Oral History of William H. Jeffress, Jr.

Second Interview – August 9, 2011

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is William H. Jeffress, Jr. The interviewer is Professor Angela J. Campbell. The interview took at Georgetown Law.

PROF. CAMPBELL: All right we're recording and today is August 9, 2011. Bill, I thought I would see if there is anything you wanted to add from our last session?

MR. JEFFRESS: No, I don't think I want to add anything about that period of my life. If I think of something, I'll throw it in.

PROF. CAMPBELL: Did you want to talk about the Dionne Warwick incident?

MR. JEFFRESS: I was talking to you about when I was at W&L [Washington and Lee]—this was 1964—Dionne Warwick was, of course, a very famous Motown singer. She came to campus to perform at a campus-wide concert and then performed in a fraternity house later. There was no hotel in Lexington where she could stay. She had to drive all the way to Roanoke to find a place that would accept a black person to stay over. That was kind of an eye-opener to me. Shows how far things have changed in my lifetime.

PROF. CAMPBELL: I had one other question I wanted to ask you. We had talked a little bit about how religion was an important part of your upbringing. I was wondering about politics. You mentioned at one point you were a Republican, and I believe you're a Democrat, is that correct?

MR. JEFFRESS: I am. I'm a Democrat. My family was not terribly political. I had two parents and three brothers, and we pretty much split in every election three to three. (laughs)

When I was either in high school or perhaps in college, Virginia had one of the first Republican governors they had ever had, Linwood Holton, who I thought was a really good governor and a good face for the Republican Party. We also had Nelson Rockefeller. They were progressives, I would say. There was a lot wrong with the Democratic Party in Virginia, including massive resistance to school desegregation and so forth. So that's why I became interested in Republican candidates. I worked for Rockefeller actually in the summer of '68.

PROF. CAMPBELL: You worked on his campaign?

MR. JEFFRESS: In the primary. But of course Nixon was nominated. I voted for the Democrat and became a Democrat thereafter, and have always been.

PROF. CAMPBELL: Okay. So when we were talking last time, you had just arrived in Washington with your wife and your daughter and a new baby and were starting a clerkship with Judge Gesell. Tell me what it was like at that time.

MR. JEFFRESS: Well, that was rather an eventful period in American history, including in Washington. We had the riots in '68. Fourteenth Street, lower Pennsylvania Avenue, were still block-after-block burnt out buildings. Demonstrations against the Vietnam War had become violent in many cases. The Nixon administration chose to be highly confrontational against the demonstrations. There was a lot going on in federal court at that time, with the government seeking injunctions against demonstrators, challenges to various aspects of the war policy.

It was tense in Washington. While I was clerking for Judge Gesell on May Day 1971, the anti-war groups announced a May Day event at which they would shut down the federal government. They did things like drive old clunkers into tunnels in Washington and stopped

them and disabled them. I was riding my bicycle to court at that time. I remember riding that morning—I lived in Burleith [a Washington, DC neighborhood]—and rode down past the Memorial Bridge which was lined with National Guard troops. As I went through Georgetown, there was a strong odor of tear gas. But I got down to the mall and got to work that day. It was a very tense time. There was a lot going on.

PROF. CAMPBELL: You were working in the federal courthouse here on Constitution [Avenue]?

MR. JEFFRESS: Right.

PROF. CAMPBELL: When you first started clerking, were you his only clerk or did he have another clerk?

MR. JEFFRESS: Judge Gesell always had only one law clerk.

PROF. CAMPBELL: How would you describe your relationship with Judge Gesell?

MR. JEFFRESS: It was very, very close. He became my very good friend and mentor throughout my legal career until he died. If I had anything I wanted to talk about, I'd go down to see Judge Gesell, and he was very happy to talk to me.

But it was a special experience because he had only one clerk. The clerk did everything—sat in the court when he was trying cases. He would come to work at 7:00 in the morning and write out in longhand some opinion he was working on. He would hand it to Doris [Brown, his secretary] who would type it up and hand it to me. I would have to work in some law and cites and so forth for the opinion.

When we came off the bench after a session in court, he would discuss the lawyers' performance and the witnesses and other things that had happened in court. It was a unique learning experience. I can't think of anything that contributed more to my upbringing as a trial lawyer than that year with Judge Gesell.

PROF. CAMPBELL: Learning in terms of what was an effective presentation at trial or effective techniques at trial?

MR. JEFFRESS: That and I've got to admit one other aspect of it. It was a confidence builder. When you come out of law school you don't have much basis to know whether you'll be an effective trial lawyer, or whether you'll like it. Sitting in court for that year watching lawyers, including lawyers with great reputations come in and out of court, I said no question in my mind, I'm as good as half these people anyway. I will not embarrass myself. (laughter) And I watched some very fine trial lawyers do things that have taught me a lot.

PROF. CAMPBELL: Anything stand out in your mind that you want to talk about?

