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Interviewee: Archibald Cox

Session #1

Interviewer: Thomas Hilbink

Brooksville, Maine

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Q: I was hoping that we could spend the first session talking about things that happened prior to your becoming Solicitor General. So this is all the biography and history prior to 1961.

Cox: Well, go ahead. We'll see how long it takes.

Q: Okay. I need to say, I'm Thomas Hilbink and I'm here in Brooksville, Maine, with Professor Archibald Cox. We're discussing his work as Solicitor General as part of the Supreme Court Historical Society's program on the Office of Solicitor General.

So I guess I'd like to start with some basic information, where you were born, when, and things like that.

Cox: I was born in Plainfield, New Jersey, May 17, 1912. I, with my family, lived in Plainfield until after I'd graduated from law school. My wife [Phyllis Ames Cox] and I had our own home.

Q: Did you go to public school or private school?

Cox: I went to private schools, both in Plainfield, until I was fourteen, when I went to St. Paul's School in Concord, New Hampshire.

Q: At St. Paul's, at that time what did one study in high school at St. Paul's? Was it still Greek and Latin-based?

Cox: Well, Greek, and not everyone studied Greek. I did study Greek for three or four years, and Latin about the same length of time. I guess I'd had a little Latin before I went to St. Paul's. One studied English and American History rather more intensely than anyone seems to do now. And, of course, English literature courses and elementary writing courses, a little bit of science. Sacred studies, being a church school. Well, that was the bulk of the courses. They had different names, but that's what they came to.

Q: Did you do activities like debating or things of that nature?

Cox: Yes, I did quite a lot of debating. Of course, at St. Paul's in those days, all sports were intramural sports, and everyone, or almost everyone, literally almost everyone, took part in them. I was no great athlete, but I played football, hockey, baseball in spring rather than rowing, which was the primary activity.

Q: I understand your father was a lawyer.

Cox: Yes. His father had been a patent, copyright lawyer -- well, only a little copyright -- patent, trademark, unfair competition, with emphasis on trademarks, which was where he

was a considerable expert. He was a sole practitioner in New York City, and my father took over his practice at quite an early age, and, I think, probably had a nearly even balance between patent law and trademarks and unfair competition. Very little copyright.

Q: So, being a lawyer was something that was very common in your family.

Cox: Oh, in the family, because it was also very common in my mother's family. Her grandfather had been a very distinguished lawyer, William M. Evarts, Attorney General, Secretary of State, senator from New York.

Q: Did you feel that there was an explicit expectation, or an implicit expectation, that you would go to law school as well, and become a lawyer?

Cox: I always was going to be a lawyer, so I guess the answer to your question is yes. We were not wealthy compared to nearly everybody else at St. Paul's School, but, we were very, very comfortable. In those days, if you fell in that category, it was sort of assumed you would go into one of a limited number of professions: teaching, medicine, law, or you might go into the financial community.

But, watching my son, who, of course, is grown now and older than you, I guess, the choice was much easier in my day than in his. So it was, in a way, sort of foreordained. I toyed briefly with the idea of going back as a master at St. Paul's School, but never to the point of actually exploring it, just in my own head.

Q: You mentioned your son. I actually have to admit I knew who your son was before I knew who you were.

Cox: Well, yes, not surprising.

Q: A friend of mine in college worked for your son.

Cox: Oh, I see.

Q: I remember her coming back to school one night and saying, after she first started the job, and saying, "I'm working for Archibald Cox." And the name didn't really mean anything to me then, because I was three back in 1973.

Cox: Right.

Q: I said, "Who is that?" and she explained to me that he's your son. So that was my first experience when I heard of the name Archibald Cox.

So do you recall that when you were young there was a lot of talking about law and the legal profession and cases?

Cox: Oh, I wouldn't say a lot, no. Some, but certainly not the substance of any of the cases. I'd always read quite a lot of American history and biographies. I don't know how young I was when I first read [Albert J.] Beveridges' [*The*] *Life of [John] Marshall*, but it may have

been when I was high-school age. I was aware of major historical cases, including ones like the Lemon Slave Case of my great-grandfather and others outside the realm of constitutional law.

Q: And do you think that was typical? Did most young people know that, or did that have a lot -- it sounds like that might have had a lot to do with your family history.

Cox: Well, I think certainly that influenced it. I don't think that I discussed John Marshall with many friends out of college.

Q: Then you went to Harvard College.

Cox: That's right.

Q: What was your major at Harvard?

Cox: American History.

Q: Did you study much law in the process of that, or legal history, things of that sort?

Cox: No. No, I said my field of concentration was American History, and I guess technically my field was History, Government and Economics, and then my specialty within that field was American History. I had courses in government, and there must have been some references to constitutional law. There was, to the best of my recollection, no course

on constitutional history at that time such as I was later to teach and such as Mark Horowitz teaches now, and people in the government department taught earlier, earlier than I.

Q: Did you have any professors who you recall being particularly influential, whose lessons stuck with you?

Cox: Well, I think probably the person who had the most influence was my tutor just my senior year, Paul [Herman] Buck, who became the provost, acted as president when government was involved in the war, the atom bomb and so forth. He sort of stung me into making a little more academic effort, particularly on a thesis, than I'd previously made at Harvard.

Q: So your earlier years at Harvard were not years where you were spending all your time in the library?

Cox: No. No. My father died during my freshman year, but I think he had a good deal of influence. He'd said to me back at some point -- I suppose when I was going to college or talking about college -- "You go to college to grow up. When you go to law school, you'll have begun your career." And I guess I lived accordingly.

But I did do well enough in college to be a candidate for honors in American History, and I proposed to Paul Buck that I write a study of the effects over a long period of American History of the constitutional differences in the composition of the Senate and House of

Representatives. I called it the *Senatorial Saucer*, having in mind Thomas Jefferson's explanation to the French: "As you pour legislation into your saucer to cool it, so we pour into the Senate, legislation from the House."

Paul Buck said, "You don't have brains enough to do that."

So my answer was, Goddamn it, I was going to do it. So I did. So he got me to do a little more work in my field and on the thesis than I otherwise would have done.

Q: Do you think it was an intentional challenge?

Cox: I rather guess so. I mean, he didn't carry it to the point of formally disapproving my proposal.

Q: And was it in that year that you were applying to law schools or to law school? Did you only apply to one law school?

Cox: I only applied to Harvard. You know, in those days anyone was admitted to Harvard who had a bachelor's degree from any recognized college or university. No problem. But it was also literally true, the old saying, "Look to the man on the right of you, look to the man on the left of you. One of the three of you won't be here next year." I looked it up for my class. It was literally true. How far it was failing and how far it was economics because those were depression days, that I don't know.

Q: So I guess I didn't ask. You graduated from Harvard College in what year?

Cox: [19]'34.

Q: Then went immediately to your first year of law school.

Cox: Yes.

Q: When you were writing your thesis, were you down in Washington observing the Senate?

Cox: Oh, no, no, no.

Q: It was really a historical piece.

Cox: Oh, yes, indeed. It, in fact, only got up to the Civil War.

Q: There have been a number of articles in the *New York Times* in the last week about how people fear the Senate is losing that character of more diplomatic or statesmanlike behavior.

Cox: To find any statesmanlike behavior in Washington these days is a rare, rare phenomenon.

Q: In your first year of law school, if you had grown up at Harvard College, from the very beginning in law school, were you applying yourself in a different way?

Cox: Well, yes, one worked very hard and very regularly five and a half days a week and couldn't -- well, often worked on Saturday afternoon and Sunday, certainly, as one approached exams and things like that.

Q: Were the first-year courses the same as they are today, namely contracts, torts, criminal law, property, things of that sort?

Cox: Pretty much, but behind those names was very different material than today.

Q: How so?

Cox: Well, there was far more going back to the common law. Indeed, the section on procedure --

Q: Yes, that's true.

Cox: -- began by studying details in the old English forms of action.

Q: This was before the reform of the Code of Civil Procedure.

Cox: Before the federal rules, yes. And I think I'm right in saying that Massachusetts still separated law and equity. Property was very different. And I think the class in Torts spent far more time on the details of the intentional Torts, got around to negligence, causal problems -- causation problems, I should say -- much later in the course than they would today, and today they get on to broader questions quicker.

Q: Today they do?

Cox: Yes. My knowledge isn't great, but that's my impression.

Q: Right. Right. I would imagine especially in Civil Procedure it seems it would be absolutely no comparison between the two.

Cox: Absolutely. No, no. I was thinking primarily of Torts when I spoke. Property-- well, property is much like Civil Procedure--

Q: And it also seems that something like Torts would have changed a lot in the 1920s. That seems to be when [Benjamin Nathan] Cardozo was on the New York Court of Appeals and handed down a lot of his decisions that we see in casebooks today.

Cox: The problems of causation, the Palsgraf [*Palsgraf v. Long Island Railroad*] case, were very central. I would think it was probably in the second half year in Torts that we studied negligence and causation and the first half year was spent on intentional Torts. Maybe I exaggerate. I ought to remember better. I taught Torts for a good many years.

Q: I guess I know how most people studied for law school in the past few years and it involved, other than preparing cases for class, around exam time it involved outlining and things like that. Is that something that was done when you were in law school?

Cox: Oh, yes. Of course, a huge difference in the general study habits of students came about as a result of the availability of all kinds of canned materials, which didn't exist at all when I was in law school. I couldn't buy an outline anywhere or I couldn't buy summaries of the cases anywhere. Indeed, there wasn't always a simple treatise. So, oh, yes, you would spend a lot of time making an outline and going over your notes, spent a lot of time as exams approached in going over old exams.

First year, four of us lived together in an apartment on Prescott Street, and we spent a lot of time wrangling about hypothetical cases.

Q: And how did your professors handle class? Was it Socratic method?

Cox: Most, much more than today. Yes, most of them did very little or no lecturing. But some more than others. But nothing like the amount of lecturing there is today.

Q: And did you feel or did you get feedback from professors or fellow students that you were particularly good in the Socratic method as a student?

Cox: Well, I don't think that I ever had that feeling. Well, I was not among those who worried about getting flunked out. Earlier there was nothing outstanding about my grades, or very rarely. But I'd done well enough, and I think I just sort of assumed that's what I'd do in law school.

Q: But you did significantly better than just okay.

Cox: Yes, yes, I was very fortunate.

Q: I guess the reason I was asking if you had excelled in the Socratic method was because that's often the reason -- well, I think one of the main reasons Dean [Christopher Columbus] Langdell invented the method, was to prepare students for oral arguments in front of a court. So I was wondering if -- You later became widely recognized as a very good oral advocate, and so I was wondering if you got some sense of that even when you were back in law school.

Cox: Oh, no, I certainly never would have linked the two. I don't know whether I'd be inclined to link them today.

Q: Your courses were taught in the Socratic method, but if I'm correct, this wasn't part of your grade. Your grade was fully based on your exams.

Cox: Oh, it was totally on exams.

Q: You mentioned one professor, your Civil Procedure professor. Who were some of your professors your first year?

Cox: Well, let's see. I had Dean [Roscoe] Pound in Criminal Law; Eddie [Edward] Morgan in Procedure; a Professor Thurston in Torts; a Professor Gardner in Contracts; Professor Edward "Bull" Warren in Property. How many have I given you, five?

Q: Yes.

Cox: That's it.

Q: And all these courses lasted a full year, correct?

Cox: Yes.

Q: What was Dean Pound like as a professor?

Cox: Well, he was -- I marveled at two qualities of Dean Pound. One, the fine distinctions he could make and, two, his ability to organize logically.

Q: In these courses, did you get a sense that professors were teaching about more than just the topic at hand; it was more than just torts? It may have been about the court system more generally or the system of government? Did you sense something of that? Do you recall that?

Cox: Did I consciously think in those terms? No. But that doesn't mean that if somebody had sort of inclined someone, yes, of course, there was some of that.

Q: I guess the reason I'm thinking of this is in Victor [S.] Navasky's book -- on the -- Kennedy Justice book, he talks at great lengths in comparing you to Byron [Raymond] White and Burke Marshall and others in the Department of Justice, and he makes this distinction between you as a Harvard graduate and the others as Yale graduates and that there is, especially considering the dominance of legal realism at Yale versus the more judicial restraint perspective of people like Felix Frankfurter at Harvard, that you reflected a Harvard philosophy and Marshall, White and others reflected a Yale realist philosophy. Do you think there's anything to that?

Cox: Well, I think it can be overstated in both directions. After all, one never would have thought of Byron White as a free-thinker as a lawyer or as a justice. As you know, he's often on the conservative side of justice, where I clearly wouldn't have been. And I think Frankfurter, in terms of the issues in the mid-thirties, was not a conservative thinker. [Billings] Learned Hand was a relatively liberal judge of his day. In writing about Cardozo, he observed that the appellate judge faces a dilemma: on the one hand, he must find some composition with the dominant needs of his times. On the other hand, he must wrap himself in something of a glorious past in order to maintain his legitimacy, his power to win consent.

But that dilemma was something on which professors at Harvard came down at various points between the two extremes. Yes, there were none as far over as the realists at Yale, and there were some perhaps more conservative than anyone at Yale. But I don't know. I don't remember enough about the Yale faculty at that time.

Q: Well, I wouldn't expect you to. What about your later years at Harvard, your second and third years? I know you studied, took at least one class with Professor Frankfurter.

Cox: Yes. Unlike other people who had high records, I did not enroll in his seminar on federal jurisdiction, which is the one which all of the high-stand people typically went into and only high-stand people were admitted.

Q: It was essentially a federal courts course, in what today is called Courts course?

Cox: It was that area, yes. I enlisted in his big course of Public Utilities, and it was greatly to my advantage, I think. Frankfurter -- I'm sure he did the same thing in other years-- I would think that sixty percent of his questions were addressed to me. Well, maybe I should say fifty percent. Thirty percent went to Arthur Woods who was the next highest standing man in the class. And there was a third man he called on in a descending number of times, and then some small fraction was spread around the room.

Q: And there were a hundred people in the course?

Cox: Oh, well over that. [Laughter] I suppose I exaggerate, but it seemed like that.

Q: Right. Well, especially if you're on call that much, it must seem like at least half the time.

Cox: Yes.

Q: Did you get the sense then that he was basically in the process of evaluating you to decide about clerkships?

