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1968-1990

Mr. Schultz: Today is January 26, 1998. We are in Mr. Gardner's home, and we are going to continue discussing private law practice. Mr. Gardner, let me start by asking you about your work with the Administrative Conference of the United States during the 1970's and 1980's. Maybe you could begin by explaining what the Administrative Conference is and what your participation was.

Mr. Gardner: The Administrative Conference, pursuant to a statute, enacted I believe in 1966, was supposed to be sort of a convention of government lawyers, professors, and attorneys in private practice. For about two years President Johnson did nothing about it, but finally appointed a director and a governing council. The council included Walter Gelhorn, who was in effect the guiding light of its work throughout its nearly 20 year existence. I was made a member, members being private practitioners rather than government officials who were so-called public members. Private attorney members were appointed for a two year term and I was appointed to and then made Chairman of the Committee on Informal Action which was a fascinating subject. I was reappointed for a number of terms and resigned about 1978. In a year or two later I came back as a senior member. I was allowed

to listen and to talk, but not to vote.

Informal action, as you know, occupies most of the 's activities. I created the fact that 90 percent of what the did, it did by informal action. I once stated that in a small article on the Administrative Conference and then Paul Verkuil quoted me for that 90 percent figure and Ken Davis then quoted Verkuil for the 90 percent figure and I ended up quoting them both. So it was by then an incontestable fact.

On the Committee was Ken Davis. I thought surely he'd been asked to be Chairman but said no. He was the outstanding expert on informal action and was well aware of that. I was Chairman. We had at least an eight year quarrel over two basic propositions. He wanted to eliminate all discretion, in particular prosecutorial discretion, and I was violently opposed to that since I considered that a prosecutor's discretion was one of the most important foundations of a sensible government concerned with civil liberties.

I had an aspiration that with sufficient work and sufficient talent one could produce an informal procedure act equivalent to the Administrative Procedure Act as a way of crystallizing at least the basic standards that ought to apply and Ken thought that was silly. We had an eight year contest over each of those. Neither of us winning, except that nobody ever undertook the formidable task of drafting an informal procedure act. Roger Crampton as Chairman gathered a number of

outstanding professors and we had a weekend "retreat" or meeting to discuss it. The professors in general agreed that it was a job that should be tried but none wanted to do it himself.

By and large I think the conference gave a pretty large amount of good but nothing spectacular. In my committee we discovered the most useful thing to do was approach a particular agency and study it carefully with a competent man and provide particularized recommendations. One example being the SEC no-action letters. They were SEC advices responsive to inquiries of what was legal or not legal and they were not made public. Only the person who made the inquiry got the answer except if you were one of half a dozen large New York firms. They pooled all of their answers and they had a library which no one else in the country had. In any event, we got the SEC to make them public as a routine matter, which I considered probably a good thing. And so it went in our Committee. We accomplished very little in general solutions, but a modest amount of good in particular instances. About the same thing occurred in the other Committees. The Congress was never interested in the work of the Conference and eventually about three or four years ago eliminated its funding. One Congressman, his name I forget, had been trying to accomplish that for two or three years on the express ground that the Conference was useful initially in teaching people how to draft

regulations, but now that they knew, they didn't need a Conference to teach them how.

The Conference at first had some very good Chairmen. The first Chairman was Jerry Williams, who was not notable. He was Dean of the Texas Law School and is now on the Fifth Circuit. Then there was Roger Crampton who was at the University of Michigan. I can't remember whether he was Dean or not.

Mr. Schultz: He was Dean of Cornell at some point, I believe.

Mr. Gardner: After his Administrative Conference job he went off to Cornell as a Dean and I think he's now given up the Deanship and is teaching there. He was admirable. Then Nino Scalia who was also very good. I believe he was a Nixon appointee. He had been in the government in a fairly obscure position. He was very good but I didn't find him as enterprising as Crampton had been.

Mr. Schultz: Can I interrupt to ask you, what did you mean you didn't find him as enterprising as Roger Crampton?