MR. JEFFRESS: I saw some good lawyers that year. One that sticks out is Ken Mundy, who I'm sure you know of. Ken was trying a murder case—I think it was murder, might have been attempted murder—but it took place at an after-hours place over in Shaw, which was then a slum, on the second floor of a townhouse on P Street. His client had left the poker game in a dispute and had come back to the poker game according to the witnesses and shot one of the players. So Ken represented the defendant. One of the government witnesses, who was a guy at the poker game, had testified that after the shooting he had left and gone back to his house. He then came back and the police had already arrived when he returned. There wasn't much

discovery in those days, and I don't know that Ken really knew anything about it, but he smelled a rat. (Jeffress chuckles) About ten minutes into the cross-examination, the witness was clearly very nervous about Ken's questions about going back to his house. The judge excused the jury and asked him, "Look, do you want to consult a lawyer?" He said "Yeah." The judge found somebody to come in and advise him and he then took the Fifth on any further questions. And I think Ken knew that he didn't leave the scene for no reason. He went back to his house to stash his gun. He had a gun there, went back to hide the gun, and then came back.

That whole performance by Ken, which I thought was brilliant, made me excited about being a criminal defense lawyer. I knew this is what I'd like to do. Ken just listened and used his experience to know something is wrong here and to not let it go, keep probing and probing. And it won the case for him. I think it was a mistrial, and his client later pled to some lesser offense as I recall. But I thought that was brilliant.

There were some very fine prosecutors in Judge Gesell's court at the time. Jim Sharp is one that I remember tried an awful lot of cases in his court. After the case was over, often the judge would have the prosecutor or public defender, or for that matter private lawyer if he wanted to, come back to chambers and he would give him a critique of his performance. I would sit there and listen, and that was a learning experience too.

PROF. CAMPBELL: I'll bet. So what percentage of the cases that he heard were criminal cases? Was that a large part of the docket?

MR. JEFFRESS: That was sort of a watershed year—1970. What had happened, they had just reformed what used to be the Court of General Sessions, which was now the Superior

Court. Jurisdiction over many cases that had been exclusively in the District Court was now in the Superior Court. That had happened I think a year or two earlier.

But in 1970 the District Court went to the individual calendar system, which Judge Gesell was very much a proponent of. So instead of having a bunch of cases over there being heard by whatever judge was available on the date, every case was individually assigned to a judge. The result of that was that Judge Gesell got, I think, 320 civil cases, many of which had been languishing in the court without any attention from a judge for years and years.

We also had a large criminal docket, but it was the civil cases that went to the individual calendar system and something had to be done. He devised a plan. He said I want to notice every one of these cases for a status conference and bring these lawyers in. I think by instinct he knew that if he did that, a third of them would settle or be dismissed. So he assigned me to do that.

Doris Brown—by the way, who is very active in the D.C. Circuit Historical Society and was his secretary at the time, also a close friend of mine—she had been thrown from a horse and suffered a fractured skull just about the time I started my clerkship. So I had to function as a secretary and a law clerk. I always told Doris, her job was a lot harder than mine. (both chuckle)

But we scheduled those cases. I scheduled four of them every half-hour for I think two solid weeks. I didn't want to schedule all of them for nine in the morning and make people sit around. So we did four every half-hour. Well it wound up, three of them settled or dismissed before they ever came in, and the other one would take ten minutes, so we had a lot of down

time. If I had to do it over again, I would have scheduled 20 of them an hour. But he cleaned out his docket faster than any judge on the bench, I believe, after the individual assignment system.

We tried some civil cases. He had an interesting case by the beneficiaries of the United Mine Workers' Pension Fund against Tony Boyle and the Union, which put the money of the Pension Fund in what was then called I believe National Bank of Washington, which was owned by the Union. Put it in there at no interest, so there was a breach of fiduciary suit against Tony Boyle and other trustees of the Pension Fund. That was an interesting case. It was tried to him as a judge. He wrote a lengthy opinion after hearing the evidence. Harry Huge represented the plaintiffs, and the defendants were represented by Paul Connolly, Edward Bennett Williams' partner. So it was a well-tried case and an interesting case. [*Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971)]

We had a number of other civil trials, but the criminal trials—he would probably try a case a week, or at least a case every two weeks. Some of those cases took a day or two to try. He was on the bench a lot—a lot more than I think is required today with the caseload that they have.

PROF. CAMPBELL: So what are some of the most memorable cases from your year of clerking?

MR. JEFFRESS: Well, two of them had to do with the Vietnam War. One was a case called *Hentoff v. Ichord*. Congressman Ichord was head of what used to be the House Un-American Activities Committee and by this time was called the House Internal Security

Committee. They were upset that college campuses were inviting people to speak who were against the war. They were prepared to issue a report which would list the speakers that they disapproved of and the campuses that had invited them to speak, and which would question the patriotism of the colleges.

And somebody—Nat Hentoff was I believe a journalist—brought a suit for a TRO and injunction against the issuance of this report, saying it violated the First Amendment and exceeded Congress' power. Judge Gesell found that he could not enjoin a congressman who was engaged in an official act under the speech or debate clause. But he found he could enjoin the public printer, who was simply a functionary. He could enjoin him from printing the report and that is what he did.

