

Part of the Richard Nixon Oral History Project

An Oral History Interview with OWEN FISS

Interview by Timothy Naftali
September 27, 2011
New York, NY



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Descriptive Summary

Scope and Content

Biographical Note

Owen Fiss worked for U.S. House of Representatives Impeachment Inquiry Staff in 1973 and 1974 where he consulted on the question of what was an impeachable offense. After graduating from Dartmouth (B.A., 1959), Oxford (B. Phil., 1961), and Harvard (LL.B., 1964), he was admitted to the bar in New York in 1965. Fiss also clerked for U.S. Court of Appeals Judge Thurgood Marshall from 1964 to 1965, and for U.S. Supreme Court Justice William Brennan in 1965. He then worked as a Special Assistant to Assistant Attorney General of the Civil Rights Division of the Department of Justice from 1966 to 1968. Years after his work on the Inquiry Staff, Fiss became a Professor of Law at Yale Law School.

Administrative Notes

About the Richard Nixon Oral History Project

The Richard Nixon Oral History Project was created in November 2006 at the initiative of Timothy Naftali to preserve the memories and reflections of former Nixon officials and others who had been prominent in the Nixon era by conducting videotaped interviews. Naftali insisted from the project's inception that it be a serious, impartial and nonpartisan source of information about President Nixon, his administration, and his times. A second goal of the project was to provide public domain video that would be available as free historical content for museums and for posting on the Internet. Donors to the project neither requested nor received a veto over interview questions or interviewee selection. Accordingly, the project includes interviews with former staff members of the Nixon administration as well as journalists, politicians, and activists who may have been opposed to the Nixon administration and its policies. Taken as a whole, the collection contributes to a broader and more vivid portrait of President Nixon, the Nixon administration, and American society during the Nixon era.

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The following is a transcript of an oral history interview conducted by Timothy Naftali with Owen Fiss on September 27, 2011 in New York, NY.

Naftali: Hi, I'm Tim Naftali. I'm director of the Richard Nixon, Presidential Library and Museum, in Yorba Linda, California. It's September 27, 2011, and I have the honor and privilege to be interviewing Professor Owen Fiss, for the Nixon Video Oral History Program. Professor Fiss, thank you for doing this.

Fiss: Thank you.

Naftali: Just so, we can give our viewers, and future researchers, some biographical information about you. Could you tell us a bit please about your work as a clerk for both Judge Marshall, and Justice Brennan?

Fiss: I graduated law school in 1964. I then went to work with Thurgood Marshall, who was a judge on the Second Circuit at that time, and clerked with him from I guess the summer or September 1964, until July 1965. Then I went on in 1965, to clerk for Justice Brennan, on the Supreme Court. As I ended my clerkship, with Judge Marshall, Justice Marshall, as he's known now, he received an invitation to become Solicitor General of the United States, an invitation by President Johnson. Like many of Johnson's invitations it was one he could not, Marshall, could not refuse. I was his last clerk on the Second Circuit. We both went to

Washington at the same time, and maintained a close relationship. At that time, the Court of Appeals judges had only one law clerk, and I was it, which was a great honor, but it made it extremely difficult to get any work done, since Marshall loved to tell stories for most of the day. I usually wound up working at night just to keep up with the work. He had long been a hero of mine and it was incredibly exciting to work for him and to get to know him. I would say that the experience clerking for Justice Brennan was another dream come true.

As you know, Brennan was essentially the architect of most of the important Supreme Court decisions during the Warren Court era. Not *Brown* itself, but once you got on, of course he was not on the Court, but once he did get on the Court, he was always viewed by Chief Justice Warren, as his lieutenant, or most trusted member of the Court. Marshall served from 1965 until 1967, as Solicitor General of the United States, and then moved to the Supreme Court. They, Marshall and Brennan, became very close to one

another. Not just in terms of formal doctrine, or how they came out on issues, but I think there was sort of a deep personal relationship between the two. I found myself, sort of, very much caught up with both of them.

They were two very important figures in my life. In the spring of 1966, as I was ending my clerkship with Brennan, I began to think of what the next step was. I had interviewed at some law schools, with the eye of going into teaching, but I also interviewed with John Doar, and became his Special Assistant in the early Fall, maybe late August before Labor Day, in 1966. And as a Special Assistant, I spent most of my time, with John. We traveled together, we appeared in court together, I had some of my own cases, but most of it was developing my relationship with John Doar, either when he presented a case, or had to decide some issue.

John left the, he was then Assistant Attorney General of the Civil Rights Division, and he decided to leave shortly after the Neshoba trial and actually left the division at the end of December 1967, or in January 1968.

Naftali: One question, the Neshoba trail is that the Mississippi burning?

Fiss: Yes.

Naftali: Okay, could you tell us, it's such an important case, in particular for people who study the Civil Rights era, could you tell us a little bit, you worked on that case obviously, with, did you?

Fiss: I did not work on it much, because, actually, if you recall the events, the killing, was in June of 1964, so by the time that I got to the division, in September 1965, the prosecution was already staffed and the people were chosen who would work on it, and I was not one. It was tremendously important for Doar's career in life and for the nation, but it was something that I did not work on. Most of the things that I worked on had to do with matters that came into the office starting in September 1965: the opening of the desegregated schools, implementation of the Voting Rights Act in 1965. Cases involving the cut-off of funds to recalcitrant school districts. The first employment cases that were filed were filed during that period, employment discrimination cases. I also had the responsibility for one of John's most difficult cases, and that's the case involving the desegregation of the Houston Independent School District, that became our case. That if you recall, this is all during the Lyndon Johnson presidency, and most of our documents on the defendants were served to the school board, which of

course, happened to be located in the Lyndon Baines Johnson Building, in Houston, Texas. It was a very, very, difficult and touchy case. After John left, I pretty much decide to leave also.

The new Assistant Attorney General was a person named Steve Pollack, and I admired him greatly, and liked him. I don't know it was just such an intense personal relationship with John, it just seemed difficult to continue. I was not about to become a career government lawyer. I thought my usefulness in the division was mainly being an independent soul, and not caught up with the bureaucratic politics. That it would be just a very important for the department, and important for myself to move on.

