The date today is September 26, 2001, and this is a resumption of the oral history interview of Judge Laurence Silberman. The interviewer is again Raymond Rasenberger.

MR. RASENBERGER: Judge Silberman, when we last spoke, we had gone through your youth, your well-spent youth I should say, and your first job in private practice in Hawaii and you had just talked about coming back to Washington, to Washington for the first time as an appellate lawyer with the National Labor Relations Board. Do I have that much right?

JUDGE SILBERMAN: That is correct.

MR. RASENBERGER: I wanted to ask you just about that experience, that lasted only a year or so, as I recall, the NLRB job. I assume you were doing some appellate arguing in the D.C. Circuit, or is that not so?

JUDGE SILBERMAN: Actually, I did have one case in the D.C. Circuit. I remember it quite vividly because the Board decision that I was defending was favorable to a union. The panel included Judge Bazelon and I barely got a chance to argue. He virtually took over the argument and pounded the poor petitioner employer's lawyer.

MR. RASENBERGER: How did the case come out? Do you recall?

JUDGE SILBERMAN: Oh, I won, of course, but I hesitate to say I won.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Bazelon won.

MR. RASENBERGER: Although it was called the Bazelon court in those days for good reason.

JUDGE SILBERMAN: Right.

MR. RASENBERGER: Did you have much contact with any of the other D.C.

Circuit Judges then or did you form any views about the court as a whole that you can recall worth mentioning?

JUDGE SILBERMAN: Not when I was an appellate lawyer at the NLRB. Later, when I was Solicitor of Labor, I developed a friendship with Harold Leventhal, and we used to have lunch on occasion.

MR. RASENBERGER: Yes, he was a very outstanding judge, by most views anyway.

JUDGE SILBERMAN: I thought he was quite brilliant.

MR. RASENBERGER: Did you think the court at that time, did you tend to think of it as a strong, relatively strong court despite the Bazelon or—

JUDGE SILBERMAN: Well, its image during the period of the late '60s and '70s was very much of an activist court.

MR. RASENBERGER: Do you have any other generalities to say about your experience at the NLRB as an appellate lawyer?

JUDGE SILBERMAN: Yes. I indicated before that I hadn't found appellate argument at the NLRB anywhere near as satisfactory as it was in private practice and that I felt quite stultified there. For one thing, we didn't have adequate secretarial help. One time I actually paid out of my own pocket for a secretary to type a brief. But even more distressing was that the appellate section of the Board had developed a style of brief writing which they insisted on imposing on all lawyers and I thought it was rather unimaginative. It was unwise to try to make every brief look like it was written by the same lawyer. As an appellate judge, I can say that my views as a young appellate lawyer at the NLRB were absolutely correct. I find Board briefs

boring because they are all written in exactly the same style. Unlike, for instance, Solicitor General or those of the appellate section of the civil division of the Justice Department.

MR. RASENBERGER: Which have individual characteristics?

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: All right then.

JUDGE SILBERMAN: Naturally, what I objected to was the repression of my own individual mode of expression.

MR. RASENBERGER: Yes, of course. Then after about a year you went on to be Solicitor of the Department of Labor, which is quite a jump from the appellate section of the NLRB. Other than your brilliant work as an appellate lawyer is there anything else that accounted for that step, big step?

JUDGE SILBERMAN: Yes. As I said in our last session, I had indicated that I was interested in a job in the Nixon Administration, but expected that I might be in line for a special assistant job to a political appointee or perhaps a deputy. It frankly never occurred to me that I would have a shot at a presidential appointment like the Solicitor of Labor. There was a lawyer in town by the name of Ken McGinnis who was doing a good deal of talent spotting or recruiting for the Nixon Administration, and he knew of me. I think my grade at the NLRB was a 13 step 10. In other words, they couldn't make me a supervisor, so they brought me in at the highest pay they could accomplish. But I had been a partner in a well-known management labor firm in Hawaii, and I was not unknown in certain circles, so it was between that and the fact that I was known as a management lawyer before I went to the NLRB. I even had some political connections. Hiram Fong, a Senator from Hawaii, was an acquaintance for whom I had worked

in his last campaign. It was that combination of factors, particularly with Ken McGinnis' recommendation to the White House personnel office. To my utter astonishment George Schultz gave me a call, I think sometime in February of '69, and asked me to come over for an interview. I then realized that I was being interviewed for Solicitor of Labor. I think, as I said the last time, one marginal advantage I had was that I looked 10 years older than I was.

MR. RASENBERGER: Had you ever met Schultz before?

JUDGE SILBERMAN: No, but as I realized afterwards, I was a rather unique commodity because I was perhaps the only partner in a corporate management labor practice firm who had taken a year's leave of absence to go argue cases for the NLRB. So, I looked less combative against trade unions than most management labor lawyers would appear, and therefore was received as more attractive both to the personnel people in the White House and to George Schultz as a possible Solicitor. That was totally fortuitous.

