We have discussed the N.R.A. and the A.A.A. cases. The second Gold Clause case was not a very important case. It had to do with a very public utility in Massachusetts that had their payments that they had to make, that were made to them, by factories that used water power, to be paid not in gold coins, just in gold, not in money. That made a little variation. The decision was made that would cover that phase, too.

The Public Utility Holding Company Act was an extremely important case, because it involved the Securities and Exchange, and the holding by them, by a single holding company, of many public utilities. It was upheld, merely as a policing organization, whereas in interstate commerce there should be power in the Federal government to require that holding companies should at least register. It never went any farther than registration. Later cases came up as to whether they had to divest themselves of part of their holdings. When you once got the principle established that they had to register, it necessarily followed almost that the government had the right to say how they should manage their business, what limitations they should be under.

I don't think there was anything singular in the preparation or argument of this case. The man who worked with me on the brief was Paul Freund, who's now a professor at Harvard, and the group that had worked with me on the others. Actually, it was a man by the name of Warner Gardner, who came from Columbia, who was an extraordinarily capable man. He was the first person that I'd known who had taken the

course in drafting of state and Federal legislation at Columbia. It was originated about the time that he was in school, two years before. There is much criticism--properly much criticism--of the sloppy drafting of both Federal and state legislation, not so much today as prior to that time, back in the early part of this century. The draftsmanship was not a specialty. Now you know they have a drafting group that meets with Congressmen to draft legislation. Columbia had started the first--indeed the only course I ever knew of--in drawing up proposed bills, and Gardner had been very successful in that.

You could say that some of the New Deal legislation was declared unconstitutional because of sloppy legislation. I don't think that's all of it, because say in the N. R. A., they had gone so far in delegation that the Court said it went beyond the limits of the constitutional power. Congress can't delegate its legislative power. But they can delegate the administration of an act after it's been drawn. That was criticized by Justice Cardoza as delegation run riot. It was a problem of how far you can delegate. It's still a problem of just where to draw the line. But I wouldn't say it's been drawn carelessly--as a matter of fact, the bills were drawn quite carefully, and there was much discussion within the administration of the drafting of bills.

You take the Wage-Hour Bill, which of course had very important features. It was drafted and re-drafted, at the various conferences that were held as to just what approach should be made so as to get the advantage of the general welfare clause in the Constitution.

Certainly our office did not assist in the drafting of most of them,

but in those that the administration was interested in, and that had strong political overtones.

I don't recall having anything to do with the SEC bill. The Wage Hours, yes. The second Triple A, the recovery of the large amount of money that was collected improperly under the first Triple A. The N. L. R. B. There were many conferences over that. There were some very able people in the White House. Judge Rosenman was in on a number of acts, took an active part in the discussion and the drafting. Of course, there was Corcoran and Benjamin Cohen, who were intimate with the White House, and were called on and were able to do excellent draftsmanship. They were both well educated, competen men, and were relied on by Mr. Roosevelt for many of the things that he was interested in which were administrative--administration legislation. They'd be called in. There'd be discussions. A few times I was asked to come over to the White House and sit in on one of those. The President would also take part in the discussion, as to suggestions that might be made about messages to Congress on this bill.

The ones I've been speaking of were altogether those that came out of administrative agencies, and of course the agencies hadn't been created, because they were just about to be created through those bills.

I don't know if Frances Perkins contributed to the drafting of the N. R. A. or the Wagner Act. I'm sure she was consulted about it, because she was a very competent person, and knew well the conditions. But I don't recall her sitting in on discussions. I'm referring to discussions of four or five people of technical questions.

In the Public Utilities Holding case, I would say that Dean Landis was the most active person in that. He, as you know, was later dean of the Harvard Law School. He was not only competent but extremely able lawyer in his own right, and his advice on the technical matters was both sought and followed. So far as the actual originating of the idea, I think a thousand people had thought of it and worked on it. Corcoran and Cohen were very active in the drafting of that. Corcoran (Cotton & Franklin) had been an associate of an important law firm in New York--Wright, Gordon, Zachry & Parlin. He was competent to draft a bill of that type. He had been drafting trust instruments, bonds, stocks, and so forth in New York, and contributed greatly to the formulation of the words that went into the act, and was interested in it as a protective measure for the control of the conditions that had arisen before the Crash. Cohen was a man who had great facility of expression. He could contribute greatly to the choice of the proper word to describe what you wanted to.