Now, you must remember also, just before I go on for the period after that that Thurgood Marshall was the Solicitor General at the very same moment that I was working with the division. Indeed, one day, John and I were going up to the Attorney General's office, to make a presentation, about some employment discrimination cases. His office was near, my office was near his and in-between our two offices, was the Solicitor General's private office. John thought we were running a little late so he wanted to go the fifth floor, on the Solicitor General's private elevator, and I said, "Okay, let's go." We pushed the button, the elevator came up, the door opened, and Thurgood Marshall was standing in the elevator, and he in his jovial but somewhat mocking, he said, "Okay, come on in," knowing that we were trespassing on this elevator. So the three of us, each one of us is quite tall, was standing in the elevator, and the elevator moved, maybe about 15 feet, and then became stuck. This is on a Saturday morning and we, the three of us, looked up and there was a sign there saying, "No more than two persons in the elevator," and we were stuck there. We missed the meeting with the Attorney General, and we had to have the fire department gets us out of the elevator, so that was not the best. Anyway, I had a very, close relationship with Thurgood Marshall while he was Solicitor General, and John Doar. There were cases that we handled like: *Walker v. the City of Birmingham*, which had to do with a contempt proceeding brought against Dr. King, for marching against temporary restraining order in Birmingham, in April 1963, which involved the Solicitor General Office. So there was a pretty, close working relationships. In 1968, after John left, I decided to begin my academic career, and I look up a position at the University of Chicago. I stayed at Chicago for 6 years, until I would say, the summer of 1974.

Naftali: Let me ask you before we go on, I just wanted to ask whether what cases, interesting cases, you worked on with Justice Brennan, in the year you clerked for him.

Fiss: At that time, the Justices had only two law clerks, now they have four. Once again, it was a pretty, intimate relationship, and it also meant that all manner of cases, almost every case came before me as well as my co-clerk. Remember the clerkship is taking place in 1965, fall of 1965 all the way to the spring of 1966. One line of cases had to do with the Voting Rights Act of 1965, which was passed in the spring of 1965, following the Selma march. And so one group of cases I worked on with Justice Brennan, were the cases that were arising under the Voting Rights Act of 1965, cases like *South Carolina v. Katzenbach*, examining the constitutionality of the statute. Probably the most significant case of that term, under the Voting Rights Act, was a case, and it's called: *Katzenbach v. Morgan*.

A case involving the power of Congress to enact measures to further, though not restrict, the power of Congress to implement the 14th Amendment, and implicitly implement the 15th and 13th Amendment as well. *Katzenbach v. Morgan* was an important affirmation of Congressional power to act as a coordinate branch of government to enhance the egalitarian of the law in court. In recent years, that's become under attack by the Rehnquist Court, and I presume, it will be continued by Roberts Court. That was a basic building block of that era, and indeed turned out to be the foundation of the Civil Rights Act of 1968, and then subsequently, the Voting Rights Act of 1982, and then the Civil Rights Act of 1991.

Another group of cases that were important were the school desegregation cases, although this was 1965, most of the previous decade was testing the validity of *Brown* on its face. The metaphor that we used was sort of like cracking the ice to get – there were about two, when I joined the division, in 1965, there were about 2,000 school districts in the South that operated in open defiance of *Brown v. the Board of Education*. But as we got closer to that date, on the Supreme Court, we began to deal with the understanding of what desegregation is, or what *Brown* would require, not just the paper compliance, but the performance of the school district. I worked for reasons I'll explain in a moment, I worked with Justice Brennan, on a lot of those cases. I think they were given to me, as opposed to my co-clerk, maybe, because I clerked for Thurgood Marshall before. But also in my third year of law school, I wrote a paper everyone was required to write a big

paper, and I wrote a paper, too big, but a paper on Northern school desegregation: what would be the implication for the North once *Brown* got out of dealing with the dual school system of the South. In January, of 1965, while I was clerking for Marshall, that paper was published in the *Harvard Law Review*. And so by the time I clerked for Brennan, I was just a little kid, but I guess I was seen as someone who had a lot of expertise on school desegregation then.

Naftali: When did you because later this would be significant? Did you look at the difference between *de facto* and *de jure*, segregation and how to deal with the?

Fiss: Yes, at that time the distinction between *de facto* and *de jure* was not as it is now. At that time, there were very, few case. No Supreme Court cases but they were beginning to sort of conceptualize it in terms of this distinction and my view as to sort of whittle away at the distinction. On the theory that the government is responsible for the foreseeable consequences of its action and in fact, there wasn't, there are differences between so-called *de facto* and *de jure*, but not a difference that is captured by the word *de jure, de facto*. I think both cases the government is responsible for the segregated pattern. But that's what the subject that was essentially the subject. Now, when I clerked for Brennan, the cases that we dealt with were Southern cases from the 8th Circuit and 4th Circuit, not so much the 5th Circuit. But the Supreme Court began to articulate what it meant to desegregate a school. Those early cases were the stepping-stones for very, famous case in 1969, or '68; maybe, I'm sorry, '68 while I was still at the Division, called *Green v. New Kent County*, where the Supreme Court began to give some substantive content to the duty to desegregate. Also this may account for why I didn't deal with this case in the Department of Justice, the Neshoba case. This was also the term in which, the Supreme Court decide important cases on state action. A case called, *United States v. Guest*; the *United States v. Price* and the question is to what extent do state officials have to be involved in a crime, before the Federal Government can take jurisdiction over the matter. *Guest* went far in explaining what that involvement could be, and the *United States v. Price*, which involved the Neshoba prosecution, also entailed that question, because although there were sheriff's, deputy sheriff's, involved in the group, that were charged with killing the civil rights workers, there were also lots of private non-state officials, and the Supreme Court held that the involvement of the deputy sheriff was sufficient, but the private individuals as part of that conspiracy could also be prosecuted.

Naftali: You go into academia you make the choice. You're at the University of Chicago, when do you go to Yale?

