

Today is December 13, 2001 and we are resuming the oral history interview of Judge Laurence Silberman for the D.C. Circuit Historical Society. The interviewer is again Ray Rasenberger.

MR. RASENBERGER: Judge Silberman, when we finished up at our last session you had just left the Labor Department and had been considered for a position, actually offered a position, as a judge on the Ninth Circuit, which that offer had been subsequently revoked for reasons you had explained. I guess that brings us to the end of your career in labor, or in labor law, at least as an executive branch individual. And then you moved on to Steptoe and Johnson as a lawyer. Let me ask you first before we go on from there. Was there anything in the Steptoe experience, which I guess was fairly brief, which stayed with you or stays with you today in terms of your role as a judge?

JUDGE SILBERMAN: I had a couple of interesting cases. I was recruited by Steptoe primarily to sort of head a labor practice, but with one exception of one big labor case, I sort of evolved gradually into more general administrative law practice, and I was just at the point of getting it started really when I was called back into government about a year later, a year after I started at Steptoe. But I do recall, there were several interesting things, I remember when Watergate blew. I recall vividly when John Dean made a public statement to the effect that he would not be a scapegoat, and I immediately had the view that the President was culpable.

MR. RASENBERGER: Why was that?

JUDGE SILBERMAN: Because I knew the people. And I couldn't imagine that, first of all, when John Dean said what he did, I thought he was implying pretty strongly that the President was knowledgeable and therefore guilty, but beyond that, it seemed to me

inconceivable that Nixon would not have known about something that Dean knew about.

MR. RASENBERGER: Let me interrupt you here for just a moment [checking tape recorder].

JUDGE SILBERMAN: And as Watergate unfolded, I used to spend a good deal of time in John Nolan's office, or he in mine. I think he had a television set, and we were watching various things and discussing matters and intently following the developments.

MR. RASENBERGER: This would have been in 19— ?

JUDGE SILBERMAN: 1973.

MR. RASENBERGER: In the summer say?

JUDGE SILBERMAN: Yes. That is correct. And then—

MR. RASENBERGER: So you knew Dean pretty well I guess.

JUDGE SILBERMAN: Not well, but I knew him enough to conclude as I did. You recall, he was very young to be general counsel, or White House Counsel. The first White House Counsel was John Ehrlichman, who then, after a year, moved over as Assistant to the President for Domestic Affairs, and John Dean became White House Counsel. And he was rather young, even callow, for the job. So his very youth and inexperience suggests to me that it was extremely unlikely that he would have been personally guilty unless those superior to him were guilty. In any event, John Nolan and I followed those events very carefully. I got caught up in the events on several items. First of all the story I told you about the fights with Colson became public by virtue of a Sy Hersh story in *The New York Times*, which had a good part of the story, not as much as I've given you, but a good part of it, particularly the battles with Colson. This was a sort of an off-shoot of the Watergate investigation. There was also a responsiveness

program that the White House had demanded of various departments of government, and I remember having to testify about that before the Watergate Committee with respect to the Labor Department. Unfortunately one of the Assistant Secretaries of Labor had written a memo in response to the responsiveness program to me which I rejected, didn't pass on to the White House because I thought it was inappropriate. And my Executive Assistant, instead of following my instructions to destroy it, kept it in the file and when the Watergate investigators subpoenaed everybody, he called me on the phone and said, "Gee I, you know I didn't follow your instructions and I've kept this document in the file," and I told him, of course, that he had no other alternative but to turn it over to the Committee. And the Assistant Secretary was largely ruined because of that—which was a bit of a shame. He had a senior job at a corporation which let him go and he never really did very well after that. I have always felt terrible about that because although the memo was ill-advised and I thought inappropriate it was a bloody shame that it had not been destroyed.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: It certainly was never passed on to the White House because I made a judgment that I thought correct. But that was the second incident. Then John Ehrlichman called me to represent him, actually to represent his legal defense fund. I suppose I had an image of being fairly much a straight arrow. I refused to represent him. I didn't think, I took the position that I wasn't going to represent anybody involved in Watergate. But I did make an exception. There was a fellow who was Assistant Secretary of Treasury for Law Enforcement by the name of Ed Morgan.

MR. RASENBERGER: Yes, that's familiar.

JUDGE SILBERMAN: You may recall in the picture I showed you with George MacKinnon in the White House, Ed Morgan is in that picture.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: He was then an Assistant Director of Domestic Affairs under Ehrlichman.

MR. RASENBERGER: And he was drawn into the Watergate—

JUDGE SILBERMAN: He was drawn in, not to Watergate *per se*, but he was under investigation for the backdating of Nixon's deed, of his vice presidential papers, which had tax consequences. You may vaguely recall.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And Morgan came to me to represent him. And I don't think this is a breach of attorney-client anymore because of what occurred, but I spent days questioning him and was absolutely convinced that he was innocent. I represented him. And by the time I went back into the Justice Department in February of 1974, I had, as I recall, gained indication from the special prosecutor's office that he would not be indicted—that they were pretty much convinced that he was innocent. When I went in as Deputy Attorney General he insisted on having another counsel who knew him personally; it was very important for him to have someone who believed in him, and so the two of us got Dick Van Dusen, who had been Undersecretary of HUD and was a senior, I think a managing, partner of a very large Detroit firm—a wonderful guy—and Dick took over the representation of Ed Morgan. To both Dick's and my astonishment, after Dick had secured an indication from the special prosecutor that there would be no action against Ed Morgan, Morgan went in on his own without telling counsel and

confessed.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Out of an oppressive sense of guilt.

MR. RASENBERGER: Wow.

JUDGE SILBERMAN: He was really a very fine individual. He went to jail, and he never, ever recovered from it. I don't think he, unlike many Watergate figures, he never, ever recovered. He was consumed with guilt, and he backdated that deed apparently with no benefit to himself and not at Nixon's request.

MR. RASENBERGER: That is some story.

JUDGE SILBERMAN: Yes. That was a sad story. But, in any event, I stayed at Steptoe and Johnson a relatively short time, it was from the end of January 1973, until about the end of 1973.

MR. RASENBERGER: Now, this is when Watergate was unfolding. Was this the period when newspapers—everyday *The Washington Post* had something else about it—and for that period of time you were in a law firm and basically a spectator, except for this Morgan representation, except for your connections with John Dean.

JUDGE SILBERMAN: No, not connections with John Dean, but *The New York Times'* revelation of the Colson fights, which was a big story in the summer of 1973 and it becomes relevant, and in a moment I'll tell you why.

MR. RASENBERGER: Okay.

JUDGE SILBERMAN: Actually, Woodward had tried to get that story earlier about the Colson efforts. See Colson was trying to fix cases in the Labor Department and

elsewhere, the NLRB, and so forth. I told you about that earlier.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Woodward got the story first from some people in the Labor Department and the NLRB. He called me at home and I wouldn't confirm anything, and I'll never forget it because, and we have laughed about it between each other subsequently, he got so aggravated at the fact that I wouldn't talk on the phone that he hung up on me.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: But Hersh had other sources and had gotten the story some months later. So that is the setting of the stage when in the fall of 1973 October you have the "Saturday Night Massacre."

