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 April 12, 2018. This is the fourth interview.

MS. McMAHON: Well, let's start there. You were just telling me about a criminal case that you had in the Eastern District of New York.

MR. LEWIN: Early in private practice, we were still a very small firm. We had hired as associates Supreme Court law clerks. We were very fortunate in being able to attract them. I guess maybe my having been a Supreme Court law clerk was a factor. We got Bill Jeffress, and we had Marty Minsker who had clerked for Justice Harlan. He was Justice Harlan's last clerk, and he came with us.

Shortly after he came, I was contacted and asked to represent a fellow by the name of Bernard Rosenthal, who owned Jack's Army Navy Store in Bedford Stuyvesant. It was a store that sold surplus goods. At that point, Bedford Stuyvesant was a very dangerous neighborhood in Brooklyn. The population overwhelmingly Black and not well-to-do. There was a lot of crime in the neighborhood in Bedford Stuyvesant. Jack, who was maybe in his late 50s at the time, maybe 60, owned this surplus store in which the personnel and the customers were virtually all Black. The foreman of the store would take orders for automobiles that, according

to the government, were stolen on order. The case made the front page when this whole bunch was indicted. I think there may have been 60 people who were indicted in this car-theft-to-order ring. It was on the front page of the *New York Times.* And the car-theft-to-order ring was run out of Jack's Army Navy Store. His foreman, who managed to flee and was never prosecuted, I think, was at the center of this ring. He was the guy who people would come to. They'd say, "I want a 1969 Lincoln with brown leather seats." The foreman would send out his runners, and they would go to an area of downtown Brooklyn. The first one who would come back with the car that met the order was financially rewarded. In those days if you took a rubbing of the serial number off the engine of the car and went to New Jersey you could get a New Jersey registration for the car. You didn't have to bring in the car. You just brought in the rubbing of the serial number. So that was the system they used. They would steal the car to order. They would then take a rubbing of the serial number, go to New Jersey, get a New Jersey registration, and provide it to whoever ordered the car with a New Jersey registration and New Jersey plates.

So they were prosecuted. I think there were over 60 defendants who were put on trial in a series of trials. They were found guilty by juries and sentenced. Bernard Rosenthal, who was "Jack," the guy who owned the store, would sit in the store in a cage. He had a gun. He had a gun license, and he claimed that he was scared for

his life. Nonetheless he would sit there, would own the store, and they would bring cash to him when people would buy stuff. I and Marty Minsker, who helped me in the case, represented Bernard Rosenthal in this charge. He was indicted along with everybody else. The evidence against him was very thin. It consisted mainly of the testimony of a very heavy Black woman. She did have a record of some kind of past offenses, but she had testified for the government in a number of these cases, which had resulted in convictions. Cynthia Wharton was her name. Rosenthal went to trial with another guy. He was not the foreman but a little bit below the foreman. It was just a trial for the two of them, and I was retained by Rosenthal to represent him at this trial before Judge Judd in the Eastern District of New York. He was a terrific judge, Judge Judd. The co-defendant hired for $5,000 some lawyer who did a lot of criminal work down there but did no work really during the trial.

We went to trial in the case. Cynthia Wharton testified. Using the skills that I had learned in the Hoffa case and the others I cross-examined her, and I was the only lawyer I think who really ended up demolishing her on cross-examination. She testified that Rosenthal was not actually taking money or involved in these transactions, but she testified about a couple of conversations that she had with Rosenthal that supposedly showed that he knew what was going on and in some way maybe profited from all this. I used my cross-examination of Cynthia

Wharton two years later, ’74-’75. I was Visiting Professor at Harvard Law School. I gave the first course anywhere in the country in “Defense of White Collar Crime.” I was very proud of the cross-examination I had done of Cynthia Wharton.

Judd was a good judge. He denied our motion for judgment of acquittal even though there were certainly grounds for disbelieving Cynthia Wharton. Then Jack Rosenthal, Bernard Rosenthal, testified. He wanted to and we went through preparing him. He testified in his own defense and said that he sat there in the cage and did not know anything at all about what the foreman was doing about this car-theft-to-order ring. At the end of the defense case Judge Judd granted a judgment of acquittal, which was very unusual. He didn’t even send the case with regard to Rosenthal to the jury. By cross-examining Cynthia Wharton and with Rosenthal himself testifying, the judge was satisfied that he would have to set aside any jury verdict and there should be a judgment of acquittal. So he entered a judgment of acquittal for Rosenthal.

The case went to the jury against the other defendant. I always treated this as being a tribute to my cross-examination because the jury acquitted the co-defendant. We had a legal argument that we filed in advance of trial that we made, and some lawyers for some of the defendants who were in jail but on appeal seized on that legal argument. A couple of defendants who had been jailed after their trial

got their convictions reversed on appeal based on the legal argument that we had made in our case before Judge Judd. I took that as a tribute to our defense efforts. Rosenthal was acquitted at the end of the defense case without the case going to the jury. The co-defendant was acquitted by the jury, and other defendants who were already in jail but were appealing seized on this legal argument and got reversals. I think there are reported cases in which they got reversed.