Fiss: That's an interesting story. I'm at the University of Chicago, stating in 1968. In the fall of 1974, I'm sorry 1973, I taught at Stanford Law School, in California, and then returned to Chicago to teach the balance of that year. I left Chicago in that end of the year and as my mother put it, 'anyone has to be crazy to go from Palo Alto to Chicago in January.' And during that whole spring I was toying with the idea of either going to Stanford, staying there permanently, remaining at Chicago, which I liked enormously, or going on to Yale, and sometime in that spring I decided to go to Yale and joined Yale Law School faculty in July 1974.

Now, the interesting thing is that in January, very early in January, as I was still in Palo Alto, I received a telephone call from John Doar. John Doar had just become the Chief Council for the Impeachment Inquiry of the House of Representative. John and I speak about a lot of things and did before, but this was a telephone call about the Impeachment Inquiry, in which he asked for my advice about developing the staff, but also invited me to help them out. So from January 1974 to August, middle of August of 1974, I was teaching in Chicago up until June, trying to make my life's decision of where I'd wind up and at the same time, flying back and forth from Chicago to Washington to consult with John on the Impeachment Inquiry. Then in the summer, the academic summer begins like June 1st, as I was packing up my house, my three children, my wife, and looking for a house in New Haven, and as I was moving I – we didn't have a house, eventually we found a house, but it wasn't ready, and we had to stay at a friend's house. But during that summer, and as I was changing, moving from Chicago to New haven, I was also commuting down to Washington to continue in my capacity as a consultant for John. It was a very hectic extraordinary time, just the move, but then to have the consultation it was an extraordinary grueling time. As you probably know, John works very hard. Works 7 days a week, as expected, at least of me, that I'll be working at least as hard he is, and I would go down and sometimes stay awake, without sleep, for 2-3 days before I returned to New Haven, or Chicago, and I would just come in and out on that basis.

Naftali: When he called you, what did he want you to do?

Fiss: Well I think he wanted to get my advice about young staff members, and people that he – he was building a staff at that very moment. I mentioned some people. He had very high standards of

who – I mean he knew a lot of people I knew, and was not anxious to take a lot of them. He was meticulous in hiring people who had not publicly taken positions one way or the other on the issue. One of my friends at that time, and a person I admired greatly had, and John was very inclined to hire, on the basis of, his talent and capacities, but it turned out that he had signed some petition that addressed the issue of whether the President should be impeached.

Knowing John from the division, he conceived of this task very similar term, as he conceived the running of the division. As you know, John is Republican. He served under Ramsey Clark, and Nicholas Katzenbach, and worked during the Kennedy years and also during the Republican ear, but John's, John was not political. He believed in the law and he believed in the neutrality, and objectivity of the law, and he ran the division to convey that impression of fairness and impartiality. When he spoke, the Courts listened in a way that they would not listen to the lead council for the NAACP, or private council. He felt you know outside the Department of

Justice, there's a written: the United States wins when justice is done, and I think that was John's abiding goal. Always to figure out what was just, apart from politics, and he was very determined to build a staff that would be impartial and capable of gaining the confidence, not just of the Democrats, but also the Republicans on the House Judiciary Committee.

Naftali: Did he convey to you when he spoke to you a bit of surprise that Chairman Rodino had asked him to take this job?

Fiss: No, no, he's a modest person, but no. Indeed, it was a perfect choice, brilliant choice. Brilliant choice.

Naftali: Did he need some help in looking at the precedence the previous examples of, well, the one previous example of presidential impeachment, and the other impeachment cases involving judges, and one justice, did he ask you to look at those and see what, whether there were any useful precedence for them to consider?

Fiss: That really wasn't my role. John had a very large staff and he had a number of people looking up the precedence, looking up the history, but he had to sign off on everything. It wasn't enough that he had a 28-year-old lawyer doing a memo on the grounds of impeachment, he had plenty of people doing those memos. He had to sign off on the ultimate, well, the first big project was something on the grounds of impeachment. The Constitution says, "The

President can be impeached for high crimes and misdemeanors.” And the question that he had to confront was what does high crimes and misdemeanors consist of? Specifically, does it require that the President violate some criminal statute, or was there some improprieties, though not criminal, where appropriate grounds for impeachment? He had plenty of staff researching that question and they all submitted the drafts and memos to him. But John worked; he didn’t take one person’s word for it. I mean he never relied on any one. He had to make the judgment himself. My task with the grounds of impeachment was to get all these memos together, and to put them into a document that John would be prepared to sign. So I worked almost like a law clerk to John Doar, of saying, “These are the positions that are outlined on it. This makes sense, this doesn’t make sense.” The people he had working for him were wonderfully talented and some went on to write a books, like John Labovitz, who you’ll probably interview. But my job was to come in, when all their work was done and for 5 days, 3 days, a week, analysis the whole thing and tell John this is what he should do, and this is what he should sign off. I was like the last, I think everyone, everything went to John, no one reported to me, but I was the last step before John, and that was replicated also in an area that didn’t – one of the grounds for impeachment is sort of almost legal question. But when it came time to write the factual presentation, the information, I got the reports from everyone, and I basically, was John’s law clerk again, saying, “This is what we’re going to say on the basis, of all this information.”

Naftali: Professor Fiss, please tell us a bit if you could recall the names of the people that you recommended to Mr. Doar that he, ultimately, hired.

Fiss: Well, I think I probably had the most decisive role in hiring people who had worked with him and with whom I worked during my time in the Civil Rights Division. Two people particularly come to mind – a woman named Dorothy Shelton now Landsberg now a lawyer, but she wasn’t a lawyer.

She was in the Civil Rights Division she would been known as a research analyst. That’s the precursor of paralegal and the other person was Bob Owen. Bob Owen was someone that John worked with in the Civil Rights Division. He was his first assistant. He worked with him. He was the one that worked with John on the Neshoba case. John adored him and respected him.

I may have sort of urged him to take those from the Division. He didn't want a wholesale transfer, but he wanted enough talent that he needed. People like Bob Sack, people like Bernie Nussbaum, people like Hillary Rodham Clinton were people who I did not know and he had his own sources of hiring these people.

