

INTERVIEW NO. 2

October 16, 1997

This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit. The interviewee is David Carliner and the interviewer is Charles Reischel. The interview took place on October 16, 1997.

Mr. Reischel: We finished talking last time about your *Marcello* litigation of which there was a great deal over about fifteen years, I think. The high point of which I guess was your argument in the Supreme Court.

Mr. Carliner: I'm not sure that was the high point, that was sort of a, if taken in a musical sense, it was a counterpoint rather than a high point. The main issue there was a due process issue and the issue that I was arguing, which was an unwinnable issue, was *ex post facto*. And the Court held rather summarily that it was not *ex post facto*.

Mr. Reischel: That led into a subsequent argument that you had up there too, I think.

Mr. Carliner: There were a lot of *Marcello* cases, but I think only one went to the Supreme Court.

Mr. Reischel: Right, on *Marcello*, but *Lehman* was about whether or not, if I read it correctly —

Mr. Carliner: *Lehmann v. Carson*, that was a savings clause case wasn't it?

Mr. Reischel: The question was whether or not Congress had intended retroactivity for a provision, a particular provision, and they reiterated summarily that, of course, the *ex post facto* clause didn't apply to immigration. I guess they had so held even before *Marcello*, but you were trying to construe the immigration statute to say that Congress didn't

mean to apply it retroactively.

Mr. Carliner: I wouldn't make an argument like that today. Congress is enjoying doing what it can to the illegal aliens.

Mr. Reischel: Well, I think they've tried to clarify when something is retroactive and when it isn't. I don't know how much is —

Mr. Carliner: Well, Justice Scalia doesn't believe in looking at legislative history unless it is the same language as the statute.

Mr. Reischel: Well, somebody said that he believes the Constitution should be read as it was written. But I was listening to a law professor who said, "What about the warrant clause? No searches without a warrant."

Mr. Carliner: Isn't Justice Marshall the one who said, "It is the Constitution we're expounding"?

Mr. Reischel: The first Justice Marshall, yes, exactly so. One of the other cases I looked at was the *Quan* case that you argued in the Supreme Court. The *Quan* case seemed to be about, the law in it had to do with whether aliens on parole in the United States were "within the United States" for some provision, or whether they weren't. This seemed to be a highly arcane and technical matter, and the Court, I think, held that they were not within the United States. But it seemed to really be about whether or not the Executive Branch could give mercy to people who, if they were expelled to Red China, would be persecuted.

Mr. Carliner: The underlying issue is that if you are in the United States, you can apply for a stay of deportation on the grounds that you could be persecuted or for asylum under one of the statutes on the grounds that you would be persecuted. But you had to be "within

the United States" to do that. Outside the United States, you could not apply. There's a difference even today between people; there's a distinction: when you are outside the United States you come in as a refugee and the procedures are different. Inside the United States, you apply for asylum.

I've had cases of a brother and a sister from Ethiopia. One applied for refugee status from home, and the other was inside the United States applying for asylum from Ethiopia. They would be persecuted there. They were handled by two different agencies. One was approved and one wasn't, even though the factual circumstances as to each person were the same. So the procedures are important. And they've never been – the Court has these Haitian cases. The United States intercepted Haitians from coming here so they could not land in Florida. If they land in Florida, and they come up on the beach, they could apply for asylum. They would stop them from being able to do that. While intercepting them as they were coming from Haiti, they would put them on boats to go back to Haiti or put them on this land that we had control over in Cuba. And the case in the Supreme Court several terms ago was on the very issue of whether they had eligibility to apply for asylum. So it's not a question of the substance; it's a question whether you're in the border. It's a very important [distinction].

Mr. Reischel: And where were all these people in *Quan* who were fleeing Red China?

Mr. Carliner: Well, Quan was an individual as I recall. Was he the fellow who they were telling to have the U.S. Army coach in China?

Mr. Reischel: I think so.

Mr. Carliner: Anyway, there's one case I had where a guy had gone to China,

having been in the United States. He had been in the U.S. Army for 90 days, and being in the U.S. Army for 90 days, even though he was illegally in the United States, he could apply for U.S. citizenship with a special status given to guys who serve in the Army. So he came back to the United States from China and claimed that he would be persecuted there because having a U.S. Army uniform demonstrated obviously that he was a CIA agent, or something. The Immigration Service said, "No he was not in the United States and he couldn't apply for asylum." So this case was one of my cases in the Supreme Court. And the Solicitor General thought better of it, to think of a guy who would serve in the U.S. Army, come back from China, apply for asylum, and couldn't get it. So what they did was make him a citizen. That mooted the case.

[Small Break Here]

Mr. Carliner: Is the D.C. government able to hire anybody these days?

Mr. Reischel: Yes, but only if it is an emergency situation. We're on a continuing resolution because they're fighting about school vouchers again.

Mr. Carliner: Clinton says he's going to veto it.

Mr. Reischel: That's right. So we'll continue. We may end up on furlough again over this. But, don't – (laugh) My comments on that I don't want to be recorded. In any event, we were talking about *Quan* a little bit. Who is or was an alien on parole?

Mr. Carliner: The phrase "parole" is used as a term of art in immigration law that permits somebody from coming into the United States who cannot come in legally. So he's paroled in for various purposes, for humanitarian purposes sometimes, to put him in jail for other times, but he is excludable from the United States. So he is "paroled" into the country and is permitted to stay here for the purpose of the parole procedure, and sometimes he ends up being

granted permanent residence, or whatever. Sometimes he's found to be excluded from the United States, and he is put under exclusion proceedings as distinguished from deportation proceedings. Exclusion proceedings are for people who are "not in the United States," and they have fewer rights in terms of procedures in subsequent matters than people who are being deported.