Cox: Well, of course, there were very few clerkships at that time, you know, very, very few. Frankfurter chose for [Louis Dembitz] Brandeis. I'm trying to think whether he chose for another Supreme Court justice. He chose for Learned Hand and Augustus [Noble] Hand. If there were clerkships in circuits other than the Second, I don't know of them, but there were few enough so that I don't know of them.

One must have thought some about who will get the clerkships. I don't know that it was -- I can't remember it as being much on my mind, and it might not have been at all, because of the end of -- I worked very, very hard second year with the [*Harvard Law*] *Review* and regular work. I went eighty, ninety hours a week. At the same time, I'd fallen in love and became engaged.

The spring of second year I had a terrible time with my eyes. Nobody has ever explained what it was. It was just strain on the muscles, I think. The result was that I resigned from the *Review* and spent my third year-- well, I attended my courses and continued to try to do

well, but was less the center of things like *Law Review* and faculty lunches and all that sort of thing.

And while I knew Frankfurter in class with a good deal of interchange, and during second year perhaps I'd seen him once or twice about *Law Review* things, I was not one of those students who went to the Frankfurters for tea or a little "hot dog" following him around. I just don't remember whether I wasn't totally surprised when he called me and asked me if I would be interested in being Learned Hand's clerk and said, well, he would recommend me, which typically meant that's it. But he would have to consult the judge; one, because I had had the eye trouble and, two, because I was getting married.

Augustus Hand had a clerk who had the year before, it was either the year before or that year, I'm not sure which, who was married, and this had created -- [laughs] I kind of laugh today. In the spring he would take his clerk with him to, I think it was Elizabethtown, New York, up in the Adirondacks, and he would live with the Hands, but they'd never had a married clerk, and things just weren't right for having a young married couple. And it created something of a problem, so Frankfurter was wondering if the same thing would happen with Learned Hand. But Learned Hand had said no problem.

I may have met him, in fact, in the summer, but it would be quite the reverse with me. Learned Hand's summer retreat was at Cornish, New Hampshire, over the river, and my family for years had gone to Windsor, Vermont. So I would be right there, make the trip over across on the covered bridge, if there was any reason to do it, but it was just a twenty-

minute drive. And actually, in fact, Learned Hand had known my father quite well, so there was no problem on the personal side.

Q: Did you have an idea, or did you think much about the Supreme Court as an institution while you were in law school, things that you brought from Harvard Law School to your work as an Assistant Solicitor General or Deputy? I'm not sure what your title was when you first worked there in the thirties.

Cox: I think you're just a lawyer for the Department of Justice. Well, I can't believe that one's thinking wasn't influenced by the years in law school, but I have no -- I'm not conscious of my having had a philosophy about the court that I felt strongly about. At law school this was thought to be a wonderful position.

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Cox: We all knew people who were fine lawyers and made fine reputations on the staff of the Solicitor General: Erwin [Nathaniel] Griswold, Paul [Abraham] Freund, and I think I knew him some by that time -- no, I guess it wasn't until I got to Ropes, Gray [Ropes, Gray, Coolidge, and Rugg], but later Charlie [Charles E.] Wyzanski [Jr.]. And one had been well aware of the great problems of the old due-process clause and the limited scope of the court's reading of the commerce clause, and was accustomed to people criticizing those, but in terms of a rounded philosophy, I don't think that I had any.

Q: You were in law school during the court-packing plan.

Cox: Yes.

Q: And I believe during what is now known as the "switch in time." Is that --

Cox: Yes, yes. I was never for the court pack; I was always against the court-packing plan.

Q: Why did you think it was a bad idea?

Cox: Well, I think it's excessive politicization of the process.

Q: When you were in Professor Frankfurter's course, was there any discussion of the court-packing plan? Since I imagine he was somewhat privy to it.

Cox: Not that I recall.

Q: Okay. It sounds to me like you felt that the substantive due process or the court and those who were known as "The Four Horsemen" [James Clark McReynolds, George Sutherland, Willis Van Devanter, Pierce Butler] were not necessarily following a line of jurisprudence that you approved of, but you still felt very strongly that the court-packing plan was not the answer?

Cox: That's true.

Q: Okay. I had a question going back. You said that most people who followed Frankfurter took his federal jurisdiction course. This is a course you just didn't have an interest in taking or --

Cox: Well, I was unduly influenced, I think, by one day's experience. They were going to discuss a case that I had written up for the *Law Review*, or was writing up for the *Law Review*, more likely current writing up for the *Law Review*. And I found the class exceedingly dull, that particular meeting of the seminar. So I thought I would try Frankfurter's other course. Well, that was -- I think it may have been that you could take only one seminar, and I did want to take a seminar on corporation finance with Professor Ralph Baker, not because of any deep interest in the subject, but because of admiration for him.

By my third year, I had become a friend of Professor Austin Scott, and through him had met one or two members of the faculty outside of law school. This was because Phyllis, my wife, is the granddaughter of Dean James Barr Ames, and her father was, for a time, secretary of the law school. Professor Austin Scott, one of Harvard's greats, was a pupil, devoted follower of James Barr Ames and a friend of her father and mother. And I would see the Scotts out at the Ames' house out in Wayland. So that way I also frequently met with her at the Scotts' house in Cambridge, where she would stay overnight when we had a chance to get together, go out together.

Q: So you were --

Cox: Well, then this brought me in touch with Ralph Baker. So it may have been that if I have to choose between the one where I'd had the dull session and Ralph Baker's seminar, choose his and take Frankfurter's big course, that was perhaps the combination of reasons.

Q: Did you see yourself, like I think a lot of --

[Telephone interruption]

Q: I was about to ask you about the students at Harvard. History books about Harvard, when Frankfurter was there, talk about a number of students who studied under Frankfurter and either studied under him with the intention of working, then moving to Washington, or who were pushed in that direction by Frankfurter. Did you have some sense while you were in law school that you would like to work for the federal government?

Cox: I don't -- certainly not specifically for the federal government in Washington. I had a sense that in addition to practicing law, I had public responsibilities and would seek to contribute to government-- public service, as we would have phrased it. And what form that would take, well, I didn't know. I might start out in local affairs. Where does it lead? Who knows.

Q: Did the sense of public service come from your family?

Cox: Well, I think, yes, the family, St. Paul's School, reading history. All those things go to shape one, don't they?

Q: Right. Right. I have a similar inclination, and I'm not sure I could explain where it came from since my own parents have not been public service oriented. But you certainly were getting that.

Cox: There was the prominent example of William M. Evarts and other members of the Evarts family. My father didn't do much. Well, in Plainfield he was president of the Board of Education and he had done a few things for Woodrow Wilson, I think, at the time of the peace conference. But I'm not sure about it; I was too young and never did learn exactly their nature. So it was fitted in. Governor [John Graham] Winant of New Hampshire, John Winant, was the one who was held out to us as an example when I was there as a boy.

Q: Maybe we could talk some -- well, one more question about law school. By the end of your third year, had you begun to think about where you would go, or was the Hand clerkship offered to you rather early in that?

Cox: No. Hand -- oh, no, late, March of the third year, because all things were done much later than they are now, in terms of jobs. Yes, I'd begun to think about where I would practice. The choice was really between Boston and New York. I don't think I ever really seriously considered anything else, even in my own mind. But which to do? I had my choice between top firms in both cities. Quite early in the third year, by November, I had accepted a position at the Boston firm of Palmer Dodge.

My wife and I had followed the -- I had followed the advice to decide first where you want to live and then go practice there, rather than decide where you want to practice and go and live where you want to practice. And that was rather clear. Boston, New England.

So when I was offered the clerkship, I had to go to Ammi Cutter, the man that I had talked to about Palmer Dodge, and seek release, as it were. He said that, yes, they would release me but not to think I would have any claim to a job at the end of the year with Learned Hand [Interviewer laughs].

So the next year while I was with Learned Hand came the process of deciding which Boston firm I would go with. By that time my brother-in-law had been a year at Ropes Gray, and I had learned a little about Ropes Gray. I had gone to Palmer Dodge because Mr. Dodge was clearly one of the two top trial lawyers in Boston. He was a bit on the senior side, but still the person next in line, from the trial point of view, had a fine reputation. I always thought that a lawyer was one who stood up on his hind legs in court. I did learn something about Charles Rugg at Ropes Gray in the interval. And you probably know. You've read Ken Gormley's book [*Archibald Cox: Conscience of a Nation*], I assume?

Q: Yes, I have.

Cox: I accepted a position at Ropes Gray. I really just had a terrible time making up my mind.

Q: So you thought or you knew you wanted to go into litigation rather than corporate transactions or something.

Cox: Yes. That's right.

Q: And your father had been a trial lawyer as well, correct?

Cox: Well, yes, in patent cases. It wasn't a general run. No jury work.

Q: Right. Can you talk about your clerkship with Learned Hand?

Cox: Well, it was a wonderful year. He had tremendous influence on me. I wish I could state it better. You and I talked earlier, I tried to articulate what he described, the basic dilemma of a judge's work: the need of a judge to speak through the mouth of others in order to secure his authority, as opposed to the need to find some composition with the dominant needs of his times.

He was an example of hard work, of do it yourself. He wouldn't let a law clerk write even the facts of an opinion for him. He would have you go over it and edit it, but he would do the draft and everything following.

Have you read Gerry [Gerald] Gunther's *Learned Hand: The Man and the Judge*, by any chance?

Q: I haven't. I've heard it's very good.

Cox: The one thing that Gerry misses about him -- at least I didn't get the sense -- was Learned Hand's puckishness, his sense of humor. He would sometimes after -- The judges on the Second Circuit all wrote memos on every case they heard oral argument in to each other on the panel, before the conference. Sometimes after writing a memo, he would dance, literally dance around the room singing from Gilbert and Sullivan, "The law is the embodiment of everything that's excellent, and I, my lords, embody the law." This would come after reaching a result because of precedent that he was slightly uncomfortable with.

He had his law clerk work right in the room with him. It was a big room. And you dealt with him not by memo, but with conversation, but, of course, you didn't speak unless spoken to. And you never know what form the -- what he was going to say.

You were responsible for reading the briefs, thinking about every case of the panels that he sat on. So it might be, "Sonny, what do you think about -- " Well, you'd usually know which case he was himself working on, or reading the briefs getting ready to write his memo. Or it might be something out of the blue, "Sonny, to whom am I responsible?" he once asked me. I had no answer. "To whom am I responsible? Nobody can fire me, nobody can cut my pay, not even those nine bozos down in Washington who sometimes reverse me. To whom am I responsible?" And then he pointed around the room at the books lining the walls. "To these books about us. That's to whom I'm responsible."

Or it might be -- I remember the day when out of the blue he suddenly said, "We may as well both stop pretending that we're working. We know perfectly well we're watching the

*Lusitania* come out across the river to go to Japan.” That was the biggest ship, you may remember, in those days, and was towed out and taken for scrap.

Q: Yes. Wasn't the *Lusitania* involved in --

Cox: Did I get the name wrong?

Q: No, no, I think you're right. The boat that was hit or damaged by the Germans before the U.S. entered the war?

Cox: It may have been. There was one.

Q: Yes. My World War II knowledge is limited. So in editing things, were you reading, were you kind of doing cite and substance checking of sorts?

Cox: Well, he expected you, if you thought a sentence was badly phrased, to say so, and so forth. There were opportunities. There were also specific assignments, things to research. I remember particularly vividly one example. This is around June or July; it was the end of the work in New York. He was going to Cornish and I would go up to Windsor. And we often rode uptown on the East Side subway together. His house was in the sixties somewhere. We'd get off at the same stop and he'd walk a few blocks to his and I'd walk the somewhat longer number of blocks to an apartment way over and farther up on the east.

On this particular day, on the subway just before we parted, he said, "Sonny, are you sure those cases held what you had me cite them for? I didn't read them. I've never done this before. Are you sure they held what you said?" I reassured him. We got off; he headed for 65th Street, and I crossed the street and took the downtown entrance to the subway, and went back and reread the cases [laughs]. He did always read them himself, but he did have things for his clerk to research. And he would discuss cases sometimes at length, sometimes more briefly.

Q: And did you have discussions about where you would head after working for him, or larger career paths?

Cox: I don't think so, and certainly not long-range career. And I don't think he undertook to express an opinion as between Ropes and Gray and Palmer Dodge. I don't think he properly could, really.

Q: He wasn't urging you to go to Washington?

Cox: No, no.

Q: But you really feel his view of the role of the judiciary and the role of the judge had a big influence on you?

Cox: Yes, absolutely.

Q: So you went to Ropes and Gray after your year in New York, and you started doing litigation work, is that correct?

Cox: Yes. Yes, also started litigation work. In fact, we did a greater variety of things. It is true that most of what I did was work for Charles [B.] Rugg. They called it -- it was the constitutional litigation over the milk industry the constitutionality of the milk marketing agreement and the Agricultural Marketing Agreement Act and Supreme Court briefs. And there were other lawyers who were senior to me but junior to him who worked on it, but I guess I was doing the first draft. Now, this wasn't the only case, but it was the big one.

I did the next most work for Charlie Wyzanski, I think, certainly over the course of two, three years. Charlie, of course, had made an enormous name for himself for his oral argument in the *Associated Press* case [Associated Press v. National Labor Relations Board]. It was argued in sequence with the *Jones & Laughlin* case [*National Labor Relations Board v. Jones & Laughlin Steel Corporation*], involving the constitutionality of the National Labor Relations Act. But he had argued other cases and argued them well. He'd been Solicitor of the Department of Labor, close to the President.

But there were others I was assigned to work for and not all of them were in litigation. Charlie Wyzanski was important, and also Charlie Rugg, because that led me into the labor relations field. In those days, if a labor law, trade union problem arose, it went to the litigators, I guess partly because of history because "Go get an injunction" was frequently the employer's standard procedure and partly because -- well they were the ones quick on their feet. Charlie Wyzanski's role in relation to the National Labor Relations Act and the

Labor Department meant that he attracted clients for trade union problems that didn't come to Ropes Gray otherwise.

Q: He had been instrumental in writing and passing the NLRA [National Labor Relations Act]?

Cox: Well, I think he had worked on it. Yes, he wasn't one of the major authors.

Q: But he had been in the Labor Department at that time?

Cox: Yes. Well, by the time, where was -- I've forgotten. But the result was that I found myself doing labor work. It was a period when organization, particularly by the textile workers, was coming back in New England. But there were others. Charlie Wyzanski had at least one client who had mines in Alaska that were on strike. I didn't get to Alaska. I did get to California, but I didn't get all the way to Alaska in that connection. So I was sort of thrown unceremoniously into that. It was sort of like throwing a four-year-old child into the ocean and letting him learn to swim. But, well, I didn't want to leave out the labor side.

