**ORAL HISTORY OF**
**JUDGE STANLEY SPORKIN**
**NOVEMBER 4, 2004**

This is the fifth interview of the Oral History of Judge Stanley Sporkin as part of the Oral History Project of the D.C. Circuit Historical Society. It is being held by Alexander Bennett on November 4, 2004. The tape and any transcripts made from the tape are confidential and governed by the wishes of Judge Sporkin, which have been made in the form of a written donative instrument.

Mr. Bennett: When we finished the last session, we were talking about the Keating case, which you described, and I thought there was an additional aspect of the case I should perhaps ask you about. One feature of the case was that you actually called Charles Keating as the court's witness when neither side had called him. I wonder why you did that and what led you to that.

Judge Sporkin: Well, there is the authority under the rules for a judge to be able to call a witness – on the judge's own discretion. I guess the point is that I took my position extremely seriously. There are many of my brethren on the bench who treat being a judge as merely an arbiter or referee and really do not get enmeshed or involved in the case itself. I believe that any position in life that you take has to be dedicated. It has got to be that you really are involved, and you cannot sit idly by. You say what is the role of a judge? The role of a judge is to make wise decisions, to find facts and to try to come up with the right decision.

In that case, where I was sitting without a jury and I was trying to make findings of fact, the lawyers were very reticent to set forth all the facts in the case. That bothered me. They did not want to call Keating as a witness. Neither side wanted to call him as a witness. I used the comment at one point in

describing the decision to call him: you cannot have Hamlet without Hamlet. And here was Hamlet. Here was the key person in the case, and nobody would call him.

And so I did make the decision to call Keating as the court's witness so that we could have a complete, full record. Not a lopsided record or half of a record, a full record. I believe that is the court's prerogative and should be what courts do.

When I did call Keating as a witness, of course the problem I ran into was what was I going to do with him. He was my witness. I had to then make the decision that I would treat him as if this were a case and a party would call him as a witness. I decided to do two things. One, I would treat him as my witness, or how his own lawyer would treat him and have Keating present all things in his favor. Then I would treat him as the adversary would treat him and cross-examine him. I called him and I told him exactly what I was going to do. I said, Mr. Keating, here is what I am going to do. I am going to ask you some very simple questions and I want to get your best statement and I am going to give you a chance to really set forth exactly what happened. And then of course I am going to test your answers. And that is what I did, and it worked out pretty well.

Mr. Bennett: Did that have an impact that you can recall on the decision you made?

Judge Sporkin: It sure did. One of the things I learned as a judge is that every case has what I call a key to the case. And when you find the key, you unlock that case.

What was his testimony? Asked why he did what he did, his answer was astounding to me. He said that whatever I did was done with the advice of counsel and the advice of my accountants and that I surrounded myself with scores of lawyers and with ample accounting consultants and auditors. He said that I did not do anything without vetting everything through the accountants and lawyers.

The complicity of lawyers and accountants caused me to write probably the most famous words of my career, which were: where were the lawyers and accountants – these professionals who could have stopped these improper and inappropriate activities from occurring? Why did they not do something?

And that became the key to the case. The professionals were not doing their jobs.

If you look at that case, you will find that theme was later picked up by a fellow named Harris Weinstein, who was then counsel to the Office of Thrift Supervision, and he proceeded to go against professionals of the other troubled savings and loans to recoup monies from those professionals. And the agency recouped hundreds of millions of dollars.

That was the key. Yes, that occurred only because of Keating. That was his testimony. How else could we have found that out?

Mr. Bennett: Let us turn to the second case that was among the five cases that we identified at our last session. This was the *Microsoft* case. Can you tell us just briefly what the *Microsoft* case was about when you were involved in it.

Judge Sporkin: The *Microsoft* case came up as the result of a proposed consent decree that was presented to me by the Department of Justice, Antitrust Division, and Microsoft.