Mr. Reischel: But people who, like the boatlift people, are seized within the three-mile limit or twelve-mile limit, whatever it is now, they would be within the country?

Mr. Carliner: No, being three miles offshore, you're not within a country unless you get on the beach here.

Mr. Reischel: Oh, right, but once they get on the beach, then they're within the country?

Mr. Carliner: Then they're here.

Mr. Reischel: And a different set of procedures, and they have greater rights.

Mr. Carliner: If you are out in a boat coming in from Balboa or Jamaica and the Marines or Coast Guard picks you up, and they cart you back to wherever you came from, you're not here. Even though you're within the three-mile limit, and you're picked up and put on a Coast Guard vessel which is a U.S. boat, you're not in the country.

Mr. Reischel: But if you land in an airport as a stowaway?

Mr. Carliner: If you land in an airport as a stowaway, you're here.

Mr. Reischel: You're here and then you have greater rights.

Mr. Carliner: You have better rights. To some extent the distinction of being what you can apply for has been somewhat obliterated, but it's still there. To be excluded in the United States, you don't have – for persons who are under exclusion proceedings, due process is

what Congress says it is. If you are under deportation proceedings, due process is what the Constitution or courts say it is. It's not a statute. And, in some ways, those procedures are what law is all about.

Mr. Reischel: Well, all too often they are. You mentioned while looking at my brief earlier, *Woodby*. I use *Woodby* for the clear and convincing evidence rule.

Mr. Carliner: Yes, that's a standard rule.

Mr. Reischel: I take it that's for taking somebody's citizenship away.

Mr. Carliner: Yes.

Mr. Reischel: Clear and convincing evidence. I'll have to talk to you sometime about how —

Mr. Carliner: Rules of clear and convincing, preponderancy, evidence and burden of proof and so on.

Mr. Reischel: Sure. One of the cases you asked me to look at when we talked earlier was the *Rusk v. Cort* case where I think you were on it with the ACLU. In fact, Steve Pollak and you were the authors of the *amicus* brief in the Supreme Court in that one.

Mr. Carliner: Maybe. I know Steve. He was in the Solicitor General's Office at one time, and I don't know that he was ever on a —

Mr. Reischel: He's also active in the ACLU, I think.

Mr. Carliner: I think he was a contributor to it. I don't think he was active in it. Maybe I'm misremembering it. He was in the White House, you know.

Mr. Reischel: President Johnson, wasn't it? Liaison for District matters?

Mr. Carliner: Yes. Liaison. Charles Horsky was there for Kennedy, and Horsky

stayed on for a while, but he had worked for Kennedy, and having worked for Kennedy, he was not, for Johnson, essential. Steve replaced him.

Mr. Reischel: Steve replaced Horsky?

Mr. Carliner: Yes. Steve came over from the Department of Justice. He had been First Assistant to the Assistant Attorney General for Civil Rights. I think that was his job.

Mr. Reischel: May have been.

Mr. Carliner: I don't know. But we were good friends.

Mr. Reischel: I think he was on the brief with you in *Cort v. Rusk*.

Mr. Carliner: He could have been. I don't remember. He would have had to be in private practice then.

Mr. Reischel: Speaking of procedures, *Cort* is one of the few cases you had me look at where the Supreme Court actually said that one of these petitioners was entitled to procedures. That was where the statute made a draft evader or somebody who left the country or wouldn't return to the country in time of war for service, if I remember correctly, automatically stateless, lost citizenship.

Mr. Carliner: Yes, someone who deserted the Army during the war could be expatriated. Leaving the country, I'm not sure that was a ground for expatriation. There was this case of someone in North Africa, a question of whether he deserted or he was AWOL, and there's an important difference, of course. One who deserts in that situation is expatriated. That wasn't *Cort* though.

Mr. Reischel: No, I think *Cort* went to England and he taught.

Mr. Carliner: England, and then he went to Czechoslovakia and he —

Mr. Reischel: He would not return for the Korean War service.

Mr. Carliner: Was it the Korean War? He refused to submit to the draft so he would have been expatriated.

Mr. Reischel: And, the Supreme Court held in *Cort* that that statute was unconstitutional.

Mr. Carliner: Yes.

Mr. Reischel: On due process grounds.

Mr. Carliner: Yes. I think that the major contribution we made there had to do with jurisdiction to bring a lawsuit.

Mr. Reischel: What was peculiar jurisdictionally about the case? Do you recall?

Mr. Carliner: Well, he was outside the United States, and his brother was required to come to the United States and seek *habeas corpus* in order to challenge his loss of citizenship. In order to come to the United States, he needed some special dispensation and wasn't sure that he could get that dispensation. He brought an action for declaratory judgment. There's lots of litigation on declaratory judgment. One of our clients was Serge Rubinstein who had a fear of closed spaces, that psychological thing, like being locked in a closet. In order to bring a writ of *habeas corpus* at that time, you had to surrender to the customs agent or a U.S. Marshal. Custody meant custody.

Mr. Reischel: You mean imprisonment.

