HONORABLE STEPHEN F. WILLIAMS

Oral History Project
The Historical Society of the District of Columbia Circuit

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The Historical Society of the
District of Columbia Circuit

United States Courts
District of Columbia Circuit

HONORABLE STEPHEN F. WILLIAMS

Interviews conducted by Jonathan E. Nuechterlein, Esq.
November 18 and 25, 2007
March 2, 2008
May 5 and June 9, 2013

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were recorded digitally or on cassette tape, and the interviewee and the interviewer have been afforded an opportunity to review and edit the transcript.

The contents hereof and all literary rights pertaining hereto are governed by, and are subject to, the Oral History Agreements included herewith.

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Introduction

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges of the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Oral history interviews are conducted by volunteer attorneys who are trained by the Society. Before donating the oral history to the Society, both the subject of the history and the interviewer have had an opportunity to review and edit the transcripts.

Indexed transcripts of the oral histories and related documents are available in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C., the Manuscript Division of the Library of Congress, and the library of the Historical Society of the District of Columbia

With the permission of the person being interviewed, oral histories are also available on the Internet through the Society's Web site, www.dcchs.org. Audio recordings of most interviews, as well as electronic versions of the transcripts, are in the custody of the Society.

Preface to the Oral History of Judge Stephen Williams

This oral history consists of five interview sessions with Judge Stephen Williams — three conducted in 2007-08, and two in 2013. We devoted Session 1 to his life from boyhood through law school; Session 2 to his pre-judgeship legal and academic career; Session 3 to his appointment to and first days on the D.C. Circuit; Session 4 to his views on administrative law; and Session 5 to selected cases on antitrust and competition-oriented regulation.

In December 2019, the Judge and I exchanged our final emails about this oral history. We decided in principle to conduct one or two additional interviews and then bring the project to a close. There were several reasons why, at that late date, we were still working towards the completion of an oral history begun in 2007. The Judge was busy with various academic projects during that twelve-year period, including his second book on pre-revolutionary Russia, published in late 2017. For prudential reasons, we also agreed not to conduct interviews while I was the general counsel of an agency that appeared before him (2013-2016) or while a high-profile case that I argued was pending before him (late 2018 to early 2020). During the early years of this project, the Judge also suggested that he was not particularly eager to finish a retrospective on his life and work. Completion would connote that his main contributions were behind him, and the Judge would not go gentle into that good night.

We never did resume our sessions. The Judge contracted COVID-19 in May 2020, was placed on a ventilator soon thereafter, and never fully regained consciousness. He died on August 7 at the age of 83, before signing the customary Letter of Intent to donate these interviews to the D.C. Circuit Historical Society. In our December 2019 email exchange, however, he told me that the draft letter the Historical Society sent him "seems fine, except that I thought I might expressly add you to those involved in decisions [about disposition of the oral history in case of death or disability], as you combine sophistication about the issues with a benign outlook on my posthumous interests." He added, with characteristic optimism, that he was "in good health, so that the type of event that might trigger a need for this d[oes]n't seem imminent." It is hard to re-read that passage now.

After the Judge died, I was at first inclined not to make these transcripts public, given the absence of a signed Letter of Intent. Over time, and in consultation with his family, I changed my mind. Publication of these transcripts will benefit many readers and will harm none. And the Judge unfailingly supported such Pareto-optimal outcomes in life.

The Judge and I met for these interviews in the townhouse he shared with his wife Faith near Logan Circle in the District of Columbia. We recorded all five on old-style Dictaphone cassette tapes. The Judge's secretary — Mary Matera, who served him loyally and well for more than three decades — then produced raw transcripts for our review. The Judge and I contemporaneously collaborated on transcript edits for the first three sessions, and I have largely accepted the products of that collaboration for purposes of this final master transcript.

Completing the transcripts for the fourth and fifth interviews presented greater challenges. I sent the Judge my proposed edits for the fourth session shortly after we conducted it in May 2013,

but I have no record that he reviewed them or offered any of his own. For this master transcript, therefore, I have abandoned many of my 2013 edits in favor of the literal words in the raw transcript. Finally, neither the Judge nor I had edited the raw transcript for the fifth session when it was found in his computer files in December 2020. After many months of searching, the tape for the first half of that session was finally found, but the tape for the second half has not been. I stayed as faithful as I could to the tape (for the first half of the interview) and the raw transcript (for the second half) while making the edits needed for accuracy and comprehensibility. In many cases, that required me to insert clarifying words in brackets; all bracketed words and all footnotes are mine.

In a few places, I exercised my discretion — given my "benign outlook on [the Judge's] posthumous interests" — to omit brief passages from the underlying transcripts. I did so if those passages were irremediably opaque as transcribed; tangential and uninformative; or otherwise unlikely to have escaped the Judge's own red pen had he survived to review these transcripts before publication.

Preparing this document has been a bittersweet experience. Like many others, I miss the Judge tremendously. But by documenting the Judge's spontaneous thoughts on a vast range of issues, this oral history brings him back to life and reminds us who he was — brilliant, kind, intellectually ravenous, and very funny. I am grateful to have played a role in preserving this record of an exemplary judge, scholar, and man.

Jonathan E. Nuechterlein
March 2022

HISTORICAL SOCIETY OF THE DISTRICT OF COLUMBIA CIRCUIT

Agreement Respecting Oral History of Stephen F. Williams

1. In consideration of the recording and preservation of the oral history memoir of Stephen F. Williams by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Faith Williams, wife and personal representative of the estate of Stephen F. Williams, appointed March 3, 2021 by order of the Superior Court of the District of Columbia Probate Division, do hereby grant and convey to the Society and its successors and assigns all of the rights, title, and interest in the voice recordings and edited transcripts of the five interviews of Stephen F. Williams identified in Schedule A attached hereto, as well as the unedited transcript of the fifth interview, including literary rights and copyrights. All copies of the voice recordings and transcripts are subject to the same restrictions herein provided.

2. I understand that the Society may duplicate, edit, or publish in any form or format, including publication on the Internet, and permit the use of said edited transcripts in any manner that the Society considers appropriate, and I waive any claims the estate may have or acquire to any royalties from such use.

3. The voice recordings and unedited transcript of the fifth interview shall not be made available to anyone other than myself, my daughter Sarah Williams, and the Historical Society without my express written permission or the written permission of my daughter Sarah Williams until January 1, 2051.

4. I reserve for the estate, my daughter Sarah Williams, and anyone else whom I, acting as personal representative of the estate, may designate in writing the right to use the said voice recordings and transcripts of the five interviews.

Faith Williams, Personal Representative

State of Arizona
County of Maricopa
SWORN TO AND SUBSCRIBED before me this
17th day of January, 2022

Notary Public

LEE ELLEN HURSKY
Notary Public - Arizona
Maricopa County
Commission # 611615
My Commission Expires June 23, 2025

My Commission expires: June 23rd, 2025

ACCEPTED this 9th day of February, 2022 by Stephen J. Pollak, Chair of the Board of Directors of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Schedule A

Voice recordings and transcripts resulting from five (5) interviews of Stephen F. Williams conducted on the following dates:

Interview No. & Date	Description of Media Containing Voice Recordings	Pages of Transcript
Int. 1 Nov. 18, 2007	Cassette Tape	22
Int. 2 Nov. 25, 2007	Cassette Tape	19
Int. 3 March 2, 2008	Cassette Tape	12
Int. 4 May 5, 2013	Cassette Tape	21
Int. 5 June 9, 2013	Cassette Tape (unavailable)	21

The edited transcripts of the five interviews are in digital format.

The Historical Society of the District of Columbia Circuit

Oral History Agreement of Jonathan E. Nuechterlein

1. Having agreed to conduct an oral history interview with Stephen F. Williams for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Jonathan E. Nuechterlein, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the voice recordings and transcripts of the interviews identified in Schedule A hereto, including literary rights and copyrights.

2. I understand that the Society may duplicate, edit, or publish, in any form or format, including publication on the Internet, and permit the use of said voice recordings and transcripts in any manner provided for by the donation instrument executed by Faith Williams, personal representative of the estate of Stephen F. Williams, that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the oral history or the information contained therein without permission from the Society.

Jonathan E. Nuechterlein

ACCEPTED this 4th day of February, 2022, by Stephen J. Pollak, Chair of the Board of Directors of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Schedule A

Voice recordings and transcripts resulting from five (5) interviews of Stephen F. Williams conducted on the following dates:

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Oral History of Judge Stephen F. Williams
Session 1
November 18, 2007

Mr. Nuechterlein: Hello, this is Jon Nuechterlein. I am a partner at WilmerHale, it is November 18, 2007, and we are here with Stephen Fain Williams to begin his oral history for the D.C. Circuit Oral History Project. For the sake of full disclosure, I have known Judge Williams for many years. In fact, I clerked for him — first, as a summer clerk, back in 1988 (we worked together on his cases in an office at the University of Colorado in Boulder), and I went to work for him as a bona fide clerk in 1990-1991. So I have heard some of these stories, but I have not heard them all. I am looking forward to hearing more.

For this first installment, we are going to talk about the Judge's background. So, Judge, it would probably make sense for you to tell us a little about your parents and grandparents. We have the outline that the oral history people have provided to us, and one of their questions is when your ancestors arrived in the United States. I am not even sure if I could answer that question for myself, but do you have any insights?

Judge Williams: Everybody has a lot of ancestors, as you go up the family tree. They arrived in a range of times from the early 17th century to maybe the mid-19th century and probably after.

Mr. Nuechterlein: Do you have any Mayflower ancestors?

Judge Williams: I do.

Mr. Nuechterlein: Do you know their names?

Judge Williams: One was Richard Warren, who apparently is responsible for about 12 million American progeny (I'm not sure if that's cumulative or present-day). It sounds like a lot, but if you imagine someone who had ten children, each of whom had ten children, with an average gap of 25 years between generations, you'll see that since 1620 you would reach a current number of descendants far above 12 million. Of course Warren and his progeny were nowhere near so prolific, so there are only 12 million. There's also another Mayflower forbearer, Thomas Rogers, who didn't lead to so many descendants; I don't have any figures on him.

Of course many of my ancestors were thrown out of countries or found life uncomfortable in the countries where they were.

Mr. Nuechterlein: For religious reasons?

Judge Williams: Yes — well, at least some. Some were Huguenots who were thrown out of France as a result of the revocation of the Edict of Nantes in 1685. I don't

think they made their way — in fact, I am reasonably sure they didn't make their way — straight to the US, but proceeded instead through some intermediate countries, and at least one of the original exiles or his or her child proved to be an ancestor [who came to America]. I think the ancestor to arrive most recently was a great-grandfather who was starving in Ireland as a result of one of the potato famines and came to Texas, and he played an important role in my mother's background. I should say that both of my grandfathers were lawyers, although I don't think my mother's father did much practice.[1]

Mr. Nuechterlein: Did you know them?

Judge Williams: I didn't know my father's father at all; he died nearly 20 years before I was born. But I knew my mother's father.

Mr. Nuechterlein: He was a lawyer?

Judge Williams: Yes, he was a lawyer, although not very active as a lawyer.

Mr. Nuechterlein: This was a Fain?

Judge Williams: Yes, this was William Hugh Fain.

Mr. Nuechterlein: Where did he live?

Judge Williams: He and his family lived in Greenwich, although in an early period in my mother's growing up, they used to go to Houston, Texas, where her grandfather lived. I think they went every winter — just why, I am not sure. Anyway they did.

Mr. Nuechterlein: So this is a little bit of a Horatio Alger story: the family went from the potato famines of Ireland to Greenwich, Connecticut in several generations.

Judge Williams: Yes — I suppose really two — the great-grandfather comes over, and his daughter is soon living in comfort in Greenwich.

Mr. Nuechterlein: So tell us a little about your parents themselves. We can start with your mother.[2]

Judge Williams: OK. She was born in 1907 in the city of New York but was brought up in Greenwich and went to Rosemary — as it then was, now Choate

[1] Judge Williams added this note to the transcript: "Jon—it might be fun to put in somewhere around here reference to my ancestors who left Scotland after an itinerant preacher persuaded everyone in my ancestors' town to take a no-alcohol pledge. Only one couple, my ancestors, stuck to it. Apparently because the other townsfolk thought they were holier-than-thou, they left, and they or descendants made their way to America."

[2] Virginia Fain Williams.

Rosemary Hall — and then to Bryn Mawr. And after Bryn Mawr, she moved to New York and got a job in the office of an architect, William Lescaze, who at one time was fairly well known and among architects is still well known. But she dropped that when she got married. And I think that was probably a pity. It probably was a result of some sort of notion that married women should be in the home rather than off at work.

Mr. Nuechterlein: What is the date range that we are talking about here?

Judge Williams: They were married September 6, 1930. And I think it was just between college and marriage that she worked for Lescaze. And I remember hanging on one of the walls of our summer house in Norfolk, Connecticut was a sketch of a building for an elderly invalid, imaginary as far as I know, which looked quite charming. It was very modern. It clearly presupposed that this elderly invalid had a lot of people helping, because she was out in the countryside, and how she was going to get anything to eat or see anybody would have to depend on quite a few people helping her. I thought about it wistfully in comparison to the retirement communities most people end up in nowadays. I remember that my mother mentioned that most of the work at Lescaze's wasn't very glamorous — at least some if it was working out the exact details of closets in some houses that he was designing.

Mr. Nuechterlein: When did your mother meet your father?[3]

Judge Williams: They married in September, and they met about 6-8 months before. Something like that.

Mr. Nuechterlein: What year?

Judge Williams: 1929 or '30. They met at a dinner party, and they both agreed that the host of the dinner party, who was a relative of my father's, was perhaps the most boring person either of them had ever met. And my mother took from it that sometimes good things can come from going to a boring party.

Mr. Nuechterlein: It makes the guests talk to each other.

Judge Williams: [Laughter.]

Mr. Nuechterlein: And so they got married several months later.

Judge Williams: There weren't long engagements in that era.

Mr. Nuechterlein: And you are one of how many children?

[3] C. Dickerman Williams.

Judge Williams: One of three. I am the youngest, with two older sisters.

Mr. Nuechterlein: Do you want to say a few words about that?

Judge Williams: Sure. My older sister Joan went to Putney School in Vermont and then to Radcliffe. She wanted to go to an art school after college, but my parents didn't feel that subsidizing that was a good venture. And I remember her talking about whether she should learn how to type. She very determinedly decided not to. She was concerned that anywhere she got a job would slide her into typing, and she would never emerge, and that would be the end of it. In fact, I just met someone at dinner a few nights ago who did learn typing, started out typing at McKinsey and Company and rose, not to be a consultant, but to an administrative post there.

So my sister's calculations weren't 100% right, but it worked for her because she somehow or other got into investment analysis and became very, very good at it. She founded the Young Women's Investment Association — that was the name at its founding, but since then it has undergone a name change [to Financial Women's Association of New York] and is now a huge organization. And she just retired from the Bank of New York as an investment analyst.

Mr. Nuechterlein: What is her name again?

Judge Williams: Joan Farr. And my next older sister is Honor, who had a radically different career. She went to Radcliffe, and before that she also went to Putney, and while she was there, Putney had a teachers' strike. In fact, both of them were there at the time of the teachers' strike. Just terribly discombobulating to the school. And I think it was in the middle of my sister Joan's last year, so she just finished up. But my sister Honor went to Chapin School for a couple of years, which at least in part overlapped with my father's being Solicitor (as it was so called and perhaps still is) at the Department of Commerce, so he and my mother were living in Washington.

Anyway, Chapin and then Radcliffe, and there she took what proved to be an important course for her. It was Professor Reischauer's course, which was generally known at Harvard as Rice Paddies. It had a more formal title such as History of Far Eastern Civilization or something like that. She became quite obsessed, and then she took an intensive course in Japanese, and she did very badly. I remember her saying she got a "DD" because it was two courses; and she felt that even the "D" had been a charitable grade.

But she remained interested enough so that, upon graduation in 1956, she set out for Japan with a job at a college there teaching English. She didn't continue to teach at that college, but she remained in Tokyo for the rest of

her life up to now. She married a Japanese man, from whom she is separated now, and has two daughters, both of whom live in the US.

Mr. Nuechterlein: You mentioned your father's work at the Department of Commerce, and since he was a well-known lawyer in his own right, I was wondering if you could say a few words about his legal career.

Judge Williams: Sure. He clerked for Chief Justice Taft…

Mr. Nuechterlein: Was that right out of law school?

Judge Williams: Yes, right out of law school.

Mr. Nuechterlein: What law school did he go to?

Judge Williams: Yale. He was Chairman of the Law Journal. Then, when he was done clerking for Taft, he went right into the U.S. Attorney's office in New York. He spoke with a little irritation of it later. He was assigned to the Criminal Division and particularly prosecuted bootleggers, so he knew criminal procedure very well. I do remember his saying that, as a prosecutor of bootleggers, it was important for him not to drink liquor during Prohibition (although I think he went to a huge number of parties where there was a great deal of liquor). That seemed to be the honorable thing.

To return to the irritation, which I think was mild but real: while others were developing skills more immediately useful in a general civil litigation practice, his concentration on bootleggers wasn't so completely transferable.

Then he was in private practice after that.

Mr. Nuechterlein: What firm, do you remember? Was it in New York?

Judge Williams: Definitely in New York — except for fairly brief stints in Washington, his whole legal career was in New York. He was in Breed, Abbott & Morgan, but I am not sure whether that was before or after he was General Counsel of the American Locomotive Company. I think before. And then he became General Counsel of the American Locomotive Company, and then, in the last two years of the Truman Administration, he was Solicitor of the Department of Commerce.

Mr. Nuechterlein: Was he a Republican or Democrat?

Judge Williams: He was definitely a Republican.

Mr. Nuechterlein: But he had a job in the Truman Administration?

Judge Williams: Yes, but at least as he described it to me, the Department of Commerce was a small enclave of conservatives in the Truman Administration. He was a great admirer of Charles Sawyer, an Ohio Democrat who was Secretary of Commerce, and they got on very well I think. As to things that he did, the Steel Seizure Case was obviously highly political, but a lot of stuff they did was — like, in a sense, most of the stuff I do — largely apolitical, where the principal job was being sure that the Department acted within the law — just like my job.

Actually, in his papers, I came across a memento of those years. A big thing he did was to settle the dispute over the Dollar Line, a dispute that generated a case called *Land v. Dollar*,[4] a big case on sovereign immunity. I think that was decided … just before he started at the Department of Commerce. Anyway, it was a huge litigation that went on and on, and he did settle it. And I have in his files a picture of him giving or receiving, I honestly don't remember which, a check for a million dollars that was part of the ultimate settlement. I recall, in connection with that, he flew out to San Francisco a couple of times, and that seemed to me, a kid in his teens in the early 50's, a terribly dramatic thing to do. [Laughter.]

I think at that time I had been on a plane once when we went to look at boarding schools. We went up to Boston by plane, and I was to look at Exeter. That was certainly the first time I had ever been in a plane, and we did very little travel, so I think it held the record (for me) for a long long time.

Mr. Nuechterlein: What did your father do after the Truman Administration?

Judge Williams: After the Truman Administration, he started a small law firm with others; it had various names, but most of the time it was McClay, Morgan, and Williams.[5] They did a lot of maritime things, which I think is something he picked up in the Department of Commerce, because it has (or had) the Federal Maritime Commission. We occasionally review their decisions from time to time. In any event, it certainly gave him exposure to maritime law that I don't believe he had before at all.

I tend to regard as the high point in his career the [Oksana} Kasenkina case. She was a teacher with the school that the Soviets maintained in New York for the children of workers at the Soviet Mission at the UN and the consulate in New York. She decided she wanted to break away from Soviet control. But they caught on to this, and their goons picked her up

[4] 330 U.S. 371 (1947).

[5] May be a transcription error; Dickerman Williams' *New York Times* obituary identified the firm as Baker, Nelson & Williams.

and took her to the Soviet Mission in Manhattan, a building just off Park Avenue in the high 60s.

Word got out about it, and my father had the idea of using the writ of habeas corpus to get her out. As you know, it is an ancient writ designed to challenge the custody of someone, so this suit was filed on her behalf. It didn't do any legal good, but it received some publicity because the factual background was exceptional. I don't know if the New York newspapers were particularly interested in the innovative use of the writ, probably not, but as a result of the publicity, a throng of reporters gathered on the sidewalk by the building. She was on the 4th floor and saw them, and she jumped out of the window.

She wouldn't have done that without the crowd, because the Soviets would have just scooped her up and taken her back. She did survive, and the newspaper men protected her from the Soviet agents. She wrote a book about it.

Mr. Nuechterlein: So you father practiced for many years in this firm?

Judge Williams: Yes, from the end of the Truman Administration to his retirement, which was a gradual thing — he let his work taper off — sometime in the late 70s.

Mr. Nuechterlein: I was fortunate enough to meet your father in 1988. He was in his 90s then -

Judge Williams: If it was the summer of '88 he would have been on the verge of being 88.

Mr. Nuechterlein: And he lived to be how old?

Judge Williams: Lived to be 97, very nearly 98.

Mr. Nuechterlein: What can you tell us about his political views? Would you say he was a mainstream Republican?

Judge Williams: He certainly was a Republican, and probably what was the Republican mainstream at that time. He was very into economics, but he definitely was soft on protectionism — both the two major kinds. One is tariff protectionism, and the other is regulation of, for example, trucking, which is now seen as having worked entirely for the purpose of protecting trucking firms and trucking labor and of course has now been done away with. This protectionist inclination may have come from the time he was at the Commerce Department, which was pro-business.

Mr. Nuechterlein: When I think of the Republican Party from the first two thirds of the 20th century, I think of a business orientation.

Judge Williams: He had considerable understanding of markets, but he was more pro-business than pro-market. He was also, as the Kasenkina story suggests, very anti-communist. I once asked him when that started, and he mentioned that when the Bolsheviks took over he was kind of agnostic — "this is an interesting idea if it works." I am sure there was a gradual awakening process, but what really turned the lights on was a set of articles by Eugene Lyons … called *Assignment in Utopia*. It was a series of articles about what Lyons found when he went to the Soviet Union.

Unlike a lot of other people who went there in the 30s, he got it right. The articles locked my father in on the viewpoint that I don't think anyone now questions.

Mr. Nuechterlein: How did he feel about the New Deal?

Judge Williams: Well, he wasn't one of the people who called Roosevelt "that man." I remember discussing minimum wage laws with him; he found it odd that farmers resisted the minimum wage, because on the family farm, using family members, labor wouldn't be paid at all. Because their non-family competitors would be paying the minimum wage, among farmers it would be advantageous for the family farmers.

And for farmers as a whole, it probably would have made little difference, because their competition was other U.S. farmers, and the minimum wage would raise all their costs and prices. So there would be little harm — always on the assumption that foreign competition wasn't a big deal. Which was probably pretty much true in that era.

Mr. Nuechterlein: Do you remember your parents having political discussions?

Judge Williams: Certainly, by the time I knew them, they were roughly on the same page. My aunt used to recall a moment in the mid-20s — she and my mother were lying on a beach in Bermuda, and my mother turned to her and said, "Well, I think I am really a socialist."

But certainly by the time I knew her she wasn't a socialist at all. They were both out of the current Republican mainstream — they would be classified as social liberals. Their very best friend was very active in Planned Parenthood, and they were staunch proponents of the right to have abortions. Although certainly, as a lawyer, my father thought *Roe v. Wade* had absolutely no constitutional basis, he definitely liked the policy — if he had been a legislator, that is what he would have voted for.

Mr. Nuechterlein: Had they ever identified themselves as libertarians?

Judge Williams: I don't think so. The Libertarian party, if it existed at all, wasn't yet well-known, but certainly you could line up quite a few of their positions as

libertarian, except for my father's sympathy for various kinds of protectionism.

Mr. Nuechterlein: You mentioned during our break that there was something about your mother that you wanted to talk about.

Judge Williams: She was a very bright and talented woman, but what I wanted to mention is that she had legal skills. There was a time when there was a meeting about her mother's estate in the offices of Sullivan and Cromwell in New York — my mother, father, lawyers from Sullivan, and a lawyer from Connecticut called Mr. Badger. Apparently after this meeting, the associate and partner from Sullivan and Cromwell were walking down a corridor, and the associate asked the partner, "Who do you think is the better lawyer, Mrs. Williams or Mr. Badger?"

She cared a lot about words, which lawyers tend to, and she cared about using them correctly. She was very good at Scrabble and anagrams, crossword puzzles, which I am terrible at, and I am not much good at Scrabble either. She was extremely verbal. We actually have some paintings of hers in the house. She had a lot of skills.

Mr. Nuechterlein: Let's move on to where you grew up. Am I correct that was Connecticut?

Judge Williams: No — I grew up in New York City. In the summers, we went to Norfolk, Connecticut, but for 9-10 months of the year, we were in New York City.

Mr. Nuechterlein: Where?

Judge Williams: Upper East Side. I went first to some school — you may want to delete this:[6] One time when my father picked me up at the end of school, the head of it said, "I would like to talk with you and Mrs. Williams about Stephen's development" — I was five at the time, maybe four. The time was set up, and he came to my parents' apartment, and he said, after a lot of throat clearing, "I have to tell you that Stephen does not understand the role of the father in the reproductive process." I assume it was a pretty progressive school — I have very little recollection of it. That is the high event from it.

Then I went to Collegiate from first through third grades, and what I remember mostly is … my sisters' endless teasing me about it. There was a report card that said that I was "mature in thought, immature in actions." Then I started the fourth grade at the Buckley School, which ran from K to eighth grade, and then I went to Millbrook School for ninth through

[6] Too charming to delete.

twelfth — Millbrook being a boarding school. About two hours north of New York.

Mr. Nuechterlein: Tell us about those years in Millbrook. Did you enjoy them; did you learn lots of things? Tell us about your classmates you kept in touch with.

Judge Williams: It was a very small school at the time, partly why I went there. When my parents took me to Exeter, which was something like seven or eight times as big, I remember feeling just overwhelmed by the number of people, so at least I thought a small place would be more comfortable. I am not sure whether that was really true. That played a role in my going there.