I looked at the decree. I knew consent decrees, almost having invented them when I was at the SEC. This was one of the softest decrees I had ever seen. When I looked at it, the decree struck me that this was sort of a face-saving compromise that the Government had worked out so that it could close a sticky case that had been around for many years. It looked as if the idea was to sort of put a little lipstick on the pig and then get rid of the case.

What I figured out myself was that this case had first been before the Trade Commission, then went to the Department of Justice. It was a new Administration. The case had been sent over from the Trade Commission because of a 2-2 split before that agency, which meant that nothing would happen there. At the Antitrust Division someone probably said, look, we have to get rid of this turkey. And it was probably decided to come up with a compromise that both sides could live with. And, indeed, Microsoft was almost emboldened by the decision because it knew that it would be business as usual.

I found that the decree did not have any enforcement teeth to it. As I recall, the decree was almost outmoded the day that it was signed. I likened it to something that only was operative during snow days in Washington. It was very weak. Not only was it weak, I concluded that it could not be enforced in

court, which later proved to be correct. Later on, when the Government tried to enforce the decree, it was ruled that the decree was unenforceable.[10]

Mr. Bennett: Your decision as reported gave a number of different grounds for refusing to approve the decree as in the public interest, including: not enough information had been provided you to make the necessary findings; the decree was too narrow; the decree was silent on certain anticompetitive practices and therefore an inadequate remedy; and you were not satisfied that the enforcement compliance provisions were adequate.[11] But then after you rendered that decision, both sides appealed to the Court of Appeals, both the Government and Microsoft.

Judge Sporkin: I didn't have a chance.

Mr. Bennett: Essentially what was done is the Court of Appeals seems to have taken the position that you had addressed issues that were not spelled out in the complaint and that you should not have done so. That seemed to be the fundamental position of the Court of Appeals.[12]

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[10] An effort by the Department of Justice to enforce the 1995 decree by a contempt action was unsuccessful. *See United States v. Microsoft Corporation*, 147 F.2d 935 (D.C. Cir. 1998) (sometimes referred to as *Microsoft II* in the Court of Appeals).

[11] *See United States v. Microsoft Corporation*, 159 F.R.D. 318, 338 (D.D.C. 1995). *See also United States v. Microsoft Corporation*, 1995 WL 121107 (D.D.C. March 14, 1995) (additional observations of the district court).

[12] *See United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995) (sometimes referred to as *Microsoft I* in the Court of Appeals).

Judge Sporkin: There is no question in my mind that a judge who is going to have to approve something and put his signature on a decree has a broad right to consider certain issues. This hearing occurred in September. During the prior summer I was spending time at my beach house in Margate, New Jersey. By the way, I used to do some of the important work I had there because, for example, the Keating opinion was written on the beach during one of my summers at Margate. In this case, while I was getting prepared to consider the decree in the *Microsoft* case in September, my son-in-law was visiting me with his family in Margate and had gone to the library and brought back a book about Microsoft. I forget the name of it.

Mr. Bennett: *Hard Drive*.

Judge Sporkin: Yes, *Hard Drive*. I read it to prepare myself for the hearing. In that book the authors raise the issue of a concept called vaporware. What is vaporware? It is where a company announces a product to freeze the market and to prevent competitors from coming on with their product, even though the company does not have the product. It seemed to me that in our system of jurisprudence, that cannot be a legal activity. A company that has monopoly power to be able to announce a product that it does not have to the marketplace – and lie to the marketplace – in order to freeze out a competitor, it seems to me would be contrary to the antitrust laws. Indeed, I think I may have said in my opinion that it also would be contrary to the securities laws because it would be a misstatement in the marketplace.

Mr. Bennett: You considered that those sets of issues were fairly raised by the complaint in the case?

Judge Sporkin: I thought I should have an answer. In other words, I was asking for information. Tell me folks, do you engage in that practice?

The Government took the position, when I asked the Government about the practice, that the practice was legal. And I think that position is reflected in my opinion.

