Today is Wednesday, February 6, 2002, we are continuing today the oral history interview of Judge Laurence Silberman. The interviewer is still Ray Rasenberger.

MR. RASENBERGER: Judge Silberman today I think we can wind this long set of interviews up. We have been through your distinguished and varied career right up to the time you had gone onto the bench, and of course that's where you have been since 1985. And I am sure any reader would be interested in your views on many legal issues, and I am sure any reader can find those views in your written opinions and so we need not delve into them, but as I look at some of your writings, and opinions, and speeches, there are certain themes that seem to emerge and I thought I'd ask you if you would like to expound a little bit on some of them. They come under various labels. One of them, for example, is called Judicial Activism or Judicial Restraint whichever side of the coin you are coming at it from. And some of your opinions deal with that. I call your attention particularly to a recent one I noticed that was issued on December 21, 2001, and your concurring opinion ends with a remark that, "Supreme Court decisions particularly in the last century have resembled more the periodic declarations of a continuing constitutional convention than efforts to read the Constitution as a body of positive law." Would you like to sort of summarize your views on activism, the views that underlie that particular statement, anything else you want to say on this subject that you either have said or haven't said already?

JUDGE SILBERMAN: Well, I have written a lecture which I gave at various law schools in 2000, the title of which is "Will Lawyering Strangle Democratic Capitalism: A Retrospective." That was the title of an article I wrote back at AEI in 1977 or '78 and this was an opportunity to look back 25 years, approximately, and see how the trends that I decried in that original speech had either continued or discontinued. I concluded they had continued, in that

speech in which I analyze the effect of the growth of the legal profession on American society as a whole and on American lawyers. I reiterated the point I made much earlier–an earlier draft of the speech–which is that judicial activism, particularly practiced by the Supreme Court, was an engine to the growth of the legal process in the United States and a crucial factor which explains the enormous and disproportionate growth of the legal profession. In that speech I give my own definition of judicial activism. The concept of judicial activism, however, is hardly new. When I was at Harvard Law School between 1958 and 1961 virtually all of my professors were of the view that judicial activism in our democracy was illegitimate.

MR. RASENBERGER: Legitimate or illegitimate?

JUDGE SILBERMAN: Illegitimate.

MR. RASENBERGER: Illegitimate, yes.

JUDGE SILBERMAN: That view stemmed from Felix Frankfurter, who as you know was a professor at Harvard Law School, and as a Supreme Court Justice he on occasion deplored judicial activism. I hasten to say, on occasion he practiced it himself, which has been something of a disappointment because he and his predecessor Oliver Wendell Holmes were symbols of judicial restraint. It's interesting that these two figures are symbols of judicial restraint because Holmes, as you surely know, was a profound political conservative who nevertheless dissented repeatedly against opinions of the Supreme Court which were animated by a conservative majority's efforts to resist legislative efforts to redistribute income. Thus, Holmes was an opponent of such cases as *Lochner v. New York*. Frankfurter, on the other hand, was a political liberal who found himself often in opposition to left-of-center majorities of the Supreme Court seeking redistribution policies. By redistribution I mean redistribution of economics or

political power. So these two have been heroes of mine although I hasten to say Frankfurter, in particular, often engaged in judicial activism himself. Perhaps the classic example is *Rochin*, the constitutional decision in which he reached out to condemn activities that "shocked the conscience of the court" without regard to strict constitutional interpretation. That was my background with respect to judicial restraint. I never changed the views that I developed at Harvard Law School. It has always seemed rather simple to me that in a democracy federal judges appointed for life may not allow themselves, or should not allow themselves, to make policy judgments but should do their very best to interpret the policy judgments Congress makes and turns into legislation as well as the policy judgments that are embodied in constitutional law, that is to say the Constitution. Now policy judgment is a judgment on which there is a degree of discretion. I do not believe judges legitimately exercise the authority to make such a judgment. That leads me to the view, and I've thought about this a good deal, that it's crucial for a judge to proceed on the basis that there is a theoretical right answer to every case. To be sure, judges are imperfect, as you know, and it may be that judges often make mistakes and do not get the right answer. However, to believe that your only legitimate purpose is seeking that right answer prevents judges from drifting off into discretionary policy judgments. By right answer I refer to the answer to the case which is driven by normal legal materials, statutes, prior judicial decisions, which, using logic, will lead you to the "right answer." In that respect, Holmes, one of my heroes, uttered what I think in hindsight was an unfortunate comment when he said the life of the law was not logic it was experience. First of all, he was talking about the common law and under the common law judges did make law. But we, the Federal Judiciary of the United States, have rejected the common law notion; we operate with respect to our decisions in accordance with

statutes and the Constitution. And I might say that I wholly agree with Jefferson's views when he, back in the latter part of the 18th century and early part of the 19th century, condemned common law judges and the common law process as no longer appropriate when you had robust legislatures and a robust Congress. I think he was quite correct.

MR. RASENBERGER: There are times as you know when, let's take a statute rather than the Constitution, when there are gaps that don't provide answers to questions. Sometimes those gaps are deliberately left by Congress in the interest of getting the legislation enacted without having to face up to certain issues. How does a judge committed to judicial restraint deal with those kinds of situations?

JUDGE SILBERMAN: First of all I don't think I've ever seen a statute where, even if badly drafted and even if there are ambiguities or gaps, one could not reason through the materials to determine what the right answer is to a case presented under that statute, even one in which there is some measure of ambiguity. If you see a compromise in legislation, which is typically true, and the issue arises you can look and figure out where the line of compromise was and extend it out and see where that issue is–which side of the line it's on. Now, beyond that, of course, there are the cases coming from the agencies. The Supreme Court, to a certain extent, has gone a long way to reduce judicial activism in its famous *Chevron* opinion of 1984 in which it held that federal courts, district courts and courts of appeal, reviewing agency action and faced with a case that deals with an ambiguity in a statute or a gap should defer to a reasonable agency interpretation of that statute rather than puzzle through the process as I described. That opinion, *Chevron*, is, in that respect, a very important opinion supporting judicial restraint. It is rather amusing that it was written by John Paul Stevens who was hardly a devotee of judicial restraint

and nobody hates the *Chevron* opinion, the *Chevron* case, more than John Paul Stevens who would give his right arm to reverse it.

MR. RASENBERGER: [Laughter.] Yes I've read a talk or an article you did on *Chevron*–I found it very interesting. We will go to the constitutional arena and judicial restraint. Obviously the court has had to flesh out the Constitution–courts I should say–have had to flesh out the Constitution over these years in ways that the drafters could not even possibly have conceived of, and it involved policies.

JUDGE SILBERMAN: You see I don't think that's right. I've read a great deal about the Framers of the Constitution and, although the exact facts, technology, etc., that would cloth a case in 2000 could not have been anticipated exactly by the Framers, the nature of the controversy wouldn't have looked all that strange to them. They were rather far-seeing people. But beyond that, I think it is indisputably correct that for much of the Supreme Court's history the majority of the Court hasn't even tried to figure out what the Constitution meant with respect to particular issues–it simply invented new constitutional provisions to cover policy objectives they wished to pursue. And I think that has been a horrifying development and is understandable in terms, as I have written, of public choice doctrine–it's power. They have sought power. And they have aggrandized themselves and the federal judiciary and American lawyers. There are certain provisions in the Constitution that necessarily might change in application with technology and developments like the notion of a reasonable search. One talks about telephones and movies and so forth—

MR. RASENBERGER: Computer hard-drives.

JUDGE SILBERMAN: Computer hard-drives. You're talking about

technologies that were not available to the Framers, but the principles can be extended out, principles that are embodied in the Constitution could have been extended out, but I think there has been much too much proclivity on the part of American lawyers, American law professors, who are perhaps the most corrupt group of all, and judges to say: "Oh well we can fill in gaps, it has to be fleshed out so, let's go, let's have fun, let's do what we think a black-robed elite ought to be able to do."

MR. RASENBERGER: [Laughter.] Well just to take two illustrations. What you're saying, I gather, you would say for example Marshall's initial decision that the Court had the power to declare acts of Congress unconstitutional, and secondly the Court's determinations, I guess you could say, that the Fourteenth Amendment basically applies most of the Fifth Amendment to the states–that both of those were logical extensions of the intent of the Framers that—

JUDGE SILBERMAN: Certainly the first. Certainly the first–I agree with you on that. I think that implicit in the very language of the Constitution is the notion of judicial review. Although having watched it over 200 years or thought about it over 200 years of American history if I were a Framer myself I would preclude judicial review since I think it's—

MR. RASENBERGER: You mean the ability to declare an act unconstitutional?

JUDGE SILBERMAN: Yes, yes I think I would because the cost has exceeded the benefits. But in any event, I think it was a logical interpretation of the Constitution. I also think probably you're right about the interrelationship of the Fourteenth and the Fifth. But as a perfect example, a case holding that the Fifth Amendment, the case District of Columbia—

MR. RASENBERGER: Which case is that?

JUDGE SILBERMAN: The one holding that the equal protection component of the Fourteenth is included in the due process clause of the Fifth in order to declare segregated schools in the District of Columbia unconstitutional. It was a political judgment, it had no legal validity.

MR. RASENBERGER: Would that be your feeling about *Brown v. Board of Education*?

JUDGE SILBERMAN: No. In *Brown v. Board* I thought was a correct result although I thought the reasoning was ridiculous and long. All that was necessary was to take Justice Harlan, the original Justice Harlan's dissent in *Plessy v. Ferguson*, which I thought was absolutely correct. You may recall, Harlan wrote that separate but equal was an illusion, that when the government set up separate schools for blacks it could not help but be imposing a government-sponsored stigma on blacks. I mean I thought it was rather a simple proposition and we would be much better off if they had simply taken his dissent and put it into Supreme Court law.

MR. RASENBERGER: Do you think there's a term "original intent," which you have heard many times, do you think that sums up the direction that one would go in looking for an answer to some of these difficult issues of constitutional interpretation or is that just part of the story?

JUDGE SILBERMAN: I don't like the term "original intent." I prefer the phrase "original meaning." I think when interpreting any legal document whether it be a statute, a contract, or the Constitution, one is bound to consider the meaning of words used at the time that they are adopted. I don't think the fact that the Constitution was adopted over 200 years ago

gives any legitimacy to the notion that you can change the meaning of the words as time goes on. The Framers provided a method whereby you can amend the Constitution. It is a difficult process, it's true, but they never contemplated, and I think it's an outrageous usurpation, that the Supreme Court justices would be authorized to amend the Constitution by judicial decision.

MR. RASENBERGER: Right. Do you have sort of a capsule view of the Supreme Court's Commerce Clause jurisdiction in this respect?

JUDGE SILBERMAN: Oh, that's hard. I think some mistakes were made back in the 19th Century, but you're probably thinking more about the more recent cases holding that there is some limit to the Commerce Clause power of Congress—

MR. RASENBERGER: Or the cases that went pretty far in the direction of holding there was no limit.

JUDGE SILBERMAN: I beg your pardon?

MR. RASENBERGER: I mean in earlier cases when it really expanded the Commerce Clause.

JUDGE SILBERMAN: Yes. That's true. And I think a fair reading of the Constitution would lead one to the conclusion that there are limits. Where the limits are is not an easy question to determine, but there are limits. And it's interesting that the present court in struggling to articulate those limits is accused of judicial activism by those who never openly stated but implicitly believe there shouldn't be any limits. Well, that doesn't accord with the language of the Constitution.

MR. RASENBERGER: Right. You mentioned Holmes and Frankfurter as advocates of judicial restraint, which I think everyone recognizes to be the case. Are there any

federal judges of more recent vintage that you would put in that category?

JUDGE SILBERMAN: Yes. But I don't think I would like to name them.

MR. RASENBERGER: All right, that's fine.

