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Robert T. Lasky
THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: ROBERT T. LASKY

Interviews conducted by
Laura McCreery
in 2005

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[End of Interview]

Interview 1: July 31, 2005

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McCreery: Today is July 31, 2005, and this is Laura McCreery speaking. On this tape, I'll be interviewing Robert T. Lasky at his summer home in Deer Isle, Maine.

01-00:00:48

Lasky: Stonington, Maine.

McCreery: Stonington, Maine. I guess you told me that. That's technically where you live.

01-00:00:52

Lasky: Right.

McCreery: We're talking today for the oral history project, *Law Clerks of Chief Justice Earl Warren*. Let me ask you to start us off by stating your date of birth and then just talking a little about where you were born.

01-00:01:07

Lasky: I was born on May 30, 1942, in Philadelphia, Pennsylvania. I lived in Philadelphia through high school, went to Central High School in Philadelphia. I went to college at Franklin and Marshall College, in Lancaster, Pennsylvania, graduated in 1964. I then went to University of Pennsylvania Law School, graduated in 1967.

McCreery: Okay. Before you go too far forward, let me ask how you went to Franklin and Marshall. What was that process of choosing the college?

01-00:01:39

Lasky: I wanted to be far enough away from home that I was not easily accessible to my parents. I wanted to go to Princeton. I was fourth in my class in high school, which is a very competitive high school. The first three guys got in and I didn't. I also applied to Swarthmore and Haverford, where I was admitted, but they were too close to Philadelphia. And Franklin and Marshall seemed like an appropriate distance from Philadelphia; it was sixty miles away. It was basically a geographic decision. I wanted a small liberal arts college, once Princeton was not, unfortunately, available to me.

McCreery: Yeah. Now, what were your interests as a young man coming out of high school? What did you envision for yourself?

01-00:02:26

Lasky: I don't think I really had any particular occupational notions until college. My father was— well, had been a government lawyer. He had worked for the Department of Labor for— well, until the early fifties. Then he went into private practice by himself, and he was a kind of— Today, wouldn't even exist in a large city. He practiced by himself. He did mostly plaintiffs' negligence, some domestic relations, some workmen's comp, and was not

very successful financially. So I grew up in a very modest financial circumstance. I had a full scholarship to college and a full scholarship to law school, as well. So there were some restrictions, in terms of how far away I was willing to go, from a financial standpoint. I didn't want to have to spend a lot of money travelling, because we really didn't have it. So Franklin and Marshall just seemed to be an acceptable geographic distance, a good school. It did not have the then reputation that Swarthmore or Haverford had, but those two were not acceptable from a geographic standpoint.

McCreery: Okay. Now, what did you study there?

01-00:03:47

Lasky: We called in government; most people call it political science. I was a government major. I think my principal activity, other than the usual silliness people engage in in college, was I became editor of the school paper, and seriously considered a career in journalism. During my junior year, I worked for the *Vineland Times Journal* as a newspaper reporter, which is a small daily newspaper in New Jersey. That actually changed my view, because I realized that there were an enormous number of unhappy people in journalism. Not everybody could be "Scotty" [James Barrett] Reston. There were just a lot of frustrated people, with a high level of alcoholism. I looked at the folks that were twenty and thirty years older than I was and I said, "I don't want to be there in twenty or thirty years." The other alternative, because I could write and think and talk, was law school. My mother had entertained the notion that I become a doctor. I will never forget, in my senior year of college, she asked me if it was still too late to take science classes, and I said it absolutely was. So in any event, I shouldn't say for want of something better to do. I think I had decided I'd probably be a pretty good lawyer and that law school made a good deal of sense, given my skills. I also thought it was an area in which I could succeed, and that was important to me. Being successful was important. I applied to Harvard, Yale, Columbia, NYU and Penn. Got into all of them; went to Penn because Penn gave me the most financial aid.

McCreery: That's a very good reason.

01-00:05:37

Lasky: Well, again, at the time of my life, that was something that was necessary. I don't think I've regretted that choice, and I went to University of Pennsylvania Law School, graduated in '67.

McCreery: Well, tell me a little about law school. What did you think of it when you got there?

01-00:05:58

Lasky: I thought it was mostly trade school. I think law school certainly taught me critical thinking. I thought most students really didn't understand the environment in which they were functioning, because they considered it a continuation of their liberal arts education. I thought it was entirely different

than my liberal arts education. It was trying to teach me certain kinds of patterns of thought and analysis that I'd later apply in concrete circumstances, to real-world problems. I thought the faculty members that focused on that—Curt [Curtis] Reitz, for example, who taught me first year contracts and who, as you know, was a Warren clerk—did not suffer fools gladly. The kind of liberal bullshit that passed for analysis for many undergraduates, he had no patience for, and quite a number of people never got it. I also thought a surprising number of students never maximized their experience in law school, either by recognizing that the principal resource of the law school was its faculty and trying to develop relationships with the faculty—which I did, with some level of success—and understanding the manner in which you maximized your academic success. Most students never focused on how to take one of those tests and what you ought to be doing to maximize your probability of success. For me, law school was a way station. In many respects, I wanted to get on with my life and it was a means to an end. I thought my undergraduate college experience was wonderfully rewarding emotionally; I considered law school a trade school and a way to get on with my life.

McCreery: Okay. Now, you mentioned faculty relationships and you named Professor Reitz. Tell me how you went about building those relationships, and with whom.

01-00:08:05

Lasky:

Well, I suppose I had the strongest relationship with Curt Reitz. I had a good relationship with Paul Mishkin, who taught federal courts and constitutional law. I knew Tony [Anthony] Amsterdam reasonably well; but Tony was interested in folks that followed him around all the time and I didn't want to do that. I think I built the relationships pretty much the same way I built [them] in college: by working very hard, demonstrating a genuine interest, and talking to the faculty about what they were trying to teach me. Some people said, oh, he's brown nosing. To me, I was trying to learn from someone who certainly had something to teach me. I thought developing those relationships was the most rewarding part of both college and law school. I don't know that I did anything special; I just tried to be an interested, concerned student, which I really was, and I wanted to be successful. One of the ways of doing that was understanding how they thought and what they have to teach. These exams were all anonymous, so that there wasn't any suggestion that your grades were in any way related to your relationships with the faculty. I just found some of them just incredibly engaging and incredibly bright and challenging. So I approached them on the basis that they had something to offer to me, and maybe I had even something to offer to them.

McCreery: Yeah. And of course, building relationships in the real world, as you—

01-00:09:38

Lasky:

Right. Yes. Yes.

McCreery: —went on to find out. Well, now, you also worked on the *Law Review*.

01-00:09:43

Lasky: Yes. I was the comment editor, the person that edited the short student pieces.

McCreery: Okay. Was the *Review* trying to do anything special, in your view?

01-00:09:55

Lasky: No. No.No. Penn had a bit of an Avis complex.

McCreery: [chuckles] Number two.

01-00:10:02

Lasky: Number two. Now, there was Harvard, Yale, Columbia maybe, and then there was Penn. And there was a certain amount of striving, particularly to try to get name authors to write articles. But the student pieces were where I was the comment editor; I was responsible for the short student pieces. I think it's probably the same today as it was then. The big difference today, most law reviews, as I understand it, all or substantially all of the students write on. At Penn, at that point in time, it was entirely grades. So you had a range of people, a range of interest. Some people really didn't want to do it, but were on it because they had the requisite grades, and some people did. I thought it was a useful experience; but I thought, frankly, far too much effort went into the production of a *Law Review*, particularly the student pieces. Students labored endlessly over works that really were not an original contribution to the scholarship, in the ultimate analysis. It's an enormous amount of hubris that law considers student research— In what other profession is substantially all the research done by students? So I always thought that was a little anomalous. As an experience, I thought the time was considerably greater than the reward, but everybody did it. And at the time, I didn't think about it. It was only in retrospect that that became clear.

McCreery: Yeah. Well, I'm interested, knowing that you went on to clerk at the Pennsylvania Supreme Court, as your next stop. Now, how did that idea first come up?

01-00:11:52

Lasky: Well, I think no one entertains the notion that they're going to get a Supreme Court clerkship. So my clerking decision was focused principally on the assumption that I'd only clerk for one year. My wife and I are both from Philadelphia, and we assumed that we would settle in Philadelphia. Sam Roberts had a very good relationship with Curtis Reitz. Both at Reitz's suggestion and independently, I did a fair amount of research, trying to find out who would be a, quote, "good judge to clerk for." While many people thought federal appeals courts were more prestigious clerkships— I talked to a couple of former Roberts clerks—and Reitz had not clerked for Roberts, but knew him well—and they said it was a fabulous experience. I just said, "I'm only going to clerk for a year and I really want to have a good year." So of the

judges I considered, he was far and away the individual with the reputation for genuinely including his clerks and being solicitous of their welfare, and they turned out to be absolutely right.

McCreery: Okay.

01-00:13:16

Lasky:

Oh, he was a *wonderful*, wonderful man. Pennsylvania—it still does it today—is one of the few courts in the United States that rides circuit. So it would sit three times a year in Philadelphia, twice a year in Pittsburgh, and once a year in Harrisburg, which is the capital of Pennsylvania. When the court was not in session—and it was usually in session for two weeks at a time—the justices lived wherever they chose to live. Sam Roberts lived in Erie, Pennsylvania, which was known to his clerks as Dreary Erie, the mistake on the lake. Which was an interesting year. Erie's right in the middle of the snow belt. From October through March, there was nothing but snow on the ground. It's a little nicer today, I understand. A very small, somewhat gritty Pennsylvania town. The judge was very conscious of that, so he went out of his way to try to provide for the clerks an enriching personal experience. He had also lost his wife several years earlier, so he was a widower. I think the clerks provided for him a level of company, relationships, that to some extent, would've been different, had his wife still been alive. We had lunch with him every day, for example. We always went out to lunch, we always went to the same place, and we always fought over who paid the check. He was enormously inclusive, in terms of the business of the court. He would discuss, at any length you wanted to discuss, anything that was going on. Just as in the case of Warren, the clerks did the initial draft of the opinions; but he was extraordinarily actively involved in the massaging of that work. He would discuss endlessly, strategies. The Pennsylvania Supreme Court, at that point, was very fractured. He was considered to be the leader of the liberal wing of the court. There were a number of very conservative justices and he was in the minority.

McCreery: How many total?

