INTERVIEW NO. 2

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Mr. Schultz: Mr. Gardner, in the last interview we talked about your clerkship with Justice Stone. Do you have any further observations you'd like to add about the Supreme Court or the workings of the Court.

Mr. Gardner: I do not remember exactly what I said in our last interview but I am quite dissatisfied with the basic operation of the Court. Much too little attention seems to be directed to what I think is their major job of settling the law and doing so in terms that can be understood by the Bar and by the lower courts. Much too much attention is directed to maintaining an individual point of view, to debates among the Justices. I would guess that probably a dozen cases a year become so fragmented that there is no way they can be understood except by virtue of charting with some care the positions of each of half a dozen contributors to the decision.

A considerable cause of that unfortunate state of affairs seems to me to be a surfeit of law clerks. There was a day when one law clerk was all that a Justice needed. Now they have four -- causing opinions too often to end up much like a learned article -- a display of erudition that is impressive but not particularly helpful in the main job of the Court which

is articulating an intelligible body of law. I think too it may be that the fractured nature of the opinions and the insistence of most of the Justices in having their precise view spread out for posterity rests, oddly enough, on the law clerk structure. If a position is researched in depth, discussed in depth and the Justice's office is committed to that position, I think it is harder psychologically to say "all right, all right, my colleague's opinion is not going to destroy the republic and I might as well go along with it." But if you have to justify a conference position not hammered out by a team of law clerks, go back and tell them that the large amount of research that they did you tossed overboard, it must be somewhat difficult.

Mr. Schultz: Thank you very much. After working for a year in the Supreme Court, I believe you then worked in the Solicitor General's Office.

Mr. Gardner: I did for a little over six years.

Mr. Schultz: And how did you come to obtain a job in the Solicitor General's Office?

Mr. Gardner: I was held in reasonably high regard by Adolph Berle who taught corporate law at Columbia, and he was also working in one capacity or another in what was known informally as Roosevelt's "brain trust." When Solicitor General Reed was nominated to replace a wildly incompetent Solicitor General, Berle recommended to Reed that he get me to join the group he was forming. Those days were not quite so sensitive to the appearance of

absence of conflict and complete purity as we are now. I'm told that now it is not considered proper for a law clerk to go directly into the Solicitor General Office because who knows there might be some case in common between his service in the Court and the work in the Solicitor General's Office. In those cruder frontier days, it was assumed that people were honest and you didn't have to worry about that. Then if there was an overlap somehow you'd stay out of it. In any event there was no formal bar at that time.

So Reed offered me a job and I, having only a couple of months before decided that I wanted to teach law rather than teach economics, accepted his offer. This was work so attractive that I put aside teaching law for awhile as I did for about 50 years.

Mr. Schultz: But your intention when you went to the Solicitor General's Office was ultimately to teach law?

Mr. Gardner: Yes.

Mr. Schultz: When you went into the Solicitor General's Office how many attorneys worked there other than the Solicitor General?

Mr. Gardner: The core staff who did the work consisted of Paul Freund and Charlie Wyzanski, Alger Hiss, Charles Horsky, and me. There were two more or less peripheral participants. One was a man named Marvin Smith who worked on run-of-the-mill criminal cases and had been there for many years and then a man named Hudson who was rather older than any of us. He was a brother of Manley

Hudson, the international law man. He had been hired by Solicitor General Biggs as his principal attorney. I think that he was incompetent, or rather I saw nothing to indicate that he ought to be called exceptionally competent. He left after about a year, having participated very slightly in work of the office.

Mr. Schultz: Solicitor General Biggs preceded Stanley Reed.

Mr. Gardner: He did, yes.

Mr. Schultz: Now what about Jerome Frank, was he in this office at that time?

Mr. Gardner: No, he never was. He was General Counsel of the Agricultural Adjustment Administration and did a spectacular job in recruiting able attorneys. His staff over there -- just a random selection of those that I knew were my partner, Shea, Abe Fortas, Lee Pressman, and Alger Hiss. They are only a sample. They aren't the whole lot, but he had a remarkably able staff over there. Then he went directly to New York, maybe directly to the Court of Appeals, I'm not sure.

Mr. Schultz: I'd like to go back to Paul Freund, Alger Hiss, Charles Wyzanski and Charles Horsky, which is quite a staff.

Mr. Gardner: I thought it was.

Mr. Schultz: Could you describe each one of them for me as you remember them then, and also as you came to know them later?

