

Today is Wednesday, January 23, 2008. We are continuing the oral history interview of Judge Laurence Silberman. The interviewer is still Ray Rasenberger.

The purpose of this addendum to Judge Silberman's earlier oral history is to cover the ground that he has covered since we completed the last interview in 2002, which includes his service as Co-Chairman of the Commission on Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction.

MR. RASENBERGER: So, Judge Silberman, before we begin, is there anything...it has been almost 4 years now since we last interviewed. Do you have anything you want to change or say about your personal life – we did cover that quite a bit in the earlier oral history – that might be relevant in view of this later time?

JUDGE SILBERMAN: I certainly should mention that Feb. 18 of last year, 2007, my wife, Ricky, died at Georgetown Lombardi Cancer Center. She had been fighting breast cancer for seven years and it had finally engulfed her. We had planned, only the next month, to have a black tie dance at the Metropolitan Club, to which, incidentally, you would have been invited, along with John Nolan, to celebrate our 50th anniversary. I had always prayed that she would last long enough to make the 50th anniversary. But, as I said at her funeral, I also prayed that she would not suffer and I was glad that God heard the latter prayer and overrode the first. We had a funeral at Georgetown Chapel, which is where Ricky wanted a service. Unfortunately, it is small and the crowd overwhelmed the chapel. I believe that all of my colleagues on this Court

came and seven of the Supreme Court Justices came and Lord knows how many people in and out of the Executive Branch in Washington. Fortunately for me, in June, 4 months after, my classmate, Tim Dyk, a judge on the Federal Circuit, married to Sally Katzen, who was one of my wife's dear friends, had a dinner party, and to that dinner party they invited Tricia Winn, who lost her husband to cancer shortly after Ricky died. He was a prominent oncologist. We met at that dinner and then within a relatively short period of time we were engaged and I was married two weeks ago.

MR. RASENBERGER: Thank you for that update and my condolences on Ricky's death and congratulations on your marriage.

JUDGE SILBERMAN: Incidentally, I should note that Tricia was five years behind Ricky at Smith, which made it somehow seem appropriate.

MR. RASENBERGER: Right. That is great news.

Okay, the main event that we came to talk about today is your service on the Commission on Intelligence Capabilities. I know in our earlier oral history discussions you talked about involvement in intelligence activities in a number of ways, including being offered a national security-type job on intelligence, as I recall in the Ford Administration, and more recently you have served as one of the judges on the Foreign Intelligence Surveillance Act Court of Review. At the time we did the last oral history interviews, that court had been in existence for some time but had not decided a case. As I recall, there has been a case decided since then by the court and maybe that is a good

place to start getting into the whole subject of intelligence capabilities. Was there anything about that service or that case worth mentioning?

JUDGE SILBERMAN: I think so. I think I may have told you the last time that when Chief Justice Bill Rehnquist appointed me to that court, he told Ricky that he had the perfect job for me to do – that I had all the background, and one time had all the clearances, because, as Deputy Attorney General and Acting Attorney General, I had, on numerous occasions, authorized foreign intelligence surveillance activities. I don't recall whether I told you that I had also testified against the existence of that court.

MR. RASENBERGER: No I don't recall that.

JUDGE SILBERMAN: Which gave Bill a kick when he appointed me. I had raised questions about the propriety of judges deciding these issues *ex parte*, both because I didn't like an *ex parte* proceeding and second, because I thought judges were being asked to make what were very close to policy judgments which were not appropriate. Nevertheless, I took the appointment and, as you know, the government finally, after all those years, filed an appeal. Remember, an appeal can only be filed by the government because it is an *ex parte* court and the targets never know they are targets. That was an enormously big case because the Foreign Intelligence Surveillance District Court had determined, to put it simply, that the Patriot Act had constitutional infirmities, and therefore they had refused – several of the judges – had refused to authorize certain surveillance pursuant to the Patriot Act, or certainly the government's interpretation of the

Patriot Act. The government then, finally for the first time, appealed. They used to, in the past, always try to negotiate with those district judges, but this time the government thought they were stymied and they thought the district judges were wrong. It was an unusual experience for a federal judge. Most of what I testified about, in opposing the legislation, I experienced as an appellate judge. I disliked intensely being put in a position to answer a question *ex parte*. I sat with two other judges who were on that panel, both senior judges – one Ralph Guy from the 6th Circuit and Ed Leavey from the 9th Circuit. It was quite uncomfortable trying to make a judgment based on the government’s brief by itself.