There may be some other members of the Civil Rights Division who followed him to impeachment. I probably wasn't involved with that, but quite frankly, I don't recall who they were. Bob Owen and Dorothy I remember the most because they worked around the clock with me. We had a little office where all the stuff was coming into and they were often in that office with me and we spent a lot of time together.

Naftali: Was there much of a debate among the staff regarding the issue of high crimes and misdemeanors required in an indictable offense? Was there a debate or –?

Fiss: One thing you should know is I often did not participate in the discussions of staff or the debate or the preparation of their views. A debate in any formal sense, I just was not part of. I would say there was a disagreement and a very difficult decision that had to be made. Maybe the staff was divided among itself as to whether a crime was necessary or whether it was sufficient if there were some other impropriety.

Some members of the staff may have taken the view that a crime was a necessary condition, a crime in the sense of a violation of Title 18 of the United States Code, but ultimately, as you know, John took the position that it was not a necessary condition that there be a violation. So if there was disagreement, debate among staff, I don't really know.

Naftali: Do you recall Mr. Doar telling you his reaction to meeting Sinclair for the first time or do you at least recall what he thought of Mr. Sinclair?

Fiss: No, I don't.

Naftali: Was Mr. Doar –?

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- Fiss: I mean I did have conversations with him about Sinclair and he was generally very respectful of him, but I can't recall a very specific conversation.
- Naftali: When you started as a consultant it wasn't clear yet what kind of information you would be receiving from the Special Prosecutor or the White House Special Prosecution Force. When you were and I know I'm taking you back a long time, but it is I think significant.
- When you were thinking about the process of...you wouldn't call it discovery, but collecting information in the beginning, did you assume that Jaworski's office would hand over material? Was that a basic assumption when you began or did you think you would have to do investigations of your own?
- Fiss: Well, by the time I began working, commuting down from Chicago there the basic decision was taken. Namely that there would not be an independent investigation, but that we would be dependent on the investigation of all other agencies or institutions. Our task would be primarily a collection and synthesis of the information that was made available by other Senate Committee investigating, Special Prosecutor, all of those things, that decision was already made.
- Now one decision that was not made, but was made while I was there – it was unfolding – was the tapes. I mean the tapes were not available before January. Remember the tapes become available, I guess, in the Spring of 74. There's 18 minutes that are missing, but the tapes, I think, were released by President Nixon in the spring of '74.
- Naftali: April 30th.
- Fiss: Okay and when they were released it seemed kind of innocent and one investigative thing that John did do was to get hold of those tapes. The ones that were released and go over them with recording technology that would pick up conversations and parts of conversations that were omitted from the printed version of the tapes.
- As you recall, the Committee, I think this happened in July – not the Committee the Impeachment Staff – released a different
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version of the tapes different than the one President Nixon released and that was of tremendous public significance in terms of the committee members were just sort of shocked at some of the things that appeared.

It was a very important moment in the history of the inquiry. That could be considered like an independent investigation so that much was done.

Naftali: Some of those tapes, I believe, were included in the materials that the Special Prosecution Force handed over in March weren't some because didn't they hand over to the Impeachment Inquiry, the eight tapes that they received from the White House in 1973?

The smoking gun, not the smoking gun, I'm sorry. The cancer on the Presidency tape, the March 21, 1973 conversation between the President and John Dean was handed over after the Saturday Night Massacre by the White House in response to the public outcry.

Fiss: Yes.

Naftali: I believe that was part of the collection of materials that passed to the Impeachment Inquiry in March.

Fiss: Right, yes, but I was referring to the re-transcribing of the tapes that were released by the President in April of that year.

Naftali: I was going to ask you whether you listened to yourself any of these tapes.

Fiss: I've never listened to a tape, never, all the time I worked there.

Naftali: Okay.

Fiss: I mean they were available. I made great use of the tapes, but I didn't listen to the actual voice. I relied on transcriptions. They had to be checked and double-checked, but I've never to this day, I've never listened to a tape. I mean I've read the transcript dozens and dozens and dozens of times, but I've never listened to them.

Naftali: They are the primary records. You may find them interesting.

Fiss: I'm sure.

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- Naftali: There was also a question of whether to issue a subpoena or not, was there not, to obtain more information? Was there ever a question that the House would not issue a subpoena for information?
- Fiss: I was not involved in those discussions. If I were there, I would probably be included, but remember I'm trying to teach my classes at Chicago and so I just came in. John says we have to file this memorandum on the grounds of impeachment when can you be here or stuff like that, but I'm sure anyone that worked there full time would be involved in that.
- Naftali: Tell us what you can remember, please, then of your role in shaping the five articles, ultimately, that would be voted on by the Committee.
- Fiss: I drafted all of the articles and wrote the information that was used in support of it. Obviously, basing it upon all the work that the staff had been doing. The most interesting and, of course, involved in that process, I had views about and the most interesting discussion and what should be included and what not to be included.
- The most interesting discussion was on Article Three. Article Three was to make the grounds of impeachment the refusal of the President to cooperate with the Senate investigation. John conferred with many people about all during the process and one person that he greatly respected, admired – I don't think it's any secret – was Burke Marshall.
- Burke Marshall was of the view that it's he was uneasy with Article Three. He thought Article Three had a tinge of compel self-incrimination. From that perspective, he was very reluctant. I took the position in discussions with John, I had never met Burke Marshall as of that moment, although, he was later to become my colleague at Yale I still had never met him.
- John always conferred with him. Many evenings I would spend in John's office in the Civil Right Division when he would be speaking to Burke Marshall and I would be the other person in the room listening to it. I knew Burke Marshall's view point, but I took

the opposite view point and defended Article Three as an appropriate ground of impeachment.

Essentially, because I didn't think it was incrimination, but it was a continuation it was a condition for the continuation of the exercise of power by the President. Well, Article Three was, in fact, included as one of the grounds and when I went to Yale I got to know Burke Marshall extremely well and he was a friend and colleague until his death and I was very close to him. I think to his last day he always teased me about supporting Article Three.