Mr. Gardner: Starting with Freund who was the senior. He was, of course, a very thoughtful, very able, non assertive

lawyer who was always a gentlemen. He was almost exclusively on special projects -- not the routine work of the office. He and Jerome Frank worked together on the Agricultural Adjustment Act briefs. They started with a draft from Jerome Frank's office and then going on to the Solicitor General's office. I recall being in Paul's office one day when he looked at a Jerome Frank footnote and in the footnote, there was a passage that was underlined and in the underlined passage, was a passage that was capitalized. Paul looked at that and said, "Wouldn't you think that's important enough for the text"? (laughter)

Paul then as ever since invoked universal admiration. He was also the only person I have ever known, God knows including myself, who you could see leaning back in the chair with his eyes closed and you were confident that he was thinking and not asleep. Wyzanski came over from the Labor Department working on the National Labor Relations Board cases primarily. He had an extraordinary ability, along with a phenomenal memory, to think nearly like a machine and less like a person who has human passions than anyone I ever really encountered. I remember one case -- I happened to be down there -- it was an Indian case and then as now the Justices have a game they like to play, "if you're right counsel, why not this or why not that?" and lead you down a path to another disaster. Somebody asked Wyzanski, "If your position is correct, Mr. Wyzanski,

why not?" (I forget the why not). For about 60 seconds, he thought and said, "You're right your Honor." He sat down and that was the end of his argument. I don't think he would do that for a private client. (laughter) It would be funny.

Mr. Schultz: Did you lose the case?

Mr. Gardner: Oh, of course, he gave up the case without 60 seconds thought because he examined the hypothetical and it was perfect without any flaws. I've never been too close to him after the Solicitor General's Office. He had no emotion, but he did have a considerable vanity. He wrote a ten or a twenty page, not exactly a memoir, but something close to it, which he sent to Judge Weinfeld with copies to a good number of friends. He said that Reed was so impressed when he heard him make a Supreme Court argument without notes that Reed invited him to present the cases on the constitutionality of the National Labor Relations Act instead of Reed himself. In an exercise in mild malice, I took the trouble of pulling out the Supreme Court Reports to ensure that my recollection was right. The main case was argued by Reed together with Warren Madden, the Chairman of the Labor Board. Reed argued the secondary case alone. Two less important cases were divided between Wyanski and the General Counsel of the Labor Board. Wyzanski was in charge of the briefs but his role in the oral argument was markedly less than what he recollected.

Alger Hiss was likeable, and very able. So far as his

politics were concerned, Joe Fanelli, who was working in the office for a while, I thought correctly summarized the case. Hiss he said was a little to the right of Grover Cleveland. My judgment of his character was clear that he could never be engaged in disloyal espionage. Yet as his trial went on, I could never believe on the evidence that he was an honest man. What the full truth may be, I don't, to this day, know. The business of covering for somebody seemed more probable than anything else, however improbable.

Mr. Schultz: The business of what?

Mr. Gardner: That he was being a gallant cover for maybe his wife, maybe somebody else, is the only way I can reconcile my judgment of his character with my judgment of the facts of the trial, because they were kind of contradictory. The first year we were there, Horsky and I, we arrived about the same time, our work was supposed to be reviewed by our seniors (every senior still being in his 20's). As Freund was busy thinking large thoughts, it meant either Wyzanski or Alger. My office was next to Hiss, one door down. I don't know about Horsky but as far as I was concerned, I could tell when Alger had left his office to go to the library or the men's room, or God know where. At that point, I'd pop out to have my work reviewed and discover, as he wasn't there, it must be reviewed by Wyzanski which was much more satisfactory in the sense that Wyzanski would immediately say he was wrong, when he was, without a long and prolonged battle.

By the first winter, or spring maybe, I concluded there wasn't any real need for anyone to review our work. So I induced Horsky to join me in simply going ahead and sending our work on to the Solicitor General or the printer, whatever the case may be, and nobody complained, so that indignity didn't last too long.

Horsky has been, if not my closest, almost my closest friend for 50 years and he is a completely satisfactory man, to whom I am greatly indebted. Among other things, when I went abroad for the Army, I left a pregnant wife as a house guest with the Horskys, where she lived for a couple of years until I came back. I have never adequately repaid that courtesy.

Mr. Schultz: You talked a little bit about how briefs were written and either were reviewed or not reviewed. Could you talk a few minutes about the other workings of the Office? How were decisions made about what position to take on cases and that sort of issue?

Mr. Gardner: It was the exceptional case in which there was occasion to specifically address what position to take, putting aside the authorization of appeals. One of the curious aspects of the Office was that all government appeals had to be authorized there. Inevitably there were policy decisions to be taken, but they were usually easy ones. Most cases on the merits in the Supreme Court require some degree of policy decision which was exclusively the responsibility of the Solicitor General. We would make recommendations, we'd discuss it and so on, but

it was his decision. On most days I never undertook to trouble the Solicitor General with the appeal authorization.