JUDGE SILBERMAN: But I would say, one of the things that has disappointed me terribly about being a judge is the recognition as to how few judges and justices are really believers in judicial restraint. I often have struggles with my conservative colleagues who I think sometimes are guided more by Adam Smith than the Constitution or the statutes, and I also have disagreements with my so-called liberal colleagues who seem to be driven by other goals or objectives and in the federal courts around the country I find relatively few judges really committed to judicial restraint. Now it's interesting in a way that the D.C. Circuit as a whole is probably the best court of appeals on this basis if you're judging by virtue of judicial restraint. And that is the reason why our case load has dropped so precipitously or dramatically over the last ten or fifteen years because as you know with respect to most federal statutes involving jurisdiction in the federal courts, that is to say statutes which provide for judicial review of agency action in the court of appeals often provide that a company, union, individual, etc., may petition for review either in its home circuit or the D.C. Circuit.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And for many years, even today I suppose, the D.C. Circuit has a vastly disproportionate number of administrative law cases as compared to other circuits. However, over the last ten years we have seen increasingly those seeking a conservative policy outcome are tempted to go to places like the Fourth Circuit or the Seventh Circuit and those seeking a left-of-center liberal policy outcome go to the Ninth Circuit or perhaps the

Second Circuit. I had an interesting experience at an ABA meeting in this respect in which Nino Scalia and I questioned a group of lawyers as to how they decide which circuit they go to on appeal, this was a section of the ABA I think called the Public Utility Section, which is composed of lawyers who do FCC, FERC and various other kinds of high-value litigation. It is a very sophisticated portion of the bar, and these lawyers, one of them was a classmate of mine, one of them was a classmate of Nino's, were ducking and jiving and didn't want to answer the question. We finally pressed hard enough that one of them fessed up and said, look if we don't like the policy of the agency we will go to the Eighth Circuit or the Fifth Circuit or the Ninth Circuit or the Seventh Circuit or the Fourth Circuit. If we have a good administrative law, *i.e.*, a good legal claim, we will go to the D.C. Circuit.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: So I take some satisfaction of the fact that the D.C. Circuit as an institution is perceived, and I think accurately, as more committed to judicial restraint perhaps than other federal courts of appeal.

MR. RASENBERGER: Do you think *Chevron* has contributed to that also?

JUDGE SILBERMAN: Yes, yes.

MR. RASENBERGER: I don't want to get too much into particular cases, maybe not at all here, but I can't resist asking whether you have any thoughts you want to express on *Bush v. Gore*.

JUDGE SILBERMAN: Well I will. If you ask me. I wasn't willing to express any views on it for about six months because it is the only case that ever came to the Supreme Court or my court, in which I was somewhat familiar, and in which I didn't trust my own

judgment. It cut too close to the bone. However, having thought about it a good deal since then, read some material, including Dick Posner's book, which I'll go back to in a moment, I think that had I been on the Supreme Court I would have joined the concurring opinion written by Justice Rehnquist, which I think was correct. I do not think the majority opinion was correct. I do not think the Equal Protection Clause could be extended, should be extended, legitimately as far as the majority went, and of course there were seven justices who adopted that notion. But I would not have joined that opinion, but I did think the concurring opinion was correct. By the concurring opinion I am talking about Justice Rehnquist. I do think it was a violation of particularly Article II for the Florida Supreme Court to have so dramatically changed the rules and I would of phrased it rather simply: that in interpreting a statute in a post-election context, a post-election presidential context, a Supreme Court of a state violated the Constitution if its interpretation of the statute was an unreasonable one. Similar to *Chevron*. And I don't think there is any doubt that the Florida Supreme Court's interpretation was unreasonable, as three members of the Florida Supreme Court itself pointed out. And so then I, that's the way I would have decided that; I thought that was correct.

MR. RASENBERGER: You've mentioned Richard Posner's book. I gather his view of why it was correct is not your view.

JUDGE SILBERMAN: Well I think he would agree with the formulation I just gave although he wasn't as critical; he was somewhat critical of the equal protection notion. But the difference between the two of us is he thinks there was great discretion and he thinks the Supreme Court's decision is a triumph of pragmatism, which is his great philosophy.

MR. RASENBERGER: Yes, yes.

JUDGE SILBERMAN: And I think in that respect his book is rather strained. To try to defend his own philosophy of pragmatism, with which I disagree, Posner sees himself as a linear extension of a British common law judge which you just get up there on the bench and come up with what you think is right answer politically, as a policy matter.

MR. RASENBERGER: Right. Let me ask you about a couple of areas of constitutional law that keep coming up. I'm thinking of the whole question of separation of powers and I have in mind your opinion in *Morrison v. Olson*. And also things that I have read that you have said about regulatory agencies. This whole area, is there any sort of generalization you can make about your philosophy on separation of powers.

JUDGE SILBERMAN: Well, when I wrote *Morrison v. Olson*, which incidentally is the longest opinion I've ever written, 88 pages, I thought the answer we set forth, Judge Williams joining me, was the correct analysis, the correct answer to that issue as it stood. And even the Supreme Court's opinion which reversed, tacitly admitted as much by using Justice Rehnquist's famous phrase, it is our present considered view, as in effect he reversed the logic of *Humphrey's Executor v. Myers*. That reception in the Supreme Court was a great disappointment to me. I suppose my greatest disappointment as a judge. I find it rather amusing that years later many people, a good part of the bar, the majority of law professors, who were incidentally either critical of my opinion at the time or even actually argued against it like Professor Tribe, have now come to the view that I was right. And I am asked on occasion does that give me a sense of solace. My answer is absolutely no. Because what that simply reflects is a perception on a part of a liberal democratic group of lawyers and law professors that that device, the Independent Counsel Statute, could be used and has been used to torture Democratic presidents as well as

Republicans. So long as it was only the latter rather than the former it was perfectly all right.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: I have on occasion, including at a dinner at Harvard Law School, used the following historical analogy. With a group of Harvard law professors I asked the following hypothetical: In 1949, a Republican Congress after legislative hearings revealing communist infiltration in the Treasury and State Departments, such people as Alger Hiss and Harry Dexter White, etc., passes a statute called the Loyalty in Government Act instead of the Ethics in Government Act. The Loyalty in Government Act authorizes a three-judge panel of the D.C. Circuit, with one actual D.C. Circuit judge, to appoint an independent counsel under circumstances similar to the Ethics in Government Act to investigate and prosecute violations of espionage statutes. The findings of the committees that draft this legislation find that the Democratic administration has a conflict of interest because there are too many senior officials who have been shown to be communists or communist sympathizers. I have hypothesized had that statute been passed and challenged and gone to the Supreme Court of the United States, it would have been held to be unconstitutional on exactly the grounds I articulated in my opinion and Scalia joined in dissent. By a vote of nine to nothing.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: I even went—

MR. RASENBERGER: You mean the *Morrison v. Olson* grounds.

JUDGE SILBERMAN: Right. Separation of powers.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: The whole apparatus; the whole nine yards. Nine-zero.

Would have been held unconstitutional. If you took the present Supreme Court and put them back in history for that point it would have been held unconstitutional eight-to-one.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: The one who would have dissented is Rehnquist. He hated communists.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: So much he would have let his policy views—

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Now I gave that hypothetical to a group of Harvard law professors at a dinner. They all agreed that I was absolutely correct that that case would have been 9-0 on exactly the grounds I articulated in *Morrison v. Olson*. I was rather amused that one professor was trying hard to figure out how he could make, I think it was Nesson at Harvard Law, how he could make a distinction between the loyalty in government and ethics in government. But that wasn't very persuasive. It was obviously policy driven. I have used that hypothetical on occasion. No one disagrees with me.

MR. RASENBERGER: That's a good one. Well you could say that driven by pragmatism is a version of driven by policy.

JUDGE SILBERMAN: Of course. That's exactly correct. That is exactly my view. It's interesting that in the number of cases that I have decided that have gone to the Supreme Court, either on direct review or because its gone up, in a sense, because there is another case contrary to that that went up—

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Someone asked me how, what my batting average is. And my response is, the Supreme Court is batting about 750.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: I said I don't think I've ever been wrong.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: Of the cases I've been reversed, other than *Morrison v. Olson*, my opinions have been to the left of the majority of the Supreme Court.

MR. RASENBERGER: Really.

JUDGE SILBERMAN: But I thought I was following a statute or prior Supreme Court decision.

MR. RASENBERGER: Right. Are there any other opinions–I know *Morrison v. Olson* was not only your longest opinion but in some senses your strongest opinion in terms of jurisprudence–any other opinions of yours here on the D.C. Circuit that you consider particularly significant in terms of from anything, from the effort you put into them to the effort that the Supreme Court had to put into those issues?

JUDGE SILBERMAN: Oh gosh Ray, there's a lot.

MR. RASENBERGER: Yeah.

JUDGE SILBERMAN: One that's very much in the news today because of the potential litigation that's about to transpire between the Comptroller General and the Vice President is the Hillary Clinton case, in which I wrote the opinion holding that the Clinton Administration was correct in rejecting the notion of the Federal Advisory Committee Act applied to the President's health care task force. And that opinion not only interprets the statute,

which is a very close question, but also makes clear that the constitutional question is a very serious one, which is one of the reasons why—

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And the constitutional question of course deals very much with presidential power. There are a number of opinions in the communications area dealing with telecommunications, FCC cases come up. There are a number of labor cases, I teach labor law at Georgetown and a number of my opinions are in the labor law casebook. Perhaps the most important one was the one a few years ago holding that President Clinton's executive order banning replacement of strikers on the part of government contractors was in excess of his powers: in a sense unconstitutional because in conflict with the National Labor Relations Act.

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

JUDGE SILBERMAN: There have been a number of administrative law cases which I've written which are of some importance I guess. And there is one constitutional case which was rather noteworthy because it was a hot political issue at the time, it still is in some respects, there was a question of whether it was constitutional of the Navy to discharge an officer on grounds that he had declared himself a homosexual, which was an en banc opinion of the court. Actually I've written a number of en banc cases for the court because fortuitously I was the most senior so-called conservative so it came to me assigned.

MR. RASENBERGER: I see. Do you think the en banc procedure is used about the right amount of time?

JUDGE SILBERMAN: Yes. When I originally came on the court I actually

supported the de-en bancing of some cases because I thought we were overusing the process and it was causing too much tension, but now we are pretty much down to one or two a year and that's manageable. We are fond of saying the Supreme Court gets paid to sit en banc; we don't.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: And the en banc process is enormously time-consuming.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: So it should be reserved for extreme cases.

MR. RASENBERGER: Let me ask you a little bit about the concept of federalism, that is state versus federal powers. Would you say you are in basic agreement with where the Supreme Court has been going in the last decade or so in that area in terms of the balance that they seem to be trying to strike between state and federal power?

JUDGE SILBERMAN: I haven't focused as hard on that issue–looked carefully at it. To tell the truth, after the first ten years on the court I became so disappointed with the Supreme Court opinions that I don't read them unless I have to with respect to a particular case before me. I have become enormously disenchanted and cynical about their opinions for this reason: Typically a number of them do not write their opinions; their clerks write their opinions. And one of the things that's crucial in my judgment about judicial opinions is that judges should write at least the analysis in every opinion. I have tried in the vast majority of my opinions–actually to write the analysis because it is only by writing that you can be confident that you have reasoned through a case.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: Many of the Supreme Court justices, a number of them,

do not write their own opinions, they just vote on the results, and it's the political or policy result. And they are not bound by the analysis; sometimes even if it's their own signature. But typically when they sign on someone else's opinion they are really not bound by that analysis–they will switch it in the next case if they want to change the results. Now there are some justices who write their own opinions, Scalia being the foremost example, and he has a terrible memory; he could forget a case three weeks after it's decided. But if that case came up six years later he would reason it through exactly the same way.

MR. RASENBERGER: Yeah. Well I know that you did say in one of your writings that judges often do not truthfully explain their reasoning.

JUDGE SILBERMAN: That's connected with not writing your own opinions.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: You get a law clerk who starts out with some canned framework of an opinion–well this is our standard of review, this is this, this is this, this is this, and it doesn't reason through the case the way you would have thought the judge had to do in order to decide what he or she decided. So that's a discipline of writing. There is an interesting dialogue between Posner and Judge Wald in some law review articles in which Posner also made the point that it's crucial for judges to write their own opinions. I must say that Judge Wald who seems to have implicitly acknowledged that she did not write that much of her opinions, nevertheless was capable in my judgment, much more capable than I would have been, in making sure every opinion, even though it might have been drafted by her clerk, reflected her views exactly; she was much better at narrowing the efforts of her staff.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: The interesting thing is she's really a splendid writer. I think her speeches often are much better than her opinions because she wrote them herself.

MR. RASENBERGER: Well there is no doubt that writing helps the thinking process, for most of us anyway. I mean some people can think things through maybe word-for-word without putting anything down on paper, but not many.

JUDGE SILBERMAN: No. And the real key is that when you write it yourself–you've heard judges say, it wouldn't write; what they meant is when they wrote it, when a judge wrote the opinion him or herself it became apparent that there was a logical flaw in their reasoning.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: And I have on at least two or three, four occasions received a draft from a clerk which reflected my views and the views of the panel at conference and when I sat down to rewrite it I found that there was a flaw and changed my view–changed my position on the case.

MR. RASENBERGER: Yes, I can believe that. It happens to me all the time when I start to write. Well I was going to ask you, I did ask you a little bit about more modern judges that fit in the Holmes-Frankfurter category. Without limiting it to modern would you put Learned Hand in your pantheon of—

JUDGE SILBERMAN: Yes.