That's not the end of the story. After the acquittal, as unfortunately sometimes happens to lawyers, we sent Mr. Rosenthal a bill. He said, "Well I testified, I didn't need you guys." And he refused to pay. He paid something as a retainer, but he refused to pay the rest of the bill. This is the only client I have ever sued. I brought a lawsuit. Since we were in Washington, we sued him in the Eastern District of New York. By the luck of the draw, it really was the luck of the draw, who ends up getting the civil case? Judge Judd. So we won. We got a judgment against Rosenthal for attorneys' fees pursuant to the retainer after he refused to pay saying, "Oh I testified, I didn't need you guys."

MS. McMAHON: What was it about the cross-examination that you thought worked so well?

MR. LEWIN: Well I have to go back and find it. I handed it out to the class in the white collar criminal class I gave at Harvard. Jamie Gorelick may still have it. She was in the class. I just felt I had really done this woman in. It was

both her past record and inconsistencies. There were all kinds of things, but I used it as a sort of model cross-examination. In the other cases she was successful. She had testified in these other cases, and all these other guys went to jail. I would have to find the cross, but I remember I distributed it to the class at Harvard, so this was before '74-'75, because that was the year I was teaching at Harvard.

In '74-'75, when I was teaching at Harvard, I ended up representing a very public Jewish figure in New York. Bernard Bergman owned a whole bunch of nursing homes in New York. The *New York Times* at that point had done a whole series. They got some reporter whose mother had been in a nursing home and was very badly treated. Not in a Bergman nursing home but in some other nursing home. They decided they were going to do a series on nursing homes and how the elderly were being treated in nursing homes. They seized on Bernard Bergman who was a rabbi, Orthodox, and had done very well financially with nursing homes in New York. He became a very important figure in the New York City Jewish community, and once the government got after him, the *Times* really went after him. There was a televised Senate hearing. I can't remember who was the chairman of the Senate committee in which they subpoenaed Bergman to testify. I represented him and sat there at this televised hearing next to him when he said he was going to answer the questions. He didn't take the Fifth. He testified and frankly was very well prepared. Everybody said after the public hearing that we

came off much better than had been expected because everybody said, "Oh this guy must be a terrible crook." And yet he testified very effectively. But that did not stop the government from going after him.

At that point a special prosecutor was appointed in state court for nursing homes, a fellow by the name of Charles Hynes. who later became the D.A. in Brooklyn based on the reputation he had made. The Southern District of New York went after Bernard Bergman, but they really could not find very much to charge him with. There were allegations that patients were being mistreated, that he was cheating, but they didn't turn up very much. What they did turn up ultimately – and we did a plea deal based on this – was that he had hidden or concealed partners in some of the nursing homes. The K-1 tax forms did not name the partners. So he pleaded to filing misleading tax forms, which was a very minor offense compared to everything that they had tried to charge him with. There was there was both a federal investigation and a state investigation. The agreement that we reached with federal and state prosecutors was that he would plead to this federal offense, and he would plead to some minor state offenses, and there would be one sentence, which would be the sentence given by the federal judge. The federal judge was Marvin Frankel, who was very highly regarded. He argued cases in the Supreme Court. He had been in the S.G.'s Office years before and was a very, very highly respected man, who everybody thought was ultimately going to go from being a

judge on the Southern District of New York to being promoted to the Second Circuit. Well, we had a sentencing of Bernard Bergman before Marvin Frankel. We made a very substantial submission to Frankel with the point that the crime he had pleaded to was nothing, really very minor. Frankel sentenced him, I think, to either three or six months in jail based on this plea. That enraged the *New York Times* and the New York media community, absolute outrage. All that Bernard Bergman got was three or six months in jail. The lawyer who Bergman retained for the state proceeding, who died a couple of months ago, was a terrific trial lawyer by the name of Gus Newman. I worked with him, and we worked out this deal together. But because of the outrage the state judge ignored the plea agreement and sentenced Bergman to another year in jail. We challenged that in federal court, but lost it in the federal court because, I think, of the public outrage. The district judge and then the Court of Appeals rejected the claim that there was only one sentence that was supposed to be imposed and that was Marvin Frankel's sentence.

Maybe the biggest loser was Marvin Frankel, because as a result of his sentence of Bernard Bergman, he was not promoted to the Second Circuit. After a couple of years he resigned from the district court and went and formed a leading white collar criminal defense firm. He's the one who ended up suffering because he did what a judge should do, which is he looked at the offense, he looked at the

individual, who had a very high reputation, and gave him a very minor sentence notwithstanding the public outcry.

