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Table of Contents—Dennis M. Flannery

Interview 1: August 17, 2004

Audio File 1


Audio File 2


[End of Interview]
Interview 1: August 17, 2004

[Tape number one. This is August 17, 2004. I’m Laura McCreery speaking, and on this tape I’ll be interviewing Dennis M. Flannery at his office in Washington DC. We are working today on the oral history project Law Clerks of Chief Justice Earl Warren. Mr. Flannery, would you start us off by just stating your date of birth and talk a little bit about where you were born and raised.]

Flannery: This year I will be sixty-five; I was born on February 10, 1939. I was born and raised in New York City. Actually I was born on West 139th Street in New York City, which is about twenty blocks north of Columbia University. One of the things I like to say about my background is that I went to high school and college in New York City. I went to law school at the University of Pennsylvania, and I remember, one of the things that’s really stuck in my head about the University of Pennsylvania was hearing references to the upper west side of New York and hearing that that ended somehow on 96th Street and left me to wonder, “What about the rest of us at 139th Street and 200th Street?” Up the upper west side of New York a little further. It put things in perspective.

But I went to {Carnegie New York?} Grammar School in New York City, which is on 142nd Street and Amsterdam Avenue. I went to a wonderful high school, one of the best in the country, {inaudible} High School in New York City, {inaudible} Street. And I went to college at Fordham University.

McCreery: I’m sorry to interrupt; I’m not picking your voice up quite as well as I could before we started. Could you move your clip up a bit? There. That seems to be better. What were your reasons for going to law school, and how early had you thought about the law as a career?

Flannery: I certainly did not give it deep probing thought. I always liked to debate, {I liked} arguments back and forth. But beyond that I really don’t think there was any great probing reason why I went to law school. It seemed to be something I would be able to do well, so I did it. I was probably the first of my family to go to college and certainly the first to go to a postgraduate environment.

McCreery: Who were the adults who influential to you as a youngster and young adult?
Flannery: I don’t think anyone other than my parents. There were some very inspiring priests and nuns in [the school] went to that certainly I admired, but I don’t think of any that would have been a formative influence on me. My mother was a wonderful person. She valued education greatly.

McCreery: I’m still seeing a little problem with that microphone, so again, I apologize. I’m going to take this off and see what we can do. [tape pause] We’ve started again with a little adjustment to the mic that I hope will help. I wonder how you chose Penn as your law school.

Flannery: Part of it was economics. I applied to a number of law schools, and I was fortunate enough to get admitted everywhere I applied, to get a scholarship everywhere I applied. Penn had a wonderful reputation.

McCreery: Tell me something about the faculty of Penn at the time you were there.

Flannery: I think it was probably the best that it ever was. Bernie {Wilson} at Harvard. Paul Mishkin.

McCreery: He’s actually retired from Berkeley now, although he didn’t have his whole career there.

Flannery: [He] went to Penn, Stanford, USC—I had been told that law school would be a terrific, invigorating experience, much more exciting than college. I did not really find that to be the case. I found that the most enjoyable part of law school was the Law Review, which was a world of its own. I was fortunate enough to get on the Law Review, and I was editor in chief, and so I think those were the experiences in the law school—and of course getting to know some faculty members and things about the law. But I think the Law Review experience was the one I remember the most and had the most influence on me.

Two years before me, apparently, it was not in very good shape. And the fellow who was my immediate predecessor had as his goal getting the thing out on time. So it always got out on time, and I followed that goal. It’s good for a law review to get out on time. Those were the days when you had eight issues.

[Editor’s note: the next section of this interview, which appears to be about the Law Review, is inaudible, Please feel free to insert a few lines here if you wish]
and then went into real estate competitive {inaudible} Philadelphia
{inaudible} a good friend of mine {inaudible} Hank Gladstone, {inaudible},
Mike {McCoy?}, he was a

1-00:09:20
Flannery:  The Warren clerkship was done probably differently from a lot of others. He
did not interview clerks himself. I believe he had some sort of a panel or
grouping of his former law clerks, who screened applications, but I don’t even
know that for a fact. I know when I was told I was having a clerkship with
Chief Justice Warren I remember it was a letter, or it was communicated to
me initially through the Dean of the law school, Jefferson Fordham. But in
any event the first time I met Chief Justice Warren was the first day I reported
for work.

1-00:10:07
Flannery: Do you recall your first impressions?

1-00:11:33
Flannery: We were very different from all the other clerks. We did not have our offices
in his chambers. We were upstairs even, so we weren’t even on the same floor
as Chief Justice Warren. So my two co-clerks, James [C.] Gaither and John
[Hart] Ely, and I were sort of in a little world of our own up there. We would
see him, essentially, first when he would call us down to tell us what the
results of a particular conference were. If he was going to do an opinion, to
give one or the other us the assignment to do the opinion, we would see him.
Then if we were working on the opinion he would initially tell us what it was
that he wanted to do with the opinion. Sometimes he was quite specific and
sometimes he was a little more general, but he always told you essentially
what he was looking for. Then you would go through working the drafts with him until he was satisfied with them.

Then he had a ritual, certainly in the fall, to take us to lunch almost every Saturday, and we would go to one of the clubs, I think the University Club, and watch college football games. That was fun in the beginning. It got to where a little after a while—because I think he was more interested in the games than we were, but we were interested in spending a little time with him. But it was not a daily interchange with him, and sometimes a week would go by I would think, and who knows, maybe more, where you wouldn’t see him at all.

McCreery: May I ask if he gave you any specific instructions about confidentiality, about your role—

1-00:13:07

Flannery: Oh, certainly. You bet. It was a very different time, and it’s hard to think back at it. It began in the fall of 1964. Vietnam, if it was on the horizon, was a dim, dim spot on the horizon; it just started to pick up as the term went on, from ’64 to ’65, and I’ll tell you a Justice [William O.] Douglas story when it’s the appropriate time about Vietnam. But it was not the burning issue. The sixties, I don’t think, were not really the sixties yet. I think that happened probably a little after we were there. I think we were all very respectful, very conservative in our views of what our role in the Court was. I think we were very clear in working with him that he regarded us as assistants and people who he essentially used—in a nice way—but used in order to help him do his work. We did not have agendas of our own. He did not expect us to be acting as if somehow or another we were movers and shakers on the Court. It was very clear that we were to be discrete.

I was, for reasons that I don’t quite understand, selected as chief clerk. I think it was because I was the only one of the three who was an editor in chief of the law review. That’s the only reason I can think of. So it was mainly an honorary title. I got, I think, a thousand dollars more than everybody else, which I then had to use to throw a party for all the law clerks; it didn’t do me much good. But one of my functions, maybe my only one, was to line up speakers for the other clerks for lunch every once in a while; we had maybe ten or twelve over the course of the year. It would include each of the justices, who would come and have lunch with all the rest of us; everyone would always look forward to that. And them some very selected—pre-selected—outsiders. I would have to clear them with the Chief Justice and make sure that he had no problem with them. Generally it was not to include news people, although he had great, great respect for Anthony Lewis, and Anthony Lewis was on the list, did come, and we had a very nice lunch with him.
John Lindsay was an up-and-coming congressman who was on his way to running for Mayor of New York, and with Chief Justice Warren’s approval he was invited. I remember John Lindsay, when the lunch was over and I took him out to say thank you and walk him out of the courthouse, him looking over at the Congress after having this nice cerebral lunch with us, he shook his head and said, “Now here I go back to that madhouse,” or words to that effect; I’m not sure he said “madhouse,” but it was certainly “here you guys are, and here I go back to that maelstrom.”

We had Robert Kennedy, who—this is an interesting story. It was the tradition to have the Attorney General come. So Robert Kennedy, as Attorney General—which was before my time—was a luncheon speaker. I think speaker is the wrong word. You just have lunch, and they’re sitting at the table with you, sort of a conversational thing; he wasn’t on a dais or anything like that. Apparently, the first time he came he was really worked over, as I understand it, by the clerks. They were very snotty and superior and really looking down on him. It was, from everything I understand, a very unpleasant experience for him. To his credit he came back in succeeding years but always brought someone with him; his deputy came and sort of fielded the questions. Not fielded the questions but was there to give him some assistance. Our term he was then Senator, because President Kennedy had been assassinated, and with Chief Justice Warren’s permission we invited Robert Kennedy to come, and he accepted and he came. This was probably the most memorable lunch we ever had. He brought someone with him. It wasn’t clear who the person was.

McCreery: President Kennedy or Robert Kennedy?
1-00:17:45
Flannery: No, President Kennedy is already dead. Long ago.

