

**Tom Karis            Constitutional Court Oral History Project**

**Interview 1: 25<sup>th</sup> February 2013**

**Interview 2: 23<sup>rd</sup> March 2013**

**(The transcripts were substantively and substantially edited by the interviewee)**

**Interview 1**

Int        This is an interview with Professor Tom Karis, and it's the 25<sup>th</sup> of February 2013. Tom, thank you so much for agreeing to participate in the Constitutional Court Oral History Project, we really appreciate it. I wondered if we could start by talking about early childhood memories, where you were born, a bit about family background, and what were some of the formative influences that may have prepared you for a particular professional trajectory?

TK        Well, I start by saying that I was born in Minneapolis Minnesota. My parents were Greek immigrants. They never really had a good command of English. Greek immigrants would look for small business, and that helps to explain why they were part of the westward movement and my father had quite a large restaurant in a very prominent part of Minneapolis, not far from the university. And it also had a soda fountain, so I had the great experience of a soda fountain being available to me at any time. But then when I was about maybe twelve or thirteen years old, I, during odd hours, worked at the restaurant. What I did was simply be at the cash register. And right nearby was a streetcar barn, so many of the streetcar workers, conductors, and others, would come in, and so one of the first things I learned was that they had a number of synonyms for different kinds of tobacco. So they would come in and somebody would say, "Well, I'll have some rat poison today". And I course knew exactly what that was. But the great thing was that there were also a lot of magazines for sale. We had no books in our house, and I sometimes think it was great to have such a combination of True Confessions, Hollywood stuff; it was just another part of the world that I became acquainted with. My father, like other immigrants, liked to invest in real estate, and he bought an excellent two storey duplex, not far from the university of Minnesota, and the local high school principal lived upstairs. When I think back upon it, I think I was really too naïve, it never occurred to me to sit down with him and talk about my future, or that kind of thing. And then across the street was the...forgive me for suddenly going blank on names...but the family across the street were among the founders of Minneapolis. They were strict prohibitionists and my father was very much opposed to prohibition, because you could not sell even three point two beer. I became aware of a constitutional issue by realising that there was a prohibition in the constitution against any kind of alcohol. And when that prohibition was repealed, he was very, very happy. It meant that he could sell three point two beer. Oh, yes, across the street was Horatio, P van Cleve. Among the founders of

Minneapolis. He became a member of the City Council and he had two sons. The younger son was in the same class that I was in. So during the summer time I would join him and his younger son...I've forgotten where the older was...at about maybe six o'clock in the morning to drive across the city to a lake for the early morning dip. Minneapolis has four or five lakes within the city limits. This is part of its beauty. Well, since I brought up my neighbour across the street, he had a brother who was blind and I would watch sometimes as somebody was reading to him. I was rather jealous of that, what was he reading? Then some years later when he was...my father had lost his business during the Depression...I remember seeing a sign on his window, saying...with the eagle symbol of the NRA, National Recovery Administration, which said, we do our part. Well, oh, he did his part, he did go bankrupt, and that was a difficult time, I can visualise him sitting on the sofa in our living room, rather desolate. What was he going to do? He had five children. I was the oldest of five, the second was my sister. The third and fourth were twins, who eventually became FBI Special Agents. And the youngest was Peter, who just recently died. I thought how unfair life is that the youngest of the five brothers should go first. At any rate, what happened was that Van Cleve was dry against alcohol, and he put through an ordinance in the City Council that no beer, three point two beer could be sold within a certain distance of a church or an academic institution. And this restaurant my father opened up after he lost his restaurant, was really just a very small place, mainly a bar. Its name referred to the football team at the University of Minnesota. At any rate, it was close to the university, and my father had to close his business, and then manage somehow, I'm not quite sure, to move his family west to California. You know, I said there were no books in the house, and I remember once a man came to the door selling with beautiful brochures, were Compton's Pictured Encyclopaedia. And I took the publicity to my father and said, can we buy this, can we get this? He said I'll ask one of my customers. He learned a great deal from talking to his customers, who were lawyers, professional people. He came back and said, well so-and-so told me that we should not buy the Compton's Pictured Encyclopaedia, we should buy the Britannica, which will be valuable for a longer period of time. But because my heart was set on the Comptons and my father was accustomed to deferring to me, the oldest son, we bought that. And I remember that it had in every volume a few inspirational pages. I think it was, small talks and large issues, something like that. Written by a man named Mee. And I really found those inspirational. I should mention church played no part in my life personally. The important thing was to be a member of the Greek Orthodox Church because you were Greek. When I was in grade school, by the fifth grade, and then the sixth grade, I would take the streetcar from southeast Minneapolis to the other side of Minneapolis where the priest had Greek lessons. We would all stand up when he came into the room and kiss his hairy hand, and all that time I don't remember any effort to educate us about Greek Orthodoxy. It was a class about Greece, the glories of Greece. I remember my mother once saying to me, that I should appreciate this glorious background that we had because the Greeks had discovered the "foss". And I corrected her, I said, "no, no, Thomas Edison discovered the light". I realised later, she meant the

philosophy, wisdom. She sometimes lorded over my father because she had a bit more formal education in Greek than he had, and she subscribed to the national Greek language newspaper, and when that arrived, she would drop everything, sit on the living room couch and read this Greek newspaper. Well, of course I spoke Greek at home, but in later years, say...when I was in South Africa for example, and I met members of the Greek embassy, I was very careful never to speak Greek, because it's a very bad Greek, it would be embarrassing. My horrible example is that the word for ice cream in Greek is *pawyoto*, and instead of saying *pawyoto*, my mother said 'ice-creamy'. I'll jump ahead to the time when I was in the Embassy in Pretoria and met the Greek diplomatic representative. We went to some parties at his house. I remember my rather angry feeling about the Greeks that I met there. They were snobs I thought. It was clear to me that they looked down upon my grandmother and my grandfather as hillbilly Greeks. I was bothered that I could not talk to them and I went to the Greek priest in Pretoria. There was a lovely little Byzantine Greek Orthodox church in Pretoria, to which we never went except for some special occasion. But I went to him and he agreed to give me Greek lessons every Saturday morning to straighten out my endings. Didn't last very long. But there is one anecdote, which I remember so well. When we went to the first time, Mary, my wife, noticed that Mrs Capsinbellis, was a very striking woman, she had the profile of a Cretan beauty. And as we went around the buffet table, Mary kept looking at her and then afterwards she said, "dear Mrs Capsinbellis, forgive me having been staring at you all this time, but you remind me so much of my dancing teacher in Brooklyn, Madame Kunutis". She said, "My dear, I *am* Madame Kunutis!" Well, an amazing coincidence. But it meant that we developed a special connection with this Greek family, and we adopted two of their puppies, named...it's not important (*laughs*). But to come back to literature and so forth, I discovered the public library, and really loved going there and taking out books, and I discovered there during the summer, that if you wrote a brief report of a book you'd just read, that your name on a chart would have a silver star after it, and after you had five silver stars, there would be a gold star. And I sometimes think...so that was a kind of distinction that nobody knew about, but to me it was satisfactory. I sometimes thought that my own interest in intellectual matters was partly the result of my being very un-athletic. I simply was not an athlete. Well, when you choose up sides for a team, each side has a captain who chooses members of his team, and I would always be the last one to be chosen. A couple of summers I was the YMCA camp counsellor, and when the counsellors played against the campers, I managed to be the umpire, not to expose myself...I'm wondering if having a gold star at the library if that had an influence on me. In fifth or sixth grade, we had to write an essay, and I wrote an essay on the Hessians during the American Revolutionary War. I don't remember what I looked up, I must have found something in the library, and to my astonishment I won a prize, maybe twenty-five dollars or something like that. The beginning of seeking rewards for intellectual activity perhaps. Now where am I? Well now, living near the university, half a block from my house, the father of one my schoolmates, Henry Rottschaefer, was a Professor of Constitutional Law at the University of Minnesota. Again, my

naiveté about approaching adults, I never spoke to him, for example, about my interest in law. I was interested in the prohibition amendment, for example. But what I discovered was that he hated Roosevelt. He hated Roosevelt because of the so-called court-packing plan, or the unpacking plan. And I learned this from his son. And then in high school, I remember, I think, in eighth grade we had a study hall, a large room, about maybe a hundred students, and sometimes we'd be given quizzes, and I remember one day that the people who got first and second and third and fourth prize in this little quiz, the names were put up on the blackboard, and mine was number one. And maybe this made up for my being a lousy athlete (*laughs*), but a kind of distinction, certainly polished my ego. But I loved reading and read a lot. In high school, I was president of the Honor Society, there was a National Honor Society, and one day when I was in twelfth grade, we were going to initiate new members. So there I was up on a stage in charge of this programme, and as I looked over the audience, I noticed on the first row to the far left, was my mother, and Mrs Torrens, the mother of one of my friends. She had gone to pick up my mother. I was really astonished. What were they talking about? And I don't remember ever really trying to explain to my mother what the Honor Society was. One other time when I was coming home...I think at this level the anecdotes, I'll never finish...I saw my mother and Mrs Rottschaefter in the lawn of her house. What could they be talking about? I discovered that she was asking permission to pull from her gardens some dandelions, which she would use in one of her Greek dishes. That was the kind of connection we had. Well in high school...it was a wonderful high school. I was editor of the school newspaper. That was really quite thrilling, because the English teacher had total confidence in me, which helped a great deal. And so I would go downtown to the printer's office, when it was ready to be put to bed, and got to know the printer who set out the front page and the headlines and so forth, that was a great experience. I thought really I should maybe be a journalist.

Int I'm curious, Tom, when you speak, for a young person, there seems to be such an interest in developing a strong intellectual background, and you have a love of reading, and I'm wondering where that developed? Was it just your own...something that was part of you, or did it come from your family? Was it from friends or parents of friends, I wonder where that interest came from?

