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Jesse H. Choper

THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: JESSE H. CHOPER

Interviews conducted by  
Laura McCreery  
in 2004

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It is recommended that this oral history be cited as follows:

Jesse H. Choper, "The Law Clerks of Chief Justice Earl Warren: Jesse H. Choper" conducted by Laura McCreery in 2004, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2013.



Jesse H. Choper

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**Interview #1: June 6, 2004**

Begin Audio File 1

01-00:00:35

McCreery: This is tape one and I'm Laura McCreery speaking, and on this tape I'll be interviewing Jesse H. Choper at his office in the Boalt Hall Law School and we're working today on the law clerks of Chief Justice Earl Warren Oral History Project. I'd like to start with a little of your own background. So could you state your date of birth and talk a little bit about where you were born.

01-00:00:59

Choper: I was born in 1935 in Wilkes-Barre, Pennsylvania.

01-00:01:03

McCreery: Okay. How did the family happen to be there?

01-00:01:07

Choper: Both of my parents were immigrants and my father became a merchant and he went to Wilkes-Barre because he felt that that was a place that presented him with an opportunity. He also died a few years after I was born. My mother kept on there. But I lived in Wilkes-Barre and went to college in Wilkes-Barre, as well. Little community college, then. Wilkes College. Was in Wilkes-Barre for the first twenty-two years of my life.

01-00:01:42

McCreery: Okay. What did you study at Wilkes College?

01-00:01:45

Choper: I was an accounting major.

01-00:01:46

McCreery: Really?

01-00:01:46

Choper: Of all things, and I taught accounting for three years at the Wharton School while I was going to law school at the University of Pennsylvania.

01-00:01:54

McCreery: Okay. What caused your change of career? What brought that about?

01-00:01:58

Choper: Oh, that's a long story. It was all by accident. It was the function of a teacher of mine at the college, a professor who was also my debating coach, who, after I had told him that I had taken a job with a national accounting firm, said, "No, you should go to law school." He filed all the applications and it was much easier to get in those days. He got me full tuition scholarships at four law schools: Harvard, Yale, Columbia, and Penn. I went to Penn because I could teach accounting there. They were the only one that had a significant undergraduate program in accounting. So that's where I ended up.

- 01-00:02:44  
McCreery: And your financial circumstances were such that that was attractive, I take it?
- 01-00:02:48  
Choper: Yes. The financial circumstances played a role, but I probably could have gotten another job someplace of some sort. But it was the teaching. I always had in the back of my mind that I'd be interested in teaching, and I loved it. I loved it a lot more than the law school. And I never left, in effect.
- 01-00:03:07  
McCreery: Okay. Tell me something about the faculty at Penn at that time.
- 01-00:03:10  
Choper: Well, it's a very good law school now, it was a very good law school then. I think, in a way, that it was more highly considered then than it is today, but within a couple of notches in the pecking order. And there were very good teachers. It was a fine faculty and a fine law school. I continue to support it. And there were a number of people there who had a very substantial influence on my career.
- 01-00:03:40  
McCreery: Such as?
- 01-00:03:41  
Choper: Well, such as my colleague here who came to Boalt after I came. Paul Mishkin was one who had a very great impact on my way of thinking. The then dean of the law school went way out of the way to help me get this clerkship with Earl Warren. His name was Jefferson Fordham and he was quite instrumental in getting me the clerkship, recommending me, and he was friendly with the Chief Justice and helped a lot.
- 01-00:04:18  
McCreery: Okay. Before we leave law school, I happened to have a conversation with Paul Mishkin in which he told me, remembering that you and Anthony Amsterdam were in a seminar of his—do you recall how that went?
- 01-00:04:30  
Choper: Yes. Oh, well, I had four classes with Paul Mishkin. I had a classmate who was first in the class by a margin that usually separated twenty people named Tony Amsterdam, who was sort of a legend as a law student. As my friends used to say to me, "You were first among the mortals." But anyway, I think we were in all these classes. We were in many of the classes together. It was a relatively small law school. We had 120 students in the whole class. And we learned a lot in classes with Paul Mishkin.
- 01-00:05:13  
McCreery: Okay. Well, how did Dean Fordham go about connecting you with the idea of a Supreme Court clerkship?

01-00:05:19

Choper:

Well, things were very different in those days. The faculty simply selected two or three people who were graduating, and I guess it was with our permission, but they filed the applications for the clerkships. And they had only a few contacts with judges, but I know that they tried for me with Chief Justice Warren, and they tried for another fellow with Justice Hugo Black, and they tried for a third, Amsterdam, with Justice Frankfurter. And he and I got them.

01-00:05:59

McCreery:

Now, Chief Justice Warren had been in his job long enough that he had some kind of a recruiting mechanism sort of set up by then, I think, and was looking to have some representation from the West Coast, as I understand it. Do you know much about how that worked on a larger scale?

01-00:06:16

Choper:

Yes. Yes, yes. He was entitled to have three law clerks. All the rest only had two in those days. Today everyone's got four. But because he was Chief Justice and he had special obligations in his office, he had three. He always took one from the West Coast. Actually, I'm wrong about that. One from California. One of the California law schools. And he had a faculty member at Boalt, Adrian Kragen, who made a final recommendation. I think it was really the final selection. Warren chose the other two clerks. He had had, four years before, a clerk from Penn named Curtis Reitz. I think he was very happy with him. He came back to be on the Penn faculty. He was one of my professors. I'm sure, although I don't know. I'm just confident that he checked with Curt Reitz about me. But Chief Justice Warren was a great admirer of Dean Fordham's, I know, because Fordham was quite liberal. Had started the American Bar Association section on individual rights. It was a time when the law profession, it was quite conservative and not liberal. Jeff Fordham was an exception. Was an exception. I think Warren was very sympathetic towards him. He was also a southerner who stood up for civil rights in a very strong way, and I think the Chief admired Fordham.

01-00:08:06

McCreery:

Did you actually meet the Chief as part of the recruitment process?

01-00:08:09

Choper:

No. Never met him until at least six weeks after I started work, because he was away on July 1 when I started. He did it strictly on the basis of the recommendations that he received. And I think largely from Fordham and Curt Reitz.

01-00:08:25

McCreery:

Well, describe to me a little bit about your move from Penn up to Washington and how you set yourself up and started the job then.

01-00:08:35

Choper:

Pardon me?

01-00:08:35

McCreery:

How you set yourself up for living there and starting a job.

01-00:08:38

Choper:

Oh. Yes. Well, living, I had a friend there who worked for the government. He was actually from Wilkes College and he was my debate partner, although he was two years ahead of me. And he was also two years ahead of me at the Penn Law School. And he went on to be one of the very early lawyers of the civil rights division in the Department of Justice in 1958. And we had roomed together in law school for one year and he was very happy to get an apartment with me when I came there. We roomed together for that year. So living was easy. He had an apartment already, and I just stayed there when I came up until we found a bigger one. He went on, by the way, to be a judge of the court of appeal in Massachusetts, and died recently, much too young in age in his middle sixties. Last few years. And he was someone I kept in touch with over the years when I went away. One way or another, we were in touch with each other.

When I got there, to the court, to start work on July 1, the Chief was abroad. He used to travel a good deal, and often outside the country during the summer. He had one carryover clerk and that was Murray Bring. He had clerked the year before and then he was the chief clerk the next year, our year. Two of us showed up the same day, the new ones. Joe Bartlett and I. Murray had just been there, I mean, had been in the office all the time. He taught us the ropes, I guess, as to what the routine was in the office. We started work immediately because the cases were coming in all the time. The petitions for what are called certiorari, for review, and that's what we worked on mainly over the summer, but also preparing cases for argument, what we called bench memos. Long memoranda on cases that were about to be argued. There we were, working away. I don't remember whether it was three weeks or four weeks or five weeks or six weeks after we started that the Chief came back to work. I don't think he had met either Joe Bartlett, who was the other clerk, or me before then. We met him.

01-00:11:33

McCreery:

Do you recall your first impressions?

01-00:11:36

Choper:

Well, I had been to watch the Supreme Court in action the year before. No, it was the summer before, so it was before I got the clerkship. Warren was a national figure. I was always very interested in politics. I knew about him since he ran for president, as early as 1948. He was considered in '52, and at that time I was seventeen years old and quite interested in national politics. Watched the Republican National Convention—listened or watched. I don't know. Fifty-two, they probably didn't have television then. So he was a well-known figure.

The thing about meeting him was that he was—it's hard to get an apt phrase. He was a regular guy. He was a good deal older. He celebrated his seventieth birthday in the year that we were there, although it was only his seventh year, I guess, on the court. But he had a warmth about him and a welcoming nature and a regular guy attitude. There were no airs about him at all. I think the first time he may just have dropped in our office where we were. He had come in, he was getting himself back into the swing of things with his very small secretarial staff downstairs. But he had an executive secretary who was a classic kind of person who ran the office.

01-00:13:29

McCreery:

Yes. Tell me about Mrs. [Margaret]McHugh.

01-00:13:30

Choper:

Mrs. McHugh. Well, she had been around a long time. She had been Chief Justice Vinson's secretary. The justices had one secretary and two law clerks. That was the standard allotment. Except Justice Douglas had two secretaries and one law clerk. He used his budget that way. The Chief had three law clerks and one secretary paid for by the budget, the court budget. But he also had a secretary that he brought with him from California named Maggie Bryant. And she did his personal work, some of his fringe court functions. I think she worked on speeches periodically. But in any event, Mrs. McHugh—and that's the way we knew her. We knew Maggie as Maggie. Mrs. McHugh was Mrs. McHugh. She was Vinson's secretary. And indeed, she was Vinson's secretary when he was in the Treasury Department. He was the Secretary of the Treasury before he came to the Court. So she'd been with him a long time. The Chief just kept her. She was the antithesis of the sort of person that you associated with the Chief. We came really to like her greatly, but she came across as an officious sort of person. She ran the place. There was no question as to who was in charge of that office. And it wasn't the Chief justice, it was Mrs. McHugh. But as things develop, you developed good relations. So that was Mrs. McHugh. Yes. And she told us what to do also. She was there when we showed up. She ran a tight ship.

01-00:15:36

McCreery:

When you talked about Mr. Bring being carried over from the year before and showing you the ropes, tell me a little bit about how you did handle the workload and distribute the cases to be reviewed.

01-00:15:50

Choper:

Yes. Well, I forget how it came about, but we each specialized in certain areas with the cert petitions. I think we all did the criminal stuff, there was too much of that, and the whole pauper's docket. It was just called the miscellaneous docket, and which only one copy of the petition was filed. We used to write a memorandum that went to all of the justices. This was before the age of a Xerox machine. They used to type nine copies with carbon paper. Nine pieces of carbon. You got down to the last one, it was not so easy to read.

