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Kenneth Ziffren
THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: KENNETH ZIFFREN

Interviews conducted by
Laura McCreery
in 2004

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Table of Contents—Kenneth Ziffren

Interview 1: August 4, 2004

Audio File 1

1

Birth and upbringing in Chicago and Los Angeles — Undergraduate education at Northwestern University — Chicago politics in the 1950s and '60s — Returning to California to attend law school at UCLA — Law school faculty — Editorship of *Law Review* — Lloyd Rigler and the investigation of enforcement of laws against homosexuals in Los Angeles — The assassination of President John F. Kennedy — Waiting for the offer of a clerkship for Chief Justice Earl Warren — Summer work with law firms — Learning from the Chief — California politics — Warren's relationship with Richard Nixon, Pat Brown, and Jerry Brown — The workload among the clerks — *Miranda*, *Escobedo* — Typing — Choosing cases and priorities — More about *Escobedo* and other major cases

Audio File 2

12

Paperwork — More about *Escobedo* and *Miranda* — The clerks and the writing of the Chief's opinions — *Ziffren Truck Line* footnote — The right case to fulfill an objective — Five-three-one decision on *Miranda* — Justice Thomas Clark and *Mapp v. Ohio* — Warren as a political operator — Questions the justices ask — Washington power circles, relationships outside the Court — Narrator's father's relationship with Warren — Justice Arthur Goldberg's departure from the Court — Justice Abe Fortas — President Lyndon B. Johnson — "The Kennedy Commission" — Warren's self-effacing work ethic — His judicial philosophy — "The underdog" — Obscenity cases — *Ginsburg v. New York* — The Texas recidivist law — Gordon Gooch — Narrator's "contribution" to U. S. jurisprudence

Audio File 3

24

Warren's legacy, "immeasurable and measurable" — Narrator's continuing personal relationship with the Warren family — Warren's approach to retirement — The Chief administering the oath of office at Richard M. Nixon's presidential inauguration — Reflections on the clerkship and subsequent teaching career at the law school at UCLA

[End of Interview]

Interview 1: August 4, 2004

[Begin Audio File 1]

McCreery: This is Tape 1 on August 4, 2004. I'm Laura McCreery, and on this tape I'll be interviewing Kenneth Ziffren at his office in Los Angeles. We're collaborating today on the oral history project called Law Clerks of Chief Justice Earl Warren. May I start off having you give a little of your own background, namely date of birth and a little about where you were born?

1-00:00:35

Ziffren: Sure. I was born in Chicago, June 24, 1940. When I was around three years old my family and I moved to Los Angeles. Then I grew up here. My mom and dad were divorced when I was about eight, and I lived with my mother and went to public school here and then to Northwestern for undergraduate and came back to UCLA Law School for the law school.

McCreery: While we're on the subject, what was LA like in those days when you were growing up?

1-00:01:23

Ziffren: It wasn't nearly as smoggy. It was actually very multi-ethnic. Throughout my youth. I remember at high school the ethnic composition was white, black, Asian, Hispanic, with all forms and variations in there. It was almost pastoral.

McCreery: That is quite a difference from today. What took you to Northwestern for college?

1-00:02:10

Ziffren: I wanted to get away from home. Actually, both of my parents had gone there, so it was an easy out.

McCreery: What did you find when you got to Chicago?

1-00:02:31

Ziffren: I remember the first weekend I was there, and I was out at a party. It was about two o'clock in the morning, and I'm coming back to the dorm, and there's a thermometer outside the door. I opened the door slightly inebriated, and I looked at the thermometer, and it's six below zero. I went inside, and I didn't come out for the weekend. [laughs] I never could get used to the cold on my ears, even with muffins.

In those days Chicago was a very swinging town. This was during the first Mayor Daley's tenure, in 1960. There we all were. I was at that point the president of the Young Democrats at Northwestern and had contact with the mayor and a famous politician named Jake [Jacob M.] Arvey. I was one of a crew of college kids who went down to the precincts on voting day in

November of 1960 and did what the mayor and his crew suggested in terms of getting out the vote.

McCreery: And what were those suggestions? Do you recall?

1-00:04:15

Ziffren: The suggestions were to stay very close to the vote counters and to make sure that a sufficient amount of paperwork was counted.

McCreery: Had you had these political interests from an early age?

1-00:04:34

Ziffren: Yes. My father—and mother, but mostly my father—was very active in the Democratic Party, and he was the Democratic National Committeeman from California from 1953 to 1960. Those were the days when there were two DNC members from each state, and in California the south was the male—that was my father—and the north was the female.

McCreery: Those were exciting times, and that election of course brought a huge period of change for the country. Were you carrying out your political interests in your studies at Northwestern as well? What were you working on there?

1-00:05:30

Ziffren: Yes, to some extent I was. I actually organized and put together a mock UN on campus in my junior or senior year, trying to internationalize, or globalize, the Northwestern experience. At the same time I should remember, as I do to my regret, that we had a poll or a mock on election day, or close to election day, at Northwestern, and the student body was three to one Nixon over Kennedy. So it was still a very rock-ribbed Republican school, at least at the undergraduate level. Of course we were in a town, Evanston, that was the national headquarters of the WCTU, the Women's Christian Temperance Union. That kind of typified all of Evanston and their reaction to these young radical college kinds.

McCreery: How do you think your time in the Chicago area shaped you as a person?

1-00:06:52

Ziffren: The breadth and depth of new experiences in an atmosphere that was away from home, and what I'll call good old Midwestern values, something I was still rebelling against at the time. Because I think I was, as I've illustrated I think with the voting, more liberal and more activist than my colleagues. At the same time one of my closest friends at Northwestern during this period—and we've stayed friends and are friends today—is a man named Dick Gephardt. I ran his campaign for student body president in his senior year. He won. We stayed friends over the years. I helped him in his '88 campaign for President, and then of course this year I've been helpful to him, I hope, in both fundraising and giving him access to people in whatever industry I was involved in.

McCreery: So clearly you've continued your political interests over the years.

1-00:08:28

Ziffren: Yes.

McCreery: How did you decide to come back to Los Angeles to go to law school?

1-00:08:35

Ziffren: That's partly a weather decision and partly economic. In fact, despite the fact that my father and mother, albeit separately, were practicing law and that eventually I went into my father's law firm after clerking for the Chief, until my senior year I did not want, nor had I planned, to go to law school or to go into a legal career. I was planning all through college potentially to go to graduate school either in philosophy or in some form of political science. In those days, the early sixties, the draft was very peculiarly structured—I say peculiarly by today's standards because if you were going to graduate school you did not get a deferment and you were eligible for the draft. If you went to law school you got a deferment until you were out of law school. Astonishing in today's world with the disregard for lawyers and unfortunately for law schools as well. That kind of turned the tide for me, and I decided I would try out for law school.

My parting spirit of liberalism at Northwestern was organizing a protest the at our graduation ceremony, where we were all marching around with banners protesting the fact that the senior class had not been consulted on the graduation speaker. The graduation speaker was a Congresswoman from Evanston named, I think, Marguerite Stitt Church, whose major claim to fame was that she was the president of the WCTU [Note: per the WCTU website, she was not]. The class was not consulted by the administration in choosing her. So I got about ten, twenty kids organized, and we all marched around the graduation ceremony with placards as our parents sat in the audience holding their eyes and saying, "Please let them graduate." [laughs]

In any event, I then came back here, and the summer before law school decided to try to get a kind of a head start. So I worked at the law library the summer before, which was a really good experience kind of getting me into both the culture and making me learn how to look up books or cases or things of that nature.

McCreery: What were your financial circumstances when you went to law school?

