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Transcript: Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators

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TRANSCRIPT

LOOKING BACK ON *PENN CENTRAL*: A PANEL DISCUSSION WITH THE SUPREME COURT LITIGATORS

Richard Lazarus: Good morning. It's an extraordinary pleasure to be here for two reasons. The first is this is one of the few years that I don't have to stand up here and talk about a Supreme Court case that I lost and try to persuade you all that I won it. I also get to present what I think must be the single most remarkable panel that we've ever had at this conference and we've had a lot of quite remarkable panels. To commemorate the 25th anniversary of the

Penn Central decision, we're going to have three panels this morning, this is the first. This first panel is going to discuss the origins of the case; sort of the making of *Penn Central*. The second panel is going to talk about the larger political and social setting of the case and its consequences for historic preservation law. And, the third is going to look more broadly at the significance of the *Penn Central* decision for takings law and constitutional law in general.

For this first panel, we have five of the most important lawyers who played a role in producing the Court's opinion, short, of course, of the Justices themselves. We have all three oral advocates for the *Penn Central* decision. We have the former law clerk to Justice Brennan during the October 1977 Term, and Justice Brennan, of course, wrote the majority opinion. And we have the former law clerk to then-Justice Rehnquist in the October 1977 Term and Justice Rehnquist wrote the dissenting opinion.

With the benefit of hindsight we all know now what *Penn Central* has become. Twenty-five years after it was decided, *Penn Central* is livelier than ever. It has become the lodestar of the Court's takings analysis. As people have found in recent years, woe to the advocate who stands before the Court and tries to suggest a departure from the *Penn Central* test. That was the fate of Rhode Island in the *Palazzolo* case for trying to suggest a per se no takings test. And, that was equally the fate of Michael Berger in the *Tahoe Sierra* case when he tried to propose an expansive per se takings test. As long as Justice

O'Connor and Justice Kennedy are the 5-Justice majority on the Court on these issues, the Court seems well wed to *Penn Central*.

In *Penn Central*, as you all know, the Court upheld New York City's historic landmark designation law as applied to Grand Central Terminal. The Court concluded that there was no taking presented on the facts of the case. The Court stressed that there was "no settled formula" for the takings analysis, that it was ultimately a matter of justice and fairness, and the Court declared the "parcel as a whole" rule and rejected the "noxious use" test. The Court instead identified three factors to be balanced to resolve the takings inquiry: the character of the governmental action, the reasonableness of investment-backed expectations, and the economic impact. Justice Rehnquist dissented, joined by Chief Justice Warren Burger and by Justice Stevens.

To start to tell the story of *Penn Central* the panelists have decided to respond to a series of questions to start a conversation going and then hopefully open it up for you all to ask them questions as well. We're going to start chronologically with the jurisdictional stage at the outset and a question for Mr. Gribbon. Before beginning, let me introduce the panel. The panel includes Leonard Koerner who is an attorney for the City of New York and presented argument for the City of New York in the case. We have Daniel Gribbon with Covington and Burling who presented oral argument for *Penn Central*. We have Chief Judge Patricia Wald, formerly a judge on the United States Court of Appeals for the D.C. Circuit, who represented the United States in the case, and presented oral argument. We have David Carpenter who was the law clerk for Justice Brennan. David is at Sidley and Austin in Chicago and David and I have litigated with and against each other in many cases in the Supreme Court. And finally my colleague in academia, Buzz Thompson, who is a professor of law at Stanford University and someone who teaches in the natural resources and environmental area. Professor Thompson was a law clerk to Justice Rehnquist when *Penn Central* was decided. Starting at the beginning, Mr. Gribbon when this case was beginning, what strategic considerations were you thinking about in the decision whether to seek Supreme Court review in this case?

Daniel Gribbon: Well the principal, perhaps the only, thing we were thinking about was the decision of Judge Breitel in the New York Court of Appeals, which broke new ground. It didn't last very long, but it did break new ground. He had come up with a theory that in a matter of a taking you are entitled only to the value that you privately had added to the piece of property and are not entitled to

the value that the public had added either by location or taxing or something of that sort. And, in addition, he had concluded that in the takings area the landmark designation program was so socially and culturally beneficial to the public that instead of being entitled to just compensation you were entitled only to any compensation that was necessary if you were unable to make a profit from the property that you had left. That seemed to us to be wrong in both respects and it was for that reason that we filed a petition for a writ.

Lazarus: Was it a case where you thought it was likely review would be granted? Were people fairly confident or did it seem more like a long shot at the time?

Gribbon: It did not seem like a long shot to us. It seemed to us that Judge Breitel was breaking new ground and one way or another the Supreme Court would review it.

Lazarus: With the benefit of hindsight at the jurisdictional stage, not at the brief-writing stage and not at the argument yet, but at the jurisdictional stage, is there anything that you would have done differently at all in thinking about how the case was framed.

Gribbon: I don't think so. When you win a review you are sort of satisfied. [*Laughter*]

Lazarus: All right. Mr. Koerner, at the op stage when the jurisdictional statement came in in the case, what was the city's reaction, was the city surprised, did the city think this was a real threat, what was the strategy in trying to resist review?

Koerner: To follow up with Mr. Gribbon, I think I have to give a little historical perspective to understand why we were not surprised that he filed a petition. Our whole argument in terms of seeking to protect the landmark legislation was to treat this as just another exercise of the police power similar to zoning. There had been a decision by the Supreme Court in the Euclid case, about 50 years before, which said essentially that government can regulate through zoning. As a consequence, what we tried to do was say, well, if you can regulate through zoning, this is no different other than it is a different type of land use in that when you look at what the city was trying to do, take all its individual designations, put them together with the designations of historic districts, you have a comprehensive plan. So you have a comprehensive plan for landmarks just as you do for zoning, and then the test is not whether they can make the highest and best use but whether or not they can make a reasonable rate of return on the property as limited, just as an owner in a particular zoned area would have to do and he would not be entitled to the highest and best use. We then analyzed what they could do. We showed with the

use of air rights, which I can discuss later, that they were able to make a reasonable rate of return and that is how we submitted the case to the highest court of the state of New York. And we thought that was a pretty good argument.

