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Conversations in Legal Education: Carl A. Auerbach, November 9, 2004

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CONVERSATIONS IN LEGAL EDUCATION:

ORAL HISTORIES OF THE FIRST HALF–CENTURY OF THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW

Narrator: Prof. Carl A. Auerbach

Interviewer: Prof. Michael Rappaport

Recorder: Ruth Levor

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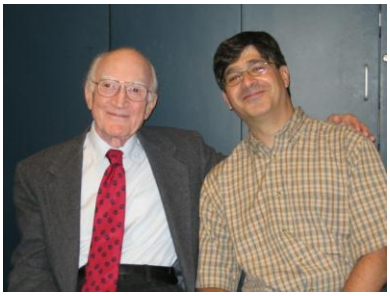
TAPE 1: SIDE A



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RL: This is an interview of Professor Carl Auerbach for the project: Conversations in Legal Education: Oral Histories of the First Half Century of the University of San Diego School of Law. The interview is being conducted by Professor Michael Rappaport at the University of San Diego School of Law Legal Research Center on November 9, 2004. This is the first tape of this set of interviews. Tapes and transcripts of this interview will be archived at the University of San Diego's Copley Library.

MR: Thank you, hi, Carl.

CA: Good morning.

MR: I thought we'd start off in talking about administrative law by starting out in law school, work for you, so as I understand it you were at Harvard between 1935 and 1938, at least my chart says, and so I guess the first question is: was administrative law taught there in the form of an administrative law class or were there other classes that involved administrative law that really weren't called administrative law. How did administrative law fit into the curriculum?

CA: Well, the interesting thing is that Harvard Law School did not at that time have a course in administrative law available to undergraduates. Frankfurter gave a seminar on administrative law for graduate students and undergraduates were asked to apply for

permission to enter that seminar, which I did, and Frankfurter permitted me to be a member of that seminar, but I don't know when administrative law started to be taught as a regular undergraduate course.

MR: By undergraduate you mean J.D., for J.D. students.

CA: J.D., right J.D. My guess is that not until the influx into the law school after World War II.

MR: Mm-hmm, and that seminar, would that have been called administrative law? Was that term in ...

CA: Yes, oh yes, it was called administrative law.

MR: Right, and so you took the seminar?

CA: I took the seminar, and we used Frankfurter's casebook on administrative law, which I gave to the library, by the way.

MR: And it was a published casebook?

CA: Yes, oh yes, it was. I think it was Foundation Press.

MR: And do you remember very much from the seminar?

CA: I do remember very much, because when I started teaching administrative law, I went to look at my notes and I had a sum total of six pages [laughter], which made absolutely no sense to me.

MR: Mm-hmm.

CA: Frankfurter was not very organized, and what happened was, in truth, that whoever happened to be visiting him at the time was brought into the seminar, and this visitor took over the seminar for that day. I thought we learned very, very little about administrative law.

MR: Mm-hmm.

CA: But you had to write a paper, and that was some benefit.

MR: Right, and, so that you took the seminar and that you had to get special permission to take it suggests that administrative law was something that you were interested in already?

CA: Oh, yes, oh, yes, oh, yes.

MR: Do you know where that interest came from, or ...

CA: Just my interest in government, essentially.

MR: Mm-hmm, kind of, the New Deal was occurring, that was some of the important issues?

CA: Yes, of course, and Frankfurter got me my first job, so [laughter] taking the seminar paid off.

MR: Mm-hmm, were there others, so just, I'd love to sort of pursue that further, the first job in just a second, so were there other courses as well, I mean, would there be a sort of public utilities law?

CA: Frankfurter gave a public utilities course.

MR: Mm-hmm.

CA: Labor law wasn't even given as a separate course then, which was amazing. What happened was I had Calvert Magruder for torts, and the last two weeks of the torts course was devoted to labor law and concentrated mainly on injunctions against unions [laughter].

MR: Mm-hmm, Norris-LaGuardia ...

CA: Yeah, my prime interest in administrative law then was the labor field, and I had no training in that whatsoever.

MR: And the impression one gets from some of the histories is that administrative law is really kind of invented later on as a subject with the treatise writers who write later, so it's not really ...

