INTERVIEW XI

DATE: February 27, 1969

INTERVIEWEE: FRANK M. WOZENCRAFT

INTERVIEWER: T. H. Baker

PLACE: Mr. Wozencraft's office, Department of Justice, Washington, D.C.

Tape 1 of 1

W: Keeping the high moral ground is particularly important when you're dealing in an international situation. For instance, at the Vienna Conference, I went to great pains to be sure that none of our speeches sounded patronizingly colonial, but rather were geared at protecting world peace through the stability of treaty relations. Now a lot of the treaty relations come out of the colonial days, and you have to be a little careful how you phrase your points. We were careful, I think, always to take what I thought was genuinely high moral ground, our genuine interest in seeing that stability of treaty relations was maintained. This is also true in the Congress. If you do something that's clearly moral, it's a lot harder for a congressman to get a crack at you than if you don't.

An example of this also is in the proposed revision of the Administrative Procedure Act. If we had simply said "No, the act in present form is perfect; we don't want any changes," then we would have lost our moral position, because we would simply be defending the status quo without a real evaluation. We would have been regarded as obstructionists. Instead of this, what we did was draft our own revision of the proposed act, showing that we were being constructive, that we did want to help, and

giving reasons why all the things that we felt were wrong were wrong. So that we retained a much higher position.

Then the staff of Edward Long's Senate subcommittee lost the high moral ground that it was seeking, to improve the whole administrative process, by refusing to pay attention in detail to our suggestions. That made them cavalier and not paying appropriate attention to the ultimate best interest of the country, and as a result of that, the subcommittee refused to act upon it, at least until there was further evaluation, and, in effect, the thing died with Senator Long's defeat.

This brings up another basic concept, which I call the sagging-zone defense. There are times when, if you try to resist an idea that you think is a bad idea or a proposal that you think is a bad proposal, at the threshold, you will be overwhelmed. They will pass the ball over your head; they will break your rigid line, and you've lost. On the other hand, the sagging-zone defense, as in basketball--you give a little, you cover zones, you cover the main basing points, you let them maneuver, but you try to keep them where any shot at the basket is a hard one. In the football analogy, this is sometimes called the prevent defense, when you don't mind their getting yardage, but don't want them to score near the end of the game. Unfortunately, the way the Washington Redskins used this there has all too often been a score, so I prefer to use the sagging-zone defense.

This is not just plain delay, however. That doesn't work. If you're just delaying, people will catch on soon enough, and they will usually find some way to jar you into action, so that your delay must be constructive and using the time to get into the forefront issues that you feel need to be there, postponing to another day the ultimate decision which you would have a sharp conflict.

Now the other side of the coin of the sagging-zone defense is that sometimes you must grab the ball and run with it. An example of this is the personnel interchange program, where unless our office had taken the initiative in pressing the program, it simply would have been overcome, partly by the sagging-zone defense of a few bureaucrats who didn't like it, but more by simple inertia and the fact that there were other items of higher priority that made it more difficult to get the attention of the key officials focused on the program. We scored a touchdown on this particular program on the last day of the Johnson Administration, by getting an executive order issued, which did create the commission, but which left the appointment of its members to the new president, so that it could, in effect, be his program.

In all of this, an important thing that you have to keep up with are where the inputs and pressure points and filters are. During my first year in office, I spent a lot of time learning this and developing inputs, which come only as you establish your relationship of confidence with the people with whom you're working. Coming in, in the middle of an old administration, this is a little harder than it is with a new administration where they have nobody else to turn to. In our situation, as long as Nick Katzenbach was attorney general, he had held my position, and it was awfully easy for others, as well as for me, to ask his opinion. What happened there, however, was that he would promptly get it referred to us. But still, for the independent input to come from me, it took a little longer to develop.

The pressure points is another very important area. You have to know where something can be blocked if it's bad. An example of this would be in the air pollution situation and the interstate compact situation. When the deputy assistant secretary is

coming out with a position that offends what our executive-branch constitutional and legal position should be, I have to know where to go. And I know that the way to do it in this case was not to the general counsel, and not even to the assistant secretary above this deputy, but to the undersecretary's office. Knowing your people is very important here. You have to know where you can get your results.

Most important of all is the last filter when you're dealing with the White House. On a signing statement or a veto message, the opinions of the various agencies are coordinated by Budget and forwarded to the White House where one staff assistant is charged with its preparation. The message is then rewritten in the White House, almost invariably. Where there are delicate separation-of-powers questions or executive-privilege questions involved, every nuance, every word can be important. The man in the White House doing the writing may not be sensitive to this; it hasn't been his area of specialty. And before long I learned that it was very important to shepherd the signing statement not only up to the last filter, but, whenever possible, through the last filter, because how it came through to the President would be in the form that the special assistant sent it, not in the form that the Budget Bureau relayed your message.