- 01-00:16:33  
McCreery: Was that the most recent associate justice got the last copy?
- 01-00:16:36  
Choper: I don't know. Probably. Probably. But they had pretty good carbon paper. You didn't mimeograph. They had mimeograph machines, but we didn't do it that way. And they were called flimsies because it was like tissue paper that was used for the cert petitions on the miscellaneous or the pauper's docket. So we divided those up. We didn't have any system for that. But for the other cases, we had areas in which we specialized.
- 01-00:17:07  
McCreery: And your specialty was?
- 01-00:17:09  
Choper: Well, I know one was income tax. I did all the income tax cases because—
- 01-00:17:13  
McCreery: That old accounting background came in handy, huh?
- 01-00:17:15  
Choper: Yes, that's right. That was an area that I thought I knew a lot about. I know that I did the church and state cases. Why? I had an interest in that. I did not do the antitrust cases or the government regulation cases, the big regulatory agency cases. Quite honestly, I forget what the rest were. I'm pretty sure I did the labor law cases, for some reason. Which did come from administrative agencies, but they were a specialized area. We had a big antitrust case there that I didn't work on. I think Murray Bring did that. And we had a big Federal Power Commission case that Joe Bartlett did that term. I worked on the Communist cases, too, First Amendment cases, as I think about it. I worked on the big birth control case, also. Look, this is a while ago. But I remember dealing with the Chief on a bunch of those cases. So those were my areas. I also worked on the race cases. Only a few. But those were also my cases.
- 01-00:19:09  
McCreery: So it grew somewhat out of your own interest and also—?
- 01-00:19:12  
Choper: Yes. No, no. We split them up by our own interests. I really have no recollection of any discussion about that. I think I said, "I'll take these," or they said they'll take those. There may have been a little bargaining, but I don't remember it, among the three of us. We did it. We divided it up.
- 01-00:19:34  
McCreery: Rather than—
- 01-00:19:36  
Choper: His offices were down one floor from ours. The concern down there was that the work be done. They didn't really care who did it.

- 01-00:19:42  
McCreery: Give me an idea of the volume of cases.
- 01-00:19:45  
Choper: Yes. There were about 2,200 cert petitions, more than half on the miscellaneous docket, and I think they probably decided about 150 cases on the merits. Which would mean about fifteen by each office. Lot more than there are today, I believe.
- 01-00:20:10  
McCreery: Yes.
- 01-00:20:11  
Choper: They've cut way back on those. I could be high a little bit. Maybe 125 to 150 cases on the merits.
- 01-00:20:20  
McCreery: And just to get an idea. How did the week go leading up to the court conference at the end of the week, and then your debriefing of that? How did this—?
- 01-00:20:27  
Choper: Yes, the weeks were pretty much the same, even when they had oral arguments or the conference. We just did the work. We knew we had to deliver the cert petitions that came in by a certain date so as to be ready for the conference. We knew we had to get him the bench memo on the cases that were to be argued before the conference. I forget how many days before argument. And he read all that stuff, that's for sure, very carefully. And then we worked on opinions. They were, in many ways, what took the—I mean, certainly any one took many times as much work as anything else. But we worked those in. The other things were scheduled. The opinions had no specific deadline.
- 01-00:21:24  
McCreery: And for those where the Chief justice did write the opinion—
- 01-00:21:28  
Choper: Yes, we took it.
- 01-00:21:30  
McCreery: —how did he assign the assistance of that to the three of you?
- 01-00:21:35  
Choper: Who did the cert petition. He assigned it to the person who did the cert petition or the bench memo.
- 01-00:21:42  
McCreery: Okay. So the continuity—

01-00:21:43

Choper: So I worked on four major opinions, and that's why I worked on a tax case. I also worked on a series of church and state cases that he did and I worked on a movie censorship case in which he wrote a major dissent.

01-00:22:05

McCreery: That's *Times Film Corp. v. Chicago*?

01-00:22:06

Choper: *Times Film*, that's right.

01-00:22:07

McCreery: Is that worth talking about a little bit in terms of the—

01-00:22:11

Choper: Yes. I think—

01-00:22:13

McCreery: —the process?

01-00:22:14

Choper: They all have stories connected with them, that's for sure.

01-00:22:15

McCreery: Yes, yes.

01-00:22:20

Choper: He lost the vote in that case. It was five to four the other way, not to strike down Chicago's system of requiring that all films be submitted and approved before they could be shown in the city of Chicago. There had been a number of cases in this area that bore on it, including movie censorship cases, but they never really talked about the basic system itself. They had reviewed in the past half a dozen years a bunch of cases that had been censored. I think for the most part they had overturned the censor's decision. But this was the first frontal attack on the system of movie censorship. And as it turned out, the Court wrote a very narrow opinion saying, "Well, we only hold that you can require a submission before the film be shown. We don't say what goes on afterwards." The opinion wasn't all that clear. But that was the question they decided. The Chief, along with three others—and they were the four liberals on the Court. The Chief and Justices Black, and Douglas and Brennan, they dissented. They wanted to say that you couldn't have a system of movie censorship. The Chief wanted to write the dissent. By that time in his tenure on the court, he delegated the initial draft to the law clerks in almost all the cases and didn't give us very much detailed direction. There was certainly nothing in writing in which he said, "This is what I want to do." I mean, he told us how he wanted to come out. And we would talk a little bit about it. But it was pretty free reign to begin with. I want to emphasize that he took a great deal of what we did, but he read it with great care. I could talk about each of the cases in that way, in which he would change certain phrases that he didn't like. But anyway, I wrote this long opinion. I don't know that he ever said he

wanted to write a long opinion, but he wanted a dissent. And I sent down the draft and he was quite happy with it.

I know that indirectly, because he had an exchange of correspondence with the dean of the law school where I had agreed to teach before I got to the court, University of Minnesota Law School. See, I took this job and they gave me a year's leave of absence. And he was a very well-known First Amendment scholar. His name was William B. Lockhart. Indeed, I became a collaborator with him on a casebook afterwards, which carried his name until just recently when he died at the age of ninety. But Warren and Lockhart had had some exchange and Lockhart told me, "Oh, the Chief Justice said very nice things about that *Times Film* opinion," because that was an area that Lockhart was interested. And I think he may have written the Chief and said, "That was a fine opinion." And the Chief said, "Well, your new young faculty member had a lot to do with it"—whatever he said, I don't know.

So he liked the opinion. I took opinions that all of the people on the court in the majority, the five, the majority had written, one kind or another, and tried to use it against them. And he sort of got that. He said, "Well, you sure"—I forgot—"dealt with them by name," or whatever it was, and he liked that. He went over it. He made a couple of little changes. But he filed the opinion. It went out and so forth. It was interesting. He said to me, "Well, I'm pleased with this and so forth," or something like that. And he said, "I think we're right." But he said, "You know, I really hate to do it for those people." That's what he said. By which he meant the movie industry, which as a governor, he had had lots of—I don't quite know. I never pushed on that. It was clear that he didn't feel he owed them anything. But this, he felt, was the right thing to do. See, that was one of the admirable traits—I remember that about him. He was just an admirable person. Very close. He said, "I really hate to do it for those people." But he did.

01-00:28:05

McCreery:

Did he discuss with you his views on censorship generally?

01-00:28:11

Choper:

Nothing except that he didn't believe in it. He thought that that was a threat to the First Amendment, despite the fact he was very prudish about sex. He had these three daughters. But nonetheless, on a system of censorship. I filled up the opinion with a lot of instances of movies that had been censored. Of course, they had to do with politics very often, racial issues they censored. Any interracial appearances and a lot of—I forget. Memphis, Tennessee and places like that wouldn't permit that on their screens. Or I remember there was a very well known naturalist movie which showed the birth of a buffalo. Maybe that was silly but they censored that. They said take that out. Stuff like that. Look, censorship had those difficulties connected with it. And I believed in the dissent I worked on very strongly, what I did. I enjoyed it.

01:00:29:38

McCreery:

What did you learn from the process of writing that particular opinion?

01:00:29:46

Choper:

I certainly had never written anything that significant before. What did I learn? I was an accounting major at a small school. So I think I only wrote one paper, research paper, in the course of that whole four years, which was basically on the Electoral College. It was an argument. I didn't know I was going to law school. I took a point of view and I argued it through. And I'd written several pieces that were published in the Pennsylvania Law Review when I was an editor of the Review. This opinion was simply another step along that way. When I went to write articles, subsequently, I didn't have much confidence that I could write. I think that gave me some confidence, but not all that much. But it's a different style. This was writing on a particular position and it was an argument. I like to think that although the pieces that I write say this is the way it ought to be done and this is why, I think if you write as an academic, you have the obligation to be much more objective about it and recognize the weaknesses of your own point of view. I should say, in the movie censorship case, I didn't think there were any weaknesses. But I think Supreme Court justices ought to write that way, also. That is with greater objectivity and recognition, open recognition, of the difficulties of the problems that they're resolving. And not many of them do that. Not enough of them do that. There are some who are very good at that. On the Court at that time was Justice Harlan and I thought he was the best—this is a strong statement, but he was the best lawyer. I use that term as sort of a term of art. He was the best lawyer not only on the Court, but I think ever to sit on the Supreme Court. He's been very strongly recognized since then. But anyway, I could go off on tangents on all of these things.

01:00:32:29

McCreery:

Did you get to know Justice Harlan very well on a personal level?

01:00:32:33

Choper:

No, I didn't. I didn't. I got to know only one of them, and that was Justice Brennan. He was very close to the Chief. He had this, also, similar personality, even more—although I don't think he ever ran for elective office—but more political in the best way. He was so warm and friendly. Everyone was his friend. So I got to know him there and over the years afterwards. I got to know him. He made everyone think that you were a close friend of his. Whatever. He was the only one I really got to know when I was there.

I spent a couple of sessions with Justice Black, who had been my hero before I got there. He had been my hero. I once got his two clerks to have lunch with him alone. The four of us had lunch. The two clerks, the justice and I, and they told him—it was a fascinating lunch. He was cut from a different cloth, Justice Black. The Chief once sent me to see him, to talk to him about an opinion that we had worked on, that I had worked on in the Sunday closing

law cases. That was the other opinion. I said I worked on three. That was the second. I forget. They were sort of together, some of them. Anyway, it was a funny meeting.

01:00:34:19

McCreery: How so?

