

## CONVERSATIONS IN LEGAL EDUCATION:

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

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TAPE 2b: SIDE A

### ***REDACTED BY THE NARRATOR***

MR: Let me go back to the Walter Logan Bill for a second. So you mentioned two possible objections to it. One was the idea, which continues with the APA, of some people that you can't have a single procedure or a single law that governs all the different agencies. They're too different. Another idea, with the Walter Logan Bill at least, is that what's really going on here is this is an attempt by people who don't like agencies to cripple them, right?

CA: Right.

MR: So Roosevelt, I know, thought the second certainly about the Walter Logan Bill.

CA: Right.

MR: Is that your, or you may not remember, was that your view at the time, was that...?

CA: Oh sure...

MR: It would have dramatically changed things and hampered ...

CA: Oh sure, yeah, now I don't recall a lot. You see, the APA in many ways tried to meet this basic objection because most of its requirements are minimum requirements,

leaving a lot of discretion to the agencies on procedural matters. So this satisfied a lot of people at that time, and I would have to look at the Walter Logan Bill again to be more specific about the particular provisions to which the agencies who were operating then objected.

MR: Right, right. But the world would have been very different had the Walter Logan Bill not been vetoed.

CA: Yeah.

MR: So then things continued to operate without a single statute like the APA. Let me just ask you a particular question. It's sometimes thought that the NLRB was kind of a lightning rod for criticism at the time, and that some of the critics, here was an agency that was particularly acting based on politics and not giving fair process, and these were the kinds of criticisms that, of course, led to Taft-Hartley and to some extent to the APA-type reforms. Do you remember these criticisms at the time, and what were your views about them?

CA: When I came out of law school, I wanted to work for the NLRB, because that's where the action was. And I was actually interviewed by Tommy Emerson, and I was blackballed.

MR: Oh, really.

CA: Word had gotten to Washington from some of my close friends at the law school that I was very anti-Communist [laughter], so they blackballed me. Just absolutely no question about it. And later on, this hung over the NLRB. Lee Pressman admitted that he'd been a member of the Communist party. Nat Witt admitted he'd been a member of the Communist party. And that sort of put a cloud over the agency, which had done, in many ways, a superb job in guaranteeing the right to bargain collectively. Nevertheless,

it gave agencies a bad name. It was always the NLRB “horror cases” which were adduced to justify particular provisions that were obnoxious generally.

MR: Right, and when you said “the NLRB horror cases,” I assume you mean particular cases as opposed to people who were members of the Communist party.

CA: Right. Right.

MR: So there were such horror cases?

CA: Oh, yeah. Oh, sure.

MR: And to what would you attribute that?

CA: I don’t know. I never had proof that ideology affected the way cases were adjudicated.

MR: And so when something like Taft-Hartley then gets discussed, I mean, I assume that was a very divisive issue ...

CA: Oh, yeah.

MR: As someone who was a strong proponent of labor like yourself, I assume you would have thought it was not a good idea, or am I wrong?

CA: Correct.

MR: Now ...

CA: If I’m not mistaken, Taft himself ultimately came to the conclusion that it wasn’t a good statute.

MR: Because it went too far, or it didn't go far enough, or didn't have the right approach?

CA: No. The division between the General Counsel and the Board, making the General Counsel an independent agency.

MR: Right.

CA: I think Taft himself admitted later that that was not a very excellent idea.

MR: Right. Right. And so just around the same time then, the APA is enacted. Do you remember the APA being debated?

CA: Oh, yes.

MR: It would have been something obviously of concern.

CA: Oh, yes. I remember using the Attorney General's comments on the APA in our work in the last days of the OPA.

MR: You mean the Attorney General's manual or ...

CA: Yeah, the manual.

MR: Well, the manual would have come after the APA was passed.

CA: Yes, the manual explained, told us what to do. That was the Bible.

MR: Right. Right. Well I was going to ask you if, were you involved, I'll jump back then to some of the ...

CA: No, I was not involved in drafting it in any way. I was working in the OPA.

MR: I would imagine that would have been one of those things again where it was put together for a practical purpose, and no one could have imagined that it was going to end up having the importance it would end up having as a tool, but I guess you ...

CA: No. That's probably correct. You've worked in an agency. All this stuff, you don't see how it relates to you directly at the time. You're preoccupied.

MR: And do you remember what the main, I mean, were there significant criticisms of the APA at the time, or did, when you were at the agency, and you said you worked with the APA, were people unhappy with it? They ...

CA: Yeah, yeah. You know Nat Nathanson wrote the first big article on the new statute, and I remember he was not entirely laudatory of what they had done.