Mr. Carliner: But there was a change in the law, and subsequently you submit to the control but are necessarily interned. Anyway, the government was unwilling to allow him to do anything but sue under custody and be put in jail, and then he could bring a suit for *habeas*

corpus. Well, I'm sure from his previous experience of not having been to jail, he didn't care to go back in order to knock on the door to come out. He just didn't want to go in. So he brought an action for declaratory judgment as to whether he had committed an offense. He is charged with using a false affidavit in order to avoid the draft, and that was the merits of the case, and we brought an action for declaratory judgment to say that that was not an offense for which he could be expatriated.

The government was unwilling to allow him to do a declaratory judgment. That became the overriding issue with them, declaratory judgment for *habeas corpus*. We won in the Court of Appeals in Washington and went to the Supreme Court, and that was an interesting little by-play. The Attorney General had been Tom Clark at the time, and Rubinstein had wanted us to hire a lawyer who would be able to make a presentation to Clark. So somebody was hired; I forget who it was. He went to Tom Clark, who was on the court, and reminded Clark that he was the Attorney General when the case against Rubinstein was brought. Well, Clark, of course, didn't know anything about it; the Attorney General can't remember all the cases that were brought in U.S. District Court. Nonetheless, Clark recused himself. As a result, there was a 4-4 decision by the Supreme Court which had the effect of affirming the U.S. Court of Appeals. All kinds of footnotes to the cases.

Mr. Reischel: Did the law subsequently get clarified as to — ?

Mr. Carliner: Yes, *habeas corpus* – you could use declaratory judgment as a way of doing it.

Mr. Reischel: Oh, the law that you established became established law.

Mr. Carliner: Yes, in effect, to certain courts of appeals. Later, I think a case

went to the Supreme Court on that issue. I remember, can't remember the case, but there was a case there, and, I think, the Supreme Court appointed a person who was previously a law clerk to one of the Supreme Court Justices, a right-wing person, who wrote a brief, *amicus* brief, for the court on this issue.

Mr. Reischel: One of the other cases that I read at your suggestion was *Convento* which, as so many of these cases when someone like me who is not an immigration lawyer reads, turns on some point that looks incredibly technical. This was "what's an enlistment," if I remember correctly.

Mr. Carliner: Well, there was a case which was really not technical at all. It is one of the more important cases. The law provided that anyone who had served in the military – Navy, Army, Air Force – during WWII, during time of war, and served for three months, could apply to become a citizen of the United States. The word was "enlist." Well, the U.S. Navy had been headquartered in the Philippines for a long time, and the Navy used Filipinos to be stewards and to work at part of the Navy. They never worked at any other aspect of the Navy. These people joined, they enlisted in the Philippines, and very often their enlistments would expire, and they would be dropped at the landing in Norfolk or San Diego, or some place like that, and so, while in the United States, they would reenlist in the Navy. Well, the Immigration Service took the position that you had to enlist in the United States in order to have the benefit of this provision. You could not enlist in the Philippines. So the Immigration Service had taken the position that these people had enlisted in the Philippines, and the reenlistment in the United States was not —

Mr. Reischel: Was not an "enlistment" for purposes of a statute?

Mr. Carliner: In the Court of Appeals they said, “50,000 Filipinos,” I’ll never forget this argument, “would be able to become citizens if you allowed them to do that.” Well that didn’t move the Court of Appeals any.

Mr. Reischel: That just meant that 50,000 Filipinos had served in the United States Navy.

Mr. Carliner: Yes, that’s right, they did that. So at any rate, that argument was literally unpersuasive. It might have been somewhere else with an anti-Filipino attitude. But that was really a huge gold mine, if that’s the right metaphor for it. The headline story in Philippine newspapers and as a result of that this had more than the rippling effect for just being able to serve in the Army and become citizens. The Filipinos were confined to the stewards jobs and could not go into the Navy generally. And so, when they became citizens, they could serve anywhere in the Navy, and these people perhaps had qualities to be quartermasters, seamen, whatever. So the Filipinos like them get beyond being stewards and taking care of cooking. Apart from that, since they were able to become citizens, they could sponsor their wives to become permanent residents, and they could sponsor their brothers and their parents. So the number of Filipinos who have come to the United States through this has been enormous. The Philippine quota, there is a quota for them, has been oversubscribed because of the very large number of Filipinos who had to come in through this enlistment clause. So in terms of major decisions that I’ve been involved in, that in terms of the quantitative, the technical issue is rather interesting, but the effect on the number of people is vast.

Mr. Reischel: And Congress didn’t tamper with it, I take it.

Mr. Carliner: No.

Mr. Reischel: The Supreme Court, I think, denied *cert.* I'm not even sure *cert.* was sought.

Mr. Carliner: This was a case in the U.S. Court of Appeals here.

Mr. Reischel: Yes.

Mr. Carliner: There have been other cases involving Filipinos which I was not involved in. During the war, you could be a Filipino in some circumstances who would serve in the U.S. Army, and serve for three months, and automatically you could become a citizen. There were also Filipino detachments that were attached to the Army. Filipinos who worked with them were not eligible to apply for citizenship under that provision. There was an ambiguity between some units which were attached to the U.S. Army but were not part of it.

Mr. Reischel: Well, did the government accede to the ruling? They didn't try to challenge it?

Mr. Carliner: I don't remember. Challenging jurisdiction isn't likely for the Department of Justice. They might have a case arising in a jurisdiction where they have a conflict on the surface, but I don't remember a case like that.

Mr. Reischel: I think it became the law. I was just wondering if Congress changed it, and it looked to me, from looking at it, that the United States must have acceded, not fought it anymore.

Mr. Carliner: It was not a Supreme Court kind of issue, but it could be, I don't know; it's hard to say what the Supreme Court will do.

