

INTERVIEW XXXVIII

DATE: November 15, 1988

INTERVIEWEE: JOSEPH A. CALIFANO, JR.

INTERVIEWER: Michael L. Gillette

PLACE: Mr. Califano's office, Washington, D.C.

Tape 1 of 1, Side 1

G: You sent the President a memo on November 21 [1966] outlining Stuart Saunders' claims regarding the administration's commitment to help the [Penn Central] merger along.

C: Saunders had talked to me on the phone and he (inaudible) to see me prior to that time. And I had asked Ramsey [Clark] his view--as had others like Marvin Watson, I guess, independently--and the position of the Justice Department in the general sense was to oppose the Penn-Central merger.

(Interruption)

G: --in the merger to begin with--

C: I must have become involved because of Stuart Saunders coming to see me. Now, whether the President said, "See him," or whether Marvin or somebody asked me to see him, I don't know, and is calling me. I would have seen him under any circumstances, which is why I don't know, because he was a friend of the President's and he was a, I think, financial supporter, of the Democratic Party, or at least the Lyndon Johnson Democratic Party.

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G: But he took the initiative, as you recall.

C: Oh, he took the initiative and pressed very hard.

G: Do you recall what he said in those phone conversations?

C: No, I mean, he said that he wanted the merger to go through. That it had been years in the making and it was critical and essential for the survival of the railroads on the East Coast.

G: Did he feel that he had a commitment from the administration to--?

C: He told me that he felt he had a commitment. And he gave me the memorandum for the record that Robert Kennedy had written on September 3, 1964, reflecting his conversation with Saunders on August 1, 1964, in which Kennedy said that while the Justice Department was opposing the merger before the ICC [Interstate Commerce Commission], if the ICC decided that the merger should go forward, the Justice Department--that he, as Kennedy put it, quote, "I did tell Mr. Saunders that I would inform my successor by memorandum which I have placed in the department files, that if the hearing examiners recommend a decision should be contrary to the government's position and favorable to the merger, and the merger applicants have by that time formulated terms for inclusion of the New Haven and the proposed Penn Central system which is satisfactory to the New Haven trustees and to the district court, then, unless circumstance of material change, it would be my recommendation the Department of Justice not continue opposition to the merger beyond that point."

On September 4, 1964--that same date--[Nicholas] Katzenbach, who was then the acting attorney general, sent this memo to Saunders volunteering in his letter, "I might add that I am in agreement with his conclusions." Saunders then went ahead and did

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make arrangements to include the New Haven, so he met that condition, and I reflect that in my memo to the President.

G: Was there political significance to including the New Haven?

C: I don't know whether it was important *vis-à-vis* the whole East Coast or the New York City commuting problems. Whether that was politically significant to Robert Kennedy, I don't know.

Ramsey took the position that the memorandum that Bobby Kennedy wrote was not binding on the United States because contrary to what Bobby Kennedy said in the memorandum, the Justice Department opposed the merger before the ICC after the hearing examiner had acted. Conditions had changed and, when this is the biggest merger in the history of the country, Justice had an obligation to tell it the way it saw it.

When I called Ramsey he told me that he intended to file a brief before the Supreme Court that said that the case should be sent back to the ICC and that the lower court should consider the non-merging railroads in its decision. Saunders told me that he thought that would be a violation of a commitment by the administration.

At the time I sent the President this memo I did not know where he stood. I guess the President got the memo at the Ranch and called me on November 23--or Jake Jacobsen called me on November 23. Well, he called me; he did talk to me late that day, but some time during the day I guess Jacobsen talked to me--this is the day before Thanksgiving. I just had several conversations with Jacobsen that day. And Jacobsen or the President, and I may have talked to the--they've got the President talking to me at 8:54 [p.m.] in my office; [it] has him calling at ten, whenever. Told me to set up this meeting on Thanksgiving Day, which I did, with Secretary [John] Connor, [Willard] Wirtz,

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[Gardner] Ackley, [Alan] Boyd, Ramsey Clark--I have Katzenbach listed here. I don't remember whether Katzenbach actually came to the meeting. He may have.

G: Did he tell you at the time how he wanted it resolved?

C: My recollection is that the answer to that is yes. He wanted the merger approved.

Now at some point before that meeting I did talk to Katzenbach and what my notes show was that what he thought ought to be done about the Penn-Central merger, and my notes say that Katzenbach, quote, "thinks memo pretty well a commitment," close quote.