TK Well reading a lot, I just enjoyed reading. And maybe I'll try and suggest perhaps intellectual life is to be contrasted with athletic life. Although when I was a camp counsellor I was involved as a kind of umpire. Well, my parents never really talked with me very much about school, yet my mother was very self-conscious about the fact that she had more formal education than my father in reading that newspaper. I think also going to a high school with the children of professors and professional people, maybe I did think of this as competition, which is the way it was. I ended up as valedictorian of my class and I remember probably eleventh grade or so, before the last year, becoming aware of this. And I didn't make a decision that I wanted to be it, but again it was a kind of impetus. But I think intellectually and politically, it was the

experience at the University of Minnesota. I could go on at great length but I'll be brief about it. It was a very exciting place in the years before the War (I graduated in 1937). There was controversy regarding the state's Democratic Farmer-Labour Party, the AFL-CIO rivalry, the role of the small but active Communist Party. Some political science professors were influential. There was also a well-attended students forum. Every candidate for Congress or for governor was expected to come to the University of Minnesota to speak at the forum. Some of the toughest questioners came from New York City. New York did not have a state university at this time, so what they did was to go west to the Midwest, to the great big state universities, Michigan, Ohio, Illinois, Minnesota. So we had a wonderful sprinkling of Stalinists and Trotskyists. And also in political theory, I studied with Evron Kirkpatrick. His wife, later, Jeane Kirkpatrick you'll recognise because she was Ambassador of the United Nations, and so forth. But there were other people I can think of who were active in the Democratic Farmer-Labour Party. You will remember Hubert Humphrey. He was teaching at a small college and sometimes visited a small class on democracy. There was opposition to the governor, (Elmer) Benson, I remember, who they considered to be a Stalinist or susceptible in their minds to Stalinism. And so anyway I discovered a group of academics who were very much involved in opposing for ideological reasons, this candidate, who did become governor as I remember. I was an editorial writer for the newspaper, the Minnesota Daily. You can compare it in format to the New York Times; it covered world news, it was quite an enterprise. And when I...at the end of each month, I would have clipped out my editorials which they published and measure how many inches, and I would be paid according to the inches. It couldn't have been very much. And then there was something called the Jacobin Club, I discovered. The Jacobin Club had been organised by somebody named Richard Scammon. I'll tell you about him in a moment. It was an anti-fraternity fraternity. Scammon was the son of a Professor of medicine. He maybe looked a bit like the actor Sydney Greenstreet. He was an enormous big man. And he had studied at the University of London...London School of Economics (LSE). Studied with Harold Laski, whom he knew very well. And there I was as a freshman, and somehow I was invited to join the Jacobin Club. When Scammon came, he met with us, a very powerful person in personality, and he wandered around the room and he said, you are going to become this, you Kartritses (changed to Karis after the War), you'll become Chairman of the students forum. And I don't know how I did but I became the Chairman of the students forum. Later on, he was an expert on elections. Later on he became director of the Bureau of the Census. And when I...well I may come back to the University of Minnesota. Oh, yes, for the Jacobin Club, we would present papers and I had just finished reading Clarence Streit's, *Union Now*, if you know that book. He argued for a union of Britain and the United States. And I think it was the first time I had read a full-length book on a kind of new issue. And I volunteered to discuss this at the next meeting of the Jacobin Club. That was one of the most unhappy experiences of my life. I was totally unprepared for tough questions. I'd read the book but the questions were far ranging. It was a reminder of the importance of being prepared and a lesson that I think I learned.

Int What did you study at the University of Minnesota?

TK Oh, you know, at the University of Minnesota I was also a member of something called the Arts College Intermediary Board. We were representing the students in talks with faculty people. And I wrote an article called entitled "*Ah Bewilderness*"... published in a literary magazine. The title was a play on the title "*Ah Wilderness*" by Eugene O'Neill. My article criticized the proliferation of courses that were available. What a dumb and arrogant article. About this time, there was introduced a "liberal arts major"... which meant essentially you could do anything you wanted to do. One of the courses I took was really not a course, it was simply something I could do as an individual. It was called the writing of term papers and theses. It gave me access to the stacks of the library. So this liberal arts major that I entered or became, gave you extra credit for A's, and suddenly I realised that I could graduate in three years. And in retrospect, I really regretted that, I lost a wonderful year. The war was about to begin and there I was. And what was I going to do. You know, again, that I was naïve about talking to professors about what I was going to do. I took a small honours class in psychology from B.F. Skinner, who was famous or notorious for the baby box, a box in which you could leave the child there, there would be things to play with and so on. But there was a lot of criticisms for that. He wrote a book, which was a kind of utopian novel, *Walden Two* and left for Harvard. At any rate, I never spoke to anybody about what I was going to do, and suddenly I was going to have to leave after three years and I happened to talk to him. And he said, go out east, get a doctorate, and come back and teach here. I was stunned. Nobody had ever given me any advice and, it certainly struck me. And again how does one go about? Well I noticed one day on the bulletin board that Columbia University offered graduate resident scholarships, board and room and scholarship full coverage. So I applied and I got it. So I came to Columbia. But I'm thinking you ask about other influences...intellectual influences. You know, I won't try to recollect any anecdotes but the excitement on campus politically as the war was approaching, and the...I remember one of the New York students was a Trotskyist, and I remember one day walking across the campus with a sister of a high school friend of mine, who was a member of the Young Communist Party in the state, and she saw him coming down the stairs, as we were going to go up the stairs, and she grabbed my elbow, and quickly we went down to get out of the way, and pointed out to me people you should not associate with. The question never came up about whether I was going to join the Communist League, I don't think there was any such chapter on the campus, she had already been a member. But I wanted to write a senior honours paper on political theory, and I was taking the course from Professor Harold Quigley, a course on Far Eastern diplomacy, but I'd taken courses in political theory from Kirkpatrick and others. So I talked to her about what I should do, and I told her I was taking a course from Quigley. Well, she said, "why don't you write something under him?" I said, "but he's very conservative". She said, "of course he is, but he's a great scholar". I've never forgotten this moment. It

showed that somebody could be doctrinaire but still be appreciative of non-doctrinaire scholarship. I ended up writing it under him, but in political theory. I wrote on the political ideas of Mencius, the disciple of Confucius. I had the book that he had written, and he had a theory of tyrannicide, which one could compare that with such theories in western political thought. And so I read this book, and I wrote it, and then I turned it in to Professor Quigley, who did I tell you lived just around the block, just around the corner. I remember once going to give him something and as I stood at the front door, I noticed his study, books from floor to ceiling. And I think back upon it, he never invited me in. It seemed to me strange, here I was writing an honours paper under him, and I wonder why he never invited me in. But I don't think I thought about that at the time, only in reflection. So I wrote this paper, and when I delivered it to him, he said, "oh if you had delivered it on time, you would have graduated summa cum laude". Oh! Instead I graduated magna cum laude because of the grades. That was a disappointment. But I should have known better. Oh...so the great thing was that I could take...I didn't have to have a single major, as a liberal arts major, you could take anything that you wanted. And I had some really outstanding professors.

Int It seems to me that you were interested both in political science...and it seems to me that you were also interested in law? Correct me if I'm wrong...at that point?

TK Oh, I was interested...there was a course taught in Constitutional law taught by Oliver Fred. Well, I found that fascinating. He made it fascinating. But I majored essentially in political science, and in history. But so much debate was going on when today I talk to my grandson, who's trying to figure out what kind of college to go to. I say, well, you must decide, you can go to a great liberal arts college. My oldest son went to Swarthmore, one of the best liberal arts colleges in the country. I said, or you can go to a great state university, where it might be bewildering, but it's really very exciting, so much is going on. Well, I'm not sure what he's going to do (*laughs*).

Int And I'm wondering...it seems to me that it was exciting to be where you were, the war was arriving, I wondered what you made sense of that politically? And also heading east, which must have been a huge life event for you, as well?

TK Well, the war, I was very much in favour of intervention and when the war came I welcomed it. My graduation at the University of Minnesota in 1940, was in the football stadium. So the dean would say, all BAs stand up, and a couple of hundred people would stand up and so forth. But what I remember about that was that the ROTC, the Reserve Officers' Training Corps, you could work toward officership, when that came in the band played, The Parade of the Wooden Soldiers. I was kind of shocked by that because I was in favour of the war, but there was also a lot of anti-war sentiment in Minnesota.

Int Why do you think that was? Why was that?

TK The anti-war sentiment?

Int Yes.

TK Well, Minnesota like Wisconsin had a long progressive tradition, and therefore reacted very emotionally and strongly to the rise of Hitler. And I had some Jewish friends. But I don't think that made much difference. At Columbia, as a graduate student, well, various incidents that are really kind of fuzzy in my mind, but I do remember when I heard about Pearl Harbour, I was in the Columbia Law School library and somebody came to return a book, and he said, "they bombed Pearl Harbour". I said, "what!" He said, "I'm going home to be with my wife". That's how I heard about it. And then I had...when I'd finished everything except the dissertation, I knew I wanted to go into the army, or I would be drafted to go into the army. And I don't know why I applied to go into the Navy. I really can't figure that out, why would I do that? I was interviewed by somebody from the Navy. Later I received a letter from the United States Navy, saying, we regret very much at this time, that there is no berth for you in the Navy. What could explain that? I was healthy, educated, I volunteered to go, why was I rejected? I've never had the explanation, except I think the explanation may lie in my interview by the Navy person. He looked at my courses I take and he said, "Oh, I see you took a course in administrative law." I'd taken some course in the law school, as a political science student. I said, yes. He said...in effect what he said was, are you in favour or against administrative law? You know, like are you in favour against the study of history? So he may have thought that if you are in favour of bureaucracy, you must be some kind of radical? Then the other thing is, my name was not Karis, K a r i s, because at the end of the war...that's another story...we changed our name to Karis, from Katritses. And I wonder whether that name Katritses might have struck him negatively. Something foreign about it. So this is conjecture. And so I went into the Army. And I don't think I've had such an exciting wonderful time in all my life.

Int Really?

TK I remember I went to Fort Dix, and soon met somebody who turned into one of my best friends, who was about to write a dissertation at Columbia, on the, Decline and Fall of the Irish Theatre. I remember that topic. And here I was approaching writing a dissertation. My first great sensation about being in the army is some great feeling of freedom, because I wasn't preparing for classes or exams, or meeting deadlines. When we got through with what we had to do during the day, we were free to go to a movie, or do something else. And why



were we free? Because everything was being done for us: food, uniform and so on. So maybe there's a lesson in that.

Int I just want to take you a little bit back, your experiences at Columbia, how did they compare to your experiences at the University of Minnesota, which was very formative?

TK Well, the University of Minnesota, politically...as regarding political debate and atmosphere of debate, was far more exciting. At Columbia there was one occasion when the students had a protest and they closed off Columbia college. One of my colleagues at City College now, I've seen a picture of her climbing out of a window. They had closed some office, she should have stayed inside. I was teaching a course at Columbia, a graduate course on southern Africa, just did this twice at Columbia. But I remember having to meet my class somewhere outside of the classroom. The war, you know, strange to say this, I don't remember that there was much impassioned discussion about the war. Either you were for it or against it. During my first year, I sat at the same table with other people who had the same scholarship, one of them became very famous as a Catholic writer- Thomas Merton. So I met with the same group of people each day for lunch and dinner. And I really don't remember any sustained intellectual conversation. What did we talk about?

Int Quite early on you'd won a prize in constitutional law, I wonder if you could talk about that?

TK Oh, *that* was quite a surprise. A professor of Columbia Law School, Noel Dowling, loved to teach a course on judicial review and that was open to political science students, as well as law students, so I joined this. and I think he must have spent half the semester on Marbury versus Madison, and I enjoyed it very much. He was a personal friend of Justice Stone of the Supreme Court. It was a wonderful seminar because he was very enthusiastic about this particular seminar and having non-law students, political science students in it. So that was it. I guess I must have got an A in that course. And then when graduation time came, I looked in the programme, I discovered I'd been given this prize (*laughs*). What was it called? Toppan prize in constitutional law. So he had picked the person out of this really small seminar.

Int And your decision to go into the army, how was that received by your family?

