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**David F. Levi**

Gerald B. Tjoflat

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# David F. Levi

*Recorded April 7, 2022*

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## Interview Transcript

**David F. Levi:** Well, welcome everybody. I'm David Levi, and this is the great Judge Gerald Bard Tjoflat who has really just had the most remarkable career on the federal bench and started actually on the Florida State bench. And let me just acknowledge Judge Rosenberg in the audience here, a Duke Law graduate, who's a US district judge in the federal district in Florida and is just doing a wonderful job too. So it is nice that Duke has this tradition of graduating students who become judges.

**Gerald B. Tjoflat:** Yes.

**Levi:** It's really important.

**Tjoflat:** Why not?

**Levi:** Why not? They've got to do something.

**Tjoflat:** That's right.

**Levi:** So we're going to be talking about your life on the bench, and it's just so amazing. So you first served on the Fourth Judicial Circuit Court of Florida from '68 to '70.

**Tjoflat:** Yes.

**Levi:** Then you were appointed by President Nixon who was a Duke Law graduate.

**Tjoflat:** Yes.

**Levi:** And maybe that wasn't entirely by coincidence to the District Court for the Middle District in Florida. That was in 1970. And then President Ford appointed you to the Fifth Circuit Court of Appeals in 1975.

**Tjoflat:** And my commission is countersigned by your father.

**Levi:** So this is a family event.

**Tjoflat:** [It] said that, "Gerald Ford, Ed Levi."

**Levi:** Yeah. Well, my father-

**Tjoflat:** "Attorney General."

**Levi:** My father was attorney general. And then when the Fifth Circuit was split, you went with the 11th, because that's where Florida is. And you eventually became chief judge of that circuit from 1989 to 1996. And it was only in 2019 that you took senior status, which is a form of, it's not retirement, but it gives you greater discretion over how much-

**Tjoflat:** How much work you want to do.

**Levi:** Yeah. How much work you want to do. And then you told me just a few minutes ago that you're keeping a full load. So that means you've got a full complement of law clerks, and you're very busy. Here you are. You've been a judge for 54 years and you are the longest serving federal court of appeals judge in history.

**Tjoflat:** Yeah. In active service.

**Levi:** In active service.

**Tjoflat:** Yes.

**Levi:** That's amazing.

**Tjoflat:** Well, it just happened.

**Levi:** How do you do that?

**Tjoflat:** It just happened.

**Levi:** You must like the work.

**Tjoflat:** They call it genes or something.

**Levi:** Well, I think it is genes. But so, you've had this most remarkable career and you have all these terrific law clerks, and we're celebrating your 50 years. Well, more than 50 years. One of the ways that your law clerks have been doing this, and the law school is to record the record of your life of service. And you've been doing this with your local clerks, I think you say on Friday afternoon.

**Tjoflat:** On Friday for about 10 months.

**Levi:** For about 10 months.

**Tjoflat:** It's an oral history, they call it.

**Levi:** It's an oral history. I think you've already done something like 15 hours.

**Tjoflat:** Something like that.

**Levi:** And it's going to be truly a treasure trove for future historians of the courts because you've seen so much and you've had this remarkable career and impact in so many different areas. So many of the things that we take for granted now, you were part of the group of judges that at the time drove these reforms.

**Tjoflat:** Yes.

**Levi:** So you know a great deal about sentencing and the administration of the probation system, the organization, the administrative organization of the courts. And all of that is being covered by your law clerks. But today we thought that we would focus on your relationship with the law school, with Duke. You're a 1957 graduate of the law school, and you've been among the most loyal and active alumni that we have. I was dean of the law school for 11 years, and you were there for me and you were always there for the school. And you were there for my predecessors and for my successors. Our Federalist Society chapter is named for you. It's the Jerry Tjoflat Federalist Chapter. And I'm sure that if ACS could name their chapter after you, they would as well. There's a scholarship in your name. You've hired more than 110 Duke Law students.

**Tjoflat:** Oh. Well, if I went back to practicing law, Bill Adams, there were the top three graduates at the Duke class of 1950 came to Jacksonville.

**Levi:** So then the-

**Tjoflat:** And I practiced law with them.

**Levi:** So that would be 113.

**Tjoflat:** Well-

**Levi:** And still going strong.

**Tjoflat:** We started hiring Duke students in 1958, the three of us did.

**Levi:** That's pretty good.

**Tjoflat:** And every year after that, while I practiced law since 1968, so probably it was called a Duke firm in Jacksonville. As a matter of fact, some alumni who were big clients and Florida people were grumbling about, "Why don't you go down there to Gainesville and hire a bunch of people?" So-

**Levi:** Well, you're the full employment act for-

**Tjoflat:** And then I've hired clerks every year since.

**Levi:** Yeah. Well, we all owe you big time. So you started in Pittsburgh. You were born in 1929. And why don't we cover a little bit of the early history, because you were not born into well to do family and your folks were immigrants. You were a baseball player apparently.

