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NEW BRUNSWICK

AN INTERVIEW WITH DAVID SIVE

FOR THE

RUTGERS ORAL HISTORY ARCHIVES

WORLD WAR II * KOREAN WAR * VIETNAM WAR * COLD WAR

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TRANSCRIPT BY

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Shaun Illingworth: This begins our third interview with Mr. David Sive on December 18, 2007, in West Orange, New Jersey, with Shaun Illingworth and …

Christopher Shields: … Christopher Shields.

SI: Okay, Mr. Sive, thank you very much for having us here again today.

DS: Thank you.

SI: Before we started the tape, we were talking a little bit about the role of publicity in trials. Do you want to start off with that?

DS: Yes. Well, if I sound like [I am] teaching a law school course, why, you tell me if that's good or bad. [laughter] …

SI: That is fine, yes.

DS: Yes. Most important environmental cases are, in essence, a judicial review of administrative action, and the judicial review of administrative action can be a review of, in environmental law, a federal agency's action or state agency's action. … The development of environmental law, beginning, really, with the Storm King Mountain Case, involved the review of actions of federal agencies, and sometimes together with state agencies. [Editor's Note: In *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965), a landmark case in the history of environmental law, and subsequent legal actions, Mr. Sive represented a number of organizations in opposing the construction of a pump storage power plant on Storm King Mountain near Cornwall, New York.] The agency action can be what is called informal agency action or formal agency action. Formal agency action is where the agency proceeds by a hearing which is really very much like a trial, except the evidentiary rules are a bit looser before agencies than before courts. The Storm King Mountain Case was a review of action of the Federal Power Commission, which was a formal agency action. … Well, as an example, the case which is important in my own participation in the development of environmental law, what I call The Citizens' Committee Case or the Hudson River Expressway Case [*Citizens Committee for the Hudson Valley v. Volpe*], was a review of informal agency action, where there isn't a formal trial and where the evidence is a collection of documents and perhaps the minutes of informal hearings [regarding] the way in which the Army Corps of Engineers acts. … The Army Corps of Engineers was the defendant in a large number of suits brought to enjoin dams or bridges or other works which gave rise to environmentalists' objections. In the review of agency action, the principal rule is a rule which developed as administrative law developed, and that rule is, defined in each case, the scope of the review, how deeply the review can go. … In most cases of review of administrative action, the findings of fact by the administrative agency are reviewable only if … the findings are arbitrary or without any evidentiary base. The review by the court is similar to the review by a judge, in a civil or criminal suit, of the holding of the verdict of a jury, so that, when the agency action is reviewed, a very important question in virtually all of the cases is

whether the review involves findings of fact or conclusions of law. … That distinction is built into the general act which governs administrative agencies, the Administrative Procedure Act, so that, in the review, it's very important for the party seeking the review, the environmental interest, to deem findings of law rather than of factual matters, the same issue which arises when the judge has to determine whether to grant the motion to overrule a jury verdict or what he must follow in his instructions to a jury. … A lot of the … early environmental cases, indeed, I suppose, most of them, involving judicial review of administrative action are cases in which the environmentalists find it very important to expand the scope of review and the defendants, the agencies, to narrow the scope of review. … The scope of review is expanded by deeming conclusions those of law instead of fact, whereas the defendants say, "This is factual and your review of it is limited to a finding of fact which is arbitrary, without evidentiary base." … In the course of my own work, the presentation of the environmentalists' points involved an effort to expand judicial review of administrative action and expand the scope of conclusions of law. That has a very interesting history, which is illustrated by events today. Going back to the New Deal, administrative law really began or went through a great explosion of its scope with the establishment, by the New Deal, of new agencies or the expansion of the scope of agency's powers. The SEC [Securities and Exchange Commission] was established by a New Deal law. The Federal Communications Commission, I think, was established then, and the powers of the administrative agencies were deemed to be or said to be expanded. The expansion of the power of the agencies and the narrowing of the scope of review was the argument of liberals, and the expansion of the powers of the courts was deemed broadened by conservatives, largely Republicans, to hold back the actions of the agencies. Now, that's illustrated by a very interesting sequence of events, which I haven't seen anybody else point out, but I just happened to remember that one of the most important cases in that New Deal period was a case [*Berman v. Parker* (1954)] that involved the power of a slum clearance agency to use the power of imminent domain to condemn properties to follow through with a redevelopment plan. … The Supreme Court upheld the power, the eminent domain power of the agency, a slum clearance agency, in Connecticut. The decision was by William Douglas, [a liberal Supreme Court justice]. Now, you come down to two years ago, the controversy over the power and use of the eminent domain power in New London, Connecticut, and you have the agency, a redevelopment agency, seeking to condemn the house of a middle-class, a lower middle-class, woman who was fighting the "Goliath" of the development agency. [Editor's Note: *Kelo v. City of New London* (2005).] … The liberals supported the woman against the power of the evil agency. The exercise of power was upheld by the Supreme Court. I think it refers to this case of William Douglas; I don't recall. Now, that shifting of the views of different interests with respect to classical controversies, the powers of an agency, the scope of review, the eminent domain power, is, I think. It's one of the things which sustain the basis of our government. In other words, if there's a shifting of views with regard to important governmental powers between conservatives and liberals, and, in one era, the conservatives are taking one position and, in another era, the other position, that sustains, I think, the duration, the stability, of the government. … Just one other illustration of that, these days, conservatives and Republicans, we see it in every TV program about the present campaign [the 2008 Presidential Campaign], are talking about keeping back the wicked government, the government agencies. You just listen to [Arkansas Governor and Republican Presidential

Candidate Michael] Huckabee and it's classical, but what is their view about the use of the power of the government to forbid abortions, which is an act of privacy? … The privacy action was invented about twenty years ago, again, a decision involving the State of Connecticut, so that this shifting, I think, and this hypocrisy, you can say, is inconsistency, and that goes for liberals as well as conservatives. The liberals, now, I don't see anyone remembering the expansion or the protection of the upholding of the power of eminent domain by, of all people, the great liberal demigod William Douglas. The importance of expanding the scope of administrative review … in judicial cases was the principal issue in a large number of the cases, and the principal issue which I faced, to really wrestle with the upholding of the powers of administrative agencies in the days of the New Deal. … Thus, I began to study administrative law and to become knowledgeable about it, to the point where, in later years, along with a course in environmental law, I would occasionally teach a course in classical administrative law.

One very interesting aspect of that was my being appointed a member of the Administrative Conference of the United States, which is a body … whose function was to review and improve and reform administrative law, the law dictating the powers of the agencies, which are set forth in the organic act creating the agency, the Army Engineers, the Transportation Department, the FCC [Federal Election Commission], and, also, in the Administrative Procedure Act, and the working of the two together is a fine point, which I don't want to go into here. … It was really a funny incident. Sometime in the late '70s, a gentleman came into my office and asked to see me. He was then the head of the Administrative Conference of the US, an office which was occupied by Justice [Antonin] Scalia before he was appointed to the Supreme Court. That illustrates the importance of it, and that Conference was approximately 120 people, a third practicing lawyers, a third … administrative law scholars, mainly from the law schools, and a third officials, the highest official, or the next highest, of the government agencies. The gentleman was the Head of the Administrative Conference. I don't recall his name; you'll forgive it, but the basic illness of mine, Parkinson's, affects the memory. … I can check all these dates or other names which I forget.

SI: We can always adjust that in the transcript.

DS: Right. We exchanged some pleasantries, and then, he said, "Well, I'm here to ask you if you'd be willing to join the Administrative Conference." I didn't know what it was, literally. So, I asked him to excuse me, "I'm just going to the lavatory," went out through the office into the library, not the lavatory, pulled down the *US Government Manual*, understood the Administrative Conference and its importance. … I went back to him and said, "I think I can make myself available." [laughter] Within thirty days, I was at a conference of the Administrative Conference, sitting alongside what I'd call the "demigods of administrative law." One was a Professor [Louis J.] Jaffe from Harvard, who wrote the basic text on judicial review of administrative action. Another was Walter Gellhorn, whom you may have heard of, Professor at Columbia Law School and the brother of the more famous Martha Gellhorn, the World War II reporter, and others, oh, Kenneth Culp Davis, the author of the classical six-volume treatise on administrative law. I was seated with them. … Oddly enough, I had never taken a course in

administrative law in law school, because, to me, administrative law was the practice before federal agencies, or liquor license cases in New York, where the grant of the permit is reviewable by administrative action. I stayed with the Conference for about six or eight years. I think those appointment's were for a two-year period and it was renewed two or three times. In between that and the study of administrative law, in connection with litigations which I brought and as a general student of environmental law, I became quite expert in the refinements of the problem, the scope of … judicial review. In that connection, I wrote a *Columbia Law Review* article, which I think I entitled "Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law," [published in 1970], just as a title for somebody who was learning administrative law in connection with the development of environmental law.

Environmental law did not secure its name, I think, until 1969 or '70? … In 1970, the law exploded. This, I think, is discussed, it must be, a fair amount in the Sierra Club interview. [Editor's Note: In 1982, Ann Lage interviewed Mr. Sive as part of a series of oral histories with Sierra Club leaders for the Regional Oral History Office at the Bancroft Library, University of California, Berkeley.] … Just to review it here and place it in its context, 1970 was the great year of the expansion, the growth, of the environmental movement and the beginnings of the explosion of environmental law. … It caught on, the environment movement caught on, in good part because of Earth Day.

The first Earth Day was April 1st, I think, [April 22nd], in April of 1970. 1970, January 1st was the effective date of the National Environmental Policy Act. 1970 was the date of an action involving the New York State Forest Preserve, Article XIV, and 1970 was the year, near the end of '70, when the Clean Air Act was amended. I think that was adopted, became law, in November or December.

The Clean Air Act had in it what is called a citizen's suit provision, the citizen's suit provision was the adoption in federal law of a citizen's suit statute first enacted in Michigan. … That was in large part the work of, I think, the most famous and important professor of … environmental law, Joseph Sax of Michigan Law School. He wrote and carried on in the Michigan Legislature, the State of Michigan, to enact a citizen's suit which granted standing to environmental interests in the courts of Michigan. That citizen's suit provision was copied, in large part, in the Clean Air Act.

The issue of standing has continued all through the whole period to the present date, and in a number of Supreme Court cases. Justice Scalia, and [Justice Clarence] Thomas following him, have stated that granting the standing to environmental interests without the traditional harm to person or property is unconstitutional, but the standing has been upheld. The citizen's suit provision, in a number of the environmental statutes, following the basic Clean Air Act. Now, that sets in its context the development of environmental law, and the environmental law really is important with respect to, well, its basis, in large part, the activism of environmental organizations.

The mixture of the two processes, the legislative process, defining the policies in the law, and the judicial process is important and, to me, has always been fascinating. In fact, in my own work, the place of myself in the work as a member and leader of a number of environmental organizations, the political work and the judicial work, the legal work, the litigation, the mix here is utterly fascinating. … To illustrate that, I think I may have mentioned in the Sierra Club interview what I refer to as the earliest environmental case of mine, a case which arose before environmental law was used. Looking backward, it involved the review, at the behest of a group of organizations engaged in the protection of the New York city parks. The case involved the proposed grant of a grant by a [George] Huntington Hartford, [II], to build a café in the southeast corner of Central Park.

In that case, the environmental interest lost, all the way up to the Court of Appeals. In the case I interposed a brief, an *amicus* brief, for the Sierra Club. Very shortly after the decision [John] Lindsay became Mayor and Tom Hoving, Park Commissioner, and he nixed the project.

Another classical illustration is the dispute over the Alaskan Pipeline, you probably remember that, in which a suit was brought by, I think the National Wildlife Federation, in which I didn't participate directly, but I did participate in the political controversy involving it.

The environmental interests won in the federal courts, on the ground, the very narrow technical ground, that the statute authorizing the pipeline limited the width of the pipeline, I think, to fifty feet and the work of digging and constructing the pipeline went beyond the fifty feet. The environmentalists won, but, as I recall, it was at the beginning, or just before, the first great controversy over the supply of oil and the price of gasoline. Congress amended the Pipeline Act to authorize the pipeline and the anti-environmental interests, [if] you can call them that, won. [Editor's Note: In November 1973, President Richard Nixon signed the Trans-Alaska Pipeline Authorization Act into law.] … Did you have a [question]?

SI: This is something we started to talk about in the last interview, but I want to re-ask it. You mentioned how publicity and the political interests played into these cases. Were you active in cultivating that publicity and those political contacts?

DS: Yes, right. The work of mine with the environmental organizations, [such as] the Sierra Club, the Natural Resources Defense Council, the Environmental Law Institute, the Environmental Planning Lobby and others was political. The question of the extent to which one may participate in the political side of a controversy, at the same time as, or shortly before, or even after, the court action really involves aspects of professional ethics. To what extent may a lawyer who's the litigating lawyer participate in the political side? … The best illustration of that is in the Hudson River Expressway Case. I called as a witness, among others, a Stewart Ogilvy, who was an officer, one of the leaders, of the Atlantic Chapter of the Sierra Club. … The propriety of his testifying while he was an officer of the Sierra Club and carrying on the political controversy was in dispute. Well, fortunately for the environmentalists, it was upheld. There must be cases, I'm certain, in which the environmentalists has argued for … the question of the

ability of a person involved in the political controversy to be a witness in the legal side of it. … You'll find, I'm certain, if you examine it, the same contradictions, which, to me, is a ground for the stability of the system, that the different interests take different views about classical legal questions depending [on] whether it's good for the good guys. That is, I think, the best illustration of the fact that an environmental lawyer pursuing environmental cases has had to become adept in the rules of professional ethics. Could I head the Sierra Club Chapter and carry on opposition to the Expressway at the same time that I was litigating the case? Well, fortunately for me and the environmentalists, … I think it was not seriously argued by the attorneys for the [New York] State Transportation Department and the Army Corps of Engineers, who were defendants in the Expressway Suit.