TK That's an interesting question. I think they just took it for granted, that you're going to go in, you were drafted if you don't go in. My brothers who are twins, younger than I am, one of them became a navigator in the B-17 which bombed the Ploesti oil fields, and he was shot down in the Adriatic. And one

of his crewmembers drowned but he managed to survive. His twin, was in the Quartermaster Corps, and I could talk at length about an interesting experience, but I won't...when I was with the tank battalion that I was in, landed in Forges-les-Eaux, in Normandy, and the young women, WACs women, as I recall, would come through with donuts and so forth, and sometimes other groups would come through. But usually their identification was hidden. Anyway, I knew that my brother was in the Quartermaster Corps, and I talked to one of these women and she said, oh, they are so-and-so, at a certain place. And, yes, I was already a lieutenant, second lieutenant, and I had a jeep, and I went looking for my brother. And I found him after a day's long search. And found him where he was being, I guess, punished for something or other, because he was working, peeling potatoes and getting rid of the stuff, and I slept in the barn, *I in the hayloft*, and that was one of my wonderful experiences in the army. But you know, I'll mention this very, very briefly, the army had a programme called the...it was the orientation programme, in which everybody, every soldier, was required to have one hour of discussion per week on the aims of the war: why are we fighting, know your enemy, know our values in a democracy, and so on. And that was right down my alley, so I volunteered to be the battalion orientation officer. So I went from platoon to platoon for an hour of discussion, not a lecturing. Because it was a drafted army and you knew you could expect...you have a social studies teacher or some other mature person, so when dumb things were said about the French, the French are dirty, somebody would be come up to say, well, they don't have much soap these days, or something like that. So I enjoyed that very much. One day one of the writers of background material, Saul Padover, of the New School for Social Research, came, and I remember somehow just spending a couple of days driving with him around Western Europe hearing constant commentary. His background was European history. I was a lieutenant leading a mortar platoon in an armoured division, but I rode in a jeep. It was my job to climb up to a hill and to radio back directions on shooting a mortar, which is just stovepipe and goes over hills. I sent you something about my army exploits and I never was in any danger, I never fired or had a mortar fired. But we liberated Pilsen in Czechoslovakia, so we got one battle star but that wasn't any fighting involved there either. But as we came down from the Sudeten mountains towards Pilsen, we saw some American flags in windows. Just amazing that there could have been held onto. In Pilsen I saw thousands of German soldiers being marched through the city, and at the end of one procession there was a grossly obese man who was stumbling along, because people were rushing out from the sidewalk to smash him in the face, it was a bloody mess, because he had been part of the...Gestapo. I was told later that he was responsible for some woman's death, who was pregnant; that stuck with me. A bystander invited me to go to a nearby basement where someone was being tortured, I declined. And I also met a group of Greek so-called slave labourers. Managed to get some extra food for them. There, I was very fluent. They couldn't speak any English, and my Greek was terrible of course, but that was quite exciting to meet such people. Later on somebody tried to explain, well, these are real selfish people,

they just wanted to get something out of the Germans instead of staying back in Greece. That didn't make any sense.

Int You also mentioned in the article you sent me that at some point, you ended up in Paris?

TK Oh, yes, well, you know, there I was in Pilsen, Czechoslovakia, and Battalion orientation officer, and the order came through one day, send one of your officers to Paris to a school for...an I&E school, Information Education school. And there was only one person deserved it, I'd been a volunteer orientation officer...and that was at the time when I was looking into the possibilities of getting transferred into some kind of military government position. But I had to go to Paris. And then from there, we went to Oberammergau where there was a school for discussion leaders. And so I was in a group of about four or five men who were the faculty for a course that lasted about a week, training people how to be discussion leaders in the whole European theatre. So that was great fun. There was one very radical guy, I don't know if he was a member of the Communist Party or not, but I remember one skit which he had kind of organised, in which this person said, but I'm an anti-Communist, I'm an anti-Communist. And then somebody in the group...this is an example...said, well, I don't care what kind of a Communist you are, we're against Communists. So we tried to come up with silly anecdotes like that. I found, when I look back among the soldiers who were in these groups...I haven't thought very much about that for a long time, and I'm never sure if I gave it much thought, there really wasn't much overt, articulate expression of the American values we were fighting for. They were soldiers, going to an orientation session, I hope they found it interesting. They really weren't even...do I remember ever being challenged by anybody over what I said? Kind of discouraging to think of that. But maybe these discussions did have a kind of overall effect. Maybe some people might have done more reading than they might otherwise have done.

Int And then you also mentioned that you at some point attended the Nuremberg Trial, and I wondered whether you could talk about that?

TK Well, there's not much to say. You know, when I was in Pilsen, the war had just about come to an end, and I had a jeep. To have a jeep without much control over what you do, so I just drove to Nuremberg. And Nuremberg was really a sight that I should never forget. Looking over Nuremberg was looking like total, total devastation, as if the whole city had been burnt down. You'd find a few steeples here and there. But I found the place where the trial was going on, and the one officer who was in charge of admitting you to observe it, was a person of Greek background. And I think perhaps the Greek connection may have helped. Maybe it wasn't necessary. And so I sat there, a very, very small courtroom, only a few rows of spectators. I thought maybe I was in the second row. And we had earphones so we heard simultaneous translation.

When I think of it, there in the first row was Goring in front of me, and others whom I could identify at the time. None of them ever spoke. Then during a break I was told that I could get a haircut. So I went to some other room to get a haircut and then I discovered that in the chair next to me was the Chief Prosecutor the Supreme Court judge, Robert Jackson, whom I admired. I think I remember feeling like introducing myself as someone who was interested in constitutional law and expressing respect and so forth. Somehow I didn't. There's really not much more to say. There were, I think, two rows of the defendants, I could identify some of them. That was it.

Int Coming back to the United States, Tom, after having been in the army, in terms of adjustment, what was that like for you?

TK Adjustment from the army?

Int Yes...

TK Well, you know, those were a wonderful almost four years. One thing was that for somebody who had no athletic prowess, I discovered that I could meet the standards in officer candidate school, followed by one month of so-called battle training, but in officer candidate school you had to do all kinds of things. Climbing walls and crawling under machine gun fire. None of them requiring very great athletic skill, but I did it all. That gave me a great deal of confidence. After all, it was non-competitive, and I was highly motivated.

Int When you got back to the United States did you go back to Columbia to complete your work, or did you...?

TK Oh, yes, I went back home, and then I went to Columbia. I had finished everything except the dissertation. I'm just trying to think about...well, the dissertation essentially...I was very much interested in legislative judicial relations. And that constitutional of course seminar I took was one of the best I've ever had. I've forgotten what I was going to say now...

Int You were talking about your dissertation...

TK Oh, about the dissertation, right. What I did essentially in the dissertation, is what I've been doing now, writing a book on the Constitutional Court. I was interested in some quotations from Brandeis and I think, Cardozo, in which they raise a question of influences on the judges on the legislature. And the question came up in reading them, how much influence does legislature, does congress have, on the judges? How does one get at that? And what I did was to take the first child labour bill under the commerce power, 1905. You may

remember that that was struck down under the commerce clause, in Hammer versus Dagenhart. With a wonderful great dissent by Holmes. So then the advocates which prohibit child labour then use the taxing power. And that too was struck down. And then in 1933 National Recovery Administration also concerned itself with Fair Labor Standards Act and that too was struck down. And then Hammer versus Dagenhart, the child labour decision, congress again used the commerce power in 1941, the court...I don't remember now if they expressly overruled Hammer versus Dagenhart, but here you had a kind of before, and after before and after. And so it was very easy to ask yourself just what influence, if any, did the decisions have on the members of the Court. So one of my major sources was the Congressional Record, and in the book I've been trying to finish now on the Constitutional Court part of the many debates.

***(Most of the above paragraph has been edited out at the interviewee's request)***

Just yesterday I was writing about legitimacy and how does one judge legitimacy. Well there is a well known political scientist who has come to that programme at the New York law school, who has written in a widely cited

article in the *Journal of Politics*, based upon questions that he devised which then were given to a commercial firm, which of course was sophisticated, they asked these questions of a core section of people, and its conclusion was that the South African Constitutional Court had very little legitimacy. What I was able to do was I took two cases, one was the death penalty case and the other was, same sex marriage. In both of these cases there was overwhelming evidence that popular support for the death penalty, popular opposition to same sex marriage. And in reading over debates on this, I saw that there was a good deal of positive criticism in the legislature. But not one single person challenged the power of judicial review. Surely this is powerful evidence of legitimacy. So...I was just writing about this yesterday and I thought I'd have one footnote saying, for a contrary review see so-and-so (*laughs*). I'm not going to write more than that.

Int And then you mentioned that at that time life was very full, this is post-war, and you were looking for a job, and as I understand it, at some point you entered the State Department.

TK Well, you know, remember when I mentioned the Jacobin Club, which I became a member as a college freshman, and this very impressive Richard Scammon showed up from the University of London. And I kept up with him. I saw him during the war. I went to a meeting of the American Political Science Association, and saw him holding court next to the registration desk. He was becoming a well-known expert on elections, including British by-elections. I had sent him a short article I had written, while a graduate student on British by-elections in wartime that was published in the *American Political Science Review*. Now I told him I was looking for a job. After praising the article, he had asked if I would like to work for him.

***(A large portion of this paragraph was edited and largely removed at the request of the interviewee.)***

He was the director of research on Western Europe in the State Department and his division included the British Commonwealth Research branch, thus South Africa. The upshot was that I became responsible for basic political and social research on South Africa and made my first trip in 1955. Another matter of chance my branch chief was a close friend of Gwendolen Carter, the doyenne of African studies in the United States – an impressive, physically imposing woman of great charm and enthusiasm despite being on crutches. Her visit to the office one day led to the most important intellectual and professional association of my life.

***(The following paragraph was edited and largely removed at the request of the interviewee)***

Int How did you then come to be involved in South Africa?

TK Well, my job was basic research on the Commonwealth...basic research on the British Commonwealth. And British Commonwealth included South Africa. And then I get started on the NIS (National Intelligence Survey) on South Africa. And I was given time...I remember a couple of weeks...oh, as it happened, first on Ireland, I was given time off to read Irish novels and just to do background reading. Same thing on South Africa. Just read for a week or two before you get into it. We had occasional visitors from South Africa. As I say, Gwendolen Carter who played such an important part in my life, came one day, this dramatic woman, like Eleanor Roosevelt, a very big woman on crutches, great gusto, great enthusiasm, and then she met the branch chief, and then I was introduced to her. I remember I was about to go on my first trip to South Africa. And oh, she said, "could you get some electoral documents for me?" And I did. And I remember talking to a friend much later on, who had been in the State Department, and who knew about Gwendolen Carter. She was the doyenne of African Studies, first president of the African Studies Association. And she drove a car, with a special kind of thing, but she was crippled. And I remember this person saying to me when I said about how, my relation with her, said, "oh, she's always using people". I was outraged. She's always using people! Here was a woman who travelled as she did. People would meet her, and they would offer to be helpful. She would say, oh, could you wrap this up and take it to the post office for me, that kind of thing. She reciprocated by finding them jobs. But I shouldn't get sidetracked I guess by Gwendolen Carter.

Int She sounds an absolutely fascinating person, and I read what you sent me about her and she's quite incredible.

TK You know, she...we had some differences about US policy, I was much very in favour for tough pressures. She was less so.

Int Tough pressures in terms of sanctions against South Africa?