**Tjoflat:** Yeah. Would be a baseball player.

**Levi:** And you were pretty good.

**Tjoflat:** Not bad.

**Levi:** But you got a scholarship to-

**Tjoflat:** Virginia. Yeah.

**Levi:** To UVA.

**Tjoflat:** Yeah.

**Levi:** Yeah. And that's where you went, you started your undergraduate. But then for financial reasons, I think you ended up at the University of Cincinnati. And you started law school there.

**Tjoflat:** Yeah.

**Levi:** And then what happened? How did you end up at Duke?

**Tjoflat:** Well, the Korean War was hot in 1951, '52. And I had a draft board that didn't like me or anybody else, I think. So I was in the first year of law school and Christmas Eve, I got greetings to report at the induction center on January the 15th. And that was the day of midyear exams. So I went to the induction center and everybody else went to exams. And so then I was drafted into the infantry, because back in those days, you went to infantry rifleman replacement. MOS, they called it, Military Occupational Specialty.

**Levi:** Specialty.

**Tjoflat:** Then they would put you on a train and send you to Fort Lewis, Washington, put you on a boat and go to Japan and then Korea. And so everybody fell out, the 200 in the company and he called my name out and said, "You step aside." And it turned out I was sent to the Counter Intelligence Corps, Army Intelligence Corps school in Baltimore. And from there, I was supposed to go to Presidio of Monterey and learn Chinese, because the Chinese were heavily involved in the Korean conflict at that time. But the school was full. So I warmed up as a special agent in the Counter Intelligence Corps doing FBI type work, I guess you'd call it in Roanoke, Virginia and then got out. And at Christmastime, I went to see the dean of the law school.

**Levi:** Here?

**Tjoflat:** No, in Cincinnati. I said, "I'm getting out on the 14th of January. Exams are going to be on the 15th or the..." I said, "You think I could take the exams of this class two behind?" He said, "If you're a

glutton for punishment, I'll go along." So I took exams. I got out on Friday and took exams Monday. I start that week. And well, then I finished Cincinnati the first year and it's a regional law school. And I talked to him about going to a school of wider... And he said, "Go to Duke." And-

**Levi:** Isn't that interesting? Any idea why he said-

**Tjoflat:** He just said, "Go to Duke." And I wasn't-

**Levi:** Sounds good, right?

**Tjoflat:** I was the best man in the wedding of a guy in a Counter Intelligence Corps who was from Laurinburg. So I'm driving to Laurinburg and I stopped in Durham and met with the dean.

**Levi:** And that would've been Jack Latty.

**Tjoflat:** Yeah. No, that wasn't Jack Latty.

**Levi:** Who was it?

**Tjoflat:** It was...

**Levi:** Could that have been Horack?

**Tjoflat:** Well, he quit. He retired the next year and went to Tampa and became a Senator in Florida, Joe McClain.

**Levi:** Okay.

**Tjoflat:** Joe McClain was dean. He said, "If you've done all right..." I didn't know what my grades were, "If you did all right..." It only had turned out all right, and so now I'm in Durham. And so I finished here, and we were getting married in July and wanted to go someplace we didn't know anybody. We wanted to go to New York. My wife to be said, "No, let's go someplace else." And we didn't know anybody. I got an offer or two from Florida and went there. So that was-

**Levi:** You know, in that-

**Tjoflat:** That was the end of that. Well, the beginning of that.

**Levi:** In the beginning of that. In that time, it's still true, but a lot of Duke Law graduates then, either they stayed in North Carolina or they went to Florida or Atlanta or Texas. It was somewhat more directed that way. Some went to New York and DC, but I think not the way if you were to compare it to now, where lots of students go to New York, DC, California. It was less, less true then. Well, what was your experience like at Duke? You were over on the West Campus.

**Tjoflat:** In the West Campus, next to the parking.

**Levi:** This-

**Tjoflat:** A class of 36.

**Levi:** This building wasn't here. You had a-

**Tjoflat:** Class of 36.

**Levi:** 36.

**Tjoflat:** You were called on every day.

**Levi:** Yeah. Kind of a different environment. And what would you say your favorite classes were? Do you recall?

**Tjoflat:** Oh, my. Well, Jack Latty, Doug Maggs and Pascal.

**Levi:** There was-

**Tjoflat:** A lot of the professors had been there a long time. They were there, a lot of them, in the '30s when the law school was basically built.