01:00:34:23

Choper: Because I characterized in the course of the drafts of the Sunday closing law opinions a couple of earlier cases that he had written. He had voted to sustain the Sunday closing laws, all right. And one of the decisions that strongly supported the way I thought the case should be analyzed was one that he had written. But he didn't want to read it the way I did. That's why I guess he told the Chief he was having some trouble with the opinion when the draft went out. And the Chief said, "Go and talk to Black," he said. I remember that. That was wonderful. So I went in and in my—whatever it was, naiveté or artlessness or whatever it was, I said, "Well, Mr. Justice," I said, "the real point you were making in the *Everson* case was so and so." He looked at me and he said, "You know," he said, "that's certainly not so. That's what the dissenters said I was doing in that case." So he wanted to read it much more narrowly than I did. That was an interesting experience—but I never got to know him well. Except that one lunch. It was about an hour and a half. This was early on in the term, maybe after two months, and it was quite an experience to talk to him about things.

01:00:36:07

McCreery: Did you have much chance to see the justices interact with one another?

01:00:36:11

Choper: Never. No, no, not with one another. Although occasionally I'd be down in the Chief's office and one of the other justices would come in. Of course, they'd come right in. Mrs. McHugh would show them right in. But very limited interaction of that. As a matter of fact, I only saw the Chief talking to other justices a couple of times in the whole time. But the clerks—there were twenty of us. Maybe not twenty. There were eighteen. That's nine times two, minus one is Douglas's, and plus one for us is eighteen. There were nineteen, because of one clerk for retired Justice Reed who also spent some time working in our office.

01:00:37:03

McCreery: Is that Mr. Ball?

01:00:37:04

Choper: Mark Ball. Yes, that's right. He was the fourth one. And the Chief always treated him as one of his own clerks. He was very, again, gracious. He was a very gracious man. He took on this extra person because he felt he didn't have anything to do, which was—[phone ringing] Let's just let it go. Four rings and it will stop. See who it is.

01-00:37:31

McCreery:

Okay.

01-00:37:32

Choper:

415. There were two people I was expecting to call. I told them not to call. That's it. Where was I?

01-00:37:40

McCreery:

You were talking about—

01-00:34:41

Choper:

Oh, about Mark Ball.

01-00:37:41

McCreery:

—Mark Ball.

01-00:37:42

Choper:

Yes, yes. They really didn't have anything to do because Justice Reed was totally out of it. I think it was just Reed. I think Burton may have died before that. Ball was just Reed's law clerk and Reed used to come in occasionally, but didn't have anything. Didn't sit or anything. They had nothing to do. I don't know what Reed had him doing. So the Chief just took him on and treated him like one of his clerks. Several of them, more than one, I think, subsequently he took on as a regular clerk. Tim Dyk was one, who's now a judge on the Federal Court of Appeals, whatever it's called. No, maybe that was it. Yes.

01-00:38:43

McCreery:

Okay. Just in terms of the justices interacting. How often did you attend oral argument?

01-00:38:49

Choper:

Well, as often as I could when I wanted to go listen to it. I certainly wanted to go listen to it in the cases in which I had written the bench memos. That was quite a few. But it couldn't be done. We didn't know at the time whether we'd be writing those opinions. We didn't know which ones he'd take. Or when some famous lawyer came and argued. But in the main, we were just too busy. It would be very nice to spend some more time down there. And I heard some great advocates. I heard some great advocates there. I thought great lawyers. Edward Bennett Williams is a very famous lawyer who was famous for other reasons, but I came to learn—he was a trial lawyer, which is a different breed, but he was a very smart guy and very excellent Supreme Court lawyer. And the Chief, I think, admired him a great deal, too, because they were friendly. I know afterwards they used to go to football games together when Williams owned the Washington Red Skins. And they used to sit in Williams box. I heard Archibald Cox, who just died the other day, argue. I thought he was masterful. I didn't know him. I never met Williams, I don't think. I didn't know Cox. I knew who he was. But he played the Court like a piano, as a maestro in many ways. He had a certain—you know, he was a Boston

Brahmin and he projected that. He tended slightly to lecture to them, but not in an offensive way. He was very good.

I heard a lawyer named Leonard Boudin, who was a very famous civil rights lawyer who often represented Communists. So we had at least a half a dozen of these Communist cases. At least. He did a bunch of them. He didn't do all of them. The Communist party had their own lawyer named Abt, who was sort of truculent, I thought. But Leonard Boudin was—who I came to know later—a very good lawyer. Very good.

There was this great military lawyer whose name I know forget. It's awful, you forget names. [Frederick Bernays Weiner] But he was very well known also. He looked like a military officer. I think he had been a military officer. His name's on the tip of my tongue. There was a famous lawyer from Covington & Burling whose name I can't remember now, but who was a famous antitrust lawyer. [Hugh Cox] He argued the General Motors-Dupont case, which was a big one. And he argued without a note. So, I mean, this is a performance. This guy would cite pages of the record and so forth. They'd ask him a question, he'd say, "Well, Your Honor, you know, on page so and so of the record"—the record was this high, literally. It was taller than anybody on the court because it was a very complicated antitrust case. So I heard lots of them, yes.

The people in the Solicitor General's office were very good, almost to the—I shouldn't say almost. I have no reason to except anybody. They were very, very good. Phil Elman who also was very good. Oscar Davis was very good. The Solicitor General himself, the first one—I was there for two. Cox was Solicitor General for the second part of the year, and J. Lee Rankin, who was a very modest advocate. Chief liked him. He liked him because he trusted him. He didn't trust all the lawyers in the Solicitor General's office. He thought at least one of them, who will go unnamed, was slick. He greatly admired people who he thought told the truth and were forthcoming.

Oh, I went to hear Thurgood Marshall argue once. Quite disappointing, I thought, to me. Look, he won his case. But, again, that's a separate story.

01-00:43:30

McCreery:

Yes. Of course, the Chief Justice and Lee Rankin later worked together on the Warren Commission.

01-00:43:34

Choper:

The Warren Commission. And he picked him to be the counsel to the Warren Commission. I know he admired—he was a great admirer of Rankin's.

01-00:43:40

McCreery:

Yes. In general, how do you characterize the Chief Justice's treatment of counsel?

01-00:43:49

Choper:

He was almost courtly in some ways in the way he addressed counsel and so forth. But if he felt that they were playing games with him, he could get quite abrupt. I remember—fairly direct, you know. And I never heard him say this famous thing. You know, “Yes, but is it fair?” I never did hear him say that. Again, I didn’t go down that often. I don’t think he ever said—he may have said it that Term. Maybe he never heard himself say it either. But I remember him really going after one lawyer. It’s like a long story. But the lawyer was a—it had to do with a missing fact in the record. It was a racial discrimination case called *Boynton against Virginia*, in which—this is before sit-ins became popular. This is 1959 I think this happened. Young African American fellow, was a law student at Howard Law School in Washington. He lived, I think, in Alabama. He took a bus home one night from Washington, DC. I think it was to Montgomery. But the bus—there was a bus change in Richmond, Virginia. And it was in the evening and he went and tried to get something to eat in the one little restaurant that was open in the Richmond bus station. They wouldn’t serve him because of his race. He was not a born protestor or anything like that, but he got upset about this. To make a long story short, he refused to leave the restaurant and they arrested him and fined him twenty-five dollars. So he brought his case up, came all the way up to the Supreme Court. And the question was how we could reverse his conviction. It’s a long—well, it’s a story, so—I worked on the bench memo.

There was a critical legal issue in the case. It’s pretty clear that if the state had done this to him, that was contrary to *Brown versus Board of Education*. Segregation was unlawful when engaged in by the state. But this was not engaged in by the state. It was engaged in, for all intents and purposes, by a private restaurant. That was, of course, the great issue in the sit-ins later and the result of ultimately the Civil Rights Act in 1964. This was one of the first two sit-in cases to come before the Court. The other one was also that year. But this guy actually sat. It became known because the government, Solicitor General’s office, filed an amicus, what’s called an amicus brief, that the restaurant was in fact owned by the two interstate bus companies. Owned and operated by the two interstate bus companies that used the Richmond bus terminal. I forget their names at this point. Well, that could have made some difference, because then it wasn’t just a private restaurant, it would be a restaurant owned by big public utilities, and that could open it up. The argument then could have been made that they really were, given the privileges they had from the state—they were monopolies. The bus companies—at that time, there was no competition. They were all regulated heavily. They still are regulated to a good degree, a substantial degree. They had to have federal licenses from somebody, I don’t know, in order to operate interstate routes. Probably the Interstate Commerce Commission or something like that.

So the question was how you could get this in the record, that this was really not simply a run of the mill private restaurant. And I spent some time trying to

figure out how that could be done. And as a matter of fact, I knew a fellow in the Solicitor General's office who had worked on their brief. His name was on the brief. And I saw him one day and I said, "You know, you stuffed that in the brief." I said, "It's very helpful." I said, "But how to account for it—it's not part of the record. How can you stick it in?" I said, "What did you expect us to do with that?" He said, "Whoa. That's your problem." I remember him saying that. I know his name, too, but I won't mention it. So I went up and tried to figure out legal ways in which this could be done. It didn't look good. Right.

I forget what I recommended to the Chief in this case, but I guess I sent him the bench memo. He was not happy with what I had done. I think I—I know what I said. I said, "Dismiss the case as improperly granted." All right. And I said, "Because the next time something like this happens"—I said this in the memo. I said, "They'll put it in the record and then you can make the argument." He called me down. That's the expression we used to use. He called me down -- because we were on the floor above his office. He was unhappy with this. He said, "I read your memo." So this was before the argument. He said, "I read your memo," and he said, "I don't like to do that," he said, "in this case." I said, "Well, it's only a twenty-five dollar fine, Chief." I said, "The next time"—I think I either had said it in the memo or I said it to him then, or I repeated it, I know. I said, "The next kind of case like this," I said, "we won't have this problem. This is not a—he hadn't been sent to jail." And he said, "Now, Jesse," he said, "I want to tell you." First of all, he said, "I may not be here the next time we have a case like this. Secondly," he said, "this fellow, Boynton, is going to want to practice law." Actually, he was studying to be a lawyer. He said, "And in all likelihood, he's going to go back to"—I think it was Alabama. That's what I said—"to practice," he said. "You know what's going to happen to him?" He said, "They won't admit him to the bar because he has a criminal conviction." So it's not just a fine he said—he made his point. He said, "So I want you to go up," he said, "and search that record or search for that with a fine tooth comb" I remember him using that, "to find me more." Well, I did the best I could, but I didn't come up with much more. I mean, it just wasn't there to come up with.