Mr. Reischel: Were there other cases that you felt particularly good about or particularly upset about that you had handled in the immigration area?

Mr. Carliner: Well, the exclusionary rule was one. We had petitions for *certiorari* quite often. People would be questioned about their rights without being given warnings. The Immigration Service, or what not, would give people rather rough treatment then. Almost always in the deportation hearing. The Immigration officer involved would say the guy had been in such and such, and the testimony from those officers sworn to tell the truth, or a U.S. employee presumed to tell the truth, would be taken as true for purposes of the proceeding.

Mr. Reischel: Just like police officers.

Mr. Carliner: You'd have cases, this is administrative law, where you'd have a hearing in which the alien says one thing and the INS officer says something else, and the Immigration judge believes the INS officer and that's credible and probative evidence. So you appeal that and the Court of Immigration Appeals says, "Well, it's credible, and such and such." And if that's the case, they're going to review it, and, anyway, the court is reviewing an administrator whose decision is presumptively valid.

Mr. Reischel: So you would have liked to see a Miranda-type warning?

Mr. Carliner: Yes. So we had a number of cases where we tried to challenge the conduct of the Service. The only one we ever won was on a different footing. There was a case in which somebody, a client, was living on the second floor of an apartment building, and the INS officers climbed up the whatever to get into the guy's apartment. Not through the front door, but through the windows in the back. So they came in the back, and they came in the front, and this guy, he was living in Prince George's County some place, he was in bed with a headache or whatever, and these half dozen INS officers swarmed over his apartment, and they took him into custody. He was found deportable in the hearing, and I raised a different twist on this. I don't

remember what the particular issue was, but the Board of Immigration Appeals held that was an improper search. I won that case. There are a number of cases like that, but the ruling wasn't expanded, not in New York, anyway.

Mr. Reischel: But, no prophylactic rules, Miranda-type rules or Escobedo-type rules?

Mr. Carliner: I had lots of petitions for *certiorari* in the Supreme Court and I never got *cert.* on it. Although I knew from my son who had friends who were law clerks on the Supreme Court, and I'm not sure if I learned through them, but it was a troubling issue for some of the Justices, but we never had four who were troubled enough.

Mr. Reischel: Troubled enough. (Laugh) Even this, I take it, was back in the Warren Court days?

Mr. Carliner: I don't know if it was Warren or Burger. I just don't know without fishing out my briefs. But that's where we were on the issues. That was one that we fought, raised lots of times, and never got anywhere. One of these days I mean to go down to the Supreme Court where, I understand, they have records of the colloquies of Supreme Court Justices at conferences.

Mr. Reischel: Oh really? I didn't know they had those.

Mr. Carliner: Yes. Not yesterday's cases.

Mr. Reischel: No (laugh), I'm sure they have some time limit on it.

Mr. Carliner: The *Naim* case is one that I'd like to look at, just out of curiosity.

Mr. Reischel: Sure. I looked today at those two orders; the first one that said it wasn't clear what the Naims' relationship to Virginia was before they went, when they went to

North Carolina and when they came back, and then the part said, “and we don’t have all the issues here,” which I take it was the full faith and credit issue.

Mr. Carliner: Well, I’m not quite sure what the record was before that court in Portsmouth, but the Naims were living together in Norfolk or Portsmouth, and they lived there before they got married. And then they went to North Carolina and got married and came back the same day.

Mr. Reischel: Well, the Court remanded it for findings in the Virginia court, and I take it the Virginia court clarified it; it did something additional.

Mr. Carliner: No. The Virginia court did not address it; they said we’ve got nothing else to say and did not make any additional comments. They went back to the Virginia Supreme Court of Appeals to make findings, but they refused to make any.

Mr. Reischel: Is that right? I think you filed a motion to recall the mandate after that?

Mr. Carliner: Yes, and they said there’s no constitutional relationship before the Supreme Court.

Mr. Reischel: Well, what they said, I think, is really interesting. What they said was, “In light of the Virginia court’s further action,” which apparently was saying we won’t do anymore – there’s no federal question presented.

Mr. Carliner: No?

Mr. Reischel: Oh my, what a shame. Although maybe not.

Mr. Carliner: I was too early in trying to challenge the miscegenation statute.

Mr. Reischel: Right, and who knows what would have happened if they had

taken this issue then.

Mr. Carliner: I was a fool rushing in, but then I'm no angel.

Mr. Reischel: The other one of your immigration cases I looked at a little bit was more recent. You ended up representing Unification Church with respect to some of its trainers.

Mr. Carliner: That case was just decided in the District Court. Judge Jackson, I think, decided that. I'm not sure any major issues of law were involved there, but the Unification Church was not a very popular organization. It brought a lot of people here for training.

Mr. Reischel: And the question was whether or not they were bona fide trainers?

Mr. Carliner: I don't remember specifically what they – I've got the brief here some place. The Unification Church, I guess, was running a bona fide training program. I say that, but you've read more recently than I have. I don't remember.

Mr. Reischel: Was the INS's concern that they were just going to bring these people into the country and keep them here?

Mr. Carliner: Well, no. What the Unification Church was doing in those days was to bring a lot of people here mainly from Japan, despite the fact that Moon is Korean. He didn't have a strong base in Korea. Mostly people from other countries. They were bringing them here at the outset of his activities. They were going from door to door to raise money. They were selling things or fund-raising. So the question began, "Were they coming here to solicit funds or what not?" Now they've given that up. They've gone into real estate. But they did have a training program, and that was the issue that I had before Judge Jackson.