Naftali: Let's talk about Article Four. Why was that included?

Fiss: What was Article Four again?

Naftali: Secret bombing, I think, of Cambodia.

Fiss: Yeah, I'm sorry.

Naftali: I'd like to know

Fiss: What was the final vote on Article Four?

Naftali: I believe it was a party line vote.

Fiss: Right

Naftali: My question is to understand your role. How did Mr. Doar decide which Article to place before the Committee for its judgment? Tell us if you can remember the process. I mean you said you worked on all five Articles, but how was it decided there would be five Articles and what their substance would be? How did that happen? What did you see of that process?

Fiss: Well, I'm sure he was conferring with Bert Jenner. Remember, he's the minority counsel and I think he was conferring with Rodino, Congressman Rodino who was the Chair of the House Judiciary Committee. He's conferring with a lot of people. My view was that...remember, let's go back to the grounds of impeachment. I did not think that you had to violate a criminal statute in order to be grounds of impeachment. I don't think it was an independent requirement.

On the other hand, and you can see this in the brief on the Grounds of Impeachment. I thought it had to be something more than a policy difference. It had to have crime like elements to it. It had to have a kind of moral core about the impropriety of doing it. My view was essentially that Article Three we had this difference of opinion and I think he went with it, but after we left Article Three and moved to Article Four, that fell on the other line of an appropriate grounds of impeachment.

I don't recall exactly John Doar's position, but my hunch, my recollection as best I can say, he was not personally committed to that ground of basis for impeachment for reasons that I just articulated, but I think he found himself under a duty to be more inclusive what he gave the Congressman. I was not party to any of that conversation, so I don't know it, but it must have been that Rodino wanted to have that before the Members and John.

He's an independent person, but he realized that he was the head of the staff and that Rodino had to make the decision. I'm not sure actually what he thought about Article Three in the final analysis. He doesn't elaborate long. I do think that he was probably more in favor of that. He could see that argument, but really was very cool towards Article Four and probably included it for purposes of complying with the mandate from the Chairperson.

Naftali: So important to the story, again, I apologize. It's a long time ago, but when you came in to work on them, were you handed a draft or did he say, "Owen we're going to do five and they'll touch on these issues. Abuse of powers, objection of justice, bang, bang," and then you went and did the first draft? Was there a draft given to you, which he wanted you to comment on and edit?

Fiss: Drafts came in never saying those five grounds. I mean these things would come in. Some of them were shaped by the writing process, I mean really of collecting all the information to sustain this. I never had a vision when I began that there would be five articles of impeachment and I began with one and amassed all the information. There were people pulling stuff together, but putting it all together into this information, this report that was going to be submitted.

Then we did one, then two, then three. I mean he would react, then three. Burke Marshall would weigh in on it, again, and then we'd go back. I'd make this adjustment or that adjustment and Bob Owen would look it over. It's almost endless, almost endless. It wasn't a sense of a preconceived plan, but let's see how it writes, let's see how it holds up, what's the best we can do to make this viable for the Committee, but I never had the sense, oh, we have five. Let's stop doing it. It was more step by step really.

Naftali: Do you remember when this process begins? Basically, you start with one and moved. Are we talking about May, the time that he's laying out the Statement of Information or is it June or is it even in early July?

Fiss: Well, I think it starts in May picks up a lot in June and the heart of it is July. The heart of it is July. Remind me when was the Statement of Information submitted?

Naftali: That's in May, he starts.

Fiss: He starts, but it's not submitted to the Committee.

Naftali: Well, Doar starts presenting the staff the Statement of Information on May 9th.

Fiss: To the Committee in Executive Session.

Fiss: Right.

Naftali: That goes on for about six weeks. He's laying out the volumes, which presumably you looked at before he...

Fiss: Well, when you say I wrote them, believe me, the staff had a lot to do with it, but I was like the last step before. So I think it's May, but now when is the Grounds of Impeachment filed? March?

Naftali: February. So that's the first big document that you worked on.

Fiss: That was my first work.

Naftali: It's working on that document that you yourself conclude that there are grounds for impeachment?

Fiss: Yes.

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- Naftali: At that point, when you're working on that, you don't yet have a sense of how many grounds there are for impeachment.
- Fiss: No, but I know my views are beginning to take shape about the bombing of Cambodia.
- Naftali: That it's a policy difference.
- Fiss: Yeah, because I'm working on this memorandum for the grounds of impeachment, but by that time, I have a picture of the whole and what people are thinking about. I'm working on it, but I know its application to this context. I have a glimpse of it.
- Naftali: This is before the Committee, I'm sorry, before the Inquiry gets the material from Jaworski, back when you're working on this initial Statement what are the things that you know about because you don't know the tapes. What are the things you know about that you can sense there has been an abuse of power here?
- Fiss: I'm not sure if I can recall what I knew then as opposed to the end. I mean it's sort of it's a little bit based on...maybe what the public knows not more advanced begins to be categorized in different forms – abuse of power, refusal to cooperate with the Committee. Remember, *The United States vs. Nixon* is going through the court at this time, but I can't tell you what I knew then as opposed to what I knew later. It's all sort of...
- Naftali: Let me rephrase this. Maybe it's a more helpful way. What do you remember learning that sticks out in your mind and so you attach to for obstruction of justice, abuse of power? What were the things that you learned that you thought, 'aha,' this is solid evidence of an impeachable offense.
- Fiss: Well, maybe this would be the best way of conveying...I remember working on the Statement of Information very late in the process and trying to put the pieces together. I worked hard to be careful about it and I, perhaps, over compensated and had sort of this person is the President of the United States kind of difference.
- One night, I'm working. I don't remember if it was Article One or Article Two, but I was convinced that if we did not have what was in the tapes, it wouldn't fly. I mean I just knew it. I put all the pieces together, every little tidbit, but this was the President of the
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United States that we're dealing with and I genuinely said, "My God, if we didn't have this statement in these now re-transcribed tapes, this Article would collapse."

There wouldn't be any basis for it. It was the limits of circumstantial evidence when you're dealing with the President of the United States and impeachment. You had to have some admission or quasi admission in order to make it fly.