MR. RASENBERGER: There was only one party.

JUDGE SILBERMAN: Right, but we did ask the ACLU to file amicus briefs. Now, they were not privy to the factual matters, but the factual matters were not that crucial, and because it was *ex parte*, I remember discussing the case with a couple of my colleagues on the court who had been in the Justice Department and had been involved in this matter. I also discussed this case with the journalists who had followed the whole subject of the Foreign Intelligence Surveillance Court for some time. I felt no inhibitions about talking with people because I was very anxious to try to see what arguments would be presented in opposition to the government.

MR. RASENBERGER: It was a Patriot Act issue in a way.

JUDGE SILBERMAN: Yes, it was. The issue, simply put, was the amount

of information that the law enforcement people could glean from foreign intelligence and vice versa and how much emphasis on foreign intelligence was necessary before surveillance was taking place. The Patriot Act had described it – it had to be a significant factor – but they did not preclude use of that information in law enforcement so long as the government’s initial purpose as a significant factor was foreign intelligence. We concluded that the district court was in error and that the government was even more right than it thought. That is to say, we thought the inhibitions that the government itself had imposed on the original statute, a so-called wall between foreign intelligence and law enforcement, had been overdone and was not constitutionally required. That issue, of course, has not been finally determined by the Supreme Court. Someone tried to seek *cert* on it and I don’t know how they could have possibly had standing, but the issue will ultimately get to the Supreme Court because I believe there are some persons or defendants who were targets of foreign intelligence surveillance, and were also convicted of crimes, who are challenging the constitutionality of the Patriot Act. I believe there may be a district judge in Michigan who held that the Patriot Act was unconstitutional and disagreed with our opinion. That case will eventually come up through the 6th Circuit to the Supreme Court perhaps. I don’t know.

MR. RASENBERGER: But your opinion was not published.

JUDGE SILBERMAN: Yes it was. There was an excerpt of only a few pages that was not published, but the rest of the opinion was published.

MR. RASENBERGER: I see. Okay.

JUDGE SILBERMAN: And actually I wrote it. It says *per curiam* and normally judges would never disclose who actually wrote a *per curiam* opinion, but in this case, everyone knew that I had written or drafted the *per curiam* opinion. My colleagues expressed views on bits and pieces and they certainly contributed, but the reason it was known that I drafted it, for one thing, is it is in my style, but secondly, the Justice Department had to come over to my office...to my chambers...to go over the opinion to make sure there was no breach of security in the part that we were making public.

MR. RASENBERGER: Oh, I see.

JUDGE SILBERMAN: That is another reason why this *ex parte* process is very uncomfortable.

MR. RASENBERGER: Yes, I see what you mean. Okay, well, between that and the Commission, were there any other intelligence cases or anything relevant to the Commission's activities that you were involved in?

JUDGE SILBERMAN: No. Let's go off the record for a moment.

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JUDGE SILBERMAN: I don't recall the exact date, but you can deduce it from journalistic treatments, I suppose. There was a good deal of tension between Gov. Kaine and Congressman Hamilton and certain members of the Commission and the White

House concerning various issues. I received a phone call from Andy Card. Oh, let me take a step back. You will recall the Commission was originally supposed to be chaired by Henry Kissinger. Some of the families of those killed in 9/11 objected strongly to Kissinger, for what I didn't think were particularly good reasons, and Kissinger decided to withdraw. There was also some hostility to Kissinger based on his client list. In any event, Kissinger withdrew as chairman.

So as I started to say, I received a call from Andy Card, the President's Chief of Staff, in which he asked me whether I would be willing to replace Gov. Kaine as Chairman of the 9/11 Commission. I was somewhat puzzled because I had no indication – nothing in the papers appeared – suggesting that Gov. Kaine wished to leave. I deduced from my conversation with Andy Card that this would be a matter that the White House would “manage,” which was another way of saying I thought they wanted to push him out and replace him with me. I told him I would think about that and I called back some time later to say that I declined and that I didn't think it was a good idea. I told him that I would have been willing to become Chairman and leave the bench – after all it was war time – if they had asked me initially or after Kissinger pulled out, but this looked to me like it would be a repeat of the Saturday Night Massacre and I thought it was a dumb idea for both the Administration and for me. The 9/11 Commission was, unfortunately, quite split amongst partisan lines and I thought that replacing Gov. Kaine with me would exacerbate those tensions and would not look fair or appropriate to the American people.