I had a particularly educational experience with this on the signing statement on the Freedom of Information Act, where the draft that I cleared in Washington was changed in Austin down at the Ranch by the press secretary in a way to keep the press happy, but not a way to correctly reflect the legal position. And this causes a little bit of trouble, not too much as the facts eventually turned out, but it was an excellent lesson that you must follow your handiwork all the way.

B: Let me ask you a question here. You have dealt mostly with Joe Califano and the group that worked with him. Are they an effective operation?

W: They're exceedingly effective. Sometimes they're almost overly effective, because their main aim is to get things done, and they'll get them done sometimes with a short-range impact that is very successful. It was our job to worry about the long-range impact as well, and we didn't want to sell our constitutional birthright for something which, in a relatively short period of time, might turn out to be a mess of pottage.

B: Do people like that ever take advantage of their real or apparent closeness to the president?

W: I think every special assistant almost has to take advantage of this if he's to get anything done. Obviously, various ones do it to various degrees. Harry McPherson, for instance, was obviously very close to the President, but he never threw the President's name around. On the other hand, the things that Califano was working with--it was impossible for us to tell whether it was his idea or the President's. I did see several memoranda on various decisions that he sent in to the President, and these memoranda were fairly and accurately phrased. It looked to me as if he was making an effort to get to the President a balanced view of what the disputing agencies and departments had presented.

B: I'd better clarify that in case it comes out wrong in the transcript. The phrase was "fairly and accurately."

W: Yes. With fairness and with accuracy.

B: It almost sounded like "fairly inaccurately."

W: Sorry.

Now once in a while we run into the opportunity for something which I would call making lemonade out of lemons. Occasionally, we would want the President to veto a bill. An example of this, frankly, was the highway bill of 1968, which we felt had horrendous provisions in it with respect to the District of Columbia, flagrantly breaching the separation-of-powers concepts and also all concepts of really what good government called for. The District Committee tried to design the highway system, part of which would have had a throughway running underneath the C & O Canal along the Potomac, which would have been quite an engineering monstrosity.

B: Who is "we" in a case like that?

W: In this case, it's the Department of Justice. It was our official department position. The Department of Interior wanted a veto as well. The District of Columbia government couldn't quite make up its mind. I think it eventually wanted to veto, but not by much. For various reasons, it was decided that the President would sign the bill. At this point, you have a lemon as far as our legal position is concerned, and so how do you make the best of it? How do you make lemonade out of lemons? And what we did in this instance was come up with a signing statement which raised these problems, gave a way of handling them, which made it clear to the Congress that these were special circumstances applicable only because of its unique role in connection with the District of Columbia government. And that because of a little technicality and the wording of the statute, the mandate did not run against the Department of Transportation, but only against the D.C. government. So we have in the signing statement a statement that, if it had run against the Department of Transportation as well, it would have been necessary to veto it. However, the legislation wisely referred to the basic transportation laws, the highway act,

and those provisions clicked in, and there was no absolute mandate running against the Department of Transportation, and so the President signed the bill.

B: Does the wording in a signing statement have any precise legal effect on the implementation of the law, or is it just--

W: Often it does, because it will constitute a direction to the executive branch about how to implement it. In some instances the signing statement will say, "I am instructing the executive branch not to use this optional procedure which the statute creates, because it would be illegal. It would violate the separation-of-powers doctrine."

B: But it cannot constitute precisely, say, an item-veto type act?

W: Unfortunately, or fortunately, depending on how you look on it, the president cannot item-veto, but he can tell his own people not to follow an optional procedure, not to avail themselves of an optional procedure. Now if it's a mandatory procedure, then you have a serious question. You have to see if you can avoid that in some way, by interpretation if possible, and have perhaps his signing statement constitute his interpretation of the bill as it becomes law.

These signing statements and veto messages are one of our major and most delicate works in the Office of Legal Counsel, and these are things where we--particularly in the veto message--would clear it with the attorney general on all counts, and then we would try to work carefully with the Bureau of the Budget and the special counsel in the White House. As I say, that was the last filter we tried. If we couldn't beat it, then we'd try to make the best of what we had.