TK Sanctions, economic sanctions. And she really never became quite comfortable with that. But she enjoyed important people, meeting important people, and when she...she had done her dissertation at Harvard on the British Commonwealth, and then she got a grant to travel through the British Commonwealth. And she drove through much of Africa. I think she had an assistant with her. And so when she came to South Africa, she was interested in meeting everybody important, including Luthuli, and other African leaders, as well as Afrikaner leaders. I remember seeing some Afrikaner editor, saying, this amazing woman came in, she knew so much, and then she wrote her book on South Africa (*The Politics of Inequality*). How did she learn all of that? As if, how do you know all of that? She had a great focus and clarity. I remember I was co-author with her and somebody else with a book on the Transkei, and I remember sitting next to her until about one o'clock in the morning, rewriting something. And it would be easy to put it off, but no, we have to finish it. Of course when she did her dissertation, mustn't get into that, but she was writing it and giving it to a typist as and she was writing it. She was determined to finish it by a certain date. And then she remembered on that certain date she was a bit distracted by the necessity to get up and get coffee for the questioners. But where are we? Let's go back to...

Int You were talking about working in the State Department...well, working on the British Commonwealth, and then now having to travel to South Africa. Prior to this, what had your knowledge been about South Africa?

TK Nil. No knowledge at all of South Africa. I don't remember ever being interested in it. But here I was immersed in it, and my colleague who sat next to me, Waldermer McCampbell, was a historian, and who had written a dissertation published by some...in some government archives in South Africa. And he would brief people about to go to South Africa. I listened in to all of this. Well, and then the trip was great. I don't think I'd ever had a more exciting time.

Int This was in the 1950s?

TK 1955. At the time of the Congress of the People, the great mass meeting. And I had to pay a call on the consul general in Johannesburg, I'd just arrived, I said but I'm looking forward with great enthusiasm to attending the Congress of the People, this enormously important meeting, out of which came the Freedom Charter. "And, no", he said, "you can't, you mustn't go." I said, "why not?" "Because we've been informed by the police that there may be



violence.” One of the big mistakes of my life was listening to him. I should have just gone. But it was an exciting time, 1955.

Int What was your experience arriving in South Africa and what did you observe? What are your memories of that time?

TK Well, when I was writing on South Africa in the department, I came to relish the reporting by the political officer. He was really outstanding. There were two political officers and he was the one who covered politics and labour. And so when I met him I inherited all his contacts. I remember going to a party, a reception of some kind, and two dozen people, filled with people I'd been reading about. People that he knew and that I was introduced to. that was really quite wonderful.

Int Were these people black South Africans, were they involved in ANC politics? Who were some of the people...?

TK Oh (*laughs*), I'm glad you asked because there were no blacks. I remember I think going back to South Africa from the State department going to Port Elizabeth, there was a consulate then, I don't know if there's still one there, and there were some blacks invited, and that caused a kind of a scandal. I remember once a black American theologian came to the embassy in Pretoria, and he walked up about five flights of stairs, because he realised you're black, and couldn't go into the elevator. A distinguished American. He should have insisted. But your question was more general...

Int Well, I'm curious about how you made inroads, having acquired contacts, etc, from the political officer, how you then made inroads into actually developing such an interest in South Africa?

TK You know, I feel like saying that South Africa is the most interesting country in the world. I need to tell you what there is about it that is so fascinating. In a horrible way and of course not a horrible way.

Int I'm curious to understand why you think that?

TK Well, I sometimes think if I were to have adequate material at hand in which to write any detail about my experience, it was about an extraordinary range of extraordinary people. Extraordinary people. For example, Afrikaans speaking people. Afrikaner theologians, Professor Keet in Cape Town. Other's names I should remember more clearly right now. Here were Afrikaners, theologians, who were opposed to racism, generally opposed. And then trade union people. Of course you meet someone like Helen Suzman right away, she was

one of my main contacts in white politics. But it was easy enough to meet white politicians. What I did, every fortnight I had to write a political report, and all that was based on the newspapers primarily, or I would pick up the phone, or I might have gone somewhere. But I remember I went to the...well, of course, the great experience was the Treason Trial, I went to the preparatory session in Johannesburg. I just observed it. Then I remember at an early point I got to know the lawyers for the defence. I also got to know a lawyer for the prosecution by the way...I can't remember his name right now...whose father was very well known judge. And I remember when the dean of Harvard Law School came, he expressed to somebody surprise that somebody would serve the prosecution. That surprised me, surely the Dean of Harvard Law School should welcome legal representation for all sides. So I would interview these people, and one day I was involved...went to a kind of party, a swimming party and so forth, here I come an outsider, I talk off to the side to a couple of the lawyers...and then I'd been very much interested in constitutional law and freedom of speech and clear and present danger...But I remember leaving and driving some blocks away and just sitting and trying to reconstruct the whole thing. And that happened many times. I wasn't taking notes, and I spoke to them in those circumstances.

Int At that point, when you were in South Africa during late 1950s, I'm wondering...

TK In '57, '59.

Int '57 to '59. I'm wondering in terms of meeting people like Arthur Chaskalson, Sydney Kentridge, George Bizos, at what point did you start meeting people in the legal profession who were involved in political trials?

TK Well, at the very beginning.

Int At the very beginning/

TK Thanks to the Treason Trial. Because I reported on the Treason Trial in detail. And once I had a long article published in one of the State Department publications, I guess maybe it was classified. I remember I was at the Rivonia Trial where...I met Arthur Chaskalson for the first time...I've gone blank on an important name...but so easy to talk with them. They were glad to talk to somebody who...had some background and I thought were very open...And then there was one person on the prosecution side whom I got to know very well, and I always felt that he was being completely open and honest with me. One day the dean of Harvard Law School came, and I was...there were two people in the political section. My superior covered white politics. And when Parliament met, the embassy moved to Cape Town, I happily remained behind. I could do anything I wanted. It was easy to turn out this fortnightly

report, and then special reports from time to time I was asked to do, but I was free to go anywhere and interview anybody. What was I about to say...? Or what were you asking?

Int I'm curious, Tom, in terms of your experiences in the 1950s, how you understood South Africa, in terms of racial segregation, coming from a background where you did in Minnesota...?

TK Oh, no, you know,...well I came from Minnesota, but no, the...I'm just fully prepared for a segregationist society. It's what I expected. When I went on that trip by myself it's what I expected. But I was meeting people who were, in various ways, fighting it. And then in talking, I remember when I first went there, I went to Pretoria to the University of South Africa. There's a political scientist there, not particularly liberal, but I remember talking with him, and he was showing me around, and we came to a place with some periodicals, oh, he said, I mustn't leave those in sight, he put them someplace else. Well, you know, this was his little protest, but he was clearly supportive of the National Party.

Int And then coming back to the United States after 1959, you went into academia, and I wondered what made that... what prompted that decision?

TK Well, while I was in the State Department, I realised I had no ambition to rise in the State Department. You were given the chance to indicate your preferences, and I remember saying that I want my next assignment to be in blacker Africa. My next assignment professionally was an excellent one. To be the chief of the economic section in Monrovia, Liberia. I had a friend in the British High Commission who had been in Monrovia, Liberia. His description of the life there was not very pleasant. And I was weak on economics. But I would have been chief of the economic section. And if I was ambitious it would be a good day. But I had getting...I never lost thought of academia, and I realised that the time had come. I did really want to do this. I also, by the way, came to realise as I talked to friends, and I went back to the Department, that it was quite commonplace for members to seek certain jobs, to seek certain positions, and if they didn't like what was offered to them, to try to work around it, to get it changed. I knew I was not good at that kind of politicking. Either way I could accept this position or not. And I knew that it would mean a commitment to continue. And I would be foolish. But I'd been in the State Department for, well, two years in South Africa, and then several years before that in the research division. And, what had I published? So when I came back, it's amazing how chance, the role that chance plays in your life. But I called Scammon....He said, "well, how would you like a job at ten thousand dollars a year?" That was a pretty good job in those days. And because of his support, I became the Great Lakes Regional Director of the Foreign Policy Association. I hope that sounds impressive, because it certainly was not an impressive job. The Foreign Policy Association was a kind of adult education

organisation, and they published booklets, background material. And they had a programme called the Great Decisions programme. And that was a programme in which you had an eight week period and each week you had one focus question of foreign policy. And background materials and that were supplied. And you would visit organisations as a consultant, say for example, the Catholic Church in Detroit was interested in this. And so they would organise small groups meeting in their homes, and they would supply the background material. But the key thing about this being quite original was that an effort would be made to get the local newspaper and local radio and television, to focus on that issue each week. So these people would be sitting reading the background material and it would be just discussion. So my job was being really a consultant, and I was living in Ann Arbor. I moved to Ann Arbor, Michigan from Boulder, Colorado, where I was working briefly for the Foreign Policy Association. It was my job to travel around in my area, and to meet with important people, important for producing this programme. Trade union people, church people, adult education people, any variety of people, and then to advise them about the programme. And then often I would give a talk and I would talk about comparing South Africa and the United States constitutionally, how they differed. That was fun to do and nobody knew much about South Africa. But the...but I really knew I didn't want to continue with this, I really hated it, I was away from home too much, we had young children. So then...oh, I must tell you when I got the job at City College. Again chance. In Ann Arbor...I knew that I had to publish quickly, and so I wrote an article on the Treason Trial. And I spent evenings in the University Michigan Law School, so I was really working very hard. And one of my close friends, Samuel Hendel, who was the chairman of the political science department at City College, he had a son who was a freshman at the University of Michigan. And of course we looked him up. And he sort of became a member of our family. He was an overweight kid, I can always just think of him as somebody wandering around the kitchen looking for more food. So one day his parents, on some trip, stopped by to see their son, who was somebody that we had adopted. And Sam Hendel, is very much interested in constitutional law, because when he was a private lawyer in his early thirties, he decided to go back to school to get a PhD. He wrote a dissertation, published, on Charles Evans Hughes. And so I met him when I was a graduate student. He was a fellow graduate student but twenty years older. And at that time City College was split between the uptown campus and the 23<sup>rd</sup> Street campus, which since then has become a separate college. And the appointments committee, the key committee, had one member from down below. But Sam Hendel was very concerned with good teaching and he was very interested in my talk about my experience with the orientation programme. Anyway, as the Chairman he went down to visit a student, a class, and this class was taught by a personal friend of the...what we'll call the departmental representative, or the sub-chairman, personal friend, who had some interesting job but was a lousy teacher. And Sam who was devoted to good teaching, wrote a very negative report. This produced an angry split, personalities, conflict between the so-called sub-chairman downtown and uptown. And so they were looking for a harmonious personality. That was my qualification I was told. Not my

academic work, but somebody who could work uptown and work downtown. So I went downtown as the departmental representative. And I got along very well with them and uptown. There was one incident that always comes to mind whenever I talk about this. I was walking across the street with the senior professor once, going to have lunch together, and I don't know what I said, but he stopped me dead in my tracks, grabbed my elbow and said, "don't you ever say that to me again". I haven't the slightest idea what I had said. So you can see the difficulties. So I was there for several years and then the Chairman resigned uptown, and I became Chairman of the whole department. You know I rather enjoyed it (*laughs*). Mary accused me of liking power. Well, I don't know about liking power, to decide on tenure and have to tell a young woman that you have one more year, but we don't have room for somebody of that specialty, and have her burst into tears and so forth. But I enjoyed it (*laughs*). So that's how I got my teaching job. A combination of luck and connections.

