

TTT

Interviewee: Archibald Cox

Session #2

Interviewer: Thomas Hilbink

Brooksville, Maine

June 20, 2000

Q: This is Thomas Hilbink, with Professor Archibald Cox on June 20, of the year 2000, in Brooksville, Maine, for the Supreme Court Historical Society project on the Office of Solicitor General.

So yesterday you had been talking about your clerkship with Judge Hand, and the quote I guess you were trying to recall, you quote in your book, *The Court and the Constitution*, as, "He must preserve his authority by cloaking himself in the majesty of an overshadowing past, but he must discover some composition with the dominant needs of his time."

Cox: Yes, I think that states -- he was writing of Cardozo, but I think that it states his own philosophy to the extent one can reduce it to a single sentence, and one with which I became imbued with under his influence.

Q: After I read that last night, the question that came to my mind was, you had talked about how he said to you, "Sonny, to whom am I responsible?"

Cox: Yes.

Q: And I was wondering, when you were Solicitor General if you were to ask one of the people working for you, "To whom am I responsible?" what would your answer have been to your own question.

Cox: Well, I would probably have -- during the later years of my four and a half years I would surely have responded in terms of the obligations, divided obligations, to the President as head of the executive branch, on the one hand, and to the Court, the law, on the other.

Q: There were a few questions as well that I was thinking of after going over the tape. I guess you didn't know at the time, but as you found out later, that Professor [Paul Abraham] Freund was also considered for the --

Cox: Oh, he was offered the job.

Q: He was offered the job by Kennedy.

Cox: Yes.

Q: And turned it down. Did you at any point have discussions with Professor Freund?

Cox: No.

Q: Before or after you took the position?

Cox: About the position?

Q: About being Solicitor General.

Cox: No, I don't think so, because certainly he didn't speak to me of the offer to him. John Kennedy knew of his reputation and of my admiration for him. He didn't need to ask me what I thought of him.

Q: Though I think when I was going through the Kennedy papers, they had sheets of recommendations, and you did recommend Paul Freund for the position of Solicitor General during the transition.

Cox: Oh, oh, I see. Well, I'd forgotten that entirely.

Q: It was one small sheet of paper.

Cox: And Paul categorically recommended me, as I had learned, which was good of him. And I guess it was fairly easy for Kennedy to do, in view of previous relationship. But I didn't know any of that at the time, and I didn't need to talk to him or anyone else about whether I'd take it. I think I knew that the offer to him would create a problem in his mind.

Frankfurter had refused the job under Franklin [D.] Roosevelt and it wasn't a tremendous surprise by any means to learn that Paul felt his primary obligation was to Harvard [University], and to keep on with editing the books, the series about the Supreme Court.

Q: The *Holmes* bequest?

Cox: Yes. Have I answered your question?

Q: Sure, sure. The other two people that Ken Gormley writes were considered, though not offered the job, were Carl McGowan and Morris [Berthold] Abram. Were you at all familiar with them and their work?

Cox: Carl McGowan I certainly was. I don't remember much, but he had a very fine reputation. He was widely known at the time. Where had he been, in Chicago?

Q: I'm not sure.

Cox: That's kind of a wild shot. It may be memory or it may be totally wild. He went on the Court of Appeals for the District of Columbia Circuit. Again, I'm awfully vague on this, maybe I should simply say nothing, but if for any reason you want to pursue it farther, I would pursue whether he didn't have something to do with Adlai Stevenson's previous campaigns and work. But he wasn't primarily a political figure.

Morris Abrams was a prominent lawyer in New York. I don't think he got any appointments during the Kennedy presidency.

Q: Not that I know of. After you accepted the job, do you recall advice you received from anyone or letters? I'm sure you received letters of congratulations. But the people, I guess, I would think primarily of would be Erwin Griswold, who was then the Dean, correct?

Cox: Yes, yes.

Q: And Learned Hand., who was still alive then.

Cox: Well, they both communicated their congratulations. Did they include advice?

Q: Yes.

Cox: To the best of my recollection, no. I don't think it was -- it wasn't in the character of Learned Hand.. The chief message one got from Erwin's congratulations and so forth about my leaving was he wished it was him [laughs]. I was able to tell. When LBJ was looking for a Solicitor General, I guess to succeed Thurgood Marshall, when he put Marshall on the Court -- no, it must have been -- Marshall succeeded me. Do you remember who came as Solicitor General after Marshall?

Q: You're right. It was Griswold.

Cox: It was?

Q: Yes.

Cox: Well, [William] Ramsey Clark, the Attorney General, called to ask me to comment on who should be named, and I said to him the ideal person for him would be Erwin Griswold. "Oh, he'd never take it," Ramsey said.

I said, "He'd fall all over himself to take it. You can tell the President that unhesitatingly he'd take it." He always has been a strong Republican, but he was a very visible head of a committee to reelect LBJ in '64. And they did ask him. He'd been in the office. He'd made a tremendous reputation when he was in the S.G.'s office, when he was in the Tax Division and so forth. And, of course, I don't mean to belittle his reputation as Dean, but that you would know of. You might not know the other. But, no, I don't think he -- he knew I'd worked in the office and so forth.

Q: And Griswold remained S.G. under [Richard M.] Nixon, as well.

Cox: He stayed on quite a while under Nixon and then resigned.

Q: But then returned to Harvard Law School afterwards?

Cox: No, he went into practice in Washington.

Q: Oh, he did?

Cox: Yes.

Q: Oh, okay. Another question I had following up on yesterday is, and this, I guess, might bring us into other matters, but your staff that you said largely stayed on from the previous administration as well, but I'm curious, could you connote some political bent to the staff? Would you say they were generally conservative or liberal, that their views on some of the issues -- I guess I'm thinking from Ken Gormley's book that your first assistant, Oscar Davis, advocated that you take a civil rights case, that your first case argued before the Supreme Court be a civil rights case, when Justice Frankfurter had suggested it be a criminal case.

Cox: Yes, yes.

Q: And it struck me that he was looking at things from a political perspective. But do you recall that members of your staff were openly conservative or liberal, if not Democratic or Republican?

Cox: Well, I think they varied a good deal. Probably the center, if you can have a center of opinion of a group, was somewhat on the liberal side, but that's not true of everyone by any means. On some individual issues some may have been passionately liberal but not on others. Bruce Terris was, for example, on the one-person one-vote issue; but as I told you yesterday, when it came to sit-ins and the question whether there was a denial of equal

protection in enforcing the criminal trespass statute, he and others felt passionately that the law required deciding against civil rights movement.

So they varied. Some came from private practice. Probably a majority had made careers and legal positions in the government, whatever age they were at that part of their careers, and therefore had disciplined views and were not party politics-minded people.

Q: So in some ways they were advising you as lawyers.

Cox: Yes. Oh, yes.

Q: You didn't look to them for political guidance.

Cox: No, no. And I didn't think a great deal in political terms.

Q: We spoke yesterday, briefly Jack Greenberg's name came up. And I was wondering, when you were Solicitor General, there were some cases where you were involved as *amicus* and then there were other cases where you weren't. Did you have an impression of the Legal Defense Fund's work in that time?

Cox: Well, they were very good. They were good. They were first-rate lawyers.

Q: Did you agree with the direction where they were pushing the Court?

Cox: In general. Well, you know, sometimes yes, sometimes no. My sympathies were with the civil rights movement.

Q: Clearly.

Cox: Quite strongly so. On the other hand, there were positions on individual cases that seemed to me to overdo it as a matter of constitutional law. I don't have any particular case in mind, but --

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

Q: Okay.

Cox: Well, I think that's the answer to your question.

Q: Okay. Yes. You did discuss yesterday the specifics of the sit-in cases and your position -
-

Cox: Yes. I don't think there were others. Did I agree with them a hundred percent in all the school desegregation cases? My memory isn't that clear. But I would doubt it. Also we supported their position in general. And when I said "in general," I meant that there were a number of cases where we supported their conclusion but we may not have agreed completely with their reasoning. I don't think we ever filed a brief opposing their view.

Q: What about contact with other attorneys? One person I'm thinking of is Joe Rauh, who would have been doing a lot of litigation in a number of contexts at that point.

Cox: I know Joe [Joseph Louis] Rauh. I had known him in the past. I assume I had some contact with him while I was Solicitor General. There's nothing that particularly stands out in my mind, but that may be a defect of memory.

Q: The other thing I'm wondering about is contact with the press while you were Solicitor General. Did you hold press conferences?

Cox: Well, I don't think I ever did. Don't remember any. You've got to remember all the way through here that the old man's memory isn't awfully reliable.

Q: No, I understand. Well, you did mention Anthony Lewis yesterday and that he had called you.

Cox: Well, I knew the lawyers [reporters] who covered the Supreme Court. Tony, I guess, is the only name I can reel off, but there were one or two others that I knew not quite as well as Tony. It's partly because I had known Tony when he was a Nieman Fellow at Harvard and studied a year at the Harvard Law School.

Q: The Nieman Fellowship, is that a fellowship for --

Cox: For press people.

Q: Okay. Yes. Yale has a similar program as well.

So we were talking about Anthony Lewis. So you got to know him while he was at Harvard as a Nieman fellow, then he called you before John Kennedy had, about the Solicitor General's Office position. Did you remain in contact with him regularly during the administration?

Cox: Well, in a sense, yes. I mean, I would see him up at the Court at least once a week on Mondays when the Court was in session. Did we talk occasionally? I'm sure the answer is yes, although I don't have pictures in my mind of specific occasions or subjects. And I think we talked fairly candidly on both sides.

Q: On or off the record?

Cox: It may be that occasionally it was made explicit that it was on or off the record. I think in most cases one trusted to the other's judgment as to whether it was appropriate to treat it as on or off the record. The reason I'm putting it both ways is I seem to remember Tony's telling me things which were going on within the Department, about my colleagues that I didn't know, and it would have been amiss for me to say that Tony Lewis told me that. But I think this was treated as between friends trusting each other.

Q: Jack McKenzie, he was another.

Cox: Oh, he was another. That's right. That was his name. He's a good fellow, yes.

Q: Yes, he's now at NYU law school. I'm not sure exactly what he's doing, but he's taking classes with me.

Cox: [Cox laughs] Yes, he was a good sort.

Q: Were you closer to, or did you have more contact with someone like Tony Lewis than someone like Jack McKenzie?

Cox: I would think somewhat more.

Q: Because he was someone you knew. In the Kennedy Library there's an interview with Tony Lewis where it's a question of contention about whether or not he, as the *New York Times* reporter, got the Solicitor General's briefs before the other news sources did. Did you have any arrangement to pass him copies before?

Cox: Certainly no arrangement that I had any knowledge of. Does he acknowledge that he did?

Q: Not exactly, no.

Cox: Because I was going to say, I never heard of it. I don't think I'd have furnished a copy, no, I don't think it ever would have reached that far.

Q: I'm trying to decide whether we should -- well, why don't we talk about the Department of Justice more generally. Yesterday we talked a bit about, well, you said that you had not had any formal discussions with either John or Robert Kennedy about what your position would be or how you would come to decisions. But I'm wondering, I know you did more than just the appellate advocacy, it sounds like, from various things, that you did play -- for instance, in legislation, that you played some part in the drafting of the Civil Rights Act of 1964. Is that correct?

Cox: I certainly was consulted about it. I don't think there was any disagreement between me and Burke Marshall and the lawyers in his office that we would rest it on the Commerce Clause. But I was certainly very much a part of that decision. I don't recall having any very close contact with the drafting. I did some work up on the Hill, lobbied certain people, particularly -- oh, dear, names again. I know him quite well. Mayor of New York at one time, congressman.

Q: John [Vliet] Lindsay?

Cox: John Lindsay. I saw John on several occasions, worked with him, worked with or on him, whichever is the right preposition. And there were others, not a great many. There could well have been questions that came up that I was talked about, what did I think. Well, with Burke, or one of the lawyers in his office, discussions of that kind were frequent, friendly, informal, very informal. Might just be over the telephone. Might be talk. Was I

in on conversations in Bob Kennedy's office? Probably. I don't have any particular memory.

The legislation that I was -- [coughs] -- I'm sorry. One of the things that I got with old age was terrible allergy.

Q: Do you want me to get you a glass of water?

Cox: No, I don't think it would help particularly. Was the Voting Rights Act.

Q: Before we discuss that, can I ask you another question about the Civil Rights Act?

Cox: Yes.

Q: I guess you said that there wasn't much disagreement about grounding, especially Title II of the Civil Rights Act and the public accommodation section in the Commerce Clause.

Cox: Yes.

Q: Why the Commerce Clause? Why was that so generally accepted rather than using the Fourteenth Amendment?

Cox: The Civil Rights Cases.

Q: The fear or the thought that you would have to overturn those?

Cox: Yes.

Q: And that you couldn't, or that the Court wouldn't do it?

Cox: Well, you say "You couldn't" or "that the Court wouldn't do it," aren't those equivalents?

Q: Right, right, right. I was just trying to phrase it a slightly different way.

Cox: Probably wouldn't. That the Court probably wouldn't overturn them. That was my guess.

Q: But when they were coming to you, it was in part, or was it as a lawyer, just as another mind, or do you think you were treated as the Supreme Court expert? You knew what was going to happen if this went up to the Supreme Court.

Cox: Well, I suppose it was a mix of the two.

Q: So you said you had been involved in the Voting Rights Act. How was that? What did you do?

Cox: Well, by that time, of course, Nick [Nicholas de Belleville] Katzenbach was Attorney General. Well, I was consulted again about on what constitutional theory to act. By that time was Ramsey Clark Attorney General?

Q: Not yet, I don't think.

Cox: Not yet. He may have been Deputy. That would probably be it. In any event, the basic scheme that this is necessary and proper to enforce the Equal Protection Clause, that one had to outlaw the poll tax and other things like that as a way of assuring equal treatment of black voters. And that because it was a way of assuring equal treatment of black voters, a means to the end, that was constitutional under Section Five of the Fourteenth Amendment. That was my thought and that's was what the act was -- the core of the constitutional theory of the act, and the core of what they upheld in the voting rights cases. I've forgotten their names now.

