ARTICLES

SUPREME COURT LAW CLERKS' RECOLLECTIONS OF OCTOBER TERM 1951, INCLUDING THE *STEEL SEIZURE CASES*[*]

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ABNER J. MIKVA
JAMES C.N. PAUL
NEAL P. RUTLEDGE
MARSHALL L. SMALL
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INTRODUCTIONS

GREGORY L. PETERSON[†]

Welcome. The Robert H. Jackson Center exists to preserve and advance the legacy of Justice Jackson through education, events and exhibitry. Today's special roundtable discussion of the Supreme Court's October Term 1951 is made possible through the generosity of Chautauqua Institution, the Supreme Court Historical Society, the Robert H. Jackson Center and Chautauqua County, and we thank them. I am pleased to introduce Professor John Barrett, who will be moderating the first session.

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JOHN Q. BARRETT‡

Welcome to Chautauqua Institution. Our panel brings together five lawyers who fifty-five years ago served as law clerks to Justices of the Supreme Court of the United States. My co-moderator is Professor Ken Gormley of Duquesne University School of Law. Our format will be two segments. In the first, we will discuss the Justices and some of the cases of that Supreme Court Term. In the second segment, which Ken will moderate, we will discuss the *Steel Seizure Cases*,[1] which came to the Supreme Court in the spring of 1952.

Our honored guests and panelists are five lawyers who have led high-achieving, diverse and public-spirited lives:

Charles C. Hileman was born in 1924 in Greensburg, Pennsylvania. After completing one year at Allegheny College, he entered the Army in July 1943. After six months in the Army Specialized Training Program, he joined the 75th Infantry Division, where he served until his discharge in December 1945. He was a Staff Sergeant Squad Leader in the European Theater from October 1944 until VE Day in May 1945, serving in the Battle of the Bulge, receiving the Combat Infantry Badge, a Bronze Star and three battle stars. In January 1946, he returned to Allegheny College. He was active in sports, was elected by the lettermen as Outstanding Athlete of 1947, earned his B.A. degree that year and later was named to Allegheny's Athletic Hall of Fame. Mr. Hileman received his J.D. degree from The Law School of the University of Pennsylvania in 1950, where he was Editor-in-Chief of the *University of Pennsylvania Law Review*. He was the law clerk for Judge Herbert F. Goodrich at the United States Court of Appeals for the Third Circuit during 1950–51 and then a law clerk for Supreme Court Justice Harold H. Burton during the Court's October Term 1951. In June 1952, Mr. Hileman joined the Philadelphia law firm of Schnader, Harrison, Segal & Lewis, which then, at twenty-five lawyers, was one of the city's largest law firms. By the time of

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[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

his retirement on January 1, 1994, the firm had grown to more than 250 attorneys. He was a litigator throughout his career. Among his more interesting experiences was being part of the trial team that defended Philadelphia Communists in a criminal prosecution under the Smith Act in 1952 and 1953. Mr. Hileman was administrative chairman of Schnader's Litigation Department for eight years and chairman for eight years. He was a member of the American College of Trial Lawyers, chaired its Ethics Committee for two years, was very active in the Philadelphia and Pennsylvania Bar Associations, and served for eight years as an Allegheny College trustee.

Abner J. Mikva was born in 1926 in Milwaukee, Wisconsin. As an undergraduate, he attended the University of Wisconsin at Madison and Washington University in St. Louis. In 1944, he joined the United States Army Air Corps, where he was a 2nd Lieutenant and navigator and served until November 1945. He received his law degree from the University of Chicago, where he was Editor-in-Chief of the *University of Chicago Law Review*, in 1951, and he was a law clerk to Supreme Court Justice Sherman Minton during the Court's October Term 1951. After his clerkship, Mr. Mikva returned to Illinois, where he entered the practice of law, becoming a partner of future United States Supreme Court Justice Arthur Goldberg. Mr. Mikva's practice included extensive litigation and appellate work, and he presented several constitutional cases to the Supreme Court. He started his political career in 1956 in the Illinois House of Representatives, where he served five consecutive terms. In 1968, Mikva was elected to the United States House of Representatives. He represented portions of Chicago and its suburbs, served on both the Ways and Means Committee and the Judiciary Committee, and was reelected four times. In 1979, he was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Mikva became chief judge of the D.C. Circuit in 1991 and continued judicial service until his retirement in September 1994. He then served as President Clinton's White House Counsel from October 1, 1994, until November 1, 1995. Judge Mikva currently is Senior Director and Visiting Professor at the Edwin F. Mandel Legal Aid Clinic of the University of Chicago and also engages in

arbitration and mediation work with JAMS, a national dispute resolution firm.

James C.N. Paul was born in 1926 in Chestnut Hill, Pennsylvania. In 1943, he enlisted in the United States Navy and, after ninety days of training, was commissioned as an officer. He was posted to the Pacific Theatre, served in the amphibious forces and after two combat experiences was promoted to the rank of Lieutenant (j.g.). Returning home in 1946, he received his B.A. degree from Princeton University in 1948 and his J.D. degree from The Law School of the University of Pennsylvania, where he was Editor-in-Chief of the *University of Pennsylvania Law Review*, in 1951. He was one of three law clerks to Chief Justice of the United States Fred M. Vinson for two years, during both Supreme Court October Terms 1951 and 1952. Mr. Paul was a law professor at the University of North Carolina (Chapel Hill) from 1953 until 1955 and then at the University of Pennsylvania from 1955 until 1963. In 1959, Professor Paul was awarded an Eisenhower Fellowship to study prospects for "rule of law" development in various anglophonic countries in Sub-Sahara Africa. During 1961–63, he served as a traveling Consultant to the Peace Corps, negotiating special programs including placements of U.S. lawyers in five African countries. In 1962, he took a leave from Penn to become, at the personal invitation of the Emperor Haille Selassie, the founding Dean of Ethiopia's first University Law School (at HailleSelassie University, which today is Addis Ababa University). In 1967, Dean Paul became first the Acting President and then the Academic Vice President of the University. In 1970, after receiving a medal from the Emperor for distinguished service, Dean Paul returned to the United States and became dean of the Rutgers University Law School in Newark. In 1975, he became Rutgers's William J. Brennan Professor of Law, working on human rights law and development issues. During 1991–95, he served as an active consultant to the Ethiopian Constitutional Commission and a sometime consultant, on Africa Projects, to the United Nations Development Programme. After retiring from Rutgers in 1996, Professor Paul made many trips during the next five years to Ethiopia and other African counties, including post-genocide Rwanda, on missions for The Carter Center. In 2001, he became Ethiopia's nominee to sit on the

International Eritrea-Ethiopia Claims Commission at The Hague, an international tribunal that arbitrates war claims arising from their 1998–2000 war, and he still serves in that capacity. He has authored or co-authored five books—most of them on "human rights-based approaches to human development"—plus the usual assortment of law review articles.

Neal Person Rutledge was born in 1927 in St. Louis, Missouri. His father was Justice Wiley B. Rutledge, Jr., President Franklin Roosevelt's final appointee to the Supreme Court. After attending Haverford College for one year, Neal Rutledge served in the Marine Corps from 1945 to 1946. He received his B.A. degree from Harvard University in 1947 and his J.D. degree from Yale Law School in 1950. He clerked for Judge Charles Fahy at the United States Court of Appeals for the District of Columbia Circuit during 1950–51 and was a law clerk to Supreme Court Justice Hugo L. Black during the Court's October Term 1951. After serving with the U.S. Atomic Energy Commission in Los Alamos, New Mexico, from 1952 to 1953, Mr. Rutledge entered private practice in Miami with Claude Pepper Law Offices. He continued to practice in Miami with Faircloth & Rutledge, and then with Rutledge & Milledge, trying civil and criminal cases in over half of the states and teaching tort law as an adjunct professor at the University of Miami School of Law. From 1970 to 1973, Mr. Rutledge taught law full-time at Duke University Law School and as an adjunct at North Carolina Central Law School, an historically black college. He resumed law practice in 1974 as Of Counsel with Wald, Harkrader & Ross in Washington, D.C., handling principally federal antitrust trials. He also litigated *Green v. American Tobacco*, which produced the first judicial finding in the United States that smoking cigarettes caused lung cancer. During his career, Mr. Rutledge argued approximately ten cases before the U.S. Supreme Court.

Marshall L. Small was born in 1927 in Kansas City, Missouri. He received his A.B. degree from Stanford University in 1949 and his J.D. degree from Stanford Law School, where he was Note Editor of the *Stanford Law Review*, in 1951. He was the sole law clerk to Supreme Court Justice William O. Douglas during the Court's October Term 1951. From 1952 to 1954, Mr. Small served on active duty as a 1st Lieutenant in the Office of

the Judge Advocate General, Department of the Army, in Washington, D.C. Following a brief period on the Stanford Law School faculty as an Acting Assistant Professor of Law, he associated with Morrison & Foerster in 1954 and was a partner of the firm from 1961 through 1992, including stints as managing partner (1971–76) and chair of the firm (1982–84). Since 1993, he has been Senior Of Counsel to the firm, which during his career has grown from twenty-three lawyers in San Francisco to over 1,000 lawyers in nineteen offices throughout the world, and for the past ten years he has been the firm's General Counsel. Mr. Small has been engaged in a diversified business practice, which includes counseling boards of directors, serving as special counsel to board committees, and handling compensation arrangements, corporate and other public disclosure matters, and securities law matters. He is a member of the American Law Institute and a Fellow of the American Bar Foundation and served as a Reporter for the ALI's Corporate Governance Project from 1982 through its completion in 1993. Mr. Small also is a member of the American Bar Association's Business Law Section and has served on its Committee on Corporate Laws. He also has lectured and written extensively in the fields of corporate and securities law.

ROUNDTABLE DISCUSSION

Moderator: To begin, I ask each panelist how he became a Supreme Court law clerk. Marshall Small, how did you get this job?

