



Interviews with  
**Michigan Supreme  
Court Justices**

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## INTERVIEW WITH OTIS M. SMITH

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

Conducted by Judith Christie

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**Topic 1: Justice Otis M. Smith talks about his entrance into politics and the Supreme Court, his family history and growing up in Memphis, Tennessee, working multiple jobs to save money to go to college, and enlisting in the armed forces in 1942. He then discusses entering law school and his ambition to succeed from a young age**

*Mr. Lane:*

This is another in the oral history tapes sponsored by Michigan Supreme Court Historical Society, and this one focuses on the Supreme Court career of Otis M. Smith who served from 1961 through 1966. Is that correct?

*Justice Smith:*

That's correct.

*Mr. Lane:*

This is Roger Lane representing the Historical Society. We're sitting on October 23, 1990 in Justice Smith's office in the First National Building in Detroit. In order to get started, let's focus for a moment on when it was in your career as a young lawyer or perhaps after you had served a good deal of time in government, when you first began to be aware of the probability or possibility of service on the Supreme Court. Was this sort of a childhood ambition or did it come much later?

*Justice Smith:*

Well, no way in my wildest dreams could I ever have imagined that I would sit on the Supreme Court. I think, to put it quickly in perspective, I started practice in Flint about the first of January, 1951, and I was in general practice until the middle of 1957 when Governor Williams appointed me as chairman of the Michigan Public Service Commission.

*Mr. Lane:*

Was that your first government position?

*Justice Smith:*

That was my first state position. I had been an Assistant Prosecutor in Flint in 1954 for just about 1/2 year. It was something that I had done. I was a public administrator for the county by appointment of the Attorney General of the state in 1955, 1956 and 1957 until I came into Lansing, but I have to tell you that I never sought public office in Lansing or let me put it this way - everything that I sought, I lost. The ones that I did not seek, somehow they came to me, so...

*Mr. Lane:*

Were you personally acquainted with Governor Williams?

*Justice Smith:*

Oh, yes. I came into politics really because of Williams and because of Sir Thomas Moore. In law school, I became enamored of Sir Thomas Moore, the law chancellor of England in the days of Henry VIII, the fellow who was beheaded because he would not pervert the law towards his king's ends, so he was beheaded and I guess I was tremendously impressed, not only with that kind of courage, but with the language that he used that was to be significant throughout my public life. That was before he was beheaded. He said something like this, "I remain the king's good servant but God's first", and I got the Hoben's print of the painting made by Hoben, the Dutch painter of Thomas Moore when I was in law school, and brought it to Flint with me where I made my home, and had it framed, and I had the printer in Flint insert those words - "The king's good servant but God's first" to remind me that I had a higher obligation as a lawyer.

*Mr. Lane:*

You know what this suggests is that something was imbedded in your mind very early in your life, perhaps through the church, through the precept of your parents, that led you to appreciate that concept, that attitude. How do you explain that?

*Justice Smith:*

Well, I was brought up in a very religious family, but I cannot say that I was religious, and I guess the part of that remark from Thomas Moore about "God's first" was certainly applicable to me off and on in my life, but I'm one of those people whom the epic poem describes best as "the hound of heaven is always looking for your soul", and I always seem to be resistant, but I say that and say that I'm not really...I'm basically religious, but I'm not an institutional church person as I perhaps ought to be, but I was just struck with the idea that Thomas Moore made that there were several authorities to whom he was responsible and to whom he had loyalties, in this case, the king, who was the embodiment of the government. I always wanted to keep in mind that I

had this obligation to law, but I also had an obligation to a higher law, one of morals, which would go above law, and that I had...not in a sectarian sense or secular sense of following some rule of some church, but that I not only had to satisfy the requirements of law, but I had to satisfy the law of conscience.

*Mr. Lane:*

A moment ago...you were talking just before we turned the tape on...you mentioned your mother and a saying that she often repeated that had, to me, religious overtones.

*Justice Smith:*

Oh, yes. Well, my mother was always quoting King James version of the Bible throughout her life until she passed on in 1979 at age 87, and of course, my father, having died very early in my life, my brother and I, at least, we knew the Bible without reading it because my Mother Eva would certainly quote it to us. You mentioned this thing about not being able really to be hedonist about things and enjoy a lot of fine clothes and cars and things of that kind, because even though I think I told you I had the opportunity to drive a Cadillac, I never drove one while I was at General Motors because I couldn't bring myself to the idea of consuming so conspicuously, and I always sort of figured that what the Bible said that my mother quoted had a lot of truth in it, "better to mortify the flesh to resolve the spirit", and I thought I was doing that.

*Mr. Lane:*

As you look back, did she have enormous influence in what they sometimes call "the formative years"? Did she leave her imprint very pronounceably on your personality?

*Justice Smith:*

No question about it. I say that there were several significant people in my life, one who was my mother. My father died too early to be of any impact. My scoutmaster, and my brother who is alive, who is three years older than I am and lives in Washington.

*Mr. Lane:*

Jay Hamilton?

*Justice Smith:*

Yes, Jay Hamilton, my brother.

*Mr. Lane:*

What did you call him, Ham?

*Justice Smith:*

Well, I don't...he was christened John, but he didn't like being John Smith, so he changed his name to Jay Hamilton, but that's something he took himself as a name.

*Mr. Lane:*

If I may interrupt...there's is something that that brings back to mind. Do you recall...now, you lived in very, very harsh circumstances from an economic standpoint as I recall when you were a small boy, in Memphis, was it?

*Justice Smith:*

Yes.

*Mr. Lane:*

One of the tales I remember...

*Justice Smith:*

Memphis, Tennessee, not Memphis, Michigan. There is a Memphis, Michigan, as you know, over near Richmond...

*Mr. Lane:*

Alvey Kaufman...remember Alvey?

*Justice Smith:*

Yes.

*Mr. Lane:*

Worked for the Detroit Times, no longer with us. One time not long after you had come to Lansing, recited in an article that you and your brother at some early stage in your life had to alternate going to school because there was one suit of clothes that you had to share or something?

*Justice Smith:*

We did alternate in high school a couple years. I was in and he was out and vice versa...

*Mr. Lane:*

But was it because you were so strapped?

*Justice Smith:*

Yes. There is nothing especially heroic about it. It is just a fact that between 1930 and 1940, we lived very close to the edge of starvation, I mean, literally. There was no Social Security. It kicked in about 1935, and nobody had the required number of quotas, and there was no thing like ADC and stuff like that, and I think we were probably too proud to have accepted it had it been available, but the three of us, my brother, my mother and myself, we just had to get along the best way we knew how for those ten years.

*Mr. Lane:*

Did you eat a lot of beans, baked beans and stuff like that?

*Justice Smith:*

Ate a lot of cornmeal mush which we'd get for ten cents a bag for five pounds and boy, that

would fill up the void in your stomach, and I remember going to school, even high school, many times without any food at all, didn't have anything in the house, no breakfast. We'd go through the morning and work in the cafeteria at noon. The rules were that the cafeteria workers couldn't eat until everybody else had eaten, and you'd have what was left over. So, I'd have usually watery spaghetti, but it just reminds you. You can do a lot of stuff.

*Mr. Lane:*

Did it affect your physical well-being? As you look back, do you point to some infirmity in your development physically that resulted from this? Or was it just tough times?

*Justice Smith:*

Just tough, yes. You know, we went to the Wonder Bread Bakery and got day-old bread for half price and stuff like that.

*Mr. Lane:*

Does this influence your thoughts about the common nowadays dialogue with respect to poverty where there are arbitrary limits that must seem to you like you would have been floating on air if you would have had the kind of income that now classifies you as a poverty victim.

*Justice Smith:*

Yes, but I think it's a relative thing, though, you know. I have thought a lot about that because one tends to be too subjective in judging things. What we endured in the 30's in the depression, you know about this...everybody was having a hard time, pretty much, and so poverty was a relative thing, so there were people who had something to eat but nothing else, and then there were people like me who used to go by the homes of kinfolk who had something to eat, and you'd go over there and make irregular calls and say, "How are you getting along?" I had an Aunt Laura, who used to, her husband worked at a meat market, and so they always had plenty of food. They lived almost as poorly as we did except that they had food, you know. They had a terrible looking house, and had a house full of kids, but they always had food. I'd go by there and inquire about the health of my aunt Laura, her husband, and my cousins 1, 2, 3, 4, 5, and 6. My aunt Laura was on to me. She said, "Boy, you look hungry. Sit down and have some food", and I'd say, "Well, I just came by to say 'Hello'". She said, "Well, sit down and eat anyway". Oh, I was most appreciative of that. I suspect a lot of people had to do that.

*Mr. Lane:*

You know, my wife's father was a butcher, in the...near the starch works, over in Argo, Illinois, and she recalls people coming in asking for dog bones, knowing full well that these people were desperate to get something to put in the pot, and to get some nourishment out of it and some flavor.

*Justice Smith:*

Oh, yes.

*Mr. Lane:*

Anyway, along this line, I also remember, it seems to me, Justice Smith, that when you got to the appropriate place in your schooling, you won a scholarship. Was it to Morehouse, and you couldn't...?

*Justice Smith:*

That's true. I graduated from high school, oh, boy, following in the footsteps of my brother who had been such an excellent student, and had been what the kids used to call a BMOC - Big Man On Campus...I was the class president, editor of the newspaper, editor of the class annual, member of the debating team, letter man in football, etc. When I got out of high school in 1939, I was offered a scholarship to Morehouse College. It was tuition scholarship only, and I probably would have gone off to Morehouse and become part of that little legend down there had it not been for the fact that my brother, who had a similar scholarship two years early to...

*(phone interruption - break in recording)*

*Justice Smith:*

I was saying that I probably would have gone off to Morehouse, but my brother had a similar scholarship, tuition scholarship only to Tuskegee two years before, and he went down with about all the money the family could give him to augment the scholarship, and he had a rough time, that year of 1937-38, that he had to cut his hours almost in half to work just to survive, and I thought, "Well, rather than go off and be subjected to that additional burden, what I'll do is just work a few years to save money to go to school". That's what I did. I got a job in Nashville at the state capitol.

*Mr. Lane:*

And Morehouse was in Atlanta?

*Justice Smith:*

Atlanta, and I was in Memphis.

*Mr. Lane:*

You were in Memphis, but you went, though, to Nashville.

*Justice Smith:*

To Nashville to work as a janitor, messenger in the state capitol. I did that for a couple of years to save money, lived very conservatively, I guess you'd call it. I used to do all kinds of things to save money. One of them...I'm sure that somebody has done this crazy thing before...you say, "Well, what's the cheapest I can get out with and still get the nutrients?", and I figured that if I bought a quart of milk and a loaf of bread and a head of lettuce every day, and split it three ways, 1/3 for breakfast, 1/3 for lunch and 1/3 for dinner, I can get off the cheapest. I had tried everything I knew how just to be able to save money to go to school, and so I did that for, I don't know, several weeks but it got to be awfully oppressive, so I would do that occasionally rather than for a long time.

*Mr. Lane:*

Where was your shelter? What was the...?

*Justice Smith:*

I stayed in a YMCA.

*Mr. Lane:*

I see.

*Justice Smith:*

In Nashville, and I also had a room with a family, a minister and his family for part of that time.

*Mr. Lane:*

In those days, did you have your sights pretty firmly set on "someday, I want to be a lawyer"?

*Justice Smith:*

No, I wanted to be a journalist. I wanted to be what you are. I wanted to be a journalist. See, I was in the newspaper business in high school, and when I got out of high school, that interim between high school and the time I was able to go to college a couple year later, I volunteered to work for the local Black weekly, something called the National Globe Independent. I did a lot of free work for them because they couldn't afford to pay anybody extra, so I just free-lanced for free.

*Mr. Lane:*

Was that useful experience?

*Justice Smith:*

Oh, yes. I got books on how to write, you know, and I got a camera to be able to take pictures to go along with the writing, and I used to give myself tests on powers of observance, you know, walk around the block; try to notice everything; come back and write it down, and then go back and check with what was there...

*Mr. Lane:*

What got you into this intensely focused kind of activity? This wasn't characteristic of the fellows that you visited with, was it?

*Justice Smith:*

A lot of them did, you know. People don't really understand that part of the African, southern culture of my generation and before. It had a peculiar focus. Peculiar is not the word for it, but it was unusual, I think, for the times in that it really had boundless optimism in what could be done if you were really highly qualified. Mom used to say that you had to be twice as good as the white person to get the same job. We didn't know realistically as kids what lay ahead, but we just thought we ought to be good in whatever we did, and we were encouraged by wonderful teachers, and we were supported by...

*Mr. Lane:*

You mentioned the scout master. Did he have something to do with it?

*Justice Smith:*

Oh, boy! Charles Chapman, Troup 107, St. Stevens Baptist Church, Memphis, Tennessee. Wonderful, wonderful man who had a great troop and he inculcated all kinds of values. He was a tremendous man. I say very quickly that I had the happy occasion on his 93rd birthday, about a couple of years ago - he is now dead - to go back to Memphis and along with Kroger, the big food retailer on whose board I serve, and I have for the last seven years, set up a camping fund in his memory.

*Mr. Lane:*

That must have been a delight.

*Justice Smith:*

Yes, because I remained in contact with him off and on for the past 50 odd years, 55 years, I guess. He was a big factor because the scouting movement and the way he portrayed it, the way he ran his troop, and what he expected of the boys, and how he was able to communicate with the boys the idea of character and patriotism...

*Mr. Lane:*

And hard work, I bet...