Q: I have them.

Cox: No, Nick was still certainly Attorney General, because I remember writing his argument for him.

Q: He argued it before the Supreme Court.

Cox: Yes. I was out by the time.

Q: And did you anticipate a challenge?

Cox: Oh, yes, it was clear. Oh, it was very doubtful. The constitutionality of the Voting Right Act was fairly debatable.

Q: It seems like at that point -- Section Five of the Fourteenth Amendment, correct?

Cox: Well, it had never been invoked before.

Q: Right. That's what I'm --

Cox: Oh, I misunderstood you.

Q: It hadn't been used before, really, had it?

Cox: Well, it had, but you had to have read rather widely to be aware of the analogies. The analogies that were closest were under -- what is the language of Section Five? Is it as broad as "necessary and proper"?

Q: Hold on a second. Okay. Section Five. "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Cox: It was reading in a "necessary and proper" theory of which the Court had to be persuaded. There were cases upholding legislation forbidding the manufacture of malt

liquors, which was sustained under the enforcement clause of the Eighteenth Amendment, the prohibition law, on the ground that they were necessary and proper ways of preventing the manufacture of intoxicating beer. That they were broader than the prohibition law was held not to be a valid ground for holding them unconstitutional.

Equally, you didn't have to show that the literacy tests outlawed by the Voting Rights Act were always applied in a racially discriminatory fashion; it was enough for the government to show that they frequently, under certain circumstances, were likely to be applied in a racially discriminatory fashion.

What were those circumstances? Well, I forget; but the Voting Rights Act identified them. It focuses on the Old South states.

Q: What about the shift in burden in proving the discrimination, that the Voting Rights Act took rather than placing the burden upon those people, the voters who had been discriminated against, to prove that there was discrimination, that the voting rights had flipped that burden and placed the burden on the state to prove that they had not discriminated? Was that something --

Cox: Well, it did that only under certain circumstances. I've forgotten them. One was whether less than a certain percentage of the people had voted. And the Act did allow the states, instead of making this conclusive, a chance to prove that the inference was not warranted, that there was no discrimination in the application of the literacy tests. If the state could carry the burden of proving that it didn't discriminate, then the Act let it out.

So that it was sort of like saying if the brewery could prove that it would make only near-beer, then it gets out from under the statute I spoke of in connection with the Eighteenth Amendment. But one was not likely to know of those cases.

Q: Right. They were rather obscure. Was there a sense in drafting either the Voting Rights Act -- well, the Civil Rights Act it seems clear from what you said earlier. But the Voting Rights Act, of anticipating how certain justices might see this and where they might fall --

Cox: Oh, I don't think so. But I was an occasional advisor about these pieces of proposed legislation, not someone who was regularly present at the meetings in the Department of Justice and followed it through with care.

Q: As an appellate advocate, were you concerned about statutes that were drafted to set up three district Courts and then a direct appeal to the Supreme Court? Was there something about that that would have been more difficult for you since it wouldn't have that second stage of an appellate process?

Cox: I don't remember any such legislation or proposed legislation.

Q: Well, it seems that -- I could be mistaken on this. It seemed that the Civil Rights Act set up that kind of fast track appeal.

Cox: Maybe so. That can't have been very important or I would have some recollection about it. I mean "very important" to me in my role as Solicitor General.

Q: The other major pieces of legislation I'm wondering if you played any role in are some of the Great Society legislation that was proposed in 1964, such as the Medicare/Medicaid Bill. Did you play any role in that?

Cox: Don't think so.

Q: Okay. And then what about the Equal Opportunity Act, and specifically the Legal Services Program?

Cox: I don't think I had anything to do with the legislation. I probably was aware of some of these things at the time, but I don't think I had any part. Certainly I have no recollection of contributing anything of any significance.

Q: What about policy more generally? One thing -- well, specifically, the civil rights movement. Were you involved in any discussions of strategy or how to handle the various -- the crises of the civil rights movement such as the Freedom Rides or the --

Cox: Oh, yes, yes. I certainly -- again, I was not a regular participant. It was not one of my responsibilities in a literal "jurisdiction within the Department" sense, but I was sometimes consulted about specific things. Often they were just informal contacts. I often talked with Burke Marshall, people like John [Michael] Doar, and [Harold H.] Greene in the Civil

Rights Division, Nick Katzenbach as head of the -- what's it called? His title was Assistant Solicitor General, but he had nothing to do with the Solicitor General or the work of the Solicitor General. Later the title was changed to Office of Legal Counsel or something like that. It became quite an important division of the Department, kind of a freewheeling sort of thing. So I was aware all this was going on and had informal contacts of one kind or another, and might be consulted about specific things.

Q: Do you remember any specific --

Cox: No. I'm rather poor on the specifics, certainly. But I certainly remember talking about problems created by Governor George [Corely] Wallace in Alabama, and others of that kind. Of course there were cases coming along. Had the Supreme Court by 1961 decided everything about racial discrimination or equality in bus terminals, things like that? I have difficulty here separating what I simply know from reading the cases from having had some contact with those cases.

Q: Well, the Supreme Court in interstate travel, yes, by '61.

Cox: Including the -- when was the case involving the restaurant in the bus terminal?

Q: I can't remember.

Cox: That was sort of the last of them.

Q: Oh, you mean *Wilmington*? *Burton v. Wilmington Parking Lot*? That was a parking lot, not a bus terminal.

Cox: No. Well, there was one. I think it was somewhere in Virginia. I don't think that would be dealt with in here.

Q: So in *Boynton v. Virginia*, the Supreme Court reversed a black law student's trespass conviction for refusing to leave the white section of a restaurant operated by a private company in the Richmond Trailways Bus Terminal.

Cox: Right. That's the case I was thinking of.

Q: Okay. So by that time you know that the actions, say, blocking the Freedom Riders were -- the Supreme Court had ruled on that.

Cox: Right.

Q: But in terms of the actual actions that the Department of Justice should take in order to enforce these laws?

Cox: Well, I didn't play any significant part. I mean, there were -- Bob or Byron, if Bob wasn't free to meet, had a luncheon once a week for the Assistant Attorneys General and the Deputy and certainly, at the start, the Solicitor General. And a lot of these things might come up during that lunch. Now, it soon became clear that the conflict with Court

sessions meant that I wouldn't be able to regularly attend. It having become impossible to attend regularly, I began to feel -- well, if I was preparing an argument, I wouldn't go. So that I didn't always go, but I think I continued to go sometimes, and things of this kind were sometimes discussed there, that as well as in the informal meetings.

Burke Marshall was a pretty good friend, so that he and I might just talk about something on a friendly basis if he wanted to talk to somebody. To suggest that I played a major part in them would be wrong, but to suggest I had nothing to do with them would be equally wrong.

Q: You knew Burke Marshall from a long ways back, didn't you?

Cox: [Laughter] Well, I knew him from a long ways back in Plainfield, New Jersey, where we both lived and where he was the closest friend to one of my younger brothers. So I knew him as a little boy ten or twelve years younger than I. Of course, one thing that inescapably -- two things that inescapably entered into my position in the Justice Department. One was the fact that I was senior in age to all the other Assistant Attorneys General and the Deputy, Byron White. And the other was that I had a direct relationship with the President and continued to do some things out of the role of Solicitor General, I mean not part of his duties, for the President.

Q: Such as what? What were these duties?

Cox: If a problem had anything to do with labor unions or wage price policy, he was likely to have me involved in a consulting fashion. Another, totally different example, is the hot debate between Louisiana and the Interior Department, where Stewart Udall, whom I had gotten to know back in the days of the labor legislation was Secretary, over what were known as the "mud lumps" of Louisiana. The geological process in the Gulf near the shore meant that sizable areas that had been under water would emerge, usually attached to what had been islands or shore property. But they were sizable areas.

Q: As in an acre or as in a square mile?

Cox: Oh, I think as much as a square mile. Total, a lot of land.

Q: Yes, really.

Cox: Oil was also in the Gulf. Who would own the oil pumped on the mud lumps? Were the mud lumps, if they were public land of the United States while under the sea be public land owned by the United States after they emerged. I think I've got it right. At any rate, would the United States be entitled to the oil or would Louisiana be entitled to the oil?

The Louisiana delegation, naturally, was supporting the states very strongly. And the congressman from a district in Louisiana -- I've forgotten his name; I got to know him quite well -- was pressing quite hard, and he was rather important in the leadership and to the administration. And he and Stewart Udall in the Interior Department were completely at loggerheads, with the Interior Department ruling against Louisiana. And he carried it to

the White House, and the President said, "I'll have my lawyer decide this." And called me up, I guess, said he was having it sent over to me. So with Steve Pollack, whose name we mentioned yesterday, we studied it, got up an opinion. I have forgotten which way we came out.

Q: Well, considering you didn't want to teach property law, it's a rather interesting property law question.

Cox: [Laughter] Well, I've forgotten what the -- it was in the general field of property law, but I've forgotten what principles applied. There were very few, certainly very few clear principles, I think.

Q: Off land that is essentially created out of nothing. It'd be a great exam question.

[Laughter] I'll have to remember that if I ever have to teach property.

But do you remember, was there during, say, the crisis at University of Mississippi, or the Freedom Rides, do you remember the atmosphere around the Department of Justice?

Cox: Well, there was a lot of tension.

Q: I would imagine. What about during the Cuban Missile Crisis, were you at all involved in that?

Cox: I was involved slightly because it was determined that I would be the Acting Attorney General. Nick Katzenbach took the view that he was going to take his wife, and I guess he had sons or daughters in their teens in Washington, and they were going to leave, hide out somewhere, as best they could.

Bob Kennedy, of course, would be with the President. So I would be the Acting Attorney General and would be in charge of the Justice Department and act as Attorney General at the refuge under the mountains in Maryland and Pennsylvania. I remember going through the drill of having an alarm and going up there, and we were shown all through the area, "You will be in this room," who will be where and so forth. They made the damn thing very real.

Q: I guess it's obvious that there was a belief that we were on the brink of a nuclear war.

Cox: Oh, no question about it, no question about it. Scary.

Q: What about your family? Where were they at that point?

Cox: Well, they were -- by the first half of the Sixties, the older two children were away at school, boarding school or college. My son went to St. Paul's, as I did. Our daughter Phyllis was with us.

Q: In Washington?

Cox: Well, we lived in nearby Virginia, or not so nearby, as a matter of fact, but fairly nearby, commuting distance by car.

Well, I didn't think -- Nick reached that decision, and I'm not sure that I regarded it as an appropriate course. I didn't follow it. Now, as I said, I don't remember what time of year that it was, so it possibly was in the summer and Phyllis and young Phyllis were down here.

Q: You mean in Maine.

Cox: Yes. I don't think it was summer, but I'm not -- if it's important, you can unhook me and we can very quickly find out.

Q: I can't recall, but we can look at it when we take a break. I can't recall the exact dates of the Missile Crisis. I'm really actually interested. It must still exist -- maybe you're not allowed to speak about it, but what was this hideout? It was in the mountains, and was there --

Cox: Underground.

Q: Yes. Can you recall what -- everybody had their own room. Was it like a giant underground hotel or command center or what?

Cox: Well, I don't think it was that big. I don't know that every department, every Cabinet officer, would be there. I didn't -- it doesn't stick in my mind, and I wouldn't have been focused upon it. I would have been focusing on the things I would need to know. It was all underground, and for underground, it was a considerable layout. But I don't think your analogy --

Q: Is accurate. Okay. I'm thinking, actually, that it was not in the summer, because Ken Gormley talks about a relative of yours. You lived near Bobby Kennedy in McLean [Virginia]?

Cox: Oh, oh, that story about Bob. My sister was visiting my brother, who lived across the street from Bob out in McLean.

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

So we just established that the Cuban Missile Crisis was in October of 1963. '63 or was it '62?

Cox: Three, I believe.

Q: Okay. And that you were --

Cox: Yes, the end of October. Well, I'm sure it was '63. All I see is October here, identifying the date.

Q: So you would have been Acting Attorney General in the event of crisis. I guess another thing I'd like to talk about, then, would be the various individuals. You've mentioned Burke Marshall a number of times. But could you talk about your feelings about Attorney General Kennedy? As I understand it, your feeling changed over time.

Cox: Well, I was very disappointed when I read in the newspaper that JFK would appoint his brother Attorney General. He had some Washington experience, but no very wide experience as a lawyer, hardly anything you could call demonstrated qualifications. And I had hoped that Kennedy, as President, would name a really topnotch, experienced, broad-gauged individual.

Q: Your recommendation, your formal recommendation was for Erwin Griswold.

Cox: [Laughter] I guess he would have been very good, but I'm a little surprised that I did that. I don't remember these. How many posts did I make recommendations for?

Q: I have an incomplete list, but Frank Bothwell, Haywood Boggs for, I think, the NLRB, Arthur [J.] Goldberg for Labor, Paul Freund, and Erwin Griswold.

Cox: [Thomas] Hale Boggs was a prominent congressman.

Q: Haywood Boggs, who must be a relative. Or would Hale Boggs have been the person?

Cox: As of now, I'd say Haywood must be a mistake for Hale.

Q: Okay. I may have copied it down wrong. But, yes, Hale Boggs was a member of Congress from New Orleans.

Cox: Louisiana, wasn't he?

Q: So who else would you have had in mind at that time in terms of who [unclear]?

Cox: Oh, I don't think -- I'd hesitate to say today. I'm so bad on people's names.

Q: But you weren't impressed with Bobby Kennedy.

Cox: No. Actually the slight contact I'd had with Bob, personal, had been a disappointment. The senator had asked me to show and discuss the draft of the labor relations law with him, and it seemed to me he was really very ill-informed about the labor movement and very unsympathetic to the labor movement and to collective bargaining. That rather turned me off, too.

