

Regional Oral History Office
The Bancroft Library

University of California
Berkeley, California

Robert J. Hoerner
THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: ROBERT J. HOERNER

Interviews conducted by
Laura McCreery
in 2004

Since 1954 the Regional Oral History Office has been interviewing leading participants in or well-placed witnesses to major events in the development of Northern California, the West, and the nation. Oral History is a method of collecting historical information through tape-recorded interviews between a narrator with firsthand knowledge of historically significant events and a well-informed interviewer, with the goal of preserving substantive additions to the historical record. The tape recording is transcribed, lightly edited for continuity and clarity, and reviewed by the interviewee. The corrected manuscript is bound with photographs and illustrative materials and placed in The Bancroft Library at the University of California, Berkeley, and in other research collections for scholarly use. Because it is primary material, oral history is not intended to present the final, verified, or complete narrative of events. It is a spoken account, offered by the interviewee in response to questioning, and as such it is reflective, partisan, deeply involved, and irreplaceable.

All uses of this manuscript are covered by a legal agreement between The Regents of the University of California and Robert J. Hoerner dated June 24, 2004. The manuscript is thereby made available for research purposes. All literary rights in the manuscript, including the right to publish, are reserved to The Bancroft Library of the University of California, Berkeley. Excerpts up to 1000 words from this interview may be quoted for publication without seeking permission as long as the use is non-commercial and properly cited.

Requests for permission to quote for publication should be addressed to The Bancroft Library, Head of Public Services, Mail Code 6000, University of California, Berkeley, 94720-6000, and should follow instructions available online at <http://bancroft.berkeley.edu/ROHO/collections/cite.html>

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

Robert J. Hoerner "The Law Clerks of Chief Justice Earl Warren: Robert J. Hoerner" conducted by Laura McCreery in 2004, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2014.



Robert J. Hoerner

Table of Contents—Robert J. Hoerner

Interview 1: June 24, 2003

Audio File 1

1

Birth and upbringing in Iowa — Attending Cornell College and University of Michigan Law School — Military service in Japan — More about law school and editorship of the *Michigan Law Review* — Constitutional law and the Supreme Court clerkship— First impressions of Earl Warren — Golfing with General Omar Bradley and other Supreme Court clerks — Antitrust law — IFP cases — Casework — Ex-deny — Mrs. Margaret McHugh — Earl Warren’s temperament— Voting blocs on the Supreme Court

Audio File 2

16

The chief justice’s judicial philosophy — Judicial activism — Behind the scenes at the Supreme Court — The John Burch Society’s anti-Warren campaign — President Dwight D. Eisenhower — Working (and playing) with fellow clerks Marc Franklin and Michael Heyman — Friday conferences and confidentiality — Bench memos, Warren’s treatment of counsel, Saturday lunches — Leaving the Supreme Court for Jones, Day, Reavis & Pogue and the Antitrust Department — Earl Warren’s influence on the narrator’s politics and career — The Warren Court and constitutional law — *Brown v. Board*

[End of Interview]

Interview #1 June 24, 2003

[Begin Audio File 1]

01-00:00:00

McCreery: OK, this is tape number one on June 24, 2003. This is Laura McCreery speaking, and on this tape, I'll be interviewing Robert J. Hoerner at his home in Bay Village, Ohio. We're working today on the oral history project, "Law Clerks of Chief Justice Earl Warren." OK. Now, let me start in a straightforward way by asking you to state your date of birth and then talk a little bit about where you were born.

01-00:00:38

Hoerner: I was born in Fairfield, Iowa, in Jefferson County. The date of my birth is October 12, Columbus Day, 1931.

01-00:00:48

McCreery: Now, what were your family circumstances at that time? That was the start of the Depression, of course.

01-00:00:54

Hoerner: Well, I was reasonably comfortable. Both of my parents were high school teachers. My mother stopped teaching high school when I was born, and continuing through my sister, and then finally resumed again. My father taught high school all the time. About the most he ever made, I think, was \$5,500, but in the 1930s and forties, that was enough. We lived in a four-bedroom house and raised our own vegetables. He raised our own vegetables, we had chickens during World War II, and so, it was a relatively easy, middle class existence.

01-00:01:45

McCreery: What was Fairfield like at that time?

01-00:01:47

Hoerner: It had a square and it had 6,000 people or so. No one was particularly rich. It was regarded as a mini-industrial city. We had the Loudon Machinery Company and the Dexter Washing Machine Company, and Fairfield Glove and Mitten, so there were several manufactories in a little town of 6,000, which I'm not sure was common. Other than that, it was your ordinary, small-town Iowa, Midwestern community.

01-00:02:29

McCreery: What sort of a child were you?

01-00:22:31

Hoerner: Difficult, I'm sure. I was fairly rambunctious. I went fishing with my father and hunting with my father and would run around the countryside and played sports in high school. I was always, throughout my life, I've been a good student. I've had good grades, anyway, and I think part of the reason I've gotten where I've gotten is because my grades were good, which always said to me I must have had a talent for taking tests successfully.

01-00:03:13

McCreery: Who were the adults who were influential to you as a youngster?

01-00:03:16

Hoerner: Well, my parents, of course. My father and my mother were both very anxious that I work hard and get good grades and study, and all of that. I can't think of any other adults that were particularly influential in my life.

01-00:03:39

McCreery: Now, you attended Cornell College in Iowa.

01-00:03:41

Hoerner: I did attend Cornell College.

01-00:03:43

McCreery: What did you study there?

01-00:03:46

Hoerner: Well, I majored in political science and I was considering Grinnell, in Grinnell, Iowa, and Cornell, in Mount Vernon, Iowa, and Cornell would give me a full-boat scholarship but Grinnell said I had to earn one. A bird in the hand is worth two in the bush, so I went to Cornell. I ran cross-country there. I was first man on the cross-country team and I played golf on the golf team. I was second man on the golf team. My sophomore year, I shot a 77-75 in the conference, which left me in fourth place. It's the best I've ever played since then. As a result, I think I was a junior Phi Beta and I guess I was somewhere between second and fourth in my class. As a result, I got a scholarship to the University of Michigan Law School.

01-00:04:56

McCreery: Now, how early did you start thinking going to law school? What brought that up?

01-00:05:00

Hoerner: Well, my mother wanted me to be a lawyer. Three of her brothers were lawyers, or two of them were a lawyer and one was a judge, her father was a lawyer, and she sort of felt that law was the thing to do in my family, anyway. I guess the problem I had was I had no particular desire to do something else. So, I just sort slid into law, and I think it's been a pretty good place for me.

01-00:05:32

McCreery: How did you choose Michigan?

01-00:05:34

Hoerner: Well, I think somehow or other, my major professor knew some professors at the University of Michigan and touted me to them, and I guess they thought I was acceptable.

01-00:05:57

McCreery: What year did you start at Ann Arbor?

01-00:06:00

Hoerner: I was in the service after Cornell, so—

01-00:06:04

McCreery: Oh, well, let's talk about that briefly, shall we?

01-00:06:08

Hoerner: First of all, the local Jefferson County draft board wasn't going to let me finish college, and so, I petitioned the state board to get to graduate from Cornell, which they let me do. Then, after that, I did not enlist but I volunteered for the draft, and so I was drafted. I went to Fort Leonard Wood, Missouri, where I had basic training, and then I had engineer basic, and learned about building bridges and learned about explosives and stuff like that. Then, they sent me off to Japan, where I became a tele-typist and a crypto-operator, and lived in Tokyo. The Army did a wonderful thing: they gave me two weeks of Japanese language school. Now, two weeks of Japanese language school didn't do the Army any good, but it helped me a lot in getting around Tokyo, and ordering sake at the bars, and that kind of thing. Then, I got out a little bit early and I remember, we crawled across the Pacific on a troop ship. One of the engines went out, and so we crawled across the Pacific at four-and-a-half knots an hour, stopped at Adak, Alaska, in the big circle route. I remember they let the General and his dog off to fly to wherever he was going to, whereas the mere troops, the dog-faces stayed on the boat and crawled across to Seattle. That always piqued me, somewhat, although I understand.

01-00:08:01

McCreery: What year did you get out, then?

01-00:08:05

Hoerner: Let's see, I would have graduated from college in '53 and got out of the service in '55, started at Michigan in September of '55.

01-00:08:19

McCreery: So, you made the move then to Ann Arbor, after your service was finished?

01-00:08:26

Hoerner: I was married at the time, and we worked at the Leland Lodge, in Leland, Michigan, which was near Traverse City, for two, three months, and then I started at Ann Arbor.

01-00:08:38

McCreery: Well, tell me something about law school and how you liked it.

01-00:08:43

Hoerner: Well, I enjoyed law school. I wasn't unhappy, going to law school. I regarded it as an intellectual and academic challenge, worked hard, and ended up, I guess, being second in the class. I was Editor-in-Chief of The *Michigan Law Review*. I had some Bs there in the last half of my junior year and first half of my senior year, and that pushed me down to second. But being Editor-in-

Chief of the *Law Review* is really a full-time job, and so you have a full-time job in terms of the *Law Review*, and then you have to study, also. So, it's a pretty busy time, and I was, well, fairly busy. I was involved in some kind of fraternity. I didn't have a live-in fraternity, but I was involved in some kind of thing like that. So, I was OK.

