

## Senior D.C. Circuit Court Judge Laurence H. Silberman Gives Guidance to the Energy Bar on Winning that Appeal!



### Leading Luminary of the Law Shares Insights

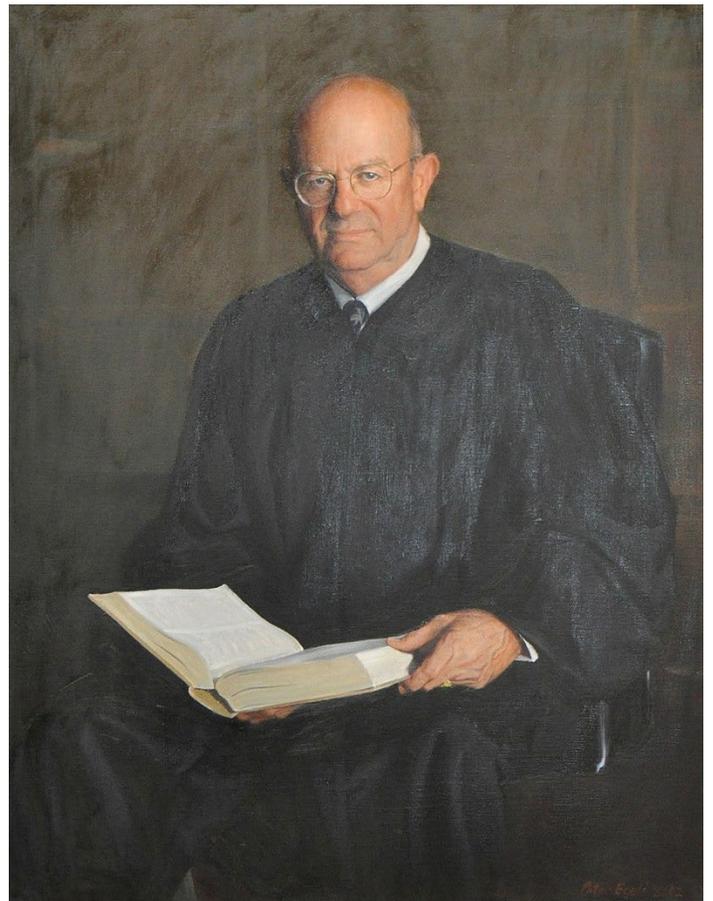
It was a great honor for your humble scriveners Gary E. Guy and David Martin Connelly (aka “Henry Luce and Ben Bradlee”) to be granted entrance into the Judicial Chambers of a veritable institution on the bench of the United States Court of Appeals for the District of Columbia Circuit, the Honorable Laurence Hirsch Silberman. This prolific jurist, who has penned leading case law decisions in many areas of the law, including energy, graciously permitted our request to sit down with him for an hour-length interview in November. And what a wealth of wisdom he bestowed! Here is a recap of some of the highlights (including praise of the current FERC Solicitor’s Office, and what he calls a “heinous crime” committed by some of us during oral argument).

### Formidable Pre-Judicial Career

While it may seem as if Judge Silberman has always been on the appellate bench, where he has been on senior status since November 1, 2000, he was appointed in October 1985 after a most impressive career already. In effect, by virtue of his ongoing stellar judicial career, he has eclipsed all his other impressive achievements, following graduation from Dartmouth College in 1957 and Harvard Law School in 1961.

**“I started out as a labor lawyer in Hawaii to clerk for an appellate judge.”**

“I had an interesting background for a Circuit Judge” he explains. “I started out as a labor lawyer in Hawaii to clerk for an appellate judge. But he died before I started.” Derek Bok, the Dean of Harvard



Law School, had recommended the clerk position to him. He became a partner in a Hawaii firm, Moore, Silberman & Schulze, and practiced there for eight years. He was also a bank executive (Crocker National) in San Francisco, and a partner at two law firms (Morrison & Foerster and Steptoe & Johnson) in Washington, D.C., where one of his areas of specialization was practicing before the Federal Communications Commission. So, he knew banking, administrative law, and based on government positions, labor law, three important specialties for an appellate court judge.

In terms of government experience, he was a labor lawyer at the National Labor Relations Board for two and a half years. He was one of two NLRB appellate lawyers who wore a Nixon button. He left the NLRB for a year so as “not to be an employment lawyer all my life” and because this move “made me more attractive for a political appointment.”

