



Pebbles From The Paths Behind

CHAPTER VI

Warner W. Gardner

READERS OF THE *GREEN BAG* need no introduction to the late and legendary Warner W. Gardner (1909–2003) or to his notable career as a lawyer and as an extraordinary human being. When nearing his eightieth year Warner decided to enjoy himself by preparing a memoir of his youth and early career, up to the point where he left the public service to enter the private practice of law. Upon completing the manuscript in 1989 he had it printed up in soft cover with extremely limited distribution to family and friends. He called it *Pebbles From The Paths Behind: A Sort of a Memoir: The Public Path 1909–1947*. With the thought that it would be of interest to a much wider audience, the *Green Bag* 2d (Vol. 8, No. 2, Winter 2005) republished Warner’s imaginative Preface, together with Chapter V on his illuminating year as the law clerk to Associate Justice Harlan F. Stone during the Supreme Court’s October Term 1934. With a similar thought, the *Green Bag* is now republishing Chapter VI, which deals with the six-year period Warner spent in the Office of the Solicitor General. It was an exciting time – probably more so than in many of the subsequent years – and with increasing responsibilities Warner served under four successive occupants (Reed, Jackson, Biddle and Fahy) of the important position of Solicitor General of the United States. Here is what Warner thought of them and of others, as well as of the vital functions the Office was performing during an era of constitutional crisis.

– Bennett Boskey

ROOSEVELT'S FIRST SOLICITOR GENERAL was a North Carolina lawyer and politician named J. Crawford Biggs. He was considered by the Court and his staff alike to be a man of uncommon incompetence.¹ Attorney General Cummings must have come to the same view, since the Solicitor General argued neither of the major cases (*Panama v. Ryan* and *Gold Clause*) that arose during his term of office. Stanley Reed, who was General Counsel of the Reconstruction Finance Corporation and had joined Cummings in the *Gold Clause* arguments, was nominated to take Biggs' place and took office on March 23, 1935.

Adolph Berle, whom I had not seen since I left Columbia, was good enough to urge Reed to recruit me into the Solicitor General's Office. When Reed called me, sometime in the spring of 1935, I had just concluded that I would rather be a lawyer than an economist, but had given no thought at all to how and where I would be a lawyer. The Solicitor General's Office seemed a nice solution to all problems and I readily agreed.² Fortunately, in those days "conflict of interest" was examined in light of common sense

rather than rigid rule, and the current requirement of two sanitizing years between Court and Solicitor General would have been thought absurd.

In July 1935, then, I gave Tom Harris about the same minimal and unhelpful instruction that Westwood had given me and moved ten blocks uptown to enter upon six years of completely rewarding professional activity.³ [Editors' note: Herbert Wechsler was clerk to Harlan Fiske Stone in 1932–33, followed by Howard Westwood in 1933–34, Gardner in 1934–35, Thomas Harris in 1935–36, and Harold Leventhal in 1936–37.] It is curious that my only other occupation which permitted me to believe that my strengths were fully used while my weaknesses were unimportant, was the remarkably dissimilar occupation of intelligence officer in the 6th U.S. Army Group a decade later.

A. Solicitor General Reed

1. *The Office*

Except for two attorneys on the fringe of the Office work⁴ Reed recruited a new staff in the spring and early summer of 1935. The

1 Justice Stone, who was not notably charitable to counsel, said that Biggs was not fit to argue a cow case before a justice of the peace, unless that is the cow was fatally sick. James M. Beck, Coolidge's Solicitor General, came off marginally better. Beck, Stone said, would get hopelessly lost in oral argument and would, if a Justice asked a question showing him the way out, quote Shakespeare and march off in the opposite direction.

2 When I went to the Office for an interview Reed was for a while occupied and I was deflected to Biggs, who was either in the final days of office or was being phased out under the ubiquitous title "Special Assistant to the Attorney General," a blanket description covering alike a multitude of talent and a multitude of spavined politicians. He was jacketless, a condition rather more informal than now, and his vest was covered with shells of the peanuts which he was devouring while he listened to a baseball game on radio. By mutual assent the interview never progressed beyond "hello" and he returned his attention to the ball game.

3 It may be worth recording the 1934–1935 salary levels for the new law graduate. Where Shea & Gardner in 1988 is forced by its prosperous competition to pay the entering attorney \$65,000 a year, Wall Street in 1934 was recruiting the cream of the law schools with a salary of \$2,000, which would translate into about \$18,000 in 1989 dollars. Stone, parsimonious by nature but also anxious that his clerk live comfortably, paid \$3,600. By 1936 my law review friends were receiving \$2,600 on Wall Street while Reed offered me and Charley Horsky \$3,200. Never again was the financial balance to tilt toward me rather than the New York bar.

4 Marvin Smith was an old-time attorney whose work was confined to criminal briefs of no large im-

operative Office consisted of five attorneys. Paul Freund was the senior, and was concerned more with special briefs and special projects than with the routine of the office; he remains the only person I have known who would be presumed to be thinking rather than sleeping if he leaned back in his chair with his eyes closed. Alger Hiss had been brought over, from Agriculture's collection of brilliant lawyers assembled by Jerome Frank, in order to prepare the Agricultural Adjustment Act brief. Charles Wyzanski had left his office as Solicitor of Labor in order to prepare the Labor Board briefs. Charles Horsky, who had been President of the Harvard Law Review and clerk to [Augustus] Hand, and I were the juniors. Not one of the five had reached the age of 30 years.

It is immodest, but not unnatural, to wonder if any law office had quite the level of talent as that of this five-man Office. Certainly, Horsky and I have always felt that any office where we were the lowest level had to be extraordinarily good. Our work load in respect of briefs on the merits was about the same as that currently handled by a staff of 20-plus, with the in-house production of the massive constitutional briefs perhaps off-setting the much higher current volume of minor commitments, such as certiorari cases and appeal authorizations.

The work of the Office was closely confined to the briefs and arguments before the Supreme Court, except for a requirement,

which has endured for more than a half-century in the hope of bringing some consistency to the Government's litigation, that an appeal from an adverse District Court decision had to be authorized by the Solicitor General. The attorney to whom the brief on the merits was assigned was responsible for knowing the record, to avoid misstatement and overlooked portions, as well as for the quality of the brief. The burden of brief-writing varied greatly according to the originating division: at that time a brief from the Lands or Criminal division would surely have to be rewritten from scratch, and one from the Antitrust Division would surely require little or no reworking. I believe that during my six years there we never asked for an extension of time, choosing flawed work rather than the unending replication of delay which results from moving this month's work into the next month. That aversion to delay, which has long since been overcome by our successors, was helped by having a top priority (i.e., next-to-Congress) with the Government Printing Office; page proof of any brief, however long the manuscript, delivered before midnight was on our desk at 9 AM.⁵

Reed was a satisfactory Solicitor General, and a satisfactory man to work for. His mind and his judgment were both solid rather than adventurous, and I can recall no issue that he did not, in the end, understand. He had an unenthusiastic confidence in my work but we were not close.⁶ In all, I agree with, but would not want to soar beyond,

portance. David Hudson had been brought in by Biggs as his heavy artillery and remained for about a year, arguing a number of medium-sized cases but not otherwise participating in the work of the office.

- 5 My first, and my last, instance of corruption of a public servant was my practice of delivering a bottle of the best Scotch to the night superintendent of the G.P.O. along with whatever brief was taken to him shortly before Christmas.
- 6 At one time in the spring of 1936 I was scheduled to accompany a quite stupid trial lawyer in the Tax Division for a two week circuit of district courts concerned with the validity of the windfall tax, discussed below. I expressed to Reed my pleasure with the assignment and my despair at my companion. With a remarkable amount of emotion, he said, "I hope you spend every minute of the two weeks in

Stone's comment to Frankfurter in 1938: "I am quite happy about Reed's appointment. He is honest, straight-forward and a hard worker."⁷

For about half a year Horsky and I suffered the indignity of having our work reviewed by Hiss or Wyzanski.⁸ That practice atrophied, I believe when Charles and I discovered that none complained if we didn't search out supervision. I cannot remember with precision, but know that Reed reviewed briefs rather more closely than did the next

two Solicitors General. Probably he went over briefs on the merits in typed form, and certiorari petitions and responses in page proof. Neither revision nor discussion was likely except in the important briefs on the merits.

One project, some literary polishing of a major address by Stone, produced sufficient embarrassment and entertainment to be worth the telling, even though it cannot be told except in detail so full as to compel narration in the margin.⁹

his company. I hope you have to sleep in the same bed with him in flea-blown motels. I[t] would do you good." I could only conclude that he saw some flaw in my character. As the excursion fell through, I have remained unimproved.

7 Quoted in the Bar resolution addressed to the Court (largely composed by Boskey with help from me) in the memorial services on Reed's death, at age 96. 449 U.S. at xliii. [Editors' note: Bennett Boskey served as law clerk to Justice Reed in 1940-41 and to Chief Justice Stone in 1941-43.] The approving verdict is in sharp contrast with the Stone judgments on Reed's predecessors, Beck and Biggs, quoted at the start of this chapter.

8 I shortly began to wait until Alger had left his office, as for the library or the men's room, before taking around work to be reviewed. He would cling stubbornly to his initial thought, costing me loss of patience and both of us loss of time. Wyzanski, in contrast, so long as his mind was switched on to the professional channel, thought like a well-made machine, without any tinge of personal feeling, and would abandon initial positions as rapidly as error could be shown.

This trait was dramatically shown in his argument of *Zimmern v. United States*, 298 U.S. 167 (1937). Some Justice, I forget which, asked him the typical probing question designed either to help adjudication or to bedevil counsel: as you urge A, counsel, why is not B (an absurdity) also true? Charlie thought for more than 30 and less than 60 seconds and then stated, "I believe you are right, your Honor," and sat down, abandoning the Government's case. This mental machine rested, however, on a thin crust below which were some unusually turbulent emotions. A slight hint of these may be glimpsed in the brief he wrote in *United States v. Seminole Nation*, 299 U.S. 417 (1937). As he had used none of the draft brief bearing the names of the Assistant Attorney General and three assistants in the Lands Division, he struck their signatures. They complained to Reed who asked Charlie, in the interests of domestic peace, to restore them. Wyzanski did so, but also added that of his secretary, with the public explanation that her contribution far exceeded that of the Lands Division.

9 Stone in 1936 delivered a major address, "The Common Law in the United States," 50 Harv. L.R. 4 (1936). Two decades later Charles Wyzanski, in a critical review of Alpheus Thomas Mason's biography of Stone, asked "Was not Stone's clerk, Warner W. Gardner, the ghost-writer of Stone's epochal address on the Common Law at the Harvard Tercentary?" Harv. Law J., Oct. 2, 1958.