01-00:15:32

Lasky:

Seven. Appointed for twenty-five-year terms; they were not appointed for life. My co-clerk and I spent an enormous amount of time writing dissents, particularly in criminal constitutional law cases, because the majority of the court had stopped reading the Supreme Court opinions sometime in the late forties, I think. Cases like *Miranda* [*Miranda versus Arizona*] existed, but were not acknowledged by the Pennsylvania Supreme Court. So it was a fascinating year. I had a very large level of insight into how an appellate justice goes about his work. He was much more accessible personally than Warren was, for a variety of reasons, and we can talk about it later. So it was a wonderful, wonderful year. He casually knew Warren, and when it became clear that I was a serious candidate for a clerkship, he went out of his way to

call the chief and say, “Don’t pass this guy up.” So he was also helpful in that regard.

McCreery: Did he actually suggest it to you?

01-00:16:38

Lasky: No, Curt Reitz did.

McCreery: Ah-ha.

01-00:15:41

Lasky: I’m sure you’ve heard this before, but the chief had a well-established pattern for taking clerks. He took one clerk from some California school every year, and then he tended to rotate clerks among other law schools. I don’t know if he ever took a clerk from Yale or Harvard, but his view was that Harvard and Yale had plenty of clerks. Harlan [Justice John Marshall Harlan II] always had Harvard clerks and [Justice Potter] Stewart always had Yale clerks, and there were other folks that deserved a chance. So he was very careful to try to rotate among other schools. The year that I was leaving Roberts was the year he had kind of tentatively, before he decided to resign, he had tentatively decided to take a Penn clerk. So it was really a question of Reitz, who had been a former Warren clerk, guiding the selection process. I went through a clerkship committee, but once Roberts weighed in and Reitz weighed in and it was a year to take a Penn clerk, I was reasonably confident I was going to be selected; and it turned out, obviously, I was.

McCreery: I’m sure the experience on the Pennsylvania Supreme Court—

01-00:17:58

Lasky: Well, Warren would not take someone who did not have prior clerking experience.

McCreery: Oh, is that right?

01-00:18:02

Lasky: Yes. Now, I don’t know if he ever took a clerk right out of law school, but I was told at the time he basically wanted you to have clerked at least at some other court. That was an enormously intense experience, and an experience without the same level of guidance that I had from Roberts, when I first started clerking for him, that if you had not had a year of experience, it would’ve been much more difficult.

[Interruption to adjust recording equipment]

McCreery: Just a little bit.

01-00:19:04

Lasky: Well, I was told by both Curt Reitz and a fellow by the name of Bill [William H.] Dempsey, who’s now dead, I believe.

McCreery: No, he's not.

01-00:19:10

Lasky: Oh, he's not?

McCreery: I interviewed him.

01-00:19:11

Lasky: Oh, I thought he was—

McCreery: No, no.

01-00:19:21

Lasky: In any event, Bill was the head of the clerkship committee. I remember him commenting that the chief had basically only wanted people with at least one year of clerking experience.

McCreery: Yeah. It may have been very true in those later years, yeah. So that was very much a factor, though, it sounds like, the experience in Pennsylvania.

01-00:19:40

Lasky: Yes, and it was also very useful. I was accustomed to reading a record and how judges thought—at least how Sam Roberts thought. Some people in the Pennsylvania court didn't think much. [they laugh] And I had learned techniques for getting through large masses of written material—which is extraordinarily valuable, as a Supreme Court law clerk—quickly. So I think I was significantly helped by that prior year of experience.

McCreery: Yeah. Okay. Well, knowing what your entrée was, what was the actual recruitment process? What do you remember about interviews?

01-00:20:18

Lasky: I had an interview by— I'm trying to remember. Was it just Bill individually? I think it was just Bill individually. I'd never met Warren till the day I walked into the office. I had that one interview. I no longer recall how I was informed, whether Bill called me or I got a letter. I don't remember. But it was only a single interview. As I said, it was a relatively foregone conclusion that the chief was going to take a Penn clerk that year. So it was up to Reitz, and to some extent Dempsey, to pick the Penn graduate. I was at the right place at the right time. I obviously had a good law school record, but there was an element of fortuitousness associated with it. I think that's true for most clerks, but it was in my case.

McCreery: Yeah. Now, at what point, perhaps after learning that you were accepted, when did the issue come up about Chief Justice Warren's plans to retire, and how did you learn about that?

01-00:21:25

Lasky:

The chief didn't tell anybody in advance. He said subsequently that he deliberately selected his clerks for the following term, even though he intended to resign, because he did not want anybody to recognize that he might be resigning because he hadn't taken clerks. So he had made an arrangement that none of us knew about, that we would clerk for [Justice Abe] Fortas. I learned that Warren had resigned, I was driving to work in Erie, Pennsylvania, for Justice Roberts, and was listening to the morning news on the radio and the announcement was that Warren had resigned. I literally almost drove off the road. I got to the office, I called my wife and I said, "You're not going to believe this." Then the next thing I did was call Warren's chambers. He had a long-time major domo—what would you call her?—guardian of the gate, Mrs. McHugh. I said, "This is Bob Lasky, and I was supposed to clerk for the chief justice next year." She said, "I know who you are." She was *very* stern. I said, "Well, I've just heard this announcement." She said, "You're expected in Washington June 7," or whatever it was. I said, "Yes?" And she said, "Of course! Do you have any other questions?" I said, "No, I'll be there."

McCreery:

She didn't tell you much, though.

01-00:22:49

Lasky:

No. Oh, not at all. I went home and I said, "Well, I guess we're still going to Washington. I don't know exactly what happening, but I don't think we're going to be a candidate for food stamps, so I guess I have a job." When we got there, the chief said that it was a little unusual, that he fully expected that we wouldn't complete the year with him, but as long as he was chief justice, we would continue to work as his clerks; and that if Fortas was confirmed, then we'd become Fortas' clerks. And we went about our business. Over the summer, as I'm sure you've heard from other clerks, you have these miles and miles of cert petitions that you've got to plow through. The chief didn't spend a lot of time with the cert petitions. He didn't really do much until you prepared the flimsies. Again, I'm sure you've heard the name. So we just went to work on those mounds of cert petitions. Then we met Fortas and he acknowledged that we were going to clerk for him, at the point at which he was confirmed; but until that process happened, the chief was going to continue to function and vote and run the court, and we were going to be his law clerks. I think I was, on a personal basis, having to spend a year with Earl Warren was something that I was much happier occurring than Fortas. Fortas' reputation, from a clerk's standpoint, was not of someone who was a joy to work for.

McCreery:

Okay. So purely on that basis, more out of working with the chief justice?

01-00:24:26

Lasky:

I felt that I had an opportunity to get to know someone who was one of the most, perhaps *the* major historical figure of mid-twentieth century America, and I thought that was a unique opportunity. While Fortas certainly had a

reputation for being the more brilliant justice, he also had a reputation for being very personally difficult. I had learned from my prior year that working for somebody who admitted you to the process was the most rewarding part of the clerkship, and Warren didn't have that reputation. He did not nearly have the level of personal time available to his clerks, both because he had a whole range of quasi-social obligations—I'm sure you've heard this from others, but the State Department must've called two or three times a week. Would he do this? Would he do that? He was an enormous favorite of particularly African nations. And the ambassador from Guinea would be in town and he'd probably want to meet Earl Warren before he wanted to meet the president of the United States. Warren was very gracious about that. He was basically unavailable to the clerks during the week, except for specific times when he wanted to talk about something. And then I'm sure you heard that on Saturday mornings was our time with the chief. But even that was just enormously rewarding, on a personal basis.

McCreery: Okay. Well, since we're speaking of Justice Fortas, realizing that he did resign before your year was out, but he was there most of the term—

01-00:26:10

Lasky: Yes.

McCreery: —how well did you get to know him?

01-00:26:12

Lasky: Not particularly well at all. From a propriety standpoint, we were Warren's clerks. I'm just trying to phrase this appropriately. The law clerks all ate lunch together every day—I'm sure you've heard this—in the dining room off the cafeteria for the law clerks. A lot of the clerks thought they were associate justices, for purposes of that year, and lobbied the other clerks, on the theory that they lobby their justice for a particular point of view. Warren didn't think the clerks really ran the court, he thought he ran the court. [laughs] He knew what went on in that lunchroom, and he wanted his clerks to be his clerks and he wanted to feel comfortable that he could confide in them and it wouldn't be bandied about. Warren felt—and I think he was absolutely right—he was a much better lobbyist for his issues than any of his law clerks would ever be. Until we were Fortas clerks, we were Warren clerks, and he expected that separation to be maintained. So I really did not get to know Justice Fortas at all.

McCreery: Okay. Now, what about the matter of confidentiality? How explicitly was that addressed?

01-00:27:35

Lasky: Well, we talked about this briefly, before the interview started. I remember the first meeting we all had with the chief. He called us down to his office. Physically, his clerks were on the second floor of the court and his chambers were on the first floor. He was the only justice with that arrangement. That

was just a physical space problem. He called us down to his office, and the first thing he said, “Boys,” and we were always referred to as boys, “you are my lawyers this year. I think anything you learn is essentially burdened by the attorney-client privilege. I expect you to respect that and to conduct yourself accordingly, and nothing should leave this office that would otherwise address the business of the court. The court speaks through its opinions. I do all the talking around here, publically, and you don’t do any talking. You’re my lawyers, and you have to conduct yourself accordingly.” As I said earlier, to some extent, I think that even constrains this interview today.

McCreery: Yeah. Okay. Well, and that has certain implications, doesn’t it, for not only how the work proceeds, but how your whole life is carried out during that period? Did that carry over into social things, as well, that sense of being able to— Who could you talk to?

01-00:28:50

Lasky: Well, I talked to my wife about the experience, obviously. My wife’s not a lawyer, and most of the intricacies of what I was working on were of not particular interest to her. She was very interested in one aspect of the court’s business, which I was very careful even not to discuss with her, substantively. I was clerking in the middle of the major call-up for Vietnam. There were cases in almost every circuit court in the United States, at that point in time, challenging the constitutionality of the draft and of the war, on the basis that it was an undeclared war. Congress had not declared the war and it was, therefore, unconstitutional. A number of justices had granted stays of people being shipped out to Vietnam, and at one point, I think there were 50- or 60,000 draftees throughout the country whose movement to Vietnam was being held up by stays issued by various circuit justices. Ultimately, the court determined to duck that issue, never granted certiorari in any of those cases, and vacated the stays and the war went on. Now, that was an issue my wife and a lot of my friends were vitally interested in, and I just said no. I said, “Cert petitions are there. I don’t have any idea what the court will do, and I don’t want to discuss it with you.” Now, that was the one issue that everybody I knew was vitally interested in, and I just felt constrained. There really wasn’t much I could say, either, on that. The court either would or wouldn’t. I had my own views that it would not take that issue, and it ultimately did not.

McCreery: Yeah. Yeah, and as you’ve indicated, 1968 was quite a year, in the world outside the court.