I was originally quite drawn by the zoo they had there, which had been started by Frank Trevor. He had just driven up to the school with a station wagon full of animals and talked to the headmaster, Mr. Pulling. And his enthusiasm and intelligence were so great that Mr. Pulling gave him a job on the spot, and he started a zoo, which has now become quite a huge enterprise at Millbrook. …

In the end, I had very little contact with the zoo, and I didn't enjoy Trevor's biology course very much. It seemed to me to be too much focused on taxonomy — we were always classifying animals, which didn't seem to be very interesting. If there was stuff on evolution, which I think I would have found fascinating, as I do now, I *don't* recall it. There was also looking at things through microscopes, amoebae, spirochetes and so forth, and I remember having great difficulty finding what I was supposed to be finding. I didn't seem to have very much of a knack for that. So, anyway, that aspect of Millbrook didn't prove out very much for me.

But I found it offered a lot of attention to individuals, and there were challenging courses. I went into … an advanced Latin course on arrival, and same thing for French. My first year I was taking classes in French and Latin with people who were at least a year ahead of me. They certainly made sure they tried to fit students into the right classes.

There was a class taught by Mr. Pulling on the Bible, and that really focused on interesting stories and so forth. And there was chapel twice a week, which included one reading from the Bible at the Thursday chapel and two at the Sunday chapel. So that gave me good exposure to the Bible, which simply seemed to be extraordinary, and may have had some effect on my writing.

Mr. Nuechterlein: How about socially? What do you remember about the social milieu of the New England boarding school back in those years? This being your first time away from your family.

Judge Williams: In some aspects, Millbrook was less preppy than other prep schools. There were people there that undoubtedly had loads and loads of money but you didn't see it. Obviously no one could have a car, nobody had a TV set, there was no way someone could display wealth at Millbrook, so that was a good thing. I was very shy.

Mr. Nuechterlein: Were you homesick when you first got there?

Judge Williams: Yes, I must have been. There were a very limited number of times you could go home for weekends, which was probably a good thing. But I found a niche of a sort. I never became a madly social being there. My best friend was Tony Piel, whom I encountered later at law school. A very bright, very talented person. …

Mr. Nuechterlein: You mentioned earlier that the Buckley brothers were at Millbrook — Bill and Jim?

Judge Williams: Bill and Jim, plus two of their brothers whom I've never met, John and Reid. This was of course before I got there; they had all graduated — I didn't overlap with them. When I think of the Buckleys at Millbrook and myself at Millbrook, I do think of this anecdote involving Frank Trevor, who . . . I guess was ardently pro intervention in World War II. He certainly locked horns with Bill Buckley, who was an America Firster — an organization that opposed intervention in World War II.

Mr. Nuechterlein: This is while Buckley was a high school student?

Judge Williams: Right. And I must have had some political disagreements with Trevor, because I do remember another teacher reporting to me that Trevor had said that "Williams is the most dangerous student here since William F. Buckley."

Mr. Nuechterlein: What do you think he meant by that?

Judge Williams: Well, (a) I had bad ideas, the way he saw them, and (b) he must have thought I had some skill at presenting them; otherwise I wouldn't have been dangerous.

Mr. Nuechterlein: What sort of ideas or topics?

Judge Williams: That is a good question. This was the Eisenhower era — good feeling, complacency, and so forth. … They probably were things having to do with America's international role. I can't recall any specific clash with Trevor on such things.

Mr. Nuechterlein: Do you recall ever focusing on domestic, economic, regulatory issues?

Judge Williams: I really don't.

Mr. Nuechterlein: Were you exposed to economics in high school?

Judge Williams: No — high school was devoid of economics.

Mr. Nuechterlein: Latin instead.

Judge Williams: [Laughter.] Latin made us think, so that would be enough. I am jumping ahead: I had my first economics course in my freshman year at Yale, and it was at 8:00 am, and I was sort of an early riser, so that wasn't so bad, but I have to say that something about the teacher or whatever made it terribly boring, although Yale had a good economics department. I never took another economics course. In fact I never took another economics course in my life.

Mr. Nuechterlein: I took exactly one economics course at Yale and had exactly the same experience.

Judge Williams: Oh really?

Mr. Nuechterlein: Yes. You mentioned before we began here that your first job was pumping gas?

Judge Williams: I worked in a gas station.

Mr. Nuechterlein: Do you remember which one?

Judge Williams: This was a gas station in Norfolk, Connecticut, where we went for the summer, and it was probably the first summer I had a driver's license, so I would have become 16 the September before. I pumped gas, which wasn't rocket science obviously, and I tried to watch what the mechanics were doing by way of repair. I can't say that I picked up a great deal. I did learn how to change a tire; I don't mean just changing the wheel and tire, but removing the tire from the wheel and replacing it. But you have to have the equipment, so later in life it doesn't do any good without the equipment. At least I know what they are up to when I watch them doing it in a garage.

Mr. Nuechterlein: When did you buy your first car?

Judge Williams: I think it was when I got to New York after law school, and after my 10 months in the Army.

Mr. Nuechterlein: Did you put a lot of thought into what you were going to buy?

Judge Williams: Well, I liked the idea of a convertible, and being in New York, I wanted something easily parked, and I got a VW convertible. VW had a very good reputation.

Mr. Nuechterlein: You are not still a car aficionado?

Judge Williams: No, I am really not.

Mr. Nuechterlein: So this is sort of an interesting summer job, given your background. You had gone to an exclusive prep school, and you took a job pumping gas one summer. Was this considered something that was good for you?

Judge Williams: I am sure my parents thought it was good for me. In exactly what ways, I don't know. They knew I was very interested in cars – it was a natural thing.

Mr. Nuechterlein: I think I remember the first President Bush spent some of his summers bailing hay out in the West because that was considered good for the character.

Judge Williams: Yes. When I was small, the farm we lived on was a working farm — not worked by my parents, but it was a working farm. One summer I was a farmer helper in a serious sort of way, getting up at 6 a.m. or before to milk the cows. And being with the farmer and his main helper on all the stuff they were doing, I got a real exposure to farm life.

Actually, that reminds me that Millbrook has put out a 75th Anniversary CD. And in the course of it, they interview lots of graduates, not including me. They interview actually both Bill and Jim Buckley, and Bill talks on the CD about his brief period of involvement with the Millbrook zoo, and says that it gave him a lifelong dislike for all things agricultural. I will say that my time on the farm made me not want to become a farmer.

Mr. Nuechterlein: This was your parents' farm?

Judge Williams: Yes, my parents' farm.

Mr. Nuechterlein: What sort of salary did you make at the gas station?

Judge Williams: I am sure it was minimum wage.

Mr. Nuechterlein: What would that have been?

Judge Williams: $1 an hour? Very, very small. But it presented a tax situation. If my income, or perhaps my earned income, rose above $500, then I had to file a tax return. I can't believe the tax rate was very high, but my parents wanted me to continue working, and they wanted me to have an incentive to work. They didn't want me to receive more taxable income, so after I hit $500 they paid me.

Mr. Nuechterlein: I'm sure the gas station appreciated that.

Judge Williams: So clearly my parents weren't interested in boosting the family income.

Mr. Nuechterlein: You graduated from Millbrook and went to Yale. What was the college admission process like then? Was it highly competitive to get into Yale? Had your father gone there for college and law school?

Judge Williams: Yes he did. It was obviously much less competitive than it is now. I really can't say what position I would be in if what is happening in 2007 had prevailed in 1954. I sailed in.

Mr. Nuechterlein: Did you apply anywhere else as a safety school, or did you apply, get the answer back that, yes you were admitted, so you didn't need to apply anywhere else?

Judge Williams: I did apply to Haverford, but it wasn't really as a safety. Again the yearning for the small was at work, and so I did apply to Haverford. I assume I got in, but more relevantly I got into Yale. The college adviser at Millbrook told my parents, "Steve can write his own ticket." He felt confident I could get into anyplace.

Mr. Nuechterlein: I went to Yale, just for the record. Did they have residential colleges then?

Judge Williams: Oh yes — I was in Pierson. They all had some number of residential seminars, and I remember I took an English seminar with Joel Dorius, who I thought was a really good teacher. … He helped me see things in what we were reading that I would have never seen.

Mr. Nuechterlein: What did you major in?

Judge Williams: History. I remember another teacher … — L. Pearce Williams, whose specialty was the history of science. He didn't teach the main European history course, but they had "sections." Once a week, a small group of people — 20 or so — would meet. … There was a separate book for that part of the course, which had problems and was supposed to teach you how to reason from the raw material of history. And he was just extraordinarily lively and came up with comparisons that made things understandable and vivid, which on the whole they weren't in the main lectures.

Mr. Nuechterlein: Did you write a senior thesis?

Judge Williams: I did — I wrote on the Hoover Moratorium. Very few people know of the Hoover Moratorium now, but a continual problem from the end of World War I until the Hoover Moratorium in 1931 … was the failure of the Germans to pay reparations, and the failure of the European allies to pay their wartime debts to the U.S. There were successive reductions under the Young Plan and the Dawes Plan, and finally, once the Depression got underway, it obviously became still more difficult for them to pay. The

Hoover Moratorium was a moratorium on the payments across the board, Germans to the Allies, and the Allies to us. It was done in the hopes of rescuing the European economies from the Depression. Obviously in some sense it was completely inevitable, but it was a good thing that the world's principal creditor called a halt to it semi-voluntarily. That made it a less contentious problem than it would have been if we had kept on trying to collect the debts. Of course moratorium means just delay. But as it proved, it wasn't just a delay; it was the end.

Mr. Nuechterlein: Who was your thesis advisor?

Judge Williams: I forget — it wasn't a very hands-on giving of advice.

Mr. Nuechterlein: Do you ever remember thinking "Oh, I wrote this interesting paper, maybe I should get it published?"

Judge Williams: I really didn't — no.

Mr. Nuechterlein: That is one of the odd things about college — people are constantly writing these papers that only one other person will probably ever read.

Judge Williams: I am sure I sensed that it wasn't good enough. Whether it could have been turned into something good enough, perhaps by the help of some shoving by a teacher, I don't know.

Mr. Nuechterlein: … I am thinking about William Buckley and his book *God and Man at Yale* and … about current President Bush's view of Yale in the late '60s when he was there. And I am wondering whether you perceived a particular ideological environment at Yale. Did you feel estranged at all from the other students, or did you feel you were more in the mainstream of the Yale students' worldview at that time?

Judge Williams: I was probably in the mainstream. A very central event of it — almost the exact chronological center of my time at Yale — was the Hungarian Revolt of 1956. Everyone was on the side of the Hungarians. If we were to construct a parallel today, I'm not sure if that would be true.

Mr. Nuechterlein: So, Judge, tell us a little about the Yale Political Union when you were a student there in the '50s.

Judge Williams: Well, it was modeled on the Oxford Union idea that students could hone their skills as debaters. There was a right-wing party called the Party of the Right, and a left-wing party, I don't know how it was labeled. And each of them in my time had one incredibly articulate … outstanding spokesman (they were men, as were all students at Yale at the time). For the Party of the Right, it was Richard Arnold, who later became a judge of the Eighth Circuit. You mentioned, while we were talking, "Wasn't he a Democrat?" Well, yes, he was a Democrat, but I remember a conversation with him —

I don't know if it was at Yale or a later, at law school or even beyond — in which he said, "A liberal Republican is the worst thing because it is against nature." You might say the same of a conservative Democrat. But he probably didn't feel that was against nature.

He certainly showed at Yale the brilliance that he later showed. I can't remember particular lines of his but he was definitely very eloquent. Then on the left there was André Schiffrin, who later went into a very distinguished career in publishing, being director of publishing at Pantheon for decades. He also was very eloquent. I do remember a line of his — well, I am not going to get it quite right — but it was basically how the Republicans are always criticizing the Democrats for giving away countries the U.S. doesn't have. That must have had to do at least in part with China.

Mr. Nuechterlein: Do you remember debates at the time about economic policy?

Judge Williams: There must have been debates about tax policy, but I honestly don't remember them. I think it is fair to say that today a debate about economics would be carried on at a more sophisticated level than it would have been then. ... I also remember — and this may say something about Yale in that era — I think it was André Schiffrin who was very critical of the course on Marxism, and I remember him saying it was just an attempt to inoculate the students.

Mr. Nuechterlein: Did you have any Marxist professors?

Judge Williams: Not that I know of. If there were, they kept it in the closet. The course on Marxism took us through the great Marxist writers, but of course it also took us into the uses of Marxism by Leninists and Stalinists and Third World dictators who assumed power and then justified their one-party rule with Marxist theory. It is fair to say that it didn't leave one with a very warm feeling toward Marxism.

Oddly enough, later in life, I found that Marx occasionally said something that was really very penetrating and smart. I quoted a whole paragraph of his in my book,[7] so maybe my general distaste for Marxism shows that the course was just an inoculation. But I have been thinking back on it. It does seem to me that Marxism then and Marxism now, on the whole, as a way of looking at the world, tends to flatten things into class struggle. Social life, economic life are so much more complex than class struggle that Marxism overall seems to be really quite a deadening set of notions.

[7] Stephen F. Williams, *Liberal Reform in an Illiberal Regime: The Creation of Private Property in Russia, 1906-1915* (Hoover Inst. 2006).

Mr. Nuechterlein: Did you get the sense that other students at Yale College were flirting with Marxism?

Judge Williams: No, not at all. No sense at all, except for André Schiffrin, who was definitely a strong and articulate left-winger.

Mr. Nuechterlein: One gets a sense that, at Oxford and Cambridge in those days, there was a lot of Marxist ferment.

Judge Williams: Yes. If there was at Yale, I completely missed it. …

Mr. Nuechterlein: Were there any discussions about whether Yale should admit women?

Judge Williams: No.

Mr. Nuechterlein: Where did people meet women?

Judge Williams: People went to Poughkeepsie and Northampton. Women came from various places. …

Mr. Nuechterlein: Were there any great universities in that time that were co-ed?

Judge Williams: Well, Harvard de facto was, although, as my wife will tell you, in her era it was definitely not fully integrated as it is now. Radcliffe had a separate residential life, but to some degree there was an integrated intellectual life. There was obviously geographic convenience, and in addition some jointly given courses.

Mr. Nuechterlein: What about racial minorities? Do you remember Blacks on campus?

Judge Williams: There was a tiny handful — very few.

Mr. Nuechterlein: Was there a sense that Yale didn't look like the United States at large? Was that a concern for anybody?

Judge Williams: People weren't talking about it, I don't think.

Mr. Nuechterlein: Did you meet any of the Black students?

Judge Williams: I am sure I met them, but I didn't have any extensive contact with them.

Mr. Nuechterlein: Asian-Americans?

Judge Williams: I don't think there were many Asian-Americans.

Mr. Nuechterlein: How about Jews?

Judge Williams: Yes —

Mr. Nuechterlein: I was told that, during this time, there was a quota system designed to limit the number of Jews at Harvard and Yale. Do you remember hearing anything about that?

Judge Williams: I didn't — it seems I had my ears and eyes closed. I don't remember that being a subject of discussion.

Mr. Nuechterlein: But you knew there were Jewish students?

Judge Williams: Oh yes. I have to admit it was a problem I had and still have — I am not very good at identifying who is Jewish, so I have absolutely no idea what the proportions were.

Mr. Nuechterlein: Was there any sense of Jews being outsiders at Yale College at the time, or were they fully assimilated?

Judge Williams: I think they were pretty assimilated.

Mr. Nuechterlein: So you graduated in 1958?

Judge Williams: Yes.

Mr. Nuechterlein: And you moved straight on to Harvard. Did you know early on in college that you wanted to go to law school?

Judge Williams: Law school was certainly on my parents' agenda and so it was something that I thought about. At college I had notions of going into the ministry. I had a strong but very erratic idealistic streak. For some reason or another, I thought I would do well as a minister. I didn't really believe, which made it not a terribly good fit.

Mr. Nuechterlein: You would have fit in perfectly at the Yale Divinity School.

Judge Williams: I would have fit in perfectly today, but I am not sure if I would have fit in in the mid-'50s. I think I would have been ahead of my time.

Mr. Nuechterlein: Were your parents church-going people?

Judge Williams: Randomly, or occasionally.

Mr. Nuechterlein: What type of church?

Judge Williams: My father had been brought up as a Presbyterian, and in fact his mother was Presbyterian, but, as a young girl at a marriageable age, she had a suitor whom she liked a lot who was a Methodist, and in the end that was the deal-breaker.

Mr. Nuechterlein: Don't both the Presbyterians and the Methodists — don't they both trace from Calvin?

Judge Williams: Whatever the divergences were, they were conceived by her in the 1890s as too great.

Mr. Nuechterlein: At some point you gave up these dreams of the priesthood to go to law school.

Judge Williams: Not exactly priesthood. Even at law school I had resistance. I actually won a Ford Foundation scholarship to study Chinese, which was to be integrated with law to some extent. It was a flight from the law. And in part a flight into scholarship, to which I later did turn, for 17 years. There was a special resistance to being a conventional lawyer.

Mr. Nuechterlein: But your parents, you say, wanted you to be one.

Judge Williams: They were very enthusiastic.

Mr. Nuechterlein: Why? Did they think you would be good at it?

Judge Williams: I think they thought I would be good at it. My mother had somewhat idealistic notions about lawyers. She thought they were always dealing with *principles*, and she distinguished that from businessmen, who were just making money. That may have played some role. I remember my mother being quite articulate on that ideal.

Mr. Nuechterlein: And your father didn't set her straight?

Judge Williams: No. My father really had a high regard for law professors, and he admired enormously his professors at law school.

Mr. Nuechterlein: Now that was during the era of Legal Realism.

Judge Williams: Yes. In another effort to break away from the law, I toyed with foundation work. We had a friend who was on the board of the Ford Foundation, and he set up an interview for me there. And I came away from that horrified on two grounds. One was, I said something to the person interviewing me indicating my notion that the great thing about the Ford Foundation was all these bright people having millions to throw around; I pictured great lunch conversations finding new ways to deploy their millions. And he responded that there was rather a strict chain of command. He depicted it as the most bureaucratic organization, and that didn't appeal to me at all. And the other thing I remember him saying that repelled me was, "When we travel, we travel first class." So he wasn't speaking to the idealist in me. But I do remember talking to my father about that, and my father specifically saying, "It is not as if you would become a law professor," which he regarded as challenging and serious. He regarded foundation work as dilettantish and frivolous.

Mr. Nuechterlein: So did you apply to other law schools?

Judge Williams: I applied to Yale and Harvard, and I got into both, and I spent a long time mulling which one to go to. And I decided I should flip a coin. So I flipped it, it came up Yale, so I said, "well, maybe it should be the best out of three." So I flipped some more, and Yale was still ahead, and then I thought, maybe it should be the best out of five. And Harvard won on the best out of five, so I went to Harvard.

Mr. Nuechterlein: So what do you think guided you to keep on flipping?

Judge Williams: I think it must have significantly had to do with Cambridge over New Haven. …

Mr. Nuechterlein: We all have a sense of the difference that Harvard and Yale law schools have today. When you think back to the late '50s and early '60s, when you went to Harvard, what was the popular conception of the distinctions between those two law schools?

Judge Williams: People still thought that you got a serious legal education at Yale.

Mr. Nuechterlein: Is there a "but" coming?

Judge Williams: There is a "but," but I don't recall anyone saying to me that attention to other disciplines would engulf the legal education. I think I did ask family friends and people like that, and I don't think anyone said, "Steer clear of Yale."

Mr. Nuechterlein: And your father was OK with your heading off to Harvard?

Judge Williams: Oh, he was OK with my heading off to Harvard, and by the same token, he certainly didn't raise any ideological objection to Yale.

Mr. Nuechterlein: We have all heard these stereotypes of Harvard Law School — the first year, in particular — from the popular media, like *The Paper Chase*, books like *One L* — I think they both took place, like, ten years later. Do you recall the first year being high-pressure?

Judge Williams: I think it was high pressure. But at the same time, I should say, I was a member, for example, of a study group there, and I think what we did was practice on exams, which was a useful thing to see what exams were like and to have practice at writing an answer. This study group used to meet the in the late afternoon and do this for an hour or an hour and a half or so, and then it would be time for drinks. So it couldn't have been too absolutely nose-to-the-grindstone.

Mr. Nuechterlein: And you were a member of the Law Review?

Judge Williams: Yes.

Mr. Nuechterlein: I assume that was highly competitive then.

Judge Williams: Yes.

Mr. Nuechterlein: Do you remember a lot of stress in the class about competing for a seat on the Law Review?

Judge Williams: I don't remember people talking about it.

Mr. Nuechterlein: Did it seem like a competitive environment to you? Were your fellow students obviously ambitious?

Judge Williams: A lot of them were much more ready to speak out in class than I was, and some of those I identified to myself as loud mouths, but some of them were very, very bright. I rarely spoke in class. The first and only time I was called upon in Contracts, there was something about a case that engaged my interest, so I was able to say something that the professor really liked. I don't remember what it was.

Mr. Nuechterlein: What professors stand out as particularly good ones?

Judge Williams: Braucher was very funny, but I never understood Commercial Law, which is what I took with him. I had Property I and Property II with Casner, and it was very clear, and gave to a large extent a sense of how property held together as a system. I should say, at the same time, that when I later came to teach property, I took a somewhat more Yale-oriented approach, because I tried to fit it into economic notions and to some extent sociological notions. That hadn't really happened at all in Casner's class. There was a clarity I remember about it, a sense of someone being totally prepared and totally conscientious about trying to bring out the meaning of the materials, within a certain constrained sphere.

I had Abe Chayes, who was very exciting. I don't know if I fully understood corporations, but he was almost, you could say, electrifying. I remember this — I won't focus on the professor, but Torts — I do remember when we came to nuisance, my mind immediately started to see it in economic terms, and these weren't the terms in which the professor addressed it. As one of my few affirmative interventions in law school, I put forward a view that would now be associated with Pigou, the professor whose ideas to a significant extent were overthrown by Coase in his famous article on social costs. But even Pigou was far too advanced for that course in that era, and the professor just brushed it off.

Mr. Nuechterlein: I take it this was before Melamed and Calabresi's article, *Another View of the Cathedral*.

Judge Williams: Yes. It was definitely before that article, and it would have been shortly before Coase published "Social Cost" in 1960, but it is fair to say that my

gambit there was just brushed off without hesitation and without its being engaged with. That says something quite critical at least about that professor and probably about Harvard Law School in that era.

Mr. Nuechterlein: Did you get the sense that the professors were trying to instill in the students a sense of mission, of the use of the law as a social tool for the betterment of society — was that part of the environment at the time?

Judge Williams: Griswold was Dean at the time, and I connect this remark to him, although possibly he said it later or it really was said by someone else, but I think it captures the feel: "The world has no need for more lawyers. It has a huge need for better lawyers." Of course, it was a self-serving remark to some extent. There was certainly a notion that lawyers were a good thing, and this was largely put on the basis that lawyers were essential for the wheels of commerce to run.

Mr. Nuechterlein: What about the law of racial equality, which was obviously an important issue at the time? Was there much focus on that in law school?

Judge Williams: Very little.

Mr. Nuechterlein: So the focus was really on what the people in law firms do.

Judge Williams: I think that is fair to say. Yes. Maybe this is my mother's influence, I had a kind of scornful view of business, moneymaking, so forth. I really didn't see its role in making life better for people.

Mr. Nuechterlein: You didn't see the value of a capitalist economy?

Judge Williams: It wasn't that I thought socialism was a good thing. It was that it didn't seem very uplifting. Sort of the spirit of Irving Kristol's book, *Two Cheers for Capitalism*. As a young idealist I didn't think two cheers were enough.

Mr. Nuechterlein: Harvard Law School was co-ed at this time?

Judge Williams: Yes, it was — but in my class of approximately 500, there were eight women.

Mr. Nuechterlein: Would I recognize any of the names?

Judge Williams: One I remember very well was Nancy Eastham, and she is the mother of a Canadian law professor. His first name is Edward, and his last name is Iacobucci, and her husband was also a Canadian law professor, but I am not sure about that.[8] Her son certainly is. I saw him at a conference, and I

[8] From 1967 to 1985, Frank Iocobucci was a professor at—and, for a time, dean of—the University of Toronto Faculty of Law; he later became Chief Justice of the Federal Court of Canada. His son Edward Iacobucci is also a professor at the same law school and was dean from 2015 to 2020.

knew she had married someone named Iacobucci, and he looked plainly too young to have married her, so I introduced myself and found out he was her son. There was another I met post-law school when I went down to Mississippi with the Lawyers Committee for Civil Rights under Law — that was in 1965.

Mr. Nuechterlein: Did you overlap at all with Ruth Ginsburg?

Judge Williams: No — I am 99.9% sure of that. Her travails with Harvard Law School were earlier.

Mr. Nuechterlein: How about racial minorities? Were there Blacks or Asians?

Judge Williams: There certainly were Asians. One, Wally Tashima, became a federal judge — part of the enormous contribution of our class to the federal judiciary. But I don't think I knew him at the time. There were Asian faces, and there were black faces, but very few. I have a count on women, but not on minorities.

Mr. Nuechterlein: The admission process at Harvard Law School was fairly competitive. Was there any sense that the admissions office was trying to achieve social or economic diversity, or was it solely on the grades?

Judge Williams: I think the overwhelming focus was on LSATs and grades. I think they must have made an adjustment from where the grades were coming from.

Mr. Nuechterlein: But it was a solely quantitative assessment?

Judge Williams: I believe it was quantitative, and yielded a prediction of how well, quantitatively, they would do in law school.

Mr. Nuechterlein: Was this an era in which people failed out of law school? ...

Judge Williams: [There] is a terribly famous and much-quoted statement. The class gathered together in the auditorium, and was addressed by the Dean, who said, "Look to the right of you, look to the left of you; one of you three will not be here at the start of the second year." I can't remember if the Dean actually said that to our entering class. I think he couldn't have said it, because it was totally not true. I think our class of 500 was roughly 500 through the second and third year. Although, actually, I just learned from some friends of mine that I had a classmate — I don't know if he did badly or just didn't like it — but he did drop out after the first year and became extremely distinguished in Chinese literary scholarship, which is probably is a strong net benefit for the world all around. I learned of it from talking with the wife of a now-deceased classmate, who had kept somewhat in touch with this person. We were talking about it because one of my sons is now a Chinese literary scholar.