The next one, the Railway Labor Act, I'm not sure what that refers to. I think that's the case that I argued on the Virginian Railway. If it is, it was an important case. I'm not sure that I realized how important it was going to be when I argued it. It was on how far you could go towards the regulation of negotiations between the railway workers and the labor unions themselves. We hadn't realized how important that was going to be, and as you know, the railroads had had a great deal of trouble with strikes for many years, and I'd had some part in litigation over that through the Chesapeake and Ohio Railroad that I was district

counsel for in Kentucky. We'd had a switchmen's strike down in Kentucky that was very bad in the late twenties, before I came up here. I was interested in that, and the railroads were just as much interested as the workers or managers, because there's nothing that's as costly to the railroad as a strike. They'd been trying to work out some method of adjustment between them, and for all practical purposes, the bill was really written as a matter of agreement between the railroads and the railroad workers. While there were many things that they fought over, fundamentally they were very glad to have it, because otherwise the railroads had come to the realization that they couldn't deal with five, six, eight, ten thousand workers individually. You can't do it. You have to deal in a different way.

Of course the Association of Engineers and the Association of Switchmen had become very powerful political and economic entities. They really sat down among themselves and worked out the bill that was acceptable to the administration and acceptable to Congress. There were many people who were interested in it in Congress, who came from railroad districts. The whole thing was just a question whether the Congress had the power to effectively deal with the labor aspects of interstate railroads--and they were all interstate by that time. The day of the small railroad was about over. They'd been combined from 1870 on down. They were put together from small pieces that had originally been railroads, one from Baltimore to Washington, that type of thing. And they'd all become interstate. So it was a perfect field for it. There

was no question about the interstate character of railroads.

So when it was presented to the upreme Court, they had had enough experience with those things obviously to grasp it with no difficulty and see the necessity of it, and from my point of view, and I think from most lawyers' point of view, there's no question about it, because we'd already had the early Coronado cases; the first and second Coronado case had shown the principle by which the whole control of interstate commerce had grown to what it is today.

In the Wagner Act it was not at all a case of most of the lawyers feeling it would be sustained, because there had been a number of cases when this Court had held that production, w ether it was in a textile mill or a steel mill or a factory of any kind, that production itself was essentially a local matter. And while it had been held equally well that so far as transportation is concerned, it was interstate, making a great difference between them. Then in transportation there was always a recognition of government's interference; that went on back to the I. C. C. and even before that. You couldn't even build a canal like the Erie Canal without state help, government help. Then came the period of state aid to canals--Ohio, Baltimore, the Chesapeake Canal here, all those. People had accepted the fact that in transportation you always have government assistance. We had the new system of airplane traffic; it received the same governmental aid. Roads. Any transportation has to have governmental aid. That was a help for the railroads.

I would say that before I argued the Wagner case, I felt that it should be sustained by the Court as it was then constituted. However,

there was plenty of reason to doubt it. We had lost cases right along that were very similar to it. One of the ones that was lost was the coal case, the Guffey Act on coal. Also that was quite a blow because we thought that that was something pretty closely akin to the National Labor Relations Act. I remember it particularly because of course I was then Solicitor General. Ordinarily the Solicitor General doesn't argue except in the Supreme Court of the United States. Well, we had lost a good many of these N. L. R. B. cases in the circuit courts, so I lost several of them, and I said to my group, "I'm going down and argue these cases myself. There's no reason to lose there. I'm going to argue it down in my own circuit, because there they know me, and they're very excellent judges, and I'm sure I'll be able to show them that this is a perfectly constitutional act, in view of the Coronado cases and the cases of the grain areas of Chicago . . ." we called the rates on the markets at Chicago wheat because wheat was moving interstate, which didn't seem much different from controlling the wages, or at least negotiating over the wages and working conditions, which is what N. L. R. B. was.

So I went down to the court of appeals of the sixth circuit, which was held in Cincinnati where I'd been accustomed to arguing when I was practicing law in that circuit, and knew the judges, in the way that a lawyer knows judges. I had respect for them, they had respect for me. When I went there, Miss Florence Allen had been appointed one of the judges, and I felt sure she would be thinking a good deal in that direction.

When I got there I found that while she'd been on the panel, she'd had an accident a few days before and couldn't sit, so I had Judge Moorman and other judges who were not sympathetic to my point of view. And I had a very hard time, and they almost refused to listen to me. Finally one of them said to me, "We've asked you three or four times to distinguish this act from the Guffey Coal Act, and so far you haven't answered that question."

