

The date today is January 25, 2002 and we are continuing with the Oral History interview of Judge Silberman on behalf of the D.C. Circuit Historical Society.

MR. RASENBERGER: Judge Silberman, the last session we had was devoted almost entirely to your experiences as Deputy Attorney General and Acting Attorney General in the Nixon Administration basically.

JUDGE SILBERMAN: No. For most of that was in the Ford.

MR. RASENBERGER: Then Ford.

JUDGE SILBERMAN: Yeah.

MR. RASENBERGER: That's right.

JUDGE SILBERMAN: The first six months is Nixon and the rest are Ford.

MR. RASENBERGER: That's right. And then I am going to ask you a little bit about your decision not to stay on with Ford. But there was loose item from last time and that concerned J. Edgar Hoover's secret files, and we had talked about what ever happened to those in terms of the expected, or at least what you or I would expect, FOIA request to see those secret documents which you had seen.

JUDGE SILBERMAN: Did you see the case?

MR. RASENBERGER: And you sent me--yes, the case. I just want to refer to it on the record here: *Summers v. Department of Justice*, and the opinion, your concurring opinion, 140 F.3d 1077, which deals with this very issue comes about as close as your telling what you're allowed to tell as possible. In that case, as I recall, the opinion was a remand to the District Court. Is that were it still stands?

JUDGE SILBERMAN: I checked after our interview. I had my clerk check it;

apparently the case has been settled.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: So I guess the government gave the plaintiff essentially what they wanted.

MR. RASENBERGER: So we will, presumably—

JUDGE SILBERMAN: I don't know.

MR. RASENBERGER: What will happen. Yeah.

JUDGE SILBERMAN: Yes. I think I told you last time there was another book which seemed to have access to much of that information.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: The title of which is, *It Didn't Start With Watergate*. But I remember the book as being, pretty trashy in its defense of Nixon. But part of it was a criticism of Johnson, and that seemed to draw upon stuff that—

MR. RASENBERGER: You had seen?

JUDGE SILBERMAN: Yes, I had seen, and maybe some stuff that I hadn't seen.

MR. RASENBERGER: I see. Interesting. Okay. Well, so we are in the Ford Administration and Saxbe has stepped down as attorney general, and Ed Levi was the candidate of the President and you decided you did not want to stay on at that point as Deputy, is that right?

JUDGE SILBERMAN: Yes, that is correct. Did we discuss this last time? I can't recall.

MR. RASENBERGER: You did in the State Department interview somewhat. Anyway, you didn't want to work with Levi for reasons you indicated I think at least in the State

Department.

JUDGE SILBERMAN: Did I indicate in the State Department what the reasons were?

MR. RASENBERGER: Well—

JUDGE SILBERMAN: Pretty much under Bill Saxbe I had an arrangement where I basically ran the Department. He hadn't really wanted to be hands-on all that much. We had a couple of issues that we would follow. And that was the arrangement that we had, and I didn't think that it made sense to try to stay on as deputy. Levi asked me to; George Schultz called me on Levi's behalf to persuade me to try and stay on, and Ford asked me to stay on, but I didn't think it was a good idea.

MR. RASENBERGER: Yes. I remember you were under some considerable pressure actually to stay on, as I recall.

JUDGE SILBERMAN: Right. But I didn't think it was a good idea, and also couldn't afford it because by that time my son had started at Exeter.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And the salary of Deputy Attorney General was not adequate to cover all my expenses.

MR. RASENBERGER: Right. Now as I recall you started to talk about being asked then to recommend someone else for the job.

JUDGE SILBERMAN: Yes. First of all, I was offered the post of Special Trade Representative—

MR. RASENBERGER: That's right.

JUDGE SILBERMAN: By Ford and Rumsfeld; Rumsfeld was Chief of Staff then. And I agreed to take it and it was widely known in Washington that I was to be nominated; in fact the White House almost nominated me but I told them to hold back because the President had wanted to get the approval of Russell Long, the chairman of the Finance Committee. I went up and met with Russell, and to make a long story very short, Russell's price was that he wanted his Staff Director as one of the deputy jobs. I told Russell I would be glad to talk with him after I was confirmed, and Russell said you don't understand.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Have I described all that in the State Department?

MR. RASENBERGER: A little bit. You said something like you did not want to be 50% Russell's guy.

JUDGE SILBERMAN: No, Russell told Ford after two weeks of going back and forth, in which incidentally Jack Marsh who was Ford's legislative head and ex-Congressman came over to the Justice Department to try and persuade me to agree to take—his name was Bob Best—and I explained to Jack that if I took him as a *quid pro quo* of confirmation I might as well not have the job because he would be over in Geneva, and he would be taking direct instructions from Russell Long.

MR. RASENBERGER: Absolutely right.

JUDGE SILBERMAN: And this was very much a President's problem more than my problem. Marsh, an ex-Congressman, didn't totally appreciate all of this.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: But when Russell Long finally gave up figuring out how

to stop me any other way or get me to agree to a *quid pro quo* he called Ford when the energy bill was on the floor and told him he had three votes and the President wouldn't get them, and he needed them, unless he withdrew me from Special Trade Representative and put in Fred Dent who was then Secretary of Commerce and was perceived as closer to the southern textile interest. And he told Ford in that conversation, Larry Silberman is 100% your man, I'm entitled to 50% of his appointment.

MR. RASENBERGER: That's it. Interesting little civics lesson there. Then I guess the White House did ask you for—

JUDGE SILBERMAN: Yes, actually before that.

MR. RASENBERGER: Before that.

JUDGE SILBERMAN: The President directly asked me for the names of three people to replace me.

MR. RASENBERGER: Did you say that Rumsfeld was lobbying you?

JUDGE SILBERMAN: Yes. Don, who was my friend, still is a close friend, as you may have noted I swore him in as Secretary of Defense, called me to urge that his Princeton classmate, Marty Hoffman—

MR. RASENBERGER: Yes, I know Marty.

JUDGE SILBERMAN: Be put on the list. He was then General Counsel of Defense, put on the list as Deputy Attorney General. I don't recall whether I put him on the list, and I like Marty very much, but my first recommendation was Ed Schmults, and he was picked; and then the Administration had to withdraw when it, I think it was the old *Washington Star*, disclosed that he was a director of a corporation that had just been indicted for antitrust

violations, and although he was clean as a whistle, in that post-Watergate era they didn't even want to try to disclose that or to prove that and as a result he was withdrawn and ultimately Ace Tyler was selected to replace me. I recommended Schmults once again to Smith when Reagan was elected and he was picked as Deputy Attorney General.

MR. RASENBERGER: Then, after the Special Trade Representative fiasco, if that is the word for it, there was an offer that you become White House intelligence coordinator. Could you talk a little bit about what that was all about?

