FAITH IN JUSTICE: ALFONSO J. ZIRPOLI
AND THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

Interviews Conducted by
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1982-83
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The Historical Society of the United States District Court for the Northern District of California is a non-profit organization established by federal practitioners and judges and is dedicated to preserve and develop the history of this court. The Society's goals are threefold: 1) to marshal the sources for historical study of the District; 2) to initiate and encourage comprehensive and scholarly study of the court; and 3) to develop interpretive programs and exhibits making the fruits of this research accessible and meaningful to the legal community and the general public.

In 1980 this series of oral histories conducted by The Bancroft Library was initiated as an important effort in the furtherance of the Society's objectives. By preserving the personal reminiscences of individuals whose experiences and memory can yield valuable "oral evidence" of the court's history, the Society hopes to enhance and amplify the written record.

In addition to historical study of the District, the Society hopes to promote greater public understanding and appreciation of the role of the federal judiciary. Except for those involved in the legal process, the operation, significance, and impact of federal trial courts remains largely a mystery to most Americans. By focusing on the history and activities of the Northern District, the Society hopes to bridge this gap between the legal and lay world and even encourage other District courts to initiate similar efforts. As the nation nears the 200th anniversary of the ratification of the United States Constitution, it is an appropriate time to raise the level of public understanding by placing the contemporary role of district courts in historical perspective.

Thanks are due to the foresight and generosity of the individuals and organizations whose support make this work possible.

Robert Peckham,
Historical Society of the
U.S. District Court,
Northern District of California

San Francisco, California
April, 1981
NORTHERN CALIFORNIA U.S. DISTRICT COURT SERIES
Interviews Completed by 1987


Wollenberg, Albert C., Sr., *To Do the Job Well: A Life in Legislative, Judicial, and Community Service*, 1981.

INTerview History

Researchers interested in the history of the United States District Court for the Northern District of California, and in the evolution of the modern federal district court, are fortunate to now have available four oral histories conducted with individuals long associated with the Court: Herman Phleger, George B. Harris, Albert C. Wollenberg, Sr., and, in this volume, Alfonso J. Zirpoli. In addition, an oral history completed with William T. Sweigert, a recently deceased Northern District Court judge, under the auspices of both the Court and the Earl Warren Era project, is in its final stages of production and will be available in late 1984. Since 1980 the Northern District Court has worked with the Regional Oral History Office to research and prepare oral history memoirs with some of the Court's distinguished attorneys and judges. These oral histories are part of a unique effort on the part of the Historical Society of the United States District Court for the Northern District of California to collect materials relevant to the Court's history. These interviews complement each other in their discussion of critical themes and topics.

Alfonso Joseph Zirpoli has been a judge of the Northern District since 1961, and is currently serving on senior status. The memoir opens with Zirpoli's recollections of his arrival in San Francisco from Denver in 1918 as a young boy, with his mother and younger brother, Armando, to meet their father who had come out earlier to assume a new position at the Italian consulate. Both boys matriculated through San Francisco grammar and high schools. As Zirpoli characterizes Washington Grammar School, "When you graduated from that school, you either ended up in San Quentin or you were employed by the Bank of Italy." Zirpoli dates his interest in the law from his father's own enthusiasm for it and his experiences in the debating society at Lowell High School. As he reminisces about his youth, the reader can imagine life in Italian North Beach in the period after World War I. This young Italian American opened his first law office in North Beach and counseled many Italian clients.

Clearly a highlight of this period for Zirpoli was his warm tutelage under A.P. Giannini, progenitor of the Bank of Italy (which became the Bank of America) and fellow Washington Grammar School graduate, and Zirpoli's efforts on Giannini's behalf in the Democratic party and in the bank's politics, all in the 1930's. Throughout his life in San Francisco, Zirpoli has kept close ties with the Italian community and he has maintained memberships in numerous Italian associations such as the Italian Mutual Benefit Society, the Italian-American Chamber of Commerce, and Il Cenacolo.

Several episodes dominate Zirpoli's recollections of his years as an assistant United States attorney in San Francisco between 1933 and 1944, including his role in the apprehension, investigation, and trials of the
accomplices of "Baby Face" Nelson; in the hearings before the Alien Enemy Control Board; in the Northern District Court cases of Fred Toyosaburo Korematsu and Mitsuye Endo; and in the courtroom of Harold J. Louderback, a judge for the Northern District who was impeached by Congress in 1932.

Zirpoli has retained a lively interest in the "Baby Face" Nelson cases. He had saved eleven case files from the trials and shared them with the interviewer as part of her preparation. The details of the activities of Nelson and his many accomplices were very involved, and Zirpoli strove to recall them. During his review of the transcript, he rewrote several lengthy passages to clarify the stories. Zirpoli's account illustrates the investigation and prosecution methods used by the FBI and the Department of Justice in the 1930s.

During the early phase of World War II, Zirpoli's assignments in the office of the U.S. attorney in San Francisco led him to experience the pressures and fears directed against Japanese, German, and Italian individuals, both alien and citizen. He was a prosecutor before the Alien Enemy Control Board, a hearing board which decided, on the basis of the evidence presented before its officers, whether certain aliens should be considered dangerous enough to endanger national security and therefore interned in camps. These camps were similar to the camps which held so many Japanese and Japanese Americans later in 1942 around the country; very little is known of their work and the people which the boards assigned to be internees. Zirpoli's account reveals the procedures by which the San Francisco board did its work. At the suggestion of Chief Judge Robert Peckham, the interviewer attempted to arrange an additional session to cover the board more fully. The interviewees were to have been Thomas Barclay and Edwin Owens, along with Judge Zirpoli, but this session did not take place. Interested readers may see an oral history interview conducted with Edward J. Ennis in, Japanese-American Relocation Revisited, Volume I, which was completed as part of the Earl Warren Era project in 1976, for additional information about the board.

Much of the documentation of the Korematsu, Endo and the other Japanese American internment cases has focused on them as they came before the United States Supreme Court in 1943 and 1944. Zirpoli's recollections of his role as an assistant U.S. attorney in Korematsu and Endo as they were prosecuted in 1942 at the lower level fill in many details about the roles of judges, of Earl Warren as California's attorney general—all cast against the backdrop of curfew and exclusion orders in force in the San Francisco Bay area during World War II. As a side note on Endo and Korematsu, the timing of this particular interview session coincided with the efforts of Fred Korematsu and fellow internees Minor Yasui and Gordon Hirabayashi to have the Northern District vacate their convictions for violating the militarily-imposed curfew.

Between 1944 and 1961, Alfonso Zirpoli involved himself in a number of political and legal activities—as a private attorney, as a member of the San Francisco Board of Supervisors, and as a supporter for several state and national candidates. Zirpoli worked on the campaigns of Democratic candidates Adlai Stevenson and Stanley Mosk, and urged, though unsuccessfully, General Dwight D. Eisenhower to run for the presidency as a Democrat.
One important thread for the history of the Northern District Court in this period, and on which Zirpoli comments, is the establishment of the indigent defendant program in 1951. Zirpoli chaired a special committee arranged by the Court at the suggestion of Judge George Harris to Chief Judge Louis Goodman. It was also in this period that Zirpoli registered his interest in the administration of the federal courts in California by becoming a lawyer delegate to the Ninth Circuit judicial conference.

The remainder of this oral history memoir concerns Zirpoli's career on the bench of the Northern District. President John F. Kennedy nominated Zirpoli to fill a vacancy on the Court in 1961. The nomination sailed through Democratic channels quickly, despite the pressures of Governor Edmund G. Brown, Sr., for selection of another nominee. Zirpoli answered the interviewer's questions on a wide variety of topics—substantive areas of adjudication such as antitrust, conscientious objection and prisoners' rights, as well as his memberships on the Advisory Committee on the Federal Criminal Rules and the Committee on the Administration of the Criminal Law, both committees of the Judicial Conference of the United States. Zirpoli had retained materials from his work on these committees which he allowed the interviewer to review, such as remarks before Congressional committees and annual reports of these Judicial Conference committees. Along the way in these discussions, Zirpoli assesses his own approach to trial court judging ("I probably interrogated witnesses a little more than any other judge.") and sentencing, the role of the court in wartime, the differences between the trial court and the court of appeals, the role of attorneys, and other topics. By way of his description of the antitrust cases, Zirpoli comments on a judge's expertise in understanding the technical details of what cases are brought before him.

As is typical of oral history sessions, both the interviewer and Judge Zirpoli introduced many topics which could not be covered because of time constraints, such as the judge's relationship with President Kennedy and Attorney General Robert F. Kennedy, during his first years on the bench, or cases which there was not time to mention, such as the collective bargaining case involving Granny Goose Foods and the California Teamsters which went to the United States Supreme Court in 1974.*

The oral history process began with Judge Zirpoli in a preliminary meeting with the interviewer to discuss a general outline of topics and time periods. Zirpoli filled in additional topics which he wanted to cover. The interviewer presented the judge with a Lexis printout of his district court cases, and the judge selected many for discussion. For the most part, these are the cases which were covered. The footnotes show some of the books and materials which the interviewer used to develop questions. In addition, the interviewer drew on oral histories conducted earlier and other research, as well as a tape

recording which Zirpoli had made on his own and which highlighted his career in the law. The library of the San Francisco Chronicle held several useful articles detailing Zirpoli's actions in draft resistance and death penalty cases. Outlines of each upcoming session and copies of cases to be covered were always sent several days ahead of the scheduled meeting. Many times Judge Zirpoli had written notes about the topics included on the outline and incorporated these ideas into the interview. The interviewer conducted all taping sessions in the judge's chambers at the Court in the Federal Building in San Francisco on 9 September, 14 October, 2 and 24 November, all in 1982, and 7 and 24 February, and 5 and 12 May, in 1983. Both the judge and the interviewer sat at a large table in one corner of his private office, with case reporters and other items spread out before them. At the far end of the table, current case records had been stacked in high piles, awaiting Judge Zirpoli's attention.

Judge Zirpoli reviewed the lengthy transcript during his convalescence from a serious illness early in 1984. Fluent in Italian, he corrected the spelling of the Italian words. He also corrected his phrasing in some discussions of the cases, and made his language more explicit and added descriptive phrases in other portions of the transcript. He loaned the interviewer the photographs which appear throughout the volume; they are from a small family collection. The judge's assistant of many years, Maggie Anderson, was of invaluable assistance during this review process.


As is frequently the case in oral history interviewing, the actual process of recollection, once begun, is a tap that is difficult to turn off. Several months after the interviewing had been completed, the interviewer saw Judge Zirpoli at an eightieth birthday celebration for Bernard Witkin, a noted California law jurist. The judge greeted the interviewer warmly, appeared pensive for a moment, and said, "Oh, I forgot to tell you about my experiences at Boalt Hall with Witkin when I proofread his first book...."

3 July 1984
Regional Oral History Office
486 The Bancroft Library
University of California at Berkeley

Sarah Sharp
Interviewer-Editor
Sharp: I know from the Jackson book* that you had been born in Denver in 1905.

Zirpoli: Yes.

Sharp: I thought we would start with your coming here. I wondered if you remember the trip coming out to San Francisco?

Zirpoli: Yes, I remember the trip coming out to San Francisco, but I ought to add a comment here that has some bearing on my being here. My father [Vincenzo Zirpoli] met my mother [Stella Graziani Zirpoli] in Rome. He had been in the Italian cavalry for seven years. She had her family in Torrington, Connecticut. So he came to the United States to marry my mother and they moved to Denver, Colorado immediately, where she had a cousin residing. He got his first job as a bronco buster in the stockyard. But he decided that he would return to Italy, so he went to the Italian consulate with his little horse and buggy and parked outside the consulate.

When he entered, the consul was interviewing a man for military service and he was having some difficulty with the forms. My father asked if he could be of assistance. After it was over, the consul turned to my father and said, "What can I do for you?" My father said, "I would like to return to Italy." The consul said, "Why don't you remain here as secretary of the consulate. We don't have a secretary for the consulate."

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*This symbol indicates that a tape or a segment of a tape has begun or ended. For a guide to the tapes see page 239.

*See Donald Dale Jackson, Judges (New York: Atheneum, 1974);
"Judge Simpatico" is the chapter about Judge Zirpoli, pp. 277-302.
Zirpoli: So he remained in Denver in 1904 and I was born in the following year, 1905. Had it not been for that incident, I would have been born in Italy. Who knows what my life would have been. We remained in Denver until 1918 when my father was transferred to San Francisco. The consul general in Denver was transferred to San Francisco. My father moved over to San Francisco with him and remained his secretary of the consulate until 1939. During much of that time, he also served as acting consul.

I recall the trip to San Francisco because my mother had an uncle who was a priest at the St. Regis College and we went to a very early Mass. I remember going to the Mass for prayers in preparation for our journey to California. When we arrived at the depot and were boarding the train, there was a tremendous thunder and lightning storm that I always remember.

Upon our arrival in San Francisco, we expected my father to be there at the Ferry Building, but there was some mistake and there was no one there to receive my mother and me and my brother [Armando Zirpoli], who was two years younger than I. It was the first week of April. The Travelers Aid phoned the consulate and my father came down and got us and had someone take care of our baggage. We took the California Street cable [car]—it was my first cable car ride—up California Street. The consulate was situated at Clay and Montgomery and we went first to the consulate. That was in the original Bank of America building at Clay and Montgomery.

I was expecting to see a lot of trees, especially orange trees and some fruit trees. There were many trees on the streets in Denver. To my disappointment I saw no orange trees, no fruit trees. San Francisco was just a big city with very few trees and plenty of hills. We stayed with the consul in his home for a few months. Finally we found an apartment on the top of Nob Hill in a building which has since been torn down. They have a big tower there now on Clay, the Clay-Jones. That was our first location.

My brother and I enrolled in Washington Grammar School. This was an all boys school situated at Washington and Mason Streets. It has since been torn down. The fame of the school is the fact that A. P. [Amadeo Peter] Giannini was a graduate of the school and the district attorney (I am trying to remember his name) [Matthew Brady] was a graduate of that school. These were the two most important graduates. But as I say, it was an all boys school. When you graduated from that school, you either ended up in San Quentin or you were employed by the Bank of Italy.

My mother dressed us up in little Lord Fauntleroy clothes consisting of knee britches, a little jacket, hat, and button shoes and everything. But it was a pretty rough school and by the time we got home, we were a mess. I attended that grammar school just
Zirpoli: for a few months from April to June. When I graduated from Washington Grammar, I was supposed to make a speech at graduation day, but I was ill. What I was supposed to do was to make President [Woodrow] Wilson's famous speech of declaration of war. This was a rowdy bunch of boys and every once in a while they would interrupt the class and ask the teacher to have me practice my speech, or they would break out in song whenever they felt like it. The only one who could handle them was the principal, McCarthy, and if you didn't behave, he'd take you out in the yard and challenge you to a fight. That was the way you learned to behave as far as that school was concerned.

After I graduated from Washington Grammar, I entered Lowell High School which was then the best school in the city and probably still is. At Lowell High School, I took the usual courses including a course in Latin, but I didn't learn very much or don't recall very much as a result of that class, a few expressions now and then. I also took a class in French.

Sharp: Did you remember any more of that?

Zirpoli: Oh, yes, a little more of that. But we were speaking Italian quite a bit in the family and that facilitated my study of both Latin and French. I also became a member of the debating society at Lowell High School. My brother was two years behind me. His classmate was Edmund "Pat" Brown [Sr.] who eventually became governor of California, so we got to know each other fairly well. From Lowell High School, I went to the University of California [Berkeley].

I might say that while I was in Denver, I used to work whenever I could as a boy. I sold newspapers in front of the Brown Palace Hotel, never dreaming the day would come when I would be a guest there. When I came to San Francisco, I continued to sell newspapers while I was in school. I remember selling papers on my arrival here almost immediately, particularly one issue. I used to buy the [San Francisco] Examiner at the Examiner building, an armful of them, and walk to Nob Hill yelling, "Extra, extra, Big Bertha bombards Paris," and that was the big headline.

In high school, I enrolled in the ROTC [Reserve Officers' Training Corps] and they didn't have uniforms that would fit me. I was too small, so it cost me $25 to have all of my uniforms tailored to my size.

These are the basic recollections, you might say, in grammar school and high school.

I tried out for the basketball team, but didn't make it. My brother and Pat Brown made it, but I didn't. I used to be water boy for the football team.
Zirpoli: When I entered Cal, I commuted. We used to take the ferry boat every day. It was a very pleasant journey and we could study on the ferry boat and on the train. I entered Cal in 1922 and received my AB in 1926. (That AB included the first year in law school.) Then I entered Boalt where I received my Doctor of Jurisprudence degree in 1928. I was not on the law review. I did have a B+ average.

While at the University, I became interested in basketball. I particularly became interested in Italian cultural activities since I took courses in both French and Italian. I became president of Il Circolo Italiano of the University of California and later the first president of Pi Mu Iota, the Italian honor society. I also engaged in, you might say, dramatics. I played a part in two different plays that we put on, Italian plays, and we had regular meetings in which we would invite speakers, professors, or whoever we thought could make a contribution as it related to some form of Italian culture. I was also a member of the Congress Debating Society in college.

While at Boalt Hall, I began buying stocks, that is to say, Bancitaly and Bank of Italy stock, which brings me back to the period just before I entered college. I worked as a messenger boy for A. P. Giannini. This was a very wonderful relationship that became more meaningful with the passage of the years.

After I received my degree of law, I entered the private practice of the law. But before I get into that, I might say that college life was very pleasant. I played on the college 145-pound basketball team. I had taken a defense test and the boxing coach wanted me to go out for the boxing team. I conferred with my father and he said, "No, it's too rough a sport and you may be injured." Then I asked him if it was all right for me to play basketball and he said, "Fine, that's a very gentle sport." Well, as a result, I had my nose broken twice playing basketball!

Sharp: I wondered when you came to UC Berkeley? It would have been right after the close of World War I? Did you have many older students, veterans, coming onto the campus then as a result?

Zirpoli: Oh, yes, there were some that came on later. Yes, there were.

Sharp: Did they change the campus?

Zirpoli: No, I could notice no change. There were some of the graduate students who in those days were employed as Prohibition agents. That was their outside work. We used to meet in the basement of the old Boalt Hall building to talk about things. This being the Prohibition era, once in a while we would go down to Broadway in Oakland and have some beer that they called "near beer" with a very low percentage of alcohol, half of 1 percent, I think.
Zirpoli: Of course, in Boalt Hall, I took a course in Roman law. I remember after the examination was over, Henry Robinson, who became an important San Francisco lawyer, and I were not in agreement with the other students on certain interpretations of the Roman law, and we talked to Professor Max Radin about it. He told us we were wrong. We said, "If we are wrong, your book is wrong." We got out his book, and sure enough, his book had it the way we said it should be and he said, "That's wrong." Then we went upstairs and looked at the Pandix, the original Latin text, and his book was wrong. So he asked us to stay over an extra week after we graduated to review his book [laughs] and make corrections if necessary.

We graduated, as I said, and I remember we had a big party after the finals in which I supplied the wine. This was, of course, during the Prohibition era, but each family was allowed to make two hundred gallons a year. Throughout the North Beach section, you could see the crates of grapes piled up on the sidewalk alongside of garages or entrances to basements where the people would crush their grapes and process them in the hope that they would get wine and not vinegar. Quite often, they ended up with vinegar instead of wine.

Sharp: Were you involved in any of the wine making in your family?

Zirpoli: Oh, for our own family. My great delight was after we drew the wine, I would pour boiled water back into the barrels and we would make a drink that we called aquarella meaning "little water." It was more like a little light soda than it was anything else. But of course, as I say, this was the year of Prohibition and it had its effect on our society. The people used to like to go to parties, young people, and drink what they called bathtub gin. I never drank it. I would go to a party occasionally, but I would pour mine in a potted plant or some other place. [laughs] In other words, I was willing to participate in the party, but I wasn't interested in the bathtub gin.

Sharp: It sounds like it might have been pretty rough tasting.

Zirpoli: Tasting, yes. I never cared for it.

Sharp: I have a few other questions about your law school. I wondered what the main thrust of law school education was when you were at Boalt Hall?

Zirpoli: They were the basic courses. The main thrust was to teach you criminal law, torts, property, contracts, constitutional law, and an elective would be one like Roman law, negotiable instruments. These were all of the basic courses.
Zirpoli: You also participated in moot court in my time and I was a moot court finalist. Henry Robinson, whose name I just mentioned, and I were finalists against the Johnson twins, Gordon Johnson and Gardiner Johnson. Gordon Johnson became a very important lawyer in the community and a member of the firm of Thelen, Marrin, Johnson, [and Bridges]. His brother, Gardiner, became a state legislator and also a very successful lawyer. They are both living. Henry Robinson died about three years ago. In fact, we had our fiftieth class reunion in 1978 at the Pacific Union Club and we will hold our fifty-fifth reunion next year.

Another graduate of that class was Robert Gerdes [spells name], who wrote a thesis on water law in his last year which was published in the California Law Review. As a result, he was hired by the Pacific Gas and Electric Company upon graduation at $600 a month, which was a phenomenal salary.

Sharp: What attracted you to the law?

Zirpoli: Oh, I was interested in the law—my father had some small interest in the law. My father was quite an historian for one thing and I became interested in the law, became interested at Lowell, when we started with the debating society. I indicated an interest in the law and my father encouraged it. So I ended up, as I say, in Boalt Hall. Also when I was an undergraduate, I was in the Congress Debating Society. These were partial incentives to the study of the law. Now, I will go on unless you have some questions.

Sharp: I have a few other questions. Did you begin your work with the Young Democrats at this point or was that later?

Zirpoli: No, that came later. In that regard I will say this, that I became a young Democrat during the [Woodrow] Wilson election in 1916 when I was only eleven! [laughter] He was the one I was rooting for and so I stayed with the party from that day on.

Sharp: Let me ask you a few other early questions. I wonder what you recall about the Italian community?

Zirpoli: When I arrived in San Francisco, I noted that this was a truly Italian community, that if you walked along say from Montgomery Street and up Columbus Avenue, you would be more likely to hear people speaking in Italian than in English. As a matter of fact, I remember walking behind two gentlemen who were arguing vehemently about a subject matter which I don't recall. They were trying to impress each other with their arguments. Finally one of the gentlemen made a comment and his friend responded, "You goddamn right." So for emphasis he reverted to the English.
Zirpoli: I also recall that in the Bank of Italy building they had two elevators and the operators of the elevators were Genoese. As I entered the elevator with my father and he spoke to him in Genoese, I turned to my father and said, "Do you mean to tell me that this man is an Italian?" Because there is such a wide difference in the Tuscan and the Genoese dialects. Of course, what we spoke was basically Tuscan. Although my father was born in Potenza in southern Italy, my mother was born in Tuscany. Of course, my father having been in the service, his basic language was Tuscan, somewhat Roman, because his family had moved to Rome when he was nine years of age. (His father had died and they all moved to Rome.)

The North Beach section was a truly Italian community. You had restaurants that had been in operation for many years. You have to remember that the Italian-American community in North Beach in San Francisco I would say, in many respects, is the most exemplary in the entire nation because it was composed of Italians, many of whom had come to California in 1848 and even before 1848, most of them from Genoa; most of them were Genoese or Piedmontese and then a substantial number of Tuscans.

In fact, San Francisco had the first Italian opera in 1850 followed later by another group that had a repertoire of fourteen operas and Madame Bianchi and her husband ran the opera house. She became known as the mother of opera in California. When she died, they wrote quite an editorial about her and her contribution to the music of the area.

But many of these people, as I said, came around before the Gold Rush, including [Domingo] Ghirardelli, who arrived before the Gold Rush. He had migrated to Peru and came to California in early '48. He didn't go to look for gold. He opened his famous cafe and ultimately went into the manufacture of chocolate and he is the founder and builder of what is now known as Ghirardelli Square.

I use this as an example of the nature of the Italians who came here before the turn of the century. After the turn of the century, a greater number of Italians came from other parts of Italy, southern Italy in particular. We had many successful Italians. The Italian Mutual Benefit Society received its charter from the state legislature in 1858 and is undoubtedly the oldest mutual benefit society in California. There were two Italian [newspaper] dailies being published when I came here that had originated—a morning and an afternoon daily. The first one was published in 1859. One of them was La Voce del Popolo and the other was L'Italia.

These are indications of the nature of the Italian community in San Francisco. They had their own dramatic societies, put on plays—any number of societies. I am not going to go into all of them and the nature of their work, but they opened the Italian school in 1885,
Zirpoli: Of course, after I entered the practice of law, I became interested in Italian affairs. I became trustee and president of the Italian school. I became attorney for and ultimately president of the Italian-American Chamber of Commerce. I became a member and ultimately president of Il Cenacolo. I became president of the America-Italy Society. I was also a member but never an officer of the Leonardo da Vinci Society. I was interested in the work of the Sons of Italy and joined that group in 1928. Eventually I became the grand venerable for the state of California. Now, these are some indications of my interest in the Italian community.

I was also interested in the work of the Italian Welfare Agency. Then in 1931 I was one of the charter members and organizers of the Columbus Civic Club, which was to become a political arm for the Italians of this community. By that time, the Italians represented approximately 16 percent of the population. If they had a cause, therefore, they voted as a bloc. They were very significant in the election of Angelo Rossi as mayor in 1931.

Sharp: I wondered if you remembered any family activities that you might have had when you were younger, in grammar school, things that you and your family liked to do together?

Zirpoli: When we were in Denver, of course, one thing I always remembered is that we went to Steamboat Springs once for a big vacation. I also remember going to Colorado Springs.

Here in San Francisco we had some social life based upon some of these societies. My father was a very able speaker and much in demand, so I would attend many of these functions where he would speak. In fact, that was one of those factors that encouraged me to get into debating and into speech. I started making speeches when I was pretty young myself. I remember speaking in Washington Square on more than one occasion.

Sharp: How old might you have been?

Zirpoli: Oh, that was after I got out of college on my graduation.
Now, upon my graduation from college, I interviewed with a couple of firms downtown and no one offered me a job. At that time, they were only giving you $40 a month. I was walking along Columbus Avenue and I saw the firm name [Julian] Pardini and [Angelo J.] Scampini, 21 Columbus Avenue. So I walked up one flight of stairs and asked them if they could use a young lawyer. They were both fairly young themselves. They said, "All we can do is rent you a room at $20 a month if you'll accept it." I said I would accept.

I also had an immediate source of income because in those days the Italians were numerous and still had substantial properties in Italy, and they had to issue and send powers of attorney there from time to time. Also, those who desired to have their relatives come had to file with the Immigration Service affidavits of maintenance and support which would be presented first to the American consul in Italy from whom the visa was to be secured. That assured me a minimum of $60 or better a month in income. In fact, I had forms printed because the nature and volume of my business warranted it.

I did very well the first day of practice because my mother gave me some furniture. I bought an oak desk, a typewriter, some chairs. My first day, after the furniture had all been laid out, I was looking out the window and saw a man across the street with his arm in a sling and a card in his hand. He came across the street and up the stairs to my office and when he entered he said to me, "I should like to speak to Avvocato Zirpoli." At the time, I looked more like a school boy, I guess.

I said, "But I am Zirpoli." He said, "Brother Cubiciotti of the Sons of Italy sent me to you and I want you to be my lawyer. If you'll be my lawyer, we'll go fifty-fifty." I said, "What is it about?" He had his arm in a sling. He said, "I was riding the bus on the
Zirpoli: California Transit" (the predecessor of Greyhound), "and the bus missed the bridge at Niles Canyon."

How could one ask for a more perfect case? An absolute liability. I said that I would be delighted to represent him. And it wasn't even nine o'clock yet in the morning!

I got the forms that Pardini had and prepared a complaint and a summons and went over to Alameda County and filed it and served the California Transit. I had lunch on the ferry boat and came back to the office, and I was in the office about ten minutes to one. About fifteen or twenty minutes later, I got a phone call from the insurance carrier [Hartford Connecticut]. They said, "Are you interested in settling this case?" I said, "Of course, I am."

In the meantime, when my client came to see me, I said to him, "But we'll have to get a report from the doctor." "Oh," he said, "I have it." He reached in his pocket and he pulled out a complete medical report from the doctor which recited not only the nature of the accident but the consequences thereof. He really didn't have any serious injury, mostly a sprained shoulder.

The insurance man came over to see me and the same afternoon we talked it over. He wanted to know how much I wanted in settlement. I said, "$5000." He said, "I'll only give you $500." I said, "No." We negotiated. Since my man had no permanent injuries, and I am talking about 1928, we settled it for $1,300. I remember we went to the bank. We were able to get there before closing time and he signed all of the necessary papers. We received the check, went to the bank, cashed it. I gave him $700 and I kept $600.

Sharp: All on your first day!

Zirpoli: I said, "My gosh, is this what the law practice is all about?"

Sharp: It's pretty easy.

Zirpoli: Well, it was a long time before anything like that happened again, but in all events, that was a very, very fortunate and happy beginning. When I started to practice law, I received a phone call from A. P. Giannini inviting me to lunch at Bardelli's Restaurant. Every once in a while he would invite me to lunch.

In 1931, we had the big proxy fight for control of the Bank of Italy.*

*For more information on this proxy fight, readers are directed to Marquis James and Bessie Rowland James, Biography of a Bank, New York: Harper and Brothers, 1954, especially pp. 305-346.
Sharp: I was going to ask you about that. I wondered if you had been involved.

Zirpoli: I was involved in a sense. I had previously prepared a memorandum, a legal memorandum, for Pardini and Scampini with relation to a concern in the East Bay which was involved in a proxy fight. Because of that, they asked me to prepare a memorandum and indicate how they could stop the [Elisha] Walker group from using Bancitaly funds for the securing of proxies. [Lawrence] Mario Giannini (the son of A.P.) asked me to do that. I prepared the memorandum and, of course, they received it free. I guess they figured I was too inexperienced, so they hired the attorneys Sullivan and Roche who did exactly everything I said they should do, but they filed in the wrong court. [laughs] They received $20,000.

In preparation for the proxy fight, we used to meet every day at Petri's cigar factory, which is an enormous building on Sansome Street. They eventually went into the wine business. It's a well-known name in the wine industry. There they would have lunch. They had a husband and wife who would prepare lunch early for the working staff and later for the executives. We would all go there for lunch and discuss the proxy fight. The proxy fight was conducted like you would a political campaign.

Sharp: That's what it sounded like.

Zirpoli: Angelo Scampini became the firebrand for the proxy fight.

Sharp: I understood there was sort of a campaign tour of the state.

Zirpoli: That's right, there was a campaign. As you said, it was put on like a political campaign. You went to Sacramento. You noticed a meeting in the big hall there and invited all of the stockholders. Scampini would get up and make a speech and tell them how Jean Monnet, one of the Bank of America officers, was squandering the bank's funds by spending it on gifts and flowers and the entertainment of women [laughs] and things of this character. He also made a big speech at Dreamland [in San Francisco]. When they would go out, A.P. would make sure that Angelo got plenty of rest.

I recall we were in Sacramento in the restaurant during the proxy fight and some fellow entered the restaurant and he said, "They tell me that SOB A.P. Giannini is here. Where is he?" A.P. looked up at him and he said, "Yes, I recall you. You are the fellow that always wanted to sell me the worst type of strawberries when I was in the produce business!" [laughter]

Now, I mention that because A.P. had a phenomenal memory, an absolutely phenomenal memory, which was one of his strong points. A.P. was a man who would accept your word, but if you ever broke it,
you were through. You couldn't get anywhere with A.P. anymore after
that. You have to remember that when A.P. started the Bank of Italy,
there wasn't a word in the local papers about his opening of the Bank
of Italy. There was in the Italian paper, but not in the local.
When he won the proxy fight by a landslide in 1932, all of the papers
had headlines that read, "Giannini ha vinto," Giannini has won.

Then, as I say, I had this experience. I was not as active in
it as, let's say, Scampini or someone like that, in the proxy fight.
I was somewhat reluctant to get too active because one of my dear
friends was Armando Pedrini, vice-president, who was on the other
side. So there were some small problems there. As a matter of fact,
Pedrini was the president of II Cenacolo at the time, and after the
proxy fight he had to resign. A.P. was a member of the Cenacolo, too.
We had club rooms in those days at the Fairmont Hotel. We had a suite
there and lovely club rooms which we gave up in the beginning of World
War II because of the lack of housing space for the military in San
Francisco.

In 1931, at the time of the proxy fight, I went to see A.P.
I said that I would like to be appointed assistant district attorney
for the city and county of San Francisco, and that the men in charge
of the office of the district attorney, Matthew Brady, would never let
me in to see him.

A.P. sent me to see Tom Finn. Tom Finn was then the Republican
political boss of San Francisco. When I sat down to talk to Mr. Finn,
I said, "Mr. Finn, you must understand that I am a Democrat, a
dedicated Democrat." He just turned to me and said, "A.P. sent you,
didn't he?" That was enough. He telephoned Brady and the next
morning, I was working as an assistant district attorney.

Let me stop you right there because I want to back up and ask you
some other questions. I had some other questions about your going
into private practice. I wondered if you did any work at all for
Pardini and Scampini or were you just housed there?

Oh, I did some research for them, yes. In fact, I remember the first
case I researched for them. My research proved that they were all
wrong, so they weren't too happy with that first research.

I remember another case that I wrote the briefs on for them in
the district court and the court of appeals and we won. That had to
do with a trust over in Marin County and the method of the use of the
funds of the trust.

But my practice moved pretty fast with Father's connections and
my Italian and knowledge of the language. When I started my first
month, I must have earned $120, which at that time was not bad. I
never earned less than $200 and up throughout the Depression.
Zirpoli: Now, I had invested in stocks. I borrowed money and bought Bancitaly and Bank of Italy stocks and when I graduated, I had an equity of $46,000. When the crash came in 1929, the famous blue Monday, I was sold out and I was left owing the Bank of America--the Bank of Italy, I should say--$10,000. I went to see Mario Giannini about it and said, "I don't see how I'll ever be able to pay back the $10,000. If you could cut it down to five, I could go out and maybe I could borrow five from here and there and eventually I can someday pay back $5000." He said, "No, you are an honorable man and we'll hold you to your indebtedness." Now, they did settle with the people as to whom they had some question of whether they would eventually collect. That experience had some value in later years, in that when I returned to the practice of the law after leaving the office of the U.S. attorney, Mario Giannini arranged for me to rent a suite in the Bank of America Building, and he also sent some of the bank's business to me.

As I say, this was the situation at that time. So I was doing fairly well. I had cases in the federal court right off the bat. I got a couple of Prohibition cases, too.

Sharp: I was going to ask you about that.

Zirpoli: I represented two pharmacists. The Department of Justice had indicted some fifty persons for conspiracy to violate the law by the selling of alcoholic beverages, presumably under prescription in a conspiracy with a couple of doctors. They offered to accept pleas of guilty from my clients and they would fine them only $250, but I said, "No." The cases never went to trial. Eventually there was repeal [of Prohibition] and that ended the cases as to my particular clients.

I also represented one big bootlegger who was a heavy investor and with the crash his brokerage firm sold him out. I concluded that they sold him out at the lowest quotation presumably for each day for each security, so I filed a lawsuit in the federal court in which I was successful. They said that my client owed them [the firm] a substantial amount of money. I was successful because I got them to cancel this alleged indebtedness to them and to pay him $10,000, which gave me a fee of $5,000, a lot of money at that time.

Sharp: That's a lot!

Zirpoli: [laughs] Yes, it was.

In fact, this was during the time when Judge [Harold] Louderback was sitting and was passing out the receiverships that eventually led to his impeachment, but that's something I will have to get into at a later time in my story.
Sharp: Were you concentrating on a certain specialty?

Zirpoli: No, I didn't. I had a general practice. I had an early experience in a personal injury case in which my client was truly at fault and he couldn't win. This fellow was severely injured for life. I remember going through the trial and Judge Shorthall sent for him and asked me how I thought I could possibly win that case. The jury was nine to three against me. During the trial, I was so worried and concerned that I couldn't hold my food, and I just decided I wasn't going to handle any more personal injury cases.

After that I farmed them out, which was better for me because I did get a number of them. I was able to give them to the ablest personal injury lawyers in the community and collect approximately one-third of the fee. I would do a lot of the investigation for them and help them in the preparation, but the responsibility would always be theirs.

From 1928, when I got out of college, I decided to get into politics and I joined the Al [Alfred E.] Smith [presidential] campaign and was assigned to the speakers' bureau. There were very few Democrats in San Francisco and this area at the time and I didn't make a single speech. I don't know that anyone else on our speakers' bureau had an opportunity to make a speech either. In 1932, I was very much interested in the [Franklin Delano] Roosevelt campaign. The Young Democrats were just forming then.

Sharp: I wanted to ask you about that. Smith was the first Catholic to have gotten the presidential nomination. Was that a pretty important--

Zirpoli: Oh, I don't doubt that it had some importance, but I would not say that it was the most significant factor in his defeat. The most significant factor in his defeat is that everything was going beautifully. The stock market was rising, conditions in the country were great, and there was no reason not to expect that [Herbert] Hoover was going to give you a chicken in every pot.

Sharp: Your Democratic party work that you started in '28, was that part of an Italian-American effort or just part of a San Francisco--

Zirpoli: No, no, it was part of San Francisco as a whole. Prior to that, I had campaigned for Pat [Edmund G., Sr.] Brown who was running for district attorney [in San Francisco] under the banner of Cincinnatus [New Order of Cincinnatus], as we called the society.* There were

PRESIDENT A. J. ZIRPOLI

Zirpoli, born in Denver, Colorado, of Italian parents, on April 12, 1905; has resided in California since the spring of 1918, is a graduate of Washington Grammar and Lowell High Schools of San Francisco; received his A. B. degree at the University of California at Berkeley in 1926, and in 1928 received his J. D. (Juris Doctor) degree from the School of Jurisprudence of the University of California at Berkeley.

Since 1928 he has practiced his profession as a lawyer in San Francisco, and in that year's embroilment campaigned actively in behalf of Alfred E. Smith, Democratic nominee for President. In March of 1932 he was appointed assistant district attorney for the city and county of San Francisco, which office he held until August 30, 1933, when he was appointed assistant United States attorney for the northern district of California.

In 1932 he campaigned actively for the cause of Franklin D. Roosevelt, both before and following the National Democratic Convention. In the same year together with other Young Democrats in San Francisco, he joined in the movement to organize the San Francisco Young Democratic Club.

He is a director and counsellor for the Italian Chamber of Commerce, vice-president of the Columbus Civic Club, and is a member of the Olympic Club and numerous other clubs in San Francisco and the bay region.

At the same meeting J. J. Irwin, former national committeeman, was appointed chairman of the southern speakers bureau by Executive Vice-President Robert Riddell.
Zirpoli: a number of Democrats there, but as I said, I always felt myself an avowed Democrat and I joined the Al Smith campaign.

In 1932, A.P. Giannini decided he was going to support Roosevelt. The Treasury Department and the California state controller's office weren't giving him the bank branches and some of the concessions or things that he felt he needed. So he decided that he was going to support Roosevelt, but A.P. was not a man who campaigned. He disliked making speeches and so he sent for me and Scampini and we became his representatives, so to speak.

I recall we went to southern California to a dinner at the Biltmore Hotel and met with [California] Senator [William G.] Mc Adoo, and the president of the University of Southern California, who was an active Democrat at the time. They had a big dinner to raise campaign funds. But we had no commitments from A.P., so we couldn't make any offers. He naturally contributed later. He already was contributing almost--well, he was contributing to Senator Mc Adoo's campaign and supported Senator Mc Adoo.

Now, I got to know Senator Mc Adoo very well as a result of that relationship. When he came to San Francisco on his Senatorial campaign in 1932, I arranged a big dinner for him at the St. Francis Hotel. We had over 250 people there. That was pretty good for a political dinner in those days. We had a half-hour of radio time and he came out for repeal. He was always known as a dry and this was a big event for Senator Mc Adoo to come out for repeal.

All of the people who were interested in getting into the wine industry and the grape growers were very glad to attend. It proved to be a very successful dinner. I had Miss Italy there as our guest to sit with Senator Mc Adoo and then we put on a skit. We had an Italian man who used to prepare the scenery for the S.F. opera company. He put on an act showing repeal, recovery, and reconstruction, the three Rs.

After the dinner, these famous plaques used in our skit disappeared. A few days later I went to the Orpheum Theater and Horace Heidt put the same skit on the stage.

As I say, as A.P.'s representative, we got in pretty well with the so-called leaders of the Democratic party. As I was then a Young Democrat, in 1935 I became state president of the Young Democrats and presided at the national convention of Young Democrats in Indianapolis. President Roosevelt spoke to us by means of a phonograph disk that he had prepared. I made the introductory remarks and then turned on the disk and he then spoke to us. Then I introduced Mrs. [Eleanor] Roosevelt and she spoke to us, and I got to know her. She was quite interested in the Young Democrats. J.F.T. O'Connor, who became controller of currency, was also interested in the Young Democrats.
Sharp: Let me ask you about Mr. Roosevelt. I had seen a note that Al Smith was a real opponent of Roosevelt's New Deal policies. I wondered if your work campaigning for Roosevelt, if that represented some sort of major conversion for you?

Zirpoli: No, there was never a conversion of me. [laughs] As I said, I was a dyed-in-wool Democrat and it didn't make any difference who the candidate was. The only time that I ever changed was when Jim [James] Rolph, who was mayor of San Francisco [1911-1930] and whom I knew (in fact, I spoke with him at two big dinners that I recall), became a candidate for governor [1930]. I changed my registration so that I could vote for him for the Republican nomination. Then I changed my registration back again because it was for that sole purpose.

We'll get up to 1948 later and that's another aspect of my political life.

As I say, as the state president of the Young Democrats and as chairman of the national convention of Young Democrats, I got to know Jim Farley fairly well. I was in the United States attorney's office and we had no Hatch Act at that time, so even though you were an assistant United States attorney, you could engage in politics. In August of 1933, I was appointed assistant United States attorney primarily because of my relationship with Senator McAdoo. In fact, there was another friend of mine who wanted to be appointed in southern California. I contacted Senator McAdoo and this friend was appointed.

I continued in the United States attorney's office until 1944, but in 1936 I was named as a delegate at large for Roosevelt for the Democratic national convention in Philadelphia. Just before that, Senator [Culbert L.] Olson, who later became governor [1939-1943], was campaigning for "production for use." He wanted to send a delegation to the Democratic convention of 1936 that would pledge itself to "production for use" and, therefore, would not necessarily be a Roosevelt delegation. But Henry H. McPike, who was the United States attorney and who was very friendly to Olson, asked me to meet with Senator Olson at the Whitcomb Hotel.

When I got there, Senator Olson asked me if I would have the Young Democrats join and campaign for his ticket of delegates at the Democratic convention. I said, "No, we don't participate in the primaries. We go out and try to enroll people and register them and do everything we can, but we accept the party nominees and we don't indulge in these preliminary campaigns." I thought that McPike would be sore, but apparently he wasn't. Anyway, we returned to the office.
Zirpoli: About four or five days after that meeting, I received a telegram from Farley saying that he was naming me and three other Young Democrats (that I could name) as Roosevelt's selection for delegates to the national convention. So I became a delegate at large and attended the Democratic national convention. I merely served as one of many honorary secretaries.

I was assistant U.S. attorney at the time and I had some doubt in my mind as to spending all of the money needed to go back to the convention in Philadelphia, which was a foregone conclusion. But in those days an assistant United States attorney could be named as a deputy marshal to accompany the marshal when he was taking a prisoner to some different locality. At the time, there was a prisoner to be transported to Philadelphia. So I was appointed a deputy marshal, and we transported the prisoner to Philadelphia, and I attended the convention.

Of course, everybody is named—I was named an honorary secretary. They take certain people in each state and each one would be named an honorary secretary of the convention. This carries me into the 1936 campaign.

Now, I haven't talked about my work in the U.S. attorney's office.

Sharp: I thought we might do that next time.

Zirpoli: All right, now continuing then, as I say, in 1936, when I was then thirty-one years of age, a vacancy arose in the office of the president of the Federal Land Bank of the eleven western states. I went to see A.P.—Armando, my brother, was with the Bank of America at the time—and I told A.P. I would like to be president of the Federal Land Bank. He turned to his secretary and said, "Get me Senator McAdoo on the phone." He talked to the Senator and then he turned to me (I could only get parts of his conversation with the Senator) and said, "All right, Senator McAdoo said he is going to send your name in to the president [Roosevelt]." He would have to submit it to the Senate for confirmation.

I left A.P.'s office and I was walking down Montgomery Street. I met Maurice Harrison who was the leading Democratic figure in this area. He said to me, "How are you getting along, son? Why don't you come upstairs to my office and we'll talk." So I went upstairs to his office, the Brobeck, Phleger, and Harrison office, and he asked me how I was getting along and what I was doing.*

*For additional information on this firm, see two oral histories with Herman Phleger, Sixty Years in Law, Public Service and International Affairs (1979), and Observations on the U.S. District Court for the Northern District of California, 1900–1940 (1981), both completed by the Regional Oral History Office, The Bancroft Library, U.C. Berkeley.
Zirpoli: I told him that I had just come from a meeting with A.P., and he said, "Why do you want to do that? You're a good lawyer and you have a political future. You shouldn't do that."

So I thought about it for a couple of days and decided maybe I shouldn't. I went back to see A.P. and he looked at me and in his gruff way [laughs] said, "Ah, can't you make up your mind?" He said, "Get me Senator Mc Adoo on the phone." He got Senator Mc Adoo on the phone and I heard A.P. say, "Tell them to withdraw it." Then he turned to me and he said, "Now, you see all the trouble you have caused? The president is sending your name into the Senate and I have to tell Mc Adoo to tell them to withdraw it."

Sharp: Were you embarrassed?

Zirpoli: Yes, naturally I was embarrassed and to have A.P. say gruffly to me, "Can't you make up your mind?" But as I said, I would still have lunch with him occasionally.

Then there was a famous SEC [Securities and Exchange Commission] hearing involving Bank of America, Transamerica, and branches [around 1939], and the Securities and Exchange Commission was going to stop, or wanted to stop, the transfer of certain banks to the Bank of America which would become branches of the Bank of America.

A.P. was attending the hearing which was in the grand jury room of the old court house and post office building. A.P. was seated right to my left in the front row. I was here [gestures seating] and A.P. was to my left. They had a fellow who later became president of the Central Bank of Oakland (I can't remember his name at the moment) who was testifying, a man whom A.P. had thrown out of the Bank of America and whom A.P. distrusted. While he was testifying, A.P. got up, six-feet-two, pointed his finger at the fellow and said, "That's a damn lie." I pulled on his coattails and I looked up at him and I said, "Mr. A.P., you can't do that." He looked down at me and said, "But I did, son, didn't I?"

So in later years when I went on the bench and my law clerks would tell me I can't enter a particular order, I would tell them the A.P. story.

Now, continuing, where am I now?
Additional Notes on Family and the Italian Community

Sharp: I wanted more about your political activities, but let me take you back just for a couple of other questions.

I wondered how you might assess this whole period with respect to the Italian community? There were a lot of things going—the 1929 crash, the Depression. But besides that, there were the beginnings of fascism in Europe and some pretty extreme political activity.

Zirpoli: Again, let's go back. First of all, the Italians were predominantly Republican. They were property owners. The crash did not affect them very much and the Depression affected them not to the degree of others because, on the whole, they were in pretty good shape. As I said, they were basically Republican in their politics. Many of them undoubtedly voted for Roosevelt because of A.P. and his unquestioned influence, and that influence was felt throughout all of the branches of the Bank of America in the state of California.

Now, with the advent of [Benito] Mussolini, they all looked favorably upon Mussolini. In fact, the newspaper, L'Italia, its editor and publisher was a great fan of Mussolini, so he [Ettore Patrizi] played him up big and they would praise him at most of the rallies. This was true in the early thirties. I am not talking about when you start getting close to '37, '38, and '39 when the changes came. When Mussolini lined up with [Adolph] Hitler, some of that attitude changed.

Zirpoli: Before lining up with Hitler he had accomplished many constructive things which were praiseworthy. Now, this was before he really lined up with Hitler, of course, in the early days of fascism. I remember going to see the newsreel, like Pathé news. I remember also sitting in the audience and they flashed on the screen, "The first dictator governor of America, Governor McNutt of Indiana." So here you are, this attitude with relation to fascism depended on the period involved.

It wasn't until Hitler got into the picture, which was substantially later, when Mussolini joined with Hitler, you had this turnabout, so to speak. Of course, those Italians who were enthusiastic for Mussolini, or could be deemed Fascists, eventually became problems when we entered into the war.

Now, my father, I said, resigned from the [Italian] consulate in 1939. He resigned from the consulate in 1939 because he saw what was coming, clearly saw it, and he told all of the members of
Zirpoli: the family that it was inevitable that America would be involved in the war on the side of the Allies and not the Axis and, he wasn't going to be in the Italian service with that as a prospective future, so to speak. So as I say, he left the consulate and went into the insurance business.

Sharp: There was a period basically in 1932 when Hitler came into power through 1939 when your father left the consulate. How did he begin to see what was going on? Did he talk about it a lot?

Zirpoli: He began to see what was going on because, after all, my father was, as I said, quite an historian. As far as what was happening in diplomatic circles, he was always very knowledgeable and he could see this change in the movement of Hitler and the manner in which Hitler was taking over. Not only that, but he had a cousin in Rome who was the official photographer for the royal family and eventually for Mussolini. He would send my father photographs. I recall a photo of Mussolini greeting Hitler at the Rome railway station. We received many photographs of Mussolini and Hitler and [Herman] Goering; a fantastic collection, which, when Pearl Harbor came, my mother burned them all. She put them in the trash burner and burned them all. She didn't want them around. It was too bad; it was unfortunate. It was a fantastic collection.

As I say, my father saw it coming. In fact, my father, he died in 1942, not long after the war was declared, was somewhat broken-hearted by the whole thing. He wanted America and Italy to become friends, particularly I would say because of his sons, if I had to make an analysis of the reason therefor.

But there was this interest, as I say, because they were getting good reports out of Italy. I mean Mussolini was doing some good things. As a matter of fact, we copied our Social Security system after the social security system he had invoked, so that this was some indication of what he was doing. This social security that he invoked in Italy and provided was a big thing. People talked about running the trains on time and they joke about that, but this program that I just mentioned was of real significance to the populace. Of course, he was rebuilding everything. He rebuilt this so-called Euro-village there outside of Rome. There was a great deal that was done--drainage of the swamps, construction of roads, and things of that character, so that everybody was getting involved. Of course, he was boasting a lot about mare nostrum, for the Mediterranean Sea. Then, of course, they made mistakes. They went into Libya and got involved there and the island of Corfu, and other problems for which there were mixed reactions, of course.

Sharp: I wondered how your own activities in the Italian community changed in this early Depression period.
Zirpoli: No, I didn't change. I increased, if anything, my relations. As I said, from the point of view of the Italians it wasn't that bad as far as the Italian community was concerned. I am not saying it was good, of course. There were people out of work but most of the Italians were, as I said, property owners. They saved their money and we did get some help through the Italian welfare agency, but the need therefor was not as great as it was to the remainder of the community. My interest in Italian affairs just kept increasing, it didn't diminish, and with the advent of World War II, I also did some broadcasting to Italy, propaganda-type, Voice of America.

Sharp: We'll have to talk about that.

Zirpoli: I don't remember a great deal about what I said. [laughs] I mean I told them that America and Italy had always been friends, the Italians were doing so well here and it was unfortunate that we should be enemies, Mussolini was not good for Italy, and things of that character.

Sharp: What other notes did you make? It looks like you have done quite a bit of writing.

Zirpoli: [referring to notes] Of course, I started out with my grandparents, but we'll leave that out. [pauses to go through notes] I've gone through the 1932 and 1936 campaigns. Then I get to the '48 campaign.

Sharp: Okay, maybe we'll hold off on that.

Zirpoli: Then the '48 campaign and after that was my interest in politics with Adlai Stevenson. Then, of course, there was [John F.] Kennedy, Clair Engle, and the [San Francisco] board of supervisors, 1958 to '61, volunteers for better government, my own marriage in 1936.

My wife [Giselda Campagnoli Zirpoli] taught at Galileo High School. I met my wife when she enrolled at the University of California, just before that, and I took her up to the campus to enroll her. Then she graduated and taught at Galileo High School. We were married in 1936 and I have two daughters by that marriage. They're married and I have six grandchildren.*

Sharp: I can see their pictures all over your chambers here.

Zirpoli: Yes, this is the youngest one now.

*The daughters' names are Sandra de Saint Phalle and Jane Felder.
Zirpoli: The America Italy Society I have mentioned. The dinners we had, the people we've had, I participated in the big dinner for [Guglielmo] Marconi when he came to San Francisco and accompanied him to the dining room through the kitchen. When the dinner was over, I accompanied him out of the dining room through the kitchen.

There was the enemy alien program, of course, I have to get into and the war, my association with [Harold] Faulkner in 1944.

Then I left the Faulkner firm in 1952 to go on my own. There is the program for indigent defendants in the federal court from '51 to '56. There are a number of trials--"Baby Face" Nelson, Fleishhacker, George T. Davis, Frank Flynn, Nye and Nissen.

Sharp: I thought we would talk about those later.

Zirpoli: My antitrust interest and association with Tom [C.] Clark. [pause]

Sharp: Let's talk a bit about your grandparents.

Zirpoli: My grandparents? There is a portrait of my grandfather on the east wall there. That's a good painting. It was done by his cousin who was one of the best-known artists in southern Italy, in Naples, at the time. He operated a stagecoach line in southern Italy out of the town or city known as Potenza. His name was Vincenzo. In my father's family, the first son was Vincenzo and the next first son was Alfonso, Vincenzo, and Alfonso, in that type of rotation. He died when my father was nine years of age and the family moved from Potenza to Rome. My grandmother was a Morgano. That was a noble family of southern Italy. As I say, they all moved to Rome when my grandfather died and my father went to school there until he was seventeen. Then he entered the Italian cavalry, and remained there for seven years until he came to America to marry my mother.

My mother was a Graziano and she was born near Lucca in Tuscany. My father was born in 1880 and my mother was born in 1878. Now, my mother's family was a relatively poor working family. She became a governess for the children of an Italian consul who later became an Italian ambassador. So, while she had no real significant prior formal education, she used to sit with the tutor who taught all of these children. She acquired a very substantial education herself and traveled throughout many parts of the world. She was in Beirut during the famous Christian massacre and was in Denver, Colorado in the 1880s, about 1889 or approximately 1900; it was in that period, I don't recall the exact years.

The Graziano family included one who became the commanding general of the Italian forces in World War I. Also she was distantly related to [Giacomo] Puccini, so she met with Puccini when she was a child. Her family then moved to Torrington [Connecticut] where they all went to work in the factories there.
Zirpoli: My mother had a phenomenal memory. She lived until she was ninety-two and to show the value of the education she got, I remember a doctor coming to visit her when she was eighty-two and she recited a poem about doctors in its entirety from [Torquato] Tasso. So she could recite to you from memory from Tasso and from Dante [Alighieri].

Sharp: She sounds like a remarkable woman.

Zirpoli: Oh, her memory was just fantastic. We would visit people who had moved and bought a new home and she could tell them more about what was in the living room of their old home than they could!

Sharp: Did you make any notes there about your brother?

Zirpoli: I'll talk about my brother now. Now, my brother went to Washington Grammar with me and he attended Lowell [High School] and played basketball. When he graduated, he wasn't interested in going to college, so he went to work immediately for the Bank of Italy and remained with the Bank of Italy until his retirement. He ultimately became a vice-president and a significant officer of the bank. He became branch manager out in the Park Presidio, branch manager at Stonestown, and branch manager at the Columbus branch and also the Clay-Montgomery. He also had some responsibility in relation to coordinating the work of all the branches of Bank of America. As I say, he wasn't interested in going to college. He did attend the American Banking Institute classes, of course, after he got into the bank. He was a good athlete. My brother was a great basketball player, a soccer player, and a baseball player. He was very good as a baseball player, although he never tried to do anything professionally. He used to play in what they called the winter league here which was baseball played out at Golden Gate Park primarily on the part of professional players during the winter months.