1-00:12:29

Ziffren: Just that I was not well-to-do; I had been more or less raised in the upper middle class, so to speak. The tuition at UCLA was, I think, \$100 a semester. I got an apartment off campus but nearby and roomed with a friend of mine from high school, and I think it cost us \$400 a month. I did some work on the side, and I had worked a bit in college, so I had a couple of thousand dollars to last me through.

McCreery: Hard to believe the process now.

1-00:13:22

Ziffren: Yes. Then getting a scholarship after my first year and saying, "Gee whiz, I'm saving \$200." [laughs] But in those days it was significant.

McCreery: That's quite a turn of events. Tell me something about the law school faculty here at that time, at UCLA.

1-00:13:48

Ziffren: The faculty was just coming out of what I'll call the doldrums. The law school had, I think, started in 1949, so the first graduating class was, I think, '52. The Dean at that point was a fellow named Dale Coffman, who was an arch-conservative. He solicited people of that ilk as teachers. So Ezra Pound taught there, and others. But in the late fifties there was a rebellion against Coffman's dictatorial ways and conservative ways. He was well known also to be anti-Semitic. The dean of a state law school in that world was really not what anyone wanted. So he was replaced by a then young man coming from Duke to the faculty, and then working his way up, named Dick Maxwell, Richard Maxwell. He was the Dean and was in the process of recruiting a number of outstanding moderate-to-liberal types who were really in various areas of prominence in the law school community and the teaching community. So it was very, very exciting place with really a lot of great teachers and good scholarly work that was done by them.

McCreery: You had been stirring the pot in Chicago. Was UCLA ready for you?

1-00:16:08

Ziffren: Oh, yeah. In law school it hits you that first day, that first class. I will never forget the first class I went to because it was a torts class, and the professor was William Cohen, who is now at Stanford. He started at the rear of the alphabet, and there was one person, if you will, below me, or above me; I'm not sure how to put it, and Professor Cohen decimated him in about five minutes. Then I was up, and I fought him for forty minutes, and I was sweating and I was exhausted. But I kind of stayed with it, and that really kind of turned everything around for me. I decided I was going to love this and have a great time. So I really started hitting the books and trying to think out the problems and anticipate the issues ahead of time rather than the way I think most of our education was and is today in the undergraduate area or even in K-12, where you absorb. This was a brand new way of thinking and a brand new way of intellectual pursuit for me, and I really enjoyed it.

McCreery: Who was influential to you there?

1-00:18:06

Ziffren: Bill Cohen was very influential. The Dean was quite helpful. There was then a subsequent person who became Dean later; he was a professor of mine at the time named Bill Warren. Ben Aaron was a labor professor and actually, when

he took off for a semester, a guy named Derek Bok came in and substituted for him. That was a great course. So there was a fair number. Norm Abrams and Murray Schwartz were criminal law professors. Harold Marsh was corporate law. All of them I remember today with great fondness, and others. Chadbourn in procedures and Van Alstyne in some constitutional law areas. So it was a really good crowd of professors, very stimulating, and would make you work, gave me incentive to work hard.

McCreery: And you still remember this very well.

1-00:19:43

Ziffren: I do.

McCreery: I can see that it was quite a turning point for you perhaps.

1-00:19:49

Ziffren: It was.

McCreery: What were your own interests in the law as you made your way through school? What stood out to you?

1-00:19:52

Ziffren: As I said, I had not till my senior year thought about law school and, again, my motivations for going were not really to practice. It was just to try to learn something. As I kind of got into it I was really not attracted to one area over the other. But in between my junior and senior years I had been named editor of the *Law Review*, and I was also working downtown at Gibson, Dunn and Crutcher and trying to edit the *Law Review* at the same time. When our class took over—we were supposed to put out five issues a year, but when we took over in May we were two issues behind. So my goal was to try to galvanize my class and the class behind us into catching up and getting ahead of everything. So I spent an enormous amount of time and energy trying to put together the issues of the *Review*, both with a view toward catching up on the calendar but at the same time qualitative stuff.

We came up with a couple of symposia where I used my political connections and other connections to get famous people, so-called, to write for the *Review*. Those were very well-received. Then my kind of—I don't know whether this is a gift or a burden, but I was trying to plan for the year after. What we came up with was, I had some friends here that I had met kind of through relatives, distant cousins and so on, and one of those people was a man by the name of Lloyd Rigler. Now, this is 1965, and Lloyd and his partner Larry Deutsch were among the few gays who outed themselves, so to speak. This was not the thing to do in those days. Lloyd was very interested in trying to find out how the police department enforced what I'll call sexual laws. So he made a grant at my request to the *Law Review*, and that funded some empirical research that the *Review* did over a year's time starting when I was still there, but it wasn't published until after. It was a very explosive and fascinating series of articles

and notes, comments and so on about the enforcement of homosexual laws in Los Angeles during that period.

So I was able to kind of exercise my activism in different ways but, if you will, shaped in a scholarly disguise, so to speak.

McCreery: What was the response to that piece when it did come out after you had left?

1-00:24:51
Ziffren:

It created a lot of controversy, but the politicians who got it—and I made sure through the next year's *Law Review* that we shipped copies to the legislature as well as to city council and mayor and all of that—it created some controversy, but it got everyone talking about it. As a result, I like to think the laws started to liberalize, the enforcement started to liberalize, to the point that today none of those laws exist of course. Enforcement of what I'll call anti-gay or anti-lesbian laws is completely in the other direction, at least in enlightened metropolitan areas.

McCreery: Did you have much of a sense of trying to accomplish a particular thing in embarking on this?

1-00:25:58
Ziffren:

No. No, I just thought it would be an interesting study, and it would also give the second-year law students who were working on it, as well as some of our editors in the third year, stipends for the summer so that they didn't have to go to work; they could work on this. We would pay them, and that was the idea of the grant from Lloyd.

McCreery: But of course now we look back and see how groundbreaking—to use that overused term—but how groundbreaking it was.

1-00:26:32
Ziffren:

Yes.

McCreery: What about other events while you were in law school? That would have included President Kennedy's assassination and so on.

1-00:26:46
Ziffren:

Again, I was to the left of Kennedy, so I never really appreciated him. But I do remember on that fateful day I'm walking down the hall in the law school, and someone rushes up to me and says, "Did you hear the President's been shot?" I said, "Oh my God, Johnson." [laughs]

McCreery: Your first reaction.

1-00:27:25
Ziffren:

Yes. And I'm thinking back; I'm not sure whether I was saying that Johnson was the shooter or whether, "Oh my God, I can't handle this if it's going to be Johnson taking over." So, mixed message.

McCreery: Well, that gives us a good idea of who you were—

1-00:27:42

Ziffren: Yes.

McCreery: —certainly. Did you have thoughts in mind about what you wanted to do after law school, or was the clerkship something that happened of its own accord. Tell me how that happened.

1-00:27:55

Ziffren: First, in terms of the clerkship, the Dean and Professor Cohen—Cohen had been a [William O.] Douglas clerk—encouraged me to try out for some clerkships. As it turned out Douglas was the first clerkship interviewing at that time on the west coast, so Professor Cohen kind of put me up for it, and I interviewed for that and didn't get it. The clerkship that year went to a fellow I'm still good friends with named Jerry [Jerome B.] Falk, who's a prominent lawyer in San Francisco. I then was put up for clerkship with Chief Justice [Roger J.] Traynor on the California Supreme Court. I had interviewed for that and interviewed for the Chief, and I knew from the interview with—Hank Steinman and Gordon Gooch were the two former clerks who were interviewing on the west coast or elsewhere for the Chief. It was the best interview I know I've ever had. It was so much fun, and it was such a blast, and the three of us, so to speak, really hit it off in the interview, and it was a great interview. I was really pleased at how it had gone.

