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R. Markham Ball
THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: R. MARKHAM BALL

Interviews conducted by
Laura McCreery
in 2004

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R. Markham Ball

Table of Contents—R. Markham Ball

Interview 1: December 16, 2004

Audio File 1 1

Birth and upbringing in Wilmington, Delaware — Education at Friends School, Amherst College, and at Oxford (as a Rhodes Scholar) — Life at Oxford as a married man — Return to the U.S., starting Harvard Law School, having a baby — Felix Frankfurter, Henry Hart, Al Sacks, others at Harvard Law School — Clerking for Stanley Reed on the Supreme Court — Memories of Chief Justice Earl Warren — Warren and the Japanese Internment during World War II — Writing opinions for the Court — Dynamics among justices on the Warren Court — Intellectual leadership on the Court — Warren’s sense of right and wrong — Earl Warren, “warm human being” and “good father” — Earl Warren invites Ball’s nine-year old son to a shared birthday party at the Court — Confidentiality on the Court

Audio File 2 18

More about Warren’s character — *Griswold vs. Connecticut* — Fellow law clerks — *Pro se* docket, *in forma pauperis* cases — Leaving the court to work at Covington and Burling — The War on Poverty — Working at USAID, other firms; traveling — The Warren Burger Court, and the Supreme Court now

[End of Interview]

Interview #1 December 16, 2004

[Begin Audio File 1]

01-00:00:00

McCreery: Tape number one on December 16, 2004. This is Laura McCreery speaking, and on this tape I will interview R. Markham Ball at his office at the International Law Institute in the Georgetown area of Washington, DC. And we're collaborating today on the oral history project Law Clerks of Chief Justice Earl Warren. I'll ask you to start us off, if you would, by stating your date of birth and saying a little about where you were born.

01-00:01:06

Ball: Get right to the difficult questions to start with. Born on March 24, 1934 in Wilmington, Delaware. Went to public schools and then my last six years of pre-college education were at a Friends school in Wilmington, which probably had an influence on my view of the world, which I think in retrospect was quite important. I went to Amherst College, majored in English literature. I went to Oxford as a Rhodes Scholar in 1956 and was there for two years.

01-00:01:46

McCreery: How did that get started?

01-00:01:48

Ball: How did the Rhodes Scholarship get started?

01-00:01:50

McCreery: Yes. I'm sorry. How did it come about for you is what I should—

01-00:01:56

Ball: Well, it was one of those things, one of those glittering prizes that we were all so interested in in those days. And I actually have English ancestors, an English grandfather, and so I was interested in England anyway. But the notion of going to Oxford for two years and getting that medal of honor pinned on you is very enticing and it led me and many others to apply. And those were two great years. We complicated it, my wife and I, by getting married between my first and my second years. Now, in those days—and this is ancient history but you're interested in history—in those days the Rhodes Scholarship was limited to men, young men, and furthermore they had to be bachelors. Well, my wife and I had known each other since she was eighteen and I was nineteen and we really wanted to get married pretty badly. And so my father made a deal with me. He said, "Mark," because my father wanted a son to be a Rhodes Scholar. He said, "Mark, if you apply to get that Rhodes Scholarship and get it and postpone your plan to get married right away, then the scholarship will finance you at Oxford for the first year. You get married, lose your scholarship, and I'll finance the second year." So he did and as generously as he could. But I went into my second year at Oxford a married man of twenty-three with a wife. And we didn't like to ask for too much money, so we lived a rather poverty-stricken existence, riding on ancient bicycles and not wanting to spend three pence for a bag to put the groceries in,

that sort of thing. And I was very popular because I was the only person within my range of male acquaintance who had somebody at home to bake cookies. And so our social life was really quite full. My wife did not, as they feared, interfere with my interaction with the university and my peers. And we were under observation then. Every time the American Secretary of the Rhodes Trust would come to Oxford, my wife and I would be invited to tea or sherry at Rhodes House and we would chat with the warden of Rhodes House and the American secretary. Obviously the question on their minds, not articulated, of course, to us, was does getting married ruin the capacity of one of our scholars to be a proper Rhodes Scholar? The answer was no, it did not impair, and I think it was the year after we left that Rhodes Scholars could be married.

General Peter Dawkins came to Oxford University and my college about the year after I did and was married in his second year and did not lose his scholarship. I have seen and known him over the years and have told him, he doesn't seem to acknowledge this debt, that he owes me something for preparing the way for him to get his stipend in the second year.

Anyway, that was Oxford. I read law. Went back to Harvard Law School, which was a bit of a cold shower bath after all the sort of one-on-one education I'd been getting from the Quakers, from a small college, and then my tutor at Oxford. Oxford's a big university but you work very closely with one tutor, who really is concerned about how well you do. Then I went to Harvard Law Schools, came into the second year having gotten one year's credit for two years work at Oxford, and I was one of 600 people. And it was hard to tell if there was anybody actually in a position of authority there who gave a hoot about me. It was a bit of a shock. Harvard was not an entirely joyous occasion. As a matter of fact, our first child Larry was born just before my final exams in my first year at Harvard. Trying to study for those exams with a baby crying. Desperate times, desperate times. But we got through it.

01-00:06:49

McCreery:

I wonder what sparked your interest in the law.

01-00:06:52

Ball:

Well, I'd had a father who was a lawyer. He worked for the DuPont Company. At one point, growing up in Wilmington with a DuPont father I thought I was going to be a chemist. But then I realized how hard you had to work at chemistry and it turned out that English was easier. I read stuff, I enjoyed it, got As on my papers so went that path of least resistance. And in a sense, the law was kind of the path of least resistance, too. Not really being sure what I wanted to do with my life, though I tried journalism for a while. I was a college newspaper editor and I worked for Time, Inc. In the summers I was a stringer for *Time* in Oxford. But I thought that was a pretty high-pressured profession where, I don't know, I didn't like the way the journalists had to sort of insinuate themselves into people's offices and people's lives and

make nuisances of themselves to get stories. Anyway, I gave up that idea, too. Law offered lots of possibilities. Politics, actually, law practice, whatever. And I did it.

01-00:08:13

McCreery:

Okay. Tell me something more about Harvard Law. What about the faculty at that time.

01-00:08:19

Ball:

Well, they were great. It's interesting. They were very much under the influence of Felix Frankfurter. I took a federal courts course taught by Henry Hart. I guess the book is now Hart and Sacks. And the dedication is to Felix Frankfurter. The dedication of their case book. "To Felix Frankfurter, who opened our minds to these problems." And we had a very sophisticated discussion in federal courts of not just procedure but the balance between state and federal courts and laws. And it was Harry Truman who said that he was looking for a one-handed lawyer because every lawyer he knew said, "On the one hand and on the other hand." And we did a lot of on the one hand and on the other hand in federal courts.