Int Absolutely. And you taught at City College for a long period of time.

TK I can never remember years. Yes, for quite a long time.

Int 1961 to 1989, I think it was.

TK (In 1978 -79 I was a fellow at Yale) And then, when the graduate school was finally organised...it hasn't been very long, so I taught a course there a couple of times. So one day, Dan Rustow who was a distinguished professor, had called me to come and have coffee, and he said, we'd like to have you become executive officer of the doctoral programme. And I had very, very mixed feelings about that. It was kind of exciting to think of coming down to the CUNY Graduate Center - so much is going on. It meant really kind of a headache of a job, because in the entire political science faculty of the City University of New York, the number of members of the faculty is huge, but the number of members who are also members of the doctoral faculty is relatively small. And you have to deal with all these people, and you have to make arrangements with other departmental chairmen; I'd like to have somebody here to teach a course here, and we can repay you somehow. And I really didn't care for that too much but I agreed. And I think I was a good executive officer but I remember the executive officer of sociology was right next to us...to me...when I went to see him he said, Oh, he had some kind of scotch or something, he brought out for our first conversation. Oh, yes, I remember he was active in a democratic socialist group. One of my colleagues said that so-and-so wants to create socialism on one floor. So I remember he said to me, "look", he said, "don't allow yourself to be taken advantage of", he said...On one or two days a week he didn't come in at all. You have a deputy. So I had a deputy. But my deputy did not have tenure, and so I took over much of what he was doing, which is very foolish. I had to deal with...he would help...deal with financial aid and also part-time teaching jobs in the City

University system. Teach one course and political science one at Lehman College or someplace else. And there were often times when I came in five days a week. I tried to come in less often. I enjoyed it on the whole but I think maybe I could have, maybe I might not have retired quite as early as I did.

Int Why do you say that?

TK Well...during that time I was also working on *From Protest to Challenge*.

Int Yes, which is what I wanted to talk to you about.

TK And that was very, very time consuming. I was just not spending enough time with my wife.

Int I'm wondering whether you could talk about how...you mentioned meeting Gwendolen while you were at the State Department. I'm wondering at what point you decide to collaborate with Gail Gerhart and Gwendolen Carter on the books, *From Protest to Challenge*, how that came about?

TK Well, easy to explain. Well, I met Gwendolen Carter, because she came to visit her friend, who was my branch chief. And she asked if I could do something for her, which I did. She was really such a vibrant, charming, delightful, erudite person. I've never met anybody quite like her. I'm going to diverge from your question by giving one anecdote. We were in Washington together, and we were invited to a party at somebody's house. And we took a cab, and when we got there, she realised she could not manoeuvre those stairs with her crutches. Sometimes she would give me one crutch and then she would hold on(to) the bannister. But somehow it was impossible. But she said, "ah, I have an idea, let's go down to the basement", and there were the basement steps going up to the kitchen. She said, "I'll do what I did as a child". She turned over and sat down on the first...just sat down, facing downwards, and she managed to lift herself up to each step, and she emerged rear end first in the kitchen where all the distinguished guests were waiting. Well, she did it in the most delightful way, she was laughing and just joking about the whole thing. An example of how she didn't want people to feel sorry for her and she wanted to be independent. You know, without going into her life too much, She grew up in Canada. Her father was a paediatrician and she had infantile paralysis at a very early age.

Int Polio?

TK Polio. And I remember that her parents wanted her to become as independent as possible. And even as a child, maybe five or six years old, on little crutches, she crossed busy streets.

Int Incredible.

TK Incredible, ja. But to come back to *From Protest to Challenge*, I'll try and be very brief about that...I'd written an article on the Treason Trial, and I've forgotten quite how Hoover got hold of the whole record of the trial, but I went out there to do a guide to the microfilm record of the trial, and Mary and my two at the time sons were in with my family in Los Angeles, and I was up there near Stanford. Mary came up to meet me a couple of times but I really worked very, very hard sitting down with the microfilm, and I produced a guide, reproduced my article in the Political Science Quarterly, but also it was a kind of a day-to-day guide, and it was filled with all kinds of historical documents. And one day Peter Duignan, an extremely right-wing guy, interesting guy, he said, you know, maybe we could collect those documents and publish them in a little booklet, all these documents. And then he said, "maybe Gwendolen Carter would like to join you". Of course she was always anxious to do anything. And so this became a project to produce a volume of historical documents. Then about this time we had a grant to go to the Transkei, we did a book on the Transkei with a third person, three of us, and...but while we were there, I guess with this in mind, possibility, we interviewed a few historic figures. I remember in Natal, in Pietermaritzburg, we interviewed one of the early founders of the ANC.

Int Was it Albert Luthuli?

TK No, no, it was somebody who was important at the very beginning, and much older. But we did interview (Albert) Luthuli. And there were a number of interviews. Some of them, of course, dealt with the Transkei. So when we came back, I'm not quite sure how the decision was made to be more ambitious, but we thought we'd produce one volume, and Gwen (Gwendolen Carter) was great at getting grants. Sometimes I can understand why some academics seem to be jealous, and resentful of American academics because we get so much money, and here we come from outside to write about their country. But the...we had a number of Ford Foundation grants, Rockefeller grant, and at the end a big grant from the US government...I'll think of it...which the graduate school was happy about because I was able to hire a number of assistants who turned out to be of very little help, but they were hired. So, it was really to be one volume and I remember travelling to...with Gwen (Gwendolen Carter) to Yale to meet the Yale librarian for advice on how can we systematically find out what's available in academic libraries. And he was very, very helpful. So it just grew. Gwen Carter was a key person. She acted mostly as an editor, she didn't do any of the writing, but she was an excellent writer, and she was very fast. I don't know whether I've mentioned

this incident...oh, you read what I gave you about Gwendolen Carter memorial gathering in Florida, about her life. Anyway...

Int I wondered if you could talk about that?

TK Well, you know...let me think a second...I'm thinking about a number of different things at the same time...where was I? Well, I was mainly talking about how this project grew...oh, I remember. She edited a book called *Five African States*, and she asked me to write the chapter on South Africa. This is quite early in my career, and I was really, really honoured by this and kind of surprised. Her big book was the *Politics of Inequality*. Here I was going to write a chapter. And I worked very hard. And then we came back, I think, from California, and I had a note from her saying, 'I'm looking so forward to seeing you, now that you've completed your chapter', and so forth, so forth. And I remember sitting in the living room sofa feeling really quite terrible, that I hadn't finished it. And the only thing to do was to telephone her and confess. So I called her up and I confessed. And her reaction was, "That's simply grand, you've done that much?" Well, I'd done most of it. And then...that's the way to deal with people. Now going back to the project, it just grew. It was just Gwen (Gwendolen Carter) and me. And then...well, I taught a course on South Africa a couple of times, at the graduate school. And the first time I ended the class by saying, if there's anybody here who is thinking of writing a dissertation on black politics in South Africa, I'd be very happy to meet you. So the class ended, up came this young woman, Gail Gerhart. And her dissertation was published by the University of California, in a series of books about South Africa. At some point I remember Gail (Gerhart) telling me that more copies had been sold of her book than of any other book in that series published by University of California Press. And so I asked her if she would write the section on the PAC (Pan-African Congress), in that volume. Which she did. I'm not sure if she wrote more but I think under the influence of somebody like Gwendolen Carter, I said we must make her a co-offer. Some years later, she revealed to me how surprised she was at that and how pleased, how generous. Well, generous, I think she's a brilliant writer, a great scholar, and then she became part of this. And in fact, the last volume, is really done with somebody she knew at Wits, is done pretty much by herself.

Int In, *From Protest to Challenge*, how did you go about organising it, did you include interviews, how did that work?

TK Well, first collecting the documents, and in many cases that was in connection with an interview. You know, I'm not sure if...we did a lot of interviewing, but never in a very systematic way. For example, we happened to see Joe Mathews, the son of Z.K. Matthews, in Lesotho, the day after a big raid of the government on the ANC. And he was feeling very reflective. He's an amazing, amazingly articulate person, and so we just ended up having him talk about the history of the ANC. The whole history. Then once before Gwen



(Gwendolen Carter) and I were in...I forgot which capital in East Africa...while we were sitting with a group of ANC leaders, and first she charms them, and then you ask easy questions, and then you realise and she had said to me, they're anxious to talk about what they're doing, they're anxious to get the story out. There's no problem. Once when I went by myself, and I brought my son along on one occasion, and I was in Lusaka, and one of them said to me, we'll have somebody come up to your room, I don't know who it would be, but they would arrange so I was not wasting the evening, you see. Knock on the door, in comes somebody whose name I don't remember, but he later became Chief of the Police in South Africa, and was sentenced to jail. Who's that?

Int Jackie Selebi.

TK Jackie Selebi. So in he comes in, I had no...I wasn't going to try to focus on a few problem areas where I needed clarification. I talked on a subject that everybody likes to talk about, himself. What is your history? What is your political history? And then as you go on, you can diverge and go into some parts of it. But interviews are still essential and interviewing the same person, again it's very important if you can do it.

Int At this point...and I presume you did this right through the eighties?

TK Excuse me?

Int You did this during the seventies and eighties? The interviewing, meeting people in Lusaka...?

TK Oh, you mean during the seventies and eighties?

Int Yes, during the 1970s and eighties.

TK Oh, well, let's see, when would the earliest time be? When I was in the embassy I was meeting people, and then I would interview them for say a dispatch, but it wasn't as part of a historical project. I was there in 1955.

Int And then from '57 to '59.

TK This really can be marked by the summer I spent at Hoover. When was that?

Int I can check. 1965.

TK 1965, at Hoover. Oh, ja, well that's the beginning of it.

Int You mentioned to me how your visas were repeatedly denied to South Africa.

TK Yes.

Int I wondered if you could talk about those experiences?

TK Well, when I was in Lusaka, teaching at the University of Zambia. I should note that that was a great time for interviewing. I had the wonderful idea, while there- we would drive, my wife and I had three sons...we'll drive to Cape Town. So I had a family passport, we were all on one passport, but I had to get a visa. And the South Africa government had some kind of office in Lusaka. So I went there and then when I went back later they said, sorry we cannot give you a visa, it's been denied. Why? And they never gave me an explanation. And there were a number of denials. I don't know whether what I gave you includes my experience with the South Africa embassy, but I can be very brief about that. Well, oftentimes South Africans would say to me that the real bad people are the people in the Department of the Interior, they're the ones who issue passports and issue visas. The good guys are in the Department of Foreign Affairs, and they're very embarrassed by all these academics being denied visas. And so I thought well maybe I should talk to the embassy. But before I did that, and I could back up a bit...the President of the Africa-American Institute, which published *Africa Report*, I think, a lawyer who's now President of College, he was denied a visa. He was really very angry about this. And in talking with him, he suggested maybe I could write an article about the record visas denied, and also passports denied so people or they have to take an exit permit, means they can't get back in again. So I wrote this article, which was published in *Africa Report* (November – December 1976), filled with pictures, and I did a lot of telephoning and writing. It was kind of a record of people who were denied visas with no explanation, or who sometimes were denied at the very last minute and so on. And then the article ended with a recommendation of visa retaliation. That was a policy with the Russians. Visa retaliation. And the title of the article is a great title, quote, "we have nothing to hide?" unquote. And quotations from the Minister of the Interior. And so at the end we suggested to deny a visa to the Minister of the Interior would have an impact. So just shortly after that, I telephone the South African consulate and I make an appointment with the number two man. So I go to Washington, go to the consulate, he greets me in a very friendly way, a really charming guy, right away you felt at ease with him, and glad to see you, come in, Professor Karis come in. So we go in and I sit down and he walks over to his desk, and he picks up the magazine and he waves it in the air and he says, this is not going to help you (*laughs*). And of course I was denied again. And I can't remember how this changed. We finally were allowed in.