McCreery: I’m sorry. This is Robert Kennedy.
1-00:17:49
Flannery: Who is now a Senator. In my year. Notwithstanding having been worked over pretty badly by clerks his first turn, and then I guess having a better experience later, he nonetheless agreed to come to lunch with us even though he was no longer Attorney General and he could easily have said no. So he agreed to come, and he did come, but he brought with him someone who no one was quite sure who that someone was. He introduced him, and I caught the name; it was Saul Bellow. He said, “Saul Bellow is here with me too.” And it seemed that no one knew who Saul Bellow was, which is very surprising. And these are very bright clerks and everything; maybe no one could put it in context. I, who was by no means the most literate of the group, did at least know who Saul Bellow was. So as the lunch went on, every once in a while Senator Kennedy would throw a question to Saul Bellow, and
Bellow would say something or other as if he was, for all we knew, an administrative assistant or something. And the lunch went nicely enough.

Then, when it was time to bring Senator Kennedy and Mr. Bellow up to Chief Justice Warren to say hello and goodbye as they were leaving, I remember the three of us were riding up in the elevator together. And the two of them started giggling almost with each other. One or the other, I think it was Bellow who said to Kennedy, “I couldn’t help thinking how proud their mothers must be.” Then we went up to Chief Justice Warren’s office, and I told his guardian at the gate, Mrs. [Margaret] McHugh—and you probably have heard Mrs. McHugh stories—I told her, “Here is, obviously, Senator Kennedy and Saul Bellow is with him.” I don’t think she knew who Saul Bellow was from the man in the moon, either, so she wrote on a piece of paper and brought it in. Then we were ushered in, and Chief Justice Warren said, “Oh, Senator, it’s so good to see you.” And then to Bellow he said, “And you too, Mr. Bellows.” He added an “s” to it. [laughs] And then we had a nice little chat and left.

By this time I was saying, “Gee, whiz, this Bellow, this great literary guy, must think everyone’s a boob. “They never heard of me.” So I went out of my way. I said, “Mr. Bellow, it was such a thrill to have you here. My wife is your biggest fan”—which wasn’t quite true—“and she just loves Herzog, and would you write a little note to her?” So he did, and I still have it, “to Judy Flannery, from your admirer,” or something or other. “Saul Bellow.” I actually still have it in my copy of Herzog. But that whole incident was one that I always look back on as one of the more memorable lunches we had.

I remember another time that we were having our lunch, and somehow Martin Agronsky—I don’t know of that name means anything to you; it’s of a rather different vintage—he was a commentator, probably on CBS, and he was a fairly aggressive reporter. Somehow he ended up in the lunchroom with the clerks, not particularly invited, just sort of came. I remember how uncomfortable I was the whole time during the lunch that he was there. I think for the most part people behaved themselves, were very discrete. But you could tell there was sort of a sense that, “Gee, this is pretty good, this very well-known guy is here.” But I was very uncomfortable that whole time. It wasn’t one of my lunches; I wasn’t really responsible for it, but I just had a sense this shouldn’t be happening. And he left, and nothing much was made of it. But in contrast with Tony Lewis, where you just knew that this was someone who knew all the rules and knew where the things—Martin Agronsky was a fine man, but I don’t think he was in that same league, and he certainly not someone we would have invited as a luncheon guest.

McCreery: Other than arranging these very interesting luncheons, how else did your relationship with the Chief vary from those of your fellow clerks?
Flannery: Not at all.

McCreery: That was mainly the difference being chief clerk.

Flannery: Right. I think I was in essence the person who was supposed to organize the work flow among the three of us. But that was almost silly in a way because we were sort of all equal, to say the least. So in no way was I boss or superior or were they reporting to me. But we would just sort of divvy the things in a common-sense way. So other than the lunches I think there was very, very little that differentiated me from the rest of them.

McCreery: In dividing up the cases would you have special areas of interest among you? How did that work in fact, or was it really just passing them out?

Flannery: Yeah, passing them out, I think. We would just pass them out. This was in the initial review stage, the certiorari petition review or direct appeal review, writing these little memos for the Chief Justice. If one of us were doing one and it seemed to be something that another had expressed a great interest in—like I know one of the clerks had an interest in bills of attainder, which don’t come up very much, so if one of those came up we would say, “Do you want to do this?” “Oh, yeah, I’d love to do that.” But other than that I think essentially we just did them as they came along. And if there were cases, such as capital punishment cases, all three of us would review it, and one of us would do it, but the other two would review that. That was just our own sense that we wanted to be as careful as possible; that was nothing that we were told to do.

And of course when it came to writing opinions, drafting opinions, that was something the Chief Justice would assign, and he would tell which of us were to do it. I think generally that was also done by who had done the last one. I think it was generally rotated, although he may have steered one or another one way or the other. But generally it would just be who hadn’t done one, or who had had done the most recent one, or who was up for it.

McCreery: And was there a continuity, if say you had worked on a bench memo and then if it went far enough—?

Flannery: Yeah, that would more or less be the way it worked; if you did the bench memo and it turned out that he took on that opinion to write, the odds were pretty good that you would then wind up doing the draft of that opinion.
McCreery: Again, you mentioned that he would give you some bit instruction at the outset of that actual opinion-writing process, in terms of where he wanted to go with it. How specific was he, either in general or in specific—?

1:00:24:42 Flannery: You don’t work on that many opinions—I can’t remember whether I worked on three or four; I’m taking that number out of the air—but I don’t think, you don’t work on ten or anything like that, at least in those days you didn’t. So it’s hard to speak too confidently about the process. But my impression is, my recollection is—which may be embellished by what you have read and heard over the years—in the cases where he really, really had an interest, cases involving fundamental fairness—equal protection, that sort of thing—I believe his instructions were quite specific. He didn’t draft the opinion, but he told you in a very specific way where he wanted to come out and why. Then you in essence filled in the blanks. I don’t mean that he logged out fifteen pages, but he was very specific. In cases that would involve the tax code, Interior Department regulations, things like that, he was interested, he was responsible, he was serious. But he certainly essentially knew what the result should be, why they were going to get there, and I don’t think he would give you as specific instructions as he would with the ones that were the core cases that really were the ones that he was most interested in.

McCreery: You mentioned the capital punishment cases. How many of those did he have, if you recall?

1:00:26:14 Flannery: I remember one. It would be interesting if the one surviving co-clerk from my year mentioned it. And if he didn’t then different things are burned in our psyches. You’re nodding, but I don’t know if that means whether he mentioned it or not, but I’ll tell you what it was. It was a request for a stay. I’ll never really forget this. It was a request for a stay. I think it was— it might even have been a Saturday; all of this is vague in my mind, but the core story is not. So then John went down and talked with Chief Justice Warren about it, and Chief Justice Warren denied the stay.

I remember the rest of that day just thinking about that. I believe the execution was like at 11:00 at night, something like that, which would have been 2:00 in the morning our time. I think I actually woke up at two o’clock and thought
about that. That was certainly one instance where you had a sense where, while you’re not making the decision, and you’re not the ultimate decision maker, that what you were doing had a very real impact on human life. I don’t know what the case was about; I don’t know what the crime was. I am sure it was murder or something like that. I don’t know what the circumstances were. But that was an episode in the clerkship that had a profound impact on me then, and, while I don’t think about it all the time now, when I think about that term and some experiences we had that’s one that I don’t forget.

And I don’t recall others. I don’t recall capital punishment cases, certainly where it was at the threshold of the execution—there may have been other capital punishment cases as we went along—but that one I haven’t forgotten, and its, what, forty years since the incident.

McCreery: Are you in a position to talk about why you think he might have denied the stay? I mean, clearly the case had made its way up—

Flannery: Yeah, correct. I mean, there was no ground for him to grant the stay, as simple as that. I think certainly the three clerks, if there were one, would have, just the way we were, would have made sure that he was aware of it. But I do recall that the conclusion of all three of us was that there were no grounds for a stay. When John Ely briefed the Chief Justice I’m sure they talked about it extensively, and I’m sure they talked about whether there were any grounds for it. But I think basically it was that there was no ground on which he could, or would, grant it.

Now, I don’t think he was anti-capital punishment, although I don’t recall one way or another; I had no discussion with him on what his inner feelings were. But I do think in capital punishment cases he would be very, very concerned to make sure that it was a fair process and that the system had worked the way it was supposed to work.

McCreery: The term “fair” comes up so often in respect to the Chief. You yourself a moment ago used the phrase “fundamental fairness.” How do you characterize his approach to these matters, realizing that one had to work within the law?

Flannery: I think that was always his lode star. His benchmark always started with fairness whatever the issue was. Even with the Internal Revenue Code, I think, he would look at it from the point of view, “is it fair, does it make sense.” That and equality. I don’t know if he was an egalitarian. I don’t know what his social views were. But certainly on the sense of rights of people, and people being treated the same to the extent they could be, and having the same chance with all the limitations society has, I think that’s really what drove
him. So I think in just about any case, but particularly ones the involved core constitutional issues, I think his first question to himself was “is this fair?”

McCreery: By the time you had your clerkship Chief Justice Warren had been in his position for some ten years. Indeed, some of the key decisions for which he is really known today had already occurred, although not all of them. You had so recently had the apportionment cases, for example. I wonder, do you recall what sort of expectation you had coming into it about what the Warren Court was? We now call it the Warren Court, but did you have an expectation that he would respond in a particular way to certain issues, do you recall?