01-00:30:42

Lasky: Yes.

McCreery: I don’t know how much that was kind of coming in and affecting your work

01-00:30:47

Lasky: Not a great deal. I think it was a much more interesting world outside the court than it was judicially, that year. I don’t think there were major watershed

cases. We thought Powell versus McCormack would be a major case, but it really— Congress had never sought to replicate that silliness. We labored endlessly over that opinion, because we thought it would be a great historical document. I gather it's not been the source of constitutional wisdom we thought it might be. But it was a fascinating time outside. When we first came to Washington, it was right after the Martin Luther King riots. I remember walking to work— My wife and I lived on Capitol Hill, so I walked to the court most days. There were still troops on the corners with machine guns, which I found a little unsettling because I'd never had that experience before. So there was a very tumultuous time outside of the court; but I don't think it was a particularly tumult— Other than the Vietnam cases, it was business as usual. How did the outside world affect me? We were so busy, and so focused on what was going on at the court and what we were doing, that a lot of that, unless my wife said something to me, kind of passed me by. I looked at the nightly news, but I'm sure other clerks have told you, we worked eight, eighty-three till, often, mostly into the evening. We worked Saturday afternoon, after we came back from lunch with the chief. And most of us worked on Sundays, as well. I worked eighty-, ninety-hour weeks. Part of it, unfortunately, stemmed from the lack of technology at the court, and the fact that the judiciary committee wouldn't appropriate enough money to have a decent photocopier, so we had to prepare these silly flimsies. I don't need to explain what that is.

McCreery: The copies of the—

01-00:32:55

Lasky: Yes.

McCreery: The junior justice gets the last one.

01-00:32:57

Lasky: Right, right. Well, actually, the law clerks got the very last one. The junior justice got the next-to-the-last one.

McCreery: All right. Well, before we leave the subject of Vietnam, did you hear much about Chief Justice Warren's views on how the war was progressing, or how it may or may not have changed his own relationship with President Johnson?

01-00:33:22

Lasky: I don't recall discussing the war at any length. The chief was very open, generally, about those kinds of issues. And he loved to tell political stories.

McCreery: Oh, yes.

01-00:33:39

Lasky: And he was a great raconteur, wonderful storyteller. I think he recognized that that was a very sensitive issue for many of the clerks. Many of us otherwise would have been drafted. The one intersection I do remember personally

between the chief and the war—I have to back up. When I left law school—I’m trying to remember. I was married, but I believe they were drafting—as long as you didn’t have children—they were drafting married men. Unless you otherwise had a deferment. Obviously, my student deferment had expired. Sam Roberts believed his law clerks were necessary to the national defense—a position with which I was not going to quarrel. So he wrote a *very* strong letter to the Pennsylvania Selective Service Board—and he also knew the head of the board—that he thought his clerks were entitled to a deferment. I got one. Got to Washington and I notified my draft board that I had changed positions, and the chief made it clear that he wouldn’t write any letters to anybody’s draft board. But then he smiled and said, “I don’t think they’re going to draft my law clerks.” [they laugh]

McCreery: But philosophically—

01-00:35:07

Lasky: Philosophically, he would not take a public position that his clerks ought to get deferments. I think in his heart of hearts, he may have thought that that war was politically appropriate. I do not think he shared the vehemence of many of the clerks, in terms of the anti-war sentiment.

McCreery: And by ’68, it was shifting in the public sentiment quite a bit, as well.

01-00:35:37

Lasky: Yes. Oh, yes. Oh, there were vigils and people were marching in the streets. I did a couple. My wife did quite a number, more than I did; I was too busy. But I think personally, he did not share that level of animosity towards the war; but he certainly was not going to take a public position on the subject.

McCreery: He also had quite a history of insisting that he not receive special treatment—

01-00:36:05

Lasky: Yes.

McCreery: —that ordinary citizens.

01-00:36:07

Lasky: That’s correct.

McCreery: That played into—

01-00:36:09

Lasky: I’m sure it did, I’m sure it did. His law clerks were not special characters. I think he also knew that we weren’t going to get drafted.

McCreery: Right. Right.

01-00:36:16

Lasky: So he could maintain that position, without fear of disruption of the business of getting the work done.

McCreery: But also maintain no appearance of special—

01-00:36:29

Lasky: Absolutely, absolutely. In that regard, he was really quite careful that he not be perceived as taking advantage of his position. I'm sure you've heard the story about how he got his car.

McCreery: Well, I think so.

01-00:36:46

Lasky: Oh, it's an interesting story.

McCreery: Tell me, and see if it's what I think.

01-00:36:48

Lasky: He had been invited to the White House—I guess it was during the Eisenhower administration—and he showed up in a taxi. It was quite a bit of a drill to get inside the White House grounds in a taxi. It got back to the president that the chief justice had arrived at the White House in a taxi, and someone said, “The court doesn't have a car? You don't have a car and a driver?” He said no. So the next appropriations bill, there was a car and a driver for the chief justice, and he had one ever since. Then several years later, there was one other car, that's it, for all the remaining justices—which Bill [Justice William O.] Douglas considered his personal vehicle. It used to really annoy the other justices that they could almost never get the use of the car because Bill Douglas was always using it. I'm trying to remember the driver's name. He had a very good relationship. It was an African American man, whose son, if I remember correctly—I know he went to his son's funeral—was shot in Washington, the year we clerked, and we all went. The chief justice and all the clerks went to his son's funeral, in a black neighborhood in Washington, in a very old-style black church. There were these three guys and the old chief sitting in the audience for the funeral. But he went. He wanted to go. He felt he should.

McCreery: Well, we have to remember, it was quite a different environment then—

01-00:38:29

Lasky: Yes. Yes.

McCreery: —just in terms of the makeup of the court and the entire staff.

01-00:38:33

Lasky: Absolutely.

McCreery: So that says a lot about him. Well, you mentioned Justice Douglas a moment ago. I wonder, did you have much chance to get to know any of the other justices?

01-00:38:48

Lasky: Well now, we did, in the limited sense that they all made one or two appearances during the—you probably heard this—in the clerks' dining room, where we all—

McCreery: Okay. Speakers—

01-00:38:56

Lasky: Yes. Well, more than speakers. Depending on the justice, it could be pretty much a free-for-all.

McCreery: Okay.

01-00:39:02

Lasky: But because of Warren's strictures that you were his clerks [lawyers] at the Supreme Court and you were to keep everything within the chambers, we really did not— Now, I don't know if it was true of other years and other clerks, but we really did not have a lot of intersections with anybody other than Warren. Now, we would talk to their clerks, other justices' clerks, at lunch and we knew we were being lobbied. But lobbying the clerks did very little to change the chief's view on any subject.

McCreery: Yeah. I wonder if there was much clerk-to-clerk negotiation in a serious fashion.

01-00:39:35

Lasky: There was for certain chambers. At least there was the appearance of that. I think [Justice William] Brennan's clerks occasionally did change his mind. Brennan and Stewart, and to some extent, Harlan, were the justices, I think, who were most open to a dialog with their clerks that might affect the way in which they voted. Warren would discuss cases with you, but the first thing he told you was how the court had voted, and obviously, how he had voted, if it was a majority opinion, and that wasn't up for discussion. The chief had made up his mind and your first task was to produce an acceptable first draft of that opinion, if he had assigned it to himself. But Warren never seriously discussed with his clerks— Justice Roberts did. We had a meaningful ability— Influence isn't the right word. Justice Roberts was much more open initially, to how he would vote; and often, in close cases, really didn't make up his mind until he talked with his clerks.

McCreery: Wow.

01-00:40:59

Lasky: Warren had his mind made up before he talked to his clerks.

McCreery: He would announce that.

01-00:41:04

Lasky: He would tell you, this is the way the court had voted; I've taken the opinion; you're assigned the draft. Sometimes he'd give you some guidance about what he wanted in the opinion; sometimes he wouldn't. He'd just leave you to your own devices, to start with. In a lot of the cases, once you knew the result, how you were going to get there was reasonably clear.

McCreery: Okay. If there was more than one way to get there, was that a subject of discussion?

01-00:41:28

Lasky: The way that would arise is you would do a first draft, and then the chief would go over it with you and it was incumbent upon you to say to the chief, I made this decision, I made that decision; how do you feel about this, how do you feel about that? But we very rarely got a lot of guidance in advance, being told, this was the result, he had taken the opinion, go do a draft. The three of us would discuss quite a lot about how we thought that ought to be crafted. Whoever was writing did the writing, but we all discussed it extensively.

McCreery: Okay, but there was quite a bit of give and take among your three?

01-00:42:11

Lasky: An enormous amount of give and take, and no—as I said earlier; or maybe I said before I was on camera—that no opinion went to the chief until the three of us were all comfortable that it was the best product we could collectively produce. One clerk had the assignment and talked to the chief and did the bulk of the work on each opinion; but it was a collegial product, in the sense that we all exchanged the opinion and made comments and marked it up. We treated it as if we were editing a *Law Review* article for somebody else. I think we each had meaningful input, in terms of the others' work.

McCreery: It's a bit of a vetting process.

01-00:42:51

Lasky: Yes. If you ever—I'm sure you have—if you read Warren opinions, they do not have a great deal of stylistic flair, as a general proposition. I don't know if the chief expressly said it, but he was not interested in flashy opinions. So we all went out of our way, I think, to make them very straightforward and non-exciting. Some of the issues were inherently exciting, but he did not have the drafting flair of a Harlan or a Douglas or a Stewart. Warren would never have written about pornography, "I know it when I see it." That just wasn't the way he thought about these things, and he expected the clerks, to the extent they could, to mimic his style. So one of the ways of doing that was if we all exchanged work product, it tended to homogenize things.

McCreery: Now, that's the very thing he was sometimes criticized for, that rather plain sort of style, the utilitarian approach.

01-00:44:05

Lasky: That's was the chief's view.

McCreery: What are your thoughts about that?

01-00:44:10

Lasky: What are my thoughts? That was Warren. Warren was not a pretentious man. He was an extremely *unpretentious* man, considering how far he had risen through the national scene. He was a strikingly simple person. It wasn't his style to be flashy. I'm sure you've heard, he lived in a two-bedroom apartment the whole time he was in Washington. He'd have a grandchild there all the time. I guess you've heard that, as well. But he was interested in running the court effectively. He certainly was interested in results that he felt—I don't know Warren had an agenda, but he certainly had a view, and he wanted his view to prevail. He put a great level of emphasis on collegiality among the justices. He got along with everyone. My sense of today's court is [that it's] extremely fractured, on a personal basis. It was very difficult to get along with Bill Douglas. The chief, when everyone says, "Oh, Bill. I keep trying and he keeps not listening to me—" He would tell us wonderful stories about how impolite Douglas was to everybody else, and the chief would just smile and shake his head and say, "Oh, Bill. He just doesn't get it." But collegiality was very important. I think the person that he liked the best was Harlan. Harlan was a very gentlemanly, courtly individual; and so was Warren, in his own way. On a purely personal basis, they got along very, very well. They were quite apart judicially; but personally, he very much liked John Harlan. He liked Brennan a lot, too, on a personal basis. But collegiality was very important, running the court effectively was important and flash and dash was not.

