



Interviews with
**Michigan Supreme
Court Justices**

INTERVIEW WITH THOMAS GILES KAVANAGH

Sponsored by [Michigan Supreme Court Historical Society](#)

Conducted by Roger F. Lane

November 19-20, 1990

Topic 1: Justice Kavanagh talks about his family history, his father's work with newspapers and the Democratic Party, his schooling, and his first jobs in law firms. He discusses his involvement in the recounts of 1950 and 1952, seeking a Supreme Court nomination in 1955, and running for the newly created Court of Appeals in 1964

Mr. Lane:

This is another tape in the series by the Michigan Supreme Court Historical Society. Today, which is November 19, 1990, the focus is on former Justice Thomas Giles Kavanagh and with him is Roger Lane representing the Historical Society, and we're sitting in the living room of Justice Kavanagh's home in Troy. Justice Kavanagh, the traditional way of starting these things has been to review the early family and professional history of the person who wound up on the Supreme Court, and I'd like to have you start just as though you were in a school exercise, telling where you were born, who your parents were, what kind of home you lived in, how many kids, brothers and sisters. Would you start out in that fashion, and we'll go on from there?

Justice Kavanagh:

Sure. I was born in Bay City, Michigan on August 14, 1917. My father was Giles Kavanagh. My mother was Mary Adeline Washington Kavanagh. My grandfather, both my grandfather John Kavanagh and my grandfather George Washington were active Democrats up in Bay City, had been for many years. My father was a newspaper man and he had worked for the Bay City Times and the then Detroit Journal which is now the Detroit News.

Mr. Lane:

Was he a reporter type newspaper man?

Justice Kavanagh:

Originally, yes. He worked for the Bay City Times when he started out as a reported. He came down to Detroit to work for the Journal, lived in a rooming house with some other reporters.

Mr. Lane:

When was that?

Justice Kavanagh:

In the early 1900's.

Mr. Lane:

Prior to your arrival.

Justice Kavanagh:

Oh, yes. He had some...one of his roommates in this rooming house where all these reporters lived was Clarence Buddington Kelland.

Mr. Lane:

That's interesting.

Justice Kavanagh:

And if I'm not mistaken, Ring Lardner lived there for a while, too.

Mr. Lane:

They were newspaper men in Detroit?

Justice Kavanagh:

Yes. Ring Lardner, of course, if from Niles, but I think he was working in Detroit. But at any rate, my dad and mother were married and living in Detroit and my grandfather wanted my father to come back to Bay City, to bring his daughter back to Bay City so he asked my father to come back and work for him. My grandfather published weekly newspaper, two weekly newspapers actually. One was called the Bay City Democrat and the other was called the Industrial Herald. The Industrial Herald was a union newspaper, and he had a job printing shop in connection with this. So my dad came back and worked for my grandfather until 1924. In the meantime, we were all born. My sister Pauline was the oldest member of our family, born in 1909, I think. My brother George was born in 1911. My sister Maureen was born in 1914. I was born in 1917 and Jack was born in 1920.

Mr. Lane:

That completed the family, five?

Justice Kavanagh:

Yes. There were five of us in the family, three boys and two girls.

Mr. Lane:

You grew up then in Bay City and went to school there?

Justice Kavanagh:

Yes, went through the...well, let's see.

Mr. Lane:

Parochial schools?

Justice Kavanagh:

Yes, parochial schools, St. James School in Bay City. We moved down here in 1928. I was in the fifth grade. I started the fifth grade here.

Mr. Lane:

By "down here", you mean Detroit?

Justice Kavanagh:

Detroit, yes. We moved in actually out by the U. of D. parish. My father had left, he had quit working for my grandfather in 1924. He went into the, oh, you now call it the P.R. business, I guess - public relations, and he worked at that, his own business, for two to three years, and then he was...Ray Canfield was a newspaper man who had been hired by the Democratic State Central Committee as the secretary which was the only full-time paid job of the committee, and Ray Canfield died, and my father was selected to be the secretary of the Democratic State Central Committee just before the 1928 election. That's when we moved down here.

Mr. Lane:

Was he then working for the Detroit News or did that come later? Do I remember that?

Justice Kavanagh:

Later. He worked for the...his only job was for the Democratic State Central Committee from I think it was 1927...yes, probably 1927, and he worked for them through the campaign of 1928 and they ran out of money, and he was working and not getting paid. Having to feed all of us, he decided he'd better go to work for somebody who could pay him. So he worked for the Detroit News, went and became a re-write man for the Detroit News, and this, of course by this time, was when the depression started, and he had so many, had so many people calling on him to get jobs and so forth during the depression that in self-defense, the News gave him a special office so that he could handle his clients.

Mr. Lane:

Along with his job, though, he would remain on the News payroll, right?

Justice Kavanagh:

Oh, sure, he was doing re-writes and so then he was appointed Collector of Internal Revenue. The Democrats, of course, won in 1932.

Mr. Lane:

At that time, during that campaign, was he the leading salaried figure? Was he then getting a salary from the Democratic Party?

Justice Kavanagh:

Oh, no. Oh, no.

Mr. Lane:

But he had the title of what...Secretary of the party or Executive Secretary?

Justice Kavanagh:

No, he resigned, I suppose. I don't recall the formalities of his separation but the party had run out of money, and he worked for several months afterwards without getting any pay.

Mr. Lane:

But he was active in the 1932 election?

Justice Kavanagh:

Oh, sure he was, but he was working for the News.

Mr. Lane:

I see. This other stuff was on the side? The party work was on the side?

Justice Kavanagh:

Oh, of course, yes...sure.

Mr. Lane:

He must have served well to get appointed Collector of Internal Revenue. That was a real prize.

Justice Kavanagh:

Oh, indeed it was, yes. There are a lot of political battles over that, too. He and Bill Comstock were close friends, and Comstock had run for governor in 1930, and my dad had worked hard for him and with him. When he was elected in 1932, he said to my father, "Because you've done so much, anything within my power to give you, you can have". My dad said, "I've got a job with the News, and politics is very insecure. I don't want that. You're only in there for two years". He said, "I hope you're in there for a lot longer, but at any rate, I wouldn't want it". Comstock kept after him and finally he said, "What about a Federal appointment?" My dad said, "Well, that's better than two years, but I still don't really want it". The in and out of it is that they go so much into it and there were so many broken commitments that finally my dad's dander got up and he decided to seek the appointment as collector. Actually, he wanted to be appointed Collector of Customs, and they got into a big mix-up and Al Diebel was appointed Collector of Customs and the national committeeman, Horatio Abbott from Ann Arbor was appointed

Collector of Internal Revenue, or was about to be and they got into such a hassle over it that finally President Roosevelt asked Secretary Morgenthau to come out here. He came out to Michigan, and he reported to the President that as far as he was concerned, he would be very happy to have Giles Kavanagh be the Collector of Internal Revenue but anybody else, he didn't have any interest in. So he was appointed in 1935.

Mr. Lane:

For the people that are unfamiliar with that time and of the circumstances of the depression in 1935, it is worth noting, is it not, that that was a very choice plum.

Justice Kavanagh:

Oh, indeed it was.

Mr. Lane:

...of any employment or patronage job or whatever you want to call it. That was "Mr. Big".

Justice Kavanagh:

Yes, I think it was probably the biggest appointment in terms of salary and the importance of the position of any that the party had to offer.

Mr. Lane:

And in those days...you correct me if I'm wrong, the Collector of Internal Revenue...he sort of one hand or a couple fingers, ran the office and he was pretty much a figure in the administration.

Justice Kavanagh:

Definitely. He was the boss in this area which covered the State of Michigan. The district was the State of Michigan. There was a collector in Chicago and a collector in Cleveland and they had different things, but the collector in this area was in Detroit.

Mr. Lane:

Well, now you were 17 or 18 years old and by this time, were you just plowing your way through school in the traditional fashion? What were you in school at that time?

Justice Kavanagh:

Well, in 1935...I was graduated from U. of D. High in 1934, and I started...I went to the University of Detroit my freshman year starting in September, 1934, and I was playing football and I injured my ankle, so I couldn't play football any more. I was very disappointed with my treatment at the U. of D. They had promised me a football scholarship and when I couldn't play, they said no scholarship. So, I was very unhappy and I transferred to Notre Dame the beginning of my sophomore year, the fall of 1935. I started at Notre Dame and I was graduated from Notre Dame in 1938. At that time, I had worked in the summer for McManus, John and Adams advertising agency. I wanted to get into the advertising business, and the recession in 1938

started in March, I guess, or there about, and as a consequence, the job I had been promised by McManus, John and Adams had gone up in smoke because the advertising business was dead at that point. I had met Mary, Mary Mahoney, and...

Mr. Lane:

Did you meet her at Notre Dame?

Justice Kavanagh:

At Notre Dame, yes. She lived in South Bend. Her father was Vice-President of Bendix Corporation in South Bend. We had announced our engagement before I was graduated. On the strength of the promise of the job, we were going to get married right away and then, of course, when the job fell through, we had to defer our plans. So, my dad said to me, "I think I can get you a job with Wayne County and if you'll go to law school, you and Mary can get married". I said, "That's a deal". So we were married and I went to night law school at the University of Detroit Law School, and I worked for the Wayne County Auditor from January, 1939 until June, 1942 when I left to...well, of course the war had started, and I left to become the office manager at a machine shop, Asam Manufacturing Company.

Mr. Lane:

What was the name of it?

Justice Kavanagh:

Asam...A-s-a-m. It was owned by Frank Asam and Dick Asam was Frank's son who had been my classmate...I missed one part of my education...when I was graduated from Jesu grammar school in June of 1930, I went to Catholic Central High School which was then down on Harper and Woodward, and I went there for one year and then the new U. of D. High was built very close to our home, so I transferred at the beginning of my sophomore year to the U. of D. High where I finished. Dick Asam and I had been classmates at Catholic Central, and he urged me to come to work for his dad and himself in this machine shop, and I did.

Mr. Lane:

That was in 1942?

Justice Kavanagh:

In July, 1942.

Mr. Lane:

Were you still going to law school?

Justice Kavanagh:

Yes, I was finishing law school. I finished law school in January, 1943. It was my last...really, I was about to begin my last semester. Well, Dick and I came to a parting of the ways very shortly after I went to work for him, so I went to work for Barney Youngblood in the Register of Deeds

office in September, 1942. I might say that our son Hayes was born in August, 1940 and our daughter, Katie was due in November, 1942, and so I worked for Barney Youngblood for a very short time and then I got an opportunity to go with the law firm as a law clerk before I finished, went to work for the law firm of Leightner, Crawford, Sweeney, Dodd and Mayer which was...

Mr. Lane:

How do you spell "Leightner"?

Justice Kavanagh:

L-e-i-g-h-t-n-e-r. Clarence Leightner was a very prominent lawyer. He was dead at this point. I never met him, but the firm was a well-regarded firm. I think there were eight of us all totalled in the firm when I went there. At that point, it was regarded as a mid-size law firm. I think the big law firms maybe had 15 people in them. I went for work for them starting in November, 1942.

Mr. Lane:

This was before your graduation?

Justice Kavanagh:

Yes, I was graduated in January, 1943. I wrote the bar in the spring of 1943 and was admitted to practice in the spring, 1943. I stayed with that law firm until 1947, and then I left and I went into practice alone. I rented an office...I shared an office with John J. Sloan who was a very well-regarded lawyer in Detroit, a fine man.

Mr. Lane:

S-l-o-a-n?

Justice Kavanagh:

S-l-o-a-n, John J. Sloan. He and Tom Chalk had been partners for years, and they had split up, and John had his own office, and Tom Chalk had his own office, but I went with John, and I stayed with John Sloan in Detroit until 1955 when...we had moved to Birmingham in the meantime. In 1944, we moved to Birmingham from Detroit, and in 1955, I went into partnership with Cass Wilson and Carl Ingraham. Cass died the first year we were together. Carl and I stayed together for a year or so, and we weren't really going anyplace together so we both split up.

Mr. Lane:

He wound up being a judge, didn't he?

Justice Kavanagh:

Yes, Carl was in the 48th District Court here until he retired.

Mr. Lane:

Prior to this time, though, you had begun activities that would lead you to your judicial career, had you not? Had you not, for example, taken part in the Williams recount and that sort of the thing, that got your feet wet?

Justice Kavanagh:

Oh, yes.

Mr. Lane:

That was when? Did you get into both of those, 1950 and 1952, and did you make a lot of acquaintances and friends within the party that you would bump shoulders with later on?

Justice Kavanagh:

Oh, sure. Actually, that's where I met Tom Downs and Sam Ostrow was...

Mr. Lane:

O-s-t-r-o-w?

Justice Kavanagh:

O-s-t-r-o-w. Samuel B. Ostrow, a fine guy, good lawyer. He had worked in Raymond Starr's office when Raymond Starr was the Attorney General. He and John Brennan were in charge of the Attorney General's office which at that time, was, of course, much smaller than it is now. Sam Ostrow was really in charge of the recount, and Sam asked me to help out, and I did. I just dumped my practice and went to work full-time on the recount.

Mr. Lane:

Was that in 1950?

Justice Kavanagh:

Yes.

Mr. Lane:

That was the first recount, and then there was another one later, right?

Justice Kavanagh:

1952, yes.

Mr. Lane:

Was there something about that recount business that...did it take on the aspects of a crusade or was there a great sort of an emotional aspect to it that made it a memorable event and caused the people that took part together to stay in touch sort of like in a fraternal way in future years? Was there something like that to this whole business?

Justice Kavanagh:

Well, you might say that. The Democrats had been uniformly unsuccessful in recounts and Sam Ostrow conceived the idea. He read all the cases and did his homework very well, and he became convinced that every time there had been a recount, only one issue had been preserved for decision by the Michigan Supreme Court, and depending on, according to Sam's belief and mine,

which way would favor the Republicans, that issue was decided and Sam figured that the only way we could beat that would be to bring up many issues and on each one, if there was an issue here that would cost so many votes, bring up an issue over here that would offset it, don't you see, so there was no way that the Supreme Court could decide the election if they were consistent in their rulings.

Mr. Lane:

I see.

Justice Kavanagh:

And when this became apparent and this strategy worked,...when it became apparent that there was no single decision that the Supreme Court could make that was going to affect the recount, they called it off.

Mr. Lane:

Is that right?

Justice Kavanagh:

Sure, and of course, that elated us all because it was not only great political strategy but it was a great legal concept that stood us all in good stead.

Mr. Lane:

Well, now in the first instance, which...did the result of the recount go immediately from the vote counting level in the precinct county to the Court, or was there some intermediate body, like there came later to be the Board of Canvassers that oversaw the recount, the actual counting a second time of the votes.

Justice Kavanagh:

Well, there was a Board of Canvassers there, all right.

Mr. Lane:

Was there?

Justice Kavanagh:

Oh, sure, but what would happen. For example, this one Supreme Court decision said that the lines...on a paper ballot, the lines of the vote had to intersect within the circle, so you'd go through all the paper ballots and look at them in the various precincts and you'd pull out, you'd challenge the ones where they didn't intersect in the circle. You know, honest mistakes are going to happen all the time, and honest mistakes aren't generally going to make that much difference. So, Sam conceived the idea that every time there was a challenge to a Democratic vote where the lines didn't intersect in the circle, he'd pull a challenge for a Republican vote where the lines didn't intersect in the circle and in that way, it was balanced so that if the Michigan Supreme Court said, yes, the law is that they must intersect within the circle, wouldn't affect the count because there were as many on one side as on the other.

Mr. Lane:
Did Williams win in the original count?

Justice Kavanagh:
Sure.

Mr. Lane:
Oh, he did?

Justice Kavanagh:
Oh, yes.

Mr. Lane:
So the impetus for the recount came from...?

Justice Kavanagh:
I'm sorry. I said that with great assurance. I don't know.

(telephone interruption)

Mr. Lane:
We were talking about the recount and the mechanism for determining and I had asked if from the first count that Williams had been held the winner and the recount really was mounted by the opposition to Williams or was it the other way around. Do you remember that?

Justice Kavanagh:
I really can't say now.

Mr. Lane:
But at any rate, it came out something like 8,000 or so for Williams, didn't it? Well, then in 1952, there was another recount, and this one was a real squeaker. 1,100 and some votes was the difference. Was it the same cast of characters, the same atmosphere, or was there some difference in 1952?

Justice Kavanagh:
Well, of course, my participation in the recount of 1952 was limited because shortly after it started, my father died, and I dropped out of it, but as I recall it, it was starting to be the same kind of thing, and we had learned from the experience two years prior and we had learned well, because we had saved evenly in every precinct so there was no way, there was no way that a decision one way or the other was going to really affect the outcome of the election.

Mr. Lane:
I'm encouraging some deep discussion of this because, and you would have to verify this, there

was, out of these recounts and the associated events, the riling up of political activity that got you into your campaigning for judge. If I remember, there was one kind of an aborted stab towards this...was it in 1954 or 1955 when you had expressed an interest in a Supreme Court situation? Was that not true?

Justice Kavanagh:

I'm not sure I understand what you mean.

Mr. Lane:

Well, see, I'm focusing ahead to the time when you're going to run for the Court of Appeals, and that's when you first started your judicial career. Now harking back to the things that led up to that, there was activity, was there not, in 1954 or 1955 when you were interested in a prospective vacancy on the Supreme Court?

Justice Kavanagh:

Oh, definitely, yes.

Mr. Lane:

Let's hear about that again.

Justice Kavanagh:

Okay, in 19...of course, at that time, under the old constitution, they had spring conventions and fall conventions and in the spring conventions, they would nominate candidates for the Supreme Court and in the early part of,...well, in 1954 in the fall election, Thomas Matthew Kavanagh had been elected Attorney General and because the name ran so well and a lot of my friends and a lot of...in fact, there's a kind of an interesting story...on the day after the election in 1954, the Detroit Free Press ran a picture of the newly elected state officers and they had my picture as Thomas M. Kavanagh, Attorney General. Agnes Kavanagh, Tom's wife, whom I didn't know at that time met me several years later and she said, "You know, I've been wanting to meet you ever since the Free Press ran your picture when Tom won". Well, at any rate, I decided and my friends, some of my friends, my father's friends urged me to run because there was going to be an open seat on the Michigan Supreme Court so I tried to get the nomination at their urging, and...

Mr. Lane:

That was your first stab at judicial office, was it not?

Justice Kavanagh:

Yes.

Mr. Lane:

That was when Gene Black was there maybe?

Justice Kavanagh:

Gene Black had been...he was the Republican Attorney General under Kim Sigler.

Mr. Lane:
And broke with Sigler.

Justice Kavanagh:
And broke with Sigler and was very helpful to Mennen Williams in Mennen's first campaign for governor.

Mr. Lane:
Which was against Sigler, of course.

Justice Kavanagh:
Which was against Sigler, and so I tried to...do you want me to...

Mr. Lane:
Yes, why don't you recite what happened.

Justice Kavanagh:
All right. I tried to reach the governor and ask him for his blessing in an effort to get the nomination. I talked to Larry Farrell and Larry said the governor would get back to me, so...

Mr. Lane:
He was Executive Secretary?

Justice Kavanagh:
Yes, and so I also went to talk to Gus Scholle who was then the head of the AFL/CIO political action deal, and Gus was very friendly and open, and I told him what I wanted to see him about and he said candidly that he had a candidate, and his candidate was Eugene Black, and I said, "Well, he's a Republican". Gus said, "Yes, I know that, but he's been very good to us, and a lot of the people in the union think he's a good man, and I personally am going to try to get the union to back him". Well, I could count so I knew that wasn't an opening that I was going to stand much chance in, so I renewed my efforts to reach the governor to get his blessing for the other nomination...

Mr. Lane:
Two to be nominated.

Justice Kavanagh:
Two to be nominated, and Gus said, "Look, I don't know you, and I'm not opposed to you, but I do have a candidate, Gene Black, and if you can get the other spot, great". Well, that's the way Gus and I left it. I kept trying to reach the governor and finally Larry said to me, "Tom, I have talked to the governor, and he does not want to talk to you". "Okay, I wish he would have told me that when I first asked", but at any rate, we went ahead. We went up to the convention then...

Mr. Lane:

Still now knowing who Williams was going to put in there.

Justice Kavanagh:

That's right. He had not made any announcement, and Phil Hart and Jim Allen who were very close friends of mine and very close to Mennen had been unable to get any word from him until the night before the convention started when Phil came down with Jim and said the governor had just met with a few of his people and he had decided that Stephen Roth of Flint was his choice, so I had no alternative but to run against Gene Black because I didn't want to buck the governor's choice in the convention, so I did. I ran, and I don't remember whether it was the second or third ballot that finally gave Gene the number of...

Mr. Lane:

There was more than one, though.

Justice Kavanagh:

Oh, there was more than one, indeed, yes.

Mr. Lane:

Well, then...that's interesting...had Williams declared his support for Black at that point?

Justice Kavanagh:

No.

Mr. Lane:

I see.

Justice Kavanagh:

No, not officially.

Mr. Lane:

In those days, the governor dominated the convention to the point where he had said, "I want Black", it would have been Black and that was it, right?

Justice Kavanagh:

Yes. If he'd have said, "I want two guys, 'A' and 'B'", that would have been it, but that didn't happen. So Gene Black then was elected at that point in the spring election of 1955 to take office the first of January.

Mr. Lane:

So you continued your law practice during that period and for some years thereafter, right?

Justice Kavanagh:
Right.

Mr. Lane:
Were you practicing in Oakland County then?

Justice Kavanagh:
I was. I had moved my practice. I had gone into partnership with Cass Wilson and Carl Ingraham, and we started in January, 1955 and Cass died the first year that we had our partnership and Carl and I stayed together for a couple years and decided we weren't helping each other very much and we were kind of getting on each other's nerves, I think, and we decided to part while we were still friends, and we did and we are still friends. I'm very fond of Carl. Carl was later elected to the 48th District Court here, and as I say, I'm very fond of Carl.

Mr. Lane:
When was the next time that you expressed a pointed interest in judicial office?

Justice Kavanagh:
Well, ...

Mr. Lane:
In 1964, was it?

Justice Kavanagh:
Well, Sander Levin was, in 1964, was the Chairman of the Democratic State Central Committee and he was also the chairman of the Oakland County Democratic Committee.