MR. RASENBERGER: Anyone else? This is not an exam so don't feel like you have to come up with other names here, I just thought if there were some others that teamed on—

JUDGE SILBERMAN: Well Learned Hand certainly would be included. I'd

rather not mention judges who are alive today.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: I have sat with judges and of course on occasion I've sat with judges who were visiting from other circuits so you can't assume that I am talking not only about D.C. Circuit judges. I have sat with judges whose views on the case would be absolutely predictable in light of the parties, without regard to the merits. And I find that terribly distressing.

MR. RASENBERGER: Yes, I agree. I wanted to ask you just generally a little bit about—

JUDGE SILBERMAN: Actually there is an interesting story about judicial restraint. Were you involved, Ray, in that case involving the Iceland—

MR. RASENBERGER: The ship?

JUDGE SILBERMAN: The shipping.

MR. RASENBERGER: The Navy contract?

JUDGE SILBERMAN: Yes. Were you involved?

MR. RASENBERGER: Yes, our firm was, yes.

JUDGE SILBERMAN: That was one of my very first cases. In fact it came up on motions I think before I even was assigned to merits in the fall of 1985. And I was keenly aware of the NATO concerns about Iceland.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I'll never forget one of my law clerks who was drenched and very sophisticated about foreign policy was working on a motion with me and arguing the

NATO/Navy/Iceland position and when I looked, and of course that would have been my foreign policy concern. I came out the other way.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: That was the first case where I felt it was imperative, that I had to think of myself as doing something different as judge than I did as a non-judge.

MR. RASENBERGER: Well, would you conceive of any circumstances where the fact that our national security interests were involved somehow, would lead to perhaps a different conclusion than otherwise? I am reminded of the phrase, whether it was used or whoever who said that, the power to wage war is the power to wage war successfully, or words to the effect. It seemed to suggest that, when the cheese gets really binding in terms of our security interests, some things have to give in the interests of foreign policy or security objectives.

JUDGE SILBERMAN: Well, I think there is ample room in reading the Constitution itself as well as Supreme Court cases interpreting the Constitution to allow for national security concerns. On the other hand, there have been some horrible mistakes made in the name of national security, perhaps most glaringly the Japanese relocation cases.

MR. RASENBERGER: Yes. Perhaps I did ask you last time: we have obviously globalizing society in terms of trade and other issues, and we have greater, more powerful international judicial institutions than we used to have, I'm thinking of the court at The Hague, and so on. Do you see those as readily accommodating in our system. I guess I am not giving you a very specific question here, and it's hard to answer.

JUDGE SILBERMAN: Well, except I think you are touching on something on which both Judge Edwards and I were asked recently to speak to Georgetown. The question is

how much does foreign law, how much of a legitimate role does foreign law play in interpreting the Constitution or American law.

MR. RASENBERGER: Exactly.

JUDGE SILBERMAN: Most of all the Constitution. And our answer was simple, none. Although Justice Breyer keeps trying to bring it in. Now how much foreign tribunals play a role in ordering American affairs depends on treaties. I have never been very impressed with the body of "international law," which I think is often a figment of prosecutorial imagination.

MR. RASENBERGER: Public international law.

JUDGE SILBERMAN: Right; public international. When I was at Harvard I was interested in pursuing international law and Professor Katz who taught it said there really isn't any international law, it's baloney. Take the course in international transactions.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: I still think it's baloney.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Now what's happened because of American judicial activism, a fascinating development, is that other nations around the world, the judiciary in other nations around the world are becoming entranced with American judicial activism because it promises power to judges. I have been to conferences with European Justices and Israelis. The Israelis, for example, had a very strong tradition, more like the British tradition of judges not getting involved in policy matters, and judges are increasingly attracted to the American system for obvious power reasons. And one conference I attended over at the Supreme Court with

several Supreme Court Justices, and I think Breyer was then a circuit judge, and he was there, with Italian Justices of their Constitutional Court and they were all entranced with Brennan.

MR. RASENBERGER: Yes. [Laughter.]

JUDGE SILBERMAN: Brennan was the model.

MR. RASENBERGER: They think rule of law means rule of judges.

JUDGE SILBERMAN: Right; exactly. Very simple. And so what's amusing is that that is going to spread somewhat until there is resistence from the political branches in foreign countries–we'll see.

MR. RASENBERGER: Yes. Well certainly in the EU the judicial branch is very powerful compared to their legislature.

JUDGE SILBERMAN: Right.

MR. RASENBERGER: All right. I didn't ask you, we've talked about, this is now going back to your pre-judicial experience, about public figures you've dealt with–Reagan, Rumsfeld, to name a couple. Would you care to identify what you might call your favorite public figures, people you have encountered that you have felt particularly competent, particularly likeable, particularly successful at what they were doing. I know these kind of lists always end up leaving people out so I don't want wish you into something that can be misinterpreted. But you have had an unusual opportunity to see top levels of government at work in several presidencies and several administrations, do you want to talk about any particular people other than the extent that you already talked about them.

JUDGE SILBERMAN: Well I will go through the Presidents that I have dealt with and grown to know. And I suppose you could deduce from my prior discussions or writings

that Richard Nixon was a very interesting figure who I came to have great distaste for. There was something about him that which turned everything away from idealism and towards cynicism, even when, maybe in his heart of hearts, he was idealistic. Gerry Ford was a lovely human being. But perhaps somewhat miscast as President. He just never had an animating vision of what a President should do and that I think made him a lot weaker than he would have otherwise been. Reagan of course did have an animated vision. I spent a lot of time with Reagan as I probably described in the campaign of 1980 and occasionally as an advisor on arms control and I was very puzzled by Reagan. He was man of enormous discipline I figured out afterwards. And he was capable of hiding and/or presenting parts of his personality in a very carefully controlled fashion. But I don't think we are going to know enough about Ronald Reagan for some years. I think Morris' book is just dreadful and I think the real problem Morris had is he just didn't understand Reagan. He just couldn't get a handle on him. He was very difficult to read. But he was a man who had clear vision on both domestic and foreign policy which turned out, in my judgment, to be quite sound. I thought so at the time when I was supporting him; I thought so afterwards. But he cared not a wit for the people around him. They were just interchangeable figures on a board which made me not, which made me never, want to go to work for him. George Bush, the elder, had some of the characteristics of Gerry Ford. He is most famous for rather contentiously referring to the vision thing. But one of the things that I learned in government is that to be a good leader of any department or President of the country, the most important single thing is to have a sense of where you want to go–a vision. You can't be a good "manager" of the government or of a department unless you have a notion as to what you want to accomplish. And that usually requires a few ideas, a few goals. I remember many years ago

when Don Rumsfeld and I came back from a trip to the Middle East when we were both special envoys and I was to replace him. Don Regan who was then Chief of Staff met with us just before we met with the President to report on our, particularly on our visit with Tariq Azziz the foreign minister of Iraq, and Donald Regan complimented us considerably on our work. We were dollar-a-year men. Don was still CEO of G.D. Searle and I was a senior partner of Morrison and Foerster. And Regan went on in some length that we accomplished what we did only because we were not government bureaucrats; we were successful businessmen and/or lawyers. And he turned to me and said don't you think that's right, the people who really come into government and really do well, are successful. And I said you know, the truth of the matter, Don, is the people I've noted who do best as cabinet secretaries are professors.

MR. RASENBERGER: [Laughter.]

JUDGE SILBERMAN: I thought businessmen are often lost because they are driven by general accounting principles, bottom line; there is no bottom line in government. And lawyers tend to be awful managers because they will typically take one or two issues and pursue those only and let everything else go adrift and they will just pursue cases rather than vision.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And I said a professor has a capacity to conceptualize the notion of what the department should do and that's more important in a way for managing a department than the typical managerial tasks. But Regan thought that was horrifying.

MR. RASENBERGER: Yes, I can believe it.

JUDGE SILBERMAN: So those are my views of the—

MR. RASENBERGER: Now just one final area. Over the years that you have

been on the bench here your name has often come up as a possible candidate for the U.S. Supreme Court. I wondered if there is anything you want to say about those instances, if there were any instances, or your own thinking or reactions as to what happened and what didn't happen.

JUDGE SILBERMAN: Well it's sort of interesting. In 1987 after the Bork nomination failed, one of the senior people at Justice told me that I was likely to be nominated as a replacement. And there was a good deal of discussion between Justice Department personnel and my wife because I didn't really want to talk about it. There were however some factors which have been described to me subsequently which caused my name to be dropped, one of which was a story that was being spread by Judge Mikva to the effect that we had had an altercation. It actually got way out of hand, and it was suggested to me that we had a—

MR. RASENBERGER: Physical?

JUDGE SILBERMAN: Yeah; that we had a physical fist fight. But actually Mikva never actually said that. What actually happened was that I had written a letter some time ago to the *Legal Times* explaining that we were having a heated dispute–just three judges–about a case involving affirmative action and he said something to me which caused me to say if he were ten years younger I would be tempted to punch him in the nose. It was just three judges there, and it is not by far the worst thing I've ever heard judges say to each other in their conference, but the story was spread and it sounded, by the time it was spreading it appeared as if there were an actual altercation.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Not true. And he subsequently said it was not true. But

it was quite a flapdoodle. And then there was another matter which had surfaced which was the suggestion that I had been part of the group that had met with an Iranian official in the campaign of 1980 who was seeking the delay of the release of the American hostages, but that was a false story, as the Congress subsequently decided. In fact, I was brought along to a meeting as an ex-Deputy Attorney General by Dick Allen who was the head national security advisor to Reagan. And it was true that an individual came to the meeting, he was not an Iranian he was a Malaysian, I thought he was a Moroccan. I couldn't remember which. He claimed that he had special contacts with the Iranian mullahs and that they might be induced to release the hostages to candidate Reagan rather than to President Carter. I recoiled like a bite by a snake and said we only have one President at a time, go talk to Carter.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: But in any event, that story was being spread by *The Miami Herald* as an absolute reverse of what happened, and it took some years before Congress investigated and found out it was as I described. But that floated at just that time and so the two things together knocked me off as well as a third thing which is sort of amusing. I am told the National Rifle Association was opposed because many years ago when I had been Deputy Attorney General and confirmed as Deputy Attorney General I had told Senator Kennedy that I would be willing to work with him to ban "Saturday night specials" if we could define them. And of course I knew damn well you couldn't define them separately. But the NRA was nervous about that which is rather amusing because they didn't know that I am a hunter and gun owner. But it was a very unpleasant time in which there was some campaigning which I've never been willing to do and wouldn't let my wife do at all. And so then I dropped off the list, and then it

went through Ginsburg and Kennedy.

MR. RASENBERGER: Yes.

JUDGE SILBERMAN: Some years later when Souter was chosen, again I was on the list of three, originally four but Starr was dropped off, and it was Souter, myself, and Clarence. And George Bush the elder who is a wonderfully decent human being had Boyden Gray tell me afterwards that he would have nominated me but for the fact that I had just joined and written a good deal of the *North* opinion. It was too hot at the time. Incidentally, that was quite correct, it was too hot at the time. But it was so decent of him. Now the amusing thing is I think George Bush the elder would have nominated me because he knew me and we were friends, not as much for my judicial philosophy.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: The next time around, again on the list, Clarence was chosen. I was pretty sure I really wasn't a serious candidate. I was pretty sure that the Administration would pick Clarence and I indeed had done all I could to support Clarence. But there was one rather amusing tidbit which you'd love. With my name on the—

MR. RASENBERGER: Short list.

JUDGE SILBERMAN: Short finalists. I was advising Clarence and I knew it was going to be Clarence and Clarence was invited up to Maine to meet with the President but I thought it crucially important that nobody know that–that that not get out. So I instructed Clarence's secretary to keep the door closed to Clarence's office and to tell people that he was in conference, and since the press knew somebody was going up to Maine they figured it must be me.

MR. RASENBERGER: I see.

JUDGE SILBERMAN: And there was one judge on this court who was particularly politically interested and politically connected and he kept every twenty minutes popping into Clarence's office to see where Clarence was, and Clarence's secretary kept saying he's in conference.

MR. RASENBERGER: [Laughter.] Those are interesting stories; humorous stories. Again—

JUDGE SILBERMAN: The *Los Angeles Times* wrote a piece some years ago in which they described me as one of those, as a character in the last twenty years who came closest a number of times. It was a very nice piece. But the third time was not real; the closest was '87 but probably '90, '91 was close too with Souter but if I hadn't written the *North* opinion.

MR. RASENBERGER: Timing is everything isn't it?

JUDGE SILBERMAN: Yes it is. But I wouldn't have changed that for all the tea in China. I am very proud of that, of the parts of our opinion in *North*. The amusing thing is I ended up dissenting in the *North* case on a number of issues. I would have reversed for a whole series of other reasons including the refusal to call Reagan.