MR. RASENBERGER: Right. And how did that ultimately affect your life?

JUDGE SILBERMAN: Well I recall I was at a charitable ball that night when we heard about the "Saturday Night Massacre" and my first reaction when Archie Cox was fired, and Elliot resigned, and Ruckleshaus was fired, I said something like I knew Nixon had made much of his anti-Harvard feeling but this looked a little too much.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: All three graduates of Harvard Law School.

MR. RASENBERGER: [Laughter.] I never focused on that. So then Bork became Acting.

JUDGE SILBERMAN: Right. And you know all that occurred at that time. But I remember that night someone said to me, you know I'll bet they turn to you to go back into Justice. I said, "No, that's silly. Given my stiff-neck attitude on various matters, I can't imagine

the Nixon Administration wanting me.” In any event, you may recall, the first problem was: how was Nixon going to get an attorney general confirmed? And it became rather obvious quickly that he had to get a Senator, only a Senator would be confirmed. And he wanted a Senator that was as conservative as he could get but couldn’t be too conservative because he wouldn’t get confirmed either. So it quickly narrowed down to either Marlow Cook of Kentucky or Bill Saxbe of Ohio. And Saxbe was chosen in no small part because, you may recall, he had become somewhat famous for the remark he had made when asked whether he believed Nixon’s protestation that he was not knowledgeable about Watergate, and Saxbe said it reminded him of the man who had played the piano in the cathouse for 30 years and claimed he didn’t know what went on upstairs. Do you recall that?

MR. RASENBERGER: Yes, I do. [Laughter.]

JUDGE SILBERMAN: Well that made Saxbe Attorney General.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Because he was quite independent. I had known Bill in the Senate where I had worked with him on the Labor Committee on Legislation.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: There is another fortuity here that explains my going back into government. David Wimer was then head of personnel in the White House. He had been head of personnel in the Labor Department, I had recruited him. And we were reasonably close. When Saxbe was chosen as Attorney General and confirmed, or in the process of confirmation, I don’t recall whether it was Wimer or Saxbe who first called me about the prospect of coming back as Deputy Attorney General. But I talked with both of them, and Bill

Saxbe made very clear that he was not going to work all that hard. He was getting old, and he was willing to take this job but had been attorney general of Ohio, he had been Senator, and he didn't want to kill himself, he wanted to be free to go hunting, which he loved to do, and he wanted somebody who had administrative experience and ability to run the Department day-to-day. And I realized, from both the White House prospective and from Saxbe, I was rather unique because I had been an Undersecretary or the number two chief operating officer of a department for three years.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I was a lawyer. And because of the stories that came out as a product of the Watergate investigation I was perceived at the time as a "white hat." So I was perceived as a good administrator, and could get confirmed, and I was a loyal Republican—reasonably conservative at that too. So I was almost unique.

MR. RASENBERGER: Well did you have any hesitation about taking the job or did it look—

JUDGE SILBERMAN: No, I didn't. I had refused earlier, I forgot to tell you, in 1973 to come back into government. There were several jobs that the White House had come to me on. And I did not want to go back into the Nixon Administration, partly because I was appalled at Watergate. But Justice was different—particularly after the massacre—Justice was virtually independent of the White House with respect to all Watergate matters; indeed, Saxbe and I both on confirmation were obliged to promise that we would protect the special prosecutor. So it was this anomalous position whereby, I used to tell people, we had an obligation to loyally carry out the President's policies except where we were prosecuting him.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Or supporting those who were prosecuting.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: You know it was a challenge to take on such a role. So I thought yes, that's the one place I would be willing to go. Now there is an amusing incident about that which tells you a lot, I think I may have told the State Department fellow. Saxbe had a very public meeting with Nixon after he was nominated, in which he came out and said he believed Nixon.

MR. RASENBERGER: Oh.

JUDGE SILBERMAN: And remember he was—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: That comment earlier suggests to the contrary. But he said he believed Nixon—now he believed him. Nixon had assured him that he was innocent. And I recall someone from the White House, it could have been Dave Wimer, but it could have been someone else, called me and asked whether I would meet with the President as the new Deputy Attorney General or the new nominee.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I told that person of course I would meet with the President but I wanted to warn them that I would not say what Saxbe said because I didn't believe the President.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Now this is a testament to how weak, I am sure no one

ever told Nixon this, but how weak he was at this point.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: That a Deputy Attorney General would be recruited who would openly tell his staff that he didn't believe him.

MR. RASENBERGER: Yes, that is remarkable.

JUDGE SILBERMAN: But I recall the ones in the White House who helped a little, who were involved in recruiting me with Saxbe, believed that I would be loyal to Nixon accepting on these areas and they knew they couldn't get anybody in—

MR. RASENBERGER: That's right.

JUDGE SILBERMAN: —was going to be a partisan or advocate for Nixon on Watergate.

MR. RASENBERGER: Right, right, exactly. So you became Deputy Attorney General with not only administrative responsibility but, I gather in light of Saxbe's absences, the overall responsibility of Acting Attorney General.

JUDGE SILBERMAN: Sometimes.

MR. RASENBERGER: Sometimes?

JUDGE SILBERMAN: Sometimes I was Acting, and I was Acting for the last month, or maybe more than a month after Saxbe went off to India before I went to Yugoslavia.

MR. RASENBERGER: So I thought I would ask you about what happened on your watch, so to speak, at Justice as Deputy and as Acting, in any ways you think are significant, whether with respect to the relationships of Justice to the judicial system, to judicial appointments, to ongoing developments in Watergate, to the FBI. Everybody in Justice gets

asked about the relationships with the FBI, and matters of that nature. What stands out in your mind from this period?

JUDGE SILBERMAN: Did you see the speech I gave on the 25th Anniversary of Watergate?

MR. RASENBERGER: Was that a Minnesota speech?

JUDGE SILBERMAN: Yes. Yes.

MR. RASENBERGER: No. I was going to ask you about that because there was a reference to it in the other—so in terms of what you did as Deputy Attorney General, to pick up again, particularly with respect to Watergate, I take it there was a speech where you described what you—oh see, I have the speech in front of me, and may we include that in the record?

JUDGE SILBERMAN: Of course.

MR. RASENBERGER: And while I am on the subject, may I include in the record your speech about the Philadelphia Plan on Affirmative Action?

JUDGE SILBERMAN: Yes, of course, going back to the Labor Department.

MR. RASENBERGER: Referred to last time?

JUDGE SILBERMAN: Right.

MR. RASENBERGER: Okay. Well that talk will of course speak for itself, we don't need to go through what you've got in there. Is there anything else you would add about that?

JUDGE SILBERMAN: It was an extraordinary difficult time. The pressure was so intense. Because as you could well imagine trying hard to loyally carry out the President's policies except when he was under prosecution, it was like walking through a minefield

blindfolded.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: One had to think every day about what was the right thing to do. We had to provide information to the impeachment, to the Judiciary Committee of the House with respect to impeachment, and we had to think all the time what was appropriately sent over and what was not. We never had any intention of acting as Nixon's counsel; we made clear that the Justice Department couldn't play that role, it hadn't played that role. In Andrew Johnson's time, the Attorney General resigned and acted as Johnson's counsel; he couldn't as a government lawyer representing the President.

