with a phase of the moon code. Many key products were involved. These employees were indicted. I represented the company after the fact. The company was anxious for a general settlement and the key actors in the company involved represented by personal counsel were prepared to plead guilty as they eventually did and some went off to jail. There was one obstacle. The corporation was ready to take its fines but one high official, a vice president named Vinson, had been indicted. He said he was innocent. I could not plead him otherwise, and a settlement of the whole mess hinged on the disposition of his case and we prepared for trial.

Three managers in the company's Philadelphia plant said Vinson had met with them in Philadelphia and he had told them to fix turbine prices with their opposite numbers in Westinghouse. Vinson denied this accusation. The managers took FBI lie detector tests and passed. They said the meeting took place in Dining Room B, at lunch, at Philadelphia sometime during a 3-month period.

Vinson remained firm. Along with my able colleague and friend, Bob Owen, I set out to prove Vinson was being framed. It took weeks. First we eliminated some dates by showing that on certain days the three managers were not in Philadelphia and on other days the dining room was closed for redecorating. Many days remained to be accounted for and this was particularly difficult because Vinson in nearby New York was in charge of the GE fleet of airplanes and flew everywhere at the drop of a hat. Thus he could go to Philadelphia at a moment's notice but analysis of the airplane logs eliminated this possibility. Then it was up to Vinson to prove he was in New York City on-all the days still unaccounted for. Some days were easy. He had signed lunch chits at the company dining room. Other dates were blank. Finally we nailed them all down but one. Finally Vinson's wife remembered the missing day. Vinson had gone to the bank to get out a real estate paper from his safe deposit and the bank had stamped the time. We were now set with a copper riveted alibi to beat the charge. Bob and I presented all our proof to the head of

the antitrust division in a long late night session at the Department of Justice before a group of skeptical attorneys -- then we waited. Before long disaster threatened. The antitrust division had checked the aviation records and found another plane! When I got the call, I was devastated. I felt after all our work I had been hornswoggled. Frantically I called the company. Before long the mystery was solved. There was indeed another plane, but it was a one-seated wooden radar testing plane that could not have gone from New York to Philadelphia and anyway Vinson was not a pilot. The U.S. dropped the case against Vinson and the other defendants pled guilty.

Estes Kefauver, a senator heading a crime committee who had an eye for publicity decided to investigate GE's price fixing conduct and hauled Vinson with me in attendance before him for a dramatic hearing. He wanted Vinson to take a lie detector test. Vinson refused. I handed the Senator a memo indicating how unreliable these tests were and Kefauver scoffed. But Vinson saved the day. He simply said if his accusers could pass lie detector tests, he had no faith in them. Csockett, the famous cartoonist, showed Kefauver's antitrust subcommittee putting the electrical companies on the hot seat for price fixing and yours truly snipping off the electrical current behind Kefauver's back. There was much more to my practice than knowledge of law and somehow I was always in the middle of action.

Two of my several arguments in the United States Supreme Court gave me great satisfaction. One was a patent case.*/ It involved the Ray-O-Vac leak-proof patent. An able patent lawyer from Chicago had the case for the company. He lived and breathed patent law, but the company thought I might be of help before the Supreme Court. The Supreme Court hated patents, C&B thought up a non-patent point that might win and since the man from Chicago thought the point made no sense, I insisted on 5 minutes of his argument time. He put on a brilliant defense of the patent in a dull but informed way and was getting nowhere -- the Justices were restless. He had 5 minutes left but didn't sit down. Finally I pulled him down. In the remaining three minutes I said "you must sustain the patent. Two courts below have found invention as a fact. You have a rule you will not upset concurrent findings below." I sat down. The Court woke up. Justices Frankfurter and Roberts bombarded the other side with questions. We won by a split vote! Afterwards I heard that Justice Black told his law clerk that if you could patent a leak-proof battery you could get a patent on a piss pot. But he was in dissent and finally a patent had been sustained in the USSC.

The other case was Cellophane.**/ I had tried the case below. The antitrust division claimed that du Pont had

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*/ The Goodyear Tire and Rubber Company, Inc. and General Dry Batteries, Inc. v. Ray-O-Vac Company, 321 U.S. 175 (1944).

**/ United States of America v. E. I. duPont de Nemours and Company, 118 F. Supp. 41 (D. Del. 1953), affirmed, 351 U.S. 377 (1956). [Cellophane case].

monopolized cellophane. It produced over 90 percent. I had argued that competition from other flexible packaging materials deprived du Pont of power over price and hence it had no monopoly power. The facts were on my side -- the law was on the side of the Government. Before the argument I prepared from our set of exhibits in evidence nine packets of flexible wrapping materials -- wax paper, Pliofilm, etc., which the court had found were used functionally interchangeable with cellophane and arranged with the clerk at the Supreme Court to have them handed to the Justices when I requested in course of argument. I had won below -- the Government was laughing me out of court in the USSC. When my turn came I argued that the U.S. was all theory, I had tried the case and had the facts, then nodded to the clerk. He passed the packets. The Solicitor General had never seen these physical exhibits, although they were in the record. He protested. Justice Warren scolded him and then I had the Court in the palm of my hand. The Justices passed the packets back and forth. Whispered and nodded they saw how bread, candy, cereals,, cigarettes, etc. were all wrapped in these different materials as well as in cellophane and sensed the competition. They obviously relished this glimpse of real life. When the Government counsel rose to respond, I felt I had won. The Court wouldn't let him talk and kept waving the packets. We squeaked through on top. It was a smashing triumph after months of hard work. Cross-elasticity of demand had won for a brief moment.

During my entire time at C&B, I combined agency practice and court work. The contrast was sharp and not complimentary to the agencies. Courts were far more expeditious, less political and result oriented and made without exception an attempt to be fair. Agency procedures in actual practice were often rigged and controlled by agency counsel. Coming from the courtroom one often felt as though he was in a foreign country. Elaborate records were developed before hearing officers, often of marginal ability, and ultimately the agency would decide without ever looking at the testimony and exhibits while purporting to weigh the proof. The quality of agency practice and procedures varied markedly. In my experience the FTC and CAB were well below standards set by the FDA and the Federal Reserve Board, for example, although I did equally well and equally poorly before all of them.

One of the joys of a trial practice like mine was the chance it gave to learn different areas of the law, to be before different judges and agencies and to learn, often on a crash basis, the intricacies of different businesses. I learned much about professional football attending owners' meetings, about cellophane visiting plants and marketing conventions, about toilet tissue and paper towels calling on supermarket buyers with Scott salesmen, etc. The business implications of litigation often took me to board meetings where practical business policy had to be meshed with litigation tactics. This brought me into contact with top

management. I participated in many sessions, helping to fashion strategy that would accommodate both the business needs of the client within the law and the requirements of the litigation. In many instances I became a negotiator for the client. Cases had to be won or lost in a manner least traumatic for the underlying business. These tactical decisions had far-reaching financial repercussions on the clients involved.

C&B rarely had one partner handling the client's business problems and another handling its litigation, a situation so typical of New York practice in my day. For most of my major clients I was both advisor and advocate and for me this was a combination that worked well. It was not unusual in an antitrust matter, for example, for me to analyze a government suit and prepare a brief for the United States at a very early stage, drawing from documents and my knowledge of government objectives a sharp adversary statement of the government's cases. I would send this to the client and in effect say this is my problem, how do we deal with it. There were moments when a new client wondered who I was working for, but this technique was effective and certainly got everyone down to brass tacks in a hurry. I have an autographed picture of Pete Rozelle, Commissioner of the NFL, in my study, inscribed, "To Gerry, attorney-psychiatrist, without whose help NFL would never have been termed the sports phenomenon of the 1960's." This perhaps reflects my dual role as advocate and advisor.

There were many problems beyond winning a lawsuit that had to be worked out, and that added immensely to the challenge of my practice.

Of course, trials were the best fun. A long trial out of town, as most of mine were, throws a team of lawyers together night and day relying on each other, sensing each other's strengths and weaknesses much in the manner of a camping trip. Close friendships are formed that last long after the trial is over. You have a common bond just as if you had climbed a difficult mountain together.

I ended up before many judges and came to know some of the very best federal trial judges of my time. Judge Forman (N.J.), Judge Rifkind (N.Y.) and Judge Leahy (Del.) were my favorites. Later I have tried to pattern my own court along lines I learned from them. There were others. I saw some judges overwhelmed by the complexity of the issues, others shielding ignorance by intemperate arrogance, and others seeking to avoid decision at extreme cost of time and energy because of possible reversal on appeal. Such an experience is sometimes disillusioning, but almost essential training if one aspires to become a seasoned litigator or by chance end up a trial judge.

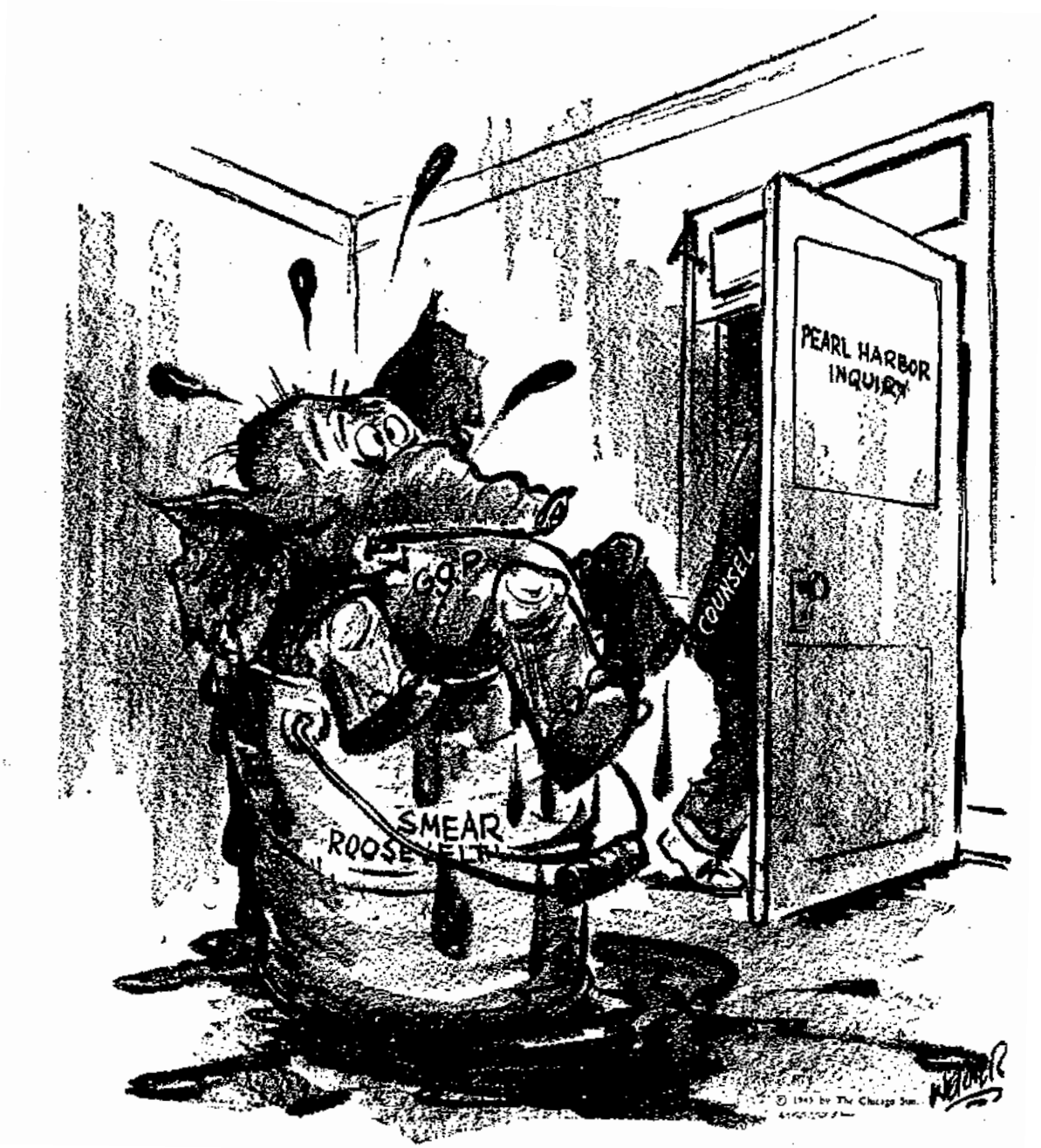
My earnings rose rapidly. I became fully involved in aspects of what we called "firm management," but in fact the firm prospered without any strong guiding hand. Inevitably, I became involved in civic affairs and to some extent in

politics. Eventually I took two very interesting assignments in government service while remaining a partner at C&B.

Politically I was one of the early members of the Washington Home Rule Committee, and worked for years with Walter Washington, Marve Hornblower and many others; trying to get a franchise for the city. I was a member of the Democratic Central Committee for a number of years, elected on two occasions. I was a card-carrying Democrat and always subscribed to the $100 dinners. One of the most exciting political ventures I took on was to be an advance man for Stevenson in his second campaign. I traveled with him across the country into Portland, Oregon, down through California, and back to Phoenix during an exciting part of an obviously failing campaign. Later I campaigned for Humphrey and Harriman in the District of Columbia.

During the Kennedy campaign I was a bystander. In the Johnson election I also did very little advance work. However, I was one of the two members of a committee that was organized to persuade intellectuals to come out publically for Johnson. Jim Kelloqg, former head of the New York Stock Exchange Board and a very good friend, and I obtained endorsements from a wide variety of important people. Johnson felt that he was considered a nonintellectual, and he was trying to attract, as we were able to do for him, the endorsement of physicists, nuclear scientists, college presidents, authors, historians, novelists and others of renown.

Chicago Sun - Dec. 16, 1945




*Left to Stew in His Own Juice*

Within the city, after our kids had polio, I became very interested in Children's Hospital, and served on its board for a long time. I had various jobs in the Community Chest. I was chairman of the board of St. Alban's School. At other times I was a member of the boards of Beauvoir and Madeira School. I occupied almost all of the possible jobs in the Yale Law School Alumni Association, being chairman of its executive committee and the law school's representatives on the Yale Council, succeeding Roger Blough for a period of five years. With Lloyd Cutler I helped to raise capital funds.

In April 1967 I received the law school's Citation of Merit at the annual alumni day gathering, embarrassed yet pleased by all the kind things said and the exaggeration of the citation itself, which reads:

"CITATION OF MERIT

to

GERHARD A. GESELL

of the Class of 1935, in tribute to his distinguished career as a public servant and practicing lawyer and his devoted service to the Yale Law School.

His high achievements in public life and in the practice of law have brought distinction and honor to himself and to the Yale Law School. He has served the School faithfully as president of the Association and chairman of its Executive Committee and as chairman of the University Council's committee on the Law School, and in countless other ways as well. Purposeful and decisive, a lawyer of high integrity, superb skill and esteemed judgment, he is a gentleman of charm, sensitivity and intellect.

He exemplifies the highest standards and traditions of the legal profession. The Yale Law School Association is proud to pay him honor."

The Sunday Star · Nov. 18, 1945

The other assignments that attracted me included an appointment as chairman of a Committee of the Judicial Council of our circuit to consider methods for improving the court system, a project on which I worked for some five years with a group of distinguished lawyers before going on the Court. In addition, I took appointed cases and helped Charlie Horsky, one of my partners, in representing some of the victims of McCarthyism. I was an early member of the American College of Trial Lawyers, joined ALI, etc.

Shortly after the war, a rather unusual assignment came my way. A Joint Congressional Committee was created to investigate the Pearl Harbor disaster. Roosevelt had died. I remember learning of his death riding a Pennsylvania Railroad train with Donald Hiss on my way to Wilmington from New York City. Truman was president. The Joint Congressional Committee was chaired by Senator Barkley. William D. Mitchell, former Attorney General and Solicitor General, a distinguished Republican with a reputation for honesty and integrity, was appointed general counsel. After conferring with members of the Supreme Court he came to me and asked me to be his chief assistant. I had never met him.

For a period of months, I was deep in the Pearl Harbor inquiry, presenting witnesses before the Joint Congressional Committee. We unraveled the facts carefully and thoroughly. After being sure that the top secret intercepted Japanese

messages were made public for the first time.*/ We decided to start from the beginning and work our way up to Kimmel and Short, the two commanders in charge. Things went pretty well for a time. Some of the America Firsters on the committee, particularly Homer Ferguson from Michigan and a man named Kceff from Wisconsin, constantly sought to divert the inquiry into an investigation **of** how we got involved with the British and in their view brought on the attack because of this; but of course the focus of our work was much narrower, and we kept it that way. Our job was to find out why we were surprised at Pearl Harbor.

***Two*** events led to Mitchell's decision **to** resign and **I**, of course in full agreement, went with him. **As** the evidence against Kimmel and Short accumulated, their friends wanted them to come to the stand and justify their performance by blaming FDR before all the evidence was in. Mitchell and **I** resisted this with everything at our disposal. Finally one day, and this was the last straw for me, Homer Ferquson stated that he had just learned a "shocking fact." He had learned, he said, that President Truman had not decorated the man who had broken the Japanese code. **Up** to this time it was a great secret as to how the Japanese code had been broken. We had put out a story to the effect that we had captured the key to the code by breaking into the Japanese embassy in Portugal.

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*/ Before the war started the U.S. had broken the Japanese code and we were reading their most secretive traffic, including diplomatic messages.

In fact, the code had been broken by cryptanalytical methods using IBM computers. Ferguson, abetted by Keeff, insisted that the man who broke the code be brought forward and given an opportunity to explain how he had done it, so that a decoration could be awarded him. This, of course, had absolutely nothing to do with the Pearl Harbor disaster.

Chairman Barkley had a rule that any witness would be called so long as any committee member demanded that the witness be presented, and so we had to go forward. On the morning before, General Marshall asked for an executive session of the committee. He appeared with a letter from Truman to state that disclosure of the method of breaking the code would set our intelligence efforts far back throughout the world, because we were reading the Russians, we continued to read the Japanese, and we had broken other significant codes. Ferquson stood up and said he would not sit in the same room as "that traitor General Marshall." The meeting broke up and the hearing was called. Barkley nodded to me to question the witness, and I refused. He was angry. The committee went ahead nonetheless, and that day all codes the U.S. was reading around the world, including the Russian, were changed and indeed our intelligence effort was set back enormously.