One issue that I treasure,--I may treasure it so much that I may be repeating myself. The Post Office, which at that time was by and large a agency, directed by Catholic politicians, undertook to ban from the mail a magazine called The Nudist. The District Court enjoined the banning. I said they couldn't appeal it and there arose a storm. They demanded a personal audience with the Solicitor General, Francis Biddle, and about eight portly gentlemen armed with law books marched over and we sat down for a conference. They handed him a copy of the magazine and said "this is what your young man says the mails have to carry." Biddle carefully examined each page as he turned through the magazine. Everybody sat in silence awaiting the final judgment. He finally got to the back cover and he put it down and he said, "Pretty little girls, aren't they?" I don't believe the Post Office ever again undertook to take an issue to the Solicitor General.

Mr. Schultz: What was the work load like? How hectic was the pace?

Mr. Gardner: I would say the Office was overworked, except that the summer time was very slack. The Court wasn't in session and there was no routine flow of cases. It seems to me that when the Court was in session there would be one or two nights a week when you hadn't completed your work and had to stay at it. We had very good relationships

with the Printing Office. I guess I participated in petty corruption. Each Christmas I used to take a bottle of a good scotch down to the night superintendent. If we got a brief there before midnight, we'd have it on our desks in the morning printed or in proof, whichever was needed.

The Solicitor General's review varied according to the Solicitor General, and, to a degree, according to his schedule. The amount of review that we, the working lawyers, gave to drafts that came up from the divisions depended entirely on the individual division. Now to illustrate the latter first, the Antitrust Division through my time had first-rate lawyers. Everybody was very good. Beyond that, their records were enormous and there is a presumption in favor of accepting their mastery of a ten-volume record. We took as our responsibility, with every division other than Antitrust, that we were responsible for the record as well as the brief except in very rare exceptions. But with Antitrust, we tended to take the record on faith, then simply to go at the law, and even then to go at the brief more as a literary editing job than a legal research job.

At the other extreme were two divisions, the Criminal Division and the Lands Division and in each case our practice would be to read over the brief more or less rapidly and then to pull out a yellow pad and start from scratch. It was almost never anything that

we could use. When Carl MacFarland came to the Lands Division, he largely changed their condition. He was like a corporate slave driver, though he came out of, I guess, the University of Virginia as a law school professor. He brought a great deal of order to the division and he brought in some capable brief writers. The Claims Division was very well run by my frequent antagonist and later partner, Frank Shea.

In general, I would suppose, a brief on the merits would be assigned to one of the attorneys in the Solicitor General's office where three days to a week would be devoted to review, revision, etc. And then, what happened after that depended on the Solicitor General and his degree of confidence and the degree of competing concerns. Reed would go over every brief on the merits -- often in consultation with the attorney and we would discuss it. I remember his once saying, "Why don't you sit down and stop that God Damn whistling." I was waiting for him to make up his mind. It didn't seem to me that he needed as long as it took. Less important briefs, such as those in opposition or petitions, I believe would go through his office, but didn't get much of his attention.

Jackson and Biddle delegated a great deal more responsibility. If it was a case that Jackson was going to argue, he would get into it throughly, and the brief and record would go to him. Apart from his cases, only the most important ones which I thought needed his

participation would come to him. By and large, the great part of the work was left to the staff.

If it was not a case for the Solicitor General, the attorneys would have to go over the record and on their own write or revise the draft brief from the Division or agency. When I was First Assistant I would review, at least, in a perfunctory way, all briefs except tax briefs which would go to Arnold Raum. I think it was only when more difficult Solicitors General later came along that the work of the staff attorney was invariably reviewed. I understand that Erwin Griswold wouldn't let a postcard go out of the office without his going over it in person. He was a very good Solicitor General but I would not like to work under so close a review.

I'm not so sure, but I rather believe that Archie Cox also reviewed everything personally. As to the others, I don't know.

Mr. Schultz: Did you typically work long hours, nights and weekends?

Mr. Gardner: I typically worked from about 10 until 6 or 7:00 p.m. If we were behind on a brief, I would work into the night as long as necessary and so too for weekends. There wasn't any typical pattern one way or another.

Mr. Schultz: And you worked for, I think, four Solicitor Generals: Reed, Jackson, Biddle and Fahy. Is that correct?

Mr. Gardner: Yes, but only briefly for Fahy. He and I were plainly not going to be happy companions.