The outcry was so big, and the *Times* was regularly writing about nursing home scandals, really attacking nursing homeowners. Just at that point, when Bergman was testifying before the committee, the committee counsel was Gary Naftalis. He's a white collar criminal defense lawyer, very respected also, who ultimately was in Frankel's firm in New York. The *New York Times* ran a piece about the two lawyers in the Bergman hearing, Gary Naftalis and Nathan Lewin. The author of the article, who was friends with the guy who was writing about the nursing home scandals, was basically a *New York Times* food reporter. His name I think was Frank Prial. He wrote a long piece about the two lawyers. He had some stuff on my background. This was after the Nixon case. There was a paragraph that said that Lewin also was writing articles for the *New Republic,* and he attacked Richard Nixon after his firm was representing Richard Nixon. I was furious at that. I read that article, and I called him up, I called up everybody, I called up Tony Lewis and everybody I knew at the *Times,* and said you have to withdraw that. That's unethical. I could not attack my client. I'm representing Richard Nixon. And the fact of the matter was, I had been writing in the *New Republic* and writing about Watergate and being very critical of Nixon. Then when Jack Miller came back from California and told us that we were representing Nixon, I totally

stopped. The last article I had written, which was very critical, appeared before we represented Nixon, but it had a date line that was, I think, a couple of days after it was public that we were representing Richard Nixon. This may be why this guy concluded that I had attacked Nixon after we were representing him. But at that point the *New York Times* did not have, as it now has, this little box, which for a while was on page 2 and now, they have it on some other page, which is corrections. I called up the *Times,* and the *Times* said, "Yes, yes, Mr. Lewin we will correct it, we'll take care of it." Well, it was one day, two days, three days, I kept calling. I said I want it corrected.

They didn't correct it. So I sued the *Times* for defamation. The great case of *Lewin v. New York Times*. Floyd Abrams represented the *Times.* He took my deposition, and he told me, "The *Times* never pays in a defamation case. You're going to have to go through to a trial on this case." And he took my deposition, and we did a little bit of discovery. Ultimately the *Times* ran a full column apology essentially saying they were wrong. When I wrote the piece and when it was published, I was not representing Nixon. But that is all I got from the *Times*. I never got any money, never got anything, other than this full column retraction which they printed. But anyway, that was the story of Bernard Bergman.

MS. McMAHON: So you mentioned the Nixon case. I know that was a big part of your time at Miller Cassidy.

MR. LEWIN: Right. I don't know if I had mentioned before that that the way Miller had gotten me to leave the government and come with the firm, and I still remember his line, was, "You don't want to work for Richard Nixon." We had represented very successfully this fellow Richard Moore, the guy who worked in the White House. We really represented him so well. Moore was never charged with anything, and Moore, I think, recommended to Nixon that he retain Jack Miller. Miller flew out to California and came back and told us that we were representing Richard Nixon. That is why I stopped writing about Nixon in the *New Republic,* although I had been writing and appearing on National Public Radio broadcasts where I was interviewed about Watergate.

So we represented Richard Nixon. I was not in the middle of the Nixon representation. Miller did most of it himself, and he had other people in the firm working on that. But when the case became a Supreme Court case over the constitutionality of the taking of the Nixon papers, then I became involved. I did write the brief in the papers case. Miller and I together argued the case in the Supreme Court. In those days it was a one-hour argument on each side. So when the case got to the Supreme Court, I thought we were very strong on a number of constitutional issues, bill of attainder and other constitutional claims. Miller argued and I argued maybe 10 or 15 minutes of the case. I met Richard Nixon. I have a photograph with Richard Nixon's arm around me, signed. I never framed it.

I kept it in my desk. People ask me what was Nixon like? The funny thing was that Nixon was like a caricature of Nixon. I never became that friendly with him, but when you talked to Richard Nixon, you thought, "Oh, there is someone who is imitating Richard Nixon."

MS. McMAHON: So when Jack Miller came back and said, we're representing Richard Nixon, he didn't talk to anybody else at the firm about this?

MR. LEWIN: He may have mentioned it to John Cassidy that he was going out to California to talk to Nixon. but we were not retained at that point. He had been asked to go out there, and he went out to California. He comes back and he gives us the information. We may have sensed it from the fact that he was going out to California. He had represented Moore and suddenly there he is, he's flying out there. I think we knew that he was flying out there to see Richard Nixon, but nobody knew what the result was necessarily going to be. Suddenly he comes back, and we're representing Richard Nixon. He was involved in the discussions about the pardon and a lot of the other things, the negotiations concerning what ultimately happened in terms of the statute and the papers. He and Stan Mortenson and other people.

My involvement in the Nixon case was really at the Supreme Court level. I was also not involved in the civil suit. The Supreme Court said it was constitutional to take his papers, but you had to pay him for it. So then the firm brought the lawsuit

to collect for the Nixon family for the taking of the papers. That took years, and ended up finally with a settlement, which I think was very favorable to the government. The government was very tough in terms of negotiating this, so the case ended up with a settlement. But I was not really involved in the civil case. My involvement was in that first Supreme Court litigation and in the second Supreme Court case. Bill Jeffress was involved in that one. I did not do that one.

MS. McMAHON: So what was your strategy going into the Supreme Court case? Your legal theory?

