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Interview with

Abe Krash

Conducted by Victor Geminiani

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VG: This is the oral history of Abe Krash. The Interviewer is Victor Geminiani. This interview will concentrate primarily on Mr. Krash's critical contributions to the case of *Gideon v. Wainwright* decided on March 18, 1963 by the United States Supreme Court. The interview is being conducted in the law offices of Covington and Burling in Washington, D.C. on March 17, 1993, the day before the 30th anniversary of the decision in that landmark case. The oral history is being conducted also as part of the oral history collection of the National Equal Justice Library. Thank you, Mr. Krash, very much for making some time available on this rainy Washington afternoon.

AK: Thank you it's very nice to be here.

VG: Could you tell us a little about your background before you became associated with Arnold and Porter.

AK: Well I grew up in Wyoming, in Cheyenne. When I was finishing high school, a high school principal told me go east young man. I had had an uncle who had gone to the University of Chicago, so I without knowing much about the University of Chicago applied, and I was admitted to the college of the University of Chicago. It was just about the end of the war, World War II, and I was then 17. I went to the college at the University of Chicago it was the time of Robert Maynard Hutchins and was a very exciting time to be at the University of Chicago, then I went to the

University of Chicago Law School. After I graduated from the University of Chicago Law School. I was a graduate fellow at the Yale Law School for a year doing graduate work. In 1950 I came to Washington to look for a job. I went to work as a young associate in the law firm of Raoul Berger who subsequently became a distinguished constitutional law scholar and authority. He had a small firm, and I worked with him for a couple of years. Following the election of 1952, when President Eisenhower was elected, Raoul Berger had decided that he was not going to continue his firm and I was out on the street with a lot of other people. And one day I received a call from Patricia Wald who was until recently the chief judge of the United States Court of Appeals of the D.C. Circuit. She was someone I had known at Yale Law School, and she told me that she wanted to know if I would be willing to come over to the firm that was then Arnold, Fortas and Porter on a temporary basis to work while she was going to have her first child, and I did. I came over there, and I saw Abe Fortas and another partner by the name of Bill McGovern and they hired me on a temporary basis really for six months to work until presumably Pat would come back. Pat Wald decided she didn't want to come back, and she wanted to raise a family. I was invited really within the first six months; I was invited to stay on as an associate which I was extremely delighted to do to say the least.

VG: This was 1953?

AK: This was in ... I came there in March of 1953 right, right about now as a matter of fact.

VG: Can you tell me how large the firm was in those days.

AK: I was the 12th lawyer, and we were all in a house on the corner of 19th and N Streets in Washington, DC the entire firm. It was a very small firm. We had lunch all together every month.

VG: What work were you initially assigned?

AK: I was originally brought to the firm to work on an antitrust case which Abe Fortas was in charge of. We were representing the Lever Brothers Company in a great monopoly case, called the soap monopoly case. I was brought in to be the young associate working on that case.

VG: Arnold and Porter has a national reputation for its long and historical commitment to pro bono activities. Do you know anything about the reason that this philosophy in that great firm has developed?

AK: Yes indeed. It really grew up out of I would say the idea that I think Abe Fortas primarily had but also Judge Arnold certainly and Paul Porter shared. The idea was that lawyers were not simply ... law was not simply a way of making a living, but that you're not just a gun for hire, but that lawyers had a public responsibility over and above being practitioners

making a living. Fortas believed that very deeply and preached that to the young people and practiced it. Arnold also felt very strongly the same way. We became involved, the firm is that is, became involved during the late 40s, at the time of the loyalty security cases. When government employees were being forced to leave the government, being charged with being disloyal or a security risk, without a hearing, or with a hearing which was a sham. They were desperately seeking representation in these cases, and Arnold, Fortas and Porter undertook to handle those cases when a lot of lawyers weren't willing to do it. Some of them became very famous cases. It took a great deal of courage on the part of those three men to do that because some clients would shun lawyers who did that, but they were determined to provide representation to people who they felt really needed it. They believed deeply in freedom of speech and freedom of association, and they were profoundly offended by what they thought was the unfairness of the government loyalty security program. We represented a number of employees several of the cases went to the Supreme Court. That was really, I think, the origins of the idea that the law firm had a responsibility over and above just the day to day practice of law. It was expected that we would do things in the community, that was in the air, that was the idea, and we were all encouraged very much to do that. Various people taught. The firm

always had connections with various law schools where people had gone to teach. The idea, that being involved in the community and doing pro bono things, was very much a part of the ethos of Arnold, Fortas and Porter.