But as Mr. Gribbon indicated, Judge Breitel, who was the most powerful judge in the state, had other ideas. He must have read about this economist Henry George. I don't know where he got this theory from but he developed a theory in the opinion which essentially said that Penn Central in the ownership of Grand Central terminal had received many benefits from the government in setting up the railroad operation, such as for example it was submerged for the first time which enabled Park Avenue to be developed. As a consequence Penn Central was able to buy the property and then develop it through the use of hotels and make a profit on the hotels. Judge Breitel felt that that showed that Penn Central was benefitting from the property. Unfortunately that had nothing to do with the terminal in 1977. And he went on for pages about this.

The other thing which he said which was troubling is that it was not a zoning case, that we had singled out *Penn Central's* property, Grand Central terminal. That is precisely the opposite approach of what we wanted. We wanted to say we weren't singling out anybody, that the benefits and the burdens were being shared equally throughout the entire city, that everybody including the owners of Grand Central were benefitting by having all these landmarks, and to single out someone we said would be wrong and that is not what we are doing. But Judge Breitel felt we were singling them out but nevertheless found, because of Henry George, who I later spent more time looking up after the case was decided, that Penn Central was not harmed. [Laughter]

The other point Breitel emphasized was that he said the city at this period was in fiscal distress, which was true. He seemed to indicate that because of the fiscal stress we would be able to use a regulatory power, that is the police power, rather than the condemnation power. Obviously that's not a principle that can work. Either you can regulate or you can't regulate; it cannot depend on the finances of the city. That was a problem.

So that when we saw this opinion, Dorothy Miner (the illustrious counsel of Landmarks) and I both realized that this case was going beyond the state court of appeals. And so when Mr. Gribbon filed his petition I did what all lawyers do, I said to the Supreme Court it was just a routine application and, you know, hoped for the best. It took the case. [Laughter]

Lazarus: In the opposition, did the city start to distance itself from the lower court's analysis?

Koerner: Yes. We wrote a piece in the brief in which we completely objected to Judge Breitel's position. As a consequence, before we did that, since he was so powerful in New York, and since as an institutional litigator we would do 30 cases or more a year in the state court of appeals at that time, I had to write him a letter and I explained that while we loved what he did we really couldn't urge it on the Supreme Court. [Laughter]

Lazarus: And this is at the jurisdictional stage, this is before review is granted?

Koerner: This was before review when I had to write the response, yes.

Lazarus: All right. The Court grants, actually let me, I don't know whether either David or Buzz, I didn't plan to ask you any questions at the jurisdictional stage, anything you would feel free to talk about it?

Carpenter: It was one of the few cases Justice Brennan talked about with me and his other law clerks at the jurisdictional stage. During the term, he handled all the cert. petitions and jurisdictional statements in appeals entirely himself, and actually I think the Penn Central case was an appeal.

Lazarus: You're right it was an appeal.

Carpenter: And he did mention this case to us at the jurisdictional stage. He said that sooner or later we're going to have to take one of these landmark zoning cases, and he read to us from the jurisdictional statement during one of our daily meetings. But that's really all I remember at this stage.

Thompson: Because the Justice that I clerked for is still on the bench, I cannot talk too much about what actually went on in the chambers of the Court as a whole. But I can give you my own impression, which is that this is probably a case that would have been heard even if it hadn't been for Judge Breitel's decision. But that certainly helped. It was one of those decisions that just called out for Supreme Court review. From an academic standpoint I have to say, though, that of all of the opinions that were written in the *Penn Central* case, Breitel's is the most interesting. It's the one decision that really sort of broke new ground and raised some very, very interesting issues that the courts still are dealing with.

Lazarus: All right, moving to the briefing on the merits, Mr. Gribbon in approaching the brief what was essentially Penn Central's

strategy in trying to frame the issue and presenting the case to the Court in the briefing on the merits?

Gibbon: Well essentially it was to attack Judge Breitel's decision because we thought once we got that out of the way it was fairly clear sailing, that there had been a taking of our air rights which were an essential part of our property interest, and we were entitled to just compensation. Not very complicated.

Lazarus: And in terms of the response, obviously, Mr. Koerner you had already shown that you were going to abandon Judge Breitel's analysis. So you actually had to come up with an entirely new construct, maybe what you had argued below. What was the City's strategy for winning the case before the Court?

Koerner: Mr. Gibbon's approach was essentially, as he indicated, that there had been a taking and therefore they were entitled to the highest and best use. In the state court system there was more of a discussion about whether or not, even as regulated, Penn Central could earn a reasonable rate of return. So this was a slight change and he was going for all of the booty, treating this essentially as a condemnation, so what we tried to emphasize were the benefits that we had given the owners of Grand Central terminal which included the ability to transfer air rights, which was a relatively new concept, but essentially what that means is that any unused air rights over the terminal could be transferred to other properties. The planning commission, with the aiding and abetting again of Dorothy Miner and Landmarks Preservation, had made two amendments which made it easier for the owners of Grand Central terminal to transfer those air rights. They had removed a limitation on any particular site, which had been a maximum of 20 percent, and they increased the number of sites to which they could be transferred. And essentially what we argued was that was a very valuable resource.

We also pointed out that they could develop the station and make it more commercially viable and they did not do that. It was their burden to show that it was not viable. And essentially we wanted again to bring the Supreme Court back to the principles that they had already used in examining police power regulatory takings case. Because we understood that, particularly coming from New York, if we tried to jab a new theory into the Supreme Court to support our position, we would be in a precarious position. When you look at what we did 25 years later, and we'll discuss this later of course, it's well settled, but then what we essentially said to Penn Central was you can't build this 55-story building even though the zoning permits it and even though right next door Pan Am had already done precisely

that. So when you view it from the simplistic perspective, one would say that Mr. Gribbon had a very powerful argument. So we had to show that we were dealing with him equitably. We wanted the Court to go away with the impression that we were trying to be fair. And that really was our approach.

Lazarus: Was there a takings test that you were advocating in the brief?

Koerner: Well I know this is a takings conference but our whole argument was that there was no taking. Instead what we were saying was a taking would only occur if the appellant satisfied its burden of showing that it could not earn a reasonable rate of return and what we essentially said was given an opportunity in the trial court they did not do that.

