Chapter 11

REMINISCENCES

I. Introduction

David E. Feller*

Archibald Cox was admitted to the Academy in 1953. Much of his life you know about and I want to expand on it just to say it is a great honor to introduce him. Without anything further, Archie, lets hear what you've got to say.

II. Fireside Chat

Archibald Cox**

Archibald Cox: Thank you, Dave. I just want to say this is an extraordinarily happy occasion. For one thing it is a truly great honor to be here. The pleasure is heightened in the way I have stepped from part of yesterday, today, and part of tomorrow into a world that fate took me away from. I used to think that I knew very well the world of collective bargaining and labor arbitration. Then fate, as you perhaps know, took me out of it. It's been great fun to come back and see a lot of old friends.

David E. Feller: How did you get into it in the first place?

Archibald Cox: Largely chance. I got into it first during the years in which I was a young associate at the Boston law firm of Ropes & Gray and then in 1941 with the National Defense Mediation Board. You used the phrase "How did you get into it?" The metaphor that might best describe the way I was introduced to collective bargaining, labor relations, and labor unions was the way some old-

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fashioned families used to teach their children to swim: "Well, he's 4 years old. That's old enough. Throw him in the water. He'll find out how to swim."

That's very much what happened in those days in the New England area where there had always been unions but they were not very strong, and they were particularly weaker during much of the 1920s. Although there had been some organization in the textile mills, they were largely unorganized at that time. For some reason, I was concerned with litigation, and the labor matters fell to the litigators. Partly, I suppose because a good number of them involved the National Labor Relations Board (NLRB). Partly because in the old days labor law meant getting an injunction. In any event that's the way it happened and we pretty much just crawled into the water and learned to swim.

I remember an occasion in the 1970s when I went down to Fall River to sit as an arbitrator in a case involving some of the Fall River-New Bedford textile workers and the mills that were left. I was greeted by the older people in the room where the hearing was to be held, "Here comes the man who brought in the CIO [Congress of Industrial Organizations]."

Mind you, I was with employers who had nothing to do with the labor unions themselves. But what had happened was there was some union activity taking place in some of the mills, and suddenly one day management woke up and found it had a work stoppage on its hands. It didn't have any demands. I didn't know who'd called it, but there it was, so what do you do? You get your lawyers. What do the lawyers do? Well, you send one of the young associates to do something or other. And I was sent down to Fall River. The only thing I knew was that the president of the company chiefly affected, I think it was American Thread, was convinced that the mills had to be organized. And if they were going to be organized, it would have to be an industrial union—the textile workers that Emil Reive was then the president of. He didn't want any part of AFL [American Federation of Labor] craft unions because he'd had 12 of them in the past and each bargained separately.

So I took myself down to Fall River. After nosing around for most of the day, I got word that in the morning, if I would be in a certain hotel room, I'd meet someone who would tell me what was going on. So I went there (I've reached the age where names escape me) but they were the chief local people for the TWUA [Textile Workers Union of America]. Since I'd been told they were going to be organized, they wanted the TWUA.

I worked out a "for members only" contract. The union clearly didn't have a majority but they had enough to grant them recognition in a members-only contract. Armed with that, during the next few months, they proceeded to organize all the mills. I wouldn't say that was the first thing I was given, but that illustrates the way you learn to swim. That was true of negotiations and dealing with the NLRB across the board.

But by June of 1941, in the United States, if you remember or you've read, the defense effort was a major matter and strikes in the defense industry were a major matter. The president created the National Defense Mediation Board. In New England a lot of us were wholly committed to this cause. Britain and other Western Allies thought we ought to be in the war. My younger brother, for example, had graduated from college that June, and had enlisted in the British army with a number of his friends.

Charlie Wyzanski, who was at Ropes & Gray then, brought a number of clients just for labor work because he had made a great reputation out of his oral argument in a case. He argued the *A.P.*[1] case the same time as the *Jones & Laughlin*[2] case on the constitutionality of the National Labor Relations Act (NLRA). The president named Charlie as vice chairman, public member, to this board and Charlie urged me to come to Washington with him. I was persuaded and became one of the early staff of that National Defense Mediation Board. While my family was getting resettled, I lived for a few months with Ralph Seward[3] who was executive director. You know some of the others.

We started out just four or five of us—Lew Gill, George Kirstine, Avery Leiserson—and we were the assistants of the board that started off with Will Davis as Chairman. Charlie was a vice chairman. George Taylor, who you and many other members of this organization know, was on the board, among other public members. Then there were the labor members—George Meany and Philip Murray. Their opposite numbers were on the industry-employer side.

We were the assistants to the panels on which the board dealt with cases and performed a wide range of assignments. It again was

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[1] *Associated Press v. NLRB,* 301 U.S. 103, 1 LRRM 732 (1937).
[2] *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, LRRM 703 (1937).
[3] First president of the National Academy of Arbitrators, 1947–1949.

an effort of learning by doing. You might be asked to try to work out stipulations of fact in disputes that were before the board. Or you might be assigned to see if you couldn't get agreement to minor issues in advance while leaving particular panels, the big ones. And sometimes it was even possible at those preliminary discussions to go out and negotiate the whole contract. The board wouldn't have to get itself involved.

David E. Feller: How long did that last?

Archibald Cox: That came to a somewhat dramatic crisis as so many other things came to a crisis in the same form. It was the hulking, overpowering figure of John L. Lewis and the United Mine Workers. In this particular instance the dispute was primarily between the UMW and the steel companies, the owners of the captive coal mines. The issue was the demand for the union shop.

The thing I remember best takes an effort of imagination. You've all seen or seen pictures showing the hulking, overbearing power of John L. Lewis. In contrast to that was young Carter who was a mild-mannered, slender young man and the perfect figure to plead the case against the union shop in terms of the individualist miner who didn't want to join any organization, but just wanted to go his own way. Then there was Lewis scowling at him.

