

Judge Newsome-I'm here at Harvard Law School this afternoon, that being June 2, 1995, with Professor Vern Countryman, and we're here to talk about his long and distinguished career. I'd like to start by asking you your place and date of birth.

Mr. Countryman-The place is Roundup, Montana, and the date is May 13, 1917.

N-How many people were in Roundup when you were born there?

C-Well, I don't know. I don't remember when I was born. We left there when I was five years old, but I did get a look at Roundup one time many years later. I was riding the train west to east, and they said we stopped at Roundup at two a.m. So I had the porter call me, and I lifted up the shades and I saw two unpaved streets about a block on each, looked like the whole town must have consisted of 500 people.

N-Where did you move when you were five?

C-California.

N-Where in California?

C-Well, we floated around a little bit. My dad was looking for a job then. We lived in Long Beach for a while, and Redondo Beach for a while, and we finally ended up in a little place called Salida which isn't very far from Modesto.

N-Could you spell that for the tape?

C-S A L I D A

N-How many people were in Salida?

C-It was smaller than Roundup. I don't think it consisted of anything except the restaurant at the intersection of the road. That's all I ever saw.

N-But it was close to Monterey, did you say?

C-I don't know where Monterey was or is.

N-What was the closest big town to it, do you remember?

C-Modesto.

N-Oh, Modesto. Well, what was your father's occupation?

C-He had been running a grocery store in Montana, and he had various jobs in California. When we lived in Salida he was the foreman of a big peach and melon ranch. Later when we moved to Longview, Washington, he became a member of the Police Department.

N-When did you move to Longview?

C-I was about 8, I think.

N-Is that then where you spent the rest of your growing up years?

C-That's where I grew up until I went away to college.

N-And how many people did Longview have?

C-Oh, Longview had 15,000 or 20,000.

N-Was it close to Seattle?

C-150 miles south of Seattle.

N-So that would put it closer to Olympia?

C-South of Olympia too. It was right across the river from Oregon. The Columbia River. Longview sat right on it.

N-What do you remember about growing up there? Anything stand out?

C-Well, not very much. It was pretty much a company town. Longview was created by the Longbell Lumber Company, and they had a big mill there. It was sort of dull, it really was.

N-And your father was a policeman there?

C-Yeah.

N-Did your mother have an occupation?

C-No.

N-How many children were there in the family?

C-Four.

N-How old, what were the siblings in terms of, were they older or younger than you?

C-Younger. I was the oldest.

N-What, how much younger are they then you are?

C-Well, the one next to me is about 2-1/2 years younger, and the one next to him is also about 2-1/2 years younger than the one ahead of him. Then there's a gap of, I think, 13 years between me and the youngest brother. My parents kept wanting a girl, and you see what happened to them. They got four boys.

N-What was your family's ethnic background?

C-Ethnic?

N-Yes.

C-Oh, we never knew for sure. We were sort of airdales, I guess.

N-Airdales (laughter).

C-I've been called by some man who lives in Texas who still spells his last name, how the hell did he spell it, Countenant. He says that's the proper spelling and it all comes from Germany, but I never looked into that.

N-And your religious affiliation?

C-None.

N-None? Well, who would you say was the most influential on you in your early years?

C-Oh, I would say Douglass if that's early enough.

N-That's not early enough. Can you remember who it would have been back in high school let's say?

C-No, I can't.

N-Do you remember anything about, well, how big was your high school in Longview?

C-Oh, I think we graduated in a class of about 300.

N-Let's see, you would have graduated in about 1935.

C-Yeah.

N-That was still in the Depression. Did your family have any problems or suffer any?

C-Oh, yes. My father was unemployed during a large part of the Depression.

N-Even though he was a policeman he was unemployed?

C-Yes. The Police Force laid him off, and he only got back, they also allowed a man to free lance in the sense he would check all the merchant stores, the merchants paying directly, and whoever had that job gave it up and my dad took it over. That's how he got back to work. I don't think he ever made more than \$150 a month on that job.

N-So the Depression did have an effect on your family.

C-You bet.

N-Did you have enough to eat?

C-Yeah. We raised a lot of stuff. We had a 3/4 acre plot out on the outskirts of town, and we raised beans, tomatoes, and chickens, God knows what. Always seemed to have enough to eat. We didn't have anything for spending money or much for clothes.

N-So what stands out most of all during your high school years?

C-Oh, I made the football team. That was important to me. I can't think of much else. I was also editor of the school newspaper. Those two things kept me pretty busy.

N-What was your rank in your class, do you remember?

C-Number two.

N-Number two?

C-Yeah.

N-What was it like growing up in Longview?

C-Pretty damn dull. Not much to do there.

N-What was the primary composition of the town in terms of population? Were they, you know, was there a certain ethnic group that was located there, or was

C-No, I think there was only one black or dark man in town, and everybody else was white, but whether they were Irish, or Germans, or Swedes, I didn't know.

N-Then from high school you went to the University of Washington, is that right?

C-Right.

N-What made you decide to go there?

C-It was cheaper.

N-Had you looked at other places?

C-I inquired about them, but I didn't go look. Looks were not important; it was the cost to get there. You could find that out by mail.

N-I assume from what you're telling me that your folks couldn't give you much support for school?

C-They didn't give me any. My dad gave me a dollar one time while I was in high school. I remember that very well. He must have been feeling real lush. But I had an aunt who helped out a little bit.

N-It sounds like your father wasn't all that thrilled about your going to college.

C-No, he didn't see much point to it. This was entirely my mother's idea, and that's one thing she stuck to. She insisted that all the kids go to college.

N-And they all did?

C-They all did, and three of them graduated. One of them didn't.

N-Sounds like she was pretty influential though.

C-She was quite influential.

N-And you had an aunt who lived in town?

C-Yeah.

N-And she gave you some financial support?

C-A little bit, yeah. What she did was because her mother had done it for her.

N-I see. What was it you wanted to do? Did you have anything in mind that you wanted to do when you went to college?

C-I didn't decide I wanted to go to law school until my second year in college I guess. So at first I didn't know what the hell I was doing there.

N-What did you do to support yourself?

C-I worked in the library, first at the University Library and later at the Law School Library.

N-Was that enough to keep everything together in terms of your money?

C-With the little help I got from my aunt, it was. At least I didn't starve to death, and I'm still here.

N-How big was the University of Washington then?

C-My recollection was about 12,000.

N-So it was pretty big.

C-It was fairly big, yeah. Well, I really focused on the Law School. I was a good student by that school's standards. I don't think that's a great law school. I think it's about a third rate law school, but that was the one I was going to. I was sort of one of the big shots at the Law School.

N-Going back to your college years, what was it in your sophomore year that made you decide you wanted to go to law school?

C-I took some political science courses that interested me in the law, and that's how I got into it.

N-Was there any one person that was influential in that?

C-No.

N-How, where did you graduate in your college class?

C-I don't remember where, I was summa cum laude I know, but I don't remember my exact, or if I ever knew, what my exact rank was, I don't think I did.

N-Were you when you went to college, or before you got to college, were you a real bookish person when you were in high school, when growing up?

C-Yeah. I read a lot.

N-Was there anything in particular you read?

C-I liked mostly history and biographies, and I still do.

N-Now, you majored in political science, I guess, from what you're telling me, and why did you decide to go to the University of Washington? Was it just the money again?

C-Just the money, yeah.

N-Why do you think it was a third rate law school?

C-I know damn well the people who were teaching there. We had a few good ones, but you've never heard of them because they never published anything. We had a guy named Shattuck who was sharp as a tack, taught contracts and secured transactions. We had another guy named Shully who taught constitutional law. He was damn good. Then we had the old Dean of the Law School who taught Evidence. I thought he was one of the best Evidence teachers I ever met in my life although he never wrote anything either. But the rest of the faculty was

N-Ho hum, huh? Let me show you a couple of things I dug out. This is the Mast Head of the Washington Law Review I think in your junior year, second year of law school.

C-Yeah.

N-Do you know what happened to any of those people who are listed on there? You were listed as the vice president of the Law Review, right?

C-The president, Bob Purdue, as far as I know is still practicing in Washington. I think Jane Abernathy died. As far as I know Cullen is probably dead. He was drinking himself to death 20 years ago. But the others, as far as I know, are still alive, but whether they're in Washington or elsewhere, I don't know. I haven't kept track of them.