VG: In 1962 you participated in preparing the case for the Supreme of Clarence Earl Gideon brought to reverse his conviction in Florida for breaking and entering within intent to commit a misdemeanor. He received a five-year sentence for that offense in his trial. Can you describe how you first became involved in that case?

AK: Yes. What happened was that the Supreme Court had appointed Abe Fortas as Gideon's counsel. Obviously the assignment was to write a brief on Gideon's behalf in the Supreme Court. One day shortly after he was appointed, Fortas called me to his office, and said "I have been appointed as counsel in this case and I would very much like to have you work with me on it." I was a young partner, and that was a command performance. I was delighted to have that opportunity, so I did.

VG: Do you know why Abe Fortas and Arnold and Porter in particular was asked to represent Mister Gideon by the Supreme Court?

AK: No I don't, but let me say Fortas, you have to recall that Fortas was, at that point one of the most widely respected lawyers in Washington. He was known. Certainly he knew personally a number of the Justices on

the Court. It was clear when the Supreme Court granted certiorari, agreed to review the Gideon case, they did two very important things. First, was they issued an order at the time they agreed to review it saying counsel are requested to brief the question of whether or not Betz against Brady should be overruled. That was a clear cut signal that something very significant was about to happen. Secondly, they appointed Fortas who, they did not appoint an unknown, they appointed a very distinguished lawyer. It was a very strong signal that important events were in the course of taking place. Why they happened to choose Abe Fortas rather than someone else I don't have any idea at all. I don't know.

VG: Do you have any idea as to why Abe Fortas agreed to take the case?

AK: Well, I think he first of all to be asked by the Supreme Court was in itself was a great distinction. No one who was, I just do not think that anyone who was, a member of the Supreme Court bar who was asked to represent someone would not respect the Court's request. In fact, he would feel honored that he was asked to do that, number one. I think, secondly that Fortas must have felt, I suspect, that it was an enormously challenging and exciting assignment. It, I'm sure, stirred his imagination and all the things in him that were a great advocate to try to function in this case.

VG: Do you have any strong memories of Abe Fortas in general?

AK: I do indeed. I worked very closely with him from the time I came to the law firm in 1953 until he went to the Supreme Court in the summer of 1965. I saw him very rarely after that. But we worked very closely on a number of extremely interesting and exciting matters. He asked me to, shortly after I came to the firm he was appointed by the United States Court of Appeals as the lawyer for the appellant in the *Durham* case, this was in 1953 I believe. That case involved the question of what should be the appropriate standard of criminal responsibility - essentially the question is what should be the standard for the insanity defense. And the standard at that time was a standard which had been adopted in England in 1843, the so called right and wrong test. It had nothing to do - it was irrelevant really with modern psychiatry. Fortas had been very much interested in psychiatry, and knew a number of the psychiatrists in Washington. He was extremely interested in seeing if there could be reform in this area. He and I wrote, he invited me to write the first draft of the brief for him, and we worked very closely on the case which became a celebrated decision. The *Durham* decision really was the revolutionary step in the whole law of criminal responsibility, and it ignited the debate about the criminal responsibility which has gone on to this day as a matter of fact. So I started to work with

him on that occasion. He and I then, he was the senior partner, one of the three senior partners, and he invited me over the years to work with him. I worked with him on many of his client matters. I helped him write briefs, I helped him write speeches, I went with him to appearances he made in court. I went with him to meetings with clients, traveled with him, and I did have the opportunity to work with him. You asked me if I had any memories of him. I will say, that how long has it been since I've worked with him, it's been since 1965, so it's been more than 27 years, almost 30 years, there is rarely a week that goes by when I'm not involved in something, that I'm doing, where I won't hear his voice inside of me saying well you might have considered or what about this or think about that. He was a marvelous lawyer. I would say he was, measured by any standard Abe Fortas was, one of the best lawyers of his generation. I don't think there is any doubt about that and he was a very, very exceptionally able man, and a man of great energy, of great force, a superb draftsman of documents, an absolutely top flight oral advocate, had great skills and abilities in giving advice, clients just relied on him tremendously. He was far ranging, worked in many different fields of the law and one could learn a great deal by working with him and I did. I count him as one of my mentors and he taught me enormously, and I will always remember him.