Mr. Small: Justice Douglas took his clerks from the Ninth Circuit—he was Ninth Circuit Justice, out in the western part of the United States. He did that because he wanted to give law students from that area an opportunity to come back and clerk. Most of the clerks had traditionally come from the eastern law schools. So the western law schools nominated candidates to be selected. Justice Douglas did not select his own clerks. He asked someone. In my case, it was a former law clerk, Stanley Sparrowe, who was a private practitioner in Oakland. He would interview each of us and then select one. Stanford Law School, which I attended, nominated me as a candidate and Stan

Sparrowe selected me, but I did not meet the Justice until he came back to the Court in late September 1951, actually, because he usually stayed late out west and then came back.

Moderator: Let's work our way from west coast to east. Judge Mikva, coming out of Chicago, how did you come to be a law clerk to Justice Minton?

Judge Mikva: Well, Justice Sherman Minton was the Justice for the Seventh Circuit, which is the mid-western circuit, covering Illinois, Indiana and Wisconsin. He had served in fact on the Court of Appeals in Chicago before he was appointed to the Supreme Court. He had traditionally taken his law clerks from Northwestern University in Chicago or the University of Indiana, which was his *alma mater*. My dean at that time at the University of Chicago was Edward Levi, who later on became Attorney General of the United States, but the law school was going through a transformation under Levi and he wanted to up it in its national rankings by getting some clerkships for Chicago alumni, and he literally camped on Justice Minton's door step until Minton agreed to pick a candidate—to pick a law clerk—from the University of Chicago. I'd been Editor-in-Chief of the *Law Review* and Levi sent me out there and I passed the interview and I got a handwritten note, which I still have from Justice Minton saying, "I'd like you to come with me in the October Term."

Moderator: Let's move to Philadelphia. Charles Hileman, how did you come to be a clerk with Justice Harold H. Burton?

Mr. Hileman: Well, Justice Burton was the Justice for the United States Court of Appeals for the Third Circuit. The Third Circuit covers Pennsylvania, New Jersey and Delaware. He always took one of his law clerks from that circuit. He had a tradition of taking as his clerk a lawyer who had worked as a law clerk for Judge Goodrich in the Third Circuit Court of Appeals. And so Dean Owen Roberts of the

University of Pennsylvania Law School called me into his office—

Moderator: Owen J. Roberts had, by the way, worked his way up to law school dean from what position?

Hileman: Yes, he worked his way up to dean from being a Supreme Court Justice—retired. Anyway, he called me into his office and said he had a proposal for me, and that is that I would become a clerk for Judge Goodrich of the Third Circuit and then Justice Burton would probably hire me as his clerk for the next year. That's what happened. I had an interview with Justice Burton, I think it was a little *pro forma*, but anyway, he then hired me as his clerk.

Moderator: The Owen Roberts/University of Pennsylvania Law School path also was part of your experience, Jim Paul. How did you come to work for Chief Justice Fred M. Vinson?

Mr. Paul: Well, it was even simpler than it was for my former mentor and friend, Charlie Hileman. Owen Roberts called me in and said Fred Vinson owes me a favor and I am going to send you down to Washington to clerk for him. So my clerkship was a product of extortion, I think. I will add this: I got down to Washington and tried to figure out a lot of things to say, questions that the Chief Justice would ask, and so on. I was ushered into his office. I found a man who looked a little bit like a tired Saint Bernard, with big bags under his eyes, you know, bushy eyebrows. We had a dog sort of like that in our house. Anyway, he was more than that; he was, politically, a very experienced person, sagacious, shrewd, wise, and I felt I was being just looked over, that I wasn't going to get the third degree or anything. And after five minutes, he said, "Well, I guess you'll do." And that was the sum total of it.

Moderator: Neal Rutledge, you were coming out of the Yale Law School. How did you come to be Justice Hugo L. Black's law clerk?

Mr. Rutledge: Why, personal influence. Not by academic stardom, although I did alright in law school—I was in the top 20 percent of my class. But my father was Roosevelt's last appointment to the Supreme Court, and he had served, of course, with Justice Black. They were very good friends. I had learned to know the Justices. I was in high school growing up and going off to college. I also had known Judge Charles Fahy, who was solicitor general when my father was serving on the Court and they had known each other. And so as a tribute to my father, an offer came through two of my professors at Yale Law School, John Frank and Fowler Harper, saying that, basically, if I took a couple of courses and if I did alright in them and they thought I was up to it, that these two judges had said they would like me to clerk for them on my graduation. So I spent a year with Judge Fahy and then the next year with Justice Black and it was a wonderful opportunity for me because I got to see from the inside the two courts that my father had served in.

Moderator: That gets you into this intimate, proximate confidential relationship. I'd like to hear now about the boss, the Justice for whom you worked and what the relationship was like during the year, or in Jim's case two years, that you were a law clerk. We'll proceed in the same way. Marshall, can you tell us about Justice Douglas as you knew him?

Small: Well, Justice Douglas had a reputation as a kind of laid-back, casual westerner by reputation in the public press. But I was cautioned by Stan Sparrowe not to expect that, to expect a stern taskmaster who would require me to work very hard. And that was true. Justice Douglas was a rather complicated individual. Working with him on the Court's business across the desk, responding to his memoranda, he was all business and very stern and not at all relaxed or jovial. If you got him outside of that context, either during the clerkship year or thereafter, he could be quite amiable and amusing. I think the clerks who

worked for Douglas generally had that same experience, some better, some worse, but all that same way.[2]

I give one illustration of the jovial side. On the thirteenth anniversary of his joining the Court, he had a little cocktail party in chambers just for those of us who were on staff. He made martinis the way he used to make them for FDR and told us about how times were back in the '30s in Washington where he'd been working. He remembered I'd grown up in Kansas City, Missouri, and so he recalled that he had a speaking engagement there one time and took his dog Frosty with him and was going to stay at the best hotel in town. When he got there, the hotel refused to admit him because he had his dog. So the two of them ended up in a motel. When the Chamber of Commerce found out, they were so embarrassed they sent a case of dog food to Frosty. Douglas said that thereafter, Frosty would never eat any other kind of dog food.

Moderator: Neal, please tell us about Justice Black.

Rutledge: Well, Hugo Black—I think we all as law clerks who where there refer to our Justices as "the boss," and I did the same with Justice Black. But he of all the people that I have worked for, from grade school through seniority, was less of a boss than anybody I have ever known. You got that feeling right away as a law clerk with Justice Black. Obviously he was in charge. He was the Judge. He made the decisions. But you felt always that you were working with him rather than for him. This is a very difficult year, this '51 Term, for Justice Black because his wife was seriously ill and died during the Term and he was very devoted to his wife. And I would have expected on her death that he would have been considerably less efficient in doing the chores—particularly the routine chores—of being a Justice. But every morning he appeared, kept up

[2] *See generally* Marshall L. Small, *William O. Douglas Remembered: A Collective Memory by WOD's Law Clerks*, 32 J. SUP. CT. HIST. 297 (2007).

his work and it was just marvelous to behold. Frankly, it was a privilege to know him and to work with him in his office. It was just a double privilege.

Moderator: Charlie, what was Justice Burton like, as a boss and as a personality?

Hileman: Justice Burton was a Senator from Ohio for a good many years and the desk next to his was taken by Senator Harry Truman. When Truman became President and there was a vacancy on the Supreme Court, he appointed Harold Burton as a Justice. And Justice Burton was a wonderful man—I guess all the other law clerks always referred to what a kind person Justice Burton was. It was really true of him. He really treated his law clerks like family—it was a very friendly relationship. Mrs. Burton and the Justice took Margaret and me to a play in Alexandria. At their insistence, we had them to dinner at our apartment in Alexandria, with our two young daughters. Most of the Justices had two law clerks. John Douglas was the other law clerk and his father was Senator Paul Douglas from Illinois, so that added fun to the job. Justice Burton took us law clerks and our wives to a reception held by the President and introduced us to the President. He did a lot of very nice things for us. So he was a great Justice to work for.

Moderator: Let me stay on the Senate theme and skip to you, Judge Mikva. Please tell us about Justice Minton.

Mikva: On the other side of Senator Burton and Senator Truman was Senator Sherman Minton of Indiana. Truman used to say those were his two lawyers. Then after he appointed Harold Burton to the Court, he appointed Sherman Minton to another vacancy that occurred. Minton had won one term as a United States Senator. He was elected in 1934. As he put it, he wasn't really much of a Democrat at that point. He'd gone down to New Albany, Indiana, to practice law and the Republican Party was full—it had too many young, ambitious lawyers in it. So he became a Democrat

and got a little active with Roosevelt's election in '32. And in '34 when a vacancy occurred in the Senate, the state Democratic chairman asked Minton to run for the Senate and he did. And of course he won. As he put it, he won on Franklin Roosevelt's coattails and he knew it, so when he got to the Senate, as far as he was concerned, Roosevelt was the leader and he was a follower and he was going to be as strong a New Dealer as there was—and he was. He co-sponsored much of the important New Deal legislation, co-sponsored the Court-packing legislation, and co-sponsored other bills that Roosevelt wanted.

After winning one term, he lost in 1940. Roosevelt then appointed him to the Court of Appeals. It was very hard to determine in those days what a Midwestern Circuit Judge was like because they didn't have many national cases; they had mostly cases about parties in Illinois or Indiana. And so Minton came to the Supreme Court as a Justice really known as a New Deal Senator and Harry Truman's seatmate. And lo and behold, when he got on the Supreme Court, it turned out he was really quite conservative. He used to explain that he was elected on Roosevelt's coattails, he knew what the people expected of him and he did it, but when he was appointed to the Supreme Court he was expected to be his own man and he frequently did things much different than the liberal New Dealers would have predicted. Minton explained that even though he was Truman's lawyer and they were good friends, he did have to go through the motions when he was proposed to be nominated. He went over to see Truman at his request. They were sitting there and Truman had the World Series on the television. Minton, who had been a semi-pro baseball player in his youth, pointed to the player up at bat and he said, "You know, Mr. President, that fellow can hit a homer any time he is at bat." At which point the fellow obligingly hit one out of the park. Truman said, "Well, Shay, if you can call them that well in the Court, you will be a heck of a Supreme Court Justice."