*Justice Smith:*

And hard work, oh, yes...

*Mr. Lane:*

And self-discipline, I suppose.

*Justice Smith:*

There were a lot of people around me...if you look at a lot of those people who came out of that milieu, they may not all have been as lucky as I was in terms of opportunities, but they certainly had a lot on the ball.

*Mr. Lane:*

This is a...I'm trying to prepare an index to the tape...that's what this scribbling is every so many minutes, so that somebody, when they are interested and want to go back, they can, without looking at the whole thing, they can find their place. Now then, you were not able to finish school right away. The war came along, isn't that right?

*Justice Smith:*

I did save up enough money to enter Fisk University in the fall of 1941.

*Mr. Lane:*

Was that in Nashville?

*Justice Smith:*

That's in Nashville. Fine little Liberal Arts school, was at that time, really high quality. Very small student body, and I went there. I was still in the depression, Roger. I got to remember this for you, because this was an experience that haunted me for years. In order to be able to survive just that one year in Fisk, I had four jobs. I was janitor of the gymnasium, and I was secretary to the coach/athletic director who had me writing to all the coaches and A.D.'s around to set up games for his basketball and football games, and I read to a blind student, and I waited on tables off campus at a restaurant for my meals, and then the coach was kind enough to give me a cot in the basement of the gymnasium which was built, as I remember, in 1889, and it was, of course, in 1941 and 1942. It was a fairly old building. Well, anyway, I got this cot outfitted, and I had gone to an old moving company and bought a large show-business type one drawer trunk and put everything I owned in that trunk, and went down to the basement of the gymnasium to spend my year. I could not afford to stay in the dormitory. I just didn't have that kind of money. Well, anyway, I'm down in the basement of the gymnasium for the first couple of weeks, the great big two-inch roaches and the rats would get up in bed with me. I remember waking up in the middle of the night with a rat on my chest with his tail agitating my nose, and I was terrified. I think for 15 to 20 years after that, I would wake up almost in a start just remember that rat who was on my chest. I flung the covers back and it hit the floor and went about, but it was terrifying. After a couple, three weeks, the animals learned that there was a human there, and I guess they didn't like my smell, and they didn't bother me. The only animals I had any troubles with after that were the students, the guys...it was a men's gymnasium. I guess the girls used it occasionally, but the guys would use it mostly, and down there, they had all the weight lifting equipment and other things, and they would flop on my cot sometimes, but that's the only people I had to contend with.

*Mr. Lane:*

These were very hard, grinding times. Did you feel...you mentioned you did four things to try to keep body and soul together while you were going to school...did you feel that you were oppressed or that you were being unfairly dealt with by providence or that you were some how a lot worse off? Were you conscious of that, than you neighbors, the fellows who were able to have cars and or course, there wasn't much of that?

*Justice Smith:*

There wasn't much of that. I don't remember that. I probably...I didn't feel personally put upon. Let me put it that way. I did feel very strongly about a system that denied all of us first right of citizenship, and I became interested in issues during the two years that I was between high school and college when I was working. I met a lot of people who were...

*Mr. Lane:*

That would be 1939 to 1941?

*Justice Smith:*

Yes, 1939 to 1941, who were busy trying to do something about it, and I joined up with the

NAACP and I did a lot of work in that and other organizations in the city and the region trying to outlaw lynchings and outlaw poll taxes as a prerequisite for voting which were the two main items on the agenda, the kinds of things that we talk about: voting rights acts and things of that kind that happened in 1964 and 1965. Nobody even thought that could happen in their lifetime.

*Mr. Lane:*

Do you remember when you cast your first vote?

*Justice Smith:*

Oh, yes.

*Mr. Lane:*

When? Did you have to pay a tax to do it or was this beyond that time?

*Justice Smith:*

Let's see. No, I didn't have to pay a tax. I didn't vote down there because, you see, I went into the service when I was 20 years old, before I was eligible to vote, and I went into the Reserves in Philadelphia where I had gone from Fisk, gone to work for the summer but decided to stay for the year to acquire some skills so that when I went in the Army, I wouldn't be assigned a truck driving or Cooks and Bakers School. I wanted to go in the Army with a skill. I thought that might save me from the drudgery of being a cook or a baker or a truck driver.

*Mr. Lane:*

You know what my first classification was as a draftee?

*Justice Smith:*

What?

*Mr. Lane:*

Ammunition handler. You beat me.

*Justice Smith:*

Well, when I was a kid, I used to make radios, little battery sets, and I used to repair radios. I had a kind of a skill that I acquired somehow, mostly out of interest and reading a lot of stuff, and tinkering around with it, and so I wanted to be in radio in the Signal Corp, so I enlisted in the Signal Corp, listed Reserve, and I went to school myself there in Philadelphia and got a course in radio telegraphy, and I got to be a pretty fair radio man, even before I went into the service.

*Mr. Lane:*

Did I remember somewhere that you served in the 477th Bombardment Group?

*Justice Smith:*

Yes.

*Mr. Lane:*

How did that come about? You started in Signal Corp...?

*Justice Smith:*

Started as Signal Corp, and I was in Reserve from October 1, 1942 until I think it was May 18th or May 23rd...I have forgotten which date, in 1943. At the bend of the Reserve, I was allowed to work, and this was a year after I was at Fisk, 1942-43, and when I went into active duty at Fort Meade, Maryland, I was immediately transferred from the Signal Corp Reserve. I was transferred to the Air Force and so I was sent to Torrence, Utah for basic training and then back to Scottfield, Illinois for radio training, Air Force style, and I became a radio AAF, radio operator, MOS... military occupational specialty classification 756, and that's what I was in the 477th for a good long time until I got tired of that, and I was doing a kind of double duty. The Public Relations officer of the base at Godman Field, Kentucky, just next to Fort Knox, where the 477th was training...

*Mr. Lane:*

Godman? G-O-D-M-A-N?

*Justice Smith:*

Godman Field...Godman Field, Kentucky. That's where I became editor of the camp newspaper, the Godman Field Beacon, and so I just asked to be transferred from radio from the squadron to the base headquarters and I then became a public relation specialist as a sergeant and I also ran the newspaper as part of that assignment.

*Mr. Lane:*

Wasn't the 477th the outfit that Coleman Young served in, Clifton Wharton and...?

*Justice Smith:*

I don't think Cliff was in, but William G. Coleman, Jr. who was Secretary of Transportation in the Ford years and a lot of rather prominent gentleman of color who were in the 477th, fellows around Detroit here, Kermit Baller, who is a lawyer here, and a lot of other people...Elmer Kennedy, who is Assistant Director of the City Engineering Department, was a flyer in the 477th. He was a successor to the 332nd fighting group which was the original Tuskegee airmen group that went overseas in combat, and the 477th was a B-25 medium bomber group, really a really small bomb, but they called it medium at that time, just medium at that time is not what medium is now. The biggest thing we had then would be 17's, 24's, and they would be tiny compared to the transit bombers they have today.

*Mr. Lane:*

Then when did you...you never did get overseas in your Army...?

*Justice Smith:*

No, the 477th never got overseas.

*Mr. Lane:*

Then what happened? What was the next step in your...?

*Justice Smith:*

Well, one thing that happened in the army had a lot to do with what happened to me later. When I graduated from radio school in Scottfield, Illinois, and in the middle of the year in 1943, because I'd had prior training and because I was fairly diligent, I came out of radio school #1 in my class. There were about 400 soldiers from all over the country and all over the world, for that matter, included three French who were there. I was #1 in my class, made a 100 perfect score on the final examination, never did that before, and never did it since. That was to become significant later on. I still wanted to be a journalist, and so I got out of the service in 1946, and applied to the William Allen White School of Journalism at Kansas University, I think they call it, in Lawrence, and what I thought was the School of Journalism at the University of Michigan, but it turned out to be a department of journalism rather than a school, and also the College of Journalism at Syracuse. I really abandoned Michigan because I thought, well, if they just have a department as part of Liberal Arts Department, they don't really think much of journalism at Michigan, so I want to go someplace else. I probably would have gone to Kansas because I had great admiration for William Allen White, the sage of Emporia.

*Mr. Lane:*

Was he still active at that time?

*Justice Smith:*

I think he was, yes. His son certainly was in Washington as a Bureau Chief, I think, but I was really impressed with his wisdom and the way he approached journalism, and so I wanted to go where he was, and the school was named for him in Kansas. But then I read in the paper that they had some racial trouble out in Lawrence, and I said, "No, no, no. I don't want to go there", so I went to Syracuse instead. While at Syracuse that one year, adding that on to my one year at Fisk, 1941-42, my brother is beckoning me from Washington, D.C. where he now lives with his small family, and he said, "Come down. Let's get together again", because we'd always planned to do that. So, I inquired of the various schools in Washington, D.C. and the Catholic University of American in Washington had a program for admitting returned veterans with good, with good academic background, B or better, after only two years of pre-law undergraduate training. Of course, at that time, when I was in Syracuse, that was 1946-7, I was 25 or 26 years old. I'm getting worried about getting to be an old man before I get into anything, so I felt if I could accelerate the process, then I will go immediately into law. Now, how did I decide to become a lawyer? That was the turning point. Right at Syracuse. I still wanted to be a journalist because I was enrolled in the School of Journalism. Quite frankly, I surveyed the journalism situation among the great color race of the United States and decided that unless you owned a newspaper as a publisher, then writing was highly unremunerative, and that I probably couldn't make a decent living out of it, and I thought, "Well, let me see how I stack up with law", and I had a little bit of a push from my brother who somehow, for no particular reason, although he just thought I might be a good lawyer. I don't know why. I don't think he remembers why, but he just thought. I think he was just tossing out things that I might have ambition for, and of course, when he mentioned law, I was at first negative about it. I went to the Veterans Counseling Center at Syracuse, got a battery of test that lasted off and on for what would amount to almost a week,

certainly five full days, and they were angled towards analyzing my interests and skills towards the classification called "Author, Journalist, Lawyer", and it turned out that I had some skills and some considerable interest in that work, and I decided then to try the law school. I was able to get in the Catholic University Law School out of that program, which I understand a number of schools had two or three years without having the requirement of the four year undergraduate degree of admission to law school, which I think is universal now, but which was not back in those days, so I got in the Catholic University Law School.

*Mr. Lane:*

Is that where scoring 100 on the Signal Corp radio test came in?

*Justice Smith:*

You're right on target, Roger. You're right on target, because the Admissions Committee, although I satisfied the formal requirements, was not that enthusiastic because they had a lot of very bright people in that class, people with Baccalaureate degrees and some with Masters degrees, and lads who had been in seminaries and had excellent training, and they weren't too much persuaded, so I kept writing the Admissions Committee and finally, I was admitted. I was told by a young law professor at Catholic University, a fellow by the name of Richard J. Blanchard, who had been an officer in the Navy, and he was just returned from the service as I was, and he spotted that particular thing, of being #1 in your class in an Army training school, and he told me himself, that he had a tough job of convincing the other two members of the Admission Committee, but he was able to convince them based upon his argument that anybody who could eager-beaver his way around 400 other soldiers could probably study law successfully, and that's how I got in.

*Mr. Lane:*

Did you do well in law school?

*Justice Smith:*

Yes, I did pretty well. Yes, I was a member of the championship Moot Court team, won a gold key and dictionary for that. I was on the Law Review. I was co-author of the leading article in the Law Review with two other law students. I was told that I was #11 in my class of about 50 some odd lawyers.

*Mr. Lane:*

By then, did you begin to develop a focus for..."By God, I'm going to be a judge someday"?

*Justice Smith:*

No, no. That's a funny thing. When I was a high school class president, I wanted to be a United States Senator. Well, all such foolish notions had gone out of my mind.

*Mr. Lane:*

No, no. Excuse me, sir. That's significant, it is not? You, at that stage, when you were 17 or 18 years old, you were thinking not just in a total dream world, but you were thinking, "Well, by golly, maybe if I do things right and work hard enough and get a lucky break or two, maybe I could make the United States Senate". Was this about the way it went?

*Justice Smith:*

Well, you know, I think I was born in a dream world, because I was thinking about that, and it came to me on what they call "Class Day"...as a senior in high school, when you declare what your ambition is, and you go around wearing the clothes or whatever that indicates what your ambition is, and with some people, it was kind of a traditional day at that school anyway, and I got the idea from there, having been junior class president and senior class president, that I might be headed for elective office. Now, I'm living in Memphis, Tennessee. You know, I've got no realistic chance of becoming senator there, although I think that in my era, most of us thought of going north.

*Mr. Lane:*

That was Kenneth McKellar's..?

*Justice Smith:*

You're right, K. McKellar. But anyway, I asked my high school principal, who was a man of great learning, great wisdom, Harvard Divinity School graduate among other things and had been in World War I...

*Mr. Lane:*

This was a high school teacher?

*Justice Smith:*

Yes, he was principal.

*Mr. Lane:*

And he was a graduate of Harvard Divinity School, you said?

*Justice Smith:*

Yes. He was a pastor of the church as well as the principal.

*Mr. Lane:*

What kind of a school was this?

*Justice Smith:*

This was a public school...Booker T. Washington High School.

*Mr. Lane:*

Must have been a heck of a public school.