MR. RASENBERGER: Was there a special prosecutor at that time who was totally independent of, more or less independent, of Justice?

JUDGE SILBERMAN: Yes and no. But as you will see from my speech there were some areas where we had to cooperate with the Special Prosecutor.

MR. RASENBERGER: I see. Right.

JUDGE SILBERMAN: Yeah. And I had enormously high regard for the Deputy Special Prosecutor, I didn't know Jaworski very much at all, but I spent a lot of time with Hank Ruth.

MR. RASENBERGER: Yes, I know him.

JUDGE SILBERMAN: And we became close friends; good friends; we still occasionally see each other. The speech deals with the most combustible issue that arose relating to Watergate and Nixon, which if you have a chance to read it, includes the time I had to submit a resignation to stop something that Nixon wanted relating to John Connally, the Connally

prosecution.

MR. RASENBERGER: You resigned or submitted a resignation?

JUDGE SILBERMAN: Submitted a resignation. But they backed down—you'll see it. Well first of all, running the Department, just running it was an enormous job. One of the innovations of that time which developed into an even greater structure today is I set up an office of policy development which, it was my notion, would be staffed by economists, political scientists, and lawyers, to do a good deal of research about the impact on the legal process has on the American system. I was even then beginning to be troubled by what I thought was the over-lawyerization of American society. That office subsequently became headed by an Assistant Attorney General after Congress created it by statute sometime in the '80s. But perhaps it was the late '70s.

MR. RASENBERGER: I guess that proved to be a good idea?

JUDGE SILBERMAN: Yes, I think so.

MR. RASENBERGER: It worked.

JUDGE SILBERMAN: I think so.

MR. RASENBERGER: Do you still think that from what you know of it?

JUDGE SILBERMAN: Yes. As a matter of fact one of my ex-law clerks is now heading that office as an Assistant Attorney General for Office of Legal Policy—Viet Dinh.

MR. RASENBERGER: Did that office get into policy areas that regulatory agencies got involved in?

JUDGE SILBERMAN: Yes. Yes. As a matter of fact one of the things that I did a good deal of work on with Phil Areeda as Ford's co-counsel—Phil Areeda, Professor of Harvard

Law School who came down to be co-counsel under Ford with Phil Buchen as counsel. Areeda and I did a lot of work on airline deregulation.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: So you're the one?

JUDGE SILBERMAN: Unfortunately. Remember I was Deputy Attorney General for about six months under Nixon and then another seven or eight months under Ford. So with respect to the first six months under Nixon, there was a good deal of focus obviously on matters relating to Watergate.

MR. RASENBERGER: Ending with his resignation?

JUDGE SILBERMAN: Ending with his resignation. One incident I recall is that I had to fire Don Santarelli who was the administrator of LEAA—one of the major elements within the Justice Department, big budget element, the grant-making agency. He had given an interview to the Philadelphia paper in which he called for Nixon to resign, and I called Don in and said you know whatever you privately think you cannot make a public statement like that when you are one of Nixon's appointees, so he quietly resigned and we still remain close friends. Then I recall learning about the smoking gun—the tape that so inculpated Nixon, about two weeks, or a week to two weeks, before it was released when a young lawyer on the White House Counsel's staff called me and told me. I had been planning to give the opening speech at the ABA convention in Hawaii that summer.

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

MR. RASENBERGER: And to continue, Judge Silberman you were talking

about the smoking gun and the Nixon impeachment, what led to the Nixon impeachment, and you were going to Hawaii to speak to the American Bar Association.

JUDGE SILBERMAN: Yes, in August of that year, and as soon as I found out about the smoking gun I believe I canceled my trip. But the most vivid memory I have about that week was, I was informed, I think either I was Deputy Attorney General, of course I was Deputy Attorney General, but I don't recall whether I was Acting or not, but Bill Saxbe may have been out of town. But I was informed that Jim Schlesinger, who had been the Secretary of Defense, had instructed the military not to follow any orders from the President concerning deployment of military forces without his approval, and I remember that.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: That impressed me as a major constitutional crisis.

MR. RASENBERGER: I would say so.

JUDGE SILBERMAN: My response was to resume smoking.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Then when Nixon resigned two weeks later Gerry Ford became President and he called me and he asked me to replace him as the closing speaker at the ABA which frustrated me no end because I recruited Bork to go in my place when I canceled and he complained he didn't have a speech so I gave him my speech.

MR. RASENBERGER: Oh. [Laughter.] So you had to get another speech together.

JUDGE SILBERMAN: So I ended up having to give extemporaneous remarks.

MR. RASENBERGER: I see. [Laughter.]

JUDGE SILBERMAN: Very frustrating. And particularly since I thought it was a damn good speech—which I gave Bork. And it was a—

MR. RASENBERGER: And did he give it pretty much as—

JUDGE SILBERMAN: Yeah. He modified a little, but he gave it pretty much and it was a condemnation of judicial activism which he then subsequently elaborated in a number of talks. In terms of my colleagues in the Department, two people, one of whom I helped recruit and one I recruited. Carla Hills had already been approached by Elliot Richardson to come in as Assistant Attorney General for the Civil Division and then after Elliot and Bill Ruckelshaus left I sort of took it up and persuaded her to come as an Assistant Attorney General for civil where she did a fine job and we remained close friends ever since. I just last week performed a wedding for one of her daughters. And then the second person, who was rather important to bring in, was Nino Scalia who I recruited to replace the Assistant Attorney General for OLC, a fellow by the name of Dixon from Georgetown Law School who was so scared by the Watergate events that he was, I think he had lost his nerve, and so I interviewed with Nino and immediately liked him and recruited him. He was nominated by Nixon and appointed by Ford.

MR. RASENBERGER: Oh is that right?

JUDGE SILBERMAN: Yeah.

MR. RASENBERGER: He had been head of the Administrative Office?

JUDGE SILBERMAN: Which is a professorial kind of job.

MR. RASENBERGER: Yes, right.

JUDGE SILBERMAN: And he had also worked in the White House Office of Telecommunications in the first Nixon Administration. One of my Associate Deputy Attorneys

General, Jon Rose, had come up with Nino's name, he knew Nino because he had been an associate in Jon's father's law firm, Jones Day.

MR. RASENBERGER: I see. So this was really your first contact with Scalia.

JUDGE SILBERMAN: Yes. And we became dear friends, and are still dear friends.

MR. RASENBERGER: Yes. During your period, I suppose there was not much going on in terms of selecting or confirming judges, or am I wrong?

JUDGE SILBERMAN: No there was, it continued to go on. One of the more interesting matters was Meskill to the Second Circuit. Oh, and the other one was Tony Kennedy. Perhaps I should talk about Tony Kennedy first.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: You may recall, I had been offered a seat on the Ninth Circuit as Undersecretary of Labor but then it sort of dissipated when it turned out that they had committed that seat to somebody else.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But the next year when I was Deputy Attorney General another seat on the Ninth Circuit became available, and Bill Saxbe asked me did I want it. Because as Deputy Attorney General I essentially did most of the judge picking and so—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Obviously I could have it if I wanted it. But I had decided that it was a blessing that the other one had gone by because I really was too young. I thought I was too young, and I had kids then. I just didn't think financially, as much as I was

dazzled by it, I just thought financially it didn't make sense. And perhaps and also that I was too young to go on to the reclusive life.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But, so Reagan, then Governor of California, recommended Tony Kennedy who had been his counsel at one point and was practicing law and lobbying in Sacramento, California. The ABA came in early on to tell me they objected because Tony was too young.