We had the meeting. It was a very--well, before we had the meeting, on the twenty-first in addition, I got Alan Boyd's views, who was the deputy undersecretary of commerce for transportation. He wanted the merger approved. I sent that over to the Justice Department where they had their own independent letter, and on the twenty-second of November, the day before I had the meeting, the Solicitor General, Thurgood Marshall, said, "I remain convinced that we should urge the [Supreme] Court to reverse the district court's judgment approving the immediate consummation of the Penn-Central merger. I believe, moreover, that the course we would be suggesting to the Court is not basically inconsistent with Boyd's position." And Marshall argued that the heart of Boyd's position was that the department ought not be opposing the merger, that they just say that the ICC should be required to look at the impact of the merger on other railroads in the East.

[Donald] Turner felt that there were other more desirable ways to recast the East than the proposed Penn-Central merger. And there were strong feelings that this would be anti-competitive. The Council of Economic Advisers--well, let me hold off on that for

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a minute. Well, the Council believed, Gardner Ackley believed, that the Penn-Central merger should be consummated and the sooner the better. "We recommend the Department of Justice support the ICC." Now that memo came in the day after our meeting, on the twenty-fourth. So I probably asked for that. But by that time the President--I mean, at the time of that meeting the meeting was directed at getting the government to approve the merger. And indeed there was quite a dispute between Ramsey and Alan Boyd, Boyd feeling that Ramsey was his lawyer and not an independent judge of the merits of the merger. Ramsey feeling that they had the right to take their position they thought was right and Boyd's views were just one of the views the Justice Department should consider.

G: What about Connor and [Willard] Wirtz? Did they have a--?

C: Connor sided with Boyd. And I don't remember what Wirtz' position was.

Ramsey also took the position that the Solicitor General had the final decision-making authority on what went into a brief that he'd file. This is not in the statute, but it's been a traditional decision of the Justice Department. I, at some point during that day, recall running down Thurgood Marshall who was away for Thanksgiving in Atlantic City, and talking to him about this and actually getting his agreement to language that we battered out around my table to be put into the brief. And the language is, for lack of a better reference, it will be in the papers that we give you on Penn-Central.

G: Yes. But Marshall did change his mind on the deal, didn't he?

C: Well, the brief was changed. The brief was changed to, instead of--let's get to that. I think the Gardner Ackley memo was done after the meeting, after we knew what Gardner's views were. Now, in terms of the (long pause) briefs that were filed, the

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contrast, the original draft, the final brief flatly said, "thus while not contesting the commission's action in approving the Penn-Central merger." (Long pause) The original draft said, "The judgment of the district court should be reversed and the case remanded for the entry of an appropriate injunction against the commission's order authorizing immediate consummation of the merger." Okay?

G: Yes.

C: The final draft said, "In the special circumstances of this case, however, such a remand may not be necessary. We suggest that the Court continue its stay and hold the case for a reasonable time after the scheduled arguments to enable the commission to correct its own error by expeditiously concluding the related proceedings." So, we fulfilled, if you will, what the President considered to be a commitment to Saunders not to ask for remand of the case.

Now, the most controversial part of this--and that language, to the best of my recollection, we worked out around the table in my office--we were actually rewriting the brief in my office, and I called Thurgood Marshall and read it to him and got his approval.

G: And Ramsey Clark did approve at this point?

C: Ramsey Clark acceded, I think it would be fair to say he acceded. I mean, Ramsey was not one to do things he didn't approve of.

Now we had here--where did we have the [Abe] Fortas--? Didn't you have the notes about his conversations with the President destroying the tape? No? That all just appears here.

G: Yes, that's all I have.

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C: That Thanksgiving Day, the night before the President called me late and I'm sure told me where he wanted to come out, he also talked to Justice Fortas a couple of times on Thanksgiving Day--on the day before Thanksgiving. On Thanksgiving Day he talked to Fortas once at 1:47 where the note [in the President's Daily Diary] says that the belt [dictabelt] was destroyed on the President's instructions. He talked to me at 2:36; he talked to Fortas at 3:06. I talked to him at ten to six that night, 5:51; he called me at 6:14 p.m. and that was related to, my recollection is, all to the Penn-Central--his conversations with me. He also, his conversations with Fortas were, to the best of my recollection, related to the Penn-Central case and what should be done.

G: Did you talk to Fortas also?