Int I think you were granted a visa in 1980, I think it was, between 1979 and 1980, you mentioned the Ford Foundation travel grant. Meeting with black leaders in South Africa...

TK But I had a number of grants from the Ford Foundation.

Int I'm wondering, I'm curious, not being able to enter South Africa and there was the death of Steve Biko and then there was the Soweto riots, and then the huge uprising of the Mass People's Movement, and the States of Emergencies during the 1980s, looking in how you experience that time, your memories of that time?

TK At second-hand? Well, you know, one way would be to talk to South African visitors, and the State Department had a programme for foreign visitors. And I got on their list as somebody who was interested in any South Africans. So I was informed that so-and-so is arriving, and really got a mixed bag of people. So I would get in touch with them and I would often drive them all over Manhattan and into Brooklyn. And I got a reputation for being a great travel guide. And during all this time I was talking about South Africa. I'd say, notice that building over there, then come back to South Africa, back and forth. Mary thought I was going to have a horrible accident at some point with it. So I really met many people and then when I got back into South Africa I was surprised at how many people were reciprocating. They remembered that. For example, there was a couple in Pretoria, who...a lawyer, and I took them around, and then when I got a visa, I looked them up in Pretoria. And I said, is there any young black person, of future interest or importance that you think I should meet? And he was a lawyer, as I said. Oh, yes, Dikgang Moseneke. Because he had been denied membership of the local Bar and these people were pushing for him. So I had a luncheon with him that lasted the entire afternoon. And that was just a good and lucky example. Then another thing, sometimes in talking I was in the ANC office just constantly, and sometimes I would tell them about somebody who was coming from South Africa and might like to meet them. The upshot was that Gail (Gerhart) and I got a grant, a small grant, from the Rockefeller Foundation, we refer to as in *the grant for tea and lunch*. So we would invite these people together with the ANC, or we could meet them ourselves, of course, but we also brought them together with ANC people. That worked out very, very well.

Int You also met a lot of leaders in exile, so I presume you may have met Jacob Zuma, etc, in exile, during the seventies and eighties, and I wondered whether you could talk about those experiences and your memories of meeting...

- TK My memory is proving not so good, right? Well, you know, it was great to go to London, there were so many exiles in London. And when I was in Lusaka. It was never any problem about, I thought, having people talk.
- Int What's remarkable though is that people trusted you, at a such a crucial and very dangerous period in South Africa's history, that the ANC leadership trusted you.
- TK Ja. Well, maybe...I'd written various things. Especially those two *Foreign Affairs* articles I mentioned to you. The ANC office wanted copies. I was arguing for stronger pressure. But even before then...
- Int You were also very critical of US policy in terms of their constructive engagement with South Africa and I wondered whether you could talk about that and what were some of the battles?
- TK Well, just on that right now let me to go back to the travel. The Assistant Secretary of State for Africa, who is a good friend, I just differed with him on so-called constructive engagement. And I was urged by an editor at Foreign Affairs, to write a letter about this, and the letter is, I don't know, about half a page long and a separate page. I think I have more pride for that letter than anything I've ever written. It was an attack on constructive engagement, concerned with whites, not with blacks, and so on. Well, you know, there were so many meetings going on all over the country at campuses about South Africa, and about policy towards South Africa. South Africa was a hot subject all over country, and the question of policy kept coming up all the time.
- Int Tom, at what point did you start having the sense that apartheid was going to come to an end?
- TK At what point did I sense that apartheid was going to come to an end?
- Int Yes. Was it in the late eighties, or did it come as a surprise...?
- TK I can't imagine that I ever thought that it would go on and on. I can't think of any...yes, there were turning points I guess.
- Int People I interview usually tell me that by the late eighties they had a sense that things were changing.
- TK In the late eighties?

- Int Yes.. Would you...?
- TK Well, by the late eighties you've had a good deal of evidence of official white interest in contact with (Nelson) Mandela and so on. I would have thought...
- Int And you and Gail (Gerhart) were at some point involved in arranging a meeting between white leadership in South Africa and black exiled South Africans...
- TK Well, that's what I had in mind, which I didn't explain well, this small grant from Rockefeller. When somebody would come from South Africa and say, I'd like to make contact with the ANC. Well, they could just look up in the phone book. But then I'd arrange for a meeting, with or without me or Gail (Gerhart). So that...but to go back to your question, about when I realised that the game was up? I don't think I ever thought that it could go on and on. And the optimism of South Africans themselves, I think in particular Afrikaner theologians, there were a group of them, most admirable people I've ever met. For them to want more contact with the ANC and so forth. Remember you had, for a period of time, people travelling to meet with the ANC. There were a number of big meetings in Lusaka, in Dakar, meetings when groups of South African lawyers met ANC lawyers. That was terribly important. There was a kind of respect though...I tried to trace this in what I've written, asking myself about attitudes towards the power of judicial review, and it comes to be accepted in the early eighties more and more.
- Int In 1990 when (F.W.) De Klerk gave his famous speech in February 2<sup>nd</sup>, I wondered what your memories are of that particular time?
- TK That's such a historic moment, you can imagine. I don't have any particular memory attached to that.
- Int What about the release of Nelson Mandela a few days later?
- TK Ja. Well, you know, by the late 1980s, really the jig was up. They knew that economic sanctions were going to be tougher. In fact, was it, I think (F.W.) De Klerk, I have a quotation from him saying that, this is after the big change, you know, if you have any problems, concerned about power and what's going on, take a case to the Constitutional Court. They were looking upon the Court as a saviour. Well, there's some other things in my mind.
- Int I wondered, before we stop, at that point in South Africa's history, what was your sense of change, of transition, and how it would play itself out between

1990 and '94? What were some of your experiences and memories leading up to the elections, etc?

TK 1990 to '94?

Int Yes, 1990 to '94.

TK Well, I think it was very clear by the late 1980s, there were already contacts between the government and, you know...

Int Leadership?

TK Leadership. And I think when...I'm trying to think of a certain speech, mainly by De Klerk, where they said that they were in favour of judicial review, in favour of human rights that were justiciable. And there were already, in various official places, statements making this very clear. By the mid-eighties. But it's an interesting question because I was talking to various people, writing about it, the question came, just when was the critical kind of turning point? I'm not sure if there's a single critical turning point. I think these meetings between whites and the ANC in Lusaka and in Dakar, also in London, were very important. I remember once...I'm not sure how relevant this is at this moment...talking to Gail (Gerhart) about how it was such a long time since we've seen Oliver Tambo, and I suddenly had an inspiration. We have a grant, let's go! So we went to London. And had a great afternoon with him, maybe twice, I'm not sure now...

Int What was he like...Oliver Tambo?

TK Well, there's...hard to describe adequately. I had known him for a very long time, that was one person I was very comfortable with. And there was a...I'm searching for adjectives that are not inadequate...he's very thoughtful, far-seeing, person committed to equality and freedom, all the constitutional values. Gail (Gerhart) and I asked him questions about...oh, there was always interest in...many people were always interested in whether or not the ANC is following the Communist Party line in any way? Perceptions they took at various turning points for the Soviet Union. We talked about...you never felt that he was trying to make excuses, he was, I thought, very straight-forward.

Int At that point, had you met Albie Sachs?

TK Oh, Albie (Sachs), I met Albie (Sachs) a very long time ago when he...before he left South Africa. I should never forget spending a very long evening with him in his hotel room in Cape Town, on which he had a whole pile of papers,

different kinds of cases, minor but bad cases, which he was acting as a lawyer, and he was sort of just going...and I'd tape the whole thing, him going through these case by case by case. And then after he left South Africa I met him in Dar es Salaam, and for several days before his terrible accident, of course, I remember one thing in particular, you know, his father (Emil Solomon (Solly) Sachs) was a historic figure, and I asked him about his father, and in the course of his answer, I realised that his father had left a big trunkful of all kinds of papers. And he had thrown them all away. I said, "Albie (Sachs), I can't believe what you've just said. These are of historical interest". "No, no, I didn't think they would be of such interest". And he threw them all away (*laughs*). That's one of the problems one faces. Disappeared documents. But Albie (Sachs), he was also present at a meeting at Columbia Law School which brought together many people.

Int This was during the early nineties?

TK The, I guess, early nineties. You know, Albie (Sachs), I heard him give a talk at Columbia Law School, which was.... great, kind of standing room only reaction, although they weren't standing. And then I had him come to City College once. And there must have been maybe I don't know, seventy, eighty, a hundred people there. And City College was having problems with a man named Leonard Jeffries, who was a very racial-minded black, and one day he paid me a compliment, he praised me and he said, "Tom, you are my favourite conservative". The first time I've ever heard that said. That was his way of distinguishing me from other City College people. But so, when he spoke when he was there, Jeffries was in the audience, but wearing a kind of Dashiki, African shirt, and very visible. And Albie (Sachs) began his talk by saying that you really can't...how did he put it...you really can't show your connection with Africa and your feelings for Africa simply by wearing a colourful dashiki (*laughs*). It must have been directed at him, couldn't help but miss it. But Albie (Sachs) has a great skill...I've heard him several times...in speaking.

Int I'm wondering, Tom, whether we stop at this point and we start the next interview talking about your book on the Court, and...?

TK Well, I was going to ask to be excused for a moment so that I can go to the men's room...

Int It's been a long interview, thank you.

TK It's fine, it's fine.

**Tom Karis                    Constitutional Court Oral History Project**

**Interview 2: 23<sup>rd</sup> March 2013**

Int        This is the second interview with Professor Tom Karis. Tom, thank you so much for agreeing to participate in the Constitutional Court Oral History Project and for the generosity of your time.

In the first interview we focused on your professional and personal trajectory and the beginning of your interest in South Africa, and I wondered in this interview whether we could talk about your interest in the Constitutional Court and also a bit about your book on Constitutional Patriotism. I wondered if we could start by talking about how you became interested in writing about the Court, and what was the genesis of that project?