MR: What were his criticisms, you don't remember?

CA: I can't recall, no. I think I have his piece somewhere. It was an excellent piece on the whole statute.

MR: When one looks back at administrative law, it's almost as if there's this one big statute. There's the APA and there's, you know, a couple of small things, but it's mainly the APA, and I, one wonders whether or not the people at the time had any inkling that this was it. That this was the, of just how important what was being enacted was, but I guess it's ... do you have any ...?

CA: Oh, it was recognized as important, because it would govern what you had to do, no doubt about that. But I think, on the whole, the initial reaction was hostile. It wouldn't have mattered what the bill contained [laughter]. The initial reaction was generally

hostile and, in time, it was shown it wasn't that difficult to absorb, to internalize it, and to work with it.

MR: Right. Right. There's some sort of ...

CA: Except for what we discussed last time, which was, I think, an absolute departure from the intent of the APA with regard to rulemaking. Apart from that, I would say it's worked out okay.

MR: Right. I actually wanted to go back to that a bit, in ... with respect to price regulation in your agency, you had a challenging of those regulations at the time, they were inactive, but your understanding was, or was it not, that what was contemplated was instead that that would not happen in most cases, and instead, you would have a rulemaking. It wouldn't be challenged at the time of the rulemaking, but instead would be challenged in an enforcement action in the District Court.

CA: Correct.

MR: Right. And you think, so that would have been the approach that the APA contemplated, but of course, not something that ended up being followed eventually.

CA: That's right.

MR: You think, based on your writing, you think that would have been a better approach.

CA: Well, the best approach would have been what we later developed in the wartime OPA.

MR: Right. Right.

CA: What complicated the situation was the enactment of the Hobbs Act. This came in '50, it was early Eisenhower, maybe '53, when, no '50, still Truman, do you remember when?

MR: I don't remember when.

CA: The Hobbs Act. Well, that took away the jurisdiction of the District Courts ...

MR: Right.

CA: ... and said review is now going to take place in the Courts of Appeals. Once that occurs, you see, then what do you do? You can't say we're going to send it directly to the District Court when the statute says you have to go to the appropriate Court of Appeals. The Hobbs Act contemplated that for the Court of Appeals would send disputed legislative fact issues for trial in a District Court, retaining jurisdiction of the review proceeding until the factual issues were tried and a record made which would be added to the record already in the Court of Appeals. The Court of Appeals would then review on the basis of the record.

MR: Right.

CA: But then, I talked with Harold Leventhal about this over and over again, why in heaven's name would you want to involve the District Courts at this point? Why not send the matter back to the agency to determine the legislative fact issues. The Court of Appeals should say to the agency: "Your facts don't support what you've done, and therefore, you'd better open the case for additional fact finding" but allow the parties to be heard on the factual issues.

MR: Right.

CA: And that was essentially what I came up with in the article.

MR: Right. Right. Let me ask you one other question, and I don't know if you have any insight into this or not, but I thought I'd give it a try. One of the peculiarities of the APA is that it defines rulemaking both as particular and general.

CA: That's right.

MR: And that sort of created real problems for courts [laughter], who like everybody else, is used to the idea of rulemaking being general and adjudication ...

CA: The legislative history on that was quite clear ...

MR: Oh yeah, what ...?

CA: They were after the single utilities, to make certain that rulemaking affecting a single company like AT&T would follow the specific rulemaking, not adjudicating, procedures.

MR: But the APA had already by definition decided that rules, that price regulations, that ratemaking, were rules, so regulation of the prices of AT&T would already be rules.

CA: This they just wanted to make sure.

MR: It was overkill.

CA: Right. They just wanted to make sure.

MR: Okay. Fair enough. Well, let me ask you about some additional people then. Go back to, first of all, when you were at the Department of Labor, was the Secretary Frances Perkins? Did you have a chance to get to know her?



CA: Once.

MR: Any particular ...?

CA: You forced me to make a confession now. I belonged to a union when I was in the Labor Department, and the secretaries at that time complained that they were very badly treated. You know, women weren't treated very well then. They felt they would not be very effective if they had to go to the Secretary and voice their complaints. And so I was selected [laughter] to go see Frances Perkins to present their complaints, and I went to see her. No sooner had I finished telling her why I wanted to see her, she drew up in her chair and said: "What, are there grievances in the Labor Department?" [laughter]

MR: [laughter]

CA: And I had to tell her there were [laughter].

MR: That's wonderful.

CA: That was the only time I saw her in my life.

MR: And do you remember what the upshot of the whole thing was? The grievances...