Mr. Gardner: Crampton had ambitions for the Conference. Taking up projects and taking a very active interest in them. Scalia was more hesitant about adopting new programs or objectives than was Crampton. I think he was obviously able and I liked him very much and I can't at this point explain in any detail why I thought that Crampton was better in the job. The Chairmen who followed Scalia were not very inspiring. For one example: the annual meeting had been accustomed to having the Attorney General or someone of comparable repute address the

meeting. Loren Smith, when he was Chairman, decided to reach to the truly upper strata and he had speak to us the judge on the radio or television program, People's Court or something.

Mr. Schultz: Judge Wapner or somebody like that?

Mr. Gardner: That's the fellow. It was insanity rising to the highest possible levels. When I came back I forget who was Chairman. I was assigned to some committee chaired by the General Counsel to the Commerce Department. I forget his name, but he was a first class bureaucrat. He had an assistant who came to meetings with him and did all the work, thus requiring no thinking of his own.

Mr. Schultz: What significant impact do you think it had, if any?

Mr. Gardner: A vague and hard to measure impact in forcing the General Counsel of the departments and agencies to take a little walk with you and consider the impact of their work on the affected people. In general, get their eyes appropriately focused beyond the immediate programs to which they were committed. I think it was useful and good in that sense, but I also think it had no lasting impact. Probably, we're about where we would have been anyway.

Mr. Schultz: Mr. Gardner, I want to change the subject and ask you now about a case you handled in the late 1960s called Fortnightly, which I guess was ultimately argued in the Supreme Court.

Mr. Gardner: I didn't handle the case. It was a very important case for the broadcasting industry relating to whether or not

the cable industry could pick up broadcast programs and carry it on without copyright or royalty obligation to the broadcaster. One of the usual counsel for the broadcasting people, Vernon Wilkinson by name, felt that they ought to get before the Court a brief written by someone who didn't know anything about the technicalities on the assumption that ignorance would permit him to communicate more effectively with the Court than could one with expertise. So, as I had plenty of ignorance they came to me. The National Association of Broadcasters asked me to write a major amicus curiae brief. I don't believe amicus briefs are very influential but in this case I thought it might well be because of the challenging subject.

The broadcast interests were on the sidelines. The parties were a cable station and the American Association of Copyrighters. I can't remember the exact name. They had Louie Nizer who was a self-proclaimed outstanding attorney. The problem was that he had won in the District Court, Southern District of New York, and he'd won in the Court of Appeals, and the broadcast industry was feeling fairly confident. I was not so confident and thought that they would lose in the Supreme Court if they didn't make some very considerable concessions and seek a lesser goal. I forget what the smaller objective was that I was seeking. In any event, the broadcast systems reacted violently to the suggestion that the National Association of Broadcasters should ask

for a smaller pie than they already had, because they could see otherwise nothing but disaster. I went up to New York with a couple of assistants and from 10:00 a.m. until 8:00 p.m. had a quarrel with the General Counsel of the three Associations. At 8:00 p.m., I finally got up and said that the only thing I knew about the television industry was how to turn the damned box off, and that we were going home.

I modified our position quite a bit, probably too much, and only later did I discover that the broadcasters who were our client were really independent of the networks. ABC, CBS, and so on sounded awfully important from the outside, but the broadcasters were not all that impressed by them. In fact, I probably could have had my way completely had I realized the power structure more clearly. I was out of sorts by then and I did not go down and listen to the argument, but my assistants did and they said that Nizer, who had just finished writing a large book explaining how to be a brilliant lawyer, read his argument to the Supreme Court, which is the surest way in the world to put the Justices to sleep or virtually to sleep and to destroy all their interest. He did a wretched job and the broadcast industry lost the entire issue and the cable industry ended up without any obligation to the broadcast industry for picking up the broadcasts and carrying them on.

I think it has been at least twenty years since

then; I have not been approached by anyone in the broadcast industry or the television industry to do anything. I've been persona non grata for many decades and I've have concluded when you're dealing with the television industry the image is a lot more important than the fact. I was prepared to give up what they'd thought they had won in the lower courts, and my disloyalty was made worse when it later developed that I was right. In any event, it was an entertaining episode.