JUDGE SILBERMAN: Yes. You may recall this was during the period following Sy Hersh's disclosure in *The New York Times* of a story alleging that the CIA had engaged in domestic surveillance. That story, incidentally, was vastly overdrawn, and in my view the real scandal of that period was not the CIA but the FBI. I've already described the FBI problems.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But when ultimately the Church Committee inquired into all of that they buried the FBI problems because it led to the wrong Administration.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And made much of the CIA difficulties. Now I had, as Deputy Attorney General or even perhaps I was Acting at the time, I can't recall, initiated an investigation of the CIA, including the investigation of Dick Helms that was prompted by Bill Colby's coming to see me and disclosing the crown jewels of the CIA—you know the stuff that had been collected under Jim Schlesinger's watch—alleged violations of law during the Cold War. I remember it vividly because after Bill Colby spent three hours going over that with me and one

of my Associate Deputy Attorneys General and his General Counsel, my reaction afterwards was disbelief or shock. And what I was shocked about is how little there was.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: That we had gone through at that point almost 30 years of Cold War and I was surprised at how relatively little there was. Now some of it was more serious than others. The mail openings were tricky, although they had been blessed by Brownell as Attorney General.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: And some of the other stuff involved interrogations of people in the United States that if it had been taking place—foreigners—if it had been taking place outside the United States it wouldn't have been a problem. In any event, I was deeply involved in all of that, in that investigation, and keeping the White House informed. Incidentally, I regarded it as a great sadness that Helms was forced to plead guilty to a misdemeanor. I would never have prosecuted Helms, and that happened under the Carter Administration.

MR. RASENBERGER: Yes. I remember.

JUDGE SILBERMAN: I think it was a grave mistake. Don Rumsfeld had, before the Special Trade Representative job was offered, had a candid conversation with me asking if there was any job in government I would be willing to stay for. And the one I had mentioned was Director of the Central Intelligence Agency. So when the STR matter exploded both Rumsfeld and Ford were very concerned about the intelligence problem. By this point the Church Committee had gotten started. The press was all over the CIA. And so they decided it was really a very good idea to have somebody in the White House in charge of “the problem,”

which was a multifaceted problem. One, it was a coordination of intelligence, and two, it was dealing with those who were attacking the intelligence community. So it would be Special Assistant to the President for Intelligence. And they asked me to come and do that and Don indicated that, after some months of that job, it would be likely that Bill Colby would leave and then I would replace him as the Director. But number one, I had long ago thought that I would never want to work in the White House: I just didn't like the atmosphere of White Houses, just any White House.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: There is too much jockeying.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Just not my taste. Partly because there's lack of structure.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: There's a lot of elbowing. Secondly, I didn't underestimate the importance of the problem of defending certain activities of the intelligence community, but I had the impression that I would end up taking all the spears in the chest. And I wasn't sure if Ford would stick on certain issues—he might cave—and then that would be all. And finally I didn't like being put in a position where I would have an incentive to try to let Colby be the flycatcher and then replace him.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: It just seemed dishonorable. I liked Bill Colby, I thought he was a decent and straight guy. We had dealt together on a number of matters, so I just didn't

feel comfortable with that for all those reasons so I declined—actually I declined three days in a row. I had to go over to the White House three times.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And the first time Ford asked—I'll never forget it, when he first made the offer, it was more than an offer, urging me to do it. I said I had to talk to my wife and he said—while he was walking out of his office—can I call her? I said I would rather you didn't. Of course the truth of the matter is she would have said yes.

MR. RASENBERGER: Yes—when the President calls—

JUDGE SILBERMAN: Right. And I was using her sort of as a pick.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Well, after having turned him down three days—three afternoon sessions with he and Don Rumsfeld—he asked, he said to me, would you at least go talk to Henry.

MR. RASENBERGER: Kissinger?

JUDGE SILBERMAN: Yes. Which of course led me to believe that part of the idea for this came from Henry who was desperate at that point that something be done to prevent the hemorrhaging of the CIA. So I went over and spoke to Kissinger and he urged me to take it and said my country needed me, etc., etc., etc. And I'll never forget saying to Henry, would you do it if you were me? And he was sort of taken back and said I'd do it if I trusted the President.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: First of all, what was so revealing about it is, if I were President of the United States and I wanted somebody to take a job and that person wouldn't take

it, there is no power on earth that would induce me to have that individual go to talk to one of my cabinet officers.

MR. RASENBERGER: Of course.

JUDGE SILBERMAN: And it would almost look like Henry was the superior figure—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I thought Henry's comment was interesting because one of the reasons I didn't want to do, as much as I liked Ford, I just didn't think he was strong enough.

MR. RASENBERGER: Yeah, the fact you were sitting there to support that—

JUDGE SILBERMAN: Right. So, in any event, I declined finally. And Kissinger and Ford both then moved to discussing an embassy. They wanted me very much to get foreign policy experience. And it was Henry's idea that I go to Germany. You know about that.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And Ricky wouldn't do that—that was the only thing she ever said no to.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: So I ended up in Yugoslavia for which I had a great interest.

MR. RASENBERGER: Over how long a period in time did these various offers and turn-downs—

JUDGE SILBERMAN: —

MR. RASENBERGER: So it was rather rapid. They were going to get you into some job in the Administration.

JUDGE SILBERMAN: Yeah.

MR. RASENBERGER: Okay. So now we are in Yugoslavia and that is covered in some depth by your State Department Oral History, so I thought I would not go over that very much except perhaps to ask you whether any of the recent events in Yugoslavia resonate with views you held then or held since, including the evolution of this to a war crimes trial in The Hague for Milosevic. Have you got any thoughts on the modern issues?

JUDGE SILBERMAN: Well, during the late ' 80s early ' 90s when Yugoslavia started to come apart I was not in the least surprised because, although it had been often said incorrectly that Yugoslavia was held together by Tito, that was not true. Tito had died long since and it still held together. It was held together by fear of the Soviet Union. And once the Soviet Union collapsed the natural centrifugal forces which had been very powerful would have threatened to break up Yugoslavia, even before WWII came to the fore. I was not surprised. When I was Ambassador, I think I told the interviewer from the State Department, a census asked individuals in Yugoslavia what their nationality was, and only 11% described themselves as Yugoslavs.

MR. RASENBERGER: Really? That says it all.