Sharp: Who wanted to keep in shape?

Zirpoli: Yes, so he played with the Bank of America team, the basketball team and baseball team, and played with these people during that period. One of the fellows he played with a little in later years was Joe DiMaggio, who became my neighbor in 1937. In the beginning of '37, I bought a little home in the Marina and Joe [Joseph P.] DiMaggio bought the home next door for his father and mother. His mother was a very aristocratic woman in appearance. His father was just a fisherman. He couldn't read or write, but he could read the box scores. So he would go to Chestnut and Fillmore every day and buy the paper to read the box scores to see how his son was doing.

DiMaggio was very nice to the children in the neighborhood. He would play ball with them on Sunday, play catch with them.

Sharp: It must have been a pretty big deal.
Zirpoli: It was a big deal for the kids of the neighborhood. Yes, it was indeed. I attended his first wedding and the reception. His second wedding I did not attend because that was not the same formal type of thing as the first one. But I always enjoyed him. Of course, his brothers were all very successful. Three of them made the big leagues.

Now, I don't know what you want to discuss with me further this afternoon, whatever you have in mind.

Sharp: Okay, let me look over my notes. I think we have just about covered everything.

A. P.'s Proxy Fight: "Back to Good Times"

Sharp: I do remember, as a result of the winning the [Bank of America] proxy fight, Giannini then launched a campaign that he called "Back to Good Times." It was a campaign to gain depositors.

Zirpoli: What A.P. did was as soon as they won the proxy fight, he sent a telegram back to San Francisco, "tear out the partitions." It was A.P.'s philosophy that the president of the bank had to be accessible to the public, so the president could not have a private office. The branch managers had to have their office right out there in front where everyone could see them and do business with them. A.P., as I said, was a man who, if he had faith in you, he would loan you money, and the best proof of it was the history of the bank after the [1906] fire and the things that A.P. did after the fire.

Of course, when A.P. came back, out went Elisha Walker and all of his group, Pedrini and so forth. A.P. was letting the people know that the bank was their bank; it was intended to be the people's bank. His philosophy was that this was a bank for the people, for the working man. This is not the bank for the owner of the steel mill or the owner of the railroad. "We want the people that work in the steel mill, that work on the railroad, that work on the farms."

His branch banking theory was a very good one and was very beneficial to California because he was able to move funds from the south to the north when they were needed in the north, and from the north to the south when they were needed there—depending upon the period of the year and the agricultural needs, primarily, of the state at the time.
Keep your dollars moving!

The nation's dollars are rapidly getting back to work. Confidence and common sense are with us again. This is especially true throughout California ... The moving dollar is the stabilizer of prosperity, the life of industry, the power behind the payroll. It is the infallible remedy for unemployment ... The goal of "Good Times" can be reached only by dollars that move! ... Move your money by banking, sensibly spending or investing it. Banked dollars create credit—credit finances business—business creates prosperity ... California courage and initiative are leading the nation back to good times!

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Zirpoli: A.P. didn't believe in accumulating wealth for personal use and he didn't want the bonus of $2.5 million that Bancitaly gave him. He turned that over to the University of California. These were indications of the type of individual he was. He didn't believe in any lavishness because he felt you could only ride in one automobile, you could only sail on one yacht, even if you wanted to sail on a yacht. He hated to make speeches. He would appear at the dinner but you didn't call on him to make a speech.

Sharp: Did you consider going to work for him instead of going out on your own?

Zirpoli: No, I really didn't except that one time in 1931. A fellow named Angelillo was then the head of the Federal Land Bank. He was an Italian and his term was expiring, so I thought, "Why don't I get this job as head of the Federal Land Bank?" Well, I didn't, so who knows what my future would have been.

I will say this, too, with A.P., later on we had these various campaigns for the governorship and the like. There were times when people, like the controller of currency, and our Sheriff [Dan C.] Murphy were all candidates, both candidates for governor among others. A.P. was very friendly to both, so he couldn't take sides. So he called me on the phone and he said, "Look, I want you to take care of the campaign for J. F. T. O'Connor," the controller of currency. I said, "Sure, you give me a headquarters and I'll set up a campaign structure for your friend," and I did. But he would call on you once in a while for something of that nature.

He would not support Roosevelt for a third term. He didn't believe that the president should have a third term. He believed in compulsory retirement at sixty-five. That is still the practice at the Bank of America.

Sharp: That's really about all of the questions that I have. I thought that next time, we would focus a little bit on your short period as assistant DA for San Francisco and then move into the period when you were assistant U.S. attorney.

Zirpoli: Assistant DA of San Francisco, I have very little to relate. As a matter of fact, I was only there a year from 1932 through '33 (the early part of '32). I was down in the bond and warrant office, which means that I would receive bail and issue warrants of arrest, and I would occasionally appear in the municipal court. The first case I tried in the municipal court or prosecuted was a fellow who was charged with drunk driving. He defended himself and he got an acquittal.
Zirpoli: There was a big trial of the public defender of the city and county of San Francisco, Frank Egan. While I didn't participate in that trial, the jury was out for several days and everyone thought the jury would be coming in on a Sunday that I happened to be on duty, and that was going to be my big moment. I would appear in court and receive the verdict of the jury, but they didn't come back that day! [laughter]

Sharp: So you lost your big moment.

Zirpoli: I lost my big moment, but as I say, that job was a half-day job so to speak because I could have my practice in the afternoon and the same was true with the assistant U.S. attorney when I was first appointed in August. It was presumably a half-day job. It turned out to be more so that eventually, by 1936, I had to give up my office downtown because I was spending too much time in the U.S. attorney's office and it didn't pay me to maintain an office downtown. It was fairly costly although I was still receiving good fees on the outside for work.

I did render some services even after I gave up my downtown office. I remember in particular one instance in which I helped purchase or participate in the purchasing of a big winery wherein the buyers offered to give me a one-third interest. I turned them down and said I was just interested in my fee. I made a terrible mistake because we had a tremendous wine inventory and we sold the inventory and made enough money to pay for the whole winery, so I would have had a one-third interest in the Windsor winery without cost! [laughter]

So there was nothing particularly exciting during [District Attorney] Brady's regimes except on those occasions when I would go out with the homicide squad, and take a dying statement or interview someone in connection with a homicide or attempted homicide. Those were harrowing experiences in many respects. First of all, the speed with which they would travel in the car would endanger my life. We'd come up Market Street and it was like a Keystone comedy. You would see the streetcar coming toward you and your car was going to pass the streetcar. I turned to the detective and told him, "Look, I'm not worried; I want to be alive. If the other fellow is dead before I get there, it's just too bad." [laughter]

But as I say, those were the basic experiences. I took a number of statements.

Sharp: We'll start then with your period as assistant U.S. attorney. Maggie told me that you made a tape of some information.
Zirpoli: On one aspect of it, so she will give you the tape. I have been asked to give a talk on Alcatraz Island because I was in charge of habeas corpus, so I got to know the island and some of the people fairly well.*

Sharp: Great, that's fine.

Zirpoli: I don't know whether this is going to be interesting or not.

Sharp: It is so far. I think we are getting a good start anyway, but you have a lot of material to cover.

Zirpoli: I have some more to cover, yes.

Sharp: I really like your making notes. It helps you to begin to really think about some of the things you were involved in.

Zirpoli: I have the files for "Baby Face" Nelson [Lester M. Gillis].

Sharp: When we get to that, I'd really like to see those.

Zirpoli: I have some of them here and I have some at home. I was going to write that up one day, write the story. I was going to write a book entitled To Harbor and Conceal, but it's more the story of Fatso [Joseph Raymond] Negri, the messenger boy, than it is, in a sense, of "Baby Face," for he had contacts with [John] Dillinger and everybody.

Sharp: What year was the "Baby Face" Nelson trial?

Zirpoli: The trial was in March of '35. He was dead, of course, by this time. 
##

The Investigation and Impeachment of Judge Harold Louderback

Sharp: I have brought some questions about "Baby Face" Nelson.

Zirpoli: All right, we'll see if I can answer them.

*Judge Zirpoli spoke about these experiences on 6 October 1982 to members of the Historical Society of the U.S. District Court for the Northern District of California. A copy of these remarks has been deposited in The Bancroft Library.
Sharp: I am sure you can.

Zirpoli: On "Baby Face" Nelson, there are two methods of telling that story. One of them is to put Negri on the stand and let him tell it and the other is for me to just narrate it. But anyway, we'll go ahead.

Sharp: Let's start first with the impeachment of Judge [Harold] Louderback if that's all right with you.*

Zirpoli: Now, on the impeachment of Judge Louderback, I did not play any significant role.

Sharp: I had a few questions down here. I wonder if you could just set it up for me and tell me first of all what your initial acquaintance with the judge was.

Zirpoli: My initial acquaintance with the judge arose when he became a district judge, not when he was on the superior [court] bench [in San Francisco]. When he became a district [court] judge, I first met him, in a sense, after the famous crash of 1929 when a number of the brokerage houses were going into receivership. I had filed a suit to recover some money which I won and thus benefited the estate of one of the bankrupt brokerage houses. I got them a considerable amount of money, about $50,000, and I petitioned for $500 for attorney's fees. Judge Louderback denied my petition.

I was not aware that there were any real problems arising until I received a telegram from the Italians in the redwood empire country, in Eureka and its environs, in which they asked me to accompany Fiorello La Guardia to Eureka for a reception by the Italian community. I then visited La Guardia at the Palace Hotel [in San Francisco] and he couldn't make it, so we never did make the trip.

But by this time I knew that Congress was looking into the activities of Judge Louderback as it related to the appointment of receivers in these bankruptcy estates. He had favorite persons whom he would appoint. Therefore, they would be getting the benefit of the compensation and fees for serving as receiver. Congressman La Guardia didn't like this and he was behind the investigation of Judge Louderback. Judge Louderback was impeached by the House of Representatives for his conduct in this regard and they subsequently had a

*Joseph J. Franaszek is currently researching a monograph on Judge Louderback's life. An excerpt is included in The Historical Reporter, Vol. 2, No. 2 (Fall 1982), p. 2, as, "It Was Decided that the Cat Should Stay and the Judge Should Go": The Impeachment of Judge Harold Louderback."
Zirpoli: trial in the Senate in which they failed to receive the necessary two-thirds vote by one vote. As a consequence he returned to the bench.

I might say that anyone with a prior history of that character, where more than a majority voted for removal, would resign, or some of them would resign before the case ever got to the impeachment stage (even though the number is relatively small in the history of the country).

I had no significant role in the sense of offering information and being of any particular help to anyone in connection therewith, but he came back to serve on the bench and I think he served well.

He was a person who adhered strictly to formality and court procedure. I remember on one occasion we had a small case involving the railroads and failure to comply with the safety requirements. These were misdemeanor charges that the government would file against the railroad. I received a case of that character from the appropriate department of the government and filed an information against the Southern Pacific (I have forgotten the number of counts, but a substantial number of counts), and the attorney general suggested that I permit them to plead nolo contendere and recommend a fine of $300 on each count.

I made the mistake of going into Judge Louderback's chambers and suggested that this was the disposition that we would like. He threw me out of the chambers, and properly so all considered, since this was the wrong approach. But I went into court and he accepted the nolo contendere and he proceeded to fine them $300 on each count! [laughs] He wanted, as he should have, that this be the action of the court and not the action of the attorney general or someone representing the attorney general.

I tried a number of cases in his courtroom thereafter but, as I say, he was a stickler for formality. He used to address everybody as Mr. Jones or whatever the name of his clerk was by his last name and always Mr. or Mrs. or Miss. There was no informal approach to anything on his part.

Sharp: Let me back you up a bit and ask you a few other questions. With the actual impeachment, the charges made by Congressman La Guardia were that Louderback had used his powers as a judge to extend favors to his friends by appointing them receivers. I wondered how you heard about these charges, if it was pretty common knowledge--

Zirpoli: I have no clear recollection, but it was in the press, primarily from the press. Then I knew that there was some talk about who would represent Judge Louderback. At one time there was some talk about Harold Faulkner representing him. He eventually ended up with James Hanley.
Sharp: Was there a special role in the impeachment for U.S. Attorney George Hatfield?

Zirpoli: No, I don't recall any special role. Hatfield, who knew him personally, I assume was questioned as was one of the assistants, Al [Albert C.] Wollenberg [Sr.]* But I don't know anything about the details of that. In other words, they did approach Al Wollenberg.

Sharp: It was the La Guardia committee that approached Wollenberg?

Zirpoli: Yes, the La Guardia committee or an investigator for the committee.

Sharp: Apparently, Judge Louderback felt that the charges were untrue.

Zirpoli: It isn't necessarily that he felt that the charges were untrue; he felt that they were not justified. There was no benefit to him for it. He was appointing these people because he felt that they were competent and would do a good job. He didn't know that there had to be a special rule as to who you might appoint and that you shouldn't appoint a friend.

I would even question that today, if the person you appoint is competent. For instance, there are occasions when I will appoint a doctor. I had a medical evaluation to be made with relation to a very wealthy individual in San Francisco. I called a friend of mine out at Mt. Zion [Hospital] who I felt was one of the leading heart specialists in America who wrote the book on A and B types. He gave me an opinion. I thought that this fellow was feigning and the doctor said, "No, he's not feigning and not only that, but he's crazy for doing some of the things that he does. He is further imperiling his life."

So what I thought was going to be some form of contempt order, I was all wrong. So I see nothing wrong personally with that as long as the objective is an honest and honorable one.

Sharp: But apparently he felt that--

Zirpoli: He thought it was political.

Sharp: He did; he felt apparently that there were some forces, real forces, within the San Francisco legal community that wanted him out.

*Wollenberg was an assistant U.S. attorney, 1928-1934. Readers are directed to his own oral history, To Do the Job Well: A Life in Legislative, Judicial and Community Service, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981.
Zirpoli: Heller, Ehrman, White and Mc Auliffe was the [law] firm that he felt was out to get him.

Sharp: What do you think about that?

Zirpoli: I don't know. I have no way of offering any opinion on that. Judge Louderback was a man without friends.

Sharp: How would you describe the discontent that surrounded Judge Louderback then?

Zirpoli: The discontent is hard for me to evaluate after the passage of all this time. I don't know how much discontent there was because of the appointment of the receiverships. I think there was some, but I think most of the discontent was the fact that he was a strict disciplinarian in the courtroom. You couldn't get near the witness box or if you wanted to offer an exhibit, you had to pass it to his crier or the clerk who would then pass it to the witness or the jury. Then when they finished, the crier would have to pick it up and bring it back. If you did anything of that nature, got too close to the jury box, he would call you on it in the courtroom, and in a sense bawl you out.

Sharp: He was then significantly different in terms of his approach than, say, Judge [Adolphus F.] St. Sure?

Zirpoli: He was significantly different than Judge St. Sure in that Judge St. Sure wasn't as strict in the application of the procedure or decorum.

Judge St. Sure was pretty tough on sentencing, however, and they used to call him "Sure Shot" Sure because of the nature of sentences. The story they liked to tell is about the fellow who borrowed some stuff from the naval yard where he was working to work on his home and his neighbor's home. They charged him with theft of government property. Judge St. Sure asked for a probation report and he got one. The probation report showed that he was a good neighbor, and he was very nice and kind to the children, and worked with the Boy Scouts, did everything he could for their benefit, and the judge commented, "This is an excellent report." Then he turned to the United States attorney and said, "What is the penalty prescribed by law?" The U.S. attorney said, "Five years in jail and/or $5000 fine." Judge St. Sure would say, "Commit the defendant to the custody of the attorney general for five years. That is all. Call the next case." So he got the title of "Sure Shot."

Sharp: It sounds worthy.

Zirpoli: He was a fair trial judge and he was a good trial judge.

Sharp: I will be asking you more about him later.
Sharp: Hatton Summers was chairman of the House Judiciary Committee and La Guardia then was a member of the committee. It was La Guardia who was in charge of the investigation. The committee came to San Francisco at some point in September of 1932. Before that, there was a committee of the San Francisco Bar Association that had already done its own investigation sometime between May and July of that year, '32. Randolph Whiting was the president of the San Francisco Bar; Adolphus Bianchi was chairman of the San Francisco Bar's committee investigation of Louderback. I wondered if you had any connection, any relationship, with either the San Francisco committee, the bar committee, or with the La Guardia committee?

Zirpoli: No, I did not, but Whiting was a member of the firm of Heller, Ehrman, White and McAuliffe. So that may be one of the reasons that Judge Louderback felt that the firm was against him.

Sharp: The Senate trial then was in early 1933. I wondered if any members from the U.S. attorney's office went back for the trial?

Zirpoli: Not that I know of.

Sharp: How did you hear about what was going on, just through the newspapers?

Zirpoli: Through the papers. I mean that was a subject of daily news, so to speak, and basically it was through the papers. As I said, I had had just the one experience with Judge Louderback and I didn't give any real importance or significance because I didn't come into the U.S. attorney's office until August of '33.

Sharp: And you hadn't had any contact with them in the San Francisco district attorney's office for any reason?

Zirpoli: No, I did not.

Sharp: I wondered if you thought that the impeachment created some sort of shadow for the district court?

Zirpoli: It unquestionably did, but what evaluation I made on it then I can't recall. There is a young man who is writing a story on Judge Louderback.*

Sharp: Yes, I talked with him and he is going into quite a bit of detail. There seems to be a pretty full record of all of the impeachment. So he is using it and hopes to write just a monograph on the whole impeachment.

*Judge Zirpoli here refers to Joseph Franaszek, footnoted above,
Sharp: What happened within the court once Judge Louderback came back? Did people sort of avoid him in the hallway?

Zirpoli: No, I mean nothing happened. First of all, he was never friendly anyway, so it wasn't a question of avoiding him. He always avoided everyone and so when he came back, he behaved very much in a sense the way he did before, possibly a little more aloof. Of course, he had some problems arising out of his marriage as well. I don't know too much about those problems. I don't know whether he was living up at the Fairmont Hotel on Nob Hill at the time.

Sharp: Are there any other notes about the impeachment that you wanted to make? I didn't know if you had done any more writing on it.

Zirpoli: No, I am not going to do much on the impeachment. It isn't a narrative that I have enough knowledge of to make whatever I say worthwhile. It would take a tremendous amount of research or comment from someone, if there is anyone still living, who was an active participant. One person that one might talk to might be Harold Faulkner on his role.

Sharp: Did Judge Wollenberg ever tell you very much about his speaking with the committee?

Zirpoli: All I remember is that he did tell me that they came to see him, but I have no recollection as to what he said to them. [pause]
III YEARS AS ASSISTANT UNITED STATES ATTORNEY, 1933-1944

Cops and Robbers: The "Baby Face" Nelson/"Fatso" Negri Cases

Preliminaries

Sharp: I'd like to move on then to the "Baby Face" Nelson material. I have some questions from the tape that you made and some questions from the eleven files on U.S. v. Negri that I saw, and the case of John Paul Chase.*

Zirpoli: I had nothing to do with John Paul Chase in any real sense.

Sharp: Right, I didn't think that you did.

On the tape, you mentioned that as assistant U.S. attorney you had responsibility for all of the flight and interstate commerce cases.

Zirpoli: Yes.

Sharp: Was that a large number of cases?

Zirpoli: No, but there were a number of them. I remember there was a Point Lobos [steamer] murder case which rose out of an indictment in Alameda County and we then undertook that as an unlawful flight case.**

*Judge Zirpoli made his own tape covering some of the topics discussed in this and later interviews. It has been deposited with his interviews in The Bancroft Library. The judge allowed the interviewer to review his original files of court records from the Negri trial.

**This is also known as the King-Ramsay-Conner case. See a volume of oral history about it, The Shipboard Murder Case: Labor, Radicalism, and Earl Warren, 1936-1941, Regional Oral History Office, The Bancroft Library, University of California, 1976, as part of the Earl Warren Era Oral History Project.
Zirpoli: I was then in contact with Earl Warren, who was district attorney of Alameda County at the time; I mean I use that as an illustration.

You had some substantial number of what we called white slave cases at that time, which was the transportation of a female in interstate commerce for purposes of prostitution. There were quite a number of those.

In fact, I tried a very significant case. It had to do with the importation of three women from Hong Kong to be used for purposes of prostitution in San Francisco. It was a very famous case [U.S. v. Wong See Duck, et al.] as far as Chinatown was concerned and it was reported in the Chinese press each day and with all of the details. There were two trials. The jury disagreed on the first trial. The second trial, we had Judge Walter C. Lindley. He was from Danville, Illinois. We received a conviction in the second trial because we had found another of the three women who had been imported from Hong Kong and she was able to corroborate the only witness I had, who was the girl who was brought here from China and then ran away to Donaldina Cameron's home on Sacramento Street, in Chinatown.* I don't know whether you want any details of that case. If you want them, I can give them to you.

Sharp: What I would like for you to do is essentially set us up for talking about the Negri cases and give me sort of a general idea of the other kinds of cases that you were involved in. A little more detail, I think, on this would be good.

Zirpoli: I'll give it to you now. What happened was that the immigration attorney, Arthur Phelan, came to see me and said that this woman had fled to the mission and she had a story to tell as to how she was brought to this country. So the story as it unveiled was that a Chinese who made numerous trips to China, every time he returned he said his wife was pregnant and was to have a child. When he got older, he sold the right to bring one or more of these children of his to the United States, so that he built a form of insurance for himself in his old age. So if you paid him, let's say, $1000, you could bring someone over.

A syndicate in San Francisco headed by Wong See Duck, who had a big store in Chinatown, would send a lieutenant, a young man, to Hong Kong who paid $250 Hong Kong money to the family of the young Chinese lady and they would then give her a family history with photographs saying that you were born in this village, you lived in

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*Donaldina Cameron, 1869-1968, grew up in San Francisco, and opened a Presbyterian mission in Chinatown to aid female Chinese prostitutes.
Zirpoli: this house, you had to go so far to find the fountain for water, there were so many rooms in the house, the people who lived in the house were the following, and this is a photograph of your uncle whom you will recognize. She would be given the life story of a family and her role in the family so that when she would arrive in San Francisco, she would then identify her uncle immediately and say, "That's my uncle." The immigration authorities would be satisfied that her story was true, that she really was the daughter of a Chinese. She would be shown photographs from her father as well and she would be admitted to the United States.

One girl they bought in Hong Kong and brought to San Francisco had relations with a young man (Wong See Duck's lieutenant) on the boat and she became pregnant. Of course, this was not readily noted when she arrived. When she arrived, she was put up for sale and the syndicate bought her, but they bought her on condition that the payments would be in three equal monthly installments to insure undamaged goods, so to speak.

As I say, she also had the right to buy out. That is to say that as she earned money, all of the surplus she could accumulate, she could use to buy an interest in herself. I have forgotten what the exact figure was, but let's say she had a responsibility of earning $20 or $30 or $50 a day. Everything she earned over and above that she kept and eventually used it to buy herself out. One of the girls that I eventually had as a witness is one who had bought herself out.

Phelan presented these facts to me and I said, "I'll interview her." I interviewed her and I was satisfied that she was telling the truth. I said, "I think the jury will believe her." We presented it to the grand jury, the grand jury accepted it, and the indictment was returned. At the first trial, the jury was a hung jury—it was her word, a prostitute and so forth.

In the second trial, we found the other young lady, the one who had bought herself out. She came and told her story and on a second trial we got a conviction.

This was a famous case for Chinatown because of the nature of the people involved. I mean a man who owned this big hardware store in Chinatown was the prime investor in the syndicate that bought her. He and two other ladies bought this girl and they were all convicted. So it was an interesting case, as I say, because the Chinese papers carried a transcript of the trial day by day.

Sharp: Was this fairly typical of some of the white slave cases?
Zirpoli: There were quite a number of white slave cases in those days. One ring was transporting girls from the United States to Hawaii and we prosecuted that gang successfully.

Also, during this same period, there was a famous San Francisco police graft where the police were taking money from madams in the houses of prostitution in the San Francisco area. That was one of the primary sources of graft money. The FBI got into that and I prosecuted one of those cases—indeed, the only case that ever went to trial. None of the state cases went to trial. We had a successful prosecution there.

Sharp: Do you remember the name of that case?

Zirpoli: I will have to think about it. I know that Jake Ehrlich was in the case. Jake Ehrlich is the lawyer who wrote the book, *Never Plead Guilty*. However, he pleaded his client guilty in that case. This was an important case because it also involved the McDonough brothers who were the principal bail bondsmen of San Francisco at that time. They operated their bail bondsmen office like you would a bank. They had a teller's window and everything. They were very wealthy. They had invested a lot of money in the old Bank of Italy and made a lot of money. They were using their money to put up bail for people accused of crime in San Francisco and they were the principal bail brokers. If you jumped bail, they'd send a man to England or wherever you were and bring you back, so that they wouldn't forfeit bail. Sometimes the bail was pretty high and, in fact, this did occur in one instance which was $40,000 bail. They went to England and brought back the defendant and the court remitted the bail.

Sharp: Forty thousand dollars sounds like an extraordinary sum.

Zirpoli: At that time, it was. These were some of the activities that were transpiring. There were others. I would say, I must have prosecuted, all told, maybe ten or fifteen white slave cases in that period. In later years, the government quit prosecuting those cases.

Sharp: They were too numerous, or the prosecution couldn't get the evidence?

Zirpoli: I guess they would now, but they won't pay much attention to that now. People move about regardless of their relationship today, they don't feel the same moral obligation to prosecute that they did then.

Unraveling the Tale

Sharp: Let's move on to talk about the "Baby Face" Nelson material.
Zirpoli: All right. In 1933 when I came in, there were very few FBI agents, so you knew them personally. There was a question of locating "Baby Face" Nelson. That question arose. So I talked to the FBI and heard about [Joseph Raymond, "Fatso"] Negri and I then decided I would try to help them. I went undercover.

Sharp: Let me just stop you there. You said went undercover as Tony Damico. Was that something that you volunteered to do or was that something that was assigned?

Zirpoli: No, that wasn't assigned to me. I was under no obligation to do anything of that character. They were telling me about their problems. I indicated that because of my knowledge of Italian I might be able to telephone his mother and maybe as a result of that, make a contact with Negri. So I took that name, and we put a tap on the phone of his mother. It wasn't proper to do so, but we did it. We had an FBI agent in an abandoned service station and I got my brother-in-law, who was then in high school, to be excused for a week from school so he could sit there at the phone because of his knowledge of Italian. He is now a lawyer.

Zirpoli: I got to know something about FBI agents. These were the agents that were ready to shoot things out. These were not accountants or investigators of bank embezzlement. These were agents who were trying to track down gangsters. As I say, they put the tap on the phone of Negri's mother, and, unfortunately, the tap went on one day too late. If we had the tap on a day sooner, I might have made a contact with Negri. But anyway, I never made the contact.

We also knew that John Paul Chase was a friend of "Baby Face" Nelson, so what we did was to try to contact people who knew Chase. Chase's girl friend more or less submitted herself to a pickup by the FBI because Chase wanted to know if they had photos of him. They took her to the Shaw Hotel to interrogate her. They didn't take her before the nearest United States magistrate, as they were obligated to do. There was no magistrate then— it was the United States commissioner.

An attorney named William Ferriter then filed a petition for writ of habeas corpus for her release and I filed a pleading in those days known as a demurrer on the theory that he had not alleged that he was doing this at her request. The court sustained my demurrer and dismissed the petition. In the morning after the hearing in the afternoon, the FBI shipped her out of the Shaw Hotel to Illinois and when the attorney filed a new petition the next day with the proper allegations, I filed a return to the effect that this young lady was no longer in the jurisdiction of this court, and that ended the matter.
Zirpoli: She talked, and as a result of her conversation, they did catch up with "Baby Face" Nelson and John Paul Chase and Nelson's wife in Barrington, Illinois. In the shoot-out there, two FBI agents [S.P. Cowley and H.E. Hollis] were killed and "Baby Face" was also killed. After cruising around for quite a while, they finally went to look for a priest for the last rites for Nelson.

They picked up Chase and Nelson's wife [Helen Gillis] and then they started looking for Negri.

They eventually picked up Negri in Portland, Oregon. Negri was coming out of church, midnight Mass [1934]. He had been attending Mass with a madam up there. As he came out and walked down the lane, the church was set back, he suddenly saw the FBI agents and all guns were pointing at Negri. They took him immediately to San Francisco. In so doing they did not have to go through formal removal procedures because Negri consented to the removal. They brought him to the jail in Piedmont, a very elite jail, but it hadn't had any prisoners for a long time.

Then from the jail, they brought him to my office for an interview and the first question I asked him was, "How do you like that jail in Piedmont?" He said, "Oh, that's the jail for you! They even give you napkins." [laughter]

I then interviewed him and we had a series of interviews. Some of the statements given by Negri are reported at great length in the files.

Negri first met Nelson in 1932 when Negri was working for Hans Stritmatter and Joe Parente who were notorious rum runners at the time. They hired some of these fellows as toughs to go with the trucks to avoid having their liquor hijacked. Chase was also so employed. The employment arose through Graham and McKay, notorious Nevada gamblers and proprietors of a hotel and gambling institution, the Golden Hotel.

Nelson actually told these people about the fact that he had been an escapee from the prison in Joliet [Illinois] and then they read in newspaper articles and particularly in a magazine story about this shoot-out with [FBI] Agent Baum, who was killed and [FBI] Agent Newman who was wounded. At the time he was under indictment in Wisconsin and was then a fugitive from justice. The [Lindbergh] statute which applied to interstate flight then applied to him and it would apply to anyone that harbored and concealed him.

As I say, Nelson came back to this area. He wasn't a rum runner anymore. He was now a part of the Dillinger gang and a bank robber. He went to Spider Kelly's cafe on the Barbary Coast where Joe Negri was working as a clean-up man. He cleaned up the place,
Zirpoli: washed the windows and the floors and the bathroom and everything else. Nelson saw Joe Negri and asked him how he was getting along. Joe said things were pretty tough, he didn't have any money, and "Baby Face" peeled off $700 and gave it to him and said he would be in contact with him. "Baby Face" contacted him later. I have all of these dates written somewhere. Let me see. [pauses to go through notes]

Negri had first met Gillis ("Baby Face") in March or April of '32 while they were employed as truck drivers for Hans Stritmatter and Joe Parente, who had a liquor smuggling gang at the time. Gillis told Negri that while serving a life sentence in the state penitentiary in Illinois on a bank robbery job, he escaped and made his way to Reno, where he contacted William Graham, of the notorious Graham and James McKay gambling syndicate. Graham provided refuge for Gillis and thereafter sent him to see James J. Griffith, proprietor of the Andromeda Cafe on 155 Columbus Avenue in San Francisco. At the time Gillis saw Griffith, Gillis was using the name of Jimmy Burnett and also the name of Jimmy Burnell. Griffith introduced him to Stritmatter, proprietor of the Bridge Cigar Company in Sausalito.

The rum running activities of Stritmatter and Parente at the time were extensive and required the hiring of a number of toughs to serve as armed guards. Stritmatter gave Gillis a job in which he was working in association with John Paul Chase and Joe "Fatso" Negri, Anthony "Soap" Moreno, Louis Tambini ("Doc Bones"), who had read about Nelson's activities in True Detective magazine. I think it was True Detective, July of 1932.

Negri didn't see Nelson again until sometime before Christmas of '32 when he met him in Spider Kelley's bar. Then he didn't see him again until January of '34 when Nelson told him to meet him in the Vallejo General Hospital. Negri was familiar with the hospital because it was a stop-over station for them during their rum running days and it was operated by [Thomas C.] "Tobe" Williams, also known as the Guniff from Galway. Negri had heard that "Tobe" was all right and could be trusted. He went to the hospital and asked "Tobe" where Nelson was. "Tobe" told him he would be in in a little while. He met Nelson in the reception room where in a bookcase they had a book with false covers in which Nelson used to keep some of his cash. For the purposes of the trial we had him describe exactly where the reception room was. We reconstructed that room, the bookcase, and everything else.

After meeting with Nelson at the hospital they went to a restaurant to eat with Nelson's wife, who later checked into the hospital for medical attention. Negri would make various trips to the hospital and bring her flowers on some occasions. There Negri met Chase and Nelson and they agreed that they would contact him.
Zirpoli: Nelson and Chase asked Negri if he wanted to join their gang, which meant he was going to join "Baby Face" and Dillinger and Hamilton and who were the others—"Pretty Boy" Floyd. Anyway, he would be joining up with this gang and he wanted to know whether he had to participate in bank robberies. They told him, "No, you don't have to. We've got the mob to do that. You will be the messenger boy." So he knew that that was going to be his assignment and they would let him know when they wanted him by sending a letter to "Frenchy" Mazet (also known as "Blondie"). His true name was [Eugene] Gene Mazet.

Sharp: Right, that's the name that I have.

Zirpoli: Gene Mazet, yes. When Negri finally got a letter in June of 1934, he was told to go to Chicago. He did go there, and there he met Dillinger, Hamilton, Van Meter, Jack Perkins, and some others whose names I don't recall.

In one of the interviews Negri said that the day after the disappearance of the Reno bank teller, Frisch, he met Chase at the bank buffet restaurant on 22nd Street in San Francisco, which was operated by "Soap" Moreno. Chase told Negri he had been in Reno and had to get out in a hurry because things were getting too hot for him—Chase's Buick had blood on the back seat and was suspected to have been used in connection with the disappearance of Frisch and eventually was torched.

Frisch was to have been the government's star witness against Graham and McKay, who were charged with unlawful use of the mails to defraud. Of course, his disappearance ended the prosecution, so to speak, of Graham and McKay, but brought many FBI agents into the Reno-San Francisco area and prompted Chase and Negri to go to Chicago.

There they planned a big bank robbery in the countryside and Negri was to be the messenger boy. They cased the place first and mapped out the roads. They committed the robbery and met Negri at an intersection and gave him the suitcases with the money, which he then brought to the hotel in Chicago. When the members of the gang returned to the hotel, they each gave Negri a tip out of their respective share of the money. So each one gave him $100 and he ended up with $600 or $700 for his role in the robbery.

In one of those robberies an officer was killed.

Sharp: That was Baum, the FBI agent?

Zirpoli: No, Baum was killed when "Baby Face" escaped from Joliet and the FBI was trying to pick him up.
Sharp: That's right, but I also have Cowley and Hollis. Is that--

Zirpoli: No, Cowley and Hollis were the two agents that were killed in Barrington, Illinois. The fact that an officer was killed in the bank robbery constituted some leverage on Negri, and I am sure the FBI used it to get his full confession.

Sharp: So there are three agents that were killed. The ones that you are just going to talk about, Baum, Cowley, and Hollis. They were all agents that were killed as part of the search for "Baby Face" Nelson--

Zirpoli: That's right, and Newman was wounded. Now, Newman became important to us because he testified before the grand jury in Wisconsin and he was the first witness we called to the stand because he was able to lay the groundwork for the court's jurisdiction, flight in interstate commerce.

Negri, the day before the trial, was in my office with me and Tom [Thomas C.] Lynch and Vernon [E.] Criss, the FBI agent. It was approximately noon hour. I said to Negri, "When you testify tomorrow--" And he said, "Who me? I'm not testifying tomorrow." I said, "It's lunch hour. We are going to go lunch, Tom Lynch and I." We left him with Vernon Criss, the FBI agent, and I said, "We'll meet again at two o'clock."

Now, I don't know what Vernon Criss told Negri, and I never inquired. But after two o'clock when we came back, Negri said he would go, he would testify. Negri was scared stiff, naturally. These mobsters that you are talking about, not only Nelson but the other people that he was going to implicate, would want to seek their revenge in some fashion. But he agreed to testify and he did. As I say, we put agent Newman on first and, as Tom Lynch said, "We put Negri on and we go for broke. If he fails it, that's the end of our case."

Well, he didn't fail us. In fact, after he testified--first Newman was on--and after he testified for about fifteen minutes, I saw him [Negri] down in the marshal's cage. Negri said to me, that after he had been testifying for about fifteen minutes, "I could see the pained expression on Johnny Taaffe's face." (He was chief counsel for "Tobe" Williams and the other defendants.) He also said with gestures of his fingers that he could tell that the muscles of Taaffe's anus were twitching. [laughter] That was his way of expressing the effect of his testimony.

As I say, the trial took place, I think it was in March of '34 or '35.

Sharp: In '35.
Zirpoli: In '35 and we had good lawyers; it was a great show. There was Judge Walter C. Lindley sitting there. He had thirty-five years experience as a presiding district judge. He had previously tried the Al Capone case; he was known throughout the country. The prosecutors were myself; Robert [B.] McMillan, who was a very able trial lawyer (he was a senior lawyer, he was well along in years, but a very able trial lawyer with a lot of prior experience); Tom Lynch, who later became [state] attorney general*; Valentine C. Hammack, who became one of the prosecutors of the Japanese war criminal trials, the [Hideki] Tojo trial.** We had assistant U.S. attorney Miles Pike, who came down from Reno. He later became the chief justice of the supreme court of Nevada. This was the prosecution crew.

Against us we had some very fine lawyers and I have listed them all. You may have a list of them there, I don't know.

Sharp: I do, yes, among them John Taaffe.

Can I just stop you right there because I have a lot of questions about the trial? Let me just ask you about the lawyers for William Schivo, [Ralph] Rizzo, and the others. They had really big name lawyers to defend them, and I wondered how was it that they got these lawyers to begin with?

Zirpoli: They retained them. Of course, there was some feeling among some of the lawyers, Johnny Taaffe in particular, that the government was going to indict these people for harboring and concealing Nelson, but they weren't too sure. They made up a list once at a race track and one of these—I don't remember whether it was Schivo or Rizzo—talked, so we let him go. Of course, Negri pleaded guilty. He got a six-month sentence.

But "Tobe" Williams could well afford the best and Graham and McKay had used Johnny Taaffe as their lawyer in the mail fraud case in New York and they paid him well. In fact, they paid him $25,000 for one of the cases. However, they won most of it back while playing cards on the train on the way out to New York for the mail fraud trial.


**Tojo was the prime minister of Japan during World War II. He was tried as a war criminal and executed.
Anyway, they were able to hire them. You had [Nathan C.] Coghlan, dean of the criminal bar, the oldest member of the bar; Johnny Taaffe, undoubtedly the best trial lawyer since Earl Rogers; Harry McKenzie. There were two McKenzie brothers, they were both able. McKenzie was a fellow you had to worry about because he could introduce a lot of levity into a trial and we wanted this to be a very serious business.

We would plan every night. We would meet in the grand jury room and plan our strategy for the next day. We did a lot of things that maybe you wouldn't do today. They thought we were going to bring a witness to testify about one of the defendants whom they claimed had been beaten up by the FBI. We had no intention of calling the witness, yet we marked a lot of exhibits which related to that witness. This marking of the exhibits for identification caused the defendants' attorney to prepare for evidence we did not intend to introduce.

##

Sharp: You mentioned earlier that Negri and the others were prosecuted under the Lindbergh--

Zirpoli: The Lindbergh kidnapping gave rise to the introduction of legislation in Congress which made it possible to prosecute all of these interstate flight cases. So what we were doing was utilizing the laws enacted by Congress arising out of the Lindbergh kidnapping.

Sharp: The law was passed in 1934. So by the time you had this case, it was a relatively new law.

Zirpoli: Yes.

Sharp: So you were prosecuting him under essentially brand new legislation.

Zirpoli: Yes, and we did it under the conspiracy statute, however, to bring everyone in, and the conspiracy statute carried a maximum penalty of only two years.

Sharp: What I have is a violation of Section 246 of Title 18 and Section 88.

Zirpoli: Eighty-eight would be the conspiracy statute, as I recall it. Now, the code has been amended, but as I recall it, that was the statute.

Sharp: So what really was the connection between the so-called Lindbergh law and the trial, the case of U.S. v. Negri et. al.?*

Zirpoli: The Lindbergh law proceeded to make flight in interstate a part of Congress's jurisdiction, i.e., interstate commerce. Once this was established we then used the conspiracy statute to bring in all the named defendants.

Sharp: If you hadn't had those changes by the time this particular trial had come about, how differently would Negri and the others have been tried?

Zirpoli: Probably by state authorities.

Sharp: And it would have been possibly a lesser offense?

Zirpoli: I don't know whether it would necessarily be a lesser offense because the state crime violations carried with them in many instances more severe penalties than the federal law carries.

Sharp: What were the main problems or main issues for the prosecution in a case like this one?

Zirpoli: The main problems for the prosecution were to prove that these co-conspirators actually harbored and concealed "Baby Face" Nelson, and did something to harbor and conceal him with the knowledge that he was a person who was wanted and was in flight for the commission of felonies. So it became important for us to have Negri testify about the conversations he had with the defendants, what they had read in the newspapers, True Detective magazine, and what "Baby Face" himself told him. They, therefore, had knowledge and having knowledge, if they furnished him money or housing or transportation or did anything of that character, they were aiding and abetting.

Now, the defense was, for instance, that "Soap" Moreno was forced to do it, that "Baby Face" took him for a ride down to the beach not too far from the Cliff House. They went out on the beach, and Nelson took his gun out and twirled it on his finger and told him, "We need some help." These fellows were quite reluctant to help "Baby Face" at this time. But even though they were reluctant, the fact remains that they did.

Sharp: I was intrigued to see that there were so many witnesses. I counted thirty-nine witnesses. Who decided the selection and the order of the witnesses?

Zirpoli: Basically, I did but with the help of [Robert] McMillan and [Thomas] Lynch. Miles Pike of Reno didn't play a significant role there. He came into the case because we had as one of the defendants, the fellow from Reno, [Frank] Cochran, and we were unsuccessful in getting the removal of Cochran's wife [Anna Cochran], and also because of other implications as they related to Graham and Mc Kay and possibly the disappearance of Frisch.
Zirpoli: But we had so many witnesses because you had to put everything together. It isn't enough just to have Negri testify. If Negri says they were at a particular hotel, we wanted a register of that hotel that shows that they were there. Or, if they stopped at some motel in Nevada, we wanted the people from Nevada there to corroborate what transpired. We wanted the flunky that worked in Joe Parente's place there to testify as to what happened. We were trying to corroborate Negri all of the way down the line, so wherever he said he was, we had someone who testified that that's where he was. Then we needed the nurses and the doctors over in the hospital.

Sharp: I had down that H.H. McPike was the U.S. attorney.

Zirpoli: That's right, Henry McPike.

Sharp: --And that he questioned Negri before the San Francisco grand jury in January of '35.

Zirpoli: Yes.

Sharp: I wondered if he then had an additional role once the trial actually began?

Zirpoli: McPike? No, McPike did not go into court to try cases. He ran the office of the United States attorney. This was an important case, so he became very much interested in it. When we arrested these people, we would bring them up to his office to question them. I remember "Soap" Moreno was brought to the office of McPike. I was there and I was doing the questioning in the presence of McPike.

Now, "Soap" Moreno had gone to the same grammar school I had gone to, so I was trying to say, "Look, Soap, for your own good, why don't you talk and tell us?" And every time I asked him anything, his response was, "I have nothing to say." No matter what question I asked him, he said, "I have nothing to say." So we didn't get anything out of Moreno. I was hopeful that he would become a witness.

None of these people talked except for Rizzo and Schivo.

They all had good lawyers, as I say—somebody paid them all—. Then you look over the list of their attorneys. Of course, now, Jake Ehrlich represented a man from Chicago, [Clarence] Leider, but he pleaded him guilty. There were several of them that pleaded guilty, so by the time we went to trial, the number that actually went to trial was not that great.

Sharp: I have a part of the list here. Joseph Sweeney.
Zirpoli: A very fine trial lawyer; Frank Hennessy who later became U.S. attorney; Jake Ehrlich, Nate Coglan, and Fred McDonald, who represented Grace Perkins, who was acquitted. I don't think he asked a question during the whole trial. He just sat back and as long as she wasn't mentioned he wasn't going to do anything, which was very smart. When the time came to argue to the jury, he said, "I don't remember hearing my client's name mentioned."

Tom Riordan, former assistant U.S. attorney; Sol Abrams, a former assistant U.S. attorney; and George A. Whitely of Reno, who represented Cochran--

Sharp: I have Thomas Riordan, Sol Abrams, and Richard Fuidge?

Zirpoli: Fuidge represented Mrs. Nelson [Helen Gillis] later. That was a very important situation there. She had served time in the Milan [Michigan] prison and there was a lot of sentiment that was going up in her favor, that after all, she was forced to do this, and she had her boy. It became a question of what should we do, so we agreed to give her probation because we found that the basic purpose of the prosecution had been served, and she had served time and we didn't see that we were going to get anything by prosecuting her further.

Since she was prepared to plead guilty on the probation, that's what we did. Otherwise, we would have had to go to trial and we didn't think the case justified going through this very delicate subject of correspondence between our office and the office of the attorney general in Washington, D.C., and there may be some letters in the file in relation to that.

Sharp: I think you need to name her for the purpose of the tape.

Zirpoli: Helen Gillis, ["Baby Face"] Nelson's wife.

Sharp: I don't remember seeing any exchange of the letters, but I did wonder about the handling of her because she was a woman, how differently she was handled because she was a woman.

Zirpoli: We handled her differently because she was the wife and we felt there was a certain amount of coercion as far as she was concerned, and they had her child. She had served time. This was a delicate subject for us. It was something we discussed. We wrote to the attorney general to get his okay which we got. As I say, Fuidge was going to go to trial. Fuidge was doing everything he could to build up sympathy for her in the press and elsewhere and the press was responding.

Sharp: I had down that she was tried separately and that she pleaded guilty.
Zirpoli: Yes, tried separately. In other words, we didn't try to prosecute her in the main case. She was in Milan [prison] and after it was over, we brought her case up. She was brought out here on a writ and she pleaded guilty. This was several months later, quite a number of months later; I guess at least six months later.

Sharp: I had down a note then that you had written a letter under McPike's signature to Homer Cummings, the U.S. attorney general, in May of '35, giving details of the Negri trial, how it turned out and everything. Also, you had asked authorization to enter a nolle prosequi as to all of the defendants' names in the indictment, which meant that you weren't going to prosecute any further. I am not sure if I understand why you sent the letter and why all of this had to be done?

Zirpoli: I don't remember. When was this?

Sharp: In May you sent a letter [5 May 1935].

Zirpoli: Oh, yes, we dismissed some of the people in the case. Let's see if I have an indication who we dismissed at the trial.

Sharp: I might have part of that—Arthur Pratt, Ralph Rizzo, and William Schivo.

Zirpoli: Yes, definitely two of them became witnesses, Rizzo and Schivo.

Sharp: Grace Perkins was acquitted.

Zirpoli: Yes, she was represented by Fred McDonald.

Sharp: Louis Tambini was acquitted, Eugene Mazet was acquitted.

Zirpoli: That's right.

Sharp: But the date of the conviction for the people who were convicted I have as April 5, 1935.

Zirpoli: The case was dismissed before trial as to William Schivo and Ralph Frank Rizzo. They furnished evidence which corroborated the government's case. Anna Cochran successfully resisted removal from Nevada, and the case against her was later dismissed. The case against Chase was dismissed because he had already pleaded guilty to the murder charge and was on his way to Alcatraz when this trial started.

Sharp: But with Chase and Anna Cochran, they were tried in 1938?
They were never tried. They were dismissed at a later date, probably 1938. Anna Cochran, the judge in Nevada refused to remove her. So she never went to trial and we later dismissed her case. Chase we dismissed because he was serving a life sentence,

Clarence Leider, of course, pleaded guilty and Arthur Pratt pleaded guilty.

There were two indictments returned. One was a corrective indictment, so the one that didn't go to trial, we dismissed that in its entirety. But I had Helen Gillis pleading guilty in December of '35, and Negri pleaded guilty.

I'll have to look at that file again because I thought that I had understood that in 1938 John Paul Chase and Anna Cochran were tried for a violation of the National Motor Vehicle Theft Act, for obstruction of justice and harboring a criminal, and for the murder of [FBI Agents] S.P. Cowley and H.E. Hollis.

No, Chase had already been tried and convicted for the murder. He was tried and convicted actually for the murder of only one of them. I have said two in more than one place, but they just tried him for the murder of one of the two agents. As I say, we may have carried her on the books and it was not dismissed until some time later, just as we may have carried Chase on the books.

I wondered some about the role of Judge St. Sure.

Judge St. Sure participated in all of the preliminary proceedings. The time to deposit bail came up and we had the bail hearings. Judge St. Sure presided over the bail hearings and motions. I remember at one of the bail hearings for "Tobe" Williams, Johnny Taaffe made a motion for the reduction of the bail and McPike was with me at the time. I asked Judge St. Sure for the right to interrogate "Tobe" Williams as to his assets and what would be a proper bail, consistent with his prior history. Johnny Taaffe refused to permit the interrogation of his client, and said that he would deposit the bail. He wasn't going to ask for a reduction if his man had to be interviewed. Of course, we wanted to interview him because we knew that he had a prior record of blowing the safe in Montana back in 1888 when he lost his leg (that's why he had the wooden leg). This was something that we wanted, and as long as we were there, let's make a record.

You have to remember, too, that when you get back to 1933, '34, and '35, the nature of the news was completely different from what it is today. Today the papers are full of crime, it's true, but a case like the "Baby Face" Nelson case or the Chinese slave case, this was big headline news. You weren't worrying about Iran or Israel or
Zirpoli: nuclear energy or anything of that character. These were the big
news items; any little thing that happened in court was a big news
item.

In those days, I filed petitions to cancel a certificate of
citizenship of three persons. There wouldn't be a single newspaper
story about the three, rather there would be separate stories
about each one! The nature of the news was so different in those
days.

Sharp: That was one of the things that I wanted to ask you about because
you had mentioned that especially this case got just a lot of media
attention. How did you have contact with the reporters? Was it a
matter of them coming to see you?

Zirpoli: They'd come to see you every day! If I told something to a reporter
of the afternoon paper, the reporter for the morning paper (a woman)
would come in to see me the next morning and she would be as sore
as hell, and said, "I'm not going to print your name in the paper
anymore, I'm not going to do that because you gave him a scoop." Well, I wasn't trying to give anybody a scoop and people were fight-
ing for scoops then, too. They wanted to break the news first.

Sharp: What did you think of the reporting of the "Baby Face" Nelson trial?

Zirpoli: Oh, it was fairly accurate, certainly as accurate as what you get
today, maybe better. You had reporters assigned full time to our
court. There was a reporter from the Examiner, for the Chronicle,
the Call-Bulletin, and the Daily News--four papers.

Of course, I have to admit that being a young lawyer, I wanted
to make my way in my profession. I wanted my name to become known
and I was pleased to be quoted in the press. I don't give a damn
today. I prefer not to be quoted at all. They can forget me
altogether and I'd be happy, but that was a different year, a dif-
ferent period in my life, and I was looking forward to that.

So I was happy to talk to reporters, and there weren't the same
strict rules about talking about cases that you have now.

Sharp: You could say pretty much whatever you thought?

Zirpoli: That's right.

Sharp: Was McPike a stickler about talking to reporters or suggesting how
you handle reporters?

Zirpoli: No, no, the only time I ever caught hell was from the Attorney General
of the United States when an article appeared in True Detective maga-
zine, "G-Men Strike." He said that a U.S. attorney should not lend
his name to an article of that nature.
Sharp: I was going to ask you about that. How did you come about writing that?

Zirpoli: There was a local writer. I can't even think of his name, a very well-known local writer who later wrote quite a number of books and he was interested and wanted to write this story. He said, "Al, I would like to write the story as told by you."

So we wrote the story as told by me and we talked about things like these mobsters meeting in the back of a red brick house to purchase bullet-proof vests, that Perkins was the salesman, and the bullets could splatter against the red brick wall of the schoolhouse! [laughter] So it made an interesting story.

Sharp: Did he come and sit in the courtroom and listen to get the flavor of it?

Zirpoli: I don't remember how much attention he paid, but he was following the case and then he wanted to write the story. He also wrote the story on the white slave traffic, the Chinese case. He made a big story out of that. Although I prosecuted the case it was "as told by Valentine C. Hammack." I said, "Go ahead, you tell the story." That's the way it was then.

Sharp: Did you wait until the trial was all over to start working with this--

Zirpoli: Oh, yes. Jennings was his name, the writer.

Sharp: I would like to go on a little more, if you have time, and ask you about the habeas corpus cases and Alcatraz. Some of the questions I have are from the paper that you gave, the remarks that you made on the sixth.* Some are from the book written by Warden [James] Johnston about his experiences in Alcatraz.** There was a terrific number of habeas corpus petitions filed.

Habeas Corpus Questions and Alcatraz Island Prison

*See footnote on p. 27.

Zirpoli: Yes, Warden Johnston carries a number in excess of fifteen hundred, but I said approximately sixteen hundred because there were other cases since the writing of that book, a number of cases.

Sharp: But at least in Johnston's period a very small number of hearings were granted, something like fifty or fifty-two.

Zirpoli: When you grant fifty hearings, those were a lot of hearings. You have to remember that some of those prisoners filed as many as fifty petitions.

Sharp: I was amazed to read what you said and what Johnston himself said, that he thought it was therapeutic for--

Zirpoli: Johnston, that was his theory. As far as Johnston was concerned, he didn't want them to spend their time figuring out ways to escape, so he encouraged it.

Sharp: It strikes me that that could have been a real disaster in terms of the district court.

Zirpoli: Well, it was. It created quite a problem. That's what forced me to innovate as to the method by which to handle these cases, but those fellows [prisoners] wrote pretty good petitions, far better than what you get out of the prisons today in the final analysis.

Of course, we had one of those fellows, Verhuel, who was a writ writer. He helped quite a bit, but Verhuel, I don't think he was ever successful. I don't recall any in which he himself was successful and I talked to him about it at one time. He did tell me that he brought about the release of a prisoner once. It was when he wasn't in jail and he was on the outside. He had some cards printed "attorney-at-law" and then showed up in prison with these cards. In the meantime, the man he was to see had requested that he talk to his attorney and he named Verhuel or whatever name he was carrying as his attorney. The attorney showed up with his card at the appointed time having been granted an appointment to talk to the client. He went into the prison and then took a gun out of his briefcase and when the guard came in with the prisoner, he marched everybody out of jail. But they didn't get very far. [laughter]

Sharp: Let's talk just a bit about the procedure of filing a writ in those days. How did you begin the process of filing a writ?

Zirpoli: The prisoner would prepare a petition for writ of habeas corpus and he would file it with the clerk. If he was indigent, he would execute a pauper's oath with it. The clerk would then file it and the court would direct the issuance of an order to show cause. Unless it was totally frivolous on its face, he ordered a show cause.
The order to show cause would be issued and would be served on the United States attorney.

The United States attorney would then have to respond to the order to show cause by moving for a dismissal or filing a return in which he would indicate the reasons for the detention, or set forth that there was no violation of the right of assistance of counsel, or whatever the claim happened to be. The court would then review them.

For those that had merit, the judge would issue the writ and direct the production of the body of the prisoner in court. That meant we had to bring these fellows in court and we didn't relish the idea of bringing these guys over here [to San Francisco] under guard as often as it would have been necessary. So when we had forty of these cases pending--approximately forty, I don't remember the exact number--we then evolved the idea of doing what they did in the old deportation Chinese immigration cases.

I talked to Jack Shirtzer who was the clerk for Judge St. Sure, who had been around for nearly fifty years. He told me what they used to do at the turn of the century.

