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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

Date: November 12, 2004

Accession No.: OH-LRC-Auerbach-2004-2a

TAPE 2a: SIDE A

REDACTED BY THE NARRATOR

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 12, 2004. This is the second 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: All set? Are you ready to start, Carl?

CA: Yeah.

MR: Okay.

CA: Should we get some water?

MR: Sure.

CA: I need some water, so we won't have to be interrupted.

MR: Okay, so the last time, we had been talking about a number of issues regarding wage and price controls, and we left off in the middle of a line of questions, but you also

mention now that you've looked back at some materials, and I thought I would ask you a couple of questions just to fill in some of the story from earlier. So, we'd talked about the authority of the National Defense Commission, is that right? And prior to Congress passing the statute, in what 19...?

CA: '42.

MR: ... '42, I guess the question is what was the authority that the National Defense Commission had for regulating prices in the war industries? And, so what you are saying is that there wasn't statutory authority, it was all by Executive Order or ...?

CA: No, the statutory authority was the very general Wilson-era National Defense Commission Act that goes back to 1916. And President Roosevelt issued Executive Orders pursuant to this general authority given him by the National Defense Commission Act and the constitutional executive power.

MR: Okay, so he wasn't relying entirely on his presidential powers, but in part ...

CA: Right, this statute, by the way, is still in effect. It's never been repealed.

MR: Oh, okay.

CA: National Defense Commission Act [laughter].

MR: So that might give current presidents some authority to ...

CA: Yes, it would be interesting to know whether that has happened.

MR: Right. I know there've been some subsequent statutes that have also been added, and it's possible that they've cut back at the same time, or that they would need to be read together, that emergency authority of the President in certain circumstances, so it's

probably a complicated question for lawyers. Is there anything else that you wanted to fill in? You've mentioned there was a fireside chat ...

CA: I checked my recollection. I started working for the Price Stabilization division of the National Defense Commission in October of 1940.

MR: Okay.

CA: So there was just a little over the year that we operated without specific statutory authority.

MR: Okay. Now, we had, I had been asking you about some of the potential problems and challenges when you regulate wage and prices, and the difficulties of having a rule that can respond to the changing circumstances, and you had mentioned that, to some extent initially, and then later on even more so, the regulations were framed in terms of limiting profits.

CA: No, I don't think we ever actually issued such an order. We were thinking that this was the way to go when the dangers in specific areas are past. The one thing that that wouldn't do, for example, if the price for aluminum scrap or second-hand machine tools is going through the roof. If you have an aggregate profit standard, you don't necessarily get at the prices of those particular items. But once the war was over, for the transition period until civilian supply was replenished, we were thinking that we would do this kind of a flexible regulation.

MR: Right. I suppose the other problem, which is sort of well known from public utility regulation, is that when you have a kind of reasonable profit standard, you don't have incentives or as strong incentives to keep costs down, then if you have something like a cost plus standard, then ...

CA: Well you do, you see. If there is any kind of pressure on prices ...

MR: Do you mean a market pressure or ...?

CA: It will lower, it's not profit, it's aggregate profit control, so you don't know how it will work out in terms of the incentives for particular operators in the industry. They may try to get more profit in a particular area by cutting costs considerably, if they can't do that in another area. You don't know exactly what ...

MR: So it's aggregate profit in the sense of profit across several different commodities that are alike.

CA: ... for the industry, commodities groups, sure, and the industry as a whole, not over commodities. We never did that. That wouldn't work out.

MR: Well, let me ask you one question about, take some of this experience and things about what eventually the future ends up looking like, so after the New Deal and after some changes, we get the repeal of many these wage and price controls. We still have a significant amount of price regulation in particular industries for a while, airlines and trucking and so on, and then in the late 1970's and 1980's, we get the deregulation of a lot of these areas. We get, more significantly, less use of price regulations, so that we are now at the point where we, one might argue, we're at the low point of price regulations in the whole century or for quite a period of time, so I guess I'm wondering, based on your experience involved in some of these matters and also just your political views, do you think that these have been mistakes in general, or do you think that price regulation is sort of getting a bum deal? Or it makes sense, although if we were in war again, it might make sense to regulate?