Mr. Lane:
That's the Sandy Levin that later ran for governor and now is a congressman?

Justice Kavanagh:
That is right. That is right. He is Senator Carl Levin's brother. John Foley who is now a Circuit Judge in Kalamazoo County, had worked for our law firm, for Carl and I, actually when the three of us were together, and John had left and had gone to work for the NLRB and then he had, after working for the NLRB for a while, he went to work for the law firm that Sandy Levin was with, so John called me at Sandy's urging to ask me to run for Circuit Court in Oakland County, and I told him I wouldn't run for Circuit Judge in Oakland County and he asked why, and I said, "Because I don't think we can elect a Democrat in Oakland County", and so Sander called me after John reported to him and urged me to reconsider. He said, "Will you think about it for a week and can we talk in one week?", and I said okay. He called me back in one week and in the meantime, I had read in the paper where they had formed this brand new thing called the Court of Appeals so when Sandy called me back, he said, "Have you thought about running for judge in Oakland County?", and I said, "Yes", and he said, "What's your answer?", and I said, "No", and he said, "Well, that's too bad". I said, "I'll tell you what I will do". He said, "What's that?". I said, "I will run for the Court of Appeals". There was a long silence, and he said, "Why do you say that?", and I said, "Because I think I can win that", my thought being that a popular name in

a wider election than a county would control the election and as it turned out, I was dead right. I ran first in the 2nd District for the Court of Appeals.

Mr. Lane:

This conversation with Sandy Levin, that would have been in the spring of 1964, was it?

Justice Kavanagh:

It was either late May or early June of 1964.

Mr. Lane:

Oh, the election was hard on then.

Justice Kavanagh:

The primary was August 1st...I'm sorry, September 1st which happened to be my father's birthday and not being too superstitious or anything, I thought he might help. I think he did.

Mr. Lane:

What did it take? Did you just throw your name in, or did you actually mount some significant, cohesive campaign?

Justice Kavanagh:

Well, this was a brand-new court, brand-new office. Nobody knew anything about it.

Mr. Lane:

How many people were candidates in the primary in your district, the 2nd District?

Justice Kavanagh:

If my memory serves me right, there were 14 candidates.

Mr. Lane:

So you came through aided by your name recognition in great style in the primary, right?

Justice Kavanagh:

Oh, yes, I ran first.

Mr. Lane:

In the primary, too?

Justice Kavanagh:

Yes.

Mr. Lane:

And then there were three to be...

Justice Kavanagh:

Three to be elected in each district and Tim Quinn ran second and Louis McGregor ran 3rd, and the three of us were elected.

Mr. Lane:

That was in the primary, the three of you ran, 1-2-3, among the six nominees. Is that correct? There were six run on the ballot in November and the three of you then were the top three?

Justice Kavanagh:

That's right.

Mr. Lane:

And the winners in November, that's how you reached the Court of Appeals, is that right?

Justice Kavanagh:

That's right. If my memory serves me right, the other three nominees were Francis O'Brien, a Probate judge from Washtenaw County, a nice guy, had been in the legislature and he was later elected...Farrell Roberts also ran and I'm trying to think who the sixth person was. It might have been a lawyer named Taft from Monroe. Oh, no, it was Judge McDonald from Lansing.

Mr. Lane:

Oh, from Lansing?

Justice Kavanagh:

I think so. I'm pretty sure those were the six of us that ran.

Mr. Lane:

There was an interesting chapter now that comes right after the election process. Here are nine people from three districts sitting there, and they have all been elected to something that hadn't existed. What happened then? The nine of you, as I understand it, got together to talk about things. Tell us about that.

Justice Kavanagh:

Well, after...there was some doubt as to who the third person would be in the 3rd District because Bob Burns was in a very close race with somebody and I'm not sure whether it was Stuart Hoffius or not, but it was a very close race so for several days.

(End of side 1, tape 1)

Topic 2: Justice Kavanagh talks about meeting to organize the Court of Appeals, the processes and atmosphere of the court, and running for the Supreme Court in 1968. He further discusses his beginnings on the court, the political and personal issues in the court, and Justice Gene Black and other members of the court

Mr. Lane:

...was the one that sprawled all over the state.

Justice Kavanagh:

That's right. The first was Wayne County at this time. It's since changed, but in 1964, the first district was Wayne County. The 2nd district were all the counties around Wayne. There were sixteen counties in it including all the thumb counties, Genessee, Ingham, over to Jackson, included Hillsdale and Lenawee counties, Washtenaw, Livingston. There were sixteen counties in the 2nd district and 17, the first and those 16...my mathematics aren't that great. Take the 83 less 17 comprised the 3rd district, as you mentioned, covered all the rest of the state including the U.P. We met after it was decided that Bob Burns had made the third spot...we met at the Detroit Hunt and Fish Club which is a private club that John Gillis belonged to not too far from Tawas, and I drove up with...I picked Louis McGregor up and then I picked Tim Quinn up on the way up, and we discussed the thing, and I expressed the opinion going up that I felt that since it was a new court, it was important that we select the chief judge which the purpose, the announced purpose of the meeting, that we select a chief judge who would have acceptance amongst the members of the bar particularly and consequently, I felt that since Louie McGregor and Tim Quinn and Don Holbrook had all been Circuit judges and were at the moment Circuit judges that it should be one of them that would be the Chief Judge. Louis McGregor said, "I don't want it, and I will not be a candidate for it". Jim said, "I don't want it either, but I agree with you that it should be a Circuit Judge, so if I'm elected, I will take it". Well, we got up to the meeting and the discussion came to selection of a Chief Judge and John Fitzgerald nominated T. John Lesinski who was the Lt. Governor.

Mr. Lane:

And of course, John being then a state senator.

Justice Kavanagh:

A Republican state senator. In his nominating speech, John pointed out that T. John Lesinski was very well-regarded in the legislature on both sides of the aisle. Both the Democrats and Republicans liked him and that John thought it was very important that somebody who had rapport with the legislature should be the first chief judge of the court. So, we debated that for a while, and I gave my reasons for my nomination of Tim Quinn. We discussed it, voted, and I was the only one that voted for Tim Quinn.

Mr. Lane:

I would like to re-create the scene. Was this a secret ballot, or did you just stick your hands up in the air or what?

Justice Kavanagh:

My recollection is that we just stuck our hands up, but I said to Tim, "Why wouldn't you even vote for yourself?". He said, "I knew where it was going". But I must say, and I have said several times since that I thought that was a very wise decision to select T. John because indeed, he did

have the respect and a great rapport with the legislature and that was very important in the early days of the court particularly.

Mr. Lane:

For one thing, you had to get money to operate, didn't you?

Justice Kavanagh:

Precisely, and the legislature gave T. John...T. John figured out what we needed and presented it to the legislature and they just said, "You've got it". It worked out very well, and that court got off on the right foot, and that court was and is, I think, one of the better courts in the whole country.

Mr. Lane:

Well, it was widely recognized in Time after it got going in that fashion, was it not?

Justice Kavanagh:

Yes.

Mr. Lane:

As I recall, T. John and maybe some others were called to the kinds of conferences that were appropriate to tell was the genesis was of the Michigan Court and that sort of thing.

Justice Kavanagh:

Absolutely, and many of the ideas that we developed, well actually, T. John's suggestion, were adopted by other courts in other states. One of them was the idea of having the pre-hearing division of the court which would analyze cases and report with recommendations to the judges. That enabled the court to handle the tremendous volume of work. We started out with some 300 odd cases that the Michigan Supreme Court assigned to the court. That was our original case load, and now it's many, many, many times that. Without that, that kind of an administrative staff, it couldn't handle the work.

Mr. Lane:

Were some of the innovations in procedures and staffing of the Appeals Court borrowed, almost soon after by the Supreme Court?

Justice Kavanagh:

Yes, yes, within a couple years, they went to a...although, I went on the Court, the Supreme Court, four years later. In 1968, I was elected, and at that time, we had two commissioners, and that has not expanded. I forget how many they have, something like 14, if I'm not mistaken.

Mr. Lane:

I was told, and maybe you could verify this, that the first commissioner came in 1965 which would have been after the, or when the Court of Appeals was being organized or had already

started, and this was Joe Plank, and he was hired as a...he was losing his hearing, as I understand it.

Justice Kavanagh:

He had been president of the State Bar.

Mr. Lane:

He had, and he had very fine background.

Justice Kavanagh:

Yes, good lawyer.

Mr. Lane:

But he was sort of an isolated fellow in the scheme of things at that time, and then later, they hired Howard Ellis?

Justice Kavanagh:

Howard Ellis.

Mr. Lane:

And this was how the commissioner function began in the Supreme Court, but you had already were unfolding a more organized way of approaching this problem of recommendations and preparation of studies of a case issues and that sort of thing.

Justice Kavanagh:

Well, that's accurate as I recall it.

Mr. Lane:

At any rate, you got going in 1965, and things went swimmingly, did they not?

Justice Kavanagh:

They sure did. We had great rapport, the nine of us. I've often said that we just...we all fell in love with each other, and we worked together beautifully. We all respected each other.

Mr. Lane:

As I understand it from the word "go", there was very little political consciousness in the Court of Appeals.

Justice Kavanagh:

None, none, and I say that because I'm convinced it is absolutely true. We all came from different backgrounds. I had been very active as a Democrat. T. John had been very active as a Democrat.

Mr. Lane:

As a renegade Democrat at one point, right?

Justice Kavanagh:

Yes.

Mr. Lane:

He knocked off the party's choice for Lt. Governor.

Justice Kavanagh:

That's exactly right. I think his name was Vanderveen, wasn't it?

Mr. Lane:

Yes, it was. He later made it to Congress, but he lost for Lt. Governor. Dick Vanderveen.

Justice Kavanagh:

Was it Dick?

Mr. Lane:

Yes.

Justice Kavanagh:

But whatever we did, we did as a Court, as a group, and politics didn't have anything to do with it. Tim Quinn had been an active Republican. Louis McGregor had been an active Republican, candidate for the Supreme Court by nomination of the Republicans a few years before. Don Holbrook had been active as a Republican.

Mr. Lane:

John Fitzgerald's father was a republican governor.

Justice Kavanagh:

Republican governor, right, Frank Fitzgerald. John had been active and had been elected a Republican senator, but there was no partisan politics at all.

Mr. Lane:

How can you explain that? Is there some way...was it just the fresh slate, and you all were elected for terms of six...

Justice Kavanagh:

Six to ten.

Mr. Lane:

So there was no immediate thought that anybody had to give of renewing their tenure, is that correct?

Justice Kavanagh:

Oh, I think that certainly had a lot to do with it, but I also think that many of us, if not all of us, when we were elected as non-partisan judges and we read the constitution which said that the judicial offices shall be non-partisan, I think we took it seriously.

Mr. Lane:

I'm leaning on this a little bit as you might anticipate because this was not the way it was to be later on in your judicial career, is that not true?

Justice Kavanagh:

Well, as long as I was on the Court of Appeals, there was no partisan politics at all.

Mr. Lane:

Let's jump ahead to 1968. That's when you set sail for the Supreme Court, right? What did you have to do first to get pointed in the right direction?

Justice Kavanagh:

Well, Sander Levin again was still State Chairman and he came to me and asked me if I would run for the Michigan Supreme Court as a Democratic nominee because Mike O'Hara was the incumbent who had been nominated by the Republicans and Mike was a very popular guy with a popular Irish name and nobody wanted to run against him. I told Sandy that I was very happy on the Court of Appeals and that I had no great desire to leave it, but I said, "If you can't get anybody, I certainly will run". I figured that as a party member, owed that to my party. If they need a nominee and they can't get anybody else, I'll run. I was very fond of Mike O'Hara. We were good friends. So they finally said, "Okay, you're it. We want you to run". I said, "Okay, I'll run, but on the condition of two things, one of them that the party will raise whatever money I need to conduct a successful campaign, and I won't be looked to to raise any money on my own", because when I had run for the Court of Appeals, I had run on a budget of I think \$4,200.00. I knew it would take more to run a state-wide campaign. It finally came down and they said, "How much money to you absolutely need?" I said, "I have to be assured of at least \$25,000.00". Well, Sander said, "The party will assure you". I said, "Sandy, I've been in this party a long time. Where are they going to get \$25,000.00?". He said, "We'll see if we can't get some help from the union". They did, and the UAW came up with a check for \$25,000.00.

Mr. Lane:

Which kind of came in one bite.

Justice Kavanagh:

In one bite, and I had several fundraisers and I raised a total, I think if my memory serves me right, of \$12,000.00 so I had a total budget of \$37,000.00 if my recollection is accurate, but at any rate, that's how it was, and I won. I narrowly defeated Mike by 28,000.

Mr. Lane:

Was it Mike and you, Mike O'Hara and Thomas Giles Kavanagh head to head?

Justice Kavanagh:

Yes.

Mr. Lane:

Or were there other candidates?

Justice Kavanagh:

No. You see, Ted Souris had reduced the Court from eight to seven as provided in the new constitution when he, as a sitting justice decided not to run for re-election, so it would have been that Ted Souris and somebody else, but since Ted said no, that reduced it, so Mike and I ran head to head.

Mr. Lane:

What did you win by? Was it 40,000?

Justice Kavanagh:

28,000.

Mr. Lane:

28,000?

Justice Kavanagh:

Yes.

Mr. Lane:

And Mike took it pretty hard, didn't he?

Justice Kavanagh:

Yes, he did, although we later patched things up, but he couldn't understand why his friend would run against him. I kept trying to assure him that it wasn't anything personal, it was just the way the structure was built. Mike took it hard. It took us some time to patch it up, but as I say, I'm sure that before Mike died, we were good friends again.

Mr. Lane:

This is 1968 in November. Do you recall your first entry upon the scene of the Michigan Supreme Court? Would have been either later that year or January of 1969. Where did you meet your colleagues and what sort of reception did you get? Who were your colleagues? That's one thing. Do you remember?

Justice Kavanagh:

Yes, I do. The first time I met my colleagues as such in a group was in the conference room in the Capitol building.

Mr. Lane:

Was that when you appeared to be sworn in or prior to that?

Justice Kavanagh:

Prior. It was shortly after the election.

Mr. Lane:

You were invited to attend a conference?

Justice Kavanagh:

I was invited to attend a conference.

Mr. Lane:

Who was then Chief Justice? Who extended the invitation?

Justice Kavanagh:

T.M. Kavanagh. T.M. Kavanagh had been elected Chief Justice and...wait a minute. Wait a minute. Yes, I think Tom was the Chief Justice. Of course, John Dethmers was Chief Justice...

Mr. Lane:

Let's review who was on the Court.

Justice Kavanagh:

On the Court were John Dethmers, Harry Kelly...

Mr. Lane:

Was Carr still on?

Justice Kavanagh:

No, Paul Adams and Tom Kavanagh, Thomas Matthew, Gene Black and Tom Brennan, and I replaced Mike O'Hara. My recollection is that T.M. was the Chief Justice until the election in January when the new Chief Justice was elected and that was John Dethmers. John Dethmers was Chief Justice...I hope my memory is right, but John Dethmers was the Chief Justice in 1969 and 1970 and then in 1971, Tom Brennan was elected Chief Justice. That's the way I recall it. I could be wrong on that. But at any rate, there I was. As I say, I recall the first meeting with the group, although we had met as members of the Court of Appeals. We had met with the Court in joint meetings, so I knew all of these gentlemen who were now my colleagues. We got along fine. We got along fine. There was no animosity. At least, I felt none.

Mr. Lane:

Well, when you were seated in 1969, did you vote for Dethmers to be...?

Justice Kavanagh:

No, I voted for T.M., but he was defeated.

Mr. Lane:

Well, let's see...?

Justice Kavanagh:

Paul Adams, T.M. and I voted for T.M. and the other four, that would be...

Mr. Lane:

Including Black, right?

Justice Kavanagh:

Included Black. That's right. Gene Black used to...he used to get mad at his colleagues and he got mad at each of his colleagues in turn, don't you see, but he wouldn't stay mad very long. He'd be mad at T.M. Kavanagh one day and the next day, they'd be great friends but he'd be mad at John Dethmers, and then he and John would become friends, and he'd be mad at Harry Kelly or he'd be mad at me or he'd be mad at Paul Adams or somebody. Gene was always mad at somebody.

Mr. Lane:

I'm dwelling on this a little bit because it seems to me that this is the introduction to a very important force on the Court because here is this fellow, Black who for some years, had flown under the Democratic colors and he was throwing the vote, was he not...he was a swing vote in this proposition, and he had thrown his weight to make Dethmers, a former Republican State Chairman, the Chief Justice of the Court.

Justice Kavanagh:

Yes, that's true?

Mr. Lane:

Well, did this not...do you remember anything about the atmosphere of that? Did this leave some scars?

Justice Kavanagh:

Well, you see, I was...I think Gene had supported Tom Kavanagh, Thomas Matthew before and as I say, he got mad at Tom for some reason and didn't support him this time and voted with Brennan, Kelly and Dethmers to make the fourth vote, to beat Tom. That's my recollection of it, Roger. Yes, Gene was...

Mr. Lane:

He played a big role two years subsequent to that, did he not...remember....

Justice Kavanagh:

When Tom Brennan was elected...absolutely, sure.

Mr. Lane:

This was a different atmosphere that you came into, then, I take it?

Justice Kavanagh:

Oh, yes. It was a different atmosphere. Much different than the atmosphere that I had left on the Court of Appeals. It was funny. During the campaign for the Supreme Court, I said to John Fitzgerald, "John, why is it that the...", and of course, the Michigan Supreme Court at that time was notorious for the internecine squabbles that were going on..., and I said, "Why is it that the Supreme Court seems to be so bitter in their differences and our court, which I'm convinced has as deep and many differences as they do, and yet we don't have that kind of feeling?" John said something that I think to this day was accurate and very perceptive, and he said, "Well, all of our differences are professional", and I think he was right. The differences on the Supreme Court at that particular point were not professional. They were personal, they were political. They were...I don't know what, but they weren't professional differences. That changed later on, thank God.

Mr. Lane:

Was it attributable to the system, to the individual people that were there, the seven of you, or was it a matter of one or two personalities? This was not a congenial atmosphere, and it became...this entered in at times, I take it, to the decisional process, or was later on to do that, and this becomes significant in an analysis, evaluation of the Supreme Court of Michigan, does it not?

Justice Kavanagh:

Yes. The Court had been labeled rightly or wrongly as an intensely politically partisan court. I think Gene Black to his dying day felt it was and remained so.

Mr. Lane:

By this act that we just spoke of, contributed, did he not, to throwing, the swing vote, in other words...he went against his political tradition which was at that point, I would say, a Democratic allegiance. Am I making too much of this?

Justice Kavanagh:

Don't forget that Gene started out as a Republican and he became a Democratic supporter in many respects. He was very supportive of Mennen Williams always.

Mr. Lane:

But weren't we talking not so long ago about the fact that Gus Scholle was a force behind his elevation to the Supreme Court?

Justice Kavanagh:

Yes.

Mr. Lane:

And we all know who Gus Scholle was.

Justice Kavanagh:

Indeed. Well,...

Mr. Lane:

I don't want to belabor the thing.

Justice Kavanagh:

Yes, and I can't...I can't hang the horns on Gene. Gene was true to himself.

Mr. Lane:

Of course, Harry Kelly had been a former Republican governor, and he had lost in a very close election to...

Justice Kavanagh:

Mennen.

Mr. Lane:

Right, to Williams.

Justice Kavanagh:

John Dethmers had been a former...

Mr. Lane:

Republican State Chairman, had he not, and Attorney General.

Justice Kavanagh:

Yes, Attorney General, that's true. And of course, Paul Adams and Tom Kavanagh had both been Attorney General.

Mr. Lane:

As had Gene Black.

Justice Kavanagh:

As had Gene Black, yes.

Mr. Lane:

So they all had depended for earlier preferment on their political colors.

Justice Kavanagh:

Absolutely.

Mr. Lane:

How then...we got that out of the way for the moment anyway...what was the atmosphere in

terms of deciding cases? Was this reflected in your best judgment in the early year or two? This was after one of the early phases of reapportionment but before the later phases, correct, of legislative reapportionment that was extremely divisive?

Justice Kavanagh:

Yes.

Mr. Lane:

But that was not flaring up at the moment. When you came in 1969, there was a quiet time in this area, was there not?

Justice Kavanagh:

Yes, for a short time there was. And I didn't notice any...well, the issues in front of the Court did not have any overt partisan political implications for a long time, and as I recall it, it wasn't until the apportionment question came up that those partisan influences surfaced.

Mr. Lane:

Of course, there was nobody with the clear-cut political muscle to carry the day, was there, because here you had Black floating back and forth and very much attached to some philosophical goals but you couldn't...nobody could say, "By God, we need four votes for this" and impose his will, either from within the Court or outside the Court. You had sort of an evenly divided Court with Black swinging in the middle. Wasn't that the way it should be described, or?

Justice Kavanagh:

You mean on political questions?

Mr. Lane:

Well, sure.

Justice Kavanagh:

Yes, certainly on political questions, I would say that was true. But, you know, on questions, as I say, no overt partisan political implications, you had divisions of philosophy on the Court. We did not agree on constitutional readings. We didn't agree on statutory readings. We didn't agree on common law precedential readings as one group. We differed. Those differences didn't follow party lines at all.

Mr. Lane:

Do you remember, though, wasn't Gene Black, even at this time when he had occasions, making speeches or in newspaper exposure, he was foreseeing the time in 1970 when Williams, former governor, John Swainson, former Democratic governor were to be the candidates and that he was..

(telephone interruption)

Mr. Lane:

Maybe I'm a little ahead of myself, but I can recall reading prior to the election of Williams and Swainson that Black was already shouting from the treetops that this is a formula to control the political agenda in Michigan because he knew apportionment was going to come up again. He had been through all this before and he knew that in 1972 or 1971, after the 1970 census, there was going to be this apportionment decision that would come from a highly partisan source, or am...I recall...I shouldn't...Did that happen later or do you remember that?

Justice Kavanagh:

I don't recall any discussion of it.

Mr. Lane:

So this wasn't a big factor.