Well, I'd been answering it for some time, so when I started out again with about the same argument, he just closed the brief and closed the book and sat back and never said another word the rest of the argument. That was the Fruehauf Trailer case, and I lost that case, just as everybody else had been losing them before. It came up to the Supreme Court, and of course eventually the case was won. (April, 1937)

A great deal was done by the quality of the National Labor Relations Board that was appointed. Even today, if you examine the people that were on that board, they were representative of good quality men. There's a man by the name of Charles Fahy who was later Solicitor General and is now a judge of the court of appeals of the District of Columbia. He was the general counsel. And I think his handling of the problems connected with that had much to do with public acceptance at least of the desirability of the board. The public's attitude that such a board was desirable probably had an effect on the attitude of the Court, when you come to look at things that necessarily have some incidents of commerce connected with them.

The case was of course a very important case. We followed our practice of inviting the general counsel of the National Labor Relations Board to take part in the argument, and it's one of the few cases which was recognized then as being a very important case, because all the arguments are included in the printed volume of the United States Supreme Court Reports. That was done because the supposed importance of the case brought it this wide publicity, and it was argued every place and talked of every place.

The work on the brief was done by Judge Wyzanski of Massachusetts and Charles Horsky. They worked very hard on those labor briefs. And by a Columbia man whom you know, Professor Herbert Wechsler. He was called in to advise us on that matter, and rendered great service. He didn't wholly approve of all the things that we said in the brief, so his name doesn't appear on it, though he had taken part in the analysis of it. That was at his request. He thought we had gone perhaps too far in the commerce clause. But his general advice on the problem was very helpful.

The Processing Tax case? I understood that to mean the case that recovered for the government the amount of money that had been improperly paid under the old AAA case. I think we did discuss that. That was a billion dollar case, which after all is a lot to have involved in a single case.

On the Gold Bond Refunding--I don't know what that means. We had a case from the Dixie Terminal in Cincinnati that involved a

gold clause, where there'd been some refunding done by the Cincinnati Power Company, I think. It's called the Dixie Terminal, where they built a great terminal building to house the business that passed between Cincinnati and Kentucky electrically. They had some gold bonds. I remember it particularly because it's the only case that I argued against (with or against) the lawyer who later became Senator Taft and a nominee for President, Robert A. Taft. That was back when he had no yet come into great national prominence, although he was well-known in the community from which he came, and of course well-known throughout the country because of his father's Presidency. That case was argued by him on behalf of the Cincinnati bondholders, and of course he made an excellent argument. The momentum that had been obtained by the previous gold clause case nevertheless carried over into his, necessarily; there was not any great difference in it, although there were differences. By analyzing the brief you can find where he had subsumed the correctness of the other decisions, and yet had gone far with his own views as to why these gold bonds should be paid.

The T.V.A. power case--the T.V.A. had already been settled, but these cases involved problems of whether arrangements could be made with cities, so that they had power from T.V.A., and what their stockholders could do to object to it, and so forth. There were several of those cases that went along together. The briefs were all drafted in the Solicitor General's office, but just who worked on it I don't know.

I certainly thought I had an unusually capable staff of men. It

was accidental in one sense. I was given absolute carte blanche by the Attorney General to have anyone that I wanted, from the time I wen there. I don't remember when he first said it. It was thought that the Solicitor General's office had not been as strong as it should be. As a matter of fact, the Roosevelt Administration had not been in too many years. In '35 it had been there three years, but it hadn't been very successful, as we've seen (in Court) at least not heretofore. When I came here not many new people had been recruited into it. I was given the privilege of bringing in anyone I wanted to and asking anyone I wanted to.

A man that I took over with me was Professor Paul Freund, now of Harvard who had come down to work at the R.F.C. when I was over there, and I had come to know him there and to respect his abilities and judgment. There was at the R.F.C. also Mr. Corcoran that I've spoken of before and Mr. Cohen worked over there, or at least was around there a good deal. Mr. Corcoran had done a good deal of recruitment for the R.F.C. Those were largely the boys from Harvard that came there. Well, he had made suggestions, and probably continued making them, although I have no one specifically in mind.

Judge Wyzanski came there a little later, after I'd been there some little time. He had been over in the Labor Department--or, perhaps he'd gone to the Labor Board later. But at any rate, he'd been around Washington and belonged to that Harvard group that was quite active. Mr. Warner Gardner, of whom I spoke a while ago, had been at Columbia, and he was a law clerk of Justice Stone, and Justice Stone

had suggested to me when I went over to the Solicitor General's office that here was a likely young man who'd be around here, and wanted me to look him over.

