

INTERVIEW NO. 3

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1936-1941

Mr. Schultz: Mr. Gardner I want to start by asking you about your role in President Roosevelt's famous court packing plan. I understand that in October of 1936 you were assigned to do research on how President Roosevelt could control or change the Supreme Court. I'd like to start by asking you who asked you to write this paper and what you remember about that conversation.

Mr. Gardner: The first person that I dealt with of course was Solicitor General Reed. He was, however, relaying what I imagine what was a general request from the Attorney General Cummings. I would imagine that Attorney General Cummings asked him for the loan of an attorney in his office who would be able to conduct the research for him. I had not known Cummings at that time. I had been in the Solicitor General's office for about a year and a quarter and I was more dispensable than some of the older attorneys so I was assigned to Cummings and spent probably the next three months working for him on the court plan. I cannot recall the extent to which that was an exclusive assignment or done in the nooks and crannies of minor routine work in the office, but I'm sure that my assigned briefs received less than usual attention.

Mr. Schultz: Do you remember what questions he asked you to research?

Mr. Gardner: They weren't very specific but they were very important. He said if the President were re-elected, as seemed highly probable then, he wanted to move immediately to do what he could -- short of a constitutional amendment -- to rescue the New Deal program from the apparently intransigent majority on the Supreme Court and I was to explore the issue and see what could be done.

Mr. Schultz: And what were the avenues that you looked into, the possible ways the President could control the Supreme Court?

Mr. Gardner: Well, there was first the congressional power over the jurisdiction of the lower courts. There was the power to control the appellate process in a way that I cannot at the moment recall. There were suggestions to require a super majority on the Court to invalidate legislation. Suggestions to . . . I believe my memory is just not up to retrieving the particular issues and the reasoning backing them - there were about half a dozen all told. I would have to take a very hasty look at the paper which I retrieved.

Mr. Schultz: Mr. Gardner, can you tell me in general, what conclusions you reached after doing this research?

Mr. Gardner: I reached the conclusion that no step taken by the Congress could effectively immunize legislation from constitutional review by the Court and that the only way feasibly to control what seemed to us at the time, and still seems to me, a devastating determination on the part of the Court to invalidate any legislation that

upset the traditional common law relationships between people, was that to use a power which had been abundantly exercised in the past -- which was to increase the number of justices on the Supreme Court, which lay within the power of Congress. And in the first half of the nineteenth century, and maybe throughout the nineteenth century, the Court membership had gone up and down according to political needs at the time and it seemed that was the only effective way that would not leave the whole program at the mercy of the majority of the Court. We added the attraction, the attraction as defined in the first draft, my draft, we had the arrangement that the Court would shrink back to nine and that actually, in fact, would become a nine-man court composed of people under 70.

I was 27 at the time and it seemed to me obvious that senility set in no later than the 70th year. At the age of 87 I don't subscribe to that view quite as heartily as I did then. The attraction of the plan to me was that I thought that a nine-man court was about the maximum number for efficient operation. I just wanted a different nine. And the notion that you would appoint an additional judge for everyone over 70 would be a strong incentive to retire at that age.

Mr. Schultz: Do you remember how many there were over 70 at the time?

Mr. Gardner: I believe there were 4 or 5. I believe that one of the more arrogant statements of youth was one that I made

when I got back from Europe after the War and visited then Chief Justice Stone and had the temerity to enter in my diary that he "seemed in admirable health though 73." That was '46 so he would have been about 62 or 63 at the time of the court-packing episode. So I would gather from that that nobody was over 70 except for the 5 men who constituted the majority.*' In clearing out the ancient relics we would clear out all the undesirables.

Mr. Schultz: So President Roosevelt would get about five new appointments to the Court?

Mr. Gardner: And then when the over-70 man retired he would not be replaced. In effect it would drive out everybody as they reached their 70th birthday and that seemed to be a good thing.

Mr. Schultz: It's a clever idea -- did you come up with it?