Al Sacks, who became dean at Harvard, happened to be someone I got to know as a mentor, really, which was terrific. I shouldn't claim complete {anonymity} for my experience at Harvard because there was at least that one professor who I thought was very supportive, very helpful. But large classes and in those days a very competitive atmosphere. One knew to the last decimal point what one's average was and exactly where one stood in the class, what number you were from one to 600. And that put a very competitive edge on the whole thing.

01-00:10:16

McCreery:

Well, you mentioned Justice Frankfurter and I wonder, as you look back now, what kinds of lawyers was Harvard turning out at that point? What was the philosophy?

01-00:10:28

Ball:

Well, I guess we were very well trained technically. We didn't know a thing about law practice. This was in the days before clinical work by law students. There was talk in those days that perhaps the third year of law school ought just to be eliminated altogether. What kind of lawyers? They were all kinds. They're all very, very able. Most of them, most of us went into corporate law firms. Some taught. Many taught. Ralph Nader was just a couple of years ahead of me at Harvard Law School. We had all sorts. Able type A sorts who devoted themselves to many different things.

01-00:11:31

McCreery:

Now, you mentioned some of your early influences, such as the Friends School and the experience at Oxford and so on. Did you know at that point what you wanted to do in your law career?

01-00:11:42

Ball:

No, definitely not. I was hoping that something interesting would happen. I don't know exactly what. Growing up in Delaware, a small state, I'd had in mind the notion of maybe going back to Delaware and running for something. I had two classmates in this very small Friends School, thirty-seven people in my graduating class, one who ran for governor of Delaware unsuccessfully but was a very leading Delaware judge. Another classmate on the Third Circuit. And I figured that this is kind of local politics. I think at the end of the day my wife and I decided that we wanted a broader, wider community to live in. The Wilmington I grew up in was really rather closed. Heck, I was used to it but for my wife that was going to be a bit of a shock. But it wasn't so much a choice against Wilmington as a gradual opening up of my eyes to the possibility of practice in Washington.

Al Sacks and other people teaching at Harvard, Roger Fisher was one, had been in the early stages of their careers associates at Covington & Burling, which Al Sacks told me was the best law firm in the country. And I was offered a summer clerkship with Covington & Burling. We were not summer associates, we were summer clerks. We were wined and dined, made to feel very important, which is really pretty good when you're dealing with twenty-three and twenty-four year olds. And I think gradually I developed the notion that I was going to do something related to the public sector in government. I was gradually giving up notions of getting elected to anything but there are a lot of things one can do in the executive branch, for example. And I was leaning more and more toward that.

One thing I did, an experience I had at Covington & Burling, was lunch with Dean Acheson. The summer clerks invited Dean Acheson to lunch and he graciously came along and told his tales, which I characterize as stories of the great men who have known me. But his career was fantastic. He combined private practice in a first rate law firm with sessions in the government and out of the government, rising to higher and higher levels until finally he became Secretary of State. That's a pretty good model to emulate. Well, I think I'll give it a shot, see if I can't be Secretary of State. Never made it. But his career and the notion of in government and out of government was something that did appeal to me and was something I was able to follow. I just thought the issues were more important. I was never good at tax law, never much interested in corporate law. I wrote my final year paper, third year paper at Harvard on an administrative law question, a free speech question. And that's the way my instinct took me.

01-00:15:17

McCreery:

Well, you mentioned the friendship and closeness to Professor Sacks. But how did it actually come up that you got in line for the Supreme Court clerkship?

01-00:15:27

Ball:

Well, if you've done enough of these interviews you've realized that life is just one accident after another. And at Covington & Burling I did some work

for Bob Randall, who was at that time a senior associate whose specialty was tax law. And I did a research project for him. I probably did several. Gosh, I remember this. This is the last piece I did that summer. I stayed up until 3:00 in the morning finishing it. It had to do with the taxation of cylinders that contained gas. Capital gains versus ordinary income. Darned if I know what it was. But I researched it and handed him in a memo. And he suggested that I apply to Stanley Reed to be his law clerk. The process seemed to be quite informal. And he wrote me a nice letter of recommendation, which I still remember. And I interviewed with Stanley Reed and was hired.

01-00:16:41

McCreery: Well, that would have been in 1960 then?

01-00:16:46

Ball: Well, I graduated from law school in '61. Yes, this would have been the summer of 1960, right.

01-00:16:56

McCreery: Okay, all right. Well, what happened next?

01-00:16:58

Ball: Well, I had my year at the Supreme Court. Our son by that time had been born. He would come to pick me up after work with my wife and he would play in the fountains outside the Court. And he referred to that big white building as Daddy's Court, which was kind of neat. And I had a very interesting clerkship for three quite different men. We're being observed by the chairman of our International Law Institute. Three quite different men. Stanley Reed had been Solicitor General of the United States. When Franklin Roosevelt called him—this is just after the Black appointment, in which Black was nearly derailed for his previous membership in the Ku Klux Klan. When Roosevelt called Stanley Reed at solicitor general, said, "Stanley, I want to appoint you to the Supreme Court but I've just got one question for you. Have you ever been a member of the Ku Klux Klan?" He had not. That was a joke, I think, although Reed was from Maysville, Kentucky and maybe it wasn't a joke. So Reed was a good man to work for. He knew the law as it ought to be. We would sometimes go down to the US Court of Claims, Claims Court, and hear various courses there, including cases brought by Indians. He would never let me draft of opinions in Indian cases because he knew I would probably try to follow the ruling Supreme Court precedent. He wrote those opinions and he followed his dissents in Indian cases. He still was pretty darn convinced. Good man to work for.

Once I did an opinion in which I disagreed with his take on something. Guess we probably got to the same result by different routes. And he said, "Well, Mark, your analysis is a good one. And you've got some very strong cases to support your point of view. But I have the vote," he said. And, actually, he didn't overrule me on that case. He took my stuff and then he put his own stuff in, taking it quite a different way. But the two positions were quite

inconsistent. Later on, doing some legal research at Covington & Burling, I came across that opinion in the Federal Reporter. Son of a gun, it was a case citing that opinion and it was cited for Justice Reed's position, not my position. I don't know how they figured out which was the one they should pay attention to. Well, he was fun to work with.

01-00:19:54

McCreery:

How did he involve his law clerks in his process?

01-00:20:00

Ball:

Oh, gosh. We had adjoining offices and we would go to whatever court he was sitting. The DC Circuit Court of Appeals or the Claims Court. I'm quite sure I did bench memos for him ahead of time. And I drafted opinions and we would talk about them and we would sit together and work on them. We didn't have the kind of out of the office relationship that Chief Justice Warren had with his clerks but he was a good man to work for and a man of strong opinions. Harold Burton at the time, what a public servant. He must have influenced me, too. He had been mayor of Cleveland and a Republican senator from Ohio and was appointed to the Court by Harry Truman, just because Harry Truman thought so well of him. He was a thorough public servant and he was working in retirement to hear cases in the DC Circuit and the Court of Claims when he really shouldn't have been working. He had terrible Parkinson's disease. When I left he autographed his picture, a picture that he gave me, and it was so shaky you could hardly read a word he had written.

