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NEW YORK UNIVERSITY SCHOOL OF LAW –  
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)  
Oral History of Distinguished American Judges

HON. LAURENCE H. SILBERMAN  
U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT  
An Interview  
with  
Paul D. Clement, Kirkland & Ellis

May 17, 2017

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[START RECORDING]

00:00:18 MR. CLEMENT: Judge Silberman, thank you for meeting with me today. I am, as you know, Paul Clement, your former law clerk. I'm pleased to conduct this oral history on behalf of the Institute of Judicial Administration at the NYU School of Law. So judge, can we start at the beginning and can you tell us where you grew up?

00:00:38 JUDGE SILBERMAN: I grew up in southern New Jersey in Ventnor and Margate City, just south of Atlantic City. I was born in Pennsylvania, but my parents moved to New Jersey when I was five.

00:00:50 MR. CLEMENT: And can you tell us a little bit about your immediate family?

00:00:53 JUDGE SILBERMAN: Well, I have a sister with whom I'm very close, who lives in Louisville, Kentucky. My mother was my primary influence, and my mother and father were divorced when I was nine. So, it was my mother who brought me up.

00:01:14 MR. CLEMENT: And besides your mother, were there other important influences for you when you were growing up?

00:01:19 JUDGE SILBERMAN: Yes, I had an uncle, who was a lawyer and it was he who, I think, probably gave me the idea of being a lawyer, at a very young age. As a matter of fact, I never ever remember anytime that I



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want to drop back a year; so she found this little prep school, which is now defunct where, as I said, I was the only non-Catholic. As a matter of fact, the coach -- teasing me of course -- said when we played another Catholic team we were at a disadvantage when the other four players would cross themselves beforehand, but I wouldn't. He asked me whether, just as a gesture, I'd cross myself too so it wouldn't look that we were at a religious disadvantage. I told him that my ancestors had left Spain in 1492 so I didn't have to do that and then he told me, "You dummy, I'm just teasing you."

00:03:15

00:03:37 MR. CLEMENT: [Laughter] That's a great story. Besides baseball, were there other extracurricular activities you pursued in high school?

00:03:43 JUDGE SILBERMAN: Chasing girls, like everybody else.

00:03:45 MR. CLEMENT: But no debate, you weren't a newspaperman?

00:03:49 HON SILBERMAN: No, not in prep school, no.

00:03:52 MR. CLEMENT: And then I know from the pennants in your chambers that you went to Dartmouth for your undergrad. How did you choose Dartmouth as your destination?

00:04:02 JUDGE SILBERMAN: Well, you'll be amazed about this. My first decision was I wanted to go to Harvard Law School. I know that sounds peculiar, but my

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grandfather, who was a very successful businessman and everybody else on both sides of the family besides that uncle was a businessman. But my grandfather

00:04:27 had two sons-in-law who were lawyers, one was a Harvard graduate. And my grandfather had a very high opinion of Harvard Law School as a client. So I remember his telling me that he wanted me to go to Harvard Law School when I was six, seven, eight. So that was in my head when I was thinking of college.

00:04:52 So, I didn't want to go to Harvard because I wanted to go to Harvard Law School. I did well in the prep school, so they wanted me to apply to a lot of schools, which I did- Ivy League schools- so they could say someone had been accepted at these schools. And the two choices I had were

00:05:17 Dartmouth and Yale. Dartmouth was one my mother wanted because she had gone there as a girl to winter carnival and my doctor, my pediatrician, was a Dartmouth man. I got into Dartmouth. I didn't get in to Yale. So I went to Dartmouth, which was my one of the two choices. I retaliated years later by

00:05:42: rejecting Yale Law School.

00:05:48 MR. CLEMENT: [Laughter] Did you have any favorite subjects or professors when you were at Dartmouth?

00:05:51 JUDGE SILBERMAN: Yes, I had two wonderful professors.

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One was Arthur Wilson<sup>2</sup> and he was my mentor. He was a professor of government and a specialist in biography. He became so close that he advised me on every aspect of life. The other professor that I was particularly impressed with and close to was a professor by the name of John Adams, who was an expert on modern European history. He kindled an affection, love, for the Balkans. Turns out -- and I didn't learn this until many years later -- Adams was not his real name. It was Adamovich.

00:06:16

00:06:41

He once told me, which was apropos of my subsequently going as ambassador to Yugoslavia, that the Serbs were the greatest people in Europe because they could reduce a very complicated economic and political question into a simple formula: nine grams in the back of the neck. So those were the two professors. Wilson, who was so close to me, was also a mentor to my son at Dartmouth. My son was taking his senior thesis or his paper to Wilson just before he died.

00:07:06:

00:07:21

MR. CLEMENT: Wow, what a great family connection. So after college you spent a year in the army?

00:07:27

JUDGE SILBERMAN: Yes. Six months.

00:07:29

MR. CLEMENT: Six months. Were there any highlights from that six months?

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<sup>2</sup> Arthur McCandless Wilson, <https://ead.dartmouth.edu/html/ml65.html>.

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00:07:32 JUDGE SILBERMAN: That was a nightmare because I volunteered to go in the paratroopers. They told me they would not sent anybody in for six months active duty, five-and-a-half years reserve, to the paratroopers because it was too expensive to train them and it wasn't worth it for somebody who was in the reserve. At that time, 1957, they

00:07:57 for the first time had a number of college graduates who were going in as enlisted men. The rule was, if you were a college graduate you had to go to clerk typist school, which was a disaster because I had broken my fingers, a number of them playing

00:08:22 baseball. And so I graduated almost at the bottom of my class in clerk typing school with a grand score of eight words per one minute. They subtracted mistakes.

00:08:34 MR. CLEMENT: [Laughter] So if we transition from that experience in the army to law school, why did you apply to law school?

00:08:44 JUDGE SILBERMAN: As I told you, I wanted to be a lawyer from the time I was six years old. There never was *any question* in my mind as to what I would do. So I applied to law school. My grades at Dartmouth were not spectacular. They were good, but not spectacular. But I did extraordinarily well on the comprehensive exams. I wanted those exams before I applied to

00:09:09 law school. I also did very well on the LSATs. So, I

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applied to law school when I was in the army.

00:09:17 MR. CLEMENT: And you said earlier that you had always had your heart set on Harvard Law School, but did you apply anywhere else, heaven forfend Yale?

00:09:26 JUDGE SILBERMAN: I did apply to Harvard and Yale and Columbia and Penn. My mentor, Professor Wilson, as well as other professors, urged me strongly to go to Yale because they liked Yale's approach of law and something else: psychology, economics, sociology,

00:09:51: whatever. In deference to Arthur Wilson, when I was accepted to all of them, but particularly deciding between Harvard and Yale, I went down to Yale and sat in on a couple of classes. I sat in one class taught by a professor, who had the nickname Fred "The Red" Rodell.

00:10:16 After sitting in that class, I decided for sure I was going to Harvard.

00:10:24 MR. CLEMENT: And did Harvard live up to your expectations?

00:10:25 JUDGE SILBERMAN: Yes. I adored Harvard Law School.

00:10:29 MR. CLEMENT: When you were at law school, did you already develop a sense of what kind of law you might want to practice?

00:10:36 JUDGE SILBERMAN: Yes. Well, at first there was a negative. I have a particular problem: I can't count. I think I have a decent economic sense, but I cannot

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count. I always make mistakes. So, I was inclined to think I should not go into anything which dealt with economic, corporate transactions.

00:11:01: I was interested in litigation, but I was particularly interested in two subjects, both of which were taught by Derek Bok:<sup>3</sup> labor and antitrust. I thought recently, why was I so interested in labor and antitrust? The explanation I think goes back to my college days. If you look in my college yearbook, it points out that I was a

00:11:26 member of the Republican Club, not surprising, the International Relations Club, and the Pre-Law Club. I was interested in international relations as well as law, and antitrust and labor both involve aggregations of major economic power conflicting. So it was

00:11:51 in some respects an analogy to my interest in international relations. Also my stepfather - I forgot to mention my stepfather, who was also an important influence -- and my stepfather had been president of the New Jersey Hotel Association and I remember a particular bitter strike when the bartender came into the hotel

00:12:16 bleeding, crossing the picket line, which generated some interest in labor

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<sup>3</sup> Derek C. Bok (1930- ), a professor at Harvard Law School who served as law school dean as well as president of Harvard University.  
<https://www.harvard.edu/about-harvard/harvard-glance/history-presidency/derek-bok>.

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00:12:23           law. So, I was interested in both anti-trust and labor law primarily.

00:12:26           MR. CLEMENT: Did you take any international law classes because of your interest in international relations?

00:12:31           JUDGE SILBERMAN: Excuse me for stopping. I went to talk to Professor Katz,<sup>4</sup> who you recall was a giant in international law and international relations. He had been the author of the Marshall Plan<sup>5</sup> and I asked him about taking a course in international law. He said there wasn't much to it, something like "it was baloney." But he said there was a course in international

00:12:56           transactions and even that reduced itself to the proposition of if you have a transaction in Germany, hire a German lawyer. So I decided not to take either course.

00:13:09           MR. CLEMENT: Beyond that did you develop any general views about the law while you were still in law school?

00:13:13           JUDGE SILBERMAN: Yes. When I was at Harvard, all of my professors generally believed in judicial restraint, those who were Democrats and those who were

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<sup>4</sup> Milton Katz (1907-1995), a professor of international law at Harvard Law School. <http://www.nytimes.com/1995/08/11/obituaries/milton-katz-teacher-dies-at-87-was-law-expert-and-us-envoy.html>.

<sup>5</sup> The Marshall Plan was an American program to give economic aid to Western Europe after World War II.

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Republicans. There was a counter-reaction to the judicial activism of the

00:13:38 '20s and '30s. So, I was taught and imbued with notions of judicial restraint, which I'd like to think has never left me. And it was put into my head by my professors at Harvard back in 1958 to '61.

00:13:56 MR. CLEMENT: So jumping ahead a little bit, but you mentioned that your belief in judicial restraint has never failed you. A lot of people these days like to say that judicial restraint is only in the eyes of the beholder and it's just a cover for something else. Would you care to say a couple of words about how you'd respond to that kind of criticism of judicial restraint?

00:14:24 JUDGE SILBERMAN: I think it's baloney. Whether it comes from the left or the right. Nowadays, we see the opposition to judicial restraint comes almost as fiercely from some people on the right as it does on the left. I think it's very simple. A very

00:14:49 simple concept: judges are not in the business of making policy. And I think, although it can be difficult in a particular case as to what the right answer is, I think there is always a right answer, theoretically, in every case. A right answer based on law, precedent, and most importantly logic.

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00:15:14 I have come to believe that Oliver Wendell Holmes<sup>6</sup> was wrong when he said "the life of the law is experience," rather than logic, unless he was speaking strictly about the past. I think the life of the law is logic.

00:15:29 MR. CLEMENT: So going back to law school, what did you do in your summers in law school?

00:15:34 JUDGE SILBERMAN: Well, back in those days, you didn't work in law firms in the summer after your first year. So after my first year, I worked in a summer camp as a baseball instructor. In my second year, I wanted to try practice in a small town. So I went

00:15:59 to work in a law firm in Wilkes-Barre, Pennsylvania. And after that, I decided I didn't want to practice in a small town.

00:16:16 MR. CLEMENT: [Laughter] So perhaps one of the more important questions I'll ask you, how did you meet Mrs. Silberman?<sup>7</sup>

00:16:24 JUDGE SILBERMAN: Well, I have to confess, I was tossed out of Dartmouth for a semester. Well, I was tossed out under conditions where I had to re-apply after a semester for "conduct unbecoming a Dartmouth gentleman." I was a bit of a smart alec and defended

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<sup>6</sup> Oliver Wendell Holmes, Jr. (1841-1935), associate justice of the Supreme Court from 1902-32, appointed by President Theodore Roosevelt.

[https://www.oyez.org/justices/oliver\\_w\\_holmes\\_jr](https://www.oyez.org/justices/oliver_w_holmes_jr).

<sup>7</sup> Rosalie Gaull "Ricky" Silberman (1937-2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/20/AR2007022001458.html>.

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on the grounds that the charge was inconsistent on its terms. But it goes to show how the

00:16:49: world is so changed. It was alleged that I had spent the night in a dormitory at Skidmore College, which was, of course, then an all-women's school. Of course today my defense should have been I was trying to integrate the school, but...

00:17:09 MR. CLEMENT: I thought you would have invoked *Skidmore* deference.<sup>8</sup>

00:17:16 JUDGE SILBERMAN: [Laughter] [I] never thought of that. But I've said for years that *Skidmore* deference is non-deference deference. It's phony. So I wouldn't have used that. In any event, in order to graduate with my class, I had to go to Harvard for two summers. In those days, I think if you were at Harvard, Yale, Princeton, Dartmouth, maybe a few other schools, if you lost a semester and

00:17:41 wanted to graduate with your class, the only place you could go and get credit was Harvard summer school because the courses were exactly the same as the courses during the regular year. So I went there for two summers. The first summer on July 3, 1955, at a dance in Memorial Hall I met my wife. She was

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<sup>8</sup> "Skidmore deference" is an administrative law principle that a federal court may defer to an agency's interpretation of a statute administered by such agency according to the agency's ability to demonstrate persuasive reasoning. See: [Skidmore v. Swift & Co.](#), 323 U.S. 134 (1944) and see [Christensen v. Harris County](#). 529 U.S. 576 (2000).

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00:18:06           introduced to me by my roommates at Harvard, and I decided after dancing with her once, I went back and told them I was going to marry her. It took me a couple of years, but I did.

00:18:26           MR. CLEMENT: So how does a nice kid from New Jersey end up in Hawaii?

00:18:33           JUDGE SILBERMAN: Well, you recall Derek Bok was my mentor. He arranged for me to clerk -- and knowing I was interested in labor law -- he arranged for me to clerk for a federal district judge in Newark, [New Jersey] who had been Roosevelt's<sup>9</sup> labor counsel, Mendon Morrill.

00:18:58           And it was in his court, one way or another -- the government used to bring the big Taft-Hartley<sup>10</sup> cases involving the New York port. I interviewed with him. Even though I was a Republican, he was impressed that I read *The Reporter*

00:19:23           magazine, which was a magazine back in those days that was hardline on national security, but that was a Democratic Party-sympathetic magazine. So he was impressed that I was that Catholic in my taste. He offered me a clerkship and I was ready. I was excited. I had arranged to go the next year with a firm

00:19:48           in Washington. I think the name was Bergson Borglund

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<sup>9</sup> Franklin D. Roosevelt (1882-1945), 32nd President of the United States from 1933-45.

<sup>10</sup> The Labor Management Relations Act of 1947, or Taft-Hartley Act, [Pub. L. No. 80-101, 61 Stat. 136](#) (current version at [29 U.S.C. §§ 141-197](#)).

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and they were experts in antitrust. They were a boutique firm. It eventually merged into what is now Hogan or whatever Hogan is now or Wilmer Cutler & Pickering. I can't remember which. But in any event, that was my

00:20:13 arrangement. Well, the judge died just only two weeks before I was to arrive. His secretary called my wife to pass the bad news. I had two little children at that point and this was long after

00:20:38 the hiring season had passed. This was May or June. I think it was June. There was an offer to go and help the new Nigerian government write a constitution. But my wife was reluctant to bring two little children to Lagos at that point.

00:21:03 So that didn't sound very good. Then Derek Bok came and got me in the library. I think it was in the business school library, I was writing my paper, and he said, "What do you think about going to Hawaii?" I said, "Derek, I've never been west of Cincinnati." Derek had spent two years I think in the Air Force Counsel's Office in Hawaii and he

00:21:28 adored it. He loved it. He said, "It's one of the most exciting places in the world, and it's particularly exciting for labor law because there are big massive unions and they're fighting. And there is a law firm in Honolulu that has virtually a monopoly, it does

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have a monopoly, on corporate labor  
0:21:53 practice. They're all, almost all, Harvard graduates.  
And they've called me and they need somebody  
desperately because one of their associates left to  
run for office and so, would you at least talk to  
them?"  
So I talked with them and they offered me a job. I  
said, and they agreed, that if I didn't like Hawaii I  
would come back to the firm in Washington. And then  
we went to  
00:22:21 Hawaii and both my wife and I fell in love with  
Hawaii.  
00:22:28 MR. CLEMENT: And what was the practice like in Hawaii  
at that point, at least the labor practice?  
00:22:31 JUDGE SILBERMAN: Well, labor law practice is  
decentralized. It's not focused in Washington. So it  
was just as vigorous and interesting in Honolulu,  
perhaps more vigorous and interesting in Honolulu,  
than anywhere else in the country. My first case,  
fortuitously, first time I appeared -- oh I have to  
00:22:56 stop -- you couldn't take the bar immediately back in  
those days until the Supreme Court declared this  
unconstitutional in a Vermont case.<sup>11</sup> You had to be a  
resident of Hawaii for a year before you took the bar.  
I can still remember telling clients over the phone

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<sup>11</sup> [Supreme Court of New Hampshire v. Piper](#), 470 U.S. 274 (1985).

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that I'm not a practicing lawyer, but if I were a lawyer... But any event,

00:23:21 the very first time I appeared in any court was a really major labor law case in the Ninth Circuit. That happened because I had written the briefs before the Board<sup>12</sup> and in the Ninth Circuit. The senior partner, who had won the Ames at Harvard,<sup>13</sup> got sick... just two weeks

00:23:46 before the argument. He came down to the office one day and said, "Guess who's arguing the case in [the] Ninth Circuit?" Well, that was quite a thrill.

00:23:58 MR. CLEMENT: Was that your first Court of Appeals...

00:23:59 JUDGE SILBERMAN: First time I appeared in any court.

00:24:00 MR. CLEMENT: In any court, wow.

00:24:01 JUDGE SILBERMAN: In any court. It was a big case and I won. So that really helped accelerate my career.

00:24:11 MR. CLEMENT: And how long did you practice in Hawaii?

00:24:15 JUDGE SILBERMAN: Almost eight years.

00:24:16 MR. CLEMENT: You enjoyed it there, so why did you come to Washington?

00:24:22 JUDGE SILBERMAN: In the bar convention of 1967, the general counsel of the NLRB and the deputy general counsel came to my house for dinner, Arnold Ordman and Steve Gordon, both dead now. We consumed a good bit of alcohol, wine I seem to recall, and one of them

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<sup>12</sup> National Labor Relations Board or NLRB.

<sup>13</sup> Upper-Level Ames Moot Court Competition.

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00:24:47           suggested -- oh, told a story that they were under hostile investigation by Sam Ervin's<sup>14</sup> committee in the Senate for being too pro-union. And they thought, "Well, gee, wouldn't it be a great idea if you were to come back and argue appellate cases for us because then we could point to at least one Republican who had been a partner in a corporate labor firm, showing we had diversity -- different term, *diversity*." So Derek Bok had once said when I was at Harvard, that if you want to practice labor law you should spend some time in the appellate section of the General Counsel's Office at the NLRB. Now, I didn't do that originally. I thought well, you know, I've been banging on unions for seven years, had a reputation of being really tough, so I thought it would be nice to switch positions and argue for the Board at least for a while, so I did.

00:25:12

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00:25:59           MR. CLEMENT: And then you did that for not *that* long a period of time and then you became Solicitor of Labor. How did you make that jump?

00:26:09           JUDGE SILBERMAN: Well, there was a fellow who I got close to, who had been associate general counsel [of

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<sup>14</sup> Samuel J. Ervin Jr. (1896-1985), senator from North Carolina from 1954-74 and member of the Senate Government Operations Committee.  
<http://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/ervinobit.htm>.

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the NLRB] in the Eisenhower Administration.<sup>15</sup> His name was Ken McGuinness, and he became an advisor and a friend. When the campaign

00:26:34 of 1968 was going on, I noticed that all the board lawyers were wearing Humphrey<sup>16</sup> buttons. So I and one other young lawyer, who you know well, who was just out of Georgetown, John Irving,<sup>17</sup> were the only two that wore Nixon<sup>18</sup> buttons and somebody wrote an article about

00:26:59 that, that here are these strange characters wearing Nixon buttons at the NLRB. After the election, I sort of was interested in whether there'd be a possibility of my getting a job in the Labor Department or in the Nixon

00:27:24 Administration. I was only thirty-two or thirty-three, so I thought maybe a special counsel or deputy, assistant to something. I was quite flabbergasted when George Schultz<sup>19</sup>, the new secretary of labor, called me up and asked me to come over and interview, and I realized when I got there that I was

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<sup>15</sup> Dwight D. Eisenhower (1890-1969), 34th president of the United States from 1953-61.

<sup>16</sup> Hubert Humphrey (1911-78), vice president from 1965-69 under President Lyndon Johnson and the Democratic nominee in the 1968 presidential election.

<sup>17</sup> John S. Irving, an attorney who worked at the NLRB from 1965-69 and 1972-79, the last four years as general counsel.

<sup>18</sup> Richard Nixon (1913-1994), 37th President of the United States from 1969-74.

<sup>19</sup> George P. Schultz, an economist who served as secretary of labor, director of the Office of Management and Budget, and secretary of the treasury in the Nixon Administration. He later served as secretary of state in the Reagan Administration.

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interviewing for the job of Solicitor of Labor, or  
General

00:27:49 Counsel, which is a presidential appointment. I was  
rather surprised. Well, it turned out that the group  
in the Hotel Pierre: Peter Flanigan, Haldeman, and  
Ehrlichman<sup>20</sup> had been going over potential candidates.  
But I think because of Ken McGuinness, had come up  
00:28:14 with my name as a possibility of Solicitor of Labor  
along with several others. George interviewed them  
and we cottoned immediately and to my surprise I was  
offered the job of solicitor. I think the advantage I  
had is I always looked, like you, older than I was.

00:28:37 MR. CLEMENT: And what were the highlights of your  
work as solicitor?

00:28:41 JUDGE SILBERMAN: Well, I want to tell you a story  
about a potential railroad strike. You recall, I've  
discussed the Taft-Hartley procedure. The lawyer for  
the railroads was Warner Gardner<sup>21</sup>, of Shea & Gardner.  
He was a very shrewd lawyer, very good lawyer who had  
been in the Roosevelt Administration.