CA: I don't know that I could tell you I've always held to these views, but I have in recent years. I don't really think, in fact I think I alluded to this in the Nathanson lecture, I don't think the issue is whether you ought to rely on the free market in a certain context, say airline industry, or regulate routes and prices in that industry is an issue of principal

dividing liberals and conservatives. I think it depends pragmatically on whether it works. If the market works to produce the kinds of results that we expect, then fine, if it doesn't, then you ought to do something else to produce those results. Now, I think there are a lot of people that are not very happy with the way the airline industry is going. Look at what the market has done. Practically every airline is broke now. So what are the criteria [laughter] as to whether it's working well or not? Every one of them is almost in bankruptcy. I mean, what would you think? Is that working well? Is that a shining example of the way to go?

MR: Well, I'd rather not bring up my views [laughter], but I do agree with you that a pragmatic approach, but when you do take a pragmatic approach, that moves the question back one level.

CA: Of course.

MR: Which is, then, how well do we think markets work verses regulation? And perhaps it's not unfair for me to say that your view is, although it would need to be based on the specifics in any particular industry, that markets still have their warts, and price regulations are certainly something that ought to be in our toolkit and employed.

CA: Of course. Of course.

MR: Okay. I'm not surprised by the answer. Okay, so let me then, I wanted to ask you about a number of the people that you worked with, and there could be a large number of people, so we might jump back and forth from topics just to go over some of these people. Personally, you had mentioned a story last time but hadn't gotten into it, about your first boss and his investigation of Huey Long, a guy by the name of Ansell.

CA: General Samuel T. Ansell, A-N-S-E-L-L.

MR: I wanted to ask you about, I guess, his investigation of Huey Long.

CA: Well, the Congress of the United States, Senate, wanted to investigate Long very badly. Nobody volunteered to do it [laughter]. General Ansell, out of private life, said he would, and he did, with great success.

MR: Was he working for the Congress, or is he part of ...?

CA: No, the Senate, he was employed by the Senate ...

MR: Right, okay.

CA: ... to conduct the investigation of Huey Long. He went down there and bared the details of the corruption in Louisiana. So Huey Long on the floor of the Senate denounced him and his ancestors and his mother and his grandmother in the vilest fashion. And Ansell, despite the fact that the members of the firm told him he would lose, because of the Debate Clause in the Constitution, sued Huey Long for defamation in Ansell versus Long, and of course, Huey then pleaded the Debate Clause, and the case was thrown out. But the great, I forget his name now, the great cartoonist for the Washington, it may have been the Post or some other newspaper, then drew a beautiful cartoon calling Huey Long, instead of Kingfish, which was his name, Kingfish Huey Long, Crayfish, Crayfish Huey Long [laughter], and he gave the original of this to General Ansell, who hung it up in his office. Let me tell you one of the interesting sequels to this, which is indicative of the Southern cultural tradition to this day, Samuel Ansell had a son who was in the firm, a lawyer and a football player in his college, and he was in the Willard Hotel once and found himself in the same elevator with Huey Long. He beat the hell out of Huey Long, right then and there ...

MR: Really.

CA: ... and was never sued [laughter].

MR: [laughter] Wow! That's interesting. So when Ansell did this, was that before you worked for him?

CA: Yeah. By the way, it's a very interesting case on the Debate Clause.

MR: I'll have to take a look at that. Okay, so that was Ansell. Now, I mentioned briefly last time about Frankfurter, who I guess you knew when he taught the seminar in administrative law that you took. Was that your main contact with Frankfurter, or did you ...?

CA: Well, while I was in school, yes ...

MR: And then, what about afterwards?

CA: Then he also, you know, supervised the paper that I wrote.