Moderator: How did he treat you?

Mikva: He treated me very well. He was a very kind person to his clerks. He thought this was a learning opportunity for us. We used to, with his encouragement, go watch the proceedings in the House and the Senate and learn something about the way the Congress worked. He was concerned about our careers and our well-being. He never overworked us and even when he would be irritated with our expressing views different than his, it was always civil and jovial and he would tease us a lot about our being left-wingers, as I went to the left-wing University of Chicago. He had a little more trouble with my co-clerk. Ray Gray went to the University of Indiana, which was Minton's *alma mater*. But he'd say, "They got a new left wing now down in Indiana."

Moderator: Jim Paul, please tell us about Fred Vinson, the Chief Justice, as your boss.

Paul: Well, I suspect he was a little bit different. His relationships with his law clerks, at least during my time with him, were rather formal. We had a few social events outside the Court. The only social events that I had to get to know him in a different view was like Justice Minton. The Chief Justice was a big ballplayer and fan. He had played second base at the Centre College baseball team in Kentucky, the old "Praying Colonels" of Centre College. And he therefore felt that he too knew a good deal about the game. And occasionally one of us, even myself, got summoned into his office and he said, "I want you to take me out to Griffith Stadium and watch the Senators play."[3] Of course the Senators always lost in those days but that was sort of a different experience.

In preparing for this meeting, I did go through David McCullough's biography of President

[3] Griffith Stadium, the home of the Washington Senators, was located at the corner of Georgia Avenue and W Street N.W. It was demolished in 1965.

Truman.[4] I did that because Chief Justice Vinson was an extraordinary friend of Harry Truman. Harry Truman admired him greatly for all his political talents—as a congressman for twenty-two years, he served in the Roosevelt administration and briefly on the Court of Appeals, came back as Treasury Secretary under Truman. The Chief really liked that position. For the record, John, I am holding my fingers together, I did find quotes—this is what Truman said of Vinson: "He is a completely devoted patriot with a sense of personal loyalty seldom found among Washington's top men." That says a lot, I think, if one knows Washington. And then again it sort of may seem strange to us today, but the President and Chief Justice Vinson loved to play poker. McCullough says that Truman was a "loose" player who liked to be in the pot but sometimes shouldn't have been there. Vinson, on the other hand, was an expert and that was also something that Truman admired greatly. Also, a story is reported that one evening they were sipping away on their bourbon, and this time they were playing blackjack, Truman was dealing and Vinson drew a ten, and the other card, he needed—just one card more—not too high—anything below a queen would help him win this pot, which apparently was pretty big, and Truman dealt him the queen of spades, and he was out. And the Chief exploded and said, "Why you son-of-a-bitch." And then he said, "Excuse me, Mr. President." I guess that shows something of the relationship.

I want to close this by saying I once sent a book that I had written to Truman—I won't talk about the book except it was about history in the politics in the Jacksonian period;[5] I knew Truman was a great fan of Andrew Jackson as President, in fact that he used Jackson as a model, and I thought that this book at least was relevant to his interests. And he wrote back and thanked me and all that stuff, but when he wound up he said, "I

[4] *See* DAVID MCCULLOUGH, TRUMAN (1992).

[5] *See* JAMES C.N. PAUL, RIFT IN THE DEMOCRACY (1951).

hope you have a grand tour with the Chief Justice. I don't know a finer man." All of that, to me, just epitomized his admiration for Vinson; he liked to be a folksy politician, yet underneath he was terribly shrewd and knew what he wanted and often got people to do it.

Moderator: We are going to move in a moment to some of the cases, but first I would like you to compare notes on how the Justice actually used you—what work did you do, what were the employment expectations, for you as law clerks? How did you keep busy day to day?

Mikva: I'll start because they are all so reluctant. Justice Minton was not an early bird. He would come in about 9:30 or so. And frequently if we got up early enough, I would be able to get in a round of golf with two of Jim's co-clerks, Howard Trienens and Newt Minow. We would go out there and be back by 9:00 and be hard at work when my Justice came in, and I guess when the Chief came in as well.

Once there, we didn't have that much interchange. There were certain things that Justice Minton expected very much for the clerks to do. One was to do the so-called cert memos. You get a case to the United States Supreme Court by filing a petition for *certiorari*—in shorthand it's "cert." And the clerks, at least in Minton's office, would write memos to the Justice as to why we thought that *certiorari* should be granted or not be granted. Unless *certiorari* is granted, the case isn't heard by the Supreme Court. You need at least four votes to grant *certiorari*, and only then is the case taken and heard. We would write these memos that took a good part of the time during the summer and early fall, writing memos on all the cert petitions that were filed. He would look them over and he'd always agree with us if we recommend that cert not be granted. He thought the Court shouldn't hear too many cases. The Chief Justice had a special arrangement where he could put cases on the "dead list," which meant that they were not going to be discussed in Conference unless one of

the Justices asked to take it off. And Justice Minton didn't want to even consider the cases that were on the dead list. As far as he was concerned, if the Chief Justice said, "We don't need to consider this case," that was good enough for Justice Minton.

Moderator: Did each of you also perform this screening function by writing cert memos?

Hileman: Justice Burton had two clerks, John Douglas and me. And we did every other cert petition. We'd write a short memo telling him what the case was about and our recommendation as to whether he should vote in favor of taking the case or not.

Moderator: Once the Justices meet in the Conference and decide what cases they are going to take, and the cases are being fully briefed and they are heading for oral argument, did you have tasks that were part of getting your Justice ready for that next phase in the process?

Rutledge: I remember being tremendously impressed very quickly as a law clerk for Justice Black at the difference in the perspective from the Supreme Court from the perspective in the U.S. Court of Appeals. Now the United States Court of Appeals in Washington, D.C., as Chief Judge Mikva can testify, has a particularly special place because it gets a lot of federal government cases that wouldn't appear in the other ten circuits in the country. So it's a very interesting place to work. But most of the cases come to the Supreme Court—and this just staggered me—by way of a writ of *certiorari*, which is a discretionary writ. You apply to the Court and it can be either from a state court or from a federal appellate court. Actually it can even be from a trial court in unusual circumstances. You apply for this writ and then it's entirely at the discretion of the Court whether to take the case or not. If the Court decides not to take it, there is no precedent so far as the Court is concerned. But what we had in our chambers—Black's chambers—was every Monday morning, this cart would be

rolled in by Spencer and it was just loaded practically to the ceiling with these petitions for cert from state courts all over the country and from the federal courts. The volume was just tremendous and we would divide that—Sam Daniels and I were the two law clerks—down the middle and it took us the better part of a week to write memos on each case as to whether we thought the Judge should vote to take the case or should not. So a great deal of our work was on the *certiorari* end.

Moderator: In the oral argument phase, what were the responsibilities and the involvements of the clerks?

Small: Well, unlike the other Justices, Justice Douglas did not ask for what they call a bench memo to be prepared when cases were sent down for oral argument. Our main job was on the cert petitions that has been described, except one thing was a little bit different—Justice Douglas only had one clerk traditionally through a large part of his time on the bench and he was the longest serving Justice in the history of the Court, over thirty-five years. Most of that time he only carried one clerk. The year before I was there he experimented with two and then went back to one and continued. In later years he started to take two, and then three but of course by then the business of the Court had just increased exponentially in terms of the numbers of cert petitions filed and in order to keep up with it he really needed more clerks. At some point a number of the Justices got together and formed what they called the cert pool, in which one clerk from one office would write the memo—a cert memo—for all the offices participating, but Justice Douglas never would do that. He felt that the Court *really* should operate so that each Justice would look at things himself, now herself. And another thing that was different in the Douglas chambers was that a number of cases were filed which were called *in forma pauperis* cases. These were traditionally filed by prisoners who had some claim of constitutional deprivation and were asking for relief. A lot of those cases were frivolous and

the typical practice was to put them on this so-called dead list and that was usually the responsibility of the Chief Justice's clerks to do that. But again, Justice Douglas felt everybody deserved to have a look, even the *in forma pauperis* petitions, and so he had his clerks look at all the petitions as well and let him know whether there were any petitions that warranted his attention, to make sure that justice was done. So we were busy in those chambers. We didn't do the bench memos but we did do lots of other things that kept us occupied.

Mikva: We did bench memos for Justice Minton. After cert was granted in a case, he wanted a detailed bench memo on what we thought the major arguments were and indeed even a recommendation note as to how we thought he ought to vote on the merits of the case in Conference. (He felt free to ignore those when necessary.) And they were expected to be much more detailed. In the cert petitions, sometimes a memo could be very short: "This is a frivolous case. Denied." But in a bench memo, he expected us to put in all the cases and all the precedents that might possibly decide the question. Then when he would be on the bench, of course, it was traditional that the clerks for all the Justices had to be there while the cases are being argued—we had these little crevices over on the side where we could sit and listen to arguments. And at least once a day, a note would come over from Justice Minton: "Can you find the case of so and so?" Either my co-clerk or I would run back to the chambers and tear all the books off the shelves—we didn't have computers in those days. And of course we could never find the case he was remembering. We used to call it a "Justice Minton *NO* case"—and we found a lot of "*NO*" cases.

Moderator: Let's move into the cases. 1951 to 1952—the last year of the Truman administration; the depths of the Cold War; the Red Scare/McCarthy era—brought cases involving those issues to the Court. Let me begin with you, Charlie. The *Sacher* case

was one momentous case. Please tell us what that was about and how you recall it.