Mr. Schultz: Do you think that's often true in law practice that the client cares as much or more about your just being on the client's side than about the quality of the legal advice?

Mr. Gardner: Well, one I think obviously is a factor, but I think what is more important if the lawyer can somehow make himself even a minor celebrity. If he becomes famous his professional career in private practice is pretty well assured. Some very able lawyers who are not well known continue obscure in the public's eyes. A lot of terrible lawyers who are well-known...I'm not going to go any farther in that direction. We both could find examples.

Mr. Schultz: Well speaking of high-profile situations, let's talk a few minutes about Anita Hill. That issue arose near the end of your career. Can you tell us how you came to be part of Anita Hill's legal team.

Mr. Gardner: I have been a friend of John Frank for many, many years. He is a slightly younger lawyer. I worked with him when he was in the government. I tried to have him hired for the Solicitor General's office when that was my concern. And he went out to Phoenix because he had or was thought to have bad lungs, I think. And from being a bright very liberal youngster he'd become, I think, the most prominent attorney in practice in Arizona and was very good and has combined to an unusual degree his liberal activities with corporate representation.

He's a trying man sometimes but anyhow we'd known each other for years. He was active in opposing the Bork nomination, active and reasonably effective. When Anita Hill stumbled into these hearings unexpectedly and on very short notice she was advised initially by one or the other or both of two lady law professors here in the District who in turn recommended that she approach John Frank to get his help. And he immediately agreed.

I think the hearing was to start on a Thursday and this was on a Tuesday and by the end of Tuesday he got to thinking that his Bork activities would be prejudicial to Anita in this hearing if he took a prominent part. So he set about to find someone to serve as a stalking horse, preferably an establishment lawyer in Washington who could add a note of respectability. He tried one very prominent lawyer, I think with a reputation for liberal causes, and he said, oh yes, he'd like to but he was a little busy at the time and couldn't.

His partner told me later that he regretted that he did bow out. So then, Tuesday night, John tried me and I said, sure I'd help. And, on Wednesday noon, I guess, I joined Frank and Anita and the two lady law professors -- I'm a little hazy on their names which is why I'm being obscure; my memory is not as good as it ought to be, and also Charles Ogletree the very energetic black attorney, who had just gone up to Harvard to teach. He was very able and very frenetic, on a deadline all the time. John Frank has some tendencies in that direction.

It was not at all clear to me what I was supposed to do and it wasn't at all clear to anyone what they were supposed do to. There was very considerable disorganization. It was not clear at least to me or anyone else, whether Frank or Ogletree was in charge. They didn't differ but they dashed about conducting their own enterprises and there was not a great deal of coordination.

I went over Anita's statement. The establishment attorney who didn't want to be seen in public and I each objected to her graphic and precise account of disagreeable things like pubic hairs on the coke can that had been told to her by Thomas. We thought she ought to be more polite about it and use vague terms. But she had her view and no one can say it was wrong. Since she was telling what Thomas had said, she thought she ought to say exactly what it was. It gave her considerable

discomfort but not enough to convince her that she ought to soften the account.

I decided that the only thing that I could see that I could do usefully, because I was not her principal advisor by any means, was simply to listen to the opposing testimony and, if anything developed to try to do something about that. The opposing testimony, I thought, was unreliable and distasteful, but what could I do about it? I had no client on the stand, and I couldn't interrupt the testimony of the Thomas advocates, particularly since when Anita wasn't present I had been moved out of the central location into the general audience by the staff of the Committee.

The pro-Thomas testimony was uncontested by the Democratic Senators. Neither that nor the disorganization, lack of clear program on Anita's side, seemed to me at the time to be disastrous. She was a splendid witness, evidently sincere, calm and collected. I haven't seen more than two or three witnesses in my many years that I found as satisfactory as she was and the Committee, I think, had much that feeling. The Democratic side was warm and outspoken in complimenting her and the Republicans to a degree joined in.