There was another very competent man who worked a good deal on things for me, particularly the tax matters, by the name of Arnold Raum, who had been at R.F.C., where I'd come to appreciate his good qualities. He was interested in taxation. He's now one of the judges on the tax court. He'd come over from the Department of Justice, and helped in tax matters.

Of course, Robert Jackson had been with the Treasury Department, general counsel of the Internal Revenue Bureau. When he came over to the Department of Justice, he worked very closely with the Solicitor General's office, and he had gone down and gotten hold of one or two good men. He wasn't in my office, but we worked very closely. He was in another division there (probably tax), but he was interested in arguments, and i was quickly found out that there was no better advocate to present a case than the later Justice Jackson. He and I worked very closely together and were very intimate.

There was a man by the name of Golden Bell from California who just came and asked for a place there, and sold himself. He was diverted from the direct work of the Solicitor General's office because Mr Cummings took a fancy to him. He wrote many of the drafts of the opinion of the Attorney General. He worked on the examination into bills that had been passed, or that were going to be enacted into law, before they were approved by the President, for their legality.

Thurman Arnold was the same way. He'd been a professor up at Yale. Bob Jackson sold him to me. It was when the Attorney General was away one summer, and Bob came in and said, "Meet this man, he's awfully good. Perhaps he has a sabbatical year--if we can get him down here, he'd be very useful. He's the man who has a new idea every day."

He introduced him to me. So he was brought down.

John Abt? No, I don't recall him. I remember the name, but I had nothing to do with his coming here. I had suggestions from Columbia on men, and Justice Frankfurter--of course at that time he was at the Harvard Law School. I had come to know him through Mr. Corcoran, I think, who had brought him in when I was on the R.F.C., and he had suggested several names. Some of them were taken. I'm not sure just who they were.

There was Mr. Charles Horsky. He was another very capable man that we had. He'd been a law clerk to Justice Stone. Whether Justice Stone had suggested him to me or Professor Frankfurter, I don't remember. At any rate, he came.

Yes, hey were talented; that was true all through the government. The reason was that there were not many openings, and the government was the place where they could come and get a salary of two or three thousand dollars a year, which was so much more--well, they couldn't get any anyplace else. They had to go to work in filling stations. Things like that.

We still get that kind of talent here, in the Supreme Court.

The law clerks are of that quality.

Things like this happened. Governor Max Gardner, whom I'd known, went out as governor and he had a legal adviser in North Carolina. He said something to me about "This is an awfully good man, and I'm going out, and why don't you take him on at the R. F. C. ?" We took him over there, and pretty soon he was doing awfully well.

He came in and said, "How am I doing?"

I said, "Fine."

He said, "Could I expect an advance?"

I said, "Yes, certainly. You get the regular raise at the end of six month ."

"How much is that?"

"Two hundred dollars a year."

He said, "Well, that won't do me. I can't get along on that. Couldn't I go out in the field?"

"Yes, where would you like to go?"

There was a vacancy in Georgia. I said, "There's a place down there now; would you like to go down there?"

He went down there for $2400 or $2800, or $3000, whatever it was, and pretty soon he formed a firm there. We had representatives around over the country. The next thing I knew he was handling the Coca Cola business and quitting us entirely, just giving us a short time. He became later the secretary of Coca Cola, and a high official of the company, and went on to a salary much higher than anybody else that was around there. But there were many of these young men.

You see, the trouble is that ordinarily, when the Government is not expanding very rapidly in some agency, government progress is so slow. A man progresses like I would think would be true in an institution like Columbia. No matter how brilliant and able you are, there are people ahead of you who just some way you can't get past. It's only when something new comes along that you have a chance to show what you can do.

Well, these were all new things. T.V.A., the work that was done down there--not just the law work, but the whole conception. It brought many people to the fore, all the New Deal agencies did, who wouldn't have been heard of otherwise. Mr. Jones was no more capable after he got to the R.F.C. than he was before he came there, but it gave him an opportunity to show the great capacity that he had. That's true with the Solicitor General and the Solicitor General's office. Chance has a lot to do with it.

When I got appointed to the Court in '38, Mr. Roosevelt had never spoken to me about it at all before, and I'd rather given up. I think I told you before I thought I would have to wait until there was a vacancy from my part of the country, because Mr. Cummings told me when Justice Black was selected that my name was laid aside at that time because the President said, "He'll have to wait until McReynolds goes," or whatever the language was. That was the last I heard of it.

At any rate, it wasn't long until this other vacancy came, and there was discussion that I might be appointed, but there was discussion that other people might be appointed also, when Justice Sutherland retired.