Mr. Gardner: I came up with the refinement, shortly abandoned by Cummings, that no successor would be appointed when the Justice stayed on after 70. But I wasn't the first one on the basic principle, because McReynolds, the Attorney General during the Wilson Administration, suggested that same device for the district court judges. That I did not discover and did not know. Apparently, it was the discovery of a man who was doing research for a book published by Cummings and MacFarland who was an assistant attorney general. It came to my attention

*/ Mr. Gardner overlooked Justice Brandeis.

after the bill had been drafted and while they were trying to justify, preparing to justify it to the Congress. And it seemed to everybody a perfectly wonderful exercise in irony that the device had been first advocated by McReynolds.

Mr. Schultz: After you wrote the paper, what happened to the idea?

Mr. Gardner: The history went through several stages. Early in December I finished the paper and then Cummings told me to go draft a bill on this. I drafted a bill that I was quite satisfied with and as far as I could tell Cummings was too. That was then given limited exposure within the government, the President and his then assistant, Jimmy Roosevelt, and I suppose ranking people in the Department of Justice, certainly Reed, and certainly Jackson and MacFarland.

Once the ubiquitous Tommy Corcoran and Ben Cohen came over I remember meeting them in Cummings' office. However, it's developed a long and continuing controversy between Joe Rauh and me. Joe was very close to them and said that they were horrified and thoroughly opposed. I, to the contrary, saw no indication of this during our conference with Cummings.

Mr. Schultz: Now, who are Corcoran and Cohen?

Mr. Gardner: Corcoran and Cohen were, in effect, presidential assistants. I think they were not on the White House payroll but they were in constant attendance on the President and his thinking and they contributed a great deal to the innovative thought of the whole New Deal

program. They had sort of a roving commission and whatever particular area became subject to the concentrated governmental attention they would generally get mixed into it. Corcoran was a Irishman. He was essentially a lobbyist. Cohen was essentially a thinker. They made a very effective pair who probably did a lot more good than they did harm.

Mr. Schultz: And where was Joe Rauh at that time that he . . .

Mr. Gardner: He was Ben Cohen's assistant. He was very close to Cohen.

Mr. Schultz: Oh. And was he at the meeting?

Mr. Gardner: Oh no. So it was just a matter of recollection and either his recollection or mine is reliable.

Mr. Schultz: But it's also of different conversations - you recalling that meeting, and he's recalling conversations?

Mr. Gardner: One theory would be that I am recalling a conversation which was directed to essentially my bill and justification that the Court was being tyrannical and had to be curbed and as I am about to indicate shortly after I had drafted the matter -- a couple of weeks or so -- Cummings' justification shifted to what I thought was an unsupportable and sleazy ground. He urged that the old men were too feeble to do their work and they needed help. If I had been older, I would have stopped at that point but I was only 27, and also I shared their objectives completely. I thought they had to do something about the Court. I did not like in any way the plainly false justification that the men were too

old to do their work and needed help. As I say if I had been a few years older I would have said alright that's your job, not mine, and I would have stopped working on it. But I didn't, I continued doing what I was told.

Mr. Schultz: Now did you meet with the President on the subject?

Mr. Gardner: I did and Cummings was a strange man. I don't know anyone else who would allow a largely unknown 27 year old kid to go to visit the White House and explain his department's position to the President on this bill. I think it was because we were doing it in such a limited, secretive way. There weren't many people he could send if he wasn't himself able to go.

Mr. Schultz: So, you went without him?

Mr. Gardner: Yes.

Mr. Schultz: You were the representative for the Justice Department?

Mr. Gardner: Yes. Which as I say is perfectly extraordinary. I wasn't wholly alone -- I met Sam Rosenman who was effectively the White House counsel -- they didn't have those positions in those days. Rosenman and I went up to his bedroom.

Mr. Schultz: Can I just stop you? Can you just tell me about Sam
Rosenman?

Mr. Gardner: The only time I knew him was that morning when we together went up and talked with the President about this bill. He was obviously an able man. This was not the time that the President was told about the plan. Cummings had told and talked to the President before. All I was doing was answering questions that the

President had about it and explaining the detail. I had not been sent over with the mission of remaking the United States Government, but only that of explaining detail. But it did seem, and even more now, an extraordinary act of faith in a youngster, or else cynical indifference, whichever you might think of it. Anyhow, it was for me quite an experience.

Mr. Schultz: So tell me about the meeting with Roosevelt.