When I raised the issue at a subsequent hearing, counsel for an amicus came forward and said he would like to be heard. I think his name was Gary Reback, if I have his name right. He said, Your Honor, I would like to present certain evidence to you. He introduced in the record two documents. If there ever was a smoking gun document, these were smoking gun documents.

The interesting part is that, prior to that time, I asked that question of the Government and of counsel for Microsoft. Counsel for Microsoft said they did not engage in vaporware. That was a response to a general ballpark question whether Microsoft engaged in vaporware. I did not have these documents at that time. At that point Microsoft said that it did not engage in that practice and the Government took the position that, even if Microsoft had engaged in the practice, the practice did not violate the law.

Reback then came in with these documents – a self-evaluation by an employee of Microsoft who was writing a memo to Gates in which the memo set forth the reason why he was entitled to a bonus for the year. In it he

recounted to Mr. Gates that: don't you remember on such and such a date I got you to preannounce product X to freeze out company ABC? There were two documents in contiguous years in which that same scenario took place. But they covered different companies and different products, as I recall.

Then I had the documents and then I again asked Microsoft just answer a very simple question. Are these documents of Microsoft? Because I did not know whether they might have been forged documents. The answer was yes. And that to me was the key to say, look, what is going on here? What I needed was more information. Based upon that, and the points that you summarized from my opinion, I could not approve the settlement.

Mr. Bennett: The Court of Appeals reversed your decision and instead of remanding it, the Court of Appeals actually directed that the decree be approved. They said that on such things it is okay for the district court to do such things as to clarify ambiguities of the decree and so on, but that, when the government is challenged for failing to bring as an extensive action as might be, a district judge should be careful to limit its role to determine only whether the decree appears to make a mockery of judicial power.[13] Subsequently, there was legislation enacted saying in effect that the original intent of Congress was that courts in approving antitrust decrees should not take such a narrow role as the Court of Appeals described and spelling out what Congress considered the proper standard for decision in such cases. That legislation became effective in

[13] *See Microsoft I*, 56 F.3d at 392.

June 2004.[14] We should ask you whether that legislation gives you some sense of vindication as to the standard you applied in the *Microsoft* case?

Judge Sporkin: There is no question that it does. I knew at the time what the Tunney Act was designed to do because it arose out of a case that I was involved in at the SEC. It involved a company called ITT and its attempt to take over Hartford Insurance Company. There was a big scandal during the Nixon years on that case. There was a thought that some money had been paid to the Republican Party to put on a convention in San Diego and that was the reason the merger parties got approval of the merger between ITT and Hartford.

The remedy was to pass legislation to give courts a broad authority in approving antitrust cases. That is clearly the basis of the Tunney Act, and I knew it. And of course the district courts had that power. I just think again the Court of Appeals, as they had often done in other cases, had taken a very narrow view, and it had absolutely misstated the intent of Congress. I see that Congress has now come forward and said that the original intent was exactly the way I said it was.

[14] Section 221 of H.R. 1086, 108th Cong., 2d Sess., enacted into law on June 22, 2004, amended the Antitrust Procedures and Penalties (Tunney) Act, 15 U.S.C. § 16(e), to spell out the standards to be applied by a court in making the public interest determinations required for judicial approval of an antitrust consent decree. Section 221(a)(2) states that the purpose of such amendments "is to effectuate the original congressional intent in enacting the Tunney Act . . . ." Section 221(a)(1)(B) sets forth a congressional finding that it would misconstrue the meaning and congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments "solely to determine whether entry of those consent judgments would make a 'mockery of the judicial function.'"

Mr. Bennett: One of the other things that the Court of Appeals did in a separate section of its opinion was to go on to say that under circumstances that the Court of Appeals laid out in its opinion it would be inappropriate for you to continue with the case after the remand. What was your reaction to that?

