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Ralph J. Moore

THE LAW CLERKS OF CHIEF JUSTICE EARL WARREN: RALPH J. MOORE

Interviews conducted by
Laura McCreery
in 2005

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01-00:00:42
McCreery: Tape number one. This is August 19, 2004. I'm Laura McCreery, and on this tape, I'll be interviewing Ralph J. Moore, Jr. at his office at the law firm Shea and Gardner in Washington, D.C. We're collaborating today on the oral history project Law Clerks of Chief Justice Earl Warren. Mr. Moore, would you start us off by stating your date of birth and then talking a little bit about where you were born and where you were raised?

01-00:01:08
Moore: I was born September 29, 1932. I was born in Saint Paul, Minnesota. During the Depression, my family moved various places. During World War II, my father, for a short time, worked for the War Relocation Authority at a relocation center near Twin Falls, Idaho, Minidoka. Then we moved to California, where I grew up.

01-00:01:39
McCreery: What took you to California specifically?

01-00:01:41
Moore: My dad took a job out there.

01-00:01:45
McCreery: Where was your—

01-00:01:47
Moore: My dad was a lawyer, so he took a law job out there. In California, I lived in Palo Alto for a while, then down in Lindsay, in the Central Valley, halfway between Fresno and Bakersfield. Then we moved to Sunnyvale, which is now called Silicon Valley. Then I went to Yale for four years, went in the Army for two years, went to law school at Boalt.

01-00:02:15
McCreery: Okay. Well, I wonder if you can tell me how you decided to attend Yale for your undergraduate degree.

01-00:02:28
Moore: The minister in my church was a Harvard graduate, and I was applying to various schools, and he said, "Why don't you apply to Harvard?" So I applied to Harvard, and I discovered that when you apply to Harvard, you might as well apply to Yale and Princeton. So I applied to all those schools and got scholarships to all of them. He said, "Well, you'd probably be a better Yalie than you'd be a Harvard student," so I took his advice and went to Yale.

01-00:03:00
McCreery: What did you study there?

01-00:03:02
Moore: My major was American studies.

01-00:03:08
McCreery: What was Yale like in those days?

01-00:03:11
Moore: Well, it was all men. So you had to travel for dates. Academically, it probably wasn't as rigorous as it is now. Didn't have as many nervous breakdowns among the students. But I thought it was a wonderful place.

01-00:03:34
McCreery: What were your own interests as a young man?

01-00:03:40
Moore: I was interested in government. I was interested in history to some extent. I was interested in lots of things. That's why I took a major that wasn't really a major, American studies, which allowed me to take English classes and history classes and whatever I wanted. Career-wise, I didn't know exactly what I wanted to do. By a process of elimination, I went to law school because I couldn't think of anything else to do. I wasn't sure that being a lawyer was what I wanted to spend my life doing, but I did go to law school and I did become a lawyer.

01-00:04:22
McCreery: Did you go to law school straight out of Yale?

01-00:04:25
Moore: No, I was in the Army for two years. It was at the end of the Korean period, from '54 to '56. I was, almost the entire period, an E2 in the Army. I went through my basic training, and then I went off to a Counterintelligence Corps school and became one of the Counterintelligence Corps agents that the Army had in those days. I was assigned to a unit that had responsibility for security out at Pacific Proving Ground, where they were testing—set off one hydrogen bomb, which, my recollection has, it was the biggest one they ever set off. Then they set off a number of atom bombs. They stationed us on Eniwetok. The atoll had its largest island down the southeast corner, which was true of all the atolls. They set off some of the atom bombs on the other side of that atoll on Eniwetok. The hydrogen bomb was set off on Bikini, which was 180 miles away. They got us up in the morning the day they set the thing off. Told us to look the other way, and there was the flash. It was still dark. We went off to the mess hall, and as dawn came up, you could see the mushroom cloud off there in the horizon. Fifteen minutes, twenty minutes, something like that, this huge shockwave rolled through, and then that was followed by a series of lesser shockwaves. It was impressive. It sort of convinced everybody who observed it that you didn't want those things going off accidentally or in anger

01-00:06:29
McCreery: Thank you for telling about that. That's quite a memory. Did you already, then, intend to go to law school, though, when—

01-00:06:37
Moore: Yeah, I applied to Harvard and Columbia, Yale, and Berkeley. I grew up in California. My dad told me that if you're going to practice in California, maybe California is a good place. I married a New Haven girl, so we decided to live on the other side of the country to avoid too many conflicts with my in-laws. So I went to Berkeley.

01-00:07:09
McCreery: Before we started taping, you mentioned that your own family had some ties to California politics. Can you tell me the nature of those?

01-00:07:16
Moore: Well, they weren't active politically in any organizational sense, but my dad and my mother were liberal Democrats and always voted for Franklin Roosevelt. But they were admirers of Earl Warren, and so, needless to say, my mother wasn't living when I got the clerkship, but my dad was, and he was very pleased.

01-00:07:48
McCreery: Tell me about law school at Berkeley.

01-00:07:52
Moore: Berkeley is a relatively small law school. It had—my recollection is somewhere between 100 and 150 people in the class. Dean Prosser was the dean in those days. He taught torts. He'd go around the classroom and ask us questions. We all read his hornbook, of course, and it had the black letter rules, and then the discussion, brief discussion. He'd ask questions—we'd read the case on contributory negligence—why does it matter that the plaintiff was negligent? So you'd debate that, and after he announced, as each person tried to answer, that his answer was unsatisfactory or rubbish, after he got tired, he'd tell you what his answer was and go on to the next thing. He was a classmate of my father's in law school at Minnesota. He was a fairly formidable character. There were a lot of good teachers there. It was an intellectually challenging experience, and I enjoyed it a lot.

01-00:09:15
McCreery: What were your study habits?

01-00:09:18
Moore: I belonged to a study group. There were six, five, four—basically five of us—that would get together in advance of each class that we took together, particularly in the first two years, and, having read the cases to the extent we felt like reading them, we'd talk about them and then go off to the class. Then the day before the exams, I'd read over my notes. I took careful notes in law school. I'd read them over, try to get stuck in my head the main points, and tried to decipher the issues and the questions they gave us.

01-00:10:02
McCreery: What were your own interests in the law at that point? Anything in particular?

01-00:10:07
Moore: They were pretty much unformed. I wasn't sure what I wanted to do. Still thought a little bit about teaching, teaching government or something like that, but that would have required going to graduate school. So when I finished, I signed up for some interviews at different law firms and went talking to them. San Francisco firms, several of them, and Gibson, Dunn, Crutcher in Los Angeles. Then I was called in by Adrian Kragen, who was our tax teacher and worked for Earl Warren back in Warren's gubernatorial period, I think, or maybe the attorney general period. He and a teacher from Stanford interviewed me, and they picked me as the West Coast clerk for that year. So I went off to Washington, and it's been all downhill ever since I finished that year. That was the peak of my career. It was the most interesting year in my life, professionally. But I hadn't any particular plans to do this or that or the other thing. I ended up, after that, spending a couple of trimesters at Cambridge University with University of California money and Cambridge Clare college money. Then I practiced briefly with a firm in Oakland, and came back with the Justice Department for a period of time in the antitrust division. Then I went to work for this firm.

01-00:12:06
McCreery: Tell me a little bit about the time when you and your wife moved to Washington, D.C. so that you could take on the clerkship in 1959.

01-00:12:18
Moore: I don't know what you want. We drove up to see my grandparents in Washington State. Drove across Glacier Park. Drove back here. I reported to work in the middle of the summer, whenever I was supposed to. One of the clerks from the preceding term, Bob Hoerner, was held over long enough to sort of teach us what we were supposed to be doing. Then the chief came back from his vacation. We got to meet him, which was an important experience.