But I dealt with him long enough to come to admire him and to become very, very fond of him. He was a first-rate Attorney General, I think. He also was a wonderfully, wonderfully loyal friend. One example, I spoke of being called on by the President when questions of wage price were under discussion. And there was one sort of near crisis involving the steel

industry and the steel workers union, where he had sent an Air Force plane down to Arizona for me.

I had made a speech at Harvard at commencement time entitled "Wages, Prices, Government and --" I don't know, something like that. "Wages, Prices, and Government," I expect. The same day the stock market had taken a very sharp dip and there was some newspaper publicity blaming it on the speech. The White House, Pierre [Emil George] Salinger, Ted [Theodore C.] Sorensen, and others, began putting out Statements that the speech had never been properly cleared, that I wasn't authorized to speak on that subject and so forth.

I was in to see Bob about something, I don't remember what, but in the course of the casual greetings, "How are you doing," and so forth, I allowed as I was hurt by these White House releases. I told him. He said, "Well, it's all untrue." He knew perfectly well he had seen the speech in advance and, I think, had shown it to the people in the White House in advance. So he immediately dropped everything he was doing, reached for the telephone, called his car, and was driven over to the White House to straighten this out [laughs]. That was an awfully good mark of loyalty, friendship. I just give it as an example of his loyalty and friendship to those he worked with. It was wonderful. But I think he was a very good Attorney General.

Q: What were his good qualities?

Cox: Well, I think he had pretty good judgment. He wasn't a deep thinker about the law, didn't purport to be, or try to be. And I'm not sure if the Attorney General has to be. He did feel obliged to argue one case in the Supreme Court. There was a press myth that every Attorney General, by tradition, argued one case. The tradition went back as far as 1950, maybe. It didn't go back any farther. I knew it didn't go back any farther, knew of Attorneys General who hadn't ever argued any case in the Supreme Court. But it put pressure on Bob to argue one. When the reapportionment cases were before the Court, we picked one out for him and he made a -- I don't think I'd say brilliant, but made an altogether satisfactory argument. If he'd been a young man in the Justice Department, I would have been entirely willing to assign another case to him.

His manner and enthusiasm were great pluses. The general spirit in the department among nearly all the Assistant Attorneys General was very high and so on down, I think.

Q: So would you say that your view of the qualifications one needs to be Attorney General changed from before to after as a result of your encounters with him?

Cox: Well, I guess I still would like to see the Attorney General be a lawyer of some distinction and with a reputation at the law.

Q: Can you recall what your feelings were when, say, Janet Reno was named Attorney General?

Cox: Well, I guess when she was named, I would have liked somebody better known. I just didn't know that much about her. After that, my opinion was greatly influenced by people who did deal with her as Attorney General and found it very difficult.

Q: But to kind of detach from her previous qualifications, more her demeanor?

Cox: Well, I suppose. I never wanted to ask whether her previous experience really fit her for the job.

Q: Yes, it's a big leap from Dade County to the United States.

Cox: Yes. Terribly big.

Q: How about Byron White? Well, I guess we could talk a bit about him in two different positions. Was he somebody you were close to at the Department? It sounds like you were very close to Burke Marshall in terms of your contact.

Cox: I guess I wasn't close to Byron. I think Byron was fun to be with and so forth, but he's a somewhat reserved person.

Q: When he was nominated, did you support his nomination? Was he the person you thought should go to the Supreme Court?

Cox: Well, I hoped that Judge [William Henry] Hastie would be named. He was the person whose name I principally pressed in discussions, but I think Justice Douglas killed his chance of getting it.

Q: How so?

Cox: He, at some point, had said to Bob Kennedy -- I'm not sure what point and it may not been right then and there at the time he was being considered -- that Hastie would just be another vote for Frankfurter. Bob seemed, from what I saw and heard, to be greatly influenced by that.

Q: Bob Kennedy and Douglas had something of a close relationship, did they not?

Cox: Well, I don't really know that, but I guess so.

Q: Okay. Well, let me go back a second. When Justice Whittaker resigned, what was the process that went into -- how did the process of choosing a nominee and debating, how did that happen? Were you consulted immediately, or did you offer your opinion unsolicited?

Cox: Well, I remember discussing it with Bob Kennedy and others. "Others," I mean a few of the Assistant Attorneys General and maybe their number-one deputies or assistant. I guess I was in more than one discussion of that kind. I don't think anything was ever -- maybe it was put on paper, maybe it wasn't, I don't know. I didn't ever talk with the President about it.

Q: In your mind, what were the qualifications that you would have set out for a Justice at that time?

Cox: We didn't talk in terms of qualifications or setting out -- but talked in terms of people.

Q: And William Hastie, was he on the Third Circuit at that point, or was he in the Virgin Islands? He was on the Third?

Cox: He was on the Third Circuit. Of course, the Third Circuit had jurisdiction over the Virgin Islands. I forget who I might have been for in addition to Judge Hastie. I probably had one or two other names that I put into the hopper and supported.

Q: And Byron White was one of those.

Cox: Well, I don't have any specific recollection of discussing Byron White with -- who would I have discussed it with? With Bob Kennedy, I suppose. I don't remember.

Q: The other person who is discussed a great deal in relation to the Kennedy administration and his part in it is J. (John) Edgar Hoover. What interaction did you have with Hoover?

Cox: Very little with him personally. There were matters, occasionally cases, bail and things like that, where the FBI was interested. Again, my memory is so bad. There was

one incident that's sort of somewhat amusing and revealing, but I simply can't recall the details of it, where I sought the advice of the FBI on whether to oppose a motion for release on bail. The extent of their infiltration of some organization that they believed was subversive became clear in an amusing way, but I just can't seem to recall it, even by talking that much. I don't recall any problems in Supreme Court cases with the FBI.

Q: There were a few cases that I thought were possibly -- might have involved the FBI, such as a case called *Lamont [Basic Pamphlets] v. Postmaster General*, that involved the Postmaster only sending foreign mailings of what was considered communist political propaganda to people if they affirmatively sent a postcard to the Postmaster saying, "I would like to receive this material."

Cox: Yes, yes.

Q: Would that have been a case that -- it seems like Herbert Hoover was very involved in--

Cox: You mean J. Edgar Hoover.

Q: J. Edgar Hoover. Oh, I keep saying Herbert. I mean J. Edgar. I'm sorry. [Laughter]

Cox: No, it's okay. I shouldn't pick you up.

Q: J. Edgar Hoover being central to the anti-communist crusade in the fifties.

Cox: I don't recall any discussion with the FBI about the case. I don't see why there should have been any. We defended the act of Congress. I didn't like it, but I didn't think it so bad that I ought to refuse to sign the brief. Indeed, I think I'm right in saying that I argued the case myself.

Q: You did.

Cox: The reason was -- I wasn't happy to argue it. I didn't think I could just slough it off where the constitutionality of an act of Congress was involved and give it to some low-ranking person who was willing to argue it in order to get an argument. And none of the more qualified people wanted to argue it or was willing to argue it, that if my position had been reversed with theirs, I probably wouldn't have wanted it either. But I thought it was my duty, so I argued it, probably with some restraint in terms of how hard I pressed. But we succeeded in losing, as I remember it.

Q: You did.

Cox: Yes.

Q: Yes. Norman Dorsen, a former student of yours, was an opposing counsel on that case.

Cox: Oh, oh.

Q: That raises an interesting question. So you disagreed with the substance of the act.

Cox: Oh, yes.

Q: But you felt that because it had been passed and signed by Congress that you should advocate its constitutionality nonetheless?

Cox: Well, I think I can't say that. I don't say that I think a Solicitor General should defend the constitutionality of *any* act passed by Congress. I certainly don't think that today. I don't believe I thought that at the time, although I may not have been as clear in my mind as I am now because I hadn't seen cases that I've seen in later years. But I certainly think there's a very -- well, it has everything going for it. It's a real rough one to not file the briefs. Well, not *to sign* the brief. The brief would be filed. In any event, I can't remember even considering refusing to sign a brief supporting the statute. And the argument came about as I said.

Q: To what extent was your position based on a concern about alienating Congress or angering them by not supporting them?

Cox: Well, certainly I didn't explicitly think "if we get Congress riled up, the President and the administration, the President will have a hard time on other legislation." No, I didn't think in those terms at all.

Q: What about some of your extra-departmental duties? It sounds like from what you were saying earlier, that President Kennedy came directly to you on areas that you had a great deal of knowledge and experience such as labor and wage price controls.

Cox: Yes, there wasn't much of that kind. There was one thing involving the steel industry, where I remember he did send an Air Force plane down to Arizona where I was speaking, to get me back for a conference at the White House. I was one of a number who attended the conference. I wasn't the only person there. It wasn't a sole consultation with him. There wasn't much else of that kind, if anything. And the "mud lumps" example, again, certainly wasn't commonly repeated.

I didn't have that much to do with him personally. He'd call up on the telephone occasionally to ask what I thought about a specific thing. He might call to ask what I thought about some of these demonstrations, fusses down in the South.

Q: There's one -- I'm wondering if you can tell me the story -- that connected, I believe, to *Engle v. Vitale*, the school prayer case in 1962.

Cox: Oh, yes, yes. He did call about that, because he would be asked at a press conference what to say. Yes, I remember that very vividly, because, fortunately, I got into the office normally pretty early in the morning, around eight o'clock or thereabouts, and the phone would ring. Don't get the impression this was every week, once a week or anything like that. But the phone would occasionally ring and it would be the President himself. And he called after the school prayer decision, what should he say.

I must confess that I had never had any particular interest in the law of church and state or the meaning of the separation and freedom of religion clauses. They hadn't been involved in any litigation where the federal government was involved, and I hadn't -- well, there'd been few cases in the Supreme Court actually up till that time. So I didn't know much of anything about it. But I gave some kind of a professorial answer, felt clear that I wasn't given him any useful advice, I was sort of embarrassed, and it sounded very professorial. I said that would think some more about it and try to call him back. Of course, he came up with this perfect answer that people should pray more in their home.

I also had an interesting experience, amusing and interesting to a degree, as a result of the school prayer decision. There was a program in Washington that the Kennedy Administration, I guess, initiated and encouraged, bringing young interns into the various departments. All told, scattered around the executive branch were quite a number of these interns. I think that it was every Tuesday -- it was once a week in any event -- they would meet in -- the hall, what's it called? The Daughters of the American Revolution there on 18th Street, on the west side, down toward Constitution Avenue, below the State Department.

Q: It's near the OAS.

Cox: Which?

Q: It's near the Organization of American States, right? It's kind of right near the White House.

Cox: Yes, but on 18th, beyond what you'd think of as the Executive Offices. I think of it as the old State Department Building.

Q: The Old Executive Office Building.

Cox: Yes. It was below that and across the street. Well, in any event, they had a sizeable auditorium. And this group would be gathered there once a week. Because it was an administration-sponsored thing, they could get all sorts of high-ranking people to speak. And they'd signed up Justice Douglas. The date when he was to speak came just at the start of a recess of the Supreme Court. To get the plane he wanted to get, he could make his speech but he couldn't stay to answer questions. So he asked me to go and answer the questions for him. And it so happened that this fell just a few days after the school prayer decision, and the questions promptly began with a barrage of questions about the school prayer issue.

As I say, I had no background on the subject, no interest in the subject. I'd read the opinion by that time, but that was about all. But I felt it was my obligation to try to defend it. So I answered the leading question in a way that I thought would defend it, and the "boos" just lifted the roof off the auditorium. Up there was one little group that applauded, but otherwise it was just "boos" of disapproval of the decision.

Q: Wow.

Cox: That's the interesting part.

Q: Well, it probably comports with what the majority of Americans think now.

Cox: Yes. And I'm not sure what my initial gut reaction was entirely. It was certainly one of surprise. Although I went to a church school, by that time I was enough of a backslider that it didn't offend any deep religious feeling that --

[Visitor interruption. Tape recorder turned off.]

Q: We were talking about *Engle*, the church-school issue.

Cox: Yes. Basically, we were talking about what I did for the President and contact with the President.

Q: Well, there was another question. You've mentioned that you spoke at a Harvard commencement one year and that caused some trouble. But then I know the example you gave of the President flying you back from Arizona on the Air Force jet, you had been there to speak to a bar association.

Cox: Yes.

Q: I assume you gave a lot of these speeches.

Cox: Well, I think I spoke to bar associations and perhaps at law schools. I think the "Wages, Prices, and Government" was the only time I undertook to speak about any other subject.

Q: Do you recall what the general type of topic you spoke on at these events was?

Cox: Well, it would have had something to do with the general area of the Supreme Court, the Office of the Solicitor General, constitutional law.

Q: So you would talk about your work as Solicitor General in those types of forums?

Cox: I think that was it. I haven't any --

Q: Okay. Well, I know it was especially in 1963, the Kennedy administration pressed the various bar leaders to get attorneys involved in defending civil rights in the South, specifically, but become more involved, to uphold their professional duties. Was that something that you were asked to speak about?

Cox: I don't recall ever having that kind of message one that I was seeking to deliver. It's possible, but I just don't recall.

Q: I have another question about the litigation process. I'm wondering how things functioned in terms of starting cases, the various Divisions or U.S. Attorneys bringing cases around the country to try to enforce the law or uphold the law. Were you ever involved in discussions as cases were going to enter the district Court level with an eye to the appeals process?

Cox: Well, I think so. I'm a little vague. It seems to me that occasionally a proposed anti-trust case would be the subject of somewhat broader discussion than just the Anti-trust Division. The civil rights area, the same thing must have been true. That suggests there may have been cases involving other Divisions where that was the case, but I don't have even the same degree of vague recollection about there being such cases, such discussions.

Q: When you first took over as Solicitor General, the tradition is for the Solicitor General to visit with each of the various Justices.

Cox: Yes, in descending order of seniority.

Q: Do you remember what happened at any of these meetings?

Cox: Well, only that Felix Frankfurter and I talked at some length, and he was concerned about the Attorney General putting more emphasis on criminal cases. Who did I say? Did I say Attorney General? I mean Solicitor General. That was why I was much inclined to make my first case one in the criminal area. But happily, Oscar Davis, John Davis, maybe

others, too, on the staff talked me out of it. They were absolutely right. I'd have been a fool.