Flannery: First thing I’ll say is that our term I don’t think had any really significant cases; it’s up to the people that are litigating. Reynolds v. Sims was the term before us. Miranda was the term after us. These were all sorts of important things. We had cases that had some significance, I suppose, but nothing like that. So our term was essentially tranquil. As I recall. There were no real blockbusters; I mean, there are some cases that you could pull out that have some significance, but nothing like those.

I guess I went to the Court—and I was not a deep thinker about the law; I was not enmeshed in constitutional issues. I was someone who had done well in law school, had enjoyed various of the courses, but I did not see myself as a budding constitutional law scholar and never have been, still aren’t, and never will be. But I certainly went there, I think, with a sense that it was an institution that really was a safeguarding of basic rights of a broad range of people. I don’t know if the term “activist” was a common term then. It’s certainly one that’s been applied to the Warren Court, but then you look at other courts. I mean, Roe v. Wade was not on Earl Warren’s watch. This election decision in 2000, Lord knows, was not on Earl Warren’s watch. So I think “activism” is something in the eye of the beholder.

But I think one did have a sense that the Warren Court, and Chief Justice Warren in particular, was there to guard the basic rights of people and to make sure that freedom was extended to as many people as it should be and not essentially looking to parochial interests of one group or another. I think it really cut across groups and was trying very hard to set itself up as the ultimate protector of the people’s rights. I would think that’s the way he viewed it himself. I think the basic question, “is it fair, is it fair,” I think derives from that, or one derives from the other. Certainly, that’s the way I thought of the Court when I went there, and he certainly did nothing to disabuse me of that. I mean, he was not an emotional man. He did not make rhetorical speeches; he did not cry. He did not display great angst about what he was doing; he seemed very confident all the time. But I think he always had his antennae up of questions of fundamental fairness seemed to be involved anywhere in a matter that was before him.
McCreery: It’s interesting looking back, too, because so many of these specific cases were dovetailing with the big issues of the day. There was so much civil rights activity in the South at the time you were at the Court. I suppose it’s hard to know which came first. Many of these things were growing out of the Brown decision of the previous decade. Did you have a sense of Warren as a leader in these matters or more responding to things as they came through?

Flannery: I think everyone responds to things as they come through. The Supreme Court can’t reach out and make policy; it has to wait for cases to come up. So in that regard I think he was responding to things before him. As you say, a lot of it was a result of Brown v. Board of Education. A lot of it was a result of the basic decisions they made on criminal justice which would then spawn additional cases. But I thought he was a leader on the Court. I certainly never had any impression that anyone was leading him around or that he was being used by any other justice. I think they might well come to him and talk to him about things. We wouldn’t really know because we were upstairs on the second floor. But I had no sense whatsoever that he wasn’t his own man, didn’t make up his own mind, and if you wanted to try to get him to change his mind you had a bit of a job ahead of you.

McCreery: Did you have much view of how he himself would interact with the other justices around an opinion?

Flannery: I really don’t. I don’t know how he ran the conferences. I don’t know how involved he was in whatever chitchat the justices had among themselves either before or after a conference in trying to get consensus on an opinion. I tend to doubt that he walked around from chambers to chambers talking to people; my sense is that they probably came to see him. But I don’t know any of that. So not having been in the antechambers—all the other clerks were who had a pretty good sense of what was going on, not completely, but have a sense—we really didn’t, so I’d just be speculating.

McCreery: We don’t want you to do that. [laughs] You were talking about how he might have interacted with the others, and it’s been certainly said that he brought great political skills with him from his time in California and a savvy in terms of how to deal with other people. Do you have much view of how he put those talents to work?

Flannery: No, I really don’t. I really don’t.

McCreery: To what extent did you attend oral argument or see the justices in action in the—?
Whenever we wanted to. We would go down, especially if a well-known advocate was appearing we would go. We certainly would want to see Archibald Cox. I’m sure there were two or three or four or five others that we and all the other clerks would want to go see. We’d be standing in the side watching them. But that was pretty much a matter of personal interest; if we wanted to go I believe we were able to go, and if we didn’t want to go we didn’t have to go. I think, as with a lot of young lawyers, we were struck by the uneven quality of the advocacy. Some were just terrific, and some you just [laughs] wondered about.

Are you thinking of examples?

No, not specifically. I mean, that’s been true through life too, whoever it is. The quality is sometimes very, very high and sometimes surprisingly not high.

How did Chief Justice Warren interact with counsel?

I’ll tell you an interesting story that he told me that reflects a little bit of, not how he interacted, but what impressed him? I had a wonderful one-on-one lunch with him after I got out of the Army. I went into the Army after the clerkship, and I was in the Army from 1965 to 1967. I actually saw him one time while I was in the Army when he came to Europe, which we can talk about if you’re interested. But this was after that, and when I got back from the service we arranged to have lunch together; or I arranged to have lunch with him. We had this wonderful lunch. It took a couple of hours, and it was certainly the most intimate conversation I had with him, much more so than any I had with him when I was clerking.

One thing he said to me, which was really interesting, he said that there were three advocates—this was after he retired—there were three advocates in the years that he was on the Court that he thought were the best. One was Edward Bennett Williams, which comes as no surprise. The second was a fellow named Bill Dempsey, who may be on your list. And if Bill doesn’t know this, and you’re still talking, you can tell him, that he was on this list. He was, at that time, I think a partner at Shea and Gardner, which has just merged with another firm, but Bill, who was in a clerkship before our term. And I’ve never been able to remember the third person, so I don’t know who the third person was, which is surprising. But he told me that those were the three who he thought were the best.

Then he asked me if I had any idea why that would be the case. I said no. He said, “Well, I’ll tell you what it was. All three of them would appear in Supreme Court arguments, go up to the podium without a single piece of paper.” They would just say, “May it please the Court,” and go on with their
argument and answer questions and never have this protective device of notes, or an outline, or anything else before them. He said they were just there, and they would respond, they would do the argument, and then they would be finished. He thought that was tremendously impressive.

It made a great impression on me, and from that point on I tried to do the same thing as much as I possibly could. I only had one Supreme Court argument unfortunately, long after he was gone. But when I did that I was a young fellow—I was in my thirties or so—but I did that completely without notes. It was a great kick. And I did a lot of arguments from that point on until I got a little older and the memory wasn’t quite as good. I always remembered that, that he said that. And it was right. My sense was, wherever I was, whether it was district court, court of appeals, or the one time in the Supreme Court, if you’re able to do that, and in a non-show-offy way, but just seem to be conversing with people, responding in a natural way, not having to flip through papers and notes and indexes and everything else, it made a great impression. Now, of course, that requires tremendous preparation. It’s not that you’re winging it. It’s that you’re so prepared that you’re confident enough to get up there without the notes.

So that was one anecdote that he told me that made a tremendous impression on me, and that’s one area where certainly a conversation with him did influence how I practiced law. Other than that, I think—I don’t remember all that specifically how he actually reacted back and forth with counsel. But my sense is it was respectful and that he was not one who was overly intrusive in oral argument. He would ask a question when something was on his mind, but he didn’t try to dominate in oral argument, is my recollection. But it’s very vague.

McCreery: As an aside, how did your Supreme Court case come out?

1-00:43:39 Flannery: I lost the case, but I got rave reviews for having done it without notes. [laughs] And I mean it; people would, as was walking out, reporters and everything else said, “My God, young man, how did you do that?” So I pulled it off in the sense that I was never at a loss for words, I did quite well, certainly as well as I would have done with the notes, but I didn’t win.

McCreery: How about Chief Justice Warren himself? Was he good on his feet without notes?

1-00:44:11 Flannery: I never saw him give a speech. So I don’t know.

McCreery: He was known to have given a lot of speeches on which he apparently worked very hard ahead of time, but I don’t know much about how he delivered them.
Flannery: I don’t either. I never saw him, to my recollection, behind a lectern giving an after-dinner speech or anything like that. I don’t know.

McCreery: Let’s talk a little bit about the other justices who served your year and what the alliances were as you viewed it at the time.

1-00:44:44
Flannery: Clearly he had close relationships with Justice [William J.] Brennan and Justice [Arthur J.] Goldberg. I think he was aligned a lot with Justice [Hugo L.] Black and Justice Douglas. But I don’t believe there was that close personal relationship, certainly not with Justice Douglas, and I don’t think with Justice Black either; I think Justice Black was sort of in a different world. But I think on First Amendment and that sort of thing—and on a lot of things I think those five you’d expect to be aligned with each other. He had great, great respect and affection for Justice [John M.] Harlan. He thought he was just a wonderful person, and I never heard him say anything but warm things about Justice Harlan even though they disagreed on an awful lot of things. Justice Clark? I think they got along fine; I don’t think there was any particular philosophical connection between the two of them, but I think they certainly had a pleasant relationship. Justice [Potter ]Stewart I think was still kind of feeling his way. I don’t think he was either here or there with Chief Justice Warren; he was another justice. And then there was Justice [Byron R.] White, who was a complete benign {and a dud?}. Justice White was a surprise to all of us. He was quite unpredictable.