Mr. Nuechterlein: You mentioned that your class holds a record of sorts — tell us about that.

Judge Williams: I think we hold the record for any law school for the number of federal judges, and I believe the class had that record even before Tim Dyk went on the Federal Circuit. In any event, they now include Anthony Kennedy at the Supreme Court, on our court Larry Silberman and me, Lanier Anderson on the Eleventh Circuit, Wally Tashima on the Ninth Circuit, and Tim Dyk on the Federal Circuit.

Mr. Nuechterlein: Did you know any of these people well when you were in law school?

Judge Williams: Except for Tim Dyk, through law review, no.

Mr. Nuechterlein: Didn't know Anthony Kennedy?

Judge Williams: Not at all. Nor Larry. As Larry said at the hanging of my portrait, I spent most of my time in the library or at the Law Review, and he was seldom in the former and never in the latter.

Mr. Nuechterlein: This is the end of our first day interviewing Judge Williams. We will resume soon.

Oral History of Judge Stephen F. Williams
Session 2
November 25, 2007

Mr. Nuechterlein: In the last session, we went up through Judge Williams's law school years. He says there was one additional [classmate] from those years he meant to discuss. …

Judge Williams: I thought I would mention Bernie Nussbaum, who has become famous as one of the White House Counsels for the Clinton administration. Faith just told me he appears in the Bernstein book on Hillary Clinton, so I guess he is a long-time Clinton fan. He was the editor of my note, which was on a boring subject — state authorities, these quasi-public entities such as the Port of New York Authority. In fairness to the editors who assigned it, the fault was at least partly mine in failing to make anything good of it. Bernie, though a faithful and active editor, didn't transform it.

Mr. Nuechterlein: Have you kept in touch with him through the years?

Judge Williams: No, I haven't. When he was here as White House Counsel, he came to periodic lunches that the Class of '61 Washington contingent had in that era. I was just thinking that there hasn't been one of those lunches for a long time. The probable reason is that a large fraction of that contingent has gone off to other places in retirement.

Mr. Nuechterlein: You also knew Tim Dyk.

Judge Williams: Yes — not very well. He was on the Law Review, and I certainly saw him there.

Mr. Nuechterlein: You graduated in 1961 from law school. What did you do after that?

Judge Williams: First I took the bar exam.

Mr. Nuechterlein: The New York Bar?

Judge Williams: Yes.

Mr. Nuechterlein: How did you do?

Judge Williams: I passed. There are only two possibilities — pass or fail, and I passed. Very soon after that, I started work at Debevoise, Plimpton, Lyons & Gates — or actually maybe it was Debevoise, Plimpton & McLean in that era, I am not sure. A friend of mine liked to call it "Debevoise, Plimpton, Lyons & Gates, good at talk and great at debates."

Mr. Nuechterlein: How did recruiting work in those days? Did they come to campus? Did you interview?

Judge Williams: Actually, I was quite interested in the Paul, Weiss, Rifkind firm — I forget just why. It may have been partly because I had a classmate, Bob Rifkind, the son of the Rifkind of the firm, who was my rival and then my partner in the moot court system that Harvard employed. And for some reason or another, my father seemed eager to steer me away from that, and one way to do that was to steer me toward Debevoise & Plimpton. I don't remember them coming to the campus, but I remember very well my time interviewing at D&P because my first interview was with Mr. Plimpton. I was in his office, and the phone rang, and he embarked on a 30-45 minute conversation about some complex financing, of which I understood not a word.

Mr. Nuechterlein: Did you pretend?

Judge Williams: No, there was no occasion to pretend. The conversation rolled on, and we had a few minutes of conversation, and then I was sent around to a designated list. One piece of advice my father gave me was to go to a firm where you liked the people, people you would like to go to lunch with and so forth. I found the people there very engaging. I did have interviews at Paul Weiss. But — it may have been after my father's gentle steering toward Debevoise & Plimpton — that was the end.

Mr. Nuechterlein: What were the starting salaries?

Judge Williams: I remember feeling embarrassed at what I thought was the princely sum of a hair over $7,000 a year. The idea that anyone would pay $7,000 a year for my time — that was quite shocking to me. I also remember thinking, if you take what I am paid and what I am doing, some client is paying $5 an hour for what I was doing. It seemed scandalous. But I charged ahead. The dollar was different in that day, but even adjusting for inflation, lawyers' salaries and fees were different.

Mr. Nuechterlein: Were you in litigation? Deals? Do you remember?

Judge Williams: I was in litigation a bit. I guess I was never specialized there, because I went off to the U.S. Attorney's Office, which was thought a particularly suitable way to specialize. I remember I had a tax case and that I wrote a memo for it that Martin Lyons really liked, and he asked me to specialize in tax. I felt honored to be asked, but I did not feel drawn to tax. I held the invitation at bay.

I did a lot of financing work. One of my friends there said that he saw a parallel between Debevoise & Plimpton and Wellesley (I see you shaking your head): "first rate people engaged in second rate work." I don't think he meant to deny that these financings were very sophisticated and challenging, but I think his thought was that the work was not as engaging

as the people. I don't know just what his angle on the Wellesley education was.

Anyway, there was a heavy load of financings, which certainly weren't as engaging as litigation. On the other hand, litigation, one could easily see, was very taxing. Of course, after that I went into the U.S. Attorney's office, where I only did criminal litigation, which is a very intensive form of litigation.

I do remember — this is jumping ahead, I am afraid — the trade-offs of the different segments of the law, at least as they appeared to me. I worked on a case in the U.S. Attorney's office with Arthur Liman, who worked on the case while he was in the office and came back to be the lead government representative on it. He took pills to calm him down (I am sure they were legal), but at some phase during the trial, he may have been hospitalized with ulcers or something, and you could see that the physical stress of litigation on him, who really was a master at it, was very severe.

As I think about it, I continue to be amazed at my father, who was not a laid-back person (of course how could a litigator be laid back?), and I am amazed at how cool he was at being able to handle the pressure of litigation and also lead a normal life.

At Debevoise, my biggest litigation was the incredibly long, drawn-out antitrust suit. That was a more leisurely form of litigation.

I remember very well that, just before I started working on the antitrust case, our firm had the idea that we should file interrogatories asking the government essentially for details of what their position was. The government's claim was that the client's acquisition of another firm had tended to lessen competition, a violation of Section 7 of the Clayton Act, specifically in the envelope industry.

And so one of the questions was: "How did the acquisition tend to lessen competition?" And the answer from the Department of Justice was: "By accelerating competition in the envelope industry." That seemed to show a paradox, at least, in their position.

Mr. Nuechterlein: What did they mean?

Judge Williams: I think, as one steps back from it, that probably the driving force behind the government's complaint was (as it sometimes is in antitrust cases) pressure from competitors that felt that the acquisition might cause more aggressive competition. In fact, prices in the envelope industry fell, although I am sure there were complicated causes for that, but certainly they did, and I am sure part of it was increased competition. In essence, the government's case — this was a vertical acquisition —was really a now-abandoned theory: a version of "predatory competition."

Mr. Nuechterlein: "Predatory competition" meaning, in this case, that the company had made itself more efficient as a result of this merger, and it was therefore able to produce goods at a price lower than its competitors and still turn a profit? Or was there any claim of selling below cost?

Judge Williams: There was no claim that the client and its partially acquired firm were selling below costs, measured in any way. When you think of it, basically as you said, either they were more efficient or they were ready to accept lower profit margins than the envelope industry liked to enjoy.

Mr. Nuechterlein: This sounds a little familiar to me — it reminds me of the E.C.'s treatment of the GE/Honeywell merger.

Judge Williams: I don't claim any expertise in that — but I have heard of certain parallels.

Mr. Nuechterlein: How hard did they work you at Debevoise? Was there a billable hours expectation?

Judge Williams: If there was, it was not stated. I worked very hard.

Mr. Nuechterlein: Did you bill time?

Judge Williams: Yes, and they made it easy for you by paying for your dinner. Particularly in my early times there, all kinds of associates and young partners and I went out to dinner at 6:30 or 7:00, often at some of the very nice restaurants that were located near the firm. Towards the end I reduced participation in that and would have a sandwich sent in. They made it easy for you by paying for it. I guess now they make it much easier by having cars to take you back home. I guess it was much safer back then — that was before the great crime wave hit New York. I guess I often worked until 9 or 10. In the period that I lived on West 96th Street, I would often walk home through Central Park. That would now be thought lunatic; some thought so even then.

Mr. Nuechterlein: What time would you get in?

Judge Williams: 8:30 or 9, something like that.

Mr. Nuechterlein: When you started there, did you have any sense that you might stay over the long term, become a partner?

Judge Williams: I guess I was highly ambivalent about that. There was this continual sense, which my 17 years as an academic did fulfill, of wanting to be able to set my own agenda. Obviously I don't do that as a judge.

The other thing that work in a firm didn't do was enable me to take the position that I wanted to take — which being an academic does, and which was being a judge does, within the constraints of the law.

Mr. Nuechterlein: So you were there about 10 months before military service?

Judge Williams: No. I started in the Army Reserves in August 1961, as a result of the Berlin crisis. The Reserve unit which I joined (because that was a comparatively painless way of avoiding the draft) was activated. I think I joined it something like the week in which the unit was activated.

Mr. Nuechterlein: That was unexpected?

Judge Williams: Unexpected by me certainly. I later learned that some people who had served longer in the unit were aware of rumors that it would be activated. It was a kind of intelligence unit. "A.S.A." were the initials, standing for Army Security Agency. What it did was basically listening. So the core training for the unit was training yourself to listen to dots and dashes and to copy them down. But I never actually reached that stage because I had not even had basic training at the time we were activated. My first period in the Army was about four months, September 1961 to January 1962, when the unit was in Fort Devens, Massachusetts. That was actually a quite charming place. I later took Faith there on our first date; we sat by a lake that, when I was stationed there, I thought would be fun when one had a girlfriend.

Our unit didn't do much. The people who had been regulars in the unit got retraining in their specialties — and the big specialty was this listening activity. Something or the other was found for me to do. No long-term possibilities. We were milling around marking time.

In January, I went to basic training in Fort Dix, which was where a vast proportion of the Army got basic training. That was a period of my life in which I lost weight – like 10 pounds in 8 weeks. I remember some things of that time very vividly. The low crawl under live machine gun fire, a very tense activity. I remember after you get to the end of the course, you are free to stand up, you are alive, it is wonderful — and I threw up. Probably tension. A strange experience.

Mr. Nuechterlein: So you had a drill sergeant?

Judge Williams: You arrive on the bus from New York with a lot of others in the same position. The first thing they did actually with my name was to get it wrong: "Bill Stevens!" So I tried to correct that, but I don't think the correction was very well-received. Then you start life. One of the sergeants especially stated that the purpose was to stamp out individualism.

Mr. Nuechterlein: They were communitarians?

Judge Williams: They were communitarians of a kind, yes. Basically the object was to make sure you followed orders, no matter how peculiar, as needed. All

these stories about how the Army turns rotten kids into stalwart citizens — I am sure that is true.

Mr. Nuechterlein: So here you are, having gone to a prep school, Yale College, Harvard Law School — first of all, did you tell anybody about that?

Judge Williams: Oh no — of course not. I should say that when I went to basic training, there were three others from our intelligence unit that went that same time, and actually we were made squad leaders because we had some experience. It was not an activity that played to my strengths. One or two of the others surged ahead inasmuch as one could surge ahead in basic training.

Our unit, because it was an intelligence unit, was a relatively well-educated group. In fact, of my three best friends in the intelligence unit, one is a professor at NYU Law School now; one has just retired as a teacher of English at Flagler College in St. Augustine, Florida, a wonderful person, just very witty and full of ability to cite reams of Shakespeare in a very amusing way; and one, Pierre deVegh, who was an investment manager on Wall Street later. They were not the ordinary grunts certainly. They were probably among the better educated in the intelligence unit. And the education level there was relatively high compared to basic training.

Mr. Nuechterlein: How long were you in the Army?

Judge Williams: A total of 9-10 months. We were activated for the Berlin crisis, but it was perceived as receding.

Mr. Nuechterlein: Did you seriously entertain the prospect of going to war?

Judge Williams: Yes, there was talk of that. And by the time of basic training, January 1962, the sergeants used to try and concentrate our minds on the theory that what they were teaching us would be helpful to our survival if we were sent to Vietnam.

Mr. Nuechterlein: So after 10 months … how did this work exactly — why didn't you stay in the military and get sent off to Indochina?

Judge Williams: The deal with the Reserve program was that you joined supposedly for six months of training — that is why all the people in the unit had the training for listening to signals — and then you were on reserve for five-and-a-half years; that makes it a total of six with your six months of original training. They somewhat shortened our terms in compensation for the time spent as an activated unit. After deactivation, we served a periodic night and a periodic weekend. The weekend that Kennedy's assassin was shot was a weekend we were on duty. A bunch of people were sitting around doing

nothing, and someone had the radio on, and there was Ruby shooting Oswald.

Mr. Nuechterlein: Basic training ended, and you went back to New York and Debevoise?

Judge Williams: Basic training ended and then I went back to the unit. It was demobilized, deactivated in June, and soon after I started again at Debevoise.

Mr. Nuechterlein: You stayed there actually several years.

Judge Williams: Yes, until I went to the U.S. Attorney's Office in the spring of 1966.

Mr. Nuechterlein: Before I ask you about that — particularly as your former clerk, I am curious: did you give any thought to clerking for a federal judge?

Judge Williams: I remember thinking of it in law school, and I only applied to Justice Harlan. And that was probably for a bad reason — that he was a friend, from the U.S. Attorney's Office, of my father. That link did not do any good. I don't know what Harlan's system was for picking clerks. It would have been very interesting.

Mr. Nuechterlein: So you never thought of clerking, like, on the DC Circuit?

Judge Williams: I didn't, no — I guess I thought that I would go to New York.

Mr. Nuechterlein: — or the Second Circuit?

Judge Williams: No. I wasn't really focused on it.

Mr. Nuechterlein: You missed out.

Judge Williams: Yes, I missed out.

Mr. Nuechterlein: So you went to the U.S. Attorney's Office in 1966. What motivated you to look for a job there?

Judge Williams: It seemed to be the classic thing to do if you wanted to be a litigator. As I said, I had conflicting thoughts on being a litigator — the great positive being the variety, the challenge, a new set of issues continuously, the downside being the incredible pressure. Faith likes to recall a Christmas Eve when I was working at the office until 10 or something, but that was because we were in the middle of trial. A trial waits for no man.

Mr. Nuechterlein: You did criminal prosecutions?

Judge Williams: Yes.

Mr. Nuechterlein: Did you have a specialty?

Judge Williams: There were a huge number of drug cases. People seem to think that the war on drugs is a new thing, but in the U.S. Attorney's Office in the early '60s, it was a huge part of the criminal docket.

Mr. Nuechterlein: Which drugs would you prosecute?

Judge Williams: Mainly heroin. There was a drug unit. I wasn't in it but it scooped people up and assigned cases to them. Then I made my way into the securities fraud unit. I worked on a case with Arthur Liman. That was a case against a very well-known swindler at the time, Lowell Birrell. When one of his swindles broke, he had taken off to Brazil, and then he was returned to the U.S. I don't know the details of the return, except that another person working on that case told me that he returned to the U.S. without even a toothbrush. So I take it that it was not voluntary and was engineered by the FBI and friends in Brazil.

Mr. Nuechterlein: Did you enjoy your years there?

Judge Williams: Yes I did. In the securities cases, a great challenge was to try and make it coherent for a jury — or for anybody. I remember working with a guy from the SEC on charts that would map out the flow of funds, all backed up by checks and deposit slips and so forth, and trying to get those in a way to communicate the exact nature of the scam.

I enjoyed summing up, enjoyed cross-examination. On the Birrell case, I was low man on the totem pole — the witnesses I was given were small fry. I had a nice securities fraud case of my own just when I was ending my time there, involving a father-and-son team whose last name was Parrott. Great fun cross-examining Mr. Parrott.

Mr. Nuechterlein: How did this experience affect your views of juries? Did you think that jurors reached the right results? Did you talk to jurors after a verdict?

Judge Williams: I didn't talk to them afterwards — no. We were not encouraged at all to do that. There was one trial where we did get feedback. I was handling the trial, and it was fairly early in my time as an Assistant; there was a senior person sitting with me. As I recall, there was one person among the venire that I was nervous about, and I thought of using a peremptory challenge on him — but didn't. Later I did learn that he had been quite active for acquittal.

Mr. Nuechterlein: Do you remember what made you nervous?

Judge Williams: Yes — he looked to me like a pointy-headed left-wing intellectual.

Mr. Nuechterlein: A beard?

Judge Williams: No, not a beard. Worked for one of the NY media.

I will say that I certainly didn't see any greater pattern of folly on the part of juries than judges. One criminal trial comes to mind. A defendant chose a bench trial, the evidence was pretty overwhelming, and the judge acquitted him. There were two possible stories. There was the government's story, that this guy stole a suitcase — a very small crime — stole a suitcase in Pennsylvania Station. And his story was that he was helping a little old lady carry her suitcase. The judge acquitted, but he also rather severely instructed the defendant that he certainly hoped that he would not be involved in this sort of thing again. The defendant was very young. I think the judge did not want him to be marked in a way that a felony conviction would mark him.

Mr. Nuechterlein: Were you the prosecutor?

Judge Williams: Yes --

Mr. Nuechterlein: I take it this was one of your early cases?

Judge Williams: Yes, it was an early case. Very handy for training young assistants.

Mr. Nuechterlein: And when were you involved in the case with Arthur Liman?

Judge Williams: He was brought back as lead counsel in the Birrell case because he had been involved for the government at the indictment stage. A story told about him, which was always very impressive, was that at the end of some very long securities trial, running months and months, he had summed up for the government, and the first thing the jury did was to send back a note asking for the exhibits mentioned by Mr. Liman and arranged in the order in which Mr. Liman had spoken about them. So that certainly set out an ideal of clear communication to a jury.

Mr. Nuechterlein: This is neither here nor there, but did you watch any of his cross-examination of Oliver North? That was my first exposure to Arthur Liman.

Judge Williams: Oh really. He was cross-examining Oliver North on whose behalf?

Mr. Nuechterlein: He was the Senate's counsel [during the congressional Iran-Contra investigation of 1987], and John Nields was the counsel for the House.

I am going to ask you a question that requires some generalization, and maybe the generalization is misplaced. Do you think that your experience as a prosecutor has affected the way you conceive of the role of prosecutor now that you are a judge? Having been a prosecutor, are you sympathetic toward the challenges that prosecutors face, or in fact are you more demanding in what you expect of prosecutors because you have been there and can see when someone has done a shabby job?

Judge Williams: Seems like a very good question, for which I don't have a very good answer.

Mr. Nuechterlein: Let's talk about Faith — you said you met her in 1965?

Judge Williams: I met her in the fall of 1965 at a wedding of someone she had known in college and someone I had known in New York. I was in the receiving line, and the gentleman in front of me was her brother, whom I had gone to school with — two schools, actually. And so we were chatting away, and along came Faith in the receiving line, and her brother introduced me to her, and nine months after that we were married.

Mr. Nuechterlein: What month was this?

Judge Williams: September 1965.

Mr. Nuechterlein: And when did you get married?

Judge Williams: June of the next year.

Mr. Nuechterlein: That was a quick engagement.

Judge Williams: By current standards, lightning.

Mr. Nuechterlein: Tell us a little bit about your courtship of Faith. Was it love at first sight between the two of you, and did the plans for the wedding begin after two weeks?

Judge Williams: The course of true love never did run smooth.

Mr. Nuechterlein: Of course, these days, if you meet in September, you are not even going to be able to reserve a place to get married by the following June.

Judge Williams: We did not have a vast wedding, so there was no worry about that. Actually there was a bit of luck involved.

She was up in Cambridge, and it so happened that that I was working on an acquisition of a company in Boston; I had to go there for the closing. So I gave her a call when I found out her number, which was much harder in those days. Anyway, I called her and took her out, and then, after maybe one more date, there came an evening — quite soon, I think it was October — in which she sent me packing. I was very crestfallen. She later explained that she intuited me as someone she might marry, and that made her hopelessly nervous. So she cut it off. But then fate intervened again, and a very good friend of mine from Debevoise & Plimpton was getting married in Boston, so that brought me to Boston, and I tried again with Faith, and this time she accepted me back into the fold.

Mr. Nuechterlein: How old is Faith? Is she about your age?

Judge Williams: No — she is five years younger than I am.

Mr. Nuechterlein: So what was she doing when you met her?

Judge Williams: When I met her, oddly enough, she was momentarily interested in city planning. I had an uncle who, in one aspect of his life, was a city planner. I was (and am) very fond of him, and so this seemed to be a very positive thing about her. I think her city-planning career lasted about two weeks. Then she started working for a publishing company. I can't remember the name.

Mr. Nuechterlein: A book publishing company?

Judge Williams: Yes. It published some sort of guide to colleges, and so Faith knew (probably still knows) the names of colleges which, to me, were extremely obscure, but she knew where they were and all kinds of things about them. I don't think it was a very challenging job. But you had to be accurate and so forth.

Mr. Nuechterlein: Did you have a religious ceremony? A civil ceremony?

Judge Williams: A religious ceremony. We both admired William Sloane Coffin a lot, so I guess I was assigned the task of calling him up to see if he would marry us.[9]

Mr. Nuechterlein: You admired him! Why?

Judge Williams: It is interesting to think of nowadays — he was the classic left-wing clergyman.

Mr. Nuechterlein: So this was 1965, and the war was already…

Judge Williams: 1966, and the war was really almost at its absolute peak, and I guess I had not completely given up on the policy. Maybe my admiration of him was in deference to Faith, but I didn't feel I was being pushed around at all by her. So I called him up and he said he couldn't do it, but he recommended a guy named Howard Moody, who was the rector of the Judson Memorial Church in New York. I called him up, and he said probably yes. He asked us both to come over, and we met him in his office. An early question was, "What day would you like to get married?" So we gave the day, and he said, "What time?" And we said "4:00," and he said "AM or PM?" That somewhat endeared him to us.

[9] Coffin was a well-known peace activist and, at the time, the chaplain of Yale.

Then he asked, "Are you sure you want to risk spoiling a good relationship?" We said we were willing to take that risk. And then he performed the ceremony. The ceremony was in the Quaker meeting house at Gramercy Park in New York, a lovely building. Actually, since then we have been to a wedding there, for the daughter of a cousin of Faith's.

Mr. Nuechterlein: What was his religious affiliation?

Judge Williams: Judson Memorial is actually Baptist.

Mr. Nuechterlein: Has Faith been a Quaker all her life?

Judge Williams: No — her father was a Quaker at this time, and Faith had sort of dabbled in Quakerism, as I have. I actually participated in a "Ban the Bomb" march while I was a Yalie. We had no effect on the Bomb, but we did cause a minor accident. We distracted the eye of a driver, who smashed into the car in front of her, then panicked and smashed into the car behind her, and then panicked again and smashed a second time into the car in front of her. So we did some damage but did not solve the issue of nuclear weapons. That may have been my last involvement with Quakers while I was in college. Law of unintended consequences.

Mr. Nuechterlein: Faith's father was a Quaker?

Judge Williams: He was a Quaker. She only became very actively involved — in fact we both did, at the time — when we went out to Boulder in 1969. I don't think we had any joint Quaker activity before then, other than the site of our wedding.

Mr. Nuechterlein: I have actually been to a Quaker wedding. There is no script, and people will just say nice things about the couple as the Spirit moves them. Was your wedding like that?

Judge Williams: No, it wasn't. It was in a Quaker building, and Dr. Moody gave a talk, and he actually said something that I have used at many weddings since (but not at yours, and I am not quite sure why I didn't). He said, "Don't be troubled by your differences — you will grow by your differences." Of course he did not point out just how many growth opportunities we would have. Obviously I have always remembered that in the 40-plus years since.

He also told a complicated story about being in World War II. He was a bombardier, and he told a story that seemed to involve him being stretched in a terribly perilous way — feet and arms connected to parts of the plane, but his whole middle section not connected — nothing but 40,000 vertical feet and then earth below his middle section. In fact I hadn't thought of that analogy for a long time. I assume he was alluding to the possible sense of anxiety that people have approaching matrimony. Whatever the details, it was generally a very good talk, although talking about life as a

bombardier was a little odd, considering he was chosen for his peacenik connection.

Mr. Nuechterlein: In 1969, you decided to go into teaching. What prompted you to do that?

Judge Williams: Well, basically I thought it would be a way of exploring the law without any prior commitments dealt you by your client. I think circumstances like the midnight work on the Birrell case made Faith enthusiastic [about a teaching career].

Mr. Nuechterlein: How did getting a teaching job work in those days -- similar to the way it is now?

Judge Williams: Somewhat similar. There was the AALS [American Association of Law Schools]; they had a meeting in the fall, and you submitted to them a one-page form with basic data. Then that went out to the law schools, and they called you either to meet you at the actual AALS meeting or to meet you elsewhere. The University of Colorado called me before the meeting, and they sent the Dean and James B. White.

Jim later spent the end of his academic career at the University of Michigan, after becoming famous for his book *The Legal Imagination*. Jim was absolutely a dazzling character. It was very clear from the first moment of conversation with him that he was very brilliant, and that certainly helped me embrace the idea of teaching at the University of Colorado.

The other places that I went to were University of Indiana and Ohio State University. I liked particularly Ohio State — I was there on a gorgeous day, very deceptive — but Colorado seemed more appealing.

Mr. Nuechterlein: And Faith agreed?

Judge Williams: She seemed to be very happy about it. Part of her theory was putting a little mileage between herself and her family.

Mr. Nuechterlein: Oh.

Judge Williams: Well you know — independence, growing up.

Mr. Nuechterlein: So you went out in the fall of 1969. What did you teach? Do you remember?

Judge Williams: The first year, I was given the second half of Civil Procedure, to students who had had someone else for the first half of the course. I taught Property by my request. Property was a split course — there was Property I and Property II, and Property II was located in the fall, so again I was teaching students who had had someone else for the first part. What else did I

teach? At some early stage, Evidence. It was a few years before I moved into Administrative Law.