Mr. Schultz: I wanted to ask you to describe each one of them as a supervisor, as a lawyer and as Solicitor General.

Mr. Gardner: It would be pretty presumptuous of me. The sinner can pass judgment on the saints, but it would be worthless.

Mr. Schultz? I can edit it out.

Mr. Gardner: Reed was enormously better than J. Crawford Biggs of whom Stone once said, "he was not fit to argue a cow case, unless the cow was sick." Reed was a good competent, not brilliant, not quick attorney, but solid, and I was happy enough to be working for him.

He was succeeded by Jackson who was a brilliant advocate, remarkably deft in his touch and with remarkable instincts about what to emphasize and not to emphasize.

There was an important case that he was going to argue and I more or less abandoned any feeling of responsibility for mastering the record. I knew he would do it and do it as well or better than I possibly could. This produced an unfortunate result. The case involved the validity of Dennison Dam, a major source for the Southwest Power business. It was attacked as an unconstitutional exercise of federal power and was justified chiefly on grounds of the general welfare clause, which was a fairly anemic reed to lean on in those days. I went to the argument and remember waiting and walking up and down the aisle on the edges of the court room with Jackson. He said it was a consolation that I always knew the record perfectly, since he hadn't looked at it. I told him that I didn't look at it either, since it was a consolation for me that he was

going to. So, we went in. The angels took care to look out for him. He didn't get a single question on the record during an hour of argument.

Biddle was an absolutely delightful man, quite the most charming person I have ever worked for. He was not a particularly good advocate. He too left the brief writing to me and how he prepared himself for his own oral arguments, I have no idea. I didn't participate in it; I'm not sure what he did. But he was a man of superb poise, confidence, and graciousness. In terms of living a pleasant life, I'd rather have him than any Solicitor General that I worked for, but not as an advocate. He had no interest in reading the briefs. When we had a policy problem, his judgments were fairly good. Of those three Solicitor Generals, I would put him at the bottom in terms of legal skills and ability, and at the top in terms of personality.

Mr. Schultz: What happened to him?

Mr. Gardner: He became Attorney General and then Truman removed him and, God help us, put in Tom Clark who was a much inferior selection. I had just come back from the War and made a courtesy call on Biddle. Oh, I've told you this, I'm sure at our last meeting. The lovely circumstances of his resignation as Attorney General, didn't I?

Mr. Schultz: No.

Mr. Gardner: Well, if it were anybody but Biddle, I wouldn't believe a word of this tale.

Mr. Schultz: Oh, you told us this at lunch, but go ahead.

Mr. Gardner: The appointment secretary, Matt Connolly, phoned Biddle to say the President would like his resignation. Biddle said he was a cabinet member and would not resign on a clerk's call, but would be happy to honor the President's own request. Truman called him to the White House and they had a very pleasant chat, including Biddle's resignation. Then, Biddle said "As I was leaving, I leaned over and patted him on the shoulder and said, 'Now, Harry, that wasn't so bad, was it?'" As I say, I believe it was absolutely true but had it been anyone else, I wouldn't believe a word. He then was Chief Justice of the Nuremberg Tribunal where, oddly enough, in Nuremberg, he was an exceedingly successful Chief Justice. There, the principal job was keeping the British, the French and the Russians, and ourselves on a tolerable speaking acquaintance at least, and not having the whole thing blow up, and for that Biddle was superb. He knew the issues well enough and he was a thoroughly charming person and he kept everyone contented.

Again, oddly enough, Jackson did a remarkably bad job as a prosecutor. Perhaps remarkably bad is too strong a word. He had turmoil in the prosecuting staff, according to those who were there, and his judgment was said to be erratic. I wasn't there.

Mr. Schultz: Did Jackson go on to be Attorney General and to the Supreme Court and then left the Court temporarily, to be prosecutor?

Mr. Gardner: Temporarily, which a good many on the Court felt was improper and I would agree with them. My own relations with the prosecution were fortunate. When V.E. day came, I burned all of my files, despite the lesser need for security, and went off with a companion for a three-day trip to Munich and Bechtesgarten because I couldn't get out of Heidelberg, our headquarters. When I came back to London, I learned that Jackson had been searching for me everywhere. So I went into hiding. I had two telephone numbers, one so that any unidentified caller was to be told that I had gone to an unknown destination, and another which I had given to the transport people, meant that I was to be run down no matter where I was. I survived about a week in London before I was able to get a flight back home successfully and then got on a small plane from London to go to Prestwick, then used for trans-Atlantic flights. Everybody who traveled in those days, of course, was in uniform, and I sat down and then noticed that a civilian had come in and sat down next to me. I didn't pay any attention to him until I wondered what a civilian would be doing traveling on a military airplane at this point. I looked around after awhile and it was Jackson.