Justice Kavanagh:

I don't recall that it was, Roger. I can't say that it was not, but I wasn't aware of it. Gene, God love him, was...he would sound off on many different circumstances. My big disagreement with Gene, I think, basically was that I always...Gene was always saying that we never had any trouble in the practice of law in Michigan until the Supreme Court started changing all the rules, you know, court rules. That was the beginning of the end as far as Gene was concerned. Everything was much better in the good old days and I always used to say to Gene, "Gene, you remember the good old days that never really were. That's why we changed these rules. If they were so good, we wouldn't have bothered changing them".

Mr. Lane:

Now, he was...his annoyance was directed at that time against the Court rules of 1963, I take it. Is that right?

Justice Kavanagh:

Well, I think it started out earlier. His annoyance started out a lot earlier than that. He was annoyed with Court rules...certainly the Court rules of 1963 were there, but I think he was mad at Court rules of 1931, maybe, or something like that, 1929 or whatever it was. He was always firmly convinced that the good old days were a lot better than the mess that Gene always perceived we were in then.

Mr. Lane:

Did the work of the Court seem to run pretty smoothly then the first couple of years that you were there given the cast of characters that we just enumerated, the seven of you? You got on reasonably well and turned out your work in pretty good order?

Justice Kavanagh:

Well, I was never unhappy with it. I always recognized that we could have done a better job that we were doing, but I think that's always true. Yes, I think the Court got along fairly well. The bitterness seemed to diminish gradually, and our differences started to be professional rather than personal or political. I really don't recall any political differences except on the apportionment area. There were personal differences, but you know, Gene would get mad at me for one reason

or another. One thing he always said, "You never cite any authority in your opinions", and I'd say, "Gene, I only cite the authority that is necessary". We differed about that. Gene and I got to be good friends. I have great affection and respect for him. He was a different guy, and he was a good guy and a good colleague, cantankerous as hell at times, but you know, we got along fine.

Mr. Lane:

He was a good lawyer, was he not?

Justice Kavanagh:

Yes.

Mr. Lane:

Had a lot of good experience in trial work.

Justice Kavanagh:

Yes. He was a good lawyer, I think, as one lawyer can judge another lawyer. Yes, I would say Gene was a good lawyer. He was a hard worker, very hard worker, and as I say, we got to be good friends.

Mr. Lane:

I'm told that during the middle 1960's, he was the most...if you measure work by opinions of the Court written and dissents, that he was the leading producer on the Court during that period. This would have been prior to your arrival.

Justice Kavanagh:

I wouldn't have any doubt of that at all.

Mr. Lane:

Now at this time, did he go back and forth to Port Huron?

Justice Kavanagh:

Yes. He used to stay with Meredith Doyle when he was in Lansing. Mez had...I guess it was a flat, and when we were in session, Gene would sleep over there. Gene didn't enjoy having lunch with us, and...

Mr. Lane:

Would you usually have lunch in or would you go across the street?

Justice Kavanagh:

When it first started out, we would go out to lunch. Later on, when we moved into the present quarters, after a while, we thought it would be good to have lunch sent in, and we did that. Gene...I'm not sure that we started that while Gene was there. I don't know that. I don't recall.

Mr. Lane:

Well, in 1969, your first year on the Supreme Court, 1970, you would have been domiciled in the Capitol, right.

Justice Kavanagh:

Yes.

Mr. Lane:

So then during your...if you'd had lunch, it would have been downtown.

Justice Kavanagh:

Downtown, yes.

Mr. Lane:

The Court wouldn't go as a group?

Justice Kavanagh:

No, but oftentimes, T.M. and I would go. Occasionally Paul Adams and sometimes Tom Brennan. Of course, Harry, you know. Harry didn't come all that often. He had difficulty getting around with his disability, and Dethmers would have lunch with us occasionally, you know.

Mr. Lane:

It was hard for Harry Kelly because of his peg leg.

Justice Kavanagh:

Exactly.

Mr. Lane:

Would he frequently have a sandwich in his office or that type of thing, or was he just not there that much?

Justice Kavanagh:

Well, he missed some sessions.

Mr. Lane:

Especially toward the end, did he not?

Justice Kavanagh:

Yes, he had a lot of trouble with that thing. It was not easy for him. He was such a swell, wonderful guy. He never complained at all.

Mr. Lane:

Very warm man personally, family man.

Justice Kavanagh:

Right, right. Super guy.

Mr. Lane:

Real proud of his kids, too.

Justice Kavanagh:

Yes.

Mr. Lane:

One of them got to be Flipper on the television.

Justice Kavanagh:

That's right. Oh yes, Harry Kelly was just aces. He was a first-rate guy. John Dethmers and I, God, I had nothing but respect and affection for John Dethmers. He was a perfect gentleman and a good colleague although we differed greatly in our judicial philosophy, but John was a very kind, decent man.

Mr. Lane:

What about...at that point in the Court's history, what did you have in the way of commissioners? Where there one or two or three or four?

Justice Kavanagh:

Well, originally we had Joe Plank and Howard Ellis and then we hired Ruskowski...

Mr. Lane:

Who later got to be Reporter.

Justice Kavanagh:

Right, and then we hired Denny Donohue. I can't remember exactly how it came, but we kept adding to it.

Mr. Lane:

So things went along pretty much in that fashion for a couple years. Now in 1970, we have another campaign and two, as it turned out, two new members came on the Court and two went off. Dethmers, as I recall, was a candidate for the election. Kelly had reached the age where he could not run?

Justice Kavanagh:

He didn't run. I'm not sure whether it was his age or not. It could have been.

Mr. Lane:

But in any event, the result was that Dethmers was defeated for re-election.

Justice Kavanagh:

Right.

Mr. Lane:

As you had defeated O'Hara and Governor G. Mennen Williams, former governor and former governor John Swainson were the Democratic nominees and they were elected by a wide margin as I recall.

Justice Kavanagh:

Right.

Mr. Lane:

They came on the Court then in January, 1971. What did that mean? Anything to the work of the Court? You know, it's said for example that the chemistry of the Court changes with each change in personnel.

Justice Kavanagh:

Sure it does.

Mr. Lane:

What do you recall about what was different when these two new colleagues came on the Court and two others were gone?

Justice Kavanagh:

Well, in many areas of juris prudence, there was agreement amongst more members than there had been. I don't recall, again, I don't recall any political partisan, political impact on the Court. As I say, my recollection, for whatever it's worth, is that it wasn't until the apportionment question came up that there was any partisan division.

Mr. Lane:

Well, now the apportionment question was not long in coming up, was it?

Justice Kavanagh:

No.

Mr. Lane:

Because the census had been completed.

Justice Kavanagh:

That is true.

Topic 3: A discussion of the apportionment issue of the early 1970s

Mr. Lane:

And this thing began to loom, at least those who were keenly interested. It was apparent that before too long that that was going to be in the fire.

Justice Kavanagh:

Oh, yes. Indeed.

Mr. Lane:

What do you recall about the events then as they unfolded, because this was going to have a significant impact on you? The heat must have started late in 1971 or the very early months of 1972 because the apportionment commission would have been convened somewhere in that time frame.

Justice Kavanagh:

True.

Mr. Lane:

What the Apportionment Commission's result was going to be was not too hard to anticipate. Am I being realistic?

Justice Kavanagh:

Oh, I would say yes. Of course, I used to tell my so-called Democratic confrere that I had grave misgivings about this whole business of embroiling the Court in this kind of an issue, so they should not have been surprised and I'm not at all sure they were surprised when I wrote that in my view, the Michigan constitutional provision which imposed that obligation on the Court was unconstitutional under the Federal constitution.

Mr. Lane:

This was what you wrote in the case *In Re Apportionment of the legislature*, and this would have been published in about...well, the spring, at any rate, early spring of 1972.

Justice Kavanagh:

Yes, I think so.

Mr. Lane:

And at that time, you dissented, right, from the majority holding?

Justice Kavanagh:

Yes.

Mr. Lane:

And you wrote separately and you wrote as you just described that this apportionment matter was not properly before the Court because the underpinnings of the activity that brought it there were unconstitutional.

Justice Kavanagh:

Well, I wrote to the affect that the provision in the Michigan constitution that set up this obligation on the Court to pick between one or the other of the recommendations according to which was more constitutional was totally ineffective because it was an improper delegation to the Court

(End of side 2, tape 1)

Topic 4: Justice Kavanagh continues his discussion of the apportionment of the legislature in the early 1970s, his dissent with the written opinion, and the political issues involved with the apportionment situation. He then talks about the additions of Mary Coleman and Charles Levin to the court

Mr. Lane:

Well, here we are now. This is continuing the tape of the 19th with Thomas Giles Kavanagh, and here is it the following day, Tuesday, November 20th. We were just talking about your dissenting opinion. Why don't you read...I see you have it there in front of you...why don't you read what you consider the nub of your position here and I think that you, at one point, said something like, "we were asked not to make a judicial determination. We're asked to do something else". Is that really what the whole ballgame is all about here in your judgment? Why don't you read a little bit of what you consider to be the nub of this because this was a critical event on your period on the Court, was it not?

Justice Kavanagh:

Well, I would say yes. It certainly divided us sharply. Well, what I wrote was that...well, I'll read a bit of this.

Mr. Lane:

Sure you said in substance that this was not a proper...

Justice Kavanagh:

Well, actually what I wrote and this is in 357 Mich 493...I wrote, "When the U.S. Supreme Court in Reynolds vs. Simms struck down non-population factors in apportionment, it became apparent Article IV could not stand as written". That's our Article IV, Michigan Constitution of 1963. Then, I quoted Justice Souris who had written in 1964...

Mr. Lane:

Eight years prior to this, right?

Justice Kavanagh:

Here's what he said: "Having concluded that the apportionment and districting provisions for

both the Senate and House of Representatives were violative of the 14th amendment, it was my conclusion that Section VI of Article IV which established the commission likewise had to be held void. Section VI in my view was so dependent upon the continuing validity of the preceding sections by which the Commission's duties were specified and expressly limited that it could not survive alone". That's the end of the quote from Justice Sotomayor. Then I wrote, "I, too, am convinced that the parts are not severable and that Section VI's commission fell with the prior provisions of Article IV, but since all of my colleagues would simply prune the unconstitutional limitation from the Commission and thus accord life to a Commission not defined by the people, it is necessary to examine the Commission they would create. As I view it, even this cannot stand. The Commission described in Section VI is an apportioning agent comprised of representatives of political parties. To be sure, the people are under no constraint to select such an apportioning agent.

They could have selected a single officer to perform the task or provided for a committee to be selected by the governor or provided for any other non-representative group but when they did seek to create a representative group for this work, they were obliged to observe the constitutional requirement that if a class be recognized, there may be no legal discrimination in favor of part of that class". I cited the case of *Skinner vs. Oklahoma* which held to that effect. Then I said, "The provisions of Section VI requiring a third party to receive more than 25% of the gubernatorial vote in order to obtain representation on the commission and making no provision for representation for other parties receiving less than 25% but still representing a significant number of voters is invidious discrimination offensive to both the 1st and 14th amendments". I cited *Williams vs. Rhodes*, a U.S. Supreme Court decision to that effect. Then I wound up by saying, "There is no valid commission under Article IV and hence there is no need to review their work. Indeed, it is only improper to decide this case as presented to us and to select any of their plans is to make a political decision. In this setting, the parties do not come to this Court asking for justice. They ask for campaign issue. It is difficult to conceive of anything better calculated to undermine public confidence in this Court and destroy our credibility. Today, this is a tragic error of the first magnitude".

Mr. Lane:

Now, had that dissenting opinion been circulated in the usual way? Had this been seen by the others prior to the time that the votes were actually cast?

Justice Kavanagh:

I don't have any specific recollection of that, but I'm confident that was the case because that was the usual thing. We analyzed...we wrote our opinions and circulated them before voting on the whole thing.

Mr. Lane:

Circulating means that copies went to your colleagues.

Justice Kavanagh:

Absolutely.

Mr. Lane:

Just as theirs came to you.

Justice Kavanagh:

Precisely.

Mr. Lane:

As you look back and then you remember that looking forward to the time when this issue arose again ten years later and was decided by a unanimous court, much, almost in the precise fashion you have described the problem, that court said what you said in 1972 and what Justice Souris pretty much in 1964. How do you account for what actually happened in 1972? Was it as Black said in his very vitriolic expression about the macedonian cry and all that stuff? Is that really what it was, or what do you think it was that caused the result to be as it turned out?

Justice Kavanagh:

Well, I really don't know. I'm not going to ascribe improper motives to any of my colleagues in any case. I'm inclined to think that the real answer lies in the fact that the whole concept of one man-one vote was a slow developing legal concept and that it took some of us longer to realize the implications of that than others. I think some of us grasped it earlier than others and I think certainly by ten years after that, it was very commonly accepted and everybody had learned to live with it. I think they hadn't learned to live with it at this point. They were still striving, as they had for generations, to come up with some way of saying, "Hey, the way we want to do this is okay because we got the votes", and it took some of us a lot longer, as I say, to realize that that just won't fly.

Mr. Lane:

This was written, what you just read us, in May and it was entered in the record, Michigan Supreme Court, in May, 1972.

Justice Kavanagh:

Right.

Mr. Lane:

As I was trying to review this and get my mind straightened around so as to be able to ask you sensible questions, I took a look at a case that was filed in June, one month later, wherein Gene Black in a dissent, and this is the case on registration. Do you remember that case? It was a challenge by...this is the dissent...it was a challenge by these people, the UAW CAP Council, NAACP, Michigan State AFL CIO, Michigan Democratic Party...these were plaintiffs in a suit to invalidate the registration law of Michigan which said that if you did not vote for two years, there would be certain events that would happen. The appropriate election clerk; if you were in a township, it would be the township clerk, if you were in the city, it would be a city election commissioner, the city clerk, and (this is a different one), those people would send notice to you, and you would be obliged, if you wanted to stay on the rolls, to sign your name on a card and

drop it in the post office box, or, you know, there was a procedure somewhat; that was part of it.

The effect of what invalidation of that process would be to leave a lot of people on the election rolls that had not been voting regularly. There would be some question about whether those people had moved or that sort of thing, or died, and Black was saying that this was a naked attempt to utilize the power that the Democratic Party felt that it had on the Supreme Court to advance its political purposes, and he says, among other things, in his dissent on that election registry case, he says, "Who brought the suit? It is brought to review before an Appellate Court consisting of...", and then he says, "Six of seven justices who hold their judicial nominations and hence their respective tenures to that same party. Four of these justices are bound to benefit directly and politically from the decision criticized here. The upcoming 1972, 1974 and 1976 Democratic nominations and endorsement to this Court consider". In other words, look, the people that are sitting there and are going to decide this case, one of whom was you, are contemplating whether or not they are going to be endorsed by the party that stands to benefit, either later in 1972, 1974 or 1976. He goes on and says, "This case is defended by an Attorney General whose original appointment to that office was made by the writer of the instant majority opinion". Now, he is talking about Kelley being appointed.

Justice Kavanagh:

Yes.

Mr. Lane:

...to the office of Attorney General by John Swainson who wrote the opinion. Now, he goes on and he uses very strident language in what I've read here, and part is italicized. Do you think that he saw the thing the way it was, or was he just ranting here? You were, in 1976, to suffer the consequences when he said that a person would suffer if he did not go along in a case of this sort. In 1976, as we well know now, the prophesy if that is what this is of Gene Black came to fruition. I just wonder how far you go in accepting his explanation or if you have a different one for why the Court divided the way it did in the case we were just talking about, the apportionment case, given the history, you know. Eight years earlier, somebody had pointed out pretty much the same things under the same circumstances that you did, and yet in 1972, the...

Justice Kavanagh:

Excuse me for interrupting, Roger, but you understand that this case did not involve the question of representation. This question involved a question of voter eligibility.

Mr. Lane:

That's true.

Justice Kavanagh:

And that implicates a whole different school of thought. I shouldn't say school of thought, but it's a different question all together.

Mr. Lane:
Okay.

Justice Kavanagh:

The voter registration thing - I have always felt that anything that was calculated to make it easier and better for everybody to vote was a good thing, and I didn't perceive that to be the statute that we're talking about...I didn't perceive it to have anything wrong with it. It didn't implicate the question of representation in any way.

Mr. Lane:
No.

Justice Kavanagh:

It had to do with voter eligibility, and, you know, so long as it applies to all voters equally, I don't have any problem with whatever they do.

Mr. Lane:

I see. Well, Black in a footnote cited the constitutional language under which this law was written that says, "The legislature shall"...this is the provision of the constitution that he considered pertinent..."The legislature shall enact laws that preserve the purity of elections, preserve the secrecy of the ballot, guard against abuses of the elected franchise and to provide for a system of voter registration and absentee voting".

Justice Kavanagh:

Yes, which certainly...I have no problem with that. The legislature of the constitution authorizes the legislature to do it and they did it.

Mr. Lane:

Yes, okay. Well, the thing that seems to me to be the repeating pattern here is this four vote combination and that's what the reason is for bringing this up. If it was a four vote combination in the apportionment case in May to satisfy a political purpose, is this another example in June of the same thing. That's really what I'm asking. This is the one. And then here in December, you have another instance of where four votes are sprung after a sort of unusual sequence of events, and now I'm talking about the Government vs. State Treasurer case where Brennan had been assigned, Tom Brennan, to write what he thought was going to be the majority opinion, and he goes ahead and does it and circulates his opinion. There is silence for four months, and finally when the time is running out for Justice Adams to have a vote; his time expired on the 31st of December, suddenly the four vote combination appears, and here you have an opinion that was clearly a strange creature.

This was something that invalidated sort of an inference, the financing system of the schools of the state. But by its terms, it said, well, this question is moved now because there has been a new state school aid law adopted, so we're telling the legislature, "You better take a good look at this problem, even though we admit that our opinion right now has no force. There is going to be no order issued", and there was not. In January, the thing with two new justices on the Court, was ordered re-heard and the opinion later was vacated, later in the year. I'm sorry that I dwelt so

long on this. I thought I saw a pattern here that was significant, and I just wondered if you thought the same way because there is going to be a change in the apportionment attitude and there is going to be a change in a lot of other things due to the fact of two new people coming on. You'll excuse me for that long digression. I thought I was going to...

Justice Kavanagh:

Well, I'm not...why don't you pose the question specifically that you have in mind.

Mr. Lane:

Okay, let's say we're talking about the changing character of the Court due to changing membership and in 1972, the year we're talking about when the apportionment case was decided where you entered a dissent that we were discussing - in 1972, there were two new members elected to the Court, right?

Justice Kavanagh:

Yes, right.

(interruption in the tape)

Mr. Lane:

I think the thing that needs to be answered here, Justice Kavanagh, is whether you anticipated, or what you did anticipate when you cast the vote that you did. I'm putting a great focus on it because a lot of people say that apportionment was the most important thing before the Michigan Supreme Court for about two decades, and it certainly was important in your political life and in your judicial life as it turned out. Did you recognize or did you have some inkling in 1972 when you filed the dissent that we were just talking about that this would be instrumental four years later in depriving you of the support of the party that had originally nominated you for the Supreme Court? Even though you were then Chief Justice, it caused or was a significant cause, according to the leadership of the party, for withdrawing or withholding support in 1976. Did you have any inkling that this was in the wind?

Justice Kavanagh:

Well, I knew at the time that many of my friends and Democratic hierarchy were very unhappy with me and with my decision, and I knew that a lot of them were probably going to have nothing to do with me politically after that, but I don't recall that I anticipated that it would affect and cause them to withhold their nomination. I don't know that that thought ever occurred to me at that time. Later on, toward the time of the convention, it became apparent to me that there were a lot of them that wanted to get rid of me.

Mr. Lane:

Well, part of what causes me to go through all of this is that I went to the State library and went through the files, you know, that are there, on your biographical...what do you call it...vertical

file, and here's one of them, "State Democrats dump Kavanaugh". This is dated 8/30/76. It was in that context that Morley Winograd who was then the Party Chairman...

(telephone interruption)

Mr. Lane:

Morley Winograd had some very severe things to say about your conduct on apportionment and also what he called your unwillingness to support Democratically nominated candidates for the Supreme Court whereas...

Justice Kavanaugh:

Let me get into that a bit because they did make a big deal. I said that I wouldn't support...they wanted me to endorse the Democratic slate. I said, "I can't do that. I cannot...the judicial ethics forbid a judge to endorse partisan candidates and I won't do it". They said, "Well, what about other candidates for judicial office?". I said, "There's is no judicial ban...no ethical ban on that in the thing but I personally don't believe that it is good practice for a sitting judge to endorse the candidacy of another judge, but that's a personal thing with me, but that's the way I feel about it, and I will not support anybody else. When I campaign, I will campaign only for myself. I will not campaign for or against anybody else."

Mr. Lane:

In effect, if I understand it, in 1976, we're talking about, they wanted you to oppose two of the colleagues who you were sitting with on the Court and who were, it happened, on the ballot in an unusual set of circumstances with you. There were going to be three of you incumbents, a very unusual situation, on the ballot that year, right?

Justice Kavanaugh:

Right, right.

Mr. Lane:

And they wanted you to, if I understand correctly, to oppose your colleagues, or at least, I suppose one or both of them.

Justice Kavanaugh:

Right.

Mr. Lane:

Well, that's not too tough to understand why you would be reluctant, having sat in confidential and continuing conference with these people.

Justice Kavanaugh:

Yes.

Mr. Lane:

Well...

Justice Kavanagh:

You know, it was horse shit as far as I was concerned, and I wasn't going to play that game.

Mr. Lane:

Well, it's interesting...here's another clipping that was dated about a month later. You want to read that one? Can you see that?

Justice Kavanagh:

Yes. I see that.

Mr. Lane:

It says, "Past Bar Presidents endorse Kavanagh". Here is another unusual occurrence, was it not?

Justice Kavanagh:

Yes, yes.

Mr. Lane:

There were 17 of 19 living former Presidents of the State Bar that signed an endorsement of you.

Justice Kavanagh:

Right.

Mr. Lane:

And most of them were Republicans, right?

Justice Kavanagh:

Yes.

Mr. Lane:

Now, how did that all come about? Was there a little bit of engineering behind that or would you rather not talk about it or what? This was very unusual.

Justice Kavanagh:

Actually, I didn't solicit it, and it says there...they...I'll tell you really the guy I think that masterminded it was George Bushnell.

Mr. Lane:

Is that right. He was one of them, right?

Justice Kavanagh:

He was one of them, and I think he got the thing going, but I didn't solicit it. I was very grateful for it, whoever it was.