CA: They went noplacé.

MR: No, well, that's interesting. Let me see then, you'd also mentioned Magruder, any reminiscences about him?

CA: You know, the Emergency Court of Appeals used to have hearings wherever the parties were located, so there wouldn't be too much travel. I had Nat's job for a while, when I came back from the War.

MR: Which job was that?

CA: To defend the regulations before the Emergency Court of Appeals. I traveled with Magruder, you see, we'd have meals together and talk about everything but the work of the court.

MR: And what was his job at the time?

CA: He was one of the judges on the Emergency Court of Appeals.

MR: Oh. I see. Okay.

CA: He was one of the judges. So I saw a great deal of him then. And, of course, when I worked for him, there were, his children were still in school, so he didn't come to Washington, bring his family to Washington, he came earlier. So I saw a great deal of him, and he liked burlesque. So I used to go to the burlesque [laughter] shows with him.

MR: In Washington, D.C.?

CA: Yeah, on Seventh and G Street, in the old burlesque house.

MR: Oh, is that where it was?

CA: Did you know that?

MR: No, I didn't know that that's where it was.

CA: Was there no burlesque house when you were in Washington?

MR: No.

CA: Really?

MR: Right, there might be some sort of modern day [laughter] ...

CA: I didn't realize [laughter]...

MR: ...degeneration of burlesque, but no burlesque.

MR: [fades in] ... more people. So you mentioned that Nat Nathanson many times, so I guess you first met him in Washington. Would you want to talk a little bit about your remembrances of him at the time and his role ...

CA: Well, Nat, when he left Justice Brandeis, I'm trying to remember whether he went to the SEC at that time or not. Well, I don't know where he came from, but I discovered that Nat was going to be the Associate General Counsel for all OPA's appellate work generally, so of course, he would have to get involved in our important price and rationing activities, so that he could become intimately acquainted with them and not have to read a paper record when called upon to defend them. So he was constantly talking with people in the Price Division about our problems, and he was sort of lawyer for the Price Division. If we had a legal problem, he would generally have less to do than we [laughter], and we would saddle him with coming up with some solution.

MR: Right.

CA: And then, of course, in time, when appeal proceedings were brought, he was extremely busy.

MR: Mm-hmm, and so that's where you knew him.

CA: Yeah.

MR: This would have been then in the Office ...

CA: In 1940.

MR: Right. And then did you continue working with him in the Office of Economic Stability or ...?

CA: No, Nat left.

MR: He, what, went into academia, or ...?

CA: He went back to Northwestern.

MR: Right. Okay.

CA: But we remained very close friends. One of the people who worked for me, who was with me in the Office of Economic Stabilization, was Brainerd Curry.

MR: Oh, yeah?

CA: Yeah, he was on my staff then, and I always felt when I got back from the War, I don't know what my job was, but he had a higher job, higher rated job in OES. And I always thought, I have no evidence for it, but knowing Brainerd, I have always been convinced that he resigned feeling that since I came back from the War, I ought to have his higher job, and he did resign, and I did get the job [laughter].

MR: [laughter] He must have been a very honorable person.

CA: Yeah, Brainerd was. Originally, I hired him to help keep the price of silver in line. He was in charge of silver when I was Chief of the nonferrous metal section legal work.

MR: Mm-hmm. It's just an incredible thing when you think about some of the sort of leading legal minds, that these people were making sure that the price of silver was in line, and the price of ...

CA: It's just amazing.

MR: So, is it your impression that this was, that these agencies were, unusual, that the sort of price agencies were unusual in that respect, or if we went through other agencies, would we also find ...?

CA: Well, I keep wondering, you see, you read not long after the War, the Hector Memorandum which portrays a group of government lawyers who aren't at all like we were. You couldn't order Henry Hart or Dave Cavers or Harold Leventhal, you couldn't order them around, you know, and say, "You do my bidding. This is the way I want it to come out." No way! [laughter] And we had an amazing staff; it's hard to know what's happened since. In your government experience, I don't know whether you had a sense of independence in what you were doing or not. I don't know, and the essential thing for a good government lawyer is a sense of independence.

MR: Right. It's always hard to know, you know, there's one perspective when you're inside an agency, and there's a different perspective from the outside, and so it's always hard to know. It might be that everyone who's inside an agency sort of feels they have independence, and people outside of it sort of say, "Oh, no, they're just doing the bidding of some person," and you can't be inside and outside at the same time, of course. Well, that's interesting. Maybe we should just ...

CA: Stop now.

MR: Yeah, because it's kind of a ...