MR. RASENBERGER: Oh. Well I am glad you went into this. This is a subject I am sure other people have wondered about. I had, too, but I didn't know whether it was something you wanted to talk about or not. Judge Silberman, that concludes my questions. Perhaps after we read the transcript we will want to go back and pick up with a few more although I think we certainly have had some good questions and some superb answers here and I am very happy with the way it has gone. I want to thank you on behalf of D.C. Circuit Historical

Society for taking all this time to subject yourself to this interview and personally thank you because I found it a very interesting time myself. It's like reading a biography really first-hand. Thank you.

We are back on the record to continue Judge Silberman's last answer.

JUDGE SILBERMAN: I have often been asked, given the several occasions when I was apparently close to being nominated to the Supreme Court, whether I deeply regret or even regret not having had that opportunity. Everyone assumes I would deeply regret it. I think I tell the absolute truth when I say I do not. And the reason I do not is twofold. First of all, I like being able to retire at the age of 65 or take senior status and spend more time with my grandchildren which you could never do as a Supreme Court Justice.

MR. RASENBERGER: True.

JUDGE SILBERMAN: Just can't psychologically do it. But the more important reason is that I grew to have such profound dislike or distaste for Supreme Court jurisprudence and lack of respect for the Supreme Court as an institution that I'm afraid that had I been appointed one of two things would have happened. Either I would have been miserable psychologically at the open policy making up there, and it is quite open, or I would have become corrupted and joined in on it. Almost every law clerk who has left my chambers to go to the Supreme Court, and according to the *National Law Journal* last year, the highest number of my law clerks as compared to any other circuit judge had gone on to Supreme Court clerkships over a ten-year period, almost without exception, within three months of being clerks on the Supreme Court, I would receive a call in which the clerk would express enormous disappointment–some even despair–about the Supreme Court process of decision. I might say that was also true of a

couple of my colleagues who left here and went up and became justices. But after awhile the justices perhaps get more comfortable. I don't think the perks or the prestige of being on the Supreme Court would have been all that important to me and certainly wouldn't have been adequate to offset the concerns that have lead me to view the Court as a largely illegitimate institution. So I tell people when they ask me that, very few do but some do, that I am very happy where I am and do not regret for a second that I didn't get one of those appointments.

MR. RASENBERGER: Thank you.

[END OF TAPE - END OF ORAL HISTORY]

APPENDIX I

The Origin of Affirmative Action as We Know It–The Philadelphia Plan Pivot

by The Honorable Laurence H. Silberman*

I am now a senior judge and have the time and inclination to look back 30 years ago to the actions of President Nixon's first Labor Department. I had been planning to tell my version of the Philadelphia Plan story. It is interesting and poignant coincidence that John Irving provided the opportunity by asking me to speak to this gathering. John was my executive assistant as Solicitor and Undersecretary of Labor until he went off to the NLRB. He loyally and effectively supported me during a tumultuous period. Yet John, from the beginning, advised against the crucial shift in affirmative action that I pursued, so if I was misguided it was not John's fault. Of course, as a federal judge, I am not permitted to present normative views on present, or even past, policy issues, but nothing precludes me from describing historical events, nor is there any barrier to explaining in personal terms why we took the position we did.

First, the background. The Wirtz Labor Department had gotten itself into quite a tangle with the Comptroller General over its efforts in enforcing Executive Order 11,246. That order, as you well know, bars government contractors from engaging in employment discrimination and requires "affirmative action" to avoid discrimination. The Labor Department had and has the overall supervisory role in enforcing the order.

The Department's Office of Federal Contract Compliance had sought for several years to establish pre-award compliance requirements on construction contracts over a million.

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* Of the United States Court of Appeals for the District of Columbia Circuit. This speech was delivered to the Federalist Society and the Labor & Employment Practice Group, The Willard Inter-Continental Hotel, Washington, D.C., October 10, 2001.

OFCC had focused on several cities and sought to oblige bidders in those cities to submit manning tables showing the number of minorities to be hired, before contracts were actually awarded. That approach was tried in Philadelphia. An inter-agency board, prompted by the OFCC, issued the original Philadelphia Plan in October 1967. Under that Plan, after the bids were to be opened, the low bidder would not be awarded the contract until compliance officials approved the number of minorities to be hired in six skilled trades. The scheme ostensibly relied on the contractors to come up with the numbers; the government did not propose to openly set forth those requirements at the pre-bid stage, or, for that matter, after the bids were opened, but some suasion and negotiation was contemplated.

The Association of General Contractors and the construction unions induced Congressmen to complain to the Comptroller General that the Plan proposed in Philadelphia (and in force in Cleveland) improperly injected uncertainty into the bidding process. On November 18, 1968–right after the presidential election–the Comptroller General issued an opinion determining that the "lack of specific detail and rigid guidelines requirements" could lead to denial of contracts to a low bidder based on "purely arbitrary and capricious decisions." The Comptroller General's insistence on clear pre-bidding standards surely was designed to put the Labor Department between a rock and a hard place. If the government promulgated numerical requirements for minority hiring it faced both political and legal problems. The Labor Department ostensibly backed down in late November 1968, quietly announcing that the Philadelphia Plan was rescinded, but its compliance officers pursued similar techniques, leading various Congressmen and Senators to again complain to the Comptroller General. At the same time, civil rights groups in Philadelphia were insisting on resurrection of the Plan.

That was the situation we inherited. I was confirmed as Solicitor of the Labor Department on May 1, 1969, the last of the assistant secretary level appointees. Art Fletcher, an African-American former professional football player and candidate for Lieutenant Governor in the State of Washington, had been appointed Assistant Secretary for Wage and Labor Standards. OFCC was placed under his wing. He, not surprisingly, was anxious to reinvigorate OFCC and particularly the construction industry plans.

But the problem was primarily a legal one, so it fell to me to see if I could fashion a solution to the conundrum. Hugh Graham's excellent book *The Civil Rights Era*, which extensively discusses the Philadelphia Plan struggle, acknowledges a gap in his account. As he put it, the available White House and Labor Department records do not reveal when and why George Shultz decided to revive the Philadelphia Plan [at 324]. He tells us in a footnote (at p. 539) that George reviewed the manuscript when Secretary of State in the mid-1980s, but said, "he could not recall with sufficient precision the timing and circumstances that led to the Labor Department's commitment to the revised Philadelphia Plan."

By that point I suppose my own involvement in the fashioning of the revised Plan had become somewhat awkward since, as many of you know, in 1977 I had written a column for *The Wall Street Journal*, in which I acknowledged that we had been wrong in pursuing the policy we did. I am afraid I was in the unfortunate position of having persuaded my boss, the Secretary of Labor, to embrace a far-reaching policy that I later renounced.

I can recall exactly the moment when the core concept of what was to be the "Revised Philadelphia Plan" was born. I was discussing the problem with Gene Mittleman, Senator Javits' minority counsel on the Senate Labor Committee. Gene was one of the most

capable congressional staffers I encountered in my years in the executive branch, and one of the few who always could be relied upon to speak for his principal. During the conversation, we came upon the notion of openly and boldly requiring all bidders to commit to meeting the percentage of minority hires in the construction trades that *we* would demand. To circumvent legal and political problems, the numbers would be expressed in terms of ranges, and contractors would be obliged only to use "good faith" to reach the numerical targets which would be described as a goal. Timetables would be included to measure progress to the goal. I thought that this approach would eventually pass legal muster because the anti-quota provision of the Civil Rights Act 703(j) applied only to the Act itself, and, in any event, we were obliging contractors to aim for goals not hard quotas. Moreover, contractors would be forbidden to discriminate in reaching their goal, a caveat which, in truth, may have been more clever than realistic. Much later, after all hell broke loose, I suggested to Gene that the goals and timetables device might have been his idea, but he insisted that it was mine.

I gained the Secretary's approval after his most searching inquiry, briefed Undersecretary Jim Hodgson, and then brought the idea to Art Fletcher. Fletcher was delighted and could hardly wait to go to Philadelphia to announce these revisions. Jim Jones, my seasoned associate solicitor for civil rights, cautioned me to get the Justice Department on board before we launched our initiative. So I did. I got a quick written opinion that our approach would pass muster from Jerris Leonard, the Assistant Attorney General for Civil Rights, and then advised Fletcher to hold a hearing in Philadelphia so that we would have something of a discrimination record to support the Plan as a remedy. By that time several courts had approved numerical obligations for future black hiring as a remedy for past discrimination, even though the future

hires were not past discriminatees. It should be noted that by treating blacks as interchangeable the courts were tacitly accepting the concept of group rights rather than individual rights. In any event, although we predicated our plan as an independent affirmative action obligation, the remedial guise would be some protection against legal attack. Unfortunately, Fletcher announced the Plan first and had the hearing afterward, which was a bit awkward.

Senator Fannin on July 1 asked the Comptroller General for an opinion on the revised Plan. My office responded with a long brief in defense of the Plan, which was publicly released on July 16. At a certain point–I think it was even before the brief was released–Senators Fannin and Curtis went to the White House and demanded that I be fired. George Shultz instructed me to prepare a one-page memo to the President justifying our position. John Irving and I stayed up much of the night trying to find the exact right words. We claimed that the substantive obligations of the executive order exceeded non-discrimination requirements–which if you read the order carefully is quite a stretch. We "discovered" the seeds of the Philadelphia Plan in the last report Vice President Nixon had sent to President Eisenhower in his capacity as chairman of a government contracting commission. As I recall, he had acknowledged the need to take affirmative steps to avoid discrimination. It was a bit hokey, but it worked.

Then on August 5 the Comptroller General, pressed by outraged Senators and Congressmen from both parties–the AFL-CIO was apoplectic–issued his second Philadelphia Plan opinion. This time he declared the revised Philadelphia Plan in violation of the Civil Rights Act's anti-quota provision. I was rather surprised; it was one thing for the Comptroller General to express a view on the legality of contracting procedures. Putting aside separation of power concerns, contracting was his business, but the Civil Rights Act was enforced by the Justice

Department and the relevant assistant attorney general had specifically opined that the Plan did not violate the Civil Rights Act.

Nevertheless, contracting officers in the departments and agencies were universally terrified of the Comptroller General. He could under certain circumstances seek to hold them personally liable for irregularities in the contracting process. Still, any action against contracting officers would have to be brought by the Justice Department. I realized that a formal opinion from the Attorney General would checkmate the Comptroller General. Accordingly, on my advice, George Shultz requested an opinion from John Mitchell. I went over to discuss the matter with Bill Rehnquist, then the Assistant Attorney General for the Office of Legal Counsel, the office that prepares such opinions. That may have been the hardest sell in the whole process, but eventually he was persuaded and the opinion arrived on September 22. The very next day the Department issued the numerical ranges to be used in the Philadelphia Plan.

Although the Comptroller General still huffed and puffed, the Attorney General's opinion had really cut off any immediate legal threat. Congressional opponents were outraged and they staged rather explosive hearings in late October before the senate subcommittee on separation of powers. The executive branch stood firm. Then in December the continued opposition of the AFL-CIO and conservative Republicans led to the dropping of a political thermonuclear bomb. The Comptroller General wrote Senator Byrd to request a rider on our appropriations bill to prevent any funds spent on Philadelphia Plan activities. Despite the Administration's fierce lobbying, Senator Javits' brilliant and impassioned defense, and President Nixon's threat to veto the whole appropriations bill, the appropriation rider passed overwhelmingly 57-32.

That was the bleakest moment in the fight. I was contemplating resignation when I received a call from a Jack McKenzie, an editorial writer for *The Washington Post*. He said, "I see you are in deep trouble," I agreed. He then said something to the effect "don't worry I am going to save you"–and he did. The next day, the day the rider was to be voted on in the House, the *Post* editorial "Quotas and Goals" exhorted the House to undo the Senate's "grievous folly." That day, for the first time in this fight, some of the national civil rights groups openly broke with the AFL-CIO and joined the Administration lobbying in the House. It was a rout: we won and the Senate subsequently receded.

Although the Contractors Association of Eastern Pennsylvania sued in Philadelphia, they lost in both the district court and in the Third Circuit; the Plan was endorsed as a broad remedial measure with little attention paid to the fact that the remedy was proposed prior to a fact-finding hearing. In those days it was virtually impossible to beat a "pro-civil rights" case in federal court.

We went on to spread construction industry city plans around the country, as I have written, much like Johnny Appleseed. Early the next year we issued Order No. 4, which extended the concept of government-imposed goals and timetables to all government contractors. I remember sitting in my office with Pete Nash, who was to be my successor as Solicitor, going over a draft of that order and adding factors that should be used in calculating a goal so that it would not appear to be *per se* racial proportional representation. When I testified later on various occasions in both Houses, as the undersecretary, I was rather open in asserting a right to impose these requirements regardless of any showing of discrimination. I insisted that the executive order's affirmative action obligation was a good deal broader than Title VII. For that reason, I

opposed successfully efforts to transfer OFCC to EEOC.