Lazarus: So your focus was "reasonable return" as a touchstone for takings. Once review was granted, was there a lot of involvement with amicus?

Koerner: Yes, that was more handled by Dorothy Miner who was the counsel to Landmarks Preservation and she was the one who rounded up the amicus briefs. The State of New York filed one, the Municipal Arts Society, the National Trust for Historic Preservation, all put in briefs in support. As Mr. Gribbon pointed out in oral argument, we won on numbers in terms of amicus briefs. *[Laughter]*

Lazarus: Judge Wald, you were working for the Department of Justice at the time, where you were the Assistant Attorney General for the Office of Legislation. Do you recall how and why the United States decided to file an amicus brief in the case? These days they seem to file briefs in every case before the Court. But they didn't do that back then.

Wald: I always felt I played a very anomalous role in this whole litigation. I was the assistant attorney general for legislation. It was not a litigating division and although I had had some litigating experience, a fair amount before I took that job, I certainly didn't have any in the job. I had no relationship with the lands and natural resources division except in terms of their legislative priorities.

One day Wade McCree who was the Solicitor General at the time came to see me. And he said you know there is a tradition in this department that all heads, all assistant attorneys general, this is 1978, get to argue one case in the Supreme Court. And I said at the time I was busy, I think I was trying to get FISA passed which was the foreign intelligence act and an omnibus judgeship bill to get President Carter 150 new judges, etc. So he said we think we have a good one for you to argue. It was a little bit like a barrister being called in and

the brief is already written and indeed the brief had already been written by the lands and natural resources division. So they gave me the brief and in retrospect I was certainly a bit of a dummy, I think, in terms of the merits of the case. They gave me a brief and I read it and read the cases, etc. And then Frank Easterbrook, who was then the Deputy Solicitor General, came to see me for 15 minutes. I think he had somebody with him but I don't remember who it was, from lands and natural resources. I don't even remember what they talked about, but it wasn't anything very much pointed in terms of what I would say at the oral argument or what points I would raise.

Subsequently, I talked with Lois Schiffer, a good friend of mine, who in the Clinton administration became the head of the lands and natural resources division and was at this time the head of the general litigation part of the division. She said, my god, they didn't even moot court you. No, there was no moot court. She said nowadays if you get to do a Supreme Court argument you get four moot courts, etc. I had never argued in the Supreme Court before either. It was a little bit of babe in the woods. So I asked her, seeing as how I was not present at the creation of the brief or any of the strategy that went into it, I asked her subsequently when this panel came up, if she could go back in her memory and remember some of the background. She said that they had gotten a letter from the National Trust asking them wouldn't they like to come in and do it, and she said you know in general they decided that they would but she referred to it as a quote ho hum case. *[Laughter]* I said, well, was there any dispute about what kind of, of what attitude you would take, what points you would make, and she said she didn't remember much about the brief at all. She was the head of the litigation section, but she couldn't remember whether or not she had even reviewed it. But she said one question was, did the U.S. actually have any relevant interest in this seeing as how these are primarily state and locally administered programs. And so there was a little question about whether the U.S. really did have a pertinent interest. They decided that it had, but there was no significant dispute inside the department about what attitude they would take or anything else. And so that's how it came to be. Well I'll let it stay there.

Lazarus: At the merits stage Buzz and David, what do you recollect of your own, not your Justices', your own sort of preliminary assessment of the case when you read it. Buzz.

Thompson: One of the things you have to realize at this point in time, going back 25 years, is that at that stage the Supreme Court's takings jurisprudence was pretty much a mess. It probably still is a

mess, but it's a different mess today than it was 25 years ago. There were a lot of decisions out there, but there wasn't much in the way of a coherent approach that the Court had taken to takings cases. In addition to that, this was the first in a series of new types of governmental regulations. This was the beginning of the historic preservation period. The courts hadn't faced laws such as the Endangered Species Act yet. And so one of the difficult things in thinking about this case at the time was how to take this very unformed jurisprudence and apply it to a totally new field. With that in mind, though, what concerned me most at the time and still concerns me the most was the size of the imposition, the burden, that was placed on Penn Central compared to what the potential benefits were to Penn Central. This is the reciprocity of advantage issue, and for that reason I thought that there was probably a fair prospect at that point in time that the Court was going to reverse the New York courts.

Lazarus: David do you have any recollections?

Carpenter: My initial reaction to the case was simple: I was trained to think that very, very few things should be takings, and I thought this was a law that should be upheld. That said, I had no illusions that the court would necessarily see the case that way. As a law clerk, there were lots of cases that I thought should be decided certain ways and the Court sometimes decided them differently. [Laughter] One thing going in, I thought this was a reasonably important case but less important than a lot of the other cases that we had that term. I certainly never thought this was a case that we would be sitting around talking about 25 years later.

Lazarus: At the oral argument, Mr. Gribbon what are your recollections of what happened at the oral argument? When you think back to the oral argument, looking back to the transcript now years later, do you have any reactions? Most surprising moments of the argument? Worst moments? Best moments?

Gribbon: I can easily respond to the most surprising moment. I was well into my argument when Justice Marshall, who usually doesn't take much interest in matters of this kind, he was slumped back in his chair, he suddenly came forward almost stood up and said: how did you get this property in the first place, did you steal it fair and square. [Laughter] Before I had recovered sufficiently to say anything, he had slumped back in his chair and never showed any interest in the argument thereafter. [Laughter] But I suppose, of equal importance, I was going as well as I could at Judge Breitel's opinion, feeling that was our best chance if we could knock that off. It is true that the city of New York had more or less disavowed it and

none of the many amici had argued in favor of it, but it still seemed to me to be worth a shot, so I was arguing away when Justice Stevens more or less waved me off. He said don't pay any attention to that or something to that effect. So there was basically the main argument that I had intended to make and he said they weren't going to pay much attention to that. Well he was wrong in the sense that they did adopt, the majority did, one half of Breitel's opinion, that is the notion that if we could make a reasonable earning on what was left that there had been no taking. Now that was novel as far as I was concerned and Breitel said it and in the majority opinion they adopted it even though Justice Stevens said they weren't going to pay much attention to the New York decision.