MR. RASENBERGER: How old would he have been then?

JUDGE SILBERMAN: I think he was 37 or 38, and I remember telling them, well why do you say that? He is my classmate. And Jack Sutro looked at me and said well I guess maybe he's not all that young.

MR. RASENBERGER: [Laughter.] There was no other answer. Well that was certainly a good choice.

JUDGE SILBERMAN: Well I'm not so sure about that. But, in any event, that is neither here nor there. But then there was a spectacular fight about Tom Meskill. Tom Meskill had been a Congressman, and then a Governor of Connecticut, and he was very well liked in Congress. He hadn't practiced law for a very long time at all. And Nixon had wanted him nominated for the Second Circuit. We sent his name to the ABA. The chairman of the standing committee was Jack Sutro, senior partner at Pillsbury Madison, and actually a friend of mine. And the ABA came in with a preliminary report that Meskill was unqualified because he hadn't practiced law very much. By that time I think Ford had become President and if anything Ford was more adamant that Meskill should be nominated. I was a little troubled about the ABA's

rating because in those days the ABA was rigorously nonpartisan, a situation which I don't believe obtains today. That is to say, their opposition to Meskill had nothing to do with his political views or the political views of the members of the Standing Committee.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But they just genuinely thought he didn't have the litigation experience, or the lawyering experience to be on Second Circuit. I remember the President saying, you know, "full speed ahead," and I remember calling Jack Sutro in to tell him that we were going ahead with the nomination notwithstanding the ABA's report.

MR. RASENBERGER: And they said he was unqualified?

JUDGE SILBERMAN: Unqualified.

MR. RASENBERGER: Which is the worst rating they can give you?

JUDGE SILBERMAN: Right. Right. Let me digress for a moment. I used to have a lot of arguments with Jack and the ABA Standing Committee concerning professors because they would generally try to take the position that a professor without much litigating experience was unqualified, and I thought for the court of appeals that was a particularly parochial and dumb position. I actually had the view then, which is even stronger now, that most trial lawyers are less qualified to be Court of Appeals judges than are professors who never tried a case.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But there was a certain amount of parochialism on the part of the ABA.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But on the other hand, their opposition to Meskill was more troubling—they had some merit to their position. But I remember having a discussion with Jack, and Jack telling me in all his high dudgeon that he would have to go up and testify against Meskill as unqualified, and I remember telling Jack, “you had better bring a helmet.” And he went up to testify and he got pounded by every single Senator on the Judiciary Committee—Democrats as well as the Republicans because the Democrats in those days were if anything more hostile to the ABA because they had prevented friends of Senators from getting judgeships.

MR. RASENBERGER: Of course.

JUDGE SILBERMAN: In other words, they’ve done exactly the job that they were originally asked to do by Brownell in the Eisenhower Administration. So they were all mad at him and besides they all liked Tom Meskill.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Who incidently turned out to be a fine judge. Now retired. In any event, he was confirmed unanimously and the ABA was completely humiliated, completely humiliated, which had its impact some years later when Jim Buckley was nominated and the ABA in the Second Circuit—the ABA representative for the Second Circuit—was damned if he was going to find Jim unqualified given his popularity, very similar to Meskill.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And so he found him qualified. [Laughter.] And then the Administration moved him from the Second Circuit to the D.C. Circuit.

MR. RASENBERGER: Right. That’s right.

JUDGE SILBERMAN: Frustrating the devil out of the D.C. representative who probably would have argued that he was unqualified.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: In any event, that was one situation.

MR. RASENBERGER: Well now did you have any recollection of having a particular approach, or maybe you developed something since that time, as to what you look for in selecting judges, district judges, court of appeals judges, or recommending them I should say, what qualities, and where politics ends in that process, if it's involved at all?

JUDGE SILBERMAN: Well as you can see from the speech I gave about the 25th Anniversary of the "Saturday Night Massacre," the President called me once and asked me how I was doing on judges and what kind of judges were we picking, and I said, and I was trying to find those who believed in judicial restraint, the Frankfurter type.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And he approved of that. For the district court, basically the choice is made by Senators who would present names to the Justice Department, and the Justice Department and the ABA would try to screen out the ones that they thought not competent with the exception of the District of Columbia district court. The court of appeals we try to maintain control over, "we" meaning the executive branch. Almost all the work was done at Justice, the White House had very, very little involvement from the White House Counsel's Office or anyone else in the White House, and most of that was done in my office by one fellow who had been doing it for many years. He had the title of Executive Assistant to the Deputy Attorney General. I didn't spend as much time on it as probably I should have because I was so

busy trying to do so many other things, administer the Department and deal with the many, many crises the Watergate era threw up to me. However, insofar as we had discretion on the Courts of Appeals, we would look for Republicans with good backgrounds, well-educated, and/or litigating partners in good firms, or on the district court and had done well on the district court.

MR. RASENBERGER: Or from academia?

JUDGE SILBERMAN: We had some from academia but remember I was having terrible fights with the ABA about that.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: So I think, however, that I subsequently determined, that I was surprised, that some of the people we selected—I would rather not use names—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Turned out to be much more prone to judicial activism than I would have thought based on their background and record beforehand. But my own personal view is that the law schools had become increasingly corrupted by judicial activism and so the environment in the profession had changed, and if you didn't have a strong view against judicial activism you were going to be corrupted by law reviews, and your law clerks, and so forth. And so many more of these Republican judges turned out to be activists than I would have suspected, which led me to have a quite different view about how to go about selecting judges when I was, in 1980, chairman of Reagan's lawyers and law professors campaign.

MR. RASENBERGER: Oh.

JUDGE SILBERMAN: So I had a clear view of what kind of people ought to be made circuit judges, partly out of what I thought were bad experiences from the Nixon era.

MR. RASENBERGER: You were looking more for people who already had track records as judges?

JUDGE SILBERMAN: Or as professors.

MR. RASENBERGER: Or as professors.