CA: No, it goes back not only to Frankfurter, but it was the shame of the Harvard Law School that Ernst Freund in Chicago was giving courses in administrative law for many years and wrote two pioneering books about administrative law. So Chicago was way ahead of the Harvard Law School at that time in this area because they had Freund. And I would say that Freund is probably the founder of administrative law as a separate course in law schools.

MR: Did you know Freund?

CA: No, I did not know him. There again, you know, you can never be sure until you chase it down whether there was somebody even before Ernst Freund.

MR: And do you, and this would be a hard thing to remember, but is it your impression that the subject matter was conceptualized more or less the same way we think of it today or, it's kind of interesting to imagine that labor law wasn't given, as far as torts, so that

would kind of suggest that perhaps that the whole area of administrative law was thought of a little bit differently then. The way we think of it now is sort of the law governing administrative agencies.

CA: Right. We still have this difference--administrative law refers to substantive fields of regulation like public utilities or OSHA or labor law, and administrative law, as ultimately Ken Davis developed it, to refer to the basic laws governing the way all agencies of government must conduct themselves. This difference still exists in law schools today. I do not know why public utilities, but not labor law, was given as a separate course in the Harvard Law School I attended.

MR: I don't want to get ahead of ourselves but you mentioned Davis, so Davis is sometimes thought of as the person who turned administrative law into a field; now that's somewhat of an overstatement, but you then think that his contribution was for the generalized concept or ...

CA: If you look at Frankfurter's casebook, you'll find there all of the stuff that Davis dealt with. By the way, it was a traditional casebook, which has always been a roadblock to good [laughter from MR and CA] legal research and writing. Davis wrote it out, you see. That was the thing. Take even the Hart and Wechsler casebook on federal courts. I pleaded with them for many years to put out a treatise based on their magnificent casebook; they never would.

MR: And why wouldn't they?

CA: I don't know, because the casebook is the bane of legal scholarship [laughter].

MR: I'm wondering whether it's, well, you would think that their message could be more clearly given.

CA: Right. I mean, it was interesting that delegation, separation of powers, as I recall, is very much emphasized in Frankfurter's original casebook, very much so.

MR: The other person from Harvard of that period of sorts is Dean Landis, who is an important person in administrative law. Was he there at the time when you were taking class?

CA: Yes, yes, actually he signed my diploma, he was dean for a short period.

MR: Was he teaching anything that related to that area?

CA: He was teaching mainly legislation at that time, as I recall.

MR: So it was kind of separate from administrative matters.

CA: It was separate. He wasn't doing administrative law.

MR: And, did you get the impression at the time, some people would draw a distinction between Frankfurter's approach and Landis's approach to the New Deal, and maybe that develops later on, did you get the impression at the time that they sort of differed very much on their views?

CA: No, it would never have come up, you know, in the classroom context.

MR: Okay, so why don't we then move from law school, and it seems that you, I have something that says you began in private practice in 1938, but then you start in the Department of Labor Wage and Hour Division in 1938 also, so did you have a job in private practice first?

CA: Oh yes, this was the job that Frankfurter got for me.

MR: Okay.

CA: It was difficult to get jobs in 1938, very very difficult.

MR: Because of the general economic conditions?

CA: Yes.

MR: And that was true for lawyers as well?

CA: And the fact that Jews were not welcome in a lot of the big law firms.

MR: Mm-hmm.

CA: That was a very salient factor at the time. Frankfurter had a friend; I think it must have been from law school days, who was the Judge Advocate General in World War I, who also is responsible for the Uniform Code of Military Justice, an amazing person.

MR: What was his name?

CA: [General Samuel T. Ansell] Umm ...I've got it down here, you can see what my memory is like, [pause] ...

MR: Or if you want, we can add it in later on.

CA: He was the man who went down to investigate corruption in Louisiana, when Huey Long was kingpin in Louisiana.

MR: Oh, really!

CA: I'm saying this in the hope that it will cause me to remember his name [laughter]. Oh, gosh.

MR: Well we can ...don't worry about the name. I can't remember anyone's name, so we'll fill it in later.

CA: Then what happened was that Magruder, who had been my teacher, became general counsel of the Labor Department's Wage and Hour Division, created to implement the Fair Labor Standards Act of 1938. Magruder called me up one day, and said in effect, you can't be working for a private firm when I need you and persuaded me [laughter], despite the very nice treatment I had at the firm [laughter], to leave and join him in the Wage and Hour Division. That's how I got into government.