Lazarus: Mr. Koerner what are your recollections?

Koerner: Well, like Mr. Gribbon, I was extremely pleased that our rejection of Judge Breitel's rationale was accepted by the Court without any discussion because I was prepared to discuss it ad nauseam. But I was afraid it would be a diversion from what we wanted to achieve. On the other hand, there was a lot of discussion about singling out Grand Central terminal so I didn't know how to read the justices' minds except for Justice Marshall who, as Mr. Gribbon indicated, seemed to be supportive of our position. [*Laughter*] We had this comprehensive plan argument but as I indicated earlier in this conversation people still had a hard time with it. All the judges we argued before had a hard time understanding why we were not singling out Grand Central terminal when in it's in the middle of a business district. And, psychologically, this case was a big change because prior to it most of our designations were received with approval by the people who owned the properties. Historically, district litigation involving such areas as Brooklyn Heights, the people who lived in these areas liked the designations. They believed it helped their property values. The problem here is that Grand Central terminal is clearly being curtailed substantially and the judges were very troubled by it. We emphasized the comprehensive plan, I thought I made some inroads, but then they would come back and ask me again about individual properties and they were particularly concerned with a church and what we would do. And they asked Mr. Gribbon, if the church decided to close down and move outside the district and we both gave answers that essentially they could do that. Interestingly enough, that may not be the answer now, but they had a lot of trouble with the individual designations. So I didn't know how to read it. I mean we tried to emphasize the comprehensive plan and, more importantly, they did seem to accept the value of air rights

which was a new concept in the Supreme Court, that that was something of value and could be considered.

The one difference I have with Mr. Gribbon, I don't think they adopted Judge Breitel's opinion. I think what they did, they just applied the zoning test and when Justice Brennan wrote his opinion I think he was just applying the reasonable rate of return in saying that you have to look at everything. One thing that the opinion picked up, for which I give a lot of credit to the clerks in the Supreme Court, is the fact that Judge Breitel said to the owners of Grand Central terminal, I know I set forth this standard, if you think under this standard you can make a showing, go back to the Supreme Court and they will be obligated to review it. And Justice Brennan in his opinion specifically noted that, that if they could show that there was a hardship they could still go back there at any time. Now, I think that was helpful to us and they picked up on it.

Lazarus: Were there any surprising moments for you at the argument? Any answer you gave you wished you could take back?

Koerner: The one thing I thought about was, they asked me what if Penn Central stopped operating the terminal, and I glibly said well that would be a different case and they probably would have shown a hardship. Obviously, in retrospect, I'm not sure that should have been the answer. Because what we would say now is that if they wanted to leave the terminal that doesn't mean they discharged their obligation. If the terminal could be used as a discotheque or a Union Station model, as you know where you have all those stores, maybe they can still earn a reasonable rate of return. So I might have just been too quick to close down the terminal. That's the one thing I've thought about.

Lazarus: Judge Wald, your recollections of the argument.

Wald: Well, when I reread it the first thing that struck me was the cultural difference because they referred to me throughout the argument as Mrs. Wald. And that was the way. Indeed in those early days, that wasn't that early, but if you were a married woman it was always Mrs. Wald. Now of course that wouldn't happen. Everybody is Ms.

But sure enough I thought it was interesting because one of the first questions I got in my brief period arguing as an amicus was exactly the one thing that I mentioned that the Justice Department worried a little bit about, what interest does the United States have in this case. We had to answer of course that the United States had no program where they directly imposed these kinds of restrictions for landmark provisions. I went through the rigamarole about all of the

national landmarks but they were grants and aids and tax credits, etc. etc. One of the Justices asked you know very directly but has the United States ever imposed directly restrictions like this for landmark purposes and of course I had to answer no.

The rest of my argument it seemed to me was like the tail wagging the dog or the tail of the dog after Mr. Koerner's argument because they just kept going with the hypotheticals. They had the St. John's Church across from Lafayette Park and if they wanted to move out into the suburbs and could they sell it to a supermarket, etc. And then the other one, which was a little bit tougher, was well out in Manassas there is a battlefield, you know the Manassas battlefield is on a farmer's piece of property which they suddenly decide is defined as a Civil War landmark or has Civil War relics on it. And he wants to sell it for development, can he do that? Does he have to keep it just as a farm indefinitely? And so that seemed to go on and on and on.

I did want to mention because you didn't ask me about the U.S. brief because there are a couple of things in looking back that are kind of interesting. As both the earlier speakers said, the U.S. took the line that this was not a takings so long as a reasonable use was allowed. Then also the question came up about the divisibility of property, an issue which is still with us. And they took the line that the property was not divisible for analytical purposes, you couldn't take one piece off and say that's a taking of that particular piece. Then they said this is like zoning, which I must admit as I read through, and I really was a neophyte in the field, I did have the ho hum attitude a little bit. Like, well my God, just because all the landmarks are not in one part of the city which had been set aside as a landmark division of the city, like New Orleans, etc. just because they are scattered around the different places, didn't seem to me to be a real difference. Although the U.S. did put in its brief and this is the reason I bring it up, it put in a sentence that said they admitted that this picking out of landmarks quote may create opportunities for arbitrariness not present in broad area zoning, Mr. Gribbon, I remember, picked up on this either in his reply brief or at oral argument. But the other thing that I remember kind of amusingly because Easterbrook had been down to see me as the deputy solicitor was, there is a big footnote in the U.S. brief from Posner. Posner and Easterbrook later became of course the economics and law types, but the U.S. was citing, thinking it was in its favor obviously, a Posner analysis which they said showed that basically what had happened here was like a non-monetary landmark tax on it, etc. So

that's basically it. I just remember breathing a huge sigh of relief when my time was up. [*Laughter*]

Lazarus: Like the reference to Mrs. Wald, the transcript also shows the Justices referring to each other as Brother, as Brother Rehnquist. And once O'Connor was on the Court all that quickly left their rhetoric. David, what are your recollections of the argument in general and do you have any sense that the argument made a difference in this case?