* * * *

It has been suggested by several writers describing the Philadelphia Plan's genesis that the Nixon Administration adopted the revised Plan as a cynical ploy to divide two traditional allies in the Democratic Party's coalition, the AFL-CIO and civil rights groups. I cannot speak for everyone in the Administration, but I can assure you that no one in the Labor Department, nor for that matter in the White House, with whom I dealt, ever embraced that rationale. To be sure, we were a good deal more independent of the AFL-CIO than was the Wirtz Labor Department, but it should be recalled that the Association of General Contractors were just as opposed as were the construction unions. And many–probably most–of the Republican Senators, led by Everett Dirksen, were also opposed.

George Shultz, who bore the primary responsibility for our new policy, although a formidable bureaucratic infighter, did not have a cynical bone in his body. He was genuinely concerned about black employment prospects from the first day he became Secretary of Labor. He saw his job as dealing equitably with three separate constituencies with different interests: organized labor, employers and the minority community. Moreover, as a professional labor economist he was particularly disturbed by the soaring wage rates in the construction industry, which he attributed in part to discriminatory restrictions on the supply of labor.

Art Fletcher, who was to be the spokesman for and administrator of the plan, was naturally anxious to do all that he could to better the conditions of black Americans. In this regard, although other minorities were nominally included in our affirmative action efforts, it was the plight of American blacks that drove the whole policy.

I certainly had more influence than perhaps I should have had. That was in part because I was perceived both within the Department and at the White House as a reliable Republican. Arnie Weber, the brilliant Assistant Secretary for Manpower, a long-time academic associate of George Shultz, who retired in 1994 as President of Northwestern, once said to me–our relationship was rather frosty–that George Shultz had staffed the Labor Department with an eye to talent rather than politics until he got to Solicitor–and then he had to have a real Republican.

Yet, I had always been strongly sympathetic to the civil rights movement. In fact, I had refused to support Barry Goldwater in 1964–I even signed an ad for Johnson–partly because of Goldwater's opposition to the Civil Rights Act. (Luckily for me that transgression had been overlooked when the Administration was staffed.) I had been somewhat uncomfortable with the "southern strategy" pursued by Richard Nixon in the 1968 campaign and thought an aggressive government push for minority hiring would offset that policy–giving blacks a stake in the Administration.

I was also quite troubled by the OFCC strategy of pressuring contractors to hire more blacks without ever indicating what would constitute compliance with the affirmative action obligation. It seemed lawless to me. In this regard, organizations like the NAM were telling us they would be more than willing to do whatever the government wanted; they simply needed some certainty.

Most important, having come from Hawaii and, in the aftermath of the urban riots of 1968, I fervently wanted faster "progress" in race relations. Non-discrimination seemed inadequate. I, as well as many others in the bureaucracy and in the judiciary, were seeking quick

integration of the workforce. Underlying this push for integration was an implicit assumption. In the absence of discrimination, minorities would naturally end up in job classifications–certainly manual labor jobs–roughly in proportion to their numbers in the workforce. As a corollary, it was thought that for jobs such as those in the construction industry the apprenticeship training programs, like other job qualifications, were an artificial barrier to black employment. (The same kind of thinking underlay the famous *Griggs* case in the Supreme Court.) I remember Don Slaiman, the AFL-CIO's civil rights chief, accusing me of Ivy League snobbism in my unwillingness to recognize the possibility that construction job qualifications were legitimate and therefore progress should be made by adapting apprenticeship programs rather than overriding them.

The AFL-CIO and conservative Senators from both parties were our most powerful political opponents. But others were dissenters. I have mentioned John Irving's quiet disagreement. More open in his opposition within the Department was the redoubtable Arnie Weber, who administered our apprenticeship programs as part of his Manpower Empire. I remember going to Chicago, the fall of 1969, to speak to a lawyer's group, and opening a Chicago newspaper to read of Art Fletcher's aggressive praise for the Philadelphia Plan approach two days before, followed by Weber's criticism the day after. I called George Shultz for guidance as to how I should answer press queries as to the intra-Department dispute. His response: "Weave their comments together."

But it was Thomas Sowell's criticism that caused me to begin to doubt the wisdom of our policy. Again and again he took issue with the critical assumption that underlay the whole premise: that in a perfectly non-discriminatory world jobs would be distributed roughly

in proportion by race. He maintained that cultural factors lead different ethnic and racial groups into different occupational paths, and that our policy would balkanize the country.

As my confidence ebbed, in 1971 I received a call from my old Harvard Law Professor and mentor Derek Bok, who had recently been installed as the President of Harvard. He asked if I would meet with a delegation representing the American Association of Universities who wished to complain about HEW's implementation of the executive order vis-a-vis universities. I agreed. I met with a three-man group composed of John Dunlop, the Dean of Harvard's Faculty of Arts and Sciences, another first-class labor economist who was a valued consultant to the Department; William Bowen, the President of Princeton, ironically Bok's co-author of the recent book defending affirmative action, *The Shape of the River*; and the President of Michigan, a university today much involved in affirmative action litigation. They were intensely critical of the civil rights chief at HEW, Stan Pottinger, whose aggressive (and in their view unrealistic) pursuit of faculty minority hiring goals was causing academic dyspepsia. It was claimed that he was insensitive to academic standards. I recall vividly John Dunlop's example of what he regarded as a particular absurd position HEW was taking, drawn from our construction industry experience. Pottinger had told the universities that they could not apply hiring criteria that were more restrictive than that governing the least qualified tenured professor in any department. John asked rhetorically, How could one possibly identify the least qualified member of the economics department at Harvard? I started to laugh, and John immediately broke in to say, "I know you would point to Galbraith but that is a political judgment."

At the end of the meeting I observed that it appeared the elite universities had recently and wholeheartedly adopted affirmative action for their student bodies. John brushed

that observation aside saying, "that is different and, moreover, outside your jurisdiction."

I do not recall what relief, if any, we afforded the universities, but I do remember telling one of my aides that it was probably healthy for the academic elites to experience the same pressure that employers and unions felt because, insofar as we might be misguided, they would constitute a more politically respectable opposition. Boy was I wrong.

By 1972, with my doubts increasing, I drafted President Nixon's response to a letter from the American Jewish Committee condemning quotas in language that might have suggested a retreat from our policy. I hoped to help fashion that retreat in the second term, but that was not to be. The President accepted my "resignation," and when I returned as Deputy Attorney General, after the Saturday Night Massacre, I had too many problems to tackle "affirmative action."

I did, as I mentioned, write my *mea culpa* in *The Wall Street Journal* in 1977, entitled "*The Road to Racial Quotas*." I admitted that the goal-quota distinction was an illusion and that any numbers led ineluctably to the concept of proportional representation. I was prompted to do so by the appearance of the *Bakke* case on the Supreme Court docket. The universities that had complained to me only a few years before concerning HEW's pressure on faculty hiring were defending proportional representation of their student bodies on so-called "diversity" grounds. Diversity, as I wrote in a recent opinion, could be justified indefinitely, whereas affirmative action suggested only a *temporary* remedial notion even if the remedy was national in scope. Although the Court ignored my article, it had a ricochet effort. The Fifth Circuit cited it in its *Weber* decision. It only had a brief shelf life, however, because *Weber* was in turn reversed by the Supreme Court.

After I became a judge my inconsistent positions on affirmative action were thrown up to me when my good friend Bill Brock, the Secretary of Labor, had a rooftop party at his Department. He and Ed Meese, the Attorney General, were engaged in a rather fierce intra-administrative squabble over the executive order (in which George Shultz supported Brock), and Meese was also a guest. They were continuing their argument over cocktails and both reached out to me for support. I, of course, declined to express a view. That night I regretted my reserve, but took solace in the realization that probably whatever I said would be wrong.

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As I revisit those events of long ago I cannot help wondering what would have happened if we had taken a different position, one not supporting numerical racial employment targets. I rather doubt, in that regard, that anyone else in the Department of Labor would have suggested the open embrace that I advocated. The OFCC would probably have sought to continue to impose pressure on contractors without much real bite or force except in cases of actual discrimination, in which case OFCC would probably have been transferred to EEOC.

Would many other institutions in the country like the universities have nonetheless drifted towards proportional representation? My wife thinks yes. I am not so sure. That a Republican Administration took the position it did caused a rapid undermining of resistence to that notion throughout our society. The Philadelphia Plan may well have been the crucial turning point.

APPENDIX II

"Will Lawyering Strangle Democratic Capitalism: A Retrospective"

by The Honorable Laurence H. Silberman[**]

Over twenty years ago while I was at the American Enterprise Institute among a group of refugees from the Ford Administration, pondering our government service–and the harms we inevitably caused–I wrote an essay for the first issue of our newly launched magazine, *Regulation*. The title, "Will Lawyering Strangle Democratic Capitalism?" may well have been a bit hyperbolic, but it was suggested by another editor with greater dramatic flair. The essay received some modest attention; even the American Bar Journal gave it a not-unsympathetic review. My proposition was straightforward. Although the legal process, by which I meant all the work performed by lawyers, judges, and legal regulators–for which the number of practicing lawyers is an accurate proxy–is essential to democratic capitalism, too great an expansion of the legal process actually causes harm to both our economy and our polity. In other words, there is a theoretical tipping point, and we had, in my view, long passed it.

Looking back, I see that the themes that I touched on in that piece have been expanded by others, including Walter Olsen, a subsequent editor of *Regulation*. He, some years later, published *The Litigation Explosion*. The tipping-point concept, analogous to the Laffer curve, has been pursued extensively in economic literature by Stephen Magee Professor of Finance and Economics at the University of Texas. I was certainly not original in noting the rise of litigation or in decrying what Nathan Glazer had called the "Imperial Judiciary," which I, in

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[**] Of the United States Court of Appeals for the District of Columbia Circuit. Given at Drake University School of Law, Des Moines, Iowa, March 30, 2000.

part, blamed for attracting too many persons into the profession. But, I focused on the entire legal process as an integrated whole. I used cancer as the metaphor; the legal process had become a cancer which constituted both a major drag on our economy as well as an interference with the scope of democratic choice.

I employed Say's Law to suggest that the growth of the supply of lawyers was in part pushing the demand. By this, I meant that the demand for lawyers has a defensive nature. For example, few businessmen will attend a meeting if their counterparts are accompanied by counsel without being similarly protected; introducing one lawyer into a transaction causes a multiplication of lawyers. The Supreme Court, in its *Walters* decision (which upheld the *de facto* ban on paid lawyers in veterans benefit cases), recognized this phenomenon. It noted that an existing system of awarding veteran benefits, operated essentially without lawyers, would be changed fundamentally if some claimants hired counsel. Other claimants, in order to protect their share of a finite pie, would be obliged to retain attorneys, inevitably increasing the cost of the whole system.

Perhaps my most controversial observation–at least within the profession–was the notion that a disproportionate amount of intellectual talent, for the health of the nation's economy, was being drawn into law. Derek Bok, who, after serving as Dean of the Harvard Law School, became President of Harvard University and presumably gained a broader perspective, made the same point in a major address some years later.

I also noted that socialism had never achieved major political respectability in this country, and, therefore, the socialist impulse had been sublimated into the legal process. It was used to restrict the influence of those major economic institutions that would be owned publicly

in a socialist economy. Professor Marc Galanter, in a series of articles starting in the early 1980s, implicitly agreed with that diagnosis but applauded rather than criticized those developments.

Dean Robert Clark of the Harvard Law School, on the other hand, in an effort to blunt the increasing acceptance of the cancer metaphor, argued that the economy actually might benefit from the enormous increase in the number of lawyers. As befitting a specialist in corporate law, he distinguished those lawyers engaged in advising or implementing business transactions from those involved in litigation. The former, the majority of the profession, he suggested, performed work essential to the stability of transactions. Their greater need was dictated by, among other economic trends, the increase in international trade. He maintained that the work of transaction lawyers should be thought of as mere "normative ordering" and should not be viewed as implicating the authority of the state.

The primary difficulty I find with Dean Clark's heroic effort is that his division of the profession into the more-productive business-counseling portion and the litigation portion is quite artificial. The demand for increased use of lawyers as business advisors is tied inextricably to the risk of litigation. No one uses a lawyer without at least thinking of the prospect of either pursuing or avoiding litigation. If one seeks norm-ordering not enforceable in court, one goes to a clergyman. And once one sees the legal process as an interconnected whole, it should be apparent that its character has quasi-governmental aspects because the end point, litigation, which takes place before judges, necessarily implicates the sovereign power of the state. I had observed that state legislatures, Congress, or activist judges could often achieve a regulatory objective as easily by creating a private cause of action as by establishing a regulatory agency.