00:29:06 He went into federal district court seeking an  
injunction saying that he was leading in, but the

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<sup>20</sup> Peter M. Flanigan (1923-2013), H.R. Haldeman (1926-93), and John D. Ehrlichman (1925-99), advisors and aides to President Nixon.

<sup>21</sup> Warner W. Gardner (1909-2003), an attorney who served in the Solicitor General's Office, Labor Department, and Interior Department in the Roosevelt Administration, before founding the law firm Shea & Gardner in 1947.

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government was going to follow.<sup>22</sup> That was the story in the press and that caused a crisis because we were trying to squeeze the parties, not letting them know we were going to move, hoping they would settle on their own. So there was a big meeting at the White House and George brought me.

00:29:31 John Ehrlichman, the counsel to the president, and various other people, Bryce Harlow,<sup>23</sup> who was this legendary legislative affairs guy going back to the Eisenhower Administration, and a number of other people. And one of the lawyers, I think it might have been John Ehrlichman, said, "Let's just call the judge and tell him it's not true. We

00:29:56 haven't made any decision whether to go in."  
I said, "We can't do that," I piped up. "We can't do that. We can't call a federal judge on a case we're not even a party to, and even if we were a party, you can't call a judge ex parte."

There was a big discussion about that. George was looking a little askance at me, but I was insisting.

00:30:21 Then I suggested that Ziegler<sup>24</sup> just make a statement from the White House saying it's not true and of

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<sup>22</sup> [Int'l Ass'n of Machinists & Aerospace Workers v. Nat'l Ry. Labor Conference](#), 310 F. Supp. 904 (D.D.C. 1970) (Sirica, J.).

<sup>23</sup> Bryce Harlow (1916-87).

<https://www.nytimes.com/1987/02/18/obituaries/bryce-harlow-dies-aide-to-presidents.html>.

<sup>24</sup> Ron Ziegler (1939-2003), White House press secretary in the Nixon Administration from 1969-74. <https://www.nytimes.com/2003/02/11/us/ron-ziegler-press-secretary-to-nixon-is-dead-at-63.html>.

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course the judge would see that, but we wouldn't be communicating directly with the judge. On the way back from that session, George looked at me and said, "Boy, I hope you know what you're talking about. You know you shouldn't easily conflict

00:30:46 with the counsel to the president." I said, "George, I'm sure on this one." There's another thing that's relevant though, relevant probably in terms of present day. I got a call shortly after I became solicitor, to go over and meet with John Ehrlichman -- all the departmental counsels. John said,

00:31:12 "Look, the Cabinet officers had been given pretty much carte blanche to pick their undersecretary" -- there were very few deputies then -- "the undersecretary, and assistant secretary. But the White House insisted on approving the general

00:31:37 counsels because you are going to be the early warning system. If things go wrong in the department, if the department is not following the president's policy, we expect you to let us know." Well, I thought about that

00:32:02 on the way back from the White House meeting and thought, you know I don't think that's right. I don't want to do that. I called one of Ehrlichman's assistants and said, "Look, the president has appointed George Schultz as secretary of labor. I

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00:32:30 assume he, under the president's direction, makes labor policy. And I don't feel right ever reporting to the White House anything that he does that anybody would think disagrees with the president. It's up to the White House and the president to deal with George Schultz and I don't want to be an agent." And

00:32:55 subsequently either Ehrlichman or Ed Morgan<sup>25</sup> called me back and said forget it.

00:33:00 MR. CLEMENT: Well, it sounds like when you were solicitor you did a couple of things that could have got you fired, but instead you got promoted. So how is it that you became the undersecretary?

00:33:12 JUDGE SILBERMAN: George, you know, went to the White House as OMB<sup>26</sup> director. He was the star of the cabinet. Indeed, the president had appointed him as head of an oil import task force, which was an extraordinary thing to do for the secretary of labor. The Congress had just created the post of OMB. It had been BOB, Bureau of Budget. OMB,

00:33:37 significantly, meant the director was involved or in charge of management of the government or at least an effort to insist on that. My biggest rival at the

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<sup>25</sup> Edward L. Morgan (1938-1999), a lawyer and Nixon Administration official who served as Ehrlichman's deputy from 1969-73.  
<https://www.nytimes.com/1999/08/20/us/edward-morgan-61-nixon-aide-convicted-in-tax-fraud-case.html>.

<sup>26</sup> Office of Management and Budget.

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00:34:02: Labor Department was Arnie Weber,<sup>27</sup> one of the most brilliant men I ever met. He once said to me at a cocktail party that George Schultz had picked nothing but talented people for his assistant secretaries, undersecretaries. When he got to solicitor, he had to have a Republican. We did not get along that well, but he was brilliant. The question would have been, I suppose, who would be undersecretary following Jim Hodgson,<sup>28</sup> who was the undersecretary, when he became the secretary. I think George and Jim both decided that I should be undersecretary and Arnie should go to the White House with George because Arnie would never want to work under me.

00:34:46 MR. CLEMENT: So after you're undersecretary of labor, what's your next career move?

00:34:52 JUDGE SILBERMAN: Well, I was fired as undersecretary of labor. I had fought for two years with Chuck Colson<sup>29</sup> -- Colson kept trying to fix cases in the Labor Department. So I instructed everybody in the Labor Department not to answer his phone calls, which aggravated him.

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<sup>27</sup> Arnold R. Weber, an economist and professor of business whose positions in the Nixon Administration included assistant secretary of labor for manpower and associate director of the Office of Management and Budget.

<sup>28</sup> James D. Hodgson (1915-2012), secretary of labor in the Nixon Administration from 1970-1973. <https://www.nytimes.com/2012/12/11/us/james-d-hodgson-labor-secretary-dies-at-96.html>.

<sup>29</sup> Chuck Colson (1931-2012), advisor to President Nixon who served as director of the Office of Public Liaison from 1970-73. <https://www.nytimes.com/2012/04/22/us/politics/charles-w-colson-watergate-felon-who-became-evangelical-leader-dies-at-80.html>.

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00:35:17 But the casus belli was my appointment of an African-American regional director in New York. Javits,<sup>30</sup> at my request, when the Occupational Safety and Health Law<sup>31</sup> was passed, had put in a slot for a regional director of the Labor Department because I thought our various

00:35:42 aspects, our various divisions in each region weren't coordinating with each other and I wanted a political appointee reporting directly to me and the secretary who would be in charge of each region. When Frank Zarb,<sup>32</sup> who was our assistant secretary for administration who was recruiting those persons, came

00:36:07 to me, I told him I wanted him to consider African-Americans and he came to me and said, "Look, I've got a magnificent African-American for regional director in New York, Clay Cotrell. He's a Harvard Business School graduate and he's in charge of our Manpower Administration. He's a Republican and our biggest shot." So I

00:36:32 said great. Frank came to me about a month later and said, "You're not going to believe it, but the civil service won't approve Clay Cotrell."<sup>33</sup> I said, "Why in

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<sup>30</sup> Jacob Javits (1904-1986), senator from New York from 1957-81.

<https://www.nytimes.com/1986/03/08/obituaries/jacob-javits-dies-in-florida-at-81-4-term-senator-from-new-york.html>.

<sup>31</sup> Occupational Health and Safety Act of 1970, [Pub. L. No. 91-596, 84 Stat. 1590](#) (current version at [29 U.S.C. §§ 651-678](#)).

<sup>32</sup> Frank Zarb, a businessman who served as assistant secretary of labor in the Nixon Administration from 1971-72. <http://hf.com/people/frank-zarb/>.

<sup>33</sup> Clayton J. Cotrell.

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God's name?" So I checked in and the civil service commissioner said, or chairman said, "It's not my decision. It's the White House's decision." It

00:36:57 turned out that Colson was objecting to a black as a regional director of the Labor Department in New York. Well, I was horrified. I was beginning to have doubts about our affirmative action policy, but the last thing I could imagine is our discriminating against the most qualified potential regional director on the grounds that he was

00:37:22 black. Well, it turns out it was the Building Trades Council in New York, led by a guy by the name of Peter Brennan who was objecting.<sup>34</sup> He was so politically powerful that Rockefeller, Nelson Rockefeller,<sup>35</sup> was supporting him. So the answer was no. They wouldn't appoint him, so I submitted my resignation. George Schultz called me

00:37:47 up. We spent three days together as he tried to convince me to back down. George kept saying, "I'm not a politician, but if Rockefeller and John

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<sup>34</sup> The Building and Construction Trades Council of Greater New York, an umbrella organization of construction industry unions. Peter J. Brennan (1918-1996), its president from 1957-73 and 1975-92 and secretary of labor in the Nixon and Ford Administrations, was a well-known opponent of affirmative action. <https://www.nytimes.com/1996/10/04/nyregion/peter-brennan-78-union-head-and-nixon-s-labor-chief.html>.

<sup>35</sup> Nelson A. Rockefeller (1908-1979), governor of New York from 1959-1973 and, later, vice president under Gerald Ford. <https://www.nytimes.com/1979/01/27/archives/rockefeller-is-dead-at-70-vice-president-under-ford-and-governor.html>.

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Mitchell,"<sup>36</sup> who is the head of the campaign, "both say this is some issue that could decide New York in the election, I have to defer to them."

00:38:12 And I said, "I can't." I said, "I'll be glad to resign quietly, but I can't abide by that." He said, "Would you at least go down and talk to Nixon in Key Biscayne?" And I said, "Doesn't make any sense because I'm not going to change my view and I don't want to tell the President personally 'no,' but I would have to." So after three days, George Schultz called me up and said, "I want

00:38:37 you over in my office" and I came over and he said, "You can have Clay Cotrell but under a condition. You may not set foot in the state of New York until after the election." This was February or March of '72. After the election, Clay Cotrell was fired and I was fired too. Ehrlichman on Nixon's behalf offered me a seat on the Ninth Circuit.

00:39:02 Nixon thought I was a good lawyer, but too rigid for politics. I won't go into all the details on the Ninth Circuit -- I accepted it, but ultimately it turned out that the seat had been promised to somebody else, to -- it gets too complicated to go into and

00:39:27 instead I was offered a seat on the federal district

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<sup>36</sup> John N. Mitchell (1913-1988), attorney general in the Nixon Administration from 1969-72 and chair of Nixon's re-election campaign during the first half of 1972. <https://www.nytimes.com/1988/11/10/obituaries/john-n-mitchell-dies-at-75-major-figure-in-watergate.html>.

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court in Washington with a promise that the first vacancy in either the Ninth Circuit or the D.C. Circuit would go to me, but I was at that point disgusted. George, to his credit, offered me the post of undersecretary of treasury, but I wanted to leave at that point.

00:39:51 MR. CLEMENT: And so what did you do next?

00:39:53 JUDGE SILBERMAN: I became a partner at Steptoe & Johnson.

00:39:55 MR. CLEMENT: And pretty soon the siren call to come back to government came unexpectedly. So how did you end up becoming a very young deputy attorney general?

00:40:05 JUDGE SILBERMAN: Well, you know it's sort of interesting. I think I may have been the only person qualified for the job in a strange way. In this event, the head of personnel in the Labor Department, a fellow by the name of David Wimer,<sup>37</sup> partly on my recommendation had become head of personnel in the White House. I was at

00:40:30 a black tie dinner the night of the Saturday Night Massacre, when Elliot Richardson resigned and Bill Ruckelshaus was fired.<sup>38</sup> Bill and I had been club

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<sup>37</sup> David J. Wimer (1940-2005) served as special assistant to the president and director of presidential personnel for Presidents Nixon and Ford, responsible for recruitment and recommendation of all cabinet, subcabinet and executive-level appointments.

<sup>38</sup> October 20, 1973, when President Nixon ordered Attorney General Elliot Richardson, Deputy Attorney General William Ruckelshaus, and subsequently Solicitor General Robert Bork to fire Special Prosecutor Archibald Cox, who was investigating the break-in of the Democratic National Committee office at

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mates at Harvard, we were both members of Lincoln's Inn and he was a year ahead of me and I knew him fairly well.

00:40:55       Someone said that night, "I'll bet they are going to come to you for deputy attorney general." I said, "That's ridiculous." Any event, Wimer, who was head of personnel -- well now, let me take a step back. They had to, when Elliot resigned, the president had to find an AG who could be confirmed.

00:41:20       That meant almost inevitably a senator. There were two senators who were sort of center-Republicans. Not liberal Republicans, not conservative Republicans, but center: Marlow Cook and Bill Saxbe of Ohio; Marlow Cook from Kentucky.<sup>39</sup> Saxbe was eventually chosen

00:41:45       because earlier in the year he had been asked by the Washington Post, "Do you believe Nixon?" And he said, "It reminds me of a man who played the piano in a cathouse for 20 years and claimed he didn't know what went on upstairs." Which made Saxbe very famous and easily confirmable. Saxbe and I had gotten to know each other through the passage of the Occupational Safety and Health Act and I may not have been his

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the Watergate Hotel. Richardson and Ruckelshaus resigned rather than carry out Nixon's order.

<sup>39</sup> Marlow Cook (1926-2016), senator from Kentucky from 1968-74. William B. Saxbe (1916-2010), senator from Ohio from 1969-1974 and attorney general in the Nixon and Ford Administrations from 1974-75.

<https://www.nytimes.com/2016/02/06/us/politics/marlow-w-cook-senator-who-groomed-mitch-mcconnell-dies-at-89.html>;

<https://www.nytimes.com/2010/08/25/us/25saxbe.html>.

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first choice, but he was perfectly happy with me, and David Wimer, who was head of personnel, came up with me as the idea

00:42:20 for deputy attorney general. I was the only lawyer with management experience in the Nixon Administration who could be confirmed because for a brief period, halcyon period, I was a hero to the liberal press because the story of my resignation over Clay Cotrell came out during the Watergate hearings as well as my

00:42:45: resistance to Colson, who became enemy number one. So I was confirmable and had administrative ability and was a loyal Republican, to Republican principles. So I think I was the only human being who fit that criteria. When I was appointed or nominated or at some point in the level, I was asked whether I would meet with the president. Saxbe

00:43:10 had met with the president and said he believed him. I was asked whether I would meet with the president, and I told the White House I of course would meet with the president, but I would not say that I believed him because I didn't believe him. It was an indication of how weak the president was at that point that he was never told my views. And of

00:43:34 course I had been offered other posts after Watergate blew, and refused. This was one I thought I could take because the Justice Department was virtually, at

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that point, independent of the White House on any matter that touched on Watergate or touched the president's potential prosecution -- Watergate is too general a term.

00:43:58 MR. CLEMENT: And just so I am understanding, so it was really because you were in the wake of the Saturday Night Massacre that you felt like the Justice Department was a safe place to be?

00:44:10 JUDGE SILBERMAN: I felt I could take a job in the Justice Department and I didn't think I could take a job anywhere else, because the Justice Department was at that point, because of the Saturday Night Massacre, largely independent of the president with respect to matters that related to his impeachment or prosecution. Now that didn't mean we didn't have a

00:44:35: concern for the presidency with respect to impeachment. And one time, I remember disagreeing with Jaworski<sup>40</sup> with respect to his case against Nixon. Jaworski wanted us to join as amicus in his case against Nixon, and I told him I didn't -- or told whoever -- yeah it was

00:45:00 Jaworski, I guess, or Ruth, his deputy<sup>41</sup> -- that I

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<sup>40</sup> Leon Jaworski (1905-1982), the second Watergate special prosecutor from 1973-74, following Archibald Cox's firing.  
<https://www.nytimes.com/1982/12/10/obituaries/leon-jaworski-77-dies-in-texas-special-prosecutor-for-watergate.html>.

<sup>41</sup> Henry S. Ruth Jr. (1931-2012), Cox's and Jaworski's deputy, and the third Watergate special prosecutor from 1974-75.  
<https://www.nytimes.com/2012/03/27/us/henry-s-ruth-who-helped-lead-watergate-prosecution-dies-at-80.html>.

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wouldn't agree to that because I didn't think there was standing in the case.

00:45:10 MR. CLEMENT: Now was the Justice Department where you first met future Justice Scalia?<sup>42</sup>

00:45:16 JUDGE SILBERMAN: Yes. We had an assistant attorney general by the name of Bob Dickson from Georgetown Law School.<sup>43</sup> He was a good man, but he was completely a basket case after the crisis of Watergate and he was afraid of his shadow. I suggested he might better off go back to Georgetown. It was more

00:45:41 than a suggestion. And I started interviewing for a potential deputy attorney general. John Rose,<sup>44</sup> one of my associate deputies, recommended Nino Scalia, who for some years had worked at Jones Day, which was John Rose's father's firm. And I called Nino in as the first of the people I would

00:46:06 interview and had such admiration and affection for him instantly, that I never went any further and offered him the job, subject to the Attorney General's approval. He took it. I think at the time he actually had a higher rank as administrator of the

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<sup>42</sup> Antonin Scalia (1936-2016), associate justice of the Supreme Court from 1986-2016, appointed by President Reagan.

<sup>43</sup> Robert G. Dickson Jr. (c. 1919-1980), a law professor at George Washington University and Washington University in St. Louis who served as assistant attorney general for the Office of Legal Counsel from 1973-74.  
[https://www.washingtonpost.com/archive/local/1980/05/07/robert-g-dixon-jr-dies/9422132c-758a-443e-a6d3-5e4b3bb16134/?utm\\_term=.936bb8e48471](https://www.washingtonpost.com/archive/local/1980/05/07/robert-g-dixon-jr-dies/9422132c-758a-443e-a6d3-5e4b3bb16134/?utm_term=.936bb8e48471).

<sup>44</sup> Jonathan C. Rose, a lawyer who served in various positions in the Nixon, Ford, and Reagan Administrations.  
<http://www.presidency.ucsb.edu/ws/index.php?pid=43760>.

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Administrative Council,<sup>45</sup> which was not a  
00:46:31 very influential institution, it was mostly academics,  
but he was perfectly willing to come in as OLC.<sup>46</sup> And  
so he was in the strange position, he was nominated by  
Nixon and appointed by Ford.<sup>47</sup> He came in through the  
interregnum.

00:46:53 MR. CLEMENT: And what was it like to work with  
Justice Scalia at that point.

00:46:57 JUDGE SILBERMAN: We became instant friends. And I'll  
tell you a story that relates to the famous "wall",  
which you  
00:47:12 know about from your days as solicitor general. I  
objected to one of the persons who was working for him  
in OLC, because she was responsible for advising  
agencies on FOIA<sup>48</sup> and I thought she was not zealous  
enough in protecting government interests. So I asked  
Nino to fire her, get rid of her. Nino  
00:47:37 argued with me, saying she was too valuable. I said,  
"Well, I think she has to be moved off FOIA." That  
was Mary Lawton.<sup>49</sup> We moved her into National Security

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<sup>45</sup> Administrative Conference of the United States, an agency that promotes improvements in the efficiency and fairness of federal agencies. Justice Scalia served as its chair from 1972-74.

<https://www.acus.gov/contacts/antonin-scalia>.

<sup>46</sup> Office of Legal Counsel.

<sup>47</sup> Gerald Ford (1913-2006), 38th President of the United States from 1974-77.

<sup>48</sup> Freedom of Information Act, [Pub. L. No. 89-487, 80 Stat. 250](#) (current version at [5 U.S.C. § 552](#)).

<sup>49</sup> Mary C. Lawton (1939-1993), a Justice Department lawyer involved in drafting FOIA and, later, in charge of foreign intelligence surveillance. <https://www.nytimes.com/1993/10/30/obituaries/mary-c-lawton-58-us-official-shaped-intelligence-policies.html>.

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and that's where the wall first was created. The famous wall between intelligence and law enforcement based on a Fourth Circuit case<sup>50</sup> that was decided before the FISA<sup>51</sup> statute. And

00:48:02 as I wrote in an opinion some years ago<sup>52</sup>, it was misconceived, but that's an ironic twist. There's another rather funny incident-- oh, two incidents. Once when Bill Simon<sup>53</sup> was made czar of energy, he came up with a grandiose public

00:48:27 relations stunt, which is no cars would be available for anybody but cabinet officers, so my vehicle would be taken away from me. I was on a pretty straitened budget anyway and the thought of having to buy a car and drive in was leading me to leave the post, so I asked Nino is there any -- I told this at his memorial service -- is there any

00:48:52 grounds by which I could keep a car. He went and researched, said, "Well, we can call it a law enforcement vehicle. All we have to do is put a radio in the back and have your driver become a deputy U.S. marshal and carry a gun." So I was able to keep my

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<sup>50</sup> [United States v. Truong Dinh Hung](#), 629 F.2d 908 (4th Cir. 1980).

<sup>51</sup> Foreign Intelligence Services Act of 1978, 50 U.S.C. §§1801-11, 1821-29, 1841-46, 1861-62, 1871.

<https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286>

<sup>52</sup> In re Sealed Case No. 02-001, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) (per curiam).

<sup>53</sup> William E. Simon (1927-2000), director of the Federal Energy Office in the Nixon Administration from 1973-74.

<http://www.nytimes.com/2000/06/05/us/william-e-simon-ex-treasury-secretary-and-high-profile-investor-is-dead-at-72.html>.

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car.

00:49:17 But the most far-reaching and funny incident started when he came into my office one day and said, "You'll never guess who's coming down as co-counsel to Phil Buchen<sup>54</sup> in the Ford Administration." I said, "Who?" He said "Phil Areeda."<sup>55</sup> Now, Nino and I would tease each other constantly about ethnic references. His Italian, my Jewish. He always claimed he understood Jewish culture better than I did because he came from New York.

00:49:42 He was right. But in any event, he said, "You'll never guess who's coming down," and he said, "It's Phil Areeda," who had been a professor at Harvard right after we both left and a legendary figure in antitrust as you well know. And he was not deputy, he was co-counsel. It was a special job. My response was, "Aw hell, the mafia is taking over the administration of justice."