Mr. Reischel: You're still handling cases in some of the courts, are you not?

Mr. Carliner: For the Unification Church?

Mr. Reischel: No, no, just generally. You still have an active litigation practice.

Mr. Carliner: I still have an active litigation practice. Less and less litigation.

The jurisdiction has changed. Mostly, back in 1961, you had the choice of where to bring a lawsuit, and someone could live in New York, California, and could bring that to the United States District Court in the District of Columbia where jurisdiction lay here. If you were pursuing a decision of the Board of Immigration Appeals, you'd go into the Circuit Court, and you could choose the circuit in which the alien was living or the circuit in which the hearings were held. Well, the Immigration Service used to have its headquarters in Washington, D.C., so if you're reviewing a decision of it, you could bring your case in the District of Columbia. And now they're in Virginia, and some of the cases are going to the Fourth Circuit. There were very few cases in the D.C. Circuit. Reviewing a decision of the Board of Immigration Appeals would go into the Circuit Court, but if you had other kinds of cases, they would go into the District Court. The U.S. Court of Appeals for Washington was the luck of the draw. Depending on which three judges were on your panel. In Virginia, that court is generally hostile to alien cases, but not always. At the one in Washington, I haven't been in the Circuit Court of Appeals in Washington in a long time, and I've been before the Court of Appeals in Virginia, of course.

Mr. Reischel: Do you think that more or less a reflection of the Reagan/Bush appointees?

Mr. Carliner: Yes, sometimes Republican Presidents tend to appoint people who are less friendly to the aliens and people who are —

Mr. Reischel: I would think the D.C. Circuit would probably have been at the same time.

Mr. Carliner: At the same time. Well then it was more friendly then than now; but now with Silberman and all that, it is no better than the Fourth Circuit.

Mr. Reischel: Yes, I would think it would be about the same. Although now we're getting some of the Clinton influences, it's becoming a different —

Mr. Carliner: Pat Wald. Is she a sitting judge there?

Mr. Reischel: She's still in active, regular active service. She stepped down from being Chief Judge to allow Abner Mikva to become Chief Judge.

Mr. Carliner: And then when Mikva was off, who is the Chief Judge?

Mr. Reischel: Harry Edwards is the Chief now, and he'll be the last Carter appointee. The next one, well, probably Harry Edwards because he was young enough. His age and Silberman's age are such that Silberman will never be Chief Judge unless something happens to Harry Edwards. If he's offered the United Nations or comes off the bench, something like that (laugh). I don't know, I guess Williams or Sentelle would be the next in line. It would be one of those, but Edwards is still fairly young.

Mr. Carliner: There is a judge who wrote a very detailed brief and citations, who is he?

Mr. Reischel: Spottswood Robinson.

Mr. Carliner: Is he still on the court?

Mr. Reischel: No, he went senior a number of years ago. Wonderful, wonderful gentleman.

Mr. Carliner: Yes, very genteel.

Mr. Reischel: I don't think he even sits anymore; I think his health has been very

bad. Yes, he was Dean of Howard for many years. Howard University Law School. Yes, he'd have 400 footnotes in an opinion, quite daunting to read but quite helpful too.

Mr. Carliner: Very helpful. You didn't have to write a brief; he'd write it for you.

Mr. Reischel: I take it the Immigration law has been constantly changing. You mentioned the Haitian situation and the Cuban boatlift situation.

Mr. Carliner: Well, the Haitian situation was not changing; it's been like that forever, but the immigration law now is quite changed in terms of the available remedies, penalties and what not.

Mr. Reischel: Had the statutory law been fairly stable for a while before that?

Mr. Carliner: Well, better than stable. In the course of time, more immediate relief was available for people, so you could get discretionary benefits which you might not have been able to get before in terms of suspension of deportation and those kinds of things. Except for people who were aggravated felons, and there's nothing worse than being an aggravated felon.

Mr. Reischel: Tend not to get mercy from anyone. (Laugh) But that was all rolled back with the recent legislation?

Mr. Carliner: Yes, in the last three or four years. You can marry your mother, and you'd get a better sentence than if you sell cocaine or marijuana. The drug business has changed the immigration law. Not that I have that many clients in that situation, but the jails in the south are full of people who are there for drug convictions.

Mr. Reischel: Well, not just there, here too. Many of them, so many drug crimes were federalized that the United States Attorney is putting people away everywhere, here

included.

Mr. Carliner: There is not a high proportion of immigration cases. The number of criminals involved is not disproportionate to the numbers.

Mr. Reischel: I suppose smuggling enforcement, did that change?

Mr. Carliner: Well, smuggling was always, nothing new about the —

Mr. Reischel: Right, but there's been a lot more of it at least with respect to drugs. Yes?

Mr. Carliner: I don't see much of that in my practice. My favorite story about smuggling, which I may have told you already, is a guy called "Coyote" who helped people cross the Mexican border. They treat people very badly, and they squeeze a lot of money from them; they were not nice people. But nonetheless, that's how they made their living. This guy got caught, and they sent him for three years to a reformatory in Minnesota. The reformatory he went to happened to be the place where all the immigration forms were printed. He was assigned to the print shop, and he was there for two years, and he had this collection of Immigration Service forms, so when he left, he took copies of all of them. So, he was in business forging these forms. White collar crime, not much danger. So, it's upward mobility. (Laugh).