I don't think the strong stand Mr. Cummings took in favor of the Court reorganization plan had anything to do with his not being appointed to the Court. I don't think Mr. Cummings wanted to go on the Court. He was a natural lawyer, in the sense that he enjoyed the law, particularly the higher ranges of the law, where he was in a position to draft bills, or if he was in active practice he enjoyed that. He had an important firm in Connecticut that handled larger legal affairs in that state, and he wanted such a firm here. Ne never showed any disposition to wish to go on the Supreme Court. He knew that it was a hard place. He knew that he was in the middle sixties at least at that time. I remember his 60th birthday that he had shortly after I went there. He thought he wouldn't have a long service. It was the practice to put no one on the Federal courts who was over 60 years of age. Now, that wasn't an unbroken rule. Some exceptions were made, if a man had had his birthday the day before, or even might be a few years older. But it was not thought desirable that men beyond that age would be put on the Federal Courts. It would give them an opportunity for experience and development that they couldn't get the best out of. With very few exceptions, that was done, and I'm sure that had some effect on Mr. Cummings, because he was a man who wouldn't want to do something himself that he had advised the President not to do with other people. But relations between President Roosevelt and his Attorney General were very close, and so far as I could see, and I'm sure I would know, there was mutual respect between them and they worked very well together. If Mr. Cummings had really desired to go on, I suppose the President

would have made an exception in his case. But he never indicated the slightest desire to do so. In fact, he indicated quite the contrary, that no, he didn't want it, he'd have a lot more fun arguing cases and trying out various legal matters in the Court than he would sitting on it. Of course he had been active in the Court Enlargement Bill, but that wouldn't have been a factor. Nobody was questioning the appointments Roosevelt made at that time, and he was making appointments that were acceptable to Congress. Mr. Cummings was entirely acceptable to Congress. I haven't the slightest doubt he would have been not only nominated but confirmed if he had really expressed an idea to go on, or if anybody had brought his name forward and the President had thought he wanted to go on.

I don't think the President asked me for suggestions as to a successor in the office of Solicitor General. It was known that Jackson would succeed me, I think. That was generally assumed. He was then assistant attorney general. I think I told you about his telling me that he would rather be Solicitor General than Attorney General. It was a small incident, but it showed the quality of mind of Jackson.

From time to time there were rumors of Mr. Cummings' retirement, because he'd expressed a desire to form a law firm, which he later did, and practiced law here in Washington. Whether it . . . perhaps he wanted to make money, or public service, or whatever. Every now and then there would be suggestions that Cummings was about to resign, and sometimes people would say that I would succeed him. This time, though, the general impression was that Mr. Jackson would succeed him, because Mr. Jackson was thought of as a possible candidate in New York for the

governorship, getting him ready for the end of Mr. Roosevelt's second term. It was talked of at the time, so that it would be a natural thing to promote him to the Attorney Generalship.

He came into my office one day and said, "I've just been over to the White House, and I told the President that I'd seen some of this talk about me being Attorney General when Cummings went out. I told him that you deserved that place, and that I would not accept it."

Well, that's unusual, to have a man tell you something like that. In fact, it's the only instance where it happened in my life. I said, 'Well, I certainly appreciate that. No reason for you to do that, if the President would rather have you or thinks that's the best thing to do"--whatever I said, I don't remember the words.

He laughed and he said, "Well, I'll tell you. I'd lots rather be Solicitor General than Attorney General, and if you become Attorney General, just help me out on the Solicitor Generalship."

That was merely natural again. He was a man of that type. He was generous to his friends, and ambitious for himself, too.

The first I heard of my appointment was when I was called to the phone and told that the President wanted to speak to me--which happened, not every day, but several times a year he'd call me up about something. He said, "Well, Stanley, I'm afraid I'm going to have to ask you to resign the Solicitor Generalship."

I wasn't surprised about it. I knew what that meant. I said, "Well, sir, . . ."

He said, "Yes, I've just sent your name up in nomination for the vacancy of Justice Sutherland on the Supreme Court. Won't you come over and have lunch with me today?"

That was all that was said. Maybe some other pleasantries passed back and forth. That was the first I heard of it. Later Senator Barkley called me up and said, "Your name's just come in--nomination for the Supreme Court."