MR: Oh.

CA: ... in his seminar.

MR: What was that paper on, do you remember?

CA: Yeah, actually, it won the Addison Brown Prize for Admiralty Law [laughter].

MR: Oh! Not surprising.

CA: I dealt with the history of maritime labor relations on the East and West Coast, involving the Seafarers Union and Harry Bridges' Union.

MR: And did you also know Frankfurter after law school?

CA: Yes, indeed. I used to visit him quite regularly when he was on the Court. I was involved in two cases before him the Court and argued one of them. I lost them both, but Frankfurter dissented in both six to three decisions.

MR: You had mentioned just a little bit about the way the seminar had been run, but what are some of your reminiscences of him? What was he like, do you remember?

CA: In terms of substance, he was not a good teacher. Maybe, in a basic way, what he communicated was more important than the substance of the course, but with regard to the substance of administrative law, it wasn't very much at all. In class, it was very strange, and I never understood why he did it--he was very nice to the students from Harvard Law School taking the seminar, but the graduate students who came from other schools were very shabbily treated, with some basic exceptions. I still remember one graduate student from NYU whom he reduced to tears right in the class by going after him on the basis of a paper that this student had written. The exception was Bernie Meltzer. That's when I first met Bernie. He was in that seminar; he'd come from Chicago, but his brother, Bernie's brother, was a graduate of Harvard, no, not a graduate, he was a student at the Harvard Law School on the Law Review who committed suicide while he was at school. This was Bernie's oldest brother.

MR: And what was Frankfurter like after, when you knew him in Washington?

CA: Well he was always brilliant. He'd run, excited, around the office, picking up something, showing you this, that, the other thing. I used to see him at least once or twice a year. The minute I would come in he would say, "Let me show you what your liberal friends are doing now [laughter]," meaning the people in the Court who he thought had deserted him, Douglas and Black, in particular.

MR: Well, I'm glad you mentioned that, because I was going to ask you, because a lot of people, it's often pointed out that, as the issues changed from the old standard New

Deal issues, that there was a split amongst the New Deal justices of this sort. And I guess, so he was quite open about that?

CA: Oh yes, oh yes.

MR: Was this something, you think, in retrospect, could have been predicted? Something about his personality?

CA: I think it's sad to say, it was something about his personality. He thought he should have been the intellectual leader of the Court, and he was until the Flag Salute case, and Black lost confidence in him after the reversal. Frankfurter had taken him up this path only to have to go down it again. Frankfurter should have known better, because Black was a very strong-willed person, and no way would Black have become a tutee of Frankfurter or anybody else, but they were at one time the closest of friends. Black was put on the Court the year that I took the seminar, and Frankfurter defended him when Black's Ku Klux Klan membership came out, and said that was an aberration, that was not typical of Black, who should be confirmed, because he'd be a wonderful judge, etc., etc.

MR: So you think it was more had to do with sort of personalities and kind of leadership aspects then, an alternative view on it might have been, it's sometimes put that Frankfurter believed in judicial restraint from the beginning, and even when circumstances changed, and the liberals had control of the Court, he still wanted to employ his old principle, and others like Black and Douglas especially saw new circumstances and changed their view somewhat.

CA: You're making an excellent point with which I would agree. I think that judicial restraint was very important to Frankfurter.

MR: And was there something about Frankfurter that you could sort of say that he would stick to his, was there a certain stubbornness, you know, that you said, "Well I had

this view, and I'm going to continue to hold this view even though circumstances have changed?"

CA: No, I don't think it was a matter of temperament, but this is the way he saw the particular cases in terms of the kinds of deference that the courts, even the Supreme Court, should pay the other institutions of government. That's really what concerned him.

MR: And that never changed, correct?

CA: That never changed.

MR: Right, okay. Now, I guess you've mentioned several different people who, I guess, had worked either at the OPA or ...

