Oral History of Nathan Lewin

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Susan McMahon, and the interviewee is Nathan Lewin. The interview took place in Washington, D.C., on February 6, 2018. This is the second interview.

MS. McMAHON: I'm Susan McMahon and I'm here with Mr. Nathan Lewin. This is the second of our interviews for Mr. Lewin's oral history. Last time we talked about your early life, your time in law school, and let's begin today by talking about your clerkships. So you first started with Judge Lumbard on the Second Circuit.

MR. LEWIN: In 1960 when I graduated there were some top students in the class who could immediately qualify for a Supreme Court clerkship. I don't think that happens any longer. But there were a couple of people in the class who received immediate Supreme Court clerkships. John French, who was the president of the *Law Review*, I think clerked for Frankfurter. Richard Arnold, who was number one in the class and ultimately of course the chief judge of the Eighth Circuit, I think clerked for Justice Brennan. Phil Heymann clerked for Justice Harlan straight out of law school. So there were a couple of people who got clerkships immediately from law school.

These were done by and large on the recommendation of the faculty. Frankly I was a pretty shy student at Harvard, and I did not become that friendly with a lot of faculty members. I don't know whether I described this last time, but the summer

of my second year, the New York law firms that I was interested in came up to interview at Harvard. Did I describe this last time?

MS. McMAHON: Yes, and how none of them . . .

MR. LEWIN: So I couldn't get a job. I ended up working for Professor Benjamin Kaplan and we got along very, very well. I took his copyright course in the third year, got what was for Harvard a phenomenally high grade, so he obviously thought well of me. I applied for clerkships and, as I say, I was not an outgoing student who knew the faculty that well and my recollection was that I really very much wanted to clerk for Judge Learned Hand. I think that following year was maybe his last full year before he died. I didn't get that clerkship. It went to a fellow named Andy Schoettle on the faculty recommendation. But I did get a clerkship for Judge Thomas Swan, who was also retired, but he was still taking a clerk who would live in New York and would be shared with Judge Lumbard, who was the chief judge. So I did get the Swan-Lumbard clerkship.

Judge Lumbard ended up having two clerks. He had one clerk directly as his clerk and me as the Swan-Lumbard clerk. His full-time clerk was Fritz Schwarz, Frederick August Otto Schwarz, who ultimately ended up being years later corporation counsel for the City of New York. So we were Judge Lumbard's clerks starting with the fall of 1960.

Earlier, before we became his law clerks, Lumbard, together with Judge Henry Friendly and I think Judge Charles Clark, had heard a very high-profile appeal, which was the appeal in the case of the Mafia convention. *United States v. Bufalino*, I think was the name of the case. In Apalachin, New York, they had a meeting of top Mafia folks raided I think by the FBI. They all fled. They were subpoenaed to a grand jury in the Southern District of New York. They all took the Fifth Amendment when asked what they were talking about in Apalachin. The U. S. Attorney in the Southern District of New York indicted them all for obstruction of justice for taking the Fifth Amendment. Very dubious proposition that if everybody takes the Fifth Amendment, they are guilty of obstruction of justice, but they were indicted and they went to trial before Judge Irving Kaufman. There was a fellow in our law school class by the name of Marc Cherno who became a clerk to Judge Kaufman that year. Cherno and I were friendly from the *Law Review* days and he's a very nice guy. Kaufman had a reputation for being a brutal, nasty, hostile guy who would frequently fire his law clerks and then rehire them but, a really bad man, Judge Kaufman. But he was very, very ambitious. He was then a district court judge, wanted to be a judge on the court of appeals, which he ultimately became. He also wanted to be in the tradition of some Jewish Justices to be appointed ultimately to the Supreme Court. He geared his judicial activities towards these promotions. He, of course, sentenced the Rosenbergs to death, which

was high profile and made him look like a very law and order judge. People knew that he was a very nasty man. When Fritz and I became law clerks to Judge Lumbard, Lumbard had been assigned by the panel to write the opinion in that case reversing the obstruction of justice convictions on the ground that you couldn't convict people for conspiring to obstruct justice because they all took the Fifth Amendment.

MS. McMAHON: So they weren't just charged, they were convicted in fact?

MR. LEWIN: They went to trial before Judge Kaufman, a very highly publicized trial, they were found guilty, and Kaufman gave them substantial sentences. They appealed to the Second Circuit. The appeal had been heard before we became law clerks. The Second Circuit's procedure was that after they heard the appeal the three judges would send memos to each other. They were internal memos. All three panel members agreed that the conviction had to be reversed. Lumbard was assigned to write the opinion. As we started our clerkship, one of the tasks was to work on this opinion reversing the convictions.

Lumbard was a very fine man to work for. He was very open, perceptive, far from a legal craftsman. He was a great administrator. He was chief judge. He loved being chief judge, all the administrative things that went with it, but it was a joke frankly in the chambers, that you never let the judge try to write an opinion. He

had a male secretary whose name I think was Jim Ackell. Once when we were backlogged, Lumbard said, "I'll try a hand at this opinion." Ackell then distributed it to Fritz and me laughing about it, saying look how ridiculous it is, he tried to write his own opinion. So the clerks really did a lot of work in terms of writing the opinions.

Fritz and I worked on this opinion to reverse the conviction. It had been decided months before we came on as clerks, but the opinion was still in the process of being written. So we wrote the opinion, it was issued, a lot of publicity, conviction reversed.

The next day I'm in the elevator. I think we were on the 24th floor or something like that. The district court judges in the Southern District were on lower floors, and I'm going down in the elevator and I'm all by myself in the elevator. I pushed the button to go down to the ground floor, and the elevator stops at the floor that Judge Kaufman had his chambers on – I don't remember what floor it was, 13, 12, whatever it was – and I am alone in the elevator and Judge Kaufman walks into the elevator. So the two of us are in there all alone in the elevator. Now I had prior to that time just as a matter of interest sat in on trials in the courthouse, and I sat in on a trial with Judge Kaufman. I think it was one where Edward Bennett Williams was defense lawyer, and I wanted to watch that. Anyway, I'm in the elevator and Kaufman walks into the elevator and the two of us are alone in that elevator. And

he looks at me and he says, "You're Lewin." I thought to myself, "My God, how does he know who I am?" "You're Lewin." I said, "That's right, Judge." He says, and I remember these words clearly, he says, "You have ruined me."

I'm looking at the federal district judge and Kaufman apparently viewed this reversal of conviction as a blow to his possible advancement in the federal judicial system. He used those words, "You have ruined me, you're Lewin, you have ruined me." And again, within the building it was known that Lumbard did not write his own opinions – "what have Ed's law clerks said recently?" I guess putting those two things together he assumed – although I would have thought he would have known differently certainly with a panel consisting of Lumbard, Friendly and Charles Clark – that this was not something that a law clerk did. Nonetheless he singled it out, "You have ruined me." It was kind of a shattering moment.