01-00:13:02
McCreery: What do you remember about meeting him for the first time?

01-00:13:06
Moore: I just remember that he was a friendly guy. He was the Chief, he was in charge, but he was awfully good to work for. He took time with us. He spent a lot of time with us. Every week, at the end of the arguments, when there were arguments, he'd call the Clerk of the Court in and give the order list, and he'd have us, all three of us—Murray Bring and Bill Dempsey and I would be there, and then after the Clerk had the order list, he'd leave, and the chief would talk to us about what had gone on in the cases during the week, and some of the discussion in conference, and how the votes went. Then, on Saturdays, he ordinarily spent Saturday lunch with us. Sometimes in the afternoon, we'd watch a football game or a baseball game with him on television. Go to the University Club. So he spent a lot of time with us. He talked about lots of things besides what the court was up to at the time, although that was a subject of conversation. He told me once that Justice

Frankfurter didn't like my memos in the prisoners' petitions cases but not to worry about it. He told me another time that Justice Black did like my memos in those cases, which showed me that Justice Black had good judgment, and Justice Frankfurter, there was something deficient about his judgment. [laughter]

01-00:14:53
McCreery: What else did you talk about on those lunch occasions while—

01-00:14:56
Moore: He talked with us about California period, of course, and his days as a prosecutor. He told about how he shut down a boat that was taking people offshore to gamble. His crusades against corruption in Alameda County. He was circumspect about his comments about Richard Nixon, but we had enough discussion. Nixon was running for the Republican nomination at that time. Nelson Rockefeller was giving him a little sweat. The Democrats had their set of candidates, including John Kennedy. We had a number of the people come and talk to us, the clerks. Had Dean Acheson, the justices. During the year, we had luncheons once a week. We'd have somebody in to talk. Pretty interesting characters. We talked about politics with the chief. Not so much partisan as his take on the individuals.

01-00:16:24
McCreery: He certainly knew a lot about politics and had a lot of experience in it.

01-00:16:29
Moore: He was a natural politician. We took him to dinner a few times. Went to ballgames with him a few times. He'd go out in public or go down the street, and people would stop us, introduce their grandchildren, and ask him to autograph something. He always handled these things as though it really pleased him to meet these people and their grandchildren, and I think it did. It wasn't an act. He was just a naturally warm person who liked human beings and was good with them.

01-00:17:16
McCreery: You didn't see much difference, then, between the public Chief Justice Warren and the private man? How do you characterize that?

01-00:17:26
Moore: What you saw was what you got. You read these things that say that he always asked, "Is it fair?" I don't remember him saying, "Is it fair?" particularly, but he was very much interested in how people were being dealt with by government, by prosecutors, by the powers that be in life, and was very much interested in the fairness of things. I think that came from his ability to get into people's shoes.

01-00:18:15
McCreery: You were talking a moment ago about the upcoming 1960 presidential election. I'm reminded that, after the chief justice died, you contributed a piece to the *Hastings Constitutional Law Quarterly*—

01-00:18:28
Moore: I did.

01-00:18:28
McCreery: —as did many other former clerks. In it, you say that in discussing that upcoming election, the chief observed how men are not soon cured when they are bitten by the presidential bug.

01-00:18:46
Moore: Oh, yes. Yes.

01-00:18:49
McCreery: Did he himself have the presidential bug?

01-00:18:52
Moore: Not by then. I think he was cured. Of course, he tried twice, in '48 and '52, and he really would have liked to have gotten the nomination. He'd tell us about the campaign in '48, and he got back to California close to the end, and the Republicans were so sure they had it in the bag that they had closed their offices, and he said, at that point, he knew they were in deep trouble. But he tried again in '52, and he went to Wisconsin. That was Joe McCarthy territory, but it was also Bob La Follette territory. La Follette backed him, and he won a number of delegates in Wisconsin. He hoped that—and I think he hoped a lot—that Taft and Eisenhower would deadlock and that Republican delegates would turn to him. That didn't happen. On the train back from California, Richard Nixon was busy trying to line up second-round votes for Eisenhower, which he used to get himself a nomination. You know the history of it. But he wanted to be president. He got appointed chief justice, and he was perfectly content with that job for the rest of his active professional life. I don't think he had any further desire to run, but he had Nixon's number, and Nixon, after losing '60 closely to Kennedy, and then getting beaten fairly well by Pat Brown in '62, after which we didn't have Nixon to kick around any longer, he came back in '68 and finally made it. He kept running. All through this period, Harold Stassen kept hoping that something would happen that would make him president

01-00:21:14
McCreery: Then, as you say, Chief Justice Warren later got to swear in President Nixon. Touch of irony there.

01-00:21:21
Moore: Touch of irony. He never said exactly that he was for Kennedy, who he considered somewhat unqualified for the job, I think. But I knew from things that he'd said—for instance, his comments to Earl Mazo—if I remember right, "You're a goddamn liar" is what he said—that his feelings about Nixon were

very strong. His son, Earl Warren, Jr., headed up Republicans for Brown in the ’62 election out in California. He obviously wouldn’t have done that if he didn’t have his father’s approval. Indeed, Pat Brown and Earl Warren went duck hunting for years together and they were good friends. So he did have his views about Nixon. He said something when Nixon went to New York and made some sort of a deal or had some sort of an understanding with Nelson Rockefeller. He was taking moderate positions at that point. The Chief just chuckled about it and said, “He’s just running for president.”

01-00:23:13
McCreery: Speaking of things California, do you recall any occasion on which Chief Justice discussed with you the internment of Japanese-Americans during the war?

01-00:23:27
Moore: I don’t have a precise memory of that. I think we talked about it. I think, by the end, he thought that was a mistake, but I don’t recall him saying it was a mistake. I don’t know. You probably have comments from a lot of people who do remember what he had to say about that.

01-00:24:06
McCreery: Many of them say he didn’t discuss it too much. But we’re asking.

01-00:24:13
Moore: That’s sort of consistent with my recollection. Those people out in California at the time of the internment were afraid, and they thought there was a danger there, and so you can understand, without attributing base political motives to Warren, what might have been driving him. The general in charge of that part of the country, history has been unkind to, and I don’t say undeservedly. What was his name? McAdoo? I forget his name. But Warren was certainly active, I gather, in lobbying, or at least in advocating, for the removal the Roosevelt administration accomplished. My dad, as I say, worked briefly for the WRA in 1943 or ’42, so I got an opportunity to see one of these camps close hand.

01-00:25:32
McCreery: What do you remember?

01-00:25:34
Moore: I remember a sea of mud. There were all these people jammed into barracks. They were one family to a room. It was not good living conditions. It was not inhumane, but there were guard towers and barbed wire around the places. It was effectively little prisons. Or not-so-little prisons. There in southern Idaho, in the middle of the winter when it wasn’t frozen, it was just mud, and they had these planks, and the kids would get up in the morning and go to brush their teeth, get washed, and go off to school, and they walked on these planks. If they didn’t, they were up to their thighs—not their thighs, but almost to their knees in mud. That’s what I remember about it. I was a fifth grader at that point. I, of course, had my own views about the injustice of it all as I grew up and as the years went by. I think I may have even written a paper or two in

college on that subject. I don't remember conversations with the Chief about it. I don't think that he felt he did anything bad. He certainly didn't have that sort of an attitude. I think he may have thought it was a mistake, but I couldn't quote him.

01-00:27:07
McCreery: Thank you. Let's talk a little bit more about your fellow clerks the year you were there, Mr. Dempsey and Mr. Bring, and then Mr. Rosett was a part-time clerk for Chief Justice Warren.