Nobody knew...very few people knew about this. I was sort of astonished to find out some months later that the Vice President, Dick Cheney, who is a close friend, did not know about this and I think you can understand why I do not wish that this be disclosed until after the Administration leaves office.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: But the reason it is relevant, in answer to your question, it explains why the Administration came to me to chair the WMD Commission...co-chair with Chuck Robb. After the invasion of Iraq and the failure to find weapons of mass destruction, which virtually everybody in the government and in the military and the intelligence community were convinced did exist, there was a good deal of disquiet in the government and outside the government about that failure. And the President was under certain political pressure to try to figure out (a) whether or not the intelligence community had done an adequate job, and (b) whether there were any indications that the Administration had pressured the intelligence community into its conclusion that Iraq had weapons of mass destruction or, as the NIE had put it, that there was a 90% certainty that Saddam had weapons of mass destruction. It was determined that a new commission would be set up to look into that issue. The 9/11 Commission had not yet reported, but the focus of the new Commission was actually a much broader charter. The 9/11 Commission was initially designed to figure out what happened, or what didn't happen, when we were attacked on 9/11. They weren't actually given the

charter to examine the structure and performance of the intelligence community broadly. We, however, were. The Executive Order was quite broad in asking our Commission to evaluate the behavior and effectiveness of the intelligence community and to recommend any changes we thought appropriate. I was called this time by the Vice President, not by the Chief of Staff, asking whether I would be willing to serve on the Commission, probably as co-chairman. The initial notion was that I would serve as a co-chairman along with Congressman Foley...retired Congressman Foley.

MR. RASENBERGER: Tom Foley?

JUDGE SILBERMAN: Tom Foley of Washington. This time I agreed to do it. I initially thought I would be obliged to retire from the bench, but when I went over to meet with Gonzales and his staff to look over an Executive Order, I was rather surprised when one very senior fellow from the Office of Legal Counsel, who was present at the meeting, pointed out to me that I did not have to retire, that the Canons of Ethics specifically allowed a senior judge to take an appointment in the Executive branch or, for that matter, a state government, so long as the senior judge, during the period of the appointment, would not use judicial resources, including his secretary or law clerk, in the performance of this non-judicial role. That made it rather easy for me because I would have been reluctant to give up my seat on the bench, but I was initially willing to do it, because it was war time. When I got over to the White House and we were discussing the Executive Order, Andy Card came into the office...Gonzales' office... to say (or maybe

we met first in Andy's office) and I learned that Congressman Foley, who had initially, as did I, accepted in a phone call with the President, had called Andy Card to tell him that he couldn't do it after all. He explained that Nancy Pelosi had put enormous pressure on him...he was a partner in a firm that did a good deal of lobbying...to urge him not to accept the appointment. Congresswoman Pelosi wanted to force the Administration to come to the Congress to get authorization for a commission that would be bipartisan. She did not want the President to simply appoint a bipartisan commission. She wanted something more like the 9/11 Commission, where half the members were appointed by Congress and you had a really sharp partisan split. So Congressman Foley apologetically withdrew. At that point the President came into the room and asked me whether I would be willing to be the sole chairman and, as I recall, I said I didn't think that was a good idea. I thought the co-chairmanship arrangement, although perhaps awkward, was preferable, since I certainly had been a Republican prior to going on the bench and was perceived pretty much as a conservative, and I thought it would be much better to have a known Democrat to serve as the other co-chairman, but also someone who I thought I could work with. Foley had specifically told the President that he was quite comfortable working as co-chairman with me before he felt obliged to withdraw. I should divert for a second to say that when the President called me to ask me to officially serve as co-chairman, he got me on my cell phone driving along from home to chambers, and I couldn't help but tell him that...first of all, he was on a cell phone which, of course, is less

secure, and he said, "I am not troubled about that." I said, "Well, I have a slight problem because...as I understand it, the city council had passed a law making it illegal to talk on a cell phone while driving." So I said, "Will you guarantee me a pardon if I am arrested while I am talking with you?" He laughed and said, "I will take care of that." In any event, back to the White House. The President agreed, I think, with me that it would be much preferable to have a Democratic co-chairman and he called Chuck Robb, who I did not know, and Chuck Robb, the ex-Democratic Senator from Virginia, agreed to serve as co-chairman.