N-This is a Mast Head of you when you were president of the Law Review.

C-That's my senior year. I have to tell you something about this. Our senior year in law school was our fourth year in law school.

N-Oh, really?

C-Yeah. They were admitting people after they completed three years in undergrad school, but then after they got us in there they extended the law school to four. So we spent the third year, which is my year here, taking the dog course we'd been ducking the first three years since they hadn't thought to invent many other new courses to put in that fourth year. They invented two-One on income taxation, and one on bankruptcy, both of which I took, but mostly it was dog courses.

N-And by “dog” courses you mean what, torts and contracts and all that sort of thing?

C-Oh, no. Public utilities, stuff that was real dull.

N-Oh, I see.

C-Stuff you would never have taken if we hadn’t had to fill out a fourth year.

N-Were you then president of the Law Review the fourth year, the year after this?

C-No. This was

N-That was the fourth year, I see. So you started law school after your third year of undergraduate school?

C-That’s right.

N-It was supposed to be a six year program, but they made it a seven year program if you got there. I dug out also, I didn’t dig out the whole article, but this was, I guess, your big article you wrote when you were on the Law Review on the Federal Trade Commission.

C-Yeah, that’s right.

N-That’s out

C-I wrote this in one of the courses I took in the fourth year which was one of the “dog” courses.

N-One of the “dog” courses.

C-Called trade regulation or something like that.

N-I guess those concepts though all were pretty new back then. Really administrative law was just coming into its own at that point. And for the tape, I’m referring to the Washington Law Review and State Bar Journal from Volume 18, January 1942, number 1, “Federal Trade Commission and the Courts” by Vern Countryman. The Law Review was combined with the State Bar Journal, how did that work?

C-Well, it was solely a device to, as far as I could see, to get the practicing lawyers to buy the Law Journal.

N-I see.

C-Put them in together at one price.

N-That was kind of, at least as far as I know, that was fairly unusual to have the combined State Bar Journal and the law school Law Review.

C-I guess it is fairly unusual. I haven't seen it.

N-Is it still true today? Are they still doing it that way?

C-I don't know.

N-What is it that you wanted to do? What did you think you wanted to do by the time you were in your fourth year of law school?

C-Well, I guess I was focusing on what I was going to do immediately. When I got out of law school I took a job with the National Labor Relations Board as an attorney in the Seattle Regional Office, but I only stayed there three or four months. I got the clerkship with Douglass.

N-So you, that would have been in 1940.

C-1942.

N-1942. So you were there for 3 months. How did it come about that you applied for that clerkship with Douglass?

C-I didn't apply for it. He at that time was taking all of his clerks from the University of Washington, and he just looked over each year as long as the Dean would push forward, and I was one of those. He took me.

N-How come he waited so long? I mean if you were out of school already, wouldn't he have already contacted you or someone?

C-Well, he hadn't. He waited until he came out to spend the summer out there at Gooseberry which he did every summer at that time.

N-Lewis Ferry?

C-Gooseberry.

N-Oh, Gooseberry, excuse me. Where was that?

C-That was in the mountains over by Yakama.

N-So what happened? How did that happen? Did he call you up, or how were you contacted?

C-Through the Dean's office I was told that Douglass would be in Seattle on such and such a date and he wanted to see me and where I could find him. So I found him and talked to him.

N-That must have been really something when the Dean called you up and told you that.

C-It was quite impressive and quite scary too.

N-So what, tell me about the day you met him.

C-I don't know. He looked a hell of a lot different then, than, well, he looked about like he did in this picture over here (excuse the looking glass; it was damaged on the way up here). He looks pretty young you see. That's the picture he gave to me at the end of the year which was probably taken sometime during the year.

N-So, he would have been about how old in that picture?

C-Oh, I'd say early 40's.

N-Early 40's? Well, what kind of a guy was he in his early 40's when you first met him?

C-He worked your ass off. He never hesitated to give you plenty of work. I remember one time he called me in and said "Give me a brief of all of the cases the Supreme Court has decided on the full faith and credit clause." That was quite a few cases. I worked on the God damn thing until I had a stack like the Sears Roebuck catalog. I took it into him, and he was writing an opinion on an absentee divorce case. And somewhere in that opinion it says this court has never held so and so under the "full faith and credit clause," that's where my research went.

N-Did you help him draft opinions?

C-No, sir, never. He would draft the opinion with no help from anybody and would come out to me, and I would have to check for errors or anything that I thought ought to be changed. Didn't need much changed. I enjoyed those sessions very much.

N-Let me go back for just a second because I think it's going to be of interest to anybody who listens. What took place during your first meeting with him in Seattle? Do you remember walking in, was he abrupt or was he warm?

C-Well, he was quite friendly. I had heard what a heller he was for work so I spent most of my time convincing him I'd been working all my life and he wouldn't be anything new to me. And I guess I convinced him because he took me. I really have no good recollection of that meeting with him at all. I do remember that conversation, but that's about it.

N-Had you ever been that far East when you moved to Washington? I assume you moved to

Washington not long after that?

C-That's right. No, I had never been there.

N-And you didn't know anybody back there I assume?

C-No.

N-So that must have been quite a daunting experience for you?

C-It was. I had one friend back there. He'd been working for the National Labor Relations Board in Seattle and had helped me get a job there. Then he transferred to Washington so I knew him.

N-Was there any particular reason why you went with the NLRB? Is that what you were interested in at the time?

C-Well, I was always interested in labor law, yeah, and this fellow interested me in the job. I enjoyed the work although I didn't do it for very long.

N-That would have been again pretty early on in NLRB's existence, I guess, wasn't it?

C-Well, 1942.

N-So it was 7 years after the Wagner Act, or thereabouts, right?

C-Yeah.

N-Well, let me go through. Let me ask you first, do you remember who any of your fellow clerks were when you were on the Supreme Court?

C- Oh, I remember some of them. John Frank was a clerk. Black.

N-And who was John Frank?

C-John Frank is now practicing law in Phoenix, Arizona, and has been for years. Vic, who was on the faculty here, was clerk for, I've forgotten the name of the judge. Vic was hired to be the clerk for, draw a blank, I am so sorry, I don't remember. They're the only two

N-That stand out?

C-Yeah.

N-Did you get to meet any of the other Justices?

C-Some of them. I met Justice Roberts, Justice Black, and Justice Murphy. That was about it. Felix Frankfurter wouldn't talk to Douglass' clerks. Tried to convert everybody else, all the other clerks to his camp, but he never talked to Douglass' clerks.

N-What do you remember about Roberts?

C-Well, Roberts was a big blond fellow, not bad looking, very middle of the road.

N-He was a pre-Roosevelt appointee, wasn't he?

C-I think he was.

N-How about Murphy?

C-Murphy had more guts than anybody else on the Court. He would come out against the Catholic Church although he was a devout Catholic. He'd come out against the Army although he maintained his Reserve Commission in the Army. He took positions on a few cases that even Black and Douglass wouldn't go for, but he went for them. He knew he was going to get crucified, but he did it anyway.

N-Somebody once told me, claimed to have knowledge of it, that he never wrote any of his own opinions.

C-That may, I think that's an exaggeration, but I think he got some help from his clerks which distinguished him from Douglass who didn't give any out. So I think the clerks helped him sometimes, but sometimes they didn't. I think that opinion writing by clerks is much more common than supposed.

N-Today?

C-Today.

N-What about Justice Black?

C-Well, I admired Black a lot, but I was a little disappointed in him when he got pretty old. I thought he veered a little to the right there. But at the time I was clerking he and Murphy and Douglass, I thought, were the best Justices on the Court.

N-And Frankfurter?

C-No, I was never very impressed with Frankfurter.

N-How come?

C-Well, for one thing, he was such a middle-of-the-road bastard, and hated Douglass so much he let it spill over into the clerks and everything else. And in the second place, I didn't think much of most of his opinions.

N-Why did he hate Douglass so much?

C-Because Douglass just baited the hell out of him. He was a sucker for being baited, and Douglass knew it and didn't like him so just gave him hell all the time. Not the loveliest man in the world.