Q: Right. It seems that you were entering the field when it had been revolutionized, really, hadn't you? The NLRA, I guess, was passed while you were in law school, correct?

Cox: Yes, yes.

Q: Had you taken a labor course in law school? Was one even offered?

Cox: Actually, I did take labor law in law school, but one didn't get to study the NLRA. One just studied the labor injunctions and the Norris-LaGuardia Act.

Q: So you were becoming one of a few experts in a new field, it seems.

Cox: Well, I had studied those subjects. I don't know that any of my seniors were even aware that I had studied labor law, and I didn't see any between my course and my work at Ropes Gray. Well, I was at least knowledgeable so that I understood the talk. But I think the course played very little part. I took it because I took about as many courses in public law as one could.

Q: One of my professors in law school actually said she was student of yours in the early seventies, and said she took your labor law course for a similar reason. There weren't as many public law courses in law school then as there were five years later, and labor law was one of them.

Cox: Right.

Q: There's no such thing as an employment discrimination course or things like that, that are standard fare.

Cox: Right, right.

Q: So you were at Ropes and Gray and then you moved from Ropes and Gray. You went to Washington from Ropes and Gray.

Cox: Yes. Charlie Wyzanski was -- remember, we're now in the late spring, summer and fall of '41. I am one of those who thinks we should be in the war. It appears that we were going to be in the war. I had a younger brother who went off in the British Army. Charlie Wyzanski was asked by President [Franklin D.] Roosevelt, to be vice chairman of what was known as the National Defense Mediation Board. It heard, attempted to mediate or make findings of fact and recommendations for the settlement of disputes, labor disputes, having a major effect on defense production.

For example, one of the occasions for setting up the board or a very early case -- I've forgotten which -- was a strike out at North American Aviation in California. They were making airplanes for the British and us. Charlie asked me to come to Washington full time as one of the very small staff. There were, in fact, four or five of us. I thought we ought to be in the war. This would be new, interesting, working for the government. And I left Ropes Gray with a better "come back" from them rather than from Palmer Dodge, "Don't think you have any claim on us."

And off to Washington I went, and was with the National Defense Mediation Board until it came to grief in a dispute involving John L.[Llewellyn] Lewis and the United Mine Workers. He rejected its recommendations for a settlement, continued to strike, and forced a settlement in his favor. The result was to wipe out the public members but the Board continued and eventually became the War Labor Board.

When Charlie Wyzanski left, then the question was, what would I do? There was almost no work for us to do. Things were at a standstill. I did not appreciate the ability and value of William H. [Hammatt] Davis, who was chairman. I was absolutely wrong about him. I know I was wrong now. But somehow we never hit it off. It was a little worse than that. But I know any number of people, my contemporaries, whom I admire, who admired him. I mean, it's just something odd.

So that when Charlie Wyzanski left, in effect, the person I had worked for and with had left, and he persuaded Charles Fahy to put me on the staff in the S.G.'s [Solicitor General's] office. That was just before Pearl Harbor.

Q: So Wyzanski had worked in the S.G.'s office, himself.

Cox: Yes.

Q: And had he spoken to you a lot about that?

Cox: I had known of the work in the S.G.'s office as a tremendously desirable thing and knew people who had worked there. Oh, no, the S.G.'s office, the quality, the tremendously high quality of the S.G.'s staff were kind of a given in the circles in which I moved.

Q: And had that been something that you and your classmates had discussed back in law school as well?

Cox: Well, if you mean “discussed” with a view to working there? I don’t think that one assumed that they might be that fortunate. Remember at that time, as when I was S.G., there were only eight or nine lawyers in the office. One was aware of it as a wonderful opportunity. But as something likely to happen? No.

As a matter of fact, it isn’t confined to the Wyzanski connection. When I was at Ropes Gray I sometimes worked with [Hubert] Brian Holland. Brian Holland had been in the Tax Division at the very top and knew all about the S.G.’s office and had written Supreme Court briefs that may have been edited in the S.G.’s office. I think Brian even for a short time was in the S.G.’s office, but I’m not sure of that. He told me this within the last three or four months, and it came as a surprise to me, but he certainly knows. So I had heard about the S.G.’s office on all sides. It wasn’t just a Wyzanski thing.

Q: So you moved then from the board, the Mediation Board, to the Solicitor General’s office.

Cox: Yes.

Q: This is 1941. What were some of the major issues that you worked on, some of the major cases? Can you remember in general what they were?

Cox: I don’t have any real recollection of that. No, I don’t. I remember my first. I remember my debut before the Court after I’d been there and worked on a certain number

of briefs. I don't remember whether it was during the -- I guess it was sometime during the first year I was there.

[END TAPE ONE, SIDE TWO; BEGIN TAPE TWO, SIDE ONE]

Q: This is Thomas Hilbink with Professor Archibald Cox on June 19th, 2000. This is the second tape in our discussion for the Supreme Court Historical Society Project on Solicitor General's office.

So you were just about to tell me about your first Supreme Court argument.

Cox: *Webber v. the United States*. Webber had applied to become a citizen in a district court in California, and the judge had denied him citizenship because his motive for becoming a citizen was to make himself eligible for the old-age pension available to U.S. citizens under California law, the Townsend Plan, I think it was called. The government unsuccessfully tried to confess error in the Court of Appeals. He sought to obtain *certiorari*, and again the Solicitor General said we should confess error.

Q: So in this case, the district court had denied him citizenship?

Cox: That's my memory.

Q: And basically the Solicitor General had said he should become a citizen, is that right?

Cox: Yes. Oh, yes. And, well, they suggested that I had earned the opportunity to have a Supreme Court case, and why didn't I go up and confess error. So I went up on a Friday and confessed error, gave the reasons. On the following Monday, the decision came down affirmed.

I remember that on Tuesday or Wednesday, Mr. Fahy came into the office. He had a very quiet, self-effacing manner. He had a very firm backbone, firm character, strong principles, but his manner was very quiet and self-effacing. He asked what happened. It was only years later I thought of the answer I should have made, that was to say, "Just think what will happen, Mr. Fahy, when I'm trying to win."

One reason I mention this is that I think I am unique in history, and perhaps will always remain so, as the one lawyer who lost the first case he argued and the last case he argued, each time by an equally divided court.

Q: Was *Bakke* your last oral argument?

Cox: No.

Q: So your last case?

Cox: Was in some Common Cause matter.

Q: And the Court, an equally divided Court, you mean there was a four-four decision, and so they affirmed.

Cox: Yes.

Q: Can you explain what “confessing error” is? I’ve read about it, I know about it, but in part for the people listening to the tape in the future. Confessing error is something that only the Solicitor General can do in the Supreme Court, isn’t that correct?

Cox: Well, I suppose anybody can do it in his own case. Never occurred to me that nobody else could. It would be extraordinary for private litigants suddenly to confess error, but I don’t think there’s anything that -- I suppose they don’t need to. They would just pay up, settle up, whatever it is. Or if they were the plaintiff, dismiss the suit.

The Solicitor General, occasionally when he feels that the decision of the Court of Appeals, usually on the argument of the government was wrong and that the petitioner for *certiorari* is right and should at least win on the issue before the Supreme Court does file a confession of error.

One is slow to come to it, but it has been the view of the Solicitor General, of the Solicitors General in the past, especially before 1980, let’s say, that the Solicitor General owes one duty to the President as head of the executive branch, but an equal duty to the Supreme Court; and that the duty to the Supreme Court requires him to follow and make sure that every paper filed in the Supreme Court by the government follows a very highly principled

standard of accuracy, candor, full disclosure, and that if the decision below is wrong enough, then he shouldn't attempt to sustain it, but should confess error.

And Solicitors General have done that for a long time. Some have taken somewhat different forms, apparently. For example, Thomas [Day] Thacher. I've seen one brief that he filed, a tax case, where he argued the government's side to uphold the tax and the taxpayers' obligation, but then stated sort of at the conclusion of the brief that his personal view was to the contrary.

Q: Thomas Thacher was a Solicitor General?

Cox: Yes. Oh, yes, under [Herbert] Hoover. I'm pretty sure it was Hoover. It could be back under [Calvin] Coolidge, but I don't think so. I think it was Hoover.

But there were -- it was hard to know. Confessing error infuriated the judges of the Courts of Appeals sometimes. When I was first Solicitor General, there came a case where I thought the decision below was that badly wrong and couldn't stand, shouldn't stand. I don't know what precise form it took, I don't remember, but I had some communication with the Chief Judge of the Court of Appeals. Did they want us to file a motion for rehearing in that court and tell them? And got a rather annoyed letter back, certainly: "We've done the best we can. If you don't like it, you'll have to deal with it." I thought that maybe they would find that a preferable solution to confessing error, but no. So I continued the practice on the, I don't know, rare occasions. It was always something rare.

Q: I know there are a lot of traditions involved in arguing before the Court, from the morning coat to just basically using the phrase "May it please the Court" at the beginning. And there are other things, I'm guessing. Did anybody sit you down before your first argument and say, "This is how you do things," and, "Don't do this, don't do that"? Were the traditions something you had to pick up on your own?

Cox: Oh, I think, pick up on your own. After all, you'd been in Court and heard a considerable number of arguments.

Q: So you would go, even prior to your own argument, you sat in on a lot of oral arguments?

Cox: Yes. You couldn't go all the time, but, well, if it was a case -- well, you did hear a considerable number of arguments. I can't think of just -- I guess for a variety of reasons you might go.

Q: I didn't ask you this, but I meant to. When you were clerking for Judge Hand, would you sit in on the arguments before the panels?

Cox: Not regularly. He very strongly discouraged it. If there was a day when John [William] Davis was to argue against Thomas D. Thacher, then I went to hear that argument. I went to hear a few others. I'd been there on motion day. But there had to be some pretty special reason.

Q: John W. Davis of Davis Polk [Davis, Polk & Wardwell], he had been Solicitor General as well, correct?

Cox: Yes, yes.

Q: He, for me, most famously argued the *Brown* [Brown v. Board of Education of Topeka] decision towards the end of his career.

Cox: Very much toward the end, yes.

Q: It may have been his final appearance before the court.

Cox: I couldn't say.

Q: But he was really considered, from what I've read, the best oral advocate of his day.

Cox: Well, he was -- if he wasn't the best, he was one of a few number of most outstanding.

Q: How did the office function under Mr. Fahy? What were your duties as an assistant?

Cox: Well, I had the regular work. It consisted, first of going over the different Divisions of the Department of Justice recommendations for appeal or no appeal in cases that the government had lost in the lower court. That would be true of, well, all the Divisions of the Department. If it was a Court of Appeals, then it would be *cert* or no *cert*. Well, there was

still some appeal to the appellate jurisdiction of the Supreme Court, but limited. And of course, when going from the Court of Appeals to the Supreme Court, the independent agencies also had to obtain the approval of the Solicitor General to go for *certiorari*. By volume, that would be the largest number of cases.

Second, when the Appellate Section of a Division had finished its brief, finished the brief or finished the petition in a case pending in the Court, it would come up to the S.G.'s office and be assigned to one of his assistants who would edit or rewrite, and get ready for the Solicitor General the draft that had come up. That might involve a great deal of work and some very substantial changes. That done, each in the end went in to the Solicitor General.

Q: Mr. Fahy approved everything that came through the office?

Cox: Everything went to him, at least in form. I think he went over everything. I don't think he made many changes, revisions.

Occasionally, Mr. Fahy-- though I don't remember any occasions under Mr. Fahy, I used to do it. If the lawyer in my office who passed on the appeal recommendation disagreed with the Division, I was very likely to hold a conference. I suppose that Fahy did that some, although I can't remember any, I confess.

Q: So as an assistant in the office, you weren't responsible for calling the various departments or section chiefs or in the Department of Justice to get together at that point

to say there's a conflict. That would be something where you would report it up and it would be the Solicitor?

Cox: Well, you would send it in showing the conflict. The Solicitor General would determine whether to have a conference.

Q: Okay. But you weren't operating independently; it was the Solicitor General who dealt with that level of conference.

Cox: That's right. And as I say, I can't actually remember any conferences in Mr. Fahy's office.

Q: But you would probably have been included in those.

Cox: Well, I would think so. There's one question in my mind. I was a very junior lawyer in the office. Some of the things that I did may have gone through a senior assistant. If it was tax, Arnold Raum. And if it was not tax, the first assistant. I think that "Gardner" was his name, but I'm not sure of that. Arnold Raum I remember. I'm a little hazy about this, but it seems to me it was possible. I don't think it was standard process, but I think it sometimes might have happened.

Q: Was the Solicitor General's office divided according to department or would each member have a circuit, would each member have a certain number of departments?

Cox: Oh, no. No.

Q: So you were handling cases from Labor as well as, I guess it was, Department of War at that point.

Cox: Well, you were handling them from the Division, the Appellate Section of the Civil Division, of the Tax Division, of the Lands Division, as it was then called, of the Anti-trust Division. Did I say Criminal?

Q: No.

Cox: Criminal Division, and then independent agencies. Well, those might go through the Anti-trust Division or might come straight to the S.G.'s office. Certainly SEC and Labor Board came straight to the S.G.'s Office, but not the Federal Power Commission. The ICC cases, well, the Anti-trust Division was usually had some role in them. But the only specialization was that Arnold Raum specialized in tax. In my day, Wayne [G.] Barnett was specialized in tax. That doesn't mean that he worked only on tax cases. It doesn't mean that nobody else did any tax cases, but nevertheless it is true, they got to be experts.

Q: Did you have much contact, other than in oral arguments, did you have much contact with the Justices in that period?

Cox: No.

Q: At that point was Frankfurter on the bench?

Cox: Oh, yes, yes. Oh, yes.

Q: He must have been.

Cox: Yes.

Q: And [William Orville] Douglas was as well.

Cox: Yes.

Q: There were a few Justices who were there both times, when you were there, and Justice [Hugo LaFayette] Black.

Cox: And Justice [Hugo LaFayette] Black, yes. But there were certainly Justices Black, Douglas, and Frankfurter. I guess Stanley [Forman] Reed was gone before I became Solicitor General.

Q: Yes, he was.

Cox: He was still alive, but he's --

Q: Tom C. Clark was a [Harry S.] Truman nominee?