MR. RASENBERGER: Governor of Virginia, wasn't he?

JUDGE SILBERMAN: Both senator and governor.

MR. RASENBERGER: That's right.

JUDGE SILBERMAN: As a matter of fact...to divert for a second, when the President was announcing the Commission and had the two of us in the White House, we had a little discussion beforehand as to what title Chuck would use, and I interjected that I thought the only title, as a matter of protocol, that he continued to have was governor – that presidents, ambassadors, judges and governors retained their title for life. I didn't think senators did, but Chuck would prefer to be referred to as a senator. We had a funny conversation about that because the President asked that when he leaves the office would he have to be referred to as governor. And I said, "No, president is a title you keep, too."

I did contribute views as to members of the Commission.

MR. RASENBERGER: I was going to ask you that.

JUDGE SILBERMAN: There were several people who had been recommended by senior people in the White House, but we didn't have a full slate and I strongly recommended Pat Wald, one of my colleagues on this Court, both because we didn't have any women and Pat is certainly perceived as a liberal Democrat and I have enormous confidence in her judgment and her integrity. According to Woodward's book, there was some resistance in the White House as to Pat's appointment with, I think, Karl Rove at one point somewhat jocularly referring to her as a Communist, but I insisted that we have Pat. I also selected Harry Rowen, or urged the selection of Harry Rowen, who had enormous experience. He had been in the McNamara Defense Department, he was a first-class scholar at Stanford, an expert on national security affairs and had been the senior intelligence official under Casey. He had the job under the CIA director, as assistant for the community as a whole, because the director of the CIA was the head of the intelligence community. I remember calling Harry, who was in Beijing, and it was sort of amusing that I was calling Harry to serve on the intelligence community when he was in Beijing because we both recognized, of course, that we were not on the phone alone.

MR. RASENBERGER: Were there others who you were involved in selecting as commissioners, or was this mainly a White House process?

JUDGE SILBERMAN: Actually I had to approve...I approved all of them. I don't recall whether there were others I suggested. No. Both Chuck Vest, the president of MIT, and Rick Levin, the president of Yale, were selections of...I think Andy Card suggested Vest, who we knew from Massachusetts, and the President knew Rick Levin of Yale. Oh, another one I was quite involved with was Lloyd Cutler, who had been mentioned and I was strongly in favor of. As a matter of fact, I considered both Lloyd and Pat Wald as potential co-chairmen, but the President came up with the notion of Chuck Robb. And the problem with Pat was she didn't have intelligence experience...and Lloyd, who did have intelligence experience and had been White House counsel under two presidents, was very old, so Chuck Robb was the selection, but I did weigh in strongly in favor of Lloyd Cutler as a member and I was the initiator of Pat Wald.

MR. RASENBERGER: And your relations with Robb, I take it it worked out fairly well.

JUDGE SILBERMAN: Astonishingly well. The concept of having co-chairmen is one that you would think inherently was difficult, but we worked very closely together. I have enormous respect for his judgment and wisdom. Insofar as we had exterior relations, Chuck pretty much dominated that and I was more the inside man, although we consulted each other on everything.

MR. RASENBERGER: Let me ask you, did you...despite the fact that there was an ethics rule that said that a senior judge could serve on a commission such as this,

did you have any hesitation about the dual role of judge and commissioner personally or were you satisfied that the ethics ruling was basically sound in terms of your own standards?

JUDGE SILBERMAN: I was rather surprised that the judiciary had considered that and specifically decided that was appropriate. It ran counter to my notion of what judges should and shouldn't do, but on the other hand, since it was clear that it was considered by my colleagues and had been carefully considered and thus was permitted, I thought, well, why not take advantage of the ruling. I didn't really think that there was a conflict in my own mind because what I was doing wasn't legal at all. It was strictly a nonlegal position. Still, what would have bothered me if I had been writing this ethics rule because you have a judge expressing a view on a policy issue and then going back as a judge and judges aren't really supposed to be involved in policy formulation, but I thought well, number 1, it is war time, and number 2, this is a pretty specialized area, and so not without some concern, I decided what the hell, I will do it.