01-00:09:51

McCreery:

Did you have particular interests in the law during school?

01-00:09:54

Hoerner:

Yes, I did. I was interested in constitutional law, and I wanted to practice constitutional law. Now, that was a pretty naïve thought—there maybe are a couple dozen people in the country that practice constitutional law, and you can't really have a practice of doing that. What you can do is you become an expert in litigation, and every now and then, you might get a case that involved a constitutional question. But that what was what I wanted to do, and that was, I guess, part of the reason which directed me towards seeking to obtain a clerkship.

01-00:10:37

McCreery:

Before we get you out of law school, what about the faculty at that time?

01-00:10:44

Hoerner:

I was particularly fond of a professor named Sam Estep. I assume he's dead now, but I'm not sure he is. I'm seventy-two, and he'd have to be older than seventy-two. I was very indebted to the dean, Edwin Stason, for getting me the clerkship, I think, and Marcus Plant, who taught torts, was somebody that I had a lot of respect for. There were some characters on the law school faculty—Laylin James was sort of a character—but basically, they were able people and they got the material across and I related well to them.

01-00:11:41

McCreery:

Well, you started to mention how you began to think of a Supreme Court clerkship, but what actually happened that led you into that?

01-00:11:52

Hoerner:

To tell the truth, and that's what I'm doing here, I got my clerkship because of what happened the year before. The year before, the dean, Edwin Stason, considered that he had a wonderful class of students and he took four of them. He didn't physically take them, but he recommended four of his class of students to four different justices, I think Black and the Chief and a couple of others. He said, "They're wonderful students, they're wonderful people, they would serve you very well, and you can take any one of them and not go wrong." Of course, not one of them was selected by any one of the four justices that he presented them to. So, he decided that he wanted a Michigan Law student to clerk on the Court, and he had to adopt a different mode of getting there. So, he sorted through the class and lit on me as being the person he wanted to tout. So, my recollection is that he touted me to Chief Justice Earl Warren and to Justice Black. Warren was interested, had me down to

Washington, and offered me a job. One of the interesting highlights of that, from my standpoint, was he asked if I'd had any experience. I said, "Well, I've been Editor-in-Chief of the *Law Review*, and of course, you have to revise work and do work and so forth, but I haven't actually clerked for any other judge or justice." He said, "Well, you have two children and an experienced clerk gets an extra thousand dollars a year, so I think you've had enough experience." I was very grateful to him for taking that position.

01-00:13:56

McCreery: And to your children!

01-00:13:57

Hoerner: Yes, yes.

01-00:13:59

McCreery: What was your salary, may I ask?

01-00:14:01

Hoerner: My belief is that it was \$8,200. That was as an experienced person; I would have gotten \$7,200 otherwise. Now, \$8,200 back then was a lot more than \$8,200 is now, I'll tell you that. We—Jones Day was the firm I retired from—pay our starting lawyers over \$100,000 a year, I believe, at least it's up to \$80-90,000, and that was simply unheard of back then. But it didn't mean as much; what I got meant more than that amount of money would mean now.

01-00:14:49

McCreery: Now, what do you recall about your first meeting with the Chief? Was that that interview, then?

01-00:14:55

Hoerner: That would have been the interview, and I don't really recall very much about it. The one thing that I do recall is that I made very clear to him that I admired his jurisprudence, that I would be proud to work for him, and that I would look forward to researching cases and drafting opinions and whatever he wanted me to do in the way he wanted it. I wasn't going to try to be a Felix Frankfurter to his Earl Warren. I was going to try to be a junior Earl Warren to help him do what he wanted to do. I think that may have helped me get the job, but it was also heartfelt and true.

01-00:15:40

McCreery: Was that your own idea, to put that forth?

01-00:15:43

Hoerner: Well, I thought that was relevant to him and he would want to know that.

01-00:15:50

McCreery: Do you recall first impressions, just of what sort of guy he was?

01-00:15:55

Hoerner:

Oh, yeah, he was a big bear of a man. He had quite the mane of hair and he wasn't fat, but he was a substantial person. He radiated confidence in himself and he put you at ease and it just seemed to me, then, in the first meeting, and was only confirmed by my subsequent association with him, he was an outstanding human being.

01-00:16:31

McCreery:

So, then, the next step, I take it, was that you and your family made the move to Washington. Just tell a little bit about how that came about.

01-00:16:43

Hoerner:

We ended up in a garden-type apartment down in Arlington, Virginia, and we had to go out and buy some furniture. I remember our dining room table consisted of one of the big boxes that a chair came in, and it was a comfortable living, but compared to where I am right now, it was fairly barren and fairly un-dramatic. It turned out that I was carpooling with Terry Sandalow, who ended up being dean of Michigan Law School, and Steve Shulman, whom I don't have a sense of what his subsequent history was, except that he was a special assistant to Arthur Goldberg when he was Secretary of Labor, and Henry Sailer, who became a partner in Covington & Burling. So, we would try to schedule our comings and goings at the same time, since we were carpooling together, and we would have, obviously, a lot of conversations about what was going on in the court, to and from the court and our homes.

01-00:18:10

McCreery:

So, they were clerking for the other justices?

01-00:18:15

Hoerner:

Terry clerked for Stewart and Henry and Steve clerked for Harlan, and I clerked for the Chief. Incidentally, we always called him the Chief—everybody called him the Chief—you didn't say, "I clerked for Mr. Chief Justice Warren," you'd say, "I clerked for the Chief."

01-00:18:37

McCreery:

Short and sweet. Now, as an aside, did you have much chance to get to know the other justices?

01-00:18:43

Hoerner:

Not really. Some clerks did. I know the Douglas clerked walked every morning with Justice Brennan, and Chuck Miller. There were, I'm sure, other relationships, but I can't say that I was ever close to any. Well, there was one occasion. I had a call from Clark's clerk, Chuck Phillips, or one of Clark's clerks, and he said, "The justice wants you to join him playing golf." This was at Burning Tree Country Club, and that was where Eisenhower played. Eisenhower, at the time, was President. So, I said, "Well, I just can't do it because I'm working doing some stuff for the Chief that I have to get done today," and I got a call about fifteen minutes later, says, "Tom talked to the

Chief and he's let you go for the afternoon." So, then he had to go out to my garden apartment so I could get my clubs because I didn't have my golf clubs at the Supreme Court. So, Tom Clark, Bob Hoerner, and Chuck Phillips all went out to play golf, and when we got there, I heard Mr. Justice Clark talking to somebody, and he says, "Oh, well, join us." It turns out that it was General Omar Bradley, so I played a foursome with Omar Bradley and the others I named, and I was more nervous than I had ever been before. Pretty much I shot straight bogey golf, which I thought was terrible at the time, but now if I could shoot bogey golf, I'd be delighted. I can't, anymore. I'll even get a par now and then, but—

01-00:20:37

McCreery:

That's quite a story. Well, your experience at Cornell College came in handy, didn't it? Sought out as a golf partner. Well, tell me something about when you first started work in the summer of 1958: what was the introduction and how did you get going?

01-00:20:56

Hoerner:

We started out pretty much the way we finished up. What happened is that this is what I recall—now, remember, this is forty-five years ago, so what I say might not be correct recollection. What I remember is they distributed twenty-five certs. Now, certs are petitions for a writ of certiorari, and that's people seeking to get into the court, have a court take their case. So, we'd get twenty-five certs and Mike Heyman, who was one of my co-clerks, and Marc Franklin, who was the other of my co-clerks—Mike ended up being a very senior official in the University of California and then ended up being Secretary of the Smithsonian; Marc taught and still teaches, I think, I don't know, at Stanford—we would divide up sort of an eeny-meeny-miney-mo kind of thing, we would divide up the certs so we'd each get about eight of them. Our responsibility then would be to write what we called cert memos on the cases that we had assigned to us. They would run two to five pages, maybe. Then, the Chief would look at those cert memos and go into conference to decide which of the certs ought to be granted. They would grant them. Most of them would be turned down, denied, some would be granted, and if it happened to be that one of the cert memos that you wrote was one a case that was granted by the court, it had the rule of four: if you get four justices that want to grant the case, then they'll grant it, even though five would turn it down.

If your case was one of the four that were granted, why then, you would write what's called a bench memo. The bench memo was the more substantive memo. The cert memo was, is this issue important enough for the court to take it, and you had to look at things sometimes like, is there a conflict of circuits? Does one say one thing and one say the other? Or is it a public issue of great importance or what have you? Is it ripe for decision? Do the facts of the case present a good case for resolving the issue that it presents? All those kinds of things. If they grant it, then you write the bench memo. Now, that's on the

merits, whatever issue it was that the court wanted to hear, then you have to write, well, how should that come out? You'd advise the Chief of what your views were and what the law seems to be and what the briefs in support of the two sides, or sometimes you'd have lots of briefs, *amicus curiae* briefs, would say. Those briefs might run six to fifteen pages, eight to twelve, most likely. Then, you'd have oral argument and you would typically go down and sit on the sidelines of the court to listen to the arguments of cases where you'd written the bench memo.