N-Tell me some more about working for Douglass.

C-Well,

N-Did you ever get fired? His reputation is he used to fire his law clerks all the time?

C-No, that happened after my time.

N-Oh. I see.

C-No one had been fired up until my time, including my time. I don't think the fellow who succeeded me ever got fired either. But I have heard those stories from later clerks.

N-Was he as fiery and volatile as he's been made out to be?

C-Well, no, I don't think he's very fiery and volatile. He's more; he doesn't talk a hell of a lot.

N-Douglass didn't?

C-No, at least I don't think so. He was sort of quiet and went about his business. He never tried to recruit anybody on his side on anything that I ever heard about.

N-Really? He didn't do any politicking to get justices to go his way?

C-Not when I was there. That may have changed. I was one of the earlier clerks, you know.

N-What about Chief Justice Stone? He was the Chief Justice at that time, was he not?

C-Yes, he was.

N-Did you have any impressions of him?

C-Only that he was a great big man. I never met him.

N-I see.

C-Douglass thought a lot of him. He once told me when he gave me this assignment to recall the cases on the "full faith and credit clause," he told me he and Stone were really the only ones who understood it. So I figured Stone was pretty lucky to make it into that category.

N-I guess none of them lacked for ego?

C-No, I don't think so. Maybe this guy from Chicago now, what's his name, on the Supreme Court

N-Oh, Stevens.

C-Stevens, he may be a little quiet. I never hear about him saying much of anything.

N-I want to go through. I know you're probably not going to remember most of these, but the reason I am going to do this is, during the time of the year you were there you, there were lots of bankruptcy decisions that were written, that Douglass wrote. I wanted to go through, well, for example, this is Marine Harbor Properties Manufacturers Trust.

C-I remember it vaguely.

N-And that obviously has some very important things to say about, as I recall, fair and equitable rule among other things. Another case, this is not a bankruptcy case obviously, but Clearview Trust v. United States was decided during your time. Did you work on either of those cases?

C-I worked on both of them, but I tell you I don't remember much of a damn thing about them now.

N-Would you have helped with the drafting of the decision or just the research?

C-Just the research. We would have this session on every case where I'd go over the drafting and try to find something wrong with it. This may interest you because one of the books that's been written lately tells about some clerk who undertook to write an opinion and damn near got fired or maybe did get fired. I did that one time on an inconspicuous little case involving the Federal Bankruptcy Act, and I went through the whole damn thing and made several suggestions for inserts. There's one footnote in that opinion that is mine, all mine. One sentence long citation.

N-Let me show you some other bankruptcy decisions I've found from the time you were there and see if you can remember which one it was.

C- I remember all of these. This one, Group of Institutional Investors v. Chicago, Milwaukee was a hell of a big case.

N-Yes, it was. A very important case for some of the things it had to say, especially about executory contracts, as I recall.

C-Well, I, this is a good example of how you work when you're working on Chicago, Milwaukee. He had the record brought into his office which was in an old piano box. The next week whenever I went into his office about all I'd see were these pants hanging over the edge of the box. This long opinion came in, I don't remember now how long it was, but it was pretty damn long.

N-His pants hanging over the box?

C-Yeah, he had his head down in the box.

N-Oh, I see.

C-I spent over a month checking this opinion against the record. I didn't find a single God damn mistake. But that's when I really got interested in bankruptcy, in this opinion more than any of the others.

N-This is not a bankruptcy case.

C-No, that's Clearfield, (Clearfield Trust Co. v. U.S., 318 U.S. 363) I think. This one didn't amount to much. It was an opinion, but this one was really interesting. I had gotten interested in reorganizations as a law student. I learned a little about it in law school. I really got a workout on this case. We also had another case up there. Reid wrote the opinion. This was Chicago, Milwaukee, and I think Reid had Western Pacific.

N-It was a companion case to it, yes. I saw that. And these were railroad reorganizations under old 77(b), was it?

C-Yeah. 77, not 77(b)

N-77.

C-77(b) was non-railroad corporations.

N-And that was the predecessor of Chapter 10, I guess, of the

C-Yeah, 77(b) was, that's right.

N-What was wrong with 77(b)? Why did they have to, do you remember what the big problem was with 77(b)?

C-No, that was changed while I was still in school.

N-I want to stop for just a second.

C-Won't get much out of this.

N-Oh, you'd be surprised. All right, is there anything else you can tell me about Douglass that stands out in your mind? He must have been a genius. He must have been extremely difficult to work for.

C-He was harder than hell. I enjoyed working for him very much although I worked my ass off. I never got mad at him.

N-Did he get mad at you?

C-No, not that I was aware of. I didn't mind being worked that hard by someone who was working himself that hard also so it was sort of a joint endeavor although I was a minor role, but I was all for getting this job done.

N-I need for the record to state what cite was on the Institutional Investor v. Chicago Milwaukee St. Paul Pacific Railroad Co. It was 318 U.S. 523 decided in 1943. This was the case that really peaked your interest more than anything in bankruptcy?

C-Yeah.

N-Well, what did you do after your clerkship ended?

C-Let's see. I got drafted before my clerkship ended.

N-That would have been '43?

C-'43, yeah.

N-So you weren't even there for a whole year?

C-No, I wasn't. I came in September of '42 and left in June or July of '43. I had a short term.

N-What did you do in the war?

C-Well, the day I went into the induction center because I was summoned by the Draft Board, I

had a call for personnel specialist which at Ft. Lewis Induction Center meant anybody with more than a high school education would be thrown in to fill this gap. So they got a bunch of us by that method of selection and sent us to Washington and Jefferson College in Pennsylvania where the personnel boys were all psychologists had taken over the university and were running a series of schools through. And the big job was, you won't believe this, but they had divided a card 8-1/2 by 11 and they poked holes in the edge of it, and then they had a thing with a bunch of fingers on it like this. And they ran the card through here and lifted them up, and where the holes had been punched the cards would drop out. That's what you'd do if you were looking for an auto mechanic. The number I still remember is 405. If you were looking for a personnel specialist, I've forgotten what the number was. That was all we did, learn how to do that, for three months. The most boring God damn kind of work I ever spent in my life. Then we all got out of there. We were all personnel specialists. They shipped us all to overseas replacement depot. I had to fly to get into Air Cadet training so they held me there at the Overseas Replacement Depot for four months. Then I passed some preliminary exam, but then they decided they didn't need any new people to become pilots or navigators. They could use the gunners from the old school and get new gunners that didn't have to be trained as anything, so I was thrown out of the Overseas Replacement Depot and sent to Italy, where in due course I was commissioned. Got a field commission for no apparent reason except they had the thing and had to fill it. So for the last two or three years I was overseas, I was a Personnel Specialist Officer. Never heard a shot fired. Never saw an enemy. The most boring God damn time I ever spent in my life.

N-How long were you in the service?

C-About four years.

N-So you did that. That's all you did? You were in Italy most of that time?

C-Yeah, that's all I did. Once I left the United States I . . . We stopped off in Casablanca overnight, went on to Italy the next day and stayed in Italy for four years.

N-So you would have gotten out of the service in late '46?

C-Yeah, I think that's right.

N-What did you do immediately after the war as soon as you got out?

C-Well, first I decided to go back to law school to get some more education because I knew I didn't have very much. So I started to find the law schools, and then my old alma mater University of Washington asked me to come and teach there for a year. So I postponed all these applications and taught at Washington for one year. Then I went back to Harvard, Purdue, Yale to do a year's graduate work.

N-You were also an Assistant Attorney General during that time?

C-Before I taught at the University of Washington, just to fill in the time. I got out of the Army sometime in the summer, and this job at the University of Washington didn't start up until fall so I got a job as assistant to the Attorney General for a few months.

N-What made you decide to go back to Yale Law School or to go to Yale Law School?

C-I thought that then, I was mistaken, but I thought it was the most forward looking law school in the country.

N-Why did you think that? Did Douglass have any influence on that?

C-Douglass never said a word to me about Yale Law School, but he had a great influence on me nonetheless in selecting a law school where I'd do advanced work.

N-I take it from your relationship with him, that while he may have been an influence, you two didn't really have that much to say to each other, is that right? I mean there wasn't a whole lot of

C-I don't think he had much to say to anybody.