I had refused to narrate to Mason tidbits of my year with Stone for the sake of his biography, and was not beloved of him. On October 7 he wrote me (with copies to Stone's widow and children) "I wonder if you are content to let this inference stand unnoted?" On October 8 I replied "Of course I did not write the address. I recall vaguely lending some minor assistance to some address * * *." I added that I would indeed let [the] Wyzanski inference "stand unnoted. There are too many contemporary errors in inference to warrant tilting a lance * * * over the precise degree of assistance a law clerk may have been twenty-five years ago." Mason on October 10 replied (again with copies to the Stone family). "At stake is the reputation of a man with whom you spent one of the most important years of your life, * * * who is now himself powerless to repudiate a statement which you know to be untrue." On October 13 I replied that I had now reread the address and recognized a number of literary embellishments almost surely contributed by me to a thoughtful analysis the substance of

2. 1935 Term

Three New Deal statutes came to judgment in this Term; each was invalidated.¹⁰ *United States v. Butler*, 297 U.S. 1 (1936), held the Agricultural Adjustment Act to be unconstitutional because payments to farmers to reduce production, funded by a tax on processing, was an invasion of powers reserved to the states. Stone, joined by Brandeis and Cardozo, [dissented. Reed] was outshone by that consummate actor-advocate, George Wharton Pepper, until Reed regained the limelight by fainting, I assumed from exhaustion, at the close of his argument.

Carter v. Carter Coal Co., 298 U.S. 238 (1936), held invalid the Bituminous Coal Act, fixing hours, wages and prices in bituminous coal mining. Hughes, perhaps out of respect for his decision in *Appalachian Coals*, concurred only as to hours and wages. Cardozo, joined by Brandeis and Stone, dissented.

Perhaps the high water mark of judicial arrogance was reached in *Ashton v. Cameron County District*, 298 U.S. 513 (1936). There the Municipal Bankruptcy Act was held invalid as an invasion of the powers of the

State; while, to be sure, the State had eagerly consented, that consent was an invalid impairment of contract. This was too much for Hughes, who in this case joined the three regular dissenters.

I preserved about a dozen briefs on the merits on which I worked during this Term, none of much consequence except for an *amicus* brief for the R.F.C. in the *Ashton* case. Along with these there was, of course, the steady flow of petitions, responses and appeal authorizations. Altogether, the year was significant to me chiefly in terms of the osmosis by which the Solicitor General's relations with the Court, the Divisions and the agencies became comfortably understood.

My relations were perhaps closest with the Tax Division. Probably more than half of our cases came through that Division yet it was considered dull stuff and often received only perfunctory attention. I took their problems seriously, and also rather liked their ranking officials. They in turn furthered my education, a year or so later, by assigning me oral arguments while I awaited

which was the work of Stone alone.

On the next day I reversed field and wrote Mason "to complete, somewhat hilariously, * * * our correspondence. I have last night discovered that Tom Harris was Stone's clerk at the time, so Wyzanski must have had the wrong clerk in mind." On October 29 Wyzanski sent [a] note of apology to the Record and the Herald Tribune, which had reprinted the review.

Seven years later Wyzanski's review was published in a collection of his papers. Mason had somehow seen, in galley proofs, the statement about my ghost-writing. Wyzanski had deleted it in galley, but Mason demanded a more ceremonial apology. I wrote to Wyzanski that Paul Freund had remembered that I did some literary work for Stone in my first year in the Solicitor General's Office. Wyzanski sent that letter to Mason, who promptly wrote me that I was "trifling with the reputation of a man with whom you had enjoyed a relation of confidence and trust" by my refusal to "repudiate a statement which you know is untrue." I replied that I had "read with amazement your singularly offensive letter. * * * While nothing in my experience indicates that an obsession can be eased by evidence," I proceeded to give him a complete list of his extravagances and of my shaky memory, adding that both Freund and Wyzanski remembered my work; I had let the matter rest, not having "foreseen that a righteous indignation might be like the cicada, which every seven years makes shrill emergence." He made lengthy reply, concluding that "Distortion of a record, particularly when a man's personal and/or professional reputation is involved, is to me a very serious matter. To you, it is a trifle." I sent this to Wyzanski noting that "the only element of certainty and consistency in the whole history is that Mason is an incorrigible ass."

¹⁰ So, too, was a New York statute prescribing a minimum wage for women, by the usual 5-4 vote. *Moorehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936).

the passage of the three years of bar membership for Supreme Court bar eligibility.¹¹

[3]. 1936–1937 Terms

Toward the end of our first year Reed offered Horsky and me the choice of assisting Hiss and Wyzanski on the major constitutional cases or carrying on the ordinary work of the office without much supervision from anyone. Our elections were unhesitating; Charles was captivated by the Big Case and I by freedom from supervision.¹² As it developed, some special projects took the bulk of my time during the Term, and the routine work of the office was a secondary concern of all five of us.

I was, however, able to devote a good part of the summer of 1936 to the Government's brief in *United States v. Wood*, 299 U.S. 123 (1936). Congress in 1935 had made Government employees eligible for all District of Columbia juries and Wood claimed a violation of the 6th Amendment when convicted of larceny by a jury including four Government clerks and two pensioners. *Crawford v. United States*, 212 U.S. 183 (1909), had so

held and we considered that effective criminal prosecutions in the District of Columbia required its overruling. I launched a massive inquiry and in the end came up with a dozen commentators, starting with Fitzherbert in 1516, and a dozen cases, commencing with 1346, establishing that at ancient common law the crown cases could be tried to a jury including the King's servants. The Court, chiefly on the basis of the Government's "elaborate research", overruled *Crawford*.

That research had its points of interest. The Department of Justice, by some miracle of acquisition never known to me, had a good collection of the early reports, known as the "Yearbooks." They were, 500 years later, in good enough condition to be read and handled as ordinary books. They were, however, printed in "blackletter," a densely inked rendition of Latin blended with Norman-French. Diligent inquiry produced two or three people in Washington who thought they could read it, but couldn't. Somehow I stumbled on Irwin Langbein, a[n] SEC attorney who lived in a rural farmhouse, surrounded by bare dirt, horses, goats and many children. He could read blackletter, it

11 My first oral argument was in *Chatham-Phenix Bank v. Helvering*, 87 F.2d 547 (CADC 1936), argued on October 12, and my second was *Commissioner v. Blumenthal*, 91 F.2d 1009 (CA2 1937). Each was a tax case of no discernible importance. I lost them both.

12 There is a cautionary moral, for one engaged in the self-indulgence of composing memoirs, to compare, a half century later, my recollection of that choice with that of Charles. Katie Louchheim in 1983 published a book entitled "The Making of the New Deal." Many, including Wyzanski and my partner Frank Shea, declined the interview and I broke it off when I discovered that Katie's notion of scholarship was to turn on a tape recorder and let the egos come tumbling out. In any case, Charles told the machine (pp. 84–85):

"Then along came the National Labor Relations Act. I was put in charge of those cases. * * * The team that worked on those briefs included Abe Feller, * * * Charlie Wyzanski, who was in the Solicitor General's Office, Steve Farrand and myself."

Any degradation of the Wyzanski role has its elements of poetic justice. Wyzanski in 1984 gave moderately wide circulation to an autobiographical letter that he had written to Judge Weinfeld. In it he stated that Reed, "observing me argue without a note, and observing that even Butler, J. seemed to be impressed, determined that I rather than he should argue the constitutionality of the National Labor Relations Act." In point of drab, historical fact, of the four cases Reed shared argument of the principal case with Madden, Chairman of the NLRB (*Jones @ Laughlin*, 301 U.S. at 5–11), argued the second major case alone (*Fruehauf*, 301 U.S. at 50) and assigned each of the two lesser cases to Wyzanski and Fahy to argue jointly (*Clothing Co.*, 301 U.S. at 58–62; *Associated Press*, 301 U.S. at 117–22.

seemed to me, as easily as I could read the sometimes heavily inked New York Times. Another curiosity was the response of our opponent, Bill Hughes. He telephoned me to say that he had undertaken a tabular summary of my authorities, was leaving town on another case, and had asked the printer to deliver the page proof to me; he asked that I correct the page proof of his brief as I saw fit and return it to the printer for the final print. That act of trust resulted in due course in a reproduction of the joint tabulation in the Court's opinion as the most convenient summary of 15th century practice. Finally, it may be worth noting, the case was argued by Brian McMahon, the amiable but hardly scholarly head of the Criminal Division. Despite a remarkably diligent effort, the cases he was presenting remained a mystery to him, with the result that after a bit the Court addressed its questions not to counsel but to "Mr. Gardner," who was suffering in the adjoining chair.

I believe my standing with the Court was eased, throughout my time with the Solicitor General's office, by the *Wood* case. Brandeis asked me to tea and spent some time exploring what he mistakenly thought were my techniques for research. Hughes,

five years later, converted me into a scoundrel by an excessively generous comment on my research.¹³

There followed a month-long holiday, driving to Montana with Horsky on the occasion of his sister's marriage.¹⁴ Upon our return, I put in about a month of brief writing and revision before I was drafted into other campaigns, which for most of the 1936 Term put general Supreme Court litigation into a part time category. I seem to have done substantial work on only six briefs on the merits during this term, apart from one which was a part of the windfall tax project discussed below.

The only one of the cases that is prominent in my mind 50-odd years later is *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481 (1937). It is prominent because of Thurman Arnold, who was then mis-employed as head of the Tax Division. Taxation was probably the only field of human learning which he could not subdue with a blustering intelligence and humor. *Tex-Penn* was a highly complex reorganization case. I spent hours trying to get the intricate web of fact and law into Thurman's head and into mine and failed in both objectives. He argued the case against John W. Davis, and understood

13 A day or two before I filed our brief in *Brooks v. Dewar*, 313 U.S. 354 (1941), I suddenly wondered if there was power under the supremacy clause for a state court to enjoin a federal officer. I spent a fruitless two or three hours in search, and was not able to get back to the matter before oral argument. During the argument I started a sentence intended to say, "I have found no case in point but am ashamed to say that I have not been able to conduct an adequate search." I did not achieve what I had hoped would be endearing candor because the Chief Justice interrupted me after the first seven words to say, "The Court is satisfied that there are no such cases if Mr. Gardner reports that he could not find them." I saw no civilized way to complete my thought and have for a half century borne the burden of an outrageous lie to the Supreme Court.

14 Three aspects of that trip are prominent in my memory: (1) We were accompanied by Barbara Eggleston, a high school friend of both Horskys, who in October married Charles. (2) We drove in my pride and joy, a new Ford convertible, and suffered three cracked engine heads en route; an enterprising mechanic in Helena discovered that the car had been equipped with a truck water pump, which threw out all radiator water at higher speeds. (3) Mrs. Horsky finally found something useful that I could do on the day of the wedding, and I was dispatched to get matches to distribute about before the reception. I met a Horsky cousin and we spent an hour or so in a Helena bar before I remembered my duties; I got a carton of matches from the bartender and distributed them throughout the house. Mrs. Horsky picked up a pack during the reception and went white. It pictured a Scot in kilts crawling under the doors of a pay toilet, and was captioned "It pays to economize."

only fragments of the Davis argument. The opening of his reply was a model of aggressive despair: "My opponent's arguments are like a bag of feathers tossed into the air. My comments on the few feathers I have been able to grasp are * * *."

In the summer of 1937, if I have my dates straight, Wyzanski left for Ropes & Gray in Boston and then the federal bench, while Hiss left for the State Department and then the federal penitentiary.

By way of replacement, Henry Hart came to brighten the Office for a year or two. His nature was so endearing that it was always hard to realize his high level of intelligence. I have consoled several generations of disappointed attorneys by recounting how Henry, Harvard professor and famed author on procedure, had grown embarrassed by motions to admit him *pro h[a]c vice* in order to present an argument and had dutifully sat for the D.C. bar, only to fail it. He and I had adjoining offices and together greatly enriched some future day in a painter's life. The 5th floor ceilings were about 12 feet high, with a beading about a foot from the top. If a quarter were tossed up, flat to the wall, and came down just over the beading, it would lodge behind it. When one succeeded, the other would replace the lost quarter with two. As Henry was not only wiser but also better coordinated than I, most of the roughly \$10 nest egg was contributed by me. Tom Harris, Ed Ennis and Bob McConnoughy joined the Office in comparatively senior positions

somewhere in the 1937–1938 period and Dick Salant, who later abandoned the law for the riches of television, Joe Fannelli and Steve Farrand were recruited into the junior positions at about this time.