Mr. Schultz: He found you.

Mr. Gardner: I was caught. Actually, it was good that I was caught. I told him that I wanted to go home. I had been away for almost two years. He canceled his requisition for

me; this probably would not have happened if I had not been apprehended by him.

Fahy and I didn't get along at all. He was able, and widely respected and I'm not sure that I did not bear much of the blame for our difficulties. They were principally two: (1) Fahy was a really solemn man and didn't easily accept levity. (2) I had been accustomed to running the office. He was Acting Solicitor General for about three months, waiting his nomination, which was held up a very long time because, I was told on pretty good authority, Roosevelt had told Tommy Corcoran that he would appoint him as the next Solicitor General, and had promised Felix Frankfurter that he would never appoint Tommy Corcoran, so he solved that by making no appointment. It was my great, and on the whole irritating, concern that Fahy, during the three months he was Acting Solicitor General, thought he was the Solicitor General, and I thought he was only an Acting Solicitor General who was undertaking to reexamine things that had been settled by his predecessors. I didn't at all like working with him, so I left. He was able and certainly conscientious, but not my cup of tea.

Mr. Schultz: During those years and during your year clerking on the Court, you must have seen a large number of arguments. Who do you recall as being a great advocate -- Supreme Court advocate -- of those times?

Mr. Gardner: The best, I think, was George Wharton Pepper. He was a good lawyer and also a remarkably capable theatrical

actor, and exploited the combination of legal ability and dramatic ability. I once had a case down there and he argued the one before me. Ordinarily, you are filled with impatience to get that fellow out of the way and let the Court get down to important business -- your own case. Pepper had a case involving a patent on a washing machine -- the case before me. He held my attention riveted throughout his presentation of the patent issue. That's a magical feat. And I'd put Bob Jackson, I'd put Bob next to him. Nothing like the theatrics but a very able mind, with sound judgment and a good manner. The third was a thoroughly distasteful man, Fritz Wiener.

Mr. Schultz: Could you spell that?

Mr. Gardner: Wiener. W-I-E-N-E-R. There had been an enormous case involving the Northern Pacific Railroad and land grants going back around for a hundred years with about sixty subordinate issues. Someone, probably Biggs, had hired a man thought to be outstanding at the Boston Bar who made the most God-awful hash out of an argument that ever occurred. The Court just gave up since they couldn't decide it at all, and set the case for reargument. Reed or Jackson and I, with some apprehension, decided to try Fritz Wiener, then a senior but not top attorney in one of the divisions. He got on top of that vast collection of issues and made the case perfectly plain. He presented the case without a single note for two hours and won the case hands-down. And, that's the only Wiener argument I had myself seen, but I understand

there were others. He was always very good.

He happened to be quite offensive personally. Nobody could put up with him. Frankfurter and I had at least a two-year battle about Wiener. He kept insisting that Fritz ought to be brought up to the Solicitor General's Office, and I kept saying that in that office he'd have to do more than write a brief and make an argument. He couldn't possibly get along with the divisions and agencies that he would have to deal with. I don't know, but I think he may have been brought up to the S.G.'s Office after I left. It didn't occur to me at the time -- it certainly does now -- how grossly improper it was for Felix to be trying to dictate who should work in the S.G.'s office to present arguments to him.

Mr. Schultz: Do you recall any other interactions with Justice Frankfurter, involving cases or similar kinds of issues?

Mr. Gardner: Not involving cases; involving people, yes. He had been meddling in that area almost all of his adult life. I had at least two long sessions with him when we differed about an issue or person and a good many phone calls over the years. I was never a Frankfurter man. I never went to Harvard. He viewed me simply as one of the people he wanted to keep abreast to ensure that they followed his advice. He told me, I think accurately, that I was getting near the end of my service, adding that I wasn't meant for private practice. I should concentrate on teaching. And I thought,

damn, he is probably right. I still think he was probably right. I survived the world of private practice rather well only because of a few strokes of good fortune. I could otherwise have spent half a lifetime in a frustrated condition. Getting clients is terribly important in the private practice of law. I am not naturally gifted in that area and managed only by good fortune to do well.

Mr. Schultz: Did you ever see John W. Davis?

Mr. Gardner: Never did.

Mr. Schultz: Are there any other memorable arguments or incidents that you remember doing arguments on?

Mr. Gardner: Wait. I remember seeing John W. Davis argue when I was a clerk. This was in the Gold Clause cases. Clerks then didn't work in the Supreme Court building. So it was kind of a special occasion to hear arguments.