So I worked up a program whereby we would name the United States commissioner as a master to hear the case of the prisoner at the prison. He would hear the testimony at the prison and would report to the judge for disposition. That made it fine. We didn't have to bring the prisoners over. We only had one person to go over, the commissioner.

So I sent the plan to the [U.S.] attorney general [Homer S. Cummings]. He sent me back a wire affirming it. After we were reversed by the [U.S.] Supreme Court, I got an invitation to go to Washington [D.C.] though I was only an assistant, to attend a conference of United States attorneys. I couldn't understand why they wanted me there. But I brought along all of this stuff on habeas corpus. When I got to the Department of Justice building they said, "You are wanted in the solicitor general's office. I went up to Solicitor General Charles Fahy, I came through the door, and Fahy said, "Where in hell did you get that habeas corpus idea?" I reached in my pocket and pulled out my telegram and showed it to Mr. Fahy and that ended our meeting! [laughter]

Were the 2255 petitions handled the same way?

The 2255 were handled the same way up until the amendment of the code. Then you had to file your 2255 in the court in which you were convicted and that's why [Robert "Birdman"] Stroud had filed
Zirpoli: a habeas corpus and then he filed a 2255. I think the last one he filed was back in 1960. He was still making an argument of double jeopardy. He had a possible basis for his argument because he was tried once and then twice. The second time the solicitor general went in and confessed error. So he said, "You can't try me a third time." But they did and the [U.S.] Supreme Court sustained it.

Sharp: You talk about this innovation of using the U.S. commissioner as a master. I wonder if that was the extent of the changes in the Northern District Court in this early period of this huge increase in the number of habeas corpus and 2255 petitions?

Zirpoli: Most of them you could handle easily enough because a great many of them--most of them--did not have merit. Many were repeat petitions that had already been passed on. Finally, some courts got to the point where if somebody filed as many as those fellows filed at Alcatraz, they would issue a direction to the clerk of the court not to permit further filing. Also, we got to the point of eventually using prepared forms for these fellows so that they would have to comply. The form was one in which you had to list all of your possible grounds and exhaust them all, so you couldn't try one time and another another time.

Sharp: I wondered if that created additional bureaucracy, additional forms.

Zirpoli: No, the law clerks handled it. When the number got great because of the state filings, and we reached over six hundred a year, and we had more than any other district in the country, then we had permission for the creation of a special law clerk known as a writ clerk.

This writ clerk has all of the cases presented to him. They all come to him and he screens them and prepares a sheet as to what he thinks is an adequate disposition. That then goes to the law clerk of the judge, the law clerk reviews it, and if he agrees, you can prepare an order.

In most cases you can dismiss because it's frivolous, or there is no basis, or no constitutional question. They may raise a lot of questions that are not constitutional in nature and so you can dismiss those without any problem.

One of the fellows tried to escape when he got here, too! [laughs]

Sharp: You mentioned the four cases.

Zirpoli: There should really only be three because I would exclude Price.

Zirpoli: Yes.

Sharp: I need you to tell me about those and why they were notable.

Zirpoli: They raised the question of assistance of counsel and the district court didn't give them a hearing on it. The court of appeals sustained the district court and the Supreme Court reversed it. Holiday, of course, was the one that had to do with this new procedure that we had innovated whereby the prisoners were brought before the U.S. Commissioner for hearing. The [U.S.] Supreme Court said no, "You've got to bring the body of the party before the court that issued the writ, you can't do it otherwise."

That became a somewhat important principle and that is reflected even to this day in the ruling of the [U.S.] Supreme Court declaring unconstitutional the statute which gives the bankruptcy judge the powers of an Article III judge when he is not an Article III judge; therefore, he cannot make a definitive ruling nor actually try a case. Under the bankruptcy law as amended, we were giving all of these powers to the bankruptcy judge and the Supreme Court said no, you can't do it, the commissioner was not a judge.

Sharp: I thought I had seen that connection, but I am glad that you made it really clear.

The last question is sort of a hindsight one, but I wondered generally what your perspective was on the expansion of the use of habeas corpus by prisoners, especially now having been a federal judge and having been on the receiving end of this multitude of cases.

Zirpoli: The habeas corpus is abused, no question about that, but there isn't anything you can do about it. This is something that is provided for in the constitution and if the constitution has any meaning, that's why it has to be preserved. We have had committees of the Judicial Conference of the United States working on it, to find procedures which will minimize the work and the responsibility of the judge.

There is a committee headed by Judge [Ruggero J.] Aldisert of the Third Circuit which has prepared some specific rules for habeas corpus and 2255 proceedings, and also for prisoner rights proceedings so that we ended up by preparing a special form. The prisoner has to go through the form and he sets forth that he has exhausted all of his state remedies, and sets forth all grounds listed on the
Zirpoli: form that can possibly apply. He also has to establish that he has exhausted his state remedies, otherwise, the court will not entertain jurisdiction.

So you are able to throw so many of them out for lack of exhaustion of state jurisdiction and that takes care of them immediately. Or, somebody will make a claim that obviously is frivolous and you throw it out. Some people have written time and time again like a fellow named Harper now who must have filed ten or fifteen state prisoner petitions. Sometimes you give him leave to amend, and if he can't make a meaningful amendment, then you deny it outright.

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Further Notes on Judge Louderback: The Herbert Fleishhacker Embezzlement Trial

Sharp: I thought we would start just with a few notes on Fleishhacker. You had told me there was a trial for embezzlement and acquittal in 1938. That was Herbert?

Zirpoli: That was Herbert Fleishhacker, yes. He was president and chairman of the board. The bank was in great difficulty. That was the Anglo Bank.


Zirpoli: It was in great difficulty and they had to get some help from the government.

Sharp: That was the $22 million that the Reconstruction Finance Corporation--

Zirpoli: Yes. In addition, they got some assistance, as I recall it, from Standard Oil. They named a new president, whose name I don't recall at the moment. When the investigation turned to Herbert Fleishhacker, it revolved around a report that I had received from the FBI which indicated malfeasance on the part of Herbert Fleishhacker in a number of situations. The statute of limitations had run on most of them.

However, there was one instance wherein the statute of limitation had not run and that related to some stock that he owned in a shipping company that owned some property in China, and he had pledged this stock with the bank. He proceeded to sell the stock, which had been pledged to the bank, and received checks. I think
Zirpoli: there were eleven checks of, I think, $5000 each—I am not positive of the figure—which he received, endorsed, and cashed. So we charged him in an indictment with separate counts for each check. He was represented by Theodore Roche and another lawyer who became a judge in San Mateo County. I can't think of his name at this very moment, a very fine lawyer.

Because of the importance of the case, Frank [J.] Hennessy of the United States attorney's office decided to sit in the trial with me so that I wouldn't have to shoulder the full responsibility, although I tried the case and this was my assignment, bank embezzlement.

Fleishhacker was a great benefactor of the city and county of San Francisco. He gave them all the land where they have the zoo, Fleishhacker Zoo and the Fleishhacker Pool, although he also owned adjoining lands which acquired greater value as a result of that. So there was the problem of prosecuting a well-known figure in the community and a community benefactor. The jury acquitted him. We tried to be fair. There were things that we could have brought into the trial which would have been prejudicial, but they wouldn't have been fair, so we didn't.

I remember when the jury went out in the afternoon, they deliberated and then they went to dinner. Theodore Roche was terribly worried that if there was conviction what would happen to Mr. Fleishhacker. If he wasn't eighty, he was pretty close to eighty in years; he was in his late seventies at least. I tried to explain to Fleishhacker's attorney the procedure, and that for purposes of appeal, he could remain free on his bail.

The jury went out to dinner at six o'clock. The judge didn't go out to dinner until at least seven-thirty and he went to the Bohemian Club. It was Judge Louderback. The jury came back with a note around eight o'clock saying, "May we convict him on some counts and acquit him on others?" But, the judge did not come back from dinner until nine o'clock. By that time the jury had decided to acquit him on all counts. When they came in with the verdict, it was a verdict of not guilty. At the time, I was disappointed because this was a big case and I would have liked to have won the case. But with the passage of time, all factors considered, I now don't regret the fact that I lost.

Sharp: What was that bit of evidence that you could have brought in, but you didn't?

Zirpoli: He used a check, for instance, on one occasion for $700 or $800 (I think it was $800) that he had made payable to a lawyer. He then endorsed it and had his secretary go down and cash it. He bought
Zirpoli: several copies of the book on the first hundred days of the Franklin Delano Roosevelt administration.

Sharp: So introducing this would have strengthened--

Zirpoli: It was an indication that he was disposed to do this, but I thought that that would be unfair, so we didn't do it.

Sharp: Did this particular case give you any more insight into Judge Louderback?

Zirpoli: Oh, he tried it well. I have no quarrel with the way the judge handled the case. The only quarrel I had was had he been back from dinner on time, it might have been a different story. No, by this time the impeachment proceedings were long past and I have had no quarrel with his conduct as a trial judge except that he was a strict disciplinarian. You had to be careful about approaching the witness box and how you handled exhibits and things of that character.

The Northern District During World War II

The Alien Enemy Control Board

Sharp: I would like to move into talking about the Alien Enemy Control Board.* As sort of an introductory question, I wondered if you had been involved in any work in the U.S. attorney's office with respect to the aliens before the Alien Enemy Control Board.

Zirpoli: Oh, yes, in a small sense even before Pearl Harbor. I was involved in that I knew and was aware of the fact that the FBI was preparing lists of possible enemy aliens in the event we were to find

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Zirpoli: ourselves in a war. So they had already prepared lists of members of the German Bund, the Italian-American veterans of World War I, and certain Japanese societies. In particular the one I recall, as I used to call it, was Hokobei, although I don't see that name in any of the court opinions (not that there would be any particular reason to have their names in there). But these were societies which were truly Japanese in nature with clear allegiance to the emperor.

So these lists were prepared by the FBI and we picked them up the day of and the day following Pearl Harbor.

Sharp: Did that set into motion quite a few activities within the U.S. attorney's office?

Zirpoli: It set in motion the activities in the sense that these arrests had to be on a so-called presidential warrant which I was authorized to issue and to seek approval of the president. What I would do was prepare a list of the people who were apprehended and indicate the reason therefor. So the list would be—the following were members of the German Bund, the following aliens, and they were picked up; or the following Italians were veterans of World War I, they were picked up because having once fought for Italy, they might be disposed to do something again; and these following were members of the Hokobei Society.

I don't recall the exact number that we picked up. I think within the first two days, we must have picked up a thousand to fifteen hundred people and they took them all down to Sharp Park.

Sharp: They had made some arrangements for them to be kept at Sharp Park?

Zirpoli: It was the immigration center and they had the facilities.

Sharp: I wasn't at all clear, and I told you this in my letter, about the dates that the board was operating. I wasn't really sure when it started and when it finished its work. Do you recall?

Zirpoli: I can't give you the exact date, but the board was created for the purpose of hearing cases against enemy aliens, so to speak. For instance, all of those who were picked up were given hearings before the board.

Sharp: So some time after Pearl Harbor the board would have gotten going?

Zirpoli: That's right and we had on the board [Judge Edwin J.] Owens of Santa Clara. I have forgotten the name of the professor from Stanford, but you have it.

Zirpoli: Barclay of Stanford; he's still alive. Then we had a local contractor.

Sharp: That was the citizen member?

Zirpoli: Yes, but it was the name you--you have the name Harrison that I don't recall.

Sharp: You don't? I had an interesting note about him. That is Leland Harrison and he was a San Francisco attorney who was apparently from the Phleger firm--

Zirpoli: Yes, Maurice Harrison.

Sharp: I have Leland. I wonder why.

Zirpoli: We also had a man from the Lillich firm, Ira Lillich, but Ira Lillich resigned shortly after he was appointed. I don't think that he had any sympathy with the program.

Sharp: Do you mean he opposed the program?

Zirpoli: He opposed the program and its method of operation--with some possible justification.

Sharp: But you don't remember this Mr. Harrison at all?

Zirpoli: There is Gregory and Maurice Harrison, the only two I know.

Sharp: All right. Back to the dates, did the board then end its operations after the internment, the general internment began?

Zirpoli: No, some of it continued because I remember we even went down to New Mexico to conduct the hearings for the Japanese, some two hundred hearings in New Mexico near Santa Fe.

Sharp: So it would have gone on probably through May or even into the summer?

Zirpoli: Approximately, yes.

Sharp: Could you just set out the main issues that the board had to deal with then?

Zirpoli: The purpose of the board was, of course, to examine the individual involved and ascertain his loyalty and whether the individual was a security risk. Now, if an Italian was known to have a Fascist uniform or a Ballila uniform (which was for the young Fascist group), then we would feel that he had some sympathy. For instance,
Zirpoli: if one of them was arrested, and they found the uniform in his home, he would have a pretty tough time convincing the board that he would not constitute a national security risk. If we had someone else who made Fascist speeches and was known at rallies to raise his hand in salute to the Il Duce, we had a pretty good idea that he would be of questionable loyalty.

These questions also arose later with citizens because certain American citizens of Italian origin were also excluded from the area. They were not interned, that's true, but they were excluded. Your background and your history determined whether you should or should not be excluded.

There was a reference in one of the briefs of Mr. Purcell to a prominent San Franciscan who was excluded, and that was Sylvester Andriano, who had been a member of the [San Francisco] Board of Supervisors, president of the Police Commission. He was a very active church man, but he happened, unfortunately, to also be the attorney for the consul general of Italy, which was a good relationship from the point of view of an attorney because it brought him a tremendous amount of business, particularly probate business (people who died here and had relatives or heirs abroad). He was also president of the Italian school. He was also president of the Italian-American Chamber of Commerce. The sad part about that is that the reason he was elected president of the Italian-American Chamber of Commerce is because we didn't trust the candidate who was opposing him whom we felt was a Fascist. Now, as I say, Adriano did not try to test the constitutionality of the order.

Sharp: He left, yes.

How long would the hearings take for, say, one person?

Zirpoli: Oh, I would say, depending upon the parties involved, normally they wouldn't take more than say twenty minutes to half an hour. What would happen is, as the U.S. attorney, I would present the case to the board, which consisted of having the FBI read and give us all of the evidence it had (much of which was undoubtedly hearsay), but we weren't going by the usual rules of evidence that apply in a court of law.

Based upon the report of the FBI and our interrogation of the alien involved, we would make—not I, but board—would make a determination.

The only control over the agent that I suppose existed was exercised by me. If he got too far afield or if the agent offered an opinion, I would call him on it and tell him he had no business offering an opinion, that all he was there to do was to give us the
Zirpoli: facts, and that the decision as to whether the person was loyal or disloyal was up to the board, not to the agent.

I remember I got into a little squabble with one agent who was trying to offer an opinion.

Sharp: There was some mention that some of the agents were a little overzealous.

Zirpoli: That's right, and when that happened, I would tell the agent (we'd have a court reporter), I'd say, "Let's put your comment on the record." "If you feel this way about it, let's put it on the record," and they would back off. So, as I say, these were problems we had.

Now, for instance, we had one fellow that worked for the Bank of America who was a definite Fascist. He used to wear the Fascist emblem and everything else. Of course, he clearly was a security risk, although he was well along in years, because he was such a rabid Fascist. There wasn't any doubt as to where his sympathies lay. So we were confirmed in our opinion as to him because even after he was released from Missoula [Montana], he still indicated his allegiance to Il Duce.

Sharp: A real stalwart sort of figure.

I had also seen a note that the Office of Naval Intelligence also--

Zirpoli: All of the intelligence offices reported to me; that is, the army intelligence, the navy intelligence, and their reports, I found, were exaggerated for the most part.

Sharp: More so than some of the FBI?

Zirpoli: Oh, definitely. The FBI reports were far more objective than the navy reports. The navy would learn about a name and if it happened to be the name of a Japanese admiral, they would conclude that there was a blood relationship between him [and the admiral]. Some of those Japanese names are like Smith. Just because Smith was an admiral of the American navy, for instance, didn't mean that another Smith was his nephew or his son, and I found reports of that character.

Other problems which we had, of course, were problems which arose pursuant to the requirement that all enemy aliens turn in their fire arms, signaling devices, and explosives of any kind or character. So we had cases where some farmer was picked up who happened to be a German alien and he had dynamite that he used to
Zirpoli: blow up tree stumps on his ranch. We would release these fellows. We would give them a hearing and we would release them. This caused the displeasure of General [John] DeWitt, who then reported to the secretary of defense, who even went so far as to report it to [President] Roosevelt because I got back an FBI report asking for an explanation.

When they got overzealous and a fellow had an ordinary search light—everybody has—it would be considered a signaling device.

The arms were all turned into the marshal. He collected hundreds and thousands of arms from Japanese, Germans, and Italians. One of these was a Japanese gun store that caused tremendous scare headlines because they reported the number of guns seized and the amount of ammunition seized. The next day they seized another gun and another twenty rounds of ammunition and there would be the same headline, just having the figure augmented by another gun or another twenty rounds of ammunition.

This was the type of hysteria that prevailed. Of course, there was tremendous fear for the personal safety of the Japanese themselves. The way people felt, you would never know what their reactions might be.

Sharp: Did you and some of the other assistant U.S. attorneys who were working on these cases on the board, see yourselves as sort of a moderating influence, I mean trying to sort out--

Zirpoli: Oh, in a small way that's true. A moderating influence in the sense that I guess I had a better recognition of certain of the practical problems involved.

I may have told you already about my discussions with DeWitt, and members of his staff more than DeWitt, as it related to the operation of the F [street]car in San Francisco. This was the car that had its origin in the Marina and it would take you downtown. It passed along Beach Street and General DeWitt wanted the south side of Beach Street as the point of exclusion. I said, "It should be the north side. These people have no other practical means of getting downtown. They take that streetcar every morning."

Well, I finally won out. The moderation was that merely because a fellow happened to have a gun or merely because he happened to have some dynamite, it doesn't necessarily mean that he should be interned even though he was an enemy alien. So to that degree there was moderation.

As U.S. attorney, you could release some of these people without the necessity of a formal hearing, too. In other words, I would refuse to prosecute.
Sharp: Just because there wasn't enough evidence?

Zirpoli: --Dynamite, they would blow up tree stumps, which the FBI report would correctly reflect. I wasn't going to intern him and require him to go through a hearing. We had enough hearings as it was.

Sharp: Later on, by mid-December or so, supposedly General DeWitt became very, very dissatisfied with the Department of Justice in general, that you just weren't doing your job, that you weren't prosecuting enough aliens and you weren't interning as many as you should.

Zirpoli: I don't know how dissatisfied he was.

I know he was dissatisfied, for instance, with relation to curfew and hours of "black out" (no lights visible from the outside) because the Marin Shipyard was operating twenty-four hours around the clock and we weren't going to prosecute Marin Ship. He insisted on it and so we did file a complaint with the commissioner. Then Washington sent word to General DeWitt directly, not through our office, and General DeWitt then asked us to dismiss the case. I said I would do it when I got a request therefor under his signature. Since he had gone that far, I wanted it in writing from him and I got it and we dismissed.

Sharp: We mentioned just a few minutes ago Thomas Barclay and Ed Owens. They were on the board and I wondered how you might have interacted with them other than presenting the case.

Zirpoli: My interaction with them was the presentation of the case. Beyond that it became social. For instance, when we were down in Santa Fe in New Mexico and we all had dinner together, breakfast together, lunch together, things of that character. We became very friendly. They were very fine gentlemen, both of them. He is a very fine professor, Barclay, at Stanford. Owens was at [the University of] Santa Clara and then he was dean of their law school and became a superior court judge. These were all highly respected men—Ira Lillich was a leader in the bar here. Maurice Harrison, he was a leader in the bar and he was also a leader in the Democratic party.

Sharp: How might these men have been appointed to the board? How would that have come about? Do you have any idea?

Zirpoli: I don't recall. I think they were appointed by the president. Someone would designate them, but I don't recall.

Sharp: And Thomas C. Clark?

Zirpoli: Tom Clark happened to be in California as head of the antitrust division on December the seventh or eighth. In fact, we were engaged in a jury trial. I was with Tom Clark because he had had no trial
Zirpoli: jury experience. I had been asked to enter into the case and I did. We were to argue the case on Monday morning. Pearl Harbor was Sunday and we argued it Monday morning and raised the flag better than the defendants did. We had greater opportunity to do it and we got convictions.

So Tom Clark received instructions to serve as the liaison man with the Department of Justice and the military for purposes of national security.

I recall when they ordered the Germans and the Italians to move out of the area to the south of Beach Street that I presented to him the situation of a man whose son had been killed in Pearl Harbor and we were telling him, "You move out." So I called Tom Clark in and I said, "I want you to listen to this story." There wasn't anything you could do really.

But then because there wasn't a clear understanding between the military and the Department of Justice, they sent Ed [Edward J.] Ennis out here from Washington. Ed Ennis came out and entered into a formal agreement of some kind, a written agreement. I have never seen it since. I saw it at the time. It was between the Department of Justice and the military as to what the rights of the military would be in this connection.

Sharp: Mr. Ennis--

Zirpoli: He became general counsel for the American Civil Liberties Union, he's still living. I guess he was general counsel for the American Civil Liberties for the last fifteen or twenty years.

Sharp: We had done an oral history with Mr. Ennis, and with Tom Clark as well, as part of the Earl Warren project.* Mr. Ennis comes out in the oral history as very much in opposition to the military and to General DeWitt and very supportive of the Department of Justice trying to be this moderating influence.

Zirpoli: There is some truth in that, but in the final analysis, the Department of Justice finally gave in.

Sharp: Right, I want to ask you about that, but a little bit later on, because I think your views would be an important part of that. ##

Sharp: I wondered about the U.S. attorney's office and whether or not any members took part in the Tolan committee hearings [held in San Francisco in February and March 1942].

Zirpoli: No, and I remember very little about it. I do know that they were here and I knew [John H.] Tolan very well and beyond that my memory doesn't help me.

Sharp: Do you remember if there was any specific or general effect of the committee hearings on the Alien Enemy Control Board's work?

Zirpoli: I don't think it had any general effect on the work of the board, but it did have an effect on the evacuation program because there was so dang much testimony about the hostility to the Japanese.

Sharp: So it really speeded it up, it seems.

Zirpoli: That's right, the testimony as to the hostility of the Japanese and also the unwillingness of the people in the inner states to accept unrestricted movement of the Japanese. So there had to be, in the final analysis, war relocation centers because that's the only thing that was ultimately acceptable to the governors of the various states. There was strong resentment to having the Japanese come into those states.

Sharp: When the board was interning those aliens that were not convicted but at least committed to these internment camps, was there quite a bit of resistance even at that point in the surrounding communities to having the camps located there like the one in Missoula, there was in Texas--

Zirpoli: I don't know of any specific resistance to the camp as long as it was under the control of the military. Missoula was under the control of the military and so I don't know of any. I don't recall any.

Sharp: I have down four that were specifically Alien Enemy Control Board camps. I'm not sure if this was right or not, but two for the Japanese, one in Texas and one in New Mexico, which were the ones you mentioned, and then two for Italians, one in Minnesota and one in Montana. Were there more?

Zirpoli: Oh, I am sure there were more even on the East Coast. I'm sure, but I can't tell you where they were located.

Sharp: In your own tape that you made about a month ago, you talked about your work with the board. You mentioned Sharp Park, as well as these camps.

*The full title for this congressional committee was the Select Committee Investigating National Defense Migration.
Zirpoli: Sharp Park was just a place for them pending the hearing. Once the hearing was conducted, if they were ordered interned, they were sent on to Missoula, the Italians, for instance.

Sharp: You did then go to some of the camps, some of these particular centers?

Zirpoli: I have never been to Tule Lake.

Sharp: But you mentioned that you went to New Mexico to do some of the hearings there.

Zirpoli: Yes, there we were conducting hearings and the only hearings that I participated in were held in San Francisco and in New Mexico.

Sharp: But you never saw any of the camps, either the board ones or the general internment camps?

Zirpoli: No.

Sharp: Did the aliens have defense counsel? Did they have lawyers who represented them in front of the board's hearings?

Zirpoli: Some of them did. In the hearings before the board itself, not really. I don't remember any lawyer appearing at any of them. The only time the lawyers appeared would be if somebody was picked up on a complaint like that man with the dynamite or an Italian having a gun or something of that character. Then a lawyer would appear, because normally a complaint would be filed with the U.S. commissioner and then we would order it dismissed.

Sharp: I had seen some mention that the Justice Department forbade Hoover and the FBI from publishing the names of the people that were arrested for these hearings in order, I presume, to save the families from some sort of embarrassment of the publicity of being arrested. Do you remember having to deal with that at all?

Zirpoli: No. I do know that all of the reports were confidential and there were reasons for that. You might be a German alien or an Italian alien, and if your nephew didn't like you or your sister-in-law didn't like you or somebody like that, they might be the ones who would be giving information detrimental to you because the FBI interrogated a lot of people. If they wanted to know about you, they would go and talk to your friends and even members of your family and find out what you know about their activities.

For instance, we had an Italian lady who used to always be at the Italian consulate and also go to all of the social events at the German consulate. She was a citizen who was ordered to leave the area. One of her relatives didn't like her and had a lot of bad things to say about her.
Of course, after the war and many years after it, a number of these Italians, at least by way of illustration, who were ordered out of the area or interned, were always anxious to talk to me to see if I could tell them who was responsible for what happened to them. Of course, I never did make any disclosures of that character. Of course, the informants all bore numbers. They never had a name. I could get the name from the FBI, but it would be, say, according to 234 or according to 243, X did this or that.

The informants were not brought into court then, so there was no confrontation.

Oh, no, never. That would just appear in the FBI report and that's all.

The person, the alien, would then be confronted with this list of activities that people told the FBI, or whomever, about?

Yes, they would be confronted, that's right, with whatever—the agent would make his report and the alien would be there and would hear it. Then it would become his turn to answer. Now, we had one [case] where a naval intelligence report said that the father of this Japanese was an admiral in the Japanese navy and when he heard that, he started to laugh. I mean it was so ridiculous!

There has been some comment, and you have raised it, too, that there were few restrictions on what was admissible evidence into these hearings. Did that bother you at all that it was somewhat loose?

If you had to give every one of these people a full trial, the equivalent of a full trial, you would never finish—they'd be there and you would be there for months. We gave them an opportunity to answer, there was no question about that. Whatever went into the record, they heard it all and they could give their response to it.

In his oral history, Tom Clark mentioned that the Germans and Italians were handled sort of on a one-by-one basis.

Yes.

He mentioned that originally he thought that possibly the Japanese could have been handled the same way.

Yes.

Was there much feeling within the department that that was possible, too?
Zirpoli: I think there was feeling that it was possible. They had an example in England to follow if they wanted to follow it and they didn't. But the number was so great, particularly when it came to the Japanese. The emergency was so great and the number was so great that they couldn't do it.

Sharp: So you think that the numbers, the sheer fact of the numbers, is one of the important considerations?

Zirpoli: Yes, and then a substantial number of the Germans and Italians were asked to leave the area by the general, particularly those few who were citizens that they were concerned about, and they would do it voluntarily. So there was never any need for any hearing. They left. Some of them went to Chicago. As I say, one of them, a lawyer, went to Chicago and went to work for the Internal Revenue Service in Chicago.

Sharp: I had a note to ask you about General DeWitt's dissatisfaction.

Zirpoli: I only met him twice.

Sharp: He doesn't seem like a very amicable person.

Zirpoli: Bendetsen was the person you dealt with, Colonel [Karl] Bendetsen.

Sharp: He was actually in charge of the evacuation from what I had read.*

Zirpoli: Yes, he was a lawyer and he was in charge. That's right.

Sharp: Now, with DeWitt's dissatisfaction, which most of the historical sources make quite a big deal of, it is said that he pushed and pushed and pushed. I wondered if that filtered down to your own work in the prosecution of the aliens, your work with the board, if you were hearing—?

Zirpoli: Oh, I know. I knew that I was under some kind of pressure from him. I could feel that. I mean the very fact that he reported to—

Sharp: All the way up—

Zirpoli: All the way up on this dynamite incident was some indication to me, but that really didn't worry me. The only other thing I was worrying about, DeWitt might not have liked me because I was Italian and that was something that I had to give some thought to, especially when we were arguing about that boundary line [on Beach Street].

*Bendetsen was director of the Wartime Civil Control Administration.
Sharp: Because that looked pretty suspicious? I mean he might have thought that you looked fairly suspicious?

Zirpoli: No, he might have thought that I had some sympathy for these Italians. He had no sympathy for the enemy aliens at all, and for the Japanese he had none whatsoever and, as a matter of fact, used the expression that "a Jap was a Jap" and things of that character, even when he testified before the--

Sharp: Is that right? Before the Tolan committee?

Zirpoli: I think so.

Judge [William] Denman made some reference to it in his dissenting opinion.*

Sharp: Was there pressure on your office from any of the California state officials like the attorney general?

Zirpoli: None. The attorney general filed a brief. [Earl] Warren was the [California] attorney general succeeded by--I can't think of the name of his successor--Kenney.

Sharp: Robert Kenney?

Zirpoli: Yes, he was succeeded by Robert [W.] Kenney and they filed an [amicus] brief, but their concern was primarily fear of rioting and retaliatory measures on the part of the populace.

Sharp: Did you hear from the public at all? Did people picket the U.S. attorney's office or write letters or make nasty phone calls?

Zirpoli: No.

Sharp: Were they even aware that this was going on?

Zirpoli: Oh, sure, they were aware it was going on. The curfew made headline news; the necessity for travel permits and all of these things were carried in the press. Of course, the Japanese complied very well. They were adequately regimented in their reactions.

Sharp: What about Mayor [Angelo] Rossi? I had seen a note that he had intervened on behalf of some members of the Italian community whom I think had been arrested.

*This is a reference to Judge Denman's dissent in the Ninth Circuit Court of Appeals case, Toyosaburo Korematsu v. United States, 140 F. 2d 289 (1943).
Zirpoli: The only one that I can think of that he might have intervened in behalf of would be Sylvester Andriano.

Sharp: Yes, because he had been mayor quite a while, like twelve or thirteen years.

Zirpoli: Yes, he had been mayor. That's right, because he was elected around '30-'31.

Sharp: In '31, I think.

Zirpoli: I was in his campaign, so I remember. I was supposed to make the opening campaign speech in the Lafayette Club and the mayor sent for me at my home. He sent his car to pick me up and my mother was greatly impressed to see that the mayor's car was picking me up. I was only twenty-five years or twenty-six years of age. I got to the club to make the speech, but the dinner that the mayor attended was over and he managed to get to the club before it was time to make my speech so I never made it! [laughter]

Sharp: Oh, that's too bad!

There was also mention of a group of Italians who had called on the attorney general, on Mr. Warren, to plead some sort of reconsideration of hardship in several of the alien control board cases.

Zirpoli: Who did they meet?

Sharp: They called on Attorney General Earl Warren.

Zirpoli: I am not familiar with it.

Sharp: Okay, I just didn't know if you had any memories or if you recalled it at all. I had originally thought that the internment began in May, but actually it began in March of '42, the more general internment.* The contact with the process of internment for your office, for the U.S. attorney's office, what was that?

Zirpoli: None, unless somebody violated the order. Otherwise, we had none. In other words, the army just took care of the whole thing.

Sharp: Now, I think it's in '43, a year later then, that the War Relocation Authority went into civilian control and that was headed by Dillon Myer, who passed away recently.

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*On 22 March 1942 the first group of Japanese and Japanese Americans moved from Los Angeles to the Manzanar Assembly Center.
Zirpoli: Eisenhower started it, Milton Eisenhower, and then Myer.

Sharp: I think Eisenhower was just very, very briefly.

Zirpoli: That's right. He was given another assignment by the president. It had to do with war information.

Sharp: Was there any change for the involvement of the U.S. attorney's office once it became a civilian setup?

Zirpoli: As far as, for instance, what happened in those relocation centers under the War Relocation Authority we had none. The only incident I had was Mitsuye Endo.*

Sharp: I had seen a remark that said that as the evacuation, the general evacuation and the internment of the West Coast Japanese, was implemented, that the restrictions on the Germans and the Italians were somewhat relaxed at that point.

Zirpoli: The only restrictions on the Germans and the Italians were south of Beach Street, travel, curfew, but those are the same restrictions that applied to almost anyone. Curfew, let's take lights out, that applied to everyone regardless of your background. Travel and being out after 6 p.m. applied to Italians and Germans unless you had a permit, but it was a very simple thing to get a permit.

We issued some of them in lots of ten or twenty at a time. For instance, when the scavengers wanted a permit, I didn't listen to each and every scavenger. So whoever represented the scavengers, generally a lawyer, would come in and ask for a permit for the scavenger and give you the list of names and you would proceed to grant the permits. The crowd of people would come in and it would only be a matter of a few minutes and you would give them a travel permit.

Sharp: But this was more of a feeling that once the internment of the Japanese started in March, the wholesale internment, that that sort of took the pressure off and that restrictions against and hard feelings even against the Germans and the Italians somehow dissipated.

*Zirpoli refers here to his writing of the "Brief in opposition to petition for writ of habeas corpus" for the case In the Matter of the Application of Mitsuye Endo for a writ of habeas corpus, No. 23688-S, in the Northern District Court, 26 August 1942. Zirpoli's role is discussed later in this interview.
Zirpoli: It dissipated because, first of all, you couldn't tell who was a German or an Italian or a Frenchman or an Englishman from personal appearance. They became part of what we would call the American scene in every real sense because they intermarried and we had all of these problems. The Japanese always remained unto themselves and to a degree maybe even today they do more than any other racial group. We weren't worrying about a German invasion on the West Coast or an Italian invasion on the West Coast.

On hindsight, their feelings were wholly exaggerated but, as I said before, the War Department went so far as to conclude that if there was a Japanese invasion, we wouldn't stop them short of the Rockies. When they made that kind of a report, it's an indication of their feeling.

Sharp: It sounds pretty incredible now to look back on it.

Zirpoli: Yes, and that's one thing you have to bear in mind when you consider these cases. When you consider Yasui, Hirabayashi, Korematsu, and Mitsuye Endo,* the time period involved changed. Yasui, Korematsu, and Hirabayashi are reflections of the conditions in December [1941], January, and February [1942]. Mitsuye Endo's case had to be tested by the conditions that existed three years later approximately.

Sharp: Was there any role for the Northern District Court in the process of the internment?

Zirpoli: The district court?

Sharp: Yes, as a federal court.

Zirpoli: The only way the district court for the Northern District of California got involved was, for instance, in the case of Korematsu and Mitsuye Endo. Those are the only two. There was one in Portland and one in Seattle and that's all. There was one other seaman's case that had some significance. There the problem involved was his right to sue and collect for damages for injuries received on board a ship. The defense was that he had no right to prosecute his claim as an enemy alien. (This was a Japanese alien.) The court said, "No, no, he has the right to access to the court and, therefore, his case may proceed."

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Sharp: When would this have come about?

Zirpoli: Oh, this would be—there is a mention to it in one of the briefs some time around—I don't know, some time around '42 or '43 when the case was pending. This was for injuries he had received as a seaman.

Sharp: Okay, I remember that.

Zirpoli: Let me see, I may have something on a date, I'll give it to you. This was also an important case. I just happened to run across it by accident, Ex parte Quirin.* It had to do with the landing of the saboteurs on the East Coast and I relied in small measure on this [U.S.] Supreme Court rule which permitted the creation of the commission, a special commission, to try them. This was argued in the Supreme Court in October of 1942. He filed his suit in April of '41 and after Pearl Harbor, they tried to abate the proceedings. They wanted abatement of the suit during the war and the Supreme Court, of course, said, "No, he has the right to access to the court like anyone else, citizen and alien alike, as long as the courts are open certainly for purposes of civil litigation."

Sharp: I had more of a personal question for you and that was I was wondering about your father.

Zirpoli: My father was a former secretary of the Italian consulate, which he left in 1939 because he saw the war coming. So he saw the war coming and he resigned for that very reason. He didn't want to be associated with the consulate in the event of a war. My father died in '42. Of course, he worried about me, as he would.

My father had a cousin in Italy who was a great photographer. He was photographer of the House of Savoy and later actually official photographer for the government of Italy. He would send my father a copy of all of the photographs that he would take of Mussolini and Hitler and Goering and all of these people, and my mother had a tremendous collection of great historic value. But with Pearl Harbor she burned them all, put them all in the coal burner of the stove that we had, and burned all of these valuable photographs.

Sharp: Was she fearful that there would be some reprisal against—?

Zirpoli: Yes, she was. Of course, my father tried in whatever way he could to be of assistance, too, based on his knowledge of who would or would not be a possible danger to the community.

*The U.S. Supreme Court decided this case on July 31, 1942, and wrote a formal opinion later.
Sharp: Did you talk to him about some of the cases that--

Zirpoli: Not particularly. No, not particularly.

Sharp: He was fairly close to the action in the sense of being in the consulate. At least in the recent past he had been in the consulate.

Zirpoli: Of course, my father didn't live very long after the war. [pause]

U.S. v. Fred Toyaburo Korematsu

Sharp: The rest of my questions are about the cases, Korematsu first and then some about Endo after that. For Korematsu, in the brief for the petitioner in opposition to the demurrer written by Wayne [M.] Collins (who was the ACLU* attorney), I wondered what you thought was most noteworthy about that particular brief? He attacked the government's position from several angles from what I could see. He talked about the prosecution having to prove this martial law theory.

Zirpoli: Yes, they went on the theory that under martial law you couldn't do this. My theory was that we're not talking about martial law at all. This is not a question of martial law, this is a question of exercising the power of the president with the approval of Congress.

In other words, I went on the theory that these were war powers. Therefore, whatever measures were necessary in the national interest could be taken and that the theater of military operation was not that which existed forty or fifty or a hundred years before.

So, I had to argue on the question of qualified martial law and war power in a sense because the court asked about it. That was one of the questions they interrogated of me when we had an oral presentation.

When the time came to write the brief, I commented. I said, "We don't have to even consider it. But if we have to consider it," then I went on to say, "you have to conclude that in today's version of warfare, the military zone is not that which was a military zone in Milligan's time in 1867.**Therefore, there would be need for what one might call a form of qualified martial law."

I wasn't making this as a strong argument. I would have preferred not to have to argue it at all. But this was one of the big arguments that they made on behalf of Korematsu and Mitsuye Endo and

*American Civil Liberties Union.

**This is a reference to Ex parte Milligan, 4 Wall. 2 (1867).
Zirpoli: since they made this argument and the court questioned me about it, I tried to meet it and I tried to meet it in the brief.

But our primary argument was that that this was an exercise of the war power on the part of the president and of the Congress.

Sharp: An important issue in the defendant's brief, for me, was about the war powers—what Collins said was the war powers of the federal government are subject to provisions and limitations of the Constitution, which is not superseded by war. I mean what he was saying was that it is not unlimited.

Zirpoli: I know, but I argued that when the very life of the nation is at stake, some of these constitutional rights have to give way. You have your constitutional right of free speech, but it is not absolute and you can't, to use the old expression, "Holler or shout 'fire' in the theater and cause a stampede." I mean you can be prosecuted.

So my argument was that we had to weigh and balance these constitutional rights one against the other and see what predominates in time of war, and is the power of the government to defend itself paramount if the very life of the government or the nation depends on it.

The other argument is, what is the good of saving the nation if you have to destroy constitutional rights in so doing?

So these were countervailing arguments, but nevertheless that was the argument.

Sharp: Collins then clearly came right out and said that Public Law 503 (which was the congressional law), Executive Order 9066, and then the Japanese Exclusion Order 34 (that was DeWitt's order) were unconstitutional for all of these reasons, primarily because of the rights of the private person that were squashed.

Zirpoli: Yes, but the rights of private persons, many of the rights of private persons, have to give way and they are surrendered in time of war. It depends upon how you interpret your war, but if the war is of such a nature and the threat is such, you can restrict the activities of citizens whether they are Japanese or German or Italian or French or English. I am talking of restricting the rights of American citizens. All American citizens had to put their lights out regardless of their ethnic background.

Sharp: What are your observations of Wayne Collins and Mr. [Clarence E.] Rust?
Zirpoli: Jim [James C.] Purcell and Wayne Collins and [Ernest] Besig, they were all good lawyers, they were great civil liberty lawyers. Wayne Collins, I had great admiration for him. They wrote good briefs, they made good arguments, and ultimately they succeeded with Mitsuye Endo. But, of course, Mitsuye Endo was not Hirabayashi or Korematsu. Mitsuye Endo was in 1943 or '44. I have forgotten the year when the [U.S.] Supreme Court ruled [1944]. When the Supreme Court ruled, it ruled based on conditions existing then, not on conditions existing at the time of Pearl Harbor or immediately thereafter. I think the Supreme Court made it pretty clear that you had to draw these distinctions.

Sharp: Besig's role was particularly interesting. I noticed that he put up his own treasury bond for bail for Fred Korematsu.

Zirpoli: Yes.

Sharp: That sort of personal involvement surprised me. I didn't expect that he would sort of go out on a limb like that.

Zirpoli: He was head of the American Civil Liberties Union in this area [San Francisco] and Collins did a lot of work for them and became particularly interested in the Japanese. He developed a tremendous Japanese following. He was the principal attorney for the return of the properties of the Japanese that had been seized during the war. He also was attorney in the defense of Tokyo Rose [Iva Toguri d'Aquino].

Sharp: That's right. I hope we get around to talking of that. That's a much later case actually, '53 or '55.


Sharp: Next time I think I would like to ask you about that.

Was the ACLU as strong an organization in terms of getting these cases worked out--

Zirpoli: It was fairly strong. By this time, you had Al Wirin in southern California whose name also appears on some of the briefs. Oh, no, they were fairly effective. They were doing a pretty good job then. The big problem, the unfortunate problem, about the American Civil Liberties Union is that some of the people in the American Civil Liberties Union were labeled as Communists by people like Senator [Joseph] McCarthy.

Sharp: It gives you a bad name without any real substantiation.

Zirpoli: Yes.
Sharp: The amicus briefs entered by Herbert Wenig in Korematsu and in Endo I thought were really interesting. It was part of Earl Warren's role as attorney general and then, of course, as governor by this time, that I hadn't seen. He was pretty much supporting the U.S. attorney's office and stand.

Zirpoli: They were supporting the office primarily because they said, "If the military doesn't handle this situation, then we've got to do it and we don't have the police force to do it or the facilities to do it; the army can do it, but we can't. Who is going to patrol the so-called Japanese district if the Japanese are permitted to remain there? Who is going to prevent bloodshed in that area? Who is going to prevent rioting when this becomes the responsibility of the state that we are not equipped to handle?" This was pretty much their argument.

Sharp: They seem really quite fearful of what was going to happen.

Zirpoli: The Supreme Court didn't go into that in any detail at all to speak of but that was their basic fear.

Sharp: It's a very impressive brief, some of the language. I don't know who wrote it, if Warren wrote it--

Zirpoli: wenig wrote it, Herb Wenig.

Sharp: --Very persuasive.

Zirpoli: Judge [William T.] Sweigert of this court was the chief deputy to Earl Warren as attorney general and also became his executive secretary when he became governor. Warren assigned Herb Wenig to this litigation.

Sharp: In your brief in support of the demurrer, it's the military necessity argument. It's very similar to the brief that you wrote for Endo.

Zirpoli: No, the brief I wrote for Korematsu was similar to the brief I wrote in Endo. Oh, yes, because from my point of view the argument had to be the same. I was trying to justify the original detention, putting them in the camp, because I was arguing, I was saying, "She hasn't exhausted her administrative remedies. Until she exhausts her administrative remedies, she has no right to habeas corpus."

So the only thing left for me to argue was basically the original order. "If what was done originally was proper, then she can't complain now because she has an administrative procedure she can follow that will enable her to be released. Pending that hearing, this so-called temporary detention is permissible because it's the very thing we were trying to support in Korematsu."
Sharp: I don't know if you remember what you were thinking at the time, but in the original brief that you wrote for Korematsu, do you remember having a choice of ways that you could argue what you did?

Zirpoli: Korematsu was a criminal trial and the only problem that I had was that if I declined prosecution, it would be difficult to enforce General DeWitt's orders for then they could be disobeyed and there would be no prosecution. The offense involved would be at the most a misdemeanor. The probabilities are that the person would get probation, so we felt that it was better to enforce in this limited fashion.

The big problem that arose with relation to Korematsu was, what do you do after you get a conviction? Do you want an appeal? The answer is no, we didn't want an appeal. We didn't want a test case. So the court put him on probation and suspended the entry of judgment. I felt that this might be the means by which we could prevent the case from going up to the Supreme Court because we didn't want it to. Even though the Supreme Court might rule in our favor, we didn't want one [a test case].

That was a subject of discussion between myself and [Edward] Ennis and [John] Burling. I didn't talk to Burling personally, but it was a subject of discussion between me and the Department of Justice, let us say, and that was my idea because I had a lot of experience in criminal law and entering of judgment and suspension of entry of judgment. I figured this would not be a final order and hence was not appealable. When the [Ninth Circuit] court of appeals got the order, they said, "Is it appealable?" "We don't know."

So they certified the question to the [U.S.] Supreme Court and, of course, [Judge William] Denman didn't like that. He said, "Why don't you talk about what is involved here and let's discuss this matter." In his first dissent, he wasn't necessarily anxious to rule against the government. What he wanted was a presentation of all of the facts to the Supreme Court and not a simple question, "Is this an appealable order?" Well, the Supreme Court said it was an appealable order, but by this time the Department of Justice was convinced it was an appealable order, too.

Sharp: Yes, so you were stuck.

Zirpoli: So although they went up there, they didn't press that at all really by the time it got to the Supreme Court.

Sharp: Let me back you up a little bit back down to the district court level and Judge [A.F.] St. Sure. I wanted to ask you about his role in the case. We haven't really talked too much about him as a person or him as a judge and what kind of judge he was. I was hoping you would remember some of how he was.
Zirpoli: Judge St. Sure was considered, to use the slang, a tough judge. (laughs) He gave fairly heavy sentences. He was a very able judge and, of course, there was a plea of guilty in effect as far as Korematsu was concerned so that all that was left was for the judge to decide what the punishment shall be. As I said, we persuaded him to suspend the execution of the judgment and he did. But his role was very minor in the final analysis. I mean he heard the case, he heard the constitutional arguments, he ruled against the arguments, and Korematsu was found guilty and he suspended the execution of the sentence, put Korematsu on probation.

Sharp: Just the way what Korematsu did, it essentially said that he was guilty just by going ahead and testing the curfew; just the way he set it up, he meant for it to be a test case almost in just the way he did it.

Zirpoli: Not so much, for instance, as maybe Mitsuye Endo. Mitsuye was deliberate. Korematsu is still alive.

Sharp: Is that right? I didn't know that he was.

Zirpoli: There was an article in the paper recently that Korematsu is going to file a lawsuit.

Sharp: For reparations?

Zirpoli: He wants a new hearing to present further evidence to set aside the conviction, I don't know. I saw this in the paper about a week ago, but he is considering doing that.

Sharp: Is he still in California?

Zirpoli: No, I think he is in Seattle.

Sharp: If you move up the ladder then up to the Ninth Circuit, the dissent that Judge Denman wrote and that you showed me, I found myself wondering who Judge Denman was really talking to, who his audience was meant to be in his writing that dissent.*

Zirpoli: I don't know who his audience would be. I suppose his audience was whoever would be disposed to read a dissenting opinion. I mean he had his views and they were strong in that regard and he felt that there was a form of discrimination taking place. He felt that the court should consider everything, the court should have considered the constitutional questions. It shouldn't have passed them on to the Supreme Court, so he proceeded to set forth all of the problems

*Toyosaburo Korematsu v. United States, 140 F. 2d 289 (1943), pp.291-300.
Zirpoli: that existed and that had to be tested and determined. He was some-
what of a liberal judge, although you never would have expected it
necessarily from his background. It's true that he was a Democrat,
but he was basically an admiralty lawyer before he went on the bench.

Sharp: I didn't entirely understand everything he was saying in the opinion.
He was dissenting from the grounds of the majority opinion, but dis-
senting in part. It seemed he was sitting on the fence.

Zirpoli: He was dissenting in part because he was saying the majority opinion--
"I am dissenting because all they want to do is certify it and they
don't want to write an opinion; they don't want to give their
reasons therefor. These are all of the problems that exist. Shouldn't
we explore these problems? If we're going to send it on, send it on
with at least an indication that we have explored it or we ought to
resolve it and let them affirm or reverse, but let's not just pass
this on without taking our full responsibility in the case."

Sharp: Why couldn't they do that? Why couldn't the court really address--

Zirpoli: The court didn't want to. The vote was against him. I think Chief
Judge Curtis D. Wilbur was the presiding judge at the time. Cir-
cuit Judge Albert L. Stephens wrote a concurring opinion.

Sharp: Chief Judge Wilbur wrote the opinion.

Zirpoli: Judge Denman didn't concur with the result. He said, "That's no
way to do it," and so he went on for quite a number of pages. I
think he had written a dissent in Hirabayashi on the question of
certification. That's right, he was saying, "You are doing what you
did in Hirabayashi, you're avoiding the issues again."

Sharp: Right, and it made me wonder what kind of person Denman was.

Zirpoli: Denman? [laughs]

Sharp: He has come up before.

Zirpoli: Oh, I had enough experience with Denman before and experience with
him later as far as that goes. I kind of liked him. He took a great
interest in his work. He worked hard. It was obvious that he had
some liberal views, although one would never have suspected it based
on his earlier background and those views were expressed in habeas
corpus proceedings before and after.

Sharp: He seemed somewhat of a maverick.

Zirpoli: Yes, he was.
Sharp: I have a sense of the rest of the members of the court, his colleagues, sort of going, "Here we go again, Denman is sticking out like a sore thumb and not letting this thing ride by." Were there repercussions, ill feeling against Denman?

Zirpoli: I have a feeling that there was some, but I have no way of measuring it at all. I just have that feeling based on these various experiences I had with Denman, including the fact that he went into court to listen to an argument in a case where he was basically sitting as a district judge in the habeas corpus case. If the judge will take the trouble to go into the courtroom and sit down in the front row and listen to what his colleagues have to say about him in his case, that's some indication.

Sharp: What did he look like?

Zirpoli: Oh, a very handsome man, a big man, white hair, a very handsome man. You can't imagine one who was more distinguished-looking as a judge than Denman.

Sharp: Did he do this often, this sort of dissent?

Zirpoli: Oh, often enough, yes. [laughs] That was another problem with him.

Sharp: In textbooks on circuit court judge behavior and collegial decision making, there are always references to judges who dissent and the animosity or a more gentle term, ill feeling, that begins to grow against the one who sticks out and just sort of won't go along with the--

Zirpoli: That is something that is hard to measure because nobody is going to come out and say that the situation exists. You just have to draw your own conclusions based upon what you see and you experience. I would say that there probably was not the friendliest of feelings between Chief Judge Wilbur and Denman.

Sharp: From the district court perspective in eventually realizing that this was going to go up to the circuit court, was there some feeling that the defendant in this case would have had an ally in Denman? Was it sort of predictable?

Zirpoli: No, they never gave it a thought. The only time that that thing ever broke out in the open was in the habeas corpus case rising out of Alcatraz when Judge Denman directed the issuance of a writ based on a petition that already had been denied by Judge Dal Lemon. Then the district court in banc reversed him and said, "He has no authority to direct us what to do or what not to do, but in deference to his position, we find that there is no merit to his order" [in Ex parte Stidman].
Sharp: That's all of the questions that I had for Korematsu. I wondered if you had any extra notes that perhaps you had written there that you would like to include.

Zirpoli: No, as I said, the only observation we always have to keep in mind is that the Korematsu decision in the [U.S.] Supreme Court was decided on the conditions that existed at the time that Korematsu committed the offense. In Mitsuye Endo, the order of the court's ruling was based upon the conditions existing at the time the court ruled, which was three or four years later. I don't know if I have the date for Mitsuye Endo here or not, but it's 323 [U.S.] 383. [pause to review papers]

Sharp: I think it was '44, but I'm not sure.

Zirpoli: Yes, there you are, October of '44. So by that time all of the conditions existing that justified action in Korematsu no longer existed. If Korematsu had asked for release himself from a prison camp—if you want to call a prison camp an internment camp—they would have undoubtedly granted it to Korematsu or Hirabayashi or Yasui.

In the Matter of the Application of Mitsuye Endo for a Writ of Habeas Corpus

Sharp: Then the few questions that I have about Endo.* How did you go about writing the "Brief in opposition to the petition for the writ of habeas corpus"? That seemed like it would have been pretty straightforward because of the administrative remedies that she hadn't exhausted.

*As part of his review of this interview, the interviewer-editor asked Judge Zirpoli to consider several additional questions regarding the Endo case. The questions and answers follow below.

Sharp: Were you aware of the dismissal of other Japanese American California state employees, besides Endo?

Zirpoli: No.

Sharp: During the Endo court proceedings, was the issue of firing these Japanese Americans ever presented or discussed?

Zirpoli: No.
Zirpoli: Yes, but that was the basic argument and that's an argument with which I was familiar. I had been handling habeas corpus out of Alcatraz all of these previous years. By this time, I had been handling them for about six years, so I was looking for a procedural method to avoid the question entirely. The procedural method was to say there had been no exhaustion of administrative remedies. But Purcell made a good argument. He made a very good argument. He said that the administrative remedy wasn't freely there in the final analysis. She wanted to go back to Sacramento. You know that they would have denied her the right to go back to Sacramento. It would have been a futile act for her to seek her release, but the argument against that was, "You say it's a futile act, but you can't tell--." Sharp: Until you try.

Zirpoli: "--Until you try, and you've got to try." "If they enter an order which is a proper restriction on her right of movement or whatever it happens to be, then you at least exhausted your remedies. That is the proper time to seek a writ."

Now I think the court has since bought that argument more than it bought any other. Eventually when they argued in the [Ninth Circuit] court of appeals, that is the same argument that the

Sharp: What were the reasons for not summoning Lieutenant General John DeWitt to testify on behalf of the army?

Zirpoli: He was not needed. You don't put on new evidence in a habeas corpus case of the nature here involved.

Sharp: Colonel J. F. Watson, Judge advocate, Western Defense Command, apparently attended the hearings as an observer. Did he provide any assistance to you? Ever make any comments on the case?

Zirpoli: Yes, he briefed me on the army procedures involved.

Sharp: Do you recall any of the public feeling about the case?

Zirpoli: No.

Sharp: Did you get a chance to talk about the case with Judge Roche? Any sense of his private feelings?

Zirpoli: No.

Sharp: Do you recall your reaction to the U.S. Supreme Court's overturning of Judge Roche's ruling?

Zirpoli: I thought the Supreme Court was right.
Zirpoli: attorney general made, although I had nothing to do with that brief myself. I was of counsel but they wrote that brief.

Sharp: Did you have any input from Mr. Hennessy for this brief?

Zirpoli: No, Mr. Hennessy was the head man and he just wanted to be sure I worked hard. No, I got some input from the Department of Justice. I wouldn't want to state that I did not get input there. I got input from the Department of Justice because our approach and our strategy was discussed.

Sharp: In a meeting sort of arrangement?

Zirpoli: In meetings and conversations.

Sharp: With whom?

Zirpoli: I had meetings with Ed Ennis, several; primarily with Ed Ennis. I primarily met Ennis and [had] some discussions back and forth. But they did not want to argue Milligan or martial law. I agreed in the final sense with that, but I had said I had to argue it. The judges raised the question and having raised the question, I had to argue it, so that I think that if the Department of Justice were to evaluate my role, they would say that I was very good on the technical aspects, and maybe not as good as they might have hoped for on some of the other aspects.

Sharp: You had a rather broad interpretation of the war powers in both Korematsu and Endo. It's a defense of the war measures that were taken.

Zirpoli: They interpreted them strictly and I interpreted them broadly. I said, "In times of war you can't particularize in the same way you could for other measures because Congress cannot foresee everything that is likely to occur or to happen, and they have to give broad powers." That was my argument anyway.