Hileman: The *Sacher* case was on petition for cert from a decision involving the New York Communist case. There were eleven avowed party leaders—Communists—who were tried for violation of the Smith Act, which is conspiring to overthrow the government of the United States by force or violence. There were cases like that all around the country, and the New York case was the first one. There were eleven defendants and each defendant had a lawyer and the trial lasted six months. Throughout the course of the trial, the judge and the lawyers were constantly involved in battle between each other. The judge threatened to hold them in contempt but he didn't. But at the end of the trial after six months, all of the defendants were found guilty, as they were in all those communist cases. He asked the six lawyers to stand up and he said, "I am citing you for contempt of court. And I have list of contemptuous acts...," going twenty pages long or something, and he didn't give the lawyers a chance to say anything and he said, "I find you all guilty of contempt." And he imposed prison sentences for all of them up to six months. Well, they appealed that to the Court of Appeals for the Second Circuit and it affirmed those contempt citations. They were totally separate from the guilt of the defendants, so they had their own separate appeals. The Supreme Court granted *certiorari* in that case and the question was whether the judge properly held them in contempt. The only issue before the Supreme Court was whether the judge properly did that himself—that is, he charged them with contempt of court, and then he decided himself they were all guilty, even though most of the contempt was against him personally, the alleged contempt. And then he sentenced them. And the question was whether that was proper to do that or whether he should have called on another judge to decide that question. That was the only question

before the Supreme Court. The Supreme Court, much to my chagrin, affirmed the convictions.[6]

Moderator: Did you argue with Justice Burton about how you would vote in that case?

Hileman: That is one of the many times maybe when I argued with him, because Justice Burton was a conservative Republican and John Douglas and I were both liberal—civil libertarians. So I argued that what Judge Medina did was an outrage. There was no reason at the end of the trial for him to do all this himself and it appeared unfair for him to be the judge and the jury in his own accusation.

Moderator: And the executioner. So much for the input of law clerks, right?

Judge Mikva, let me turn to you. *Adler*, the Feinberg Act case, may be a cousin of the *Sacher* case.

Mikva: It was. It involved the teacher oath in New York City. You have to remember, this is the height of the McCarthy era. It wasn't that the Russians were coming as much we were convinced that there was this domestic conspiracy that's going to undermine our institutions by teaching kids to be communists, and singing communist songs by Paul Robeson and other terrible things like that that have to be outlawed. And New York required that teachers take an oath swearing that they were not communists or they wouldn't be allowed to teach in the schools. One teacher or principal by the name of Adler refused to sign the oath. His or her case came all the way up to the Supreme Court. And both my co-clerk and I thought it was outrageous. First of all, we have a strong tradition in this country against oaths—even the Constitution speaks against oaths.[7] The idea that a teacher who clearly was acting on principles and wasn't a communist would be denied the right to teach

[6] *See* Sacher v. United States, 343 U.S. 1 (1952).

[7] *See* U.S. CONST., art. VI, cl. 3.

because of this law offended us. We had recommended that cert be granted but other than that we tried to keep our views, when we recognized that wasn't where he was, to ourselves. Sherman Minton, who like Justice Burton was very conservative on these issues, came back from the Conference and said, "Well, I've been assigned to write the *Adler* case. Here's what I want you to do." And it was going to be my turn to write the opinion, the first draft anyway, so I was taking copious notes, trying to do it exactly the way he thought it ought to be done. I wrote a draft and sent it in to him and the next day he came storming into our office, saying, "God damn left wing University of Chicago. I should have known better." And he took the opinion from me and handed it to my co-clerk, Ray Gray, who was from Indiana. But Gray was far to the left of me and when he took over the opinion, he ended up with many more things that obviously displeased Justice Minton. Finally Minton took the opinion and ignored everything that Ray Gray and I had suggested and wrote the opinion by himself with his secretary and circulated it. I remember that even the Justices who agreed with him were very upset with the way it had been written. So that while we didn't have the power to influence the decisions, maybe we did have some influence on trying to make the decision consistent with other things the Court had been saying. But it ended up the law of the land and if anyone wants to take a look at it, you'll find an opinion that did not do very much by way of shedding light—but it shed a lot of heat.[8]

Moderator: Another very significant case in this Term of the Court involving schools and involving value inculcation was called *Zorach v. Clauson*.[9] It was about release time from the public schools that would allow students to be recipients of religious instruction. Marshall, tell us about *Zorach* and how you remember that case.

[8] Adler v. Bd. of Educ., 342 U.S. 485 (1952).

[9] 343 U.S. 306 (1952).

Small: Well, as you say, that was a case that had a program set up to allow students to leave the public school and attend religious instruction off premises, presumably at a local religious institution. And Douglas took the position, which frankly I thought was defensible, and frankly I agreed with it, that that wasn't an establishment of religion and that the state ought to be free to permit that sort of arrangement. I was troubled by some of the language in his opinion, which I called to his attention and we had a frank discussion on it and he did make changes in the opinion as it finally was circulated. But there were bitter dissents from some of the other Justices who didn't agree with that result. Justice Douglas's own views were modified over the years and he came to, I think in some respects, take the views of some of the dissenters in *Zorach*. I think that was simply an example of a situation where you had a sitting Justice who was on the Court as long as he was, whose views evolved and changed over time on a particular issue, although on some issues that he had a particular compass that he followed throughout his career.

Moderator: Let me ask about one final area in this segment of our program. *Brown v. Board of Education*,[10] the question of school segregation, came to the Court in the next two Terms, in the '52 Term and in the '53 Term, culminating in the *Brown* decision in May 1954. But a string of segregation cases had been in the Court in the years following World War II and school segregation is before the Justices in some preliminary ways while you are law clerks. What do you recall of that issue?

Rutledge: Well, the school segregation issue was a prominent one, all during the period that my father had served on the Court—he went on in '43, he died in '49. Here we are in '51, but the earlier cases started out, so to speak, from the top down and they involved rich kids' law schools. There were

[10] 347 U.S. 483 (1954).

many southern states that had no law school that a black man could go to and some of those states would send a black man that wanted to go to law school (and was qualified to), they would pay his expenses and send him up north. And he would end up at the University of Illinois or Michigan or somewhere like that.

Moderator: The Court had marched through that. I like the downward idea—the law schools, the graduate schools. Now we are talking elementary and secondary schools. Where were the Justices on that in '51 and '52?

Rutledge: I can't tell you where the Justices on the Court were on that. All I can tell you is that for Black, who was from Alabama and was the most southern of anybody on the Court, his view, as far as I could tell it on that, was that this was a dynamite kind of a case which would have political ramifications and which would stir the entire country up. But he was personally in favor of enforcing the same kind of law at the elementary school level and the high school level that the Court had already pretty well established at the college level and the law school level.

Hileman: Up to that point, the Supreme Court had always taken the position that it was alright for a school district to put the black children in one school and the white children in another school as long as they were equal. So the rule was "separate but equal." And the cases all involved a question whether the black schools were equal. But the *Brown v. Board of Education* case was brought up in a way in which the Court couldn't decide it that way—it had to either decide whether the school could be segregated or not. But the Supreme Court decided not to hear the case in our Term. So we really didn't get into discussion of that case on the merits.

Mikva: An interesting story that at least Marshall Small and I remembered is that there was a tradition of inviting a Supreme Court Justice down to lunch with the clerks. We had our own separate dining

> room so that we could talk about the cases and not be overheard by lawyers who wanted to know what was going on. And we would invite one Justice down each week to talk to us about what was going on.
>
> One week we invited Justice Frankfurter down. It was just about this time of the year, May, and one of the desegregation cases had been argued in that Term. I don't remember what it was—I think it was a South Carolina case[11]—and clearly no opinions were being circulated. So it was clear the Court wasn't going to decide the case that year because if they heard it in the fall, certainly the drafts of opinions are circulating among the Justices by May. And one of the clerks had the temerity to ask Justice Frankfurter, who was our guest, "Mr. Justice why isn't the Court going to come down with a decision in the desegregation case?" This is 1952, May of '52. Frankfurter looked at us as if we were all wet-behind-the-ears recent law school graduates, which we were, and he said, "Why, don't you realize this is a social revolution we're talking about. You really want us to come down with a case like that in an election year?" We all gasped in horror at the idea that the Court even knew when the election was, let alone would consider when to hand down cases based on the election date. I remember one of Justice Frankfurter's clerks, Abe Chayes, was looking for a hole in the ground that he could fall into and not be there, he was so embarrassed. Then the same clerk followed up with, "Mr. Justice, we don't understand. What does that have to do with whether the case should be decided or not?" Frankfurter explained to us the politics of it. "Here you've got these two candidates running for President, Eisenhower and Adlai Stevenson. Neither one will read the opinion but they'll come down on different sides of it. One will oppose it, one be for it. Is that the way you want this important case to be put into the public arena?"

[11] *See* Briggs v. Elliott, 342 U.S. 350 (1952).

Well, I was a Stevenson Democrat and I like to think he would have read the opinion. I think he would have come out for it. President Eisenhower made it very clear later on, privately anyway, that he was very much opposed to the decision in *Brown v. Board of Education*. But if he had expressed himself publicly in the campaign saying he was opposed to it, what would have happened at Little Rock, where the only way that the decision was enforced and the peace was kept was because President Eisenhower called out the troops to keep the peace in Little Rock, Arkansas? Perhaps he would have said then, if he had made it an issue in the national campaign and been elected anyway, which he would have been, what President Jackson once said—"The Supreme Court has got its decree, let them enforce it"—which would have been a disaster for the country. So over the years I began to think that Justice Frankfurter maybe had more sense than I thought he had when I was twenty-five.

Small: That report is essentially as I recall it. But I think at the time of that luncheon, we didn't know specifically who the nominees were going to be because neither of the parties had had their convention, although I think there was speculation that it might well be Eisenhower and Stevenson. So just a minor footnote.