Mitchell and I resigned not long after this, and the committee wound up with an inconclusive report aided by its new counsel, who at one time had been counsel for Kimmel!

Again there were cartoons. Several characterized our resignations as another Pearl Harbor and another showed us

New York Times - Dec. 16, 1945

"NARY A PEARL"

Lewis in The Milwaukee Journal

putting the Republican effort to smear Roosevelt into their own bucket of smearing tar. Others showed us looking for a needle in a haystack. Since then controversy continues and the revisionists have been hard at work rewriting the facts to prove their preconceptions. This was, nonetheless, a most interesting experience, and gave me a good deal of background about the Hill.

I think the thing that impressed me most during all this was the integrity of General George Marshall. We had met him, Mitchell and I, at the beginning of the investigation, and before we got down to business, Mitchell, a staunch Republican, said to General Marshall, who was sitting all alone with the two of us in his big office, "General, next to yourself and Roosevelt and Churchill, who do you think was the greatest hero of the war?" Marshall said, "You don't have to include me. Next to Churchill and Roosevelt, the greatest hero of the war without question was Harry Hopkins." Of course, Hopkins was viewed by many as a left-wing radical, and Mitchell was dumbfounded. He blurted out, "Well, what about Ike?" Marshall said, "Ike?" "He was a good officer. I always used him when I wanted a compromise." The great contribution of Hopkins, he said, "was that Hopkins could talk to Stalin, to Churchill, and to Roosevelt on an intimate, first-name basis." Marshall described him as "lord root of the matter," because he would insist they decide and not just talk when they got together. Hopkins was the one effective

go-between among these three great leaders and really the man, in Marshall's opinion, who had greased the way to many important, significant decisions that had won the war.

Marshall was fully cooperative throughout the investigation. There was much speculation that he and Roosevelt knew the Japanese attack on Pearl Harbor was coming, and that they encouraged it to get us into the war. As far as Marshall was concerned, he was embarrassed, because he could not remember where he was the night before Pearl Harbor, and the speculation ran that he was in the White House conspiring with **FDR** when the Japanese message cutting diplomatic relations was intercepted. Marshall said he was not. He searched his diaries, followed up every possible lead, and could find no evidence where he was that night. In all probability, he came home tired, had a light dinner, fell into bed, and got up in the very early morning to ride horseback as was his custom, at about 5:15 a.m. There were no records at all at the White House that he had been there. The thought was that it was at the White House that he learned of the crucial final Japanese message, which was intercepted and which gave clear indication that war was **on** its way. Marshall was urged to testify that he was home in bed but since he could not remember he refused to say so and took much abuse. But the accusations had no foundation. **I** personally reviewed all *of* Roosevelt's papers relating to Pearl Harbor, including his most intimate correspondence with Churchill. There was

nothing in any of these papers, which President Truman willingly and easily made available, to suggest in the slightest way that Roosevelt had any knowledge of the attack that was coming or that General Marshall knew the Japanese were about to attack.

I took on this assignment without compensation while remaining a partner at C&B under a special statute which exempted both Mitchell and myself from any of the conflict of interest laws that then vaguely hung over the area where an attorney, while still in practice, undertakes some kind of government work.

During the war, one opportunity came my way. The Attorney General wanted me to become a special prosecutor to try a criminal conspiracy case against a scattered group of pro-German editors publishing small pro-Nazi newspapers mostly in Pennsylvania and the Middle West. I looked at the Government papers. These people were misguided, but not subversive. I declined. The case was tried before Judge Eicker in Washington, D.C. by a man I disliked, O. John Rogge. He lost. The case was a shambles. It actually killed the judge, a nice man who had been an SEC commissioner. All defendants were acquitted. Although the defense lawyers had behaved abominably, I felt I had made a sound decision in avoiding this sample of war hysteria.

Except for the Pearl Harbor investigations, things were rather dull during the Truman and Eisenhower administrations,

as far as I was concerned. Law practice continued to be demanding but much of it was routine. At the very end of the Truman administration, President Truman attempted to get me to come and help at the White House as one of his immediate assistants, but I declined through Dean Acheson, who took me off the hook, saying that if I talked to the President, I'd be unable to refuse. The only governmental opportunity that came along for me in the Eisenhower administration was a suggestion from Gordon Gray that I come to the Pentagon as General Counsel, but I was in the middle of a long trial up in New York, and this was out of the question. Moreover, the Pentagon did not hold any interest for me.

Everything became more sparkling when Kennedy reached the scene. Kennedy was a showman from the start. He set out to dramatize his concept of the New Frontier long before he was sworn in, reaching out for talent. Sargent Shriver and my old friend Harris Wofford were an informal search committee checking into suggested names and assembling lists for possible appointment to key posts. The makeup of the Cabinet was naturally receiving a great deal of attention because Kennedy had announced that he was going to have his full team in place by the time he was sworn in. There was much speculation in the press and the possibilities were constant fuel for gossip. I had been working for Humphrey and had not been involved in any way in the Kennedy campaign, but by pure happenstance I had a catbird seat to watch developments. Kennedy lived directly across the street from us in Georgetown, and his home became the center of

attention during the pre-inaugural activities. He was making his plans at his home, and from time to time announced appointments on the front steps. Possible candidates for high office, including the Cabinet, slipped in and out of his house, some by the front door and some by the alley in back. When he reached a decision on a particular job, it was usually announced from his front steps at an informal press conference when he called together the group of newsmen who were always hanging around outside. In fact, press headquarters was next door to our house, where a friendly neighbor had opened her living room and poured coffee for the representatives of various media as they came in, shivering from the cold. A few of our close friends in the press, in fact, used our house as a refuge.

As each appointment was announced, Peg would call me at the office with the news, and I would hasten to the Metropolitan Club for lunch. Without revealing my superior sources, I became known for my reliability as I announced my "guess" as to each appointment and proved to be so extraordinarily accurate when the Star came out later that afternoon. This was great fun.

Matters became a bit tense when Harris Wofford told me I was near the top of the list for Attorney General. The press began to call, and The New York Times printed a piece saying that I was to get the job or was the leading candidate or something of that kind. Of course, nothing came from any of this. I was not even approached. Kennedy selected his brother, Bobby, at the last minute shifting him from deputy at

the Pentagon to Attorney General, where of course Bobby immediately began in his energetic way to select a top team.

When the day for the swearing-in finally came, a large crowd gathered on the corner of 33rd and N to watch President Kennedy in full regalia leave for the Capitol. Kennedy came out in top hat and went across the street to present a plaque to the kindly neighbor, and to give her two tickets to the Inaugural Ball. It was quite exciting for everyone. Aero 'Saarinen, the architect, and his wife, Aline, who had been a roommate of Peg's at Vassar, were with us on our front steps and we were in touching distance of the new president. Saarinen was absolutely beside himself with joy. He worshipped Kennedy, and felt that at last someone was going to go into the White House who would get things moving again.

Byron White had been named Deputy Attorney General, and I knew him slightly from my Yale activities. I had tried to recruit him for C&B at an earlier time when he was a law clerk for the Chief Justice. After Bobby Kennedy was sworn in, I got a call and went over to meet with him and White. I knew Bobby very slightly, having met him when he was riding the Stevenson campaign plane as we went into Boston many years before. Kennedy said that he was considering two names for Assistant Attorney General in charge of the Civil Rights Division. One was Harris Wofford, and one was Burke Marshall. He said that since both of them had worked for me, he wanted my opinion as to who should be appointed. I immediately said that he should appoint Burke. Kennedy was surprised. He

said, "He knows nothing about civil rights." I said that was correct but he had a superior legal mind and it seemed to me racial issues were going to present extremely complicated Constitutional legal problems requiring an outstanding lawyer rather than experience as a civil rights specialist: I went on to say that I thought Wofford, a vital, knowledgeable man, could do much more helpful work if he went into the White House as an advisor to the President because he knew the personalities and the issues. When I left the Attorney General's office, I immediately called both Burke and Harris to tell them what had happened, and to his credit Harris said he thought I had done the right thing. And that's the way things worked out. I hope Harris meant it. He went on to have a great career in civil rights and education. Burke got the job.

After a few more days went by, I got a call from the President himself. He said he was calling me "at the suggestion of his brother," who wanted me to be Assistant Attorney General in charge of the Criminal Division. I immediately declined, saying that I did not want to play cops and robbers. The President did not seem surprised. He was very cordial. It was a brief chat. Jack Miller, who eventually got the job, did an excellent job.

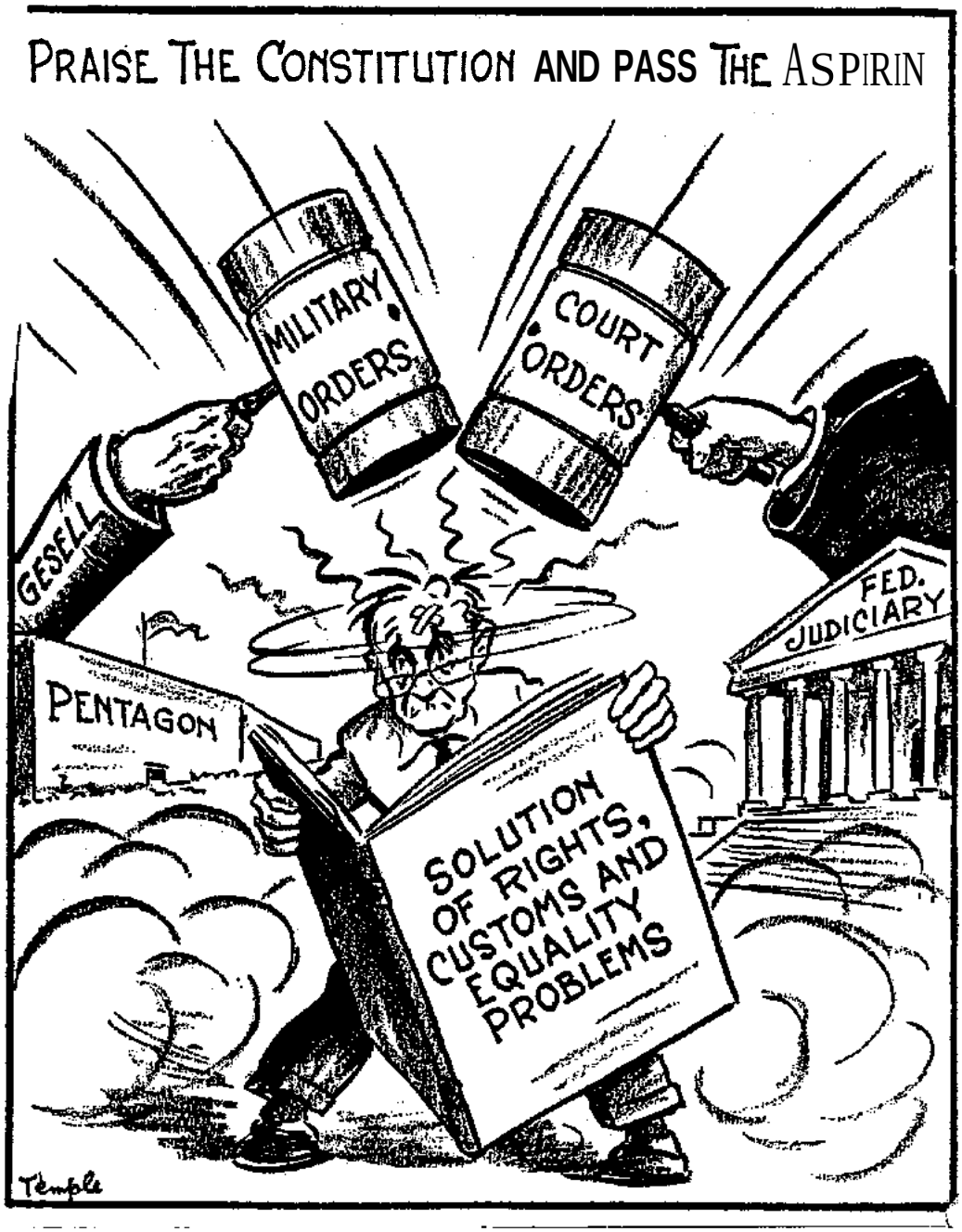
Many of my friends were going into the Kennedy administration. From C&B, John Douglas went to head the Civil Division, Johnny Jones went to be the deputy in the Tax Division, and there were others who went to other parts of the government. I had an urge to get involved, but felt the Kennedys were ruth-

SOCIAL DICTATOR
GESELL DEMANDS
U.S. MILITARY DEFENDERS OF NATIONAL SECURITY
U.S.

less and devious. I was hesitant. There were several minor opportunities.

I remember another call from Bobby. He was very angry because the United States Steel Company had raised the price of steel, and he and his brother, the President, felt that they had had a commitment from Roger Blough, the president of U.S. Steel, to hold the line on prices. In their Irish anger they suspected some kind of a conspiracy to fix prices was involved, because the other companies had followed U.S. Steel's lead. Bobby asked if I would leave the firm and take on the job of prosecuting Roger Blough dangling the possibility of a federal judgeship if I took the job. I laughed and said I had no intention of doing anything of the kind. In the first place, Blough was a friend of mine. He and I had worked together very closely in connection with a major Yale Law School fund drive and in other matters at the Law School. I had never represented him. I also pointed out to Bobby that since I had been active on the defense side in the antitrust field, and written all kinds of briefs on price fixing at one time or another, I would be a poor choice to become a prosecutor because my own words would be thrown back in my face. He was sort of miffed. The whole thing blew over, however, and nothing was ever done involving Blough or the steel company.

My real involvement with the Kennedy administration came later, when the President appointed me Chairman of his Commission for Equal Opportunity in the Armed Forces. This was a challenging job, which I carried forward during the latter


PRAISE THE CONSTITUTION AND PASS THE ASPIRIN
MILITARY ORDERS
COURT ORDERS
GESELL
FED. JUDICIARY
PENTAGON
SOLUTION OF RIGHTS, CUSTOMS AND EQUALITY PROBLEMS
Temple

part of the Kennedy administration, and on into the Johnson administration. By letter to me dated June 22, 1962, President Kennedy indicated our focus was to be on the following two questions:

> "1. What measures should be taken to improve the effectiveness of current policies and procedures in the Armed Forces with regard to equality of treatment and opportunity for persons in the Armed Forces?
>
> "2. What measures should be employed to improve equality of opportunity for members of the Armed Forces and their dependents in the civilian community, particularly with respect to housing, education, traqsportation, recreational facilities, community events, programs and activities?"

We had a committee of distinguished members, both black and white. The two most outstanding members were Abe Fortas, who later went to the Supreme Court, and Whitney Young, a national leader in the black movement. While I continued to practice law, I ran the commission from offices in a small building facing Lafayette Park.*/ For almost two years I had

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*/ About this same time I became one of the original members of the Lawyers' Committee for Civil Rights Under Law organized by President Kennedy. Since its establishment in **1963**, hundreds of thousands of hours of legal time, worth millions of dollars, have been contributed to Lawyers' Committee cases. In 1982 alone, over **33,000** hours, valued at more than $2.8 million were donated in cases referred by the national office. He sent the following telegram on June 10, **1963** to a group of prominent attorneys.

> "At four o'clock on Friday, June 21, I am meeting with a group of leaders of the bar to discuss certain aspects of the nation's civil rights problem. This matter merits serious and immediate attention and I would be pleased to have you attend the meeting to be held in the East Room of the White House. Please advise whether you will be able to attend.
>
> John Kennedy"

88TH CONGRESS
1ST SESSION

# H. RES. 479

IN THE HOTJSE OF REPRESENTATIVES

AUGUST 7, 1963

Mr. SELDEN submitted the following resolution; which was referred to the Committee on Rules

# RESOLUTION

*Resolved,* That an appropriate committee of the House of Representatives of the United States Congress investigate the formulation, contents, and appropriateness of the initial report of the President's Committee on Equal Opportunity in the Armed Forces entitled "Equality of Treatment and Opportunity for Negro Military Personnel Stationed Within the United States".

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two full-time jobs. I recruited two or three young men to help, and we went about our work. At one time early in the game the entire commission met with President Kennedy and had our picture taken. I recall that when we went back to the offices across the street from the White House, the black members commented quite openly that they felt that Jack Kennedy had no understanding of the black problem.

We got out two very significant reports, one relating to discrimination on base and the other relating to discrimination off base. McNamara, who was Secretary of Defense, cooperated throughout the study and specifically detailed his aide, Adam Yarmolinsky, to make sure we had access to all papers and all personnel. We held quite a number of informal hearings, and we then broke up into groups of two to do some field investigation.

I teamed up with Whitney Young. We went to a Navy base and an Army base, both in the South. At the Navy base in Florida, we found that all of the married black enlisted men were in shanty buildings on one side of the railroad tracks and the whites were all in much better quarters on the other side of the railroad tracks. There was complete segregation on federal property! When we reported this to the captain in charge of the base, he told us pointblank that we were not correct, and that that condition didn't exist. I remember we put him in a car and drove him there and showed him the place. I wrote him a letter the day after we left saying I wanted an immediate report as to what was going to be done about the

situation. Three days later I got a wire. The captain had leveled all of the black housing, and placed all of the blacks with the whites in the other, better facilities across the tracks. I remember also at this base we found that no black had ever been allowed to stand guard at the entrance, and that there were other types of petty discrimination which we called attention to, and which were at least for the moment corrected

At the Army base, we found that the merchants in this city who depended on the base for their principal business did not permit any black soldiers to go into the stores. Even the store that sold Army and Navy surplus goods where soldiers would pick up odd items to supplement the "general issue" that they had, would not allow blacks in to buy. I met in several meetings with the business leaders, and when I indicated that if the situation wasn't corrected we would recommend that the base be shut down entirely, the city fathers adjusted their position. It must be said that the Army had been trying for a long time to accomplish this, and were in no respects party to the blatant discrimination that was taking place.