When the Mitsuye Endo decision came down from the [U.S.] Supreme Court, I thought it was a good decision. I mean I didn't quarrel with it. I thought that Purcell and Collins did a good job when they were saying, "You talk about administrative remedies, but in truth and reality they aren't there."

Sharp: And especially because she was a California state employee and the Personnel Board in Sacramento probably wouldn't have even considered rehiring her really.

Zirpoli: General DeWitt would not have let her into Sacramento.

Sharp: Yes, she couldn't have lived there.
Zirpoli: She had to have their okay wherever she went. They would release her but in order to go into whatever area was involved, she needed the okay of the military command.

Sharp: Who was Purcell?

Zirpoli: Jim Purcell, and he had an associate, [William E.] Ferriter, he was a general practitioner in this area and participated in some criminal work. How he got this case, I don't know. He must have known Mitsuye Endo.

Sharp: But it is clear he wasn't an ACLU lawyer.

Zirpoli: No, he definitely was not. He was a general practitioner, but I thought he did a good job. I mean it was a kind of a job that I wasn't expecting from him.

Sharp: In the records there is a letter to Judge [Michael] Roche regarding the leave regulations which applied to Endo—

Zirpoli: An affidavit.

Sharp: Yes, and it said that it was useless for her to apply because she couldn't return to work in Sacramento. That was obviously part of Purcell's argument.

Zirpoli: That was in response. What happened is the director of the relocation center or the war authority center submitted an affidavit, which I had requested, indicating that she could apply for leave. I wanted to support the failure to exhaust administrative remedies and that this notice was given in the usual manner, including the paper in the camp, and she knew about it, and at no time did she ever ask for leave, for indefinite leave. So I filed that to show there was no exhaustion and Purcell answered by saying, "This doesn't mean anything in effect," and filed a counter statement.

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Sharp: I wasn't really sure. Was it Judge Roche or Judge St. Sure then who wrote the opinion?

Zirpoli: In which case?

Sharp: In Endo.

Zirpoli: In Endo it was Judge Roche and it was very short. It wasn't an opinion. It was just an order, as the transcript shows. Let's take a look at it here. [pause to review transcript] He merely said she's [reading] "not entitled to the writ and it further appearing that she has not exhausted her administrative remedies under the provisions of the executive order, it is ordered that the writ of
Zirpoli: habeas corpus be . . . denied," signed by Judge Roche. By the time of July 2, 1943, and by the time the Supreme Court heard it in November or October of '44, a full year had gone by.

Sharp: What do you think was the impact of Hirabayashi, Korematsu, and Endo?

Zirpoli: Well, Hirabayashi and Yasui and Korematsu merely sustained the curfew or the order directing you to present yourself in an assembly center, and they were predicated upon conditions that existed at the time. By the time you got to Mitsuye Endo, there was enough language in the Supreme Court saying that if this was something that they were putting into effect now, let's say in '43 or '44 in Korematsu, we might rule differently. Having said that, they then turned to Mitsuye Endo and said, "We look at the problem as it exists today and we have to decide it as of today and, therefore, as of today we are satisfied that there was an unconstitutional deprivation of the rights of Mitsuye Endo." So the specific language made a substantial difference. Purcell was very clever in that regard because he referred to conditions "now." [pause to review transcript] I am trying to find it. Maybe it was in his reply brief, but there was an emphasis on the conditions existing "now." [pause] I am sure he did. Hirabayashi reflected violation of a "curfew" order and had no binding effect in the Endo case. The Hirabayashi case specifically reserved the question of whether failure to report for transfer to a relocation center was a crime. The court restricted detention to temporary detention so that the Supreme Court was trying to avoid deciding the question of whether such a restriction applied after Pearl Harbor (1942) would be valid today (1944).

Purcell hung onto that argument. Even in '43 (the date of the Hirabayashi decision), he said, "The validity of even a curfew restriction might be another matter today. What is the status of detention now"—and he emphasized the word now—"of a loyal citizen beyond the exclusionary." So that was his position.

Sharp: In these sorts of cases, the string of cases dealing with the Japanese internment and the military necessity, it strikes me that you get sort of a time warp situation that the military necessity may or may not exist, but there was an agreement that it did exist at a certain point but then lapsed. The military necessity evaporated.

Zirpoli: It evaporated gradually. It existed for quite a while because we were losing that war. After all, while this was going on, Pearl Harbor—they took Hong Kong, they took Singapore, they invaded Borneo, they took the Philippines eventually, they defeated us at Wake Island. I have forgotten the name of the bay. They had defeated our fleet in another battle. There had been some so-called shelling of Santa Barbara and some balloons allegedly landing on the Oregon coast. All of these things were transpiring and for the first six
Zirpoli: or eight months of the war, we were losing, we weren't winning in the Pacific.

Sharp: Now, for me, it is genuinely difficult to see that and to understand the pressures and the reality of the feeling--

Zirpoli: Yes, that is the great difficulty, if you didn't live through the scary period and the scary headlines and all of the things that you were getting, big headlines of, "San Francisco Bay is being Mined." "Mining San Francisco Bay." That means you were afraid that submarines were going to come in, or they were going to bomb the bridge, and somebody would talk and they would give you a headline about the shelling of Santa Barbara--

Sharp: Goleta Bay--

Zirpoli: --Or balloons were landing on the Oregon coast [chuckles] and then we were losing these battles. Boy, we weren't playing up our losses as greatly in a sense as we should, our losses in the Pacific. When you consider all of the area that the Japanese took over in the Pacific, they had taken over Hong Kong and invaded China and taken over Singapore and into Borneo, you've got a pretty good idea of how far their operations had gone.

Sharp: Oh, yes, it was a very extensive area.

Zirpoli: And also the problems of fifth column activity which were evident in Europe.

Sharp: Are there other comments that you would like to make?

Zirpoli: No, I think that we have pretty well exhausted it.
IV THE INTERIM YEARS, 1944-1961

Tokyo Rose and Other Prisoner of War Cases

Sharp: This interview today is really about what seems like sort of an interim period in your life to me. It is a mixture of political activities, private practice and work on the [San Francisco] Board of Supervisors. I thought we might start by talking about your representation of Major [Wallace E.] Ince. I just wanted to be sure that your representation of him was as part of the actual Tokyo Rose trial. Is that right?

Zirpoli: Not necessarily as part of the actual Tokyo Rose trial. Major Ince was then under investigation on the subject of possible indictment by the United States attorney for the offense of treason because Major Ince became a broadcaster for the Japanese in English, and presumably would be broadcasting with American troops as his target, just as Tokyo Rose was.

Major Ince had been captured and taken prisoner and he was held in the prison camp. I have forgotten the name of the camp now. There were quite a number of Americans who were there. In fact, during the Tokyo Rose trial, many of them were called as witnesses. I remember that we all had a reunion at a restaurant in San Francisco in Chinatown in which they relived some of their days in the Japanese prison camps.

Major Ince was taken out and he was obviously under a threat of death if he didn't comply. So he would broadcast and he would talk about subjects of current interest, but he was also a very intelligent man and he knew that if could convey some messages in the course of his broadcast that might be helpful, he realized it would pay him to do so. So he showed an interest in sport events, particularly tennis, and that gave him an opportunity to comment about the weather--"this is a beautiful day for tennis"--which he had hoped would be a signal to the American forces that this is the time to come over for some bombing.
Zirpoli: In all events, he was never indicted, of course, and they did call him as a witness in the Tokyo Rose case, just as they did all of the other prisoners—not all of them, but those other prisoners whom they brought to the West Coast to testify. Now, Wayne Collins was the defense attorney for Tokyo Rose. I am trying to think of the name of the attorney who prosecuted. He was a special prosecutor out of the Department of Justice who came down to prosecute on behalf of the government.

Sharp: Tom DeWolfe and James Knapp.

Zirpoli: Yes, that's right.

Sharp: Your representation of him—what did it consist of then?

Zirpoli: I merely accompanied him to the courtroom and sat by while he testified and was there to protect his interest to whatever degree was necessary.

Sharp: How would it come about that you were representing him instead of somebody else?

Zirpoli: Because he came to see me to retain him.

Sharp: Did he know about you from somebody else?

Zirpoli: Oh, I don't recall the circumstances that caused him to come to my office. He came to my office and asked me to represent him and told me he was under investigation and he felt he should have the benefit of a lawyer.

Sharp: What were the main issues involved in representing him?

Zirpoli: The main issue involved in representing him was to indicate that he was under coercion and threat of death primarily, and that in his broadcast he was attempting to be beneficial to whatever degree possible by the nature of his broadcast if they had charged him. They never did charge him.

Sharp: I read about him and the trial in the book Tokyo Rose.* Apparently he testified that Iva Toguri d' Aquino, who was considered to be Tokyo Rose, had assisted him with food and medicine. I wondered if you could talk more about what his role was as a defense witness.

Zirpoli: I can't tell you more than his description of the circumstances existing at the time. Of course, there was more than one Tokyo Rose in a sense. She [Iva Toguri d'Aquino] got the name and she was indicted but there were others. She had the necessary background and they could qualify her as a radio commentator.

Sharp: The feeling of the author of this particular book was that Iva had been pretty much used as a scapegoat because there were other people, other women, who certainly could have been Tokyo Rose, but there was no one particular Tokyo Rose and that she was sort of getting it all. Did you think so at the time?

Zirpoli: I thought pretty much so, yes, at the time, I really did. I mean I said, "They pick this girl out and why?"

Sharp: Do you know who represented Norman Reyes? Do you remember him at all?

Zirpoli: No.

Sharp: He was another one of the defense witnesses. He had been imprisoned with Major Ince and he seemed to get—at least from the book—a really tough going over by Tom DeWolfe and James Knapp. His story was pretty much discredited by some of the FBI investigation. I wondered if you remembered very much about that, because it seemed fairly striking.

Zirpoli: No, what was his name again?

Sharp: Norman Reyes [spells name].

Zirpoli: No, the name sounds familiar. He may be one of those that was there when we all met for dinner.

Sharp: Do you remember very much about Judge [Michael] Roche at all?

Zirpoli: Judge Roche?

Sharp: Yes, he was chief judge of the Northern District Court then and was the judge who tried this case.

Zirpoli: Judge Roche was a very passive judge on the bench very frankly and he was the type that would permit the evidence from both sides, so to speak, without, let us say, any scholarly distinction as to types of evidence. He was not a legal scholar, but he was a man of pretty good judgment and common sense. But that's the kind of a trial where both sides kind of open up.

Sharp: I wonder if you recall very much about his instructions to the jury.
No. Zirpoli: No.

Sharp: There was some feeling that he really undercut the defense by his instructions to the jury, laying out pretty strict instructions so that they could seem to only come to one conclusion, that she was a U.S. citizen at the time of her offense and that she did indeed commit treason.

Zirpoli: No, I don't recall the instructions, but a trial of that character, it could very well be that the activity of others becomes immaterial and all you are interested in is the activity of just this young lady.

Sharp: Does anything stand out as sort of a major impression of the whole trial and all that went on?

Zirpoli: Nothing other than that I rode down to my office once with her in the marshal's van when they were taking her back to jail. [laughs]

Sharp: Did you talk to her?

Zirpoli: Oh, yes, but I don't remember what the conversation was. We were both in the van, the marshal's van. The marshal's van was just leaving when I was leaving the courthouse myself and they offered me a ride, so I went along with them. They took her down to the old Hall of Justice on Kearny Street and my office was on Montgomery one block away.

Sharp: Was there anything particularly distinctive about her?

Zirpoli: No.

Sharp: Did she seem villainous or--?

Zirpoli: Did she?

Sharp: Yes.

Zirpoli: Oh, no, she didn't create any such impression at all. I mean she was affable and made no complaints.

Sharp: It is interesting to have you see the U.S. attorney's office from the other side. I think I recall that Frank Hennessy made one of the major summations, I guess, at the end of the trial. I wonder what particular impressions you had from seeing Mr. Hennessy and seeing the U.S. attorney's office operate from the other side since you were now in private practice.
Zirpoli: No, other than your normal observations that anyone would make. I mean the prosecutor has one objective and that is to present the evidence that would indicate guilt beyond a reasonable doubt. By reason of your trial experience, you have a pretty good idea what the defendant's counsel's role is and when you leave that office, you just take on the role of defense counsel.

The benefit of being a prosecutor is that you learn your rules of evidence and you learn your criminal law and you are better able to ultimately apply it even as defense counsel.

Sharp: There were some forty-five or so defense witnesses, half of whom I think had just affidavits that they sent in, but a pretty large number of defense witnesses. I wondered if there was a certain amount of meeting with the other lawyers ahead of time to plan the strategy of her defense.

Zirpoli: Not particularly that I recall. Of course, there were some depositions taken in Japan.

Sharp: Oh, is that right?

Zirpoli: Yes, and Wayne Collins traveled to Japan to participate in those depositions. You have to get approval of the court, which was provided for, and his expenses were paid to go to Japan for that purpose.

Sharp: Are there other things that strike you about this trial that seem worth commenting on?

Zirpoli: No, there weren't any, but I mean there is no question that she broadcast. The only questions that arose were the conditions and the circumstances under which she broadcast. They were trying to establish that she was forced to do so under threat. That is basically as I remember it.

Sharp: There was another interesting case that you just gave a few notes on. That was this prisoner of war case, the Italian rancher.

Zirpoli: That is not particularly significant. It is interesting. What happened was that toward the end of the war there were Italian prisoners at Vallejo and they were given the weekend off. They would come to San Francisco, some of them, to visit relatives or friends of people in the Italian community. Then they would return to the camp. This man went down to Half Moon Bay to visit a farm there and he remained. He never went back to the camp and the owner of the ranch was then indicted for harboring a prisoner of war, and we were going to trial.
Zirpoli: The judge in the case was Judge J.F.T. O'Connor of southern California, Los Angeles, who was a former controller general of the United States and a Roosevelt appointee. I had met him in 1932 and I was very close to him through the years. He became a candidate for governor and A.P. Giannini asked me to help him because A.P. was on friendly terms with several of the candidates at the time. So, I was also close to him in that respect.

When the case was called and I appeared with my client, he [O'Connor] didn't even show any sign of recognition [laughs], which is understandable.

I was ready to go to trial on Monday, but Sunday my client told me that he knew that my defense was that he didn't know that his guest was a prisoner of war. He then told me that he had read about it in the Italian papers. So I couldn't let him commit perjury. We went in and I said, "We are just going to have to plead guilty, that's all."

So he entered a plea of guilty and then the judge referred it to the probation officer. The probation report came in two or three weeks later, I don't recall when. I submitted a written statement to the probation officer as well which was to be read by the judge, of course, and when we appeared and he indicated that he had read the probation officer report, I said I had read it, too, and I thought it was true and correct in all respects.

He [O'Connor] then commented from the bench, "This man does not need probation. Except for this offense, he has lived an exemplary life, a hard-working farmer that hasn't been to the city in the past twenty years. Therefore, there is no need for probationary supervision. A $250 fine."

That ended the case, which I thought was a very just and compassionate ending. It was a real understanding of the judge. It would have been ridiculous to send him to jail. It wouldn't have served any useful purpose.

Sharp: Were there other sorts of cases like this involving the various prisoners of war?

Zirpoli: There was one German who was prosecuted by the assistant U.S. attorney, William Licking. I don't remember too much about that trial. William Licking was the assistant U.S. attorney that prosecuted. I remember the fellow got a ten-year sentence. He had engaged in some type of sabotage or act of sabotage.
Comments on Political Activities; Changes in North Beach

Sharp: I want to ask you about the indigent defendant program that was established in 1951, but are there other sorts of highlights of your private practice that you would like to put in here and talk about?

Zirpoli: Do you want me to talk on the indigent defendant program first?

Sharp: No, let's see if we can get in some other highlights first.

Zirpoli: During the period, you have to remember, from '32 until I went on the bench, I was politically active, going back to my participation with A.P. Giannini in the '32 campaign, as state president of the Young Democrats in 1935 and 1935, and Roosevelt delegate to the Democratic national convention in '36, and thereafter I would be serving in one capacity or another. I was northern California campaign manager for Adlai Stevenson in both campaigns.

The most interesting aspect of that political era is that in 1948, I had the feeling that [Harry] Truman could not be re-elected. I discussed this with William Malone, the Democratic party leader in San Francisco, and stated to him that I thought it would be better for me to get some backing for [Dwight] Eisenhower in the Democratic party so that if Truman were not the nominee, we wouldn't be replaced by other Democratic leaders.

I then sent a letter to Sacramento and reserved two names, Californians for Eisenhower and California Democrats for Eisenhower. At the total cost of $4--$2 each--I thereby preserved these names for a period of thirty days. I felt that this would give me ample time to explore the possibility of General Eisenhower becoming the Democratic candidate.

So I wrote a letter to General Eisenhower and received a response from him that he wasn't interested in being a candidate for president, at that time at least. Earl Behrens was the [San Francisco] Chronicle political writer at the time and he phoned me when he learned about the reservation of the names and asked me if I would contact him and let him know what General Eisenhower said.* I never did, but there

Zirpoli: was a fellow in New England who did the same thing, wrote a letter, and when he received his response, he caused it to be turned over to the press and it became a center two-full-page spread in *Life* magazine.

At that time, I also went down to Santa Barbara to speak at a political caucus at which representatives of the various candidates were invited to speak. There I spoke on behalf of General Eisenhower as a Democratic candidate. Then we were subject to interrogation from the audience. I remember one of the questions that I was asked related in part to his liberal views and his attitude toward blacks. I had the answers to those questions. There hadn't been any discrimination in his army conduct. All the orders that he had issued clearly indicated that there was no such discrimination. I sent a copy of my speech to the general and I received a thank you letter.

But feeling as I did, I got other people interested in Eisenhower as a Democratic candidate including Jimmy Roosevelt (President Roosevelt's son), so that when the California delegation went back to the Democratic national convention, there was a group of them who were discussing the possible nomination of Eisenhower. That group was led by Jimmy Roosevelt. I think there were about eight or ten of them in the delegation. There was a little hard feeling that was engendered in part there. But, of course, I had protected my bases—my political bases—with my discussions with William Malone in advance.

As I say, that was the '48 campaign. Then in '52 we had [Adlai] Stevenson. He came out here and we had a tremendous rally for him in North Beach, probably the best political rally they ever had in North Beach. We blocked off Grant Avenue and used Washington Square. There was a lady, Rena Nicolai, who operated a restaurant on Grant Avenue, La Pantera. She was providing food and snacks for everybody that attended the rally. They had big, huge bowls of spaghetti out there that they were serving. Then Stevenson had lunch in the restaurant and they took his picture eating spaghetti. It became a rather classic picture in a way. It wasn't used in the campaign, but she had an enormous enlargement made of it and posted it up in her restaurant.

Sharp: It was pretty good for business, I imagine. [laughter]

Zirpoli: This restaurant became a gathering place for most of the Democratic leaders and party workers.

Sharp: Were there a lot of strategy sessions?

Zirpoli: Oh, no, those were mostly social. We would go there and eat and drink and enjoy ourselves.
Sharp: Now, this was '52 or '56 because--

Zirpoli: In '52 was the big one. It was true in '56 as well; '56 was much more difficult in a sense because here you had the president [Eisenhower], an incumbent. In '52, you had high hopes. We had Stevenson ride the cable car and have his picture taken and pictures of that nature. We had pictures of the Democratic donkey and the candidates. I remember one that I have got somewhere with me and Ben Swig of the Fairmont Hotel. [laughs]

Sharp: Oh, great, I would love to have a copy of that if you can dig it out.

What persuaded you to work for Stevenson?

Zirpoli: I was a Democrat, a loyal Democrat. It would take a great deal to persuade me not to support a Democratic candidate. I had no philosophical affinity with the Republican party and their position. I was a young liberal!

Sharp: I just wondered if you knew him personally.

Zirpoli: No, the first time I personally met him was when he came here for the campaign. I enjoyed meeting him. I thought he was a very fine gentleman. He was a nice person to talk to. But other than that, I had no real connection with him.

Sharp: Was your main function in the campaign as one of the lower level organizers?

Zirpoli: I was sort of an organizer in a sense for northern California. I would make speeches throughout northern California, contact people in the various communities, the county chairmen in the various counties throughout northern California, and prepare for speakers to go there or for Adlai Stevenson to go there, and things of that character.

This is one way in which I got to know Clair Engle who was later elected the United States Senator. I served as his northern California campaign manager in a way.

Of course, I was also endeavoring to interest the Italian community in voting Democratic. The Italian community had been historically Republican in its political makeup. I remember making a speech in 1936 at the Columbus Civic Club in which I said that this was the last stronghold of the elephant and that the elephant wouldn't be around any more. [laughter]

Sharp: Was that true?
Zirpoli: That was a political group. The Columbus Civic Club was organized in 1931 to assist Mayor [Angelo] Rossi in his campaign for mayor. I participated in the organization of the Columbus Civic Club and in that campaign. I wrote the constitution and the bylaws of the club.

Sharp: That was primarily a political club?

Zirpoli: That was to become an Italian-American political arm. In other words, it would be a place where candidates would appear or ballot propositions would be discussed. Then the Columbus Civic Club would vote on them and endorse candidates or issues.

Sharp: Was there a real turning around of the Italian community?

Zirpoli: No. In San Francisco, I would say, that I think it is still predominantly Republican. Of all of the ethnic groups, it is probably the closest one that still has strong Republican ties.

Of course, as I say, then we were in the '56 campaign and then came the '60 campaign. But prior to the '60 campaign, I had breakfast with Senator [John F.] Kennedy at the Fairmont Hotel. He invited me to breakfast and asked me to commit myself to him for the 1960 election. I told him at the time I would consider it. I was a supervisor at that time of the city and county.

Then, of course, when the time came, I decided I would support Kennedy for the 1960 election. Red Fay [spells name], who became undersecretary of the navy for Kennedy and had been one of Kennedy's shipmates during the war, and I became co-chairmen for the Kennedy campaign in San Francisco. Following that campaign and the election of President Kennedy, I then wrote a letter to the president, to his brother Robert Kennedy, to Clair Engle, and to the state chairman [Roger Kent] of the Democratic party stating that I would be interested in being named a United States district judge, and I was advising them of this fact early because I did not want it to be said at some later date—"We did not know you were interested." Of course, in '61 I was appointed to the bench.

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Zirpoli: Now, during all of these same years, of course, I was active in the Italian-American community.

Sharp: Right, I was going to ask you.

Zirpoli: That started in 1928. In 1928, I was admitted to practice and I joined the Order of the Sons of Italy. In fact, my first case came from an officer of the Order of the Sons of Italy. I also joined the Italian Mutual Benefit Society, a society that was organized in 1858 with a charter from the state legislature. It may
Zirpoli: be the oldest mutual benefit society in California. It is still active. It was a difficult society to get into because they just permitted relatives and Genoese to become members, but anyway, they accepted me and my dues were then $1 a month. They have remained $1 a month since 1928 to this day. I have a plot in the cemetery by reason thereof. I am entitled to certain hospital benefits, medical benefits, and prescription benefits free, which I have not exercised.

This is an indication of the capacity of the society and the ability of its directors to capitalize on their small investments. Of course, this is a nonprofit society, so the money could never go to any of the members. So even though the society may be worth several million dollars today and has a very small membership of three to four hundred, the only benefit you really ultimately get is your plot in the cemetery.

That was the beginning of my Italian-American activity. I immediately joined the Italian-American Chamber of Commerce. I eventually became the attorney for the Italian-American Chamber of Commerce and toward the later years (in fact, the years just preceding my coming onto the bench), I was president of the Italian-American Chamber of Commerce, which was, incidentally, organized in 1885. I was also a trustee of the Italian School, which was organized in 1885. I had joined the Italy-America Society and served as a director and eventually as the president of that society. I was a member of the Leonardo da Vinci Society and served as a director. I eventually became and served as grand venerable of the Order of the Sons of Italy for the entire state of California and at that time, we had approximately fifty-five lodges scattered throughout the state.

Sharp: This speaks of quite a large Italian-American population in California.

Zirpoli: At that time, I can't tell you what the percentage was, but you have to bear in mind that at that time, in 1928, about 16 percent of the population of San Francisco was Italian. If the candidate had the confidence of the Italian people and particularly if he happened to be of Italian origin, you were pretty much assured of nearly 100 percent of that 16 percent vote. So it became a very influential voting bloc.

Sharp: When Mayor Rossi was a candidate, that was a pretty important network, I imagine.

Zirpoli: Oh, yes, he had that vote solid.
Sharp: For twelve years, he was mayor.

Zirpoli: It could be; I don't remember whether he was twelve—it may very well be three terms, yes.

My first interest in Italian-American affairs started at the University of California when I was president of the Italian club, Il Circolo Italiano, and then I also became president of Pi Mu Iota, the Italian Honor Society, and I moved right from that circle into these Italian societies after my graduation, and I did a lot of speaking. I would speak at Italian functions. I made several speeches in Washington Square. I made a Columbus Day speech in Sacramento with then Governor [James] Rolph and I recall riding in the Columbus Day parade with him. (I may have mentioned this before.) He was in the car ahead of me, an open car, and we rode along J Street, or, I have forgotten which street it was in Sacramento. There were some houses of prostitution on the upper floors and the ladies would all be looking out the window at the parade. He would tip his hat to the ladies as he went by. [laughter] Somehow or other that impressed me. As I say, this was my Italian-American activity.

Now all of these activities I maintained until I came on the bench. Then after I came on the bench, I ceased my political activity.

My Italian-American activity, I continued and to a degree continue to this day. I was also president of Il Cenacolo (which means "last supper"), which was organized in 1929, and that was a luncheon club. It started out with club rooms in the Fairmont Hotel which we gave up during the war because there was a housing shortage for the military, so we never did get a permanent home thereafter. But the club would definitely meet once a week for luncheons.

It was composed of Italian business and professional men primarily. We had a number of illustrious members. I could point to A.P. Giannini by way of illustration or Emilio Segre (the Nobel laureate) as a further indication of the makeup. So we had ordinary businessmen and, as I say, professional men. It was about as representative of the community as you could get, the Italian-American community, although you did not have to be of Italian origin to become a member because we have a substantial number of members who are non-Italians who have an interest in Italian culture.

The purpose of the luncheon was to hear from speakers on current subjects every week and to entertain and hear from Italian visitors. If some Italian senator or deputy or minister visited San Francisco, we always tried to get him at our club for luncheon and to speak.
Was this almost entirely men then?

All male? Entirely male [laughs] except for the opera outings. We would give an opera outing in October of each year at which we would invite the director of the opera of San Francisco and a whole group of opera stars. We'd have them all up there at the Louis Martini winery and ranch for a big Sunday outing. It was a beautiful outing. We would have one of the major chefs of San Francisco. In later years, Orsi of Orsi's [restaurant] would come up and prepare the entire luncheon for us, a picnic luncheon, and a savoring of all of the various Louis Martini wines, and that continues to this day, the tradition.

Let me back you up a bit because I have some questions. I remember you telling me that there were a number of Italians who left San Francisco as part of the alien exclusion. After the war then, was it a matter of many of these people coming back into the Italian community, or deciding not to come back?

All of them; I don't know of any who didn't. Of all those I know, they all came back.

Was it a difficult transition for many of them?

No, they had no problems. Some of them were taken out of the camp and brought down to the military school on the peninsula to teach Italian to the military government officers during the war. Some of them were gradually released. If they felt someone was not a risk, he would be released. As I say, by the close of the war they all came back without exception as far as I know.

What were the changes in the North Beach area during the World War II period and afterwards?

Changes in the area?

Yes.

Oh, basically none except the slow and gradual infusion of the Chinese into the area. The Chinese have taken over most of North Beach now except for some businesses and some restaurants, cafes, pastry shops, and delicatessens, and things of that nature. With those exceptions, North Beach is basically Chinese today.

Was this influx of the Chinese a matter of distress for the Italian community?

A matter of distress? No, I wouldn't say it's a matter of distress. It may be a matter of regret because they see the traditional North Beach-Little Italy disappear. This was an area where you could hear
Zirpoli: Italian spoken on the streets and this was an area where you would buy your Italian paper. (There were two Italian dailies during this period.)

What happened was that as the Italians became more affluent, they purchased homes. In the beginning of 1922, they started purchasing homes in the Marina district and most of the people who reside in the Marina district today—I don't say most, but a great majority of them—are Italian because as they acquired a little wealth and purchased property, they moved there and some of them moved down to the peninsula. The richer you got, the farther away you went from North Beach.

Sharp: So that community was really dispersed--

Zirpoli: It was dispersed because they were prosperous. So there was no distress involved. As you became wealthy, so to speak, you wanted a bigger home and you wanted grounds and everything else and you just moved out to get a bigger home. You didn't want to live in a flat any longer or above a grocery store or restaurant or something of that character.

A typical family to illustrate that point would be maybe the Petri family. They had a cigar factory and they prospered. Then they went into the wine business and prospered and continued to prosper. They lived in North Beach in one of the flats and, of course, they moved out. They bought a big home. Angelo Petri bought a big home on Russian Hill and as the children grew up and became adults and married, they bought enormous estates. One of them bought an enormous estate on the peninsula. One of them bought a tremendous mansion in Pacific Heights and then purchased the top floor of a big condominium. This is the nature of the progress economically of these people. I use that merely as an illustration.

Origins of the Indigent Defendant Program

Sharp: Let's talk about the indigent defendant program then that was established in 1951. You made a few notes about this on your own tape. You mentioned that Louis Goodman was chief judge [of the Northern District Court] at this point and that there were some eighty attorneys involved.
Zirpoli: Louis Goodman was chief judge. George Harris* suggested to Louis Goodman that the court set up an indigent defendant program and that I be asked to serve as chairman of the committee. I was asked to serve as chairman of the committee and I said I would. I then caused notices to be published in The Recorder asking for volunteers and that there would be a meeting in the courtroom of the chief judge for the purpose of setting up the committee for the representation of indigent defendants. I said that we had responses from in excess of eighty attorneys.

At that meeting, we agreed that we would try to arrange to have two attorneys available every court day of the week, for appearance in court to represent indigent defendants if needed. We gave the attorneys postcards on which they would indicate dates that were acceptable to them. These were then all forwarded to my office because I ran it out of my office. We prepared a calendar and we would insert two names based on the return from the cards for each day of the week with the understanding that if anyone could not make it for some emergency reason, then I would cover or otherwise cause it to be covered by another member of the panel.

The lawyers were great in their response. As I said, we had approximately eighty of them to make up this calendar so that no one would be given too great an assignment. What would happen was that you appeared in court. At that time, we had the master calendar. We didn't have individual calendars as we have it now. The master calendar judge would call the criminal calendar each day if there was one. So with two men in court—two lawyers, some women, of course—(there were a number of women, it was relatively few compared to today), but with two lawyers, the court would appoint one. If there were two cases, he would appoint one for one, and the other one for the other. If there were three cases, you would get appointed for two of them. This made it fine because you were there from the outset and you assumed responsibility thereafter for the representation of the individual involved.

Now, before the indigent defendant panel was set up, the judge would merely ask a lawyer in the courtroom to step forward and you were appointed whether you liked it or not, so to speak. This way you had people who had volunteered and who were willing to appear and the top trial lawyers volunteered.

Sharp: This was entirely pro bono then?

Zirpoli: Pro bono, the whole thing, and you even paid your own expenses.

Sharp: Let me just stop you for a minute because I am interested in Judge Harris. Why did he come up with this idea, do you think?

Zirpoli: Why did he come up with it? I don't know. Well, one reason why he came up with it, I suppose in part, was because he realized that there were several lawyers who were getting too many appointments. I was getting a substantial number, but Jim O'Connor, by way of illustration, any time he appeared in court, he was appointed. Jim O'Connor represented so many indigent defendants and spent a lot of his own money investigating on their behalf. I know Judge Harris was conscious of this fact. I assume that's the primary reason for his suggesting that we set up a panel, so that you could draw from it--

Sharp: And try to spread out the work?

Zirpoli: And spread out the work. Of course, the panel was set up but it became quite a task for me, and became quite expensive. Eventually the Ford Foundation took it over.

Sharp: Right. I guess I am looking for some altruistic clue to Judge Harris's personality, or some special reason that he wanted to do this because he wanted to help indigent defendants.

Zirpoli: --Altruistic. I know that Judge Harris was a stickler for maintaining the civil rights, all of the rights of the prisoners, so he had an interest in seeing that they were properly represented. But I think one of the basic things was the realization that the work-load was getting too great for the small number of lawyers.

Sharp: This is the first time we have talked about Chief Judge Goodman as well. I wondered if you could tell me some more about him.

Zirpoli: Chief Judge Goodman was an excellent chief judge. He had the interest of the court at heart. He was always seeking ways and means to improve the services of the court and he was active even nationally in the committee work of the Judicial Conference. I was often appointed by Judge Goodman to represent indigent defendants and Judge Goodman named me as his lawyer-delegate to the judicial conference. For about seven or eight years straight until he died, I served as his lawyer representative to the judicial conference of the Ninth Circuit. I also remember meeting him in Washington on one occasion when he was attending a committee meeting and invited me to dinner and to meet Judge John Biggs of the Third Circuit. Judge Biggs was a well-known judge, not only as a judge but from his background as a writer.
Zirpoli: As I say, Judge Goodman always thought about the interest of the judges and the improvement of the court. He conceived the idea of getting a little dining room where they could all eat together. You have to remember that initially there were only three judges on this court and by the time he became a judge of the court, the number had risen to five, I think, and that's when he thought it would be nicer if they could meet together at lunch. Then it became six when Judge Harris came on after him. He conceived the idea and he was the one that prepared all the initial plans for this building.

Sharp: Judge Harris or Judge Goodman?

Zirpoli: Judge Goodman prepared all of the initial plans and set out plans for the dining room, but of course he never lived to see the completion of the building [450 Golden Gate Avenue]. His widow still lives in Palo Alto. We named our library after him. He also conceived the plan of a loan fund for indigent defendants. If a person were placed on probation and he was without funds, Judge Goodman created a fund so that the probation officer would loan the individual $10 or $20, whatever was needed, to take care of him for a few days or to enable him to pay his passage back home, subject to repayment just as you would a student loan fund. I don't know whether there is any money in it left. I've had some thoughts about reviving it, but this fund served a very useful purpose for many years and much of the money was repaid.

Sharp: Is that right?

Zirpoli: Yes, it was started with $500. While it wasn't a great deal that Judge Goodman contributed, nevertheless it had its real value because of the ability to rotate.

Sharp: Was Judge Goodman always getting people to contribute to it?

Zirpoli: He never tried to get too much from other people. I mean he was a man of substantial wealth himself. He had some substantial investments in oil wells. He owned wells and got royalties.

As I say, he was a good man for the court. He was a good chief judge. One of the reforms that he engendered was to do away with the master calendar and bring us to the individual calendar. That was a major reform. But I remember that I had once written a letter in which I had opposed the individual calendar and insisted we should maintain the master calendar. But when I came on the bench, I participated in a campaign for the individual calendar, and some people reminded me of my previous letter.

Sharp: You were then persuaded that the individual calendar was a better use of time?
Zirpoli: I was persuaded and so we changed over to the individual calendar. Of course, Judge Goodman had died in the meantime and I inherited all of his robes and I still have them to this day.

Sharp: That is an interesting tradition. Is that a common custom?

Zirpoli: No, that's the only time. I don't know of its having happened before. It's just that his widow presented me with his robes just before I was inducted.

Sharp: Did you wear them then?

Zirpoli: Yes, I have been wearing them ever since for the last twenty years. I have not had to buy robes, and you wonder what condition they are in today.

Sharp: Once this indigent defendant program got under way, then did you have a lot of phone calls or meetings with Judge Goodman letting him know about the progress of it, or memos--

Zirpoli: No, there was rarely any need for it. I would comment on it at the judicial conference [of the Ninth Circuit], but that would be the most. No, it was working smoothly. The difficulty was that it, as I say, became expensive because I was appointed on some cases and one of them cost me about $1,500 of my own money to represent the indigent.

Lawyer Delegate to the Ninth Circuit Judicial Conference

Sharp: I would like to know more about when you went to the judicial conferences as Goodman's lawyer-delegate.

Zirpoli: The judicial conference is provided for by statute for all circuits. Now, at first it was just a meeting of judges. Then they invited lawyers to participate as spectators. I attended some of the early meetings in the thirties by really being a spectator in the audience side of the courtroom. Then when they named lawyer delegates, eventually I was named. In the beginning, they only named two or three of them. [Harold] Faulkner was one of the first lawyer delegates. They could comment, but they had no right of vote. They could merely comment when called on. Eventually you became the equivalent of a judicial delegate, so with the passage of time, the lawyers began to vote on measures, recommendations that were being made to the Judicial Conference of the United States or recommendations for legislation, or whatever the problem happened to be.
Zirpoli: The conference grew in numbers from a relatively small number to as many as 250. It became more difficult because you had to have the necessary meeting place that could accommodate everyone. The judicial conference meeting dates are set at least three years in advance now so that you can be sure to have all of the necessary accommodations.

You could participate and you might make speeches. Active people at the judicial conference, the lawyers, particularly in the early days, were Harold Faulkner, Eddie Simpson of Los Angeles, Joe Ball of Los Angeles, Leo Friedman of San Francisco, and myself.

There were many things that we advocated and one of them was the full disclosure to the defendant of a transcript of all of the testimony before the grand jury. You are still not entitled to it and we have been advocating it all these years. Today, you are entitled only to a transcript of the testimony of the defendant if he appears before the grand jury. You are entitled to the transcript of the testimony of a witness under certain provisions of the criminal code, but only at the time of trial, not necessarily in advance, although some judges order it in advance. Of course, there was no provision for stenographic reporting of the testimony anyway. You had to have a provision first for stenographic reporting, and then for disclosure, but you still don't get the type of disclosure that you get in the state court. We had argued that this practice had gone on for forty years in the state court and we didn't see any detrimental effects. We thought it would be a good idea on the federal side.

Of course, all of those names I gave you were all defense lawyers. The U.S. attorneys were represented at these conferences as well, and they always gave their point of view. But this was one subject—for instance, that became a subject of debate for many consecutive judicial conferences. I see Joe Ball, for instance, is the attorney for De Lorean. He would make a great history, I'll tell you that.

Sharp: He would. He also is in with Pat Brown.

Zirpoli: Yes, well, Pat Brown is in with him. [laughs] I think you better get that order right! Joe Ball was a member of the Committee on the Rules of Criminal Procedure [of the Judicial Conference of the United States] with me for many years and I served as chairman. So I got to know Joe Ball pretty well. I got to know Eddie Simpson pretty well and not only that but we had a professional relationship. By way of illustration, if Simpson had a case in the Northern District of California, either Harold Faulkner or I were likely to be his representatives.

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Sharp:  I'll end with this indigent defendant program just on the note with you as a lawyer delegate to the judicial conference of the Ninth Circuit. Is this program something that you might have talked about and tried to popularize or persuade some of the other--

Zirpoli: Oh, yes, we did talk about it and it was written up nationally. Then when the bar association took it over from me and they got a grant from the Ford Foundation, then I think they got an award for it, a national award.

Sharp:  This would have been after '55 then.

Zirpoli: Oh, yes, '51 to '55. I had it for four years.

Interlude on the San Francisco Board of Supervisors

Sharp:  Let's change tracks radically and talk some about your work on the San Francisco Board of Supervisors back in 1958.

Zirpoli: All right, in 1957, the Volunteers for Better Government asked me to meet with them. That was a downtown group of young men, business and professional men. They wanted to run a ticket of three candidates for the Board of Supervisors. They asked me if I would be a candidate. I told them I really wasn't interested. I was interested in politics, but not as a candidate. They asked me to think it over and I said I would and would give them an answer in two weeks.

I received a phone call in the interim from George Christopher who was then mayor. I had previously served as co-chairman of the committee for his election as mayor [in 1956]. He said, "Al, if I had known you wanted to be on the Board of Supervisors, I would have appointed you."

I thanked him and then I decided maybe I ought to be on the board, but I don't want to be known as someone's man. I didn't want to be designated as Christopher's man and I wasn't voting as Christopher directed.

So I decided to run and I met with the committee. I wanted to know what they would do in the way of finances. I wanted to know what they would do in the way of getting the media, particularly newspaper support, and they assured me that they could take care of all of that. So I became a candidate and strangely enough most of the money that they got for the three candidates, most of it came from my friends. [laughter]
Zirpoli: I received the endorsement of the San Francisco newspapers, so I really had no problem. I went out and campaigned. I started out by saying I would make no promises of any kind or character and I found that that didn't sit with the voting public. They were looking for you to make some promises. I didn't feel a man ought to be making promises. I thought I should be telling them that I would try to serve the interests of the city in its entirety, and try to evaluate every issue that comes up, and give my honest opinion as to what was in the interest of the city. They wanted more; so I had to start commenting on issues from time to time.

Sharp: What issues did you pick to comment on, do you remember?

Zirpoli: One of them that I commented on, one of the issues of the time, was the desirability of having district elections instead of city-wide. I told them that I was definitely in favor of city-wide elections and I didn't think it was good to have people thinking primarily of a district rather than the city as a whole. Now, that I remember discussing in some detail. I really don't recall all of the other issues, but on the Board of Supervisors at that time, we paid attention strictly to city business. You were really out of order if you presented an issue that wasn't strictly city business. In other words, we weren't presenting issues which were national in scope or which were social in character. It had to be city business.

Today, the Board of Supervisors introduces resolutions on everything or writes letters on everything, including the conduct of the guard of the Queen of England, by way of illustration. Well, none of that. We wouldn't permit it. We would rule you out of order right away. Someone would rise and say, "This is not the business of the board."

When I was on the board, there were eleven members on the board, of course, and there were only sixteen employees of the Board of Supervisors, including the clerk. I don't know how many hundred they have today. You did your own homework. They gave you the privilege of a use of a car once a week with a chauffeur. You would use that car and the chauffeur to go into the various areas and personally review projects and things that had to be reviewed, so you would--

Sharp: --Know what was going on.

Zirpoli: You would know what was going on. If there was a problem with relation to the city and county hospital, you would have the chauffeur drive you out there. You would go there, you would make your survey. Whatever the problem happened to be, you would personally check it out. You would cover the city for re-zoning purposes and check it all out and you had no assistants. It was considered a part-time job, and in a sense it really was just part time anyway. Part time may have involved twenty hours or more a week, but you could do it pretty
Zirpoli: well in that time and conduct your own business. I remember when we left the board, the salary was $400 a month when I came onto the bench. It was less than that initially. It was $200 and then it was moved up to $400.

Sharp: Let me just stop you for a minute. We don't have any information at all on the supervisors' role in the discussions of construction of BART [Bay Area Rapid Transit] and of Candlestick Park.*

Zirpoli: BART was conceived as a Bay Area project and it was so set up that all of the counties involved had to join and participate in order for it to go ahead. I introduced the resolution for San Francisco's participation in BART. That was my role in BART. There is a plaque somewhere—I've never seen it—with the names on it, including mine. I also participated in the enlargement of the airport and the creation of the big airport that we now have. There is a plaque there somewhere, too, which I have never seen.

Then as far as the ballpark is concerned, Candlestick Park, by the time I got to the board, there was already a commitment to Candlestick. There wasn't anything I could do about that, although I did raise some objections. I would have preferred that they had selected another location, but there wasn't anything I could do about that any more.

Sharp: I have a few back-up questions on both BART and Candlestick Park. Marin County withdrew.

Zirpoli: Yes.

Sharp: Did that create sort of a problem as far as San Francisco city and county were concerned?

Zirpoli: No, the project was still adequate to go ahead.

Sharp: As I understand it, it was 1957 that it was on the ballot.

Zirpoli: Yes, and then the counties had to join.

Sharp: By the time you came onto the board [in 1958], what were the main issues then that the board had to deal with in terms of BART?

*For additional perspective on these matters, see an oral history interview with George Christopher, "Mayor of San Francisco and Republican Party Candidate," in San Francisco Republicans, Regional Oral History Office, The Bancroft Library, U.C. Berkeley, 1980.
Zirpoli: There were no problems, San Francisco approved of and joined BART.

Sharp: Was there sort of automatic support, that everybody was behind it and--

Zirpoli: I am trying to think about it. I don't remember any opposition, but I do know one thing. Whenever there was a particular resolution that I would want to introduce and I feared opposition from Supervisor [James Leo] Halley in particular (a strong Republican who reacted to me as a Democrat), I would tell the people who were interested in the particular resolution or ordinance to go to see Halley first and get him to present it. Then I would support it. [laughs] This way we would be sure of getting our measures through. I mean that was a political tactic that I employed at that time.

I remember another thing I was very much interested in but I couldn't engender enough ultimate interest. I presented projects and plans for a monorail from here to the airport, but I wasn't able to put it over and now, as I think back, it would have been a pretty good idea! [laughs]

Sharp: That would have been sort of addition to BART, as part of BART?

Zirpoli: Yes. No, really in a sense in addition to it, a straight monorail that would have taken you directly to the airport.

Sharp: Oh, I would have voted for that! [laughs]

Zirpoli: Also, there were problems about discrimination. I was interested in the resolutions that would avoid possible racial discrimination in employment in San Francisco. This was something that was just beginning to develop at the very end of my term. Then I came onto the bench. Before I came onto the bench there was also some talk about the possibility of my running for mayor, but I really had no desire to do it. Some people came to see me and wanted me, but I was interested in the court.

Also, there were some people that thought I would run for Congress against [William S.] Mailliard. I had no intention to. One of the Republican leaders and financial backers of Mailliard invited me to the Pacific Union Club (it was the first time I had ever been in the club) and suggested that if I would not run for Congress, a group of financial interests in San Francisco would support me for mayor. I said that I hadn't really decided but I would let them know at a later date. I had no intention of running, but I wasn't going to tell him that. [laughs]

Of course, the man that someone ought to interview about the San Francisco Board of Supervisors is Robert Dolan, the clerk of the board. [spells name] Robert Dolan, I think he still has minutes of about every meeting of the board in the last twenty-odd years or more.
Was he somebody that you came to know once you—

Zirpoli: Dolan was the clerk of the board. He was the man for whom I had and continue to have the highest regard and respect as the most knowledgeable man of the governmental and political set-up in San Francisco. I don't know anyone who knows as much about San Francisco as Dolan does. I would invite him to all of our meetings of the various committees I served on, particularly the finance committee. I would always ask his views and he had a way of presenting them that would make you listen. He would say, "I would most respectfully suggest that you consider—." And that's all he'd say. He wouldn't tell you yes or no, but the way he went about it and considered it, you knew damn well you really should consider it! [laughter]

Sharp: Speaking from real experience then.

Zirpoli: Yes.

Sharp: What about Donald Cleary?

Zirpoli: Cleary was the--

Sharp: Lobbyist [in Sacramento].

Zirpoli: He was a former newspaperman in San Francisco. He was a pretty effective lobbyist, yes. He had a nice way about him and a nice approach. There was never anything abrasive about his conduct at all and he'd had a lot of newspaper experience. They all had known him as a newspaper reporter.

Sharp: I wondered, especially with Candlestick Park and with BART, that there might have been reason for a lot of communicating between Sacramento and the Board of Supervisors. Donald Cleary as the so-called lobbyist for the city I would think might have some special relationship with the board because of the importance of what was going on.

Zirpoli: He had a special relationship as a lobbyist, but I don't remember his participation in BART in any way.

Sharp: I think we have covered just about the main things in terms of your term on the board.

I had seen a note that [Nikita] Khrushchev had come to San Francisco.

Zirpoli: Oh, yes.

Sharp: Do you remember that visit?
Zirpoli: Oh, yes, very well.

Sharp: Did he meet with the board?

Zirpoli: We had him to dinner at the Palace Hotel. Khrushchev was seated at the main table next to the mayor, let's say in that chair, and I was seated at this first table right across from him together with Fazackerly, who I remember was a former member of the Board of Supervisors, Fazackerly and myself and others, including two of the security officers for Khrushchev. I remember Fazackerly—I'll never forget—saying to me, "Shall we do it now?" [laughter] I don't think those security officers understood English, but that was quite a comment to come from him while we were there at the table.

He was a very affable person, so I rose from my table and had my program and I presented it to him for his autograph and he autographed it for me, whereupon [Mayor] Christopher asked me to get his autograph and people began coming to my table for me to go to Khrushchev and get his autograph.

That is my basic meeting and recollection of him. I met him and shook hands with him and things of that character and that was it.

Sharp: Did he speak English?

Zirpoli: No, not that I know of. He may have spoken it.

Sharp: When he came in '59, that was a very difficult time for the United States. [Fidel] Castro had taken power in Cuba nine months before and I had sensed that perhaps relations might be quite a bit strained.

Zirpoli: No, he was very cordial in San Francisco and he developed a very strong relationship with George Christopher and later invited him to visit him in Russia. Christopher spent a week with him there, and brought along two San Francisco newspaper reporters as part of the entourage. He walked along Nob Hill. He was interested in the cable car. People were a little worried about his walking on Nob Hill because they felt he needed more security. He wanted to visit Disneyland.

Sharp: I had a few extra questions, mostly relating to your work in 1958 on Stanley Mosk's campaign for state attorney general.

Zirpoli: He asked me to be his northern California campaign manager and I consented. Stanley Mosk had been [executive] secretary to Governor Olson before he was appointed to the municipal court and I met him when he was secretary to Governor Olson. As I say, being active in Democratic politics, he asked me to serve as his northern California campaign manager. So I did and I went around collecting money for him. I collected quite a bit, but I always brought a beautiful young lady wherever we would go to interview to collect money.
Sharp: Did that work pretty well?

Zirpoli: Yes, [laughs] I think it did.

Sharp: We had an interesting interview with Stanley Mosk as part of the [Edmund G.] Pat Brown [Sr.] project. One of the things that they came across in the interview was that Mosk was a real stickler for no deficits in his campaign.* I wondered if you had found that to be true also.

Zirpoli: I don't know whether it was true or not. All I know is that we paid all our bills. We had no problem.

Sharp: When Mosk came into office, he was swept in with many Democratic victories in 1958. Pat Brown becoming governor was the most obvious one. Mosk then was running not against an incumbent. He was running against Pat [Patrick] Hillings who was a [Richard] Nixon protégé, from what I can tell. Do you have a sense of Hillings as a candidate? Do you remember him at all?

Zirpoli: Not very much. I, of course, knew Pat Brown very well and had some interest in all of his campaigns. In fact, he was in the same high school that I attended. He was two years behind me, in my brother's class. He was the cheerleader at Lowell High. They created a group called [The New Order of] Cincinnatus in San Francisco and he was an unsuccessful candidate. Then he eventually was elected district attorney and Tom Lynch became his chief deputy. Then Tom Lynch became attorney general.

Appointment in 1961 and Transition

Sharp: Had you been interested in a position in Mr. Brown's administration once he became governor?

Zirpoli: No. No, I wasn't interested at all. I had been appointed district judge. Pat Brown's brother was a candidate, but I got the appointment.

Sharp: That was Harold?

Zirpoli: Harold Brown. I may have commented about that already, I don't know. I sent that letter I told you about to everyone saying I was interested. When a vacancy occurred on this bench, they called me from Washington [D.C.] and indicated that I would probably get the appointment. There was a meeting of the congressional delegation with the chairman of the state Democratic party and the national committeewoman from California [Elizabeth Smith Gatov]. They agreed on me, but then a few days later (Clair Engle had agreed, too), Pat Brown came into the picture and pushed forward his brother's name. Then I knew I was having a problem. In fact, Pat Brown had urged me to withdraw my name in favor of his brother in return for future support. I refused to do it.

Sharp: Future support for what?

Zirpoli: I would withdraw my name for appointment to the district court, he would support me for a later appointment.

Sharp: To the district court?

Zirpoli: Yes, but I told him I wasn't interested. This all happened during the induction ceremony of Cecil Poole as United States attorney. I had been asked if I wanted to be United States attorney by Robert Kennedy and William Orrick, who was deputy attorney general at the
time. I told them I wasn't interested in going back to be a U.S. attorney. So Cecil Poole was appointed. At the induction ceremony, Pat Brown attended because Poole had served as his chief deputy and [clemency] secretary as governor. He then asked me to step into the corridor and we walked down the corridor and he asked me to withdraw my name. I said no.

Then we went to a ground-breaking ceremony in the Western Addition and Mayor [George] Christopher was there. I was there and Pat Brown was there. He suggested to the mayor that the mayor talk to me to see if he could get me to withdraw. Of course, the mayor said no, he wouldn't do it. The mayor told me about it later.

I went back to Washington to attend a meeting of the Order of the Sons of Italy in America. I was a delegate at the Mayflower Hotel. (I'll throw this in as a sidelight because it's a cute story.) Also as a delegate was an individual named John DiMassimo [spells name], who worked as a gardener for the city and county of San Francisco. He was an ex-wrestler and built short and stocky, almost gorilla-type, but a very likable soul who had two heroes. One of them was George Christopher and I was the other one.

What happened was that while I was attending the convention, I phoned "Whizzer" White, now a U.S. Supreme Court justice, who was then deputy attorney general (under Kennedy) at 8:30 in the morning for the purpose of talking to him about my appointment. His secretary said, "Come right over." So I said, "He knows what I want and he tells me to come right over, that's a good sign." So I went right over and when I arrived in his office he asked me to sit down just a minute and he sent for a fellow named Andretta who handles all of the business of the attorney general's office and the financing. When Andretta stepped into the room, he turned to Andretta and he said, "I want you to meet the next Italian judge." I think that's in that [Jackson] book somewhere.

That night I was in the Mayflower and we were there having a little cocktail or something and John DiMassimo came up to me and said, "I went to see Jack Shelley [Congressman from San Francisco and later mayor] today," [imitates Italian accent] in his broken English, "to get appointment with attorney general. I want him to appoint you for the judge. Jack Shelley tell me to come back tomorrow, so tomorrow morning I will go back." In view of what had happened, I phoned Jack Shelley and I said, "My gosh, this guy may spoil it. Whatever you do, don't get him an appointment with the attorney general."

The next night I asked John DiMassimo what happened. He said, "I go to see Jack Shelley and Jack Shelley, he say I cannot get an appointment, so I go to the office of the Department of Justice on the first floor, on the second floor, on the third floor, on the
Zirpoli: fourth floor. I see a big sign: Office of Attorney General. I go inside and the secretary, she say, 'Mr. Robert Kennedy, he is not in. He won't be here until close to six o'clock.' John DiMassimo said, "That's all right, I'm from San Francisco, I wait."

He waited and five minutes to six, Kennedy put his head out the door. He rarely wore his jacket, he was always in his shirtsleeves, and saw this fellow there. So he invited him in. I said to John DiMassimo, "What did the attorney general do while you were talking to him?" He said, "Oh, he was just chuckling." So he didn't do me any harm. [laughs]

As I say, I was told by 'Whizzer' White at the time, after he spoke to Andretta, to just be patient and they would get Harold Brown's name withdrawn, and I was patient.

Sharp: There was an actual Senate confirmation hearing, and all of that?

Zirpoli: Oh, there was, yes. I was asked to go back. There always is. I went back to Washington to appear before the Senate committee. There were only two Senators there, Hiram Wong and the Senator from Colorado, and I was asked one question. Hiram Wong just turned to me and said, "Do you understand you may no longer engage in politics?" I said, "I understand, Senator." And that was it. [laughs]

Sharp: No fanfare--

Zirpoli: That was the whole confirmation hearing.

Sharp: No television cameras--

Zirpoli: No, no, I was there with Clair Engle and that's all that happened.

Sharp: I had just a few extra questions about Mr. Mosk's campaign because it seemed to be really interesting. Now, Mosk was running as a superior court judge from Los Angeles.

Zirpoli: Yes.