MS. McMAHON: I can imagine.

MR. LEWIN: But that was Kaufman and who knows what the connection is. Years later when I was practicing law, I appeared before him. He was in the court of appeals, and I represented John Lennon on the appeal of Lennon's deportation order. His immigration lawyer, who was not an appellate specialist, came to me to handle the appeal, and I wrote the brief, and I argued the case.

Kaufman again knowing that he was not going to be the judge who was going to deport John Lennon, ruled in favor of Lennon and we won that appeal.

There was another case which was not high profile involving a lawyer here from suburban Maryland. The lawyer's name was Rosenberg, and he was subjected to a perjury trap. The U.S. Attorney in the Southern District of New York, a lawyer whom I respect, I think it was then Otto Obermeier who was the U.S. Attorney. They were after some Mafia figure, and somebody related to him retained this lawyer. They tried to find out from the lawyer where his client was and where the other person was. The lawyer was not cooperating. So they sent out two FBI agents who set up a perjury trap in which they asked him some questions which they knew he would not tell the truth. They then indicted him for perjury, and I represented him on appeal.

I still remember being in the courtroom. I argued the appeal, and one of the judges on the appeal was none other than Irving Kaufman. This was a time when I was regularly writing articles in the *New Republic* about legal issues. After I left the government, I started doing that. Kaufman then says to me in the course of the argument – maybe this was his little revenge on Lewin – "Mr. Lewin you're the fellow who writes regularly in the *New Republic,* aren't you? About legal matters?" I said, "Yes, Your Honor I am." He says, "Well what you write about are cases which are really outrageous and things where the courts should be

correcting that." I said, "Yes." "Well, you don't think that this is that kind of a case, do you?" I go into my legal argument, "it's a perjury trap." Kaufman, I think, was the chief judge of the three judges on the panel. My client had come up for the argument. He had been released. He was not sentenced to jail. He just ended up being disbarred as a result of his conviction. His trial judge was a very severe sentencer, but even so saw that this was not a case that this guy should go to jail. My client was sitting in the courtroom, and I think Kaufman knew that. At the end of the argument, Kaufman turns to both his colleagues on the bench and says, "In this case, we're affirming from the bench." That was it, you know. This was Irving Kaufman at his maybe standard Kaufman style, taking revenge on this guy who when he was a law clerk wrote the opinion that dented his reputation. Kaufman was not a nice man, and everybody knew that at the time but very, very personally ambitious. In any event that was one of the high points or low points of my clerkship the year that Fritz Schwarz and I clerked together.

Fritz was a terrific co-clerk, and we enjoyed working together. Then suddenly a couple of months into the clerkship, with no advance notice at all, I'm sitting in the office, and I get a call in which I'm told Professor Paul Bator was on the phone. Bator had clerked for Harlan, and Harlan had apparently assigned him to find every year a Harvard graduate whom he would recommend. Harlan would take one Harvard clerk and one clerk from anywhere else. Bator says to me on the

phone – I didn't really know him; I never took any classes with him – "Would you be interested in clerking in the Supreme Court for Justice Harlan?" Well my God of course. He says, "Well I'm going to recommend to the Justice that you be his clerk for next year but you have to go down and meet with him, go down to Washington and meet with him and see if he likes you and you can get along."

MS. McMAHON: Do you have any idea why or how the professor came to recommend you?

MR. LEWIN: I'm quite sure it was because of Benjamin Kaplan's recommendation. Maybe it was other people at the law school, but I was not the kind of student at law school who was an obvious star in terms of speaking up in class or doing things like that. I did my work on the *Law Review.* I was an officer of the *Review*, but I'm quite sure that this was the result of Bator getting a very high recommendation from Ben Kaplan.

It just came totally out of the blue. It's not as if I wrote an application or I filled anything out. Just suddenly pick up the phone and there is Bator on the phone, telling me he's going to recommend me to be the clerk for Justice Harlan the next term. So I went down to see Justice Harlan. I had never met him before. One of the things I was concerned with was that I was a Sabbath observer. There were only two law clerks, and I understood that you had Sundays off but other than that

you were going to be working at the Court. So Harlan and I had, we had a very nice meeting, I forget what we talked about exactly but he's an amazing man.

MS. McMAHON: What were your first impressions of him?

MR. LEWIN: Very, very positive. He never, during all the time that I knew him, ever disappointed me in any way. The first impressions were not only that he was a Justice of the Supreme Court but that he was very cordial, very open. It was a very big contrast from the clerkship that I had with Lumbard. With Lumbard, his instincts were good, he was very nice, but in terms of being a legal craftsman or writing opinions, which was not what Lumbard was good at. On the other hand, Harlan was astounding, in terms of both the work that he did and the attitude he had towards judging. He was a model Supreme Court Justice. Exactly what I thought a Supreme Court Justice should be.

He would write substantial portions of opinions. He would take all the cert petitions. This was before the cert pool, so every chambers reviewed all the cert petitions on their own. On every cert petition I or my co-clerk John Rhinelander would write a memo at the beginning of the term. As we had more work to do later in the term, the memos got shorter and shorter, but we would write memos to the Justice about every cert petition. Not the prisoner petitions, not the miscellaneous petitions but the actual printed petitions. Make a recommendation. Harlan had talked about the fact that he thought Justices' internal papers should be

destroyed or burned. Hugo Black did this, but apparently Harlan's papers are available I think at Rutgers or some place because somebody contacted me some time ago and said that they had seen my cert memos in the Harlan papers. Harlan had a terrific sense of humor too. I occasionally would write him cert memos in rhyme.

MS. McMAHON: Really?

MR. LEWIN: Some of them were sort of funny kinds of things. But any way we had this discussion, and I said to him, "I think I ought to tell you, Justice Harlan, that I am Sabbath observer, and I would have to leave early on Fridays and wouldn't be available on Jewish holidays." I was worried that the New York law firms had said, "Get yourself a dispensation from a rabbi." I thought he might say something like that too. When I told it to him, he immediately said to me, "Well, are you ready to work on Sundays?" I said, "of course, yes." I had thought – at that point also I was single – that I was going to take an apartment that was within walking distance of the Court on Capitol Hill. I did ultimately take an apartment there at the amazing monthly rental, I think, of $90 a month.

MS. McMAHON: Oh my gosh.

MR. LEWIN: On Capitol Hill. But I said yes. He said, "Okay that's fine, I've got two law clerks. Your co-clerk will come in on Saturdays and you can be here on Sundays." Fantastic. And my co-clerk, it turned out, was John

Rhinelander, who had graduated from the University of Virginia. He later became I think counsel to the Defense Department. He had a very illustrious career. Unfortunately he died a number of years ago. He was then single, and I was single.