Now, I told you it was the era of glittering prizes. Getting a clerkship on the Court was a prize. And Harold Burton brought me up short one day by referring to the clerkship as a wonderful opportunity for public service. And it was, of course. It was, of course. But that was his character. We worked on not a lot of cases together, because he really didn't have the strength to do a lot. So I worked for the two of them about half-time and the other half of my time I was Chief Justice Warren's fourth clerk, devoting about half my time to that. And with the Chief I did just the regular stuff. The memos on cert petitions typed on those little flimsies, five by eight. And then bench memos and opinion writing. I wrote only one opinion and it was not on a very important case. It had to do with patents and it was unanimous. But I did that one opinion.

Now, typically the clerk who did the bench memo would then, if the Chief took the case and took the opinion, the clerk who wrote the bench memo would write the draft of the opinion. There was one case, I was trying to remember exactly what it was, and I can't, in which my Harvard Law School training came through and I did an analysis in the bench memo which the Chief really couldn't use. It was just not consistent with the way he viewed cases. I wish I could remember what it was. It was not insignificant. It was kind of dumb of me to do it that way because I should have known that it was not going to be something the Chief could use. And, regrettably, having

pitched the bench memo that way I was not asked to write the opinion in the case. There was no recrimination. I was never criticized for that. But I noticed that I wasn't given the draft opinion in that case. But you've talked to other clerks at that time and other times and I enjoyed the same openness from the Chief, the same warmth and support. The post-conference debriefings, all that stuff. And the Saturday lunches, baseball games.

I saw the Chief Justice of the United States get thrown out of a major league dugout. He took us to the Senators game. They were the Washington Senators in those days. He took us to the Senators game and the manager of the visiting team was an old friend of his from California days. Again, I wish I could remember who it was. But somehow they communicated. Maybe the Chief sent a note down to him. And the next thing you know the four clerks were sitting up there in the stands still but the Chief, in his business suit, is sitting in the dugout of the visiting team chatting away with the manager. Well, the chief umpire walked by that dugout and he saw this man in a business suit sitting there and he went, like, "Out of there." I couldn't hear what he said but it was clearly, "Out of there." And the Chief Justice of the United States, having been overruled, or being in a forum that was not under his control, left and came back and joined his law clerks. So it was a terrific experience in terms of seeing that great man at work and being admitted so openly into his confidence and friendship.

01-00:26:08

McCreery:

You touched on the Saturday lunches, which I gather were a time that you could socialize with him and talk about many other subjects. What sorts of things did you discuss and did you ask him?

01-00:26:19

Ball:

Oh, well, there was a lot of old politics. The train ride from California to the Chicago convention when Nixon stole the delegation. We heard a lot about Richard Nixon. "He's not interested in anything except money." We heard a lot about John Kennedy, too. I don't know if it was at that lunch or elsewhere, but the Chief Justice really admired, if not revered Kennedy. Of course, he had the hugest respect for the presidency. It was something which was transformative. And he greatly admired Kennedy. And it started, I think in concrete terms anyway, in personal terms, at Kennedy's inauguration, on that very, very cold day in January. Bitterly cold. And a very long parade, inaugural parade. Now, they built the viewing stands for the dignitaries out in front of the White House and the President and the Chief Justice and the other important people were sitting in the stands. I guess the stands had to be heated. It was still a bitterly cold day. And gradually, as this parade went on and on and on, more and more of the dignitaries began to leave. Well, that was not something one did with the President of the United States. The Chief Justice knew a lot about what one did and didn't do, and one didn't leave the box, the stand of the President of the United States before the President left. So he stayed. The Chief Justice stayed until the bitter end. And the next day

he received from President Kennedy a handwritten note thanking him for hanging in there. Just a short gracious note. And that kind of got the love affair going or cemented it. But the Chief Justice never ceased to admire him.

I don't know why the Chief Justice took on the so-called Warren Commission. Never discussed that with him. But I'm sure that his decision was influenced by the fact of his huge admiration for the President. I don't know how it would have worked in his thinking process but it certainly had to be there. Had to be there. What else?

01-00:29:16

McCreery:

Okay. Well, we were talking about President Kennedy and I believe you had his election the year that you were there clerking.

01-00:29:26

Ball:

Yes, yes.

01-00:29:26

McCreery:

Do you recall leading up into that election the Chief Justice's thoughts and perhaps even predictions about what would come about?

01-00:29:34

Ball:

Not specifically, except his dislike of Richard Nixon was sort of front and center all the time. And I don't know how he felt about Kennedy prior to the election. I just don't remember that. It was on election or on the inauguration day that I saw this bonding begin. It may have begun earlier but it was certainly apparent at that point.

01-00:30:01

McCreery:

And did you have any window on the Chief Justice's relationship with the President after the inauguration? Did you have any knowledge of their—

01-00:30:13

Ball:

No. I do know that when the clerks gave a—I guess it was a surprise party for the Chief Justice, although I'm sure Mrs. [Margaret] McHugh wasn't surprised, for his seventieth birthday, President John Kennedy came just to pay his respects. But no, I don't know of anything else about the relationship.

01-00:30:42

McCreery:

Okay. Did the Chief Justice ever discuss, in your recollection, when talking of earlier events in California, the incarceration of Japanese Americans during the war?

01-00:30:54

Ball:

Oh, sure, that was one of the questions that we asked him. My recollection of his response is not that he really tried to justify it. Others may recall attempts to justify it. But all I remember is the Chief Justice saying, "Boys, you had to be there then." In other words, it was the decision made under the circumstances of the time, which felt right at the time. And that's about all he could say about it.

01-00:31:26

McCreery:

Well, you were talking a few minutes ago about the process of working with the Chief Justice on the cases. You talked about one instance where you were not asked to write the opinion after having worked on the bench memo. I was interested because you said you should have known that the approach you took wouldn't be of use to him. And that leads me to ask how did the Chief Justice work with you during the process that might lead up to an opinion and how would you know where he wanted to go with something?

01-00:31:59

Ball:

Well, after the conference, he would debrief us. He would be debriefed by us. And you got a pretty good sense of the tug and pull in the conference and who was saying what and what Felix said and all that sort of thing. And if the Chief was taking the task of writing the opinion, then you would sit with him. First at the regular Friday meeting after the conference. And then when you were about to draft you would sit down with him and just talk it through a little bit. I wish I'd done more opinions because the one I did was really kind of cut and dry. We had a talk about it. I understood his position. He basically agreed with one of the parties. I wrote a fairly short opinion. We went over it in draft, didn't take very long, and that was that. I wish I could tell you about the opinions that really made history. That unfortunately was not one of mine.