MR: So, it was a private firm where you were working; was it then in Washington, D.C. or was it ...?

CA: Washington, yes.

MR: Washington D.C., and so you stayed for a brief period of time there and then went to the Wage and Hours Division of the Department of Labor.

CA: Right.

MR: You say that it was the newly enacted law that involved wages and hours?

CA: Yeah, it was enacted in 1938, the year of my graduation.

MR: But wages and hours had been regulated ...

CA: No, not thoroughly. No, no, not before then ...

MR: Well, I guess the National Industrial Recovery Act, which briefly would have dealt with it, and labor matters might have dealt with it a little, but there nothing general ...

CA: Oh yes, but not even then was there fixing of minimum wages, the mandatory minimum wages, or requirements for overtime pay. The Fair Labor Standards Act was the last of the New Deal measures.

MR: The Wage and Hours Law?

CA: Yes.

MR: And what was the purpose of it? Was it seen as a, you don't think of inflation as happening during the Depression, was it dealing with inflation? I mean ...

CA: No, no, the maximum hours provisions were seen as spreading the work, not that workers would get more money for working more than forty hours a week, but that employers would be encouraged to spread the work and hire new people. That was the theory.

MR: So it was a way of dealing with unemployment ...

CA: Right, because you still had serious unemployment in 1938. In fact, we never solved the unemployment problem until the War started. And mandatory minimum wages were justified on the New Deal's purchasing power theory; that if you increased the minimum wage, there would be more purchasing power, and that would help the economy as a whole by increasing demand for goods. All this was apart from the social justice concepts, which also were important.

MR: And so you went, and what was your job with the Wage and Hours Division?

CA: I was in the Opinion Division, which interpreted what the law meant. Two of the opinions I helped write gave rise to cases that are in all the administrative law case books today. The Interpretive Bulletins were written in the Opinion Division. They were an invention by Magruder, a real legal invention.

MR: Mm-hmm.

CA: We had a statute which imposed mandatory requirements on all the employers in the United States [laughter] with no conception as to exactly how the statute was going to work and what it meant. There were only seven lawyers working for Magruder at the time. When I showed up for work, there were hundreds of thousands of letters [laughter], which we couldn't possibly answer if we lived forever, so Magruder got the brilliant idea that we should devote ourselves to putting out Interpretive Bulletins on what the statute meant. My first job was to do a legislative history on the statute, which I did for the whole staff and particularly to keep the lawyers writing Interpretive Bulletins. We then sent the Bulletins out to all the people who had written us and said they could write us again if they had questions after reading the Bulletins. This made our task manageable. Yet when I left the Labor Department two years later, I still had a backlog of two thousand letters on my desk.

MR: So these were the Interpretive Bulletins that the SKIDMORE case would refer to?

CA: Right, the other case was ADDISON against Holly Hill Products Company. There still is controversy as to whether courts should defer to the Agency interpretations embodied in Interpretive Bulletins. What's the name of the case raising the issue? I've forgotten it.

MR: Meade ...

CA: Yeah, the earlier one.

MR: Umm, Christianson?

CA: No the basic one.

MR: Chevron?

CA: Chevron. Of course, Chevron.

MR: Right, no, no, it's still, my students know SKIDMORE very well.

CA: Right. Well, I helped write the Bulletin in SKIDMORE and the regulation in ADDISON against Holly Hill Products.

MR: Oh, really!

CA: Yeah, and when we lost in ADDISON against Holly Hill Products, Magruder was then a judge and told me he still disagreed emphatically with Frankfurter's decision in that case.

MR: I think you won in SKIDMORE, didn't you?

CA: We won in SKIDMORE.

MR: Right, right.

CA: Conventional wisdom was just the opposite. We should have won in ADDISON and gotten an independent judicial opinion in SKIDMORE.

MR: How come?

CA: Courts are supposed to defer in reviewing agency rules and express independent opinions about what the law means.

MR: Right.

CA: This is a good lesson for students: conventional wisdom doesn't always work.

MR: And when you worked on the Bulletin and then the case got litigated, I think it would be hard to have imagined that you would know that you were working on something that would continue to be in the casebooks a half-century later.

CA: Yes.

MR: I guess, one question is, did you theorize what the Bulletins were in the way that administrative law came to be then ...?