MR. RASENBERGER: You got to know Schultz pretty well after you took the Solicitor's job I take it?

JUDGE SILBERMAN: Of course.

MR. RASENBERGER: And formed a strong bond with him, did you?

JUDGE SILBERMAN: Yes. We became rather close, although we had our disagreements. During the time I was Solicitor of Labor I worked on the development of the Philadelphia Plan, which has put me in the peculiar position of having persuaded my boss to adopt a policy which I later determined was mistaken. I am giving a speech on the circumstances in the historical background of that in a couple weeks, which I will give you.

MR. RASENBERGER: How much later?

JUDGE SILBERMAN: You'll see in the speech. I wrote a piece in 1977, an op-ed in *The Wall Street Journal*, which was my *mea culpa*.

MR. RASENBERGER: All right. Were there any other, other than any affirmative action program, were there any other issues, significant events, that you could identify as characterizing your tenure as Solicitor of the Department?

JUDGE SILBERMAN: Yes. I was largely responsible for the supervision of the drafting, or in some cases the actual drafting, of the Occupational Safety and Health Act. I also worked through the terrible problem of the Yablonski killing, defending the Labor Department's refusal to investigate the mine worker's election while it was still proceeding, which gained me the great enmity of Joel Rauh and others who blamed me for defending the Labor Department. Refusal to do that investigation until the election was over they claimed attributed to Yablonski's murder. So, Joe Rauh testified against my confirmation as Undersecretary of Labor, Deputy Attorney General, and perhaps every other position I had.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Let's see what else was going on. We were also working on the ERISA statute. It will occur to me later on.

MR. RASENBERGER: Let me just ask you about OSHA and ERISA. Those are two major statutory landmarks. What do you know about the origins of OSHA? Did it come out of the Labor Department?

JUDGE SILBERMAN: Oh, absolutely. Well, out of the Congress and the Labor Department and the AFL-CIO and the Labor Department. The AFL-CIO and Democrats in Congress had a vision of what should be done with respect to occupational safety, we had a

vision, and the final legislation was a compromise between the two.

MR. RASENBERGER: Were you responding to the administration position?

JUDGE SILBERMAN: Yes. There is another thing that I worked on. I developed the administration's response to national emergency disputes, which is a subject you may have some knowledge about. As you recall, back in the late '60s and the early '70s the country was often faced with strikes in the transportation industry covered by the Railway Labor Act. But, you recall, the Taft-Hartley Act provided a mechanism for a cooling off period, etc. But, more often than not, those disputes ended up in Congress, and Congress was forced to come up with a collective bargaining agreement to solve the issue. George Schultz charged me with coming up with a legislative scheme that would be a better alternative. I came up with the notion of final offer selection, which, you may remember, was a device whereby, instead of appointing an arbitrator to resolve disputes between employers in transportation industries and the Union, the panel would be obliged to choose between the last offer of one side or the other, and take that position "holes boles." I developed that scheme with the hope that it would never be used because it would be so draconian. The risk would be so great that one side would lose all together–that there would be a disincentive to get to that point. Secondly, the possibility or imminence of arbitration always chilled collective bargaining because both sides would hold back thinking the arbitrator was going to split the difference anyway so they were better off not moving towards the middle. This mechanism was designed to have exactly the opposite dynamic that would induce people to come to the middle, because if they did end up in this process they wanted to be more reasonable more often. George Schultz liked the scheme and it was put in an administration working group under John Ehrlichman's office–I think John had became domestic

advisor rather than the counsel. And it was sort of funny because, after I came up with this scheme, arbitrators were appalled, they hated the idea. The AFL-CIO didn't like any compulsory settlement of disputes so whatever its dynamic they were opposed to it. They preferred for obvious reasons the alternative of Congress deciding the merits of a labor dispute because those days typically had a democratic House and Senate.

MR. RASENBERGER: That's interesting, I have always been attracted to final offer selection. I never knew where it came from.

JUDGE SILBERMAN: Well, at the risk of sounding immodest, I developed the idea when I was sitting thinking one day about why it is that so many tort cases are settled. They are settled because both sides have such a high risk of losing all together. And the reason why labor disputes weren't settled is they often ended up with arbitration, either by arbitrators or Congress, so the risk of trying to be reasonable and moving to the middle was greater than staying obdurate.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: After I came up with the scheme and George liked it, arbitrators were opposed, the AFL-CIO was opposed, and George was under some pressure from people who said it was an unknown leap into the dark. So, I'll never forget George once asked me, Larry, can you find any indication that anybody else ever came up with this? So I had lawyers in the Solicitor's office working for days trying to find another example, and one of my most intelligent lawyers found, believe it or not, that the idea had been suggested by someone in the Weimar Republic. George was very proud to tell *The New York Times* that the idea went back to the Weimar Republic.