CA: By the way, you know that I was never a Supreme Court clerk, but Frankfurter tried to get me a clerkship with Murphy. One of the New York columnists, Lyons, Leonard Lyons, that name mustn't mean a thing to you ...

MR: Does his son ...?

CA: ... he was like a Walter Winchell but more sober and more serious. He wrote a column saying that Frankfurter was trying to get Murphy to be one of his people by getting his person to become Murphy's clerk, and that finished it with Murphy, or else I would have left the Wage and Hour Division and gone to work for Murphy [laughter]. I'm glad that didn't happen [laughter].

MR: Why so?

CA: Because the experience in the OPA and the Defense Commission was much richer than anything I could have gotten on the Court.

MR: Okay. So I guess one person that you said had worked in, maybe it was at the ..., I'm not sure which of these, was Richard Nixon.

CA: Yes.

MR: So tell us about that.

CA: As I indicated to you, when we started working in what became the OPA, we had a very very small staff. Ginsburg wrote to all his friends in the law schools to urge them to recommend people who might like to come work for us, and Douglas Maggs, at Duke, was one of them. Did you know Maggs, the constitutional law scholar? The father of Peter Maggs?

MR: I know the grandson now, Greg Maggs.

CA: Well, Doug Maggs, Douglas Maggs, was at Duke, and he recommended Nixon, who was graduated from the Duke Law School. We interviewed Nixon and hired him, and he worked for Tom Harris in the Rationing Division of OPA.

MR: So was that, do you think, his first job out of law school?

CA: Yeah, I think it was, and he stayed there until he went into the Navy.

MR: So, several years, right?

CA: Oh yeah, in fact

MR: Do you remember Nixon at the time?

CA: Oh yeah. If you look at Nixon's biographical data in the books, they'll never tell you that he worked for the Office of Price Administration, because that's not good in

conservative eyes, although that experience came in handy when he was President and launched a price control fiasco of his own. But he lists his work as being in the Office of Emergency Management of the National Defense Commission, never mentions the sub-unit of which he was a part.

MR: And do you remember how people thought of him at the time?

CA: Very well, very well.

MR: He was a smart lawyer ...

CA: In fact, I was present when we were considering what would have been a nightmare, the rationing of milk, which was getting to be in very very short supply. We were discussing who should do the legal work if we had to ration milk, and Nixon came out second. The first was Sy Rubin, do you know him? He was later the Head of the American Society of International Law and Head of the Export-Import Bank, a graduate of the Harvard Law School, of course. Sy was named for the job, but we never rationed milk.

MR: Right. So I guess at that time Nixon, there were no indications that Nixon was going to go somewhere, he was going to be the Republicans'

CA: Except that he was interested in politics. He worked immediately for Jake Beuscher, who was a colleague of mine at the University of Wisconsin and the father of environmental legal studies in the United States. Nixon was very kind to Jake Beuscher while he was President. He invited him and his wife often to the White House and was very considerate of him, very kind towards him.

MR: Now, you mentioned that this might have had an impact on Nixon's decision to impose wage and price control. First you described it as a fiasco; why do you think it was a fiasco?

CA: Well, it didn't work, it didn't work very well.

MR: It didn't work in the sense that it didn't control inflation?

CA: Yeah. It didn't. Yeah, that's right.

MR: One of the things that's often sort of pointed out was here was Nixon, this quote-unquote "conservative," and of course, as you've pointed out to me on many occasions, and I think you're absolutely right, that Nixon was in many respects a liberal president. I think you called him the last liberal president [laughter]. And people wonder how he could have sort of undermined his principles as a conservative, but I suppose part of the answer is that this wasn't just an ideological thing for him; he had seen it done.

CA: Right, he had seen it done. Right. Exactly.

MR: But still ...

CA: And he thought it could be done again, but you know, peacetime and wartime are quite different.

MR: Right. I guess we're approaching the end of the tape, so why don't we break?