Then the Court would meet and they would decide how the case ought to come out. If the Chief was in the majority, then he would decide who would get the opinion. He might assign some to him, but he might assign some to anybody else that was also in the majority. If he was the senior judge in the minority, then he would decide who ought to write the dissent. If you were involved in an opinion that he wrote, then you would typically do the drafting for him. He would meet with you and he would say, "Now, this is the way we want to decide it, these are the grounds, and you've covered them correctly in your bench memo. I want to emphasize point A a little more than your bench memo does, and I think we can let point B alone," and whatever it is. Then, you'd draft an opinion for him, that's his consideration, and he'd read it over. He'd change it or adjust it or correct it or say it was pretty much OK the way it was, and he'd send it out to the court. Then, the dissent would be written, if there was a dissent, and it might be that a justice would say, hey, I'm willing to go with you, but I don't like this paragraph. Can you change the emphasis of this paragraph so it's less and such? We were cleaning up; I ran into and I don't know how I come to have it, a little memo from Frankfurter to the Chief, saying, I want this word changed. This word does not give the right impression, it ought to be this, or maybe you said take it out, or something. I don't have any others of those, as far as I know, and I don't know how I have that one. So, I didn't make a point of taking memos of other justices to the Chief home; I don't know why I had it. The point I'm making is that the other justices would read his opinion and they'd decide, well, that's fine, and then the Chief would say, hey, Clark will go along with us, we were concerned about him. Clark will go along with us, good. So, that's the way it went, and then in due course, on Monday, it was pretty much always on Monday when I was there, they'd hand down the opinions. So, that's the way it went, and Marc and Mike would handle the ones that they worked on. I drafted three opinions and they're in the books. I have the books sitting over there. One of them was, let's see if I can remember, *The United States vs. RCA*, which was an antitrust case. One was *Spano vs. New York*, and one was something else. Both of those latter two were criminal cases. That was sort of the way it worked.

01-00:27:31

McCreery:

Do you want to use one of those as an example to show how this process worked? Are they worth going through at that level?

01-00:27:38

Hoerner:

Oh, I don't think so. One thing I would want to say is that the associated staff of the court was wonderfully helpful. I remember in the RCA case, it involved a merger or an acquisition, and it involved the Federal Communication Act of 1934, which in turn was based on the Federal Radio Act of 1928. So, I simply called up to the court's library and I said, "Would you give me please the legislative history of the 1934 Act and 1928 Act? Within a day or so, I had all these books on a cart with little marks in them for all of the legislative reports, Senate reports, House reports, Congressional argument about it. It makes drafting a lot easier when somebody does all that work for you. I can assure you that in one respect, being a law clerk doesn't help you when you finally are hired into a law firm because you are the one who finds those legislative reports; you don't have somebody bring them you.

01-00:29:09

McCreery:

That's an important difference. Well, this case sounds like it may have fit into your later interest in the antitrust area. What was going on generally in that area, that year?

01-00:29:19

Hoerner:

In anti-trust? Well, in antitrust, some of the justices said this, the only rule about a federal antitrust case is that the government wins. It tended always to win, and the Chief was very much on the side of the little person. He wanted to do justice, and it seemed to him that often, the little person should have justice. So, the little person was often, in antitrust cases, could be a billion-dollar-plus corporation, but it might be somebody more cottage industry. Well, that's not fair—it wasn't cottage industry—his critics would say he's in favor of cottage industry. Well, he really wasn't, but he tended nevertheless to be in favor of the government and against price-fixing, in favor of not allowing two big companies to merge together. He thought the country would be better off if they would compete with each other and citizens such as you and me, back there. I'm still here; you weren't born yet. He would think that we'd be better off if we had the competition of the two companies rather than they'd be combined together. So, that period of time was one in which the government, generally speaking, won the antitrust cases. Now, you moved into the Chicago school in ten or twenty years, and that wasn't any longer, necessarily, the rule. Now, it is not necessarily the rule. In other words, the issue is more one of efficiency and more one of, well, it isn't just because you have two small companies getting together, that doesn't make an antitrust violation anymore.

01-00:31:33

McCreery:

Now, just to follow that thread a little, why do you think that area interested you, personally?

01-00:31:41

Hoerner:

I think that it interested me because what you want to have happen in your economy is to have the goods and services produced which the people need.

In our society, the way we go about making sure that those goods are produced are the fair prices through competition. In other words, I'll make a widget and you'll make a widget and I'll color mine pink and you'll cover yours blue and we'll argue in the public press about which color is the best. That's a very simple example. If what you have is your pink and my blue merging together are fixing the price of those, then the method we have for producing the best price for the goods and services which the public buys doesn't work because it benefits the companies and not the public. So, I always felt and still feel, to a substantial extent, that competition is good and that to a point, agreements, whether it's by merger or whether it's by price-fixing or whatever it is, which reduces competition, is bad. It hurts the public. It keeps the methodology we use for providing a fair price for goods and services from doing its job. So, would you rather have a government agency, and that's what we do sometimes, in the railroads, that kind of thing, they set the prices. Would you rather have that go on throughout the economy? I suspect that most Americans wouldn't want that. I wouldn't want that. People didn't want it, so the clash comes, well, is it good to have, let's say, this merger go forward so you can have more efficiency, which will reduce costs, and so which might permit a better price, or is it bad to have the merger because you have these people not competing anymore and raising the prices because they can. He said in his recent book, "I did it because I could." They can do it now. So, I made a very, very simplified approach to those kinds of issues, but I think that illustrates what the issues are.

01-00:34:46

McCreery:

I presume you were taking some interest in that area. Even while you were a clerk, were you developing that antitrust?

01-00:34:54

Hoerner:

My best recollection is that when we do our eeny-meeny-miney-mo, I would try to come up with the antitrust cases.

01-00:35:02

McCreery:

Well, that was my next question, how did you divide up the workload? Was there much by topic like that among the three of you?

01-00:35:09

Hoerner:

It was just we'd divide it up. I think my best recollection is that Marc would get one and Mike would get one and I would get one, and Marc would get one, and Mike would get one, and I would get one. Maybe that wasn't the way it was, but that's the way I think it was. Then, somebody would say, "I really would like to take that one," and one of us would typically say, "Sure, you can have that one, but I get this one."

01-00:35:35

McCreery:

To give me an idea of volume, you mentioned earlier twenty-five cases divided among the three of you, in other words, what was the volume?

01-00:35:44

Hoerner: Once a week, you'd get twenty-five cases.

01-00:35:46

McCreery: OK, so the volume for the year was in the several-thousands.

01-00:35:49

Hoerner: Yeah. Well, oh, yeah.

01-00:35:55

McCreery: What about the *in pauperis* cases as a percentage of the docket, or however you want to describe it?

01-00:36:00

Hoerner: The IFP cases, as we called them, *in forma pauperis*, all came to the Chief Justice's office. When I was there, the Chief was the only one to have three clerks; everybody else had two, except for Douglas, who had one. He took the money for the second clerk and used it for his far-flung international correspondence. So, we would divvy up the IFP cases, too. They were circulated; we were responsible for writing the memo for the entire court, and that produced eleven copies. There was nine justices, one for the clerk that wrote it so he'd know what he said, and one for the file. Eleven copies gets pretty faint when you get to the eleventh one, and so we called them flimsies. These were flimsies, and they were about as thin a paper as you've ever seen. Everybody else did their own typing. We did our own typing with respect to the cert memos and the bench memos and the drafts, but in terms of the flimsies, we had a secretary and she typed the flimsies. So, our work, our thinking, our minds were displayed for all the other clerks. I don't know if they'd remember, but they doubtless had a view on what our tendencies were, and that kind of thing. It wasn't very often that the court would take a flimsy, or take an IFP case, because they were, for the most part, IFP means *in forma pauperis*, which means they weren't paid. When they weren't paid, they didn't have to follow printing and that kind of thing. So, it wasn't very often the court would take one of those, but it did. I believe that *Escobedo*, for example, was an IFP case. So, they did produce some importance cases once in a while.

01-00:38:28

McCreery: Now, did the Chief give you any instruction on what to look for in reviewing the IFP cases?