00:50:07 He said, "No, no. He's not one of ours. He's one of yours". Suggesting, of course, that Areeda was Jewish. Well, the irony is the three of us were close friends. Phil and I became

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<sup>54</sup> Philip W. Buchen (1916-2001), White House counsel in the Ford Administration from 1975-77. <https://www.nytimes.com/2001/05/24/us/philip-w-buchen-85-is-dead-advised-ford-on-nixon-pardon.html>.

<sup>55</sup> Phillip E. Areeda (1930-1995), a professor of antitrust law at Harvard Law School who served as counsel to President Ford for four months in 1974 and 1975. <http://www.nytimes.com/1995/12/27/us/phillip-areeda-considered-top-authority-on-antitrust-law-dies-at-65.html>.

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such close friends that I would stay at his house whenever I would go to Harvard. I always just assumed he was Jewish. He never mentioned anything.

00:50:32 When I was leaving, when I wanted to resign as deputy attorney general, Ford asked me to come up with three names to replace me. And I considered Areeda immediately and decided no because Levi<sup>56</sup> had what I thought was a cockamamie theory of using the antitrust laws to break the Arab boycott.<sup>57</sup> And I didn't

00:50:57 think it was wise politically to have two Jews in the top two positions. So I discounted Areeda -- I knew Phil Areeda really well. He was a conservative Republican on most policy views. He was perfect in

many respects, but I discounted him. I recommended Ed

0:51:22 Schmults<sup>58</sup> and it's a long story. He was originally 8 nominated, pulled back, and then of course became, based in part on my recommendation, deputy attorney general in the Reagan Administration. But any event, going back to Phil Areeda. Ed Levi finally comes in and he talks with me about deputies. He said,

0:51:47 "What about Phil Areeda?" And I explain why I had

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<sup>56</sup> Edward H. Levi (1911-2000), attorney general in the Ford Administration from 1975-77. <https://www.nytimes.com/2000/03/08/us/edward-h-levi-attorney-general-credited-with-restoring-order-after-watergate.html>.

<sup>57</sup> An oil embargo from October 1973 to March 1974 by members of the Organization of Arab Petroleum Exporting Countries (OAPEC) against nations, including the United States, that were viewed as having supported Israel during the 1973 Yom Kippur War.

<sup>58</sup> Edward C. Schmults (1931-), an attorney who served in the Treasury Department and White House Counsel's Office in the Ford Administration, and who later was deputy attorney general in the Reagan Administration from 1981-84. <http://www.presidency.ucsb.edu/ws/?pid=43713>.

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discounted Phil Areeda and Levi understood that made sense. In the meantime, Areeda calls me and said, "You know there's one job in government I would stay for: your job," and I explained to Phil that I had thought of him initially, but discounted him. And there's this dead silence on the phone and he said, "Wait a minute, Larry, I'm not Jewish." I said, "Well what are

00:52:12 you?" He said, "I'm Lebanese Catholic." I said, "Oh my God, it's perfect," and I ran upstairs to tell Levi. He had just hung up the phone on Ace Tyler.<sup>59</sup> I blamed Nino for that for years.

00:52:31 MR. CLEMENT: Do you have other highlights of your time at the Justice Department?

00:52:35 JUDGE SILBERMAN: The most dramatic day of my life. Now you may recall that both Saxbe and I, just as Elliot Richardson and Bill Ruckleshaus, at confirmation had agreed to honor the regulation, which gave Archie Cox (originally), now Jaworski, independence

00:53:00 unless -- and tenure -- unless he would engage in a gross impropriety. One day Saxbe is hunting down in

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<sup>59</sup> Harold R. "Ace" Tyler Jr. (1922-2005), deputy attorney general from 1975-77 in the Ford Administration. Previously, he served as a judge on the U.S. District Court for the Southern District of New York.  
<https://www.nytimes.com/2005/05/27/nyregion/harold-tyler-83-lawyer-and-former-federal-judge-dies.html>.

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Mississippi with Eastland.<sup>60</sup> I am called first thing in the morning -- I'm acting attorney general -- by Jim St. Clair.<sup>61</sup> Jim St. Clair had been retained, he was a very distinguished Ropes & Gray lawyer, as Nixon's lawyer in Watergate. He was on the White House payroll. He said, "Larry, this is a serious matter. I am calling you to tell you formally that Jaworski has engaged in gross improprieties." Holy cow. I said,

00:53:25

00:53:50: "What are you talking about?"

He said, "Well Buzhardt,<sup>62</sup> White House counsel, was called before the grand jury and the questioner, the lawyer, asked about communications between White House counsel and the president."

00:54:15

I said, "Then, what is the impropriety?"

He said, "Well, I don't understand, Larry. It's obvious. It's a breach of attorney-client privilege." I said, "I don't think that's right, Jim. I don't think any government lawyer's discussion with another government official can be cloaked in attorney-client privilege."

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<sup>60</sup> James O. Eastland (1904-1986), senator from Mississippi in 1941 and from 1943-78, and chair of the Senate Judiciary Committee from 1957-78. <http://www.nytimes.com/1986/02/20/obituaries/james-o-eastland-is-dead-at-81-leading-senate-foe-of-integration.html>.

<sup>61</sup> James D. St. Clair (1920-2001), a partner at Hale & Dorr (now WilmerHale) and President Nixon's chief defense lawyer during the Watergate scandal. <https://www.nytimes.com/2001/03/12/us/james-st-clair-nixon-s-watergate-lawyer-is-dead-at-80.html>.

<sup>62</sup> J. Fred Buzhardt (1924-1978), special White House counsel for Watergate from 1973-74. <https://www.nytimes.com/1978/12/17/archives/fred-buzhardt-jr-nixons-counsel-in-watergate-dies-a-loyalist-and.html>.

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00:54:40           Governmental privilege, yes, but not personal attorney-client privilege." Well, we had a little discussion about this and at the end of it, towards the end of it he said, "Well, Larry, I'm on the government payroll too."

I said, "Jim, that's your problem." At that point my secretary came running down that long hall, or the long conference room in the deputy attorney general's office, white as a sheet. She said,

0:55:05           "The president's on the line." I said, "Jim, I'm sorry I have to ring off, your client's calling."

"Wha!" The president got on the line. He said, "Larry, how are you doing selecting judges?"

I said, "I think I'm doing what you want."

He said, "You know what I want? Frankfurter<sup>63</sup> types."

I said,

00:55:30           "I'm looking for men and women who will believe in judicial restraint."

He says, "That's what I want." Now this was really quite extraordinary because Nixon virtually never communicated with subcabinet officials. In fact, he rarely communicated with his cabinet officials. So I was sort of stunned at this conversation. I couldn't imagine he was talking about judges. He said,

00:55:55           "Larry, I have a particular problem. You know,

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<sup>63</sup> Felix Frankfurter (1882-1965), associate justice of the Supreme Court from 1939-62. [https://www.oyez.org/justices/felix\\_frankfurter](https://www.oyez.org/justices/felix_frankfurter).

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there's an investigation of John Connally,<sup>64</sup> pursued by the Watergate Special Prosecutor in the District Court or in related grand jury proceedings in the District Court. What I have

00:56:20 learned, which upsets me, was something profoundly wrong that the Justice Department is doing, not the independent counsel. There is a witness by the name of Jacobsen<sup>65</sup>, prospective witness against Connally. Jacobsen is a liar and he's been indicted for a felony in Texas. I

00:56:45 understand that the Justice Department, in order to help get Connally, is dropping all proceedings against Jacobsen."

I said, "Mr. President, you have me at a disadvantage. I'm not familiar with this."

He said, "Call me back."

I said, "I will look into it" -

00:57:10 - and he said, "Call me back immediately." Well I was madder than a wet hen, that I didn't know anything about it. I called Henry Petersen,<sup>66</sup> who was at a

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<sup>64</sup> John Connally (1917-1993), governor of Texas from 1963-69 and secretary of the treasury in the Nixon Administration from 1971-72.

<http://www.nytimes.com/1993/06/16/us/john-connally-of-texas-a-power-in-2-political-parties-dies-at-76.html>.

<sup>65</sup> Jake Jacobsen (1919-2003), a Texas lawyer indicted for perjury for lying to a grand jury about a payment he solicited from the dairy industry in 1971, allegedly on Connally's behalf. Connally was later acquitted of perjury and conspiracy to obstruct justice charges relating to the matter.

<https://www.nytimes.com/1974/04/17/archives/connallys-name-turns-upin-watergate-investigations-of-big-political.html>;

<sup>66</sup> Henry E. Petersen (1921-1991), assistant attorney general for the Criminal Division in the Nixon and Ford Administrations from 1972-74.

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conference in Airlie House. I said, "Henry, what the hell is this about? And why haven't I been told?"

00:57:35 He said, "Look on your calendar, you have a meeting with me on Monday. That's what it's about." And he explained and he said he had worked that arrangement out with Hank Ruth, the deputy special prosecutor, and he was doing exactly what the Justice Department would do if there was only one department, if we weren't bifurcated. Because Jacobsen was pleading guilty to a felony in the District of Columbia,

00:58:00 which was even more penalty or even more prison time than the one in Texas. We would always drop the Texas case in return for his testimony. So of course I realized Hank was right. So I called the president back. The whole thing had taken about an hour. It was astonishing, I got through immediately.

00:58:25 And I started explaining to the president exactly what happened and I could tell he was getting agitated. And I remember in response to my saying this was normal procedure, he said, "I don't want to hear about normal procedure," and he was yelling. He said, "I want

00:58:50 orders." And I realized he was giving me an order. He got so excited, he said instead of "giving orders,"

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he said, "I want orders." "And call Haig<sup>67</sup> when it's done." So I started writing a letter of resignation. Bob Bork<sup>68</sup> came running

00:59:15 down the hall because I guess John Rose told him and Bork said, "Not this time Larry. If you go, I'm going too." And my associates are taking my pictures off the wall, gallows humor, and I write my letter of resignation and I call Haig to tell him it's coming over. He said, "What are you talking about? I don't know what -- what is going on?" And so

00:59:40 I explained what happened to Haig. He said, "Oh my God, Connally is in his office." He said, "Wait a minute. Don't send the letter of resignation. Please don't send it over yet."

I said, "Well, the chauffeur's ready."

He said, "No, no, please give me time." Two hours later he calls me back, "Larry, it never

1:00:05 happened. Forget it, it's never happened." But, I thought to myself, "Holy cow, if Connally was in his office, this could be obstruction of justice." So I wrote a long

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<sup>67</sup> Alexander Haig (1924-2010), White House chief of staff in the Nixon and Ford Administrations from 1973-74 and, later, secretary of state in the Reagan Administration.

<https://www.nytimes.com/2010/02/21/us/politics/21haig.html>.

<sup>68</sup> Robert Bork (1927-2012), Solicitor General in the Nixon and Ford Administrations from 1973-77. President Reagan appointed him to the D.C. Circuit in 1982 and nominated him to the Supreme Court in 1987, but the Senate voted not to confirm him.

<https://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html>.

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- 1:00:20: memo to Hank Ruth describing exactly what happened, not mentioning the call from St. Clair because that wasn't germane. I had already decided that on my own and that didn't involve him. Three weeks later, Hank Ruth came to me
- 1:00:45 and said, "Larry, I think it was obstruction of justice, but we've got so much on Connally and so much on Nixon. This is just going to complicate matters. So I'm not going to do anything with it." Turns out, he never told anybody in his office about it. He gave me the memo back. But another memo tracking the events prepared that day by my assistant deputy attorney general was disclosed in a Freedom of
- 1:01:10 Information Act suit filed by the Washington Post in 1980 and then poor Haig was questioned about it and Haig hadn't done anything wrong. And I was questioned of course about it. It was just an extraordinary event.
- 1:01:28 MR. CLEMENT: It sure is. So how did you move from the Justice Department to ambassador of Yugoslavia, which is not the most obvious lateral move?
- 1:01:38 JUDGE SILBERMAN: Now you recall I was always interested in foreign policy. The White House -- when I wanted to leave as deputy attorney general, I was first offered a post of trade representative, and to

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01:02:03           make a long story short, Russell Long,<sup>69</sup> who was  
                          chairman of the Finance Committee, conditioned my  
                          approval on my selection of his head of staff of the  
01:02:28           Finance Committee, a guy by the name of Robert Best,<sup>70</sup>  
                          as my deputy in Geneva. I told Russell Long I would  
                          be glad to talk to Best after I was confirmed.  
                          Russell Long didn't like that. He ultimately called  
01:02:53           Ford and said, "I don't want Silberman. I can't  
                          stop his confirmation, but I've got three votes on the  
                          energy bill and you need the energy bill. So I object  
                          to Silberman because he is 100% your man and I'm  
                          entitled to 50%. I created the job." The president  
                          then offered me a post of assistant to the president  
                          for intelligence. I declined. I didn't  
                          want to work in the White House. Rumsfeld<sup>71</sup> knew I was  
                          always interested in CIA and there was some indication  
                          I might get that job eventually, but I didn't want to  
                          work in the White House. So they said they wanted me  
                          to get foreign policy experience and Henry offered me  
                          various posts including Germany, which I was inclined  
                          to take because I was one of

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<sup>69</sup> Russell B. Long (1918-2003), senator from Louisiana from 1948-87 and chair of the Senate Finance Committee from 1966-81.  
<https://www.nytimes.com/2003/05/11/us/russell-b-long-84-senator-who-influenced-tax-laws.html>.

<sup>70</sup> Robert A. Best (1937-2014), an economist and lobbyist who served as chief economist of the Senate Finance Committee.  
<http://www.legacy.com/obituaries/washingtonpost/obituary.aspx?page=lifestory&pid=173614449>.

<sup>71</sup> Donald Rumsfeld, an official in the Nixon, Ford, and George W. Bush Administrations who served as President Ford's chief of staff from 1973-74 and secretary of defense from 1975-77.

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1:03:18           the few Americans who believed in German unification.  
But my wife begged me not to take Germany because as  
the first Jewish ambassador, she knew I would have to  
go to concentration camps and she couldn't bear it.  
So the other one was Yugoslavia, which was always of  
interest to me and in some ways, by virtue of

1:03:43           NATO planning, the most important spot in Europe. So  
I took Yugoslavia.

01:03:54       MR. CLEMENT: And why is it that you didn't want to  
work in the White House?

01:04:01       JUDGE SILBERMAN: I hate the jockeying. I just can't  
stand the idea of going in everyday, jockeying to get  
yourself ahead of somebody else. It just always made  
me feel uncomfortable.

01:04:16       MR. CLEMENT: Judge, what were your primary  
responsibilities as deputy attorney general?

01:04:21       JUDGE SILBERMAN: There was no question concerning my  
role vis-à-vis the attorney general. The attorney  
general made clear when he took the job that he was  
getting old. He wasn't going to spend every day  
running the department.

1:04:46       The theory is that I would be chief operating officer,  
but of course, I would take any policy issue to him.  
So I spent my time trying to manage the department.  
There was an article that appeared in the *Washington*

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Star, the old *Washington Star*,<sup>72</sup> which was very flattering about the management of the department. Saxbe was indifferent to any criticism that he wasn't spending enough time there. He was asked by one reporter, "Why are you spending so much time hunting? Why aren't you spending more time at the Justice Department?"

01:05:11

01:05:36 His response, which my children loved, was, "I have a deputy who has got a great mind for detail and he's meaner than a junkyard dog," [laughter]...which I've never lived down. But I did my best to make it clear that although I was largely

1:06:01 managing the department I was consulting Bill Saxbe on any policy issue. One day, there was a big argument between Scalia and Bork, which was brought to me and they were fighting back and forth. And I said, "Well, I think I ought to go up and consult with the attorney general about that." Neither one

01:06:26 wanted to be part of that, but -- so I went back up and took the elevator up to the fifth floor (I was on the fourth floor) and smoked a cigarette because Saxbe was out. Came back down and said, "The Attorney General agrees with me that so and so happened." This

01:06:51 was never told to Bork and Scalia until John Rose told Scalia years later, and he was quite annoyed.

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<sup>72</sup> *The Washington Star*, a daily newspaper published in Washington, D.C. between 1852 and 1981.

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01:07:00 MR. CLEMENT: That's great.

01:07:01 JUDGE SILBERMAN: But the other time -- every morning, Saxbe would have a morning meeting with his executive assistant, a guy by the name of Bill Hoyles,<sup>73</sup> who was very good, his assistant attorney general for legislative affairs, Vince Rakestraw,<sup>74</sup> who was very good, and me. Most of the

01:07:26 time of that 40-minute meeting was taken up by such subjects as hunting or farming in Ohio, but I would come down and tell my associate deputies, "The following things are decided and we

01:07:51 should do..." So John Rose and Nino Scalia both came to me and said, "Look, we should be part of that morning meeting." I turned them down, but they came again and again. They said, "Look, we're part of the fundamental staff, the attorney general's staff. We should be part of this." Okay, so they both come.

01:08:16 So they're listening to this discussion about tobacco, farming, hunting, or whatever was in the attorney general's mind, and after a week they both came to me and said, "You know, we don't want to be part of the morning meetings anymore." I said, "Oh no, you wanted 'em. Now you're stuck." Saxbe

1:08:41 was a wonderful character. He didn't want to spend

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<sup>73</sup> William M. Hoyles, Saxbe's administrative assistant in the Ohio Attorney General's Office, Senate, and Department of Justice.

<sup>74</sup> Vincent Rakestraw, an Ohio lawyer and longtime aide to Saxbe who served as assistant attorney general from 1973-75.

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every day on Justice Department matters, but his judgment and instincts on the top political issues tended to be right. I told you about the -- the incident when I was going to resign, I forgot to tell you

01:09:06 that I called Saxbe to tell him that I was resigning and I might be asked what his view was. And his response was -- that I've told publicly before -- was, "Tell the president to go piss up a rope," which wasn't what I was going to do.

01:09:29 MR. CLEMENT: So judge, we mentioned that you took this unusual transition from the Justice Department to the position of Ambassador to Yugoslavia. Can you share a highlight or two from your time as ambassador? I understand it was not the most tranquil time.

01:09:48 JUDGE SILBERMAN: Well, I had a big fight with the State Department and the Yugoslav government at the same time concerning an American that was in jail there and who had figured out a way to communicate with me.<sup>75</sup> He had been born in Yugoslavia. It turned out that the Yugoslavs secret police arrested him -- the very day Ford was there, which was part of an

01:10:13 effort to -- on the part of the strongly pro-communist group in Yugoslavia-- to offset some of those who

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<sup>75</sup> Laszlo Toth, a Yugoslav-born American engineer arrested on espionage charges in Yugoslavia in 1975.  
<https://www.nytimes.com/1976/08/04/archives/us-citizen-tells-of-his-ordeal-in-yugoslavia-as-accused-spy.html>.

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wished to liberalize-- to undermine any relationship with Ford. So that was quite a battle. At the time, Yugoslavia was leaning towards the

01:10:38 Soviet Union because we were collapsing in Vietnam, and Tito<sup>76</sup> thought we were weak. So I thought it was a bad time to not be aggressive about trying to get an American out of jail, who it turns out they were trying to recruit for the secret police to work in the United States. There was an argument with the State Department bureaucracy because the

01:11:03 State Department bureaucracy, realizing Yugoslavia was so important during the Cold War, didn't ever want to alienate them. My view is that the tougher we were with Yugoslavia, the more we'd be respected, the more likely that they would stay in a center position rather than leaning to the Soviet Union. That

01:11:28 became a big argument and eventually, thank God, he got released from jail and I was applauded for that except by some senior official in the State Department

01:11:53: who told *Time* magazine and *The Wall Street Journal* that I was a conceited arrogant bastard. So I used to sign my cables "Silberman CAB." Kissinger<sup>77</sup> and I have subsequently become close really good friends. But at

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<sup>76</sup> Josip Broz Tito (1892-1980), communist revolutionary leader and president of Yugoslavia from 1953 until his death.

<https://www.washingtonpost.com/archive/politics/1980/05/05/tito-rebel-created-modern-yugoslavia/31f15695-a0c0-4c28-b811-f0c7bb40dd93/>

<sup>77</sup> Henry Kissinger<sup>923-</sup> ), a political scientist and diplomat who served as secretary of state in the Nixon and Ford Administrations from 1973-77.

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01:12:18 that time, *I* thought Kissinger was on my side,  
but I think, in hindsight looking at documents from  
the Ford White House, he really was disinclined to  
agree with me, but didn't want to order me to desist,  
for reasons which are a little complicated. Any  
event, for whatever reason, that battle with the  
01:12:43 State Department and the Yugoslavs has followed along  
on my career.

01:12:52 MR. CLEMENT: So tell me what you did during the  
Carter Administration?

01:12:57 JUDGE SILBERMAN: The interregnum. I went to AEI,<sup>78</sup>  
which was a wonderful, wonderful experience. Bork was  
there. Scalia was there. Ralph Winter would be in and  
out. Jeane Kirkpatrick. Herb Stein. Paul McCracken.  
Ben Wattenberg.<sup>79</sup> We would have brown bag lunches,  
discuss everything including the most contentious  
issue, which was supply-side

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<sup>78</sup> The American Enterprise Institute, a conservative think tank based in Washington, D.C.

<sup>79</sup> Ralph K. Winter Jr., a Yale Law School professor who was appointed by President Reagan to the Second Circuit in 1981.

Jeane J. Kirkpatrick (1926-2006), a diplomat and political scientist who served as ambassador to the United Nations in the Reagan Administration from 1981-85.

Herbert Stein (1916-1999), an economist who served on the Council of Economic Advisors in the Nixon and Ford Administrations.

<https://www.nytimes.com/1999/09/09/us/herbert-stein-nixon-adviser-and-economist-is-dead-at-83.html>.

Paul McCracken (1915-2012), an economist who chaired the AEI's Academic Advisory Board in the 1970s and '80s. He was an advisor to Presidents Eisenhower, Kennedy, Johnson, and Nixon.

<https://www.nytimes.com/2012/08/04/us/politics/paul-w-mccracken-adviser-to-presidents-dies-at-96.html>.