Paul: Well, I just wanted to say one thing. First of all, I am very appreciative that this vast audience could listen to these garrulous octogenarians reminisce, or make up stories, or Lord knows what we are doing. But in the school segregation cases, I think the primary lesson to think about here is that the cases required that the Court overrule a precedent that had been well-established many years ago and followed and never really challenged until these cases came up in the 1950s. Of course, a vastly changed context existed when the *Plessy v. Ferguson* "separate but equal" case was decided.[12]

[12] 163 U.S. 537 (1896).

But one reason why it is interesting today is because it raises the question which I think a lot of people have thought about—under what circumstances should the Court overrule a well-established precedent? And we have that problem obviously coming up at some point in time, I think, if the Court confronts *Roe v. Wade*.[13] It at least is provoking to think: well, what is the difference in *Roe v. Wade* and *Plessy* if the majority of the Court feels it was the wrong decision when it was made? I just wanted to call that to your attention. It may be obvious.

Moderator: It is a wonderful and provocative thought, and beyond our format to answer here. Please join me in thanking the panel for the first part of this program. We will now take a five minute recess and then resume with Professor Ken Gormley leading a discussion of the *Steel Seizure Cases*.

* * *

Moderator: For those in the audience who are not familiar with the *Steel Seizure Cases*,[14] let me just give you this much background:

In April 1952, President Harry Truman made a decision that would forever haunt his presidency. The steel companies and the Steelworkers' unions were at an impasse. There was about to be a strike of over 600,000 steelworkers, which President Truman feared would cripple production of steel necessary for efforts in the Korean War. So President Truman made a bold decision. He ordered his Secretary of Commerce, Charles Sawyer, to seize the nation's steel mills to keep them running. In an address on April 8, Truman said our national security and our chances of peace depend on our defense production and our defense production depends on steel.

[13] 410 U.S. 113 (1973).

[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

> The response to this action by President Truman was swift and negative. The *Chicago Daily News* called it "leaping socialism." The *New York Daily News* said "Hitler and Mussolini would have loved this." The *Washington Post* wrote, "President Truman's seizure of the steel industry will probably go down in history as one of the most high-handed acts committed by an American President."
>
> The United States Supreme Court swiftly granted *certiorari* in this case and held that President Truman had exceeded his powers under the Constitution. This definitive 6-3 decision in the *Youngstown Sheet & Tube v. Sawyer* case amounted to a stern rebuke of President Truman at the end of his presidency. It also became the granddaddy of the Supreme Court decisions dealing with presidential power, and it is one that is still very relevant today.[15]
>
> In late November 2002, I had the privilege of organizing a program, co-hosted by Duquesne University and the Harry S. Truman Library and Institute, celebrating the 50th anniversary of the case and bringing together many of the people involved in it.[16] As part of that program, Chief Justice William H. Rehnquist, who as a young man was a law clerk for Justice Robert H. Jackson at the Supreme Court and a co-clerk of these men, was gracious enough to provide an interview, filmed in Washington, D.C., in early November 2002, to begin that program. It is fitting today that we begin this segment with some of that

[15] *See generally* MAEVA MARCUS, TRUMAN AND THE *STEEL SEIZURE CASE*: THE LIMITS OF PRESIDENTIAL POWER (1977; republished 1994); Patricia L. Bellia, *The Story of the* Steel Seizure Case, *in* PRESIDENTIAL POWER STORIES 233–85 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

[16] *See Steel Seizure Symposium Issue*, 41 DUQ. L. REV. 665–755 (publishing comments, discussion, articles and correspondence by David E. Feller, Ken Gormley, Chief Justice William H. Rehnquist, Milton Kayle, Ken Hechler, Stanley Temko, Maeva Marcus, John Q. Barrett and Clifton Truman Daniel).

filmed interview with the late Chief Justice Rehnquist.[17]

* * *

Beginning of film

Moderator: Good afternoon, Chief Justice Rehnquist. On behalf of everyone assembled at Duquesne University in Pittsburgh, as well as the Harry S. Truman Presidential Museum and Library that is co-sponsoring this event, I'd like to thank you for participating in this special program.

I have just a few questions to set the stage as we begin this retrospective, looking back fifty years in history. You were just a 27-year-old law clerk, clerking for Justice Jackson only a few months in Washington, at the time the *Steel Seizure Case* landed in the courts. At the time, was this a case everyone expected would be a constitutional landmark? What was the atmosphere surrounding it?

C.J. Rehnquist: The atmosphere, so far as one living in Washington was concerned, was very much that it would. The law clerks talked and talked about it at lunch and it wasn't just the Supreme Court arguments in the case that received press coverage. The arguments before Judge Pine in the District Court were front page news in the Washington papers, perhaps not elsewhere.

Moderator: And did you and your fellow law clerks have any prediction what would be the final outcome when it worked its way through the Supreme Court?

Rehnquist: Oh, I don't think most of us knew what position our Justices would take. We did have a vote at lunch one day and I think, as I recall, we were evenly divided. But that was not on the basis of

[17] *See id.* at 681–83.

what we thought our Justices would do, because most of us didn't know.

Moderator: And what do you remember most vividly about the oral argument? I believe it was May 12, 1952.

Rehnquist: Well, the fact that John W. Davis argued for over an hour and I think was asked only one question. He had a style of advocacy that you don't hear nowadays, but it was very impressive. And then Solicitor General Perlman got a whole bunch of questions from the Court.

Moderator: And Arthur Goldberg participated as well?

Rehnquist: Yes, he participated in oral argument for the AFL-CIO, I believe.

Moderator: For the Steelworkers, yes. And in your book on the Supreme Court, you tell a wonderful story about the Justices' Conference that Friday, which they voted on the case in private.[18] What do you remember about that?

Rehnquist: Well, as I say, of course the clerks weren't present in the Conference. But George Niebank, my co-clerk, and I were just dying to find out what happened, as I suspect all the other clerks were too. So we followed Justice Jackson into his office when he got back, just as we always did. He would tell us what happened at Conference. And he said, "Well, boys, the President got licked."

Moderator: And Justice Jackson's concurring opinion in the *Steel Seizure Case* is generally regarded by Constitutional scholars as the most significant. What did he say about presidential powers and why did he write separately?

Rehnquist: Well, I think he wrote separately because almost everybody did write separately. I think the opinions had to be prepared in a fairly short time,

[18] *See* WILLIAM H. REHNQUIST, THE SUPREME COURT 151–92 (2001); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 41–98 (1987).

and I think even those who agreed with Justice Black's outcome felt that there needed to be more said about the thing. And Justice Jackson's concurring opinion classified presidential power in three different ways. First, where he acted with the approval of Congress. There, Jackson said, "Only if the whole government is disabled does he lose." Second, where he is acting without Congressional authorization but without Congressional disapproval. There it is kind of a middle ground. And finally, what Jackson felt had happened in the *Steel Seizure Case*: where he was acting in an area where Congress said, "Don't do what you want to do. You do something else." And there he said the power is at its nadir.[19]

Moderator: Right. And did public opinion, do you think, influence the Court's ultimate decision that

[19] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (footnotes omitted):

> We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

President Truman had exceeded his constitutional power?

Rehnquist: I think it did. The government made some extraordinary claims at the very beginning, in the District Court, that the President had all the authority that George III had unless it was taken from him by the Constitution. Well, you can imagine the press outcry about this. I mean, it just made headlines. And it just gave a negative aspect. The government abandoned that argument long before it got to the Supreme Court, but it just got the government off on the wrong foot.

Moderator: And there was ambivalence about the Korean War even at that point, wasn't there?

Rehnquist: Very much so. There were people fighting and dying in Korea but very few sacrifices called for on the home front. World War I— Rather, World War II—I'm not that old; World War II—you know you had 14 million people under arms but a lot of things restricted on the home front. The Korean War, you just didn't have those restrictions on the home front, so there was just a real ambivalence, as you say.

Moderator: Yes. And what would you say is the lasting significance of the *Steel Seizure Case* as we look back in constitutional history fifty years?

Rehnquist: Well, I think the subsequent opinions of the Court have adopted Justice Jackson's concurrence, and that kind of trifurcation is probably its contribution. I think people have expressed the view that had it come up in time of declared war, it might have come out differently. And so, you know, it is just one of many cases in this area, but I think the Jackson concurrence has been pretty much what it stood for.

Moderator: I'm reminded that one of the great things about a retrospective like this is it allows us to learn history from key people who actually participated in it, so your recollections are particularly relevant

and meaningful. And it puts us in a good position now to step back a half century and examine a presidential decision that's really largely been lost to history books and law books but is still highly relevant. So thank you very much, Chief Justice Rehnquist, for introducing today's program.

Rehnquist: It has been a pleasure to be here, Professor Gormley.

End of film

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Moderator: Thank you very much. I think you can get a sense even from that brief recap by Chief Justice Rehnquist how monumental this decision was at the time. We're now fortunate to have with us five other law clerks from the Supreme Court Term of that year to discuss the significance of the *Steel Seizure Case*. It was important then and also, as we'll discuss, is important even today with respect to the full issue of presidential power. I want to start with your recollections, as Chief Justice Rehnquist mentioned, about the argument, with John W. Davis, famous Supreme Court lawyer, once a candidate for president, and Arthur Goldberg, later on the Supreme Court, representing the unions. What do you remember about it, Jim?

Paul: Well, I remember John W. Davis because, I suppose for an older generation, he was really a role model. After all, he was a man who had run for president. Of course he lost miserably but he campaigned with dignity. And then he had been Solicitor General and held many other public positions and was sort of dean of the bar. He was also earning a hell of a lot of money on Wall Street. He made, as Bill already said, a very impressive argument. I'm not sure whether he got one question or no questions, but obviously the Justices were reluctant on that score. What I remember most is his dramatic finish. He was up on his feet,

and he said, quoting Jefferson, "In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."[20] And he pulled out a big handkerchief, which I don't have, and dabbed his eyes with it and sat down.