The Board recommended against the union shop. I had to check my memory on that because I was rather surprised in retrospect. But it did. The labor vote was split with the AFL voting with the employers and public members and the CIO members, of course, voted for the United Mine Workers opposing the recommendation. The result was that the CIO members resigned and the National Labor Relations Board came to a standstill.

It was now October I would say, so it was about 4 months. At that point Charlie Wyzanski was made a district judge by President Roosevelt, and those of you from Boston will remember Charlie in one guise or another, by reputation if not in person. I didn't know what to do.

I was guilty of one bad misjudgment. Will Davis, the chairman, was a great figure. Younger persons whom I've come to honor and respect thought the world of him, but we didn't get off on the right foot together. So when Charlie left, I felt sort of lost, and, as you say, got another job. Charlie turned out to be my great good fortune in life. He persuaded Charlie Fahy, the solicitor general to name me as one of a staff of very select young lawyers. The office handled all Supreme Court briefs. Those with some experience also argued orally. It was a wonderful opportunity. Forgetting the war—it

wasn't Pearl Harbor yet—what better job could a young lawyer have? So I worked there for about a year and a half.

David E. Feller: You have to understand that the marvelous thing about the solicitor general is the slogan in that office which is that "the government wins whenever a case is rightly decided." If the government wins in a lower court but the just people in the solicitor general's office decide that the government really was wrong, that an injustice had been done, they would confess error, and the junior person in the department would go to the Supreme Court. His job was to tell the Court that the government was wrong, that the case should be reversed, and the other party would win.

Archibald Cox: What a wonderful first assignment for me. I was entitled to an oral argument. I'd been writing briefs for months. What could be better than to be given your first case which you couldn't lose because you were confessing you were wrong. This happened on a Friday and on the following Monday the decision came down affirmed.

David E. Feller: What did Charlie Fahy say to you?

Archibald Cox: Well, he had a very mild manner but steel underneath. He behaved gently, and the steel didn't appear on the surface. He was a man of great courage. He came into the office and sort of asked me mildly what happened. I didn't have any answer. About 6 months later I thought of a great answer that I should have said, "Oh, Mr. Fahy just think what will happen when I'm trying to win."

Happily, I did get further chances. I was there about a year and a half. During the war, Washington was the place where one shuffled from department to department. I had a brief tour in the State Department. Then Frances Perkins asked me to become associate solicitor in the Labor Department, which put me back in the labor field. While there was very little collective bargaining, most of the work was in enforcement of the Fair Labor Standards Act.[4] I did a great deal of appellate argument as part of it. It did at least put me back in touch with the people interested in labor law, labor unions. I was there until 1945.

David E. Feller: And then what happened?

Archibald Cox: We went back to the Boston area in the summer of 1945. I was at Ropes & Gray. Then Austin Scott, a very senior,

[4]29 U.S.C. §201 *et seq.*

distinguished, professor at the Harvard Law School, and Mrs. Scott came out to lunch one day. We'd gotten to dessert and he said, "Archie, have you ever thought about teaching."

I said quite honestly, "Why no, I've never thought about teaching. I want to be a lawyer."

He said, "You better think quick. Jim Landis (then the Dean) is going to call you tomorrow morning and ask you to become a member of the faculty."

That brought me up short. I did go out and see him, did think about it, and did decide after a good deal of back and forth that I did want to become a teacher. I think there were three dominant things. One, my wife's family had long, distinguished connections with Harvard Law School. James Barr Ames was her grandfather and those who know the history of the Harvard Law School know he was a great dean there. Second, her other grandfather was the first dean of Stanford Law School and her father had been secretary of the Harvard Law School. In those days you couldn't receive a higher compliment as a young lawyer than to be asked to join the Harvard faculty.

The third thing was I found myself a little uncomfortable representing only employers and employers' positions. In the government I'd at least been able to persuade myself I was taking a public view, deciding what was right and doing that. I didn't have the same freedom when I was representing clients who had a distinct interest or thought they did. Becoming part of the faculty, there you had complete independence, meant I'd have to write and think.

So I went out and the understanding was I would concentrate on labor law and I would be available to teach something else, which was usually torts.

David E. Feller: Was that the period when you put out the first really important casebook?

Archibald Cox: Well it was a wonderful time, Dave, teaching labor law. But it was a challenge to put together a new labor law casebook, to build a new course. All the previous labor laws books were all about the labor injunction. Maybe they printed the NLRA in the back.

David E. Feller: When I was at law school just before you joined the faculty, I never took labor law because they handed out a mimeographed copy of the National Labor Relations Act as the casebook and it had nothing to do with any of the labor law we now know. You put an end to that with your first casebook.

Archibald Cox: There was that in the narrow sense but, looked at more broadly, it was a wonderful opportunity because labor law was being made in those days—in the 1940s—and nearly everybody believed this was the future. I was thinking during the first session this morning, if somebody had said that before the end of the century we would be listening to the discussion in that first program, he'd have been laughed out of town—absurd, impossible.

You might have different roles, different points of view but collective bargaining and the institutions that went with it were the heart. What one wrote, one could hope would contribute something to the growth of labor law. It was also a time when one could mix with teaching, if he worked long enough hours, quite a little bit of arbitration, and I did arbitrating of various kinds chiefly in New England or through the Northeast. I never had any permanent umpireship as such, but I got a variety of cases. I also had opportunities to advise the Massachusetts legislature, the governor, and others in ways that could be useful. A lot of the work I did was done with John T. Dunlop,[5] who was an enormous help to me. He really introduced me to the building trades and the distinctive personnel of the construction industry.

David E. Feller: And that brought you back to Washington?