The most serious problem at many bases had to do with off-base living quarters. We were able to work out arrangements by which these off-base facilities were put off limits unless they eliminated their policies of discrimination, thus assuring that regardless of race, creed or color all military personnel had equal access to quarters for themselves and their family.

A biting cartoon showed me demanding that the defenders of national security in the armed forces become subservient to

a social dictatorship. Our "Gesell report" was labeled as a radical takeover of the defense establishment and assailed by hard-line southerners. The Congressional Record in the summer and fall of 1963 is full of personal attacks on yours truly which I never answered and a resolution to investigate the Commission introduced in August 1963 failed to pass. The so-called Gesell affair fizzled.

We learned that many units of the National Guard were completely segregated, and we set about to make sure that blacks were admitted to the National Guard components in every state. Bobby Kennedy, somehow got wind of this and didn't like it. He thought the issue was politically dangerous. He called me to his office and protested. He said he wanted to see in advance a copy of anything we put out on the Guard. I told him that I'd been appointed by his brother, not by him, and that I was going ahead. I never sent him any material, and I never heard from him again on the subject. The National Guard was fully integrated in due course as a result of our pressure.

President Kennedy was pleased with our first report and instructed the Secretary of Defense to report his reactions in thirty days. While McNamara was slow to respond, he always came through and things began to move. The commission work was still in progress when Kennedy was assassinated. I recall that at this tragic moment I was arguing a case before the full Federal Trade Commission. A note was brought in and handed to Chairman Dixon, and he announced that the President

the Oval Room. Johnson came across, put out his hand, and said, "Hello, Gerry, how the hell are you?" I was absolutely dumbfounded. I had met him only once before, perhaps twelve years before, at dinner at Ganson Purcell's house: Johnson was then a young Congressman. He had an extraordinary memory for names. Moyers didn't know my nickname, and apparently Johnson had no trouble pulling it back by memory.

I told him briefly about the commission. He had not heard of it apparently. His attitude was finish it up, go ahead, get it done quickly, which I went ahead and did, publishing the second of our two reports a few months later. Johnson did indicate that he'd like to meet the members of the commission, and on one occasion we all went to call on him, much as we had done with Kennedy. After this meeting, the attitude of the members of the commission was entirely different. Universally they all said, here is a man who understands blacks, who understands the black problem, and they were much more hopeful than they had been after leaving the presence of John F. Kennedy.

The commission's reports had some effects immediately, and eventually had a pronounced influence when the Department of Defense made it clear that off-base facilities could not discriminate against black soldiers, sailors and Marines. On December 21, 1964, President Johnson wrote his thanks, saying:

> "You and the members of your Committee have taken seriously the assignment given you by President Kennedy in June of 1962 and I know that since that time the progress that has been made must give all of you a feeling of deep satisfaction. The fact that today every State in the Union has an integrated National Guard is, I

> believe, due in large measure to the quiet and persistent efforts of your Committee. The Committee has done its work well and I congratulate and thank you for your contribution."

Apart from this, I had only one further significant contact with President Johnson. On one occasion I was asked to come, on short notice, to the White House, and found there seated around the oval table, Burke Marshall, Whitney North Seymour, a leader of the New York Bar, and a group of 12 prominent black leaders. Johnson had no staff with him. The subject apparently was why there had not been more black appointments to the federal courts around the country. It soon turned out, as Johnson took up the situation in Texas, Chicago, Atlanta, and New York, that he knew more about the local political situation than these black leaders realized. He pointed out the difficulties, he listed with precision the number of blacks he had appointed already to one position or another, and frequently challenged these men to come up with better qualified candidates. He kept talking about how important it was that blacks get into law firms and questioned me at some length as to why C&B had not hired more blacks. At that time, we had no black lawyers, and I explained with some care that we wanted only to take lawyers who would be qualified to *go* all the way to partnership, and that we were not about to run the firm by taking in people with inadequate abilities or preparation merely because of the color of their skin. Johnson agreed with this and kept saying that the trouble was too few blacks were being graduated from law

had been shot. Some people in the audience began to sob. The members of the press raced out, and the hearing was adjourned in midstream. I have never seen people so moved by a public event of that kind. It reminded me of the time when FDR died. I was riding the Pennsylvania Railroad from New York to Wilmington, doing work for Du Pont when the conductor announced that FDR had died and people throughout the car began to cry and to sing hymns. Both occasions were very moving.

There was a dramatic series of events following this awful assassination. I remember the funeral procession where Haile Salassie walked at the head *of* the parade next **to** the very tall head of France, Charles De Gaulle. Everyone was bewildered, many felt they had lost a friend, and rumors were flying everywhere. Johnson quickly took over. He was an experienced politician, and most people felt that the government was back on course. Only the Kennedy people sulked.

After a reasonable time, I sent word to the White House that I wanted to find out whether the President wished me to continue as Chairman *of* the Commission on Equal Opportunity in the Armed Forces. Our work was still in midstream. I was asked to come to the White House, and spoke with Bill Moyers, who was then one of Johnson's right-hand men. Moyers said, "The President wants to see you." I was surprised and pleased, and after waiting a few moments I was ushered into

schools and urged the black leaders to encourage more young blacks to enter law school. It was Johnson's view that the lawyers really in the end were running everything, not only in Texas but everywhere. As we left, Johnson had let slip purposely that he was going to put Thurgood Marshall on the Supreme Court. This was a very interesting meeting, and soon we all received a beautiful photograph of the group made by Johnson's ubiquitious Oriental photographer, who in those days accompanied him everywhere.

I did get a glimpse of Johnson on one or two occasions at political fundraising meetings, and I acted as chairman of the Concessions Committee at his inauguration. This involved a lot of legwork selecting the concessions to be sold along the line of march, and as a result, I sat in the preferred seats in the front of the White House along with Whitney Young and many dignitaries.

At no time did Johnson ever ask me to do any particular public service, and I really didn't think he was very aware of who I was and what was more I was sure he didn't care. He was a very complex man, generous in the extreme, difficult at the other extreme, and of course stories about him will continue to emerge for many years to come.

While I leavened my practice with a bit of teaching at University of Virginia, government assignments, civic activities and politics from time to time, I never strayed far from the law. Washington practice in my day offered many

advantages. First and foremost for me was the fact that my clients were for the most part out of town. I didn't have to commute with them, entertain them, join the same clubs and pretend to like the same things and get my social life so entangled with them that objective advice would be difficult. Lawyers in many cities I met were constantly catering to their trade. I was spared all this. Most Washington lawyers were on the road a lot, and I surely was. Covington's national practice took me to many different courts and exposed me to every type of lawyer imaginable. This was for me a constantly broadening experience which was to be invaluable when I became a trial judge. And after a long trip or trial out of town, it was always refreshing to sit down with people who were doing useful things, full of ideas, reading books, looking more often on the bright side of affairs and not be under any compulsion to conform. The period from FDR to Johnson was rarely dull. In Washington we felt we were at the hub of the universe and in some degree privy to major events in a watershed period that was changing the city and changing the world.

One of the surprising developments in recent years is the growing belief expressed by many recent law graduates that corporate practice is dull and removed from opportunity to further the public interest. Of course any generalization in this area is nonsense but at C&B in my time such was not the case. C&B had the most prestigious and biggest corporate practice in D.C. and yet it received the gold medal of the

Civil Liberties Union for the firm that had done the most for civil liberties in the first 50 years of the Union! Nobody talked about pro bono work, we just did it. Indeed at one time the firm was a bit concerned to find after a survey that 25 percent of time logged was "for free." As a firm, we were into everything, helping the YWCA, victims of McCarthyism, handling assigned cases for arsonists, homosexuals and the Bad Man of Swampoodle and doing countless chores for various members of the Community Chest or non-chest members like Planned Parenthood. We lent lawyers and secretaries free to Legal Aid and Legal Services. What's more, many seem to forget sound advice to corporate clients can go far to bring corporate practices into harmony with established public policy.

It is particularly difficult to write about my happy busy days at C&B. Much of the excitement and challenge can only be understood by revealing client confidences or by discussing personalities, not always in favorable terms. I want none of this, *so* it's difficult to paint the full flavor of those days.

C&B was a stimulating place to work. It was loaded with talent. There was plenty of money to go around and few squabbles. While my social life rarely included colleagues, I enjoyed working with other lawyers in the firm and, with few exceptions, there was *a* true collegiate atmosphere. I remember that when one partner began to boast of how much

business he brought in, we laughed at him and cut his take because it was the firm that drew the clients -- its high reputation for quality work. As the firm grew, it became less attractive. High standards continued to be emphasized and relations among the older established partners remained reasonably serene, but size brought its own inevitable problems. The firm recruited only young lawyers it felt could be partners eventually, and it did a good job. The pressure for partnership became such that an eventual partnership became almost a matter of course. Partners had favorites whose routine work had become indispensable. They were fearful they would lose able associates if partnership became unavailable. The ability of these people was unquestionable, but some attributes of a true partner many had not. Their client appeal was slight, status as leaders of the profession was never to be realized, and some of them had little sense of what others had done and were doing to make their lives so comfortable.

On top of this came an inevitable tendency to award conformity and question idiosyncracies, forgetting that the strength of the firm came from the highly individualistic nature of the earlier partners fueled by Mr. Burling's exceptional eye for those who, regardless of school marks, family or class showed special qualities yet not fully tapped. At the same time, young lawyers showing the irreverence and skepticism of the '60s and '70s pushed to have a voice in all

firm decisions, ignoring the need to earn status by performance, believing apparently that those who created the firm could not be trusted for its future course. These changing times and attitudes made life less congenial.

Contemporaries in other firms were experiencing the same tendencies to bureaucratize law partnerships and indeed C&B was having fewer strains than many other firms.

Working with C&B in my day was a rare privilege. Those of us in the forefront of major litigation had extraordinary support in depth. Everything I have recounted was a team effort. To work with partners like Hugh Cox, Graham Claytor, James McGlothlin, Burke Marshall, John Douglas, Howard Westwood, Paul Warnke, Nes Foley, Ham Carothers, Bob Owen, Dan Gribbon, Charles Horsky, Jack Schafer and those then younger associates like Ed Gignoux, Abe Chayes, Al Sachs, James Hamilton, Steve Pollak, and Harris Wofford assured excellence and high quality. I have never been associated with an abler gang. Although often the point man, I couldn't miss.

A special word about John Lord O'Brian is more than necessary. He came to the firm after World War II from a long career which combined public service and a successful corporate practice. We were together constantly. I lacked the intellectual ability to be his companion in many ways. His love of literature, stained glass, poetry and the classics was deep, and his memory incomparable. Unlike Hugh Cox, I couldn't keep pace with him in this area but when it came to

the trial of cases and client relations at hand, we worked well in tandem and I profited greatly from his wisdom. He was often at the trial table. Although he lived well into his nineties he never was at a loss to call up a story appropriate to the circumstances, and he never repeated. His wit was legendary.

Mr. O'Brian asked me to tell him when it was time for him to stop talking in court and when after an unsatisfactory Supreme Court argument I told him, he hugged me and expressed his thanks for my friendship. He would sit in strategy conferences where clients wondered who and/or what should be asked of whom to get results from Uncle Sam, and always at the end he would quietly say, "I suggest we practice law." He was a very wise and charming man who helped me immeasurably along the way. He gave C&B class and filled the void created by Dean Acheson's departure for extended services in the Department of State.

Things continued to go well for me. I found mixing the high drama of the courtroom with an advisory role and a mixture of politics and civic responsibilities most satisfying. I had turned down opportunities to go into business, to join another leading firm and to join a law faculty as dean. It looked like more of the same. I was happy with the thought. Then my whole life changed.

JUDGE

1967 --

My nomination by President Johnson as a United States District Judge for the District of Columbia came as a complete surprise. In the fall of 1967 I was home, mid-afternoon, packing to fly out from Dulles in the evening to Los Angeles to take depositions in a suit I was handling for Procter & Gamble when the White House called. President Johnson was put on the line, and said, "How the hell are you?" and I replied I was fine and asked for his own health. He then asked, immediately, whether I would like to be a judge. Startled, I blurted out, "What court are you talking about?" And when he said the United States District Court, I said, "Well, I guess so." He then passed a few pleasantries and said that I should not be surprised if the FBI was soon in the neighborhood making background inquiries. I turned to Peg and in a complete state of shock said I guessed I was going to be a judge.

On the trip west I began to realize what a difference my way of life was to be and what adjustments would have to be made once the news was out. Johnson was good to his word. My selection was by the President personally. It was his own decision. I was not recommended to him by the Department of Justice, and of course he was in no way my friend.

The appointment came about in an odd way. When Thurgood Marshall was eventually appointed by the President to the

Supreme Court, the Solicitor General's post became vacant. To me this post was the ultimate trial lawyer position in the country, and I had from time to time mumbled to friends that I'd like a chance to be Solicitor General someday. Unbeknownst to me, Ramsey Clark, then Attorney General, whom I barely knew, sent my name to the White House with a full background presentation, and recommended the President select me as Solicitor General. In this manner, the President became familiar with some of my activities, and in his thorough, inquisitive way he began to make other inquiries about me. Still, I knew nothing of what was going on. It was well known that President Johnson hated to have anyone learn in advance about one of his prospective appointments, and often if there was a leak he would turn and appoint somebody else simply to fool the press and to show his dislike for the leak. So apparently some who knew what was going on had been very careful not even to mention it to me.

The President was seriously thinking of appointing me Solicitor General. He spoke to Clark Clifford about it, and asked Clark what he thought of my being selected. I knew Clark slightly, because he had been brought in to the General Electric mess as an advisor to the President when their top executives were caught price fixing and I was battling the devastating facts, but he was never a close friend. And that certainly proved to be the case. I'm informed that Clifford told the President that while I was a good trial lawyer, he

thought Johnson should select someone of more distinction, and suggested that perhaps a dean of a law school should be chosen. The President then inquired into the background of Lou Pollak, Dean at Yale, but when it turned out that Pollak was violently against what was going on in Viet Nam, the President then turned to Griswold, who was at Harvard, and Griswold eventually was appointed. Of course Griswold was able to stay on with Nixon, because he was a Republican and a conservative, but if I had gotten the job, I would have been in place a very short time and would never have been a holdover with President Nixon. Even if the chance had existed, which I am sure it would not have, I would have walked out.

At the same time there was a vacancy on the District Court, and it had been open for some time. Different political factions based in D.C. and elsewhere all had candidates. Johnson realized that I was apparently qualified, and that my selection would not ruffle any political faction particularly, and *so* I got the nod, which I am sure came in part because of the kind prompting of my great friend, Jim Rowe, who was then close to Johnson.

There were no hitches. After a thorough FBI investigation in which President Johnson participated personally by calling one of my neighbors to find out whether or not I had drunken parties at my home, my name went to the Hill. When I came before Eastand, I had some concern because I didn't know how he would view my civil rights activities which had caused concern in his home area. It never was even mentioned.

I went before the subcommittee, and my nomination was approved by the full Judiciary Committee, the Senate, and went to the President's desk in a single day. The ABA found me exceptionally well qualified, its highest endorsement, and Eastland, who sat as Chairman of the subcommittee, was kind enough to say that I had one of the finest FBI reports he had ever seen. So I got off to a good start.

The Washington Post gave me an editorial boost on December 2, 1967, opining:

EXCELLENT CHOICE

"Gerhard A. Gesell is an excellent choice for the United States District Court for the District of Columbia for two principal reasons. First and most important, he is, as members of the American Bar Association's Committee on the Federal Judiciary have indicated, exceptionally well qualified to be a judge. His extensive experience in the courtroom, his brilliant legal mind and his capacity to see all sides of a controversy are precisely the qualities most sought in nominees to the bench.

"Scarcely less important is Mr. Gesell's deep and abiding interest in the improvement of our judicial machinery. He was chairman of the able committee of lawyers named by the District's Judicial Council to survey the courts here. The report he brought in last May contained 45 recommendations for all the local courts, many of which, the report emphasized, could be put into effect by the judges themselves. Among the recommendations was a survey of the courts here by management experts, a proposal which he was later instrumental in putting into effect.

"Burdened as it is with stale cases and a workload beyond its capacity, the District Court is urgently in need of energetic judges who are keenly aware of its critical problem. We hope that this fine appointment will be quickly followed by naming of a successor to Judge Holtzoff and by the creation of enough new judgeships to carry the increased load."

The Senate gave its advice and consent December 7, 1967, and I was headed for the Court. Congratulations poured in and those who didn't approve kept quiet. Christmas was a festive time. My partners gave a fancy dinner for Graham Claytor and me at the City Tavern Club. Graham was leaving to be President of the Southern Railway System. The day after New Years I reported to the Courthouse and immediately was put to work after the usual swearing in ceremony in a jammed courtroom. John Lord O'Brian robed me and all the family was there. Stark reality set in and my life changed.

Chief Judge Curran assigned me Courtroom No. 6, which had the only vacant chambers. I moved in my own furniture and spruced the place up. I've been there ever since, in spite of two or three floods.

Again my luck held. Doris Brown, my exceptionally talented secretary, without whom I could not have managed a complex practice or indeed this new assignment, agreed to come with me at a financial sacrifice. Jock McBaine, who was leaving C&B to go west, agreed to fill in as my first law clerk. Judge Jones put me in touch with a wonderful guy named Ed Roan, a former fireman who took over as messenger-bailiff, and I was set to go.*/

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*/ In 1979 when Roan retired my good luck continued when Roy Smith already an experienced bailiff took his place following the death of Judge Youngdahl. Doris Brown has stayed the course!

The first couple of years were strenuous. There was so much for me to learn. I knew evidence, the procedural rules, and had a clear notion of how I wanted to run my courtroom. But we were a court of general jurisdiction in those days, required to deal with local as well as federal issues. In addition to brushing up on the intricacies of Bazelonian criminal law, there were many unfamiliar areas; real estate, probate, patents, admiralty, et cetera. A judge is very exposed. You can't bluff. I worked hard to be prepared night after night and, of course, all day.