Mr. Schultz: Because the Court was in the Senate.

Mr. Gardner: The clerks worked where the Justices lived. I went down and listened to that argument. I don't remember much about Davis in particular. But another man who was representing Bankers' Trust was a typical New York lawyer of prominence. He had a plump stomach, white hair, and white piping on his vest. He made a dramatic gesture and out popped his false teeth. He caught the teeth at knee level and put them back in his mouth and continued without diminution in aplomb or the slightest deviation in his argument.

Mr. Schultz: Reed fainted at the end of an argument?

Mr. Gardner: In the Agricultural Adjustment arguments.

Mr. Schultz: What argument?

Mr. Gardner: Agriculture Adjustment Act argument. Reed had been working too hard preparing it and the strain of the argument plus the fact that it wasn't going terribly well proved too much and he fainted.

Mr. Schultz: What happened then?

Mr. Gardner: It was near the end, and he was carried out. The Court decided against him.

Mr. Schultz: Did you have any particular strategies or habits or do you have any observations on brief writing or arguments or preparing for argument?

Mr. Gardner: No, I didn't. Indeed, when Bob Stern was in the Solicitor General's Office for a long time and undertook afterward to write a case book or a text book, I refused to help him. I always thought it was silly, that one couldn't write a case book on that subject. In the first place, the basic requirement is natural wit and intelligence which you're not going to get out of a case book. Second, the most desirable means of preparation depends entirely on the man and whatever mechanics he finds useful. And, indeed, all the time I presented, I suppose, maybe a hundred oral arguments before Courts or agency tribunals but never developed a standard method of preparation. One thing I did not like was the presentation of a practice or "moot court" argument to my colleagues, which I always refused to do.

Mr. Schultz: You never participated in a moot court before your

arguments?

Mr. Gardner: No, because chiefly, I think, because I started out in the S.G.'s Office and there wasn't time to develop an argument, try it out, refurbish it, and then present it. The idea of the moot court argument was completely alien to me. The way I rationalized it was in part because a successful argument depends to a large degree upon a steady flow of adrenalin that keeps you on your toes. That adrenalin flow is a little hard to get in a moot court. Only late in life did I adopt the practice of dispensing with notes. Of course, I never read an argument. It's the surest way to lose a case but, most of the time, I had notes in front of me, chiefly outlined notes, in case of need. Following the example of a very young partner who put a case in the Supreme Court without a note before him, I thought I'd try it and I did. You make it a very severe sacrifice of absolute orderliness and your phrasing is inelegant. But you're probably not going to be able to make a polished argument anyway because the Supreme Court now views oral argument as a time for them to talk, rather than to listen. The apparent spontaneity of a noteless argument keeps the attention of the Court really better than trying to cause the Justices to go down a carefully thought-out path.

I think it all comes down to there just isn't anything useful to be said in the way of general rules beyond the obvious. Don't try to be funny. Prepare

your argument with an eye to flexibility. Don't interrupt the Justices talking to you -- a bad habit I have never wholly overcome. Chief Justice Hughes had the same bad habit, which produced a startling result in one case. I was arguing a case in which the state court had enjoined the local regional manager of the Bureau of Land Management. The ranchers sought to enjoin the collection of minimal fees for grazing cattle on public lands. I worked very hard on the merits and had it in pretty good shape but also worked on the suit against the United States which was the same as always -- very uncertain.

The day before the argument, I suddenly wondered, now is there authority for state courts to enjoin a federal official proceeding to enforce a federal regulation under a federal statute. It seemed to me to be a nice question. I spent the evening before the argument hunting for authority one way or the other and couldn't find it. I presented the point anyway and was going to, I thought, alert the Justices of the issue and win their hearts and affection by commendable candor.

I had a sentence worked out that I started to use. The sentence was, "I have not found any case to support or to contradict this point. It is true I did not start looking until last night." I thought that might give them a warm feeling for an honest lad. Hughes interrupted me in the middle of the sentence. He said, "Mr. Gardner, the Court is satisfied that, if you cannot

find any case, there is none." Well, I could have said, "Your Honor, you ought to let me finish the sentence in which case I would have told you that I have barely started looking." But to my shame I just remained quiet. By the grace of the good God if there was such a case, it didn't turn up.

Mr. Schultz: You said you probably argued about 100 cases in one place or another. Do you know how many before the Supreme Court?

Mr. Gardner: I counted once. I had about 25 when I was at the Solicitor General's office and only about four in private practice.

Mr. Schultz: That's a lot. And what were the most significant cases that you worked on when you were at the Solicitor General's office?