Judge Sporkin: I was not very happy about it. The Court of Appeals had again done something that was inappropriate in my view, because what they pinned it on was the fact that I had read this book called *Hard Drive*. It just does not make any sense. Of course judges are entitled to read the daily papers. They read a lot. This is not the case of a jury reading something that is not in evidence. A judge can read outside materials. I recall that going back to the *Brown v. Board of Education*. Not only did the Supreme Court read documents that were not in the record, they read books. They read a lot about segregation. How else is a judge going to bring to bear in a case reasons for doing certain things?

Later on in the *Microsoft* case, the Court of Appeals itself had arranged to have its own consultant to help them and assist them in a case. And that consultant would not have been cross-examined by anybody. It would have been strictly *ex parte*. Of course, in the end, the Court decided not to do it. But there is an irony here that is beyond belief.

One of the problems in the *Microsoft* case was that both the Government and Microsoft appealed against me. Nobody was there for me. I could not give them an answer or response. Perhaps that had something to do with outcome of the case.

Later on, I was vindicated in another way, because when I had said

that the decree was not an enforceable agreement, it proved to be not enforceable. And, as you know, Judge Jackson's opinion in a later phase of the Government's dispute with Microsoft, which was affirmed in large part, found that there was a violation of the antitrust laws.[15]

Mr. Bennett: It does seem that you accepted the decision of the Court of Appeals with equanimity, because I saw some public comments that you made reported in the press about the difficulties in getting a subsequent district court judge to participate in light of what had happened to you in that earlier case. You said it should not be a problem and that any judge here is capable of doing it, which does not seem to reflect any great distress over the decision.

Judge Sporkin: These are scorched-earth events and later on Microsoft got Jackson removed.[16] That is what was happening in these cases. Look, it happens. The only good side of it is that I did not have to spend years of my life working on the case. I was in and out. I had given my views of the case, and it was over.

My decision in the case reflected the concept of every case having a key to it. I believe also that I had the ability to be able to quickly size up a case and come to a decision. If you look at my record you will see this reflected in my decisions. I would say that maybe 90-95% of the time I had gotten the right issue and in that way I did not have to sit down and worry about cases for years as some folks did. I would quickly come to a decision.

[15] *See United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*) (sometimes referred to as *Microsoft III* in the Court of Appeals).

[16] *See Microsoft III*, 253 F.3d 34 at 116-17.

When you examine my record, you should also find that, after the passing of Judges Gesell and Richey, I always had the lowest record of open cases. Indeed, I tried to be 100% current and succeeded in doing so because I could size up quickly and dispose of cases, many from the bench. I think that I may already have mentioned that one of the comments I received from a lawyer in a case when I was ready to rule was: take some time, Judge, I know you like to rule quickly, take a little more time. I think I did take a week in that case.

Right or wrong, many of the concepts that I developed in my judicial days may be a product of my earlier career. I think it is important for other judges to consider these ideas, because I do think that they may well have continuing application and may well help courts streamline their case load and help them to dispose of matters. Maybe at some point we will have some sessions like this among the other judges to debate my concepts.[17] Maybe they will find some good and some bad aspects to my concepts.

Mr. Bennett: Let us talk now about the *Princz* case. I think you mentioned that, when one of your law clerks first looked at this case, it seemed to her like a case of a person with a long-standing grievance but perhaps not a solid legal case. She thought

[17] In addition to the views on judicial efficiency expressed by Judge Sporkin in the present series of interviews, Judge Sporkin has delivered several speeches addressing judicial efficiency and related matters. Among them is Judge Sporkin's speech entitled "Reforming the Federal Judiciary," the Tenth Annual Alfred P. Murrah Lecture at the Southern Methodist University School of Law, on November 9, 1990. Judge Sporkin returned to the same subject in an address on October 21, 1993, to the Annual Fall Meeting of the ABA Section on Litigation, entitled "Streamlining the Litigation Process." Both addresses are included in the materials accompanying this oral history.

that the case might be disposed of summarily. How did this case develop after that?

Judge Sporkin: I think I mentioned at our last session that people used to say: how did you get all these big cases? Well, they do not start out being big.