There is one other necessary principle that any compleat counselor must follow, and that is the old politician's recognition of the art of the possible. It does not do any

good at all to go banging your head into a stone wall if you know you're going to get beaten down by the Congress when you try it. Or if the president can't afford to buy it, or if the courts will come out against you, obviously you don't do it. You wouldn't do it anyway if you thought the courts were really going to come out against you, but you might leave them a little leeway, or leave questions for them. There are some attorney general's opinions where all of these factors have come into play, even the opinions themselves, although basically the legal substance of the question is what the attorney general has to deal with. But he must also consider the consequences, the results of this.

In the last week of the administration, two official attorney general's opinions were issued. Both of them were on matters that had been under way for about a year. One of them involved an official attorney general's interpretation of the *Afroyim* [*Afroyim v. Rusk*] decision, which, in June of 1967, had held unconstitutional a provision of the nationality laws, depriving a person of his citizenship if he voted in a foreign election. The language was very sweeping and the question was, how far has the court invalidated other provisions of these laws? This was a very difficult question, because nobody knew. There weren't enough guidelines set down, and yet we had to tell the Immigration Service and the State Department how to apply this opinion on an operating level. There were extensive conferences with great disagreement between these two agencies.

My office finally came up with a quite detailed analysis of each section in the nationality laws and its applicability to it. I was never very pleased with this. I didn't like it very much. I wasn't sure that it had inexorable logic, or that the guidelines provided by the court were sufficient for us to reach all of these conclusions. I also felt very strongly that, in our position as the law enforcement and litigating branch of the government, we

should not foreclose the question from reaching the courts for further clarification by giving up in cases where there was some language that might be construed as meaning the court would strike down the statute, but where it clearly had not yet done so.

I did feel an obligation, after all the work that the staff had gone to and these other two agencies, Immigration and State, to refer this to the attorney general for his views. His other duties kept him from getting to this for a matter of months. Finally, in the closing days of the administration, he had to get to it. He didn't like it any better than I did, and the question was then, what did we have time to do that would make sense? And in the last week, we succeeded in coming up with a new approach, which simply made a general interpretation of the opinion without seeking to apply it to every case, but making clear that, in 80 per cent of the cases, that probably would come up, the rule could fairly clearly be ascertained from what the minimum holding of *Afroyim* would require. This was issued in the closing days of the administration; I would have expected more flak than seems yet to have come. This is probably because now State and Immigration still have to go back almost to the process that we were doing before: How do we apply this edict on these various provisions and in these various cases? But I think that it was a substantial contribution, and I'm just awfully glad that we were able to get it done, even though, if we had had more time, I think we could have probably improved its wording here and there. But its concepts were fundamentally sound.

The other final throe of the Department of Justice was an opinion involving the right of the General Accounting Office [GAO] and the Comptroller General to upset a decision by an Armed Forces Contracts Board of Appeal in a case where the board had decided in favor of the government. Here again, there was even an element similar to the

Afroyim position, in that we felt that we should not permit the GAO to deprive the government of an opportunity to at least have its favorable decision presented to the Court of Claims. If the GAO had stayed out of it, the air force would not have paid the claim; the contractor would have sued in the Court of Claims, and the government could have then sought to defend the award, which it might or might not have succeeded in doing. But at least it would have had a hearing, and we did not feel that this should be foreclosed by GAO. GAO relied upon its statutory authority to settle and adjust all claims by and against the United States under 31USC71, as meaning that it was a final authority in this area, and it was the equivalent of a court action as far as binding the executive branch, even though it would not have bound the outside parties. And it also insisted that it did not even have to give the air force a hearing, no brief, no oral argument, no nothing.

We thought this raised serious constitutional questions and considered putting these in the opinion. GAO was violently opposed to this. In the final analysis, we came out with an opinion which did not deal with the constitutional issue on the assurance of GAO that it would not be pressing this case independently, although it may do so in later cases, I understand. But telling the air force that it was under no obligation to make the fact findings that GAO had requested it to make, and then going on to say that each department in the executive branch, in its function as litigator, should review the findings of these boards and let the Justice Department know when it felt that litigation by our department was in order.

This is opening a real hornet's nest as, of course, we knew it would, because the private bar doesn't want to have its cases reopened where it wins in the Contract Board of

Appeals, but if it loses, it can always go to the Court of Claims. It has been a sort of heads-I-win, tails-you-lose proposition as far as the government is concerned, in reverse. If the board is for us, it [the private bar] can go to the Court of Claims. If the board is against us, we lose. If the GAO comes out against us after the board was for us, we lose, and review is short-stopped. We did not feel that that was appropriate.