MR. RASENBERGER: Isn't this what is sometimes now called baseball arbitration?

JUDGE SILBERMAN: Baseball took it from this idea. The Senate came close to passing the bill. I think they failed by two votes, and I can't recall what happened in the House, but it didn't pass. However, it was taken up by municipalities dealing with municipal unions and then ultimately by baseball.

MR. RASENBERGER: I didn't realize the municipalities. It's in effect in a number of places?

JUDGE SILBERMAN: A number of places. But I have a fantastic story to tell you about it.

MR. RASENBERGER: Tell me.

JUDGE SILBERMAN: I'll get you a picture. This [referring to photograph] is a picture of the White House working group that was working on this scheme. We developed it in the Labor Department, but then they wanted it washed through the working group under the auspices of John Ehrlichman, the Assistant to the President for Domestic Affairs. That's [referring to photograph] his deputy, Ken Kohl, that's Dick Cook, White House Legislative Liaison, Bill Gifford, the Labor Department Legislative Liaison, Jim Lynn, then General Counsel of Commerce, later Secretary of HUD. Ed Morgan, who sent me the picture, was one of Ehrlichman's assistants as Director of Domestic Council. He subsequently very tragically went to jail for having backdated the Nixon deed when he was Assistant Secretary of Treasury, and, incidentally, I represented him when I was at Steptoe and Johnson.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: I had gotten him cleared by the special prosecutor when I went back as Deputy Attorney General. I was absolutely convinced of his innocence. I had only taken him as a client after cross examining for three days. I refused to represent John Ehrlichman.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: He asked me to represent his legal defense fund, and I refused to get involved in any of the Watergate cases because I was of the view that Nixon was guilty, which is an interesting point.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But I was convinced that Morgan was innocent. After I went in as Deputy Attorney General, he was represented by Dick Van Dusen, who had been Undersecretary of HUD, and was a senior, I think the managing, partner of a big Detroit law firm. Dick called me when I was Deputy Attorney General to say that Morgan, consumed with guilt, had gone in on his own and confessed.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Yes. After we got him cleared.

MR. RASENBERGER: That's an amazing story.

JUDGE SILBERMAN: Not only that, but he was so consumed with guilt that when he left jail he never even tried to resume his career; the last I heard he was on a beach in Mexico.

MR. RASENBERGER: Oh, what a sad story.

JUDGE SILBERMAN: And he did that without any personal gain. He backdated

Nixon's deed to give Nixon a tax advantage without Nixon even knowing it.

MR. RASENBERGER: Oh, amazing. [Reference to picture.]

JUDGE SILBERMAN: There [referring to photograph] I am making the presentation to the President.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: That's Tenney Johnson, who was General Counsel of the Transportation Department, Mike Moskow, who was on the staff of the Council of Economic Advisors. I hired him as my Deputy Undersecretary the next year.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And that's Ehrlichman. Now, you can see Nixon is listening intently to this presentation.

MR. RASENBERGER: Right across the table from you.

JUDGE SILBERMAN: Right. Listening to this presentation, imminently involved, and aware because he had been a drafter of the Taft-Hartley Act.

MR. RASENBERGER: Oh, of course.

JUDGE SILBERMAN: Now the interesting question is, who is this gentleman?

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: After I left the meeting I called Ed Morgan and asked who was the white-haired gentleman to whom Nixon was deferring, who sitting on the other side of the table with Nixon in this place of honor, with all the rest of us across the table. And Morgan said, that's MacKinnon.

MR. RASENBERGER: MacKinnon?

JUDGE SILBERMAN: And I said, do you mean Judge MacKinnon, of the D.C. Circuit? Morgan said, yes, he served in Congress with Nixon and they worked together on this statute. At which point I said to Ed, don't you realize how inappropriate that is for a federal judge?

MR. RASENBERGER: Yes, then sitting on the Circuit.

JUDGE SILBERMAN: Then sitting on the Circuit, having been appointed to the Circuit by Nixon.

MR. RASENBERGER: Astounding.

JUDGE SILBERMAN: Sitting on the Circuit, with an imminent discussion on this issue. I said to Ed Morgan, that is palpably inappropriate. Don't you remember what happened to Fortas?

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Now Morgan had been a lawyer in Arizona, but was not a litigator, nor was Ehrlichman.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: It never occurred to either of them how inappropriate it was for MacKinnon to be sitting in there discussing this legislation.

MR. RASENBERGER: And it apparently never occurred to MacKinnon either?