Sharp: I wondered since you were so well a part of the legal community, if you made a special effort to get support from the legal community of San Francisco, if that's how you saw your bailiwick?

Zirpoli: Oh, yes, I tried to get support from the community of San Francisco. I was interested in getting the lawyers particularly in support of his candidacy. Mosk had been elected superior court judge by the biggest vote ever given a candidate in Los Angeles County and that was the thing that we played up. That was the primary thing to put forward.
Sharp: He also said that he got the CDC [California Democratic Council] endorsement and he said that he thought it was very important to his victory.

Zirpoli: Which one?

Sharp: The CDC, the California Democratic Council.

Zirpoli: Of course, you had to get Democratic support, but he had no problem on that score. Of course, the Democratic voters were in the great majority.

Sharp: Apparently, there was some question about Pat Brown not supporting Mr. Mosk.

Zirpoli: I can't tell you; I don't remember that.

Sharp: The last thing is more about Mosk as a Democratic national committeeman, which he was in 1960. He came out fairly early for Mr. Kennedy and I wondered if you and Mosk then might have worked together on your campaigning--

Zirpoli: No, it didn't work out that way at all. What happened is that we had a San Francisco meeting with Bill [William M.] Malone, who called the meeting. Among those in attendance were myself and Bill Malone, Red Fay, whose name I have mentioned, and Tom Lynch. At that meeting it was decided that Red Fay and I would be co-chairmen for San Francisco, an all-citizen group. In other words, we were trying to get Republicans in as well as Democrats.

Sharp: Now, this would have been sometime in '59?

Zirpoli: I don't know. It was already after the first of the year sometime when we were organizing the campaign proper. Up until then it was a question of getting commitments in the Democratic national convention and it wasn't until after the convention that the campaign of which I spoke got underway.

Sharp: Up until 1960, was anything particularly notable about Mr. Kennedy's campaign that impressed you?

Zirpoli: I met him for breakfast at the Fairmont Hotel. When Christmas came, I got a beautiful Christmas card of himself and his wife and the baby (they only had one child at the time) signed, "Jack." Thereafter I got to know Robert Kennedy well and, as I say, my daughter (Jane) served as an extern or intern or whatever you want to call it with Kennedy while she was going to Radcliffe. My son-in-law [Richard de Saint Phalle] worked in Kennedy's office while he was attending law school in Washington. So I got to know the Kennedys, not so much Ted Kennedy but Robert, yes.
Sharp: Would your relationship have continued on with Robert Kennedy after you became appointed judge?

Zirpoli: My relationship with Kennedy? I really feel that it would because he told me that "whenever you are in Washington, drop in to see me." So I would drop in to see him. If I wanted to attend a meeting of the Senate, he would personally escort me to a seat in the gallery. He wouldn't have someone in the office do it. He would do it himself. So we got along beautifully.

Sharp: We'll talk more about that once we get talking about your years on the bench. That is really all of the questions that I have. I have kept you longer than I had expected to. I hope that's okay.

Zirpoli: Oh, it's okay, it's fine. Thank you for bringing me that book.*

Ed Ennis is still around. I hear from him. He is in New York. After I went into private practice and he went into private practice, I also associated with him in some professional matters. I got a letter from him about three or four months ago asking how I was.

Sharp: We talked about your appointment last time, but I had a few transition questions. About the time that you came onto the bench in the Northern District Court, there were a series of seminars I know that were being given for new federal judges.

Zirpoli: Yes.

Sharp: I wondered if you happened to go to any.

Zirpoli: I set up the first one for the judges at Carmel [California] and it was in March of '63 or '62, or thereabouts.

Sharp: How did you go about deciding what should be in these seminars?

Zirpoli: We talked about it and the Administrative Office [of the Courts in Washington, D.C.] asked me to set it up. So I made all of the arrangements for our housing at what is now the Hyatt House in Carmel there (just before you enter Carmel). We were there for a week. It

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*The Japanese-American Relocation Reviewed, Volume I: Decision and Exodus, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1976. Judge Zirpoli had been interested in the oral history interview conducted with Edward Ennis which was included in this volume.
Zirpoli: rained every day, I remember that very well, and we had these judges from different parts of the country who attended the seminar.

There were other seminars held in some other parts of the country. These were for all of the new judges. There were about sixty new judges appointed at that time.

We had experienced judges talk about various subjects such as habeas corpus and sentencing procedures. We had discussions about criminal trials and how to make the maximum or better use of your time. Things of that character were discussed.

Now, I don't remember all of the details any longer. I remember I always accused one of the court of appeals judges as misleading us because the law subsequently changed in one area. As I say, it was very pleasant. It was a very nice meeting with all of these judges and we got some value from it.

Sharp: What were some of the ways that the issues were raised? For instance, with the habeas corpus, were the judges that were talking about habeas corpus, was it a way of getting the new judges to--

Zirpoli: --To better understand such things as exhaustion of the state remedies before you entertain a habeas corpus petition from a state prisoner. Fortunately, that happened to be an area with which I was already familiar. It was an illustration of the things that they discussed. They discussed judgment and sentencing and time for modification. They reviewed some of the rules.

Sharp: I imagine that the sentencing, that was not particularly controversial but a very personal sort of--

Zirpoli: The sentencing is not controversial except that there is a desire to avoid disparity in sentences, to avoid a situation in which for the same offense under similar circumstances one judge might give somebody the equivalent of five years, and somebody else would put them on probation and, of course, that's bad. So we wanted to discuss those problems.

Sharp: I know that the seminars are now pretty routine, that is is sort of an expected thing.

Zirpoli: They are routine, but I was not responsible for the fact that we had the seminars. I merely served as arrangements chairman for the seminar and the Administrative Office arranged for the judges to come out and speak to us. We had Joe Estes come out from Texas and we had Walter Hoffman come out from Virginia. We had the ex-governor of Minnesota, Luther W. Youngdahl, then a judge in Washington, D.C., come out. We had Judge [William F.] Smith of the Court of Appeals for the Third Circuit come out. He was a former U.S. attorney and
Zirpoli: trial judge who had a lot of experience in the criminal law field. These were the people that came out and spoke to us.

Sharp: When you first got onto the bench, did you feel that maybe you were a few steps ahead because you had been an assistant U.S. attorney, and you had practiced in the San Francisco federal courts?

Zirpoli: No, I didn't feel that I was ahead, but I felt secure in my ability to discharge my responsibilities, let's put it that way. Although I did learn one or two things immediately. On my first day as a judge, the first case I had, a criminal case, I learned that a judge has to be careful of what he says and how he says it. I had a defendant appear before me--maybe I mentioned this before?

Sharp: I don't think so.

Zirpoli: I had a defendant appear before me in a criminal case. He wanted to plead guilty. It was his first appearance and I said to him, "It's not my normal practice to accept a plea of guilty on the first appearance of the accused. Are you aware of the consequences of a plea of guilty?" I said, "Do you appreciate that if you plead guilty, I can sentence you to as many as ten years imprisonment and a fine not to exceed $10,000?" His response was, "I don't appreciate it, your honor, but I do understand." So I felt secure that the plea would never be reversed because his response indicated a thorough understanding, but I recognized that I had to be careful, that the word "appreciate" was improper. The question was, "Do you understand that that's what the consequence of a plea of guilty will be?"

The basic thing was that I did realize that a judge has to be careful. He can say too much and that's not good.

Sharp: What about the shifting from advocating for one side or one party to not doing this?

Zirpoli: I didn't have any trouble on that score as far as discharging my responsibilities is concerned. However, I probably interrogated witnesses a little more than any other judge would. This displeased some of the defense lawyers.

Sharp: I would think so.

Zirpoli: If I would turn to the witness right away and say, "Isn't it a fact," and he says, "Yes," then it's all over. [laughs]

Sharp: Did you find that there were certain situations where you did that more frequently than in others where you did some of the interrogating?
Zirpoli: I would do it more frequently if the counsel were not competent. That often happens. If the counsel is not competent or the counsel doesn't know how to get an exhibit in evidence—and there are some simple things to be done—then I would proceed to lay the foundation for it and then tell him to proceed.

Sharp: It still seems to me though that it would be fairly complicated for you as a new judge even two to three years into your being a judge, the whole idea of not advocating one position or the other still might seem difficult for you.

Zirpoli: No, but I still interrogate more than most judges do as far as that part of it goes. I do that on the justification that if the questions and answers have not been sufficiently clear, and there is some clarification required, then I really have an obligation to clarify the situation or the facts for the benefit of the jury.

But, no, I don't take on the role of an advocate in the sense that I become partisan in my approach.

I may take on the role of an advocate to ask a question when it appears that somebody is trying to deceive the court or the jury, and I may interject a question which could carry with it some adverse implications, but it's merely a question that should be answered directly and can be answered and disclose the true facts.

Changes in the Code of Civil Procedure

Sharp: What about this work with Judges [Albert C.] Wollenberg [Sr.] and [William T.] Sweigert on the new rules for the civil cases?* This seemed to be fairly early in your years on the bench.

Zirpoli: Yes, in '62, I think. That was a committee that Judge Harris set up. Most of the work was done by Judge Sweigert when you get right down to it. He had the knack for it and the capacity to write rules. He was a man who was very business-like and well organized. We worked with him, but basically to give our thoughts or ideas. He wrote the whole thing and we just helped him make changes or suggestions.

Zirpoli: This pretrial and discovery procedure was just beginning to get into full bloom. In the prior years, there was less disposition to make full disclosure or to admit facts and Judge Sweigert, as I said, being very well organized, decided we ought to rewrite our rules and rewrite them based upon the provisions of the Code of Civil Procedure as they relate particularly to discovery and pretrial. So he did a good job.

We basically follow those rules today. There have been modifications. There continues to be some modifications.

Sharp: Are these rules done district by district?

Zirpoli: Yes, so-called local rules. Of course, in 1963, the Northern District of California had two divisions, our division and the Sacramento division, and these rules were written for our division. They had their own local rules for the Sacramento division, although the judges here sat in Sacramento and the judges in Sacramento sat here from time to time.

Sharp: So they had to keep shifting?

Zirpoli: Well, there was not too much shifting, but there was some depending upon the volume of business and the needs.

Sharp: Did you see some fairly quick impact after these rules were brought into use? Did things really change quite a bit?

Zirpoli: Oh, yes, certainly. These changes were helpful because we were able to get cases to trial as soon as they were ready. Now the whole procedure is in a sense even more expeditious because the court will call status conferences and most courts, after ninety days or whatever period they want to fix, will insist that if there has been no action in the case that the parties be brought before the court. If they don't indicate activity, the case will be dismissed. So that prods the attorneys.

The whole theory behind these rules is that the court wants all cases filed to be the responsibility of the court, to police them from the cradle to the grave. While a case is in the attorney's office, it is the lawyer's business and the client's business, but the day they come into court, then the responsibility of policing that case and seeing to it that it moves properly is that of the court's. So this theory of policing from the cradle to the grave was being given some meaningful support by these new rules.

Sharp: Could you comment on any resistance on the part of some attorneys?
Zirpoli: Very frankly, I don't recall any particular resistance from the attorneys. They were given an opportunity to comment, and some attorneys did. But I don't recall any real resistance. These rules required, for instance, that the lawyers meet in advance of a pretrial hearing, confer, and agree on certain things where they can and indicate where they don't agree. They have to set forth issues and do all of the things that are necessary to expedite the actual trial and facilitate it. The judge most knowledgeable on the new rules and their prime author was Judge Sweigert.

Sharp: Okay, maybe we can get him to tell us about--

Zirpoli: Well, Judge Sweigert is in his last days.* It is very sad.

Sharp: I have heard that he was ill.

Zirpoli: Yes, he has cancer and he is in bad shape, so I don't think you will get anything more from Judge Sweigert.

Sharp: We actually had done an oral history interview with Judge Wollenberg and Sweigert together. We have been unable to get the interview back from Judge Sweigert, so it is unfinished at this point.

Sampling Antitrust Cases: From Electrical Equipment to Wall Products

Sharp: I would like for us to move on to talk about antitrust. What I have done is to get some questions about each case and then to shift to a more general consideration.

Zirpoli: My first meaningful introduction to antitrust was to attend a conference at the request of Chief Judge Harris in the electrical equipment cases. There were over 1,900 cases filed throughout the country and a great number of them were in this district. So he sent me to sit with these judges who met in a conference at Palo Alto for the purpose of working out a program for the handling of these cases.

That became my introduction as a judge into complicated multi-district antitrust cases. From there on, I became the representative of this court. One hundred and forty-four electrical equipment cases or thereabouts were assigned to me for what we call common discovery.

*Judge Sweigert died on 16 February 1983.
Zirpoli: In other words, the conference of judges took the various product lines that were being furnished and sold by General Electric and Westinghouse and Allis-Chalmers and assigned different product lines to individual judges.

I took on one of the [product] lines and my cases were settled. These cases would be transferred to you only for discovery purposes. When the discovery was complete, the case presumably would go back to the original judge in each case unless it was settled.

After a few went to trial (two or three) in different parts of the country, they were all settled. In the first one plaintiffs got a judgment against General Electric for $29 million. There was some question about the power of the assignee judge to entertain these cases or motions made in connection with them. I wrote an opinion on that sustaining the power of the transferee court.

So this was my big introduction to antitrust. Now, I had had some prior antitrust experience both as a prosecutor for the government and as a counsel in private litigation.

Then, of course, the biggest cases were the gypsum cases. There were other cases of a somewhat similar magnitude.

The Hughes Air West case was a securities case, but it had all the trappings of a big antitrust case. That case became significant because Howard Hughes refused to respond to a notice to take his deposition that was issued by opposing counsel, the counsel for the plaintiffs, representing the stockholders of Air West. After giving him every opportunity to purge himself for his failure to submit to a deposition, I finally entered his default. The potential value of that default went into many millions of dollars.

Sharp: How did it all end up then?

Zirpoli: They settled. They ended up with a settlement before me for some $37 million. They couldn't get around that default. They tried. They took an appeal and I was sustained. They never got anywhere and then finally they settled the case.

Sharp: You had mentioned that you had been sort of tangentially involved in the electrical equipment cases, but I wasn't sure how you fit in there.

Zirpoli: No, I never got involved except for discovery purposes, but there never was a trial of the cases assigned to me. The cases were all settled. That took care of them for me.

Sharp: How many judges were there involved in the electrical equipment cases at your level, at the discovery level? Do you have any idea?
Zirpoli: Oh, I would say thirty or more because there were about thirty
different districts involved. There were over 1,900 cases. When
it was all over they paid several hundred million dollars to the
various plaintiffs throughout the country.

Sharp: That's what I thought. Well, I think we can come back to this in a
bit because I have some questions about the multidistrict litigation.

Zirpoli: Yes, I might say that these meetings which we had resulted in the
enactment of the multidistrict litigation statute.

Sharp: Oh, it did?

Zirpoli: Yes, but I had had a prior experience myself. Before we got into
the electrical equipment cases, one of the first antitrust cases I
had involved the furnishing of bleacher seats for gymnasiums and
stadiums in schools throughout the country. I can't think of the
name of the company now, but at all events, there were four different
districts involved. Judge Edwin A. Robson of Illinois suggested
that we all meet in Chicago and determine how to handle these cases
so that we wouldn't each go off on a different tangent.

I worked out a formula for it, which was to have common discovery.
In other words, we take the deposition of the defendant or defendant
employees once and all of the states which were involved would
appear at the deposition, or where motions were involved they would
all appear, and they would all agree to be bound by the deposition or
ruling of the court. So you would have one deposition instead of
four for the same person.

We went to Illinois and we worked it out, but the state of
California wouldn't go along with me. So I would just enter an
order deferring any ruling on any motions California made until the
judge who heard the case pending in the other three courts had made
his ruling and I would enter an identical ruling. So it worked out
all right and this was the forerunner to these meetings. Of course,
Robson played an important role in the electrical equipment cases.
Other judges who played important roles were Judge Joseph S. Lord,
III, Judge William H. Becker, Judge Hubert Will, and Judge Thomas
J. Clary.

Sharp: Let's talk about some of these cases then. The first one (and I put
these in chronological order just for ease) is the Winchester Drive-
In Theatre case.* I noticed immediately that Joseph [L.] Alioto was

*Winchester Drive-In Theatre, Inc., et al. v. Twentieth Century-Fox
Sharp: one of the attorneys for the plaintiff. He is considered an important antitrust plaintiff's attorney from what I know. Had he come before you in many other cases?

Zirpoli: Yes.

Sharp: What was that like?

Zirpoli: He appeared as counsel for plaintiff in the Winchester case, which went to trial, but Alioto lost. In that case, Alioto wanted to testify and I said he could not testify. I said that if you testify, you may not argue to the jury. He elected not to testify.

His primary opponent was Allan [N.] Littman, and he was one lawyer that knew how to handle Alioto, I'll have to say that.* Not everybody knows how to handle him, but Allan Littman knew how to do it. He did a good job, and he eventually got the verdict in his favor.

Of course, Alioto was in some of the electrical equipment cases as well, but he was not in any of those before me. His firm was involved in the gypsum cases. They represented one line, but he did not personally appear. He rarely appeared personally. An attorney who is now in Los Angeles appeared, Max [Maxwell M.] Blecher. He is now a famous antitrust lawyer, too. They were all in the Oakland Raiders case in Los Angeles.

Sharp: Oh, that's right. I have a few questions then about the particulars of the case.

The Syufy drive-ins had been in an antitrust case before, the so-called Rancho case of 1958 with the same problem basically.**

Zirpoli: Yes, and in the prior case they issued releases which the jurors in the subsequent Syufy, Winchester Drive-In case found to apply to the new defendants in Winchester.

Joseph Alioto had a very effective method of presenting a case which was to put on a prima facie case for the plaintiff (he was the plaintiff's attorney most of the time) and rely on his abilities as cross-examiner when the defense put on its case. In that regard, he was very good.

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*Littman was an attorney with Pillsbury, Madison and Sutro.

**Rancho Drive In Theatre Corp. v. Fox West Coast Theatres Corp. and United Artists Theatre Circuit, Inc., No. 37792, Nov. 8, 1958.
Sharp: In this particular case, it seemed like your opinion turned on the defendant's situation as tort feasors. There are some important comments that you make toward the end about federal courts applying state law.

Zirpoli: Yes. Well, you wouldn't apply state law in an antitrust case because that's typically federal legislation. So I said you should apply the federal rule. The court of appeals agreed that I should apply the federal rule.

Zirpoli: Another important case was the attempt of the Department of Justice to enjoin the merger of the Citizens National Bank of Los Angeles and the Crocker National Bank of San Francisco on the theory that it would result in a restraint on interstate commerce.* I disagreed. I felt and concluded that the money market, the availability of funds for all purposes was of such a nature that it was in a sense really nationwide for the big insurance companies making more loans for housing than the banks. Add to this the activity of your savings and loans and other categories: credit union, savings and loan, insurance companies, and the banks, this merger couldn't possibly have an anticompetitive effect. There was no proof that Crocker was going to actually start de novo, so to speak, enter into banking in the Los Angeles metropolitan area, and there was no indication that Citizens was going to enter into banking in San Francisco.

Then on top of it, we had a situation in which Transamerica owned 41 percent of Citizens [National Bank] and Transamerica would be finding itself in possible difficulties as a bank holding company which would subject it to the banking acts. On analysis of the whole picture, I concluded that the community interest was better served by having these banks merge than by not having them merge.

Sharp: There are two things in particular that struck me. The passage of Bank Merger Act originally in 1960 and then amendments in 1966. And, it intrigued me that you had so much of the history of the legislation in your decision. It seemed like you wanted to weigh fairly heavy on the side of what the intent--

Zirpoli: If Congress didn't intend any change, why did they go to all of this trouble? We were satisfied that Congress definitely intended these changes and that there were some other considerations when you talk about bank mergers that do not necessarily apply to the usual antitrust case.

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Sharp: How did you and Judge [Walter L.] Pope and Judge [William T.] Sweigert divide the work on this case?

Zirpoli: We divided it originally on the question of preliminary injunction. Judge Pope wrote an opinion on that. When the time came for the final opinion, he was the presiding judge and asked me if I would write it. I said yes, but I relied a great deal on what he had already done. I thought that, leaving me out of it, that was a very good team, the three of us. We had Judge Sweigert who was well organized and Judge Pope had some prior banking knowledge.

Banking was not new to me. I studied banking at college at the University of California. I had been A.P. Giannini's messenger boy. My brother was a vice-president of a bank. I knew something about banking, probably not as much as I should have known, but that was an interest that piqued my curiosity more than might otherwise have been the case.

Sharp: Your expertise or at least good working general knowledge of banking brings up the question which is really general, about the expertise of the judge especially in antitrust cases where there are excruciatingly detailed questions.

Zirpoli: Yes. I am not claiming any real expertise. I am just saying that I had prior exposure. "Money and banking" was the course that I took, so I had prior exposure and I had the prior experiences, unrelated to expertise, which were sufficient to pique my interest and curiosity and make me delve into it in greater detail.

We had many experts who were called in the course of that trial, and that case was tried in a relatively short time. That was a case that was exceptionally well prepared. In other words, we had an excellent pretrial with everything properly marked—exhibits and witnesses identified—so the trial moved with great rapidity. I don't think it took more than two weeks to try this case. Under normal circumstances that case could have gone on for a month or two months but, as I say, we were well organized. We made counsel for all parties go by the rules. We made them prepare a pretrial statement and everything was done that could possibly be done to get the case in proper order for trial.

Sharp: It's a very interesting case from the point of view of Bank of America, its history, and its growth and then the growth of Crocker and Citizens as well. What would you say were the most persuasive arguments brought by Mr. [Richard] Archer who was the attorney for the defendant?

Zirpoli: The most persuasive argument? He argued everything that went into that opinion to a great degree. His most persuasive argument in the final analysis was that the community really benefited thereby, and
Zirpoli: that in truth and in fact there was no indication that Crocker was about to enter metropolitan Los Angeles or that Citizens was about to enter San Francisco. This was the big thing that the government was relying on because they had a memo that had been prepared by somebody from Transamerica, I think it was—either Citizens Bank or Transamerica because of the relationship—which indicated that they ought to look into the possibility of a branch office in San Francisco. But it is one thing to talk about something that you ought to look into and another thing to know what you intend to do, and Solomon, who was president of the Crocker Bank, was an exceptionally good witness and able to convince us that they couldn't make it if they had to go in de novo, and if they tried to accomplish the same objective, it would have taken them ten years or more. Those were the basic arguments. Archer did a good job in the case, very good.

Sharp: I was intrigued by Bank of America. Your connection with Bank of America goes back to when you were a very young man.

Zirpoli: I added a footnote there on Bank of America that was not relevant to the case, but I just wanted to add it anyway. It related to Bank of America becoming the goliath of the West because A.P. Giannini catered to the little fellow, whereas Morgan was only interested in deposits from the president or executive of big corporations.

Sharp: The Bank of America's image has changed so much in the many years that have passed.

Zirpoli: Oh, yes. [pause]

Sharp: There are the three Wall Products v. National Gypsum cases.* I don't know how many Wall Products cases there are.

Zirpoli: Oh, there were over a 140 cases pending. What we did was take the first eleven and we tried those as a pilot case on the theory that if liability was established, then these major companies would be foreclosed from the denying liability, so that once we established

Zirpoli: the antitrust violation for the major companies—U.S. Gypsum and National—then we had the case established on liability for all the cases. After that it was going to be a question of what the damages were. So we fixed damages initially in the first cases and I fixed attorneys' fees in the first case. After that, it became a question of establishing damages for the remaining cases and they finally settled. Now, they could have settled—the defendants—settled these cases a lot cheaper as the counsel for U.S. Gypsum (the local counsel) actually wanted to do, but the house counsel and general counsel for U.S. Gypsum didn't want to settle. Eventually they had to.

The value that came out of the gypsum case was that in the course of the litigation, the price of gypsum wallboard dropped considerably and saved the consumers during that period, and not too great a period, some $87 million. Then they ended up with a settlement of $67 million. The monies were deposited at 11 percent and we earned nearly $10 million in interest before the monies were paid out. That took care of the attorneys' fees, administrative costs, and everything.

Sharp: I hadn't thought of that sort of arithmetic and that sort of genesis, not genesis but—

Zirpoli: In fixing the attorneys' fee we made a multiplier, depending upon the contribution the attorney made to the success of the case. The important thing there is that [the attorney] Fred [Frederick P.] Furth had spent a tremendous amount of his own money before he got his first settlement.* He must have spent $150,000 or more.

Plaintiffs first settled with one of the defendants, Kaiser Aluminum, at a relatively small figure. Kaiser's attorney, Gordon Johnson, was very smart to get his client out of the case for about $100,000, nothing compared to what it would have cost them had they gone to trial. Of course, the Brobeck firm got out of the case because they didn't establish participation on the part of another named defendant, Georgia-Pacific.

Sharp: I was interested to see that in terms of the importance of the case that there was some setting out of the rights of sellers in price verification with respect to their consumers.

Zirpoli: Yes, as long as they were careful in what they did, there would be no violation of the Robinson-Patman [Price Discrimination] Act. In other words, you say, "Is it true that you are selling for less?" That is all I want to know. I don't make too much inquiry. Then I am entitled to meet the competition under the act. But if I start talking about it, what we are going to do or what can be done, then

*Furth was the attorney for the plaintiffs, Wall Products Company.
Zirpoli: you are getting beyond the proper area there. I had some discussion on that somewhere.

Sharp: I think it is in the 1971 case. At least that is what I was referring to. These gypsum companies learned from each other this new pricing program and centralized the pricing authority then.

Zirpoli: What happened is that U.S. Gypsum put out this revision with the understanding that if everybody else didn't go along, they would take it back and that was my theory, that such conduct constituted a violation. Now, that's why I called it conscious parallel action pursuant to the tacit understanding by acquiescence. That's the language that I worked out and it still applies. [pause to go through papers] Sometimes I forget that I wrote all of this stuff! [pause] You go ahead.

Sharp: In the 1973 case, you had the second half of the suit from what I could tell and some different conclusions regarding the results of the price fixing. Now, this set of plaintiffs took the suit further than the 1971 case to say that they were actually put out of business.

Zirpoli: They claimed that as an element of damages.

Sharp: Yes, and I was interested in the assessment of the overcharges as well as the assignment of the penalty of the treble damages.

Zirpoli: The overcharges were fixed by getting actual figures from different parts of the country. There were very many marketing zones, right. In these cases it is difficult to establish damages with any exactitude. You can't be exact and if you come up with a good estimate and they don't controvert it, then it will stand.

Sharp: What about this issue of the plaintiffs' other losses, the plaintiffs in antitrust cases wanting to ask for more than seems fair when it is difficult to decide what is fair or what is reasonable?

Zirpoli: You would have to prove specifically that they actually forced you out of business. As I recall, they never made an adequate proof in those cases. I think I just allowed them damages based on the differential and their values.

Sharp: Yes, I wondered about what the formula was for arriving at it.

Zirpoli: I might add something very important about the wallboard cases. A later decision of the Supreme Court would not have permitted the wallboard verdict for all plaintiffs, basically only the first user.

Sharp: Why is that?
Zirpoli: Because they then reverted to the theory that the only one who can recover is the immediate purchaser. You can't pass it on. Now, I had no problem on that because the various parties involved worked out a formula—the plaintiffs—that was acceptable to all of the classes and, as a result, the damages were applied only once and then they were distributed proportionately in accordance with your relative share of the market and the costs involved. A later decision, the *Illinois Brick* [v. Illinois, 431 U.S. 720 (1976)], said no.

Sharp: How much later was *Illinois Brick*?

Zirpoli: Oh, I don't know, at least four or five years later. In fact, there was one gypsum case that remained unsettled. The attorney came in and I told him, "What are you going to do now? You're out of luck." Kaiser was involved with this company and Kaiser agreed to pay them $30,000 to get it out of the way.

Sharp: That was the end of it at that point?

Zirpoli: Yes.

Sharp: Is this a good time to talk about the treble damages penalty?

Zirpoli: Well, the statute provides that.

Sharp: I know, but the statute provides other sorts of penalties too.

Zirpoli: The only statute provides for treble damages and attorneys' fees. What happens is that normally you present the case when you are going to a jury trial in such a fashion that the jury will merely fix the damages and the court will thereafter treble it. Otherwise, you get into a difficult area: Should the jury know that the damages are to be trebled? Preferably not. So then they just decide what the damages are. Then the court trebles them.

Then based upon the damages and the results, the court proceeds to fix the fee. But the fee is fixed based on time consumed and the legal fee scale existing at the time, so the attorneys have to justify their attorney fees by bringing in their records. They bring them in. Then the court can apply some kind of a multiplier because of the complication involved, the contingency basis on which the case was undertaken, and other factors of that character. That's where the attorney, Furth, got his real benefit because he was the lead counsel, he was the counsel that pressed the case.

He was the one who brought it to a successful conclusion and, of course, he was lucky in many respects because he was starting out on the theory that it was the interchange of communications on price information. It didn't turn out to be the basis for his case. His
Zirpoli: case turned on some memoranda which had been written by and prepared by United States Gypsum officers indicating that they were going to put this out and if everybody accepted and agreed, that would be it, and if they didn't, it wouldn't. This was something that he got in the course of discovery when he was spending all of this money for discovery.

Unfortunately, there are a lot of situations in which lawyers don't have a good antitrust case. They file it in the hope that they will get the evidence that they would like in the course of discovery. That happens quite often.

Sharp: I was going to ask you about that because the discovery has gotten so elaborate now and has gone on so long.

Zirpoli: There is criticism that there is abuse of discovery, and there is, there is definitely abuse of discovery. But controlling it is very difficult because at the same time you want to curb any abuses, you can't preclude someone from getting something to which he might be entitled.

Sharp: Is there some way, do you think, of the judge or some other person drawing some limits on discovery case by case?

Zirpoli: Some judges fix the limit on the number of interrogatories that you can file. While I have no specific limit on the number of interrogatories that are filed, if I find that they are oppressive, then I will sustain objections. Otherwise, I prefer that the interrogatories be limited primarily to the ascertainment of the individuals having the knowledge of the incidents or possession of the documents. When that is established, it is preferable that they proceed to take the deposition of the individual involved.

Sharp: What is the most interesting part of the whole wallboard pricing issue?

Zirpoli: The principal problem?

Sharp: The principal or most interesting--

Zirpoli: The most significant, of course, is price fixing. It is the conspiracy of agreement to fix the price or a conspiracy of agreement to allocate distribution centers among different manufacturers. In other words, I'll say, "You take this area and I'll take this area," and things of that character.

Sharp: That is one of the most common areas of antitrust litigation?

Zirpoli: Yes, probably the most common.
Sharp: I don't think we have gone over this, but what would you say were the major impacts or impact of the wallboard cases?

Zirpoli: The major impact of the wallboard case was the very fact that it reduced the price of wallboard immediately and throughout the proceedings and it continued. Building costs were going up during this period. When you bear in mind the fact that building costs were going up but the price of gypsum wallboard went down substantially, then you get a good idea of the benefit that the consuming public got from it.

Sharp: I don't know if they know to thank you for the price going down.

Zirpoli: [laughs softly] Well, I am not interested in the thanks as such. I mean I just try to do whatever I think is right based on the law as I see it.

Sharp: It seems like the victims and the enemies get lined up pretty quickly in an antitrust suit as an area of litigation. The idea of competition in American business is a very sacred sort of element.

Zirpoli: Yes, but antitrust still remains a partially controversial field. The approach to antitrust, unfortunately, may depend upon the administration in power as far as the Department of Justice is concerned. Some attorneys general will take a very strict view of it and be very forceful in their attempts to enforce the antitrust laws, and others won't be that way. They will be far more liberal.

Sharp: So you have seen quite a few swings?

Zirpoli: I would say you see some swings. When you get into the criminal prosecution end of it, which you don't get too often, then you get more fighting on the part of the industry. The [U.S.] attorney general's office, unfortunately, has not been able to compete with private counsel. The litigation goes on for years, the administration changes, the attorneys in charge, let's say, of the Ma Bell [American Telephone and Telegraph] cases, by the time they finish it, they will have had at least six, seven, or eight different attorneys in charge in and out of the administrations. You get the IBM cases, which have been going on for years before Judge Edelstein in New York. God knows how many different government lawyers have been in that case, whereas the representation on the part of IBM has been pretty consistent throughout. The representation of the telephone company has been consistent throughout.

Sharp: I was just wondering if there were other sorts of questions I could ask you about the length of the cases.
Zirpoli: They take quite a while, the antitrust cases. I had another anti-trust case involving the Alioto firm and that is the Pacific Far East Line, but that is very recent, in which I dismissed the case in the form of a sanction because of the failure of Pacific Far East Line and its counsel to comply with the discovery orders of the court and I also found fraud on the court. I had the testimony from John Alioto who was the president of the Pacific Far East Line and I was satisfied that he was not truthful in his answers to the prior rebate practices of the Pacific Far East Line.

Now, that case is on appeal. What the court of appeals will do with it, I don't know, because the field of sanctions is a field that is to a great degree within the discretion of the trial judge, but the court of appeal may say that I went too far, that I should have just made them pay monetary damages instead of dismissing the case.

I dismissed that case because I felt that the defendants were denied their full privileges, their full defense. The denial of discovery had so prejudiced their case and then I had some serious doubts on the ability of the defendants to prove their defense in the light of what had transpired.*

Sharp: The issue of the attorneys' fees, which is the main concern in the other 1973 Wall Products v. National Gypsum, I am not sure that we need to say anything more about it.

Zirpoli: In that case I limited the attorneys' fees to the time involved in establishing the Sherman violation. I denied them compensation for those efforts and time and depositions involved in the so-called Robinson-Patman violation. In other words, I fix attorneys' fees based on the results achieved and the successes obtained, and where there are no successes, I don't grant attorneys' fees.

Sharp: Is that sort of a general rule for you?

Zirpoli: With me, yes, but it is not very clear right now. Some courts say if you prevail, you should collect on everything. If you have two theories and you prevail on one, you should be able to collect whatever you had to expend. I am not ready to buy that in its entirety.

Sharp: Why?

*Upon his review of this interview, Judge Zirpoli noted that he had been affirmed in this case by the Ninth Circuit Court of Appeals in all respects.
Zirpoli: Because if you have a theory on which you don't prevail, there is no reason why you should incur all of these costs and require the other side to pay for them, have them incur costs on an issue that you can't sustain. For the one that you sustain, yes, I understand it; you prevail and that's what you should be paid for, but I don't think that the defendant should pay for an issue in which he prevailed just because the plaintiff prevailed on the other issue.

Sharp: Because it could go on and on?

Zirpoli: Yes.

Sharp: I hadn't realized this before, but I saw that it is only in antitrust litigation that recovery of attorneys' fees are provided on top of treble damages.

Zirpoli: Yes.

Sharp: I wondered why that was.

Zirpoli: To encourage private enforcement so the lawyers will take these cases and enforce the antitrust laws. If you don't give them an incentive, they are not going to take on a complicated case that may involve the expenditure of very substantial sums, particularly if they take it on a contingency basis. The attorneys' fees are paid to the plaintiff so that if you recover, by way of illustration, a verdict of let's say $750,000 and the judge allows $250,000 attorneys' fees; that becomes a total of $1 million to the plaintiff, but if the attorney has a 40 percent contingency fee contract, he gets $400,000 instead of the $250,000. Some people think that the attorney gets the fee that has been fixed by the court. No, the fee is awarded to the client (the plaintiff) and then the attorney gets his fee in accordance with his contract.

Sharp: The encouraging of private attorneys to take these types of antitrust cases then lessens the burden on the government essentially?

Zirpoli: Yes, there is more enthusiasm on the part of private counsel. [laughter]

Sharp: I would think so. The U.S. attorney isn't going to benefit in quite the same way as the private attorney. In setting these fees, you drew on an earlier Ninth Circuit case regarding Twentieth Century-Fox film from 1964.

Zirpoli: Yes.

Sharp: That had given some guidelines for attorneys' fees.

Zirpoli: There were other cases besides those.
Sharp:  Right, yes, but I was intrigued though that it was actually a Ninth Circuit case that you selected.

Zirpoli:  It was a Ninth Circuit case, but there was another case that the Ninth Circuit had been following, if I am not mistaken.*

Sharp:  The point is a small one really, but I was interested to see that you were looking back to the Ninth Circuit for some suggestions.

Zirpoli:  Well, I always look there first!

Sharp:  That seems a good move.

In that last case, which is a fairly short one, one that you dismissed, Franck v. Carborundum, a horizontal price fixing case that you dismissed because of lack of evidence--**

Zirpoli:  Franck had filed a number of antitrust cases. When anybody sold him anything he didn't pay his bills and they would ask him to pay or sue him, he would then file an antitrust case against them. I have had him in here before. In this case, he wasn't able to establish anything really, so I just threw it out. In the last case I had with him, even his son was going to testify against him. He was doing it to harass in the hope they would pay him or discharge his indebtedness to them.

Sharp:  So people bring in the antitrust cases for all sorts of grievances.

Zirpoli:  And in propria persona. The sad part of it is, he [Franck] is a fairly intelligent man. He might have been a good lawyer if he had studied law. But he wasn't an honest man.

General Concerns in the Area of Antitrust

Sharp:  That brings me all the way around to some more general questions about antitrust. Of all of the antitrust cases that have come before you so far, what are the most difficult ones to sort out?


Zirpoli: One of the difficult cases naturally was the Howard Hughes case where I had entered a default. If I start picking them on the basis of difficulty, that is number one. Number two, I would say the Pacific Far East Line case was very difficult because that's a case where you had to find some fraud that was being exercised on the court. You had to find that there was a deliberate destruction of the discovery process, things you don't like to do. So those are the most difficult.

Probably Pacific Far East was even more difficult than Hughes because in the Hughes case, as I said, I entered a default as far as Hughes was concerned in the two companies he owned. Hughes had written me a letter (and I verified that it had been signed by him) in which he said, "I have no objection to my deposition being taken, but at the proper time and place and under appropriate circumstances."

So I said to his counsel, "Mr. Hughes is telling the court what to do, so to speak." As the principal witness he was denying the parties the essential evidence that they needed to prove their case, so I just entered the default.

When his lawyers appeared before me, I said to his lawyers, "Are you telling me that Mr. Hughes will see me in hell before he will submit to a deposition?" Then I said, "If you are, you tell Mr. Hughes he is going to have to wait a long, long time." Hughes died about three years ago and he will still have to wait a long time before I join him.

Now, the Hughes case was a securities fraud case, but it has much of the aura of an antitrust case and the problems that arise are very much the same.

Sharp: If you look just at just this short stack of cases altogether, it seems that part of it is trying to figure out whether or not something is really a violation if it hasn't come up before.

Zirpoli: What you do is you review all of the facts. You look at what is supposed to be the relevant market in which the competition takes place, and does the conduct of the parties constitute what is known as an unreasonable restraint on trade. If their conduct results in unreasonable restraint on trade, then you take whatever action is necessary.

I had one which was a divestiture case involving one of the major paper companies. Eventually I ruled that they should divest themselves of their San Francisco unit. I remember I wanted to keep this secret. I didn't want anybody to know what my ruling was going to be, until I actually issued it, because I was afraid it would have a reaction on the stock market as to the companies involved. It
Zirpoli: turned out that the only reaction on the stock market was that it moved down one-eighth of a point. [laughter]

Sharp: Not a great one!

Zirpoli: No.

Sharp: Could we talk about varieties of penalties a bit? In 1974, President [Gerald R.] Ford signed a new act, the Antitrust Procedures and Penalties Act, which is actually after several of these cases, which changed penalties for antitrust violations of the Sherman Act.

Zirpoli: That was on the criminal side.

Sharp: Yes. There are three areas: changing the charge from a misdemeanor to felony, increasing the [maximum] jail sentence, and then upping the [maximum] fine. Apparently, this was passed after years and years of discussion on the part of Congress. Since we haven't talked very much about the criminal side, I thought we might for just a bit.

Zirpoli: Criminal antitrust cases are rare, very rare. If I go back over twenty-five years, I don't think I can, in my own mind, conjure up more than three or four criminal cases in this district.

Sharp: Why are they so rare?

Zirpoli: Because a civil case will serve the necessary remedial purpose. After a successful decree in a civil case the government rarely goes after them in a criminal case. Of course, the first one I participated in was the lumber products case, in the prosecution of which I aided Tom [C.] Clark. That goes back to 1941.

Since 1941 to this day, I have some serious doubts that anyone can point to more than five or six criminal prosecutions in this district.

[Around 1957] one of them involved wire nails and the Japanese importer thereof. I was defense counsel then and I represented Nissho Iwai, one of the biggest trading companies in the world. My people were not indicted because I cooperated with the government. I found out what was happening and immediately said to the government prosecutor, "Look, tell us what you want us to do." The government filed suit against others and they then ended the cases by entry of consent decrees. Sometimes that is all that happens. There were treble damage suits that followed thereafter, but my people were never involved with them. We were very fortunate. So you can think of a few criminal cases, but I really have a tough time giving you the name of an antitrust criminal case.
Sharp: It does bring up the question though of penalties for civil antitrust litigation. It's fines mostly?

Zirpoli: Yes, mostly fines. Once in a while, a six-month jail sentence will be imposed.

Sharp: Do you consider fines to be the most effective remedy?

Zirpoli: No, because the individual doesn't pay it, the company pays it. General Electric can afford to pay fines. Rarely has anyone gone to jail for antitrust violations and if they have, for not more than six months, as I recall.

Sharp: Is there another solution to all of the antitrust litigation? The trust practices is what I am asking.

Zirpoli: No, I don't know of any other solution. Unfortunately, it is a long and difficult one. The whole process is so long and difficult. You have to establish a relevant market; you have to establish the participation; you have to establish the conspiracy; you have to establish the impact on the market; and things of this character. I have had other antitrust cases. I remember an IBM [International Business Machines] case involving [computer] software.* I ruled that there was no impact, that the conduct of IBM did not result in damages. The Ninth Circuit Court of Appeals sent it back saying, "You didn't inquire enough." I think they were wrong, but I am not going to argue! [laughs] That remains to be resolved. The case has now been settled.

I had another one involving the trucking industry, but this was also on the civil side. That went up on appeal and it's back now for further trial based on the question of whether or not the defendant, California Trucking Association, was properly asserting its Fifth Amendment rights or whether they were using this as a subterfuge to fix prices.**

Sharp: What about the recidivism? Corporations, generally large corporations especially, are showing up again and again in antitrust litigation.

Zirpoli: There isn't that much. Where would you find it? Maybe Standard Oil. By way of illustration, you would see one or two cases involving Standard Oil. The gypsum people were involved once before, about thirty-odd years ago.


I haven't seen yet any Judicial Conference committee, for example, on antitrust trying to figure out what to do about it.

The Judicial Conference has on occasion interested itself in legislation that could be deemed to be antitrust in character, but it avoids taking any positions because this is not a judicial function. I mean, enacting the law is not a judicial function. The only time we would take an interest is when there is a possible impact on the courts.

In other words, if you had litigation which would permit a user to sue on behalf of every user in the United States, this would be of great concern to the courts, and while they haven't had legislation quite to that degree, there have been statutes proposed from time to time (that have yet to be enacted) which would begin to take on a magnitude of that character. Of course, the Judicial Conference has opposed that type of legislation because, after all, whatever you get has to be manageable.

What about the skills and the efforts that the trial court judge uses in antitrust cases generally, simply because of the size and the length?

The size and the length and his knowledge of the particular area. He has to educate himself, that's what it amounts to. In the IBM case on software, I had to educate myself on the use of computers and software (of which I knew nothing before the trial started), and I had a glossary of about two and one half inches thick of language that I had to learn. This was very complicated software which they used in equipment to manufacture airplanes and things of that character where, by use of the numerical process, you could set up a machine that could cut all of the steel and the gear and everything that was needed.

Done by computer programs.

That's what happens to federal judges when they get appointed to the bench. They know nothing about patent law and they have to take the trouble to read about it and learn about it. Most of them know nothing about admiralty. They have to take the trouble to learn about it and read about it.

I don't know quite how to ask this, but are you generally satisfied that you found out enough to work with each case?

I told you the story before, didn't I, that of Judge George M. Bourquin of Montana? Judge Bourquin was an old judge in Montana who had never tried an admiralty case. He came to San Francisco to try an admiralty case. He called the lawyers involved into his chambers and said, "Gentlemen, I know nothing about admiralty law. Therefore,
Zirpoli: I wish you would furnish me with the text you think I should read and the material I should read in preparation for this trial," and so they did.

When the trial was over, he said, "Counsel, will you please come to my chambers?" When they got into his chambers, he said, "Gentlemen, be seated. I want to tell you fellows that you have got a hell of a lot to learn about admiralty law." [laughs]

There you are! That's the kind of preparation that you have to indulge in.

Sharp: Because there is some feeling that the whole thing should be reworked and that there should be--

Zirpoli: There are feelings that the things should be reworked, and that we ought to have specialized judges with expertise in particular areas and fields. Even the chief justice [Warren Burger] has expressed himself on this subject, but I am not in accord with this view. I mean there isn't anything that the lawyers can do for which they cannot properly prepare the court or for which the court cannot properly prepare. If they have got a case and they want the judge to get an education, they can give him a glossary as they gave me with the software. They can give him a statement of the whole operative procedure of input for purposes of use in computers and things of that character. Then they can write proper briefs. There is no reason why it shouldn't be that way in my view.

There are a lot of people who won't agree with me. They think you ought to have judges, a special judge handling patent law, a special judge handling admiralty or antitrust or securities fraud.

I discovered the same thing in my TECA, Temporary Emergency Court of Appeals, that I sit on. I knew nothing about oil and gas regulations affecting allocation and pricing, but the regulations and prior decisions were there for me to read. I was able to read the regulations, legislative history, and preceding cases. Strangely enough, no member of that court had any prior expertise in the field. Yet the [U.S.] Supreme Court has not to date accepted certiorari in a single one of their cases. Their decisions have been final. I mean if you are going to carry it to that extreme, you might as well get specialized judges on the [U.S.] Supreme Court.

Sharp: What about circuit court review, appellate review, of district court antitrust decisions? Do you have any sense of a general criteria for antitrust decisions review or is it the same as any other case? Are there special things going on?
Zirpoli: I don't know. I have been sustained in most of my cases, but the two of them which were sent back to me, I could never understand. [laughter] One of them was on the question of impact.* I found there was no impact. If there is no impact, no damage, that ends it. I was going to assume everything else, violations or anything you want. They said, oh, no, I should go into the violations and so forth. But I had assumed them, so that there was no need to go into them. So I don't know.

In the other one,** I concluded that this company that was complaining about tariffs was exercising its statutory right to complain about tariffs, but the Ninth Circuit Court of Appeals said no. The court of appeals said maybe they had an ulterior motive and were just trying to create an unlawful, unreasonable restraint in trade, things of that character. So I don't know, I don't know that they act differently in their handling of antitrust than any other type of case.

Sharp: Is there anything that can be done, do you think, to ease the backlog of the antitrust cases that are in the courts currently?

Zirpoli: The only thing that I know of that can ease it is to impose sanctions where frivolous cases are brought; beyond that, I don't know.

Sharp: What is and what isn't frivolous is up to the judge somehow?

Zirpoli: He can tell from the facts, say if a fellow like Franck brings a frivolous suit. Franck v. Carborundum is a good illustration.

I will tell you that one of the early cases that I had was against a judge, [Marvin] Sherwin of Alameda County. That was when the judges here had to disqualified themselves because of previous professional relations with him. It was in June of '63 that the decision came out from the Ninth Circuit Court of Appeals. I have forgotten the date of the trial, but it was at least a year before that, so I was relatively new on the bench. The members of our court asked me to take over the case and I did. He was found guilty of violation of the income tax laws. It was a very interesting case because here was a judge who was on trial, a former legislator, and who had served on the [Assembly] Revenue [and Taxation] Committee of the legislature. He was saying that he didn't understand the internal revenue laws!

*Symbolic Control v. International Business Machines Corp. (1975)
Zirpoli: I presided over that trial. The only question that was ultimately raised on appeal was related to the instructions that I had given the jury. The instructions to which they objected were instructions that I had previously advised counsel I would give. Sherwin's lawyers not only did not object but they had actually approved the instructions I gave.

Sharp: There is another early case that you wanted to talk about there?

Zirpoli: Now, if we start going over cases, there were a lot of cases involving prisons such as Santa Rita and the state penitentiary practices.

Sharp: I thought we would spend some time on the prisoners' rights cases. The first couple of times that I was here, we picked some from the Lexis printout. I thought I would send those over to you and you could see them.

Is there a changing process of trying antitrust cases from the 1960s from when you first came on?

Zirpoli: Change?

Sharp: Change just in the process of the way that they are conducted?

Zirpoli: No, except possibly they are better prepared for trial. I mean the cases are more thoroughly briefed.

Sharp: Are there some differences between the private antitrust and the cases brought by the U.S. attorney's office?

Zirpoli: Basically, there should be no difference because the government has to establish a restraint in trade, unreasonable restraint. In a civil case you have to establish an unreasonable restraint by a preponderance of the evidence, but on the criminal side, of course, the proof has to be proof beyond a reasonable doubt. So the proof increases on the criminal side when the government prosecutes.

As I say, I find that there were relatively few criminal prosecutions. Generally, when a criminal prosecution took place in antitrust cases in the past, the officers would come in and plead nolo contendere or some such plea. Then the court would impose a fine. On rare occasions would someone get a prison sentence and if they did, it wouldn't be more than six months.

But most of those would be cases where they would come in and plead guilty or nolo contendere with the thought of saving hundreds of thousands of dollars in legal fees and costs.
Sharp: I have just two last questions. One is in your use of the consent decree and consent agreement. I had understood that there was quite a variety in how judges approach the use of both of these. I wondered if you had some general feelings about the use of both of them?

Zirpoli: The judge has to review any consent decree. It has to be one that he would be willing to sign in the first place. If he doesn't like it, he is not going to sign it. Now, what happens is that people come in and they will enter a consent decree depending upon the nature of the case involved. If it is just a case between you and me involving my illegal use of your copyright and I say I won't use it anymore and if I do, this will be deemed a violation of the court's order (the consent decree), such subsequent violation will be found to be in contempt of the court's order and subject to sanctions.

On the other hand, if it is a class action, then you have to give notice to all the members of the class. That may involve sending personal notice to thousands of people and publications in the newspaper and on TV indicating what the consent decree is, when it will be heard, so if there are any objections, the people can come into court and object.

In the gypsum cases, we had to have that kind of a hearing. In the Hughes Air West case, we had to have that kind of a hearing. So the people involved are all advised and they come in and interpose their objections.

In the cases involving discrimination, such as the Southern Pacific [Railroad] case or any other case of that nature where discrimination has been alleged and there is a consent decree, then you have to hold a hearing so that people can come in and voice their objections. The judge is not going to sign a consent agreement that is not proper.

In other words, let's assume that there was a suit filed by the American Basketball Association against the National Basketball Association and thereafter the parties wanted to come into court and enter into a consent decree in which the court would approve a merger of the American and the National associations into one. Well, the judge is going to think twice. I had a situation of that character in which I said no. I said, "If you ever want to dismiss this case, you have a perfect right to dismiss it, but I am not going to give you a consent decree of this nature."

Well, the case was dismissed. In later years, the two associations merged [laughs], but I had nothing to do with it. I wouldn't approve it because, in effect, the nature of the antitrust violations that they were complaining about would have been enhanced by what they were about to do.
Sharp: Can you generalize at all about your feelings regarding concentration and competition in business? You have seen a lot of it. You have seen a lot of antitrust cases come before you in all sorts of industries. I wondered if you had ever come to any grand conclusions.

Zirpoli: No, my only grand conclusion is that I am a believer in free enterprise. There is no argument about that in my mind. That I believe in, although I think we are gradually becoming a socialist state. But nevertheless, I still believe in free enterprise. I think that that's the system that best serves the individual and is the one that I would prefer because I, despite my age or any other circumstances, feel that I can still compete! [laughter]
Perspectives on the Work of the Conference: Membership on the Advisory Committee on Federal Criminal Rules and the Committee on the Administration of the Criminal Law

Sharp: Are you ready?

Zirpoli: Yes—-that depends on what you're going to ask me!

Sharp: I thought we might talk some about the [Judicial Conference] Committee on Federal Criminal Rules.* Both in talking about your work on this committee and on the committee on the Administration of the Criminal Law, what I am interested in is the process of how you worked on it, the process of the discussion, options, and alternatives.

Zirpoli: These committees are arms of the Judicial Conference of the United States. The Judicial Conference of the United States is the governing body of the federal judicial system so to speak, the work of the courts. It makes recommendations to Congress from time to time as to legislation that may have an impact on the courts. It may suggest legislation or it may comment on legislation. Generally, it doesn't comment on proposed legislation unless requested to do so by the Congress.

But, at times, the Congress fails to make such requests. Then we have to take the initiative ourselves in one or another of our committees so as to bring to the attention of the Congress whatever problem we have in mind that we feel ought to be considered by the Congress.

*Judge Zirpoli was a member of this committee from 1962 to 1971 and its chairman, 1966-1971.
Zirpoli: The conference has the responsibility of supervising the courts and the administration of justice, the promulgation of Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, and rules of evidence. The members of the conference are the Chief Justice of the United States, the chief judge of each judicial circuit (there are twelve circuits), the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit (a total in all of 27).

They couldn't possibly as a group handle all of these problems, so the conference creates committees. There are standing committees and ad hoc committees which are created to deal with particular areas, so there is a committee on the administration of the courts, there is a committee on the budget, there is a committee on judicial ethics, there is a committee on the administration of criminal law, and there is a committee on practice and procedure which has below it advisory committees, one on the civil rules and one on the criminal rules. The chairman of each committee reports to the conference at each session of the conference. The conference meets twice a year, generally in March and September of each year, to consider the various problems that arise.

Now, with relation to the committee on the rules of criminal procedure (on which I served for a number of years and eventually served as chairman), what we were interested in were the necessary changes or modifications in the criminal rules. The basic problem that arose and which we felt required review by us was a revision of the criminal rules in such substantial measure so as to permit greater discovery, pretrial discovery, thereby eliminating to the degree possible the elements of surprise, and also, problems with relation to bail reform. At the same time we had to be careful not to create an abuse of discovery.

So during my period, two of the most significant areas in which we functioned had to do with the revision of the rules. We worked on these revisions. In 1970 we published the preliminary draft of the proposed amendments.* Now, this preliminary draft was a pretty extensive review of the rules with modifications, additions, and suggested changes. If you will pick up the rules today, you will

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Peyton Ford
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Prof. James William Moore
J. Lee Rankin
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Prof. Bernard J. Ward, Reporter
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Advisory Committee on Criminal Rules

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Adrian A. Spears
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Zirpoli: find that most if not nearly all of the suggestions we made were adopted. There were some slight modifications, one or two that weren't—but for the most part, they were all adopted. With some small changes since, they are the basic rules that we function under today. Now, this was a big job and it took a little time.

Then there was the Bail Reform Act. I have forgotten the exact date of the Bail Reform Act [1966], but it was initiated by Senator Robert Kennedy. It resulted in the present statute with relation to release on bail. The basic requirement is that if a person was charged with a crime, he should be released on his own recognizance, or admitted to bail under particular conditions with the criteria to be, will he present himself in the court when required to do so. In other words, basically to secure his presence in court.

While there was some discussion that the court should also consider whether he constitutes a danger to himself and to the community, that was not accepted in the Bail Reform Act. Our committee reviewed that and at one time it was suggested that we incorporate this provision, but we said, no, we will not. I have forgotten exactly which year we did that.

Then came the revision of the federal Criminal Code and that was being presented as a reform of the federal Criminal Code, rather than mere revision. There were a lot of suggestions being made then about preventive custody and things of this character depending upon the nature of the crime or the offense.