McCreery: Well, that's a good way to [audio file seems to skip] maybe, what was important to him. Now, realizing this was the end of his tenure that you were there, how did he go about maintaining those relationships, as you were able to observe it. What would he do when he was trying to get something on a particular case?

01-00:46:38

Lasky: I don't think in that regard, he changed his methodology from prior years. He did a number of things. He took a number of the schlock opinions for himself. That's an unfair word, but you understand. He would take some opinions in cases that were relatively mundane. One of them particularly sticks in my mind, Bacto-Unidisk

McCreery: Okay. We'll talk about that in a moment.

01-00:47:04

Lasky:

Yeah, right. Simply because he felt that he ought to do his share of grunt work, or his clerks, their share of the grunt work. He was very careful, in terms of how he assigned opinions, both in terms of how he thought that justice would deal with the issues and whose turn was it to get one of the good cases. He tried to be very fair about that and to spread the fun around. He put a great store in collegiality in the conferences. As I said, Douglas continued to trouble him. My sense is, once he recognized that Fortas' confirmation was not happening any time soon, with some reluctance, I think he settled back into the saddle and said, I've got to ride the horse one more year.

McCreery:

Okay. There was no talk of him leaving before another replacement would be named?

01-00:48:02

Lasky:

No. No. No. He was not happy with what ultimately happened, and he was not at all happy with his successor. I suppose I can tell this story. Nixon, who was not at all a favorite of Earl Warren's, not remotely— He had little affection for Richard Nixon. He had some advance notice about who Nixon was going to appoint, and he was not enthusiastic about that particular appointment. The White House wanted to hold a press conference and wanted to have Warren there, at the press conference announcing [Chief Justice Warren] Burger's appointment. Warren got wind of that and he left the court early in the morning and was out all day. Mrs. McHugh got calls and we got calls. Where is the chief justice? Where is the chief justice? We didn't know. The clerks didn't know. Mrs. McHugh, I suspect she did know, but she said, "I don't know where he is." That happened, I think, on a Thursday or a Friday afternoon. We saw him that following Saturday and one of said, "Chief, where were you all day?" He said, "Well, boys, I took a walk." He really did. It was a nice day and he left the court and he was out all day. He just didn't want to go to that press conference and that was his way of dealing with the fact. He did not want to be associated with that nomination and he didn't want it thought that he was approving that nomination, and he certainly didn't want to do Richard Nixon any favors. So he just took a long walk.

McCreery:

Well, thank you. That's a telling sort of detail.

01-00:49:52

Lasky:

It was a very nice way for him to handle that issue.

McCreery:

Yeah, it avoids any kind of confrontation.

01-00:49:56

Lasky:

Right. He was just absent. Didn't tell anybody. I think Mrs. Mrs. McHugh knew he was gone for the day; I don't think anything passed her by. But we didn't know, until we found out what he did two days later, when we had lunch with him.

McCreery: Yeah. Yeah, and then, of course, there were a lot of ironies in the way of—

01-00:50:12

Lasky: Yes. Yes.

McCreery: —as you say, with Mr. Nixon becoming president and appointing Warren Burger and so on. Were there any discussions with the chief justice more generally, about kind of his mood or his assessment at the point of his retirement? What was he thinking, in looking back on what he had done at the court, do you know?

01-00:50:38

Lasky: I don't recall discussions. The chief let you know what was on the table and what wasn't. I don't recall discussions with him about, what is your legacy? He knew what his legacy was. There wasn't much doubt about that. He would tell you what went on in the conferences, if you got him going. He was pretty good about that. He would tell you political stories. He *very* much liked to talk about his days as governor of California and county attorney, I guess it was, in Alameda County. What was it? I forget the title. District attorney of Alameda County.

McCreery: And then attorney general.

01-00:51:25

Lasky: Attorney General of California. He would certainly tell you stories about the convention, where he thought he was going to be president of the United States and felt that he had been shafted, is about the right word, by Richard Nixon. Which is one of the reasons he was so fond [chuckles] of the president. But he didn't reflect with us a lot on, quote, his "legacy." As I said earlier, when you and I were talking earlier, he became a little emotionally absent, towards the second half of the term. I think he was done. He stopped voting on certain cert petitions, because he didn't feel that he ought to be determining the cases or participating in determination of the cases the court took next year. That's interesting. We argued with him about that. It's not easy to say to the chief justice, you are shirking your responsibilities, so we tried to say it in a nicer way than that. But all three of us said, you're the chief justice; you're here; you have a constitutional entitlement to vote; you shouldn't be absenting yourself from voting. Especially because he often would've been the fourth vote for some cases that otherwise didn't get taken. His view was, well, boys, I hear you, but I just don't feel comfortable being the fourth vote for a cert petition that someone else has got to dispose of the case, so I'm just not going to vote.

McCreery: He stood firm.

01-00:52:57

Lasky: Yep. And when he had made up his mind— He would listen; he might even discuss it substantively. I'm sure that some law clerk has some story that he changed his mind; but not in my term.

McCreery: Okay. Well, that tells us a lot, doesn't it?

01-00:53:14

Lasky: Yeah.

McCreery: Now, you just happened to touch on the subjects that he liked to talk about and the stories he liked to tell. Do you recall him discussing with you the matter of the internment of Japanese Americans during the war?

01-00:53:25

Lasky: Yes. Yes. Yes. I'm sure every clerk asked about that. Well, this is certainly not the business of the court, but I think I can talk about this. He believed—or he said he believed; and I do believe he believed this—that there would've been bloodshed, that there would've been riots, that many Japanese Americans would've been killed, that the civil disorder would have been extraordinary. He maintained to us at the time, that he had very serious misgivings about the constitutionality of what was going on. But he felt as a matter of public health and safety, that—and I don't think he understood at the time, how ugly those internment camps would be—but that he really was protecting both the lives of Japanese Americans and the public welfare in California, by allowing or participating in that activity. He certainly regretted it. Later in life, he certainly believed it had been unconstitutional. And I think he would have said—and he basically did say—every once in a while, something unconstitutional has to be done. I think as a governor, he would've perceived his responsibilities differently than he did as a chief justice.

McCreery: And that's actually a very good thing, because one of the things that's often asked or evaluated about Earl Warren is, did he change his mind about things? Some of his various actions and episodes in California did not indicate or predict the kinds of decisions he would make on the court.

01-00:55:25

Lasky: I think his views modified to some extent; but I also think a great deal of it had to do with: what did he perceive his responsibilities to be?

McCreery: In these different roles.

01-00:55:34

Lasky: Absolutely. There's an enormous difference in responsibility between what a governor ought to be thinking about and what a chief justice of the United States ought to be thinking about. I think over time, some of his views moderated. He became, I believe, somewhat more focused on individual rights and the court as the guardian of rights and freedoms of individuals. Certainly, he no longer had to run for elective office. He no longer had to consider the

popular appeal of his actions. I think he almost took a little perverse joy out of some of the things he did that turned out to be, at least in some segments, unpopular. I'm sure you heard, in his office, he had a little sampler that said "Impeach Earl Warren."

McCreery: Oh. [laughs] I didn't know he had it in his office.

01-00:56:26

Lasky: Yes, he had it hanging in his office. He got a great chuckle, at some level, about the consternation that some of his decisions caused in certain circles, because he knew he was right. Warren had a bedrock— He had someplace he went to that gave him a level of certainty about what he was doing, that was extraordinary. Once he made up his mind and he was satisfied he was doing something correctly, he didn't go back and revisit it. He knew he was right, he was comfortable in his own skin. The clerks would agonize endlessly over some of these. Not the chief. Once the chief made up his mind, his mind was made up. He knew what he wanted to do and that it was right, and he was comfortable with it. But he had bedrock values, that I don't know exactly where they were completely acquired, that enabled him to see even the most complex cases in what for him, were fairly simple and understandable terms. He didn't agonize a lot over his decisions.

McCreery: And once he decided—

01-00:57:33

Lasky: Once he decided, that was it. That was it.

McCreery: Okay. Well, how do you answer these people, then, you say, well, he completely changed his views on things?

01-00:57:43

Lasky: Oh, no. No, no, no. No, he changed his role. We used to talk to him about being a prosecutor and he said, "I had a job to do." Cases like Miranda and Gideon [Gideon versus Wainwright], in my view, were very much motivated by his experience as a prosecutor. I think at base, they had almost an equal protection rationale. The white-collar criminals always showed up in court with highfalutin lawyers. The chief knew, as a prosecutor, that they had a hell of a lot better chance of getting off than the poor schlub that didn't have any help. And for him, those cases weren't hard. His job as a prosecutor is to put people away. But his job as Supreme Court justice was to make sure people were treated fairly. For him, his prosecutorial experience made it completely clear, the role of an attorney in that process, and that the folks that had the money got meaningfully different treatment from the criminal system than those that did not. Miranda, in my view, was motivated as much by the fact that when the mob got arrested, their lawyers were there thirty minutes later, and that this was the chief's way of a level playing field. And he also believed, as the result of his tenure as a prosecutor, that the cops could do better. They didn't need to coerce confessions. With good investigation and

careful work, you're going to get to the same result, and you're not going to trample individual rights. So a lot of his criminal decisions, he very much understood the practical implications of what was going to happen, and he firmly believed the police could do better. And basically, they *have* learned to do better.

McCreery: Yeah. And he certainly had seen what the police were doing.

01-00:59:34

Lasky: Absolutely, absolutely. And while it was his job as a prosecutor to put people away, it wasn't his job as United States Supreme Court justice to put people away.

McCreery: So you see the two as very much of a piece.

01-00:59:43

Lasky: Absolutely.

McCreery: Different role, different purview.