Then they started back with Thomas. We were badly outdone in timing the witnesses. I was so innocent of public relations, that I didn't realize at the time, and wasn't in control anyway, the Republican side of the Committee had maneuvered it so that Thomas had all the

evening hours, the television hours. At the start of the hearing, Anita had been scheduled to go first and the Committee asked if it would be alright if Thomas went first. Well, I was the only one around that the lady professors could ask because Frank and Ogletree were tearing off on their own projects and again in my innocence I thought that's good, we'll find out what he's going to say. I didn't realize that we were being led into a trap. Thomas testified first, then Anita, then Thomas testified again rebutting Anita in the evening hours, and that's where the nonsense about the technical lynching of a poor black man was paraded.

Mr. Schultz: Right.

Mr. Gardner: When people are in a repetitive sitting situation, for reasons that are not clear to me, they generally tend to go back to the seat they had the first time they were there. The first time we sat down Ogletree was immediately back of Anita. Frank was in the back row, his objective being to keep out of the public attention. So I sat one seat removed in the row behind Anita. The television cameras were set up in a corner of the room so as they got a picture of Anita they couldn't help but get a picture of a white-haired, broken down, white honky over her shoulder, and it made a pretty good aesthetic contrast.

Mr. Schultz: So it sounds like she took the lead in her testimony.

Mr. Gardner: She didn't take directions as to what she would say at all. All the Republicans, and Specter oddly enough in

particular, would accuse her of going back and being instructed by lawyers how to perjure herself, or how to avoid it in the next session. She, in fact, during the recess period went off with her priest, her minister or whatever he was, in a room by herself and didn't have any contact with the lawyers. I never had any doubt as to the honesty and the sincerity of her testimony. I've not been too happy with her subsequent career, but to a degree she is perhaps naturally exploiting her experience and the prominence that it brought her. She had the misfortune of having Senator Boren become the President of University of Oklahoma. He was one of the Senators who voted to confirm Thomas.

Mr. Schultz: Other than the timing of her testimony is there anything you would have wanted done differently in hindsight?

Mr. Gardner: There certainly is. Biden was so much a neutral, and so anxious to show everyone, particularly the Republicans that he was completely impartial, that he, in effect, allowed the Republicans to dominate the hearing. And then on the Democratic side, there were a lot of nice gentlemanly people, ineffective as compared to the effective, unscrupulous attacks of Hatch and tall fellow from Wyoming.

Mr. Schultz: Simpson?

Mr. Gardner: Simpson and Specter. The one effective man on the Democratic side had chained himself into silence. It was Kennedy, and the hearing came just after he had taken his nephew out on that trip to Miami, no I guess

it was a Palm Beach bar, and the Smith episode was very prominently in the press then. Only once did Kennedy get so impatient that he burst into speech. Had he been able to talk throughout the hearing it could have gone in a different direction.

Then Biden, for example, agreed that it was a very difficult area and that no one could ask Thomas about anything other than what had happened when he was actually at the office. Well, we didn't have the Clinton atmosphere then and no one expected that Thomas would be engaged in lewd contact in the office. In any event, all the supporting material of conduct outside of the office was irrelevant under the Biden rule. And then there was strong supporting testimony from another girl who had been fired. Because she had been fired, Frank, I think, or Ogletree, I don't remember which, did not want to call her. And she would have been a good witness indicating roughly comparable experiences. That was a mistake; I don't know of any other mistakes.

It was a disorganized thing. There were four other witnesses designed to support Anita Hill. Not major but minor ones. Ogletree thought it was good to call the hearing closed at about 2:00 a.m. Monday morning as I did indeed myself and so we agreed not to have Anita come back, not to call on her witnesses and not to try to squeeze them in under Biden's time bar, which was probably a mistake. We weren't as far ahead as we thought we were. In any case, it wasn't the hearing; it

was the fact, oddly enough, that the black vote was terribly important to a group of eight or ten of the Senators who voted for Thomas and the black community was supporting Thomas, so the hearing itself would have made no difference.

Mr. Schultz: Ultimately, it was one or two votes, I think, that determined it.

Mr. Gardner: The final vote was 52 to 48.