VG: The *Gideon* case had to do with the right of counsel in criminal issues. Could you tell me the state of the law the best you recall it in the early 1960s when the case came up before the Supreme Court?

AK: Well you have to distinguish first of all between what the situation in the federal courts and what was the situation in the states courts. In the federal courts the rule had been established in 1938, in a case called *Johnson against Cerpst*. The rule became established that in all federal criminal prosecutions the accused was entitled under the Sixth Amendment to the assistance of counsel, in any serious criminal case. If a defendant was indigent the government had to provide him a lawyer. That was the situation in the federal courts. The situation in the state courts was quite different. There the situation was that in a case involving the death penalty - a capital offense, the states were obliged to provide a lawyer. Those cases went back to the famous *Scottsboro Brothers* case, the *Powell* against Alabama in the 1930s, I believe. In any event, the rule had devolved by the 1960s that in capital cases in the state courts that due process of law under the 14th amendment required the appointment of counsel. But in all other felonies, that is in cases involving serious felonies other than capital offenses, the rule was that, the rule of constitutional law was that, the states were obliged to provide a lawyer only if there were special circumstances such that a trial

without a lawyer would be unjust or unfair. The list of special circumstances kept growing longer and longer. For example, if the defendant was a young offender, or he was mentally ill, or the offense was a very complicated one. Those were deemed to be special circumstances. So you had case after case coming to the Supreme Court involving what was a special circumstance. Now in practice, in all but five states as a matter of practice, the states, all the states except for five, did provide for a lawyer in all felony cases. There were only five laggard states as I recall Alabama, Mississippi, Florida and North and South Carolina. I think were the only five states which didn't make provision for the appointment of counsel. So nevertheless there were a substantial number of cases in which, obviously in those states where, you didn't get a lawyer. But all the other states the right to counsel was being recognized in varying degrees anyway.

VG: Clarence Gideon was tried in Florida, a state that did not provide him right to counsel. As you read the record in that case did it indicate that any special circumstances were occurring in that case?

AK: No, I thought that was one of the things that troubled Fortas, because, and troubled me and the others that were working on the case because it was a garden variety offense, he was charged with breaking into, breaking and entering a building which, was it, was felony, but none of the

things that the Court had identified as special circumstances seemed to be there. Our mission of course, we were representing Gideon so our mission, was to get his conviction overturned, but it was very difficult to see that there were special circumstances.

VG: Can you tell me a little bit, if you know, about the background of Clarence Gideon.

AK: Really I know very little. He wrote a long letter to Fortas and subsequently of course I've read Tony Lewis's book and other things. My impression my sense was he was basically he was a drifter. He was a bit of a con man, actually I think. He was a loner. I don't know what his employment record or background. I think at the time of the case he was in his late 40s or early 50s. He was not a distinguished citizen to say the least.

VG: As you analyze the case can you tell me what the key elements were that were developing in terms of your preparation for the case, what elements in terms of legal positions or strategies you all developed.

AK: Well I think there were, Fortas, you have to go back a minute, Victor, and let me say that first of all Fortas' objective was to win the case. But one of his overriding feelings was he wanted to establish the rule that an accused person was entitled to a lawyer in every court in this country when there was a serious offense. He wanted to get that principle planted. He felt

that there were two great problems that we had to deal with. The first was to convince the Court that establishing a rule of constitutional law requiring a lawyer in every case would not be a radical thing to do. And we were able for the reasons I just spoke to you when you just asked me a few minutes ago and I was describing the situation as to the right to counsel. It was clear that as a practical matter the right to counsel existed, well it existed, in the federal courts and in most states, so you're only talking about five laggard states. So getting the Court to go, even in those states in a capital case you had to provide a lawyer, so it was an evolutionary step, and he wanted us to be able to demonstrate that. We surveyed the states, and there were already a lot of analyses of what the states were doing available to us, so we were able, I think quite quickly, to make that point. The other point was a more complicated and subtle point and that was the question of federalism. And the problem in a nutshell was this. There was as you probably recall, Victor, an ongoing debate in the Supreme Court at that time about the scope of the 14th amendment, specifically whether or not it covered all or only some of the Bill of Rights. Some of the Bill of Rights, the way lawyers would talk about it they said, had been incorporated into the due process clause of the 14th amendment, some had not. The problem that Fortas confronted was that he wanted to convince those justices who were opposed to expanding the