Mr. Gardner: At some point, probably that morning, the White House said that they had some questions and wanted them answered. I imagine it was inconvenient or possibly even impossible for Cummings himself to go. There wasn't in December of '36 really anyone else I expect that he could send to answer questions. Reed was aware of it but keeping himself as distant from the project as he could.

Mr. Schultz: Because he had to argue before the Court.

Mr. Gardner: He was essentially a conservative man.

Mr. Schultz: He wasn't crazy about the idea?

Mr. Gardner: He didn't oppose it but he wanted to keep his hands clean - I think that's a slight overstatement but I imagine earlier that morning that Cummings must have told him the White House wanted to ask some questions on the bill, so they agreed to send me over to answer questions. I must have reported to him when I came back but there wasn't any very elaborate report - just that we had an hour or so of questions answered and discussed.

Mr. Schultz: Was that the only time you met with the President?

Mr. Gardner: The only time that I did -- we're now talking about the bill obviously not semi-social occasions and so on in the White House. It was the only time I met with the President. Another time I went over to have lunch with Jimmy Roosevelt who was then the President's aide and he and one or two other people of whose name I have no recollection. And again it was only an explanatory luncheon meeting. I can't recall what we said other than the fact that the lunch was held.

Mr. Schultz: Do you remember anything about your impressions of President Roosevelt from that meeting?

Mr. Gardner: Well, the President was obviously a very intelligent man. He had no trouble with understanding problems and was obviously a very courageous man and an able man.

Mr. Schultz: Was he in his wheelchair?

Mr. Gardner: He was in bed.

Mr. Schultz: He was in bed.

Mr. Gardner: He did not like to get out of bed was my understanding. He was more comfortable in bed than strapped in his wheelchair. And his mornings were quite often such that he could do his work in bed and this was one of those mornings.

Sometime in December Cummings got seduced into this sleazy idea of coming to the rescue of overworked old men. I don't know where that came from and have always suspected that it came from Carl MacFarland. He was close to Cummings.

Mr. Schultz: Now who is Carl MacFarland?

Mr. Gardner: He was initially a professor at the University of Virginia and may have come directly from the University, that I don't know, into the Department to run the Lands Division -- the Lands Division had a collection of largely incompetent attorneys. It was not one of the smarter outfits in the Department. MacFarland was a very good, effective administrator. He added two or three very able people to spice up the Lands Division and put in regular management controls, which I would find highly offensive if I were subjected to them, but they worked. He had charts on the walls showing what had to be done and who was doing it, how nearly complete they were. His office was like a computer having little bar charts that they're 24 percent, 63 percent , and so through their tasks. But he was very effective head of the Division. I didn't like him chiefly because he was a ruler by the book and not a thoughtful man at all. He went on to become President of that Mormon university.

Mr. Schultz: Brigham Young?

Mr. Gardner: Yeah. He was a very good President.

Mr. Schultz: • So you think he came up with the idea that the Court was overworked?

Mr. Gardner: I think he was the one and I believe he's probably the only one who could capture Cumming's allegiance for a dubious proposition. However, I remain exceedingly fond of Cummings. We worked together very closely on his eulogy for Cardozo, a particularly difficult literary

job since the dead man wrote so beautifully. It turned out exceedingly well. He had a very sensitive ear for the English language. We remained reasonably close while I was in the Department but on the change in that bill I did not like him.

Mr. Schultz: Did you ever talk to him about your disagreement?

Mr. Gardner: Yes. But not in a admonitory or rebellious tone. I said I didn't like it and didn't think it would be persuasive. I didn't say I didn't think it was honest. But I'm not too pleased with how readily I gave in. I think largely it was because I was on the team and Cummings was captain; it would have been disloyal to walk away.

Mr. Schultz: So tell me what happened to the proposal. I guess it was submitted to Congress?

Mr. Gardner: It was submitted to Congress in early February of 1937. Cummings presented to the Senate Committee his bill to relieve old men. The next day, Bob Jackson, whom I did not then know at all well, spoke; he was head of the Antitrust Division, and I was only later to work with him very closely. Jackson, to his credit, urged enactment strictly on the ground that the Justices had abused their power. He offered no talk at all about overworked old men who needed assistance.