It turned out that John Rhinelander's grandfather was the Anglican bishop of Pennsylvania I think, Bishop Rhinelander. Justice Harlan, whose grandfather after all was the first John Harlan, had a big painting of his grandfather in his secretary's office. He would occasionally bring guests who would come visit him to meet his law clerks. We had an office near the Justice's office. His secretary's name was Ethel McCall. John Rhinelander and I would be working there typing up memos or working on drafts of opinions, and he would bring his guests in to meet us. More than once he introduced us by saying, "Here are my law clerks, John Rhinelander, whose grandfather is the Anglican Bishop of Pennsylvania, and Nat Lewin, whose grandfather was the leading rabbi in pre-war Poland." That's how we would be introduced to Harlan's guests as they would come in. And we both got married right after I think the summer after our clerkship.

MS. McMAHON: Oh, really?

MR. LEWIN: And, of course, we invited Justice Harlan and Mrs. Harlan to the wedding in New York at the Fifth Avenue Synagogue, and they came. I don't have pictures here, but I have pictures which I ultimately sent to the *Supreme*

Court Review when they did a whole issue on Justice Harlan. There is a picture of him there in a yarmulke with his wife. The line for shaking hands and greeting people was longer for the Harlans than it was for the bride and groom. Everybody wanted to shake hands with Justice and Mrs. Harlan. They were very, very nice and very cordial during that entire year. Then there would be annual reunions of the Harlan clerks. Harlan's home was someplace up on R Street in Georgetown, so we would occasionally be there.

The clerkship was as model a Supreme Court clerkship as you could possibly imagine. You were working with a Justice who for whom there was really nothing else other than the matters that were up before the Supreme Court, and we had some pretty high-profile litigation that year. That was the year of *Baker v.Carr* on the whole question of whether you go into the reapportionment area, which Frankfurter of course felt was a political thicket that you should stay out of. Frankfurter felt very strongly about that. Harlan agreed with him. I worked on Harlan's dissenting opinion in *Baker v. Carr*. Frankfurter wrote a major dissent, of course. Harlan did too. The surprise vote in that case I think was Justice Clark, Tom Clark, who surprised everybody by coming out in favor of getting into the reapportionment thicket.

In the middle of the year Justice Whittaker, whose chambers were right next door to Harlan's, resigned. I remember Harlan telling me that Whittaker came in to say

it was such a relief to resign. Whittaker was very capable of taking care of technical tax cases. Whittaker would read his opinions from the bench with footnotes, and those are the cases he liked. But he told Harlan that when it came to questions like reapportionment, which Frankfurter was constantly badgering him about, and due process and equal protection, all these vague constitutional provisions, he found the decision of those cases just too much for him. He resigned in the middle of the year and Byron White was appointed to replace him.

So the last two sessions of that Supreme Court term, those two argument sessions, White was on the bench, but Frankfurter was not because Frankfurter had a stroke in the middle of that year. I still remember the day that happened. We were sitting in our office, and we heard ambulances and we didn't know what it was. Harlan came in and said, "You know, very quiet, we don't want to announce this, we don't want to tell anybody." In those days if a Supreme Court Justice was disabled or sick or something it was a very confidential thing, you didn't disclose it. He told us very confidentially that Frankfurter had been taken off to the hospital with a stroke. Byron White, as I say, had been appointed to replace Whittaker. Whittaker resigned, but Frankfurter stayed a member of the Court until the end of that term. I have on the wall in my office over here, I can show it to you, a print of the Supreme Court building which I sent around to the different chambers to have signed. Frankfurter signed it in the hospital. It is the Supreme Court as it

technically was at the end of the 1961 term, but they never sat together that way. Frankfurter was in the hospital, he signed that print, Byron White signed it because he was a member of the Court, but White never sat with Frankfurter although they were technically on the Court at the same time at the end of the 1961 term.

MS. McMAHON: What was the atmosphere at the Court like around that time? Were the Justices friendly with each other? Was there antagonism?

MR. LEWIN: There was not any open hostility that I saw, but there were differences in philosophy and opinion that sometimes could not be surmounted. I remember there was one case, I don't remember the name of the case. It involved the right to a jury trial. Our chambers, Harlan's chambers, were right next to Black's, Black's was a corner chambers, and we were very friendly with the law clerks for Justice Black. We were all male law clerks in those days.

MS. McMAHON: Of course.

MR. LEWIN: And the law clerks would get together. On that subject I should tell you that I was friendly with a woman lawyer who graduated Columbia Law School with high honors, a professor at Cardozo now. Her name is Malvina Halberstam. I knew her because she was Orthodox Jewish. I knew her from the Orthodox Jewish community. She was doing very well at Columbia, and she was applying for clerkships. I said to Justice Harlan, "There is an applicant for a clerkship who is graduating Columbia whose name is Malvina Halberstam. She's

really terrific. I think she would make a great law clerk." Harlan said to me, "Nat, I wouldn't be comfortable with a girl law clerk." That is what he said.

That was the year that he wrote an opinion, I don't remember the name of the case, in which one of the lines was, "A woman's place is in the home." The issue was whether a woman who was indicted for beating or assault on her husband in some southern state was entitled to get her conviction reversed because women were automatically excused from grand jury service. I don't remember the name of the case, but the Court held that it was constitutional, with Harlan writing the opinion saying that it makes sense. Women can automatically be excused because a woman's place is in the home. That is what he said in the opinion, 1961.

MS. McMAHON: Times have certainly changed.

MR. LEWIN: Harlan was very friendly really with the other Justices. He didn't have any personal battles. He was closest to Frankfurter. Frankfurter would occasionally pop into the Harlan chambers and even occasionally into the law clerks' office. I still remember the door opens up and there is Justice Frankfurter standing there to talk to us. Frankfurter viewed Harlan's chambers as being part of his. His kind of people he could talk to.

There was this case involving the right to juries, and we felt, and Justice Black's clerks felt, that the two of them should agree. Yet they were writing concurring opinions that were separate. We came up with this great idea that Harlan should

come in and talk to Black because they will discover that they really were on the same wavelength with regard to that case. We prepared the whole thing. We talked to Harlan. Black's clerks talked to Black. Harlan went next door, had a meeting with Black. We waited to see what the result would be. Harlan comes back to our chambers and he says, "I just can't agree with that man, I just can't agree with him." That is what he said, "I can't agree with him." And we said, "Why not?" There was a difference in terms of legal philosophy or attitude, but that's what happened. They ended up writing separate opinions, although they were very similar in terms of results, but they could not agree on the same opinion. That year also involved a New York State Regent's prayer, *Engel v. Vitale,* in which the Court, with the exception of Justice Stewart I think, ruled that the New York State Regent's prayer was unconstitutional. I certainly agreed with that at the time. Black was assigned to write the opinion. Black writes an opinion in which he says this is unconstitutional for a number of reasons including not only that the state is writing a prayer, but that the state is spending money writing a prayer. It's an expense out of the public funds for religion, which is not permitted according to Black. Black was very strict, very strict on that. Harlan disagreed with that. His view with regard to expenditures allegedly in violation of the establishment clause of the First Amendment was much closer to what the Court is today. It was not as absolute as Hugo Black was. So he did not join the Black opinion. He wrote a

separate concurrence in that case. It turned out that because there were a couple of Justices who did not participate in that decision, Black's opinion would only have gotten four votes. So Black toned down his opinion. Harlan said I will withdraw my concurrence if Black narrows his opinion so it does not talk about financing of religion. That is what happened. Black narrowed his opinion and Harlan withdrew his concurrence. I have the unpublished concurrence in my office. Just wait a minute, let me bring it in.