Mr. Schultz: Right, my recollection is here there was at least one Senator that could have gone the other way if it would have made the difference. It was very close.

Mr. Gardner: But, I like to say that when I win a case, I have one or two people watching and when I lose one I have 20 million.

Mr. Schultz: That I think wraps up the specifics of Shea & Gardner. I'd like to just give you the opportunity to reflect on private practice in Washington and to compare private practice to your service in the government.

Mr. Gardner: Well, first the comparison is easy. The variety of issues, the excitement, the feeling what you're doing makes a major difference, all line up on the side of government service, as you know. Your basic trouble with government service is as you advance through the ranks, you pretty soon get to a point where the political foundations are of first importance. I went in to the government service being a nonpartisan, belonging to neither party, and stayed in that condition despite occasional embarrassment when I got into the

Senate confirmation stage. It was evident that I couldn't continue there. Krug, who was Secretary of Interior at the time I left, very sincerely but I think naively, urged that I was in a position of a nonpartisan Assistant Secretary pretty well acquainted with the working of the Interior who should stay on whoever controlled the White House. And it might have been an opportunity to create something somewhat equivalent to the British permanent Undersecretary. But I was confident he was completely wrong in that. Being both young and an easterner and having already offended two or three of the western Senators there wasn't any future in the Interior Department secretariat.

My major government service, both in time and perhaps importance, was in the Solicitor General's Office which is about the best job a lawyer can have in the United States. But it was a real wrench to come into private practice where you were in a sense engaged in matters of no apparent consequence. But it was a wrench more or less easily overcome. Any occupation that requires a lot of work, full attention, is interesting and rewarding in itself; whether it is a big or a little matter.

Private practice in recent years has become somewhat distasteful, I think. The practice of law has become a business, a merchandising business, rather than a profession. I overstate slightly but only slightly in that aspect of the law practice I have not the slightest

talent and I don't think I've ever known, and don't know now, how to ask somebody to hire me as a lawyer or how to go about that. Our firm has been among those less infected by the drive for business development, but we're unquestionably infected by it now. So too are many excellent firms which used to find adequate income flowing effortlessly to austere, superior polished people. It's reasonably evident now that business developing is critical to most large law firms which require constant fuel to drive the engines. Even though it is not possible to escape the business development aspect, I don't like it, and I doubt that many of the people of other firms like it.

Mr. Schultz: What advice would you give somebody coming out of law school today and looking forward to a career?

Mr. Gardner: Fortunately, I'm not asked to give that advice, but if they were in a small community with established family and social connections, and liking the life, then by all means do a small town practice and not get caught up in a large law firm. We have lost from Shea & Gardner over the years probably a score of highly talented young men and women. They go into government service and stay there and I think by and large are happy and probably happier than they would be in private practice. When you happened to hit a good agency, the SEC used to be, whether it still is don't know, and if you're content with the prospect of staying put in a mid-level position and not advancing certainly not to division head level,

and I think these days there's a political requirement even at section head level, you can have a good stress-free life. There are highly capable men in Justice who have spent their lives litigating. But again that's risky because a bad superior can play hell over them. So I don't know.

A large law firm in the first place requires at this point, I think, eight years as the usual period before you're considered for partnership, which is outrageous. At Charlie Horsky's funeral the other day my mind went back to when he and I were in the Solicitor General's office together. He and I were the juniors and Paul Freund, Alger Hiss and Charlie Wyzanski were the seniors, and they conducted probably the most important litigation the government's had in this century. Not one of them was 30, and not one of them could now be considered at his age for partnership at Covington or at Shea & Gardner. Things have not improved.

After that long apprenticeship you end up in a large firm with a fairly narrow practice area. Most large firms have a litigation section; if you end up there you're a little better off, the work area is somewhat broader. By and large compartmentalization is not that attractive.

I have myself been very lucky. As a general proposition, teaching or government service would probably be more satisfactory for me than private

practice. I have in fact been happy in private practice, and happier than I'd have been if I'd tried to stay in the government, and probably happier than if I'd undertaken to teach, but I had a lot of underlying and perhaps undeserved good fortune.