Another illustration is the controversy involving the proposed construction of a dye plant on the shore of South Carolina, opposite Hilton Head Island. [Editor's Note: Beginning in 1969, Hilton Head residents, organized as the Hilton Head Island Community Association, began their opposition to a proposed BASF chemical plant on Victoria Bluff.] The interests protecting [the environment], well, opposing the dye plant, which allegedly would pollute the waters, of a very narrow strait between the island and the coast, the interests involved a number of really very different parties: a union of blacks who were seamen and had an interesting history and spoke English with a particular accent; retired admirals and officers of the Marines, because of their interest in the matter. Hilton Head Island is close to the Marine base at Parris Island, and the developers of the communities, resort communities. Their principal lawyer, was a firm with a Joab Dowling. He was a person who was one of the ten or twelve people, it seemed to me, who govern South Carolina. … I think it's always been close to a feudal state and I think still has that character now. Well, he was [with] a law firm, one of the largest in South Carolina, small by New York standards, who engaged me … to help them in the environmental suit, which I brought. … I brought, which I think was the first environmental suit under the National Environmental Policy Act, NEPA, which established the requirement of an environmental impact study and environmental impact statement, an EIS, which has become the most frequent base in all environmental litigation, of literally thousands of cases, since its enactment, its effective date being January 1st, 1970. … The author of it, its main proponent, was [Washington State US Senator] Henry Jackson. He was not a very leftist liberal, but there's a very important environmental history in the State of Washington, and a couple other states, including Wisconsin.

The EIS became a part of the review of administrative action in dozens of cases and, including a number of cases in which I participated and used it as the basis of the suit. Well, I brought an action to enjoin the issuance by the state authorities, a state pier authority, a water authority, of the license for the pier which would receive products to go into the manufacture and which would send off the boats with the finished product. … That suit was brought around the third week of January, 1970 and was, I think, the first suit under NEPA. The suit went on for about six or seven months, with some, I thought, helpful testimony by officials of the Port Authority of South Carolina in depositions, and some important disclosures and documents discovered as part of the discovery process. The case was settled before a trial could be held. The Secretary of the

Interior came out in opposition to the dye plant at the behest of the development's opponents and Senator Strom Thurmond who dominated South Carolina politics, and one of whose principal claims to fame was marrying a Miss America, forty years younger.

Yes, right, and part of the work in which I engaged was, to me, a fascinating visit to the Interior Secretary in his office, by Joab Dowling and myself, and the presentation of the views and opinions of the admirals and the developers of the island and, of course, also, the members, the black members, of the fishermen's union. The Secretary of the Interior, shortly after the meeting, stated that he opposed the grant of the permit. That finished the controversy. I really do not know, and never will know, to what extent the decision was based upon some of the disclosures which I secured in the discovery proceedings in the case, but. Needless to say, I didn't fight Joab Dowling and his partners over many years in stating what a great lawyer I was, [laughter] because I won the case, but I'll never know how much was [due to the legal aspects]. I think, [it was due to] less [the] importance of the disclosures than the views of a part of the important leaders of South Carolina.

This conflict of views is very important as the basis of the development of environmental law and the environmental movement. The movement joins people of wealth and, really, the highest and most aristocratic of social classes and the middle-class people, and even protectors of people in poverty areas and non-white interests, the joining of the two where the environmental controversy was, as many of the controversies involved the protection of a specific area of land. … That land is often the wildest and the most beautiful of lands. The best illustration of that is the Adirondack area of New York State, in which I've been involved in the protection of Article XIV, the Forest Preserve, with which you're familiar.

Beginning with the early '60s, a good deal of my involvement has been in the protection of the New York State Forest Preserve, both in the Adirondacks and the Catskills. That is in part somewhat selfish because, in '57, I and my wife bought a house in the western part of the Catskills, in a very beautiful, mountainous area. It has 160 acres surrounded on three sides by Forest Preserve land, and, on the fourth side, by a fisherman's club, whose members include prominent people. The club owned five thousand acres in this, I think, most beautiful of all areas of the Catskills.

Through the 1950s, 1960s, and 1970s, I became a member and leader of all of the Adirondack protective organizations and brought or was involved in lawsuits and controversies with them to the date of my retirement in 2005.

One of the most important groups was the so-called Association for the Protection of the Adirondacks, which originally consisted of aristocrats, the owners of vast areas of land in what has always been called the "Great Camps," and these "camps," quote, were wooden buildings, sometimes several buildings, in the center of five, ten, twenty thousand acres, owned by the Vanderbilts and the Rockefellers and J.P. Morgan. … The classical union of these owners was established in 1906, before the word environment meant anything other than that part of your

upbringing [that] was not … hereditary. It's a classical dispute among psychologists and physicians, "Which is more important, heredity or an environment?" … You'll find again, the interest groups take opposite sides in that classical study by doctors and psychologists. The Association was the principal protector of the Forest Preserve provision of the constitution.

SI: If you are putting it in as an overview, that is good.

DS: Yes, right. In 1924, I think it was, [1922], the Adirondack Mountain Club was organized, and I later represented the Club and the Association, [the] so-called APA, in several different suits and in the political aspects of the protection of the Forest Preserve. One of the signers of the corporate charter of the Adirondack Mountain Club was Franklin Delano Roosevelt, living in Hyde Park, and with the interests of people like [Secretary of the Treasury Henry] Morgenthau, [Jr.], who was a neighbor [of the Roosevelts in] Duchess County, New York State. Well, I continued, joined in, I think, the mid-'60s, the Association, the APA, for the Protection of the Adirondacks and became, I think, the first or second member of their governing board without the aristocratic background. … The background included the Rockefellers and other owners of the Great Camps, including the members and leaders of the so-called "Adirondack League Club," which is the owner of, I think, close to fifty thousand acres in the western part of the Adirondacks and on which I think there are located twenty-two private lakes. If you look at maps of New York State, you see a great emptiness along the east side of the road going from Utica to Old Forge. That's the area of the Adirondack League Club.

The conflict of different interests is illustrated by a controversy involving the use by members of the Sierra Club, who organized, deliberately, to really litigate the legal side of it, a trip by five or six members along the Moose River, which rises in the center of this great wilderness area, in the center of which is West Canada Lake. That's the best known feature, which lies twelve or fifteen miles from the nearest road, by foot trail. The Moose River flows west into the Black River, which is really considered the end of the Adirondack Plateau, which flows north into the St. Lawrence River.

The Sierra Club members canoed along the Moose River and were halted by the League Club. There was a litigation which determined that the use of navigable waters is protected against the exclusion by the owners of the land in both sides of the river. … The court determination was that the canoeing in the Moose River could not be barred from canoes … to the extent that the river was "navigable." What waters are "navigable" is a classic controversy involving the authority of the Army Corps of Engineers. The question became, "Is the Moose River navigable, and in what portions is it navigable or not navigable?" I don't think that was [resolved]; that was never determined in a resumption of the case. The matter was settled between the Sierra Club and the League Club by permitting canoes to go through along the Moose River, but forbidding them to land on the sides of it and camp on the land.

That was the private land. This is, to me, has been a fascinating aspect becoming involved in a number of controversies where the question is, "Are waters navigable?" If they're navigable, the

Army Corps of Engineers has the power to govern them and erect works in them. That determines the environmental controversy. In the Moose River Controversy, the case was remanded to determine the extent to which the Moose River was navigable, the parent body of the Sierra Club, which really supported the action by the Atlantic Chapter, which I had headed back in the '60s, asked me to represent them in arguing against the navigability of the [Moose] River, I decided not to do so, because I thought that taking the side which I probably had more sympathy with than the League Club … would hamper me and reduce my influence which I had with the classical aristocratic protectors of the Adirondacks, who became involved, [in] later years, in the protection of the Forest Preserve in the Catskills, lessen my influence with them. I told them I wouldn't represent them.

The series of controversies through the years involving the Forest Preserve is another illustration of participation in the political side of the work and the judicial side, and the judicial side. The powers of the vis-à-vis executive agencies, including the President, involved a question of "executive privilege."

It was also interesting and fascinating being involved in questions of executive privilege, and the case where that was developed most was what I call the "Amchitka Case," which I think is discussed, to some extent, in the Sierra Club interview. [Editor's Note: Mr. Sive represented litigants in *Committee for Nuclear Responsibility v. Seaborg*, an environmental suit to protect Amchitka Island from nuclear weapons tests.] Well, that case became, in the Court of Appeals, the Circuit for the District of Columbia, one of the three or four determinations of the extent of executive privilege where the controversy is between the courts and the executive. … In upholding the power of the courts to review the action of the agency, the Nuclear Regulatory Commission, in authorizing and carrying on the underground nuclear tests, in the District of Columbia, in circuit court upheld the judicial power, the power of the judiciary. The Amchitka Case was in some part based upon the *Nixon v. Sirica* case, upholding the power of the court to govern the extent, to compel disclosure of tapes in the Watergate Papers case. [Editor's Note: In *Nixon v. Sirica* (1973), the court ruled against President Richard M. Nixon and upheld that Nixon's executive privilege was not absolute.]

SI: Watergate?

CS: The Watergate tapes.

DS: Watergate, right, yes. Again, I stayed, during the case, in the Watergate Hotel, in Washington, by coincidence. The present controversy is between the power of Congress, the legislative body, not the executive body, and the power of the executives to withhold or to take the extreme position, [in] which Ms. Miers, I think, the one who Bush tried to [in 2005] appoint to the Supreme Court and became his counsel, they refused to appear before the Committee headed by the Vermont Senator, I'll remember the name, and also the chief advisor of Bush who has been subpoenaed. I'll remember his name, too. [Editor's Note: Mr. Sive is referring to

Harriet Miers and Karl Rove's failure to appear before the Senate Judiciary Committee, chaired by Vermont Senator Patrick Leahy, to testify in its hearing on the dismissal of US Attorneys.]

That is another illustration of the mixing of judicial powers and the powers of other departments, and the executive privilege question arises in controversies involving, generally, two of the three basic branches of government. The environmental litigations continued all through the course of my own legal practice, and, of course, in the leadership of environmental organizations.

One of the important and very interesting events, to me, was, in 1965 through 1967, there was, first, the vote, in '65, on Election Day, the vote, "Yes," the affirmative vote, for the holding of a constitutional convention, a state constitutional convention, which the New York State Constitution requires, I believe, every twenty years. This dates back to a time, … well, in the nineteenth century, when part of the growth of constitutions was involved in expanding the power of people to review and legislators to hold constitutional conventions, which goes back to Revolutionary War times. … Immediately after the "Yes" vote, I and members of the leaders of the Adirondack Mountain Club and the Appalachian Mountain Club and the Association for the Protection of the Adirondacks organized a Constitutional Council for the Forest Preserve, "CCFP," to carry on the political work involving the composition of the convention, the determination of who would be the delegates to the convention. That was determined to be elected delegates elected by state senate district.

The work of the people protecting the Forest Preserve involved very heavy political work in the election of delegates who would support Article XIV from any amendments of it damaging the scope and extent of it. That led to the election of a majority of a majority of the delegates being Democrats. The Democrats, as you can imagine, were largely the delegates from the state senate districts in the big cities, New York, Buffalo, Albany, etc., and the Republican delegates from the rural districts. The Democrats outnumbered the Republicans and controlled the convention. Their leader, the President of the Convention, was a classical Tammany Hall figure, an Anthony Travia. Well, at that time, … I think I had become, in part because of my activities in Democratic clubs and Democratic committees, which included the candidacy for Congress in '58.

I was a leading Democratic environmental advocate and appointed the staff head of the Committee on Natural Resources and Agriculture, heading a staff of six or seven who did the work, the background work, for the convention delegates involved in those issues. … It was very interesting to, in my view, really educate the Democratic delegates, largely from the big cities, none of whom had the background of myself, of hiking and camping in the Adirondacks and Catskills and getting to love it passionately.

I did succeed in convincing the Democratic members to uphold the Forest Preserve, pointing out, among other things, that the chief person supporting the continuance of the Forest Preserve provision of the constitution, at a convention in '38, was Al Smith. [Editor's Note: Former New York Governor Alfred E. Smith served as a delegate to the 1938 New York Constitutional

Convention, which established Article XIV, formerly Article VII. He had been the 1928 Democratic Presidential nominee.] … [You can see] the history of the protection of the Forest Preserve by the aristocratic groups and the middle-class groups of, largely, the hiking clubs, which were politicized in the '60s and '70s, and became, … in many respects, the core of the environmental movement. Organizations such as the Theodore Gordon Flyfishers, which was, in my experience, a very aristocratic group. Fly-fishing is not a sport of poor or too many middle-class people. Among the controversies which involved what you might call environmental law. If you define environmental law as that law which is used to protect and advance environmental interests, then, it includes a part of real estate law. As an instance, an important law governing the taxation of real property by municipalities where the property is owned by a nature trust or a nature conservancy is an aspect of environmental law. … That led to, to me, in some respects, the most satisfying case in terms of establishing some legal doctrine in a field in which I was far from an expert. Environmental law became a part of [other fields] of law and other bodies of law became parts of what you might deem environmental law. The other fields included the law of zoning, the law of real estate taxation, the procedural law involved in the civil procedure in the state courts, the state court rules governing the scope of administrative action, and the judicial review of administrative action by state agencies.