So while I'm waiting to hear about the Chief I get a call from Chief Justice Traynor, and he said, "I'd like you to come and be my clerk, but I need an answer over the weekend, by Monday, because there's some stuff to do and I need to know that you're available and all of that, and if you're not I've got to move on." I said, "You couldn't wait for me to hear from the Chief Justice?" [laughs] And he said, "No, I'm sorry, I can't. But I hope you'll make the right decision." So over the weekend I pondered endlessly and decided that I thought I'd have a really good chance of getting the clerkship with the Chief. So I called and told Chief Justice Traynor that unfortunately I couldn't meet his time schedule and that I would have to pass.

I then had a two-week period where I still hear nothing, and I'm getting more and more anxious about it. One morning, then, I remember getting up late and missing a couple of classes, and I'm in my apartment, and it's so late that the mail comes. I look in the mail, and there's a letter from the Chief saying, "I'm inviting you to be my law clerk next year." So I jump up and down. One of the best days of my life.

So that's that part of it. I had interviewed around town, because it was my third year, with a number of top firms, both the larger ones and what I'll call the boutique entertainment law firms, because I had developed a kind of interest in entertainment law, not copyright but entertainment. After many

struggles I decided both for emotional reasons and what I'll call future—which I'll get back to—that I was going to go with my father's law firm. The practice they had—there were four people in the firm, three Ziffrens and a fellow named Buzz Aarons. Buzz was a tax specialist who ended up going to the tax court many years later. But it was my father and his two brothers. I was attracted to that both because they had a really good boutique practice doing a fair amount of tax work, real estate, minor corporate—I don't want to say minor—not SEC corporate work but M&A corporate work, and a fair amount of entertainment. I had decided in my tenure at law school that I was much more interested in transactional law than I was in litigation. So I had more or less shaken hands with my father to join his firm on my graduation. He was of course supportive of me clerking if I had the opportunity to do that.

McCreery: As an aside, what had you been doing with Gibson, Dunn and Crutcher?

1-00:35:11

Ziffren:

This was just a summer gig, although I remember one of the tasks I was given, which was like going against the grain—there was a lawyer there named, I think it was Homer Crotty. And that was just like he was. The firm represented a bunch of fraternities and sororities, and I can't remember whether this was limited to SC or whether it was both private and public schools. Anyway, there was a threatened intervention or case that was going to be brought by the attorney general of something—I don't remember exactly—that basically said that fraternities and sororities in schools that receive federal aid, I think it was, couldn't discriminate and in essence had to admit—whether it was blacks, Chicanos, Jews, whatever, I can't remember. Of course Crotty, on behalf of the fraternities and sororities, wanted to resist it. So I ended up having to research the arguments on why they would not be allowed and why the anti-discrimination measures that were either federal law or state law or whatever didn't apply to voluntary associations such as fraternities and sororities. Needless to say that did not give me a lot of pleasure. But we do what we have to do.

That's my only memory of substance during that summer, but I did meet a number of lovely men and women who I've stayed friends with till today. Some of them ended up going into other areas, and I have represented them in various regards. So it was a lovely experience that way.

McCreery: Let's talk about when you first met Chief Justice Warren in person. Maybe there's the story of moving back to Washington and getting started at the court?

1-00:38:11

Ziffren:

Sure, I think we were all back there shortly after, I want to say, the fourth of July. It may have been late June, but I think it was after the fourth. The Chief was coming in—we worked, if you will, alone, without him for several weeks. He was coming in for, I guess, a week over the summer to write letters or

make speeches or something like that. So he was scheduled to show up, and there were the three of us plus a [Stanley F.] Reed clerk, Reed having retired but nonetheless maintaining an office at the court. Occasionally the Reed clerk would join us in dealing with the Chief. What I'm trying to remember is whether my first sight of him was in his office or whether he came, then, upstairs from his office to where we were, which was on the second floor, opened the door, and I stared at him and, [laughs] "Whoa!" I can remember that happening, and I don't remember whether that was the first time I saw him or whether that was later and he was just stopping up to say hello and kind of blew me away.

McCreery: When you say blew you away, what do you mean?

1-00:40:31

Ziffren:

Well, it's not expected, and you look up and there's that face and that vision, and it's very impressive. I mean, I adored him. And I always will. He was very much a surrogate dad to me. I was very, very fortunate—all this political stuff that we've been talking about—I was very fortunate to be politically involved insofar as he was concerned because he *loved* to talk about California politics, both historically and what was going on at the time, so that during the term quite often when he would leave the office his secretary would call me and say, "The Chief's going to take a walk, and he'd like you to join him." And I said, "Great," so I'd run down and we'd go walking on Constitution Avenue and chitchat about California politics and what was going on at the time. Then his limo would be following us, and somewhere around the Court of Appeals or a block later the Chief would get a little tired, so he and I would then get into his limo and drive him to his apartment. Then the limo would take me back to the court, and I would then work till normal hours, the normal being somewhere around eight o'clock.

McCreery: What was going on in California politics at the time? What did you talk with him about on these walks, do you recall?

1-00:42:48

Ziffren:

There was a bunch of Richard Nixon stiffs. Pat [Edmund G.] Brown. I remember distinctly—let's see this must have been, I want to say either '66 or '68; this was after the clerkship—where there was a big fight in California about knocking off the judges who had been appointed to the Supreme Court, and he was very very involved emotionally in that. He would call me from Washington after the clerkship and say, "What's going on about that?" and "How do you think it's going to come out?" And we'd talk about that. This was not Rose Bird; that came later. This was before then.

And then when the three clerks and the Chief would get together on Saturday at lunch a lot of that was a reminiscing lunch about his life and times in politics in California. It was mostly about issues. Some of it was about people and personalities, but it was mostly about issues, actually.

McCreery: You mentioned Mr. Nixon.

1-00:45:04

Ziffren: He was not fond of Nixon, and we heard the story which I can't retrieve right now, but I remember him telling all of us the story about the California delegation on the train on the way to the convention and how Nixon was working the aisles or the staterooms or whatever you want to call it. I remember that. Things of that nature.

McCreery: Did you have much of a window on his relationship with Pat Brown?

1-00:46:06

Ziffren: Yes. I was friends with Governor Brown and actually became Jerry Brown's lawyer in his campaigns on disclosure and fundraising activities both as Secretary of State, then Governor, and then when he ran for President. So I was doing, in essence, volunteer work for Jerry. Also Jerry and I in 1968 toured California more or less, and he was Gene McCarthy and I was Bobby Kennedy. So we would debate at these Democratic clubs and stuff like that around the state, five or ten different occasions. But obviously we're still very good friends.

McCreery: And you have a long association with the Brown family, it sounds like.

1-00:47:22

Ziffren: Yes.

McCreery: You mentioned the other clerks your year, and we should perhaps name them. You were there with Mr. Hale—

1-00:47:35

Ziffren: Yeah. Mike Smith and Jim Hale.

McCreery: And then the sort of part-time Reed clerk, was that Mr. Lawson that year?

1-00:47:46

Ziffren: That's right.

McCreery: You've described how your offices were on a separate floor from where the Chief was.

1-00:47:53

Ziffren: Yes.

McCreery: I wonder how the three of you who were in that office—how did you get along, how did you divide up the work, how did things proceed?