MS. McMAHON: Sure.

MR. LEWIN: So there [reading], "In *Engel v. Vitale* Mr. Justice Black assigned to write the opinion of the Court first circulated an opinion which held that the New York State Regents prayer was unconstitutional in three respects … an officially government-sanctioned prayer . . . preference . . . amounted to support of religion with tax funds. The breadth of the opinion prompted Justice Harlan to circulate the short concurrence which appears at page 1119 of this volume. Douglas also circulated a memorandum in which he expressed . . . to the result. It appears that Justice Black's opinion spoke for a majority of the seven-man Court but commanded no more than four votes. It was suggested by Justice Stewart that the case be set for re-argument so that the majority opinion would speak for at least five Justices. At this point Justice Harlan advised that he would be able to join Black's opinion if it were more narrowly drawn. Consequently, the decision was

composed and joined in by Justice Harlan as well as by Justice Douglas, and Harlan withdrew his concurrence." So he had originally written a concurrence. This was the limited ground on which Harlan would have concurred if Black's opinion had stood as was originally.

MS. McMAHON: Did you have any role in crafting this concurrence?

MR. LEWIN: I may have, I may have done a little bit of editing, but this was Harlan himself. He wrote that. He would write it and then he would give it to us to maybe make some suggestions. I don't remember. I may have made some suggestions. But this was the Justice's individual, personal work. No question. I remember that.

MS. McMAHON: Was that true of most of his opinions, and most of his writings, he would do the first . . . ?

MR. LEWIN: One case was a very technical milk marketing order case in which there was a conflict between circuits. I had worked on a milk marketing case when I clerked for Lumbard. It was very technical, and you had to work through the regulations to see what the impact would be. This case comes up to the Supreme Court. I don't think a single Justice on the Supreme Court really understood the milk marketing order. I did because I spent a lot of time on it. So I wrote this memo that Harlan distributed about the milk marketing orders. Long memo. I wrote all that – eighteen, nineteen, twenty-two pages. Harlan distributed

it, the case was argued, the Court rules consistently with this, I don't even remember the details of it. The opinion was assigned to Harlan because he was the only Justice who appeared to know what this actually did. I wrote the opinion in that case. The Lehigh Valley Cooperative Farmers case. I can't say that I felt that Justice Harlan totally understood it either, but he was willing to accept what I said about it. I haven't read this memo in years, but I wrote this. I wrote this whole thing, and the opinion follows that memo. So on something like that, very, very technical, he relied on his law clerks. And another thing that he relied on when I clerked was this case, which now is reported in various criminal law casebooks.

MS. McMAHON: *Robinson v. California.*

MR. LEWIN: *Robinson v. California* was a case involving a drug addict, who was arrested and prosecuted, not because he was using drugs, but because he showed signs that he was an addict. He wrote a pro se petition, which in those days were distributed on carbon paper. They used to call them "flimsies" because the prisoners' petitions were distributed on carbon paper. It was our job to look through the flimsies and see whether there was anything in any of them that warranted granting cert. I came across this case. Harlan says in his memo it should be taken off the special list a couple of weeks before, and it was again passed at our last conference so that I might look into it. I called his attention to it. I said this guy has been prosecuted not because he used narcotics or because he

was found with narcotics, but because he had needle marks in his arm. You can't prosecute somebody because he's got needle marks in his arm. The statute said, "be addicted to the use of narcotics." It recites how he was convicted because the examining officer said he obtained a fix at a gas station. He admitted that he had obtained a fix a week before his arrest, but not because he was then using narcotics. He was an addict, and that was a crime. Harlan said, [reading] "the punishing in this manner for the status of being a drug addict raises serious constitutional questions . . . ."

So I drafted this memo to the conference, and the Court granted cert in *Robinson v. California*, they granted a cert petition in that case. It was argued the last argument session of the term. Byron White was already on the Court, Frankfurter was after his stroke, but White was on the Court. The Court ruled that the conviction was unconstitutional. The case was not assigned to Harlan. It was assigned to Potter Stewart. Stewart wrote an opinion that did not follow this rationale. *Robinson v. California* said it violated the Fourth Amendment somehow, which is very peculiar because we had distributed this memo, and we thought it was a due process violation. The opinion as distributed came out very close to the end of the term. That's one of the problems at the end of the Supreme Court term. If they are ready to leave sometimes opinions get sent out very close to the end, and several Justices

signed on to Stewart's opinion. Harlan is shown in the U.S. Reports just concurring in the result on due process grounds.

I particularly recall that Byron White dissented. He had been Deputy Attorney General and he was very pro-law enforcement, even in his first term. He felt you could convict the guy on the evidence that was shown. So he dissented in his first term on the Court from that result. I was sort of shocked. We were sitting in our office as law clerks and the door opens and Byron White walks in. New Justice. He's there to talk to us, and to me really because I had written this thing about *Robinson.* He thought that the result that the Court reached was wrong and he was going to dissent. But he came as a young Justice, first came in to talk to Harlan's law clerks about it. I remember we had a couple of discussions. I had a couple of discussions with Byron White about *Robinson v. California*, which he knew I had lifted out of the pile of *in forma pauperis* cases and gotten the Court to grant cert and then to reverse. So that was another memorable thing during that year.

MS. McMAHON: How did you feel when Justice White walks in to talk with you?

MR. LEWIN: We discussed the merits of the thing. He was making arguments that the conviction should be affirmed, not reversed. As I said ultimately the decision in the case was not on the ground that Harlan and our chambers had taken it off the dead list, gotten the Court to grant cert and decided.

The bottom line being not what Harlan had urged, but on the ground that was not assigned. We had expected to be assigned the opinion because of this, but the opinion assignment process was such that it got assigned by the senior Justice in the majority. Warren being the Chief, he just assigned it to Stewart, and then now comes this opinion, which was a surprise.

MS. McMAHON: Are there any other cases that really stuck out to you during your time at the Supreme Court?