We were not favorable to reforms for preventive custody, but we were then, by that time, disposed to include a provision that the court may consider whether or not the defendant is a danger to himself or a danger to the community when the matter is referred to the court for the setting of bail or other conditions of release. Now, that is still with the Congress. That has yet to be resolved. This question of the reform of the federal Criminal Code has been going on now for over ten years, eleven or twelve years. I don't know what it is now—twelve approximately.

Our committee started working on it the minute we received a copy of the Brown Commission report, which was a very thorough, well-prepared document. The Brown Commission report was a report of a commission for the revising of the federal Criminal Code of which Edmund G. Brown [Sr.] (former governor of California) served as chairman. We had many observations to make in connection with it. Now, in the first report we made on it, [George C.] Edwards [Jr.] was chairman of the committee at the time, and we had not had an opportunity to go through it in any detail at all.
Thereafter, I was appointed chairman and we worked diligently on it. In fact, we took the first Senate bill and reviewed it, the entire bill, line by line. When I say we reviewed it line by line—Senate Bill 1—you can see by the sheer volume involved just what an enormous task it was. When we reviewed it line by line, we were primarily interested in those procedural aspects of the legislation which might have an impact on the operation of the court. When it came to the description of substantive crimes—what shall or shall not constitute a crime—of course, that is basically a prerogative of the Congress. We accepted the language of the Congress, unless we saw a specific need to comment. But there was very little that we commented on in that regard.

There were aspects of it that we were very much interested in. They related to the fact that first there would be an increase in the litigation of criminal cases. There would be an expansion of federal jurisdiction. Now, we said, "That's a matter for Congress and whatever the responsibility is, we will accept," but we felt that Congress ought to realize the degree to which there would be an expansion of federal jurisdiction. There were proposed statutes that we called piggyback provisions in the new laws which would have expanded federal jurisdiction in matters which would normally be the responsibility of the state.

Then we looked into the procedural and evidentiary problems as they related to what you might call states of mind, which is not really procedural but in a sense it is. We were very much interested in the procedures to be employed in the new law as it related to states of mind with relation to the commission of crimes, what are the states of mind. There are various states of mind known as "intentionally," "knowingly," "recklessly," "negligently," and we felt that there was some confusion in this area and that we could simplify it. So we offered our suggested states of mind.

Then there was the question of bars to prosecution. These related to trials where the party was not convicted of a major felony, but was convicted of a lesser included offense. Here we were confronted with a statute of limitations on a misdemeanor, let's say, of a year, and for a felony of five years. We didn't feel that the statute of limitations could be deemed in a sense to be waived if the fellow was tried for a felony and convicted of a misdemeanor. One of the reasons we objected to that is that we were afraid, too, that there might be a series of prosecutions truly based on the lesser offense, but the greater offense would be charged. Then you would end up with a
Zirpoli: conviction of the lesser, and the statute may have run on the lesser offense. We didn't approve of that. So we entered our objections there.

Then there were questions with relation to offenses of general applicability as we call them. They relate to criminal attempt, criminal conspiracy, and criminal solicitation. We were particularly objecting to criminal solicitation as creating a new area of criminal conduct which we felt was adequately covered by conspiracy and criminal attempt.

There were some problems with relation to what constitutes an attempt. There were some problems of what constitutes an abandonment of attempt, or an abandonment of conspiracy. We tried to point out, based on our experience, the various problems that arise in these areas and we set them all forth in our report, which was a very extensive report.

Then there were proposed amendments to the pretrial release provisions of the code and we had our objections on the question of pretrial because they were setting up an equivalent—not entirely the equivalent—of another agency separate and apart from the probation office. We didn't see any sense in a probation officer going over to check you and spend time and effort to find out about you and your family and everything else for the purpose of pre-release; then have a head of a department to do that (who was going to be paid under the act even more than the chief probation officer); and then have the probation officers go through and do the same thing over again.

Now, I am not saying that there is no justification for such difference in approach because that difference has since been accepted, and recently by the Congress, but at the time we were very much concerned about that particular problem and we felt that our experience didn't justify this setting up of another bureau so to speak. I am still not satisfied that the circumstances as they exist in the courts justify it.

We now have a pre-release provision, but I have never had any difficulty in setting bail or conditions for release based on our past experience. If I wanted a pretrial investigation by the probation officer, I would order it. I did on occasion and I didn't have to do it too often. But in all events, we have that now and those were additional problems upon which we commented.

Now, these are all problems that have an impact on the court.
Zirpoli: Of course, another thing that we were interested in was this civil commitment of mentally dangerous persons. Now there is a federal statute that permits commitment if a person is unable to carry on his defense or to confer and consult and cooperate with counsel, but that is a temporary commitment and that is before trial. What we were interested in was the enactment of a statute that would permit the confinement of a person who was mentally ill and who was a danger to himself or to a community.

We worked on that for a long time with the Department of Justice, with the Public Health Service, for the purpose of working out a procedure that would guarantee and provide all of the necessary due process. To insure such due process we provided that after a trial in which an insanity defense had been raised, and the defendant found not guilty, we could nevertheless conduct a subsequent hearing with appropriate medical and other expert testimony. If after such hearing we found him to be a danger to himself or to the community, he would be then confined in a federal institution.

Now, this was a difficult problem because there were constitutional questions involved in the due process area. Now, this is somewhat reminiscent of [John] Hinckley.* Hinckley was confined, but he was confined under the equivalent of a state law. He was confined under a statute applicable to the District of Columbia because in our state courts, we have civil commitments. We don't have the equivalent of state civil commitment on the federal side. So whenever a person is involved in the violation of a federal law, if he is found not guilty by reason of insanity, there is nothing we can do. We can only call it to the attention of the state authorities and suggest that they take the appropriate action.

If the court were satisfied that a defendant was mentally incompetent, it could commit him pending trial to the medical center until he is competent to stand trial. However, there is a limit to how long you can keep him there. If you get a report that he is okay, you bring him back as soon as you get that report and the trial goes on.

But sometimes you get a report that he is okay and he comes back and he is really not okay, and he has been in custody for a year. Sometimes they can be in custody for a longer period for mental incompetency than they would be for the offense that they committed.

*This is a reference to an attempt by John Hinckley to assassinate President Ronald Reagan in March 1981.
Zirpoli: So there the court might dismiss the case. The court must then turn to the district attorney in the city and county and the chief of police and say, "This guy is a danger to the community. He is your responsibility now. You better institute civil proceedings against him." But that isn't always done.

So to meet that problem (and we started this long before the new code was suggested, Senate Bill 1), we submitted proposed legislation, namely a revision of Chapter 313, Title 18, United States Code. There have been some versions of it since submitted, primarily coming from Congressman [Peter] Rodino. I forgot the number of his bill. We reviewed his bill and pointed out some modifications, but his bill basically tracked what we have suggested. However, such a statute has still to be enacted.

Of course, there is a lot of discussion about enacting such a statute now particularly in light of Hinckley. So this is a continuing indication of the nature of the work of the committee.

Another problem that arose was the question of sentencing. The new Criminal Code set forth various formulas for sentencing. They were concerned, and the courts have always been concerned, with the disparity in sentencing. It could be that a person in Michigan commits the same offense as one in California and their basic social positions are identical. Yet there may be a tremendous disparity in sentence because if the law says you can be sentenced for not more than five years, one judge could give one year and another judge could give five. It could even happen within the district where you have a number of judges.

So we have been trying to meet this question of disparity in sentencing all along ourselves. What the legislation proposes is that a [Sentencing] Commission be set up to fix guidelines. The original bill provided that the commission would be composed primarily of people appointed by the president. It would be a separate commission--appointed three or four by the president and the rest by the Judicial Conference. We felt that was wrong because this responsibility is a judicial responsibility--sentencing. It is not a congressional one. Congress can fix the terms of the sentences, but when it comes to the exercise of discretion within the terms fixed by Congress, this is a judicial function.

We thought that the setting up of a commission in the fashion they suggested was wrong. It would create a separate commission with people getting enormous salaries. Once they had set forth the guidelines, after the first year or two, they would be getting these enormous salaries with maybe little or nothing to do thereafter. We concluded that the best way to handle it is to let that become the responsibility of the Judicial Conference of the United States. That
Zirpoli: is still our position. That is something yet to be resolved because they have not passed any legislation which constitutes a reform of the Criminal Code despite the passage of all these years. So this was the position that we wanted the Congress to know about.

Then there was the question of appellate review of sentences based on this same question of disparity. The new Senate bill tries to set forth guidelines for sentencings which would permit an appeal by the defendant if he thought it was excessive and an appeal even by the prosecutor if he thought it wasn't adequate within certain minimal standards as provided by the Senate bill. I am referring generally to the Senate bill [SB 1 in 1974] because that was the first bill after the Brown Commission report.

We pointed out that we thought such appeals should be to a panel of district judges and not to circuit judges because district judges have a greater familiarity with sentencing and the sentencing process. There were also questions as to what records should go before the court of appeals. The way they had written it, apparently the appellate review body would get the whole record of the case. It would be ridiculous to give the appellate review body the transcript of a trial that lasted for weeks or months when all that is involved is the question of sentencing. So we made suggestions in that regard as to what type of records should go up and that basically we would prefer that it be a panel of district judges set up for that purpose. There has been no legislation to date on it, but it is a matter still being considered. These were the suggestions that we were making.

Then there was the question of the failure in the Senate version and even the House version to include any provisions for the continuation of the Youth Corrections Act. We felt that that had to be continued. There is the question of fixing sentences without parole. We discussed that but that is not basically our responsibility. In other words, whenever we made a suggestion, we would definitely say to the Congress, "This is basically your responsibility; it is not ours. However, these are problems that we foresee that we think you ought to know about. That was as far as we would go.

Now, the other problem was the effective date of the new law. We suggested that the effective date be three years after enactment (they had it for one year after enactment). Basically, because there would be a tremendous process of re-education and re-evaluation. Also, because we discovered that in connection with the Speedy Trial Act (and you discover it in connection even with the Bail Reform Act), that with the passage of time, you find that there are some modifications that ought to be made. If you had this three-year interval in which to work those all out, I think the ends of justice ultimately would be better served and the judiciary better served. So we made suggestions of that character as well.
Zirpoli: Of course, I remember when we were first asked to submit a report to the Judicial Conference of the United States on Senate Bill 1 and I was speaking to the chief justice [Warren Burger] just before the conference. I said, "Chief, this is going to mean a re-education of the entire judiciary." He put his arm around my shoulders and said, "That's all right for you young fellows." Well, I am at least three years older than the chief justice, so I felt pretty good about it! [laughs softly]

As I say, there I was discussing the work of the Committee on the Administration of the Criminal Law. Now, more often than not, when bills were referred to us we would make no recommendation because we felt that they were not within the responsibility of the judiciary and were basically the responsibilities of the Congress. But when we did that, if we felt that there was some area that might indicate an impact on the court, we would make whatever observations we felt justified without making a recommendation.

These bills considered by the committee come to us either because we initiate them and then submit them to the Congress or the Senate, or the House refers them to us for our consideration and comment. Such bills arise in many areas. There are quite a few bills in the antitrust field on the criminal side that are presented. If there are problems, we will see what the problems are and we will then alert the Congress.

Now, on the Speedy Trial Act, there was a problem that arose in connection with the criminal rules. We were not asked to comment on the Speedy Trial Act by the Senate. It was Senator [Edward M.] Kennedy who started it. But after the Senate had approved it, we got an invitation from the House and I went over to testify. We worked on that line by line and in great detail and I indicated to them why I thought it was not desirable to have this statute enacted.

The chairman of the Subcommittee [on Criminal Justice of the House Judiciary Committee] said, "Why didn't you tell all of this to the Senate?" I told him, "Because they didn't invite me." I was speaking in vain, in a sense, because they had already agreed on what their vote was going to be before I even addressed them! [laughs] But anyway, I went into detail. On Senate Bill 1, I went into considerable detail with Senator [Roman L.] Hruska when I was chairman of the Committee of the Administration of the Criminal Law. He gave me a good audience, I'll say that, and even though there were only a couple of Senators there, he was the primary spokesman because he was quite familiar with it, far more than most of the Senators.

To make a long story short, I suggested that they not pass this Speedy Trial Act because we had already taken measures to take care of that situation ourselves under Rule 50 (b), whereby each district
Zirpoli: worked out a plan for the handling of cases so as to expedite the processing of criminal cases. This was done initially through the Committee on [Federal] Criminal Rules. We had adopted a model plan and submitted it to each of the districts subject to such variations as they felt they would like to impose. For the most part, our plan was pretty well adopted. It became pretty much the uniform plan. Based on our experience, we were satisfied that we could accomplish all of the objectives of the Speedy Trial Act.

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Zirpoli: In fact, during the first three years, we felt that our approach would work out even better than the Speedy Trial Act. Since our plan had been in effect not quite eighteen months, we wanted Congress to defer enactment of the Speedy Trial Act at least for thirty months so that we could get the benefit of the effect of our plan.

We had a professor from Harvard who was using some statistics that didn't have a valid base. Senator Kennedy was also using statistics that didn't have a valid base.

Sharp: This is Ted Kennedy at this point, isn't it?

Zirpoli: Yes, Ted Kennedy, yes. Congress went ahead. After enacting the Speedy Trial Act they had to make some changes. The only concession we got from them was to extend the effective date of the act for an additional six months. [laughter]

As I say though, we have since had problems, not too great, and the courts were able to comply. We would have been able to do this under our plan as effectively as they are doing it under the statute as enacted—not that we had any quarrel with it. We agreed with their objective. We thought it was right. We didn't necessarily have any quarrel with their statute, but we said this is something that we are in fact resolving.

It is this same question of the court in fact resolving questions that caused us to raise objections on the Senate Bill 1, which would reform the Criminal Code as it relates to certain types of defenses such as insanity, entrapment. We didn't want to see these defenses codified and frozen because these were areas of development. It wasn't clear as to what definition should apply with relation to entrapment. Is it the propensity of the individual to engage in this conduct? Does that relieve the situation from entrapment? On the question of insanity there were various types of defenses. So we were saying to the Congress, "Now, in these areas, don't enact legislation." I doubt that they will; I really doubt that they will. I think they'll adhere to our suggested program, that these defenses be left to the judiciary.
Zirpoli: We have these fairly well-established principles, and when you rewrite those defenses and freeze them, then everybody comes in and asks to have these defenses interpreted by the courts anew. As a result, you have appeal after appeal trying to find out just what Congress meant by this, and what they meant by the other. At least we have enough precedents in these various areas to have a pretty good idea of what constitutes entrapment today, what constitutes a proper insanity defense. So there, by way of illustration, we were objecting to any freezing of definitions.

Now, what I have just outlined to you is basically the most important aspects of my work on the Committees on the Administration of [the] Criminal Law and the Federal Criminal Rules.

I did work on the Habeas Corpus Committee, but on the Habeas Corpus Committee we made some progress but not a great deal of reform. The basic work on reform in that area has really been performed by Judge [Ruggero J.] Aldisert (since I left the committee) of the Court of Appeals of the Third Circuit, who is a very able and a scholarly judge and a good administrator. He served with me on the Administration of the Criminal Law.

The one thing we did do is we worked out a set of forms that we tried to make applicable, that would be uniform, and would apply throughout the country whereby the prisoners would have to set forth the specific information that was needed to properly evaluate a petition for writ of habeas corpus. He'd have to show that he exhausted his state remedies and he would have to assert all of his constitutional claims at one time. We didn't want the condition to continue that was existing whereby the petitioner would come in with one claim one day and it was denied, and then two or three months later he would look around and find another, and then that was denied.

So a specific set of forms was set up for that purpose and a set of forms was set up for what they call Section 1983 [of Title 18 U.S.C.] cases, which are based upon the denial of civil rights to prisoners. As I say, we made progress in that regard in that we have worked out some programs to facilitate our entire approach because of the volume involved. As of today, and in recent years, the major draftsman of procedures of that nature has been Judge Aldisert of Pennsylvania.

Now, I think I have covered the committee work to what may be deemed to be adequate for our purposes. I don't know.

Sharp: Could I have a few questions?

Zirpoli: Oh, yes.
Zirpoli: Oh, I might make one other observation before I leave on the committee work. Now, I appeared before Congress on three separate occasions, but as a result of my working on the committees. I found toward the end that I was better off if I asked the representatives of the Department of Justice to come, the representatives of the House Judiciary [Committee] and the Senate Judiciary [Committee] to come, and we would meet jointly. These were people who were doing the spade work. Before my term ended I participated in three sessions of this nature which I found to be very productive, because we were discussing details together. These are the fellows that were going to advise their congressmen or prepare memos for them. I felt that this was by far the most effective way to work on legislation.

Sharp: There was a sense of some real give and take in these sessions then?

Zirpoli: Yes, this is a better method of operation. You just go before a committee and you make a speech and that's it. Then maybe the staff reviews it. But, if you work with the staff and you sit down with them, you sit at a table, all around a big table, and discuss these various items, and you work out details, it turns out a lot better.

Sharp: I sense that there must have been some tension between the Congress and what it might have thought its purview was with respect to some of the court procedures and some of the committees that you were on, and perhaps it wasn't altogether clear what you thought you were supposed to do and how Congress was reacting.

Zirpoli: No, I wouldn't quite say that because, after all, they refer a bill to us and ask us for our comments and recommendations, and we would make comments and recommendations. We would approve it or disapprove it and give our reasons therefor. That's about all you can normally expect. Of course, we would appear whenever requested to do so. There have been appearances naturally before the Congress by members of the Budget Committee of the conference when Congress must fix the budget for the judiciary.

There would be members of the Probation Committee, if it related to problems regarding probation. There were members of the Magistrate's Committee (which was separately created later when problems relating to magistrates arose), and there was a committee on the Speedy Trial Act that was later provided for. At first, the [Committee on the] Administration of [the] Criminal Law handled problems relating to magistrates. Between the two, between Criminal Law and Criminal Rules— we handled just about everything that had to do with the administration of criminal justice; that would be magistrates, and the Criminal Justice Act, which provides for the representation of indigent defendants.
Zirpoli: I might say on the question of representation of indigent defendants, one of the great influencing factors as far as the creation of the public defender’s system is concerned was the plan of the United States District Court of the Northern District of California. Now, that plan was the forerunner if any particular plan was.

Sharp: That was pretty early, wasn't it?

Zirpoli: Oh, yes, I started that in '51 to '55. It was then taken over by the Bar Association of San Francisco.

All right, now I will see if I can answer any specific questions.

The Federal Magistrates Act

Sharp: I had a few questions about the Federal Magistrates Act. I was looking at bits and pieces of the act as I found them in the 1970 revisions of the Criminal Code. It seemed to me that the purpose of the Magistrates Act was to take a bit of the burden off of the district court. Is that right?

Zirpoli: That's right. It was definitely to take a bit of the burden off of the district court, and to handle all of those petty offenses, of course, which were previously handled by United States commissioners. So they continued the work of the commissioners. Then they were given the title of magistrate in order that they might carry on other functions that are very time consuming. For instance, even in civil litigation matters pertaining to discovery, there is no reason why the court should have to spend its time reviewing interrogatories or documents and so forth, when they can be referred to a magistrate, by way of illustration, who then makes the review or makes the tentative rulings, which the parties can agree shall be binding or which shall be subject to review by the district judge or shall constitute only recommendations to him.

Now, to the degree that it is helpful depends upon the judge.

Also, cases can be tried before the magistrate; you can have a jury trial before the magistrate under circumstances in which he otherwise would not have jurisdiction if the parties agree to it.

Certain extradition matters used to be handled by the court and now they are handled by the magistrate. Certain types of removal are handled by the magistrate, so that a lot of problems of this character can be taken from the court and thus relieve the court.

Of course, it was necessary for changes of this nature because of the continuously expanding federal jurisdiction and a continuing increase in the complicated nature of the cases that are being presented to the court, and have been for the last ten years, so to speak.
Sharp: With the Federal Magistrates Act, I had seen a note in one of the testimonies that you had given that referred to the use of the Youth Corrections Act by the magistrates.* It seemed to be somewhat of a problem, a controversy about the magistrates--

Zirpoli: No, it was not necessarily a problem. We merely wanted to be sure that the magistrate had the power to sentence under the Youth Corrections Act, and expunge the record if the circumstances justified it, and they hadn't made provision for it.

We just wanted to make sure that this provision was really in the new Senate bill. When they were talking about magistrates, they had not made that provision. There was no mention of situations, for instance, of revocation of probation. These are little gaps, that's all, that I was interested in and we were interested in filling.

Modernizing the Rules

Sharp: In reading through the draft of the changes in 1970, I saw lots of references to making the rules more in line with pretty recent district court decisions, U.S. Supreme Court decisions, some state court decisions, as well as new American Bar Association standards relating to pretrial procedures. It looked like there was a tremendous effort at modernizing the Criminal Code.

Zirpoli: The effort of modernizing goes back to 1963 and the primary author there was Judge [William T.] Sweigert. He revised all of the local rules to do just exactly that—to expand discovery. He did a great job. He was the draftsman. The other members of the committee were myself and Judge [Albert C. Wollenberg, Sr.], but Judge Sweigert did the work and he did a tremendous job, which is evident if you pick up his original draft of the rules and compare them with the rules today. You will find that his rules are the basis for everything that we have today. There have been changes, most of them being promulgated through the work of the rules committee headed now by Judge William W Schwarzer.

Sharp: I guess it takes a special kind of insight to be able to sense what the rules should be, and how the rules should be different from the way they were, as Judge Sweigert was doing this whole time.

Zirpoli: That was the result of experience, of his experiences in court. He found that if we could have proper pretrial, by way of illustration, you could narrow the issues; you could get a stipulation of the facts if they were not in dispute; you could have all of your exhibits prepared in advance; you would know in advance who your witnesses are. If they were experts, you had to indicate, for instance, the nature of their testimony. This way you wouldn't spend a tremendous amount of time trying to find out about this expert. They would have to tell you what he was going to testify to and if you wanted to depose him, you would know what to depose him about. Otherwise, you could carry on a deposition with him that would go on for several days, whereas an hour or two hours might have done the trick.

He saw all of these and worked out these procedures. One of the significant procedures, of course, is pretrial. Then there were questions of status conferences. I mean if a case is filed and nothing has been done for three months, somebody has got to do something to get this case moving. So you call what is known as a status conference. I may have commented on this before.

Sharp: No.

Zirpoli: This is this concept that when the case is in the lawyer's office, it is his business and the client's business. The day he moves it into court, it becomes the court's business. The court has the responsibility of policing it and seeing that it moves and then to see also that the parties do not indulge in tactics that are going to be abusive in character. That is the whole purpose of this pretrial procedure and the rules enacted in connection therewith.

Sharp: The whole time that you were working to put together the 1970 draft of the rules, was it a matter of your portioning out the work among the judges on the committee?

Zirpoli: Oh, no. Our committee had a reporter. Professor [Frank J.] Remington was the basic reporter of our committee. We would discuss everything at these meetings and submit memos. Based upon the conclusions we would reach, he would submit to us suggestions with relation to the rules, so that we had someone who was working as a draftsman there. If I had to do all of that, as well as all of my trial work, [laughs] it would be too much.

Sharp: Was it a matter of you as the committee of the judges drawing on all of your experience and saying--
Zirpoli: The Criminal Rules Committee [of the Judicial Conference] is composed of judges, lawyers, and professors (because you can appoint persons other than judges to these committees), so that we had the benefit of the three areas of the law.*

On the Administration of the Criminal Law, the committee consisted of one judge from each of the eleven circuits (now twelve) and no lawyers—that was another matter—and there I really had to work pretty hard because I didn't have a reporter. I had a representative of the Administrative Office of the Courts, Mr. Carl Imlay, who was of tremendous help to me, but that was something that I had to do quite a bit of work on.

Sharp: Did you share with Judge Sweigert some of these things that were going on in the Committee on the Federal Criminal Rules?

Zirpoli: No, other than conversation. I mean there was no true consultation in that sense. The committee was big enough that we had a reporter, but what we did, and which would apply to it, we would make a report to the judicial conference for the Ninth Circuit. So the judges would get a copy of our report.

As far as, let's say, the federal criminal rules are concerned, those rules were distributed throughout the country before they were adopted. We were generally allowed as much as eighteen months for comment from judges and lawyers. We didn't get as many as you would expect. That was the surprising thing. There weren't too many people that really took the trouble to go through it and comment. Each judge got it and he had the privilege of commenting.

Sharp: Did Judge Sweigert comment to you?

Zirpoli: [laughs] I can't recall at the moment.

Sharp: I just thought that it was something that he was interested in already, so he might have.

Zirpoli: --Although Judge Sweigert was a greater stickler on the civil rules than he was the criminal.

Sharp: Why is that, do you think?

Zirpoli: Oh, it is pretty hard to say. I guess because under the civil rules the pretrial was far more significant. The criminal cases do not require a great deal of pretrial. The basic pretrial problems in

*See lists on p. 149a.
Zirpoli: criminal cases are the right of the defendant to any statement that he had made, or the right to copies of statements of witnesses, under what is known as Section 3500 of Title 18; or the obligation of informing of an alibi defense if requested by the U.S. attorney; and things of that character. So the rules were not quite as significant.

Sharp: There is the theory or issue of the idea of judicial rule making. I think the federal criminal rules were originally written in about 1944. The civil rules preceded it by about ten years.


Sharp: But the feeling that maybe it shouldn't be the judges and these committees that are sitting around [writing new rules].

Zirpoli: That's a good subject for argument. As far as I am concerned, I think it is appropriate that the Judicial Conference should be the basic party responsible therefor. Now Congress instead of just adopting our suggested rules or failing to act on them within a specified period of time, thereby making them law, has been going into the proposed rules in greater detail.

So it is becoming more of a case of congressional acts, so to speak, or ultimate congressional responsibility to a greater degree than it was before. I'm not so sure that that's necessarily good because when they get it, it takes them too damn long to work it out.

Sharp: That's probably the major--

Zirpoli: This has been the problem that arises with the new evidence code, for instance. So the problems do arise on that score. But you can argue basically on congressional responsibility.

Sharp: I had a few additional questions on the Administration of the Criminal Law Committee. One of the early reports that I saw was 1970, which was when Judge [George C.] Edwards [Jr.] was still the chair. There were extensive comments about the committee's feelings about Senate Bill 30 which related to the control of organized crime in the United States. Was that something that you worked on?

Zirpoli: Yes, but eventually it resulted in some forms of congressional enactment. But the big bill, as originally presented, wasn't getting anywhere and we felt that they were invoking provisions that weren't necessary and they were having problems in the area of protective custody. We had some doubt about the constitutionality of it because the bill was extending protective custody beyond questions involving homicide or treason or something of this character. The bill would also create some crime commissions that we felt were not going to be of any particular service and that the bill would create problems, which we also felt would just prolong litigation and just make it a lot harder.
Zirpoli: So I don't recall the specific details and if you look at the report, the report won't tell you very much—I mean if you look at the report of the Judicial Conference—because it merely refers to Chapter X or Chapter XI and who knows what Chapter X or Chapter XI said? Looking at a report of that nature wouldn't be very helpful or significant. [pauses to go through papers]

There were provisions. There were immunity provisions. There were provisions for housing, housing facilities for people who committed certain crimes, and there were problems of protective custody, special provisions for dangerous offenders. [pause] We didn't think there ought to be special statutes for special things. If there were sentencing provisions, they ought to be included in the overall sentencing provisions.

These were some of the problems that arose. There were problems with relation to the granting of immunity to witnesses under certain circumstances. There were problems that arose with relation to the wiretapping. There were problems in relation to the reforming of the grand jury.

There were problems with relation to the secrecy of testimony of witnesses before the grand jury. The way the law is written now, if I appear before the grand jury, there is nothing to stop me from going out and telling anybody what I said to the grand jury. Though grand jury proceedings are secret and may not be disclosed, this does not apply to a witness before the grand jury.

These were all problems to which we gave consideration. Some of the areas were strictly matters for the Congress and not for the judiciary and we would just so state to Congress.

Now, there were a number of bills of that nature that came up, including some bills that came up with relation to a reform of antitrust. There was a period there when there was going to be a big crackdown on antitrust and permissibility of greater class actions on the part of users.

Of course, they are all wonderful things, but the important thing is to say what will the impact be on the courts. If you do this, you say, "Well, that's fine, we are protecting the consumer." No one has stopped to consider what the ultimate impact on the court would be or the ultimate cost would be. Then you might find yourself in trouble. That's where the references to [the Judicial] Conference always served a fairly useful purpose because we could at least tell them what the impact on the court would be.

Sharp: With respect to the Judicial Conference, I wonder if you think there might be some issues that the Judicial Conference doesn't deal with right now that ideally it might deal with?
Zirpoli: In my view?

Sharp: Yes.

Zirpoli: I don't know that they really overlook very much. Of course, right now the Judicial Conference of the United States is greatly concerned about the bankruptcy courts and the result of the Supreme Court decision which said that there were basic functions that the bankruptcy judge could not perform because he was not an Article III judge.

Now, that is the most immediate problem as it affects the courts. We are getting the effects of that because there are a number of people in the bankruptcy proceedings now who are asking for different types of orders, restraining orders, and things of that character. They won't accept rulings from the bankruptcy judge.

But here we do have some very, very serious problems that have to be resolved and Congress may resolve them by just making them Article III judges and that ends it.

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Zirpoli: Pending legislation we have adopted a procedure for reference of bankruptcy matters to the bankruptcy judge as a sort of special master. The plan adopted by a general court order has been adopted throughout the circuit. The circuit made that a rule and it was adopted throughout the circuit. We get this exchange from time to time. We find out how other courts handle their business. That is one of the purposes of the Ninth Circuit judicial conference each year. You go to a conference and you learn quite a bit from the other judges and the innovations that arise.

A great example of the innovations that arise was the innovation that brought about the creation of the multidistrict panel and the transferring of multidistrict cases to a single judge. These were all part of the innovative process. Some people have innovative processes that you might not like. There is one on the method of settlement that they have that a lot of judges are talking about favorably where they have the equivalent of a mini-trial, and have the jury give a preliminary verdict. Then the case is settled based on that. That's a form that I don't approve because I think I have a better procedure for settling cases, but this is an innovation that some people might like very much and adopt.

Sharp: The way you talk about the work of the judges and the work of the districts, it is very individualized.

Zirpoli: Now, what do you mean by individualized?
Sharp: Each of the district judges seems to have his or her own way of working in the courtroom. You spent some time telling me about your ways of working in the courtroom.

Zirpoli: Oh, working in the courtroom it is true, but we do have some general rules. We have our own Rules Committee. Judge Schwarzer is chairman of the Rules Committee and we review our rules every year or two years and update them. That goes back to Judge Sweigert and his time. But you have a committee there that represents the court. The matter is then discussed at a judges' meeting and the judges all have their input in it. Then they adopt a rule that it is adopted after every judge has had an opportunity to comment on it and give us the benefit of his or her input, so there is enough exchange really.

It's individualized in the sense that generally the chairman of the committee is doing the spade work and the hard work, but he is getting suggestions from other judges from time to time and, of course, here we have the benefit of the common lunch room and we can discuss problems every day if we wish. But we do meet approximately once every month with a full calendar of matters under discussion.

Sharp: These would vary from procedural rules to what other sorts of topics on the calendar?

Zirpoli: To illustrate some of the things discussed at a lunch meeting, if a new statute is enacted and we want to know what the effect of it is and the impact on the court, we have the most knowledgeable person with relation to that problem come to lunch and to tell us about it.

Sentencing and the Sentencing Commission

Sharp: Would there also be some discussion of individual cases and how judges might be handling them?

Zirpoli: Oh, not quite that much on individual cases. Sometimes you might confer with another judge on the sentencing problems, if you feel you have one. Of course, they have a plan in some districts where they do just that; three judges will confer. I have the responsibility of sentencing, but I will confer with two others and get their views before I sentence. But we don't do that very often here. Sometimes a judge will confer. He is a little concerned about what would the reaction be to this kind of a situation and he'll come and say, "What do you think about it?"
Sharp: You were talking about the Sentencing Commission and the opposition of the Committee [on the Administration of the Criminal Law] to the idea of a sentencing commission.*

Zirpoli: We're not opposing a commission; we're opposing the idea of a commission as a separate, independent body and as a body that receives its responsibility primarily from the executive. The executive has the obligation of enforcing, not sentencing. Sentencing is the function of the court.

Instead of calling it a commission, we could say, "Let the conference set up a committee." You don't have to hire new people or pay new people. The conference can set forth their rules and guidelines for sentencing, the factors to be considered before imposing sentence.

Now, those are not going to change from day to day and, as I say, we just don't want to create a commission for which there is no actual need.

Sharp: But it isn't a resistance on the part of the committee for uniformity?

Zirpoli: Oh, no; oh, no. We believe in uniformity. We are as desperately trying to do that as anyone. In our courts, in order to help bring about uniformity, we used to get reports on every sentence, a factual background, which is distributed to the judges every month for review.

This would be particularly significant, let's say, in the area of tax evasion or in the days of the draft resistance. You wouldn't want one judge sending the fellow to jail for five years, and another one putting him on probation or give him six months or two years. We would get all of these reports and we'd look at them and we'd see how our court judges were reacting so we could have a better understanding and bring about some greater uniformity.

Uniformity is wonderful and I believe in it, but you can only go so far because it isn't that often that two cases are really alike. There are different circumstances in relation to each person's life. I mean the factors that prompted him to commit the crime, his responsibility, his background, his education, the temptations that were put in his way, whether he is remorseful. You have to look at all of these various factors; whether there was violence involved or not involved.

Zirpoli: One of the functions of the commission would be to set forth the various criteria upon which to ultimately predicate a sentence.

Sharp: But that would be, you think, better housed within the Judicial Conference as opposed to a separate entity?

Zirpoli: Yes.

Sharp: I saw it mentioned in your report, the report on Senate Bills 2698 and 2699 (2699 was the Sentencing Commission; 2698 was the mandatory minimum sentence bill), that your committee sought the counsel of the Probation Committee of the Judicial Conference, of which Judge Wollenberg, of course, was a member. I wonder if there was this sort of cross-exchange—

Zirpoli: What happened, when you get into a situation of that character, Judge Wollenberg would be invited to our committee on the Administration of the Criminal Law, and he would invite me to his committee. We would be exchanging views and ultimately come out on some that we were in a sense both agreed upon. We wouldn't come out with a conflict.

Sharp: No, I meant sort of a cross-fertilization of ideas.

Zirpoli: Oh, yes.

Sharp: I wasn't sure how independently these various committees within the Judicial Conference worked.

Zirpoli: They're independent but, for instance, there is a member of the [Criminal] Rules Committee who is also serving on the Administration of the Criminal Law Committee. He is the liaison judge for the two committees. I was serving in that capacity until I became chairman of the Administration of the Criminal Law Committee. I was liaison member serving on both committees.

Sharp: That's important to have.

Let's see if I can just wind this up with a few other questions. I did wonder about the role of the [U.S.] attorney general in the Judicial Conference and his office, and how much he might have been involved.

Zirpoli: The attorney general, a representative of the attorney general, sits on the Federal Criminal Rules Committee and we listen to his views. He may express them strongly and we may disagree. If we disagree, we say so. If he wants to insert a dissent, we add his dissent. That's happened more than once.

Sharp: I'm sure! Are there some specific kinds of dissent that the attorney general's representative might sort of automatically have?
Zirpoli: The attorney general may have had from time to time some views about the national security and wiretapping that might not be in conformity with the views of the judiciary, so you hear his views. But the subject is controlled by the judiciary. You can wiretap under certain circumstances, an emergency, but you have to make a report within forty-eight hours (I've forgotten the time limit now) to the special committee that has been set up in the judiciary, or you go to them in advance and get authority to conduct certain types of domestic surveillance in the way of wiretaps or otherwise.

It is the same way with wiretapping for racketeering. You go to court and get an order first. That's been a subject of some debate and disagreement between the attorney general's office and the judiciary.

Of course, if you go back far enough, if you go back fifty years, why, they conducted wiretapping! [laughs]

Sharp: That's right, you were telling me about some of that.

Zirpoli: Those were practices that are not proper.

Sharp: That's just about all of the questions that I have about the Judicial Conference.
VII THE NORTHERN DISTRICT COURT

Friendship and Service with William T. Sweigert

Sharp: If you're out of steam then we won't go on, but I had two other kinds of questions. I wonder if you might like to make some notes about Judge Sweigert and some sorts of things you might recall about him and his approach to judging.

Zirpoli: Did you see the story in The Recorder?

Sharp: No, I didn't see that.

Zirpoli: You ought to get the story in The Recorder. See if you can get a copy of it downstairs. I have forgotten which day it was, Thursday or Friday of last week.* I adjourned court in tribute to the memory of Judge Sweigert. That's my comment in open court. [gives interviewer comments]**

I might say that Judge Sweigert was beautifully organized and well disciplined, and I would repeat everything that I said in court as far as that goes. He was a very warm and friendly person. He was a wonderful man to be with at lunch time. He could tell stories in the style that few people could do and they all had a moral to them, or if he told a joke it was really something that was funny and had a point to it. He had some strong views and moral convictions and he stood by them. I have rarely seen him become aroused, but I also recall one occasion in which he did and there was every justification in the world for it. This was in a [Ninth Circuit] judicial conference--


**Judge Zirpoli's comments on Judge Sweigert appear on p. 171a.
STATEMENT OF SENIOR JUDGE ALFONSO J. ZIRPOLI:

HAVING BEEN PRIVILEGED TO ENJOY A CLOSE PERSONAL AND PROFESSIONAL RELATIONSHIP WITH OUR BELOVED SENIOR JUDGE WILLIAM T. SWEIGERT THROUGHOUT THE GREATER PORTION OF HIS PROFESSIONAL LIFE, WHICH COVERS A SPAN OF SIXTY YEARS OF DISTINGUISHED SERVICE AS A LAWYER, TEACHER, DEPUTY ATTORNEY GENERAL, EXECUTIVE SECRETARY TO GOVERNOR EARL WARREN, AND STATE AND FEDERAL JUDGE, IT IS WITH GREAT SORROW THAT I LEARNED AND MUST PAINFULLY ACCEPT THE FACT THAT HE WILL NO LONGER TAKE HIS PLACE WITH US ON THIS COURT.

WE BOW IN REVERENCE AND TRIBUTE TO THIS WARM AND FRIENDLY GENTLEMAN WHOSE STRENGTH OF CHARACTER, IMPECCABLE LEGAL SCHOLARSHIP AND WISDOM, LACED WITH COMMON SENSE, ENABLED HIM TO BRING TO THIS COURT NOT ONLY A PROFOUND UNDERSTANDING OF THE LAW, BUT A DEEP AND ABIDING SENSE OF THE NATURE OF HIS RESPONSIBILITY IN THE ADMINISTRATION OF JUSTICE, WHICH HE CONSCIENTIOUSLY DISCHARGED WITH GREAT INDUSTRY, COURAGE AND COMPASSION AND WITHOUT FEAR OR FAVOR.

HE WAS A TRULY GREAT JUDGE, WHO POSSESSED AN INHERENT CAPACITY "TO HEAR COURTEOUSLY, TO ANSWER WISELY, TO CONSIDER SOBERLY AND DECIDE IMPARTIALLY."

WHILE HIS LOSS MEANS SO MUCH TO US AND TO THE ERA HE SYMBOLIZED AND THE LEGACY HE LEFT, WE MOURN HIM AS A FRIEND AND EXPRESS OUR DEEPEST SYMPATHY TO HIS WIDOW, VIRGINIA, AND TO ALL THE MEMBERS OF HIS FAMILY.

THERE IS COMFORT IN THE KNOWLEDGE THAT HE LIVED A FULL AND USEFUL LIFE, A LIFE THAT MADE ALL WHO CAME INTO CONTACT WITH HIM, AND IN PARTICULAR THIS COURT AND THE ADMINISTRATION OF JUSTICE, THE BETTER BECAUSE HE PASSED OUR WAY.

WHEN THIS COURT ADJOURNS TODAY, IT WILL DO SO IN RESPECTFUL TRIBUTE TO THE MEMORY OF THE LATE SENIOR JUDGE WILLIAM T. SWEIGERT.
Zirpoli: which related to whether or not we should name Judge Wollenberg as our district representative on the Judicial Conference of the United States. A judge in the Southern District was objecting and made some comments that caused Judge Sweigert to rise to his feet and really let him have it. That's the only time I ever saw him get truly angry, by way of illustration.

He could be critical in court at times but he did it in such a way that it was beautiful. He never had an iota of malice in anything he ever did or ever said. So he was about as ideal a gentleman as you can find. I'm not going to describe the ideal gentleman, but if you give me all of the virtues of an ideal gentleman, I am sure he would fit them all.

He was well read. That's why he was such an interesting person at the lunch table. No matter what the subject was, he was well read. He had a great influence on Earl Warren as governor, probably a greater influence on Earl Warren than any other man that I could think of.*

Sharp: Why was that possible, do you think, that he had such a great influence?

Zirpoli: Earl Warren had named him deputy attorney general [of California]. He served there for eight years. Then he named him his executive secretary. Earl Warren learned to trust him, lean on him, and he valued his counsel and his advice. If anybody did anything to convert Earl Warren to the liberal that he eventually became, I would say it was Judge Sweigert.

Sharp: In terms of Judge Sweigert being a judge, how do you think he was different than you are, for example, in the courtroom?

Zirpoli: I would say that his cultural background is better than mine, for one thing. His approach is better than mine in that he is better organized than I am. He kept copious notes, which I don't do. I rely on the transcript. I don't know whether I procrastinate more than he did or not. I'm not going to say. I don't like to say that I procrastinate at all. [laughs] But I'll say one thing, that he was very industrious and he got his work out on time, in plenty of time.

*A lengthy oral history interview was conducted in 1972 with Judge Sweigert, entitled, "William T. Sweigert: Democrat, Friend, and Advisor to Earl Warren," as part of the Earl Warren Era oral history project. The interview transcript is in process.
Zirpoli: You have to evaluate judges in different periods of their life. If you want to evaluate Judge Sweigert, you don't evaluate him by the last year of his life. You have to evaluate him by the preceding years because, having died of cancer, it's quite obvious that in the last years, particularly the last six or seven months, he was going downhill and naturally was a different person. He was more quiet at the lunch table. He didn't get the same pleasure of telling stories that he used to get. It would be hard to get him to repeat a story in the last months, whereas before he used to relish in telling stories. A new judge would arrive and he wouldn't want the judge to hear it, that's all. [pause]

Courtroom Comments: Lawyers' Styles and Juries

Sharp: I have a few questions that spin off from last time when we were talking about antitrust and some other material.

I wondered if you see now that there are differences in attorneys' styles depending on the kind of cases that are at hand?

Zirpoli: Naturally there are. There are differences in style that relate to the inherent talents and the benefits of thorough preparation. If you are an inherently great trial lawyer with a tremendous feel for the courtroom, there are certain types of cases that you may try with great ease or facility.

If, on the other hand, you have a case that requires tremendous preparation and detail, all of these inherent qualities are not going to help you because you are going to have to engage in that preparation and detail.

So, when you get into the area of antitrust, personality is meaningful but far more meaningful is preparation and understanding of the detail, organization. You get into antitrust litigation and you have to have your case well organized and prepared so that everything follows in its logical order.

If you have a one-day or a short two-day trial, your personality can be far more significant than it can be in a long trial.

One basic example of the differences were Johnny Taaffe and Harold Faulkner, the two great criminal trial lawyers. Faulkner's greatness was based more on the thoroughness of his preparation. Johnny Taaffe, not that he wasn't thorough and well prepared, had a little flair about him, an aura about him, that was a little different. He could say something that if another lawyer said it, it would sound
Zirpoli: like corn, but if he said it, it was fine. For instance, if he said, "the temples of justice will crumble," an expression of that character, it was fine, it was okay.

So there are differences, but of course there is nothing to compare with preparation and thorough knowledge.

Sharp: Is the preparation always obvious?

Zirpoli: Oh, yes, I would say yes, it's obvious.

Sharp: Maybe this is part of your comparison and contrast of Mr. Faulkner and Mr. Taaffe, but have there been changes over the years in the way lawyers approach their cases?

Zirpoli: Their approaches may differ, but sometimes I comment to the lawyers about that. My favorite comments come from my experience in part and in part from Piero Calamandrei, who was a noted Italian jurist. His little book, Eulogy of Judges, is full of gems. When a lawyer is getting too loud or something, I might give him a quote from Calamandrei to tell him that he shouldn't create such a glare when indirect lighting is far more effective! [laughter]

There are some of those differences. You don't try to comment. You have to be careful about commenting to lawyers. If a lawyer wants to come in and he is a new young lawyer and he wants to get the judge's reaction, fine, I am glad to give it to him. It's a good idea. But you certainly can't be critical of a lawyer in court unless he gets out of line. Then you have to call him on it because if he is getting out of line before the jury, you can't have the jury walk out of that courtroom with a misinterpretation of the law, or a misstatement of fact.

Sharp: A couple of times you have mentioned your active role in questioning the witnesses and others during a trial. How does an attorney accommodate this?

Zirpoli: Oh, sometimes he accommodates, sometimes he goes out in the courtroom and says, "The son of a gun, he spoiled my cross-examination!" [laughter]

Sharp: Does everybody know that about you?

Zirpoli: Oh, I think that is pretty well known.

Sharp: Is that a good thing? Is it perceived as a good thing?

Zirpoli: Oh, probably in the long run it is. I may go too far though and that is because of my nature and my inability to restrain myself at times. But I am not tough on lawyers. I am considered a fairly easygoing
judge and I am not a stickler for strict adherence to the rules. If I can dispose of a matter and the lawyers are all there, I am not going to worry about whether they complied with all of the required rules or not. Now, some other judges look at it entirely differently. They just won't bother to listen to you unless you comply with the rules.

Sharp: Now, what about juries? Have you seen a lot of changes in juries, and how they deal with cases in the years that you have been on the bench?

Zirpoli: It depends upon how far back you want to go. If you go back forty or fifty years, the probability of convictions were far greater than they are today, for instance, in a criminal case. Once in a while, jurors are not truthful. They will tell you that they have no particular prejudice or bias. Then you end up with a jury hung eleven to one and you find that someone is opposed to the Vietnam war, for instance, [and] he wasn't going to find anyone guilty of draft evasion under any circumstance. I am using this as an extreme example but it illustrates what I have in mind.

But on the whole, the jury system works out very well. If the jury pays attention, they are going to do pretty well. They get a definition of a reasonable doubt from the judge and if the facts create a reasonable doubt in their mind, they're not supposed to return a verdict of guilty. Therefore, even though you might not agree with the jury's verdict, it must be accepted without comment.

Sharp: Now, the composition of juries has changed considerably since you were first an attorney--

Zirpoli: Oh, yes, now it's representative because it is basically taken from the voter registration lists. In the old days, you go back at least fifty years and you find that the jury was composed of members of the Olympic Club, the Bohemian Club, the Pacific Union Club, the clubs here on Van Ness Avenue, and names suggested by the various assistant U.S. attorneys. People would suggest names to the clerks and they would throw all of those names in the jury wheel. It was an entirely different jury in my view. It certainly was not representative. In the early days, women weren't on the jury anyway. Now there are more women on the jury than men.

Sharp: That's because of work situations?

Zirpoli: Primarily.

Sharp: Does that seem a better way to go?

Zirpoli: Well, it's at least a fair way to go, definitely.
Sharp: Last time we talked about the issue of the expertise of the judge. What about the issue of the expertise of the jury? I saw a note that suggested that sometimes a case can get over the collective heads of the jury.

Zirpoli: That's a problem. That's a problem of an antitrust case. There are certain types of litigation that really don't lend themselves to a jury trial. I think a complicated antitrust case would not lend itself to a jury trial. I had proposed legislation years ago that would remove this type of litigation from the right to a jury trial.

Sharp: How far did that get?

Zirpoli: It didn't get very far. They're still talking about how to resolve that. There have been several decisions on this question and I don't know what the [U.S.] Supreme Court will ultimately find, if there is a situation that is too much for a jury. If you get into very technical areas, you may find that very difficult. There could be difficulty even in a patent suit, an antitrust suit. It could be very difficult in very complicated business transactions, with corporations and numerous parties involved. You try to resolve these by preparing glossaries for the jury. Every effort is made to facilitate the work of the jury but, as I say, there are situations that could very well be well over their head.

Sharp: Are there advantages and weaknesses as well in judges rather than attorneys conducting a preliminary examination for the prospective juror?

Zirpoli: Oh, I am 100 percent in favor of the procedure that we employ. The judge asks the question in such a fashion as not to create any innuendoes. In other words, the judge would inquire as to the background of the jurors. He is not going to start probing a juror's mind by offering a question that suggests in its wording how he is supposed to react.

Sharp: The judge is as the neutral one?

Zirpoli: As far as I'm concerned, I never had any problem on it. I interrogate the prospective jurors as thoroughly as I can. When I finish, I ask, "Are there any questions that counsel wishes to ask?" Rarely do they ask any questions or they ask, "I didn't hear what she said her husband did," or would she elaborate on a particular point. That's about all that's ever happened in all the years I have been sitting on jury cases.

You see, in the state courts picking a jury in some criminal cases will take weeks.
Zirpoli: Here you can pick a jury in an hour or two hours. For a very complicated case it may take you one or two days at the most, particularly if it is a case that has received much public notoriety and is of such a character that you feel you should interrogate the jurors individually. Then it takes a little more time, but you can see the tremendous difference. There is still much activity on the part of some lawyers who want greater participation and on the part of legislatures who now are considering the federal system because they see the enormous savings of time and expense.

Sharp: So that is something that might end up legislative one way or the other.

Zirpoli: Yes, there is a bill before Congress that would permit attorney participation. So far it has never been enacted. On the other hand, there is now suggested legislation on the state side to follow or adopt the federal system. But we have it because our rule says that the court may permit counsel to participate—we don't do it very often but we may. Some judges do to a limited degree.

Sharp: That is all the questions that I had for today. Are there some things that we haven't covered that you thought we should on these topics?

Zirpoli: Well, not based on your letter. We have done fairly well. I undoubtedly will think of a lot of things later. It's just like a gentleman does when he makes a speech at a big dinner when he is driving on his way home. He thinks of all of the nice things he could have said, or the jokes or stories he could have told.

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Conscientious Objection and Selective Conscientious Objection: U.S. v. McFadden and Other Cases

Sharp: I thought that we might start by talking some about the issues that were raised in the four cases—the Stauffer, the Browning, the Miller, and the Goodwin.* They all involved men who had filed for conscientious

Sharp: objector status and for withdrawal from the army, but they were actually habeas corpus cases when they came to you. At the point that the cases came to you, they had all been denied the CO classification.

Zirpoli: Yes.

Sharp: One of the things that I noticed first about the cases is that they show a bit about the process that the men had to go through while they were in the army, talking to the chaplain, talking to the hearing officer, and then being denied by the Conscientious Objection Review Board, which was an army board. There was quite a bit of disagreement among the different army personnel. In some cases, the chaplain and the hearing officer said, "Okay, yes, this man should be a CO," but then the board came in and decided the other way.

Zirpoli: Well, basically, of course, I concluded that they had not applied proper standards. Once the man indicates that this was his belief, that in effect he is kind of a true conscientious objector, he doesn't have to be a pacifist, but he might say, "I'm willing if we are invaded, and we're placed in jeopardy ourselves, then whatever is necessary to repel the invasion or the jeopardy that the individual is put in is permissible, but not as an active act on my part." I felt that those were proper objections. I also concluded in most instances that in my view the military boards had not applied the proper standards.

I had a little difficulty later. The head of Selective Service was critical of my activity and that of Judge [Robert H.] Peckham's, but they later sent a letter of apology.

Sharp: What was that all about?

Zirpoli: The head of Selective Service was saying that we were being too lenient. Then they had to send a letter of apology because, after all, the responsibility was ours. I mean they performed their responsibility and we performed ours. If we are in disagreement, that's because the law permits a disagreement and permits the court to be the ultimate decider on a question of that nature.

As I say, San Francisco got to be known as a lenient place for those who wanted to violate the Selective Service Act, primarily because our sentences were not as severe as they were elsewhere in the country.

In a review of the history and development of these Selective Service cases, you can start with the Jehovah's Witnesses. In the beginning, the Jehovah's Witnesses were not disposed to perform work of national importance if they were granted conscientious objector status. We worked that out on the theory that this is work of national
Zirpoli: importance, it was, so to speak, a direction from Caesar and you have to do what Caesar says, and this does not impair your religious beliefs in any way.

Eventually we worked these things out for the Jehovah's Witnesses in this district. There was particularly a lawyer from San Jose (whose name I don't recall) who represented most of them, and then they applied this test really throughout the country for Jehovah's Witnesses.

Sharp: Now, the Jehovah's Witnesses, those cases, were they part of this period or earlier?

Zirpoli: Oh, yes, they were definitely part of this period.

Sharp: So among the so-called CO cases there really were a variety of religious beliefs and moral beliefs.

Zirpoli: Yes. Well, the Jehovah's Witnesses, there wasn't any question about their objection because they were objecting to war in any form.

Now, when you got to the Catholics and the McFadden case then the problem becomes a little different. The question is, can you say you are a conscientious objector only if you are one who objects to war in any form? Of course, I decided in the McFadden case that if you were a Catholic, and the Catholics say that if you have a moral conviction that is an unjust war, it's your conviction that decides, but it's also a conviction which, if you make it, coincided with the teachings of the Catholic church, and I quoted Pope John [XXIII] somewhere in there.*

Of course, it went up to the [U.S.] Supreme Court. Now, when it went to the Supreme Court there were two other cases somewhat similar in nature.

Sharp: From the Northern District or from other districts?

Zirpoli: No, from other districts, and the Supreme Court wrote an opinion in those two cases, Gillette and something else [Negre]. They consolidated these two cases and wrote an opinion and Justice [William O.] Douglas dissented. When it came to the appeal of my case, they just said, "Reversed upon the grounds stated in these other two cases," and Justice Douglas said, "I again dissent as I did in the other two cases."

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Zirpoli: I worked pretty hard on that case. I thought I did a pretty fair job [chuckles], but the Supreme Court did not agree. In other words, for them the test was that you had to be opposed to all wars.

Sharp: A more blanket--

Zirpoli: Yes, you couldn't discriminate as to which war you would support or would not support. My argument was that it isn't a question of discriminating which you would support or wouldn't support for personal or political preferences. It was because you were satisfied with the dictation of God and your conscience that this was an immoral war. If you are going across the Pacific to engage in a war of that nature, there is every justification for a personal conclusion that this is not a morally just war. If it is not morally just and God says I should not participate, I shouldn't. But anyway, as I say, I was reversed on that.

There were questions of recognition; I mean this is denial of recognition of Catholic teachings in my view. Therefore, it violated the establishment of religion clauses. Denial of equal protection was another of the arguments I made. In other words, I went through all of those issues and tried to resolve them.

Sharp: Since we are on the McFadden [case], I have got a few other questions about it and then we can go back a bit to the other. The U.S. v. McFadden is considered one of the strongest cases for what is called the SCO, the selective conscientious objector.* It's strongest because you actually dismissed the indictment against him [James McFadden] in a pretty sweeping way. You mentioned that you worked real hard on the case. I guess I would like for you to tell me what you went through in terms of having thought about it.

Zirpoli: Just about every religious faith filed some kind of brief as a friend of the court. So I was reviewing all of these various teachings and the teachings of the Catholic church, and having reviewed them all I had to also make the necessary constitutional analysis as it pertained to equal protection and freedom of religion and the various problems that are invoked under those circumstances.

*Readers interested in this case and the issue of the SCO may want to see John A. Rohr, Prophets Without Honor: Public Policy and the Selective Conscientious Objector, Nashville: Abingdon Press, 1971.
Sharp: You also are a Catholic yourself, aren't you?