C: I have no record of talking to him that day. I mean, I've got none in my--I've gone through everything now. And there was a point, there was some time at which I talked to Fortas, on or around Thanksgiving. Now whether it was that Thanksgiving--because Fortas said to me he celebrated Thanksgiving on Wednesday instead of Thursday because there was--the President always kept him working on Thanksgiving Day. But I don't have--I just have no, I mean, I just don't remember talking to Fortas that day. The reason I'm hesitant is I think it would have struck me. I know I was struck at the time, I mean, I was struck by the President talking to Fortas about a case that was headed there [to the Supreme Court], although I'm sure the President--the President in one sense didn't think twice about it, and in another sense was concerned enough to whatever he talked to Fortas about that he recorded, decided to destroy the belt.

G: In talking to you about it was he cautious or guarded in recounting that he had talked to Fortas?

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C: See, I have no, I mean my present--when the President would talk to Fortas sometimes he'd say, "Abe says this," or, "Abe that." And sometimes he'd say, "I've got a very good lawyer who tells me--," okay? Or, "This very good lawyer." And often it would be Abe, sometimes it would be Judge [A. W.] Moursund down there.

But in any case, we file our papers, the papers were filed, and the Supreme Court decides in March. It's argued over the ninth and tenth of January, 1967, and the Supreme Court decides on March 27, 1967, to remand it to the ICC to look at these, and what with, among other things, a dissent by Justice Fortas, who says the case should not be remanded; the merger should go forward. The Supreme Court does say, and I'm sure affected by what the Justice Department said, that the case should be promptly sent back from the ICC and could be handled on an expedited track.

Eventually the case is decided finally and the merger is approved, and that is in January of 1968, within a year, down to the ICC and back. And that decision is written by Justice Fortas approving it.

G: With Marshall abstaining?

C: With Marshall abstaining and, in both cases, William Douglas dissenting in part.

G: Do you have any independent recollection of the President talking to Fortas about this, or is it merely the timing of that diary entry?

C: I have recollections of the President talking to Fortas about this. My recollection is that the President did talk to Fortas about this, and the reason I say that is because I always had an uneasy feeling about it. Part of it I think is, the President--there was nothing he wouldn't reach out to try and do or get done. I don't think in any way, incidentally, I don't think in the least sense that there was anything corruptly motivating the President, I mean,

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that Saunders had made a contribution or anything like that. I think it was just a situation in which the President thought this was the right thing to do. And by God, let's get it done. And here's how you go get it done.

G: Was this, do you think, the most extreme case of LBJ crossing that separation of powers barrier between the Supreme Court and the executive branch?

C: I think in retrospect, looking back on it, it's the most troublesome. I mean, you are talking about a case pending before the Supreme Court. You are talking about a President talking to a justice about that case, and I think the most difficult conduct here is Fortas' really, not the President's, in not putting up any amber lights for the President, one. Two, in participating in the decision. Three, in the first decision in March of 1967, writing a dissent saying exactly what the President wanted to do and arguing for it and then in January of 1968 writing the final decision approving the merger. I think that's a little troublesome for a Supreme Court justice.

G: You had also the ICC. Do you have any sense that the President talked to Bill Deason or anyone on the ICC to--?

C: I don't have any indication that the President talked to Deason, but he talked to Deason a lot. And I think in the context in which things were done, I'm sure that in one way or another the President or someone else on the staff told the ICC to move fast and get this thing done. It was basically remanded to have the ICC look at whether three smaller roads should be included and consciously decide that, everybody indicating that the merger would go forward whatever the ICC decided, so long as their decision was rational. So I don't think there was any pressure on the ICC to come out one way or the other. I'm sure there was some push from the White House, and it may have even been

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me, to decide it fast and get this thing done. And indeed, the Supreme Court was telling the ICC that in its decision, in the Court's decision--in the Court's decision in March of 1967, telling the ICC to act fast.

G: Yes. This whole episode came out of the Justice Department's initial opposition to the merger at the time that Robert Kennedy was attorney general. Later Kennedy turned around. Was Kennedy's reversal of positions a significant factor in this as far as the President was concerned?

C: I don't think so. I think Saunders was a very street-smart guy, and he knew it would--to the extent it might be relevant to the Johnson Administration, it would be important to have Kennedy locked up so that there was no way Kennedy--so that, if you will, the President's political flank, *vis-à-vis* Kennedy, was covered. Saunders was smart enough to know that. But I don't think--I mean, I have no sense of the President doing anything here that he didn't think was right. So I think it's just that he never stopped to think about how he was going about doing it.