Mr. Lane:

It says they sent letters to 15,000 lawyers which wasn't bad considering the fact that lawyers are the people most interested in a political campaign of this sort. Or should I call it a campaign for public office? Well, you did, so that the students of history might be fully informed, what was the result of your being dumped by the Democratic Party and endorsed or embraced by 17 out of the 19 living former State Bar Presidents? It was a pretty good result.

Justice Kavanagh:

Well, it was the best as far as I was concerned.

Mr. Lane:

Well, you were elected by a 2:1 margin, as I recall, over the people who could be considered to have been your opponents.

Justice Kavanagh:

Yes. As a matter of fact, if you've got those figures...

Mr. Lane:

I don't have them right with me, but I do remember...

Justice Kavanagh:

I think I got as many votes as all the other candidates combined. That included the Democratic nominee, the Republican nominee and three or four other party candidates.

Mr. Lane:

Do you think that might have influenced the strategists in the party to perhaps refrain from any temptation to try this tactic again?

Justice Kavanagh:

I think so. I think it...they said they wanted to teach me a lesson and actually, I think they learned a lesson.

Mr. Lane:

Well, I guess we've dwelled on that enough. There are some other things that happened while you were on the Court. One of them I wanted to ask you about occurred, I think, in about 1970, and there had been some unrest in the...well, in the public, I guess, and in the profession about bad conduct of lawyers, and there was some pretty bad stuff that went on in Livingston County, as I recall, and some of the lawyer, the mechanism for disciplining lawyers was called into question and the Court, which has charge of this sort of thing, in 1970 or 1971, shook up the lawyer discipline system of Michigan. Do you remember that? Created a new Commission to Superintendent, put two laymen on the commission for one thing, as I recall, for the first time. One of them was John Murray who we both know quite well. Did you have any role in that episode, or do you...?

Justice Kavanagh:

Well, I think we were pretty much of a mind that something should be done to improve

the...certainly the perception as well as the reality of the grievance system. I don't lay any claim to being the...I was in a position so that I was...it looked like it was mine, but in all candor, I think my colleagues to a person were as interested in it as I was.

Mr. Lane:

Was Tom Brennan then the chairman, the Chief Justice, do you recall, in 1971?

Justice Kavanagh:

No, it seems to me Tom Kavanagh was. Thomas Matthew Kavanagh was....wait a minute...wait a minute. 1971?

Mr. Lane:

Yes, 1970 maybe, but 1971 because 1971 would have been...

Justice Kavanagh:

When was I elected Chief Justice?

Mr. Lane:

That was 1975. We'll get to that.

Justice Kavanagh:

Okay, okay. Then Tom Brennan succeeded John Dethmers.

Mr. Lane:

So in 1970, he would have been, but 1971 when Williams and Swainson came on the Court, it would have been...

Justice Kavanagh:

That's right. T.M. Kavanagh...that's right...he was elected in...that would have been...

Mr. Lane:

January, 1971 when Swainson and Williams came on the Court.

Justice Kavanagh:

I guess so.

Mr. Lane:

So Williams, Swainson, T.M. and Adams would have been the four votes for Chief Justice, probably.

Justice Kavanagh:

I think I probably...I'm sure I voted for him.

Mr. Lane:
Of course.

Justice Kavanagh:

Sure, I voted for T.M. Yes, I guess that's right, it was 1971. So now what year are we talking about?

Mr. Lane:

Well, I think it was 1971 when this new discipline mechanism was put in place, and that was quite a salutary achievement, I think, on the Court, was it not?

Justice Kavanagh:

I think so.

Mr. Lane:

Widely viewed that way in the profession. Now, it's true that other improvements and changes were made later, but this was certainly a long step forward over what had been the practice of discipline. I'm thinking particularly, you may remember now...this figured, I think, in your campaign in 1968. There had been some disorder, let's call it, in Livingston County, and Martin Lavan and some of his rascally fellow lawyers had engaged on conduct that was later determined to not have been proper way for lawyers to conduct themselves, and there was quite an uproar in the newspapers and this led to the shake-up that I referred to. That was one of the contributing parts of it, and if you'll remember, when Mike O'Hara was running, this became an embarrassment to him because Mike had turned the campaign and wanted to give sort of a pass. He wanted to give a clean bill to the Circuit Judge who should have been exercising his influence in a little different way, and I'm talking about Mike Carland.

Justice Kavanagh:

Mike Carland. Yes, but of course, that was 1968.

Mr. Lane:

Yes, but this was the seeds of what happened...the disorder in 1968 that started being publicized then was what led, as I recall, to the reform in the disciplinary area two years later. It had to simmer for a while.

Justice Kavanagh:

Okay.

Mr. Lane:

Mike O'Hara, you know...I was a reporter at the time, and he blamed me somewhat for contributing to his defeat.

Justice Kavanagh:

If my recollection is accurate, the Free Press endorsed my candidacy on the basis of Mike O'Hara's support, in effect, of Mike Carland and Martin Lavan's which was strange because both Mike Carland and Martin Lavan were very dear friends of mine.

Mr. Lane:

As I recall, Mike Carland wanted a pay raise, and he went to the Shiawassee Board of Commissioners who had a say-so in supplementing his pay, and...

Justice Kavanagh:

I think at that time, his Circuit included Shiawassee and Livingston.

Mr. Lane:

Correct.

Justice Kavanagh:

Yes.

Mr. Lane:

So then, in order to bolster his desire for approval in Shiawassee County of a better supplement than he was getting, he asked the Supreme Court to give him a pat on the back, so to speak, at a time when this other stuff was festering and Mike O'Hara, who was a yes vote for that and it all...the result of this was first published in the county paper in Livingston County in Howell or Brighton, one or the other.

Justice Kavanagh:

What was the name of the publisher of that paper.

Mr. Lane:

I don't...

Justice Kavanagh:

There was a lot of publicity.

Mr. Lane:

No, this was the regular, this wasn't the wildcat paper.

Justice Kavanagh:

Oh.

Mr. Lane:

But this was a paper that was tuned into Mike Carland's interest and Mike apparently heard the word from John Dethmers, then Chief Justice, passed it onto the paper thinking it would do him some good, and us news hawks in Lansing who were, who were bird-dogging the Court trying to keep track of what was going on, didn't know anything about this. We charged Dethmers, and John, with some reluctance, finally got out the minutes and they showed that Adams said, "I can't vote that way", and I've forgotten how the rest of it came out. Somebody was gone, Kelly was gone, I think, but there were these votes, one of whose votes was O'Hara's, saying that Mike

Carland is a great fellow and he is doing a fine job. He ought to get a pay raise. That was about the way it translated. The newspaper people in Lansing were peeved because this was a scoop for the Livingston County Journal, some weekly paper and none of the rest of us had a shot at it. It also caused a little backwash amongst the news hawks at the time, and that didn't help Mike O'Hara either. Oh, well, we're getting off on some strange things here, but that was sort of an interesting chapter in some respects.

Justice Kavanagh:
Oh, yes.

Mr. Lane:
Now, we've got this constant change in the chemistry of the Court. We talked about that a little bit. In 1973, you got two new members. Do you remember who they were? They were Mary Coleman, the first woman to sit on the Supreme Court of Michigan and a good friend of yours, a former colleague on the Court of Appeals, Charles Leonard Levin.

Justice Kavanagh:
Right.

Mr. Lane:
Let's talk just for a moment. Here's the arrival of the first woman to sit on the Michigan Supreme Court in the history of Michigan. How did that...was there any ripple within the Court over this, or what do you remember about her advent?

Justice Kavanagh:
Well, Mary had been the president, I guess, of the Probate Judges Association, and she was very well liked by all the Probate judges. She was certainly very well known to everybody on the Court, and I think we all had very high regard for her and personally, she was a beautiful, charming woman, and professionally, she had served well as a Probate judge and was very highly regarded by her colleagues, so I don't recall that there was any resentment or anything. The fact that she was a woman, I don't think bothered anybody. I don't know that any of us was really into the Women's Movement at that point. I'm not sure that that answers your question.

Mr. Lane:
Well, I just...you know, people speculate that if you can think back 20 years, 18 years, there hadn't been women there. There would have been some modest mechanical problems...the men's world. The women back then and prior to that time were...some of them a little grumpy about the failure to provide sufficiently for women and women's needs. The bathroom facilities, stuff like that, the conduct of men. There was a time when there were spittoons all over the place, and women didn't, I don't suppose that was in accord with the thinking of a lot of people about the surroundings of it but you worked with a woman present.

Justice Kavanagh:
Well, now that you mention it, I do recall that we all agreed that we'd have to clean up our language.

Mr. Lane:

Well, just another little...if I could talk over the racket. The first woman senator was elected to the legislature, and her name was Lottie Holman O'Neil. She was an exemplary woman, a fine legislature, but she was the first, and there was no place for her to take care of the normal needs that people experience in that sort of a setting, and she, after some difficulty, succeeded in getting her problem solved, and this involved the creation of what was called "Lottie's potty". Well, that's enough of this sort of thing. At any rate, she came on the Court as a professional and shoulder to shoulder with the rest of you. She had good experience in the Probate area. She and Chuck Levin both ran like the wind at the polls, didn't they.

Justice Kavanagh:

Yes, indeed they did.

Mr. Lane:

He was, of course, very well...he became a very influential member of the Court because of his great intellect and his experience.

Justice Kavanagh:

Well, of course, you understand that he formed his own political party to get the nomination.

Mr. Lane:

When did you hear about that?

Justice Kavanagh:

I knew about it beforehand.

Mr. Lane:

You were very close to him.

Justice Kavanagh:

Yes, Charles and I...he is one of my dearest friends and has been since we were first on the Court of Appeals together.

Mr. Lane:

In fact, when he reached the Supreme Court, you frequently rode to Lansing together, did you not?

Justice Kavanagh:

Oh, indeed. Chuck and I couldn't be closer. I have utmost respect for him and regard. He is one of my dearest friends, and I think he is one of the best judges around.

Mr. Lane:

He probably never will enjoy the advancement to the Federal judiciary that some of the other

Supreme Court justices in Michigan have enjoyed because of his political...what?...orientation. Is that correct?

Justice Kavanagh:

Probably so. Certainly the Republicans would never sponsor him for a Federal appointment. Of course, the Levin family, by and large, have always been Democrats, but Chuck has, because he got there on the Michigan Supreme Court without the formal endorsement of the Democratic Party, a lot of Democrats in the regular organization regard him somewhat as undeserving of Democratic support for the Federal thing. That's my surmise, so I think you're right. I don't anticipate that he'll ever be on the Federal bench. His father was a distinguished Federal judge, and of course, as you know, his cousins, both Senator Carl Levin and Representative Sander Levin are very powerful, influential Democrats, so it is possible that if the Democrats ever regain the White House, Chuck might be considered for Federal appointment. I can say this, that he would do them credit.

Mr. Lane:

While we're talking about your other colleagues, how would you characterize the obvious...you have a high regard for him, but give me a couple of qualifications that he has that are superior that cause him to be so high in your esteem. Is it his...in other words, his intellect, his writing ability, his energy, his collegiality, his...?

Justice Kavanagh:

Well, I think, as it if given to one of us to make such an assessment, Chuck was certainly the closest thing to a scholar that we have had on the Michigan Supreme Court since, probably since Cooley.

(End of side 1, tape 2)

Topic 5: Justice Kavanagh continues to talk about Justice Charles Levin and his involvement with the Shavers case and an advisory opinion case. He then talks about Justice Thomas Brennan's resignation, the appointment of John Fitzgerald, and the re-election of Justices Fitzgerald and Thomas M. Kavanagh a year later

Mr. Lane:

...continuing about Justice Levin.

Justice Kavanagh:

I was saying that in my view, he is a first-class lawyer technically, and above that, Chuck has a great respect and affection for jurisprudence, the science of the law, and he is dedicated to it, and he is a very hard working man. He works at odd hours. He has a very poor concept of time, but he is dedicated, and he works very hard. I know he works very hard.

Mr. Lane:

Let's turn to one of the cases, I think, where he had a big role, and you correct me if I'm wrong. Did he write *Shavers* or did he make a great contribution to the no-fault insurance cases?

Justice Kavanagh:

I don't recall without looking it up whether he wrote the opinion that was adopted in *Shavers* or not, but I know he studied the no-fault question a lot, and he worked very hard on it. Of course, you understand, Chuck and I do not agree all together on that, but boy, he worked on that, he worked very hard on that case. Whether he wrote the opinion, I don't remember.

Mr. Lane:

But this would be somewhat of the kind, where there was a new concept that had to be thought out and analyzed and perhaps implemented in the sense of having been expressed in the law; this was where his power lay.

Justice Kavanagh:

Yes, exactly so. He has a very good grasp on the concept of government, and he appreciates greatly the importance of the responsibilities and the differences in responsibilities of the three branches of government, and he respects that difference. He is a voracious reader, and he reads everything he can read on these things, not only the minutes of the legislative bodies and all but the opinions of the scholars that have addressed an issue, and before he makes up his mind, he is very well informed.

Mr. Lane:

I happen, in preparing for this sort of discussion, I happen to have come across one of his opinions in an Advisory Opinion case. You know that category of decision that the Court is called upon to make which is a little out of the...

Justice Kavanagh:

Yes.

Mr. Lane:

There is no such thing in the Federal juris prudence, and I can recall...I happened to spot this. Here's Justice Levin writing about some request from the governor or the legislature for an opinion in advance of the effective date of a law or proposed law, and what I happened to spot was a long extract from Felix Frankfurter that was written in a law journal or some place like that back in, let's say, 1922 or before he even reached...this was not in a United States Supreme Court pronouncement. This was an academic, a leading academic analysis of this particular unusual judicial or juris prudential animal, and Frankfurter did not have a very high opinion of the advisory opinion process which calls for a judgment in a vacuum. I guess he...

Justice Kavanagh:

Yes.

Mr. Lane:

Chuck felt that way pretty much, did he not?

Justice Kavanagh:

Yes, although I think he became comfortable with the Michigan constitutional provision that judges should do that.

Mr. Lane:

Well, that's part of your duty as a justice of the Michigan Supreme Court.

Justice Kavanagh:

Right, exactly.

Mr. Lane:

To deal with these problems when they come to you, right?

Justice Kavanagh:

Yes. But I think he largely shared that...there are many lawyers who think it is not a wise policy or practice for a court to issue advisory opinions, and you know, you can get very respectable authority on both sides of that question, but I think Chuck is comfortable with it as we all became comfortable with it. I must confess that in the beginning, I was more inclined to think it inappropriate, but I don't have any problem with it.

Mr. Lane:

One example, I think, that the Court felt did not welcome in the advisory opinion category was when this legislature, faced with the Headlee problems which were quite severe for the legislature, sent a demand...I'll call it demand to the court for a certain kind of opinion on a Headlee problem, and it said, "We have an appropriation bill", and it gave the number of it. It was a general government bill. It had the Court's budget it in, and it said, "We will deal with this bill when you give us your opinion", presumably the kind of opinion the court or the legislature wanted. Now, the Court demurred, as I recall it, in that case for properly stated reasons. It didn't talk about a blackjack or shake down or anything, but that was a very questionably request. Do you recall that one?

Justice Kavanagh:

Vaguely. I don't...I don't have it fresh in mind.

Mr. Lane:

Let me ask you a little bit about another of your colleagues who in the chronology of this whole matter is about to depart. Now, it's 1973, and we have Thomas E. Brennan who is engaged in some other pursuits, and he is about to leave the Court. Do you recall that episode?

Justice Kavanagh:

Well, yes. Tom had conceived the idea of sponsoring, himself sponsoring the formation of a law school, and as you know, the legislature had toyed with the idea of creating a law school in the Lansing area for a long time because many legislators felt that they wanted to go to law school.

They were never able to bring that about for reasons that I don't know, but I felt, as Tom felt, that another law school in out- state Michigan would be very beneficial, and I encouraged him as much as I could in his efforts to develop this law school. Some of the other members of the Court did not think it was a good idea, and they...

Mr. Lane:

The matter would come up, would it, in conference context?

Justice Kavanagh:

Yes, yes. We would talk about it informally. I don't know that we ever talked about it formally. You could check that in the minutes of our meetings, but certainly informally, we talked about it a lot. I remember T.M. Kavanagh did not think that a justice of the Michigan Supreme Court should be spending any of his time thinking about creating a law school, and I think it was perhaps Tom's attitude that, Tom Kavanagh's attitude that eventually resulted in Tom Brennan's decision to leave the court and devote his full time to the law school.

Mr. Lane:

Well, getting to the matter of court chemistry, there was a change that occurred as a result of this episode. I think it was late 1973, toward the end of the year, November or somewhere in there that Tom Brennan resigned and prospectively said he was going to leave the Court at a certain date not too far distant.

Justice Kavanagh:

Right.

Mr. Lane:

And so then you got another colleague by appointment.

Justice Kavanagh:

Right.

Mr. Lane:

And that was another former colleague on the Court of Appeals, right?

Justice Kavanagh:

Exactly so. John Warner Fitzgerald.

Mr. Lane:

Right, so....

Justice Kavanagh:

This may be of interest to you. Both Chuck Levin and I had very great respect for John Fitzgerald as a judge and as a person, and John, like most of us who had been on the Court of Appeals, had a great affection for that court, and the colleagues and the camaraderie that that court had at that time was a beautiful thing, so Chuck and I leaned on John Fitzgerald to get him to accept an appointment to the Court.

Mr. Lane:
Is that right?

Justice Kavanagh:
Absolutely, and he was not...he was perfectly content to stay where he was, and we convinced him that we, as a court, we needed him on the court, and he finally agreed, and of course, I don't know the mechanics of how the appointment was brought about. I wasn't privy to any of that, but I know that both Chuck and I lobbied John Fitzgerald very hard to accept it if it came about.

Mr. Lane:
Well, it did, and he came on the Court in the end of 1973. Let me see here what it says on the official list...Fitzgerald - shows he came on in 1974. It must have been that Brennan resigned so that his resignation would be effective at the end of 1973 and John Fitzgerald came on at the start of 1974.

Justice Kavanagh:
Yes, I guess that's right.

Mr. Lane:
Now, one of the things that is pertinent here and I think goes into the thread of your whole tenure as you look at 16 years on the Court. He had to almost immediately start thinking about holding his seat by going through the electoral process.

Justice Kavanagh:
Right.

Mr. Lane:
And so I have talked to him, and he likes to recall that he turned in his state car, and he announced with a flourish that he would accept no lawyer contributions, and his troubles were mounting.

Justice Kavanagh:
Oh, yes.

Mr. Lane:
What do you remember though, about his campaign in 1974? He and Thomas Matthew Kavanagh were both on the bill.

Justice Kavanagh:
Well, I...

Mr. Lane:
Weren't there some awkwardnesses in this and some frictions that resulted?

Justice Kavanagh:

To some extent. To some extent, because Thomas M. Kavanagh was a very active Democrat before he became Justice of the Supreme Court, and he never really got over that. I think Tom was very fond of John Fitzgerald personally, but I think his lifelong Democratic biases...anything that affected the political process, Thomas M. Kavanagh felt should be decided on the only practical and available way of doing it, and that was via partisan political process. And I think Tom would have been content, totally content, to have John Fitzgerald be successful in the election, but I think he felt he owed an obligation from his partisan political upbringing to support the nominee of the Democrats who would be nominating somebody to run against him. I don't...I really don't remember too many of the details of the campaign. I know I had felt for a long time and told Tom, told everybody that was foolish enough to listen to me that in my view, the only proper way for a judicial candidate running in the State of Michigan which constitutionally has to be a non-partisan thing was to be non-partisan, and I didn't think it appropriate for a sitting judge to endorse the candidacy for a judicial office of any other person. Now, the code of ethics does not forbid that. Under the code of ethics, a judge is free to support the candidacy of other non-partisan candidates. I never felt it appropriate to do that, and consequently, I never publicly supported the candidacy of anybody running for judge. Privately, I was active and I was active in support of John Fitzgerald's re-election, and I was active in my support of Thomas M. Kavanagh's re-election, but that was a private thing, not publicly.

Mr. Lane:

And these people that you referred to by name were both sitting members of your court and colleagues of yours that you saw every day and worked with.

Justice Kavanagh:

Absolutely. Absolutely, and I felt it inappropriate to publicly endorse their candidacy so I never did. Privately, I supported them both and worked as best I could for their election.

Mr. Lane:

Now the problem that arose, though, was with the nomination of the other Democratic candidate, right?

Justice Kavanagh:

Yes.

Mr. Lane:

And that turned out to be Blair Moody, the sitting Circuit Judge in the city of Detroit in Wayne County and the son of a former United States Senator and dear friend of one of your colleagues, another one.

Justice Kavanagh:

Right, and a dear friend of mine. Blair Moody was a dear friend, and Blair Moody's father and my father both were reporters on the Detroit News at the same time, and they were very close friends. I thought the world and all of Senator Moody, and Blair and I became better acquainted later on. I didn't know him that well at that time, but I certainly had nothing against him. My support of John didn't indicate that I didn't love Blair.

Mr. Lane:

But there got to be some...for one thing, as I recall, John Fitzgerald won by a very slim margin of...was it 11,000 votes? Do you remember?

Justice Kavanagh:

I don't remember exactly, but I know it was close.

Mr. Lane:

Yes, and this would be out of a couple million cast. Well, so he hung on. He was re-elected and Thomas Matthew Kavanagh was re-elected.

Justice Kavanagh:

Yes.

Mr. Lane:

This brings us to 1975. Now, 1975 as it turned out, was a year of turmoil for several reasons, and it started in the first month when it fell to the Court to select a Chief Justice, and that's when you were elected Chief Justice, correct?

Justice Kavanagh:

Yes.

Mr. Lane:

This was a very awkward event, as I understand. What would you care to say about it?

Justice Kavanagh:

Well, T.M. Kavanagh, Thomas Matthew Kavanagh was the Chief Justice in 1974, and his wife, Agnes, died in June, 1974, and it affected Tom greatly as could be expected and Tom got to be very difficult to live with on the Court. None of us suspected that he was ill at that time, but he was, but it got to the point...he was very tough on Mary Coleman for reasons that he never made clear, and he was...I think that he was a little tough on John Fitzgerald as well. It became a very difficult time on the Court. As a consequence, four of us; Mary Coleman, Chuck Levin, John Fitzgerald and I met and concluded that Tom had to be replaced as Chief Justice, and they urged me to be the candidate.