1-00:48:00

Ziffren: I don't think we were intimate. I don't think it was a really close relationship; we didn't spend down time with each other. We really respected one another; we got along. Mike and I were bachelors; Jim was married. We didn't really

have a lot of common interests, again, apart from the Court. In retrospect I think we worked very well together. We would always pitch in for one another if it mattered. After a while we knew which one of us liked this kind of case so that if a case landed on my desk—make it up, a corporate case—Jim was really interested in corporate situations so I'd send that to him, and then he'd write on it. In terms of dividing up the workload, it's completely accidental. I'm sure others have told you this already: we worked on typewriters. I mean *typewriters*. [laughs] I'm sure we'll get into this a little later, but in terms of *Miranda* [*v. Arizona*], what turned out to be *Miranda*, we did something of an organizational nature then—this is 1965—that today, forty years later almost, would be duck soup in a computer context. But then we were doing it from the ground up, and it was very difficult to organize and put together. But we did that, and it was one of our, I think, big achievements. If you want me to I can go over and tell you about that.

McCreery: Go ahead, please.

1-00:50:51

Ziffren:

Escobedo [*v. Illinois*] had been decided in '63 by the Court. While it arguably resolved a number of the confession issues, it also left open more than it resolved. So during the '64 term the Court started getting flooded with confession cases, primarily from IFPs [in forma pauperis], in jail, seeking some form of retroactivity treatment on *Escobedo*, but then there were also the normal what I'll call number of cases that were then current cases in dealing with lawyers and interrogation. The Court didn't really take any of those cases, so here we come in, the '65 term. And from the very beginning of the term I remember the Chief saying to us, "We're likely to take an *Escobedo* case or two during this term, so I want you to do something to either segregate them or keep track of all of them that are around so that when we choose what case to hear you'll be able to give us kind of a structure and we'll chose the right cases to illustrate however we're going to come out."

I have a kind of a mathematically-organized mind, and I figured out a way of isolating the *Escobedo* cases while at the same time processing them in what I'll call the ordinary course of business. So that if a case, for example, had a confession issue but also had a more important, so to speak, search-and-seizure issue it wouldn't get lost in the shuffle. So we invented a chart with what I'll call an issue check list, which today in a computer software program, pow, it would be right there for you. But as I said we were typing on Underwoods, or Remingtons; I remember those names.

So what we did is over the term as the cases would come in, and since it was the Chief's clerks that were handling the IFPs, this miscellaneous docket, we basically put, I want to say, 250 cases on hold, so to speak, for what in the Court became known as the *Escobedo* Conference, where one Friday-Saturday the justices were going to decide whether to take cases, and if so, which cases to take. Out of that list of call it 250, the three of us worked on narrowing it to

a suitable number of cases that could be argued. And that's kind of how we ended up; I think we in the end, if you will, submitted fifteen or twenty cases that we thought might be good vehicles to the justices for this conference, and it was out of those that they picked the four cases that ended up getting argued and heard.

McCreery: In general, what did you look for in selecting those fifteen to twenty cases out of so many?

1-00:56:05

Ziffren: We looked for what I'll call clarity first: clear issues where there wasn't a lot of controversy about the facts. One kind of segmentation was state and federal. Another was retroactive, not retroactive. Retroactive before *Escobedo*, after *Escobedo*, or not. We wanted to try to make them one-issue cases rather than also having a search-and-seizure issue or other issues. And I think we were also looking for what I'll call "voluntary" confessions as opposed to coerced, because if we were going to go beyond what I'll call the prior law it would be necessary to deal with it in that atmosphere rather than a confession beaten out of a prisoner. Like the *Miranda* facts were kind of the archetype because you don't have a severely diminished capacity but you don't have a bright guy, and you have him being questioned not necessarily with a gun to his head. So all of that area I think we tried to get cases that would potentially illustrate the need for lawyers aside from the coercion issue.

McCreery: To sidetrack just a little bit, do you have any knowledge of how usual it was to have what you're called the *Escobedo* Conference and to be looking for something like this?

1-00:59:23

Ziffren: Highly unusual. I heard, but I've never confirmed, that they did something like that in *Brown v. the Board [of Education]*, but from the history of that it doesn't seem likely because that was a holdover.

McCreery: From the Vinson Court.

1-00:59:47

Ziffren: Yeah. They may have done that on *Baker v Carr*, but I thought we were unique, or relatively unique, in that regard. Because also the sheer bulk of the cases was way more than any of these other possible cases, or issues.

[Begin Audio File 2]

McCreery: This is tape two, still on August 4, 2004. I'm Laura McCreery continuing the interview with Kenneth Ziffren on the Earl Warren Law Clerks Project. We've been talking about the process of seeking cases for the justices to review in what you're calling the *Escobedo* Conference. Tell me a little bit more about how that transpired and what they did during those two days.

2-00:01:12

Ziffren:

As I recall, we were preparing memos, as I said, throughout the term. One of the functions of the memo to the Chief and then to the other justices was that we would recommend “hold for Escobedo,” and that kind of went on throughout the term. Again, we then collected all those cases—again, I’m giggling because I’m thinking about what we had to do then with paper and what we would end up doing now with no paper. But with tons and tons of paper I almost have a vision like we plop these cases here and these here and mix them up on the floor [laughs] or something like—

McCreery:

Physical interaction.

2-00:02:45

Ziffren:

Exactly, yeah. But I think we ended up, as I said, with somewhere—maybe it wasn’t fifteen; maybe it was less—but we ended up with a double-digit number of cases that we had done pretty complete memos on, and those were circulated to all the justices. They decided then to take four cases, which were all going to be argued on one day; I think it was one day. Then, as part of that, it was also—I think in one or maybe two of the cases it was really IFP time. So the Court had to appoint a lawyer to handle those, and that’s how, I think, the Chief picked one of his former law clerks, or *a* former law clerk to handle *Miranda*. I think there may have been one other that was also IFP, and the Chief picked another lawyer to handle that. They chose a federal case so that we were going to get the SG’s [Solicitor General] office to participate in the argument, that vehicle.

And then I also clearly remember getting dozens of briefs from what I’ll loosely call interest groups that were not in the case itself. And in that context I want specifically to mention Tony Amsterdam’s brief, which was at least to me the most influential of all of the briefs that I remember reading. It was really, *really* well thought out, as one might expect from Tony. Tony was, I believe, one of the former Frankfurter clerks. It was sensational. It put the Court for the, I think, first time working on this on the basis of the Fifth Amendment instead of the kind of fuzzy way that Escobedo and its predecessors had gone down in trying to get the Sixth Amendment in there. Tony’s brief was just—it was a publishable law review piece, if you know what I mean, and it was just beautiful. It was really well done. I know I borrowed freely from it in both conceptualizing it and in organizing what ended up to be what I’ll call my section of the opinion, and relying—not relying, but really using that as the foundation piece.

Now, having said that, this was the Chief’s opinion. He was much more, I want to say, active in shaping and editing the opinions than in any other case that any of the three of us had been involved in during the term. We would fight him on this in various ways, and he would be very responsive. It was a wonderful dialogue. In certain instances—I remember in one case that I had worked on we circulated the case, and one of the other justices came back

with a comment that didn't make any sense, and the Chief asked me to incorporate it in the opinion. I said, "Chief, it doesn't make any sense. Let me explain." And then we went into this. And he looked at me, and he said, "Ken, I want that vote. Put it in." And I said, "Okay, I understand. You don't have to hit me over the head. I just wanted to tell you that it doesn't make sense."
[laughs]

So there were things that were political that he was very aware of. There were other things in this context where he wanted to convey a particular message. As you I'm sure know from talking to the other clerks, he was not a brilliant writer. He had a wonderful mind and a wonderful vision of what he wanted to say; it's that he wasn't wonderful about saying it. So that those of us who could write better—and I'm not saying I'm a great writer; I think Mike was very good, I'm okay. I thought Jim was pretty good. Other clerks that the Chief had were brilliant writers, and you can tell that reading the opinions. But at least on *Miranda* he was very involved with every page and every footnote, which is another story that I'll tell you if you like.