Ben Wattenberg (1933-2015), a political advisor and commentator who was a senior fellow at AEI from 1977 until his death.

<https://www.nytimes.com/2015/06/30/us/ben-wattenberg-author-and-commentator-dies-at-81.html>.

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- 01:13:22 economics. And that was a wonderful period. But I decided I couldn't afford to stay on an academic salary and agreed with Dewey Ballantine to act as of counsel, at least half-time, because Phil Buchen was there and we were still
- 01:13:47 friends. But I found that was an impossible thing to do because my creative energy was going into writing rather than practicing law. So I knew if I was going to practice law I had to do it full-time. But I wasn't as happy when I'd go to partnership meetings at Dewey Ballantine. I thought they were too interested in deciding to make
- 01:14:12 partners, too interested in an individual's ability to generate clients. Morrison & Foerster approached me to start their office in Washington. Well, that felt perfectly natural because I knew some of the senior partners there, as one was an old friend. And my law firm in Honolulu was an offshoot of Morrison & Foerster.
- 01:14:37 So it felt great and I liked their atmosphere and their style. So I agreed to become the managing partner of the Washington office and create it.
- 01:14:50 MR. CLEMENT: And what was that experience like, standing up a new office?
- 01:14:53 JUDGE SILBERMAN: Hard. It's always hard when you go from government, which I've now done twice or three

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times, from non-legal positions back to law. It's always hard to adjust unless you come from the solicitor general's office and clients are breaking down your door. It's a little hard to get started and get clients, particularly if you're as amorphous a position as deputy attorney general and ambassador to Yugoslavia. But I had gotten to the point of really getting it going when a strange thing happened. I had represented the Chairman of Crocker Bank<sup>80</sup> on a particularly delicate matter,

01:15:18

01:15:43 interesting matter, but I was hardly a banking lawyer. I learned, to my astonishment, when the other senior partners called me and said that he was essentially insisting that I take over the Crocker account, Crocker business, which was one-quarter of Morrison & Foerster's business. And I said, "Well,

01:16:18 I'm glad to meet with him, but it doesn't make any sense at all. There must be 20 partners at Morrison & Foerster -- 20 lawyers, maybe 10 partners -- who know more about banking law than I do." So I went up to meet with Tommy Wilcox in New York at the Waldorf and I explained that it didn't make any sense. He said, "No, I'm insisting."

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<sup>80</sup> Thomas R. Wilcox (c. 1917-1993), chairman and CEO of Crocker National Bank from 1974-81. Crocker was based in San Francisco and was bought by London-based Midland Bank in 1981 and, later, sold to Wells Fargo. <https://www.nytimes.com/1993/07/21/obituaries/thomas-r-wilcox-76-a-banker-who-rose-from-page-to-chairman.html>.

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So I really had no choice -- and I love San Francisco, so I decided okay, we'll move back to San Francisco. Problem this created, I didn't want to go back as a partner at Morrison & Foerster because I'd have to supervise a lot of people who knew a hell of a lot more than I did about banking law, which was very little. So I decided I better be the general counsel of the corporation and go to the corporation. He wanted me

01:16:43

to be "executive vice president/general counsel" generally. Jack Sutro<sup>81</sup> of Madison, Pillsbury & Sutro came to me and said, "Larry, you cannot be general counsel without taking the bar." I said, "That's ridiculous. I'm not going to

01:17:08

practice with anybody else. I could be general counsel of Crocker if I stayed in Washington." He said, "I know, I know, but our rule is if you go out to California and you become general counsel, you have to take the bar." Well I thought to myself, you know I haven't taken a bar in a long, long time. The downside risk is so awful,

01:17:33

look what happened to Kathleen Sullivan,<sup>82</sup> and the

01:17:58

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<sup>81</sup> John A. Sutro (1905-1994), partner in the San Francisco corporate law firm Pillsbury Madison & Sutro from 1935-71.

<https://www.nytimes.com/1994/05/05/obituaries/john-sutro-lawyer-88.html>.

<sup>82</sup> Kathleen Sullivan, name partner at the Los Angeles-based corporate law firm Quinn Emanuel Urquhart & Sullivan and former Dean of Stanford Law School. She failed the California bar exam in 2005 when she left Stanford and joined the firm. <https://www.wsj.com/articles/SB113374619258513723>; <https://www.quinnemanuel.com/attorneys/sullivan-kathleen-m>.

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downside risk of flunking for an ex-deputy attorney general of the United States would be so horrible that I'll have to study for months just to make sure, way beyond what I would need to. So I decided I would avoid the problem by calling myself "executive vice president for legal and government affairs" and make my deputy: "deputy general counsel", and they never bothered me.

01:18:25 MR. CLEMENT: So was your job in the end really a legal job or was it more of a management job or both?

01:18:30 JUDGE SILBERMAN: It started out as a legal job. Although it had involved regulatory affairs too, but it was basically a legal job. A classic general counsel's job. But then after I helped negotiate the sale of much of the bank to Midland, which was then one of the largest banks in the world, and we got a billion

01:18:55 dollars. I was asked to head strategic planning to figure out what to do with the money. So, I ended up getting a little bit of a business school education by hiring Michael Porter<sup>83</sup> at Harvard, who you must know as the leading competitive strategist. I spent most of my time on strategic planning deciding what the bank's business should be.

01:19:28 MR. CLEMENT: And so how did you get involved with the

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<sup>83</sup> Michael Porter, an economist and professor at Harvard Business School.  
<https://www.hbs.edu/faculty/Pages/profile.aspx?facId=6532>.

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Reagan campaign?

01:19:32 JUDGE SILBERMAN: Well since my time at Yugoslavia -- I had written a memo. A cable disagreeing with what became notorious as the Sonnenfeldt Doctrine.<sup>84</sup> Do you remember what that was?

01:19:51 MR. CLEMENT: I don't. Remind me.

01:19:52 JUDGE SILBERMAN: The Sonnenfeldt Doctrine essentially was: we should not shake too hard, shake the tree of democracy and liberty in Eastern Europe because look what happened in Hungary when we couldn't follow up. We couldn't protect people. So we should basically accept the Soviet Union's sphere of influence is Eastern Europe. I thought

01:20:17 that was fundamentally wrong. I thought our strategic objective was the disestablishment of the Soviet empire through prudent means. My position on that became known and therefore Dick

01:20:42 Allen,<sup>85</sup> who was the national security advisor for Reagan during the campaign, recruited me to be co-chairman of Reagan's foreign policy advisors.

Actually before that, Jack Kemp<sup>86</sup> had asked me to be

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<sup>84</sup> Helmut Sonnenfeldt (1926-2012), a foreign policy advisor in the Nixon and Ford Administrations and counselor to Henry Kissinger.  
<https://www.nytimes.com/2012/11/22/world/helmut-sonnenfeldt-expert-on-soviet-and-european-affairs-is-dead-at-86.html>.

<sup>85</sup> Richard V. Allen, a foreign policy advisor to Presidents Nixon and Reagan who served as national security advisor from 1981-82.  
<https://www.hoover.org/profiles/richard-v-allen>.

<sup>86</sup> Jack Kemp (1935-2009), congressman from New York from 1971-89 and secretary of housing and urban development in the George H.W. Bush Administration.  
<https://www.nytimes.com/2009/05/03/us/03kemp.html>.

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- chairman of his presidential campaign (we were friends) and I told him, "No. I think you should support Reagan." And he did. And [he]
- 01:21:07: convinced Reagan to accept supply-side economics. In any event, so I was co-chairman of Reagan's foreign policy advisors along with Fred Iklé,<sup>87</sup> who was permanently on the campaign payroll. I was also chairman of Reagan's lawyers and law professors. The foreign policy
- 01:21:32: group spent a lot of time with Reagan. I spent hours with Reagan in meetings in Los Angeles with several others. The chairmanship of the lawyers and law professors involved strictly -- the only thing we did was publish an ad indicating our view that Reagan would
- 01:21:57 appoint sound people to the Courts of Appeals. The people on my list included Bork, Scalia, Ralph Winter, Frank Easterbrook, Dick Posner, all people with absolute disinterest in judicial
- 01:22:22 appointments.<sup>88</sup> The only one on the whole list -- oh,

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<sup>87</sup> Fred Charles Iklé (1924-2011), a sociologist and defense policy advisor in the Nixon, Ford, and Reagan Administrations.  
[https://www.washingtonpost.com/local/obituaries/fred-charles-ikle-reagan-administration-defense-official-dies-at-87/2011/11/11/gIQA5AlzQN\\_story.html](https://www.washingtonpost.com/local/obituaries/fred-charles-ikle-reagan-administration-defense-official-dies-at-87/2011/11/11/gIQA5AlzQN_story.html).

<sup>88</sup> Frank Easterbrook was appointed to the U.S. Court of Appeals for the Seventh Circuit by President Reagan in 1985.

Richard Posner, was appointed to the U.S. Court of Appeals for the Seventh Circuit by President Reagan in 1981. He retired in 2017.

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Charles Fried<sup>89</sup> was on it too -- who wasn't interested in a judicial appointment was me. My real interest was being CIA director. I was appointed head of the CIA transition team after the election. But when Bill Casey<sup>90</sup> was rejected as secretary of state, he switched to

01:22:47 CIA and I decided to stay out of government for a while.

01:22:54 MR. CLEMENT: And so on the transition team, were you actually present over at the agency?

01:22:59 JUDGE SILBERMAN: Yes, yes, two weeks.

01:23:00 MR. CLEMENT: Two weeks.

01:23:01 JUDGE SILBERMAN: And then I diplomatically broke my foot to get out of it.

01:23:05 MR. CLEMENT: That's very clever. Well, so take us then to your interest (if there was interest) in a judicial appointment, because you just said that you were the only person on that list who wasn't interested. So how did you become interested?

01:23:26 JUDGE SILBERMAN: Well, shortly after I came back to Washington to start Morrison & Foerster's office, I

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<sup>89</sup> Charles Fried, a Harvard Law School professor who served as solicitor general in the Reagan Administration from 1985-89.  
<https://hls.harvard.edu/faculty/directory/10288/Fried>.

<sup>90</sup> William J. Casey (1913-1987), an official in the Nixon, Ford, and Reagan Administrations who managed Reagan's 1980 presidential campaign and served as director of central intelligence from 1981-87.  
<https://www.nytimes.com/1987/05/07/obituaries/william-casey-ex-cia-head-is-dead-at-74.html>.

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had lunch with Bill Rehnquist, <sup>91</sup> an old friend. Bill said, "Larry, have you thought about being a judge?" I hadn't, and I began to think about it. I had

01:23:51 advised Bill Smith<sup>92</sup> that I had made a mistake as deputy attorney general in selecting first class litigating lawyers who were partners -usually senior partners or at least the age of 50 (we'll get to that)-- in major firms who

01:24:17 were Republicans. And I watched and it seemed to me that litigating lawyers, unless they had something in their background that indicated their commitment to judicial restraint were

01:24:42 dangerous. They were too ready to regard the law instrumentally rather than on the principles of judicial restraint I thought important. So I argued strongly, with Bill Smith and Ed Schmults, that you should pick academics. Well, one of the academics after a few years was Paul Bator, <sup>93</sup> who was a dear friend. And Paul was

01:25:07 nominated, as you remember, for a seat on this court. And Paul ran into certain legal difficulties and asked

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<sup>91</sup> William H. Rehnquist (1924-2005) was appointed to the Supreme Court in 1971 by President Nixon. He served as chief justice from 1986 until his death.

<sup>92</sup> William French Smith II (1917-1990), advisor to and personal lawyer for President Reagan who served as his attorney general from 1981-85.  
<https://www.nytimes.com/1990/10/30/obituaries/william-french-smith-dies-at-73-reagan-s-first-attorney-general.html>.

<sup>93</sup> Paul M. Bator (1929-1989), Harvard Law School and University of Chicago Law School professor who served as deputy solicitor general from 1982-83.  
<https://www.nytimes.com/1989/02/25/obituaries/paul-michael-bator-is-dead-at-59-lawyer-teacher-also-served-us.html>.

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me to represent him. I did represent him.

Eventually, he had to withdraw from the nomination.

At that point, Bill Smith called me and said, "All right Larry,

01:25:32 we've run out of academics. What about your taking a seat on the D.C. Circuit?" And I thought about it. I remember Tex Lezar<sup>94</sup> was in charge of judicial selections for Bill Smith, and Tex said

01:25:57 to Bill, "You can't take Larry Silberman. He's too old." And Bill said, "He's 49." Tex said, "My God, he's been around forever." In any event, I agreed and I came on. There was a slight hitch because at that point

01:26:22 Crocker Bank was under investigation. I knew that they were innocent, but knew so only through attorney-client privilege. So I was sort of stuck and I actually called Fred Fielding<sup>95</sup> and said, "I better withdraw as a nominee."

He said, "No, no, let's wait and see how it works out," and it did work out. So

01:26:47 I didn't have to disclose any attorney-client privilege. I became a judge and here I am. Oh incidentally, Bork advised me not to take the job.

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<sup>94</sup> H.J. "Tex" Lezar (1947-2004), an official in the Justice Department from 1981-85. <https://www.washingtonpost.com/archive/local/2004/01/08/hj-tex-lezar-former-ass/9f2e6d7c-c8ea-46ea-afdf-7ff125481c98/>.

<sup>95</sup> Fred F. Fielding, White House counsel in the Reagan and George W. Bush Administrations from 1981-86 and 2007-09. <https://www.morganlewis.com/bios/ffielding>.

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Scalia advised me to take it. These were two of my best friends. Bork said, "You'll be bored to death. You're too much of an activist," and he pretty much implied he was bored. Nino

01:27:12 said, "You've always been bifurcated. You've always been inclined towards being a quasi-academic. I think you should take it. I think you'd be happy."

Nino and I would trade advice for 30, 40 years, so I listened. I took it. Then I became a judge and I was

01:27:37 reminded almost immediately by Bork and Scalia that I may have been their superior in the Justice Department, but now my seniority was lower than theirs and I sat with them only once. One of Bork's clerks, it was either John Manning, Peter Keisler, or Brad Clark,<sup>96</sup> leaked to one of my clerks, Jonathan Nathanson,<sup>97</sup> that they had plotted to

01:28:02 give me this absolutely nasty FERC case.<sup>98</sup> So armed with this information I went into our first meeting after the arguments and they, with a wicked gleam in

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<sup>96</sup> John F. Manning, Peter D. Keisler, and Bradford R. Clark clerked for Judge Bork at the D.C. Circuit from 1985-86.

Manning later worked in the Justice Department during the Reagan, George H.W. Bush, and Clinton Administrations and is now Dean of Harvard Law School. <https://hls.harvard.edu/faculty/directory/10552/Manning>;

Keisler later served in the George W. Bush Justice Department and is a partner at Sidley Austin. <https://www.sidley.com/en/people/k/keisler-peter-d>;

Clark later served in the Reagan Justice Department and is now a George Washington University Law School professor. <https://www.law.gwu.edu/bradford-r-clark>.

<sup>97</sup> Jonathan Nathanson clerked for Judge Silberman from 1985-86 and is now an energy industry executive.

<sup>98</sup> [Nat'l Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n](#), 811 F.2d 1563 (D.C. Cir. 1987).

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- their eye, turned to me and said,
- 01:28:27 "What's your view? You're less senior now. What's your view on the FERC case?" So I said, "Well, on the one hand -and on the other hand- and on the other hand- and then that hand." Nino was getting agitated, you know how impatient he was. And I said, "I think I'm dubitante." Nino said, "Damn it! You don't even know what dubitante means!" Scalia
- 01:28:52 said, "It's obvious, it's A-B-C." Bork turns to Scalia, said, "Well, if you know, if you have such a clear idea, you ought to write it." Nino looked up and said, I'll never forget, "Son of a bitch, you, you set that up! [laughter] I'll never write this opinion! I'll never do it!"
- 01:29:17 Well, guess what? The next year he was nominated to the Supreme Court. He never did write it. Bork ended up writing it and I ended up rewriting it.
- 01:29:31 MR. CLEMENT: [Laughter] Sounds like it should have been per curiam.
- 01:29:33 JUDGE SILBERMAN: The lawyer for Bork on that was Richard Cordray.<sup>99</sup>
- 01:29:37 MR. CLEMENT: Wow, quite a group. Quite a group. Let me back you up just a little bit and ask you about your confirmation process. Was it like the drag-out

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<sup>99</sup> Richard Cordray clerked for Judge Bork in 1986-7. He later served as treasurer and attorney general of Ohio and as the first director of the Consumer Financial Protection Bureau from 2012-17, appointed by President Obama.

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affairs we've become used to?

01:29:50 JUDGE SILBERMAN: No, I told you before I had a problem. This was the problem. I was nominated in April and confirmed by October, which isn't that long. But it was drawn out by one thing. The Treasury Department was investigating

01:30:15 banks because of violations of the Bank Secrecy Act<sup>100</sup> and that stemmed from a regulation that had been published at the very end of the Carter Administration by a guy by the name of Richard Davis,<sup>101</sup> who was an assistant secretary. He didn't write it himself and it was screwed up. As it turned out, it wasn't obvious right away,

01:30:40 every major bank in the United States misread that regulation. Bank secrecy -- it required you to report deposits or withdrawals above a certain amount. That regulation extended it to wire transfers, which was a massive extension to the bank business. No big

01:31:05 bank caught it. It was so badly written. But, because of political pressure on the Hill, based on a scandal that took place in Boston, there was a lot of pressure on an assistant secretary of treasury by the

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<sup>100</sup> The Bank Secrecy Act of 1970, or Currency and Foreign Transactions Reporting Act, [Pub. L. No. 91-508, 84 Stat. 1114](#).

<sup>101</sup> Richard J. Davis, assistant secretary of the treasury for enforcement and operations in the Carter Administration from 1977-81.

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name of Walker.<sup>102</sup> And he

01:31:30           panicked and went after all the banks hammer and tong.  
And so the question became -- after the New York  
banks, then the California banks -- and the question  
was, did Crocker violate it? And if Crocker violated  
it, as the executive vice president, was I  
responsible? Now, I knew through attorney-client  
privilege, the mistake was made by somebody four  
levels down below me. I never saw it. But I couldn't  
say that

01:31:55:           because I learned it through attorney-client  
privilege. So any event, Biden<sup>103</sup> demanded that the  
FBI go out and investigate whether I knew anything  
about it. And we couldn't answer it because that was  
all attorney-client privilege. Any event, eventually  
Crocker advised, against my advice -- I withdrew as  
counsel because I was in a conflict.

01:32:20           I advised Crocker to fight because the statute made it  
a penalty only if you willfully did this, and  
everybody had made the same mistake and this was just  
Walker panicked. But Crocker decided to pay a million  
dollars to get the government off its face and then

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<sup>102</sup> John M. Walker Jr. served as assistant secretary of the treasury for enforcement and operations from 1981-85. President Reagan appointed him to the U.S. District Court for the Southern District of New York in 1985, and President George H.W. Bush appointed him to the Second Circuit in 1989. He took senior status in 2006.

<sup>103</sup> Joseph R. Biden Jr., senator from Delaware from 1973-2009 and vice president from 2009-17. He chaired the Senate Judiciary Committee from 1987-95.

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the FBI went out and looked and saw that I had nothing to do with it. So I was confirmed unanimously.

01:32:45 MR. CLEMENT: Unanimously, wow.

01:32:47 JUDGE SILBERMAN: I was confirmed unanimously six times. I know that would not be true today.

01:32:53 MR. CLEMENT: Times have changed. Times have changed. So when you came onto the D.C. Circuit, did you come on with a fully formed view of the proper role of an Article III judge?

01:33:08 JUDGE SILBERMAN: I think the answer is largely yes. Well, on everything fundamental. There were ancillary issues that I learned after I came here ... concerning, for instance, how you handle disputes with other judges and so forth. But I did have the same view of an Article III judge that I had at Harvard.

01:33:31 MR. CLEMENT: And what sources shaped that view?

01:33:34 JUDGE SILBERMAN: My professors, my own thinking. I came out of Harvard with the same views, so it had to be -- well I think back on why I

01:33:59 went to Harvard. How much I knew about judicial role before I went to Harvard I don't know -- but intuitively, I believed that judges didn't make policy or shouldn't make policy. And as I said, I had this other view. I don't know where I got it, when I got it. There was a theoretical right answer to every

01:34:24 case. There's a theoretical right answer for every

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case based on logic and the logic, of course, is informed by precedent. And therefore although we're frail humans, we don't

01:34:49 always see it. It's important to always keep that in mind. Because once you concede that there isn't a right answer to some cases, then it's only a question of how many cases that you will apply that theory to. I had a rather fierce argument with Bill Renhquist at a judicial conference many years ago about that. He thought my view was naïve.

01:35:16 MR. CLEMENT: And when you came onto the court, did you have any judicial heroes or role models?

01:35:22 JUDGE SILBERMAN: I did, part of my Harvard training. Frankfurter and Holmes. But I thought of Holmes at that point as a believer in judicial restraint. I concluded -- also Frankfurter. And they were more advertised than real. Holmes sometimes

01:35:47 would write brilliantly when he was describing why he was not exercising judicial restraint. The same thing was true of Frankfurter. I mean, *Rochin*<sup>104</sup> was one of the classic great cases of Frankfurter using eloquent language to disguise judicial activism. So I've changed my view and took their pictures down from the time you were here.

01:36:13 MR. CLEMENT: And are there any candidates for new

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<sup>104</sup> [Rochin v. California](#), 342 U.S. 165 (1952).

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pictures?

