

## 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 It's never been repealed.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?