McCreery: How so?

1-00:46:25
Flannery: He had a sense, coming from the Kennedy tradition and all the rest of it, that he would probably be—I don’t know if left-right helps particularly—but he was certainly a centralist justice. But I would have expected him to be a little more to the left than to the right. But he was probably more conservative in his approach across the board and I think more unpredictable than perhaps the others. I don’t know if Justice White had a philosophy, but he did have a “take-them-one-at-a-time” and—in any event he was not viewed by me, for whatever that’s worth, as one of the five justices that Chief Justice Warren—of the four Justices of which he was the fifth that he would be aligned with in most matters.

McCreery: You mentioned that a couple of your friends were close to other justices. Did you have much chance to get to know any of them?

1-00:47:17
Flannery: The friends or the justices? [laughs]

McCreery: I’m sorry. The justices.
No. I’ll tell you one story with Justice White, which is kind of interesting. We got to know him because he liked to play basketball, so those of us who could play basketball—and it’s interesting; his clerks really weren’t very good. But there were some good basketball players of the other clerks—and I was okay; I wasn’t particularly good, but I was okay, so I was a regular. I think Gaither was too; I don’t think John Ely was, but I don’t remember. I think Jim Gaither probably was, and I was, and there were several others. We would have basketball games with Justice White, which at first were a big thrill, to be playing basketball with a Supreme Court justice. Then after a while—he was a rough guy, and he was stronger than any of us—we were all sort of pasty guys—he was much stronger than us, and he would throw it around, and he liked to see us bounce off him and everything. But I at least got to know him a little bit through that, but not, “Hi, Byron, hi Dennis,” but I knew who he was, and he had a vague idea of who I was.

I remember—wow, since I left the Supreme Court in ’65, then I was in the Army for two years, this was probably in 1968 or 1969, and I was visiting, with my wife, friends of my parents who lived in northern Virginia. People I didn’t particularly know very well, but they were good friends of my parents. There was a knock on their door, and the husband of the couple went to the door. I heard him talking to someone, and the voice was very familiar. It was someone whose car had broken down and wanted to call AAA or something. I said to myself, “Gee, that sounds like Justice White!” And it was. So he came in, and here I am, this young guy, twenty-eight, twenty-nine. I think—I obviously told him who I was. Then he made like he remembered who I was. “Dennis, so good to see you, dah dah dah.” So these people were tremendously impressed [laughs]. Here I was in northern Virginia hobnobbing with Justice White. But I think that’s the only other time I got to see him outside the context of the basketball court.

You said you had a story about Justice Douglas.

Oh, yeah! For these lunches with the other justices I was warned that Justice Douglas would be the toughest to pin down. So you would just make dates, and he would cancel them or not show up, or whatever, at the last minute. So you’d try to schedule them real early so you’d have a chance that somehow, after the fifth or sixth cancellation, he’d finally come. So that’s exactly what happened. We kept inviting him; he kept saying yes then not coming. So finally—I think we were right up toward the end of the term, getting there anyway—he said he would come, and once again he didn’t show up. We were waiting and waiting. His secretary sent word down that he knew this was sort of it; or he wasn’t going to be able to come at all, and if we were able to wait, and our justices wouldn’t get angry with us, he would come. But it would be late. So we were already down there, and he did come.
It was a wonderful lunch; he was very, very charming. But the interesting thing was that the reason he was late was he was over at the White House, participating in some sort of briefing that President Johnson was having about Vietnam. He came back talking about Ho Chi Minh and the Ho chi Minh Trail. These were names that we could hardly pronounce. I mean, it’s so hard to think of a time when this wasn’t part of our fabric. But the thing was just beginning. So he was talking about the Ho Chi Minh Trail, and the problems over there, and how it was going to require a buildup of forces, and all this stuff. It was a rather abstract conversation, albeit interesting, for most of the clerks, except for me. I was going into the Army as soon as the clerkship was over for two years. I’m listening to the stuff, saying “Oh, my God, of all the great timing in the world.” In any event, it was the first enlightened education I had about what was going on in Vietnam, and it was sort of interesting that it was straight from the White House to our little lunch.

McCreery: You knew ahead of time, then, that you were planning to enter the Army at the end of your clerkship—?

1-00:52:06 Flannery: Yeah, I had an ROTC commission from college which I was able to have postponed active duty for three years of law school and then for the clerkship, but I was going in October of—I think it was October of ’65. So I went into the Army in October of ’65 and served until ’67.

McCreery: To follow up on that, where did you go?

1-00:52:28 Flannery: Thank God to Germany. I was with the Third Infantry Division and so always never knew whether we’d all be just sent over to Vietnam or we would be individually sent to Vietnam, because it was a fighting unit. But the division itself never got sent to Vietnam. It’s now one of the leading fighters in Iraq, ironically enough. But it never went to Vietnam. It was the most decorated division in US Army history. It was Audie Murphy’s division in World War II, the Marne division, the blue and white patches, so it was quite a unit. Because of the delays in my going in—I actually went in as a first lieutenant, then second lieutenant; I was a captain very quickly in service. I was a captain most of the time in service. There were [levies?] almost every day of officers and enlisted men being sent from Europe to Vietnam. So each day you’d get up and look at the bulletin board to see if your name had come up. But mine didn’t, so I spent the entire two years in northern Bavaria with the Third Infantry Division.

McCreery: Checking every day to see if—

1-00:53:35 Flannery: Checking every day. That’s right.
McCreery: Again, it is hard to look back at that time before the height of that war. Do you recall how you and others of your age viewed it at the time you were serving on the Court?

1-00:53:51 Flannery: When we were serving on the Court I’m not sure we viewed it as much of anything. I think it simply was not a burning issue, and certainly it wasn’t going to affect the clerks. I don’t think any of them, as far as I know, went in or served in Vietnam, nor did an awful lot of other people I know. Both of my co-clerks had done reserve duty. Gaither had been in a six-month stint in the Marines, and John Ely in the Army. So they both had some military service, but I don’t think they had active duty ahead of them. I’m confident that they did not go, and I don’t think any of the others had military service at all. So for them I don’t think it was anything like it became in ’67, ’68, ’69, right up until the draft ended, a burning issue of not only wondering if the war made sense or whether you were going to be directly involved in it and sent over there and actually find yourself in harm’s way. So it was a very, very different time. It was right at the cusp of all the furor that was going to occur in the sixties. But it really, really was not part of that.

McCreery: Now, set the stage for me a little bit; you mentioned a few minutes ago President Kennedy’s assassination the fall before and so on. To what extent was the winding up of the Warren Commission activity in effect in your year?

1-00:55:18 Flannery: It was winding up, so from that point of view it wasn’t in effect in our year except for the first couple of months. John Ely actually had worked on the Warren Commission staff, partly, I think, because he was supposed to clerk for Chief Justice Warren the term before ours. Ironically, if John had he might have been the person who drafted Reynolds v. Sims rather than Frank [Francis X.] Beytagh, because Frank took John’s place, I believe. I think John had the clerkship and then had to drop out in order to fulfill his military service, and Chief Justice Warren told him, obviously, that he could come the next term. But then, I think, when John’s military service was over he was then able to get a spot on the Warren Commission staff. So John actually was a staff member.

Jim Gaither and I were sent over by Chief Justice Warren to help in the cleaning up, the finalization of the Warren Commission Report. We were essentially proof readers, that sort of thing. We had no independent role. Our names are mentioned in the report. Some of the other justices also agreed to have their clerks go over as well. I can’t remember who they were or how many there were, but there were a few others. I found that a nice bonus, in a way, to get at least peripherally involved in that process. But it was very much peripheral.
There was concern that Chief Justice Warren was very tired, that it was taking a toll on him; I know Mrs. McHugh would tell us that, that she thought it was just too much for any one man to do. But once it was over—and I can’t remember when it ended; but I think it seemed to end almost around the time the term started; that may be wrong, but that’s my vague recollection of it—it seems that life just went on. I don’t recall any long discussions with Chief Justice Warren about the report or him focusing on it. He seemed to be moving right back to what he was supposed to be doing on the Court.

McCreery: Do you have any view of his relationship or interaction with President Johnson?

Flannery: No. I will mention a couple of things. He had tremendous affection for President Kennedy and was outspoken about it. For whatever reason he really liked and respected President Kennedy. I think he had great respect, almost awe, of the presidency and therefore—I don’t know what his views personally were, one way or another, about President Johnson, but he always spoke, when he did refer to him, with great respect, but not with that same sense of—and of course President Kennedy was dead so that may account for it, but with President Kennedy it was just a great warmth that he would express. With President Johnson, and for President Nixon later on, it was respect—you didn’t know how much was for the man, how much for the office—but there was never anything that he said that led you to believe that he didn’t have respect for President Johnson, and for that matter, President Nixon. But President Kennedy was the one that I remember that he really, really spoke about with warmth.