01-00:38:37

Hoerner: I couldn't say he did, really. Particularly as we got into the year, we had an idea what the court was interested in and looked for that. I should say, and I think I can say at this point, that there was a concept my year, and I think it's well-known now, of ex-deny. Now, ex-deny was a so-called special list, and the special list consisted of cases which were not discussed in the conference. Before you think that, well, that means the clerks were running the court, any justice—which meant any clerk, really—could take a case off the special list and provide that it would be discussed. But there would be cases that just

didn't merit discussion. There was no issue presented which, no matter how it came out, was important to the jurisprudence of the country. Some people may feel that's a bad thing. That is, the court ought to do justice. The Chief tended to feel that the court ought to do justice much more than, say, Frankfurter did, but he would feel it ought to do justice in cases that involved important issues. So, you'd have the special list, and if something was on the special list, it wouldn't be talked about. I'd have to say that I speculate that most of the IFP cases were put on the special list. Most of them were ex-denies, and they weren't talked about except that if somebody wanted to talk about them, then they could. One of my most ignominious situations was one in which I said that a particular IFP was one in which the petitioner had his silver anniversary in the court. He had filed and he'd been there twenty-five times, and I wrote very little, if anything, about it, and said ex-deny. Several of the clerks were outraged by this, and I had thought, well, my God, if every justice, all nine justices, and went back over time, so it was more than nine, didn't think the case was worth taking and none of the clerks thought the case was worth taking, then why should I require the court to spend time on it for the twenty-fifth time? They all felt that I was not being fair to this fellow, and so, they took it off the special list and somebody else wrote a cert memo on it.

Of course, it was denied. I subsequently regretted that. That was not something I should have done. That's not the role of a clerk. I might say, people will ask, well, did you affect the decisions of the court? There was one decision, once, that I think I may have affected the decision of the court. It was a Trading with the Enemy Act case and it happened I'd clerked at Covington & Burling after my junior year in law school, and happened it involved a very complicated set of rulings and administrative issues, and I knew about it. This involved that same thing, and so I said, well, hey, that's decided wrong. I talked to the clerk for, oh, I can't say it now, Chuck Phillips and for Douglas, and interested him in it, and apparently, in the conference, the Chief said, "For some reason or other, my clerk thinks this is a case that ought to be looked at." Douglas then piped up and said, "Well, my clerk thinks the same thing." They said, "Well, let's let those two clerks get together and see what they can do with it." So, they did, and so we wrote a little grant, vacate and remand, so it was a little opinion about what appeared in the merits. For some reason or other, the Harlan clerks wanted to get involved in it, and so, by the time they got through with it, I'm sure that the lawyers for the parties didn't know what the hell was going on. That case would probably not have been taken and vacated and remanded but for my presence on the court. But apart from that one tiny, little, unimportant case, the clerks—at least, not our term—did not decide the cases. They helped their justices decide the cases the way their justices wanted to decide them. That was their role and that was what they did. There's been a book written about five years ago which had the clerks getting in fistfights, even, with each other. That's not anything that could possibly have happened my term. We got along all right, we may have disagreed with each other sometimes, we did, but we were civil just like the justices were civil.

01-00:44:22

McCreery:

How common was that, to have clerks for two different justices working on something collaboratively, as you just described?

01-00:44:28

Hoerner:

Somewhat unusual, somewhat unusual. I suppose you'd have someone writing a majority opinion and someone writing a dissent, and the clerks for those two justices might talk to see if they couldn't find a little bit of common language so it would fit together better in the system of justice. But mostly, you'd work for your own judge.

01-00:45:01

McCreery:

Do you have any knowledge of the origins of ex-deny?

01-00:45:05

Hoerner:

It existed when I got there, so I think it must have simply been that there are some of these cases that are so worthless that we should have to spend time with them. Justices are very busy people and they have a lot of very important things to do. I might digress here to say something about our relationship with the Chief: the Chief was Chief Justice of the Supreme Court. The Chief was head of the federal judiciary. The Chief was the *sine cure*, the head of the third branch of government. Executive, legislative, and judicial. The Chief was a very busy man and so, he didn't see us as often as other justices saw their clerks. We had our offices, indeed, on the second floor and he was down on the first floor. Everybody else was on the first floor, right next to their justice. The thing I'd want to emphasize about our relationship with him is that when one of his clerks thought he needed to talk to the Chief about how a case ought to be written, what grounds ought to be used, whatever it was, you talked to Mrs. [Margaret] McHugh, who was his secretary, and you'd say, "I need to see the Chief for about ten minutes." Within a day or two, she would get you your ten minutes. It was very important to him that he talk to his clerks when his clerks wanted to talk to him. So, I appreciated that he was busy and I appreciated that we didn't see him as much as some other clerks would see their justices, but I understood why and I valued very much the fact that he was willing to see us whenever we needed to see him, in our opinion.

01-00:47:09

McCreery:

Since you mentioned Mrs. McCue, tell me just a little about her.

01-00:47:15

Hoerner:

She was immensely loyal to the Chief, and while she would get on your nerves a little bit because she ran a fairly tight ship, still, you understood that she had a very important man to work for and she was trying to protect his time and what he did with his time. I came to understand that and came to appreciate it.

01-00:47:42

McCreery:

Her relationships with the clerks were—

01-00:47:46

Hoerner:

It was OK. We weren't effusive with each other, but we were comfortable. One thing, I don't know why I just thought of that, one thing that I would say about whether or not we got on, I never, in a year, saw the Chief angry with anyone. He wasn't that kind of a person. He didn't get angry with people. He would talk to you in a reasoning kind of way and talk to whoever it was, and even though a justice wouldn't agree with him, he wouldn't fly off the handle. I remember, this was being told by a predecessor clerk, I think Dallin Oaks, who clerked the year before we did. The year before we clerked, we were upstairs, the clerks were all right next to where the conference room was. Surprisingly, there would frequently be other clerks for other justices, would find it necessary to stop in to chat with the Chief's clerks on those occasions when they would have conferences. I remember, the walls were thick and they were heavy oak and they were solid, but you could still hear some things through the walls. I remember Dallin Oaks saying that he heard Frankfurter say one time, and he assumed he was talking to the Chief but he didn't really know, he said he heard Frankfurter say, "Be a judge, God damn it, be a judge!" [laughter] So, that reflects, to me, the fact that Frankfurter's theory of how issues ought to be decided was not the same as the Chief Justice's. I think, at least by the end of my term, which was the 1958 term, came in '53, why, the Chief was pretty comfortable with the way he was deciding cases. He would let Frankfurter pretty much roll of his back; he just didn't worry about it.

01-00:50:21

McCreery:

As you say, he was in his sixth term by then, I guess.

01-00:50:24

Hoerner:

Or fifth.

01-00:50:24

McCreery:

Maybe this is a good time to talk about the voting blocs among the justices a little bit, as you observed it at the time.

01-00:50:30

Hoerner:

Well, Brennan and Black and Douglas and the Chief tended to vote together on civil liberties cases and civil rights cases and criminal procedure cases. Tended to. Now, there was a case called *Henry, United States vs. Henry* or *Henry vs. United States*, in 361 U.S., which was the term after mine. In that case, Clark dissented in a criminal procedure case, saying that the conviction ought to be upheld and the Chief went along with it. Which illustrates, I think, that the Chief as Governor of California, as Attorney General of California and as a prosecutor, understood what people had to do in order to convict criminals and catch criminals, and so forth. In his opinion, if they did the right thing, he would go along with the conviction. So, he was not a lily-livered person who always went against the criminal defense. Now, Stewart would sometimes go with those four on civil liberties matters, and I guess most people would go on civil rights with him. Clark would go on go on

government regulation of business matters. Frankfurter and Harlan would tend to be against the government, and Stewart would be against the government on regulation of business matters, but they would tend to not so often be for the government on civil liberties matters. I suppose the less said about—who's the justice I've forgotten?

01-00:52:46

McCreery:

Justice Whittaker?

01-00:52:47

Hoerner:

Yeah, Whittaker. The less said about Whittaker, the better, maybe. What can I say? See, most of the justices were persons who had been very successful and respected and noted in their field before they got to the court. Clark was Attorney General of the United States, the Chief was Governor of California, Douglas was a professor and head of the SEC, Frankfurter was a professor and had written extensively in literature, and on and on. Now, Whittaker had been, for a year or two, I think, a court of appeals justice, but he, I think before he got to the court, he had never had the recognition that any of the other eight people had had. As a result, he was not as confident of his decisions, of his thinking, of his philosophy. I'm not sure he had a judicial philosophy. He was very much a fact-person and he would follow the facts wherever they came. Frankfurter sensed this, and he would get after Whittaker, and he would try to persuade Whittaker to go along with him in terms of the way he wanted. I think this was most clearly identified in *Frank vs. Maryland*, which is a so-called rat inspector case. That was one where the question was whether you needed a search warrant to go in and hunt for rats. Douglas was in the majority, a 5-4 majority, and wrote the majority opinion. Frankfurter kept nibbling away like a little rat at a piece of cheese at Whittaker. He's get after Whittaker, and get after Whittaker, and get after Whittaker, and he finally got Whittaker to change his mind, flipped over, so that Douglas wrote the dissent. You can see that. If you know that's what happened, read *Frank vs. Maryland*, and Whittaker has a little concurrence, and you can see how he's not real sure about what he ought to do, but he ultimately went with Frankfurter. That's why, I think, he finally resigned from the court. He just wasn't comfortable with the kinds of decisions he had to make. He had no big theory about how justice ought to be administered in the United States. Where are we?