JUDGE SILBERMAN: So I was, as I said, not surprised. I also in private conversation—I never took any public position—I moderated one or two sessions in the Council on Foreign Relations on Yugoslavia, and I was rather amused that all the people who were against

the war in Vietnam were in favor of intervention in Yugoslavia and people who were generally supportive of the Administration, Kennedy and Johnson Administration, in Vietnam, even somewhat dubious, were the ones who were opposed to our intervention in Yugoslavia; so it was complete reversal. I, in private conversations with friends who were in the executive branch, at dinner parties and so forth, or luncheons, urged that we stay out. And still people believe that our military intervention in Yugoslavia was a mistake—and is a mistake—that’s true both with respect to Bosnia and Kosovo. Although Bosnia is a closer case; Kosovo I think a disaster. Now that does not for a moment mean that I have any views in defense of Milosevic or anybody else who was standing trial for war crimes. And I admired enormously the willingness of my colleague and friend Pat Wald to go over there and act as a judge in The Hague for a couple of years. And I’ve talked with her a great deal about her experiences. But the criminal prosecution of individuals accused of war crimes is one thing. As a matter of American foreign policy I have never thought it was wise to have intervened as heavily as we have on Yugoslavia. It is no longer of vital interest to the United States and it was a great, great, great awful cost we paid in terms of the resentment that was generated amongst young Russians, Chinese, and many other people around the world who were frightened by the American display of power in a situation where the United States acknowledged, made a virtue over the fact, that it was not in our vital interest, for humanitarian reasons of course. But once a country intervenes militarily that powerfully when it’s not in their vital interest it’s not surprising that that tends to scare people around the world.

MR. RASENBERGER: Yes, yes.

JUDGE SILBERMAN: In any event, I was against it.

MR. RASENBERGER: When you were Ambassador you were also a special envoy on ILO affairs.

JUDGE SILBERMAN: True.

MR. RASENBERGER: And you did talk a little about that in your State Department oral history. I don't know whether there is anything particularly salient about that that is worth mentioning.

JUDGE SILBERMAN: Well it was only interesting in the sense, I don't remember whether I said it in the State Department interview, but I was in a unique position because the President had set up this cabinet committee to deal with the ILO which included George Meany.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And the truth of the matter is that the question of whether we remain in the ILO was a question which involved two people, most importantly George Meany and Henry Kissinger.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Meany wanted out because he was disgusted with the European tolerance of ideological movements within the ILO which of course were the same as the UN.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: The ILO is a part of the UN.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And which reflected hostility to democratic values.

Henry, looking at it from the point of view of Secretary of State, did not wish to withdraw. The compromise was this committee and a special envoy—me—who would go around the world and tell our allies that we were serious; that we would pull out if they didn't support us. Meany was so clever, he started out with the proposition that he didn't want anybody in the State Department involved because he didn't trust the State Department: Kissinger had apoplexy—it has to be a State Department official as the special envoy—and then Meany said okay I'll accept one of two ambassadors, Moynihan or Silberman. Well Moynihan was an anathema at this point to Kissinger; he was then our UN Ambassador.

MR. RASENBERGER: Right, that's right.

JUDGE SILBERMAN: So I was the second choice. And it was an incredible experience because I was representing both the Republican and Democratic parties, that is to say, Meany controlled the Democratic party—at least on this issue.

MR. RASENBERGER: On this issue.

JUDGE SILBERMAN: On a hell of a lot of other issues. And so it was interesting going around the world in this special—

MR. RASENBERGER: Well yes—they appreciated how much authority you were carrying.

JUDGE SILBERMAN: Yes, but Kissinger was trying to undermine me.

MR. RASENBERGER: Oh, I see. Through his own channels. Oh, that must have been uncomfortable.

JUDGE SILBERMAN: Well, it was typical.

MR. RASENBERGER: Right, I mean that is government in a way.

JUDGE SILBERMAN: Yeah. Henry and I had an—

MR. RASENBERGER: An easy way out anyway.

JUDGE SILBERMAN: Yeah—

MR. RASENBERGER: Yeah. Others have said that. Well he's got his point of view out there in three volumes, maybe there's four.

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: So we are now in 1977 and your winding up your term as Ambassador and you've completed your work as ILO representative, Carter has been elected, and as I recall, your resignation is effective with his inauguration.

JUDGE SILBERMAN: January 20th.

MR. RASENBERGER: From there it appears from your c.v. that you went to the American Enterprise Institute as a resident fellow and basically did some writing and publishing, on subjects of your own choosing I take it.

JUDGE SILBERMAN: That is true.

MR. RASENBERGER: And was that the kind of refreshment and renewal that you, that it is often advertised to be, for you?

JUDGE SILBERMAN: Yes. It is sometimes said that it is correct that you don't build up any intellectual capital when you are in government, you draw it down.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I was advised, and I have advised others, to go to an academic institution of one kind or another after you leave government and spend some time thinking and writing, which is what I did, and speaking.

MR. RASENBERGER: Yes, the back-and-forth part of it benefits everyone I think. You can say the same about being a judge and having had experience in the rough and tumble of government and politics couldn't you?

JUDGE SILBERMAN: Something a little different, but I do think there is an advantage in being a Federal judge, particularly a Federal appellate judge, and perhaps particularly the D.C. Circuit to have a background in government and in politics.

MR. RASENBERGER: Yes. Then after a year or so there, am I correct, you went to Morrison and Foerster part-time and then I guess full-time as a managing—

JUDGE SILBERMAN: No, slightly different. I spent a year at AEI and then I agreed to spend part-time at Dewey Ballantine as counsel there. Phil Buchen was the Washington partner; he had started the Washington office, and he had been Ford's counsel as you recall.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And so I thought it would be helpful financially if I got back into law practice and so I agreed to spend about one-third or one-half of my time at Dewey Ballantine.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: The rest of the time I continued to write and lecture. That went on for about a year, and I found that very difficult because everything depended on where your emotional energy was in the morning; if you were thinking about a legal problem, it is hard to think about something else, and vice versa.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I mean I liked some of the partners at Dewey Ballantine but I didn't really like the atmosphere of a New York law firm.

MR. RASENBERGER: This was in New York? Or no, a New York firm, Washington office.

JUDGE SILBERMAN: Right. I remember being in a partnership meeting when decisions were made how to, whether to make associates partners and I was truly astonished at how cold-blooded those decisions were.

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

MR. RASENBERGER: We were talking about firms making partners or not.

JUDGE SILBERMAN: Yes. In those days in the firms that I had experience with, outside of New York firms, if a young man or woman—there were very few woman partners—but if a young man demonstrated that he was a superb lawyer he would be made a partner without regard to the economic situation in the firm. That was not the New York—

MR. RASENBERGER: No.

JUDGE SILBERMAN: And I guess its not anymore anywhere in the country. But, in any event, I was sort of shocked by it and put off and so I think that year Morrison and Foerster approached me to go back into law full-time and to start their Washington office. And I had a long connection with Morrison and Foerster—some of their senior partners were close friends of mine. But beyond that, my law firm in Hawaii, in which I had been a partner, was a offshoot of Morrison and Foerster.

MR. RASENBERGER: I see. So you went with them for a period of time, and according to the c.v. the next event was moving to the Crocker Bank.

