

Oral History of Joseph L. Rauh, Jr.
Conducted by Robert S. Peck
1984 ADA Meeting and Thereafter to 1992
[Side A]

Mr. Rauh: I remembered that '84 meeting of the ADA because it was strange thing to have happened that George McGovern whom we'd supported once and who'd lost very badly, so politicians kind of shun people who've lost once. George did call me and said, "Would I nominate him? Would I make the case for him at the ADA?" I hadn't been active in the ADA since 1980. I haven't been active in it now since '84 either. I couldn't turn George down, an old friend and great warrior. So, we went. I think the rule was they had to get 60% for a nomination support. What they did was eliminate somebody each time. The first time Jackson got eliminated, on the second ballot Cranston got eliminated. Hart took his name out. His pollster was there and asked that he not be considered. That's because he would have been fifth. So, we're down to George and Fritz [Mondale]. George was fighting that, and Fritz got one more, I think, than 60, because he didn't pick up the Jackson votes, but whoever was running the Cranston thing wanted to eliminate George, wanted it to come down to a battle between Cranston and Mondale. So, they went for Mondale against McGovern even though their views were much closer to McGovern's. Anyway, by, I think, one vote they were able to get their 60%. Well, then I moved to defer the thing until much later because it's early in the campaign. Maybe Mondale will be too conservative, and why don't we just defer it.

I got the votes of the non-labor people, the majority of those, but that wasn't enough. The labor people who voted as a phalanx, plus the minority of the individuals, were able to defeat my motion to defer. That was a perfectly legitimate way of dealing with the problem. I

tell you what happened now that I think of it. I made that motion. The man in the chair, I think, was Marvin Rich. I'm not sure. He consulted Leon Scholl, who ruled me out of order, which is pretty strange to do to the guy running the organization for so long. I stood there while he ruled me out of order, and thought, what the heck – shall I appeal the ruling of the chair or should I not? I decided, what the heck, I might as well as get trounced as a man than as a mouse. So, I said, "I appeal the ruling of the chair." They didn't even know what the procedure was for an appeal ruling of the chair, but I explained it to them: that I got a right to speak and then one person speaks and then the chair speaks, but the chair wouldn't be in the chair anymore if all that happened. I argued against being out of order. You know I've been around a long time. I had Roberts Rules in my pocket, and that's what the ADA is governed by. I read them Roberts Rules - motion to defer is appropriate at any time, and then somebody said something, "Well, we called the meeting for this purpose, and therefore you can't have motion to defer." Well, Roberts doesn't an exception. That's the vote we had. They beat me. They sustained the ruling of the chair that I was out of order. So, Mondale got the nomination. It would have helped George a little bit, but Mondale would have been nominated. I happened to think maybe the only person in America, I happened to think Mondale was right, politically as well as substantively, when he said that he had to raise taxes because you couldn't do all the things that people were saying without raising taxes. I thought he was right. He would look like a bigger jackass saying he can spend all this money but not saying how you get it. That was murder I gather, and it's been murder ever since to say the truth which is you've got to raise taxes. There was a campaign. I was for Mondale. I think he was right in what he was doing. He was a lot more liberal than Reagan, and I helped a little bit, as much as I could. I was already then 73. I did make

arrangements for John Andersen, to whom I have remained close, to campaign for George. We had to make some financial arrangement guaranteeing those who might, because he was campaigning, might cancel his speeches. I think only one speech was canceled. I don't think George ever asked for that, so it turned out all right. They had a big Illinois reception for George speaking for Mondale, I think it was in Champaign, and Andersen was the big supporter. I think Andersen's been sort of for the Democrats ever since '80. I'm glad to see that. What he would have done with Perot, who was the only one who supports John's belief in a third party, I don't know. That's over, so I imagine he'll support Clinton very strongly. The tax question turned out to be a disaster politically, and nobody will ever know whether it would have been just bad or worse the other way.

Mr. Peck: We had actually come back after talking about the Bork, Ginsburg and Kennedy nominations to that convention, which means that, I think, brings us to the '88 Presidential election at this point.

Mr. Rauh: In '87, I had a hip transplant, in January of '87, and that went beautifully, swimmingly well, and three days later I had a heart attack, internal bleeding, and I came pretty close to dying. I was in intensive care for a couple of weeks; I was in the hospital for almost two months. No, it wasn't quite that long. I think it was five weeks. I got home on Valentine's Day. I went over on the 5th of January and got home on Valentine's Day. They brought me home in an ambulance from Johns Hopkins. While I was recuperating, a couple of things happened.