There is a published opinion on that. [*Hentoff v. Ichord*, 318 F.Supp. 1175 (1970)]. I think the administration went nuts—well, Congress went nuts. Congressman Ichord went nuts. It was one of those instances where Congress and the administration were finding, not just in that instance but others, that the courts were standing up to them. They couldn't try to suppress dissent without getting pushback from the courts. So that was one.

The other one was by far the most famous case that Judge Gesell had when I was there, which was the Pentagon Papers case. You recall that Daniel Ellsberg had pirated a copy of the Pentagon Papers and given it to the *New York Times*. The *Times* published excerpts. The administration sought a TRO, which was granted by Murray Gurfein in New York. [*United States v. New York Times Co*., 328 F. Supp. 324 (S.D.N.Y. 1971)] But then, the *Washington Post* published the next day some excerpts, and the government came in to seek to enjoin the *Washington Post* as well.

It was 4:30 I think on a Friday afternoon when they came in. Under the random assignment, the case was assigned to Judge Gesell. The bar exam was the following week, and I had intended to leave work Friday and take off the next week and study Saturday, Sunday, Monday, and Tuesday. The bar exam was Wednesday, Thursday and Friday. But the case came in, was assigned to Judge Gesell, I said the heck with the bar exam. We worked furiously that night, Saturday, Sunday, all day Monday. Judge Gesell denied the TRO. And it's funny. When it was assigned to Judge Gesell, I think the government was disappointed probably because he was an activist judge. But the truth of the matter is, he was by no means a dove. He was a hawk on the war. He was a strong supporter of the military. We used to have lots of conversations about the war, and I disagreed with him.

But that didn't affect him in this case. He had a strong view of the First Amendment and felt that the government was well beyond its powers in seeking to suppress dissent. At the same time, had he thought, or had he found, that there was something that was about to be published that revealed troop movements or endangered the military in the field, he probably would have had a different view. But there was nothing convincing in the TRO papers that said that, and so he denied the TRO.

The Court of Appeals, that night, reversed him and entered its own TRO. It said he should proceed to a preliminary injunction hearing, which he set for Monday. We had the parties in over the weekend. A lot of disputes, including the government insisting that the reporters and management of the *Post* could not be present for the hearing. Judge Gesell said, "That's not going to happen in my courtroom," and they relented. He felt that having Katharine Graham and Chalmers Roberts and some of the people at the *Post* who were working on the story in the

courtroom, would be a help; that if the evidence showed that there was something that would really damage the national interest, that the *Post* would act responsibly and not publish it. Interesting idea. I'm not sure I agreed with it at the time.

But anyway, the case went forward with the *Post* reporters and Katharine Graham in the courtroom. The judge told them: "Look, we've got a short time to consider this matter. I want the government to tell me the three most damaging things that are in these papers—things that they contend, if published, would be like shouting fire in a movie theater," or something like that.

He told them pick three. They put on a witness whose name I now forget, but all this is now public. He started testifying that the papers revealed that a Canadian diplomat had behind the scenes assisted the government with intelligence and provided support. They contended the people of Canada didn't know about this, the world didn't know, and if something like this was published it would impair the country's ability to get cooperation from our allies.

I was sitting there in the courtroom, and I could see Chalmers Roberts flipping through books and getting another book and flipping it through and handing it to his counsel. It turned out on cross-examination, this whole story had already been published in a book, memoirs, I believe, of this diplomat. (chuckles) Serious embarrassment to the government.

The other two instances were not really convincing at all. The judge felt that there is damage to a country when it gets a reputation that it can't keep secrets, I mean there is diplomatic damage. But there is no imminent threat to military, to the conduct of the war, to troops. So he denied the preliminary injunction at the end of the day Monday. The government

asked him to stay that, and he said "No, the court of appeals is right upstairs. If there's going to be any stay, you'll have to go to them."

The Court of Appeals did stay his ruling. Then, I think two days later, or maybe just a day later, the Court of Appeals affirmed Judge Gesell. [*United States v. Washington Post Co.*, 446 F.2d 1327 (D.C. Cir. 1971)] It said no preliminary injunction should issue. But the Second Circuit had affirmed Judge Gurfein that an injunction should issue. [*United States v. New York Times Co*., 444 F.2d 544 (2d Cir. 1971)] So naturally, it was in the Supreme Court within twenty-four hours. [*New York Times Co. v. United States*, 403 U.S. 713 (1971)] The Court decided, Judge Gesell liked to say, "They decided that I was the only judge that got it right from the beginning, and I never enjoined them for ten minutes." (both laugh)

So that was a fascinating case. It showed a lot of the strengths that Judge Gesell had as a judge, just in getting to the bottom of the case and wanting to know what the merits were, and to be able to get to it in a 48-hour time frame. It was quite a performance.

PROF. CAMPBELL: So how did you feel when the Supreme Court upheld his ruling?

MR. JEFFRESS: I felt good about it. It was something we had worked hard on.