*Justice Smith:*

Well, it was in more ways than one. It was...had severe problems overcrowding. I can tell you of personal knowledge that separate but equal did not work because our school had...I think I remember the figure...42 teachers and 2,100 or 2,200 students, so you can tell...we sat two in a

seat in high school in some classes because we just didn't have the teachers, but they were dedicated and worked you awfully hard. Of course, one of the things about the southern culture is that it is authoritarian, essentially, it used to be. They didn't book any kind of a disturbance in high school. You obeyed the teacher, and if the teacher couldn't handle you, the principal would certainly intervene, and then the principal could get physical and would, if necessary, on rare occasion, but there were only a handful of detractors in class and in the school, I mean. They handled that pretty well. But anyway, I asked the principal one day, on the steps. I said, "Professor, let me ask you a question", and this is towards the ambition, and I said, "Do you think I could become President?", and he said, "Son, president of what?", and I said, "President of the United States". He mumbled something. He went away just shaking his head, "This boy is crazy". I didn't ask if I could be Senator. I asked if I could be President, so I must have been hallucinating a little bit.

*Mr. Lane:*

You know, possibly why I bear down so much on this, is I was in college with a young fellow who unfortunately had heart disease and died when I was in the Army. He was 25 or so. This fellow had his sights set on the United States Supreme Court, and as I remember this fellow, just a brilliant man, and you could imagine -here is a fellow that's handicapped very severely physically. He can't go out and kick a football around. What's he do? He's reading, he's using his head, he's using what he's got. And this fellow, I always felt, even to this day, I entertain the idea seriously that this guy could have made it, and that's why I think I'm so interested in asking so insistently about these things of what, where you can go, because my God, you went somewhere, didn't you?

*Justice Smith:*

Yes, I always wanted to be somebody. That's what we used to say down south. The distinction between being good for nothing on the one hand and being somebody and "being somebody" was kind of a generalization applied to people who had a college degree and college training and who were school teachers, lawyers, doctors, dentists...

*Mr. Lane:*

Any ministers?

*Justice Smith:*

We didn't...I don't think...the ministry was sort of...I'm sure that was some body, but I don't think it was...it was something...there, you had to have the call, whatever that meant. It also included in our little area there...if you had a significant job in the post office, because a lot of people of color who had college degrees wound up working in the post office. That's not the modern post office. That's the old post office where they really used to give service, so it was to be able to be a railway mail clerk, for example, was really an accomplishment, and that was "being somebody".

*Mr. Lane:*

That was a job that at one time, was remunerative, and had some romance to it.

*Justice Smith:*

Oh, yes. As a matter of fact, one of the best high school teachers I ever knew, a fellow by the name of Marvin Tarpley, left teaching high school to become a railway mail clerk, and so it was part of being somebody. That's what you thought about. So when I was up in the stratosphere thinking about being President of the United States and Senator, I was a kid who was really fantasizing, but having no realistic expectation of doing that, but just sort of fantasizing about it in the way you would as a teenage boy.

*Mr. Lane:*

There's something more, though, is there not?

*Justice Smith:*

I don't know. That's all I can make of it.

*Mr. Lane:*

Okay, but never to have fantasized, you might say, in this sense, never to have had the push and the vision to keep going up one rung after the other, even when the top is a long way away. That's what I'm trying to say.

*Justice Smith:*

Yes. Well, part of the culture that I came from had for one of its principle motivating sayings, "Shoot for the stars. At least you land somewhere in the sky". I heard that repeated 100 times when I was growing up, in school, in church, around the neighborhood - "Shoot for the stars and you land somewhere in the sky", so it was certainly...we had great optimism about what America could do, even back in those days, and the thing that is so significant to me, Roger, is that in my lifetime, a great lot of what I thought America can do, it has done. Not everything, but you know, this is the basis for my great pride with anybody about being born here. I think the American people are fundamentally fair, and when they're faced with things that they see unfair, that their disposition is to right a wrong. I have great faith in that, and I always did, even back in the worst days of the Depression and the worst days of the apartheid system, you want call it in the south. I always kind of figured, and I wasn't the only one, that someday, this thing would be righted. They'd fix the system. That's why I volunteered for the Army. I wasn't drafted. I went off because I thought that a lot of good people, black and white, to fight for. I really believe in the country. I still do. I have great faith in it, and I have...I get emotional about it, to tell you the truth.

*(End of side 1, tape 1)*

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**Topic 2: Justice Smith discusses his employment after leaving law school, his appointment to be Chairman of the Public Service Commission and then State Auditor General, his friendship with Tom Burns, and his work-related health problems. He then talks about his**

## **appointment to the Michigan Supreme Court and the legislation apportionment case of the early 1960s**

*Mr. Lane:*

Let's jump ahead now to...you're out of law school. How did you happen to come to Flint? That's where you really had your practice, wasn't it, before you...?

*Justice Smith:*

Yes. That's one of those things, you know. So much happens, as you know, by serendipity or happenstance or what anyone would call it. I was invited to come to Flint. It was almost like the business of my getting in law school, because I had done something else that...

*Mr. Lane:*

I see.

*Justice Smith:*

When I was in law school, as I said, I was on the Moot Court team. I had been in the preliminaries during that year, 1948 - 1949, and I had won. I had been judged the best of the four on the floor that particular night, and that put me, after two prior preliminary rounds, put me into the finals, two juniors and one senior against two juniors and one senior in the finals, and we were arguing a moot case before real judges. We had Justice Robert A. Jackson from the U.S. Supreme Court and Court of Appeals Judge E. Barrett Prettiman of the Court of Appeals in D.C., and the third member of the bench was T. Alan Goldsborough, the gruff old ex- congressman from Maryland who was a District Court judge, and I happened to be on the winning team. My picture was sent to my home town paper, and my home town at that time was where I last hung my hat, which was in Flint where I had worked in General Motors on the line from just after that big strike in 1945-46. I got out of the service in February 18, 1946, and I went to Flint to work in the factories to save money to go to school that fall, and this was before I went to Syracuse. I went to Syracuse in the fall of 1946, but between April and September, I worked in Chevrolet Manufacturing in Flint.

*Mr. Lane:*

Was that the time when you were working on some kind of a grind wheel, dirty job, and you couldn't get...?

*Justice Smith:*

Yes, I was a nickel buffer.

*Mr. Lane:*

Nickel buffer, yes.

*Justice Smith:*

Because I had stayed in Flint for that short period of time, that the address that the P.R. office at

Catholic University had was my address in Flint, so they sent this picture of me shaking hands with another Supreme Court Justice who came out for the ceremony, the late William O. Douglas, who presented the pen and the dictionary to the three winners. That went in the Flint Journal. Dudley Mallory, a lawyer in Flint, graduate of the University of Michigan, class of 1926 Law, had been practicing there for 20 - 25 years or so, saw it, recognized the name. There's a lot of Smith's around Flint, and the address was a part of Flint that was what people would call a ghetto. Anyway, he called up members of my family and told them "have the boy come in and see me when he is next in town", and I went into to see him around Easter, 1949, and I still had a year to go in law school, and he said, "Keep in touch. I'm trying to get a nice young man here to help me with the practice. I have 'made it', so to speak. I want to maintain the office for the clients who have been coming to me off and on for 25 - 26 years, so if you're interested, keep in touch", and I did. I didn't really think that seriously about coming back until I got out of school in 1950 and found out that there was no place for me, despite the credentials which are not overwhelming, but they were pretty good. I couldn't find any place. I couldn't find an office to go to, so I went to Mr. Mallory, and he said, "Well, come on it". I should say that when I graduated from Catholic U. Law School in 1950, by that time, I was married six months, married and had a child on the way, and needed to work, so I came from Washington to Detroit, and got a job working General Motors on the line at the old Ternstedt Plant down at Fourth and Livernois. I wasn't buffing nickel. I was doing something very close to it called polishing metal, which was very similar to buffing nickel, a very dirty job, but I had a law degree, and I had taken the D.C. Bar examination in June of 1950. I learned in August that I had passed, so I was working there as a lawyer. I was sworn in by letter in August, 1950 in the D.C. jurisdiction, and then I took the September Bar in Michigan, 1950, and I learned around Christmas time that I passed that one, and then I was admitted to practice in Flint. I accepted finally Mr. Mallory's offer to join him in the practice and on the 8th of January, 1951, I was sworn in in Flint, and he had an office waiting for me. I had a wonderful, wonderful time starting out with this gentleman who treated me like a son. I had a great time, good time with him. I was there from 1951 to 1957 when I got a call from George Stevens who was a lawyer in Flint who was also the County Chairman of the Democratic Party.

*Mr. Lane:*

You had been active during this period?

*Justice Smith:*

Yes, as I say, following this inspiration of Thomas More, I thought I ought to get into government, and I also had another inspiration, the Christopher movement, the fall of Keller, and the Christopher movement which was, to use the old Chinese proverb for their own slogan, "Better to light one candle than to curse the darkness", so for those reasons, I got involved in politics in Flint, and I looked for a party to belong to, and at that time, the Republican party in Flint was kind of a closed shop. They kind of only wanted you if you were one of the better people, and I was not then a confirmed Democrat. I had heard of Williams, and I went around to listen to him talk, and I really became taken with the guy because he was the first politician I met in a long time who didn't, as I say, insult your intelligence with a lot of garbage. Williams always

talked issues, and that impressed me, and so I sort of moved into see what they were doing and became involved in his big recount in 1952, and then I think in 1954, I became secretary of a counting committee in Genesee and I was active in "Dollars for Democrats" and things of that kind, and worked along with Jerry O'Rourke and other people in Flint who were still there and were active in the party. It did not prevent me from going off and doing my civic duty as an Assistant Prosecutor for a Republican prosecutor, Chester R. Schwesinger who was kind enough to agree to pursue me for a year to come into the office. When they had a very small office in Flint, they had a Prosecutor, Chief Assistant, and four assistants, and they were going to lose one guy, and...

*Mr. Lane:*

You were one of four assistants?

*Justice Smith:*

Yes. I guess they've got about 30 some odd now, but I was the fourth and final assistant, as I called myself, and I went in in the last half of the year of Ches Schwesinger's and tried - I counted them - 20 jury cases, and I lost one, but it was the biggest one I tried, and I took about 50 - 60 preliminary examinations and got considerable experience as an Assistant Prosecutor in that very short time, but anyway, I ran for school board, the Flint School Board, in 1953. I lost. I ran for Municipal Judge in Flint, and I think that was in 1955, and lost. Still, I had no thought of ever being on the Michigan Supreme Court. I think that the little firm that I was a part of by that time, Mallory and Smith; I think we had two matters, I believe, in the Supreme Court, during the time I was there. Mr. Mallory's matters, not mine. I worked on...my ambition when I started practicing law in Flint was scaled down to what I thought was realistic expectation. I said I wanted to be a good, honest lawyer and to be regarded so by me peers, and I had a great emphasis on honest. I wanted simply to be able to make enough living to support my wife and four sons. That was my ambition when I started practice in Flint. That's all. Running for the school board - I was asked to do that. Running for the Municipal judge - I thought I would make a pretty good municipal judge, but I had no thought about being either a Circuit Judge or on the Supreme Court at that time. I sort of gave it up as any elective office because Mr. Mallory kept saying that you can't keep one foot in government and one out. You've got to decide what you're going to do. Then, here I am, active in the community so much so that I was chosen by the Flint Junior Chamber of Commerce in 1956 as "The Most Outstanding Young Man in Flint" in 1956, which I understand brought me to the attention of Lansing in the way that they had not previously remembered me. They knew me as a very hard worker for Williams in the election campaigns, in 1952 and 1954. I had went around all over Flint with Tom Kavanagh who was elected Attorney General in 1954, and I had worked with Phil Hart who was Lieutenant Governor, and had great rapport with him and great fondness and affection for Phil, and so Phil Hart himself told me that when my name was thrown into the discussion about filling the position of Chairman of the Michigan Public Service Commission, that he kicked himself for not himself having advanced it. The fellow who thought about it was Alfred B. Fitt, who was the Governor's legal advisor, and I had encountered him in these extradition hearings. I had a couple governor's extradition hearings for clients who were sought to be extradited to southern states, one Arkansas and one someplace else, and Al Fitt told me he remembered me because I didn't come up there wearing the flag of the Democratic Party. I came up there as a lawyer for the hearings to be conducted, and so he thought that was somewhat unusual, and so when they were

fishing around for a name to fill the Chairmanship which was vacated by William R. Hart, Bill Hart, he tossed my name in, and he said, "When I tossed it, and they all said, 'That's it'. See if he is available and see what the industry thinks about him". Well, I didn't know anything about this, and I wasn't called immediately. My name was leaked to the industry and then they put the investigators on it, to come up to Flint to see whether I had any horns, any great problems with anything that would make it embarrassing for the Governor to appoint me, and they apparently didn't find anything. I am told that Tommy McIntyre - you probably knew him - who worked for the Times.

*Mr. Lane:*

I never met that fellow. I heard about him.

*Justice Smith:*

I heard about him. Tom Burns, you know him, who followed me by five or six weeks on the Commission told me, and he knew Tom McIntyre from his days in the Legislature said that, "I went all over Flint trying to find something wrong with that guy". He said, "I don't believe it. I couldn't find anybody who would say anything bad about him. I want to meet this guy". But anyway, when they couldn't find anything wrong with me, then the Governor, communicated with the County Chairman, George Stevens, who called me one afternoon and said, "The Governor wants to appoint you Chairman of the Public Service Commission". I hadn't asked for it. I knew so little about it, in sort of a half humorous way, I asked George, "What kind of a welfare agency is that?", and he said, "Are you serious?". I went up to see the Governor, went over to Lansing to see the Governor...down, I guess it is from Flint, and he asked me, "What is your regulatory philosophy?", and I said, "I don't have one." I said, "I think I know a fact when I see it, and I think I can follow the law pretty well". He said, "Well, you just can't go over there and be a housekeeper. You've got to...". I said, "I know what you're asking for, Governor, but I don't really have a philosophy. I just...". Well, he wasn't too pleased with that answer, I must tell you. At least he didn't appear to be pleased, and the more I thought about it, the more I thought, "Well, I'm making \$13,000 to \$14,000 now in the law practice and this only pays \$11,500, and that's only a raise...I was paid \$9,000 and they raised it to \$11,500, and I finally told Phil Hart who was Lieutenant Governor down here in the Jeff Jack dinner in the spring, 1957, I said, "Phil, just tell the Governor that I can't afford to come. I appreciate the thoughtfulness, but I just don't want to be...I don't want to leave practice. I can't really afford to". He said, "Well..."