01-00:55:57

McCreery:

Well, I wonder, how typical was that of the way Justice Frankfurter operated, both with the other justices and with the clerks? Any view of that from your personal experience?

01-00:56:07

Hoerner:

Well, Frankfurter would do what he could to persuade anybody he could get to go along with him. He was very opinionated, he very much knew what he thought ought to be done, he was very much of the view that you oughtn't to simply do justice; you ought to do justice within the framework of the greater

concern for the history of the law, and how Lord Holt did it, way back when, or whatever it was. He was a very bright man, don't misunderstand me, and he was a very able man, and within the framework of his judicial philosophy, he was very good. So, I'd have to say that I had a lot of respect for Frankfurter, but I didn't really like him very much, and I certainly didn't like his jurisprudence very much. But who am I? I was a law clerk; so what? Douglas was exactly the opposite of Frankfurter, in that his view was that he was going to decide the case the way he thought it ought to be decided, and he would vote and he would write it and he would be a dissenter or he would write the opinion for the majority, if the Chief assigned it to him, and then he'd move on. He didn't try to persuade or proselytize anybody, and, well, he was just very different.

01-00:57:50

McCreery:

It was an interesting contrast, isn't it?

01-00:57:52

Hoerner:

Oh, it was. It was a polar contrast.

01-00:58:02

McCreery:

They others may have operated somewhere in between?

01-00:58:04

Hoerner:

Sort of somewhere in between, and I think Douglas was probably very extreme that way. I think most persons being justices would naturally believe their way of looking at a case was right, and if they could talk somebody else into going along with them, they'd like to do that. But Frankfurter was extreme in that regard, and Douglas was extreme in not trying to do it. The rest were sort of in the middle.

01-00:58:41

McCreery:

Let me pause here for just a moment and change tapes. I'll turn this off.

[End Audio File 1]

[Begin Audio File 2]

02-00:00:00

McCreery:

OK, here's tape number two. It is still June 24, 2004, and this is Laura McCreery continuing the interview with Robert J. Hoerner. Mr. Hoerner, you mentioned a few moments ago this idea of judicial philosophy, in referring to some of the other justices, but how would you characterize the Chief's judicial philosophy?

02-00:00:34

Hoerner:

It isn't black and white. He liked to see justice done, but he also knew, as anyone who was a justice on the Supreme Court knows, the court does not sit there to do justice. It can't look at every case and decide whether the decision below was right or not, and if it was wrong, to correct it. That's not why it

sits; it can only decide maybe eighty to a hundred cases a year, and so it has to regulate what it takes. So, I suppose in terms of what cert petitions he would vote to grant, he would vote to deny some cases, indeed many cases, where he thought the decision was wrong. Now, once the case was granted, so that the Supreme Court was going to decide it, he would feel much more comfortable doing what he thought justice required. Not necessarily always—I know there was one case in which it was *Dick* versus somebody, and it was the only case in my term in which the lawyer just completely lost it. He just absolutely lost control of himself.

02-00:02:09

McCreery:

You saw this happen?

02-00:02:10

Hoerner:

Yeah, I saw this happen. He said, “I want the court to do what’s right here, and you, you have to understand what I’m saying even though I’m not saying it,” and so finally, then he walked away, and the court, of course, dismissed that case as a cert having been improvidently granted. There was one case that I’ll tell you about, it’s sort of interesting, it was an IFP case in which the fellow said that some guy, I don’t know who, owned this town, and he had it in for the defendant. It was a death case and he was up seeking a stay. What he said was, look, they said I killed this guy, the guy didn’t exist, I couldn’t have killed him. They said I was convicted after a trial, there wasn’t any trial. The guy who controlled the town simply made up the record, made up the death, made up the conviction, and I’m being railroaded. He wrote it in a way that was very persuasive. Now, the case had come up through the fifth circuit, and the fifth circuit, well, there had been either a federal habeas or a 2255, in which a federal judge—this was state court—had said, “No, I don’t find that that happened,” and it had gone up to the fifth circuit, and the fifth circuit had said, “We think the conviction was regular,” and it came up to the Chief for a stay. The IFP came to me, and that was not one that went to the whole court because it was just for a stay. It just had the ring of truth to it, but I had to say to the Chief and I did say to the Chief that maybe this is true, but the job of the Supreme Court and your job is not to find facts, and there had been two fact-finders below, the district court and the court of appeals, they found that his story wasn’t true or that it didn’t warrant relief, and so I just would have to recommend that you not grant the stay. He didn’t, and the fellow was going to be executed at eleven o’clock that night and I was a party, and that was the only time in my clerkship in which I had a moment at pause, a moment of silence at five minutes until eleven. I wasn’t confident that justice had been done there, but I was confident that the Supreme Court and the Chief Justice had behaved toward that case the way he should have behaved.

02-00:05:43

McCreery:

So, that’s a distinction, isn’t it? The law?

02-00:05:48

Hoerner:

The Chief would try to do justice if he felt he could within the framework of the judicial system that the Supreme Court administered.

02-00:06:09

McCreery:

In your tribute to the Chief in *The Hastings Law Review* some years ago, you talked a little bit about your year, the '58 term, and you described it as a little bit of a turning point and mentioned, I think, the term "judicial activism." Can you expand a little bit on that?

02-00:06:31

Hoerner:

I think it was. Well, the Chief had not had any apprenticeship as a judge of any kind of any court. He'd been a prosecutor, he'd been a Governor, and so, he came to the court without any experience other than a very strong feeling that he knew who he was and he knew how things ought to go. Nevertheless, he didn't know how things ought to go on the Supreme Court. Frankfurter, our beloved Mr. Justice Frankfurter, would lean all over him to say, you can't do that because that's not a proper function of the court. He was very much concerned with *Brown vs. Board* the first couple of years, and he knew what he wanted to do there, and I would have to say that I don't know this firsthand, but based on my conversations with other clerks, he was the one responsible for a unanimous *Brown vs. Board* opinion. He thought it was extremely important and to the community at large that the Supreme Court not be shown to waffle on the question and so forth. But apart from that, he was being pressed on all sides—Harlan and probably Stewart to some extent, but not so much, and particularly Frankfurter—that you've got to only do those things that have been done in the past, follow *stare decisis*, and all that kind of thing. Douglas, of course, would not argue to the contrary because he didn't do that. Now, Black might, but the feeling I had in reading some of his older opinions was that he wasn't completely comfortable with going along with Frankfurter in some cases or with doing the things that Frankfurter wanted him to do, and that my term, the 1958 term, he came to be more comfortable with doing what he thought he ought to do. Please don't understand that I'm saying he ought to take every case where he thinks that it's the wrong decision and right the injustice, but it's a moving together of that. He felt that he had the right, when a case was important, to do justice in the particular to be fair, in a particular case. I thought that '58 term, he moved, not dramatically, but he moved measurably in that direction.

02-00:09:49

McCreery:

As I think you said in your *Hastings* piece, it may have set the stage for what came later, some of the due process cases, the reapportionment, not to mention the continuation of the civil rights area.

02-00:10:00

Hoerner:

Yes, I felt that way. I feel that way. I might say that that piece, which I think was in two *Hastings Constitutional Law Review*, I have reread it recently and

it continues to represent what I now think. I would like to incorporate my reference into this oral history talk that I'm giving.

02-00:10:28

McCreery: Consider it done.

02-00:10:29

Hoerner: All right, thank you.

02-00:10:30

McCreery: Now, did you have much of a view of how the Chief operated behind the scenes when he was trying to garner support for an opinion?

02-00:10:39

Hoerner: Not really. He'd walk down the hall and talk to somebody and the way two people who work in the same area and are congenial would. Well, let me modify that: it was very important to him in *Brown vs. Board* and in some of other watershed opinions, where you're talking about issues that are important to the country, to try to get as close to a majority as you could. Not a majority—as close to a unanimous opinion as you could. In those cases, I don't know what he did, but he would act to try to get a unanimous opinion, or maybe a unanimous opinion with a little concurrence by somebody. Apart from that, I just don't know what he did. I can't recall very many cases, except for the *Frank vs. Maryland*, where he didn't have somebody with him and then he got somebody with him in the process of writing the opinion. You'll have to look to somebody else for that.

02-00:12:02

McCreery: Well, he was said to have a lot of diplomatic skills. What do you think he brought from his experience in California Governor? Any thoughts on that?

02-00:12:10

Hoerner: Well, he was used to trying to compromise issues, trying to get *amicus curiae* to come along, try to get somebody to stop opposing use of funds to build a hospital or trying to get a lot of somebodies—the legislature, the head of the legislature—to try to get money for a road or that kind of thing. So, his whole experience in California as Governor had to do with trying to get his legislative programs passed. That necessarily meant he had to work with people, he had to compromise with people, he had to trade things off, I'm sure. All of this sort of thing that goes on behind the scenes when you're a Governor. Here we have Taft; I shan't say anything about him except that I expect he has to do the same kind of thing. I think that same kind of procedure was involved in his being Chief Justice, except that in the beginning, he wasn't as sure what he ought to strive for. That was why I said something about the '58 term being watershed—that as he moved along, he felt more comfortable knowing what he wanted to work for.