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TAPE 2a: SIDE B

REDACTED BY THE NARRATOR

CA: I saw Nixon after he was defeated by Kennedy. I was headed from Madison, Wisconsin, to New York, and there was an enormous storm, and we were landed in Dulles, the only place we could land. It must have been two or three o'clock in the morning then, and I saw Nixon standing there alone. He was completely unshaven, and he had a long trench coat on, and he looked forlorn and awful, and so I said to my daughter, who was with me then, "Would you like to meet Mr. Nixon?" She said yes, so I went over and said hello to him and introduced Linda. He was very very nice. We had quite a talk. That was the last time I saw him [laughter].

MR: So there wouldn't have been Secret Service at that time?

CA: No. He was absolutely alone, absolutely alone.

MR: That's a good thing.

CA: He was headed for his law firm, I guess, in New York.

MR: Well, all this talk about Nixon makes me want to ask about Alger Hiss, but we have that plenty of time when we do the next subject for our, so I'll put that aside and ask you about one or two other people. You said that, I want you to remind me of what his role was, that you worked with, in the agencies, Harold Leventhal, who later became a

well-known judge in the D.C. Circuit. Could you tell us a little bit about Leventhal? What his job was, and what your interactions with him are?

CA: Well, as I indicated to you, the Price Stabilization Advisor, which was the first name of the division under the Defense Commission, was Leon Henderson, who'd come from the SEC. He'd been an SEC commissioner. David Ginsburg knew him at that time, so when Henderson moved into this work in 1940, David went with him and became General Counsel, his General Counsel. David then hired Harold immediately, and Harold was Associate General Counsel for prices.

MR: And I guess at the time he was a lawyer in Washington?

CA: He was a lawyer in Washington, I think. He'd been Stone's clerk, as you know.

MR: Okay.

CA: I'm trying to think. I have the memorial service for Harold someplace, and I could check it to see what he did before 1940.

MR: So did you have a lot of interaction with him?

CA: Oh yes. He was in many ways one of my closest friends until he died. He, as I indicated last time, was my boss at this time. I'm quite sure, though you didn't pay much attention to it, you must have looked at this aluminum scrap regulation after that. Well, if you read it, nobody would want to do anything with aluminum scrap [laughter]. The Associate General Counsel for rationing was Tom Harris, who was Nixon's boss, and he was also a law clerk to Stone, from Columbia also. Guess who was Associate General Counsel for enforcement? Due to my intervention, Tom Emerson [laughter].

MR: Oh really, due to your intervention? When did you meet Emerson?

CA: Well, Emerson's wife, his first wife, was a colleague of mine in the Wage and Hour Division, and I liked her enormously, and she came to me once and said that they were in need, that Tommy didn't have a job, people didn't want to hire him, and could I do something for him. I went to Ginsburg ...

MR: They didn't want to hire him because of the politics?

CA: Yeah, I went to Ginsburg and said we should hire him, and we did, and we paid for it [laughter].

MR: In the sense of political feedback?

CA: Oh, yeah.

MR: We'll also have to talk about that more in the next series. Okay ...

CA: But then, just to finish on Leventhal, I want to give you a sense of the whole. After the War, you see, Harold and David became partners in a Washington law firm, Ginsberg and Leventhal, until Harold went on the bench. So I would see him practically all the time, really. And then he became Counsel to the Democratic National Committee, and it was from that position that Lyndon Johnson put him on the Court of Appeals for the District of Columbia. Harold was also the liaison between the Judicial Conference and the Administrative Conference of the United States, so I would see him at the meetings of the Administrative Conference as well. And then we were practically in constant correspondence on different matters, mostly administrative law.

MR: So his sort of D.C. Circuit judging in administrative law cases, clearly in part, based on a lot of different things, but clearly in part based on his experience at the time.

CA: No doubt, he said so.

MR: Okay, well we have a lot of names, but why don't we jump to some other subject and then come back. Now we skipped over, I guess, the period from, what was it, from 1943 to 1946, when your administrative law career was on hiatus and something called World War II.