It worked. When President Nixon took office, he was tapped, first to be Solicitor, then Undersecretary, at the Department of Labor. He stated that the labor unions had a veto over appointments while George Schultz was Secretary of Labor, but they gave him a pass because he had won cases favorable to labor at the NLRB. He was also Acting Attorney General during the Watergate crisis.

Once the Ford Administration came into office, he was appointed Deputy Attorney General. Interestingly, when *The Wall Street Journal* celebrated its 130<sup>th</sup> anniversary last summer by republishing its best opinion pieces, it highlighted a July 20, 1985 piece by Judge Silberman concerning his review of the secret papers of J. Edgar Hoover in 1974 and 1975 as Deputy Attorney General, uncovering a 1964 White House aide attempt to have the FBI smear Republican presidential candidate Barry Goldwater. The Johnson appointee appealed to Mr. Silberman that he was young and did not want his children to learn of the episode, leading Mr. Silberman to conclude, “I thought to myself that a number of Watergate figures, some of whom the department [DOJ] was prosecuting, were very young, too.” By the way, his review of the Hoover files led him to conclude that naming the FBI building for Director Hoover “is as if the Defense Department were named for Aaron Burr.”

Then President Ford appointed him Ambassador to Yugoslavia. He was anti-détente, a self-described “hard liner.” He was also engaged in special events in the UN, where he was closer to Daniel Patrick Moynihan than to Henry Kissinger, the instigator of détente.

He served on the Committee on the Present Danger from the end of Ford’s term through that of Jimmy Carter. In that connection, he explains, “My view was more aggressive on disestablishment of the Soviet Empire, more like Reagan. He and his staff reached out to me to be one of three co-chairs of his foreign policy committee.”

He was also approached by George Bush, who he had known from the Nixon and Ford administrations. While attending the funeral (and serving as a pall bearer) of Wisconsin Congressman William Steiger, the architect of a major cut in the capital gains tax, Mr. Bush came up to him in the kitchen and said, “Larry, I want you to support me.” But he replied, “George, I am sorry, I am supporting Reagan.” Mr. Bush was surprised, saying, “I didn’t know you knew Reagan,” to which Mr. Silberman responded, “I don’t.” This is to illustrate that, as he puts it, “For him it was always personal. I didn’t agree with George, I agreed with Reagan.”

**“I wanted to be CIA Director.”**

In addition to co-chairing Reagan’s foreign policy committee, he was chair of his judicial selection committee along with such luminaries as Robert Bork, Antonin Scalia (both of whom who had served under him at the Department of Justice), and Richard Posner, and others who wanted to be a judge. “I wanted to be CIA Director.” He was named transition chief to the CIA, but the top job went to William Casey, who wanted to be Secretary of State, but was “inarticulate” and therefore made CIA Director instead. “So, I went back to the bank.” But he also served during the first Reagan term as a member of the General Advisory Committee on Arms Control and Disarmament and the Defense Department Policy Board.

He then recalls that in 1985, “Someone I recommended to the court got a bad time getting confirmed. He had to withdraw. I got a call from Bill Smith [Attorney General William French Smith] asking me to be a Circuit Court Judge” to fill the vacancy. This is not at all what he wanted, and he resisted at first. He explained to the Attorney General that he had been involved in judicial selections during the Nixon years as Deputy Attorney General and believed he made “profound mistakes” in recommending judges, who ended up very different once they got on the bench from what was anticipated of them in terms of judicial restraint. “I recommended looking at law professors who were known commodities by their writings” as opposed to picking senior partners in law firms.

However, Attorney General Smith replied that they had run out of academics and needed him. Not knowing what to do, he called his former DOJ colleagues who had gone to the same D.C. Circuit, Bork and Scalia. “Bork said, ‘don’t do it, you will be bored to death; you are an activist.’ Scalia said, you will love it because you are scholarly.” He took Judge Scalia’s advice – and the rest is history.

### **Commitment to Judicial Restraint**

“Everyone knew I was committed to judicial restraint,” by which he explains that he “eschews policy making” by judges. This was clear from speeches he gave as Deputy Attorney General. According to His Honor, Democrats appointed to the bench “have an instinct to do justice, to do fairness to parties,” whereas Republican appointees “ask what the law was when it was enacted, not starting *ab initio*.”