Mr. Gardner: It's easiest and it's simplest to explain the cases I did not work on. My second year there was the year that the New Deal crisis was approaching with the Agriculture Adjustment Act, the National Labor Relations Act, and the Social Security Act, all under challenge before the Supreme Court. Those were divided among the senior attorneys in the office. Horsky and I were just completing our first year. Reed said one of us would serve as an assistant in that work and the other would carry on the routine work in the Solicitor General's Office, getting the briefs written and the arguments prepared. And, I much preferred unsupervised work on unimportant cases to being an assistant in important

cases, so I leapt greedily for the routine, and didn't work on any of those constitutional Goliaths.

Mr. Schultz: Are there any cases for arguments that stand out in your mind?

Mr. Gardner: No, no one is prominent in my mind. You're now talking about my arguments?

Mr. Schultz: Your arguments or briefs that you wrote.

Mr. Gardner: One brief which I wrote was in a case called The United States v. Wood, which involved the constitutionality of government employees sitting on juries in the District of Columbia criminal case. The Court some years before had held this to violate due process and the obstacles in the United States Attorney's Office were very great. Too many potential jurors were government employees. I had the summer to work on it, the first full summer I was in the S.G.'s Office, and I did a very thorough job. I went back to the Year Books and I got cases in which, in those days the jury did not have quite the same impartiality as we try to ascribe to it now. In any event, there were early records of the King's servants and the sheriffs' employees sitting on the jury. My opponent, a man named Hughes, a rather prominent criminal lawyer here, said he had just completed a draft and was most uncertain about the Year Book cases. He was going out of town and he wanted to send his brief to me and I was to revise it as necessary and then send it to the printer.

Mr. Schultz: Your opponent?

Mr. Gardner: My opponent, yes. The case showed a certain lack of mistrust by the local bar. It was also that case which Brian McMahon argued. He was an awfully nice fellow heading the Criminal Division, to whom the concept of reliance upon a Year Book case was of grave concern. He took a room at the Hay Adams and we spent two days there going over the case. At the argument, the Chief Justice got rather fed up asking him questions and waiting for him to ask me, and at the end was asking Mr. Gardner directly. I think the free use of Year Book cases made a lasting impression on several of the Justices there. Brandeis, for example, asked me to tea and inquired about my research techniques, and all of this I found really gratifying.

Mr. Schultz: I gather you had a excellent reputation with the Court for doing thorough research.

Mr. Gardner: Yes, I did and also all along I had a fairly good standing with the Justice Divisions and the agencies, who were reasonably comfortable with me. That was a lovely job.

Mr. Schultz: Did you like oral argument?

Mr. Gardner: Oh yes.

Mr. Schultz: In your book, you mention an incident with Thurman Arnold which I thought was worth recording.

Mr. Gardner: Thurman had moved from being the head of the Tax Division where he was wildly out of place. He headed the Antitrust Division succeeding Bob Jackson where he

was beautifully attuned to the work. Along with a very vigorous pursuit of traditional antitrust defendants, he went after the labor unions for many aspects of their work that seemed to violate the antitrust laws. He lost one case in the Supreme Court but didn't give up. He wanted to try it another way, but he lost in the Court of Appeals and then encountered two obstacles: One, he tried to file a cert petition while Solicitor General Jackson was out of town.

The second misadventure was, at that time, I, and almost everybody else I knew, believed in almost any kind of dispute -- the labor union was right and the employers were wrong. There was a very heavy presumption in favor of the labor movement. In any event, I refused to authorize any petition for certiorari. Thurman hit the ceiling and devoted some weeks to an attempt to get me discharged on the stated grounds that I had too much authority and too few years and too little judgment. Many years later, we came together at some point. I said he certainly ought to know that I now thought he was right in that labor dispute. He said, "Well, you ought to know that I would not have had the fun of trying to get you fired if I had thought there was any chance of doing it."

Mr. Schultz: Did you get to know him in later years.

Mr. Gardner: No, I knew him better when he was head of the Tax Division because, before Arnold Raum came to the office, I was the one who usually worked with the Tax Division.

Thurman had one very large and important case involving the reorganization of two oil companies. John W. Davis was his opponent. It was a very complex tax problem and I worked hard and long trying to get it into Thurman's head. He wasn't the man to go from Section 1900(17)(h) to the Third Section of Chapter 14 and then to Section 64 and on through that maze of technicalities on oral argument. He made a respectable opening argument. He opened his reply with a wonderful beginning for a man who did not really understand his opponent. He said, "My opponent has spent an hour throwing feathers to the sky and I would like to catch a few before they hit the ground."