In the first place, my wife, was an incredible advocate for me in the hospital. I would tell anybody with a bright, loving wife, to have her by your side in the hospital. They're

about to do 95,000 things wrong, and each time she would catch it. She was just incredibly helpful. She lived in a hotel across the street from Johns Hopkins, spent her time there, and she is really the reason I didn't go, I believe. At any rate, I think that certain things happened as I was recuperating.

One of them was the D.C. Law School had persuaded me to help with the saving of Antioch, which was really the creation of the D.C. School of Law. I did that, but Olie thinks, and I guess it's true, that the real adrenaline came from the Bork case. I went to work on the Bork thing and we did succeed in defeating him.

In the campaign I helped Dukakis. I had gone to a fundraiser for him in Washington, and he recalled, or I recalled, we recalled together, a meeting at American University in 1953 or '54 when he was at Swathmore. I had made a speech against Joe McCarthy to what was called the Washington Semester. That's a couple of months of attendance at American U. of students from all over the country, college students. When I finished, a young Swathmore junior or senior got up and made another speech against McCarthy, Joe McCarthy. It was great, absolutely great, and that was Mike Dukakis. I was very impressed with him. Here's a young Greek, ethnic politician, wanting to make his career in politics, and in the ethnic State of Massachusetts took on Joe McCarthy. I thought that was absolutely great.

During the course of the speech at the fundraiser, he referred to that. I started doing things, but I never did, I was by that time 77, and wasn't terribly active, but I helped him all I could. I thought he was going to run a good campaign. I thought anybody who could make an eloquent speech against McCarthy as a junior or senior in college could be a good campaigner. I was wrong. He was not a good campaigner. I cringed the night of the debate when Bernard

Shaw asked him what he would do if his wife was raped, and he gave such a pallid answer that it was terrible. I think that was a very bad turning point in the thing. I happened to hear that in the company of about fifty liberals in New York City. It was an 80th birthday party for Ken Galbraith. Kay Graham had *Newsweek* send over the tape, because the press conference was during dinner for Galbraith. They had a place set up in the Century Club where you could hear the press conference. It was just heartbreaking. I never saw a happier crowd go into a room to hear a speech and a more dejected crowd come out of that room. People weren't even talking to each other. They were trying to get their wraps, or whatever it was, and get away from everybody else. It was the most disastrous thing I ever heard. He got slaughtered. It was a shame. It was a Bush victory, and I couldn't have been sadder about it. In the meantime, you had Kennedy approved, and then Bush went on to complete the job.

Now we're in the middle of the second Bush campaign and the first Clinton campaign. Last Monday, Dave Rosenbaum of the *New York Times* called and asked, "Where are the liberals at this convention? Why aren't you here?" I said because I'm physically incapable of getting around Madison Square Garden. What are you – I mean – crazy? I can hardly walk. It's not a boycott. We have to try and win with Clinton and Gore. We talked for a while. What he printed was – I did say this – he said, "Aren't you saddened by the fact that it's the more moderate group who now has control of the party?" I said – and he quoted this – "Of course, I feel disappointed in the move of the party to the right." And then I said, "But, they are so much better than Perot and Bush, Perot still being in, but I can only say I'm for them, and I'm for them with enthusiasm, at least enthusiasm against the other two." Well, he only printed the thing to the "but." Well, that's all right. He was making a point that that saddened the liberals. Then he put

in a couple of sentences very laudatory of me which he was trying to be nice and friendly. I am disappointed, but I still think we have to win. I do think there's a good chance. I don't know if I told you but – I guess I did in some interview I had recently. I said Perot's not going to get an electoral vote. Did I say it to you?

Mr. Peck: We talked about this before the tape was on.

Mr. Rauh: Oh, really.

Mr. Peck: I think you also said that you had done it in an interview, too.

Mr. Rauh: Now everybody can say, "Oh, well, you made it up after the event."

But, I do think I said it on tape a couple of times before. Anyway, it doesn't matter. I never thought Perot was a serious candidate. It just happened a lot swifter than one would have predicted. You would have predicted he'd let it go downhill a little while before he got it. He got out when he had enough people still for him that there are people who are sore that he got out. If had waited another week or two, he probably would have gotten out with people less angry at his getting out.

Mr. Peck: Would you have ever imagined that Clinton would have been as successful campaigner as he was this year after his '88 convention speech?