MR. LEWIN: Well, *Baker v. Carr*, *Engel v. Vitale*, the milk marketing case, *Robinson v. California*. One of the other things was that this was my introduction to Supreme Court advocacy. Today the law clerks come out to watch almost all the arguments. In those days, Harlan would say, don't bother coming in because there were a lot more arguments, they had 150 cases. "Don't bother to go in to listen except when you know I think it's worth your hearing it." I remember him saying there was an advocate, a Supreme Court lawyer by the name of Fritz Wiener, Frederick Bernays Wiener, who frequently appeared to argue cases in the Supreme Court. Although he was not arguing for the government, he still followed the traditional attire of people arguing. He would come in in tails. Harlan recommended we go in and hear Fritz Wiener's argument, and certainly Archibald Cox's arguments in the Supreme Court. There were a couple of people at that time who the Justice said, "It's worthwhile going in and you ought to hear the

argument." But I did not hear all the arguments. I don't know whether I heard 50 percent of the oral arguments in the Supreme Court that year, because the Justice felt your time is better spent doing something else rather than hearing the arguments.

MS. McMAHON: Do you think that seeing some of those arguments inspired you to be a Supreme Court advocate one day?

MR. LEWIN: It did not take much inspiration for me to want to be a Supreme Court advocate. When the opportunity presented itself to go work for the Solicitor General to argue cases in the Supreme Court, I grabbed it. There wasn't even a second thought about it. The year that I clerked after all was the 1961 term. In January of 1962, John F. Kennedy is going to be delivering the State of the Union message. Harlan says to us, "I'm not going to the State of the Union message because I do not think it is appropriate for a Justice of the Supreme Court, or for anyone from the judicial branch, to be there because it is a political event." Harlan as a matter of principle did not attend State of the Union messages. And told us why. He said that that was the reason. But it was very exciting, with the Kennedy administration, Robert Kennedy being Attorney General, people who were clerking on the Court thought about the next thing you were going to do. You were going into private practice or were you going to go to the government,

some government job. The idea of going to work for the Department of Justice was very exciting.

The law clerks of the Supreme Court had a room where we would have lunch. We could have lunch together, go down to the cafeteria, take our stuff, go over to the law clerks' lunch room. We invited very important people to come and have lunch with us, and they would speak to the law clerks. The Chief Justice's senior law clerk – the Chief had three law clerks, everybody else had two – had the job of arranging for these luncheons. He invited Harry Truman, and Truman came and had lunch with us. I have a picture at home of the law clerks with Harry Truman. We're sitting around this long table, and the door opens up and President Truman comes in, head of the table. He says, "Guys, I just want you to know you don't have to be a lawyer to be on the Supreme Court." Justice Black's law clerk, a very clever guy, yells out, "Mr. President, your appointments prove it."

MS. McMAHON: Do you remember any other speakers that you had?

MR. LEWIN: We had Dean Acheson. There was a whole incident with Robert Kennedy, the Attorney General. Kennedy was invited to come to speak with the law clerks. Kennedy had an original idea in response. He said "No, rather than me coming over there, why don't you law clerks come over to the Department of Justice and I will have Solicitor General, all the assistant Attorneys General and we'll all meet and have lunch together?" Great idea. So the day was set when all

the law clerks went over to the Department of Justice. There is a huge room in the Attorney General's suite at the Department of Justice, which is now basically used as a conference room, but Bob Kennedy put a big desk in there. He would sit behind the desk, and he frequently would have new lawyers or other lawyers at the Department of Justice sitting in a semi-circle around that desk in this huge room. He would talk to them. He was very good at motivating lawyers. Later when I worked at the Department of Justice, I saw that.

So we went over there. In that big room they had little tables set up and we sat around and had a great lunch with different Assistant Attorneys General and the Solicitor General. At the very end of that lunch Bob Kennedy says, "Okay, now take your chairs and sit in a semi-circle around here and ask some questions and we can talk." We sit around this semi-circle and Kennedy says, "Okay, do you have any questions?" People asked him some questions. Then George Saunders, Justice Black's law clerk, says, "Mr. Attorney General, Mr. Kennedy, when you were counsel with the Labor Committee, you subpoenaed the head of the Teamsters Union, Dave Beck, to testify." It was filmed or televised. "You asked him questions to which he took the Fifth Amendment." Kennedy says, "Yeah, that's right." Saunders says, "Well, you knew he would take the Fifth Amendment to all these questions. Why did you keep asking him more questions that made him take the Fifth Amendment?" Kennedy says, "Well. we have the right to go

and ask the questions and he's got to take the Fifth." Saunders did not let him go. He said, "But you knew that was just kind of embarrassing." At that point Kennedy got mad, and he pounded on the table and said, "Okay, thank you folks, it was nice having you here, goodbye." It ended on a really rough note.

We all went back to the Supreme Court. About a month or two months later an article appears in *Esquire* magazine about the Kennedy brothers, Jack Kennedy, Robert Kennedy and I think even then Ted Kennedy. They interview the Kennedys, and Bob Kennedy talks about the fact that you have to go through adversity in order to really know how to deal with life. He's quoted in the article saying, "Why just the other day I had lunch with the law clerks of the Justices of the Supreme Court. They were all at the top of their class at law school, their future is set for them, they've got no problems, they will have an easy time in life, they are soft, they don't have the power that one should have. All that they were able to talk about with me was the fact that the elevators in the Supreme Court were not working well." Derogatory statements about this lunch. I don't remember anybody complaining to him about the elevators, but that is what he says in the article. That article made its rounds in the Supreme Court and went to the Chief Justice, Earl Warren, as well. Warren issued a rule based on that experience that if the law clerks have lunch with any member of the Cabinet, they are not allowed out of the building. The lunch has to be in the building. That was the Chief Justice's ruling.

This was a big controversy that year that we clerked. These are kind of the memorable things you remember.

I was excited at the possibility that I would work for the Department of Justice for an Assistant Attorney General. My wife and I got married after that year, that summer, August of 1962, is when we got married. She was born in New York, raised in New York, and her attitude, which she had told me and has repeated to this day, is that she did not want to marry somebody who was going to be living any place other than New York. I managed to persuade her that, well, for a year or two years while I would be working at the Department of Justice it was worth living in Washington.

During the year that I clerked I applied to Assistant Attorneys General. There was a slot that was set up in the Kennedy Department of Justice as Special Assistant to an Assistant Attorney General. And the Supreme Court law clerks vied for those slots. One that everybody wanted was to be Special Assistant to Louis Oberdorfer, who was then Assistant Attorney General in the Tax Division. Not that I wanted tax law, but nonetheless everybody told me Oberdorfer was a fantastic guy. So I applied for that, didn't get it. Then they said, "The Assistant Attorney General in the Civil Division, John Douglas, he's really good, apply to John Douglas." I applied to him, didn't get it. And then finally somebody said to me, "Well, how about the Criminal Division?" I said, "Criminal Division, who wants to do

Criminal Law?" In those days you didn't do any Criminal Law. You had a little course at Harvard Law School on Criminal Law. You didn't want to do Criminal Law. But if that is the only way I am going to get to the Department of Justice, fine. So the Assistant Attorney General in the Criminal Division was a fellow by the name of Herbert (Jack) Miller. I applied for that, and I got that job. So I became Special Assistant to Jack Miller in the Department of Justice. The fact that he was in charge of the Criminal Division was not something attractive to me, but nonetheless that was a way of getting into the Department of Justice and persuading my new bride that it was worth a year or two years in Washington rather than moving back to New York. So I started in the Criminal Division after we got married. I took a short honeymoon and then started working at Main Justice. In those days Main Justice was totally open, no security.