He was so busy with all the crowd, he heard me and didn't hear me. All I know is the next thing I knew, I was facing Williams, a man whom I held in awe, and did hold in awe for most of his life, even when I got to know him almost intimately, I still held him in awe for what he was, you know. He was an overpowering man with not only his personality, but I always thought he was a tremendous guy because he stuck to his guns. He was a leader. If he advanced something that wasn't popular, he would keep right on advancing until he could sell the people on it, you know, and I thought that was pretty nifty kind of stuff, and I always found him to be an honest guy. I thought a great lot of him, but anyway, next thing I know, I'm facing Williams who asked me, "When can you start? Legislature has raised the pay from \$9,000 to \$11,500. When can you

start?", and like a blabbering idiot, I said, "Well, I can start in the fall". He said, "God, no. We've got all kinds of big cases up there, Bell Telephone cases pending, the application of UPS to start in Michigan is pending". He said, "We've got to have somebody up there right away". I said, "I can't do it right away". He said, "When can you do it?" I had a lot of practice to wind up, and I gave him a date sometime off, and he said, "How about July 1st?", and I said, "Okay". I didn't really mean to go over there, to say yes, but I couldn't say no, and that's how I got to be PSC Chairman.

*Mr. Lane:*

How long were you in that job?

*Justice Smith:*

July, 1957 to about October, 1959, and that's a little story, too, that may have been reported in the press: Thomas N. Burns, who was a great friend of Larry Farrell's, and Tommy was a Republican, but he knew all the Irishes of every stripe, and Larry Farrell and Tom were good friends. When Frank Shemansky had finally persuaded Williams to let him come back to Wayne County as Probate Judge, we had to get a replacement, and Tom Burns said to me, just in idle conversation, "I don't what the hell they're looking for. You're the best guy. You ought to be...". I hadn't even thought about it. I said, "Wow". He said, "Are you interested?" I said, "Well, it's interesting.

*Mr. Lane:*

This is Auditor General, now, State Auditor General?

*Justice Smith:*

State Auditor General, yes.

*Mr. Lane:*

At that time, a state-wide elected position, right?

*Justice Smith:*

Yes, and so he said, "Let me check it out. Do you mind?". I said, "Oh, no. It would be nice to have been invited, you know". But I wasn't really thinking about it. I didn't make any pitch for it.

*Mr. Lane:*

By this time, he was serving with you on the Public Service?

*Justice Smith:*

He was a member of the Public Service Commission.

*Mr. Lane:*

Republican member, right?

*Justice Smith:*

Right. He came five weeks after I did. He came in August of 1957, and this was 1959, so we had worked together for a couple years at great harmony. Tommy and I were like brothers. We never

disagreed on a matter ultimately. We used to make 20 or 30 decisions a week, and we'd always discuss it and carry on the public business.

*Mr. Lane:*

Did this come to be a very significant help, factor in your service on the Supreme Court?

*Justice Smith:*

Being a member of the PSC?

*Mr. Lane:*

Well, I'm talking about the method, the ability to make these decisions and to make them in harmony. Now, you, as we will presently discover, went into an atmosphere that was somewhat lacking in harmony at times, but you, talking now about the Supreme Court...when you got there, there were some pretty strong egos and some clashes and that sort of thing. I want to ask you eventually how it is that you were able to get these, one after the other, decisions that you wrote without dissent or one concurrence and that sort of thing. This, to me, is part of your...the significance of the kind of service that you gave, but anyway...Maybe I asked the question too quickly.

*Justice Smith:*

I think that really comes from your perception of what the decision making process is about in government. There are a lot of judges who will tell you that they are paid to render their personal decisions. I heard that a lot on the Michigan Supreme Court when I was there from several of the judges, that they thought their responsibility was to render that personal judgement. I always thought that in a collegial situation where you were not the sole decider, that you were supposed to make sense by compromise if necessary. They say the art of politics is compromise. The art of successful government is certainly in a place where you have many competing forces is compromise. There is nothing strange about that. There is nothing profound about that. That's just a fact.

*Mr. Lane:*

Well, Burns must have felt the same way. You and Burns had good chemistry, and you both...

*Justice Smith:*

Well, we did, and we had great respect for one another's opinions. That's why we didn't ever disagree on anything ultimately. We'd have discussions about it if we were on different sides, but usually, rather than trying to make his point with the other guy and make it stand up, you'd give your opinion, and you'd say, "What do you think?". That was kind of our way. He'd say, "Well I think this". I would often say, "God, that sounds better than what I said", and he'd say, "Well, no. I don't think so". So we'd often wind up arguing the other guy's position and we'd wind up saying, "Why don't we do this", and "Sure". Tommy paid me the greatest compliment I have ever been paid in my life. He said, "I'm older than you are. I've been around longer. I've been in government more. I was the Assistant Prosecutor. I was in the Legislature for two terms. I've

seen this animal around here. I never thought I'd be a part of any government, any government agency that worked like this one. As a Chairman and as a leader of this organization, it works like a textbook" He paid me...he always paid me the highest compliment about what I was doing, and he was very cooperative with me in administrative matters. James H. Lee, who...Maurice Hunt was on when I first went on, but Maurice left...

*Mr. Lane:*

For California or something.

*Justice Smith:*

Yes, his term came to an end, but then when Tom came on, and we just instantly hit it off. Neither one of us was trying to upstage the other one. We didn't have any personal agendas or party agendas. We just wanted to do the right thing, and so Jim Lee, who was there and a Democrat...Jim was a passionate guy, and I'm going to use that word again in connection with somebody else whom I served with, but Jim had a feeling that somehow the utilities and the transportation companies including the railroads were not really forthcoming with everything. He had great suspicions about it, and so he had difficulty seeing that point of view. After all, he had come from 25 years of being on the other side as a representative of the City of Detroit tax payers. He was part of the corporation Counselor's office and was designated to be the representative of the tax payers in major cases, so Jim had seen a lot, and I guess it sort of soured him on what was coming from the utilities. I guess Tommy and I were sort of innocent about it, but we just tried to see what made sense, and then I would go off and try to sell Mr. Lee on what we had done, and most of the times, I was successful, but not always. We usually were unanimous. Tommy and I would basically work it out and we would do it in the strangest times and strangest places. Both of us commuted to and from Lansing every day, almost every day. Tommy lived in Saginaw, 75 miles from Lansing. I lived in Flint, 50 miles away, and we'd often leave together, not always, but often leave together at 6:00 or 6:30 and headed home. We'd head out to old M-78 and we'd get out to Perry corner, outside of Lansing, and one of us would get a thought, and we'd raise a hand up in the car, and we'd go over to the parking lot of that restaurant in the corner, and we'd go in there and have a cup of tea or coffee, and he'd say, "About that thing we were discussing today, that case...". I bet we did that 30 to 40 times over a couple years, and sometimes when we were kind of puzzling over something, I'm driving my little car, and he's driving his, and we're in tandem. He would go on further. He wouldn't turn off at Perry corner. He would go up to M-13 to Durand on M-78 and go to Saginaw that way, and we stopped in there sometimes, but more often than not, we'd get a hot thought, a hot flash or something on the way outside of the city, stop in at Perry and discuss it, and say, "Let's do that", or we'd say, "Think about it overnight". The next morning, we'd come in and say, "What do you think?", and we would wrestle with the toughest ones and decide what we would do and then we'd go and try to sell it to Mr. Lee.

*Mr. Lane:*

There must have been some observing in the front office about how things were progressing over there because that agency had kind of a spotty record for some time before, and a heck of a

turnover. You're probably more familiar with that than I when you looked into what you were taking on, but boy, there was a real...

*Justice Smith:*

Bill Elmer, John Viele, Bill Hart had come through. It didn't have a good reputation, and Bob Derengoski, who was then Chief Counsel for the Commission on assignment from the Attorney General and who later became Solicitor General of the State before he retired...Bob was the Chief Counsel of the Commission when I got there, and he told me himself that, after about a year of the Burns/Smith administration, if you will call it that, that the appeals were reduced by 2/3's.

*Mr. Lane:*

Is that right? That's remarkable.

*Justice Smith:*

I said, "Why is that?" He said, "Marv Salmon and the other Circuit judges, Coash and other Circuit Judges over in Ingham Circuit which was the appeal jurisdiction from the Commission's decision, had come to believe in the Commission and when you got over there, instead of the presumption being that you're wrong, the presumption was that you're right, so they'd run over there to get an injunction against the order going into effect, and most of the time, they were denied. It makes my job very easy". Well, you know, we weren't playing to any gallery. We were just trying to get it right. Well, next thing we did, I think, was of some usefulness, was in that the two years that we were together there, a little bit more, we caught the calendar up to current. We had a current calendar. We worked like dogs. Tommy worked as hard as I did.

*Mr. Lane:*

He later went to the Court of Appeals, didn't he?

*Justice Smith:*

Yes, he retired from there just a few years ago.

*Mr. Lane:*

I suppose you must have stayed in touch somewhat?

*Justice Smith:*

Yes, he's a remarkable guy.

*Mr. Lane:*

Is he out in...where?

*Justice Smith:*

Saginaw. He's back home in Saginaw.

*Mr. Lane:*

Excuse me for the interruption. Next was the Auditor General. Burns ran a little interference there, did he?

*Justice Smith:*

Yes, Burns thought, "My God, you're the best candidate", and I hadn't even thought about it. I told you what happened there, and he went over...he called up and he told me...either he went over or he called up, I'm not sure, and when he put this out before Larry Farrell, Larry thought it was a hell of an idea, and I think within an hour or two after we'd had the conversation about wouldn't it be nice to have been invited to be Auditor General, here was Larry Farrell on the telephone and said, "Tommy Burns talked to me about it. I think's that a hell of a good idea. First thing, are you interested? Second thing, will your health permit it?", because I'd had some health problems then right on through there. I said, "Well, I don't know. Let me talk with my doctor".

*Mr. Lane:*

Was that your ulcer?

*Justice Smith:*

Ulcer and nerves, anxieties about doing the right thing. I worked awfully hard, and I was trying to clean up my practice in Flint. The biggest contributing factor was not the working of the PSC. I loved it. It was the best job I ever had in my life. I think I probably did as good a job there as I have ever done anyplace before or since. It was my practice which I had left in response to the invitation of Williams which I should never have realistically accepted at that time. I had a big dime store practice. I had a lot of probate cases. I had a lot of accident cases and things I had loused up, I had to clean up, and I didn't have anybody to help. I worked nights and weekends on my private practice trying to clean it up. I went on...I damned near collapsed.

*Mr. Lane:*

Just exhausted yourself.

*Justice Smith:*

Yes.

*Mr. Lane:*

I remember...you're talking about this kind of over-exertion. You remember Frank Shemansky, you man who succeeded in Auditor General. He got into some trouble that way. He was going with four hour nights, and he collapsed.

*Justice Smith:*

Was he.

*Mr. Lane:*

And a professional football player. You remember him, don't you.

*Justice Smith:*

Sure, I remember Frank well.

*Mr. Lane:*

He had a collapse in there somewhere.

*Justice Smith:*

Did he?

*Mr. Lane:*

Yes, he did, in the job as Auditor General. But, I keep interrupting...

*Justice Smith:*

Anyway, I went back and checked with my doctor in Flint about what he thought about this job which would obviously put me in political office where I had to get on the chicken circuit, chicken feed circuit, and he said, "Well, I don't know. I think it might be a good change for you". I didn't have him to dodge behind. I thought about it for a few days and I said, "Okay". That's when I was appointed by Williams to be Auditor General. I had to run in the 1960 election to succeed myself which I did, and I was elected in the 1960 election and then in 1961...this is how I came to the Court. We had all kinds of jokes about the Court. Everybody was ambitious, all of the Attorney General, all the people were ambitious. Whenever there was a vacancy on the Supreme Court, anybody in the Williams administration, close to it, and some other places, I suppose, had the ambition to go on the court. I didn't.

*Mr. Lane:*

You did not?

*Justice Smith:*

I did not.

*Mr. Lane:*

Even after this advancement?

*Justice Smith:*

No, I wasn't even...

*Mr. Lane:*

Couldn't you see that right up ahead?

*Justice Smith:*

No, I couldn't. As a matter of fact, my focus always was on getting my service over and going back to Flint, and of course, the longer I was away, the dimmer that became, but I had originally intended to go for a couple years.

*Mr. Lane:*

You never took your residence out of Flint, did you? Even when you were on the Court, you stayed in Flint, didn't you?

*Justice Smith:*

That was a time that I decided that the community was too much, and when I came to the Court, I thought that I'd better take a chance and move into Lansing. That is when I came to Lansing, to move to Lansing was in the early part of 1962, after I had been appointed to the Court. The story of how I happened to be appointed to the Court is a classic one. I really think so.

*Mr. Lane:*

Good. Let's hear it.