JUDGE SILBERMAN: That's an interesting story. Because I complained to Ed Morgan, who complained to Ehrlichman, who I think called me, and I explained why it was quite inappropriate. MacKinnon never appeared again. Many years later–I've kept this picture all those years–I wrote the opinion in *Morrison v. Olson*, in the independent counsel case, in which I

was quite critical of the behavior of the special division of the D.C. Circuit, for having gotten much too activist in the supervision or guidance of the independent counsel. I thought it was unconstitutional, as you recall, for a whole host of reasons, but that was one of the reasons, and indeed that was one ground that Rehnquist was critical of that panel. Well, in any event, after I wrote my opinion, and it was published, George MacKinnon came into my office and he was livid at my opinion criticizing the behavior of the special panel. In those days George wasn't sitting he was just doing his independent counsel stuff.

MR. RASENBERGER: Had he sat on that panel himself?

JUDGE SILBERMAN: He was the presiding judge of the panel. MacKinnon was the man who in effect ran the independent counsel business. When George came in to complain to me about my opinion, he was red-faced, and he looked up at this picture right over my desk on the wall, and he paled perceptibly. He looked at it and said, I would have recused if anything came up, and turned around and walked out, and didn't say another word. And, of course, what was so interesting as far as I was concerned about it is George's behavior as the presiding judge of that special panel was reflective of the same lack of sensitivity to the separation of powers notions that led him to sit in on these meetings on the legislation being developed in the Nixon Administration.

MR. RASENBERGER: Isn't that interesting?

JUDGE SILBERMAN: A couple of years ago, Frank Swoboda of *The Washington Post* wished to do a story on the genesis of final offer selection. He knew that I had developed it back in the Labor Department before it had developed in baseball and then municipalities used it in government unions where they can't strike. He came out to get an

interview on all that, and George had died by that point, I think, and I showed him this picture and told him the same story. His eyes widened, he said my God what a story, and went back. Somebody killed the story, because in those days, independent counsel was a very popular notion.

MR. RASENBERGER: Yes that's right. Glad it didn't come full circle.

JUDGE SILBERMAN: This was before *The Washington Post* and other institutions sympathetic to the Democratic party realized that it was just as disastrous when used against a Democratic president as it had been for a Republican president and that fundamentally it was a misconceived and, I think, unconstitutional notion.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: That, of course, is a major story and *The Post* wouldn't run it.

MR. RASENBERGER: Isn't that interesting. Now this meeting was about final offer selection?

JUDGE SILBERMAN: Yes!

MR. RASENBERGER: Briefing the President?

JUDGE SILBERMAN: Yes!

MR. RASENBERGER: Coming up with a decision on it?

JUDGE SILBERMAN: Yes! As an amendment to the Taft-Hartley Act.

MR. RASENBERGER: Yes. What actually came out of the administration after that meeting?

JUDGE SILBERMAN: Proposed legislation which would have included the final

offer selection as the major technique to be utilized to avoid strikes in the transportation industry.

MR. RASENBERGER: But the Congress, or at least part of it, would have nothing of that?

JUDGE SILBERMAN: No, well the AFL-CIO was dead opposed, and as I said I think it came within two votes of passing in the Senate because it had some Democratic Senator's support, but it didn't pass, and I can't recall what happened in the House. It served a purpose because after we proposed that as a device to avoid national emergency disputes, it seemed to me there were less of them. I think the unions were a little worried that if they had a strike in the transportation industry that legislation would pass.

MR. RASENBERGER: Yeah, I think a very powerful concept, too bad it's not more prevalent. Speaking of those kinds of situations the Railway Labor Act, of course, was the primary example.

JUDGE SILBERMAN: Forgive me, incidentally, I'm not sure it really is designed to be used and I wouldn't have thought of it as particularly appropriate for individual negotiations such as in baseball.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: I think it may not be so useful there. Its major purpose was not to be used.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: If it had to be used, it was a device that would settle, but its major purpose was to create a disincentive to its use to force the parties to bargain.

[END TAPE I - Side A; START TAPE I - Side B]

MR. RASENBERGER: On a related subject, as you know, the Railway Labor Act is notorious for creating long unresolved disputes and has never been successfully amended in that area. Did you make a stab at that in your—

JUDGE SILBERMAN: Well you remember the national emergency dispute provisions of the Taft-Hartley Act applied to industries like airlines and railroads covered by the Railway Labor Act. In fact, the three industries most likely to cause a national emergency were railroads, airlines, and ships, shipping or longshore.

MR. RASENBERGER: Right, but even before you got to the national emergency you had these protracted negotiations.