PROF. CAMPBELL: Did you attend the argument at the Supreme Court?

MR. JEFFRESS: I didn't. I was taking the bar exam. Even though I hadn't been able to study and hadn't taken a bar review course, I decided well, I paid my admission fee and may as well just go take it and see what happens. It turns out I passed anyway, so I never wasted any time on a bar review course. (both laugh)

So those were probably the three most notable cases, but we had everything from environmental cases involving complicated issues of standing; we had libel cases; we had run-of-the-mill Social Security cases; and contract cases. A complicated case went to a jury. A building was built and something went wrong. The owner is suing the builder; the builder is suing the architect and the structural engineer. It was one of these complex civil cases that took a lot of time to figure out. What are the jury instructions on the claim? How do you write a verdict form? And that's just invaluable. There is no way anybody learns that in law school. And to be able to learn it from a master, Judge Gesell, again, has made me a much more knowledgeable trial lawyer.

PROF. CAMPBELL: So how many of the trials were bench trials versus jury trials?

MR. JEFFRESS: Civil, about half and half. Criminal, almost all of them jury trials.

PROF. CAMPBELL: Did you have any impressions about the jury system and how well that works or doesn't work?

MR. JEFFRESS: I thought it worked well. And Judge Gesell did too. He said there have been times when he disagreed with a jury, but never times when he didn't see some reason why a juror could legitimately conclude as they did. And I had great faith in the jury system, gave me great faith in the jury system. I felt that they got to the bottom of things pretty well.

I was surprised at the skepticism that jurors showed toward witnesses, not particularly police officers, but including police officers and FBI agents. Looking back on it, that's healthy. I just helped an associate in my firm try an attempted murder case out in Frederick County, Maryland. They had police officers testify, and it was obvious to me that they were saying

things to make themselves look better, not because it happened. I think the jury system provides a dose of skepticism about testimony of both sides. That's healthy. That is what a jury trial is all about.

PROF. CAMPBELL: So were there any other Watergate-related cases when you were with Judge Gesell?

MR. JEFFRESS: Well remember, Watergate didn't happen until '72. So I wasn't there. He, of course, did wind up having the Ehrlichman case, the Ellsberg break-in case. He had a number of Watergate-related cases. Wound up having also Iran-Contra. He had the Oliver North case, but I wasn't his law clerk. I would stop by chambers and talk to him many times about it. But by the time I left, the Watergate break-in had not occurred.

PROF. CAMPBELL: Right. Okay. In the Pentagon Papers case, who represented the government?

MR. JEFFRESS: The Justice Department. They were assisted by the State Department. There was a lawyer named Fred Buzhardt, who I think was Assistant General Counsel at the Defense Department. So it was a number of different agencies. Joe Hannon, who later became a superior court judge, was head of the Civil Division of the U.S. Attorney's Office. He actually came to file the complaint. But they were all government lawyers. I'm trying to think who represented the *Post.* Rogers and Wells? It's all public now, but I can't remember the names of the lawyers. But they did a good job in forty-eight hours.

There was an incident I remember at Judge Gesell's home. The courthouse cooling system was being renovated and so we couldn't go to the courthouse. So he had all the lawyers

at his home on Sunday morning. He had asked that the government show him portions of the papers that they felt were most highly sensitive. So they brought an envelope which was triple sealed and top secret, SCI, and all this sort of thing. He said, "Just leave it here and I'll read it. It will be ready tomorrow." " Well, we can't leave that here, you can't keep that, that's top secret" and so forth. He said, "Well, I'm going to put it under the sofa. That's the safest place in Washington for one of these things." And they backed off and let him keep it. (both chuckle) I never got to read it. I didn't have a security clearance.

PROF. CAMPBELL: Okay, that was going to be my next question. That's a great story. So your next experience was clerking for Justice Potter Stewart. How did you get that clerkship?

MR. JEFFRESS: Well, I had been editor-in-chief of the *Yale Law Journal*. Potter Stewart normally picked at least one, and many times two, of his clerks from Yale. I don't know how frankly he had—I don't think I even applied. No, I think I had applied. I think I applied to him and Justice White and Justice Marshall. But anyway, he called up Judge Gesell to ask about me, and Judge Gesell gave a—. This was like September, so I hadn't been there long. But he asked me over to interview the next day. I went over and interviewed and he offered me the job on the spot, and I took it. While I was interviewing with him, Justice White had called Judge Gesell and he said, well I think he's already taken. (both chuckle)

PROF. CAMPBELL: Now who were your co-clerks?

MR. JEFFRESS: Ben Heineman, who was also from Yale, who I knew very well. Went on to become general counsel of General Electric. A very good person. Richard Parker went on to become a professor of criminal law at Harvard Law School. At that time, we only had three,

although there were people who clerked for senior justices who would come help out from time to time.

PROF. CAMPBELL: How was the responsibility divided up within chambers? What was your role as a law clerk?

MR. JEFFRESS: At that time, Justice Stewart had his law clerks review every single cert petition.

PROF. CAMPBELL: There was no pool then?