Naftali: Without the tapes, a lot of dots that couldn't be connected.

Fiss: It couldn't be connected in the mind of a kind of impartial neutral arbiter. I mean you could make charges, I guess, but it wouldn't be convincing given that you're dealing with...I mean maybe if you're dealing with a minor official. I mean its function, this was not a criminal proceeding, but a function, a little bit you applied to him beyond a reasonable doubt and it was necessary.

If you didn't have the tapes, I don't think you could meet that kind of...a doubt would persist and given that you're dealing with the President of the United States, you shouldn't do this.

Naftali: Wasn't one of the challenges that you, though, you saw a pattern you could still make the argument that there were zealous lieutenants doing things that he didn't know about or didn't want to have happen?

Fiss: You could make the argument. I don't know if I believed that argument, but it was the doubt that kept on, but you could make that argument that this was all maybe he just turned a blind eye. You needed that extra increment of evidence to make it really convincing.

Naftali: How tight do you feel the case was at the point that you delivered it to the Committee for its --?

Fiss: Iron clad, iron clad, I believe.

Naftali: Was it? Did at any point Mr. Doar convey to you a concern that perhaps there wouldn't be a bipartisan majority for an Article or was he convinced that there would be some Republicans who would support at least one of the Articles or did he not talk about this at all with you?

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- Fiss: We talked about everything, but I never recall a conversation where he put it in terms of bipartisan, getting these people to vote, the Republicans to vote on it, but I would say his overriding mission, his overall conception, although, he didn't talk about this Republican or that Republican, his overall conception was that we had to do this in a way that transcended partisanship.
- I think just the party vote on Article Three was probably deeply disappointing to him although I was not clear as to how attached he was to that Article at all, but he always conducted his work to make this a bipartisan product. It was absolutely crucial that Bert Jenner was on board. It was absolutely crucial that Bert Jenner would sign the brief or the memorandum on grounds of impeachment.
- I mean he always had this vision of being as much of transcending party differences and so I'm sure he was deeply disappointing every time he didn't achieve that.
- Naftali: He must have been disappointed them with how some Republicans treated Bert Jenner.
- Fiss: Yeah, yeah.
- Naftali: The Statement of Information, what can you add to tell us to give us a sense of how that format was selected as a way of presenting this information to the Committee.
- Fiss: The last comment I made was to underscore his determination to avoid any form of partisanship. You can tell from the title Statement of Information how that's consistent with the purpose. There's never been a document before in the history of these proceedings called Statement of Information.
- What he wanted was a statement of information not a brief or anything near a brief. He presented it as a kind of dry, methodological, impeccable distillation of all the information that was the tone that we kept throughout. If you will recall one of the members of the Judiciary Committee, when John read it, remember he read it.
- He said John Doar could put us to sleep even if he were reading the Happy Hooker. He was at his most Midwestern Republican
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qualities of just dryly reading fact by fact without trying to give any sort of sense of drama or mystery unfolding or any tinge of advocacy. One thing you have to understand, this is how he ran the Civil Rights Division.

The Civil Rights Division begins its operation in the late 50's, but really takes off overly the early 60's. This is an extremely decisive, explosive issue in American politics. He believed it was necessary if we're going to make any progress on civil rights issues that he had to present this matter in a kind of elaborate, factual presentation. That was his signature in the Civil Rights Division.

Many of the Judges who later became heroes of the civil rights began with great skepticism of these civil rights. These people – Judge Johnson, Judge Wisdom, Judge Brown – were all parts of the society that was being criticized and attacked during that period. John developed a mode of operating which just consisted of the dry presentation of facts. You can't get a grasp of John by looking, I don't think, at the Neshoba trial which is kind of dramatic and [inaudible].

John's real contribution was the development of these facts in the early voting cases before the Voting Rights Act of '65. School desegregation cases where the presentation was just like these are the number of students, these are the school buildings, these are when they were built, these are the teachers, their salaries, this is what happened, these are the facts.

His emphasis during the Civil Rights Division was almost like treating these cases like anti-trust cases. Not as a kind of a criminal case with a human interest story and he operated the division to always put the emphasis upon the facts, facts, facts. When he became the Chief Counsel of the Impeachment Inquiry he had the same model.

I was not present when he chose the top title Statement of Information. I wasn't in on that discussion. I don't know who on the staff made it or recommended it, but when I came and saw that this is what it's going to be called, I smiled. This was like so John. That's basically how it would evolve.

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- Naftali: Do you think he was a little disappointed that the Committee Members needed a little bit of tutoring. I understand that Dick Cates used to give them little seminars on how to...I've read there were some complaints from the Committee Members. They were having a hard time absorbing the Statements of Information. Do you remember that at all?
- Fiss: I have a vague recollection of it. I mean, it's not easy to be a Judge in an anti-trust case reading volumes of economic, volumes of information on economic performances. This was the same thing just go on and on, but he didn't shake from that. He didn't move from that.
- Naftali: At what point do you think he shifts from being someone who's assembling material to actually being a prosecutor? When do you think he made up his mind about impeachment, I guess that's a better way to put it.
- Fiss: I think it was pretty late in the process, I think he had made up his mind. I'm not sure about which Articles and all the rest, but I think by the time the...he had been seeing drafts of Statements of Information and I think as that began to sort of assemble, I think he made up his mind at that point. I think it was late in the process. How late, I can't recall specifically, but it did not come quickly or easily.
- I think also I remember...keep in mind Presidential politics are changing during this period. I mean, we're not sure of the outcome at all. I remember, I think Nixon makes a trip abroad in what July and returns home extremely popular and successful. It's not clear what's going to happen in terms of what the Committee would do.
- I think what happened was he returned home very popular and then the Impeachment Inquiry released the re-transcribed tapes and that sort of pushed back on the public reaction to his trip abroad.
- Naftali: Why did the Committee not wait for the Supreme Court decision on the other tapes because, of course, the smoking gun tape doesn't come out until after the Judiciary Committee has voted on these Articles. Was there any thought to waiting until Jaworski and Sirica's case had been adjudicated by the Supreme Court to get it?
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Fiss: I don't remember any discussion about waiting at all. I don't know if we knew what was on those 18 and a half minutes and stuff.