**Levi:** Then it was started in the mid '30s.

**Tjoflat:** Yeah.

**Levi:** Yeah. And that was a great group. People may not know this, but when Duke was founded, when the university was founded in the mid '30s, the law school just kind of sprang onto the stage. And it had a lot of money. And they went around the country and they tried to poach the very, very best people from around the nation.

**Tjoflat:** I think that Richard Nixon's class, which I think was '38 was on scholarship.

**Levi:** Yeah. I think they were entirely on scholarship.

**Tjoflat:** The whole class.

**Levi:** Just about, yeah. So in the 1950s though, this was the period after the war and Duke, at least initially didn't do very well after the war. A lot of the law schools during the war, at that time, it was mostly or all men. So their enrollment was way down Duke and UNC actually combined during World War II.

**Tjoflat:** Yes.

**Levi:** And then after the war, the schools were flooded with...

**Tjoflat:** GIs.

**Levi:** With GIs coming back. But Duke, not so much. And Jack Latty who had been the dean, I think just-

**Tjoflat:** Well, it was Joe McClain and then Dale Stansbury who taught evidence and contracts, had been here a long time.

**Levi:** Yeah.

**Tjoflat:** He was dean for about two years, then Jack Latty.

**Levi:** And then Latty. But Latty went to the Board of Trustees at one point in the 1950s and said, "We may have to close the law school," because it had not rebounded the way some of the other schools had. But by the time you got here, I think it was looking up. And in the late '50s-

**Tjoflat:** Yeah. We were ready to go.

**Levi:** We were ready to go. And then they built this building. Yeah. And then they took off. Okay. So you graduated in '50...

**Tjoflat:** Seven.

**Levi:** '57. And you end up in Florida and you're practicing law. How do you become a judge? How does that happen?

**Tjoflat:** Well, I'm practicing with these two lawyers. I was blessed with great law partners in the practice of law. We had the largest firm in Jacksonville by the time I went on the bench, which was 28 to give you [inaudible 00:13:55]. I think we started out with about six or seven over a 10 year period, up to 28 or so. And we had great clients.

Well, anyhow, how I'm on the bench is a freaky sort of thing. Florida had the first Republican governor since reconstruction in 1968, just by a pure accident. Anyhow, there were 11 of us state judges for three counties. And under Florida law, you ran in a partisan election for the judiciary, like they do in North Carolina, say for all the courts. And if a judge died midterm, the governor would appoint for the balance.

So a judge named Jones, and this is in the spring of '68 had died and about the time of the Florida Bar was meeting. And I was in Miami and they got back on Monday from the weekend Florida Bar meeting. And I happened to be a Republican. There weren't any Republicans. As a matter of fact, when I came to Florida, I went down to register and they said, "You're going to register as a Democrat." I said, "No, I'm a Taft Republican. Let me..." "No, no." So I registered as a Republican, which they said, "You can't vote. You can vote in the general election, but that's all."

So anyway, but parties didn't much matter then in those days. Some clients told the governor, "We need to put this guy on the bench." And I had two children. One was 10, one was eight, thought well, might as well. So I was appointed June 18th, 1968. Now, I had to run in the next general election for four and a half years left in the term. That meant November of '68 as a presidential year. And that would be a massacre because the Democrats out-registered the Republicans in the three counties by 95 to five.

So anyway, so I took the job. I told my partners, "I'll see you in January." And down I went and I was having a good time. I had no campaign. I qualified to vote, no campaign treasurer, no nothing. And I was trying a case before a jury in August, the last day of registration. And I thought there would be three or



four Democrat lawyers who had been prosecutors that had name recognition. And I remember that the juries in the box and the clerk came through the door in the back of the courtroom. And I told him, "Be at ease." He came along sidebar. He said, "Judge, you don't have an opponent."

**Levi:** That's the best kind.

**Tjoflat:** Yeah. Yeah. So in November, the precinct's registrar of elections, who was a good friend, he said, "I don't want you to get the big head, but I'm going to give you something." And it showed the precincts in the three counties, and some precincts would be like this, Hubert Humphrey 890, Nixon two, Tjoflat two.

So now I'm on the state bench and a vacancy occurred on the federal district bench two years later, and so that's where I went.

**Levi:** That's where you went. And let's talk about a couple of things here that are part of your story. So becoming a US district judge, every judge has their own path to the bench and they're all a little bit different, but yours is different because Nixon was a Duke Law graduate. And I'm sure that didn't hurt.

**Tjoflat:** Well, Dean Latty sent me a note, a copy of a letter that he wrote, "Dear Dick." So he wrote to the president touting my appointment.