N-So your relationship was pretty much like everybody else's was?

C-That's right.

N-Was it just that he didn't want to, was he just anti-social, or was he just somebody that kept to himself, or what?

C-I don't know how to explain that. I think I'm pretty much like him. I don't talk a hell of a lot either, but I can't explain why that is except that I have this feeling of inferiority about some of the training I've had.

N-What did you want to do when you entered Yale?

C-I thought I wanted to teach.

N-How come?

C-It looked more interesting to me than practicing law.

N-Had you had other than the stint with the Attorney General and the NLRB, you really hadn't had any private practice experience at that point. You then became

C-I got some later, and I was right.

N-You, how did you become an assistant professor at Yale?

C-Well, they just appointed me at the end of the year, the year I'd spent as a graduate student.

N-You didn't get a degree or anything after that year, I assume?

C- No, I didn't. I could have if I had turned in my 100 [page] paper, but that was a little inconvenient. I wrote that paper during my year as a graduate student there. Then the next summer I'd gotten a job teaching at the University of Chicago Law School, and I didn't figure I'd have much time to finish that paper up so I never turned it in. I never got a graduate degree there, but I was hired near the end of my year of graduate work.

N-Then you went to Chicago for the summer?

C-For the summer.

N-I see. You were an assistant, an associate professor of law there [at Yale] from '48 to '55?

C-Yeah.

N-What did you teach?

C-Bankruptcy and commercial transactions.

N-Do you remember any of your students?

C-Yeah. One of my early ones was George Treister, and he almost drove me crazy.

N-How come?

C-He'd come after class quite frequently to tell me what he thought I'd been wrong about. In a very polite way, very inoffensive. Half the time, I think I agreed with him. He was in my first class teaching at Yale. I had George Treister and Norman Redlich who used to be the Dean at NYU. George would come in very graciously and straighten me out on what I'd done wrong that day, and Redlich would come in and say something like "I hear you took back what you said, the stupid thing, you said in class today." But I remained very good friends with both of them.

Tape 1 - Side 2

N-Do you remember any other students?

C-Well, I remember Hugo Black, young Hugo, he was also in George Treister's class, but he wasn't as bright as George. I don't remember any others. It's been a long time ago.

N-Right. So those were the two courses mainly? Bankruptcy and Commercial Law, that's what you taught during the entire seven years there? How did Yale change during your tenure there?

C-Well

N-That's a leading question that assumes a fact not in evidence. Did it change?

C-It sure as hell did, but I can't give you an unbiased answer. I'll give you a biased one.

N-O.K.

C- My view of the situation. I sort of teamed up with a guy named Fowler Harper, who was a full faculty member, and we got into, it doesn't seem like much, but at the time I guess it seemed like great trouble to the president of the university who was A. Whitney Griswold. Fowler had tenure, but I didn't. So when I served out my seven year stint, and that's what it usually took at Yale in those days to get tenure, Dean Wesley Sturges recommended me for tenure to the faculty, and the faculty voted affirmatively, but I was told, I wasn't there. Then it was sent over to Griswold who started digging in his heels on the whole damn thing. First he said "Well, we'll have to postpone this until next year." He said to me "Now you buckle down and do something worthwhile." That brief you and Fowler filed in the Supreme Court, on the trial of the second string of Communist leaders, isn't any good, the other fellows tell us. So you better do something better next year."

N-Which brief was that?

C-A brief in the second string of Communist days in the Supreme Court. I've forgotten the name of the case. The first string case had been there before.

N-When you say "first and second string," I not sure I know what you mean.

C-First and second string Communists, they were the defendants in these cases.

N-But when you say first string, you mean these were the big guys, and then there was a second group, the second string as you call it? I see.

C-That's the way I understood it. So anyway I stuck it out for another year, and in the meantime Wes Sturges served out his term as Dean, and Griswold had appointed Harry Shulman to take his place as Dean. Shulman in my judgment was a liar and a crook. He called me in and said "I don't think the faculty is going to vote tenure for you." They had already voted the year before.

“But I’ll let you stay on another year and see if you can straighten yourself out.” I told him “Go to Hell.” He and Griswold and Rostow, and I know you asked about all three of them, they were obviously working in cahoots, and Rostow supplied most of the brains.

N-That was Gene Rostow?

C-Yeah, Gene Rostow.

N-Well, tell me a little bit about each one of these characters. What was Griswold all about? I mean what kind of a guy was he?

C-I didn’t know him very well, but I didn’t admire him any.

N-Was he the Griswold who eventually became Solicitor General?

C-No no, that was

N-That was a different Griswold.

C-That was the Dean at Harvard.

N-Oh.

C-A. Whitney Griswold, the President at Yale, told me that a number of people, including his cousin, Erwin Griswold at Harvard, had told him to get rid of me. Old Irwin Griswold retired, and he was finally the guy who hired me at Harvard so I figured A. Whitney was embellishing the story of a liar. Rostow and I never did get along.

N-What kind of a guy was he?

C-He was an oily bastard who His objective was to get himself on the Federal Court, and he never made it, and I think that’s good.

N-How about Wesley Sturges?

C-There was a great guy. He was, I thought, a fine fellow. Of course he was for me; the guys were against me so

N-There were two or three other people that left at about the same time you did, weren’t there?

C-Yeah. John Frank who is now, as I told you, practicing in Phoenix, Arizona, and David Haber.

N-And why did they leave?

C-Well, a lot of people didn't think too much of John Frank's work. I have to admit that I sort of share that view. So I didn't think there was anything wrong when they denied John Frank tenure even though I thought it was wrong to deny it to me. Dave Haber was different. He was sort of, I don't know, I thought Dave's work was pretty good. He worked with Tom Emerson and wrote two or three books on freedom of speech and that sort of thing which I thought were very good, but the majority of the faculty didn't think so.

N-Were you the victim of basically McCarthyism?

C-Well, I think so in a general way. McCarthy himself never got after me that I know of, but the same sort of thing.

N-Did these people ever intimate that your views were just too left leaning?

C-A. Whitney Griswold certainly made that point, yeah.

N-He said that you needed to find something productive to do. Why did he think that the Supreme Court brief that you had written for the second string Communists was not a good brief?

C-I don't know, particularly since the Supreme Court later decided the case on the point we made in that brief.

N-What about James William Moore, was he there then?

C-J. W. Moore was there, yeah. He was a very conservative guy. I got more and more embellished on the other side. He thought less and less of me. We started out working together. He taught bankruptcy also, but we had pretty much broken up by the time I left.

N-He was also, was he not, the person who wrote "Moore's on Federal Procedures"?

C-"Moore's on Federal Procedures," right.

N-He was also the Editor of Colliers at the time, wasn't he?

C-That's right.

N-Why did they need two people teaching bankruptcy at Yale? Was there that much demand for it?

C-Yeah, there was. It was a popular course there.

N-How did you split it up? I mean the teaching duties.

C-The first time I taught it, to make it easy on me, we just divided the course in half. I taught one half, and J. W. Moore taught the other half. Then we added up the grades and figured out what the scores were, and after that we each made our own course, and we both had pretty good enrollment.

N-In terms of philosophy of outlook in the bankruptcy area, was there a distinct difference between the two of you?

C-Well, I think so.

N-In what way?

C-I think that, well, I'll tell you, J. W. Moore's method of teaching would be to fire a hypothetical at a kid and say the kid gave the right answer, he would say "That's right, 22 Fed.2nd 444." And that went on for 50 minutes. That isn't the way I ran a class.

N-How did you run a class?

C- With Socratic discussion. I wasn't interested in giving them the latest citation.

N-Was he pro reorganization if there was such a thing back then or pro consumer?

C- He never understood reorganization very well.

N-How did he end up being Editor of Colliers?

C-Well, you assume that he wrote a hell of a lot of it. He farmed out most of the writing, not only *Colliers*, but his *Federal Practice* too. For instance, you can look at, I think its chapter 30 of his *Federal Practice*, and if you go back a couple of editions you'll find a chapter 30 which I wrote. You'd never detect it from looking at the damned book.

N-He never gave credit to anybody for Moore's *Practice*?

C-Well, sometimes he gave; he got help from other people outside the school too, like Larry King who is now really in charge of these things.