JUDGE SILBERMAN: There is no question. I am jumping way ahead of myself, but my view, which I expressed to Bill Smith, who became Attorney General and Ed Schmults who became Deputy, was that it was much safer to look for academics. Of course the amusing thing is that I had a committee, mostly on paper, we didn't have meetings, of law professors who were part of Law Professors and Lawyers for Reagan, and every law professor on that list subsequently became a judge.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: In any event, we're going back to the Nixon era, Nixon and Ford era. Several things that are of importance; that are perhaps interesting. One of which is after Nixon left, shortly after Nixon left, *The Washington Post* wrote a headline story about the existence of the secret and confidential files of J. Edgar Hoover. Now when I first became Deputy I asked Clarence Kelley, who was the Director of the FBI, whether there were any such files because I had heard rumors about that, and Elliot Richardson when he had been Attorney General had asked the same question.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Kelley said no. So I was astonished when *The Washington Post* headlined that story.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I sent one of my associates, Deputy Attorney General, Jim Wilderotter, down to talk to Kelley and he came back white-faced, Jim did, and said Kelley is thunderstruck but he has figured out they are referring to the files that are right in his waiting room, and the reason he said there were no secret files is he thought they were quite open; they were right in his waiting room.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: He never went and read them.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: I had to spend I think three or four weekends, I was then Acting Attorney General, Saxbe had left and gone off as Ambassador to India. I had to spend three or four weekends reading those secret files because I was asked to testify—demanded to testify about them—by the House Judiciary Committee, and I was shocked, stunned to my toes, because Hoover had for many years directed his SACs to come up with whatever scandal material they could on public figures—particularly political figures—pass it, back-channel, to Hoover, and that stuff was then used to blackmail Congressmen, Senators, and other political figures, into supporting the FBI.

MR. RASENBERGER: Wow!

JUDGE SILBERMAN: It was horrible. I mean absolutely horrible.

MR. RASENBERGER: So a bunch of dossiers on each individual in public life?

JUDGE SILBERMAN: Yes. As many as they could find.

MR. RASENBERGER: Oh, as many as they could find?

JUDGE SILBERMAN: Whatever scandals they had.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: I mean some of those I hope to take to my grave because they still have never been public. Some people still alive. One of the things that has been made public, and was a shocker—I remember testifying before the House—that amongst the horrors I found was that the FBI had operated as a Gestapo, a political police force, investigative force for Johnson who was by far and away the worst abuser of the FBI, although Roosevelt was pretty bad too. There were two presidents that refused to have anything to do with Hoover's wares, his nasty wares.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Eisenhower and Truman.

MR. RASENBERGER: Interesting.

JUDGE SILBERMAN: But Roosevelt misused the Bureau and Johnson misused it terribly. One of the things Johnson—well I had testified before the House before I tell you about this. The FBI had been used in a political campaign to find dirt on a political opponent. At that point, the Congressman from California who had once been an FBI agent? Don Edwards. He was the Chairman of the Committee and there was a fellow from New York who was Herman Badillo, I think.

MR. RASENBERGER: Herman Badillo?

JUDGE SILBERMAN: Yes. And they started demanding I tell them who it was. I didn't want to talk about what specifically was in those files. I wanted to speak about it just generically. And one of them said, I know what it was. It was an effort to get Al Lowenstein, remember, who had run against Rooney, who was a great protector of the FBI—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: and Chairman of the committee that authorized or appropriated funds for the FBI. And I said no that is not true. And they said you had better tell us because we know that's it. And I said, as a matter of fact, it involved the presidential campaign of 1964, at which point Don Edwards slammed down his gavel and stopped the hearing.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: And it subsequently came out. What happened was that Johnson's special assistant Walter Jenkins, who you may recall, was found in the men's room—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Johnson was paranoid that Goldwater would use that against Johnson in the campaign—it was in the last month of the campaign.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: So he wanted dirt on the Goldwater staff. And he asked one of his assistants to find it for him for the FBI. Do you know who it was?

MR. RASENBERGER: No.

JUDGE SILBERMAN: Bill Moyers.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Yes. Bill Moyers called over to the FBI to find dirt on Goldwater's staff.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Yes. This is according to the files. I'll tell you the rest

of the story. Well it turned out they did find dirt on one of Goldwater's staffers, and Johnson was ready to use it, Moyers and Johnson were ready to use it, but Goldwater never had the slightest intention of using Jenkin's matter against Johnson.

MR. RASENBERGER: I see. They were waiting for Goldwater to make the first move?

JUDGE SILBERMAN: Right.

MR. RASENBERGER: And he never did.

JUDGE SILBERMAN: And he never did because, this was also clear in the files, he thought it was inappropriate.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: Now, you know I have been a life-long Republican, Ray, but I voted and signed an ad for one Democrat in my life. It was Johnson in '64 against Goldwater.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: I didn't think Goldwater was smart enough to be President. That's before I realized that character was much more important than brains.

MR. RASENBERGER: [Laughter.] Yes, you're right.

JUDGE SILBERMAN: And so when I read this I was so stunned. Of course I had read—all the stuff on Johnson was just awful, just really awful. About his misuse of the FBI, there's a book out about it, which, I think the title is, *It Didn't Start With Watergate*. Nixon had several times during Watergate indicated that Johnson had been engaged in pretty bad stuff. I'd always thought that was Nixon trying to defend himself by diverting attention away from himself

to Johnson.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And I wondered how Nixon knew all this. I think Nixon knew about it because Hoover told him when he first became President.

MR. RASENBERGER: Of course.

JUDGE SILBERMAN: And I think that is the genesis of Watergate in a way because Nixon was the kind of guy who believed in situational ethics. Whatever Johnson did, he would do.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But he didn't trust the FBI, he thought they were too pro-Democrat. So that's where I think he ended up setting up the plumbers because he wanted the same kind of political intelligence that Johnson had.

MR. RASENBERGER: I see. I see. You know the Johnson tapes are coming out slowly.

JUDGE SILBERMAN: I know.

MR. RASENBERGER: And they are fascinating listening to.

JUDGE SILBERMAN: I can't bear it because I am so horrified about what I read.

MR. RASENBERGER: What you know, yeah?

JUDGE SILBERMAN: He, for instance—I suppose it wouldn't hurt to say this—one of the people targeted for investigation was Richard Goodwin. When Johnson wanted, you know, Doris Goodwin's husband.

MR. RASENBERGER: Yes. Right.

JUDGE SILBERMAN: To see whether he was in secret contact with Bobby Kennedy.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Johnson was using the FBI to try to figure out who in his Administration was close to Kennedy.

MR. RASENBERGER: Yes. Well he started out with everyone close to Kennedy in his White House and wanted it that way for a period of time.

JUDGE SILBERMAN: Yes. But then he distrusted them afterwards.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I mean at one point asked Hoover to investigate *The Washington Star* to see whether Kennedy had any secret money in it.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Hoover kept coming back with memos saying, look, they are Republicans.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Johnson said I don't believe it; Kennedy is behind it somewhere.

MR. RASENBERGER: I'm surprised these files that you had to go through never got out through the FOIA channel.

JUDGE SILBERMAN: That is a very interesting question. I don't know exactly what's happened about that. I think when the Church Committee was investigating and found out about this stuff, I think there was an effort on the part of the Democrats in the Senate to bury

it.

MR. RASENBERGER: Oh. Truthfully that's—neither side would benefit from having those tapes made public, or those files made public, I suppose.

JUDGE SILBERMAN: Well certainly Nixon is already been tarnished without ever touching those files. I think any fair-minded person who went through those files would conclude by far and away the worst President of the United States with respect to misuse of the FBI was Johnson and the second worst was Roosevelt.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Kennedy was being blackmailed by Hoover.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Hoover knew all about the sex stuff. So Kennedy couldn't dare—

MR. RASENBERGER: He wouldn't touch him.

JUDGE SILBERMAN: He couldn't fire Hoover. I remember thinking the two Presidents post-Roosevelt who were clean were Truman and Eisenhower.