MR. JEFFRESS: No, there was no pool. Or if there was a pool, it was only like three justices who participated in it. But Justice Stewart had his law clerks review every single petition. There were at that time maybe 3,000 or 4,000 petitions a year. I thought it was a really good system. You got to the point where, you know, two-thirds of them are frivolous. All Justice Stewart expected was a memo saying criminal case, search issue, fact question, deny. That would be enough for him, okay. And you got to know what he wanted and what he thought was interesting or certworthy. Maybe I would spend twenty minutes on a cert petition like that.

There would be others that I might spend a whole day on, that really were complex. And also, when you had six to nine chambers, each one doing an independent review, there were petitions—handwritten petitions, IFP [*in forma pauperis*] petitions—that some clerk got interested in and started reading the record and said, "you know, this guy's got a point." There were a handful, maybe four to six cases, that either got granted or got summarily reversed just based on the cert petition, where the court below had failed to read the record or made some

finding which was directly contradicted by the record, or something like that. So I thought that was a really healthy system.

That's the cert petitions. And then, when the argument calendar came out— they would have an argument calendar come out for two weeks, ten to twelve cases each week for two weeks running. They heard a lot more cases back then than they hear today. When the argument calendar came out, Richard and Ben and I would hold a draft to see who took responsibility for each case. What we would do is draw straws, and one of us would get first choice, one get second choice, and one would get third choice. And then the guy that had third choice would get fourth and so on. You selected the cases that you wanted. By the time you got to the end you had *Port of Portland v. United States* [408 U.S. 811 (1972)], which was a direct appeal to the Supreme Court from some decision about allocation of rail lines in the port of Portland. All of us felt, gosh I hope Justice Stewart doesn't get assigned this opinion. (laughter) We would have to write it. We weren't sure how it would come out, but it was clear it was going to be nine to nothing because nobody was going to write a concurring or dissenting opinion.

Clerking at the Supreme Court has a lot of things that are educational and interesting. One part of it is reading through all those cert petitions. By the time you leave, you have a good idea of what the cutting issues are in every area of the law, whether it's patent law, antitrust, criminal law, jurisdiction, and what have you. It's invaluable. I'm sure you could go do that yourself, but I probably wouldn't have the self-discipline to do it if I hadn't had that job.

PROF. CAMPBELL: So what about Justice Stewart? What was your relationship like with him?

MR. JEFFRESS: It was excellent. He was a very fine lawyer. He said one time to me, "Look, I don't want to be known for having any particular ideology. I want it to be known that I was a first-class lawyer." And he was, he really was. He wrote some of his own opinions. I remember he had one opinion, I won't mention the case, but there was an opinion on a criminal procedure issue where he knew all his law clerks disagreed with his position. He said I'm going to write this myself and he did. It was an excellent opinion.

When his law clerks wrote opinions, he often heavily edited them. He was a good craftsman and a very smart guy and a fundamentally nice person. I remember he had three law clerks a year. He was on the bench from 1958, and here I was in 1972. He would have reunions of law clerks that were well-attended. But he would forbid his clerks and secretaries who organized the event from preparing name tags. He was very proud of the fact that he not only remembered all his law clerks, he remembered their spouses, called them all by name, remembered their children and what they were doing. He was a very, very nice person and good person to work for.

PROF. CAMPBELL: Did you ever have any interactions with him outside the office setting?

MR. JEFFRESS. I would stop in every now and then just to say hi. We talked about some issues. We had the annual law clerks reunion. I would see him there. I had interaction with Justice Powell. I had known Justice Powell from Richmond where I grew up. He grew up in Richmond, and he was a trustee of Washington and Lee where I went to college. So I knew him, and he was appointed to the Court my year, I think January, maybe February, that he took his seat.

He was a friend. I had a lot of interaction with Justice Powell in later years. He got me to represent his bailiff, who had a little problem with a drunken driving charge; two or three other cases. I represented a seamstress at the Supreme Court in a claim that we settled. I used to stop by and talk to him as well. He was also a very, very nice man, an excellent justice I thought.

One thing about that year at the Supreme Court that made it particularly interesting was over the summer, both Justice Black and Justice Harlan died. In replacing Justice Fortas a year earlier, President Nixon set out to find nominees who were Republicans, who were under sixty, and there just weren't that many of them, and who were judges—a Republican judge under sixty years old. And the first person he landed on was the Fourth Circuit—

PROF. CAMPBELL: Carswell?

MR. JEFFRESS: No, Carswell was second. I'll come to him. Haynsworth, Clement Haynsworth. Clement Haynsworth, for reasons that I can't fully recall, proved unacceptable. It was obvious that he was not going to be confirmed in the Senate. And I think Nixon was really—people thought when the Haynsworth nomination had to be withdrawn, that he just out of pique nominated Harrold Carswell, who was about the least qualified person ever nominated for the Supreme Court. But other people said no, it wasn't really pique. If you make your qualifications a Republican judge under 60, there were only a handful of them. Carswell was one. That, of course, went down in flames very quickly. Finally he found Harry Blackmun.