N-You're talking about *Colliers* now as opposed to Moore's *Federal Practice*?

C-Yeah, not Moore's *Federal Practice*. So he gave some credit outside, but most of it he didn't. He never gave me any, and I know other people who didn't get any.

N-Did you at some point really become not just distant but enemies?

C-Well, we never came to exchanging blows, but we stopped talking to each other. I'm sure he was one of those who voted to deny me tenure.

N-Do you think he was the one that was the inspiration or the main factor in your being denied tenure?

C-No, I think that was Shulman and Rostow.

N-Well, you left because you were denied tenure, I guess. What did you decide, or what made you decide to go into private practice then in 1955?

C-Because I couldn't find anything else. I couldn't get another teaching job. I'll come back to that point later.

N-O.K.

C-Couldn't get a teaching job after I left Yale, in the year after.

N-What made you decide to join, I think the name of the firm was Shea, Greenman, and Gardner?

C-Yeah. Well, I went down and talked to a number of firms in Washington, and I liked them the best. There was a guy named Warner Gardner, who was a hell of a good lawyer, and they had a spot working under him which they offered me, and I decided to take it. I've always been glad I did. While I didn't really love the practice, I thought I got better experience there than I would have any place else.

N-How big a firm was it?

C-It was about ten members.

N-That included associates or is that just the partners?

C-No, that included everyone.

N-Everybody. You could have probably gotten a job with practically any firm in Washington though, couldn't you?

C-Well, maybe, I don't know. I didn't really try that.

N-Did you know these people before you?

C-No.

N-What made you decide to go to Washington? Why not Boston or New Haven or whatever?

C-Well, I had about enough of New Haven for a while, and I didn't know much about Boston. I hadn't been there. There were more people in Washington who seemed to be looking for lawyers than other places I heard about. It's pretty hard to assign reasons why you did something that long ago.

N-But you were 38 when that happened, weren't you?

C-I don't know, maybe.

N-Well, '55, it sounds like 38 to me you were about.

C-I guess so.

N-So it must have been kind of tough becoming an associate in a law firm at the age of 38?

C- It was. When you get bounced out of a university you don't have very many choices.

N-The only published opinion I could find in which you were a lawyer while you were working for them was an Admiralty opinion, a Federal Appeals Court case. I don't have the name of it with me, but

C-I know which one it is. It's

N-I don't think I listed it in the letter.

C-Yeah, I think you did.

N-Maybe I did.

C- Priest

N-No, that was later. That was the court marshal.

C-Oh, well,

N-It isn't important. I just noted that. You must have been doing everything, not just bankruptcy or any

C-It was something I was supposed to be doing while I was teaching at Yale?

N-No, this was something, I'm talking about while you were in practice in Washington. What kind of practice were you doing there?

C-Oh, Warner's chief client, but the one I worked on most was the American President Lines.

N-O.K. That explains the name of the case too.

C-I did handle one case for them that went to the Court of Admiralty Appeals. I guess that was the one. It involved somebody off the ship or some such thing.

N-Is that mainly the kind of work you were doing, was admiralty work, or did you do anything else?

C-No, a lot of our stuff was not admiralty at all. It involved all the steamship companies who were fighting for subsidies in the United States, and most of our time was spent on those subsidy hearings.

N-That doesn't sound very interesting.

C-It wasn't.

N-You then in 1959 left the firm. What made you decide to leave at that point?

C-I got a chance to go back into teaching, but I had to take a Deanship to do it, at the University of New Mexico. So I always tell my friends who become Deans these days I'm the only one that had a good excuse for becoming a Dean. They had a lower standard for Deans than they did for professors so I became a Dean. So that's why I went to New Mexico. I was sick of the practice and thought maybe something would come out of going back to teaching even though I had to become a Dean in order to do it.

N-Well, you were going to tell me why it was you couldn't find a teaching job after you left Yale.

C-Well, the reason was everybody knew why I left.

N-And that was?

C-I had been denied tenure because some people thought I had done something wrong.

N-There is no indication or, you never had the feeling you were black listed because of your political views?

C-Oh, not black listed in the sense of, I don't think Yale sat down and sent out letters to

everybody saying "Don't hire this guy." But word gets around just the same.

N-You, there's no secret about the fact that you've always been pretty liberal in your politics, isn't that right? When did, how did you become such a liberal in your political thinking?

C-I think when I was clerking with Douglas.

N-Up to that point you didn't feel, didn't have those kinds of beliefs?

C-Well, we used to talk around while I was in the University about various issues, and I usually ended up on the liberal side. I think it was mostly Douglass's beliefs.

N-Well, how did you, of all places, how did you end up getting an offer to be Dean of the Law School at New Mexico?

C-My friend Harper was going back to Yale, had the Acting Dean of New Mexico back there as a graduate student for a year, and the Acting Dean was looking for somebody to take his place. And Harper sicced him on me, and we clicked.

N-Had you ever been in New Mexico before?

C-No, never seen it.

N-And this was in Albuquerque, I assume, is that right?

C-Which is uglier than sin.

N-It has changed some since then, but I have to say, you'd probably think the same thing about it.

C-But I liked it there. The weather I thought was great.

N-You spent five years there. What can you remember about that experience?

C-Well, like the story of my life all over again. Had a big fight there. Some character named Pin Carr, not Penn

N-P I N?

C-Pin Carr.

N-C a r r?

C-Carr, in the State Legislature, decided that we were a bunch of dangerous characters down in the law school. And he introduced a Resolution to investigate us, and we defeated him in the Legislature. Resolution never got through, but that took some time. That went on for quite a while.

N-Was this again because of anything in particular?

C-We could never find out what bothered them. We didn't know. We didn't know him well enough to ask him.

N-Do you remember any of the faculty or any of the students that you had going through?

C-I remember the faculty. It wasn't a very big faculty. I believe there were just six of us altogether.

N-Only six on the faculty? You taught there then too?

C-Yeah.

N-Bankruptcy?

C-Yeah, bankruptcy, and corporations I guess I taught there. Well, I think I miss-spoke when I told you that I taught bankruptcy and commercial transactions at Yale. I taught bankruptcy and corporations, but I didn't teach commercial transactions until I got to Harvard.

N-Well, is there anything, what made you decide you didn't want to stay in New Mexico anymore?

C-I didn't like the deaning.

N-You didn't like deaning?

C-No.

N-What led you to come to work at Harvard in '64?

C-They asked me to come as a visitor with a view which means they want to look you over. So I was getting tired of deaning and decided to come back and subject myself to the view. The first year I was at Harvard I was just a visitor. At the end of that year they offered me a permanent position.

N-Did they, did somebody call you up, like was it Erwin Griswold at the time that was the Dean?

C-He was the Dean. I guess the way this came about was I had an appointment to come back here and talk to their Appointments Committee, and then the University of Miami offered me the deanship there. And I called Erwin Griswald to tell him about that, and then is when he told me for the first time that they weren't asking me as a visitor, they were asking me as a visitor with a view. And I decided to take that chance and go and apply, and so I came on back here.

N-And that was the first time you had spent really much time in Boston from the way it sounds.

C-Any time.

N-Any time. What do you remember about the year of a view? Do you remember anything about your experiences or early years here?

C-No, I didn't think I was treated much differently than anybody else. I never had much of a feeling that I was "on view."

N-And you had an offer of a permanent position, as what, an assistant professor at the end of the first year?

C-No, full professor.

N-Full professor?

C-They usually offer you whatever rank you have when you come here, and I was a full professor in New Mexico.

N-So you were tenured after a year?

C-Yeah.

N-And you taught commercial, you taught corporations and bankruptcy from that point forward?

C-Commercial law and bankruptcy.

N-Commercial law and bankruptcy, I see. Who was teaching bankruptcy here before you got here?

C-A guy named MacLachlan.

N-What can you tell me about him? Did you know him?

C-I knew him slightly. I think he must have turned over, I think he was dead by the time I was hired to replace him. I think he must have turned over in his grave because I had written an

article while I was still teaching at Yale about the Uniform Commercial Code and Bankruptcy Law and the conflicts between them. In the course of that I'd gotten cross with MacLachlan on several points so I later discovered that he had been voting against me for years in the National Bankruptcy Conference which is sort of an organization that people interested in bankruptcy liked to be in. Any one man could veto anybody else, MacLachlan vetoed me year after year until they finally took the vote away from the members and gave it to the Board of Directors of the organization and then they voted me in.