JUDGE SILBERMAN: We never made an effort to amend the Railway Labor Act, nor did we make any effort to amend the National Labor Relations Act, although there was a good deal of pressure to do so. At one time George Schultz asked me, as Solicitor, to come up with "the right answer" to situs picketing, which was a hot issue in the construction industry. I finally came back to George and said there was no right answer, it was a question of power. Do we want to give more power to the construction unions or less power? There was no theoretically "right answer." He decided to leave well enough alone. Situs picketing was, in a few words, the unions' picketing other sites, where the same employers were involved. It is a problem that arises in the construction industry because on a construction site you have a number of employers working together. The question is, how broadly can a union striking one employer strike the site and thereby perhaps put pressure on secondary employers to put pressure on the primary employer.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: The area of the National Labor Relations Act that deals with secondary boycotts is very intricate.

MR. RASENBERGER: Back to OSHA for a minute. Was that an idea that was sort of in the air generally?

JUDGE SILBERMAN: Oh yes. There was no question.

MR. RASENBERGER: We needed–something like that?

JUDGE SILBERMAN: The Democrats wanted an Occupational Safety and Health Bill and many Republicans did too. And the Administration came out strongly for an Occupational Safety and Health Bill, but there were procedural and structural differences between the Republican and Democratic alternatives. And there were differences with respect to how the standards should be set, etc. The final legislation was something of a compromise.

MR. RASENBERGER: As is usually the case.

JUDGE SILBERMAN: Right.

MR. RASENBERGER: And ERISA, were you, was Labor a major player in the development of ERISA?

JUDGE SILBERMAN: Yes. Although it did not pass until after I left as Undersecretary of Labor. Actually, I was rather opposed to ERISA for the following reason. I was afraid if you imposed regulatory requirements on private pension plans you would deter the adoption of new plans, since it was not even conceived of requiring employers to have private pension plans. Any burdens we placed upon them could create a disincentive, and I think that was right. I think a number of employers had dropped the private pension plans after the legislation because unfortunate–but I did work on the various proposals during my time as

Undersecretary.

MR. RASENBERGER: So we have really been talking here about the Solicitor job and the Undersecretary job.

JUDGE SILBERMAN: Right. I became Undersecretary in 1970. I think I was nominated in the spring, and confirmed in September of 1970.

MR. RASENBERGER: Now, was Shultz still Secretary then?

JUDGE SILBERMAN: No. That is why there was a vacancy created. Shultz had been moved by Nixon from Secretary of Labor to Director of OMB. Jim Hodgson was the Undersecretary and he was moved up to Secretary, and then I was promoted from Solicitor to Undersecretary.

MR. RASENBERGER: That obviously broadened your responsibilities in various ways. Any thing significant as far as the Undersecretary job as distinguished from the Solicitor's job?

JUDGE SILBERMAN: Well of course the Undersecretary was basically the chief operating officer of the Department so there was much more of a management job. The Solicitor's office itself had been pretty large, but the Undersecretary job is basically the, as I said, COO, so it is basically a managerial job as well as having its policy component, and Jim Hodgson and I had a wonderful working relationship. We were very close, and he would have me basically run the management and he would take the major policy issues that he was interested in. Not that is wasn't—

MR. RASENBERGER: I can't believe he kept you out of the policy areas.

JUDGE SILBERMAN: No, no, no. We would both be in policy issues and he

would get involved in management too; we had a wonderful working relationship. Now George Shultz, still as Director of OMB, had some interest in labor matters. And, as I recall–oh, I just remembered something about that final offer selection legislation. Bob Packwood was leading the effort in the Senate to get the bill passed. He was on the labor committee, and a moderate Republican. However, as we came close to the election of 1972, the White House was particularly interested in attracting the Teamsters, who were one of the unions opposed to the amendments that included final offer selection. And I was instructed by George Shultz directly to tell our allies on the Hill that we were going to abandon the final offer selection, abandoning push for that as a *quid pro quo* for the Teamsters' support; and I had to call Bob Packwood and tell him that we were withdrawing our position, leaving him out on a limb.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And he was not a happy Senator.

MR. RASENBERGER: No. I am sure he wasn't.

JUDGE SILBERMAN: But I was honest about it so we remain friends.

MR. RASENBERGER: Yeah. I mean he understood the imperatives of running for President, although—

JUDGE SILBERMAN: He wasn't happy, he wasn't happy about our—

MR. RASENBERGER: No reason for him to—

JUDGE SILBERMAN: But George did remain involved somewhat in labor matters.

MR. RASENBERGER: Well his career had been in labor before—

JUDGE SILBERMAN: He was a labor economist.

MR. RASENBERGER: Yeah. You mean at OMB, as Director of OMB he took a special interested in–

JUDGE SILBERMAN: He had a much boarder portfolio of course, but he did keep an eye on the labor field.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: In some respects Jim Hodgson never developed the kind of relationship with George Meany and Lane Kirkland which George Shultz had. Partly because George Shultz retained that relationship.