02-00:14:04

McCreery:

You've touched on this a little bit, but one of the criticisms leveled against him in the role of Chief Justice was that he didn't come from a scholarly background, and although he had done trial work earlier on, he didn't follow a similar path to some of the other justices, in terms of judicial experience. Did that have an effect on his methods of operating, in your view?

02-00:14:42

Hoerner:

To tell the truth, and as I said, I am telling the truth, I don't think he cared as much about some of those questions as Frankfurter did. He wanted the case decided the right way, in his view, and if it was decided the right way, if whoever was writing the majority opinion wrote it to come out the way he wanted it to come out, he would go along with it even though he might not have written it the same way. He was concerned about the conclusion and the result, and so, he went along with it. Now, when he wrote, I think that he worked hard to get us to help him write it in a scholarly kind of a manner. I won't say I was Justice Frankfurter, but I certainly tried to do that, and I know Marc and Mike tried to do that. So, I think the public treated him unfairly in that regard. It was just not where he was, in terms of what he was trying to achieve. He would say, "Well, I got the court," including Justice Stanley Reed, "to go along with *Brown vs. Board*, that's what I wanted to have done and I did it!" When a man achieves the things that he's trying to achieve, it seems to me it's being niggardly to say, well, he didn't achieve all these other things, either. Well, that's wasn't what he was trying to achieve—the shot-putter throws a shot seventy-two feet, the fact that he didn't win a 100-yard dash isn't very important, is it? I think he won the ones that he was trying to win, and I think he went along with those that achieved the result he wanted to achieve. He dissented from time to time; I read his opinions and there are a lot of dissents in there. Not a lot, but there are some. I remember there was one dissent on a Freedom of Information Act case, and so he didn't go along with what the majority wanted to do there. He wrote and stood up for this own view of the Freedom of Information Act. So, I don't know if that is responsive to your question, but that's the way I'd answer it

02-00:17:44

McCreery:

Now, you touched a moment ago on public perception, and of course, this was the height, more or less, of the impeach Earl Warren movement led by the John Birch Society, and so on. What kinds of views did you get while you were there that year of what the public thought and how they responded to the Chief?

02-00:1805

Hoerner:

Well, maybe I'm going to unfair in what I say, but I thought they were largely right-wing nuts and extremists, and I don't think the Chief paid any particular attention to them. I don't recall any threat on his life while I was clerking for him. I'm sure he would have paid attention to that, if there had been one. It may be that he had threats that he dealt with through the Supreme Court police or other people, but I wasn't aware of them. I just don't think he cared. The

criticism from that segment of the population was not criticism that interested him, bothered him, concerned him.

02-00:18:55

McCreery: It didn't slow him down in what he was doing?

02-00:18:56

Hoerner: It didn't slow him down at all. I was going to say, maybe it made him the other way, but I don't know that, either. I think he just didn't pay any attention to it.

02-00:19:10

McCreery: A while ago, you talked about the fact that as the head of the judicial branch, he was leading one of the three branches of government. Did you have much view of his interactions with the other branches? Perhaps starting with President Eisenhower?

02-00:19:27

Hoerner: I think that if Eisenhower had had it to do over again, he might not have appointed Earl Warren as Chief Justice. I think he might well have preferred to have *Brown vs. Board* decided the other way, but I don't know that. That's the sense I have. I know that he had a lot of trouble with President Johnson's request that he head up the commission to investigate the assassination of President Kennedy. He did not feel that was something a justice on the Supreme Court, including the Chief Justice, ought to do. He didn't think it was appropriate for him to do it, it wasn't a function of the justice, and it would use up a lot of time that he was supposed to spend judging cases. But he had a good relationship with Johnson, and Johnson, my recollection, well, I guess I don't have a personal recollection because I wasn't clerking that year, but my understanding is that Johnson said, "You're the only person in the country who can persuade the citizens of the country as well as the broader world of the conclusions you reach. So, please do it." He finally said, "Yeah, for the good of the country, I will." So, there was that. Nothing more comes to mind at this moment.

02-00:21:30

McCreery: During the Eisenhower years, though, talk a little bit about what he might have told you about Vice President Nixon and his history with him.

02-00:21:40

Hoerner: Well, he was not a fan of Nixon's. He didn't relate well to Nixon, he wasn't in favor of Nixon's being Vice President, even. I think he certainly wasn't in favor of his being President. He didn't have a lot of respect for Nixon. He didn't think Nixon was a good person. I'm sure there are a lot of specific instances that exist that if I knew what they were, I could fill the rest of your tape with them, but I don't know what they are. So, I just can't say more than that he did not care for Nixon.

02-00:22:35

McCreery: I gather it had gone on for a while in that vein.

02-00:22:37

Hoerner: Yeah. Yes. It had. I think in this *Law Review* article we mentioned that I said that Kennedy and Johnson both came to the reunion affairs that we clerks had for Chief Justice Warren; Nixon never did.

02-00:22:58

McCreery: It's a telling detail, isn't it?

02-00:23:00

Hoerner: Yeah. A minor detail, but it reflects how they felt about each other, I think.

02-00:23:07

McCreery: You've made brief mention of the other two who clerked at the same time as you, Marc Franklin and Ira Michael Heyman. Tell me a little bit more about how the three of you worked together as colleagues, and how you spent your time.

02-00:23:22

Hoerner: What I'm about to say is not typical. Well, it was sort of typical. We would take a paper, maybe two or three sheets of paper, and wrap rubber bands around it, turn it into a ball, and the lamps which hung from the ceiling where we were, were big lamps like that, and they would come in and then they would go up like this. We would talk about the case, whatever it was, while having a game consisting of trying to throw the ball into the lamp. The Chief walked in on us one time when we were doing this, and he was good-natured about it, but he was a bit nonplussed that his clerks were doing that. This was simply a way we had of trying to talk together without getting too serious about it. Well, we were serious about it, we were very serious about it, but at any rate, we got along very well. We wouldn't always consult with each other. There wasn't any requirement or even any commonality of Mike saying, "I'm going to say this. Bob, is that OK with you, or do you think that's the way I ought to go?" Now, we could say that. I could say to Marc, "I think this is the way I ought to handle this point, do you have a better way of doing it?" Something like that. It was basically, we'd each do our own work.

02-00:25:05

McCreery: As an aside, did you use the real basketball court?

02-00:25:12

Hoerner: I'm not sure. What I remember is when I was subsequently working for the antitrust division in the Department of Justice, we had a basketball team and we would play the Supreme Court then, Supreme Court law clerks. One of the things I remember very clearly, we were playing the clerks and some clerk broke free down for the far end of the basket, and he wanted the player that had the ball to throw the ball to him, and the player that had the ball was Mr. Justice White, so he didn't say, "Whizzer, toss me the ball!" He said, "Mr.

Justice, Mr. Justice, I'm open!" So, it was a situation where the protocol of the court carried over even onto the basketball court.

02-00:26:03

McCreery: That takes a lot longer to say, doesn't it?

02-00:26:04

Hoerner: Yeah, it does.

02-00:26:06

McCreery: OK, thank you. Well, tell me about the meetings that you would have with the Chief after the Friday conferences.

02-00:26:19

Hoerner: My recollection is that he would invariably involve us in his reports to the Clerk, capital-C Clerk of the Court, on how the conference went. The Clerk would need to know in those cases where the opinion was coming down, he would need to have it and he would have to know what it was, and he would need to know how the conference came out because he would have to tell the reporter to write it. Grant, grant, deny, deny, deny, deny. So, he would always have us present in those conferences. Once in a great while, we might say, "Excuse me, Chief, but can that be what happened?" He might say, "I'm just as surprised as you are, but yes, it is what happened," or he might say, "Oh, well, yeah, let me think about that." We would be kind of a check for him on those cases where we had written the bench memo and written the cert. Then, after the presentation to the Clerk was over, we might sit down with him and I might be particularly interested in why this case was not granted. Seemed to me it ought to be—I recommended to him that he vote with three, or whatever it was. Then he would say, "Well, Frankfurter felt this way and he got Whittaker go along with him," and what have you. So, we would often have discussions as to why the court did what it did. That's what I want to emphasize, is that he let us rove through the official business of the court, his public life, and the quid pro quo of that was that we kept our mouths shut, and we did.

02-00:28:32

McCreery: What did he tell you about that specifically, about the confidentiality?

02-00:28:36

Hoerner: He said, "Boys," he'd sometimes call us boys, "nothing that happens here and nothing that I tell you goes outside the court, indeed, goes outside this room." Just flat-out tell us, and we honored that. Absolutely, we honored that.

02-00:29:04

McCreery: I lost my train of thought. Oh, I know: you did a good job of describing the process up to the point of writing an opinion. Did he give you any instruction for your writing before that point, before you were actually working on a formal opinion?