MR. LEWIN: Well, it was very difficult to have a strategy because everybody recognized that Nixon was so unpopular and such a hated figure at that point that the likelihood of being able to prevail in the Supreme Court was very, very slim. I thought that if it wasn't Richard Nixon, but just objectively speaking, we were right on the law, but the possibility of winning in the Supreme Court, in terms of the real world, was so very slim. So I can't say that we had a strategy that we thought was definitely or very likely going to be able to win. We tried to make the best presentation we could of the legal arguments that could be made against the taking of his papers and tapes, but the Court rejected that.

MS. McMAHON: How often do you think that happens, that you're right on the law but the politics, the real world, something else leads to a different decision?

MR. LEWIN: Too often, too often. My wife says she's insisted already for years that I'm too naïve and I believe in the integrity of the legal process. She says it's more often than not, certainly in cases that are of public interest, determined by things other than the strictly legal standards. A perfect illustration is the John Lennon case.

I forget what year it was, but a very good friend of mine was the president of the Immigration Lawyers Association. This lawyer was also a graduate of Yeshiva College, so I knew him for a number of years. Because of his status among immigration lawyers, John Lennon selected him to be his immigration lawyer. Lennon came to the United States, and there was this whole issue about the fact that Lennon had pleaded guilty in England to a narcotics offense, minor but nonetheless to possessing. I forget if it was marijuana or something, but nonetheless he pleaded guilty, so that technically he might have been deportable from the United States because of this criminal conviction. Then this friend of mine, his name is Leon Wildes, was very good in terms of immigration matters, both advising people and handling things before immigration judges. But Lennon lost the immigration case before the Immigration Administrative Law Judge. So the next step was going up to the U.S. Court of Appeals, where Wildes had no familiarity, had never been in a court of appeals. So he called me and asked me to

represent Lennon on the appeal to the Second Circuit. The bizarre thing is, I never met John Lennon.

MS. McMAHON: Oh really.

MR. LEWIN: Even though I represented him on appeal and even though I am the lawyer who won the case so that he was able to stay in the United States, I never met John Lennon. Leon Wildes sent me the record, and I wrote up the brief. I argued the case. Who was the Chief Judge of the three judges in the Court of Appeals? None other than Irving Kaufman. Have I talked to you about Irving Kaufman?

MS. McMAHON: Yes.

MR. LEWIN: So Kaufman was the Chief Judge. I thought to myself, "I don't know, but this is a case where it could have come out either way." I think I made a very persuasive case as to why this was not deportable under American law even though it was a plea to a narcotics conviction in England. I even forget the details as to how we worked our way through the American immigration law, but I argued. And Irving Kaufman, who all his life as I told you was conscious only of the reputation of Irving Kaufman and nothing else mattered, not the law, not a fair application of the law – he was not going to be the one who is going to throw John Lennon out of the United States.

So he wrote an opinion agreeing with my argument in the Second Circuit and saying that Lennon was not deportable. So that is how you win a case. I thought I wrote a damn good brief. I thought I made a damn good legal argument. But the real fact is that no matter who had represented John Lennon in that Court of Appeals, Irving Kaufman would not have thrown John Lennon out of the United States, period. I recognize that in terms of real life, even though I am very proud to say, "Hey I saved John Lennon." Although I had never met John Lennon, and he did not come to the appeal, I argued the appeal. He wasn't there, but he wrote out a check for our services. The stupid thing I did – we deposited the check. The check with John Lennon's signature would today be worth more than the face value of the check. But what do you know?

MS. McMAHON: So it seems like that even when the real world comes into play sometimes that helps you, sometimes it hurts you.

MR. LEWIN: Absolutely. Jodie Foster. After the attempted Reagan assassination by John Hinckley, Hinckley claimed he was so obsessed with Jodie Foster, he had done this after he saw the movie, and he had done it to impress Jodie. He was indicted, and he was going to go to trial represented by a Williams and Connolly lawyer. It was going to be a pretty toughly fought trial. He was acquitted on grounds of insanity. His insanity defense prevailed.

It was clear that Jodie was going to be a witness. Somebody recommended to her that she contact me, I forget who it was. I get a call and it's Jodie Foster, who is now going to be subpoenaed to testify for the defense at the Hinckley trial. Hinckley was hopeful that she would testify that she was conscious of him and that he was around all the time and because he was, he was stalking her.

I talked to her. She said she does not want to testify in public at a jury trial with all the publicity and the photographs and the whole thing. The reason that she retained me, or retained a lawyer, was to find a way that she could avoid having to testify in public at a jury trial. I thought about it and it occurred to me that if the parties agreed, we could film her testimony in a courtroom, direct and cross, and show it to the jury rather than have her come in live and testify before the jury, if both sides agreed. I approached both the prosecution and the defense, and ultimately the judge, after I got the prosecution and defense to agree that in order to avoid emotional harm to Jodie as a result of all this, we should be able to have her appear in the courtroom where the trial was actually going to take place.