Somewhat surprisingly, friends reacted as though I had retired. Many assumed it was a ten to four job, with weeks of vacation interspersed. Their main query used to be, "Are you having fun?" It was surprising to realize how ignorant even many lawyers were as to what the job entailed. I'm afraid my protestations and explanations often were taken with a grain of salt.

The shift from active practice to judging brings many changes. Some I realized almost immediately. Others grew on me as time went along.

The practice of law has its own built-in disciplines. You can steer your efforts into areas of the practice congenial to your temperament and skills. Your mistakes are rarely noticed by the client or most of your competitors. You can associate others to bolster your weaknesses.

Judging is different. You can't pick your cases. You are more alone. You have little experienced help. There is no true basis for comparing your performance against others. Your mistakes are fully exposed. There are no rewards.

And there is little competitive prod. A lifetime job subject to "good behavior" gives a judge leeway within which to operate at almost any pace. Thus a judge must be his own self-starter, develop a thick skin, and work like hell to master many fields. It is a wholly different ball game with many aspects that are not familiar even to a successful practitioner. In spite of my long experience in federal courts, I soon learned that the job was far more complex and demanding than I had expected. This pleased rather than annoyed me, and I pitched in to do what I could to master the work and be useful.

As I had suspected, if one had trial experience two qualities more than any other were needed: an ability to administer a case load and common sense will eventually make a federal trial judge more or less at ease and productive.

The transition from an active practice to the bench brought many side effects, not all of which were welcomed. I no longer had to travel, and it was good to be regularly at home in the evenings. For years there had hardly been a week I had not gone out of town to see a client or meet a court date. Then, too, a judge is master of his own schedule. He is not at the beck and call of others, and he no longer has

his concentrated train of thought yanked far away by persistent and often intrusive phone calls. Thus, life becomes more ordered.

On the other hand, the work is lonely. Lawyer friends are hesitant to keep in touch even when their business brings them to the Courthouse, because most of my generation, at least, grew up at the bar conditioned to avoid other than formal contact with judges. Conversely, once one becomes a judge he is under many restraints which may well make him less interesting to his former companions. The gossip of the Courthouse, and there is a good deal usually, is kept within the confidences of the system. The United States District Court for the District of Columbia is on the cutting edge of many national issues and concerns. A judge never knows what the next case will involve. For this reason it is difficult except among a few intimates to discuss matters of current interest without seeming to be prejudiced on an issue that is or soon will be before you.

This has always been a sensitive area. Southern federal judges more than most seem to be able to maintain a close personal relation with the bar. In Washington there is a different atmosphere. Justice Harlan and I were good friends. We had tried a case together for weeks on end and our wives liked each other. Soon after he came to Washington, we were invited to his home for dinner. Soon after this, we attempted to reciprocate but he refused. For several years at the end

of each term he would call or write saying how sorry he was that he could not see me because I had had some matter in his court. He was sincere, but it was frustrating. Not all justices had such scruples, but they all gave lawyers a wide berth if anything involving their work was in the backyard. They set a tone and it had trickled down.

Few laymen or even practicing lawyers realize an aspect of a judge's job which in many ways is its biggest challenge once one settles in and makes the necessary adjustments in his or her social life and financial affairs. Most people seem to believe the law is already mostly written down and that all a judge has to do is pluck it out and apply it to the case at hand, much like turning a nut on a bolt. Nothing, of course, could be further from reality. In fact almost every case presents a new situation which cannot be duplicated in the books. There are actually remarkably few controlling precedents. The increasing complexities of our volatile society present issues not contemplated when an applicable statute was enacted yet it must be applied and one must constantly develop new approaches to meet unexpected circumstances and the changing times. Thus there is infinite variety and novel issues to be found in the cases assigned which, until the full facts are exposed, may seem routine upon a casual reading of the complaint. Packed along with the legal challenge lurking in almost every case is the human interest of the situation presented. Even after many years on

the bench a judge is constantly amazed to view the incredible variety of problems brought on by conflicts of personalities, greed, carelessness and sometimes stupidity. All phases of society come before you and at the end of almost every day there is ample material from the day's doings to fashion a short story if not a novel. And of course there is satisfaction in seeing a fair result emerge as the law is shaped to the facts and the contest is resolved without the parties resorting to force or violence. If a judge loses an interest in people and their concerns he should leave the bench. The best judges always care.

A United States District Judge has two basic responsibilities: first, try cases, and second, manage the case load assigned, These tasks are of equal importance and I'll try to cover each aspect in what follows discussing the trial work first.

In the beginning my principal trial work centered on the criminal calendar. There was a logjam of never-ending cases, one after the other. The criminal calendar, particularly during the first 4 or 5 years, was typical of any large city because we were a court of general jurisdiction. There was an endless series of rapes, murders, armed robberies, housebreakings, drugs, child abuse and the like. Most of the defendants were black. While each case had its own often tragic human interest, the end result was usually to lock up a human being and there was always a danger of getting case

hardened, careless and indifferent as the stream of cases poured in and out. By and large the defense lawyers did a fair job, but some were inadequate or too inexperienced to serve the best interests of their assigned defendants.

During the first two years I noted my verdict as the jury went out. It was remarkable that over this period in about 98% of the criminal jury cases, the jury came out as I did on the basic issue of guilt or innocence. There were differences in multicount indictments, no doubt reflecting compromise or sympathy in the jury, but even these were usually inconsequential. I gained a lasting respect for and belief in the jury system. Doubts I had had as a trial lawyer were dispelled.

Cases simply look different when you are an impartial observer behind the bench and not an advocate at a trial table. Many lawyers do not realize that they have wholly failed to get across some fact they assume the jury knows and understands, and of course advocate zeal often clouds judgment. My belief in the jury system was greatly strengthened because I decided to test it from the start. After now some sixteen years of charging juries, I have yet to comment on the evidence, to comment on a witness or intentionally to give any subtle or other clue to point a jury to a result! Judges who do this overlook the common sense of the jury and believe too much in their own omnipotence.

Much of the unfavorable criticism of juries comes from the emphasis in the media on large verdicts or unexpected jury results. Sometimes juries go haywire. So do judges. So do presidents. But the day-to-day conscientious effort juries put in and their sensible solutions win my praise.

The criminal calendar gives a sad picture of urban life among the more disadvantaged. Most defendants are school dropouts, lack any vocational skill and are hardly able to read and write. They are often caught up in drugs in some fashion, as users or distributors, without motivation or pride. They have not grown up in stable families and seem to have a view of life based on the eight to twelve hours a day many spend looking at the violence and make-believe on TV. Because of the violence of their offenses and hurt to society, they must be taken off the street, but prison offers little hope of reformation and rehabilitation, and soon a judge may find himself sentencing the same defendant again when arrested for a second offense after his release from the first.

The concern that "personality disorders" may lie at the root of such defendants' difficulties led to many insanity pleas geared to sometimes unrealistic standards set by well meaning appellate judges. Whenever that issue went to the jury, however, it was seldom that the defendant prevailed. I have rarely had a jury find a defendant's crime was caused by his mental condition. There are of course uncontested cases leading to mental commitment, but the juries don't buy the

idea. They are not influenced by psychologists and psychiatrists tracing street crimes to the defendant's mother's womb.

Murder cases have their special fascination. Most murders occur by chance as a result of disputes among friends or family members. I tried many murder cases in the early days on the bench. Sex and alcohol play a large part in the often meaningless and unintended results of knifings and shootings that occur at the climax of heated arguments.

Apart from many cases of this type, I remember three much publicized deliberate double murders that came my way, all resulting in conviction. The "Gentlemen Two" killings where the barman at the Gentlemen Two restaurant knifed the manager and his beautiful friend to death with a total of more than sixty stabs when they were in the establishment after hours dancing to soft music while the bar man was cleaning up. The "White Tower" killings in Georgetown when three Marines celebrating graduation from Quantico and a lady friend met up with two blacks in the White Tower late at night. The blacks were armed and considering robbery. The Marines were white, dressed in white dress uniforms. Words led to shooting, two Marines were killed and the other wounded, as was the lady accompanying them.

Finally there was Billy Austin Bryant, who deliberately killed two FBI agents, firing at them through his apartment door when they came to arrest him. Bryant was wanted for bank

robbery and had led quite a chase through the city after he escaped from Lorton Penitentiary. The FBI prepared a locked case, buttoning up every detail and conviction was assured. The jury could not agree on the death penalty, so the statute left it to me to decide. I was very troubled. This was the first FBI killing since the Pretty Boy Floyd era. One agent was, like Bryant, black. Bryant had an IQ of 135. I asked two colleagues to act with me informally as a sentencing panel. One was for death, the other not, so it did me little good. I decided not to order the man killed.

Bryant had become a focus of the campaign in 1969 against capital punishment. Had I ordered him executed he would have been a "hero", ensconced in a special cell at the D.C. Jail and the object of much attention. I told him in effect that I wasn't going to fall for this. I imposed two consecutive life sentences to commence after completion of a sentence of up to 54 years he was already serving. I told him he would die in jail but at such time as God appoints. When I finished, Bryant said he was glad he did it and the FBI had him deep in Atlanta Penitentiary by early morning the next day. To his dismay, Bryant was not as he had expected the focus of the capital punishment controversy then raging in the city, and he was soon lost from the public attention forever.

The trouble with the criminal system is that our proper concern for constitutional protections leads to endless delay. There is no certainty of speed in the system, and criminals

caught red-handed walk the streets on personal recognizance awaiting trial and even long after conviction. The public does not approve. Incarceration is expensive and almost wholly nonrehabilitative. The public thinks prisoners are pampered which they are not. We have to find a better way.

My own belief is that we start too late. Most adult offenders have juvenile records, often long ones. Sending a juvenile "home to mama" without meaningful supervision is no solution. Teen-agers these days are not little unsophisticated darlings. Among this group are vicious little punks who should have the screws tighten on them early. Our juvenile justice system is far too lenient. Some system fashioned like the CCC of FDR's time, where many of these young people could learn a trade, be subjected to discipline not present in a fatherless home and made to go to school might be worth trying on a large scale. At least something new must be attempted. I have never forgotten a young 18-year-old defendant brought into my court as an adult because of his frequent vicious juvenile offenses. He pled guilty convincingly to first degree murder. As I was about to commit him he raised his hand and asked, "Now may I go home"!

The conviction rate in criminal cases runs in our court about 89 percent, but whenever one gets restless with our tedious often indecisive way, it is well to remember the hazards of identification testimony, the possibility that legal assistance is inadequate, the occasional overreactivity of the police and certainly during my time the uncertainties

of a developing but fluctuating criminal jurisprudence. Conviction of the innocent is most unlikely, yet it can happen. On the other hand, delay threatens society. Violent conduct must be decisively punished or people will resort to violence to defend themselves. The civil rights of victims of violent crime are too often wholly forgotten. A trial judge confronting these conflicting considerations often has to tread carefully and struggle to keep proper balance.

Then there is the problem **of** drugs. Most crimes today are drug-related.,. Drugs are sapping much **of** the vitality of our urban communities, and we don't know what to do about it . . . whether we are judges, legislators, prosecutors, policemen, parents **or** teachers. The small fry get caught, few **of** the real violators get caught, Draconian solutions or legalization are the only alternatives and we are not yet conditioned to make such a choice.

**I** did not often find sentencing a traumatic experience. It was not difficult to be sorry for defendants coming from broken homes, uneducated, not very bright, lacking marketable skills and often victims of circumstances largely beyond their full control. But they had chosen to peddle drugs or to beat and abuse people on the street or in the privacy of home. It seemed clear to me that the public interest required such violent offenders be locked up. The sentence of choice was probation, particularly for first offenders not falling into these harsh categories. Over half of the cases in our court

got a chance at probation initially. With experience a judge gets a better sense of the odds and becomes more lenient often with no later cause for regret. It's tricky business, and there is no sure formula. If you guess wrong you have regrets. You must do the best you can with what you know at the time and look ahead. Prisons are often mean and degrading and life there may be vicious. You are dealing with human lives not cases. But you can't remake the city and the public must be protected.

There is, of course, much that should be done about prisons, and I tried to help. ,The Youth Corrections Act, an essentially rehabilitative sentencing statute, required that defendants below age 22 should, if qualified, have a chance to be turned around in a special prison environment free of adults. The District of Columbia ran out of space for youth offenders. I committed a young man to the Youth Center and they refused to take him because there was no space. After long hearings, I ordered the mayor to build a new Youth Center. He demurred, pleading lack of funds. I told his special emissary who came to me in chambers that the Mayor faced contempt and possible prison if he didn't comply. The funds were found and Youth Center II was built*/.

On another occasion, The Washington Post wanted access to the local prisons to interview prisoners and to report on

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*/ United States v. Alsbrook, 336 F. Supp. 973 (1971) [requiring the building of Youth Center II at Lortonl.

conditions. I said they had a constitutional right to do this within limits I set out. I took much testimony showing that prison reform followed public exposure of conditions. The Court of Appeals affirmed, but the Supreme Court; in spite of the Chief Justice's concerns for prison reform, got timid and reversed -- but this kind of issue never dies.*/ As I write the prisons in 40 states are under attack because of claims of overcrowding and other conditions that violate the Eighth Amendment. Many seek solutions but there are none in sight.

There is no way I can describe the civil work**/ which has in recent years consumed 95% of my time. It is varied, often complex, not always very significant. Former law clerks have written about some of the more unusual or interesting cases. Reading these recollections, I realize how often a federal trial judge in Washington, D.C. becomes involved in the issues of his time -- I have had cases involving:

The House Unamerican Activities Committee

Freedom of the Press in many contexts

The Draft Registration

D.C. Home Rule

Street riots -- Vietnam protests -- Yippies

Presidential power to fire

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*/ Washington Post and Bagdikian v. Kleindienst, 357 F. Supp. 779 (1972), affirmed, 494 F.2d 994 (1974), reversed sub nom. Saxbe v. Washington Post, 417 U.S. 843 (1974).

**/ I leave until later discussion of the Watergate criminal trials.

Whistle blowers

Presidential power to ignore appropriation bills

Pentagon Papers

Watergate -- eight defendants and several related cases

Homosexua1s

Refugee rights

Medical and legal malpractice

Abortion

Baby Doe type cases

Prison conditions

Wiretapping

Environment

Judicial misconduct and reform

Iranian hostages

Swine flu

Voting Rights

Race and sex discrimination.

Other cases defy classification such as: Indians having water cut off from their fishing rights by ranchers; protesters throwing blood on White House furniture; a Navy captain complaining that the hospital had inserted controls in his brain; self-dealing by members of a nonprofit institution; problems of disturbed persons having grievances against the President; a bizarre plane accident; a religious sect claiming the right to use drugs as part of its ritual. And then there is the grist of the mill: trademark and patent matters; SEC

frauds; contract violations; construction disputes; miscellaneous torts; labor controversies; disputes over legal fees; antitrust; truth-in-lending, Social Security, and the endless often weird variety of pro se claims. Things were rarely dull. I can only talk about a few high points.

I came on the bench at the beginning of a tumultuous period. Martin Luther King's nonviolent protests were cut off by his killing and the first of numerous Washington riots occurred, accompanied by the burning of a section of the city. Opposition to the Vietnam War was increasing, and violence broke out. Race and the war were the focus -- traffic was disrupted on occasion. College student protesters were flamed by agitators from outside. Confrontation with police increased -- President Nixon's administration fueled some of these disturbances. He and some of his supporters taunted the opposition, hurling charges designed to picture them as Communist-inspired. It was not unusual to smell teargas walking to work, and matters were tense. Naturally the judges of our court became involved. Some of the work fell to me.

Howard University students had been enjoined by another judge from rioting on the campus to further protests against the university's administration, which the students believed was not sufficiently militant in advancing black causes. However, a riot broke out, some buildings were set afire and I found the agitators in contempt for ignoring a directive to desist.

The Nixon administration was handling the matter directly through Deputy Attorney General Kleindienst. He came to chambers late one evening accompanied by Ruckelshaus with an Order €or me to sign. Rioting was still in intermittent progress on the campus. I asked, "How are you going to enforce this Order?" And Kleindienst looked me straight in the eye and said, "Frankly, that's none of your business." I said that he was right but that I would not sign the Order until I knew and he reluctantly outlined a horrifying plan. Police were to surround the campus, marshals from other cities had been brought in, a unit of the National Guard was being assembled just out of sight, and it was planned to announce that the campus would be raided at midnight unless all protesting ceased and those concerned left the premises. This was to my mind a deliberate effort to hype up the controversy into national proportions and a threat to life and property. Earlier Harvard students confronting a somewhat similar deadline had amassed at the deadline to demonstrate solidarity and many were hurt. With the aid of Ruckelshaus, my plan was adopted. Broadcasts were made to parents and students urging that students go home. The Guard and police were withdrawn. There was no confrontation deadline. After midnight, our own marshals without outside help went in. Things had already quieted, aided by a light rain. The ringleaders were quietly arrested and later some were convicted and sent to jail. I was dumbfounded at the Nixon approach, but put it down to

Kleindienst's inexperience and unwillingness to buck the Attorney General and White House paranoia which had been increasingly apparent.

When the Pentagon Papers case broke a little more than a year later and I became enmeshed in that classic struggle between the press and the White House, I learned at first hand the corrupt influences at work in the Nixon administration and had fair warning that events like those which surfaced in Watergate were bound to occur.

The Pentagon Papers were a 47-volume top secret retrospective study of Vietnam events and involvement over a 16-year period. The materials had been assembled for President Johnson. There was much information unfavorable to Kennedy and Johnson policies which could provide support for mounting anti-Vietnam war agitators. Daniel Ellsberg had worked on the Papers, had access to one of the few restricted sets, and decided to leak them to the press in segments.

The New York Times broke the story first, promptly followed by The Washington Post. Each paper planned a series of articles. The Attorney General moved separately to enjoin the Times in New York City and the Post in Washington. I drew the Post case at 5:20 p.m. Friday under our random system of assignment to the consternation of the prosecutor, who had labelled me liberal. Immediately I heard the TRO, which came on with great fanfare. New York proceedings were going on, but a TRO had been issued there. There was no showing made of

irreparable injury and I ruled from the bench refusing to place a prior restraint on publication, saying that the First Amendment guarantees should be preserved. The Court of Appeals later the same night granted a TRO and ordered me to hold further hearings on Monday. The Courthouse was closed that weekend for repairs and the case moved to my home in Georgetown on Saturday, where I met with counsel to arrange for Monday's hearing.