I said, "Mr. Barkley, I'm very happy," and he said, "I'll do everything I can to see that it goes through all right." That was not unexpected either, because he'd been a very staunch supporter of mine. A fellow-Kentuckian. I'd come to know him. I went to California with him. I think that was where I came first to know him, the year before, back in 1920. There he'd been a candidate for office. He really owed me nothing, because when he was a candidate for governor, I was for Campbell Cantrell who was his opponent. However, when he came down to my county campaigning, I took him around to introduce him to the politicians there. He always seemed to appreciate it and was always very kindly disposed towards me, though I hadn't done as much for him. He came from the western part of the state.

My name went before a judiciary subcommittee, of which Senator Logan, who was the other Senator from Kentucky, was the chairman. So I had a relatively simple time before the committee. The confirmation went through. There was no vote--I don't think they took a vote on it. I don't remember. Anyway, it was nothing at all.

Well, I was in a peculiarly good position, because I suppose I knew every Senator, Democratic and Republican, at that time, having worked with the Federal Farm Board, the R.F.C., and then as Solicitor General, and I'd been active in getting about. I was young then. I saw them all, and they all knew me. Nothing had gone bad. Everything that I had done had gone very well.

No, the office that we're in now was not my original office when I came to the Court. Justice Sutherland, who had been here before me--it was his retirement that brought me onto the Court--had had an office on the corner over next to the Folger Library; on that corner of the Court are the best offices in the building, because they have more light. The others are closed in. The worst office in the building is the Chief Justice's. It's badly designed, a dark little hole where you can't even see to read without a light. But these two corner offices are very nice. This is a corner office here. The secretary's office is there, and the law clerks'office is here, so it makes it possible to go between the secretary and the law clerks without going through the Justice's office--the three offices open that way, which makes it very convenient. That's where the best light is, and the Library of Congress and the Folger Library, it's a beautiful outlook--I've spent 19 or 20 years here in that office, never changed.

Then, when a Justice leaves, the ranking Justice has the choice of the office, if he wants it. So I had to make a change, because I had the best to start with. Sutherland was an older judge and one of the few who worked at the Court, so they gave him the first choice of offices

when they came over here.

When I came in here, I had to excuse myself from cases that I had directed to be brought here, and on many of them of course in the earlier years I had worked on the briefs that were presented here. No, I didn't sit in on such cases; I would just leave the bench. Probably for a year I had a smaller number of cases to work on than the other Justices. That was really an advantage for me, because obviously coming from practice, never having had any judicial experience, it was difficult for me to do the work that I was supposed to do.

There were no problems in adjusting to the tempo and customs of the Court, after the first meeting. I remember being quite concerned, because I'd understood that the Justice who was latest in appointment, the most recently appointed, gave his judgment as to how the case should go first, and I thought that would be quite difficult, since some of the cases were cases where I obviously wouldn't know as much about what the Court had been doing as the Court itself was. So I had a great advantage when I came here, because the Solicitor General is the person who sees every case that comes down from the Supreme Court, during the three years that I'd been there, and is more intimately in touch with the newer cases in the Court--the briefs in the matters we had been dealing with. Take the matter of taxes. We had many, many federal income tax cases that I had worked on and argued and so forth. So I was better prepared--I'd had an opportunity to be better prepared--than almost anyone who might come to the Court.

But I know the first conference, I was somewhat concerned as to

whether I would acquit myself well or not; worked very hard to know all about the cases, and was happy to find that the then Chief Justice, Mr. Hughes, than whom no one could better understand a case or state it, was the one to state the case first. Chief Justice Hughes first stated the case. The conception I had had was that the youngest or newest Justice speaks first, but that only applies to the vote. After the discussion, which goes from the Chief Justice down to the newest Justice, then the vote is taken, and the vote starts with the newest Justice and comes back up. But by that time you know how everybody else is feeling about it, and about how they're going to vote, or substantially so. There may be some change as the discussion goes on, but you have a very good idea. So the new man does not need to be embarrassed over having to take the lead when the Court has more experience than he has.

This is one interesting thing, though. The first case that I heard was Erie Railroad v. Tompkins, which has come to be a famous case in the United States. It overruled the doctrine of Swift v. Tyson that had been in effect for over a hundred years, that so far as trials in federal courts are concerned, the trials which would take place--no federal trial court or district court covers more than one state. Most of them were only small sections of the different states, you see, so there's something like 130 district judges, perhaps more than that now. At any rate, the law had been that in matters of general law, the federal courts would exercise their own judgment as to what the law should be, and did not follow the state law. That was the doctrine of Swift v. Tyson, and had

been so applied. There had been some criticism of it, because the law in the same state might vary as to whether you were in the federal court or the state court. So there'd been some discussion of it, but I had never been particularly interested in that. My federal work had been largely limited, when I was in practice, to court actions, and one or two constitutional cases that had involved organization of farmers into unions or cooperative associations. I hadn't had wide experience in the federal courts, and I don't know that I'd ever questioned the rule at all. So to have this case brough up the very first thing was very interesting. That case has become the most prolific source of litigation in the twenty years that I've been on the Court, and still is, because it means that the federal courts have to know the state laws and the variations in them. Like today, we have cases all the time as to what is the state law and how it should be applied. Certainly it is the case that's been most often cited since I've been on the Court, the first case that I heard.