Mr. Rauh: No, and I thought it was cute the way he started his speech last night, saying that he wanted to get the nomination, he wanted to be able to continue his speech of four years ago. I thought that was a deft touch. I thought it was a good speech; although the best speech of the convention was Cuomo's without any doubt. I thought Clinton and Gore both made good speeches. I think they will run credible campaigns. How far Clinton goes to the right I think has yet to be seen. I just don't know.

Mr. Peck: One of the big events of '89, of course, was the Court's flag burning decision. It inspired the President to go out to the Iwo Jima memorial and call for a constitutional amendment. Had you ever seen a President do something like that?

Mr. Rauh: I can't quite recall the equivalent of that. He's loose with constitutional amendments. He has no feel for the greatness of the document, that you don't screw around the edges of that document. He ought to be more careful. He's veto happy. He's constitutional amendment happy. Abortion – he wants one; balanced budget, flag burning. They're not things that one makes amendments out of. Our Constitution is too great a document. Why Ben Franklin was so much smarter than George Bush, I don't know, because he lived two hundred years earlier. Those guys were *smarter* because they had the essential principles that have stood the time. There's nothing in the kind of amendments – I think there are two more that Bush is for. At least the three are so obvious. So I am really quite shocked. I think Brennan was the great leader there, and I think he still is. What's going to happen with Brennan as a spokesman for liberalism remains to be seen. He's in the hospital today for tests, is what the hospital says. When an 86-year old frail man with a stroke and throat cancer goes to the hospital, all you can do is pray.

Mr. Peck: I actually saw him last week. This was a dinner at former Senator Mathias's home. He was sort of talking about how his replacement on the Court, David Souter, was someone that he thought would be capable of growing into the job. Now, he's always been an optimist about these things, and he frequently says he has lunch with him. What was your reaction when first, Justice Brennan announced his retirement and, then, later when we had what was called the stealth candidate, David Souter, nominated?

Mr. Rauh: My reaction when Brennan got off was one of absolute desolation. He was a great, great judge. Before we finish with your question, may I ask you if we have ever discussed his reaction to the Rehnquist elevation?

Mr. Peck: No, we haven't.

Mr. Rauh: You may want to insert it back there, because I want to put it right on the record that I hope you will do the first editing, taking out when I've repeated and when I've screwed up something. Since it's you, just feel totally free to do that. Then give it to me, because I really don't feel up to do the whole job. You can also move stuff around in a way that helps you chronologically.

What happened was that Brennan made a statement that Rehnquist would be all right as Chief Justice, a pro-Rehnquist statement. I went to the office and I wrote a handwritten letter, with no copies, to Brennan. I said something like, "Dear Bill: You have every right to say what you did, but I just want you to know that the people who believe the most in you and in what you are, are fighting this, and this was a terrible blow to us in the morning paper. You don't have to respond. You don't have to write me anything. You don't have to call me. I just feel like I want you to know how it's being interpreted, and how much it hurts the people who love you the most." The next morning I hadn't gotten in the office, I walk in, my secretary says Justice Brennan has called twice. I called him back, of course, immediately. He said that was a very fine letter, "but you don't know how bad Burger's been. You don't know, you don't understand what this Court has gone through with Burger." He must have torn Burger limb from limb. I said, "Just look, that doesn't mean we should give up our fight against Rehnquist." "Of course, you shouldn't give up the fight." He never said another word. He had a vengeance about Burger.

There are two letters I'm referring to. I sent him a copy of my piece in the *North Carolina Law Review* about an unabashed liberal looks at a half century of the Supreme Court. He wrote me the most lyrical letter. That's what I was looking for, but I don't have it. It may be in my papers. I don't know where it is, but I just couldn't locate it. The letter I did locate was one where he thanked me he says for getting him the Four Freedoms nomination. I didn't get it for him. Nobody has to get anything for Bill Brennan. He's the most revered guy by liberals in the world. It's a lovely, beautiful, modest letter and I treasure it. In the letter he wrote me on the *North Carolina* piece, he was lyrical on how good it was, and so I put it away somewhere. When I saw him the next time, I said, "Bill, I guess you wrote me that letter in confidence, to say a piece is wonderful that dumps all over Burger." He said, "I didn't write you that in confidence, I don't care what you do with it." If you ever come across it, it's not confidential. I could hardly believe it. He said, "For Christ's sake, I mean it." He didn't mention Burger in the letter, but those pieces are very anti-Burger. Also, he had really blown that morning when he had gotten my letter about Rehnquist. I believe him. He never said another word after that, but the damage had been done. Rehnquist had gotten the benefit of Bill Brennan.