MR. RASENBERGER: Well that's something that history has yet to record, except that you are telling it now.

JUDGE SILBERMAN: Yeah. I don't understand why there's not more about it because I don't even know what's happened to those files, Ray. I am sort of mystified now that you tell me, I am going to figure out afterwards—I remember somebody made a FOIA request for them. Of course a lot of the stuff is private. Oh, I remember a case came before me a couple of years ago involving those files.

MR. RASENBERGER: The secret files?

JUDGE SILBERMAN: Yes. And there was a FOIA request.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And Justice was desperately trying to stop revealing them. I wrote an opinion on it, a concurring opinion, saying I had actually read those files and they're pretty awful and they should be disclosed. I forget what case that it—I don't know what's happened to that case. Now some of the stuff can't be disclosed because it's embarrassing to individuals who would be unfairly tarnished.

MR. RASENBERGER: Well that's the problem, the picking and choosing.

JUDGE SILBERMAN: Well you can do that under FOIA. You know, if there is an unwarranted invasion of personal privacy I'd not release that part of the file.

MR. RASENBERGER: But that would still leave plenty of releasable material.

JUDGE SILBERMAN: Yes, oh absolutely. A lot of the people are dead.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: I mean the kind of stuff like whether a major politician, a major, major, major Presidential candidate had an illegitimate child.

MR. RASENBERGER: Oh, Warren Harding—Wow.

JUDGE SILBERMAN: I thought Hoover, after I read those files, I was convinced Hoover was the single worst government official who had served in the 20th century, and it breaks my heart to see his name on that FBI building.

MR. RASENBERGER: Yes. You are not the only one. Other than those Hoover files, did you have much to do with the FBI during your—

JUDGE SILBERMAN: Yes, yes. I am very proud of this.

MR. RASENBERGER: Yes. Oh.

JUDGE SILBERMAN: Read that. You have to read it.

MR. RASENBERGER: Judge Silberman is handing me something that looks something like a small baseball bat.

JUDGE SILBERMAN: No, it's a club. It's a police club.

MR. RASENBERGER: It's a billy club. That's true. Presented to Hon. Laurence H. Silberman, Deputy Attorney General, United States of America, and the Whole Department of Justice.

JUDGE SILBERMAN: That's the key language. And the Whole Department of Justice.

MR. RASENBERGER: [Laughter.] Yes, we know what those code words mean. "With Respect And In Appreciation From Director Clarence M. Kelley and the Command Staff and Members of the Federal Bureau of Investigation—1974." Yes, I see why you keep that on your desk.

JUDGE SILBERMAN: Yes, well the point was that I did try very hard to understand the Bureau and—

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

MR. RASENBERGER: Sorry, your Honor, we were interrupted by a shift to a new tape. We are now on Tape II, Side A for this session.

JUDGE SILBERMAN: —involved one of my partners at Steptoe and Johnson in that secret and confidential files of J. Edgar Hoover. To put the story very quickly. Remember

Jack Miller was the Assistant Attorney General for criminal, and he was actually a Republican recruited by Kennedy—part of a nice practice of having the Assistant Attorney General for criminal from another party, which I always thought was a good idea.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And Miller was investigating Bobby Baker, and Johnson was frantic. Johnson was frantic because Baker knew where all the bodies were buried and Johnson was afraid it was going to come to him. This is really incredible. Hoover, knowing Johnson's views about this, refused to cooperate with Miller's investigative efforts. He refused to wire a witness that Miller wanted wired. You know—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Hoover actually sent a memo saying that was contrary to Bureau practices—to wire a witness. Ridiculous; they wire witnesses all the time.

MR. RASENBERGER: Of course.

JUDGE SILBERMAN: But he didn't want to help Miller go after Baker because—

MR. RASENBERGER: He was protecting Johnson?

JUDGE SILBERMAN: Protecting Johnson.

MR. RASENBERGER: Johnson was still in the White House at that time.

JUDGE SILBERMAN: President, yes. And Bobby Kennedy was Attorney General. This is the early days before Bobby left, and Miller was the Assistant. And so, as I recall, the files indicated that Miller, perhaps with Kennedy's, maybe it was Kennedy's suggestion, but anyway, Miller went to Treasury, and they went to Bob Jordan who was special

assistant to Henry Fowler.

MR. RASENBERGER: Oh.

JUDGE SILBERMAN: To get Treasury agents—I forget whether they were ATF or Secret Service, or something—Treasury agents to wire the witness, and they did. Jordan arranged it; they did; and of course they got the evidence to indict Baker.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: Well now, while Johnson was President and Baker was being tried, Edward Bennett Williams, I think, was defending Baker, and one of Johnson's confidants would call an associate at Williams and Connolly, Judy Hope.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: To get a day-by-day report of how the trial was going on. You know who that confidant was? Abe Fortas; when he was a Supreme Court Justice.

MR. RASENBERGER: You're kidding.

JUDGE SILBERMAN: I am serious. After Baker was convicted, and he never did, as it might be recalled, turn on Johnson.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Johnson found out about Bob Jordan's role in providing Treasury agents to wire a witness that was crucial in the indictment of Baker. And he demanded of Fowler, I think it was in the last year of his Presidency, that Jordan be fired.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: And Fowler wouldn't do it.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Right.

MR. RASENBERGER: Wow, wow. Jordan, just for the record, the Jordan we are talking about he was Bob Jordan of Steptoe and Johnson.

JUDGE SILBERMAN: My classmate at Harvard and my partner at Steptoe and Johnson.

MR. RASENBERGER: Yes. I didn't know you were classmates. That's a fascinating story.

JUDGE SILBERMAN: It is. I think John Nolan knows that story; I think I told him. I know Jordan—

MR. RASENBERGER: I'm sure. Well let's see, do we have anymore of these stories?

JUDGE SILBERMAN: Well I think that about covers what I can talk about on the secret and confidential files. This all came up after Ford had become President. I remember thinking to myself why is it *The Washington Post*, who obviously knew about these secret and confidential files, didn't disclose it earlier? I think they didn't want to disclose it when Nixon was President; not while he was under impeachment because it supported Nixon's claim that Johnson had been doing bad things.

MR. RASENBERGER: I see. It might have also been unfavorable to a Kennedy or two.

JUDGE SILBERMAN: Yes that's true. It was, although it was much more unfavorable to Johnson. Johnson had used the FBI above all else to try to get Kennedy.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Or to get anybody who was close to Kennedy, or find out.

MR. RASENBERGER: Yeah. He was paranoid on that subject.

JUDGE SILBERMAN: Yes he certainly was.

MR. RASENBERGER: No doubt about it. Just one more thing—

JUDGE SILBERMAN: Oh, incidentally, Moyers called me after this became public. Remember the story I told you about Moyers calling?

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Moyers called me.

MR. RASENBERGER: You were still then Deputy Attorney General under Ford.

JUDGE SILBERMAN: He was very upset. And he said you know that the FBI typically has these CYA memos that blames something on somebody else. And I'm innocent.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: And I said Mr. Moyers if you wish I will conduct an independent investigation as to exactly what occurred and if in fact you're innocent of this I would make a public statement to that effect. And there was a silence at the end of phone. I remember there were several of my staff in the room. Silence on the phone, and Moyers said "I was very young then," he was almost in tears, and he said "what do I tell my children?" And I said I don't know, but some of your columns have blasted people involved in Watergate who also were very young.