Archibald Cox: And that more than anything else brought me back to Washington because somebody, I'm not quite sure who it was, asked John early in the Korean War period to work on preliminary efforts to set up what became the Wage Stabilization Board of the Korean War. And John asked me to come along and help him. There was a period of commuting to Washington that kept me busy.

In due course, the Wage Stabilization Board was established. It had a subsidiary, the Construction Industry Stabilization Commission, of which I was one of the public members who did a lot of work on many of John's other ventures in the construction industry. Particularly whenever the NLRB was involved, he would always get me to deal with it. The Wage Stabilization Board came to grief in the spring of 1952 over a dispute about the wage settlement in the steel industry. The board approved a wage settlement much higher than the ostensible wage stabilization guideline.

[5]Honorary Life Member, National Academy of Arbitrators.

Most of you will remember reading about the Supreme Court case involving the seizure.[6] It broke the ceiling and that caused a split on the board not unlike the one that had occurred earlier in the National Defense Mediation Board. I guess this time it was the industry members who pulled out and the result was a period of great agony with strikes, seizure of the steel mills by President Truman, and the Supreme Court decision that he'd exceeded his power. Eventually the settlement was put into effect and the president attempted to reconstitute the Wage Stabilization Board. He asked me to be the chairman. We came to grief pretty soon, but it's worth talking about because it was part of the background of Watergate. I'm going to try to give you a little bit of my personal life during the Watergate experience as we move along.

The first crisis we had was a case that, like the steel settlement, broke the nominal old wage stabilization guidelines. It involved North American Aviation. An arbitrator's award by David Cole[7] poked up above the wage ceiling. We had agonizing sessions of the board, and particularly of the public members, and voted after a long session with the industry members disagreeing, to approve the settlement.

I was just worn out. I had never had that kind of experience. I can remember lying on my back on the sofa in my office practically shedding tears of weariness when in walked the industry members led by Malcolm Denize, telling me they were resigning. That just about broke the dam with the tears. Well, after a couple of hours pleading, pleading is the only verb, I'm said, "Look this is consistent with the new ceiling at the steel level. We will adhere to it." I persuaded them not to resign.

We rocked on for a few weeks more when the hulking figure of John L. Lewis appeared. He had negotiated a settlement with the bituminous coal operators that went way beyond anything that had been approved before. The question was what would the Wage Stabilization Board do. Well the public members, Charlie Killingsworth of the University of Michigan and Herman Lazarus from Philadelphia and I, the three of us, were clear that there was no way we could approve it and honestly pretend to maintain a wage ceiling. Harold Enarsen who worked in the White House and was in a way President Truman's man on the board, grudgingly

[6] *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 30 LRRM 2172 (1952).
[7] President of the National Academy of Arbitrators, 1951.

went along with us. That meant, with the industry members, a vote to disapprove.

Of course, Lewis called a strike. He also was persuaded to appeal to Roger Putnam, who stood between the president and wage controls, on one hand, and price controls, on the other. Roger Putnam assured Lewis that if he would call off the strike, he would review the settlement very carefully. I think he did call off the strike and things dragged by. Charlie and I had a number of evening sessions with Putnam. Each one a dinner. We had to go to his apartment. It would be a fairly lengthy cocktail hour then we'd all go out to dinner. Then there came a night when the cocktail hour went on and on and on and Putnam kept disappearing to the kitchen to get more ice or more drinks. I said to Charlie he's trying to get up the courage to give us the bad news and yes, he came in and the answer was that he was giving up or at least so recommending to the president.

During that time, I remember so vividly now, long walks with David Cole who had become head of the mediation service. Of course, when Lewis was on strike, Cole was pleading for realism. Lewis might be acting against the law, but to try to enforce the law was unrealistic. You have to adapt to reality; face the distribution of power. He quoted the old saying that was constantly invoked during World War II, when Lewis caused trouble: "You can't mine coal with cannons." I particularly remember his quoting Winston Churchill, "A democracy must never reveal its weakness." I was both personally fond of David and an admirer of his. This weighed heavily with me but it didn't sway me at that time.

I did see President Truman about the matter. I got 15 minutes with him. I went into one of his small private offices. We were introduced and the two of us sat down. He talked about the weather without interruption for 14½ minutes and then said his time was up. He later said that Roger Putnam promised to consider the appeal very carefully if Lewis called off the strike and that was that. He didn't really have any choice. He also didn't have any choice because Eisenhower had won the election and was going to take all controls off anyway. So I did my resigning act. I still objected as a matter of principle to this giving in and went back to Harvard.

David E. Feller: I remember that because I was working for Arthur Goldberg[8] and he said, "That damn fool Archie Cox.

There's a way he can work this out and approve this if he doesn't insist on vetoing it. It's going to be the end of wage stabilization." And of course, you did insist, and it was the end of wage stabilization. But it was going to end anyway.

Archibald Cox: I was going to say Eisenhower would have ended it. So I'm back at Harvard and I think my adventures into government in Washington are over. I had no objection being a professor, but then came Senator John F. Kennedy. I'd first become slightly acquainted with him when he was in Congress and I'd testified once or twice before the House Labor Committee, whatever its full name was, at his request. He had the habit even then of calling on professors at Harvard, MIT, or maybe somewhere else in the Boston area, they were the most likely ones, to advise him on the policy of things he had occasion to deal with.

In 1957 he called me and wanted me to get together a group to draw up recommendations for him in dealing with the labor problems that the Senate was going to have to deal with. The problems grew out of disclosures to a Senate committee about corruption in a number of unions, other criminal conduct, racketeering-like activities, and internal abuses, not corruption, but still abuses, in some of the labor movement.

This was the big news in a way at that time. Obviously, Congress was going to have to deal with it. The only instructions Kennedy gave were that I wasn't to get anybody who lived west of Chicago because it would interfere with our getting together, but otherwise "You choose them and you all write the ticket." Well we did get a group together. The ones I now recall most quickly were Doug Brown at MIT, Dick Lester at Princeton, Phil Taft at Brown (who was the only one who was really an expert on the internal affairs of unions), and somebody from Yale. I don't think that John Dunlop was on the committee, but he certainly was a great help to me in that connection.