N-Well, before we get to the National Bankruptcy Conference which I'm coming to, do any of your colleagues that you taught with, I mean you were here for 23 years and you're back, but do any of your colleagues stand out in your mind?

C-Well sure, my best friend here is probably Victor Brudney who I told you was a clerk on the Supreme Court.

N-You spell his name how?

C-B r u d n e y, and another good friend is Andrew Kaufman who was here before and is still here.

N-And what do they teach?

C-Well, Andy teaches commercial transactions and constitutional law. Brudney teaches corporate finance and security trade.

N-Anybody else that in the early years, did you know, I guess by that time, was Karl Llewellyn gone?

C-He was gone. Never knew him.

N-Which of the students do you remember?

C-I don't want to remember any students. Too damn many of them.

N-Was Jonathan Landers one of your students?

C-I don't believe he was. I know who he is, but I don't believe he was a student of mine.

N-When were you invited to join the National Bankruptcy Conference?

C-My recollection, which is sort of dim, was about 1964.

N-About the same time then that you came to Harvard?

C-Yeah.

N-So it wasn't William James Moore, or James William Moore, excuse me, that kept you off of the Conference?

C-Yeah.

N-It was him? He and MacLachlan then both kept you off? MacLachlan, however, by that time would have been I guess dead.

C-By '64?

N-Right.

C-He was, yeah.

N-Moore was still on, but they had given the appointment powers to the Board of Directors?

C-Yeah.

N-Was he angry when you got appointed?

C-I don't know. He never came to me very much, and I never saw him for years. I don't imagine he was pleased.

N-Let me ask you about some other people you must have known, both from the National Bankruptcy Conference and just generally. What can you tell me about Charles Seligson?

C-Oh, I liked Charlie very much. He was a pretty damn good lawyer and a real pleasure to work with. A very friendly man. I rated him pretty high.

N-How about William Rochelle?

C-Bill Rochelle I knew quite well. A damn good lawyer from Texas.

N-You worked on a case with him or two, didn't you?

C-Yeah, only one case.

N-How about Sidney Krause?

C-I never knew Sidney very well. He didn't last long after I came into the Conference.

N-Now some of the people you were also, well, was Peter Coogan on the National Bankruptcy Conference?

C-Yes, he was. He was a damn good lawyer too.

N-Was he with Ropes and Gray?

C-Yes, he was, and he came out here and taught several courses.

N-Anything else you can remember about him?

C-Well, he was the guy who did not like trustees. He was all for debtors in possession. He said if you get a trustee, you're liable to get some ignorant ass who doesn't know a damn thing about the business.

N-Some of these people I'm going to ask you about now are people I think that you worked with, basically people who were secured transactions or UCC people, like Grant Gilmore, for example.

C-I knew Grant longer than anybody else, I guess. He had been teaching at Yale when I was teaching there. Very bright guy, wrote beautifully. He died only a couple of years ago I guess. A very able lawyer.

N-Herbert Anderson.

C-Him I don't know.

N-Elmer Whitehurst.

C-Him also, I know who they are, but I don't know much about them.

N-Harold Marsh.

C-There's a smart son of a bitch. Harold, he figured things out his own way, and that's it. We were trying to make sure that we got chapter 13 set up so that any self-employed person could use it. Finally I said "why, self-employed barbers ought to be able to use it." Harold went through the ceiling. "Self-employed barber, what the hell are you talking about?" He was a character.

N-Why was he so against a self-employed barber being able to file chapter 13?

C-I never found out why, never found out why from Harold. But to show you the kind of guy he was. He visited here for a year. So he went into class one day, and he said "I'm going to lay out all we've covered so far." Everybody got out their paper and pencils, and he started talking and

they were writing down every damn thing. Kept going for 15-20 minutes, and then he stopped and said "Now why is that all wrong?" I don't think the students learned much, but he's a bright guy.

N-Leon Forman? There's another NBC person.

C-Well, I liked Leon quite well, but I don't think he's in a class with Gilmore and, oh any of the other people we discussed.

N-Barney Shapiro.

C-Barney's a very bright guy. You know him and talked to him. You've had him in your courtroom.

N-I have had, yes.

C-I think he's a good lawyer.

N-Stefan Riesenfeld.

C-I've got to be wrong about Riesenfeld. I could never understand what in the hell he was talking about. I literally cannot. But I'm told the students like him just fine. How in hell they can understand him I don't know so I have no basis for an opinion.

N-How about Homer Kripke?

C-Homer was a good lawyer too. Always proclaimed that he was flying in the sense he said I'm essentially a representative of secured creditors, and when I speak I'm speaking how they feel. I think he was very honest about it, and it made him more effective.

N-He was also an SEC lawyer, wasn't he?

C-Yeah, I think he was.

N-How about Larry King?

C-Oh, a good friend of mine. A bright guy. He is, has been for years, I think maybe he turned it over to Ken Klee now. For years he was chairman of the legislative committee of the NBC which involved his handling most of the relationships between the NBC and the Congressional committees, and he always did an excellent job of handling it so that we never got lost in the boonies someplace.

N-You testified an awful lot of times before Congress yourself, didn't you?

C-Yeah.

N-Can you remember any specific instances?

C-Well, I can remember the one, I can't remember the date, but I remember George Treister, Frank Kennedy, Larry King, and I went to testify in support of a proposal to make bankruptcy judges Article III judges, and they didn't get made Article III judges, but three of the four of us got relieved by the Chief Justice, Mr. Berger, from the Rules Committee.

N-What year would that have been?

C-I was trying to figure.

N-It must have been '77, '78.

C-Thereabouts, yeah.

N-You were on the Advisory Committee, the Bankruptcy Rules Advisory Committee in '74, right?

C-I was a reporter, I wasn't on

N-Oh, I see.

C-Reporter for chapter 13, writing the chapter 13 rules.

N-And that would have been for the '73 Rules?

C-Yeah.

N-The Act Rules. Why do you think, do you have any evidence that that's why Berger didn't reappoint you to the new rules committee?

C-I don't have any evidence. I don't understand why he kept Larry King on. The fact that he didn't favor making you fellows Article III judges didn't disqualify him from drafting rules for people who are Article III judges. As a matter of fact, he is probably the best draftsman they had at that point, because among others they threw out was Frank Kennedy, who was the best draftsman on the committee, and George Treister who was the smartest guy on the committee, and me, who was neither of those things.

N-Do you remember a time in 1976 when New York City was about to go broke and you had to testify before Congress, didn't you on that occasion?

C-Yeah, I think I did. Yeah, they were just introducing a bill to try to help New York City.

N-Chapter 9, I guess?

C-Chapter 9, yeah. This was a little ahead of the Bankruptcy Commission which later turned in a report, and I guess it was their Chapter 9 they finally adopted. But, Senator Hruska got in this for some reason so he

N-He was from Nebraska?

C-Yeah. He called me and he called Larry King at different times, wanting us to come down and testify. One thing we both emphasized was that whoever had drafted this bill, it turned out to have been Scalia when he was in the Department of Justice, he must not have known what the hell he was doing because he had the bankruptcy petition from New York City filed in Brooklyn. So I was sitting in the hearing room when he called Scalia and asked him why the hell he did that. He didn't even know he had done it. He just copies from somebody else, that's all.

N-This was, now Justice Scalia. Antonin Scalia.

C-Justice Scalia, that's right. We didn't get a bill at that point. Something small came up we got it later.

N-And New York City of course didn't file for chapter 9 either at that point?

C-No.

N-But that wasn't really the emergency, was it?

C-That's what the whole thing was about.

N-Hruska, the name is H r u s k a?

C-Yeah.

N-Let me go back to the list I was asking you about. You talked about George Treister. What can you tell me about Charles Horsky?

C-Charles Horsky is, I regarded him as a very distinguished man. A damn good lawyer. He can handle almost anything. He served as the chairman of the National Bankruptcy Conference for quite a while, but he was no bankruptcy expert. But he ran those hearings better than any chairman we had before or since. A very easy man to get along with. I respected him because he was a damn good lawyer.