JUDGE SILBERMAN: Yes, it seems a little strange but let me explain. I started the Washington office of Morrison and Foerster. It was building very nicely after a year, I was doing general administrative law practice. The largest single client of Morrison and Foerster by far, 25% of the billings of the firm, was Crocker Bank, which was then the eighth largest bank in the country. The senior partner at Morrison and Foerster who was in charge of the Crocker Bank account was a gentleman by the name of John Austin. He had reached 65; under the rules of Morrison and Foerster that was retirement time. He went to the CEO of Crocker Bank, Tommy Wilcox, and told him that he had to retire. And gave him the names of four or five of the senior mature partners at Morrison and Foerster who he suggested as possibilities to replace him—he had his number one choice, two, three—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: To John Austin's shock, Tommy said, he didn't want them, he wanted me. And I was here in Washington, and I had done one matter for Tom Wilcox, a regulatory matter involving the Federal Reserve. And so I got this phone call from John Austin and his partners. And he said it's a really serious problem. And I was absolutely thunderstruck. I said, "John, I know very little about banking law, very little." And John said, "You don't have to tell me that, I know that!"

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: John Austin was always a little arch about somebody who spent a lot time in government.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: He would tease me about that or even suggest I wasn't a

real lawyer because I had spent all this time in government. So he was thunderstruck at Wilcox's position. And he said, "you know, this is your choice. It means moving to San Francisco. But Wilcox had said if you or somebody like you doesn't do this, and I think by somebody like you, he means only you, he's going to switch the law firm to Sherman and Sterling."

MR. RASENBERGER: Huh.

JUDGE SILBERMAN: And have them come open a San Francisco office.

MR. RASENBERGER: Wow. Nice to be wanted, but that was a heavy price he was threatening to use.

JUDGE SILBERMAN: Well it put me in a hell of a spot.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And so I agreed to meet Tommy up in New York at the Waldorf, and I went in and explained to Tommy Wilcox that there were at least 2,000 lawyers in the United States who were superior in their ability to do banking law than I was—I mean I do very little. Wilcox was nevertheless insistent. And so I agreed. It was a hot summer in Washington.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And of course I had spent a lot of time in San Francisco when I was practicing in Hawaii.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: So I figured really I had no choice. And we decided the better thing was to come into the bank itself rather than simply go out to Morrison and Foerster's office in San Francisco to run the Crocker matter—

MR. RASENBERGER: I see.

JUDGE SILBERMAN: Because I realized that there must have been 30 lawyers in San Francisco who were working on Crocker matters and it was going to be awkward to supervise them when it was obvious to everybody that they knew more about banking law than I did.

MR. RASENBERGER: Yes. I see.

JUDGE SILBERMAN: But if I went in as Executive Vice President of a bank, which is what Tommy really preferred, then I would be the client. It doesn't really matter how dumb a client is.

MR. RASENBERGER: Right, usually.

JUDGE SILBERMAN: So I went out and I became Executive Vice President of Crocker Bank. We had a problem at the outset about the title, because Tommy wanted me to be Executive Vice President and General Counsel. And Jack Sutro, an old friend of mine and then senior partner at Pillsbury Madison, and a lion of the bar out there, told me that the bar took the position that anybody who designated themselves general counsel of a corporation in California had to be a member of the California bar.

MR. RASENBERGER: Oh yes. Which you wouldn't want to do.

JUDGE SILBERMAN: Which meant that I would actually have to take the bar.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: You couldn't waive in. At that point I met George Coumbs who had just become the General Counsel of Bank of America, and he was apoplectic about having to take the bar, and I realized that it would take months of work. The downside was

so horrible, particularly if I flunked it—as an ex-Deputy Attorney General—

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: That I would have to work, you know you couldn't possibly, you couldn't take any chances, you had to work up to maximum.

MR. RASENBERGER: Right. It's a tough bar. I have a friend who had to do this very same thing.

JUDGE SILBERMAN: So I decided to hell with it—this is ridiculous. You know I'm not going to be practicing. So I designated myself Executive Vice President for Legal and Regulatory Affairs.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: And I made my deputy, Deputy General Counsel. So if you looked and wondered who the devil was the General Counsel—

MR. RASENBERGER: There wasn't any.

JUDGE SILBERMAN: Well it was obviously me, but I didn't use the title. And the Bar never came after me.

MR. RASENBERGER: Oh that's interesting. So did you function as a lawyer or did your functions get broadened?

JUDGE SILBERMAN: Certainly I started as the General Counsel.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: But I also had government affairs. Over time other duties were dumped on me and I became more of a businessman than a lawyer. I was head of strategic planning, and the economics department reported to me and various other functions. So I had a

number of administrative responsibilities—strategic planning perhaps was the most important because it turned out incidentally one of the reasons, or perhaps the key reason Tommy Wilcox was trying to recruit me, is he wanted somebody to help negotiate the sale of the bank. And he had some reason to think that I would be helpful in that.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: And it turned out, within a year or so we did negotiate the sale to Midland Great Britain.

MR. RASENBERGER: Right, I recall that. Well that experience was in the total scheme of things fairly pleasant and positive?

JUDGE SILBERMAN: Yes, yes, I loved it. Very, very exciting. And after four years I had pretty much given up the law. My deputy became the General Counsel under me, and I was doing broad-scale banking work. And we got to the point where I was going to have to give it up, any connection to the law, and at that point I sort of decided no, I didn't want to do that, I didn't want to give up entirely, and so I decided for a number of reasons I thought I would like to go back to practice. I accomplished pretty much what I wanted to.

MR. RASENBERGER: And you did. That's when you went to Steptoe?

JUDGE SILBERMAN: No, no, no. I went back to Morrison and Foerster.

MR. RASENBERGER: Oh, okay.

JUDGE SILBERMAN: Steptoe was one year between Labor Department and Justice.

MR. RASENBERGER: Yes, right.

JUDGE SILBERMAN: So I went back to Morrison and Foerster and came back

for two years until I became a judge.

MR. RASENBERGER: Where you stayed until you became a judge. Okay.

Now while you were at Crocker, which was from '79-'83 roughly, it appears there were various what you might call extracurricular activities related to the political—

JUDGE SILBERMAN: Right. I was co-chairman of Governor Reagan's foreign policy advisors during the campaign of 1980.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: One of his domestic advisors, and chairman of his lawyers and law professors committee.

MR. RASENBERGER: Right. And then, now the Committee on the Present Danger is not a Republican or Democratic committee as such.

JUDGE SILBERMAN: No, it is rigorously bipartisan.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: In fact its rules pretty much required one Democrat per one Republican. I joined that shortly after I left Ambassador to Yugoslavia and was put up for membership there by Lane Kirkland.

MR. RASENBERGER: Right. And that lasted—

JUDGE SILBERMAN: Until the time I became a judge.

MR. RASENBERGER: Yeah, that was ongoing. Well anyway you did get drawn into the Reagan campaign in 1980 I take it.

JUDGE SILBERMAN: I did.