01-00:59:45

Lasky: Absolutely. He didn't become an individual who believed strongly that you ought to be fair; I suspect he was actually fair as a prosecutor. It's just people assume—and it's often a fair assumption—that if you're a prosecutor, you're going to have a certain view about how criminal justice ought to be conducted. Well, Warren had a certain view about how people ought to be treated, and I think he probably treated them fairly as a prosecutor, as well, although he had a different role at that point in time. He would've been completely comfortable with the notion that the jury decides. If I think I've got a good-faith reason to bring a case as a prosecutor, I'll bring it. If the jury doesn't agree, the jury doesn't agree. But that doesn't mean he doesn't have values about the integrity of the system. So I think to some extent, he became a more broadly-focused thinker. One of things the court does see is this enormous terrain in front of you, of the entire panoply of legal issues that are available to the Supreme Court. You're not exposed to that until you're there, and it has to affect your thinking. But he was a well-formed individual when he became chief justice of the United States. I don't know what president he would've been, but I suspect he would've been a fabulous president. And I think he would've been a much-loved president, because his inherent—Almost goodness is the right word. That would've had to emerge if he had become president of the United States. God knows whether that would've changed this history in a different way; but I think he ultimately came to the view that he had as much effect on the course of the United States as chief justice as he would've had as a two-term president.

McCreery: Great. Thank you. I'm going to pause here and change tapes.

Begin Audio File 2

McCreery: Okay, here's tape two on July 31, 2005. This is Laura McCreery. Actually, I should put my microphone on; that would be a thought. Continuing the interview with Robert T. Lasky, here in Stonington, Maine. It's quite distracting to have this lovely view out here, by the way.

02-00:00:54

Lasky: Well, maybe before you're done, you can pan, for the people who want to know what you are coping with.

McCreery: That would be good. Luckily, it's a very engaging conversation. Now, you were just touching on what kind of a president Chief Justice Warren would have made. I know he told a lot of stories about the old days. Did you have much inkling from him about wanting to be president or regret about the way that whole thing turned out?

02-00:01:22

Lasky: Oh, he unquestionably wanted to be president. And he told us the story of 19— Well, what convention? I guess it was the '51 convention. Which I'm sure you've heard from other clerks.

McCreery: Yeah.

02-00:01:38

Lasky: That Nixon promised to hold the California delegation together, reneged on the promise, and let the delegation fracture, because he had cut a deal with Eisenhower. Well, the chief believed—and I think he was completely correct in his belief—that they would've elected an elephant as a Republican president that year, and that whoever was the Republican nominee would be president. I think he clearly wanted to be president of the United States. He believed that Richard Nixon's duplicity cost him the presidency. We never asked him, I never heard him directly address the question, of whether, in the final analysis, he thought that things had turned out well for him, because he spent—goodness gracious—fifteen, sixteen years as chief justice, rather than max, eight years as president.

McCreery: You indicated earlier he thought he could achieve just as much or more as chief justice, anyway.

02-00:02:45

Lasky: I think he ultimately came to the view that he had had a *very* major influence on American society and American history. But I still think there was always a level that he wanted to be president, and it was taken away from him unfairly. Being fair was important to the chief, and he didn't like it, obviously, when someone treated him unfairly. That never went away. He was *not* an unhappy man, when I clerked for him, and he was a content man and a man who was quite secure, in terms of his place in history and his

accomplishments and all those other things that get wrapped up in your sense of yourself. But I think at bottom, he still thought he would've made a wonderful president, and wanted that opportunity and felt it was taken away from him.

McCreery: Okay, well, returning to your work as a clerk, you described that after the weekly court conferences, he would meet with you or debrief you, in some fashion. How did that come about? Or how did it happen?

02-00:03:57

Lasky: Well, the conferences were on Friday. With very few exceptions, we had lunch with the chief justice on Saturday. There was an established Saturday routine, where about ten or ten-thirty, Mrs. McHugh would call and say, "All right, he's ready," and we would troop downstairs. Then we'd get into his car and we'd go to the University Club. We would have a drink or two and lunch, and through— It was about a two- or three-hour period, when things were open for discussion. We'd all come with our own agendas. We knew what the court had done, and he'd tell us basically what had happened at the conference. If he thought something amusing happened, he might share that with us. Or if we quizzed him a little bit, we might get some interesting tidbits. Then we would watch whatever sporting event was on television. He was a great sports fan. I'm sure you've heard this. Then he'd have the drivers take us back, he'd go for a swim at the University Club, and the driver would come back and pick him up. So our insights into the conference were principally the Saturday morning into the afternoon activity with the chief. But things were very fresh in his mind, and you often got some interesting gossip. In many respects, the chief was not extraordinarily interested—and I don't know if he was more interested when he was younger—he was not extraordinarily interested in sharing the give and take in the conferences, in terms of the substantive aspects. As I said earlier, I think to some extent, he was tired. He had been there and he had done that, and there was a sameness to some of it for him. He was much more interested in telling his personal anecdotes, because he still loved a story.

McCreery: Yeah. Give me some. Can you recall any?

02-00:06:03

Lasky: Well, I can remember one, which I always got a kick out of. It didn't happen my term. But [Justice Felix] Frankfurter and Douglas absolutely couldn't stand each other. I'm sure Frankfurter thought that Douglas was absolutely irresponsible, as most of the law clerks did. Judicially irresponsible. And I know that Douglas thought Frankfurter was a total pedant. The chief used to like to tell this story. The conference room at the court—I assume it's the same physically today; I haven't been back for years and years and years—was a relatively small room, dominated by a large oval conference table, and a couple of side chairs in each corner of the room, with some lamps. That was about it. The room was not very large and not very ornate, and very

functional. On these little side tables, there used to be a *New York Times*, a *Washington Post* and a *Wall Street Journal*. When [it was] Frankfurter's turn to speak, Douglas used to get up, walk away from the conference table, sit down at one of the side chairs and start to read the newspaper. Warren said he talked to Douglas about that any number of times. Douglas just said, "I'm not going to listen to that man and I'm going to go read the newspaper. He's boring, he goes on at too much length; he has nothing to say." And Warren kept saying to him, "A, he has something to say; B, it's totally discourteous. You are hurting your own cause." But none of those things ever made any difference to Douglas. I remember that vividly, because I didn't know Frankfurter, but I did have enough of an opinion of Douglas to believe that he would be deliberately rude, just because he wanted to be deliberately rude. He had no hesitancy about displaying contempt for anybody. Douglas was a very, very difficult person to deal with. And that was just the antithesis of the way the chief believed that people should relate to each other. That was just not appropriate, and he just couldn't get through to Douglas about how counterproductive that was, as well. He, once in a while, would tell us about a heated argument. He rarely participated in those. They were often between Brennan and Harlan.

McCreery: Okay.

02-00:08:33

Lasky: And the chief would say, "Oh, they really got into it." But that was the extent of what he would share, in that regard. He was a little bit circumspect, as well. I think he thought that it was one thing to tell a story about Douglas being rude to Frankfurter; that was a story. But he was even fairly circumspect with us about what actually went on in the conferences, on substantive issues. Sometimes he would discuss them with us. If he thought it was important that he needed a certain approach to get a vote or two, he'd say, that will appeal to Justice So-and-so. But we did not get a blow-by-blow of the substantive aspects of the conference; we got more stories, if I can make that distinction.

McCreery: No, definitely. But I note that both of those two little anecdotes fall along the ideological side, too.

02-00:09:30

Lasky: Yes. Yeah, yeah, yeah.

McCreery: Now, what else did you learn about kind of the makeup of the court and how they would tangle over these issues?

02-00:09:42

Lasky: Well, the chief did a certain amount of reconnoitering after he'd take an opinion, to make sure that he knew what the hot buttons were of the other justices that were in the majority. He really didn't care too much about what the dissenters were going to do. His view was, they're going to do what they're going to do. They're not with me; they're going to say whatever they

want to say. Every once in a while, the {inaudible} would circulate and we'd go down to the chief and say, "That's not a bad point. Do you want—?" "No." Most of the time, he'd say, "Let them do what they want to do."

McCreery: He had the votes, so—

02-00:10:21

Lasky: He had the votes, and if he was satisfied with the opinion, he didn't often even— Sometimes he didn't even acknowledge that the {inaudible} were there. I don't know, what was exactly the question?

McCreery: Oh, I just wondered about what else you learned about sort of the ideological sides in that particular—

02-00:10:42

Lasky: They were pretty self-evident from the drafts that had been circulated. With the exception of Douglas, who you couldn't often tell exactly what he was doing and why he was doing it— For example, he never voted for the government in a tax case. Someone finally told me it's because he'd been audited once and that he just hated the Internal Revenue Service. And Black was—I don't want to be unkind—a little bit in his dotage, at that point in time. Black was a little unpredictable, because he was not as acute as he once was. The rest of the justices, in cases of public visibility, were pretty predictable. The chief knew where they were going to be, and as long as he had his five, the other four could pretty much say and do what they wanted. He was very concerned—"very concerned"—he was often concerned with Brennan's view of cases. I think it's clear that Brennan was the intellectual center. The chief was the moral center of the liberal wing of the court; Brennan was the interview center. And I think that was no more evident than in Powell versus McCormack. I think this is a story I can tell.

McCreery: Yes, please do.

02-00:12:05

Lasky: We all thought, including the chief, that that would be a major constitutional decision. It was certainly a decision that seemed to have major constitutional import. All three of us worked on that; we had various segments. Paul Meyer, unfortunately, had that long segment dealing with all those old English cases and English parliament and stuff like that. He labored endlessly over that aspect of the opinion. He drove the Supreme Court Library zonkers with all the stuff he was requesting. Once the opinion left the three of us, it went down to the chief. Sometimes it would be a day, sometimes it would be three days, sometimes it would be four days; but it usually didn't take very long for the chief to have read it at once or twice. And then the particular clerk that had drafted the opinion, Warren would call him down and he'd actually, in short opinions, basically read the opinion while you sat there and ask you questions about it. Occasionally, he'd make a note here or change something. But you basically spent three or four hours sitting there, while he read through the

opinion. And he'd ask you questions. I'll tell another story about that that's kind of funny. In Powell versus McCormack, he had it for a couple weeks and we didn't hear anything. We asked him at one conference, how was it coming? Oh, doing fine. I'm reading it, boys. It's very long, I'm reading it. Then about two weeks later, he has Mrs. McHugh call us all down. We troop into his office and he's got this big grin on his face. He says, "Bill really likes it." Obviously, what had happened is—that happened occasionally, not often—he had sent the draft to Brennan and had Brennan read it, before it was going to be circulated to the rest of the court. And he, on that one, wasn't really sure how he felt about it until "Bill really liked it." Then he said, "You guys did a good job. Bill likes this." But that was a case in which the chief had no question that Congress had shafted Adam Clayton Powell and it was wrong. But there were an enormous number of constitutional issues. Some of them were *very*, *very* dicey and difficult. On those issues, I think he felt much more comfortable when his intellectual consigliere had given his stamp of approval.

McCreery: Yeah, they were said to have quite a partnership.