The involvement in other fields of law by me came to one head in connection with lands owned by a so-called Mohonk Trust, which owns, I think, about six thousand acres, in the Shawangunk Mountains of New York State, in western Orange County and part of Sullivan County. The lands were given to the Trust by the Mohonk Mountain House Corporation. [Editor's Note: The case was *Mohonk Trust v. Board of Assessors of Town of Gardiner* (1979).] The area in Shawangunk Mountains were originally acquired by a Quaker family, the Smileys, and the lands included, in the mid or late '70s, I don't recall the time, the so-called Minnewaska Tract, in the center of which was the Minnewaska Hotel, and the Mohonk Mountain House. It is still a great and well-known resort. The Smiley Family, owning the Mountain House, conveyed lands to the Trust surrounding the Mountain House lands of four or five thousand acres, which it had given free to the trust, for which the family charged ten dollars an acre.

The question arose, a question of real estate law of what qualifies … for exemption from real property taxes. The question involves a determination of whether the land is used for charitable or educational purposes or the promotion of the moral welfare of men, women or children, language which came from the original certificate of incorporation of the YMCA. That question involved whether those lands, which are kept really as a wilderness, were lands used purely for education or charitable purposes or the promotion of moral welfare, I forget the exact word, of men, women or children. … That case was determined against me in the State Supreme Court, the trial court, and the Appellate Division, the intermediate appellate court. I appealed to the Court of Appeals. The lower courts reversed and held that the use of lands as wilderness or a park purpose was educational. The question, the most interesting one, was that of whether educational function required a classroom, some kind of formal class.

A fascinating part of this, to me, was the use in the briefs and in oral argument of a quotation of a poem of William Wordsworth. Wordsworth is a poetic god to me. I have a [collection of poetry] here on the table. The principal quotation was, "One impulse from a vernal wood [may] teach you more of man, of moral evil and of good, than all the sages can." The case has been fairly widely cited and used by the Nature Conservancy, and other organizations holding wilderness lands, in part because the basic statute governing the taxation in many states is very similar to the New York statute and, thus, involves the same questions.

The case illustrates the necessity of lawyers involved in environmental litigations becoming knowledgeable or expert in other branches of law, and the fact that the several branches overlap. This is illustrated also in a number of cases where the governance of land is by fairly traditional zoning ordinances.

Zoning ordinances and the institution in law of zoning date back, I think, to the late nineteenth century. They, of course, govern the use of lands, and the zoning authority is lodged, generally, with municipalities. … That is the reason for the establishment, in, I think, the early 1920s, of municipalities, in very small areas and [with] populations of less than a thousand people, near the North Shore of Long Island, near Huntington, Long Island, and Syosset, to vest the governance of land-use in municipalities which they could control. The development of environmental law involved the law of zoning, and, actually, in my firm now, one of the partners is a lawyer who has carried on, for many years, almost wholly a zoning practice. … The zoning bar is a fairly separate group of lawyers interested in zoning law and representing interests in the adoption and enactment of zoning ordinances and the interpretation of them.

I was involved in a large number of such cases. The most interesting one was in the early '80s, of myself, was one in which the words of a statute were involved. A chief problem is that of whether the words should be given a broad interpretation or a narrow interpretation.

There, too, in that controversy, you find that several interest groups contradict themselves. Some people, for instance want a broad interpretation of government power against the law of privacy, which they say doesn't exist, is a mistake, in the abortion controversy. The most personal power imaginable, to govern a woman's body, is protected by Huckabee and all the others with him, and, yet, they oppose as wicked government in economic regulation.

The most interesting case involving zoning, and, as in many cases, the interpretation of words, is one in which I represented, for the first time, a developmental interest, [*Town of Henrietta v. Department of Environmental Conservation*]. … That was in the early '80s, when Leonard Dobbs, a real estate developer in New York; … worked together with and operated on behalf of a large real estate developer in Detroit, whose name I forget. The Detroit developer became fairly famous and went to jail. He was involved in the collection of art works. I don't recall the name.

Dobbs spoke to me and told me that, in his view, the interest of a private person in [the] protection of the environment included that of determining the uses of the land and in other

aspects of the development, in his case, a proposed shopping center in the Town of Henrietta, a suburb of Rochester. He owned a tract of land which he wanted to develop for the shopping center, and that involved, of course, the interpretation of a section of the zoning law of the Town of Henrietta. That zoning law section was a section which bears, again, a name which I forget, the description of shopping centers, and shopping centers which involved multiple uses of land. The centers often have, well, … the land parcel on which the pure shopping facility is built is [often] next to or close to a residential portion of the land parcel. The zoning laws governing large tracts which include shopping centers often permit the multiple uses within a parcel, a large parcel.

The law governing development of shopping centers became very important with the fantastic expansion of shopping centers, beginning, I think, after World War II. The law governing shopping centers prescribes the governmental actions in a chain of governmental actions ending with the final approval of the shopping center. … The process includes the reference of the proposal of the application to an administrative body, a planning department, and then, the approval by the planning department and the holding of a public hearing before the legislative body, the town council, and the approval after that hearing. It involves, of course, the review of the actions of administrative agencies, a department of planning or a chief planner, and the legislative action of the town governing body and often a review of those by the court. … The proposed grant of the final approval of the shopping center planned by my client came down to, to me, the most fascinating exercise in law, of the interpretation of statutes.

I think ever since, oh, even before I became a lawyer, I've always been fascinated with the use of words and the different definitions of words. … That's really the heart of most law and that's part of my interest in law.

Well, the Henrietta case involved the definition of the word "If." The ordinance governing shopping centers provided, in substance, that "if" the planning department grants the approval of the application, the application shall proceed to, in this case, to the town council for legislative action. An application was made if the developer of another shopping center area in the same town and illustrating the use of environmental law by different interests, developmental interests, as distinguished from environmental interests, each developer instigated, in part, the creation of a citizen's committee opposed to the other guy's development. The contest was between the two developers with two sets of lawyers. I opposed the application of the other developer. The Henrietta zoning ordinance provided that "if" an application for approval of a shopping center was approved by the town's planning department the applicant might proceed to request a public hearing in the application by the Town of Henrietta council, and that the Council would make the final approval of the project. The rival developer did not secure the approval of the Planning Department, but nonetheless applied to the Town Council which held a public hearing and approved the application. I brought an injunction action alleging that the plain meaning of zoning ordnance was that the statute forbade the Town Council hearing if the applicant did not secure the Planning Department's approval. The attorneys for the rival developer argued that the ordinances, by providing that the ordinance plainly meant that if an applicant did not secure the

planning commission's approval, the Town Council might not hold a hearing and approve the project. The trial court held that the rival developer might secure the Town Council's approval despite the failure of the developer to secure the approval of the Planning Department. It approved the argument of the rival developer's attorneys that the ordinance did not forbid such approval because to do so required the ordinance to provide that such Town Council action was not forbidden, that to do so required to state that such action was forbidden because the ordinance failed to provide that such Town Council action "if, and only if," the Planning Department approved the application.

I appealed the trial court judgment to the Appellate Division of the Supreme Court. It upheld the trial court judgment. I appealed to the Court of Appeals, the State's highest court. It reversed the prior decisions. It ruled that stating "if, and only if," was not necessary.

This is fascinating because one of the arguments against lawyers, and always is, is, "They're putting [in] unnecessary provisions and they're just expanding a simple word to be a whole chain of words and clauses," in a will or a contract or a statute, but the Court of Appeals held that the statute didn't have to provide "If-comma-and only if-comma," but, for different reasons, … I don't think the shopping center was ever built. There arose, I think, financial problems of the main financier of it, who became involved in some criminal action, the details of which I forget. That case, … what I call the Henrietta Case, was I think the first case involving action under the state analog of the [National] Environmental Policy Act. Through the years, a number of states copied the federal act and enacted, in the state, a law fashioned after it, requiring an environmental impact statement for any agency action, governmental action, involving environmental consequences. The law is differently phrased, but that's what it means in substance. So, the development of environmental impact statements and the interpretation of what is called the "state NEPA" or the "Little NEPA," is now a big fraction of the practice of and work of the traditional zoning bar, as well as the other aspects of zoning. A zoning lawyer is one of the partners in my firm. Also involved in the development of environmental law is the law of taxation, what charitable organizations shall be taxed, both in federal and state context, in addition to the municipal context in the Mohonk Case. This first developmental interest which I represented really affected profoundly the growth of my firm, from originally, when it was established in '71 or '72, with three partners, who were one part of a larger firm which divided, because of some very intense disputes among the partners during the time that I was both an associate and, later, a partner. The firm was originally three partners and one associate, just finishing at Harvard Law School. He was the son of one of the larger clients of the firm when it divided and left with four or three partners and one associate. The representation of developmental interests is something which posed questions and problems, and no doubt, to some extent, may be criticized by people who criticize lawyers, saying, … "You represent opposing interests," or, "You represent opposing interests in opposing cases for different interests," and, here, again, you take different sides of it. I personally don't like [former Mayor of New York City and Republican candidate for President Rudy] Giuliani's representation of some of his clients and some of his clients, one of his, is some Middle East development company, but the practice of environmental law in representing developmental interests is very

important in the development of environmental law. … Beginning in the '80s, I think about the mid-'80s, the classical, large law firms, the Wall Street firms in New York and the comparable ones in Chicago and other places, began to place in their staff, both in partners' and associates' [positions], environmental lawyers, and the environmental law sections in the practice by the large, prestigious law firms has been of tremendous importance in the growth of environmental law. … These law firms which established environmental sections will occasionally represent … an environmental interest which may be a wealthy owner of lands who opposes the enactment of an amendment to a zoning ordinance which rezones property adjoining or near his property for commercial uses. … At this time, now and for several years, the environmental sections of the large [firms], two hundred, four hundred, fifteen hundred lawyers, are quite large, as in the Chicago firm where my son-in-law works, a very large, classical one. I think that the environmental section of it has between fifteen and twenty lawyers in one of the classical New York firms. …

[TAPE PAUSED]

SI: Go ahead.

DS: Which has a large New York office.

SI: This is the Philadelphia law firm.

DS: Yes, has an environmental section of forty lawyers and the practice is mainly for developmental interests. … The practice of environmental law, to the extent that it's the representation of governmental agencies, which is important, can be both furthering the environmental purpose [of] the good guys and the bad guys, and that is another illustration that [is in] support of the stability of government. … In one sense, you think it's hypocritical, but, in a larger sense, it stabilizes governmental institutions. Well, … my firm has grown, and I just went in to its annual Christmas party, to twenty lawyers and I think the firm is the largest virtually wholly environmental firm in the country, and it now involves one partner who deals solely with insurance, the insurance involved in properties … the use of which leads to controversy. That is the reason for there being one lawyer devoted to environmental law and involved in insurance, insurance law. Well, the practice of environmental law, like, I suppose, other bodies of the law, and this is most interesting, I imagine, to you [Christopher], with a background as a lawyer, is, of course, an interesting illustration of how law develops, how a body of law develops. A body of law develops by legislation and it develops by court determinations of law, to develop judicially. … The body of environmental law, [as] I've said … in various contexts, law review articles and lectures and teaching courses, is the largest body of law developed, at least in its early stages, mainly by courts, and this leads to the importance of environmental litigation and led to the teaching of environmental litigation as a separate course, the first at Columbia Law School in the mid and late '70s, going into the '80s, and led to the development of environmental law and the laws defining environmental law as the subject of agencies of Continuing Legal Education in the law, CLE. … The continuing education of