**Levi:** Yeah. It didn't hurt.

**Tjoflat:** No.

**Levi:** And you know, I have a different story, but the point that I'd make here is just that my law school, which was Stanford, when I decided I wanted to be a judge, they got behind me and the former dean, Paul Brest, and my con law professor, Gerry Gunther, they all wrote letters. I don't know how much effect they had, but probably, my guess is quite considerable.

**Tjoflat:** Well, by the time the federal position opened, which was, as I say, two years, I already had a reputation on the state bench. And there was a reputation in that part of Florida, for example, we never had contested elections on the state court at all, whoever appointed you or however you were elected, you stayed. And so there wasn't a lot of hullabaloo about that federal vacancy.

**Levi:** Right.

**Tjoflat:** But the story really is it I got there by happenstance. I mean, it was just the last thing in the world I was thinking about doing.

**Levi:** But let's talk some more about two things because you and I have discussed this and I think we share it to some extent. Part of your history, which you've discussed, is that you decided to go to a smaller location, a mid-sized city where you became a lawyer, where you practiced, and where you became a judge. And that's a different experience than being a judge or a lawyer in a huge city. They both have things to speak for themselves, to being a lawyer in New York, you're going to have extremely sophisticated cases obviously, or Chicago or Los Angeles or something. But there are other joys that are

part of being a lawyer or a judge in a place like Jacksonville, or in my case, Sacramento. Let's just talk about that a little bit, because I think we have similar views on this.

**Tjoflat:** Well, given that about New York, a classmate, Gary Stein wound up in the New Jersey Supreme Court, but he had been practicing five years at Cahill & Gordon and I'm up there on business. This is back in '61 or '62. And I said, "Gary, how long did it take for you to have an identity in New York?" He said, "About five years." But at any rate, so Jacksonville was a city of about 320,000, and the county maybe 400,000. And so everybody's sort of a generalist. You're doing all kinds of things is what I'm trying to say. In those days in the criminal practice, for example, you were appointed by a judge out of your... The federal court judge would call you and say, "Tjoflat, it's your turn to come to arraignment." And you'd wind up with three or four or five clients and you got no pay if you went. If you lost, went to New Orleans on appeal, you paid your own way to New Orleans. You had to pay to have the briefs. That was just part of being a lawyer and that was the obligation of the courts. But the point is you got involved in the community heavily and learned lots of different skills in that way, I think.

**Levi:** And you knew everybody, I think.

**Tjoflat:** Yes.

**Levi:** I think of the idea of the lawyer as the glue person in the local community, that you know the bankers and you know the workers, and you know the newspapers, and you know a lot of people.

**Tjoflat:** Well, that's right. And as I'd tell clerks, I've been telling them this for 50 years, "If you went to a medium-sized city, like Jacksonville was, or you went to Savannah or you went to Pensacola, or you went to Durham or Raleigh and you read the local newspaper for, say two or three years. And you followed crime and you followed litigation, let's say, disputes and one thing, another, you would always see the names of five or six lawyers seem to be doing everything." They were involved in the controversial cases of all sorts. They were maybe involved with the government. They were involved in civil rights matters, maybe in criminal cases. They just seemed to be popping up. And these are the great generalists, I call them. And they are really the wise people, the wise men. It seems like everybody searches them out, especially in the difficult kinds of cases.

And in sitting on the bench, the greatest lawyers you see come out of smaller places. They don't come from New York or Washington, DC or Chicago or someplace, because they're in departmentalized law firms and they sort of have tunnel vision as a way. No matter how smart they are, they've been doing the same thing over and over. And so you have an argument from one of these lawyers from Montgomery, Alabama, or Fort Worth, Texas. You sit in Fort Worth or Jackson, Mississippi, let's say. And they have a presence about them in the sense they're not nervous about anything. They're in full command of their presence. You've seen that. They give away points that they should give away if they're the appellant. They just give away to the appellee. They just give away the points. And they argue the justice of the case. They just pick it out. They're having a conversation with the court.

All of you are going to do moot court. And when you do moot court, you've got an argument all fixed up, remember that you're having a conversation with the court and you're trying to get the court to understand your position, and it makes sense. Your position makes sense. It has to make sense, because if you are the appellant, we've got to write an opinion. And I tell lawyers in argument, I said, "You want

us to write an opinion that says that? What do you think it would look like on the front page of the Atlanta Constitution?" If it said, "The 11th Circuit has just held X, Y, Z," what do you want?

You can't do that. So you were having this conversation and these lawyers, they just seem somehow to be able to carry them all that way. Both sides, whether they're appellees or appellants. And they shrink everything down. Every case has a centerpiece. The practice of law sometimes is difficult with problems. Every problem is simple. Every problem is simple. What's difficult is making it simple. And so that's what these, what I call these great lawyers. You might call them country lawyers.