01-00:27:20
Moore: Art Rosett spent a lot of his time working for Warren.

01-00:27:22
McCreery: With Justice Reed as well. When you arrived, you said Mr. Hoerner showed you the ropes and you began your work. How did you divide up the workload, first of all?

01-00:27:36
Moore: In thirds. Art wasn't part of it then. As I recall, during the summer, we had the stack of certs that had accumulated over the summer, and the briefs in the cases that were going to be argued starting in October. Our job was to write memos, cert memos, on all the certs and appeals for the Chief Justice, and to write bench memos on the cases that were going to be argued. Of course, those memos are basically digests of the issues that were presented by the cases, with relevant citation to the key cases. If the grounds for granting certiorari that was asserted by the petitioner was a conflict among the circuits, we'd identify the cases that were supposed to be in conflict and whether there was a conflict. The petitioners sometimes saw conflicts where there weren't conflicts. That was our job, to digest these things so that the chief would be able to get a quick introduction to the case and then probably use them as he went along, sort of to refresh his recollection. He'd take them home. He'd take the briefs home, he'd take the petitions home, and go through them to the extent that he thought was appropriate. We were going through all that stuff in the summer.

In addition, in those days, they had what they called a miscellaneous docket. They had that for a number of years. They don't have it now, now that they've got the cert pool, but in those days, the clerks in each chambers prepared memos for their own justice. But in addition, they had this miscellaneous docket, which were largely prisoners' petitions. Some of the capital cases came in in that docket, and there were a great number of petitions from prisoners. There were some people in the prisons who developed a specialty of writing petitions, and they were quite good at it. So they have their issue of the week, so to speak. There were a couple of prisons around where you knew it was the same author who was writing this week's batch of petitions from that prison. The one I remember in particular was very good at it. But in any event, the chief's clerks wrote the petitions for the entire court on the misc.

docket, so we were writing the cert memos for all the justices on the prisoners' petitions. Generally, we divided all the cases sort of equally. The chief didn't involve himself in that. He'd sometimes ask one of us to work on this or work on that, but in doing the regular workload that was coming through, we just divided them equally. We traded them some. I had an interest in estate tax for some reason that I don't remember, and so I ended up with all the estate tax memos, or cases. We'd have that sort of specialization. We'd take miscellaneous petition cases off the shelf as we came to them, except for the capital cases, which were handled immediately. I kind of was interested in those petitions, and so I did maybe half of them that term. We'd crank them out and send the memos around to all the justices.

The chief was quite interested in seeing to it that the prisoners got a fair shake. Apparently, the year before, or the year before that—I think the year before—it came to his attention that a deputy in the clerk's office was applying the rules of the court rather rigorously to these petitions. The last thing in the world that the chief wanted to hear was that some prisoner had been executed because his petition had been sent back because he didn't quite dot his I's and cross his T's the way the rules said. The clerk's office was instructed to send all petitions through, and then, if they were untimely, we'd note that in the memo. But we were told to figure out what the petition was about, and if necessary, let the chief know that there was something here that we needed a response from the state from in order to—ordinarily, the state, sometimes the solicitor general—in order to figure out whether there was something here or not. The chief would call for a response in those cases, and then when we got them together, we were expected to see to it that the memos stated what the issue was and what the—we weren't supposed to be loading them one way or the other, but see that the prisoners case, if there was one, was there so the justices could decide what they wanted to do about it.

In one sense, I was sort of proud of that work that year. I think we had more summary reversals and remands than any year up to that point. I never looked at it subsequently, but that was because the chief wanted us to find out what was going on in the case and let the court have an objective statement of what the issue was. We paid some attention to those petitions. The result was that the justices paid some attention to those petitions, and the result was that, I think, there were over fifty summary dispositions, frequently for lack of counsel. A lot of cases were sent back because of lack of counsel. There were a lot of cases that involved confessions that were obtained under dubious circumstances, and a variety of other kinds of issues. We were sorting that out.

01-00:35:03

McCreery: But your recollection is that the chief was taking a particular interest in the miscellaneous docket, given what had happened in the clerk's office previously.

01-00:35:12
Moore: That led him to, one, tell the clerk's office, "Don't send them back; let us, the justices, deal with them." I don't know what it was like in previous terms. I expect that these instructions had been around for a while, but he wanted us to give these people a fair hearing. We weren't supposed to be their lawyers, but we were supposed to see to it that our memos did not give short shrift to whatever issues there might be in the case. We were supposed to figure that out and get it out in the memo. He was interested in doing that, and I think his interest was satisfied by what we turned out that year.

01-00:36:04
McCreery: What about capital cases? How were those handled?

01-00:36:08
Moore: Well, except in one capital case, where the clerk's office forgot to put the sticker on, they came through with a big pink thing that said "Special" on the jacket. Our instructions on those were to act on them immediately and get the memo ready and get it to him. It was an interesting bunch of cases when you started getting records. It did not give you confidence. The outcomes in our criminal courts, there were—in those days, you didn't have Miranda. There were all these cases coming through where people had confessed to something or signed a statement or admitted something, under circumstances that just gave you a lot of trouble. One of the cases, it was decided our term was—a case called *Blackburn v. Alabama*, and the issue there was the confession had been obtained from a man who was seriously mentally ill. After they got the confession, the police, I think, decided the guy was ill. The judge had him examined, and the three examiners said he's mentally ill, and so he was committed and he wasn't tried. But he had made this confession, that was written by a policeman, not by him. It was in the policeman's words, not his. Four years later, they decided that he was well, that he was well enough to stand trial, so they had a trial. They convicted him of whatever it was. The trial court admitted the confession.

Well, two of the examining psychiatrists said he was nuts at the time he signed the confession, at the time he committed the alleged offense, and the third one had this—he signed a statement that said he was okay, and that he was not okay all the time, so it was internally conflicting. That was too much, so the court unanimously, as I recall, in an opinion by the Chief, threw that one out, but we kept getting those darn confession cases, and they were a terrible problem, because you had the notion, you got the feeling—at least I did—that a lot of those confessions weren't worth anything. Yet people were being convicted with them right and left. They kept coming through. As they paid attention to the misc. docket and they kept seeing these cases, they got enough fed up with it so that later on, *Miranda* was decided.

Then the other big issue that you saw a lot of, they did not require counsel in non-capital cases in the state courts at that time. So you got all these terrible records where these people were trying to defend themselves, and they had no

more ability to defend themselves than I do to fly to the moon. Guilt or innocence, in that context, is just a crapshoot. No particular relationship between outcomes and guilt. The court was paying attention to that, and paying increasing attention to it. I think, a couple years later, they granted cert in *Gideon against Wainwright* and appointed Abe Fortas to argue it, and they put a stop to it by saying, you've got to assign counsel for felonies in the state courts, which was the rule in the federal courts. Then you had some cases where police—in state prosecutions, under a case called *Wolf against Colorado*—didn't have any particular adverse—nothing bad happened if they just violated people's Fourth Amendment rights, so you got this illegally-seized evidence, but it could be admitted. People were convicted on it. Combination of the police activities on confessions and their ways of harvesting evidence would give a lot of people the willies. It surprised me. I knew that there was some interest, at the time that we were going through these cases, in taking another look at *Wolf against Colorado*, and sure enough, two years after I left there, they decided *Mapp against Ohio*, which changed that rule and required exclusion of illegally-seized evidence in state prosecutions, state court prosecutions. The misc. docket was getting the attention it deserved, and it led, later on, and particularly, of course, after the Warren side of the court got five votes, led to those famous criminal procedure decisions that the Warren court is famous for, or, in some people's eyes, infamous for.