professional bodies is, I think, a post-World War II growth. This is maybe best studied by sociologists and political scientists, in the law and other professions, accounting and medicine and others, and, in there, that has been a large part of my own work and practice, and that arose out of the establishment of a course, one, and then, several, in environmental law and environmental litigation by the most important CLE agency in the law field, what's called ALI-ABA, A-L-I-A-B-A, the American Law Institute-American Bar Association Joint Committee on Continuing Legal Education. It's the longest name of any group I know anywhere. [laughter] That was called the Committee on Legal Education of [the] two agencies, but known in short as "ALI-ABA." It began the first CLE course in environmental law, which was sponsored by the California Bar Association, which had a three-day conference, CLE conference, in San Francisco, which I joined out in California. … Then, the head of this joint committee, a gentleman who became very well-known and famous in law circles, a Paul Wolkin, actually phoned me in the Fall of '70. He had read about the Hilton Head Island Case, among others, in the *Times* and *Life* Magazine and others, and an article in *Fortune Magazine,* and asked me to begin to organize an environmental law course for ALI-ABA, which I did. The first course was held in Washington, in, I remember, it was very picturesque, I think they call it the Hall of Whales. It's a huge room which has whales suspended [from the ceiling in the Smithsonian Museum of Natural History]. That was in September '71 and I carried on as the head of the principal environmental law course of ALI-ABA, really, for thirty-three years. 2004, I think, was the last one and, after three or four years of alternating Washington and San Francisco as the site of it, it was established each year in Boulder, Colorado, and that came about, the designation of Boulder as the one location for it, I think with the invention, at least as far as I know, the use by me first, of the term "environmental litigation." … That's another funny story, that among the persons whom I met at the conference in San Francisco, the first one was a member of the law faculty of the University of Colorado Law School and he was also present at a second CLE conference, which was in '71 at Boulder, too, and which I attended. … Then, he asked me to teach environmental law in the summer session of the new Colorado Law School in '76. Well, I taught that and got to love Boulder, as so many people do. [laughter] It's one of the most fantastically beautiful places to work. The National Atmospheric Administration is there, also some other agencies, and always funny to me [was] seeing waiters at the restaurants who were beautiful young women and not the classes of people who have the jobs [typically], … some of which only immigrants will supply now. So, at the end of this course, I told him I'd like to come back. Well, at the CLE conference, which he attended, he asked me if I would bring the CLE course I wrote up to Boulder. So, I invented the term "environmental litigation" and the course was billed as a course in environmental litigation. To some extent, a body of law is built by people teaching it, and the first courses in environmental law in law school were around 1970, and in '76, I think it was, was the first course in environmental law at a law school faculty. … I carried on a seminar at Columbia, beginning in '72, in environmental law. To teach that, I resigned from teaching a course, a graduate course, in civil practice, in discovery, which was a separate field, at NYU, and then, at the end of the course in environmental litigation; … no, at the end of the course in environmental law, the whole of it, in Boulder in '75 or '76, … in the summer session, I went to the University of Wisconsin Law School at Madison and taught an environmental law course there, and then, in the four or five years following, taught, I said as

half joke and half seriously, "I'll teach it in a scenic place." So,I was invited to teach it at Utah in the late '70s, and then, at Seattle in Washington, the State of Washington, and the teaching involved a large part of my time, together with the writing of law review articles. The one in [the] *Columbia* [*Law Review*] has been re-published in a fairly large number of collections of essays and books which are turned out on any subject. They reprint them. Then, in the mid-'80s, I went for a whole semester to the University of Indiana and its law school, and there taught two courses, which most faculty members taught. The second one was administrative law. I'd become an expert in about the one-third of administrative law which is the judicial review of administrative action. I then taught, later on and in recent years, beginning around 1999, I think, environmental law at Pace University in White Plains, which has been a very important center of environmental law teaching, in large part through the leadership of a member of the faculty, Nicholas Robinson, … who worked for me in the Summer of '68, I believe. …

[TAPE PAUSED]

DS: Nick was a student at Columbia in, oh, I forget the exact year, but … in the late '60s, and he had an interest in environmental law, and like so many others who practiced it, the interest was developed first through his being a nature lover and a camper and hiker, [in] his case in California. … He worked in my office, without any compensation, in drafting one of the briefs in the Hudson River Expressway Case. … The Hudson River Expressway Case is an interesting illustration of the development of a part of constitutional law, which is environmental law, one, and perhaps the most important, illustration is the law of standing, which is a constitutional question. … Then, he began practice teaching, and then, was a counsel in my firm for many years, and then, started the environmental section at Pace. It has been, for many years, the third-ranking … of all law schools in the teaching of environmental law, in the ranking by *US News and World Report*, which … ranks professional schools. So, the last few years of my practice, I taught, in addition to practicing, courses in, well, one course in environmental law and that, plus, some other duties was my work as the faculty, and I think that it is correct that the growth of environmental law is more the result of litigation than virtually any other field of law. … I think that's correct because the enactment of environmental statutes followed a fair number of important cases which established part of environmental law, and I've said that environmental law is more owed to litigation than virtually any other important body of law, and it's in large part, I think, because the development of the law, … the development of litigation, environmental litigation, is not wholly the accident of becoming involved in a dispute. A negligence case arises because somebody's in an automobile accident. Contract law arises because [of] a dispute over [the] breach or interpretation of a contract. The making of environmental law has, to a large extent, and it would be interesting to study this and figure, estimate, the percentage has been, the deliberate program of environmental organizations, environmental law firms, the most important of which is, I think, NRDC, the Natural Resources Defense Council. It's interesting, that and the story on page one of the *Times* yesterday, in the article about the Bali Conference, [the 2007 United Nations Climate Change Conference]. There's a whole paragraph which quotes a David Doniger, the principal representative at the conference of NRDC. NRDC, I think, has become, and maybe this is just my view, but I think

it's correct, the greatest of all organizational law firms, in large part because its lawyers have been the top students from the elite schools, which have always been sought after by the elite law firms. … One interesting aspect of it now is that a top student from an elite school can command a beginning salary of one hundred fifty thousand dollars, which is, in some respects, shocking, particularly when I compare it to my fifty dollars a week. I was not a top student, but a good student, above average one, at Columbia. The organized development of law is now carried on by anti-environmental agencies, I think the most important one of which is the Washington Law Foundation. It sponsors an article on the op-ed page in the *Times* by the head of a corporate interest law firm and they carry on the bringing and prosecution of lawsuits to advance the commercial interests of corporations. … They very soundly criticize, I think, hypocritically, without naming them, NRDC and environmental clinics at law schools. The whole development of organized lawmaking, you might call it, which some people may criticize and some people think is un-American and unconstitutional, because you're not basing the standing on traditional interest to property or person. So, the development of environmental law is, in part, the work of these action agencies, Environmental Defense Fund, now called Environmental Defense, and NRDC and classes at law schools. Pace has now a faculty member who carries on an environmental clinic. Columbia has one, organized, for some reason, late in the process. Ten or twelve years ago, they asked me, and a couple of others, to form a committee and help them organize an interesting study to determine to what extent environmental law is this purposeful making of law, making of it not simply in the legislative bodies, and, also, environmental law has involved, well, I mentioned involves borrowing of law from other bodies of law and the definitions of words. The illustration of the definition of words is most dramatically shown by the word "if," but, in the early period, and continuing to this day, environmental organizations and environmental faculty at law schools heading clinics which … use the work of students as part of law training is one big branch of, one big portion of, environmental law.

SI: 1982, I believe.

DS: … '82? Yes, since '82, my own work has been about half teaching, half academic work and writing, and half law practice. The law practice has continued to be primarily litigation and, that you mentioned, the aspects, the earthly aspects, of the trial of environmental cases. Well, I think that, to a large extent, the litigation of environmental suits involves a lesser fraction of cases tried, in the strict sense, than cases decided by other means, by settlement, by summary judgment motion, by motions to dismiss, in large part because it's been the review of administrative action. … The review of administrative action is limited to action which … violates a statute, makes the wrong decision on a question of law, or, where there are questions of fact, determines whether the administrative action is arbitrary or without foundation. So, there are very few cases I can [recall], I think only one, really, I think, [that were] determined after a trial, and that was in the Hudson River Expressway Case, where there was a thirty-day trial because the claims which I made involved action of the Army Corps of Engineers in granting a permit to build a "dike," [in] quotes. … The question was whether the planned six-lane expressway along the riverfront involved a construction of "dikes" or whether what I claimed were dikes were "levees," as used in the Rivers and Harbors Act of 1899. The case was a very important part of early

environmental law and litigation. The court finally held that it did involve "dykes." The Army Corps of Engineers, among other things, in its several drawings in connection with [the] construction, themselves referred to several parts of it as involving "dikes." Well, the court finally held what I argued, that a dike was distinguished from a "levee." A levee holds back floodwaters, whereas a dike impedes or governs the main channel of a river. Part of my proof was that the expressway would extend far enough out from the shore, I think a couple hundred yards in several places, as to deflect the main current of the Hudson River, both ways, because it's a tidal body all the way up to Albany and Troy. So, I can't point to any special aspect of the trial of a case which has involved an environmental litigation, and that involves, of course, use of expert witnesses a good deal, but that's not unique to environmental cases. … Well, yes, there was a trial, forgive me, and an important and interesting case, what I call the Trident Case, [*Concerned About Trident, Inc. v. Schlesinger*]. I don't think I mentioned that in the Sierra Club interview.

SI: No, you did not. We only touched on it very briefly last time.

DS: Yes. Well, the Trident Case was tried before a judge who had a military background before appointment by Eisenhower, I'll remember his name. It involved opposition to the enlargement of a submarine base along the Hood Canal, which connects Puget Sound on the north with a body of water further south. … The base would be constructed, and has been, on the eastern shore of the Canal, which is about twenty miles west from Seattle proper. The objection to the Trident Base, the most important claim was the NEPA claim, that the environmental impact statement was insufficient. The environmental impact statement, the matters which are to be covered in it, are set forth in the statute, and among the matters is alternatives to the administrative action. The base was … planned to be enlarged to accommodate a given number of submarines, I think twenty, and the given number of submarines which [it] was determined to have the base accommodate depended on the predictions of Soviet action, the Russians, "What will they do?" Well, the litigation of alternatives, in the, I think, infrequent trials and the more frequent papers in support of and in opposition to a summary judgment motion, by either the plaintiffs or the defendants, the presence of alternatives is one of the most important and really one of the easiest things to hang a claim on under the act. So, I claimed that the alternatives which were required to be studied and weren't studied were the alternatives of reducing the possibilities and probabilities of war with the Russians, very logically. If you're not worried too much about the Russians, you don't need twenty submarines. You should have studied the alternative of a base to accommodate ten submarines, which would reduce the environmental impact of the base and its surrounding area. … That surrounding area included residences, the principal and second homes, of a number of persons along the Hood Canal and back from the Hood Canal, which had been organized by a citizens' committee, by a local lawyer, a young fellow by the name of [Philip] Best. He phoned me and I think knew of me through reading law review articles. He asked me to represent the opponents to the Trident Base expansion. They included one fairly famous person, a Walter Heller, who was the head of the Council of Economic Advisors for Carter, and lived in Minnesota and came from there, but had a second home, where I think he grew up, near Seattle and along the Hood Canal, I think adjoining the

southern side of the base and the construction. [Editor's Note: Walter W. Heller served as chair of the Council of Economic Advisors from 1961 to 1964 under Presidents John F. Kennedy and Lyndon B. Johnson.] There was a citizens' committee and, because this involved nuclear submarines, a peace organization in British Columbia, and what I call an ad hoc citizens' committee. It is a feature of the environmental movement and environmental law, the formation of particular committees, ad hoc groups, for the purpose of opposing, generally, an environmentally important action, both politically and legally. The prohibition of needless litigation involves ethical questions, if lawyers bring cases which are not needed, and also for the financial reasons; the ad hoc groups are generally underfunded. Large portions of my, particularly early, environmental practice and litigation have been unpaid or paid one small fraction of the regular charge.

The Trident action involved the citizens' committee and Walter Heller and [other] individuals.

The head of the citizens' committee was a very well-known head of the School of Public Administration [Evans School of Public Affairs] at the U. of Washington, a kind of ancestral family of the Seattle area. A principal street in Seattle, that is an exit from the interstate, [bears] his family name. … I brought the action in the district court in Washington, DC, and alleged that … the environmental impact statement was insufficient in several respects, including the failure to treat all the reasonable alternatives, one of which was peace. Well, the principal witness for the defendants, … the Department of Defense, which [James Rodney] Schlesinger became the head of during the case, had as one of its chief witnesses a rear admiral who worked at the Omaha Airbase in Omaha, Nebraska. … In cross-examining him, both in a deposition and at the trial, I asked him, did he consider the alternative of peace? and the court sustained the objection to that question, holding, correctly or incorrectly, that they're not going to go into predicting the chances of war or peace in predicting the strength and program of the Russians. Maybe it wasn't intended that the probabilities of war or peace be litigated. The environmental impact statement was held sufficient by the trial court. I appealed, and two of five claims about the insufficiency in [the] environmental impact statement, not the war or peace, not the alternative section, were held by the Court of Appeals of the Washington, DC, Circuit that the statement was insufficient. It reversed, in part, and remanded the action to the District Court but did not enjoin the project, and I advised the clients that, "I don't see the wisdom of carrying on with the very difficult raising of money to pay even a fraction of the fair charges to me as worthwhile." So, I didn't litigate a retrial of the issues involved in these two aspects of the EIS and the appeal of that when the Court of Appeals didn't enjoin the project. … The case, in the determination of the trial judge, as well as the Court of Appeals, a determination which was questioned on appeal, a course appeal by the government, by Schlesinger, who had become the head of the Department of Defense, and his name was substituted in the name of the case, the case was not carried on.

I didn't carry on the case beyond the determination by the Court of Appeals, but, in an earlier ruling by the trial court, sustained by the appeals court, the application of NEPA to defense agencies, to military agencies, was upheld. … The case is important for that doctrine, in some respects, similar to the Amchitka Case. [The Amchitka Case] was an important case in the law

of executive privilege, and that's another feature of environmental cases, I think, environmental litigation, that, more frequently, there are important determinations which make the law, [more so] than in other bodies of law, very often for the same reason that has held me back from carrying on litigation, the purely financial reason, that there's so much which a client can raise and so much which the lawyer will work for. The importance of volunteer work, *pro bono* work, by lawyers is a feature of environmental law. In that respect, of course, it's similar to the law governing civil liberties and other bodies of law.