CA: Well, not entirely.

MR: Well, that's what I wanted to ask you, because I know there's a lot that went on in your experience in the Army, but I wanted to ask you about the connection between your administrative law experience and the Army. So let me just, first of all, open up the subject. Was your experience in the government something that affected where the jobs you had in the Army?

CA: Only at the end. Until 1945, when final victory in Europe was declared, I was in the O.S.S., and that's a long story, but I was working for Arthur Goldberg then.

MR: Oh, really?

CA: Yeah, that was in the secret intelligence branch of the O.S.S. dealing with the German underground. Arthur had great contact with the international labor movement in peacetime, and we tried to create an anti-Nazi underground based on the German trade unions. When the War was over, again David Ginsburg called me up [laughter]. He was then a Captain in the Quartermaster Corps who had been decorated for his efficiency in destroying supplies during the Battle of the Bulge.

David said that he was going to go over to the Allied Control Council and work for General William Draper, who had been a Wall Street banker and was now a general who was Head of the Economic Division of the Allied Control Council's U.S. branch. And I had to go. So before long, I was there, David was there, Tom Harris was there [laughter], and Phil Elman.

MR: Oh, really?

CA: Yeah, we lived in the same house in Berlin during that period [laughter]. And there, curiously enough, we had to worry about rationing and price control.

MR: Right, and so you took some of the old experience ...

CA: Of course, except there were some crazy things happening. Henry Reuss, I don't know whether you know him, was a congressman from Milwaukee for many, many years, but he was one of our group. He was also in the OPA with us, and he's retired to California. He and I were called by General Clay, who said to us he heard that there was a black market going on in such-and-such a place in Berlin. We were ordered to close it down. We looked at each other and just wondered what was going on. But nevertheless, in the Army, an order is an order, so we ordered some tanks, and on a Sunday morning, when the black market started, we came down with our tanks and cleaned it out completely. Of course, the black marketeers went someplace else. Ultimately, we tried rationing and price control.

MR: It was difficult circumstances; do you feel that it was reasonably successful?

CA: It was reasonably successful. The problem was that, although Germany was supposed to be administered as a unit under the Potsdam Agreement, the Russians refused to obey, and they controlled all of the areas of Germany which produced wheat, and we, as a result, had to bring in wheat from the United States in order to sustain a minimum caloric consumption by the German people. So we had direct control of the supplies, but we never controlled the black market in them once they left our hands. You would find in Berlin Russian soldiers hanging up a carcass of a cow or horse and selling slabs of it to hungry Germans for watches, fur coats, musical instruments, jewelry [laughter]. We never could control that.

MR: Right. Now there's a story, I'm not sure I have all the names right, but there's a story about how, I think it was Erhardt, but how there were price controls, and I'm not

sure if he was the President at the time or whatever, but over the weekend, he announced [laughter] the end of these price controls without the knowledge of the Army of the Western Allies, and before they knew what would happen, the whole thing had been changed. Are you familiar this story?

CA: No, but it wouldn't have happened. It wouldn't have happened.

MR: Right. Well, I'll have to find my description of it, show it to you because you'll be able to decipher it to me ...

CA: Because General Clay, Clay maintained quite some control you see, through General Draper, who was an amazing person.

MR: This would have been probably ... well, I'll have to check the dates.

CA: I wouldn't know. After February 1946, I wouldn't know what went on. I left when Ginsburg was still there.

MR: Right. Okay, so that was part of your sort of administrative law experience?

CA: Right. That was afterwards, yeah.

MR: And so when you came back, you decided to go into the Office of Economic Stabilization. It sort of made natural sense to build on what you had previously ...

CA: No, mainly because Henry Hart asked me [laughter].

MR: Right [laughter]. And well, why don't I ask you a little bit about Henry Hart. What are some of your thoughts on Henry Hart?

CA: Well, just probably the most amazing person ever in the legal teaching profession.