01-00:33:11

McCreery:

And you said that one opinion did turn out to be unanimous when it—

01-00:33:14

Ball:

Yes, yes. That was not a hard case.

01-00:33:20

McCreery:

Yeah, right. I do wonder, though, if on other opinions that were being worked on, perhaps even by your fellow clerks, did you have much view of how the Chief Justice would try to bring the other justices into the fold on a certain case where he really did have to go out and try to win votes?

01-00:33:44

Ball:

Well, of course there's the famous case of making it an opinion of the Court in *Brown*. That was well before my time, of course. But there was a lot going on in my era in the criminal law, in the rights of defendants and the right of the prosecutors to use improperly obtained evidence. It's so interesting. The Chief Justice, a former prosecutor, really had come by that time to have a very strong concern for the rights of the accused. And I think was consciously, he and Brennan and Black, probably, working together to expand the jurisprudence there. And there was a conscious looking out for areas that would help them move forward.

Now, the questionable vote at that time, as I recall, was always Tom Clark. Of course, the Chief Justice maintained cordial relations with nearly everybody on the Court. Not everybody but nearly everybody. And I'm sure he and Tom Clark just talked a lot. And eventually Justice Clark would be sort of ready for

a particular case and so they'd grant cert and move things ahead a little bit, five-four. So he very much was involved in and in charge of that process of making the majority in cases that would advance his view of fairness to criminal defendants.

01-00:35:25

McCreery:

And, of course, there was a very key example of what you've just said in your year. The Ohio search and seizure case on which Justice Clark wrote the five-four opinion.

01-00:35:37

Ball:

Oh, I'd forgotten he wrote the opinion. Well, that's interesting. Yes. And that, of course, is consistent with the Court's tradition as I knew it, that in a five-four case in particular, the least persuaded justice would write the majority opinion.

01-00:35:53

McCreery:

Talk a little bit, if you can from personal experience, about how the Chief Justice would use his political skill or all the background that he brought in that process of assigning opinions. Did you have any view of that?

01-00:36:08

Ball:

I really can't tell about that. Sorry.

01-00:36:12

McCreery:

Okay. I can understand. It took place—

01-00:36:15

Ball:

Well, yeah.

01-00:36:15

McCreery:

—not in your presence but—

01-00:36:17

Ball:

No, but it's too bad I have such a faulty memory because doubtless all this was discussed in the post-conference meeting with the clerks. But I just can't recall specifics.

01-00:36:30

McCreery:

Okay. You talked about Justice Clark being often in the middle ground during the time you were there. Let's talk a little bit about the other justices sitting at that time and kind of where the alliances were and how you saw that play out.

01-00:36:50

Ball:

Well, he had the greatest respect for Justice Brennan, Justice Black. Justice Black had been a politician, too. Justice Black could be a little WASPish every now and then. I remember there was a time when Justice Black said something argumentative or cross when they were reading their opinions and later apologized to the Chief Justice for that. The Chief Justice, of course, accepted the apology, that's what one does, but said, "Hugo, you can't un-ring

a bell.” These are two guys with feelings. But they were quite sympathetic with each other. Who else was there? Douglas, kind of a disgrace, in my judgment. He was just tired of being a justice and was curt and impolite. I don’t know that the Chief had much respect for him personally. Poor old Charlie Whittaker was there. That’s what the Chief called him, was poor old Charlie.

01-00:38:05

McCreery:

Did he?

01-00:38:06

Ball:

Yeah, because Justice Whittaker had not been trained in constitutional law and didn’t really have convictions, let alone courage of his convictions. And he ultimately resigned, as you know, on grounds of ill health. Justice Harlan, somebody I respected a great deal. I’m not sure I talked to the Chief about him. Don’t know what the Chief thought of him. Justice Frankfurter, well, there was a personality clash there.

01-00:38:36

McCreery:

Did you see much of that?

01-00:38:38

Ball:

I can’t remember any clashes on the bench. No, I’ve never seen that. It was just the comments that the Chief would make about Frankfurter’s bombast in the conference, which he obviously didn’t like. Who? I forget. Potter Stewart. Respected, liked. Who am I forgetting?

01-00:39:11

McCreery:

No, I think you’ve named them all.

01-00:39:12

Ball:

[laughter]

01-00:39:14

McCreery:

I think you have. Did you have any occasion to get to know any of the other justices very well, aside from, of course, Justices Reed and Burton.

01-00:39:23

Ball:

No. Of course, each of them came to lunch with the clerks once during the course of the time. And I do remember dismay at Justice Douglas, who by that time, instead of having two law clerks and one secretary, had two secretaries and one law clerk, poor Bernie Jacob, who was always running to try to pick up the pieces before Douglas did something in an opinion. He was just slapdash. He must have been on the Court for twenty-five years. After about ten years he said, “Oh, the cases just come around again. It’s all kind of routine after a while.” He really did not treat his office with sufficient respect. But that was just an impression. I had known Justice Harlan slightly before. Oh, maybe when I was in law school or before through a family connection. And always admired him greatly. Thoughtful, judicious. And once or twice I talked to him about careers and law firms and he was very helpful with that.

Reserved man but fulfilled my picture of what a Supreme Court justice ought to be.

01-00:40:58

McCreery: Okay. In your view, where was the intellectual leadership on this Court?

01-00:41:05

Ball: Well, I would guess it would be in the liberals. It would be probably Hugo Black and Justice Brennan. What was your question exactly? I want to respond exactly to your question here.

01-00:41:27

McCreery: Oh, just intellectual leadership.

01-00:41:29

Ball: Intellectual leadership. Yeah, and I'll stick with my answer on intellectual leadership. I would say moral leadership may have come from the Chief Justice.

01-00:41:37

McCreery: Can you expand on that a little?

01-00:41:40

Ball: Well, he had such firm views of right and wrong. And he held them with such sincerity. And I think he impressed them on others. And he had the skills, the interpersonal skills, the political skills, to bring people around. I've talked about Justice Clark, the business of bringing Clark onboard. And he had the capacity to do that. And the motivation for that I think came from the Chief's sense of where things ought to be in this country. And that was a moral/political judgment.

01-00:42:29

McCreery: The Chief Justice was very clear on those matters? He didn't hesitate?

01-00:42:33

Ball: Well, I think not. I've told this story elsewhere but I'll tell it again.

01-00:42:44

McCreery: I'm sorry to cut you off. I think your microphone has dropped. Let me pause just one moment.

01-00:42:49

Ball: Sorry.

01-00:42:50

McCreery: It's my fault. I probably didn't clip it on very well. I was looking at this—

01-00:42:56

Ball: Where should we start from?

01-00:42:59

McCreery: We got it okay. Sorry about that.

01-00:43:17

Ball:

The case was a flag burning case. Now, here I suppose my Harvard training did come into play. I didn't really see a difference between saying a word and making a gesture. I didn't in terms of expression of views. And to my mind, the burning of the flag was an expression.