MS. McMAHON: Oh, really?

MR. LEWIN: Zero. Anybody could walk in off the street. If your office was open, they could enter your office, take stuff off your desk and walk out of the building. Nothing, absolutely zero, in terms of any security at the Department of Justice. I had an office in the Criminal Division, second floor, and I got to work on a brief or two briefs in some important cases in the Second Circuit. I got to know Jack Miller a little bit at that point. I didn't really know him well. I became friendly with his First Assistant, who was the guy who really sort of got me into

this job, a fellow named Howard Willens, later with Wilmer, Cutler & Pickering, now WilmerHale, a fine lawyer. I was doing these briefs, and then Miller tells me, or Howard tells me, "There is this case down in Nashville, Tennessee that is going to go to trial soon against Jimmy Hoffa." I have to tell you, I barely knew who Jimmy Hoffa was. I was told this is very high on the Attorney General's priorities, and there are three lawyers down in Nashville who are preparing for this trial. The trial is going to start sometime in October or November. I forget exactly when. "We want you to go down there. They need a guy who will write the legal memoranda and work on the legal side of the case. Not do the trial work, but actually do the legal work in the case." So I said okay. I did not know how important Jimmy Hoffa was to Bob Kennedy at that point but nonetheless okay. So I packed up my wife, and we drove down to Nashville, Tennessee.

MS. McMAHON: So now it's not just Washington, D.C. but Nashville.

MR. LEWIN: Now it's Nashville, Tennessee, for a while, for a trial. And again this is the Jewish side of the thing. We arrived in September in the middle of the Jewish holidays. Three guys are waiting for me: Jim Neal, a guy by the name of Charles Shaffer, who was a very fine trial lawyer who ultimately ended up being John Dean's lawyer years later in Watergate, and a fellow by the name of Jim Durkin, who was in charge of the documents for the case. The case was almost all documentary. The whole theory of the prosecution had been created by Jim Neal.

Jim Neal was a lawyer from Nashville, very, very talented, very bright, who applied for a job with Bob Kennedy because Neal had a master's degree in tax law/ He had gone to Georgetown and gotten a tax degree. Bob Kennedy met him and hired him. Kennedy decided from his familiarity with Neal from the interview that Neal would be better in the Criminal Division as a trial lawyer. It was a brilliant decision because Jim Neal was a magnificent trial lawyer. He was in charge of the Hoffa case. He worked out this legal theory under which Hoffa was prosecuted for a bunch of misdemeanors that grew out of an arrangement Hoffa had with the Test Fleet company, which had hired the Teamsters. Payments were being made to Hoffa's wife, surreptitious payments. Therefore, Hoffa was benefitting illegally from this arrangement. So he was indicted on a whole bunch of misdemeanor counts that were to go to trial in Nashville. And I was sent down to be the legal guy.

When I arrived, they were waiting for me. They had all these legal memoranda that I had to write. I explained to them that on the Jewish holidays I would not be available. I'm told that they got on the phone that night to call either Jack Miller or Bob Kennedy or both to complain that they had sent down some guy who is not going to be able to do any work for them. After a couple of weeks they changed their tune. I immediately started working with this great team. Neal and Shaffer were phenomenal trial lawyers. The judge had earlier suffered a heart attack. His

name was Miller, and he would not sit in the afternoons because he was recovering from a heart condition. Court was only until 1:00. In those days, no security in the courtroom, nothing, other than marshals up front.

One of the memorable things happened during the trial. Hoffa had four lawyers for that trial, four lawyers. Hoffa would sit at the end of the table and the four lawyers were on the side. He had a local lawyer by the name of Osborne, who was a fine lawyer. Unfortunately, he was later convicted of jury tampering and went to jail and was disbarred. Here was the jury box, the government table was over here. Neal, Shaffer, and Dirksen, who was handling the documents, and I would sit behind them. We had an opening sliding door.

For a couple of days in the trial, the leading journalist in the United States then, Drew Pearson, came to hear the trial. He sat next to me. He slept through most of the time that he was there because it was a very boring trial. At one point I'm sitting there near these doors that open up. The door swings open, a guy walks past wearing a raincoat. I'm thinking to myself, what's he doing? Hoffa is sitting at the end of the table, his four lawyers are there, and suddenly I'm looking at this guy and he pulls out of his raincoat this huge pistol, and he starts firing. Hoffa's four lawyers dive under the table. I go down on the ground. I'm thinking, who knows what is going to happen here. Hoffa was the one guy who stood up. This guy was firing at him. Hoffa stood up and starts punching him. It turned out that

this was a guy who was sort of crazy. He was in some flop house in St. Louis, and he said a dream came to him, "Get Hoffa, get Hoffa." He went out, he bought a pistol, BB-pellets or something and came to court to kill Hoffa apparently. But since these were just BB-pellets, nothing happened, except that Hoffa beat the hell out of him.

The funny thing is the transcript of the trial. The jury was out, thank goodness. Hoffa had one lawyer by the name of Bufalino, who was incompetent as a lawyer. He didn't actually do anything in court, but he was there in order to try to give the judge a heart attack. That was the strategy I think. He would get up and make the most outrageous arguments. The judge would excuse the jury, and Bufalino would go into this whole tirade about something. Fortunately when this happened the jury was out, and Bufalino was in the middle of one of his tirades. I don't have a copy of the trial transcript, but what we saw afterwards was really funny. Bufalino was talking about some nonsense, and then the next thing that happens in the transcript is that one of the lawyers says, "Your Honor should someone wipe the blood off the floor?" Hoffa got up and punched this guy and then the marshals jumped on him, so there was blood on the floor. That's the way the transcript reads: "Your Honor, should someone please wipe the blood off the floor."

MS. McMAHON: Oh my goodness.

MR. LEWIN: Since the jury was out, it did not affect the jury. What did affect the jury was that Hoffa, during this trial, was trying to bribe the jury.

MS. McMAHON: Oh.