Q: Can you recall what Justice Frankfurter had in mind in terms of major criminal cases? I guess maybe *Mapp v. Ohio* was something that was argued early on.

Cox: Well, many of the controversial cases were state cases, and one of the things we should talk about at some length is when did the government go into cases as *amicus*. When is it appropriate for the government to go in as *amicus*? There's been a great tremendous change in policy.

Q: Let's talk about it now.

Cox: Well, all right. Those are the central questions. When I was a lawyer in the Office of the Solicitor General and in previous years, the government filed a brief as *amicus* in cases in which the United States or an independent agency of the United States was not a party, only when the constitutionality of some federal statute the government was charged with administering was involved or when the interpretation of some statute that the government was charged with administering was involved. It might be private litigation involving the interpretation of an Anti-trust law or it might be -- it's pretty rare, but it could be in rare circumstances private litigation about the National Labor Relations Act, to which the NLRB was not a party. It might be the Interstate Commerce Act, and possibly other statutes.

But by the time I became Solicitor General, it was accepted that the government might file *amicus* briefs in civil rights cases. Not necessarily, but "might." The decision to go into the Tennessee reapportionment case, *Baker and Carr*, involved opening a new area for filing *amicus* briefs. In fact, it was years --

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

Q: So you were saying -- you were talking about --

Cox: Filing briefs *amicus curia*, and had specifically began to speak of the fact that going into *Baker and Carr*, a reapportionment case, potentially added a category of cases in which the government would consider filing *amicus* briefs. In fact, the decision to authorize filing an *amicus* brief in *Baker v. Carr* had been made under Lee Rankin in the previous administration. Somehow that bit of paper got forgotten with the passage of a couple of years and changes in personnel. Oscar Davis, no longer first assistant, had gone on the Court of Claims. John Davis was gone as clerk somewhere; maybe he went to the Supreme Court of the United States.

Q: I think he did. I think he became the Supreme Court --

Cox: I mentioned the Ninth Circuit, but somebody left and went to the Ninth Circuit. But I guess he later went to the Supreme Court of the United States. Well, I'm not sure of the number-three when I first went in. Phil [Philip] Elman, he had gone to the Federal Trade Commission. So that's probably why nobody in the S.G.'s office remembers this, and I don't

know why it didn't come to light in the Civil Rights Division. Also it may be that this was initiated in a direct approach to me in *Baker v. Carr*. In any event, it was a new departure.

I mentioned it to Bob Kennedy for that reason, partly for that reason. But adding the reapportionment cases was the limit that we took the decision to expand the filing of *amicus* briefs.

Today, they file *amicus* briefs, as far as I can see, in every State criminal case. I presume this is the major reason the office has been expanded from nine lawyers, which it was when I left. Today it's in the upper twenties, I believe, if not more.

Q: What does that change signal to you?

Cox: Well, along with that certainly went greater consciousness of the party politics effects of the positions taken by the Solicitor General in the Supreme Court. I don't think party politics questions entered our minds, when I was Solicitor General. I've been told, very reliably, that at least at one time -- and it may be true today, I don't know -- every step taken in the Supreme Court was vetted from a politics point of view before it was taken. That would have been unthinkable earlier, outrageous.

Now, I think in the case of someone like Charles Fried, that he took these politically strong Republican positions out of conviction, not because of political thinking on his part.

Q: He just fundamentally believed that what he was advocating was the correct interpretation of the Constitution?

Cox: I think so. I think he did, yes. It did coincide with his views of policy and politics, but I think what's-his-name's book we were talking about yesterday --

Q: Lincoln Kaplan.

Cox: Kaplan's book, to the extent it implies that Charles had a political motive, is unfair.

Q: But that's something that you noted yourself in the beginning of the [Ronald] Reagan Administration, that type of politicization of the Solicitor General's role?

Cox: Well, there was the time when it began. I don't want to -- you note I didn't say when this political vetting of every step was taken. I said there was a time. I didn't know whether it took place now, because I don't know. There are limits to what I know about those years. It would be irresponsible to say more. The fact that government, the S.G.'s office, goes into this greatly increased number of cases is a known fact; that it goes into a greater variety of cases greatly varied kinds of cases as *amicus* is extrinsic fact. I can know that. But the other things about their thinking, I don't know enough about that.

Q: It was something I was going to ask you about today, though, because a number of times yesterday you -- 1980 was a year that you seemed to be saying there was something different before and after 1980 about the way the Solicitor General's office --

Cox: I think these changes occurred after Reagan, and after his appointees were Solicitor General and Attorney General. I think that under President [James Earl] Carter and his Attorney General -- oh dear.

Q: His Attorney or Solicitor General?

Cox: No, I was thinking Attorney General. I was thinking about him -- Griffin Bell -- just a few minutes ago. So far as I know, they continued things pretty much as Erwin Griswold had done it; and I think Erwin was continuing pretty much as it had been done before. I don't think Erwin enlarged the office. I'm sort of assuming that it wasn't enlarged under Carter. I don't really know that.

Q: But from your point of view maybe entering into -- there wasn't a political aspect of entering into *Baker*? Or if you had had it -- let me start again. If Solicitor General Rankin had not applied for to be an *amicus* in *Baker*, would you have done so?

Cox: I didn't know anything about Rankin's having done it. That was the point I was trying to make to you.

Q: But it had been done, right?

Cox: Well, but since nobody knew it, it might just as well not have been done in terms of the way everybody treated it and thought about the case. But it came up.

Q: I guess I don't understand. You inherited *Baker* from the Eisenhower administration.

Cox: No, I must have stated it very clumsily. The first I can recall about *Baker v. Carr* was when John -- was it John Seigenthaler or was it a friend of his from Tennessee -- got in touch with me. And the people who got in touch with me were speaking for the plaintiffs in *Baker v. Carr*, asking that the Solicitor General file a brief *amicus* supporting federal jurisdiction. That was the first I've heard of it. When I mentioned it to somebody on the staff, it was the first he or anyone else on the staff had heard of it.

What I was trying to tell you was that in later years, 1970, there turned up a piece of paper that no one knew about in 1962, '63. No one remembered it in '62, '63. Signed by J. Lee Rankin, saying as we did, "Brief *amicus*-authorized". That was, I presume, a memo that would go down to the Civil Rights Division. But since nobody in the period 1961 to '65, let's say, knew about that piece of paper, we all acted as if it didn't exist, as if no brief *amicus* had been authorized, as if the matter had never been considered.

Q: Okay. I understand.

Cox: I concluded that we should go in. I was in Bob Kennedy's office about some other matter, and quite casually -- entirely casually, I said, "Bob --" I guess it was John Seigenthaler who was with the *Nashville Tennessean*. Though at some point he went to work for Bob Kennedy, I think.

Q: I think he was his personal assistant at that point.

Cox: Well, then it wasn't Seigenthaler; it was somebody else who came. It was somebody who I'd come to know during the campaign back in '60 and who Bob had known well during the campaign, and I had had some common meetings with Bob quite regularly during the sixties. So I said, "Your friend (naming him) from the *Nashville Tennessean* was in to see me and said that he'd missed you."

"Oh? What did he want?"

And I said, "He wanted to file a brief *amicus* in this," and added a sentence or two telling what the case was.

"Oh? Are you going to do it?"

And I said, "Well, unless you strongly disagree," or something like that. "Unless you disagree." Maybe there wasn't any "strongly."

And he said, "Well, are you going to win?"

And I said, "I don't know, but it will be a lot of fun." And with that we broke off and went about our business. It was really my decision. But it did open up a new area of *amicus* activity. That's what we were talking about, basically.

Q: What was it about this case that made you think that this was a new area to push the Solicitor General's office into?

Cox: Well, just the malapportionment was so outrageous.

Q: Where did you fall -- it seems like the big issue -- well, obviously the central issue of *Baker* was the justiciability of the issue.

Cox: That's right.

Q: Considering the precedent in *Colgate v. Green*, did you have doubts about the justiciability of the --

Cox: Well, I had doubt about the outcome, whether we would win or lose, whether our position would win or lose. And as one got more deeply involved and got ready for the oral argument, I was inclined to think that the case was one of those might very well turn on whether I came out even with Felix Frankfurter in the oral argument, whether he'd demolish me with his questions or whether I stood my ground sufficiently that if it were called a debate or a prizefight, it would be a tie. And of course, it was therefore a tremendous surprise when in the first argument he asked almost no questions and said almost nothing.

Q: And then that case was reargued a second time.

Cox: That's right.

Q: At which point, Frankfurter had left the Court, correct? Well, no, no.

Cox: He stayed on the Court and wrote a strong dissent.

Q: Oh, right. I'm thinking of the aftermath. *Baker vs. Carr* is a case that Ken Gormley talks extensively about, that Victor Navasky talks extensively about, and the way it's set up in especially in Navasky's book is that you had profound concerns about the apportionment cases in general. But from what you just said, it sounds like your concern wasn't whether or not the Court should become involved in this area of law.

Cox: Not only that, but the only case in which we didn't support those challenging the existing situation was the Colorado case. In all the other cases I had no hesitancy in arguing that they were unconstitutional. He certainly has it wrong in suggesting I had trouble with all the reapportionment cases.

Q: One point that they make is that you were troubled by the one-man one-vote.

Cox: Going the whole way for one-man one-vote did trouble me, particularly in the Colorado case where the apportionment of the Senate in a way that took into account the relative political power of each of the three sections of the state with three rather different sets of economic interests had all been adopted by a popular referendum. One-person one-

vote, I found too-strong medicine. But as I said a moment ago, in all the other cases we supported those who were challenging the state apportionment.

I had a highly complex set of criteria. The individual who was Chief Justice Warren's law clerk the year that *Reynolds v. Sims* came down told me that -- well, this was in later years when I was out to California visiting for one reason or another at Berkeley. And this individual -- I've forgotten his name -- we were together, and he said that the Chief's opinion in *Reynolds v. Sims* was based on my brief in the apportionment case. And I said, "How can that be? We didn't support one-person one-vote."

And he said, "I know, but all the Chief did was take your brief and turn it upside down and write exceptions to the one-person one-vote that covered all the cases that you had attempted to exclude by this complicated formula."

And of course, he was the Chief. Common sense tells that he was absolutely right. My complex formula was something that never could have served as anywhere near a controlling guide to state legislatures or whoever else it was, state constitutional conventions writing a statute, apportioning representatives in the House or in the Senate, whereas one-person one-vote was something you could hold them up to snuff on unless they could show this, that and the other thing as an exception. My friend may have been too charitable. I don't want to claim that my brief did that much, but it was interesting that he told me as much.

Q: Right.

Cox: And I think that was a terrible thought, in my position, that it was just an impractical constitutional rule that I was advocating.

Q: But it seems what you were advocating was not -- I guess having read the things I've read, it seems to me that what you're advocating, you didn't want one-person one-vote even with the exceptions, that you thought the Supreme Court should be able to take other things into account.

Cox: I don't know, when you say "didn't want one-person one-vote," exactly what the implications are. I did not urge the Court to lay down a rule one-person one-vote with exceptions. I did not press that on the Court. I didn't want to press that on the Court. I resisted it. Was I in a sense sorry even when the decision came down that that was the law that the Court had laid down? I certainly wasn't -- I may have had doubts whether it would sell as law, but apart from that, of course, it's a fair and right way to have representatives apportioned. I never thought it was a bad way of apportioning representatives.

I can't, as of now, recall where Court's ruling, one-person one-vote with exceptions, and the position argued in our briefs would have led to different results. I simply can't say, but I don't think you can say either.

Q: Right.

Cox: You'd have to go back and read the briefs, and not just the Supreme Court opinions and what you've read about the Supreme Court opinions. As I remember now, I don't think we in the Colorado case ever opposed one-person one-vote. We argued on the grounds that were not --

Q: You weren't narrow.

Cox: Not terribly. I think it was an effort to come up with something that I could swallow and be as little objectionable to Bob Kennedy and Burke Marshall and the people who agreed with them as possible.

Q: I guess what I was trying to say was that it wasn't that you thought one-person one-vote was a bad idea, but that you didn't necessarily think it was a constitutional requirement.

Cox: No, I didn't.

Q: But is it fair to say that that was what Bob Kennedy and Burke Marshall and, I think, Bruce Terris --

Cox: Oh, Bruce was very strong. Yes, they wanted this. I think they all thought we should all come right out and argue in the Colorado case for one-person one-vote.

Q: And were you concerned with the federalism questions involved therein?

Cox: Well, I was simply concerned that this is too much. Here we're dealing with the Constitution, something that's intended to preserve fundamental existing rights, rights of people, and in the history of the country no one had ever observed in both houses of the legislature the one-person one-vote, not ever in all our 150 years plus. As in the abortion cases, how can you say this is a fundamental right being protected when all history was against it? I was worried about the amount of making new law the Supreme Court could do and still preserve its authority. Remember Learned Hand in the Cardozo speech.

Q: It's been written that you were also concerned about the enforceability of the decision.

Cox: Well, I was wondering whether, I mean, in the sense of would people accept it as law and would it carry the force of law, something deserving obedience, acquiescence. I was too intellectual, too academic, maybe too professorial, to think then: "How was my complex formula ever going to achieve acquiescence?" It might be accepted as law, but how was it ever going to be clear enough so that people could live by it and would live by it in a genuine way.

Q: On a case like *Baker*, that is, a giant case in significance, I know you obviously spoke to people in other Divisions and had long discussions in the Solicitor General's office, maybe in *Baker* or maybe in other cases. Would you ever speak to colleagues back at Harvard law school or other professors, seeking guidance?

Cox: Well, did I ever talk to them about cases? I guess the answer to that would be yes. Did I ever specifically go and seek advice? Well, seldom, if ever.

Q: But can you remember specific times when you did?

Cox: No, no. We're talking about -- your question related to professors at law schools.

Q: Right. Right. Other attorneys?