Mr. Reischel: (Laugh) He learned a real trade. Well, speaking of changes, let's talk a little bit about home rule, which is another cycle. We talked last time about the early days when there was the Georgetown group of people who were interested in the franchise, and then I guess when the southern stranglehold got broken. Was that under Johnson?

Mr. Carliner: Well, what brought about the change was not the southern stranglehold, but the Home Rule Committee had been campaigning for home rule among the

Democrats in Washington. Many of the Republicans were against it. The Chairman of the House District Committee was from South Carolina.

Mr. Reischel: McMillan.

Mr. Carliner: McMillan. Nothing close to home rule could get out of his Committee. There was no way of discharge petitions getting out of committee. Speaker O'Neill was Speaker of the House, and he was quite sympathetic and friendly toward it, but he wasn't in a position to change the course of events in the House of Representatives on that. Under the Reorganization Act, with which you're probably familiar, the President has the authority to submit reorganization plans to Congress to change different government entities from one to another as long as they do not change the powers that the people exercise within those structures. So Charles Horsky, he was the White House Advisor then, but then Steve Pollak took over from him, and I had made this proposal and took it to the White House.

Mr. Reischel: You did it yourself or as part of the Georgetown Committee?

Mr. Carliner: Well, lawyers of the Washington Home Rule Committee or not, we organized a committee for the reorganization plan. There's some controversy on that. There were some people among whom was Joe Rauh who were against it. Smallwood Williams, who was the bishop of the biggest black church in Washington on New Jersey Avenue, organized the community. The idea emanated from me. The organizing committee drew upon the statutory authority of the President to submit reorganization plans. Previously, the city was governed by three commissioners. So, the proposal was to create a Mayor-Council form of government with a Mayor who was going to be in title more or less a typical Mayor, and the Council, the City Council, which had nine or eleven people on it. So that was a proposal that went to the White

House, and by that time Horsky had left and Pollak was there, and so President Johnson agreed to it. It didn't go to the House District Committee.

Mr. Reischel: Did Steve Pollak back the plan inside?

Mr. Carliner: Yes, he supported it. It didn't go to the House District Committee, where it would have gotten a slow death and burial. It went to the Congressional Committee on Government Organization. Under the Reorganization Statute, Congress's role is to vote a plan down or up. I'm not sure it had to go back to the President.

Mr. Reischel: I think they had to veto it. I think there had to be a majority of one House against it.

Mr. Carliner: I think subsequently some issue was raised about this in home rule.

Mr. Reischel: Congressional veto, *Chadha*.

Mr. Carliner: That's right, I guess.

Mr. Reischel: Another one of your immigration cases. (Laugh)

Mr. Carliner: That's right. Anyway, we had a major lobbying effort to get the Congress to accept the new reorganization plan, a really Herculean one really. We turned out people to work on this, and it went through.

Mr. Reischel: What was Joe Rauh's objection?

Mr. Carliner: He wanted to have officials elected from the community. He didn't want to take "a half an inch" that was his —

Mr. Reischel: He didn't want a half a loaf; he wanted the whole thing.

Mr. Carliner: Another metaphor was that was not a loaf of bread, it was an

organism and that things developed out of their organic development. He had another phrase. I don't remember it now. But we got things gradually, and got half a loaf, which sustained some things, which had a life of its own; it's good to know it as something else. So anyway, this went through, and Pollak was in charge of picking people to be on this Mayor/City Council form of government for Johnson's White House. The obvious person to choose was Walter Washington. He was in one of the major housing organizations here. He was comfortable. He was virtually a Washingtonian. I think he came from Jamestown, New York. The members of the City Council were to be "broadly representative of the District of Columbia." So they chose a number of people: Polly Shackelton, one guy named Joe Yeldell who presented himself. He turned out to be something of a sorrow. John Hechinger was chair of the City Council.

Mr. Reischel: Was Marion Barry on it?

Mr. Carliner: No, he was on the School Board, wasn't he?

Mr. Reischel: He was at that time, he had been, but —

Mr. Carliner: He wasn't on the original one.

Mr. Reischel: Was John Wilson?

Mr. Carliner: There was a Republican at one time, a lovely fellow who died, I can't seem to remember.

Mr. Reischel: John Wilson?

Mr. Carliner: No, John Wilson wasn't there.

Mr. Reischel: Arrington Dixon?

Mr. Carliner: No. Somewhere I've got all these names. Anyway, it was a broadly representative group that was the appointed Mayor/City Council form of government.

All the activities to get home rule for Washington had come out of Volunteers in Home Rule Committee and other organizations. But with this creation of the Mayor/City Council form of government, they had offices, staff in the District Building, and all the impetus for moving forward came out of that group. They had money, had lobbying, had offices and so on.

Mr. Reischel: Of course, you had more people involved in governing the District on a day-to-day basis.

Mr. Carliner: That was adopted in 1967 as I recall.

Mr. Reischel: I think that's right. It's called the Reorganization Plan of '67, but I think by the time it got through —

Mr. Carliner: That was adopted then, and two or three years later Congress passed a bill granting the same powers as the Reorganization Plan; I don't think they expanded the powers but provided for the election of the Mayor and the City Council.

Mr. Reischel: Right. Well, of course, they gave true legislative authority to the Council where before it had only had police power authority.

Mr. Carliner: Yes, but they had the power to adopt regulations.

Mr. Reischel: Yes. Police regulations.

Mr. Carliner: Just police regulations?

Mr. Reischel: That's right.

Mr. Carliner: Well, they expanded the authority —

Mr. Reischel: Of the Council in the Home Rule Act. But then you turned around and sued?