N-Were you aware of the fact that he, your Alma maters are the same?

C-He went to the University of Washington?

N-Uh huh.

C-No, I didn't.

N-He was a graduate of the University of Washington.

C-I'll be damned. He never mentioned that when I talked to him.

N-Did you have any occasion, or did you have any interaction with him over the years other than through the NBC?

C-Well, he and my former partner in the firm Warner Gardner were very close friends. Had offices in the same building. So I ran across him occasionally in my connection with Warner, but not very much.

N-Did you ever take any cases to the Supreme Court? You did take a couple that, did you ever argue one before the Supreme Court?

C-No. What case did you say?

N-Sobel was the one I was thinking of that you were involved in.

C-I didn't take it to the Supreme Court.

N-I think it got denied, actually.

C-Yes, I think so too.

N-What about, excuse me, I didn't mean to interrupt you.

C-I think I was just on the brief in the Sobel case. I didn't argue it.

N-How about Asa Herzog?

C-I am very fond of Asa. I think he was a damn good judge at one time. I don't think he would be anymore, but it's not his fault. Poor guy, he's got more questions than anybody I know.

N-Well, tell me what involvement you had with the 1970 Commission, if any, on the bankruptcy law?

C-Well, I came down here when they were getting close to their deadline. I was never on the Commission or on the staff. Frank Kennedy was the chief recorder. He got me down here two or three weeks. I remember putting the final report together, and I helped on it, but God, don't ask me what part I helped on, I don't remember.

N-How about the drafting of the '73 Rules? You were, you said you were a reporter for the chapter 13 section.

C-I was a reporter for the chapter 13.

N-How did you get involved in chapter 13 of all things. That wasn't

C-Nobody else was

N-So then

C-That was true. I used to try to pay some attention to consumer problems since I didn't think anybody else was paying much attention.

N-Was it a special interest of yours, this consumer stuff, or just something you thought needed to be done?

C-Something that needed to be done. No, I wasn't especially interested in it. Could usually work up sympathy for consumers, but I don't do much of that.

N-How about the '78 Reform Act?

C-I didn't do a damn thing on it.

N-You didn't do a damn thing on it?

C-No. Not a damn thing. Nope. I told them my wife was very ill, and I decided I'd better stay home and take care of her.

N-And this was in '78?

C-'78?

N-'78

C-Oh, you're talking about the

N-Yeah. Not '94. I'm talking about the 1978 Bankruptcy Reform Act. The new act, code.

C-Well, I didn't have anything to do with the rules on that, no. I was

N-No, but I mean the code itself, enacting the code.

C-Well, sure, we did some of that when I worked with Frank Kennedy on the Commission. Also I'd been down here to testify before congressional committees on several different occasions about the proposed provisions of the New Act.

N-Was there any specific part of the code that you were particularly responsible for drafting, or helping to draft?

C-No.

N-Who were principally the people that were involved with them?

C-I think Ken Klee and Rich Levin were.

N-Rich Levin?

C-Yeah.

N-But other people from the NBC weren't assisting them?

C-Sure, a lot of people from the NBC were assisting them. I had never realized to what extent the congressional committee could listen to people without making any record at all. I came down here on more than one occasion because they wanted to talk about something. They usually had several people, and not just one. And we'd just sit around and talk. Nobody was making a record.

N-You're talking about down to D.C. now, right?

C-Yeah. Quite a lot of that going on. I guess it wasn't viewed as improper. Nobody was trying to keep it a secret.

N-Were you involved in any other drafting of rules or code provisions or anything either before that or after that? You said you got bounced off the Rules Committee because of Berger being mad at you, I guess.

C-Yeah. No, that's the only experience I had with drafting, when I was a reporter on the chapter 13 rules.

N-What was your major interest in bankruptcy law during your career here at Harvard? What

was it that you fancied more than anything else?

C-Well, I guess I got particularly interested in preferences under old Section 60 and executory contracts under old Section 63.

N-Was there anything in particular that attracted you to those particular areas?

C-I couldn't understand them very well.

N-You wrote several articles on both of those areas. One on preferences and executory contracts. But you're best known for the executory contracts article, I think. How did you arrive at your definition? I can read it to you if you'd like for me to.

C-No, I can

N-You can probably recite it yourself.

C-Well, I started out by saying "an executory contract is one on which both sides still had some performance". And somebody, I think it was George Treister, said "That's no good because you're going to make every little nit picking contract which has a technical breach or a minor breach in it (Tape 2, Side 1)

N-We were talking about George Treister, saying that you were going to make every little contract an executory contract, every time a little breach in something

C-I thought he had a good point which he usually did when I talked to George. So I came up with what I've got in it now. An executory contract is only one in which both sides are still in bankruptcy so uncompleted that if they never finish it it will constitute a material breach. I thought that would get rid of the minor breaches and the technical breaches and remove them from the field of executory contracts altogether. Now I'm aware of the fact that two people have written articles giving me hell for that. Jay Westbrook and a man named Edward. I know

N-Which was the second person's name?

C-Edward.

N-Edward?

C-Yeah. I'm now trying to write an answer.

N-Really? That's what you're working on right now? You still think your definition is right?

C-So far, but I haven't gotten very far, and they are hellish to read. They've got a little thing

here and then you don't have, and then you go back, so I got lost several times.

N-I went back and looked through your first installment of your article on executory contracts. It was really quite an interdisciplinary kind of approach you took. You've examined the definition in all different kinds of legal contexts. Do you think it needs any, you've already said you don't think so and you'd just gotten into it, but is there any, the basis, their basis as I understand it is it just, it sweeps in too much.

C-Well, they keep saying that the concept of executoryness (God damn them for that term) is manipulatable. It's easy to manipulate. It can mean anything. I have yet to look at their proof of how manipulatable it is.

N-Well, some people say that in furtherance of that argument that if the court thinks it is a good contract, they will find it to be executory so that the debtor can assume or reject it. Or, if they think it is a bad contract, the debtor can reject it.

C-Well, I want to see some proof of that.

N-In your response, there is also a view I've heard that that is the way it ought to be- if it's good for the debtor essentially, that it ought to be deemed a contract that can be assumed, and we just ought to get rid of executories.

C-Even my critics admit, or at least Westbrook does, that the function of the trustee is to increase the estate or decrease the claims. And so, if they throw a lot of these things out as not being executory contracts but something else, that may be increasing the estate, but I wouldn't advocate they do it.

N-How did you become, well, let's go back to your experience on the Bankruptcy Advisory Committee for Bankruptcy Rules, how did you become a member of that committee?

C-Oh, I think I was appointed by Chief Justice Warren.

N-So that would have been back in, what, '70 or '69? It would have been before '70, in '68 or '69.

C-Thereabouts.

N-Do you know how your name got selected?

C-No, I don't. I assume that Warren never heard of me. Somebody suggested me to him, but I don't know whether that was. The committee had a chairman. It changed from time to time while I was there, and I can't remember. They were always federal judges, but I can't remember

who they were. But I assume whoever the chairman was at the time had suggested me, and that probably King and Kennedy were already there as reporters for other rules and may have suggested me to him. I don't know.

N-We were talking about Chief Justice Berger and his dislike of your position on Article III status for bankruptcy judges. Do you have any insights as to why he was so vehement about it?

C-Well, he had a lot of vehement people beneath him. My opinion is that most Article III judges, especially Article III District Court Judges don't want to share that with bankruptcy judges, that status. And he was simply echoing their feelings on it. I don't suppose it made a hell of a lot of difference to him personally. But he is the chairman of the Judicial Conference, and I suppose he was echoing the feelings of the other members of the Judicial Conference.

N-You wrote an article called "Scrambling to Define Bankruptcy Jurisdiction" in 1985. Were you at all involved in what went on during the Marathon, putting together the Emergency Rule and then the legislation thereafter?

C-No, I didn't have anything to do with that.

N-You were very critical of the whole process of the Emergency Rule.

C-Yeah.

N-The process of putting it together. I'm referring now to an article, I think it's in 22 Harvard Journal Legislation.

C-Yeah.

N-How do you, how do you think they came about that solution, came to that solution?

C-I don't know.

N-What do you think is going to happen to the bankruptcy jurisdiction?