TK        Well, I've always been interested in constitutional law. I think in the preface I may have given you, I mentioned that my father, a Greek immigrant, whose knowledge of the American constitution was extremely limited, but there was one issue that he was exercised by and that is prohibition. Because he had a restaurant and he was quite excited when the prohibition amendment was repealed and he was able to sell three point two beers. So that was my earliest exposure to the importance of a constitutional issue, affecting my father's business. And then at the corner of our street, lived Professor Henry Rottschaefer, a professor of constitutional law at the University of Minnesota Law School. And his son was a classmate. I never had much of a conversation with him but enough to remember him as somebody who hated Roosevelt and since I admired Roosevelt and the New Deal so much it quite struck me that somebody could hate Roosevelt. And it was because of the court-packing plan, or what some people would call the court de-packing plan. And then as an undergraduate at the University of Minnesota I took a course in constitutional law by Oliver Field, which was a very fascinating one. And then as a graduate student at Columbia my dissertation dealt with the American Supreme Court. In the way that's similar to my interest in the constitution in the book that you referred to. That is to say, I was interested in the relationship between the court and the legislature. I was struck by an observation by Cardoso about the influence of lack of influence of the Supreme Court on the legislature. Well, what I ended up with was an examination of a question of the...how did the court...did the legislature, did Congress deter action by the...did the court's decisions deter Congress? And I had a case study beginning with child labour in 1906 was the first child labour bill introduced, and it was struck under the commerce power. And it was struck down by the Supreme Court in, I think, 1918. And there was a great dissent by Justice Oliver Wendell Holmes. So I examined reactions to that in the Congressional record, and then in the light of that decision, Congress enacted a tax on child labour. Another way to get at it; it still was declared unconstitutional. At which point there was emphasis on a constitutional amendment. But when the New Deal came along the NRA and so on, there were again efforts through legislation to end child labour, and to



enact fair labour standards under the commerce power. And the Fair Labor Standards Act was upheld in 1941 by the Supreme Court, which then explicitly, if my memory is correct...explicitly overruled Hammer versus Dagenhart in a 1918 decision striking down the child labour law. So it was a complete circle here, 1918, 1941. And efforts to use different powers. and in the book I'm interested in the relationship between Parliament and the Constitutional Court. And eventually in the reputation of the Court, the Court's credibility, or widely speaking the legitimacy of the Court. And I thought one way to do this is to examine parliamentary reactions to what the Court has done. So this is similar to what I did in a dissertation so many decades ago. There's a lot of loose opinionated talk about the Constitutional Court. Well, I have two chapters, which really focus upon what I'm trying to explain now. One is the death penalty and the other is same sex marriage, the latter in a chapter on equality for gays and lesbians. In each case there was very strong public opinion, very much in support of the death penalty, very much against same sex marriage. The Court struck down the death penalty and upheld same sex marriage. And in carefully reading parliamentary debates, I was able to say that there was not one single person in either instance who criticised the power of the Court, the power of judicial review. Which seemed to me to be very good evidence of the Court's legitimacy. And yet there's an article by a prolific political scientist named (James) Gibson, who has written an article in the *Journal of Politics*, based upon questions that he formulated, which he then handed over to a commercial public opinion research firm. It used his questions. Interviewing a large number of South Africans in their own language. I've just looked at the article, and about eight or nine languages are mentioned. So you have people, Zulus and so forth, answering questions about the Constitutional Court. Of course some of them had never heard of it before, so he points out, he didn't count those people. But thanks to proportional representation, you have representation by extreme left wing and extreme right-wing parties in Parliament. So it's an excellent survey of opinion. Well, I didn't intend to go into such detail about it. What is fascinating to me about the Constitution is that it's very clearly aimed at transformation for a more egalitarian society. And the judges have this obligation to interpret anything that they do through the lens of achieving the aims of the values in the Constitution.

Int I found your chapter four on Makwanyane, the death penalty...

TK On the death penalty...

Int ...very fascinating because you go into such in-depth analysis of the background of how Parliament, and people within Parliament, had changed their opinions over time on the death penalty. And I was really fascinated by your analysis of Tony Leon, for example.

TK *(laughs)* Well, Tony Leon, was in favour of the death penalty, and then he has to react to some horrible examples of rape and so forth, among people he knew. And then in that section I wrote about him and the Democratic Party, and I left open the question as to whether or not he was going to change his mind. It seemed as if he is but it wasn't clear. It was up in the air.

Int And there's also some suggestion in that chapter that perhaps the Court was...it was really the ANC that wanted the abolition of the death penalty and the Court seemed to have followed suit. I wondered whether you could talk about that?

TK Well, the ANC position, (Nelson) Mandela was in the opposition to the death penalty. But I think the criticism of the death penalty was much wider. It wasn't really...I wouldn't credit the ANC for it. The ANC rank and file represented a good deal of the opposition. At the same time there was a great deal of emotional support for it. It's incredible to think that rape of children, including of infants, occurs. Apparently the thought is, I guess, that if you rape a child, your chances of getting AIDS will diminish. But the...there's been an interesting article written by Ursula Bentele, whom you've interviewed, about the death penalty. What was interesting to me was reviewing such cases in other constituencies and the underlying question of whether or not the South Africa Constitutional Court should look to precedents in other countries. It doesn't seem to be a very hard issue. But apparently some members of the Court think it's a hard issue when there's a consideration of cases elsewhere.

Int I'm also wondering, Tom, your book, it focuses on Constitutional Patriotism and I wondered whether you could define it and how it manifests in South African society...?

TK Constitutional Patriotism is a concept not familiar to Americans; it was a concept popularised by Habermas, who some people say is the leading intellectual in Germany during the debates of the European Union. There were questions to whether you could have a European Union without some kind of attachment to what? Not a common history, not a common language. What he argued was, that you could have an attachment to a common set of values, which are in your Constitution. And so essentially Constitutional Patriotism can be defined as attachment to values in the Constitution that also express the values of the people. Professor Frank Michelman, I was interested in seeing, has a personal relationship with Habermas, has talked with him, and Michelman has written an article in a Law Journal...in which he talks about Constitutional Patriotism as referring to the attachment of people to the values of a Constitution. Presumably the values expressed, their own historic values and their own personal values. I thought this would be a way of focusing upon the reputation of the Court and the credibility of the Court. It's quite amazing to think that there are people who consider the Court itself, if not the Constitution, as lacking much legitimacy, but the article I refer to does

Int This is (James) Gibson's article?

TK Yes. Questionnaires and results of a professional firm, which one has to have a knowledge of a higher mathematics after the figures are juggled and so forth, and conclusions are reached that are really not persuasive to me at all.

Int I'm also interested, Tom you were very privileged to attend the inauguration of the Court, and I wondered whether you could share your memories of that historic event?

TK Well, yes, I'll give you a few memories. And then I'll also send you some pages I've written, which have some detail about what happened. Well thanks to Arthur (Chaskalson), I was in South Africa at the time, but thanks to him, I was involved in all the things that were going on. It was an amazing array of legal luminaries from around Africa who attended, and also Judge Stephen Breyer of the American Supreme Court. They were wined and dined, they were taken around Johannesburg. There were dinners. But what was most interesting was the way in which the ceremonies had been planned. I've got some pages to send you; I remember there were about eight or nine young students on the platform, each of whom recited one of the items in the Bill of Rights. There was attention paid to colours, different colours that were connected with (Nelson) Mandela and with the ANC. But it was really a joyous occasion, a very large group, with at one point the judges on the platform but mainly the children and speakers. It's the detail about it, which I think is interesting that I'll give you.

Int And I wondered in terms of that first Bench, I'm sure you had known some of them, besides Arthur Chaskalson, had you met the others? and I wondered whether you could talk about what you think of the choice of the first Bench, given that they were such a diverse bunch of people?

TK I really did not know many of them at all.

Int Oh, you didn't, alright.

TK Incidentally, the one for whom I have developed enormous, enormous respect for, is Judge (Johann) Kriegler, and I went up to the Constitutional Court hoping to see somebody and that person wasn't available. I said, well, is there any other member of the Court here that I could see? And, yes, Judge (Johann) Kriegler. And I guess he appealed to my ego when I started to introduce myself, he said, "oh, I know who you are!" And I'm not quite sure what he meant by that. But he talked about...you know, he referred to himself as a maverick Afrikaner. He walked to the corner of the room where there was

some kind of gun in a display, and he used that as a point of departure to talk about the violence in South Africa. I don't think I can adequately describe how much I came to like him.

Int And of course you had met Albie Sachs before?

TK Oh, I'd known Albie (Sachs) for a very long time. And it was great to go into his office and to hear what his life was like. Who else...?

Int There was Ismail Mahomed, Tholie Madala...

TK Oh, yes, I knew Ismail Mahomed. He had a gift for beautiful rhetoric, and his own story of having to leave Bloemfontein before sunset and so on. Somebody was going to write a biography of him, I don't know what's happened, but it deserves to be written.

Int I'm curious, in your book you mention...there's a chapter, which I haven't read, where you say there were two who weren't chosen, and I presume that was subsequently, and you refer to Professor Dennis Davis and Geoff Budlender....

TK Oh, I called that "*Two who are not chosen*".

Int Yes, I'm curious about that.

TK Well, you know, I managed to get the full text of Judicial Service Commission interviews, and here were two men, Dennis Davis, and Geoffrey Budlender, imminently qualified to be on the Constitutional Court, and very, very long interviews, very searching questions. The one which really...well, so I've used this as a source for describing each of them. I'll give you just one example, at one point somebody in the Judicial Service Commission asked Dennis Davis, with some concern, that he understood that Dennis had once written an article many years ago, which showed a sympathy for Marxism. Dennis then went into a very detailed explanation of how his time at Oxford introduced him to Edward Thompson, a Marxist humanist historian and that his understanding of history had been much affected by him. When he said that as he grew older.

*(The following portion of this paragraph was edited and removed by the interviewee.)*

I expected him to say as American might say that he became more critical of Marxism. He said, as he became older and thought more and more about it, he said, I could now describe myself as a sophisticated Marxist. Of course I was delighted by that. I wondered, it was impossible to imagine any American lawyer coming before the Senate Judiciary Committee for consideration for the Supreme Court saying that he was a sophisticated Marxist. Well I thought at that point that Marxism really was more respectable in South Africa than in the United States. It was certainly for the ANC, members of the Communist Party were members of the cabinet and so on. To have people like Bram Fischer, a very great figure, great Afrikaner, who was also an important Communist, give it legitimacy...use that word again.

Int I'm also curious about how you discussed Geoff Budlender, because there is concern that he really ought to have been a judge and wasn't chosen?

TK Well, you know, he himself, brought up a related question to the end of the interview in which he said that he'd been accused...I think that word is accurate...accused of criticising selections to the Constitutional Court, as being too much influence by considerations of race. Well, the Constitution calls upon the process of selecting judges that they should take into account race and gender. And Geoff felt very strong that this should be very pursued, that there should be more and more diversity than there was, and there already was a good deal. And he made very clear that he was in favour of that and criticised those who had misunderstood him about it. These interviews are extremely revealing of values and assumptions and the questioning is sometimes pretty rough, which is great.

Int In terms of the first Bench, I wondered whether you had reviewed the interviews of the Judicial Service Commissions of the first Bench?

TK No, no. You know, I wonder if...I don't think there's been much use of Judicial Service Commission transcripts. I think at one point the way for me to get them was to get in touch with a person in Bloemfontein who had had the records. And it turned out that there were quite a number of interviews of the Judicial Service Commission, which had not been transcribed. And I had a foundation grant. I found myself saying that I would pay for the transcription, and she went ahead and had that done. And then I think I donated those to the law library at Wits. It seems to me it's a very important source for researchers and hasn't been adequately used.