Dean Clark also suggested that the growth of the number of lawyers could be

explained in part by the increasing economies of scale *in the use* of lawyers achieved by large organizations. I do not doubt that such economies of scale exist. It has often been noted that large corporations have a competitive advantage over their smaller competitors in dealing with regulation, and, as I have noted, the legal process includes and complements regulation. But increasing that particular kind of competitive advantage is hardly welfare-enhancing. The optimal growth of our economy depends very much on our creating a climate in which new entrepreneurs and small companies will flourish.

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So much for theory; how justified were my fears? The growth of lawyers over the last 20 years, at least looking at that period as a whole, continued apace. According to the Bureau of Labor Statistics, the number of lawyers in the United States nearly doubled between 1977 and 1996, from 448,000 to 880,000. Over the same time-span, the total population of the country only grew from approximately 219 million to 268 million. That means that the percentage of lawyers in the general population increased from .204% to .332%. If one goes way back to 1961, the year I graduated from law school, one can see that the trend since then has been inexorable. Although BLS statistics are not available for that year, the ABA's are. According to the ABA, in 1961 the United States had only 257,403 lawyers. The population was then approximately 183 million, so the percentage of lawyers in the general population was .141%, less than half of the 1996 figure of .332%. It is also worth noting that, while the number of lawyers has increased by almost 100% since 1977, Gross National Product (in real terms) has increased only 56%.

Society seems to be resisting, however; the growth of the legal process is

encountering real friction. First, and perhaps most important in a democracy, the public's regard for lawyers appears to track the growth of the size of the profession in inverse terms; the more the number of lawyers grows, the less lawyers are respected.

A 1992 poll commissioned by the ABA revealed surprisingly widespread dissatisfaction with lawyers.

- Only 40% of respondents held a favorable impression of lawyers. The only professions that scored worse were stockbrokers (28%) and politicians (21%).
- 56% replied that today's lawyer is no longer a leader in the community.
- Only 36% said that most lawyers are "a constructive part of the community."
- Only 22% felt that the phrase "honest and ethical" described lawyers.
- 51% believed that most lawyers filed "too many lawsuits and tie up the court system."

Just last year, a Harris Poll confirmed this trend when it reported that those who thought a lawyer's occupation was one of "very great prestige" had dropped from 36% in 1977 to 19% in 1997. I *know* this poll is reliable because journalists were at the bottom–only 15% thought that occupation highly prestigious. The invariable reaction of leaders of the bar to such dismal news is to speak of the need for a public-relations offensive, particularly calling attention to the profession's *pro bono* activities and urging that lawyers increase their *pro bono* efforts.

Even my colleague, Chief Judge Edwards of the D.C. Circuit, who cogently has described some of the profession's difficulties and distressing trends at the law schools, thinks an answer to the lawyer's declining image might lie in even greater emphasis on *pro bono* work. He

suggests that partnership decisions should turn in part on a candidate's *pro bono* efforts. I believe, somewhat heretically I am sure, that all this talk of *pro bono* activities is quite counterproductive. Implicit in the emphasis on *pro bono* is the profession's acknowledgment (if not Judge Edwards's) that its normal work is not really something to brag about. It does not seem to have occurred to leaders of the bar that the public's view of lawyers–and what lawyers do–is influenced by the lawyers' own view of what they do. If one does not believe in the intrinsic value of one's work, one can hardly expect that others will have a different opinion.

When I entered Harvard Law School in 1958, Dean Griswold told the entire assembled class that if we wished to earn a great deal of money we should go across the river to the business school. Oh, we would certainly do all right, but a lawyer's satisfaction came largely from the value of the service he or she performed to society as a whole. (Admittedly, he was more than a little parochial about the businessman's role.) In other words, practicing law itself was regarded as *pro bono*. Perhaps working directly for the government could be thought *pro bono* plus. Being a judge, of course, was super *pro bono*. Our professors thought the practice of law was an honorable and valuable calling, no matter who we were representing. Today, however, particularly at our elite law schools, most professors teach a quite cynical view of the law and the work of lawyers–at least those representing the productive sectors of the economy. The disdain for the capitalist system is palpable, and much legal scholarship is warmed-over Marxism with the only variation being in how the oppressed class is described–the oppressors, the analogue to Marx's bourgeoisie, typically are white males. It follows that the actual practice of law–sometimes even for a few years–is perceived often as a corrupting disqualification for those seeking academic positions. It is no wonder, then, that today's lawyers, reflecting this

academic culture, hide behind the shield of *pro bono* activities when attacked. Lawyers see *pro bono* services as the penance they pay for serving a capitalist system. (Much *pro bono* work–which, is more and more handsomely compensated because of fee-shifting statutes–is really an effort to seek redistribution of money or power by circumventing the political process.)

American lawyers simply refuse to face the obvious explanation for their increasing unpopularity. The American people are reacting negatively to the vast increase in the number of lawyers and the growth of the legal process that this increase represents. These developments have had, as one would expect, political consequences. Litigation "reform" is increasingly an issue before state and federal legislatures. (I put reform in quotes because I do not wish to take a political position.) It is and will be a tough struggle, however, and not just because of the increasingly aggressive direct and indirect political activities of lawyers and associations of lawyers. Even if the majority of the public is disgusted with our tort system, for instance, they may be of two minds about legislative changes; everyone, after all, hopes to win the jackpot. But just because you play the horses doesn't mean you have respect for bookies.

The public as a whole are not the only ones to react to the trend line. Institutional clients have adopted an interesting defensive strategy. Lawyers have been hired as employees and brought in-house, so to speak, to staff rapidly growing general counsels' offices. It is often said that this development stems from efforts by corporations and other organizations to control their fees. I think that factor does not explain the trend adequately. I actually rather doubt that it has been all that effective in limiting total legal expenses. As an ex-corporate executive who created a general counsel's office, I learned that the efforts many general counsel and their staffs take scrutinizing legal bills and micro-managing legal output are of dubious value. If a law

firm's performance is not worth its cost, a client should simply get another firm.

The general counsel's office really developed, I think, because CEO's and other organization heads instinctively wished to gain control of an increasingly important area of the institution's concern. Any executive worth his or her salt wants to control as much of his organization's environment as possible. As the legal process grew, the CEO wanted to bring the general counsel inside the corporation and as much of the company's legal activity as possible.

Once the general counsel worked inside the corporation, he or she naturally wanted to control all the company's legal affairs. If only the general counsel and his close associates were familiar with the points at which the corporate business brushed up against the legal process, his relative influence in the corporation was enhanced. To this effect, many general counsel began to disperse their corporations' legal work widely, and they increasingly delegated only specific tasks to individual law firms, often litigation. In the process, law firms lost their institutional ties to the corporation. Professor Abram Chayes, with his wife Antonia, traced this development in an insightful 1985 article in the *Stanford Law Review*. They observed, quite correctly, that the general counsel–and his staff–have become responsible for painting their corporation's big legal picture and integrating that picture into the even-larger competitive setting. Under the general counsel's tighter, if not necessarily more productive, control, the senior partner of the outside law firm, once looked to as the wise counselor to the organization, has become outmoded.

The inevitable consequence of this development was the diminished status of lawyers in private firms–even litigators. Today, the senior partner of a major law firm typically takes his "instruction" and provides his services to a rather junior lawyer in the general counsel's

office. If your "client," the person to whom you give legal advice or provide legal services, slides down the organizational structure, your own status declines accordingly.

Not surprisingly, this trend has robbed the whole profession of much of its luster. To be sure, lawyers, at least at the high end of the market, are actually making more money in real terms than was true 30 years ago. In 1961, when I graduated from law school, a young lawyer at an upper-crust New York law firm could expect to earn the equivalent, in today's dollars, of approximately $40,000. That same young lawyer started at $87,000 in 1996, and this year the figure is approaching $150,000. Some young lawyers after clerkships are making more than the federal judges for whom they clerked.

I think there are two reasons for this enormous increase. First, the most talented lawyers have been driven by the market into narrower and narrower specialties in order to add value to the general counsel's office. Insofar as they do so, they can charge commensurately higher billings. Second, law firms seem almost desperate to increase their billable hours to levels that we once would have thought unbearable. Many of my contemporaries, reaching the end of their legal careers, cannot understand what has happened to them. They make a good deal more money than they ever expected, but they hate what the practice of law has become. They would gladly trade a good portion of their incomes to recover the old client-law firm relationship.

Why, it might be asked, are law firms so anxious to increase their revenues and profitability? I think the core reason was identified by the famous anthropologist Robert Ardrey who, you may recall, wrote such important books as *The Territorial Imperative* and *African Genesis*. His thesis was that humans, like all mammals, have two drives (other than the basic ones): to acquire property and status. If you depress the opportunity to acquire one, the second

becomes much more important. When I was an ambassador to a Communist country, where property acquisition was quite restricted, I observed that an individual's official status was a good deal more important than in this country.

As lawyers' place in society, and their status *vis-a-vis* their clients, have dropped, they have been driven to acquire more property. Efforts to repress that drive–running as they are counter to human nature–are doomed. That lawyers would gladly trade a portion of their income to regain the previous equilibrium between status and property is of no avail. Unless we significantly reduce the number of lawyers as a percentage of the population, thereby cutting back the legal process, lawyers will not regain their once respected place in our society.

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What is my prognosis? We see some very recent indications that the growth of lawyers and the legal process is slowing down. The number of college graduates going on to law school has stabilized; law school enrollment peaked in 1991 at approximately 130,000 and has remained close to, but below, that figure since. It is perhaps a good sign, regarding my concerns about the percentage of our most-talented college graduates going to law school, that for the '94-'95 school year, applications for Stanford Law School dropped by 19%, while applications to Stanford Business School increased by 50%. To be sure, salaries for new associates this year have jumped through the roof and one might think that is an indication of explosion of demand for lawyers. But the truth is more complex. These salary increases are a defensive reaction to the enormous demand for analytical talent–not necessarily for lawyers qua lawyers–mounted by the new technological companies. They have sucked people out of the consulting firms, investment banks, even students out of the best business schools before graduation, as well as

young lawyers out of firms. The last may well be a desirable "brain drain." In any event, the general counsel of corporate clients have already indicated that it will be difficult for firms to pass through these costs to their clients–which means, of course, the billable hour requirements will be terrible.

Still, the important question is why so many college graduates were drawn to law school in the latter half of the twentieth century? In my 1977 article, I pointed to the proliferation of regulatory legislation and increasingly bold judicial activism as factors, besides high earnings, that promised greater influence and power to those serving the legal process and that therefore attracted too many college graduates to law school. Regulatory legislation has gone somewhat out of fashion recently. But judicial activism remains and is still a crucial factor explaining the vast number of American lawyers. For the more the judiciary reaches out to decide issues heretofore outside of the legal process, thereby expanding the law's reach, the more relatively attractive lawyering becomes, notwithstanding countervailing influences. To be sure, it is not clear how much judicial activism is a product of the manner in which the typical law professor and lawyer thinks about the legal process, and how much it is a cause of the problem.

The heyday of the present cycle of judicial activism began in the late 1950s led by the Warren Court. It is revealing, as my colleague Judge Randolph recently mentioned, that before that trend was apparent, a special committee of the ABA in 1959 worried that "the law is becoming a dwindling profession–not enough people wanted to be lawyers." The Warren Court seems to have saved us from that fate.

Although one hears increasing protests against judicial activism, few signs indicate that it has been significantly discredited. Opponents have often been rather short-sighted

in attacking the capillaries rather than the jugular. The jugular–the core problem in my view–is the Supreme Court. The Supreme Court is the key, not because it is the worst offender–in this respect, the Rehnquist Court is a vast improvement over the Warren Court and certainly much less troublesome than the State Supreme Courts–but because, by example if not by direct control, the Court is the dominant influence on American judges. When the Supreme Court engages in activism it has an exaggerated impact throughout the judicial system. Power, after all, is quite enticing; even judges around the world, trained in less judicially robust systems, are entranced with the activism of the American judiciary. Unfortunately, the Supreme Court has never recognized that the *manner* in which it decides cases–its example if you will–is much more important than what it actually decides in the relatively few cases it takes.