Mr. Nuechterlein: There are many ways to teach Property, and in recent years a lot of people have been teaching it through the lens of law and economics. Were you one of the vanguards in that movement?

Judge Williams: Yes, I think I was. I remember I called Charlie Meyers, who was the author of a Water Law casebook. Water Law was one of the courses I taught too. I was asking him about what books to use, and he suggested I call Richard Epstein. So I did, and I found something that most people find when they call Richard Epstein: there is no great burden on them to keep the conversation going. But I felt very honored. Here I was, a nobody from Colorado, and he was already very distinguished, and he talked at great length and in great detail and very interestingly about Property and casebooks and so forth. Whatever the casebook was that he recommended, I adopted.

I found it was interesting to view Property Law as a building block of an economic system, and not simply as a set of rules which someone worked out and were more or less coherent among themselves.

Mr. Nuechterlein: You mentioned before that you didn't have much formal training in economics. You took one course in college.

Judge Williams: And I worked on this antitrust case at Debevoise & Plimpton, and that certainly restored interest.

Mr. Nuechterlein: Did you start reading economic literature to get you up to speed on these concepts?

Judge Williams: I can't remember. At some very early stage, the Law Review asked me to review Dick Posner's *Economic Analysis of Law, First Edition.*

Mr. Nuechterlein: That was the '70s?

Judge Williams: Very early in the 70's. It was interesting: I found that Posner's work "spoke to my condition," to use a Quaker phrase, in the sense that, in many respects, it approached things in the kind of consequentialist way that seemed to me essential or inevitable. In some respects, he deliberately put in things that he was confident would make people react with some shock. The whole question about pricing limbs was articulated by him in a particularly bloodless way, and that slightly horrified me. But the fascination enormously exceeded the horror.

Mr. Nuechterlein: When you were asked to review his book, had you met him yet?

Judge Williams: I had seen him around on the Harvard Law Review, but I can't really say I knew him.

Mr. Nuechterlein: Oh, you overlapped with him.

Judge Williams: Yes. He was a year behind me.

Mr. Nuechterlein: Was he recognized as brilliant then?

Judge Williams: Yes he was. The Harvard Law Review had a very elaborate system for choosing the President, which took hours and hours and hours. And it was clear from a very early stage that Dick was just astonishingly brilliant, and that it would be crazy for the Law Review to pick anyone else. Nevertheless, the system ground on and took hours and hours and hours, and of course it did elect him President.

Mr. Nuechterlein: What sorts of things made it obvious that he was brilliant?

Judge Williams: On the Law Review, you get reports from the people who had worked on any piece of student writing that an editor had done. And those reporting about him, very bright people themselves, made clear that they were in awe of him. There was no way to explain these encomia except that he was very, very bright.

Mr. Nuechterlein: Was he a nice guy? People liked him?

Judge Williams: I didn't know him all that well, but in the reports on him, no one said anything nasty about him.

Mr. Nuechterlein: My year at Yale, [to pick the editor-in-chief of the Yale Law Journal,] we used something you may be familiar with — the Borda count, where you rank your preferences. You don't merely vote for people "yes" or "no." It measures the intensity of likes or dislikes. And the predictable consequence of that is you get someone highly competent and uncontroversial.

Judge Williams: As I said, nobody suggested that there was any sort of character flaw in Dick that would undercut the advantages of having someone who was very brilliant.

Mr. Nuechterlein: You've kept in close correspondence with him over the years, haven't you?

Judge Williams: Yes, but not starting from Law Review days. I wrote a review of one of the Morty Horowitz books entitled *The Transformation of American Law*. I found his economic analysis woefully defective. I forget just how that review came to Dick's attention, but for some reason Dick saw it before it was published, and very kindly asked me to publish it in the *Journal of Legal Studies,* which he was editing. I told him that I

had committed to publish the review in the UCLA Law Review. And of course I visited for a year at the University of Chicago, where he taught. It was very nice there.

Mr. Nuechterlein: When were you in Chicago?

Judge Williams: Chicago was ’79-’80. I had been at one conference, at least, that took place in Chicago before then. The conference had originally been scheduled for Cornell, but an incredible storm forced everyone to go back; the conference was cancelled and replaced by this one in Chicago. Dworkin, Ellickson, George Priest — good people.

Mr. Nuechterlein: You mentioned that it was a couple of years before you started teaching Administrative Law?

Judge Williams: Yes.

Mr. Nuechterlein: How popular of a course is that at the University of Colorado?

Judge Williams: It didn’t fill a big room.

Mr. Nuechterlein: At Yale, it was a very popular course. A lot of people expect to go to Washington.

Judge Williams: Yes — obviously, I think it is important for any lawyer anywhere, but no, it was not a blockbuster course.

Mr. Nuechterlein: Were you assigned to teach that, or did you choose it?

Judge Williams: I honestly can’t remember. I think I saw it as a nice foil to Property, a different way of organizing matters.

Mr. Nuechterlein: As you describe it, it sounds like your first clearly public-law-oriented course.

Judge Williams: I also taught a course in the law of city planning. So that is kind of public law. In fact, as I think back, it seemed to me the real issues in that were effectively administrative law issues, issues that one would now classify as administrative law: the relationship between courts and agencies. That of course is the issue of administrative law. I suspect that what happened is, I had a long-term interest in city planning, and I stumbled into that course, and then seeing that an administrative law course was focused on the more central issues, I moved into that.

Mr. Nuechterlein: Describe your scholarship a little bit in the ’70s. What were you writing about?

Judge Williams: I wrote something on aesthetic regulation in the interest of city planning.

Mr. Nuechterlein: "Aesthetic regulation?" I don't know the term.

Judge Williams: It is an element of zoning — also an element of historic preservation, design review, that type of thing. It seemed to me, as I explained in my paper, to raise First Amendment issues, but ones that were solvable in a fairly reasonable way.

I recall that one of the people at the Justice Department later talked with me about whether I was suitable to be appointed a judge. He had seen the paper, although I don't think he had read it carefully. It somewhat alarmed him because, on a casual reading, it seemed to smack of judicial activism.

Mr. Nuechterlein: Did this relate to the government's ability to zone out adult entertainment?

Judge Williams: No — although at least one of those cases had been decided by that point, I think, and so I used some of the reasoning from it. It was more a matter of the city trying to make itself look better.

Mr. Nuechterlein: As for your other writing…

Judge Williams: The review of Morty Horowitz. The Colorado Law Review asked me to do something on a couple of water rights cases that I didn't know anything about at the time, so I immersed myself in that. And it certainly was an economic analysis — I don't think it had any legs. When I visited at UCLA…

Mr. Nuechterlein: When was that?

Judge Williams: That was '75-'76. While at UCLA, I talked with Dick Maxwell about property law issues, and that led into oil and gas law, which he taught. That subject just right up front raised very interesting economic problems, particularly the common pool problem and how different common law principles had failed on that. What were suitable ways of making the law more efficient? And also, of course, if the property rights were well defined, to what extent was there a threat of premature exhaustion of resources?

Mr. Nuechterlein: So that, over time, became your academic specialty: *The Natural Gas Revolution of 1985*.

Judge Williams: It certainly became a great interest. And it involved network industries, which proved to be a lasting interest.

Mr. Nuechterlein: What is your first law review article that, in looking back on it now, you are genuinely happy with, knowing your future in law and economics?

Judge Williams: It is hard to say. Very early on, the review of Morty Horowitz's book.

I should say that, when I visited UCLA, I audited a course called Law and Economics, which was really sort of an intermediate micro course. It was taught by Armen Alchian, and it did a great deal to revivify my interest in economics.

Mr. Nuechterlein: Was there a discernible law and economics movement by this point?

Judge Williams: Yes, I think that is fair to say.

Mr. Nuechterlein: Did you attend conferences devoted to law and economics issues?

Judge Williams: The budget at Colorado was always very lean, and so I could attend conferences only when somebody from outside the university paid for it. That was the case for that one in Chicago in '78-'79. That was nine or ten years into my academic career.

Mr. Nuechterlein: Did you find like-minded souls on the Colorado faculty?

Judge Williams: Not really many — no.

Mr. Nuechterlein: How about students? Did you have students that seemed particularly proficient at looking at the world the way you did?

Judge Williams: There were a few, yes. One of them became a clerk — Bill Mooz.

Mr. Nuechterlein: Oh yes — I went camping with Bill Mooz once. How long were you in that house on Euclid Street in Boulder?

Judge Williams: The whole time. We bought that in 1969 and still have it.

Mr. Nuechterlein: I bet the property value has appreciated.

Judge Williams: Yes, somewhat.

Mr. Nuechterlein: I am going to ask you about your kids. You have five children?

Judge Williams: Yes, five. Geoffrey was born August 8, 1969. We flew to Colorado on July 7th, bought the house, and closed July 8th.

Mr. Nuechterlein: Tim is next?

Judge Williams: No, then it gets complicated: Susan and Sarah. Susan is older than Geoffrey, but her parents had split, and there were all kinds of other difficulties. She is actually Faith's second cousin once removed, so we heard of this problem. Susan arrived in January of 1971. By that time, we were already launched on adopting Sarah. We got word from the adoption people in Vietnam that she had been assigned to us nine months before she arrived in March 1971.

Mr. Nuechterlein: She was born in Vietnam?

Judge Williams: Yes.

Mr. Nuechterlein: Describe your interest in adopting her.

Judge Williams: At that point, we were to some extent persuaded by the population growth people, who were totally wrong, but whose influence was at its peak. We were unsure we would have any more children ourselves, but we wanted to raise more children, and all these terrible things were happening in Vietnam, so adoption seemed like a win-win solution. We were very active in the adoption movement in Colorado and got in contact with a remarkable Australian woman in Vietnam who was very good at organizing reasonably good conditions for orphans there — and also in trying to place them in the West. Sarah came through that.

Mr. Nuechterlein: And Tim was next?

Judge Williams: Yes, Tim arrived in December 1973. There was a stillborn child while we were in Chicago, in May or June 1980. And Nick was born in April 1981.

Mr. Nuechterlein: One of my fondest memories of working with you that summer in 1988 was of you hoisting Nicky up and Nicky saying, "I love you Daddy!" I was thinking that parenthood can't be all bad.

Say a few words about what the five of them are doing now.

Judge Williams: Susan is a housewife; she works in the home and has two children. One is at little over 7, and the other is a little over 3, and Susan takes care of them. They live in Chantilly, about 45 minutes away. Our only child with children, therefore — our grandchildren — happily live in the same city as we do.

Geoffrey has done an extraordinary number of things, but is now embarked on getting his Ph.D. at Rutgers in economics. He says there is a very small group of Ph.D. candidates there, and he stands out because he has had a lot of math training, which is of course what modern economics mostly is. I think Geoffrey sees himself as a big fish in a relatively small pond.…

Mr. Nuechterlein: I think we have covered Susan and Geoffrey.

Judge Williams: Oh, Sarah — Sarah is the only one who went to law school. I don't really think law school interested her that much, but then after a couple of years in the Florida state bureaucracy, she took a special real estate law program at the University of Miami. That really did engage her interest, and she is now doing real estate law in New York — but I think it is much more real estate than law.

Mr. Nuechterlein: Tim?

Judge Williams: Tim and Nick came with us on my first expedition to Russia, which we call in the family "bringing the rule of law to Russia."

Mr. Nuechterlein: [Facetious:] Worked out well.

Judge Williams: It had effects on the Williams family because, in the Arbat area of Moscow, Tim met a Russian girl, and they corresponded for years. Various things happened in his life and her life, and he went back to Russia in the summer of 2000, and to our surprise — at the end of the summer of 2000 — he announced that they were engaged to be married. Indeed, they were married in December of 2000 in Moscow. I remember Faith kept saying throughout the trip, of one decision and then another, "Next time we have a wedding in Moscow in December, we must do this differently."

That opportunity actually hasn't arisen, and the marriage did not work out, and they divorced two years later. But his interest in things Slavic lasted. He started getting a Ph.D. in Slavic studies at Columbia. And then he went to Poland to learn Polish as his minor Slavic language, Russian being his major one, and wanted to stay there — so he stayed by teaching English. I think it's been three years. Now, surprisingly enough, he may be about to move to Japan to teach English there.

And that is a natural segue to Nick, who took an intensive course in Chinese at Harvard, paralleling his aunt, who took an intensive course in Japanese. Nick did well and liked it — loved it. At some point after his time at Harvard, he told me he wanted a career in which he had plenty of time to devote himself to reading and translating Chinese poetry. The choices seemed to be either an academic career, in which you can do that, or another career that would leave him plenty of time to do that. He seemed to prefer the first, and in about a year and a half, he will get his Ph.D.

Mr. Nuechterlein: He was a math prodigy right?

Judge Williams: Yes, he was very good at math in the early days, and his major at college was math. But his interest in Chinese was much stronger.

Mr. Nuechterlein: That requires some intellectual versatility — math and Chinese. Not many people are gifted at both those two things.

Judge Williams: I don't think they're very often mixed.

Mr. Nuechterlein: I think the next major topic of discussion is your ascension to the judgeship. Maybe we ought to do that next time.

Oral History of Judge Stephen F. Williams
Session 3
March 2, 2008

Mr. Nuechterlein: I'm talking to the Judge today about his nomination and confirmation to the Court. I think we left off our last interview with the judge's academic career, so now it is time to talk about the day he got "the call". Apparently he was first considered for the Tenth Circuit, but that encountered difficulties, so he was later proposed for the D.C. Circuit. So, Judge, why don't you tell us how you first found out that you were being considered for a seat on the Tenth Circuit.

Judge Williams: I have to admit the process started with me. It started at a very particular moment in time, which can be checked out easily, and that was when I read an editorial in the Wall Street Journal revealing and celebrating the nomination or confirmation of Dick Posner for the Seventh Circuit. I said to myself that if they want Dick Posner for the Seventh Circuit, then surely they will want me for the Tenth Circuit. There are obviously a number of leaps in that logic. In any event, I made some phone calls. Actually, the person who was completely pivotal through the whole thing was Bill Buckley. Both directly through his friendship with the President and through various indirect steps, he boosted my nomination.

Mr. Nuechterlein: Maybe it makes sense to pause here for a moment to talk about Bill Buckley, who died this past week. I know you went to the same school as he did?

Judge Williams: I did.

Mr. Nuechterlein: But you didn't overlap at all.

Judge Williams: No, not at all.

Mr. Nuechterlein: When did you meet him?

Judge Williams: I think I may have met him briefly when he came up at Yale when I was there. I am not honestly sure about that. Faith and I had dinner at his house in New York sometime when I was a lawyer there. Must have been the late '60s. At that time I was at the U.S. Attorney's Office. There were quite a few people there, including Jim Buckley, whom I didn't know but who would later become my colleague on the court. My most intensive contact with Bill was in connection with my nomination, and there were many phone calls, sometimes his reporting a development, sometimes my reporting a development, discussing what might be done.

Mr. Nuechterlein: So Posner was nominated to the Seventh Circuit, and you found out about it, and you thought it would be appropriate — a stroke of similar wisdom — to appoint you to the Tenth Circuit?

Judge Williams: A comparison is not an identity.

Mr. Nuechterlein: So you picked up the phone and called Bill Buckley?

Judge Williams: No, I actually called my father who was very close to Bill, and he started investigating.

Mr. Nuechterlein: Was you father in retirement at this time?

Judge Williams: Yes, he was.

Mr. Nuechterlein: So he contacted Bill Buckley.

Judge Williams: Well, although I described what seemed to be suitable logic for the administration, actually I wasn't expecting at all that that logic would be followed. So at first I wasn't very invested in this. And then I got a call telling me that my nomination to the Tenth Circuit had passed the "Thursday Committee," which was a committee of Justice Department and White House people who met on Thursdays and talked about judicial nominations. Passing the Thursday committee normally led to a nomination, and nominations in that era led pretty often to confirmation and appointment.

Mr. Nuechterlein: Do you know who was on the Thursday Committee?

Judge Williams: I honestly don't. It was a fluctuating membership.

Mr. Nuechterlein: Did you have to talk to any of these people?

Judge Williams: No — or at least not that I know of. That is to say, I don't know the exact membership of the Thursday committee.

Mr. Nuechterlein: So they were just proceeding on the basis of Bill Buckley's recommendation.

Judge Williams: At least in the sense of starting out, right.

Mr. Nuechterlein: Presumably he was not himself…

Judge Williams: No, absolutely not. No. No.

Mr. Nuechterlein: So you didn't have close personal ties with anyone directly involved in the process. Were you being considered because of your ideological orientation? Because of your scholarship? Had somebody in the administration read it?

Judge Williams: I think somebody had at least looked at it quite early, and at a later stage I did speak with Justice Department people in Washington who had read

some of it. One of the people I met with that I particularly remember was John Harrison, who now teaches at UVA. Do you know him?

Mr. Nuechterlein: I think I have met him.

Judge Williams: Yes, he is very smart. But if they were checking me out for ideological soundness in those meetings, they had a very subtle way of going about it. At least it so seemed to me. There was a somewhat roaming discussion intelligent people might have about the law. Since then I have occasionally gotten a call from someone who was being considered and looking for guidance on how to confirm one's ideological credentials. And I am not able to provide any guidance because I at least didn't feel called upon to prove my bona fides as a conservative.

Mr. Nuechterlein: Do you know whether they were talking to any friends or colleagues?

Judge Williams: I'm not sure whether the FBI and ABA vetting began right after I passed the Thursday committee, but my recollection is that, not long after that, word came of trouble in the form of Senator Armstrong.

Mr. Nuechterlein: Armstrong of Colorado – the Republican senator?

Judge Williams: Yes — Gary Hart was the other senator.

Mr. Nuechterlein: You were OK to Hart?

Judge Williams: Yes; at least there was no report of opposition from him. Anyway, word came back to me that Senator Armstrong objected. I am reasonably sure Senator Armstrong never said, although it was probably the case, that he didn't like the idea of a nomination being driven by forces outside Colorado. There was a turf aspect to it.

Mr. Nuechterlein: Had you ever met him?

Judge Williams: No, I hadn't. After my name surfaced, I met him twice, when the Justice Department thought that, at a meeting, I could bring him around, but I failed to. He pretty much said at the beginning of each of the meetings that there was no chance of bringing him around.

Mr. Nuechterlein: So these were two meetings that were held between your endorsement by the Thursday committee and the ultimate decision not to nominate you to the Tenth Circuit?

Judge Williams: Yes.

Mr. Nuechterlein: What year is this? 1986?

Judge Williams: No; 1986 is the grand successful climax.

Mr. Nuechterlein: So probably ‘84.

Judge Williams: As I recall, we’re talking of ‘83 & ‘84. Senator Armstrong was extremely nice — and totally unmoved by anything I had to say. I should say that the turf battle aspect seemed to be a very significant, perhaps dispositive, factor. But he also had the idea that I was a liberal in conservative clothing.

Mr. Nuechterlein: What gave him that idea?

Judge Williams: Well — I think in 1972, I had actually rung doorbells in Boulder for George McGovern. The Vietnam War was a very big issue. I had what I regarded as a centrist position; I was very concerned about what would happen to the people there who had supported us. It seems to me that concern was well placed.

Mr. Nuechterlein: It has certain analogues today.

Judge Williams: So I am not sure whether he had accurate information, on which he personally put an extreme cast, or whether he got all kinds of inaccurate reports that were exaggerations of my leftist phase.

Mr. Nuechterlein: How did he know that you had rung doorbells for George McGovern?

Judge Williams: I don’t know if he knew that. I point it out because, if you were looking for activities in my background that were suspicious from his point of view, that would certainly be such an activity. A second thing I should mention is that Faith and I went on a candlelit peace march on a beautiful snowy evening in Boulder, with Geoffrey on my back.

Mr. Nuechterlein: What year was that?

Judge Williams: Geoffrey was a year and a half — so it had to be late ’70 or early ’71.

Mr. Nuechterlein: Did Senator Armstrong raise any of these ideological concerns during your interviews or did you just surmise?

Judge Williams: He certainly didn’t say, “I am suspicious of you because word has it that you have done ‘X.’ ” He just seemed to have a vision of me as at best as a recent convert, and at worst as a liberal in conservative clothing.

Mr. Nuechterlein: Did he say that? Did he say he was concerned because you were a recent convert?

Judge Williams: I am sure he didn’t use those words, and what is hard for me to sort out — especially at this remove — is how much I was told by someone in the administration about what he thought and how much was what he said to me. My memory of the two meetings is that he was an extremely

agreeable and charming person and that I got absolutely no sense of moving him an inch on the matter.

Mr. Nuechterlein: Were you there alone or were you accompanied by anyone?

Judge Williams: I was alone. One meeting I remember explicitly was in the Senate Dining Room. I don't know why it was in the Senate Dining Room; it was not meal time, and we didn't eat anything.

There was quite a long period between the initial discussions about the Tenth Circuit and when they actually decided to put me forward for the D.C. Circuit. In fact, I don't think I was ever told that they had completely given up on the Tenth Circuit. What happened was that it kept ebbing and flowing, and suddenly the D.C. Circuit emerged out of nowhere.

Mr. Nuechterlein: Was there a particular call you got when you heard that you were now being considered for the D.C. Circuit?

Judge Williams: It wasn't quite that way. The call came from Grover Reese, I forget his exact title at the time, but he was an aide to the Attorney General. … I vividly remember Reese's somewhat elusive call. He said that they wanted to nominate me for a court. His first position was he couldn't tell me what court it was, and I said even though I did want to be a judge, I didn't want to go to Alaska. In fact there were very few courts I would want to be on.

Mr. Nuechterlein: Did you have a sense that it was an appellate court?

Judge Williams: I think, after some provocation by me, he did say it was an appellate court. Then, after some more phone calls in fairly short order, I finally persuaded him to tell me, on condition that I would promise, under oath, that I would not reveal it to a soul. So I took that oath.

Mr. Nuechterlein: Including your wife?

Judge Williams: Right. Actually, it was only a four-day period, as I recall, between when I knew what court was involved and when I got the call from Reese saying they were going forward, soon followed by a call from the President. I probably told Faith after the call from the President.

I must have come fairly close on the Tenth Circuit, because I know my ABA vetting and my FBI vetting were all done under the assumption that it would be the Tenth Circuit. That led to one of the more startling moments of the whole process. When I went before the Judiciary Committee it was a rather strange scene. There was a district court nominee from California, who had Senator Wilson in attendance and a big booster group in addition. I, of course, had no Senator supporting me. I did have my family.

I was called behind the hearing room before the session began. Duke Short, the Committee Counsel, read aloud five questions that he predicted Senator Thurmond would put to me; he also briefly held a piece of paper in front of me with the questions. He was entirely accurate, word for word, as I recall. I could not precisely understand Senator Thurmond's actual words. He certainly had a very heavy Southern accent, and although no one has ever confirmed this for me, I think he may have had a stroke or something; it seemed to me his speech was slurred. The questions came in the order read to me, and of course once a fragment came through I could fill in the rest. There were also one or two questions from Senators other than Thurmond.

Mr. Nuechterlein: The usual protocol now is to go meet the individual senators on the Judiciary Committee before they show up for the hearing. Did you do that, or was your first experience with Senator Thurmond at your actual nomination?

Judge Williams: That was my first exposure to him. I met with Senators Hatch and Simpson shortly before or after the committee meeting. I remember both interviews very well, each for very different things. Senator Simpson was very gracious and hospitable and told jokes, and I went on my merry way. Senator Hatch, after a friendly greeting, started by saying, "I know your parents were very staunchly left wing." I said, "Senator Hatch, I have to stop you there." And I gave a brief précis of my parents' conservative credentials. He didn't seem to be out to get me at all. I honestly forget what we talked about afterwards. Maybe it helped that I was able to dispel the first problem rather firmly.

Mr. Nuechterlein: Did he ask about your own ideology?

Judge Williams: I don't recall if he did.

One thing I left out; we got diverted slightly from the Senate Hearing. I should come to the climax of that. The last question — or, rather, statement — was from Senator Simon, who said: "When you were checked out by the FBI and ABA, you were being considered for nomination to the Tenth Circuit. Here you are nominated to the D.C. Circuit, so this will have to be redone." I remember it was a declaration, not a question or suggestion. I responded, first, that the criteria for being an appellate federal judge should be the same for all circuits — and, second, that, if there was a difference, the fact that the D.C. Circuit has such a heavy administrative law caseload made me more suitable for it than for the Tenth Circuit, as I had taught Administrative Law for years. I talked afterwards with my Justice Department handlers, and they managed to make sure there wasn't a complete redo.

Mr. Nuechterlein: Did Senator Simon oppose your nomination?

Judge Williams: No.

Mr. Nuechterlein: Did anyone oppose your nomination?

Judge Williams: No — no one openly. In fact, the day that I got the call saying the Senate had voted, whoever called said, "Yes, seven judges in seven seconds."

Mr. Nuechterlein: And then they rested.

Judge Williams: Right.

Mr. Nuechterlein: You were talking about Strom Thurmond and his questions — do you remember the substance of those questions?

Judge Williams: How is the Constitution to be amended — by Article 5 or by the Judiciary? And that seemed to have an obvious answer. I am slightly simplifying the question in my rendition of it, but that was perhaps the most totally obvious one. I would say that all of the questions had the happy attribute that the answer that was right for Senator Thurmond was also right. It was the obvious and the inevitable answer. They were obviously rhetorical questions. I guess someone out to push a "living Constitution" model might have had a hard time answering them.

Mr. Nuechterlein: I think they would say they are not amending the Constitution.

Judge Williams: Of course, that is how they would handle that.

Mr. Nuechterlein: To back up a little bit, when you heard that you were being diverted from the Tenth Circuit to the D.C. Circuit, did you view that as a promotion? Or were you sorry you wouldn't be in Colorado?

Judge Williams: Yes, I was sorry I wouldn't be in Colorado, but I thought the D.C. Circuit would be much more fun.

Mr. Nuechterlein: So you viewed this as a happy development.

Judge Williams: Yes, as long as Faith could be persuaded it was a good development.

Mr. Nuechterlein: And could she be?

Judge Williams: Yes, she could be. Reluctantly. She did it for me, to put it simply. If I had been indifferent about the choice, she would have been decisively opposed.

Mr. Nuechterlein: How about your kids? Were they happy with the prospect of moving?

