



## Interviews with **Michigan Supreme Court Justices**

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### **INTERVIEW WITH JOHN WARNER FITZGERALD**

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

Conducted by Roger F. Lane

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#### **Topic 1: Joining the Supreme Court and leaving the Court of Appeals**

*Mr. Lane:*

Now, the tape has started and the listener should know that we're focusing on Justice John Warner Fitzgerald who served on the Supreme Court from 1974 through 1982, is that correct?

*Justice Fitzgerald:*

Well, 1982, yes. At that time, the term expired in January 1 at 12:00 p.m., so you can say 1983, I guess. They changed that subsequently.

*Mr. Lane:*

We're sitting in Justice Fitzgerald's office in the Cooley Law School where he is now a professor. The introducer is Roger Lane representing the Michigan Supreme Court Historical Society, and we propose to just ramble a little bit and reminisce and get as much of Justice Fitzgerald's recollections about his judicial service and his family background as time will permit. I thought I would start the conversation by asking Justice Fitzgerald to explain how it was that he ever first thought of sitting on the Supreme Court of Michigan and just what were the circumstances.

*Justice Fitzgerald:*

First sitting on the Supreme Court of Michigan, I suppose every lawyer thinks at some time that he would like to sit on the Supreme Court, but I don't know that the idea ever really occurred to me in concrete or absolute terms. The first time that it arose that I saw that there might be an opportunity to sit on the Supreme Court, there might be a chance that I might, came about in 1973 when then Justice Brennan retired or resigned from the Supreme Court so he could spend all his time at Cooley Law School. I was on the Court of Appeals at that time, and this created a

vacancy on the Supreme Court for a one year period. He resigned as of December 31, 1972 so there was going to be that one year of 1973. I was appointed in 1973, but our constitution requires that anybody who is appointed to a court run at the next election, so that's always a consideration. Well, I was on the Court of Appeals and I was on the original Court of Appeals, and I had been elected to a ten year term. They had done this to stagger. They had ten year terms, eight year terms and six year terms.

*Mr. Lane:*

That was in what year?

*Justice Fitzgerald:*

I was elected to the Court of Appeals in 1965. And so I had one more year to go on my Court of Appeals term, and the consideration then comes up do I want to give an indication that I am interested in the appointment for this one remaining year of Justice Brennan's term which would mean I would have to resign from the Court of Appeals and then also run for the Supreme Court the next election which would be in 1974. So that was of some concern, of course, I would have had to run for the Court of Appeals also, but the Court of Appeals, being a new organization, the tenure there is considerably less volatile than it had been on the Supreme Court because there had been justices who had been on the Supreme Court and had been defeated for re-election. Otis Smith,...

*Mr. Lane:*

May I interrupt at this point?

*Justice Fitzgerald:*

Sure.

*Mr. Lane:*

Has there ever been a sitting Court of Appeals judge?

*Justice Fitzgerald:*

Not to my knowledge, no. I don't think so, no sitting Court of Appeals judge has ever been defeated.

*Mr. Lane:*

That speaks to the difference in the selection process, does it not?

*Justice Fitzgerald:*

I think it does. I'm trying to think of the other...Mike... from Menominee...

*Mr. Lane:*

O'Hara.

*Justice Fitzgerald:*

Mike O'Hara had been defeated and running for re-election on the Supreme Court, so the job obviously was a little more...re-election was a little more volatile than it was on the Court of Appeals, but I kind of looked at it from the standpoint that if I were ever to be on the Supreme Court, this was the time to do it, and this was probably the mode in which to do it because to run would have meant that I wouldn't be running for the Court of Appeals and I would only be running for the Supreme Court and if you lost, you lost.

However, of course, this was sort of the situation with the Supreme Court appointment, so I indicated to the governor, then Governor Milliken, that I was interested in appointment to the Supreme Court and considerable time went on...I think about a three month period in which there were others interested in appointment to the Supreme Court, not the least of which was Tim Quinn, who was also on the Court of Appeals, and there were others. Well, I ultimately heard from the governor asking me if I would accept an appointment to the Supreme Court and on November 14, 1973, I was appointed to the Supreme Court. I said yes, I would, and I was appointed to the Supreme Court.

*Mr. Lane:*

When did Justice Brennan leave?

*Justice Fitzgerald:*

He left as of...

*Mr. Lane:*

The same day?

*Justice Fitzgerald:*

No, he left as of the first of August, I believe it was, that year, and then he didn't leave until the end of 1972. He said, on August 1st, "I am resigning, but I am going to finish out the year to December 31st", so I was appointed in November, but my term would not start until December 31 or January. I am looking at my certificate of appointment dated the first day of January, actually 1974 was when I...he stayed on through 1973, and I went in on January 1, 1974, but it had been announced in November that I was to be appointed to the Supreme Court. Well, that of course, necessitated running in November, 1974 which I went into with my eyes wide open, I knew this, and it was a kind of a volatile time because not only was I getting acquainted with a new job on the Supreme Court but also having to start to think about running in a state-wide election in November.

It was very...it was a tough time because the procedures on the Supreme Court as far as hearing the cases and getting reports from commissioners was totally different from the Court of Appeals, so I was not only learning the job but also getting into the whole concept of keeping the job. Well, passing over that made for a very difficult nine or ten months there, and I then ran again in November of 1974 in the general election and was then elected for an eight-year term, a

full term on the Supreme Court, so in effect, I had nine years on the Court of Appeals, quit one year short of my term ending, and then as it turned out, I had a grand total of nine years on the Supreme Court, one year of Brennan's term and eight years to which I was elected, so that added up to the fact that I had nine years on both courts.

*Mr. Lane:*

From day one, had you made up your mind that you would run in 1974.

*Justice Fitzgerald:*

Oh, yes. No question about that. That was...it was not said as a condition, "Would you take the appointment and also run?", I think that was just inherent that anybody appointed for that one year period would also run for re-election.

*Mr. Lane:*

This would be a non-spoken position of the appointment, would it not, from the governor's standpoint.

*Justice Fitzgerald:*

Totally unspoken. No word was ever mentioned, "would you take a one year appointment and also run when you need to?". That was never mentioned at all, and I think that anybody who took the appointment would just expect they were going to run as I did.

*Mr. Lane:*

Sooner or later, I think I would like to ask about the political tenor of events and to get your thoughts on that subject. Now whether you would care to go into the atmosphere that you entered when you took your seat on the court and how you responded to the problems of the campaign - whether this is the time for that...I think people would be interested in knowing that. We've talked about the Court of Appeals where people are almost never defeated and where the atmosphere, is it not, extremely different.

*Justice Fitzgerald:*

The atmosphere is totally different on the Court of Appeals. You never see in the media a Court of Appeals judge identified as a Republican or as a Democrat. As you know, it is very common in media accounts to say that the Supreme Court is composed of "x" number of Republicans and "x" number of Democrats. It's just...well, I think in some respects, it's a canard that is hung on the Supreme Court, and it is never hung on the Court of Appeals judges for the difference in the selection process - to get on the Court of Appeals, you have to file petitions, non-partisan petitions, and then run and the election is totally non-partisan. Supreme Court, you've got to take a nomination of a political party which does sort of put a mantle on you.

Now, there is also the provision that if you are an incumbent on the Supreme Court, you don't have to be re-nominated by a political party. You can file an affidavit of incumbency and you're on the ballot automatically. I remember thinking a little bit as July, I think it was, you had to file the affidavit of incumbency, and then the partisan conventions where nominees were chosen were in August, wondering was this the time to maybe junk this whole idea, be the first one ever to do it, and just not take a nomination from the Republican party, since I had a Republican background - just not do it. I'd be on the ballot. I would have the incumbent designation. It would say "Justice of the Supreme Court" under my name. Well, I didn't give than an awful lot of thought. I gave it some thought, but not too much.

*Mr. Lane:*

Did you file the affidavit?

*Justice Fitzgerald:*

Yes, everybody files an affidavit.

*Mr. Lane:*

I mean the one that guarantees your listing on the ballot?

*Justice Fitzgerald:*

Yes, I filed the affidavit, and everybody always does, because I suppose there's always that outside possibility that you might outrage your party in some way and they don't nominate you.

*Mr. Lane:*

One of your colleagues on the Supreme Court outraged his party some years later, right?

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

And did not get re-nominated.

*Justice Fitzgerald:*

And you're referring to, of course, Thomas Giles Kavanagh, and he did not get re...but the affidavit of incumbency insures that your name is on the ballot just as though you were nominated. Well, as I say, I thought it over a little bit..."Is this a time to make a play for junking this system of choosing", at least as far as I'm concerned, "choosing Supreme Court nominees", and say, "I am now a non-partisan, and I'm not going to take a partisan nomination". Well, I guess I'm too much of a team player, and thought this was not the time to rock the boat to this extent, so I filed by affidavit of incumbency, also went to the convention, went through all of the motions for the nomination and got it at the Republican convention.

So, I was there on the ballot for two reasons, the affidavit of incumbency that anybody's got who

is an incumbent, and I was also nominated by the party. But the idea did cross my mind of not taking it, saying I'm on the Supreme Court, I'm a non-partisan. But I think as time, to some degree, has shown, this identification of Supreme Court justices as Republicans and Democrats continues even to this day, and we haven't really progressed too much to the idea that the Supreme Court is a non-partisan job. We haven't really progressed very far in that direction whereas the Court of Appeals started out that way, is to this day, considered non-partisan.

I doubt seriously that anybody in the state of Michigan could break-down the number of Court of Appeals judges that there are in the state now and identify each of them as to what, at least, their political beginnings were. I don't think anybody could do that.

*Mr. Lane:*

Here's a selection process, that is, for the Supreme Court, that has been roundly damned for decades, perhaps longer, and yet, do you see any chance that it might be changed, and if not, why not?

*Justice Fitzgerald:*

I don't see any for the foreseeable future, and you will find even the candidates today for this upcoming election in the fall of 1990 saying that this is an outmoded, unworkable, contradictory process, that I go one day to a political convention and the next day, I am a non-partisan. I think both present candidates have said this. It just does not make sense, and Michigan is the only state that has this particular type of nomination process. Some states, the Supreme Court justices run on a partisan ticket; some of them run truly on a non-partisan ticket just as Court of Appeals judges do in this state. Why won't it change or why hasn't it changed?

I think partly it's because both major political parties see...want to be able to say, "Well, we put, or we have a member of our party on the Supreme Court", and so long as they've got this hold, new nominees for the Supreme Court have to be nominated at a partisan convention, they'll be able to do that. There have been some abortive attempts to do away with it, suggested changes that the legislature has talked about, but they've never gotten any place.

*Mr. Lane:*

Do you think the change in the reapportionment provisions, that is, now that the party stake in reapportionment that was once directly thrust into the Supreme Court...now that that is no longer true or is it any longer true?

*Justice Fitzgerald:*

Well, actually there have been two times that the Supreme Court ended up in apportioning the state and I think that probably is a factor also that the political parties, want to, at least in their minds, keep a string on the members of the Supreme Court, when it comes down to one of their

very most serious functions and that's apportionment, but this business of filing an affidavit of incumbency did, at least, open a door for a Supreme Court justice to cast off political considerations, if he wanted to, and not take that nomination.

I think perhaps that was an attempt, though it has not been very successful, to divorce the Supreme Court from politics. While we're discussing this, I do want to say that political considerations as such do not very often enter into the decisions of the Supreme Court or the deliberations of the Supreme Court. It is something that is alleged that is not so. You can take any volume of the Michigan Reports and read it, and rarely will you ever find a combination of the justices as coming down as majority or minority opinions in a case based on their political affiliations. It runs much more to legal philosophy, social philosophy if you will, and I don't know whether that goes along with political affiliation or not, but it is very rare when it comes down to political affiliation as deciding a case. The last apportionment, re-apportionment case, as I recall, was unanimous.

When we re-apportioned the state of Michigan the last time, it was a unanimous decision with one concurring opinion, as I recall, filed by Justice Blair Moody in which he concurred in the result but expressed some different reasons there for it, so that kind of picks the whole theory in the head. Here, you've got all the justices agreeing on apportionment regardless of political party. If the parties think that keeping some sort of string in the nomination process on the justices is going to make any big difference, it doesn't appear to work out that way.

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## **Topic 2: Supreme Court campaigns and the decision-making process**

*Mr. Lane:*

But Justice Fitzgerald, returning to your 1974 election campaign, do I recall that you declined all contributions from lawyers?

*Justice Fitzgerald:*

I did. That was my one big experiment in the elective process. I had always had the feeling that lawyers, as far as courts are concerned, are a special interest group, and consequently, I decided early on that I would simply say, "I will not take any money from lawyers" which, when you come right down to it, was a rather remarkable pronouncement, but you know what? It didn't create a ripple. It didn't create a ripple. It got maybe six or eight inches of copy in the newspapers and that was the end of it. It was never mentioned again, so all that I accomplished was taking in considerably less revenue than any other candidate ever has.

*Mr. Lane:*

Before or since, in modern times, has this ever been done?

*Justice Fitzgerald:*

Not to my knowledge. Now, there have been some limitations put on the amount of money that lawyers may contribute. One hundred dollars is the most that a single lawyer can contribute to a candidate. That, as I recall, that limitation was not on at the time that I said, "I will take no money from lawyers". As I say, it read real good at the time that I did it, but it scarcely created a ripple, and, you know, it was just a sort of experiment in nothingness, as it turned out.