Mr. Schultz: Now this was in Congressional testimony?

Mr. Gardner: Congressional testimony. The contrast looking back on it is remarkable. Chief Justice Hughes organized a very effective counter fire to the plea of overworked old

men. To the best of my recollection that Senator Robinson, I think of Arkansas, who may have been the Majority Leader in the Senate, at least if not that he was a very powerful figure -- I'm afraid that there was a side deal somewhere between him and the White House by which if this bill gets through he would be put on the Court. He was not my notion of who ought to be on the Court. And then he died. And it was in this misfortune that the final important support in the Senate disappeared.

In the course of this debate the Sumner Retirement bill was enacted. It permitted retirement from Supreme Court service but continues authority to serve on lower federal courts. This is thought to give constitutional protection instead of only legislative protection to continuing the judge's salary for his life. It's been on balance a good idea because it has stimulated retirement -- people who otherwise would hang on. Van Devanter retired almost immediately after that bill was enacted and was replaced by Black. It apparently speeded up the retirement process with other Justices as well.

Mr. Schultz: ' So, before this bill they could retire at full salary but there was a risk that salaries would be cut?

Mr. Gardner: Yes. I can't remember the terms in the existing statute but what this bill did was offer constitutional as well as legislative protection of their salaries.

Mr. Schultz: How could it offer constitutional protection?

Mr. Gardner: The Judge retires from regular, active service but remains available. Thus, the retired Justices still do sit on the courts of appeals.

Mr. Schultz: I see.

Mr. Gardner: So that was the only direct benefit that came out as a whole exercise. The indirect benefits were I think rather considerable. And while it was not the sole cause it was at least a major factor in the complete shift of the court's reaction toward the constitutionality of congressional legislation.

Mr. Schultz: What do you think accounts for the public reaction to the proposal - you know the hue and outcry?

Mr. Gardner: It was an attack on the revered tradition and as such not at all welcome. Part of it, of course, was that at all stages of the New Deal there was a very heavy minority reaction against it -- political, republican and economic distaste for much of the New Deal and that substrata opposition was of course opposed to throwing mud on the white marble walls of a very important institution. What caused the reaction in legal circles, I don't really know.

Charlie Wyzanski, for example, who was in the Solicitor General's office, was in violent opposition and claimed he tried to resign but was talked out of it by maybe Frankfurter or maybe some other Justice on the Court. I don't know quite how to explain the lawyers' opposition other than the fear that if you start

politicizing or tampering with the Court there's no end to it. I can't explain it other than a fear, perhaps a legitimate fear, that it represented a political threat to the integrity and independence of the judiciary. It's a reasonable position.

Mr. Schultz: Did you ever talk to Justice Stone about the court packing plan?

Mr. Gardner: Yes. I had a feeling that I ought to confess my activities there. He was, of course, somewhat divided. He had both in his dissenting opinions and more vigorously in private conversation, said the Court was simply building up trouble for itself by being hostile or unsympathetic toward any new legislation. And to a degree he felt vindicated by the court-packing proposal, but also he was, of course, quite strongly opposed to it. And I felt that I should go by and confess that I had something to do with it. He and I were not exactly close but remained in reasonably frequent contact with each other. So I told him about it and all he did was laugh and say, "Well, you're very young," which I certainly did not view as a compliment.

Mr. Schultz: What's your view of the proposal today?

Mr. Gardner: My view is that at the time it was necessary and the country could not have survived a major economic depression and dislocation where a third of the country was out of work and they couldn't pull out of that, it did not seem to me then, and it does not seem to me now, without a whole lot of legislation which was enacted

then and eventually upheld. Of course, it was the War, and not the New Deal tampering with the economy that finally got the economy on solid ground again. But even now I do not believe that a responsible government could have avoided seeking a remedy for a Court that struck down every remedial device that was tried because it violated somebody's contract. And, as I say, I believe the court-packing effort was at least partially responsible, if not largely responsible, for the change in attitude of the Court. Actually someone, Stevens or White, in a more or less recent opinion, has indicated their view that the Court changed its posture because of it. So on whole I'm glad we did it.