A lawyer then appeared for the state. He was not a government lawyer. He was hired specifically for this and he was from Alexandria, Virginia, or someplace like that, and he had a southern gentility about him. I went down to hear the case argued. And I think he was a fairly well-known lawyer, too. Very early in his argument, the Chief leaned over and he said, "Mr. So and so," he said, "or Counsel," he said, "who owns the restaurant?" in a very gentle way. "Who owns this restaurant?" And the fellow said, "Well," he said, "that's not part of the record, Your Honor." See, I mean, he was prepared for this because the government had this in its brief. And the Chief said—it was an exchange of two or three times. The Chief followed up. He said, "Well, I didn't ask if it was in the record." He said, "I asked you who owned it." And the guy said something else again. And the Chief again pushed him again and

the guy sort of slipped. He said, "Well, Mr. Chief Justice," he said, "do you want me to testify here?" Which, for a lawyer—I think you've got to understand that. So it was funny. But anyway, the Chief could push pretty hard. Because we all know who owned the restaurant. And I think if he'd said it, maybe it would become part of the record in some way or at least could be used. But he wouldn't say it. I forget exactly what he did say. But anyway, that was the case.

Then Justice Black wrote an opinion in which he finessed the whole thing. It was one of the most skillful opinions. He was a very shrewd guy. They unanimously reversed it. They found it to be a violation of the Interstate Commerce Act, which he said—"He wrote the Interstate Commerce Act," he said, "when he was in the Senate, or at least this provision of it or whatever it was." It all turned out fine. They reversed the conviction.

01-00:53:23

McCreery:

That's an interesting example, isn't it, of the Chief Justice's thinking—

01-00:53:26

Choper:

Yes.

01-00:53:26

McCreery:

—about what's important in this case and what does it mean later on.

01-00:53:30

Choper:

Yes. Yes. The one thing he was—look, he would be the first to admit that he was no great intellectual or big thinker in the sense from an academic way of doctrines and so forth. But he had instincts from a lifetime. His instincts, his knowledge of the way the world worked, very much reflected in *Brown*, which he wrote by himself. He felt he ought to do it. He was new to the court. Whatever it was. And you see this very straightforward opinion which people have played with over the years, fifty years now. There were law review articles on how to write a better *Brown* opinion and so forth, and how to connect it doctrinally. But that wasn't his concern. It's not that he threw those ideas away in the opinions that his clerks drafted, because they did tend to be more doctrinal. These were high-ranking law school graduates. They thought they were pretty smart. We all did.

01-00:54:49

McCreery:

That's why you were there, after all.

01-00:54:49

Choper:

That's why we were there. But his intuitions were really quite extraordinary, his knowledge of the world. This was one. This was what was important to him. And it was a way of saying this is not fair. I mean, don't tell me about—it's not fair to this person, to this young man. There you are.

01:00:55:13

McCreery:

You've given some other examples on previous occasions of cases that particularly demonstrate the Chief's way of thinking about the common man, shall we say.

01:00:55:27

Choper:

Yes. I guess the cases that stick the most with me on that—I mean, this *Boynton* case was one. He would bring to bear also his experience in law enforcement and saw things that none of us saw, in the way the system worked, the way police officers worked, in the way the district attorney—you know, he was district attorney here, of Alameda County for, I don't know, fifteen years. He was in the office more years than that. That was one of the biggest stints that he served in his career, in the district attorney's office.

01:00:56:20

McCreery:

And quite a law and order guy.

01:00:56:22

Choper:

Yes, he was, although he always said—how much of this was the way he would like to have remembered it or not—"We play by the rules." I do believe that. Now, did he play by all the rules that he voted to institute when he was on the Court? I don't know. But I think he played by most of them. I think he tried to be very fair, to respect the rights of those accused and so forth, and of being a conscientious law enforcement officer. That's what I think. I don't think he cut corners. I think he did it in a way—if he believed that the person was innocent, he wasn't going to go try them. Or if he thought that there was reasonable doubt—I've never really talked to him about this. Look, you can't be successful in politics the way he was without making compromises. You can't be driven unfailingly by principles. You've got to give way. We all do that in life, some more than others. But, of course, in my judgment, American politicians today, almost to a person, have totally thrown all of that away. They do what they have to do under the circumstances in order to get reelected and nothing else counts. But he was not like that, it seemed to me. Maybe a different era, maybe I was different, I saw the world differently. I don't know. But he was someone of great integrity. Great integrity. And he wanted to do the right thing. And it wasn't so much the right thing for him, it was the right thing for the system. He was a great patriot. I don't know if anyone has told you the story—it's too bad. John Ely, who just died recently, was also with him on the Warren Commission. I'm rambling. The Chief was very critical of Justice Jackson, who took off a year from the court to go to be a Nuremberg prosecutor. He was the chief prosecutor at Nuremberg. Critical is strong. Warren thought that was not good for the Court. He was very devoted to the institution of the Court. And he also once said that—I mean, he didn't think this ought to be done. And he thought that Justice Roberts was wrong when he served on a commission to investigate Pearl Harbor.

So I was very surprised when he got involved in a commission to investigate the assassination of President Kennedy. And I would see him almost once a

year. We would have these clerk reunion dinners and I would go back. A group of us had this tradition. We gave the first dinner when we were clerks, whether that made any difference or not. But we'd go to visit with him on Saturday, noon, knowing that we'd all go out to lunch and so forth, which we did, with his existing clerks. And I talked to him in his office before that, before the lunch, before we went to lunch. And I said, "Chief, I was sort of surprised to hear you take this thing." "Well, let me tell you," he said. "Very soon after the funeral," he said, "Nick Katzenbach [who was then the Attorney General] and [maybe] Archie Cox [who was then Solicitor General]" he said, "they came." "They came to see me and said the president wanted me to serve on and chair this commission and I told them no." He said, "You know how I felt about this," and so forth and so on. And he said, "I just told them that I couldn't do it. I didn't think it was the right thing. I didn't think it was my place," et cetera, et cetera. Didn't think it was right for someone on the Court to do it. So he said about—shortly thereafter he got a call from the White House asking if he would come over and talk to the president. Well, see, this is part of his lack of pretense. There was no question. He went to the White House. He was asked to go to the White House, he went to the White House. I could tell you other stories about that, too. And Lyndon Johnson was known in those days as being an extraordinarily persuasive person in different ways. There was an expression at the time, no reason why you'd know it, but they'd say, "Johnson would give you the treatment." It was called, "the treatment."

01-00:61:49

McCreery: Okay. I'm so sorry to cut you off.

01-00:61:51

Choper: Go ahead.

01-00:61:51

McCreery: I have to change tapes here.

01-00:61:52

Choper: Go ahead. That's fine.

01-00:61:53

McCreery: I don't want to miss this.

01-00:61:55

Choper: Yes, cut me off.

Begin Audio File 2

02-00:00:34

McCreery: Okay. Here we go with tape two. It's still June 9, 2004. Laura McCreery continuing the interview with Jesse H. Choper.

02-00:00:42

Choper: So he gets the call to go to the White House. A brief diversion. See, he was a patriot. I often use that word. He was a quintessential American patriot. Love

of country. And he was very proud of his service in the First World War. So Johnson calls and he comes to the White House. They had some small talk and went into the Oval Office, just the two of them, and Johnson said that he really wanted him to serve as the chair of this commission. This is what the Chief told me. He said, "Mr. Chief Justice," he said, "you're the only person in the country that can do this." He said, "You know, there are people all over the world who feel that I was involved in planning this assassination in order to be able to take office," he said, particularly in what were then called the under developed countries. He said, "You are the American public official in whom they have confidence because of the race cases, segregation cases and so forth." And the Chief said that, "I told him that I appreciated what he was saying, but that I thought it was the wrong thing to do for the Court." And he said, "Well," he said, "then he said to me"—he said, "Well, Mr. Chief Justice," he said, "if I asked you to put on a uniform and serve your country, what would you do then?" He said, "Well, of course." He said, "Of course I would." He was seventy-four years old, right. 1964, sixty-three. Seventy-three years old. He said, "Of course I would." He said, "Well, I'm asking you something even more important than that." And the Chief said to me something like—I remember—he said, "What could I say?" So that was the end of our conversation. But that was Johnson, the treatment. I remember I heard that he once talked to a congressman who said the same thing, that he was extremely effective, I mean, persuasive. I don't know.

02-00:03:00

McCreery:

And in this case appealed to the patriot.

02-00:03:02

Choper:

He appealed. Yes, he knew that. At core, he must have known that that was something about the Chief. He must have done his homework. Yes, but he was an American patriot is what he was. So I talked to him also about it when the criticism came down. He also was a person—again, I'm less confident of this. When he made up his mind, he made up his mind. He wasn't looking back. And I remember what he told me was—he said, "I could have gotten a conviction of Lee Harvey Oswald," he said, "in under two days," is what he said to me. That's the way he saw that. Now, that of course wasn't the criticism. No one really was saying that Oswald didn't do it, but that there were other people involved and so forth. I have not studied that carefully, but I've never seen anything that I've looked into after a little bit that shakes my conviction that they came to the right conclusion, even though it took a somewhat difficult theory to do so. The single bullet or whatever it was theory. But I don't think anyone's ever made a good case against that. The Warren Commission was a group of talented people.

What I have no question about is that there was any cover-up in that thing by anybody. And he had some very strong people working for him. John Ely was one. He's the one I know really well. Mel Eisenberg, on this faculty, also was a member of that commission. I don't know any two people—and I know

them both well—of greater integrity. I mean, they're not going to get pushed around on any of this sort of thing. Rankin was a man of great integrity. The Chief regarded him as a person of integrity. That was what he really admired about him. I don't know that Rankin was any great lawyer. He must have been good to become Solicitor General. He wasn't a political appointee in that sense. There wasn't a payoff of any sort. And he hired a lawyer from California here who was considered to be one of the premiere trial lawyers in the state, a fellow named Joe Ball, who I came to meet later. Was one of the premiere lawyers of Los Angeles. I don't have any question that he did what he felt was the right thing.

02-00:05:58

McCreery:

Okay. Well, while we're talking about the Presidency, you had the election of President Kennedy during your term, and I wonder if you could just comment on how that played out from your vantage point at the time.

02-00:06:14

Choper:

Well, look. The Chief always voted by absentee ballot in California. Kennedy ran against Nixon. The Chief hated Nixon. I mean, his experience with him produced a totally negative judgment about him in his mind. I mean, he made no bones about that.

02-00:06:40

McCreery:

Had been going on for a while?

02-00:06:43

Choper:

Oh, yes. He felt that Nixon had sneakily, underhandedly undermined his opportunity to get the Republican nomination for the Presidency in 1952. It's as simple as that. And I'm sure that all of that is true. I mean, everything we know about Nixon goes to that. It's a separate story. But it's been told many times what Nixon did. But the Chief recounted it a number of times in some detail, how Nixon got on the train in the middle of the California delegation going to the Convention and tried to swing people toward Eisenhower. Which he did, and as a consequence he got the vice-presidency. But anyway—

02-00:07:40

McCreery:

Do you recall him saying what passed between him and Nixon on the train?