Mr. Carliner: I sued. Not after they elected them.

Mr. Reischel: No, you sued after they adopted your plan. [Laughing]

Mr. Carliner: After they were appointed because they weren't elected. A form of government should have the right to elect officers.

Mr. Reischel: [Laughing] So you came up with this plan, and then you sued to prevent it from being implemented?

Mr. Carliner: Yes, but I don't think there's anything anomalous about it, but Walter Washington was pissed off about it. Anyway, the suit never went anywhere.

Mr. Reischel: You were arguing, if I remember the lawsuit correctly, Ninth Amendment, the powers reserved to the citizens. Now all those arguments sound very good to me.

Mr. Carliner: Bork agreed with that too, but in a different context.

Mr. Reischel: If I remember the circuit opinion correctly, they said you didn't raise a substantial question. Our rights are so insubstantial —

Mr. Carliner: I didn't expect that they would have an opinion or dismiss summarily.

Mr. Reischel: There was a question about whether or not they had to dismiss you or convene a three-judge court. It's only a three paragraph opinion.

Mr. Carliner: Well a three-judge court would have been the District Court.

Mr. Reischel: That's right, but they had decided they didn't even have to do that because it wasn't a substantial federal question, which I guess tells us a lot about our rights.

Mr. Carliner: Anyway, the Circuit Court of Appeals dismissed the appeal, and the Supreme Court did not grant *cert.* so that was it.

Mr. Reischel: I've always thought those were good arguments in lots of ways, but history is against us.

Mr. Carliner: Well, history has been against us more substantially because people ask me why we want home rule. I said to make the same mistakes other cities make, but I didn't realize what a needless mistake we were making.

Mr. Reischel: Well, you were still involved at the time the home rule battles were —

Mr. Carliner: Yes, I was still involved in that, but I never voted for Marion Barry. I never liked him.

Mr. Reischel: Somebody recently said, I was listening to one of these arguments recently, "Look the last two governors of Arizona have been convicted as felons, and nobody's taken away their home rule."

Mr. Carliner: Well, the Mayor of Boston was in jail.

Mr. Reischel: Sure, Curley, back in the '40s.

Mr. Carliner: I don't think we should take our home rule away because the Mayor's in jail. He might improve the prison system.

Mr. Reischel: But, I take it, there were people at the time that home rule went through who realized that this crushing pension debt that they transferred to the government was going to be quite difficult.

Mr. Carliner: Well, there are aspects to it which are not serendipitous. One of the people who was really helpful to us was Ancher Nelson.

Mr. Reischel: Of Minnesota.

Mr. Carliner: He was a conservative Republican from Minnesota, and he sat on the House District Committee with McMillan. Ancher Nelson and McMillan did not see eye-to-eye on home rule. One of the issues that Ancher Nelson was interested in was vocational education. He was a woodcrafter of things, and one of the things that came out of this legislative effort was the establishment of the Federal City College, as part of that. It was also the elected Board of Education, which was before the government. It was also electing a non-voting delegate to the House of Representatives.

Mr. Reischel: Now were these part of your program?

Mr. Carliner: It was all part of it. Sturges Warner, an attorney with the Jones, Day firm, was heavily involved with the non-voting delegate part. It all came about as part of this whole package. It was done simultaneously. So these are spin-offs which would have given considerably more power and benefits to Washington than just the home rule government. I park my car at the University of District of Columbia garage. I know it's about a mile from here, and I take the Metro downtown, and when I go in this garage, they have parking for about 700-800 automobiles. This marvel is a product of having a University of District of Columbia city parking garage. [Laughs] So I get a benefit from that.

Mr. Reischel: Well, it's got to have been pretty painful for you to watch what's been happening to us lately.

Mr. Carliner: Yes, it is painful, but I think you have to look forward because Barry has been such a disaster for our government.

Mr. Reischel: With all due respect to the Mayor, who I have known for a long time now and I think is a brilliant politician, I think he makes —

Mr. Carliner: Yes, there's no question he's a brilliant politician.

Mr. Reischel: And a born politician.

Mr. Carliner: He has a great style. Not for running the government though.

Mr. Reischel: One of the things I really like about him is when he's in a room, he's really interested in what makes people tick.

Mr. Carliner: Is that right?

Mr. Reischel: Yes, he's very interested in everybody, and I think that makes him an excellent politician. But there's no question he was not the person to be elected Mayor when a conservative Republican Congress came in. So now we're really going back —

Mr. Carliner: One of the offices that was denigrated was the Non-Voting Delegate. Walter Fauntroy had it for a long time, and he had risen a high level, and he was qualified in it. But Eleanor Holmes Norton has been brilliant in handling —

Mr. Reischel: She's a brilliant woman.

Mr. Carliner: She is, and people said non-voting delegates, what do they do? But, in the House of Representatives, she serves on committees and all the work she has done on it, it's amazing she hasn't become chairman of the District Committee. One thing she cannot do, although they tried to finesse it, was have a vote on Committee of the Whole where you can vote on legislation as such. But, ninety-five percent of the work of the House of Representatives is done on committees reporting out legislation and using your power that way.

Mr. Reischel: Was that an idea that you all borrowed from other governmental structures, earlier ones? Were there other non-voting delegates earlier?

Mr. Carliner: Yes, Hawaii and Puerto Rico. Hawaii has representatives because

it is a state, but Puerto Rico has a non-voting delegate.

Mr. Reischel: The territorial apparatus?