Mr. Schultz: I think that's what most historians have said too. Civil Service reform -- what was your role there?

Mr. Gardner: My role was I had worked with Solicitor General Reed for the two or three years that he was in that office before being appointed to the Court. There was widespread dissatisfaction with the Civil Service Commission insofar as it related to lawyers. It was worse than useless in finding able lawyers. And, too, it was counterproductive beyond measure. Within the Civil Service you could hire a new lawyer only from a Civil Service list. They were unimpressive examinations producing an undistinguished list which in any case was largely dominated by those with veteran's preference. You would have a choice among I think the top three on the list. In consequence the Civil Service system was

bypassed - almost every recent appointee in Justice, for example, was a special assistant to the Attorney General, outside of Civil Service, which was what my title was at the time.

Because of the wide dissatisfaction the White House created a commission to study the problem. Reed was made chairman. On it were Frankfurter and Jackson and Murphy, a high official of the Civil Service Commission and two or three distinguished private citizens: a General Wood who was head of Montgomery Ward, and a very able lawyer who was general counsel of the Pennsylvania Railroad and had a fairly public role, whose name I now forget, and one or two others. It was a very high grade commission. Reed wanted help and persuaded Solicitor General Biddle to let me go for a few months and I served as, I think my title was Assistant to the Chairman, or it may have been Executive Secretary. The other title was held by Oscar Cox, a very able lawyer who had been with Sullivan & Cromwell and was then general counsel of the Treasury Department. It was a pretty good group. And I had probably the best office in the Supreme Court building an enormous corner office on the first floor.

We studied and ended up with a system by which lawyers would be a special group within the Civil Service Commission. The mechanics I don't recall completely. But they'd be examined throughout the country. There would be a nationwide true/false

mechanical examination and eligibility for appointment was the top quarter or top fifth. There would be that nationwide test and then a particular appointment would be made only after examinations or discussion with a panel of lawyers. The other detail I don't remember, but it worked remarkably well. An able student in an obscure law school in the far West would be brought to the attention of people in Washington by his score and the comment of the reviewing committee. Instead of going only to Harvard, Yale and Columbia, as was customary, the whole country was opened up to appointment, which was beneficial to the agencies and obviously to the applicants. The system worked so well the Congress could not tolerate it. There was no play in it, no room for a congressional intervention in the hiring process. And after two years it was scuttled. It worked so well, chiefly because Herb Wechsler was its first executive director, or executive secretary, I don't remember what the title was. He was the first director and was then succeeded by Ralph Fuchs who also did an admirable job.

Mr. Schultz: Who selected or commissioned the director?

Mr. Gardner: . Either the Attorney General or the Solicitor General. They had asked me to do it and I wouldn't. I urged Wechsler and Wechsler didn't want to do it any more than I did. He felt it would be better if he was able to say that Columbia wouldn't extend his leave so he unfortunately couldn't consider the position. With full

confidence he wrote off to the Dean of Columbia and said he had been asked to do the work but he thought he should come back to Columbia. They replied that it's such an important job, you simply ought to do it. We'll extend your leave. And so he had entrapped himself thoroughly. But he didn't sulk, instead he did a brilliant job of work.

Mr. Schultz: Now what was the Advisory Committee on Lawyers?

Mr. Gardner: You know I believe that the whole commission had the missions beyond the lawyers - they didn't do much, or attempt to do much in the non-lawyer area. I think the Advisory Committee on Lawyers that has a familiar sound - would be either a subcommittee of the Commission or an outside group that was created to give their ideas on government. I just can't remember.

Mr. Schultz: It's not important. Now, tell me the circumstances under which you left the Solicitor General's office.

Mr. Gardner: I had been spoiled under two Solicitors General, Jackson and Biddle. They didn't have a great deal of interest in the day to day work of the office - not much interest in going over briefs and so on. And so I had a very happy, contented life directing the regular flow of work in the office. Jackson would carefully prepare his own cases but Jackson just didn't interfere with the less important work at the office unless I had a problem and took it to him in which case he was always very helpful. Much the same arrangement prevailed under Biddle, though he was

not quite so helpful when I took problems to him. Under either man, I was thoroughly spoiled. We also had a nice degree of cooperation in several things that I was interested in, such as the intergovernmental tax immunity which the Treasury had sold us and on which we were pursuing with substantial success.