McCreery: I’m going to pause to change tapes.

[End Tape 1]

[Begin tape 2]

McCreery: Here’s our second tape on August 17, 2004. Laura McCreery continuing the interview with Dennis M. Flannery. You were recalling while we had the tape off that President Johnson also came to one of your lunches with the clerks.

Flannery: No, one of the reunions.

McCreery: Oh, one of the reunions. Pardon me

Flannery: This was after I got out of the Army, so maybe it was 1967. Could have been ’68, and Jim Gaither was working at the White House. He was the one who, I think, arranged for President Johnson to drop in for one of Earl
Warren’s clerkship reunions. They were always very nice functions where you’d have an evening with just the clerks that we hosted and then the next day a brunch that Chief Justice Warren and his wife would host at Congressional Country Club, I think, for us and spouses and that sort of thing; it was very, very nice. This was at the Saturday night clerks’ get-together with Chief Justice Warren. We were told that President Johnson would be dropping in. And he did.

It was interesting that—by this point you had clerks who certainly were in their thirties if not forties; whenever it was Chief Justice Warren had been on the Court, as you said, since the fifties. So we weren’t a bunch of kids. Yet it struck me how difficult it was for anyone to strike up a conversation with President Johnson. He came in; he was clearly prepared to stay for fifteen or twenty minutes, even a half hour. He wasn’t just coming, waving, and leaving. He was there, he was there to spend some time with us, and you could tell that Chief Justice Warren was very pleased that President Johnson had come. And President Johnson then stood there—someone had brought him a drink—just waiting to engage in back and forth with the clerks. No one seemed to be able to say anything to him. I never knew whether we as a group were a little bit taken aback by being in the presence of a president of the United States, or whether there was some hostility about Vietnam and therefore you didn’t particularly want to cozy up to him, or why it was. But it was a very awkward, as I recall, several minutes. President Johnson, to his credit, certainly tried. He would make an opening here—and there was no hostility; no one was turning their back on him, everyone was standing around, quite respectful. But there was no natural back and forth with him. So after a while he said, “Thank you very much” and left, and everyone said how wonderful it was for him to be there. But like a lot of things in life the actual event itself didn’t have much to it.

McCreery: As you point out Vietnam was quite a different thing by that time.

2-00:03:17
Flannery: Sure was.

McCreery: Speaking of President Johnson, you touched on Justice Goldberg a little while ago. Of course, around the end of your year President Johnson persuaded him to—as I understand it persuaded him—to leave the Court and become Ambassador to the UN. What was your view of all that?

2-00:03:36
Flannery: My view of all that was, first of all, that Justice Goldberg shouldn’t have done it, and I think that’s certainly a view that he had. My sense was, though, that Justice Goldberg had political ambitions of his own and probably thought that if he was ever going to be President himself it wouldn’t be directly from the Supreme Court but would be from something like this. So my sense is that
obviously he felt he would help the country. As UN Ambassador he was a negotiator. All of that had something to do with it. I’m sure President Johnson was able to appeal to his own sense of duty and sense of his own significance. And I’m sure, as in a lot of things in life, there was also a sense of “what’s the next step beyond this.” But that’s just me a person reading papers with no insight whatsoever that’s beyond what your insight would be. That was the way I thought about it. My understanding is that as the years went by Justice Goldberg regretted very much having made that decision.

McCreery: Certainly is an unusual path for a Supreme Court Justice to take, to resign.

2-00:04:54
Flannery: Yes. And he wasn’t on the Court very long. I’m sure, as each year went by after President Johnson’s departure and President Nixon’s coming in, that Justice Goldberg probably said to himself, “What might have been.”

McCreery: You also had the ’64 presidential election in your year. Was that much on your radar screen from where you sat?

2-00:05:24
Flannery: I guess it was pretty much a non-event in that it was pretty clear that President Johnson was going to win. I guess there was some interest about who his Vice President was going to be, that sort of thing. But I don’t recall it being of the significance that the 2000 or 2004 election was or now will be. I don’t recall it being a burning issue; I’m sure we were all interested in it.

McCreery: Now, for Chief Justice Warren’s part, did you give much thought, or have much view of, how he was perceived by the public during your year.

2-00:06:09
Flannery: Well, there were all those “Impeach Earl Warren” signs and things like that.

McCreery: Still.

2-00:06:14
Flannery: Oh, they still want to impeach him? [laughs]

McCreery: I’m saying it had gone on for a while, didn’t it?

2-00:06:18
Flannery: Yeas. I remember when I went into the Army my first immersion was at Officer Training School at Indianapolis, Indiana. Ted [Theodore R.] Boehm’s hometown, I guess. I remember that was the first time I actually saw “Impeach Earl Warren” signs. I think I took a picture of them. I can’t remember whether I sent it to him or not, but it was interesting to actually see it rather than just read about it. He never expressed, that I recall, any sense of angst or unhappiness or concern about that sort of thing. I think he simply felt
he was doing what he was supposed to be doing. I don’t recall him ever
talking about it, or at least if he did—and I don’t remember him doing it—in
any way expressing any concern or even sadness about it. I think his sense
was that he was doing what he was supposed to be doing.

McCreery: As we said it had already been going on for a while and pretty much
continued.

2-00:07:25
Flannery: I had no idea whether in bed at night his stomach churned. Sometimes you
lose perspective on people in the public eye. You almost think of them as a
different form of life. Yet when you have your own troubles, and your own
things that are going wrong, and you can’t sleep at night, your sense is,
“These people can’t be that much different from the rest of us,” whether
they’re presidents or chief justices or whatnot. So I just don’t know. I don’t
know whether he let his hair down either to himself or to his wife or whatever,
but I certainly saw anything but a very controlled person who just seemed
extremely self-confident, did not seem to doubt decisions once they were
made, did not seem to go over old ground, seemed prepared to move on to the
next thing, and was very much self-contained.

McCreery: On other occasions to what extent did he let his hair down, shall we say, at the
Saturday lunches, for example? What did you all talk about?

2-00:08:29
Flannery: Well, I’ll tell you an interesting story on that as well. He had a few stories that
he would tell us at lunch that I really thought were let-down-your-hair stories.
We would be thrilled. One involved a very famous raid on a gambling boat
somewhere in the waters of California when he was Attorney General, I guess,
of California, whatever he was. A very famous story, and I can’t remember
the details of it. But it was one that he told, and he told it with great relish.
You had a sense, “Boy, this is something he really just sharing with us.” And
there were a couple of others like that that I don’t remember. But at the time
they struck me and the other two fellows that I was with that, “Gosh, this is
what it’s really like to get to know a great man, to get these stories.”

When I got out of the Army in ’67 I came to this law firm. And then in ’71 I
left to go into a public interest firm, and I did the Alaska Pipeline case, which
is one of the good cases of the time. It was a place called the Center for Law
and Social Policy. It did a lot of public interest kind of thing, public interest in
their view, one of which was the Alaska Pipeline. They also had internship
programs where law schools would send second- or third-year law students to
spend a semester at the Center and get credit. Stanford, Penn, good law
schools, good students.
I mentioned to, I guess, Mrs. McHugh—I didn’t talk directly to Chief Justice Warren—I mentioned that I thought the students would get a big, big thrill if Chief Justice Warren might come over and have lunch with them; I mean, they were doing these good things, and I sent the brochures. It was very difficult because he didn’t like to do these things. You always felt, I think, that somehow or other it might turn out not quite right. So he was a very difficult fellow to get to do these things. But after these discussions back and forth with Mrs. McHugh, sending her the materials and everything else, she said that he was really very impressed with the kind of work they were doing, and I think she may have said, to her surprise, he would like to come.

I was just ecstatic. So we had the lunch, and I remember he came in his chauffeur-driven car. It was very exciting, people looking out the window, and there he came. He sat down and had the lunch with them. And he stayed a long time, so he really did enjoy it. He was very relaxed, he was very enjoyable. But he told every one of those special stories, whatever they were, two or three; there weren’t that many of them. Every one just came out, just like he told them to us. And I said, “Ah, Gee whiz.” [laughs]

McCreery: Burst your bubble.

It burst the bubble, yeah.

McCreery: It’s interesting that you felt he was reticent to do things like that, that they wouldn’t go well. Can you expand on that a little?

My sense is that he just didn’t want to be in a position where it would turn out that either the event, or the sponsors of the event, or something about the event would contain a surprise that he was not quite aware of, and he just didn’t want to be exposed.

He didn’t like surprises.