*Mr. Lane:*

In practical terms, did it severely limit your...?

*Justice Fitzgerald:*

Yes, it did cut down considerably on the amount of money because lawyers are major contributors to judicial campaigns, and I think this \$100.00 limitation is a fine thing, and certainly \$100.00 is a drop in the bucket when it comes to the cost of an election, but add enough of those together, and you've got quite a bit of money. Consequently, it did curtail considerably the amount of money that I took in, and it was a noble experiment, but it was a wash-out.

*Mr. Lane:*

You won, as I recall, in a very close...

*Justice Fitzgerald:*

Very tight election. My opponent...the Democratic party had nominated Blair Moody to run against me, and of course, he came with good credentials as a Circuit Judge in Detroit. His father had been a U.S. Senator. He had spent time in Washington himself, and he had had some very important cases in Detroit and like that. His name was certainly well-known, and I think the Democrats saw this as a main chance to defeat an incumbent, so Blair Moody was nominated. It was a very, very tight election. I won by exactly 11,000 votes on the head, and the vote was upwards, as I recall, of 2,000,000. It was 900,000 and something versus 900,000 and something, and the differential was exactly 11,000 votes, so it was a narrow, very narrow victory.

*Mr. Lane:*

Do you remember how much your campaign expenditures amounted to and how much his amounted to?

*Justice Fitzgerald:*

I am almost embarrassed to say how much my campaign expenditures amounted to. I don't recall exactly. Of course, we filed...you filed reports. They were not as detailed as they are now, but I think my total expenditure for that campaign was something in the vicinity of about \$16,000 or \$17,000. Well, that is not very much to run a state-wide campaign on, and I think that then later Justice Moody who ran two years later and defeated incumbent Justice Lindemer...I think his expenditures, if I recall correctly, and I certainly stand to be corrected on this, were in the vicinity of a \$120,000 or so. Now we have to remember, of course, that this is almost twenty years ago and either amount went a lot farther then...



*Mr. Lane:*  
But the ratio...

*Justice Fitzgerald:*

Our ratio was about 8:1, I would say probably, and so, as I say, my experiment was not...I won, but it was...and I don't know that having had money from lawyers and had more money to put into television, newspapers, radio, whatever, would have increased the margin or not. Hard to say. It's one of those things you have no idea whether I would have won by...maybe I would have won by 12,000 votes instead of 11,000. Who knows?

*Mr. Lane:*

There is speculation that I've heard that the campaign format..when you have to run for the Supreme Court, saps the energies of the court in discharging its judicial function. Did you find out of that experience...?

*Justice Fitzgerald:*

I did.

*Mr. Lane:*

...of other experiences that this was true? What could you say about that?

*Justice Fitzgerald:*

I did. Now, the court is very, very lenient or understanding of...it's generally two members are campaigning in any given election. The other person who was running for election at this time was Thomas Matthew Kavanagh. At the time I was running on the Republican nomination, Thomas Matthew Kavanagh was running with the Democratic Nomination. Of course, he was the Chief Justice, and that period of time, and I suspect it is still true, that period of time from approximately July until November, the activities of the court are not crippled but curtailed because of the fact that there are certain times that the candidates, the two candidates, simply can't be there or certainly, you've got at all times the thought of a campaign on your mind, but I found that as far as the two of us were concerned, Thomas Matthew Kavanagh and myself, they were very understanding, and we got our work out and all that, but at any time...I think in every two years from July to November, the court's work is...I guess the best word I could use is "hampered" by the fact that two of the seven members are running for election. There are certain things that you have to go to. There are certain times that you can be there and the other justice that is running can't be there, and it does, I guess, hamper...that's the best word I can think of. It hampers the operation of the court.

*Mr. Lane:*

Thinking of...

*Justice Fitzgerald:*

As long as you've got to run, there's always going to be that problem, I guess.

*Mr. Lane:*

Thinking of historians or scholars that might in some future time be interested deeply in this part of the Supreme Court process and what inhibits it, would you care to go into the mechanics of Supreme Court decision making as distinguished, let's say, from City Council where one fellow is on a trip or vacation, and they take the vote, and it is 5-1 with two or three missing. You don't do that on the Supreme Court, do you, because each...

*Justice Fitzgerald:*

You are obliged to vote. You may to abstain from an opinion. You can disqualify yourself for whatever reason there may be...say "I shouldn't hear that case because I was...maybe I was the trial judge down below before I came on the court", or something you can disqualify, but if there is a case that you have sat on and heard, and then an opinion is circulating around the conference table or even what turns out to be a dissent is circulating, you've got...you can't say, "Well, I guess I won't sign this one. I abstain from it". You have to participate. If you sat on and heard the case and not previously disqualified yourself or recused yourself for some good reason.

*Mr. Lane:*

Would it be fair to say, too, that the individual justice regarding himself as a state-wide elective officer, is very particular about the exercise of his responsibilities?

*Justice Fitzgerald:*

That's right.

*Mr. Lane:*

And the others understand this, and he would, if he felt it necessary, everything would be delayed until he could get...

*Justice Fitzgerald:*

Oh, yes, until you've had an opportunity to think it over. This is one of the reasons that partly contributes to delays on the Supreme Court. Not only on the Supreme Court, but the Court of Appeals also, to a much lesser degree, that if you get an opinion that you didn't write, from one of the other justices, you're allowed generally about as much time as you need to consider, "Do I want to sign this?", or "Don't I want to sign this? Do I want to write a dissent? Do I want to just sign it an concur only in the result?" The members of the court are very courteous, almost courteous, I would say, to a fault in allowing people as much time as they want to consider whether they're going to sign an opinion and it does, occasionally, lead to delays.

There are times when a justice cannot make up his or her mind. "Is this what I want to sign?" Particularly at the time I went on, and I think this is no longer quite so much true... I think there are today some deadlines that we tried off and on, and it just didn't work. I think it's just too

traditional that you have as long as you want, unlike the U.S. Supreme Court which, by tradition, gets everything out by the end of June that they've heard during the year. Rarely does ever a case that is argued before the U.S. Supreme Court ever go beyond the last week in June for a decision and here, I have seen cases...I recall cases that have laid six months, nine months while one justice was making up his or her mind..."Do I or don't I want to sign this?"

*Mr. Lane:*

Why does it happen here and not in Washington?

*Justice Fitzgerald:*

Well, I think simply because of tradition. I think, and I don't know that it is written any place that the U.S. Supreme Court must get all of its cases out, written and released by the end of June, but it has always been that way. Once in a great while, it will go over on a case, but it never goes over more than a couple weeks, maybe a month at the most, and it's just one case that maybe they heard late, and there isn't time to get the opinion around by the end of June. As I say, I know of no place where it says they have to.

There is also, I think in the U.S. Supreme Court, the idea of a summer recess. They are off from June until October, and while the work of the court goes on...I know they're reading, they're studying, they are hearing emergency appeals on a one to one basis. The justices are assigned different parts of the country to hear emergency appeals. They can issue stays and things like that. The Michigan Supreme Court continues to work through the summer. Maybe not hear cases in one month, but there are administrative meetings where all of the justices are around the table. There are opinion conferences all around the table. U.S. Supreme Court...my understanding is during the summer, they don't all sit down around the table and talk about their cases because theoretically, they are all done.

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### **Topic 3: The case of Scholle vs. Secretary of State and the composition of the Supreme Court during his time**

*Mr. Lane:*

Do I recall that you had a conspicuous experience on what happens in summer recess where you...this would have been prior to your service on the Supreme Court, I believe...didn't you go to...or what am I thinking about...to New Hampshire?

*Justice Fitzgerald:*

Oh, yes.

*Mr. Lane:*

Tell us about...what is the story on that?

*Justice Fitzgerald:*

Well, it goes back to when I was in the Senate from 1958 to 1965 when I was elected to the Court of Appeals, and it was the famous one-man, one-vote case, now called one-person, one-vote case...Scholle vs. Hare. Gus Scholle vs. Secretary of State saying that the State of Michigan was mal-apportioned and that while the House of Representatives approximately was apportioned right, the Senate was all out of commission. Senatorial districts...there was no rhyme or reason to the size of them, either geographically or population, and I was one of three senators who intervened on behalf of the Senate in the case of Scholle vs. Hare, and the case was...had been through the Michigan Supreme Court in which it was said that it was mal-apportioned, had gone up to the U.S. Supreme Court under the Federal constitution and it began to look like the U.S. Supreme Court would also say that Michigan was mal-apportioned, and it had to be done on a much more scientific basis.

There were three Republican Senators: Senator Beadle who was the majority leader of the Senate, Senator Younger from here in Lansing and myself coming from Grand Ledge, and I guess probably one of the reasons that Senator Younger and I were on it was because we were right around Lansing all the time, and Senator Beadle as sort of the head of the Republican senators, so we intervened, and if you read the actual report of Scholle vs. Hare in the books, it will say, "August Scholle vs. James Hare" and underneath, "Intervening parties: John W. Fitzgerald, Paul Younger and Frank Beadle", and the U.S. Supreme Court had the matter before it, and it looked as though the election for senator in the state of Michigan was going to be at-large. In other words, there were, at that time, 34, I believe, senate seats, and if you were going to run for the senate, you ran as a senator over the entire state of Michigan.

Well, even the greatest advocates of one-person, one-vote didn't advocate that, so in order to avoid this...this had been the court's decision that you run at large...we went, the three of us, with our attorney who was then Whitney North Seymour from New York City, who had been hired, frankly, by the Republican party at a very...he really believed in what he was doing, very nominal sum, and we went to Littleton, New Hampshire where Justice Potter Stewart spent summers, and presented the case for a stay which would permit running in our old districts for one more election until things could be straightened out, and Justice Stewart granted a stay which meant that at the primary in August and in the general election in November, the Michigan senate districts would remain the same as they were.

*Mr. Lane:*

That was in 1964, was it?

*Justice Fitzgerald:*

That was in 1964, yes.

*Mr. Lane:*

And this was an individual act by Justice Stewart...?

*Justice Fitzgerald:*

Yes, he issued a stay which they may do. Then, when the court reconvenes, it is considered by the entire court.

*Mr. Lane:*

But in Michigan, there is no analogous...?

*Justice Fitzgerald:*

No analogous situation where one justice may act, at least within recent history, where one justice can issue a stay pending a get together of the entire court to decide what the vote is on making it a permanent stay or dissolving it. There is no analogous situation.

*Mr. Lane:*

Justice Fitzgerald, do you recall what the political alignment...we talked a little about the political forces impinging on the actions of the Michigan Supreme Court...what was the political set of events when you arrived in 1973? Or was it the first of 1974?

*Justice Fitzgerald:*

The first of 1974.

*Mr. Lane:*

Who were your colleagues at that time?

*Justice Fitzgerald:*

My colleagues were Justice Levin who had also been on the Court of Appeals and had run as an Independent for the Supreme Court, but that's another story, and Justice Thomas Giles Kavanagh, who had also been on the Michigan Court of Appeals, Justice Williams...

*Mr. Lane:*

Justice Swainson.

*Justice Fitzgerald:*

Justice Swainson,...we have five...let me think, who else was there at that time?

*Mr. Lane:*

T.M. Kavanagh...

*Justice Fitzgerald:*

And T.M. Kavanagh who was Chief Justice, and...

*Mr. Lane:*

And Justice Coleman.

*Justice Fitzgerald:*

And Justice Coleman, yes. That was the...those were the people on the court at that time...myself, Justices Swainson, Coleman, Williams, T.G. Kavanagh, T.M. Kavanagh and Justice Levin. And of course, while we're discussing the political name tags that are hung on justices, as I mentioned

before, and I'm sure anybody listening to this knows, Justice Levin did run as an Independent, and consequently, has made use of this affidavit of incumbency ever since, and has never been nominated by a major political party.

*Mr. Lane:*  
Was that true?

*Justice Fitzgerald:*

Oh, yes, never has been nominated by a major political party, so he simply files his affidavit of incumbency, and he is on the ballot, so...I suppose that if one were to look at the breakdown of the court politically, at least what the media would have said at the time, there were two Republicans on the court, me and Justice Coleman. The Democrats would have been Justices Swainson, Williams, T.G. Kavanagh, T.M. Kavanagh, and one Independent, Justice Levin.

*Mr. Lane:*

Would you care to talk about the concept of collegiality? Sometimes there is quite a bit made of this aspect of service on the Supreme Court.

*Justice Fitzgerald:*

Well, there is a lot more collegiality than the general public, and I think, for that matter, the media thinks there is, or would like to think there is. There aren't...any disagreements and so forth that I have ever discovered, ran to legal philosophy and not political philosophy. One of my ex-colleagues, Justice Thomas Giles Kavanagh, used to have a saying that I remember he said, or I heard that he said early on when on the court, "The members of the Supreme Court are, for a certain period of time, involuntary seat mates".

You didn't choose with whom you sit, and consequently, you just have to...there has to be a certain amount of collegiality and right now in the legal profession, there is all this talk about civility and professionalism and so forth, and I think on the court, at least, civility certainly, and professionalism and collegiality always did obtain, much more than people thought it did, and now, for whatever reason it is, the profession is waking up to this that civility right now, in the practice of law, is not what it once was, and we ought to do something about it. On the court, at least, it was not any great problem.