*Justice Smith:*

I'm Auditor General. I have run with John Swainson in the 1960 elections and others, of course. This is in the fall of 1961, and Talbot Smith, who had just been appointed Federal Judge, was leaving the Michigan Supreme Court, and we were joking around in the administrative board sessions, after the sessions and before, particularly Sandy Brown and I, who had great rapport. We used to kid about it. Sandy would say...

*Mr. Lane:*

Maybe I should interrupt here so that the persons who will hear this tape will know that...was it once a week or some periodic times, the eight Chief elective offices, I think it was, of the government, would have a formal scheduled meeting in a conference room area setting, in the Governor's office, and that was the State Administrative Board, right?

*Justice Smith:*

That's right.

*Mr. Lane:*

And there would be a review of major contracts and that sort of thing, of policy, some policy discussions, right?

*Justice Smith:*

Right.

*Mr. Lane:*

Okay, just so people will understand.

*Justice Smith:*

Then there were informal meetings every day up there at the Governor's office. They would last from five minutes to fifteen minutes or whatever was required to discuss the issues or anything that is facing the government, you might call the politics of operating the government would be discussed at that point. It would be just a matter of finding out what is troubling anybody or the Governor is announcing anything that he wants us to be aware of and to support, he would speak to that, but in any event, it was during or after those sessions when we had this little joking around about who was going to become the next Supreme Court Justice, and I never even

thought about it. I didn't hint that I was interested. I really hadn't thought about it. If it crossed my mind, it was not a serious thought. Here it is, one afternoon...it must have been early September...I think early September, I get a call from John Swainson, the Governor, and he asked me if I could accompany him to Grand Rapids. He had a couple little stops to make over there, little appearances he had to make, and he wanted to talk something over with me, he said. I looked at my calendar and said, "Sure". He said, "Well, can you be downstairs in the parking space in 15 minutes?", and I said, "Yes, meet you there". So I met him back at the capitol and got into the Governor's limousine with the Governor and of course, the State Police driver, and we headed for Grand Rapids where he had these appearances to make. We got out on the highway and he said, "What do you think of the vacancy occasioned by Talbot Smith going to the Federal Court?" Now, I figured that here was my friend and my party leader and so forth and my chief of government. He's already made his mind up as to what he wants to do, but he wants to ring me in on it in some way, and he really isn't interested in me. He's interested in what I think, and he's going to tell me what he thinks, which he wants to make sure I understand it and support it. So, I had a little understanding with him and with Williams that I would always tell them what I really thought.

*Mr. Lane:*  
Always tell them what?

*Justice Smith:*  
What I really thought about anything, that I wouldn't play games with them. I mean, "Okay, you know, you ask me what I think. You may not like to hear the answer, but I'm going to give you what I really think, and you can do anything you want with it, that's your business, but you're going to get really my best thinking about it, and it's going to be the best I know how". Anyway, so I said to John Swainson in response to his question, "Well, if you really want to know what I think, I think you ought to go down in Wayne County and get one of those Wayne Circuit Judges that Mennen Williams has appointed". He said, "Name one". I said, "God, there's so many of them". I started ticking off names. I said, "Horace Gilmore, Joe Salaman, Vic Baum and others, Joe Rashid. Every one I'd name, he said, "He's not well. He doesn't want it. He's got a problem". I finally got...I said, "There must be somebody down there. They're electable. They have great credentials in Wayne County where you need the vote". He said, "How about you?" It was a complete surprise to me, and I was sort of taken aback. I said, "Well, I want to think it over". He said, "What is there to think about?" I said, "You know, that's a big jump. That's the sixth largest state in the union. That Court is important to a lot of people. I want to think about it for a bit".

He was a little disappointed with my answer, I think, and he said, "All right, well think about it. Let me know what your answer is". So we made the trip, came back to Lansing, and I thought, "Oh, God. What do I do? This is big, big stuff". Here, I'm 39 years old. I had been a lawyer, I think, about eleven years. I practiced in Flint for a little bit less than seven. I had been in government. I mean, this is big league. So I'm starting to quiver a little bit. I said, "Let's go back to Flint where they know me as a lawyer, not as a public figure or politician or whatever you want to call it in Lansing. Let's go back to your roots in Flint where you practiced law and ask some of the guys, real good guys, both parties, whom you really have confidence in, people who know you as a lawyer, as a friend, know how you're made up". So, I went back and talked first of all to Mr. Mallory, my mentor and great benefactor and then to about three others, John M.

Wright and a couple other guys. "What do you think?". Well, I've got to say honestly that nobody was that enthusiastic about it, even my own benefactor. He thought about it, and he said, "Well, Smith, you can't do any worse than some of those old guys up there already. You might as well try it". With that kind of endorsement, I finally got back to John Swainson and told him I would try it, and if I didn't work out, I would be happy to step down, let somebody else do it. He said, "Aw, you'll do all right". So, Swainson presented me to the Court as a member of the Bar and as Governor, he introduced me to the Court. I took my seat.

*Mr. Lane:*

You did that in October, 1961, knowing that you'd have to run, then?

*Justice Smith:*

In 1962...

*Mr. Lane:*

That was in the spring election, right?

*Justice Smith:*

No, it was the fall.

*Mr. Lane:*

Was it a fall election?

*Justice Smith:*

Yes.

*Mr. Lane:*

For the remainder of the term of Talbot Smith, right?

*Justice Smith:*

Of Talbot Smith, which would have ended, I think, probably at the end of 1963 or 1964, but because the new constitution went into effect, it was suspended in order to get everything, it was...you know, they put the dates back for all the people who were incumbents for longer terms than...the effective date of the constitution, I think, was 1963, and I think they put it back, so my term actually full term expired in the end of 1966, so I ran in 1962 to keep my seat because the law requires you when appointed to run at the next general election.

*Mr. Lane:*

You beat Louie McGregor, didn't you?

*Justice Smith:*

Louie McGregor of Flint, my old home town, who was a Circuit Judge, Louis D. McGregor.

*Mr. Lane:*

He was a good one, wasn't he?

*Justice Smith:*

Yes, he was a good guy. I clearly won in Wayne and south Macomb. That's where the vote came out, and I did rather well in the U.P. as I did in 1960...I did very well in the U.P. I think you can look at the records...I think I won majority of the counties easily in the U.P. in 1960 for a partisan office, the Auditor's General post, and I did rather well up there in 1962. I did reasonably well all over the state.

*Mr. Lane:*

Do you remember when you first walked into the conference of the Supreme Court? Was the Court meeting at that time, the time of your appointment, or was it at some subsequent time?

*Justice Smith:*

I was introduced to the Court. I don't recall if they were in session in October. They probably were in session. They used to sit in quarterly sessions. They used to sit...

*Mr. Lane:*

For terms...

*Justice Smith:*

Yes, terms, two and three weeks at a time and then meet once a quarter, and while I was there, they changed it from once a quarter to once a month, about one week a month, but I was introduced to the Court, took my seat on the end next to Harry Kelly.

*Mr. Lane:*

At that time, the Court was in the third floor of the Capitol, and there was a rather large conference room over to one side of the Court, opposite to where the courtroom was. Is that the way you remember it?

*Justice Smith:*

Oh, yes...Kelly, Black, Kavanagh, Souris.

*Mr. Lane:*

Souris was there?

*Justice Smith:*

Yes. He had come in early part of 1960. He took John Voelker's place.

*Mr. Lane:*

Right. That was an interesting...

*Justice Smith:*

I was 39, he was 36, I think it was. We were the two boys on the Court. Everybody else was in their 50's.

*Mr. Lane:*

Had you had contact with Souris before you went on?

*Justice Smith:*

Yes, I knew him mildly from his campaign. I think in 1960, he ran, because I think he was appointed in the early part of 1960 when John Voelker, who was elected, I think, in the spring election of 1959 and immediately decided that he didn't want to stay any longer, and he left, and Governor Williams appointed Ted Souris to the Court, I think, in the early part of 1960, and I came in the latter part of 1961, so Ted had been there...

*Mr. Lane:*

He'd been there quite a while.

*Justice Smith:*

But Thomas M. Kavanagh was there, and the other names that I mentioned.

*Mr. Lane:*

What I'd like to do as we get into the work on the Court is to sort of break-out, if it is agreeable to you, the entire chapter, shall we call it, on legislation apportionment which kept coming back.

*Justice Smith:*

And back and back.

*Mr. Lane:*

And repeated, and in sometimes acrimonious settings and full of flux because of the new constitution, because of what was going on in Washington, because, to some degree, the changes in the make-up of the Court. Do you recall...would it serve any purpose to sort of take a look in your own mind's eye as to how.

*Justice Smith:*

I ought to go back and review that. I have some very, very vivid memories of my work on the Court with the other members, and of course, the apportionment was the most important thing we ever did.

*Mr. Lane:*

The reason that I approached the matter in this way is because it is so recurrent, and it was such an energy consumer, apparently, on the part, as to the Court. I think when we get to it, I looked it up, and there were, in one case, the head notes ran to like 50.

*Justice Smith:*

Everybody wrote an opinion.

*Mr. Lane:*

There were six and seven opinions in more than one of those cases, and I think that this might be an opportunity to somehow pull the thread of that together. There are people, for example, who have been thrown into one end of it, or Reynolds vs Simms, one man and one vote, one person, one vote becomes a sort of slogan, kind of a label, and then the substance of all the churning that went on to arrive at...my gosh, this thing went on long after you left the Court.

*Justice Smith:*

It started when August Scholle, who was President of the state AFL-CIO filed a law suit against the Secretary of State, I think, in the early 1950's. Scholle vs. Hare I, we call it, and that was when the issue was whether it was a justiciable matter.

*Mr. Lane:*

The Supreme Court of the United States had held it was not, right?

*Justice Smith:*

Let me see. I think it had. I would have to check and see. I know...I think it had, sure. I think it had in some cases.

*Mr. Lane:*

In an Illinois case...

*Justice Smith:*

Well, of course, Baker vs. Carr is the one that overruled that, and said it was a justiciable matter. That came...

*(End of side 2, tape 1)*

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**Topic 3: Justice Smith discusses legislative apportionment concerning Scholle vs. Hare, the effect of the U.S. Supreme Court case Reynolds vs. Simms on the court's actions, and the general election of 1966, which he lost to Thomas Brennan**

*Mr. Lane:*

This is another tape in the series sponsored by the Michigan Supreme Court Historical Society, and former Justice Otis Smith is here this morning in his office on the 13th floor of the First National Building. With him is Roger Lane of the Historical Society, and we're going to talk some more about his service on the Michigan Supreme Court. That's a counter.

*Justice Smith:*

Does the date matter? Doesn't matter?

*Mr. Lane:*

Yes, it does. For the record, you know, that kind of thing. This is October 25, 1990. Now, can we talk some about the whole, knotty, long drawn-out problem of legislative apportionment. I would like to suggest that just before you came on the Court, I think it was in 1960, there was a decision by the Michigan Supreme Court that was appealed. This had to do with, as I recall, this was one of the Scholle vs. Hare matters that was brought on by Gus Scholle, the President of the AFL-CIO in Michigan, and a very astute, forward looking citizen who was keenly interested in all aspects of the political life in Lansing, and he had challenged the constitutionality of the apportionment that then existed, and this was just prior to the meeting of the constitutional convention in 1961 and 1962. The Supreme Court had upheld the constitutionality of this unbalanced system where the Senate was partly apportioned on a geography basis and there were other alleged defects, and it went down to Washington, and was remanded. Now, does that come about to your time?

*Justice Smith:*

That certainly does. As a matter of fact, I think it was in the spring, 1962 when the Baker vs. Carr decision of the U.S. Supreme Court was made and the Scholle vs. Hare case which was on appeal with many other cases around the question of whether or not apportionment was a justiciable issue, that is to say whether or not it could be judged in court rather than being a political issue which is what the Court had previously said, as you know. So, we got Scholle vs. Hare II, because there was a I back in the 50's, after the 50's census, these kind of occurred after the census, and Gus Scholle was interested in one man - one vote, and there was a lot of activity in the early 50's. As a matter of fact, there was, I think, a constitutional amendment, so-called Balance Legislature Provision, that was passed back in the early mid-50's which actually kind of grew out of the agitation that Gus Scholle had started with his interest in apportionment. Curiously enough, this is not the first time the Michigan Supreme Court had the case, this kind of case. I checked back, and I think it's in the records that after the 1890 census and I think after the 1900 census, there were cases, not by Mr. Scholle, of course, but by other people way back in those days who did not like the apportionment at the time. There was one case in which the Court, Michigan Supreme Court stated in one of its opinions that districts which were more than 2:1 could not be countenanced, and that was back after the 1890 census, I think.

*Mr. Lane:*

Is that right?

*Justice Smith:*

Yes, so it had a history to it in Michigan, at least, and I suspect elsewhere. In any event, we come up to the moment of the decision in the U.S. Supreme Court case of Baker against Carr in the spring of 1962. I had been on the Court about four or five months, five or six months, and the remand occurs and here we are to decide once the Supreme Court had said that in Baker vs. Carr that it was a justiciable issue, and remanded the case to us. We were decide whether the attack on the apportionment of the Michigan Senate, as I remember it, was done by the people in the constitutional amendment in the 50's.

*Mr. Lane:*

1952, I think.