Judge Williams: Susan was in college at that time. In a sense, the move was hardest on Geoffrey because he would be coming here for his last year of high school. But he liked the idea of something new. He is pretty

adventuresome. The three youngest didn't voice any objection. I don't know if they fully grasped what was going on. And Faith took them here to look at houses with her. And they all came for the Senate hearings. Looking at houses before the Senate acted seemed dangerous to me — likely to be taken as a sign of hubris. She certainly tried to accustom them to Washington and to the schools they might end up at.

Mr. Nuechterlein: A postscript on the Tenth Circuit nomination — who ultimately filled that seat?

Judge Williams: Filling it took a long time. I am not honestly sure why, but, as in our court, a seat can stay empty for many years. In the end, it was filled by David Ebel. Do you know him?

Mr. Nuechterlein: I know people who clerked for him. He is probably one of that court's most respected jurists.

Judge Williams: Yes. I have met him and like him very much.

Mr. Nuechterlein: So you got the call you had been confirmed by the Senate. That must have been very exciting.

Judge Williams: Yeah! In the period between the hearing and the final Senate vote, some people were obviously interested in derailing the nomination. An alternative newspaper in Colorado, *Westword*, had an article, and its pitch seemed to be aimed at depicting me less as a turncoat than as an opportunist. I guess there could be a lot of overlap between those two categories. I remember my brother-in-law, Steve Morrow, wrote a letter to *Westword*. which they published. [He said] it is true that Stephen Williams was a liberal before he was a conservative, but it is also true that he was a conservative before he was a liberal. He had known me when I was about ten. He was in a position to vouch for my early ideology.

Mr. Nuechterlein: This alternative newspaper was a liberal newspaper?

Judge Williams: Yes.

Mr. Nuechterlein: So you would think they would take some comfort in the possibility that you were an opportunist because that might have meant…

Judge Williams: Right. I guess it would depend on where they felt the advantage lay. There had to be some suspicion. I had the feeling that somebody was stimulating this; just who, I don't know.

Mr. Nuechterlein: Seems like it never gained much traction.

Judge Williams: No, I don't think so. I had gone to school at a very early stage with a person who later became a Senator from West Virginia, Jay Rockefeller,

and I remember calling him up in this period of uncertainty. He said, in essence, we Democrats don't care at all. He obviously didn't think the administration was sneaking a liberal in. He seemed to think it was a Republican fight.

Mr. Nuechterlein: How long between the time you got the call and you actually moved out to D.C.? Didn't you have courses you were teaching or scheduled to teach?

Judge Williams: It worked out pretty well. Through the spring of '86, it looked as if I would be confirmed, so I would not be teaching in the fall. Actually, in my last year of teaching, I taught two courses for the first time—Federal Courts and Public Lands, a Western-oriented course. I can't say there was much payoff to teaching the second once I got to the bench.

Mr. Nuechterlein: But you had had Tenth Circuit aspirations.

Judge Williams: Exactly. It meant that I knew a little more of the vocabulary of these rather special arrangements than I would have. I do remember one line from the course book that I used. Someone celebrating wilderness described it as a place "where the hand of man had not set foot."

Mr. Nuechterlein: I assume — I know — there is a formal process by which you are inducted in the court.

Judge Williams: I was sworn in on our deck — we have a picture of it.

Mr. Nuechterlein: In Colorado?

Judge Williams: Yes — in Colorado. A local district judge, Jim Carrigan, who retired rather than take senior status, and now I believe conducts a lucrative arbitration business. But in any event he swore me in. My family and Steve Morrow were there, I'm not sure about Steve's wife. We had a beer and I was a judge.

Mr. Nuechterlein: This is the analogue to a wedding on the beach with one's family.

Judge Williams: Right. Then there was an investiture back here.

Mr. Nuechterlein: Where was that?

Judge Williams: That was in the courthouse.

Mr. Nuechterlein: I assume all investitures are in the courthouse.

Judge Williams: Yes.

Mr. Nuechterlein: For some reason I thought the swearing-in was part of the investiture. But apparently not.

Judge Williams: Well, you take the oath again, but it is decorative. The speakers were my brother-in-law — who really had everyone laughing; he was a great speaker — and Kent Greenawalt.

Mr. Nuechterlein: The professor at Columbia?

Judge Williams: Yes. This is another suspicious part of my past. Actually- I don't know how it was regarded. But I was with Kent in Mississippi in the summer of '65.

Mr. Nuechterlein: You were a freedom fighter.

Judge Williams: Well, a legal freedom fighter. He and I worked on a number of cases that were all at an early stage of development. I remember working on a complaint in a case called *Love v. Mississippi*. And *Love* was indeed the right name, because the theme of the case was that there was some constitutional illegality, I forget of just what sort, going on in Mississippi's failing to give welfare, or putting restrictions on welfare, to unwed mothers. Love that had been carried too far.

On another case, I remember, Kent and I did field research, not very successful, in some town in Mississippi. We were essentially talking with possible plaintiffs or witnesses, for a case about discrimination in public services. Tony Amsterdam — who was then and still is a well-known Con Law professor — developed the original theory.

Mr. Nuechterlein: He and I worked on a cert petition about a year ago.

Judge Williams: Oh really?

Mr. Nuechterlein: About Alabama's death penalty scheme.

Judge Williams: Oh, OK. This was a possible claim of racial discrimination in the allocation of municipal facilities. The roads in the black sections of this town did not seem to be very well kept up. What left its impression on me was when our host for the night showed us the bullet holes in the wall. The family that gave us a room for the night had been actively involved in protesting the power structure, and the power structure had reacted. I don't think anyone had been killed.

Mr. Nuechterlein: Just intimidation.

Judge Williams: Yes, intimidation. And I remember Kent and I were driving along the road and were pulled over by a sheriff's car. Remembering the bullet holes in the wall, we were anxious, but nothing happened.

Mr. Nuechterlein: Back to the summer of 1986. When did you formally join the court and occupy chambers?

Judge Williams: Shortly after I got through the Senate, I came to Washington and interviewed a few clerks and I also hired Mary. Mary had been working for Judge Wald, and Judge Wald had been perfectly happy with her, but because of the pay structure of judges' secretaries, she could not pay Mary more. Mary wanted to be Chief Secretary, which would mean more pay. I forget how we found Lindy — Mary was instrumental in that.

Mr. Nuechterlein: I know one of your clerks from the first year was Bill Mooz. He was a student of yours at Colorado?

Judge Williams: Yes, he had been. He also helped me as an R.A.

Mr. Nuechterlein: Who were the other clerks from that first year?

Judge Williams: The other clerks were Rob Tiller and Josh Rosenkranz. Josh was in the unusual position of having already clerked, though only momentarily, for Scalia.[10] As I recall he'd been hired for a Scalia clerkship on the D.C. Circuit for '86-'87 and for a Brennan clerkship for '87-'88. So when Scalia was appointed to the Court, Josh's court of appeals clerkship was unavailable.

Rob Tiller had been going through law school, and then he was scheduled to be another clerk of Scalia's. There was a third clerk Nino had picked, Paul Cappuccio. People talk about Nino sending me his clerks, or offering them to me, but of course they are human beings and the Thirteenth Amendment does apply, and Paul did not seek to work with me. My next year's three clerks were all part of my Scalia inheritance.

Mr. Nuechterlein: Had you known any of the judges that were on the D.C. Circuit when you joined the court?

Judge Williams: Jim [Buckley] was on but I knew him only from dinner at his brother's house. Leventhal[11] at that time was long dead, but I had met him. I did a paper for the Administrative Conference. All papers were done under the guidance of a committee before they went before the full Conference. It was [Judge Leventhal's] committee that had charge of the subject, so the paper was to go before his committee.

I may as well tell you this story though it is somewhat embarrassing. I was supposed to come to Washington to talk about the paper with the committee, but there was some confusion about the date — entirely my fault — and I came to Washington exactly one week ahead of the scheduled meeting. But [Judge Leventhal] very kindly made time in his schedule to talk with me about the draft. And I am reasonably sure I talked

[10] Antonin Scalia served on the D.C. Circuit from 1982 until 1986, when he was elevated to the Supreme Court.

[11] Judge Harold Leventhal served on the D.C. Circuit from 1965 until his death in 1979.

with Bill Allen of Covington on that occasion. He was a wonderful source of ideas for improving the paper.

Anyway, by the time I got to the court, Leventhal was dead. Jim had just joined, and apart from him I didn't know any of them. I made a number of calls before I started — one to Ken Starr and one to Larry Silberman, both of whom were very welcoming.

Mr. Nuechterlein: When you came to the court in '86, did you have the impression that it was an ideologically divided court in any way?

Judge Williams: It had that reputation around the country, and I didn't see anything that particularly contradicted that. When I look at the list of my cases for the first year or two, I see there were quite a few dissents. But we didn't have abortion cases, of course, which for the last 35 years have been the greatest single source of judicial disharmony. I think in my 22 years, the case most closely touching abortion was a dispute over funding birth control activities abroad, and I was not on that panel. So that whole hot-button area was out.

Mr. Nuechterlein: To the extent the court was divided ideologically, was it your first impression that it was a friendly ideological division or was it a personal one or somewhere in between?

Judge Williams: There were certainly elements of rancor. Very definitely. At various meetings of the court, when we were alone together, people used some quite harsh language. Nothing like that would happen today.

Mr. Nuechterlein: Is that largely a function of the personalities involved or a function of time?

Judge Williams: A combination.

Mr. Nuechterlein: In some ways the ideological divisions in Washington are worse today.

Judge Williams: Just what the explanation is, is not clear.

Ben Wittes is writing a book on the federal courts of appeals and has puzzled over all of this. Part of it is the caseload. He compares us with the Sixth Circuit, where they have a great deal of death penalty litigation — another subject we don't have at all. He depicts a group of judges there that feels the death penalty is a weapon being used against the African-American community and another group that doesn't see it at all that way. Here, race and sex preferences were the biggest divisive issue, but there were others. To some extent there were environmental cases that acquired an ideological look to them. How much else was going on I am not sure.

Mr. Nuechterlein: Give me a sense of the social life you had with the other members of the court during this time. I can imagine a lunchroom with Reagan appointees at one table and Carter appointees at another.

Judge Williams: Well, very few of the court of appeals judges had lunch in the judges' dining room at all, so they didn't have a chance to divide in that way. I am an extreme example — having an apple and sandwich in my office. There weren't all that many occasions for us to manifest discord at mealtime.

Oral History of Judge Stephen F. Williams
Session 4
May 5, 2013

Mr. Nuechterlein: It is May 5, 2013, and we are back after a five-year hiatus to resume Judge Williams' oral history interviews. Judge, we left off at the point in 1986 when you had been confirmed by the Senate and were preparing to take office. Remind us of the events through your first days on the bench.

Judge Williams: I came back from Colorado. I interviewed a harvest of Scalia clerks.[12] And I had lunch with Pat Wald, who was very nice.

Mr. Nuechterlein: She was the Chief Judge?

Judge Williams: She was the incoming Chief Judge. It must have been—just before or just after July 1.

Mr. Nuechterlein: Who was it before that?

Judge Williams: It was Spotts Robinson. I don't know if Pat had actually taken office or was about to. And she was very gracious. We chatted amiably. I am not sure there were any special lessons I picked up in that discussion, but it gave me a comfortable feeling. There was also a party for some judge on the court, and it was at Pat's apartment, I'm pretty sure. That was a very pleasant event.

Mr. Nuechterlein: And that included the rest of your colleagues?

Judge Williams: Yes.

Mr. Nuechterlein: Did you know any of them before you arrived at the court?

Judge Williams: Well, I knew two of them. I knew Nino [Scalia] because he had been head of the Administrative Conference when I did a paper for them. And I knew Jim Buckley, though not well at all, because he and I had been at a dinner at Bill Buckley's.

What I remember particularly about Jim was that he was flat on his back with a backache, which he happily recovered from. Later, when I had terrible backaches, I followed his procedure, and that enabled me to see something [interesting] in the court's robing room. Lying on my back in the robing room, I noticed that there is sort of an entryway before you get to the door into the courtroom, and at the very top of this sort of arch was what looked like a track for a curtain. It was my guess — and it has been neither confirmed nor rejected — that the track once held a curtain to produce a certain muffling of sound. And that [would have been useful] if

[12] Then-Judge Scalia had hired these clerks for D.C. Circuit clerkships before he was elevated to the Supreme Court.

the rumor was correct that Judges Bazelon and Burger[13] used to scream at each other in the robing room. As I say, that hypothesis has never been confirmed or denied. But I certainly have never gotten any alternative explanation of why this track was there. It has since been removed.

Mr. Nuechterlein: So tell me about your first sitting. What did it feel like being a law professor for all those years to suddenly be a judge hearing cases? Do you remember the cases?

Judge Williams: Let me see — I think one of those days, maybe all the days, I sat with Larry Silberman, along with a district judge sitting by designation, an Eisenhower appointee from the district of Montana. As you could guess, he was quite old. There were a torts case and a Speedy Trial Act case; those are the ones that are coming to mind.

Mr. Nuechterlein: Did you feel at all shy about asking questions?

Judge Williams: No. I think it is possible that the court [as a whole] has gotten more active in asking questions since then. But no, I didn't feel shy. Dick Posner has observed somewhere that the transition from professor to appellate judge is pretty easy. You are doing something very similar: you're trying to figure out what the rule means, what its application would be in different circumstances, and what the arguments are for interpreting a case this way and interpreting it that way. That is what professors and appellate judges do. Opinion-writing is somewhat different.

Mr. Nuechterlein: Do you remember your first opinion?

Judge Williams: The first one to come out was in a labor law case. I remember feeling not very comfortable with it because I had never had anything to do with labor law at all.

I also remember that Judge [Ruth] Ginsburg sent me a nice note congratulating me on my first opinion. So that was a heartwarming thing. Incidentally, the Ginsburgs had us to supper that fall. Which was very nice. That was my only exposure to Marty Ginsburg's cooking, which was fantastic. His charm was fantastic too.

Mr. Nuechterlein: So you had a full complement of clerks by the time court started?

Judge Williams: Well, a full complement — the standard package then was three clerks and two secretaries. It seemed to me at the outset that having two secretaries was strange. And three clerks were plenty.

[13] David Bazelon served on the D.C. Circuit from 1949 to 1985 and was Chief Judge from 1962 to 1978. Warren Burger served on the D.C. Circuit from 1956 until his elevation to Chief Justice of the United States in 1969.

Mr. Nuechterlein: Presumably the two secretaries were a vestige from the days before computers.

Judge Williams: Exactly. I may have been the first judge to have a regular desktop computer with suitable word-processing software in it. In those early years, you could see signs in the way [opinions were revised] that the secretaries were clearly trying to avoid the horrors of trying to retype the whole 70 pages. I think it's fair to say that the court's opinions have somewhat shrunk in length since that era. Probably a healthy thing.

Mr. Nuechterlein: That's interesting. If I remember correctly, by the time I ended up clerking for you in 1990, you were using what was then considered an unconventional word-processing program. It was Microsoft Word, which no one used. I had to learn it [from scratch] because the industry standard was WordPerfect.

Judge Williams: Yes, exactly. And the federal judiciary, except for a few crazies like me, pretty much stuck with WordPerfect.

Mr. Nuechterlein: Why were you using Microsoft Word?

Judge Williams: Because I was using it in Colorado.

Mr. Nuechterlein: You weren't using it to strike out against the monopolist WordPerfect?

Judge Williams: No. [Laughter.]

Mr. Nuechterlein: So you had three clerks. Did you give any thought to how to use clerks now that you finally had them?

Judge Williams: I intuitively was not drawn to the idea of bench memos.

Mr. Nuechterlein: Why is that?

Judge Williams: There never seemed much point in it. Surely I was going to have to read the briefs. So if a clerk did a bench memo, that would mean more for me to read. And it was a distinct likelihood that a lot of what I [would have] to read [in the bench memos] would not be of great interest to me. After looking at all three briefs in a standard case, I would have reached a pretty firm conclusion on some of the issues. And on the issues I found troublesome and needed more to be done on, there was no guarantee that the clerk would necessarily have shared that view and would have gone out and done the extra research [on those issues]. So [bench-memo-writing] just seemed to me a process that would delay things.

Mr. Nuechterlein: If I am remembering this correctly, instead of bench memos, you would have meetings. Everyone would read the brief, and then you would get us in a room and ask questions.

Judge Williams: Yes — that was roughly it. There has been a change since your era. During my first time in the hospital for hip surgery, I knew I was going to be convalescing for a period running up pretty close to the next sitting. So I thought that to coordinate with the clerks, I should get all the reading of the briefs done before the surgery and would leave the clerks notes giving my initial take on all these cases. So I did that. That seemed to be a very good idea. Since then I have usually done that [for all cases that haven't been] no-brainers. This approach starts a conversation with a clerk — and sometimes it ends the conversation, or comes very close to ending it, because, on the issue where I have indicated a leaning but noted some doubts, the clerk comes back with something that resolves the doubts.

Mr. Nuechterlein: I am trying to remember if all three clerks read all the briefs in all the cases for a sitting and then met with you collectively.

Judge Williams: It was more the clerk on the case and me. That is certainly the way it is now. I don't recall any shift. Sometimes, in a hot case, all the clerks get very interested and start pursuing it.

Mr. Nuechterlein: You mentioned when we spoke informally before that Richard Posner had offered advice on how to use clerks and how not to use clerks.

Judge Williams: He had said that you should write the opinion from scratch yourself and not have a clerk draft it. In some cases I have done that, but I have to say that they have been rare. The extent to which I change a clerk's [draft] opinion obviously varies a lot. What usually happens is this. I read over a clerk's draft and think, "that is pretty good." And then I start all over again on it, and I see some little thing that bothers me, and it snowballs, and I see more and more things that bother me. So typically I think the draft changes quite a lot. You might be a bad example in this because your drafts were very good. It varies hugely depending, unsurprisingly, on the draft that I get. I certainly like to think that, by the end of the process, the opinion has the stamp of my thinking, that it reflects entirely what I think. The litigants and the taxpayers deserve that.

Mr. Nuechterlein: Judge Posner is one of the few judges that doesn't rely on his clerks to draft opinions.

Judge Williams: He and Easterbrook are the same.

Mr. Nuechterlein: And I think Justice Stevens. Give me your rationale for letting the clerks do the drafts.

Judge Williams: The rudimentary thing is this. You come away from oral argument with a vision of what has to be addressed, but that vision may be incomplete. So having someone else's take on it usefully highlights issues that ought to be addressed and, to some extent, facts that ought to be included. The vision

one person comes away with is incomplete and in some cases inaccurate. Having a draft [from a clerk] is certainly useful [to address that concern].

I know that Posner is very scornful of the following proposition, but I think it is also useful to have a clerk place some raw facts out there — on paper. Otherwise, I might have to spend quite a lot of time getting the facts from the record to formulate them exactly. The same is true to some extent for cases that ought to be cited. Typically I start with a clerk's draft, [which] has most of the cases that will end up in the final opinion and most of the facts. [This process] seems timesaving.

Mr. Nuechterlein: I should add that, from the perspective of the clerk, it makes all the difference if you feel like you are part of the process of writing the opinion and not just cite checking or critiquing it. That makes the job that much more interesting.

Judge Williams: I would think so.

Mr. Nuechterlein: I often think that one of the things you love the most about your job is the opportunity to have what are essentially small seminars, with students of your choosing, to talk about any number of issues under the sun.

Judge Williams: Yes — I think that is one of the joys of it. One little phrase of yours is very important there — "students of your own choosing."

That reminds me of a conversation I had with a student at the University of Colorado in my last year there. I knew that my nomination was under consideration in the Executive Branch, and I remember talking with a student who had very firm thoughts about what should be and should not be in an opinion. I was thinking, no, you are wrong — at least in the case of my opinions, [the things you would omit] will be there. It involved the issue of addressing possible vulnerabilities of the opinion — [whether to] state them clearly and then try to refute them.

Mr. Nuechterlein: The student thought it would be better to write something closer to a brief, where you hope that the reader doesn't notice the arguments on the other side?

Judge Williams: Right.

Mr. Nuechterlein: Tell me a little about the culture of the court. Your first year was 1986–87. Justice Scalia has just been elevated to the Supreme Court.

Judge Williams: Yes, he was around in the summer, but he was terribly busy on his confirmation process.

Mr. Nuechterlein: Justice Rehnquist had just been made Chief Justice?

Judge Williams: The clerks that year and I went up and heard part of the Senate debate on that, I think.

Mr. Nuechterlein: As I recall, that was ideologically contentious. Tell me the extent to which, during all your years on the court, the court has been affected or not affected by partisan ideological divides in DC.

Judge Williams: I think certainly in the early years it was quite heavily affected by them. There was some sense of entering warring camps. Actually, Harry Edwards told me that, when he first arrived, Bazelon said to him, "Well, you will be voting with us!" And Harry said, "When I agree with you!"

I think there was certainly some feeling like that. [During that period,] Wald, Mikva, and Edwards sat together on a panel that, in one day, produced two *en bancs* even though they heard only three cases that day. That is a pretty striking ratio. And you can play it either way. It doesn't make any difference which team was ahead on the panel — just that there was a deep split.

Mr. Nuechterlein: What were some of the issues in those days that were particularly divisive along ideological lines?

Judge Williams: Well, certainly the whole question of affirmative action or racial preferences, however you wish to frame that issue. I'm trying to think if criminal law was divisive — maybe a little bit.

Mr. Nuechterlein: When I think of criminal law in the D.C. Circuit, I think of the old-style disputes between Burger and Bazelon.

Judge Williams: Right — it wasn't as extreme as that. I do recall some cases where it seemed to me that there was a bending over backwards to generate a retrial when there was no need for a retrial. In the beginning we didn't have sentencing appeals. I haven't seen any numbers on this, but I would say that the principal issue in half of our criminal cases is the sentencing, given the complexities of the Sentencing Guidelines. And we are not out of that [now even though,] since *Booker*,[14] the Guidelines have been optional or at least not mandatory, because they are still the first step in calculating what a Guidelines sentence would be and then analyzing the sentencing judge's explanation of why he deviated from them. …

Mr. Nuechterlein: One set of issues you have not mentioned is justiciability — for example, standing.

[14] *United States v. Booker*, 543 U.S. 220 (2005).

Judge Williams: Yes, those, too, certainly were big issues. My reading is that those disputes declined in significance after those early years because the Supreme Court became much more open to finding standing than it was in the past. …

Mr. Nuechterlein: To what extent do you think these disputes about standing [in the 1980s and 1990s] reflected a deep philosophical divide about justiciability issues themselves as opposed to underlying disagreements about the relief sought in particular cases?

Judge Williams: … A view that originated in the Progressive Era was that courts should not get involved in anything that smacked of policy at all. That view was then picked up by conservatives, largely as a response to the Brennan Court. The progressives did not want the courts doing the things that progressives saw the courts doing [during the Progressive Era], and the conservatives in the Brennan era did not want the courts doing the things they saw those courts doing. And in both cases, of course, the position was reinforced with a broader ideological structure, which at least on its face was neutral. And I thought, at the time [I arrived at the court], that the ideological structure was sound.

I notice small signs that there may be a non-ideological weakening of that view. One sign is the Fifth Circuit opinion in the Louisiana casket case,[15] in which the court is confronting a Louisiana statute that limits the people who can sell caskets. Basically, the statute creates two separate rules: one for out-of-state caskets and one for in-state caskets. The one for out-of-state caskets has no particular limit on what the casket-maker must be doing with the rest of his time. The one on in-state caskets says that the casket-maker must be an undertaker, essentially providing undertaker services. And the plaintiff is a group that, as one might say, has been chosen by God for this purpose. It is a Benedictine monastery that is following the edict of St. Benedict to make its own living. This one chose to make its own living by making caskets for sale.

There is a brief discussion [in the opinion] of a completely flimsy argument [by the state] as to some genuinely public-regarding purpose for this rule. It is very flimsy because, if out-of-state caskets can be made by people who are not undertakers, what is the consumer-protection element in applying that rule to in-state casket makers? That is pretty quickly taken care of. Then you come down to Louisiana's flat-out honest defense of the statute, which says it is simply to afford a benefit to the current incumbent in-state casket makers by cutting down the competition. And the court says that is not an acceptable purpose. The court does not go into a long treatment of the history of [substantive] due process — or as I like to call it, the rule against partial legislation. But it rejects [the state's defense]. And it cites a Tenth Circuit case that flat-out says, "this is what

[15] *Abbey v. Castille*, 712 F.3d 215 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013).

legislatures do all the time, and it is perfectly OK constitutionally." So the Fifth Circuit very consciously, I assume, framed the issue in terms of a circuit split. Whether the Supremes will bite, who knows?

Mr. Nuechterlein: So where do your sympathies lie?

Judge Williams: My sympathies lie entirely with the casket-makers.

Mr. Nuechterlein: The competitive casket-makers.

Judge Williams: Yes, the Benedictine Monks.

Mr. Nuechterlein: And what would be the constitutional basis for invalidating that state law?

Judge Williams: Well, that is obviously the weak point. The very fact that you have a doctrine that was foolishly called "substantive due process" suggests problems, because process is process and not substance, right? So that is a problem. Even if you apply the more accurate name, "rule against partial legislation," you can fairly ask, "where does that rule come from?"

Mr. Nuechterlein: If you were a judge in that case, what tools would you seriously consider?

Judge Williams: I would do a lot of research.

Mr. Nuechterlein: Perhaps the rational basis test under the equal protection clause?

Judge Williams: The rational basis test can be rational basis with teeth, instead of toothless. And we know that there are realms where rational basis does have teeth, and maybe this should be one of them.

For a long time, I was persuaded that the strongest objection [to this judicial role] was not really a doctrinal one but a practical one. And that is the question: doesn't this involve judges too much in policymaking? Richard Epstein called my attention to the fact that we do have a methodology in the negative commerce clause [context] that seems to have worked without causing outrage — except perhaps on the part of Justices Scalia and Thomas, and even then in a muted way.

Mr. Nuechterlein: On the other hand, the judicial rulings on the commerce clause can always be overcome by Congress.

Judge Williams: That is true.

Mr. Nuechterlein: So there is a political check.

Judge Williams: Yes, that is fair enough. But have any [those rulings] been overturned by Congress? I don't think it's common.