After a number of meetings and other correspondence, in 1957 we drew up some recommendations to the Senator who was a key

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[8]General Counsel, United Steelworkers of America at the time. Former U.S. Supreme Court Justice.

member of the Senate Subcommittee on Labor of the Committee on Education and Labor. These dealt with reporting and disclosure, trusteeships or receiverships of local unions. There was a code of ethical practices. There were also some rules with respect to election of union officers. On the whole, it was rather modest regulation of the internal affairs of unions, if you're going to regulate them at all. I told Kennedy we thought this was a very reasonable bill, a set of proposals. He told me to put it in legislative form and I drew that up. Then he announced that he alone was going to present it to the labor union leaders. I sought to dissuade him. I knew what was going to happen. No, he was going to do it himself. He was going out to Hickory Hill, his brother Robert's place in McLean, Virginia, because his own house in Georgetown was smaller.

What happened, of course, was that, led by George Meany they gave him the standard treatment that some of the older labor union officers gave someone who sat down across the bargaining table as an employer for the first time without any experience.They browbeat him and scared him like anything. Well, I finally succeeded in persuading him that this really wouldn't turn out to be utterly unacceptable. By some stroke of good luck, and perhaps something more, he persuaded Senator Ives[9] to join with him. He was known by the labor movement as one of the more reasonable members of the Senate and the bill was drawn up, introduced, and referred to the Senate subcommittee.

They appointed a committee of lawyers to advise them: David Cole, Bill Wirtz, and Arthur Goldberg from the Steelworkers CIO, and Lou Sherman, who was there as a lawyer and was familiar with the building trades. I had floor privileges all through this. It was great, good fun. Because of my Harvard Law status, I was treated very generously by the senators and took part in the discussions in the committee almost as if I were a senator myself. Soon gradually emerged the Kennedy-Ives bill.

Provisions with a variety of subjects, known as the "sweeteners," also were put in. For example, there was a redefinition of supervisors that helped the IUE [International Union of Electrical, Radio, and Machine Workers], and a provision for dealing with the no man's land between state and federal jurisdiction, and on the whole were what labor wanted rather than what employers wanted.

[9]Senator Irving M. Ives, Republican from New York, served in the Senate from 1946 through 1959.

There were special provisions dealing with the problems in the construction industry where under existing law the whole system of prehire contracts was illegal.

This bill pretty much sailed through the Senate. Because there was no preliminary work done in the House, it went over to the next session in 1959. On the floor, by I think one vote, the Senate added the so called McClellan Bill of Rights, which had been drawn up by a student of mine. The best way to describe it was that if you were a far-out libertarian, in that sense not necessarily an economic conservative, and writing a code of liberty for the individual in sweeping terms, you'd have written this bill of rights for union members. It went in by one vote and threw things into a tailspin. Any bill that went through that way was going to be very hostile to the labor movement. I'm not sure that any bill could go through in that form, but it would have been bad if it did. What to do? Well that produced a whole flurry of negotiations as you will remember, Dave.

David E. Feller: I got involved.

Archibald Cox: You and I, I think for the first time, began to work together.

David E. Feller: That's right. We had to figure out something that would satisfy the unions and we had complications with the Senate rules because a motion to recommit had been tabled. Lyndon Johnson somehow figured a way that we could get something acted on and we got Senator Kuchel.

Archibald Cox: We rewrote the bill of rights, we played with the sweeteners, did some other things. Then the great question was, could we get Senator Kuchel[10] aboard, a Republican leader. Kennedy somehow got him aboard. After that critical moment, then it went through the Senate. The House meanwhile had passed the Landrum-Griffin bill, which modified the National Labor Relations Act, as amended by the Taft-Hartley Act in ways that industry wanted.

David E. Feller: The sweeteners became sours.

Archibald Cox: The sweeteners became very sour indeed—and the Senate passed it. President Eisenhower took an extraordinarily active role in support of it, and the bill then went to conference and

[10]Senator Thomas Henry Kuchel, Republican from California, served in the Senate from 1953 through 1969.

there were long, long negotiations in conference. See if you can help my memory, Dave. We had many negotiations, and I have some memory of a very critical session with Arthur Goldberg and others; it was just a small group of us. I think it was on a Sunday, that we sort of were on the verge of striking a critical deal when Joe Loftus, a reporter from the *New York Times,* walked into the room. Do you remember that at all?

David E. Feller: No, I don't really.

Archibald Cox: I don't really remember it very well but there was that kind of meeting and negotiation. Gradually we worked things out with the House after a period of great antagonism when particularly the Representatives Landrum[11] and Griffin[12] were especially bitter against Kennedy and me. I never saw him flare up the way he did on one occasion when Landrum had attacked me as a communist. Kennedy took his head off and the session had to adjourn. But a compromise did come out. It became law and it made some improvement. It wasn't too much trouble in terms of the internal regulation.

David E. Feller: It was the sours that were the problem.

Archibald Cox: And from Kennedy's point of view, it was quite important because it was a legislative accomplishment that was a little dubious. Let me say a word about Kennedy, of my impressions of him, at that stage. You all have heard of his winning personality as a public person and his equally winning private personality. He was a very warm, loyal friend, quick to rise to one's defense. I thought and still think that he had an unusually good mind. He was a hard worker when he did go to work on something, and an awfully quick learner. He'd remember things.

David E. Feller: I remember the floor debates in the Senate when all these crazy amendments came up and he was handling them off-the-cuff in just absolutely marvelous fashion.