*Mr. Lane:*

Well, that is during your period of service. Now, you would not apply that comment to times that...where for example, the plate glass conference table cover was smashed by somebody's fist...

*Justice Fitzgerald:*

I have heard that story, but I don't know whether it is apocryphal or whether it actually happened. I have heard that sometime before I went on the Supreme Court, one of the justices was so adamant about his position on something or something, that he banged his fist down on the plate glass top of the conference table and broke it. I've heard the story, but I never heard it from anybody who was there at the time, and I never heard it from anybody who saw it happen. Who knows, maybe the water decanter fell over and broke the thing. I guess a plate glass top to the conference table broke, but how, I don't know, and this story has hung around for years, and years and years. As I say, I never heard from anybody who was there at the time that it actually happened, or anybody that ever claimed that they saw it happen. That's not to say it didn't happen, but I never heard it from anybody who saw it happen.

*Mr. Lane:*

Would you...you were not on the court at the time of Gene Black. He had already left by the time you arrived on the court, didn't he?

*Justice Fitzgerald:*

Yes, he departed...yes, he had departed two years previously, I believe it was.

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#### **Topic 4: Family background and attending the University of Michigan Law School**

*Mr. Lane:*

Justice Fitzgerald, I hope that our conversation would lead back into your early origins in the respect that your family is very much identified with public service for what, the fourth generation?

*(End of side 1, tape 1)*

*Mr. Lane:*

Well, I think what we need to talk about is your reaction to your father being governor and whether this...I think you said, while it was interesting, you didn't...

*Justice Fitzgerald:*

It didn't spur me on to want to be a public servant at the time. I mean, there are really...the thought really didn't cross my mind.

*Mr. Lane:*

It's been observed, you know, that your family...I think I've heard this said, is the only family in Michigan history to have produced a top officer, first ranking officer in two branches of government, the executive and you having served as Chief Justice in...

*Justice Fitzgerald:*

Well, I think that's true. At least, it has never been called to my attention any other family that had that situation arise, and then of course, there is...my father was never in the Legislative branch and he was never in the Judicial branch, and I was never in the Executive branch. However, my grandfather was in the Legislative branch, and my son is now in the Legislative branch, so between the four of us, we have covered all branches of government. No, I don't think there is anybody that has ever produced a governor and a Chief Justice in one or two generations. To return to the topic at hand, I don't think...I have no recollection, at least, that his experiences and what I shared of them spurred me on to think that public service is what I wanted to do.

*Mr. Lane:*

So when he died, you were a freshman in high school?

*Justice Fitzgerald:*

I was a freshman in high school and went on to finish high school. World War II was on. I graduated in 1942. Pearl Harbor had been in 1941, and any able-bodied male at that time expected to go into the service, and I did. I managed to get in two terms at Michigan State and went into the service for two years. Then I ultimately came back and finished up at Michigan State.

*Mr. Lane:*

What was the nature of your military service?

*Justice Fitzgerald:*

It was not glorious. It was...I never...when pressed, I never left the United States. I was one of those people who simply shuttled from coast to coast, from Texas to New Jersey to Illinois in the United States. I never went over seas.

*Mr. Lane:*

What branch were you in?

*Justice Fitzgerald:*

I was in the Infantry, strangely enough.

*Mr. Lane:*

Were you ever assigned to a divisional component of the Infantry, the 95th division or...?

*Justice Fitzgerald:*

I was, at one time, assigned to 104th Division, but I ultimately was discharged from the army following a bout of pneumonia. I had viral pneumonia which is one of those things that leaves you mighty weak for six months to a year after you have it, and I had an especially bad case, and so I was discharge, I got a medical discharge, and the war was not quite over yet. The war ran on for another three to four months at the time I got discharged, but as I say, I was one of those



people who just shuttled from coast to coast in the United States with different assignments and never did get overseas.

*Mr. Lane:*

Then you finished at Michigan State?

*Justice Fitzgerald:*

Then I finished up at Michigan State. Even then, I didn't have in mind that I was going to even become a lawyer. That had not yet really occurred to me. Oh, I suppose that he being a lawyer, it once in a while it had occurred to me like it did to a lot of people, but I really didn't plan at that time to become a lawyer and while at Michigan State, I had worked in what was then called the Public Relations Department at Michigan State and when I graduated, I was offered a job there, so I stayed on there, and I stayed on there for four years. It was about that time that I began to think in terms of a law degree, but still not in terms of a political entree because I was a lawyer or anything like that. I entered University of Michigan law school. I made the decision, "I'm going to quit and I'm going to go to law school".

*Mr. Lane:*

That would have been about 1948, 1949?

*Justice Fitzgerald:*

No, that was not until 1952. I entered there in 1952 and went on what they called then the "Accelerated Program" which most law schools still have. I don't know whether Michigan still does or not. Three summers and two years, and I started in the summer of 1952 and finished in the summer of 1954...three summer terms and two full academic, regular academic years. I guess there must have been in my mind some urgency, but I was about four or five years older, you see, than all of my classmates. Most of them had not been in World War II because they were too young, and I was eighteen when I went in myself. I was young, but because of the time that I had worked at Michigan State and the two years that I was out and in the army, I was five years or so older than all of my classmates, and so I kind of had the feeling that I wanted to get done as fast as I could, so I stayed on that accelerated program, and finished up. Well, what to do? I always had sort of had in mind that I guess that if it works out right, one goes back to one's home town to practice law, so when I finished law school and took the bar exam. It took as long then to find out whether you passed the bar as it does now.

I took it in July and found out in December then that I had passed, and I got sworn in to the bar, and I had made all the plans to practice law in Grand Ledge. I had gone so far as on sheer faith that I was going to practice to have stationary printed and rent an office and fix that up so that as soon as I found out that I had passed and could practice, I could open up. Well, as it turned out, I did pass, and I was sworn in in very late December of that...1954, and opened up an office in

January, 1955. Well, I had a general practice in Grand Ledge. I suppose there were a few people that were waiting for me to get through law school, but not too many, and but, you know, business began to come. It's always slow when you start up on your own, and in January, 1955, I got a very interesting telephone call, and it was from then to be Representative Charles Chamberlain of Ingham County. He had been elected to Congress, and up until that time, he had practiced, he had been prosecutor and things like that here in Ingham County, but he'd also had a job with the Senate which was called Legal Counsel to the Senate. They had one lawyer on the payroll then in those days, generally somebody relatively fresh out of law school, and you were assigned to the Chairman of the Senate Judiciary Committee. You really had more connection with the Chairman of the Senate Judiciary Committee than anybody else though the title of the job was "Legal Counsel to the Senate".

The job consisted of research for the Judiciary Committee and things like that. Representative Chamberlain called me up one day and asked me if I was interested in a part-time job with the legislature, and I said, "Well, what?". He didn't even reveal what it was. Well, it turned out that he had had this job up until this time, and the Chairman of the Senate Judiciary Committee was Senator Harry Hittle from Lansing, and he had told then Representative Chamberlain, "Find a replacement for yourself. Find me somebody to take this job," and Representative Chamberlain had not buckled right down and found somebody immediately and here, it was about time for the session to start. He was leaving, and...

*Mr. Lane:*

He had been elected to Congress?

*Justice Fitzgerald:*

Yes, and Senator Hittle wanted somebody in this job. I said to Representative Chamberlain, I said, "Well, what is it?". He said, "Well, it's Legal Counsel to the Senate", and he outlined the duties and so forth. Well, I had never heard of the job before, or anything about it, and I said, "Well, it sounds interesting. How much time does it take away from the practice of law?", and he said, "Well, it takes whatever...you're there when the legislature is in session", and of course, in those days, the legislature was in session a lot less than it is now, and I said, "Well, that sounds interesting", and he said, "Well, come in tomorrow and meet with me and Senator Hittle, and we'll talk about it, and see if you are the person he might want for this job". So I went in and met with the three of them, and I evidently was fine with Senator Hittle, and he said, "Are you interested in the job?", and I said, "Yes, I am", because as I say, I was just starting a law practice, and it was not that overwhelming yet, and it was a per diem job. You were paid by the day when the legislature was in session, and it paid the magnificent sum at that time of \$20.00/day which, if you had to spend the whole day away from you office, maybe didn't pay, but there were also other times when the legislature...what it came down to, if they were in session for five days in a given week or you had to go in for a special meeting or something, it could mean \$100.00 or so/week. In those days, to a beginning lawyer, that didn't look too bad, so I took the job.

*Mr. Lane:*

How did Charlie Chamberlain happen to call you? Had you been acquainted for some time?

*Justice Fitzgerald:*

I had not been acquainted with him, and that is a happenstance. At the time I passed the bar in December, he saw in the newspaper a little squib of who had passed the bar in this area. Well, there weren't as many people taking the bar in those days as there are now, and from the Lansing area including Grand Ledge, my home town, there were probably three or four names at best, for the whole state, and he told me later, he said, "I saw that name there, 'John Fitzgerald, Grand Ledge'", and he said, "I thought to myself that must be Frank Fitzgerald's son", and he said, "My acquaintance with your father goes back to when he was much younger, back in the 1930's and he had achieved the award of Eagle Scout, and there had been a ceremony here in Lansing in which he had been presented with his Eagle Scout badge and among the presenters was my father who was then Governor of the state", so talk about small worlds and coincidences...there was a real one, and he said to himself, "That must be...". Well, here he was in the position of Senator Hittle breathing down his neck, saying, "Find somebody to replace you", and him not being able to think of anybody right off hand, and suddenly he thought, he had read where I had passed the bar and I was setting up law practice in Grand Ledge and consequently, he called me and asked if I would be interested in the job.

That almost is a providential type of story, but at any rate, I was fine with Senator Hittle, and I took on the job, and it was not terribly demanding. You had to analyze bills and things like that and be present all the time during the sessions and so forth. It blended in okay with the practice of law because you only had to be there during session time which, you know, it didn't run eight hours/day, so I spent two years in that job, and Senator Hittle passed away sometime after that, within the next couple years, and the Chairman of the Judiciary Committee became none other than a senator from Kalamazoo, Carlton Morris, and this was a patronage job, pure and simple, and had Senator Morris wanted somebody else in it, I would have been out of a job, and somebody else would have been in there. It was pure and simple patronage. But he evidently had nobody in mind, and he had been on the Judiciary Committee, and I had worked with him over the past couple years, and everything was fine, so he said will I take this job for another two years, and I said, "Yes, I will", so I took the job for another two years.

During that period of time, the senator from the district in which I lived, which was then the 15th District, and it was comprised of Eaton, Clinton and Shiawassee counties...the senator from that district was a lawyer from Owosso by the name of Donald Smith. Well, Don Smith's attendance record was not everything that it might be, and he was absent for long periods of time and so forth, and pretty soon, it became pretty obvious that he was not going to run for re-election at the next election because, as I recall the story at any rate, he had gone to California and his Senate checks were being forwarded to him in California, and so while they never got to the point where the seat was declared vacant or anything, or he was never censured by the Senate or anything, he obviously wasn't there so Carlton Morris said to me, "Why don't you run for the job? There's a vacancy there. I mean, that's the time to run when there's no incumbent", and obviously Donald

Smith, Senator Donald Smith was not going to run, so I gave that a lot of thought. Should I or shouldn't I?, and I guess I really, up until that point, had not really thought too much about a political career. Well, I decided to do it. I ran in a three-way primary.

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## **Topic 5: The Court of Appeals in 1964 and T. John Lesinki**

*Mr. Lane:*

That would have been your first...?

*Justice Fitzgerald:*

That would have been my first term in 1958, starting in 1958. I suppose this would have been the election of 19...would there have been an election in the fall of 1957...at any rate, 1958...maybe it was in the election of 1958, and I ran in a three-way primary. Two candidates from Shiawassee County and me from Eaton County and nobody from Clinton County. The candidates from Shiawassee County were a young lawyer from there by the name of Lewis Benson and a House member who had decided to run for the Senate by the name of Adrian deBoom. He had decided he would now run for this vacancy there in the Senate seat. Well, I...between the two of them, they managed very nicely to split the Shiawassee County votes since they both came from Owosso, which left me Eaton County and Clinton County which added together pretty well, put them out of the picture. I was elected to the Senate.

I spent three terms there, and in my last term, we had had the constitutional convention. It was now the fall of 1964, the constitution of 1963...it was now the fall of 1964, and created during that legislative session was the new Court of Appeals which the constitution called for. Well, there were two members of the legislature who were very interested in running for the new Court of Appeals, myself...I had had three terms in the Senate and that was beginning to be about enough and the other one was the then Lieutenant Governor, T. John Lesinski who presided, of course, over the Senate, and whom I knew very well. So, between the two of us, we saw to it...well, there was no question what it was going to pass, but we sort of shepherded through the legislation creating this new Court of Appeals, and both of us ran for it in the election of 1964, in the fall of 1964. Both were elected.

*Mr. Lane:*

Did you run by districts?

*Justice Fitzgerald:*

Ran by districts. There were three districts, just as there are now, and he ran in the 1st District and I ran in the 3rd District which was the big outstate. Wayne County was a District all by itself

then. Now, it's got a little more territory in it. The two of us were elected, both of us to terms on the Court of Appeals, and we both left...he left the Lieutenant Governor's job and that, of course, was in the day and age when the Lieutenant Governor could be of opposite parties and George Romney was governor.

*Mr. Lane:*

That was the last time around?