As will shortly be developed, Van Devanter retired from the Court in June 1937 and was succeeded by Black. Sutherland retired in January 1938 and was succeeded by Reed. Black was the target of a bizarre *quo warranto* proceeding¹⁵, while Reed was confirmed without a dissenting vote.

B. Special Projects

1. Court Packing

In early October 1936 Reed assigned me to Cummings for some research assistance. It is not irrelevant that I was then a week or two past my 27th birthday. Cummings said that if Roosevelt were reelected, as was expected, he was determined to move against the five or six Justices who were so stubbornly opposed to any Government regulation that nothing could be done to strengthen the still devastated economy of the nation. I was to survey every suggestion, short of constitutional amendment, that had been made and to report back as soon as feasible after the election.

I must have made occasional oral reports to Cummings or Reed, but don't recall any. On December 10, 1936, I handed in a 65-page memorandum entitled "Congressional Con-

15 An idiot named Levitt had been made U.S. judge for the Virgin Islands; in the course of some quarrel, he held the Governor in contempt and despatched the U.S. Marshal to jail him. It fortunately was a territorial rather than an Article III court, and Levitt was removed from office. He arrived in Washington as a Special Assistant to the Attorney General, and I was, along with a few others, instructed to find something for him to do. I believe none of us succeeded. Levitt, in any case, had time to prepare and file an original writ of *quo warranto* to remove Black from office because he had been a member of Congress when the judicial emoluments were increased by passage of the bill allowing retirement from active service rather than resignation. I seem to remember having drafted the responding paper but may not have, since it is not among the briefs which I preserved. In any case the Court held there was no standing in this manner to vindicate a theory of constitutional government. *Ex parte Levitt*, 302 U.S. 633 (1937).

trol of Judicial Power to Invalidate Legislation." I am confident that neither the Department nor the White House had made any other constitutional inquiry undergirding the President's proposal of February 5, 1937. In rereading the paper a half century later, I consider it well short of perfection but adequate to the need. In 1981 I sought retrieval of the paper, which had been in the 40-year custody of Paul Freund pending completion of his Holmes Devise history of the "New Deal" Court. In returning a copy, Paul remarked that the paper "has stood the test of time very well." I replied,

"I seem to have combined what was in view of the importance of the issue comparatively superficial research with a remarkable confidence in my judgmental conclusions. While I should hope this reflected a short allowance of time, I *have* encountered, in the subsequent 45 years, some mean-spirited people who have suggested that such is my customary condition."¹⁶

The paper concluded that the Court's constitutional review had solid historical support; that the Court would not accept a Congressional declaration that the legislative findings of fact were conclusive; that Congress could not oust state courts of constitutional review unless there were a federal court alternative; that the Congress could not enact a "procedural" rule which specified the number of votes required to declare an Act unconstitutional; and that the Court would invalidate a statute which excised constitutional adjudication from the juris-

diction of federal courts. Finally, a didactic one-page discussion concluded, "There is no possible doubt as to the power of Congress to regulate the number of judges who shall constitute the Court." I indicated that it seemed undesirable, chiefly on administrative grounds, but thought this must be weighed against the fact that only this expedient was assuredly constitutional.

After some considerable discussion with Cummings I was told to go draft a bill. In the course of drafting I thought that I had found a solution to the administrative problems which had earlier concerned me. If an additional justice were appointed for each justice over 70 who had not retired, and without a subsequent appointment on the retirement of the over-70 judge, the Court would fall back to nine members as the old codgers retired.¹⁷ The result was a pure confrontation of power, would surely work to make retirement at 70 invariable, and would do no other harm to the functioning of the Court. At the age of 27 it is axiomatic that senility settles in from the 70th year forward; a conclusion I find more dubious in my 80th year. I was in any case highly pleased to find so neat a solution to the constitutional crisis.

Cummings and I spent a morning with the ubiquitous Corcoran and Cohen, finding that they were in strong support and without suggestions for change.¹⁸ Cummings, early in the White House consideration of the bill, twice dispatched his young assistant to represent the Department at the White House. One was a morning conference with

16 Both points seem to be confirmed by an introductory sentence in the paper. "At a number of points the investigation is less exhaustive than I should like but nowhere, in my opinion, is there any likelihood that further investigation would uncover material sufficient to change the results reached."

17 I cannot recall whether I developed this on my own or whether my attention had been drawn to the fact that a broadly similar proposal had in the 1913–1916 period been made in respect of lower federal court judges by the House Committee, President Taft, and Attorney General McReynolds.

18 Joe Rauh has been emphatic and vociferous that Cohen and Corcoran were shocked and were opposed to the bill. I do not know whether Joe has given full rein to a somewhat romantic memory or whether their distaste arose when the bill was fundamentally changed before its public proposal.

Roosevelt as he lay abed (that being easier for him than strapping himself into braces and a wheelchair) and the other a lunch with the White House aides, chaired by Jimmy Roosevelt. But after that, probably from early January, I was not a part of the consultative process, but would draft or revise according to Cummings' instructions.

To my dismay, the stated purpose of the bill was transformed into a measure to relieve the Justices of their crushing burden of work, made especially difficult by their advanced age. An additional justice was to be appointed for each that was over 70, but the addition was permanent and subject to a maximum of 15. The justifying papers, from the President's message on down, spoke almost exclusively of overwork, with little or no reference to judicial usurpation of power. As the Justices were not overworked, and were comfortably discharging their duties, a constitutional confrontation that men could fight for became an exercise in Madison Avenue sleaze. I have never known the origin of this strategy, but have always guessed that Carl McFarland, who was very close to Cummings and of a notably practical cast of mind, may have been responsible. If I had been somewhat older, I would probably have begged out of the subsequent drafting, but as it was I stated my disagreement and continued to work as I was directed. Out of a fine school-boy honor, I complained to none of the distortion of my handiwork. I did no work on any of the justifying memoranda or statements; I cannot now remember whether

I managed to avoid it or was never asked.¹⁹

On February 5, 1937, the President sent to the Congress his "court packing" message and bill. A substantial majority of the legal profession and of the press were in shocked dissent.

The Senate hearings²⁰ opened with a statement by Cummings on March 10 and one by Bob Jackson, then in charge of the Antitrust Division, the next day. When they are reread 50-odd years later the Cummings statement, directed exclusively to the unfair burden cast on these aged men, was a smoothly crafted bit of hokum, while the Jackson statement, which never mentioned overwork but only judicial tyranny, was a brilliantly effective demonstration of what the matter was really about.²¹

The court packing bill died, by an almost unanimous vote of the Senate Judiciary Committee, in May 1937. A crumb tossed to the Administration was passage of the judicial retirement bill, which by keeping a retired Justice eligible for Article III service served to give him constitutional protection against a salary reduction after retirement. Van Devanter retired under its provisions on June 2, 1937. In fact, however, the Administration although ignominiously defeated in the Congress had already won its campaign in the Court.

On March 29, 1937, about a week short of two months after Roosevelt's message, the Court by a 5-4 vote in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, held constitutional the State of Washington law fixing minimum

19 It is only fair to note that, as best I can recall, I am more outraged now than I was in 1937 at the transformation of my handiwork into what seems to have been an effort to market deceit. I was probably made tolerant by a feeling of team rapport; we were all working together to achieve an important goal and nobody had elected me captain.

20 Hearings before the Senate Committee on the Judiciary on S.1392, 75th Cong., 1st Sess. (1937).

21 Among other points, he explained that the Court's membership was changed from 6 to 5 in 1801, to 6 in 1802, to 7 in 1807, to 9 in 1837, to 10 in 1863, to 8 in 1866, and to 9 in 1869; in each case the motivation was blatantly political.

A year later Bob Jackson became Solicitor General and I worked very closely with him. But in 1937 we were barely acquainted and our views, while identical, were independently developed.

wages for women, thereby overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), which had been decided only the year before.²² There followed in April a series of cases which by a 5-4 vote sustained the power of Congress to protect collective bargaining where the work was in or affected interstate commerce.²³ In May the Court, again by a 5-4 margin, upheld state and federal social security taxes, levied to support payments to the unemployed and the aged.²⁴ The Court was not again, at least during the next half century, to hold that the common law rights of contract and property were beyond the reach of regulatory legislation.

It is accepted wisdom that the extravagances of court packing were unnecessary, and that the process of attrition would in ordinary course have produced this shift in constitutional doctrine. So, one may suppose, it would have. But who can know how long that process would have taken, nor what would have happened to a country still devastated and yet unable to enact corrective legislation? The Court, long after the event, has itself attested to the impact of the effort. Justice White, writing for the Court in *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986), said:

"The court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or the design of the Constitution. That this is so was pain-

fully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process clause * * *."

I thought that I owed Stone a confession, and called upon him in order to admit authorship of the bill. He was not distressed, but made response in terms humiliating to one possessed of the maturity of 27 years. He chuckled and said, "After all, you *were* very young."

2. *Windfall Tax*

The benefits paid under the Agricultural Adjustment Act were to have been financed by a quite high excise tax on processing the commodity involved. It appears that about \$100 million of tax had been paid and about \$950 million had been withheld, typically by injunction and escrow payment, pending Supreme Court decision as to validity. The processors, as an almost invariable rule, had increased their selling price, or less frequently had reduced their purchasing price, sufficiently to cover the tax. The administration after the *Butler* decision was determined to prevent the enrichment, by tax refund, of the processors who had passed on to others the burden of the tax.

Recoupment of the windfall tax benefits was a problem riddled with constitutional snares. Perhaps for this reason, finding a solution became a task for the Solicitor Gener-

22 *West Coast Hotel* was argued on December 16 and 17 and in normal course the Justices would have voted on the following Saturday. The final vote could have reflected *sua sponte* reformation, or Hughes and/or Roberts could have changed their vote in February. Whether the result was due to the Court Packing project can be, and has been, argued either way. The case in favor of *sua sponte* reform is strengthened by the circumstance that Tom Harris has told me that Harold Leventhal, Stone's clerk of that year, said that the vote was taken before the Court Packing Bill was announced.

23 *Labor Board v. Jones & Laughlin*, 301 U.S. 1 (1937); *Labor Board v. Fruehauf Co.*, 301 U.S. 49 (1937); *Labor Board v. Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. Labor Board*, 301 U.S. 103 (1937).

24 *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

al; perhaps on the other hand it might have been viewed with grim satisfaction as a fitting consequence of his having lost the *Butler* case. Probably because Alger was about to leave, the job was assigned to me.

It was accepted wisdom in the winter of 1936 that a retroactive excise tax was invalid, while an income tax could be retroactive for a limited period of time. While our judgment might have been different a year later,²⁵ we put aside the simple expedient of a retroactive processing tax divorced from the unconstitutional control of agriculture, and turned to the income tax field for our basic platform.