02-00:07:44

Choper:

I don't think anything passed between him and Nixon. I think Nixon went around on the train and went and persuaded individual delegates—look, the plan was perfectly clear. The plan was that Warren went as a favorite son from California. That was the way things were done. They kept their votes together. They would vote for neither of the two strong contenders. The two leading contenders were Eisenhower and Senator Taft. Eisenhower the war hero, and I guess supported by the East Coast establishment of the Republican Party, and Senator Taft was called Mr. Republican. Robert A. Taft was a conservative, a conservative wing. Warren was considered to be the progressive wing of the party, which he was. He felt that there could be a

deadlock. That was his chance, if there was a deadlock. Well, Eisenhower got it on the first ballot, I think, because he lost some of California's votes. Look, he wanted to be president. There's no question about that. He'd have made a terrific president. Better president in my judgment, than he was Chief Justice.

- 02-00:09:00                   McCreery: You're not the first to say that.
- 02-00:09:01                   Choper: Is that right?
- 02-00:09:02                   McCreery: Expand on that a little bit, though.
- 02-00:09:03                   Choper: Well, he was a man of action. He felt constrained in every way at the court. He certainly, although he was—no question but he was an activist judge. Still, he was much more constrained than he wanted to be. So he was not a person who operated without judicial restraint. Less than a lot of other people, but nonetheless, he felt constrained by the job. Small staff. I don't want to say he was a fish out of water when he got there, but it was a total change. He said that. He sat here. He said, "Coming from being governor," he said, "I had this big staff." He said, "I walked into the Court." You know, Vinson had died, it was a quick thing. He arrived at his new office and it was Mrs. McHugh, he said, sitting behind the desk, he said. And Alvin, who was his messenger and the three law clerks. He said, "That was my whole staff." It was a totally different situation for him. Anyway, he would have been a great president. There's no question he would have been. Look, Eisenhower was quite a successful president. I think Warren would have been better. I mean, I think I liked his politics better than Eisenhower's and so forth. I think he would have been more of a leader. But Eisenhower did a lot for the country. It was the glory period of the country. See, that was the thing. If anything was to be done, that was all that was going to be done. And it was. It was the golden era. 1950, 1960 was the golden era of the United States. And I was there living through it. I really feel very fortunate about that.
- But Nixon. So he made no bones about his dislike of Nixon. I don't think he knew Kennedy at all. Not that I know of. I don't know that he ever met him before the election. But I remember, we went down to see the Chief late one afternoon. I don't know why. I think he said he's sending his ballot today. And one of us said, "Well, who'd you vote for, Chief?" And he got this big, wide grin. I don't think he said anything. Everybody knew who he was voting for. But what happened was this. He, of course, was asked to swear Kennedy in. That was traditional for the Chief Justice to do that. So he did. And it was this bitter cold day the day of the inauguration and he was up there sitting with Mrs. Warren when they were invited to go to review the parade from the president's box in front of the White House. It was a bitter cold day and there'd been an enormous snowstorm the night before in Washington that tied

up traffic. I mean, it was really something. Washington doesn't do well anyway in weather situations. But I think it was down to ten to fifteen degrees. So much so that the Chief gave us tickets to the inauguration because he had tickets. So I went there, I watched it. Well, anyway, he was asked to go to the White House and sit in this reviewing stand afterwards. Well, they had it glass enclosed in some way, but not all of it. They had heaters underneath. It was cold out there. And it went on interminably. Interminably, until six, seven in the evening. And we were watching it off and on on television. Get a look at the Chief when they went by. He was sitting right next to the president. And you saw this big reviewing box empty out over the course of the afternoon. Must have gone on for four—I don't exaggerate—four or five hours this went on. There was the Chief there, Mrs. Warren with a blanket, as I recall. We saw him the next day or soon thereafter. "Chief, what were you?" I don't think we said, "You're seventy years old." "Chief, all these other people are gone." I said, "Chief, why did you stay there? It was freezing out." He said, "You're invited by the president. You never go before the president goes." That was it. See, that's the way he was. He was a simple man in many ways. Very simple rules of etiquette. That was it. But he came to admire Kennedy.

I remember that in March—inauguration was on January 20. I would say this was March 15, two months later. It was his seventieth birthday and we gave him a surprise party. Surprise in the sense that we invited all the prior law clerks. This was the first "reunion" sort of dinner. And most of them showed up. I think we had about fifteen of us there. I forget what the pretense was, but we were all dressed up for dinner. Maybe he didn't know. Maybe he knew that the others were coming, too. I forget. Whatever it was, it was. Joe Bartlett knew the Kennedys. He was my co-clerk. He was also from Boston, very prominent Boston family and a Democrat. He knew Teddy. He used to go for dinner at Bobby's house and blah, blah, blah. He was a tutor of Ted Kennedy's at Harvard. So he made arrangements. He invited the president to come and drop by this dinner for cocktails before.

You want the rest of this? I mean, this is a long story. It was in a little private club in Washington on the second floor. One of these classic elevators. Four people got in, it was pretty crowded. So we were told that Kennedy would show up at such and such a time. We were all there already. And Murray Bring and I, I don't know why, we were delegated to go down and meet the president. We learned that he was going to be there in five minutes. It was dark. March, maybe by this time 7:30 at night. He was on his way to someplace else. I think he may have had a tuxedo on, as well. And this car, big limousine, drove up and sort of like the doors flew open. It's an image I carry to this day. And out he jumped, Kennedy, followed by this group of people, Secret Service people obviously. So we met him at the door. We said to the Secret Service guys, we said, "We're the Chief's law clerks," and so forth. We said, "The party's upstairs." There was an elevator and Kennedy jumped into the elevator and they indicated that we should go in, too. I didn't expect to go in with him into the elevator. So it was only one floor up, but

nonetheless, there was an elevator. So the two of us got in there with him. They let us in. They certainly wouldn't do that in a million years today, but they did. I should say, when the elevator door opened at the second floor, they were waiting for him already in front of the elevator door.

So what do you say? I forget what we said. He said, "Well, where are you two fellows from? Where'd you go to law school?" And I said, "University of Pennsylvania." Murray said, "NYU." "What happened to Harvard?" he said. We got to the second floor and he came out of the elevator, and this was a surprise, and the Chief was standing—I guess they probably set him up there close to the elevator. Maybe Joe was in charge of that upstairs. I don't think anybody else knew about it but the three of us, I mean of the clerks. And I remember the look on the Chief's face. Sort of surprise and awe. "Mr. President," he said. I forget whether the president said, "Happy birthday, Mr. Chief Justice," or what. "Mr. President," he said. He was so honored and flattered by it. "Can we get you a drink?" There was a little bar. There was a guy, a little bartender there tending bar. And they had everything there. People drank in those days, you know, whiskey. And Kennedy said, "Sure." He said, "I'll have a beer." Well, there was no beer there. They're running around the Metropolitan Club, I think it was, trying to find him a beer.

Anyway, it was quite a thing. The Chief really liked Kennedy. He must have seen him on a few occasions. I'm sure he did at a White House dinner, I guess. But this was all in the first couple of months. But by the end of his term, when he was assassinated, the Chief was very fond of him. Very, very fond. Thought he was a great president. He spoke at his funeral in the rotunda of the Capitol. Very moving speech, I thought. And anyway, that was that. That was relating to Kennedy. But they were heady times. This was a big change in Washington, the passing of the torch from one generation to the next. It went back after that, actually, to the older timers after Kennedy. But Kennedy, he was very popular.

02-00:19:51

McCreery:

But exciting times for you with your political interests.

02-00:19:54

Choper:

Very exciting. Heady is the way I describe it. It was a very heady experience being in Washington at that time, being at the inauguration, meeting the president. He was certainly the only president I've ever met. Yes, I think that's true.

02-00:20:14

McCreery:

Well, this was a nice idea to throw this seventieth birthday party.

02-00:20:17

Choper:

It was.

02-00:20:17

McCreery:

And I guess that inaugurated something of a tradition of dinners? Tell me a little more.

02-00:20:19

Choper:

Yes, yes. Every year, the law clerks had a reunion dinner. We enjoyed it that evening and the notion was we should do this once a year, which we did. It had its own ritual to it, its own schedule. The dinner was on Saturday night. It was a black tie dinner someplace. I forget. Maybe we used to have it the same place. And it was just for the clerks. Thurgood Marshall used to come at the beginning when he was SG. Someone invited him for cocktails. Once we had trouble getting rid of him. I think he may have even stayed for dinner. I forget. He was a character. He was a great raconteur. And the Chief would then say a few words after dinner and then open himself up to questions from all of us, willing to talk about whatever we wanted to talk about for, I would say, more than an hour. He would just go on and answer these questions. Took some criticism from some people. I remember quite well. I felt uncomfortable once. One of the clerks was now a United States Attorney and was very unhappy with some of the Court's pro-defendants decisions and was quite forthright about it. And the Chief made good humor, explained his point of view and so forth. He was also very frank about what was going on at the court and so forth and so on. And then the next day, the Chief hosted a Sunday brunch for the clerks. They were all men and their wives were guests, I guess. I don't know. I think it was always wives rather than just friends. And that was a nice event.

02-00:22:32

McCreery:

Okay. Now, while you were in the clerkship, was their other socializing with the Chief Justice, other than the Saturday lunches?

02-00:22:37

Choper:

A little bit. Yes, other than the Saturday lunches. Joe Bartlett lived in a fancy house, townhouse in Georgetown, and he had a dinner party fairly early on. Gutsy thing to do. Invited the Chief. I think it was just the—well, certainly the three clerks, and wives and the Chief and Mrs. Warren. That may have been all of it. I think that was all of it. So that was one social event. And I was sort of surprised the Chief came. But he was not a guy who did a lot of socializing in Washington. I mean, there's a big social circuit there and he was always invited. I'll take a detour for a minute. We once saw him late one afternoon dressed in a dinner jacket. "Where you going, Chief?" "Well," he said, "I'm going to the"—I'll just make up a name, right—"the Malaysian Embassy." "Chief, why are you going to the Malaysian Embassy? You go to many of them?" "No, I go to very few." Of course, he's on the list. "Why you going to this one?" He says, "You know, it's a small country." He said, "They really feel good," he said, "when the Chief Justice or a somewhat high ranking official appears." That's the way he was. I like to use the phrase feel-gooders. He said they were honored by this and so there's something—so he'd pick out occasionally to go to ones like that.