Mr. Lane:

You had seniority, among other things.

Justice Kavanagh:

Yes. I was very fond of Thomas Matthew Kavanagh, and I had the utmost respect for him. He was an honest, decent fine human being. He had, like the rest of us, he had a hatful of faults, but he was a totally decent man, and I went to him before the election in January, 1975, and told him that we, the four of us, were going to vote for me. He didn't take it very well. He was very unhappy. He told me in no uncertain terms that he felt that I had cut the ground out from

underneath him, and it was a bad thing for the Court and a bad thing for everything. I said, "Well, John, you know, the die is cast, and that is it. I would prefer it if you would simply announce that you don't want to run, but if you do, I can assure you that I have four votes". Well, he was so mad that he said, "We'll see about it", and insisted on the election which, of course, turned out that I got the four votes that I had, and I was...Tom was very unhappy about it, very unhappy about it. As I say, this was in January, and Tom died, I think, in...

Mr. Lane:
April.

Justice Kavanagh:
...April, and we didn't realize. Certainly, we knew that Agnes' death had changed Tom. He was very cantankerous, and we didn't realize that he was sick. Of course, as you know, the John Swainson tragedy, in my view, developed, and it was a very difficult time.

Mr. Lane:
Well, John...or Thomas Matthew Kavanagh died in April, and that left a vacancy on the Court to be filled by gubernatorial appointment.

Justice Kavanagh:
Right.

Mr. Lane:
And the appointment came in the form of designating Larry Lindemer, a prominent local practitioner in Lansing to take his place.

Justice Kavanagh:
Right.

Topic 6: He also provides an account of the events of 1975, including the death of Thomas M. Kavanagh, the investigation of John Swainson and his belief that Swainson was framed, and his involvement with Swainson's investigation. He then discusses the Dearborn Fire Fighters case concerning Act 312, which came about during the 1975 upheaval

Mr. Lane:
Now, before Larry came on the Court in June, there came the first word, did there not, that there was going to be trouble for John Swainson?

Justice Kavanagh:
Yes, actually that had gone on for a few months.

Mr. Lane:

When did you first hear about this or how did the word come to you and what was the reaction in the Court?

Justice Kavanagh:

Well, we were stunned. The charges made that John Swainson had manipulated the Court business for a fee in favor of a fellow by the name of John Whalen, and the FBI contacted me and the other members of the Court.

Mr. Lane:

Do you remember how the contact was made and when it was made?

Justice Kavanagh:

I don't remember the exact date, but it was right around the time of Tom's death. I think a little before Tom's death.

Mr. Lane:

How did the word come to you?

Justice Kavanagh:

Well, somebody identifying himself as an agent of the FBI asked if he could talk to me.

Mr. Lane:

Came into the office?

Justice Kavanagh:

Came into the office of the Court, yes. He talked to me and told me about this, and I was aghast, and I, of course, looked up the John Whalen case that had been in front of the court...

Mr. Lane:

Was this Robert Ozer that brought the word or was it somebody else? You don't remember...?

Justice Kavanagh:

I don't remember whether it was Ozer who was the first...I think it probably was Ozer that made the first contact with me, but I went and looked up and my recollection was refreshed, but I rather than John Swainson, had carried the ball on the Whalen thing, in that I was much more instrumental in the Court's decision regarding Whalen than John Swainson had been, although we voted together, but I was the guy that kicked the dog in the first place, and I did it on the basis of the pleadings, not...I didn't know any of the parties involved, and so I couldn't believe the charge. I don't believe it to this day.

Mr. Lane:

This was a granting of a rehearing, was it, of a felony conviction. Was that what it was? Do you remember?

Justice Kavanagh:

I think so. Something like that. I don't really recall the details of it, but I remember how astounded I was at the concept, the suggestion that John had taken a bribe to influence some decision on the Court, and as I said, you know, to Ozer, I said, "Well, that's ridiculous to even think that because there isn't one of us who could do it all alone", you know, and there is nothing. John has never talked to me about this thing. He didn't influence my vote. I always thought I had influenced his vote, and I did it because I thought it was right.

Mr. Lane:

Did this Federal agent offer any kind of documentation or something that was at all persuasive to support his representations? Do you remember that? This thing turned out, of course, in an acquittal, right?

Justice Kavanagh:

Sure, absolutely. I don't remember exactly what he had. He had this Whalen...I think it was Whalen...somebody had testified, given an affidavit that he had, that John had solicited a bribe, and I think an affidavit to the effect that he had accepted a bribe which was later....John was acquitted of that charge which was totally ridiculous.

Mr. Lane:

This guy was a scurvy, penny-ante crook.

Justice Kavanagh:

Absolutely. Absolutely.

Mr. Lane:

Did you ever come to a judgment as to how this all...what led to this thing, how it all grew up into this...?

Justice Kavanagh:

Yes, I have a very firm conviction about how it came about, and I've said it before. I can't prove it, you understand, but I believe that the word came out of Washington. If you remember the political climate in Washington at that time of the Nixon and the Brownells and all these people that were getting rid of their political enemies, and I think the John Swainson incident was a part of that. I think the word came from...because John was being prominently mentioned as a candidate for the United States Senate.

Mr. Lane:

I remember that.

Justice Kavanagh:

And that is what took John out of the Senatorial picture, and if it hadn't come up, John would be the United States Senator, and he would be the United States Senator today, I think, so I am convinced that it was a put-up job originating in Washington.

Mr. Lane:

Now this fellow that actually carried the ball in the prosecution was imported from Buffalo or somewhere, was he not?

Justice Kavanagh:

Someplace. I'm not sure. His name was Robert Ozer. He was a special agent of some sort, and ...

Mr. Lane:

Had no background in the Michigan operation of the FBI or Justice Department.

Justice Kavanagh:

Not as far as I know.

Mr. Lane:

Well, I think it was well established in my mind, at any rate; I am very confident of it that he was brought in only a short time before the proceedings crystalize, and he was brought in from Buffalo or Philadelphia or someplace in the east and it seemed almost as though...well, you could draw a lot of conclusions given the timing of it.

Justice Kavanagh:

Yes, as I say, I can't prove that, but I am confident, I'll go to my grave with that conviction that John was framed.

Mr. Lane:

But this really was a terrific blow to the Court given the...

Justice Kavanagh:

It was devastating, devastating.

Mr. Lane:

How did the members react? Did you meet for a conference and discuss this?

Justice Kavanagh:

Oh, of course we did. Talked about nothing else practically. It was devastating, and God,...

Mr. Lane:

He had to excuse himself almost immediately, did he not?

Justice Kavanagh:

Oh, yes.

Mr. Lane:

And so the Court was already one light because of Thomas Matthew Kavanagh's death.

Justice Kavanagh:

Right.

Mr. Lane:
Then comes John's...

Justice Kavanagh:
John's unavailability because of the charge.

Mr. Lane:
He couldn't participate until this thing was cleared up.

Justice Kavanagh:
Right.

Mr. Lane:
And he agreed to that, didn't he?

Justice Kavanagh:
Oh, without question.

Mr. Lane:
Did he do anything? Did he participate in any of the administrative matters?

Justice Kavanagh:
No, not as I recall.

Mr. Lane:
Just as though he were removed from the Court and put off in a closet somewhere.

Justice Kavanagh:
Yes, that's my recollection of it, Roger.

Mr. Lane:
And so this happened, these two things happened in the spring of 1975.

Justice Kavanagh:
Right.

Mr. Lane:
And then Larry Lindemer came on in about June, but of course, he was totally new, not only to the Supreme Court but to the whole process of judicial...

Justice Kavanagh:
Right. As soon as Larry's name was mentioned, announced as the designee, I called him and asked him to come into the office. Larry was a very busy lawyer, and he had indicated that he was going to need a couple months to wind up his practice, and I urged him to expedite that

process as best he could because I said we needed him badly, and we needed him immediately, and Larry, the gracious man that he is, exceeded to that request, and came aboard right away.

Mr. Lane:

He was very busy. He was a partner, the second leading partner in the biggest local law firm in the Capitol.

Justice Kavanagh:

Yes, and I, you know, the old cliché, about giving a lucrative practice to serve as a judge which truly doesn't apply, never applied to me, and I don't know that it applied to very many. I think that did apply to Larry. I think he came at a rather considerable personal sacrifice.

Mr. Lane:

He told me that. I have spoken to him about that subject. Now, so Larry Lindemer comes on. You're two short, and one recruit, let's call him for the moment. A very able man, but he hadn't had a chance to get his feet wet or hear any of the arguments. Summer recess is upon you, and this Swainson matter is hanging over the Court. Now, do I understand that you went to get counsel?

Justice Kavanagh:

Yes.

Mr. Lane:

Tell us about that?

Justice Kavanagh:

Chuck Levin...it was Chuck's idea, and...we were devastated by this thing, you understand, and I sure didn't know what to do, and Chuck and I talked about it, as we've talked about everything, and Chuck said he thought we should get, the Court should get counsel, and it shouldn't, we shouldn't put that burden on anybody that practiced in front of the Court and Chuck suggested the name of Albert Jenner who had been...well, God, he'd been very active in the ABA and he had represented the Republican members of Congress in some preceding.

Mr. Lane:

Had he not been...was he a president of the ABA at one time?

Justice Kavanagh:

I'm not sure of that.

Mr. Lane:

He was very prominent.

Justice Kavanagh:

Very prominent and a fine gentleman, but Chuck and I went to Chicago to see him and ask him if

he'd represent the Michigan Supreme Court and counsel us as members of the Court on how best to do our duty and he did. I got to be very fond of him. He was a fine person and a brilliant lawyer. I think we made a good decision to retain him, and I think it helped us. As I say, it was Chuck's idea, and I think it was a great idea.

Mr. Lane:

At this time, were the members of the Court being approached by government, Federal government investigators or approached with respect to whether or not they would testify, were there depositions taken and all that kind of stuff, or wasn't there much of that?

Justice Kavanagh:

I don't recall any deposition, but...I remember I did testify in John's trial, really kind of as a character witness.

Mr. Lane:

For him.

Justice Kavanagh:

For him, and...it was an interesting thing. David Doumochel was my law clerk at that time, and David Doumochel had worked for the Federal Government on a task force that...it didn't have anything to do with the Swainson matter, but this...he had worked for the Justice Department, and so he told me much later that Mr. Ozer and one other agent came over to my office in the Lafayette Building and asked me if I had ever gone to the office of...I think it was Chicky Goldfarb, a bondsman, with John Swainson, and I couldn't remember...I had in the back of my mind for some dumb reason that the Goldfarb office which used to be right next to the, near Recorder's Court, had been transferred. I thought they had moved their offices. Chicky Goldfarb's father had started the business. I had gotten bonds from them when I was practicing law, early on, you know, a million years before this, and I think he had since died. I didn't know Chicky Goldfarb at that time from Adam's off ox, and I don't know why I had the notion that his office had been moved out of downtown Detroit out into near Northland someplace.

When they asked me the question, I said, "No, I was never at Chicky Goldfarb's office". "You don't remember going there with John Swainson?" "No". Well, Dave Doumochel told me many years later that the FBI or this task force had pictures of me at Chicky Goldfarb's office with John Swainson and John...and then what had happened...John and I had decided we were going to go out to lunch together and so he said, "I've got a picture that is coming from the J.L. Hudson Company, and I've got to pick it up. Do you mind going by and" ...and so and so, I forget who it was, was going to pick it up for him..."and I've got to pick it up there, and we'll go to lunch then". I said, "Fine", so I drove. We went over, and as it turned out later, it was Chicky Goldfarb's office. John went in and got his painting which he said was from the J.L. Hudson Company. I got out, and I forget, I was standing there talking to whoever was around, and we went to lunch and I promptly forgot all about it. I attached no significance to that at all. Mr. Ozer didn't question me further about it, but I said, "No, absolutely not", you know. As I say, it was several years after that I found out all about this thing and "That's what they were talking about".

Mr. Lane:

If you got on the stand and testified that way at the trial, that would have been perjury and you could be breaking rocks, is that right?

Justice Kavanagh:

It wouldn't have been perjury because I didn't know the truth of it. I didn't deliberately lie. I just...

Mr. Lane:

Prove it.

Justice Kavanagh:

Yes. It was funny. I was embarrassed, and I attached no significance to that at all. Dave said, "You know, they've got your picture". I said, "What are you talking about?", and that was it.

Mr. Lane:

Well, the Court, because of these interruptions in its activity, as I recall, was reduced to rendering 3:2 and in one case, at least that I recall, a 2:2 decision, the 2:2 being a Dearborn Fire Fighters case. Do you remember that?

Justice Kavanagh:

I sure do.

Mr. Lane:

That was a pretty important...

Justice Kavanagh:

Oh, yes. The Dearborn Fire Fighters case if I recall correctly...was that the one that was concerned with the constitutionality of Act 312.

Mr. Lane:

Yes, that's correct.

Justice Kavanagh:

The compulsory arbitration.

Mr. Lane:

Yes.

Justice Kavanagh:

Yes, I remember that.

Mr. Lane:

And the thing wound up, I don't know...2:2, whatever the heck that produces...some discussion.

Justice Kavanagh:
Confirms the lower court.

Mr. Lane:
Well, but what about a 3:2. There was no...there were loads of questions whether that had an precedential value if you had a 3 member majority, as I remember, and the Court had to figure that one out, and made some kind of an improvised rule, as I remember, in case law, and then eventually it became sort of moot because you got back to...

Justice Kavanagh:
Incidentally, on that Act 312, you know, I was of the opinion then that that law was unconstitutional because I felt it transferred the, in effect, the powers of the government to a non-elected official and I so wrote in dissent, and after I left the Court, I later was appointed an Act 312 arbitrator.

Mr. Lane:
For the sake of history, this is the compulsory arbitration statute that relates to the settlement of fire and police or at least fire.

Justice Kavanagh:
Fire and police.

Mr. Lane:
Pay or collective bargaining disputes, right?

Justice Kavanagh:
Right.

Mr. Lane:
And so the public power to determine how much a fireman gets paid is put in the hands of an arbitrator.

Justice Kavanagh:
Exactly.

Mr. Lane:
Which transfers the power of the purse to a private body. This came back to haunt Coleman Young.

Justice Kavanagh:
Oh, Coleman Young, when I announced my decision as the arbitrator, Coleman Young almost quoted my dissenting opinion verbatim.

Mr. Lane:
Well, now we go along into the time when John Swainson's trial occurred, and he was acquitted

of the principle charge which was bribery or soliciting a bribe, something like that, but he was convicted on a perjury count.

Justice Kavanagh:
Right.

Mr. Lane:
Or two of them or whatever, and he then...

(End of side 2, tape 2)

Topic 7: Justice Kavanagh finishes his discussion of the resignation of Justice Swainson, then talks about the appointment of James Ryan, and the 1976 elections and the difficulty in campaigning in general. He speaks about his the collegiality and stability of the court after 1976, assigning T. John Lesinski to reorganize the Recorder's Court in Wayne County, and his duties as Chief Justice and the challenges of dealing with people

Mr. Lane:
Well, having then been convicted then of perjury, John Swainson was obliged to resign from the Michigan Supreme Court, and this happened in November, didn't it, or thereabouts?

Justice Kavanagh:
Yes, I forget the exact timing of it. He had stepped down in the spring, and I forget. I guess you're right. I think that's when...

Mr. Lane:
So then there comes another vacancy.

Justice Kavanagh:
Yes.

Mr. Lane:
...on the Court. Now, that vacancy also was to be filled, as it turned out, by a gubernatorial appointment.

Justice Kavanagh:
Right.

Mr. Lane:
And that is how James Leo Ryan arrived on the Michigan Supreme Court, so you had two...you had then another change in the chemistry. He came on, I think, in December, did he not?

Justice Kavanagh:

I think so.

Mr. Lane:

Now, what...do you recall...you must have received him eagerly. What was the, do you remember anything about Jim Ryan's arrival on the Court?

Justice Kavanagh:

Well, I remember....

Mr. Lane:

Appointed 12/2/75.

Justice Kavanagh:

Yes, I remember when he was sworn in. We had a big gathering in the Court. I remember Tom Brennan spoke at the thing. Tom Brennan always spoke very well. I think Tom has a great gift for oratory, and he did himself proud and he did Jim Ryan proud as did the others, but all I remember about that was that it was a very happy occasion for a lot of my friends who were also friends of Jim Ryan's.

Mr. Lane:

Now with James L. Ryan reaching the Court, you go into 1976 and 1976 turned out to be another sort of watershed year. Ryan had to run. Larry Lindemer had to run, and your term was expiring, so that meant that if you elected to stay on the Court, or to run to stay on the Court, there were going to be three members of the Court on the ballot in 1976. What did this do for you shorthandedness and being behind in the work and all that stuff?

Justice Kavanagh:

It did not help. I didn't help. Campaigns are very difficult.

Mr. Lane:

Explain a little bit what the campaign, the necessity for campaigns and the way that the other members of the Court have to view them, the requirement of the person, the burdens that he carries in order to hold his seat. Why don't you give your view of the whole business? This is an appropriate occasion for that, is it not?

Justice Kavanagh:

Well, you know, the burden on the Court that an election imposes is considerable, and the argument as to whether judges should be appointed or elected has gone on from the beginning of the country. I was, for a long time, persuaded that the people should have the right to elect their judges, and consequently, I...well, I realized the impact on the Court of running for office, and so I eventually came to change my mind about the election of particularly Appellate Court judges. You get good judges by election. You get good judges by appointment, and unfortunately, you get bad judges by either method. So there is no magic in the system of selecting judges, but I am now convinced out of consideration for the work of the Court that the people are better off by having their, certainly their Appellate Court judges appointed rather than elected. Understand, I

got on the Court by the election process, and I am confident that I would never have been on the Court under an appointive system, but none the less, I am now persuaded that the election of judges...I can still defend the concept of electing judges...you see, I am perfectly willing to let the electorate decide the issue if the electorate can be informed, but as a practical matter, informing the electorate about the qualifications of a candidate for a judicial office in a state-wide race is for all practical purposes, impossible, and even in a race where the districts...say for the Court of Appeals. You know, the 3rd District covers umpteen...

Mr. Lane:

At one time, it was 66. I think it is fewer now.

Justice Kavanagh:

Okay, yes. Again, that's a practical impossibility, and so I am now of the opinion that we'd be better off if we elected the District Court judges, even the Circuit Court judges and the Probate judges but not the Appellate Court judges. I think they should be appointed. I have no problem with a partisan governor appointing. That's the way the ball bounces, and that's fine, but because of the impact on the Court, I am persuaded that it is not wise to elect Supreme Court and Court of Appeals judges.

Mr. Lane:

Please explain the impact on the Court, what you mean by those words. It is here, let's say May 15th. There is a conference of the Court scheduled, and you're going to be in Lansing two to three days, and there are three of the seven members, three of the seven in this instance who have to think about whether they will be entitled to sit there come January, and so in order to assure their tenure, what is the practicality of this? They have to go, don't they?

Justice Kavanagh:

Of course, they have to go, or if they're there, their mind is someplace else. It's very difficult.

Mr. Lane:

"We've got to hurry up and get this conference over so I can get over to Grand Rapids".

Justice Kavanagh:

Yes. "I'm going to meet with the Bar or something". Oh, yes. It is very difficult.

Mr. Lane:

And you cannot, in good conscience, sitting there especially having been through the process, you cannot be severe in judging your brethren, can you?

Justice Kavanagh:

Absolutely not. You shouldn't be.

Mr. Lane:

It's going to be your turn the next time.

Justice Kavanagh:

You bet.

Mr. Lane:

Not only that, is it not true that each one of these persons rightfully views himself as an elected state-wide officer, answerable to all the people in Michigan.

Justice Kavanagh:

Absolutely. You put your finger on it. That's what makes it so difficult, and it does slow down the work of the Court because even when you're in your office trying your level best to handle the work that you have to do on a particular case, write your opinion or study the briefs and all this business, it is very difficult if your mind is on "What should I do about my campaign".

Mr. Lane:

Or your campaign manager is on the phone saying "How are we going to get another \$2,000 to get this ad in the paper?" and all.

Justice Kavanagh:

Precisely. It is very difficult, very difficult.

Mr. Lane:

And you have to raise money, don't you?

Justice Kavanagh:

Yes, that's the worst part of the whole thing.

Mr. Lane:

Now, you, in 1976, fortune smiled on you.

Justice Kavanagh:

Indeed. Well, I became a martyr.

Mr. Lane:

But the others, your colleagues did not become martyrs. Jim Ryan had problems and Larry Lindemer surely must have had some.

Justice Kavanagh:

Yes. Well, as I say, I became a martyr because...you've adverted to the fact that the Bar presidents endorsed my candidacy which was an unprecedented thing, and I got...I got a lot of contributions from people. I had several letters saying that "I've been a Republican all my life. Here's ten bucks for your campaign. I like what you're doing".

Mr. Lane:

Well, in this article...I'll refresh your memory a little bit...this is the one that is headed "Past Bar

Presidents Endorse Kavanagh". This is the martyr. You were canonized a martyr in this. "In a letter sent this week to the 15,000 members of the Michigan Bar Association, one of the presidents criticized actions by the State Democratic Party to emphasize partisanship in the campaign, called them 'a serious attack on the independence and the integrity of our state's judiciary'." Now that says it, I guess, doesn't it?

Justice Kavanagh:

Yes.

Mr. Lane:

Now, there is something in the canons about independence, too, is there not?

Justice Kavanagh:

I think so.

Mr. Lane:

Okay, but at any rate, this was a trying time for different reasons then. In 1976, you've got three...you've just come through a traumatic year of 1975 that we described. In 1976, it is a different kind of problem. You try to struggle to catch up but three of you have to toil hard and long and travel a great deal to give yourself a chance of retaining your office.

Justice Kavanagh:

Yes, indeed. It was difficult, very difficult.

Mr. Lane:

Now, in 1976, one of your colleagues was defeated. Larry Lindemer had lost and Blair Moody who had not succeeded in 1974 succeeded in 1976 and became a member of the Supreme Court, so there was another change in chemistry. Starting in 1977, there was at least stability that was enjoyed by the Court for some years. Thinking back through all that barbed wire, figuratively speaking, 1974 and 1975, 1976...and you were now Chief Justice. What were some of the things that were going through your mind, some of the objectives you were striving to achieve? One of the things I remember...you used to talk about collegiality, the need for it, what it meant.