So in 1971, [President Nixon] appointed two very well-qualified people, [William] Rehnquist and Lewis Powell. Rehnquist did not meet his criteria of being a judge, and Powell

didn't meet his criteria of being under sixty. But at least he found some very well-qualified people. They passed the Senate in no time and they took office in, I think it was January.

What had happened was that in the fall, the Court had heard argument in the abortion case [*Roe v. Wade,* 410 U.S. 113 (1973)] to a seven-person court. Probably Chief Justice Burger thought this case will be unanimous, not going to be a big problem, no reason to wait until we have nine justices. But it turned out, they took a vote in chambers, and that's not the way it was at all. And when they got to the end of the term, everybody, I think, and Justice Stewart agreed with this, felt that this is a case where if it's going to be close, much less invalidate the abortion laws, it ought to be a nine-person court. So they re-listed it for argument the next year, and it was decided the following year. So that was one big case.

PROF. CAMPBELL: So you were there the first time it was argued but not the second time?

MR. JEFFRESS: Right. Wasn't decided my term. It was decided the next term. The death penalty cases—when I became a law clerk, the Supreme Court had stayed all death sentences since I believe 1967 or '68, for a case that was decided having to do with equal protection. They decided the death penalty was not invalid as a denial of equal protection. At the time they decided that, there were probably three hundred or more people scheduled to die on Death Row.

But there was another cert petition—the first one was *Aikens v. California*—that raised the due process Eighth Amendment cruel and unusual punishment issue. They decided to grant cert on that and continue the stay of the executions. So when you had a backlog of almost four

hundred people scheduled to be slaughtered if the Court upholds the death penalty, that puts some pressure on the Court to knock it down. And sure enough, they did.

That case, *Aikens v. California,* [406 U.S. 813 (1972)] was dismissed because I think Aiken either died or had his sentence commuted, I forget which. And *Furman v. Georgia* [408 U.S. 238 (1972)] became the lead case. The Court waited and argued that case when they had nine members. It was argued right after Rehnquist and Powell came, and the Court decided, as you know, to invalidate all death sentences as imposed, but not to find that it was *per se* cruel and unusual. So, that avoided the execution of all these people on Death Row. I thought at the time, wrongly, that that would put an end to the death penalty. I didn't think it had the popular support that it turns out it did have. To my surprise, most legislatures went on to pass revised statutes providing standards, and those survived muster.

PROF. CAMPBELL: Now did Justice Stewart write the opinion or a concurrence in that case?

MR. JEFFRESS: No, there was one short *per curiam* for the Court, and then each justice—two of them may have joined together in some opinions—but as I recall, there were at least five or six opinions, separate opinions, and maybe nine. No, there wasn't nine; nine was Pentagon Papers. I forget how many opinions, but there were a lot of separate opinions and one short *per curiam*.

PROF. CAMPBELL: Okay. He wrote a concurrence. So there were a number of cases that were re-argued. Do you remember any others?

MR. JEFFRESS: The abortion case is the only one I remember being re-argued. Because others they had held if they knew they were controversial. They didn't' argue them until they had a full court.

PROF. CAMPBELL: Are there any other cases that were particularly memorable from that term that you worked on?

MR. JEFFRESS: There was a case in which Justice Stewart wrote a—did it wind up being a dissenting opinion or a concurring opinion [it was a dissenting opinion]—but it was the reporter's privilege case, *Branzburg v. Hayes*, [408 U.S. 665 (1972)]. I think Caldwell was the name of the reporter. But anyway, Justice Stewart was a very strong supporter of the First Amendment. He used to say, if it was one of these right-to-know type of cases, he would uniformly be in favor of the government. He said the First Amendment is not a Freedom of Information Act. But when faced with a question of freedom of speech, he would uniformly come down on the side of the freedom. And the reporter's privilege was sort of a combination of those. He wrote a pretty well-received, reasoned separate opinion in *Branzburg v. Hayes.* That was an interesting case decided that term.

PROF. CAMPBELL: Would he have written his own dissent or would that be something that—

MR. JEFFRESS: Ben Heineman worked with him, but they worked together on it. If there was an opinion over his name, it definitely represented his thinking and not his law clerks.

PROF. CAMPBELL: Did he encourage you to present your own views and then debate them?

MR. JEFFRESS: Oh absolutely. We would in advance of every argument—I told you how the law clerks would divide up the cases—and we would all meet with the Justice and talk about each case. He would ask questions and we would give opinions. They were great discussions because there was nothing you couldn't say to him. I mean, even if you knew he disagreed, I would tell him that I disagreed.

PROF. CAMPBELL: Did you write bench memos for the cases that were going to be argued?

MR. JEFFRESS: He didn't want bench memos. He wanted you to study the briefs and everything and take notes, and he wanted to sit down and talk about it. And we would spend at least a full afternoon, sometimes a full day, before the argument session, talking about the cases. Then after the arguments sometimes, we would talk about them again before conference.