Zirpoli: Oh, I am a Catholic myself but I'm like—like the cases say, I don't go to church very often, but the fact that I go or don't go to church does not mean that I couldn't be a conscientious objector, just giving you a quick illustration. I was not influenced by the fact that I am a Catholic because I didn't know enough about the Catholic teachings and religion. I had to find out about them, so it wasn't because I was one. It was after reading the various treatises that were presented and the various briefs of the friends of the court—I think we had briefs from—have you seen the opinion?

Sharp: Well, yes, I have actually. It's right here.

Zirpoli: Let's get it. I think there is an indication somewhere; there may be. [looks through opinion] Yes, [reading] "Amicus curiae briefs were submitted by representatives of the following religions: Jewish, Baptist, Lutheran, Presbyterian, Quaker, Disciples of Christ, United Church of Christ, Reformed Church in America, and also the Inter-denominational National Council of Churches."

Sharp: That's about all of them, isn't it?

Zirpoli: [continues reading] "There are strong suggestions in the briefs that the role ascribed to one's conscience by the various religions are quite similar. There is also some suggestion that religions other than Catholicism also distinguish between wars."

So, as I say, this was the type of information that was placed in my hands. So I had the various documents of the church. Here is the Pastoral Constitution of the Church in the Modern World [from Vatican II, 1967].

Sharp: Were you able to separate how you thought about it in terms of theology and theologies as opposed to just what your more intimate personal feeling was about being a conscientious objector?

Zirpoli: I was able to do that because of Pope John's statement. He provided the basis for it. I don't understand this—

Sharp: I don't think it is all there.

Zirpoli: No, it isn't.

*Both quotes are from U.S. v. McFadden 309 F. Supp. 504.
Sharp: That's what I thought when I was reading it, that it wasn't all there.

Zirpoli: No, what is it, 310?

Sharp: No, 309 [F. Supp. 502].

Zirpoli: Let's see if I can get it. [looks for opinion]

Sharp: Do they always leave out some?

Zirpoli: No, they're not supposed to. I was looking for the reference to St. Thomas Aquinas, but also a reference to the pope. [further pause to go through opinion]

Sharp: Oh, and to Vatican II?

Zirpoli: I thought I had it in the opinion.

Sharp: There are references to Vatican II, to the Pastoral Constitution of the Church in the Modern World and then to Pacem in Terris [1963].

Zirpoli: That could very well be because the date, 1963, would coincide. I had some other references, [Chief] Justice Harlan Stone among others, but in all events--[pause] As I said, I based it on free exercise of religion and equal protection, the basic arguments, and establishment of religion. Those were the three constitutional bases for my action and, therefore, I felt that the statute which required it to cover all wars was unconstitutional.

Sharp: That is Section--

Zirpoli: [Section] 6(j)--

Sharp: --Of the Selective Service Act.

Zirpoli: Yes. In other words, I concluded that it violates the equal protection and due process.

Sharp: Did you expect that the Supreme Court would reverse you?

Zirpoli: I really didn't know. I thought I had--[laughs]

Sharp: You thought it was pretty tight?

Zirpoli: --And I thought it was pretty good, but then I was reversed. As I say, the only one to dissent was Justice Douglas.

Sharp: Was that because he was in agreement with you or for some other reason?
Zirpoli: He was basically in agreement, yes. Of course, he dissented in the other two cases, but they were satisfied that the statute was proper. I just felt that, you know, if you can find it unconstitutio-nal to stop the president insofar as it relates, for instance, to something like the steel strike or things of that character, that there is every justification for concluding that this was unconstitutional.

Sharp: What was the response to this case and your decision in this case of the other judges here at the court?

Zirpoli: My response?

Sharp: Their response to you and to your ruling in this case?

Zirpoli: I don't know. No one objected, let's put it that way. I don't recall anyone finding any objection. They may have had them. If they did, they just didn't tell me.

Sharp: Because this is not just your average, everyday case.

Zirpoli: No.

Sharp: And it seems to me as though it would have sparked--

Zirpoli: Well, it sparked a lot of interest in the Catholic world, no question about that, because the Catholic paper (I've forgotten the name of it), the Catholic Monitor or whatever it is, published the whole opinion. Of course, the clergy did comment, as you have found out already, to the ruling of the Supreme Court.*

Sharp: I guess I am interested, too, in your feeling about being a selective conscientious objector, because it is something very different, I think, from just being a conscientious objector.

Zirpoli: But the basic question was do you have to be a true pacifist in every sense of the word. I said, "No, you don't have to be a true pacifist as long as it is in good conscience." I mean, if it's something that is contrived, that's one thing; the question is, is this a sincere belief? If it's a sincere belief and if that's what you say God dictates to you and it's a sincere belief, then I thought you qualified, even though it was based upon your conclusion that this was an immoral war or "unjust war" as the Catholic church puts it.

*See article on this case on following page.
Anti-Draft Ruling Reversed

The U.S. Supreme Court yesterday reversed a ruling by a San Francisco Federal judge that the draft laws violate the religious freedom of Catholics opposed to the Vietnam war.

The high court acted in a case involving James Francis McFadden, 26, of San Francisco. McFadden refused to be inducted into the Army because he said the Vietnam war violated his conscience as a Catholic. He was indicted.

U.S. District Judge Alphonso J. Zirpoli dismissed the indictment in February. 1970. He said that the First Amendment prohibits the government to order a man to act against his conscience.

He said the draft law was unconstitutionally forcing Catholics like McFadden to choose between their religion and going to jail, or abandoning their convictions to avoid jail.

In yesterday's decision, the U.S. Supreme Court ordered Zirpoli to reconsider his ruling.

A leading Catholic theologian in the Bay Area—the Rev. Msgr. J. Warren Holleran—urged Catholics to work vigorously to persuade Congress to change the draft laws so they would include selective conscientious objection as a valid grounds for refusing induction.

Monsignor Holleran is past president of the Priests' Senate, Roman Catholic Archdiocese of San Francisco; is currently a professor at St. Patrick's seminary in Menlo Park; and is director of the Vallombrosa Center in Menlo Park, a Catholic retreat and conference center.

Monsignor Holleran told the Chronicle yesterday that he was disappointed in the Supreme Court decision, but that he felt they had no alternative.

"The court is interpreting the legislative intent of Congress," Monsignor Holleran said. "I really don't think they had any other choice."

"The ruling of Judge Zirpoli is certainly in accord with Catholic teaching both from a moral and a legal point of view. As Catholics, we believe that the only immediate guide for concrete decision which the individual possesses is his conscience."

San Francisco Chronicle, April 6, 1971
Sharp: You had some support for your decision because of an earlier decision that Judge [Stanley] Weigel had made in [December] '69 in the U.S. v. Bowen case where he had declared the same Section 6 (j) to be unconstitutional.

Zirpoli: I think I cite him--

Sharp: You did, yes. I'm not sure which page it's on, but you did. Were there other SCO cases that you had? I didn't find any of them.

Zirpoli: No, I had no others because the others, most of them, were Jehovah's Witnesses cases.

Sharp: Right, and they were more clear-cut because of the established religious practices and theories.

Zirpoli: Yes.

Sharp: Do you think that you would have been a conscientious objector?

Zirpoli: No, I would not.

Sharp: Do you think you would have been a selective conscientious objector?

Zirpoli: No, I don't think so. There is one reason for that; one of them is that my religious beliefs are not that strong when you get right down to it.

Sharp: Is it hard at all to understand that some peoples' beliefs are that strong, that James McFadden could--

Zirpoli: No, it wasn't hard to understand at that time because you had enough precedent. You certainly had the Jehovah's Witnesses, number one. Number two, you had a number of conscientious objectors who would refuse to accept alternative work of national importance and who went to jail.

That's the irony of the whole thing, that the fellow who wouldn't budge an inch, who wouldn't do anything conditional, whose convictions were so strong, he probably had greater justification as an objector than anyone else, and he's the one that went to jail every time. I went down into the marshal's office and talked to one of these fellows. I was convinced that his beliefs were absolutely sincere, but he wouldn't accept alternative service. So he ended up with a sentence of two years in jail. Somebody else accepts alternative service and may not be as sincere, certainly as the man I have just mentioned, and he would be given probation.
Sharp: I know. I was astounded at the numbers of conscientious objector cases and draft resister cases that came through the Northern District in this period, '68 through '71. It must have created a dilemma for the court, the mass number of cases and just dealing with the issue of the war and people saying, "I'm just not going to—"

Zirpoli: No. I mean, the volume was there, but for the most part these were all cases that wouldn't take more than a day or two of research on the part of the court. I mean, we got cases where you really have to spend weeks and months on them. If you start comparing them as to complexity and magnitude, you could almost say they became run-of-the-mill cases.

Sharp: Yet there is something very special about them to write an opinion in which you talk about the soul, God, people's conceptions of God, and people's conceptions of war. It is somehow qualitatively different than talking about antitrust or bankruptcy.

Zirpoli: You do that because Congress did it. If Congress had not created a conscientious objector class, had not created it at all, I don't know. The Congress created the exception, which is the conscientious objector. Let's assume that Congress had not created an exempt class. You'd have an entirely different ball game. But having created the exempt class, then you look at it to see what is a conscientious objector. And I can't use my standards. I have to use the religious standards of the parties involved and I have to determine whether or not these are sincere. That's some of the discussion that I went into in those cases where a soldier sought discharge as a conscientious objector. Whether there was a difference in view depending on whether it was the padre or the captain or some other officer who made these particular findings and as to the competence of the person who was making the finding.

Sharp: You allowed in these other cases a broader definition of religious beliefs and commitment than the people in the army did. Another word for that is more liberal, I guess.

Zirpoli: That's right.

Sharp: You have a reference in Browning to "universal moral law" and that that's okay.

Zirpoli: Yes, I have a footnote on that, do I not, in Browning? [pauses to go through opinion] But that conclusion, I think, is supported by a previous decision, that what is morally good is traditionally a religious question and I cite the Seeger case.*

*U.S. v. Seeger, 380 U.S. 163 (1965)
Sharp: Right, and the Seeger case is pretty central to setting a precedent for this broader religious belief.

Zirpoli: That's right. I think in those two cases I referred to the Seeger case.

Sharp: I think so, too, yes, which is quite a bit earlier being '65.

Zirpoli: That was a Supreme Court case.

Sharp: Right.

Zirpoli: Again here, the tenets held by the applicant can be nonorthodox religious belief and again I cite Seeger.

Sharp: So it is pretty important in these kinds of special cases to use precedents from other courts, especially the Supreme Court.

Zirpoli: Well, I am bound by the Supreme Court unless there are exceptional circumstances that make you feel that if the Supreme Court were to reconsider the problem in the light of the passage of time or change of circumstance, they would reach another conclusion. Then you can gamble on it and hope that your case will go up to the Supreme Court and that the Supreme Court will agree. Of course, that does happen on rare occasions.

Sharp: The other part of these cases that I think we need to talk about especially in Miller and Goodwin is what you refer to as a "crystallization" of the applicants' beliefs.

Zirpoli: That's right, but the "crystallization" can arise at any time in his life as a result of his experience and what he sees and what he learns; convictions are formed based on experience and things that you learn.

Sharp: It seems like that would be sort of difficult to pin down; at least, the army sure couldn't do it or they did not accept that this person could think through something and go from, over a long stretch of time to--

Zirpoli: But I think I tried to justify it by showing the history of the person and his reactions, and how beliefs or convictions were formed, and when they were formed, and what helped him form them, including conversations with individuals or letters received from family members or something of that nature.

Sharp: Were there ever cases where you weren't convinced that the person was sincere?
Zirpoli: Very frankly, I don't remember. If there were, there would be no particular need for me to write an opinion. As I say, most of them, when you get right down to it, were Jehovah's Witnesses, so on some of them I didn't write an opinion. Yes, there were one or two. I think I remember one of them, a fellow (I don't know if I can remember his name), he married Joan Baez.

Sharp: David Harris?

Zirpoli: Yes, although I think ultimately he was sentenced by Judge Carter. I'm not sure about that, but he is an example of one who resisted. Now, whether he raised truly religious reasons I don't recall, but he got a sentence. He got a heavy sentence.

Sharp: That was through his draft resistance as opposed to his conscientious objector [status].

Zirpoli: Yes.

Sharp: I am just trying to piece together how you might have decided that somebody wasn't sincere in his conscientious objector feelings.

Zirpoli: You would have to look at the history of his conduct and his life history. If his life history showed no religious training of any kind and no affiliation with any individual or discussion of religion, and if religion came up for the first time in the draft, and it appeared to you that there is no basis for it, and that he is not sincere, then you make that conclusion.

You may be wrong at times because that is where judgment comes in, and if you make a mistake, you make a mistake. But the responsibility then is placed on you. If there is a reasonable basis for your conclusion, you are not going to be reversed by the court of appeals because they are not going to substitute their judgment for yours.

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Zirpoli: [You must consider the] impact, if these people were not granted conscientious objector status they would turn out to be poor soldiers anyway. Even the army didn't like to get people in that category within the army because they weren't going to prove to be proper army men.

Sharp: It is sort of a morale thing, too.

Zirpoli: It does a lot of harm, more harm than good.

Sharp: I have a few more questions and then we can get on to the other ones.
Zirpoli: Then I also made an analysis of the conscientious objector class as opposed to those who were in the university and were being exempt. When you start making an analysis of it, the injustice and inequity of the situation, it would strike me that somebody with religious belief is certainly to be [more] preferred as a conscientious objector than somebody who decided to stay in college. Maybe he graduates and decides to move into law or into medicine so he can get three more years of college and escape the draft. You can rest assured that there were a number of people who did just that.

Sharp: Oh, I'm sure. I think I know some! [laughter]

Zirpoli: It could be!

Sharp: There wasn't too much mention of the war itself in most of these cases. In Browning, you say that the war was a triggering agent for the petitioner's rejection of participation in any war. I wondered if there was somewhat of a conscious effort to stay away from the war itself and stay more toward dealing explicitly with the habeas corpus issues?

Zirpoli: No, we didn't try to get into the war. It was just a question of whether they qualified or didn't qualify. I've tried a number of cases in which somebody would get up and make an argument about the war, and I would instruct the jury that they are not to consider the war or people's political arguments about the war. They would want to even make the arguments to the jury.

I had the one situation in which the defendant elected to represent himself (I'm not sure whether I mentioned it), a Selective Service case, and I told him he should have counsel. He didn't want counsel and I instructed him as to all of the applicable rules. Then when the time came for him to argue, he argued. When the time came for me to instruct, I had to instruct the jury to disregard his arguments about the war. The people in the courtroom got up and objected and I had to clear the courtroom.

What happened was the first fellow got up and objected and I had him come forward and asked him his name. He told me and I put him in custody of the U.S. marshal. Then another fellow got up and I put him in the custody of the marshal. Then I said, "I am ordering the courtroom cleared of everyone except the lawyers, the parties, and the press." Some lady got up and started to object and I said, "There isn't anything you can tell me about this war and your objections that I haven't already heard from my daughters." So I said, "You are excluded from the courtroom." After the trial was over and the jury returned the verdict, I then let these two people go that I put in the custody of the marshal.
Zirpoli: But those are things that you expect. I had an Indian object, the whole Indian tribe tromped in and out of the courtroom.

Sharp: What case was this?

Zirpoli: I don't remember the name of the case, but it was an American Indian.

Then I had another case where after the defendant and his friends left my courtroom, they all gathered together and walked down the corridor and out the building shouting, "Hell, no, we won't go."

I had another one in which I was seated on the bench and all of the flower children came in. They all had flowers. There were some flowers on my desk and a little girl came up, a three or four-year-old, not more than that, and presented me with a bouquet of flowers. I told you about that.

Sharp: I have heard about that.

Tempers of the Changing Times

Zirpoli: Yes, well, these were all incidents that indicate the temper of the times and the reactions of people.

Sharp: When I was going through the Chronicle looking for some information about the draft and your role in some of the cases, I couldn't help but see sort of in a time warp all of the protests that were going on. At the same time you were reading about some horrendous situations in Vietnam itself with some of the [civilian] massacres that unfortunately occurred, the invasion of Cambodia (that was in 1970), and the Senate's condemnation of the president [Richard Nixon].

Zirpoli: Yes.

Sharp: You saw all of those things, too, and you had all of these people even closer to you in the courtroom. How do you filter out all of that and get yourself back to considering the issues that are in the cases?

Zirpoli: You just follow the rules: This is the charge, this is the offense, there are the accepted instructions, and you just follow them, you just follow them. It's only when you get to a position, let's say, as to determine whether a person is or is not a true conscientious objector and you have got all of this background, then you use that background. Based upon the conclusions that I reached in McFadden, conclusions of that type, I make that decision.
Zirpoli: No, I have practiced law for a long time and by that time I had practiced law for over thirty-five or forty years, depending upon which year that came up. When you have that much practice behind you and most of it in the federal court, you know what the rules are, you know what the rules of evidence are, and you just play it according to the rules.

Sharp: Were these cases somewhat easier for you then because you had had that much experience?

Zirpoli: I had also prosecuted Selective Service cases in World War II. That was one of my assignments in World War II. Judges were a lot tougher then, too. They gave five-year sentences.

But you have to remember, World War II was a very popular war. Everybody wanted to get into the army. It wasn't just a question of trying to stay out. It was a question of how can I get in, particularly if you were a college graduate or a college student. It wouldn't be long before you would end up with a commission or you would try to get a commission. So the atmosphere was entirely different. That would be classified as a just war, let's say, by way of illustration whereas Vietnam would be classified, as at least some of the Catholics did, as an unjust war.

Sharp: How different were the CO cases in World War II that you worked on? You said the judges were harsher, for example.

Zirpoli: The sentences were tougher.

Sharp: Like what, for example?

Zirpoli: Five-year sentences were not uncommon and a two-year sentence would be about a top sentence in the Vietnam war. So the sentencing was different.

Sharp: From what I had read, the attorneys, the defense attorneys for the CO cases in World War II, that was quite a bit too in the sense you had more Jehovah's Witnesses, I suppose, then. During the Vietnam period, there was a much broader range of religious belief that was considered.

Zirpoli: Oh, yes, definitely.

Sharp: I wondered what sort of comments you would make about the lawyer's side--the defense lawyer's--side of it, and the comparison between the wars, and how the CO cases were presented and the people defended?

Zirpoli: I don't know that there was any truly great difference.

Sharp: A lot of people have said that it is significantly different during the Vietnam war.
Zirpoli: The representation?

Sharp: The representation in the sense of the lawyers, and we might get into this with the draft cases.

Zirpoli: Well, the representation in the sense of the lawyers is that you didn't have to be a strictly Jehovah's Witness lawyer in the Vietnam war. The lawyers in the Second World War were very limited in number and they had a definite tie to the particular group. These lawyers for the most part had no particular tie. They weren't doing it themselves for religious reasons and sometimes not even for political reasons. It was either because they were retained or were appointed.

Sharp: A few other questions about these four cases, the Conscientious Objector Review Board, which was the army board, did they generally deny these petitions, do you know?

Zirpoli: I have no way of telling because all I got were the ones that somebody raised the question on. Those that were denied and that no one raised the question on, I haven't any idea. So if I were to determine the number that ended up in court as contrasted to the number of actual denials, I would have no way of knowing.

Sharp: From what I had talked about with Judge [Albert C.] Wollenberg [Sr.] and some of the other things that I found out, there was this large number of cases of CO and draft evasion cases. I guess I'd like to push you a little bit further to tell me how these cases might have been an occasion for comment among yourselves.

Zirpoli: Among the judges?

Sharp: Yes.

Zirpoli: There was no particular occasion for comment. At that time the probation officer prepared reports showing the sentences of all judges in which we could see what the other judges were doing and, as I say, I don't know of anyone who gave a five-year sentence, for instance. Maybe they did; I don't know of anyone who did. I think the standard sentence was about two years and I think most of the judges applied it.

Sharp: But I wondered if you remember sitting around and talking about it with the other judges and how you felt about it?

Zirpoli: I am sure we did, but I can't pinpoint an actual conversation in my mind because we would meet for lunch every day, so we'd talk it over. For purposes of sentencing, judges often consult with one another, not that they are bound by what the other judge says or anything, but they want to get a reaction, "What do you think given these circumstances?"
Zirpoli: In fact, there are some courts that have a regular committee to do just that. The judge meets with two other judges and discusses and presents all of the facts to them and seeks their comments and recommendations. He is not bound by them. But we don't do that here. On rare occasions it is done, however.

Sharp: Does that seem like a good idea, to have that in a common fashion?

Zirpoli: It's a good idea when you've got cases that require that type of consideration and interpretation. But let's say the run of the mill case, there is no need for it. I mean if you have got somebody who has embezzled $200 or $300 from a bank and you are going to give him probation, you're not going to go around and get the views of another judge. If somebody is coming up for a sentence that is going to be substantial, for ten or fifteen years, you might want the views of another judge. You might want the views of another judge if you have a case of the type of, let's say, Patty Hearst just to use an illustration of a type of case. Where you are considering public reaction as well and things of that character, then as the sentencing judge you might want to get the views of other judges.

Sharp: Was the McFadden like that for you?

Zirpoli: No! [laughter] No, it wasn't. No, I didn't consult with anyone on that. I went ahead on my own.

Sharp: Did you want to and not, or you just didn't think it was necessary?

Zirpoli: No, I didn't bother. I was younger then, a little more of an activist probably than I am now. That's an era when I would be described as an activist judge, I guess.

Sharp: The court of the Northern District got this pretty incredible reputation, and you have already mentioned it and Judge Wollenberg mentioned it too, for being an "easy" court. Did that bother you at the time, or you thought it was great, or you didn't care?

Zirpoli: No, that didn't bother me so much—certainly, from a point of view of conscience. There has been a change in attitudes for crime and punishment in the last ten years, let's say, at least, but the attitude then and certainly of our court and my attitude was that you shouldn't send this man to jail unless you had truly aggravating circumstances or a crime of violence. You had a kind of a belief in rehabilitation. You had a faith in the effectiveness of the probation system, and I still have a certain faith in the effectiveness of the probation system. You had the realization that if you were going to make the probation system really work, you had to take chances because is you put five people on probation and they all made good, that means you are under-utilizing the probation system. If you put ten on
Zirpoli: probation and maybe you lose one or two, at least that is a better indication that you are making effective use of it.

Many prison authorities like [James] Bennett, the former director of the Bureau of Prisons of the United States, always felt that there was no benefit derived at all if the sentence was in excess of five years. The only basic benefit derived is that you kept the man in custody for a longer period and, therefore, he ceased to be a threat to society. But for rehabilitation purposes, he felt that no value could be derived from a sentence in excess of five years. That was sort of the thinking of the time. And then the personalities involved. It's hard to compare districts. When you get into a big metropolitan district, you get into a district in which you have the various judges and there are some exchanges of views, and you end up with a little more even-handed application of the sentencing process.

If you get into some district that is, let's say, the mid-South or something, without naming them (I could name people), you see a situation where the judge gives a sentence and it would be incredible in San Francisco.

Sharp: Do you mean harsh, overly harsh?

Zirpoli: Yes, oh, yes. Now, I had an experience as a trial lawyer in which I represented a Chinese gentleman charged with the importing of herbs from Communist China, by way of illustration. He was indicted in Tennessee. So I went down to Tennessee. I was going to plead him not guilty and I felt I could win the case. Well, I sat in the courtroom and when I saw what was happening there in Tennessee, I came back and agreed to plead my man in San Francisco if the United States attorney there and here would accept. The U.S. attorney in Tennessee said yes if my man would be a witness in Tennessee, and I said he would.

To make a long story short, my man pleaded here and got a $1000 fine and six months probation. Two other Chinese went to trial in Tennessee, one from New York and one from Tennessee. They were convicted and given five years. Now, that's a tremendous disparity, but this judge in Tennessee, what experience did he have with Chinese? Practically none. And Communists—Communism must have meant something very serious to him. Importing from a Communist country in violation of the law—you know, a serious crime. And it was Communist China we were talking about, too! [laughter]

Sharp: On top of it all!
The Issue of Draft Resistance

Sharp: I thought we might talk some about these draft cases then and the draft in general. There is this March '68 mass trial of a hundred defendants with a hundred attorneys who pooled their arguments, I suppose.

Zirpoli: Yes.

Sharp: How did all of that come about, that you would have the panel all put together like that?

Zirpoli: I tried to remember that and I don't remember how that came about. There is an article here on it, isn't there?*

Sharp: It doesn't give very much on that. I guess I was thinking a little bit about the antitrust cases and how they were pooled, at least some of them, because there were so many defendants. It was put together to be easier for the judge, I suppose.

Zirpoli: Aubrey Grossman was the leader, but I ruled against him, as I recall.

Sharp: The only mention I found about how this all turned out was that you had dismissed some of the arguments like that the Vietnam war was a violation of international law?

Zirpoli: Oh, yes, that was one of the stock arguments, not only here but even in the jury trials.

Sharp: Apparently, you tried to narrow it down to some of the more important matters like the constitutionality of the draft board regulations themselves and the conscientious objections to the draft? I wondered if you just recall how this all proceeded and how it all ended up?

Zirpoli: My recollection is I ruled against them. The only question that became important was the question of the structure and make-up of the draft boards. I ruled against those who were objecting to the structure of the draft boards for the most part, but there may have been one or two instances, and I don't recall them now, where the draft board was improperly constituted, but I don't remember the details of that.

Sharp: Because you had to deal with so many of these cases, the CO cases and the draft cases, I am wondering what sort of effect it had on you personally.

*See following page.
Draft System on Trial
In Mass Court Case Here

By William Cooney

The most concerted attack in history on the Selective Service System was launched in Federal Court here yesterday.

Federal Judge Alfonso Zirpoli, already burdened with written legal arguments, allowed attorneys one hour of oral argument yesterday and said he would give them another two hours this afternoon.

At stake is the fate of at least 100 youths who have refused to be inducted into the Armed Services. A panel of some 100 attorneys have agreed to defend them, and have pooled their arguments to present en masse instead of individually as each trial comes up.

Yesterday three of the defense points were argued, that youth morally and conscientiously opposed to war in general or the Vietnam war in particular should not be drafted, that a youth is denied his Constitutional rights when he can not have an attorney represent him before a draft board, and that the makeup of draft boards is discriminatory in that minorities are excluded.

But throughout the arguments, Judge Zirpoli repeatedly interrupted with opposing arguments and several times said, "These points may be better raised at the individual trials."

At one point he said, "If you are really interested in raising these points, why not try a case that has the points in a trial, get a ruling, and then, if necessary, appeal it. Keep the case moving until you get a final decision?"

At other points Judge Zirpoli said, "If you want to get somewhere, you are going to have to show me where there is an issue which I can take and rule on, which I have the power to decide."

The point of conscience was argued by Aubrey Grossman, leader of the panel of attorneys. "We are dealing with a mass phenomenon," he said. "This war so violates the conscience and moral scruples of these men that they just can't serve."

The best definition of a conscientious objector, he said, is "one who knows what is good and right and must do what is good and right."

The point about the draft boards not allowing a youth to have an attorney with him was argued by Daniel Weinstein.

The draft board regulation prohibiting an attorney is unconstitutional, Weinstein said, because everyone is entitled to an attorney in a criminal proceeding. A draft board hearing is at least a quasi-criminal proceeding because, by refusing to abide by the board ruling, the youth can subject himself to the criminal process, Weinstein said.

RACE

Attorney Terry Francois, who is also a San Francisco Supervisor, argued the point about the makeup of draft boards, citing those in the Western Addition and in Hunters Point.

In the latter case, he said, there is only one Negro on the board, whereas half the population, at least, is Negro.

In Hunters Point, he said, none of the members live in Hunters Point or Bayview, where the population is 43 per cent Negro, and only one of the board members is Negro.

San Francisco Chronicle, March 28, 1968
Zirpoli: It didn't really bother me. I had my own views about the war in Vietnam, but I didn't let them control me. My own views about the war in Vietnam, and it is still my view from the point of view of international policy, is that we should never have gone to Vietnam. My view is we should let the Russians and the Chinese fight it out. I am of the view that you can't conquer a people and the Russians are proving it. They haven't really conquered the Poles, they haven't really taken over Afghanistan. They want to get out of there now, and the same thing happened in the Orient. The center of the battle would have been the Chinese and the Russians to determine who would be the influencing factor in that area. I didn't think it was in the interests of our national defense that we be there in Vietnam. I think the French learned their lesson.

I am also one of those who believes as Machiavelli said: "You never conquer any people." You can send a million soldiers in there and in two generations the Romans are no longer Romans or whoever they happened to be. They become Britons or whatever they are or wherever they are. So this is a personal belief that you just can't conquer millions of people without putting in millions of soldiers.

Sharp: Did the stories of people resisting and all of that, did it reinforce how you already felt?

Zirpoli: No, I was still of those who believed that it's "your country, right or wrong." No, because if my beliefs were that strong, then I should never sit on one of those cases. I should just step down. That's what you say to yourself. I mean if you really feel that strongly about it, then you have no business there on the bench.

Sharp: It strikes me that what you are talking about is an example of how a judge operates, how a judge works, in the sense that there is a kind of objectivity that you learn to have about what you are doing. There are the personal feelings that the judge has.

Zirpoli: Yes, his personal feelings can enter into it from time to time. You can't get away from the fact that you are human. Your personal feelings will enter into it when you have before you a situation that calls for permissiveness to indulge in your personal reactions. That's why, let's say, whether you want to give probation or not give probation, there is no reason why the letter of the law should be that strict. You can say to yourself, "Look, I analyzed this thing. Somebody might have sent him to jail and some other judge would not and I am one of those who wouldn't under these circumstances." That may be due partly because of your own background and your personal beliefs.

Sharp: Is sentencing one of the main areas then for a judge where there is a sort of gut--
Zirpoli: The sentencing is an area in which you have got to forget the Sermon on the Mount, "judge not." You're not God, but nevertheless, you have got to pass judgment and sentencing is a matter of great concern to many and most judges. Of course, before I came on the bench, I had thirty-three years of trial experience as a prosecutor, and as a defense attorney. Therefore, I had learned to accept and to approach with greater ease these problems than someone who had no prior experience of this nature.

Sharp: One of these other cases is the 1970 case of Robert Andre. It is one of the newspaper articles that I sent you.* It pointed up the issue of the draft board's use of induction to punish men who didn't comply with the regulations. I wonder if you could comment on that and what its implications--

Zirpoli: I don't remember. My recollection on that is somewhat hazy. But if it turned out that that's what the board was doing, I would rule against it. [pause] But I don't remember the details. The name sounds very familiar to me, but I don't remember enough detail about Andre. Is that in here somewhere? [looks through papers]

Sharp: It's this one.

Zirpoli: This was one the question of retroactive application. But these were the people that were improperly inducted, illegally inducted. I was saying that if this fellow was illegally inducted, he's entitled to go free and so is anybody else who has been illegally inducted; I would use a retroactive rule.

Sharp: Do you remember how that turned out?

Zirpoli: I think we ordered him released.

Sharp: Yes, but I wondered about the other people. The U.S. attorney agreed it might be--

Zirpoli: I have no real recollection though on those, but I see that the draft boards stopped the practice.

Sharp: That whole issue of the draft board's ways of operating is pretty serious, I think.

Zirpoli: I think that this is a situation that aroused the ire of the head of the Selective Service.

*See following page.
Judge Rules Illegal Draft For 6000

By William Cooney

Approximately 6000 men now in the Army because they were drafted illegally should be released, a Federal judge ruled here yesterday.

Judge Alfonso T. Zirpoli ruled specifically on the case of Robert W. Andre, 25, now a private languishing in the stockade at Fort Ord for being AWOL.

Andre had his induction sped up because he failed to give his Long Beach draft board his current address and was inducted illegally on April 9, 1966.

Nine months later, the United States Supreme Court ruled in the Gutknecht case that speeding up a man's induction, just because he burns a draft card or fails to give a new address, is illegal.

RETROACTIVE

The importance of Judge Zirpoli's decision is that, for the first time, a Federal court has ruled there "... is no substantial reason why the decision in Gutknecht should not be given retroactive application."

He noted that the government claimed such a retroactivity ruling would affect approximately 6000 men who were drafted as delinquents.

Letting all those men out could cause great administrative problems, the government argued.

That is a concern, the judge said, but, "... since delinquency induction was not authorized by Congress, the petitioner is in the Army illegally.

"In view of this the factors of law enforcement reliance and administrative convenience are entitled to almost no weight in the balancing process."

PRISON

Andre's attorneys, Michael Sorgen and Mark Sussnow, saw another implication in the judge's ruling:

"Thousands of men who refused illegal induction orders are now in prison," Sorgen said. "And they should be released, too."

That thinking could be accurate, admitted James L. Browning, the United States Attorney here.

He said he got from Judge Zirpoli a 10-day stay of execution of the order to release Andre, and will immediately file notice to appeal Judge Zirpoli's ruling.

START

Sorgen and Sussnow, though, said they thought the Army should immediately start processing the 6000 soldiers for discharge, even if the government does appeal.

"If the government keeps these men in the Army and in prison, knowing of Judge Zirpoli's ruling, it is holding them illegally," Sussnow said.

Sorgen added, "I would hope the government would respect the rights of these men and release them now."

Since the Gutknecht decision last January, many men whose induction or conviction was not final have been given a second chance.

Draft boards automatically withdraw induction orders for many. Courts dismissed cases which were still on appeal of refusing induction.

Judge Zirpoli's ruling is the first in the country to affect men already in the Army.

San Francisco Chronicle, May 26, 1970
Sharp: It could have been.

Zirpoli: And the attorney general didn't agree with it. What happened was that after Selective Service raised hell, we found out the Department of Justice didn't agree. In a way, the Department of Justice was disposed to really accept these conclusions. In fact, the Department of Justice wrote a letter and said, "Please don't associate us in any way with that letter (of Selective Service)." That's what in effect they said.

Sharp: And a letter of apology came?

Zirpoli: In effect, yes. Now, Judge Peckham's experiences may parallel mine to a great degree and it would be interesting to get his views on it.

Sharp: Yes, because he had quite a few of the same kinds of cases.

Zirpoli: Yes.

Sharp: The whole issue of the draft board's acting improperly and the animosity and protesting against the war would create sort of a very difficult role or position for the court, I would think, to be constantly calling draft boards on the carpet and--

Zirpoli: Well, it wasn't that bad.

Sharp: It sounds pretty dramatic.

Zirpoli: I know, but it wasn't quite that dramatic! [chuckles] Of course, you always have to remember, too, of all the communities in America, this was the primary center of resistance.

Sharp: So it's magnified.

Zirpoli: Magnified. People came to San Francisco; if they wanted you to report for induction and you didn't want to report, the thing to do was to come to San Francisco and then your case would be before one the judges in this district. So a lot of people came here deliberately. In fact, there was a journal that they issued to draft resisters in which they were advised to do that.

Sharp: And all the procedures were listed about how to do that.

It gave you a certain kind of reputation as generous and humanitarian and great.

Zirpoli: Yes, I don't know about the "great" part, but it became a reputation of being an easy judge. If you were all out for the war, we were terrible. If you felt the war was not a good war for one reason or another, then you thought we were pretty good. Your reaction depended upon your point of view.
Zirpoli: But that's true in any controversial question that arises in the court. That's true of the application of the death penalty. It's true of the nature of the court's reaction to crimes.

Sharp: Did you get a lot of mail?

Zirpoli: Some, not too much. Somebody sent me a postcard calling me an old Jewish son-of-a-bitch and saying I was a toad of Governor Brown. The writer was an American Legion veteran. I have forgotten how that went, but it was very comical in a way.

Sharp: But you were able to maintain a sort of lighthearted feeling about the mail or the criticism.

Zirpoli: No, I've only had two or three instances in which I thought that a letter of that nature was serious. For one in particular I had the FBI get me photographs of the individual, so when he appeared in my courtroom I could recognize him. Another one, I got from a lady, an elderly lady, who still writes me. I gave her probation, but she still threatens me. [chuckles] Then I had a fellow who was in Alcatraz who threatened me, but he mellowed with the passage of years and decided he wasn't going to kill me after all.

Sharp: I had one last question about the draft lawyers. I wanted to ask you again because I wondered if there was some sort of qualitative difference about the input of draft lawyers from, say, the input of antitrust lawyers? Was there something really special about the lawyers involved?

Zirpoli: No, the lawyers who were involved in the draft are the lawyers who today are involved in some form of public interest, for instance, affirmative action lawyers. They were typical of affirmative action lawyers today and were in a sense typical of the Selective Service lawyers. You weren't going to get any of the big downtown firms or the top lawyers coming in on Selective Service cases. First of all, they had plenty of business. Unless some member of the family, one of them was involved, you wouldn't have them here. These other lawyers for the most part were struggling lawyers. They were lawyers with limited experience, or they were lawyers who represented extreme views like [Aubrey] Grossman, for instance, a lawyer who would be representing the left wing, as far left as you can get it; or they were Jehovah's Witnesses' lawyers as a select group; or they were relatively young lawyers. Some of them were in it by court appointment.
A Note on Law Clerks

Sharp: Were your law clerks at this point especially instrumental in helping you to do any special thinking?

Zirpoli: Yes, my law clerks have been instrumental from the day I came on this bench, and I have been very fortunate. I have had wonderful law clerks, all of them.

Sharp: Since we're on the issue of law clerks (and then I'll get to Judge Sweigert), do the law clerks have sort of an assigned role as far as you--

Zirpoli: As far as I'm concerned?

Sharp: Yes.

Zirpoli: My law clerks, I let them do any and everything they can accomplish. In other words, every case on the calendar goes to a law clerk. They've got to do the research and prepare a memo. They go through the case and do the memo, and they make a recommendation, and then I review it. If I approve it, and if they have done a good job, I may accept it in the form it's in. I may modify it or I may disagree with it, of course, after it's all over. But I give them all the leeway I can. They are all self-starters. I have been very fortunate. I pick my law clerks from Boalt Hall. I have always been able to get one from the top 5 or 10 percent of the class. This understanding that I have with Boalt Hall facilitates my selection of the law clerks. So as I say, I have been very fortunate in the quality of my law clerks and their subsequent practice and subsequent careers have proven that to be true.

For instance, I would not pick as a law clerk someone who is an angry young lady or an angry young man who is a crusader and has got some big crusade in his heart. Then I'm not interested because that's not being objective enough. But that's something I try to find out before I engage them. I had one young lady applicant with top grades, but she was a very angry young lady and she had her beefs about the state of society, and of course, I didn't want that.

We had an experience over in the Supreme Court of California where the clerks wrote a letter to the editor, which was a tremendous reflection on the attitudes of the moment. I don't remember what they were, but it caused great anxiety among the justices of the supreme court because they wanted to make sure that no one would ever interpret this as the views of the justices.

Sharp: Do you think your views on how the law clerk should work and what he or she should do have changed since your first--?
Zirpoli: No, they haven't changed. When I first started, I could do more of the research myself. I've always had only one law clerk. Some of the judges have two. Now, before I became a senior judge, the work-load was a little heavier and there were a number of matters that I would dispose of without assignment to the law clerk. Today I assign everything to a law clerk, even though I can dispose of it without research because one of the objectives of a law clerk here is to acquire the benefit of experience. If based on my experience in habeas corpus I don't let the law clerk see a habeas corpus petition, they're not going to find out anything about it. So I let him look at it, let him make the memo. If I find they missed a point, I just call their attention to it: "Well, this is all fine. Everything you've got here is great. But you just have the wrong defendant," by way of illustration, or respondent.

So I believe in letting the law clerk do all that he or she can.

Judge Sweigert and the War in Vietnam

Sharp: The last issue then that I wanted to ask you about with respect to the Vietnam war and to some of the issues that came before the Northern District is Judge Sweigert's view of it, as he expressed it in 1970 in the case of those three Boalt Hall students who wanted to challenge the war's legality. Sweigert, as I read in an article, supported their right to challenge it and in a limited way--

Zirpoli: Gave them standing.

Sharp: Gave them standing, and used this opportunity to express his opposition to the war.*

Zirpoli: Yes, and I would say that he was greatly perturbed by the fact that the [U.S.] Supreme Court refused to tackle the question, and he's the one that made reference to the steel cases and others where they were prepared to make rulings on the power of the president, but when it came to the war, which was even more important, they would not rule.

Sharp: They sort of abdicated.

Zirpoli: They abdicated on it: "We're talking about a political question and, therefore, we don't pass on political questions."

But as he himself pointed out, from his point of view, this was not a political question; it was a true constitutional question. It was a question of who has the power to declare war, and is this a

*See following pages.
Judge Here Takes On War Case
By William Cooney

United States District Court Judge William Swegert defended yesterday the right of three young men to challenge the legality of the Vietnam war and went on to chide the U.S. Supreme Court for dodging the issue.

The Federal jurist denied a Government motion to dismiss the suit in the course of a wide-ranging opinion which indicated Swegert himself tends to regard the war as unconstitutional—because it has not been declared by Congress.

He said he will not make a final ruling until the Government attorneys have filed an answer in the suit of three Berkeley law students, all of them military reservists.

In his 28-page discussion of the legal issues, Judge Swegert said: "Whatever the ultimate decision...we are of the opinion that the courts...should discharge their traditional responsibility for interpreting the Constitution of the United States.

"It has already been charged that the failure of the courts to decide the constitutional question one way or the other, has contributed to the controversy and the consequent unprecedented disunity of our country on the Vietnam war issue."

He said he has taken "judicial notice of the fact that the armed forces of the United States are now committed and have been for nearly five years, to a full scale war in Vietnam; that this war has never been declared by the Congress and that the President of the United States, through the incumbent and his predecessor in office, has continued...nevertheless, to conduct the war without receiving or even requesting a congressional declaration."

Judge Swegert then listed the reasons continually given by the Government for continuing fighting and knocked:

"It will be noted that none of the foregoing arguments make any pretense that Article I, Section 8 (II) ("Congress shall have power...to declare war...") has been complied with to explain why, for various reasons of expediency, the Constitution has not been complied with.

"They are, therefore, of doubtful relevance in a court whose duty it is to see that the Constitution is complied with."

TONKIN

The Tonkin Gulf Resolution, since repealed by the Senate, does not comply with Congress' duty to affirmatively declare a war if it wants one, the judge said.

Why, asked the judge, has not the legality of the war been decided by the Supreme Court?

Because, he said, lower Federal courts have avoided ruling on the main issue, preferring instead to dispose of cases "on technical, jurisdictional, procedural grounds" instead, such as: that the issue is "political" and should not be decided by courts; that the Government has not "consented" to be sued; or that the person challenging the war has not "standing" to sue.

And the Supreme Court, he noted, has denied petitions seeking review of the question.

On the "political" question,
Judge Sweigert noted that the Supreme Court stepped into the case of Congressman Adam Clayton Powell being barred from taking his seat in the House of Representatives, and also ruled against President Truman who had ordered the seizure of strike-bound steel mills during a national emergency.

"It seems to this court," said Judge Sweigert cryptically, "that to strike down as unconstitutional a President's wartime seizure of a few steel mills but to shy away on 'political question' grounds from interfering with a presidential war, itself, would be to strain at a gnat and swallow a camel."

He went on to the issues in the case before him:

**REAL**

"To say that these three plaintiffs must wait until they 'are called up, perhaps suddenly, and ordered to the Vietnam arena, perhaps quickly, and then file a court suit, perhaps with too little time to properly do so, borders we think, on the absurd..."

Federal attorneys must reply to the suit within 15 days, and after that will come arguments on the constitutionality of the war.

His discussion in his order yesterday, he wrote, is "designed to further, so far as a District Court can appropriately do so, an ultimate ruling in our Ninth Circuit and, hopefully, by the Supreme Court, upon all the important issues here considered."

But he also strongly indicated he leans toward the view the war is unconstitutional. He said that, in the event he rules in favor of the reservists — that the war is unconstitutional — "the effect of any such judgment will be stayed pending any appeal by" the Government.

He concluded with a strong presentation of the Constitutional question involved.

**CASE**

"A strong case can be made," he wrote, "for the proposition that compliance with the Constitution and its plain provision that the power to declare war lies, not in the President, but in Congress, should be made to rest upon something better than the ambivalences of congressional inaction or mere defense legislation, appropriations and questionable resolutions."

"That such compliance calls for nothing, less than what the Constitution plainly says — a declaration of war by Congress or at least an equally explicit congressional expression, either general or limited, but in any event such as to clearly indicate a congressional intent to meet its responsibilities... by consenting to (or refusing to consent to), the initiation or continuance of war by the President; that unless the President receives, upon his request or otherwise, such a declaratory consent, either general or limited, as soon as reasonably possible, any undeclared war becomes a usurpation by the President or an abdication by the Congress — or, perhaps, both."
Zirpoli: war, and has it been declared? He concluded that it was a war and it was not declared.

Sharp: Why did he do this?

Zirpoli: Well, Judge Sweigert was a man of strong principle and if that was his conviction, he was going to express it, and the case before him provided a vehicle to properly do it. He wouldn't do it if he didn't have a vehicle to do it although he might express his views in the dining room, maybe to me or some other judge. Once in a while judges do that. They should not philosophize, for one thing, but they do. The court of appeals does it more often than not.

Sharp: Why is that?

Zirpoli: Well, maybe that's a little too strong, more often than not. But they often philosophize when there is no need for it. You will more often find them doing so in the dicta of the court of appeals decisions than you will in a district court decision. Of course, the functions of the two courts are a little different, so it is understandable.

Sharp: Because of their reviewing the law as opposed to reviewing the facts?

Zirpoli: Yes, they are reviewing primarily the law. They are not supposed to substitute their judgment on the facts for that of the trial court unless the court's judgment is clearly erroneous. In other words, if the facts or the evidence will not support a conclusion of the judge, that's one thing. But let's say if the judge just doesn't believe a witness, the court of appeals has no right to say, "We believe him."

Sharp: Did Judge Sweigert talk to you about this ruling?

Zirpoli: Oh, he didn't talk to me in the sense of talking to me. I mean at the dinner table he just said, "I've got this case, and why in the hell doesn't the Supreme Court perform its duty and pass on the constitutionality of it?" I mean that type of conversation, yes.

Sharp: He just said he was going to do it. It wasn't a question of his really seeking your--

Zirpoli: Oh, no, no, no. He didn't seek our counsel. No, Judge Sweigert rarely sought counsel or advice of the judges as to what he should do. He wrote well and he wrote good opinions, and he didn't need any advice in that regard.

You have to remember that Judge Sweigert had a pretty good understanding of the social and economic problems of our time, and Earl Warren relied on him. He was a tremendous influence in the
Zirpoli: programs invoked by Earl Warren as governor, as it relates, by way of illustration, to Medicare and problems of that character.

Sharp: I had even seen a piece that talked about the relationship between Warren and Sweigert. Sweigert is given quite a bit of credit for--

Zirpoli: Yes, probably in the historical society's Bulletin.*

Sharp: Is that it?

Zirpoli: It could be.

Sharp: --assisting Chief Justice Warren in becoming more liberal in some of his views.

Zirpoli: Yes, definitely. I think Sweigert had more influence on Earl Warren than any man. During the election campaigns, I am sure Judge Sweigert wrote most of the speeches or did all the spade work on them.

Judge Sweigert was responsible for most of the judicial appointments in the state of California that were made by Earl Warren. The governor would just go into Judge Sweigert and say, "Who do you think we should name?" Or Judge Sweigert would say a few days after the vacancy, "We ought to appoint so-and-so."

He was very active in that regard and he was very effective because he would make the appointments early. As a consequence, no one would be angry or sore because they weren't appointed. They didn't get their applications in, and the number of applications would be less. Sweigert would make an analysis and an appraisal of the lawyers in a particular community. He would call the lawyer and say, "The governor would like to appoint you to the superior bench," and you didn't even think you wanted to be on the superior bench. After you received a phone call you'd say, "I'll call you back tomorrow." Then he would get acceptances from a number of them. I know some judges were appointed in that fashion.

Sharp: That's quite a bit different from Mr. Reagan's approach to judicial appointments with a judicial selection advisory board.

*See the Bulletin of the Historical Society of the U.S. District Court for the Northern District of California, Vol. 2, No. 1, Spring 1983. Included in this issue are an essay summarizing Judge Sweigert's political and judicial career and a memo which the judge wrote for Earl Warren's gubernatorial campaign in California in 1942.
Zirpoli: Yes. Of course, I can understand it on the federal level in part. Traditionally, the American Bar [Association] and others have played a role in making recommendations. You have an FBI investigation and everything else that goes with it.

Sharp: I was thinking more of Mr. Reagan as governor of California. His appointments process was quite a bit different in terms of the judiciary.

Zirpoli: That was true of most of the governors and even Pat [Edmund G.] Brown [Sr.] did. Pat Brown would take too long before he made his appointments and he wasn't as systematic and definite as Earl Warren. Earl Warren was systematic and definite because Judge Sweigert was a good organizer. He was well organized in everything that he did. I mean he kept records of everything. I don't keep records. I just don't fit in his class.

Sharp: This ruling that Judge Sweigert made, do you recall what the response of the other Northern District Court judges were to it?

Zirpoli: I don't think anybody objected, but I don't recall anything specific other than his advising us and telling us that he was doing this. I am not sure if he told us after he had actually done it or before, because most of the judges don't tell you what they are going to do in advance, unless they are seeking some advice.

Sharp: So nobody really openly opposed him?

Zirpoli: I have no recollection of anyone opposing him. You would have a hell of a time opposing him because you would have to work out an argument. You couldn't just say, "I don't like what you did." He would say, "Why not?" Then you would have to start making an analysis and he'd say, "Do you mean to tell me that this is not a war? Do you mean to tell me that the president declared war? When and where did he declare it?" You'd have a tough time meeting that kind of argument.

Sharp: Yes. It was quite significant the way the press treated it. They treated it as though he had said that he had declared that the war was unconstitutional, so the press sort of took it a few steps--

Zirpoli: But it didn't get, nationally, I don't think it got that much reaction.

Sharp: I don't know. I know it's fairly well known within San Francisco that he had done it, but nationally I don't know what sort of response there was. Do you recall how this turned out? In the article it said that he was going to give the U.S. attorneys fifteen days to present their side of it.

Zirpoli: No, I don't. I don't recall with any clarity.
Sharp: I didn't find in the Chronicle what had happened afterwards.

Zirpoli: He did nothing that meant anything because the war went on; he didn't stop it!

Sharp: I just wondered if these three young men did go ahead and pursue the challenge, and what happened to the rest of the case.

Sweigert wanted the district court and the Ninth Circuit really to deal with the issue of the war and the war's constitutionality. I wonder if you recall sensing any willingness on the part of the Northern District or the Ninth Circuit to do this?

Zirpoli: I don't remember any. There never is. You have no desire to pass on a constitutional question unless it's meaningful. This has no consequence, so just let it stand. The same way during the Japanese [internment] cases. There is no desire to take an appeal in those cases or to have them appealed if you can avoid it. There was a sense of deliberate effort to avoid appeal in the Japanese cases.

Sharp: Yes, I know.

The Court in Wartime

Sharp: Over the course of these interviews, we have talked about war quite a bit. The courts' and the district courts' role, as it were, in war-related matters, all sorts of matters—the Japanese-American internment, the curfew orders, and all of that, and now the CO and the Selective Service stuff.

I wondered if you had any broader view of the court's role in wars and how the court is supposed to act or react?

Zirpoli: The basic, broad view in war is that the war should in no way affect the civil rights of the individual unless an imminent danger is presented that requires actual curtailment. Absent that, all the rights have to continue as they were, and then you have to continue to be, let us say, vigilant against arbitrary action of the state, let's put it that way.

Sharp: So that one of the main differences between what was happening in San Francisco in World War II and the question of the Japanese and the difficulties is that there was a major feeling of national--

Zirpoli: Well, certainly as far as the Japanese were concerned in World War II, there was a form of military necessity. How true it was, to what degree it really was, I cannot say. At that time, we were in a
Zirpoli: position where we had to accept basically the conclusions of the military because the courts were not given the other views. The courts were not fully apprised, for instance of, let's say, even the views of the FBI in their entirety at the time.

But based upon the information that was given us, based upon the progress of the war in the early stages of it, there was every indication of imminent peril, of actual attack on the West Coast. I mean we had lost all of the naval battles in the first four or five months. Then the Japanese had taken over everything that they sought to take over up until that time, and we had lost major naval battles. So there was every reason to be concerned from the point of view, let's say, of the military or those who believed that all of these things were true. The courts were presented with the facts as they knew them. They had no other source.

You had fifth column activities in Europe as some indication. While there were no acts of sabotage on the West Coast that we actually know of, we do know that there were mixed allegiances among the Japanese. I mean they don't want to particularly admit that today, that at that time there were. There were people who actually owed their primary allegiance to the emperor. I mean that was part of the oath of the societies of which they were members.

Of course, today--I'm not quarreling with them--but today they slide over that and overlook that aspect of the situation, the condition as it existed.

Sure, on hindsight, we were all wrong. There was no need for it. But you can't wait until something happens and that was the situation. [pause]

Sharp: I think that's all the questions that I have about these things. I wondered if there are other comments that you would like to make about the Northern District.

Zirpoli: No, I haven't anything more that I really think that I could add that is of any value. There is the question involving Santa Rita, San Quentin--.

Welfare and Aid to Families with Dependent Children

Sharp: There is also the issue of welfare cases which you had, AFDC [Aid to Families with Dependent Children] matters.

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Zirpoli: Did you find something in the papers on that?
Yes, I did.

Did you find a comment from Reagan?

I think I might have missed that.

They were very unhappy with my ruling.

I'm sure they were. Let's see, what did I find? According to the San Francisco Chronicle, September 11, 1970, you ordered an increase in the AFDC program, a 32.4 percent increase to reflect the increase in cost of living. The state was supposed to do this to comply with a federal order, but it didn't. Deputy Attorney General Elizabeth Palmer objected to your ideas, as did Lucian Vandegrift, who was Human Relations Agency secretary, and said they would appeal. Reagan blasted your ruling on the following day. You ruled that in September. In December, your ruling was stayed by the Ninth Circuit. Later on, in '71, April of '71, you delayed your order to cut off $700 million in federal funds for the AFDC. You said it wouldn't be necessary to do it if the state Department of Social Services would raise the benefits by 21.4 percent, which it had been ordered to do by you previously and Sacramento Superior Court Judge Gallagher.

Yes, and they did, and then Reagan claimed credit for it in his campaign for president. While he was campaigning for president, he was telling everybody how he increased the aid for dependent children in California.

What he had done actually was in response to several orders that you had made.

I cut off federal funds. They either did it or they didn't get federal funds. They had to make their choice.

Judge Wollenberg had quite a few of these AFDC cases as well.

One of these was a three-judge court and he was on the court with me. I've forgotten who the third judge was. But we had a three-judge court.

One of the reasons I wanted to talk about the AFDC cases was because they show the federal court's involvement in state matters, essentially. They also show the court in a similar way almost to the Selective Service and conscientious objector cases in the sense that it's the position of sort of a current monitor of practices, federal or state agency practices.

We were doing it all of the time.
Substantive and Administrative Changes within the Court Since 1961

Sharp: I thought we would start by spending some time just talking about how the court has changed overall since you have been on it, since 1961.
Zirpoli: All right.

Sharp: First of all, I might try to pin you down just a little bit and ask you about how the types of cases have changed themselves. For example, is there more antitrust now than—

Zirpoli: I think I'll really just tell you about the growth of the court, the nature of the cases, and things of that character. To start with, when I first came on the bench, the federal bench, in 1961, there were two district courts in California: the Northern District, with its seat in San Francisco, and the Southern District, with its seat in Los Angeles. There were six district judges in the Northern District of California, with five sitting in San Francisco and one in Sacramento, which was considered a division of the Northern District.