02-00:14:47

Lasky: Yes. Yes. That's right. Oh, absolutely. Brennan, as I said, was the intellectual anchor of that— Brennan did the real hard, heavy lifting, from a thinking standpoint, and Warren got the votes.

McCreery: Almost a brains and brawn—

02-00:15:04

Lasky: Yes, exactly.

McCreery: That's oversimplified—

02-00:15:06

Lasky: Well, no, but there was an element of that. Certainly, is an element of that. He had enormous respect for Brennan's intellectual capacities, and I think Brennan had an enormous respect for Warren's ability to manage people and get things done.

McCreery: Yeah. Now, you just mentioned that you all thought that this case would make a bigger splash and have a longer tail, shall we say, than it did. And you mentioned that he had all three of you work on parts of the draft. How common was that?

02-00:15:36

Lasky: Uncommon. That was the only time it happened. Every other opinion, a single clerk was assigned the opinion. He also knew that we exchanged the drafts internally and that he didn't look at them until we had all, quote, "approved" them. But we all recognized that this was a case that had an enormous number of issues, and he wanted this one nailed, to the extent it possibly could be

nailed. He left it up to us, if I remember correctly, how we whacked it up. But he said, “All three of you are going to work on this. Work it out. Each of you take a portion of it, do the draft, and put it together and give it to me.” I don’t recall any longer—other than Paul got the very laborious issue—how we determined who got what. I reread the opinion, and I must confess, I’m no longer certain. I think I wrote the mootness section. I did the drafting of the mootness section, and I may have done some of the justiciability, but I’m no longer positive. We did homogenize each other’s work and try to, as I said, mimic the relative plainness of the chief’s style, so that by the time an opinion left and the chief got it, it was pretty plain vanilla, to the extent we could all make it that way.

McCreery: And this was a fairly important case to the chief, would you say?

02-00:17:00

Lasky: Yes. Yes. He was going to be reversing Warren Burger, which certainly was an element.

McCreery: You said he had no doubt in his own mind that Congressman Powell—

02-00:17:14

Lasky: Oh, absolutely. Absolutely. And he thought that this would be a case that would be studied and poured over, and I think he regarded it as a swansong and he wanted it to be a good one. It turned out to be not very important, I guess, as a matter of constitutional development; but at the time, we thought it very well might be.

McCreery: Yeah. Well, let’s talk briefly about some of the other cases that you’ve worked on. Actually, just before we do that, you mentioned that in assigning opinions, he would take some of the so-called grunt work for himself and try to farm the good stuff out.

02-00:17:55

Lasky: Right.

McCreery: Can you just comment briefly on how he would use his power to assign opinions? That’s a fine art in itself.

02-00:18:05

Lasky: Absolutely. I think this is well known. Other than trying to make sure that everybody got good work, he often, if he thought the case was particularly challenging intellectually for the liberal wing, he’d assign it to Brennan. If he thought the case was kind of fun, he often would give it to [Justice Thurgood] Marshall. He thought Marshall had a particular flair to his style that he kind of liked. He wanted, to the extent he could—and he was sometimes constrained by the voting patterns—make sure that Harlan and the more conservative justices got their fair share of good opinions. He was a very good loser, in the sense that if he was in the minority, he was in the minority. And the senior

justice in the majority assigned the opinion. He had a very short statute of limitations, and with the exception of Bill Douglas, who he just couldn't abide Bill's lack of civility, had excellent personal relationships with every member of the court. So he really didn't need to use the opinion-drafting powers, though I understand some justices did. Maybe he did, earlier in his career, to keep people in line. That wasn't necessary. They all respected the chief. They weren't going to modify their views, necessarily, but they all respected the chief. They, with the exception of Douglas, generally agreed with this notion that civility was an important internal matter and it ought to be maintained. His notion of opinion assignment, other than he would take some of the less sexy ones for himself, was to try to keep people happy that they had a fair share of the interesting opinions. If someone expressed a particular interest in writing that opinion, he'd try to accommodate it. So he didn't, in my term, at least, use it as a bludgeon or a carrot; he just tried to be fair and spread the work around and ensure that everybody felt that they had been appropriately and fairly treated in the opinion assignment process.

McCreery:

Okay. Now, with regard to some of these opinions that you worked on—

02-00:20:30

Lasky:

Yes. This is kind of amusing, I think. Really, the gravamen of the story is sometimes the court takes a case it really doesn't understand. It's called *United States v. Bacto-Unidisk*. It involved an antibiotic sensitivity disc, in which a doctor would take a throat culture, for example, and there'd be a disc that'd have fifteen or twenty or however many antibiotics on it. You would take the throat culture and drop it on each of these little areas where it had been treated with a specific antibiotic, and by looking at the manner in which the culture reacted with the antibiotic, you could tell which antibiotic was specific for that particular germ, and which would be effective and which would not be. The question before the court was whether these antibiotic sensitivity discs were drugs or devices. If they were a drug, it was subject to a much more significant level of regulation than if it was a device. The classic device is something like a crutch or a hospital bed, and a drug is a drug. These discs had been initially manufactured and distributed as if they were devices. The manufacturers of the discs did not go through the pre-clearance procedure that you needed to go through if it was a drug, and they were ultimately seized by the government, by the FDA, in seizure action, and the case worked its way to the Supreme Court. When you read the definitions—and actually, the opinion's pretty candid about it—the definition of drug and the definition of device essentially overlap. There's almost no guidance whatsoever, on the face of the statute, about how to resolve this. Now, for Warren, this was not a complicated case. Once he understood from oral argument that if the discs were improperly manufactured, they could misdiagnose [and] give you a false indication of what antibiotic was specific for this particular problem, you could be treating someone with the wrong antibiotic, the disease could get worse, they could get much sicker, or they could die. Once the chief understood that was the result of mis-manufacture, for him, it was a fairly

easy case that it ought to be regulated in a more substantial way, because public health was at issue. He was not particularly concerned with how one got to that conclusion; it was a drug. And I remember being assigned the opinion, and I asked him how we were going to get there. He said, “Work it out, Bob; it’s a drug.” I said, “All right.” Now, I was a twenty-six-year-old law clerk. What I knew about this was only what I had read in the briefs. I had probably played back the tape of oral argument once. Well, clerks very rarely found oral argument illuminating. The justices sometimes did, but I don’t think the clerks paid a lot— We only went to the arguments when the stars were there. Because we were too busy. If Edward Bennett Williams or some name was arguing, or it was a very high-visibility case, sometimes we’d go to argument; but mostly, didn’t even read it.

McCreery: So you’d rely on the tape to—

02-00:24:10

Lasky:

Yes, rely on the tape—if, in fact, you even wanted to at all. My guidance on that was, it’s a drug. I asked the question. It’s a drug. Okay. I went back to the briefs and did some research and I wrote what I thought was a fairly credible opinion. The chief liked it and circulated it, there were almost no comments. Early in my career—I’m now a corporate lawyer—I was a litigator. I developed a small subspecialty, in terms of litigating adulterated food cases, which involves the Food and Drug Act. Not this particular aspect, but the Food and Drug Act. I had just finished a case in Florida that was, at the time, a major food and drug issue. It was about swordfish and whether swordfish was inherently adulterated food. If you ever eat swordfish in a restaurant these days, it’s because of that case. Swordfish had not been very much available until we got the FDA regulations overturned. The case was over. The case attracted a fair amount of both national notoriety, because it was clear that very few people took the FDA on, on adulterated food issues, and my client did. So there’s a lot of people from the FDA there at the trial, and a fair number of people generally. It was in Pensacola, Florida. There aren’t a lot of places to go, and we all ended up in the same bar. Now, the case was over, so we were just sitting there talking. Where’d you go to school, yadda-yadda-yadda, how’d you come to Washington? Well, I came to Washington to clerk. I never used to say for whom, because I always hoped maybe someone would ask and then I could hit them with Earl Warren. And they said, “*Earl Warren?* Do you know anything about this case called Bacto-Unidisk?” And I said, “No, no.” I said, “I know it was my term, but I don’t know much about it.” All the FDA lawyers said, we had been trying to figure out what that case means for years. What was he doing? He screwed this up, he screwed that up, he screwed this up. He changed this, he changed that. We couldn’t figure out what this case meant. How could he do this? Okay, mm-hm, mm-hm. And I thought the moral of that story really was that this was not a case that any of the individual justices brought any particular expertise to. It was an area for the practitioners in the field, a very technical area. For the chief, it was an easy case. But leaving law clerks essentially to their own devices, to roam around

in the wilderness— And the rest of the court didn't provide a greater level of input. I remember that as one of the opinions where almost nothing— He got almost no comments from anybody. I went back and reread it just prior to this interview, and it still reads all right, and I still don't know a lot more about it than I did then. But I was told by the professionals that we really screwed things up and didn't understand this and didn't understand that. And I think that's not necessarily unique, and it's not unique to Earl Warren. The court sometimes finds itself taking cases in areas where there is a great deal of lore and law that can never be captured in a single case; and where the court is a prisoner of its inputs; and where none of the justices, and certainly, none of the clerks, bring any real-world expertise to those subjects. And sometimes, I think the court probably does screw it up. Now, did we screw it up here? I don't know. But I was certainly told, particularly by the FDA lawyers, that we did.

McCreery: In some detail.

02-00:27:52

Lasky: Yes, in some detail.

McCreery: Yeah. Perhaps even on more kinds of issues than you'd imagined.

02-00:27:58

Lasky: Right, right, yes.

McCreery: How would you know?

02-00:28:00

Lasky: No, and we didn't, and the chief didn't. But for him, as I said, that wasn't a hard case.

McCreery: Yeah, okay.

02-00:28:04

Lasky: That was a drug.

McCreery: Okay. Well, that just tells us something about the court.

02-00:28:07

Lasky: Yes. Yes. Even the court that unquestionably gets the best advocacy of any court in the United States, and has the greatest level of input, there are cases in which, I am sure, the decision-making process is divorced from the reality of the implications of those decisions, and this was certainly one of them. I'm sure it's true in tax cases and sometimes in antitrust cases. The court recently had a case that I followed with some interest, the intellectual property case associated with these music services. What do the justices and the law clerks really know about all of the implications of those copyright cases, where they're really changing the manner in which American business will be conducted? And in rather dramatic ways, but subject to a rather constrained

level of input. That's the way the system works. But the court does find itself sometimes enmeshed in circumstances that it probably does not have the maximum quantum of information for good decision making.

McCreery: Okay. Yeah, that's very well put. Well, what about some of the other cases that you worked on?