01-00:43:46

McCreery:

Symbolic speech, so called.

01-00:43:47

Ball:

Symbolic speech. And I think actually the law now agrees with my view of the law. Maybe it did at that time. Maybe that's what was held in that case. Anyway, I was talking to the Chief Justice about that, advancing my views, my analysis. And he said, "You can't burn the flag. There are some things you just can't do. You cannot burn the flag of the United States." Full stop. That was his notion of what's right and what's not right. And there's nobody going to change that. I so admired him for that. There were some words that a man could not say in the presence of a woman. Free speech aside, this is just the way it has to be. He had some very wonderful old fashioned ideas of right and wrong and I can't tell you how important that example was to me at that time. I was just out of law school. We had a president who was idealistic. We had a chief justice whom I idolized. And they shaped my notion of what public men should be. Men who were guided by a sense of what was right, what had to be done. And everything flowed from their character, their strength of character.

There's a lot of historical revisionism going on about John Kennedy and some skeptics might want to quibble with me. But as I saw it, at that time, the call to principle that John Kennedy made and the adherence to principles, principles, of the Chief Justice were what made them worthy to be our nation's leaders. I am these days, I have been since 1960, a Democrat. I have to reveal that, because with a few exceptions, like Jimmy Carter—maybe it's the process of getting old, too. But I have been so disappointed that the men in public now do not conform to the ideals of public men that I had developed in my twenties, with the example, I suppose, of the Chief and the President at the time.

01-00:46:33

McCreery:

You talked earlier about some of the stories the Chief Justice would tell, including his involvement in a national campaign much earlier. Had that interest in national office for himself fallen by the wayside or was it still alive in him? Any indication?

01-00:46:53

Ball:

Oh, no, no indication at all. He was quite happy to be Chief Justice. You know the story of his becoming Chief Justice as opposed to an associate justice?

01-00:47:03

McCreery:

Yes, I do.

01-00:47:05

Ball: "Mr. President, you said the next opening." [laughter] And he fully understood the power of that position, properly used. I think he aspired to nothing else.

01-00:47:21

McCreery: It set a fascinating contrast. You've just described the man with this very strong moral compass and ideal of personal behavior and so on. Had been quite a law-and-order man earlier in his career in California and yet here he was, really at the time you were there, leading this revolution in due process and going places no one had ever gone before.

01-00:47:46

Ball: Well, that's right and you're right to see that as maybe a conflict. But I guess if I were going to give a better more complete definition of a great public man it would include a capacity for growth, which goodness knows that the Chief had. But I still love him for those things which I really don't agree with him because they're core values. But no. I guess putting people in jail is in and of itself not a core value for the Chief Justice. I think the notion of fairness overrode that.

01-00:48:26

McCreery: And I'm interesting that you brought up that his views evolved over time and perhaps appropriate to the role he was in, too. Being DA of Alameda County, California, is quite different from being Chief Justice.

01-00:48:41

Ball: Yeah.

01-00:48:42

McCreery: Did you have much sense of how things were evolving in him at the time you were there, realizing you had somewhat limited contact.

01-00:48:51

Ball: I didn't see a change over the nine or ten months that we were working there. No, I didn't. From where I sat he had his views. He had his program, if you will, for advancing the rights of criminal defendants. And he advanced that program while I was clerking there but I don't think he changed his views or changed his personality or anything in that time.

01-00:49:25

McCreery: What about the public man, Chief Justice Earl Warren, versus the man that you worked with privately? Any distinction there?

01-00:49:38

Ball: Well, there were members of the public who just thought he was Satan himself. But they were wrong. [laughter] He didn't really have occasion to say much in public, did he, except through his opinions. I think he was a believer in the way courts operate collegially but behind closed doors and the way that they express themselves is through their opinions. So the public perceived of

him however they perceived the opinions, which was typically filtered through whatever newspaper they read or TV they watched. Certainly he projected dignity. He certainly looked like somebody who ought to be chief justice. I wonder whether the warmth of his personality came through. It must have during his days as a politician. As Chief Justice I suppose he was removed somewhat and didn't really have much opportunity to show that. Of course, he showed it with his clerks and his family and so forth. Extended family. Maybe I got a few extra stories because I was a new father. But he told about what he would do on Saturdays in California. Give Nina a break. He would put all the children into a station wagon and they'd go off and they'd do stuff. I don't know. Whatever the project was. The kids would name it and they'd do it. And they'd stay out for as long as everybody was on good behavior. But as soon as somebody got cranky, then they went home. What's the point of that story? I don't know. He was just a warm human being. Good father. Oh, I guess I was on the family thing. He loved his family. They all came to the brunch that he would give after the annual dinner. John Daly and Honey Bear and more than I could keep track of.

01-00:52:08

McCreery:

A large and lively family.

01-00:52:09

Ball:

Yeah. A wonderful family and they all loved the old man, and darn well they should. And I know something about being a grandfather now, too. He was cut out to be a grandfather. Once we had some out of town visitors and I was showing them around Washington and I took them to the Supreme Court. I'd been away from the Court for only a few years. And somehow we got behind the great bronze gates and into the Chief Justice's chambers and Mrs. McHugh announced us and the Chief comes out to greet us. Well, our friends had a little girl of about two and the little girl for some reason took it in her mind to run into the Chief Justice's inner sanctum. So as the Chief opened the door, this little girl ran toward the Chief Justice, tripped over the threshold and fell flat at the feet of the Chief Justice. And I can still remember it. I can see it in my mind's eye, this great big man reaching down to the floor and picking up this little girl and saying, "Well, well, well, well, well." He just liked kids, liked people. And, of course, I've told you the story of our son who has the same birthday as the Chief Justice, our older son.

01-00:53:40

McCreery:

Yes, your first born son. Well, tell that story, if you will, please.

01-00:53:45

Ball:

All right, because I love that story. I may not be able to remember cases but some things really stick with me. Somehow I came to know that the Chief's birthday was March 19th and that's the birthday of our older son, who when I was at the Court was about two going on three. And I told the Chief about this coincidence. He said, "Well, when he's old enough to understand and appreciate it, we'll have him in for a birthday lunch." I thought, "That's nice

but, of course, this'll never happen." I just didn't think about it. I totally forgot about it. About six years later I get a call from Mrs. McHugh and she says, "The Chief says it's time for their birthday lunch." Wow. The darn thing is Larry, even at nine, considered it Daddy's Court. He had no idea what an extraordinary event this was. He was just a kid. So my wife and I were both invited, too. And we got Larry looking as decent as you can get a nine-year old to look, which wasn't all that great because his hair kept sticking up and so forth. We put him in the back of the Volkswagen bug which we then drove and drove into Washington for this luncheon at the United States Supreme Court with the Chief Justice of the United States. And as we were crossing the Fourteenth Street Bridge I suddenly had a thought which made my heart sink. What in the world are this nine-year old and the Chief Justice of the United States going to talk about? We may be on the way to a social disaster. So we walked in, had little steaks around the table in the Chief's office and it was a roaring success. These two guys, the Chief Justice and Larry Ball, talked about baseball. Larry knew all of the statistics. He was a baseball nut. And the Chief knew not as much as Larry but a lot. [laughter] And they chatted about this player and that player and there came a time when the Chief got confused between Jimmy Fox and Nellie Fox. So, again, Larry set him straight and the conversation got on. It was a wonderful moment.