MR. RASENBERGER: Significantly?

JUDGE SILBERMAN: Oh yes. Yes.

MR. RASENBERGER: On domestic and foreign policy issues?

JUDGE SILBERMAN: Primarily foreign policy. I spent a good deal of time briefing Governor Reagan and George Bush, and discussing with them—of course George Bush had an extensive background as an ex-CIA Director—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But a good deal of time briefing Reagan on national foreign policy—national security issues.

MR. RASENBERGER: And was that a major time-consumer for you? Or was it something that was, did you enjoy doing that?

JUDGE SILBERMAN: Oh I loved it.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: It was very exciting. I think there were a least four long meetings. Two of them I recall in a motel in Los Angeles near the airport.

MR. RASENBERGER: With Reagan?

JUDGE SILBERMAN: With Reagan. One of them I was there with Paul Nitze and Gene Rostow and Dick Allen, who was subsequently the National Security Advisor, and who was sort of in charge of all the outside advisors in the national security field. And another one was with another group, largely defense-related people. There was one in Washington, a long meeting in Washington, and then there were a number of short meetings that I would have with his campaign staff on foreign policy issues. Then in the fall, in October, a few weeks before the election I was sent down to Central America, at Reagan's request, and I spent some time with the

President of Guatemala, Salvador, and the Sandinista Junta in Nicaragua. And I think Reagan and his staff were particularly interested in my perceptions as to whether the Sandinista Junta were communists or not. There was a good deal of debate about that at the time. So I spent about, I recall, six hours with the Sandinista Junta—

MR. RASENBERGER: Sizing them up?

JUDGE SILBERMAN: Talking. Well it was interesting because they wanted to talk about various practical accommodations of the United States, and for two reasons I thought that was impossible, first of which is Reagan wasn't elected.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: So it was inappropriate to make those kind of comments or have those kind of discussions. And secondly, I thought if I talked with them at length about their ideological views I would be a better predictor of what they would do and be than if I tried to talk about practical questions.

MR. RASENBERGER: True.

JUDGE SILBERMAN: So as an ex-ambassador to a communist country I was in a pretty good position to discuss that.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Well after those hours and hours of discussion I did come back and I recall reporting to Dick Allen (I don't recall that I spoke to Reagan directly on this or not) and telling him that three of the ones I had talked to were, I was certain, communists. They were kids—immature—but they were communists. And that included Ortega and Hussein and somebody else.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And the two others were not communists; but they were fools.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And they weren't going to last. And that turned out to be true.

MR. RASENBERGER: That's the case?

JUDGE SILBERMAN: I was right on the button.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Essentially the Sandinista Junta was communist.

MR. RASENBERGER: And that was borne out later?

JUDGE SILBERMAN: Yes. So that was an interesting experience.

MR. RASENBERGER: So that brings us up to the 1980 election. You had some contact with Reagan, not a lot, but got to know him somewhat.

JUDGE SILBERMAN: Yes. As I said, I spent a great deal of time with him in three or four meetings.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: In the summer and fall of '80 on foreign policy issues. He was an interesting character in some respects. After all that time with him I never had the impression that there was a personal connection. There was with George Bush. We had been friends for a long time. As a matter of fact, as an interesting sort of sidelight on that. Do you remember a Congressman by the name of Bill Steiger?

MR. RASENBERGER: Yes, from Wisconsin, yes.

JUDGE SILBERMAN: He and I were close friends and he died very young of complications caused by diabetes, in fact I don't think anybody knew that he had diabetes. He had been one of the early supporters of George Bush for the Presidency in 1980, and then he died late '78, or something like that. And I went out to the funeral and George Bush was there. George Bush, as they say, Number 41.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And he got me in the kitchen of Bill Steiger's house and he asked me to support him in his presidential race. And I said I am sorry George, I can't because I am going to support Ronald Reagan. And George Bush said, gee Larry, I didn't even know you knew Reagan, and I said, I don't. And he couldn't understand that.

MR. RASENBERGER: No? Sounds more anti-George than pro-Ronald.

JUDGE SILBERMAN: No, no, the point was, for George Bush, and we had known each other through the Nixon era, Ford era, personal relations were everything. He didn't have much interest or focus on philosophy or ideology.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: So he was sort of surprised that I would be supporting Reagan and not knowing him.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I was supporting Reagan because I believed what he was saying. Obviously I was more conservative than George Herbert Walker Bush.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But personally I liked George Bush very much. And even after spending all the time with Reagan I liked Bush much more than I liked Reagan personally. I mean I didn't dislike Reagan, he was a very interesting character. He didn't give much of himself; he was incredibly disciplined. Now in terms of these, there is an interesting point though. While I was going through these briefings I was also trying to wrap up the Midland deal. And I kept getting called out of meetings with Governor Reagan to deal with problems that were developing in the merger.

MR. RASENBERGER: Bank merger, yes.

JUDGE SILBERMAN: And I remember thinking at one point when I was called out of a meeting that you know some day I'll think about how funny it is that I'm being called out of a business meeting with somebody that may become President of the United States. When I came back to San Francisco, once Ricky asked me what was my impression of the two—George Herbert Walker Bush and Reagan. And I told her what I told you, that I liked Bush more but Reagan had a longer attention span.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: You didn't see his eyes glazing or any of that sort of thing? He was really listening?

JUDGE SILBERMAN: Yes or talking. Well, he would always keep his sense of humor, but I thought he had more focus than Bush and maybe even had a greater intellectual depth. I thought that was interesting given the fact that George Bush was a Phi Beta Kappa from Yale—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And Reagan had this image of being—

MR. RASENBERGER: A dunce from California.

JUDGE SILBERMAN: Right. But I'll never forget one meeting when I was with Gene Rostow and Paul Nitze. They had been Atlantacists from the beginning on NATO matters in their creation and at one point Reagan asked the three of us, how do I get leverage on our European allies dealing with the Soviets, you know they've always been trying to put themselves in the middle—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: How do I get some leverage there? And I thought Rostow and Nitze would jump out of their skins—they didn't like any question like that.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: I thought that was exactly the right question. It provoked an interesting conversation. So I came out of that experience—bottom line—with enormous respect for Reagan as a politician and less interest in him as a person, because I didn't think he cared much about any other individuals, which it happened turns out to be true.

MR. RASENBERGER: Very often.

JUDGE SILBERMAN: Well it was particularly true of him.

MR. RASENBERGER: Yes, I see.

JUDGE SILBERMAN: Other than his wife, I don't think he was ever close to anyone.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: Whereas George Bush was enormously interested in everybody and personally considerate, and so forth.

MR. RASENBERGER: That is a very interesting insight. Well, in any event, so Reagan got elected in 1980 and you are still with Crocker Bank but you were involved in some party activities after that—

JUDGE SILBERMAN: Well first of all, after the election I was asked to head the transition at both Justice and the CIA.