CA: If you look at them, you will see we stated at the beginning that they were promulgated primarily to aid workers and employers in complying with the statute, and that they represented the current best opinion as to what the agency enforcement policy would be.

MR: And the language in the case about an agency being entitled to only so much deference as they are able to persuade the Court that they are entitled to, is that something that came from judicial opinion, or do you remember if that was supplied by a brief?

CA: No, I do not recall that was in our brief.

MR: And do you remember your reaction upon seeing that?

CA: There is another thing to consider in this connection, which is interesting in terms of the way government worked. There was an Enforcement Branch as well as an Opinion

Branch in the General Counsel's office. The Enforcement Branch was authorized to bring civil suits to enforce the statute. The Labor Department could not bring criminal suits. We had to ask the Department of Justice to bring criminal actions, and it did only in the worst kinds of violations of minimum wages primarily. We were constantly, in the Opinions Branch, monitored by the Enforcement Branch, because it didn't want us to go too far out on a limb, because it was concerned with its batting average and wanted to win more cases than it lost. The Opinion Branch wanted to push the statute as far as it could be pushed, and this was done consciously on the ground that the statute was intended to benefit workers who were not in a good bargaining position. Workers who were in a good bargaining position didn't need the Wage and Hour Law; they could take care of themselves through collective bargaining. Therefore, we insisted, doubts ought to be resolved in their favor, so that the employers would have to take the initiative of going to court rather than the workers. This was the way we justified pushing the statute as far as we could, but the people who headed up the Enforcement Branch would go to Magruder and complain bitterly that we were trying to put them in a position where they would lose cases, you see, and that would be bad for compliance, which was true. And this was a tension that was there all the time. I'm sure it exists today in similar situations.

MR: And I guess that kind of assumes then that the Bulletins would not have been given significant deference ...

CA: No.

MR: ...or else the Enforcement people might want, might not have regarded it as a problem.

CA: No, I think Justice Jackson just did some creative work in SKIDMORE. I'm not sure that we had developed ahead of time this theory that agency interpretations should be entitled to great weight in the courts. That's a statement of what happened [laughter].

MR: Right. So you were then at the Department of Labor from '38 to 1940.

CA: ’40 …

MR: And then from 1940 to 1943, you’re in the Office of Price Administration?

CA: Well, the War was looming on the horizon. The War broke out, and I was very eager for the United States to get into the War. President Roosevelt created an Advisory Commission to the Council of National Defense. This was provided for in a statute going back to Woodrow Wilson’s times, so Roosevelt resurrected the statute and ordered the National Defense Commission to mobilize the manpower and material of the nation for war. The draft was instituted and an effort begun to build armaments. You know, we had no armaments whatsoever at that time, no Air Force to speak of, ...

MR: But this was all supported by legislation, it wasn’t just ...

CA: No.

M R: It was just done through the …

CA: At that time, the mobilization effort was launched by Executive Order promulgated under authority of the Wilson-era statute.

MR: ...right, I guess there was a great deal, as with lend lease, there would be a great deal of controversy about visibility that ...

CA: You bet. I went to work for the National Defense Commission and then the part of the National Defense Commission that became the Office of Price Administration and Civilian Supply. The War Production Board was the other principal agency in the National Defense Commission. In time, Civilian Supply was transferred to the jurisdiction of the WPB, and the OPA was left with Price Control and Rationing.

MR: So was the lack of, let me just explore a little bit the lack of legislative authority, so that must have been for lawyers working for the agencies a bit of a challenge and ...

RL: Finish the question.

CA: We began to write a statute almost immediately.

RL: Okay, let's take a break.

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TAPE 1: SIDE B

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MR: One of the things you worked on right away was to start drafting a statute.

CA: Right, Harold Leventhal was put in charge of that job.

MR: And what was his job at the National Defense Commission?

CA: Well, our boss was David Ginsburg, and Harold was his Associate, Associate General Counsel.

MR: So Ginsburg was the General Counsel then.

CA: Ginsburg was the Boss, yes.

MR: And so you started working on a statute with Leventhal, and then I guess that got passed fairly soon.

CA: Well, not fairly soon. The Emergency Price Control Act may not have passed until 1942, but that I have to check.

MR: So, in 1941, if you're regulating prices, or you're exercising binding authority, people have standing to challenge these actions. How did they hold up in court?