Cox: Yes.

Q: Okay. Well, he was the other that was on the court when you were S.G. who could have -- he was the next senior after Douglas. But Justice Frankfurter never invited you up to the Court for lunch or something like that, as a former student?

Cox: Well, I don't think so, but I can't say I wouldn't ever have been at tea at the Frankfurters or something like that.

Q: Had you appeared in court, in any court, as the primary advocate at any point before your first oral argument in the Supreme Court?

Cox: Oh, yes. I had. While at Ropes Gray I had certainly appeared before the motion session of the Superior Court often, about as often as one can, for a year. I had tried one or two cases to a judge. I'd argued one case in the Supreme Judicial Court. Then I had -- it seems to me that Mr. Fahy arranged for me to argue one Labor Board case.

Q: For an administrative judge?

Cox: No, no, no. For a Court of Appeals.

Q: Court of Appeals. I see. I see.

Cox: I can't remember the case. I can't even guarantee that I did it, but at least that was talked about. May have been considered and dropped or considered and done, I'm not sure which.

Q: So it was not your first time.

Cox: No, I hadn't done much. There's no doubt about that.

Q: It seems like law firms today, if you want to go into litigation, they make you do document, various discovery things for about four years before you show up in court. So I thought --

Cox: Yes. Well, the supposed simplification of trials turned out to make them thousands of times more complicated.

Q: True. In the Solicitor General's office, did you have moot courts? Did you prepare for oral argument that way or some other way?

Cox: No.

Q: So you were very much expected to do it all on your own.

Cox: Oh, yes, yes.

Q: And would you need to get approval for your oral argument from Mr. Fahy, as well?

Cox: No, no.

Q: So it was in many ways a very independent job.

Cox: Yes, yes.

Q: Well, I think those are all the questions I have about that topic, so should we go have some lunch?

Cox: Okay. [Tape recorder turned off.]

Q: So we're now back on the afternoon of June 19th of the year 2000.

We had been talking about your work in the Office of the Solicitor General under Charles Fahy. Then as I understand it, you moved to Harvard from the Solicitor General's office?

Cox: Oh, no, no, no. Working in the office was a wonderful experience, but at the same time I was a little uncomfortable with removal from wartime activities. Should I be in the service? Well, I wondered. I had two children. Whatever class it was, I wasn't subject to the draft. But there still was the question, should I go in? And, well, if I didn't do that, shouldn't I do something that was more closely connected to war?

But Mr. Fahy, who was a very sensitive and observant person, knew I was a bit unhappy. I don't think I ever complained to him or anything. It was a great experience working under him, and I was absolutely devoted to him and a great admirer. But he knew this and he worked it out quietly, and it was put up to me so that sometime in the spring of '43. I suspect getting on toward the end of the term. An opportunity was offered me to work in the State Department, working directly with Tom [Thomas Knight] Finletter who later was Secretary for Air, and under the general wing of Dean [Gooderham] Acheson, who was an Assistant Secretary of State at that time.

So I went and, through the summer and on to October, November of '43, I was with Tom Finletter. It was the most interesting -- he had a number of jobs, ranging from being a key figure in the supervision of the smuggling of industrial diamonds into the United States through Switzerland, to foreign funds control and other wartime economic things.

But the most interesting of all was this: he set up and functioned as the head of a Combined Committee on North Africa. There were a number, as you may remember from your history of World War II, Combined Committees with the British. This Combined Committee brought together the U.S. and U.K. agencies involved, including the British Embassy and all the U.S. agencies having anything to do with civilian supply to, and civilian government in, North Africa. It later extended to Italy.

Tom had dreams, and I guess I shared them, of extending this arrangement so we were the responsible folks for civilian activities in the reoccupied parts of Europe. Well, Tom was a little too ambitious, and this all came to grief pretty soon. Incoming cables were simply not

routed to Thomas K. Finletter [laughs]. That's the State Department's way of saying, "You're through." We had, frankly, nothing to do. I had nothing to do with the smuggling or the foreign funds control. Donald Hiss ran one of those.

Q: Donald Hiss?

Cox: Yes.

Q: Not Alger Hiss?

Cox: Not Alger, no. Donald, his brother. And I was very much again at loose ends when [Secretary of Labor] Miss [Frances] Perkins asked me to come and be Associate Solicitor of Labor. Again, I'm pretty sure she was heavily influenced by Charlie Wyzanski, who had become in the fall of '41, before Pearl Harbor, a district judge in Massachusetts. That's the reason I left the National Defense Mediation Board.

Well, the Associate Solicitor of the Labor Department is -- Well, it's the number-two legal position in the Labor Department. While it wasn't direct wartime work, it was a bit closer, some of it, at least, than the S.G.'s office had been. There was nothing in the State Department. You couldn't tell whether there'd be anything come back in the State Department. But I didn't feel I was deserting Tom Finletter, of whom I was very fond, and he didn't feel that I was deserting him. I accepted Miss Perkins' proposal.

The Associate Solicitor -- The great bulk of the work was responsibility for all the District Court Enforcement of the Fair Labor Standards Act. This was equally true of other statutes enforced by law by the Labor Department, but the great bulk of it was wage and hour. There was an Appellate Section, and the head of it, Bessie Margolin -- Well, I don't think she nominally reported to me, although, in fact, having been in the S.G.'s office, I was handling a good deal of the appellate work.

But I was in charge of all the regional offices, with an eight-lawyer staff. I decided when to authorize suit to be brought by the regional attorney. There was other work, particularly in the construction industry. The Associate Solicitor sat on a board, I'd forgotten the full title of it, but a board which set prevailing wages under the Davis Bacon Act, and also acted as a subsidiary of the War Labor Board, handling stabilization, wage stabilization, and disputes of a major impact on production when they were in the construction industry.

In fact, I tried very few district court matters, but I did argue a lot of cases in the Courts of Appeals and performed those other functions and dealt with the legal aspects of other problems that came up in the Department as the number-two lawyer.

And that lasted so long as Miss Perkins was Secretary. When she left in along about July of '45, well, the fighting in Europe was over and the bombs had been dropped in Japan, and it was clear that the war, in effect, was over and it was time to wind things up and go back home. And I went back to Ropes Gray.

Q: So their offer, despite a number of years passing, still was open.

Cox: Oh, yes. I went back and was welcomed back.

Q: So Wyzanski was no longer there.

Cox: He was no longer there. He was on the district court.

Q: Can I go back and ask you a question? Charles Wyzanski had clerked for Learned Hand?

Cox: Well, he had briefly. He had been Augustus Hand's law clerk. But also there had been a short period of time when for some reason, I guess Learned Hand's clerk was sick or out or something like that for about a month -- I could be two or three weeks off in the length of time -- when he clerked for Learned Hand. So he in essence clerked for both. But Augustus Hand was the one he started off and had the full term with.

Q: It sounds like he really acted as a guardian for you.

Cox: He certainly gave me a boost all the way along the way until I was back at Ropes Gray.

Q: And he was at that point on the district court.

Cox: Yes. He didn't have anything to do with my going back to Ropes Gray.

Q: Right. But did you get the sense that his helping you had stemmed from your common fraternity of Hand clerks?

Cox: Well, I suppose it was a factor in our friendship. I think you could greatly overstate it.

Q: Well, I mean I'm sure there were other things as well.

Cox: That was something we had in common. Beyond that, I don't --

Q: Do you know if Judge Hand had played a role at all in helping?

Cox: I know he wrote letters supporting me, recommending me strongly in some of these instances. He could have done it -- I don't remember in which -- He could have done it in all of them, but without my knowing one way or the other, and maybe he did .

Q: How long did you spend at Ropes Gray once you returned?

Cox: Until November or December.

Q: So, a matter of months.

Cox: Yes.

Q: And then you were --

Cox: And then I went out to the law school.

Q: Okay. And who contacted you?

Cox: Well, I had really never thought of teaching at the law school. Mr. and Mrs. Scott were lunching with Phyllis and me one Sunday out in Wayland, where we were living. And in the course of lunch, Mr. Scott said, "Archie, have you ever thought about teaching?" And I said, "Oh, not really, no. Not seriously, Mr. Scott. Charlie Rugg mentioned once that he understood the law school had considered my name, and I said, 'Oh, I wouldn't be interested.'" I brushed it aside.

And his response was, "Well, you'd better start thinking quick. Jim [James McCauley] Landis is going to call you tomorrow morning and invite you to become a member of the faculty." And he did.

Q: And was this a hard decision for you?

Cox: Certainly wasn't an easy one. But, yes --

[END TAPE TWO, SIDE ONE; BEGIN TAPE TWO, SIDE TWO]

Q: Okay. Go ahead.

Cox: Well, it was hard. I had thoroughly enjoyed practice. I was told that the next time they opened the partnership up, my chances were strong. I'd be stopping doing something that I knew I could do pretty well for something that I didn't know that I'd be good at. A very strong pull to do it was the independence of a professor, particularly a Harvard Law School professor.

In the government, if you are in sympathy with the general policies of the administration in office and you're in positions such as I was in, it's pretty easy to believe that what you're doing is the right thing by your own standards, and when you make a decision that's being made by you for what's right. It may not, in truth, be quite that easy, but it's pretty easy to come to believe. And I think there is a good deal to it. On the other hand, it was very clear, and particularly as I had moved up a little bit in practice, that I didn't call the shots on whether people I was representing in labor negotiations would give in on this issue or not, and they didn't always do what I wanted them to do. That weighed strongly with me.

Second, as Derek [Curtis] Bok put it in explaining how he happened to drop what he was doing and go to Harvard Law School, at least in those days being invited to join the Harvard Law School faculty was simply the greatest compliment a lawyer could receive, and it was a very different process than it is now. People were being drawn to faculties out of practice. There was none of this having to go through a regular course of this, that, and the other thing to prove your talents as a scholar.

Third, it's hard to measure, but I think undoubtedly a factor was that Phyllis, my wife, was the granddaughter of James Barr Ames, who was still a famous and important dean in the contemporary thinking about the law school and the law school people, a tie through her of that kind. So I think those three things are what pulled me to do it.

Q: While you were there, what courses were you teaching?

Cox: Well, when I went out, my understanding with Landis was that I would regularly teach Labor Law. And that meant that I would be, or at least seek to be, the top person in the labor law field in all the law schools in the country. Then I would teach every year at least one other subject. That would depend on the Dean and on his needs and the school's needs.

I said in the course of the conversation that I shouldn't -- didn't want to ever be called upon to teach Property, because it bored me, or anything in the corporate field, because I didn't know anything about it. But beyond that, the sky was the limit. We talked about Torts.

I started off teaching Torts and Labor Law. I continued to teach Labor Law. A seminar, yes. I gave seminars on the Supreme Court only after I'd been in Washington. I did Torts for a number of years, but then taught a variety of courses: Unfair Competition, Agency, Administrative Law. I said Unfair Competition, didn't I?

Q: Yes.

Cox: Well, there might have been something that slipped my mind that I did for a year or two. It was very much -- It was not at all the way I see it today, at Harvard, at least. You were very much at the call of the Dean. You taught what he wanted you to. But it was your subject you were expected to master and continue to be master of.

Of course, they were wonderful years to teach Labor Law because, two things. One, we were making labor law. We were making collective bargaining law. And, two, they were years where everybody believed in the future of collective bargaining and trade unions as institutions, both of them as institutions. And that made it exciting, filled with vitality and challenge. Writing the casebook and things like that.

Q: So you engaged in writing the casebook relatively early?

Cox: I think I had the first modern casebook.

Q: "Modern" meaning post-NLRA?

Cox: Yes. Modern with a focus on collective bargaining, trade unions.

Q: Were you involved, I know -- and we can talk about this later -- I know you were later involved with labor legislation in the Senate with then Senator [John F.] Kennedy.

Cox: Yes.

Q: Were you engaged in policy matters prior to that?

Cox: Well, I --

Q: I guess during the Truman or [Dwight D.] Eisenhower, early Eisenhower administration.

Cox: I had testified in Washington at one stage and talked about changing the Fair Labor Standards Act. I followed with care the Taft-Hartley debates, of course, prior to the '47 enactment. And I suspect I'd engaged in some correspondence with people on the Hill, but there was no close relationship or permanent sort of thing.

I particularly remember the talk about modifying the Fair Labor Standards Act. So I think it was [Robert Alphonso] Taft who got me in on that. It sounds a little puzzling because my views and Taft's were the seldom the same. But I think that's not a quirk in my memory.

Then we came to the time when Kennedy was in the House, and at his request I testified before the House Labor Committee. It wasn't any particularly warm continuing relationship at that time, but I did once or twice testify at his request.

I was involved in Washington with John [Thomas] Dunlop at Harvard in the construction industry. As I said, when I was Associate Solicitor at the Labor Department, one of the jobs was on the board that set Davis Bacon Act, prevailing wages, and served as a subcommittee, as it were, of the War Labor Board to deal with disputes in the construction

industry. Something of that kind continued, I think, not on a governmental basis. Well, maybe a remote government basis, but it continued through the late Forties.

Then I became busily involved with John Dunlop during the Truman administration when we were getting around to the Korean War and the need for wage and price controls. And John and I got up the wage stabilization side of it and the labor dispute settlement side of it. We were in Washington doing a lot of intense work over a period measured in weeks rather than days.

When the Wage Stabilization Board, as it was known, was set up, there was again a subsidiary for the construction industry, and I was co-chairman of that.

I'm afraid I'm going to have to ask you for a brief recess.

Q: Sure. Of course. [Tape recorder turned off.]

Cox: Well, let's see, I was talking about --

Q: The Wage Stabilization Board.

Cox: The Wage Stabilization Board. The Wage Stabilization Board had a rocky life, as had the National Defense Mediation Board and, toward the end, the War Labor Board. Its first trouble was with the steel industry. Big trouble. It had resolved a dispute over wage rates in steel by granting a wage increase far in excess of what the supposed ceiling formula

would produce. And the Employer Members had walked out. The public members, in effect, were forced out, and after some delay, new Employer Members were induced to come back on. Maybe some were the same, some new. And a new set of public members were appointed, and I was appointed chairman.

This is about August '52. We had a short and rocky life. First, almost right away, a case came before the board which David [L.] Cole, who was perhaps the most distinguished impartial independent person arbitrating and mediating in the country in those days, had been one of the two arbitrators and had awarded above what would be approved under the ceiling formula adopted by the Wage Stabilization Board prior to the steel strike. It seemed to me that given the steel decision, there was no holding to that formula any longer. So we wrote an opinion of the public members that approved the increase by setting a new ceiling at the level of the steel settlement.