So anyway, you said socializing with him. Then he gave a dinner for the whole office staff. Also a black tie thing. Oh, I bet Mark Ball must have been at the—I'm not sure if Mark Ball was at the Bartlett dinner. I don't remember that. There were about fifteen—let's see. The Chief and Mrs. Warren, and the four law clerks, Mrs. McHugh and her husband, Maggie Bryant and our wives—we had a secretary who came with her husband. It was at a single long table with the Chief at one end and Mrs. Warren at the other. It seemed pretty big. I was sitting close to the center, I guess. I could hear sort of both sides. Mrs. Warren was saying something to someone next to her. She was also wonderful, salt of the earth, down to earth kind of person. And she said something about, "Well, the Chief Justice said"—and he looked up and he said, "Nina, are you dropping names again?" I mean, that's just the kind of guy he was.

We would go over to his apartment on Saturday periodically at the Sheraton Park Hotel and have a drink before lunch, and Mrs. Warren was there. Mrs. Warren sent him a sandwich for lunch many days, I think, on the days he didn't have a lunch scheduled. At least once, I was in the office talking to him when she came in and he got up and gave her a big hug. I mean, it was really wonderful. Touching family situation.

02-00:26:27

McCreery:

Yes. And you often hear that he was such a family man with his own children, grandchildren, and then others, as well.

02-00:26:34

Choper:

Yes.

02-00:26:34

McCreery:

Did you have much view of that family life?

02-00:26:37

Choper:

His daughter, Dorothy, who died of some illness. She was divorced and she was living with him in Washington. So I bet she was at this dinner, too, when I think about it. You mentioned socializing. She was at a number—well, maybe that was later on when we used to come back for it. I'm losing track of the time. But she was there on a number of occasions and Virginia lived in Washington and got married, I think. Maybe she got married while we were there to a fellow named John Charles Daly, who was a radio-TV guy. Nice fellow. I got to know him some. Yes, I'm sure. Maybe they were at this dinner, too. I never met his youngest daughter until I came back to California. She's also a very gracious person. Honey Bear. Formerly named Nina, after his wife. It was the same name as Mrs. Warren. So yes, you always saw these pictures of him with his family, and oh, he had this great family and so forth. Three sons, three daughters. At one time or another, I met all of them over the years. Two of them now died. A daughter died and the oldest son died. Oldest son was Mrs. Warren's son.

02-00:28:18

McCreery: Oh, that's right, yes.

02-00:28:20

Choper: But he always included him as a full-fledged member of the family. I got married. I met a woman in Washington while I was clerking and got married at the end of the term. She had been married and had a little son. And I mentioned that to the Chief. "Oh," he said. He liked her. It was funny, I mean, the whole—it was a funny story. I guess he met her at some function that I took her to. Must have been this dinner earlier at Joe's house maybe. And he said something to me afterwards. He said, "Oh, what a nice date," and so forth. The other two were—no, Murray wasn't married. Joe was married. But he said some nice things about her and I said, "Well, you know, this looks like it can be serious." It was pretty soon. "What does she do?" I told him that she only worked part time as a dental hygienist because she had an infant son. "Oh," he says, "that was with Nina," he said. Same as with Nina. He said, "It was the same thing, and had always been a great part of my family," and so forth and so on. So interesting.

02-00:29:41

McCreery: Yes. That tells a lot about the man. Going back to when you were in the clerkship, you had given the *Boynton* case as an interesting example of how the Chief thought about things. And I believe I've also heard you talk about the *Poe* against *Ullman* case on the anti-contraceptive law. Is that perhaps worth telling to look at the process that he followed?

02-00:30:12

Choper: Yes. It was the second time that a challenge to the Connecticut anti-contraceptive law had come to the Supreme Court. The first was before his time. As I recall, in the middle to late 1940s. No, maybe early 1940s, in which the Court got rid of that case. They didn't want to tackle this for reasons that go under the heading of substantive due process, which was anathema to the post New Deal Court, in which the Court would review social and economic legislation and say that it violated due process without any mention of anything except due process in the Constitution. Indeed, the same debate that goes on with the abortion cases today, in which the Court recognized a Constitutional right.

So the Connecticut anti-contraceptive law was challenged over a period of more than twenty years. Three times it got to the Supreme Court. It got there the second time with us. They got somebody who went under a pseudonym, Poe, to bring this case, and Ullman was—in fact, the earlier one was also Ullman—the attorney general of Connecticut. And this was *Poe* against *Ullman*. It came to the Supreme Court. The lower courts wouldn't overturn the law. And the Court was quite split over what to do. And I think Justice Frankfurter, either he circulated a memorandum saying what he thought ought to be done, or he circulated a draft opinion. And it was ultimately the opinion that prevailed, although only with four justices. And his view was to treat this

as a non-case because the Connecticut anti-contraceptive law had never been enforced except in one case, and that was against a birth control clinic that had opened. But never—and the notion was that contraceptives were sold throughout the state of Connecticut and so forth and so on. At least condoms. I don't know. Look, there was an issue here. But it had never been enforced against a private individual, or maybe once and after the state courts upheld the law the case against the defendant was dismissed. So Frankfurter adopted this legal theory saying this law was really a nullity and this is a fake case in a sense. But he had to construct some doctrine about that, that this is not a justiciable matter anymore and so forth. And I told the Chief that I thought that that's the way he ought to go. So he called me in and he said, "You know, I read your memo on this urging me to join Frankfurter's opinion." He said, "You know what?" I don't know what he said exactly. The thrust of it was plain. "I don't like those technical arguments, you know, about that there's no standing in the case or so forth." He said, "So I'm uncomfortable doing that." And then we talked some about it. But then he said something, "Well, maybe I will go along with them," he said, "because," he said, "I hate to strike down any law, vote to strike down any law that seeks to regulate the welfare of the people." And I think what he meant in this somewhat unsophisticated way is he didn't believe in substantive due process. No specific provision in the Constitution preventing it. He didn't want to do it. He didn't like the law, he thought it was a bad law, and ultimately he voted against it five years later in the *Griswold* case, which sort of surprised me a little bit. But he did. So that showed restraint in our case on his part. He felt very different about that as a judge than he would as a legislator or as an executive official.

02-00:35:06

McCreery:

Do you have any knowledge of how he might have approached the same opinion had he been writing it?

02-00:35:13

Choper:

He didn't know, that was the problem. No one quite knew how to get rid of this. I thought Frankfurter's opinion, actually, I agreed with it. I don't think that litigants ought to be able to force the Supreme Court to decide an issue that's premature. It was premature. And so then they opened up birth control clinics and they eliminated that issue and that was the end of it. We had a real live case and a real live controversy. So there were only two states in the country that had such a law, Connecticut and Massachusetts, and it wasn't enforced in Connecticut. Whatever it was.

02-00:35:55

McCreery:

Okay. Well, let's talk about some of the other cases that you did work on. You talked about the group of cases on the Sunday closing laws.

02-00:36:04

Choper:

Yes.

02-00:36:05

McCreery:

And touched on that, but maybe you can tell me how that came up, and particularly since it was a group of cases, how was that all put together?

02-00:36:13

Choper:

Yes. There were four cases, one from Maryland, I think maybe two from Pennsylvania, two separate cases brought by different groups of people, and one, I believe, from Massachusetts, the *Gallagher* case, but who knows. I don't remember now where it was from. But the cases principally raised two kinds of issues. One is could the state do this generally, or was this simply religious legislation. And the Court rejected that by an eight to one vote. That was not where it was at, all right, although how they were going to do it was another matter, and that goes back to my exchange with Justice Black as to how you would reason that. And I had written the bench memo and he said, "Write these opinions," and he told me how he wanted to come out. I agreed. He came out the way I had originally urged that he do. The second, the other cases, were brought by Orthodox Jews who took the view that you can have this law, but you got to give us an exemption from it because, as a consequence of our religious beliefs, which require us to not do business on Saturday, and Sunday we're at a substantial disadvantage and it's burdensome to us. At the time, I agreed with what we did, which was to say, "No, they're not entitled to an exemption." And why not? Here I am, Jewish myself. In fact, while I by that time was no longer an observant Jew, nonetheless, I was raised as one. And I had substantial sympathy for the situation. But the notion was where do you draw the line in this sort of thing. This is a polyglot country with all kinds of religions. This was not the kind of situation in which the state was trying to discriminate against some religion. It was a neutral law and it just affected different people differently. So I think we said in the opinion, "Suppose you're a Muslim and you can't go to school on Friday." And you say, "Look, you're closed on Saturday and Sunday. Now, you got to excuse us every Friday." Must the state excuse under those circumstances? Must trials be rescheduled if you're—I forget what we wrote exactly. But it was there. I changed my mind about that, actually, since then, and the Court did, too, within three years. But, again, he was very sympathetic to the claim. I know that. He was quite proud of the fact that his youngest daughter had married an observant Jew. He was quite friendly with some high-ranking rabbi around the country. He read books that the rabbi gave him to learn when his daughter fell in love with this Jewish fellow. He was somewhat hesitant about it, but he did it and that was it. Brennan dissented.

02-00:40:02

McCreery:

I was going to say the—

02-00:40:03

Choper:

And ultimately prevailed.

02-00:40:06

McCreery:

Later on.

02-00:40:07

Choper: Yes, three years later. I mean, he didn't overrule the case, but in effect he gutted the case, the one that we had. Yes.

02-00:40:16

McCreery: You also mentioned working on a half dozen or so Communist cases. Can you tell me about that?

02-00:40:21

Choper: Yes. I did the bench memos in those cases. I can tell you what do I remember about those. We lost most of them. We lost most of them. The Court was split basically—except on the race issue. There were four liberals and five people who were more conservative. And occasionally the liberals would catch a fifth vote. That's the way it was, it's the way it's been on the Supreme Court now since 1970 with just that lineup. Different players, but that's the lineup, with a short window of a couple of years in which the liberals lost that when both Brennan and Marshall retired. And there were a few years, beginning in 1962, between sixty-two and sixty-eight that the liberals were in control. That was the height of the Warren Court. The Warren Court was not—I mean, there were the segregation cases and some others beginning in the mid 1950's. There was some stuff, but that was after 1962 when the liberal wing was in charge.

02-00:41:22

McCreery: Yes. Later, it—

02-00:41:23

Choper: Yes. After Frankfurter left and Arthur Goldberg went on to the court. And then subsequently, when Tom Clark left and Thurgood Marshall came on, they had six votes. They could do whatever they wanted most of the time.

02-00:41:42

McCreery: But in your time, the five to four—

02-00:41:44

Choper: My time. Well, we lost almost all of the big Communist cases that year. And I remember once on one of the cases that finally came up—one of the cases that came up and they took, I recommended they deny certiorari. The Communists had lost in the court below. I think I probably said in the memo to him—this only went to him. I said, "Deny," and I said, "just going to lose this thing, too." The practice was, as I'm sure you've heard from others, that he'd call us down at the end of the conference when he read all the orders to the clerk, the clerk of the court, who's now Judge Browning—

02-00:42:29

McCreery: Mr. Browning, yes.