02-00:29:22

Hoerner:

Well, yes. You'll have to understand, we'd written a bench memo, fairly comprehensive. As I say, it went from eight to fifteen pages, and we'd have the main points that the counsel raised, and then we might have anything we thought was relevant. So, he would often say, "I took this opinion and I think your bench memo is a good starting point, and go ahead with it." Or he might say, "I took this opinion and while your bench memo hits the main points, we want to go stronger on this because this point here is relevant over there and we want to see if we can say something here that'll help us get the court we want over here." Or he might say, "Leave out this point because the court didn't like that. Court didn't go along with it and so, we can't say it." So, he would be very attuned to what the discussion was in the conference, and he would want us to write only those things that the conference went along with. There could be things that I, Bob Hoerner, Boy Clerk, thought was very persuasive and the conference hadn't said a word about it or somebody didn't like it, in which case, I would leave that out. Yeah, sorry, I'm providing you with a—

02-00:31:04

McCreery:

That's all right. You were kind of on your own up to that point of opinion writing, in terms of the writing itself?

02-00:31:11

Hoerner:

Yes.

02-00:31:12

McCreery:

That's a lot of good experience writing, isn't it? How important was that?

02-00:31:15

Hoerner:

Our job in the bench memos was to let him know what counsel were saying. He's got to be up there in the bench, he's got to be hearing counsel argue, and he doesn't want to hear something coming out of counsel's mouth that has never even appeared in the bench memo. So, whether we thought the point was any good or not, we would have to canvas it, at least, to let him know it was going on, so that he could respond to it to the extent he wanted to. He wasn't a dramatic questioner, but he wasn't like Thomas is, either, who doesn't open his mouth on the court, as I understand it. A lot of that, I think, has to do with the level of confidence that the justices have. Frankfurter was talking all the time because Frankfurter had more confidence than he needed, [laughter] and Black would talk a lot, the Chief would talk some, and Whittaker would not say much. Brennan was a serious questioner, and I think the extent to which they asked questions had to do with a couple of things. One, they to try to get admissions out of counsel if they disagreed with them, and say, "Well, how can you say that in view of this and this and this?" Or they would have a lot of confidence. They would want to argue how the case ought to be decided with their fellow justices from the bench when they were purporting to talk to counsel.

02-00:33:09
McCreery: What can you tell me from your own observations about the Chief's treatment of counsel?

02-00:33:13
Hoerner: Oh, the Chief was very respectful of counsel. He was a genuinely nice man. I don't mean to insult him by saying he was a nice man. He was a genuinely nice man. He was almost without exception—and I can't think of an exception right now, but it's hard to say always or never—very respectful to counsel. Now, he'd be firm, he'd say, "I'm sorry, your time is up, sir." So, he would be firm but he would be courteous, let's put it that way. He would be courteous to counsel. As one who's been counsel, we lawyers, we appreciate that.

02-00:34:10
McCreery: Now, are there other cases you worked on that merit any discussion today as examples of—

02-00:34:19
Hoerner: I worked, as I say, the *Spano* case and *Napue vs. Illinois*. One of them was a knowing use of perjured testimony case and the other was a coerced confession case. They're sort of in the mainstream of the law. I can't say that there was anything remarkable about them.

02-00:34:49
McCreery: But what did you learn from taking that process and carrying it through to working on an opinion?

02-00:34:58
Hoerner: What did I learn? Well, I learned that you need to concentrate on what you're trying to achieve. I don't know what to say beyond that. In other words, if you're trying to get to A, you need to progress to A. I learned that it's important to try to think through distinctions which potential dissenters might want to make and try to write it so that you made it difficult for the dissenter to dissent on that ground.

02-00:35:55
McCreery: To change topics a little bit, tell me about the Saturday lunches.

02-00:36:00
Hoerner: Oh, well, those were wonderful. As I said, we didn't have the same kind of occasion to meet with the Chief on an ongoing basis that happened in other offices. So, the Saturday lunches, there were probably somewhere between four and seven or eight of them, were the substitute for that. In those luncheons, why, we would ask him, well now, how did the Republican Convention go where you were selected as Vice President and Tom Dewey was President? He would tell us.

02-00:36:52
McCreery: They won in Chicago.

02-00:36L57

Hoerner:

In my *Law Review* article, in one place, I checked what he said happened, and I cite two books and the proceedings of the Republican Convention, and they absolutely bore out what he said. So, he wasn't funning us; he was telling us the truth. Also in my *Law Review* article, I noted that he told us about a predecessor governor who had assigned the Bureau of Motor Vehicles of California to give particular license plates to particular buddies of his, so that if a highway patrolman came along and saw a ZW starting, he'd know this is a buddy of the Governor and tread with care in picking him up for speeding or whatever it was. The Chief put an end to that. The Chief, he was very egalitarian and he did not believe that he ought to, except where it was necessary to carry out his function, he did not believe that he ought to assign to himself rights and privileges which the ordinary people didn't have. So, from forty-five years ago, I can't remember everything that we said, but it was a wonderful, wonderful experience in which he told us what his philosophy of running government was. We asked questions about it and he answered them. I say essentially without exception, in my case. I was very happy and comfortable with the questions, with the extent to which he was willing to discuss the issue and with the answers he gave.

02-00:39:02

McCreery:

Of course, coming from a much more open atmosphere to the relative cloister of the Supreme Court, that must have been a nice socializing time for him, too, with his clerks.

02-00:39:11

Hoerner:

That could be, yes.

02-00:39:16

McCreery:

Was there other socializing that took place outside the office that year?

02-00:39:29

Hoerner:

Several times, I think, he had the clerks and their wives over to his apartment in the Park Sheraton for dinner, and those were very gracious occasions. They showed what a close-knit family he had and how he and Nina, his wife, got along so magnificently well. The clerks would have some affairs. I remember the Chief Clerk, Mike, invited him over to lunch, I think it was Saturday lunch, maybe, something. Anyway, it was beastly hot, and so, Mike had a setup in which he had the air conditioning on, which they only had an air conditioner in their bedroom, and they turned that on, and then he blew a fan down the stairs, and it was still very hot. But everybody was agreeable. I know we had the clerks out to a picnic in a park in Northern Virginia. I probably should say this, but we had little children and they were still on bottles, so I put together some gin martinis in the baby bottles, and we'd sit there sucking on bottles filled with martinis. We didn't want to get arrested by the Virginia gendarmes.

- 02-00:41:05
McCreery: That sounds like fun. Did you have occasion to get to know Mrs. Warren at all?
- 02-00:41:10
Hoerner: Not really. She was a gracious, wonderful lady, and we were enormously respectful of her and she was very congenial with us, but to get really to know her, I can't say I did. The person you want to make sure you talk to about that kind of thing would be Murray Bring. Murray, I think he was Chief Clerk the year after we were there, and for whatever reason, I think he got closer to the Chief and his family on a personal basis than any other clerk did. He would have insights, I think, that no other clerk would have.
- 02-00:41:57
McCreery: OK, thank you. Well, I wonder what else you'd like to say about that year, the '58 term?
- 02-00:42:06
Hoerner: Oh, I'm sure I'll think of some things that I forgot to say, but just give me a minute, here.
- 02-00:42:12
McCreery: Of course. Take your time.
- 02-00:42:24
Hoerner: Nothing right away comes up.
- 02-00:42:26
McCreery: We can come back to that any time you'd like. I'm just thinking about as the year was ending and you were looking to move on and so on, how did it come to pass that you went over to the antitrust division of the Justice Department as your next thing?
- 02-00:42:41
Hoerner: Well, I didn't do that right away, of course.
- 02-00:42:43
McCreery: Oh, you did not, OK. I wasn't sure of the timing.
- 02-00:42:45
Hoerner: I went with Jones, Day, Reavis & Pogue, as it was then, and I was initially interested in a Minneapolis firm. I thought that Minneapolis was a nice city to practice law in, but the firm I talked to said they really didn't do much antitrust and they sent their main antitrust matters down to Chicago. So, I didn't follow that up. For me, Jones Day in Cleveland was kind of a compromise between Covington & Burling in Washington, DC, where they had a lot of federal law, and if I couldn't practice antitrust law, I wanted to practice other federal law, and a Midwestern attitude. I grew up in Iowa, went to Cornell College of Mount Vernon, Iowa, I went to Michigan Law School, and I was comfortable staying in the Midwest. For me, Jones Day in

Cleveland gave me most of what I wanted out of Covington & Burling and most of what I wanted out of the Minneapolis firm I talked to. So, it was for me a very happy choice and has always been a very happy choice. I wouldn't change it, wouldn't have changed it.

02-00:44:13

McCreery:

I see now, consulting my notes, that of course, you didn't go to the Justice Department until 1963, is that right, for a couple of years? How did that come up?