Cox: Well, other attorneys in the Department, sure.

Q: Of course, right.

Cox: Or in the government, sure.

Q: Did you speak to -- I assume never while a case was pending, but did you ever have conversations with Supreme Court justices about past decisions or even present? Am I wrong in assuming that you never talked about pending litigations with members of the Court?

Cox: I can't imagine doing it.

Q: I can't either, but I figured I should ask.

Cox: Oh, I don't think so. About, well, past decisions, some casual reference to them, probably, occasionally. One saw different amounts of different justices. I don't know, do you want me to elaborate on that?

Q: Sure.

Cox: Well, there were a few occasions during the year, formal or semi-formal occasions, a few of those, where one would dine and justices were dining. There was one dinner every year for the justices and the Solicitor General and the clerk and, I guess, the Marshall. I think that was it. Maybe one or two other people attached to the Court, something of that kind. One dinner a year.

In the summer, Justice Black included me just once a year in an informal party for justices who were in Washington at his house in Alexandria -- down in the old section, a beautiful old place. It was very informal, drinks and dinner. The ABA [American Bar Association] would give a dinner to the Supreme Court with the people from the Department of Justice, and I think wives -- I know wives were included in this.

We did not dine out much in Washington, so it was comparatively rare to be at a dinner with a justice. There was a dinner early when I was Solicitor General -- I forget who gave it -- that Phyllis and I did go to. I know she was seated next to retired Justice Stanley Reed, who I had known, a previous Solicitor General. And it's always vivid in my mind, because the occasion -- I say "at the beginning." That isn't quite accurate, because it was shortly after Byron White was put on the Court. And in the course of dinner, Justice Reed said to

her, "Too bad Archie will never become a justice," and explained. He said, "It's like a pendulum; it swings back and forth. If it swings out and hits you when it swings in your direction, then you are named to the Court. If it swings in your direction, but doesn't get there, it never swings further on a later occasion, so you never get it." And Byron had gotten it when I might have, and that was that. Well, I don't think -- I know nothing in history that supports this, but it always stuck in my mind. It saved me a good deal of what otherwise might possibly have been hoping and anguishing.

Q: Yes. I thinking about that after reading that in Ken Gormley's book, and I thought the -
-

Cox: Oh, he tells that?

Q: The counter example is Stephen [Gerald] Breyer, who I think was considered the first time as [William Jefferson] Clinton's first nominee.

Cox: Oh, was he?

Q: But then was passed over in favor of Ruth Bader Ginsberg. But then it came back the second time.

Cox: [Laughs] Well, that's right. Well, that's interesting and amusing too, because, of course, Steve is a good friend.

Otherwise, the justice I saw the most -- well, there were occasions when you were thrown with them one way or another. But the justice I saw the most was Justice Brennan, partly, I think, because he was probably the friendliest fellow. During the time I was Solicitor General, one of the university law schools, I believe, in New York -- my memory is uncertain, but I think it was NYU [New York University] -- had money for a comparative study of judicial systems or something like that, and particularly appellate systems, in England and the United States.

There was enough money to finance putting together U.S. and U.K. teams. The number one of the U.S. team was Justice Brennan. Also on it were, I think, Ed [Edward Philipp] Lombard, and one or two state judges and myself as Solicitor General; maybe one or two more. The head of the U.K. team was the Master of the Rolls. I'm not sure who the others were -- but they'd have had somebody as a member of the bar or some people who were members of the bar and appeared often in the court.

One summer we made a trip over to England and visited their courts, particularly appellate courts. We visited several of the Inns and talked with people at several of the Inns. Then the following winter, their team came over to the U.S. So during that time, particularly on the trip to England, I saw a lot of Bill Brennan. And it's hard to believe -- this came up because you asked me if I ever talked about any Supreme Court cases with justices -- it's hard to believe that at that time we didn't talk about some past decisions, both recent and past and probably farther past.

Q: And was your relationship with him, it was ongoing after that point?

Cox: Yes.

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

Cox: Well, I got to know Brennan quite well, but my relationship with him wasn't one where such as I'd call on him at his house and chambers just as a friendly visit or that we'd have lunch together as a friendly lunch, no. But I, one way or another, did see him occasionally and seems to me we did discuss one or two personal matters. I, of course, had occasion to see the Chief, once or twice, a little bit more than once or twice -- well, on administrative matters.

I was along when Nick Katzenbach asked him to become the head of the Warren Commission. Nick, very graciously, asked me to go with him because I was Solicitor General and customarily was the one who dealt with the Court. I told Nick I would certainly go, that he should not ask me to say anything, because I thought the Chief should refuse. I was strongly opposed to his serving.

Q: Why were you?

Cox: Effect on the Court and its work. After all, the Jackson venture at Nuremberg led to most undesirable consequences. I don't think you could say the same thing of Justice [Owen Josephus] Roberts and Pearl Harbor. But the Jackson one did much trouble in the Court. And they both burdened the Court. And for the Chief to do that would be an even

added burden. Of course, Earl Warren, when Nick asked him, refused, and then LBJ got him down to the White House that night. When LBJ got you personally and really wanted you to do something, I guess you always ended up doing it.

Q: I'm always reminded of the famous photo of LBJ with Abe Fortas, where LBJ is kind of leaning over him like a giant.

Cox: Yes, yes, yes. Right.

Q: There was one other story from Ken Gormley's book that involved an encounter with Justice Frankfurter. Well, actually there were a number of things. Yesterday at the end of the session you had started to mention something about Justice Whittaker and *Baker v. Carr*, and the discussion you had with him.

Cox: Well, shortly after the opinions were handed down in *Baker v. Carr*, Justice Whittaker decided to leave the Court and took early retirement. I learned about this because it was a headline in the *Washington Post* and every other paper. When I got to the office, I guess as soon as there were any facilities available, of course I wrote a short note to him. I sent it by messenger up to the Court, expressing regret at his resignation, wishing him well, and I said something like, "I recognize that you must be very busy. If you had a few moments, it would be a pleasure to see you." I may have put it the other way around, so the emphasis was "I know you won't have time."

But before the messenger was back to the office, Justice Whittaker, either he or his secretary, had called, would I come right up to the Court and see him. And I went up. By this time it was 10:30, 11 o'clock. I went to his chambers, and we sat on two straight chairs as all the other furniture was carried out. Justice Douglas wanted to move from what had been his chambers to those that Justice Whittaker occupied, and somebody had decided they weren't going to take an extra moment before they did it. It was really awful, an awful sight. But literally, there were still some books in the bookcases, but they were going.

And Justice Whittaker, in fact, talked very freely. He particularly talked about *Baker v. Carr*. He had dissented, as you will remember. During the oral argument, in his questions and his nods and so forth, he had seemed rather persuaded by our argument. But he talked about it and told me what a terrible time he had had making up his mind. He'd just agonized over it.

Of course, by this time I knew that it was mental unease that had caused his early retirement. Emotional unease, let's say, better than mental. But it was psychological problems. And he told me at some length how he had written complete opinions as if for the Court on both sides in an effort to make up his mind. I'll come back to the conversation a little later.

My comment at this point: he was an awfully nice man. And I guess as a circuit judge -- he was a Court of Appeals judge -- he was comfortable and entirely adequate. But particularly the constitutional cases in the Supreme Court just overwhelmed him, the importance of the

question. I guess he'd agonized over others in the past, but he certainly had agonized awfully over *Baker v. Carr*.

Coming back and relying on our conversation again, it was just unbelievable about how he would go about deciding cases. This all came out in the conversation. For example, he was terribly critical of some of his brethren for their reliance on law clerks and their opinions, not doing it themselves, and so forth. In one of those bookcases not disturbed there were the eight or nine or ten volumes of a big anti-trust case that had been before the Court. He had undertaken to read that record.

Q: My gosh [laughs].

Cox: I mean, it's the only instance we specifically talked about, but if he did that in that anti-trust case -- I knew the case well enough to know that it was an utter waste of time. I mean, there may have been passages here and there worth reading, but heaven forbid the Solicitor General would have read it all. And we talked some about that. Well, that was that.

It was clear that *Baker v. Carr* was what had forced him off. And in that connection, you recalled yesterday that I had told Ken Gormley or somebody about a conversation with Felix Frankfurter after his serious stroke and retirement from the Court, in which he had murmured -- he couldn't speak altogether clearly, but he had murmured something that seemed to say it was the government's position, my argument in *Baker and Carr*, that brought on his first stroke and led to his forced retirement. I suppose that as a former

pupil, former choice for law clerk, some of my positions as Solicitor General, and particularly in *Baker v. Carr*, were disappointments to him.

Q: So with *Baker v. Carr*, here's a case that two justices point to as the reason they retired.

Cox: Yes. Well, that oversimplifies it a little.

Q: Right. No, and I think it's clear that other things were happening.

Cox: Well, Whittaker yes, just about. Frankfurter, it was a stroke and he didn't retire immediately after the decision and so forth. But go ahead from there. That was important.

Q: Did that give you pause about the position you had taken as Solicitor General in that case?

Cox: No, I don't think so. I mean, one didn't like -- well, in Whittaker's case, it was poor Whittaker. His difficulties in wrestling with cases was something I'd realized to a degree before *Baker and Carr*. I doubt that anybody foresaw that they were going to force him off the Court.

Frankfurter -- well, it was sad, worrisome that he should feel a little bit personal about it. But I don't think one's positions as Solicitor General could be based on personal loyalties, gratitude or lack of gratitude.

Q: And it may be my -- I'm obviously much younger than you were -- lack of self-confidence, but was there ever -- and it seems to me that there could have been a time, were I in that position, that I would have argued a case and been very convinced of my position and then read it and then the Supreme Court comes down with an opinion and the defense is very persuasive on the other side. Was there ever a time where you, after a case had been decided, where you thought "Maybe the other side had more merit than I gave it," or, "Maybe I should have argued the other way"?

Cox: Well, I was an advocate and had the outlook of an advocate and argued cases where we knew the government might lose, one or two, and only one or two where we sort of hoped the government would lose. We were talking about *Lamont v. Postmaster General* this morning earlier. It's a big way from doubt about the government's position to confessing error. They are two very different things.

Q: Yes. Yes, indeed.

Shall we break for lunch now?

Cox: Probably a good idea. It's half past twelve. Yes.

[Tape recorder turned off.]

Q: So I guess we had spent some time before lunch talking about the apportionment cases. I was wondering if we could talk about some of the criminal cases that came up that you

argued or that were significant while you were before the Court, since Justice Frankfurter thought they were quite important.

One of the cases I had a question about that struck me as particularly interesting, I guess, it may not have been memorable, *Soldana v. United States*. The case was where federal convictions of crime will be set aside by the Supreme Court of the United States where it appears from a suggestion of the Solicitor General and from the Court's independent examination of the record that the combination of circumstances in the case was not consistent with the fair administration of justice. Does this ring a bell at all?

Cox: Only very vaguely. The name. I think we filed something very like a confession of error.

Q: But was this a unique case in that sense, though? It sounds from the reading --

Cox: Well, gosh, confession of error isn't a unique thing. In the literal sense, it's happened only once. But it doesn't happen every term, by any means.

Q: Right. I guess the way this case was worded, it sounded as if you were setting up something more than just a confession of error. It was almost a --

Cox: Well, it does sound as if we had filed something more elaborate or knew some outside facts that hadn't somehow gotten in the record, things like that. I'm afraid I simply don't remember, and we don't have a copy of the opinion here to refresh my recollection.

Q: Okay. What about criminal cases more generally?

Cox: Well, I don't recall any federal criminal cases that one would think of as of great importance in the evolution of the law or Supreme Court doctrine. I take it that means that there weren't very many of first-rate importance. But to some extent it may be a defect of memory.

Q: No, the ones I found --

Cox: But they are mostly state cases.

Q: And at that point the Solicitor General was still not entering the state cases.

Cox: That's right, yes.

Q: So the two major cases, or maybe three, would have been *Mapp v. Ohio*, *Gideon v. Wainwright*, and *Escobedo v. Illinois*. *Escobedo v. Illinois* may have been -- it was 1965. It may have come down after you had left.

Cox: No, *Gideon v. Wainwright*, actually, the -- well, this reminiscence has nothing to do with Solicitor General. Actually, during the late forties and early fifties, I was assigned to right-to-counsel cases by the Supreme Court to represent the indigent who was attacking their convictions on the ground that they hadn't had constitutional assistance of counsel.

Of the first pair, I won one and lost one. This is pre-*Gideon v. Wainwright*. And it was when -- what was the controlling decision in those years? *Betts v. Brady*? Was that the name of it? I'm all mixed up about the names.

Q: *Betts v. Brady*. No, you're right.

Cox: It may be. Again, you know, I remember enough to distrust my memory.

Q: No, you're completely correct.

Cox: Well, in my cases, I think I accepted *Betts v. Brady* and did not think to reargue that, but argued that there were special circumstances that required counsel, that justified setting a conviction aside. I won one case and lost one case. They were both prisoners in the Pennsylvania Penitentiary. It came just the other way. If I had to say you can win one and only one, I'd have chosen the one I lost and not the one I won.

In the case I won, the overbearing behavior of the trial judge on sentencing on a plea of guilty was held to be a sufficient critical: special circumstance. The trial judge had noticed what he thought was a previous conviction of this man. This appeared at the bottom of one page of one record. If you turned the page over, you saw, the trial judge corrected himself, saying: "No, that was your brother." The Court didn't turn the page over. Also, they said that he was overbearing and his efforts to be funny were offensive, and so forth. So it didn't rely wholly on this mistake in reading the record, but it figured. I didn't invoke it because I knew better.

In other cases, I thought that the judge misread the statute dealing with sentencing multiple offenders; and that if the defendant had counsel, there would have been a chance to straighten out that erroneous interpretation. But that argument didn't prevail with the Court.

The result of my winning one of the two cases was that I was deluged from letters from the Pennsylvania Penitentiary from other prisoners wanting me to represent them. Well, there were two who had -- two or three who had pretty good cases under the one that I won. I represented them at some stage along the way. I think that it was in the Supreme Court.