- 01:36:17 JUDGE SILBERMAN: Well, I thought Scalia was by far and away the best justice we have seen in American history going back in my time. I don't know how far back I go in my memory of justices, but I think he was. He sharply turned in concept of judicial restraint. Now, he had occasional feet of clay himself. But we
- 01:36:42 all do. But in terms of his basic philosophy, he was more rigorous than any justice we ever had in the United States in his application of judicial restraint.
- 01:36:56 MR. CLEMENT: And did you see that already when you were colleagues at the Justice Department? I mean, did you see the basis for that or did you see that when you were colleagues on the D.C. Circuit?
- 01:37:10 JUDGE SILBERMAN: I thought of Nino as a Supreme Court justice almost immediately after I had recruited him as assistant attorney general for OLC. Part of that was, I thought it was crucially important to have an Italian-American on the Supreme Court. And back in 1984, I
- 01:37:35 had gone around to all the senior people in the administration suggesting that Reagan leak the names of three people who he was considering for the Supreme Court: Bork, Posner, and Scalia. A Protestant, a

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Catholic, and a  
1:38:00 Jew. Ironically, that was Posner- that was an old  
Posner, who is of course dramatically different from  
the Posner who once wrote the book *Federal Courts*.<sup>105</sup>  
So I had thought of Scalia for that. I don't think we  
thought that much, when he was at OLC and I was deputy  
attorney general about judicial philosophy. We  
thought as lawyers. We both had that view and I don't  
know how many times we talked about it: view of  
judicial restraint, both the old Harvard. I certainly  
knew  
01:38:50 what his views were as a circuit judge. I knew when  
he was nominated what his position was going to be on  
the Supreme Court. As you know, I acted as his  
counsel when he was nominated, which came about  
because he knew that some of the issues that would be  
most difficult  
01:39:15 would be 'what can you answer as a judge?' But  
secondly, as I have publicly said, he asked me to act  
as his counsel because I was free.  
01:39:27 MR. CLEMENT: [Laughter] The price was right.  
JUDGE SILBERMAN: Right.  
MR. CLEMENT: So judge, I want to just ask you about  
your first year on the bench. You mentioned you came  
onto the bench with a judicial philosophy, but surely

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<sup>105</sup> Richard A. Posner, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985).

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there must have been something that was of particular concern to you on your first year on the bench. Can you give any insights into what were your concerns in your first year?

01:39:54 JUDGE SILBERMAN: Well, there was a crisis of morale on the court in that first year or two. We had, I think with Judge Buckley or Judge Williams,<sup>106</sup> we ended up with a majority of judges appointed by Republican presidents. That was somewhat of an earthshaking development because the D.C. Circuit had

01:40:29 always been, particularly under Bazelon's<sup>107</sup> leadership, a forerunner of the most activist philosophy. So there was a tense time and that led to a

01:40:54: particularly difficult problem in personal terms. We had agreed, the majority, to en banc<sup>108</sup> a number of cases that were decided by so-called liberal

01:40:18 majorities. Some of them were cases that really should go to the Supreme Court, but any event, I'll never forget Pat Wald<sup>109</sup> at one point accused me of being the majority whip, like it was a

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<sup>106</sup> James L. Buckley and Stephen F. Williams were appointed to the D.C. Circuit by President Reagan in 1985 and 1986, respectively. They took senior status in 1996 and 2001, respectively.

<sup>107</sup> David L. Bazelon (1909–1993) was a judge on the D.C. Circuit from 1950–85, appointed by President Harry Truman. He served as chief judge from 1962–78. <https://www.nytimes.com/1993/02/21/us/david-bazelon-dies-at-83-jurist-had-wide-influence.html>.

<sup>108</sup> En banc, review of a case by all of a court's judges, rather than by a smaller panel.

<sup>109</sup> Patricia Wald was a judge on the D.C. Circuit from 1979–99, appointed by Jimmy Carter.

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01:41:43           parliamentary system, although most of the cases were  
                          en banc by situations in which clerks of another  
                          judge had

01:42:08           fomented them. But I felt for a couple of reasons  
                          that it was problematic and I actually did something,  
                          which caused a permanent break between Bob Bork and  
                          me; and which was I sent a memo de-en bancing four  
                          cases. And we did do that.

01:42:33           It had a permanent impact on the court because ever  
                          since then we've been very reluctant to en banc cases.  
                          I am fond of saying that the Supreme Court gets paid  
                          to sit en banc. We don't because en bancs are an  
                          enormous pain.

01:42:58           It takes forever to get them out and you spend a lot  
                          of time spinning your wheels. But that was a big  
                          crisis. All the conservative appointees opposed me  
                          and all the liberals agreed with me in the de-en  
                          bancing. And as I said, Bob

01:43:23           and I were never friends after that.

01:43:30           MR. CLEMENT: Occasionally now, I know it's much rarer  
                          as a result, but occasionally the D.C. Circuit does  
                          take something en banc.

01:43:39           JUDGE SILBERMAN: Yes.

01:43:40           MR. CLEMENT: What would lead you to vote for  
                          something en banc?

01:43:45           JUDGE SILBERMAN: A conflict amongst panels is the

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most obvious. If there's a conflict in circuits and I think another circuit is right and it is not Supreme Court-worthy, I'd be inclined to look at it. But by far and away, the most important is tension between panel opinions because I think that's one of the most important, maybe the most important objective of a court of appeals is uniformity. And I hate to see one panel not follow loyally another

01:44:22 panel. Actually, I hate that on the Supreme Court. I hate the idea that people dissent over and over and over from opinions that are settled by a majority. I remember Harlan<sup>110</sup> -- I forget which case it is -- where Harlan took one strong

01:44:47 position on an issue, and then the next time around, he took a strong position preserving a prior majority opinion even though you knew he didn't agree with it.<sup>111</sup> And I thought, you know, Harlan was a judge. That's one of the things I hate about the Supreme Court. That's why I once called it a non-court court.

01:45:09 MR. CLEMENT: But do you think that the Supreme Court justices have a different standard for that? I mean, you mentioned Justice Scalia as being a model and of course he stuck to his guns on issues like punitive

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<sup>110</sup> John Marshall Harlan II (1899-1971), associate justice of the Supreme Court from 1955-71, appointed by President Eisenhower.

<sup>111</sup> [Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers Int'l, AFL-CIO](#), 370 U.S. 254, 267 (1962) (Harlan, J., dissenting); [Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL-CIO v. Needham Packing Co.](#), 376 U.S. 247 (1964).

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damages where he would keep on dissenting.<sup>112</sup>

01:45:23 JUDGE SILBERMAN: I think he was wrong. I think he was wrong and told him I thought he was wrong on that.

01:45:28: MR. CLEMENT: So you think he should have played along with the punitive damages jurisprudence?

01:45:31: JUDGE SILBERMAN: "Played along" is a pejorative way of putting it. I think he would always concur. He should never dissent. He could concur saying "I still have this view." But if he was writing -- but he should always think of it -- either you overrule prior opinions or you follow them. Like *Wickard v. Filburn*.<sup>113</sup>

01:45:55: MR. CLEMENT: So you went on the bench when you were, I believe, fifty years old?

01:45:59 JUDGE SILBERMAN: forty-nine exactly. Well, I was on the bench -- no, no, you're right. I was appointed November 1st and I was fifty October 12th. So, I was fifty.

01:46:11 MR. CLEMENT: Now, do you think there's a right age to go on the federal bench, particularly the appellate bench?

01:46:17 JUDGE SILBERMAN: When I was deputy attorney general, I had the view that nobody should go on the court of

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<sup>112</sup> See, e.g., [Exxon Shipping Co. v. Baker](#), 554 U.S. 471, 515 (2008) (Scalia, J., concurring); [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 429 (2003) (Scalia, J., dissenting); [BMW of N. Am., Inc. v. Gore](#), 517 U.S. 559, 598 (1996) (Scalia, J., dissenting); [TXO Production Corp. v. Alliance Resources Corp.](#), 509 U.S. 443, 470 (1993) (Scalia, J., concurring in judgment).

<sup>113</sup> [Wickard v. Filburn](#), 317 U.S. 111 (1942).

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appeals, including me, below forty-five. I think somewhere around fifty is the best age.

01:46:31 MR. CLEMENT: And why is that?

01:46:33 JUDGE SILBERMAN: Well, several reasons. First of all, you have enough experience and prestige that you carry both with you to the court of appeals. Secondly, you're not going to get bored and I'm afraid if you go off -- there are many people who will go on the court in their late thirties or even earlier and they get

01:46:58 antsy. And we've known a number of them who've left. I was offered, you know I told you I was offered the seat when I left the Labor Department. I was again, the next year when I was deputy attorney general, a seat on the Ninth Circuit appeared, and as deputy attorney general I was selecting judges. Saxbe said, "Do you want it?" I said, "No. I said yes last year, but I now realize I'm too

01:47:23 young." And so that seat went to who else? Tony Kennedy, my classmate.<sup>114</sup> And when the ABA came in to complain about him being too young, they looked at me when I said, "What do you mean too young? He's a classmate of mine." And they looked at my bald head and said, "I guess he's old enough." I

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<sup>114</sup> Anthony M. Kennedy, associate justice of the Supreme Court appointed by President Ronald Reagan in 1988 and retired in 2018.

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01:47:48 think -- back to my point: I wouldn't put anybody on the court of appeals below forty-five. Although I'm inconsistent on that because I'm taking a positive position with respect to a law clerk who's being considered, who is under that. But law clerks are entitled to any exception of mine.

01:48:09 MR. CLEMENT: Special treatment.

01:48:10 JUDGE SILBERMAN: Right.

01:48:11 MR. CLEMENT: And do you think it's any different for the district court?

01:48:14 JUDGE SILBERMAN: No, no. There's a difference of standard for the district court and the court of appeals. I fought with the ABA back when I was Deputy Attorney General because they took the position initially that academics who didn't have litigating experience shouldn't go to the court of appeals. And I took the position, which shocked them so much, that academics in many respects might be better than litigating lawyers. I hadn't yet got to the view that I got by 1980, but I was beginning to think about that. I thought it was, for the court of appeals, that an academic has an advantage. For the district court on the other hand, trial experience is essential.

01:48:39

01:48:56 MR. CLEMENT: So do you think there should be a different standard for the Supreme Court when it comes

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to essentially sticking by your guns? I mean Justice Scalia, for example, continued to dissent on punitive damages. Other justices have continued to dissent on the 11th Amendment. Do you think there's a different standard for the Supreme Court?

01:49:17 JUDGE SILBERMAN: I think the single biggest problem with the Supreme Court is it forgets it's a court.

01:49:23 MR. CLEMENT: And what do you mean by that?

01:49:25 JUDGE SILBERMAN: They should act like another court. They should follow their precedent - loyally, or overrule it. And I once argued with Nino on this point, which he increasingly disagreed with. When he first got on the court, he was more inclined with. My view is what the Supreme Court holds is not as important

01:49:50 as *how* they approach the case. Do you understand what I mean? Its impact on the entire federal judiciary is more important when they act strictly as a court and not as an institution that's constantly looking at issues, on

01:50:15 questions like standing. Instead of coming out with a question of standing depending on what your view is on the merits, I'd much rather see someone take a consistent position on standing, forgetting the merits. I tried to argue with Nino and others that how

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01:50:40           they decide, how they approach is what matters, is more important than what they say; it has more of an impact on the whole judiciary. But what happens is they become fascinated by the substance of the issues.

01:50:54           MR. CLEMENT: Well, I heard Justice Scalia say relatively late in his career on the Supreme Court that his job was getting easier because most of the cases before the Court were asking the Court to extend a decision that he had already dissented from and so he already knew the answer. Do you think that he should have essentially participated in those

01:51:21           cases and tried to develop the doctrine of the majority even though he'd already been on record as disagreeing with it?

01:51:28:           JUDGE SILBERMAN: Well, I would respect a concurrence saying, "I continue to have my view, but I recognize we're bound by the prior precedent."

01:51:41           You understand the distinction between what I mean, between a court that focuses on issues rather than the case?

01:51:49           MR. CLEMENT: I certainly do, I certainly do. And from the advocate's perspective, when you argue in front of the Supreme Court, part of the reason it's so different is you have to be ready to prepare for nine different jurisprudences.

01:52:07           JUDGE SILBERMAN: Yeah.

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01:52:08 MR. CLEMENT: Which is not the case in the courts of appeals, for precisely that reason.

01:52:13 JUDGE SILBERMAN: Right, but the image that creates to the rest of the judiciary is very harmful, I think.

01:52:19 MR. CLEMENT: And can you spell that out? Why is it harmful?

01:52:22 JUDGE SILBERMAN: Because it leads judges in the court of appeals to think, "Hell, all I care about is the issue and I'm less inclined to follow precedent."

01:52:36 MR. CLEMENT: So we talked about dissenting opinions, concurring opinions. What criteria do you use to decide whether to join the majority opinion or write separately?

01:52:49 JUDGE SILBERMAN: Well, sometimes that's not an either-or. For instance, I just recently wrote a concurring opinion<sup>115</sup> in a case in which I totally agreed with the majority, but thought there was a legitimate reason to speak to an ancillary issue. So that's sort of a

01:53:14 different kind of situation. On dissenting, I think if a majority is clearly, in my view, wrong and there's a published opinion, I will dissent. If I'm not sure they're wrong, I probably won't dissent. If I think it's close, then probably I'd go along. But if I

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<sup>115</sup> [Global Tel\\*Link v. Fed. Commc'ns Comm'n](#), 859 F.3d 39, 59 (D.C. Cir.) (Silberman, J., concurring).

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01:53:42: think the majority is clearly wrong, I'll write a dissent. And a concurring opinion, which I occasionally write, may be for all sorts of reasons. It may be I agree with the result, but I think the rationale is wrong, then I would write a concurrence. But sometimes I

01:54:07 write a concurring opinion -- I just wrote one in which I indicated, you'll see it eventually, a defense of *Chevron*.<sup>116</sup>

01:54:19 MR. CLEMENT: Have you ever written a concurring opinion to your own majority opinion?

01:54:24 JUDGE SILBERMAN: Yes, several times.

01:54:26 MR. CLEMENT: What prompted you to do that?

01:54:29 JUDGE SILBERMAN: When I couldn't get the majority to agree with all aspects of my opinion. I've done it at least twice, maybe three times.

01:54:43 MR. CLEMENT: And let me ask you a question, I mean I asked you earlier about your beginning years on the court. You've now been on the D.C. Circuit a number of years.

01:54:54 JUDGE SILBERMAN: Almost 32 years.

01:54:55 MR. CLEMENT: Are there particular aspects of the court's caselaw that have really changed over that time?

01:55:03 JUDGE SILBERMAN: No, I don't think so. It's pretty

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<sup>116</sup> [Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837 (1984).

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much the same mix. You know, probably a majority of our cases come either directly or indirectly through the district court from the agencies. I love our jurisdiction. We have only about 10% criminal, which is

01:55:28 perfect, I think, to maintain interest. Many of our cases involve economic questions, which I find interesting. There's one incident I will tell you about, which you'll get a kick out of. I once sat with Doug Ginsburg<sup>117</sup> and Steve

01:55:53 Williams<sup>118</sup>. Occasionally, I'd disagree with them on the question of how important economic analysis should be in determining whether an agency's position is reasonable. I once accused them both of thinking Adam Smith<sup>119</sup> was an addendum to the Constitution. But at one time we were arguing about a case and Doug Ginsburg turned to me and said, "You know, you understand economics about as well as anybody your age." And you know what? Putting aside the fact that he was ignoring Williams's age is close to

01:56:28: mine, he makes an excellent point. Because when I was at Harvard, few of my professors, as brilliant as they might have been, really understood economics. It

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<sup>117</sup> Douglas H. Ginsburg was appointed to the U.S. Court of Appeals for the D.C. Circuit by President Reagan in 1986. He took senior status in 2011.

<sup>118</sup> Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit took senior status in 2001.

<sup>119</sup> Adam Smith (1723-1790), a Scottish economist and philosopher best known for *The Wealth of Nations*, a foundational text of modern economics.

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wasn't until Posner developed his theories that you had a fundamental change. I mean Louis Loss,<sup>120</sup> he didn't

01:56:53 understand economics. Everything was a political model. Ralph Winter wrote some brilliant law review articles on that at Yale, on corporate law. Instead of using a political model, he used an economic model. You know what I'm talking about?

01:57:13 MR. CLEMENT: Mm-hmm. And tell me, how do you think about the relationship between law and economics, because...

01:57:19 JUDGE SILBERMAN: I don't think anybody can be a court of appeals judge today without understanding economics. That should be a sine qua non. I find in my teaching, and I've taught now for over 30 years at Georgetown, NYU, and Harvard, that my students are less well educated than my contemporaries were in political science, government, humanities, history.

01:57:44: They're much better educated in technology, but on the other hand, we didn't even know about technology, so that's not really a fair comparison. But better educated in economics.

01:58:00 MR. CLEMENT: And how does a judge reconcile, though, the law and economics and taking economics into

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<sup>120</sup> Louis Loss (1914-1997), a professor of securities law at Harvard Law School. <https://www.nytimes.com/1997/12/16/business/louis-loss-83-dies-harvard-professor-defined-interpreted-field-securities-law.html>.

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account with judicial restraint?

01:58:12 JUDGE SILBERMAN: Well sometimes, an agency position is stupid as a matter of economics and I'm perfectly willing to say that's arbitrary and capricious, that's unreasonable. Sometimes, as one famous case where I disputed Williams and Ginsburg on a question of what was an opportunity cost and I thought they were right as a matter of economics, but

01:58:37 the agency's position was not unreasonable. It was subtle.

01:58:42 MR. CLEMENT: But what do you do when an agency is charged with interpreting a 'stupid' statute?

01:58:50 JUDGE SILBERMAN: Then they interpret the stupid statute loyally I think.

01:58:53 MR. CLEMENT: Economics be damned?

01:58:55 JUDGE SILBERMAN: Yes.

01:58:56 MR. CLEMENT: And we talked a little bit about the sort of mix of cases. How about the volume of cases? There's a perception that the D.C. Circuit judges are a little underworked compared to the judges on other circuits and a little underworked compared to the way things used to be when you first came onto the court. Is there truth to that?

01:59:21 JUDGE SILBERMAN: The caseload declined consistently from the time I first came onto the court up until a couple years ago. I haven't been following it quite

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- lately. As everybody knows, I publicly responded to Grassley<sup>121</sup> saying we didn't need three more judges. And I took the
- 01:59:46 same position with respect to the twelfth judge. Merrick Garland,<sup>122</sup> who is one of my dear friends, was caught up in that position. Harry<sup>123</sup> and I disagreed. We went up and testified years ago. I said we didn't need a twelfth judge. Harry said, "Well, if Congress creates it, we should fill it."
- 02:00:11 Eventually, Grassley was able to eliminate the twelfth judge. I didn't think we needed the number of judges that we now have, but we had them and the funny thing is with more judges
- 02:00:36 I'm not sure we're more productive. Some of our judges are very slow.
- 02:00:44 MR. CLEMENT: And roughly in the same time period that you've been on the D.C. Circuit, the Supreme Court's merits case law has been cut down in half. Has that had any effect on, sort of, the work of the D.C. Circuit or the way you handle cases?
- 02:01:00 JUDGE SILBERMAN: Not perceptibly. The same kind of cases that come from us and cert is granted today would have been the same kind of cases 30 years ago.

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<sup>121</sup> Chuck Grassley, senator from Iowa since 1981 and chair of the Senate Judiciary Committee since 2015.

<sup>122</sup> Merrick Garland was appointed to the D.C. Circuit by President Clinton in 1997. He has been chief judge since 2013.

<sup>123</sup> Harry T. Edwards was appointed to the D.C. Circuit in 1980 by President Carter. He took senior status in 2005.

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02:01:12 MR. CLEMENT: And so with all the other things that have changed or not --

02:01:16 JUDGE SILBERMAN: In other words, the great constitutional questions.

02:01:18 MR. CLEMENT: Sure.

02:01:19 JUDGE SILBERMAN: Some of the great important administrative law cases come from the D.C. Circuit just as was true 30 years ago. Not that many, but some.

02:01:30 MR. CLEMENT: And as a D.C. Circuit judge, do you approach a case any differently knowing that because of the nature of the case it's probably destined for the Supreme Court?

02:01:43 JUDGE SILBERMAN: No. I don't. That's not true of all my colleagues, -- I don't think I've ever approached it any differently. I have approached dissents from denial of rehearing en banc. Sometimes dissents

02:02:08 from cases with an eye to the Supreme Court, but I would write it the same way whether I had an eye for the Supreme Court or not. I once wrote the independent counsel opinion,<sup>124</sup> I have to confess, with an eye to Byron White,<sup>125</sup> since he had said things which were perfectly consistent with my view. He just

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<sup>124</sup> [In re Sealed Case](#), 838 F.2d 476 (D.C. Cir.), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>125</sup> Byron White (1917-2002), associate justice of the Supreme Court from 1962-93, appointed by President Kennedy.

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changed his view.

02:02:34 MR. CLEMENT: So over the years, has your approach to hiring law clerks changed at all?

02:02:38 JUDGE SILBERMAN: Yes. I've always been interested in law clerks who believe in judicial restraint. I had two affirmative action programs, putting aside questions of race. One is I had an affirmative action program for Yalies. Hugely if they were trained by Harvard-educated Yale professors. You

02:03:03: did ask me, didn't you, about -- I did tell you why I turned down Yale. The second affirmative action program was Democrats who believed in judicial restraint, and there were a few.

02:03:28 Several of them abandoned their attachment to the Democratic Party when, I think partly, they realized that there is no place in the Democratic Party anymore for believers in judicial restraint. That was not true when I first went on the court, but it's now gone. Partly, the argument is it's a phony philosophy, but the truth of the matter is -- reminds me of when I had lunch

02:03:53 with Archie Cox, a professor of mine, after he left the SG's office. Archie was old Harvard. He believed in judicial restraint. A liberal, but believed in judicial restraint. Then he was Solicitor General. This was before he was special prosecutor. When he

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left the post of Solicitor General, I had lunch with him and I'll never forget

02:04:21 what he said. He said, "Look. The Warren Court<sup>126</sup> is off the tracks," or something like that, "but I love the results." So, but a few of my clerks -- there's one clerk who still remains an advocate of judicial restraint, and still a Democrat. You know who that is.

02:04:44 MR. CLEMENT: Would that be Rachel?