Carpenter: Well three things were significant at the argument. Preliminarily, from a law clerk's perspective, the main importance of oral argument was that it was an opportunity to get a sense of what the other Justices thought about the case. This case was exceptional in that it was very well argued on both sides. That wasn't true of most Supreme Court arguments during this term. So, generally, the value of attending the oral argument was seeing the questions that the other Justices asked and what things concerned them. And three things turned out to be significant to the opinion that occurred at the oral argument. First, very early in Mr. Gribbon's argument Justice Stewart pressed him very hard on how this was any different than zoning. Justice Stewart said that height limitations are perfectly valid in the zoning context, and the effect on the property owner is the same whether the restriction results from zoning that applies to everyone or historic landmark law that applies just to you. He didn't see how it made any difference in terms of the Takings Clause that landmark zoning was involved and he thought the real problem, if any, was one of discrimination, almost equal protection. And there the obvious answer was to talk about the concept of average reciprocity of advantage, which Mr. Gribbon did, but Justice Stewart just wasn't buying it. He didn't view that concept as important to the law of takings. And that was one thing that turned out to be significant in the preparation of the opinion.

The second thing is that Justice Powell and I think Mr. Koerner was alluding to this, pressed very hard on what would happen if circumstances changed and it turned out that Penn Central was unable to use the terminal in the railroad business. He was very concerned whether Penn Central would have an opportunity to come in and get relief if circumstances changed, such that use of the terminal in its present form became uneconomic. That concern was subsequently reflected in the opinion, I think in a footnote.

And there was a third thing that was significant which related to the way Penn Central had argued the case. It had presented a syllogism: air rights are property, this takes away air rights, therefore it's

a taking. But the original plan for the terminal had included an office tower, not the 55 stories or whatever was proposed in the case, but I think 20 stories. A question was asked whether there was anything in what the Landmark Commission had done that would indicate that they would have disapproved a lesser-sized structure more along the lines of the original plan. And Mr. Gribbon was forced to acknowledge that there wasn't. And that was significant too because it meant that to a great extent the characterization of the law as having taken away all the air rights above the terminal really wasn't accurate and that too was reflected in the opinion.

Lazarus: Buzz, what are your recollections of the argument and your sense, if any, whether the oral argument affected the results in this case.

Thompson: My memory of the oral argument 25 years ago was that it was an extremely spirited and very humorous oral argument where the Justices were very engaged and argued back and forth with each other. Reading the transcript reminds me, first of all, of how funny a lot of the questions were that the various Justices asked. Earlier we were regaled by the question by Justice Marshall. Daniel Gribbon had only begun talking and had noted that New York City was the greatest city in the world when Justice Rehnquist said, "Well how are you measuring greatest, in terms of population, or are you measuring in terms of total taxes?" [*Laughter*] And you see that throughout. I really urge you to read the transcript that is in your materials. In addition, you can also get an audio file of the entire oral argument on the Internet. You just go on the Internet and search for "Penn Central oral argument." You can listen to the entire argument which is nice because you can actually begin to tell which of the various Justices are speaking.

As I mentioned, the other thing I remember was the Justices were very engaged. They asked a large number of hypotheticals and when you go back now, you realize that the oral argument was really a rehearsal for a number of the cases that have come since *Penn Central*. There were several hypotheticals that were basically the Lucas facts. One of the Lucas hypotheticals was presented to Leonard Koerner and, if I'm not mistaken in my reading of the transcript, Koerner agreed that in the Lucas-type situation there would be a taking, because the property in those cases would not be economically productive. There was also another question that I think came from Justice Stevens: if there was a taking in this particular case, when did the taking occur? Did the taking occur at the time the landmark was designated, or not until the later point in time when the Penn Central

corporation asked to build on top of Grand Central station? So there were a lot of issues that came up that we've seen in the last 25 years.

In terms of the importance of this oral argument, I don't think that the oral argument probably ultimately swayed any of the Justices. But I think it was an oral argument that could have been extremely important. The ultimate issue, as I think a number of the panelists have suggested, was whether or not this case was any different than your standard zoning case. The way in which Penn Central ultimately had to distinguish those zoning cases was to argue that Penn Central had been singled out here. And there were two parts of that argument. One of them was the reciprocity of advantage argument: Penn Central was bearing a burden that was much greater than the benefits it was going to receive, and therefore this case was very different than your typical zoning case. The second was the discrimination argument. And I always thought the discrimination argument was a losing argument because this was a situation where there was a landmarks commission that applied a set of standards that was subject to judicial review. I don't think that the lawyers, looking back at the oral argument, ever clearly differentiated between these two arguments. I would have pushed a lot harder on the reciprocity of advantage argument in comparison to the discrimination argument.

Lazarus: After the conference, David, Justice Brennan is going to be writing the majority opinion. What are your recollections of the opinion-writing process, and I mean those you can share, versus those that you can't share in terms of what you were thinking about when you were assigned to draft the opinion and what you were trying to accomplish?

Carpenter: At that point in time the Supreme Court decided or gave plenary consideration to about 160 cases and about probably half to two-thirds of them came down after May 1st. And the month of May was simply a nightmare for law clerks; it was like sleepwalking. A Supreme Court policeman told me he'd seen clerks walking down the halls, almost in a trance, talking to themselves during May of many terms. [Laughter] And I remember having experiences a lot like that. After the conference it was very apparent to me that it was going to be a very, very hard opinion to write because different things were important to different Justices. Justice Brennan told me that it should be a very long opinion, but one of Justice Stewart's clerks told me that you better not say anything and should make the opinion very, very narrow. [Laughter]. Any Supreme Court opinion is a formidable thing to undertake, but this was certainly the hardest one that I worked on.