*Justice Fitzgerald:*

That was the last time around that the Lieutenant Governor could be of the opposite party of the governor, and so T. John Lesinski went on the Court of Appeals, and I did. There were three elected from each district, for a total Court of Appeals of nine. The terms were staggered, ten years, eight years, six years, depending on how many you got, and I happened to get the ten year term.

*Mr. Lane:*

Did you run high, electorally?

*Justice Fitzgerald:*

Yes, yes.

*Mr. Lane:*

You led the...

*Justice Fitzgerald:*

I got the most votes in the 3rd District which gave me the ten year term.

*Mr. Lane:*

Oh, I see. One in each district.

*Justice Fitzgerald:*

One in each district, and that was then to go into a staggered six year situation.

*Mr. Lane:*

Who were the others in the 3rd District.

*Justice Fitzgerald:*

There was Robert Burns who had been a Municipal Judge in Grand Rapids and Donald Holbrook, Sr. who had been a Circuit Judge in Clare and Isabella and Midland Counties, so we were the three who were elected in the 3rd District.

*Mr. Lane:*

Were there a great many candidates?

*Justice Fitzgerald:*

As I recall originally, for the primary, there were nine, nine candidates.

*Mr. Lane:*

And that meant that the six were in the run-off.

*Justice Fitzgerald:*

Six were in the run-off, yes.

*Mr. Lane:*

I have heard some stories about what happened following the canvas of the vote. Here you were, as I understand it, there were nine...

*(Interruption in recording)*

*Justice Fitzgerald:*

You were saying "following the canvas".

*Mr. Lane:*

Yes, now, would you relate what happened? Here there are nine Court of Appeals judges waiting to be sworn in. They don't have a place to sit. They don't have any waste baskets. They don't have anything...

*Justice Fitzgerald:*

They had nothing.

*Mr. Lane:*

I understand this was quite an interesting period that followed there. What did you do immediately after being elected?

*Justice Fitzgerald:*

Once we knew we were elected, there were nine of that knew we had been elected, and there had to be some sort of organization because the court was supposed to start sitting in January, and one of the things we were going to see to it that there was a session of court in each District in January, but this took a little lead time, so I don't know just exactly how it came about, but it was decided that the nine of us would have a meeting and elect a Chief Judge who would in turn, tell the State of Michigan how much money we needed to set up three courtrooms and offices for the judges and so forth, so we went to a place over in the thumb area to get away from the media as much as possible...

*Mr. Lane:*

Was this a hunting cabin?

*Justice Fitzgerald:*

It was called the "Detroit Hunt and Fish Club", and it happened that John Gillis who had been elected in the 1st District and I think Louis McGregor, who had been elected in the 2nd, both belonged to it, and it was nothing but really kind of a fairly primitive hunting cabin where relatively large groups could go. I think that was the name of it - "Detroit Hunt and Fish Club".

*Mr. Lane:*

In Tawas or East Tawas or something?

*Justice Fitzgerald:*

Yes, right around that territory. I forget exactly where. So we spent, I think two, maybe three days there talking about how we would organize the Court of Appeals. Well, one of the first jobs that we had to do was choose a Chief Judge of the court who would have the responsibility of organizing the whole operation, getting the money and signing the leases and setting up the offices in the courtrooms, and all that sort of thing. What it came down to was really the chief contenders for the job were me and T. John because we'd sort of come out of the operation which created the Court of Appeals in the legislature and still knew many members of the legislature. The breakdown of the Court of Appeals, if you look at it politically, just for the heck of it, was more Republicans than Democrats, and I suppose if we had cast a ballot on that basis, I probably would have been elected, but there were two things that entered in here.

I didn't want the job, and have to take on all of this business of leases and looking over places for offices and courtrooms and all that sort of thing. I didn't want to do that very bad, and second, I was a great admirer of T. John's managerial abilities and organizational abilities, so I simply said, "I'm not interested in this job", and there was no question that the only other logical person for it was T. John Lesinski, and so he was chosen as Chief Judge. Well, I suppose, just for the heck of it, I was named what they called Chief Judge Pro-Tem who could act in the absence of the Chief Judge. I kept that job all the time I was on the Court of Appeals, so he went immediately to work, and he, of course, was located in Detroit which was a little easier for some purposes.

Renting courtroom space offices...the offices for the Lansing court here were in what was then called the Pruden Building, now the Washington Square Building, exactly where they are today, same courtroom exactly, but it was going to be a period of time before it could be remodeled into judges' offices, courtroom, clerks' offices and so forth. I started out, and for about four months, simply sat or kept office, not office hours, but did my work out of my office in Grand Ledge...moved some file cases out there. I had a secretary who had been with me in the Senate. She was going to be my secretary on the Court of Appeals, Makianne Jones. She commuted out to Grand Ledge and when I had to go and hear cases,...but we did the work in the back room for about four months. Then the offices were completed here in Lansing, and I moved here to where the offices are to this very day.

*Mr. Lane:*

Justice Fitzgerald, the Court of Appeals made a splendid name for itself almost from day one and apparently had a great esprit. Can you confirm that and trace back to what accounted for it as against the experience that you were later to have?

*Justice Fitzgerald:*

Well, I think that one of the reasons why there was a real spirit there and cooperation and everything is that we were sort of writing on a tableau rasa. It was ground zero. I mean, here is a court which didn't exist on December 31st and did exist on January 1st, and so everybody kind of felt that they had to pull together to create a workable court which likewise, I think there was a certain pride...you know, we never had an intermediate Court of Appeals in Michigan, and there was a certain pride in "let's do it right". Then, for instant backlog, the Supreme Court took, I think it was something in 200 or 300 cases they had, transferred them back to us, so we had an immediate job to hear all of those cases that the Supreme Court had on their docket.

As I said, we were determined that we were going to sit in January and we did. We sat in odd places in January...in Grand Rapids, I sat there...we all sat in our own district the first time around. I sat...we sat in the Federal Building in Grand Rapids. For a couple of months in Detroit, it was necessary to sit in the old Circuit Court rooms there and in the Federal Building, because we had no courtrooms. It was just the fact that here you had nine people who were determined that this was going to be a good court, and as you say, I guess it always did enjoy a good reputation and a lot of it was just plain old hard work.

*Mr. Lane:*

Was the fact that nobody had to think about an election for six years...do you think that...?

*Justice Fitzgerald:*

That helped, I'm sure. Nobody had to think about election for six years. I didn't have to think about it for ten years, and the person in between didn't have to think about it for eight years.

*Mr. Lane:*

Is there any morale to be drawn from this, you know, just generally, in terms of...?

*Justice Fitzgerald:*

Well, I don't know how it would ever arise except...of course, the Supreme Court terms are eight years which gives you a lot of running room, but...

*Mr. Lane:*

You don't have any six year moratoriums.

*Justice Fitzgerald:*

No, no.

*Mr. Lane:*

Every year...



*Justice Fitzgerald:*

Every year, somebody is running, and here, nobody was going to run for six years, so it did...there had to be no thought of electioneering or anything like that, and all the total efforts could go into creating the court and making sure that it ran right. We were fortunate in having an excellent first clerk, a gentleman who had been an administrative assistant to T. John Lesinski when he was Lieutenant Governor, and that was Ron Dzierbicki, and he became clerk of the Court of Appeals, and he was very, very good at organization and detail and so forth, and a great deal of credit goes to him for setting up the systems, so many of which exist to this very day.

*Mr. Lane:*

Was there not some innovation in the preparation of cases once they came through the door?

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

Would you care to talk about that?

*Justice Fitzgerald:*

Well, there was a system devised by which...in the first place, the new constitution provided that from every judgement of a Circuit Court, there was an appeal of right to the Court of Appeals, so we had a ready-made source of cases. Any final judgement of a Circuit Court was appealable, criminal and civil, but you've got some very knotty ones, ones that were difficult and also, if the appeal were not brought in the requisite amount of time or if it was an appeal from something that was not a final order of the court, say some order made during the course of a trial in exclusion of evidence or admitting of evidence, those cases had to come by what we call "leave to appeal".

They had to ask the court, "May we have an appeal?" So we instituted a system of commissioners and the very first commissioner was a gentleman who had been my first law clerk for six months and was Otto Stockmeyer who now teaches here at Cooley Law School, and he stayed on with the Court of Appeals and became head of their Research Department until he came to Cooley Law School. He became the first commissioner who looked over these cases that we did not definitely, automatically have to take and made a recommendation, "Take it or not". We sometimes followed it, sometimes didn't.

*Mr. Lane:*

Did the Supreme Court, at that time, function in a similar fashion?

*Justice Fitzgerald:*

They had one person who looked over material and prepared memos, but they had nothing of exactly comparable nature, and certainly nothing like they have now with the commissioner system that they have now. It was done largely on the recommendation of the justices. They

talked every case over around a table, sat there and they read the material, and somebody would move to take the case and took a vote, "Do we take it or don't we?". On the Court of Appeals, we were able to do it by telephone conference call or just by mailing in votes. We would get the material...we were only dealing with three people also in each district.

These things were broken down by district, and you could say, "Well, I vote we take it", and somebody else could say, "Well, I vote we take it", and the third panel member could say, "I vote we don't". Well, majority ruled, so it was the nucleus, at least of the system that is still used today, only I think they have something in the vicinity of six or seven commissioners on the Court of Appeals and they have a pre-hearing staff which we didn't have when we started. Some young lawyers, fresh out of law school, bright, who looked over all these cases and wrote up what they call bench memorandums that sort of digested the cases. The Supreme Court didn't have anything like that. You could get it out of your own law clerk, but there was no central organization that served the entire court.

*Mr. Lane:*

What was the inspiration for the pre-hearing division?

*Justice Fitzgerald:*

Experience of other states. It was not unique to Michigan. I mean, we didn't think it up here. Some states had had Courts of Appeals for many years...California went back into the 1930's. Other states, New York had had one for many years, and I recall that was one of the jobs that our clerk, Ron Dzierbicki took upon himself, "How do other states do it?". Well, this pre-hearing, central pre-hearing division seemed to be the most successful in states who had had Courts of Appeals for a number of years, so we started patterning, but we did make refinements in it and so forth and changes and so forth.

One thing, it served...our pre-hearing division served the entire court. Other states such as Illinois and California tended to keep things within their districts. We had three districts here in Michigan of equal population now on the Court of Appeals, and they would have...each district would have its own pre-hearing staff, its own commissioners. Well, we started a central staff that served everybody on the court, which made it a truly statewide court, and also, I think, was considerably more efficient because any given commissioner or pre-hearing attorney might be working on something from the 1st Division one day and on something from the 3rd Division the next. Everybody knew what was going on all over, and it was not parochial as it tended to be in other states. Some states still use that system where the district is everything.

*Mr. Lane:*

Some of us thought that the quality of writing and the brevity of opinions were very high order in

the Court of Appeals, and I had heard that there was a little bit of whiplash applied from time to time. What can you say about that?

*Justice Fitzgerald:*

One of the reason was that people were accustomed to very long opinions from the Supreme Court, and that would have been the norm up until that point. The idea of the Court of Appeals was that it was going to be a volume court because of this matter of Appeal of Right. Any final order of a Circuit Court was appealable. We weren't going to have the luxury or the time or write all of this material, and plus the fact that when we first started out, the case load was not terribly high, and you had time to write and re-write and handcraft and so forth.

Now, today, there isn't the time to do this because of the sheer volume, plus I think everybody on the Court of Appeals...here's the first time that any of them had started having things they had written printed in a set of report books, the Mich-Ap reports, and I think there was a certain pride of authorship there that they work to the point where if this is going to down in the book that's going to be here 100 to 200 years from now and it's got my name on it, I want it to read well and to be good. Plus, we did talk in terms of the fact that brevity...we were not writing for the ages. There was another appeal possible to the Supreme Court if the Supreme Court took the case.

Then, you had to apply after the Court of Appeals decision was out, you had to apply to the Supreme Court and they could either take the case or not. So I think there was some thought that we are not, in many instances here, writing the last word on this, so why go into agonizing detail. We will decide the case and give the reasons therefore, make it lucid, make it short, make it punchy, make it so it's understandable to anybody. If the Supreme Court wants to take it then on a leave to appeal and write 40 pages, so be it. They can. But there was...we often had talks about this..."Let's keep it short and keep it simple and readable".

Then, as I say, we did have the luxury of the fact that at that point, at any rate, the first couple of years, backlog was not...and the amount of cases coming in, was not as heavy. You want to remember, this is the first time that the lawyers of this state had an opportunity to appeal any case that came out of a Circuit Court. When they began to get this idea through their head that they could appeal anything, more and more of them did it, and everything built up.

*Mr. Lane:*

How much credit would T. John Lesinski be entitled to for his leadership during this early period?

*Justice Fitzgerald:*

Oh, a great deal, a great deal. He did have a lot of vision as to what the court function ought to be and he also worked closely with Ron Dzierbicki whom he worked with for four years prior to that. They made a very, very good team, so the actual organization, physical organization, certainly, the courtrooms, the offices, the early employees and so forth, T. John deserves the lion's share of credit for that.

We were all able to hire our own secretary and our own law clerk, but he was the one who sought out good people for other jobs in the court, and saw to it that the physical plant...he liked that sort of thing. I can remember going into his office, and he had sort of an architect's desk set up in there with plans of courtrooms and things like that, remodeling jobs...for instance, the one here in Lansing in the Washington Square Building, that whole place was carved out of just an old office, a rather old office building.