**“Ask what the law was when it was enacted, not starting *ab initio*.”**

He sees the difference even more dramatically today than when he became a judge. He predicts that we will never again see Democrats nominate someone to the Supreme Court like Byron White (Kennedy), or Republicans appoint someone like Potter Stewart (Eisenhower), John Paul Stevens (Ford), or David Souter (Bush). He professes both respect and affection for judges appointed by Democrats, “but on the hot button issues, it is hard to find agreement.” He disagrees with Chief Justice John Roberts that there is no difference between judges based on who appoints them but says he “sounded like a Chief Justice” when he said it.

Judge Silberman has been true to his judicial restraint philosophy in that, for example, he upheld as constitutional Obamacare despite his policy misgivings. He told us he “got a kick out of President Obama stating that “if Silberman thinks it’s constitutional it must be constitutional.”



### A Long Time Reviewer of All Things FERC

Aside from leading cases in such diverse subjects as the constitutionality of the Affordable Care Act, independent counsel statutes, gun control statutes, the Patriot Act and the FISA Court, Judge Silberman has written a veritable who’s who of opinions, concurrences, and dissents, or otherwise joined in FERC and related administrative cases. The latter have included the following issues: cost causation ratemaking principles (*Sithe*); FERC lack of authority to require upgrades without allowing any network upgrade funding ROE opportunity (*Ameren*), lack of adequate environmental review (*Delaware Riverkeeper*), FERC disavowal of jurisdiction over station power retail sales (*Calpine*), unlawfulness of selective discounting (*Columbia*), the legal standard for approving a gas surcharge for gas research projects (*Process Gas Consumers*), accounting changes in depreciation with FERC pre-approval (*Alabama Power*), tax code adherence in rates (*Carolina Power & Light*), FERC discretion over investigating allegations of anticompetitive behavior (*Michigan Public Power*), limitations on FERC authority to alter hydroelectric licenses (*Platte River*), preservation of objections to allow for appeals (*Michigan Department of Natural Resources*), application of ECPA preliminary permit authority (*Kamargo*), accumulated depreciation mis-accounting giving rise to refund obligations (*Northern Border*), hourly netting (*Niagara Mohawk*), comparative hearing requirements on competitive NGA CPCN applications (*ANR*), power bidding requirements (*Kootenai*), tight formation gas tax credit eligibility (*Marathon*), contract interpretation (*Cajun*), site development oversight (*Marseilles*), Gas Research Institute funding (*CPUC*), imposition of collateral credit terms (*Gas Transmission Northwest Corp.*), remanding NGA jurisdiction determination for connection

to a cogeneration project (*ONEOK*), remanding a municipal's claim for interruptible electric power service (*City of Vernon*), vacating Interior Department mandates concerning a hydro-electric license (*Bangor Hydro-Electric*), discretionary refund authority (*La. PSC*), record requirements for setting of Period I rates (*Area Energy*), non-profit status determination (*Alaska Energy Authority*), exclusion of penalties from purchase gas adjustments (*PGW*), setting aside FERC's interpretation of a stipulation (*Tennessee*), the grounds for abandonment of a gas purchase obligation (*Transwestern*), restrictions on preemption of state authority (*SCE*), failure to adequately consider a challenge to a pipeline's effective capacity (*Moraine*), application of a backhaul construction concept in certifying a pipeline (*Oklahoma Natural Gas*), timeliness requirements for license challenges (*Smith Lake*), settlement interpretation requirements (*Me. PUC*), Sunshine Act requirements (*Clark-Cowlitz*), award of attorney fees over PGA claims (*Raton*), lack of standing to challenge a conditional order (*Del. Dept. of Natural Resources*), contract interpretation between a cooperative and a competing utility (*Cajun*), PURPA QF status (*Gulf States*), a jurisdictional determination between agencies (*CF Industries*), disposition of Operational Flow Orders penalty revenues (*Amoco*), the requirement that a petitioner exhaust administrative remedies (*Time Warner*), the upholding of clear contract language over an agency interpretation (*A/S Ivarans*), and reviewing statutory interpretation of spent nuclear fuel and radioactive waste disposal requirements (*Con Ed*).

### **Holding Practitioners to Exacting Writing Ability**

The good judge is both concise and pointed in his judicial decisions, whether he is speaking about FERC or about practitioners. Here are two examples, the first being a one-sentence concurrence (*upholding FERC*, by the way):

"I wish FERC's briefing was as clear as Judge Sentelle's opinion." *Aera Energy v. FERC*.

"Since the brief was signed by a faculty member at Columbia Law School, that was rather dismaying both because of ignorance of our standards and because the practice constitutes lousy brief writing." *Delaware River Network v. FERC*.