As I'm working on it, and basically I'm the first section and part of the second, I wanted to memorialize my contribution for history. [laughs] So I went looking and found a case called *Ziffren Truck Line*, and I forget what it was about, but there was a footnote basically describing a bunch of law review articles that had been written, mostly post-*Escobedo*, and discussing the theoretical underpinnings of that decision and where the Court should or shouldn't go next. I found a place in that footnote to do two things. One was to thank and reward some of my old law professors and friends who had written articles, so I put their names in that footnote. [laughs] And then there was some point that I was making in the footnote where I found I could use *Ziffren Truck Line* to put in. So I put it in. A week or two later the Chief calls me down. What he would do—and this was not just on *Miranda*—but what he would do on the decision I was working on with him is he would take the decision and he would read it word for word with you there sitting in his office. He would look up and make comments, or "what about," or "what about," and "what about," and he would read it, read it, read it. So in this case, he started reading the footnote. And I'll never forget [laughs] this quizzical look on his face, and he looks at me and he says to me, "Ziffren Truck Line?" I said, "I hope you don't mind, Chief?" And he said, "No, No, that's okay. It's all right." [laughs] Anyway.

McCreery: The footnote stayed.

2-00:13:24

Ziffren: The footnote stayed. Yeah.

McCreery: I'm interested in your thought that he was much more involved and much more back and forth on this particular opinion. Clearly, he'd been looking for

the right case to fulfill an objective. Did he give you much instruction going into the writing of the opinion?

2-00:13:51

Ziffren:

Yes. Unlike other cases, what he did was he gave us, all of the clerks, I think small pieces of paper, not eight-and-a-half-by-eleven, smaller than that. Ten pages that he had typed out—he didn't type them, Mrs. [Margaret] McHugh had—where he kind of laid out the principles and the thoughts. That hadn't happened in any of the other cases that, I think, any of us had worked on. I mean, Tony Amsterdam on the philosophical underpinnings and stuff like that. But the Chief in terms of "here's what I want to say; here's where I want to go," that was clear in writing. The other cases I remember working on he and I would sit down after the conference—he had picked the case for himself—we would kick it around, and then we would end the discussion and he'd say, "Okay, here's kind of the way I'm looking at this," and I said, "Great." I would then go back upstairs and work for ninety hours in a row—as I think we all did; that was fun—and try to live up to his vision. But in those cases what we had was a conversation with him; we didn't have eight, nine pages of thought.

McCreery:

On *Miranda*, then, what did he need to bring enough justices along to the five-four decision?

2-00:15:54

Ziffren:

Well, it was five-three-one. Has anyone told you that story?

McCreery:

No.

2-00:16:11

Ziffren:

Justice Clark flipped the night before, and none of us could figure out why. But it was six-three, and Clark flipped and basically dissented on the state case and concurred on the federal. That's another story. It's a wonderful story, I think. I come to the Court I want to say eight o'clock in the morning, maybe earlier. And I'm going to get some coffee before I go up to my office. So I'm walking in the hall and Lee Freeman, who is a Clark clerk, comes along and hands me something. I said, "What's this?" He said, "Justice Clark is concurring and dissenting in *Miranda*, and I thought you'd want to have this." I go, "What are you taking about." He said, "Ken, I do what I do. Come on." I said, "Oh, Okay." And I look at it and go running to the Chief's office. And he isn't there. He's getting a haircut in the Court. So I run over to the barber shop, and I say, "Chief, I'm *really*, really sorry to disturb you, but—" And then I kind of look at the barber. [laughs] And I look at the Chief, and he says, "It's okay. Go ahead." [laughs] And I say, "Justice Clark is concurring and dissenting." He goes, "What!" And I said, "I just got this from his clerk, and I just thought you should know." He said, "Well, that's very good. I appreciate that very much." He says, "Give me it." So I give it to him, and he reads it, and he says, "Here's what you do. You find me a case or two where I can quote Justice Clark when I'm delivering the opinion of the Court in *Miranda*."

You find me some cases that Tom Clark has written that are contrary to what he's now saying in this thing because I'm going to embarrass him." Or something like that. I said, "Yes, sir."

So I run upstairs, and I'm pounding my brain: where was Tom Clark liberal on any kind of constitutional law, criminal law basis. And I'm thinking of what cases has he written for the Court, and I say, "Ah!" And I find one; it's *Mapp v. Ohio*. So I dive into *Mapp*, and I find a couple of paragraphs that fit. And on the Underwood typewriter I type those up, [laughs] with the citation, and I run downstairs, and I deliver—I say, "Chief, here, here's *Mapp v*— He says, "Good, good!"

This is the last day of the session, in June '66, and so the Chief—I think *Miranda* was the last opinion that was announced at the Court on that Monday. So he saved it for last, and he said, "Now I'm announcing the opinion of the Court in *Miranda* and X and Y and Z, the other three cases. And he starts going and announcing what he wants. I then see him look at my piece of paper and look over at Clark and say, "As Justice Clark said in *Mapp v. Ohio*—." He does that, and I and maybe three other people sitting there are the only ones who knows what the hell is going on about that. [laughs] Then he finishes, and then the dissenting judges say something. Clark doesn't say anything. Since this is the last day, we're all going off to a picnic after this is over. So we all go off to a picnic, and I look around—I'm standing there with the Chief on the picnic grounds, and I say, "Justice Clark and his clerks aren't here." He says, "Okay." He says, "I'm sure that he is rewriting his concurrence to make it a little tougher. But it's fine with me; I can live with that."

That's of course one of my priceless memories from that. I never could understand or figure out why he flipped at the last moment. I mean, if he'd done it at the beginning, he'd done it at the beginning. But to do it in essence overnight and then kind of tell us all about it the day of, and have the two-pager or three-pager concurrence written at that time, it just was astounding.

McCreery: What does this tell us about Earl Warren the political operator?

2-00:23:31

Ziffren: Yeah. Well, also that he had a temper, but he knew how to utilize it—I mean, he didn't get out of control. He didn't go over to Tom and pound his head or even try to. "Okay, you're going to do that; I'll respect your right to do it. But don't think I'm going to let you off easy on it."

McCreery: He knew how to channel a development like that—

2-00:24:01

Ziffren: That's right.

McCreery: —to achieve an end.

2-00:24:04

Ziffren: That's right.

McCreery: It strikes me that by now this was very much the Warren Court, as we now call it looking back.

2-00:24:27

Ziffren: It was in one sense a media creation, and in another sense true. The media sometimes gets it right. But with the justices who were there at the time this wasn't a guy walking in with a six-gun and everyone else saying, "Yes, sir." I mean, it wasn't anywhere near that. The Chief, in context—I think it's safe to say—had no control whatsoever over a Black or a Douglas, minimal over Harlan, virtually none over Brennan, although they were allied, and so on. So it's not like there was this giant and eight pygmies, or anywhere near that. They were all very, very bright sharp people with strong opinions in various areas on their own. But he was a leader; he was the guy who took the gaff whether or not he was the author. He was the symbol of the Court. So in that way I think it was the Warren Court. But not because he always got his way.

McCreery: Thank you for making that distinction. It makes the achievements of his tenure all the stronger in a way, to reiterate that the other justices were acting so independently all through this period.

2-00:26:44

Ziffren: Yes.