MR. RASENBERGER: When you were doing it, did you feel any awkwardness related to the fact that you were a judge?

JUDGE SILBERMAN: No. First of all, remember I stopped sitting on cases when I took this job. I arranged for my law clerk to go down and finish his clerkship with Paul Friedman, a district judge. My secretary had to find another job. Almost instantly I dropped my judicial mode of thinking and went back to thinking as if I

were more of a manager or more of an executive. There was a good deal of management involved in creating a staff and determining how we would go about doing this job, then recruiting first the executive director and an enormous number of people to build up the staff. The executive director that Chuck and I agreed to hire was Scott Redd, a retired vice admiral, an enormously able fellow. I was rather amused one day we were having a conversation on a legal issue, which was rare, and Scott said something. At that point Mike Leiter, who was the deputy general counsel, a graduate of Harvard Law School who had been recommended to me by Steve Breyer for whom he had clerked, and was first in his class at Harvard. He was paired with the other deputy general counsel who had clerked for me and clerked for Kennedy and was a Republican. Mike was a Democrat. It was part of our effort to be consistently bipartisan. In any event, Mike made some criticism of Scott's view and I agreed with Mike and we both sort of suggested that this was a legal question, not a matter that we would expect an Annapolis graduate to be an expert on. The next day Scott walked in and dropped on my desk, with Mike there, his acceptance from Harvard Law School which he had turned down. That was a closeout bid.

MR. RASENBERGER: Was it of any particular help...this is really a two part question. First, was being a judge in general of any help, and secondly, was your prior experience in the intelligence aspects of judging and, make a third branch to that, your prior experience in the intelligence aspects of the government before you went on

the bench. How did those all play out in terms of your...

JUDGE SILBERMAN: Insofar as I had the ability to do this job, and that is up to somebody else to make a determination or judgment, my abilities were drawn entirely from my executive experience both in government and out of government and not at all as my role as a judge. It probably did not hurt in dealing with the executive branch to be thought of as a judge, but I don't think that meant that much. It was more important by far that frankly I was rather tough and that I would be prepared to resign if I didn't get cooperation.

MR. RASENBERGER: The Commission had a fairly tight deadline, if I recall correctly. Were you consulted about that deadline?

JUDGE SILBERMAN: Yes, I was actually. When the Executive Order was being drafted, I worried that it would be hard as hell to meet that deadline and the President, and I think Al Gonzales both, said, "Well, if you couldn't make it you could always ask for an extension." Indeed, the 9/11 Commission did ask for an extension. I thought it would be important to try to make it and did my best, along with Chuck, to manage the process so as to meet it.

MR. RASENBERGER: Yes, well, I have to say by looking at the document itself, at least the unclassified report, thirteen months is pretty darn fast for all those recommendations and all that analysis that went into it.

JUDGE SILBERMAN: The truth of the matter is that I think we had a staff

of somewhere around 70, but twenty people did 90% of the work.

MR. RASENBERGER: Oh, that is the way organizations work anyway.

JUDGE SILBERMAN: Yes. I guess that's true. Now in selecting the staff for the Commission, we were constrained in the sense that we had to either take people with security clearances or get them cleared very quickly. The first two people we hired were the two deputy general counsels, even before we hired the general counsel, because we desperately needed people immediately. We got Mike Leiter and Brett Gerry. It took us a while to get Scott Redd because, although we interviewed him in Washington, he volunteered to go over and help Bremmer in the coalition activities in Iraq, and then when we decided we wanted him, Bremmer fought desperately to keep him, and the President had to finally make the decision that our demand had priority and he came back as executive director. We had gone through a number of people and Chuck and I, although we agreed on almost everything, had some disagreement along the way as to who would be the ideal executive director. My sense is we didn't want a lawyer, we wanted a manager because we had enough legal experience, and I saw it as a management job, not a legal job. But we had to pick people with clearances or could get clearances quickly. We could take a number of detailees from the agencies, but we had to recognize that any detailee from an agency – CIA, FBI, DIA, NSA – was going to be in a conflict of interest and we had to manage that. In fact, I fired one FBI employee who leaked back to the FBI, contrary to her instructions. I don't know what has happened to her over at the FBI.