**Levi:** Yeah.

**Tjoflat:** Yeah. They're sort of-

**Levi:** Well, Justice Jackson called them county seat lawyers, but he thought they were disappearing. You and I are a little bit biased, just because of our background and we practiced and we were judges in these smaller communities. And I think another feature of them in addition to the way the lawyers interact with the community is the way they interact with one another, because they see one another all the time. And so all the students in the room will become aware that when you go out into practice, you'll find that the bench is extremely concerned about civility. And part of that is just self preservation, because if you have a bar that's at one another's throats all the time, they bring all these disputes to the courts and they really gum up the works.

And judges are very mission oriented. They're trying to provide justice to the people of the region and the district. And it's not helpful to have these collateral suits going on all the time, and accusations and filling the case with friction. But we don't tend to see that in these smaller communities, do we?

**Tjoflat:** Well, it used to be that you had a hard argument and it's five o'clock and you leave the courthouse, and both of you go across the street and have a martini. I mean, why not? Or have dinner.

**Levi:** Right.

**Tjoflat:** I'm serious.

**Levi:** Well, because you're going to see-

**Tjoflat:** Or you're playing golf together. I mean-

**Levi:** And you might see them the next week and you're on the same side. I think, at least that's the way I've always thought of it is the difference is that in the bigger districts, the lawyers don't tend to know one another and they're not necessarily going to see one another again. And-

**Tjoflat:** And they're not going to be as good, because great lawyers look at the broad picture. You unscrew your... Everybody has feelings about things. We'll call them ideologies. That's too strong. But everybody has notions or biases, or whatever you want to call them. You've just got to unscrew your head as a lawyer, put on another head that has a wide open mind, is not going to miss anything, is going to deal with the unpleasant things. And they talk to each other that way.

Otherwise you're not going to serve the client if you can't do that. I tell my law clerk, "I'm the judge, I've got to do justice here. We're going to analyze this problem and we're going to put it back together again. And I don't care what you think about it. What I want you to do is be a lawyer. So I want you to look at every aspect of this matter without any feelings about it at all."

**Levi:** And that's-

**Tjoflat:** That's the key.

**Levi:** And that's a skill.

**Tjoflat:** Yes.

**Levi:** So, well, we've talked about the practice of law and being a judge in a smaller community. Let's go back to the law school connection. I obviously want to talk to you about your law clerks, but just before we do that, do you think it's important for a judge for a lawyer and for a judge to stay close to his or her law school and why?

**Tjoflat:** Well, I think it's part of the obligation as a profession as a whole. You're in a profession, it's not a business. That's one of the problems that as the law practice tends to become a business, it's not a profession. So you're in a profession and the elite in the profession should be setting the tone. One of the problems, Yuval Levin has been writing about this subject, how the leaders of professions, whether it's medical or law, or whatever it is sometimes go off on their own thing and they're the leaders, what happens is those underneath follow. And sometimes they follow on the wrong path. But I think as a matter of the profession, the law school you came from is the perfect place to be, to interact. And if somebody in my position, so I go to other law schools that do judges in resident, or do classes or something or other, but you have the roots and this is the logical place.

**Levi:** We want a conversation between the bench and the bar and the academy, I think. I think we both think that's really important.

**Tjoflat:** Oh, absolutely.

**Levi:** I mean, maybe it's just too obvious to say, but it's good for judges to know what academic thinking is. And maybe that's one of the reasons you hire law clerks that are fresh out of law school. And they've been newly trained, like young doctors. In theory, they have the best training.

**Tjoflat:** Well, I'm in my sixth decade of hiring law school clerks. So I've seen every hairstyle, every face style, clothing style, everything you can imagine. Okay. But as you go back through the years, I go back to the '50s and the '60s and the '70s and the '80s and the '90s and this century, and you're following the progression of the generations. And you know how they're being taught in a way by the interaction with the law clerks from one year to the next. And you're also learning about how they see themselves as a future lawyer, which is an interesting thing. You've seen the same thing.

**Levi:** Well-

**Tjoflat:** Of course you do, especially when you're teaching.

**Levi:** Yeah. I mean, I think we do. So the judges benefit from the law clerks having this experience of law school, and it kind of keeps you fresh and they help you with academic-

**Tjoflat:** And you've got to interact with the academy.

**Levi:** So, well, that's what the academy gets out of it.

**Tjoflat:** I think that's indispensable, because we're in a greater reality than when you're teaching in law school, unless you're also doing things on the side so much. So I think that's very important. And I think it's very important for judges to be in communion with the bar. In the federal circuits, we used to have a circuit conference. All the judges in the conference would meet with 500 or 600 lawyers for three days every year. The government started running out of money about a dozen or 15 years ago. And so they started skipping these conferences to every other year.