One of the most important early controversies in the '60s involved an oil spill at Santa Barbara. [Editor's Note: In 1969, an offshore oil platform accident caused a massive oil spill in the channel off of Santa Barbara.] Santa Barbara is a place of pretty fancy people. Another very important controversy, which didn't come to litigation, where I was involved leading the Sierra Club, was the controversy involving the so-called "Great Swamp," the wetlands and large swamp area east of Morristown and south of this area, about twenty-five miles south. So, that growth of environmental law, by the deliberate litigation of individuals and organizations created to litigate, among other things, is a feature of environmental law, and the making of parts of the law by determinations apart from the grant of the principal actions sought by the plaintiff is a feature of environmental law.

I think the Hudson River Expressway Case may, to this day, be one instance of a permanent injunction of a large environmental project by a case which went through the whole course and trial and the Court of Appeals and the Court of Appeals upholding it and denial of *certiorari* by the Supreme Court. The defendants, the Department of Transportation of New York State and the Army Corps of Engineers, sought unsuccessfully *certiorari* by the Supreme Court. So, those are features of environmental litigation and … perhaps the expert testimony may be a larger portion of the environmental litigation, both in the pretrial stages, the affidavits of experts, and at the comparatively rare number of cases which are tried. Another dramatic illustration of the … definition of words was in the case involving the construction of an interstate through the principal park of the City of Memphis. [Editor's Note: Mr. Sive is referring to the landmark US Supreme Court case of *Citizens to Preserve Overton Park v. Volpe* (1971), in which a citizen's group fought the extension of I-40 through Overton Park in Memphis, Tennessee.] I didn't participate in that case, though I participated a good deal in the controversy, in the political aspects of it. The statute forbad the crossing or the use of parkland which would inhibit the main use of the parkland, and the road was planned to cross what is really the, quote, "Central Park of the City of Memphis." So, that is illustrative of the several features. That, too, was litigated at the insistence of an ad hoc group.

I think in environmental cases, well, to the extent that environmental cases involved the use of parkland, National Parks or state parks or municipal parks, and a good number of them do, including the Nashville Case, which went to the Supreme Court, … as many other cases now; I should have mentioned it, environmental cases are about a third of the material in a textbook or treatise on administrative law and, conversely, administrative law involves, well, like, environmental law, involves administrative law. Well, in the Trident Case, one feature [that]

was not a feature of law is the participation by the attorneys, and the ad hoc or permanent groups, in raising money. … In the Trident Case, one of the interesting parts was the raising of money by the ad hoc committee by … running boat trips in the Hood Canal and looking at the shoreline. The shoreline, the eastern shore of the Hood Canal, is one of, I think, among the most beautiful places in the world, because you look out over the canal, it's not technically a canal it's a natural body of water two or three miles, virtually against the shoreline is the Olympic Mountains, snowcapped. There aren't too many places in the world where, from the ocean or sea, you see snowcapped mountains, at least in the temperate zones of the world. The raising of monies and the involvement of the attorneys and the parties in the raising of monies for the lawyers can, in some cases, be questions of the professional ethics of lawyers. … I think that the participation of lawyers as advocates, other than in litigation or the traditional work of lawyers, participation as advocates, is almost unique in administrative law. I'm not familiar with the large number of lawyers mentioned in the civil liberties field who are known for their participation in the politics, the political movement. I can name a couple, but I don't think that it is as much as in environmental law. One interesting aspect of the Trident Case was the examination, oral examination, of officers of the citizen's group in an effort to determine how many people went on a boat trip and how much they contributed to that boat trip. Well, correctly, the court sustained, at the trial, my objection to that motion, … the effort to get the evidence by the defendants, the Department of Defense and its lawyers, that was where the judge with the military background sustained me in my claims at the trial. The Trident Case was very interesting and involved, personally, a number of trips to Seattle, where, for different reasons, my sister lived, though she came from Brooklyn, and led, I think, to the teaching at the U. of Washington in Seattle.

Other cases in the later period, yes, included cases involving the construction of "Forever Wild." That's the battle cry of the environmentalists in the Adirondacks and the Catskills. … One interesting feature there, which was unique in environmental law, to the extent that that body of law is made by litigation in the Adirondacks and, also, a good number of cases in the Catskills, I don't think I was in any important case in the Catskills, just as a matter of coincidence, the constitutional provision of [the] New York State Constitution providing that the lands constituting the Forest Preserve shall be kept forever wild was originally enacted as part of the Constitution in 1894. … For reasons which I don't think anybody knows exactly, the proponents of that, and I imagine that included persons who helped in writing it, because they were the Great Camps people, beginning around 1870, included Section IV, which says, in substance, "Any citizen may bring an action to enforce this article." That was a unique citizen's provision, seventy years before the citizen's provision of the Clean Air Act and sixty-five years before the standing of the citizens' group Scenic Hudson [was] sustained in the Scenic Hudson Case. The principal historic case … involving the "Forever Wild" provision, [*MacDonald v. Association for the Protection of the Adirondacks* (1930)] was a case brought by the Association for the Protection of the Adirondacks, a group of wealthy people, to enjoin the building of a [bobsled run] at the 1932 Olympics. … It held that that building of a track on Forest Reserve land violated the provisions of what was then Article VII. It was renumbered later on [in the 1938 New York State Constitutional Convention].

My own work in the "Forever Wild" cases, yes, there was one or two others, back in the early '70s, I'm not certain whether this is in the Sierra Club [interview], involved the enactment of the Adirondack Park Agency Act, which created an Adirondack Park Agency to which was granted the land use control, the zoning power, of the whole Adirondack Park area. It is half Forest Preserve land, state land, half private land, which is about eight thousand square miles. It's a huge fraction of the, oh, approximately forty-nine thousand square miles of New York State, equal to the area of Connecticut, I think. … When that act was enacted by the state, a lumber interest and others brought suits to declare it unconstitutional and the constitutionality of it was upheld. In one case which I brought, there were two cases, I brought [it] with the plaintiffs, including the Association for the Protection of the Adirondacks, the rich guys, and the Sierra Club and the Adirondack Mountain Club. The Adirondack Park Agency Act, interestingly enough, was the work of [Nelson] Rockefeller when he was Governor. He created [it] around '67, when, for different reasons, because of the growth of the environmental movement in general, which I date in '65, from the Storm King Mountain [Case] and Rachel Carson's *Silent Spring* book, he became interested, I think, both [because of that and] because a Rockefeller Family member owned one of the Great Camps near a so-called Ampersand Lake in the Adirondacks, near Saranac Lake, and other wealthy people, J. P. Morgan and investment bankers. He [Rockefeller] created the Adirondack Park Agency to study the regulation of the private lands of the Adirondacks, in addition to the governance of the state lands by the constitutional provision, and he rammed through the Legislature the Adirondack Park Agency Act in 1970.

One interesting part of that was, the environmental organizations in which I participated carried on very strong efforts to secure the enactment of the land use authority governing the Adirondacks by a state agency, as distinguished from the Town of Tupper Lake and the Town of Lake Placid and the town where Keene Valley lies, by the municipality with the zoning power. The Adirondack Park Agency Act created the agency and gave it the power to zone the Adirondack area and they zoned the Adirondack Park area by classifying large areas as completely wild land, comparable to the lands of the Forest Preserve. … Those lands, the wild lands, included the wild lands of the Adirondack League Club and others and the lands treasured by the hikers, where I'd been going since the age of seventeen. … One aspect of it was, when the Adirondack Park Agency Act was enacted by the Legislature and went to the Governor for signature, it went to him on a Thursday. … I remember, on the Friday, my working the Saturday and part of Sunday to get a memo to be written by a friend in the Adirondacks, … who's a lawyer, to write a memo to send to the Governor on behalf of the (APA?) and the Sierra Club and others including the Adirondack Mountain Club, sustaining the constitutionality of the Adirondack Park Agency Act, which was attacked by the developing interests, lumber companies and others, but I told him, "Please, get the memo done by Tuesday." Well, Monday morning, Rockefeller signed the act. We didn't have to do the memo, and that was an illustration of the wealth of environmentalists. Another funny one was, in '70 or '71, I remember it was the time that I and two others, I perhaps mentioned this with [the] Sierra Club [interview], Whitney North Seymour, Jr., who was the US Attorney in the Southern District, and a Steven Duggan, a partner of the law firm who was the head of Scenic Hudson, … when we were organizing NRDC

[Natural Resource Defense Council], Laurance Rockefeller, a son of *the* Laurance Rockefeller, who had, among other things, … somehow, he or his parents went through the bother of spelling his name differently, [often identified as Larry Rockefeller, Jr.], you always had to be careful when dealing with him, and he was plucked out by Steven Duggan to be among the first members of the board of NRDC. He's been a member ever since, both when he was a student at Columbia Law School [and as] he worked for me for about five or six weeks in my office, on the legal aspects of the opposition to the expansion of the Newburgh Airport. The Newburgh Airport was proposed by Rockefeller to be a fourth jetport and the Newburgh Airport lands were eight thousand acres, which, for some reason, was owned by the US and was one of the small airports given to the states after World War II. There was a program of donation to aviation by the Federal Government of territorial lands and I brought a suit to enjoin the condemnation of the lands of the airport, including the unspoiled eight thousand acres. My motion for an injunction was denied, but, and this maybe … happens in environmental cases where the government leaders are environmental interests, … Whiting North Seymour, Jr., was a top environmental interest proponent when he was a state senator, in the '60s, before he became the US Attorney for the Southern District of New York. … In yesterday's *Times,* the op-ed section has an article criticizing Giuliani for assuming too much credit as a lawyer for fighting the racketeers, pointing out that the Southern District of New York is the premier training ground, with standing and reputation, for lawyers, for young lawyers, and it's always been that and that's related to the occupancy of the US Attorney's Office, … partially related to the District Attorney's Office in Manhattan County, New York County, being occupied for thirty-five years by [Robert Morris] Morgenthau. That's what the article is about, pointing out the distinction of the Southern District as the great builder of the standing of young lawyers and of the US Attorney. Well, coincidentally, you know, a good part of the growth of my firm is owed to the joining of the firm as associates of the two partners of Sive, Paget and Reisel, the firm, [David] Paget and [Daniel] Riesel both came out of the US Attorney's Office to my firm, although, perhaps to this day, they earned less than, substantially less than, the senior partners in the environmental sections of elite firms. So, that involvement of lawyers as advocates and the attraction of a growing body of law which, like civil liberties, is part of the growth of environmental law. …

[TAPE PAUSED]

SI: Thank you for lunch. We were talking again about the course in discovery.

DS: Yes, right. I got the idea for that from my own work and suggested it, at a party at the residence of Robert [B.] McKay, and he then seemed favorable, I think enthusiastic. It was important and one of the growths of law, very important, was the growth in importance of the discovery process, after World War II. … I became quite knowledgeable in discovery by demands for documents and aspects of the scope of discovery as distinguished from the scope of admissibility at a trial. … Discovery, now, is, oh, a good fraction of a whole book of, or course on, civil practice, because far more cases are resolved [as] a result of or in discovery proceedings as those tried, particularly in commercial and corporate fields and environmental field, among others. … One of the highlights of that was beating Cyrus Vance in a discovery issue, [laughter]

which they appealed to the Appellate Division. That was the beginning of a friendship with Vance, because I've always made careful effort, as any good lawyer [does], to keep relationships with the adverse attorneys on a courteous and friendly level.

One aspect of that, which I don't know whether I mentioned in the Sierra Club interview [or not], a very interesting two or three years, I worked on litigation, as a lawyer, in the firm as a lawyer, for the State of Vermont. Vermont brought a lawsuit in '70, which was part of the revolution, the environmental revolution of '70, through the efforts of a Robert [Jim] Jeffords, I think it's Robert, who's now the Senator from Vermont. [Editor's Note: Mr. Sive is referring to Jim Jeffords; Senator Jeffords was the Vermont Attorney General in 1969.] He was then the Attorney General for the state and was an environmentalist. He decided to fight the International Paper Company, which had its principal paper processing plant on the western shore of Lake Champlain at Ticonderoga. Pulp processing for paper is one of the dirtiest industries imaginable and the residue of the processing process is some gooey scum, which the International Paper Company, for fifty years, and its predecessor, would dump out in to Ticonderoga Bay, as well as air pollution, the smoke of the plant. There was an important effort of a Lake Champlain committee, a citizen's committee, [to challenge the plant]. The chair of the committee was Peter Paine, those father was head of a bank and part of the governing community of a rural area. … I think it was they who suggested to Jeffords, in '69, that they engage me as their attorney. Jeffords and the State of Vermont a suit by a state versus a state is the one original aspect of suits in the Supreme Court. Their entire jurisdiction is appellate, except for a state versus a state.

Since 1789, I think there have been only seventy-two original suits. A number of them have involved interstate resources, like a large fraction of the principal rivers of the US. One suit I know involved the Colorado River, … which serves several states. Another involved the states of Pennsylvania and Jersey and New York involving the Delaware River and the governance of the Delaware River, part of which is opening or closing the flow of waters out of the New York City reservoirs into the Delaware, the east branch, which is the source of the water supply of … the City of Philadelphia. They take the water from the Delaware a short distance I think south of Port Jarvis, and the three states were involved in an original suit. I don't recall who was the plaintiff. The resolution of that suit is a compact administered by a three-state commission, which governs the Delaware and determines when the gates shall be open from the Delaware River reservoir system which feeds New York's water.