They had her under investigation by some internal audit group. I am quite certain she was being encouraged by someone rather senior in the Bureau, so I don't think she was on her own. But it had a salutary impact when she was fired. So you had a group who came in as detailees. You had a certain number of people who were working for contractors who had been retired from the agencies and were working for contractors. They were enormously valuable, but they also had their ax to grind and you had to keep that in mind. Then we had a certain number of academics and, because of Rick Levin, we were very lucky in getting 3 or 4 people who had just graduated from Yale, which had a new National Security major and they were stunningly good. We also had one from Harvard. These young people worked very hard. I also recruited another ex-law clerk of mine who was first in her class at Georgetown Law School, and who had worked for ten years in the clandestine side of the CIA before she went to law school. She is now at Wilmer Hale. So there were some people around you could get who had experience and didn't necessarily have an ax to grind, but it was hard to find them.

MR. RASENBERGER: Still you had to assemble these people and then deploy them in a way.

JUDGE SILBERMAN: Well, of course Scott Redd was the executive director, but I was very active in that, too.

MR. RASENBERGER: Judge Silberman, I was going to ask you a little bit about the concluding part of your report and then we can go back to some of the other things. You say in there that there have been other studies...other commissions perhaps...that have looked at our intelligence services and made other recommendations about how to solve them and, by and large, they have not succeeded in producing any change, but that you have reason to be somewhat more hopeful this time that these recommendations of yours, which are certainly very substantial and certainly worthy of consideration, would not meet that fate. My question is...now that was two years ago or so...are you more or less hopeful about your recommendations than you were at the time you wrote that?

JUDGE SILBERMAN: Well, the President went over them with some care with his staff and concluded that virtually all of them – not all of them but virtually all of them – should be implemented. He put Fran Townsend in charge of the implementation. There was some resistance. There was resistance at the CIA for taking on the role of head...of leader of HUMIT (HUMIT is human intelligence) so as to provide guidance to the FBI and the DIA for those activities. But that has come along, I gather. I have lost track now, although I have been occasionally consulted by PIAB, the President's Intelligence Advisory Board. My knowledge is rapidly diminishing since I no longer

have access to complete information. But let me continue. There was enormous resistance at the Justice Department to our recommendation of a separate new division for internal national security in the Justice Department and, more importantly, for a new division within the Bureau forging counterintelligence, terrorism and intelligence into a new national security division of the Bureau. That has been like pushing a noddle uphill. There has been enormous bureaucratic resistance to that and I, frankly, am disappointed at how slow it has been in its implementation. We wanted very much to see new training for separate intelligence types and counterintelligence types, new incentives, new structures, and so forth. The Bureau has resisted as only the Bureau can do. And I am disappointed with that. Very disappointed. There have been a number of specific changes in the analysis side and in the collection side which I think we recommended, some of which I can not discuss. The whole DNI structure is one that still remains to be determined whether it adds value or not. One thing I have told people subsequently who work in the DNI (the Director of National Intelligence) is they should ask themselves every day how they are adding value as opposed to adding bureaucracy. I wonder about that, but I just don't know enough about that. I stayed somewhat in contact with John Negroponte, the first DNI, but not so much with McConnell. My exposure, my interest, my expertise, such as it is, is diminishing rapidly. I do hear bits and pieces, some of which are encouraging and some discouraging, but I am simply not in a position to feel reasonably authoritative anymore. I do worry about the DNI structure just adding bureaucracy, not

just adding value. We, of course, had to accept the DNI. There was an interesting question – would we have been better off to have a loose coordinating mechanism, which is what my colleague Dick Posner continues to argue, from a very CIA-centric point of view. The problem with the loose coordinator...an assistant to the President for intelligence similar to the job I was offered 30 years ago...the problem with that is...and the reason that it works in England and would have great difficulty in the United States is that in England you have a fusion of all legislative and executive authority so you can run the government there much more efficiently and easily than you can in the United States, where you have separation of powers and a constant tug of war between the Executive and Congress, so the bureaucracies of government are always looking to the Congressional moon competing with the Presidential sun, making it harder and harder to coordinate or to manage.