Well, the employers were about to walk out again. I was at a stage of exhaustion, almost tearful, I induced them to see the rationality of what we had done, and stay. Then along comes John L. Lewis and the United Mine Workers with a settlement that is still way up in the air, and we turned it down. It was a split decision. The labor people voted to approve it. The industry people and public people voted to disapprove it, to limit the increase to the new formula. Charlie [Charles Clinton] Killingsworth of Michigan and I were the principal voices -- maybe I was the loudest as Chair -- for saying "No." The other public member was very much a White House appointee; he went along, but was somewhat cooler in agreeing. And Lewis called a strike.

The Economic Stabilization Administrator, Roger Putnam, stood between the President and what was the Price Administration, on the one side, and the Wage Stabilization Board, on the other side. Roger told John L. Lewis that he would hear an appeal and said that if Lewis would call off the strike, he would "hear the appeal very carefully." Just like that.

Q: Very coded language.

Cox: And Lewis understood it the way maybe he was meant to understand it. So there was a period of several weeks while Roger Putnam considered the appeal.

I did arrange an appointment with President [Harry S.] Truman, thinking it was to talk about this. I went into one of the smaller offices of the White House. In later years I knew the executive offices much better because it was Kennedy. I was never able to figure out what office it was, but I did meet him in some small room. And after greeting each other, he began to talk about the weather and talked about it for fifteen minutes without interruption, and then said his time was up, and that was that.

Q: Do you think he was consciously trying to avoid the topic?

Cox: I think he must have been. Didn't want to discuss the subject.

Q: And was that your first and only interaction with President Truman?

Cox: Only face-to-face one. Later on came my letter of resignation, when Putnam put his decision granting the increase into effect. I don't know whether I was unduly rigid. It is true that by that time, it was after the election. Eisenhower was coming in. Eisenhower was clearly going to take wage and price controls off. I thought, and for some reason Truman -- well, I remember discussing this by the hour with David Cole, who was one of Truman's closest advisors on the whole thing, and arguing: "Yes, I understand to take controls off. Yes, I understand there's no point in suffering a strike if you can take controls right off. But do it honestly and take controls off. Don't go pretending that you're having stabilization when the sky's the limit anytime anybody asks that has enough power to be a nuisance. Well, the answer was Truman feels that it is for Eisenhower to take the controls off. Well, I felt that I couldn't -- that I ought to stand up for doing it in a principled way. So I resigned.

So that gets us to '51. Then, well, I guess that probably in the '56, '57, I don't remember, Ken Gormley would have the dates, Kennedy asked me to advise him about labor legislation. There was going to be legislation.

Q: Before we discuss that, can I ask you a few questions?

Cox: Sure.

Q: One thing I'm curious about is in those years after you resigned from the post at the Wage Stabilization Board, and before 1960 or even before what you're about to start

talking about, were you involved in Democratic Party politics around Wayland or Boston or Cambridge?

Cox: No, no. Well, not in Democratic Party politics. I was taking part in town government. And they -- well, I don't remember exactly, I guess it was late forties, it may have been on to the fifties, I ran for assessor and was elected assessor.

Q: In a nonpartisan election?

Cox: Oh, yes, entirely nonpartisan. Local election, town. And, indeed, I succeeded in reorganizing and bringing some sense to the method of assessing the values of properties, which was an outrage up to that point. I, at some point in town politics, became chairman of the Personnel Board. Originally it was some kind of a committee to draw up a more systematic set of rules with respect to employment and payroll practices, vacations, and so forth.

And in the fifties, jumping around, late fifties, I was one of the select men. Indeed, I resigned only when I became Solicitor General.

Q: Quite a jump.

Cox: Yes. [Laughter] I had also, just to -- I don't think you care about details. I had drafted for Republican Governors what became rather important state legislation dealing with labor relations.

Q: For Massachusetts, which had a Republican state governorship?

Cox: Yes. At one stage back when I was at Ropes Gray, Leverett Saltonstall was still Governor, had not become Senator. Charlie Rugg was appointed to, in effect, to prosecute the Commissioner of Public Works, and I had done a great deal of work on that. So I had been in touch with the Governor, but never in a party way.

Q: Can I ask, were you a registered member of a party? I don't know if Massachusetts required that at the time.

Cox: Well, at some point I registered as a Democrat, but I'm not quite sure when it was. It may have just been in connection with working with Kennedy and thinking it would be well advised. When I say "working with him," not just on labor legislation, more broadly.

Q: Hypothetically, looking back, if you had been asked to serve in the Eisenhower administration, would you have had any reason not to do that, or do you think that would have been a position you would have accepted?

Cox: You mean simply on the ground it was --

Q: Yes, that it was a Republican administration.

Cox: Oh. No, I've never -- it might possibly depend on the job and Ike's position with respect to that area, but no general objection.

Q: So really it sounds to me that you weren't serving in the Roosevelt and Truman administrations out of devotion to Roosevelt or Truman more than it was a public service job. Is that a fair characterization?

Cox: I think that's true. I think that's a fair statement, yes.

Q: Let's talk about, well, Representative, Senator, then President Kennedy. You've said that while he was in the House, you did some work for him. Can you remember the first time you --

Cox: Well, it would have been to testify. Do I remember any details about it? No. I would have gone to testify, something to do with the general subject matter of labor relations law, internal union affairs, but what part of it or all of it, or any of the details, no.

Q: Do you recall your first encounter with him?

Cox: Not in a way that there's anything striking about it.

Q: So in '57, I guess you said, you were asked to assist on some legislation.

Cox: I was to advise him, and fairly soon that became a request to gather a group that would get up recommendations. Remember that the McClellan Committee had uncovered all these stories of corruption and graft in the labor movement. So there was pressure there for regulation of internal affairs. The labor unions, of course, were determined to get parts of Taft-Hartley repealed, and there were changes quite apart from Taft-Hartley that they'd like to make in relation to the National Labor Relations Act.

He invited me to get a group together and to draw up recommendations. It wasn't a bill, but covering the general subject of labor law, labor law reform. The only restriction on whom I got was everybody had to come from Chicago or eastward, because anybody from farther away than Chicago would take too much time in getting to meetings. In other words, I had a free hand. And I did get a group together and we did come up with recommendations.

At some point, the person in his office that I worked with was Ralph [A.] Dungan. I was aware of Ted [Theodore Chaikin] Sorensen's presence, but did almost nothing with him. It was Ralph, and we got on very well together. At some point the Senator asked me to put the recommendations in the form of legislation, which I did. Then he made what I thought was a tactical mistake. Well, he would put it in front of the labor skates, [William] George Meany and others, and he was going to do it alone. I wasn't to be there.

Well, I was perfectly sure that they would give him the standard treatment that particularly the older labor skates give any relative newcomer employer to collective bargaining. They'd spend the first meeting shouting at him and telling how he doesn't

understand and how outrageous everything he says is, how anti-labor everything he says is, and that's the way they reacted to this bill.

And it was a long time before I succeeded in persuading him that maybe I knew perfectly well that that wasn't their real reaction. Not that they loved it all. They certainly didn't love it all. But I knew they didn't and wouldn't have regarded this as anything bad, all bad. And, of course, they ended up they'd have loved to have had it in preference to what they got. But he did do that, and it had that effect.

But the bill was introduced in the Senate, passed the Senate -- in '58, I think -- but didn't get through the House. So it's back again, '58-'59. It could have been '57-'58. We may have begun a little earlier than I said.

Q: Were most of your interactions with Senator Kennedy directly or were they through Ralph Dungan?

Cox: With the Senator directly. Not everything was direct, but there was damned little that we didn't sooner or later talk about face to face and in detail. One of the wonderful things about John F. Kennedy was his genuine interest in the substance of policy.

Q: So you were really, at that point, building a direct relationship with him?

Cox: Yes, yes, I would say so. I mean, Ralph was -- was Ralph always present? Well, he was certainly present a lot of the time. When you said "direct relationship with Kennedy," there was no cutting Ralph Dungan out.

Q: Right. Of course.

Cox: Well, maybe one reason I'm a little sensitive on that is you get that kind of problem with Sorensen.

Q: Where he thought you were trying to cut him out?

Cox: He was terribly worried about being cut out.

Q: You worked on this labor bill with Kennedy. You had the advisory committee and then out of the advisory committee came a bill, is that correct?

Cox: No, I think the committee dealt only with the substance. I don't think they put it in legislative language. I think I did that.

Q: And so you did the legislation and that's what became the bill?

Cox: Yes, I probably talked to some people, but I think I basically did it. And then, of course, it had to go before the Labor Subcommittee and the Committee on Education and Labor. I was in all those sessions and was treated almost as if I were a senator. I engaged

in direct conversation with them, rather than acting as an aide whispering to my boss. The senator would then say it, which was the usual form of conversation of staff. Just as later I had floor privileges. While I couldn't talk on the record, I could whisper with senators on the floor.

Q: In these meetings where you were engaging in direct participation, were these the hearings or were these behind the scene?

Cox: Well, these were executive sessions. There were also hearings.

Q: Right. But you were in the executive sessions engaging in the conversations.

Cox: Yes, yes, yes.

Q: Okay. And what was the ultimate fate of the bill?

Cox: Well, ultimately there were changes made and compromises. If you were to study the history of the legislation in detail, the key moment was when Senator [Thomas Henry] Kuchel of California agreed. I think we had to find middle ground acceptable to him and to Senator Kennedy on some issue. Then he agreed to back the legislation, and that meant somebody on the Republican side, of course. The bill passed the Senate. I think it was by a pretty big vote. More important, the McClellan Bill of Rights was not included. Then it went to House, and the House made various changes, including the adoption of the McClellan Bill of Rights. And then there was a long conference and long sessions in the

conference. But eventually trades were made and compromise ground was found, and a measure which had some good and not too much bad, really bad, from a labor point of view, passed both houses and became law.

Q: Were you satisfied with the result? Did you feel it was good?

Cox: Well, there were things that would have been better, but it came out not too bad.

Q: At this point you had been involved in government in a number of different positions. Did your experiences up until then make you want more involvement or less, or were you -- in other words, was the exposure -- it sounds like the Mediation Board was very politicized, that the Wage Stabilization Board was similar. Did you find these experiences to comport with what you expected in Washington politics or were you somewhat bothered by the politicization of things?

Cox: Oh, I don't know. Well, in a way, I was bothered by it. I did resign as chairman of the Wage Stabilization Board because I disapproved of the caving-in. Did I recognize that this was a part of life, life in government, if you will? Yes. I think I may have found things a little rougher on the Hill in committee sessions than I expected, but that would have been the only thing that was a surprise.

Q: I guess some assessments of John Kennedy before he became President were that he didn't do much in the way of proposing and pushing legislation through, that he was --

Cox: No, this was his one big thing legislatively.

Q: Another thing that's said is that he was a very good speaker and spoke out a lot, but substantively wasn't doing as much as a lot of other senators or congressmen. Did you find that to comport with --

Cox: Well, he certainly did --

[END TAPE TWO, SIDE TWO; BEGIN TAPE THREE, SIDE ONE]

So, right before we broke, I guess I had been saying that I've read that people had the impression of Kennedy that he was more show than substance, I guess would be a way to say it. Does that comport with your view of him in your interactions?

Cox: No, no. I think Kennedy had a real interest in substance and was very good at it. I always thought, based on my contact with him, that if he hadn't been moved to have a political career, he would have ended up as a professor at a first-class liberal arts college. I doubt that he would have made Harvard or Yale faculties, maybe not Amherst, but very soon in terms of the liberal arts colleges.

I'd often thought this would have amused people interested in personalities of the day. I think it must have been a Friday. We'd finished a series of long, hard days, perhaps some Labor subcommittee meetings, executive sessions, things like that, and we both happened to be on the same plane back to Boston. For once I guess he wasn't riding in the front end.

But in any event, we were seated there side by side, and we'd seen each other so much over the past few days that we had nothing to say. We were both reading. He was reading Proust; I was reading the latest popular detective story. [Hilbink laughs.] That's purely just the way it happened.

Q: He's probably one of the last politicians to read Proust.

Cox: [Laughs] One of the things that I admired about him, one of the reasons I supported his candidacy for President was that I thought he was interested in the substance, just as I thought he did have a real philosophy underlying his positions.

Q: At what point did you become involved in his campaign?

Cox: Well, December '59, I think, was when he determined to put this informal gathering of people at Harvard, MIT [Massachusetts Institute of Technology], and to some extent other faculties, on a more organized explicit basis. And he thought he needed somebody who would serve as the leader, if you will, and who would recruit other people around the country to do the same sort of thing. And I think he asked Mark DeWolfe Howe to do this. I learned this only indirectly. I don't think Mark ever told me. Maybe he did, but I have since learned it and it seems to be true. Asked Mark Howe to do this, and Mark said he wasn't the right person, wasn't the right kind of person, that I was the one who ought to do it, and urged Kennedy to invite me to do it, and he did.

At a meeting of his professorial circle in the Boston area at the Harvard Club -- I think it was December 1959 -- he stated he was doing this, stated that he was going to be a declared candidate, and that I was to be the head of the group. And that was it.

Q: What do you think Mark Howe meant when he said he wasn't the right kind of person?

Cox: Well, I've seen Mark quoted on this. He decried his own leadership qualities, presented himself as being shy and retiring.

Q: And you were not?

Cox: So he said. [Laughs]

Q: A question I didn't ask before. Prior, when you were at Harvard in this period, or in the fifties, were you close friends with many of the faculty members? I imagine you were on friendly terms with everybody, but were there people with whom you were particularly close?

Cox: Well, I was friends with a number. I guess it depends on what you mean by "particularly close."

Q: People you spent time with outside of school or --

Cox: We lived farther away than most of the others and didn't join in the activities in Cambridge. Actually, I've never done a great deal of entertaining or going out, to tell you the truth.

Q: Okay. So, I'm sorry, I probably shouldn't have asked that in terms of flow. So there was this meeting at the Harvard Club at which Kennedy announced that he would be running and that you would be heading the professorial circle.

Cox: Yes.

Q: Did you have explicit conversations with Kennedy about what this would entail?