I became the attorney for the State of Vermont, I and the firm. That was utterly fascinating, an original suit. Among other things, the rules governing the original suits essentially give the Supreme Court the power to enact its own civil practice code, its code of trial and discovery and every other part of a civil practice law. … One of the aspects of it which was interesting was the appointment as an examiner, the referee, of Ammi Cutter, conducting the suit, who was to conduct the suit and the proceedings and issue a report, which then goes to the full Supreme Court for adoption or rejection. This was in early '70, the same time when everything else was happening, and the Supreme Court appointed as the examiner a [Richard] Ammi Cutter, C-U-T-T-E-R, who had just retired, or reached the retirement age, as one of the members of the

Supreme Judicial Court of Massachusetts, which was the Massachusetts Court of Appeals or Supreme Court. As soon as he was appointed, he called the attorneys for a meeting in his office in the Supreme Court of Massachusetts, and, there, I met the attorney for the International Paper Company and the State of New York. The paper company's attorneys were an elite Wall Street firm, the name of which I'll remember, [Davis, Polk & Wardwell], but the individual attorney who attended the conference was a Taggart Whipple, III. Whipple is a very aristocratic name in New York and Taggart, a member of this firm, [which] was known for its quality and aristocracy. The attorney for the State of New York was a good friend, whose name I'll remember, too, who teaches at St. John's [University in New York City] and he was a partner, and still is, for many years, of a leading Westchester County firm and a good friend. Well, he was there, and Whipple and I; we held a conference about how the suit should proceed. … At the end of the conference, Cutter insisted that the attorneys go for a walk with him through the aisles of the courthouse, in which he pointed out photographs and portraits of members of the Supreme Court of Massachusetts and other aspects, and I first got to understand this Cutter, who was a lawyer of some real standing and the head of the trusts and estates section of an elite Boston firm and the owner of a second home and land in the southern part of the White Mountains [of New Hampshire], which is a resort where Boston's proper people, … a lot of them, have their summer homes.

The problem for me was, Cutter had never been in litigation and he didn't understand the function of discovery proceedings. So, he held a large number of hearings, a number of hearings, personally, and wouldn't permit, didn't want, document production or oral depositions, didn't understand discovery practice. Well, that was a problem and the suit went on and, ultimately, was settled, but part of it was a funny experience. He carried on the suit at the time that I was on the Executive Committee of the Bar Association and the Executive Committee always used to host one of two annual meetings of the American Law Institute. This is the scholars and the elite people. I became a member of the Institute a few years before that, I think, and the hosting of the gathering was always at the City Bar Association, in their large and very lovely building, and is a highlight, a social highlight, of Executive Committee people and [their] families and others. There were cocktails at the beginning of it and a large number of people assembled in one of the large rooms. … I then knew that Cutter's wife was there, and I wondered, "How do I greet her? Do I talk to her?" because a trial lawyer, talking to a judge during a trial is forbidden. So, I wondered about it, but, then, by chance, … we were standing next to each other and we began to talk by her patting my shoulder and saying, "Oh, you're the young man in the suit. I'm glad Ammi is busy." [laughter] That rendered academic the calculation of how I should deal with her.

The suit went on, with a number of sessions, meetings, by me, in Montpelier, the Vermont state capital. … One of the two or three men from the Vermont … Attorney General's Office, appointed by Cutter, was a fellow by the name of John Calhoun, who was very pleasant. We spent pleasant evenings dining in the restaurants and bars in Montpelier. At the second or third of them, I was puzzled and I asked him, "By [the] way, if you don't mind my being personal, are you related to *the* John Calhoun?" His answer was, "Nobody's ever proven I'm not." [laughter]

That was pleasant, but challenging, and part of the reason for the engagement of me by the State of Vermont may have been the fact that I was charging a [good] deal less than the hourly charge which Taggart Whipple and his firm, I'm sure, was charging. It was five thousand dollars a month, I think, which was really very small, but helping me in that suit, and this was another feature of environmental litigation, is the interest in it, as well as in other public law fields, developing law, of older people. … One day, a year or two before the suit, [I came to know] a gentleman by the name of Arthur Palmer, who had been a partner at one of the elite firms, then became bored with it, became an investment banker, then, decided he would try to practice some law. He lived in some very lovely part of Long Island, near Huntington, in the aristocratic area. His neighbor was Henry Stimson, and he was interested in doing environmental work. [Editor's Note: Henry L. Stimson served as Secretary of War during World War II.] So, he came to my firm and worked for a year or two, without compensation, and I put him to work on the Vermont Case and he helped us. The Vermont Case was ultimately settled, after testimony by expert witnesses who were examined by a member of the Attorney General's staff of Vermont, not myself, for different tactical reasons. Palmer was a very gracious and wonderful person, and his wife. They had a summer home up in Northeast Harbor, [Maine], near Seal Harbor and Acadia National Park and … [my] wife and I and one child visited them a few times. … He was a great storyteller and one story about him was his friendship with Stimson, who he said, many mornings, would commute from the Huntington Station to New York by riding a horse a mile from his residence to the station, with a servant who would take the horse back, and then, in the evening, come to the station with the horse. So, he had stories about Henry Stimson. I had gotten to admire Stimson, though he was a Republican, for his work and service during World War II, … and [as] one of the saintly figures of the Bar Association.

The suit, the original suit, was fascinating and among the proceedings was the argument of a motion by me, on behalf of the state, to amend the complaint, to join to it the operation of a new plant up the lake, which the paper company built which began a good deal before the suit was begun. … Involved in the suit, and I think a large part of Jeffords' feeling, was the fact that strong west winds would shake up the water in Ticonderoga Bay and take the scum and drive large quantities of it across the lake to land on the shores of Vermont. So, the proceedings involved a lot of expert testimony about whether the scum was destructive or harmful, even though, admittedly, it was unsightly, and the proceedings involved the search for expert testimony or information about the levels of the lake, because, if the lake were low, the scum, or more of it, would rise to the surface and be driven to Vermont. If it were high, [the] lake were high, less of the scum would be driven. So, we each searched for information about the history of the lake. Taggart Whipple and his firm turned up a journal of Thomas Jefferson, who I learned took a trip in Upstate New York, I think with James Madison. Madison invested [in], bought, a large area of land in the area of Utica, New York, in the Mohawk Valley, and I think this trip was with Madison. … Jefferson wrote in his journals, a reference to the lake and said, "The water is damp and scummy," or something like that. Taggart Whipple brought it in [as] evidence and I objected. … Cutter listened to Taggart Whipple, then, listened to me, and I argued against it for about ten minutes, hearsay and other things, but the hearsay rule was based on, used on, the probabilities of it not being true, and, in this case, the integrity of the writer of

the memoir was Thomas Jefferson. [laughter] So, after about ten minutes, I supposed that Cutter would not let me question the integrity of Thomas Jefferson. I gave up. The memo of Jefferson was admitted and I didn't have any evidence which was equal in standing to the words of Thomas Jefferson.

At a point during the hearings of the expert witnesses, I told Jeffords, "I think you should consider settlement, because the fair costs of the litigation may be close to or as much or more than the cost of treating the scum," I told him, "If a settlement achieves almost or equal to or more than a pure victory, in the ordinary commercial case, I'd advise you to settle." I think he took that advice, and there were negotiations and the suit was settled at a time when I wasn't working much on the suit, but two attorneys in Jeffords' office were. … They conducted most of the examination and cross-examination of the expert witnesses who were testifying about the effects of the smoke, the air effects, on Lake Champlain and the surrounding area, vast areas of which had colored air and sky for generations, accepted by people before, among other things, vast numbers of professional people became residents of Vermont, that [were] attracted to it because of its natural beauty, including, in the last ten years, Dan Riesel in my office. He's bought a place, a home, in Vermont.

The case was settled, and then, Palmer died, after about three or four years, but he worked in my office without compensation, didn't require any, and wrote a couple of the documents in the suit against the State of New York. The most fascinating aspect of his work was the tales about Stimson, including his horse. He himself [Palmer] commuted from Huntington, they had an estate out there, but didn't go to the station by horse. [laughter] That must have been in the '30s and '20s. He was much older than I and a very lovely and pleasant gentleman. … He wrote a book later, the name of which I forget, which dealt with his experiences as an investment banker and in part as a lawyer … before he became an investment banker, which reminds me of another interesting story. You tell me if this is too much or gets boring. …

SI: Is it about you or is it about Palmer?

DS: It involves me, yes.

SI: Please, go ahead, yes.

DS: In [my] work in the Adirondacks, I became familiar with its history, which involved the most aristocratic families in the US buying the thousands upon thousands of acres for their log structures, in some cases, whole villages, like the Rockefellers' Great Camp in the center of the Adirondacks, just south of Brackett Lake, one of the Rockefellers. … One of the important aspects of the growth of the conservation movement, the environment movement before the current environmental movement, was the growth of the concept and the policy of the protection of wilderness. Much of the environmental aspect was [centered on] wilderness and in the history of the wilderness movement, in large part carried on by the Wilderness Society, whose office is in Washington, [DC]. It was the principal instrument in securing the enactment of the

Wilderness Act [of 1964], which was an important part of the environmental movement, in '64, well before the wilderness proponents were a main part of [the] environmental movement.

The Wilderness Act in '64 was in large part the work of the Wilderness Society.

The Wilderness Society was founded in '24 [1935] and the main worker in that, the main organizer of it, was a gentleman by the name of Robert Marshall. Robert Marshall was a saintly member in the wilderness movement. A large area of Montana, oh, several hundred thousand acres, in the Bitter Root Mountains, is … the Robert Marshall Wilderness. [Editor's Note: The Bitter Root Mountains are a range of the Rocky Mountains in the westernmost part of Montana.] He died at the age of thirty-eight and he was famous among environmentalists and hikers for founding the so-called Forty-Sixers. Forty Sixers are the group of people that climb all forty-six peaks over four thousand feet of the Adirondacks. It was followed by a similar organization in the White Mountains [in New Hampshire], I forget the name, and one in the Catskills [in New York], fairly recently, who climb every peak in the Catskills over thirty-five hundred feet, about twenty-two of them. My wife is one of them. You must climb four peaks in mid-winter, which is a feat, even though the Catskills aren't as rugged or as cold as the Adirondacks. Robert Marshall was one of three brothers in the family, really, the public notice of which started with a Louis Marshall, [the father of Robert, George and James Marshall]. Louis Marshall was a very successful lawyer at the beginning of the twentieth century. Among other gifts by him, when he became wealthy, was the money to establish the Jewish Theological Seminary up near Columbia University, very important in the training of liberal, I think, non-Orthodox, Jews, Jews are Orthodox, Reform and Conservative. There's an old joke somebody recited, that … he was assimilated [and], when asked, he said, "Well, I put together the Reform, the Orthodox and the Conservative."

Reform Jews are, I suppose, the most successful of the three branches. They consist, in part, of the German Jewish community which emigrated from Germany here after the Revolution of 1848. Those German families became quite wealthy, successful. Among other things, a fair number of them became the investment bankers on Wall Street, the Kuhns and Loebs and others.

[Louis] Marshall had three sons. The ownership of a Great Camp in the Adirondacks became a sign of the top aristocracy of the US. They had their winter homes on Jekyll Island in Georgia, off the coast of Georgia, near Sea Island. I've said that the wilderness movement and the Wilderness Act are owed to, in part, the anti-Semitism of the Adirondacks. Now, it is correct that the Adirondacks, a large portion of it, was anti-Semitic. They wouldn't [have] Jews and probably [not] if your name ended in an "O," and certainly [not] if you were non-white. I grew up, as a child, with the conviction, the learning, that you don't go to the Adirondacks if you're Jewish. … I remember running into questions and problems when I took the first camping trip in the Adirondacks with my brother and my father and others, wondering, "Well, what is the index of the rise into high society? Nothing more than the ownership of a Great Camp in the Adirondacks." Louis Marshall, in the early twentieth century, bought about two thousand acres near Saranac Lake and I've thought that, and I think it's correct, that you buy land and a summer

home, you do in many other things, to be in the right group of people. One of the Adirondacks Great Camps, ten thousand acres, is [owned by] the Lehman Family. That was bought around 1920, I think, and it's a great honor to be invited by the Lehmans to their … Great Camp. Each of them has a name. I forget the name of the Lehman [Great Camp]. Well, Marshall had three sons and they grew up as children in the Adirondacks.

Robert Marshall became a hiker and developed a love for the Adirondacks, which is a place of great passion. I have always thought that, even more than people who love other areas for different reasons, Robert Marshall hiked and climbed all the peaks of the Adirondacks and developed a passion for the Forest Preserve and wilderness and founded the Wilderness Society. The story of it is [his] writing the organization papers as a member of the Cosmos Club, in Washington, which is a club like the Century Club and the Metropolitan Club in Washington, but which has a special claim to exclusivity, in part *bona fide*, that it was a club for scholars and people of distinction. … If you go into their building, which was a lovely, large, old mansion on Connecticut Avenue, near Dupont Circle, the corridors are filled with books. … It really is a scholarly group and it has, among others, great members, [Henry] Kissinger, for instance, and others whose pictures are in there. I started going there when I went to Washington in so many environmental suits, because, among other things, it rented, provided lodging, small rooms, very pleasant, for twenty dollars a night, was a non-profit, and a member of the club would sponsor me as a guest. You had to be sponsored and you paid twenty dollars. Later on, I became a member of it, but Marshall, Robert Marshall, was said, and I think it's correct, to have written and organized the Wilderness Society doing the work in the Cosmos Club, which is a story. … The Marshall Family, the three sons are Robert, James and one other; I forget the name.