01-00:43:22
McCreery: It's interesting to hear how you are setting the stage for what was to come by the events of your year. Let's talk about the other justices a little bit at the time you were serving.

01-00:43:40
Moore: I've told you about Black and Frankfurter. Black had good judgment and Frankfurter didn't. [laughter] Frankfurter and Black, of course, their antagonism went way back. They were publically civil, but they had very different views of the law, the constitution, their role. Black had notions about what the rules were, and he would follow those without regard to political consequences, even though he had the political background, as Warren did, of elective office. Frankfurter had a more flexible sort of approach to constitutional issues, and I think it permitted him some flexibility in dealing with the political consequences of decision-making. The Supreme Court, prior to the time I got there, decided Yates and some other—what President Eisenhower once referred to as those Communist cases. That caused a big hue and cry of right-wing groups in the country, John Birch Society and others. I think that Frankfurter, without changing his announced rules for anything, was able to back away from those issues comfortably, for a while, while the Black wing of the court just went ahead and decided them in the way they thought they should be decided. I'm not accusing Frankfurter of political cowardice or anything. I just think that his notion of the role of the court and the role of the

justice allowed him some flexibility in dealing with political realities that some of the other justices didn't have.

In any event, you had those two, and then Douglas was Douglas. He was always writing his books up there. Giving stuff to the pages and getting it back and doing other stuff. Once in a while, he'd ask a question about the pending case. But by the time I got there, he was very much into his book-writing. When he got an opinion assigned to him, he'd have it out two days later. Zip. Turn them out terribly quickly. I wouldn't call them sloppy, but they weren't done with the same care that some of the other justices gave to their opinions. He was very bright. He only had one clerk. All the justices, except the chief, had two in those days. Chief had three, plus the Reed/Burton clerk. Most of the time, the Reed/Burton clerk. Douglas had one. He preferred to have two secretaries. He was turning out his books. He'd get out of town the minute the court was done, and he'd come back in. I think they used St. Bernards or something to get communications to him wherever he was hanging out during the summer. But he, I think, lost the same interest in the court's work that he had had earlier. He never understood why it took all the other justices so long to do their opinions. He'd get his out so fast.

Then, in those days, there were several five-to-four decisions, in which the four on the losing side were Warren, Brennan, Black, and Douglas. Warren and Brennan were, I think, a little more flexible in their approach to things than Black and Douglas were. But Warren had tremendous regard for Black, and he had tremendous regard for Brennan. I think. In terms of personalities, he and Brennan got along very well. They had a case involving some African Americans who had gone to a public golf course, and I think it was Greensboro, North Carolina—I'm not sure, somewhere in North Carolina—and gotten arrested, because African Americans couldn't go to that golf course. *Brown* was in '54. This was '59 term. So they got arrested for trespass, were convicted of trespass, and made some mistake procedurally when they appealed their case in the North Carolina Supreme Court, so they lost there. They brought it to the Supreme Court of the United States, and the majority of the court decided that there was an adequate state ground for the disposition in the North Carolina Supreme Court.

That bothered the chief, and so he wrote this very strong dissent. He wrote it and circulated it. Justice Brennan, who had voted with the majority—in fact, the majority was eight-to-one, I think—came walking into the chief's office and had a conversation with him about the dissent. The chief called me in and said, "Brennan will change his vote and will join my dissent if I make some changes in the dissent." So he wanted me to go talk to Brennan. The main idea was to get research done on the question whether the state ground on which the North Carolina Supreme Court had disposed of the appeal was really an adequate state ground or whether they followed it when they wanted to and didn't follow it when they didn't want to. I went and talked to Brennan. Brennan sent me off to the library, and I went and found a whole raft of cases

where the North Carolina—the way I remember it, this is fifty years ago, forty-five years ago, so I may not have it entirely right—but I found a bunch of cases that the North Carolina court had not followed this rule. We put that in the opinion, and chief liked that. Changed the opinion to include that stuff. Toned down some things about it, Brennan joined, and out went the dissent, which is there somewhere in the U.S. reports. But Brennan and Warren were very congenial in terms of their personalities and their attitudes towards people.

He was close to Brennan, close to Black. He admired Bill Douglas—well, in many respects. He never said anything uncomplimentary about Douglas, but the clerks all thought that Douglas was a little bit of a—he was losing interest. We had Douglas to lunch and he told us about how Harry Truman had been interested in offering him the vice presidential nomination. Of course, in '44, there was a lot of talk about giving it to Douglas instead of Wallace, and it ended up that Roosevelt let the word out that he'd take Truman. So I think maybe the business of getting bit by the bug, although he didn't say it, may have had something to do with Douglas's ambitions.

Then the other ones in the five. Frankfurter was the ideological leader. Harlan was the conscientious justice. Didn't always follow Frankfurter. Figured things out for himself. But he was over in that wing of the court. Tom Clark was still fairly pro-government in those days, and you could predict the outcomes in some cases involving the government on that basis. But he went up a lot in my estimation during that year because I could see in his work that he was doing his job, from my young point of view. He'd work at it. He was a mature and experienced lawyer, and he did his job his way. Then there was Charlie Whittaker and Potter Stewart. Whittaker was uncomfortable with the job, and you could see it. When he came to lunch with the clerks, he confessed some of it. He said that, to him, due process meant you got to process what the statute said you got, and that was the beginning and end of it. He said that it was, I guess, too late to decide cases that way, so he was going along with the prevailing notions of what procedural due process meant. He was not comfortable with it. He wasn't comfortable with the Communist decisions. He'd go back to Kansas City or wherever he came from, and those people were all—this was '59. It hadn't been so long ago that we had Joe McCarthy riding around the country, and there were large pockets of people that were not in the impeach Earl Warren camp, but were off there in the right wing. His social friends out in Kansas City I think were there. He just had trouble with the job and with decision-making and with worrying about things. The chief tried to help him develop some comfort with being a judge. It didn't work out. He left under circumstances that you probably know about. I may have forgotten them to some extent, but he didn't like being a judge. The chief worked to get him some sort of a benefit based on disability, and then he resigned and started arbitrating cases or something.

Potter Stewart was Potter Stewart. He enjoyed the job. He complained, according to reports, at one point about the chief's assignment of cases. The allegation was that he said that the chief assigned him decisions and opinions in shitty little cases. He denied that he said that. I've looked through the cases we had that term, and the chief assigned himself opinions in little cases that weren't all that earth-shaking, but I also noticed about our term that the cases that were decided did not include many that were not in that category. I don't know. I had the feeling as I watched the assignment process that Earl Warren was interested in giving the justices an equal workload and giving them equal opportunity to write important decisions, although we didn't have a lot of them our year. He took only one case that I think he regarded as really important for himself, and that was Hannah against Larch. I've got another story about Whittaker. But Potter Stewart enjoyed the job and was calling them the way he saw them.

There was a case involving the question whether you had to pay all the tax that was due, federal tax, in order to sue in federal district court, as distinguished from suing in the tax court. You could sue in the tax court without paying the tax, but to sue in the federal district court, you had to pay some tax. The question was whether you had to pay all the taxes. Term before us, the case was *Flora against the United States*. The chief had assigned that case to himself and he'd written an opinion, and based on the research that had been done for him—the research had been presented by the litigants—there was a statement in it to the effect that, uniformly, the practice had been to sue in federal district court only when you paid the full tax. Made this assertion. The court decided the case and they got a petition for rehearing back. Courts had decided all sorts of cases where the taxpayer had sued in federal district court and not paid the entire tax. So that sort of blew that issue out of the water, and the court granted a rehearing. Charles Whittaker wrote the opinion for the court and said this and that and the other thing. It came out the other way. That case was assigned to him by Frankfurter, because the chief was in dissent. The chief prepared a dissent. We worked on it in the office there. I think it was Justice Brennan who switched sides, and so all of a sudden the Chief's dissent became the opinion of the court. Whittaker's opinion for the court became the dissent. Whittaker worked hard on it, but he was not comfortable being a judge.