Archibald Cox: Yes. I think he also had a mind of some depth. I remember an occasion when one Friday night we flew from Washington to Boston together and we'd seen each other all day for several days. We were kind of talked out, so we were both

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[11]Representative Phillip Landrum, Democrat from Georgia, served in the House of Representatives from 1953 through 1977.

[12]Representative Robert Griffin, Republican from Michigan, served in the House of Representatives from 1957 until 1966 when he was appointed to the U.S. Senate.

reading. I looked over his shoulder, we were sitting side-by-side. The politician was reading Proust; the professor was reading Perry Mason's latest detective story. He was a man who struck me as having a genuine philosophy. That was where things came from inside him and they were very real.

Well, that led first to his asking me to head up an academic group that included people like Jerry Wiesner, at MIT, particularly in the defense area and the missile/nuclear area, Walter Rosenbith, Walt Rostow, and Robert Wood. I was commissioned to act somewhat as leader of this group, to enlarge it and spread it around the country. Then it was put on a pretty formal basis in January 1960. He really wanted people who would advise him on policy and not attempt to take politics and political reaction into account.

He won quite a number of hearts in the first session where he wanted to win all those who were glad to advise anyone and hold as a group those who were prepared to support him in his wish to be president. Somebody said he would be glad to advise him on this, that, and the other subject but he wondered if he ought to because he really didn't have much sense of the politics of it. JFK jumped all over him. He didn't want anyone to shape his views according to the politics of it. Kennedy wanted to know what they thought and he would do the shaping for the political reasons. That led in turn to the campaign.

I was asked to go to Washington and head up a small group of speech writers I would recruit. We would prepare materials in Washington. They would then be shipped out to the road for the use of Ted Sorenson and Dick Goodwin who were the candidate's speech writers. The best short description of that life was illustrated by a conversation I had during the course of that autumn with Charlie Murphy, whom you may remember from reading about the Truman White House. He was performing a similar role [speech writing] for LBJ who was running for Vice President and this one night we agreed to have lunch together. I went over to the Democratic National Committee there at the Carlton and joined him.

"Hi, Charlie."

"Hi, Archie."

"How you doing, Charlie."

"Well, I'll tell you. I'm tired. I sat up all night last night writing a speech for Lyndon. I got it off just before the plane out to the campaign was leaving. I sat up the night before that doing the same

thing. I sat up all night before that doing the same thing. I sit up, write the speech, and just get it on the plane."

"I forget the name of LBJ's speech writer who was with him," Charlie said and went on: "He'll get it and he'll sit up the whole next night rewriting the speech to give to Lyndon. Then he'll take it with him to the meeting. He'll read the first two lines and he'll give the same speech he gave the night before, and the night before that."

That was about the role that I felt we were playing. I had misjudged the kind of speeches that were called to write. Whenever Kennedy was to speak or did speak at a place where Franklin Roosevelt had spoken in '36, or '32, or even '40, I would look and see Roosevelt's speech at that time and there was so much more substance to them. I don't know, maybe times had changed, the press had changed, and TV had come to make a difference, and all that sort of thing. It illustrates one reason why I was pretty badly out of step.

It was not an altogether happy time from my point of view. Indeed, when, just before the election, Kennedy said goodbye and thank you, he remarked, "I hope you'll be with us for the transition." I murmured something very unenthusiastic that I'm greatly embarrassed about today. Happily, while I wasn't on board during the transition, the next time I was in touch with him was his invitation to become solicitor general. There's no better job in the world.

David E. Feller: And that was the beginning of—I don't want to interrupt you, but the significant case, one man-one vote[13]—it was really an extraordinary experience. I can tell you because I watched him at the time. Archie has this tremendous facility, well no, characteristic, that he always played it straight with the Court. They loved you; they really did. If he tried to persuade the Court his way, he won and won again and again. People said he was next to John W. Davis, the best solicitor general in history. I don't know about John W. Davis, but yours was an extraordinary performance.

Archibald Cox: It was a wonderful time and I had a wonderful staff. Happily in those days, it was a much, much smaller office than

[13] *See Baker v. Carr,* 369 U.S. 186 (1962).

it is now. It's grown from the seven or eight people we had. I think it now has closer to 30. In those days the tradition still was very strong that the solicitor general insisted on taking the position that he thought was right. He felt the obligation to treat his duties to the Court as equal to those to the president.

If his duties to the Court were really at odds with what the president wanted, then he had to be ready to step out. It was not unknown for several of my predecessors to file briefs but refuse to sign them. They would be signed by the attorney general because that's what the administration wanted. If the solicitor general didn't sign it, the Court knew why. It was like tying a tin can on the brief. Judge Soboloff had refused earlier; Biddle and others had refused. I never quite reached that point because I was close enough to advise the president that I wouldn't do it.

David E. Feller: It didn't get done!

Archibald Cox: It didn't get done and Dave's right.

The big cases were in the reapportionment field beginning with *Baker v. Carr.*[14] Civil rights were the toughest cases—the so-called sit-in cases. There was considerable division in the administration. We'd all agree on what side the government would come down on—on the side of the civil rights demonstrators.

David E. Feller: The question was how.

Archibald Cox: My philosophy was, Khrushchev had it right. You'd cut off the smallest slice at a time, the smallest possible slice. The civil rights movement would just come out bang: any action by a restaurant that discriminates violates the Fourteenth Amendment. I thought that position would never sell, and I refused to take it, but that produced some tensions. Since we came down on the right side, nobody could object too much, and then the Civil Rights Act[15] was passed.

David E. Feller: Can I ask you to jump because times a wasting and I want to get to Watergate?

Archibald Cox: So do I, and I keep looking at my watch and we've got to do it fast.