James Marshall was a partner in the firm of Marshall, Bratter, and others, [Marshall, Bratter, Greene, Allison and Tucker], on Park Avenue. They were just across the street from our office. James Marshall, in my childhood, was the head of the City Board of Education, and I remember textbooks of the schools would have the name, "James Marshall, Board of Education." Marshall, among other things, James, became a member of the Sierra Club and he disliked aspects of David Brower's [the first executive director of the Sierra Club] conduct. So, he, when Brower became the head, at a certain point, … decided he wanted to resign from the Sierra Club. About that time, he and I befriended each other, because of his interest in the Adirondacks, and his office was across the street, across 56th Street, from mine and, in fact, we'd see each other's window. So, he befriended me and we became friends and he became one of the original and important members of the first board of NRDC. … I dissuaded him from resigning from the Sierra Club.

We used to have lunches; we'd talk about a number of things and, for me, it was quite fascinating. So, I have said, in a lot of places, that a good deal of the impetus for the formation of the Wilderness Society and the Wilderness Act was the anti-Semitism in the Adirondacks, because Louis Marshall wanted to rise above that, as [did] the Lehman who bought the Lehman Estate.

Some of the Great Camps were owned by investment bankers, this original German Jewish community, including the Kuhn and Loeb firms, whose family owned a Great Camp of about seven thousand acres on a large private lake in the northeast corner of the Adirondacks, where the principal town features Tupper Lake, a large lake, like Saranac Lake. Among the members of that family was a wonderful woman who was a member of the Sierra Club, whom I befriended. I spent one long weekend up at that estate, the Great Camp, and I also spent a few days, in the summer of '67, particularly, when I worked in Albany. I was writing briefs in the second of the Scenic Hudson proceedings, representing the Adirondack Mountain Club and the Sierra Club and others. Her name was Susan Reed, who was a wonderful lady. She had tremendous energy. She came from the Reed Family, which had a Great Camp in the southern Adirondacks with a private lake, I forget the name of the lake, near Piseco. Lake Pleasant, at the southern border of the largest of the wilderness areas of the Adirondacks, the center of which is West Canada Lake. West Canada Lake is an important name and subject in the Adirondack Mountain Club, in part because it's the center of the largest wilderness area, utterly beautiful, where the mountains are about thirty-five hundred feet.

Mount Marcy, fifty-three hundred feet and forty-four hundred feet, and West Canada Lake is the midway point of the so-called Northville-Placid Trail. That's a foot trail of 120 miles, which begins at the southern … edge of the Adirondacks, near Sacandaga Reservoir in a town called Northville, which is about fifteen or twenty miles north of the Mohawk Valley.

The trail goes 120 miles through this largest wilderness area of West Canada Lake and ends close to Lake Placid. … Hiking the Northville-Placid Trail is, in many respects, like the Appalachian Trail, though it isn't quite as rugged and mountains. … A funny experience, my wife and I were hiking for four days and three nights about thirty miles along the Northville-Placid Trail from a point about thirty miles from the beginning of the southern end at the Town of Piseco Lake, the trail above that the trail goes, further northeast to Blue Mountain Lake and Blue Mountain Lake Village. Blue Mountain Lake Village is one of the most beautiful lakes. … Blue Mountain is there and ninety or ninety-five percent of the shore of it, Blue Mountain Lake, is subject to an easement, which is an important instrument used by lawyers, including myself, in preserving land by getting the development rights with an easement and conveying the easement to, among other things, a charitable organization. I, at one point, for a number of years, owned a four-hundred-acre tract in the Catskills, near the northwest, which consisted, really, of one mountain, the northwestern-most high mountain of the Catskills. … When I sold it, … I gave an easement on the summit of the mountain, forty acres, to the Catskills Center for Conservation and Development. It is a very important organization in the Catskills, and I worded the easement to prevent the logging of the summit, the forty acres. … For that, I remember, I reduced the price of that forty-acre piece, selling the land to the buyer, to half the price of the other acreage.

At the midpoint center of the 130 miles is Blue Mountain Lake, which is very famous for the Adirondack Museum. It is, I think, considered by professionals [to be] the finest of regional museums. The frontage of the lake is subject to the easement which preserves the lake wild. It has a lovely conference center, which is especially used by environmentalists and other good-

works people. It is owned by the family by the name of Hochschild. Hochschild owned virtually all of frontage of Blue Mountain Lake. One son of his is a very well-known writer of fiction; I forget the first name of the son, Hochschild, [Adam Hochschild].

Ironically, the Hochschild wealth, it's a very wealthy family, comes from the operation of a large mining area in the Rocky Mountains about thirty or forty miles west of Denver, on the road from Denver west. If you travel along that road, you see a vast area utterly ruined by the mining. So, I've always thought it ironic that the Hochschild Family, whose wealth comes from that mining created the easement of Blue Mountain Lake and funded … the Adirondack Museum.

When Rockefeller organized the Adirondack Park Agency, he appointed Harold Hochschild as the chair of it, and I would have liked to be a member, but Rockefeller wouldn't appoint Democrats. He appointed Republicans. … Hochschild led the Adirondack Park Agency for the two or three years which it took to render its final report, which recommended the creation of a state agency to govern the Adirondacks. … That accomplishment was part of the history of the aristocracy of the Adirondacks. When my wife and I, about fifteen years ago, hiked about thirty-five miles, the hike was from Piseco Lake to the southern end of Blue Mountain Lake. A few years preceding that, I got to know Hochschild and would help him and the Agency in its studies of legal aspects of what it could do. … Among other things, he invited me, "David, if you're ever at Blue Mountain Lake, ring me and see me." Well, the last night of the hiking, we got to a camp which was used by auto travelers at Blue Mountain Lake and washed and cleaned ourselves. The next morning, I phoned Hochschild. He said, "Dave, come and have dinner with us;" a luncheon. We went to his luncheon and the day after the last day of the hiking. There were two servants and fingerbowls. [laughter] So, from the wilderness to fingerbowls, an interesting thing.

The legal aspects of the work, the time spent with the agency, I befriended a lawyer, Henry Diamond. You may have heard of that name, who was one of two senior partners, of a Washington firm with about a hundred lawyers. Henry Diamond became interested in the environment, as so many others [have], because of a passion for the Adirondacks. He organized the firm which became one of the first firms practicing environmental law, among other subjects, in Washington. In the course of the work of the Adirondack Park Agency, I think before that, Diamond became an employee or a lawyer working for the Rockefeller Family. The Rockefellers have a large office, I think it's the whole of the fifty-sixth floor of one of the buildings of Rockefeller Center, the building which has a nightclub. I forget the name of it, [the Rainbow Room in the GE Building]. … In the course of events in the '60s, Henry Diamond became what I call the "[Henry] Kissinger of the … Environmental Movement."

The Rockefellers have a custom of engaging one top person in each field of public policy, education, foreign affairs, environment, and [Henry] Diamond became the star boy of the Rockefeller Family for environment. So, I befriended him. He was the opponent of me in … one important controversy which … involved the City of Rye, Rye and the Town of Stamford. Among Rockefeller's great proposed projects was a bridge, the Rye-Oyster Bay Bridge. It was

beaten politically, but, near the end of the three-month controversy, for some reason, the opponents to the bridge, ([it] may have been due to Henry Diamond,) whom I had befriended, engaged me to help bring a lawsuit against the Rye-Oyster Bay Bridge, the principal attorneys for which were the Paul, Wiess firm and a Edward (Costikyan?), a member, he was … one of the top Democratic leaders in the County of New York, in New York County. I did a little work near the end, but, Rockefeller lost the political fight, because a number of Republican legislators in the Assembly and the Senate opposed the bridge.

Rockefeller had four great projects; he was "the great builder." One was the Rye-Oyster Bay Bridge, another was a proposal to put a fourth jetport serving New York at Newburgh; one was the Adirondack Park Agency; the fourth was the Hudson River Expressway. He won only in the matter of the Adirondack Park Agency. He lost in large part because of the revolt of Westchester legislators against the Rye-Oyster Bay Bridge.

Henry and I developed a close friendship. Among other things, he, just as a matter of accident, would give the speech before meetings of organizations on the occasion of they're giving annual awards to me. We became very friendly.

Diamond became the first commissioner of the Department of Environmental Conservation, which was created in the early '70s, again in 1970, when a number of states restructured traditional fish and game agencies, [which] was the main activity before the environmental movement, created environmental departments and revised and wholly rewrote the organic law. New York did so and Henry Diamond became the head of it.

At about the same time, I organized the Environmental Planning Lobby, which consisted of a large group of organizations whose work was the lobbying in Albany. The Environmental Planning Lobby ("EPL") had been created in '68 and there was some legal work I did for it. It had an original budget of two thousand dollars a year. They were able to engage, as a lobbyist, a gentleman, not a lawyer, who ran a small advertising agency. He was engaged at the suggestion of Whitney North Seymour, Jr. Also organizing the EPL was Stewart Ogilvy, a saintly figure. Among other things, I and my wife named him as the guardian of our children in case we died.

In '70, Henry [Diamond] asked me to enlarge and strengthen the activities of the Environmental Planning Lobby and he got Laurance Rockefeller, Jr., to contribute eight thousand dollars, although he was a Republican and I am a Democrat. … That enabled us to expand the EPL, which joined some of the legal actions and I headed for, oh, the six or eight years beginning in 1970, and Laurance Rockefeller, Jr., … secured the eight or ten thousand dollars, which Henry asked him to contribute to the reorganization of the EPL. Among the officers of the expanded EPL was a lawyer who didn't practice law, but was the brother of the Governor of New Jersey, who became the head of the 9/11 Commission.

SI: Governor Thomas Kean, [New Jersey Governor from 1982 to 1990]?

DS: Yes, right. It was Hamilton Kean. He was a very, oh, wonderful, very great person, and he became, at my behest, a vice-president of EPL. He was one of the first board members of NRDC. He lived in Manhattan and I don't think he ever worked for a living, but he, all the time, I think, to this day, has worked full-time for the charities of the Kean Family, … one of the aristocratic families of Jersey.

Hamilton became a member of NRDC and he and I did a lot of work expanding EPL, which is now called Environmental Advocates, which has become the leading lobbying organization for the environment and, now, interestingly, has about four or five of its leaders, … who's full working time [was] with EPL, lobbying and writing and attending meetings, appointed to fairly high posts by the Governor, who was a good environmentalist.

There's an interesting question as to how the views and work of a person who was a leader of an environmental group should carry on as a government official, when he or she has a broader constituency. … When environmentalists see corporate people, high corporate officers, appointed to government posts, we object. We say, "You shouldn't do that," but there's no objection to these, at least I haven't heard any, yet, environmental figures of EPL, now called Environmental Advocates [being appointed as] fairly high officers in the Environmental Conservation Department. So, that too is related to environmental law and how it expands by the regulatory activities of the governing department.

The Adirondack Park Agency has largely been staffed by non-environmental organization people and their record was very favorable for environmentalists when [Mario] Cuomo was Governor, [from 1983 until 1994]. … Then, when [George] Pataki became Governor, it began to be somewhat more liberal in granting permits for developments and permits involved in the governance of the Adirondack lands. Pataki, though, was a great hiker and he hiked the Adirondacks a lot. … He's been responsible for [protecting] large areas of land, several hundred thousand acres, most recently, acreage of the Fitch Pine Lumber Company. It has been covered by the media. The growth of the division of the rights of ownership of land, of the fee ownership, what lawyers call the full ownership, the fee ownership, certain aspects of the ownership to different entities and more than one person and the growth of the grant of rights to large areas of land, several hundred thousand acres, the grant of the lumbering rights to the Fitch Pine Company, among others, with a proviso that there shall be no clear cutting. [That] is a very important instrument in the growth of public land and the environmental protection of large areas of land, in large part in the Adirondacks, which would otherwise be threatened by clear cutting and destructive practices, is an important development. Pataki is mainly credited with that, correctly. He, by coincidence, has a home near Cold Spring, along the eastern shore of the Hudson, adjoining land and an old large house owned by a charitable organization which is mainly an organization of a Perry Family in Texas, a Robert Perry who has a large ranch of a couple thousand acres in Texas, about eighty miles from the Alamo and close to the hilly lands which are near Austin, and very lovely. I've been there as a guest. Perry, by coincidence, was a lawyer who became the head of the litigation section of EPA, when the first Bush was [President]. … I had the habit and … practice of inviting, as part of the faculty at the Boulder

ALI-ABA meetings, officials, the highest officials I could get, of environmental departments. I got Perry to come out and we formed a very close friendship and I visited the family "holding," quote, Mandeville [House in Garrison, New York], which is a large, old house close to the Hudson. He has shown me the slave quarters of it. He, for many years, hasn't worked, except as administrator or the manager of Mandeville and of the Texas lands, which includes a ranch. Perry was a lecturer for many years, when the Republicans were in the Presidency, at the Boulder Conference. One of the lecturers there, too, yes, was the fellow whose name I should recall, who used to be the attorney for [Vice President Dick] Cheney and now is fairly high [up]. I forget his name, but he's now a leading partner in a large Washington firm. So, he was one of the people whom I would use to staff the faculty at the ALI-ABA programs in the thirty-three years that I conducted them, and, now, [the] chair in organizing it is Dan Riesel of my firm. … Quite a few of the people in the firm are lecturers and teachers, … some in colleges and a couple in law schools. Dan Riesel took over the course in environmental litigation at Columbia when I retired from it. I turned it over to him about eight or nine years ago; yes?