Department of Justice and White House lawyers appeared in force. I had indicated that perhaps the remedy against the Post was criminal if there was a true national security violation and the Post lawyers seemed subdued and somewhat overwhelmed by the Government's show of forces.

The Government stated it wished to proceed on Monday in camera, and that it wanted me to exclude all counsel €or the Post and all representatives of the Post who had been named defendants. I was flabbergasted. I commented that this was not Russia and that if this was the Government's final position, I would dismiss the Complaint. The Justice Department lawyer said he'd have to call the White House and I sent him to the phone upstairs. He returned and withdrew the demand. It was then arranged that some of the Papers, of which the Post had copies, would be left with me and that the Monday proceedings would focus on whatever 10 situations revealed by the Papers the Government felt were most sensitive. The group had no sooner left than two men armed with pistols at their sides and white straps across their

chests knocked at the door. They wanted the Papers back. I said I wanted to read them. They protested, saying I had no security. I told them to bug off, that I had plenty of security because the Papers were under the sofa seat, and they went off grumbling. Scanning the papers from time to time before Monday, I felt more and more certain that the whole fracas was a tempest in a teapot.

Security was tight and some of the proceedings in Courtroom 6 on Monday were in camera. My bailiff, Ed Roan, discovered a microphone under my bench. Those admitted to the in camera portion were carefully screened before admission and the Courtroom sealed from the public. A White House counsel not on the list was excluded until, after a great rumpus, he was cleared. The Post defendants who included several senior, well-informed reporters were present and proved to be of great benefit to the defense.

The in camera proceedings have long since been unsealed. The chief Government witness was a State-CIA intelligence man who proved highly unreliable. Two examples will suffice.

Outside Courtroom No. 6, White House-Pentagon public relations men were telling a curious, frustrated press that I was about to release war plans and endanger lives of troops in Vietnam. Indeed some papers went with the story. The witness involved pointed to some war plan material in the Papers. It looked dubious to me. The witness admitted no real knowledge of war plans and I asked for an expert. A straightforward,

knowledgeable senior military officer appeared and said the material was worthless to anyone and of no consequence.

On another try the witness said the Papers revealed the name of a Canadian secretly behind the lines in Vietnam whose presence was unauthorized by Canada and who, if he wasn't shot if revealed, would be cashiered by his government. This was troublesome, but I saw a stir at the defense table. Soon it was brought out that this man's history was fully described by name in two or three books already in circulation. The witness had no response.

Most difficult was the able presentation by William Macomber of the Department of State, who described how embarrassing and difficult it was to negotiate with foreign countries when the U.S. proved unable to protect its more confidential papers. Nixon's China trip was apparently in negotiation, although he didn't mention it, and there was proper concern that our standing with some foreign governments would be weakened or cut off if their cooperation with us leaked. But here the milk had been spilled and the Government had made the mistake of not controlling its own papers.

At the end I again ruled from the bench, refusing to place a prior restraint on publication. In denying an injunction, I said in part:

> "Equity deals with realities and not solely with abstract principles. A wide-ranging, long-standing and often vitriolic debate has been taking place in this country over the Vietnam conflict. The controversy transcends party lines and there are many shades and differences of opinion. Thus the publications enjoined by the Court of Appeals

> concern an issue of paramount public importance, affecting many aspects of Governmental action and existing and future policy.
>
> "There has, moreover, been a growing antagonisms [sic] between the Executive branch and certain elements of the press. This has serious implications for the stability of our democracy. Censorship at this stage raises doubts and rumors that feed the fires of distrust.
>
> "Our democracy depends for its future on the informed will of the majority, and it is the purpose and the effect of the First Amendment to expose to the public the maximum amount of information on which sound judgment can be made by the electorate. The equation favors disclosure, not suppression. No one can measure the effect of even a momentary delay."

The Government asked for a stay for a few hours to go back to the Court of Appeals and I denied it, saying the Court was only a few floors above. Again the Court of Appeals imposed prior restraint. Soon however it affirmed, but timidly kept the stay on publication in effect pending Supreme Court review. That court then prevented publication and within the month heard argument of both the Post and Times cases. Ten opinions issued. I was affirmed by a majority. When it was over, I was the only judge of the 29 judges hearing the issue who had refused to put a prior restraint on publication. The law was as I had said it was.*/

Of course the press was unreservedly ecstatic and cartoonists had a field day. Attorney General Mitchell was pictured as speared by a pen, unable to advance the sword of censorship; the Court was shown stopping arrests of the press;

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*/ United States of America v. Washington Post Company, et al., affirmed sub nom. New York Times v. United States, 403 U.S. 713 (1971).

the prior restraint of government on the typewriter was featured, and the public's right to know was declaimed. There was much favorable but far from impartial editorial comment. The cartoon I liked best was by Herblock, one of many, which showed two GIs huddled on a battlefield amid bombs and rockets with the caption, "The Government says publication of those documents on the war can be injurious." It is significant that the continued vitality of the press this case helped to preserve undoubtedly led to President Nixon leaving office under the pressure of Watergate.

It is now well known what was an immediate sequel. The plumbers were organized as part of the Watergate criminal conspiracies. The white House set out to get Ellsberg, who had leaked the Pentagon Papers, and later it fell to me to preside over the trial involving the break-in of Ellsberg's doctor's office engineered by Ehrlichman and others to uncover dirt on Ellsberg to aid the effort of the Department of Justice to convict Ellsberg on national security criminal violations. Because Watergate has more lasting historical importance and it fell my lot to have a role in the variety of civil and criminal litigation it engendered, I am writing more fully about those events.

Our court was in the middle of a storm. Once there were indications of a deep corruption within the White House, congressional committees became active, the national press (print, radio and TV) competed to make the latest disclosure,

business a special prosecutor was put in place to guide the grand juries, and eventually impeachment proceedings got underway. As indictments were lodged, it was the judiciary's job to remain firm against many conflicting pressures, to uphold the law and to do our best to assure fair trials. This was not easy, given the flood of publicity which dominated the newspapers, magazines and airways every day.

Watergate was an extraordinary period in American history. Here was a President fighting to avoid impeachment who not long before was considered to be on top of his job, informed and representing us firmly abroad. His private tapes revealed he was a crude, vulgar, deceptive man, scornful of our form of government and perhaps a bit paranoid. The Washington Post was intent on hounding him out of office and relentless in its quest as the President dug himself deeper and deeper into trouble by a lack of candor, poor legal advice and what was perceived as contempt for all who questioned his conduct or motives.

When Watergate indictments first surfaced in 1974, Judge Sirica was Chief Judge. He had been taking a limited case load, as was his right, and had free time. The break-in of Democratic headquarters at the Watergate looked like an interesting case bound to attract attention. He assigned it to himself. As Chief Judge, he was also responsible for matters arising in the grand jury. He naturally became the Watergate judge. There was, however, an increasing volume of Watergate and more than one judge could handle as the ramifications of the scandal unfolded. For reasons he never explained to me,

Judge Sirica assigned many key Watergate problems to me, both civil and criminal. This was somewhat contrary to our rules, but he persisted in favoring me, and my colleagues decided to allow matters to take their course.

As a result, Judge Sirica tried the Democratic headquarters break-in and later the main conspiracy case. I tried the Ellsberg break-in case and separate indictments for prying or other offenses against Krogh, Segretti and Chapin. In addition, Judge Sirica assigned me a suit by Senator Ervin's Committee against President Nixon and a suit by CBS and others seeking access to certain Nixon tapes. I also dealt with Solicitor General Bork's firing of the Special Prosecutor, Archibald Cox.

Throughout this period Judge Sirica felt under great pressure because of the obvious significance of the cases he was handling and the complex problems arising in the grand juries which were very active as the Special Prosecutor probed deeper and deeper. Judge Sirica had trouble sleeping and arrived at the office very early. Our chambers were on the same corridor, and my normal early hours coincided with his troubled schedule. He would drop into my chambers before 8 a.m. and we talked over developments in his cases many mornings. His law clerk often consulted me as well. Sometimes I was able to affect his decisions. More often, I was simply a sounding board as he came to a decision. In many instances I had no advance knowledge of what he was going to do. I felt then and I feel now he was all too concerned with the press

and his public image. But his conduct brought public approval of the Court. When it ended he was Time "Man of the Year," and today he is still one of the best known judges on the federal bench.*/

I was assigned U.S. v. Ehrlichman, et al., which involved the group of White House staff and their agents who had engineered the warrantless breaking into the California offices of Dr. Fielding, Ellsberg's psychiatrist, in the hope to get information concerning Ellsberg. The defendants were Ehrlichman, Colson, Liddy and two Cuban Americans, Barker and Martinez. These latter characters had also done the original Watergate break-in, having been recruited by the White House. This was a multicount indictment, The three main defendants were also awaiting trial before Judge Sirica in the conspiracy case which also included Haldeman and others and named the President as co-conspirator.

The White House interest in Ellsberg dated from his release of the Pentagon Papers.**/ He was facing criminal charges and the group indicted in the case assigned to dubbed "the plumbers," had decided to snoop for evidence

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*/ When it was all over the students of Andover voted that I should have the Fuess award, only sporadically given, for Distinguished Contribution to Public Service. I thought this was infinitely better than accepting what Time had to offer but I never had the choice.

**/ The determination to destroy Ellsberg was illustrated by the suggestion to the judge handling the Ellsberg trial that he could be made head of the FBI. The judge was not amenable.

the psychiatrist's office. Some of them, notably Ehrlichman, had lied before the grand jury when questioned.

Since Judge Sirica's trial was scheduled for the fall and impeachment hearings were possibly in the offing, I moved the Fielding break-in promptly for trial before the summer. A number of unusual problems had to be considered before the trial could get underway. They concerned the President directly.

It was first necessary to deal with the defendants' claim that they were free to break into Dr. Fielding's office without a warrant because they believed in good faith that they were acting in the interests of national security. After long argument, I wrote an opinion rejecting this defense, reviewing the Fourth Amendment precedents.**/ Suggestions that the President had inherent power to order the break-in were avoided by pointing out that the President had stated he gave no such authorization and that neither Ehrlichman nor Colson had yet claimed that he did. The President and his cohorts had been beating the drum about national security suggesting there were serious conspiracies against the country at work. My ruling was printed in full in The New York Times and received much attention. That was the end of the alse claims of national security.

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**/ United States v. Ehrlichman, 376 F. Supp. 29 1974), 546 F.2d 910 (1976).

# YOU ARE CORDIALLY INVITED TO A PUBLIC LYNCHING

## (NO RSVP NECESSARY)

Judges Sirica and Gesell have refused changes of venue for the former associates of President Nixon. The claim of pre-trial publicity has been met by rejection. Requests for postponements of trials have been refused.

Immortality has always been the greatest passion of man, and the immortality history provides Sirica and Gesell may make them unwilling to resist its temptation, no matter the resultant injustices to other men.

**1.** Though pre-trial publicity had ruled the Sam Sheppard case be dismissed from court, the rule does not apply to those in the most publicized case in the history of the nation.

**2.** Though the Watergate Grand Jury of twenty-three people included **but** one Republican, its obvious imbalance is disregarded in cases that heavily involve partisan politics.

**3.** Though the District of Columbia was the only **area** in the country, save one, to vote against President Nixon, the trials will not even be moved to a less politically prejudiced zone that could be selected from **a** choice of fifty states.

Television network newscasters remain mute on those inequities! **since** logical analyzation would defeat their purpose. No David Brinkley commentaries. **No Dan** Rather capsulizations. No shaking head of Eric Sevareid.

**"Equal** Justice Under Law" they say. But it has been a series of the most unequal injustices this country has prescribed since black citizens were felled by water hoses and citizens of Japanese heritage were contained in barbed wired camps.

The public punishment will soon begin and it will be able to be viewed on television network newscasts through artist's conceptions and reporters and analysts. The lynching can be watched in the comfort and safety of your own living room starting October the First.

# REGRETS ONLY:

THE UNITED STATES CITIZENS' COKCRESS, 1221 CONNECTICUT AVENUE, N.W.. WASHINGTON, D.C. 20036, (202) 347-6597

I did rule that since intent of the defendants was at issue, they should have access to government records at the Pentagon, CIA and Justice which they said they needed to prove they were pursuing the national interest. But Ehrlichman never pursued the broad discovery I granted, thus showing the shallow nature of the national security claim.

He did, however, insist quite properly that he should have access to his daily notes of conversations with the President and others. These papers were under lock and key and closely guarded by Secret Service in the White House. The President refused accebs. It was obvious to me that this withholding was illegal and unfair. Another confrontation was in the making. The President had brought in a trial lawyer named St. Clair from Boston to deal with this and related problems arising at that moment on the Hill. St. Clair was not very experienced in the ways of Washington, and dutifully stonewalled for the President, who gave him at times almost irrational instructions. Every obstacle was raised. I recall that at various times it was suggested that perhaps Ehrlichman could read his notes but not have copies, that he could not be accompanied by counsel, that if counsel did accompany him they would have to talk in the presence of the Secret Service agents, that he could have only a brief inspection, and so forth.

I got counsel into chambers without a court reporter and sought to persuade St. Clair that his client was taking an

indefensible position. I told him point-blank that access would have to be granted on fair terms to Ehrlichman, and that if it was not, I would have to dismiss the indictment. It seemed to me I made little impression on St. Clair until I asked him how he would feel if he was defending a criminal case and the government would not give him his client's diary relating to the events at issue. The President still shilly-shallied, making inadequate proposals through St. Clair. I indicated later from the bench I might have to dismiss the indictment. When word of this prospect reached presidential advisors, the White House gave in. Such an event would have heaped coals on impeachment fires.

In fact I had been contemplating a different course; a direction to the President to produce, stating that if he failed to produce, civil contempt proceedings against him would be held. I wrote a strong opinion and Contempt Show Cause Order to this effect but it was never issued because the President capitulated at the last minute. There was in the end, after Ehrlichman got access, nothing in Ehrlichman's White House files that helped his defense.

Colson pleaded guilty to obstructing justice in settlement of both cases then pending against him and Liddy kept mum.

As the case developed, Ehrlichman backed and filled over whether or not to call President Nixon as a witness. As other possible defenses evaporated, he indicated they would call

THE WHITE HOUSE

WASHINGTON

February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

Nevertheless, out of respect for this Court, but without in any way departing from my view that the issues presented here are inappropriate for resolution by the Judicial Branch, I have made a determination that the entirety of the five recordings of Presidential conversations described on the subpoena issued by the Senate Select Committee on Presidential Campaign Activities contains privileged communications, the disclosure of which would not be in the national interest.

I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers

connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,

The Honorable Gerhard A. Gesell
Judge
U. S. District Court
for the District of Columbia
Washington, D. C.

## LAW CLERKS

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|---|---|
| Jan.–June 1968 | John N. McBaine, Jr. |
| July | |
| 1968–69 | Alan Dranitzke |
| 1969–70 | John F. Dienelt |
| 1970–71 | William H. Jeffress, Jr. |
| 1971–72 | Timothy W. Bingham |
| 1972–73 | Michael C. Devorkin |
| 1973–74 | Roger W. Fonseca |
| 1974–75 | E. Donald Elliott, Jr. |
| 1975–76 | Mark I. Levy |
| 1976–77 | Scott Blake Harris |
| 1977–78 | Seth P. Waxman |
| 1978–79 | Eric B. Amstutz |
| 1979–80 | James J. Brudney |
| 1980–81 | Peter A. Barnes |
| 1981–82 | John D. Echeverria |
| 1982–83 | Lynn A. Stout |
| 1983–84 | John C. Millian |
| 1984–85 | Patrick A. Malone |
| [1985-86 | Michael E. Tankersley] |

him. When in response to my inquiries it developed that they wanted to ask him about his knowledge of the Fielding break-in and his possible direct or indirect authorization of it, I urged use of written interrogatories, and that was done. I narrowed the interrogatories to the key points, ultimately drafted them myself, and asked the President to respond in the interest of justice, at the same time indicating doubt as to my power to compel if he refused. He responded under oath in July, again denying any involvement, stating he was responding in the interests of justice as a matter of discretion. I later read his sworn answers to the jury.

Each of these developments as well as the trial itself created intense public interest. During the Watergate publicity my good friends told half lies about me and the press was very friendly in the main. I was dubbed Buzz Saw in Judicial Robes by the Star, and Judge Blue Eyes by The Washington Post. The news magazines also reported my doings in friendly fashion. The most troublesome problem was how to assure a fair trial. I considered transferring the break-in case. Defendants wanted Peoria, Illinois. I explored the possibility of Bangor, Maine. There was, however, no place that could provide necessary press facilities and didn't have TV and newspapers. So every venue was in a way tainted. The problem was to keep the fires dampened as best I could and to take unusual care in selecting jurors.

Jaworski, then the Special Prosecutor, went on TV and started to discuss the case. I ordered him to court the next day and told him that I would have to discipline him if he continued his publicity-seeking ways. He was chasfened. He came back to chambers and apologized and thereafter kept silent, which must have been difficult given the heavy stream of propaganda issuing from the White House. There was in reality little I could do to stop publicity which was inflaming the country, but I could keep order in the courtroom.

There was a danger that the courtroom would be taken over by the press. They were swarming all over the court house, seeking special privileges and in sone cases they were most inconsiderate. I felt things had gotten out of hand when the original Watergate break-in first occurred. Newsmen were sitting in Judge Sirica's jury boxes, holding interviews in the well of his courtroom, and it appeared that prosecutors and Judge Sirica were giving regular press interviews. I took a different course. The press was excluded from interviewing in Courtroom No. six, I gave no interviews myself, decorum during the trials or hearings was strictly maintained and the prosecutor was kept in rein. This set a proper tone for a serious criminal trial. There were few complaints. The press followed the rules, knowing all were being treated the same and the more experienced reporters welcomed my efforts to eliminate a growing circus atmosphere.