Justice Kavanagh:

Yes.

Mr. Lane:

...on the Supreme Court. Was this the dawn of a period that realized a great many of your hopes in that direction?

Justice Kavanagh:

Indeed, yes.

Mr. Lane:

Didn't this require nurturing of the process and the collegiality that was so devoutly hoped for, striven for didn't just come automatically, did it?

Justice Kavanagh:

Oh, no, it didn't come automatically. I think by this time, it was apparent to everybody that if we were going to do our job and do it right, we had to be colleagues in the full sense of the term, and how we got there, forget it. It didn't make any difference. We were there, and we had a job to do, and I think it dawned on all of us gradually that it could be and it came about. It came about. I don't think any one individual can claim credit for it. I think we, the courts had been through so much and those of us who had been on the Court for any length of time at all knew that so well that it was just a natural thing. Nobody, nobody on the Court was throwing rocks, or nobody was putting stumbling stones in the way of collegial work.

Mr. Lane:

You had a remarkable group at that point of individual personalities, did you not?

Justice Kavanagh:

Yes.

Mr. Lane:

They were all family people, all senior in the sense of having a lot of life's experience behind them.

Justice Kavanagh:

Yes.

Mr. Lane:

People of great integrity and good will and agreeable personalities, I assume.

Justice Kavanagh:

Yes, exactly so, and we became close. We became friends. I think...I spoke earlier of the collegiality of the Michigan Court of Appeals, the first Court of Appeals which was a wonderful experience for those of us nine who were first given the blessed opportunity.

Mr. Lane:

Now, three of the seven in the period we're speaking of now were former colleagues on the Court of Appeals, right?

Justice Kavanagh:

Absolutely.

Mr. Lane:

And the others that were not were Blair Moody and Jim Ryan, both who had served together.

Justice Kavanagh:

They were colleagues in Wayne Circuit.

Mr. Lane:

And you had G. Mennen Williams, sort of the godfather of the whole Democratic resurgence, and the person who had made many appointments and so on, and then the other was Mary Coleman.

Justice Kavanagh:

Right.

Mr. Lane:

Woman who I assumed fitted very well into the mix.

Justice Kavanagh:

Of course she did.

Mr. Lane:

And added a little feminine touch, perhaps, in subtle ways.

Justice Kavanagh:

Yes, and it was a pleasant time, and I think a productive time on the Court.

Mr. Lane:

Now, one of the great productive accomplishments of the Court, I believe you will agree, or I'll ask you, at this time was what was done to try to bring order to the messy situation that existed in Recorder's Court in the city of Detroit. Why don't you describe very briefly what the problem was and then what you did about it.

Justice Kavanagh:

Well, the problem was...

Mr. Lane:

First off, the Court has the responsibility to administer the affairs of all the entire judiciary of the state and that included Recorder's Court, right?

Justice Kavanagh:

Exactly so. That's what the constitution provides that the Court is charged with that responsibility, and the...for years, there had been complaints, sporadic complaints about the way Detroit Recorder's Court was being run, that judges were not attending to business. They were goofing off, and it was just a bad situation.

Mr. Lane:

The work of the Court was being backed up.

Justice Kavanagh:

Definitely.

Mr. Lane:

This had begun to have an impact on the jail population.

Justice Kavanagh:

Absolutely. As a matter of fact, Frank Angelo who at that time...I'm not sure whether he had resigned from the Free Press at that time, but I think not. I think he was still working for the Free Press and Frank and I were talking and he said, "You're the Chief Justice. You know, you've got to do something about this Recorder's Court situation".

Mr. Lane:

There was great distress publicly acknowledged and talked about in the newspapers, was there not?

Justice Kavanagh:

Definitely.

Mr. Lane:

And there were orders to clear people out of the jails.

Justice Kavanagh:

Oh, yes. It was a mess. We talked about it, and we concluded that it was like a Mexican army. Everybody was a general, and that what was really causing the problem, and we needed some single person in charge. We recognized that, in fact...I may have told you, that I said...T. John Lesinski had resigned from the Michigan Court of Appeals with a flourish, and...

Mr. Lane:

He had been your leader from day one.

Justice Kavanagh:

Yes, and I had learned that my colleagues on the Court of Appeals were wiser than I because T. John did indeed prove to be a first-rate administrator and an excellent Chief Judge, and he and I, of course, had become close and had become friends, and I knew him well. I knew what gifts God had given him in this area, and I also knew that he could be awful tough and that...so, we discussed it and finally, we agreed that we should put T. John in charge of the Detroit Recorder's Court with a free hand, total backing of the Supreme Court to do whatever was necessary to clean up that mess.

Mr. Lane:

That was quite a remarkable stroke of collegiality, wasn't it? You're talking about 26, was it not, elected public officers responsible to the people of Detroit, and you're going to put a drill sergeant in there to kick a few behinds and to make things work and things are in an awful mess, right?

Justice Kavanagh:

Exactly so. We became satisfied that there was no other practical way to do it, and so I called T. John from the conference room after we had made our decision and I said that we had been talking about Detroit Recorder's Court and we had finally decided that we had to put someone in charge, and I said, "We are of one mind that this has to be a son of a bitch to get this job done, and T. John, we are of one mind that you're the biggest son of a bitch we know so we want you to do it". He said,...

Mr. Lane:

Did you call from the conference room?

Justice Kavanagh:

From the conference room.

Mr. Lane:

So your colleagues all heard this.

Justice Kavanagh:

Oh, sure. T. John said he thought I was right on both counts, so he did undertake it, and he did a superb job.

Mr. Lane:

Let's review the numbers here. You can see that..when the program began, here was...

Justice Kavanagh:

This is from the Detroit News of 5/4/77 which says, "When the program began on 1/11, Recorder's Court had a case backlog of 5,800 and the Wayne County Jail was housing nearly 1,300 prisoners. The jail shouldn't handle more than 769 prisoners according to the Wayne Circuit Court. Last Friday as a result of the program, Kavanagh said the backlog had been reduced to 3,700 from 5,800 and the jail had 840 prisoners".

Mr. Lane:

Compared to what was it, 1,300?

Justice Kavanagh:

1,300, yes.

Mr. Lane:

That's quite a reduction.

Justice Kavanagh:

Yes, "by July 14th, Kavanagh predicted, the backlog will have been pared to 2,400 and the prison will house under 775 people, but the parish program will take until November to pare the

backlog to between 1,800 and 2,000 cases which would help insure that only about 90 days elapse between arrest and trial".

Mr. Lane:

Well, it came to pass somewhat as is described there, did it not?

Justice Kavanagh:

Indeed it did.

Mr. Lane:

Well, now this was quite a remarkable achievement. There had to be some squeals and a little blood coming out under the door, didn't there?

Justice Kavanagh:

Indeed.

Mr. Lane:

What do you recall about that part of it?

Justice Kavanagh:

Well, I recall that we did a lot of hand holding. The whole Supreme Court, as I recall, went over to the Recorder's Court building and let the judges vent their spleen all at one time and the terrible things that T. John was doing in our name, and we listened as patiently and as carefully as we could and found very little to change, and the judges, God bless the judges of Recorder's Court. They didn't like it, but they took it and they turned that Court into a model court. It was hailed all over the country as the most effective criminal court in a big city anyplace in the country.

Mr. Lane:

What was the magic of T. John? Just the butt kicking or was it more than that?

Justice Kavanagh:

More than that.

Mr. Lane:

Organizational concepts or...?

Justice Kavanagh:

Yes.

Mr. Lane:

Is there anything that should be said to flesh out this chapter, this event, for the people who are going to perhaps wonder about this in future times?

Justice Kavanagh:

Well, yes. I can't really recall the mechanics of it. I don't recall what he did, but I do know, for

example, he put computers in there that speeded up the work of handling the paper in the Court which helped materially, and...

Mr. Lane:

Was Sam Gardner the Chief Judge at that time?

Justice Kavanagh:

No, not at that time... Excuse me, no...

Mr. Lane:

He later became Chief Judge.

Justice Kavanagh:

I'm not sure, but Sam Gardner...T. John recommended that Sam Gardner be the Chief Judge, and I think maybe we did appoint him although normally the Chief Judges were elected by the members of the Court. I'm not clear on that, but I know Sam Gardner endorsed T. John's program and Sam Gardner took over as Chief Judge and did a fine job as Chief Judge. He was Chief Judge for a long time. Sam deserves a lot of credit. All those judges deserve credit, you know. It's easy to criticize, and it's not easy to be criticized. These birds who hadn't been working really started working, and they became wrapped up in their own performance, and they were knocking their brains out, and that's what did it. They did a fine job.

Mr. Lane:

One of the little glitches that I remember, or that you may wish to recognize has to do with Geraldine Bledsoe Ford. Do you recall that?

Justice Kavanagh:

Yes, I do. Geraldine and T. John...Geraldine Ford, I should say this...that I have been an admirer and friend of Geraldine Ford for a long, long time. Her parents and my parents were friends, and so Gerry Ford...she and T. John kind of locked horns because Gerry was a little more deliberate in some of her opinions that T. John thought was absolutely necessary and so she...

Mr. Lane:

She found the double-time pace a little hard...

Justice Kavanagh:

Oh, yes. She...I'm unclear how...I recall that...

Mr. Lane:

It had something to do with a Court reporter, didn't it?

Justice Kavanagh:

Yes, I don't remember all the details. All I remember is how mad Gerry was at T. John. She

claimed that it was insulting, and I remember she thought she had been insulted by some of his suggestions. I'm not sure it wasn't the manner, but at any rate.

Mr. Lane:

She did like those hob nail boots.

Justice Kavanagh:

And of course, T. John said, "If you don't shape up, we're going to ship you out". He recommended that she be given an assignment someplace else and another judge be substituted which we had the power to do.

Mr. Lane:

You could have sent her to Ironwood for a couple weeks.

Justice Kavanagh:

In fact, that was suggested, and I said, "What did the people of Ironwood ever do to me?" Well, the thing worked out fine later on. God, I remember Wade McCree who was then by this time...I don't know...was he the Solicitor General at this point or...?

Mr. Lane:

Not quite then, I don't believe.

Justice Kavanagh:

He was on the Federal bench at that time...yes, because he resigned from the Federal bench to become Solicitor General of the United States. I remember Wade McCree was a very dear personal friend of Gerry. He came to see me about this terrible thing that was happening to Gerry, and we had a long talk. Wade was a dear man and a good friend, and I remember he said, "You're wrong about this". I said, "I may be, but I've got a job to do, and it's going to get done". At any rate, it was funny. Gerry was and is a good judge. She is slow, but slow is not bad.

Mr. Lane:

Well, this was, I think you must have to view this as an epochal event in the management of the judicial function in this state and I think a lot of people would agree, right?

Justice Kavanagh:

Well, I was very happy that it turned out as well as it did, very happy.

Mr. Lane:

And there were a lot of bent noses for a while, and I think that if you ever needed some testimony to support your assertions about how these people bled through the tonsils when the Court presented itself...this was an amazing thing for me to witness...the Supreme Court of Michigan transporting itself down to some hall adjacent to the Recorder's Court place and all these people thirsting for blood and pounding the table...the defense lawyers even had their say so. This was quite a spectacle. I didn't realize that the Supreme Court was up to that kind of performance myself.

Justice Kavanagh:

Well, you know, we felt it a great responsibility and we felt we had no choice. We had to fix what was wrong, and I think we were right as far as that goes. I don't know how it could have been done otherwise.

Mr. Lane:

Well, the memorable moment in my mind was when you people were sitting there in this room taking abuse that was being freely offered from all quarters and nobody...one in a while, T. John would put in a feeble demur, but you people got pasted pretty hard, and nobody let out a yelp. I thought that was quite a performance. You remember that, don't you? There's nothing wrong with my recollection, is there?

Justice Kavanagh:

No, your recollection is as accurate as I recall it. And it worked, that's the big thing, and I think we're all friends. You know, I think they realized that we weren't doing this just to be funny or mean. We were doing it because we were persuaded that it had to be done, and they finally came to that view. They cleaned up their act and they became a first-rate court.

Mr. Lane:

Let me suggest that these were not the only judges in Michigan who presented headaches for the Chief Justice in particular, let's say the Corridor General. Do you remember any other occasions that you would care to recall in this context? I think of your trips down to Monroe and various other places?

Justice Kavanagh:

Muskegon.

Mr. Lane:

Let's just, in all seriousness, it falls upon the Chief Justice, does it not, who is conscientious and wants to see that his judicial followers, if you can call them that, the independently elected Circuit judges, mostly, and others sit on the bench, are human beings and they get into frictional situations. They have the misfortunes that others of us have, to drink too much. They have...their feelings get hurt too easy. Some of them are a little slow to get their work done, or maybe they are enamored of a golf course or whatever it is. Why don't you talk a little bit about what you learned and what you did as Chief Justice about such problems as that?

Justice Kavanagh:

Well, I've always believed that, you know, people are people, and as Chief Justice, you're right. It is the job of the Chief Justice to..he's the pump that starts the fireworks, and he has the responsibility ultimately or I should say directly for seeing that the everything runs smoothly. You talked about Monroe. That was an interesting thing because it involved two judges who were, I felt and still feel, very dear friends of mine personally; Bill Weipert and Jim Kelly. Bill Weipert had been on the bench a long time, longer than Jim had at this point. The two of them got arguing about something that I'm...

Mr. Lane:

One of them had to be Chief Judge, wasn't that part of it, because the rule said that?

Justice Kavanagh:

Yes, and they got into a big squabble, and they were just not getting along at all. Einar Bohlin was the Court administrator at the time, and he came into my office and said that he had exhausted his resources trying to resolve the difficulties. He couldn't resolve it and therefore, as the Chief Justice, it was mine. I had to do it. So I called both Bill Weipert and Jim Kelly and said, "I would like to talk to you gentlemen". They said, "We'll come up." I said, "No, no. I will come down to Monroe". So we went down to Monroe and we listened, and...

Mr. Lane:

This was you or you and somebody else?

Justice Kavanagh:

My law clerk and I went down. I'm trying to recall now whether... I think at this...I don't recall exactly what year this was. I became Chief Justice in January, 1975 and David Doumochel was my law clerk at that...I think David was the one that went with me.

Mr. Lane:

This would have been 1978 or somewhere in there.

Justice Kavanagh:

Well, it could have been Jerry McGowan. I'm not sure who my law clerk was but I remember he went with me, and the four of us, my law clerk and the two judges and myself sat discussing this at length. Then I said, "Let's go out and have lunch". We went out and had lunch, and I remember that we went to a restaurant. I don't recall now whether it was Howard Johnson's or someplace and Jim Kelly's daughter was working in the restaurant, and when we were talking, he said, "My daughter works there. Do you want to go there?", and I said, "Great", so we went there, and that was fun. So I said, "Gentleman, we're not going to break up until we've reached an agreement". So we went back after lunch, and we talked some more, some more, some more, some more, and finally, finally, Jim Kelly said, "Okay, I'll agree to thus and so and thus and so" which was what Bill Weipert had wanted from the beginning. I said, "Thank you. I really appreciate your cooperation and God bless you both" and away we went. My law clerk said to me on the way back, "I don't know how you can sit there and listen to those two guys go on like that for so long. Why didn't you just tell them that it's going to be this way and do it?". I said, "No, those are two very good judges and very good guys, and I've got a hunch that it was better, I was convinced that it was better to let them work it out themselves. I'm happy that they finally agreed". I got back to my office in Detroit, and there was my secretary who said, "You had a call from Judge Kelly from Monroe". I said, "Oh! Call him back". She called back and Jim said, "Tom, I cannot live with that. I've got to tell you I can't live with that agreement", and I said, "Oh, Jim, after all this time". He said, "I feel terrible, but I had to call you and tell you I just can't live with it". I said, "Well, okay. The trouble is Jim, you know, we're going to have to decide it". He said, "I know it. If you order it, we'll do it". I said, "Okay". so of course, we ordered it, and they did it.

Mr. Lane:

It was some crummy thing about who would take which case, how many trials...

Justice Kavanagh:

It didn't amount to a hill of beans, but God love them both, they...they're dear, dear friends.

Mr. Lane:

There must be something about the air in Monroe because you also had two Probate judges.

Justice Kavanagh:

Oh, boy. That came later.

Mr. Lane:

And they were both of the same name. Did that thing ever get straightened...or that was somebody else.

Justice Kavanagh:

No, it was Harry Seitz. Harry Seitz was the Probate judge and a fellow by the name of Seitz who was later elected judge...

Mr. Lane:

S-e-i-t-z?

Justice Kavanagh:

Yes.

Mr. Lane:

What was the other bird's name?

Justice Kavanagh:

I can't recall. He...

Mr. Lane:

He had the same name and was elected Probate judge, two Probate judges.

Justice Kavanagh:

Yes, that didn't really...I didn't go down there to Monroe on that. I learned my lesson, but...

Mr. Lane:

I guess you did. You sent me over to Muskegon for the pistol package.

Justice Kavanagh:

Was that John Piercey.

Mr. Lane:

No, that was another problem.

Justice Kavanagh:

I thought I went over with John Piercey.

Mr. Lane:

Well, you did, I think. You sent me over, though...there was a District judge named Raither or something like that...the poor guy was toward the end of his rope. He had been drinking too much, marital difficulty. He had a gun and had scared people.

Justice Kavanagh:

Oh, yes.

Mr. Lane:

I did a lot of talking and I wrote quite a report, I remember that. Well, it does show though that apart from the formal judicial proceedings dealing with judicial misconduct on the trial level, you do have other problems that don't come in the form of judicial tenure cases, right?

Justice Kavanagh:

Oh, yes. Because you're dealing with people, people do bad things and dumb things, and it doesn't make them bad people or dumb people. But I, again, I enjoyed the challenge and the responsibility. I enjoyed it immensely.

Mr. Lane:

Another of you administrative ventures, as I recall, had to do with the holding of judicial conferences...

(End of side 1, tape 3)

Topic 8: Justice Kavanagh talks about judicial conferences, the Supreme Court's involvement with the State Bar of Michigan and its disciplinary procedures, the apportionment decision of 1982, and limiting time of Chief Justice to four years or two terms. He then discusses the events of the early 1980s, including the resignation of Justice Mary Coleman, the death of Justice Blair Moody, and the challenge to Justice Riley's appointment

Mr. Lane:

If I'm not mistaken, there was a perception in some quarters that the judicial conferences were too much boondoggle and not enough conference. Is that a fair way to say it?

Justice Kavanagh:

That's a fair way to say it.

Mr. Lane:

And they were getting to be quite expensive.

Justice Kavanagh:

Yes, indeed. Yes, that is true, and...

Mr. Lane:

The judges had a penchant for going to Mackinaw Island and Boyne Highlands and places like that and for extended periods. Why don't you relate what you felt about that, what you did and what the reaction was?

Justice Kavanagh:

Well, I enjoyed those meetings as much as anybody, but I did come to the conclusion that they were becoming a rather heavy drain on the purse of the public, and so I felt we should do something about it. I suggested that if the judges wanted to meet, if they felt it was beneficial, fine, but they should do so at their own expense...

Mr. Lane:

Or in Hamtramack.

Justice Kavanagh:

Or in Hamtramack, and that went over like a lead balloon, you know. So we fiddled around and compromised, and we did finally...you see, each of the judicial conferences in each Court; Probate Court would have its conference and the Circuit Court would have its conference and the District Court would have its conference, and the public was paying for the whole smear. I suggested that we should have just one judicial conference that the public would pay for and that should be in Lansing.

Mr. Lane:

You had one in Dearborn or someplace, Livonia or...?

Justice Kavanagh:

Of course, we used to have them all over, and finally, I said Lansing, so we had one in Lansing. They didn't like that very well, but that was the only one we were going to pay for, and so...but then it was suggested since most of the judges were down in the Detroit area, it would be better, more efficient, cheaper to have it down there, and we met in Dearborn. I think we met in Detroit...yes, we met in Detroit also, but...

Mr. Lane:

There were some pretty rebellious remarks made, weren't there?

Justice Kavanagh:

Oh yes, yes indeed. Another thing we did that I thought served a good purpose. On reflection,

I'm not sure of how good the purpose was and how well it was served but,...that was to have a member of the Supreme Court attend each one of these regional conferences that these judges were having, and my colleagues weren't all that thrilled with it, but they went along with it so two or three of us would go here and two or three would go there and two or three would go someplace else just to listen to the gripes from the various judges. I remember, I went to Kalamazoo one time and went up to Traverse City and I went someplace else. I don't know, it was near Cadillac, I think. And of course, we had them locally here. I think, you know, we got a lot of...we got a lot of input and I think some of it was good for us to know. See, what I was trying to do, I kept preaching this concept that when the Michigan...when the people of the state of Michigan adopted the constitution and used the phrase "one court of justice" that they had something in mind and that was a single court of justice, and a District judge was just as much a part of Michigan's one court of justice as the Chief Justice of the Michigan Supreme Court, and everybody on that one court of justice shared the responsibility for giving the people of Michigan the best, most efficient justice system that we could.

Well, I used to say this every time I had the chance, and it was great in theory, you know, fine, but with our elective system, we had some problems because,...see, I wanted to appoint District Court judges to sit on the Court of Appeals, to augment it. It became apparent even then that the work of the Court of Appeals had gone up to astronomical figures and I forget how many different panels we used to augment that. I was in favor of assigning District Court judges, Probate Court judges, Recorder's Court judges, Circuit Court judges to sit on the Court of Appeals at various times because I thought it would do two things. I thought it would give them, the judges so assigned, a better view of the Appellate system than they would have if they just sat in their own courts, their own trial courts, and it would also be useful to the members of the Court of Appeals that would be dealing with as an equal and colleague, the members of these other courts. Well, that was fine except some of the Circuit judges said, "We don't want you assigned the Circuit court judges because they're going to run against us. In fact, in the last campaign from my office, my opponent who had been a District Court judge was saying about all of his experience as a judge on the Appellate Court. As a consequence, we want you to cut that out". Eventually we did, really over my objection, but I'm not sure I was right on it. It was my idea that it should be that way, but you know, just because it's my idea doesn't necessarily make it right. But that caused a lot of consternation too, for a while.