02-00:44:21

Hoerner:

That, again, that was occasioned by Murray Bring. He had several things that he did. At any rate, he worked as a special assistant for Bill Orrick. Bill being Assistant Attorney General in charge of the Antitrust Division. He and Bill offered me the job of Chief of a thing called the Evaluation Section, which was a new section in the Department of Justice, or new section in the Antitrust Division. So, I accepted it, and I guess I'm glad I did. Well, I don't know what to say about it. It was a new experience, I'm glad to have a chance to work for the government. Being Chief of the Evaluation Section, I was supposed to evaluate different sections of the economy and see where I could recommend that antitrust enforcement was needed. That was a little bit too adventuresome for Bill, and I think it was a little bit too adventuresome for whoever the President was, if it was still Eisenhower—maybe it wasn't. So, I didn't feel that I did as much good as I could have done. I guess the question is, well, what could have been and was what you wanted to do good, and maybe it wasn't. Maybe Bill was right, and I don't say he was not right, but it was a good experience.

02-00:46:20

McCreery:

What happened to that office subsequently, do you know?

02-00:46:23

Hoerner:

I don't know whether it's still there or not. It continued after I left and Murray finally said, "Hey, I'm not going to be a special assistant to anybody anymore, I'm through doing that, I've grown beyond that," and so Bill made him a thing called Director of Policy Planning. Then, he put my section and the appellate section and the economics section and one other section under Murray as Director of Policy Planning. So, Murray and I got along fine and so forth. I might say, and this doesn't have anything to do with the Chief Justice, the best practical joke that I know of was played on me. I had been gone, I took all of my vacation at one time, four weeks up in Leland, Michigan, near Traverse City. I came back and I went into my office and it was all cleaned out, and there was a memo in my inbox that said, "I have promoted," by Bill, "Robert Hoerner to the position of Librarian of Corporate Information." Well, this had previously been handled by a guy who was a top of a nine, and if you know anything about job assignments in the federal government, a nine is the lowest and the top of a nine means he has never got up to a ten, he's all the way up there in the top of the nine. I said, "Ew," and I went to my buddies that were

there and I said, “What’s going on here? What’s this top of a nine business? What’s happening?” They said, “Well, Bill felt that you were spending an awful lot of time on vacation and he thought that we needed to say something. Pretty soon after, about, I don’t know, one minute, why, they were literally on the floor, just rolling around laughing. I said, “God damn you!” [laughter] They just were having a wonderful time at my expense and I came to appreciate that it was perhaps the best practical joke that had ever been played on anybody. But that’s neither here nor there. No, I’m glad I did it. I guess I’m happy I did it. I felt it could have produced more results than it did, but you know.

02-00:49:05

McCreery:

Thinking, though, about the bulk of your career being at Jones Day, both before and after that, how do you think the Supreme Court clerkship affected your career trajectory?

02-00:49:18

Hoerner:

To start with, of course, being a law clerk to a justice on the Supreme Court is a wonderful credential to have. Being a law clerk to the Chief Justice is a very good credential of that kind. I assume I would have been selected anyway, but maybe I wouldn’t have, so I think that helped get me the job. I guess what I’d have to say is that, well, I had responsible work in the firm, and had some litigations that were important. I think the thing that I felt personally about it was that people just didn’t get in my face. In other words, if I said something, they would listen to me and they would not say, “Oh, that’s nonsense, don’t even think that way.” They’d listen with some respect. I was just not abused. I’m sure you appreciate that lawyers can abuse each other, but I wasn’t abused. I think that had something to do with the fact that I was a fact that I was a former law clerk to Chief Justice Earl Warren. It let me be a little more personally flamboyant than I might have felt that I otherwise could have been. We have an office golf, and I get the award every year for the most outrageous dress. Just little things like that, so people, they have fun with me but they don’t make fun of me. I think, having worked for the Chief, that has something to do with that.

02-00:51:34

McCreery:

Now, reflecting back now on your year at the court, how do you think your interests in the law developed during that year?

02-00:51:50

Hoerner:

First of all, you come to appreciate that the law is a very, very broad ocean and that you aren’t going to get on top of all of it, or even most of it. It gives you a perspective on those things which interest you and those things which don’t. I remember the court would just fill up when we’d have cases involving the regulation of natural gas prices, and you’d have all kinds of fat-cat lawyers from New York coming down to see how that could affect their clients’ income to the tune of tens of millions or hundreds of millions or maybe even billions of dollars, although I’m not sure, at that time, we were up into the

billions. It gave you a sense of what you cared about, and as I say, I cared about antitrust because I thought it was very important for the country to decide how we can get the apportionment of goods and services at the best prices. I also came to appreciate that I really wanted to do federal law, and the reason for that was, I think, that the judges you have to deal with in federal law are like to be, I don't want to denigrate state judges, but they're likely to be of more experience—and I want to be careful what I say here—and better at what they do than some state court judges. So, I developed in me a preference for federal law, if I could get involved with it. Well, those are things that I would say.

02-00:53:54

McCreery:

Did you own political views or other aspects of your life change in any way because of the Supreme Court clerkship?

02-00:54:01

Hoerner:

No, I started out a Republican and I was a serious Republican and my parents were Republicans. At Cornell College, why, for whatever reason—it may have had something to do with my major professor—I sort of shifted over to be a Democrat. So, I was a Democrat and I have been basically a Democrat for the rest of my life. My parents thought Cornell College was evil for having done that to me. The result was that I never favored a winning presidential candidate. Roosevelt and Truman always won, and then it moved over to the Republicans, and they always won for a period of time when I had shifted to being a Democrat. So, whatever.

02-00:55:00

McCreery:

Well, how much did you stay in touch with the Chief after you left his service?

02-00:55:06

Hoerner:

We had a reunion affair for him every year, and I don't remember what they were now, but I'd say once or twice a year in addition to that, I would have occasion to interact with him in some ways. We'd go to ballgames together, I mean, not he and I, but clerks and him. I don't remember it very well, so I won't have it right, but we were at a ballgame, a Washington Senators game, and a fellow was cleaning off the seats for us. It must have been a reunion of clerks because there were two clerks that were six-foot-three and over 200 pounds, and so, I started to tip him for cleaning the seats, and he said, "You don't have to do that; the Secret Service men have already done it." So, I ragged them about being Secret Service men.

02-00:56:15

McCreery:

Did you see the Chief much after he retired from the bench?

02-00:56:21

Hoerner:

Not a lot. We'd still have the reunion dinners every year, and maybe, as I say, once or twice, but I can't remember the occasion. Maybe not. I do remember

one thing, after one of these Saturday lunches, we went back to his office and he broke out a bottle of, I'm going to say it was 100-year-old cognac, but it probably wasn't. It was at least twenty, and probably maybe fifty or thirty-five or something. He poured out cognac for us in water tumblers, these heavy glass water, and we sat there in his office drinking \$100, \$200 cognac out of water tumblers, and I remember that very well.

02-00:57:11

McCreery: That doesn't happen too often.

02-00:57:12

Hoerner: No, it doesn't.

02-00:57:15

McCreery: Just your thoughts on the place of the Warren Court in constitutional law?

02-00:57:23

Hoerner: I'd have to say that in the few cases that I'd name—*Escobedo*, *Miranda*, *Reynolds vs. Sims*, and there was one other one I can't say right now—

02-00:57:41

McCreery: One of the apportionment cases, *Baker* and *Carr*, maybe?

02-00:57:43

Hoerner: Yeah, *Baker* and *Carr*, that those may have been the most important decisions in the last fifty years. The reason they were, certainly *Reynolds vs. Sims* and *Baker vs. Carr* and *Brown vs. Board*, was because that affected the way the country went about its business. They were very, very, very important changes in the way we went out about our business. I think that the fact that voting was fairly apportioned, we got a lot of gerrymandering, but still, it was very significant that each person would get a fair evaluation of his vote. I think *Brown vs. Board* made it respectable to be an African American. Before, they were second-class citizens. Unfortunately, there are still some people that treat African Americans as second-class citizens. Some African Americans as—
plays Huxtable in—

02-00:59:22

McCreery: Oh, on television?

02-00:59:23

Hoerner: Yeah, what's his name?

02-00:59:27

McCreery: Bill Cosby.

02-00:59:28

Hoerner: Cosby, yeah. He recently said that there are some people, some African Americans, don't do the best they can at being good citizens and learning things that are taught in school or what have you. So, that's true, too. But I still think that those two things are incredibly important. I said the Chief was

responsible for getting unanimous opinions—let’s ask ourselves, now, we know who the Chief is, we know what his reputation is, just suppose for a minute that the Chief had come out not trying to get a unanimous opinion, but had come out on the other side of those two questions. Suppose he would say, “Look, separate but equal is fair, separate but equal means equal. There’s no reason why you learn better when the person’s skin color beside you is brown or black instead of tan or cream.” Now, suppose he had done that, suppose he’d done that and, hey, states determine how voting is apportioned, and what business do we have saying how that ought to come out? Now, suppose he’d taken those positions, let alone a unanimous court, would he have gotten a court for those two positions that I’m postulating? I don’t know that he would have. Stanley Reed certainly would not have voted in *Brown vs. Board*. I’m not sure Frankfurter would have. So, I think that the Chief and the Chief alone may have been responsible for those two developments, important developments, in our constitutional law in the sense that had he strongly supported the other way, we might have gone the other way.

02-01:01:37

McCreery: OK, we’re at the end of the tape. Thank you for this interview.

[End of Interview]