scope of the due process clause to include more of the Bill of Rights who were reluctant to do so because of respect for federalism. The problem he had was how do I convince those justices, to do that, who are respectful of states rights and are not going to want to impose on the states the duty of providing a lawyer under the due process clause. And the way he did that was to, I would say the great insight he had was, that the special circumstances test was in itself something that those justices or people who were concerned about federalism should not be willing to embrace. They should as a matter of fact, the point he was trying to make was that that was a bad thing for federalism and it was bad because he said look what happens. You will get a trial in a state court. There will be a conviction, and then the individual being convicted will file a petition. After his various appeals he'll file a petition for habeas corpus in a federal court, and the federal court will be called upon to review the judgment of the state court. The federal judge does it under this vague special circumstances test, a very vague test and he summed it all up in a couple Latin phrases. He said this is review, he says it's ad hoc and post facto, and what he meant by that was it's review case by case under a vague standard after the fact. He said what could be more of an irritant to state court judges than to have federal judges reviewing their convictions case by case under a vague standard like this. So those people

he said who were in favor of federalism shouldn't favor it. It was a brilliant insight really and grasp of the whole situation and I think it played a very key role in Justice Harlan's thinking on the subject. So those were the two I think great points. I don't think there is any question, nobody seriously disputed that a lawyer was an extremely important person to have on one's side, but the problem was how to deal with this constitutional issue that, you know, divided the Court at that time.

VG: Do you have any insight of the essential elements of the case from the state of Florida's perspective what was their argument?

AK: Well obviously they were, I think, relying, as I recall it, primarily, on the notion that primarily, on *Betz* and on the idea that the state should not be obliged as a matter of constitutional law to provide counsel, that this shouldn't be made a constitutional imperative. I think that was basically as I recall their position. And the precedent was there; I mean on their side, they had *Betz* against *Brady* on their side.

VG: One of the amazing things that happened in this case is that 22 states ended up signing onto an amicus curiae in support of your position against the state of Florida.

AK: Yes, that was an extraordinary thing to have that many states come in and ask bear in mind what they were asking was that a

constitutional limitation be imposed on the states. In the years that have followed I have come to have the impression that that movement was led to a significant extent by Walter Mondale

VG: He was the Attorney...

AK: Yes, he was at that time the Attorney General in Minnesota, and I think he was the spearhead of that. In any event 22 states did join in an amicus brief really on Gideon's side.

VG: And only three filed in support of Florida.

AK: I didn't know that.

VG: North Carolina, Alabama and of course Florida. Was that a surprise to you by the way did you know that there was this movement among many states to in fact support your position by signing on to the amicus brief?

AK: I'm sure I must have heard it at the time, but I don't have a vivid memory of it. I do remember something about it but I don't have much of a memory of that.

VG: Did you have an opportunity to attend the oral argument in the case?

AK: No, at the time that the oral argument was set I had gone to New York with one of my partners, Bill McGovern, to try an important antitrust

case for Lever Brothers, and I to my great regret I was in court trying that case at the time when Abe Fortas was on his feet arguing in the Supreme Court in *Gideon*.

VG: Did you hear anything from Mr. Fortas or any others that may have observed?

AK: I heard later, I think I heard later, that it was a stunning argument you know. Obviously I was very interested and people talked about it. As you know, Justice Douglas in his memoirs said that the argument that Fortas made in the *Gideon* case was probably the best argument the best single argument that Douglas heard in all the 36 years he sat on the Supreme Court, so it must have been pretty good.

VG: The *Betz* case had only been decided 20 years ago in 1942. You were trying to reverse a relatively recent precedent of the Court and the Court is loathe to do that in many situations. Did you have an inkling of the winability of this case as you surveyed the justices that would ultimately make the decision?