01-00:56:28

McCreery: Yes, reach over and get that photo. Yeah.

01-00:56:29

Ball: Shall we do the photo?

01-00:56:29

McCreery: Hold that up and then read the—

01-00:56:31

Ball: All right.

01-00:56:32

McCreery: Show it to us first and then—

01-00:56:33

Ball: All right. Well, it's a photo of the Chief.

01-00:56:35

McCreery: Little higher.

01-00:56:36

Ball: Okay.

01-00:56:37

McCreery: And towards—there you go.

01-00:56:39

Ball: Okay. The photo of the Chief. But what you can't probably read at the bottom, and the ink is a bit—

01-00:56:43

McCreery: Yeah, turn it around and just read the caption.

01-00:56:44

Ball: The ink is actually fading, I'm sorry to say. His handwriting is extraordinary, by the way. He must have had a fantastic third grade teacher, the Chief Justice. "For Lawrence Markham Ball," that's our son, "on his ninth and my seventy-seventh birthday. With best wishes, Earl Warren," and the date is March 19, 1968. Don't we treasure that.

01-00:57:15

McCreery: Well, thank you for telling that story. And it makes a very good point about what sort of person the Chief Justice was. Very much so.

01-00:57:23

Ball: Yeah, yeah.

01-00:57:25

McCreery: Yeah. Going back to your work with the other clerks and on the cases and so on. What in the way of specifics did the Chief Justice say to you all about confidentiality?

01-00:57:46

Ball: Well, I don't remember the words but we sure understood it thoroughly, absolutely thoroughly. This book came out not so long ago by Eddie Lazarus, sort of telling what went on behind the scenes. Again, through another connection I happen to know Eddie Lazarus and I would be inclined to be sympathetic with him. But that was just way behind the pale, beyond the rules that we had just had drilled into us. There's absolutely no question about our preserving confidences. I remember one of our friends in Washington in those days was the Supreme Court reporter for the *Washington Post*. And, of course, he always tried to get me to tell about the Court. I wouldn't tell him a thing. I wouldn't tell him what size paper we wrote our memos to the Chief on. I wouldn't tell him we wrote memos to the Chief. He knew that much, and told me what he knew. But the notion of confidentiality was absolutely drummed into it. I am still shocked when that confidentiality is breached. How can the Court do its work unless everything is confidential?

01-00:59:01

McCreery: What has changed? Any idea?

01-00:59:07

Ball: Well, I think we have less respect as a nation now for process. We go to war although it's a violation of international law. We win elections any way we can. We write laws that reflect the interests of people who are influential without really observing process. What do I mean by that? Well, important

things getting slipped into bills at the last minute. Filibustering. Using whatever power you have to achieve your end. That seems to be the ethos that is growing today. Maybe the reason that I admire the Chief's notions about right and wrong so much is that maybe I was inculcated with some notions of right or wrong, too, at an early stage and there are ways you behave if you're a justice or if you're a clerk to a justice. And that's all there was to it. People are more opportunistic now and they use whatever means that may be at hand to achieve what they consider to be good ends.

01-01:00:36

McCreery: Thank you for your thoughts on that. I'm going to pause here and change tapes.

01-01:00:41

Ball: Sure.

[End Audio File 1]

[Begin Audio File 2]

02-00:00:35

McCreery: Tape two on December 16, 2004. This is Laura McCreery continuing the interview with R. Markham Ball here at the International Law Institute in Washington, DC. We've been talking about some of your personal recollections or recollections of a personal nature with the Chief Justice. And you mentioned to me just now the cigar story. Let's get that on tape.

02-00:01:00

Ball: All right, good. Well, this was an epic making day. I really think it was the day that the Court came down with its opinions in *Griswold vs. Connecticut*, the Connecticut birth control case. My wife liked to come into the Court occasionally on opinion day to hear what was going on. I'm going to sound like the great daddy of all time. But at this point she was very pregnant with our second son. And, as a matter of fact, as she was sitting listening to the opinions being read in *Griswold* against *Connecticut* she began to feel labor pains. And so she stood up and in a very stately way, sort of moving like the Queen Mary, maneuvered her way out of the Court and on her way to the Washington Hospital Center, where in due course our second child was born. Well, when the child was born I did the thing that people did in those days, young men. I gave the Chief a cigar. It was a small cigar. It was wrapped in cellophane. And I was in his office at the time and I said, "We just had another son," and he congratulated me and I said, "Have a cigar." He took the cigar and opened his desk drawer. In the front of his desk drawer there were about six or eight cigars all wrapped up in cellophane. He said, "Now, I don't smoke these but I keep them right here. These are cigars I've been given when other people have had children." And he began going through the cigars one at a time and naming the fathers and mothers and children. I don't know if he could do the whole eight but he sure as heck did a heck of a job. Again, I take

great pride in thinking that there in the Chief Justice's desk was our second son's birthday cigar. Yeah. He paid attention to people. He really did. He had a great way with them. And nothing phony about him. You couldn't possibly fake that. He just liked people. He liked families.

02-00:03:25

McCreery:

Well, one thing we haven't talked about much yet is your fellow law clerks the year you were there. So I wonder if you could talk about them a little and just how the workload was divided up and how several of you worked together.

02-00:03:42

Ball:

Well, among the Chief's clerks, Murray Bring was the chief clerk. And we would meet and parcel out the workload by consensus. The Chief would tell us who was going to write opinions. To tell you the truth, I can't remember who decided who was going to write the bench memos. Might have been Murray. And relationships were easy, cordial. We spent a lot of time together. Occasionally critiqued each other's work. Not too much. Mostly it was a lot of cert petitions, for example, to do and you just did them. Sent them in. On something important you might consult with Murray or Jesse Choper or Joe Bartlett. But not too much. No, we were fellow workers in the same vineyard but we didn't squeeze each other's grapes too much. [laughter]

02-00:04:40

McCreery:

[laughter] Okay. Well—

02-00:04:44

Ball:

Of course, there were a number of other law clerks there for other justices. I don't know if you're interested in them. But there were a lot from Harvard. Frankfurter had two Harvard clerks. One's still a very close friend of mine. He practices law in Washington, Dan Meador. Brennan had at least one Harvard clerk, Dan Reznick. There was Tony Amsterdam, who's now become a leading professor who was an incredible workaholic. He never left the court, sometimes for weeks. Even sleep there in the stacks, it is said, working on sort of special projects for Justice Frankfurter. Richard Arnold. Did I mention him? He was a Brennan clerk, later became a Sixth Circuit judge. He was number one in our class at Harvard. Been first in his class at Yale, too. Pretty awesome. We were all sort of in this together. We played basketball together. We got Whizzer White to play basketball with us. [laughter]

02-00:06:08

McCreery:

How did that go?