One interesting little incident, not unrelated, arose out of one of the requests I received from a man in the Pennsylvania Penitentiary, who had been convicted and claimed that he was railroaded by the police. This clearly would have involved investigation of the facts. Ordinarily I would try to write a not-unfriendly and not-cold letter stating why I couldn't do anything, but somehow, by good fortune, he caught my attention and sympathy. I guess it was his obvious link to the Quakers, his feeling about Quakers. It's something he pursued while he was in the pen. So I sent it to a friend on the University of Pennsylvania faculty, suggesting that if they had time, maybe they could look into this. By golly, they took the time and did find that the Philadelphia police had railroaded this man, and proved it, got him out.

Q: Remarkable.

Cox: Blew the lid off. It was really an outrageous thing. [Laughs] All I did was have an intuitive hunch because of the reference to Quaker organizations.

Q: Wow. A very lucky man, too.

Cox: Well, it made you wonder about all the ones you said "no" to.

Q: Yes, yes.

Cox: You were asking what were the major constitutional cases or other major issues in criminal cases in the Supreme Court in which the Solicitor General participated. I just don't think of any.

I guess the biggest constitutional question in the criminal area that I faced had to do with wiretap evidence, and I guess there the FBI was involved. There were discussions. This is something nominally Bob, but, in fact, Byron White, as Deputy, had the last word on. I remember being called into a conference and asked my opinion on whether the Supreme Court would uphold the use of evidence obtained by wiretap. I think my answer was negative.

I don't remember whether that led Byron, to adopt the "We won't use it" tradition, or "We'll recognize we can't use it" position or not. Certainly the Criminal Division wanted to continue to use it. I suppose that the FBI wanted to continue. So there was a division of opinion in the Department. There was a big formal conference on it, which I was brought

downstairs to take part in after it was well under way. I did give an opinion, and I think it was that it wasn't admissible, as ultimately was ruled by the Court.

Q: Was not.

Cox: Was not. At least that's, again, somewhat my memory.

Q: Did you want to say anything else about the criminal area?

Cox: No, nothing else that I can -- remembering that much doesn't bring back anything else. You don't have a list of the cases that -- well, you certainly don't have a list of all our cases. Do you have a list of all that I argued?

Q: That you argued? I think these are all cases that --

Cox: It would be quite a long list.

Q: Believe me, it's a very difficult task to undertake.

Cox: Let's say I don't remember any criminal cases or criminal issues. There were certainly cases that were discussed. I mean, I remember there were a fair number of cases. Bob Erdhal was the head of the Appellate Section of the Criminal Division for a time. Bea Rosenberg was the Assistant Chief and later became the head of it. She had at least one argument in the Court, if not two or even three, while I was Solicitor General. There were

times when I had consultations with Jack Miller, the head of the Criminal Division, and disagreed with him. We disagreed on this wiretap thing, if my memory is right. So it was certainly a Division that the S.G.'s office --

Q: So, Jack Miller -- you disagreed with him on the wiretap issue.

Cox: Disagreed.

Q: I guess the thing I'm puzzled by going through, I mean, I have a few criminal cases here, but it seems that the big criminal cases like *Miranda* and *Escobedo* came up after you left, and that the earlier cases were state cases where you weren't entering in.

Cox: That's right.

Q: What was Justice Frankfurter -- in this meeting, was he advocating that the federal government get involved at the State level?

Cox: Well, I don't think we got into the subject that much. No, I don't think so. No, I don't believe so. Furthermore, one can make too much of it. I talked with him at more length than any of the others on my courtesy calls at the beginning, but it wasn't as if we'd spent a whole afternoon together. One can make too much of his urging. He may simply have thought that the government's briefs in its criminal cases -- and, as I say, it had a certain number of criminal cases -- weren't as good as they should be. Or he may not have been

thinking carefully, and criminal cases were very much on his mind and he didn't stop to think about which were state and which were federal.

Q: It seems that -- well, there was an oral history with Frankfurter in the Kennedy Library, and from other things I've read, he was very upset that the Court was so involved in civil rights, it seems, that he was afraid that the Supreme Court was becoming too much a protector of African-Americans and that he wanted to pull back and get out of that area.

Cox: I wasn't aware of that. At least if I had been aware of that, I don't remember it.

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

[Tape recorder turned off.]

You were speaking of Justice Frankfurter and his concern about the Court's being too involved with civil rights. I guess he found the *Brown* case difficult, caused him much inner stress and turmoil. One of his law clerks, Phil Elman, has written extensively about Frankfurter and the *Brown* case. He was the law clerk maybe at that time; maybe one year before, but still in very close touch. My memory is that, as he tells the story, it had made sort of a critical impact on Frankfurter. But from a historic point of view of an insider writing about how the Court got where it did, his account is important. And I suppose one does know from that, that he was having trouble. Well, I've forgotten now how he chose and how he voted and what he wrote, if anything, in the cases dealing with the remedy. Was it the *Green* case that was of critical importance, the opinion by Brennan?

Q: After *Brown II*?

Cox: Oh, after *Brown II*. The case decided while I was Solicitor General. The facts were very simple. It was a school district that was relatively small, a country district. It had two schools, one white and one black. After *Brown* and after some interval, perhaps later when they got around to doing something, they simply took the signs "black" and "white" off the school, as it were. The pupils continued to go, white pupils to the school the white pupils had gone to before, and black pupils to the school the black pupils had gone to before. The school district officially took no further action either to bring that about or to encourage that, at least not in any way that was proved.

And it was held that the school district must adopt some further remedy. That's Brennan writing. It was not a unanimous decision, as I remember, and in view of talking about Frankfurter's view, it would be interesting to see where he stood in that case. I think it was *Green* against something county school board, but I may be wrong. I don't remember whether we filed a brief in that case or not, and it's even possible I have the dates wrong.

Q: It's 1968, so it's significantly after.

Cox: It was after I was serving. Well, everything else I say holds.

Q: Right, right, right, except Frankfurter was no longer on the Court.

Cox: Oh, that's true. So it wouldn't throw any light. Well, let's see, where could one look to see where he stood? The *Griffin v. Prince Edward County, Virginia* case.

Q: Yes, the same as *Griffin v. Maryland*. Is it Prince Edward County, Maryland?

Cox: I thought it was Prince Edward County, Virginia. Is there a Prince Edward County, Maryland?

Q: My sense is that the cases were coming up, but Frankfurter didn't get to sit on many of them, if any.

Cox: Oh, there were lots of cases at the end of the sixties and seventies, including school cases.

Q: Certainly. Right. But after Frankfurter had left the Court.

Cox: Yes. Well, maybe there wasn't. What date, did you -- oh, *Green* was '68. What date did you give for *Griffin v. Prince Edward County*?

Q: '64.

Cox: '4. Oh, that would have been during my time. I remember that, working very hard on the brief. It would have just been *amicus*.

Q: Right. Yes. That was the case where Hugo Black declared that "all deliberate speed" meant "now" in the final decision.

Cox: I don't remember that.

Q: Okay. Could we discuss *Heart of Atlanta* [*Heart of Atlanta Motel v. United States*] and the *Katzenbach* [*Katzenbach v. Morgan*] cases?

Cox: Sure. What about them?

Q: Well, I guess this is specific to the oral argument. As you discussed earlier when we were talking about the Civil Rights Act, you and the other people who had worked on it very consciously based the Title II on the Commerce clause. And then in the oral argument you emphasize -- you say -- the quote, you use the term "This is a grave commercial problem," and in arguing this while the opposing counsel consistently attacked the commercial aspects of it.

Cox: Yes. Well, first, the *Heart of Atlanta Motel* was as easy as rolling off a log, after all. There was a showing that prior to the statute there were virtually no places where Negroes from New York or Boston traveling to Florida could stay overnight, and of similar problems with good restaurants. So, *Heart of Atlanta Motel* was easy. *Ollie's Barbecue* was much tougher.

Q: That's the at-issue in the *Katzenbach* case. It was Ollie [Oliver] McClung?

Cox: Yes. The name of the establishment was Ollie's Barbecue, and it was a luncheon place with a good deal larger clientele than Country View restaurant, but the same sort of place, only down along the Gulf somewhere. They served, well, seafood primarily, and was mostly a luncheon trade. So you didn't know how many, if any, interstate travelers were included. And the commerce affected was the shipments of food --

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

Q: Okay.

Cox: But just as a strike, picket lines, would affect the patronage and would therefore affect the demand for out-of-state goods, so limiting the patronage, excluding the patronage of blacks would cut down the demand for out-of-state goods. And Ollie's Barbecue did directly or indirectly get a certain amount of its food that it sold from out of state.

The labor case analogy is pretty close, and the Labor Board jurisdiction did extend potentially that far. In fact, the ordinary guidelines of the jurisdiction that the NLRB would exercise, probably excluded Ollie McClung's restaurant and others like it. I say that; I don't really remember with any degree of accuracy. But, of course, the guidelines didn't indicate -- they didn't exercise the full jurisdiction the NLRB had. But the reasoning was directly along the lines of *Jones v. Laughlin*, and I think you would find in our briefs that that's the way we treated it.

Q: And you do. You rely very heavily on that and other Commerce clause cases. But in your argument, I guess Justice Goldberg questions, in the oral argument he questions the narrowness of the brief, the deep reliance on the Commerce clause. I guess I was wondering, after reading that, whether you were trying to avoid the moral issues of racism and their facts, or did you just -- you do, indeed you do relay the gravity of the issue for the country in a way that insinuates morality, but were you very consciously trying to avoid broader social arguments, or --

Cox: No, no, I was trying to avoid direct challenge to the Civil Rights Cases.

Q: Okay.

Cox: I guess that was the only thing, and I would guess in answer to his questions, I simply took no position on that, I think. I tried to avoid the question, where did we stand on that. Part of the reason would be that one had to have other cases, such as some of the earlier sit-in cases, in mind, probably in the air. I'd have to verify the various dates to see whether that was true, but I think that was true.

Q: They were all around the same term.

Cox: Yes. So it should be worrying about those cases and the impact of the differences of the disagreements among the judges in those cases on your federal public accommodations law.

Q: Have you read the more recent cases, in the past five years, such as *Lopez* [*United States v. Lopez*] and *Prinz*, [*Joseph Prinz v. Austria*] dealing with the commerce clause and other --

Cox: Oh, yes.

Q: And do you think that there's a threat to the civil rights cases?

Cox: Well, I thought the school cases -- was that *Lopez*?

Q: The Gun-Free School Zones Act? Yes, that's *Lopez*.

Cox: I thought the threat of a sharp narrowing of the Commerce Clause that some people saw in that was exaggerated. Well, this most recent case in the area is the second one, and, therefore, it makes you think again. Again, I don't think there was -- I don't say that a real reversal of direction is likely to come about. It's a curious thing.

I mean, take the Congress. It passes legislation dealing with terribly local matters all the time. If they feel morally that it's good legislation and voters morally will agree with it, Congress will vote for it. But worry about state or federal? They don't give it a thought, apparently. So it's hard to believe there's any great pressure for a cutback in the country as a whole.

Q: Yes. I don't have many -- well, since it's of particular interest to you, or it certainly was, what do you feel your impact, or the Court's impact, on labor law was in those years while you were Solicitor?

Cox: Well, on the whole, I think that the decisions of the labor field on the whole came out pretty well, developed the law as it should be developed. If my memory was better, there might be individual decisions that I would have disagreed with.

Q: Do you want to look at -- I have a --

Cox: Well, I don't even -- the names don't remind me of the issues in some of them.

Q: Okay. They mostly seem to deal with the right to organize, and the Court in those cases tended to side with union organizers and the unions in terms of organizing factories.

Cox: Yes, there were -- well, I'm afraid I haven't taught labor law in a long, long time. As with all of this, my memory is fading out.

Q: This is going back a bit, but we talked about when Justice Whittaker resigned. What role did you play when Justice Frankfurter resigned? Did you have recommendations to fill the seat?

Cox: I don't remember any discussions about that time about who should be named. How quickly was Arthur Goldberg named?

Q: Relatively quickly. Did you have any hope yourself that you would be named?

Cox: Well, I told you that story about Justice Reed. You had also read it.

Q: Right. Right.

Cox: That did have an impact on my thinking. I can't say that I was -- I think I assumed that unless the President had some commitment I didn't know of, that if there was a pool from which he would choose, that my name was likely to be in it. But I don't remember any discussions that I took part in when Arthur Goldberg was named. There could perfectly well have been discussions. It could be -- I don't think it's vanity to say that I wasn't part of them because my name was in the pool. I talked at some length with Arthur about whether he would leave to go to the U.N. or not.

Q: He consulted you on that?

Cox: We talked on a very personal basis. It may have been -- I couldn't swear with assurance as to whether it was before he made the decision or when he was worrying about it after the event, worrying about whether he'd done the right thing. But I do know we had what were very personal, particularly personal in terms of for him, talks at some length about it.

Q: Did he seem hesitant? Well, if he was troubled, he obviously was hesitant. But what were his concerns in leaving?

Cox: Well, I guess just resigning from the Supreme Court to be an ambassador was a novel step for anyone to take. Was it really the sensible thing to do in terms of duty of public service, in terms of self-interest, and so forth. We didn't ever talk about whether it was in his mind that maybe after three or four years at the U.N. he would run for Governor of New York, but I know that various people thought it was in his mind, and that it might be a step to running for President. I don't want to seem to say that ever was in his mind. There's nothing he said to me that would indicate it was in his mind. It more was more in terms of conscience and personal satisfaction, relative personal satisfaction of the two jobs and their relative importance.

Q: Had you been satisfied with his decisions while he was on the Court?

Cox: Well, he was, you know, a bit more freewheeling than I would have been. I had a very high regard for Arthur. I'd known him back -- well, again, I saw quite a lot of him in connection with the Kennedy labor legislation. But I'd also -- we hadn't any occasion to talk about it, but during the fifties, late forties, I was doing a certain amount of labor arbitration, and it brought me in contact with labor lawyers, not very often in contact with Arthur Goldberg, but sometimes brought me into those circles, in any event.