Cox: Well, yes, but I don't know if they add up to very much. He hoped I would recruit additional people and that we would supply advice, material on the substance of issues. He made it very clear to me, and, I think, tried to make it clear to them on that occasion, as he did on other occasions, that he wasn't concerned with their political advice or with the political slant to be put on things, that he wanted their best opinion on the merits, so to speak.

Q: And in assembling this group, up until then most of your work had been in the field of labor and labor law?

Cox: Well, I don't think the papers passed through me the way they did later. Jerry [Jerome Bert] Wiesner, who later became President of MIT, and was an adviser on defense

policy, of course, my role was simply to stir Jerry to get up a paper on this issue or that issue if he hadn't felt stirred himself.

Q: You were the manager or the enforcer.

Cox: Well, yes. Those are a little too strong words.

Q: Yes, I understand.

Cox: The stimulator.

Q: Right. And was it you who was choosing who to seek advice from, or was Kennedy telling you that he wanted this person or that person?

Cox: Well, some people had been advising him: Jerry Wiesner, Walter [Alter] Rosenblith, and a number of others around. But if we were lacking somebody in a particular area, I would try to think about it, identify them, or recruit them. It wasn't a great deal of work.

Q: But that was early in the campaign, correct? Prior to the nomination.

Cox: It was all prior to nomination.

Q: So through the primaries period, you were involved at about that level, something that you would say wasn't a lot of work?

Cox: Yes. I don't recall. I said it wasn't a lot of work. I don't recall doing a great deal before the convention. I do recall sort of being intensely interested in the convention and being kept very much abreast of things. So that maybe I understate or have forgotten some of the things I did. But I don't recall.

Q: Were you having many meetings directly with Kennedy or interactions on the phone or by correspondence?

Cox: Well, I don't think a great deal. I don't think a great deal, no.

Q: So at what point did your involvement in the campaign increase to the point that I believe you left Harvard temporarily?

Cox: Yes, there came a point, I suppose it would have been May or June, wouldn't it? I suppose it was fairly early after the convention when I met him at his house in Washington, Georgetown, and he asked me if I would spend full time heading up a unit which would be sort of an intellectual apparatus, preparing speeches. And he was very candid in talking about Ted Sorensen and Ted Sorensen's fear that somebody was going to elbow his way in between him and Kennedy, and did I think I could get on with Ted Sorensen. And I answered that I didn't see why not, that I could think of only one person in my life that I hadn't been able to get on with at all. So why shouldn't I be able to get on with Sorensen?

So we were set up as a unit. We weren't the research. Mike Feldman was the head of all the research of the campaign. And, of course, Ted Sorensen and Dick [Richard Naradhof] Goodwin flew with the candidate, as, during periods, did one or two others. We were thought of -- well, I was recruiting speech writers, but also brains, and speech material was certainly what we were charged with providing.

I sometimes think that the best description of what that whole period was like was expressed in a short conversation between Charlie [Charles] Murphy and myself. Charlie Murphy, you know his name. He was in Truman's White House, very important in Truman's White House, and was quite close to Lyndon Johnson. And during the campaign he, on a smaller scale, he and people under him at the Democratic National Committee fulfilled, or sought to fulfill, let's say, the same role LBJ [Lyndon Baines Johnson] that I and people working with me sought to fulfill vis-à-vis John F. Kennedy. One day we arranged to have lunch at the Carleton there next to the Democratic National Committee. So I walked over there and saw him. "Hi, Archie."

"Hi, Charlie."

"How are you doing?"

And he said, "I'm tired."

I said, "What's the matter?"

“Well, I sat up all last night drafting a speech for LBJ that just made the plane going to the campaign site where he was, and I’d done that the night before and the night before that. And the speeches will get there. Then George Reedy will sit up all night tonight rewriting my speech and give it to LBJ the next night. LBJ will read the first line and then he’ll give the speech he gave the night before.” [Laughter] I thought that, at least so far as our contribution was concerned, that was a very good description of what it came to.

Q: Right. [Laughter] So your --

Cox: It was a very, very frustrating sort of position. I don’t know how much Sorensen was being generous and how much it was the truth. He and Dick Goodwin said to people like Ken Gormley that what we wrote for speeches was very rarely of any use but that the material was useful and without it they’d have been lost.

It is true that my idea, and I think the idea of most of, many of the people, not all, that I recruited. One or two of them were big successes, and even traveled with him. Joe Kraft, who became a reporter for the *Washington Post*, a political reporter, was in that category, a great success. But it was awfully frustrating.

Q: Did you interact regularly with Kennedy at that point as well?

Cox: Well, I saw him some, interacted some with him, but generally communication was with Goodwin or Sorensen. It was difficult. Sorensen was not an easy relationship for me at all. I saw Kennedy some and I did make some travels, and if we went over speech by

speech, there'd be two or three or four speeches that I wrote which he followed pretty closely.

But on the other hand, material -- my idea of a campaign speech was, even in 1960, old-fashioned. One reason I say that, when Kennedy was to speak in a place where Franklin Roosevelt, had spoken in '32 or '36, I tried to go back and read the text of Roosevelt's speech on that occasion, and it always had a great deal more substance than the speeches in 1960. Now, of course, radio and TV, particularly TV, has come in, and style has become different. Roosevelt's style was much more akin to my professorial views. So I don't know exactly what a fair appraisal would be.

There are things that I remember favorably, and certainly nothing against Kennedy from that period. But it was not a happy time in my life. It was sufficiently unhappy so that when we were splitting up, Kennedy said to me, as you may have read -- I think it's been printed by Ken Gormley or somebody -- "Well, I hope you'll be with us getting ready for a new administration."

Q: A transition?

Cox: The transition. I gave a very -- putting it off, not a refusal, but a kind of sour answer, just because that was my mood about the whole thing.

Q: So you weren't very active then after November.

Cox: No, I was not, and I was not involved in planning for the transition.

Q: Were you hoping, despite your feelings about the campaign, were you hoping to play a part in the administration itself?

Cox: I don't think "hoping" is the right adjective. I figured I would be offered appointment to the NLRB or perhaps a second-echelon post in the Labor Department. The NLRB, how could I decently refuse? And the Labor Department certainly didn't arouse any enthusiasm for a second-echelon position.

Q: Why not?

Cox: Nothing, no new challenge. The Undersecretary of Labor, at least when I was there during the war, was an unimportant position, absolutely. No reason to think it had become more important. And it might have been, I don't know. In fact, it was Arthur [Joseph] Goldberg. I can, in retrospect, imagine being persuaded by Arthur Goldberg to do such a thing, but, in other words, it never entered my head that I'd be offered the post of Solicitor General, and I didn't think of any other that I'd be just dying to get.

Q: So the thought of Solicitor General did cross your mind?

Cox: No, I think that's a hundred percent true.

Q: So when and how did you hear about the offer of the Solicitor Generalship?

Cox: Tony [Joseph Anthony] Lewis of the *New York Times* called me up, reached me. It was Christmastime. We always went up to my mother's at Windsor, Vermont, for Christmas. And he asked me had Kennedy -- I don't know, I don't think I can be sure of quoting him accurately, but it was something like, "Has Kennedy reached you yet to offer you the Solicitor Generalship?"

I knew Tony fairly well, so I said, "Look, Tony, this is completely confidential, but I do have word to call him, and I guess that now I know that's what he's going to offer me. But you can't print this on my say-so. It would be terribly embarrassing." Well, he said he had gotten it from so-and-so, and he made it sound as though he did have another real and dependable source.

So I think it was before I ever heard from John F. Kennedy himself that I had learned. It was only a matter of hours before Kennedy's call. I had attempted to talk to Kennedy on the phone earlier, but at the time I was to call him, for some reason he wasn't available. I think I've got it right. The two of them were very close together.

I remember the first call I made was from a pay phone on the shore of Lake Sunapee, because we were on our way up to Windsor at the time he wanted me to call him. But I think I didn't get him then, and then it was after that Tony called, and then it was the next day that Kennedy finally called me and got me, during Christmas dinner, I believe, during our Christmas dinner.

Q: And do you recall the conversation?

Cox: Well, it was brief. I expressed great pleasure. I had no hesitance in accepting the job.

Q: Did you have some sense -- well, I have a number of questions. At that point did you know that Bobby [Robert F.] Kennedy would be named Attorney General?

Cox: I'm not sure. I really don't remember. Didn't we know that pretty early?

Q: From what I've read, it seems like you knew; he hadn't been named, but you knew. I think maybe John Kennedy said something to you about it.

Cox: I'm surprised, if that's true.

Q: Okay. Well, the other question I have is going back a bit. During the campaign, had Kennedy come out and/or had you worked on issues about judicial nominees or the Warren court? Because I imagine the Warren court was a big issue certainly in some states in the 1960 election. I'm not totally sure when the Impeach Earl Warren Movement began in the South.

Cox: I don't recall that as being any issue.

Q: So judicial politics was not a prominent thing?

Cox: Not by present memory at all.

Q: So essentially it sounds like you accepted the position of Solicitor General immediately upon having it offered to you.

Cox: Yes, oh, yes. Yes. Yes.

Q: And did you then have to go back to -- what did you do vis-à-vis Harvard Law School at that point? Because if this was in December, you were starting less than a month later, isn't that correct?

Cox: I suppose that the leave that I had taken was up at what would be the beginning of the second half-year, which would be about February 1. The terms have been changed, but I don't think they'd been changed at that point.

There wasn't any doubt in my mind that Erwin [Nathaniel] Griswold, the dean, would be entirely understanding of my accepting the position. I also was -- I don't know at what point I thought it through. I certainly didn't think it all through before I accepted the position, because I did it right then and there. At some point I determined that I would not ask for leave from Harvard, but that I would resign, not with the view that I would then be done with Harvard, but with the view that I shouldn't go through the business of getting a year's leave, which was all you customarily could get, but sometimes could be extended to two, but that would be the absolute limit. I felt strongly, perhaps influenced by a speech of

Learned Hand's delivered some thirty years before, that this "in and out" was bad for both the academic and the government worlds.

I remember that particularly because at a very early point, before I had actually done anything, President [Nathan Marsh] Pusey called me to come over to his office.

Q: Then the president of Harvard.

Cox: Yes. He argued vigorously that I should resign and not ask for leave. He spoke as if he was doubtful that I could be persuaded to do this, but he was sure going to have a good try. I kept trying to tell him that I had made up my mind to resign, and finally got my point across. As we got up for me to leave, he smiled and said warmly, "So long as I'm President you can come back any time you want to."

Q: When you were taking over the position of Solicitor General, it seems that the Supreme Court or the Warren Court specifically was the topic of a great deal of discussion. Looking back, maybe I'm wondering in part if this is just hindsight, but Learned Hand had made famous remarks about the *Brown* decision, and Herbert Wechsler had written his critique of the *Brown* decision. I guess a year after you came on as Solicitor General, Professor [Alexander M.] Bickel published *The Least Dangerous Branch*. There was a lot of criticism. Did you have some idea or views about the Supreme Court and how it was operating circa 1961 as you entered the office?

Cox: Well, I didn't think the *Brown* -- I didn't share the views of those who criticized the *Brown* decision and certainly didn't share anything like a hundred percent of the views of those who were critical of the decisions in the criminal field. I think those were the two controversial ones at that stage. I don't think the new due process, equal protection had yet been developed beyond *Brown*.

Q: You mean the cases like *Griswold* and substantive due process from the --

Cox: Yes, new substantive due process.

Q: Okay. So were you concerned, or did you see your role as -- you spoke earlier, I guess, as the Solicitor General's office having a dual duty to the executive branch and the Court. At that point did you see it that way entering in? Was that a remnant of your past involvement in the office?

Cox: Well, I think my ability and willingness to generalize in that way probably developed as I was Solicitor General. I don't know that I'd have said that in January 1961.

Q: So your sense of duty grew with time in some ways.

Cox: My consciousness of the possible inconsistencies between the Solicitor General's duty to the President and his duty to the Court grew with time. I don't know that I -- just as I had some awareness of the problems in the relationship between the Solicitor General and

the independent agencies but I had occasion to think much more about them as I dealt with some of them myself.

Q: And did you have any discussions with John Kennedy or with Robert Kennedy about how you would reach decisions on what position to take, etc., prior to as you were entering the office? Was there a delineation of duty?

Cox: No, no, no.

Q: So they basically gave you free reign to do as you saw fit?

Cox: Well, I think they gave me free rein to do as my predecessors had done, and I think there were assumptions certainly that I wouldn't do anything dramatically startling with political policy ramifications without some notice or consultation above. I don't know whether there were assumptions made consciously about what would happen if the head of the Civil Division, the Assistant Attorney General in charge of the Civil Division, and I disagreed on something. The Assistant Attorney General wanted to press as far as he could press. I think the assumption on things like that -- the unconscious assumption -- would have been, "Well, we'll work it out as we go along."

Q: How did people refer to you? Were you called Mr. General, or General, or Mr. Solicitor?

Cox: Well, in court you were called General. I don't know. I knew a lot of the lawyers; we were on a first-name basis. And with Bob Kennedy's informal atmosphere, most people were sort of assumed to be on a first-name basis.

Q: Okay. But the official title for the official -- I can't think of the term. If somebody were addressing a letter to you, it would be "Dear General Cox"?

Cox: No, I don't think that was very common. It would be "Dear Mr. Solicitor General."

Q: But before the Supreme Court you were --

Cox: It seems to me that it was "General."

Q: I did see in transcripts that justices would say "General."

Cox: Yes.

Q: One thing I'm curious about in the early period is there are some cases obviously that had been brought where *certiorari* had been granted prior to you entering the office. How did this transition from Solicitor General [J. Lee] Rankin to you take place, especially in terms of those cases that were ongoing and that you were having to pick up midway?

Cox: I'm not sure what you mean, how'd they take place. It became my responsibility if the papers hadn't been filed.

Q: Okay. I guess what I'm wondering is were there cases where *certiorari* had been requested by the Eisenhower administration, but that you, coming into the Kennedy administration, didn't believe that the case should be handled the same way, or that had you had it, you wouldn't have asked for *certiorari*.

Cox: I'm quite certain of two things. One, there wasn't any disposition to take a second look. Two, that the --

[END TAPE THREE, SIDE ONE; BEGIN TAPE THREE, SIDE TWO]

Q: All right.

Cox: Also you must remember in that connection that I'd become the head of the same legal staff that Lee Rankin had had. My first assistant, Oscar [Hirsh] Davis, was his first assistant, Oscar Davis. And so on down the line. But there was no thought of doing such a thing.