Senate hearings were adding to the difficulties. Senator Ervin's hearings were widely covered on nightly TV. Here he was questioning various members of the President's staff under glaring publicity at the same time their conduct was under review by a grand jury and he continued after they were indicted! The responsibility for impeachment was in the House, the responsibility for criminal conduct was in the courts, but Senator Ervin's committee persisted.

Senator Ervin had learned that Judge Sirica had heard some incriminating tapes obtained by the grand jury. He wanted them and issued subpoenas to the President. The grand jury was still at work and trials were about to start. The Senator, with the best of motives perhaps, was pressing the Senate claim to the evidence. President Nixon was resisting.

When the Ervin committee sued the President in an effort to get the incriminating tapes, Judge Sirica handed this hot potato to me. I asked each side to make detailed submissions responding to specific inquiries I deemed relevant. There had been much talk from the White House about executive privilege, but no specific claim. I indicated that only the President personally could make the claim. He didn't want to do this but eventually did by letter to me. It was far from clear that the claim of executive privilege would ultimately stand up. I felt strongly, however, that it would soon be impossible to conduct fair trials if those facing prosecution were confronted on TV with tape evidence and forced to

incriminate themselves or plead to the Fifth before the public. Congressional hearings are in the nature of things rarely a search for truth when political issues are foremost. Senator Ervin was a wise, fair man, but his involvement was unnecessary at this stage, and disruptive of orderly constitutional processes. I sustained the President's claim of privilege and caught all hell from the public which the press encouraged to believe I was participating in a cover-up,

The public had been quite supportive of earlier Watergate decisions, but landed on me with two feet in this instance. When I had clamped down on Jaworski, most letters applauded, but clamping down on Ervin's inquiry was viewed by many as throttling the press. I was accused of censoring the news, going down in the sewers with Nixon, and of being bribed. I was called "Your Dishonor," and my decision was said to be a fascist decision that would live in infamy. Another writer simply summed it up by saying, "You are an SOB." Not all the mail ran this way, but anyway I didn't read much of it as it came in attempting to keep an open mind.

Jury selections went better than I expected. It was surprising to find many prospective jurors who had little or no knowledge of Watergate. I remember a truck driver who was always on the road without a radio, a housewife who always changed her child's diapers when Watergate came on TV and several blacks who quite obviously had no interest because

Watergate "was a white man's fuss." Moreover, there were so many currents and counter-currents, rumors, disclosures, denials, et cetera, that only those with political science interests had attempted to untangle the mess as it developed. Many prospective jurors knew a little, had no opinions or for other reasons were clearly unprejudiced.

The trial itself went smoothly. Colson had pled guilty to obstructing justice, and was out of Judge Sirica's trial and mine. Liddy simply sat and listened, smirking at some of Ehrlichman's unbelievable accounts and even winking at me when Ehrlichman got wholly unrealistic. The Cubans explained how they were simply dupes. The focus was on Ehrlichman. He put on a feeble defense. He was represented by a Florida lawyer of limited talent who, it was rumored, had been selected by Bebe Rebozo; Ehrlichman's original lawyer had dropped him.

Ehrlichman's reliance on national security had failed, he failed to show a crucial telephone call by him authorizing the break-in had not taken place, he demanded testimony from Henry Kissinger whom I forced to appear,*/ but Ehrlichman elicited nothing worthwhile from him and finally the President by interrogatories answered under oath denied responsibility.

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*/ After that day in court a British judge who was a spectator came back to chambers and expressed amazement and approval of our system which brought a high official before the jury at the defendant's request. He felt it would never have happened in England.

The jury convicted all defendants. After final argument but before the charge, the Courthouse had been disrupted by some prisoners who had taken their lawyers and others hostage, and I had to hold court in the old courtroom of the D.C. Court of Appeals using the jury box which was still in place. A welcomed bourbon from Chief Judge Reilly in his chambers helped while I awaited the result after charging the jury. It did not take long.

On appeal, one of Ehrlichman's principal points was that I had facial expressions which influenced the jury. Ehrlichman's wife had asked me to 'let her bring two friends to the trial. They were stalking horses, and I the pigeon. They filed affidavits against me on appeal. However, these false claims were rejected by the appellate court.

When it came to sentencing, I felt defendants who had breached the public trust should serve some time in prison. Ehrlichman, Colson, Segretti and Krogh were lawyers. They faced loss of their right to practice law and their convictions carried almost automatically this further sanction. As for Liddy, also a lawyer, Judge Sirica had already put heavy prison penalties on him for the first break-in. Since he never attempted to excuse his conduct and made no false statement to the grand jury or the court, a concurrent sentence seemed enough. Chapin went to trial, put on a gentleman's defense and lost with grace. He had lied to protect his boss, Haldeman, who never came to his rescue in any way. I received

many letters from a wide variety of people urging leniency for each of these men. Some of them had done useful things in their lives and as always families and friends are deeply hurt by a defendant's mistakes.

When I sentenced Ehrlichman I thought of many criminals I had seen who had shown far more character and manliness than he had. He was a living noodle unable to acknowledge his weakness or fault as he tried to wrap himself in the flag with self-righteousness.*/ I never understood how the President had been able ts'tolerate him. I felt I understood Liddy and Colson. Liddy believed that the end justified any means. He was dedicated to his concept of patriotism and stuck by his guns taking the consequences without complaint. Colson was more complicated. He worked out a deal with the special prosecutor, took his sentence like a man and has since made a genuine effort to be useful to society. Prison made absolutely no impression on Ehrlichman and Liddy but it obviously affected Colson deeply. Krogh gained a new perspective on his life while incarcerated.

At the time it was difficult to accept the obvious fact that men with every advantage and trained as lawyers could have allowed themselves to be corrupted. Some of them had

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*/ As the only major participant in the Watergate situation who has not written a book I nonetheless read the accounts of others. None jibed with my recollection in all respects but Ehrlichman's account of his trial before me portrays a trial that never occurred.

difficulty in understanding what had happened to them. There was no indication that some driving ideology or burning issue influenced what happened. These defendants had simply been corrupted by power and its trappings. In an imperial presidency, those near the center were fawned on and glorified by those on the outside to a point where some, encouraged by the President himself, lost all perspective. During the lonely nights in prison this truth was recognized by a few who wrote me and they have reordered their lives accordingly to their great credit.[1]

When Watergate was over I felt the Constitution had worked, that the independence of the federal Judiciary had been demonstrated and that justice had prevailed. President Ford's pardon of President Nixon did much to detract from what had been accomplished and left a bad taste.

Even as the events unfolded proposals for reform surfaced before the nature of the sickness could be ascertained. It was suggested from the Hill that our court should be empowered to appoint a special prosecutor but the full court declined. When the Solicitor General discharged Archibald Cox I later ruled he had exceeded his power. But this event disclosed that there was no firm mechanism for investigating serious misconduct in high places and the effort to develop the Special Prosecutor statute got under way. Now, ten years later, the Court of Appeals for the District of Columbia has made the Special Prosecutor statute which had been ultimately enacted practically ineffectual with strong words from Judge

Bork, the Nixon appointee who earlier had fired Archie Cox because he was inquiring too closely into Nixon's abuses of the Presidential office. There will be other Watergates. The ability of the American public to forgive and forget will continue.

A trial judge learns very soon if he had not already realized it that he must learn to confront inflammatory issues which attract public scorn. When the judge is interjected into the middle of an unsettled issue of intense national concern, he should know he will be damned if he does and damned if he doesn't. These situations bring extremists out of the woodwork and are not conducive to peace of mind. It has been my lot to be involved in several, and it has been a great solace to know that I enjoy the independence and security granted an Article III judge. In my case this very privilege has led me to try to avoid excess and to call shots carefully, attempting to explain reasons for the actions taken, knowing that the hornets will soon be buzzing as sensitivities become inflamed.

The mail too often contains cheery greetings of which the following are typical:

> "Headline: 'Drug-Drive Searching of GIS Held Illegal'.
>
> You are about the stupidist man on the bench. It is your kind of cancer that infects the judiciary and America. We are trying to do something about the drug problem but YOU are no better than the junkie who sells drugs. Get the hell off the bench and make your peace with the victims of drugs. You aid and abet the enemy.!
>
> American citizen''

* * *

"The Rosenberqs turned traitors and turned the atom bomb secrets over to the REDs.

Now you and the other Jews are deciding what is secret and what is not

Just as Judas betrayed Christ you and the other creeps such as Eislberg and Slushberger are betraying the U.S.

All these bastards are interested in is the dollar and control of peoples minds.

No freedom of the press and turning over papers that give aid and comfort to the enemy and helps kill more U.S. troops.

You lousy Traitors."

* * *

"Congratulations your communistic decision for reserve officers. GI's are next."

* * *

"So what? Why you dumb bastard!! Definately gutless too. You are typical of the tripe running our country today.

How can you judge anything with your limited knowledge of aviation?

I'll bet you $10,000 you have been on public or Govt. payroll since you got out of college.

Slopping at trough S.O.B.

Show some guts and do something about this letter."

* * *

At times there was solace in remembering Justice Holmes who once said in addressing the Harvard Law School Association these comforting words:

> "I get letters, not always anonymous, intimating that we are corrupt. Well, gentlemen, I admit that it makes my heart ache. It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad to find evidence that one was consciously bad. But we must take such things philosophically and try to see what we can learn from hatred and distrust, and whether behind them there may not be some germ of inarticulate truth."[1]

One area burning at white heat where I found myself on the griddle concerned the conflict between abortion and "the right to life." Here religious, economic, scientific and psychological considerations are all in conflict intermingled with individual personal experiences. The District of Columbia had an archaic criminal abortion statute which as interpreted by the Court of Appeals placed on the doctor who performed an abortion the burden of establishing medical justification rather than placing on the prosecution the burden of negating this recognized defense beyond a reasonable doubt. In 1969 I ruled orally from the bench but after much thought that this statute as interpreted was unconstitutional. I said in part:

> "There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. . . .

> Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights. The abortion debate covers a wide spectrum of considerations: moral, ethical, social, economic, legal, political and humanitarian, as well as medical. . . . But it does not appear to what extent Congress has weighed these matters in establishing abortion policy for the District of Columbia beyond an expression of a clear necessity of placing the matter in the hands of competent doctors.
>
> * * *
>
> "The Court cannot legislate. A far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation. The asserted constitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social and constitutional problems presented. The Court ventures the suggestion that Congress should re-examine the statute promptly in the light of current conditions."

This case came very early in the growing legal controversy surrounding abortion. The Supreme Court reversed by holding that the Court of Appeals interpretations on which I relied were erroneous. The mail was heavy, but nowhere near the 60,000 letters Justice Blackman is reported to have received later following the landmark Supreme Court decision legalizing abortion. Apart from some letters objecting on religious grounds, the bulk of the mail was highly favorable. Many women wrote. I heard from other judges and law professors, friends and

strangers. It surprised me that many letters spoke of courage. I had not been aware I was being courageous. While I expected more adverse comment, I already knew abortion issues were controversial but thought both sides were about at an even stance and that many people really didn't care. Of course the battle still goes on but now there seem to be only extremists on either side. I thought the Supreme Court was indecisive. It often is on major issues and perhaps should be.

Later in 1983 I was again interjected into this sensitive area when I struck down the Secretary of Health and Human Services' "Baby Doe" regulations.*/ Here the issue was again directed at an age-old question: when a badly deformed or mentally defective infant is born, should doctors accede to parental wishes and allow nature to take its course or should they in the interest of the state resort to life-sustaining techniques to preserve against parental wishes whatever quality of life may be present. I ruled the Secretary's regulation interjecting federal snoopers into the delivery rooms was invalid because she had failed to follow proper procedures in promulgating an emergency regulation without hearing. Again the mail was heavy. The opinion was carefully and simply written in understandable language but my correspondents took off to

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*/ American Academy of Pediatrics v. Heckler (HHS), 561 F. Supp. 395 (1983). [Baby Doe]

voice their preconceptions -- fortunately after more mature consideration the Reagan administration watered down its position after consulting the medical profession and reached a far less drastic solution. The appeal was dropped.

Other issues were equally controversial. In late 1970 I enjoined the public printer of congressional documents from printing a black-list which the House Unamerican Activities Committee had prepared. This was a list of radicals to be circulated to alumni and officials of colleges throughout the country in an attempt to prevent any person listed from speaking on campuses. This came up as the repressive tendencies of the Nixon administration were gaining ground. I tried in simple language to urge a greater sense of decency and restraint, pointing out the total lack of any legislative purpose behind this witch hunt. Among other things, I said --

> "It is alien to any legitimate congressional function, as well as contrary to our most established traditions, for any Committee of the Congress to disseminate lists designed to suppress speech. Members of the Committee may speak their minds, and their words will carry added weight because of the great prestige of their high office. They cannot, however, by the mere process of filing a report devoid of legislative purpose, transform these views into official action by the Congress and have them published and widely distributed at public expense.
>
> "The Court notes the increasing tendency of the legislative branch to investigate for exposure's sake, and expresses the hope that members of Congress will by rule and attitude limit congressional inquiry to those matters amenable to constitutional legislative action. The Congress, the Judiciary, and the Executive branch properly seek remedies against violent

> conduct, but the marketplace of ideas cannot be closed and all branches of government must in the last analysis depend on the common sense of citizens. This is the essence of democracy and it is in times of stress that the fundamental requirement of free speech and non-violent assembly must be assiduously preserved wherever possible. */

There was an immediate reaction. The Court of Appeals refused to summarily reverse. Congressman Ichord mounted a personal attack on me from the floor of the House and some legislators of his persuasion joined in. It was labeled the Gesell affair. My civil liberties and anti-abortion record was raked over. I was pictured as a threat to Congress and the Constitution and a heavy bunch of letters favorable and unfavorable arrived. Many writers were appalled and said I had betrayed the country. I didn't know the meaning of honor, was helping break down law and order, attempting to overthrow the government to aid the punks. There was a general theme as stated by one lady, "What on earth is happening to our beloved country, especially our federal judges?" Others sent thanks and spoke of courage. There was much editorial comment from The Sacramento Bee to The Washington Post and New York Times. Again the reaction was mixed but overall favorable. None of the letters or the editorials spoke of the essential point -- that I had stepped in to protest against a congressional committee engaging in tactics wholly foreign to any legislative purpose -- i.e., to quiet those

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*/ Hentoff v. Ichord, 318 F. Supp. 1175, 1182-83 (1970).

with whom it did not agree. In the middle of all the bitter comment, I felt threatened only when a man with a gun came several times to my farm when I was not there, saying he was after me for what I'd done. After I spoke to the Loudoun County sheriff, the man never turned up again. The letters and editorials gave me a clear indication that there were well-entrenched attitudes in the land that could easily be awakened by one who became restless with the slow and faltering progress of our form of constitutional government.

Looking back now over the mail of the 16 years, it is clear that there are many people who believe the press is doing a good job of disclosing graft and want it to continue, that the military is protecting us from communism and that any judge who speaks out for civil rights should have his head examined. It comes through loud and clear that there is an amazing ignorance of our form of government and of the role of the courts. Time and time again cryptic media coverage results are misleading readers of the true issues. News is capsuled to a point where only results are disclosed and the underlying reasoning remains hidden.

On a number of occasions, usually once or twice a year, I have been asked to sit with the Court of Appeals. Judging at that level is a wholly different job. The cases have already been decided. You have nothing to do with directing the course of the proceedings, sorting out issues or developing facts. Your job is to review. The frustrations

of appellate work are enormous. You must accommodate your colleagues within reason and await their decision making. The appellate function has long been distorted. It was intended to correct error. It has become much more. Many appellate judges feel compelled to announce their own views on the underlying issues. When the decisive facts have a different thrust well-founded findings below are ignored or set aside -- not always as a matter of law, but of policy. Thus the appellate process may become a matter of personalities. The composition of the Court often foretells the result. I have been impressed with the dedication, sincerity and effort our appellate court brings to each case large or small. But my limited experience convinces me of these things: Appellate judges should have experience in the trial courtroom. There are too many law clerks messing in the appellate decisional process. Appellate courts are far behind, however, too bureaucratic and as law clerks and secretaries work over materials for the judge the judge's individual effort toward the result lessens and his or her work lacks the imprint of individual effort. The appellate work offers little feeling of personal achievement and is too removed from day to day events to satisfy one of my temperament. While it is comforting for a trial judge to be protected from his errors through appeal, the inferior role suits me the best.

Let's turn to something else -- court management. Have you ever seen Richard Pare's Court House, a Photographic

Document? It shows the early courthouses which became the focus of scattered settlements as they turned one by one into towns built around the courthouse. The courthouse reflected community pride. It was the center of activity. It was as Pare notes, "The linchpin around which the town developed." It also marked the extraordinary influence that judges in those early days played in establishing law and order*/ and setting moral standards. Here there was theatre, political jockeying, sorrow and joy and usually justice developed with aid of common sense juries.

In the cities that have succeeded the towns, all this has been lost. The people and even a large share of the practicing lawyers don't even know where the courthouse is. The press rarely covers trials in any detail. The public goes about its business nowadays with only a glimmer of what is taking place in its courtrooms. Yet, oddly enough, we seem to become more litigious every day. The volume and variety of lawsuits constantly amazes me. Problems that used to be thrashed out in town meetings or handled effectively by mayors and town or city managers now come to court as these mechanisms appear unresponsive. Legislatures beset by special interest lobbies and conscious of the complexity of most daily affairs end up speaking in imprecise generalities,

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1/ I should have mentioned earlier my remote Uncle Issac C. Parker, "the greatest of all American trial judges, the famous hanging judge who was the first federal judge in the Oklahoma Territory sitting in Arkansas. See He Hanged Them High, Homer Croy, Duell, Stone and Pearcey, Little Brown.

leaving the courts to fashion, interpret and effect practical solutions hopefully consistent with a generalized legislative purpose and the Constitution.

Yet we have not found a better way to resolve disputes and keep our form of democratic society on course. With all the criticism of the courts citizens turn to them for relief and the stability of our form of government depends on the integrity and efficacy of the judiciary. Knowing that litigation will pour in, much of a judge's time is concerned with case management, case control, how to get the work done. While lawyers are rarely in a hurry, their clients are and every delay is blamed on the courts.