02-00:06:09

Ball:

Well, he's a bruiser. [laughter] We weren't very good. We were not there for our athletic prowess. But it was, as they said, the highest court in the land. I hope it's still there. They might have filled it with books. That was the original intention. But I don't know. And we got together just the way young people starting out in their careers in Washington would get together. Some I

keep up with still but those that have moved away, like Jesse Choper, I hardly ever see, although I think the world of him, let the record show. Murray Bring practiced in Washington for quite a while. Bill Dempsey, who'd been the chief clerk, I guess the year before I was there, was a neighbor and very good friend in old town Alexandria. We lived close to them for years. But I don't know. Young professionals sort of getting together ad hoc.

02-00:07:15

McCreery:

Well, I gather the workload was quite heavy and I wonder if you could talk about the pro se docket, the *in forma pauperis* cases and how that fit in to the overall picture.

02-00:07:30

Ball:

Well, we all took our share. I think in those days each justice was getting all the pro se applications. I think that's right. There came a time later on when they were apportioned among the chambers. But I don't think that occurred. As I recall, we did the whole pro se docket.

02-00:07:57

McCreery:

I think that's correct, that the chief justice's office had them all at that time.

02-00:08:01

Ball:

We had them all. Oh, I guess that's right. You're right. I'd forgotten. We were writing for all the justices.

02-00:08:10

McCreery:

One reason that the Chief Justice had more clerks.

02-00:08:13

Ball:

That's true. I'd forgotten that. I'd forgotten that. So we did them very conscientiously, trying to find something in what was often just a whole lot of verbiage, not really very useful. There's a process I think that happens to the clerks. Maybe one reason why justices typically have clerks for only one year is that, I don't know, you get sort of battle wise or something after doing a whole lot of pro se petitions. And you tend to think that these are really not going to be very worthy petitions. And you don't treat them perhaps with the respect that you did in the earliest days. But I think that we treated them all with respect and tried to find out what was there, if there was anything there flag it. I don't remember any cases being taken off the pro se docket but there must have been some but, of course, not very often.

02-00:09:26

McCreery:

Tell me a little bit more about Mrs. McHugh.

02-00:09:29

Ball:

Well, she was great. She managed things like when you got to see the Chief and when you didn't. Scheduled events. And was very kind to the clerks. Just a little condescending to us. Had a certain very well controlled boys will be boys tone to her. Though she was fine. I think she was probably a very important part of making that office run as smoothly as it did.

02-00:10:19

McCreery:

And were there others in the cast of characters besides the Chief Justice, the clerks, and Mrs. McHugh? Other than the other clerks for the other justices. Was your daily life a fairly small world or how did you view it?

02-00:10:44

Ball:

Well, I would go and change diapers.

02-00:10:49

McCreery:

That's right. I'm forgetting.

02-00:10:50

Ball:

Oh, if my wife ever saw this tape, she would at once contest that. She says I didn't change nearly as many diapers as I say I changed. But I was really quite busy being a daddy when I wasn't clerking. It was a very full life. And we were developing friendships there, many of which have persisted. My wife and I have been in Washington, raised our four children in Washington or the suburbs. We've been here since I clerked.

02-00:11:28

McCreery:

Well, I'm wondering how your experiences that year on the Court shaped what you ended up doing afterwards. Talk a little bit about where you went next and why.

02-00:11:39

Ball:

Well, I next went back to Covington & Burling. And then came the War on Poverty. I cannot claim that the Supreme Court had anything to do with my joining the war on poverty, the Office of Economic Opportunity. It was interesting, though. This was under Lyndon Johnson, of course. Kennedy had just been killed. But the spirit of service and concern for the poor was still very much alive and three or four of us from Covington went to the war on poverty in 1964. I remember talking to a senior partner at Covington about it. He was a rabid Democrat, liberal with a capital L, or maybe small L, or both. I said I was thinking of going to work in the war on poverty, thinking he was going to say this is the dumbest thing he's ever heard. He said, "You do it, Markham, do it. This is the nearest you're ever going to get in your lifetime to the New Deal." Well, I don't know. Maybe my notions of public service were derived somewhat from my early exposure to the Chief Justice and indirect exposure to President Kennedy. I don't know. Oh, gosh. A checkerboard of different things, because there was the War on Poverty.

I did come to Washington with this notion of public service. And I was really very lucky because in the Johnson Administration I did get an interesting job as a lawyer in the war on poverty. I was the chief counsel, and only counsel for quite a while, to the VISTA program, volunteers, domestic Peace Corps.

02-00:13:47

McCreery:

Who hired you into that job, by the way?

02-00:13:50

Ball:

Well, actually, Steve Pollak, who was the deputy general counsel of OEO and who had been at Covington & Burling. He was a few years older than I am. He's had a very distinguished career, including presidency of the DC bar. And he got me over and got a few more people over from Covington also. So we did that for a while. I guess after that I had a year in administrative job at the Peace Corps, which really didn't suit me very well. I think I'm a much better lawyer than administrator. And private practice. I guess I didn't get back into government until the Carter Administration. But I was really fortunate in the Carter Administration. I was general counsel to the US Agency for International Development, which was a fascinating job. Boy, I worked hard at that, too, because I didn't know anything about the foreign aid program. And I am a conscientious guy and I worked twenty-four/seven, as they say. And my wife actually says, of all my jobs, that was the one that she enjoyed the most vicariously because I was so into it and we did travel together to third world—we met a lot of very dedicated people at AID. And the environment was just a great one. We felt perhaps more comfortable in that environment than we had in the corporate law firm environment. Not that I didn't like it but the government was really very—and it was a very, very enriching experience, that. I lasted in that job for three years, until the head of the agency got fired by Cyrus Vance, the Secretary of State. And when the head of the agency went, I hung around for a year during the tenure of an acting administrator but when the new guy came in, Doug Bennett, I was summarily fired because Bennett wanted to bring in his own general counsel. Again, my wife thought that was an outrage and a blow to the body politic from which you would never recover but, hey, he was entitled to bring in his own general counsel. So I left the Carter Administration a little earlier but maybe I beat the end of administration rush in getting back into a law firm.

And I've been at various law firms ever since, in recent years doing international arbitrations, commercial arbitrations, some mediations, teaching more and more. Now that I'm retired from the law practice I do more teaching. I teach here at the International Law Institute. I teach overseas a lot. Wore myself out this fall with a conference in Scotland, a week teaching in Nigeria, a week teaching in Istanbul and two weeks teaching in Accra, Ghana. And by the time I got home, just before Thanksgiving, I said, "Mark, you're going to have to schedule these things better." I love doing this but it's been getting tiring.