01-01:00:47
McCreery: Thank you. I need to interrupt us here for a moment and change tape, so I'll turn this off.

01-01:00:52
Moore: Okay.

[End Audio File 1]

[Begin Audio File 2]

02-00:00:42

McCreery: Tape number two on August 19, 2004. This is Laura McCreery continuing the interview with Ralph J. Moore, Jr. We were talking about the other justices who served with Chief Justice Warren during your year, and I'm recalling that Justice Stewart was relatively new, having begun his tenure only the year before you came. Can you expand a little more on how he might have changed the overall makeup of the court? Do you have much view of that?

02-00:01:13

Moore: He was there by the time I got there, so I don't really have a view on that. I don't have anything, really, to contribute to that. He operated a little differently. Brennan had overlapping clerks. He would have them for two-year stints. He'd start a new one each year so that they overlapped. I don't know whether that was true of Potter Stewart or not at that time. But he would have lunch with his clerks, whereas the rest of the clerks had lunch with each other in the clerk's lunchroom. So the Potter Stewart clerks were off in the Supreme Court public dining room. The justices had their own dining room. The clerks had their own dining room, and there was a public dining room where the staff ate and the public could eat, and Potter Stewart and his clerks, as I recall, ordinarily had lunch in there, so we didn't have as much conversation with those clerks as we did with the others. Jerry Israel and Jack Evans, I think, were their names.

02-00:02:43

McCreery: In general, how well did you get to know the other justices?

02-00:02:51

Moore: Well, we didn't hang out with them. We were kids and they were justices. You've probably heard stories about Frankfurter's tendency to treat them all as students, and so he'd wander around and chat with everybody's clerks. Prior to my time, this had led to a circumstance that offended—I think is the right word—offended Warren. So by the time I got there—I don't recall if Warren told us not to do this, or whether Bob Hoerner told us, that the chief didn't really appreciate our spending a lot of time letting Felix Frankfurter brainwash us.

02-00:03:53

McCreery: That's a strong term.

02-00:03:55

Moore: Well, that wasn't the word that was used, but that was—Frankfurter was an extremely bright character, and he was a natural teacher. He talked to clerks in the hall and talked to them about the cases. We didn't participate in that. We were also on a different floor from the rest of them, so we couldn't just walk down the next room and talk to clerks. We had to change floors. But the justices themselves worked more with their own clerks than with other people's clerks, with the exception of Felix, who was always proselytizing.

Douglas was a remote character. One of my classmates at Boalt was inducted into the Army and was stationed—came back here, was stationed here, when he received word that he'd passed the bar. His name is Sherwin Samuels, and he's still practicing out in California, or he's still out in California. He stopped by the court and asked me if Warren would swear him in, so I went and asked the chief, and the chief said no. If he started doing that, he'd just get too many people asking him. He wasn't the ninth circuit justice. Douglas was, so I went to Douglas and said I had a law student from the ninth circuit, from Berkeley, who had just passed the bar and would like to be sworn in; would he be willing to do it? Douglas said sure. Took him in, swore him in. Sherwin Samuels has Bill Douglas's John Henry on his—whatever the document is.

02-00:06:01
McCreery: That's nice. Did you have much chance to observe the relationship between Chief Justice Warren and Justice Frankfurter, and to see them interact?

02-00:06:11
Moore: Just up there on the bench.

02-00:06:13
McCreery: Did you go to oral argument very often?

02-00:06:16
Moore: We went to every oral argument. We, collectively, the three of us. We did bench memos. We divided them equally. When you did the bench memo, you'd go to the oral argument on that, so I went to a third of the oral arguments. Then in particularly interesting cases, of which there were not too many—when Arthur Goldberg came to argue on the constitutionality of the 180-day injunction provision in Taft-Hartley, a lot of people went down to hear that argument, which Goldberg lost, convincingly. That sort of thing. There was some attention to the court-martial cases. I think more of the clerks went down to hear them. I don't know how many people paid attention to the Steelworkers Trilogy. I'm a labor lawyer by career, so I pay more attention to that than other lawyers would probably. That was argued by Goldberg's firm. It's still practicing here in town. It's a very fine labor-side law firm. Those cases were argued by David Feller, who was an extraordinary advocate. Extraordinarily articulate. Fast on his feet, fast with his arguments. He did a good job on them. So I remember them. I don't think it was the practice of all the chambers to have a clerk at each argument, but it was ours, so one or the other of the three of us sat in on all the arguments. We saw interesting things. I remember a young lawyer who had just joined the solicitor general's office, and it was his first argument in any court. All of a sudden, he got tongue-tied. He was having terrible trouble. Finally, Justice Brennan said, "Counsel, is your position"—and then he went into a leisurely statement of the fellow's position, until he got him calmed down, continue his argument.

I thought that was an extraordinary opportunity to hear all those arguments. Read all the briefs. I've read things when Justice Burger was the chief justice.

His negative comments on the quality of the briefs and the argument of the counsel. Of course, there were differences in the quality of both the oral arguments and the briefs that different lawyers filed, but these cases had all been through a trial court somewhere, through some appellate court somewhere, and so, by and large, they were well-briefed. The justices back in my day were not afraid of a long brief. Erwin Griswold had a tax case that he filed a brief in that was over a hundred pages long. There was no repetition in it. He just went point by point by point by point by point. Now, you couldn't file that brief, because they're too busy to read it, and they're also too busy to hear oral arguments that are as long as they were in those days. A standard argument was an hour on both sides, and of course that's been cut down. So they don't get to read about the case, and they don't get to hear the argument. I don't know how they do their job that way, but that's what they do now. In those days, I got to read a lot of good briefs, and I got to hear a lot of good arguments. Once in a while, they weren't too good, but you could sit through a little bit of bad argument. There weren't too many lawyers who thought the Supreme Court was just another jury that you have to sway with a bunch of emotion. They argued appropriately. I thought that watching those arguments and reading those briefs at that level, having at least two go-rounds before, sometimes three, was a good opportunity to see good lawyering.

02-00:11:33

McCreery: What else do you remember about the Steelworkers Trilogy? Put it in context of what was going on in the country at that time.

02-00:11:42

Moore: Context, I don't know. The courts were interfering a lot with labor arbitration. I'm a management-side labor lawyer. You can put that in the equation for what it's worth. Employers, more than the unions, would run off to court and try to get arbitration awards set aside on the ground that there was something wrong with what the arbitrator had done. Unions would, more often than employers, seek to compel arbitration when the employers resisted it, claiming that the dispute was not arbitrable. The courts would get deeply into the merits of these labor cases. The purpose of labor arbitration of the kind that the Steelworkers Trilogy is concerned with is the interpretation of agreements. Do you have a right or don't you have a right under the agreement. It's not what they call interest arbitration, where the arbitrator decides what the agreement is going to be. It's arbitration over disputes about what the agreement means. The courts, just around the country—state courts, federal courts—they didn't like arbitrators, they didn't like arbitration, and they were deciding the cases themselves.