Mr. Lane:

Talk for a while about your relations as Chief Justice with the State Bar in the Bar disciplinary process. The State Bar is, of course, integrated in the state. That means everybody has to be a member and the Bar is supervised in a very real way by the Supreme Court of Michigan through a statute, I think, that was passed back in the 30's that put the regulation of the Bar...

Justice Kavanagh:

Integrated the Bar...

Mr. Lane:

Yes, into the hands of the Supreme Court.

Justice Kavanagh:

As I recall it, the statute that integrated the Bar put the responsibility with the Supreme Court for the administration of it.

Mr. Lane:

About two sentences long as I remember, but anyway, the Court does regulate the Bar through the issuance of rules setting out the dues, oversight of the discipline function and probably in a lot of other ways and the Bar is quite jealous of its prerogatives and why don't you talk a little about that. You regularly met at the request of the Bar, as I remember, with some of the leaders of the Bar.

Justice Kavanagh:

As a matter of fact, I instituted the practice. I don't know if it is still in effect, of having, of attending the Bar meeting in Lansing with the commissioners every year because there had been, there had developed a kind of "us against them" idea, both on the Court and in the Bar, in the Bar commissioners and it was unfortunate because I felt we were both shooting for the same goal and we didn't need friction, so I used to go over regularly, and I hope the Chief Justice still does. I don't know, but I did what I could to foster cooperation between the Bar organization and the Supreme Court. Well, I like to think it helped. T.M. Kavanagh who had been my immediate predecessor did not like to have too close of dealings with the State Bar because he was persuaded that, you know, since it was the Court's responsibility to make the rules and see that they were followed and so forth that they shouldn't be too close to the Bar. I did not share that view.

I felt that that didn't make any difference, that you're better off...if everybody understands the thing, there are no good guys and bad guys as I view it. Everybody is trying to do a good job, and we've got the ultimate responsibility for deciding what should be done by the Bar. Well, nobody is going to argue with that, and I thought we'd do better if we were closer and we knew of each other's problems more, and that was why I made a conscious effort to do that. I think the Bar appreciated it, and they...I think the cooperation between the Supreme Court and the Bar certainly was a lot closer during that time than it had been, and I think it was a good thing for the people. We've got to keep in mind that the whole profession exists in order to serve the people. That's the job, and I think we have a tendency to forget that when we're thinking about making money to support our families and practicing law and so forth. We forget that as a professional person, we're supposed to serve the people.

Certainly, the elected officials sometimes forget that that's their job, and I think it's good to keep that in mind and occasionally be reminded of it. That was really why I tried to...I don't know...my good wife used to aid and abet me in that because we developed a practice in the last few years of my...well, the last two years, I guess, of my tenure as Chief Justice of having a brunch for the commissioners after the State Bar at our house.

Mr. Lane:

I didn't know that.

Justice Kavanagh:

Yes, and it was very enjoyable. We enjoyed it, and they enjoyed it. It was a good thing.

Mr. Lane:

You met regularly, did you not,...you invited, as I recall, the President, the head of the Representative Assembly, the Executive Director and maybe somebody else to come to the Court every month or so and set aside an hour or more to...

Justice Kavanagh:

Yes.

Mr. Lane:

...to hear what they had to say?

Justice Kavanagh:

Exactly.

Mr. Lane:

And there were...sort of little agendas grew up as I remember. They would ask about certain things that was a matter of interest to the Bar as a profession, and when the Court might act on something that was pending or how it would feel about the dues the next time around, that sort of thing.

Justice Kavanagh:

Yes. We did that regularly.

Mr. Lane:

And you felt it had a beneficial effect. How about the problem of discipline, though, and the question of what some people call bifurcation of the disciplinary, of the instrumentality of discipline...

Justice Kavanagh:

Charging and judging.

Mr. Lane:

Let's see, you've got the grievance..

Justice Kavanagh:

Grievance of the commission and the disciplinary board...Board of Discipline.

Mr. Lane:

Whatever the heck it is...the two of them anyway used to be combined. The Bar resisted, did it not...

Justice Kavanagh:
Definitely.

Mr. Lane:
Who pushed for this?

Justice Kavanagh:
I did.

Mr. Lane:
You did?

Justice Kavanagh:
I did, because of my conviction that the appearance of justice oftentimes is as important as the effect of it, and I just didn't think it was ever...it offended my sense of symmetry, I suppose, to have a judge charge somebody and then make a decision on whether the person was guilty or not.

Mr. Lane:
And that was the effect of having one body conduct the entire disciplinary operation.

Justice Kavanagh:
Yes. I remember, you know...I had some good friends on the various disciplinary boards and so forth, and I remember Fred Buesser and I, who were very good friends...he was the chairman, and boy, he and I were battling toe to toe on the darn thing. Fred, God bless him, we rammed it down their throats. We ordered the bifurcation. They complained it was going to cost too much money and all this business.

Mr. Lane:
It did cost money.

Justice Kavanagh:
Of course it did, but our suggestion was "Well, why not this instead of something else?", you know, and Fred later on, after we had had in place for a couple years, Fred came to me and said, "Tom, I thought you were dead wrong. I am now convinced this is a better way to do it". That was very gratifying because I had very high regard for his opinion. He had been in the grievance business a lot longer than I had.

Mr. Lane:
Did Fred have some...he had some title in the Bar, did he not, or he was a very prominent lawyer, at any rate.

Justice Kavanagh:
Indeed.

Mr. Lane:

B-u-e-s-s-e-r...how do you spell that?

Mr. Lane:

B-u-e-s-s-e-r.

Mr. Lane:

There were other Buessers in the...

Justice Kavanagh:

Yes, his brother was active, too. I was closer to Fred, but yes, they didn't think it was the greatest idea they ever...but they learned to live with it, and I think it's good. I think it's better. Admittedly, it is more expensive.

Mr. Lane:

There was some disposition, I think, in recent times...I read something this year in the Bar Journal where Justice Levin was dissatisfied that matters hadn't gone far enough in providing the disciplinary agencies with staff and there was some intimation that if more wasn't done about allocating the Bar's dues resources in a direction that there might be more direct action by the Supreme Court. Did that...was this kind of thing discussed when you were Chief Justice that perhaps the Court itself should direct the disciplinary mechanism and provide that there should be certain funds allocated to a specified amount?

Justice Kavanagh:

Yes. We talked about that.

Mr. Lane:

But you didn't go that way.

Justice Kavanagh:

I don't think there were ever four of us agreed on it. I recall that Chuck and I were pretty much of a mind on that that the biggest single responsibility the Bar has in serving the public, organized Bar, is the police function of its services, and that certainly most of its compulsory dues should be spent toward that object.

Mr. Lane:

I would like to return just to remedy an oversight to the subject of...we started to talk to the subject of the legislative apportionment. We had started a little bit ago to talk about the era that began in 1977 when the Court's personnel kind of stabilized and everybody had been distressed by the turbulence of the prior years, and finally in 1982, there came to pass what a lot of us, a lot of people who had been involved in the apportionment..let's call them "wars" for close to 20 years, thought might have been the most remarkable achievement of the Court from a collegiality standpoint that perhaps ever occurred, and I'm talking about the apportionment decision of 1982. This must have been enormously satisfying to you. What would you care to say about that?

Justice Kavanagh:

Well, I think...it was very satisfying because by and large, it was the position that I'd advocated all along and felt was the correct position.

Mr. Lane:

And adopted unanimously, is that correct?

Justice Kavanagh:

Yes.

Mr. Lane:

Seven votes.

Justice Kavanagh:

Yes.

Mr. Lane:

The seven votes were, among other things, for holding of constitutionality of the language that you addressed in 1972 and the Souris had addressed in 1964.

Justice Kavanagh:

Yes.

Mr. Lane:

And there was, beyond that, the heroic effort knowing that the legislature was not going to fill the void, to execute the job of the legislature in apportioning the state through the Court's own mechanism that was devised for the purpose. Now, that was...do you want to recall how that went a little bit?

Justice Kavanagh:

It's kind of gone from me, in all candor. I don't remember...

Mr. Lane:

Well, the big thing, though, was the fact that everybody pulled on his oar in unison, was it not?

Justice Kavanagh:

Yes.

Mr. Lane:

And that this messy job was done and done to a very high degree of professional satisfaction of those who took their responsibility, took the whole subject seriously including students, I think of government, not only some of the legislators had bent noses. I can remember getting calls from a couple of them while this was going on reminding me where the money came from.

Justice Kavanagh:

Oh yes.

Mr. Lane:

And all that sort of thing.

Mr. Lane:

But you see, because the Court was, at this time, by this time, of one mind, they had no place to go.

Mr. Lane:

But was this...didn't this...was this the last word? Didn't this, beyond the apportionment aspect of it, this must have made you feel very gratified about the direction that you tried to take as Chief Justice many years before and to some extent, did you regard this as sort of a flowering of that atmosphere that was cultivated over...?

Justice Kavanagh:

Yes, but I must say that I regarded it more as a...it was very satisfying, but it was something that the Court itself as an institution could take credit for, rather than any of those of us who happened to be there at the moment. I think...I was very proud of that Court, and I am very proud of that Court. I think, Roger, you've touched on one other thing that I would like to speak to, and that is this: Over the years, I became convinced that no small part of the problems of the Court came from the vying for the office of Chief Justice amongst the members of that Court. I became convinced of that before I was Chief Justice so as a consequence, I exacted a promise from Mary Coleman, John Fitzgerald and Charles Levin that I would indeed agree to be the Chief Justice with their votes. I would vote for myself, and I would take it for one term, which is two years, and that at the end of that two years, if they wanted me to continue and I wanted to continue, that I would continue to be the Chief Justice for one more term, but I wanted a clear understanding from them that under no circumstances would they vote for me or anybody else for Chief Justice for longer than two terms.

Mr. Lane:

Of two years each, a total of four years.

Justice Kavanagh:

Of two years, a total of four years. I hoped thereby to eliminate the contest for the office. They agreed, and they said fine, and...

Mr. Lane:

And it's worked since then, has it not?

Justice Kavanagh:

So far, it has. Now, of course, we couldn't then bind the Court in 1991. The Court is not bound by that, but I pray that they will keep it up because the office itself is the greatest office you can have in the judicial set-up in the state of Michigan, and you do, indeed, have the responsibility for the administration of 1/3 of our government. That's a powerful office, and like any other

power, it has a very corrosive effect on the person wielding it. You are...you are the spokesman for the Court. Every time the Court is mentioned, you, as Chief Justice, are singled out. You speak for the Court and you're singled out for credit or blame or whatever for the Court. Well, if all things go well, you know, you're well regarded and respected as the Chief Justice. You know, if you're not careful, you begin to think, "Maybe I am a demon". It affects a lot of us and that's one side of it. But there is also another side of it. The members...the people who get to the Supreme Court don't usually get there by accident. They get there because of a lot of circumstances, but they're usually pretty strong-willed, strong-minded people, and they each bring their own baggage with them, you know, the good and the bad, but each one is different, and everybody on the Court has something to offer, and those talents should be made available to the service of the people. Consequently, since you have an eight year term, if you could be Chief Justice for eight years, you're going to cut out some talent of other people being made available and so I don't care if you're the fourth person in the blessed tribe, you shouldn't serve more than four years.

Mr. Lane:
And you served four.

Justice Kavanagh:
I served four.

Mr. Lane:
And then your successor, Mary Coleman, served four with a little notch on the end there for John Fitzgerald, a couple months that he filled in after the...

Justice Kavanagh:
That's right.

Mr. Lane:
And the next, G. Mennen Williams, served four, and now Dorothy Riley is nearing her four.

Justice Kavanagh:
Yes, and I...you know, I think it works well. On that one point...that's one other thing that I wanted to mention, and that was at the end of my term in 1984. If you'll recall, Blair Moody was elected in the November election and died two weeks after being elected.

Mr. Lane:
1982, right. That was in 1982.

Justice Kavanagh:
In 1982.

Mr. Lane:
He died around Thanksgiving.

Justice Kavanagh:

I think on Thanksgiving Day, if I'm not mistaken.

Mr. Lane:

Could have been.

Justice Kavanagh:

But at any rate, near Thanksgiving. The governor then appointed Judge Dorothy Comstock Riley to the vacancy occasioned by Blair Moody's death. Mary Coleman had decided not to run. I'm not sure whether she was eligible to run again or not, but at any rate, she decided not to run when her term expired at the end of 1984.

Mr. Lane:

Was it not...

Justice Kavanagh:

Wait a minute...

Mr. Lane:

She was re-elected in 1980.

Justice Kavanagh:

She was re-elected in 1980.

Mr. Lane:

And then...

Justice Kavanagh:

She was elected Chief Justice in...

Mr. Lane:

1979.

Justice Kavanagh:

Yes. Was it 1979...yes, okay, and so...but at any rate...all these dates are confusing.

Mr. Lane:

Let me re-track. She and Chuck Levin were first elected in 1972.

Justice Kavanagh:

Right, so she had run in 1972. She'd run in 1980 and they both would be elected in 1980.

Mr. Lane:

Then what happened that was a little confusing was that she talked at one time about not running

again and was prevailed upon. I think she said she was not going to run, and then a month or so later, she changed her mind and did run, and that would have been in 1980.

Justice Kavanagh:

Yes.

Mr. Lane:

And she apparently...there was some speculation, at least, that she had been prevailed upon to do this by her party supporters including the governor, then Governor Milliken.

Justice Kavanagh:

I think you're right.

Mr. Lane:

And then she resigned, having done that in 1980, in 1982. Have I got the right year here?

Justice Kavanagh:

Chuck and Mary were elected in 1980, or in 1972. They would have been elected in 1980, and...

Mr. Lane:

She left the Court at the end of 1982. She resigned about the time that Moody died.

Justice Kavanagh:

That's right. That's exactly right.

Mr. Lane:

And then Brickley.

Justice Kavanagh:

Brickley was appointed to succeed Mary Coleman.

Justice Kavanagh:

To succeed Mary Coleman. That's right. That is correct, and...

Mr. Lane:

Dorothy Riley...

Justice Kavanagh:

Dorothy Riley was appointed to succeed Blair Moody.

Mr. Lane:

Correct.

Justice Kavanagh:

Well, the statutory provision was that the governor could appoint to fill a vacancy and the person

so appointed would serve until the next general election at which time, the seat for the rest of the term would be voted on.

Mr. Lane:

Just like Jim Ryan got in in 1976 and he had to run again in 1978.

Justice Kavanagh:

Yes, right. Okay...now, so there was no problem with the appointment of Jim Brickley as far as Mary taking...Mary Coleman's appointment when Mary resigned, because Mary's term would not expire until 1988.

Mr. Lane:

That's correct.

Justice Kavanagh:

So the governor could appoint Jim Ryan, but he would have to run in 1984 for the balance of four years. No problem with that. That's what the statute provided and so forth. Now, in Blair Moody's case, there was...he was, at the time of the election, he was elected to a new term beginning January 1st because...

Mr. Lane:

Of 1983.

Justice Kavanagh:

Of 1983, because his term expired December 31, 1982. So when he died, the governor appointed Dorothy Comstock Riley and the appointment said to serve until the next general election, and the question was raised, "Can the governor appoint beyond the end of the term in which the person is seated?", and I was convinced from the get go that he could not and that Dorothy Comstock Riley could only sit by that appointment until December 31st. Then on December 31st, she had no authority to sit until the governor re-appointed her or somebody else for the vacancy occasioned in the brand-new term when Blair Moody wasn't there to take it. So, that came up and was eventually determined by the Court, and it was determined that the view I expressed, namely that the governor was not authorized beyond the end of the term in which the vacancy occurred. And so Dorothy had to step down and Patty Boyle was appointed to that vacancy, that spot. Now, I think we decided that case rightly. I have been of that opinion from the get go. The perception that we did it for political reasons because there had been a change in governors. Namely, that Governor Blanchard took office on January 1, 1983 or whatever, is that right?

Mr. Lane:

He took office on January 1, 1983.

Justice Kavanagh:

Okay. Now, and that was the thing, really the thing that I wanted to speak to. Mary Coleman announced that she was resigning.

Mr. Lane:

Correct.

Justice Kavanagh:

And she was resigning according to her announcement in order to give Governor Milliken the opportunity to appoint her successor.

Mr. Lane:

That's true and not only that, the date was chosen to reflect that. It was toward the end of December, the 28th or some such date, wasn't it.

Justice Kavanagh:

Something like that.

Mr. Lane:

There was some hiatus there between these two events.

Justice Kavanagh:

Yes, and so we discussed this at our conference after she had made this announcement, and she asked each of us to express himself on her decision to do that.

Mr. Lane:

This would have been early in December. Would it have been after the Moody death?

Justice Kavanagh:

No, Blair was still there. It was before the election.

Mr. Lane:

Was it?

Justice Kavanagh:

Yes. Blair was still there.

Mr. Lane:

She was then talking about resigning before the election?

Justice Kavanagh:

Yes.

Mr. Lane:

I see. I didn't know that.

Justice Kavanagh:

Sure, and I remember Mary was sitting at the head of the table. Blair was sitting next to her. Chuck was sitting next to him. I was sitting next to Chuck. Mennen was sitting next to me at the foot of the table. John Fitzgerald was sitting next to Mennen opposite me, and Jim Ryan was sitting on the other side of the table opposite Chuck and Blair.

Mr. Lane:

I remember now.

Justice Kavanagh:

So Mary asked each of us to express himself, so Blair said, (Blair was the first one she called on) "Well, Mary, whatever you want to do is fine with me, and that's fine. I don't see any problem with that". Chuck said much the same thing, and then came my turn. I spoke in all frankness and in all candor, and I told Mary that in my view, that was without question the most damaging thing she could do to the Court because for her announced reason to give a governor...to resign in order to give a particular governor an appointment showed absolutely no concern for the Court, but worse than that, it injected, it re-injected and underwrote all the criticism of the Court as a partisan political Court. I said, "I think it's a terrible thing, and I don't like it, and I wanted to tell you face to face that that was it". Everybody was flabbergasted because you know, the meeting up to this point, had been all peaches and cream. Well, I think,...you know, Roger, it's a funny thing, but I think in all the times that, and for all the years that we had known each other, that was the first time that Mennen Williams every really understood me and my attitude towards the Court, and I think that...it looked like a light dawning on him that I was being totally consistent.

Mr. Lane:

What did he say?

Justice Kavanagh:

Well, he said, "But...but...I never thought of that, but Brother Kavanagh has brought up a very good point, and..." He didn't know what to say. I don't recall what the others said after that, but Mennen told me later that he never really understood until I said that which was totally consistent with what I had been saying all along, that partisanship and partisan action has no place in the business of that Court. Mary felt bad. I'm very fond of Mary Coleman. I think she's a very lovely person, but I really do not think she helped her...I think she hurt the Court greatly, and I think the perception that it was a partisan court had a great deal to do with my defeat two years later.

Mr. Lane:

This was a re-ignition operation, you're saying really, re-igniting...

Justice Kavanagh:

The thing that we had laid to rest for so long. And then, of course, when Dorothy Comstock Riley thing came up, we split along party lines according to the paper.

Mr. Lane:

Well, that was a tortured episode. Do you remember what Levin did?

Justice Kavanagh:

Yes, he changed his mind.

Mr. Lane:

Well, at first...what did he say? It was hard for most of us to decipher what his position was although...

Justice Kavanagh:

He didn't want to decide it. At first, he said, "We're not going to decide it", and that would leave us split. Finally on second thought..

Mr. Lane:

He wrote and published...

Justice Kavanagh:

Oh, yes. Sure.

Mr. Lane:

Had the result of a 3:3 split.

Justice Kavanagh:

Exactly.

Mr. Lane:

And then the thing held fire for a few days and then...

Justice Kavanagh:

He realized that that was an intolerable situation and finally had to resolve it, so he eventually came along to the position that I disposed from the beginning.

Mr. Lane:

Which was Kavanagh, G. Mennen Williams, Levin and Mike Cavanagh.

Justice Kavanagh:

Right.

Mr. Lane:

And on the other side, there were Ryan and Brickley.

Justice Kavanagh:

Right.

Mr. Lane:
Well...

Justice Kavanagh:

And that, of course...I mentioned I was a martyr. Well, that election...Dorothy came up to be the martyr, don't you see, because we, this partisan court, had made a partisan decision to remove her from the Court. And it really did undo all the things I tried to do.

Mr. Lane:

A curious backlight in the factual end of the matter was that she had damned near won on her own hook in the ballot counting.

Justice Kavanagh:
Absolutely.

Mr. Lane:

She came within 11,000 or 13,000 of flagging Mike Cavanagh.

Justice Kavanagh:
Absolutely.

Mr. Lane:

That was some strange episode.

Justice Kavanagh:

Yes, but I think...I don't know...

Mr. Lane:

How do your...have you

(End of side 2, tape 3)

Topic 9: Justice Kavanagh continues to discuss the challenge to Justice Dorothy Riley's appointment and the resignation of Justice Mary Coleman and the partisan nature of the court. This discussion bridges into his views on the selection process for Supreme Court Justices. He then talks about his speech to the Kalamazoo County Bar Association, the agenda of which was dubbed, "Pot, pornography, and prostitution," and his views on criminal law which brings up the Justice Swainson's case and Robert Ozer, the FBI agent who handled it. Justice Kavanagh concludes with with a reflection on his time on the court and some possible mistakes he made on certain decisions

Mr. Lane:

Where does the matter lie today as between you and Dorothy Riley? She felt, did she not, or she reacted, as I recall, as though you had...this was a hostile matter, and...

Justice Kavanagh:

Oh, I think Dorothy expressed the view that I had influenced Chuck's change of mind.

Mr. Lane:

Is that it?

Justice Kavanagh:

I think so. I think she said it, and I...you know, as far as Dorothy and I are concerned, it's fine. You know, it was never anything personal with me.

Mr. Lane:

The perception as you said just a moment ago, that somehow, as this came out and the way it was reflected in the newspapers and you mentioned earlier that you never could prevail upon McDiarmid to do anything other than to say, "The Republicans did this and the Democrats that", and it came out that way in spades, partly because...I don't know, well, it was made to order for that, I guess. You had a Republican governor, a Republican administration ending, a Democratic administration starting.

Justice Kavanagh:

Exactly.