A thin, idealistic young lawyer named Eugene Bogan from the Treasury Department and I were assigned the job of devising and drafting the needed legislation.²⁶ We settled upon an 80% tax on “unjust enrichment”, to be measured by any increase in the customary profit margin upon non-payment or recovery back of the processing tax. Disputes were to be settled by an administrative board in the Treasury Department with Court of Appeals review. It was a very complex statute, and a year later I was unable to give impromptu explanation of what it was that I had drafted. The work moved forward with despatch, and the result, after full executive department and Congressional consideration, was enacted as part of the Revenue Act of 1936, on June 22, 1936, only five and a half months after the *Butler* decision.

There followed, of course, a turmoil of

litigation in the lower courts. My personal participation was limited to a major case (*Kingan & Co. v. Smith*) briefed in the 7th Circuit but never argued because preempted by the Supreme Court in *Anniston*, and a delightful argument in the federal court in Baltimore. Judge Chesnut presided; he was small, intelligent, and very much aware that he deserved the fullest respect of the bar. My opponent was the redoubtable George Wharton Pepper and I anticipated the worst. He lost his own case, however, by the egregious mistake of patronizing Chesnut, either addressing him as “my good judge,” or something of equal disservice to his clients.²⁷

Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937), arose on the processor’s demand that the taxes, paid into escrow under an injunction pending *Butler*, be refunded to it. I expanded our *Kingan* brief to 176 pages, and Reed and Morris argued the case. The Court, on an 8–1 vote, held the procedures valid and that the processor could not complain of non-recovery if in fact the burden of the tax had been borne by others. This largely concluded the litigation and the processing taxes were retained or paid as the case might be. A special procedure for export taxes had also been included in the 1936 Act and I had the largely ceremonial honor of arguing *Wilson & Co. v. United States*, 311 U.S. 104 (1940), which ended the windfall tax litigation by holding that the Act validly ousted the Court of Claims of its jurisdiction.²⁸

25 The Court, a year after the *Butler* decision, sustained, in *United States v. Hudson*, 299 U.S. 498 (Jan. 11, 1937), a very crude income tax – 50% of the profit on the sale of silver bullion – that was retroactive for the 35-day period it was under consideration by the Congress. We were afraid, in 1936, to pin our hopes on a retroactive “income” tax which like *Hudson* was almost an excise tax.

26 A half century later I chanced to encounter Bogan at the home of a mutual friend. He was a successful tax practitioner, far from thin and perhaps just as far from idealistic.

27 According to a citation in our *Anniston* brief, the case was *Star Milling Co. v. Magruder*, 1937 CCH ¶1,115 (Dec. 15, 1936, D. Md.).

28 This was the first of three cases which I argued against Dean Acheson. It would be false to claim glory that I won them all; from 1937 onward it was hard to lose a Government case.

3. *Maritime Commission*

For most of the 20th century the American merchant marine has been a high cost fleet and has needed Government support to compete with ships under foreign flag. The 1928 Act offered that aid, in thin disguise, by way of Mail Pay contracts. These were scandalously abused, as vividly shown by two investigations in the early 1930's, that of the Postmaster General and that of the Senate Committee chaired by Black. The result was the Merchant Marine Act, 1936, which abolished the mail pay system and substituted forthright subsidies for shipbuilding and for operations in foreign commerce, subject to very tight regulation.²⁹

The immediate task for the new Maritime Commission in 1937 was to accomplish the liquidation of the mail pay contracts without cost to the Government and to warp the merchant fleet into the 1936 system. The summer interval between Terms was usually a light period in the Solicitor General's Office and I was assigned as straw-boss of a dozen or two young attorneys from a variety of Government offices with the mission of going through the records of about 20 contractors and devising defenses sufficient to ensure that there could be no recovery for breach of the 1928 Act contracts. It turned out to be a comparatively easy assignment, since contract violations were endemic throughout the industry. In any case, no suit was ever brought though this was probably

due as much to the attractions of the new subsidy payments as to the defenses developed by the team of young lawyers.

The highlight of this two-month excursion was Joseph P. Kennedy, the first Chairman of the Commission. He was intelligent, hard-working, and brutally uncouth. A few decades later the chairmen of the maritime agencies would be deferential, or even obsequious, to the steamship presidents whom they were regulating. I remember being in Kennedy's office when the President of the largest of the lines telephoned him. Joe Kennedy opened the conversation with this pleasantry: "Listen, you goddamn son of a bitch, you are not going to sue me and you are going to be glad to sign a new contract if I let you. I will tell you why."³⁰

4. *Intergovernmental Tax Immunity*

In 1936, or thereabout, the Treasury Department persuaded the Tax Division that a major effort should be made to end the accepted constitutional immunity of state and municipal bonds from federal taxation. Because the immunity served to defeat the surtax revenues, Treasury was glad to pay the compensatory price of local taxation of federal bond interest, and would welcome the enhancement of revenue for both sides by taxes on employees, contractors and others doing government business. The Tax Division persuaded me and I persuaded Reed,

29 Many years later the field of maritime regulation was to become the primary focus of my private practice; an activity due to a series of accidents and in no way related to my 1937 exposure. I am led to note that with all its imperfections the 1936 Act continues, 53 years later, to be the principal governance of the American merchant marine, and that during this long period there has in the liner industry been no known instance of the diversion of public funds to personal pockets which characterized the Mail Pay regime.

30 Hugh Cox, then of the Antitrust Division, had also been assigned for summer work, on I believe the somewhat higher level of personal attorney to Kennedy. Hugh and my research team were invited to a 4th of July dinner at the Kennedys. They then lived in a mansion with lawns stretching from River Road to the Potomac. The house was overrun with a throng of children. One of them, when I asked if they all really lived under the same roof, solemnly assured me that they had to do so, since hotels were so frightfully expensive. Hugh was even more antisocial than I, and we sneaked out during a bad after dinner movie without the grace to say goodbye.

and Jackson and Biddle in their times agreed. Fahy did not, but by the time he became Solicitor General it was, as is later explained, too late to undo what had been done.³¹

In the three Terms, 1936–1938, we presented the “tax immunity” question to the Court in about a dozen cases. I wrote the brief in each of these. The cases were argued by the Solicitor General or, in the interregnum between Reed and Jackson, by the Acting Solicitor General, Golden Bell, who lacked some skills of advocacy but at least understood and believed in the principle. We won each of them.

The particular battles in this campaign were these: *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), and *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937), held that the states could impose a gross receipts tax on the Government contractor even though the economic burden was passed on to the United States, thus effectively overruling a long series of cases starting with *Osborn v. United States Bank*, 9 Wheat. 738 (1824). *Atkinson v. State Tax Comm’n*, 303 U.S. 20 (1938), held the same in respect of a net income tax. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), and *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), held the same in respect of income or royalties from oil leases of state lands, overruling *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393. Correlatively, *Allen v. Regents*, 304 U.S. 439 (1938), held that a federal admissions tax could be applied to the gate receipts of a

state university athletic contest.

We eased our way into taxation of state officers and employees with a series of four cases sustaining an income tax on fees and salaries of state appointed officers and attorneys paid out of funds of financial institutions in state liquidation.³² For the next step we sustained the federal tax as applied to an official of the Port of New York Authority in *Helvering v. Gerhardt*, 304 U.S. 405 (1938);³³ the Court confined *Collector v. Day*, 11 Wall. 113 (1870), to essential governmental functions. The journey was completed with *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939), and *State Tax Comm’n v. Van Cott*, 306 U.S. 511 (1939), which squarely overruled *Collector v. Day*.

Things had moved far enough along so that Roosevelt on April 25, 1938, recommended to the Congress legislation which would impose the federal income tax on interest from state and local bonds and consent to corresponding state taxation of the interest on federal bonds. By way of support the Tax Division and I wrote a 219-page book, “Taxation of Government Bondholders and Employees.” Part I traced the overruling of past precedents, as suggested above, and Part II developed a quite strong argument based upon the terms and the history of the 16th Amendment. As I recall I wrote Part I and revised Part II; the Tax Division procured a beautiful binding and printing job from the Government Printing Office.

Assistant Attorney General Morris and I

31 Frank Shea, head of the Claims Division, became involved when the issue related to government contractors rather than taxation. He was opposed on principle to giving up a present advantage in order to achieve a future gain, but accepted overruling by the Solicitor General. As the Congress never allowed general federal taxation of state and local bond interest, it is debatable whether, under Frank’s criterion, the Treasury gained or lost dollars from our work; it does not, however, seem open to doubt that the tax structures of both nation and states are simpler and fairer without the profusion of immunities which existed in 1936.

32 Reported under the lead case of *Helvering v. Therrell*, 303 U.S. 218 (1937).

33 Gerhardt was represented by Simpson, Thacher and his brief written by Dick Demuth, a law school classmate of Horsky. We liked each other’s work sufficiently that he left Simpson, Thacher for our office.

marched down to the Senate Finance Committee to support the President's proposal; he made the affirmative case and I answered questions. The senators proved themselves to be local ambassadors for their state finance departments and in no way responsive to federal needs. The prevailing position was that we couldn't prove that *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895), had been overruled until we had a case so stating, and it was irrelevant that we couldn't have a case so stating until Congress repealed the statutory immunity. The matter of bond interest remained in this unsatisfactory and unresolved condition for the next half century. The other forms of overruled immunity needed no legislation to implement and had vanished by 1940, excepting always taxes laid directly on the United States or the state as a taxpayer, taxes the impact of which discriminated against the United States, and immunities legislated by the Congress.

A by-product of the intergovernmental tax immunity campaign was a George Washington University debate between me and Thomas Reed Powell, Harvard's professor of constitutional law, who was more widely known for his brilliance than for his temperance. He had a number of martinis at the pre-debate lunch and was led to describe to a large audience Justice Murphy's first opinion, which was delivered the day before, as the first opinion of Mr. Justice Huddleson, Murphy's clerk, whom he had wrested from me. We subsequently went to the Frankfurters for tea and found Frankfurter in a towering fury at Powell, since his antennae were sufficiently sensitive to have learned of the Huddleson remark even though the Court was in session for almost the whole two hours between insult and tea.

Congress in 1982 finally broke off a corner

of the catch-22 impasse in which Morris and I found ourselves in 1938. The 1982 revenue act eliminated the tax immunity on bearer bonds of the state and local governments, since they were so convenient a medium for laundering unlawful income. In *South Carolina v. Regan*, 465 U.S. 367 (1984), the Court gave the State leave to file an original bill to enjoin the tax as unconstitutional and referred it to a Special Master. Stevens filed a long dissent on the ground that, as shown by the litigation of the 1930's, there was no constitutional immunity and reference for trial was silly (465 U.S. at 404-17). The Court in *South Carolina v. Baker*, 108 S.Ct. 1355 (1988), when the case came back on the merits, held, as Stevens had urged, that there was no longer any intergovernmental tax immunity from nondiscriminatory taxation and that *Pollock* was overruled; only Justice O'Connor dissented. Judge Morris and Sewall Key, I am sure, are now dead and I am obliged to derive delayed gratification for all three of us.