I thought the job of DNI was a management job. I, frankly, am not happy to see the DNI spend every day briefing the President, which forces him to get up at four o'clock in the morning and it means all his creative energy, or a good part of it, goes into that part of the day. I thought that was a mistake. I thought that you should have a rotating individual do the briefing of the President. DNI could be present, but he shouldn't have to prepare himself, because I was afraid that the management problems in the intelligence community would never get solved unless somebody spent time on that, but there is this great temptation to be close to the President.

MR. RASENBERGER: Right.

JUDGE SILBERMAN: And the President actually wants that, so the President gets the organization he wants. Presidents don't think about long-term management in the Executive branch – they think about next week.

MR. RASENBERGER: I sense from your recommendations overall that they call for more coordination and basically putting more power into the hands of the DNI as a coordinator of intelligence activities.

JUDGE SILBERMAN: Not just coordinator, but manager.

MR. RASENBERGER: Yes, okay, so let's take an example. You think the DNI can ever manage the Department of Defense's intelligence? I mean, isn't...

JUDGE SILBERMAN: Actually that has worked out much better with Gates as Secretary of Defense and McConnell as DNI because they had a continuing relation. Also Gates put in General Clapper, who had been the head of NGA (National Geospace Agency) and who was a first-class intelligence type to be his undersecretary for intelligence. There is an inherent difficulty, of course, but...and that is why Mike Hayden and Clapper originally testified that they should be under the DNI and taken away from the Secretary of Defense, but that couldn't get through Congress, nor could it get through the Defense Department. The answer to that question would depend on how well, particularly the acquisition process, is going. That is where there rubber meets the road and how influential has the DNI's office become in dealing with that question. Certainly

the DNI was in a better position to deal with it than the CIA Director was. Theoretically, the CIA Director was also the director of the community, but his or her power to influence what went on in the Defense Department was pretty minimal. The DNI has greater clout, indeed, he has as much clout as the President wants to give him.

MR. RASENBERGER: Yes, I think you put your finger on it in a way. It is only the President who can make this coordination happen, isn't it?

JUDGE SILBERMAN: Yes. Always was true.

MR. RASENBERGER: Yes, which means he has to rein in the agencies that need reining in.

JUDGE SILBERMAN: I thought it was important that DNI brought to the President certain issues that had never been brought to the President and to say, "I think you need to decide this." For instance, there has been this fight which still has not been resolved concerning lie detectors. Certain intelligence agencies in the United States government insist that their employees take lie detector tests routinely every 5 years, or whatever it is. CIA does that; the FBI does that; Defense refuses; State refuses. Remember George Shultz famously threatened to resign over that. I thought that was ridiculous. I think everybody should be prepared to take the lie detector test and I was going to volunteer to take one until I found out it would take 10 hours. I didn't have 10 hours to spend.

MR. RASENBERGER: That is the kind of thing, though, that normally the

President can make happen.

JUDGE SILBERMAN: That's right. It presented an enormous problem in terms of dissemination of information. Also, there were other problems in term of recruitment. Different agencies had different standards of recruitment. They could have been unified, but those kinds of problems require a lot of management attention, and the latest information of where Osama Bin Laden is tends to drive that away.

MR. RASENBERGER: Right. Then you have the problems which you mention in your report of different cultures and one that I have always noticed is the paymaster problem. I mean, you work with the guy who writes your check and all the coordination in the world is not going to break that bond between the employee and the guy...

JUDGE SILBERMAN: Unless the DNI has something to say about promotions.

MR. RASENBERGER: Okay.

JUDGE SILBERMAN: Which he could have. Yes, actually this legislation required the DNI to approve the appointment of the NSA director and so forth, but he could or she could be given much more power by the President if he wanted it.

MR. RASENBERGER: That would make a difference perhaps.

JUDGE SILBERMAN: Yes. Now McConnell has in mind, as we did too, some aspects of the way in which the Defense Department subsequently organized after

Goldwater/Nichols, in which you have strong incentives to put senior officers into joint commands. Without joint commands on their record, they are in trouble. Something like that could be done in the intelligence community, but training, personnel requirements...all those kinds of things...are very important and they should be centralized insofar as it would be useful to centralize, not for the...

MR. RASENBERGER: Right, no, for its own sake. Right.

JUDGE SILBERMAN: You know what...we are...this is good because I want to tell you...