I don’t know. I can understand anybody in public life wanting to be careful. If you’re invited to some lunch with a group you don’t particularly know, and they sound all right, and all of a sudden it turns out that their founders, or their supporters, or their benefactors are people that you don’t particularly want to be associated with it could be embarrassing. I don’t mean to overplay it, but my sense is that, as I said, I don’t think he did that sort of thing very much. Obviously, if there was something at Berkeley, and he was in California, and [UC law professor] Jesse Choper would invite him to it, I think he’d be comfortable going. But I think if there were other things involved I think he’d be a little bit careful.
McCreery: He would have been in his early eighties by that time.

Flannery: I guess so. It would have been certainly 1972. Something like that.

McCreery: Hard to know to what extent that’s a factor at all.

Flannery: I don’t mean that he was a timid person at all. I’m just saying that, as I said, during our term I don’t recall him ever giving speeches. He may have, he may have. I don’t recall us writing speeches for him, but now there’s a vague recollection maybe there was one once that someone did write, but I don’t remember it. But he was certainly not like the justices now. I mean, Justice Breyer, every time you look at CSPAN he’s out there. Chief Justice Warren wasn’t that sort of person at all.

McCreery: You mentioned Mrs. McHugh a couple of times. How would you describe her role in all this?

Flannery: I think she just loved it because she knew that she scared the bejesus out of us. We were always—we didn’t want to offend anybody. I wonder if, as the years went by and people after the—she was there that much longer, I guess, after we left, but I’m trying to think in these days if people would not just treat her as an annoyance. I think we were very—we knew that she was the gatekeeper, and we didn’t want to get in trouble with her. So she had great power, and I think she sort of enjoyed it. I think to herself she probably was laughing half the time to pull us up short and see us scurry around and everything. We would try to charm her a little bit to see if that would work. And if it did we’d feel great about it; if she put us down we wouldn’t feel that great about it. Then, when the clerkship was all over and she sort of let her hair down a little bit, you just sensed that she was a nice person. But I think she had great fun with the toying a little bit with young people who were trying very hard not to do anything that would in any way get anybody out of shape with them.

McCreery: She certainly had a solid background having worked with Chief Justice [Fred M.] Vinson all those years.

Flannery: Yeah, which is surprising, isn’t it, that she would just carry right through with—a sign of changing times. I had forgotten that, but, yeah, that’s right.

McCreery: Am I correct, though, that you would go through her to make an appointment to see him?

McCreery: Quite a formal set-up in that regard,—

2:00:15:10 Flannery: Correct.

McCreery: —which was probably quite usual then.

2:00:15:11 Flannery: I would think so.

McCreery: Knowing you had a couple of friend working for other justices, did you get much chance to kind of compare how things worked in those other offices?

2:00:15:28 Flannery: No. I think clerks for other justices had much more of a sense of what was going on, both with the justices and with each other, than we did. I don’t know to what extent law clerks actually served as emissaries from one justice to another; I don’t know to what extent they really influenced, knowingly or unknowingly, other justices. But we had none of that. As I say, part of it was just our physical isolation; we just weren’t in the mainstream of what was going on on the floor where all the justices were. Other than the chit-chat at lunch where some comments one way or another might be made about justices or the way things were going. If there were politics going on in the Court, either at the level of the justices or the clerks, I certainly wasn’t aware of it and Lord knows wasn’t part of it. I don’t think the other two fellows I was clerking with were either.

McCreery: I’m pulling this paper out to get the name right. I understand there was another clerk who worked part-time with you, who was actually assigned to Justice [Stanley F.] Reed, and that’s George {Conson?}

2:00:16:45 Flannery: Right.

McCreery: Do you have much recollection of how he fit into this picture during your year?

2:00:16:48 Flannery: No, Chief Justice Warren was very inclusive, and since Justice Reed I don’t think was around very much he would include George essentially as one of us. I think George went to most of the lunches with us. I don’t remember that specifically, but I think he did. Chief Justice Warren assigned him at least one opinion to draft, which I think he did over the year. So there have been a lot of Justice Reed clerks who are considered Warren clerks at least to some extent, come to the reunions and all the rest of that. There are two at this firm that I recall. So we had a nice relationship with George, but it was clear that we
were the three were selected for Chief Justice Warren. He was with Justice Reed but part of a satellite operation with Chief Justice Warren.

McCreery: Looking back, how do you think about your total experience as a clerk?

Flannery: It was wonderful. It was one of the great years of life. We were all young. Several of us were married. I had just gotten married between law school graduation and the start of the clerkship. Jim Gaither was married with at least one child at the time. John Ely was not. Some of the other clerks were. Some weren’t. But we were all young. In those days generally you did not do an apprenticeship someplace else, which is more and more common now. We all went and came—most of us; there may have been an exception or two—came directly from law school to the clerkship. So we were all relatively young. It was a sense that you were almost on a mountain and could pick any direction to go and it was going to be fine. The world was almost at your feet. You had been placed in a group that was considered the elite of the elite, and it was very, very nice.

I remember a couple of things that tended to reinforce it. Justice Goldberg, I recall, had his portrait unveiled at the Labor Department; he had been Secretary of Labor during our term there. He was thoughtful enough to invite all of the clerks and their spouses to the unveiling, and everyone was there: Presidents, Senators, Cabinet members and everything else. It was very thrilling to be with your wife and friends—at least friends that you had made in the last several months—in an environment like that, which was totally new, certainly to me, and I think to all the clerks as well. So there were heady things about it. There was great excitement that even behind the scenes you were working on decisions that affected lives. As I said, not the great decisions that preceded and followed us but nonetheless decisions that were significant, and you’d hear about them on the news or read about them in the paper. That would give you a big thrill.

It was a thrill to even to have a passing acquaintance with some of the justices. One story that comes to mind is, when I was in the Army in Germany Chief Justice Warren was invited to be the speaker at the commencement of the University of Maryland extension over there in Germany, which gave college-level courses to the GIs, and accepted it. As I understand the story, when President Johnson learned that Chief Justice Warren was to go over there he in essence made available Air Force One, or the plane that was Air Force One when he was on it, for Chief Justice Warren. So Chief Justice Warren invited any of the other justices who wanted to go. I think Justice Black went and one other justice—I can’t remember who that was—and as many of his family who wanted to go. Then he still had some room, so he did invite his three clerks, [Kenneth] Ziffren, [Michael E.] Smith and Jim [James T.] Hale. I got very excited about that because not only was Chief Justice Warren coming—
and here I was now in a totally different environment, in Army fatigues, Third Infantry Division and all that, and it was hard to even remember just several months ago being in that lofty environment. So I wrote to Chief Justice Warren through McHugh or whatever, and he said he’d love to see me. We arranged to have breakfast, which was kind of neat, with my wife Judy and him and his wife. The graduation was the night before, which we went to. There was a receiving line there, and I remember—and I hope I’m right about Justice Black; I’m almost positive that’s who it was—as we went through the receiving line my wife shook Justice Black’s hand and said something like, “Oh, it’s so good to see you again. My husband was on the Court last term.” And you could just see Justice Black saying, “On the Court last term?” [laughs] “Who the hell is this?” [laughs] And off we went.

But then that night I went out to the Bierstube with Ken and Jim and Mike, and I remember Mike Smith—I’ll never forget this—here he is clerking on the Supreme Court for the Chief Justice of the United States, having flown over to Germany and having—what more could one ask for? He was absolutely down in the dumps. I think his romance had just broken up or something. He was almost inconsolable. I said, “Good God, Mike, what more could anyone ask?” He was just sitting there like this. But that was very pleasant, and that night we had a good time. Then we had a very delightful breakfast with just Chief Justice Warren and his wife the next morning. Then he went back to Washington, and I went back to the Third Infantry Division.

McCreery: Did you have much occasion to get to know Mrs. Warren?

2-00:23:17 Flannery: No. She was a very nice person. You would meet her essentially at the reunion dinners, I think, and say hello every once in a while after that. But I don’t think anyone got to know her very well.

McCreery: Chief Justice Warren was said to be such a family-oriented person so I—

2-00:23:42 Flannery: He certainly was. Same thing with his daughters. Of course John Daly, who was, at least to my vintage, was a well-known television guy, *What’s My Line?* and all that, he was married to one of the daughters. He would show up at the reunions; you always got a kick out of that.

McCreery: I wonder, as you’re thinking back about the Warren legacy, shall we call it, from your viewpoint what did he view as the important contributions that he made during his time on the Court? Do have any way to comment on that?

2-00:24:16 Flannery: No, I really—not certainly first hand. I’d be commenting on things I’ve read. I think he thought, what, *Baker v. Botts* was the most significant decision because—
McCreery: Baker and Carr?

2:00:24:32

Flannery: *Baker v. Carr.* Baker and Botts is a law firm; shows where I am these days. Yeah, *Baker v. Carr* was, I think I recall him saying, the most significant decision, other than *Brown v. Board of Education.* But on the election, I think he thought that was more significant than *Reynolds v. Sims.* We get back to where we started almost, the basic question of fairness, in whatever avenue you want to put it, from civil rights to poverty law to almost anything, probably tax law included, is something that was his guiding star. I think that it is what marks the Warren Court. And with all that’s gone since then, I think, it’s still—those basic approaches to jurisprudence, I think, still hold up very well.