MR. RASENBERGER: Tall order.

JUDGE SILBERMAN: Well I was asked by two different groups—

MR. RASENBERGER: Oh, I see.

JUDGE SILBERMAN: In the Reagan apparatus. So I communicated back; I had been willing to do either, but decide which was more important, and so the answer came back—CIA. And there was some speculation at the time that they were going to ask me to be Director of Central Intelligence. So I spent a couple of weeks on the transition at the CIA. Once it became apparent that Bill Casey was going to be director of the CIA, that he was not going to get the job that he wanted to get which was Secretary of State—

MR. RASENBERGER: I see.

JUDGE SILBERMAN: I decided I wanted to withdraw because I decided this business of being head of the transition was a thankless position that didn't mean anything. People who headed a transition, and who did not end up running an agency, their views would be discarded by whoever came in and ran the agencies. It wasn't wise to try and do anything.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: So all I did was tell Stan Turner he was fired.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Which annoyed him no end.

MR. RASENBERGER: Okay.

JUDGE SILBERMAN: So after two weeks I broke my foot coming down the stairs in San Francisco and withdrew.

MR. RASENBERGER: I see. But then we have some other committees and things, there's a General Advisory Committee on Arms Control and Disarmament.

JUDGE SILBERMAN: Right. You know, are you familiar with the GAC?

MR. RASENBERGER: Not really, no.

JUDGE SILBERMAN: The GAC has been in existence for many years. It is an advisory commission and the members of which have to be confirmed by the Senate.

MR. RASENBERGER: Advisory to whom?

JUDGE SILBERMAN: To the President, to the Secretary of State, and to the director of the arms control agency. And I served on that committee with, amongst others, Don Rumsfeld.

MR. RASENBERGER: And was that a useful committee or a useful experience?

JUDGE SILBERMAN: It was an interesting experience. We spent a good deal of time looking at alleged Soviet violations of arms control treaties. We concluded that the Soviets had violated virtually every treaty that they had entered into. We demanded an opportunity to disclose that to the President of the United States. George Schultz was then Secretary of State. Both Rumsfeld and I were very close to him. He was desperate to avoid a meeting in which we

would tell the President this because there was an internal struggle about arms control, and from George's point of view, classic Secretary of State, the last thing he wanted was open disclosure of the fact that the Soviets were violating all the treaties. There was this mantra he had gotten Reagan to announce, or Reagan announced, which was "trust but verify." We are going to verify, we are going to seek much tighter verification. Well I remember we met for a couple of hours, Rumsfeld and I and the others on the committee, before we met with the President. Incidentally, they had no choice but to schedule a meeting I think in '83, early '83. There was a terrible battle going on between Richard Perle at Defense and Richard Burt at State.

MR. RASENBERGER: Yes, I remember that.

JUDGE SILBERMAN: Okay, over these arms control questions.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Ken Adelman may have been replacing Rostow as head of arms control I think at that point, but I can't recall for sure. In any event, we had the meeting and we prepared for it beforehand. And it was my job to explain in excruciating detail to Reagan so there couldn't be any mistake. Verification was a *non sequitur* if you had already concluded that the Soviets violated other treaties. Because it was like saying, I remember using the analogy, that you determine that John Doe has violated a number of laws, now the question is what are you going to do. Well, are you going to put more police on the street to make sure he doesn't violate new laws or are you going to take action under the justice system to punish him for having violated all the laws. I explained this in excruciating detail to Reagan. And Rumsfeld went on at some length, we sort of divided it up, to explain the violations.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: We had one picture of a Soviet submarine that it was bent in half which had been taken by a satellite. It was supposed to be destroyed. Well the fact that it was bent in half because it was a typhoon and it was a rubber boat—it was a phony.

MR. RASENBERGER: Oh is that—right.

JUDGE SILBERMAN: That really grabbed Reagan, I admit. But after we go through all that period and I go through my little song and dance, George is turning redder, and redder than a beet, although I think Weinberger was pretty sympathetic. And then Reagan looked at me straight in the eye and said, Larry this is really a wonderful report and that's why I am insisting on verification. We walked out and somebody, I don't know whether it was Rumsfeld or Graham—Graham was the chairman—said Jesus, that's idiotic, I mean, how can that possibly be. He looked and asked me and I was shaking my head because I was convinced looking in his eye that he knew god damn well it was a *non sequitur*, but he was not going to allow himself to be politically trapped. He didn't care if we went out thinking he was an idiot, but we was not going to get up and say to the American people, arms control was a mistake because the Soviets had been violating all these—

MR. RASENBERGER: Interesting.

JUDGE SILBERMAN: He didn't want to be boxed into that position.

MR. RASENBERGER: Right, very sophisticated.

JUDGE SILBERMAN: Incredible discipline. And you know what, he was right. Because he used the arms control process—

MR. RASENBERGER: Later on.

JUDGE SILBERMAN: To bring down the Soviet Union. So I was a little

stunned after that. I told that story to Morris when he was going to write his biography. I think one of the reasons why Morris had such trouble coming out with a book was because he could never figure out Reagan.

MR. RASENBERGER: Really?

JUDGE SILBERMAN: And also I don't think he liked Reagan's politics. That book he wrote is just a terrible book. It doesn't capture Reagan at all. Reagan is very, very, very disciplined, inside man, he did not reveal himself.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: It's going to take many years before you get an adequate biography of Reagan.

MR. RASENBERGER: Now that, of course, is a quality that serves Presidents well, often.

JUDGE SILBERMAN: Yes. I remember the last day he was in office he was interviewed by, I think it was David Brinkley. And Brinkley made a comment about his being an actor. And I'll never forget Reagan's response. He said, I cannot imagine being President unless you were an actor.

MR. RASENBERGER: Of course.

JUDGE SILBERMAN: Do you remember that?

MR. RASENBERGER: No I don't, but I mean it is when you think about the job, politics to some extent but the President especially. All right, so that the—

JUDGE SILBERMAN: There's a funny story about his asking me to be a judge.

MR. RASENBERGER: Oh.

JUDGE SILBERMAN: Do you want to get to that now or— ?

MR. RASENBERGER: Well yeah.

JUDGE SILBERMAN: During the period of 1981 to 1985—

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

MR. RASENBERGER: New Side A, please continue.

JUDGE SILBERMAN: I spent even more time on the defense policy board which was an organization set up by Cap Weinberger and Fred Ikle. Fred Ikle being the Undersecretary of Defense for Policy.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: To advise Ikle and Weinberger concerning various strategic policy issues. There was a wonderful group that included such people as Ambassador Sy Weiss, Albert Wohlstetter, John Deutsch who was then provost at MIT and had been, I guess, been Deputy Secretary of Energy under Carter, and of course went on to do various things in the Clinton Administration. Eli Jacobs was an advisor to various Republican Administrations particularly in the national security intelligence field. Paul Wolfowitz who was then an Assistant Secretary of State, Dick Armitage—Richard Armitage—is now Deputy Secretary of State was involved, I think he was a staffer, he may have been Assistant Secretary of Defense, I can't recall. Jim Roche, who is now Secretary of Air Force, was working for Ikle and providing some staff help to this group.