G: You had the Justice Department's perspective for legal standpoint; you had the Commerce and Transportation and Council of Economic Advisers' position from an economic standpoint. Was this ever sorted out, do you think, the question of mergers and competition?

C: It was sorted out at great length in my office. It was sorted out that week before with all those memos that I got, or copies of which I got. It, typically, if Saunders had come to me--I mean, this was a big thing, this was not. . . . Everybody knew about the Penn-Central merger, what do you do about the railroads in the East? You're going to have three railroads, two railroads, four railroads; what's their shape going to be? So it was as

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common as, "Are we going to build an SST [supersonic transport]?" It was an issue in the public policy dialogue in a very broad-based way. Once Saunders came to me and faced me with that issue and gave me Kennedy's memo and told me that he had a commitment from the President, having met with the President a year or so before, I did, if I look at these papers, what I would typically do in a situation like that: I'd call the Attorney General, because they're filing the brief before the Supreme Court. And I'd call Alan Boyd and ask him what the Transportation Department thought. And at some point I'd probably call Ackley, especially with a disagreement, and say, "What do you think?" And there was a genuine disagreement of substance in the government, and that we batted out in one-on-one conversations I had with these people. And I think the meeting in my office, incidentally, was not a twenty-minute meeting. I believe we met for two or three hours with people bitching about not getting home for Thanksgiving dinner.

G: Was it a question of preserving competition and enabling smaller railroads to survive on the one hand versus the economic viability of the railroad industry as a whole on the other?

C: Well, everybody was worried about the economic viability of the railroad industry. And the arguments related to--they are laid out in the papers there--the arguments related to which kind of competition would force the railroads to be better managed and provide better service. There was general agreement that we needed an East Coast railroad system. So that was it.

There was one other thing I noticed here, let's see if I can find it. Six, eleven. See, some of these memos you have mentioned here I just don't see in my--you got them? The November 25, November 26 memo from Ackley to me talking about

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Marshall's--well, maybe it's under here. Wait a minute. (Papers rustling. Long pause)

One of the--so this reminds me of something I'd forgotten--you must have another memo too of--can I have this?

G: Yes.

C: Do you have one of . . . [Larry] Levinson's memo. I saw it here somewhere. Didn't Levinson send me a memo? It's mentioned here about--maybe it's here--about Don Turner's views? Didn't Don Turner--?

G: Yes, I did see that. Yes, here it is.

C: I have to go back--after the meeting, what happened was Thursday I called--Thursday there was such a strong disagreement in the government that one of the alternatives we considered and I asked about was the Justice Department just not filing anything. Probably in response to Ramsey saying something like, "We can't violate our conscience," or what have you, which he frequently made an issue. And I said, "Well then maybe just don't say anything; don't file a brief." And I talked to Thurgood Marshall about that that Thursday. And actually now I remember I got Marshall to come back from Atlantic City, and asked him, among other things, to sit down with Gardner Ackley in trying to turn him around.

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C: At the same time we literally were writing language and briefs around my table. Ackley and Art Okun did meet with Thurgood Marshall for more than an hour on the twenty-sixth of November.

(Interruption) (Long pause)

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I went down to the Ranch on the twenty-fifth, came back--down and back that day. The twenty-sixth was a Saturday; that's when Marshall met with Ackley. But I asked him to come back and meet with him. And at some point over that weekend it became clear that the option of saying nothing would be not simply unacceptable to Marshall, the Solicitor General, but would just be really out of the, so out of character *vis-à-vis* the Solicitor General and the Supreme Court when the United States in this lawsuit, that that was not an option for us. And then we really did focus on what the language should be in the brief, something we'd begun talking about Thursday in my office, and ended up with the language and the changes that I indicated. And I guess I tried in some way to shoot--this is Saturday the twenty-sixth--to shoot for a meeting--from Levinson's memo to me--a meeting with them on Sunday the twenty-seventh, at least of Ackley and Boyd. (Long pause) But you know looking at this, somehow or other, that was resolved within that period of time, because it just doesn't show up on the radar screen any more. We must have had language that made--and then Marshall and Turner signed this memo in which [they] indicated they dropped their opposition to the merger. That was filed on the thirtieth; it was reported in the [*New York Times*] on the thirtieth, so it must have been filed on the twenty-ninth. So it must have been resolved that weekend without the necessity for a meeting on Sunday.

G: Was there a lesson in this in terms of overlapping responsibilities of cabinet departments?