Naftali: Nobody does.

Fiss: There must have been some consideration at some point, but I think once the Committee, once the Impeachment Inquiry, was authorized, I just think there was a kind of momentum that ran on an independent track and it wasn't about to be...I don't remember any discussions, although, I'm sure they must have had them.

Naftali: Did he ever –

Fiss: I mean the decision when it came down was an incredible historic moment and I remember having dinner with him that night. Then going back to the office late at night and one or two Congressmen were coming by to look at sort of information. I don't know why they were. I mean it was an incredibly dramatic turning point in American history. This whole proceeding.

Sometimes, when a lawyer gets involved in a case or a prosecutor, or a plaintiff's lawyer, defendant's lawyer, they get somewhat disappointed when there's a settlement. Like why can't we go through? I'm all prepared to go. Why are you pleading guilty or something like that, but there wasn't any feeling on John's part about that. I think when the news came down it was we did our job and we did it well and this only confirms what we were doing, really.

Naftali: For people watching who are not experts in the whole issue of impeachment, since you did not know that the story would end with the President resigning, was it anticipated that the Statements of Information would actually go to the entire House after the Committee voted and approved what Articles, in this case –

Fiss: It's very unclear what the trial in the Senate would consist of. It's conceivable. It was conceivable that it would be based on that, but I'm sure the President would want a kind of independent fact. I mean, we're talking now about multiple levels of hearsay. The Senate would like probably to have something independent, but it wasn't looking ahead to that. It was really – I don't know – our minds never really turned to the Senate trial, really.

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- Naftali: Well, I was also thinking –
- Fiss: It was such an extraordinary moment.
- Naftali: Look at the House, the House still had to vote right?
- Fiss: Yeah, oh, I'm sorry. I thought –
- Naftali: I was going to get to the Senate.
- Fiss: I'm sorry.
- Naftali: That's okay.
- Fiss: I think they assumed that the House would be acting on the basis of the Statement of Information and the action of the Committee. That that would go that would be the factual predicate for the deliberations of the House of Representatives. I mean that was an operative assumption. I don't recall any specific conversations, but we all assumed that.
- Naftali: Now do you remember the discussions about what role the President's counsel would play in toward rebutting these Statements before the Committee vote? I'm still talking about the House Judiciary Committee. Of course, there was a bit of controversy as to how much time would Sinclair have, would he be able to actually cross examine people, that sort of thing. Do you recall the issues that arose?
- Fiss: No, I mean we discussed it, but I don't have a very clear recollection. When you're writing something like this, you're always imagining what they would say. I mean you can't write an effective legal document or even political document in a kind of context like this unless...I mean every time I worked on it and I had like one iota of information.
- I tried to imagine what someone who would be defending the President would say about it. I constantly imagined what it is, what they would say, but I don't remember conversations about what should Sinclair be able to do before the Committee, etc. I don't recall that.
- Naftali: I suspect you don't believe that they are hermetically sealed, but how intertwined were legal and political issues here? You were
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saying as you put it, it's both a legal and a political document. Was this a legal process?

Fiss: When the Statement of Information was released there was a column in the New Republic saying this is the most powerful political document ever produced in America history. I kind of smiled because I thought it was just pure law. There was nothing political about it.

John was always aware of the political milieu in which we operated or he operated it was always there, but I think he really saw himself all the time as a lawyer. He certainly didn't let the staff have much input. I would never talk to him about politics or any aspect...when I say politics, like what would this Congressman's reaction be or that Congressman.

I mean we'd have chit chat, but I had no intelligence about politics and I tried to just do it as a lawyer. It had tremendously profound political implication I think that's what the New Republic meant. Its become vulnerable to political dynamics after all the Congress people are politicians and subject to that, but that was always kind of another world.

Naftali: I mean, as you say, you understood the implications of what you were doing.

Fiss: Yeah, absolutely.

Naftali: You were still in your 20s? How old were you then?

Fiss: I was in my early 30s.

Naftali: Early 30s, it must have been pretty heady. It must have been a heady time. Busy, I know, but –

Fiss: It was heady and you needed to believe in what you were doing to work two or three nights without sleep or something like that. It was very, very, very heady. My own personal feeling was, gee, I'd like to be back in Washington or Chicago getting ready for my classes or something like, what am I doing here?

I'm sure I'm naive, but I had a very technocratic aspect. I was being a lawyer. I was helping out in this inquiry. I didn't have

intelligence about the rest of the political setting and stuff like that. I just put my head down and worked.

Naftali: Just on a sort of technical, discuss a technical issue, when you would work on a Statement of Information regarding, let's say, abuse of power, would you then go and talk to Robert Sack, later Judge Sack because he compiled a lot of the material that went into that. Would you have talked to him when you were editing it or was it beyond him at that point?

Fiss: It was really beyond him. I mean, I would talk to him he was friendly and smart and all the rest. Some things I didn't understand, but it was like beyond him. Now John, John would have conversations with him. See, it wasn't like here's Judge Sack and here I am and here's John. I just worked for John and John had doubts about what I did a lot of times, I'm sure.

I mean it would go up to John. It would go to John and then John would take it up with Bob Sack or someone else. Believe me, my word was not the last word. John was the last word and he consulted and he consulted even things, he might have discussed it with Burke Marshall.

He might have discussed it with Bob Owen or the official staff. I mean we were like sort of shadow people. We were like his sort of special staff. They knew it. I'm sure a lot of them resented our doing it, but I'm looking at that from Bob Sack, but John would go back to him. John would be respectful of his position. John would go back to Bernie Nussbaum or something like that. John was very respectful of the position, but it went not from me to them, but –

Naftali: You were like a kitchen cabinet. So it was you and Burke Marshall, was there anybody else who was sort of a special adviser to him?

Fiss: Well, Burke, I mean Bob Owen operated in that way. Dorothy operated in that way. The three of us were often in the same room. Of course, you probably know about Renata Adler was a person that was involved as a kitchen cabinet. Not on a daily basis, but she was involved.