CA: Well, to my recollection, we didn't have any challenges; we had some constitutional challenges to the statute, but in the interim period, we did not have any challenges that I recall.

MR: People accepted that the President had the executive authority to do this?

CA: Well you know, people are, there were no people against the War [laughter].

MR: That would have been after 1941, right? But beforehand there were.

CA: Right, right.

MR: Right. So when would these exercises of authority have really started occurring?

CA: Well, I left the Labor Department in October of 1940, so I wonder if the Emergency Price Control Act was 1941.

MR: So, even before Pearl Harbor?

CA: Oh, yes.

MR: Okay.

CA: No, no, the statute was not passed before Pearl Harbor. I know that for certain.

MR: Alright. Okay. So, then your job continued to be in the office of Price Administration, I guess, continued to work on sort of price regulation issues, but now not wage and hours, but …

CA: No, no …

MR: What kinds of prices? Prices for war materials, or … ?

CA: What happened was very interesting. I started as Chief Counsel of the nonferrous metals section [laughter], and I became an expert on junk, nonferrous metals [laughter]. Don Wallace, by the way, a very famous Harvard economist, was the Price Administrator for that section, you see. We divided the whole industrial field into commodity sections, and there was a non-lawyer generally who was in charge of each section, and we had independent legal counsels each step of the way, so we could ultimately go to Ginsburg, who would go to the boss, who was then Leon Henderson. In this way, the lawyers had input into decisionmaking at the highest level. Then, as we kept expanding, we created two separate overarching divisions. One was Industrial Prices, and the other was Consumer Prices. I was named Assistant General Counsel for Consumer Prices. David Cavers was named, Assistant General Counsel for Industrial Prices. Henry Hart was our boss. He was Associate General Counsel for Prices, and his counterpart was Ken Galbraith. We really had quite a group.

MR: Well, that's great.

CA: So I was in Consumer Prices until I went into the Army.

MR: And was the purpose of the law kind of to keep the prices, to keep the prices high for consumers so they wouldn't use very many of them …

CA: No.

MR: … or what was the point of that?

CA: Stabilization to prevent inflation.

MR: To prevent inflation at that point?

CA: Oh, sure, oh, sure.

MR: Because at that point, I guess, there was great demand from the government for these matters … to pick up money.

CA: And you couldn't sustain rationing without price control. The pressure would have been too great.

MR: And now what kind of challenges did price regulation of this sort present for administrative law? Did you have to use, I mean, I guess, one question especially, in light of what happened, at the Wage and Hours Division, is did you have rulemaking authority? Did you use …?

CA: We were given rulemaking authority by the Price Control Act. It couldn't have operated without it, and we issued these price regulations, which contained justifications for what we did. We had intensive negotiations with each industry, even with the Baltimore junk dealers, who were a very interesting group. There was very sincere effort to get industry views reflected in what we were doing. And there were internal procedures, administrative law procedures, which I wrote about many, many years later, to give people complaining about the regulations a chance to be heard again, inside the agency.

MR: Before the regulations were issued?

CA: Before and after. And then there was the right to appeal to the Emergency Court of Appeals, which was a unique institution. Nat Nathanson was in charge of defending what we did in the courts. So we duplicated my experience in the Wage and Hour Division. Nat and the group working for him didn't want to lose any cases either [laughter]. So they were always on our neck to be, you know, reasonable, more reasonable than we might otherwise have been.

MR: But did you have, I'm a little confused, you did have rulemaking authority?

CA: Of course.

MR: Oh, I misunderstood; I thought you said, so you did have rulemaking authority.

CA: Of course.

MR: So, but in this situation, unless I'm misremembering which act we're talking about, you have challenged, is this the act where you had to challenge the rules in a very brief period, you had maybe thirty days, or sixty days, and that was the statute of limitations, and that actually was subject to challenge and approved by the Supreme Court?

CA: We never really had a challenge as to whether that time limit would preclude constitutional objections. According to the statute, a claim of unconstitutionality could not be made after 60 days. But I think Rutledge wrote a concurring opinion as I recall—maybe a dissenting opinion-- saying that you could not have a situation in which people would be subject to criminal penalties for violating an unconstitutional regulation or statute. But we never wanted to push such a claim of preclusion [laughter].

MR: And what was your view at the time about that issue? Did you agree with Rutledge, or it just wasn't something that came up?