AK: Well yes. I think first of all the fact that the Court issued the order saying should *Betz v. Brady* be overruled, counsel asked to brief that, was a pretty clear signal that there were certainly a number of justices who wanted it. It took four justices to grant certiorari, that's the rule of four, so it

was clear there were four at least who were obviously favoring doing this. It was also clear from their opinions that you had Justices Black, Douglas, Brennan and the Chief Justice who were likely to go that way. In addition, I think it was reasonably clear that Justice Goldberg would have been on that side. Byron White I believe had just been appointed so I think he was relatively unknown. I think the three justices whose views, one had to be who would certainly, we didn't know how they would come out I would say were Justice Stewart, Justice Clark and above all Justice Harlan. Fortas' objective really in the case was to see if he could get a unanimous Court, if possible. He thought that would give that much greater force and stature to the decision that every person was entitled to a lawyer. So he was, very, trying to pitch his arguments to those judges who he thought might be hesitant to join in that opinion. As I recall it I think, we thought we would win, probably win, get a majority of five but wanted to do more than that.

VG: Do you remember your reaction or the reaction of Abe Fortas when he found out it was unanimous?

AK: Oh, he was delighted. He was tremendously pleased.

VG: Clarence Earl Gideon was then retried in Florida later on. Do you have any idea of what occurred at that trial?

AK: Well, I know he was acquitted, it's been a long time but I remember hearing the accounts that he then had the benefits of a lawyer and had succeeded in getting an acquittal.

VG: Do you have any perspectives or thoughts on the importance of this case on our criminal justice system as it exists today?

AK: Well, that's a good question. I would say that first of all I think it's fair to say that all of the hopes that we had have not been fulfilled. What we didn't realize fully, I think, at that time was that it's not enough to say that you should have a lawyer appointed for you. The question is - is the lawyer appointed competent and experienced. You get effective assistance of counsel that means having both a person who is trained and also having the resources to do those things which a good defense lawyer needs to have at his disposal. He has to hire experts of all kinds and has to be able to hire investigators. So in that sense I think the hopes that we had have not been fulfilled. On the other hand, I think, there is something of very great importance here. I think I would put it this way, that there are you hear now from time to time, there are various critics of the decisions that were handed down by the Court, under the leadership of Chief Justice Warren, during the 50s and 60s. People speak of them as decisions by the Warren Court in the area of criminal law that is cases which upheld the constitutional rights of

accused persons in a variety of cases. Various critics have urged that some of those decisions be overruled or limited or modified in various ways. But I don't hear any responsible voices, or I know of no responsible voices, raised today saying that the *Gideon* case should be overturned. None of these critics that, I know of, of the other decisions say you should overturn the rule that a man is entitled to a lawyer. I think that is a point of enormous significance. In other words what that means, I think, is the *Gideon* case established a principle which I think in this country is almost universally accepted now. There may be some fringe people, but I would say by the responsible views of the legal community, academic community, people who are knowledgeable, everyone agrees, everyone agrees that it's a basic fundamental right to have a lawyer. And I think that the *Gideon* case, that's the source of it and I'm not saying it wasn't in the air but that is the principle that was established by the *Gideon* case. And in that sense I would say that *Gideon* is one of the great landmark cases of American constitutional law in the last fifty years, an enormously important case.

VG: In closing, do you have any final thoughts about your involvement in that particular case? Personal?

AK: Well it was a very exciting moment, enormously, it was deeply satisfying. I had a chance as a young, I was a very young lawyer and to have

worked with a great lawyer. Fortas was a very great lawyer and in an historic case. It's one of those things which I have a lifetime of satisfaction I look back at it with a great deal of satisfaction, and I greatly enjoyed talking about it. It was a most interesting experience. It certainly was.

VG: Mr. Krash, this nation has much to be grateful to you for. You were a central and critical figure in the establishment of one of the most important fundamental fairness and due process issues that we have grappled with as a nation, the right to counsel, and I want to thank you on behalf of the National Equal Justice Library for spending some moments to preserve those memories.

AK: You're very kind and very generous. Actually Abe Fortas really was the architect I was just a young fellow working with him but it was a wonderful experience and it's very nice being here, thank you very much.

VG: Thank you.