And it was absolutely imperative, in my judgment. In the first place you have new judges coming aboard. So you have to meet frequently. It's very important to interact frequently. And then you have to interact with the bar, because the bar is the resource that the court relies on as to administer justice. So they've got to be together. They're officers of the court. So you have to have, it's a three way thing. You have the judges and the lawyers together, and the academy. They're all together really, have to be.

**Levi:** Do you think there's a gap between the world of the academy and the world of the judge today? Have you seen any changes over your...

**Tjoflat:** A little bit of change in the sense of what the law clerks communicate. So the extent that the academy is changing, let's say... I'll put it blankly, say objectivity in the breadth of teaching, to the extent that the academy is falling down on the breadth of teaching, a full interchange of ideas and all those kinds of things. You see that little by little in the law clerks. So then you have to, I start the teaching.

When my clerks come to see me, come to my chambers in August, they all come in August. We have two weeks of indoctrination. And for two weeks, I tell them political correctness is not in these chambers. There is no political correctness. Zero. If you have an idea, I want to hear about it. If you have an idea and you think this co-clerk sitting across the table, that you're smarter than this other clerk, so you don't want to offend the clerk. I say, "You've got to go ahead and offend the clerk, because I want to hear about it." And so we have lunch every day around a library table and engage in, we pick out cases or issues that are, a lot of issues in today's world are ethical issues. They have to do with moral issues. There are a lot of things that go on in the law practice, the way lawyers act and the way cases are tried, and one thing or another, that implicate values. Morals is the best way I can think about putting it. So you are always asking the clerks, "What is this? There's no rule for this." I'm working on five cases right now that have deep ethical problems that are beneath the surface. In other words, the lawyers are arguing up here and the ethical problems are underpinning everything, and they won't talk about it. But we have to talk about it, because we have to do justice and we have to get the bottom of the problem.

So then I say to the clerks, "We don't have a black [letter] rule here. There's nothing in the law of that, the canons of ethics or anywhere else that tells you this is right, and this is wrong. So what is the source of right and wrong? So they start talking about the source underpinning, the rules of ethics. And when you engage in that kind of a conversation, you forget about your ideas about this, that, and the other thing, because you're right down to basics. And that's what you have to do, and that's what judging has

required. And so there has to be an interchange of ideas. And you start out with that attitude in the law school, basically.

**Levi:** A judge lives in the adversary world. So there's always a proponent and there's always an opponent. And I'm sure you've had the experience, I know I did, where I would read a brief and I would say, "Wow, this is so convincing. There can't be an answer to this." Then you'd read the other brief and you'd say, "Wow, this is so convincing."

**Tjoflat:** Yes.

**Levi:** "I can't wait to read the reply brief." And then you just sit there and say, "I'm really confused."

**Tjoflat:** Yeah. Well, that's true. And sometimes the answer is not in either brief.

**Levi:** That's true, too.

**Tjoflat:** That's not uncommon at all. Sometimes they're both in agreement, and then you'd be suspect.

**Levi:** Yeah. One of the, I would say one of the gaps or one of the differences that I've noticed over time, and I don't think I'm the only one who's noticed this is that most academics who study judges will say that judges act politically. And they'll support this with a certain amount of statistics. And they'll try to relate the decisions of the judge to the party of the appointing president if they're looking at the federal system or the party of the appointing governor, if they're looking at the state system, whereas judges do not think that they decide cases politically. And they find this extremely offensive. And this is a hard discussion to have.

**Tjoflat:** It was. You see it in the newspaper. There's a decision. And so-and-so appointed this judge and this judge, and so-and-so appointed this one, which is really bad. Some people think, I don't know, in the profession, I'll put it that way. That would be everybody. They think we're on the court of appeals that we have bench memoranda or we've read the briefs and made up your mind. That is a belief that is pretty widespread, that we've made up our minds. I will tell you from my own experience, that at least 50% of the oral arguments I've ever heard, what I may have thought ahead of time is wrong. Because the oral argument, that's this conversation between bench and bar, it starts surfacing what really the issue in the case is. And sometimes it's hidden altogether. But I think it's not possible to write opinions that say one and one turn out to be three.

**Levi:** That's usually the first draft.

**Tjoflat:** That's the first draft. So you have to have an open mind. You're looking for the answer to a problem. All judges are dealing with problems and you're looking for an answer. It's like you have a Rubik's Cube that's jammed together. You've got to take it apart and put it back together again. And it doesn't look like it did beforehand.

**Levi:** So you've hired 110 Duke Law students to be your law clerks. And then there have been a few from lesser schools, lesser places, which is only fair. What do you hope your law clerks will get from the year with you?