During the labor legislation, we saw quite a bit of each other, and again in the Kennedy years, Kennedy in the White House years. And I didn't think of Arthur when we were

talking about seeing individual Justices. Well, it may be that during the years that Arthur Goldberg was on the Court, I saw as much, if not more, of Arthur Goldberg than I did of William Brennan.

Q: In informal or off, not on the bench.

Cox: Yes. But it wasn't on the bench.

Q: Right, right. My sense from what I've read is that Goldberg's leaving had a lot to do with pressure from LBJ wanting to name Fortas to the Court.

Cox: Could be. I couldn't say.

Q: How did you prepare for oral argument, yourself, not others in your office? What was your general practice?

Cox: Well, much depended on available time. The difficulty of the case, the size of the case entered into it, of course. I would try, if I could, to write, and when I say "write," I mean rewrite and rewrite, with some care, an oral argument. I didn't always get it done.

Sometimes I got an outline only. I didn't expect to deliver it as written. I knew I wouldn't get to deliver it as written. Well, I think I knew it by the time I became Solicitor General.

But I thought it important to clarify your thinking, to face up to the questions of what you needed to emphasize, what you didn't have time for, and, importantly, to help get in your

mind not the full text, but key phrases that might come out in entirely different contexts. You might get some of the full text in your mind or you might not. By writing it out the danger of phrasing something not quite right was at least reduced. I don't think you ever get away from it entirely, but it was reduced.

Also, I would try to think in three steps: what questions would I be asked; how I would answer them; how would I get back to the thread of my argument if the question were asked at various different points in the argument. That third step, how to get back to the thread of my argument, I think was important. Would one follow it? Of course one couldn't memorize all this, but it made the thoughts come a little more easily when you were there on your hind legs and didn't have time to worry about the answer.

I would often ask my -- well, technically, staff -- my colleagues. Remember, we were a friendly group of eight or nine lawyers working together. I might wander into any one of the offices, might wander into Lloyd Weinreb's office: "Lloyd, you worked on such and such a case. What are the questions, the most difficult questions, I'm likely to be asked?" Or even if he hadn't worked on it, if it was a case that people generally were interested in, I might ask him.

And if it were something involving Civil Division -- I've forgotten who was the head of the Appellate Section. I guess with changes -- when I worked there under Charles Fahy, Oscar Davis, who was first assistant in the Office of Solicitor General when I became Solicitor General, was in the Appellate Section of the Civil Division. Whatever Appellate Section it

was, I might talk to them about what questions were likely to be asked, and perhaps discuss the issues.

I hope I got everything clarified before the brief was filed or printed, rather than after, but you might have occasion to ask what were the implications of this or that and talk with other people about it. This would be to a greater or lesser degree depending on the case.

I never went through this mock argument practice. I always worried that at the real argument my mind would be on what I saw as the mistakes or some others commenting on my presentation saw as the mistakes rather than on the merits.

Q: Somebody describes your style as explaining rather than hard-hitting argument. Was that intentional?

Cox: Well, yes and no. I mean, I think wanting to explain. Wanting to make it clear and make the reasons for some propositions clear, was certainly deliberate. The "rather than arguing," the excluding arguing, I suppose wasn't intentional.

Q: This reminds me of what you had to ask the Warden at All Souls College. But I heard a story a while before I knew I would interview you, and it may be apocryphal, but that you became physically ill every morning before you were to do an oral argument.

Cox: That is not true. Period.

Q: Okay. It was something that was attributed to you.

Cox: I woke up very early, if I slept at all.

Q: So you were nervous?

Cox: Oh, yes, very nervous.

Q: Even after you'd been before the Court a hundred times?

Cox: Oh, sure. Well, I never quite reached that, but yes.

Q: This is a case that you argued after you were Solicitor General, but it really struck me. In *Shapiro v. Thompson*, the welfare right to travel case, you start out the argument and you make an appeal to history, basically, describing the history of the Elizabethan Poor Laws. And then you move into a legal argument, and then at another point you start to tell the story of Juanita Smith, one of the plaintiffs in the case. Were those types of things, those types of constructions where you were using history or using personal narrative, were those things that you consciously did in your mind before the oral argument, or were those - I guess that's my question. Was that something you came up with before you argued?

Cox: Well, I -- you mean before the particular argument?

Q: Right. Were you consciously trying to think, "I need to hit on the history. I need to touch on the personal stories"?

Cox: Well, I certainly deliberately emphasized, at least I thought I did, the personal stories. For one thing, I was assured by counsel who had had the cases before they brought me in for the reargument, that these were just people who had walked into storefront Legal Services offices, but you'd think that they were individuals who'd been selected carefully to have the best stories for attacking the notion that they had no ties to the state to which they had returned and where they were seeking welfare.

There was one of them who had gone down South, as I remember, I think from the District of Columbia, to take care of a dying mother, and was there a couple of years and then came back home and was denied welfare. She'd lived most of her life in the District. She'd gone off on this errand of mercy and come back.

There was a poor woman who was in the insane asylum, home for the mentally ill, who would have acquired residence, domicile, and citizenship, except that you couldn't acquire the necessary residence while you were in the home for the mentally ill. But she'd made it her base before she became sick, but not for quite long enough.

Well, there are others along those lines, and I suppose it's told at more length in the brief than the oral argument, but I certainly tried to stress those facts for all I was worth.

Q: Did you consciously consider --

Cox: My argument, my style, may well have been one of explaining the facts in the case, but, by golly, the reason I chose to explain them was because they were so persuasive.

Q: Right, right. The use of the story about the woman who went to care for her mother, I mean, all the stories in that case are particularly striking, but your use of them was very -- it put an emotional spin on the case that I think as a justice it would have been very hard to just ignore.

Cox: I hope so. That was the aim.

Q: No, it was brilliant. No, I mean, I just read it, thinking it was brilliantly done and not solely in a calculating way, but that as a technique it was very, very good.

Well, I guess my question now is, how did you decide to leave the Solicitor General's Office?

Cox: Well, I don't remember exactly what was the immediate occasion. There must have been one. But I'd been there quite a while. I'd been there four years plus, which was quite a while. But there was in the background, there was some thinking about, talk about a vacancy on the First Circuit. I never thought of Washington as a permanent family residence.

As I say, I've forgotten what sort of precipitated a decision, but whatever it was, I was still conscious that I was a holdover and that LBJ hadn't appointed me, might be glad to be rid

of me. I talked with Nick Katzenbach about all this. He sought to persuade me to stay. I wrote a letter, which I guess included "I resigned." I think Nick, by word of mouth, if not the letter, made it clear to LBJ that if he asked me to continue, I would continue. The message he got was not one of "Cox quits." But he wasn't interested in asking me to stay. He wanted to name Thurgood Marshall. So he didn't ask me to stay, and accepted the letter, and then I resigned.

As I'd always planned to do, I went back to the Harvard law school. As for the vacancy on the First Circuit, I think I knew by that time that Ed [Edmund S.] Muskie was not going to support my appointment. I also knew that if he wasn't going to, that I wouldn't get it. It went in a very fine appointment to Frank Coffin of the State of Maine. I knew Frank, had known him as a student and as the Faculty Assistant in charge of the Ames Competition. That's the moot law clerk position he had occupied for -- well, one, two, or three years, probably two years after he graduated from law school.

So, as I say, it was a fine appointment. Two times my name has been in the hopper for the First Circuit. Happily, both went to very fine appointments, Frank Coffin for one and Steve Breyer for the other.

Q: When was the second time?

Cox: Well, when Carter was President, Kennedy and Steve, who was --

[Telephone rings. Tape recorder turned off.]

Q: Okay.

Cox: What were we on?

Q: You were talking about, I believe, the First Circuit.

Cox: Well, these two vacancies came up, one during the Carter Administration. I don't know who first thought of it, but either Senator Kennedy, who was in Washington, either directly on Kennedy's staff or on the staff of the Judiciary Committee. There was a vacancy this time, I think, from Massachusetts. It wasn't Maine. The Maine one, I had to rely on summer connections and Phyllis' family having been here a long time and so forth.

This one, I think, was to come from Massachusetts. It was now the late seventies. Whereas back in '65, I had really wanted the job, I wasn't at all sure I did want it at this point. On the other hand, I didn't want to be unappreciative of their interest, and I didn't think Carter would ever name me. In fact, I was quite sure he would never name me, but if he --

Q: Why is that?

Cox: Well, I had supported Mo [Morris K.] Udall and I had made the speech at the Democratic National Convention nominating Mo Udall. Even if Carter didn't remember that and hold it against me, because by the time of the convention, poor Mo was out of it, Hamilton Jordan would remember and would hold it. And I had had one meeting with

Griffin [B.] Bell, which was not altogether happy, in which I was representing the Maine Indians and their claims, demands to this area and other parts of Maine, but it included this area.

So they went ahead and pressed it and I did not withdraw, but, well, I didn't do any lobbying on my own behalf the first time. I didn't see a need to. Nick has written things that indicated if I'd been willing to do any the first time, it might have been a difference in result. But I didn't, and I didn't the second time.

I was proud -- forgive a little boasting. Those were the days of committees or commissions in each circuit that approved or disapproved the various people who were proposed for judicial vacancies.

Q: Was that an ABA commission?

Cox: No. I think they were named, I suppose, by the Justice Department. I think it was quasi-governmental. Maybe I'm all wrong. I've forgotten. They didn't ordinarily sponsor a candidate. And the reason for my bit of boasting and vanity is that in this instance they did. They ranked me first and most desirable to be named.

But gradually it became clear that Carter and the White House wouldn't name me. I have a vivid recollection of Steve Breyer, who was still down in Washington coming to the office to tell me that it's hopeless and then, with some shyness and embarrassment, asking me if I

would be offended if he were to seek the position. I said, "Of course not." But it was a kind of touching scene I won't forget.

But, well, those are -- we got on to this when you asked how I happened to leave and I mentioned there being two occasions when I had thought of judgeships.

Q: I've kind of taken us too far afield, and I think any oral history that talks about, that involves the Kennedy administration, I've been remiss in asking you about the Kennedy assassination. Do you recall that day and what had happened and how you found out that he had been assassinated?

Cox: Well, I found it out on the hall of the fifth floor in the Department of Justice. The fifth floor was where the Solicitor General and the Attorney General had their offices, at Constitution and Ninth for the Solicitor General, Constitution and Tenth for the Attorney General. I think I was for some reason walking from my office toward Bob Kennedy's office when I bumped into someone, one of my colleagues in the Department. It may have been Burke Marshall or may have been the head of one of the other Divisions. I think it was another Assistant Attorney General, but I wouldn't swear to it, who told me there'd been a shooting down in Texas, that the President was hit. We rushed into Bob's office. He wasn't there, but we rushed in and very shortly learned over the radio what had happened, and very shortly later, that Kennedy had died. Those were the circumstances of my learning it, which is what you asked. So it was an awful, awful time.

Q: And did things come to a halt for a while at that point?

Cox: Well, it certainly seemed like a complete halt. On the other hand, one knows perfectly well that time limits continued to run, briefs had to be filed, various other Court papers had to be filed, with time limits and such, so that they didn't halt entirely, but it certainly seemed like everything was at a standstill. In one sense, all the things of substance that didn't have somewhat mechanical grinding on did come to a halt for a time, yes.

Q: Was there any change in your job or how you did it in the transition from the Kennedy Administration to the Johnson Administration?

Cox: Not really, except that I had, I guess literally, no direct personal contact about any government business with LBJ that I can remember. I certainly didn't do occasional things for him outside as the role of Solicitor General.

Q: You say you did those things?

Cox: Did not.

Q: You did not do anything outside.

Cox: No, no.

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

Cox: I was saying that I had no personal contact with President Johnson on government business. Indeed, I saw him only on one or two occasions, formal or semi-formal occasions, and then only, you know, greetings, shake hands. I had become acquainted with him back in '58, '59 in the Senate. Well, it would be the House, I guess. He was Speaker, wasn't he?

Q: Yes. Well, no, he was Senate Majority Leader.

Cox: Senate Majority Leader, that's right. He had been undercutting Kennedy on occasion on the labor legislation. We did a lot of talking about his view and some on his activities undercutting or attempting to undercut Kennedy.

In terms of communications, there are only two things that I think of. When we finally decided to take a position on the pure sit-in question, I sent word through Nick Katzenbach, who was acting Attorney General, if not Attorney General by then, that we intended to support the civil rights position, just really the conclusion without much of anything about the line of argument, and gave him a chance to say, "Don't." He didn't say, "Don't." He acquiesced. And he sent word on one occasion about a tax case that he wished me to argue personally, because from the standpoint of revenue yield, it would make or break his budget.

Q: And had Kennedy ever done anything like that, in terms of telling you that you should argue a specific thing?

Cox: No, no.

Q: Did you have any problem with that sort of directive or suggestion?

Cox: No. There it was. The government's position was clear enough. If the President wanted me to argue it, well, I'd argue it.

Q: Okay. Did you remain -- well, one question is, was there any difference, just as I asked was there any difference in your job in the Kennedy and Johnson Administrations, did you feel there was a change in the Justice Department from Robert Kennedy to Nicholas Katzenbach?

Cox: Well, there was some differences of style, not major importance. It certainly didn't have a substantial effect on the Office or business of the Solicitor General.

Q: And did you stay in touch with Robert Kennedy after, I guess, he left? He was elected senator from New York.

Cox: Well, I stayed in touch with Bob. I didn't have any part in his run for the Presidency, but I saw him on one or two occasions when he was Senator. Not a great deal. He didn't regularly consult me about things. But I do know a few times I went to Washington to do something or to see him about something or to do something in Washington at his request. So we kept up to that extent.

Q: Did he ask you to play a role in his presidential campaign?

Cox: No. After all, he didn't get terribly close to actually campaigning, did he? Were they at the point of seeking to sign up delegates yet?