MR. RASENBERGER: Yes. That's true.

JUDGE SILBERMAN: So I had nothing but contempt for him. Because I think using the FBI to gather dirt on your political opponents is about the most heinous crime I can

think of.

MR. RASENBERGER: And not as of this date sufficiently explored?

JUDGE SILBERMAN: This has come out. This has come out; about Moyers' exact involvement. There have been public descriptions of it.

MR. RASENBERGER: Right. But I mean the scope of it beyond that?

JUDGE SILBERMAN: Oh no. I don't think there is sufficient—I said there is one book that was written by a defender of Nixon. I think the title of it was *It Didn't Start With Watergate*, and half the book is garbage insofar as it defends Nixon. But half of it describes the secret and confidential files of Hoover, and largely accurately, at least a large part of it. I think the guy's name was Lasky or Lansky or something like that. That's a long time ago.

MR. RASENBERGER: Just one final thing about your period as Deputy Attorney General. Of course that was an executive branch, and an executive position, where you had things coming to you everyday you had to decide. How did you like being the deciding person? You had that role in Labor I realize, but this was obviously more intensive in that respect, you had to call the shots, sometimes on short notice. Were you uncomfortable as an executive decision-maker? Did you enjoy it or—

JUDGE SILBERMAN: No, actually I enjoyed it; I enjoyed it a great deal. It was an enormous strain because it was inherently difficult, but it was a strain for another reason. It's one thing to have the full authority; I had the responsibility without having the full authority. Bill Saxbe virtually always backed me. But it's still different than having the authority independently. And I frankly used to disguise to a certain extent the amount of decision-making I was doing on my own. There's one story that Scalia and Bork are still furious about. When

they were having an argument in my office, the Solicitor General and the Assistant Attorney General for OLC, who occasionally clashed—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And rather than resolve the issue myself I said, “Well you know I think I ought to discuss this with the Attorney General.” Now he was out hunting that day; they didn’t know that. So I left my conference room and went in the back to the elevator, took the elevator up to the top floor where Saxbe’s office was, smoked a cigarette, and then came back down and told Bork and Scalia, the Attorney General agrees that we should do it this way.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: They found out about it long after.

MR. RASENBERGER: Did they?

JUDGE SILBERMAN: Yeah. They were furious. But I thought it was important to a certain extent not to call attention to the fact that Bill was away as much as he was, hunting as much as he was.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: Even though he was much less concerned about that. He was asked one day how he could spend so much time away from the office hunting, fishing, doing whatever, and he said, “I’ve got a deputy who works long hours, has a good mind for detail, and is meaner than a junkyard dog.”

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: That was published. My kids have never let me forget it.

MR. RASENBERGER: [Laughter.] Basically flattering I would say.

JUDGE SILBERMAN: I hope; I'm not sure about that.

MR. RASENBERGER: Okay, well that's all I have on that particular period in your life—the Deputy Attorney General job. You moved from there into the realm of foreign policy, and went to Yugoslavia. Was there any interim there between the Justice Department and Ambassador to Yugoslavia?

JUDGE SILBERMAN: Sort of; sort of. There's nothing on the c.v. about it. Rumsfeld was Chief of Staff and we had been friends. Ford wanted me to stay as Deputy Attorney General under Ed Levi.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Rumsfeld said to me, at the time I was only 37, he said you're really too young to be Attorney General. And I said you're right. But he said we badly want you to stay as Deputy; Ford said it; Rumsfeld said it. I thought it inappropriate for two reasons. My relationship with Saxbe was rather unique which allowed me an enormous sway. And I thought Ed Levi should pick his own Deputy, it was going to be hard for me to shift and perhaps restrain my administrative sway under a new Attorney General. And furthermore, secondly, I was not all that impressed with Ed Levi. He had a first-class mind, but I didn't think he was enormously courageous and he wasn't a very quick decision-maker. So there was quite a vivid contrast between the two of us because I tend to be a very quick decision-maker in administrative jobs, not as a judge, but in administrative jobs, and Levi was more of a Hamlet. So it would have been a clash.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: So I told Ford and Rumsfeld that I wanted to leave, also because I was running out of money and my son was about to go to prep school, I think he had started Exeter. So Ford and Rumsfeld offered me the post of Special Trade Representative which was cabinet level.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: And I accepted. And there was about a three week period when I was preparing to be Special Trade Representative. However I ran into a slight problem. Russell Long was Chairman of the Finance Committee which had jurisdiction over the Special Trade Representative; he had actually raised it to the cabinet level. As a matter of deference and courtesy and everything else I had to go up, once it was known that I was going to be nominated, and talk with Russell. And in that conversation, which was very friendly, he indicated that I had two deputy positions; one in Geneva and one in Washington. And for the one in Geneva, the one that does the actual negotiations in those days, he thought his Staff Director, a fellow by the name of Bob Best, would make a wonderful deputy; and I said, Mr. Chairman I would love to discuss that with him after I'm confirmed. And Russell said oh, well, oh. That's not what I mean--this is a deal and you're not going to have discretion. So I went through two or three weeks in which Russell Long would get people to say they objected to me on various grounds: first they objected that I was too anti-labor; as you know I was rather close to the AFL-CIO and they put out a statement immediately saying, you know, we think he's perfectly adequate; we perfectly trust him. And then they switched and said I was too pro-labor.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And the White House was ready to announce it.

MR. RASENBERGER: Really.

JUDGE SILBERMAN: And I told them you had better not until Russell Long gives his okay. It was a symbiotic relationship between the Chairman of the Finance Committee and the Special Trade Representative. And he called; I got a call from Rumsfeld, this was about three weeks after, I was actually going over resumes of deputies, and Rumsfeld called me and said the President wants to see you. At five o'clock in the afternoon I went over to the White House and Don saw me first beforehand and he said Russell Long called and we've got an energy bill on the floor, and he said he has three votes that can kill it, his own and two others and—

MR. RASENBERGER: On your issue?

JUDGE SILBERMAN: Right, on me.

MR. RASENBERGER: On you?

JUDGE SILBERMAN: Yes, and Russell said he was perfectly willing for me to have any other job, he will support me for Secretary of Commerce because he wants Fred Deming, who was Secretary of Commerce, to be Special Trade Representative and he told Rumsfeld, he told the President, he said: "Mr. President, Larry Silberman is 100% your man, I'm entitled to 50%."

MR. RASENBERGER: Really?

JUDGE SILBERMAN: Exactly, quote unquote.

MR. RASENBERGER: Boy, that's laying it out.

JUDGE SILBERMAN: Yes. And so the President told me the story, and I said, "Mr. President you know I understand." Thinking to myself it was his loss not mine.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: If I were him I'd be god damned if I'd want an appointee who was 50% Russell Long's man.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But Ford didn't have that kind of strength.

MR. RASENBERGER: Particularly early on I would think.