While the author in a third case, *IPTA v. FCC*, was masked because it was a *per curiam* directive that parties resubmit briefs "that eliminate uncommon acronyms used in their previously filed final briefs," there has been speculation that Judge Silberman had a hand in it. More on this point about acronyms follows below.



## Tips on Handling an Appeal; With FERC War Stories

For his own part, Judge Silberman states, “I always have enjoyed FERC cases if they are presented well. They can be very interesting because of the interrelation of law and economics and administrative regulation.” He is quick to add that, “In more recent years, there is not the sense we wish to avoid FERC cases. We find the cases interesting. It’s strictly the luck of the draw.”

The good judge advises that in taking a FERC appeal, make sure that the lawyer arguing the case is not strictly an energy lawyer. This is because of the need to spot how the issues affect administrative law in many different areas. The judges reviewing the energy appeal are thinking beyond the ramifications on energy law, that is, on administrative practice in general. For that reason, he sees an advantage to handing the case off to an appellate specialist, who knows how to present the case to other appellate specialists.

The point is that FERC law is very complicated, and it is harder for appellate judges to understand FERC than other agency cases. Lawyers who practice before FERC must be expert on intricate parts of the statute but are not to be expected to be expert on all the administrative law cases, which is the way to best approach appellate judges. “I have advised,” Judge Silberman comments, “that law firms should develop appellate specialists. Excellent trial lawyers are not good appellate lawyers. It is a special expertise.” While stating that it is good to get some trial experience, he advises getting appellate experience.

If an energy practitioner does argue the appeal, then he advises the lawyer, though moot court, to “present the case to a partner who doesn’t know beans about energy law but who is a good appellate

lawyer. When he asks what the hell does that mean you will realize you are using specialized terms that mean nothing to general law appellate judges who are experts in administrative law.”

**Acronyms “drive  
judges nuts.”**

He also warns against use of uncommon acronyms. He understands acronyms are used to save space but “they drive judges nuts. They have to keep going back.” He said it was a mistake for the Court to provide for briefs to include a glossary.

And he maintains that many lawyers underestimate the importance of oral argument. He states that the judges read the briefs and are prepared to raise the points that need explanation. It is the lawyer’s chance to turn the judge around. Indeed, he states that 25% of cases are decided by the oral argument. You should never say that you didn’t get to make your argument because of all the questioning, he maintains. He once argued *en banc* on Carter wage and price controls on behalf of the AFL-CIO and was miserable that he never got a question because he knew it was “canned against me.” He also admonishes, “Don’t read” at oral argument, calling that a “heinous crime.” “Keep your eyes on the judges. Find out what bothers the judges and deal with it.”

Nor does the Court give any deference to the alleged expertise of the administrative agency, he points out. Rather, “We defer on policy but not on expertise. *Chevron* destroyed the notion that we defer on expertise.”

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defer on expertise.”**

To illustrate, he recalled sitting on a panel with Judges Ruth Bader Ginsburg and Stephen Williams, “who are both very strong on economics, on a case alleging an agency had not applied sound economics.” In fact, he calls Judge Williams “probably our best expert on energy. He taught it before he became a judge.” Nonetheless, Judge Silberman told his colleagues that that while he agreed it probably was not sound economics, reasonable people can differ so he would uphold the agency out of deference to its policy-making prerogatives. In response, one of those two judges told him, “Well, you understand economics about as well as anybody your age.”

In that connection, at a much earlier time, he found the FERC appellate lawyers to be inadequate in their understanding of economics. He even attended a cocktail party with a FERC economist who complained that FERC was losing because of the lack of knowledge of economics by the Solicitor’s Office. That has all changed, he tells us. He has found a definite uptick in the economic grasp of the FERC Solicitor’s Office.

Giving us another a rare glimpse behind the scenes in judicial deliberations, Judge Silberman told us of a very difficult FERC case in which he participated with Judges Bork and Scalia, both of whom you recall served under him at the Department of Justice before he followed them onto the D.C. Circuit. Before

going into the deliberation, one of the law clerks leaked to him that the other two judges “had a scheme to assign it to me no matter what because they are senior on the bench and they were going to get even. I was prepared in conference. I spoke first as the most junior and said on the one hand or on the other. I am *debutante*, meaning I don’t know how it should go. Scalia said, ‘God damn it, you don’t even know what *debutante* means.’ He stated how the case should be decided going right down the line, A, B, and C. Bob, who was senior over all, said, ‘Well, Nino, if you have such a clear idea of what should be done, you write the opinion.’ Scalia’s eyes got narrow and he looked at me and said, ‘You miserable cuss, you did that on purpose. I will never write this opinion.’ The next year, he was nominated to the Supreme Court, where I helped him get confirmed. He handed over some of his pending cases and when it came to this one, he looked at me wickedly and threw the file at me, and I had to write it.”