Defenders of judicial activism have been effective in sowing confusion in the public's mind as to just what is judicial activism. One particularly ridiculous view of judicial activism–what I call the Nina Totenberg school–asserts that it is judicially active for a federal court to declare unconstitutional an act of Congress, particularly an act approved of by Washington journalists. Congressional acts are, of course, products of majority will. But the Constitution is a body of positive law that sets congressional parameters. Whether an act in question is properly declared unconstitutional depends entirely on whether a court's interpretation of both the Constitution and the statute is correct–and whether the court is activist depends on *how* the court approaches its task of interpretation. A more subtle distortion–advanced last year by Jeffrey Rosen in his *New York Times Magazine* article–equates incrementalism with judicial restraint. According to Rosen, expanding the Constitution in small steps so as to trail (and perhaps amplify) changing public opinion shows restraint, but deciding

cases with "sweeping gestures" and against public opinion is activist. Professor Rosen, it should be understood, mixes up judicial restraint with political restraint.

Because there is so much controversy as to what it means to be judicially active, I will offer a definition. Although it would certainly be helpful if I could illustrate by reference to specific cases, as a judge I am reluctant to discuss specific Supreme Court decisions because their progeny may come before me. So, I will speak only of doctrine.

Judicial activism simply means policymaking in the guise of interpreting and applying law. Policy issues are those questions of public concern on which the body politic or political institutions have free range of choice. When legislatures or constitutional conventions make law, they resolve certain policy issues and crystallize the majority view into rules. Of course, these rules are not on equal footing: constitutional rules trump statutory rules. What is true for both is that, if a judge exercises policy choice when deciding what these rules mean, that is judicial activism. It is my firm conviction that if a judge believes that it is legitimate *in any case* to exercise choice as to a case's outcome, he or she will inevitably be, at least to some degree, an activist.

That is why it is absolutely imperative as a matter of theory that judges believe that there is a theoretical right legal answer to *every* case. Of course, given human imperfections, judges who try to find the right answer often fail. But our only legitimacy as judges lies in the pursuit. Justice Thomas made a similar point in his address at Kansas Law School a few years ago. Once one asserts that there are even some cases in which there is no theoretical right answer, one is on the road to perdition, because one judge's subset of such cases will inevitably be different from another's and pretty soon no cases have right answers. This simple notion is

not generally accepted. Indeed, a justice for whom I have a good deal of respect and affection said publicly some years ago that it was naive to think cases in the Supreme Court had theoretical right answers. If cases there do not have right answers (and one assumes the Supreme Court is a court), I do not see how it can be said that cases in lower federal courts have right answers.

Several important corollaries or subordinate principles guide judges opposed to judicial activism. One was put brilliantly by Justice Scalia in his Holmes Lecture at Harvard in 1989, "The Rule of Law as a Law of Rules." A court should articulate the broadest legal principle–the rule if you will–that governs the case before him or her and, I would add, that governed the behavior of the parties at the time they acted. (In other words, the rule should be *ex ante* not *ex post*.) When a court focuses too much on the unique factors in any particular case, it permits itself to decide differently in the next case, making all too clear that it is really engaged in *ad hoc* decision-making or calibrated policymaking in small, sometimes zig-zagging, steps. That is why Professor Sunstein, generally sympathetic to judicial activism, saw a silver lining when commenting on the 1997 Supreme Court Term, a Term generally thought if as a "conservative" year. The Court shrank from articulating clear principles that might inhibit it from further constitutional expansion.

Second, a restrained judge will honestly and fully set forth his or her reasons for a decision–what my colleague Judge Williams has called "truth-in-judging." If the true reasoning is revealed, it is impossible to hide policy choices. This is a good deal rarer than it should be, particularly in the Supreme Court. As a part-time law professor, I tell my classes that the reason it takes so long to teach law students how to recognize the holding of a case is because judges seldom tell the truth. Justice Ginsburg, in a lecture shortly before she was nominated to the

Supreme Court, spoke of the virtues of speaking in a "judicial voice"–by which she meant decorously. The careful use of judicious language, however, is often designed to obscure policymaking. It is only the relentless, and sometimes not so decorous, logic of dissenters that expose this technique. One should also be aware of the dangers of stirring rhetoric, for instance, statements that something "shocks the conscience of the court." This also serves as a cloak for judicial policymaking.

Honest reasoning includes honest treatment of governing precedent. That is not to say that any court–including the Supreme Court–is engaging in judicial activism if it overrules a prior illegitimate decision; that is another favorite accusation of the journalistic crowd. But it does mean that a court must either follow the principle of a governing precedent or overrule the precedent, and that a court must not–as so often happens in the Supreme Court–put forth a blatantly unpersuasive distinction. The Court and American law are not well served by attempts to gain swing votes through disingenuously expressed reasoning. Justice Scalia, in his recent book, speaks critically of the common law tradition, what might be called twist and turn jurisprudence. He compares it unfavorably to statutory interpretation. I am quite sympathetic to his view. There is, as Jefferson recognized, entirely too much policymaking in the common-law technique to comport with a modern democratic legislative system. Nevertheless, there is as sharp a distinction, which Justice Scalia does not acknowledge, between honest and dishonest treatment of governing precedent as there is between honest and dishonest interpretation of statutes. The defects of the common-law tradition hardly justify the Supreme Court's characteristically disrespectful treatment of its own precedent.

Finally–and I think this is a matter of prime importance–it is a hallmark of judicial

activism for a court to reach out to decide issues not presented by the parties. Indeed, it is the first step on the slippery slope of activism. When a court does not limit itself to the questions presented, it behaves exactly like a legislature. The temptation to "straighten out" the law, to impose one's own construct on a general area of the law, can be quite powerful, but there can be no right answer to a question not asked. The entire Supreme Court is unashamedly guilty of this vice.

Opponents of judicial activism have trained their fire on lower federal courts. Given the recent raft of state supreme court decisions ostensibly interpreting "evolving" state constitutions, the federal courts may be a relatively minor problem. But whether activism is found in the decisions of the state courts or the lower federal courts (particularly the Ninth Circuit) those opinions can find some justification in the stated reasoning of past Supreme Court opinions. The Supreme Court is simply much more politically prudent than the lower federal courts; it takes care to issue judicially active judgments that have achieved a consensus among the elite, and it will rarely confront a view held firmly by an overwhelming percentage of the public, for instance, the constitutionality of capital punishment. To put it numerically, the Court, no matter how its prior reasoning points, will seldom confront over 55% of the American voters. That self-imposed limitation still leaves the Court enormous leeway, for, in a democracy, most divisive issues are located, if I may use a football metaphor, between the 45-yard lines.

Since the most influential agent of judicial activism in this country is the Supreme Court, legislative efforts to attack the problem are problematic. The Court's example dominates American jurisprudence. If one wishes to shrink the legal process significantly to restore more ground to the political process and reduce economic impediments imposed by lawyers, one must

seek a “little judiciary” (recall Gladstone’s proud espousal of a “little England”). A Supreme Court that behaves like a traditional and limited court, deciding only the cases and controversies before it in accordance with judicially principled standards, is an indispensable prerequisite.

APPENDIX III

On the Twenty-Fifth Anniversary of the Saturday Night Massacre

by The Honorable Laurence H. Silberman*

I was recently asked to speak on my personal recollections of the latter Watergate period, and I thought to give that talk again today. Some of the matters I will describe have been reported on–at least in part. But I dare say I will provide some fresh information and certainly some added context. You should be warned, however, I have concluded, after reading innumerable memoirs, that the author invariably portrays him or herself in an overly favorable light.

It is 25 years last October that the so-called Saturday Night Massacre occurred. Elliot Richardson, the Attorney General, was obliged to resign; Bill Ruckelshaus, the Deputy Attorney General, was fired; and the then third-ranking Solicitor General, Bob Bork, as Acting Attorney General, discharged Archibald Cox, the Watergate Special Prosecutor. The events that weekend in terms of dramatic impact rank with the fall of the Soviet Empire, the start of the Gulf War, and the recent impeachment proceedings. Still, we all tend to think of such events in personal terms. When I was asked for my reaction at a dinner that Saturday night, I responded that we knew that President Richard Nixon disliked and distrusted Harvard graduates, but this seemed a bit extreme. In a few months, however, I would replace Bill Ruckelshaus, who was a class ahead of me.

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* Of the United States Court of Appeals for the District of Columbia Circuit. This speech was delivered to the Federalist Society, Los Angeles Lawyers Division, Los Angeles, California, June 24, 1999.

First, and much more important, of course, the President had to find an Attorney General. That was dicey. It was apparent to all that only a Republican Senator would do. This was before the John Tower nomination, and it was still common wisdom in Washington that Senators or ex-Senators were easily confirmable. Yet, the White House did not dare to choose a Senator, thought too conservative. The choice came down to Senator Marlow Cook of Kentucky, a former state judge, or Senator Bill Saxbe of Ohio, the former Ohio Attorney General. Both were regarded as middle-of-the-road Republicans–not of the conservative wing but by no means part of the now nearly extinct species of liberal Republicans.

I suspect Saxbe was chosen because he had a reputation for unvarnished candor. Earlier that year, when he was asked whether he believed Richard Nixon's claim to be ignorant of the Watergate break-in, he answered that he was reminded of the fellow who played the piano in a house of ill repute for 20 years yet claimed he did not know what went on upstairs. After Nixon persuaded him to take the post, and assured him personally that he was innocent, Senator Saxbe relented. When his nomination was announced, he told the press that he believed the President.

Shortly thereafter, I was approached by Senator Saxbe and the White House personnel chief to ask whether I would be willing to be the Deputy Attorney General. I was then a partner in the Washington firm Steptoe & Johnson and had been Solicitor and Undersecretary of Labor in the first Nixon Administration. I had a reputation for being a decent manager–for a lawyer–which, as most of you know, is not really saying a lot. But my key attraction was that, like Senator Saxbe, I was a loyal Republican, and not a particularly liberal one, who could be confirmed. That was because I had been fired from the Labor Department after the 1972

election. I had made a mortal enemy in one Charles Colson by resisting his efforts to influence affairs in the Labor Department (I thought improperly). Colson, you may recall, was infamous for his reputed remark that he would walk over his grandmother to serve the President. I suppose there are some who would wish me to draw comparisons, but, as President Nixon was want to say, it would be wrong.

I will not try your patience by reviewing those bureaucratic battles. The point is that as a by-product of the Watergate investigation, they were revealed by *The New York Times* (July 1, 1973), and I was for a brief halcyon moment in my career a *New York Times* White Hat. To be sure, that I had much to do with the development of the Nixon Administration's affirmative action initiatives did not hurt in certain political circles either. So I was confirmable, and as it turned out, confirmed. As a *quid pro quo*, however, both Bill Saxbe and I were obliged to promise the Senate that we would adhere to the regulatory charter, which guaranteed the independence of the Watergate Special Prosecutor, unless he engaged in extraordinary improprieties.

It is a fair question to ask why was I willing to go back into the Administration? I actually had rebuffed White House solicitations to return to other senior positions in the summer of 1973, but it seemed to me that the Justice Department was unique. Because of the Special Prosecutor's mandate and the Department's obligation to protect his independence, joining the Department was not the same thing to me as joining the Administration in any other position.

After April 1973, I did not believe Richard Nixon. When a senior White House official suggested that I, like Bill Saxbe, should meet with the President as I was nominated, I told him that I, unlike Bill Saxbe, knew the cast of characters from my service in the first Nixon

Administration, and I did not believe the President, nor would I say that I did. Not surprisingly, there was no meeting, and I rather doubt that Nixon was ever told why. I suppose that his staff's acquiescence indicates rather clearly just how politically weak was the President.

As I think back on those days, I am struck by how anomalous was our position. Bill Saxbe and I were, of course, presidential appointees, and, as such, morally and politically obliged to do our level best to carry out the President's policies. On the other hand, the Special Prosecutor was a part of the Justice Department, therefore, even without our commitment to the Senate to support his independence, we would have felt obliged to protect and support him and his activities. The tension between those two conflicting pulls on conscience sometimes seemed unbearable. Each day it seemed that some event would force us to consider afresh what was our appropriate course–and there were no precedents. I sometimes felt that I was walking blindfolded through a moral and political minefield.

I remember, for example, in the spring of 1974 when Don Santarelli, then the head of the Law Enforcement Assistance Administration, one of the major components of the Department, visited Philadelphia, and in a burst of candor told a Philadelphia paper that, in his view, President Nixon should resign. With a heavy heart–I had enormous regard for Don's talent and character–I told him that as a consequence he had to resign. He asked me whether I disagreed with him, and I could not say yes–but I told him no matter how removed the Department was from the President on Watergate related matters the President was entitled to our loyal service on all other issues. We could not very well offer that service if we were publicly calling for his resignation. Don left quietly.

On two occasions, the Attorney General and I were approached by the adversaries

in the Watergate affair for help that we thought obliged to decline. The recounting of those incidents, I think, illustrates the difficulties we faced in steering the right course.