C. Solicitor General Jackson

1. General

Bob Jackson left his private practice in Jamestown, New York, and came to Washington early in the Roosevelt Administration as Chief Counsel of the Internal Revenue Service. He became the most rapidly rising star in the federal legal service: Assistant Attorney General in the Tax Division during the last half of 1936; Assistant Attorney General in the Antitrust Division in 1937; and Solicitor General in March 1938. This would be followed by Attorney General in January 1940 and Supreme Court Justice in July 1941.³⁴

34 There is probably some sort of moral about man's ambitions to be found in the fact that this meteoric advancement found room for three major disappointments. Jackson had expected to succeed as

He was a remarkably effective advocate. Those who were with him in Nuremburg found his performance as a trial lawyer to be spotty, but none has questioned his pre-eminence in the appellate courts. He did not use the rhetorical flourishes common to the great advocates of the preceding generation, but almost without exception produced an argument of great clarity, forcefully but not dramatically rendered, while mastering the unexpected question on argument with relaxed grace.³⁵

Jackson's only formal education after high school was at the night sessions of the Albany Law School. I know, from occasional vague remarks, that he devoted much time and effort to self-education, but have no idea what form it took. It was, in any case, spectacularly successful. I have already spoken of his oral advocacy. His written opinions for the Court have shown him, in my judgment and that of many others, to be the most accomplished literary stylist to be found in the United States reports. When one adds Ralph Davies, who much later was a friend and a client, and who had comparable though somewhat lesser literary skills, self-taught after high school, one could make an impressive case for the abolition of higher education.

With Wyzanski and Hiss gone, and

with Freund planning to go soon, I was by default Jackson's principal assistant or office straw-boss.³⁶ I was called "attorney" rather than "Deputy Solicitor General" as became the later and more elegant custom. I had the initial responsibility for the work of the office, but took care to consult with Jackson on important issues or when I was in doubt. Jackson never interfered with anything on his own motion, and never failed to be helpful when I took a problem to him. No subordinate could ask for more. Our relationship was wholly impersonal; so far as I can now recall, I never had a meal with him and never presumed to call him by his first name. But I never had a more satisfactory superior.

According to my best, though imprecise, memory, we soon worked out a carefully graduated scale of review in the office. Tax Division briefs were supervised by Arnold Raum, whom we had moved into the Office from the Tax Division, and I would look at them only in page proof. On other briefs I would either do the initial work myself or go over the manuscript of other men's work with some care. Jackson, except as I took something to him at an earlier stage, would receive page proof of all briefs. He would work over with helpful care a brief in a case he was to argue; others would receive only perfunctory attention and I would proceed

Attorney General when Cummings resigned in January 1939 and was never reconciled to Governor Murphy, who was named instead. He had, according to Biddle as recorded in my diary, hoped to be named Chief Justice when Hughes retired in June of 1941 but took in good part Roosevelt's choice of Stone as Chief and Jackson as Associate Justice. Finally, five years later, after an interlude as Chief Prosecutor in the Nuremburg war trials which included a public, trans-Atlantic attack on Black, Vinson rather than he was named as Chief to succeed Stone. Truman, on an occasion when Secretary Krug and I visited him in 1946, chanced to remark that "I would have named him Chief Justice if he hadn't pooped off in Nuremburg."

35 He said that he made three arguments for every case he argued: one, the night before, was very good; the second, as actually delivered was inferior if not wretched; and the third, as he reviewed the day when in bed, would have been absolute perfection.

36 I have a very clear recollection of starting immediately as Jackson's chief assistant, but Paul Freund remained in the Office until the winter or spring of 1939 and I would never have been placed above him. My most plausible reconciliation is that he bargained for freedom from routine supervision and stayed on until the second semester began at Harvard in the winter of 1939 in order to present a few oral arguments to the Court and possibly to complete a special project or two.

to print if I had heard nothing from him within the appointed time.

I would assign the work on briefs without consulting the Solicitor General. Oral arguments were a different matter; there were always ten candidates, each of whom was well aware of his own qualifications, for every case to be argued, and few decisions of the Solicitor General presented more difficulties. I would each month take in a list with recommended assignments, and we would put in an hour or so of uncomfortable work, but the decisions were emphatically those of Jackson himself. The guiding priorities were that Jackson would take the most important case scheduled for each month's argument;³⁷ [] Assistant Attorneys General would be assigned two to six cases a year; and the balance distributed among the more senior attorneys in the Office and the principal assistants in the Divisions.

2. *Argued Cases*

My three years of state bar membership, required before admission to the Supreme Court bar, did not accrue until April 1938.³⁸ On April 25 I argued *Taft v. Commissioner*, 304 U.S. 351 (1938). My opponent was Bob Taft, not yet a Senator, who had a personal stake of about \$1 million in the outcome and was also inadequately prepared. The Court, deploring the harsh result, nevertheless

unanimously ruled against him.³⁹ I can after a half-century remember my joy that I could adapt Wordsworth's "tintinnabulation of the Tintern Abbey bells" to "the tautological emphasis of the statutory language"; since the meters don't match, I can only assume that I have never before today checked my amiable assumption that they did. A second memory is not very inspiring. My posture has never been admirable, and I must have been almost collapsed over the lectern under the assault of nervousness. McReynolds passed to Reed a note, in the crabbed hand of the aged, that said, "Does he think he argues better on his belly?" I considered that Reed took entirely too much pleasure in presenting the note to me.

I seem to have argued only two cases in the 1938 Term. One was a fairly straight-forward defense of the Railroad Retirement Act and tax as applied to the state-owned Belt Railway in San Francisco. *California v. Latimer*, 305 U.S. 255 (1938). The other, involving the issue of federal or state jurisdiction over the Ft. Peck dam area, was won on the unsatisfactory basis of an affirmance without opinion by an equally divided court. *Montana v. Bruce*, 305 U.S. 577 (1939).

My major case collapsed on me shortly before argument. I had in the spring of 1938 written a brief in the 7th Circuit defending the constitutionality of the Federal Home Loan Bank Board and had argued the case

37 When Cummings was Attorney General, he would two or three times a year take on the argument of an important case. I have no idea whether it was at his initiative or that of Reed. I don't believe Attorney General Murphy presented any argument, and am confident that Jackson would not have suggested such a venture.

38 The explanation of the delay amounts to a vivid temperance tract. On my last night in New York, before coming to Washington for my clerkship, I had with Ed Sellers made my second empirical inquiry into how far down Amsterdam Avenue one could go, having one glass of beer in each saloon. My schedule for the next day was an interview with the bar character committee in the morning and a train in the afternoon. I did not feel up to the morning schedule and begged off. Another nine months passed before I could return to New York to receive the customary advice about intermingling a client's funds with my own along with a certificate of bar membership.

39 The executors of Mrs. Taft, senior, carried out her promise to give \$2 million to the Cincinnati School of Fine Art over a period of years. It was held not deductible from the taxable estate since it was neither a charitable bequest nor a full-consideration debt of the testator.

in Chicago, winning by only a 2–1 margin. *First Federal Savings & Loan Association v. Loomis*, 97 F.2d 831 (CA 7, 1938).⁴⁰ Certiorari was granted and briefs written but then the petitioner State of Wisconsin had a change of administration and dismissed its petition.

The principal reason for the thin gruel of the 1938 Term was my impressment into the work of the President's Committee on Civil Service Improvement, as explained below.

The October Term 1939 started off with three flood control cases. Beyond the cataloging circumstance that each dealt with flood control, each had wholly different facts and issues. Yet they were assigned for successive arguments, which I undertook to present. In those more leisured days, the Court assigned two hours for argument of cases on its plenary docket so I had a six-hour stretch, spread over two days. By the conclusion I was barely capable of walking, and certainly incapable of thought. We won them all, but I would hesitate to claim much credit for the last case argued. *United States v. Sponenbarger*, 308 U.S. 256; *Danforth v. United States*, 308 U.S. 271; *Franklin v. United States*, 308 U.S. 516 (all 1939).

I took on *Helvering v. Clifford*, 309 U.S. 331 (1940), and its companion, *Helvering v. Wood*, 309 U.S. 344 (1940), at the ungracious urging of Arnold Raum, who said that no one who knew anything about the tax laws could win those cases. The Court, by a comfortable 7–2 margin, held that the grantor of a revocable trust could be taxed on its income. The name of the case lived on for a half century, paradoxically used to describe as a “Clifford Trust” one that had been so cunningly crafted as to escape the

Clifford result.

3. Other Matters

Cardozo died in the fall of 1938 and it was incumbent on the Attorney General to present a memorial resolution to the Court. Cummings asked me to draft it, which I did in close collaboration with him. We each felt that Cardozo's delicate cascades of word and image called for our best efforts. I believe that on the whole we achieved Eloquence, though some passages at least verged on the flowery. 305 U.S. xiv (Dec. 19, 1938).

The middle years of the recurrent *Morgan* litigation absorbed some fairly emotional attention both of Jackson and of me. *Morgan v. United States*, 298 U.S. 468 (1936), dealt with 50 consolidated cases seeking review of a rate prescribed by the Secretary of Agriculture under the Packers & Stockyards Act. The Court held the District Court had erred in striking from the complaints the charge that the Secretary had entered decision without having read the evidence or briefs, or having heard the argument of the parties. After evidence was taken on remand, the Court in *Morgan II* held the rate order invalid because the Secretary had examined only findings prepared *ex parte* by the prosecuting bureau. We filed a strongly worded petition for rehearing, a course almost never followed by the Office, complaining in particular that the Court seemed to imply that the excess rates collected during the litigation and impounded by the Court should without more be paid over to the plaintiffs. The Court revised its opinion, to chide us because it should have been clear that the Court was deciding nothing about what

40 I am led to offer here an elegiac note on the deterioration in passenger transport since those halcyon days. Fifty years later I can still remember with envious clarity boarding the train in late afternoon to indulge in the luxury of an overnight “roomette,” clutching a bottle of whiskey and a promising mystery story, enveloped in the tired pleasure of a job I thought well done and the certainty that there was no conceivable way to try to accomplish any undone task until the morrow.

should happen on remand (a somewhat unusual restraint by a reversing court). *Morgan v. United States*, 304 U.S. 1 (1938).

The district court ordered the impounded funds paid over to the plaintiffs, while the Secretary at the same time reopened the proceedings before him. On the third appeal Cravath's Frederick Wood was so outraged that he moved for summary dismissal of our petition (filed by Acting Solicitor General Gardner). The Court refused to soothe that burst of temper, granted certiorari, held the Secretary's course to be proper, and directed the continued impoundment of the excess rate; Stone's opinion has some notable language (deriving from our brief) as to the governmental partnership of agency and the courts.⁴¹ *United States v. Morgan*, 307 U.S. 183 (1939). Finally, eleven years after the proceedings were begun, the Court in *Morgan IV* sustained the Secretary's rate order as entered after proper procedures. *United States v. Morgan*, 313 U.S. 409 (1941).

Since I had written the Government's brief when the Municipal Bankruptcy Act was invalidated in 1936, it was a pleasure to see *Ashton* reversed, on Jackson's argument and my brief, in *United States v. Bekins*, 304 U.S. 27 (1938).

Oklahoma v. Woodring, 309 U.S. 623 (1940), illustrates the close protection that a kindly providence offered Jackson. The case presented the issue whether the United States could under its general welfare authority build a dam for flood control, irrigation and power purposes. It was the custom for Jackson to master the record himself in the cases which he was to argue, and for me to do the same for cases where I had the

Office responsibility for the brief. Chatting outside the courtroom just before the case was called, Jackson (who had become Attorney General a fortnight before) said it was a comfort that I knew the record since he hadn't been able to get to it. What Jackson did not know until that moment was that it was *not* my custom to read the record when another S.G. attorney was responsible for the brief. I had worked over Demuth's brief a little and had added my name to the signatures, as a courtesy to Jackson who felt more comfortable if he were leaning on me rather than someone else. The record was about 2000 pages, not a word of which had been read by any Government counsel at or near the lectern. In the course of an hour's argument, not a single question in any way implicated the record of the case at bar. While the decision, which we won only by an equally divided Court, was not very satisfactory, at least the new Attorney General did not start off with a burden of personal chagrin.