PROF. CAMPBELL: When you say the full session, you're talking about the two-week—

MR. JEFFRESS: Two-week arguments.

PROF. CAMPBELL: So you would talk about all of them at the beginning or you would talk about it the day before the case would be argued?

MR. JEFFRESS: I know we would talk about more than two or three cases at a time. So I think we did it before. We might have done it twice. There were two weeks of arguments. We might have done it for the first week's cases and then again for the second week's cases. Ben or Richard might remember better than me. All I know is, when we would go back and talk to him, there would be a number of cases that we would talk about.

PROF. CAMPBELL: And did he tend to know how he was leaning before the argument or did he wait to see—?

MR. JEFFRESS: In at least half to two-thirds of the cases. He had been there a long time; he had seen similar cases; he had taken positions on issues in the law. When you had a case like that, you would look at how he had ruled, and you would try to see whether what he had said or positions he had taken applied or might not apply to the facts of this particular case.

He was a guy who believed in—what's the word—consistency, I guess is the best word, in the court. Even though he had dissented in most of the Warren-era's criminal procedure cases, he was not about to overrule *Miranda* [*v. Arizona*, 348 U.S. 436 (1966)] or overrule *Wade* or any of these cases that the Warren Court had decided because he felt like the Court should not reflect the election returns, and changes of personnel should not lead to tremendous changes in the law of the Supreme Court. So, even though he dissented in the original cases, he would uniformly apply those cases when later issues came up to sustain the precedent.

PROF. CAMPBELL: I took a quick look at the term. *Sierra Club v. Morton*, [405 U.S. 727 (1972)] were you working on that?

MR. JEFFRESS: I did. I worked on that opinion actually. That was a standing issue; lots of controversy among the law clerks. Justice Stewart felt, look, you shouldn't be able to sit in front of the television, see something you don't like, and file a law suit to change it. Law suits are about something more concrete than that. And Sierra Club, if they had chosen to assert personal interests of their members, I think he would have said they do have standing. Somebody that's visited the Tuolumne Valley, somebody that regularly fishes or camps there, or

even hikes there, who would say that this is interfering with my enjoyment of the environment. He would have said, I'm confident, that there is standing. But the Sierra Club, for one reason or another, just decided no, we're going to put this thing to rest. The Sierra Club, as an organization, has standing just because these are issues that we believe in, lobby for, promote and so forth. He said, "I'm sorry but that's not standing." So, that's why the case came out as it did. And I thought his opinion was correct. It did not curtail those law suits; it just meant that people had to come in with real plaintiffs.

PROF. CAMPBELL: Would you go to hear the oral arguments?

MR. JEFFRESS: Yes. Well, many times. Not every single one. But if I had a case assigned to me, I normally would go.

PROF. CAMPBELL: And then they would have the conference at the end of the two weeks?

MR. JEFFRESS: At the end of the two weeks.

PROF. CAMPBELL: And then that's when the assignments would be made as to—

MR. JEFFRESS: As to who was going to write the opinion.

PROF. CAMPBELL: Would he talk to you about how the vote came out so that—

MR. JEFFRESS: Oh yeah.

PROF. CAMPBELL: And did you try to write opinions that you thought might get a majority or to get as many votes as possible? I'm just wondering how that dynamic shaped the writing of the opinions.

MR. JEFFRESS: Very much. You know, some Justices didn't do it as much. Justice Douglas was famous; he could care less what anybody else thought. But Justice Stewart very much wanted to build a consensus. Sometimes, if he got an opinion that was written by some other Justice that he thought was just poor, or that said some things that he couldn't say, he would circulate a concurrence. And if the Justice modified the opinion, he would withdraw the concurrence.

He was a consensus builder. Putting aside possibly Justice Douglas, I think he got along with all the justices; certainly Brennan and White; and became fast friends with Rehnquist and Powell, when they came on the Court. So there was a lot of consensus building. Sometimes rather than write a concurrence or something, he just sent a note. Other justices would send notes. Get a note from Justice Brennan—"I read your very fine opinion."—it was always very fine opinion (laughter)—"draft and such and such. I wonder if you would consider—." It was all very polite and professional. There was a lot of consensus building that went on.

Chief Justice Burger was not a great consensus builder. When I came to the Court, he and Blackmun were known as the "Minnesota Twins." Blackmun always voted with Chief Justice Burger. That changed with the abortion case. Even though Burger concurred with Blackmun's opinion in that case, he didn't really believe it. I think from that time on, there was a real split between those two. But Chief Justice Burger, I didn't think was the kind of consensus builder that Warren was or, for that matter, that Rehnquist was later.

There were other people on the Court who were. Brennan was. I remember Brennan talked to the law clerks one time. He said when he was first on the Court, if there was a decision that he strongly disagreed with, he would write a dissent that talked about how awful the

majority opinion was. He said he learned after a few years that all he was doing was making it worse. Lower court judges read the opinion; they see he is casting the majority opinion in the worst light; and that it has a sweeping ill effect. He said he then began to write his dissents pointing out the narrowness of the holding. (chuckles). Instead of talking in apocalyptic terms about how bad it was, he would just talk about how narrow it was.