C: No, I think there was the chronic problem of a cabinet office with substantive responsibility arguing with the Justice Department. It happened to me more than once. And what's the role of the Justice Department? Do they have--they take independent

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substantive views. They don't, by and large, face this problem repeatedly except with respect to the antitrust division.

G: Historically that division has had more of a substantive role.

C: Well, historically it's the responsibility that--they consider it their responsibility in a substantive way to enforce the antitrust laws, so they're not just "my lawyer" in a situation like that. Of course, none of that, for a President that wasn't . . .

As I said, I do think it's important in thinking about this whole incident, whatever--you know, what may be characterized as overreaching--that nothing was being done here for venal reasons; what was being done was being done because the President thought it was right. And once having decided that, you just went and did it. I don't think he ever felt any inhibitions on how we'd get there.

G: Do you think he would have been as adamant about this if Saunders had not been a political supporter, though?

C: Well, I think there's no question but that having somebody like Saunders pressing that hard, and I think there's probably no question but that his having indicated in--at least Saunders having thought that he, Johnson, indicated in 1964, as Bobby Kennedy did in 1964, that the government, once over the hearings and over the ICC hump, would stay with the ICC. I think it also brought up in the President this sort of, "That's what the ICC is for, and all these kind of intellectual lawyers over in the Justice Department, their job is not to second guess the people that are responsible for making the trains run on time. Their job is to. . . ." There was an element of that in it. But once we got into the battle, I think the major point here *vis-à-vis* the President is, once he got into it, he felt no inhibitions about calling up Justice Fortas and talking to him about it. He just went and

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did it. Obviously having, as I said--or at least we'll never know what transpired because both men are dead--but having recorded a conversation and then ordered it destroyed, at some point he obviously felt that day that maybe he had stepped just a little bit beyond the White House and gotten his toe a little bit into the Supreme Court.

G: Do you think that Saunders was ever aware of how much help he got from the White House on this deal?

C: I think Saunders was undoubtedly aware that--no, the short answer to your question is no.

I also think that he was aware--I'm sure in the nature of things that somebody made it clear to him. I may have in conversations with him, but I would guarantee you that somebody like Marvin [Watson] or, whoever was--Jake--handling the political stuff was, told Saunders, "We got this for you." You know, he was not dumb. He sure as hell knew that Ramsey didn't want to do this; he sure as hell knew that Marshall and Turner didn't want to do it. I mean, he didn't come to the White House because he thought he'd won the case in the Justice Department and didn't have to. And he certainly knew I was working very hard on it.

G: Gardner Ackley sent a memo to you suggesting that if you didn't want to spend another Thanksgiving dealing with these problems on the railroad merger, you should get the Interagency Merger Committee back into business.

C: And then I told somebody that worked for me, Bill Grain [?], to take a look at that, and I don't remember whether we did get it back into business or not.

G: Would that have been a useful vehicle for averting this kind of--

C: Well, Ackley's hope would have been that if you had them talking about this over time, they'd have worked these things out. But Ackley's own memo says, "Much of the fault

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lies with Justice. They haven't liked the committee's advice and, for about a year, have been operating independently without even keeping members of the committee informed." So I'm not sure it would have made any difference. But that was typical Ackley; Ackley would want to get things on a more orderly course, a more thoughtful course. And nobody likes to try and decide something like this on Thanksgiving Day or over that kind of a weekend.

G: Yes. It does suggest that LBJ did not have a hostility to big business at all.

C: Oh, I don't think he harbored hostility to big business. I think he didn't believe in the trickle-down theory of Republican economics, which he'd often say, but I don't think he--

G: The idea of bigness did not bother--

C: I think whatever everybody worked for him. The idea of bigness didn't bother him.

End of Tape 1 of 1 and Interview XXXVIII

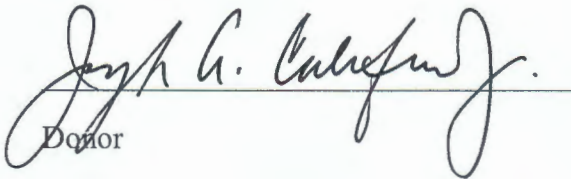
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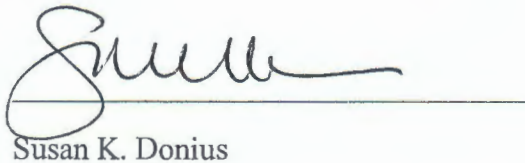
Joseph A. Califano

Interviewed by: Paige Mulhollan, Joe B. Frantz and Michael L. Gillette

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