MR: Oh, yeah?

CA: Yeah. He started teaching at the Harvard Law School when I was there, and I don't recall how I got to know him, but I liked him very much, and persuaded people to take his course, a required course in, believe it or not, Agency, that they had Henry teaching. He was in competition with Warren Seavey, and he was a terrible teacher.

MR: Seavey or Hart?

CA: Hart.

MR: Hart was a terrible teacher?

CA: Awful, and my friends almost physically assaulted me [laughter]. Henry's classes were partly deserted, and everybody would have standing room only in Seavey's classes, and Seavey permitted these people to come from Henry's classes and stand in the back of his room. But that's when I [laughter] first got to know Henry, and then, of course, he was my boss in the OPA. In that capacity, he was not very practical. He was an absolute perfectionist. He took over when Harold Leventhal went into the Navy.

MR: Mm-hmm. So the perfectionist, the sort of a guy who would never publish a final ...

CA: Yeah, this was typical but when you are putting out regulations on tin and aluminum scrap, you know, you can't take too much time [laughter]. Henry tried to get it done, but at the same time it had to be up to his standards. It was great working for him, but exasperating as hell, because we were under pressure constantly.

MR: Was it he or Arnold who wrote that famous article *The Time Chart of the Justices*?

CA: He.

MR: So another criticism of the Supreme Court for not being ...

CA: Not deliberating enough.

MR: ... having high enough quality decisions. So there was a persistent theme there.

CA: Right.

MR: So did he ever, your understanding, did he ever improve as a teacher?

CA: No. But this again becomes hearsay. You know, his famous course was in, not federal courts, but the legal process. That's an interesting story, I'll tell you. He, for some reason, insisted on giving that course at noon on certain days of the week, and the students quickly called the course "Darkness at Noon" [laughter].

MR: [laughter]

CA: Willard Hurst, Sam Mermin and I put out our book on the Legal Process in the early 1950s. In '58, I was in the Behavioral Sciences Center on the Stanford campus. Our collaborator, Sam Mermin, was in residence in Wisconsin. That was the year that the first edition of the Hart and Sacks LEGAL PROCESS came out, and Sam, without checking with me, wrote to Henry and told him he had no right to use that title on his book because we had anticipated him by three or four years.

MR: Right.

CA: And Henry was very upset, and when I heard about it, I had that rescinded right away [laughter]. Henry could name his book what he pleased.

MR: Right, although you guys were the people who came up with the term first.

CA: Yes. Actually, Bill Eskridge, you know, in his ...

MR: Forward

CA: ... forward points that out. Turns out that I seem to have invented the term, although I didn't know that at the time [laughter].

MR: [laughter] Well, another of your many accomplishments.

CA: I loved Henry. In fact, I went to see him two weeks before he died. I went up to Cambridge. He died from smoking, every one of his fingers was yellow with nicotine on both hands, and he would smoke. When he was finished with one cigarette, he'd light another one with the stub.

MR: Non-stop, huh?

CA: ... died at 60.

MR: Well that's very sad.

CA: What a tragedy.

MR: Let me ask you, then, a little bit, going then from the Army, a little bit about some of the politics of the New Deal and the APA and the like, and just try to see if some of the stories or some of the views that we get of it today, you knew at the time, or you recognized at the time, or maybe the stories are incorrect. So, sometimes it's said that, with respect to the administrative agencies in the New Deal, that there were kind of two sorts of basic attitudes towards the New Deal. There was the James Landis view, which was, at least in some of the writings, very enthusiastic, basically wanting very limited

constraints, either procedural or of judicial review, in the way of agencies. Let the agencies do their job and solve the economic and social problems that we have to deal with. And then, there's sometimes thought to be a sort of another school of people, whether it was to some extent, maybe Frankfurter or Jackson, who were certainly committed New Dealers, but who felt that the rule of law and fairness issues were important as well and wanted more checks on the agencies than someone like Landis thought. So, I guess the first question is, based on your sort of remembrances, is this a sort of fair statement of some of the disagreements, and was that evident at the time?