What do you do with a case that was 50 years old, as I recall when I got it. Of course, when you see an old case, the initial thought is that this is a person who has a grievance that is really out of time.

One of my techniques of being a judge was that I always found that my ears were better than my eyes. I always liked to hear matters. I liked to see people before me. I liked to be able to size them up. A lot of judges do a lot of the work on paper, summary judgments and whatnot. The vast majority of my work was done in court, and even when it looked as if there was not much merit to a case, I would listen to the people. In this case, when I listened to Princz's lawyer and he described the travails of this man and his family during the Holocaust, it said to me as a judge, well, maybe there is something here. Let us research the law – let us just see. Let us give this fellow the benefit of that. Why are we judges? We are judges because we are human beings and we are trying to do humane things. We are not robots. We are not on an assembly line.

I analyzed the case and wrote an opinion. I thought that the claim was not barred by the Foreign Sovereign Immunities Act and that there was jurisdiction in the court. If you look at the Court of Appeals decision that reversed me, you can see the reasoning of the Court of Appeals. I do not think it made a lot of sense when the Court of Appeals said that Princz could not

satisfy the requirements of the Foreign Sovereign Immunities Act when Princz was held in slavery and was in effect working in a factory that was building bricks. The majority opinion of the Court of Appeals was that Princz could not show that what was happening had any impact on him and the United States.[18] The theory was that the bricks were not being used in the war effort. If you want to look at a narrow holding of the majority, what do you think was happening in Germany in those days when they were fighting the war with us?

The way that opinion was written was almost like we were talking about the *Microsoft* case. Very narrow. We looked like horses with blinders running down the track. We only want to see specifically the words that the Foreign Sovereign Immunities Act says that the claim must have an impact in the United States. The fact that this man was building bricks, and I think I.G. Farben was the company, did have an impact. Part of the work was done for the Messerschmidt aircraft factory in Germany. Of course it was ridiculous to be looking that narrowly at that kind of claim. But even on this narrow issue, the fact is that I.G. Farben was a German company, owned by the German Government in a war-time setting, building products that were being used against the United States.

But that is the way the Court of Appeals was narrowly examining cases. That is what gives me a great deal of problems with the way that we are picking some of our judges who are not willing to do justice, not willing to see

[18] *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172-73 (D.C. Cir. 1994), *rev'g*, *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (D.D.C. 1992).

what was the purpose and intent of the law, as opposed to looking at it in a very narrow way to see how they could get out of doing anything about a case. There was a good dissent in that case, as you may recall, by former Chief Judge Pat Wald who sided with me in that case.

Mr. Bennett: Judge Wald's dissenting opinion essentially articulated a position similar to your position in the district court. The dissenting opinion took the view that, if there is a violation of an international norm of *jus cogens* – which included enslavement and genocide – then the defendant foreign state implicitly waives its right to assert sovereign immunity as a defense. That was her position.

Judge Sporkin: Later, Congress amended the statute again.[19] And now you see a lot of cases being brought against other countries. For instance the Iranian hostages. That legislation was passed in order to take care of cases like this where a person clearly was entitled to have justice done, as when the Nazi Government had slaughtered Princz's mother and father, his two brothers and his sister. Dr. Mengele had removed the womb of his sister. The facts are as brazen as you can find. And these are American citizens who are not able to come into an American court and not able to get relief in an American court. Where is justice?

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[19] Amendments to the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a)(7), enacted by Congress in 1996, allow American nationals under certain circumstances to sue for damages against a foreign state for torture, extrajudicial killings, aircraft sabotage, hostage-taking or the provision of material support or resources for such an act. Related provisions in a 1996 legislative enactment known as Civil Liability for Acts of State-Sponsored Terrorism, 110 Stat. 3009-3172, note following 28 U.S.C. § 1605, establishes liability of certain persons to American nationals in certain circumstances for such acts.