02-00:42:30

Choper: —in the Ninth Circuit. Very highly respected judge. Nice fellow. He was a nice fellow then, he's a nice fellow now. Then he'd leave the room and the

Chief would answer any questions we wanted to ask about the conference. So I periodically—there are a number of instances when he went against what I would recommend and I'd be curious about it. And I said about this case, I said, "Chief, why'd you take that case? I'm curious." You vote for that—I knew he voted for it, because they wouldn't get four votes otherwise. So, I mean, I just sensed that he voted for it. And I said, "You know," I said, "you just keep losing all these cases." And his answer to me was, "I know. I read your memo on that." He said, "I'm going to keep taking them. If you force the Court"—and he didn't use the word force. He said, "The Court continues to make this bad law," he says, "it will sooner or later fall of its own weight." Well, it's an aphorism or whatever it is, but that's the way he felt. He won a few of them. They'd go off on some little technicality, you know, the question wasn't put—this, I'm sure, was a guy who was questioned by some state legislative committee and held in contempt for refusing to answer the question or whatever it was. They probably didn't give him adequate notice or something. I remember they got—Potter Stewart. Stewart. Stewart went with him on this case. But those others were big cases. They were the case involving the illegality of the Communist party, which the Court upheld five to four. The party itself, and then two cases involving whether it could be illegal to be a member of the Communist party. But they upheld the law in those cases.

02-00:44:27

McCreery:

Okay. In general, what did you look for in making your recommendations?

02-00:44:31

Choper:

In general? Well, there were really two things. One is was this a case of great importance. Maybe more. If there was a conflict between the lower courts, that always worked pretty well even though the issue itself wasn't greatly important. Having a uniform law throughout the country was important. We looked for whether it was a case of great importance generally, like the Connecticut anti-contraceptive case. I don't know when that was granted. That may have been granted the year before and carried over. We could find that out. I don't remember working on that aspect of the case. But that was obviously an important case, important issue. And one of the big criteria was whether the case was correctly decided by the court below, and the notion that the court was not there to correct injustices, individual injustices, which is often said, didn't work with the Chief. I mean, he was not about to let things that he thought were unjust, not fair, go by. He would vote to take them.

02-00:45:42

McCreery:

Okay. And did he instruct you particularly, though, in what to look for?

02-00:45:50

Choper:

No.

02-00:45:50

McCreery:

You know, how to apply his—I mean, should we call it a judicial philosophy?

02-00:45:55

Choper:

No. No. He did not give us very many instructions. I can only remember one thing. If it was not the first time we met with him formally in his office, it was very soon thereafter. The only rule of the place that he ever delivered—I'll tell you a couple Mrs. McHugh delivered subsequently—but the only one he ever delivered was, "I don't want you talking to the press." He said, "I don't want that." That was it. He said, "You know, I know they come around, they try to talk to you all." He said, "They come and have lunch in the room there, in the cafeteria." He said, "I don't want you talking to the press." I remember one night I was invited for dinner at a clerk from another office's home and there was Anthony Lewis, who was then the Supreme Court reporter for *The New York Times*. I felt really uncomfortable. I didn't say very much because I'd had this edict. I couldn't very well walk out of the dinner party and I don't think he would have expected me to do that. But I sure was careful not to say anything that would indicate what's going on in the office or in his thinking.

02-00:47:21

McCreery:

Well, I can speculate, but why do you think he felt so strongly about that?

02-00:47:28

Choper:

He was wary. Any public figure, and he was a major public figure, after a while, you come to dislike, if not hate, the media. I want to tell you, in my little pond here when I was dean, that certainly became my experience. Not every one of them, or anything like that, but as a group. And I talk a lot to the media today. I think it's part of my job to explain what's going on to the public and so forth and there are plenty of nice people. But if you're vulnerable, and you're always vulnerable as a public official or someone like that, they go after you and they're merciless. Now, maybe that's the way it's supposed to be, but that doesn't mean you got to like it when you're the object of it. That's what I think it was about him.

02-00:48:33

McCreery:

And, of course, his experiences in California—

02-00:48:35

Choper:

Oh, yes.

02-00:48:36

McCreery:

—in such public roles.

02-00:48:37

Choper:

Yes. One of his clerks had been a reporter for a California paper before he went to law school -- Bill Allen. I don't know if you're going to talk to him in Washington. Yes. He covered Warren for—I don't remember the paper. You talk to him, you'll ask him about that.

02-00:49:01

McCreery:

Okay. Well, while we're thinking of it, what do you think was the Chief justice's way of drawing on his political experience in the Supreme Court? How did he use that vast knowledge he had of how things worked?

02-00:49:16

Choper:

He understood the way government worked and he understood what he thought was good or bad for the country. I think he felt that California was a microcosm of the country. Even then, it wasn't the biggest state in the country. I forget the numbers. The population was growing so much every year, and how many new schools they had to open. And he was an activist. He believed in the goodness of government. I did, too, in those days. I don't anymore. He believed in the ability of government to solve problems. He thought it was a great thing. He was a progressive Republican. As he rose, a man named Hiram Johnson, who had been governor of California and a U.S. Senator. LaFollette in Wisconsin was similarly described, but I never heard him talk, or at least that I can recall, about LaFollette. But Hiram Johnson. That was his image, his role model is the word I'm looking for. He once told us as well—he said at his seventieth birthday party when he talked, he said, "I'm seventy and I treat you boys like my family and so forth," he said. "One of the things I rely on you for is to tell me if you ever think I'm slowing down," he said—because he used this expression. He said, "I saw Hiram Johnson 'die on the vine'" he said, "and he just hung on too late." So he quit when he was seventy-eight. Yes, that's not a kid.

02-00:51:18

McCreery:

Well, staying a little longer than he'd originally planned.

02-00:51:21

Choper:

Oh, he stayed a year longer.

02-00:51:23

McCreery:

Yes, that's what I'm thinking of.

02-00:51:25

Choper:

I think he quit before he originally planned, too, because I think he didn't want Nixon to appoint his successor. But he did in the end.

02-00:51:35

McCreery:

Yes, yes.

02-00:51:36

Choper:

I know why he said he retired to me. Who knows what. He said he was dramatically affected by the assassination of Robert Kennedy. I mean, I asked him. I said, "Chief, why are you retiring? You seem to have it all"—I don't know what I said. I can't remember. The notion was, "You seem to have it all together. You seem to be having great success on the Court." And he said, "Well, Bob Kennedy's assassination, Martin Luther King," I think he may have mentioned that, too. I didn't follow it really. Something like it was just time for new something or other. Blood, I guess would be the—I remember him saying that. New people to come in. So that may have been part of the Hiram Johnson thing.

02-00:52:39

McCreery:

Well, what about President Nixon's choice of Warren Burger. He made a big show of not appointing any political friends.

02-00:52:51

Choper:

Well, he wasn't a political friend. Look, he had every right to do that. He was the president and Warren Burger fulfilled much of his image of what he wanted. He was the chief judge of the DC Circuit. The DC Circuit was split very much like the Supreme Court was split. He represented the conservative wing of that court. Judicial restraint, don't coddle criminals. I mean, all of that stuff. He became a lot more liberal on the court than one would have anticipated. I mean, not that he was any great liberal. He wasn't. I don't know. He also looked the part, for some reason. I'll tell you a story about that, too. I said, "Who do you think going's to be appointed your successor, Chief?" I said there was talk—I forget who the talk was about. Judge Friendly, everything, and he opened his drawer and gave me a piece of paper. It said Warren Burger on it. I don't know how he knew.

02-00:54:06

McCreery:

You don't?

02-00:54:07

Choper:

Well, I mean, as I think about it, I guess it was a natural selection. Burger had worked for Nixon. He was in the Justice Department under the Eisenhower Administration, I guess. He was in the Justice Department under the Eisenhower Administration. But he knew who it was. One name he pulled out.

02-00:54:28

McCreery:

Well, at that time, what—

02-00:54:34

Choper:

I think I should say he felt Warren Burger never—he said he was always very polite to him and so forth, but he said he never tried to draw on any advice or anything like that. I think he was a little put off about that.

02-00:54:54

McCreery:

Yes. Wanted to make his own mark or—

02-00:54:56

Choper:

Yes, or something. I don't know.

02-00:54:57

McCreery:

—something. Well, at that time, what was the state of Constitutional law? What did Warren Burger inherit?

02-00:55:05

Choper:

Well, look, the Court, when Warren retired, was split six to three with a liberal majority.

02-00:55:24

McCreery:

As you've described earlier, yes.

02-00:55:26

Choper:

Yes. So the state of the law was that they pretty much could do what they wanted, and they did. The liberal philosophy prevailed starting, I guess, in 1962. First when Justice White replaced Whittaker, so that was a wash, although White was more liberal, but not very liberal. It was when Frankfurter went—[phone ringing] You want to turn it off or—?

02-00:56:09

McCreery:

If you'd like, I will.

02-00:56:10

Choper:

It'll go three times. You do whatever you want. I don't care.

02-00:56:13

McCreery:

Okay, okay. I'll just wait. I'll just wait, unless it's something you want to pick up.

02-00:56:18

Choper:

I said until 5:30. That's my wife. That's all right. It was when Arthur Goldberg replaced Frankfurter. That went five liberals to four. And then, as I said, when Marshall replaced Tom Clark, it was a six—and they stayed there until the very end. Fortas replaced Goldberg, but that was the same thing. And Nixon had two appointments because the Chief, of course, had announced his retirement and he was not about to change it. I mean, I never talked to him about that. There certainly was speculation that he'd try to outlive Nixon, but he didn't. He wouldn't do that. I sort of knew he wouldn't do that. It's not the sort of thing that he would admire and would feel good about. And you'll recall that this began when Lyndon Johnson made two nominations. He wanted to make Fortas chief justice, and he wanted Homer Thornberry to take Fortas's seat on the Court. But then Abe Fortas got into trouble, and had to resign. And it was just too late. The die was cast. They weren't going to confirm anybody like this. So Nixon appointed two conservatives, Burger and Blackmun. Blackmun turned out to be very liberal, but for the first few years he was conservative. So the whole thing flipped. And what was interesting to me was the extent to which they did not come in and radically overturn everything that had been done. They certainly weren't going to go forward very often. But they never overruled *Mapp*, they never overruled *Miranda*. They tried to cut back on it a little bit. It was interesting.