It’s a shame that you don’t have a chance to interview John Ely, who died just in the last several months, because John almost preeminently among the clerks, and certainly among the clerks my term, went on to be a constitutional scholar, a very highly respected person. And I know he was influenced by the Warren approach, which was not an intellectual approach, which was not one that you would necessarily be able to footnote to the nth degree. But my sense was that John Ely, with all of his scholarship, and certainly not being an ideologue, nonetheless had a basic core respect for what Chief Justice Warren brought to the constitutional law process. It would have been interesting if you could have had a chance to talk in some depth with John rather than with someone who really hasn’t gotten involved in that that much.

McCreery: What about that matter of scholarship, though, which is often brought up in connection with Chief Justice Warren?

2:00:26:52

Flannery: He was not a scholar. I don’t think he was an intellectual. None of us were book readers, so I can’t find him at fault for not saying, “Gee, I just read so and so, what do you think of this?” Jim Gaither and John Ely and I didn’t talk about books either, so it would fair to say that he wasn’t a book reader, but I tend to doubt that he was. He was more of a man who was intelligent, who had a rich life experience that gave him great confidence in himself, and then just somehow or other had this fundamental goodness about him that was something that certainly was hard to predict, I’m sure, when he was appointed, as President Eisenhower subsequently said. Where that came from I don’t know. But was a wonderful quality. It wasn’t soppy, it wasn’t sentimental. I think he knew what all the warts were. He wasn’t an idealist, but he just had this sense of what was right. It could be that, when that is your driving force, perhaps someone can say a “t” isn’t crossed quite the way it should be, or an “i” isn’t dotted quite the way it should be. But if there are errors along that way it seems to me they are errors that serve to help a broad
group of people rather than errors going the other way that simply tend help a smaller group and are more divisive.

McCreery: We touched earlier on this notion of judicial activism. Would you apply that term?

2-00:28:42 Flannery: I don’t know. I thought—I guess in my term we may have had the decision where Justice Douglas came up with the “penumbra” and the right to privacy, which certainly did seem like something of a stretch, at least the way he articulated it. I mean, whether there’s another way that one might be able to say it is a question. But certainly in the opinions and decisions that I can recall it seemed to me that the Court was following a principled approach, one that certainly was an open one that was looking to, I think, extend rights rather than restrict them. But nonetheless it seems to me that it was supported by precedent, or by principles that flowed from precedent.

McCreery: Recognizing that you said that you’re not a constitutional scholar yourself—you’ve been on a different path—how do you view the events since the Warren Court and the elevation of the two more recent chief justices?

2-00:29:54 Flannery: I think all of us have a particular affection, if you come away with affection for the person for whom you worked. So I think there were times when we talked about the “real Chief Justice” that now seems like a long, long time ago, but I think there was a sense that he was the Chief Justice, and the people who followed him really, you know, were chief justices but not the real Chief Justice. Certainly my own bent is a one that is a Warren bent and not a [Warren E.] Burger bent and not a [William H.] Rehnquist bent, and of the three of them I certainly would feel much more comfortable with a Warren as Chief Justice than with the other two. But I’m sure that they’ve done what they’ve done, and are doing what, at least what Chief Justice Rehnquist is doing, from a sense that what they’re doing is correct from their perspective. So I can’t necessarily criticize them. I sort of wish that it was another Court. I certainly wish that that would have been the case in 2000.

McCreery: Any major surprises from your point of view in terms of the Court’s approach to things? Maybe the example that you’ve just given the 2000—

2-00:31:18 Flannery: The 2000 election, yeah. I find it inconceivable that Chief Justice Warren would have done something like that, even if it meant someone becoming President who he clearly wished were not President. And he’s supposed to be the activist. But I just find it inconceivable that he would be part of something like what went on in 2000. But who knows? I mean, I can’t juxtapose him then, now. Or now, then. But my sense is, with all the talk of activism and
everything else, that would not have been a product of at least Chief Justice Warren.

McCreery: I don’t know if you think there is any precedent for that 2000 decision, of any kind on any subject.

2-00:32:06 Flannery: Well, you’re talking to the wrong guy. [laughs]

McCreery: Just from the point of view of your own work as the sixties progressed and so on, when Chief Justice Burger was chosen to succeed Chief Justice Warren, as opposed to the other possibilities, what view did you take of that?

2-00:32:32 Flannery: Were there other possibilities? I don’t know who the other possibilities were. His name seemed to be the name that was always mentioned.

McCreery: Did it?

2-00:32:41 Flannery: Yeah, as I recall. He was, for whatever reason—I don’t know what the reason was particularly, and it was ironic that his name was Warren Earl Burger [laughs]—at the time it just seemed absolutely hard to believe. But I thought that there was a general sense that he was the guy that was going to be lined up to take the spot. So that came as no surprise.

McCreery: You spoke very eloquently about how you were influenced by Chief Justice Warren’s description of the three top advocates and—

2-00:33:21 Flannery: Whoever that third one was, yeah.

McCreery: Speaking without notes. What else did you personally learn from the Chief?

2-00:33:34 Flannery: I guess I think he had a practice, which I don’t think I necessarily learned from him, but it reinforced my own basic instincts of essentially treating everybody the same. I think he was that kind of person. Now, treating everyone the same may be with a certain amount of distance, but my sense was that he did have a feeling that everybody should be treated essentially with the same amount of respect. And I’ve always found that to be what I did before I met him; I can’t say that he steered me away from one direction toward another, but it’s certainly something that I think is correct. I don’t think he was one who was overly impressed with prestige and power and that sort of thing. I think, like everyone else, he probably enjoyed being at the White House dinners or whatever. Who wouldn’t? But my sense was that it was something that didn’t go to his head, that he could just as soon live
without it as with it. I think within the context of that, my sense is he probably did not alter his approach to talking and dealing with people depending upon what their title was; I think he was essentially pretty much the same with everybody.

McCreery: Certainly he was used to meeting people from all—

2-00:35:04
Flannery: Oh, that’s for sure.

McCreery: —levels of life. But why do you think that that innate orientation towards fairness was so strong?

2-00:35:11
Flannery: I don’t know, and I honestly don’t know what manifestations of that there were before he came to the Supreme Court. I don’t know what his history was as Governor of California other than that he was supposedly very much involved with the wonderful education system that it had, at least back then. But I don’t know the specifics even of that. So I don’t know when he was Governor whether the was considered to be a man of the people, someone reaching out to make sure that the poorest were taken care of an not shunted aside. I have no idea. So I really can’t say that—it’s easy to say that he himself was a person of fairly humble means growing up and that highly influenced—I don’t know if that’s the case. I only come in in 1964 and knew him somewhat for whatever it was, seven or eight years, and then come out again. So I can’t really get into his psychology.

McCreery: We’ve spoken a little bit of the reunions and of Chief Justice’s trip to Europe when you were there. In general, how much did you stay in touch with him after you left the service?

2-00:36:22
Flannery: Not very much. When did he die?

McCreery: Nineteen seventy-four.

2-00:36:29
Flannery: So I was in the service from ’65 to ’67, so I would be out of the loop then. And then I did have that very nice lunch with him and his lunch with the people for the Center for Law and Social Policy sometime in ’71 or ’72, probably ’72. I went to whatever reunions there were after I got out of the Army. But he was not the kind of guy you call up—at least I wouldn’t—and say, “Hi, do you want to go to lunch?” or “Gee, I’ve been thinking about you. How are you and the missus?” That thought would never cross my mind. I would feel I was being a pain in the neck and intrusive, so I just wouldn’t do that. So the only time that I did initiate the discussion was when I was out of the Army. It was nice to say, “I’m back home. Love to have lunch with you.”
He was very receptive to that, which was nice. He didn’t say no. [laughs] The lunch itself lived up to my fondest expectations, and then he surprised me in a nice way by coming to the Center. From those two I think I had a sense that I had probably used up my get-together chits.

McCreery: Your work at that center sounds quite interesting.

Flannery: It was interesting. It was a huge case involving the plans of the oil company to build this pipeline across Alaska, which they were doing without really spending the attention they should to the environmental consequences of it. I was induced to leave the firm; I was just about to make partner, and someone said “You know, you really ought to come over here and do this.” To everybody’s surprise I said no to the partnership and went over there and worked on that for two years. It was a great, great experience. It was me and a couple of students essentially taking on the Justice Department, the Interior Department, the big law firms and everything else. It was really a David and Goliath affair.