There was a rule that you had to get court opinions circulated by the end of the first week of June. This case was argued in April so there wasn't that much time to do it, given that I remember that I probably spent about two weeks just researching and reading. In addition to studying the briefs and the record and reading all the Court's taking opinions, I read many law review articles about historic preservation, a lot of that was reflected in the first part of the opinion. And while I was working some on other opinions at the time, I spent probably two weeks trying to draft and redraft the opinion - trying to get the concepts down and trying to find an organization that worked in terms of reflecting all of what seemed to have been important to each Justice in the majority. But it came together and was basically written Memorial Day weekend in three consecutive near all-nighters. Justice Brennan had very much wanted to get the opinion to work on during Memorial Day. He was an early riser who took walks early each morning, and I delivered the draft to his house at 5:30 in the morning Memorial Day just as I think he was coming back from his walk. And then he worked on the opinion, worked his magic on it that day and gave his marked-up version of it back to me Tuesday. There were lots of footnotes to fill in and the like, which I did over the course of the next two days, and the Justice went over it again on Thursday and we circulated the draft opinion to the other Justices on Friday morning, June 2nd. Now I had been talking to Buzz during the course of the opinion writing process and I knew he'd started work on a draft dissent and I'd expected a dissent to come around the next week. But within an hour or two after the circulation of the draft majority opinion, we received the circulation copies of Rehnquist's draft dissent. I was physically exhausted and I now was very apprehensive. I told the Justice that Rehnquist had been lying in wait. Now Justice Brennan was the nicest man I've ever known and very fatherly, grandfatherly. He put his arm around me and said don't worry it doesn't touch us, and he made me sit down and read the dissent - and he sat next to me while I read it. I must say I read the dissent and I thought it did touch us. [Laughter] But I was very glad that the Justice thought it didn't touch us.

Thompson: For most Justices, May is really a horrible period; certainly for the law clerks it is. It was not a horrible period in the Rehnquist chambers. Rehnquist had a ten-day rule that nothing could stay on your desk for longer than ten days. As a result, we were basically finished with things long before the other Justices would issue their various opinions. We would have gotten the dissenting opinion out even faster except that Justice Rehnquist thought that he

should have at least have one or two footnotes that referenced the majority opinion. *[Laughter]*

Carpenter: That was the fastest the entire term I think in terms of the dissent being circulated following the circulation of the draft majority.

Lazarus: In terms of when you saw the draft majority opinion, what was your feeling about the potential vulnerabilities, the potential for actually switching the Court or not.

Thompson: Until all the Justices signed on, I thought there was the potential for this case to go either way. I think this was a very, very close case. There were a number of Justices who were concerned about the impact on Penn Central of the landmark designation. I think there was also a notion that, no matter how amorphous the concept of nuisance (the idea that you shouldn't have to compensate somebody if you prevent them from engaging in a harm but you should have to compensate them if you are asking them to do something beneficial), this was one of those cases in which it was very hard to see what Penn Central had done wrong. In other words, why was it that Penn Central was "being penalized" in this particular situation? The only thing Penn Central had done was build a really great building that everyone liked. Those sort of issues bothered the Justices on one side. But on the other side, they didn't want to do anything which could undermine the constitutionality of zoning. They didn't want to get into a situation where governments would have to compensate property owners in a normal zoning case, and the hypothetical that Justice Stewart asked at the very beginning of the oral argument really highlighted the potential dilemma. Justice Stewart asked what would happen if there was a zoning regulation that had prevented Penn Central from building anything taller than Grand Central Station? Would Penn Central be entitled to compensation in that particular setting? The Justices were very concerned about the potential implications of ruling for Penn Central in a variety of other contexts. For that reason, the case could have gone either way.

Lazarus: Justice Stevens dissented, which is such a surprise to the rest of us today. Since then, Justice Stevens has been the main opponent of an aggressive view of the takings clause.

Carpenter: I thought at the time the majority opinion may well have in fact persuaded Justice Stevens, but that he may have wanted the case to come out 6-3 rather than 7-2 because he thought it was a tough issue for the reasons that Buzz has identified and thought it

looked better coming out 6-3. In any case, he certainly followed *Penn Central* enthusiastically thereafter.

Thompson: It's certainly tough to reconcile Justice Stevens' more recent opinions with his joining Justice Rehnquist's dissent in the *Penn Central* case. This was, again, the very early stage in the development of modern takings jurisprudence. And all of the Justices were looking around for ways of trying to think their way through a series of takings cases. So Stevens at this stage was, I think, very interested in questions of proportionality and justice and whether or not in this particular case there might have been other ways in which New York City could have made *Penn Central* whole. Looking at the oral argument of Judge Wald, there was a series of questions that Justice Stevens asked in which he was very interested in whether or not the federal government had ever engaged in historic preservation without providing compensation. And I believe he was absolutely convinced that there was a variety of cities and states around the nation that had found other approaches to historic preservation that wouldn't have forced this type of takings issue to come up before the courts.

Lazarus: One thing I've always thought about the case – and I was just curious if you all or anyone wanted to speculate about it – is that if this case hadn't involved Grand Central Terminal, that if it involved a significant building in terms of economics but in fact not an historic landmark with which the Justices were all familiar, that the case would have come out differently. That it might well have gone the other way. The fact that it was Grand Central Terminal, something that the Justices were aware of, that they were sort of naturally sympathetic to it, made them a little more willing to assume that this is something that the city really needed to do. That fact made a Justice like Justice Powell, who otherwise was always after that on the other side of the taking issue, more favorably inclined to the City.

Carpenter: That could have in some sense made it easier for them to reject the taking claim. But it also meant that the dollars involved were so very large. I didn't view it as the ideal set of facts to be writing an opinion saying there was no taking because the dollars were so large.

Thompson: I would agree with Dave on that. It was not the ideal case. At the same time I don't think another case would have come up because if it had involved something less than Grand Central station, if it had involved a situation where there was an economic impact on a small property owner, then I think New York City would have found a way to resolve it without going to the Supreme Court.

Lazarus: I gather that, you were telling me yesterday that Jackie Kennedy and a group were demonstrating in front of the Court during the argument.

Carpenter: Jackie Kennedy organized a train trip down from New York City and there was a demonstration in front of the Supreme Court, I think, the Sunday before the case was argued.

Lazarus: Are you surprised Mr. Koerner, Mr. Gribbon, are you all surprised by the fact that, 25 years later, this case has become such a significant takings precedent?