02:04:46 JUDGE SILBERMAN: Right, Rachel Barkow.<sup>127</sup>

02:04:50 MR. CLEMENT: So --

02:04:51 JUDGE SILBERMAN: In fact, it'd go back to the Federalist Society,<sup>128</sup> which I was involved in in formation. I helped Spencer Abraham<sup>129</sup> get money at Harvard and it was my hope and expectation that the Federalist Society would be bipartisan, Democrats and Republicans who believed in judicial restraint. Turned out to be bipartisan all right, but it's bipartisan between conservatives who believe in judicial restraint and conservatives who believe in judicial activism.

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<sup>126</sup> Earl Warren (1891-1974), Chief Justice of the United States from 1953-69, appointed by President Eisenhower. The Warren Court was known for progressive rulings on issues of race, gender, and civil liberties.

<sup>127</sup> Rachel E. Barkow clerked for Judge Silberman from 1996-97 and is now a professor at NYU School of Law.

<https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20660>.

<sup>128</sup> The Federalist Society, a conservative and libertarian legal organization founded in 1982.

<sup>129</sup> Spencer Abraham (born 1952), a politician and lawyer who was one of the Federalist Society's founders.

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02:05:19 MR. CLEMENT: So has this caused you to change your hiring practices? Are you done with Yale now, for example?

02:05:25 JUDGE SILBERMAN: I only take from Harvard. In fact, I don't even interview any clerks anymore. I just take what John Manning<sup>130</sup> supplies.

02:05:32 MR. CLEMENT: That's a pretty effective approach.

02:05:35 JUDGE SILBERMAN: Right, because it's not worth the time of my interviewing. You can't learn as much as he can.

02:05:41 MR. CLEMENT: But now, how many clerks do you have now?

02:05:43 JUDGE SILBERMAN: One only.

02:05:44 MR. CLEMENT: Yeah.

02:05:45 JUDGE SILBERMAN: So I only sit 30% of the time.

02:05:46 MR. CLEMENT: Right.

02:05:47 JUDGE SILBERMAN: And I'm teaching almost full time.

02:05:48 MR. CLEMENT: So judge, we were just talking about your law clerks and I know that you are justifiably famous for giving career counsel to your former law clerks and even to your so called non-clerk clerks. Are there any sort of general principles that you could distill from all that counsel that you would like to share?

02:06:09 JUDGE SILBERMAN: Well, I always tell them the single

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<sup>130</sup> Dean of Harvard Law School.

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most important question is your spouse and never do anything that your spouse doesn't want to do, but I'm a romantic in that respect. I try to impress upon them my views of

02:06:34 honorable behavior. Which I may say you have always indicated, you have always reflected. I also tell them don't try to plan out your whole life step by step by step. Just do a good job in whatever you do and it'll take care of itself.

02:07:03 MR. CLEMENT: Awfully sound advice, judge, and advice I've heard from you directly so I can vouch for that being consistent through the years. I've spent probably an inordinate amount of time thinking about oral argument. What's the role of oral argument from your perspective as a D.C. Circuit judge?

02:07:21 JUDGE SILBERMAN: I'd have to start -- I think you had your first oral argument in front of me, didn't you?

02:07:25 MR. CLEMENT: I think I did.

02:07:26 JUDGE SILBERMAN: You were representing a doctor on a pro bono case.

02:07:30 MR. CLEMENT: You have an incredibly good memory.

02:07:32 JUDGE SILBERMAN: And I thought at best you had a B-, maybe a C+. So given the fact that you are now the best oral arguer in the United States. It's been a sharp improvement. You know about oral argument, some lawyers spread the story that, or the theory, that

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oral argument is not that  
02:07:57 important. That is profoundly wrong. I think 25% of  
the cases I've sat on have been decisively influenced  
by oral argument. That doesn't mean that a party won  
because of oral argument that he or she would  
otherwise have lost. It does mean that the case was  
changed in some significant way by oral argument.

02:08:22 I think it's enormously important. The two times in  
which a judge thinks hardest about a case: at oral  
argument and when he or she is writing an opinion.  
And the other thing about oral argument: it's the  
beginning of the conference. So the other comment  
that is so annoying is you hear a lawyer  
02:08:47 saying, "Well, I never got my argument out. All I did  
was answer questions." Any good lawyer knows that  
that's what he desperately wants, is questions,  
because that gives the lawyer an opportunity to try to  
shape his argument to those judges who maybe are  
troubled by his argument. But you do hear it often  
and it's rather strange.

02:09:12 MR. CLEMENT: Yeah, well, I can tell you as the  
advocate, the worst experience is when you get an  
opinion that rules against you on something that  
didn't even feature in the oral argument, because you  
almost feel like you were cheated out of the chance to  
maybe convince the judges.

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02:09:28 JUDGE SILBERMAN: Well, going back to my days of oral argument, the very worst thing for me was to get in front of a panel that never asked a question.

02:09:34 MR. CLEMENT: Right, the dreaded cold bench.

02:09:36 JUDGE SILBERMAN: Yeah.

02:09:37 MR. CLEMENT: Not a problem when you're sitting on the D.C. Circuit, judge. Can I ask you whether, in 32 years on the bench, whether you think the quality of oral argument has improved, gotten worse, or stayed about the same?

02:09:53 JUDGE SILBERMAN: I think it's about the same. Sometimes astonishing when a client with a lot at stake will have a lawyer that presents an argument that's not very good. Now that I think about it, that -- and this is going to be very controversial -- that tends to happen in

02:10:18 cases where insurance companies hire counsel, because insurance companies have come to the view, many of them, that given the enormous range of their cases, they're better off with a less-good lawyer handling them all than they would

02:10:43 be if they picked and chose a really good lawyer for the important cases. Several of us have noticed that. And that's accelerated. But generally -- well, there's another problem that bothers me. I wonder whether the lawyers from the agencies are as good

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02:11:08           today as they were 30 years ago and that may be because of the pay compression. Also, there's another factor. There was a time 30 years ago when a certain number of women lawyers went to the government who could not have gotten jobs in the private sector, maybe some

02:11:33           minorities too, or they were thought of as minorities then. That's not longer true. So there were some artificial reasons why the government sometimes had better lawyers then they have today.

02:11:47           MR. CLEMENT: And can I ask you a similar question about brief writing, maybe you end up with a similar answer, but has the quality of writing briefs and the briefs you read, have they changed over the 30 years?

02:12:02           JUDGE SILBERMAN: Well, I have a maybe it's a pet peeve about brief writing, and I'm not sure it's changed. Young lawyers are often taught right out of law school by senior partners of law firms, "Don't write a brief that sounds like a law review article. Remember, you're making an argument." Too many briefs are tendentious. And so judges

00:12:27           find it difficult to find out what the hell the issue in the case is. The other thing is, lawyers will often start the brief with a statement of facts going

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back to the Magna Carta,<sup>131</sup> thinking that you will eventually come to the view that they are right instead

02:12:52 of letting you know right away what the hell the issue is. Also, the briefs have gotten longer. The best brief I ever read was an intervener who wrote a brief of a page and a half in a very contested case and the page-and-a-half brief pointed out that although the

02:13:17 holding of a Supreme Court case was in a footnote, it was a holding and it decided this case, and they were absolutely right. So what is beginning to be a little problematic is you see briefs that are too long and too many arguments thrown in like spaghetti

02:13:42: because they're a product of a committee rather than a single brilliant lawyer.

02:13:48 MR. CLEMENT: And do you have any sort of thoughts about what's particularly effective in a brief? I mean, brevity I guess is part of it?

02:13:57 JUDGE SILBERMAN: Style, style. Non- polemical style. A non-tendentious style.

02:14:04 MR. CLEMENT: And does that mean that you disfavor briefs that are sharp about the opponents or does that just mean that you have to know your place?

02:14:18 JUDGE SILBERMAN: Well, the thing that's annoying for a judge is a brief that says, "I saw what he said in

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<sup>131</sup> Magna Carta, a grant of liberties agreed to by King John of England in 1215.

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this on page 32 and that was false and horrible and so forth," and you know that kind of -- instead of thinking, "Gee, what is the problem in this case, how's the judge going to think." Don't let your brief be conditioned by your opponent's brief,

02:14:43 but telling you that is like telling a farmer how to suck eggs.

02:14:51 MR. CLEMENT: Well, I remember in clerking for you that one of the things that you always wanted to know about a case was what's really going on here.

02:15:00 JUDGE SILBERMAN: Yes, I'm afraid that's true. I always try to figure out what's the underlying dispute, what's really going on. Although even after I understood that, I might ignore it to see just what is the legal issue before me.

02:15:16 MR. CLEMENT: Of course.

02:15:17 JUDGE SILBERMAN: But sometimes if you understand what the underlying dispute is, what it really is, it casts light on what the legal issue is.

02:15:25 MR. CLEMENT: And let me ask you about another thing to see whether it's changed over your time on the bench. I think there's a perception out there, I could be wrong, but I think there's a perception out there that judges have become more polarized. Is that something that is consistent with your experience? Do you think judges either on your court or more

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generally have become more polarized over the last 30 years?

02:15:50 JUDGE SILBERMAN: What do you mean by the word "polarized?"

02:15:55 MR. CLEMENT: Well, you tell me.

02:15:56 JUDGE SILBERMAN: No, no, seriously. I'm not sure exactly.

02:15:58 MR. CLEMENT: Just, you know, well, I'll tell you what I think the public perception has become. I think there's been more and more of a focus on thinking about a federal judge based on which president appointed them and thinking that once you have a sense of which president appointed the judges on your panel you might have a sense of how the case is going to come out.

02:16:21 JUDGE SILBERMAN: Well, that's a very tough question and a good question. I'll answer it sort of indirectly and try to get to the direct point. When I first went on the bench, I sat with judges who had been appointed by Lyndon Johnson<sup>132</sup> and Nixon. And there wasn't

02:16:46 as much difference between the way those judges thought as is true today between judges appointed by, let us say, George W. Bush and Obama.<sup>133</sup> And that has gradually become more pronounced, that

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<sup>132</sup> Lyndon B. Johnson (1908-1973), 36th President of the United States from 1963-69.

<sup>133</sup> George W. Bush, 43rd President of the United States from 2001-09.  
Barack Obama, 44th President of the United States from 2009-17.

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02:17:11           division has become more pronounced. To be perfectly accurate, perfectly candid, it goes back to what I said about the founding of the Federalist Society. Relatively few Democratic appointees are as committed to judicial restraint as was true of my law professors at

02:17:36           Harvard. There's also Republican appointees who are more willing to adopt what is called libertarian views, which is judicial activism on the right. But I think it's fair to say there is more of a sharp difference today between

02:18:01           Republican appointees and Democratic appointees as to what the role of judges is and should be. So I think that's probably true.

02:18:16           MR. CLEMENT: Now, let me ask about one thing that almost all of your judicial colleagues agreed on, which was your effort to try to litigate to get higher judicial pay. Obviously a little unusual for a federal judge to end up as a federal court plaintiff. Can you tell me how that came about?

02:18:36           JUDGE SILBERMAN: Yes. I was thoroughly annoyed at the fact that our pay never went up. I was asked by - - I guess it was John Roberts,<sup>134</sup> when he was chief justice, to go with Nino Scalia and the two of us were to lobby the Republicans

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<sup>134</sup> John G. Roberts Jr., chief justice of the Supreme Court appointed in 2005 by President George W. Bush.

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02:19:01 in the Senate to get an agreement that judicial pay should go up and should be separated from congressional pay because congressional pay was sort of stuck because congressmen and senators were afraid to raise their own pay. Then Steve Breyer and David Souter<sup>135</sup> were to

02:19:26 lobby the Democrats. I remember Tony Kennedy insisted that he go with both groups. But after that experience, it was obvious to me that nothing was going to move Congress. They held on to in a death grip to judicial pay because their

02:19:51 perception was the only way they could ever get a pay increase was if there was enough pressure to increase judges' pay. So I looked at prior cases and decided there was a chance. As you know, I recruited your now-present firm, although you weren't there yet, and got

02:20:16: Chris Landau<sup>136</sup> because I didn't want to get one of my law clerks, but I wanted somebody who was essentially a non-clerk clerk to represent me. And then I had to get a group of senior judges to join me, obviously a diverse group in every

02:20:41 sense of the word, except I forgot to get a woman. In

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<sup>135</sup> Stephen G. Breyer, associate justice of the Supreme Court appointed in 1994 by President Clinton.

David H. Souter, associate justice of the Supreme Court from 1990-2009, appointed by President George H.W. Bush.

<sup>136</sup> Christopher Landau, a partner at the firm Quinn Emanuel Urquhart & Sullivan and, previously, Kirkland & Ellis.

<https://www.quinnemanuel.com/attorneys/landau-christopher>.

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any event, and I concluded that, with their advice, that we had a good case and it was worth bringing it and that was our only hope. There were a number of judges who called me around the country, who said if we didn't win, they were going to quit.

02:21:06 Part of it was not just the absolute amount of money. It was the enormous sense of frustration that their pay was frozen forever and it would never go up. So, the Federal Judges' Association<sup>137</sup> opposed. They said this was a bad idea because we would offend Congress, and I concluded offending Congress was

02:21:31 irrelevant. Their goodwill was worth nothing since they were never going to let us go and get a pay increase. And so as you know, Chris Landau and the younger partners and associates at Kirkland & Ellis, I think they went to the Supreme Court twice. They went to the Federal Circuit three times, went to the Court of Claims three times before

02:21:56 finally they prevailed or at least the government finally gave up. I remember there was one amusing incident because our first case had to be brought in the Court of Claims, because it was a monetary claim, and the trial judge sat on the complaint for almost a year. And

02:22:21 I told Chris Landau I wanted him to file a motion to

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<sup>137</sup> Federal Judges' Association, a national voluntary association of federal judges.

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expedite and Chris said, "Judge, you can't do that. That annoys judges. That's going to be counterproductive. We never do that." I said, "Chris, do it now." So he filed a motion to expedite and the trial judge issued an opinion two days later with an

02:22:46 apology for holding it that long. It didn't matter, what he had said, because it had to go back up ultimately to the Supreme Court. So it was funny that of all things I've done in my life in terms of the federal judiciary, that [one] may be the most important.

02:23:09 MR. CLEMENT: And so where do you think your victory in that lawsuit leaves us? Is judicial pay now about right, is it still woefully insufficient? Where are we?

02:23:21 JUDGE SILBERMAN: Well, if you compare American judicial pay to the countries that seemed to be most comparable-- England, Australia, Canada -- we're way behind, way behind. But at least we get the cost of living increases and we got back pay for not having the cost of

02:23:46 living increases. So we're in the same position in terms of increases as the civil service. It's a shame, but I don't think there's any chance in the world we would get anything in terms of pay increases,

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that would allow us to get close to countries that are similar to us. Now, that is more of a problem, I think, for the district court than the

02:24:11 court of appeals. And I think Justice Roberts has pointed this out, that more and more judges are being selected from other kind of government jobs than leading members of the private bar, because the opportunity cost is so enormous, and I don't think that's a good

02:24:36 thing. I think it's gone from about 70/30 to 30/70 and that's not a good thing. You can still -- people will still go to the court of appeals because of the prestige, but then a number of them will leave when demands of family expenditures become too great. So I would love to see judicial pay brought

02:25:01 up to something similar to what is true of Canada, Australia, New Zealand, but I don't think it's ever going to happen. And we haven't had difficulty attracting court of appeals judges. We have had difficulty with district judges.

02:25:20 MR. CLEMENT: So I want to shift gears just a little bit and talk about some of your non-D.C. Circuit responsibilities, but during your tenure on the D.C. Circuit. One of those that's not exactly unique, but relatively rare opportunity is the fact that you

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served on the FISA Court of Appeals.<sup>138</sup> And I guess  
let me ask you first, I mean that  
02:25:45 doesn't sound like it was too arduous, especially at  
the beginning. I mean how many appeals did you hear  
in that capacity?  
02:25:52 JUDGE SILBERMAN: The term is for seven years, whether  
it's to the lower court or the review panel. When I  
was chosen by Bill Rehnquist for the review panel,  
I'll never forget he told my wife, "This is a perfect  
job for Larry because he did this as deputy attorney  
general and acting attorney general." "Did this"  
being approving surveillance, whether  
02:26:17 electronic or other kinds. And, "He'll never have to  
sit because there's never going to be a case." And as  
you well know, since you were involved, there was one  
very important case, and when the lower court judges  
illegally sat en banc and decided that the Patriot Act  
was  
02:26:42 essentially unconstitutional.<sup>139</sup> So at that point, the  
government had to seek review, and I sat on the panel  
and as is well known, I wrote the panel opinion.<sup>140</sup>  
The reason I disclose that even though it was per  
curiam, I thought at the time since it was such a hot

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<sup>138</sup> The U.S. Foreign Intelligence Surveillance Court of Review (FISCR) hears appeals from the U.S. Foreign Intelligence Surveillance Court (FISC), which considers applications for electronic surveillance warrants under the Foreign Intelligence Surveillance Act of 1978 (FISA).

<sup>139</sup> The USA PATRIOT Act of 2001, [Pub L. No. 107-56, 115 Stat. 272](#).

<sup>140</sup> In re Sealed Case No. 02-001, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

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02:27:07 issue it would look better as per curiam, but because the government lawyers had to come up to my office to go over the panel opinion to clear all the classification questions, they knew I wrote it anyway. So at that point, it didn't make any difference. That was a fascinating case. Ted Olson, the Solicitor General,<sup>141</sup> argued that case and the amazing thing is that neither Ted nor I

02:27:32 knew anything about certain things that only a couple of people knew concerning activities which were relevant to that issue. Well, they weren't necessarily relevant. I can't even discuss them without getting into classified matters, but it was a fascinating experience for

02:27:57 one reason. I had opposed -- I had testified against the existence of the FISA Court in the House of Representatives, and Bob Bork had written in a piece in the Wall Street Journal against it -- we were both at AEI -- and I had testified against it at the request of a Republican congressman. To

02:28:21 my astonishment after I testified against it, the House voted it down and Tip O'Neill<sup>142</sup> had to call them back into session over a weekend to get it passed. I

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<sup>141</sup> Theodore Olson served as Solicitor General in the George W. Bush Administration from 2001-04.

<sup>142</sup> Thomas P. "Tip" O'Neill Jr. (1912-1994), a congressman from Massachusetts from 1953-87 and speaker of the House from 1977-1987.  
<http://www.nytimes.com/learning/general/onthisday/bday/1209.html>.

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was opposed to it because I didn't think it was an appropriate role for judges. I've written -- my testimony has been reprinted by AEI. It's not exactly relevant anymore since we do have it, but I told that to Bill. At

02:28:46 the time he was picking me he said, "Well that's perfect, if you thought it was wrong." But any event, in listening to that case, I had a sense of how difficult it is to deal with a matter that is being argued ex parte, a matter on an important issue, ex parte, there's no other side. I did ask for amicus briefs<sup>143</sup> from the ACLU.<sup>144</sup> It's not the

02:29:11 same thing. I ended up talking with one of my colleagues on the Court of Appeals who wasn't on the FISA Court just to get his view about the opposite position because I felt so uncomfortable about an ex parte position.

02:29:31 MR. CLEMENT: And I know you're such a champion of the adversary system in your judicial writing on the D.C. Circuit. You've certainly talked about that in a number of occasions. Are your views on that just reinforced by the unusual experience of having participated in an ex parte judicial proceeding?

02:29:52 JUDGE SILBERMAN: Absolutely. I felt terribly

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<sup>143</sup> Amicus curiae ("friend of the court"), a party not directly involved in a judicial proceeding but who is allowed to make submissions.

<sup>144</sup> The American Civil Liberties Union, a nonprofit civil liberties advocacy organization.

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uncomfortable working my way through that case because we didn't have an opposing advocate. The ACLU expressed certain views, but they didn't know what the hell was going on.

02:30:07 MR. CLEMENT: Right. And do you think with the benefit of that experience that sitting on that court is an appropriate function for an Article III judge?

02:30:17 JUDGE SILBERMAN: Well, I was willing to do it. So, once this Congress passed the law, my opposition was moot. My opposition of the concept was moot.

02:30:31 MR. CLEMENT: Do you think that...

02:30:32 JUDGE SILBERMAN: There is no way you could unscramble the egg now.

02:30:35 MR. CLEMENT: Of course, but do you still think that we'd be better served by not getting the Article III judges involved in that process?

02:30:43 JUDGE SILBERMAN: Yes, because some of the issues the Article III judges decide in that case -- I don't want to get into all the detail -- are really not suitable for judges in my view.

02:30:56 MR. CLEMENT: And one last question about your experience on the FISA Court. I mean you were, as Chief Justice Rehnquist pointed out in giving you the appointment, you were uniquely qualified to serve. Do you think that it's a problem to have Article III judges serving in that role if they haven't had

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experience at the highest levels of the Justice Department or other intelligence experience?

02:31:26 JUDGE SILBERMAN: No. After all, all federal judges can hear any case. They have top secret clearances. Sometimes the government, from my experience, your experience too, sometimes faces a problem bringing a case before a federal district judge who for one reason or another seems unsuitable to disclose

02:31:51 highly classified information. The government has a real problem in that situation. I'm not talking about FISA, I'm talking about any case. The FISA Court is chosen by the Chief Justice, and Bill Rehnquist started the process of a separate FBI for a judge before he or

02:32:16 she is chosen to the FISA court. I think that was a wise decision and that's still carried out.

02:32:26 MR. CLEMENT: So let's switch gears and...

02:32:29 JUDGE SILBERMAN: Wait a minute, but the answer is you're not going to find too many judges with my experience. I mean you do have some judges who served in the Justice Department and maybe some who've dealt with natural security issues, but I doubt if you have two or three in the whole country. So you couldn't have the court if you limited it to only judges who have that experience.

02:32:54 MR. CLEMENT: Judge, I believe on two occasions your

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law clerks convinced you to sit by designation as a trial court judge in the District of Columbia. What lessons did you learn from that experience?