SI: Could you tell us more about your role in founding the NRDC and more about what you did with them?

DS: … NRDC came into existence because the Scenic Hudson Board of Governors or Directors; we had twelve or fifteen people, which several times met in my office in the building at the northwest corner of 42nd Street and Third Avenue, [the] so-called Chrysler Tower East. … At one point, Steven Duggan, I think, who had the original idea of the creation of NRDC and got Whitney North Seymour, Jr., a younger partner in the same firm, and myself, one of the board members of Scenic Hudson, to propose [the creation of the NRDC]. We were influenced by the work of the Environmental Defense Fund, which was created about two years before NRDC. It grew mainly out of the Rachel Carson *Silent Spring* controversy. It was created by a lawyer, Victor Yannacone, with an office in Patchogue. He brought some early suits to enjoin the spraying of DDT in Long Island, Suffolk County. … I don't think he was successful in enjoining it, but he secured a grant of ten thousand dollars from the National Audubon Society, the principal working executive of which was a Charles Callison, whom I befriended for many years and was an expert witness for me in the Second Storm King Mountain proceeding, along with David Brower and a couple of others. At Duggan's behest, it was proposed for Scenic Hudson, at one of its meetings, to go national or beyond simply the Storm King Mountain Controversy. … It came up on a motion which was defeated by the conservative members of Scenic Hudson's board, who included some residents on the mountain, in addition to the Duggan Family. Duggan's wife, who was always called "Smoky," was the daughter of a lawyer who was the donor of a small pond, about ten or fifteen acres, close to the summit of Storm King Mountain, up a thousand feet from the Hudson River. He donated that pond to the Town of Cornwall-on-Hudson, just south of Newburgh, which includes Storm King Mountain, and the Duggan Family, in part for that reason, because they were residents of the mountain, organized Scenic Hudson, along with members of the New York-New Jersey Trails Association. I'm not certain of the exact name [the New York-New Jersey Trail Conference], though I worked with them for many years.

The Storm King Mountain Controversy started with the work of a lawyer, a Leo Rothschild, who had a small office in the Wall Street area, who was a great hiker, every weekend. … I may have mentioned this in the Sierra Club [interview]; when he learned of the proposal to build the pump-storage plant at Storm King Mountain and, as he said, (when he saw an article in the *Popular Science Magazine*, with a sketch of the mountain, half of which was torn away and a great bridge cable across the river, which the magazine called, "The World's Greatest Wet Cell Battery,") he became angry, wrote a letter to the editor of the *Times*, and then, together with Duggan and residents, formed Scenic Hudson [in] '63, almost the same time that *Silent Spring* was published. The motion for Scenic Hudson to go national was defeated. I and others tried to get it enacted and Duggan then decided, "I'll form my own organization," and he got Seymour to help him and others, and then, began the work of creating NRDC, an important aspect of which was the financing of it. Well, Duggan had the connections, among other people, with the Ford Foundation and his work, including meetings with the head or the second-ranking official of the foundation's environmental section, a Ned Ames. The Ames Family is very important family, also with an aristocratic background, and Ned was the second-ranking land or conservation official for Ford. Mainly through Duggan, Ford appropriated three hundred thousand dollars to form NRDC. Part of the formation was a very important meeting of about eighty or a hundred people in Princeton, that place for aristocrats and other people well-to-meet. In '69, I attended that meeting and that secured many of the original members and donors of NRDC and it then [began]; I don't remember exactly at what point the certificate of incorporation was filed, which would be, legally, the beginning of it. I was the lawyer of the three, the one who had actually been engaged in environmental cases. Whitney North Seymour, Jr., didn't have an environmental practice; he was then the US Attorney in the Southern District. We created NRDC.

Duggan originally got the idea of going to, or maybe he was contacted by, one or more of the Yale students in their last year, permanently got staff who were interested. I began meeting with them and convincing them that it was a good social objective to be part of the environmental movement and work with NRDC. I was the head of the Law Committee of NDRC. Shortly after NRDC was founded, I think at the behest of [President Richard] Nixon, the IRS threatened to oppose the granting of exemption, as a charitable educational organization, of NRDC, on the ground that it isn't a proper charitable activity to litigate. Litigation was immoral, and there was a tremendous fight and struggle against IRS, which was led by a partner in a very well-known and very highly regarded Washington, DC, tax firm, whose name I don't remember at the moment. Well, he was important in this opposition to IRS and, about six months after it began, IRS decided [to drop the issue], I think as part of a decision of Nixon, who was responsible for a fair number of good things, the establishing of EPA, the signature of the Clean Air Act, the signature of the National Environmental Policy Act. He was, in many respects, one of the most important creators of the environmental movement as a matter of politics. So, NRDC prevailed in the fight with IRS, although it involved some restrictions and conditions of the grant of exemption and deductibility of contributions to a litigating organization. Among those restrictions was the approval of every litigation, every entry into a litigation, of a committee of

lawyers. … That committee, I originally headed and remained the head of for quite a few years, I think ten or twelve years. … The committee would approve of legal actions which are carried on by the members of the law staff of NRDC, including [Gus] Speth and a David Hawkins, and just utterly brilliant people. The first litigation of NRDC, I think which I suggested, because they looked to me to lead, at the beginning, the legal work of all of these Yale students, was a lawsuit against the TVA [Tennessee Valley Authority] arising out of the pollution by power plants under the jurisdiction of the TVA, the opposition to which was led by a famous author who wrote a book, the name of which I forget, about the exfoliation of the Tennessee lands by TVA.

That was the first legal action of NRDC, and then, they joined, and, in later stages, led, the Storm King Mountain fight, which took the form of several lawsuits after the original licensing suit and after the remanded proceedings in the Second Scenic Hudson Case, [which] the environmentalists lost, in which I represented [them] and was at hearings for several weeks in Washington and wrote briefs in the Summer of '67, in the evenings that I worked in Albany for the constitutional convention. … A very important suit was a suit against a power plant in the federal courts by NRDC based upon the killing of huge masses of fish, several thousand fish, who were drawn up into … the opening at the foot of Storm King Mountain, called the "tailrace." The operation of a pump storage plant is using electric power to draw water from a large body of water through a pipe to the top of the hill or mountain, and then, send the water down the mountain to the shore of the water body, using that to create electricity, like a power plant. … [It] is very desirable from some standpoints, even though a third more power is used in sending the water up, but the power of the pump-storage plant creates "peak power," which means power virtually the instant you want it, like the early evenings of a hot summer day.

One of the important aspects of the Second Scenic Hudson litigation, involving many days of hearings before the FPC, was the expert testimony. … The Consolidated Edison Company, I'm trying to remember who the lawyers were, it was another large firm with a very fine trial lawyer, the company changed its highest official to a younger person who came out of the projects in the northwest, in the State of Washington. I remember, [at] the time, he became the president of Consolidated Edison and had a much more liberal view and, in later years, aided the environmentalists. I'll remember his name. The suit was a suit brought in as a plenary suit in the district court, NRDC was successful in enjoining the plant because of its suction of fish. An interesting part of this second proceeding, to me, was the examination, the presentation of the expert witnesses opposing the plant. Garrison was the leading lawyer and he had the full time of a young person who'd just come out of Harvard before that, an Albert Butzel, who's very well-known, who's a wonderful person. I befriended him. I remember when he was engaged, out of Harvard, by Garrison, he came to a meeting of [the] Scenic Hudson Board in my office and he was introduced by Garrison. He was a young person with wild hair, seemingly, and looking like a beatnik, and I just felt demoralized, because I thought of these conservative people, including a well-known author [Carl Carmer] who had a house in Dobbs Ferry, along the Hudson, a house, a hexagonal house, which has been preserved, the name I forget. Among his books was a very well-known one and highly regarded one called *Listen for a Lonesome Drum*. He was a student

and a master of the folk history of New York State, particularly the Mohawk Valley area. That book was about the Mohawk Valley. He was one of the conservatives on the board. I was really discouraged when I saw Butzel, but he just threw himself into it and his whole time was with Scenic Hudson and became a passionate environmentalist. We became close friends. He was a young lawyer with Paul, Weiss.

NRDC secured the three-hundred-thousand-dollar grant from Ford, and then, at an early point, Duggan, (at Duggan's insistence?), was to retain the head of a top mail order house in the city, which carried on mail order campaigns for NRDC and helped in the early financing.

NRDC gradually expanded its scientific staff and administrative officials and its writers and its lawyers, it has now over a million members, although, interestingly enough, the members don't have the power of the membership of many organizations where the members elect the governing board. [The] governing board of NRDC is self-perpetuating. It nominates and appoints members of the board as vacancies occur. Its membership, the board membership, at a certain point, … early after the formation, I think at Duggan's instigation, it retained, added to the members of the board, a Native American, an Indian group out in New Mexico, and I think, later on, the first non-white people. … It's been very effective and very careful, even though it isn't as democratic, in a sense, as the National Audubon Society, where the membership really elects the governing board. Among other aspects of NRDC, it was interesting, and I may have mentioned this with the Sierra Club, was a decision by Garrison, and myself and Al Butzel, to give me the responsibility, on the second go-around with FPC, the trial, to concentrate on the beauty issue. The beauty issue is the issue as to, "How beautiful is Storm King Mountain and how do you define beauty?" I engaged [David] Brower and Charles Callison and a couple others as my witnesses. … The procedure at the FPC, with its trial, is what would be the direct examination orally in court is written testimony, and the lawyers, with the witness, write the testimony and the witness is asked one question, "Do you adopt the testimony in the written statement," exhibit four, five or six? and they answered, "Yes." "Your witness." The cross-examination begins. That's the procedure of FPC, and a number of other agencies. Well, in the [trial], I cross-examined one of the leading witnesses for Con Ed, who was the topmost, or one of the topmost, people in highway construction, very well-known, and he would handle the landscaping of interstate roads, among other things. He was engaged by the power company to testify about the effects of the power plant and, among other things, he testified that the walls surrounding the 250-acre lake to be created by the plant, by expanding the fifteen-acre lake originally given to the … Town of Cornwall, and use that lake as a pumped-storage plant … to open the gate and send the water down, … among part of the examination of him by me, cross-examination, was to get him to admit, "Well, isn't that really flushing it down?" and he said, "Yes," and I said, "Like a toilet." … I think it was evasive, but it was just a show, although there wasn't a jury, but it's one of the amusing parts of the cross-examination. … That experience became part of lectures in classes at the law schools and at the CLE programs in Boulder, where I always, every time, headed three or four lawyers who presented aspects of litigation, including law concerning the scope of the examination of administrative agencies in judicial proceedings, the scope of which grew as a matter of general administrative law out of the environmental

cases. Of course, in some cases, environmentalists argue for narrowing the scope, such as in the suits which may be brought, a number have been brought, by this corporate organization, the executive director of which writes occasional … articles in the op-ed page of the *Times.* One was two or three years ago, really castigating universities and families of great wealth. He said, "It's immoral when they don't supervise the work of charitable organizations which get their wealth, and then, carry on," what to me is good works, "environmental and civil liberties suits," I suppose the primary one is the Ford Foundation, that has a liberal history. It granted three hundred thousand dollars for the formation of NRDC and I think two hundred thousand to help create the Environmental Law Institute, which became the first publisher of environmental works and scholarly works, the board of which I chaired for the first ten or twelve years. … The scope of the review of administrative action is something where you have different views depending on whether the good guys or bad guys want it to be narrow or broad, but that's lawyers. You become the advocate of your client, even though another advocate may contradict that, and that always gets interesting comments by non-lawyers, and with some justification and understanding, and that's involved in some criticism of Giuliani now. It's a continuing problem for lawyers.

SI: Let us take a break for a minute.

DS: Yes, right, okay.

[TAPE PAUSED]

SI: This concludes our series of interviews with Mr. David Sive. I want to thank you for all your time.

DS: Oh, I thank you.

SI: It has been very gracious of you to give us so much, not just today, but also during the first two sessions. Thank you very much.

DS: Well, thank you, good.

----------END OF INTERVIEW----------

Reviewed by Steven Ng 4/21/10
Reviewed by Mary Joyce Poblete 4/21/10
Reviewed by Jon Pagtakhan 4/21/10
Reviewed by Joseph Dalessio 4/21/10
Reviewed by Dion Fisco 4/21/10
Reviewed by Steven Wacker 4/21/10
Reviewed by Oscarina Melo 4/21/10
Reviewed by Shaun Illingworth 7/2/10

Reviewed by David Sive 4/13/11