So the Steelworkers Trilogy got there, and the three cases had different arbitration clauses. Excuse me. Two of them involved suits to compel arbitration, and the third was a suit challenging an award, on the ground that the arbitrator didn't have the power under the arbitration agreement to do what he did, whatever it was. The court decided, with, as I recall, a pretty solid

majority, in decisions that were written by Douglas, Justice Douglas, and announced by Bill Brennan, that unless there is something about the arbitration agreement that was very unusual and took you off somewhere else, that your job under the typical arbitration agreement, if you were a court and you were asked to compel arbitration, or you were asked to review an arbitration award, was to decide whether the issue was one that turned on what the collective bargaining agreement required. If it was that kind of a dispute, didn't matter if it was good claim, a bad claim, a crazy claim or what, off to the arbitrator, and the arbitrator's award would be respected. There's no "unless" to it. There was some question, and some argument made, I think, by Feller, the question whether the dispute was arbitrable was itself a question about the interpretation and application of the collective bargaining agreement. The collective bargaining agreement says, we're going to arbitrate disputes about the interpretation and application of the agreement. The employer says, this dispute is not that kind of dispute. Then the union says, this dispute is that kind of a dispute. Employer says, so you don't arbitrate, and the union says you do arbitrate. It was intellectually possible to say that the question of arbitrability in that kind of a case is a question about the interpretation, application of the agreement, and therefore that the arbitrator decided arbitrability, not the courts. The court didn't go that far. Douglas's opinion didn't go that far. It held that the question of arbitrability was for the courts. You don't compel people to arbitrate that which they had not agreed to arbitrate. But in making that decision, you didn't get into the merits of the dispute about the agreement. You just had to figure out was it a dispute about the agreement. You could have a bad argument on one side or a bad argument on the other side. It didn't matter. Off to the arbitrator. That's what they held.

Douglas whipped these opinions out in thirty-two seconds or something, he get them out, as he always did, very rapidly. As I recall, there was some dissatisfaction among the members of the court about the opinions, and Brennan went to work on Douglas and suggested a bunch of changes. Then he ended up, for reasons I don't recall, announcing the opinions. It may have been that Douglas had already left for his vacation or whatever. I just don't know. The opinions in the trilogy did go through some changes as a result of the discussions between Brennan and Douglas. That's the basic charter that we operate under to this day in connection with questions of arbitrability, of disputes about the interpretation and application of collective bargaining agreements.

02-00:17:57

McCreery: You've pointed out that, other than a few examples like this trilogy, your year was characterized more by run-of-the-mill labor and tax cases and so on. But I wonder, in those cases where Chief Justice Warren was the author of an opinion, can you tell me something about the opinion-writing process as you experienced it?

02-00:18:27
Moore: The chief was perfectly capable of writing opinions, and he did write opinions. But more commonly, he'd call us in, as I said, and chat about those cases that he'd taken. I don't remember on the dissents. I described one case where I got involved in doing some work on a dissent that he had written, after he'd written it, which led to modifications that he'd requested. But on the opinions for the court where he was in the majority and he'd assigned the case to himself, as I said, with one exception, they were not very notable cases, but he'd call you in, talk about the case, talk about what the court had decided, talk about what the opinion would say, and then he'd ask us to do a draft. His input into the draft, after it came to him when he operated in that mode, varied depending on the extent to which you said what he wanted to say. We were draftsmen attempting to say what the chief wanted to say, not what we wanted to say. Sometimes we'd argue with him about it, and he'd let us argue some, but if he was clear in his own mind, he wasn't going to take much advice from us.

02-00:20:19
McCreery: How well did your efforts hold up to his scrutiny after you'd drafted things?

02-00:20:27
Moore: Our efforts held up to his scrutiny pretty well. He had suggestions, he had changes. It varied.

02-00:20:46
McCreery: You were mentioning that Justice Douglas would prepare his opinions in record time. What about Chief Justice Warren? How was his own writing, if you can make any sort of—

02-00:21:00
Moore: I can't. You can research this, because you know when the case is argued, and you know when the case is decided, so you could do statistics on how long it was between argument and decision for different justices. But I've never done that. I think that the chief got his opinions out with the same speed. I don't recall anybody being a laggard. I just don't. I think that they all would get them out. I think this was true in a lot of different terms. It may have been true in ours. If you go and you look during the last days' decisions, you may find one or two that go back to the beginning of the term. Somebody in some office—I'm talking about the justice, presumably—just couldn't bring himself to write the darn thing, or ran into some problem they couldn't solve, and so they set it aside. So you'd get those cases, and people would comment, "Gee, we haven't seen an opinion in such-and-such." But I think the chief, he didn't lag behind. He didn't let us lag behind. If he asked us to go do something on an opinion, we couldn't put it at the bottom of the stack. He expected us to get work done, and he expected himself to get the work done.

02-00:22:43
McCreery: How did he lobby the other justices—

02-00:22:45
Moore: He didn't.

02-00:22:45
McCreery: —to use political term. How did he bring them around to his point of view when necessary?

02-00:22:51
Moore: I don't think he did. Of course, everybody knows what's been written about *Brown*, which was five years before I was there. In that case, he obviously had a great impact. He had his own notions of how the court needed to respond, and he did persuade the justices to get onboard a unanimous decision, which he produced. I've read recently an interview with Earl Pollock, who was one of his clerks, where Pollock talked about the writing of that opinion. I've read other things about the writing of that opinion that are not totally consistent with Earl's recollection. But what I do know is what everybody knows, that he got all these justices to sign on to the same thing, and he recognized that this was the dynamite decision of the century. He knew how it would be greeted in the South. So he thought it was terribly important for the court to be all together on it, and they continued to be all together on the race cases until my term, I think, was the first one where there was ever a division. So they went on for five years deciding all these cases unanimously. I think that they felt an institutional need to tell the South this was the law, which leads to relations between Earl Warren and the president at that time.

02-00:25:01
McCreery: Can you tell me about that?

02-00:25:02
Moore: I don't know anything about it. I know what I've read. Eisenhower did not give any endorsement to it, and Warren pretty clearly didn't appreciate that. He thought that the president had duties, too. He didn't discharge him. That the consequence for the country was a long period of very serious conflict that a strong policy by Eisenhower would have avoided. Herb Brownell would have done it, by what I read, but he could only get so far out in front of Ike.

02-00:25:50
McCreery: It was a loud silence by President Eisenhower, wasn't it?

02-00:25:53
Moore: It was a loud silence. I went to an account by one of the lawyers in the Justice Department, who was probably the principal draftsman of the Justice Department's brief in the second *Brown* decision, when they briefed the question of remedy. That was the decision in which the court said that the South did not move to desegregate immediately, but desegregate the schools with all deliberate speed. That was taken by the South to mean all deliberateness and no speed, so nothing happened, but that's not what the court meant. But in any event, this lawyer was saying that he had the government's draft prepared. Brownell had gone over it. The solicitor general

had gone over it. They signed off. So he was tasked to take it over to the White House. He took it over. The next day, he went over to get it back. The president had strong comments on the thing, and he said that if—as you may know, the government's position was basically, with a different phrase, this all deliberate speed thing the court went along with the government's position, or adopted something quite akin to what the government's brief had advocated. But the account I heard—I think the lawyer's name was Rosenthal—was that if he had adopted Eisenhower's suggestions, it would have completely gutted the brief. Eisenhower did not believe in that. In any event, Rosenthal brought it back, and Brownell and the SG told him don't worry about it, just file it the way it is. Ignore Eisenhower's edits. So that's what he did.

02-00:28:08
McCreery: You heard this account from Mr. Rosenthal?

02-00:28:10
Moore: Yeah. It was the talk that he gave out in Montgomery County.

02-00:28:20
McCreery: Did Chief Justice Warren talk about this matter with you directly at any time? The implementation of the *Brown* decisions?