Mr. Schultz: Was he an effective advocate?

Mr. Gardner: He held your attention.

Mr. Schultz: He was a character?

Mr. Gardner: He was more than a character. Bob Jackson once said in some book or some place that he was half cowboy and half philosopher, but mostly cowboy. He was very forceful, independent, an innovative thinker, and an admirable writer. He was self-confident and he was very extroverted.

Mr. Schultz: He went from the Antitrust Division to the D.C. Circuit?

Mr. Gardner: Yes.

Mr. Schultz: For a short period?

Mr. Gardner: Very short. He found working in private practice less restrictive.

Mr. Schultz: And did you know Judge Bazelon, at that time?

Mr. Gardner: No, not at that time, I knew him later.

Mr. Schultz: You knew him later.

Mr. Gardner: I knew him well enough so that he wouldn't speak to me.

Mr. Schultz: I have to ask you, why is that?

Mr. Gardner: My partner, and then my primary assistant, Bob Basseches, had been his clerk and, when Bazelon had served for 25 years on the bench, Basseches persuaded me to write a commemorative piece for one of the local law reviews. After, in my draft paper, I'd done the routine recitation of how great a man he was and summoned up the routine illustrative cases, I thought I had earned a chance to say my own piece. And so I undertook to suggest that the Court of Appeals here in the District was doing an entirely too close a review of the agencies in areas the Court didn't understand. There wasn't any effective appeal from its mistakes because, by and large, the agencies had work they had to get done and couldn't spend two years trying to get Supreme Court reversal.

Mr. Schultz: This was in the late '70s?

Mr. Gardner: Yes. But, in any event, I indicated considerable, mild dissatisfaction and then did worse. Carl McGowan was a fairly close friend (his wife, Jodie, is now my wife) who had just finished a long re-examination of a Power Commission case, composing a 75-page opinion which he ended up complaining of labors the agencies had cast upon him. In order to tease McGowan and to suggest that he had brought those labors on himself I quoted a couple

of paragraphs from his opinion. But Bazelon didn't like the criticism of the Court, I gather, and then he misunderstood my long quote from McGowan with which I ended the article. "He writes about me and ends up with a long quote about McGowan," he told some cocktail parties. For some years he wouldn't speak to me when we chanced to meet. Until one Thanksgiving we went out to Basseches' home for Thanksgiving dinner and Bazelon and his wife were there. Bazelon, by that time, had slipped rather badly; he had Alzheimer's and he was delighted to see a familiar face and thought that as the face was familiar, so we were good friends. My wife, observing his friendliness, said, "He's sick, he's sicker than he knows."

Mr. Schultz: How many years later was that?

Mr. Gardner: Oh, about five years later, I guess. So, yes, I knew him but there was not much mutual admiration.

Mr. Schultz: Now Carl McGowan you mention and he later was on the D.C. Circuit as well.

Mr. Gardner: Oh yes.

Mr. Schultz: Talk to me about him.

Mr. Gardner: He was, I would put him, probably in the same group of judges that I have most admired who were learned enough but also had strong instincts for practicalities. Stone and the younger Harlan, and Powell from the Supreme Court, and Byron White also. Carl McGowan had that same capacity, and in his cases it was particularly important because during his days on the Court, the Court of

Appeals had gone through three ideological stations: One, it started out in a conservative if not reactionary position; it then shifted over to dominance by the Bazelon and Leventhal liberalism, and has now swung back to a divided, but essentially conservative, Court again. Carl was there during throughout these changes and was a wonderfully important member of the Court. He was a balancing force, not alienated from nor allied with either side. He'd make people see both sides. I'm certain he was one of the greater of the Circuit Judges, along with Learned Hand and Henry Friendly. He was about the top.

Mr. Schultz: What about Judge Leventhal, how did you know him?

Mr. Gardner: I knew him quite well, actually, he was second after me as a Stone law clerk, and immediately after Tom Harris. The three of us knew each other pretty well. For about a year or so he worked for me in the Solicitor General's Office when I was Principal Assistant there and we've been more or less friendly throughout the years since then.

Mr. Schultz: What was your opinion of him as Judge?

Mr. Gardner: He lacks nothing in terms of brilliance or literary skills. But I think he was sometimes rather lacking in good sense. On occasion, he like Scalia, was unable to look at the results his decision would produce in the real world.

Mr. Schultz: Would you have predicted that about Leventhal from what you knew of him when he was young?

Mr. Gardner: Not really, because he had, in terms of Leventhal himself, he had a highly practical behavior. He helped found a very good law firm and then became General Counsel of the Democratic National Committee.

Mr. Schultz: We'll stop there.