CA: Well, what was evident at the time (one of my bits of recollection that relates to Frankfurter, and I'll come back to that), the basic division that goes far back in Democratic Party politics to Wilson, was the division between those who wanted an antitrust approach, you see, break up concentrations of economic power and then let the market operate, and those who thought that you would never get to a good economy just in that fashion, that once you broke up concentrations they would form again, because the more efficient would then gain the greater market share, and you'd have to break up concentrations periodically. Roosevelt, you know, played all sides. He pushed the antitrust policy by making Thurman Arnold head of the Antitrust Division in the Department of Justice. At the same time that, of course, he was creating all of these other regulatory agencies that were engaged in more direct control of what was happening. But even if you examine the controls, they were not like the wartime OPA controls that later eventuated. I mean, the SEC is based on openness and information, which bolster the assumptions, the presumptions of the market. Roosevelt would never give up on public utility regulation, but even there, all that was done (this was Abe Fortas' job) was to break up the concentrated public utilities, so that we would have a greater number of public utility operating companies. So regulation was used for antitrust purposes. And in fact, one of the things that I often wondered was why we never combined the technique of the public utility effort for industry in general--as a way of making sure that we created units that were viable and could compete with each other, that there would be a competitive order in each industry. So it's hard to say that there was a conflict. Each

group thought that the other was not going to end up [laughter] very well, but it was not competition, because both policies were followed.

MR: But I'm wondering more about the kind of policies that modern administrative law would be concerned about, so if you take a case like *Chenery II*, where Jackson and Frankfurter are both very much concerned about sort of retroactive adjudicative action without prospective rules or, I'm forgetting the name of the case, the famous Frankfurter opinion on review of fact finding and substantial evidence.

CA: Labor Relations Board? Hearst?

MR: No, No.

CA: What, ... the whole record business?

MR: Right. Right. It's not Hearst but, I'm forgetting the name of it, but in any event, these were sort of decisions where they wanted either more procedures or somewhat more aggressive, not aggressive, but somewhat more aggressive judicial review, to be contrasted with people like Landis who said, "No, no, no, let's let the agencies proceed without as much constraint," you know. That kind of dispute I'm sort of thinking about.

CA: It's hard to know how this kind of a dispute would actually arise in the course of conducting the government's business on a day-to-day basis. Let's get back to Frankfurter, because you mentioned him in this context. I recall quite vividly, one of the things I do recall from the class, and I think it appears in some of Frankfurter's opinions, although I'll be hard put to remember which ones now, in which he admonishes courts not to forget that the agencies were coordinate branches of government with responsibilities of their own, and that they could be held accountable for responsibilities of their own by the people who gave them that power, which is the Congress, and the Court should not simply go ahead and assume that it was up to them to curb the agencies. So this was a strong view that he held, which recognized in many ways the autonomy of

the administrative agency as a separate branch of government, the fourth branch of government, as some political scientist called the agencies at that time. So I find it hard to try to identify the manner in which this dispute could have arisen.

MR: Okay. What about ... let's talk a little bit more about some ... in 1940, Congress passed the Walter Logan Bill, and it was vetoed by President Roosevelt, so I was wondering if you were following that at the time. I would assume that you being in the agency...

CA: Oh, yes, indeed...

MR: ... that you would be aware of it. What are some of your thoughts about that?

CA: I think the basic objection, and it took some swallowing when the APA finally passed, was the feeling that you could not have uniform procedures to govern all agencies, that agencies were so different that they had to be left alone to develop their own ways of doing things that would suit the job which they were given to accomplish. And the Walter Logan Bill was conceived as a way of using procedural requirements to cripple the substantive objectives that the agencies were given to implement, and that was why there was objection to the Walter Logan Bill, basically.

MR: Why don't we stop on this and answer on the following ...