Mr. Nuechterlein: I have no idea. This discussion reminds me that, back in the '80s, the rallying cry of the conservative movement was "judicial restraint," and the liberals made fun of the doctrine of judicial restraint. It seems to me that the battle lines have shifted since then. When you joined the court, did you feel that "judicial restraint" described your [operative approach]?

Judge Williams: Yes, I did.

Mr. Nuechterlein: Although in this casket case, there is no readily available doctrine [for countervailing the will of the people to suppress the ability of] the Benedictine monks to manufacture their competing caskets. A good majoritarian would say, well, that's legal.

Judge Williams: Definitely an area where [my views have] changed. I guess, living in Washington, you see more of the [crony] capitalism and all the forms of anticompetitive manipulation that go on, and increasingly it seems like a serious blight.

Mr. Nuechterlein: So are there other areas besides fostering competition where you think courts are rightly vigilant against the majoritarian process, apart from the obvious cases like restrictions on free speech?

Judge Williams: The big area is one kind of anticompetitive legislative activity or another. I emphasize that area because a lot of the anticompetitive activities are not in the form of restrictions on competition; they're in the form of assistance to a particular competitive group. Those are peculiarly unreachable [by courts] because of our standing rules, particularly *Massachusetts v. Mellon* and *Frothingham v. Mellon*.[16]

Mr. Nuechterlein: Those are the taxpayer standing cases?

Judge Williams: Right.

Mr. Nuechterlein: So you are talking about ostensibly pro-competitive initiatives that involve giving money to competitors, as opposed to legislation that gives competitors, say, access rights to the assets of incumbent market participants. The latter obviously are subject to judicial review.

Judge Williams: Right. Of course that is purely statutory. It is a matter of interpreting the statute.

Mr. Nuechterlein: Tell me a little bit about how the ideological divide in the court mellowed over the years.

[16] 262 U.S. 447 (1923).

Judge Williams: I think the biggest single thing was the *Microsoft* case (which only involved seven of us).[17] Here was a very high-profile case; it is silly that it appeared to the public in ideological terms, but I think it clearly did. At least some people who self-identified as conservatives thought that Microsoft should be left alone, and a lot of the people hostile to Microsoft seemed to be liberal in some sense of the word. Yet here our court, which ranged from me as a conservative to David Tatel as a liberal, agreed [on the outcome].

When it was decided [that we would hear the case] en banc, I thought there was a prospect that we would agree, and I thought that that prospect would be enhanced if Tatel and I worked together in preparation for it. So we did. We had a number of meetings, and our clerks worked very closely together. And I think that did produce a shared basis of understanding. I have always gotten along well with him, but that [experience] really deepened our relationship a lot. [I don't know if] there's any colleague I find it more easy to deal with. That does not mean that I can always bring him around where he ought to be brought around, but I do feel he listens to me.

Mr. Nuechterlein: Do you share my sense that [the ideological divisions on the Court may have] mellowed even before the *Microsoft* case?

Judge Williams: I think they did. The date that Harry Edwards became chief judge[18] was a big date because he clearly was setting out to mend fissures. I think everyone recognized that and was ready to credit it.

Mr. Nuechterlein: How did he manifest that?

Judge Williams: Some of it was superficial. He organized an annual court dinner. He gave people birthday presents on their birthdays. He conveyed very strongly the sense that we were individually a reasonably distinguished court, but maybe not as distinguished as a collective entity as we could be if we tried to be more collegial and more respectful of each other's opinions.

Mr. Nuechterlein: How do you think the public perception of the D.C. Circuit has changed?

Judge Williams: Most people have not heard of the D.C. Circuit; you should start with that. When you say "the public," you mean some very narrow set of the public.

Mr. Nuechterlein: Yes — so, the elites that pay attention to what courts do, how do you think their perception of the court has changed in the last 25 years?

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[17] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

[18] Judge Edwards served as chief judge from September 1994 to July 2001.

Judge Williams: I think there is still a tendency to pigeon-hole the court. The history of pigeon-holing that I see is: "D.C. Circuit wildly liberal," "D.C. Circuit violently divided," "D.C. Circuit staunchly conservative." And all of those are oversimplifications, although they have an appearance of truth. … If you look at all the cases where there is a dissent, it is extremely common, probably a majority of cases, that the majority is composed of an appointee of a Republican president and an appointee of a Democratic president. And so it makes you think this is a strange "ideological" division if it is an ideological division. And I think you can look at the merits of the cases and see something more complicated than a simple "ideological" division—at least in terms of the politics of the Senate or the House or something like that.

Mr. Nuechterlein: The D.C. Circuit does seem much less ideologically divided than it was before and also less divided than the current Supreme Court. There might be a number of reasons for that. One is that the cases that you get are not as often prone to strong ideological divisions as the cases that the Supreme Court gets.

Judge Williams: Absolutely.

Mr. Nuechterlein: Another reason may be that the Republicans on the D.C. Circuit have more of a libertarian streak than their counterparts on the Supreme Court.

Judge Williams: I think that is true. Of course, there is another big thing: everyone on the D.C. Circuit knows that if an issue is highly ideologically divisive and of any significance at all, we are not likely the people who are going to be deciding it in the end. It is going to be decided by the Supreme Court, so the stakes are much lower for us.

Mr. Nuechterlein: I want to close this discussion of the court's culture by talking about your opportunity, which I take it you declined in 2001, to become chief judge. Give us a little background on your eligibility and why you decided to pass that up.

Judge Williams: The rule is that you can be chief judge for a term of seven years, but you can't be chief judge beyond the age of 70. [And you can only start being chief judge, basically, if you would have five years in that position before turning 70.] When Harry's chief judgeship was coming to an end, it was clear just by looking at the calendar that I would fit in that window by a matter of weeks.

I had seen chief judges over the years. I won't say that any of them were completely unhappy in the post, but I could see that they had quite a bit of administrative work to do, which didn't particularly appeal to me. And then in the spring, before this critical moment, which had to be September of 2001, Harry gave me a call and said, "Steve — I have this meeting two

weeks away, and I think that since you are going to be chief judge, you should be in on it, or at least know about it and come if you'd like." It was a meeting in which the people in charge of the buildings on C Street between 3rd and 6th Streets — I think Harry used the term "the stakeholders" — were to meet to talk about the parking and congestion problem. [That problem] was terrible then and is still terrible, because the people using the Municipal Building do not want to pay for a parking garage, and they do not want to have someone else come with them who could drive around the block while they do their business. And therefore they double-park, and there is quite a lot of traffic in addition, so the traffic is often tremendously congested. So I was grateful to Harry for alerting me to this, but I was very confident that I did not want to spend much time working on that problem.

Mr. Nuechterlein: Do you think he was doing you a favor by showing you a day in the life of a chief judge?

Judge Williams: It certainly made sense that, if I was going to assume these responsibilities in September, I should get in on the background, and this would be a way, at relatively low cost, of getting in on the background with respect to parking on C Street. But I don't think it was a plot to shift the chief judgeship to Ginsburg.[19]

Mr. Nuechterlein: Do Chief Judges get paid more?

Judge Williams: No — I don't think so — if they do, it would be $5000. Their secretaries get more — Mary wanted me to be chief judge. One thing that has reminded me about this episode time and again is discussions with Russian judges. In Russia, being chief judge is a very, very big deal. They have a control over the other judges that is completely foreign to us.

Mr. Nuechterlein: What does that mean?

Judge Williams: Shift them around from one place to another, disciplinary activities. The Russian judiciary is like a civil service, and if you are boss of a department, you have a lot of power that goes with that. And I think that is the way in which the government controls the outcome of the cases it cares about. Sometimes they have a more traditional "telephone justice" line straight to the judge, but I think in a lot of cases they do it through the chief judge.

Mr. Nuechterlein: Before we conclude this discussion of life on the court, I do want to ask you about your secretaries. Mary [Matera] has been with you since the beginning?

[19] Douglas Ginsburg was chief judge from 2001 to 2008.

Judge Williams: Right — she came from Pat Wald.

Mr. Nuechterlein: So that has been what — 25 years?

Judge Williams: 27 years.

Mr. Nuechterlein: Lindy was your secretary for a long time.

Judge Williams: Yes. The chief judgeship was also combined with the option to take senior status, and senior status had some real appeal. At that point, assuming that I was going to do a three-quarters load — which, from an early stage, I contemplated — I couldn't have three clerks and two secretaries. … Lindy understood this, and so she started looking around. Before the actual critical moment when I did take senior status, she saw it coming and sensibly made arrangements. I am not sure what her first job was after that, but pretty soon she got a job with a judge at the Tax Court. And that has worked out very well for her.

Mr. Nuechterlein: I want to ask you about taking senior status. So the rule is that you have an option to take three-quarters of your cases, or ...

Judge Williams: You have an option in principle to take anywhere between 0 and 100.

Mr. Nuechterlein: How does your compensation change?

Judge Williams: Your compensation is completely unaffected by it. What is affected is staff, and at three-quarters, you are entitled to three clerks and a secretary.

Mr. Nuechterlein: I guess it would be meaningless to take senior status and keep your full complement of cases?

Judge Williams: Actually, Judge Sentelle is doing that. He says that the reason he is doing it is that he has had two additional jobs besides being a judge in the D.C. Circuit for the last several years. One was being Chairman of the Judicial Conference, and the other was the Chief Judgeship itself.[20] With those two going away, with his taking senior status, he is like on vacation.

Mr. Nuechterlein: What does it mean if you are a circuit judge that takes senior status but does not have your case load diminished?

Judge Williams: How does your life change?

Mr. Nuechterlein: Yes.

Judge Williams: At least on the D.C. Circuit, your ranking changes. You immediately become junior. One thing I had not realized until I did it was that you can

[20] David Sentelle was chief judge from 2008 to 2013.

become very junior. If the judges who previously took senior status were appointed before you, they have seniority over you. So when I took senior status, I think it was only Harry [Edwards] and Larry [Silberman] who were already senior at that point, and they had seniority over me, just as they did when I started in 1986.

Mr. Nuechterlein: What is the significance of seniority other than who gets to preside over panels?

Judge Williams: [Opinion] assignment is really the only significance. There are cases that I would have assigned to myself but that were not assigned to me. And vice versa. Not a huge number. And people know that I enjoy not merely the FERC cases, but also the other regulatory cases, and so they think rightly that everyone will be happier if I do quite a lot of those.

Mr. Nuechterlein: Let's begin talking about the substance of administrative law, which is probably the most important substantive area of law at the D.C. Circuit and certainly the area the court is best known for. At a very high level of generality, I think of the principles of administrative law [as boiling down to a core objective]: keeping the Executive Branch honest. Tell us how you conceptualize the function of a court of appeals, and the D.C. Circuit in particular, in scrutinizing the decisions of regulatory agencies.

Judge Williams: Well, your summary, at a high level of generality, is the essence of it. What follows from that is making sure that the Executive Branch is complying with the law, assuming it is a case where the plaintiff has standing.

One might think that [this goal — ensuring that an agency complies with the law —] does not justify a court of appeals in being bothered at all with the facts. [Under that line of thinking,] the court of appeals could just accept the facts as found by the agency. But when you think about that for a minute, that doesn't make complete sense because it would mean that an agency that really wanted to get around the law could just find facts that justify its outcome, and at that point the review on the law would become meaningless. … But a court does have some duty to make sure that it is not getting into decisions that are properly the agency's.

Incidentally, once when I was in Russia, I had a lengthy discussion with interpreters on the meaning of the word "deference," and I found it impossible to get across what was involved. I think it is partly because we use "deference" in two different ways. One of these — I think the proper [use of the term] — describes the lens through which we examine what the agency has been doing. The other is a statement of the conclusion: "we defer to this," meaning "you win." Although I am not sure if my opinions have always rigorously done this, the word "defer" should not be in that sentence. …

Mr. Nuechterlein: We have a lot of verbal locutions to describe the proper role of a court in scrutinizing what agencies do. And deference in the more nuanced sense you mentioned — the lens through which you view agency decisions — obviously plays an enormous role in the life of the court. As a practical matter, it requires a lot of subjective judgment to know when you have gone far enough in second-guessing what an agency has done. … When you analyze APA cases, how do you draw that line? Not you in particular — the court in general. What is your sense of when the court is more or less likely to second-guess a decision of an agency?

Judge Williams: Are we beyond the area where the language of the statute seems to require or forbid [a particular outcome?]

Mr. Nuechterlein: I am talking more about the *State Farm* type of case,[21] [where the question is whether the agency has reasonably analyzed the record.]

Judge Williams: It seems to me there is inevitable subjectivity there. If you think about the area being regulated with one outlook, then omissions or contradictions in the agency opinion will look large or small depending upon how your brain automatically fills in the blanks. … Harry [Edwards] has written quite a few articles about this. One of his most intuitively correct findings is that it is on those issues, the *State Farm* issues, that you see the biggest divisions. In at least one of those articles, he pointed out that these are problems for the agency, which the agency can solve, if there is a good answer to the basis of the court's remand.

Mr. Nuechterlein: The D.C. Circuit has a reputation for being more scrutinizing of agency decisions than other federal courts of appeals.

Judge Williams: Yes. But I have heard people say that other courts sort of fluctuate more between being totally submissive to the agency and just acting as if they were the agency, while we fret and worry a great deal trying to avoid those extremes. I can neither confirm nor deny this statement about other circuits.

Mr. Nuechterlein: There is this sense that courts are more likely to second guess an agency if they understand the subject matter and find it interesting.

Judge Williams: Yes.

Mr. Nuechterlein: Often when you have complicated ad law cases in regional courts of appeals, you get a panel with no prior exposure to the area of regulation, and it finds the case mystifying, so the path of least resistance is just to affirm. In the D.C. Circuit, you have judges who have a deep background in certain substantive areas, and in some cases they were picked for the

[21] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Insur. Co.*, 463 U.S. 29 (1983).

court for that reason — because they are comfortable with analyzing the regulatory state. You are thus more likely to get [second-guessing] and less likely to get crazy remedies.

Judge Williams: Yes — I think both of those are true. Actually, the Federal Energy Bar Association very kindly gave me an award — it is on the windowsill in my chambers — and the price of getting the award was giving a little talk. And I made the argument that a judge who knows something about an area has sort of a plus and a minus for the parties involved. Exactly this: they more likely understand what is going on, but on the other hand there is some risk that they will be overconfident about their grasp of what is going on in the area and will therefore not leave to the agency what ought to be left to the agency. I think those are genuine problems.

Mr. Nuechterlein: Which is a reason for humility in the remedies: instead of saying "you may not do this," you say "have another look."

Judge Williams: I think I may have mentioned to you that sometime, quite a while ago, I asked a clerk to do a check of D.C. Circuit opinions to survey the frequency of remand for want of reasoned decision-making. Somewhat as I expected, I seem to be, in that particular sweepstakes, the winner.

Mr. Nuechterlein: We have been talking about the *State Farm* set of issues. There is also the *Chevron* set of issues.[22] I have heard several different justifications for the practice of deferring to agency interpretations of ambiguous statutes. Some of these rely on notions that Congress kind of intended for the Executive Branch to be the one to resolve interpretive ambiguities in a statute that has been committed to an agency.

Judge Williams: My guess is, as on so many issues that Congress addresses without a great deal of focus, that [rationale] is largely a fiction to justify a conclusion arrived at upon other grounds.

Mr. Nuechterlein: So what do you think the [appropriate] rationale is?

Judge Williams: I think it is the basic idea that there is a lot of policy involved in coming to an interpretation of a statute, and that policy is properly for the agency, as long as Congress doesn't resolve the policy issue one way or the other. Incidentally, coupled with that is the strong belief that one generation of regulators, one cohort of regulators interpreting an ambiguous statute, should not bind the others for all times, or at least until Congress manages to get around to correcting the statute.

Mr. Nuechterlein: So what I am hearing is a sort of highly utilitarian explanation: "We assume that Congress probably had some policy objective in mind. Who

[22] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

better than the agency — which spends its whole day thinking about these issues — to resolve the ambiguities Congress leaves in the statute? That approach is more likely to produce a result that comports with public policy than if generalist judges play that role."

Judge Williams: I am not 100% sure about [whether the outcome would be] better or worse. I guess [the key is the] flexibility of the agency, the ability to put the learning of experience to work. If a court interprets a statute, and says it means "*this*," then it is very rare that [a litigant] will be able to come back ten years later and say, "Look, history has shown that that has produced terrible results." The court is unlikely to dig its way out of the hole it has put everybody in.

Mr. Nuechterlein: We operate as lawyers and judges in a world where we speak of statutes as having "a meaning," and it is left to the agency or a court to determine in the first instance what that meaning is. Of course, that can't possibly be the right model for understanding statutes if we say that it is OK for the agency to reverse course on what it thinks a statute means. So [courts do not defer to agencies on the theory that agencies are somehow uniquely qualified] to perform the epistemic function of determining what the "true" underlying meaning of a statute is. I think we are just saying that courts should [defer to agencies because, through gap-filling, agencies rightly] play a role in legislating.

Judge Williams: I have always liked the metaphor used by Cardozo in his separate opinion in *Panama Refining*.[23] It makes sense to look at what Congress does as creating a canal that has borders and has a body in between, and as long as the agency is on the water, within the boundaries of the canal, it is OK. He was using the metaphor for a different purpose, of course, but it still applies here.

Mr. Nuechterlein: Let's go back to reasoned decision-making. When you remand for reasoned decision-making, the instruction is essentially this: "you, agency, may well have the authority to do this thing…."

Judge Williams: On the other hand, you might not.

Mr. Nuechterlein: Might not but you may well. We are not going to say that you don't, but we do want you to explain yourself. That is part of keeping an agency honest.

I was just wondering: I have worked at federal agencies that may sometimes, under some leaderships, view that sort of remand as essentially a victory. If the remand is not accompanied by a vacatur remedy, the agency can take a few more years before it has to cook up its next

[23] *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

rationale for the thing it wanted to do, and its political decision is in full force in the meantime. Perhaps a remand for reasoned decision-making is highly valuable in an idealized political system, where agencies care about meeting their responsibilities. Do you have any views on whether the actual political system we live in works like that?

Judge Williams: That is very interesting. What you are suggesting is that the key variable with a remand for reasoned decision-making is the application of vacatur. … In deciding whether to vacate, we expressly apply the sort of balancing test that we definitely, expressly apply when it's an application for a stay.

Mr. Nuechterlein: Yes, you look at the likelihood that the agency will be able to reach the same outcome on remand, after further deliberation, and you also look at the disruptive consequences of vacating a rule that may later be reinstated.

So if you do vacate when remanding for reasoned decision-making, you're telegraphing a very strong sense that the agency will probably not be able to reach the desired policy. Here, though, I'm referring to the other class of cases where you are throwing up your hands and saying, "Agency, it's up to you guys. You are the expert agency, but you have not produced something we can defer to yet, and you need to explain yourselves, but we are not at the point where we believe you can't [justify the same outcome]." My question is, in those cases what do you think the practical effect of a remand is?

Judge Williams: [The question is] how does such a remand actually work out? You probably recall the [FCC] case involving the question of ISP reciprocal compensation. There we did not vacate. ...

Mr. Nuechterlein: You did not vacate. [You remanded twice but] didn't vacate either the first or second time. I think you wrote both of those opinions.[24]

Judge Williams: Then there was [a later] opinion by Merrick Garland.

Mr. Nuechterlein: That was the mandamus proceeding. Your second decision was in [2002], and the *Core* mandamus opinion was in either 2007 or 2008.[25] There was some strong language in that opinion.

Judge Williams: That's interesting. My sense in the first opinion was that the case was really, really complicated, and we did not want to screw things up. And the Commission in the next round came up with a justification that really didn't work. I and the panel were unanimously convinced that it didn't

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[24] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[25] *In re Core Comm., Inc.*, 531 F.3d 849 (D.C. Cir. 2008). The court directed the Commission, which had not responded to the second remand for a half-dozen years, to come up with an acceptable rationale within six months or face automatic vacatur.

work. [That suggested that the issue] was not only complicated in terms of the regulatory economics and so forth, but also complicated legally, or they would not have stumbled onto a solution such as the one they did. … [That it took the Commission six years more to come up with a new rationale] may suggest you are right — that [the remand without vacatur penalty] doesn't send a strong signal. On the other hand, taking the history as a whole, I am not convinced that it would have been good to throw the system into potential chaos.

Mr. Nuechterlein: What do you think is the main contribution to our regulatory system of having this light-touch [remand-without-vacatur] remedy?

Judge Williams: I am enough of an optimist to think that [our demand for a] clearer expression in an agency's justifications has some sort of positive effect on actual thinking. I understand there are some big gaps in that proposition.

Mr. Nuechterlein: So, over the long term, the fact that there is a court willing to hold an agency accountable for [its failures of reasoned decision-making] …

Judge Williams: Yes — it has a healthy effect. And how big that effect is, I certainly wouldn't try to estimate.

Mr. Nuechterlein: Do you have a sense that remand-without-vacatur is more common now than it was when you took office?

Judge Williams: That's a good question. I don't know. I honestly don't know. I suppose that *Chevron* might make it more common—reversals in the statutory interpretation process at least theoretically would decline and therefore leave more room for spotting [other] troubles in agency decisions. There is also a paucity of empirical data on what *Chevron's* effects have really been.

The most famous [study was by Peter Schuck and Donald Elliott, entitled] *To the Chevron Station*. There have also been some more recent studies. Tom Merrill has done a piece. [Bill] Eskridge, too, has a very recent article. He accumulates the total volume of Supreme Court decisions where *Chevron* was, in principle, in play — in the sense that the Court, if it were dedicated to *Chevron*, would have necessarily gone through a certain mental process in arriving at its conclusion. I think that, in a majority of those cases, *Chevron* does not appear. Period.

Mr. Nuechterlein: In terms of the remand-without-vacatur remedy, there is some disagreement on the D.C., Circuit about whether that is even permissible under the APA. My first question is this: I don't recall seeing the court actually do an analysis of the words of [5 U.S.C.] section 706 to determine whether it is actually permissible.

Judge Williams: I think that is true. The prime exponent of the view that the words require vacatur is Judge Randolph. Certainly in the long period between his initial opinion and his taking senior status, he has had plenty of opportunities to call for an *en banc* on the issue. That would not have necessarily produced an *en banc*, but it might have produced a whole set of opinions concurring with and dissenting from the denial of *en banc*. I don't believe that happened. So I guess the unspoken understanding is that the words are not all that clear.

Mr. Nuechterlein: So Judge Randolph's view would in theory, though probably not in reality, divest the D.C. Circuit of the humble remedy of sending a case back to an agency to think about it some more without disrupting the status quo. But in reality, as he has pointed out, and as have you, that the difference [between his view and yours] does not amount to very much. That's because, [even when the court issues a vacatur order,] the agency can just come and say, "don't issue your mandate."

Judge Williams: Yes.

Mr. Nuechterlein: Then you'd have presumably the same balancing of stay factors [that the court already uses, under your approach, to decide whether to remand without vacating]. So why does anyone bother with this issue?

Judge Williams: Well, I think the answer is that nobody bothers about it very much — Ray is bothered about it a bit — but as I said not all that much.

Mr. Nuechterlein: Do you have a sense of whether certain agencies come to the D.C. Circuit with a greater presumption of reasoned decision-making than others? Are there certain types of agencies that are more likely to be subject to hard-look judicial scrutiny?

Judge Williams: Do we view a decision from agency X differently than a decision from agency Y because of a prior record of lesser competence? I honestly think the answer to that is no. We look at the issues as raised by the petitioner, we look at what the agency had to say, and we decide the case on the basis of those things. So I don't think an agency can get into an automatic losing streak, or an automatic tendency to lose, on the basis of its record.

Actually, it would be sort of reprehensible if we did [consign agencies to different categories on the basis of their past records] because, after all, agency staffs change, and one hopes there is improvement. It would be really peculiar to review a well-reasoned decision by a "bad" agency partially. This is like the problem that investors have in dealing with mutual funds (at least mutual funds other than index funds). Investors can sometime [choose a fund] on the basis of its prior record, which of course may be luck, and which also may [reflect the investment decisions] of some genius fund manager who has then gone off [to some other job].

[This issue of treating agencies differently reminds me of a question I was asked when] I was initially being vetted for the Tenth Circuit. It must have been the FBI. I had not realized that the FBI not only checks to see if you are smoking dope and doing other terrible things like that, but also seems to try and answer questions that have more to do with judicial skill or something. Anyway, the FBI agent talked with a lot of people in what is considered the relevant community, and apparently some people in the relevant community in the Tenth Circuit said, "he doesn't really know the district judges, and it is very useful to know them in ruling on their opinions." [Laughter.]

I share your laughter, but mine is mixed with dismay about the attitude that this seems to represent. And the suggestion that we would have a fixed view of an agency — a fixed view that was relevant to [reviewing the agency's] decisions — falls somewhat in the same category.

Mr. Nuechterlein: Although some agencies are subject to political pressures in ways that other agencies are not. So even though they may be just as smart as other agencies, just as capable of producing well-reasoned, lawful opinions, some agencies may be disproportionately subject to, for example, congressional oversight pressures that other agencies are not.

Judge Williams: I am not sure if I am well plugged in enough to know which these agencies would be.

Mr. Nuechterlein: Independent agencies are more subject to congressional pressure than [Executive Branch agencies. Of course, Executive Branch agencies may be more subject to White House pressure.] It may be just different types of pressure.

Judge Williams: Yes — that would be my guess.

Mr. Nuechterlein: After you have remanded a case to an agency for the first time, is there any presumption either way about the soundness of what it has done on remand?

Judge Williams: That reminds me of when I was first teaching administrative law. In *Chenery*,[26] you will recall, the Supreme Court's first decision does effectively remand for reasoned decision-making. And then the second decision says [the agency order on remand] is OK. Justice Jackson, however, remarks: "the more you explain, the less I understand it." Of course, he is talking about his colleagues on the Court, saying that their

[26] *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

opinion doesn't make much sense. Maybe a change of personnel on the Court [explains the second] *Chenery* [decision].