02-00:29:37

Lasky:

Well, I'd have to go back and check the caption, but as we talked earlier, that is another story that's at least somewhat reflective of the chief's thinking. Bacto-Unidisk was, in the sense that for him, that was a drug because there was public health at issue. The voting rights case involving the Voting Rights Act of '65? I don't remember. It was the act that required that certain states, particularly Southern states that had a history of racial discrimination in voting, that they had to submit changes in their election laws to the attorney general for approval. They could get approval and implement them; if they didn't do it, they were subject to suit. And if I remember correctly, there was a presumption even against the validity of the state action. But in any event, there were four combined cases, one from Virginia and the other three from other Southern states, that challenged the validity of some actions that had been taken under the Voting Rights Act. But the principal issues were jurisdictional: whether you have to go to a three-judge court, what were the procedures? There were a lot of relatively technical jurisdictional and related issues. Now, I was assigned the opinion. I, of course, thought the case was about these jurisdictional issues. The chief wasn't so concerned about the jurisdictional issues. He was more interested in the merits. And he thought that it was pretty clear that these actions had been taken in violation of the Voting Rights Act. I prepared the draft and it went down, and a couple days later, I got a call and we started to go through the process. He would read the opinion, stop and ask a question. He read for twenty or thirty minutes. He said, "A lot of jurisdictional questions, Bob." I said, "Yes, sir." Then he read a little longer and said, "Do you really think we need to do all—?" "Yes, sir." And I tried to explain why I thought this was important. The guts of the opinion, the last page about why this was violating the Voting Rights Act. "Finally get to the good stuff." He gets about halfway through and he looks at me, he says, "I want them to know we're still watching." I'm sure he was being a little cute with me about the jurisdictional issues. But also for him was, hey, down there, just don't forget there is a Voting Rights Act, we're going to take a case every once in a while; you guys stay on your toes. Don't fool around with this stuff. And at least for him, that case was more about telling the Southern states the court was serious about enforcing this legislation and don't fool around.

McCreery: And clearly, he took that whole matter very seriously.

02-00:32:36

Lasky:

Oh, absolutely.

McCreery: He was quoted many times as saying that the earlier cases, *Baker v. Carr* and then *Reynolds v. Sims*, were the most important of his entire tenure.

02-00:32:46

Lasky: Right, right, right.

McCreery: I don't know how strongly that relates to his own experiences in California, but he had the very strong views.

02-00:32:56

Lasky: Yes. Oh, yes, that about him was—

McCreery: —very deliberate, shall we say?

02-00:33:01

Lasky: Yes. All right.

McCreery: Now, a few minutes ago, you mentioned Justice Marshall. Of course, he was still relatively new to the court. What can you tell me about how he fit into this group?

02-00:33:16

Lasky: Well, he was very well liked. As was Warren, he was a wonderful storyteller.

McCreery: I've heard that.

02-00:33:27

Lasky: Oh. Warren's stories were mostly politically correct. Marshall's stories were almost always politically incorrect, by today's standards. He *loved* to tell stories. He loved black jokes, and he had no problem with that aspect of— He'd do an Amos and Andy that would really send you up a tree. But that was fine. Warren, in his own way, was very down-to-earth, and so was Marshall. Marshall was a very earthy, down-to-earth, direct individual. He liked people, as Warren did. They were very similar in a lot of ways. Warren was much more reserved, to some extent. Marshall would've been a great guy to go out to have a drink with in a bar. He liked people, he liked talking to people, he liked a good time. He believed that he had an important role to play on the court. Obviously, he was a symbol, and he recognized that he was a symbol and didn't want to do anything that would derogate from the symbolic nature of his position. But he also loved to twit everybody else. He always had a quip. I can tell this story. There was a case that involved admittedly pornographic materials, and it dealt with procedural issues. There was no question that the materials were pornographic. But the clerks decided they wanted to see them anyway. They were a couple of movies. So a clerk, at that point, set up a screening of the movies, in a little room in the basement of the Supreme Court. They were very pornographic, these movies. Of course, all the clerks showed up; two justices showed up: White and Brennan. It was a very funny scene. There's this little movie screen and a projector, and there's about seven or eight rows of seats. All the clerks are in the back two rows, and

sitting up in the front row are Marshall and White. The movies get going and Marshall goes to White, “You see that? *Did you see that?* Did you watch that? Whoa, did you see that?” And you would see White trying to duck down in his seat. Marshall was having a rollicking good time and he was embarrassing White. All the rest of the clerks, we barely could restrain ourselves, because Marshall was enjoying this immensely, and he was enjoying how uncomfortable he was making White. I don’t know, I guess that’s an okay story to tell. That was the nature of Marshall’s personality. He was just a very ebullient, outgoing individual, and the chief liked him enormously. Thought he had some learning to do and would be better as he got a little older, but he very much liked him personally. And they certainly got along.

McCreery: Okay. Thank you. That’s wonderful. One thing we haven’t happened to mention, and I’d like to just briefly, and that is that Boyden Gray was the Reed clerk that year. How did he fit into this whole scenario?

02-00:37:08

Lasky: We tried to be inclusive. The chief tried to be inclusive. He still was not one of the three clerks. Boyden also had his own agenda, even then. Of all of us, Boyden—hello, Boyden; I guess you’ll see this at some point—had much more defined ambitions than the rest of us. Boyden wanted to be a major political figure in the United States. It turns out he basically accomplished that. I think Warren sensed that, and sensed that Boyden was checking a box, to some extent. Maybe this is being unfair. The rest of us were just totally enamored of our one year at the center of the universe. But I think the chief tried to be inclusive.

McCreery: But you did see a little difference there, on both counts?

02-00:38:13

Lasky: Yes. Yes. Right, right. He wasn’t his clerk. He got assignments and he worked on things, but he really wasn’t Warren’s clerk, he was Reed’s clerk.

McCreery: Who was active?

02-00:38:29

Lasky: Yes, Reed still was sitting on the circuits, and one of the jobs that the Reed clerk had every year was reworking Reed will. Which apparently, Reed a lot of time on.

McCreery: Every year, right?

02-00:38:42

Lasky: Eventually, he needed it.

McCreery: Well, I suppose a retired justice dreams up all kinds of things.

02-00:38:49

Lasky: Yes.

McCreery: Well, I wonder if I can ask you to talk a little bit about your own thoughts about Warren's legacy. It's kind of a tired word, in a way, and we say "the Warren Court." But as you think back, and knowing that you were there at the end of his time, and knowing how things have played out since, what do you think his effect was on our system, in general terms?

02-00:39:23

Lasky: I think his overall effect—this is not a novel thought at all—was to legitimize and institutionalize the focus on individual rights. I think unquestionably, *Brown* [*Brown v. Board of Education*] began the era of government has a duty to be fair and equitable to its citizens. I don't think you would've had the Civil Rights Act without *Brown*; you wouldn't have had the feminist movement without *Brown*; you would have today, gay rights without *Brown*. There was a watershed in thinking that stems from that decision, and to some other extent, some of the criminal decisions about government having an overall duty of fairness and morality, vis-à-vis its citizens; and that equal treatment under law really does mean something, and that the powerless do have a way to vindicate rights in the judicial system; and that's one of the major offices of a court. Today, many people think we settle every controversy in the courts, rather than in the legislature. But certainly, the notion that the courts were a bastion to vindicate individual rights is a product of the Warren Court, at least in my view. And that continues today. The notion that everybody now goes to court complaints is because Warren made the courts appear accessible to and fair to the average individual. They were no longer just for the settlement of commercial disputes or negligence cases or something of that nature; they were an element of the political system, where individuals who otherwise felt powerless and unfairly treated could vindicate themselves. I think that's his legacy.

McCreery: Now, we've touched upon the momentous events of that year, outside the court, and as you're touching on now, the vast social changes that were occurring. So there is something of a chicken-or-egg question, in that it's often asked, was Warren leading these changes or responding to them?

02-00:41:48

Lasky: Certainly, in my year, I think he was more responding. But that's in part because he had done his work and he had emotionally moved on, I think. I don't think at the time, he realized that he was leading something. I think he was doing what he thought was right and appropriate and correct, and the political and social systems would react and adapt however they thought. He was not clueless about what the implications of *Brown* and the board were. But again, just like that "Impeach Earl Warren" sampler, he didn't really, at one level, care, in the sense that he knew this was the right decision, this was the decision he firmly believed in; the system would cope. I don't think he felt it necessary to agonize over or predict what the outcome of some of those major decisions would be. As long as he was comfortable that the decision was right, that was the answer for him. He was not an enormously

complicated man, from that standpoint. He did not sit back and reflect on his legacy or what is going to happen or what are the implications. He would do what he thought was right, and the events would unfold as they unfolded. I don't think he over-analyzed at all, the implications of what he was doing. I think he observed them and understood them, but they did not motivate his thinking. His thinking was motivated by much more basic notions of fairness and morality, in my view.

McCreery: And as we talked about earlier, Chief Justice Burger was his successor. I wonder if you had any chance to observe Earl Warren's views of how that played out.

02-00:42:37

Lasky: He certainly knew that the Nixon appointee would be someone who the chief would not be particularly simpatico with. I don't think he was impressed with Burger as an individual or as a leader. I think he thought there were other candidates that might have been more forceful. I think he also thought Nixon could've done worse, because he was certainly concerned that Nixon would do something very strange. Again, this was an event he didn't control. He had resigned. He had left his fate with a president who he didn't want to happen; he wanted Johnson to deal with that issue, not Nixon. But events had played out in a matter probably a little surprising to him. I don't think anybody thought Fortas would have the problems getting confirmed that he did. The events that caused the non-confirmation didn't appear until the minute the nomination as chief justice began to be vetted. The chief was a little surprised and somewhat unhappy with the turn of events, but that's the way things turned out. He certainly did not consult with, was not consulted by Nixon, in terms of his successor. I think if you would've asked him, he'd shrug his shoulders and say, I hope he does a good job. I've got my doubts, but I hope he does a good job.

McCreery: Yeah. He certainly felt confident that he'd done what he could do.

02-00:45:20

Lasky: Oh, absolutely. He did all he reasonably could do, legitimately to ensure the process working the way he hoped it would work, and it didn't.

McCreery: Did you see him much in his retirement?

02-00:45:34

Lasky: We saw them at the annual parties once or twice, but no. I think one of the reasons he wanted to retire was he was done. Tired. Finished. As you probably have heard, he had a very close relationship with his family. I think he sensed, although he was still physically vigorous when I clerked for him, and he swam Saturdays and that other stuff, I think he probably sensed some— He didn't talk about it; I'm guessing. But I think he probably sensed some physical decline. I do believe he thought he only had a limited number of years left, and it was family time.

McCreery: Indeed, he was right.

02-00:46:16

Lasky: Yes. I think he wanted to spend more time with his grandchildren and more time with his children, and that he had done all that he thought he— I think it had become— Tiresome may not be the right word, but more than he wanted to continue to cope with. He would not have stayed on and done a poor job.