Q: Well, he was assassinated the night of the California primary, which he had just won, and that was in June, I believe, so they had gotten three or four months into the campaign. And I think Johnson announced he would not seek the nomination in March or April.

Cox: Yes, yes, yes. That's right.

Q: So it changed significantly.

After you left, I believe your first argument before the Court after you stepped down as Solicitor was *Shapiro*, is that correct?

Cox: I'm afraid I don't remember well enough to say. There was a case that I argued involving state sales tax applied to mail order sales. That was one of the cases that I argued after I was Solicitor General.

Q: And you came back to argue that?

Cox: Well, I argued it first in the Seventh Circuit. I think it was the Seventh Circuit, and then in the Supreme Court. Can't think of the name of it now, but it was mail order sales and State effort at taxation. We won.

I argued a case involving the broadcast industry. During the period that Erwin Griswold was Solicitor General. I argued it in two Courts, lost in the Supreme Court. It was a First Amendment case.

Well, there was *Buckley v. Vallejo*.

Q: Of course.

Cox: I just don't remember the dates of *Shapiro* well enough to say whether it preceded those.

Q: *Shapiro* definitely predated *Buckley*. *Shapiro* was 1969.

Cox: Then the most I had done, probably, was to represent Massachusetts and a few other States as *amicus* in the first voting rights cases in the Supreme Court. I think I was granted a short time to appear before the Court and not to make a major argument, really. That would probably have been the only thing before *Shapiro*. *Shapiro* had already been argued once. There were three cases: a case from Connecticut, a case from the Third Circuit, and a case which originated in the District of Columbia. Counsel had different theories on which they'd argued the case, and the justices got them fighting with each other about which was the right theory. So after the cases were set for reargument, they decided they'd better get somebody in to unify things and make one argument for all. And the former Solicitor General was the logical candidate.

Q: When you took these cases, were people approaching you, or did you make clear that you were willing to keep doing these things?

Cox: Oh, the request always came from somebody else. I wasn't volunteering.

Q: Okay. Did you feel something -- was there some difference that you found between arguing after you'd been Solicitor and arguing when you were Solicitor?

Cox: Well, I don't think in the terms of the argument itself, no.

Q: Or how you approached the argument?

Cox: Well, you were unlikely to have to be worrying about the implications of what you said in Case A for Case B or Case C or Case D, which could occasionally be in your mind when you were Solicitor General. You didn't have any occasion to think quite in those terms, but you had to think of the implications because part of making any argument does involve thinking of the implications of the argument, facing up to how to deal with them or whether to affirmatively stress them and so forth. But otherwise, I don't recall any great difference. And it was still close enough in point of time, at the time of *Shapiro*, for two-thirds of the justices to be the same, if not more. So it wasn't a strange Court.

Q: Right, right. Then, of course, I feel like I may be the only person who's interviewed you in the last twenty years who isn't going to ask extensive questions about your activities in the 1970s. [Laughs]

Cox: Watergate?

Q: Yes, Watergate. And I'm guessing that you've talked about that more than you certainly need to.

Cox: Oh, my, I've certainly talked about that on many occasions in many places. Of course, Ken deals with that at enormous length.

Q: Yes. Yes, his section on that is quite impressive. Did you find after you returned to Harvard that your teaching had changed? For instance, did you teach different courses?

Cox: Well, when I returned to Harvard, I had an interest in constitutional law. My focus was no longer labor law alone. Also I went back and did a good deal of teaching in labor law, although Derek Bok was also there to teach labor law, until he became president of Harvard.

I have read that my manner, and I guess to some extent my style as a teacher, seemed less stiff and friendlier, more informal, to students. Derek, among others, has said or written that.

Q: I heard a good story from a former student in the 1970s who took your First Amendment course, who said -- and his name was Richard Bernstein. He was actually in Ken Gormley's class.

Cox: Oh, yes, I remember him.

Q: And he said that you were talking about press shield laws, and that you said that you didn't approve of them or you didn't support them, and then you said, "But I might feel differently if I carried a press card." So he and somebody else from the *Harvard Law Record* brought you a press card the next class. And you took it, put it in your wallet, then put it in your pocket, and paused a moment and said, "Nope, I don't feel any differently."

[Laughter]

Cox: What's become of Richard Bernstein?

Q: He's a very good legal historian now.

Cox: Where?

Q: He teaches at New York Law School.

Cox: At New York Law School, I see. Well, if you see him, give him my very best.

Q: I will.

Cox: I am always a little surprised by this talk about the difference in my style in teaching and the reaction of the students. I don't think the students who had been to Ivy League

colleges and New England private schools in the early years of my teaching or in the post Solicitor General, post Watergate years, would have seen any difference in me. I think my manners and style were those of a private school, Ivy League person. I don't think it of as snobbishness on my part; it was simply the manners that I'd been educated to, the style I'd been educated to. But that's just my guess. As I say, people like Derek Bok have written the opposite. I guess they would have said that the difference is more after Watergate than after S.G., but there wasn't a great gulf between them. There was some period, but not terribly long. Eight years.

Q: Do you think that being Solicitor General changed you or changed your outlook on government or the Supreme Court or maybe all of those things?

Cox: Well, with time, one develops, evolves. I suppose being Solicitor General had its effect. I wouldn't be able to tell you how being Solicitor General made me more this or less that.

Q: We've talked some about changes in the Solicitor General's office.

Cox: Yes. There's one other thing that we have said hardly a word, if anything, about. But it is a very important subject and it was a very troublesome subject. What about the relationship with the independent agencies? What about the cases where the different government agencies hold different positions? Now, we did talk about the "flags of convenience" problem. That was unique in that it was at a level to be brought to the President's attention. But most of the other differences weren't issues for a president.

But one ran into this kind of tension one or two or maybe more times every term, every year. And the Federal Trade Commission probably raised the problem most. The SEC [Securities Exchange Commission], on one occasion when I was Solicitor General, gave a real tussle. There was an effort by the independent agency to assert the right to file its own brief, saying what it wanted to and not have the case handled the way the Solicitor General thought it should be handled. Those were cases where the S.G.'s office and the independent agency disagreed.

The Federal Trade Commission was likely to be wanting to take a case they'd lost in the Court of Appeals to the Supreme Court, where we didn't think it was worth taking to the Supreme Court, maybe because the case was simply not sufficiently important or maybe because we thought they were on very doubtful ground. And they just plain wanted to go ahead: "To hell with you."

There were cases where the agencies were badly split, and a number of them are interesting. This happened to me early. Oh, dear. Well, the anti-trust use of copies of a report to the Census Bureau.

Q: This is *St. Regis Paper*.

Cox: *St. Regis Paper*, yes. I was very strongly of the view that no paper that wasn't signed by the Solicitor General should be filed on behalf of any federal government agency in the

Supreme Court of the United States. So there would be -- in one sense of the word at least -
- only one unified position.

In *St. Regis Paper*, the Anti-trust Division had one view. The Department of Commerce and the Census Bureau had another view. The Bureau of the Budget was on one side. The Federal Trade Commission had views on the subject. I'm not sure whether anybody else had a view. It was as if they were all shouting. And I heard them all, both separately and together, I expect. That's not memory; that's just what would have been my style. And finally I decided that the only way I could handle it was that I would see that both points of view were fully explained in the Court, and I would State my conclusion, which lay against use and was the same as the Bureau of the Budget's view. And I did this in the brief and also in the oral argument.

Felix Frankfurter was infuriated by mention of the Bureau of the Budget, and jumped to the conclusion that somehow the Solicitor General's position was dictated by the Bureau of the Budget, and he was outraged that I had allowed the Bureau of the Budget to dictate the Solicitor General's position. I didn't think, and I continue not to think, that the Bureau of the Budget in any sense dictated my position, but it was on the same side. It was consulted, as were all the interested agencies, and it came down that way. And some of them came down the other way. But I think Felix wrote the opinion holding that these reports were not privileged and could be used. And I've always thought that that unfortunate reference to the Bureau of the Budget and his jumping to that conclusion had something somewhat extrajudicial to do with his sentiment and his outcome.

I think I mentioned yesterday, my memory was that this problem had come up once under Charles Fahy, while he was Solicitor General, in a case involving the Federal Power Commission. I remembered that he had blocked its filing an independent brief, and I did not allow anyone to file independent briefs. I never reached again the point that I did in *St. Regis Paper*, where I presented arguments on both sides, giving each equal development somewhat even-handedly, although I expressed an opinion at the end.

But there were battles of this kind, with threats to go off file independently. I don't think anyone actually attempted to file anything independently, but one of the continuing problems of the Solicitor General was achieving a unified government position and preventing the filing of separate briefs. I believe that the latter practice has not been insisted upon by some later Solicitors General, but they now sometimes do let an independent agency file a brief taking an opposing position.

Q: And do you find that problematic?

Cox: Very. I wouldn't have done it. No, by golly. It's the Solicitor General's job to achieve a unified government position.

Q: Were there any other major conflicts? I mean, obviously there were lots of conflicts, but were there any which may have ended up at more of a consensus than in the *St. Regis Paper* case? Do you remember any of these?

Cox: I remember having at least one intense interchange with the SEC. There were several Federal Trade Commission cases, as I mentioned, and there were some others. No, as I thought I said, this would be a problem at least once every year and maybe two or three times. I would say that it was one of the important problems in addition to the straightforward handling of the Supreme Court litigation that the Solicitor General had to deal with. When to file *amicus* briefs would be another.

Q: Did you have a sense that there were only so many cases in which you could request *certiorari* or --

Cox: Well, that was a hard question. I remember discussing it with Stanley Reed. What should your batting average be on petitions for *certiorari*? Should you bat a thousand with all the petitions you file granted so that you never made an "out" by filing a petition that was denied? Well, everyone would quickly agree that nobody could select a hundred percent and only the right ones of the cases in which there should be a petition. So what would be a good percentage of grants? I think his view was that it lay in the sixties, maybe as high as seventy percent. I guess I would agree, did agree with about that kind of estimate. I don't recall ever figuring out what my percentage was.

Q: Ken Gormley refers to you as the Willie Mays of the Solicitors General, so you obviously did relatively well.

Cox: [Laughter] Was he referring to *cert* petitions or to the merits or in general?

Q: I think in general, that you had a very good average in terms of wins. Were you more likely to allow an independent agency to appeal to an appeals court?

Cox: No, we didn't pass on those.

Q: You didn't pass on those.

Cox: No. After all, some of the independent agencies go straight to an appeals Court. NLRB does.

Q: Right. Through the administrative process or --

Cox: Yes.

Q: We had talked about changes in the Solicitor General's office from the time you were there until the present in terms of their involvement in cases. Are there any other changes that you've noticed?

Cox: Well, I think the increase in size, the change in *amicus* policy. The increase in size has been accompanied, although I don't know the details, with some development of a hierarchy among the S.G.'s lawyers. He can't deal with all thirty of them personally, treating them all as equals, the way I would treat either all or all but one, and the way my predecessors treated either all or all but one. It was not extraordinary in fairly recent years to have one young man who was a little closer to law clerk to the Solicitor General. And in a

way, Phil Heymann, if he hadn't been so very able, might have been that because he had had no experience. He was straight from a Supreme Court clerkship. But he was so damn good, we quickly treated him like the others in the office. But there must be some hierarchy now. The degree to which politics, party politics, is taken into account is something new.

Q: In hiring?

Cox: No, I'm not thinking of that. I'm thinking of cases, positions taken, cases into which they go into, things like that. And I'm not saying this is regularly true today; I'm saying it has been a feature sometimes in later years. It may or may not be true of any given year.

Well, I'm not aware of other changes, but I haven't made any study of it, so the fact that I'm not aware shows very little.

Q: What about changes in the Supreme Court?

Cox: Well, of course, one huge change is the cutting down of the time for oral argument. In the last few years they have also cut way, way down on the number of cases they hear. I can't help thinking that the increase in the number of law clerks per justice makes for differences, but it's very hard, not having been a law clerk or a justice, to say from the outside just what those differences are. As I say, I can't help but think it must make a difference. When did they go from one law clerk to two? The fifties?

Q: Yes, I think in the 19 --

Cox: I think there were only two law clerks per justice, if that, in the period when I was Solicitor General.

Q: No. There were four.

Cox: Must make a huge difference.

Q: Yes.

Cox: And cutting the time for oral argument, I don't know whether it makes a difference in the result. It certainly made a great difference in the style of argument and the preparation for arguments, but whether it makes a difference in the outcome of the cases or in the character of the opinions, I couldn't say.

Q: Did you feel that oral argument made a difference when you were S.G. and --

Cox: I think it would make a difference in two kinds of cases. I think it could make a great difference in relatively unimportant cases. The example I think of is the tax on mail-order sales case that I referred to earlier. Lance Leibman, who became dean at Columbia, had been Byron White's law clerk during the year that case was argued. I had known him when he first was at the *Harvard Law Review*. He regarded that as a case stolen by me during oral argument. And it was a manageable enough case for the oral argument to have quite

an effect, but it was not a case that was of great importance beyond the mail-order industry.

I felt that the oral argument on the reargument of *Baker v. Carr* probably had an impact. I don't really know that. I remember it was argued early October, and I set out to walk back to the Justice Department after the argument. I remember coming down Capitol Hill and sort of looking at the trees -- it was a lovely day -- and relaxing, and thinking, "Young man, what have you done now?" I thought that I'd had an impact. I don't really know that I had an impact. If you were to ask someone on the Court, he might tell you, "Well, gee, despite his argument, the government won."

But I did think that there were certain very major cases which were very close, where counsel could make a difference in the oral argument. The answering of questions could make a difference. As I put it to you before in terms of my expectations, did I come off even with Felix Frankfurter, intellectually? But I don't know any of that. I may be totally wrong. Only a justice could tell you that, and I'm not sure that any one justice could necessarily tell you about the others.

Q: Well, I think I have no more questions.

Cox: Well, I'll do my best to answer them if you do.

[END OF INTERVIEW]