Also, how long can [a court] keep it up? There are two possible ways that a court can respond [to an agency that stays the course following a remand without any satisfying explanation]. One is to think [the agency is] utterly determined about this so it seems fruitless to keep trying. And the other is [reflected in] an opinion [I wrote]. This was not a case of successive remands of the same actual decision, but successive critiques of the agency's reasoning. The agency said, "we were looking for data that would support this," and the prior panel said, "all right — you can't be expected to have good data that early." But then finally there came a time when [the agency] came back to us, and they had by then years and years to produce data, and yet they had produced no data. They did produce sort of theoretical reasoning as to why this was a sensible rule, but the theories did not seem to hold up logically at all, and so we did say: "No, you can't do it."

Mr. Nuechterlein: The presumption is that if the agency tried that hard to find some good reason to produce an outcome, and if they could not come up with it even on remand, they are probably even less likely to justify that outcome the third time, and therefore you should vacate?

Judge Williams: That would be the lesson from that case. … If there is a discrete proposition that appears not to have a basis, and then turns out not to have a basis, that sounds like a case for drawing the line. …

Mr. Nuechterlein: Do you ever get approached by regulators about your decisions informally? Do you ever run into someone at a party who says, "You know, you reversed me like eight years ago, and I just want to tell you that you misunderstood X and Y."

Judge Williams: No, I haven't — that is interesting. I would enjoy that. …

Mr. Nuechterlein: You mentioned discussions with Russian judges before. You've spent a lot of time in Russia and a lot of time thinking about Russian legal reforms, such as they are. In your discussions with judges from Russia and other foreign countries, what is their view of the administrative law regime that we have in the U.S., where agencies are quasi-lawmaking bodies, and where courts supervise agencies but defer to them? Is there a counterpart to that in other countries?

Judge Williams: The answer is I can't be sure, but I think so. We know from Justice Breyer's books that the *conseil d'état* plays sort of a role like this [in France]. But it's less a court than a super-agency, so it's not quite analogous. In Russia, courts are deeply involved in looking at what administrative agencies do, and interestingly enough, the complainants

there have, at least numerically, a very successful track record. I think the [reason] is partly because these are very small-stakes cases, and the higher-ups in Russia are not involved at all.

[Also, whereas a U.S.] court's decision has an impact going forward, [the Russian] system is either [ignores] precedent or views precedent in a very special and limited way. So the government can lose a lot of social-security-type cases without any impact. In contrast, in the disability area, the U.S. courts were highly interventionist and produced a significantly different system that [because of precedent] has led to an enormous increase in the number of people on disability. That may be a good thing or a bad thing, but it certainly had a huge fiscal effect. Very little risk of that in Russia. And my sense is that the idea of having a [deferential] lens through which [a court] examines agency decisions is quite alien to [Russian judges]. Also, they don't write opinions of the sort that we do. Although they have something called an "opinion," it just has a lot of "whereas" clauses and then it has an outcome.

Mr. Nuechterlein: Is there reasoning in the "whereas" clauses?

Judge Williams: I don't think so.

Mr. Nuechterlein: That is discouraging. I want to ask you about the choice that we make in our system to have generalist courts of appeals review agency decisions of most types.

Judge Williams: Yes — exactly.

Mr. Nuechterlein: The D.C. Circuit seems to occupy a middle ground between the regional courts of appeals on the one hand and the Federal Circuit on the other, [which specializes in matters within its exclusive appellate jurisdiction]. … What are your thoughts about the extent to which it is useful to have truly generalist judges reviewing decisions of administrative agencies versus judges who really have (or acquire) a deep background in the subject matter?

Judge Williams: It is self-serving, but I am quite comfortable with this intermediate ground that you have identified. And I have heard the argument — which, it seems to me, is probably correct — that a court such as the Federal Circuit is likely to feel that it owns its area and therefore, if there is an area where there is supposed to be any deference, it gets clouded and torn away. Now assume that the court and the agency are of absolutely equal quality and intellectual quality. The problem that I mentioned earlier, about the interpretation of the law getting locked into a particular viewpoint — is more likely to occur [if the court supplants the role of an agency, because agencies can more easily change their positions].

Mr. Nuechterlein: Do you think anyone in Congress ever gives serious thought to when it is appropriate to have a specialist court of appeals review something and when it is not?

Judge Williams: Well, they do sometimes. Remember there was kind of jurisprudential crisis in veteran's benefits. … The V.A. did not particularly want 600 generalist federal judges getting into their stuff, but the veterans wanted some kind of supervision of V.A. decisions because they assumed, probably correctly, that the courts would be tilted pro-veteran, probably even more than the V.A. The solution was the creation of a Court of Veterans Appeals. My guess is that it is a pretty special set of circumstances that makes Congress take a serious look at [consigning particular topics to specialist courts].

Mr. Nuechterlein: Thanks, Judge — that concludes today's session. We'll continue in a few weeks.

Oral History of Judge Stephen Williams
Session 5
June 9, 2013

MR. Nuechterlein: This is Jon Nuechterlein, and today is June 9, 2013. Before I turned on the tape recorder, the Judge said he had an additional interesting thought about court collegiality, and I told him to hold the thought until the tape recorder was on, and now it is on.

Judge Williams: I said earlier something about the general proposition that the left-right split was less important than it had been in my earlier days on the court. I have been trying to find words to characterize the other split: I guess it's a sort of attention to judicial craftsmanship. That is a vague phrase, I guess. I am thinking in terms of what happens when a writing judge circulates a draft. Obviously, we all make mistakes, and if the other judges respond with what I'll call craftsman-like suggestions—suggestions trying to prune things that don't need to be in the decision, to prune actual errors—that process can go very smoothly with a judge, regardless of ideology, who is really committed to those craftsmanship goals. But with a judge who … does not seem quite so concerned about these craftsmanship qualities, it can just be torture. …

Mr. Nuechterlein: What would you describe as some of the good principles of good craftsmanship?

Judge Williams: Certainly not having mischaracterizations of other cases. Not using very broad language on issues that, in their broad form, may be highly controversial and difficult whereas in a restrained form are unobjectionable. Those two certainly. [Also,] simply logic, trying to pursue logic pretty carefully. Those ones.

Mr. Nuechterlein: So what do you think causes some judges to depart from those principles? They seem pretty uncontroversial, as you describe them. Most judges should aspire to logic, construing precedents accurately, and not being needlessly controversial.

Judge Williams: … There are degrees of intelligence, and on the whole, everything else being equal, more is better than less. And I guess the other thing is focus. What is the particular judge focused on? There are a lot of things other than those [craftsmanship] characteristics that the judge can be focused on. Maybe extracurricular activity. Maybe the goal of writing a splashy opinion. Those are a couple of things that come to mind. …

I just read a short article by Mike Boudin on Judge Friendly's dissents.[27] One thing he observes is that Friendly's dissents were pretty much equally divided to the extent that there were any ideological division in the judges on the panel — they are pretty much equally divided between dissents from Democratic appointees and dissents from Republican appointees. My suspicion is that is probably generally true on our court nowadays. That would be true of most dissents: most dissents don't fit into a simple ideological slot. I was thinking of asking a clerk to search my own separate opinions to see what comes up there.

Mr. Nuechterlein: That is probably a change from 25 years ago.

Judge Williams: Absolutely. Certainly the dissents that I remember.

Mr. Nuechterlein: I have always wondered — there are these two turns of phrase that can conclude any dissent: one is "I respectfully dissent," and the other is "I dissent." Does anyone attribute any significance to the presence or absence of that adverb?

Judge Williams: I don't know. The gossip is that one of my former colleagues, when presented with a draft dissent by a clerk, made one change and that was to delete "respectfully." I take it that for him at any rate it meant something.

Mr. Nuechterlein: Today we are going to focus on what I loosely call "business law" cases, particularly the regulation of competition within various industries. As I look through my list, all but one of those industries could be classified as a high tech industry. I want to begin with antitrust and a particular focus on the *Microsoft* case.[28] When I think of antitrust law in the lower courts, I don't think specifically of the D.C. Circuit, and I get the sense that the D.C. Circuit does not get as many antitrust cases.

Judge Williams: I think that is absolutely true.

Mr. Nuechterlein: Is that simply because defendants don't have their principal place of business in the District of Columbia, and there is no statutory provision that makes the D.C. Circuit always an available forum?

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[27] Michael Boudin, *Friendly, J., Dissenting*, 61 Duke L.J. 881 (2012).

[28] *Microsoft* was also a topic of discussion in Session 4.

Judge Williams: That must be it.

Mr. Nuechterlein: It is somewhat anomalous given the number of antitrust-like issues that the court addresses coming out of the regulatory agencies.

Judge Williams: Yes.

Mr. Nuechterlein: So the *Microsoft* case arose, as I am remembering, before your court in the year 2000?

Judge Williams: Oral argument was before us in the winter of 2001.

Mr. Nuechterlein: I remember it well because I had just left the FCC and was about to join Wilmer, and I remember listening to it on the radio. It was really quite a gripping argument, and it went on forever as I remember it.

Judge Williams: Well, it was two days, although the second day, things sort of petered out.

Mr. Nuechterlein: So the case was heard en banc initially.[29] Could you say a little about how that came to be?

Judge Williams: Well, I recall it quite vividly. I was somewhere, I think it was at an ALI meeting in Philadelphia, and an e-mail came around from Chief Judge Edwards. … He didn't say what the topic was, except that it was about *Microsoft*. So I remember being puzzled and exchanging an e-mail with another judge asking what this could relate to. Today, I would just call Harry.

Mr. Nuechterlein: You knew that Judge Jackson had issued an order in the district court …

Judge Williams: No doubt the appeal was pending before the court, but the decision to treat it initially en banc had not yet been made. We did gather at the time specified, and Harry proposed that we do just that. His reason was that there were seven non-recused judges — if it went to a panel and the panel split, there would be no way in which the case could be en banced under the rules then prevailing, under which a recused judge counted as a 'no' on en banc.[30] It was a

[29] Typically, the court sits en banc only after a three-judge panel has issued a decision. It is unusual for the court to bypass a panel altogether and hear a case en banc from the outset.

[30] Federal Rule of Civil Procedure 35(a) was amended in 2005 to exclude disqualified judges from the vote count.

mathematical truth. It seemed that, for something as important as this appeared to be, to follow a procedure in which en banc was simply mathematically impossible was not a good idea. So we all agreed without much hesitation and were probably in part influenced by the thought that this was an intriguing case and we would all like to be involved in it.

Mr. Nuechterlein: Did it seem to you at the time that the likelihood of Supreme Court review would be lower if the court [went] en banc?

Judge Williams: I didn't think of that. If I did think of it, I would have thought yes, that was probably true.

Mr. Nuechterlein: Your point about recusals makes me want to ask a question about them. Presumably there were recusals because people owned Microsoft stock.

Judge Williams: I think that's the case, yes.

Mr. Nuechterlein: I recall that Justice O'Connor recused herself in every case involving AT&T because she owned AT&T stock. Wouldn't it make sense simply to require federal judges to divest themselves of an individual company's stocks if there is any material likelihood that they are going to be asked to adjudicate a case involving that company?

Judge Williams: There is an exhortation in the Canons [of Judicial Conduct] that judges do just that. Obviously on its face that is an attractive suggestion. I assume that the only reason it [isn't a requirement] is that, under current law, a judge could be exposed to a huge capital gains tax, depending on when the judge bought the stock, and people in Congress were reluctant to impose that burden. That in turn would be soluble by having some sort of roll-over provision. Why Congress would not do that I have no idea.

Mr. Nuechterlein: So, back to *Microsoft*. The readers of your transcript 30 years from now may not immediately know what the *Microsoft* case was about. Microsoft makes an operating system that, at the time, had something like an 80-95% market share, depending on how you defined the market. And there were various claims in the case that Microsoft had illegally preserved its monopoly power by suppressing middleware such as Netscape or Java. The district court, which was Judge Thomas Penfield Jackson, found Microsoft to have violated Sections 1 and 2 of the Sherman Act. He then

imposed a rather extraordinary remedy — splitting up Microsoft into two different business units, even though Microsoft was a unitary company and there wasn't any easy way to accomplish that. So the two main issues in the case were (a) was Microsoft liable under the antitrust laws and (b) if so, what would an appropriate remedy be.

Judge Williams: The first of those issues divides up into the tying claim and what the Europeans [would call] "abuse of a dominant position."

Mr. Nuechterlein: Correct. If I am remembering this correctly, the Court of Appeals upheld the district court with respect to the latter theory — illegal monopolization — but rejected the district court's finding of an illegal tie. You imposed a rule-of-reason analysis rather than a per se analysis..

Judge Williams: Yes — we remanded for that modified view to be applied, but my recollection is that, on remand, the Justice Department dropped [the tying claim]. Let me just add that, on the monopolization argument, we also sorted out different types of acts. So that some of the things that had been found to be unlawful by the district court, we found that the case had not been made.

Mr. Nuechterlein: In fact, all the theories against Microsoft involved allegations of unlawful single-firm conduct. As we know, ever since the Chicago School arose in the '70s and '80s, there has been significant academic debate about the proper scope of antitrust prohibitions on single-firm conduct. Yet this was a unanimous opinion, finding violations of Section 2 of the Sherman Act. I have two questions about that, one procedural and one substantive. The procedural one is that this was a huge opinion, had many different parts, was very controversial at the time — and yet the entire opinion was unanimous. There is not a single separate statement by any judge. It is marked "per curiam," which means the whole court took responsibility for everything in it. That is extremely unusual [for such a case].

Judge Williams: How did it happen? I think the members of the court thought that—in a case of what seemed to be its importance (whether it was really important I guess history may have different views on or support different views, but it seemed very important at the time)—we all felt that if we could agree, that was enormously desirable. One thing is that, if we agreed, that probably increased

the probability that what we were saying was right. That is not always the case, but we had a sense that it was true.

Mr. Nuechterlein: Can I stop you there? That does sound somewhat counterintuitive. It is true that, in a political context, consensus usually marks the point of social balance. But if you are talking about trying to find the right answer to a question of complex legal doctrine, compromise isn't necessarily the way to get there.

Judge Williams: It isn't necessarily, that's certainly true. But I think we had a feeling, right or wrong, that searching for agreement meant listening to each other really carefully — and that the law was probably not so inscrutable or chaotic that if we did that we would not be able to reach a correct unanimous conclusion. One personal thing. I had the feeling, which I articulated to myself, but I also thought that there were two judges who were likely to be at opposite ends of the spectrum on this [set of issues], those might be Judge Tatel and me. But I also had experience with him by that time and found him to be a good listener — and a good speaker, obviously. So I proposed that we do some joint preparation, and we did. And that was extremely helpful.

Mr. Nuechterlein: Much of the first half of the opinion is focused on distinguishing between what might be called "competition on the merits" by a monopolist, which is pro-competitive and OK, versus "anticompetitive acts," which are not OK. And that line can be rather tortuous. …With respect to the monopolization discussion in the opinion, there is not a lot of theoretical hand-wringing about the ability of courts to distinguish between procompetitive and anticompetitive behavior by dominant firms.

Judge Williams: An absolutely accurate and fair point. As it worked out, in the first place, there are Supreme Court cases, which [we cited], which appear to create a kind of balancing test. Is there a purpose for a particular policy or act that is completely consistent with competition? Is there a purpose to be discerned from the act that is *not* consistent with competition? And then the Supreme Court appears to create, although it is not 100% clear, a kind of balancing test. So, in principle, there is the question of how on earth do you balance these [procompetitive and anticompetitive effects]? In fact, if you look at the sections of the opinion that deal with this, no occasion was ever presented to do the balancing. … For some things, Microsoft never offered a purpose consistent with

competition, so that ended the matter, at least if the government had given an indication of an anticompetitive purpose and effect. … Certainly failures of Microsoft or the government [*i.e.*, to give such an indication] at either of those stages produced the result without any balancing at all. You'll see that no balancing in fact goes on in the opinion. …

Mr. Nuechterlein: The Antitrust Division had not yet fully articulated its "no business sense test," which it later articulated in its amicus brief in *Trinko*.[31] … [W]hat courts often say about single-firm conduct cases is that antitrust law should suppress activity that over the long term will harm consumer welfare in some measurable sense (in the net) and that it should permit conduct that over the long term will help consumer welfare, in the net. The distinction between those two things is going to vary from context to context; it is going to be a heavily empirical question. And it is not really susceptible to neat doctrinal formulas.

Judge Williams: I agree one hundred percent, and I am sure the Antitrust Division … would have to agree on that. I think the basic idea was to have a test that ordinary mortals and more specifically judges could apply and that would have a relatively high prospect of coming out right over the long run. And I think the appeal of that [no business sense] test, which you say was formulated clearly by the government only in *Trinko*, is that it doesn't involve this mystical weighing. The argument against that test would be that it allows too many possibly anticompetitive acts because, as long as there is a legitimate business purpose, that is the end of the case, or so it appears under that formulation. So what do you do when there is a little legitimate business purpose and a big anticompetitive purpose? At least in principle, you allow it to go forward. And if you don't allow it to go forward, then you are back to weighing.

Mr. Nuechterlein: One question I often have is, if we had it to do over again — if we could go back to the late 19th Century and write the Sherman Act from scratch — whether would we decide to include a Section 2 in it. I think most people believe there is a role in the law for prohibitions on anticompetitive single-firm conduct, but that is not an uncontroversial proposition. I have heard intellectually respected people argue that, over the long term, the line-drawing is so intractable and the risk of suppressing productive conduct is so

[31] *Verizon v. Trinko*, 540 U.S. 398 (2004).

great that we would be better off if we simply narrowed the scope of the antitrust laws to multi-firm conduct. Do you have views on that?

Judge Williams: I think [I have] the sort of conflicted feeling that a great number of people have. I see that as a highly intellectually respectable argument. Actually, I went on a program for the FTC in which we presented to judges and lawyers in the Caribbean [about U.S. antitrust law]. We [discussed] a Third Circuit single-firm misconduct case. One of the lawyers we were addressing came up with beautifully articulated arguments as to what competitors of the [defendant] in fact could have done to get around the obstacles supposedly created by its conduct, which was found to be unlawful by the Third Circuit.

Mr. Nuechterlein: Is this the *LePages'* case?[32]

Judge Williams: No, it isn't *LePage's* ; it's *Dentsply*.[33] And he seemed to do a fantastic job on that. But that certainly doesn't exclude the possibility of cases where the anti-monopolization rule can be useful. My understanding is, and this is totally vague, certainly we've never seen any effort to pull it together in the actual *Microsoft* litigation; it largely became moot.[34] I don't know if that's true; I have read intelligent people saying that.

Mr. Nuechterlein: Can you think offhand of a judicial intervention in single-firm conduct that has received consensus approbation by the antitrust academy?

Judge Williams: That is a wonderful question. The answer is no, but that may not prove much because I can't be said to have my fingers on the pulse of the antitrust community.

Mr. Nuechterlein: One of the challenges in the *Microsoft* case was that the industry was obviously changing very rapidly. In some ways, the case already looks sort of quaint in part because of the rise of non-PC computer hardware that people now use in their everyday lives

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[32] *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).

[33] *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

[34] Although this passage is obscure, JUDGE WILLIAMS appears to be stating that the *Microsoft* decision, while correct on the merits, produced only incidental consumer benefits because technological change promoted competition faster than the litigation process could.

[*e.g.*, smartphones]. Microsoft Windows no longer has the scary position it seemed to have twelve years ago. Early on in the opinion, the court acknowledged that, in high tech industries, courts should be more reluctant to impose strong remedies than to find liability because the remedies might more easily become immediately obsolete.

Judge Williams: Yes — the broad concept about the special problem of high-tech industries keeps popping up in the opinion, and I know it was critical, for example, in the treatment of the tying claim. I think the court did see that as a problem throughout. In fact, if you look at the violation findings by the district court that we actually affirmed, they were very narrow bits of Microsoft behavior, which undoubtedly seemed big to the victims at the time, but they were pretty specialized and narrow things, and I can't believe we did much harm by striking them down. That doesn't mean we accomplished a great deal by doing that.

Mr. Nuechterlein: There is also the question whether the middleware threats that the suit was designed to preserve were genuine threats to Microsoft.

Judge Williams: Yes. Now the one thing on that – my recollection is there were e-mails from Bill Gates himself, which clearly took the view that they were.

Mr. Nuechterlein: But he might have been wrong.

Judge Williams: He absolutely might have been wrong. Absolutely. No, it's interesting — corporate chiefdom is slightly paranoid. Does that mean that the assumptions that he bases his fears on are sound? How do you treat them? You might say he was in a better position to appraise them than we were.

Mr. Nuechterlein: True. There is an interesting passage in the opinion about the role of causation in antitrust analysis. Once you have concluded that a particular form of conduct is anticompetitive and could harm nascent competition, the court appears reluctant to engage in a full-throttle investigation of whether that [nascent] threat was a genuine threat.

Judge Williams: You're talking about the threat to Microsoft?

Mr. Nuechterlein: Yes — once it was found that Microsoft took anticompetitive acts that could disadvantage nascent potential competition …

Judge Williams: I see.

Mr. Nuechterlein: … the court doesn't look particularly hard at whether that nascent potential competition would have been a serious threat over the long term.

Judge Williams: Again, I think that probably seemed a perfectly good way of treating the matter because, for the things for which Microsoft was found to be liable — they were things for which it had no explanation, no justification at all.

Mr. Nuechterlein: By the way the opinion is sort of interesting as well in that, although it is per curiam, different sections have very different voices.

Judge Williams: Have they been run through computers yet to determine which voice was at work at each?

Mr. Nuechterlein: I have my suspicion about which sections you may have played a particular role in, but I suppose that is still off the record?

Judge Williams: Yes I think it is.

Mr. Nuechterlein: OK — the final portion of the opinion was the unpleasant matter of disqualification. The case itself had sort of a fraught history, in that the D.C. Circuit disqualified two district judges who had been involved in Microsoft matters. First, Stanley Sporkin in the prior round.[35]

Judge Williams: Yes — I had forgotten that. What had he done?

Mr. Nuechterlein: I am having a hard time remembering, but I think it had something to do with his relying on too much on a book that he found particularly useful.[36] It wasn't in the record, but he liked it, and he acknowledged very publicly that he was relying on this extra-record material. And there were just various remarks of his that a panel of the D.C. Circuit, which I believe you were not on, found problematic.

Judge Williams: It comes back to me now — yes.

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[35] *United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

[36] James Wallace & Jim Erickson, *Hard Drive: Bill Gates and the Making of the Microsoft Empire* (1993).

Mr. Nuechterlein: Then the Court of Appeals en banc disqualified Judge Jackson [in the later case].

Judge Williams: Just for the record, [he had] prolonged conversations with a journalist about the case, while the case was going on, in which he shared his views with the journalist apparently. One has to assume that, to some extent, the journalist, at least by body language, must have responded to those.

Mr. Nuechterlein: Yes. This was obviously a big moment in Judge Jackson's career, and yet as far as I can tell, he wasn't given any opportunity to submit anything to the Court of Appeals.

Judge Williams: That's interesting.

Mr. Nuechterlein: And so there is a process question.

Judge Williams: You mean if it had been done in the form of mandamus then the brief would have come nominally from him, although in all likelihood someone from the Justice Department would have prepared it?

Mr. Nuechterlein: Although, in this case, the Justice Department didn't know about what he had done until after he had issued his final judgment, because he had embargoed [the article]. Then, at oral argument, DOJ refused to defend what he had done. So no one was defending what he had done before the court of appeals.

Judge Williams: Is that true? I thought there was some, perhaps not full-throttle defense. But there was none whatever?

Mr. Nuechterlein: I was just reading this section of the opinion yesterday, and there is an extended quote from the DOJ attorney saying that "I have no brief to defend Judge Jackson's discussion of this case with the press."

Judge Williams: Am I not right in thinking the Department did oppose his being removed from the case?

Mr. Nuechterlein: That is possible. Yes.

Judge Williams: That is interesting. I had forgotten that. I am trying to think how normal recusal litigations go. When it's mandamus, the order is directed to the court, let's say the district judge in question, to explain himself. It seems to me on those we have actually gotten

briefs from the government, presumably done in coordination with the judge. It must depend upon where the objection is coming from. Maybe the lion's share of them comes in criminal cases where it is the defendant who is calling for recusal. I think that is the most frequent claim for recusal. So that does create, I think, a sort of logical entry point for the judge's views. But you're right there wasn't one here. I think apart from this criminal defense situation, which is probably the lion's share of them, what happened in our case is probably typical. I don't think there was any dispute about the facts — of course, if one side is unrepresented, it's hardly surprising there's no dispute about the facts. It's hard to say the facts [here] were indisputable, but I think there was a basic story that did seem to be unquestioned. I think there had been some motion before Judge Jackson that had given him an occasion to set forth whatever. …

Mr. Nuechterlein: The opinion is interesting in that, towards the end, you acknowledge that Judge Jackson was feeling some degree of pressure because Microsoft was conducting a PR campaign at the same time, and it was apparently driving him crazy because he viewed the PR campaign as consistently distorting what was happening at trial. And he was aware that this was one of the highest-profile cases of that time and wanted to make sure the record was set straight. Your opinion acknowledges that judges are subject to a strong impulse to get the truth out and defend the exercise of the rule of law in the face of distorting PR campaigns. But you also point out that that's just corrosive to the public perception of the judiciary.

Judge Williams: I don't know if it was said [in the opinion, but,] as you pose it now, my reaction [to judicial frustration with a party's PR campaign] would be [to ask]: what are the methods of getting the record clear, and [is] the method of getting the record clear by statements on the [trial] record? Statements on the record would present a problem because the parties and the press hearing the judge [would] issue rebuttals … And at least beyond some incredibly hard-core types of misrepresentations, [we'd] probably think this was showing off a tender skin, so there would be limits on that. …. But to have private conversations with a journalist seems like a really, really bad way of doing it.

Mr. Nuechterlein: So I have a segue here — let's see if it works. The two judges that were disqualified from the collection of Microsoft lawsuits in the

last decade of the 20th century were Judges Jackson and Sporkin. Those are also the same two judges that you shared a district court panel with in the "must carry" cases.[37]

Judge Williams: A three-judge district court.

Mr. Nuechterlein: So of the three, you were the designated court-of-appeals judge, and the two of them were district judges. The way the [jurisdictional] statute worked is the constitutionality of [the challenged] statute would be assessed by a three-judge district court, with one court-of-appeals judge sitting by designation, and then there would be a right of direct appeal by the loser to the Supreme Court of the United States.