C-I still think that the best solution would be to make the judges Article III Judges, get rid of that old problem.

N-Do you think they are going to do it?

C-I doubt it.

N-Do you think that the present jurisdictional scheme is constitutional?

C-I haven't asked myself that question. I don't know. I'd have to go through it and look.

N-Were you involved, well, let me before I get to that, what do you think of the present Review Commission, the Bankruptcy Review Commission?

C-I don't know a thing about it. I don't even know who is on it.

N-Were you involved in the anti-War movement in the '60's?

C-No.

N-We talked earlier about a case called U.S. v. Priest reported at 21 U.S.C.M.A. 964.

C-That was my only involvement.

N-That was your only involvement? How did you get involved in it?

C-A lawyer, David Ryan, called me. He said "Now I want you to come down and testify on free speech and the First Amendment." I said "Hell, no court is going to listen to me on free speech and the First Amendment." He said "Oh, this military court will. They don't know they aren't supposed to do this." So I went down there and I testified about all the inflammatory things Jefferson had ever said and a few other people and the court didn't shut me up. They let me blab on. They didn't pay a damn bit of attention to what I said either. What they were trying was some military seaman who had attacked the war in Vietnam. They said that he used disloyal language to do so. I don't remember the language now. But that was my only effort against the war in Vietnam if that was against the war in Vietnam.

N-You were also a long standing, probably are still a long standing member, of the American Civil Liberties Union, is that right?

C-I think I'm still a member, yeah.

N-Is that how you got involved in the Sobell case we mentioned before? Just one of the cites, there are many of them, it's Sobell v. U.S., 264 F. Supp. 579, SDNY., 1967. Sobell was named as a co-conspirator with the Rosenbergs, is that right?

C-Uh huh.

N-Ethel and

C-Julius

N-Julius Rosenberg. How did you get involved in that?

C-Well, lawyers for the Rosenberg kids under the Freedom of Information Act had gotten some statements from the FBI, and those statements showed, if true, they are all hearsay, they'd have to be checked back to the whoever set the cite up, but they revealed that Judge Kaufman had done a hell of a lot of talking to FBI agents about what was involved in the case, and that he kept going to the FBI whenever anything would appear in the newspaper or on television or radio which in any way was critical of his role in the case which I didn't think was proper for him to do. Under the Canons of Judicial Ethics he is not suppose to defend himself. He was just getting the FBI to help defend him. So I wrote a letter to the House and Senate Judiciary Committees asking them to look into these statements to see whether they were true or false. I never got any response. That was all I did on that. Except when that came up, the Lobell case was still in the courts and they were trying to claim or to prove, I think by this time the Rosenbergs were both dead, but Sobell lawyers were trying to prove that what Rosenbergs had turned over to somebody else, I've forgotten who, did not really amount to secret information, that anybody would know it, including the scientists in Russia. I was on the brief on that case. I didn't argue that one either. We didn't get any place as you know.

N-Were you involved in any other cases that you can remember for either the ACLU or other kinds of cases like that?

C-That's the only one I can remember.

N-Did you, were you convinced that Sobell was innocent?

C-He would be innocent if the information turned over was not secret, and that is what they were trying to prove.

N-Uh huh. Did you think the Rosenbergs were innocent?

C-I really never had an opinion as to whether they were innocent or not although I think I sneaked to the position that they were probably guilty. But even if they were guilty, I didn't think the judge ought to be discussing the sentencing with the FBI.

N-And this was Judge Kaufman who was a District Court Judge in the Southern District of New York?

C-Yeah.

N-But then became Second Circuit Judge?

C-That's right.

N-Well, one of the other cases you got involved in, and this is a little closer to home, was the John Mansville case, and you helped Green O'Reilly I think was the name of the firm out of California.

C-Yes, it was.

N-On behalf of the asbestos claimants. How did you get involved in that?

C-Well, they just came to see me. They wanted some help on a brief. Again, I think, no, I argued that case in the District Court. Lost it. And then I was just on the brief. The case would be heard in the Court of Appeals.

N-They just brought you in as co-counsel, is that it?

C-Yeah.

N-Is there anything you can remember about that experience?

C-Yeah, our main point I thought was that the so-called trust fund which was set up for an asbestos claimant would probably run out of money soon. Now since I've been out in California for 7 years I don't know if they did or not. Do you?

N-Yes. It ran out of money.

C-I thought they would, but nobody would listen to us.

N-It did run out of money. They had to go back and patch it back together again, I guess. Well, how about the union in Continental Airlines? That was another case that you got involved in, wasn't it?

C-Yeah. I'm not a great litigator, and I usually just appeared on the brief. No, I guess I argued part of that case too in the District Court. We were trying to prove that all Continental was planning to do was get rid of this labor contract and we didn't get anywhere in the District Court or Court of Appeals.

N-What attracted you to that case? Anything in particular?

C-My sympathy for labor, I guess.

N-That dates back, I guess, to the time when you were, what, in law school and then after with the National Labor Relations Board. Well, I've been through pretty much up to the point where you left Harvard. You retired from Harvard in '87, right?

C-Right.

N-Then you moved to California. You spent a year at Hastings, teaching at Hastings?

C-A term, one term.

N-One term? How come you decided to get out of Hastings?

C-I didn't like it very much. In order to ride the T from where I lived to work I had to get up at 5:30 or 6:00 in the morning, and I didn't find Hastings very stimulating when I got there, neither the students nor the faculty. I just taught the one term there.

N-What were the, over the course of your life, what do you consider to be your greatest accomplishments?

C-Jesus Christ, I don't think I have any great accomplishments.

N-Well, certainly the executory contract definition. I mean, I can't tell you how many times that's been cited. I think I've got about 200 citations to it.

C-I've got two guys here who say it's no damn good.

N-Well, you've got a lot of other people that follow the definition, and they are the ones who count.

C-Well, I've got to answer. . .

N-Those guys don't count.

C-I've got to answer them. And I haven't been through yet.

N- Well, there must be something you're pretty proud of in your career.

C-Well, I think I'm most proud of my career right here at Harvard.

N-Uh huh.

N-I guess I'm most proud of my career right here at Harvard. I was here from '63 to '87, 24 years. I enjoyed myself very much. I was very satisfied with what I was doing. I liked the people I was working with.

N-You're glad to be back?

C-Yeah.

N-What do you think was your greatest disappointment in your career?

C-What was done to me at Yale? What people did at Yale.

N-You were a devoted teacher, I guess, and that must have been a low point in your teaching career.

C-It was. It was the bottom.

N-Do you have anything, I always give everybody that does this an opportunity, if you have anything that you think somebody in the future ought to hear, any advice or anything that you'd like to add to this record? This is your opportunity now that I've asked you all these lengthy and disjointed questions.

C-Well, I think we need, and I can only cite you some examples of this, more dispassionate views expressed in organizations like the National Bankruptcy Conference. Now, in there when George Treister said something, or when Peter Coogan when he was alive, or when Grant Gilmore when he was alive, when they said something, it counted for more than when a lot of people talked because a lot of people are just in the Conference to serve their clients' interests and that's all. We need more dispassionate people like the three I named. I don't know how we're going to get them.

N-You feel as though the Conference has become somewhat politicized, then?

C-Yeah. It has. I don't go to the meetings anymore. I haven't since I went out to California. I think I came back for the first one after that. Never been back to any more. I think it has changed a lot in ten years. Too many of them now are just there to serve their clients. There's no point to having the organization if that is what they are going to do.

N-So you think it's kind of gotten captured, if you will, by special interests?

C-Yeah.

N-What do you think the remedy is to that? I mean how do you get away from that?

C-I don't know.

N-Wasn't it always true though that you have people who are very debtor oriented or are very creditor oriented on the Commission, or on the Conference I mean?

C-Yeah, you always had some, but I don't think you had as many as you have now. The

percentage was less. And they carried less weight than people like those I mentioned who could be trusted a little more to be objective.

N-Is there anything else you could think of that you'd like to add to the record?

C-No, you've about worn me out.

N-Well, this hasn't taken nearly as long as most of them do. You've lived up to your reputation of not being somebody who talks a lot.

C-That's right. I can't think of anything to add.

N-O.K. Well, thanks very much for your time today.