MR. LEWIN: And that's ultimately what convicted him. I'm the junior guy on this four-person team. I'm just doing the legal work. Kennedy's very close friend, Walter Sheridan, was really the head of this labor racketeering unit although he was not a lawyer, he was an investigator, a very fine guy. He was born on the very same day that Bob Kennedy was born. He was a very close friend of Kennedy's. Walter was down there in Nashville. It turned out that a guy who was one of the Hoffa associates back at the hotel, Edward Grady Partin, who had a long criminal record, was cooperating with Sheridan. He would tell Sheridan things that he would hear from Hoffa in the hotel. This ultimately was the issue that went up to the Supreme Court – whether this was a violation of the Fourth Amendment or the Sixth Amendment. He would not tell him, at least so far as I knew, anything about the legal strategy, but he would tell him things that Hoffa said to Edward Grady Partin because Hoffa trusted Partin. Partin had a long criminal record, he was the head of a Teamsters local down there, and Hoffa never thought that Partin would betray him in any way. So he talked to Partin. Partin talked to Sheridan. As a result of Partin talking to Sheridan we discovered that the husband of one of the jurors, a woman on the jury, was going to meet with

the head of the local Teamsters' union. They had made a contract under which presumably there was going to be a bribe paid by the head of the local Teamsters' union to the husband of the juror so that the juror should vote for Hoffa. The FBI staked out the location, which was some place outside of Nashville, where they were going to meet in the middle of the night. They arrested the husband, arrested the head of the Teamsters' local who was going to meet out there with him, and they brought them in the next day to the courtroom to question them. It was very dramatic, because when the head of the Teamsters local, whose name I think was King, was brought in by the marshals to be questioned by the judge and by the prosecutor, Hoffa sat there at his table and went like this (gesturing). Neal jumped up or Shaffer jumped up and said, "He's signaling to the witness that he should take the Fifth Amendment." The guy of course took the Fifth. Later, in the jury tampering case which was subsequently tried in Chattanooga, Tennessee the following year, which is where Hoffa was convicted, this became evidentiary. But during the trial nobody knew about Partin's participation and his talking to Sheridan other than our prosecution team and Walter Sheridan. They had the evidence with regard to that juror because her husband was caught in the middle of the night, or one in the morning, with the head of the Teamsters local. As the trial moved to its conclusion, Partin had reported to Hoffa that he had "the colored juror" – there was a black juror – "in his hip pocket" because another Teamsters'

local president had been in touch with him, and he was in Hoffa's hip pocket. We didn't have any evidence other than this statement Hoffa had made to Partin, and we wanted to excuse this juror, get the juror out of the box.

So what do we do? We decided that we were going give the judge an affidavit from Partin that Hoffa had said this to him, that Hoffa said to him – a "I've got the colored juror in my hip pocket." Somebody had to draft the affidavit for Partin to sign. Who was selected to draft the affidavit? The junior member of the prosecution team. So I drafted this affidavit for Edward Grady Partin that he was in the hotel with Hoffa and that Hoffa had said to him "I have this juror number whatever it is, the colored juror, in my hip pocket" because of Teamsters' president or somebody had talked to him. Sheridan takes that affidavit that I drafted to his next meeting with Edward Grady Partin. Partin signs it, and Sheridan brings it back. I stick it into a sealed envelope. Before the trial is over – one of the days toward the end of the trial – Neal says to the judge at the end of the day's hearing, "Your Honor, we have a matter that we want to take up in private with the public out." The judge says okay. Everybody is thrown out of the courtroom except Hoffa, his four lawyers, our legal team and the judge. Neal says, "Your Honor, we're going to move to excuse juror number whatever it is, on the basis of the document that I am handing up to the court, sealed." Hoffa gets up and his lawyers say, "Well, we have a right to see what's in that." Neal says, "No, no, this has got

to be kept confidential. We're handing it up to the court." They give it up to the judge. Hoffa is up there saying to his lawyers, "I want to know what's in there, find out what's in that document."

The judge opens it up, reads it. He says, "On the basis of this affidavit I'm going to excuse the juror." Hoffa's lawyers are saying, "We have a right to see what is in that document." Jim Neal was a great friend and a very nice guy, and I really liked him. He says to the court, "Your Honor, I haven't even seen what's in that envelope. There is only one person in this courtroom who has seen it and that's Mr. Lewin." I'm thinking, "My God what has he done to me? They are going to be after me." "Mr. Lewin is the only one who has seen what's in that envelope." Hoffa is banging on the table that he's got a right to see it, the judge refuses, he seals it up again, he excuses the juror, and I go back to the office and I say, "What have you done to me?" My friends on the team all say, "Well, Nat, we suggest that what you should do every morning is open up the hood of your car and look under the hood of your car." I don't know what I'm supposed to be looking for, but I figured okay. So I opened up the hood of my car. I didn't find anything under the hood of the car, but that was my experience with the Hoffa trial.

I had learned then, and maybe before my clerkship, how to use the *Federal Digest*. At different times during the Hoffa trial his lawyers would make an objection based on so and so, and when I heard the objection I would run out to the U.S.

Attorney's office library, go through the *Federal Digest*, find a case or two that was relevant, and bring it back while they were still arguing or while Neal was trying to respond to their argument. I would give him the case, and they would cite the case to the judge. The judge would look at it and say, "Yeah, you know that controls." So that got me a nickname that Hoffa gave me. "Instant Law," he called me. "Instant Law is coming in." That stuck during that trial. That was my contribution in terms of the first Hoffa trial – to be Instant Law, to bring the cases in when the argument would be made in court, and I would go running out to do the research, and then bring the case in to Jim Neal.

I ultimately ended up recommending Jim Neal to be the chief Watergate trial lawyer. I recommended that to Archie Cox and to Phil Heymann years later when they were doing the Watergate investigation. Heyman and Cox asked me, "Who do you think would be a good lawyer to be prosecuting these cases if we bring them?" I said there is one guy, Jim Neal, down in Nashville. They hired him based on the fact that I had recommended Neal to both Heymann and Cox. He ended up doing the trials against Haldeman, Ehrlichman, and Mitchell. Jim Neal was the chief trial lawyer for them in all these cases.

But anyway, that was the exciting thing about the first Hoffa trial. Then I came back, and I thought about the view I had about Criminal Law was that it's not what I want to do. But once I experienced the Hoffa trial, I changed my mind. Another

job that I had during the Hoffa trial was talking to the local reporter for the *Nashville Tennessean*, which was owned by John Seigenthaler, who was a good friend of the Kennedys. The local reporter, a woman whose name I now forget, was not too bright. She was covering the Hoffa trial, and it was regularly my job after each day's session to sit down with Nellie. I explained what had happened in court that day so that she was able to write for the *Nashville Tennessean* the next day what had happened in the Hoffa trial in Nashville.