The judge, who was Barrington Parker, would sit up on the bench, have direct examination and cross examination, film it all, and show it to the jury when the trial actually takes place. And we did that. The parties agreed, and Jodie came in. We actually had a session in which Hinckley, who was then in custody in jail, came in and sat there with his lawyer, Vince Fuller, a very good Williams and

Connolly lawyer who I think died a couple of years ago or recently. He was there, and Hinckley was there, and the prosecution was there, and I was way off on the side. Jodie sat on the witness stand, and Hinckley's lawyer examined her as if this were a real trial.

A dramatic thing happened. I'm off at the side, she's testifying. Hinckley's lawyer asks, "Wasn't Hinckley around and wasn't she conscious of him." She said no, she didn't. He may have been around, but she didn't know who he was, and she was not conscious of the fact that this guy was there. That really got Hinckley very angry.

MS. McMAHON: Really?

MR. LEWIN: He was sitting at the defense table, and the next thing I know – I'm off at the side – he apparently picked a pencil up off the defense table and threw it at her.

MS. McMAHON: Oh, my God.

MR. LEWIN: This pencil was flying in the air. A big hubbub. We decided afterwards we were going to eradicate or cut that out and go back again, have a question asked again and get an answer. So that ultimately was what was filmed and shown to the jury. The prosecution agreed that that could be cut out – Hinckley reacting by throwing a pencil. That is what actually happened, he threw this pencil in the middle of her testimony.

MS. McMAHON: Why do you think the prosecution agreed to cut that out?

MR. LEWIN: (a) They probably felt they had enough evidence in terms of his guilt, and they just agreed to cut it. "Let's do this over again." But that is what happened, he threw this pencil in the middle of the thing from the defense table. But that was my representation of Jodie. Then the only other representation I did of Jodie with regard to that is I kept being asked every time that there was a hearing on whether Hinckley could be released or could go home. The prosecution felt it was imperative to check with Jodie to see what her position was. In the beginning of course she was opposed to anything that would allow or give him some kind of even temporary release, but that made little difference ultimately. By the end, nobody is asking her anymore, so I haven't been in touch with her in a long time.

MS. McMAHON: Was she opposed when they finally granted his release?

MR. LEWIN: It was Paul Friedman, the judge who granted it. She wasn't even asked at that point. Of course, in previous times, I would call her up, I would say what's your position. "I'm against it but I don't want to have a public statement that I'm against it." Okay. And then, ultimately, she said I don't even care to be called about this anymore, so she just dropped out of the whole picture.

MS. McMAHON: So how did you come up with the idea of her testifying by video? Had you heard of that before?

MR. LEWIN: I honestly don't remember. I do remember that this was the question, how was it going to be possible for her. Obviously, Hinckley was not going to give up on her testifying, so I tried to work out how it could be done. You ordinarily think depositions are played at trials, and there are video depositions. I proposed something like this, and it ultimately worked its way into a staging in an actual courtroom. Maybe it began with, "Maybe we'll agree to have her do a deposition in a lawyer's office." But with all the discussion and the feeling by counsel on both sides, that's the agreement that we came to and exactly how it developed. I do remember that I'm the one who in terms of the discussions made this proposal and then worked it out with both sides and with the judge ultimately. We needed the judge's approval. We went to him, and he said, yes, he'll do it. So we did it.

MS. McMAHON: So what about the Meese case, I know that was another.

MR. LEWIN: One of the people who was in the Solicitor General's office after my time was Brad Reynolds, who became the Assistant Attorney General under Ed Meese in the Civil Rights Division. Meese had this fellow Bob Wallach, who he knew from California. Once Meese became Attorney General, Wallach was like a leech. He would just grab on. He knew Ed Meese. He knew the

Attorney General. That was a way, his way, of becoming important. So when Meese became Attorney General, he kept calling him and bothering him about one thing or another.

Then Wallach was involved in some alleged fraud involving a company called Wedtech. Those were the days of the Independent Counsel, which the court would appoint. Robert Mueller now is a Department of Justice Special Counsel. But in those days, following Watergate, there was the Independent Counsel law. The court would appoint an Independent Counsel. An Independent Counsel was appointed to investigate this Wedtech thing that Bob Wallach was involved in. Why did it take an Independent Counsel? At the initial stages, Ed Meese was not in the circle of those who were being investigated but was on the fringes. As the investigation developed, suddenly Meese became a subject of the investigation. I was sitting in my office, and I get this call from Brad Reynolds, whom I did not know that well, but he had been in the Solicitor General's Office. He knew of my reputation and had recommended to Ed Meese that if he needed a lawyer, he should call Nat Lewin. The next thing I knew, Meese called me. Maybe Reynolds called first and asked me whether I would be interested in representing Ed Meese. I said sure. He's the sitting Attorney General subject to a criminal investigation by an Independent Counsel. I agreed to do that. There was a young partner in our

firm by the name of Jim Rocap, very talented, very good guy. I enlisted him to work with me on the Meese case. And we did it, we represented Ed Meese. Some of the things that are going on today can compare to what happened with Ed Meese. Ed Meese was actually subpoenaed and testified twice before a grand jury in this Wedtech investigation. Ultimately, we made submissions to the Independent Counsel, and Meese was cleared. The media were obviously against him. They didn't like him. The *New York Times* – nobody thought it was the "fake" *New York Times* at that time. Nonetheless, the *New York Times* did not like Ed Meese and much of the media didn't like him. I found him a terrific client, a very nice guy.