And one thing more: I may be wrong on this, but I was looking at the Chief Justice, my boss, and his mouth was making some words. I figure he was making two one-syllable words—two different one-syllable words. You can guess what they might have been.

Mikva: Well, you have to remember, we were all in our mid-twenties. Our recollections now are probably somewhat reshaped and restructured, but then they were never tempered by judgment—at least mine weren't. I thought I knew it all, and I could tell what my eyes saw and my ears heard. I saw this very crotchety old gentleman. He had to be at least seventy years old—way over the hill—making this argument. I could barely hear him, sitting off on the side there, and Court was very respectful, and I say they're not paying any attention to an important question, they're just revering his age, and revering the things he had done in the past, but he's really much too old to make this important argument. Seventy—my goodness!

And on the other hand, Solicitor General Perlman—who as I recall was second; I think Arthur Goldberg argued last, at least that is the way I remember it—got up and he was a very forceful, vigorous Solicitor General, but he was very troubled by the question. I had a feeling that he really didn't have his heart set on what President Truman wanted to do and it was more like a professorial lecture except there was a lot of hand-waving about—"well, on the one hand," "on

[20] Oral Argument Transcript, Youngstown Sheet & Tube Co. v. Charles Sawyer, (Nos. 744 & 745), May 12, 1952, *reprinted in* 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 879, 900 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

the other hand"—and he didn't seem forceful enough about it.

Arthur Goldberg, who was given, as I recall, five minutes of argument compared to John W. Davis's hour and Perlman's whatever, was arguing on behalf of the Steelworkers and he was then in his prime—early forties, late thirties. He bounced up there with vigor. In five minutes, it seems he laid out exactly why President Truman's position ought to be upheld, which is where my boss was anyway, and I became so enamored with Goldberg's argument that I made up my mind right then and there that I wanted to work for him. And I did.

Moderator: Neal Rutledge, you clerked for Justice Black. He wrote the majority opinion, although Justice Jackson's opinion, as we heard in the video, is considered the most famous today. Did you talk to Justice Black about your views on this case?

Rutledge: Yes, this case zoomed up at the end of the Term. It went before the District Court. The District Court enjoined the seizure. The U.S. Court of Appeals stayed that injunction but they didn't have a chance to actually hear the full oral argument or decide anything more in the case. And then the Supreme Court granted cert right away. So it came up in a matter of weeks. And everybody knew that it was a very important case. It was going to be extremely important. We were at war. I know we were at war because a very good friend of mine got shot and lost his right leg within months of this happening over in Korea. And we were fighting a war. We were in as much of a war then as we are now. I think the clerks particularly were aware of this. Anyway, the case came up and was decided by the Court and is— I am not sure, but it may have been Justice Jackson who described Black's opinion for the majority as "the lowest common denominator." And it was that. This was a constitutional issue that came up very fast and almost every judge that considered the case wrote—there were seven different opinions. One reason Black wrote the majority opinion,

which the audience may not realize, is that if the Chief Justice when they vote on a case is in the majority, he decides who will write the opinion for the Court—he may assign it to himself or he may assign it to any of the other judges who are voting with the majority. If he is in the dissent, as he was in this case, then the next senior Justice takes on that role. Well, Black was the next senior Justice.

Moderator: What were the salient points of his position? Why did he conclude that the President had exceeded his powers?

Rutledge: He concluded that Congress had acted in this area repeatedly, that there were basically three statutes. The Taft-Hartley Act was one of them. The Selective Service Act had a provision. And the Defense Production Act. All had provisions that applied at least in part to this kind of a problem and none of them provided for the kind of a seizure that Truman had done. Black, who had served in the United States Senate for many years, had great deference for the legislative power of Congress. It was his feeling—I disagreed with him and argued with him—that since Congress had acted in this, the President had to follow whatever Congress had prescribed. And he so wrote here is this book, which contains all the decisions from the Term that we served, this '51 term. The decision in this case consumes about 100 pages here.

Moderator: It is 131 pages long plus an appendix.

Rutledge: Exactly. Black's majority opinion for the Court, which four people did concur in, is about three or four pages long. It is very brief, simply saying the President does not have any congressional power. Moreover, Congress has acted in this field. He has acted contrary to what Congress has prescribed. He therefore has acted beyond the powers that he enjoys.

Moderator: Marshall Small, you clerked for Justice Douglas, who was also in the majority. This case, as we mentioned, came up very rapidly through the

courts. How did that impact just the way this was handled in the courts and by the government?

Small: Well the government did not really have much time to prepare its briefs and I have to think that that had some effect on the Court. There was one decision, the *Midwest Oil Case*,[21] that Felix Frankfurter presented to John W. Davis in argument that would have been in the government's favor and that Davis had actually argued as Solicitor General back in 1915, I think, and he said, "Well now you're arguing the opposite." The government didn't have that case in its brief. Whether it took Davis by surprise or not, he handled it very gracefully in trying to explain it away, which I think was a testament to his abilities as an advocate. But I think it underscored the fact that the government had not taken time, maybe didn't have the time, to carefully consider the nuances involved in determining what kind of powers a President should have in this kind of setting. They really took a rather meat-ax approach that, you know, he had whatever power he needed, and I think that bothered the Justices.

The Conference notes—their discussions of the case after oral argument—tend to underscore some of that.[22] They were concerned with the position that the government had taken and for that reason felt they needed to do something to respond to it. They might have, under some circumstances, tried to avoid taking the case at all. There was some argument about not even taking the case, but because the President's power had been put forth in such bold fashion I suspect they felt they needed to do something to respond.

Moderator: It wasn't simply a question of how the government presented the case, was it? Harry Truman hated

[21] United States v. Midwest Oil Co., 236 U.S. 459 (1915).

[22] *See generally* THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 168–82 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE (1940–1985)] (reconstructing the Conference based on Justices' notes).

the Taft-Hartley Act. It was anathema to the unions and so he was not going to use it, even thought he had it available. And you have the fact that he was at the rock bottom of popularity at that point.

Small: All that was true and I think that probably also had something to do with the Court's approach. Congress had said, "Here's an approach you can take. You don't need to use uncharted presidential power. And therefore use Taft-Hartley." As you say, he had vetoed Taft-Hartley; he didn't want to use it. An interesting aftermath: When the Court came down and said, "Sorry, you were wrong," he then asked Congress to give him authority without having to use Taft-Hartley. Congress came back and said, "No, use Taft-Hartley." He still refused to use Taft-Hartley. Finally he was able to, I think, work out an agreement between the union and steel companies so that by the end of July of '52, the potential strike was settled, and therefore, they could move on about their business. The other aspect of this case was a combination of politics in terms of his view of Taft-Hartley—his lack of approval rating in the country at the time was about the lowest approval rating of any generation.

Moderator: Right. President Truman was indeed planning to go in and ask permission after Congress. It reminds me of when I asked my future father-in-law for my wife's hand in marriage after she had already said yes. He said it sounds like the horse is already out of the barn or whatever. But I think the idea was if you are going to do this, you have to do it beforehand and actually get Congress's approval.

Charlie Hileman—because you clerked for Justice Burton, who was one of the Truman appointees on the Court who voted against the President, and you described the fact that Burton sat right beside Truman in the Senate—do you think that this was a difficult thing for your boss, Justice Burton, to vote against the President who had appointed him?

Hileman: Well, he not only sat beside him in the Senate for all those years but they became personal friends and they really were good friends. I am sure it was a tough problem for Justice Burton but he never, I don't recall, ever said anything to me about that. That is, "What am I going to do with my good friend Harry Truman, I have to vote against him?" And so I am sure it was hard to do. I learned later that President Truman was very upset over the fact that Justice Burton had voted against him. As a matter of fact, it was thought that if Burton had voted to support the President, then Justice Clark probably would have done the same—Clark was also a Truman appointee. And then the decision would have gone the other way.

Moderator: In the end, what from the opinion do you think persuaded him most? What can we tell persuaded Justice Burton to vote as he did, against the President's power?

Hileman: Well, he said in his opinion that the Congress would have had the power to do this, or authorize the President to do it. But Congress did not and, as a matter of fact, the legislative history of the Taft-Hartley Act showed that it was proposed that there be a provision authorizing the president to seize property in the event of an emergency, and the Congress voted it down. So in effect he said, "Congress had said you don't have the authority as President to do this unless we say so." Burton was a former Senator and he had great respect for the Senate, and he felt compelled to take that position and support what Justice Black said.

Moderator: And that becomes important in the Justice Jackson test, obviously, because this was the case where the President was acting against the express will of Congress and that was—

Hileman: Burton left the door open for situations in which there would be a real emergency situation. He said in his opinion that this might be different, but the President had no power under the present circumstances—this is not comparable to a threat

of imminent invasion or threatened attack or other catastrophe. So he intimated in his opinion that maybe had this been a declared war it would have been different, and he left the door open for more serious situations.

Moderator: President Truman was asked by journalists what in the Constitution gave him the authority to seize the steel mills. His answer was, "Read the Constitution. It gives the President the power to keep the country from going to hell." That was his foundation for his power.

Jim Paul, you clerked for Chief Justice Vinson, President Truman's closest friend on the Court. The Chief's dissent was a little more sophisticated than "the President has constitutional power to keep the country from going to hell." What was the logic behind Chief Justice Vinson's forceful dissent?