Koerner: We knew it was significant at least for New York state because if it had gone the other way it really would have stopped landmarks preservation in its tracks. What's interesting is what has happened since then and in my short paper I cite a number of cases just to show you the variety of designations. For example, in two significant cases, one in the Second Circuit and one in the Court of Appeals, religious organizations sought to challenge designations where they contended that their mission would be interfered with if they were not allowed in each case to destroy a building and do high rise development so that they would be able to expand their investments and get more money for their mission. Now, based on the church discussion that we all mentioned in the Supreme Court, one could conclude that any time a charitable organization says they want to expand they ought to be allowed to do that because otherwise you are interfering with their religious mission. And that indeed was a holding early on in the Lutheran church case before *Penn Central*. But these cases went the other way. The designations were upheld, the courts looked very closely at what the charitable organizations were saying and essentially what they said was you may have a little less money but you can still do your mission. And later on we were able to do some historical designations. There was one building on Broadway where Matthew Brady, a famous 19th century photographer, was for a fleeting moment in the building and we were able to preserve it. [Laughter] And essentially now the designation process is so instilled, this decision has had such momentum, that it's really now a heavy lift for an owner of a building to attack a designation. And I think landmarks at least in New York is pretty well entrenched.

Lazarus: Mr. Gribbon.

Gribbon: Yes, I am surprised that the decision has taken on such importance. At the time it was important but I didn't think it was of the cosmic importance which it turned out to be. Let me just go on to say that I have considered what I might have done differently. I

think that was one of the questions that you put to us. And I haven't for the life of me come up with any magic bullet that would have changed things. I don't think there was anything that I or anyone else for that matter could have said that would have persuaded Justices Brennan and Marshall. I was disappointed that some of the other Justices didn't come along and while I don't have any major matter there are a couple of points of emphasis that I think I failed on.

One, I think I let the argument become a question of whether the landmark program was socially desirable or not. Those demonstrators that were referred to, Jackie Kennedy Onassis and the vice president's wife, they didn't care who paid for this, all they wanted was to make sure that the landmark program continued. And Justice Brennan in his opinion asserted that if

Penn Central won this case it would be the end of the landmark program, which was wrong. As the dissent pointed out, there were a number of other ways that state and local governments had worked this out. I think the basic argument, although it wasn't articulated, really came down to whether the Court was going to stand in the way of landmark designations rather than who should pay for it. On the matter of who should pay for it, the chairman of the Landmark Commission said we have created a public park over Grand Central. And that's great but who is supposed to pay for it, Penn Central or the public.

The second point where I think I made a mistake was in not arguing the notion that air rights are a very important and discrete part of a property interest. Today I think that is well established. But at that time, 25 years ago, air rights were sort of mysterious and the court of appeals in New York had said they really don't amount to very much. And I think had I been able to persuade the lawyers on the Court that these air rights were just as important a part of property as an acre of ground or a wing of a building the decision could possibly have been different. It seemed to me that our case came down to the example which I put to them which was if a farmer has a 100-acre farm which has increased in value way beyond his investment expectations and two acres are taken to build a public road, it is no answer for the government to say well you can make a living out of remaining 98 acres so we don't need to pay you anything for the two that we took. It's perfectly clear that the government would have to pay the fair value of those two acres and I think I just failed to establish to the Court that air rights were just as discrete and important a part of property as an acre of ground.

Lazarus: Judge Wald, are you surprised by the significance of the case 25 years later?

Wald: I certainly didn't recognize the significance, maybe because I wasn't a regular player in that field at the time. In discussing it with a few people before this panel I know, let's just say an activist type described it as enormously important because, as he perceived it, it was the beginning of the movement, this is the late 70s, which was just getting started to try to make it very expensive for government to regulate in different fields, not just landmarks, and that had it gone the other way the notion would have been that you could have used the power much less frequently and with a lot more emphasis on how much it costs. This was the beginning, in this person's perception, the beginning of the attempt to turn around various doctrines, not just the takings doctrine but as we know many of the assaults upon other kinds of regulation. So I think in retrospect it was a kind of braking case, I mean it put on the brakes, this is where we stop at least for the moment. I'm sure it would have driven later Justices, and did drive later Justices who went in different directions, mad, like Justice Scalia, because he has said many times he dislikes balancing tests and where you have a lot of criteria you say to the courts below, look here are 10 criteria balance them all around and come up with an answer. And there was a little bit of that in this decision.

The lesson I think I took away from it goes back to Judge Breitel's opinion below. If you are going to innovate as a judge, if you are going to introduce an innovative theory, you have to be very careful. You have to go very slow because it is almost in the nature of the judiciary when they see something that is, if you are on a lower court, if on the Supreme Court I guess you can do anything you want, but if you are on a lower court and it's going to go up there, then you have to be very careful. Write a law review article about your innovative theory but otherwise you are flaunting the gods as it were. [*Laughter*]

Lazarus: David, there you are in your Justice's chambers in May of '78, any sense at all then of the potential significance? Is it a shock?

Carpenter: Yes. At the time I thought Justice Brennan was making some modest efforts to bring a little content to an area of law that was, as Buzz said before, then quite formalist and in disarray. But I was trying very hard really to hold the Court, that was the number one objective when you were working on an opinion for Justice Brennan, to produce an opinion that at least five Justices would join that would hold the court. As I noted, other clerks had told me that

the opinion better not say very much before I started work on the draft and in fact after it was circulated, Justice Stewart's clerk read it and said he was pretty sure it doesn't say anything at all. [Laughter]

Thompson: The question, again, is whether I am surprised by the lasting impact of the dissent, right? [Laughter] No, I'm not surprised that the majority opinion has had lasting significance. I actually think that it's an amazingly well crafted majority opinion, and its staying power is the result of two things. The first is that it does say something. It could have been an opinion that was five pages long, cited a couple of cases in support, and said we rule in favor of New York City. But it didn't. It went on to lay out a balancing test and to try to give some sense of what goes into that balancing test. And yet at the same time, because it was written to try to hold together a majority, it sets out a test which is appealing to a large number of judges. And so it's not at all surprising that as courts have wrestled with takings issues and found them as difficult as they are, they frequently find themselves coming back to *Penn Central* which appears to offer a refuge for virtually everyone – and in the process maybe doesn't say anything at all.

Lazarus: We have just a little time for questions.

Audience: I know that in the preservation movement the demolition of Penn Station was very powerful in getting things going. How much did the ghost of that demolition have an impact on the legal process, if any? Were people aware of it and aware of the reaction of people to the destruction of that station and its beauty and seeing the possibility that might come along with Grand Central and similar places?