I interrupted to go back to the Rehnquist appointment. You had me on Bill Brennan's resignation where I said I was really desolate. You asked how I felt about Souter. I thought there was a trick, having a stealth candidate for the Court, where you don't know. You remain stealthlike during the nomination process, and he was terrible. Then, two weeks before, I guess, the end of his second term, he makes quite a shift. I'm happy with the shift. Nothing would please me more than to have turn out as Benjamin N. Cardozo, but I think two weeks is not a summer. I have to see what it ultimately comes to.

There was a question, you may have asked me. I've been asked by several people whether there had ever been an opinion quite like this where it is attributed to three people, and not just one person plus other people – what do they do – consent?

Mr. Peck: Concur.

Mr. Rauh: Right. There is such a case. Do you know the case?

Mr. Peck: Well, there's *Cooper v. Aaron*.

Mr. Rauh: Yes, that's the one. Maybe we discussed this.

Mr. Peck: No we haven't. On that very day I got a call from a reporter, of course, asking the same question.

Mr. Rauh: I didn't remember it. I remembered it only in reading something of Brennan's from this lecture I have to give in which it not only said Brennan had written it but it made that point in *Cooper v. Aaron*, so maybe you remembered it. I didn't.

Mr. Peck: I remembered it because I had written about it.

[Side B]

Mr. Rauh: I had no memory of it. It made perfectly good sense. That would have been a Frankfurter touch, although I have no way of knowing. Do you know whose idea it was?

Mr. Peck: I don't. The evidence was that somebody raised it first and almost immediately everyone agreed that it made perfect sense. It never quite revealed whose idea it really was.

Mr. Rauh: Well, it's wonderful. When I read it in here, I can't remember if they were implying that Brennan did it, or what. Brennan was pretty new on the Court then, in

'57. If he got on in '56, this was '57. Brennan is frail. I had lunch with him a few weeks ago, and he made the point that he was sorry he got off. I don't know that I really think that makes any sense. He's so frail. If he can't give a lecture, he can't go through all the terrible, terrible strain that the Court was. When I went to see him to ask him to make a speech, he said he gets there at 7:30. The one thing about when you're old and frail, and I'm only getting there but I'm pretty close, it's so hard to get going in the morning. I waste all morning; I can't help it; I am just so slow. I do feel he's one of the great people in my life, and I've had a lucky life.

Mr. Peck: I know that I guess I had seen him in April, and he actually looked like he was more vigorous than he had been about a year earlier.

Mr. Rauh: I think you told me that.

Mr. Peck: I was very pleased to see that. When I saw him last week, he was looking considerably weaker than he had just in April. You could tell he was having difficulty.

Mr. Rauh: As late as this, within maybe – certainly – 60 days, he told me he was sorry he resigned. I think that's good for his morale, and I hope he enjoys saying that. It's not true.

Mr. Peck: I remember when he got off. He was looking like he needed a rest and he clearly did.

Mr. Rauh: Clearly, he couldn't have gone on. They're still planning to go to Maine, Bill and Mary. They're getting his plane tickets together, and he's planning that. I don't believe he's going to make it, and I don't believe he should. God knows, if he's going on any part because of me, I don't want him to go. I want him to live as long as possible. I'm sure Frank Coffin feels the same way. We don't know how to get him not to go.

Mr. Peck: Well, I think Mary's the only one who could do that.

Mr. Rauh: She will do that if it's possible. She's quite fine.

Mr. Peck: After, of course, his departure from the Court, one year later Thurgood Marshall leaves the Court, and that had to be almost like a devastating second body blow.

Mr. Rauh: We had opposed – this was no surprise. Whether anybody actually testified for the Leadership Conference, I don't think they did. There was a terrible feeling against Thomas when he was confirmed for the court of appeals. We had – Elliott Lichtman, my partner, had taken Thomas' deposition in our *Adams v. Richardson* and all successors' case. We knew how bad he was from his Office of Civil Rights in the Department of Education. We knew how bad this guy was. We were in a sense ready for it. I testified for the Leadership Conference against him. I didn't know at that time about Anita Hill, although some other people did. I did not know of Anita Hill until the Sunday morning when it was in *Newsday* by Phelps and on the air by Nina [Totenberg]. It was only a coincidence I even knew that, because Floyd [Haskell, Nina Totenberg's husband] called about lunch that next week. We had a date. Floyd called, and when we finished talking, Nina got on the phone and said, "Did you hear the program I just did?" I said, "No." She said, "Well, it's going to be again on such-and-such a station at 11 o'clock. That's the first time I knew anything about it. My son Carl was the lawyer for the Leadership Conference on the leak question. I was very proud of him. He worked for Skadden, Arps that charges such absurd fees. He did this as a pro bono thing for Ralph [Neas] and he got a little thing in the report about clearing us. It wasn't just not mentioned negatively, he got an affirmative thing in the report. I'm very proud of the family performance there. Is there anything

on the wires on that French bill?