There were a couple of months of publicity about the case. I spent time over at the Department of Justice. Whenever we would have meetings, they would generally be there at his office at the Department of Justice. The press would be around, the photographers. Ultimately, the Independent Counsel came out with what was a critical report, saying he should not have done this, that, or the other thing. I can't I remember all the details of that, but nonetheless the report was critical, so critical that Meese felt he had to file a response to the report. So not only did I represent him in the investigation and during the time that there was consideration of whether to indict him, but I also represented him after the decision not to indict him in terms of responding to the Independent Counsel's very critical report. I

can't remember the details, but it included answering the allegations or the criticisms that were made by the Independent Counsel.

When the Independent Counsel law was expiring, the question was whether to continue it or to let it lapse. It had a terminal date and then was it going to continue or not. The Senate Committee took testimony, and Robert Bennett, a well-respected criminal lawyer, testified that the Independent Counsel law should not be renewed. I testified that it should be renewed.

MS. McMAHON: Oh really?

MR. LEWIN: Yes. My feeling then was – and, to some extent I think what's happening now vindicates that – and I said it to the Senate committee, there are times when you want to have someone in charge of an investigation who is not responsible to the Department of Justice or to the Attorney General and is only responsible to the court, can only be removed by the court, and is really an independent counsel. My experience with the Meese investigation, quite frankly, was that I didn't like the report Jim McKay wrote. But Bob Wallach was indicted convicted in the Southern District of New York. But Meese was cleared. So the process worked in that sense. He was Attorney General, he was subpoenaed, he testified before the grand jury twice. They didn't make it easy for him by saying, "Oh come on in with your lawyer and we'll interview you." He went into the grand jury, and he testified to the grand jury. The independent counsel cleared him

essentially. He said, no, he should not be indicted. So the system can work. The notion that the President should be able to fire the Independent Counsel, to the extent that happened with Archibald Cox, is why they set up an independent counsel so the President shouldn't be able to fire the prosecutor. My feeling at that time was, and I'm on record, I testified before the Senate committee to that effect, that the Independent Counsel law should be continued even though there were a lot of critics of independent counsels.

MS. McMAHON: And that all happened after the Clinton investigations, right, and Ken Starr and all that.

MR. LEWIN: Yes.

MS. McMAHON: Do you think that is why people …?

MR. LEWIN: That's why people didn't like it and were critical of it. But I felt that it is still desirable to have a system under which a prosecutor gets appointed and is responsible only to the court and not to the Department of Justice and to ordinary prosecutors.

MS. McMAHON: And having the Ken Starr experience didn't change your opinion on that?

MR. LEWIN: No, no. Ken Starr was, I haven't seen him in a long time, but Ken Starr was a friend, and I may have told you, he was my lawyer.

MS. McMAHON: Oh, actually I didn't know that.

MR. LEWIN: Out of the blue. A funny story. When I did the yarmulke case in the district court, the right to wear a yarmulke. That was one of my early Jewish litigations. I was sitting in the office, and I got a call from a woman on the West Coast. Her husband was a psychologist in the Air Force and an Orthodox Jew. He always wears a yarmulke, and he was going to be court martialed for wearing his yarmulke in the hospital. I said that's ridiculous. Who cares, why does anybody care? Well, they said it's a violation of the dress code.

So I called up the general counsel of the Air Force. I said, "Come on, what's going on out there?" It turned out the very top of the Department of Defense, Casper Weinberger, who, although he was born Jewish, was not friendly to Judaism or to Jewish practice, said at a staff meeting that he would prefer to lose on the MX missile rather than lose on the yarmulke. He did not want to have people permitted to wear a yarmulke on the Air Force base. This fellow was a psychologist in the hospital, and they were going to court martial him because he wore a yarmulke. I brought a lawsuit in district court here against the Air Force so that he should be able to wear a yarmulke. The judge was Aubrey Robinson. We had a full hearing, and Aubrey Robinson held that there was a constitutional right to wear a yarmulke in the Air Force. The government appealed. I was surprised. I thought, wow, who is going to care that much about it, but they decided to appeal. And the appeal was heard by none other than Abner Mikva, who had been the chairman of the Jewish

caucus when he was a Congressman, Harry Edwards, and a judge from the Seventh Circuit who was very liberal. At that point, you didn't know until you came to the argument who was going to be your panel. We looked up and there was Mikva and Edwards and the judge visiting from the Seventh Circuit. My adversary says, "I don't even know why I'm walking into this courtroom. This is ridiculous with that panel." He won the appeal. The three judges ruled against the yarmulke. The military, even though they could not state a rationale as to why you should not be able to wear a yarmulke in an Air Force hospital, if the military says so we have to defer to the judgment of the military.