So I think the Chief's legacy has been strong. A great deal of it has survived. Great deal of it has survived. Then indeed this Court went on, the Burger Court went on, for example, to the birth control and abortion cases. Big moves, at least in terms of the country, the social philosophy of the country. And the extension of the equal protection rights to women. That was all Burger Court stuff. So this was an attitude, I think. This is very difficult in any way to prove. You can't prove these things. But the influence of *Brown* and the Warren Court, I think, has been enormous, radiating way beyond the decisions. I think it was the catalyst—I don't think this is my phrase—for an

egalitarian revolution in the country. And you see it played out now. Women, sexual preference, disabled people. And it played out legislatively. And it also had an enormous influence on the way courts regarded themselves in this country and what they could do, and what law students could do by use of the courts and so forth. Not all of it, I don't think, beneficially, either. But it's an enormous legacy, and on balance, of course, I think it's been very good for the country.

02-00:60:30

McCreery: Okay. Let me pause here and just change tapes one more time.

02-00:60:35

Choper: Okay.

02-00:60:36

McCreery: Please.

Begin Audio File 3

03-00:00:28

Choper: Do you edit these tapes?

03-00:00:31

McCreery: No, we just transcribe them.

03-00:00:35

Choper: That's all right.

03-00:00:35

McCreery: I mean, edit very lightly for turning the conversational word onto the written paper.

03-00:00:42

Choper: You edit the transcription.

03-00:00:44

McCreery: Yes. Just very lightly.

03-00:00:45

Choper: But not the tapes?

03-00:00:47

McCreery: Oh, no. No. But the transcript that you review and draft becomes the version available to the public.

03-00:00:53

Choper: Oh, my god. Okay.

03-00:00:55

McCreery: Okay. All right. Well, this is tape number three, and Laura McCreery continuing the interview with Professor Choper. We were just reviewing the

Warren Court legacy and what came after it. So just in brief fashion, carry that forward to the Rehnquist Court, for me, would you.

03-00:01:15

Choper:

Well, the Rehnquist Court has put its own signature on things. It has been made up of a more solid conservative base, although it is a conservative majority, but there are a couple of justices in particular in the middle. Or not in the middle, but who can be caught by the four liberals periodically. But it has a stronger core of the Chief Justice, who loosens up occasionally, but not that often, and Justices Scalia and Thomas. So they prevail most of the time. The five-fours in favor of the conservative view is pretty strong.

03-00:02:08

McCreery:

As is the wind.

03-00:02:09

Choper:

As is the wind.

03-00:02:12

McCreery:

Thank you.

03-00:02:16

Choper:

And they've had their own issue. The issue of states rights has been the big one. Congressional power versus states rights. The final word isn't in on that and this court is not going to last much longer. I don't think it's going to last beyond a year after the election, that term of the court, if not sooner. But I doubt it. I think they'll finish out that year. Let's see, November, that'll be this coming term. Will be the last term that these nine have been together. They've been together for the second longest period in history, of nine people unreplaceable, the whole Court, since the early nineteenth century. So it's made a mark, there's no question about that. But it hasn't. See, the Warren Court has prevailed largely beyond. Just hasn't moved forward. They didn't cut back on it a lot.

03-00:03:18

McCreery:

Does that surprise you?

03-00:03:20

Choper:

Yes. I guess. Surprise, yes. I would have expected otherwise. That's the way I respond to that. I would have thought they would have found a way to gut *Miranda*, to gut the exclusionary rule of *Mapp*. They cut back on it a lot a bunch of years ago, the so-called good faith exception. But nonetheless, it still has a great deal of impact. I think there's been a general acceptance that law enforcement has got to adhere to the rules more. That was before the Warren Court, but they just expanded it a great deal. I think that there's enormous support for the First Amendment, much greater than it was before. It will be interesting to see how the courts play out with the war on terrorism and the individual rights claims. They're very difficult, I think, very difficult. And they don't want to be colored by these cold abuses that you see in some cases,

like in the Abu Ghraib prison in Iraq. No one justifies that. Nobody. I don't know anybody who justifies that. Someone called it like a fraternity hazing someplace, I saw. But you can always get some people there. But the other cases are more serious, particularly how much the court will give. They'll give a little bit, I think, even the five. Although it would not be of great surprise to me if in the three cases before the Court now, five of them upheld the government's position on all of them. Five to four. That would not be a great surprise. I think they'll push them a little bit. I don't know. Wait and see. We'll know within three weeks.

03-00:05:26

McCreery:

Before long, that's right. Well, thank you for that summary. Now, you've described a little bit about how you kept in touch with the Chief Justice after you left your clerkship.

03-00:05:36

Choper:

Yes.

03-00:05:36

McCreery:

Can you describe to me his mood and interests in retirement?

03-00:05:41

Choper:

Well, his mood was always upbeat. Very savvy person. From the day he stepped out of the job, he saw the tide had turned and he recognized that. He wasn't happy about it, but he accepted it. We'd talk about these things in the group at the dinners. But I think he felt—this is great speculation on my part. This is quite an extrapolation of what I think about him. But I think he thought, "You know, I did the job when I was there. Someone else is doing it now. Nothing lasts forever." I don't know if he thought he's had a—I don't think he had any idea of the substantial influence that he would have overall.

03-00:06:42

McCreery:

That he would have?

03-00:06:42

Choper:

That the Court would have, that his Court would have overall.

03-00:06:47

McCreery:

And how do you characterize that influence?

03-00:06:48

Choper:

As I say, a great expansion of the notion of what the Constitution should do. A great expansion of individual rights protected by the Constitution. A vigorous protection of individual rights. And a very widespread—by no means total—but widespread acceptance of the role of courts in the making of important social policy, economic and social policy. That is the legacy. Those two things are the legacy of the Warren Court. I have no reason to believe that they're not going to last in perpetuity. I want to say forever. For a long time. You can have some cataclysmic event that will change the whole thing. I think one

more terrorist act and that could be the event. [phone ringing] I'm sorry about that. That's someone persistent.

03-00:07:58  
McCreery: That's all right. That's all right. What did you—do you want to pick it up?

03-00:08:07  
Choper: Let me answer it.

03-00:08:08  
McCreery: I could—

03-00:08:08  
Choper: No, no, just let me answer that. Go ahead. We start again.

03-00:08:11  
McCreery: Okay. Well, I must say, I lost my train of thought there, or exactly where you—

03-00:08:18  
Choper: I was talking about the legacy of the Warren Court. I think I said if we have another terrorist act, then—I mean, that can be the sort of cataclysmic thing that's going to change everything. But otherwise, in the absence of something like that, then the influence that he's having in the greater sympathy for an expansive reading of individual rights and the acceptance of judicial activism at all levels: state courts, federal courts, Supreme Court, trial judges. Playing an important role in the making of social and economic policy in the country.

03-00:09:04  
McCreery: What do you think about that?

03-00:09:05  
Choper: Well, I'm a moderate myself. I certainly am not as sympathetic to that as I was then. But even then, I was not sympathetic to the courts simply making ad hoc social policy decisions, doing what they think is right. If they couldn't articulate a principle, then I didn't think they ought to be there. So I haven't changed to that extent.

03-00:09:42  
McCreery: And your examples reflect that?

03-00:09:44  
Choper: Somewhat. That's right. And my whole scholarly academic enterprise has been to try to state rules, good rules, that are influenced by social policy considerations, influenced by a sympathetic reading to individual rights, but that are principled and that restrict the discretion of non-elected officials, which federal judges are and state judges are largely, even if they are elected. Which restricts them in some way from simply acting like a legislature. In my line of work, that's a boilerplate statement. But I believe in that strongly. So I would have had great difficulty. I am pro-choice. I would have had great

difficulty—you never know what you'd do if you were there. But the abortion cases. I thought that was overstepping on the court's part. And if the court will do that, it can take anything it thinks is important and say the Constitution protects it. Well, I don't believe in that. I have written a whole thesis on how church and state problems ought to be resolved, and I said in the preface these are rules. I'm not happy with all of the outcomes that they produce. I've thought about these that I'm unhappy about and I can't find a principled way to reach a different result. So that's just the way it goes on that.

03-00:11:41

McCreery:

Okay. Well, to what extent was Chief Justice Warren a mentor for you and an influence on what came next after your clerkship?

03-00:11:50

Choper:

Well, I had already made up my mind that I wanted to teach law. I'd taken the job at Minnesota before I went to the Court. He set an example of integrity, of savvy, of sympathy for liberal—I mean, I guess I liked to think that in a way that was part of me, but he showed that people who are as prominent, as successful as he was, could believe in that, could live their lives that way. So I thought he was an extraordinarily admirable person. Now, that may just be the times, the setting and everything. He was a hero. He was a real hero to me. So what can I say?

03-00:12:56

McCreery:

Okay. Well, knowing that I've kept you too long, we can end soon. Is there anything else I should have asked you as an essential thing?

03-00:13:04

Choper:

I don't think so. I don't think so. No.

03-00:13:08

McCreery:

Okay, okay.

03-00:13:09

Choper:

I mean, we can go on and on. I mean, there's a lot more. But no, I don't think there's anything essential.

03-00:13:15

McCreery:

Okay. Do you recall the last time you saw the Chief, by the way?

03-00:13:26

Choper:

He died in the summertime and I probably saw him at the dinner before, if there was a dinner in March. That was before he took ill.

03-00:13:35

McCreery:

That spring.

03-00:13:37

Choper:

That spring. Yes, I saw him then. I don't think I missed more than one of those dinners.

03-00:13:46

McCreery: And you've been part of the core that's kept the clerks getting together, haven't you?

03-00:13:51

Choper: Well, I have. I guess I've taken the leadership role in that regard. A lot of it had to do with the fact that I became dean here and this was his school, and there were occasions that arose for that to be done. We had several. We celebrated his hundredth birthday here with a big, big blast in San Francisco. Wonderful evening, I thought. And I used that as an occasion. Many of the clerks came and we had a reunion of the clerks. We've had two since then. The other was maybe a half a dozen years earlier, in which they had a preview of this film called Super Chief, which I had some advisory role in. And they had it here, and they invited a lot of people to it. Both justices Brennan and Marshall came out for it, and we had a lunch for the clerks then, as well. My one regret about it all, and I still feel very sad about it, was after his death, they had a memorial service at the Court and I believe that Bob Bork was then Solicitor General. And he called me and asked me to represent the clerks and give a eulogy. And it came on a day that I had a class, and for some reason, I couldn't see my way to do that. And Frank Beytagh did that and I read it and he did a fine job. But if there's any one thing, just generally, that I really think that I should have—I know that I would, if I had the chance to otherwise, and that it was a really quite poorly thought out decision on my part. I wish I'd done that. So we'll end it there.

03-00:16:10

McCreery: We'll end it there. Thank you so much.

03-00:16:12

Choper: You're welcome.

[End of Interview]