McCreery: Speaking of the other justices for a moment, talk a little about what opportunities you might have had to see them in action in open court, or otherwise.

2-00:27:14

Ziffren: Open court first, then otherwise. Whenever we had the chance, meaning if we weren't on a deadline to get something out, we would go down to watch oral argument on just about any case. We were interested in seeing the lawyers and how they argued it, how the justices questioned them or reacted. Especially on cases where in my situation I had written the bench memo for the Chief, I'm intellectually curious to find out how it's all going to play out in the oral argument. So we got a fair sampling over the term of getting "to know" the justices at a distance. But to hear them and to watch their minds in terms of questions that they ask, in many, many cases the questions do not reflect a point of view; they are really probing questions that have troubled the justice, or they are doing the law professor game and just trying to say, "Well, if this, if this, if this, if this" and just kind of having fun with it. So questions, I think—I read the media talking about "Well, based on the questions this case is going this way." Not true. Not true at all. But really fascinating to listen to the questions the justices had and who talked up and who didn't talk up.

In terms of outside, there was a program where, I can't remember, some day of the week over the term each of the nine justices came into a closed lunchroom in the court where all the clerks were and had lunch with us. We would then have a free-ball Q&A for half an hour to an hour after lunch. They all did that, and that was really fun for all of us. And then there were some social opportunities to intermingle with some of the justices separate from our own justice. I think we all tried to take full advantage of all of those. That's how I, for example, got to be more friendly, if you will, with Justice Douglas, and Brennan, and Stewart. Those I think were the three. Black was somewhat unapproachable, and the others were just not open to it.

So I was on speaking terms, so to speak, speaking terms with them, especially Brennan because I was good friends with Justice Bazelon, Dave [David L.] Bazelon, who was the chief judge then on the DC Circuit, and he and Brennan were best friends, so to speak. So in that kind of social gathering I would be at Judge Bazelon's home for dinner, and he'd have Brennan over for dinner, and stuff like that.

There was also a crowd, so to speak, in Washington, what I'll call the Truman crony crowd, and these were lawyers and businessmen who'd been in Washington and basically had a tremendous amount of influence and attention during the Truman era. So late forties, early fifties. And I was friendly through Judge Bazelon with this group, and they occasionally attracted a justice. That was a Sunday brunch crowd, and we'd hear—I mean there were some just wonderful old stories. These guys leaned back and—for example, Dean Acheson was at a lunch, and he was going on and on about something, and that was just wonderful to listen to. The leader of the group, the guy who picked up the checks—this was usually at Blackies, although there were some other places that we went to—was a fellow named Milton Kronheim, and Milton was a liquor distributor who had some kind of exclusive distributorship for the top liquor and wine that was in essence imported, so to speak, whether it was Seagrams or something like that, into Washington DC. He was getting on in age when I was there. He lived till he was in his nineties, and every Sunday morning he'd pitch softball in some game. I mean, he was just one of these—I mean, he went back to Roosevelt—one of these old crotchety guys with still great minds talking about old times and all that. Brennan would sometimes come, and Douglas would sometimes come to these brunches. That was just a blast, just really lovely.

McCreery: So you had a lot of different opportunities to have some interaction with the justices and hear what they had to talk about.

2-00:35:27

Ziffren: Yes, and occasionally, although at least not my experience and I think not in what I'll call our term, I would run into a justice on an opinion so that when I had drafted the opinion for the Chief and it was then circulated and one of the other justices had some problems or questions the Chief would put me in

contact not just with the clerk of that other justice but with the justice himself. That wasn't often, but I remember two or three situations where it arose. I also remember being on the other side of that. By that I mean another justice had written an opinion, I'd worked on the bench memo, the Chief calls me in and he says, "What do think about this opinion in draft?" I'd go over it and talk to him, and he'd say, "Let's go over and sit down with Bill and talk about these things." So he and I would go over to Brennan's office and chat about various portions of the opinion.

McCreery: Of the three clerks, and of course Mr. Lawson in some cases, is it safe to say that you were much closer to the Chief?

2-00:37:10

Ziffren: I think I was. I think I was because of the political and California connection. And he and my father knew each other pretty well.

McCreery: Did they?

2-00:37:28

Ziffren: Yeah.

McCreery: Do you remember how that relationship started?

2-00:37:24

Ziffren: Again, back in the forties, when my dad was trying to build some political prominence for himself, the Chief was Governor. One of the Chief's best friends was the attorney general in California, named Robert Kenny, and my father and Kenny were good friends also. So there was, in a weird way, a triangle there. By the point that the Chief was the Chief and I was clerking for him we had been through the Nixon stuff, although Nixon at the point was going to be President, which none of us knew. But my father had been, I think, the campaign chairman for Helen Gahagan Douglas when she ran against Nixon, so in that kind of off-hand way he and the Chief saw the same [laughs] about Nixon.

McCreery: That went way back, I'm sure, a lot of that.

2-00:39:03

Ziffren: Yes.

McCreery: What about the Chief himself? Whom could he talk to among the other justices?

2-00:39:15

Ziffren: Mostly Brennan. To some extent Potter Stewart. He enjoyed Douglas very much. Black at that point was kind of growing old. Clark was in and out. Justice Goldberg had dropped—what had happened was Goldberg was the justice from the prior term, took the UN position, and Fortas then came in; he was brand new. He was a good confidant to the Chief. Both ways.

McCreery: Even early on.

2-00:40:23

Ziffren: Yes.

McCreery: Give your thoughts about the situation with Justice Goldberg. That's such an unusual exit from the Supreme Court.

2-00:40:33

Ziffren: Very much so.

McCreery: It happened before you arrived, but—

2-00:40:36

Ziffren: It did.

McCreery: —what did people think about it?

2-00:40:44

Ziffren: It was a head scratch. I remember people saying, "Why'd he do that?" I think we all thought that perhaps he had more ambitions than we thought, and this may or not have been—turned out not to be—a stepping stone for running for public office. That was one speculation. The other speculation was that he was not really enjoying the cloistered life of a justice, and he wanted more action. So this was a decent place to go and offered State Department opportunities and also—because this was important to Goldberg in those days—the possibility of making some money, real money, which he couldn't obviously do as a justice. In essence he'd be a plum for a law firm post-UN and have a lot of contacts and rainmaking abilities both in let's call it the international sphere as well as labor unions that he'd previously been involved with.

McCreery: President Johnson was said to be very persuasive in these matters.

2-00:42:38

Ziffren: He was. That's true, very true.

McCreery: I was interested that Justice Fortas was able to, even in his first term, get in the swing pretty quickly.

2-00:42:53

Ziffren: Yes. He was also very, very busy because he was still, basically, if you will, representing Lyndon. [laughs] So to speak. Doing a lot of stuff over at the White House.

McCreery: Did you have much view of the Chief's own relationship with President Johnson?

2-00:43:16

Ziffren: Yeah. The Chief was genuinely respectful and fond of Johnson, which surprised me. I think it may be the kinship between veteran politicians who

know a lot about the world. They had a reasonably close—not like Fortas did—but a reasonably close relationship. Johnson, despite what the Chief called the Kennedy Commission—

McCreery: Did he?

2-00:44:06

Ziffren:

He did. It was never the Warren Commission. That was not allowed, and whenever we would ask him about it, he called it the Kennedy Commission. Even though he had been “bludgeoned,” in a way, into taking that on he did not bear Johnson any malice—I mean the Chief thought he was doing his job and that Johnson in essence had the right to ask him and that Johnson did it for the right reasons. So the Chief was, in that context, happy to serve. It was very painful for him, very, very painful because of his great affection for Kennedy. I think he had a much greater personal relationship with Kennedy than he did with Johnson. Because Kennedy was, in effect, his kid.