All this comes from your question about the influence of the Court on my life. I don't know. I never did appellate work except in one or two pro bono cases. Actually, in arbitration I turned into kind of a litigator in the arbitration forum, not in courts. And I would just say that the Chief's influence and my views of the role of the Court perhaps reinforced some characteristics in me that were there anyway. I can't say the Chief directed me the way that I ought to go but he reinforced some of my better instincts, I think.

02-00:18:29

McCreery:

To what extent did you stay in touch with him after you finished your own clerkship?

02-00:18:36

Ball:

Not much. Really it was just the annual dinners and the great birthday party. I hardly ever saw him except at those annual events, which were wonderful. And he was just as candid in those meetings as he was when we met with him just the four of us after the Friday conference at the Court. At one birthday party, the then President, Lyndon Johnson, appeared. I think I'm one of the few people in the United States who ever saw Lyndon Johnson blush. At the Chief's birthday party Lyndon Johnson brought him a present. Obviously the staff had handed him a present to give to the Chief Justice. The Chief Justice was really pleased. And he opened the little box and inside was a bust of Lyndon Baines Johnson. What a tacky present. And President Johnson blushed. [laughter]

02-00:19:52

McCreery:

Yeah, it doesn't sound like something he might have done too often.

02-00:19:56

Ball:

No, I don't think so.

02-00:19:57

McCreery:

From what we hear. How well did you get to know President Johnson, by the way?

02-00:20:01

Ball:

Oh, not at all. Not at all. And I was in his administration. I knew and worked for Sargent Shriver, who was another good public man. Forceful personality. Strong sense of right and wrong. Get the job done. He was kind of Rooseveltian in his tactics. In the war on poverty we were thrashing around. A whole lot of really good people just out of the private sector, no idea what we were doing, but really enthusiastic about it. And Shriver used to ask somebody to give him a memo on the subject. And then he'd turn to somebody and then, without telling the first person, ask somebody else to give him a memo on the subject and get two views and then he'd get the people in there to debate, which I'm told is what Roosevelt did, too. Shriver was really good at that. Very good charismatic leader. Much beloved, of course, by the people who worked for him. Other great men I didn't see much of. Saw Jimmy Carter only as reflected in memos. Poor man. Vastly overworked. Tried too hard on the detail. A great ex-President.

02-00:21:21

McCreery:

Well, I don't know how much of a Court watcher you were after leaving your clerkship but I'm sure you took great interest in the events there through the sixties and the way some of these major areas played out. The due process cases.

02-00:21:41

Ball:

Oh, yeah, but I'm not really more of a Court watcher now than most people who read the newspapers. I have opinions on some of the current justices. Scalia was a classmate of mine at Harvard, too. I didn't know him there but I've run into him elsewhere. Not a kindly man. What can I say? Very personable but does not treat his fellows with respect. Dogmatic and so forth. I don't know. And doesn't live up to my ideal of a public man. I won't go on.

02-00:22:30

McCreery:

Yeah. Well, I just wonder what you thought about the events leading up to Chief Justice Warren's retirement. He, of course, planned to retire a year earlier and the events with Justice Fortas played out and changed the timing a little bit.

02-00:22:49

Ball:

Yeah. And I don't remember that clearly enough to really be able to add anything to what you already know.

02-00:22:57

McCreery:

I just wonder what your thoughts were with the transition to the Warren Burger Court. Just generally the tenor of that Court and how much things may or may not have changed.

02-00:23:15

Ball:

Oh, it's so impressionistic now. The tenor of the Court did change. Burger was not a warm—my friend from the *Washington Post* who covered the Court said, "That Burger, he looks like a chief justice," which was by way of damning with faint praise. But gradually the Court has changed but I don't really have enough specific to say to make it worth your while.

02-00:23:51

McCreery:

Okay. Well, I'd like to just get your thoughts, though, on what Chief Justice Warren left behind and how much that's still a strong feature of American life.

02-00:24:08

Ball:

Yeah, it's a little bit like the New Deal really. The New Deal fundamentally changed our view of the role of government, its relations to the people. And I would say the Chief Justice and the members of his Court at the time had a profound effect on all sorts of things. Voting rights, rights of criminal defendants. Women's rights. *Roe v. Wade*, women's right to choose, et cetera. Again, like the New Deal that sort of established a standard, in my mind, an advance or a series of advances which now are under attack. We just hope the rascals don't undo too much of what's been done. But in terms of setting standards to be followed or attacked or changed, I think it was profoundly important, as was the New Deal, in the political sphere.

02-00:25:22

McCreery:

We hear a lot now about this term judicial activism and this idea of the Court as an instrument of social change. Whether one thinks that's a good thing or a bad thing or somewhere in between. But, I wonder, how would you apply that

term to Chief Justice Warren, if at all? How did you view his leadership of the Court?

02-00:25:44

Ball:

Well, I guess if you wanted to damn it you would say it was activist because, as we've discussed, he had very strong views about certain issues of right and wrong, certain issues of fairness with respect to criminals and so forth, and he used all of his skill to see that those views were written into his opinions. I don't think that it's fair to say the judges are making law. I think they're operating within a wide range of choices that are available to them. One of the problems with Chief Justice Rehnquist, for example, is he loves statutory interpretation. I've heard him say so. But he takes no comfort in the notion of the Court as a branch of the government. And he doesn't realize, I think adequately, at least he doesn't acknowledge, that when cases get to the Supreme Court the legal issues are just not something the clerks can work out, but the direction you go within the scope provided to you as a justice, it's a very broad set of choices to make and you've got to make the choices. And you might as well make them for the good of the country. We cannot continue to be governed by our Constitution of 1789. That's just out of the question, although not apparently in the minds of some justices. It's got to grow. And let's just hope it grows in directions that are influenced by honorable men. It's interesting, an interesting mix of people who have a mix of humility and self-confidence. Humility. There's a virtue that's not much seen today. But I'd call Earl Warren humble. Not in a sense but he certainly had a sense, a way of making contact with ordinary people. He had a contact with commonsense. He had strong opinions but he was not an arrogant man and that really is a very important difference.

02-00:28:34

McCreery:

Well, is there anything else you would like to say about the Chief Justice of his influence on you?

02-00:28:40

Ball:

Oh, just that I suppose it's been profound in ways that I don't recognize perhaps today. But, as I said before, he shaped my notion of what a public man should be and what a human being in public life should be. And I don't want to sound like an old fogey, but, darn, it's been downhill all the way since then.

02-00:29:12

McCreery:

Well, it's true that the public's notion of public service seems to have shifted a little bit, doesn't it? Well, if there's nothing else you'd like to add.

02-00:29:22

Ball:

I'm delighted to have this chance to talk with you.

[End of Interview]