Q: So even if there had been a disagreement, you would have been inclined to --

Cox: Well, it would have been very hard to undo, and I don't think cases were -- well, I can imagine that when you get on to the [George H.] Bush, [Ronald] Reagan, and [William Jefferson] Clinton years, perhaps, but I just can't imagine that being the outlook in the period that we're talking about.

Q: Because of a difference in the conception of the Office of the Solicitor General or that politics were just not that divergent?

Cox: Primarily the first of those two. Politics didn't enter into the positions taken by the Office of the Solicitor General anything like the extent to which they did in the years after 1980. There have been times, as I understand it -- I take this into account when I say it -- there have been times since 1980 when every possible case for *cert* was vetted from a straight-out political point of view, as to whether that be good or bad politics to take it up.

Q: But by far, that was an exception, or did that not happen at all?

Cox: That didn't happen at all in our day. Oh, no.

Q: Because it sounds like the various Navasky's chapter or Ken Gormley's book that a case like *Baker v. Carr* was something that the Kennedys were very concerned about politically. But that didn't enter into your office, basically? Is that what you're saying?

Cox: Well, very little. The effect on party politics, I don't think we -- that certainly didn't consciously enter into the thing in the office. After all, the ultimate position of the S.G. rejected the one-person one-vote, the popular political position -- wrongly, as I have acknowledged, wrongly even by my own standards, forgetting political party politic implications. But it is a fact.

Q: You said earlier that the staff that had served under Rankin was the same; you essentially took over the same staff. So the Solicitor General's staff was basically insulated from, for lack of a better term, the spoils system. It was not a --

Cox: Oh, they were all career positions. I don't know. I never heard of any new Solicitor General making great changes on the staff of the office. I'm not sure they could. I suppose he wouldn't have to have the same first assistant, because I guess all had a sort of first and second assistants who were a little bit senior to others. Maybe that wasn't unchangeable. And I couldn't say it was never changed. But they were all career positions. So I don't think any Solicitor General has let people go and filled the resulting vacancies.

Q: During your term, you did hire some new people.

Cox: Oh, there were people who left for one reason or another, sure.

Q: Do you recall why people generally left?

Cox: No. I think the reasons varied some. Oscar Davis left because I got him appointed to Court of Claims. Phil, I think, [Philip] Elman, I'm thinking of -- I'm again I'm having old-man name trouble.

Q: I have a list of people. Do you want me to read them off to you?

Cox: Was Phil Elman right?

Q: There's Phil Elman.

Cox: He went on the Federal Trade Commission.

Q: I have Steve Pollack.

Cox: Yes. He went back to private practice, I think.

Q: Phil Heymann.

Cox: Well, Phil went to -- where did he go? He ended up at the Harvard Law School.

Q: Right.

Cox: I've forgotten where he went. He may have gone to the U.S. Attorney's office in the District.

Q: Was he somebody that you hired, though, or was he there when you arrived?

Cox: Yes. No, he was -- he had been -- I've forgotten whose law clerk he'd been, but he'd been a Supreme Court law clerk and then came to the S.G.'s office.

Q: I guess with someone like him or when you had a vacancy to fill, how did you go about filling it?

Cox: Well, there were the lawyers in the Department with whom I'd had contact, which were more likely to be in the Appellate Sections than others, but not necessarily. There were lawyers at some of the independent agencies I knew. NLRB, Federal Power Commission, I think somebody came from there. Or from private practice, I don't quite remember. I don't think the word was formally spread by advertising, but by word of mouth.

Q: So you would tend to hire from within the legal wing of the executive branch?

Cox: No. Steve Pollack, I think, came from Covington & Burling. I'm uncertain. That's a long time ago.

Q: I know.

Cox: You didn't mention the name of Wayne Barnett.

Q: Wayne Barnett was not on my list. The list is not complete. It's from various -- just as I've seen people's names. I also have John Davis. Was there a John Davis?

Cox: Yes. John. And he became clerk of the Ninth Circuit? Something to do with the Ninth Circuit, I think. He was a good lawyer, but I've forgotten what he went to do.

Q: Bruce [Jerome] Terris.

Cox: Yes.

Q: Ralph [S.] Spritzer.

Cox: Ralph became first assistant. I'm not sure that Ralph didn't come from one of the independent agencies. He may have been the Anti-trust Division.

Q: Louis [F.] Claiborne.

Cox: Well, he came from Judge [James] Skelly Wright. He came from private practice down in New Orleans, but he'd been Skelly Wright's law clerk. He wrote kind of an autobiography. Have you seen it?

Q: No.

Cox: About his years in the office. One point he's got wrong, unfortunately, and indeed I'm a little hurt by it. He has it that he was hired only because Felix Frankfurter ordered me to hire him, which is not true at all. It's unfair to Felix, and, in a sense, indirectly to me. Felix did have influence on me. Louis had had one case in the Supreme Court and in private practice, and he had made an extraordinarily fine impression on Felix Frankfurter

in the course of that case, partly in his oral argument, and particularly in his petition for rehearing.

He also had -- Louis Claiborne had very strong recommendations from Skelly Wright. He didn't measure up to the usual standards, but Skelly Wright was a very much -- you know, he was the man of the moment when he was a judge down South, and left the South to protect him in a way and went on the Court of Appeals in District of Columbia, and he was a very strong advocate for hiring Louis.

Actually, Louis was extremely good in the office and was a wonderful staff lawyer. But if you measured the usual standards for hiring, not just by me, by any Solicitor General up to and through me, I'm sure Erwin Griswold, too, Louis wouldn't have measured up, except perhaps what Felix Frankfurter had to say and the enormous praise from one district judge. But one district judge is only one district judge.

Q: What would you describe as "the usual standards"?

Cox: Well, they were people who had been of the quality of top Law Review editors at the top law schools, that had appellate experience and demonstrated their ability either in private practice or government. I mean, look at people who worked in the office, like Paul Freund, Erwin Griswold. I named two of the best. Not everybody achieved their levels.

Q: Top law schools at that point were Harvard and Yale, or were there others that you would consider?

Cox: I would include [University of] Michigan, [University of] Penn[sylvania], [University of California] Berkeley. I wouldn't look down my nose at maybe as many as a half a dozen others.

Q: One other person was Beatrice Rosenberg.

Cox: Yes.

Q: Was she --

Cox: She wasn't in the office. She was in the Appellate Section of the Criminal Division. She was very good. I don't mean to denigrate her.

Q: No, no, I understand, I understand.

How common was it for women as attorneys in the -- well, I guess it sounds like there weren't any women acting as attorneys in the Solicitor General's office at that time, is that correct?

Cox: That is correct.

Q: But were there more in the Department generally, do you recall?

Cox: There were only a few, only a few.

Q: Were women acting as legal secretaries?

Cox: Oh, certainly acting as secretaries, yes.

Q: So there were women in the Department, just wasn't in positions as lawyers generally.

Cox: Oh my, yes. Oh, yes.

Q: I'm trying to understand the procedures of how the office functioned. Could you take a case through the -- do you remember how a case might have progressed through the office when you were Solicitor General?

Cox: Let us assume that we are dealing with briefs, petitions for *certiorari*, and other papers to be filed in the Supreme Court.

A brief or other court paper would be sent to the Solicitor General's office by the Appellate Section of the Division which had handled the case. A secretary or administrative officer would then assign it to a member of the staff. The member of the staff would do the work to put it in what he regarded as shape for filing. Occasionally a little editorial work was sufficient. Often a lot of rewriting was required. Then it would come to me, and I did go over every petition or brief. I think people on the staff would have said I was a good deal of

a rewriter. That doesn't mean that I rewrote a majority of the briefs or anything like it, but that I did a good deal, especially if I was going to argue the case.

I think the appeal recommendations were treated somewhat similarly but through a different secretary, secretarial type. That's my somewhat vague recollection.

Q: So there was the router, a secretary who routed things to the various --

Cox: Yes.

Q: Divided up the work, and then it all came back to you at the end.

Cox: Yes.

Q: Was there anything that was to go directly to you without going through this middle stage?

Cox: Certainly nothing to be filed in the Supreme Court.

Q: So there wasn't an area that you wanted some control over?

Cox: Well, I'd say nothing. That isn't -- it's almost literally true. Certainly one exception popped into my head. Louis Claiborne comes back to mind in that connection. In the sit-in cases, we avoided dealing with what we used to call the pure issue of whether

discrimination by the operator of a restaurant, public restaurant, with police arrest for criminal trespass if the demonstrators didn't leave was enough to implicate the equal protection clause.

Q: That's state action.

Cox: Was there state action?

Q: Was there state action in that case?

Cox: Civil rights groups pressed for taking that view.

Q: Pressed the S.G.'s office?

Cox: Well, they pressed it on everyone.

Q: Well, they pressed it in the Court as well?

Cox: Oh, yes. Oh, yes. And they pressed it everywhere in the government. It would have involved asking the court to overrule the Civil Rights Cases.

Q: From 1883?

Cox: Yes. Which had been a fundamental foundation stone of our Fourteenth Amendment law for years. Not questioned. Some questions were arguably thrown on them by the opinion in *Shelley v. Kramer*, but otherwise no questions, I think.

My sympathies were all with the civil rights people, but to ask for those cases to be overruled took an awful, awful gulp, according to my views of the law and the need to preserve the ideal of law. I also had the gravest doubt whether a majority of the Court could be persuaded to do it. Gravest. I thought that the argument would probably lose. So we found narrower grounds on which to support the individual defendant. Happily, we could find them in all the cases up until a group of cases including *Bell v. Maryland* came along where we just couldn't think of any narrower ground.

We took a position that said there was state action but didn't require technically overruling the civil rights cases, but we told the Supreme Court in one of these cases that if it didn't decide the case on the narrow ground, we would like to file a brief addressing the broader issue if the Court so invited. It did. That was one case in which the brief was written in the both first and final versions by Louis Claiborne and myself. He wrote half, I wrote half, and then we jointly put them together and edited the other fellow's half.

We argued that in the states of the Old Confederacy there was so much state action supporting racial discrimination that it tainted any police action backing up private discrimination and that that was enough state action to implicate the equal protection clause. So that the things we cited for the state action were sort of a whole roster of

discriminatory laws that the states had had and in many cases continued to have. But as you know, Justice [William Joseph] Brennan [Jr.] found a way of ducking the question.

Also, I have always thought if you read the opinions in *Bell v. Maryland*, it becomes clear that if the court had decided the gut issue, the pure issue, the civil rights division, and the civil rights movement, and we would have lost on the law, but it's not conclusive. You have to draw some inferences. So, of course, a lot of people were very critical of that. The civil rights lawyers were very critical of our position. Navasky was very critical of it.

Q: Well, it comes up in everything. I think it's the issue that comes up in everything I've read.

Cox: Yes.

Q: Navasky also in, I think, Casper's lawyers before the Warren Court, it is the central discussion when your name is mentioned, is this specific case or these specific set of cases.

Cox: Yes.

Q: So I have a few questions, one of which is, what was your thinking on distinguishing *Shelley*, which involved racial housing covenants? Why would that be state action yet --

Cox: Well, state action was state action only at the stage where they enforced the covenant.

Q: But at the level of --

Cox: Judiciary.

Q: So the key distinction between that and a restaurant was that in housing they were invoking the judiciary, but the restaurant, a lunch counter, they were just bringing the police in?

Cox: To enforce a nondiscriminatory law, and there was no suggestion that they wouldn't enforce it against any other sit-in trespasser. When I say "other sit-in," I mean other than civil rights.

Q: So they could have been sitting in at the lunch counter to protest. They could have been vegetarians protesting the service of meat.

Cox: [Laughs] Yes.

Q: Even though --

Cox: Yes. But I've always felt those criticisms unfair. After all, we did win for the civil rights movement every one of those cases.

Q: When you talk about civil rights lawyers, I'm imagining specifically you'd be talking about Jack Greenberg, of the Legal Defense Fund.

Cox: Jack Greenberg, that's very much one of them, yes.

Q: Would Bob Clark, Robert [L.] Clark have been another? He was the General Counsel of the NAACP [National Association for the Advancement of Colored People] then.

Cox: Well, I don't recall that.

Q: So I'm just wondering if you can recall meetings you had with Jack Greenberg. It gets to a more general question: "If a group or an attorney, if the S.G.'s office was entering a case on an *amicus* brief, would people come to you and lobby you to take X position or Y position?"

Cox: Sometimes.

Q: And was that considered perfectly acceptable?

Cox: Yes, yes. I think actually the civil rights lawyers were far more likely to operate through Burke Marshall and others in the Civil Rights Division, or Bob Kennedy.

Q: So, can you recall on the sit-in cases, for instance, who came to you to try to --

Cox: Well, as I say, I think the civil rights people were more likely to have approached the others to get them to get me to do it. I surely saw Jack Greenberg around from time to

time. We may have exchanged a few words about this, but I can't recall his specifically coming to seek to persuade me.

Q: But Burke Marshall or Robert Kennedy may have done so?

Cox: Yes. I don't know that -- I certainly know that Burke made clear what the civil rights people wanted, and I guess he tended to agree with them. I'm not a hundred percent sure on that. He didn't press terribly hard in a way that -- well, you know, he didn't rant and rave about it. And Bob was content to leave it to me. I think they pretty much left things to me. For one thing, I think they -- I don't know this, but my sense is that they were aware that if something were to go to the President on a question before the Supreme Court, he would say to take whatever position I said to take.

Q: Even if his brother disagreed?

Cox: Yes, I think even if his brother disagreed.

Q: In this process of cases going up, did you have meetings of all the attorneys to discuss the disposition of various cases?

Cox: When you say "all the attorneys," do you mean all the attorneys in the office?

Q: Yes. Say, what, there were nine or eight?

Cox: No, no. We only had one so-called formal "staff meeting," which was on one of the sit-in cases where I determined that we would make a certain narrow argument for reversing the conviction. The staff was, some of them violently, against the attack on the Civil Rights Cases, were violently opposed to the legal position of the civil rights organizations. One of them was Bruce Terris.

Q: He was opposed to the position the civil rights protestors were taking?