02-00:28:30
Moore: That was a subject of constant conservation with Warren, with everybody there. Fifty-nine, by then you had the '57 Civil Rights Act, which started out with a proposal from Brownell that was pretty good. Lyndon Johnson got it passed, but along the way, if I remember the history right, and I probably don't, the reporters, the press, figured out that Eisenhower didn't have a clue what was in his bill, and Brownell was just pushing this thing, Voting Rights Act. They asked Eisenhower something about it, and Eisenhower basically made it clear that he didn't believe in something that was important in that bill. Senator Russell from Georgia, who was the brains behind the Southern operation, or at least one of the brains, picked up on that and was able to use it to good effect to limit the '57 act. But at that point, all you had was the '57 act, and by the time I got there, you had Central High. The court in Arkansas had ordered some African American kids admitted to Central High School in Little Rock. Governor Faubus basically called out the National Guard to prevent the kids from going in, is the way I would describe it. That's my recollection. At that point, Eisenhower had to act. He couldn't allow a state to use the National Guard to prevent the enforcement of federal court order. He finally got into the act. He nationalized the National Guard and told them to do what they're supposed to do. These kids were admitted to Central High.

That case was the subject—I forget where in the proceedings it was, but in the summer just before I got there, they had a special session, if I'm not mistaken, at the court. The case was *Aaron against Cooper*. The court made some ruling about that thing, but Ike dragged his feet all the way through it. Then Kennedy came along and Kennedy talked a good game. Then Johnson made it happen.

Whatever you think of Lyndon Johnson, he was quite a study. I invited him to a party once, but that's another story. He made the Civil Rights Act go through. You can figure out where Warren was about these different presidents. I've been meaning for the longest time to write up Warren's relations with the executive branch of these three administrations, but I've never gotten around to it. But Lyndon Johnson did what needed to be done, and so you got the muscle of the executive branch behind the effort to treat African American and other minority people the same way you treat anybody else. That was important to Warren. He may have been a Republican, but he allowed—Lyndon Johnson was terribly persuasive. He arm-wrestled Arthur Goldberg off the court to go to the United Nations, and he talked the chief into chairing. Told the chief that it was his duty to chair the Warren Commission on the assassination of John Kennedy.

02-00:32:55
McCreery: The president was very persuasive on those matters.

02-00:32:57
Moore: Yes, he was very persuasive.

02-00:33:00
McCreery: You've characterized Chief Justice Warren's relationship with President Eisenhower. You say you've been meaning to write this up. How would you characterize his view of and relationships with the Kennedy and Johnson administrations? What's your story of that?

02-00:33:19
Moore: I won't give you the whole story, but I think there can't be any doubt that *Brown* was the big decision. The Warren court is remembered for *Brown*. That was the first Warren court, when Warren didn't have the majority that he had in later years. Then after he had the majority, you had reapportionment and you had criminal procedure. Those were the three big changes that were brought by the Warren court, following their adopting views that Warren shared. *Brown* led to a lot of grief in the South that Warren felt wasn't necessary if the president had done his job. Kennedy, at least, he got the civil rights bills introduced. He had them introduced. He said that's what we ought to do. Then Johnson really put muscle behind it. I don't know if you remember the speech when Lyndon Johnson said, "We shall overcome." If you were Warren—I don't know that I need to say more than this. You can just imagine how he felt about these things, because this was the most important issue that was dealt with during his tenure. It was there from almost day one. The case was pending when he got there. Eisenhower made his statement or didn't make a statement. There's some debate about it, whether Brennan was the worst damn fool mistake he ever made, or Warren was the worst damn fool mistake he ever made, or whether he never said any of it. That may be an urban legend. If it's not true, it certainly is consistent with his attitude towards it that got expressed. Warren, in his memoirs, talks about him. He went over to a dinner at the White House. Ike took him aside and

said, "You've got to understand these Southerners. They're not bad people." Something to the effect, they're worried about their daughters getting mixed up with these people. I think that may have been the last time Warren went to anything at the White House. He was offended.

On the other hand, Lyndon Johnson, we had all his awards on this issue came through for him. The former Warren clerks had always put on a dinner for Earl Warren each year. Then the next morning, the Chief and Mrs. Warren would have all the clerks out to breakfast at the congressional country club. The senior former clerk in Washington who hadn't put on the dinner had the job of putting on the dinner, and so my turn came when Lyndon Johnson was president. It was our custom to invite the president and the attorney general and the solicitor general over for drinks at the beginning of the dinner. At that time, Thurgood Marshall was the attorney general—I mean, was the solicitor general, and Lyndon Johnson was the president, and I think Nick Katzenbach was the attorney general. Marshall and Johnson came. We had never had a president come. So Johnson went around. He shook hands with us and chatted with the chief for a while. They obviously had regard for each other.

02-00:38:18
McCreery: What was his view of President Kennedy, generally, to fill in that piece of it?

02-00:38:23
Moore: I don't know that I have a clear enough picture of that. I think that he appreciated the efforts that Kennedy made. I never had any conversations with him that I recall about John Kennedy's performance in the White House. Of course, JFK wasn't there very long.

02-00:38:59
McCreery: To return to the subject of the chief justice's approach to his own work on the court, you wrote in your piece for *Hastings Constitutional Law Quarterly* that it may have surprised his critics, but the chief was profoundly conservative.

02-00:39:19
Moore: Let me take a break if I could. Can I do that?

02-00:39:24
McCreery: Okay. Before our short break, I was just asking you about your earlier observation that the chief was profoundly conservative.

02-00:39:30
Moore: What did I say?

02-00:39:32
McCreery: You were just referring to his earlier experience in California and saying—here I quote—"He genuinely believed in law and order, unlike some who've exploited that much misused term."

02-00:39:56
Moore: I think that, on the law and order point, he did believe in law and order, and that means you don't coerce confessions, among other things, and it means you don't go around just invading people's homes to get evidence without warrants and without probable cause. That's what the constitution has required since 1787. In that sense, he just came to it believing in the constitution and believing in fair play and those things that a lot of us think are essential American values. But also, socially, and social attitudes, while he had no racism in him, he was fairly conservative in his attitudes towards personal behavior. Things of that kind. He had no difficulty with the death penalty. He always recused himself from petitions filed on behalf of Caryl Chessman, who was on death row out in California at that time. Had been there since his own days as governor, I believe. He turned him down for clemency as governor, and so of course he didn't involve himself in the cases that came to the court involving Chessman. He talked to us about what a bad fellow Chessman was, and he didn't have any trouble with his execution. He did not come from a "We've got to change the whole criminal system" sort of place. He wanted the procedures to be fair.

I've said a couple of things about my term. One is that there aren't a lot of important decisions. You've got to be a labor lawyer to appreciate the Steelworkers Trilogy, and once you get by that, no one except tax lawyers would regard *Flora* as a big deal. No one. I mean, it was a big deal that there was a switch and it came out the other way, but that was an internal big deal. There were just not a lot of important cases. But what was going on was this examination, fair examination, of the criminal procedure cases that were coming to us, to the court. Of course, the race thing was going on through all this. They were terribly interested in seeing that the constitution, as they had explained it and understood it, was enforced, and that was what was important about Lyndon Johnson's succession, that he made it happen.