JUDGE SILBERMAN: No, early on he was a strong--this is why. About six months into it he just didn't have the kind of strength to dominate. In some ways he was an accidental President. He didn't have quite the fire in the belly. I liked Gerry Ford, we had been friends, he was really a wonderful person, but, in any event--then Ford said, well Don and I have different ideas, because I had been investigating, I started an investigation of the CIA, I should have told you about this. Bill Colby had come to me either as Deputy or Acting, I can't recall, to provide me formally with the so-called crown jewels. The product of an investigation Jim Schlesinger had started as CIA Director before Colby to find out what if anything the CIA had done since the beginning of the Cold War which could be arguably illegal.

MR. RASENBERGER: And presented to you when you were Deputy Attorney General?

JUDGE SILBERMAN: Either Deputy or Acting, I can't recall which I was.

MR. RASENBERGER: During that period.

JUDGE SILBERMAN: And he and his General Counsel came over and met with me and one of my Associate Deputies and I had gone over all the material. I remember, you know we spent three hours going over all this stuff, and I remember my reaction when Colby and his General Counsel left when I turned to my associate and said, can you imagine that's all there

is. You know we've been in the Cold War for what, 30 years, and I couldn't believe that that was all there was. But I said some of it was arguably illegal so we have to start an investigation. So I did start an investigation.

MR. RASENBERGER: Non-public?

JUDGE SILBERMAN: No.

MR. RASENBERGER: Criminal—

JUDGE SILBERMAN: No.

MR. RASENBERGER: Oh I see.

JUDGE SILBERMAN: Now I didn't think really there was—that investigation, to my very grave regret, led under Griffin Bell, to the indictment of Dick Helms, which I think was profoundly wrong, I never would have prosecuted. And he pleaded guilty to a misdemeanor; I think that was really quite wrong; he should never have been prosecuted. There was a lot of pressure in part generated by Sy Hersh's very hyperbolic stories about the CIA involved in domestic matters which was really, I think, going back to what I was telling you about the FBI, when the Church Committee went after the CIA as they did, and it really hurt the CIA badly, that was not the scandal; the scandal was the FBI, but Church did not want to go after the Democrats. And, as I told you, if you went after the FBI you were going to get Johnson, to a certain extent Kennedy, but more Johnson, and some, a lot of Kennedy stuff was going to be embarrassing.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Because you are going to get into all the sex stuff.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: The secret and confidential file. So Church diverted over

to the CIA, made everything out of the CIA.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: And so Helms became a victim of that. I started the investigation of the CIA which led Ford to ask me to come into the White House to be Assistant to the President for Intelligence.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: I had never wanted to work in the White House. Don knew I was interested in being CIA Director, we had a private conversation about that before he went for Special Trade Representative. But, and he said if you came into the White House and ran intelligence, by running intelligence that meant trying to coordinate the activities of the intelligence agencies from the White House, in effect replacing the CIA Director as Director of Central Intelligence; you know he has two hats.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And also dealing with the Congress; being the guy who would say no to the Congress about turning over information and dealing with the public, the press and so forth. I did not ever want to work in the White House; I hated the atmosphere in the White House because there was always this jockeying for power and nobody knows who's on top.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But I left the office saying I would like to think about it Mr. President, I want to talk to my wife and see what she thinks, and Ford said, "Can I call her?" And I said I would rather you didn't. And the reason I did is because I wanted to use her as my

grounds of—

MR. RASENBERGER: I see.

JUDGE SILBERMAN: I knew if he called her she would say, “Of course Mr. President.”

MR. RASENBERGER: Yes, right.

JUDGE SILBERMAN: So I thought about it that night and came back the next morning and said, no I didn’t want to do that. I wanted to leave government.

MR. RASENBERGER: Now what month?

JUDGE SILBERMAN: This is now April of '75. March of '75 is when this is going on. I mean, frankly I am a little annoyed by this Special Trade Representative business.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: So the whole government—I want to get out. But I feel guilty about turning down the intelligence thing because it is obviously a big problem. I had to go over to the White House two more days in the afternoon while Ford and Rumsfeld tried to convince me to come do this.

MR. RASENBERGER: Take this intelligence job?

JUDGE SILBERMAN: Yes. They were very worried about the intelligence situation at that point.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And they thought I’d frankly be tough enough to deal with it. I didn’t like it for a number of reasons. Number one, I thought if I was going to be the point guy to turn down the Congress I would be willing to do it but I wasn’t convinced Ford

would stand firm and back me up, so I would end up with all spears in the chest for no good reason. And secondly, there was an aspect of it that I didn't like. I liked Bill Colby; I respected him, and I didn't like being in the position where it was all going to be a plan where I was going to replace him.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: In six months. In other words, he was going to get sort of, I'm afraid of what it is going to look like, he was going to get all torn up in this process and I would replace him if I didn't get torn up.

MR. RASENBERGER: You mean you would have replaced him as head of CIA as well as Director of Central Intelligence?

JUDGE SILBERMAN: Right.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: That was, I think, that was Don's view.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But I didn't like it, I didn't like it at all. So I declined three times. And finally the President said, this is very revealing, he said, "Would you at least talk to Henry?"

MR. RASENBERGER: Kissinger?

JUDGE SILBERMAN: Which was an indication of in a way of how weak Ford was. Could you imagine being President of the United States saying this young man is going to turn me down but now I want him to appeal to a higher authority. So I went over to the State Department to meet Henry and he was busy, so I said screw it, I went back to the Justice

Department. He went nuts. He called me back up and said come on please come back, so I came back. And he made this long pitch that it is really crucial for the country; somebody has got to be in there who is tough enough to handle this. And after he went through it for some time I said Henry if you were me would you do it? And he said—stopped dead—he said I would if I trusted the President. I thought that was sort of an ambiguous, so in any event I declined, and then Kissinger talked with me about embassies.

MR. RASENBERGER: At that time or shortly thereafter?

JUDGE SILBERMAN: I think maybe either that time or shortly thereafter he called me over to talk to me about embassies and he dangled the notion of Germany.

MR. RASENBERGER: Ambassador to Germany.

JUDGE SILBERMAN: First Jewish Ambassador to Germany.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I went home. I was very interested because I was one of the few Americans who was whole-heartedly in favor of German unification. In fact I took that position subsequently, my theory being that a unified Germany would be a bulwark against Russia.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: It was very much in our interest.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I went home and for the first and only time in our life my wife said no. She would not do it; she just could not do it. She couldn't bear the idea of having to go to concentration camps, go through that, she has such a horror of that period.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: She just could not do it. So I had to say no, and then they discussed Yugoslavia in which I have always been interested in from Dartmouth, you know I told you a long time ago.

MR. RASENBERGER: Yes, that's right. And they had known or someone knew about—

JUDGE SILBERMAN: Yes. I had been to Yugoslavia the year before, no two years before, as Undersecretary of Labor on a mission.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: Diplomatic mission. So they knew I was interested in Yugoslavia. And they, Kissinger's view, that was a crucial place because they thought Tito would die any minute and a lot of people thought that was the spot where if a Third World War would break out, it would break out over Yugoslavia because there was a disputed claim between NATO and—

MR. RASENBERGER: Right.

[END TAPE II - Side A - end of 12-13-01 interview]