Carpenter: Yes, that was mentioned in all the amicus briefs and it was mentioned prominently in all the law review articles that I remember reading. I think the opinion reflects that one of the reasons for the historic preservation movement was that some very important buildings had been destroyed. I don't remember anybody talking about that building in particular but certainly the fact that buildings that were important had been destroyed was something that we were all aware of.

Audience: There has been a story that has been related at endless takings conferences for at least a decade as to the origin of the reasonable investment backed expectations doctrine and the story goes Brennan's clerk was unsure what to do and he phoned a friend or he called someone called Frank Michelman at Harvard and Frank Michelman said, I wrote a law review article in '67 where I

unleashed upon the world this new concept of investment backed expectations. Is there any truth to that story?

Carpenter: Not as stated. [Laughter]. No, when I was a law student taking constitutional law with Henry Monaghan we spent a lot of time on the takings clause. I studied Michelman's article then – as well as an article by Sax – but I thought as a law student that Michelman, much more than Sax, had made a serious attempt to make sense out of these decisions that were in quite a bit of disarray. I reread both articles when working on the opinion – and cited them both. The concept of “investment backed expectations” definitely came from Michelman's article. But, no, I didn't call anyone at Harvard to talk about it while I was working on the draft opinion. Nor did Justice Brennan. Michelman is a former clerk of Justice Brennan, though.

Thompson: Did Frank Michelman call you? [Laughter]

Carpenter: No. But after the opinion came down, when I saw Michelman at the Brennan clerk reunions, I actually thought of asking him what he thought about the Opinion. But I never have.

Audience: I wonder if we could tie this back to the discussion we had yesterday and ask the panel to reflect upon how one deals with perhaps unintended consequences of basically what are throw away lines in an opinion. So David, you gave the example of the questions that went on at oral argument about the fact the original proposal had 20 stories and Grand Central hadn't submitted requests to take it down to 20 stories and that became very important in laying the groundwork for what came later. We talked yesterday about the throw away line in *Agins* about the substantially advance test and that mischief that has done. I wonder if you could relate that to what goes on in the drafting of opinions and also what counsel can do to avoid that kind of language appearing in opinions that may do mischief later on.

Carpenter: I didn't regard them as throw away lines at the time. I mean Penn Central's argument was that the City had taken all its air rights. But the proposal that had been made was to put a structure on top of Grand Central that was architecturally very distinct from Grand Central and the proposal was rejected for that reason. For all we knew, if Penn Central had proposed a 55-story skyscraper on top of Grand Central that used the same beaux arts or whatever it was, architectural style, it might have been approved. Maybe that, too, would have been dismissed as an aesthetic joke, but in the posture that the case came to the Court, no one knew how such a proposal would have been treated and Penn Central, at bottom, was making a

very extreme claim that any restriction under landmark zoning law – above and beyond those that the zoning laws imposed – constituted a taking. And while it may not have been at all realistic for Penn Central to have proposed everything imaginable to the Landmarks Commission, the fact is that we didn't know with certainty that other proposals that would have allowed some use of the air rights wouldn't have been approved by the Landmarks Commission. So particularly given the way the case was framed to us, I thought it was an important point to make, particularly given my sense that it was important to some of the justices to make the opinion as narrow as possible. And Mr. Gribbon really had no choice when he was asked about this at oral argument because no one had ever proposed to the Landmarks Commission a 20-story addition above the terminal. And maybe they would have turned it down because they wanted a park above the terminal but certainly the Court didn't know about that and Mr. Gribbon wasn't in a position to say that they certainly would have turned it down.

Gribbon: I want to add that I think the idea that we could have had approval of a 20-story building is pure fantasy. There was no indication on the part of the Landmark Commission that they were going to permit anything on top of Grand Central. As the chairman said, we have created a public park. I think the dissent got it right there where they pointed out that Penn Central had spent years and lots of money with two quite different designs from a noted architect to try to satisfy the Landmark Commission whose answer was no, no, no, this is going to be a public park.

Lazarus: One other thing that is interesting about the Court's opinion is how the "economically viable use test" appears to result from a concession at oral argument and looks like it's a throw away line. But, if you look at the oral argument transcript you find out it was anything but an incidental statement. A central part of the City's argument throughout the Supreme Court litigation was that deprivation of all economically viable use would amount to a taking. I have always had the sense it wasn't just happenstance that the reference to that concession and the economically viable use test appears in the last footnote in the opinion, that it was part of keeping the coalition together. It's so striking to see just a few years later Justice Powell writing the *Agins* decision for a unanimous Court following an April argument. Powell's clerk has a 9-0 opinion and Powell takes that test out of that *Penn Central* footnote, a footnote he helped create by asking a whole series of pointed questions at oral argument in *Penn Central*. The Justice takes it out in *Agins*, he elevates it to the text, he

makes it *the* test, and then Scalia jumps on it a decade plus later in the *Lucas* case.

Audience: Could we ask Lenny what he would change in terms of what your view was and what the city's position would be today?

Koerner: The one difference is that, if you close the facilities, we had conceded that that might be a change that would warrant some relief. And now we know that there are many different things you can do with a closed facility other than that particular use. I don't think we would concede now, for example, if they closed the terminal that they could just walk away and put something out. I want to make one more comment just so you don't feel too sorry for Penn Central. [*Laughter*] All along we had indicated that air rights, the ability to transfer to an accommodating property was significant and there was an issue with that. But you should know that at least on this one thing we were a little bit prophetic in that most all of the air rights have been sold by Penn Central and they have made tens of millions of dollars by using the air rights on other properties within the zoning resolutions. So both sides walked away fairly happy.

Gribbon: That's not quite right. I would like to suggest a possible reply to you. If the case were to come before the Supreme Court today I think there is a reasonable probability that it would have gone the other way. We would have had the senior conservative Justice, Justice Rehnquist, the Chief Justice, the senior liberal justice, Justice Stevens, and Justice Brennan would not be there. And I think with the prominence that has come about for air rights we would have stood a much better chance of getting one of the other justices or two of the other justices to go along with us.

Lazarus: Thank you very much.