Mr. Bennett: Subsequent to the decision of the Court of Appeals, there was a remand of the case in your court. What happened after that?

Judge Sporkin: That case against the Government of Germany was dismissed. What happened was that Princz's lawyers amended the complaint to name the companies in Germany that enslaved him. They sued Bayer Aspirin and a couple of other German companies. I guess they spun off from the old I.G. Farben, which is no longer around.

Princz's lawyers sued those people, at which point the German Government came in. The German Government was furious because the Court of Appeals had dismissed the case. I had to tell the counsel for Germany that you are right. You won. The victory is yours and you are not in this case anymore. This is not against the German Government. This case is against four individual companies. You have no standing in this case anymore.

I denied a motion to dismiss, at which point counsel for Germany sought mandamus against my ruling in the Court of Appeals. I had to hire a lawyer because I would normally be represented by the United States Government but the Government was conflicted because the State Department was unable to determine who it wanted to support in this case. The State Department did not want to offend the German Government.

So I hired Harvey Pitt of Fried Frank who is an old friend of mine. Of course he got the mandamus dismissed.[20] At the point the case came back to

[20] *In re Federal Republic of Germany*, 1995 WL 118035 (D.C. Cir. Feb. 23, 1995).

me. We had a status call. The lawyers came in. I asked to see them in chambers. I said, look, why do you want to litigate this case? Won't you consider compromising or settling it? They said that they needed time. They were very fine lawyers. They went out, they had time and in a couple of months they settled the case. Mr. Princz was then a janitor working in New Jersey in a synagogue. He was given some money, obviously not made whole. He at least spent the rest of his life not in poverty.[21]

Mr. Bennett: Was this the first of the Holocaust cases later settled on a broader basis?

Judge Sporkin: Absolutely. This was it. This was the seminal case.

Mr. Bennett: {After a short break} Just before we took a short break, Judge Sporkin, we were talking about the *Princz* case as the first, at least the first decided, Holocaust case. There was a subsequent history of settlements with various

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[21] As a result of the *Princz* case, the Federal Republic of Germany reached an agreement (commonly known as the "Princz Agreement") with the United States on September 19, 1995, to compensate certain United States nationals who were survivors of Nazi incarceration or enslavement in two stages. Under the first stage, there was a payment of $2.1 million to Hugo Princz and ten other American survivors of Nazi concentration camps. Under stage two, the United States Foreign Claims Settlement Commission ("FCSC") was authorized by Congress to consider and report on claims of other United States nationals who might be entitled to compensation under the Princz Agreement. Following a report of the FCSC, an additional 235 additional American survivors of Nazi incarceration or enslavement received compensation under the Princz Agreement. The Princz Agreement and related events are described in Vol. I, Annex D,
pp. D-6 – D-9, and Vol. II, Annex E, pp. E-56 – E-58, to the Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, dated September 11, 2000, in *Holocaust Victims Assets Litigation (Swiss Banks)*, No. CV-96-4849, available at http://www.swissbankclaims.com (under "chronology").

defendants for relief with respect to victims of the Holocaust or their heirs. What was the relationship to the best of your knowledge between your case and those later actions?

Judge Sporkin: I believe the *Princz* case was the seminal case. I have every reason to believe that the legislation was as a result of the *Princz* case. His lawyer, who was a super lawyer, really fought like the dickens for Princz and then for others. By the way, he was a little known lawyer. I had never seen him before. He had his own practice. Everybody who came into my court room had equal standing. It did not matter whether it was a big firm or a little firm or by themselves. But this lawyer was a super lawyer.

Mr. Bennett: Judge Sporkin, we just looked something up the report of your decision in the *Princz* case. Can you tell us what the name of the lawyer was?

Judge Sporkin: The lawyer was Steve Perlis, who was a single practitioner who was as fine a lawyer as ever appeared before me. He was smart, and he really did a job for his client.

Mr. Bennett: Thanks, Judge Sporkin. We know that you have to go to another meeting right now. We'll resume next time.