02:33:06 JUDGE SILBERMAN: Never to listen to my law clerks is one. You were one of them. The first time, you may recall, I'm sure you will recall, to our astonishment the defendant was held not guilty when we thought it was clear as a bell he was guilty. And from that experience, I got the unlovely nickname "Let 'Em Loose Larry." But the second

02:33:31 time there was at least a conviction, although I was reversed on one aspect of it by the court of appeals, ironically on an issue in which I had agreed with -- ah, it's too complicated -- on an issue on which I thought the court of appeals was right, but I was stuck with

02:33:56 bad law. Any event, I thought I learned a lot in those examples, those situations. The first of which is most court of appeals judges haven't had experience as district judges. They all should do it at least a couple of times. They're afraid because they know they're rusty on evidentiary questions and

02:34:21 they're afraid to try to conduct a trial, and it takes a while to get yourself prepared, but you learn a hell of a lot. You learn how difficult it is to concentrate through a long trial on every bit of

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on a hot summer afternoon sometimes. You learn how difficult it is to do voir dire, and how important.

You learn

02:34:46 how difficult it is for district judges to often have to resolve issues instantly. It's a wonderful experience and you have much more sympathy for district judges after that experience. I wish all court of appeals judges did it, but very few will. The ones who

02:35:11 will are of course ex-district judges, but for them it's like falling off a log.

02:35:16 MR. CLEMENT: So your most notable non-Article III service during your time on the D.C. Circuit was when you answered President George W. Bush's call to service on the Silberman-Robb Intelligence Commission.<sup>145</sup> Can you tell us how that came about?

02:35:33 JUDGE SILBERMAN: Well, I should first correct you. I always referred to it as the Robb-Silberman.

02:35:38 MR. CLEMENT: But you didn't clerk for you. [Laughter]

02:35:42 JUDGE SILBERMAN: Well, the funny thing about it, as you well know, my son's name is Rob Silberman,<sup>146</sup> and when it was announced this commission was created,

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<sup>145</sup> The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (the Iraq Intelligence Commission), a panel created by President George W. Bush in 2004. It was co-chaired by Judge Silberman and Charles Robb, senator from Virginia from 1989-2001. <https://georgewbush-whitehouse.archives.gov/news/releases/2004/02/20040206-10.html>.

<sup>146</sup> Robert S. Silberman, an executive at Strayer Education Inc., holding company for the for-profit higher education institution Strayer University. He was its CEO from 2000-13. <http://www.strayereducation.com/management.cfm>.

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Robb-Silberman, he was the CEO of a publicly held corporation and stock dropped something like 15%. People thought he was leaving the company. That was an interesting, that was a fascinating experience. I think perhaps

02:36:07 the most valuable government experience, including my judicial time, of my whole life. When I originally was asked to do it, it was by Dick Cheney.<sup>147</sup> And originally, I was to be co-chairman with Tom Foley.<sup>148</sup> And when we

02:36:32 were to meet at the White House, Tom Foley had called Andy Card, who was chief of staff,<sup>149</sup> just before to say he couldn't do the job, after he had agreed to do it with the President and was perfectly happy to do it with me as co-chairman; we knew each other. He couldn't do it because Nancy Pelosi<sup>150</sup> threatened him with a loss of lobbying access in a

02:36:57 various firm because she was so opposed to the president appointing this commission even if it was bipartisan. I was willing initially to resign, because it was wartime. I assumed that I would have

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<sup>147</sup> Richard D. Cheney, 46th Vice President of the United States from 2001-09, under President George W. Bush.

<sup>148</sup> Thomas S. Foley (1929-2013), congressman from Washington from 1965-95 and speaker of the House from 1989-95.  
<https://www.nytimes.com/2013/10/19/us/politics/thomas-foley-former-house-speaker-dies-at-84.html>.

<sup>149</sup> Andrew H. Card Jr., White House chief of staff in the George W. Bush Administration from 2001-06.

<sup>150</sup> Nancy Pelosi, congresswoman from California since 1987, House minority leader from 2003-07 and since 2011, and speaker of the House from 2007-11.

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to. When I got over to the White House, there was a lawyer from OLC -- it

02:37:21 could have been Jack Goldsmith,<sup>151</sup> who was there as assistant attorney general, I don't remember, but a lawyer from OLC who said, "You don't have to resign." I said, "Why? It's in violation of Canon 5 of the ethics<sup>152</sup> to be engaged in a policy issue and this is clearly a policy issue even if it's bipartisan." He said, "Look at the back of the

02:37:46 canons. There's a little-known note that the Canon 5 doesn't apply to senior judges." To which I said, "Does that mean I can be secretary of state and still stay on the bench?" He said, "I don't think you'd be confirmed, Judge." So I agreed to do it. And when Foley

02:38:11 backed out, the President called Chuck Robb. I didn't know him, but I got to know him well and so we did it together.

02:38:29 The canons of ethics required that I not only suspend all activity as a judge, I could not take any judicial resources. So I could not use this chambers. I could not use my law clerk for anything. I could not use my secretary. I had to have a secretary sent from the

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<sup>151</sup> Jack Goldsmith, a Harvard Law School professor who served as assistant attorney general for the Office of Legal Counsel in the George W. Bush Administration from 2003-04.

<https://hls.harvard.edu/faculty/directory/10320/Goldsmith>.

<sup>152</sup> Canon 5 of the Code of Conduct for United States Judges, "A Judge Should Refrain from Political Activity." <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.

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CIA. That's the canons of ethics.

02:38:54 MR. CLEMENT: And so where were you physically located when you were serving on the commission?

02:38:58 JUDGE SILBERMAN: We started in the New Executive Office Building, there was -- offices over in Crystal City with a skiff, big skiff. A skiff is a secure room.

02:39:14 MR. CLEMENT: And do you have any regrets about taking on that assignment?

02:39:18 JUDGE SILBERMAN: No, as I told you, I think that's the most important thing I ever did in my whole career. We recommended major changes in the intelligence community. Almost all of which -- I think we had something like 78 changes and 73 or 74 President Bush ordered implemented.

02:39:40 MR. CLEMENT: And do you have any regrets about the way the recommendations have been implemented ...?

02:39:46 JUDGE SILBERMAN: Yes, some. Well, there's one particular one. The office of DNI<sup>153</sup> has become much more swollen than what I and we had in mind. We had in mind something like the Joint Chiefs of Staff, a small group. Some of the very best people in the intelligence

02:40:11 community would serve there, maybe for a couple of years and then go back and be promoted. And I

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<sup>153</sup> Director of National Intelligence.

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actually counseled strongly against a massive big  
bureaucracy, but I'm afraid we have that and I'm not  
sure it's worth its candle. But there are some things  
we recommended which have been wonderfully successful,  
and I was particularly keen on this as

02:40:36 the former deputy attorney general. I wanted a  
separate division in the Justice Department for  
national security, and Pat Wald, who served on the  
commission with me, indeed I recruited her, agreed  
with that, so that was very important. We got that  
in. We also

02:41:01 recommended, which I thought was terribly important,  
an upgrading of the national intelligence portion of  
the FBI -- counterintelligence, counterterrorism, and  
intelligence. And there is, the FBI has finally I  
think over the years developed that separate division.

02:41:26 MR. CLEMENT: So for your service President Bush  
awarded you the Presidential Medal of Freedom, the  
nation's highest civilian honor. Is it fair to say  
that receiving that honor was the highlight of your  
professional career or was it something else?

02:41:42 JUDGE SILBERMAN: That was it.

02:41:43 MR. CLEMENT: Makes sense. Obviously, through your  
service there, you got a chance to interact with  
President George W. Bush. I know you've had the  
opportunity, starting with the campaign, to interact

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with President Reagan and a number of other presidents. Can you share any thoughts about differences, similarities, impressions you made of the various presidents with whom or for whom you served?

02:42:08

02:42:16 JUDGE SILBERMAN: Well, I spent a good deal of time with George -- excuse me, with Gerry Ford both before and after he became president. He was minority leader in the House. I used to deal with him a good deal and I dealt with him as president, a little bit as vice president, then as president. He was a very decent guy, very decent human being,

02:42:41

incredibly knowledgeable about details throughout government. When he offered me the post of ambassador to Yugoslavia, he knew, because I was at the time financially strapped, he knew that I would make more money as ambassador to Yugoslavia, I think he said, than anybody in government but him, because the government would pay tax-free the

02:43:06

education for two children who were in private school, high school, prep school, and I could rent my house in Bethesda, and I paid \$100 a month for a massive mansion in Belgrade. So I was

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astonished that he knew all of that. I did spend a good deal of time with him as deputy attorney general during the transition and as I said I was very

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impressed by his decency. I don't think he was the strongest president I ever

02:43:56 saw. Before that of course was Nixon. I grew to have enormous distaste for Nixon, but that really developed after I was deputy attorney general and learned a good deal about Nixon. While undersecretary of labor I was more impressed with him, but it was sort of

02:44:21 strange that he was such an isolated character from his cabinet and well, several of his cabinet officers told me they never saw him. And I think in hindsight that was because he didn't want many people to know him because he knew his personality was rather unattractive. Let's see, going on. I

02:44:46 did, I have one funny incident. I was at AEI and there was a dinner in which Gerry Ford gave an award to President Reagan. No, it was after AEI. And I went up -- and Gerry Ford said very nice things about

02:45:11 some of us who had served in the Ford Administration and were serving in Reagan, including Bork and Scalia, me, a few others. And I went up to thank Ford afterwards and he looked at me absolutely blank as if he didn't know who I was. And I said, "Mr. President, I'm Larry Silberman." He said, "My God, Larry, what happened to your hair?" I

02:45:36 should have said the same thing happened to you, but I didn't, I wasn't quick enough. Reagan is one of the

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most fascinating characters. I was thinking someday I'd write a book about Reagan because I don't think anybody has really

02:46:01 figured him out. The one who wrote the biography of Reagan finally gave up and wrote a silly thing.<sup>154</sup> I had spoken with him when he first went into the White House to deal with Reagan or to spend time with Reagan. He was sure two years with Reagan in the White House, he would know him completely, and I saw him right afterwards and he told me, "You were right, I don't know him." It's very hard to understand Reagan, but I can

02:46:26 tell you this. He was a hell of a lot smarter than people gave him credit for. His biggest weakness is he didn't give a damn about people. The people who served in his administration could have been robots that could be moved from here to there. The only president in the world, the only president we could have

02:46:51 ever had who would have allowed his secretary of treasury and chief of staff to agree to switch positions without even talking to him about it. He didn't care. They were all characters on the stage that could be moved around. One of the reasons I was reluctant to serve in his administration: he didn't

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<sup>154</sup> Edmund Morris, *DUTCH: A MEMOIR OF RONALD REAGAN* (1999).

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care about people. He cared enormously about ideas and policy and he was a lot smarter. I spent hours with him in preparation for his election during the campaign and I was stunned at how perceptive some of his questions were, and some of his inclinations. There's a -- well I won't go into it. There's a good book -- Marty Anderson,<sup>155</sup> my classmate at Dartmouth, has written several books about Reagan, and one of the things he pointed out is, he went back and read all the speeches that Reagan gave for General Electric, which he wrote in his own hand, and it's clear how bright he was because it ranged across domestic and foreign policy and nobody else was viewing that, that was just him. So he's an interesting character. He also had enormous discipline. When he was going to run for reelection, he was planning it, I think, no one knew it. And he never indicated to anybody other than perhaps Nancy<sup>156</sup> that he was going to do it, which was crucially important for political reasons that he didn't look like he was campaigning early. Very

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<sup>155</sup> Martin Anderson (1936-2015), an economist and advisor to President Reagan. <https://www.nytimes.com/2015/01/06/business/martin-anderson-adviser-to-ronald-reagan-dies-at-78.html>.

<sup>156</sup> Nancy Reagan (1921-2016), actress and wife of President Reagan. <https://www.nytimes.com/2016/03/07/us/nancy-reagan-a-stylish-and-influential-first-lady-dies-at-94.html>.

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02:48:31: interesting character. George H. W. Bush, I knew well from the days when he was at the U.N. and also I knew him even before that, and when he was chairman of the Republican National Committee. I always liked him very much. But there's

02:48:56 a very interesting little vignette which tells you something about Reagan, Bush, and me. At a funeral of a very bright able young Republican congressman by the name of Steiger, Bill Steiger,<sup>157</sup> who was one of the author of the capital gains reduction tax before 1980.

02:49:21 He died very early of diabetes, which nobody knew about. He was a good friend of mine. I went to his funeral, as did George H. W. Bush. He was already signed up with H. W. Bush for the election of 1980. George got me in the kitchen of Bill Steiger's widow's house and asked me to support him in the

02:49:46 election of 1980 and I said, "I'm sorry George, I'm supporting Ronald Reagan."

And George said, "I didn't think you knew Ronald Reagan." And my response was, "I don't." Because for me, the ideas were important. And George H. W.

02:50:11 Bush was a person who thought personality was crucial. His son, George W. Bush, on the other hand, was more like Reagan in his outlook than his father. He cared

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<sup>157</sup> William A. Steiger (1938-1978), congressman from Wisconsin from 1967 until his death. <https://www.nytimes.com/1978/12/05/archives/rep-william-a-steiger-hailed-as-new-gop-hope-dies-at-40-led-fight.html>.

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more about ideas, but he seemed to care about persons too,

02:50:36 but... I spent a good deal of time with him during the period I was co-chairman of the Intelligence Commission, and he, like Reagan, was a hell of a lot smarter than the press would give him credit for. That may be because in both cases they were not lawyers and lawyers are trained to sound smart even when they're

02:51:01 not, whereas both George W. Bush and H. W. Bush, who was a Phi Beta<sup>158</sup> at Yale, were not as articulate as many lawyers are, but they were very smart.

02:51:17 MR. CLEMENT: So the one other non-Article III job that you've had, I think for almost your entire tenure and we haven't talked about, is teaching law. You've taught administrative law and labor law at Georgetown for decades.

02:51:36 JUDGE SILBERMAN: And one year at Harvard when Steve Breyer asked me to replace him when he first came down as a justice, and two years at NYU Law School.

02:51:48 MR. CLEMENT: Oh, I wasn't going to leave out NYU.

02:51:49 JUDGE SILBERMAN: Okay.

02:51:50 MR. CLEMENT: But what do you think your legacy is as a teacher?

02:51:57 JUDGE SILBERMAN: My legacy as a teacher? Well, first

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<sup>158</sup> The Phi Beta Kappa Society is an academic honor society for liberal arts and sciences.

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of all, I teach using Socratic Method,<sup>159</sup> which not all professors, maybe very few professors still do. It scares students at first, but I get letters all the time from

02:52:22 lawyers who are ten, fifteen years out, who say they thought the Socratic Method that I used had been enormously helpful in practicing law. So I feel gratified.

02:52:41 MR. CLEMENT: That is quite a legacy and the Socratic Method, I'm afraid, is a dying art. So do you still use the Socratic Method these days?

02:52:51 JUDGE SILBERMAN: I do, but it's the benign -- not the way you and I knew it at Harvard. I do it row by row, so I only put one row on call on a given day instead of the cold-calling that we experienced.

02:53:06 MR. CLEMENT: But it still works?

02:53:07 JUDGE SILBERMAN: Still works, it works. I'd rather, if I had my choice, go back to cold-calling, but I'd never get any students.

02:53:16 MR. CLEMENT: So let me ask you, shift gears a little bit and ask you about some more sort of general questions. Over your career in the D.C. Circuit, you've written hundreds if not thousands of opinions. You've written incredibly influential and important decisions on issues ranging from administrative law,

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<sup>159</sup> A form of teaching based on asking and answering questions.

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separation of powers, the Second Amendment. Are there any particular opinions that stand out as ones that you think were either particularly important or of which you're particularly proud?

02:53:50 JUDGE SILBERMAN: The two most important, of course, would be the independent counsel case, *Morrison v. Olson*, and the Second Amendment case. They would be the two most important. Scalia always said they were the two most important he did. I told him, "You didn't do it, you just followed me."

02:54:11 MR. CLEMENT: [Laughter] I'm sure you did tell him that. It's interesting to me that, though not shocking, that one of the opinions that you would identify was an opinion that ultimately produced a dissenting opinion in the Supreme Court. Why do you pick the independent counsel [case]?

02:54:33 JUDGE SILBERMAN: Well because, first of all, it was the most, probably the most interesting case I ever had, because many of the issues in the independent counsel case, the appointment power particularly, had never been really discussed in any Supreme Court case going back from the very beginning. So we really were in a tabula rasa in terms of judicial opinions. Secondly, it is

02:54:58 fascinating that almost everybody today agrees, in the academic world, that I and Nino Scalia were right on

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that opinion. Of course, they only reached that view after Clinton was tortured by Starr,<sup>160</sup> which tells you a lot about hypocrisy, but still I think we were

02:55:23 right. And I regret very much the Supreme Court came out 7-to-1 against it<sup>161</sup>. I was sure White would be with me on this. He had said in the past that prosecution was, of course, a core executive question.

02:55:48 And I thought Brennan<sup>162</sup> would be with me too on that, on the grounds that anybody who is a target of an independent counsel was treated unfairly.

02:56:01 And the Second Amendment case, as you know, is quite contentious these days because the Supreme Court, while having written the opinion, doesn't seem to wish to enforce its opinion on reluctant courts of appeal.

02:56:21 MR. CLEMENT: Well, in the Second Amendment context, which I guess was the *Parker* case when it was before you and became the *Heller* case, if I have that right.

02:56:28 JUDGE SILBERMAN: Yes the reason why the name changed is because the only one who had standing, according to my opinion, was *Heller*, not *Parker*.

02:56:36 MR. CLEMENT: So when you wrote the *Parker* opinion, I think it's probably fair to say that every court of appeals that had addressed the issue had gone the

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<sup>160</sup> Ken Starr, served as independent counsel to investigate the Whitewater controversy during the Clinton Administration from 1994-98.

<sup>161</sup> *Morrison v. Olson* 487 US 654 (1988.) <https://www.oyez.org/cases/1987/87-1279>

<sup>162</sup> William J. Brennan Jr. (1906-1997), associate justice of the Supreme Court from 1956-90, appointed by President Eisenhower.

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other way. So what led you to, sort of, forge your own path in that case?

02:56:54 JUDGE SILBERMAN: I think some -- there was a dissent somewhere, maybe in a Ninth Circuit case that had taken the same position, a short dissent.<sup>163</sup> I, frankly, when the case was assigned to me, I had remembered what Burger had said either in private conversations or

02:57:18 in a speech or a talk once, that the Second Amendment strictly involved rights of a militia. And so when the case came before me as I picked up the briefs, I was under the impression that it was not an individual right. And it was only after I read the briefs and carefully looked at the Constitution that I came to an opposite view. And

02:57:45 then the fact that other courts of appeals hadn't agreed with me didn't dissuade me. Matter of fact, I thought the question was rather -- easy. I didn't think it was that difficult. I thought it was obvious the more you dug into it, that the Second Amendment recognized an

02:58:09 individual right. Didn't confer it, recognized an individual right.

02:58:14 MR. CLEMENT: So judge, you served with, I think, four judges on this court, who later became justices, the

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<sup>163</sup> [Silveira v. Lockyer](#), 328 F.3d 567 (9th Cir. 2003).

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Chief Justice, Justice Thomas,<sup>164</sup> Justice Scalia,  
Justice Ginsburg,<sup>165</sup> and then you also went to law  
school with another justice, Justice Kennedy. Do you  
feel like your experiences with those  
02:58:37 justices before they became justices gave you an  
insight into what kind of justices they would become?  
02:58:44 JUDGE SILBERMAN: I didn't know Tony in law school,  
although ironically when I was deputy attorney  
general, I think I told you, I really was involved in  
his appointment to the Ninth Circuit, really made the  
decision that he should be appointed to the Ninth  
Circuit. But other than that, I hadn't  
02:59:09 followed his jurisprudence on the Ninth Circuit when  
he was appointed to the Supreme Court. My impression  
was only the ones I was given by Richard Willard and  
Ed Meese,<sup>166</sup> I think. It's fair to say from that  
impression I was given earlier, I was rather surprised  
at his  
02:59:35 jurisprudence. More than surprised. Amazed. Nino on  
the Supreme Court was exactly what I would have  
pictured. He got a little too sharp in my view, which  
I would occasionally -- we would

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<sup>164</sup> Clarence Thomas, associate justice of the Supreme Court appointed by President George H.W. Bush in 1991. He served on the D.C. Circuit from 1990-91.

<sup>165</sup> Ruth Bader Ginsburg, associate justice of the Supreme Court appointed by President Clinton in 1993. She served on the D.C. Circuit from 1980-93.

<sup>166</sup> Richard K. Willard served as assistant attorney general for the Civil Division from 1985-88 in the Reagan Administration. Edwin Meese III served as attorney general from 1985-88 in the Reagan Administration.

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3:00:00 occasionally talk about opinions and I thought he was a little too sharp in his dissents. But then I probably would have done the same as him. And occasionally he would consult me with respect to potential language. And then he consulted me heavily with respect to the question whether he should recuse in

3:00:27 the case in which Dick Cheney as vice president was sued as vice president, not personally.<sup>167</sup> I remember that vividly because, I guess I can say now, Stephen Breyer thought, in personal terms, not professional terms, he thought Nino

3:00:48 should recuse, and I argued strongly against it. Nino was up in the air and I argued strongly against it on the grounds that I thought that his personal relationship with the vice president would cause him to recuse himself properly if the vice president was sued personally, but not as vice president. And I stiffened him on that one and I thought he came out with a brilliant opinion explaining why he wouldn't

3:01:22 recuse. But generally, he became a little more acerbic as time went on. There's no question about that, because he got more frustrated. But as to his basic positions, I was not the least surprised in anything. That leaves Clarence Thomas and Ruth.

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<sup>167</sup> [Cheney v. United States District Court](#), 542 U.S. 367 (2004).