*Justice Smith:*

...was unconstitutional when measured against the requirements of the U.S. constitution, the constitution of the United States. Well, as it turned out, I was the 7th and deciding vote that year, in 1962, on the question of whether or not the Senate was mal-apportioned. There were eight of us on the Court, of course, Justice Adams having come on early in 1962 when Justice Edwards left to come to Detroit to be Police Commissioner, and Justice Adams could not participate because he had participated in *Scholle vs. Hare* as Attorney General, so he did not participate. The other six justices all had participated, and they all had expressed themselves as three in being in favor of apportionment along one man-one vote lines and the other ones being against it. I really anguished over it because there is a natural reluctance to tinker with what the people have...

*Mr. Lane:*

...ordained.

*Justice Smith:*

Ordained in the constitutional amendment of the 50's. I discussed it with everybody, practically everybody before I joined, and I was very, very much upset about it. Of course, it was a thing of high political moment in 1962 because that was the year that Governor Romney made his emergence as a real live candidate for Governor, and he was interested and expressed a great interest in it. It was turned into a partisan issue by the partisans. Anyway, I anguished over it, and I was not unaware that I had to go up for election that year in order to maintain my seat. I knew that...

*Mr. Lane:*

Excuse me, did you need the nomination of a political party to qualify to be on the ballot?

*Justice Smith:*

Yes, at that time. I don't think I was worried about that. I was thinking about, worrying about the enormous interest. The press, I think, was almost all allied on the side of leaving it alone the way that people had ordained it in the so-called Balanced Legislature Amendment of the 50's. Of course, the partisans on the Republican side of the issue were unanimously in favor of leaving it that way. There was not only great political heat but also great legal heat on this thing. I worried about it, and I knew that I was in the eye of a storm. I will tell you exactly what I thought and how I resolved it. On the one hand, I felt that the U.S. Senate model, having two senators from each state no matter what the geographical size or population was somewhat persuasive to me. It was interesting to me that the U.S. Constitution, the same one that we're now to look at to see if the state legislatures could be apportioned on the basis of one man-one vote ordained in it that there be two senators from every state, from little Rhode Island up to, at that time, the big state of Texas, and also with the populations of New York.

*Mr. Lane:*

Did it weigh with you that Justice Edwards, I believe in 1960, had espoused that view with some vigor, and he was oriented philosophically with Gus Scholle, really, wasn't he?

*Justice Smith:*

Well, he had been. You know, as much as he had gone, in all due respects to my good friend George Edwards, that did not figure in my thinking. The thing that figured to me was that there was a Federal constitutional system which ordained, in a sense, U.S. Senate apportionment, two per state no matter what the population, and I worried about that. I also would examine the arguments, of course, on the other side. To make a long story short, recognized it as a political legal issue. I said to myself in almost these exact words, "When in doubt, vote with the people", and I was in doubt, and I voted with the people, and all hell broke loose. All hell broke loose.

*Justice Smith:*

4:3 in favor of Scholle vs. Hare and reapportionment, and all hell broke loose.

*Mr. Lane:*

Did you, in your opinion...now, you wrote in this case, did you not?

*Justice Smith:*

I think..I may have written a concurring. I think I joined in somebody else's opinion.

*Mr. Lane:*

I see.

*Justice Smith:*

I didn't write at that time. I wrote later, after Colorado against Love and Reynold Simms were decided later. That was a couple years later. At this time, I think I just decided whether I wanted to join in the Carr, Dethmers, Kelly opinion or did I want to join in the Black, Kavanagh and Souris opinion, and I joined in the latter. That's my recollection.

*Mr. Lane:*

So would this be oriented, then, to what the people's position was, in your mind, in the light of, say, the Cooley commentaries on the constitution, or just quite how did...?

*Justice Smith:*

Well, the people part is that this was obviously to me, at least, pro people.

*Mr. Lane:*

The Scholle position?

*Justice Smith:*

Yes, it voted in favor of people rather than geography and despite how the U.S. Senate is formulated in the constitution, I still thought this was further enfranchising the people and because it was a justiciable issue and because of the arguments that were presented on the side that wanted to reapportion that even though one could go either way, I think with conscience, my

judgement was when in doubt, vote with the people's interest which I think is very important in a Democratic Republic. I really think so.

*Mr. Lane:*

Excuse me for the interruption. You said, "all hell broke loose".

*Justice Smith:*

All hell broke loose, yes.

*Mr. Lane:*

Do you remember where in the year this was on the calendar.

*Justice Smith:*

This was 1962.

*Mr. Lane:*

July, August, September?

*Justice Smith:*

Well, I think we decided it somewhere around May or June.

*Mr. Lane:*

Quite early in the year?

*Justice Smith:*

Early in the year, but it immediately became a campaign issue. Governor Romney picked it up, and he said it was, and I think I quote accurately, "It was a most amazing power grab in Michigan history", he said. He kept repeating that very strongly. I winced at that because the last thing I was thinking about was power grabbing, you know. I was thinking about, "Oh, God, the papers took it up, and it was a real, real cause". The only thing that really diffused it was that John Fitzgerald, who was then a state Senator and was one of the lawyers for the other side, and some other Republican lawyers sought the stay, and they went way up in Littleton, New Hampshire and found Mr. Justice Potter Stewart, who was our Circuit Justice here in the 6th Circuit, and they presented arguments up there. I think Ted Sachs was on the side of reapportionment, and they were heard up there in a Federal Court in Littleton, New Hampshire, which I later visited just to see the sight of all my misery. But in any event, Justice Stewart, after listening to the arguments, decided to grant the stay, and I really think that saved my hide in 1962. I really do.

*Mr. Lane:*

Was one consequence of the decision that you were just describing that the Senate would run at large in Michigan?

*Justice Smith:*  
In 1962?

*Mr. Lane:*  
Yes, and is that part of the argument that Fitzgerald and the others took to Potter Stewart?

*Justice Smith:*  
I don't recall that that was their...it later came up in 1966, 1964 rather, as a matter of fact, in Illinois, you remember that after Colorado against Love, Reynold vs. Simms was decided that one man-one vote legislature, both houses had to be apportioned that way, they really had a big problem. The legislature was supposed to decide. They never did apportion and either one or both Houses in Illinois had to run at large, although the...which is something else again...this is two years projection that I was involved in again when those two cases were decided, and that's what I anticipated could happen in Michigan. In 1962, it was not the issue. I think it was that we were to adopt some plan or in some way, were to affect it or send it to the legislature, but because of the stay that was granted by the U.S. Supreme Court Justice, it never was done.

*Mr. Lane:*  
Right.

*Justice Smith:*  
It sort of got put on hold.

*Mr. Lane:*  
For two years, was it?

*Justice Smith:*  
Yes, for two years.

*Mr. Lane:*  
But you didn't get rid of it.

*Justice Smith:*  
No, we didn't get rid of the issue. In the interim, of course, the constitutional convention of Michigan 1961 and 1962 came out with...their own method of dealing with it, and there were to be plans submitted, and I always remember in 1964 after Reynold Simms, there was the Hanna-Brucker plan and the Austin-Kleiner plan. That's where I was involved again.

*Mr. Lane:*  
Now in the decision of 1962, that was based, or what was in place at that time was a 1908 constitution.

*Justice Smith:*  
As amended by the...

*Mr. Lane:*  
As amended, and the new constitution that was being put together at that time had not yet been finished off, and put before the people.

*Justice Smith:*  
That's right.

*Mr. Lane:*  
It not only had not been adopted and voted on, but there was still, I guess, some work going on to finish the document, was there not?

*Justice Smith:*  
Yes, I think it was, and it was submitted to the voters, I believe it was in the fall election of 1962, the same election, because...

*Mr. Lane:*  
That became an issue. Do you recall? They wound up in 1963, in the spring election actually voting on it, and that had been...

*Justice Smith:*  
That's right, yes. Well, that set up an apportionment commission, as you remember, and it was doomed to failure because it ordained that four would be from one party, not more than four from one party and four from another, and you got four Democrats and four Republicans, and that meant automatic deadlock over an apportionment plan. After many meetings, the apportionment commission adopted...four of them adopted the Hanna-Brucker and four of them adopted the Austin-Kleiner.

*Mr. Lane:*  
As we talk about it, it seems so obvious that this was a sure-fire, four to four deadlock. What did the people think that were putting this into the constitution?

*Justice Smith:*  
Oh, I think they really felt that there would be at least one vote possible on either side to join the others and make a five person majority for any kind of a reasonable plan, but it did not happen that way.

*Mr. Lane:*  
Not at all.

*Justice Smith:*  
And I suppose that is certainly theoretically possible, but it having been so long in Michigan then a political manner as well as a legal manner, it just wasn't to be...too much to be expected. My solution for it was, which I advanced at one of my opinions in 1964, purely as a dicta was that

maybe one of the things they could do in order to break the deadlock was to give the Chief Elections Office, to wit, the Secretary of State, deciding vote in case of a tie, and that would equip that office with some policy content which it does not have, because most of the content is service content, which is fine, but it would make it a more significant office because of the apportionment thing, and also, I think there would be more a contest if they were to do that, besides that vote would be used only in the case of a tie. That would be one way of resolving. Of course, it has been solved some other way now.

*Mr. Lane:*

But now that the heat came back on, so to speak, in the spring of 1964, right? What was the instrumentality of that prior to the decision of Reynolds vs. Simms that came along? Remember, time became a big factor in this period, but prior to the time of Reynolds vs. Simms, the Supreme Court was churning with other, with a resolution of the subject matter issue in some way, either whether it was a...

*Justice Smith:*

It was really sort of laid to rest. I don't recall that there was any big concern for two years. What happens with a new constitution going into effect and there being an apportionment commission appointed according to the constitution and it having met and come out with these plans pursuant to the constitution of 1963...

*Mr. Lane:*

That's right. It had started to function, had it not, prior to Reynolds vs. Simms.

*Justice Smith:*

Yes, it had.

*Mr. Lane:*

And the issue before the Court early in the year was "Will we adopt this...?"

*Justice Smith:*

Will we adopt Hanna-Brucker or Austin-Kleiner, and what we decided to do was to wait, which was the only sensible thing to do because we knew that Colorado against Love, and Reynolds vs. Simms were there, and every month, we'd open up the mail to see whether we had an opinion from the U.S. Supreme Court, and there wasn't one. This is in the early part of 1964, and we'd adjourn it for another month, because we wanted to get this direction. It would have been sillier to gone forward. Then what happened was that...

*Mr. Lane:*

I can remember in one of your statements...I think you had a separate opinion on this thing...everybody did, I guess, and it said, if I remember correctly, and you correct me if I'm wrong, in your opinion issued in May, I think it was, you said, "Look, I have waited as long as I can wait. I figured out if there wasn't some word from the Supreme Court of the United States by

May 18th which was an opinion day for the Supreme Court, I am going to go one way or the other". Was that not...?

*Justice Smith:*

That's true.

*Mr. Lane:*

You felt that much pressure from a time standpoint?

*Justice Smith:*

That's right, and the reason I worried about it was because I was thinking about the fundamental thing of the orderly election.

*Mr. Lane:*

Right.

*Justice Smith:*

There had to be a primary date set to concur with the general election date in November. There had to be enough time for people to campaign. What I thought was...I thought it then and I still think it was the right thing to do...that the worst thing the Court could do was to vote to dissolve, in effect, the most important branch of government in Michigan, to my way of thinking is the legislature. That's the people's branch. It's out there. It represents people, and it really is the heart of the system is the way I see it. The judiciary is important. The executive is important, but really when you get right down to it, the heart of the Democratic/Republican form of government is the legislature, and to put that in the fluid state, I thought would be unconscionable. That's why, after waiting for three months or so for a decision to come out of the U.S. Supreme Court, I decided to walk the plank, if you will, and join with "the Republicans on the Court", and vote in favor of the Hanna-Brucker plan, and I voted in favor of it reserving the Federal constitutional... but saying that this is the plan that most accurately comports with the state constitutional requirements, that is, of the Michigan State Constitution, and reserved report on the Federal question.

*Mr. Lane:*

May 26th, now what happened on June 15th?

*Justice Smith:*

On June 15th, of course, we had received not long after the decision in favor of Hanna- Brucker with my joining in to give it the majority in the Court with dissents from some of my colleagues on what you might call my side of the fence. I joined to give it the fifth vote, and I did so knowing that I would be criticized, but that's part of the job, you know. So then along comes the decision in Reynolds-Simms and the only thing to do in view of the clear pronouncement of the Court, U.S. Supreme Court that it should be one man-one vote for both Houses, was to recall the decision which we did. We recalled that opinion and decision, ordaining if you will Hanna-Brucker, and we re-examined it in the light of the plans that were in front of us, and there were, I think, at that time, three. There was the Hanna-Brucker. There was the Austin-Kleiner I which was a real bastard of a plan. I mean, it was really visibly gerrymanded in favor of the Democrats, and then they had wisely put in an Austin-Kleiner alternate which was...

*Mr. Lane:*

Was this after Reynolds vs. Simms?

*Justice Smith:*

Yes, oh yes. That's what triggered it. Reynolds-Simms was decided, and we were looking at Reynolds-Simms, and that's when we recalled the decision made only a few weeks before adopting Hanna-Brucker. We recalled that and then re-examined it. I think we had re-argument, and then we, by majority, adopted Austin-Kleiner alternate which was a pretty decent plan. I say it was a pretty decent...let me point out that it wasn't just a bare majority. Justice O'Hara who was identified with the other side joined the people who were in favor of one man-one vote, and he said he concurred in the result, so that gave us six votes, as I remember, in favor of the Austin-Kleiner alternate. They tried to get a stay from the Court on that, but the U.S. Supreme Court would not stay our decision adopting Austin-Kleiner Alternate. We had done a lot of things to make sure that we could have an orderly election. We got a certificate from the Secretary of State that there was time to have a primary, time to conduct elections in an orderly fashion, which is the thing I was concerned with all the time.