David E. Feller: Let me put in a footnote. After Lyndon Johnson was elected in his own right, Archie as a matter of conscience

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[14] *Id.*

[15] Civil Rights At of 1964, 42 U.S.C. §2000a *et seq.*

decided that Lyndon Johnson ought to have the right to decide whether he should stay on as solicitor general and he offered his resignation. Now everybody advised him not to, including then Justice Goldberg. Goldberg said, "Just stay there, Johnson doesn't have the guts to remove you. Don't ask, because if you ask if you should stay the answer is going to be no. And he did ask and the answer was no! And that was the end of Archie's career as solicitor general. A very unhappy event for the United States of America, and you went back to being a professor.

Archibald Cox: That took me back again to my home at Harvard Law School. I thought this time for sure I would be staying as long as I was active. The stay lasted a while. There were some tough times with the student unrest at Harvard that we don't have time to talk about.

The stay lasted until spring of 1973 when I was out at Berkeley delivering a series of lectures on something or other on constitutional law. One morning the phone rang and it turned out to be Elliot Richardson. Would I be available to be the Watergate Special Prosecutor? Well, I certainly couldn't answer him right off over the phone for a variety of reasons. One of the reasons was that I had awakened the morning before and this ear I'm pointing at wasn't working; it was deaf. I hoped it was the result of the flight somehow, although I've flown out west before and had no ill consequences, but it was a puzzlement because it was totally deaf. It wasn't impaired just a little. Then there were various other reasons that I couldn't answer off-the-cuff.

I told him I was in Berkeley and I had this lecture series to finish. I didn't know at the time that I was the bottom of the barrel. Indeed, I now know, thanks to the diligence of my biographer, Ken Gormley,[16] that I think I was the ninth person asked.

I should say, because it's background to the whole thing, that Elliot Richardson and I, well, let's say we had many things in common. To some extent we're cut from the same cloth. He had been one of my first students at Harvard Law School. He'd been held up by the war, I hadn't. He was one of the first and one of the best I ever had. I'd come to know him pretty well as a student because Elliot was always looking to a public career and I was the member of the faculty who most recently had had government

[16]Gormley, Archibald Cox: Conscience of a Nation (1997).

jobs. This was long before I was solicitor general, but I had had the wartime jobs. I'd had some influence on him. I remember one occasion talking to him about what he should do if he wanted to go into government. In Washington I had gotten to know Harold Ickes very well. Ickes had once told me, "Well, the trouble with you, Archie, is you don't come from anywhere." My government experience had been wholly in Washington, I had never held local office at that point and I quoted this to Elliot. If you look at his career, he very carefully sought and obtained some positions by appointment and some by election. Before he ever took a post in Washington, he had become known in Massachusetts politics.

Also we overlapped. I had been Learned Hand's law clerk, he was also a Learned Hand law clerk. I worked at Ropes & Gray and he had worked at Ropes & Gray. We hadn't seen a great deal of each other, but we more or less kept up. So I said, "Maybe, I'm certainly not saying no."

During the next 2 or 3 days in between my lectures, I negotiated with him. I did get two things changed in his proposed instructions to any special prosecutor. One broadened the special prosecutor's authority. It had been confined pretty tightly to the Watergate burglary—the responsibility for it or for authorizing it and the cover-up of the Watergate burglary and any responsibility, particularly, of course, any responsibility by President Nixon. I didn't want to get caught up with a lot of stuff about whether this is within or not within your jurisdiction. I got him to loosen it way up so that it included practically any offense by anyone high in the White House, including the president, committed during Nixon's term or in conjunction with the 1972 election. That was one.

The other was that I must have no duty to report to him knowledge that I'd acquired or things that I proposed, which I didn't want to report. To be really independent you ought to be free of the duty to keep your boss informed, and he agreed to both those. I went back and was told by the ear doctor that the ear would handicap me as much as I thought it would handicap me. I told him that I had gotten along a week maybe 10 days with only one ear and I guessed I could do it. He replied that he wouldn't tell the attorney general anything about it. I said: "That would be a great way to start the Watergate investigation, not telling him about it. I'm telling him you told me not to tell him anything about it!"

I want to skip pretty much to the final. . . . Wait! When are we supposed to quit?

David E. Fe11er: Whenever you want to quit.

Archibald Cox: Well, no, it's whenever the audience wants me to quit. [Lots of applause!] Well, I'll go on awhile. I thought you'd be interested in the last week. During the summer, the grab bag of wrongdoing became bigger. We learned more and more about the various wrongs, besides the Watergate burglary problem, the authorization, and the cover-up.

The tensions between the special prosecutor's office and the White House grew. Every now and then Elliot would call me up and summon me over and relay to me President Nixon's complaints. I would tell him, "I'll look into it"; sometimes I wasn't doing it at all. Several times I was doing it and I thought it was right. It was always understood in those conversations that he was the president's attorney general and had a certain responsibility to pass along the president's complaints. Although Elliot never said it, I understood that he was also saying "Make up your own mind about this," and I proceeded to do it.

During the summer, we were litigating the critical issue that might resolve the question of President Nixon's responsibility for the Watergate break-in or the cover-up—the effort to bribe various people connected with the break-in afterwards and hide the responsibility. On that, there was John Dean's testimony, if you believed it, that Richard Nixon was guilty of responsibility both for the authorization of the break-in and for the cover-up. But John Dean didn't strike me as the most credible character in the world. He'd been at the heart of all these doings himself as the president's counsel. Then he had turned around and gone over to the other side. He disclosed everything only when he was caught. Dean struck me as a person who might very well change his story in an effort to come out on the winning side, whether it was true or not. So I didn't think his testimony alone was very convincing.

The disclosure of the existence of the tapes, if we could get the tapes, showed a way of getting to the bottom of the truth. I think we subpoenaed eight carefully identified tapes. But it was far from clear whether the law permitted service of process on a president. It was also far from clear whether there was an executive privilege to hold such things confidential and whether the president could assert the privilege without any judicial scrutiny.