McCreery: Did he talk with you much about that?

2-00:45:25

Ziffren:

Yes, a bit. But he was on very good terms with Johnson. Again, Johnson respected his independence even with appointing him to the—I still call it the Kennedy Commission. [laughs] Because that’s who he was; it’s not “me, me, me” with the Chief. At all, ever. It was about other people, about service, about world of ideas. It wasn’t personal. Very, very little ego and very much, to the extent that he showed it at all, very much under control. Very much.

McCreery: And that was a calculated way of operating—?

2-00:46:49

Ziffren:

I don’t know whether—you see, at that point in his life I don’t think it was calculated; I think it was absolutely natural and genuine. I don’t think he went home and said, “Boy, did I beat up on them today.” Or anything like that. I think he was with his family the way he was with us, and that’s very self-effacing, and “I’m here to do a job, and I’m glad I’m in this position because I can accomplish more.”

McCreery: Well, let’s take it a step further. What was his judicial philosophy, do you think?

2-00:47:39

Ziffren:

As it evolved a lot of it was about the underdog. The underdog could be ethnic, or it could be women, or it could be small business. I think that’s the central philosophy throughout all of his decisions and participation in decisions. At the same time—and he and I had two or three fights on this, good fights, really good fights—I could never understand where he was coming from on the obscenity cases. Because to me he shouldn’t have been where he was. I was fighting him like a mad dog on every damned obscenity

case that came up, and he just had a blind spot, from my point of view. [laughs] I'm not saying he's wrong or anything like that. But he had a blind spot from my perspective, where it was the image of this dirty old man telling his kids something that they shouldn't have to hear. So I argue with him, "Chief, but if they go out and buy it themselves, what's the problem?" And we got into that. We had some wonderful—I mean that exactly as I say it—wonderful fights about the *Ginsberg* [*v. New York*] case.

McCreery: Let's talk about that because I know that's one of the ones you worked on that year. Am I right?

2-00:50:02

Ziffren:

Yes. He calls me down towards the beginning of the year, and he says, "We have this case coming up, *Ginsberg*, and I think I'm going to be in the minority on the case. I want for you to spend a fair amount of time researching it and everything because I think I'm going to end up writing a dissent." And I said, "Well, how do you think it's going to come out?" He says, "I think they're going to overturn the conviction. And I don't think it should be." And I said, "Well, Chief, I have to make a disclosure to you." He said, "What's that?" And I said, "I want it to be overturned." He said, "But you can work with me, can't you?" And I said, "Absolutely." I said, "That's what I'm here for. But I want you to know where I'm coming from, and I want you to know that I will try to fight with you." And he said, "That's exactly what I want you to do. That's *exactly* what I want you to do. I said, "Fine. Then we understand each other."

So as the case then moved along—I say shockingly—he wasn't in the minority. How he got Brennan I'll never know. But sure enough. And I had written probably the best piece of material from what I'll call the legal point of view; I'd written this extensive bench memo on *Ginsberg* and a few other cases where I tried to come up with the Chief's deep-seated philosophy, but [laughs] move it to the left, move it as much as I could move it. So I was trying to be as persuasive as I could, and I had all these cases and everything. Then after the oral argument and before the Saturday conference he called me in on the bench memo. He wanted to go over it with me so he was sure he had everything straight, and of course he was still not with me on it, but he was happy, or pleased, that I'd spent a lot of time and energy putting it all together. Then it went the way it went, so he and I never had that fight, the real fight that was going to happen.

McCreery: Had you changed his point of view—?

2-00:53:27

Ziffren:

Not a lot. Some.

McCreery: Was this one of the cases where you attended oral argument and saw—?

2-00:53:35

Ziffren: Oh, Yeah.

McCreery: —this one carried out? Tell me about—

2-00:53:43

Ziffren: I can't really remember distinctly. I can't remember it that distinctly.

McCreery: You had touched earlier on the Solicitor General's office, and you had Mr. Marshall in there, had just begun in that role, I believe. So I take it you got to see him in action.

2-00:54:03

Ziffren: Yes. He was great. He was really good. Always enjoyed him.

McCreery: But it's interesting that on these obscenity cases, *Ginsberg* in particular, and others, you set a pattern with the Chief over the course of the year, it sounds like.

2-00:54:21

Ziffren: I did.

McCreery: And yet you think his own view—

2-00:54:27

Ziffren: The best thing I did there was a Texas recidivist case. There was a law in Texas that basically gave the state the right when the defendant takes the stand to introduce his prior convictions allegedly for sentencing consideration, but they bring this in during the trial. And I was outraged. Outraged. I made a blistering argument to the Chief in writing the first miscellaneous case, or *in forma pauperis* case, that came along, how awful this was. He called me down and said, "I really liked your memo. But you know, we've dealt with this years and years now, and we've never done anything about it." But I said, "This is *awful*. How can you—this can't happen! This is just awful." He says, "Well, look. You want to take this on as a project. Go back and see what your former clerks were writing about. But I can tell you I remember from years and years ago that this has always been the case and no one's ever gotten really excited about it." I said "Okay."

So I start doing a lot of research. I see that most of the former clerks are just like I am. They're writing saying this shouldn't happen. There were about ten or twelve cases that came up during the term that this Texas recidivist law was involved. I was, I'm proud to say, responsible for doing a very extensive bench memo and a very extensive memo that the Chief asked me to write to the conference when they were deciding whether to take any of these cases. Because what I did was I pulled one and then waited for the others to develop. So this was towards the end of the term. They had their conference on it, and the Chief called me on the phone, I remember, right after the conference, and he said, "You won." I said, "What do you mean?" He said, "We got six votes

to hear the case,” and he says, “I’m going to have to choose counsel,” because none of these people had counsel. “Who do you think I should choose?” I said Gordon Gooch without even thinking about it. He said, “That’s a great idea. Come on down.”

So I come down, we get on the phone, he calls Gordon, and he says, “Gordon, Ken has been really helpful in developing this case, and I want you to argue this case next term.” Gordon said, “Great, Chief. I’ll do whatever you want. I’m happy to do it.” He said, “Is it okay if I talk to Ken about it as I’m writing my brief?” And the Chief looks at me, and I look at him, and he says, “Absolutely.” So Gordon started writing it up and called me now and then, and he came up with a really good way of handling it that was not what I’ll call a due process argument; it had to do with counsel. And he won the case.

McCreery: By another route.

2-00:59:20

Ziffren: By a different route. And I was thrilled. That’s my “contribution” to jurisprudence here in the United States. Not *Miranda*—you know what I mean; I found this, and I grew it from a kid and got the justices’ attention and made it happen. I’m very, very proud of that.

McCreery: Again, the Chief gave you some space to do that—

2-00:59:50

Ziffren: Yes, he did.

McCreery: —even when his own viewpoint may have differed.

2-00:59:55

Ziffren: Well, he ended up, of course, being on the “right” side. But yes. As an old prosecutor he was used to introducing evidence that would hurt the defendant. So it didn’t grate on him as it grated on me.

[End Audio File 2]

[Begin Audio File 3]

McCreery: Here’s tape 3 continuing on August 4, 2004, Laura McCreery and Kenneth Ziffren. We’ve been talking a lot about the specifics of your work with Chief Justice Earl Warren. Realizing that you encountered him relatively late in his tenure as Chief, how do you summarize his legacy in terms of the experiences you had at the time. Does that make sense?

3-00:01:22

Ziffren: You mean, “How influential he was on the body politic,” or—?