*Mr. Lane:*

This was on roughly June 20 or 22, somewhere in that, was it not...getting kind of close where the machinery had to start to turn for an orderly primary. You were up against the wall, is this not true?

*Justice Smith:*

Yes. Well, I think they had the primary...I don't recall whether they had the primary in August or whether they pushed it back a month to September, but it was time enough to draw the districts, were they already drawn, to get all the paraphernalia of government in place, to have the candidates in the primary. This is very important, as you know...to figure out what district they live in, to figure out whether they want to run or not, you know...

*Mr. Lane:*

Who their opponent would be...

*Justice Smith:*

Yes, and so this is part of the process, and so it was done in an orderly fashion. I was proud of that. I think I made a significant contribution to that process, at least, in my judgement...that was the most important work I ever did on the Court.

*Mr. Lane:*

But that didn't end it.

*Justice Smith:*

Effectively, it did.

*Mr. Lane:*

Well, there were a some...a lot...

*Justice Smith:*

Well, after every census now, of course, there's always revisiting, and it's a great moment, but it ended it, I think, for that decade, because they tried to get a stay, that is, the opponents of the Austin-Kleiner alternate, which the Supreme Court adopted by a 6:2 vote, as I remember...tried to get a stay from the U.S. Supreme Court. It was refused, and therefore, that was the plan that was put into place. I believe in the 1964 elections, it resulted in very interesting thing that happened in that the vote reflected the vote of the people, and it continued to do so throughout that decade, because it was one of the cleanest plans. The opponents of the plan could only quibble about three or four house districts because we didn't...the Austin-Kleiner alternate didn't worry about county or township lines. It took census tracks, and built around census tracks, starting in the middle of the state and fanning out. The disparities between the largest and the smallest House district was almost negligible and the same thing in the Senate, and you really had a plan that could reflect the rule of the people in that district.

*Mr. Lane:*

But was there not an application to the Supreme Court, either...I guess it would have been not later in 1964, but in 1965, to have the whole matter revisited by...

*Justice Smith:*

It could have been.

*Mr. Lane:*

Well, there was some argument, if I recall correctly, was there not that the adoption in compressed time framework of the Austin-Kleiner Plan II or whatever...

*Justice Smith:*

Alternate.

*Mr. Lane:*

Yes, Alternate. In June of 1964, this would be ordered into effect for the 1964 elections. Some argument was made at least that that was the Court's determination and that when the dust settled, the apportionment commission should take a more deliberate look at the whole matter...

*Justice Smith:*

Well, you're probably right. I don't remember that there was anything of a serious nature that the Court that I sat on...and of course, which I left at the end of 1966, had to do about apportionment once it had adopted the Austin-Kleiner Alternate. I do recall that the opponents tried to get a stay in the U.S. Supreme Court and failed, but it went into effect because I remember that one of the first acts of the one man- one vote, the first one man-one vote legislature in Michigan was to elect Joe Kowalski the Speaker, and one of the things that they started looking at was making the legislature go to a full time legislature and kicking the administrative offices out of the Capitol, and they started using some of the rooms for committee rooms and that sort of thing.

*Mr. Lane:*

Well, I'm going to contribute my little two cents of history here...

*Justice Smith:*

Good.

*Mr. Lane:*

...because I was affected excruciatingly, in my judgment. The thing was sent back, and I don't remember the instrumentality of the remand, let's call it, of the whole question to the apportionment commission, but what I do remember, having come to Michigan after the events that we have discussed...I had been off in New York and came back with two little kids, and at midnight on December 31st, one of those years, either 1965...I think it was 1965...it must have been 1965, I was sitting in the Appropriations Room on the second floor of the capitol where the apportionment commission was watching the clock because it had been given such and such a period of time to review the matter and if it could, to adopt a plan in the way that the constitution provided, presumably by five votes, and they were going through these darn charades, and I was looking on. I knew it was all in my field, an exercise in futility...

*Justice Smith:*

Oh, yes. I faintly remember that there was a mandate to review all plans in light of Reynolds-Simms, and they came up with the same conclusion that they had previously come up with before Reynolds-Simms was adopted. I think that's right, yes.

*Mr. Lane:*

But I remember so...and I was quite bitter about this...sitting there at New Year's Eve, the stroke of midnight, and all that stuff, and these people were going through these charades as I viewed it, and all...New Year's Eve had been given over to this. I had a couple of little kids at home. When I got out of there at midnight on New Year's Eve, I had to go write some kind of an article for the morning paper that I worked for that I knew would never would get printed, and I got home maybe at 2:00 on the morning of January 1st, somewhat agitated over the political goings-on, as I viewed them...and maybe they're government goings-on. But anyway, I wanted to make the point that the thing did simmer on for a while, and I think you had to cast a vote or two. Maybe this all seems like footnote stuff to you by now.

*Justice Smith:*

Yes. I think essentially when we adopted Austin-Kleiner Alternate, we, so far as the Court was concerned, sort of got shed of the biggest burden, and I think everybody wanted to unburden himself of some kind of an opinion, and that's when it got lump opinions...well, leading up to it and also after Reynolds-Simms, we unburdened ourselves with thoughts which, if you notice, are not just legal. That's when I advanced the thought that one way you can solve this thing, hassle, was to amend the constitution to provide that the Chief Elections Officer would have a ninth and deciding vote in case of tie. Of course, that wasn't done. Nobody paid any attention to it.

*Mr. Lane:*

Do you remember what Souris wrote, though, as to the validity of the Commission?

*Justice Smith:*

Oh, yes.

*Mr. Lane:*

You probably lost track, but this became the opinion of the Court in 1982. Are you aware of that?

*Justice Smith:*

Yes.

*Mr. Lane:*

That the Commission itself, once you've taken out the environment in which the Commission was created of limiting...

*Justice Smith:*

That was on his own motion. I don't think anybody had made that argument, I don't believe.

*Mr. Lane:*

It became a factor later on in 1972 when the apportionment committee...anyway, T.G. Kavanagh got hung up on that because he took the Souris argument, adopted it, and he was, for that reason and maybe others, he was deprived of the nomination that you think a Chief Justice of one party might get from his own party in 1976, and was able to win anyway because the constitution... Well, that's all for another time. This apportionment business was a colossal event, was it not?

*Justice Smith:*

It was a colossal event in the history of the country. As a matter of fact, you will remember Chief Justice Warren said a number of times that the most important decision that the U.S. Supreme Court made in his time was not the Brown vs. School Board decision which a lot of people thought he would say, which was very important, obviously, but also he said the apportionment case.

*Mr. Lane:*

Did he?

*Justice Smith:*

Yes. I think anybody who is in the law would agree with that, that it was just so profound in the way that it affected the make-up of the state legislatures in the 50 states that it was the most profound thing that was done by the Court. I must say that there's a footnote to all this, that I believe it was either 1965..no, it was 1965 and 1966, because I went off the Court in 1966...Chief Justice Warren visited us at our invitation. He had visited the Michigan Judges Association

meeting which was held up at Boyne Mountain resort, in the, I think, early summer of 1965 or 1966, probably it was 1966, and I had the privilege not only of being one of his two official hosts at Metropolitan Airport when he arrived by plane from Washington, D.C. That was an event in itself, which I digress to say was an event because when he stepped off...of course, naturally, I recognized him, and so did Paul Adams who was the other host, but I thought he'd have all kinds of guards around him because, you know, all over the country, they have these signs "Impeach Earl Warren"...

*(Phone interruption - break in tape)*

*Justice Smith:*

What I was saying when the phone rang was that we were chatting with him about the Warren Commission and things, all kinds of things. He is a wonderful man, wonderful man. But as I say, as he got off the plane, I was looking for all these guards, and he came walking off the plane alone with a little umbrella on his arm and a very tiny overnight case, more like a briefcase than an overnight case, and we went up to him and said, "Do you have guards?", and he said, "Oh, no. Oh, no", and this was a time when there were signs up all over the country, "Impeach Earl Warren", because of his liberal opinions. In any event, we got on the plane and took him up, brought him up from Detroit to Boyne Mountain where he stayed with us for a day. One of the things that he said in his little talk to the judges, he said, "We were watching what was to happen in the country after the decision of Reynolds-Simms. We were a little concerned, I must tell you, and then the Michigan Supreme Court applied", and we did it, I think, two or three weeks after the decision was in, and he said, and these were his words, "You were the first to apply and all the others sort of fell over like ten pins. It was something we always remember". We were the first and we were the purest apportion legislature because of the application of the Reynolds-Simms in Michigan, and the way that the apportionment commission had done it, that is, the four who had done it, and Austin-Kleiner Alternate was almost perfect.

*Mr. Lane:*

Just so people, listeners, at a future time...Austin was Richard...

*Justice Smith:*

Richard H. Austin.

*Mr. Lane:*

Richard H. Austin who later became Secretary...

*Justice Smith:*

...of State...

*Mr. Lane:*

...of State, and is now, by the way.

*Justice Smith:*

Yes. For a long time, twenty years or so.

*Mr. Lane:*

And Kleiner, Bob Kleiner...

*Justice Smith:*

A. Robert Kleiner was a labor lawyer from Grand Rapids, Michigan, a long-time worker in the Democratic Party as was Dick Austin. Dick, at that time, was not in public office. He had a little CPA firm in Detroit, and was active in the Democratic Party.

*Mr. Lane:*

Kleiner is a little bandy rooster, sort of...

*Justice Smith:*

Yes, Bob was one of the...I think we'd had a case of one man-one vote, as I understand it.

*Mr. Lane:*

Do you know if...now, when Reynolds vs. Simms was decided...that was what? A Tennessee case, was it? There must have been eight or ten similar cases before the United States Supreme Court on appeal from...Colorado was one of them.

*Justice Smith:*

Yes, Colorado against Love. Those were the two that were named.

*Mr. Lane:*

And there were several others, were there not? I think there were, anyhow, and I just wondered if you knew whether Gus Scholle, perhaps with his labor connections around the country, had helped sort of orchestrate this thing or whether his activity was limited.

*Justice Smith:*

I really don't know. That's a good question. I don't...I didn't know how they came about...to my way of thinking, if you look at the interest in that subject even after the 1890 census in the 1900 in Michigan when there was no Michigan AFL-CIO, there was no Gus Scholle, there was nobody, I think people had had a long interest in the apportionment of legislatures. Of course, as you know, the lower house of Congress is supposed to be apportioned on the basis of population but rarely was. There was a decision of the U.S. Supreme Court which reiterated that requirement which is clearly in the U.S. constitution that it be apportioned on the basis of population, and I think they had to go to court even to get the legislatures to apportion it reasonably on the basis of population, because it was all gerrymanded.

*Mr. Lane:*

Did not the Michigan constitution have a requirement in it, the one from 1908 or 1901 or whatever...

*Justice Smith:*  
1908.

*Mr. Lane:*  
Did it not have a requirement that there should be a legislative apportionment after each Federal census and this was ignored as it was ignored similar provisions...?

*Justice Smith:*  
I don't know, but I'd take your research on that. I don't recall. I wouldn't doubt that. It would be a logical thing to require.

*Mr. Lane:*  
In the 40's, I think, there was a case where people were agitated, I think, in Illinois, for that matter, because there had been no obedience to a constitutional provision on apportionment by the legislature, that it went to the United States Supreme Court, and it was a close vote. I remember Felix Frankfurter was quoted thereafter as saying that it was a political thicket, that the Supreme Court should not attempt to...it was a political question rather than a judicial...

*Justice Smith:*  
Yes, judicial,...

*Mr. Lane:*  
And this was what was overturned by Baker vs. Carr, right?

*Justice Smith:*  
Yes.

*Mr. Lane:*  
Well, it didn't stop there. Were you on the Court when the principle of one person-one vote was applied on the county level?

*Justice Smith:*  
No, I left the Court at the end of 1966 having been defeated in the general election of November, 1966, and so I was out of office the first day of January, 1967.

*Mr. Lane:*  
You did serve out your term, though.

*Justice Smith:*  
Yes.

*Mr. Lane:*  
There was some speculation, was there not, that you might...

*Justice Smith:*

You know, Tommy Brennan who I think may have been a little bit worried about that provision in the Michigan constitution of 1963 which provided that the Court would go permanently back from eight to seven members at the death or resignation of the first member, and he made an issue of it in the press between the time of the election in November when he and Thomas M. Kavanagh were elected, Thomas M. having been re-elected, and Thomas E. Brennan having replaced me by the will of the people in the November election in 1966...between the election and the first year...I don't know why he mentioned that. I suppose he wanted to run up a flag to see if I, who had lost the election but was still in my seat in my position and would stay in my position until the end of the year, the first of the next year...only about seven weeks, might entertain the thought of resigning between the time of the election and my actual term expiring at the end of the year which at least could present, would have presented an issue over the constitutional provision that the Court go from eight to seven being invoked at that point in time. It was mentioned in a story in the press, and I was asked my opinion about it, and my immediate response was that I hadn't thought about it, and I thought it would be ridiculous to try to defeat the vote of the people who obviously voted to replace me with Tommy Brennan, and I had no intention of resigning. As a matter of fact, I not only stayed in office, but I literally stayed in office until Tommy was sworn in on the first of January, 1967, and when he came off the capitol steps and headed into my office, which was then his office, I handed him a key to his office and I said, "Good luck".

*Mr. Lane:*

The Capitol steps being where he was sworn in, right?

*Justice Smith:*

Yes.