Reminding us (or maybe himself) that “you should never discuss internal deliberations,” Judge Silberman exclaimed, “What the hell!” and went on to tell us of yet a third panel conference, this one about a quarter of a century ago in another FERC case, where he sat again with Judge Ginsburg along with Judge Harry Edwards. He remembered the FERC lawyer being grilled by Judge Edwards, and he was sure the poor fellow fully expected to lose. But when they went into deliberations, “I said I didn’t know the right answer. They thought it crystal clear it should be reversed but assigned the case to me.” So, he wrote a decision affirming and explained why, and they agreed with him. “I was fast.” A month and a half later, at 9:30 am he received an uncontested motion from FERC to hold the case in abeyance when his opinion was about to be issued at 10 am. Being very disappointed that his opinion would never see the light of day and the FERC lawyer would never know he miscalculated that he better settle because he was going to lose, he went on summer vacation, only to find out that the clerk’s office accidentally issued the order. Judge Edwards was furious and put out a Notice that the decision was issued in error in advance sheets; it was withdrawn and never appeared in the Federal Reports. But the lesson from that incident, Judge Silberman tells us, is that you should never assume you know what the result will be based on the oral argument. FERC would have won

that case even though it appeared otherwise from Judge Edwards’ tough questioning of FERC. Judge Silberman estimates that, despite appearances, “ten percent of the time you will be wrong.”

**“The only time you get a flat win is if the agency’s position is in violation of the statute.”**

In terms of absolute wins and losses on appeal, His Honor points out that often the Circuit Court remands if the agency is arbitrary and capricious because sometimes, they can fix the problem “but sometimes they are stuck. Sometimes they come back a second time and they get clobbered again. The only time you get a flat win is if the agency’s position is in violation of the statute.”

### **A Life of Achievement, Still Going Strong**

Even as a busy judge, Laurence H. Silberman has taken on many additional responsibilities. He has been Presidential Special Envoy for International Labor Organization Affairs, Co-Chairman of the Chief Judge’s Foreign Intelligence Surveillance Court’s Review Panel and the President’s Iraq Intelligence Commission. And he has been teaching for 32 years, as a Lecturer at the University of Hawaii, and an Adjunct Professor of Administrative Law at Georgetown University Law Center, New York University, and Harvard University. Currently, he is the Distinguished Visitor from the Judiciary at Georgetown University. He has been recognized with the Charles Fahy Distinguished Adjunct Professor Award, and both a Lifetime Service Award and a Distinguished Service Award from the Federalist Society chapters of Georgetown and Harvard. To top it off, Judge Silberman is the recipient of the Presidential Medal of Freedom, the highest civilian honor granted by the government of the United States. (In a *Wall Street Journal* op-ed in 2015, he wrote of the same President who awarded him the Presidential Medal of Freedom that his deception as to the nuclear threat presented by Saddam Hussein is like “a similarly baseless charge that helped the Nazis come to power in Germany.”)

He tells us that he intends to resign his post as a permanent faculty member at Georgetown University Law Center after 19 years, while still teaching administrative law there. But he explains that he intends to make up for that reduced teaching commitment by doubling his seating on appellate panels. “I have not lost my cognitive ability, which threatens anybody my age.” We are indeed fortunate that Judge Silberman is not even close to slowing down.

### Questioning Silberman

Most admired public figure: Abraham Lincoln.

In school I excelled at: "I wouldn't say I excelled at anything."

Best advice I ever received: "From my grandfather, when I was 8, to attend Harvard Law School."

Most proud of: "My children and grandchildren."

Favorite book: *The Bell Curve* by Richard J. Herrnstein and Charles Murray. ("I want to answer that with a controversial book.")

Favorite thing about DC: "Its livability."

Least favorite thing about DC: "Summers."

Favorite season and why: "Fall, because of the changing leaves and coolness."

Favorite DC Restaurant: *La Chaumiere*.

Most beautiful place I have ever seen: Tie between Switzerland and the Alaskan peninsula.

Favorite type of music: Opera.

Favorite place for a weekend getaway: Eastern Shore.

Item that I would take to a desert island: Shakespeare's plays.