Int In terms of the substantive work of the Court, the cases, I wondered whether we could talk about some broader issues. For example, there's criticism that the Court has not sufficiently addressed socio-economic rights, and I wondered what your perspective is on the Court's approach to socio-economic rights?

TK Well, I think the existence of socio-economic rights is distinctive. In the twentieth century constitution it's become more common. But what really strikes me very, very much, is the explicitness of statements, certainly by Arthur Chaskalson, and by others, about poverty and poor living conditions, lack of housing, lack of adequate health, water, and so forth, and you can find very detailed descriptions of conditions that need to be improved. And I think if somebody were just to encounter this without having an understanding of the importance of transformation and understanding the Constitution they would be quite struck by it. In fact, I think it was Chief Justice Langa who in his final statement, before his retirement, said, my work has not been finished. And then went on to describe the extent of poverty in the country. And here was a judge who considered improving those conditions part of his function. Well, if one looks upon transformation, the role of the Court is to look upon law, common law, as aspects of the law, which need to be interpreted with reference to the values in the Constitution. And the...I think I mentioned when I wrote, being at a meeting in New York with one of the judges, and this American student said, well, how would you describe the South African Constitutional Court, a Court of activism or a Court of restraint? Which is a very typical political science 101 question. And I think the Judge...

Int Pius Langa...

TK ...who replied by saying, well, you must remember, in the first place, that the South African Constitution is an activist Constitution, which means that it should be interpreted in ways that will move policy, move the country toward a realisation of its values. And so a large number of the judges, I think I maybe quoted half a dozen of them referring to poverty and such conditions, that's a concern, which is, simply absent from many American Supreme Court opinions.

Int In terms of...I think one of the considerations in socio-economic rights is that the Court has not succeeded in actualising those rights. So even though judgments are handed down, the actualisation of those judgments...and this is often said with respect to the *Grootboom* ((*Government of the Republic of South Africa and Others v Grootboom and Others*) case ...

TK Yes, poor Mrs Grootboom...

Int Didn't get a house...

TK Yes, I think...did she finally die? The Court ends with a very good decision, but it didn't provide the housing that Mrs Grootboom needed. But it's a very difficult question, the question of how far the Court can go in pressing for

action. It's a pretty mixed record. And yet the Court has given very high visibility to the importance of socio-economic rights, and in the Soobramoney (*Soobramoney v Minister of Health (Kwa-Zulu-Natal)*) case the man needed...what did he need?

Int Dialysis.

TK Dialysis and he did not get it because the Court felt it had to take all needs into consideration, and when he died his widow said that the Court had killed her husband. But the...I find it difficult to generalise about how effective the Court has been. There's a limit to what the Court can do. But I think on the whole...I remember one of the...maybe with (Geoff) Budlender, after one of these socio-economic conditions, said, I'm so proud of my country. And he had come for a meeting in New York where there was a great interest in the not just the fact of the socio-economic rights in the Constitution but how effective they can be. And it's quite a mixed record, but one can argue that they've been effective to a good extent.

Int I'm also curious, despite the success in terms of the TAC (*Minister of Health and Other v Treatment Action Campaign and Others*) case, the Court has been criticised in some quarters of having come too close and stepping on the authority of the Executive. What's your sense of that?

TK Well, I think the Treatment Action Campaign, seeking distribution of certain drugs against the opposition of President Mbeki, who seemed to have bought into the mythology about these drugs, that they represented economic interests. He finally saw the light of day. That (*Minister of Health and Other v Treatment Action Campaign and Others*) case is very interesting because it's an example of an issue in which organised civil society put a great deal of pressure on the Court. At the Court hearings you had mass demonstrations, you had people wearing t-shirts which showed that they were...these were just symbols...had AIDS. I think that the...I can't go into chapter and verse, but I think that the overall record of the Court on AIDS, was very good.

Int I wondered, you draw a distinction in your book between the 'Chaskalson Court' and the 'Langa Court', and I'm wondering what that distinction is?

TK Oh, I don't think I'm prepared to answer that clearly (*laughter*). And it's tempting to say that no Court could compare with the 'Chaskalson Court' (*laughs*).

Int There is some sense that the first fifteen years represents the glory years of the Court somehow, and I wondered whether you think that's...?

- TK Well, one is tempted to agree with that because you had judges appointed who already had established national reputations. (Richard) Goldstone...who was the judge in Durban?
- Int John Didcott.
- TK (John) Didcott, and others. And when the time arrived not too long ago when every judge in that first Court had left, there was a sense among observers that the glory years were over. That may be overly romantic. Judge...(whispers) the woman judge?
- Int Kate O'Regan.
- TK Kate O'Regan. I think I refer to her as someone whose name is always linked with superlatives. Was she in the first Court?
- Int Yes.
- TK Of course there haven't been enough women in the Court. To this day the Court is still short of the number of women who should be on the Court. But to have a judge as outstanding as Kate O'Regan, sets a high standard for future women on the Court.
- Int Absolutely. I'm also thinking, in your analysis of the first fifteen years of the Court, what do you think have been some of the tensions that judges have grappled with in their adjudication of cases? What was your sense?
- TK Roxsana, I don't think I can answer that adequately.
- Int Alright, fair enough. I know you're really interested in patriotism and legitimacy of the Court, and I wondered whether you thought, from your perspective, whether the Court has succeeded in creating a moral authority in South Africa?
- TK Oh, I think so. You know, the article I mentioned before, relies upon questions formulated by the authors. And interpreted by them in a doubtful way. Then one looks at the history of the formation of the Constitution, the efforts that were made to publicise it: radio, TV, advertisements, groups, they were trying to involve millions of people. That's not easy to do. But there was a great deal of popular effort to reach the public. And I remember talking to someone who said that her family in the Transkei had two books only in their hut: one was the bible and the other was the Constitution (*laughs*). Well, it's been published



in a small edition. And then the successful effort to produce...Court, contributes to its legitimacy. That's a very important part of it. Some of the criticism of the Court I think has been petulant. I saw one article which somebody says, the Court is underworked and overindulged, that they don't produce enough cases, and that they have facilities in the Constitutional Court room, and law assistants in courts, which other judges don't have, even the Supreme Court of Appeal. In talking to some of the judges I was fascinated by hearing about their experience in the discussion of the decisions. Albie Sachs is especially vivid about this. That time is taken to go around and for everyone to express himself and then to examine any suggestions and to decide whether or not...even on the drafts of the opinion, whether to change a few words and phrases. It's been very encouraging reading Parliamentary debates to see frequent references to the outstanding judges, the cream of the crop and so forth, a lot of clichés about praising the Court. I don't think, and I've read many of these debates and very carefully, I don't remember anybody ever criticising a particular judge for being inferior or a disappointment. That's remarkable.

Int More recently there's been criticism of the Court from members of Parliament and members of political parties. So for example, judges have been called counter revolutionaries. I wondered whether you have concerns about some of these criticisms that have come up...?

TK They'd concern Judge Chaskalson and others, to call the Court counter revolutionary. I just can't believe that's taken very seriously. It's produced a strong reaction by supporters of the Court who are not a small group. The legal profession, the academic profession, I think their respect for the Court it's really quite uniform.

Int I know this is not a fair question to ask you since you are a fan of the Court, but what in your opinion are some of the failings of the Court, if any?

TK Well, that's a very fair question. And I hope I'm more than a fan of the Court (*laughs*). Failures of the Court, is that the word you used?

Int Or failings, yes.

TK Nothing comes to mind.

Int (*laughs*) Well, what are your concerns for the future of the Court in South Africa?

TK Well, there's always concern about the Court's independence. And there's long episodes that we I guess can't get into, about the Hlophe case, a leader of the court in Cape Town who accused fellow judges of racism, who did not invite him to tea. No, I think that some of the extravagant remarks by young ANC people are very quickly reacted to, because they represent a danger to the independence of the Court. How? Well, that this may lead to some kind of...I'm not up to date on what's happening on this moment with regard to action to set up a body, which would review the Court's decisions. What the criteria are isn't really clear. And those criteria constantly...I mean, those decisions are constantly being examined by legal academics. Just exactly what the criteria are, are a source of worry, because they're not clear.

Int You and Arthur Chaskalson were long-standing friends, and he sadly passed away recently, I wondered whether you could share some of your fond memories of Arthur Chaskalson, and why you think he was a good decision as the first Chief Justice...President and then Chief Justice?

TK Well, I don't think I can be called upon to praise him as a judge, but you know I think of how incredibly generous he has been with his time and not just with me. When the Constitutional Assembly...not the...when the discussions were going on, moving towards the...what were they called?

Int Interim Constitution?

TK No, before that.

Int The CODESA negotiations.

TK Yes, the negotiations. Arthur (Chaskalson) picked me up at my hotel, drove me there, picked me up and brought me back. Whenever I was in South Africa from time to time, he never...I knew he was enormously busy, I really hesitated to impose on his time, but he would take time to take me to lunch or dinner. And when I was recently there with my wife, I happened to remark that I was going to take Mary (Karis) to visit the Court building, he said, no, no, he said, I'll take you. And so shortly thereafter he took us there and gave us a super tour of the entire building and of the art that Albie (Sachs) had been successfully getting. It was a big chunk of his time. And I never had any sense that he was concerned about the time. He must have been. He read a couple of chapters. One bit of advice I've taken to heart, which is, "don't try to be up to date". (*laughs*).

Int Were you surprised at all when he was selected as the first Chief Justice?

TK Oh, no. No, no. He'd already had some experience in Namibia and this recent nonsense about his having been a member of the Communist Party, George Bizos effectively struck down. But at the same time he was always ready to give advice, and members of Communist Party were many and in different organisations. And undoubtedly some of the advice he was offered, questions he was asked, were given by groups that had Communists in them. That didn't worry him. But you know, it's very difficult I think, adequately in my few words to convey the sense Arthur (Chaskalson) gave us just enormous integrity, thoughtfulness, and when I think about him in those terms, and then after he died, thinking about other people I've met in my life, he really stands out. I can't think of anybody quite with his stature. Not that I've met such people but people that I've known about. You know, there was such a dedication to the rule of law, to doing what he could in the Constitution making. When one thinks of how much money he might have made in private practice and then to head the Legal Resources Centre, which did such extraordinary job in bringing cases at the frontier, in examining what could be done within apartheid, I can see how that kind of position could be very frustrating. I don't think I've ever heard him sound frustrated. I think, you know, after the death of such a person there may be a tendency to exaggerate, but I don't think that's true at all. The more I think about him, the more he stands out as a person of enormous integrity and enormous commitment to the rule of law.

Int Tom, I've asked you a range of questions, and I was wondering whether there was something I've neglected to ask you which you'd like included?

TK Oh, what a difficult question (*laughter*). I don't know why I have not been really very articulate. And I'll be reading the transcript; perhaps I can delete some items...but let me come back to your question. Well, there's one general need, which is to assist young blacks in getting experience once they get their degrees, getting experience with established firms. I think there are good intentions but from what I know much more could be done to help young law graduates to join firms, and also to help them in making the kind of connections with the legal fraternity that are important.

Int Tom, thank you so much, I appreciate your time, and sharing your thoughts, and also sharing your book.

TK Thank you.

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