MR. RASENBERGER: A committee of outsiders, was it a federal advisory committee?

JUDGE SILBERMAN: It was a mixture of outsiders and insiders.

MR. RASENBERGER: Yes, I see. To advise—

JUDGE SILBERMAN: And interestingly enough, you're so shrewd. Because it is kept very, very secret and the reason it turns out that it was so secret is they were desperate to avoid FACA—the Federal Advisory Committee Act. And it never became public I think until probably around '85 when I left and became a judge.

MR. RASENBERGER: I see. But who were you giving advice to?

JUDGE SILBERMAN: The Secretary and the Undersecretary for Policy.

MR. RASENBERGER: And it had been organized at whose insistence, the Secretary's or the White House?

JUDGE SILBERMAN: The Secretary or the Undersecretary, oh it was Defense, strictly Defense.

MR. RASENBERGER: Oh, I see.

JUDGE SILBERMAN: And it was very sensitive stuff. It was—

MR. RASENBERGER: So this was Weinberger?

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: Called you in and called this committee together, said I want the combined wisdom of you people?

JUDGE SILBERMAN: Right. And some of the people were in the government in various other positions.

MR. RASENBERGER: Probably was very useful—

JUDGE SILBERMAN: I think. It was very useful I think, and one of the things we focused on was strategic defense.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: We were much more sympathetic to that than the Defense Department generally.

MR. RASENBERGER: Is that right?

JUDGE SILBERMAN: Yes. During that period of time I think we had meetings about once every month or so and as a consultant I was entitled to compensation for it. I waived the compensation. I was a well-paid executive at Crocker Bank and then a partner.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But my son was then a naval officer on a ship, a frigate, gunnery officer, he had at one point indicated he would love to get hold of a flight jacket because they were warm to wear on standing watch. So I told Ikle that for compensation all I wanted was a Navy flight jacket sent to my son. And sure enough, Jim Roche, now Secretary of the Air Force, arranged for it to be sent out there and it arrived at his ship the USS *Badger* from the Secretary of Defense to Lieutenant JG Robert Silberman. And of course he was also the communications officer. Everybody thought why is this, you know this comes to the ship, this is a communication, but why is it directed personally to him. He opened it up and there's this flight jacket. Everybody said, what's that?

MR. RASENBERGER: [Laughter.] That gave a little standing.

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: There was something else called the State Department Commission on Economic Security and Assistance.

JUDGE SILBERMAN: Yes. That's something George Schultz set up when he

was Secretary of State, and I think he appointed Lane Kirkland, Frank Carlucci, and me—Carlucci was chairman and Kirkland and I were co-chairman or something like that, of that commission. And it was to look at government-to-government economic transfers in various fields and to try to make a determination what was effective and what was not.

MR. RASENBERGER: I see. There is also something called the U.S. Foreign Intelligence Act Court of Review. I don't know exactly where I read of that or where that enters into your history if—

JUDGE SILBERMAN: The Foreign Intelligence Surveillance Act Court interestingly enough is a court on which I now sit.

MR. RASENBERGER: Oh really.

JUDGE SILBERMAN: As one of three appellate judges, actually you sit on the appellate panel. This is a court that was created under at the instance of the Carter Administration to provide a judicial approval of intrusive methods of trying to gain intelligence from entities in the United States who are controlled by foreign powers, etc. It used to be done by the Attorney General and then, partly after a political fight on it, the Carter Administration recommended and the Congress ultimately passed legislation creating this court. There has been some occasional attention to it.

MR. RASENBERGER: It's largely in confidence though.

JUDGE SILBERMAN: It's all secret. And it's a one-party court because the only person that ever appears is the government seeking judicial approval for—

MR. RASENBERGER: I see.

JUDGE SILBERMAN: You know the classic idea—the black bag jobs.

Remember you go into a foreign embassy to get some intelligence, obviously there are various electronic devices.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Well the amusing aspect of that is I testified on behalf of Republicans who were opposed to the legislation. I testified against the legislation in the House, it had passed the Senate but there weren't really extensive hearings. I testified against it, arguing it was a very bad idea to give this to judges, it didn't suit them, it wasn't an adversary proceeding, it was a mistake.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: It even had, I thought, dubious constitutionality. The House, based on my testimony, voted it down. And I think it was Tip O'Neill called them back in session and got it passed the second time. And so there is a great irony that Rehnquist has appointed me on the appellate panel of this court. Even more ironic, one of the reasons, as he explained to Ricky, why it was a perfect job for me is that it took advantage of all my intelligence, classified background. And the appellate panel of this court has never had an appeal, never a single case.

MR. RASENBERGER: Oh the way it works you can appeal the decision of the three judges to the—

JUDGE SILBERMAN: No, no, no there's only one judge. The presiding judge is Lamberth. I think there are six or seven other district judges who are assigned to it and they rotate. But the only party that could appeal is the government.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: The targets never know that they're targeted.

MR. RASENBERGER: No, no, of course.

JUDGE SILBERMAN: And the government has never appealed. I don't know what goes on down there. So I sat for the last four years as a member of that appellate panel. I had to go through another FBI-Rehnquist's insistence before he appointed me, and nobody who has ever sat on that court has ever heard a case.

MR. RASENBERGER: Are there, just as a matter of curiosity, are there standards in the Act for judges to use to guide them in deciding these cases?

JUDGE SILBERMAN: You will have to either look at my testimony or look at the statute and see. My own view is the standards are not susceptible to judicial determination. But it doesn't matter because I'll never get a chance to rule on the constitutionality because nobody can challenge it.

MR. RASENBERGER: Right. Anyway, it seems to work.

JUDGE SILBERMAN: Well, you remember the hullabaloo about, what was it, the Chinese-American physicist who was alleged to have been giving information to the Chinese—

MR. RASENBERGER: Wen Ho Lee.

JUDGE SILBERMAN: And the FBI had wanted to search his computer.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And the Justice Department said it would never get by the special court.

MR. RASENBERGER: Oh I don't remember that; that's the court they were

talking about.

JUDGE SILBERMAN: The Foreign Intelligence Surveillance Court.

MR. RASENBERGER: Very interesting. All right so now we are up to your appointment to this court, and before we get into life on the court, anything about the appointment process that is worth mentioning?

JUDGE SILBERMAN: Well one story I think you will love. Someone had convinced President Reagan, in my judgment foolishly, to actually call on the phone all of his federal judicial appointments to ask them to serve, to tell them that—

MR. RASENBERGER: To personally ask them.