*Mr. Lane:*

As T. John used to remind people, "over the drugstore".

*Justice Fitzgerald:*

Yes, over the drugstore. It was over a Walgreen's drugstore, and we turned that into a very credible courtroom facility, and it still is. The Detroit facilities are still exactly where they were. That was a little newer building, the First Federal Building in Detroit. Grand Rapids was the biggest problem...it was hard to find a downtown Grand Rapids office building that lent itself...we finally did find one in the Exhibitor's Building but subsequent to that time, the state has built a new office building in Grand Rapids where the Court of Appeals now is, but we set up a very credible courtroom and offices there.

*Mr. Lane:*

Was there any secret to the high quality of personnel that you were able to bring into the Court of Appeals?

*Justice Fitzgerald:*

Well, I think it was a little bit like those of us that had run for it...everybody saw an opportunity here of something that was going to grow and prosper and be a kind of a showcase for their talents, and there was considerably competition for a lot of jobs there, and so consequently, you were able to get some of the best people for this particular job.

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## **Topic 6: Upheavals in the Court and selecting a new Chief Justice in 1974 and the death of Justice Thomas M. Kavanagh in 1975 and the investigation of Justice John Swainson**

*Justice Fitzgerald:*

Incidentally, we are going to have to crimp along about 2:45. I turned by ankle over the weekend, and I've got a real sore ankle and decided I'd better go to the doctor to see whether it is sprained or what, so I've got a three o'clock appointment. If we can wind up about 2:45, that would be the easiest.

*Mr. Lane:*

This is another session in the Oral History project. Former justice, John Fitzgerald, is sitting in his office at Cooley Law School where is now professor and here to represent the Historical Society is Roger Lane. This is our second session of taping and this time, what we hope to cover, I think, is some of the cases Justice Fitzgerald worked on and wrote and dissented from, and some of the atmosphere of the court which was a little bit troubled during the early years that he was there. Now, what do you remember about just your entry into the whole system? You replaced Tom Brennan, and Brennan, prior to his resignation, seemed to feel that he was a little lonely there, and there was an element in the court that made him uncomfortable. I'll leave it to you. What do you remember about that?

*Justice Fitzgerald:*

Okay, I'll try to recall. When I went on the court at the time of Justice Brennan's resignation and I was appointed, then I had a year to serve in which I also had to run for re-election, because of the Michigan law that requires that appointees to the bench run at the next election, next regularly scheduled election...so I came on in January of that year and had to run in the fall of 1974 in the election for what actually amounted to a new term for Justice Brennan who had departed. I was in his slot, so to speak, so that year, of course, went along, and it was a difficult year because...well, of serving on the court and running for election at any given time is a little tough. We have already discussed kind of the business of that and how it does disrupt the operation of the court when there is an election every two years for at least two members, two members of the court, and then an off year when there is just one member.

*Mr. Lane:*

Had John Swainson's troubles surfaced at that point?

*Justice Fitzgerald:*

No, they had not. His troubles did not surface until January of 1975. I had been re-elected, or elected for a new eight year term in November of 1974. My opponent had been later Justice Blair Moody, and I had defeated him for the position, so starting January 1, 1974, I now had a eight year term on the court.

*Mr. Lane:*

January, by the way, was a period of upheaval, was it not?

*Justice Fitzgerald:*

This was, because it was at that point that customarily, the court elects a Chief Justice. There had been considerable dissatisfaction on the part of some members of the court with Thomas Matthew Kavanagh as Chief Justice. He had been the Chief Justice for some period of time and there were those who had said, "I simply cannot vote for him again for Chief Justice of the court", and so I was now a new vote in an election of a Chief Justice because I had never voted before for a Chief Justice so I suppose that I sort of revolved a little bit about I felt about this.

We had an interesting situation in that only Chief Justice Thomas Matthew Kavanagh are the only ones who had their offices here in Lansing so we had had considerable contact over that one year period. Likewise, he had run at the same time I did. We were both candidates in that previous November election. I think he came into January that year fully anticipating that he would be re-elected as Chief Justice. At least, he gave no indication that he didn't think he would, but there was a group of justices, and I think that the vote on the election of Chief Justice has been speculated upon and even got down to the point where it was published in the media as to who voted for whom when the ultimate election took place in January of that year after we started our new year. But, in December, I had some feelers and some contacts from a couple of the justices that perhaps it should not be an automatic re-election of Thomas Matthew Kavanagh to the office of Chief Justice, and we should think about the possibility of replacing him.

So these persons that were thinking in this direction were Justice Coleman and Justice Levin and Justice Thomas Giles Kavanagh. Well, that was three members of the court. I am, of course, presumptively or ostensibly, was a fourth vote. Well, four votes was all it took to elect a Chief Justice. So thinking that it would not do at all for us to discuss this matter in the Supreme Court chambers in Lansing, we decided to have a lunch meeting someplace and talk this all over. There was nothing at all hard and fast or cut and dried about the situation. So, we decided to meet someplace away from the gaze of the media and the Open Meetings Act certainly was not violated because it was not a session of the Supreme Court or anything like that. It was simply getting together to talk about the possibility of who might be an alternative to Thomas Matthew Kavanagh as Chief Justice.

*Justice Fitzgerald:*

We met...elected to meet at a place that was convenient for all of us and that turned out to be the Schuler Restaurant in Jackson, and that was convenient to me coming from Lansing, and for members from Detroit who only had to go up I-94, Justice Thomas Giles Kavanagh and Justice Levin and for Justice Coleman who had her office in Battle Creek to go over the Jackson. We met there and had a lunch meeting to discuss the upcoming election for Chief Justice. Pretty obviously, I was the swing vote because there were those three votes. Presumptively, the other three votes were then Chief Justice Thomas Matthew Kavanagh, himself, Justice Swainson and Justice Williams. So that was three on one side, supposedly four...Thomas Matthew Kavanagh, and three on the other side of not committed to him. That left me sort of in the middle since I was a new vote who had never voted before for chief justice. So we had this luncheon meeting and talked it all over and the upshot of the matter was that somebody decided that it was time for a change in the office of Chief Justice.

I really forget how many years Thomas Matthew Kavanagh had been Chief Justice, but it was for a number of years and the question then arose as to whom this job should go. Well, of the four of us, which as I say, constituted enough votes to change Chief Justices, the senior member was Thomas Giles Kavanagh, and so it was more or less decided that our votes would go to him when the election took place in an administrative meeting of the court. So, when that meeting came up, and as I recall, it was either later that week or early in the following week. By then, of

course, in the interest of collegiality, if you will, or of disclosure of the facts, we had communicated, and I believe it was Thomas Giles Kavanagh who had done the communicating to then Chief Justice, Thomas Matthew Kavanagh, that he didn't any longer have four votes for the office of Chief Justice. We thought this was only fair and not go into a meeting and drop this on him. So, he was forewarned that he no longer had four votes. The notice of it to him was not particularly a long time period or anything.

It may have only been a day or so before the vote was coming up. So, it came the morning of the administrative conference and everybody was in Lansing and were gathering to go to the conference table, and there was some talk, obviously Chief Justice Thomas Matthew Kavanagh was agitated because he knew he was no longer going to be Chief Justice in a matter of a few hours...Justice Swainson attempted to sort of conciliate the entire matter, saying "were we sure of what we were doing here, and did we know what we were doing" and so forth, and Justice Williams; he also attempted to perhaps, I guess the term "conciliate" is as good as any, the matter but we had more or less formed a pact at this lunch meeting that these are the ways that we would vote. So, there was no deterring the entire thing.

*Justice Fitzgerald:*

I remember when 10:00 came and it was time to go into the conference room, it was a pretty grim group that went in there because everybody knew exactly what was going to be the outcome. I do not remember totally the mechanics of it, but I believe, to the best of my recollection, there was a motion made for the nomination of a Chief Justice, and I do not recall whether it was Justice Williams or Justice Swainson who suggested once again Thomas Matthew Kavanagh, and as I best recall, there was a vote at that time, at which point, he received three votes. He did not receive four. At that juncture, I believe it may have been either Justice Levin or Justice Coleman who made a motion that Chief Justice be Thomas Giles Kavanagh who, upon taking the vote, received four votes which made him the new Chief Justice. Well, the protocol in the court is that, with the election of a new Chief Justice, the person becomes Chief Justice immediately, so there is no waiting period or anything like that. The changed, the deposed, if you will, chief justice is still a member of the court, still an Associate Justice and so forth with the same vote and so forth as the Chief Justice, but no longer occupies the head of the table as presiding over meetings of the court.

I recall that after the vote was taken and the fact was accomplished, we decided to take a brief recess and this necessitated, of course, a slight shift in all of the chairs around the conference table whereupon, when we re-assembled, Justice Thomas Giles Kavanagh now sat at the head of the table and Justice Thomas Matthew Kavanagh was slightly...well, to his immediate right or left but no longer sat at head of the table. Well, you can imagine that someone who had been Chief Justice that long, who I really do believe thought up until the last minute that there was going to perhaps be enough votes to re-elect him, that there was some rancor in the whole situation and sort of an uneasy atmosphere in the room after we re-assembled to continue our administrative meeting.

This was the first matter of business...had to get that out of the way before we went on to any of the other matters. That was accomplished. We went on then and dealt with matters that were coming around, administrative matters, opinions and things like that, but the rancor continued. there was a noticeable cooling of relationships on the court that ensued for some time after that. It was not the harmonious or seemingly harmonious group that we had had in the previous year that I had been there. Well, subsequent to that, and I'm trying to think which came first, Thomas Matthew Kavanagh, who as I say, shared the office in Lansing...I think this must have been along in March or so in 1974 and...

*Mr. Lane:*

Would this not have been January, 1975 when the election...?

*Justice Fitzgerald:*

Yes, excuse me, 1975. This was in 1975 when the election...the election had been in November of 1974. The election of the Chief Justice was in January, 1975. Thank you for correcting me. So, perhaps along in March, 1975, and as I say, my office and Thomas Matthew Kavanagh's office were in Lansing, directly across from each other, so while the others were gone, I was there and was around him considerably more than the others were. I remember one day, he said...he was on his way out, and I guess, just as an aside, said, "I'm leaving to get my annual physical", and I said, "Well, good luck", and he left.

The following week, he did not reappear on the scene and we were given to understand that in the course of the physical, they had discovered a very serious malignant growth in the colon which called for immediate surgery. They had performed that, and it was malignant and of sufficient magnitude that he never did return to the court. I remember being called...I went to visit him in the hospital a couple of times, and he was considerably sedated because he was extremely ill, but I remember being called one evening. This was perhaps a week to ten days after the surgery, saying that it again looked like the end was imminent, and so I went up and paid a call, and I think all the other justices at some juncture had been into see him, at least.

How much he was cognizant of this, I really don't know, but at any rate, he passed away never having left the hospital following the surgery for the colon cancer, and not long after that, we were having another session of the court, (all of these were held in Lansing, incidently), in which the office of the Chief Justice was now directly across the hall from mine, it was the so-called "Chief Justice's Office". It was perhaps a little more extensive than some of the other offices, so this office was occupied by Thomas Giles Kavanagh when he came to Lansing for a meeting. He was not there regularly but whenever he was in Lansing, he used this office.

I remember seeing him arrive this particular morning of an administrative conference, and he seemed considerably agitated, but nothing was said and the meeting was to start at 10:00 or 9:30, I don't remember which. We all gathered in the conference room except for Chief Justice Thomas Giles Kavanagh. He didn't come and didn't come, and we began to wonder where...he



may have been tied up by a phone call or something. He came in and as I say, was considerably agitated.

*Mr. Lane:*

This would have been at about, after Thomas...

*Justice Fitzgerald:*

This was shortly thereafter. How long, I don't know.

*Mr. Lane:*

April or May?

*Justice Fitzgerald:*

April or May, perhaps one month or less after the death of Thomas Matthew Kavanagh. There had not yet been an appointment to replace Thomas Matthew Kavanagh which turned out to be then Justice Lawrence Lindemer was appointed as his replacement, but it had not yet occurred.

*Mr. Lane:*

He was appointed in June, I think, was he not?

*Justice Fitzgerald:*

Yes, as I recall, it was into the summer. So this all transpired prior to that. We were short one member of the court, and that was a fact. So perhaps 45 minutes or an hour late, Chief Justice Thomas Giles Kavanagh came into the conference room and sat down and said, "I have some very, very serious news for you". Also, I guess as I think of it, also absent right at that juncture was Justice Swainson.

*Mr. Lane:*

He had been present but apparently excused himself?

*Justice Fitzgerald:*

I believe he might have excused himself. I don't recall, but he was not present at the particular moment that we re-convened, so there were two empty seats at the table. At that point, Chief Justice Thomas Giles Kavanagh said, "I have some very sad and serious news for the court which I will relay to you", and he preceded to tell us what had been told to him by the Justice Department that Justice Swainson was under investigation, at any rate, for a number of charges including acceptance of a bribe and other types of allegations.