MR. RASENBERGER: What was your take on Meany and Kirkland? I mean you must have had some contact with them.

JUDGE SILBERMAN: Yes. Lane Kirkland and I–well first of all, let me talk about George Meany. I developed enormous respect for him. Many years later when I was Ambassador to Yugoslavia and somebody asked me what Tito was like, I said put aside the ideology, the communist ideology, and put aside his proclivity to use rather bloody force, in some respects he reminded me of George Meany, because both men had absolute unerring instinct for power, and how to use it, and how to deal with those others who had power. Meany once said to me after he, I think it was after he attacked Jim Hodgson once, calling him the janitor, Meany said to me, when you dislike a policy in government, a policy that the government is pursuing, always personalize it and attack the person who represents it and see if you can destroy him.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: He had his own Machiavelli.

JUDGE SILBERMAN: Well, I don't know whether–certainly Machiavellianism. It was very tough. Lane Kirkland and I became very close friends, this is dating back to the time when I was Solicitor of Labor and went over to the ILO, the International Labor Organization. I was there as one of the Labor Department representatives. I had a prepared speech developed by foreign service officers and labor department specialists to be delivered in some plenary gathering. Just before I spoke, however, the Cuban Ambassador or representative unleashed the most vicious attack on the United States, and I was being advised by foreign service officers not to respond, that this was undignified, that we shouldn't dignify the attack. But I couldn't bear it.

MR. RASENBERGER: [Laughter.] I am not surprised.

JUDGE SILBERMAN: And I responded as follows: I said I listened to the remarks of the representative of the government of Cuba and have determined not to respond to those remarks because he is the representative of only a temporary political phenomenon.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: At which point the place erupted, and the Russians walked out screaming and yelling; Kirkland was delighted, and the foreign service officers were appalled.

MR. RASENBERGER: [Laughter.] Were appalled. I imagine. But you were delighted too, I suspect.

JUDGE SILBERMAN: Well I was a little stunned at the reaction.

MR. RASENBERGER: Well, perhaps so.

JUDGE SILBERMAN: But of course I was wrong.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Castro was hardly a temporary political phenomenon.

MR. RASENBERGER: Yeah. You certainly were. He has turned out to be pretty durable.

JUDGE SILBERMAN: More durable than communism.

MR. RASENBERGER: That right, yeah, that's right.

JUDGE SILBERMAN: So after that Lane and I became rather close friends, our wives were friends, and indeed I stayed with him at one point before I went off as Ambassador to Yugoslavia or when I came back, and we remained good friends, both families, seeing each other socially a great deal until Clarence Thomas' nomination and then our wives broke apart over that issue, and as a result that family friendship dissipated, which is somewhat of a shame.

MR. RASENBERGER: Yes. The relationship having survived, I am sure, differences of opinion on many other subjects.

JUDGE SILBERMAN: Oh yes. Yes, we were not, our major subject of agreement was national security policy. After I came back as Ambassador to Yugoslavia, Lane recruited me in to the Committee on the Present Danger.

MR. RASENBERGER: Oh.

JUDGE SILBERMAN: Remember that group?

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Formed by Paul Nitze, Charles Walker, Lane Kirkland, and a few others. It was rigorously bipartisan–half Republican, half Democrats, basically anti-detente.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And during my period in Yugoslavia it became known that I was not an unabashed admirer of detente. So I was recruited into that organization by Lane. We had a large measure of agreement on national security policy.

MR. RASENBERGER: Interesting. And he stayed in his job until when, I cannot recall.

JUDGE SILBERMAN: Until he was deposed by Sweeney.

MR. RASENBERGER: Okay. So he finally had lost the reigns of power rather than–but in Meany's case he never did. He just retired or died I recall.

JUDGE SILBERMAN: He died in office.

MR. RASENBERGER: But Kirkland had a long run as head of the AFL-CIO.

JUDGE SILBERMAN: He had a longer run as Secretary-Treasurer of the AFL-CIO, the number two position.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: A fascinating character. He was brilliant, a graduate of the Georgetown School of Foreign Service, a scion of a very distinguished South Carolina family, was a master mate on a merchant ship in World War II. He used his influence to get my son papers as a merchant mariner on a ship during his semester off at Dartmouth.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Which led to my son eventually becoming a naval officer.

MR. RASENBERGER: Interesting. Well it sounds like he was a true friend.

JUDGE SILBERMAN: Yeah.

MR. RASENBERGER: Anything else during your period in labor, but particularly as Undersecretary that is worth mentioning even in terms of the—

JUDGE SILBERMAN: I was particularly interested in?

MR. RASENBERGER: Or the issues you dealt with?