JUDGE SILBERMAN: Personally—after they've gone through the process. You know—

MR. RASENBERGER: I see, yes.

JUDGE SILBERMAN: I am not sure whether they did it only with appellate judges or whether they did it with all district judges. I don't know, but they did do it with all appellate judges. He also did the same thing with all ambassadors. This was very dumb. And is to be contrasted to Jack Kennedy, who made it a point of calling his assistant secretaries, undersecretaries, and so forth. Now Kennedy was much shrewder about that. Reagan never had much interest in running his bureaucracy—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: He ran it through his speeches. In other words, he would formulate policy that forced people to follow it by giving speeches, but he didn't care about running anything, and he didn't really care about the people in this administration—they were sort

of interchangeable, he didn't pay attention to them—

MR. RASENBERGER: I see.

JUDGE SILBERMAN: You know, as witness the switch of Kennedy, I mean Reagan, and Baker—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Bizarre. But Reagan cared desperately about ideas, desperately about policy, but not about people. He didn't realize that people often are policy.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Of course Kennedy understood how important it was to have a personal loyalty coming from the Assistant Secretary of Treasury, or the Assistant Attorney General. But Reagan thought an ambassador and a judge were more prestigious so he would call them. The reason it was silly is judges, once they are appointed, they owe no loyalty to the President.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And so it's a waste of his time, and it takes a lot of time. And ambassadors, the truth of the matter is that theoretically they represent the President personally rather than the Secretary of State—

MR. RASENBERGER: Theoretically—

JUDGE SILBERMAN: There are only a few ambassadors—of which I am one—who ever tried to assert that power.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And most of them, for the most part, are reporting to a

desk officer in the State Department—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: So it's silly. But I did get the call from Reagan. And remember I had spent a lot of time with Reagan.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I could tell as he was going through the spiel that he didn't sound like he knew who he was talking to, and at some point, I said, something to the effect, you know, I'm Larry Silberman, you know, identifying—

MR. RASENBERGER: Yeah—remember me.

JUDGE SILBERMAN: I can't remember what I said. But his response was wonderful. He said, You're that Larry Silberman, I didn't even know you were a lawyer.

MR. RASENBERGER: [Laughter.] Perfect.

JUDGE SILBERMAN: Because he knew me as a banker.

MR. RASENBERGER: That's right; that's right. So you got sort of the canned talk rather than—

JUDGE SILBERMAN: No it was strictly canned, he was reading it off a card.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And I thought it was so amusing.

MR. RASENBERGER: Right. Well now I'm sure when you accepted the appointment—

JUDGE SILBERMAN: Yeah I remember what he said, Mr. Silberman, and I said, no it's Larry Silberman and—

MR. RASENBERGER: Yes, I see.

JUDGE SILBERMAN: And then he said, “You’re that Larry Silberman—I didn’t know you were a lawyer.”

MR. RASENBERGER: [Laughter.] When you accepted the appointment as a judge I assume you—I was starting to ask you whether you appreciated when you took the judgeship that it would be a dramatic change in what happened when you went to the office, so to speak. I mean at least the presumption that I have always had is that being a judge is a much more lonely job, where people do not call you. You take the cases that come along and you do your thing and you interact with colleagues but it is by no means the same exciting kind of interactive existence that you had had in all of these various other roles. Did that worry you at the time, and has it turned out to be better, or worse, or irrelevant since?

JUDGE SILBERMAN: I can’t recall whether we discussed when I was Deputy Attorney General the fact that, and even as Undersecretary of Labor, that the post of the Ninth Circuit had been offered—

MR. RASENBERGER: Yes we did.

JUDGE SILBERMAN: Yeah. So I thought hard about the judicial life and ultimately decided when I was Deputy Attorney General I was too young to do that then. This time around the ones who were influential in persuading me to be a judge were Nino Scalia, particularly Nino, Bill Rehnquist, because he had first suggested it—

MR. RASENBERGER: Was he?

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: Scalia was on the bench at that time?

JUDGE SILBERMAN: On this bench.

MR. RASENBERGER: On this bench, yes.

JUDGE SILBERMAN: Rehnquist was on the Supreme Court. Bill and I had lunch when, Bill Rehnquist and I had lunch when I moved back from San Francisco and he was the first one to say, you know, why don't you think about being a judge. You know at this point I had been god knows how many things—

MR. RASENBERGER: You're right.

JUDGE SILBERMAN: It was the furthest thing from my mind. And there was a good deal of speculation in '84 that, in fact some press speculation, that Bill Casey would leave the CIA and I would be asked to come in then. And I, that was one job that I was thinking that I would still be interested in. But when Bill Rehnquist first mentioned being a judge I began to think about it. And I have always been a little ambivalent, part of me has, as is obvious was very much of an activist, but part of me had been attracted to the scholarly life, or this time at AEI, my writings and so forth.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And ever since my law school days being an appellate judge, a federal appellate judge, has always seemed very attractive to me. So Scalia, perhaps my closest friend, had suggested that I ought to think seriously about it; he thought that I would love it. Now interestingly enough, Bork, who was also at that point a close friend, but he and Scalia had opposite reactions to becoming a judge. Scalia loved it, and Bork felt much more a sense of isolation. Strangely enough, they are both academics. Nino turned out to be absolutely right. I was, the more I thought about it the more I became convinced that, at the age of 50, I was

prepared toward a scholarly life. I loved government. Ricky used to tease me and say you can't be a permanent cabinet officer.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Or any other job. You can be a permanent judge. But the idea of withdrawing from the political world seemed more and more attractive to me. And therefore when I did become a judge I liked it from the start—I loved it. What surprised me was how little judges all in one building have to do with each other. How little time is actually spent with each other. And that was partly in a function of the time when I first came, I think we spend a little more time with each other now. But still it's a rather isolated life. You spend more time with your law clerks than you do with other judges.

MR. RASENBERGER: Yes, I was going to say, you interact all the time with your clerks and that's stimulating for both sides perhaps.

JUDGE SILBERMAN: Yes, I think so. But I have not missed the hurly-burly. And I propitiate desires that I have to discuss and express views on a broader world than the judicial world, which includes everything from economics to foreign policy to politics, so forth, at dinners in Washington, with friends.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: And you know at private dinners you can pretty much talk about anything you want. You don't talk about cases coming before the court. And I will disclose another matter. A number of journalists will call me—friends I've had over the years—to discuss with me various events that are going on, background, just my view.

MR. RASENBERGER: Yes, your take on them, sort of.

JUDGE SILBERMAN: Yes. And gives me an opportunity to express views.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: So I don't feel quite so isolated.

MR. RASENBERGER: No, and you do keep up with things obviously, that's because of all your varied background. You are more interested in what appears in the paper and more connected to it perhaps. Well, look at your friend Mr. Rumsfeld for example.

[END TAPE II - Side A - end of 1-25-02 interview]