Naftali: She would write quite a critical piece in the Atlantic afterwards.

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- Fiss: Yes, well, that's Renata, but she played a very important role. I think it was her. I hope I'm not speaking out of school on this, but I think it was her intuition when the transcripts were released that there's something funny about the transcription of these recordings. She's an extraordinary writer, but she felt that this is not how people speak. There's something – the cadence everything isn't making sense.
- Naftali: You mean when the White House –
- Fiss: When the White House released the transcript, it was embraced by the public and sort of more or less accepted until the Impeachment Inquiry reissued, re-transcribed, but I think it was basically her intuition that this is not the way people ordinarily speak that there's more on these tapes than we get from this transcript.
- Naftali: So that may be what prompted or help prompt Mr. Doar to go ahead and do your own transcripts.
- Fiss: Yes, yes.
- Naftali: As you said, that was a very significant decision and it was.
- Fiss: Incredibly significant, really, incredibly significant. As I told you first, not just because of the impact on politics when the job was done and released, but also in the writing of the Statement of Information. You had a clearer picture of what was happening in these conversations.
- Naftali: How was the decision made to interview...I believe there were eight or nine people interviewed by the Committee – Colson, Kalmbach, a few others. How was that decision made to have them testify?
- Fiss: I don't know. I was back in New Haven, Connecticut staying at a friend's house watching on TV.
- Naftali: What other issues do you recall being very significant and being sort of a center of your discussions with Mr. Doar as part of his kitchen cabinet that we might not have touched on?
- Fiss: Nothing comes to mind. I think you touched on a lot. I don't remember. I may recall later, but I don't.
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Naftali: What did you learn as a result of this process?

Fiss: I mean, of course, my admiration for John grew, but I would say the major thing that I got from the process was we had to confront one of the awkwardness's of the Presidential system of government. It was just too hard just to impeach...we have the Presidential system means that the President has an independent mandate from the populace as well as the Congress.

As opposed to a parliamentary system. I just felt that we just had too high a standard for impeachment. I mean, I think it's integral to a Presidential system, but that you have to prove high crimes and misdemeanors is a little bit too rigid and too inflexible. I never perceived that it would be so hard to do.

As I said, I don't believe to this day that it requires proof of a crime. I mean in the sense of a violation of Title 18, but it does have some crime like qualities to it and I did not believe that the bombing of Cambodia was a ground of impeachment. I had doubts about that, but I'm not sure. It shouldn't be a grounds for removing the President. I just think it's too rigid.

When things get that bad, you should be able to remove a President or have another election in the way that you have in a Parliamentary system. Now there's many disadvantages to the Parliamentary, so I'm not carrying a brief for it, but maybe you could have the Presidential system with a lower threshold for grounds of impeachment than the Constitution gave us. That was the major take away, I would say.

Naftali: Then you would have these confidence motions, right, if the President lost the confidence of Congress then they would be removed.

Fiss: Well, I would say that would take us to the Parliamentary system. I'm not recommending that, but I'm wondering. I don't come away with a clear conviction, but I'm wondering whether you could have a Presidential system with a lower standard than high crimes and misdemeanor gave us –

Naftali: You think that partly this –

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- Fiss: You know it could be systematic deception of the public that strikes me like a good crime of impeachment – systematically just misleading Congress and the public, lying or something like that. I don't think it's a crime and I don't think it would be a high crime misdemeanor, but maybe that should be sufficient grounds of what's going on. I mean the question what I came away from is whether you could have a Presidential system with a lower standard for impeachment that would still keep us as a Presidential system.
- Naftali: Well, as you know, the framers had that whole discussion about it. Where were you and what do you recall of learning that President Nixon was resigning? Where were you when you heard that?
- Fiss: I was in Washington. I was at the offices of the impeachment inquiry. The Supreme Court's decision came out sometime on was it a Thursday I don't remember. It came out then we had dinner together. Then I went back to the Division I mean I went back to the offices that night and then the next morning. Then I think that sometime during that day it was revealed to me.
- Naftali: I asked you about when the President resigned. You've talked about the Supreme Court decision. There's actually a lag between the Supreme Court decision and the President's resignation. He doesn't resign until after the smoking gun transcript is released on the 5th of August and the he resigns on –
- Fiss: What's that date of the Supreme Court's decision?
- Naftali: July 29th.
- Fiss: I may have been back in New Haven, Connecticut. I don't recall. I was not startled by his resignation. I mean, as from that night that the Supreme Court decision and I was in the office the next day, I mean I think there was contemplation that he would resign. It was not a traumatic moment for me. It was not a utter surprise, but I think I was back in New Haven, Connecticut.
- Naftali: Did you ever talk to Mr. Doar about the pardon? What he thought of the pardon?
- Fiss: No, no. I had views about it, but I –
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- Naftali: What did you think of the pardon?
- Fiss: I thought it was kind of a betrayal to our commitments about rule of law. President Ford was invited by the Yale Law School to receive some honor, I think, in that November. I think the pardon had already...when was the pardon issued?
- Naftali: September '74.
- Fiss: September, came back in, I believe, early November or late October to receive some medal of something and I decided not to go to that ceremony. I care too much about law and justice to have that, but I never discussed it with him and I'm not sure.
- Naftali: After *US v. Nixon* was decided, did you ever have occasion to talk to either Justice Marshall or Justice Brennan about participating in that case and thinking about that case?
- Fiss: No, no. I was close to both of them, very close to both of them and written a lot about them, but I would very rarely...I mean sometimes it would come up in our conversations when I would see each over the years, but since I clerked, I never asked them about this decision, that decision.
- Naftali: Did they ever mention to you after the fact anything about...they knew you were working on the impeachment inquiry, did they ever ask you about that experience?
- Fiss: No.
- Naftali: Well, Professor Fiss, have I missed any anecdote or story you would like to preserve? If not, then thank you very much for your time. You've been most gracious.
- Fiss: Thank you, I hope it was helpful.
- Naftali: It was. Thank you, thank you.