Paul: Oh, well, it was a shared belief in the validity of the basic premise on which the seizure decision was made—a shared belief with the President (and, I might say, the President's Cabinet, who swore out affidavits supporting this position—including Robert Lovett, an eminent American statesman of that Cabinet[23]). There was an emergency and we couldn't go without steel in this conflict—whether we called it a war or not seemed irrelevant. And the Chief's second premise was that Congress had appropriated money to buy armaments and enacted lots of other legislation to support this war, all with the support of the President. And these were laws on the books and they were active laws. They were there and they

[23] The Government relied on affidavits from five senior officials: Secretary of Defense Robert A. Lovett; Chairman Gordon E. Dean, Atomic Energy Commission; Administrator Henry H. Fowler, National Production Authority; Secretary of Commerce Charles W. Sawyer; and Secretary of the Interior Oscar L. Chapman. *See* Brief for Petitioner at 9–15, *Sawyer v. Youngstown Sheet & Tube Co.*, (No. 745), May 1952, *reprinted in* LANDMARK BRIEFS, *supra* note 20, at 608, 616–22; Oral Argument Transcript, *Youngstown Sheet & Tube Co. v. Charles Sawyer*, (Nos. 744 & 745), May 12, 1952 (oral argument of Solicitor General Philip B. Perlman), *reprinted in* LANDMARK BRIEFS, *supra* note 20, at 879, 904–05.

needed to be enforced and, therefore, he did have the seizure power pursuant to that part of the Constitution that the President shall execute or enforce these laws—many laws. And the point here was that's exactly what the President was doing—he was maintaining these laws that were aimed at maintaining the strength of the American forces. The next point was the President did go immediately to Congress. He presented to Congress a formal report saying in effect, "I've done this. I recognize the power of Congress over my decision, to repudiate it or leave it alone, whatever you want. But I felt compelled to do this in order to preserve the situation." This was not a decision or an opinion that says the President has great powers as commander-in-chief. It was not an opinion that says the President has inherent powers in wartime, whatever that means. Unlike the assertions that are made today, in certain corners of Washington, this is not that expansive. It was: I did this in a state of emergency but Congress has the final say—a recognition of the ultimate jurisdiction of Congress. I don't think, for all the opinions, that the Court really joined issue with the Chief Justice on that. I admire Jackson's concurring opinion; law professors would particularly love it, but Jackson never really got to the point of confronting the Chief's argument.

Finally, one other point as to this failure, dismal failure, of the Truman appointees to support him. Truman thought Justice Burton and Justice Clark had let him down. I wish our good friend Stu Thayer, who clerked for Clark, was here to defend him. Unfortunately Stu is no longer with us. But Truman did say something about this. As to Clark, he told Fred Vinson, "I wish I had never appointed that son-of-a-bitch to the Court. It was the worst mistake I ever made."

Justice Black and the other Justices threw a small party right after the decision and invited Truman. Black felt he owed it to Truman to do this, as a gesture of respect. Truman went, but he was a little grouchy when the thing started off, but then

finally he said to Black, "Hugo, I don't like your law at all but your bourbon is mighty good."

Moderator: Judge Mikva, you clerked for one of the other dissenters, Justice Minton. What was it that made him feel so strongly about this case?

Mikva: It was amazing. It was like nine blind men each feeling a different piece of the elephant, deciding what the animal is. In my chambers we never got into this business of the trifurcation of the power. As far as J. Minton was concerned, this was a simple question of loyalty to the President. And I remember he didn't write. He said, "Whatever the Chief says on this, I'm going to go along with it." As far as he was concerned, he and the Chief were of a single mind. And that is that Truman had appointed him, that Truman said he needed this power and, by God, they weren't going to take it away from him. He thought it was important enough. Truman was in the position and they were going to let him do it. A lot of things went into that. Part of it was, this is a property matter—I don't know how they would have felt if it had been a liberty matter. Not that Minton was sensitive to civil liberties, but he certainly would have been more sensitive to the fact this was simply private property, and the President was saying it was important to carry on the war. Secondly, they recognized, and I even went back and read the dissent again, there was a little bit of difficulty talking about this as a war because the President had said it wasn't a war. It was a police action. We had never declared the Korean War, it was a U.N. action. And so the President, in issuing his proclamation in the first place, relied on a lot of World War II statutes because technically we were still in a state of war with either Germany or Japan, I don't remember which. Japan. And that was a little farfetched as the rationale for this important seizure of power that he had exercised.

Really, as far as Minton was concerned, this was not a matter that needed a lot of deep dissections. You looked at the President, who had a lot of

trouble with the Congress and a lot of trouble in the country at that time. If he said it was important and you were his friend, you went along.

Moderator: And the threat of communism was very real.

Mikva: The threat of communism was real and you don't tamper with his power in that kind of respect. I think it would have been a lot different if Harry Truman had been riding the crest of a high popularity wave, with a seventy or eighty percent approval. There were other actions. I remember Minton going back to a little bit of history to remind us of other things that other Presidents had done way beyond the seizure of the steel mills, without Congressional approval, and had gotten away with it. Jefferson had bought a third of the United States, the Louisiana Purchase, without getting Congress's approval.

Moderator: Lincoln during the Civil War—

Mikva: Lincoln had kept the Maryland legislature physically from meeting because they were going to vote to secede from the Union and he sent soldiers to keep the legislators from going into the capitol building. And he got away with it. And at one point when the Chief Justice issued some kind of a writ against Lincoln, he ignored it and he got away with it. And President Roosevelt during World War II had put all Japanese-Americans into prison camps—concentration camps—detention camps they were called—and got away with it. The Supreme Court ultimately upheld it. And so far as Sherman Minton was concerned, here was this good and decent man who thought the country needed the exercise of his power. He was not going to be a part of taking it away.

Moderator: Some of the biographies in recent years have indicated that President Truman consulted with Chief Justice Vinson before making or during the time he made the decision to seize the mills, and perhaps some communications with Justice

Minton. Do you care to say anything about those stories?

Mikva: Minton was a part of that poker game that Jim Paul referred to—he and the Chief Justice were over at the White House and played poker with Harry Truman. I got the impression he really was quite indignant. I don't think he ever used the language about Harold Burton that the President used about Clark, but he was quite indignant about Burton and Clark leaving the ship that way. I got the impression that Minton had been over at the White House playing poker some nights before the decision—I know it was before the decision came down; whether it was before it was argued or before the mills were actually seized or not I don't know. But he came back and he told us that he was very upset, that he and Vinson and the President were all very upset about the fact that Burton didn't understand how important this was to the President's maintaining his position of support and if Burton had gone along then Clark would have gone along.

Moderator: Ken Hechler, who was an advisor to President Truman, told me during the program five years ago that there was blue smoke that you could see coming out of the White House after this decision, and he was particularly angry, according to Ken Hechler, at Justice Tom Clark. But those friends of his whom he had appointed—it clearly meant something.

Marshall Small, you refer to these Conference notes that you dug out from Justice Douglas, which are incredible, actually. They record that Justice Minton, I believe, gets very excited and pounds on the table. He says, "The nation is at war. The men in Korea need the steel." And he was insistent on

it. This was an extremely emotional topic for certain of the Justices.[24]

Small: I think we should give credit to David Danelski, a retired professor from Stanford who's been writing more than ten years a very objective biography of Justice Douglas. He kindly went into his voluminous records and sent me the Conference notes. Douglas had had a habit of putting all things into the public record at the Library of Congress. So there are just all sorts of things there. That's how we got these fascinating notes.

Moderator: A couple of questions before we start wrapping up. David Feller, who was one of the lawyers who worked alongside Arthur Goldberg representing the unions, told me the story that the White House almost had this matter between the Steelworkers and the steel companies settled. It was only because the Supreme Court rushed in, in literally record-breaking time, granted cert, took the case—the minute that happened, the negotiations collapsed and that was the end of it. Is this an historic case that the Supreme Court should have never taken?

Mikva: David Feller was a partner of mine later on, as was Arthur Goldberg. And I think that very much was a fact—the union and the companies had been negotiating and even during the seizure, there were negotiations continuing. If the case had taken its normal course, they probably would have reached a settlement. They were very close at the time the opinion came down. In fact, my co-clerk and I had this internal ethical battle. We knew the

[24] *See* THE SUPREME COURT IN CONFERENCE (1940-1985), *supra* note 22, at 181 (emphasis and alteration in original) (reconstructing Justice Minton's remarks in Conference):

> Truman seized the plants because the defense of the country required it. *That is not a legislative power—it is a defensive seizure.* The president had to act. [Douglas: Minton is very excited about this and pounds on the table.] There is an emergency, and we do care, and we cannot forecast the damage to the nation. Nothing would be more tragic than our boys in Korea needing bullets and having none available because of the strike. The president can seize any property in an emergency.

case was coming down, and we also had heard from the grapevine that the parties were close to settling. The question was could one of us call Arthur Goldberg and tell him to quickly settle it because the Court was going to go the other way. We decided, wisely I think in retrospect, that was not a good idea.

Moderator: That's why you still have your law license.

Mikva: That's why I still have my law license. I might not be here today. But at the time it really was a matter of timing and there was a lot of scuttlebutt around the Court even, that if the Court had just taken the normal course of things, this whole constitutional dispute might have been avoided because the parties would have settled. I thought about that many times in the 2000 election when, all partisanship aside, it was clear that whether the Court decided it or the Congress decided it, that George Bush was going to be the next President of the United States—it would have been the same way if the Court had stayed its hand as usual. I was predicting it was going to do that with all that assurance and whatnot that I would know what the Court was going to do. It never occurred to me that the Court would step in that quickly and make a decision, because clearly the political process was working and the Congress would have made the same decision without the Court using up its credentials.

Moderator: Another fascinating thing is that the Justices didn't disagree with the fact that there was an emergency here. In fact, the Conference notes that we refer to show that Justice Jackson says, "If the president declares an emergency, I will take the president's judgment."[25] There were affidavits from the Secretary of Defense saying there was an emergency. But as Chief Justice Rehnquist said in that film, it didn't feel like an emergency to the country. Is it true that if had there been a real

[25] *Id*. at 180 (emphasis omitted) (reconstructing Justice Jackson's remarks in Conference) .

sense of emergency here, the *Steel Seizure Case* may have come out differently?