Mr. Lane:

Here was the edge of the knife and which side does the thing fall?

Justice Kavanagh:

Absolutely. And the thing that amuses me is the idea that for whatever reason; I'm unclear, I would all of a sudden turn around and just act contrary to everything I'd ever said, you see. I used to really feel bad about that.

Mr. Lane:

It is a colossal irony, though, isn't it?

Justice Kavanagh:

Yes, but heck, life is made of colossal ironies, and I don't...you know, as I say, there was never anything personal in this thing.

Mr. Lane:

You know, what you have related a few minutes ago about this meeting, this conference in which Mary Coleman asked members of the Court privately, of course, of their reactions to her plan...this is the first I ever heard of that, even as close as I have been to the doings of the Court.

Justice Kavanagh:

Well, it's accurate, as accurate as I can recall it, and it's unfortunate, but I believe now as I believed then that what Mary did deliberately or accidentally was really a terrible thing for the Court.

Mr. Lane:

How did she react when you spoke your piece? It never occurred to her, I suppose, or how did you feel?

Justice Kavanagh:

Well, she didn't see anything wrong with it, what she did. She didn't perceive that this was the quintessential partisan hat that would validate all the charges of partisanship. I don't think Mary perceived that, and I don't know, but it was...I think it did the Court a lot of harm.

Mr. Lane:

I can recall very clearly the vacillation on her part in 1980.

Justice Kavanagh:

Whether or not to run.

Mr. Lane:

Yes, and I remember this.

Justice Kavanagh:

We...heck, we all urged her to run.

Mr. Lane:

Well, what she did was she let the date go by for filing an affidavit. Remember, there is an affidavit.

Justice Kavanagh:

I didn't realize that.

Mr. Lane:

Okay. That's 180 days before the end of the term, as I recall. It comes each year where it's appropriate or applicable around the July 4th. It's two or three days one way or the other. I remember trying to...I felt a duty to keep reminding her of the timing of matters and "if you're going to do it, here's the time" and all that, and I got the affidavit forms and that sort of thing, and then she did let the day go by, whatever it was, the 3rd of July or the 2nd, and then it was very shortly after that - it could have been a matter of a few days or maybe it was a couple weeks, and she then publicly changed her mind and said she had reconsidered, and she had been urged by this, that and the other people and all. So that's the origination of this at that time really, and I don't think that she ever felt after she decided that she was going to run...I assume that she probably even then did not contemplate sitting there for another eight years because if you recall,

Creighton, her husband, the Circuit judge from Calhoun County, had retired or announced his retirement.

Justice Kavanagh:

I think he had announced his retirement.

Mr. Lane:

And they had started to build a place in Florida for a retirement home.

Justice Kavanagh:

Right.

Mr. Lane:

And so that's as much as I can contribute on that.

Justice Kavanagh:

You know, God love Mary. If she did it deliberately, it doesn't make her evil, you know.

Mr. Lane:

My guess is that she was preoccupied with all this family arrangement with her husband and stuff and probably...

Justice Kavanagh:

I have no reason to say anything to the contrary. My relationship with Mary Coleman was always first-rate. But I spoke frankly and I do, to this day, think what she did had a disastrous effect on the Court because this Court is right back where it was long before I got there. It is generally regarded as a partisan Court, and that's exceedingly unfortunate, exceedingly.

Mr. Lane:

Do you think the dispersal of the Court has anything to do with these perceptions? Here you have Brickley and Griffin operating out of Traverse City basically, and you have some people operating out of Detroit. You have Mike Cavanagh operating out of Lansing. Do you think the fact that there is no...you can't hardly point except at a relatively small number of days of the year...here is the Michigan Supreme Court. These people are sitting, conferring and deciding cases...

Justice Kavanagh:

No, I don't think that has anything to do with it.

Mr. Lane:

You don't?

Justice Kavanagh:

No, I think the villain in the piece if there is a villain at all, are the political parties. Understand, I suggest neither the Democratic Party nor the Republican Party yields to any thing or anyone in their covetousness to exploit their power.

Mr. Lane:

Well, that's what they exist for, to exercise power, right?

Justice Kavanagh:

Exactly, exactly. They're doing their job. What's the solution? To get rid of this dumb idea that non-partisan officers are nominated at partisan conventions.

Mr. Lane:

Do you know that there is unanimity, I think, among...now, you're the...I think I've talked to seven or eight of the former members of the Court, and they all agree on this in one way or another, but what is there...and then, there is a...well, you know, who can do anything about it? Is there an answer to this in practical terms? If you had the seventeen of the nineteen members of the State Bar got together and people took notes of that...in that context, if you got all the members of the Court that sat on the Court before and they got together and did something in unison and issued a loud cry to the populace, would that make any difference or is there anything that would make any difference other than some form of, you know, catastrophe that wipes out Michigan and reconstitutes it?

Justice Kavanagh:

Well, I don't know how to bring it about. I can't think of any way to bring it about. The...you know, the parties are happy with it, and there is no big human cry amongst the populace to change it.

Mr. Lane:

But populace doesn't begin to understand this kind of stuff.

Justice Kavanagh:

Of course they don't, and the newspaper editors don't bother with it.

Mr. Lane:

Even at the time...do you recall when you were...this happened in 1976 to you...you ran, you won big. There was a bright light shown for a brief time on this subject matter and I can remember feeling as part of the apparatus, staff apparatus of the Court that I should at least open my yap and say something to you because I thought, "Here is a bright moment where there is a focus on this issue that there had never been before and maybe never would be again", and I thought if there had been an opportunity there to prescribe some kind of a remedy, if ever there would be a chance to get people's attention, that was that moment, and yet, somebody from the Court...no, the Bar, I think, called you and asked you about what was...were you...there was a leading question...

Justice Kavanagh:

If my memory serves me right...you see, the controversy has always been between appointive and elective. The Missouri plan vs. the other types. This is the thing, and that has confused the real issue here of partisan nomination for non-partisan offices. That's the dumb thing. I don't care

whether you elect or appoint. As I say, you get good and bad judges either way, but the thing that you know, is to say, we're going to have a partisan, non-partisan nomination. It just doesn't make any sense.

Mr. Lane:
Ludicrous is the word.

Justice Kavanagh:
Yes.

Mr. Lane:
And many of you...

Justice Kavanagh:
That's the problem, I think. You could have a state-wide primary for Supreme Court justices. I don't recommend it because I don't think that it would be a great improvement, but it would be this improvement: that it would remove not only the substance but the appearance of partisan control over these non-partisan offices. I just don't...I happen to think as I indicated earlier...I happen to think that we're not well served by the system which requires or provides for election of Appellate Court judges. But, the two things are almost always confused. The two separate questions, and they can change. The legislature can change that just like that.

Mr. Lane:
This only came to us not too awful many years ago. Do you remember back prior to 1939 or sometime, we didn't have this. The...

Justice Kavanagh:
They were non-partisan tickets which is fine.

Mr. Lane:
Which is a lot better than this.

Justice Kavanagh:
Exactly. Because if I had been elected to a Democratic office, I'd have listened very carefully to what the party leaders had to say. Yes, but you know, when I was elected to a non-partisan office, I...listen, I believe in parties. I worked very hard for the Democratic Party.

Mr. Lane:
Your father did before.

Justice Kavanagh:
Oh, and my grandfather, both of my grandfathers before that. Oh, sure, and I believe in them, and I've never been a big fan of non-partisan elections, but to have this hybrid where you get a partisan nomination for a non-partisan office just boggles my mind.

Mr. Lane:

Well, shall we confess defeat on that one and go to the next?

Justice Kavanagh:

Sure.

Mr. Lane:

Okay, the next I have on the agenda is "Pot, Pornography and prostitution". There was a famous speech made in 1975, I think it was, to the Kalamazoo County Bar Association. Do you remember who made that speech?

Justice Kavanagh:

Yes. I do.

Mr. Lane:

Explain it.

Justice Kavanagh:

Well, you have a thing here on that.

Mr. Lane:

When you came away from there and you got back to Lansing, you were quickly accosted by a bunch of newspaper people or television. I think it was television. Doesn't it say that? You had gotten out to the studio wherever it was, and Chuck Levin went out there with you, I remember that, because somebody got his...

Justice Kavanagh:

Well, that...this all got started really by accident, I think. I was invited to appear on Tim Skubick's program and...

Mr. Lane:

Prior to the Kalamazoo speeches?

Justice Kavanagh:

Of course. Sure, that's where it all got started....

Mr. Lane:

I didn't know that.

Justice Kavanagh:

I said, "Sure, I'll appear". I went and Chuck Levin rode out with me. We went out the studios on the campus, and the reporters asked a lot of questions about a lot of different things and I answered them the best way I could. One of them asked me about decriminalizing marijuana.

Mr. Lane:

Very popular topic.

Justice Kavanagh:

Which was a red-hot topic, and I expressed the view that it should be decriminalized as should...I didn't say it at that point...I said it subsequently in Kalamazoo, as a matter of fact, that I am convinced that we should decriminalize all drugs. I'm happy to say that now, late in the day, a lot of very respectable people are agreeing with that point of view, but at any rate, these reporters asked me about it. I said what I'd said before, that I was in favor of decriminalizing it. The reason, I said, "Marijuana laws are very offensive to me because I don't see them as the government's business at all". Then they said, "Well, what about prostitution?", and I said, "Well, that's pretty much the same thing. You know, I regard that as a moral question".

Mr. Lane:

Matter for the church rather than...

Justice Kavanagh:

Yes, precisely, and I didn't think that the government had any business really in legislating. I said..."he also thought government had no business 'to legislate in sexual transactions among consenting adults". I still feel that way. Most of our troubles have come from our persistent effort to impose someone's or some other's moral convictions on everybody else. Nothing could be calculated to be so counterproductive. Well, they said, "What about pornography?" and I said, "Well, I can't think of any principle distinction" and so the reporters were surprised that the Chief Justice was such manner, and if I recall correctly, it was the AP that carried the story all over the country that the Chief Justice favors pot, pornography and prostitution. So I had agreed to speak to the Kalamazoo County Bar, and I forget when that was.

Mr. Lane:

That was in late 1975, November.

Justice Kavanagh:

At any rate, when I went out there, they, of course, wanted me to talk about pot, pornography and prostitution. So I did. I told them exactly how I felt. I had written as much earlier in the John Sinclair case. This should have surprised no one that I felt this way because I had said so publicly before, that I just don't think that's the government's business. It was interesting at that Kalamazoo thing because the general counsel for the Upjohn Company which is a big pharmaceutical company, as you know, based in Kalamazoo, was in attendance at this meeting, and either he or someone at his table said, "What about the so-called hard drugs?", and I said, "What I say about marijuana applies to any drug. For example, we spend an inordinate amount of money each year trying to enforce our anti-drug laws. According to the best information I have, aspirin is a drug and I suggest that if the Upjohn Company would go into the manufacturing business of manufacturing these other drugs, morphine and all the hard drugs, that they could probably produce a product that wouldn't cost any more than aspirin. I don't recall ever reading in the paper where anybody held up a gas station in order to get money to buy aspirin tablets. I think if the price, if it weren't illegal, the price of drugs would be very low, and if there wasn't any money in it, there wouldn't be any pushers, any more than the Upjohn Company is pushing aspirin".

Mr. Lane:
Did you say all this?

Justice Kavanagh:
Sure, I said all that.

Mr. Lane:
At the Bar meeting?

Justice Kavanagh:
At the Bar meeting, and afterwards, the general counsel for Upjohn came up and introduced himself. I can't recall his name now, but he said, "You know, Mr. Chief Justice, you said a lot of things that I had never thought about before. I'm not sure I disagree with you".

Mr. Lane:
They had a pretty good Bar in Kalamazoo.

Justice Kavanagh:
Indeed. That was funny and of course, as I say, this went all over the country. Then Bob Leonard who was the president of the Prosecuting Attorney's Association, National president, invited me to address their annual meeting out in San Francisco, and so I did go out and I said essentially the same thing to all these prosecutors, some of whom, a very few, I might say, agreed with me, but I had a lot of fun with it.

Mr. Lane:
It never hurt you politically, did it?

Justice Kavanagh:
I don't think so.

Mr. Lane:
Hell, that was just before your big win the next year.

Justice Kavanagh:
Yes.

Mr. Lane:
I don't recall it being much of a campaign issue.

Justice Kavanagh:
No.

Mr. Lane:
Fortunately, others had taken care of your campaign for you.

Justice Kavanagh:
Indeed.

Mr. Lane:
Maybe this is a good time...I wanted to ask if you'd care to talk about your philosophy of the criminal law generally. You, as I recall, had developed or generated during your period on the Court or maybe started prior to that time, a reputation as being very solicitous, I guess is the right way to talk about it, of the constitutional and statutory protections and rights of the individual citizen when those rights were confronted in a prosecution and I don't know quite how otherwise to...what you might care to say on the subject. I think it is not beneficial to try to get into the mechanics of specific cases where, for example, the jury instruction is a little off-center or where the prosecutorial conduct is over- aggressive by a little bit or where the questioning of the defendant is tainted maybe a little bit because it went on too long, you know, the various individual things that go into the mix...

Justice Kavanagh:
I know what you're saying.

Mr. Lane:
What would you say about that?

Justice Kavanagh:
You've posed the question in a fairly innocuous way. Prosecutors, in their...

Mr. Lane:
You put it your way.

Justice Kavanagh:
...in their shorthand, they always said I was soft on crime. In all candor, Roger, I have believed as long as I've studied law that the constitution of the United States and the constitution of the various states had one single purpose and that was to define and preserve the rights of the citizens against the encroachment of anything within their control, particularly the government. That the purpose of the constitution was to protect a citizen from its government and to spell out and to make it very difficult for the government to interfere with that particular individual. I have always felt that was the purpose of the constitution and consequently, I have always tried to read the constitution with that in mind and protect the individual against the rest of the populace which is the government. Now, I have always looked upon the obligation of the courts as the arbitrar of the decisions in this area and that the courts had the whole responsibility for deciding questions about that and that we shouldn't ever confuse the function of the court and the function of the executive department which is to enforce the law but the court should decide, you know, what the law is as the legislature has spelled it out and what the constitution has to say about it as far as the individual is concerned in a criminal prosecution where you have the might of the state arrayed against an individual charged with violating a crime as defined by the legislature.

Now, because prosecuting attorneys are at once members of the executive branch of government and because they are attorneys, part of the judicial branch of government, they have a very difficult job, and courts have said over and over again that prosecutors have the obligation to be alert to the individual's rights, so he is carrying water on both shoulders, and he has to do his job to enforce the law but not be unmindful of the obligation that he shares as a lawyer to protect the rights of the individual under the constitution, so it's a tough job. I have the utmost respect for conscientious prosecuting attorneys because of the difficulty of their job. It isn't so bad being a governor, you know, because he owes no obligation in the justice system that an attorney does, but everybody in the justice system has this special unique obligation. So, I have written and I have spoken to meetings of prosecutors that I respect prosecutors greatly. I respect their office greatly. Some of them I think, are making grievous blunder when they try to...well, you know...like some of these prosecutors often do...we've had the experience in Oakland County most recently of prosecutors who make their own personal careers out of fighting crime, not necessarily as the legislature has defined it but as they perceive it, and I think that's unfortunate.

Mr. Lane:

Is there any instruction in this subject area in the experience of John Swainson?

Justice Kavanagh:

What do you mean?

Mr. Lane:

Did Robert Ozer conduct a proper discharge of his function in that case? You said a little bit ago that you felt...

(telephone interruption)

Justice Kavanagh:

...it came from Washington. Ozer...I always thought he was kind of a toady type fellow that...I didn't have a great deal of respect for him.

Mr. Lane:

Doesn't the...we're talking here, though,...

(interruption in tape)

Mr. Lane:

...is directed against a man who you believe and I believe and a lot of other people believe was innocent of the charge that was leveled against him.

Justice Kavanagh:

Yes.

Mr. Lane:

And that the array of force that this man confronted who was a high elected public official in this

state, was at the very minimum, daunting and I don't know how he ever paid for his defense. I assume that this came out of his hide or his friends or his...Lord knows, maybe there was someplace else it came out of.

Justice Kavanagh:

Well, his lawyer was Konrad Kohl, and Konrad Kohl is a very good lawyer, a very good friend of John's, and while he does not generally practice criminal law, all of his advise to John as John's criminal lawyer was cleared with the best criminal legal brains that the county could find, and I don't know...I'm sure John paid out of his own pocket for his defense, but knowing Konrad Kohl, I am also certain that he didn't charge the going rate for his representation to John who was a very close friend of his. I think much professional courtesy entered into that, so I think...I'm not sure. Are we talking about the same thing?

Mr. Lane:

I think so. Let's take another example. Let's see if I understand your point correctly. A neighbor and friend of mine who has been up against this sort of a problem is Norman Berkowitz who at one time, was a Deputy Secretary of State, and there arose a question about the design of the 1976 Michigan license plate, the bicentennial license plate, and he wound up being accused in Federal Court of having been responsible for the misappropriation of \$1,300 in design fee or some such thing as that. Now, if you knew this man as I know this man, on the face of it, that is preposterous unless his pen slipped or something like that. Here is a man of some years, almost equal to mine, who was put to the task of defending his integrity against the power brought to bear against him by the United States Government. This thing went on, and went on and went on. You get the sense that there is a constantly growing investment of tax funds and reputations for effective investigation and that sort of thing, and the thing begins to assume a life of its own, the prosecution of some guy. This is, I think what you're talking about. I'm getting carried away here, but I live close to this man, and I know what it took out of him. I know that he was vindicated in the end, like Earl Nelson was vindicated in the end. You know about that one?

Justice Kavanagh:

Yes.

Mr. Lane:

Now, is this what you're talking about, the abuse of the power of the government against people who don't merit that kind of abuse.

Justice Kavanagh:

In the first part, nobody merits that kind of...nobody merits any kind of abuse. Abuse, by definition is wrong, and that's certainly a part of it. But you see it every day where an individual is charged with a crime of some sort, and the all the money available to the prosecuting authorities is almost always a hell of a lot more than the amount available to the individual charged with the crime.

Mr. Lane:

Let me test this thing out.

(interruption in tape)

Justice Kavanagh:

And you talk about abuse...of course, that is the crux of it. A prosecutor certainly has the obligation when he takes his oath of office to vigorously enforce the laws as they are written by the legislature. He is not only free to but obliged to exert his best efforts to this end, and he makes the decision whether to charge according to his judgment as to whether he can prove the case that is brought. If he is of the opinion that he either can't prove it from the evidence available to him or that whatever prompts it that he decides not to prosecute. He decides whether to prosecute or not, but if he decides to prosecute certainly, he should knock himself out to try to get a conviction to prove his case like any other lawyer. But that does oftentimes present a problem, lends itself to abuse of power, because that is great power, and that is the occasion, oftentimes of abusive power, and abuse, as I said, by definition is wrong. I think judges should be very careful, because there isn't any place else to which an individual can look except to a judge to make absolutely certain that the prosecution's case is presented fairly, accurately, and not unfairly and not inaccurately.

The judge...he presides over the trial and that's why, when we write these decisions, oftentimes we will say, "This evidence, for example, is admissible, but we think in the instance of this trial, it was unfair to the individual to allow it in evidence, and we don't, as a consequence, don't think he got a fair trial". It is our job as judges to decide whether he got a fair trial or not. Now, you know, that covers a wide spectrum, and I...the catch phrases "soft and kind" that the prosecutors always use, always did use when they were campaigning against me, I thought were very bad because I don't like crime any better than the next guy, and I don't think that a criminal who is a person who has committed a crime and nobody is a criminal until he is convicted...I don't think a criminal should get away with this, but I think the difference between the prosecutors and me and I suppose that prosecutors, by and large, perhaps felt I was unduly tough on them and of course, in my view, I don't think a judge can be unduly tough. He can only be duly tough, and he should be. That's his oath of law.

Mr. Lane:

Are there any cases in this category that you feel that it's worth talking about specifically, or would you be content just to express yourself in generalities as we have been doing?

Justice Kavanagh:

No, I have no great message that hasn't been said a million times by a million different people. No, I've expressed how I feel, and I don't...certainly anybody that knows me knows that I've rarely changed my mind very much over the years on that attitude. I do what I do as I hope everybody does, according to what I think is right, and I'm not unique. I think everybody does that. You and I don't see something in the same light, well, that only means that one of us can be wrong. It doesn't mean that we're evil.

Mr. Lane:

What have I overlooked? What should we be talking about? This is in the interest of history as it might be judged ten, fifteen, twenty years from now as somebody is trying to get insight into

how things were on the Michigan Supreme Court in the 70's or early 80's, late 60's. What have we slighted or not talked about?

Justice Kavanagh:

Well, nothing occurs to me. I enjoyed my time on the bench very much. I loved it, and you know, I'm sure that...there are many things I think about. For one thing, I had misgivings on a couple of occasions. For example, I think we decided the 696 case wrongly. I think...

Mr. Lane:

Is that condemnation?

Justice Kavanagh:

Yes, condemnation. I think if I had it to do over again, I wouldn't vote the way I voted on that case, and I think...

Mr. Lane:

How about Poletown?

Justice Kavanagh:

Well, Poletown is another one. I think I overstepped the bounds there. I think I was probably wrong on Poletown, my vote on Poletown. In both instances, you understand, like all temptations, it is always presented to you as being the better good, and you do it because you're...that's the way the devil presents it to you, but I do think on reflection, I was probably legally wrong on those votes.

Mr. Lane:

There again, it's the power of government, isn't it?

Justice Kavanagh:

Oh, yes.

Mr. Lane:

Being brought to bear against somebody much less...

(End of side 1, tape 4)

Topic 10: Topics continue from previous section

Mr. Lane:

T.S. Eliot said what?

Justice Kavanagh:

T.S. Eliot said, "The last temptation is the greatest treason. To do the right deed for the wrong reason", and I think in those condemnation cases, I fell into that error. I succumbed to that temptation, but outside of that, I can't...have no regrets, no regrets.

Mr. Lane:

I think you'll find that few people, at least from what I can glean, that have served on the Michigan Supreme Court and are here with us to speak about it now, feel much differently from you, that it was a great privilege, opportunity and a fine experience in life that is hard to match anywhere else.

Justice Kavanagh:

Oh, yes.

(End of side 2, tape 4)