MS. McMAHON: Wow.

MR. LEWIN: That's the decision of the Court of Appeals. I was shocked that I lost that appeal. I petitioned for rehearing en banc. Now, who votes for a rehearing en banc? A new judge on the Court of Appeals named Antonin Scalia. Who else? A judge on the Court of Appeals named Ruth Bader Ginsburg. They voted for rehearing en banc the yarmulke case. And the third one, who wrote a very passionate opinion, was a young judge on the Court of Appeals named Kenneth Starr. The other two just noted they would vote for rehearing en banc. Starr wrote an opinion, a couple of pages about how important it was to preserve this constitutional right.

A couple of months later I get a call from Judge Starr, who I didn't know, and he said, "Mr. Lewin, the D.C. Circuit is having its judicial conference, and I'm in charge of the program. I would like to have a session on church-state First Amendment religion and the law. Out of the blue, Ken Starr calls me while he's a judge and asks me because he's running this program, the D.C. Circuit program. "Well, sure I would be glad to do that." I went out and we became friends after that. He was very interested in church-state law. He still is. He went out to Pepperdine, and we stayed in touch.

Years later – before he was special counsel – I had a case in which I sued the State of Israel for a couple of investors in a bank in Israel that had gone bankrupt. The people who ran the bank were taking money or doing things that were improper. The Israeli authorities charged not only those people, but also American investors who didn't have any idea what was going on. They charged them criminally with participating in this fraud.

One of these guys was a philanthropist who had been contributing to Israel, a guy by the name of Sussman. He lived in Los Angeles. He retained me, and I spoke to the Israeli people. They were insistent that they were going ahead. I wrote them a letter in which I said, if you don't drop this case, I'm going to sue you in an American court because I think this is abusive, it's improper. They continued to persist, and I sued in an American court. It came before a judge in the Southern

District of New York who dismissed the case for *forum non conveniens*. You can't bring this case in the U.S. court. He dismissed it, and then, all on his own – this is before Rule 11 was amended to require notice to anybody who is going to be sanctioned – all by himself, he says "I'm imposing Rule 11 sanctions against Nathan Lewin, $50,000 fine."

MS. McMAHON: Oh wow.

MR. LEWIN: He dismisses it for *forum non conveniens* grounds, and without any procedure, I was notified of nothing, I just get a call saying Judge Haight in the Southern District of New York has imposed a $50,000 Rule 11 sanction against you. Why? Because I wrote a threatening letter to the Israeli authorities. That's crazy. What did I do? I told them I'm going to sue them. That's all I did. What's wrong with that? $50,000 Rule 11 sanction. So I called up Ken Starr. I said, will you represent me on the appeal of this case. He said yes. He did. He represented me on appeal, and the Second Circuit reversed the $50,000 fine. It was ridiculous. But he ended up being my lawyer.

MS. McMAHON: So why did you go to him? Why did you pick him out of anybody that you could have asked to be your lawyer?

MR. LEWIN: I thought, this was such an outrage, I just don't want to go to some lawyer who does appeals. I want the Second Circuit to see that the lawyer who is representing me is a man of some character. I thought the whole thing was

such an outrage. He agreed to do it. He was already in private practice then, and he agreed to do it, and he represented me on this appeal. And got it reversed.

MS. McMAHON: He represented you very successfully.

MR. LEWIN: It was a good panel, I think. Judge Cabranes, I think, wrote the opinion.

MS. McMAHON: So what are some of the other big cases while you were at Miller Cassidy?

MR. LEWIN: Well, I did represent George Hansen, who was a Congressman, Mormon Congressman from Idaho, who was a very pugnacious individualist type. He didn't come to me. He came to the firm. I was available at the time. Miller brought him into my office and introduced him to me. We became friends after that. George came to a Sabbath meal at our house. He was a very devout Mormon, would not drink Coca Cola or coffee.

He was charged with violating the new, relatively new statute that had been enacted that required financial disclosure forms to be filled out annually by Congressmen. Congress provided in the statute that every Congressman had to file a financial disclosure form, certified, and if he filed a false disclosure form, then he could be criminally prosecuted and sentenced up to one year in jail, a misdemeanor provision of the statute. Well, the U.S. Attorney's Office or Department of Justice indicted Hansen. I think he came to us after he was indicted. I don't think I was

involved in the pre-indictment stage, and I don't know if the firm was involved in it at all. But he was indicted for submitting a form in which he had left out a very substantial loan he had taken from a couple of brothers who were very well off. He had left this loan off the financial disclosure form. He had left it out, but he claimed that the way he read the requirements, he had a defense. I don't really remember what the factual defense was, but we actually went to trial in the district court here before Judge June Green. Because the District at that point still had not had a lot of difficult or high-profile criminal cases, some of the district judges really were very unfamiliar with criminal practice or trial practice in criminal cases. June Green was an example of that. She had seniority status, but I was appalled at how unfamiliar she was with, things that I had learned back when I sat in and watched the Hoffa case. She was on very uncertain ground during the whole Hansen prosecution.