Small: Of course, but I think if you look back on what happened in the nation's history, I think that might well have been the case. We only need to think about what had happened during World War II with the Japanese internment situation. Clearly in there it was perceived to be an emergency, wrongfully perceived, as it turned out later. But as in so many of these cases they're going to be decided in an arena of where there is a perception that there is a felt need for something to be done to protect the security of the country.

Hileman: I'd like to step in there. I think that that is what Justice Burton said about a true emergency. I'd like to raise a different question I'm sure isn't on your agenda. Marshall Small told us about Justice Douglas's Conference notes. That's notes that the Justice took during the secret Conferences the Justices had in deciding the cases. As far as I knew, that was sacrosanct—nobody ever knew about that. And to see that they still exist and they can be found surprised me a little. Neal, tell the group what you told us about Justice Black.

Rutledge: Justice Black made, just as Justice Douglas did, very copious notes about what went on in the Conference. And we were allowed—he kept those notes over in the secretary's office. And of course he was appointed back in '37, so he'd been on the Court longer than anybody else there and he had more of these notes. All of the clerks had gone in and looked at his notes, which were superb. In fact, one of the notable things about my term as law clerk to Justice Black was that once at midnight I was working there alone. I had to go into the secretary's office to get some of these Conference notes. I decided to go in through the Judge's chambers because he wasn't there. I opened the door, turned on the lights and walked into the Judge's chambers and a shot rang out. A bullet came in through the window—whizzed right by my head. This was within two weeks of Mrs.

Black's subsequent death. So of course the Supreme Court police came up and investigated and couldn't find who fired the shot. They immediately called Justice Black at his home to warn him somebody might be out after him. And he responded by enjoining the police. And he talked to me thoroughly and very sternly—he said, "I don't want you to say a word about this to anybody." He didn't want it to get out and hit the newspapers because he didn't want his wife to read about it because she would then be even more worried and he thought it might have an adverse effect.

Moderator: On her deathbed.

Rutledge: Right. And then when he got on his own deathbed, he had these wonderful notes. He called his son, Hugo Black, Jr., and said, "In the interest of the confidentiality that I have kept, I ask you to burn these notes. I tell you, instruct you, to burn these notes." And very reluctantly, Hugo Jr. burned the notes in the fireplace there in the Judge's chambers. I regret that very much because they would have been well read.

Moderator: As we wrap up, let me just ask you to talk for a minute about the relevance of the *Steel Seizure Case* today. I began by saying it is still the "granddaddy of the cases" dealing with presidential power. It's been cited in every major presidential power case including *United States v. Nixon*,[26] dealing with Watergate tapes, *Clinton v. Jones*,[27] dealing with the civil suit against President Clinton by Paula Jones. But in post-911 America, there have been lots of presidential powers misused, as you know, dealing with the whole question of the Patriot Act, dealing with enemy combatants and the rights of enemy combatants, especially on American soil when they are U.S. citizens, and more recently having to do with President Bush's NSA secret surveillance wiretap

[26] 418 U.S. 683 (1974).
[27] 520 U.S. 681 (1997).

program. All of these have raised presidential powers issues. What do you think the *Steel Seizure Case* tells us, if anything, about those questions?

Mikva: I think that Justice Jackson's concurring opinion continues to represent kind of continuum of when the President can act and when he shouldn't act, and when he needs Congressional approval and what he can do if it is different than what he wants to do. Today's *New York Times*–talk about the timeliness of this subject—has a long story about how the number two man in the Department of Justice tells about the Attorney General, then John Ashcroft, and several other people threatening to resign if President Bush didn't call off a secret wiretap program that was going on that went beyond the authority that Congress had given in one of the important pieces of legislation they passed. In there they cite that the Attorney General Ashcroft and others were acting on the recommendations of the group known as the Office of Legal Counsel, a very important part of the Department of Justice—the think tank of justice.[28] These are the bright lawyers, many of them career lawyers, who sit and ponder over cases and precedents. And I'm sure that if OLC wrote a memo to President Bush or to Attorney General Ashcroft, the case cited many, many times would have been Justice Jackson's concurring opinion in *Youngstown Sheet & Tool*—maybe even the majority and the minority dissent as well. But certainly Justice Jackson's opinion was continuing to set the parameters in which the President can or cannot move.

Moderator: I had the privilege of testifying in the Senate last year when the NSA wiretap program was first discovered and half of the discussion in there was about the *Steel Seizure Case* and its relevance today.[29] If you heard Chief Justice Rehnquist

[28] *See* David Johnston, *Bush Intervened in Dispute over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1.

[29] *See Wartime Executive Power and the National Security Agency's Surveillance Authority Before the S. Comm. on the Judiciary*, 109th Cong. 109-435 (2006)

talking about President Truman being at his low ebb of power because Congress hadn't authorized these steps, there is a strong argument that President Bush there had gone around what Congress had done, which defies the law and in this case may have been in a lower ebb than President Truman, because his actions came up against the rights of individual American citizens under the Bill of Rights. That's very much a discussion having to do with the *Steel Seizure Case* and its significance with respect to presidential power.

The last thing I want to throw out for consideration, though, is that over the years discussing the *Steel Seizure Case*, there is no one here, is there, who thinks that President Truman took these steps out of some crazy desire to gather a power for himself? I mean, there is no disagreement, is there, that President Truman was acting because he thought this was necessary for the country? Likewise, President Bush, I sincerely believe, has taken step because he thinks these are the right thing for the country. But that doesn't mean the Supreme Court doesn't do its job—and its clerks work to help the Court do its job—so that it establishes the boundaries of presidential power. That's really what this case is about, isn't it?—the boundaries of Presidential power.

Small: Very seldom will the issue come up to the Court, though, I think, in the history of the country where we've seen these sorts of exercises of presidential power in an emergency. Very seldom has it been tested in the Court. So there will be very few cases presumably like the *Steel Seizure Case* as we go forward and meet future emergencies.

Paul: I think we're wrapping up, but it occurred to me to add a quote from Justice Jackson, in the opinion cited by Bill Rehnquist, Abner and the rest of us. Jackson said, early on, I think, that these problems

(statement of Ken Gormley, Professor of Constitutional Law, Duquesne University School of Law, Pittsburgh, Pennsylvania).

of defining the limits of presidential power, particularly by the Court, are as strange and difficult as Joseph was confronted with when he was asked to interpret Pharaoh's dreams.[30] That seems to me to have some accuracy. I wouldn't have wanted to be Joseph in those days because of Pharaoh's wrath, which might land you in a place you wouldn't want to be. But I don't think the decision supplies President Bush with much solace. Even the dissent in the *Steel Seizure Case* was very limited and different from the kinds of presidential power asserted today. So we're left with Joseph interpreting dreams again.

Mikva: Justice Black was one of my favorite craftsmen on the Court. I can't help thinking back over the years, when this issue has come up, that what Justice Black wrote as his majority opinion in *Steel Seizure Case* was what Professor Sunstein would call a "minimalist opinion."[31] He didn't reach any further than he needed to do to accommodate the lowest common denominator to get the Justices to go along with him. Therefore, as a precedent for what a President can or cannot do, it has its limitations. That's why the concurring opinion may be more useful as a scholarly pursuit. But in terms of how to decide a case, I think Justice Black did the minimum interference and harm in the way the government ought to work.

Hileman: I agree with you absolutely on that, although I want to say the main argument against the Court's decision was there was no need for the Court to get into that serious constitutional issue. There are a lot of grounds which could have sent the case back for more evidence and so forth. My own feeling is

[30] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.").

[31] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

that the majority of the Court felt that it was the time for the Court to step in and to say what the limits of a President were. And I think they were pretty—somewhat—heroic in doing that.

Moderator: Before I turn this back over to John Barrett, I'll just conclude by saying that in the end it didn't hurt President Truman's legacy all that much, did it? We now know, after David McCullough's fine work on him and the popularity of President Truman today, that he did what he thought was necessary, the Court did what it thought was necessary, and that's the beauty of our system.

Paul: And his coarse language makes him a solid, great guy, just like Andrew Jackson.

* * *

Moderator: Please join me in thanking the panelists. What we see here is really that fifty-five years is a blink, and that this country's big problems and big challenges are perpetual ones. We had, in 1951–1952, a great Supreme Court well served by extraordinarily talented law clerks. Our hope is that today too we have a great Supreme Court, served well by extraordinary law clerks, with abilities to grapple with the issues that challenge us, just as these men and their bosses did. Please join me in thanking Marshall Small, Neal Rutledge, Charles Hileman, James Paul, Abner Mikva and Professor Ken Gormley.

APPENDIX
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES AND THEIR LAW CLERKS, OCTOBER TERM 1951
OCTOBER 1, 1951–JUNE 9, 1952

Chief Justice Fred M. Vinson (commissioned June 21, 1946)
Law Clerks: Howard J. Trienens, Newton N. Minow and James C.N. Paul

Justice Hugo L. Black (commissioned August 18, 1937)
Law Clerks: C. Sam Daniels* and Neal P. Rutledge

Justice Stanley Reed (commissioned January 27, 1938)
Law Clerks: John D. Calhoun* and Lewis C. Green*

Justice Felix Frankfurter (commissioned January 20, 1939)
Law Clerks: Abram J. Chayes* and Vincent L. McKusick

Justice William O. Douglas (commissioned April 15, 1939)
Law Clerk: Marshall L. Small

Justice Robert H. Jackson (commissioned July 11, 1941)
Law Clerks: C. George Niebank, Jr.* and William H. Rehnquist*

Justice Harold H. Burton (commissioned September 22, 1945)
Law Clerks: John W. Douglas and Charles C. Hileman, III

Justice Tom C. Clark (commissioned August 19, 1949)
Law Clerks: Stuart W. Thayer* and C. Richard Walker*

Justice Sherman Minton (commissioned October 5, 1949)
Law Clerks: Raymond W. Gray, Jr. and Abner J. Mikva

* Deceased