McCreery: Yeah, that's very clear, that he felt strongly about that.

02-00:46:39

Lasky: Yes. I think he said to himself, if I really— He would've used an athletic analogy. He thought about a lot of life in terms of athletics. He would've said, I'm no longer up for this. I don't want to keep putting my game face on every day, and it's about time for the relief pitcher or somebody. Take me out; my arm is sore. I think he had just personally— He was done.

McCreery: And of course, he had seen some of his fellow justices stay on a great long time.

02-00:47:13

Lasky: He was very disturbed by the obvious decline in Black's mental acuity. He'd make a crack about it every once in a while. "Sure hope his clerks are watching." He *certainly* didn't want to be there. Again, athletically, he wanted to retire while he was still on top. That was a part of his thinking, I'm quite sure.

McCreery: Well, I wonder, looking back, how do you evaluate your experience as a clerk?

02-00:47:55

Lasky: Oh, goodness. Well, in one sense, it's almost bitter-sweet, in the sense that you don't know it at the time, but it's hard to think that the best year of your professional life is going to be your second, or the best two years are going to be your first and second. I've not done anything since then—and I've had an interesting and rewarding and even lucrative professional career—but nothing compares, from a level of excitement, personal satisfaction, to the two years I clerked. So in one sense, many people, their careers progress and they feel that they achieve more. To some extent, you feel—and I'm sure other clerks have the same feeling, perhaps—that everything else is second place to those two years you clerked. I've never been as intellectually challenged on a consistent basis, as energized, as excited about going to work, as I was for those two years. I think in my particular case, because I did litigate for about ten years, and certainly, the experience gave me an enormous level of confidence that I was as good as anybody else in the United States, as a litigator. I saw the best and the brightest, and I thought I could be every bit as good. I didn't leave the court and become a star litigator. But you leave with the sense of—I did, at least—a sense that I know I'm going to be a good lawyer. I can see what the

profession offers, and I can be there. So you certainly leave with a sense of confidence. It enabled me, for the first several years of my career, probably to think I was better than I really was. But certainly, didn't leave me with a lack of confidence in my abilities or my skills, in terms of getting a job done. So to that extent, it prepared me for the early portions of my career. When I slowly began to transition to being a corporate lawyer, my clerkship experience became much less relevant professionally. But there are things that you do in this life that you just cherish, and that's my two cherished years. Nothing else compares.

McCreery: How did you select your law firm? Or did it select you?

02-00:50:25

Lasky:

Well, that was fairly easy. I gave some thought to going to the SG's [Solicitor General's] office. The chief was kind of interested in at least one of his clerks going to the SG's office. But I had had two years of relatively low-paying jobs. If I remember, I made \$5200 at the Pennsylvania Supreme Court, and I made \$8600 at the United States Supreme Court. I got a big boost from Pennsylvania. That was the other thing; Roberts knew we weren't making much money, so he tried to help there. My wife was trying, or we were trying, to get pregnant. Or she was trying to get pregnant; I was trying to help. So we wanted to have children. And I had an enormous amount of student loans. Penn gave me a full scholarship, but I had loans for other things. So I thought, I have to make some money. So I was going to go into private practice. My wife and I had liked our year in Washington, so we knew we were going to stay there. I had all sorts of feelers from the then major firms—Covington, and Arnold and Porter, and Wilmer Cutler. A fellow by the name of Steve [Stephen] Shulman, who had clerked for Harlan, was then—well, I guess it'd been in existence for two years or three years—was the head of the Washington office of Cadwalader, Wickersham and Taft, where I ultimately ended up. But at that point, it was a small independent firm, and Cadwalader, as a firm, was a one-third partner—The firm was then called {Kane}, Shulman and {inaudible}. I was the fourth lawyer. The other three lawyers had all clerked for the Supreme Court. Steve had clerked for Harlan; Paul Posner had clerked for Brennan, and Charles {Reed?} had clerked for Justice {Reed?}, when {Reed?} was still active. The coincidence of the name is just a coincidence. They were not related at all. I got calls and lunch invitations. The chief wanted you to be a little circumspect.

McCreery: Really?

02-00:52:24

Lasky:

Yes. He didn't want you making a commitment if you— He said, "I understand you boys need jobs." And then he'd say, "You won't have any trouble getting a job. You can wait until you're ready to leave, you don't have to say yes now." But he understood we might have a lunch or two or something of that nature, but he did not want any suggestion, particularly any

of the major firms that might appear before the court, that one of his clerks had committed to going there. Technically, whether he would then have to recuse himself, he just didn't— He made it clear. If you want to get a job, don't fool around. I don't want any suggestion of any kind of impropriety because my clerk is committed to Covington. I had some difficulty distinguishing. How do you really distinguish between Arnold and Porter, and Covington and Wilmer? They all look about the same. But Steve Shulman walked in and said, "You'll be the fourth. We're going to build a great law firm." And I said to my wife, "The salary's competitive. It's a heck of a lot different than anybody else. Let's give it a whirl." So that's how I ended up at Cadwalader. Well, I remember saying to Steve at the time, I said, "I'm going to go. I'm yours. But I want you to swear to me that this is always going to be an independent office." "Oh, absolutely." Three years later, the office merged and I went ballistic. I said, "You promised me!" And he said, "How about X amount of dollars as a retention bonus?" I said, "You promised me!" He said, "How about X plus \$5,000 as a retention bonus?" I said, "Well, we're getting there." I stayed. In part, because Steve said, "Don't leave. You're making a mistake. You're going to find that it's going to work out." Yadda-yadda-yadda. "Plus, we'll induce you to stay." And I stayed, and it did work out; but I was very unhappy at the time.

McCreery: Oh, yeah. Well, it was relatively soon after you arrived.

02-00:54:25

Lasky:

Yes. Oh, yeah. Yeah. And I believed it must've been cooking for a little while before it happened, and Steve said it was. But it turned out, over time, that the quality of the client base went up, and that enabled me— One of the techniques the court did not prepare me for was dealing with clients with limited budgets. One of the things you do have at the court is almost an inexhaustible supply of time. Within reason, as long as you want to spend on something and as much as you want to masticate it, you can. I was thrown into a world of clients with, sometimes, limited budgets. They wanted a 70% solution at a 50% cost, not a 100% solution at three times the cost. I had been kind of trained to provide the 100% solution. So that was a bit of an adjustment, when I first started to practice. But Cadwalader had more clients that were willing to pay for something closer to the 100% solution. So I found, over time, that while I was still practicing in a smaller office— And the office still is only about ninety-five lawyers; it's not *that* big.

McCreery: Not for those standards?

02-00:55:45

Lasky:

No. But I think we probably crossed ten lawyers about the time I became a partner, in 1975. Because at that point, I was the only second partner in the office. We were probably about nine or ten lawyers. So it was small for a very meaningful portion of my professional career. So I had some of the closeness and camaraderie of a very small firm, with the client base and the resources of

a larger firm, which actually turned out to be a nice mix. But I was a little hot-headed and almost left. I'm glad I didn't.

McCreery: Okay. I'm glad it worked out.

02-00:56:22

Lasky: Yes.

McCreery: Well, thinking back, what was the chief justice's career advice to you, if any, at the time?

02-00:56:29

Lasky: He would've been happy if someone ended up in the SG's office, and none of us did, as you know. He would have pushed, I think, for public service, and would have said he would be happy to see some of his clerks in the public sector. We weren't his sons. He didn't consider it his office to really provide career advice. And I think he had seen, over the years, that all of his clerks were pretty much capable of making their way in the world; that that wasn't something that we looked to him for, nor did he feel incumbent to provide it. He knew we would all do okay. He wasn't worried about that.

McCreery: Yeah. And indeed, you did. Now, what did you learn from this man?

02-00:57:35

Lasky: I learned that the world is not necessarily as complicated as you sometimes want to make it. I learned that at bottom, judges are human beings and that they are motivated—which helped me very much, as a litigator—they are motivated as much by the same kind of appeals that motivate other human beings, as they are about purely brilliant legal analysis. It taught me, particularly as a litigator, to try to understand how a judge was thinking, and find a way to appeal to that judge on an emotional as well as an intellectual level. I learned that there really were values that were important, and it wasn't just a cliché to say that it's important to be fair and honest and moral, and that someone could succeed without being a wise guy. He was *not* a wise guy. And there are a lot of wise guys in Washington. And wise gals, too, I suppose. To some extent, his success is still a mystery to me, because if you looked at his background, it almost seems he was an accidental attorney general and an accidental governor of California and an accidental chief justice; and in each of those capacities, he did wonderful things. Basically, I learned that there are values that you ought to try to retain, that are human values, and that you can be a successful, important human being, without necessarily calculating everything you do, and by trying to remain true to some kind of bedrock that you really do believe in. I didn't always act that way, but he did.

McCreery: You knew where his bedrock was.

02-00:59:25

Lasky:

Yeah, absolutely. He was comfortable with where he was and what he was and how he got there. And then I think I did learn that it was important to try to maintain some kind of personal integrity, and that you didn't pay a price for everything. Sometimes you just have to say no. Ain't going to happen. I ain't going to do it. No way. Not me. Again, I was fairly fortunate. There have not been many times in my professional career that I felt that I was being called upon to do something that I had qualms about. But on a couple of occasions that I was, I remember saying to one client, "If you can't do the time, don't do the crime. And don't expect me to help you out." I think clerking for Warren gave me some level of confidence to say that was the right thing to do and I wouldn't get hurt by it. And that even if I would, I would recover. And it was important to do it right, to be fair, and to be true to yourself. That was, I think, the enduring value I got. You could be a successful, recognized, accomplished human being, and also have personal values and integrity, which he had in abundance.

McCreery:

Well, is there anything else you'd like to say?

02-01:00:45

Lasky:

No, I don't think so. I'd talk a little bit more; it's up to you. I don't know, what else is there that—

McCreery:

Well, have I forgotten anything—

02-01:00:58

Lasky:

That's notable in my term. Well, I talked about a couple cases I worked on. No, I don't think so. As I said, I think other clerks may have had a more engaged experience with him, because it was his last term and as I said, he was ready to move on. But the ability just to see him and to recognize what he stood for was something that I've carried the rest of my life. Don't you hear the same thing from other clerks? Yeah. He was not a man of enormous intellectual subtlety; but he was a man of enormous intellectual principles. I think there's a difference. I think sometimes if you're excessively subtle, you lose your grounding. He never did.

McCreery:

Well, that's a great place to end. Thank you so much.

02-01:01:50

Lasky:

Thank you. I've enjoyed it.

McCreery:

Well done.

[End of Interview]