So we litigated that all summer. Meanwhile the tension grew and grew. The tension from world affairs was getting greater all the time. One day in October, the Middle East broke out in war. In October, some of you will remember, Vice President Agnew pleaded

guilty to charges of accepting kickbacks while governor of Maryland. Agnew was forced to resign.

The complaints from the White House of the special prosecutor's conduct increased in number, and the rumors increased that I was going to be fired. I recall one conversation with Elliot Richardson in which there was reference to these rumors. I said, "Elliot, you realize that only you can dismiss me. The president doesn't have any power to dismiss me." I was mindful of Andrew Jackson and the effort to get a Secretary of Treasury who would withdraw the federal deposits from the Bank of the United States. President Jackson had to run through several secretaries of the treasury before he found one willing, but the key order had to be made by the secretary. I reminded Elliot of this and he said somewhat sadly, "Yes, that's what the Office of Legal Counsel tells me."

So it became clear that there was some basis for the rumors, but still nothing happened. Then in late September, the Circuit Court of Appeals for the District of Columbia, to which Judge Sirica's decision had been appealed, handed down an order giving us 10 days to reach a negotiated settlement—us being the special prosecutor and President Nixon.

After some preliminary talks, I did make a proposal of submitting the tapes not to Judge Sirica, but to a separate three-man board with authority to listen to them. The board would separate things out that were by no stretch relevant to Watergate and turn over the rest. It was abruptly rejected by the president.

Finally, on a Friday, the Circuit Court of Appeals handed down a decision altogether favorable to the special prosecutor. The order said that the president must produce the eight tapes, but stayed the order for a week to give him a chance to seek Supreme Court review. This is a Friday. Saturday goes by—no word from the White House. Sunday goes by—no word from the White House. The tension is mounting. Is he fixing to disobey the order? But if he is, what the devil should I do? It wasn't clear. You could report it to the Court as we'd discussed it in planning meetings, or else he reports to Court he's not obeying. What do you do then?

If it was anybody else, you'd seek contempt. After the adjudication of contempt, if nothing happens you seek some kind of coercive fine. Should we do that? I thought to turn this into a fight over money was to cheapen the whole thing. I was very skeptical of that and also doubted what good that would do. When we discussed this in staff meetings, somebody said, "We'll assemble a group of

U.S. Marshals and send them to the White House to take the tapes."

"We'll be met by the White House guards," somebody else said.

Then another voice said, "It won't be the guards, it'll be the Marines."

Then the third voice said, "Yes, and they'll be in those fancy dress uniforms Nixon designed for state occasions." At that point, visions of Gilbert and Sullivan began to go through my mind, but it didn't provide an answer. If you looked at history, it wasn't very encouraging. In *Marbury v. Madison,*[17] the Supreme Court uttered a lot of brave words, but it refused to issue the writ of mandamus directed to Madison because it knew damn well that if he disobeyed the decision the Court couldn't do anything about it.

Look at Jackson's tenure. The Court made an order that the state of Georgia disobeyed in the case involving Indian tribes.[18] People went to the president and talked about enforcement of the order. Jackson's reply, according to repute (others say it's false) comes down as, "Well, John Marshall has made his order, let him enforce it." In due course, Jackson saw that it was enforced because by that time South Carolina had tried to nullify a tariff.

One of Lincoln's generals had, under Lincoln's instructions, disobeyed a writ of habeas corpus issued by the chief justice at the start of the Civil War.

Franklin Roosevelt had drawn up a whole fireside chat explaining why he disobeyed the adverse Supreme Court order that was not what he expected in the gold standard case. However, he didn't have to deliver it because the Court decided in the government's favor.[19]

With all this history, was this a case such as Dave mentioned about "Democracy must never expose its weakness." I kept reminding myself, well, I'd been unrealistic back in the Wage Stabilization Board days, should I be unrealistic again?

You remember the old story about the little boy who destroyed the power of the emperor when the crowd was worshiping the emperor and his marvelous raiment when he said to his mother, "But Mommy, he's got no clothes." Was I then to disclose that about the law? The principle that even the highest executive must be subject to the law is supremely important. That's what our demo-

[17]5 U.S. 137 (1803).

[18]*Worcester v. Georgia,* 31 U.S. 515 (1832).

[19]Norman v. B&O Railroad, 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1937); Perry v. United States, 294 U.S. 330 (1935).

cratic system and individual rights are based on. We would have to risk exposing the hollowness of the whole thing if we were forced to confrontation.

I wish I could convey my feeling that Sunday and Monday. Still nothing happens, no word from the White House. Late Monday afternoon, I get a call from Elliot Richardson, "Come over, we've got to find a solution to this."

We negotiated while he changed into clothes for a formal dinner at the White House, the first one he'd been invited to although he'd been in the government at various positions throughout Nixon's administration. Then we negotiated again on Tuesday. He would propose to me that I would be given what was called a transcript from the tapes but it would be paraphrased to cover up the president's language to avoid embarrassing him. It would be excised of anything that was irrelevant or anything that national security required be kept silent. Its accuracy would be vouched for by Senator John Stennis from Mississippi, who would be given access to the tapes to this extent. The president's lawyer would prepare this so-called transcript. Senator Stennis with the so-called transcript in hand would be able to listen to the tapes just once—no more—and decide whether the transcript prepared by the president's lawyer was accurate.

We talked at length, but I said I couldn't go for that. For one thing, while I trusted Senator Stennis' honesty and integrity, I had strong doubts about his listening once. He was recovering from gunshot wounds and he was still weak.[20] While his integrity was worshiped in the Senate, and rightly so, there was that disadvantage. Furthermore, he'd be working from a transcript prepared by the president's lawyer who had a very close relationship with Senator Stennis. Stennis was an admirer of Nixon. There was a further objection that it wouldn't be admissible as evidence and that there was no provision for future cases.