JUDGE SILBERMAN: Well there are several things. First, on a substantive matter I spent a great deal of time trying to understand what was effective and what was not effective about our manpower programs, which were consuming billions of dollars. I was insistent that we do proper evaluation of that outflow of funds. I had brought Mike Moskow over to be Deputy Undersecretary and then Assistant Secretary for Policy, and he focused hard on the evaluation of those programs, hiring a number of economists to help. We found somewhat discouragingly that longitudinal studies showed that graduates of our manpower training programs actually earned less than the control groups that didn't go through the program over a ten-year period, which sort of suggested that we were wasting a heck of a lot of money.

MR. RASENBERGER: Sure did.

JUDGE SILBERMAN: But that has probably been true ever since. I rather doubt that anybody in—

MR. RASENBERGER: Programs go on.

JUDGE SILBERMAN: Yeah. We also worked on the minimum wage question. I, and my colleagues in Mike Moskow's shop, were always opposed to increases in minimum wage primarily because we were quite convinced that it had an adverse impact on young blacks, by pricing them out of the labor market. We learned that the most important event in a young person's life, which was a good predictor of how well they would do ultimately, was the first job.

And it didn't matter whether the first job was flipping hamburgers at McDonald's or digging ditches, if they did a good job at it, they showed up all the time, they inevitably got promoted. And so when various groups would complain about non-meaningful jobs we would respond, I would respond, there is no such thing as non-meaningful jobs, so we should do everything we could to encourage young people to get into some kind of job, particularly minority youths.

MR. RASENBERGER: The theory was that the system has upward mobility built into it and if you are willing to show up you are on that track.

JUDGE SILBERMAN: You are exactly right. But that was not a popular view in certain circles. So I did a lot of work on that, we did a lot of work on that, not all that successful in altering policy. And then the last year–I will put aside the question of affirmative action because it is dealt with so heavily in the speech, and I think that will tell you almost everything–but in the last year before the election I ended up in awful fights with Charles Colson who was then Assistant to the President. Now much of this has been reported in both *The Washington Times* and *The New York Post*, it came out during the Watergate investigations, so you can look at it. But, in any event, Colson was trying to influence cases, law enforcement cases in the Labor Department and in the NLRB, and I was insistent that we rebuff any of these efforts and our relationship was poisonous which led to an eruption when, after the Occupational Safety and Health Act was passed, I got them to put in the bill, the creation of a regional director of the Labor Department, which was a Schedule C political appointment, to coordinate all the Labor Department activities in any region. And that was sometime in '72, we were putting people in those jobs and Frank Zarb, who was the Assistant Secretary of Administration, was doing the personnel work recruiting people for those jobs, and he came up with a person by the

name of Clay Cottrell for Regional Director in New York. Cottrell was a graduate of Harvard Business School and had already been the Regional Manpower Administrator, which was the biggest segment of the Labor Department. And so we were about to appoint him when the Civil Service Commission objected, and it turned out they objected because Colson told them to object. Colson told them to object because the building trades in New York led by a fellow by the name of Peter Brennan–who, as you may recall, succeeded Jim Hodgson after the election as Secretary of Labor–objected to Cottrell as Regional Director, as far as I could tell, simply because he was black. By that point I had, as you will see in the speech, lost confidence in our affirmative action policy, but I was damned if I was going to allow somebody to be dinged simply because he was black and was clearly the best qualified. And so as the fight got nastier and nastier George Shultz got involved. Nelson Rockefeller was involved, John Mitchell was involved. Rockefeller was involved because he was Governor of New York, because the building trades were so important to Nixon's reelection, and they were important to him. Mitchell was involved because he was then chairman of the Committee to Reelect, and he was concerned about New York, so it was a very high-stakes issue.

MR. RASENBERGER: And they were involved in supporting Colson?

JUDGE SILBERMAN: Yes. Colson was in effect representing Brennan, Rockefeller, Mitchell. And Shultz called me and told me to back down. Jim Hodgson and I talked about it. Jim said he didn't feel that strongly about it, but he understood my concern. And I told George I wouldn't, and so I submitted a letter of resignation.

MR. RASENBERGER: This was in '72?

JUDGE SILBERMAN: In the spring of '72.

MR. RASENBERGER: Before the election obviously.

JUDGE SILBERMAN: Yes. So I submitted a letter of resignation, which has been alluded to in *The New York Times* story, but I'll tell you more about it now. And George Shultz and I ended up having, I think, three meals a day for two or three days as he tried to persuade me to back down or even tried to get me to fly down to Florida to meet with Nixon, which I would not do because I wasn't about to negotiate on it, I didn't think there was any conduciveness in just telling the President no. So I told George I would leave quietly, but they were of course very afraid that the story would get out. So ultimately Colson backed down; Cottrell was appointed, I was instructed under no circumstances was I permitted to set foot in New York State between then and the election. After the election my resignation was "accepted," quote unquote, because we are all asked to submit our resignation. Brennan was appointed to be Secretary of Labor, which of course was Colson's response, and Cottrell was fired, shamefully.