Well, this, of course, came as an absolute bombshell to all of us because we had had no indication of it and every appearance was that Thomas Giles Kavanagh, the Chief Justice, had just learned about it himself. This may have accounted for his lack of coming to the meeting on time that morning. He had just been sort of briefed on this entire matter. Well, I remember we were all very stunned and dumbfounded. Here we are, also, at that juncture, absent two members

of the court. Justice Swainson was there, he just didn't happen, as I recall, just did not happen to be in the room at the time though he was present in Lansing...so I don't recall that we really buckled down and did too much work at that particular point. We were all just trying to digest this and think what it meant.

*Mr. Lane:*

Was the news relayed in the sense that not only was there an investigation in the sense that investigations seem to be going on almost all the time of somebody or another but that this was an advanced investigation that was very likely to result in charges being leveled?

*Justice Fitzgerald:*

Yes, we were given to believe this, that the investigation had been ongoing and it was likely, very likely to result in an indictment within the foreseeable future. So, as I say, we were all trying to digest the matter. It seems that it revolved around, and you may get this from other person that are talked to in this oral history, a case which was signed in December, 1973 by the court. Allegations by a convicted felon and I'm trying to think of his name...John...

*Mr. Lane:*

John Joseph Whalen.

*Justice Fitzgerald:*

John Whalen, that's correct. I was trying to think of his name, in which he alleged that for certain favors, the trial had been granted to him. I really didn't know too much about this because the opinion, dealing with the Whalen case, had been signed at the December, 1973 conference which I guessed I mentioned previously...I was a guest at. I was the eighth justice. I was sitting in a chair away from the table watching "how does this work?", and this has always been the custom to invite new justices in for the last meeting of the court before they take office, and presumptively, somebody is leaving, so that is the point where supposedly this opinion was signed which granted him a new trial.

It even escapes my mind what the charges against Whalen were. I'd have to re-read the case, I guess, in order to remember, but at any rate, that is not so significant as the fact that he had made these allegations through an intermediary that he had been granted a new trial by Supreme Court decision and as I say, I was sort of...it was all sort of revolving around my head because I had not been a party of that particular opinion. It had been signed the day I was a guest in the room. Well, as time went on and there was a grand jury hearing being conducted and so forth in Detroit and of course, one of the main players in the whole scenario who was then Chief Justice, Thomas Matthew Kavanagh, was no longer with us, so as I recall, all members of the court testified at the grand jury proceedings, but I never was called because I never had any connection with this particular case. I never had to go to the grand jury, but it did.

*Mr. Lane:*

Were you interviewed by...?

*Justice Fitzgerald:*

No, I was never contacted by the FBI, the Justice Department or any functionary thereof. I guess simply because I was not on the court at the time that any of the allegations, supposed allegations, supposedly arose. I just wasn't even there. I did sit in the room the day that the opinion was passed around, but that was the extent of my involvement. So this whole matter sort of swirled around my head a little bit because I didn't have too much comprehension of it, never having been connected with that particular session of the court where it happened. One of the main players, the person who was Chief Justice at the time, was now deceased so that removed one main person who I suppose would have testified, called to testify at the grand jury, but all the other members of the court were called to testify as to their recollections surrounding the Whalen case, and the upshot of the grand jury was, as I recall, perhaps along in June or July resulted in an indictment of Justice Swainson and as I recall, the charges were bribery, a couple of counts of it.

I really don't remember the specific details but none the less, a serious, a very, very serious allegation, and as I recall at that juncture when the indictment came down, he recused himself of any further participation in the court's business. It runs in my mind there was a short period of time, this may have come down...the indictment may have come down before Justice Lindemer was appointed, because it runs in my mind we were down, at that...one point, by two justices. Thomas Matthew Kavanagh was dead and not had a replacement justice appointment, and Justice Swainson had recused himself from any further business, so there might have been a small period of time that the Supreme Court consisted of five active or voting justices.

*Mr. Lane:*

And, of course, yourself was in a position, if I understand it correctly, of having been on the court a short enough time so that you probably had not heard some of the cases that were in the process.

*Justice Fitzgerald:*

That's another consideration, yes. Some of the cases that were to be signed, where the opinions had been worked on and so forth, if you did not sit and hear the oral argument, you didn't participate in the case, so there was a period of time there when, as I recall, we were effectively down to four justices who could sign opinions. Well, of course, four makes a functional court if you get everybody to agree because you've got four votes out of seven, but it was a very great period of upheaval in the court there. We were short-handed. There was this pall over the court as various justices went before the grand jury hearings in Detroit.

You can well imagine that it was a period of great stress on the court, functioning in the continuum of the court's work, though we managed to do it. I remember saying in gest after one session of the court, after Justice Thomas Matthew Kavanagh had died,...well, first of all, we'd elected a new Chief Justice and then Thomas Matthew Kavanagh had died, and Justice Swainson was either indicted or on the verge of indictment, I remember saying in gest at the meeting of the court, "Have things always been this bad or did they just get bad when I came on the court?" to

which my colleagues jokingly said, "They got bad when you came on the court. They weren't bad before that", but that is just an aside of something that I recall happening. Needless to say, it was a very, very difficult time.

I don't remember the exact time frame...perhaps you can refresh me. I don't remember the exact time frame of the trial of Justice Swainson, and I know a number of members of the court testified at the trial as to their recollections surrounding the Whalen case. I was never called. I never went near the trial, was never subpoenaed or anything, so my recollections of that are a little vague. I certainly was not going to go to the trial as an observer, and I was never called as a witness, so at the time of the trial, and I do not remember exactly when it was,...

*Mr. Lane:*

Justice Swainson, resigned, did he not, in November, so that must have been about the time of the verdict?

*Justice Fitzgerald:*

Yes, he was exonerated, as I recall...he was a "not guilty" verdict on the count of bribery and all that he was convicted of was one count of perjury which arose, as I recall, from a statement that he had made to the investigators and a statement that he may have made to the grand jury, or whatever. I don't recall how the perjury charge came up but anyway, it was one of the charges in the trial. That's all that he was ever convicted of. The bribery charge, he was found not guilty of, so the most serious charge of all, was one that he was exonerated of. But, all through that period of time, period of the trial and as I recall, there was an appeal which was either turned down or affirmed...at any rate, the conviction stood. There was a brief period of time then when really the function of the court was almost ground to a halt.

We were so totally demoralized and stunned by this event that we did not function for some short period of time. Justice Swainson then resigned from the court, as you suggest, in November, and his replacement then was Justice James Ryan, appointed by the governor to replace Justice Swainson, so we were back to strength, at least. Justice Lindemer had been appointed to replace Justice Thomas Matthew Kavanagh, and Justice Ryan had been appointed to replace Justice Swainson who had resigned. So in a period of one year, we had a totally metamorphosed court. We had a new Chief Justice, and two new members that had not been on the court a year previous, and there is an old saying in appellate court circles that any change in appellate court changes the chemistry of the court, and not only had our chemistry changed from the fact that Justice Thomas Giles Kavanagh was now chief justice, we now had two new members and likewise, we had been through a very traumatic period, what with the trial of one of the members of the court and its aftermath.

So with that being over, we pretty much got back into the routine and getting acquainted with the new members of the court, Justice Lindemer and Justice Ryan, the members of the court were now Chief Justice Thomas Giles Kavanagh, Justice Coleman, myself, Justice Lindemer, Justice Ryan, Justice Williams, Justice Levin, so it was a big period of change and a very traumatic one.

I am sure that in the interviews that ensue with other justices, those involved, as a matter of fact, Justice Swainson, Justice Kavanagh, many of the gaps that I have left here will be filled in for the listener, and many of the details, as I say, I simply don't remember. The case, as I say, that was involved there, the Whalen case, I knew nothing about and was not as much of a participant in the grand jury investigation and the trial as were all the other members of the court, because I hadn't been there when it happened. So, with that, I guess that's sort of a background as to what the upheaval was of the year 1975 which was considerable for...

*Mr. Lane:*

A consequence of the court being somewhat crippled or short-handed was, among other things, was the Manistee State Bank versus McGowan, a 3-2 decision on the guest passenger statute. Was that kind of representative of one of the effects, the fact that you couldn't decide? There was a 2-2 vote as I remember.

*Justice Fitzgerald:*

There was one 2-2 vote.

*Mr. Lane:*

Dearborn fire fighters?

*Justice Fitzgerald:*

Yes. For some reason, some member of the court had refused himself or herself from that case. In other words, had some connection, so they felt they should not participate in it. Well, there was always, in the thoughts of the practicing bar, the profession, what does a 3-2 or a 2-2 decision of the Supreme Court mean as far as precedential law is concerned? You haven't not a clear majority of a seven member court which, of course, takes four, so what does a 3-2 mean, what does a 2-2 mean? Well, I am not sure that ever was totally resolved to anyone's complete satisfaction.

*Mr. Lane:*

I think that either you or Justice Coleman, in the dissent, in the Manistee State Bank case, expressed anxiety over the fact that the constitutionality decision could, where there was some question of policy, whether the court should express its judgement as against the legislature's, where it was a policy matter, that ...

*Justice Fitzgerald:*

When we did not have a majority of the court speaking.

*Mr. Lane:*

Right, and that this was declared, I think, at one time, to be precedential, was it not? The three...

*Justice Fitzgerald:*

Yes, yes. There was a point where it was declared that this is a majority of the court sitting, court

participating, and this is precedential. Now, there was another action that we could have taken, and I'm not positive...I know of situations where it has been taken, and that is a re-submission of a case. It's been heard, as it turns out, there aren't enough justices able to participate in the decision who have heard the case so it is asked that it is re-submitted to the new seven member court, and that has happened on occasion, and cases have been re-submitted, and basically what it amounts to is you sort of start all over again.

The lawyers, once again, put forth all of their arguments with the opportunity for them to convince two members or perhaps even three of their position, and then you're free to take a vote and you'll have whatever necessary amount. This was a real concern at that period of time as to what is the precedential value. As I say, I believe ultimately, it was decided that a 3-2 vote was a majority of the court at least participating and had some precedential value. That was a question when we were in that short-handed period there that did arise.

*Mr. Lane:*

Justice Fitzgerald, do you...as you look back, was there anything that could have been done to alleviate this grievous problem or was it just kind of like a stroke of fate that there was no answer to it?

*Justice Fitzgerald:*

No, there really was no answer to it. I mean, we were really short-handed there. There is no provision for temporary Supreme Court justices unlike all the other courts in the state. You could have a missing Court of Appeals member and a retired judge or a sitting Circuit judge, even, can be appointed for a month or two months or whatever, to sit on the Court of Appeals, just as in a vacancy, should a Circuit Judge die, you can have another Circuit Judge take his place. There is no provision to replace a Supreme Court justice, so you're waiting, when a vacancy does arise, either from death or other cause, you're waiting for an appointment by the governor and the seat remains vacant. There is no way around it.

There is no provision to call back, say, a retired justice of the Supreme Court and to appoint them to sit for that period of time. I'm not sure that is practical anyway, because that's a short period of time, and they would be participating in cases they had never heard, and about the only thing that they could participate in properly would be administrative matters and things like that, votes on day-to-day work of the court. It would be very hard for them to participate in very many of the cases, so I'm not sure there needs to be any way to remedy that because certainly the governor's appointment powers spring into existence as soon as there is a vacancy and it's however fast he chooses to act. As I say, I recall, it was a very, very difficult period of time when we were short-handed there.

*Mr. Lane:*

Is there any analogy between travail of the Michigan Supreme Court in this period and what happened in California when three justices were recalled? Do you remember in about 1986 or somewhere in there?

*Justice Fitzgerald:*

I'm not sure. Were they recalled, or did they get the vote of non-retention.

*Mr. Lane:*

Maybe that is what...

*Justice Fitzgerald:*

California Supreme Court justices...

*Mr. Lane:*

I mis-spoke, it was...

*Justice Fitzgerald:*

...stand for retention. The question on the ballot is "Shall Justice 'so-and-so' be retained in office?", and three of them said, "No". The voters said "no", they shall not. Well, the election came, of course, prior to the end of their terms and so forth, and there was a terrible hiatus there in the California. That's a different election system, of course, one that has been sometimes suggested for the state of Michigan. The justices run on a retention system, rather than an adversary system between two persons running for an office, the question is "Shall 'so-and-so' be retained?", but we've never come to that, and a number of states do have it. Yes, there would be a strong analogy to the California where the voters turned out three justices of the California Supreme Court all at once. I don't imagine that the California Supreme Court functioned very well during that period of time.

*Mr. Lane:*

Probably not, but they were undoubtedly given a set of premises involved in the standing for re-election or for confirmation, probably of some transitional mechanism there, would you not think?

*Justice Fitzgerald:*

Well, I would think, yes.

*Mr. Lane:*

It would have to serve at least until the vote was canvassed, or some other...

*Justice Fitzgerald:*

Yes, yes...right. But I suspect when you suddenly, like in California, have three members of the court that the voters don't want on the court any more, it must create a not very pleasant atmosphere in which to work. Our situation was a difficult atmosphere, but it was not one of our making nor of the voters' making. We headed into 1976 then with a full complement of justices and able to hear all of the cases and everyone to participate unless there was some reason they

refused themselves from a case. In hearing everything and deciding everything that came before us, but there was that one year period in which the upheaval was very consequential and disrupted the whole entire Supreme Court operation, no question about it.

*Mr. Lane:*

Yes, that was a...I guess that was without precedent.

*Justice Fitzgerald:*

There was nothing that I know of or have ever heard of that was comparable in the State of Michigan, at any rate to the upheaval that we had for that one year, and certainly nothing since where there was a time that there were only five justices on the court, actually, for a period...not too long, but none the less, a period where there were only five of us around the table.