We won on the first instance based on an archaic Mineral Leasing Act law. We actually stopped the whole thing. But then the powers that be got together and very quickly got enabling legislation out of the Congress, and the pipeline obviously went through. But I think the litigation itself had a substantial influence on at least making it somewhat safer than it would have been otherwise, although it still has problems connected with it. But that was a wonderful two years. But it was excruciating the number of hours I had to spend on that. And I had a family; I had two or three kids at the time, and took a pay cut and everything else to go over there. But it was it was two years that were just absolutely marvelous. Looking back, I had a great thrill.

When I got to—that was the case I argued before the Supreme Court. It was not the actual merits of the pipeline decision, which the Supreme Court denied review of. We had won that, and they denied review unanimously, which was itself a very substantial victory. But it was the follow-up of whether, on some equitable rules, attorneys’ fees would be awarded to the effort that took on the case. They had been granted by the DC Circuit, and then the Supreme Court knocked it down, and we didn’t prevail there. I remember arguing there before Chief Justice Burger. Literally I would, as I was making my argument, I would sort of superimpose Chief Justice Warren’s face, because they both had the while hair, on Burger’s face, and saying, Gee, it could have been so different.” [laughs] Not that he would do anything for me specifically, but I think his heart at least would have been much more open to the thought that we were expressing a view that had some force to it. But Chief Justice Burger certainly wasn’t buying any of it, although it was Justice Rehnquist or, as it turned out, Justice White.
McCreery: What was it like, though, to be in that room?

2-00:40:30
Flannery: Oh, it was great. It was great. I’m sorry I didn’t get to more of it, but sometimes you become an appellant advocate with a Supreme Court practice or you get cases that come along that get you up there, or you don’t. And it turned out as my practice developed it was more at a lower court level with district courts and courts of appeals. So that turned out to be the only Supreme Court case that I got to argue. But I think it came at a good time of life because I was still—what would it have been, 1974 or something like that, so I was in my late twenties still, whatever it was, 1939 to 1974. Is that thirty-five? Is that possible? No. I must have been—

McCreery: More mid-thirties.

2-00:41:21
Flannery: Yeah, early thirties, I think. So that was a great time. It was a very thrilling—I’ll tell you one wonderful story about that, nothing to do with Chief Justice Warren, but it’s probably my favorite story involving my kids. This is before the Supreme Court case, actually. While working on the pipeline case I was reading to my kids from To Kill a Mockingbird, wonderful story. And when the Court of Appeals decided what turned out in our favor on the Alaska pipeline case, and it was a really enormous case with great national interest and everything, I got a call from the Court of Appeals, DC Circuit, to go down to the court at five o’clock on a Friday, because the decision was ready they wanted to release it after the stock markets closed and all this stuff. So a real big deal. I told my family I had to go down and see, and “Hold your breath; let’s hope it’s good.”

So I got down there, and it turned out we had won, we had stopped the Alaska pipeline case. I think it was a unanimous decision by the DC Circuit; it was all of them en banc, all nine judges. The ground they gave us was a very technical ground. Even the conservatives who didn’t want to go our way had no choice, and they wrote in their opinions, “We don’t want to do this, but we have no choice, and Congress is going to have to correct it.” So it was a big, big thrill.

I got the opinion. Then there was interviews and all the rest of it, so I didn’t get home until 9:30 or ten o’clock at night, as I recall. At this time I had three or four kids, wound up with five. They had little signs and stuff as I went in. “Daddy won.” I was very thrilled. But then my daughter, who would have been eight or nine years old, my oldest daughter, the one who made the film that I talked to you about, she pulled me to the side and said, “Dad?” I said, “Yes.” She said, [speaks in wondrous tone] “Dad, you won, and Atticus lost.” [laughs] I think, of my entire legal career such as it was, that is the absolute biggest thrill, I thought.
McCreery: Oh, that’s marvelous. So what affect did this prominent case have in your own career?

2-00:43:40 Flannery: Well, for a while I was sort of a white knight on a white horse. So I came back to the law firm after a two-year absence—came back and was offered a partnership, so I came back as a partner—and I would get calls essentially from one do-gooding cause or another—“Can you help us on this; can you help us on that?”—which I did a good deal of and enjoyed. But it certainly didn’t bring in any commercial business on the opposite of all of that. So it was just one of the great experiences I had in and of its own. I certainly learned a lot about oral advocacy and handing big cases and not being particularly afraid of what’s on the other side, although once you’re in a firm like this you sort of are that other side, and people are having a reaction about you. It was a terrific experience, but it was one that took a lot of time and effort. It was a very, very trying and challenging couple of years.

McCreery: How did your own legal interests develop over time?

2-00:44:52 Flannery: I always thought I would be a litigator, just because I like the speaking; I like the oral and written advocacy, the clashing of ideas, seeing who is ultimately going to prevail. So that is what I was going to do before—actually when I was clerking, after I got out of the clerkship, after I did the pipeline case and beyond. So my career here at the firm has essentially been in litigation, and in litigation that is essentially at the trial level, although not that many cases go to trial. But the discovery, depositions, motions, that sort of thing. Sometimes going to trial, usually settling. Sometimes going out on motions, and therefore you might have appeals and counterarguments. But it was at that level that I spent just about all my time.

McCreery: And perhaps having been a law clerk to Chief Justice Earl Warren, that helped you establish yourself in other areas?

2-00:46:01 Flannery: I don’t think—certainly being a clerk helps you early on in getting employment opportunities. But then having done well in law school, being editor-in-chief of the law review at a good law school sort of helps also. But I think, other than the first year or two when you’re looking for a law firm to join or something like that, or maybe four or five years after that, once you’re beyond that, having been in a clerkship gives you a certain credential that’s always there. But you don’t find yourself at sixty-five walking around saying, “Well, you know, I did clerk for Chief Justice Warren.” It’s sort of interesting to people, but I don’t think it’s going to—

McCreery: They’re not as interested as I am.
Flannery: [laughs] But it’s certainly something that I’m proud of and happy about. Even with very, very bright lawyers, if you’re one of the group that did clerk in the Supreme Court and they’re not, you have a sense that it’s an accomplishment that certainly is a good credential, and the experience itself is even better than the credential.

McCreery: Looking back from the vantage point of 2004, we see that 1964-65, that was a very heady time, as you put it, with all of the events outside the Court as well as within around that time. Do recall if you had much of a feeling then that those times were so important?

Flannery: You certainly had a sense that having lived through the Kennedy assassination that you had experienced one of American history’s significant moments. You didn’t know quite how it was going to play out, but you really had a sense that that was a moment that was going to have an impact on the people who lived through it and on the succeeding generation. I think that’s been the case. I think the election of President Johnson did give a sense, which has changed greatly, gave a sense that progress along racial and generally equalitarian lines was inevitable, and that someone like Senator Goldwater—and I’m sure he was a very decent person—was sort of a last stand, and that just the flow of history—I had a sense—was just inevitable. There may be people trying to stop it here and there, but it was just going to keep going. That turned out not to be the case. There certainly were stoppages, and are.

So that is certainly a surprise to me now. Trying to superimpose myself back to 1964, where it just seemed to me both the thrust of the Warren Court in its smaller area of impact, and just the general approach of President Johnson to things like civil rights and poverty and education, I am very surprised that things turned out the way they did. But I guess that’s just the way things go.

As we have talked about, Vietnam certainly did not have the impact in ’64—it was starting to happen ’65 obviously—but certainly in ’64 that it had later on in the sixties. So that’s an experience, I think, that was just right after us. There was one Supreme Court clerk my term, Charlie [Charles R.] Nesson, who was a Harlan clerk, who I thought was a—he was a very impressive guy, from Harvard Law School. He got caught up in all of it, I think worked for John Doar at the Justice Department, became very much of an activist person. I think of at least the clerks that come to my mind, of all of the Supreme Court clerks that term, he was the one that probably got most directly affected by the things that happened right after we left the clerkship. Of course, he went into academia; he is a professor at Harvard, so it sort of continues through; he didn’t go into private practice or anything like that. But I think the rest of us were kind of middle-of-the-road, conservative, socially kind of—I don’t know whether anybody was smoking pot or anything else; if they were it would be
amazing to me. But I just don’t know. But certainly my little group was not
and had no sense that any of that was going on with anyone else. We just
seemed to be almost fifties types. It was right before the fifties turned into the
sixties even though it was 1964.

McCreery: Yes, we often say the sixties, and we really mean the sixties and seventies.

2:00:51:19
Flannery: We really do. The sixties and the early seventies. Or even mid-seventies.

McCreery: What else would you like to say to summarize Chief Justice Warren’s legacy
or your time with him?

2:00:51:34
Flannery: I think I’ve pretty much said in one way or another both what my sense was of
him personally, what my sense was of him as a Supreme Court justice, and
what my sense is of what his legacy has been, which is, I think, something that
has certainly not moved in a linear fashion forward, but I think it’s still very
substantial. I’m certainly honored to have clerked with him, always have been.
It’s one of the great events of my life, and I’m delighted to have a chance to
share some of the remembrances with you.

McCreery: Thank you so much.

2:00:52:14
Flannery: Thank you.

[End of interview]