So about Wednesday, Elliot reduced his proposal to writing and I reduced a counterproposal to writing built upon giving it to three people who would be named referees by the court, or some appropriate court title. In that capacity, they would do this work of preparing a transcript, doing what was necessary to enhance the parts, and listening to them as many times as was necessary. I suggested various names of Republicans I was willing to trust like

[20]Senator Stennis had been shot in a robbery attempt in Washington, D.C., in 1973.

John Sherman Cooper, the former Senator from Kentucky and a predecessor as solicitor general. I thought this would be admissible in evidence if they were court officers. Elliot said no and time clicked on by.

It's now Thursday night and we are still in disagreement but still no word from the White House. What in the hell was going to happen? That night I went to my brother's for dinner and cocktails with his family. We had just sat down after a very long cocktail hour. The telephone rang; it was my chief deputy, Henry Ruth. He said that the White House is desperately trying to get ahold of me and that I was to call Marshall Wright. I said, "Who's Marshall Wright?"

He had no idea, I had no idea. But I called the White House operator and learned they didn't have any Marshall Wright listed. I didn't think there was any such title in our military, although of course it's a common title abroad. It turned out that Marshall Wright was Charles Wright who was President Nixon's lawyer on constitutional questions. He had argued the case against me before Judge Sirica and in the court of appeals. I got him on the phone. Charlie had called in a last effort to persuade me that the proposal which he acknowledged came from the president was very sensible and reasonable. Charlie proceeded to demonstrate this by abruptly rejecting every suggestion I made. It was take it or leave it as Elliot had given it to me. Charlie Wright added the further condition that I must agree that I would make no effort to get judicial process to get any further evidence, take it or leave it.

I don't know if I can make it real to you, but here I am sitting inside a vestibule where my brother's phone was. All the chairs had been taken into the dining room for dinner and I'm sitting on the floor. Two of his children, little girls age 5 and 7, one of them standing behind me trying to hear the phone, the other one crawling in my lap.

"Let me hear, Uncle Archie."

"Is that the president speaking, Uncle Archie?"

This was a long way from my image of the way adult, critical decisions that may lead to a national crisis are made. I told Charlie, "It won't do, but we shouldn't make the last word under these circumstances." I suggested he put it in writing and I'll give you a written answer.

Friday morning, we hurriedly reduced to writing for the benefit of history what we had said that night. It was there, but the words were carefully chosen by both of us. Now it's Friday and time is ticking by. Nothing happened. No word from the White House.

What the devil do you do? Must I provoke a confrontation? What if I do and lose? Won't I do more harm than good? Again, democracy must never expose its weakness. On the other hand, I could not turn tail and run and surrender the vital proposition that even the highest title is subject to law.

After consultation with my staff, I sent everybody home. I just figured that out of sheer nervousness if we waited, we'd do something wrong. So, it's better to get away from it. When I got home the phone was ringing and it was Elliot Richardson. "I want to read you the letter I just received from the President. I read it to you for your information as a letter that I've received." He's very emphatic about that. The reason was it told Elliot that he was to announce the so-called Stennis compromise and that he was to dismiss me—fire me—and he was emphasizing that he wasn't acting on it, he just wanted me to know he had it.

Elliot said, "I'm going to get back in touch with the White House and we'll have another go round with this in the morning."

I hurried down to the office and called Jim Doyle, my public relations man, who was also by that point a very good friend with whom I'd become very intimate and whom I relied upon to see what was going to happen. It's almost the deadline for the morning papers, but he called the *Los Angeles Times* figuring that if they were publishing anything late they would put it in the *Los Angeles Times.* The West Coast would get printed that night.

Yes, the White House had made an announcement. It announced the so-called Stennis compromise. It was pretty much the offer that Elliot had made to me except there was added to it now, and never any part of Elliot's offer, an instruction that I must never resort to judicial process again. It also added the awful announcement that the Senate, the chair of the Senate committee, and the vice chair—Ervin[21] and Baker[22]—had both approved the so-called Stennis compromise.

So there was about 5 minutes to try and give something to the press in answer to this—even in the few lines available, to indicate that the Stennis proposal wasn't a fair compromise at all, that it wouldn't produce admissible evidence, and that I would hold a

[21]Senator Samuel Ervin, Democrat from North Carolina.
[22]Senator Howard Baker, Republican from Tennessee.

press conference the next afternoon. We did get it out in time so there would be an answer. The headline in one of the papers was, "Cox Defiant."

If any readers of the papers could have seen me that morning they wouldn't have described Cox as defiant. I was literally crying on my wife's shoulder and gradually, with her help, got bucked up, went down to the office, and met with the people closest to me. They were full of advice as to how I should conduct the press conference.

"Well, be tough."

"No, don't be too tough."

So I listened for awhile, somehow acting a role I knew perfectly well I wouldn't be capable of acting. For better or worse, I would reveal myself. Somehow that afternoon, I had the press conference. Then Saturday night came the word that Richardson had resigned, that deputy attorney general Ruckelshaus had resigned, and that Robert Bork had fired me.

Sunday, Monday, the public reaction was all against Nixon. The country, in a sense, did rise up and support, as I see it, the role of law. There were things that helped them do it. Importantly were the resignations of Richardson and Ruckelshaus. But in the end, I think the people realized that the foundation of our form of government was at stake and they rose up to support it; they provided the support that is the only way of enforcing the law against those who have the muscle.

Well, I kept all of you much too long, I apologize for that.

David E. Feller: Thank you very much, Archie. [Lengthy applause!] I hesitate to add a word, but there is a marvelous book called *Archibald Cox: Conscience of a Nation,* a biography by Ken Gormley. I just recommend it to you because much more than what you've heard here is in that book. It's a pleasure, it's a good read, and I want to highly recommend it to you. Thank you all very much.