CA: I'm afraid if I answered that, it would be what I now think I should then have thought.

MR: All right, fair enough.

CA: I'm not certain what I thought then…

MR: So in this situation then, if I understand it correctly, you would issue a rule, there would be procedure, procedures available before you issued the rule, as well as afterward, and then you'd get judicial review in a very brief period after the rule was issued. So this was not the kind of typical situation one sometimes hears about, I think actually you wrote about where a rule would be issued, there would be no judicial review in advance of its enforcement, in fact you would get the enforcement …

CA: Right, right, right.

MR: Now, the theory out there about getting the judicial review at the time of the enforcement is that you would go into District Court or maybe an agency administration, and you'd have a trial then where you could develop the underpinnings to justify the rule, and that would allow the court to have a record in reviewing the legality of the rule.

CA: Well, we didn't want records of that sort to be made in the courts. We wanted those records to be made in the agency giving full opportunity to the objectors to have their say and possibly persuade us to accept their views and change the regulations. In any case, judicial review would be based on the record made before the agency.

MR: Right, and in your case there really wouldn't have been a challenge to the legality, putting aside the constitutional question, the constitutional questions, but to the legality of the regulation in the enforcement proceedings, they instead would be challenged in that initial window of thirty or sixty days.

CA: Right, right, right.

MR: So in a sense then, you said we have to create a record at the time that the agency is going to act …

CA: Right … or before it finally acts …

MR: So that the courts will then have a record. So you anticipated, and here's really my question, it's sometimes presented that in the 1960's and the 1970's, Leventhal and others invented the notion of elaborate 553-type procedures in order to allow rulemaking, which was now very significant, to be subject to pre-enforcement judicial review, but it sounds as if this had actually been invented years earlier at the Office of Price Administration?

CA: Harold knew about that, of course, and we were in constant touch, all throughout his life, on administrative law issues, but there was a difference, I don't know whether you recall this piece that I wrote in honor of Nat …

MR: Sure.

CA: Ken Davis and I disagreed on that. What you now have—by making the informal rulemaking record exclusive for purposes of judicial review--is a situation in which an agency is required, before it promulgates any rule whatsoever, to imagine all the conceivable objections that might be made to what it is doing and to answer each objection on the record, so that it may satisfy the hard-look doctrine. This is what in the piece honoring Nat I predicted would absolutely kill rulemaking as an effective tool, and at one meeting of the AALS Nat referred to my piece as the voice of Cassandra [laughter].

MR: Mm-hmm. And did he mean both sort of predicting doom, but also accurately predicting doom, and not being listened to …

CA: Accurately, accurately predicting.

MR: Right.

CA: I thought an effort ought to be made to modify our wartime OPA procedures to peacetime conditions. You could have done that quite easily. And you would have had

rulemaking liberated so that it could also have been done on the basis of negotiation with industry. nPeople seeking judicial review would have been given the opportunity to build a record for that purpose based on what they were specifically objecting to.

MR: At the agency level?

CA: At the agency level. Because that would give the agency a chance to change its mind, which those challenging the regulation should have wanted. If I were an attorney for business, subject to a regulation, would I have preferred an opportunity to reach the mind of the agency by presenting facts to going to court? It seemed to me that lawyers should have wanted to go the way we did during the War, but apparently they did not.

MR: And, well, I guess that that raises a number of different questions as to why they wouldn't, why it ended up that they didn't want to do that. A subsequent development is this Negotiated Rulemaking Act, where an agency could go through and negotiate. Is that more, how closely does that kind of procedure follow to what was going on at the time?

CA: Yes. There was no reason for that act. This was within the agency's power under the APA, as its legislative history makes clear.

MR: So, is the problem then that people affected by the rule didn't want to negotiate with the agency in advance, instead wanted to go to the courts? Or is the problem that the agencies didn't want to bring in the people who would be affected?

CA: No, I don't know.

MR: Since you would think they had the authority to do so.

CA: I don't know how it would be possible to generalize about that for all the agencies. It always perplexed me, Ken Davis accepted the notion and wrote a rebuttal to my article in one of the editions of his treatise. He argued that the notion of an exclusive informal

rulemaking record for purposes of judicial review was generally accepted, that he didn't want the agency to come in with data after the fact to justify what they did, he wanted all the justifying data to be introduced before the agency acted. And this seemed to be the view that most administrative lawyers took.