MR. RASENBERGER: Supposedly for cause or for just politically?

JUDGE SILBERMAN: No. He is a political appointee. They got rid of him. And at that point Nixon, through John Ehrlichman, offered me a seat on the Ninth Circuit even though I was being fired as Undersecretary of Labor.

MR. RASENBERGER: And even though you fought the Administration on this, I guess the whole Administration was against you.

JUDGE SILBERMAN: Well I don't know about the whole administration.

MR. RASENBERGER: I mean the people that matter.

JUDGE SILBERMAN: Nixon's view, according to Ehrlichman, was that I was a

good lawyer, but I was too rigid for politics. So he offered me a seat on the Ninth Circuit, which I quickly accepted although I was only 37, and then I went to the White House and Nixon congratulated me at a dinner for departing appointees, he congratulated me on going to the Ninth Circuit.

MR. RASENBERGER: This was after his inauguration for his second term?

JUDGE SILBERMAN: No. This is after the election before inauguration. In that interim period.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: I resigned as of January 20th. But in any event I think this is in December, towards Christmas, and I am already looking for houses in San Francisco. I figured I was being appointed from Hawaii but I would live in San Francisco. Then I got a call from Dick Kleindienst, who was then the Deputy Attorney General. Has the President offered you a seat on the Ninth Circuit? I said yes, through John Ehrlichman. He said, well there is a big problem. I said what's the problem. He said the problem is that seat has been promised to a designee of Ronald Reagan who was then Governor. I said Dick you are talking to the wrong guy, I mean you have to talk to the President or John Ehrlichman or somebody. Well a week or so goes by and Ehrlichman calls me, very embarrassed, and said this is really a mess but we are stuck. Will you take a seat as a Federal District Judge in the District of Columbia, which we had open, and then we would promise you the next opening on either the Ninth Circuit or the D.C. Circuit. Well I was a little annoyed and didn't really want to be a District Judge anyway. And so I declined. At that point George Shultz called me and offered me the post of Undersecretary of Treasury, because he was going over to Treasury.

MR. RASENBERGER: Oh, of course.

JUDGE SILBERMAN: There was Treasury. I think he was going over to Treasury, and I declined.

MR. RASENBERGER: Now just why did you decline the Treasury job?

JUDGE SILBERMAN: Well Undersecretary, I think it wasn't the Deputy Secretary, was the number three position, not the number two position, I had already been number two at Labor.

MR. RASENBERGER: Oh, I see.

JUDGE SILBERMAN: Although arguably Treasury is more important than Labor, but I think I was also a little disgusted with that last go around, and I decided that I would rather go back into law practice and I guess it was about that point I was approached by Tom Powers at Steptoe and Johnson, so I ended up going to Steptoe, although Jones, Day offered me a partnership as well. So I left.

MR. RASENBERGER: That is quite a story. I had no idea that you had these other offers to turn down before you went to private practice.

JUDGE SILBERMAN: Another interesting little tidbit which, after I was at Steptoe and Johnson, I think in February of '72, pre-Watergate blowing—

MR. RASENBERGER: That would be February of '73 probably.

JUDGE SILBERMAN: '73. Exactly; sorry. I got a call from the White House, from the President's secretary asking whether my wife and I would come down and meet with the President the next day. I said of course. So my wife and I went down to meet the President and at that point he was meeting with some of his senior executive branch appointees who had left in

the first Administration but were still for some reason a good odor. There was no question I was fired at the Labor Department.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But I obviously was in somewhat good odor. I think Nixon was a little bemused at my stubbornness. But, in any event, we had this conversation and it was the strangest conversation. Nixon's small talk was not his strong point.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But he questioned me at some length about my arrangement at Steptoe and Johnson, whether I had negotiated enough pay, and the proper partnership, and so forth. And I was very reluctant to discuss that.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Very awkward.

MR. RASENBERGER: Was this just the President and you and your wife.

JUDGE SILBERMAN: That's all.

MR. RASENBERGER: That all. In his office?

JUDGE SILBERMAN: In his office. Then he said something that was quite extraordinary. He said, Larry I want you to know that my office is always open to you in terms of law practice. Well of course that was ludicrous. He followed that comment with a caveat: that would be so only for matters that appropriately would be brought to him. I was insulted that he thought it necessary to say that to me. It was only much later that I realized he was speaking for his taping system.

[END TAPE I; Side B - end of 9-26-01 interview]