PROF. CAMPBELL: I've seen some of those opinions; that's interesting. Now were the obscenity cases argued when you were there? *Miller* [*v. California*, 413 U.S. 15 (1973)] and those cases?

MR. JEFFRESS: No, *Miller* had already been decided—no, I'm sorry, *Redrup* had been decided. *Miller* was not agued my term. There was a case—I mean, this is just a ludicrous period of Supreme Court history—but there was a case called *Redrup v. New York*, [386 U.S. 767 (1967)]. *Redrup v. New York* said that in any obscenity case, the Supreme Court would review *de novo* whether the materials were obscene under the First Amendment. Crazy case. What that led to is, at least the law clerks, and quite often the justices, would go down to this room in the basement of the Supreme Court and look at these dirty movies in order to make their judgment under *Redrup*. And our cert memo would be—I would say: obscenity question, I've looked at the movie, doesn't fit your standards, *Redrup*. And what the Court would do is *per curiam,* it's reversed and remanded under *Redrup v. New York.*

And some of the Justices went. Stewart went occasionally, if we would tell him it's a close question. I remember one time Justice Powell, who is just the world's most elegant gentleman, came down. I looked over at him, and I thought he was turning purple. (laughter) I think that was the last one he thought of going to. (laughter) But that was the state of obscenity

law at that time. I think *Miller*— it wasn't decided my term—I think it may have been decided the next term. Finally they got rid of *Redrup,* and I forget exactly when.

PROF. CAMPBELL: Any memorable films that you saw?

MR. JEFFRESS: Oh Lord. Put them out of my mind.

PROF. CAMPBELL: I wanted to go back. We were talking about how the Justices would send notes to each other and try to build consensus. Did the clerks also play a role in that? Were you like sort-of messengers?

MR. JEFFRESS: Yeah. Paul Gewirtz was Justice Marshall's clerk and he found this IFP [*in forma pauperis*] petition, and he said there is something wrong with this case. He would go talk to other law clerks. The case wound up, I think being summarily reversed. And the law clerks did. We would argue vociferously about issues and opinions. I don't know that any of it ever had any effect on any Justice's vote, but it certainly was an exciting time for the law clerks.

PROF. CAMPBELL: There is one case I have some personal curiosity about. I think it was argued your term, and you may or may not remember it. The *Midwest Video* case involving the FCC and cable television rules?

MR. JEFFRESS: I don't remember it.

AC: Okay.

MR. JEFFRESS: I remember Curt Flood [*Flood v. Kuhn***,** 407 U.S. 258 (1972)] was argued my term. It was sort of a funny case, but just upheld baseball's antitrust exemption.

PROF. CAMPBELL: How much time do you have?

MR. JEFFRESS: Maybe another fifteen minutes.

PROF. CAMPBELL: I know you have other things to do. So is there anything else that you want to mention about your clerkship, or either of your clerkships for that matter?

MR. JEFFRESS: No, I think nothing else at the moment. I will tell you that being a Supreme Court law clerk has a lot of advantages. One of them is what I mentioned—by the time you finish you know what all the cutting issues are in every area of the law. And another is it gives you a feeling of confidence. You don't mind, you're not terrified to go up and argue a case. I will mention, I'm getting ahead of myself I'm sure, but it wasn't that long after I left the Court, 1977 or '78, that I argued my first and only case in the United States Supreme Court.

PROF. CAMPBELL: Oh, that was your only one?

MR. JEFFRESS: That was on behalf of Richard Nixon. Edward Bennett Williams was on the other side. I had a great time. I thoroughly enjoyed it. But I remember I had all my family in the audience. Since I was the petitioner, I gave the first argument. I started out with something about the facts and procedural history. I was about a minute into my argument when Justice Stewart interrupted and asked a question. It was a question that I knew the answer to, and more important, it was a question that he knew I knew the answer to. It was just to break the ice, you know. (chuckles)

PROF. CAMPBELL: Well, that was nice.

MR. JEFFRESS: And then, sometime during the argument, Justice White, who I knew pretty well when I was at the Court— he was famous in oral argument for sort of grilling counsel—and he with a smile was asking me some questions. At one point he leaned back and

said, “I don’t think you’ve answered the question counsel.” And Justice Stewart leaned forward and said, “Yes he has.” (laughter) I thought: Let’s take a poll. Who did this fella clerk for. But it was an exciting time. Like I say, I felt perfectly comfortable there. I’m sure had I not clerked at the Supreme Court, the opposite would have been true. I was what, thirty-two years old, something like that.

PROF. CAMPBELL: Well do you want to talk more about that case now or would you like to talk about when you started at law firm at Miller and Cassidy?

MR. JEFFRESS: Actually maybe we ought to break. Then I’ll start with the Miller Cassidy era. There are a lot of things I want to say about the firm and about the practice back in those days. So maybe we’ll do that next time.

PROF. CAMPBELL: Okay great, that’s fabulous. [END RECORDING]