As you may realize, the most important legal issue in the famous case, *Nixon v. United States*, was not the matter which gained all the attention. Indeed, it was virtually swept under the rug in the Supreme Court's decision. That question was the jurisdictional one–the tenuous claim to Article III standing that a special prosecutor in the Justice Department asserted in suing his constitutional superior. When the President raised the point in his brief to the Supreme Court, Leon Jaworski–obviously worried–wrote to the Attorney General claiming that the President was, by that tactic, violating the charter. Jaworski's argument was that for the President to challenge the court's jurisdiction to adjudicate the tape case was, in effect, to threaten to put Jaworski out of business.

Jaworski asked us to intervene. Given my well-known views on jurisdiction, it should not be surprising that I was quite unsympathetic to Jaworski. After all, it is normally thought that a party, and particularly the government, has an obligation to raise a legitimate question as to a federal court's jurisdiction. There was no doubt that the issue was legitimate. I actually believed then, and still do, that the court lacked jurisdiction. The notion that the Special Prosecutor's charter–an Attorney General's regulation–was sufficient to give the Special Prosecutor constitutional independence from the President seemed almost frivolous to me. In any event, we rebuffed Jaworski and stayed neutral, but as it turned out, his fears were groundless. The Supreme Court was not about to permit mere constitutional limits on judicial power to prevent it from playing the dominant role to which it had grown accustomed.

The second event, which occurred on Tuesday, April 30, 1974, was a good deal

more dramatic. Bill Saxbe was off hunting, and I was Acting Attorney General. That was not unusual. Bill loved to hunt. When asked by a reporter how he could spend so much time on holiday, he explained that his deputy worked ungodly hours, had a good mind for detail, and was meaner than a junkyard dog. About mid-morning, after first being primed by a call from Al Haig, the President's Chief of Staff, I received a follow-up call from Jim St. Clair, the President's Special Counsel on Watergate matters. St. Clair was a prominent trial lawyer from a Boston law firm and a part-time lecturer at Harvard Law School, who had come onto the White House staff to defend the President. He somberly informed me that Jaworski was guilty of an "extraordinary impropriety." That was the magic phrase under the charter that constituted grounds for Jaworski's removal. To say I was paying close attention would be an understatement. He went on to explain that Fred Buzhardt, the White House Counsel, had been called before the Watergate grand jury. That action was an extraordinary impropriety because it pierced, or was an effort to pierce, the attorney-client privilege. I asked St. Clair, what attorney-client privilege? I expressed doubt that any government lawyer could have a conversation with a government official that would be privileged as against a Justice Department inquiry. I remember using as an example a Secretary of a Department who takes a bribe and then discloses it to the General Counsel of the Department. (As a former General Counsel, I had had occasion to consider the nature of the problem, if not that specific hypothetical.) Would not the General Counsel, I asked, have an obligation to turn that information over to the Justice Department? I do not recall his response, but I do remember his observing that he too was on the government payroll. I told him that was his problem. Our conversation was interrupted when my secretary came rushing into my office just before noon, pale as the proverbial ghost, to tell me the President was on the line. I

told a shocked St. Clair that I would have to ring off because his "client" was calling.

I have to pause at this point to explain just how unusual an event this was. President Nixon almost never spoke to his cabinet members other than at *pro forma* cabinet meetings–let alone to a number two. I recall a dinner in 1972 with three domestic members of his cabinet and several undersecretaries when each cabinet member confessed that he had had *no* meetings or conversations with the President. They all thought they were out of favor. The President dealt almost exclusively with a small handful of White House senior staff. It was widely believed that he did so because he did not wish to be lobbied on his cabinet members' pet policies. I have come to believe, however, that Nixon was well aware of just how dark and unpleasant to others his unguarded conversations could seem. The nature of his speech was apparent when the transcripts of his taped conversations were released. I think it was to protect his own reputation that he met with so few.

The nature of my conversation with the President, as well as an outline of other events that day, was reported by *The Washington Post* over five years later on December 28, 1979. That happened because a memo that I asked one of my three Associate Deputy Attorney Generals to write was disclosed under the Freedom of Information Act. But more about that presently.

The President started the conversation by asking me how I was doing in picking judges. In those days, the Deputy Attorney General's role in that regard–at least for the Administration–was dominant. I assured him that insofar as we had discretion, I was looking only for those who believed in Frankfurterite judicial restraint. (I did not realize back then that choosing prominent Republican trial lawyers was no guarantee of such a jurisprudential

commitment.) He then turned the conversation to the Connally case. John Connally, formerly Treasury Secretary, was under investigation for allegedly accepting a $10,000 gratuity from the Association of Milk Producers in return for his efforts to boost federal milk price supports. This matter was being handled by the Watergate Special Prosecutor's office, although Leon Jaworski was recused, and his Deputy Hank Ruth was in charge.

The principal witness against Connally, who allegedly had delivered the gratuity, was one Jake Jacobsen, who was already under indictment in Texas for allegedly lying to a federal grand jury and allegedly misapplying bank funds. The President complained that it was his understanding that someone in the Justice Department was planning to drop federal felony charges against Jacobsen in Texas in return for permitting Jacobsen to plead guilty to a misdemeanor and to testify against Connally in the District of Columbia proceeding. I was taken aback but reminded the President that the Connally case was being prosecuted not by the Justice Department but by the Watergate Special Prosecutor force, which had been guaranteed freedom of independence. The President responded that the Texas charges against Jacobsen had been brought by the U.S. Attorney under the supervision of the Justice Department and that the Department was permitting or engaging in an abuse of the plea bargaining process. I confessed that I was not familiar with the details of Jacobsen's plea bargaining but would look into the matter. He instructed me to do so and to call him back within the hour.

I called for Henry Petersen, the Assistant Attorney General in charge of the criminal division, who atypically had been a career attorney prior to his appointment. Although the circumstances were undoubtedly extraordinary, I recall, somewhat ruefully, that my awareness of the gravity of the situation was mixed with bureaucratic annoyance; I was more

than a little miffed that Petersen had not reported to me on the matter. Henry apologized for that omission and explained to me that the matter had been worked out with Hank Ruth, the Deputy Special Prosecutor. He assured me that, contrary to the President's assertion, Jacobsen was pleading guilty to a felony in the District of Columbia that was at least as serious as the one for which he was under investigation in Texas. I asked Henry what we would do under normal circumstances–if the Justice Department were not bifurcated? He convinced me that the criminal division would ordinarily drop one of the pending indictments of a defendant who pled guilty to the second–so long as the second was punished as severely. This would be so even in the absence of the defendant's willingness to testify against a target as significant as the former Treasury Secretary.

After thinking for a few moments, I called the President back. Somehow I was not surprised when the President immediately answered. The conversation, however, was not a pleasant one. I explained to the President that the Department's position was neither improper nor unusual. The President grew quite agitated, repeatedly interrupting me, and argued that the plea bargain was nothing but a disreputable plot to get Connally. He said, "I want it straight. I don't want any dancing around." In response to my explanation that the Department was handling the matter "normally," the President bellowed, "I don't want to hear about normal procedures. I want orders." He curtly told me to call Haig back in one hour and he hung up on me. It was a rather stunning experience to have the President of the United States angrily hang up the phone on you–particularly when you are only a 38-year-old Deputy Attorney General. It was clear to me by his excited phrase, "I want orders," that he meant he was giving me orders to change the Department's position on the Jacobsen plea.

I told my staff that the President had issued orders with which I could not comply, and therefore I was obliged to resign. One of my deputies, in a display of gallows humor, started to take my pictures down from the wall. Before going any further, however, I was required to report to the Attorney General, who was on a pheasant shoot on Shelter Island. It was not easy to get hold of Bill Saxbe when he was hunting, but, he always had FBI escorts, so I succeeded. He was not at all pleased to be dragged to the phone and listened rather impatiently to my report. When I asked him what I should say if I were asked by the White House as to his position on the matter, he responded–and I will remember this if I live to be 100–"Tell the President to go piss up a rope." He also said he did not agree with me about resigning. He would be damned if he would resign; the President would have to fire him. He then abruptly returned to his hunting, admonishing me not to bother him again.

I then called General Haig, described my conversations with the President, and told Haig that I planned to resign that day. He seemed stunned and asked me to wait at least long enough for him to find out more about the matter. He muttered something about Connally probably being in the Oval Office.

In the meantime, Bob Bork rushed into my office, having been brought up to date by one of my deputies, and said, "Not this time." He was not going to be left holding the bag again. If I resigned, he would follow.

Late in the afternoon Al Haig called back and said forget the whole matter; the President's call was to be erased. I did not think I could do so. What, or more important, *who*, had prompted the President to call me could be of legal significance. I was certain Haig was not complicit; he had been focused on the Buzhardt matter. But it was distinctly possible that

Connally might have been involved and that could suggest an effort to obstruct justice. I was therefore bound to inform Henry Ruth. I provided him with the memorandum. A few weeks later he brought it back explaining to me that he did not think he could make out an obstruction case.

I did not, however, tell Ruth about the subject of the St. Clair call, which had been eclipsed by the President's more dramatic intervention and was not thereafter mentioned to me by anyone. The White House was certainly entitled to make a claim to us at any time that the Special Prosecutor was guilty of an extraordinary impropriety. Even if we thought the claim unfounded, it did not seem appropriate to me to pass on that information to the Special Prosecutor.

* * * *

The denouement of the Nixon Presidency came in August of that year, after the Supreme Court's decision. The President had no alternative but to turn over the tapes, which included the so-called smoking gun. I learned about that particular tape when a young lawyer in the White House called and told me about it a week before it became public. About the same time, I was told that the Secretary of Defense, Jim Schlesinger, had instructed the top military not to obey any order from the President that could cause a military confrontation without his approval. Aware of this impending constitutional crisis, I resumed cigarette smoking.

But the President went peacefully. Unfortunately for him, my last service to his Administration was to prevent him from taking his papers. I do not recall who called whom, but I told General Haig that I objected to his taking his Presidential papers before the Department had an opportunity to give a formal legal opinion as to whether President Nixon owned them. I asked

the new Assistant Attorney General for the Office of Legal Counsel, Nino Scalia, nominated by Nixon, but appointed by Ford, to look into the matter and prepare an opinion for the Attorney General. As you will recall, the Department concluded the papers were indeed Nixon's, but in the meantime, Congress legislated and, in effect, seized them.

In early 1975, six months or so into the Ford Administration, Bill Saxbe went off as Ambassador to India. I was left as Acting for a short while, long enough to help get Ed Levi confirmed, and then to help the Administration find a replacement for me. I was utterly drained and insistent on leaving for a number of personal reasons.

Shortly after Nixon resigned, so did Leon Jaworski. We appointed the decent and capable Henry Ruth to succeed him. After several months, Hank came to me asking why any special prosecutor was needed. He pointed out that, after all, the need for that office was based on the premise that the Justice Department could not appropriately investigate President Nixon and his White House assistants. Jerry Ford was now President–which meant the justification of the office had disappeared.

I immediately agreed with him and arranged for us both to meet with the newly appointed Attorney General Levi. Hank repeated to Ed Levi what he had said to me, and I added the further point that it could be thought an insult to President Ford, and to us, to continue the Special Prosecutor's office. Ed Levi pondered and then asked about the Watergate convictions that were on appeal. What would happen, he asked, if any convictions were overturned? I responded that the Department would try them--that is what we got paid for. (Not, I hasten to remind Senator Biden, with big bucks.) Ed Levi, however, worried about the possibility of criticism if the Department lost any cases, so the Special Prosecutor's office stayed, and Ruth too,

for a while.

That turned out to be a fateful decision because the office remained in place through the fall of 1976, the election year. Ruth, who left in 1975, was replaced by none other than the present White House counsel, Charles Ruff, who had been on his staff. In the spring of 1976, an obviously malicious claim was brought to the FBI–an allegation that illegal maritime union money had been put into one of President Ford's congressional campaigns. I say obviously malicious because the charge was brought by a maritime union which was furious at the President for having vetoed the cargo preference bill, and it was supported by two bureaucratic enemies of the President. Of course, this had nothing to do with the Watergate Special Prosecutor's charter, but the Attorney General turned it over to Mr. Ruff because he thought it awkward for the Department to investigate a matter implicating the President. When I subsequently learned about it, I did not disagree with Levi's premise, but I was rather surprised that he did not conclude that the charge was frivolous and therefore could have been summarily rejected.

In any event, the matter took a long time to dispose of–long enough so that the existence of the investigation leaked during the fall campaign. It had a powerful impact. President Ford had virtually caught up with Jimmy Carter when the story broke. All the country had to hear was that Ford, too, was under investigation by the Watergate Special Prosecutor, and Ford's support dropped precipitously. Well, Ford lost narrowly, but that paved the way for Ronald Reagan's victory. And he appointed me to the bench. So everything happens for the best.