The management aspect of the job has two facets. First and foremost, each judge must learn to manage his or her own individual caseload. Beyond this there is a continuing need to perfect a court's overall operations by improving assignment techniques, developing new rules and procedures and identifying the weak spots that need correction.

My individual caseload was kept in reasonably good shape by a few simple devices. Every case had a date for completing some step leading to a definite trial date set well in advance. Few continuances coupled with close review of the progress being made kept things humming. I found that lawyers respond when a judge seems to know the case, offers suggestions, and sticks to the dates and rulings he lays down.

It has been my lot, moreover, to be involved almost continuously with the larger aspects of court management. When I came to the court, I had been studying ways and means of improving judicial administration €or several years as chairman of a special committee created by the Judicial Council. The committee had sought unsuccessfully to persuade the United States District court to abandon the master calendar and go to the individual calendar system. Judges Curran and Jones had rejected the idea. The court was still on the master calendar when I arrived and everything I saw led me to feel the committee had been on the right track in proposing a system that would assign each case to a specific judge who would see it through to conclusion. File after fils showed the waste, duplications and delay the master calendar system with its diffuse responsibility often created. I immediately started to push, with a few other likeminded judges, for the individual calendar from inside. The court was swamped with common law crimes -- rape, armed robbery, housebreaking, et cetera -- it was falling further and further behind on the civil side. After a good deal of discussion, eight judges took the entire criminal calendar on an individual calendar basis and left the other judges free to tackle the civil case load. This was an experiment. It worked. Even the criminal calendar improved and the entire case load greatly improved After a few months the full court went onto the individual

system €or both civil and criminal cases as the dissenters became convinced. It has been a great success thanks to the cooperation of all concerned.

Soon after I came to the court, I came to know Chief Justice Warren Burger then a circuit judge. He asked me to help with his ambitious plans to improve court administration as soon as he became Chief Justice. I worked with him on a number of things including the planning for a program to train court executives. Chief Justice Burger had put me on the Criminal Rules Committee of the Judicial Conference, where I stayed for eight years. Chief Justice Burger put me also on the Conference Jury Committee, and on the board of the Federal Judicial Center and I helped him in various other ways. He stopped by my house at night, on occasion, on his way home for a drink and a talk. All of this didn't last very long. I felt the Center was not doing a good job, expressed disagreement and resigned. I did this privately. Although our relationship continued to be cordial he never spoke to me again on any aspect of judicial management.

I still had much to do, however, within our court, as well as for the District of Columbia. One of my most interesting assignments was to serve on the Judicial Disability and Tenure Commission, a statutory group charged with reviewing the performance of local D.C. judges. The Commission met regularly, reviewed conduct of individual

judges and took formal and informal corrective action. During my tenure the commission smoothed out some of the rough spots in the local courts, disciplined a few intemperate judges, pointed the way toward higher standards which the majority of local judges desired and in many indirect ways helped to bring about higher standards. I felt somewhat uncomfortable reviewing the bench conduct of other judges, but felt I was able to bring perspective to the deliberations of the commission which was otherwise made up of lawyers and laymen. The tribute the commission paid me at the end of my five-year term warmed my heart, as did many quiet comments by leading judges of the local courts who felt we had made significant progress.

Although I thought I knew a good deal about federal courts after years of practicing before them, I had much to learn about their management problem. I had had no idea how pinched the federal courts are financially. Appropriations are far too small. The courthouse is poorly maintained. Food is awful. Modern business equipment is unavailable or hard to get and always slow in arriving. Clerical help is underpaid. As the Third Branch, the courts get the short end of the stick. The lush spending on the Hill or at such agencies as Agriculture and the Pentagon illustrates what poor cousins we federal judges are. Perhaps it is inevitable. Courts so often are obliged to throw monkey wrenches into the machinery to maintain constitutional

standards. But when it takes eighteen months to get a leak fixed, air conditioning doesn't function, when little men cut off your hot water to save money, etc., those of us at the courthouse felt we needed more leeway to run a smoother operation which the public deserves.

In any multijudge court the efficiency of its administration depends on the skill and interest of the Chief Judge, whose selection is made on a seniority formula. Whoever is Chief Judge must recognize that a group of life-time Article III federal judges is composed of highly individualistic persons often acutely conscious of their equal status and prerogatives. Thus the federal courts run essentially by committees, which at best is a cumbersome imperfect process that tends to compromise at slow speed. With a limited budget controlled by the Administrative Office of the United States Courts and with care and maintenance in the hands of an incompetent General Services Administration, progress is difficult at best.

At one time or another, I served on almost every possible committee of the court and did my best to encourage movement. On the whole, given all the obstacles, we have had a better than average result, but it is clear to me the Third Branch could do a better job if it had more money and was free of GSA. Every court is different. Every court has its own special problems. Bureaucratic rules applicable to all federal courts often ignore significant differences.

Many judges coming from the legal profession have limited administrative skills. There is much yet to be learned about judicial management. The need for reform here is still substantial.

Part of the management problem involves developing methods for disciplining judges who shirk their responsibilities or who are unable to perform due to age or illness. Obviously in a group of several hundred men and women no matter how careful their selection there will be a considerable range of ability, variations of temperament and a disparity of motivations and energy for addressing the task at hand. Because some judges have seemed too casual, sloppy or indifferent to their case management functions an ever increasing series of rules to govern conduct on and off the bench and to dictate how a judge should proceed at each stage of a criminal or civil case has been developed. This has tended in large part to be ineffective busy work. The judges targeted have ignored the strictures.

Public concerns have resulted in Congress taking a more direct and effective step by providing authority for the disciplining of judges whose performance is found unsatisfactory after review within the judiciary itself. Recently I upheld the constitutionality of this significant reform and the case will now wind its way through the appellate process.

## Signing Off

Finally, as in everything else, I have been lucky to have had able, loyal law clerks.*/ Although I have felt the need of having only one law clerk a year now as the years roll along, when we get together on occasion, I am increasingly aware of what their companionship and support has meant. Many have remained in Washington and drop by chambers for lunch or when at the courthouse. It is good to watch each of them grow and succeed, fulfilling the great promise indicated by their resumes that brought them to Courtroom No. 6. They have all prevented mistakes, been superb sounding boards and helped produce quality work. I have learned much from them individually and as a group, and we have shared many confidences which have never been broken. Once Doris Brown breaks in a new clerk, things have rolled along serenely. The change each year has been

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|---|---|
| John N. McBaine, Jr. | January-June 1968 |
| Alan Dranitzke | July 1968-1969 |
| John F. Dienelt | 1969-1970 |
| William H. Jeffress, Jr. | 1970-1971 |
| Timothy W. Bingham | 1971-1972 |
| Michael C. Devorkin | 1972-1973 |
| Roger W. Fonseca | 1973-1974 |
| E. Donald Elliott, Jr. | 1974-1975 |
| Mark I. Levy | 1975-1976 |
| Scott Blake Harris | 1976-1977 |
| Seth P. Waxman | 1977-1978 |
| Eric B. Amstutz | 1978-1979 |
| James J. Brudney | 1979-1980 |
| Peter A. Barnes | 1980-1981 |
| John D. Echeverria | 1981-1982 |
| Lynn A. Stout | 1982-1983 |
| John C. Millian | 1983-1984 |
| Patrick A. Malone | 1984-1985 |
| [Michael E. Tankersley | 1985-1986] |

stimulating and I have never been disappointed. This aspect of the system I would never change. I look forward to having a son or a daughter of a clerk follow in the family tradition. It could happen, and what fun it would be!

It was easier to begin this account than to end it. That is because as yet there is no end. I doubt there will be a third career in the law. While semi or complete retirement is possible, I am still learning and hopefully doing a better job through experience. Age is not a chronological matter. It is a matter of energy, health and a willingness to push ahead. Someday I will know it is time to quit or surely those close to me will let me know. If I add more chapters to this account in the meantime, this sentiment will still be at the end.

G.A.G.

North Haven
August 1984

# PRESENTATION

**of the**

# EDWARD J. DEVITT
# DISTINGUISHED SERVICE TO JUSTICE
# AWARD

**m**

# HONORABLE GERHARD A. GESELL

**District Judge, United States District Court**
**District of Columbia**

**Washington, D.C.**
**May 16, 1990**

# PRESENTATION

In presenting this award to Gerhard A. Gesell, we acknowledge his devotion to bettering the lives of Americans through his distinguished work on the federal bench. We also recognize Judge Gesell's many contributions to improving the system of American jurisprudence for current and future generations, as well as his example as a colleague, friend and mentor to many.

Judge Gesell's impact on our justice system and the lives of Americans has been profound and widespread. He possesses qualities of intelligence and honesty, along with the drive to see justice carried out in an even-handed, timely manner. It is rare to find all this in one human being and we will focus on but a few of his many accomplishments and attributes.

## COURTROOM SKILL

His skill on the bench, is first and foremost, widely regarded, perhaps even legendary. One experienced trial lawyer of Washington, D.C.'s Stein, Mitchell & Mezines helps define this courtroom mastery:

> *I have tried a number of cases before Judge Gesell. His control of the case is immediate. He permits no exploration of irrelevancies and the lawyers are at once aware that a decisive and fair Judge has taken hold of the case. His broad experience in litigation lets him see what is a bit beyond the horizon He has never been bothered by the problems that plague other judges, discovery disputes. His muscular intelligence strangles them.*

T. Sumner Robinson, Associate Publisher and Editor-in-Chief of *The Los Angeles Daily Journal,* who covered the U.S. District Court for many years, remembers being awed by the judge's style as he watched the Watergate trials:

> *What remains indelibly etched in my memory is his solemn and unflinching style in disposing of these weighty and serious matters in a conscientious and ethical manner, a style seemingly unaffected by the drama that surrounded the events of the time. He remained a stern, but compassionate, judge, carefully weighing each case and each individual defendant on its or their own merit.*

## AFFINITY FOR PUBLIC SERVICE

In addition, we highlight the extraordinary breadth of his devotion to public service in all forms. Guido Calabresi, Dean and Sterling Professor of Law, Yale University, comments on one benefit society has gleaned from Judge Gesell's long service to the school as alumni chairman and its representative on the council of the university:

*Public service is a broad term. Work for one's law school may not qualify as the most significant of public service, but it surely has its part. When it is done by someone like Judge Gesell, who has also been a dominant figure in more traditional forms of public service, it serves to show how a person who is truly dedicated to the public interest, can find time for it in all its manifestations.*

Another prominent attorney of Wilmer, Cutler & Pickering. Washington, D.C., adds these thoughts on Judge Gesell's view of his profession as a public service impacting society-at-large:

*Above all, he has maintained an enthusiasm for the profession of law as a public service, and for the dispensation of equal justice to the weak as well as the power-1, that he continues to transmit to all who appear before him.*

## MENTOR TO MANY

Finally, we focus on his example as a man worthy of emulation. Judge Gesell has served as a role model for countless young attorneys. These men and women help shape the legal profession every day, and will continue to lead our justice system for decades to come in the tradition set out by Judge Gesell. Says one former clerk, now a professor at a school of law:

*He is probably the most ethical person that I know. So often in legal practice, lawyers and others manage to rationalize cutting corners. Though he understands the factors that lead people to do that, he does not believe that is acceptable. I have fewer shades of gray than before I met him.*

Another law clerk (and Judge Gesell has never had more than one a year) of Miller, Cassidy, Larroca & Lewin in Washington, D.C. sums up the sentiments of the twenty-three law clerks Judge Gesell helped mold

*His accomplishments and contributions are recognized nationwide, yet he is an unassuming, modest man. When he assumed the federal bench, he left a highly remunerative and coveted position as senior partner of one of this county's premier law firms He is the classic example of a man who has foregone material rewards to lead a life of public service in the justice system. Judge Gesell is truly an outstanding jurist, public servant, and human being. He richly deserves this award*

The Devitt Distinguished Service to Justice Award was established to recognize extraordinary service by members of the Federal Judiciary. Judge Gesell's contribution to American justice epitomizes the spirit of excellence embodied by this award.

For his distinguished service to justice, we. his confreres on the Federal Courts, United States Supreme Court Justice Sandra Day O'Connor, United States Circuit Judge Wilfred Feinberg. and United States District Court Judge

Edward J. Devitt, present to the Honorable CERHARD A. GESELL, the EDWARD J. DEVITT DISTINGUISHED SERVICE TO JUSTICE AWARD.

Judge Gerhard A. Gesell was born in Los Angeles on June 16, 1910, the son of renowned physician and child developmental expert Dr. Arnold L. Cesell and Beatrice Chandler Gesell. He graduated from Phillips Andover Academy (1928) and received his A.B. degree (1932) and J.D. degree (1935) from Yale University.

Fresh out of law school, he joined the staff of the new Securities and Exchange Commission and is given credit for helping to establish the SEC as an effective regulatory agency. After only three years at the SEC. he was put in charge of a public investigation into the New York Stock Exchange and one of its major brokerages. His handling of the widely publicized hearings, at which J.P. Morgan and many other Wall Street tycoons testified, was praised in newspaper accounts, including this one from Raymond Clapper.

> *Young Gesell was taken green out of law school and had been working for the SEC for three years. He was competent and he developed rapidly. He handled the Detroit bucket-shop case and worked up the big Atlanta fraud case. When the SEC began investigating the Whitney affair he was assigned to the job. He prepared himself with extreme care and thoroughness. In addition to that he had a gift for compact, succinct questioning. He worked with economy of effort avoiding useless questions and handled his witnesses with a cool, sure touch but calmly without browbeating, revealing skill that most lawyers are years in acquiring.*

Thereafter, he received increasing responsibilities at the SEC, handled congressional hearings and advanced to a position in the Chairman's office.

In 1941, he left the SEC to join Covington & Burling, a major District of Columbia firm, where he established a national reputation as a trial lawyer and corporate advisor. During his twenty-eight year career in private practice, Judge Gesell tried many celebrated cases in federal courts around the country, and argued several antitrust and other matters before the Supreme Court.

Judge Gesell has always devoted time to public service. While in private practice, he served as Chief Assistant Counsel to the Joint Congressional Committee on Investigation of the Pearl Harbor Attack (1945–46). He chaired the President's Commission on Equal Opportunity in the Armed Forces (1962–64), which helped prompt the desegregation of many aspects of armed services life. He was also an original member of the Lawyers Committee for Civil Rights Under Law and the recipient of numerous citations for public service and pro bono activities. He served as Chairman of the Committee of the Judicial Council of the District of Columbia Circuit (1966–67) and helped to guide the reorganization of the District's court system. He was an early Fellow of the American College of Trial Lawyers and a lecturer at the University of Virginia and Yale law schools. Throughout his career Judge

Gesell has also served on educational and hospital boards in the District of Columbia. In 1967 he received the Yale Law School Citation of Merit, the highest award given to graduates of this school, and in 1973 he received the Phillips Academy Claude Moore Fuess Award for distinguished contribution to public service.

Judge Gesell's affinity for public service endured when he was appointed to the federal bench by President Lyndon B. Johnson on December 7, 1967. He entered on duty on December 29, 1967. One of the few lawyers at the time willing to give up a senior partnership in a leading law firm for life service on the District Court bench, Judge Gesell's path to federal judgeship typifies his independent frame of mind. His many noteworthy decisions serve as an exclamation point. Although eligible for senior status ten years ago, he remains fully active.

By appointment of the Chief Justice, Judge Gesell has served on several committees of the National Judicial Conference. He often sits on the United States Court of Appeals for the District of Columbia Circuit and on several occasions has been specially designated by the Chief Justice of the United States to hear cases outside the District of Columbia. He has been a director of the Federal Judicial Center and by invitation has produced a series of demonstration materials which the Federal Judicial Center uses in training new judges. He has chaired and served on innumerable judicial committees within the District Court, most notably chairing a committee he himself inspired to modernize and rewrite the rules of the District Court Many of the rules adopted during this process, which began in June of 1972, have been followed by other Districts around the country and have influenced the Federal Rules of Civil Procedure. Judge Gesell also served for six years as the judicial member of the District of Columbia Commission on Judicial Disabilities and Tenure, which has oversight authority for the District of Columbia courts. He continues to serve as liaison judge to the District Court's grievance committee, and was a member of the Circuit Judicial Council and the Executive Committee of the District Court

Judge Gesell's approach to his judicial tasks first came to national prominence soon after joining the Court in a series of cases involving press access to news sources and the First Amendment right to publish. Most notable is the *Pentagon Papers* case, which involved the government's effort to prevent publication of government documents obtained by two national newspapers. Parallel proceedings moved to the Supreme Court from the Southern District of New York directed at the *New York* Times and from the District of Columbia directed at the *Washington Post.* Throughout a series of proceedings, twenty-nine federal judges considered the right of the courts to censor publication. Judge Gesell was the only judge who never issued an order termporarily staying or prohibiting publication. His view of the merits was eventually sustained by the Supreme Court.

Later, the designations of Judge Gesell to try a series of Watergate criminal cases and subsequently the initial phases of the Iran-Contra matter

and the Oliver North trial were further recognition of his always current docket and his ability to monitor complex litigation in a practical and yet scholarly manner. His courtroom is always a model for controlled prompt disposition of well-defined issues which have been sorted out in advance through his informed personal management of pretrial proceedings. He has always heard and decided motions promptly. His trial dates *are* also prompt and are rarely continued.

These well-publicized matters are but a small **part** of the extraordinary range of challenging and **often** novel legal issues that have been presented in regular course to Judge Gesell by reason of **his** membership in the United States District **Court** for the District of Columbia which has had a unique and demanding caseload during the last two decades. His judicial career has covered a time of controversy and tumult which has focused its litigation on the nation's capital. Judge Gesell has decided cases of national and often constitutional significance involving abortion rights, swine flu immunization, random drug testing, AIDS, genetic engineering, medical responsibility with respect to newborns, voting rights and redistricting, homosexuality, student riots and draft problems during the Vietnam war, whistle-blowers, **race** and sex discrimination, civil **rights** controversies **of** all **types,** proceedings relating to impeachment of **two** federal judges, national strikes and numerous labor controversies, bid-rigging of government contracts, major separation **of pow**ers controversies, prison conditions and much **more.** These exacting responsibilities accompanied the usual heavy load of regular civil and criminal business that falls to all federal judges in major metropolitan areas. Overall, it has been an exacting test of judicial competence, case management and impartiality. Judge Gesell's track record **through** it all justifies this Award. He exemplifies the dedication and excellence which characterizes the effort of many federal trial judges across the land and **has** served **as** a **role** model to many.