When I came back to Washington, I said to Jack Miller, "This is really interesting, I didn't do any of the actual trial work in the Hoffa case, but I would really like to get the experience of trying criminal cases." Miller said "Okay, we'll assign you for a couple of months to the U.S. Attorney's Office in the District of Columbia." I was assigned on a temporary basis to the U.S. Attorney's Office in the District of Columbia. In those days the Court of General Sessions did not handle felony cases in the District of Columbia. Every felony in the District of Columbia – robbery of a store or unauthorized use of a motor vehicle – was tried in U.S. District Court before a federal District judge and a jury. So suddenly I found I was in court almost every day trying cases before juries out of the file, basically. Unlike some of the more experienced people in that office – it was a small office at the time – they would frequently try cases never even having talked to the witnesses, the government witnesses. They go on the stand and they would look at the file and

ask them questions. I was more conscientious than that, so I would call the witnesses the day before the trial or two days before the trial to talk to my witnesses so that I would know what they were going to say on the witness stand. I did some interesting jury trials at that point, robberies of some store or unauthorized use of a motor vehicle by some guy. I had a regular diet of jury trials before U.S. District Judges. There is nothing that matches that in terms of feeling comfortable in court. It is great training to be a prosecutor, to do defense work, or to be in court all the time so you can feel comfortable in court. So I did get that, and I continued to work in the Criminal Division.

I worked on the theory of prosecuting Jimmy Hoffa for jury tampering because we had all this evidence. He still did not know that Edward Grady Partin was the guy who was going to be our central witness in a jury tampering case against him. Somebody recently as a matter of fact sent me copies of some memos that I had written at the time outlining the theory of the Hoffa jury tampering charge that we brought against him. It was moved to Chattanooga, Tennessee, instead of Nashville, so that trial was in Chattanooga. Kennedy decided, together with others, that we had to have a senior Tennessee lawyer prosecuting that case. Jim Neal was a young guy from Nashville. So they hired a very highly respected Tennessee lawyer named John J. Hooker to be the senior lawyer. Neal and Shaffer and the old team and I were doing all the actual trial work. We had a trial in

Chattanooga in which, again, I did not do any of the trial work. I just did the legal stuff. It was a total shock to Hoffa when Partin was called to testify. Hoffa never, never imagined that this guy was at the center of the government's prosecution of him for jury tampering. Partin testified, and the jury found Hoffa guilty.

By then I was invited by Archie Cox to join the Solicitor General's Office. I grabbed that opportunity. It was fantastic. In those days the Supreme Court did not apply the rule on ineligibility of former law clerks. You couldn't work on a case within a period of time that followed your clerkship. Phil Heymann went straight from being a clerk for Justice Harlan to the Office of the Solicitor General and started working right away on cases – not cases that he had seen the year before but cases that would violate a three-year rule. So long as he didn't put his name on the brief, he could work on it. Archie Cox thought it was okay, and the Court thought it was okay. Justice Harlan, who was very proper and a stickler for detail, knew that I was working for the Solicitor General's Office within the period of time that the rule essentially prohibits it. My name was not on any brief, and I did not argue any cases until that time period elapsed.

I was working for Archie Cox in the Solicitor General's Office when Hoffa appealed his conviction. When that case went up to the Sixth Circuit, I wrote the government's brief in that appeal. I was already with the Solicitor General's Office, and I argued part of the argument. Howard Willens came out, and we both

argued the appeal to the Sixth Circuit. We won in the Sixth Circuit. The Sixth Circuit affirmed the conviction, and then of course Hoffa hired – I forget his name now – a very highly respected Supreme Court practitioner to file a cert petition for him making Fourth and Sixth Amendment arguments that using Edward Grady Partin, who was in his team, violated the Fourth and Sixth Amendments. The Supreme Court granted cert in that case. I had written the cert opposition, and I wrote the government's brief in the Hoffa case. By then Bob Kennedy was Senator from New York, no longer Attorney General. Nick Katzenbach was the Attorney General. The Supreme Court granted cert and the case was going to be set for argument. Katzenbach told me that Bob Kennedy had told him that he wanted me to argue the Hoffa case for the government. I was 30 something or other. Katzenbach said to me, "I'm just afraid if you argue the case and we lose it in the Supreme Court, people will blame me for throwing away the Hoffa prosecution because I've given it to some young guy to argue," even though Kennedy had asked him to have me argue it.

Kennedy knew me as the young Jewish boy with curly hair. Maybe he had heard the Instant Law name. After the conviction in the Chattanooga case, Bob and Ethel had a big party out in their place in Virginia. We were invited, and we came out there. It was a barbecue. It must have been a Sunday afternoon. Since we're kosher, we weren't eating anything out of the barbecue. Ethel came over to Rikki,

my wife, and says, “Why aren’t you enjoying steaks or whatever was on the barbecue?” Rikki says, “Well, the truth is we’re kosher.” Ethel said, “Well, what would you eat?” Ricki said, “Maybe you’ve got a can of tuna.” Ethel says, “One minute.” She went scurrying back in, came back out with plates of canned tuna and canned salmon that we could have.

Anyway, Katzenbach said that to me, but he said, “Put yourself down.” He decided that it should be argued by Fred Vinson, Jr. That was Vinson’s son, who was then Assistant Attorney General in the Criminal Division. He says, “Put yourself down so that in case it becomes desirable for you to argue as well as Vinson, you can get up too.” And the Court gave the Hoffa case an hour and a half on a side. Hoffa’s lawyer got up and made arguments that I think were sort of persuasive in various ways with the Court. Then Vinson gets up, and Vinson is a very nice guy but frankly dreary, really dull. He gets up and he drones on and on. I was sitting there, and I felt, “My God this case is going down.” I slipped him a note that said, “Please give me 15 minutes.” He did, and I got up. I have a very contentious manner, but I got up and soon as I got up the Court starts asking questions. People who watched the argument – this may be immodest – but they said to me, “You won the Hoffa case, it was lost until you stood up.” The Court got into big exchanges with me, and we ultimately won the Hoffa case, over the Chief Justice’s dissent.

By then I was with the Solicitor General's Office, and I had a number of arguments. I refused, although it was offered to me, to argue the *Afroyim* case, *Afroyim v. Rusk*, because it involved a guy who voted in an Israeli election. I said I can't argue to have his citizenship taken away on that ground. On the other hand, I did agree to argue a case, I don't remember the name of it, which I tell people is now a skeleton in my closet. It was a case involving a guy who lived in Canada, whose family was in the United States. He wanted to come to the United States on a visit, and he applied for status in the United States. The Immigration Service interviewed him, and he admitted that he had engaged in homosexual conduct in Canada, and even in the United States when he was there. The Immigration Service said, on that basis, he's a psychopath, and they moved to deport him. He challenged that. The case went through the courts. The Supreme Court granted his cert petition although the Court of Appeals had held him deportable as a psychopath. Thurgood Marshall, who was Solicitor General, offered me that case to argue for the Immigration Service, that this guy, who was an admitted homosexual, could be deported as a psychopath. I said sure. I argued the case in the Supreme Court. I had not written the brief, I think my name is not on the brief, but I argued the case in the Supreme Court, and we won it, 6-3. The Supreme Court said yes, he could be deported as a psychopath because he had engaged in

homosexual activity. So as I say I view that as a skeleton in my closet. If that came out today, I would be viewed as supporting who knows what.

MS. McMAHON: That might be a good stopping point for today.

MR. LEWIN: Okay. **[END RECORDING]**