Mr. Schultz: This was tax immunity for the states?

Mr. Gardner: Intergovernmental tax immunity, which we effectively eliminated as far as constitutional law was concerned, but not so far as the Congress was concerned. I got along pretty well with the divisions in the Department and pretty well with the agencies. It was a fairly lovely situation.

Charlie Fahy was the Assistant Solicitor General, but that position in those days had nothing, beyond its title, to do with the work of Solicitor General's office. The office was in effect the predecessor to the Office of Legal Counsel. There was a long period of delay between Biddle's appointment as Attorney General and the appointment of the Solicitor General -- a three month period. Charlie Fahy and I were not destined to like each other very much anyway. He was an able man but also very sincere and quite humorless.

On one of our major policy issues, intergovernmental tax immunity, his views were perhaps heavily influenced by or maybe accidentally were much the same as Frank

Shea's who was never in favor of giving up anything of value to the government. But that wasn't much of

a problem with me, or with the Solicitors General and the Attorneys General who were in harmony with the Treasury Department and sought the major goal of abolishing the tax haven of state bond interest. Fahy felt otherwise. I was pretty strongly of the view that Fahy was in no position to overrule the positions taken by prior Solicitors General and Attorneys General, at least until he was a full Solicitor General.

Then we differed on other issues and I was offensive to him in that I didn't adequately recognize his authority, which was clear, because he was acting Solicitor General, and was sitting in that office. And, too, he was offensive to me because he didn't recognize what might be called my common law authority of four years' standing. We just didn't get along. Washington in those days was lovely -- all you had to do was think about moving from where you were, and maybe tell one or two people at the most. And very few weeks would go by without several people asking if I might want to move on. I ended up taking Jerry Reilly's place at the Labor Department as Solicitor. I had no great enthusiasm for the job but I did not want to continue the position of perpetual conflict with Charlie Fahy and that proved to be a mistake.

Mr. Schultz: Why was it a mistake?

Mr. Gardner: Francis Perkins had been substantially battered and weakened by the Congress. She was afraid to do anything that might produce criticism and that's not a very

endearing atmosphere to be in. And, again, while the Department had a fairly important role in the war business, it developed that the chief function of the Perkins Administration was to persuade the labor leaders to be helpful and to avoid anything that looked like a sanction. In result, I sometimes feared that the Labor Department was a detriment to the war effort. I lasted there only nine months.

Mr. Schultz: Do you have any other recollections of Francis Perkins?

Mr. Gardner: Yes. Some of them are very favorable. She was intelligent and she was an exceedingly effective advocate. She compared favorably with most of the highly regarded lawyers that I had worked for. For example, she had to appear on some issue before a Senate committee. She was out of town, and took a train scheduled to arrive in Washington in the early morning, but it was delayed and got into station about half an hour before she had to appear before the Congressional committee. I went down and met her at the train and gave her the underlying papers and talked to her during that half hour that was spent largely in transit. She made a brilliant presentation of a complex issue. Indeed, her advocacy was consistently of the highest quality. Her trouble was simply that she had no remaining backbone after being attacked by the Congress for so many years.

Mr. Schultz: How was she attacked?

Mr. Gardner: By denunciation and by denial of appropriations and legislative support, sometimes by Republicans, sometimes by others. There was always a heavy resistance to anything which could be called socialistic in legislation or activity, and her Labor Department was necessarily in this battlefield. She was responsible, for example, for inaugurating the social security program, which was by no means popular and was heavily fought. As these controversies multiplied over the years, she seemed to have come to believe that it was good government to avoid controversy.

Mr. Schultz: So, you left Labor and went to the Department of the Interior. Tell me how that came about.

Mr. Gardner: Well, as I say, Washington was then a very small town, at least as far as lawyers were concerned. If you were thought to be available, people would know about it and a variety of alternatives were likely to be presented. One arose when the long-time solicitor of the Interior Department, Nathan Morgold was appointed to a local court. He had been the Solicitor of the Interior Department from '33 and this time was '43, so for ten years I guess.