The opinion that issued will, I am sure, be one of considerable controversy. It might not have been everything that everybody would have hoped for, but given the situation, I think again we made a great contribution really to the ability of the government to defend itself against excessive contract payments in this kind of area. We wanted to be careful not to keep the GAO from also defending the government, but there is a continuing dispute between the GAO and the Department of Justice as to which is the final word on matters of law. When appropriations are involved, GAO claims that it is. And in the situation that I mentioned earlier today about PL 480, where we decided in favor of State and against Agriculture, and Agriculture went along with that decision, the GAO sent a letter to Agriculture saying that since Commodity Credit Corporation, a public corporation, was involved, over which the GAO did not have auditing authority, it had no funds it could reach to take a sanction against this, but if it ever could reach any funds, it would. And this kind of jockeying is a real separation-of-powers and constitutional problem that must be considered and thought through in all its aspects.

Let me speak very briefly, because time is running short now, about one other kind of executive law making. You can see that in the last opinion that I have been talking about, we're proclaiming the law that at least executive agencies should review the board decisions to determine where they are clearly erroneous. I don't mean every time

they disagree with the fact-finding, but where they're clearly erroneous under Wunderlich Act standards, the Wunderlich Act being one that says that findings of law by these Contract Appeals Boards are not conclusive.

B: Is that Wunderlich?

W: W-U-N-D-E-R-L-I-C-H, a 1952 statute named after the Supreme Court decision which it sought to repeal.

The other way in which the executive branch has an exceedingly sharp input on law making is not only on its own law making, but what it submits to the Congress as part of the administration's legislative program. I mentioned earlier that starting February 10, 1967, the Office of Legal Counsel took over the function of reviewing all administration that went into this program. We had all earlier participated in task forces where most of the legislative program originated and which was then screened through the Bureau of the Budget, through the various departments, through the White House staff, and eventually through the President. It was our job to review also the President's messages to the Congress transmitting these programs, and to be sure that there was a conformity between the message and the bills submitted to implement the message. This got pretty tough sometimes, because the message could change the night before it was issued, and yet the bill was supposed to go up to Congress the next day, or at least immediately thereafter.

In 1968, late January, the President called me personally with one further mandate, which was that we not only review all this legislation, but that we see that it be prepared promptly and in shape for submission promptly after his messages. This reflected a very happy amount of confidence of the President in our abilities; it did not take into consideration that we really had no authority to tell any other department what to

do in this kind of area. We could advise the White House, but we could not order the Department of Agriculture or of HEW [Health, Education, and Welfare] to get its bills done on time.

B: The President's call to you does give you a certain amount of authority?

W: It gave me a certain amount of authority but none that was very communicable. He hadn't called the other departments; there was no written document giving us any role like this. And Califano's office resisted the creation of any such document, allegedly because it would have given departments an excuse to go ahead and be sloppy and leave it to us. I was never convinced by that argument, but I didn't regard it as too important because frankly, by this time, we had developed a working relationship with the general counsel offices and the undersecretarys' offices in these various departments, where they were surprised to hear from us and surprised to hear about our role, but they did a very good job of being cooperative with us.

And in some instances, in order to achieve the President's mandate, we had to do something quite unusual; that was to take lawyers from our office and actually send them over to the departments to work with them on the legislation, because they were hopelessly bogged down. I think that the whole area of legislative drafting is one where the executive branch should devote considerably more attention to it. There are not enough good drafters in the departments themselves, particularly in departments like HEW, which have such massive legislative responsibilities, and HUD. These were areas where we really had to redo a great many things, and Budget before us. So there should be more emphasis on the legislative drafting facilities of the departments, and there should then be a systemized, institutionalized input after it gets into fairly definitive

shape, through the Office of Legal Counsel or some office like it, in the Bureau of the Budget or the White House or wherever. I happen to think Office of Legal Counsel is a pretty logical place.

B: Had not Califano's group performed this expediting and coordinating functions before?

W: Yes, and really, it was their responsibility rather than ours. And how it came over to us, I don't know, but we had the more detailed contact with the way the wording was going to be, and Califano's office was usually working on the message which was about to come out that next day or that next week.

The preparation of the legislative program was a real boiler-room operation, and within two months, the President issues about twenty messages, transmitting over a hundred bills, to the Congress. And this is an exceedingly important business and not to be neglected. I think that we paid a lot of attention to it, and while I have been worried about how much contribution we could really make, I think we did make an immense contribution. I wish we'd had a little better staffing for it, been a little more forewarned, had a little more written authority. All of these matters, however, were pretty well overcome, and I think, on balance, it was a considerable advance in the art of preparing bills for the consideration of the Congress. That's it.

End of Tape 1 of 1 and Interview XI

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FRANK M. WOZENCRAFT

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