McCreery: Yeah, the effect on constitutional law.

3-00:01:32

Ziffren:

Okay. His influence, which therefore means going well beyond the cases that he wrote, was clearly both immeasurable and measurable. You'd have to believe there was no other individual that could have led the country, if you will, through the desegregation of the schools, breaking up the what I'll call rural domination of state legislatures, establishing as a principle—that is almost done today when we “get rid of” the electoral college—the one-man, one-vote principle, the search and seizure and confession to improve the quality of law enforcement and to assure that if we're putting somebody away it's done with an eye to that person's liberty and his privacy and the sanctity of his person. So all of those areas and dozens of others that I haven't mentioned, I think we'd all be hard-pressed to believe that any other justice that was around during that roughly twenty-year period could have exerted such an influence as he in terms of the shape of the law and how it affected society. I don't believe that any of the other justices who were there at the time had the leadership capacity that he did, even though they may have been brighter, even though they may have better writers, even though they had expertise in areas that he did not. So he's quite a guy.

McCreery:

Given that one of the most important due process cases, certainly *Miranda*, perhaps the last of his really major decisions happened during your year, did you have much of a sense at the time of being there at such a pivotal moment?

3-00:04:46

Ziffren:

Yes. We all did.

McCreery:

Did you?

3-00:04:47

Ziffren:

Yeah. Again, the uniqueness of this whole process of compiling the checklist and having all these cases fit and then having a whole conference and then having a whole day, we all knew that this was big-time and in that context, I think, virtually unlike any other decision that year, including *Ginsberg* and the other obscenity cases. This was the shark.

McCreery:

Did you keep in touch with the Chief much after you left?

3-00:05:49

Ziffren:

Yes. As I said, he had continuing interest in California politics especially as it affected judges. So he would call me from time to time about what's going on. I would call him or write him letters. We would of course—all the clerks would go back for the reunion, and even though there were lots of people I always seemed to be able to sit with him for a half hour or an hour during that call it long weekend and spend some time with him and chitchat about stuff. I was and remained friendly with the family. Honeybear and I had lunch with one of her kids a few weeks ago. I get occasional calls from Warren's kids to chitchat or to help out if one of them is running for office and wants a contribution or something like that. So I continue to stay in touch obviously

after his death and Nina's death, [Mrs. Warren's death], and some of the others.

McCreery: Can you comment on the timing of the Chief's stepping down from the Court?

3-00:07:37

Ziffren:

I didn't spend a lot of time talking to him about it. I spent some. But it was very clear that it was inspired by his desire to ensure his continuity, which unfortunately didn't happen. I mean the continuity of his ideals and movement would obviously have been, from his perspective, furthered by a Fortas position. I don't believe that he sat down with Lyndon and said, "I'll drop out now if you'll appoint Abe." I don't think he did that. He isn't that kind of person, who would have done that kind of trade. But I think he had very much in mind what the possibilities were and had analyzed the political landscape and wasn't sure, obviously, whether Humphrey would be elected. So I think it was with a glance behind him to what's likely to happen that he decided to step down. Now, it was also both physically and mentally around that time that his own discipline would have him step down.

McCreery: He didn't want to stay too long?

3-00:09:36

Ziffren:

Right. He was always—here's a wonderful story, I think. During the term Ramsey Clark's about to be named Attorney General. There's Tom, his dad, sitting on the Supreme Court. There's concern as to whether both Ramsey gets confirmed and what happens on cases that involve the government that are brought to the Court. I remember so distinctly—again, this is a Constitution Avenue walk, what I used to call my Constitutional—where he and I were walking down and were talking about it. He said, "Ken, if one of my sons was going to be named Attorney General of the United States do you know how fast I'd be off this court?" He says, "That's what this is all about. It's about kids, it's about our children, it's about the next generation, it's about you. It's not about us." So that was it. That was always it. His vision of himself, so to speak, had to be that he was not going to be, if you will, old, crotchety, and slightly infirm when he stepped down. Now, I'm sure as we now look back on it there was five years between his stepping down and his death. Who knows, two, three years, maybe, before it really got tough? But, as I said, the politics of the moment and his sense of his own mortality and serving the young was what combined into that decision.

McCreery: Thank you for that summary. When the attempt to elevate Justice Fortas didn't work out and then later President Nixon chose Warren Burger instead, just what are your thoughts about how things have played out since the Warren times?

3-00:12:36

Ziffren:

Well, I'll never forget seeing—and I don't know why I watched it; just probably because I was a glutton for punishment—the Chief standing there

with the Bible and administering the oath to Richard Nixon. I wanted to take a gun—. [laughs] It's very, very memorable to me. Again, I'm now wondering why I did that to myself, why did I want to watch that. It may have been out of respect for the Chief. He was stalwart. He was absolutely stalwart in equanimity when that happened. Okay. I don't think I answered your question, but what you asked me kind of triggered that.

McCreery: That must have been a tough moment all around. I was asking about Warren Burger and his replacement of the Chief.

3-00:14:05

Ziffren: He looked good. And all of us—now, this is all partially of course what I'll call the alter kockers talking about their successors and saying they didn't have it nearly as tough and all that stuff. But Burger never, if you will, rose to the occasion in deeds. He looked good; he looked very much the majesty of the position but not the substance. The quality of the decisions and the discipline, I think, was noticeably down during his tenure. I also don't have a hell of a lot of respect for the current Chief Justice [Rehnquist] because he seems to me to lack a soul. But that's a whole different story.

McCreery: It is indeed. Is there anything else that you would like to say about your experience as a law clerk and the effect it had on your subsequent—?

3-00:15:36

Ziffren: Well, obviously it was a wonderful experience. It enlarged my view of the world and gave me some insights into issues and societal problems that I couldn't have gotten any other way. It was just lovely. It was just a lovely experience. I think along with the other clerks that we all really enjoyed it and wouldn't have traded it for making a lot of money out there in the private sector. Or, as with Mike and later on in life with me, it was one of the main impetuses towards teaching and mentoring. So that's also kind of a—I think for anyone who clerks you get into, I think, a mentoring mode because of how nice the justices and/or your call it senior clerks if there were any—there weren't in our year—handle things. So it's a wonderful tradition.

McCreery: And you got to come back here and teach at UCLA intermittently.

3-00:17:18

Ziffren: I came back here and two/three years later Bill Warren had to go on a sabbatical to author the UCC [Uniform Commercial Code], so he asked if I would teach his real estate, secured transactions course for a semester. So I did that. Then I didn't teach until in 1997, kind of trying to do a change in life for myself, I asked the then-Dean at UCLA if there might be room for me to teach one or two seminars. She made that possible, so ever since then I've taught one or two courses at school there. They let me "make 'em up," so I'm teaching a motion picture distribution course, where I take a film, put it in the theater, and then follow it for fifteen years to show what deals are made on a film, not a particular film but how the windowing of the motion picture

feature business works. And then another course that I'm resuming this year after a year's break, is called Network Television, the deals between talent and studios, networks, off-network syndication, where the money is, what the deals look like. Those are seminar courses, mostly third-year students. It's a blast and gives me a wonderful counterbalance to sitting behind a desk.

McCreery: And you've been able to pursue your interest in entertainment law in your own firm here.

3-00:19:35

Ziffren: Yeah, I'm more now in what I'll call a senior status, where I handle fewer things that are complicated rather than a whole bunch of things that are agonizing. [laughs]

McCreery: It's a nice position to be in.

3-00:19:57

Ziffren: Yes, it is.

McCreery: Maybe we'll end it there. Thanks you.

3-00:20:00

Ziffren: My pleasure. Thank you.

[End of Interview]