Mr. Carliner: Anyway, Norton, whom I have known for many years, has been really a genius, brilliant in the way she's handled the office.

Mr. Reischel: You had contact with her at the ACLU as well.

Mr. Carliner: Well, I knew her first when she had graduated from Yale Law School. She went to work for the ACLU in New York, and she worked under a guy named Noah Wolfe, who was really a difficult fellow to work for; he was so sexist, arrogant, what not. I was on the Board of the ACLU and would see the sort of relationship, but she worked for a while, she worked in New York, some sort of anti-discrimination commission.

Mr. Reischel: That's right. The city I think.

Mr. Carliner: She came to Washington, D.C. One of my extracurricular activities, I don't know why I was involved in it, but a friend of mine is a pediatric neurologist, Mary Coleman, and she'd dealt with children who have Down syndrome and autism, genetic diseases of that sort. She asked me to serve on an organization that she'd created on brain disorders of children, and she asked me to be chairman of it in order to preside at the meetings. They would give reports on medical services. Well, this isn't confidential now, but Eleanor Holmes Norton has a child who has this sort of disorder.

Mr. Reischel: Yes, I've known that, I don't know how well known it is, but yes.

Mr. Carliner: Well, I knew it contemporaneously because Eleanor had come to meetings because of her interest in what we were doing. So over a period of two or three years she participated in those meetings. But, that was never discussed. It did not become public

knowledge until some time considerably later. Anyway, I've known her, but we don't have a particularly close relationship.

Mr. Reischel: Yes. I worked for her at the EEOC for a couple of years and she's a very brilliant woman.

Mr. Carliner: But one of the people who led to getting a non-voting delegate was Congressman Ford, who became President. He was the Minority Leader of the House of Representatives then. Jack Nevius was the guy whose name I was trying to think of. I don't know whether you knew him or not.

Mr. Reischel: I didn't know him, but I read his testimony, among other things.

Mr. Carliner: Well, Jack, of course, was the one who you called for a Republican. Carl Shipley was head of the Republican party in Washington, and he was very hostile to all these things. But Nevius was not. Nevius and I and Sturges Warner and some others, we met with Ford to get his help on this non-voting delegate business, and he gave it.

Mr. Reischel: This was back in the late '60s as well. At the time of the Reorganization Plan?

Mr. Carliner: Yes, it went through, and one of the people who worked on that very vigorously was Sturges Warner. Did you know him?

Mr. Reischel: No.

Mr. Carliner: He had some sort of crippling disease where he had to use a wheelchair. He worked very heavily on that issue, and he was really prime in the campaign. But, with that help and with the help of people like Ford, that went through Congress.

Mr. Reischel: So Ford was really in favor of, as some Republicans are, local

representation, local government?

Mr. Carliner: The idea that we should have two senators. I saw Mansfield who was the Senate Majority Leader and Scott who was the Minority Leader. Whoever's in control of Congress, and they said, "District of Columbia, a state, two senators? Hell no." Neither one of them could see to do that. So the idea of Washington, D.C., getting two senators, I don't think it'll happen.

Mr. Reischel: I've sometimes wondered if there isn't some kind of a — one needs something in the Senate in order to exercise some leverage on financial matters.

Mr. Carliner: In the Senate.

Mr. Reischel: Well, the Senate is the place to exercise the leverage, right? But, there's such a long history of not letting in — Well, we're back to, we wouldn't let in a free state unless they let in a slave state —

Mr. Carliner: Well, one more congressman in a House of Representatives of 435 people is not going to make much difference. But, two senators in a 100-people —

Mr. Reischel: Has there ever been a governmental model where there were non-voting senators or one senator?

Mr. Carliner: Well, there's a model for a non-voting senator, Jesse Jackson. They have all this in this building and very pretentiously had this limousine downstairs and a chauffeur sitting there, and the tag says "Senator."

Mr. Reischel: Well, of course, there's a non-voting Vice President in the Senate. I don't know.

Mr. Carliner: A non-voting Vice President? Who is that?

Mr. Reischel: Well, the Vice President's job is to preside over the Senate, but he only votes if there's a tie vote. I don't know if there are any answers. I do think things are about as bad as they can get. I hope they don't get much worse.

Mr. Carliner: Well, this is an aside. I was on the Council of the Administrative Law Section, and the fellow who sat next to me on the Council was an attorney for Bush. He was Vice President. He was with the firm of Wilmer, Culter & Pickering; his name slips me right now, but a very lovely fellow. Anyway, the issue came before the Administrative Law Section, which was a fairly big body, as to what the White House should do when Congress asked to be sent documents and what not from the White House, whether it should plead Executive privilege and turn them down. What's the fellow's name? But anyway —

Mr. Reischel: Is it Boyden Gray?

Mr. Carliner: Boyden Gray, that's right. He said, "Of course, the White House should never send anything." He was counsel to the Vice President. "The White House should never send anything to the Senate or House of Representatives when they ask for it because it is Executive privilege." So I turned to Boyden and I said, "Do you say that as counsel to the Vice President as he is presiding over the United States Senate or as Vice President who sits in the other office in the White House?" He said, "I never thought of that." [Laughs]

Mr. Reischel: [Laughing] Yes, a little conflict of role.

Mr. Carliner: Well, we sort of ramble I guess. It's enjoyable to me to have you over.

Mr. Reischel: Yes, I know you've got a 4:00 p.m. appointment so maybe we should end this one.

Mr. Carliner: I'll have to apologize to you.