**Tjoflat:** Well, historically my experience from the Duke Law school has been fairly balanced in their approach to the law without an agenda that's bent some out of shape. I have run into some of those. It takes about six months to pound it out of them. And I remember one time I had a clerk who had a PhD in economics. He taught economics for 10 years at university. And we had a case. And he said, "Judge," it was a trust case, "We're going to decide this." He had some ... some issue he wanted... I said, "No. No, John, we can't do that. That's not in this case." And about a month, he figured out it wasn't in this case.

So if we had written the opinion with that in the case, a sophisticated reader knows, Tjoflat, you've gone off in left field or right field or someplace, over the fence, and that this case doesn't involve that.

**Levi:** Right. But I know that working with your clerks, this is just such a... The joy that you have in that, you've conveyed that over time. I know you have every five years, you have a reunion and you're very close to your law clerks over time. Why don't you talk about what they've meant to you in your life?

**Tjoflat:** Well, I write a year-end letter, right before New Year's. It tells what the court as a whole has been doing, because they know the judges, and so forth and so on. I introduce them to new judges. I tell them what some of them have been doing. For example, somebody, the clerk back in the '80s, I'll say something because a bunch of people who clerked in the '80s will know this individual. And then you just follow their careers.

I think I know probably out of the 200 or some, probably I know where 175 are, how many children they have, what they're doing. I've had a former law clerk become dean of a law school. And I did his first commencement as dean. And he turned around and hired another law clerk from a different era. And then I've sworn in law clerks as judges, which is a very warm thing. And then you enjoy their successes. Some have changed their professions. One law clerk decided to go to engineering school, went off teaching engineering in Pennsylvania, at a Philadelphia firm. Another one went to medical school. So they do sometimes different things. One is a writer.

**Levi:** It's a family.

**Tjoflat:** Yeah. It's sort of a family.

**Levi:** That's really nice.

**Tjoflat:** Yeah.

**Levi:** When they're there for the year, you mentioned that you have this two week Tjoflat boot camp.

**Tjoflat:** Yeah. Yeah.

**Levi:** And then what do they do over the course of the year? And how do you interact with them?

**Tjoflat:** Well, first I tell them in this day and age, in August I say, "In October, you won't recognize the United States." And then in October, I say, "In March, you won't recognize the world we're living in." [It's] fairly volatile. We work on these cases, and some of them are a bit more complicated than others. And so the door's always open. So it's an in and out proposition. And sometimes they gang up on me. I

mean, the clerk disagrees with where I am, and so they're back in the bullpen. And then we have a confrontation. So for them, it's a learning process. Some go this way, some go that way.

I'll say this, I would say one out of five, maybe two out of five will get in touch with me within two years or three at the most and say, "Judge, what you said it was going to be like out here is exactly right," that I would say it's even more than that. Because I tell them what they're going to run into and that they're going to be called on to do things that they ought not do, because some senior person doesn't want to put their name on it, so they give it to an associate. And so they're going to have some hard choices to make.

They always call me. Because of indebtedness, they get signing bonuses because they clerk, at the big firms in DC or New York or wherever. And they'll stay there two or three years and want to go back to Arkansas or some place. They'll always call and talk about what life is like. One of the things that they are concerned about being in a tunnel vision, kind of in a department. It's a matter of economics in law practice, you've got to have departments in law firms. You can't be reinventing the wheel every day. So there's some repetition. And sometimes I think they think they're cabined. So they talk about that.

**Levi:** So some judges have gone to hiring permanent clerks, and you have not. You have-

**Tjoflat:** Never.

**Levi:** They turn over every year. Can you talk about that?

**Tjoflat:** Oh, in the first place, if you make a mistake, it's awful. Of course, the person who's the permanent clerk has left everything else. And so you've got a problem. If you discharge the clerk, they're out there and that's a death knell maybe on their career. And then sometimes they think they're judges. I've called a couple of career law clerks or other judges, I'll just say, "Judge, you've got that one wrong," or just tongue cheek, kind of thing. And I think they ought to move on. And when they come out of law school, you clerk and move on. Lawyers have a bundle of skills. You learn some skills here and you'll learn some skills here, and you'll learn other skills in some group settings. So young lawyers want to get involved in as much as they can, like in the community, like you were saying earlier. Because you pick up all kinds of interpersonal skills, which are very important in this interpersonal society in which we live.

**Levi:** So you've done a lot of mentoring and you've helped so many generations of law clerks. Who mentored you? Who did you look to, when you came on, you were a young judge 54 years ago.