*Mr. Lane:*

You know, this prompts me to recall that I came in March, 1976...early in March, and was called over with Chief Justice Thomas Giles Kavanagh when he appeared before a group of Booth Newspaper editorial writers and editors and what was to have been a confidential, off-the-record kind of a meeting, and he expressed, even to that group...it amazed me, of course, as a recently reformed newspaper man, he expressed very strong opinions about the...what had happened to John Swainson and the manner in which-

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## **Topic 7: Memorable cases concerning workers' compensation**

*Mr. Lane:*

Well, we've talked a lot about the turmoil in the court in 1975. How about some discussion of those cases that you dealt with that you might have felt were either memorable cases or that were particularly challenging. You know, one of the first ones that comes to my mind that caused quite a buzz as I remember is the Beavers case. Do you recall that?

*Justice Fitzgerald:*

I remember *People vs. Beavers* vividly.

*Mr. Lane:*

Participant monitoring.

*Justice Fitzgerald:*

Right, a question of whether you could wire up an informant and send them into a situation and record and use what they recorded, and ...



*Mr. Lane:*

Broadcasting live, too, to the cop outside. Wasn't that part of it?

*Justice Fitzgerald:*

Yes, yes. He was also listening. One thing that you want to, I suppose, know is that we knew when we heard cases which ones were actually ours to write the opinion on. Now, if it turned out that you weren't going to be in the majority, you didn't write the opinion, but the Beavers case happened to be mine, and so I had to get into this. I was fresh enough on the Supreme Court, so a lot of these matters that were coming along were new matters to me. Another thing I should preface this by saying is that any case that came from the Court of Appeals, of course, that I had participating in, I didn't participate in on the Supreme Court for the reason that, so to speak, I had said everything I had to say on the Court of Appeals.

I had sort of tipped my hand how I felt about this case, and this happened with regularity. When I first went on the court, there were cases coming up from Court of Appeals that I had been one of the three panel members, so when that case was argued before the Supreme Court, I simply excused myself from the bench, and my six colleagues heard and decided that case. I just didn't have any part in it. I would be less than honest if I would say that there was once or twice, or many more times when I was reversed; what I had said on the Court of Appeals was not the view of the six members of the Supreme Court, but that goes with the territory, so you don't worry about that. Just as any judge that gets reversed...the difference is from us on the Michigan Supreme Court, it goes up to the U.S. Supreme Court. You don't get reversed very often. So, the Beavers case dealt with participant monitoring. The interesting thing about the Beavers case that it was under the Michigan constitution. We were, of course, dealing only with what the Michigan constitution said, not the Federal constitution on this sort of thing.

*Mr. Lane:*

How was a decision like that arrived at, Justice Fitzgerald?

*Justice Fitzgerald:*

That we would interpret it under the Michigan...?

*Mr. Lane:*

Right, rather than...this was a 4th amendment case, if you would look at it in U.S. context, was it not?

*Justice Fitzgerald:*

Yes. Well, I don't know how it actually came down to that, that we would decide this under the Michigan constitution rather than the Federal constitution, but it is a very, very common...it was just beginning to kind of come into prominence at that time where state Appellate Courts were more and more deciding cases under their constitution rather than the Federal constitution. I am going to give you a reprint of an article out of today's, October 8th, Time magazine which goes into this in some depth. "One Nation Very Divisible" is the title of it,..."As the U.S. Supreme

Court grows more conservative, state benches are becoming the new bulwarks of liberalism", and it discusses that whole aspect. This is now very, very common. This was an early...we simply decided that we were going to reach a different result that the U.S. Supreme Court had reached.

*Mr. Lane:*

Well, now that...was not that part of what attracted attention to your role in this?

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

If this had been Charles Levin, it would have been one thing, but when you wrote the opinion, it became something else.

*Justice Fitzgerald:*

Yes, I suppose that is true.

*Mr. Lane:*

Did you get any back flush for that...?

*Justice Fitzgerald:*

Not particularly, except for the fact that People vs. Beavers is still being taught in law schools today, and appears in most criminal law case books.

*Mr. Lane:*

Does it?

*Justice Fitzgerald:*

As when they get into the matter of 4th amendment, search and seizure, and things like that in criminal law. So I'll just pass that article along to you, and it is in the October 8, 1990 Time Magazine, and it goes into what a trend this is in the United States today, but this was an early example of it.

*Mr. Lane:*

This is page 76, if anybody should...

*Justice Fitzgerald:*

Yes, October 8, 1990 Time. So, I guess that we weren't pioneers in doing this.

*Mr. Lane:*

You'd had an entrapment case...Turner came along about then, didn't it?

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

Or maybe there were some others that I don't quite....

*Justice Fitzgerald:*

Afraid I don't remember right off hand, the Turner case. You might be able to refresh my...

*Mr. Lane:*

I don't recall too much about it except that there was a police activity by a man who had an outside earlier friendly connection with the "target" of the investigation, and there was some question raised, I think, as to whether or not the friendship equation was exploited in the interest of catching this fellow and convicting him. Well, at any rate, I think that the point is clear that this was early.

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

This sort of thing was...

*Justice Fitzgerald:*

This was an early example of a case, rather than being decided under the U.S. constitution, was decided under state constitution...it was decided that we could decide cases differently under a state constitution than the U.S. Supreme court under the...we could make it broader or narrower, the interpretation of a given right, so to speak. I think probably the case that I best remember out of the entire time I was on the court, and perhaps where I think, at any rate, I cast a vote for what was the law and so forth was the Poletown Neighborhood Council vs. The City of Detroit.

*Mr. Lane:*

Yes. Why don't you recall...?

*Justice Fitzgerald:*

Well, Poletown case arose because General Motors Corporation was seeking to condemn a large portion of the city of Detroit and the city of Hamtramak. This was called Poletown because a large number of people who lived there of Polish decent. It was monumental the number of buildings that were going to be taken, the number of people that were going to be displaced, the number of churches and business that were going to be torn down, and it all arose over the fact that General Motors had to have a piece of land that was served by a certain number of freeways, which this was, a certain number of railroad tracks that came into it and so forth.

The city of Detroit, of course, at that period of time...the case was decided in 1981, but the automobile industry was in bad shape at the time, and General Motors had said, "Unless we can automate more and get certain efficiencies, new type of plant to replace our old plants in Detroit, the Jefferson Avenue plant and so forth, we're just going to move out of Michigan. We'll move to

Oklahoma", as I recall. So, they sort of had the city of Detroit where they wanted them, plus they were also demanding a number of tax concessions and so forth, and the big thing, of course, was this power of condemnation, to take a vast area. There had been a statute enacted by the legislature, the previous year to this, and it has often been said it was enacted with this in mind, the so-called "quick take" statute which enabled the condemnation procedure to speed up considerable. You got the land, and then you could decide how much the person got for his property later. The Poletown case came up to us in an atmosphere of serious economic problems in Detroit...

*Mr. Lane:*

This was about the time of the 38% income tax to relieve the State Treasury of some of its grievous problems...

*Justice Fitzgerald:*

That's correct, yes, in addition to everything else. They wanted to take this large tract of land, thousands of houses, churches. I think it was nine churches that were to be demolished among this, in this given area, which was sort of a tight-knit ethnic area, called Poletown, as the name suggests. We were testing the constitutionality of the law which said no taking of private property for private purposes; you can only take private property for a public purpose. Well, the court heard the opinion and the decision came down ultimately, 5-2, that the taking of Poletown area was private property, was a public purpose.

Well, I couldn't swallow this. It was to my way of thinking that if you took private property with the idea and the full knowledge that it was going to go to General Motors Corporation, that is taking it for a private purpose, so this was the case...the wrecking balls had swung in some instances and were ready to swing some more. This was sort of a record...I'm looking for something in my file here on Poletown. Sort of a record for speed on the decision by the Supreme Court. The reason I find this in my file is that I teach Property at Cooley Law School and naturally, this is an aspect of it, condemnation, and I'm looking at the head notes of the Poletown case argued 3/3/81, decided 3/13/81. From oral submission to written decision - 10 days. That's a little unusual.

Very few Supreme Court cases come down that fast, but here we were, as I say, the wrecking ball had been swinging and had been stopped, and the whole thing had to move on or move on, one of the two, so it was necessary that we make this decision. Well, the majority of the court, five members, said that this was a proper exercise of the power of condemnation, that to alleviate unemployment is a public purpose. Well, this has never been...the taking power had never been construed this far before, to alleviate unemployment is a public purpose. I am reading from a majority opinion here...it says "the power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental".

*Justice Fitzgerald:*

Well, I didn't quite see it that way. I thought that the benefit to a private interest, General Motors for a private interest, was a little more than incidental, and so it was necessary that we get out an opinion, the majority opinion, that simply is a precarium opinion of the court, not terribly long, probably not more than 15 pages or so, and it ends up that it is concurred in by Justices Coleman, Kavanagh, Williams, Levin and Blair Moody, who incidently, had replaced Justice Lindemer at this juncture on the court, concurring in that, and I then, very rapidly, once I knew how the court was going to come down and what reasoning they were going to use, I had to get a fast dissent out, and so my dissent starts out simply by saying "this court today decides that the power of eminent domain permits the taking of private property with the object of transferring it to another private property for the purpose of constructing and operating a factory on the ground that the unemployment and other economic benefits of this privately operated industrial facility are such as to satisfy the public use requirement for the exercise of the eminent domain power because I believe the proposed condemnation clearly exceeds the government authority to take property through the power of eminent domain, I dissent", and went into about a seven or eight page dissent.

Well, Justice Ryan concurred with me and signed my opinion. Well, then later, we had the whole thing out. There was the vote - 5-2 with the majority opinion and the dissenting opinion. Justice Ryan then, as anybody can do, was able to write a much longer opinion and go into all of the facts of what had happened in this. I had simply come down with the legal reasoning and not gone a great deal into the facts of the situation, so the vote was 5-2, and Justice Ryan later found his own dissenting opinion, a phrase from which has become quite famous: "What General Motors wants, General Motors gets", and that is contained in his dissenting opinion. But at any rate, we had fulfilled the requirements of what the Supreme Court is there for by having heard the case argued one day and ten days later, we had an opinion by the majority and a dissent out and Justice Ryan was able to file his dissent. I think it was maybe a month or six weeks when he filed his.

*Mr. Lane:*

That's a little unusual, is it not?

*Justice Fitzgerald:*

Well, ordinarily, yes, but there simply wasn't time, and he was free. I did not sign his dissent, not that I didn't think it was okay, but he did use a little different reasoning in the thing and actually, what he did more than anything else was flush out the entire situation which, from a short majority in a short dissent, is a little bit hard to get all the background of the case in either one of them, so his dissent serves a purpose, if you read that, of laying out the entire history of this quick-take statute and the actions of the City of Detroit in condemning property and so forth. Well, I don't know, there are still Poletown cases on award of damages still in the courts today, and this is 1990, so...at any rate, I think that probably was the most significant case that I had a connection with while I was on the court was the Poletown case in which I dissented at the time,

and the majority and much of the media thought, "Well, let's just forget about that constitutional provision that private property shall not be taken for private purposes".

*Mr. Lane:*

You had some...a whole philosophy of constitutional...what?...

*Justice Fitzgerald:*

I guess you could say that. I don't as it was strict constructionism. It was certainly in the Poletown case, because I do think stretching to say that it is a public purpose to alleviate the economic conditions is stretching the taking clause.

*Mr. Lane:*

You also wrote a case, as I recall, that was very meticulous in preserving the ballot right of a minority party. Was it the Socialist Workers or one of those, that the...wherein you again enunciated your conviction that you ought to go very slow in disturbing the very fundamental rights of people in our society?

*Justice Fitzgerald:*

I think it had to do, as I recall, with the percentage of votes that you had to have in order to get candidates of a certain party on the ballot.

*Mr. Lane:*

On the November ballot...

*Justice Fitzgerald:*

On the November ballot.

*Mr. Lane:*

In order...they had to...they could get on the primary ballot...

*Justice Fitzgerald:*

Yes, but if they didn't get enough votes in that election, they wouldn't be on the November ballot, as I recall, and I believe it was the Socialist Workers Party. I am trying to recall the actual name of the case. It was a...and I guess you could, as I recall, the result was that they were allowed on the ballot.

*Mr. Lane:*

You were on the prevailing side of that...

*Justice Fitzgerald:*

Yes, the prevailing side of that particular matter, so I guess...

*Mr. Lane:*

How about the state Constitutional issue where...I think that you lost on this one...where there was the tie vote proposition in the Senate. Do you recall that one?

*Justice Fitzgerald:*

It was the vote of the Lieutenant Governor as splitting a tie when you got, say an 17-17 vote or 18-18 vote in the state Senate, nobody has got a majority of vote, either side, and the Lieutenant Governor casts the tie-breaking vote on the passage. As I recall, I took kind of a...maybe having served in the Senate, I don't know...

*Mr. Lane:*

Your position, as I recall, was it not, that if the constitution says that the majority of those elected and serving is necessary to adopt a bill...

*Justice Fitzgerald:*

And my point was that the Lieutenant Governor had never been elected to the Senate.

*Mr. Lane:*

Right.