Another mildly interesting thing about that is that I didn't dissent in the case--Justice Brandeis wrote the opinion, and he went farther than merely to overrule the preceding cases. He gave a new interpretation to the doctrine of the authority of the federal judges in those cases, and said that the old doctrine of Swift and Tyson was unconstitutional, because Congress had no power to declare what the law should be in its federal courts. I thought he was wrong about that. You can understand the great respect I had for Justice Brandeis and the great knowledge he had of law, and also all the other judges went with him. It was pretty difficult for me, on my first case, to disagree with him, but I did. I concurred in the result,

but I concurred in the result on the ground of the statutory construction, and said that if it were a constitutional matter I thought Congress would have power to declare what the federal law was, whether it was to be administered in the states or not, and that all they had to do was to say, under the Rules of Decisions act, that it covered not only the laws of the state (which always had been enforced) but it covered the decisions of the state that they had handed down on the particular questions of law that came up. That seemed quite heretical at that time. It's been pretty well accepted. That old case of the Erie Railroad and that statement has never been overruled. But it's been cut into, and it's been greatly commented on, and just in the last number of the Yale Law Journal (Dec. 1957), or one of the last numbers, dedicated to Justice Frankfurter, they speak of this concurrence of mine and my objection to it, saying that this may well be the most important opinion that Justice Reed ever wrote.

No, I was not at all in on the cases I didn't sit on. When you withdraw from a case, the other Justices don't discuss it with you. I would have a feeling of impropriety in discussing with a Justice a case that I felt that I shouldn't participate in. You don't carry that to ridiculous extremes. One would stop you in the hall and say, "When you were working on that case, did you run onto such and such a case?" or anything like that. I'm sure that's happened to me, and I would say, "Well, you'll find that was overruled in a later case," or any information I could give to be helpful.

If a case came from the Government, and I hadn't worked on it, I participated. I made this as a rough rule--that if I had signed any paper

in it, as a direction to anybody, or if my name appeared on the papers, then I didn't take part. I think I told you before that when I was Solicitor General, the practice was that no appeal could be taken without my written approval, any place, from one court to another. That was to avoid--even if it was from the district court to the court of appeals, we didn't do that without authority. Of course, the fellow who tries the case is always sure that he's been badly treated below, and he'd appeal every case, all the way to the Supreme Court. It doesn't cost him anything. You're just convinced that you're right about it, you know, whatever position you take, and if you reach a conclusion that the Government was wrong about it, you'd settle the case, you'd say, "All right, the other fellow wins." Well, that made it impossible, I thought, for me to participate, since, while in a few cases you might take the appeal because there was doubt and you wanted it settled, and you might think contrary to what you argued, mostly you were convinced.

I think I told you once before about one appeal that I took where I took two different appeals. In one place we won, in another place we'd lost. I didn't take the two appeals--I'm not quite correct about that--but exactly the same legal problem arose in New York and in Massachusetts in the district courts. In one state we won, and in the other state we lost. So in the state where we'd won, I refused o settle, and in the state where we lost I took the appeal, and then when the other fellow took the appeal, he came to me and said, "How can you defend this before the Supreme Court when you've written a petition for certiorari in the other; you ought to settle with us."

I said, "No," because I'd argued both of them.

It was that situation. Miss Cross--unfortunately she's no longer in this world--who was a very capable tax lawyer, either volunteered or was asked to argue both of the cases in the Supreme Court, one on one side and one on the other, and she did. She simply presented the arguments, as we wrote the briefs and brought them up, as to why one of the courts below was right and one was wrong. I think the Court appreciated it. Everybody appreciated it except the man who had won below and didn't want his case brought up here.