The most important provision at issue in that set of cases was the so called "must carry" provision, which requires cable companies to carry the signals of all broadcasters located within the coverage area of their cable systems. Congress gave a couple of reasons for that requirement. One of them was, without it, broadcasting would wither and die because more and more people were watching TV over cable systems than over the airwaves, and if over-the-air broadcasting was not carried on cable, then the advertising revenues would shrink for broadcast TV and the business model would become untenable.

Judge Williams: In fairness to Congress, you should add that this [dynamic] would leave, they said, people without access to cable utterly deprived [of television].

Mr. Nuechterlein: It would seem, speaking out of school, that a more sensible solution to that concern would be simply to grant vouchers to people to subscribe to cable service.

Judge Williams: There were lots of alternative methods.

Mr. Nuechterlein: Another rationale given by Congress is that local broadcasters were unique sources of news and other local coverage in particular communities and that, if they were not carried by cable systems, then viewers of TV over cable systems would lose access to local coverage.

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[37] *See generally Turner B'casting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner B'casting Sys., Inc. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

Judge Williams: That seemed to move the case into the content-specific aspect of First Amendment law. That [statutory promotion of local coverage] was never a [constitutional] concern at least [for] the Supreme Court majority.

Mr. Nuechterlein: It wasn't a concern of the district court majority either. There were two phases to this case. One of them was in the early '90s and involved, among other things, the proper standard of First Amendment review. That was *Turner I* . And then *Turner II*. You were in the dissent in the district court in each phase of the case. … In the first case, there was a majority opinion written by Jackson, and Sporkin concurred in the opinion but also wrote separately. You dissented. [On appeal,] the Supreme Court [held] that intermediate scrutiny would be the legal standard, and the case was remanded to the district court for fact-finding on whether Congress had met that First Amendment standard. Sporkin resolved the [second] case on summary judgment on the ground that the statute could be deemed to have satisfied that standard. You would have resolved the case on summary judgment the other way. And Jackson was in the middle, saying "I don't think we have enough facts yet to rule on these cross-motions for summary judgment, but because I must vote one way or the other, I will vote with Judge Sporkin."

Judge Williams: It appears, as you recount it, a complete non-sequitur.

Mr. Nuechterlein: That occurred to me as I was reading this last night.

Judge Williams: I'd certainly forgotten it.

Mr. Nuechterlein: In your initial dissenting opinion in '93, you found that the must-carry provision triggered strict scrutiny because it was a content-based form of regulation of speech.

Judge Williams: I assume that was on the basis of the congressional purpose to protect the unique characteristics of what the locals had to say.

Mr. Nuechterlein: Yes, that is correct. It raises interesting first principles of free speech jurisprudence because there was nothing viewpoint-based [in the must-carry statute].

Judge Williams: It was not viewpoint-related.

Mr. Nuechterlein: Purely content-based. And [Congress's] sense was that it is good

for an informed electorate to have access to broadcaster-supplied local coverage, so let's make the cable companies carry this local coverage. You would have applied strict scrutiny to that judgment. Which was a perfectly defensible way at the time of viewing the First Amendment. But it does seem to be a very categorical approach because [the statute] doesn't raise concerns about censorship or the government favoring one side or the other.

Judge Williams: It's true. My recollection is … that the Supreme Court hasn't articulated clear criteria about when non-viewpoint but content-based discrimination gets particular types of scrutiny. My recollection also is there are certainly more cases that said flat out: "[if] content based, [then] strict scrutiny." Maybe I was over-applying it. … The plurality opinions in both [*Turner*] cases are just about the same. They go off essentially on a bottleneck monopoly theory, and that struck me as just desperately weak.

Mr. Nuechterlein: You are saying the bottleneck theory is desperately weak, not because cable was not a bottleneck …

Judge Williams: It was terribly easy to get around it from a customer's point of view. The A/B switch seemed to be the single biggest obstacle, but the record showed you could get one for $70.[38] …

Mr. Nuechterlein: This was also earlier in time before the rise of satellite [TV services]. In the 1993 opinion, you said: "In considering cable, Congress confronted a very real problem — one for which it has an easy remedy entirely consistent with the First Amendment. The problem is that cable systems control access 'bottlenecks' to an important communications medium."[39]

Judge Williams: That is interesting. So I bought it in the first round.

Mr. Nuechterlein: You did. But you pointed out that [there was] a non-content-based solution to the problem of bottlenecks, which is to impose a common carriage principle on the cable systems.[40] Which is ironic

[38] Affixed to a television, an A/B switch allows consumers to switch easily between cable signals and over-the-air broadcast signals.

[39] *Turner B'casting Sys., Inc. v. FCC*, 819 F. Supp. 32, 57 (D.D.C. 1993) (Williams, J., dissenting).

[40] *Id.* ("There are well-developed regulatory responses to this sort of situation. The 'bottleneck' holder may be ordered to serve all parties that meet neutral criteria for service. The Federal Communications Commission itself administers just such regulations in assuring that interstate long-distance telephone companies have access to local telephone networks.").

because I think they would have hated it, the very cable systems [that challenged the must-carry law].

Judge Williams: Right, right, right.

Mr. Nuechterlein: So this went up to the Supreme Court, and they decided Solomonically to adopt a standard of intermediate scrutiny. The case came back down, and you had additional proceedings on whether Congress had met its intermediate First Amendment burden. Maybe I wasn't following this closely enough, but this struck me as an odd exercise. You are in essence holding Congress to a sort of APA obligation in connection with an exercise of regulatory power. I can't recall now whether it's relevant what the facts are that were not before Congress. In other words can you have freestanding fact-finding in that First Amendment setting?

Judge Williams: I think this is a completely unresolved question of constitutional law. You know that the Supreme Court, from time to time, strikes down a statute on the basis of its finding that the facts do not sustain a congressional viewpoint. My recollection is that we sort of fudged the issue on both sides as to whether the presence [or absence] of a fact before Congress made any difference, but that obviously does take the Supreme Court into a somewhat unusual role. On the other hand, if there's going to be serious review of constitutionality of statutes — and one hopes there should be, particularly for the First Amendment — [the courts] certainly can't let Congress just assume a bunch of facts that have no basis in reality.

Mr. Nuechterlein: This was a set of cases in which your position lost not once, but twice before the Supreme Court — although in both cases, as I recall, in close votes.

Judge Williams: The second one was 4-4-1 with almost no overlap between Breyer's separate opinion and the plurality opinion.

Mr. Nuechterlein: How does it feel when the Supreme Court objects to a position that you care a lot about and have written on?

Judge Williams: It's disappointing, but it's the nature of the job, so I don't go home and weep. …

Mr. Nuechterlein: [Let's] move on to another topic in communications law: the FCC's efforts over the last fifteen years to implement Congress'

directive that the FCC cap the number of total subscribers nationwide that any cable system (or affiliated group of cable systems) can reach.[41] The theory underlying this legislation is that, if too many people watch TV over the same affiliated group of cable systems, then that [group] would have undue power to suppress independent programmers. So Congress told the FCC to limit the reach of cable systems so as to ensure that independent programmers would not face market power by a monopsonist in the market for distribution for cable programming. As I articulate that issue, one question that immediately comes to mind is that this legislation seems in some tension with the Chicago School's insight that, with well-established exceptions, concerns about vertical leveraging of monopoly power are misplaced. It may be that there was an exception to that principle here. But Congress' basic concern was, rationally or irrationally, that cable systems would discriminate in favor of their own programming and against programming of independent entities.

As a result, it limited the number of subscribers that any given cable system could reach, and it directed the FCC to come up with a number. The FCC had a variety of mathematical formulas that led it to say that programmers really needed an open field of something like 40% of viewers nationwide in order to reach an efficient operating scale. But then it didn't draw the natural conclusion that the number should be 60%. It … cut that figure in half to 30% on the ground that there might be collusion between two unaffiliated cable companies to discriminate against independent providers of programming. This coming back?

Judge Williams: I do remember the 30% figure, and I do remember some strange moves the Commission was making. I suspect we said — I don't remember saying this, but it sounds as if we might well have said it — why do you think collusion is likely, and if collusion occurs, why not stop it?

Mr. Nuechterlein: What was interesting is that the [court could have] reached the same outcome through traditional APA analysis. There were a variety of empirical holes in the FCC's analysis, which by themselves would have warranted a remand.

Judge Williams: Wasn't it sort of an APA [decision] with a First Amendment

[41] The opinion discussed in this portion of the interview is *Time Warner Enter. Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

flavor? Or First Amendment with an APA flavor?

Mr. Nuechterlein: Well, that is what I was going to ask about. There is a First Amendment dimension to the case: you basically apply intermediate scrutiny, and you say this imposes on the FCC a particularly strong need to justify what it has done. As I was reading the opinion, I came to the conclusion that the FCC would have lost either way — whether you imposed a First Amendment overlay or not.

Judge Williams: That's interesting. I think the answer is quite possibly yes, but when you fix your glasses for viewing through a First Amendment lens, you don't have to address the exact question of whether [viewed through another] lens it would come out the same way.

Mr. Nuechterlein: Although what is interesting — and remember this tape is being embargoed for some period of years — you were on a panel that produced an opinion a few weeks ago in the *Tennis Channel* case.[42] One of your colleagues [in a concurring opinion] had an extended First Amendment analysis of why the FCC's reasoning didn't pass muster. And you wrote the opinion for the court, which was extremely short and said the FCC analysis had no empirical basis [for finding that Comcast Cable had 'unreasonably restrain[ed] the ability of an unaffiliated video programming vendor to compete fairly,' in violation of Section 616 of the Communications Act].

Judge Williams: … without getting into the nature of the legal standard at all.

Mr. Nuechterlein: This was probably an exercise in judicial humility. You didn't perceive a need to have a long discussion of First Amendment jurisprudence in the case because it wasn't necessary. As I was reading the *Tennis Channel* opinion, I was thinking of this stylistically: there is some contrast to the cable ownership case, where you [also] didn't strictly need to discuss the First Amendment.

Judge Williams: Oh, that is interesting. Huh. Huh. So you are suggesting that maybe the Williams of 2013 approaching the cable ownership case might just have said, "let's forget about the First Amendment." My recollection, which may well be wrong, is that … the First

[42] *Comcast Cable Commc'ns v. FCC*, 717 F.3d 982 (D.C. Cir. 2013). The concurrence discussed here was by then-Judge Kavanaugh.

Amendment had some sort of role in appraisal of this statute [that] was not disputed. Once you get below intermediate scrutiny, there is not much left so if they did agree on some First Amendment role, you are already at intermediate. … I guess that I didn't think we were in significantly dangerous territory in what we said about the First Amendment there. …

Mr. Nuechterlein: Different judges have different attitudes about the First Amendment in business law cases. Justice Kennedy … has a very expansive view of the First Amendment's role in these cases. From my own personal perspective, there are lots of forms of government intervention in the media/communications marketplace that are wrongheaded, but that I would not personally invalidate as violations of the First Amendment, because I view the First Amendment as being designed mostly to ensure that there is a robust exchange of views in society and the government doesn't censor them.

Judge Williams: Right. I certainly understand that position, and I am sympathetic with it to a degree. But I think it certainly is the case that by [enacting] what looks like purely economic or purely structural rules, Congress can seriously impinge on the robustness of the debate. …

Mr. Nuechterlein: I want to turn briefly to a couple of cases that you authored in the first decade of the 21st century. We still don't have a term for that decade; some people call it the "aughts," but that doesn't seem to have caught on.

Judge Williams: I agree — it is a nameless decade.

Mr. Nuechterlein: One was in 2002 and another in 2004 — *USTA I* and *USTA II*.[43] "USTA" stands for United States Telecom Association, the trade association for the incumbent telephone companies. In each case, it was challenging the FCC's rules governing access by new entrants to the incumbent telephone companies' facilities for the provision of competing local services, and the FCC had adopted a fairly aggressive pro-sharing regime under its original 1996 rules [implementing the Telecommunications Act of 1996]. The Supreme Court [held in 1999] that the FCC had not explained why

[43] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

it was not doing what Congress told it to do, which was to limit the facilities subject to sharing obligations to those facilities whose absence would "impair" the ability of new entrants to provide service.[44] That subsequently became known as the "impairment" standard. The FCC took a very narrow view of that restriction on its authority to impose sharing rules even after the Supreme Court's remand. The result was these two cases, *USTA I* and *USTA II*, in which you ultimately invalidated the FCC regime that made the local telephone companies hand over, in most cases, all the network facilities needed to provide competing telephone service.

Judge Williams: [That regime] meant that a competitive local exchange carrier could thrive, theoretically at least, with no facilities at all.

Mr. Nuechterlein: That's right.

Judge Williams: Entirely as a paper phone company.

Mr. Nuechterlein: Yes. One thing that is interesting about that case to me is that it reveals the intersection of competition regulation with antitrust law. The FCC had a [minimalist] view of the impairment standard that I suppose is linguistically consistent with the language of the statute. But your reaction was that Congress could not have meant the impairment limitation to be that weak — it had to have something more like the essential facilities doctrine in mind, and even though this is not an antitrust case, it's still appropriate to look antitrust doctrine [to inform statutory interpretation].

Judge Williams: And one of my two opinions [was] criticized for relying on [the] Breyer dissent [in *Iowa Utilities Board*], but the Breyer dissent made essentially the point about the incentive effects of the FCC's rules. In the first place, [they created] a disincentive for the competitive [local exchange carriers] to actually do the things Congress dreamed would come of all this. And they similarly, in combination with of course the pricing rule, created a disincentive for the incumbent [local exchange carriers] to invest anything if it was immediately going to be made available to the competitors for free.

Mr. Nuechterlein: The FCC had a contrary vision of what Congress was trying to accomplish. The FCC, I think, basically concluded that these new

[44] 47 U.S.C. § 251(d)(2); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

entrants, which are called "CLEC s," would be unlikely to duplicate the core local facilities in ILEC network because those are the ones most subject to economies [of scale and] density.

Judge Williams: Yes.

Mr. Nuechterlein: And so, according to the FCC, Congress may have had a much more modest vision of competition in mind, in which CLECs would basically become resellers of incumbent telephone companies' services and compete on the bases of marketing, customer service, and to some extent price. So according to the FCC, although it didn't put it in these terms …

Judge Williams: What you say is interesting because I don't recall their ever articulating such a theory — that [facilitating] completely synthetic CLECs is just fine.

Mr. Nuechterlein: Yes, you had to give them a couple of drinks before they would acknowledge it. There was a hope that CLECs — over time, once they got a foothold in the market — would begin deploying their own facilities and distinguishing their services on the basis of their networks and not just customer service and marketing. But there was also a sense that, if that didn't happen, it wasn't such a big deal because the ILECs were so profitable that the cheap sharing arrangements weren't ultimately going to doom the ILECs if the prices were set right for these facilities. And that Congress just wanted there to be an easier resale option. Now, one reason the FCC understandably didn't phrase this point in such bold language is that there is a separate resale provision in the same legislation that has a different pricing scheme attached to it.

Judge Williams: Yes indeed.

Mr. Nuechterlein: One thing that is interesting about your opinions is that you were fairly assertive about divining a congressional purpose underlying the '96 Act and invalidating an expert agency's view of the right way to [interpret] that purpose.

Judge Williams: That's interesting —

Mr. Nuechterlein: For full disclosure, I have been involved in this industry, and I think the outcome you chose was the right outcome. I think history also confirms that, because this was all about a contest for access to conventional telephone company networks, which are becoming

obsolete in any event [in light of] internet protocol services. And the FCC regime had nothing to do with those.

Judge Williams: Right. No one was even arguing, as I recall, for this alternative view of the congressional purpose, so it seemed reasonable — and clearly was the reading Steve Breyer had of it — that the object was to actually encourage something like conventional competition …

Mr. Nuechterlein: … Does the story of the Telecommunications Act of 1996 raise any interesting questions about monopoly industries in transition and the best way to govern them?

Judge Williams: The fascinating thing there seems to be Congress' hope that what it was doing was deregulatory. At the same time it was looking forward to broad sunlit uplands of competition, the route [it chose for] that was an incredibly intensive form of regulation. …

Mr. Nuechterlein: Justice Scalia aptly pointed out in his 1999 [*Iowa Utilities Board*] opinion reviewing the FCC's first set of rules that Congress wasn't very clear about what it expected to happen in the wake of this statute's enactment. It was plainly written by opposing teams of lobbyists, and it may be just a fool's errand to try to figure out what Congress' "purpose" might have been.

So far we have done cable and telephones, and the list of regulated industries would be incomplete if we did not turn to the natural gas industry and your role in FERC jurisprudence. I am going to begin this by saying that I know nothing, or almost nothing, about natural gas regulation. I understand there are some similarities to telecommunications regulation, that the Natural Gas Act is patterned after the Interstate Commerce Act, that the same is true of the Communications Act, that there are bottlenecks, and that various forms of common carrier regulation are imposed — and that is about the extent of my knowledge. What is intriguing to me about you is that this is one of those serendipitous contexts in which someone who was a recognized expert in the field in an academic capacity goes onto a court and becomes the nation's thought leader on the same set of issues in an official judicial capacity.

Judge Williams: I think that's a bit of an overstatement on both sides.

Mr. Nuechterlein: I have a feeling that what I have said is true, but I don't have

enough knowledge to back it up. So you wrote a book called *The Natural Gas Revolution of 1985*…

Judge Williams: It is less than 100 pages.

Mr. Nuechterlein: The book*let* was entitled *The Natural Gas Revolution of 1985*. What happened in 1985?

Judge Williams: The FERC adopted an order, the core of which was to … completely define [its role] by the regulation of natural gas pipelines as pipelines, as sellers of transportation, as opposed to their role as sellers of gas. Congress had already intervened on the question of gas to some extent [in] the Natural Gas Policy Act of [1978]. The initial proposal, which … that book was about, was to essentially separate these two activities so that FERC's function would be confined to something for which there was a logical economic case — the regulation of pipelines as natural monopolists, which they to a significant extent were. … [I]n a sense, [Congress in 1978 ultimately took] the price of natural gas itself out of FERC's jurisdiction. But in the meantime, there was all this gas under prior contracts. … [Although] the gas market had become highly competitive, there were these arrangements by which natural gas purchasers were buying gas at highly inflated prices and being denied access to competitively priced gas. The subject was what [FERC] did to solve that. There were loads of different issues, and a lot of them were purely transitional. Our opinion in [*Associated Gas Distributors v. FERC* [45]] has been criticized for making more work out of some of these transitional issues than should have been the case. And there is a good deal of justice in that critique.

Mr. Nuechterlein: So to back up a bit, when did you first get interested in natural gas regulation?

Judge Williams: Really when I was a visiting professor at SMU — no, I got originally interested in oil and gas when I was a visiting professor at UCLA and talked with Dick Maxwell.

Mr. Nuechterlein: What year was that?

Judge Williams: That was '74-'75 I think. He was very charming person, good to

[45] 824 F.2d 981 (D.C. Cir. 1987).

talk with.

Mr. Nuechterlein: Had you done much work with regulated industries up to then?

Judge Williams: No, I really hadn't. And the strange part of the process was getting a call from SMU saying that they would like me to go there to teach energy law. What is "energy law?" After the visit at UCLA, I had started teaching Oil and Gas at Colorado, but I didn't teach energy law. It seemed to me a reasonable view of energy law was to look at [the field] as a regulated industry, and that is what I did ….

Mr. Nuechterlein: So when you published the monograph, *The Natural Gas Revolution of 1985*, presumably you were in transition from academia into the DC Circuit or very shortly before.

Judge Williams: I think [it] came out before my nomination went to the Senate.

Mr. Nuechterlein: Is it correct to say that you author a disproportionate number of FERC opinions?

Judge Williams: It is. I asked a clerk to check that out and see if one's intuitive sense of that was correct, and it was. …

Mr. Nuechterlein: You were discussing an early FERC opinion that you wrote — can you elaborate on it?

Judge Williams: Sure. Basically the criticism was that we … interfered with what the Commission had done on essentially the distribution of sunk costs. [Professor] Dick Pierce, whom I have a lot of respect for, [argued] that, in the first place, there was no particular logic in how to allocate costs …. It is the perfect sort of subject on which to defer to the Commission, and [that] seems to me a very strong argument. … Maybe [that] should have been the way [the case] came out; had I taken that view firmly, I would have been in the dissent on the issue. … I am pretty sure there are very considerable precedents in which the court gets over-involved in that [issue]. While we are on that [case], the most fun part of it was that there had been two [prior] opinions by a single panel — why they divided it into two opinions, I don't know. Both of them were called *Maryland People's Counsel v. FERC*.[46] Putting aside what the court did [in those cases], it certainly used some very

[46] 761 F.2d 768 (D.C. Cir. 1985); 761 F.2d 780 (D.C. Cir. 1985).

questionable economic language. So the great challenge in [our] opinion was to work the Circuit's way out of that language without doing violence to the *Maryland People's Counsel* decision.

Mr. Nuechterlein: Do you remember what the language was?

Judge Williams: … There is a point in my opinion where I talk about it. … [O]ne of the opinions is by Scalia and the other's by Ginsburg — Ruth, that is. They went on to glory! [Laughter.] … I think it had to do effectively with Ramsey pricing — there is language in those opinions which makes it sound as if Ramsey pricing is outrageous, terrible, bad.

Mr. Nuechterlein: I thought it was efficient.

Judge Williams: [Laughter.] Well, naturally, that is what made me want to improve on the language.

Mr. Nuechterlein: Have you had interactions with policymakers at FERC during your 25 years on the bench?

Judge Williams: There was a chairman, Charles Stalon, who had been chairman of the [Illinois Commerce Commission]. I had dinner with him at one point. I am not sure exactly what stage it was — I think I was on the court. He seemed to be a very analytical, clear thinker — [I thought] it would be wonderful if his role continued. And then [Richard] O'Neill, who has been, and I think is now again, [head of FERC's] equivalent of a policy planning office. I have ended up chatting with him a number of times.

Mr. Nuechterlein: Did you get the sense when you talked to them that they acknowledged your unusually substantial role in the development of natural gas policy?

Judge Williams: I think that's probably true, but I think, in the case of Stalon, it was such early days that [such an acknowledgment] would have been premature.

Mr. Nuechterlein: In my year of clerking for you, there were three clerks, one of whom came from the fossil fuels industry and seemed eager to work with you on FERC cases. And the other two of us were deferential to that wish.

Judge Williams: Did David [Lawson] come from Texas?

Mr. Nuechterlein: He worked in the natural gas or oil industry. He is an engineer by training.

Judge Williams: I didn't know that.

Mr. Nuechterlein: So we let him do all the FERC opinions, and I am wondering whether that is typical of your clerk classes.

Judge Williams: No — I would say it much more usually gets scattered around.

Mr. Nuechterlein: And I assume there is some radical disparity among your clerks in readiness to take on this area of law.

Judge Williams: As some of my judicial colleagues have said, once you get into it, it is not so bad.

Mr. Nuechterlein: And they always seem to be happy to defer to you in opinion-writing.

Judge Williams: Not always, no. There have been definite cases that I was sitting there assuming it would go to me, and the presiding judge assigns it to himself.

Mr. Nuechterlein: All right — I have no further questions to ask about FERC. I didn't really have any good questions to ask about FERC in the first place. … So we will break – you are going off to Boulder, and we will resume in the fall.

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Biographical Sketch
Honorable Stephen F. Williams

Stephen F. Williams was born in New York City in 1936. He was the youngest of three children born to C. Dickerman Williams and Virginia Fain, with an ancestry that included at least two passengers on the Mayflower. He graduated from the Millbrook School in 1954 and from Yale College, magna cum laude, in 1958.

Williams then attended Harvard Law School, graduating in 1961 alongside future Supreme Court Justice Anthony Kennedy and Judge Laurence Silberman, who decades later became Williams' close friend and colleague on the D.C. Circuit. After graduation, Williams served briefly in the U.S. Army Reserve, working in military intelligence in the wake of the Berlin Crisis. He then practiced law at Debevoise & Plimpton before serving for several years as an Assistant United States Attorney for the Southern District of New York.

In 1966, Williams began his 54-year marriage to his wife Faith, with whom he had five children: Susan, Geoffrey, Sarah, Tim, and Nicholas. From 1969 through 1986, the growing family lived in Boulder, where Professor Williams taught law at the University of Colorado and began building his legacy as one of the nation's preeminent law-and-economics scholars.

In 1986, Judge Williams was confirmed to a seat on the U.S. Court of Appeals for the D.C. Circuit. He took senior status in 2001 but continued with a nearly full caseload until he turned 80 in 2016, and he continued sitting on cases until his death in 2020. The opinions Judge Williams wrote during his 34-year tenure have greatly influenced American jurisprudence in a wide range of fields, including antitrust, regulated industries, and administrative law.

Although Judge Williams left his full-time teaching job in 1986, he never retired from academic life. As a judge, Williams wrote many law review articles and published two highly regarded books on economic reforms in pre-Soviet Russia: *The Reformer: How One Liberal Fought to Preempt the Russian Revolution* (Encounter Books 2017), and *Liberal Reform in an Illiberal Regime: The Creation of Private Property in Russia,* 1906-1915 (Hoover Inst. Press 2006). He also showed relentless enthusiasm for helping others with their own academic projects. His protégés—including many former law clerks—have gone on to become leading legal scholars in their own right.

Biographical Sketch
Jonathan E., Esq.

Jonathan E. Nuechterlein is a partner and co-leader of the Telecom and Internet Competition practice at Sidley Austin LLP in Washington, D.C. He previously served as General Counsel of the Federal Trade Commission (2013-2016), as Deputy General Counsel of the Federal Communications Commission (2000-2001), as Assistant to the Solicitor General (1996-2000), and as law clerk to Supreme Court Justice David Souter (1991-92) and D.C. Circuit Judge Stephen Williams (1990-91). He graduated from Yale Law School in 1990 and Yale College (summa cum laude) in 1986. He is the author, with Philip J. Weiser, of *Digital Crossroads: Telecommunications Law and Policy in the Internet Age* (MIT Press 1st ed. 2005 & 2d ed. 2013).