*Justice Fitzgerald:*

I guess maybe as much as strict constitutional interpretation, common sense and a fair reading reached that conclusion for me, that it was "of the members elected and serving", was the term, and when the Lieutenant Governor casts the tie vote, that is not a vote of a member elected and serving enough to push it over to one more vote for one side or the other, either yes or no.

*Mr. Lane:*

There were a string of Workers Compensation cases I think where you were on the dissenting side in many instances. One of them that I recall that brought a little attention is the Honey West case. Do you remember that one?

*Justice Fitzgerald:*

Yes, that was a question of definition of "wife", I think.

*Mr. Lane:*

"Dependent".

*Justice Fitzgerald:*

"Dependent", that was it. It was "dependent, and Honey West had, I think, lived with and done for this man for many, many years, and he had died, and the question, I think, was whether she would continue to receive his Social Security.

*Mr. Lane:*  
Workers Compensation.

*Justice Fitzgerald:*  
Yes, not Social Security, Workers Compensation benefits, and I believe the majority said, "Yes, she stood in exactly the same position as a wife and should receive them", and as I recall, I was in the dissenting group on that one. It runs in my mind that maybe that was about a 3-4 decision.

*Mr. Lane:*  
I think it was, and she was legally married, as I recall, to another man.

*Justice Fitzgerald:*  
To another man, yes, drawing Workers Compensation on her late person that she had co-habited with and never had been married to.

*Mr. Lane:*  
Your position was this is stretching things.

*Justice Fitzgerald:*  
Stretching things, yes, to say that she was...granted, she may have been dependent on him, but I think, thinking more in terms that dependency sort of entailed marriage. I am not sure today exactly how that case would come out. I think it would come out exactly the same as it did before. We are more and more stretching the term "dependent" today than we ever were then, but I remember, I think I took a kind of a narrow interpretation of what a dependent was. At least, she had better have been married to him sometime, and she was not.

*Mr. Lane:*  
Do you recall the Workers Compensation cases that turned on mental illness? The subjective rule was adopted in *Deziel vs. Difco*, and there was a *Redfern vs. Sparks Withington*. Do you recall those case?

*Justice Fitzgerald:*  
Vaguely. The *Deziel* case...there was some kind of a term that came out of that mental illness that resulted in a severe social dysfunction. I think I dissented on that. It came down to the definition of mental illness, as I recall, and that was one, I think, of the few actual votes that came perhaps down to a partisan vote, as I recall. It was Justice Ryan, Justice Coleman and myself in dissent, and the other members of the court who either had their beginnings in the Democrat party or in the Independent Party of Justice Levin's went the other direction, a much more liberal interpretation of that mental illness.

*Mr. Lane:*  
As I recall, and you correct me if I am mistaken here, what was called a subjective rule, was it



not, wherein if the employed person who suffers disability says, "Boss, I just can't hack it anymore...".

*Justice Fitzgerald:*

Yes, "I can't cope", then that was mental illness by that definition, yes.

*Mr. Lane:*

And that was the end of the matter, and you pain benefits, is that correct?

*Justice Fitzgerald:*

As I recall, that was what was decided in that. It was left more or less up to the employee argumentally, disabled or not...as you say, this was a subjective test, and I think what I was thinking of more of those terms was perhaps a little more objective test, not...it seems to me for somebody to tell the boss, "I am mentally disabled, and I can't carry on any longer", is sort of a self-serving declaration because they are going to, of course, go on disability, and...

*Mr. Lane:*

Do you remember, was it the Dressler or Drexler case where the employee had, on his employment application, falsified the answer to a question that related to previous disability.

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

He had had a back injury, and...

*Justice Fitzgerald:*

He said he didn't have a back injury, and then he got a back injury on the job, and as I recall, I was in the dissent on that and the majority said he gets Workers Compensation.

*Mr. Lane:*

What was the rationale, do you remember?

*Justice Fitzgerald:*

I honestly do not recall what the rationale of the...I think that perhaps...it got into matters of injury and re-injury in the Workers Comp. area, and I think that he did suffer, I guess you could say from the facts...his back did get worse on the job. He may have re-injured or an injury arose on the job, and I think the majority said "This is sufficient" despite the fact that he had concealed it when he came on the job.

*Mr. Lane:*

In one of the dissents, it seems to me there was the phrase, either yours or someone else's, "It pays to lie".

*Justice Fitzgerald:*

I don't recall that that was my phrase, but it might be, and as it turned out, he had concealed the

fact of a back injury, then got a back injury or re-injured it, aggravated it, and drew benefits, and I suppose that's where that term probably came from, "It pays to lie". He drew Workers Compensation benefits that he was not drawing before because he had lied on his...he would not have been hired, probably, had they known he had a bad back.

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## **Topic 8: The legislative role of the court, collegiality, and the atmosphere**

*Mr. Lane:*

There were cases, and maybe I'm carrying on too much about these subject matters, but it seems to me there were other cases besides the election case, and the monitoring case where you were, and I was thinking of the fairly strict construction of the constitutional language as far as this passing a bill in the Senate is concerned, where you would, in your comments, either being on the prevailing side or in a dissent, would bring up the matter of the separation of powers. This was a fairly consistent theme, was it not, in your writings that this is a matter for the legislature? What is your feeling about the courts role in making public policy in that period?

*Justice Fitzgerald:*

Well, there was always that, and it continues to this day, is the court legislating by a certain interpretation of something the legislature has passed. I guess that, you know, it is always said that we're the products of our backgrounds. Having served three terms as a state Senator, I guess I'm perhaps viewed a little more stringently than some on the court, the function of a legislative body, that what they say shouldn't be tinkered with too much.

As a corollary to this, there was just recently an opinion that came down from the Michigan Supreme Court now as of a couple weeks ago in which there was a statement, a dissent filed by one of the Justices interpreting what the Legislature had said, and the Legislature had not said that at all. The opinion said, "This is what they would have said if they had considered the matter". Now that's about as far as you can carry judicial legislation or changing what the legislature did say. I guess any time that I came down on the side of saying, "This is what it says, and we aren't going to expand it any", came probably from the fact that I had been in the legislature, and didn't like to see...there is such a thing as statutory interpretation, any court sometimes has to do that.

A statute does not read well, and you have to...but to change what it a pretty obvious meaning of a statute into something else, I never did care too much for that, and I think, as I say, this case, and I can't think of the name of it, came down just recently where one dissenting opinion said, "This is what the legislature would have said if they considered the matter". That's about as far as you can take it. I always...I guess, if anything, I erred on the side of strict interpretation of what the legislature said without going too far afield.

*Mr. Lane:*

Was the Michigan court, in your view, somewhat typical or was this...to put it another way, this tendency to stretch matters in the field of legislating an infirmity of the court system generally? You know, there have been...

*Justice Fitzgerald:*

I'm not sure. I think there are courts that are known as strict interpreting courts and others who aren't, and there was a period of time on the Michigan Supreme Court prior to when I got there when the Michigan Court did have a pretty strong national reputation for, for want of a better term, legislating, interpreting legislative acts in a way that best fit social solutions or economic solutions, but that...by the time...I don't think the court, at the time I was there, was known for this. We had majorities and dissents and so forth, but I don't think the court was notorious for being a legislating court at the time I was there. There was a time maybe ten years prior to that, that it was considered to be pretty much on the cutting edge of judicial legislation. That had sort of begun to fade.

*Mr. Lane:*

Did you feel that during the latter part of your tenure on the court..I'm thinking now after the first year or two, or year and one-half of turbulence, did you feel that the court achieved a very high level of collegiality and good will?

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

...amongst the...

*Justice Fitzgerald:*

Very much so. At the time that I left, there was a great deal of, for want of a better term, collegiality, for whatever that means. We disagreed often on matters of law. It was rarely, rarely ever on partisan issues or on partisan lines, and at the time that I left, the court was very, very happy and very well. However, just as I left, things turned less so, as you will remember, Justice Coleman had retired, leaving just prior to the end of the term, and I was Chief Justice at the end of the year in which I left, and now Chief Justice Riley was appointed to the court and spent the last two weeks of December on the Michigan Supreme Court only to be deposed, after I had left, as soon as the session started up again the next year, only to be deposed.

Justice Williams had become Chief Justice, and Justice Riley was put off the court...she had been appointed by Governor Milliken, and Governor Blanchard then taking office, had appointed Justice Boyle, and the court heard the entire matter and said Justice Riley goes and Justice Boyle, as Governor Blanchard's appointment, is the proper successor, so as I left, the storm flags were flying because, as I say, Justice Riley spent two weeks on the court when I was Chief Justice and participated in administrative matters and things like that. She was unable to participate in any of

the cases because she hadn't heard any of them, but the storm signals were flying that it was going to be a bad year coming up, which turned out, it was a bad six months of quite a bit of turmoil before the court, once again, settled down. It has turned in, since then, to I think a well-functioning, as witness to the fact that Justice Riley, who was deposed from the court, has gone on to become Chief Justice, so I think that perhaps the collegiality is back. But the last two or three weeks of my tenure on the Supreme Court, things weren't...obviously were not heading in exactly a tranquil direction.

*Mr. Lane:*

Do you recall in making a judgement as to the condition of the court during this period that we speak of just now, there was a conspicuous absence, as I recall, of severe rancorous criticism, even where there was disagreement, basic deep philosophical disagreement, but there was nothing like a slashing memoranda?

*Justice Fitzgerald:*

No, there was never any writing back and forth in opinions or anything like that. If you had made up your mind about how a case should come out, you wrote your opinion. If you didn't agree with that, you wrote a dissent. There was never any personal innuendo or any kind of use of intra-court memoranda or communications or anything like that in opinions. It was a very tranquil period as far as personal relationships and personal attacks.

*Mr. Lane:*

How do you account for that as compared with the bitter strife that you have heard about...?

*Justice Fitzgerald:*

Well, I think that perhaps part of it was the very fact that we had been through that baptism of fire that year that I spoke about there when we realized just how bad things could conceivably be in the Supreme Court. Here is a change in Chief Justices which was rancorous, the death of one of the justices, a period when we were down to five, one of the justices the object of a Justice Department investigation and later a trial that we realized that petty differences that we might have between ourselves were pretty innocuous compared to what really could happen and so consequently, all of the pettiness and the rancor that could have, simply because you disagreed violently with somebody, all kind of faded into the background.

You simply spoke your piece in the only way the court can, in a written opinion...you spoke your piece, and that was that. There was no point in making it personal because I think we had, the majority of us, had been through such an awful period of baptism of fire to realize that petty differences, as far as the court is concerned, should be left behind and not perpetuated, and so things were pretty good for the last three years, four years that I was on the court, very little rancor, certainly no personal hatred or vindictiveness at all, that I could see.

*Mr. Lane:*

This is interesting...at least I was interested in your attitude about that because I ran a scan similar to the one of your cases on John Voelker when he served in 1957 - 1959. It was interesting to me, and maybe you would see something worth observing about this, that the machine turned up 84 cases where he wrote the majority opinion and 14 dissents where either he wrote a dissent...and when I did the same for your cases, and I have forgotten whether the total is entered in those sheets or not, but it came out something like 89-75. There was not that overwhelming ratio of relative agreement and yet, there was...there seemed to be an atmosphere of civility.

*Justice Fitzgerald:*

Yes. There was a much greater atmosphere of civility than I've been given to understand the court had in previous years. A lot think the reason was for...as I say, the only explanation I have for it is that perhaps we had all learned that personal differences are transitory, and that it's real trouble that contributes to a court's problem and external forces and so forth. I guess there's a old saying that most Appellate cases probably come out the way they ought to come out. You know, no matter how many dissents that may be filed. I think that we had just learned... and plus, in addition, it was a very congenial group. I think we genuinely had affection for each other. I remember, I think it started this interview last time, I observed that Thomas Giles Kavanagh once said that members of an Appellate Court are involuntary seat mates for a period of time, so we had sort of maybe all come to realize that, that we are here and we've got a job to do, and there is no point in injecting any kind of venom or unpleasantness into it. Do your job and don't go any farther than you have to in being unpleasant or rancorous.

*Mr. Lane:*

Three of you had served on the Court of Appeals prior to coming.

*Justice Fitzgerald:*

Yes.

*Mr. Lane:*

Did that have anything to do...?

*Justice Fitzgerald:*

May well have, because that was a very harmonious operation, particularly in the early days, and Justice Kavanagh, Justice Thomas Giles Kavanagh, Justice Levin and I...all three of us had served on the Court of Appeals and had been in a formative period of it and perhaps saw that an appellate court, granted, a slightly different function and different means of sitting and things like that, could be a harmonious, pleasant atmosphere, and so, as I say, the last few years were...it was a pleasant place to work.

*Mr. Lane:*

I know in my role, I would think of trying to project the idea for public relations reason of a "Family Court". I counted up one time the number of children and grandchildren that the members then sitting on the court had, and there was quite a large number, and the years of marriage, and at that one time or prior to the last of your service there, all of the justices had been

married for a long time to their original spouse, not only were there children and grandchildren, but there was a sense of stability in a family sense.

*Justice Fitzgerald:*

Yes, that may have been our own personal mind sets or something that had something to do with it. It's hard to say.

*Mr. Lane:*

Well, Justice Fitzgerald, I think this tape is about run out. Would you mind if I take a few snapshots very quickly? This is the end of the tape on 10/8/90.

*(End of side 2, tape 2)*