The Mooney case came up early. (You're familiar with the case, of course, and this is not the place to go into a general review of the situation, which had lasted since the First World War, 1915, back a long time.) There were matters connected with it that raised questions in regard to the propriety of the conviction. Mooney was seeking a writ of habeas corpus in order to secure his release from prison, claiming he was unconstitutionally imprisoned. Now that is a commonplace, but at that time it was something new. It was rarely if ever resorted to. From my own experience, the Mooney case was my first experience wi h it. Mooney claimed that he had been railroaded to jail unjustly, and that there was knowledge in the hands of the prosecuting attorney, state's prosecuting attorney, that could have cleared him, and that it was concealed and not used, and that actually he was convicted in a manner that violated the Federal Constitution.

The Mooney case was a cause celebre for years, of course. I'll tell you an interesting thing about that. When the Mooney petition for

certiorari came here, on the habeas corpus, it got here some time in the spring of 1 938, just after I'd gone on the Court. We had funds that we used for the printing of in forma pauperis cases--Mooney didn't have a nickel, of course--and the Chief Justice in conference one day said, "The Mooney case is here, and the clerk has made an estimate, and it will cost $50,000 to print the record." Well, that was more money than we had. It had been going on since 1915, as we said. There was a discussion, and it was decided that instead of printing it, the record would be shipped around to each one of us, to the places where we were in the summer, and that would give each of us several weeks to go over it. That was done. I was up at Nantucket that summer, and it was shipped up to me, and it came in a box that looked about the size of a piano box--nearly as large as one of these desks. Thousands and thousands of pages that one would have to go over to get a general view of the case.

You asked me how we settled it. It had been filed in the federal courts, as I recall--the petition for habeas corpus--and the courts below had refused. The doctrine that you must first try in the state court probably originated right there: that the state court should have a method of deciding whether or not a man should be given a new trial; that you had to go to the state court first, before you went into the federal, to avoid a conflict of jurisdiction between the two. There'd been a famous case called Mooney v. Hollohan, where this Court said: "We will not assume that the State of California will not redress any injustice, unconstitutional act, that has been done in her courts, that's brought to the attention of the Court." That was in 1935, before this.

Then, from that, Mooney went into the California courts and sought relief by habeas corpus. When he did, the California courts decided that as a matter of fact--not as a matter of law, but as a matter of fact--there had not been any such suppression of evidence, or anything that injured the constitutional rights of Mooney. Therefore the California courts decided against him.

When it came up, I thought--and Justice Black did too, I'm sure, although I don't mean to speak for him--that they had made out a sufficient case to show that there had been injustice done, even if the prosecuting attorneys hadn't actually suppressed evidence that would have been beneficial to him. So I voted to bring it up, and announced my decision on the matter. The rest of the Court of course thought that he hadn't shown that there was any such injustice. Justice Black agreed with me. I don't remember whether our reasons were exactly the same or not.

I think the language you quote is quite accurate: that a case is given certiorari if even four Justices strongly urge it. It's what has been repeatedly said in this Court. As a matter of a rule of Court (though I don't believe it's been written into the rules) there's never been a variation from this: whenever four Justices think that certiorari should be granted, it's granted. I never heard it quoted as "two Justices" any place except in the quotation you just called my attention to. With three, it's quite frequent, but it's never done because there are three. It's only done because someone else says, "Well, if three of you think it ought to come here, I don't think so, but I'll join you," and then that makes it four. But there's never been a rule that three would be sufficient to bring it here,

and ;certainly no rule that two would be sufficient.

I have no independent recollection of our discussing why or why not the grant should be reviewed--if I had, I probably wouldn't tell you--but as a matter of fact, I have no recollection of that at all. The record itself discloses that two Justices wanted not to bring it up. But speaking generally, of course there's always discussion certainly of a case that had as much publicity and interest as the Mooney case. It had been here a time or two before, and I suppose that the older Justices had their minds pre tty well made up about the whole thing. There'd be no rule about that. Every case that comes up ;here is not elaborately argued at the conference. You express your views, and if you're not content, eight people are against you and you're convinced you're right, you can't take more than fifteen or twenty minutes. There's no limitation on talk, but actually you have too many cases, you can't stop on any one of them ad infinitum. I have no recollection that there was discussion on that. I do remember the case, and the reasons that led me, and I suppose Justice Black, to vote to bring him up.

No, those reasons are not available in a written dissent, because you only noted your dissent in a certiorari. When a certiorari is refused, you can if you want to express views as to why it should have been granted, but normally it's only a n otation of dissent.

Why did I dissent? Because I thought that there was enough evidence in the case to indicate that it should be heard, and the record examined more carefully than you were able to examine it in a petition for certiorari. I don't recall that I was convinced one way or the other, but I thought the man was entitled to present his case before the Court, and I'm sure that would be Justice Black's view, too.