In 1967, California was divided into four districts. The Northern District, with its seat in San Francisco; the Eastern District, with its seat in Sacramento; the Central District, with its seat in Los Angeles; and the Southern District, with its seat in San Diego.

Today, in the Northern District of California, there are twelve active judges and three senior judges, and in the Eastern District, formerly part of the Northern District, there are now five active judges and two senior judges. So that what was the Northern District of California, when I was first inducted into office, has grown in the number of active judges from six to seventeen.

Now, it can be said that no court system in modern time, including those of all the states, has been exposed to such an impressive expansion as have the federal courts of over the past twenty years. Now, not only has the volume of the business of the court grown dramatically, but also the nature of the litigation has changed with an extraordinary increase in the number of complicated and protracted cases, such as antitrust cases, particularly the multidistrict litigation, which came into being in 1963 and for the purpose of handling it, they had to amend the laws in 1967 or '68 to set up a special multidistrict panel.

Now, in addition to the antitrust cases, we had class actions which have tremendously increased in volume; securities fraud cases, based upon the Securities Act; the labor relations and environmental cases; and there has been a tremendous growth in the statutes in administrative regulations that have come down.

Additionally, the federal courts have had to chart new experiences in constitutional law in the form of due process and constitutional changes, not only on the criminal side, but on the
Zirpoli: civil side as well, in such cases as prison reform, social welfare, civil rights and other discriminatory practices. Now, these are indications of the change in the nature of the cases and the increased complexity of these cases.

To give you an idea, the number of federal agencies jumped from twenty to seventy in the past twenty years, while the number of pages of federal regulations tripled in the seventies alone.

Now paralleling these trends, the supply of lawyers has doubled since 1960, so that the United States now boasts the largest number of attorneys per thousand population of any major industrial nation in the world. We have three times as many lawyers per hundred thousand as Germany, ten times as many as Sweden, twenty times the number in Japan.

Furthermore, the cost of litigation over the past twenty years has increased dramatically so that most of the middle class and the poor cannot afford to go to court to settle their grievances.

Furthermore, the discovery practice is now being abused in such a fashion as to prolong litigation and to increase compensable time for lawyers.

Now, these factors, in my view, tend to diminish the quality of justice and call for some reforms. Now, how can we effect reforms? What can we do? The basic response would be to examine more carefully the adversary system and determine whether, in the final analysis, it is undermining justice in many types of cases.

Now, I am not advocating that we do away with the adversary system, but the adversary system is one of the factors which adds to the tremendous cost of resolving disputes. I believe that what we should do—to give greater access to all people—is to simplify the rules and procedures and take the measures that would improve our resort to mediation and negotiation.

Many people today debate whether lawyers exacerbate controversy or help to prevent it from arising. Now, doubtless, they do some of each. I fear that there is a tendency on the part of lawyers today, rather than to try to meet with the lawyer on the other side or ask the other side to have its lawyer meet with him and resolve the problem by negotiation, to want to be the first to the courthouse. They want to file a suit to show their great strength and position of strength, and if they don't do that, someone might interpret that as a sign of weakness.

Now, it is unfortunate that such feeling exists, but such feeling adds to the volume of litigation. When you consider in the final analysis that certainly not more than 10 to 20 percent of the cases
Zirpoli: go to actual trial and that eventually 80 percent or better are settled, it's an indication that the lawyers and all the parties concerned could have saved a lot of time and trouble for themselves, expense for their clients, and time of the court by resorting to negotiation at the very outset. Certainly, the minute a suit is filed, if it's negotiable, they ought to try to negotiate it.

Now, there is a tendency on the part of some law firms (I notice at least in one) where, if they contemplate filing a suit, what they do is prepare a complaint, send it to the attorney of the other side and say, "This is what we propose to do. Would you care to negotiate a settlement with us?" I have known cases in which they have actually done that and settled their cases. So there has to be some type of reform in this area.

Now unfortunately, with possibly some exceptions that are beginning to crop up, the law schools aren't training lawyers in this manner. They're training them for conflict rather than for what I call, in general, the art of reconciliation and accommodation. So this is my reaction as a general overview of the changes that have transpired over the past twenty years.

Now, there have been administrative changes as well, which have had their impact on the courts. I have already mentioned, of course, the fact that we have had changes arising in our interpretation of constitutional law. Illustrations of these, of course, are the cases that come down from what I will call the Warren era.

But in order to take care of these changes and to improve due process, of course, legislation has been enacted, such as the Speedy Trial Act, the Jury Selection Act, all of which have necessitated the preparation of plans on the part of the district court. So we now have a plan under the Speedy Trial Act that we operate under so we can be sure that criminal cases will be terminated within a reasonable period. In other words, arraignment within ten days and trial within sixty.

We have adopted plans for the appointment of counsel. We have a federal public defender here, and I went over the history of that once before when I related how it came about.

Then we have had problems arising under these statutes, which say that you are entitled to have the benefit of counsel for the purpose of pursuing certain types of litigation, particularly in the civil rights area—where do you get these lawyers? So the courts have had to try to adopt plans for that purpose.

While many of these acts provide for attorneys' fees, if the party prevails, it is still difficult to get lawyers because there is a certain amount of cost involved. So we have adopted a plan that
Zirpoli: enables us to use the library funds that we have raised over the years. We can advance costs up to $1000 to an attorney for cost purposes alone, but not for attorneys' fees, so that they can take depositions and make discovery.

As I say, these changes that I have mentioned, of course, have resulted in a need for change in the administrative process. Of course, one of the big changes that occurred approximately in the early sixties and not quite mid-sixties is the change from the master calendar to the individual calendar. We had to change from the master calendar because under the master calendar, the judge wouldn't get a case until it was assigned to him for trial. The master calendar judge would be handling all pretrial motions. The master calendar judge would rotate every two or three or four months, whatever period we fixed.

We had to keep the lawyers from knowing when the rotations would take place because they would resort to judge shopping if they knew, and this would be particularly true on the criminal side. If you knew that a particular judge was going to be master calendar judge next month and you had a criminal case, you would try to continue it until next month and plead your man guilty because you had an easy judge or you thought you did.

The master calendar judge would be changed from time to time. Since they handled all pretrial matters, sometimes three or four judges would be ruling on a case or some aspect of the case before it got to trial.

So, as I say, we changed over to the individual calendar. Then we invoked a system of assignment to judges by lot so that no one would know which judge was going to get a case. You went down to the clerk's office and filed a case, and you would have no idea which judge was going to get it even if you waited around because the cases are all placed in categories. We have eighteen categories of cases, such as criminal, antitrust, contract, civil rights, patent, and so forth.

We selected a number from each category for each judge. Let's take contracts by way of illustration. If you want to use the twelve judges as an illustration, you fill out twelve names, or ten names for each of the twelve judges, say, you would have 120. The judges' names are placed on cards which are put in sealed envelopes. They are then mixed in, just as you do when you shuffle cards. When a man files a suit, he gets a number and then the clerk picks the first envelope, opens it, and then learns for the first time who the judge is going to be and he puts that judge's initials after the number of the case. That means that judge has the case assigned to him for all purposes.
Zirpoli: Now, this is working out a lot better. We had to do it, as I say, because with the passage of time, more complex and protracted cases were being filed. It was ridiculous having many judges passing on pretrial matters. Even before we went on the individual calendar, as some of the complex cases arose, we started assigning them to individual judges. We realized we would have to do that.

These are some of the basic administrative changes that have taken place over these twenty years. I would say these are the major changes. Now, I don't know what other questions you have with relation to the changes, because anything else would be a little more detailed, and I don't think that it would add to the overall picture.

Sharp: I have a couple of questions that sort of buttress some of the remarks that you have already made. A few questions on changes in procedures, how the use of discovery, for example, has come about. The heavier use of discovery has really come about since you have been on the federal bench.

Zirpoli: That's right.

Sharp: I was wondering about the problem of limits--?

Zirpoli: Well, there are problems of limits and some judges, for instance, will limit the number of interrogatories that you can ask. Most judges—all of them, in fact—call status conferences. After a case has been on file for a period of time, we ask the lawyers to come in and tell us what the status of the case is. They have a preliminary pretrial to work out a discovery procedure, so as to avoid the abuse of discovery, and indicate the manner in which the discovery shall proceed.

Of course, the plaintiff and the defendant are both interested in being the first to start the discovery and we have to sometimes control that, so we do. As I say, one method is to put limits on the number of interrogatories. Another method is to require depositions before you resort to certain types of procedures. There is no sense in trying to make discovery or ask for production of documents if you don't know who the responsible parties are in the company that is involved. When you learn the proper person having responsibility, then that's the person that you depose. By that process you may avoid some of this other discovery.

Of course, the party that has the deep pocket can afford to indulge in discovery. Quite often he does, and forces the man who has less resources to expend substantial sums of money, which might otherwise not be necessary. I prefer to have the lawyers get together and enter into a stipulation as to all the facts that can be stipulated and for the production of all the records that need to be
Zirpoli: produced without resorting to the court. They are fairly cooperative and we have had a certain amount of success.

Of course, we invite the parties far more today than we did prior to 1960 to seek settlement through the process of the court; that is to say, to have a judge assigned to sit as a settlement judge who will then sit with the lawyers, try to evaluate their cases with them, and suggest methods of settlement.

Generally, of course, nine times out of ten, it's a question of how much money and which of the parties is to pay it. The judge can pretty well work that out if the people end up in the same ball park if they are not too far apart. Of course, it's amazing sometimes. They are so terribly far apart and still you end up with an appropriate settlement.

Now, you have problems when it comes to things like school reform and prison reform. The judges can sit with the lawyers even there for purposes of settling it and working out a program. If there is prison reform that's needed, you sit down with the lawyers and indicate wherein the constitutional rights of the prisoners were being violated and the measures that can be taken to remedy the situation.

That happened with me at the very outset with the Santa Rita prison.* I was able to get the lawyers in together and even the members of the [Alameda County] Board of Supervisors and they ended up by making appropriations of county funds for the purpose of erecting a new prison facility.

Sharp: Is that what became Greystone?

Zirpoli: Yes. Well, Greystone is what prompted the creation of the new prison.

Sharp: I have some questions on that, but they come really a little bit later.

Zirpoli: Do you have any more on this, and then you said something about the role of the judge?

Sharp: Two things really, I guess. There are two decisions, the Miranda decision and the Mapp decision (Miranda having to do with confession,** Mapp having to do with search and seizure***). I am wondering how

*Interested readers may see Zirpoli's earlier recollections of this incident in Jackson, Judges, pp. 297-300.


Sharp: they changed the court's work and if you could just say something about that.

Zirpoli: They changed the court's work because what you are talking about is confessions and unreasonable searches and seizures. The courts have invoked stricter rules as they apply to the conduct of the police. In Miranda, the courts, because the police were abusing their authority for the purpose of securing confessions, they established a per se rule, that if you didn't advise the prisoner or the accused of his right to assistance of counsel, that was a per se violation of his constitutional rights.

Now, I was always of the view that the Supreme Court went too far. I felt that what the test should be, under the circumstances, was the confession reliable, was his statement reliable, and that as far as the misconduct of the police was concerned, that should be a matter of a civil rights action against the police. But the minute you put in that per se rule, even if you thought that the confession was reliable, you couldn't use it, and I always felt that it had to be basically a question of reliability. That was just a personal view.

There is a tendency now to move away from the old Miranda rule. Certainly, the clearest example is that you can certainly use it for cross-examination purposes, which you couldn't do before.

On search and seizures, the question should always be, in my view, was it unreasonable? That's where the [U.S.] Supreme Court gets into their quarrel. I mean one justice sees it one way and another justice sees it another way. So they look at all of the circumstances.

A fellow comes out of, let's say, a supermarket with a bag and you think maybe he has groceries, but you have learned from an informant that that's where the narcotics are to be exchanged. Then if you seize that bag, go up to him and open that bag, where are you? Will the Supreme Court say it's reasonable or it's unreasonable? I use this as an illustration of the type of problems that arise.

But there is a tendency to back away right now—not too far—and I am not suggesting that they should back away too much either. But I think on some of these questions we might be better off if we had a specific statute which entitled you to bring a civil action for unwarranted police activity, although you can bring it under the Civil Rights Act even now. So you are not entirely without a remedy.

Sharp: And yet the two decisions, Mapp and Miranda, were based on the feeling that the police had gone too far and that there needed to be this sort of—
Zirpoli: Some form of restraint.

Sharp: Yes, which I guess each judge then needs--

Zirpoli: It hasn't been too bad. I mean actually a lot of people have expressed fear of dire consequences, but the work of the police has not been unduly hampered by it really.

Issues for the Ninth Circuit Judicial Conference: Sentencing Institutes, Diversity Jurisdiction

Sharp: One other question about changes in the court. There is a Ninth Circuit judicial conference that is held annually, I believe, now.

Zirpoli: Yes.

Sharp: I am wondering if the kinds of matters that are discussed at this annual conference, what sort of implications there are for the district court's work, and how that changed over the years?

Zirpoli: The judicial conference is provided for by statute and when they met in the early days (and now I am going back to the thirties and the forties), it generally was just the judges who met. Occasionally, they would invite a lawyer, who could sit in the audience, but couldn't participate. If they invited a lawyer, he wouldn't participate anyway.

Then they evolved. They decided to include lawyer delegates. Originally each judge was permitted to name a lawyer delegate. Now, before I went on the bench, I served for many years as Judge Goodman's lawyer delegate. The purpose of the conference is to discuss matters of mutual importance and the impact of legislation on the court, rules of procedure, civil and criminal, and recommendations for changes and recommendations for the Ninth Circuit representatives to the Judicial Conference of the United States, which makes recommendations for changes, for instance, to the Congress.

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Zirpoli: Of course, another change during that era was the changing in the rules so as to permit greater discovery in the criminal cases. The change, as I say, has helped some and has alleviated in part the fact that you are not entitled to a grand jury transcript as such. There was a time when you didn't even have to have a reporter in the grand jury room. Of course, now you have to have a reporter there to report all of the proceedings that involve the interrogation of witnesses or the presentation of evidence, so that to a degree, as I
Zirpoli: say, that has alleviated a situation about which we had been clamoring in those early days.

Sharp: The judicial conferences then that are held within the Ninth Circuit, in some ways are they self-educating?

Zirpoli: They are self-educating in certain areas.

We also have the sentencing institutes. There the judges gather together for the purpose of discussing sentencing procedures so as to avoid the inequities and disparity in sentences. Then you have workshops. You get a group of judges together, and each decides what the sentence shall be. Then they compare notes to see what the results are and to see what the disparities are, particularly since you have identical situations that each judge is passing on.

Of course, we took care of that, in part, in our own district at one time by having the probation officer submit a brief summary of the sentencing in each case so the judges could review it if necessary. So this is some indication of what we are trying to accomplish through the various conferences.

Sometimes the district judges meet and the lawyers meet and the court of appeals judges meet. At least for half a day, each of these groups meet separately. Then, of course, we meet as a body and we always have a representative of the [U.S.] Supreme Court there, too, to discuss matters with us as questions arise from time to time.

Sharp: Over the years, with the lawyer delegates now in full standing as part of these judicial conferences, is there a commonality of approach with the lawyers being more involved?

Zirpoli: While there is a commonality of approach, there are definitely different approaches to some problems. By way of illustration, a peremptory challenge to a judge. You can't do that in the federal system. In the state court, you can exercise one challenge. Well, when the judges are definitely opposed to it, most of the lawyers favor it. I use this as a quick illustration of the difference in point of view.

Of course, there was also a desire on the part of the federal courts to cut down on their volume of business by removing all of the diversity jurisdiction; that is, the privilege of a citizen of one state who is suing the citizen of another state to sue in federal court.

Sharp: I had heard that. I wondered if that was going to go through or--
Zirpoli: It's still a matter of debate in Congress. Legislation has been introduced from time to time, but it has not been passed as yet. Of course, one of the big changes that may occur would be the rewriting of the federal criminal code. If they do that, that will become quite an educational process and, I am sure, the subject of most of the judicial conferences for several years to come.

When we thought it was imminent, that became part of the discussion of one or more of our own judicial conferences. I had to present to them an overall view of what the effect of the new code would be and what its impact on the court would be. That's one of the functions of the Judicial Conference of the United States and also the judicial conference for the circuit, when legislation is proposed, to try to ascertain the impact of the legislation on the court.

We have no control over what Congress wishes to enact as far as substantive law is concerned. Our interest is primarily what the impact will be, particularly as it relates to procedures. The new code will change—somewhat change, not significantly—the sentencing procedures.

Sharp: Just to follow that through a little bit more then, do you think that the different circuits would have different attitudes about the diversity jurisdiction and whether or not getting rid of it—

Zirpoli: I know of no federal judge who is in favor of it. It may be, but I just don't know any.

Sharp: How much would it cut down on the volume of your work?

Zirpoli: I don't know. I have just been guessing, but there are figures available, and I hate to guess. At least one out of twenty cases maybe.

Sharp: I was thinking maybe one out of ten or twelve.

Zirpoli: Well, I am not going to say. But you can just see for yourself. If you can reduce the caseload, by way of illustration, by 5 or 10 percent, that means a difference of forty judges. Based on the number of judges we have now, it would make a difference of at least forty judges.

Further Thoughts on Juries

Sharp: I have a question then on juries and how they might have changed. Now, you mentioned just briefly the Jury Selection Act, which I think was in '68 or '69, but fairly early in your tenure.
Zirpoli: I don't recall the date.

There was also the Bail Reform Act, which was another reform that occurred in this era. That was promoted by Robert Kennedy. There are problems there. I mean they are talking about amending it now so as to include the denial of bail if the individual involved is of danger to himself or to the community. The test is, will he show up; the so-called basic test.

Now, on jury selection, it's based on a review of the history. At one time, women were not allowed to be on the jury. At one time, each court had its own system and we had what we called blue-ribbon juries. Now, the selection has to be representative of the community and voter lists are the primary sources. So you determine how many, let's say in the Northern District of California, prospective jurors you need, and you try to work that out based on the number of registered voters. You start out with a number and say, just for illustration purposes, if you need one out of twenty, you go down the voter list and say, "All right, we'll start with number sixteen," whoever happens to be sixteen. The next one is thirty-six. The next one is fifty-six. So you pick this one and then you can jump here, and you pick that one. This would be a random selection. As a result of the random selection, you presumably get a more representative jury.

Now, a problem also arose in the question of election of the foreman. There had been a disposition on the part of the courts to look at the qualifications of the respective members of the grand jury, and you'd pick out some executive or someone who had experience as a managing or presiding officer. Well, that resulted in some type of discrimination as far as women are concerned, and may have resulted also in some forms of racial discrimination.

So what you do now is, while you don't overlook that factor, you also look at the composition of your jury and judges will now at times select a woman. Sometimes they do it just deliberately so that no one can claim that there is discrimination, or they'll select a Hispanic or a black or an Oriental as the foreman--or foreperson, I should say--of the grand jury.

Sharp: With all of these differences in the way the juries are put together and the way the forepersons are selected, how do you put it all together? What differences do you see in juries now as opposed to maybe when you were first on the bench--can you make any generalizations like that?

Zirpoli: When you picked the members of the Olympic Club, the Bohemian Club, the Pacific Union Club, and the institutions of that character, or names suggested by various people, lawyers or the U.S. attorney and
Zirpoli: judges, when you had that procedure, naturally you got people who
were better educated, for one. You got people who were older, number
two. You didn't get the people who were over seventy and you weren't
likely to get people under twenty-five or thirty either.

The change is that the jury is far more representative without
a doubt than it was. Now, whether this is good or bad—if you have
a complicated case, it's better if you have educated people. But
then that's not the function of a democracy that provides equal
protection for all. So we're adhering to our representative jury
selection system.

Sharp: Are there some cases that are handled better by judges than they are
by juries?

Zirpoli: Oh, there is no question that there are certain cases that are so
complicated in character that it makes it very difficult for a lay
juror to comprehend and analyze. This is illustrative of an anti-
trust case that I think Judge [Samuel] Conti had involving IBM.
When it was all over, he submitted an interrogatory to the jurors.
One of the jurors said, "My God, you have to be a lawyer, an engineer,
and an economist to understand the case!"

You see? But so far, you're entitled to a jury in all those
cases to which you would have been entitled to one under the old
common law. Now, even in the antitrust area, you're entitled to a
jury trial. There's some question of whether, ultimately you could
deny a jury trial in antitrust cases even if Congress did so by
statute. They have not elected to do so. I have proposed such a
statute here for such purposes, and that's a matter of debate, for a
lot of people are still saying definitely that it would be unconsti-
tutional to deny you a jury trial, even in an antitrust case.

Now, there are certain cases where you're not entitled to a
jury trial; for instance if you file a lawsuit against the United
States of America, seeking damages, you're not entitled to a jury
trial. Matter of fact, you can't sue the United States without its
consent. However, the United States, by act of Congress, has consented,
so that if a postal truck rams into you while it is going through a
red light, after you go through the administrative process of
presenting your claim, and that's not resolved, then you have a right
to sue the government. But you don't have a right to a jury trial.
But if a civilian rammed into you, another civilian, of course you'd
be entitled to a jury trial.
Prisoners' Rights and the Court's Role: Examples from Santa Rita and San Quentin

Sharp: I had some specific issues I wanted us to talk about that the court has dealt with in terms of other state or federal agencies or groups since the sixties. I just picked two examples. One is the example of conditions at Santa Rita, Soledad, and San Quentin. The other is the example of some of the AFDC matters that you have handled. From the Chronicle I got a list of some issues involving the treatment of prisoners at some of these facilities. But I thought I would describe a few of them, and then we would talk about them.

In '70, there was a suit involving the treatment of pretrial detainees at the Greystone section of Santa Rita and apparently the new facilities had been built, but they were not available to them. In May of '72 you ordered that changed, that the new facilities would be available to them.

In March of '74, the Ninth Circuit agreed with your 1971 ruling that a state prison must provide counsel for inmates; more specifically, that a prison discharge hearing had to be conducted more like a regular court proceeding. John Wesley Cluchette, who was one of the Soledad Brothers, had brought that case.

Then there are several cases from San Quentin, reports of violence; in 1971, one report in which both inmates and guards were killed.

In '75 in December, you wrote a long, twenty-six page opinion about long-term maximum security confinement at San Quentin and that the way that that confinement was being handled constituted cruel and unusual punishment. That was a '73 suit filed by six different inmates, which, I guess, was a fairly controversial ruling. You had a lot of opposition from the California Correctional Officers Association.

Zirpoli: But they eventually complied with basically everything I ruled on.

Sharp: They did?

Zirpoli: Yes. The San Quentin Six, I think it was—I can't think of the name of the—Spain.


Zirpoli: All right. Well, Spain was the lead name. These men had previously engaged in certain forms of violence and were presumably involved in the escape attempt that ended up eventually in the death of the
Zirpoli: judge over in Marin County. They were put, in effect, in solitary confinement and they were there twenty-three out of twenty-four hours of the day.

So they had no access to fresh air or exercise. I ruled that they had to have access to exercise and fresh air.

They were chained. Tear gas was used. I abolished the use of neck chains entirely. I said they could not use tear gas unless a situation of actual danger occurred and it became necessary to resort to it to avoid injury to others of the prisoners or guards.

These measures, which I suggested had to be followed, were followed, and the same was true in Cluchette. My ruling in Cluchette, strangely enough, went to the court of appeals, but it took them three years to pass on it, and they decided that I hadn't gone far enough. So they added some items, as a result of which they were reversed by the [U.S.] Supreme Court.

With relation to Santa Rita, these were people who had yet to be tried. Yet their conditions of confinement were far worse than those who had actually been convicted. If you were convicted, you were removed from the so-called Greystone and brought into one of the dormitory-type places.

Sharp: The new ones.

Zirpoli: As a result of the hearings which we had and the meetings which we had, they opened up a big outdoor area where these people could go and spend the day. They opened the receiving rooms, and the use of the showers, and the visitation rights; they were all improved.

Now, it's unfortunate that the courts had to do this because that's an illustration of the increased workload that the courts were getting all over the country. These prisoner complaints were coming in because the legislature and executive office, through the director of the Department of Corrections, were not resolving the problems.

Sharp: That is what I would like us to get at, some perspective on the issue of prison conditions and the court's role and what essentially amounts to monitoring prison conditions.

Zirpoli: The court's role is an unfortunate one. The court should not be running the prisons, but if you can't get the legislature to appropriate the money, and you can't get the executive office to invoke the proper administrative procedures, then the courts have to come in. What the court is presumably limited to is telling them that what they are doing is unconstitutional and saying you have to correct that.
Zirpoli: Sometimes you get a correction of it and sometimes you don't. We have the situation in Alabama where Judge Frank Johnson invoked substantial prison reform. You had situations in Florida where they ordered the release of prisoners when the prisons became overcrowded. They have been doing that around here, too. I noticed in Santa Clara County they did that fairly recently.

But, see, we are not equipped to do that. We don't have the personnel and, furthermore, we conduct hearings that are based upon rules of evidence. If the legislature wants to hear it and conduct inquiries, there is no limit to the information they can seek or the expert advice that they can seek. They are better equipped to make a study of that nature and resolve by legislation where necessary the problems that arise.

Sharp: The other issue then is changing standards of treatment of prisoners. You have been dealing with prisoners for a very long time, since your early work at Alcatraz and seeing what was going on there. I am wondering how these particular cases in which you had to rule reflect some of your ideas about prisons and prisoners and what they are entitled to and what they are not entitled to.

Zirpoli: The only thing that the constitution says is that you shall not be subject to cruel and unusual punishment. So what you do is you review the conditions as they exist and make a determination of whether it constitutes cruel and unusual punishment. Is a prisoner entitled to more medical care in the prison than he would have received on the outside? Is he entitled to more dental care in prison than he would have received on the outside? The answers should definitely be no, but the fact of the matter is that in many instances they get more because they wouldn't get any on the outside. They are in no position to get it. So you have to study the situation. Some of them complain about the exercise, about the food and the kitchen, and you study all of those.

Now, I think in the Spain case, I found there was no basis for at least three-quarters of their complaints but I did find there was a basis on the use of neck chains and lack of fresh air and exercise and things of that character.

So I haven't any doubt that prison conditions have to be improved, but there is also the fact that the prisons have been trying to train their personnel. They put in a training program at Santa Rita after I made my ruling--the sheriff's department did itself.

Sharp: What sort of training was it?

Zirpoli: A method of better understanding and approach to the prisoners.
Sharp: Since, I guess, about the sixties or so there has been a lot of consciousness raising about prisoners and about the lives of prisoners, and a list of what sorts of things they should be able to have in terms of the conditions. From what I have read, that has brought a huge increase in the numbers of prisoners' rights cases.

Zirpoli: Oh, yes, the tremendous growth in habeas corpus cases is the clearest example. When you get to the point that you have in our court over six hundred habeas corpus cases, and maybe a hundred or two hundred civil rights cases on the part of prisoners, you are beginning to load up the court. Most of these claims are frivolous, but you have to review them because even though the vast majority are frivolous, now and then there is a case that has merit.

This presents a problem in the [U.S.] Supreme Court, too, because most of the cases that are referred them by way of petition for writ of certiorari are frivolous, but every now and then there is a good case. And it's that every-now-and-then-there-is-a-good-case that resulted in a Miranda ruling, by way of illustration.

The Death Penalty

Sharp: The other issue that has to do with prisoners really is the death penalty and the death row appeal. The death penalty has always been an important matter for the court, I guess.

Zirpoli: Yes.

Sharp: In 1969, you were assigned all of the death row appeals. How did that all come about?*

Zirpoli: That all came about because I had one or two. It became apparent that the question of the death penalty in California was to be reviewed by the [U.S.] Supreme Court. It would have been unfortunate if some of those prisoners were executed who might very well have had a proper case depending upon the ultimate rulings of the Supreme Court. So to avoid that possibility, I was assigned all of the death row cases.

What I did was to contact the warden at San Quentin, as I said, to advise me in advance of the various execution dates so that I could appoint an attorney who would then interview the individual and

*See San Francisco Chronicle article on following page.
Issues Not Resolved

S.F. Judge's Pledge on All Stays of Execution

By William Cooney

A Federal judge here yesterday stayed the execution of a Death Row inmate—and indicated he will do the same for all others until the United States Supreme Court rules on some ticklish legal questions.

Judge Alfonso Zirpoli, who has been assigned all Death Row appeals that enter Federal courts, granted a stay to Lawrence G. Modesto, 33, who was to be killed March 5.

"Pending a Supreme Court ruling there should be protection for him and everyone similarly situated," the judge said.

ARGUMENTS

On March 3 the highest court is to hear arguments in two cases which contain important Constitutional issues which Modesto could raise here, Judge Zirpoli said.

These are that juries now have no standards or guidelines when they are trying to decide if a man should be put to death or given life imprisonment, and that a death sentence is cruel and unusual punishment.

"Why shouldn't he (Modesto) have the benefit of the Supreme Court decision?" Judge Zirpoli asked.

Both issues were rejected by the California Supreme Court November 18.

FUTILE

Therefore, argued modesto's attorney, Jerome Falk, it might be futile for Modesto to appeal to that court.

"We run the risk of having to ask for a Federal stay on the eve of his execution, if the State denied a stay on March 4—and there could be a slipup," Falk said.

Judge Zirpoli said that his having all the Death Row cases "is a pretty awesome responsibility and I, too, have a fear of a slipup.

"I have my secretary mark the calendar so there'll be no slipup and some petitioner will be deprived of having his case heard.

"I agree that possibility is remote but I am concerned and worried.""

Arguing against the stay was Albert W. Harris Jr., a deputy attorney general.

Even if the Supreme Court rejects the issues in Modesto's case, Modesto has another issue he can take to the State Courts—that potential jurors who opposed the death penalty were excluded from his jury, Harris said.

"Without sounding overly inhumane," Harris said, "you should not protect him by waiting for something from Washington, because next year, I'm sure, there'll be something else from Washington.

TACTIC

"The interest of the people has been given very short shrift for several years now.

"This is a delaying tactic.

"There he sits with another arrow in his quiver, the jury issue, waiting to see what the Supreme Court does, when he should be ordered to return to the State courts and exhaust his remedies there." There are now only five men on Death Row with firm execution dates.

Modesto was convicted of the 1961 sledge-hammer killing in Riverside of two girls, 19 and 13.

San Francisco Chronicle
February 21, 1969
file a petition if necessary and get a stay of execution. So that worked out very well.
#
We haven't had an execution in California for God knows how many years, and I don't recall the exact number.
Quite a while. The article mentioned that you had granted a stay of execution for Lawrence Modesto and you said that the Supreme Court should rule on the constitutional issue involving juries having standards or guidelines when they were trying to decide if a person should have the death penalty or life imprisonment. I wondered how that all turned out because I didn't find any other mention of it.
They said they didn't have proper standards and the law was amended. It is still being argued as to whether these standards even as amended are appropriate.
What did the standards say?
Well, there is a standard in the Supreme Court. I don't recall the details, but it indicated that certain factors have to be considered by the jury. If they were not considered and if they were not applied uniformly, then you didn't have proper standards. Sometimes whether you get the death penalty or not depends upon the jurisdiction in which you are convicted. You are more likely to get the death penalty in, let's say, San Mateo County than you would in San Francisco, because of the difference in the composition and make-up of the population.
How long did you have all of the death row appeals?
I don't want to guess, but I don't think I had them more than a year.
Was there any general effect then of your having all of them?
Well, it was a lot more convenient. It was just a matter of court convenience. It was better that one judge have them so we would get a uniformity in our rulings for the present purposes than to have three or four judges basically considering the same question.
I wonder what you would say were the important issues for yourself in considering death penalty cases?
The important issue in considering death penalty cases is to review the circumstances of conviction for one thing, and the nature of the trial and the manner in which the case was presented to the jury, how the jury was selected. All of these become factors for consideration,
Zirpoli: and that's what you'd do, you would review it. But with the [U.S.] Supreme Court entertaining these cases, you had to resolve the doubts in favor of the prisoner until the Supreme Court made its rulings.

No, I would not have permitted an execution until I was completely satisfied that the individual involved had truly exhausted all of his remedies, including certiorari in the Supreme Court. So I would stay executions to enable the parties involved to file their petitions, because what happens is first, you go into the state court and exhaust your remedies. Then you come into the federal court. From the district court, you go to the court of appeals and then up to the [U.S.] Supreme Court. Certainly, until someone had exhausted all of these remedies, you weren't going to permit an execution.

Now, eventually, I had to permit an execution where all of the remedies had been exhausted and the fellow came through my court and went to the Supreme Court. The Supreme Court turned him down and he was to be executed, and he was. He tried to come back a second time but I couldn't do anything any more. After that, my hands were completely tied. I think that was the last man to be executed in San Quentin.

Sharp: I am trying to remember his name. [Aaron Mitchell]

Zirpoli: Well, I may remember it myself, but I remember I even talked to his mother.

Sharp: I think I had seen a note that she had come to see you.

Zirpoli: Yes, and she came to my chambers and I talked to her and tried to explain to her what the situation was, but it was very difficult.

Sharp: I can't imagine what that would have been like, either being the mother or you in terms of dealing with the situation. [pause]

Aid to Families with Dependent Children: State and Federal Responsibilities

Sharp: The AFDC cases, we talked about these just a little bit last time, but essentially they are cases in which people challenge cuts that the administration had made or prevention of increases which the administration had made, somehow generally not complying with federal orders for higher, more generous allotments.

Zirpoli: Well, it was providing for the increase in cost of living. As I recall—-that was the three-judge court?
Sharp: That's one of them. That's the case you were with Judge Wollenberg.

Zirpoli: Wollenberg, yes. That was just a situation where there was failure to comply with federal statutes, which was necessary in order to get federal funds, and if you didn't comply with the federal statute and provide for cost-of-living increases, you were not entitled to federal funds, and we just told them the increase would have to be made in order to be entitled to federal funds. I think we even gave them a percentage that they had to increase. I think originally it was around 30 percent, and we cut it down to a 23 percent increase, and this caused a consternation in Sacramento in the governor's office, among others. The then governor is now our president.

Sharp: I am wondering, too, about the role of the [state] attorney general's office.

Zirpoli: The attorney general's office was opposed to it. Mrs. Palmer was the deputy attorney general. But Mrs. Palmer, I think, was pretty well satisfied that we were right. I mean, she did her best to represent the attorney general and the point of view of the state of California or the point of view of the governor, I should say, but I am sure that she was clearly satisfied that our ruling was right.

Sharp: Now, Elizabeth Palmer is somebody I have been trying to find out information about for a long time. At the time of this case, she must have been fairly elderly. I know that she had been around a long time.

Zirpoli: Yes. I wouldn't want to guess too much on it, but I am seventy-eight. She would be about seventy-two now, and that's a guess. I may be off a few years.

Sharp: Can you tell me anything more about her? I don't even know how long she was in the attorney general's office.

Zirpoli: Oh, she was there for quite a number of years. She was a good lawyer, and I think she was a very good representative for the attorney general's office. I have seen many representatives from that office, but I didn't see very many that were better or her equal.

Sharp: Was she formidable?

Zirpoli: Yes, in a very dignified way. Oh, yes.

Sharp: I don't have any image of what she looked like or how she--

Zirpoli: She was a somewhat handsome lady. She wasn't a young lady in her early twenties or something of that nature. So, no, I liked her as a lawyer and as a person. In fact, I attended her retirement party.
Zirpoli: The attorney general's office gave her a big party when she retired after God knows how many years.

Sharp: Is she still alive, do you know?

Zirpoli: I think so and I think she lives in Marin County.

Sharp: Judge Wollenberg talked a bit about her in some of these cases. I guess I think it must have been these same cases, the AFDC cases.

Now, you would have had dealings with both Tom Lynch and Evelle Younger. Tom Lynch (a Democrat) was attorney general during Mr. Reagan's first term; Evelle Younger was during his second.

Zirpoli: They were several cases really when Evelle Younger was attorney general, I don't remember any particularly significant cases when Tom Lynch was attorney general.

Sharp: I thought there were more really in the second term. Mr. Reagan considered welfare reform more substantially in his second term than he did in his first, so I thought it was probably Mr. Younger. I wondered if your dealings through the court were primarily through Mrs. Palmer or you actually had some--.

Zirpoli: No contact with the attorney general as such. Mrs. Palmer was the contact. Of course, Tom Lynch I knew because he was assistant U.S. attorney at the same time that I was.

Sharp: Yes, and you were both on a few cases together, I believe.

Zirpoli: Oh, yes. We were on "Baby Face" Nelson together.

Sharp: That's what I thought.

What is the role of the attorney general's office in these AFDC cases? What was it from your viewpoint?

Zirpoli: The role? To prove that the state of California was right and they didn't have to provide for these increases; and the role of the attorney general's office is to contest the state habeas corpus cases involving prisoners or prisoners' rights; and to defend suits against the state for discriminatory practices if they occur, to keep the attorneys' fees as low as possible to be awarded to the other side; to go to the legislature and get changes in the law, or get the legislature to appropriate monies to be paid when they had to pay money and there was no other provision for payment.

These were some of the things, and also to serve the people of the state of California, to bring an action in antitrust if necessary, on behalf of the state of California, or to seek additional monies,
Zirpoli: let's say, from the big oil companies who were using state land, or to seek compensation on behalf of all users of gasoline in the state of California if the oil companies overcharged. I mean, I am using these as illustrations of the types of litigation that the state of California can and should engage in.

Sharp: The order that we talked a little bit last time and is part of some of the rulings you had in the AFDC cases, the 1970 order to increase by 32.4 percent the AFDC allotments--

Zirpoli: I changed that to 23 later. I think I did.

Sharp: Did you change that after the Ninth Circuit stayed that or before?

Zirpoli: It may be. I'm not sure. Do you have a copy of the opinion?

Sharp: No.

Zirpoli: Let me go through the titles here. [pause to look through Lexis printout of cases]

Sharp: There are not too many from 1970 in there. Most of them are from a later period.

Zirpoli: [continues to look through papers] I don't know whether I have them or not. I can't remember.

Sharp: Anyway, what I wanted to highlight was the fact that the Ninth Circuit had stayed your ruling, your order, and that that seemed to reflect some disagreement between the district court and the Ninth Circuit with respect to the state's effort to comply with the federal order.

Zirpoli: Oh, no, that stay is not unusual. There was nothing unusual about that.

Sharp: Is there often disagreement between the circuit and the district court with respect to this kind of case?

Zirpoli: There is always disagreement when the court of appeals reverses you. I don't know what you mean by that.

Sharp: What I am wondering is, in this sort of case, when you are saying that the state is not doing what it is supposed to be doing with respect to federal orders, federal rules, is the Ninth Circuit sometimes more willing to accept that sort of noncompliance than the district court?

Zirpoli: No, we'd say there was noncompliance. You have to comply or you don't get the money. The court of appeals will generally say the same thing. They'll look at the facts.
Comparing the District Court and the Court of Appeals

Zirpoli: Now, there is a problem that arises, of course, sometimes in the relationship of the district court and the court of appeals and maybe we ought to talk about the role of the district judge and the role of the court of appeals.

I used to make this a subject of a session that I would hold with all of the newly appointed clerks over in the court of appeals. I would give them the point of view of the district judge. I am not going to go into that in any detail, but as I saw it, the primary function of the trial court is to achieve justice in the particular case before it to the extent that such an end can be obtained within the framework of the law.

Now, to achieve that purpose, the conscientious trial judge may, on occasion, knowingly stretch or bend the framework. He may stretch it a little. He will not intentionally break it or mutilate it. He knows that his decision of itself will not become a part of corpus juris, will rarely be cited in an opinion of the Supreme Court.

So in doing justice in the particular case, the role of the trial judge in the administration of justice is to act in accordance basically with his conscience and render what he believes to be a just ruling. He keeps in mind that, let's say (or at least I do), that injustice is not one of those homeopathic drugs which, when taken in minute quantities, has a beneficial effect. He tries desperately to avoid injustice.

Now, sometimes he may be unhappy with the previous rulings of the Supreme Court and he is forced to follow them. To the degree that he can render justice and make distinctions when he can for that purpose, he will probably do it.

But the primary function of the court of appeals is to publish and uphold the law and to maintain its strength, clarity, and stability. Now, if in performing its primary function, it is not able to effect justice in a particular case, the court of appeals ought nevertheless to be firm in the faith that by upholding the law the court will give greater service to justice and liberty over the long span of the years. So they are looking at the precedent that they set as it governs the courts below in the years to follow.

I look at the particular case to see that justice is rendered in that case, and that's, I would say, the basic distinction between the role of the trial judge and the appellate judge. The trial judge, he doesn't particularly become disturbed if he is reversed. When he becomes disturbed is when the court of appeals has not made an adequate review and analysis of the facts. If the factual recitations
Zirpoli: are not in accordance with what transpired truly below, then the
district judge gets a little disturbed, maybe a little riled, too,
by it.

So we try to take care of that situation, if a question of fact
is involved, the court of appeals cannot reverse you unless your
finding is clearly erroneous. That's where we are a little disturbed.
We feel sometimes that they don't truly adhere to this requirement of
Rule 52 of the Federal Rules of Civil Procedure and that on occasion
some judge will substitute his judgment for that of the judge below.
That is a cardinal rule that they should adhere to and adhere to
entirely.

There is a disposition on the part of some judges to philosophize.
Now, you really shouldn't do that. You've got an issue before you
and that's the issue you should decide. You shouldn't say, "Now, if
other circumstances existed; this would be or that would be," because
you are looking into the future and you shouldn't do it. You have to
be careful about the impact of your ruling or your decision, par-
ticularly in the court of appeals and even in the district court
because sometimes you have to look beyond the immediate case: What
is the impact going to be with relation to society generally, or with
relation to other problems that arise?

So if you have a particular question, you try to resolve it not
necessarily with the purpose of affecting future litigation, at least
on the district court level. On the court of appeals, however, you
can look at future litigation, but it should always, in my view (I
may be wrong on this), should be related to the exact issue that is
before the court.

I have seen situations in which the court of appeals has decided
to engage in dicta and expand on some kind of a ruling, and you find
that that's what the lawyers are going to be citing to you in the
future on situations where that was not the problem before the court
at the time, and it makes it tough for the judge. [pause]

Sharp: I'd like for us to shift gears a little bit and talk more personally
about judges. You started it off there in giving me those ideas about
the difference between the trial judge and the circuit. I thought we
could talk just a little bit about chief judges. When you came on--

Zirpoli: Judge Harris was the chief judge. Judge Goodman had died a few months
before. His widow gave me all his robes.

Sharp: You had known Judge Goodman then for some time.

Zirpoli: I had been his lawyer delegate for years prior thereto and at the
suggestion of Judge Harris and his request, I had set up the indigent
defendant program.
Sharp: I don't know too much about Judge Goodman and I thought, if you can do it, we might talk just a little bit about how different Judge Goodman and Judge Harris were as chief judges.

Zirpoli: Judge Goodman was a very active chief judge. [pause] I wasn't a judge then, so I'm just basing it on what I understand without having had the benefit of having him as my chief judge, but he was generally an active chief judge. He was very much interested in the responsibility of the judiciary and the work of the Judicial Conference of the United States and the Ninth Circuit and the work of the committees and in the operation of the court and the rules of the court.

Judge Harris was an easy judge to get along with as chief judge. He didn't make particular demands on the lawyers. He was more interested in the work of the court than he was, let's say, in the judiciary as a whole, whereas Judge Goodman's interest was a much broader interest. They were both good chief judges.

Sharp: Was their leadership somewhat different then, would you say?

Zirpoli: Well, their leadership was somewhat different because Judge Goodman was more apt to take the rein in hand than Judge Harris. But Judge Harris was a very pleasant person to get along with, and he was very considerate of the judges and their personal needs. I am not saying that Judge Goodman wasn't; Judge Goodman was, too. Of course, Judge Goodman was a man of substantial wealth. Harris was well to do, but he was not a man of substantial wealth or wealth comparable to Judge Goodman, and that difference in your economic status oftentimes affects your work and the role you want to play.

Sharp: Certainly. Were there other leaders in the court when you first came on, other judges that you were sort of aware of, besides Judge Harris who was a leader by benefit of his role as chief judge? Were there judges who seemed leaders?

Zirpoli: Oh, certainly. I had great respect for Judge Wollenberg and Judge Sweigert by way of illustration and other judges were Judge [Lloyd] Burke, who is still on our court, and Judge [Oliver] Carter, who later became the chief judge.

Sharp: He was chief judge then after Judge Harris.

Zirpoli: After Judge Harris.

Sharp: How would you contrast his chief judgeship as opposed to Judge Harris? Maybe you could just sort of describe him.

Zirpoli: There wasn't too great a difference. Judge Peckham, of course, has certain interests that the other judges didn't have. For instance, one of them is the very fact that we are indulging in this historical
Zirpoli: study, which is one of the pet projects of Chief Judge Peckham. He was the man who thought of the idea of having an historical society. He has tremendous interest in those areas as they affect the history of the court, the maintenance of the records of the court, and things of that character.

You have to realize that the role of the chief judge in part changed over the twenty years. When Judge Goodman was chief judge and Judge Harris was chief judge, you didn't have what we call a meeting of the chief judges of the metropolitan districts that they have now. They all meet and discuss problems.

We didn't have multidistrict litigation. Multidistrict litigation first arose under Judge Harris with the electrical equipment cases. It was after that you had a great communication between the chief judges of the various districts throughout the country. So this has become a very substantial interest on the part of our present chief judge who regularly attends these meetings. You know, when you were in Goodman's time and Harris's time, you didn't particularly worry about what was going on in some other district.

Sharp: Right, but you do now.

Zirpoli: You do now.

The Craft of Trial Court Judging

Sharp: This may be hard for you to answer.

Sharp: Are there some judges either who are on the court now or who were on it before and have retired whom you would think were personally important to you because of the ideas that you might have gotten from them, or the style, or something else?

Zirpoli: Judge Goodman, I would say Goodman, yes; Judge Harris, because I enjoyed a very pleasant relationship with him; Judge Carter, I think I had his confidence; and then the other senior judges, both of them died, Judge Wollenberg and Sweigert, and I was close to both of those judges.

Sharp: Are there kinds of ideas that the judges share in terms of sort of intangible ideas about how judging should occur, or how you should be as a judge, and how you should think as a judge? Are those kinds of things learned from each other, do you think, or is it not?
Zirpoli: To a small degree. I mean you talk things over. You know that, for one thing, you should not be saying too much. That's one thing that a judge has to avoid is saying too much. You discuss that. You don't grant TV interviews and you don't go around offering opinions on matters as to which you may have some responsibility at a later date. You don't become a sponsor for testimonial dinners and things of that character.

Sharp: When you were young and just coming onto the bench--

Zirpoli: I was fifty-six.

Sharp: All right, younger than you are now, were you aware of learning how to be a judge?

Zirpoli: Oh, yes, I was aware of it. But as I said before, I had had thirty-three years of practice. In fact, [practicing in] the federal court, I got to know these judges pretty well in those years.

Sharp: Were you aware that you were learning from them or were you aware that they were teaching you as older, longer-term judges than yourself?

Zirpoli: Well, just a certain amount of teaching; teaching in the sense that you might discuss a problem with them, but the actual teaching process as such, no. We were conducting seminars in those days for newly appointed judges.

Sharp: That sort of filled that--

Zirpoli: Yes, and that was of some assistance where you discuss different problems. Maybe you discuss habeas corpus, which would be a relatively new subject for some new judges. It wasn't for me, but it's an illustration of what I mean. The use of discovery and the employment of discovery procedures is a matter that you might have discussed, too, at times with judges because that was in the truly developing stage.

Sharp: Have you been aware at some point in your tenure on the district court bench that you weren't new anymore, that you had sort of reached--was there any year or any--

Zirpoli: I couldn't point to any one. When I went on the bench, I was given assignments immediately. I mean, once in a while, a new judge will sit with old judges for a few days before he takes on responsibilities, but that depends upon his prior experience. If you were a trial judge and you came from the superior court to the United States District Court, you didn't need that. If you were an outstanding trial lawyer--let's take Judge [William W] Schwarzer as an example--he doesn't need any instruction from the court. He could probably give us some instruction.
Sharp: You have been here a long time, and I am wondering why you stayed so long at the trial level.

Zirpoli: Well, what do you want me to do, go home and take it easy? I have to do something and you have to remember that this is a very convenient and comfortable method of retiring, so to speak, because as a senior judge, as I've said before, in the back of your mind you know that if you don't want to do any work, you don't have to. So it's very comfortable to come here, take on your assignments, take a day off whenever you want. It's a very pleasant way to be in retirement. Otherwise, you are home wondering what to do. Sure, you can work around the house and go out into the country for a ride or go to the beach or something, but that was not my practice. My practice was to come here and work, so I continue to come here.

Sharp: Let's talk about judging though. What has judging as a job, as a position, what has it offered you for so long that you have remained at the trial level as opposed to going on into the circuit?

Zirpoli: Oh, as opposed to going onto the circuit? Well, that's because I always felt that I was better suited to be a district judge than I was a circuit judge. The circuit judge, you sit there in panels of three. You don't see anyone. You get briefs, you review them, you have your law clerk do research for you, and then you sit with them, you sit down in the conference, you decide it, and you write an opinion.

Well, here you go on the bench, you see the witnesses, you hear them, you can get the action and the activity going on, and you make the decision in the first instance, and you make it then and there. It isn't a question of receiving briefs and reviewing them and pondering over them for substantial periods of time.

Sure, we're grateful to the judges on the court of appeals that they do that, so that if we make mistakes, they can correct them and they can ponder over them. But I am not suited for that type of work. You have to be somewhat more of a scholar on the court of appeals than you do on the district court. You really don't have to be a scholar on the district court. So since I don't fit in that class particularly, I am more satisfied with what I am doing.

Sharp: I think you had turned down appointment to the Ninth Circuit.

Zirpoli: In '68.

Sharp: For the reasons that you have just given me?

Zirpoli: I wrote a letter to the president [Lyndon B. Johnson] in which I said that I thought I was better suited to serve as a district judge. That was a very short letter and that's just about what it said.
Did you think about it for a long time before you wrote the letter?

No, I think I thought about it for maybe two days at the most. Two days.

Was it something that you discussed with Mrs. Zirpoli?

Oh, yes, I discussed it with my wife. I told her I thought I would be better suited—I gave consideration to the fact that I am of Italian extraction and they don't have one on the court of appeals. But that didn't prompt me to take it. After all, I had to be satisfied that I would be happier there. I would make a little more money there, that's true.

This is sort of difficult, too, but I wondered how, if you could, describe your commitment to judging?

You have to remember that from the time I was assistant to United States attorney, my ambition was to be a district judge and, therefore, I achieved that which I desired, and I found the work very pleasant.

From the point of view of pleasure in your work, of course, you had far more pleasure in the early days. After you have been sitting on the bench for twenty-one years a routine bank embezzlement case becomes routine, an armed bank robbery case becomes routine. Pretty soon antitrust litigation becomes somewhat routine, although the nature of the product involved or the parties involved may change.

So the work is not as exciting as it used to be. I think I have to truthfully say that. Of course, I had a lot of committee work and I found that exciting. But with the passage of time, you have less desire to travel, too, from place to place.

Do you think you would have turned out differently in terms of the kinds of concepts and attitudes that you brought to judging if you had been a district court judge somewhere else in another state, in Florida or New York or Kansas or somewhere?

Not particularly; only to the degree that people may have different outlooks on certain types of crimes in other parts of the country. It is true that we in California may not necessarily look upon certain types of crime with the same considerations that would apply in Florida or other states, but I don't think that there would be any basic change.

If I was born and raised in some other state and subject to a different environment all along, if I hadn't gone to Boalt Hall, if I hadn't been a Young Democrat, if I hadn't been, you might say, a
Zirpoli: liberal, if I had grown up as a Republican conservative, I might have some different views.

Sharp: I am wondering because the Northern District is considered, at least by people outside of the Northern District, fairly special in the sense that it is liberal, and liberal in some of the areas that we have talked about in terms of conscientious objectors and so on.

Zirpoli: I think we may be considered a little more liberal. As for the other districts, I don't know.

Sharp: You have been seen as innovative in some areas that we have talked about. Is that a problem for you?

Zirpoli: Not a great problem. I mean, when you say "innovative," what you are saying is I might be a little more of an activist judge, for one thing, and another thing, you have to remember that changing times causes changes in point of view even on constitutional questions. The constitution has to be interpreted in part with the times so that they have some bearing.

Sharp: Does it give you any sense of people's expectations of you in terms of your judging?

Zirpoli: People's expectations? I assume that they'll expect me to be fair and that they expect me to be reasonably courteous to everyone in the courtroom. Their expectations of me may differ from another judge. They know that I'm not a real stickler for the rules. Some other judge may be. If the brief is a half an hour later, another judge may not accept it. I have a different approach, that's all.

Sharp: In your terms of your being liberal, now there is a precedent that you are liberal because of the kinds of decisions that you've made in a lot of different cases. So people sort of have that expectation that you will--

Zirpoli: They have that expectation, but at times they are terribly disappointed. You have an expectation that because someone is liberal you are going to bring, let's say, a discrimination case [to him], and it doesn't have any merit. I may be a liberal, but, boy, that's going to be thrown out. I'm not going to permit my liberal views to overcome the obvious in the way of an unwarranted case, or one that in no way justifies the relief sought. In other words, I'm not going to ever stretch the facts to achieve a desired result in the law. Once in a while that happens at the appellate level. That's what you worry about, too, as a district judge, that someone at the appellate level, in order to better establish a certain particular legal principle (not that there is anything wrong with the principle), may stretch the facts or indulge in the exercise of discretion or judgment, which is
Zirpoli: within the province of the district court; they may indulge in it themselves.

Sharp: Have you ever thought that you have a judicial philosophy?

Zirpoli: Have I ever thought that I had a judicial philosophy? My basic judicial philosophy is that I just pray to God that I always render justice, that I haven't treated someone improperly, and that if I have, that the good Lord will forgive me. [laughs softly]

Sharp: Or that you'll be reversed!

Zirpoli: Well, I've mentioned that. I have no quarrel with being reversed if I am wrong. The only time I quarrel with being reversed is when they misinterpret the facts basically. It's like one of the district judges who went on the court of appeals. When he got there, he was talking to his colleagues about a case that he had been reversed on, and he said, "I would find no objection to the reversal if the facts only were as you had found them." He was expressing that same thought that I mentioned.

Sharp: Do you have some other ideas?

Zirpoli: No, I don't have any other ideas particularly. As I said, I am a little bit disturbed about some trends in litigation. That is one thing that disturbs me and I think that the law schools and everybody ought to concentrate on finding simpler methods and procedures for more mediation and negotiation and less actual court controversy.

Sharp: Are there any classes offered in law school in arbitration or mediation?

Zirpoli: Well, they're doing that, I understand, some of it in Harvard. Now, I don't know if other institutions are doing it.

Sharp: But that is considered pretty non-mainstream, to have that sort of class taught?

Zirpoli: Of course, there is always the thought that it might be wise to require a year or two of apprenticeship before you actually become a lawyer. In other words, after you graduate, make you work in a law office for a year or some period of that nature. I also believe that after you are appointed as judge of the court of appeals, if you have never had prior trial experience, you should be required to serve in the district court for at least thirty days.

Sharp: That would give people quite an eye opener, I would think.

Zirpoli: Oh, yes. It has been suggested. Time and again it has been suggested, but they haven't done it yet.
Sharp: Are there other sorts of comments that you would like to make about your work?

Zirpoli: Not that I haven't expressed.

Sharp: Then those are all of my questions.

Zirpoli: All right.

Sharp: I am thankful that you had this much time to spend with me.

Zirpoli: I don't know how much interest there will be in what I had to say, but anyway, I have tried my best.

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