MR: And do you think that was in part, based on distrust of the agency? That they would come in with different data at a later point or just …

CA: It must have been. I know from the OPA experience in wartime (we by the way were the only democratic country to allow judicial review at all of price control and rationing during wartime) that we were very anxious to get all the data we needed to come to a decision. We could easily change our mind, all we had to do was rewrite the regulation and publish it in the Federal Register, that's all. So it wasn't a big deal to make changes. But we could not afford in wartime to have to build records to withstand judicial review before using every regulation.

MR: Although, presumably a lot of the agencies had an arrangement where their rules would have been challenged at the enforcement stage, where you couldn't challenge them in advance of enforcement ….

CA: Right, right.

MR: … that would change at least some of the incentives and the dynamics.

CA: Right, of course.

MR: Right, well that's very interesting. So you stayed at the Office of Price Administration, I guess then, till 1943, and there were some great people there, it sounds, and then I guess at that point you moved into the Army, and then you eventually come back to the Office of Economic Stabilization, so at this point we can either talk about the

Army a little bit, or I don't know if the continuity makes more sense to talk about the Office of Economic Stabilization.

CA: Probably do the latter.

MR: Okay, so you spend three years in the Army, and then in 1946, you're in the Office of Economic Stabilization. That was not part of the Office of Price Administration?

CA: No, it was the top economic stabilization office. It was once headed by Vinson before he went on the Court, and then it was headed by James Burns, before he went on the Court, and when I came back, it was headed by Chester Bowles and Henry Hart was the General Counsel. Henry asked me to come back and sort of finish the job.

MR: And what did the agency, what was the agency doing at that point?

CA: We were then doing mostly some rationing and rent control. Price control was waning, you see, we weren't too concerned about price control at that time, although we maintained the regulations. Even then, I had about five hundred lawyers on the staff, so it was still a fairly big operation.

MR: Now when you say you weren't concerned about the price control, was that because the regulations were sort of very lenient and they allowed for a lot of changes?

CA: They were, they were, yes. The other thing was, you see, the Republicans, when did they take over, 19…?

MR: '46.

CA: … 46, right. Senator Robert Taft began to have success in getting statutory changes, which weakened the system entirely, you see. And so there was no point to try to do very much in that area because the political [laughter] situation was going the other

way, but there was a lot of interest in rent control in local places where housing was still very, very scarce.

MR: And why was the housing short? Was that because there hadn't been building because all of the economic resources were devoted to the War effort?

CA: Right, right. A new Housing Agency was created to build new houses.

MR: Mm-hmm, and did these regulations displace regulations that were sort of local regulations? One hears about the New York City rent control as having been originally a wartime measure, I'm not sure if it's World War I or World War II, but were these approving of those, and allowing of those, or are these displacing those?

CA: These were displacing. We were responsible only for those regulations which displaced local regulations.

MR: And let me ask you, maybe this is the right place to ask. Some people especially more sort of market types, when thinking about price regulation for an economy generally rather than a specific sector, think of it as being really at the outer limits of what government can do, on the idea that prices are constantly changing or prices in a market would be constantly changing in response to changing circumstances. Even a single commodity would have different prices depending on where it is, there's transportation and location costs, and so the question is to what extent is it possible to actually have rules that govern prices? And the challenge would be you couldn't have rules on the one hand because they would be too rigid to take into account this flexibility or if you did have rules, you'd constantly have to be changing them, or the rules would be so vague that there would be inevitable administrative discretion operating, and you really would have significant interferences with the rule of law. So you now will have been at three different agencies and a great deal of experience with price regulation, what would be your response to those kinds of concerns? Are they …?

CA: You've put your finger on an essential question we began to think about in the postwar period. We thought of saying to an industry, "Look, you handle your prices any way you want, but come out with no more than this maximum amount of profit . In this way, we wouldn't have to worry about the kinds of problems you are now talking about.

MR: So let me see if I understand it. So because of the difficulties of regulating the constantly adjusting prices or the constantly adjusting circumstances, you went from a sort of a profit, from a price regulation system to a profit limiting system?

CA: That is what we were thinking of doing. An alternative was to permit an industry to fix prices of particular commodities in any way it pleased, so long as the changes made did not change the impact of that industry's prices or the price indexes.