Mr. Peck: I didn't hear anything before I left the office, so I'm not aware of it.

Mr. Rauh: A lot of people say that Thomas is going to act today, because tomorrow is the end of the period. They say it's a good bill.

Mr. Peck: Now, you heard from the Justice Department on their position?

Mr. Rauh: No, what was that?

Mr. Peck: That they supported Customs.

Mr. Rauh: If he asked them, I would think he's going to follow it.

Mr. Peck: I would think so, too, but I've not heard anything yet. But he's turned out to be everything and worse.

Mr. Rauh: Incredibly bad. I think, and I really believe this, if Clinton wins, the Court is going to be a minor factor in the future. We'll get a young Brennan for Blackmun, whose going to resign at the end of this year or before, at the end of June of '93 or before. I think we'll get that, and some of the ones who are apparently not well, we'll resign, we'll get liberals. There'll be problems still, but the spectrum won't go further the other way. I think we've got a good shot now, if we can elect Clinton. I don't know how much they are going to make of the Supreme Court. I, myself, find it an important part of the election.

Mr. Peck: Prospects are not nearly as good, of course, if Bush wins reelection.

Mr. Rauh: If Bush wins, oh it really would be terrible. If he can appoint Blackmun's successor, that will just break everybody's heart. The Administration is still pushing bad judges. They're pushing a hanging judge from the 11th Circuit, Carnes, is that his name?

Mr. Peck: Yes.

Mr. Rauh: Oh, say that reminds me, there's that big ad in the *Post* about Morris Dees and his Center for Poverty Law, saying he is for Carnes.

Mr. Peck: So is Frank Johnson.

Mr. Rauh: I guess there is a certain *noblesse oblige* there. At any rate, I wish the Democrats would say no more until after the election.

Mr. Peck: Carnes was reported out of the Committee, but so far no vote has been scheduled on the floor.

Mr. Rauh: Biden has refused all our entreaties to say no more votes.

Mr. Peck: Yes, that's right. He's been holding up the nomination for women at the moment.

Mr. Rauh: For women?

Mr. Peck: The Administration in an election year has rediscovered that there is another gender. He's been holding that up until there's been action on a few other things, but he's promised if he gets action on voting rights and a few other things that he's anxious about he will act on this, so obviously he's not going to put a stop to nominations yet.

Mr. Rauh: I'm not clear on that, Bob. What is the position on the four women?

Mr. Peck: He's just basically held them up until he gets action on several pieces of legislation that have been held up by the Republicans.

Mr. Rauh: It's legislation?

Mr. Peck: Yes.

Mr. Rauh: Well, why doesn't he put Carnes in that Group?

Mr. Peck: Apparently, he imposed this rule after they voted on Carnes. I think he was receiving a lot of pressure from Hal Heflin who's a big Carnes supporter.

Mr. Rauh: Heflin, Dees, Johnson – there's a lot of power there.

Mr. Peck: We've kind of run through the history as I've been able to put it together. You've reminded me of things that I've left out. Is there anything else?

Mr. Rauh: One thing I want to say. If you ever want to be my friend for life, you'll do the editing.

Mr. Peck: Absolutely.

Mr. Rauh: I don't know what to say, but I just don't feel I can do it. I will read it after you've edited it because you might have missed a little nuance here or there, but I don't want the bulk of it. Please do it, Bob.

Mr. Peck: I will do it.

Mr. Rauh: I never hesitated when you called and said you wanted to do this, because I don't mind doing it. What really would kill me would be having to do the editing. It's going to be a tough job on you. Take your time. There's no rush. If I'm gone, if I should get sick or something and can't even read it afterwards; it's right on the record because the record is still running, you have my full authority to make the changes. I think that if there are ever two guys who have similar views, it's you and me; and if I misstated something, just please fix it. There's so much duplication and so much "ohs" and "ahs" that I just hope you'll take your pencil, blue pencil, and really do what has to be done.

Mr. Peck: I will do that.

Mr. Rauh: Thank you, Bob. I just don't feel up to it. I'm getting more tired.