**Tjoflat:** Oh, boy.

**Levi:** And who were your judicial heroes, your judicial models?

**Tjoflat:** Well, there was Elbert Tuttle and Warren Jones, and a couple more of them were born in the 1890s. And then there was Chief Justice Burger and Lewis Powell, and a couple more colleagues born before 1910. Okay. And then two or three that were in the First World War. And so they're 30, 40 years older than I am. And they're from all kinds of walks of life. And so you just pick up all sorts of things and a lot of wisdom about things not to do. As a young judge, for example, you learn early on and probably just by osmosis from this crowd that you never enter an order you can't enforce. And why do you not enter an order you can't enforce? Because you bring disrespect to the rule of law, because you



disappoint the litigants before you. If you enforce it, you make a terrible mistake and create some more problems for the public at large. Just little simple things like that.

**Levi:** So some of the judges you mentioned were part of the group that dealt with the desegregation cases of the 1950s. And that was a very brave group of people.

**Tjoflat:** Yeah. And I joined that crowd.

**Levi:** You joined that crowd. And they took a lot of, there was a lot of pressure on them from their community.

**Tjoflat:** And you would talk about who appointed who. I will tell you this, that nobody would've thought about who appointed this judge or that judge, I don't even think it would be in the newspaper. These were very serious matters involving widespread effect on communities. You're talking about turning cultures upside down. And I don't ever recall, I don't recall ideologies. I don't recall this one appointed me or this, or politics, or anything like that. As a matter of fact, the judges were against all the politicians. I mean, in those days, what had happened was, and this is one of the reasons why the federal courts got so busy starting in the '70s, is that state legislatures and executive branches, the Congress and the executive branch of federal government were not solving some problems. So everybody was running to the federal court.

So we're desegregating schools. They could have been desegregated by other courts and other devices, or all kinds of things, or cases involving insane asylums, cases involving the juvenile justice systems, all those things. They were all solvable in local government. So all everybody started running the federal courts. And so what I'm saying is lots of people didn't like what the judges... Well, they liked what the judges were doing, because they were relieving them of the problem, which in a way is ... I had a Jacksonville desegregation case. It was 130,000 students in a territory two-thirds the size of Rhode Island, to give you some idea of the size. And one thing you always keep in mind is the school board has the obligation to run a constitutional school system. Not me. They've got to run the system. That's their job. If I take over their job, I'm demeaning the local government and doing lots of other mischief. So what you do is you make it possible for them to do their job. Ugly as it is, they're going to do their job. And you're going to do as least as possible, keeping in mind that I have to enforce an injunction. I'm not going to overreach.

So that's how you do. Frank Johnson did that down in Alabama in all those cases, very narrow the decision, reserving the power to enforce, but trying to make local government do the job because that was their constitutional obligation. And in today's world, when judges make other branches of government — in separation of powers, we don't want to do Congress' job, and we don't want to do the executive branch job. When you do the executive branch job or Congress' job by filling in the blanks of legislation, say, you're demeaning that branch of government. You're saying, "You don't have to wrestle with this problem. Or the executive branch, you don't have to wrestle with it. Or in the state government, you don't have to wrestle with this problem. We'll handle it with sweeping injunctions," which, as sometimes we see, which are very unwise. And they cause all kinds of consternation.

**Levi:** So when you look back at this astonishing career that you've had of service to the nation, 54 years of judging, what do you see as the greatest challenges, the greatest challenges that you confronted and let's just say your greatest accomplishments?

**Tjoflat:** I think I've been pretty good at efficiency, of trying to make the system work, which involves a procedural on due process and lots of things, and making it work, so that people can solve problems and that local government can do its job. I think that's what I've tried to do the most, other than just deciding. You do that while you're deciding cases. And in the bar, they're trying to create good conversation between the bench and the bar that goes beyond the immediate case, because that's what it's all about anyway. The whole system of justice, however you look, to me, it's a big blob, the system of justice and the law. It's conversation with a lot of policy, and you arrive at the policy through conversation.

That's all law is anyway, just policy. And we enforce the policy. Sometimes it's made by the executive branch or by the legislative branch and we make policy, like you did on the district court. You managed cases. You're making your own policy. You're a common law judge in the way in which you go about your business.

**Levi:** That's so important. And you've been so spectacular. I don't know if you'll have another 110 law clerks from Duke, but it's obviously a privilege to serve with you for that year. I know that some of them are here today. And just for the rest of us, what an honor to be in your presence and hear your approach to judging and justice-

**Tjoflat:** Well, I'm honored to be here.

**Levi:** How important that is and-

**Tjoflat:** It's like I'm back home.

**Levi:** Your law school loves you. And I think your law school's just benefited so much from your wisdom and your caring for the institution, because that's what it's all about.

**Tjoflat:** Oh, it's a jewel. The institution is a jewel.

**Levi:** So let us all thank Judge Tjoflat. Thank you.

*Audience Applause*