Judge Gesell married Marion Holliday (Peggy) Pike on September 19, 1936 and has **two** children, Peter Gerhard and Patricia Pike, and three grandchildren, Sabena, Alexander and Justine. While always maintaining an active schedule on the bench, he spends weekends at his farm in Loudoun County, Virginia, where he manages the farm and is an amateur beekeeper. In the summer he **sails** and raises vegetables in Maine.

## Remarks of Chief Judge Aubrey E. Robinson, Jr.

Ladies and gentlemen, I assume that everyone in the **room** knows why he or she is here, so I won't have to explain that to you.

We are very pleased that members of the selection panel are present **with** one exception, and I will explain that in a second. We are delighted that Judge Wilfred Feinberg of the Second Circuit **joined** by his lovely wife,

Shirley, are with us; delighted that Judge Devitt is here; and we anticipate the presence of Justice Sandra Day O'Connor. She had a tight schedule that would have permitted her to be here at this moment, but the schedule was thrown off by forces beyond her control. So, we do anticipate that she will be present. And, of course, we knew that there could be no ceremony without the presence of members of Judge Gesell's family, Peggy especially, his son Peter, who came from Cambridge, and his daughter Patsy, who came from New York City.

There is a notation here that I am supposed to recognize distinguished guests. If I did that, then I would have to call everybody's name in the audience, including members of our court personnel. I will not do that. I will just acknowledge that all of you have the sense and sensibilities to appreciate Gerhard Gesell, are distinguished for that alone, not for you other personal accomplishments.

We are pleased as always to have judges of the Circuit Court join us, judges of the Superior Court, judges of the D.C. Court of Appeals, and we appreciate your support.

Again, and it was a pleasant surprise for me, because I was not advised that he would be here, we have the president of West Publishing Company, Dwight Opperman.

When I received the word that Judge Gesell was going to be the recipient of the Eighth Annual Devitt Award, I went down to his chambers to extend personal congratulations, and in the course of our conversation I mentioned the word ceremony in connection with a celebration. I should have known better. In no uncertain terms he told me he would have none of that. Grudgingly, he did approve we could maybe have something short, quiet and simple. But Judge Gesell underestimated my enthusiasm for a form of proper recognition. So, using the great authority of my position as Chief Judge, I convened a special review panel to consider the matter and in an unpublished *per curiam* opinion filed under seal, the panel ruled essentially as follows:

One, that there would in fact be a program; two, that it would be in the courthouse and not in Loudoun, Virginia, at the farm; three, it would be in the Ceremonial Courtroom and not in Courtroom 6 on the second floor. But it further ruled that the judges would not robe or take the bench, there would be no Marine Color Guard, and that things would be informal and we hope enjoyable for everyone.

Among the few appellate decisions accepted by him, Judge Gesell accepted this one with equanimity. I was pleased at this result because it affords me the opportunity to express on behalf of his colleagues and the entire court family our pride that he is the recipient of the Eighth Edward J. Devitt Distingushed Service to Justice Award.

In executive sessions of the court Judge Gesell has always unhesitatingly expressed his opinion with respect to our common concerns in managing the

affairs of the court. His wisdom and experience have greatly assisted the court's efforts to remain a flagship court in the federal system. He has given unstintingly of his time in working with advisory committees of the court and other important committees of the court, the Grievance Committee, the Rule 711 Committee, and now he is working with the Civil Pro Se Panel Committee. He presides at the luncheon table in the judge's dining room in an inimitable style, commenting on a variety of subjects that ranges from A to Z, that is, from animals and appeals to zoology. As Judge Devitt can attest, because over the years he has broken bread with us very frequently, Judge Gesell's comments are often provocative and certainly a respite from the mundane business of judges.

Your presence today expresses your appreciation of his passion for the law and the highest standards of practice in the law and for his years of sustained performance as one of our finest trial judges. Those who work with him and those who work for him join with all who know him in extending warm and hearty congratulations.

We are pleased, as I said before, that Judge Edward J. Devitt, for whom the *West* Publishing House Award is named, is here to do the honors. Judge Devitt is in his thirty-sixth year as a District Court Judge and for twenty-three of those years he was the Chief Judge of the United States District Court for the District of Minnesota. He is one of the "Deans" of the federal trial bench and has been our revered and good friend throughout his tenure. Judge Edward J. Devitt.

## Remarks of Judge Edward J. Devitt

Chief Justice Robinson and my fellow judges, friends, we are here this afternoon to honor Judge Gerhard A. Gesell for his distinguished contributions to advancing the cause of justice. He has earned the recognition principally through his highly competent judicial management of cases and the exercise of outstanding courtroom skills in the conduct of trials. He is a trial judge of the highest order who well serves as an example to his peers and a model to the public.

Now, I should recall for you that the purpose of this award is to give voice to the often unappreciated work of federal judges. As members of a co-equal branch of the government, they have contributed so much for so long to the remarkable history of the successful workings of our unique representative republic. We hear so much about the activities of the Executive and the Congressional Branches, but does the public and even the bench and bar as far as that goes, know and fully value the contributions of the Third Branch?

Well, our friend, Dwight Opperman, who is here with us today. the long time president of the West Publishing Company, thought not, and he saw a need to inform the public about the meritorious work of the federal judiciary,

and so he established this annual award to bring needed recognition to the work of federal judges at all levels. For more than 200 years federal judges have acted as a balance wheel in our system of government and they have insured in that way effective and fair government under the Constitution. The life and the work of this year's awardee, Gerhard Gesell, is emblematic of the commitment of all federal judges. Through this recognition of him we honor the whole judicial family.

The brochures that you have in yocr hands tell you all about the remarkable life and the times of our honored guest. I am prompted to comment after reading all about him, that some observers of our honoree in action have commented that Judge Gesell is gruff. Gruff is what they say. Well, what about that? Aren't all federal judges gruff? Doesn't it go with the territory? Some lawyers think that all Article III judges are born that way, or at least they become that way after confirmation by the United States Senate.

Well, about the gruffness business, I know this: Gerhard Gesell is an even-handed, no-nonsense judge who runs a tight ship. There is no fooling around. He gets right to the point. He prepares diligently. He listens attentively, considers carefully. He rules promptly—oh, my, that's important—and he acts fairly. Those who know him closely see a benign person with warm heart, full of concern for his fellow man and dedicated to the commonwealth. And in this instance the inner man is reflected by the outer one, for Judge Gesell has been described by a seasoned news reporter as having "a cherub's face, a Santa's wispy white hair, and a grandpa's crinkly eyes." Gruff—no. Admirable! You put it all together and you get a first class, highly competent United States trial judge, fittingly representative of the best in the nation.

Former United States Supreme Court Justice Robert Jackson was a great admirer of the trial judges. "I am convinced," he said, "that the position in our profession which requires the most versatility of mind and firmness of character is the worthily occupied trial bench.

"Further," he said, "I do not belittle the very necessary and important role of the appellate court, but I think it has been exalted at the expense of the trial judge." With apologies to you, Judge Feinberg, and the other appellate judges present.

Well, Justice Jackson must have been visualizing the likes of our Judge Gesell who has done so much for so long, by conduct and by example, to make justice work better in the United States courts. Today Gerhard Gesell joins a long line of distinguished jurists who similarly have been hcnored in the past for outstanding contributions to justice—Albert B. Maris of Pennsylvania, Walter Hoffman of Virginia, Warren Burger of Minnesota, Frank Johnson of Alabama, William Campbell of Illinois, Edward Tamm of Washington, D.C., Edward Gignoux of Maine, Elmo Hunter of Missouri, and jointly last year Elbert Tuttle of Georpa and John Minor Wisdom of Louisiana, and now you Gerhard Gesell of Washington, D.C.

So, on behalf of this Year's panelists, Justice Sandra Day O'Connor, Judge Wilfred Feinberg and myself, it is an honor to present this scroll, this beautiful obelisk. and maybe most important of all, an honorarium in the form of a check for $15,000. Congratulations.

Remarks
of
**Gerhard A. Gesell**

I didn't want a ceremony, but now that we've got it underway, I'm pleased it is taking place. I am very thankful for the honor that the committee has put on me. I told Ed Devitt before he came in that I was going to accept the award so he wouldn't have any doubt. But there is an aspect of this award that I want to talk about that goes beyond the judge that gets it You realize I'm getting to be the oldest living active specimen around here and you can understand why perhaps it fell on me.

I have made my whole life in the law in the District of Columbia. I came here right out of law school. I have had a chance to practice law to my heart's desire. I have filled positions in the Executive Branch. I have filled positions on Capitol Hill. I have filled a position with the District of Columbia government, and I want to tell YOU that the most challenging and the most inspiring work I have had to do has been as a federal trial judge.

Now, there are people who think that you get on the bench and you are a federal judge and you issue decrees, hand down harsh orders, stamp a piece of paper, and that's what the job is all about. The reason I'm glad to have a chance to talk with you now (and this audience includes many of the people I'm going to be talking about in a moment) is to make it clear that a federal trial judge is no better or no worse than the supporting services he gets, from the aid he gets from his colleagues, from the help and ideas that you pick up from the moment you enter this courthouse and a man gives you a cheery wave, until you say good night to the charlady who is cleaning up for the next day.

There are a bunch of people who have helped me in every way possible. We exchange ideas. Sometimes they learn something from me. I often learn a lot from them. The work of any single judge is a composite of what the judges can learn from other judges and the help a judge gets from the experienced supporting people all around the courthouse.

The United States District Court for the District of Columbia is the outstanding United States District Court in the land. If you look at what happened here in the last twenty, twenty-five years, we have been constantly in the eye of the storm. All of the political ferment has centered here. People come from all over the country to file their cases here. What we do is read every morning by the President, by cabinet officers, by Congressmen, and we are under the zealous eye of the national press. The performance that this great court has put forward is not the work of any single judge. It is the

work of a system that is working. It is the work of my colleagues and other people here who have contributed to it in various ways. I want to just mention a few examples, because without that kind of help I am talking about. this wouldn't be the great insititution it is.

You look around these walls of this ceremonial courtroom. There's nobody here who can remember the names of all the judges whose portraits hang there. Judges come and go. I will have mine up there some day. But the thing that counts is the record of the court as an institution. There are people here from the Clerk's Office who have made substantial contribution to our work with new ideas and extra effort. We have from the Probation Office people who take an extra effort, get interested in somebody, prevent us from doing something that would be wrong. We've got members of the bar, pretty feisty in court sometimes, but when you call on them, they're here. They **work** for the institution. They contribute to its success.

The role of any trial judge is to work with what is available, to bring out the best in everybody that's doing the job and to profit by the glory that comes from success—it is happening to me—but you also get all the blame, and that's the way it should be. The individuality of judges is a very small aspect of a smooth, hard-working court.

Now, there are a few people I've got to mention. I'm not allowed to mention Mrs. Gesell. She told me that if I did she wouldn't come, and I know she meant it. All I can say about her contribution is that she is where I found the flowers in my life, and the music, the books, and a chance to forget what goes on here from day to day. When I get home, the court is gone and we live a life.

Now, around this mom you are going to see a bunch of fairly ugly-looking people, some of them. They are my law clerks. I am going to see them tonight at dinner and I'm going to reserve for dinner some of my true feelings about them, but I do want to tell you that there is a whole law clerk family you raise as a judge. I only have one law clerk each year. I believe in doing my own work. But, you know, I look around and one law clerk can't be here because he's on a delegation representing our country in negotiations with Canada. I have members of this family in public service, in environmental work, in private practice, teaching. We stay together. I marry a lot of them—I mean, I perform the ceremony—and we are all renewed every year by the law clerks coming together to tell what is happening to them.

And then there is something very particular about a trial judge's chambers and the people working immediately with him every day in court. That is where the public meets the federal court. Stop to think about it for a minute. The public meets the appellate courts if they read the newspapers or they listen to Dan Rather, who doesn't necessarily understand the opinion. But in the federal trial court you meet people with grievances

every day. They come for a solution of their problems and it is not just the decision that you make that must be fair, it is something more than that. The public must feel they have come to a place where they will be heard, where they have been treated decently and fairly. and that is the role of a trial judge and his immediate staff. It is something of prime importance that is sometimes forgotten.

The people who have helped me work this out are here and I want to mention them. My Deputy Clerk, Barbara Montgomery, who handles lawyers and witnesses gracefully; my Court Stenographer or Reporter, who has the most incredible ear for things I sometimes don't ever hear, Santa Zizzo: my Bailiff, Roy Smith, whose inner decency and concern is known all over this courthouse as one who always wants to help and be part of the effort: and then last but far from least I come to a lady who has been with me now for thirty-seven years. I call her Doris Brown. There are some people who call her Judge Brown. She is not a lawyer. But her Irish wit and her knowledge of procedures, both the written and the unwritten procedures of this courthouse, have enabled her to cajole or entice or direct the business of my chambers into sound channels and prompt solutions. She breaks in all the law clerks. She knows ahead of time what I'm going to think when I arrive and I do a lot that she tells me I've got to do.

So, I'm very particularly grateful to all these people who have worked with me this way. I'm grateful to my friends, the judges from across the street, who came over for this ceremony. I'm extraordinarily indebted to my colleagues, and I want to thank again the committee for the honor they have bestowed on me, with a special bow to Mr. Opperman who had the foresight and sensitivity to get the Devitt Award program going.

I believe I am to tell you that there is some iced tea and cookies over in the dining room across the hall. I look forward to seeing some of you there. Thank you.

## Concluding Remarks of Chief Judge Robinson

Please join us in the judge's dining room. You know where that is. The judge's dining room is on this floor. There we are going to have a reception where each one of you will have the opportunity to greet Judge Cesell individually.

Thank you all for coming.

(Proceedings adjourned at 4 p.m.)

# The Selection Panel

## Judge Edward J. Devitt

This year's presentation to Judge Cesell is the eighth annual award of the Edward J. Devitt Distinguished Service to Justice Award. It is named for Judge Devitt, longtime Chief United States District Judge for Minnesota.

The award was created to bring public attention to the dedication and contributions to justice made by all federal judges by recognizing annually the achievements of one of the Article III judges who has contributed signficantly to that end.

Judge Devitt is a member of the American Bar Association, Minnesota Bar Association, Ramsey County Bar Association, Federal Bar Association, American Judicature Society and the Fellows of the American Bar Foundation. His activites have included

Chairman, ABA Legal Advisory Committee on Fair Trial–Press (1967–71); Chairman, ad hoc Committee on Court Facilities and Design of the United States Judicial Conference (1971–73); Co-chairman, Bicentennial Committee of the Judicial Conference (1975–76); Chairman, Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts (1976–79); Member, Judicial Conference Committee on Court Administration (1960–68); and Member, United States Judicial Conference Standing Committee on Judicial Conduct (1982). He was a member of the Judicial Conference Committee which recommended the legislation creating the Federal Judicial Center (1968-70).

Judge Devitt was the originator of the six-person jury in the federal courts, now used in 86 of the 95 U.S. District Courts, and, in addition to authoring many published articles, is co-author of *Federal Jury Practice & Instructions* (3 volumes), Devitt and Blackmar, West Publishing Company, St. Paul, Minnesota.

Judge Devitt served as chairman of the selection panel which included Justice Sandra Day O'Connor and Judge Wilfred Feinberg.

## Justice Sandra Day O'Connor

Justice O'Connor was appointed Associate Justice of the Supreme Court of the United States on September 22, 1981 and took the oath of office on September 25, 1981.

Justice O'Connor graduated magna cum laude from Stanford University, receiving a B.A. degree in 1950 and an LL.B. degree in 1952. She was elected to the Order of the Coif, and was on the Board of Editors for the Stanford Law Review.

Before entering the judiciary, Justice O'Connor was Deputy County Attorney for San Mateo County in California; Civilian Attorney for Quartermaster

Market Center, Frankfurt, Germany; in private practice in Maryvale, Arizona; Arizona Assistant Attorney General; and State Senator in the Arizona State Senate.

While in the Arizona State Senate, Justice O'Connor was elected Majority Leader, and served as Chairman of the State, County and Municipal Affairs Committee.

In 1975 she was elected Judge, Maricopa County Superior Court. In 1979 she was appointed Judge, Arizona Court of Appeals.

Born March 26, 1930 in El Paso, Texas, Justice O'Connor and husband, John J. O'Connor, III, have three sons: Scott, Brian and Jay.

## Judge Wilfred Feinberg

United States Circuit Judge Wilfred Feinberg was appointed by President Johnson as a United States Circuit Judge for the Second Circuit on March 7, 1966. He took office on March 15,1966. Judge Feinberg became Chief Judge on June 24, 1980 and served in that capacity until January 1, 1989. He continues to be an active judge with a full caseload.

Judge Feinberg received his A.B. degree from Columbia College in 1940 (Phi Beta Kappa) and his LL.B. degree from Columbia Law School in 1946 where he was editor-in-chief of the law review. He has been awarded honorary degrees by Columbia University and Syracuse University, and was the 1990 recipent of the New York State Bar Association's Gold Medal for Distinguished Service in the Law. He served in the United States Army Signal *Corps* in Africa and Italy during World War II.

Judge Feinberg was admitted to the bar in 1947, and remained in private practice until 1961. In October 1961, he was appointed by President Kennedy as a United States District Judge for the Southern District of New York, a post he held until his appointment to the Second Circuit in 1966.

Judge Feinberg has been a member of various committees of the Judicial Conference of the United States and a member of the Conference itself (1980–88), and chairman of its Executive Committee (1987–88).

Born June 22, 1920 in New York City, Judge Feinberg is married to the former Shirley Marcus and has three children: Susan Ann, Jack Leonard and Jessica Sara.