That's the race issue. But the criminal procedure issues were sort of percolating around there, and you had all these lousy confessions. The Supreme Court's job in reviewing whether a confession was voluntary or involuntary was unsatisfactory, because you had a lot of involuntary confessions that they couldn't do anything about under the standards that they had, even the probability standard of *Blackburn against Alabama*. It took *Miranda* to impose a structure on things that was designed to just get rid of that stuff. I think there was, going on my term, there was conversation, particularly about confessions, and particularly about the right to counsel, but also about *Wolf against Colorado* and the use of illegally-obtained evidence in state court prosecutions. There was a rethinking that was going on my term about criminal procedure, and I think that Warren's own attitude—he was respected by his colleagues. He was a former prosecutor. He was not a soft prosecutor. He prosecuted. As far as I know, from the record insofar as I know it, and I've read a fair amount, his record as a prosecuting attorney was he played by the rules and he didn't understand prosecutors and policemen who

didn't play by the rules, and he didn't think they had any place in our system. Coming from there, he was conservative. But as I say, he wasn't out to get rid of the death penalty. He liked to watch football. He had no use at all for the owner of the Washington Redskins, whose team was the last team in the NFL to have an African American player. He was just a racist, and Warren couldn't abide that. But that's a different issue.

02-00:46:41

McCreery: Today, we often hear this term "activism" applied to various courts, and realizing that you were there fairly early on in the Warren court period, how would you apply that term, if at all?

02-00:47:03

Moore: I'd apply it to the present court. Rehnquist and Scalia and Clarence Thomas were appointed by presidents who claimed to be opposed to judicial activism, and their treatment of some congressional legislation and their notions about states' rights require a considerably activist bent. But I don't use the term. If I were to use the term, I suppose what it means is a judge who reaches out to change things a lot. But that's not a helpful term, because changing what you're talking about, just changing things, then *Brown's* changing things, was a major change from *Plessy*. I guess that's activism. You get rid of a bad precedent and substitute a good precedent. I think people tend to use the term to mean using your personal notions of constitutional policy in place of a more literalist approach to constitutional adjudication. Justice Black had a sort of literalist approach to his Bill of Rights decisions, but I'm skeptical about literalism. I don't think you need to go so far as to say that the constitution changes all the time with the political winds of the moment, but conditions and circumstances do change, and you're applying this document to the problems that arise as a result of those changes. That necessarily leads to some flexibility, unless you're going to just relegate the thing to the past and the issues of the past. I guess what it comes down to for me is people say that judges who decide things differently than they would decide them are activists, and judges who decide things the way they would decide them are not activists, they're just applying the law. As I say, it's not terribly helpful.

02-00:50:29

McCreery: I wonder, how strong a sense did you have that Chief Justice Warren had a direction, though, that he was trying to go in, generally? Is that a fair question?

02-00:50:42

Moore: It's a fair question. I'm not wholly comfortable with the notion that he had a direction he was trying to go in, like some sort of Roosevelt with his New Deal—that sort of thing. The court can choose the cases that it wants to listen to. It can't choose the cases that are brought to it. By things it says, it encourages people to start bringing cases that they might not bring if they hadn't said those things, but they're much more constrained than Congress and the president in going out and picking issues and going there. I think that

what the chief regarded himself as doing was applying the law in the spirit in which it was intended to be applied. He didn't have a program, I don't think. He had things he believed in. Judicial policies. As I've said, the notion of fair procedure is something that he believed is implicit in due process. He operated from there. He didn't come to the court saying, "I'm going to go there." When he got there, of course, *Brown* was already there, and he quickly figured out what he thought about that. Probably knew what he thought about it before he got there. I'm sure he knew what he thought about it before he got there. He wasn't trying to take us any place. Even courts and judges that I frequently disagree with, I think most of them are trying to do their job.

02-00:53:05
McCreery: What did you learn from Chief Justice Warren?

02-00:53:25
Moore: I think this whole interview, I've been sort of articulating notions about how things ought to work in the constitutional sense. Obviously, I spent a lot of time working for and with Chief Justice Warren. I think while I came to that job with a lot of admiration for the chief, and his approach was congenial to my own views coming there, I think that it was a profoundly informative and formative experience for me. Seeing why he thought the way he thought. I've always been very much an admirer of judges who go at things the way he did. I would not say that he was terribly activist. He sometimes was impatient. People thought up a lot of legal reasons why he shouldn't do what seems right. Even some of his colleagues.

02-00:55:07
McCreery: I understand, after you left the clerkship, you and Mr. Dempsey helped him choose subsequent law clerks. How did that work?

02-00:55:15
Moore: I didn't. Murray Bring stayed the following year. I went off to England because I had the scholarship at Cambridge. Murray Bring stayed on as the chief clerk the following year, and then he and Bill Dempsey were picking the Eastern clerks, or helping to interview them, and whittled down the pack, as I recall, and then the chief did the picking. You have to ask them how that worked. I don't know. I don't know whether he continued to have the West Coast people pick a third clerk throughout the period or not. That was certainly the arrangement for quite a while, because he didn't want to make the kids out on the West Coast come all the way back to let him interview them. It's become a very different game nowadays, but so far as the question you asked, you'll have to ask Murray and Bill, because they did it.

02-00:56:21
McCreery: Did you stay in touch with the chief very much after you left his service?

02-00:56:26
Moore: I was in touch with him from time to time. Not constantly, not intimately. Being in town here, I'd see him once or twice a year.

02-00:56:40
McCreery: Did you have any chance to assess his mood after he retired from the bench?

02-00:56:45
Moore: I went into his chambers once after he—not after he retired—well, after he retired. Yeah, I guess he was in retired status. He had an office there at the court, of course. The reporter of decisions had circulated an opinion that said, "Mr. Chief Justice Warren delivered the opinion of the court," and of course he was no longer the chief justice. Warren Burger was.

02-00:57:19
McCreery: Name confusion, huh?

02-00:57:20
Moore: Yeah. Warren showed it to me, and he was greatly amused. We saw him from time to time. Went to some ballgames, until the baseball team snuck out of town.

02-00:57:37
McCreery: Did he ever comment on the appointment of Chief Justice Burger as his replacement?

02-00:57:41
Moore: Not to me. You know what he was up to was his own retirement, effective upon the confirmation of the successor, which came a cropper when Abe Fortas ran into trouble. Which was a shame from the point of view of those who preferred, as obviously Warren did, to have Lyndon Johnson appoint Warren's successor rather than Richard Nixon, of all people.

02-00:58:22
McCreery: Yeah, the timing turned out to be quite interesting, didn't it?

02-00:58:24
Moore: Yeah. It was too bad. But that's not a comment on Warren Burger. It's just a comment on the appointing authority.

02-00:58:38
McCreery: Is there anything else that you would particularly like to say about your time as a law clerk on the Supreme Court?

02-00:58:45
Moore: Not particularly. I think that the comment on the '59 term is that it's important more for what was going on behind the scenes and for some of the groundwork that was laid for what came, particularly in the criminal procedure area. The reapportionment issues really weren't being thought about when I was there. Griswold came along later, and *Roe against Wade* came after the chief retired, as I recall. So those were off in the future, but the criminal procedure stuff was definitely on the agenda, and it was on the agenda because they were having it dumped in their face in these prisoners' petitions. What they did was to get rid of—in *Mapp against Ohio* first, but

then in *Gideon* and in *Miranda*—get rid of the rules that made it such a crapshoot and allowed misconduct to not have any cost. Whether you like Miranda or you don't, or you think that it's just become a television sort of warning that no one understands and no one pays any attention to, I don't know, but it certainly got rid of a kind of litigation and a kind of police procedure that we needed to get rid of. If you read those records that I read, what went on without the lawyer, it's what you'd expect. They were looking at those cases, and on the federal side, they were sending them back for appointment of counsel regularly in post-conviction proceedings. They were looking at this horrible stuff that was coming out of the state courts. Finally said enough is enough, and Fortas got the job of arguing the case, and Mr. Gideon got his lawyer. So that's my comment on the '59 term.

02-01:01:29
McCreery: Thank you for that very good summary and for your time today.

02-01:01:33
Moore: I enjoyed it.

[End of Interview]