As a rule, I have considered ghost-writing, drafting a speech for another man, to be a degrading occupation. At some time in 1939 Jackson asked me to compose a speech for him; on what topic or occasion I cannot remember. I tried to escape, on the ground that I had some difficult briefs to get out, but failed. A day or two later Frank Murphy, by then Attorney General, also asked me to draft a speech. I was not fond of Murphy, and doubted that he would want to say anything that appealed to me, and also felt that he had no real need to choose me from among the hundreds of attorneys at his disposal. I finally yielded, though not with good grace. Even 50 years later I blush

41 " * * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice * * *. Court and agency are the means adopted to attain the prescribed end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can be rightly regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common end." 307 U.S. at 191.

at the outcome. I did a respectable job for Jackson, saying something of what we both would want said. For Murphy, I did a new title and a new page one, and then copied off the Jackson paper. Both men professed to be well pleased, and by the grace of a kindly God no one ever compared the text of the one with that of the other. A full-fledged disaster, to the Department and to me, could easily have been the price of that reversion to college-day antics.

A blazing quarrel with a formidable opponent enlivened one period of the Jackson regime. Thurman Arnold had lost an antitrust prosecution of the carpenters' union and officials based on charges of corrupt restraint of trade. I, along with most of my New Deal colleagues, at that time found it a little hard to believe that a union could do wrong and quite impossible to believe that it should be subject to antitrust prosecution. I refused to authorize certiorari, and for one reason or another Thurman could not gain the ear of the Solicitor General or the Attorney General until the time had run. Thurman, with much halloo and shouting, set about to have me fired. Jackson only laughed. In a mellow time some years later I told Thurman that I now considered him right on the prosecution, while he with equal generosity said that he should not have tried to drive me from the Department for a single error, however grievous it was.

D. Civil Service Improvement

Executive Order 8044 of January 31, 1939, appointed the "President's Committee on Civil Service Improvement." Reed was made

Chairman and the other seven members included Justices Frankfurter, Murphy and (later) Jackson.⁴² I was somehow dragooned into signing on as Assistant to the Chairman⁴³ and was installed in a magnificent corner office on the courtroom floor of the Court building (with the ultimate cachet of a parking space). Oscar Cox, then Assistant General Counsel of the Treasury and of widely recognized ability, was given the title of Staff Assistant. Each of us was matched by a Civil Service Commission functionary with similar title. As I was the only one located in the Court building, a high proportion of the staff projects fell on me.

Most of the Committee's attention, and all of mine, was directed to the vexed issue of lawyers. Most of the positions were outside the classified service, with results that were largely unsatisfactory. The agencies interested in good lawyers rarely looked beyond the graduates of Harvard, Yale and Columbia; those more interested in politics rarely looked beyond the Congressional endorsement; and those for one reason or another subject to Civil Service sovereignty could not look beyond the registers where the top positions were typically occupied by those possessed of veterans' preference.

An "Advisory Committee on Lawyers" was set up under the Chairmanship of Henry Bikle, a distinguished general counsel of the Pennsylvania Railroad. It reported in July 1939. Its principal recommendation was that lawyers should be covered into the career service, under procedures to be administered not by the Civil Service Commission but by a "Committee on Government Lawyers," to be chaired by the Solicitor General

42 I have no recollection that anyone ever considered the doubtful constitutionality of Article III judges setting out to reform a quintessential executive function; certainly I didn't.

43 I cannot now remember what sort of pressures induced me to take on what I knew in advance would be dull work, nor how much time I spent at the Court rather than in the greener pastures to which I was accustomed.

and composed of agency general counsels selected by him. The proposal was bitterly opposed by the Civil Service Commission representatives and by the non-lawyer students and proponents of good government. When the Advisory Committee's report was completed, I returned to the Solicitor General's Office and gave Civil Service reform only part time attention thereafter.

My next contact with this work was in January 1941. I was then directed to draft the Presidential Committee's report on lawyers. The draft, which came in time to be known as "Plan A," followed the Advisory Committee proposal for administration by a Committee on Government Lawyers but remade the detail of the procedures. In essence it called for nation-wide written examinations, machine gradable, to construct a provisional register. Those so selected would then be interviewed by regional committees, drawn from volunteers from the Government and private practice. A resulting register of about 500 names would be available for appointment without ranking. The Committee was sharply divided in its January 21 meeting; my draft was supported by Reed, Frankfurter and Jackson and opposed by three others including Murphy. The controversy spread through the Government, and in March the Attorney General directed that I stay out of it. Ed Rhetts, then Associate Solicitor at Labor, took on my chores as draftsman for the good people. On April 24 the President by Executive Order approved "Plan A," creating a "Board of Legal Examiners" to be chaired by the Solicitor General.

My diary for June 16, the day I returned from an extensive vacation, records, "Found the Board of Legal Examiners in session. Went in to say hello to the S.G. and never came out. Agreed to serve as Acting Secretary until they got someone but not after 7/1." I tried thereafter to interest Hart, Wechsler

and Rhetts in the position but failed, until June 25 when my diary entry reads "Wechsler heard to his consternation that Columbia thought he should do the secretary job for a year." In the following days Wechsler agreed, and the Solicitor General appointed him Executive Secretary.

Wechsler, with his assistant Ralph Fuchs, did a superb job for about a year's time, as did Fuchs for the succeeding year. The written examinations, though multiple choice, were so deftly done that they pointed to talent, and many of the most prepossessing recruits were the products of "second rate" or unknown law schools. The committees conducting the oral examinations were well chosen and conscientious. The government legal service looked well on its way to becoming a public monument. Unfortunately, the procedures were not structured to take account of Congressional or other political recommendations and preferences, nor to dissuade the Civil Service officials from joining with their usual enemies, the politicians, to scuttle the alien intruder. Accordingly, the Act of June 26, 1943, directed that no appropriated funds be spent to administer the system. 57 Stat. 169, 178. The whole structure thus collapsed into a mound of dust, redolent with memories of vanished hopes, and never to be reconstructed.

The work was dull, and its promised benefits fell victim to political robbery. But if one counts in its fortuitous sequel it was thoroughly rewarding. As we were concluding work on the Advisory Committee on Lawyers' report in 1939 I began to wonder about a brief holiday, and asked Oscar Cox if Bermuda was a good idea. He and Tom Childs had worked together at Sullivan & Cromwell and Tom had married a Bermuda girl who Oscar thought might be at her parents' home in early September when I was going. I let a few Bermuda days pass,

and then telephoned Isobel Childs. She was not only at home but was resident directly across the street from the small hotel where I was staying. I went to tea that day and there met her cousin, Rita Tucker, who had just returned to Bermuda from a fortunately broken engagement in England. I came back to Bermuda in February and again in June, on each occasion for about a week. I achieved affiancement in June and Rita and I were married on September 10, 1940. I feel that none should decry even a failed effort at Civil Service reform.

E. Solicitor General Biddle

1. General

Bob Jackson was appointed Attorney General and succeeded by Francis Biddle as Solicitor General in January 1940. Biddle had clerked for Holmes and then entered private practice in Philadelphia. He became increasingly active in Government assignments after the Roosevelt election, including chairmanship of the first, temporary National Labor Relations Board, and had served for a year on the U.S. Court of Appeals for the 3rd Circuit at the time of his appointment as Solicitor General.

The conduct of the Office was not changed in any way that I can recall with the change of Solicitors General. A minor exception is that Biddle required that all

attorneys in the Office keep diaries, an exercise of cautious prudence that I thought rather out of character. The result can be sad reading a half-century later. It has been a highly unusual year in private practice when I have had a Supreme Court case. My diary noted on February 15, 1941, that "Clerk's list for March. A few cases went over, God be praised, but 22 Government cases remain. 11 briefs at hand."

Biddle followed the same commendable principle of non-interference as had Jackson. It is true that when I went to him for advice I was not so sure of profiting from it as had been the case with Jackson, but that served to diminish the requests for help rather than to confound the operations of the Office. He was largely without interest in the briefs that we filed and was not, moreover, a very effective advocate.⁴⁴ I considered that he had a quick and effective mind, but lacked a serious commitment to put it to work. To which it should be added that those at Nuremburg considered his performance as tribunal judge was admirable and of a higher order than that of Jackson as Chief Prosecutor.⁴⁵

Whatever the judgment as to professional skills, none could doubt his preeminence as a whole man. Many generations of Main Line Biddles stretched behind him, and I never saw him show the slightest concern over what anyone not a Biddle might think of him. He had at the same time an unusual warmth and generosity toward those whom

44 *United States v. Classic*, 313 U.S. 299 (1941), may serve as one of a good many examples. It was the first successful application of the Civil Rights Acts to a primary election. Wechsler wrote the difficult brief and Biddle was to argue it. My diary for Sunday, April 6, records "SG worse, so Wechsler to argue" *Classic*. That for the next day gives this summary of the case: "Wechsler made a fine argument; indeed, the Court seemed with him. Perhaps a public-spirited servant would carry tubes of influenza germs to work."

My lot was in any case easier than that of Bob Stern when serving some years later as Solicitor General Perlman's first assistant. I had for some reason been in Court at the conclusion of a Perlman argument and reproved Bob for running down the marbled corridors at full speed. He explained, "if I don't get out of here fast, the SG will ask me how he did."

45 A plausible but wholly theoretical reconciliation of the two periods would be that his natural charm and assurance was well employed in the management of an international court, while he had Wechsler as an assistant and presumptive draftsman of the adjudicatory opinions.

he encountered. My year and a half of service under him have left me with a rich store of eccentricities, arrogance, and kindnesses to remember. Some examples, still in mind a half century later, are:

(a) In the first week he installed Evangeline Bell as his secretary. She was a tall, beautiful and very likable brunette; only the captious could consider it a defect that she had never before touched either a typewriter or a short-hand notebook. Before long she married David Bruce, who *inter alia* was ambassador successively to France, Germany and Britain, and who I am sure had no occasion to employ his wife as a stenographer.

(b) In our first discussion of assignment of oral arguments he wanted to argue an unimportant tax case. When I wondered why, he explained that it came from the 3rd Circuit, where he had written the opinion under review, and where he could therefore prepare an argument without much effort. I never did persuade him that this would be an affront to the judicial system, but did persuade him that another case would be more fun for him.

(c) The Post Office Department, at that time the almost exclusive preserve of Catholic politicians, had been enjoined from barring the mails to "The Nudist Magazine." They were outraged when I refused to authorize an appeal and demanded a personal conference with the Solicitor General himself. Half a dozen portly, ranking officials marched over. They handed Biddle a copy of the magazine, about a hundred pages of glossy print, and said *that* was what young Mr. Gardner thought the mails should carry. He turned the pages, one at a time, from cover to cover, while the audience sat in motionless anticipation. As he closed the back cover, Biddle announced his verdict: "Pretty little girls, aren't they?"