MS. McMAHON: Do you mean in terms of handling objections?

MR. LEWIN: Yes, and being able to deal with the whole criminal process. Maybe she had had a lot of civil cases, but I just had the sense that she was really uncomfortable about the whole thing.

So we had the trial. The prosecutor made his reputation based on that trial and then became a leading white collar criminal defense lawyer in Washington. That was Reid Weingarten. He was the prosecutor in that case, and Jim Cole was his

assistant. They prosecuted the case, and I defended George Hansen. To me, one of the lessons, which I should have learned before, and one lesson that certainly trial lawyers learn and criminal trial lawyers learn, is, when you are asking questions don't go too far and ask questions that you don't know the answer to. I violated that rule with none other than, as a witness, Rudy Giuliani on the stand, because he was Deputy Attorney General. During the time that Hansen was being investigated, he went in and talked to Giuliani. I don't remember the details of it, but the point was that he considered himself innocent and went in and talked to Giuliani. I brought that point out. I think I may have even subpoenaed Giuliani to testify about the fact that there was this meeting. I asked him one question too many. He came back with an answer that was very damaging. I went home, and I thought to myself, my God, how could you have done this, stupidly ask that last question when everything seemed to be going well in terms of the examination? Again I don't remember the details, but I do remember, and I've told Giuliani when I've seen him since then, and he remembers it too, that he was on the witness stand and socked it to me because I asked him some question that I should not have asked him.

The jury found Hansen guilty. The government had charged Hansen, not under the misdemeanor provision but under Section 1001 for filing a false statement. We moved to dismiss on the ground that the statute did not authorize prosecution under

1001, only a misdemeanor. Nonetheless, Judge Green sentenced Hansen for more than a year. We appealed to the D.C. Circuit.

Because he was a Mormon, one of Hansen's good friends and supporters, was none other than Orrin Hatch. Hatch felt close to Hansen because of the religious tie, and I think they got along very well. When I appealed to the D.C. Circuit, Hatch had an amicus brief filed supporting our appeal. One of the principal grounds on the appeal was that the only thing that the Congressman could be prosecuted for was the misdemeanor provision in the statute, that he could not be prosecuted under 1001 for filing a false statement, because the statute was very specific and limited. Congress was very conscious about the fact that they didn't want to put congressmen in jail for extended periods for making even a deliberately false statement. So the agreement was it would be a misdemeanor sanction.

That was a principal point on appeal, in which I felt reasonably confident. I thought the legislative history supported that, there was the statute. I wrote the brief, and Orrin Hatch and various other senators or congressmen filed an amicus brief supporting our position. We went to oral argument, and Orrin Hatch came to the oral argument of George Hansen's criminal conviction. He sat there in the audience while I argued.

Who did I draw as a panel? Who was sitting up there on the left, the most junior judge in the Court of Appeals? My classmate, Nino Scalia.

So I start off and say, “It’s very clear that the statute only provides a misdemeanor provision.” Judge Scalia says, “Yes, Mr. Lewin, but did Congress repeal Section 1001, the false statements statute, with regard to this.” “They didn’t do it explicitly, but it’s clear if you look at the legislative history, they only wanted to provide a misdemeanor penalty.” “They didn’t specifically say that in the law, did they? You’re relying on what was said by Congressmen on the floor, or things that are in the reports.” “Yes, but that’s the legislative history.” “Who cares about that, what does the statute say?”

That’s when Scalia started with his “statute only, I don’t want to hear about legislative history.” It was in the Hansen case. He ripped me apart while I’m arguing. This is my classmate. He rips me apart while I’m arguing. “How can I rely on the legislative history if that is not what the statute says?” I still remember, we walked out of the courtroom that day, and Orrin Hatch walks out with me, and he says to me, “That guy, ‘Sky-lee-a’, he thinks he’s going to be on the Supreme Court someday, he’ll never be on the Supreme Court.” That is what Orrin Hatch said to me, “Scalia thinks he’s going to be on the Supreme Court. He’s never going to be on the Supreme Court.”

Well, Scalia wrote the opinion, and he affirmed the conviction. You go into Fed. 2nd you’ll find the opinion by Scalia. Not only does he reject all my legislative history arguments, but he goes on to say – terrific blow from a classmate –

appellant has made all these arguments, but there is another argument he could have made.

MS. McMAHON: Oh gosh.

MR. LEWIN: And he spells out some other argument that I didn't make. I don't know if I didn't think of it. He says there is no merit to that argument. This was my first contact with Scalia on the bench as a judge in the Court of Appeals.

MS. McMAHON: At that point he hadn't really publicized or asked that many questions about legislative history?

MR. LEWIN: No, before that, I don't think so. He didn't have a reputation for that. But in that case, boy, did he make it clear.

MS. McMAHON: Came out with a bang. [**END RECORIDNG]**