Cox: Yes. And I had come up with, again, a narrow, specialized ground of decision. I got a request for a staff meeting, which we'd never had. One day a week, those who were free to do it would, in fact, all have lunch together at one of the downtown government cafeterias, which came somewhat close to being a gathering of the whole staff. But this was the only formal staff meeting. It was begun by saying that, "If Solicitor General files a brief in this certain case taking the position that he described, that I had proposed, it will be the worst brief filed by any Solicitor General in the history of the Supreme Court." And the staff was waiting on me to make clear its disapproval. Well, the meeting didn't last long, and we filed the brief.

Q: So what did Bruce Terris want?

Cox: He wanted, I guess, for me to file nothing or to have supported the conviction.

Q: Do you remember what his reasoning was for that position?

Cox: Well, he felt that's the law. That's the law. It wasn't opposition to the civil rights movement. Bruce was given to very strong emotions on a certain number of cases. His pro one-person one-vote was just that strong.

Q: You said the meeting ended very quickly. What was your position in response to this?

Cox: Well, I don't remember. I may have argued for it briefly, but made it clear, as I suspect most of the people in the room knew, that that was what we were going to file.

Q: Was that sort of vocal opposition perfectly acceptable to you?

Cox: I thought it was an inept way of presenting his view. But was it something unacceptable in the sense that I seriously thought worse of Bruce Terris or his work? No. Was it anything that I would consider any kind of reprimand for? No. And anytime they all wanted to get together and discuss anything, I'd certainly have been glad to do it. The reason we never all got together, there never was a case where all eight or nine lawyers had worked on it.

Q: Did you have smaller meetings?

Cox: We had smaller groups, smaller meetings. I had a lot of meetings whenever there was a disagreement between my staff's recommendation and the recommendation of the division. "Whenever" may be too much, but certainly as many of fifty percent of the times, we would have a meeting and discuss the matter. We had lots of meetings, some meetings

to discuss briefs. If I were making changes to a brief, I wouldn't make some without talking them over with anybody else who had worked on the case, unless it was just changing the choice of a single word or something like that.

Q: And would you look something over, call the person in and discuss it? Was there some sort of formal procedure, or some not even formal, but some regular procedure that you followed in that process?

Cox: Well, I don't think of the procedure as any more than somebody getting on the phone and finding a convenient time and setting up the meeting. If it was a matter of changes to the brief or talking about a problem in relation to a brief, I might get the individual to come in or I might walk down to his office and talk about it there. It'd just be a matter of how it happened to strike me on the particular occasion, whether get up or whether it was important to stay near the phone. Or if it was a matter requiring any kind of conference, then it almost had to be in my office because that's where there would be room. Most of the offices of the S.G.'s lawyers are not big enough for conference of more than three, four people.

Q: How did you handle conflicts with other divisions? Can you remember -- you had mentioned that, and I'm wondering if you can remember any meetings in particular where there was such a conflict between your staff recommendation and the division.

Cox: Well, there were a number of such cases, and some were tough ones to resolve. I think that they usually involved Anti-trust Division, maybe occasionally Criminal Division although I think that in the end, Jack Miller nearly always gave in.

Q: Jack Miller was the head of what division?

Cox: Criminal.

Q: But you can't remember the specifics of any meeting, any one meeting?

Cox: No, I don't think so.

Q: One case that I actually read about -- well, you discuss it in a footnote in *The Court and the Constitution*, your book. At the Kennedy Library there is an interview with Professor Chayes about the "flags of convenience" case [Cox laughs], which I just want to give the actual name for people who are -- it's *McCullough v. Sociedad Nacional de Marineros de Honduras*, described by you and others as the "flags of convenience" case. How in a case like that -- well, specifically in that case, how would the fact that there were a lot of different interests in the administration handled?

Cox: Well, this was handled somewhat differently from any other because of the involvement at very high levels of Defense Department, Labor Department, and others. The conflict between the Labor Board and the Defense Department became clear. Various others -- by "others" I mean other agencies who had views about it. And this was brought to

the attention of the White House. I'm not quite sure how. But the President appointed a Cabinet committee to determine what position should be taken. And the committee, not surprisingly, appointed a subcommittee which, not surprisingly, appointed a working group. And they fought about it --

[END TAPE THREE, SIDE TWO; BEGIN TAPE FOUR, SIDE ONE]

So, sorry. You were discussing the working group on the *McCullough* case.

Cox: "Flags of convenience" case.

Q: Right.

Cox: Well, in the working group and in the formal -- in the other groups up to the cabinet committee, the Defense Department prevailed with everyone coming to agreement except the Labor Department. And then it was scheduled for a Cabinet meeting at the White House. I think it was a full Cabinet meeting, but maybe it was just the committee and the President.

So I acted as if I were a member of the Cabinet in the role of the Attorney General. We assembled in the Cabinet room and waited for the President to come in. The President came in to the usual "Good Mornings," and took his seat and said, "Well, I understand that you fellows have reached a decision that national defense requires that the NLRB not take jurisdiction in these cases and that that position be urged on the Supreme Court and that

the Labor Department disagrees. Before you make up your minds, consider one thing.”

Whereupon he got up from his seat and walked half the length of the room to a bookcase and pulled down the green volume that is published as a Senate document containing all the campaign utterances of the candidates in a presidential election, and turned to a marked place and read aloud, “It is my considered view that the National Labor Relations Board has jurisdiction over the seamen under flags of convenience. John F. Kennedy.. Telegram to Joe [Joseph E.] Curran.” And dumped it on the table, “Consider that,” and walked out. The meeting broke up

By this time Arthur Goldberg was no longer Secretary of Labor; I guess he was on the Supreme Court. Bill [William W.] Wirtz either had become Secretary or was acting. Bill and I were Harvard Law School classmates and friends. He offered me a ride in his Cabinet car back to the Justice Department, and then he'd go back to the Labor Department. And as we got into his car he said, “Well, Archie, it's up to you and me to figure out how we're going to deal with this.”

And I said, “Oh, I think I've got a solution, Bill. I think we can happily get by this particular case saying ‘no jurisdiction’ and leave the broader question unanswered,” because these were vessels plying between Honduras and the United States and carrying bananas. They had Honduran seamen and flew Honduran flag, entirely appropriate. They weren't flags of convenience in this case at all, and it was most inappropriate for the NLRB to take jurisdiction. And I summarized for him, “We'll take the position 'no NLRB jurisdiction in this case, for these special reasons that don't apply to any other case.' The Defense Department can't really object. We're taking their position in the case before the

Court. Joe Curran won't like it, but we can say to him that his position's open to the future. 'You got the President's telegram, yes, fine, but this one isn't really a flag of convenience.'"

So we agreed this would do it, and that's what we filed. And I'm sure if you were to dig out the brief, you would find it is just that narrow. The Court, happily for me, wrote a much broader opinion saying no NLRB jurisdiction over any of them.

Q: So the Department of Defense --

Cox: Prevailed in its view.

Q: But did you even, in your oral argument in that case, do you recall even hinting?

Cox: I don't think I argued it, did I?

Q: I'm not sure. I'd have to check. I'm not sure. I don't think I have it here.

Cox: Well, in any event, I don't think there was any broader position taken. Certainly the brief didn't. And I assume -- I can't say I remember, but I assume I made it clear to whoever argued it that he was not to speak to Liberian vessels or Panamanian vessels.

Q: It sounds like in a lot of -- the way you described the sit-in cases and the way you're describing this case, that a lot of how you proceeded with your job involved understanding that there was a political outcome or a substantive outcome or, I guess, the non-legal

outcome of the case and that there were larger legal ramifications. And a lot of what you were doing was trying to narrow the case to keep the Court from having to rule on the larger issue.

Cox: Well, I did, in fact, do that, whether it was political ramifications or some other ramifications. I was well trained in the Socratic method. You argue the narrowest ground to win that case. [Nikita] Khrushchev had it right: cut off the smallest possible slice at a time. Sometimes it was a way of achieving broader goals that perhaps you couldn't achieve if you sought to achieve them in broad legal terms.

Q: I just have, I think, a few more questions and then I think we can break.

Go back to when you were talking about the procedures in the office, to when you said that there was somebody who directed the cases amongst the lawyers. Were there certain people who specialized in certain areas as there had been in to a certain extent in Fahy's office?

Cox: Wayne Barnett was the expert on tax cases.

Q: I guess in both instances you mentioned tax because it was particularly intricate or difficult. Or was it just a quirk that there was somebody who was particularly good or eager to work on tax cases?

Cox: Well, it's kind of a specialized field, and either you know it or you don't. I'm sure that when I was in the office as a lawyer on Charles Fahy's staff, I worked on tax briefs. And when I was Solicitor General, Wayne certainly wasn't the only one, but he was the expert. He in later years taught tax law out in California -- at Stanford [University], I guess.

Q: I guess at this point I'm asking more generally in your office, did you do moot courts or anything to help people prepare for oral argument?

Cox: No.

Q: Did you give any advice to people who were about to make their first argument? Do you recall that sort of preparation?

Cox: Well, I think that I would probably talk informally but widely about the different justices. Justice [Hugo LaFayette] Black, for example. And it seems to me that we must have said to each other as some point what I particularly always had in mind about him, that you had to be very careful when he asked questions. He had a way of asking what seemed to be a very simple question with a very obvious answer, and if you gave the obvious answer in pretty general terms, you suddenly found that you were dead logically, that you had been trapped into giving an answer that would give away your position or an important part of your position on the case before the Court.

I don't think I ever said that to Phil Heymann five days before he was going to argue in the Court, but I'd be surprised if I didn't say it at some point. Byron White seemed to me to ask

questions frequently just for the fun of the intellectual discussion. Frankfurter could be the most annoying with his questions.

Q: How so?

Cox: Well, he -- an extreme example, I was arguing a -- I think it was a Federal Trade Commission case, and I'm not sure what one.

Q: Was this *St. Regis Paper*?

Cox: I really don't remember which, but a case with several issues, each requiring somewhat separate development and taking some time to develop logically. And as I was about halfway through developing the first point, Felix asked -- he raised the second major point. And I said, as I regularly did, "Our answer to that will be thus and so. I plan to develop it in the second part of my argument." Ordinarily, the justice would then let you go back to the thread of your agreement. But not Frankfurter. He persisted. It got so bad that I did something I would not ordinarily do. I said, "Your Honor, to answer your honor in full requires me to cease developing my argument on the first half of the case, and shift to the second, and I assure you I will come to it." No, he insisted that I deal with his part then and there.

It's somewhat like the old story. I wasn't in court on the occasion, but I heard the story many times. John Dickinson was arguing a case for the Pennsylvania Railroad. I think for some reason -- maybe there were two co-defendants or two parties -- his time for argument

was a little more severely limited than a full hour. He started his argument, and Frankfurter cut in with a question of jurisdiction and took up the entire half hour with his questions.

[Harlan Fiske] Stone was Chief Justice at the time and said, "Mr. Dickinson," -- he was greatly respected, one of the best lawyers of his day in the Supreme Court -- "Mr. Dickinson, the Court will give you additional fifteen minutes because your time has been occupied before you got to the merits." And Mr. Dickinson started arguing the merits. Frankfurter went on with his questions for the full fifteen minutes, and Stone leaned forward and said, with some feeling, "I guess it does no good. Your time is up, Mr. Dickinson." Justice Frankfurter could be as bad as that. He'd get himself all wound up in his questioning and forget everything else.

So they all had their ways, little things. [William Orville] Douglas, his questions were very likely to be argumentative, as often were Black's and Brennan's.

Q: And usually argumentative towards your position?

Cox: Well, they sometimes might be or they might be arguments on the other side.

Q: I guess I ask that because it seems like Douglas and Brennan would have been people who would have most typically taken your side in the end vote.

Cox: Yes. But I wasn't basing this comment necessarily or primarily on my own experience in arguing. And, Black and Douglas could be skeptical about or opposed to the government's position.

Justice Douglas often seemed to be paying little attention to the oral argument. He told me once, out of court, that he would follow the argument enough so that if counsel said something very wrong or very new and original, surprising in that sense, then it would ring a bell in his mind and he would stop reading the letters he was signing or other things he was doing, and concentrate his attention. But otherwise, he often did other things during the course of oral argument, while listening with one ear to it.

Q: Well, since we're going through them, maybe we can just -- or we could start tomorrow by discussing specifically. I mean, you've already discussed Justice Black, Justice Frankfurter, Justice Douglas, and Justice White, their approach to oral argument. Did the Chief Justice, did he participate very much, or what was he like in oral argument?

Cox: Well, he asked questions that generally were pretty general and not very closely phrased or narrowly reasoned. He didn't ask a great many. He sometimes caused some consternation in the government lawyers arguing criminal cases. He would ask a question of fact, and the answer would be, "There's nothing in the record about that." And it was not unknown for him to smile at that point and say, "I know there isn't, but you know the answer. Tell me." Of course, most justices would scream at having that done or doing that. And it usually was when the answer was harmful to the prosecution.

Q: And in that case, would an attorney answer?

Cox: I think they'd answer. This only happened very occasionally.

Q: How about Justice [Tom C.] Clark?

Cox: He didn't ask very many questions at all. I don't think there was anything distinctive about his questions.

Q: Justice [John Marshall] Harlan?

Cox: Well, he asked very thoughtful questions, usually because he did feel the need of an answer, although occasionally it would be simply a question that looked toward an answer disagreeing with the implication of a question from one of the more liberal justices.

Q: So in some ways preparing a dissent?

Cox: Well, I think that overstates it. Just wanting to have both sides there. But I think he was mostly interested, wanting help in thinking about it.

Q: Justice Brennan. You mentioned briefly that he asked argumentative questions.

Cox: I didn't intend to imply that his only questions were argumentative. He asked a lot of questions. He liked to discuss the case, but he couldn't quite do that, but he'd move in that

direction. But nothing like Frankfurter. Frankfurter would take long periods of time, as my story about John Dickinson's argument shows. Not that he always did it. Frankfurter could surprise you. The first argument in *Baker v. Carr*, he had practically no questions.

Q: Because he was so upset, it sounds like, from everything I've read. [Laughter]

Cox: Justice [Potter] Stewart, his questions usually were seeking answers, occasionally if he knew counsel, were efforts at a little bit of humor.

Q: Justice [Charles Evans] Whittaker. He wasn't there for long. I guess he was there through the '62 term.

Cox: Well, he was there until after *Baker v. Carr*.

Q: Oh, right.

Cox: We need to talk about Justice Whittaker and his resignation.

Q: Okay. Why don't we wait until tomorrow, because we've already been talking for five hours today.

Cox: [Laughs] Okay.

[END OF SESSION ONE]