(d) I have forgotten the detail of the

"Section 16 Case," but a vast amount of oil reserves belonged either to the Government of the State of California or the Standard Oil Company according to the resolution of some highly technical issues of land law. The oil company did not like my treatment of an appeal question, and at my suggestion dispatched its General Counsel to complain to Biddle. In those days such a conference required three days on the train, a day for the conference, and then three days back to California. I took the unfortunate wayfarer in to Biddle at 9:30 AM. Biddle met him at his office door, embraced him warmly, inquired with great solicitude as to the comforts of his trip, and then said "Why don't you and Mr. Gardner adjourn to his office and work all of this out? He knows a great deal more about the issues than I do." At 9:37 AM the unhappy man was marched out the door by Biddle, to the accompaniment of some more warmth and flattery.

(e) Biddle was always impeccably dressed, yet one day he appeared at counsel table in the Court wearing a bright green tie with his morning coat. I asked him if his mind had wandered while dressing. "Not at all," he said, "I simply thought the old boys needed some cheering up on this gray morning."

(f) We entered *Mitchell v. United States*, 313 U.S. 80 (1941), to urge in opposition to the ICC that a railroad could not obey state law by consigning a black passenger to a "black" car. A diminutive but pompous Associate General Counsel of the ICC was presenting his case when Biddle, seated immediately back of the lectern, whispered to me. I whispered back, "I didn't hear." He cleared his throat and then in a resounding voice which echoed through the courtroom, said "I said, He is a miserable little worm, isn't he?"

(g) He described his diplomat cousin, Tony Biddle, as "a caricature of a handsome

man.”

(h) He was about as quirky but somewhat less endearing in the matter of personnel. I noted after a conference with him and Fahy on August 20 about filling some vacancies that he had a “strong preference for men outside Government, preferably from Philadelphia.” I wanted to hire Sy Ruben and Leonard Meeker. At the same conference “FB said shouldn’t take Jewish boy, but agreed to Meeker.” I don’t remember much outrage at this, and probably half agreed that with a predominantly Jewish staff, and with our plans to bring Bob Stern up from the Anti-trust Division, a gentile was indicated.

(i) He was sworn in as Attorney General in the White House Oval Office and asked as spectators not the usual impressive collection of relatives, officials and politicians, but rather the entire Solicitor General’s Office.

(j) Finally, to jump ahead a few years, I visited him on my return from overseas in June 1945. He said he was resigning because Truman wanted Tom Clark to be Attorney General. I would have been skeptical of the procedural account had the narrator been any but Biddle. “Mat Connelly [Truman’s appointment secretary] telephoned to say the President would like me to resign. I said that was no way to remove a cabinet officer; the President would have to tell me in person. A day or two later I was called to the White House and had a nice chat with Truman. When I got up to go, I leaned over, patted him on the shoulder, and said, “There, Harry, that wasn’t so bad was it?””

2. *Argued Cases*

I seem to have argued six cases during the 15 months when Biddle was in service as Solicitor General. Each was of consuming interest at the time, but none was of major significance with the possible exception

of *Gorin v. United States*, 312 U.S. 20 (1941). The Court there held that the Espionage Act was not unconstitutional for vagueness since the Government had to prove an intent to injure the United States. The result was conveniently timed, less than a year before our entry into the War.

Other cases were *United States v. Bush & Co.*, 310 U.S. 371 (1940), holding immune to judicial review the President’s action in increasing tariff duties on recommendation of the Tariff Commission; and *Wilson & Co. v. United States*, 311 U.S. 104 (1940), sustaining the processing tax windfall legislation as applied to exports. *Brooks v. Dewar*, 313 U.S. 354 (1941), passed over difficult questions of suit against the United States, indisputability of the superior officer, and state court jurisdiction of an injunction against a federal officer, in order to sustain us on the merits because the temporary grazing fee, though without statutory foundation, had repeatedly been ratified by Congressional appropriations.

Two cases were frustrating. *Labor Board v. White Swan Co.*, 314 U.S. 23 (1941), presented what we initially thought would be a difficult issue of showing interstate commerce jurisdiction over a retail laundry in Wheeling which collected about a quarter of its laundry from across the state line. That issue looked so easy on oral argument that I started after five minutes to leave the merits and to turn to the form of certificate from the court below but was forestalled by the Chief Justice who told me to sit down because, in effect, the Court was persuaded. I was accordingly outraged when the Court, without having heard my argument on that issue, sent the case back to the 4th Circuit because it had certified the question too generally.

Berry v. United States, 312 U.S. 450 (1941), was worse. A jury verdict for the plaintiff,

claiming total disability under a War Risk Insurance policy, was reversed by the 2d Circuit for want of evidence and judgment was directed for the Government. This presented interesting questions under the Seventh Amendment as to trial by jury and its applicability to suits against the United States. I devoted my preparation time to those issues, and only cursorily examined the evidence as to injury. Black, an impassioned defender of the jury, held my feet to the fire on the evidence of injury for the entire hour of argument, and the Court in the end reversed because there had in fact been sufficient evidence for the jury. I later heard, second hand from a clerk of Stone, that only a clerical error in the order granting certiorari allowed the evidence issue to come before the Court at all.

3. *Other Matters*

I had planned to argue *Paramino Co. v. Marshall*, 309 U.S. 370 (1940), because it presented an interesting constitutional question as to the power of Congress by special act to open up a final award under the Longshoreman & Harbor Workers Act. I concluded that this was a violation of due process, yet neither Biddle nor I thought we were empowered to confess error as to the validity of an Act of Congress. We accordingly filed a mealy-mouthed little memorandum explaining that the controversy, after all, was a private one, in which the Solicitor General could not appropriately mix. For our pains, the Court in an opinion by Reed, with only McReynolds dissenting, sustained the validity of the Act. I suffered humiliation enough at being wrong, without salt being rubbed into the wound by having reached a conclusion that only McReynolds could stomach.

Biddle argued, while I wrote or revised the briefs, in a variety of significant cases.

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), held that prospective bidders for Government contracts lacked standing to challenge the Secretary's decision under the Davis-Bacon Act that the "locality" defining the minimum wage was the continental United States. *United States v. Darby*, 312 U.S. 100 (1940), and *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1940), completed the judicial acceptance of the New Deal legislation by sustaining the Wage & Hour Act and its industry committee procedures.

United States v. Appalachian Power Co., 311 U.S. 377 (1940), was the culmination of a decade of litigation over whether the New River was navigable; if so a major power dam required a Power Commission license. The FPC draft was miserable, and I had to compose much of the brief from scratch and to master a huge record in a few weeks period which also included a Bermuda wedding and a Smoky Mountains honeymoon. Rita and I made a small detour to look at the New River in the raw, an experiment in realism which an appellate lawyer ought to avoid. At least in September the New River consisted of a trickle of water, of one to three inches depth, which meandered among boulders none of which was even moist. We succeeded in having it held navigable largely because during and immediately after the Civil War, when there were very few roads in Appalachia, a few determined men had moved produce down the river in flat bottomed boats. I could almost have wept in sympathy for the young lawyer who had in ten years at Newton Baker's firm worked on nothing except *Appalachian Power*.

United States v. Northern Pacific R. Co., 311 U.S. 377 (1940), had been argued in March by a distinguished private counsel, retained years before to conduct this mammoth contest over land grant administration for the past half century, who had not succeeded

in making clear to the Court even what issues were involved. It was set for reargument in October and I persuaded Biddle that the job should be given to Fritz Wiener, a Department of Justice attorney who had a good sense of organization and a prodigious memory. He won the case with a spectacular job of noteless presentation of a half hundred issues. He was also a man of poor judgment and an arrogantly offensive manner. For the better part of a year I was the target of recurrent admonitions from Frankfurter that Wiener should be brought up to the Solicitor General's Office, which I steadfastly refused. It was not until years later, so accepted was the ubiquitous but high-minded intermeddling of Frankfurter, that it occurred to me to be offended at the impropriety of judicial advice on the recruitment of attorneys to appear before him.

The Tax Division extended another welcome courtesy at the beginning of the 1941 summer. It scheduled its Court of Appeals arguments by railway schedules. One attorney would be dispatched westward, where he would handle that month's tax docket in the 9th Circuit and often the 10th Circuit as well while en route. Especially since Rita came to this enormous land from a 30 square mile island, I thought it would be instructive and pleasant to drive to the West Coast and back. The Tax Division kindly gave me the May docket in the 9th Circuit, along with mileage for travel, an indispensable financial underpinning for our trip. We had accordingly a splendid holiday, only slightly marred by San Francisco where on three successive days I was compelled to spend afternoon and evening preparing for the next morning's argument.⁴⁶

F. Solicitor General Fahy

1. *Interregnum*

From 1933 to 1940 the Office of Assistant Solicitor General had been a curiosity. It was staffed, in the uncharitable eyes of the young, with men possessed of advanced years, solid political connections, and no visible ability. Their chief activity was the preparation of the Opinions of the Attorney General. The Assistant Solicitor General himself had no contact whatever with the Solicitor General's Office except when in the absence of the Solicitor General he became Acting Solicitor General charged with wholly unfamiliar duties. The situation changed in 1940 with the appointment of Charles Fahy, who was the General Counsel of the Labor Board and had argued a number of their cases in the Supreme Court, necessarily gaining some familiarity with the operation. I believe that he expected to make his duties conform more closely with his title from the outset, and the tangled circumstances of political preferment made this necessary in any event.

Jackson was nominated to the Supreme Court on June 12, 1941, and, as Biddle related on June 16, stopped work immediately so that the President could become accustomed to working with Biddle as Acting Attorney General. That strategy worked well enough for Biddle to be nominated Attorney General on August 25. The position of Solicitor General remained vacant, however, until Fahy was nominated on October 29. The principal reason for the delay, according to Biddle in a gossip session of September 26, was that the President had promised both (a) Tom Corcoran that he would be the next

46 I won the two cases in which I had not even looked at the briefs until the night before, *Van Dyke v. Commissioner*, 120 F.2d 945 (CA9, 1941); *Ehrmon v. Commissioner*, 120 F.2d 607 (CA9, 1941), and lost the case where I had gone over the brief before leaving Washington, *Tooley v. Commissioner*, 121 F.2d 350 (CA9, 1941).

Solicitor General, and (b) Felix Frankfurter that he would never appoint Corcoran.

In result Fahy was Acting Solicitor General for a four month period. He was an effective advocate; he organized his material well and presented his argument in a gentle voice and with what seemed to me to be extravagant sincerity, all of which won him general admiration. He and I, however, would not have been easy with each other in any circumstances: his natural condition was a conscientious solemnity that viewed any effort toward wit or humor as unbecoming to public office, and his strategic instincts were invariably to reject the bold for the cautious.⁴⁷

There was also some exacerbation of relations in the ambivalence of our positions. I saw no reason why a smoothly running operation should be handicapped by a courteous deference to the contrary views of a man who was not yet Solicitor General. He saw no reason why the man who was in charge of the office should meet controversy rather than obedience when he issued a direction or even a suggestion.

Finally, to ensure strained relations, I had an ill-considered ambition to succeed him if he should be elevated. I had an imprecise hope that with my background I could be an honest-to-God Assistant Solicitor General and had no qualms as to the preparation of opinions of the Attorney General. The Court, or at least Frankfurter (according to

a Wechsler report of October 31), was of the same view and had assumed that I would be so designated. The Court did not know, though I should have, that there was no way that I could have worked amicably under Fahy, and neither of us knew that the work of the Assistant's office was to change so dramatically, with the Assistant Solicitor General becoming the cutting edge of the process designed to snip away legal constraints on the White House war effort. For that job, Oscar Cox – by then General Counsel of the Treasury and deeply enmeshed in Lend Lease, war production and the like – was a far better idea than I, whether viewed in terms of experience or of commanding presence. True though all this was, Fahy did not endear himself to me by interposing a gentle veto of Gardner; I was so young that it would damage the morale of his staff (elderly political hacks, in the youngsters' view) if I were appointed over them. Biddle, I was told, had felt that he shouldn't override Fahy to install an unwanted Assistant Solicitor General.⁴⁸

Against this unpropitious background the affairs of the Office were conducted during the summer and early fall of 1941.