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Clarence Thomas did not surprise me at all. I knew  
Clarence Thomas really, really well,  
3:01:51 and I knew his views. He doesn't surprise me. His  
desire to reach back and look again at cases he thinks  
were fundamentally wrongly decided a long time ago had  
an interesting impact on Nino. There was a lot of  
talk about Nino influencing Clarence. I think it  
3:02:15 was the reverse, but it happened both ways. So I  
wasn't surprised at Clarence. Ruth surprised me.  
When I was originally on the court, Ruth was bitterly  
criticized by various left-of-center groups for being  
too moderate and she certainly has behaved differently  
on  
3:02:40 the Supreme Court than she did on this court.  
3:02:43 MR. CLEMENT: And what about the Chief Justice?  
3:02:46 JUDGE SILBERMAN: I didn't sit with him very much  
because in the two years he was here I was, for most  
of that time, on the Intelligence Commission. So I  
sat with him only a couple times.  
3:02:59 MR. CLEMENT: I know that you served, at least in an  
informal capacity, as a counsel to both Justice Scalia  
in his confirmation process and that you and Mrs.  
Silberman helped out Justice Thomas in his  
confirmation process. The former, of course, resulted  
in a unanimous confirmation. The other was much more  
contentious. Do you have any thoughts based on that

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experience and

3:03:24 your observation of the process about where we are in the Supreme Court confirmation process?

3:03:29 JUDGE SILBERMAN: Interesting that you would ask.

Nino's advantage, of course, was as the first Italian-American. That meant a lot, an awful lot, to Italian-Americans all across the country ... largely because of the mafia stereotype, which was one of the reasons I recommended him back in '84, along with Bork, to the

3:03:56 Supreme Court. Nino's background had been administrative law, which was perceived by the Congress as rather dry. He hadn't written much in the constitutional realm. But I think as the first Italian-American, even if he had written more controversial stuff, he

3:04:20 would have pretty quickly gone through. I'll never forget when he came to me in a bit of a panic wondering whether it was an ethical problem that Senator Byrd<sup>168</sup> had invited him, long before the hearing, to appear in the Columbus Day Parade in Charleston, West Virginia, and Nino wondered whether this was an

3:04:43 ethical problem. I said, "You dummy that just means you're going to be confirmed."

He was pressed hard on doctrinal questions and we had

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<sup>168</sup> Robert Byrd (1917-2010), senator from West Virginia from 1959 until his death.

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agreed beforehand he would not answer any doctrinal questions, even his view of *Marbury v. Madison*,<sup>169</sup> because once you started down that road there was no stopping. I was glad to see that

3:05:12 Neil Gorsuch<sup>170</sup> returned to a pretty hardline position on that because I think it's quite inappropriate for judges to answer those kind of questions. With respect to Clarence Thomas, my wife and I regarded that as one of the most emotional, challenging events of our life. We had conspired to

3:05:34 get Clarence on the Supreme Court. I had dinner with Clarence and Bill Rehnquist to make sure Bill knew Clarence for whatever that would mean and it did mean something. I strongly

3:05:53 recommended him. And then when the Anita Hill<sup>171</sup> thing blew up, we both just felt awful putting him in that position where he was so horribly maligned. I did give him some advice, I'll never forget, for his second appearance. I told him, "Clarence, forget about confirmation, forget about it all.

3:06:24 What's at stake now is your honor. Don't go up there like Uriah Heep<sup>172</sup> in an unctuous fashion. Go up there

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<sup>169</sup> [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137 (1803).

<sup>170</sup> Neil Gorsuch, associate justice of the Supreme Court appointed by President Donald Trump in 2017.

<sup>171</sup> Anita Hill, a lawyer and professor who accused Clarence Thomas of sexual harassment when he was her boss at the Department of Education and Equal Employment Opportunity Commission.

<sup>172</sup> A character in Charles Dickens' novel *David Copperfield* noted for his humility, obsequiousness, and insincerity.

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with all guns blazing.” And he did.

3:06:36 MR. CLEMENT: He sure did. You’ve spoken publically about the decline of honor and in particular the erosion of some presidential appointees’ sense of loyalty to the administration that appointed them. Do you have thoughts about what explains this change?

3:06:57 JUDGE SILBERMAN: Well, now that I think about it, it’s almost -- well most of the problem relates to Republicans. Now there are Democratic examples. I remember Robert Reich<sup>173</sup> left the Clinton Administration and wrote a kiss-and-tell book about the Clinton Administration, which I thought was dishonorable. But

3:07:26 most of the examples I think about are Republicans. The explanation for that is Republicans face a very hostile press and have for as long as I’ve been in

3:07:43 Washington. One young man came to me, about to take a political position in a prior Republican administration and asked me what advice I have so that he would be successful. I said, “If you want to be perceived as successful,

3:08:13 what you can do is posture yourself slightly to the left of the Republican administration and leak.” So I still think that’s true. There are not as

3:08:37 many cases -- one of the things I admire so much about

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<sup>173</sup> Robert Reich served as secretary of labor in the Clinton Administration from 1993-97.

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the Obama Administration is virtually none of his presidential appointments have behaved dishonorably vis-à-vis Obama, whatever else they may have done. None. The disincentives for doing that in a Democratic administration are much

3:09:03 greater than in a Republican administration.

3:09:06 MR. CLEMENT: I know on a couple of occasions you've written opinions for the D.C. Circuit, or separate opinions, where you've been critical of the Supreme Court's doctrine in a particular area in the way that it's evolved. Are there limits to how sharply a court of appeals judge can criticize Supreme Court doctrine?

3:09:28 JUDGE SILBERMAN: Well, I once called the Supreme Court a non-court court because it doesn't follow its own precedent. And in another case, in a concurring opinion, I described the Supreme Court as having a domestic Brezhnev Doctrine, meaning that whenever they extend their reach with greater constitutional power they never retreat, which of course was the Brezhnev Doctrine.<sup>174</sup> I wrote that in one concurring opinion<sup>175</sup> that was en banc urging the Supreme Court to overrule *Pape*<sup>176</sup> and *Bivins*,<sup>177</sup> which I thought were outrageous

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<sup>174</sup> The Brezhnev Doctrine was a Soviet foreign policy that promoted Soviet control over its Eastern Bloc satellite states. Its namesake, Leonid Brezhnev (1906-82), led the Soviet Union from 1964 until his death.

<sup>175</sup> [Crawford-El v. Britton](#), 93 F.3d 813, 829 (D.C. Cir. 1996) (Silberman, J., concurring), [vacated](#), 523 U.S. 574 (1998).

<sup>176</sup> [Monroe v. Pape](#), 365 U.S. 167 (1961).

<sup>177</sup> [Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics](#), 403 U.S. 388 (1971).

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extensions of constitutional law, and I was gratified that four of the

3:10:17 justices thought it should be done and two criticized the other two for not following the Silberman view closely enough.<sup>178</sup> I was ecstatic, the only thing that would have made me happier is if the fifth justice had agreed, but the fifth justice, who you know, thought it was inappropriate to criticize judiciary for policy making.

3:10:43 MR. CLEMENT: Let me ask you another question about, sort of, the role of judges. I know...

3:10:52 JUDGE SILBERMAN: Well wait a minute, let me go back and say, it's one thing to criticize the Court qua Court. What Posner has done recently in criticizing individual justices based not on unethical behavior, but just on their judicial opinions, I think has been sort of outrageous. I don't understand that.

3:11:18 MR. CLEMENT: Well, and I guess what I would say though is at the same time, you've written, including recently, that there are times when Supreme Court justices have commented on political matters in a way that you think are inappropriate. I mean where do you think the line is in terms of...?

3:11:42 JUDGE SILBERMAN: Well, I think any judge has a right and obligation to criticize other judges for political

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<sup>178</sup> [Crawford-El v. Britton](#), 523 U.S. 574, 601 (1998) (Rehnquist, C.J., dissenting); *id.* at 611 (Scalia, J., dissenting).

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behavior. I have done that with respect to circuit judges. I criticized several circuit judges who publicly attacked Clarence Thomas's appointment because once a nominee is presented to the

3:12:09 Senate, it's a political question and judges should be quiet. The canons of ethics are rather clear on that. And I do believe it's an obligation of any judge to object to another judge, including a justice, who behaves unethically. I have criticized both Justice O'Connor<sup>179</sup> and Justice Ginsburg for what I thought was unethical -- for I know was unethical behavior.

Justice

3:12:35 O'Connor for going around the country taking a position on the appointment of state court judges rather than election, which is her position, and I pointed out in a speech a few years ago that that's a political question. To be sure, it doesn't divide Democrats and Republicans, but it's still a political

03:12:57 question. And I don't think, I didn't think she should be -- as long as she remained a judge, she shouldn't be taking that position. She has, after I gave that speech, she stopped. She may be mad at me, but she has stopped. Ruth Ginsburg's behavior in the last election, of course I gave a speech at Columbia and part of which was excerpted in the *Wall Street*

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<sup>179</sup> Sandra Day O'Connor, associate justice of the Supreme Court from 1981-2006, appointed by President Reagan.

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*Journal,*

- 03:13:26 and I thought her position was outrageous during the campaign. And judges who take political positions jeopardize the whole judiciary, so I make no apology for criticizing judges who do that.
- 03:13:48 MR. CLEMENT: Judge, I know that you've declared a war on acronyms in D.C. Circuit briefs. What explains your strong view, negative view about acronyms?
- 03:13:57 JUDGE SILBERMAN: Well, it's a simple answer. If it's an acronym that you're not familiar with, such as FCC or NLRB, you're constantly, as a judge, going back looking at the glossary to figure out what the damn acronym stands for. And it's particularly aggravating when the acronyms are made up for the case in order to save space or whatever reason. So we seem to be making some progress. Our clerk's office is instructed to send back briefs that have acronyms that are not well understood, but it's simply a point of aggravation. Don't you find it aggravating when you read a document or brief with acronyms that you have to
- 03:14:23 constantly go back and look at your glossary?
- 03:14:49 MR. CLEMENT: I think just having a glossary may be a bad sign right there.
- 03:14:51 JUDGE SILBERMAN: Well, you have a good point, you have a good point. That was the first step, the

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glossary. I took it to the second step, which is making it very difficult.

03:15:05 MR. CLEMENT: And judge, I know it's a well-established debate- it's something that when Justice Scalia wrote a book on persuading judges and the like,<sup>180</sup> one of the issues he disagreed with his co-author on is footnotes. What do you think about footnotes, either in briefs or in legal opinions?

03:15:25 JUDGE SILBERMAN: Which position did Nino say on footnotes? He was not against them.

03:15:28 MR. CLEMENT: He was not against them.

03:15:29 JUDGE SILBERMAN: No. I think footnotes should be sparing. My rule is no more footnotes than half the number of pages. Try to use that as a discipline. I don't like a lot of footnotes and I really dislike using a footnote that's an important point that should be in the opinion, which you see in Supreme Court cases all the time. Holdings of the

03:15:57 Supreme Court buried in a footnote. I try never to do that. You should ask me about legislative history.

03:16:03 MR. CLEMENT: Well, let me do that.

03:16:04 JUDGE SILBERMAN: Because on legislative history, I have a sort of similar view as footnotes. I would never use legislative history unless I thought the language is ambiguous and the legislative history

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<sup>180</sup> ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).

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looks reliable. So I never agreed with Nino that it was an

03:16:25 absolute no-no. Nino's view was that legislative history just allowed judges to root around to find something that accorded with their policy views. I argued with him on that point. I said, "Look, judges who are inclined to come out with policy views don't need legislative history to do it. They can do it by structure. Look at Justice Stevens." That was my view. Any event,

03:16:54 but legislative history is sometimes illustrative, sometimes useful, particularly when it's a debate between proponents and opponents of legislation. You know, like the famous one in Title VII<sup>181</sup> between Humphrey and whoever was arguing the other way, it might have been Russell.<sup>182</sup> That sometimes is very

03:17:19 useful. I agree that the committee reports are not always that useful, but sometimes. So I didn't have as ecclesiastical a view against them as he did. The best source was always the language, the text, and the structure of the statute.

03:17:36 MR. CLEMENT: And so judge, we talked about a number of non-Article III jobs that you did take, including

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<sup>181</sup> [Title VII of the Civil Rights Act of 1964](#), Pub. L. No. 88-352, 78 Stat. 241 (current version at [42 U.S.C. § 2000e et seq.](#))

<sup>182</sup> Richard Russell Jr. (1897-1971), senator from Georgia from 1933-71 and vehement opponent of civil rights legislation. <https://www.nytimes.com/1971/01/22/archives/richard-b-russell-dead-at-73-georgian-was-dean-of-senate-richard-b.html>.

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most notably the -- I'll still call it the Silberman-  
Robb Commission, but you can call it the Robb-  
Silberman Commission. But I know, or I certainly have  
heard the rumor, that you were offered a number of  
non-Article III jobs, such as attorney general, that  
you didn't take. Can you share with us at least a  
couple

03:18:06 of the occasions and why it was that you decided to  
stay on the bench and resist the call to serve in the  
executive branch?

03:18:16 JUDGE SILBERMAN: Well, I was offered jobs before,  
that I declined before, I became a judge, but that's  
not really relevant to this. As judge, I was offered  
the post of FBI director once and declined it  
instantly and recommended instead Byron White because  
an old law clerk had told me privately that

03:18:40 Byron White would like to finish his career as FBI  
director. But I told the Justice Department person  
who talked with me that the only way that could be  
done was a direct call from President Reagan to  
Justice White. Unfortunately, Howard Baker<sup>183</sup> wouldn't  
do that and

03:19:02 called, or wouldn't allow that, and he called Byron  
White to ask whether he wanted to be considered and of

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<sup>183</sup> Howard H. Baker Jr. (1925-2014), White House chief of staff in the Reagan Administration from 1987-88 and, previously, senator from Tennessee from 1967-85. <https://www.nytimes.com/2014/06/27/us/politics/howard-h-baker-jr-great-conciliator-of-senate-dies-at-88.html>.

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course Byron White said no because you can't ask a judge or justice that question. And you can't ask him because if you said "yes, I want to be considered" then you immediately have to be recused on any government case and it can be humiliating at that point if it leaks if you're not chosen, so it's a bad idea.

03:19:33 I was offered the post ... well, my wife was offered the post for me of attorney general back during the George H.W. Bush Administration, and we had talked about it beforehand and she was called because

03:19:56 they were about to call me and they wanted to know whether I would take it. We had talked before and she said, "No. He declines for three reasons." The first of which, I had a daughter in the Antitrust Division and I was under the impression that if I took the job as attorney general she would have to be fired.<sup>184</sup> That turned out not to be true because of the sequence, but that's what

03:20:20 I thought. Secondly, I wasn't vested yet as a judge although they explained to me they had this exotic statute, which you will be astonished about, whereby if a judge goes from the federal judiciary to the Justice Department, his service as a judge is transferred to the executive branch, all that service.

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<sup>184</sup> Kate Silberman Balaban is a career attorney in the Justice Department.

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And

03:20:47           there's actually a money transaction between the judiciary and the executive branch. I don't know who pays who. I was astonished. That was done when Bill Webster went from a judge to FBI director.<sup>185</sup> So I was told that at the time, looked it up and found out -- but

03:21:11           then I said I wasn't a judge yet -- I mean I wasn't vested yet, but that didn't seem to be very important. My daughter in the Antitrust Division. And finally, I didn't really believe in the war on drugs, which was the most important aspect of the job. So my late wife Ricky told the senior fellow in the White House who called that I didn't

03:21:36           want it for those three reasons. It was partly a conspiracy that involved Bill Barr<sup>186</sup> that was prompting this because Bill thought he was too young to be attorney general. It turned out he did get the job and he reciprocated by asking me to swear him in and telling

03:22:01           me, with the President present at the time, that he was going to immediately promote my daughter. The

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<sup>185</sup> William H. Webster was a judge on the U.S. Court of Appeals for the Eighth Circuit from 1973-78 before he was appointed FBI director by President Carter in 1978.

<sup>186</sup> William P. Barr, attorney general in the George H.W. Bush Administration from 1991-93.

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third time was when Gonzalez<sup>187</sup> resigned on a Friday night and my present wife, who was then my fiancée,<sup>188</sup> came out to the garden to

03:22:25 tell me that the former U.N. ambassador was on the line. Well, John Bolton<sup>189</sup> was an old friend, but why would he call me at nine o'clock on Saturday morning? So I went in and of course it wasn't John Bolton, it was Josh Bolton.<sup>190</sup> And he told me that Gonzalez had resigned, the President and Vice President wanted to know would I be willing to be attorney general. I said, "Well, I'm

03:22:49 newly engaged," and they said, "We know that." I said, "I have to talk to my fiancée," and then I said I'd call back. But I knew what my answer was back. It was a nasty time. And I called back -- nasty time, politically -- and I called

03:23:11 back three hours later and I said, "No, I don't want the job." "Why not?" I said, "Look, I don't have a hell of a high regard for either Senator Leahy<sup>191</sup> or

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<sup>187</sup> Alberto Gonzalez, attorney general in the George W. Bush Administration from 2005-07.

<sup>188</sup> Patricia Silberman.

<sup>189</sup> John R. Bolton, ambassador to the United Nations from 2005-06 who served in various other roles in the Justice and State Departments during the Reagan, George H.W. Bush, and George W. Bush Administrations. President Trump appointed him national security advisor in 2018.

<sup>190</sup> Joshua Bolton, White House chief of staff in the George W. Bush Administration from 2006-09.

<sup>191</sup> Patrick Leahy, senator from Vermont since 1975 and chair of the Senate Judiciary Committee from 2001-03 and 2007-15.

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Senator Specter<sup>192</sup> and they're the leading people on the Judiciary Committee, and I don't think it's appropriate to take the job as attorney general if you feel you don't want to

03:23:41 deal with them." And he said something about the views of people in the White House being consistent with that. I said, "Yeah, but I'm just too old to fake it anymore." I watched Don Rumsfeld, and the second time, he was too old to fake it -- second time he was secretary of defense -- so I knew better than to try.

03:24:05 MR. CLEMENT: You mentioned the current Mrs. Silberman, can you --

03:24:08 JUDGE SILBERMAN: Incidentally, they ended up with Mukasey,<sup>193</sup> who did a wonderful job.

03:24:14 MR. CLEMENT: You mentioned the current Mrs. Silberman, I mean we talked about how you met the first Mrs. Silberman. How did you meet the current Mrs. Silberman?

03:24:25 JUDGE SILBERMAN: Her husband died of cancer almost the same time as Ricky died of cancer too. And after about three months, Tim Dyk, Judge Dyk,<sup>194</sup> who was my

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<sup>192</sup> Arlen Specter (1930-2012), senator from Pennsylvania from 1981-2011, chair of the Judiciary Committee from 2005-07, and ranking member from 2007-09. <https://www.nytimes.com/2012/10/15/us/politics/arlen-specter-senator-dies-at-82.html>.

<sup>193</sup> Michael Mukasey, attorney general in the George W. Bush Administration from 2007-09.

<sup>194</sup> Timothy B. Dyk, judge of the U.S. Court of Appeals for the Federal Circuit, appointed by President Clinton in 2000.

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classmate at Harvard and is a good friend, and his wife Sally Katzen,<sup>195</sup> who happened to be a classmate of my wife's -- my now present wife's -- at Smith. They had a dinner party with malice aforethought, brought the two of us together. It clicked almost immediately. I asked her out on a date that weekend, and the second date I proposed. She accepted on the third, it took her a little while. But there's a funny aspect to it which I could tell the world. She went off, after she agreed to marry me, she went off to Prague for a family wedding and then was to meet me up in Maine two weeks later. When she got off the plane in Bangor, Maine, she looked pale as a ghost and I didn't find out till sometime later that she was scared to death, after having agreed to marry me, she wouldn't recognize me.

03:24:49

03:25:15

03:25:40

03:25:49

MR. CLEMENT: Now judge, sort of a last series of questions here. I remember from the time of clerking with you that you were quite clear that you were not a fan of either lawyers or judges writing memoirs and that you would only write yours down for your immediate family members. I think you were very

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<sup>195</sup> Sally Katzen, a professor at NYU School of Law and partner in the lobbying firm the Podesta Group who served in various roles in the Clinton Administration.  
<https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=34534>.

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specific, it was actually for your grandchildren.

Have your views on that subject changed?

- 03:26:12 JUDGE SILBERMAN: No. There are several reasons why. First of all, I don't think I'm important enough to have written, to write a published memoir and I find most political memoirs, or memoirs of political figures, dreadfully boring. Secondly, if you write anything for publication, you've got to be accurate. If you write for your grandchildren, you just have to be honest. And I remember one, I think I mentioned Reich earlier. His memoir had several serious factual mistakes and it was completely discredited. So you have to go through enormous effort to get all your facts right. And then finally, for
- 03:26:34
- 03:27:08 my grandchildren, I've arranged that they get my memoirs 100 years after my birth because I have determined that with respect to most men and some women, they don't get interested in their grandparents until they're about 50. They don't get too interested in their
- 03:27:27 ancestors until they're about 50. So that's about the age my grandchildren will be 100 years after, so I thought -- it's like reaching out into the future for your grandchildren, that's the only people I care about.

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03:27:42 MR. CLEMENT: And so have you written this down for your...?

03:27:44 JUDGE SILBERMAN: Yes, yes, my memoirs are complete, but they're still going on because I'm still alive.

03:27:49 MR. CLEMENT: Absolutely, absolutely. Is there anything particular...?

03:27:52 JUDGE SILBERMAN: Two law firms are commissioned, they're going to get them. And the reason I took two law firms, is in case one of them explodes or something.

03:28:01 MR. CLEMENT: Can't be too careful.

03:28:02 JUDGE SILBERMAN: Yeah, I worried a little bit about a nuclear attack, because they're both in Washington. But I guess everybody'd be dead anyway.

03:28:13 MR. CLEMENT: Is there anything particularly good in those memoirs that we've left out of the interview that we should cover?

03:28:19 JUDGE SILBERMAN: Probably, but -- no, not that we should cover.

03:28:24 MR. CLEMENT: Well thank you, judge. You've been very generous with your time, so thank you very much.

03:28:25 JUDGE SILBERMAN: Thank you, Paul. Thank you for your time.

[END RECORDING]