2. *The Fields of Combat*

Fahy and I managed to develop quite a varied menu of disagreement over a comparatively short time.⁴⁹ Examples are:

47 It is a tribute to the tolerance of my late partner Frank Shea that he could simultaneously maintain with Fahy what was perhaps his closest friendship and also an amicable partnership of 42 years with me.

48 My disappointment was by no means crushing. Even had it been, I could have found solace in the list of men who made a sufficiently determined try for the position to earn a notation in my diary. In chronological order they were John Henry Lewin, Gardner, possibly Ben Cohen (considered by Biddle but probably not an applicant), Joe Rauh, a man named Dickinson, Townsend (the principal assistant in the Assistant Solicitor General's Office), Oscar Cox, Welch Pogue and Wechsler.

49 The blood-letting as to whether the Solicitor General suppressed evidence in the Japanese evacuation case, *Hirabayashi v. U.S.*, 320 U.S. 81 (1943), arose after my departure but I have no doubt I would have joined the protest of Ed Ennis and others, as related in *Hobri v. United States*, 782 F.2d 227, 233–37 (D.C. Cir. 1986), rehearing denied, 793 F.2d 304, reversed as to jurisdiction, *United States*

(a) *Oklahoma v. Atkinson Co.*, 313 U.S. 508 (1941), presented again the issue of whether the federal dams could be justified under the general welfare clause, on which Jackson had drawn a split decision in *Oklahoma v. Woodring*, 309 U.S. 623 (1940). Jackson told me, when I suggested that he take the case for old time's sake, that he couldn't. On April 11 Biddle must have been absent, and Fahy Acting Solicitor General. My diary notes of that day record:

"AG phoned to say interested, after all, in arguing case. * * * Told Fahy of AG's intentions. Fahy came in later, very annoyed that I should discuss assignment of arguments with AG, especially after agreeing with him that he should argue the case if SG didn't. I was equally annoyed that he should be annoyed * * * [later in day:] Fahy to argue. He dropped in to relate discussion with AG and all is now peaceful."

Peaceful, perhaps, but not loving; I thought the episode a remarkable interference, because of a fortuitous designation as "Acting SG," with an ongoing discussion of two years duration with the Attorney General.

(b) One Schneiderman had been ordered deported because he was a Communist when naturalized and had filed a certiorari petition. On August 21 I recorded "Long and

unhappy conference with CF on our troubles in this case," resulting in returning the draft brief in opposition to the Criminal Division to write it both ways. I rewrote their product about three times before finally sending to Fahy, after which we had an irreconcilable dispute. He thought deportation was proper because, in the conventional choice among the statutory phrases, Schneiderman wanted to overthrow the government by force and violence. Since Thomas Jefferson and many others had approved the same aspiration, I thought this a primitive ground for deportation, and thought we should speak only to the part of the statute which forbade allegiance to a foreign power. We ended up presenting the Gardner theory in a footnote and the Fahy theory in the text, with each of us unhappy to have yielded at all.⁵⁰

(c) I was distraught because of a shortage of manpower. Huddleson had been kidnapped by Murphy when he went on the Court,⁵¹ and by the Army after his clerkship ended. Harris was leaving for the FCC. Wechsler had left for the Board of Legal Examiners. It was hard during the interregnum to know whether Fahy or Biddle must approve whatever recruit I could turn up, but Fahy must obviously be consulted, and was likely to have different criteria than I.⁵²

(d) The Treasury and the Tax Division

v. Hobri, 482 U.S. 64 (1987).

50 The Court granted certiorari and, after argument and reargument, reversed. *Schneiderman v. United States*, 320 U.S. 118 (1941). I had left by the time of argument, but I am told that Wendell Wilkie, who argued for Schneiderman, enlivened all by dwelling on the discrepancy between the Government's text and footnotes in the brief in opposition.

51 Murphy had throughout his service as Attorney General been inseparable from his first assistant, a handsome young man named G. Mennen Williams and known to all, out of respect for his ancestral wealth, as "Soapy." I tried to persuade Murphy that as a new Justice he would want the comfort of Soapy's assistance and not have to adjust to a stranger like Huddleson. He tried to persuade me to take Soapy in Huddle's place. I went as far as I could, without destroying my affirmative case, to indicate that Soapy wasn't up to it. I lost Huddle, and Murphy lost the reassignment of Williams. The last laugh was that of Soapy; he was three times Governor and then Chief Justice of Michigan, and was thought highly competent in both positions.

52 John Frank, for one example, seemed a good replacement and I took him in to Fahy at the end of July. John, when asked as to recent writing, said he had just finished a piece on Justice Butler. Fahy asked as to his judgment on the Justice. John, bless his forthright soul, said that he was up to the level of

had, as I have earlier explained, the unhesitating support of Reed, Jackson and Biddle in their drive to eliminate intergovernmental tax immunities. Frank Shea and the Claims Division, reluctant to give up the immediate cost savings from immunities for government contractors in the hope of a more distant goal, had been overruled. Fahy's arrival, along with an aggressive intervention by the War Department, upset the balance of power, while Fahy managed to bring morality into the balance pan, on the ground that a man of good conscience could not increase the war costs of the United States. I retaliated with the hardly endearing view that I did not consider that he had the authority, at least until he should be nominated and confirmed, to upset the conclusions of Reed, Jackson and Biddle. There followed a series of conferences, with Sam Clark, then head of the Tax Division, and I now against the world. Many of the conferences were with Biddle, who had not much interest in focusing on the controversy, much less in resolving it.

All of this came to a head as we prepared the Government's brief in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), a case squarely presenting the issue of a sales tax placed on the cost-plus government contractor as vendee. Clark and I wanted to concede the validity of the tax; Fahy, War and Shea wanted to contest it because its burden would fall on the United States. I rewrote our brief several times trying to find common ground. Eventually we settled out on an argument that the tax was invalid because it was imposed on the purchaser, not the seller, and the cost-plus contractor was in that context indistinguishable from the United States. The brief did not argue "burden" but Fahy did in oral argument, despite our earlier bloodied com-

promise. The Court sustained the tax, going out of its way to reject both the burden theory and my compromise.

3. *Argued Cases*

I argued only two cases in the fall of 1941. Either by chance or by discreditable but forgotten maneuver *Federal Land Bank v. Bismark Co.*, 314 U.S. 212 (1942), was set for argument immediately before Fahy's appearance in *King & Boozer*. The issue was not difficult, presenting the power of Congress to make explicit exemption of an instrumentality from state sales tax, but I found it helpful to larger ends that I was able just before Fahy's argument to review with the Court its settled precedents in respect of intergovernmental tax immunity. *United States v. Kansas Flour Corp.*, 314 U.S. 212 (1941), which I came back from the Labor Department to argue, was my final foray into the complexities of the windfall tax. The Court reversed the Court of Claims to hold that the Government could properly offset the processing taxes included in the cost of its flour purchases when, with the protection of an injunction pending *Butler*, they had not been paid by the seller.

4. *Departure*

Washington in the 30's was essentially a small town, and the New Deal lawyers a fairly compact neighborhood in that small town. If one whispered to himself in a darkened room that he was less than content with his lot, he would have a few alternatives laid before him in the coming week. I rejected one or two alternatives, and nothing came of another.⁵³

competence that was usual for the Catholic seat. I saw no prospect of a successful contest of Fahy's verdict that Frank would not in any circumstance be acceptable.

53 There was a plan, which I believe never came to fruit, to create a railroad commission to run the

The new path that did attract me was being Solicitor of Labor. Jerry Reilly, who had succeeded Wyzanski, was leaving for the Labor Board, where his long experience with the labor movement was to turn him into the most fervid antilabor member the board was to have until it should have been captured by the Republicans fifteen years later. He came over to recruit me at the end of September. Wyzanski telephoned to urge me on. Wechsler thought it would be beneficial to the Gardner Career. Biddle, with his unreflecting candor, said that he told Perkins that I was very good, got along with people well, and had absolutely no administrative experience, which is not too far distant from what I would have said had I been asked about Biddle. I talked with Frances Perkins on September 25 and entered this somewhat less than rhapsodic summary in my diary:

“Saw Secretary of Labor. Was talked at for 45 minutes. The job involves politics, tact, fighting for jurisdiction Labor Department and other unattractive duties. But sufficiently different to be attractive.”

It took something over a month to overcome the combined obstacles of my youthful idealism and a White House malfunction. I felt that as a Government servant I had no occasion to be a member of a political party, and my revulsion at the failure of Cummings and Murphy to prosecute some Louisiana hoodlums who were important political figures ensured that I did not want to become a Democrat.⁵⁴ Miss Perkins told

me that the White House would smooth matters over with Wagner and Mead, the New York Senators, if I would not go to solicit their support myself, which I did not want to do. Jim Rowe, then an Assistant to the President, had the smooth-over job but was slow turning to it. By some error my name was mixed in with routine Postmaster appointments and sent to the Hill, and the New York [S]enators were furious at being ignored. It took some weeks, including a White House plea to Wagner and a 5 minute visit by me with Mead, to get it smoothed over. It was thus not until November 1 that I left the Solicitor General's Office. My diary for that day contains a notation, whether sad or self-satisfied I do not now know, which reads:

6 years and 3 months in
Office of Solicitor General
105 briefs – 95 SCt
23 arguments – 16 SCt

I must have had a premonition that, so far as concerns my professional practice, it would all be down hill from that point forward. So it has been. The next half century (or 48 years, to be precise) has been satisfactory enough but there has never again been the abundance of varied and significant litigation to which I had become accustomed.

That does not mean that my decision to leave was a mistake. Like Brigadoon, the attractions of the Solicitor General's Office were not open to long term enjoyment. As might by now be suspected, I tend to be somewhat exacting as regards [m]y superiors, and there have over the years been a

railroads in the war, of which I didn't want to be general counsel. There was a suggestion that I might want to be general counsel of OSS, of which I never heard after saying I would be interested. There were other less dramatic thoughts which didn't find their way into my newly Biddle-constituted diary.

54 I note for the record that shortly after Eisenhower took office I drove through storm and thunder in order to register as a Democrat. That was because Attorney General Brownell, in my view, was prosecuting former White House aides for minor peccadillos but really because they were Democrats. It is hard to make rational explanation of the difference between prosecuting and not-prosecuting for political reasons, but the distinction is nonetheless an important one.

good number of wholly deplorable Solicitors General. At the same time the truly gifted ones, as Archie Cox and Erwin Griswold, have maintained a tight hands-on control of their Office which I would also have found distasteful. Beyond all that, I believe experience has shown that the ranking attorneys

in that Office began to wear out their enthusiasm and thus their skills before a decade has passed. So, with unspoken thanks to Messrs. Reed, Jackson and Biddle for having hosted a splendid party, I got into my pumpkin coach and went four blocks west, to the Labor Department. *gB*