*Mr. Lane:*

In the traditional January 1st ceremony?

*Justice Smith:*

Yes, I would not....

*(End of side 1, tape 2)*

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**Topic 4: Justice Smith talks about his method of writing decisions and the functioning of the court, writing decisions in the Fenestra case and in Berkaw vs. Mayflower Congregational Church, and his high prosecution rate in court decisions. He then discusses excusing himself from a case involving General Motors employees and begins to talk about the judicial selection process**

*Mr. Lane:*

...things that I wanted to test your memory on, but I guess this is the wrong issue to test it on was the instance where, in county apportionment problem...Do you remember, the Michigan constitution had provided that the supervisors who were key township officers, kind of executive for the township should, by virtue of their office, serve on the county board.

*Justice Smith:*

Yes.

*Mr. Lane:*

And so this introduced an alien kind of a consideration to the direct one man-one vote kind of a selection process, and gosh, maybe you should be glad that you weren't on the Court when this happened because what occurred eventually when the Supreme Court acted on challenges on the county apportionment was that in Kent and Muskegon, adjacent counties, the Court, by going 4:4, upheld the apportionment in one county and in the opposite county...

*Justice Smith:*

Oh, my goodness.

*Mr. Lane:*

You don't remember that?

*Justice Smith:*

No, I wasn't there, but I have a faint recollection that it was an issue about county apportionment, but I didn't follow it at the time. I started on my new career.

*Mr. Lane:*

Well, this might be a way...I'm going to ask you some questions about the people that you served with and in this instance, there was consternation when the Court, by dividing itself equally...there were two opposite results, two adjacent counties that were upheld because of the principle that the lower decision stands if the Court is divided, and in order that there should not be an even split, Gene Black had held off one of the votes so that it would be 4:4 in one case, and 4:3 in the other, and the next day, walked into the Clerk's office and demanded the original copy of the opinion and signed it to make it 4:4. Then Chief Justice Thomas Matthew Kavanagh almost blew up. He was...well, a lot of people were...

*Justice Smith:*

Who was that who signed it?

*Mr. Lane:*

Gene Black, and T.M. Kavanagh, Thomas Matthew Kavanagh...I can remember meeting him in the corridor up there, and he called this preposterous...not a usual word for him, and he said, "You can quote me!"

*Justice Smith:*

Tom Kavanagh?

*Mr. Lane:*

This is Thomas Matthew Kavanagh, yes. Well, one of the other things about your service on the Court that I wanted to ask you about. I've skimmed through some of the work that you did, and I thought I noticed some things of significance that I wanted to ask you about, whether they were conscious or whether my impression was right or wrong. One of them was that I think that you had what I'll call a distinctive style of handling an opinion, and it was characterized by being very low key. You weren't much on adjectives. You would immediately identify one, two or three issues, discuss them concisely, with brevity, cut it off, and if necessary, you would say, "Having decided issue #1, the other issues need not be addressed. The Court orders thus and so". Now, did you have a model in your mind that you wanted to adhere closely to in the production of an opinion when it fell to you to write the opinion?

*Justice Smith:*

Yes, I had an idea in mind, and my idea was the Brandeis method which was something I could never perfect, but I always remembered two things in writing, three things...The first thing is that you've got to learn very early that the limitations on review. Everything that comes up to the Court has some limit on it, either a judicially imposed limitation on review or legislatively imposed limitation on review. What do you do when you're reviewing a decision of the Worker's Compensation Appeal Board? There's a standard of review there. What do you do if you're reviewing what used to be called "equity" case, an old Chancery case. It's de novo...used to be de novo. In cases involving simple law suits, you were looking at assignments of error. Unemployment compensation cases, another standard of review coming from the Appeal Board, so the first thing you'd learn is that there is limitation on review, and a good conscientious judge may have all kinds of feelings about the subject matter, but you look at your review limits, #1. Number 2 is something that I had to learn the hard way because I was so awfully afraid of hurting somebody by being mistaken, that I used to just worry, worry, worry over decisions, and realizing that they're going to be used as precedents, perhaps for many years to come, that I would just work and work and work until I would get myself into a frazzle in my first year or so on the Court. To tell you the truth, I wasn't very productive and record will show that...but not my first year or two, no. You don't want to confuse me with Talbot Smith because I succeeded him and because his name was Smith, very often people would look at his work which is quite distinctive from mine...Talbot was an exquisite, highly stylized legal writer. I wrote plainly because, as I said, never...I read something that Brandeis said, "Never consider that you have fashioned the immanent rule which is the living rule beyond which no other rule can even approach. The burden is yet to be born", so you do your very best with what you've got, #2, and the third thing is that you seek clarity, having been exposed to journalism at Syracuse and having started out life to be a journalist, I thought I would not like to write long, compound, complex sentences, that I would write shorter sentences and strive for clarity and simplicity because, to use another Brandeis quote, "When we get cute, somebody gets hurt", and I was keenly aware that people who wrote in a highly stylized fashion, unless you happened to have been somebody like Cardoza who could write and did write in the grand style, as we call it, the ordinary judge just didn't have that kind of talent, so what you wanted to do was to decide the case, decide it as simply as possible so that the lawyers and judges who've got to follow it are looking at

something fairly simple, and just fitted for that occasion, something that they can interpret and apply with a minimum of effort. The ringing phrase is the highly stylized adjectives to screw up the works and make it difficult to fall. You're right. I try to write plainly. Another thing I would do in very big cases, and I'm thinking about the Fenestra case, and a few others I wrote that were very, very big cases, had huge records, took an awful long time to wade through a thirteen week trial record...on the big cases, I would set out the various segments of the opinion...facts, and I would confine my statement on facts to the section marked "Statement of Facts". I would take up the issues, and I would label the head of that section...this is...whatever the issue was, legal issue, and I would confine my discussion of that legal issue to that section for clarity's sake, simplicity's sake, and that's what I followed.

*Mr. Lane:*

Now, I found as I rifled through, I thought, an astonishing succession of cases where you were the author of the case. Now, I'm talking about your cases in that sense, and they were unanimous or maybe with a concurrence by Black or something like that. I'm trying to focus on the unanimity, the bringing together of the members of the Court where there were very serious divisions at times, and yet, when you, and I'm asking you if my observation is true, and if so, whether you strove to make it this way, that when you got a case, and even, I think the Fenestra case was one where everybody went along...now, I'll have to check that out, but did you consciously, in your service on the Supreme Court, conduct yourself in some way to bring this about when, in a lot of other cases that you did not handle, there were sharp and bitter and rancorous divisions.

*Justice Smith:*

Well, I really didn't change who I was, but I heard several of my colleagues say early in my service on the Court that what you're here for is to give your individual judgement, and I didn't agree with that, as I told you. I think we were there to make decisions by unanimous, if possible, vote, but certainly by majority vote, and so I wrote to reflect my own view of the law, but also to reflect whatever inputs I could get from others who might discuss it, but I never asked anybody to join me in an opinion. I don't think anybody ever did around there, when I was there. There was no politicking that I knew of on opinions. You'd write your material and send it around, and if they had anything to say about it, sometimes, they would. They'd say, "Well, I don't like what you're saying here, and I can sign that if you want to restate that a different way". You look at it and decide if that is a better statement of the law than what you have given, and if you think that it is, you would change it. If you think that what you said is what you really wanted to say, you'd leave it that way, and that person would then decide whether they wanted to sign it or write a separate concurring, or as a last resort, concurring in result without opinion.

*Mr. Lane:*

I'm thinking back as I ask you this question to the way of operating that you described on the Public Service Commission with Tom Burns where you would exchange your thoughts and you would be very receptive to what he thought, and before you ever, I guess, started to get into

writing an opinion phase, you had a large degree of harmony between you. Now, did you carry this over consciously? Did you work at it when you were on the Supreme Court?

*Justice Smith:*

I'd like to think that I did, but I don't think that I really did on the Supreme Court. There wasn't that kind of atmosphere. The PSC, Public Service Commission was three people, three commissioners, and there were so few and we were so close together geographically and every other way that it was much easier to do it there, because we were all operating, working in Lansing, right down in the corner of the building on the fifth floor of the Cass Building with adjoining offices, and we very often went to lunch together, so it was easy to work in great harmony, close harmony there because of the arrangement and also because of the personalities involved, Tommy Burns and me, for example. But on the Court...you remember that Justice Black worked out of his home in Port Huron. Justice Souris worked out of an office in Detroit College of Law in Detroit. Let me see...Judge Carr and Judge Dethmers were there as was Justice Adams and Justice O'Hara when he was elected to the Court in 1962, and came on in 1963, moved from the U.P. down to Lansing. Justice Kelly worked out of his home in Gaylord, so there wasn't a physical proximity. A lot of stuff was done by phone and by memo, so we didn't have the same physical location of the offices, but...

*Mr. Lane:*

Do you think that perhaps by writing in a very spare style and deliberately excluding as far as you could gratuitous observations and pointed comment, did this make your opinions easier for somebody else...?

*Justice Smith:*

I think that's true. I think that's true, and that's why I did it. I did it for several reasons. One is, of course, that I wanted to make it easy for lawyers and judges to read, but I knew from working in the Court that when a justice decided to write in a colorful style, try to write the grand style, that we would always say something that somebody wouldn't like, that might agree with the ultimate decision, but they didn't like this humorous phraseology or this biting comment about somebody or something in the case, and it was usually not necessary.

*Mr. Lane:*

You would deliberately and resolutely abstain from this, did you not? This is maybe what I'm trying to say?

*Justice Smith:*

Most of the time. I think once or twice when I got a little perturbed at one of the justices who wrote something that I thought was...

*Mr. Lane:*

Excuse me...take, for an example, the case you mentioned. Here's the Fenestra case. This, as you said a moment ago, was a blockbuster. This was a big lawsuit where there had been, in effect, a take over, had there not...the kind of stuff that you read about in recent years in Wall Street. Gulf American had come in and, as I remember, bought up control of Fenestra, is that right?

*Justice Smith:*

Yes. They bought effective control.

*Mr. Lane:*

And then the people who felt disadvantaged in Fenestra case went to court to contest this, and as you said, there was a long trial.

*Justice Smith:*

Thirteen weeks of trial.

*Mr. Lane:*

Who tried the case?

*Justice Smith:*

Judge Piggins in Wayne County.

*Mr. Lane:*

It must have been well tried?

*Justice Smith:*

Oh, yes. The only thing is the conclusion was wrong.

*Mr. Lane:*

Here is a case that was loaded with important financial implications that really took...where an outsider came into Michigan and took control of a Michigan firm and all that sort of thing...this was a unanimous decision, was it not, and if so, how did it get to be that way? Do you remember what the...?

*Justice Smith:*

Yes, I think at that time, it was said to be the biggest case ever to come through the Court in terms of court cost which was assessed to the parties. All I know is that I spent the whole summer on that case, two months of the summer working on that case. The record was six feet high, almost, exhibits and also transcripts.

*Mr. Lane:*

As you worked on the case, would you perhaps, knowing that you were coming to a touchy part of it, would you perhaps make a phone call or go over into somebody's office and say, "I want to handle this in a way that we're not going to get hung up on this thing. How would it strike you if we do this...?"

*Justice Smith:*

Well, you know, the thing is that it was such a big case and a complicated case that essentially, it fell under the heading of a case that nobody wanted to tussle with until you had written your

opinion, and I might say..I think I mentioned this, but I wrote my own stuff, except for maybe two or three paragraphs in al of my opinions. I wrote all my own stuff. Dethmers did that, and Carr did it, and one or two others did it. I think others might have used their clerks more actively than some of the other of us did. I just didn't feel that I could really understand the case and all the nuances and fact of the law except by writing it myself. I'll tell you frankly after studying a tough case, I often would finish reading all of the material; I didn't know what I was going to do until I put pen to paper and started writing a statement of facts.

*Mr. Lane:*

Would you write it long hand on a yellow lawyers' papers?

*Justice Smith:*

Oh, yes. I couldn't dictate it. I had to deal with it word by word to get the familiarity with it. I'm not a facile writer, so I couldn't just stand up and tell my secretary and dictate off the top of my head.

*Mr. Lane:*

At this time, did any of the justices use dictating equipment to any extent?

*Justice Smith:*

Yes, some did and some didn't. Dethmers, who was a very able writer, and he belonged to an organization of scribes, as they were called, legal writers, and Dethmers had a great touch in writing very difficult matters in minimum space. He had a way of writing sparingly and going to the issue. He was a master of that, and he wrote all of them out longhand on yellow pads. He didn't even use a law clerk at that time. I asked him, "Why don't you have a clerk?", and he said, "Oh, they get in my way.". He'd do his own research.

*Mr. Lane:*

That's pretty good discipline, is it not, when you have to take your pen and make each word?

*Justice Smith:*

Yes, when you're the one who is responsible for every word...you see, it's always possible if you decide where the appellent or the appellee is to more or less adopt the statement of facts on the winning side. Some people did that.

*Mr. Lane:*

Well, you'll find that in the reports with some frequency, won't you?

*Justice Smith:*

Yes, I didn't think I would have the familiarity with it to be able to deal with except by writing it, and you write the statement of facts, and you're examining every word, and you are writing it as colorless as you possibly can, as neutrally as you possibly can, and then as you come to write it, little things that you've been troubled by come to you as being decisive of the way the law is supposed to be applied because of the way the facts have come out, and that's how I gained familiarity with the case is through writing the statement of the facts, and then I would write the

issues and by that time, with all the law around me, I knew what was triggered by the facts, and I would go and write the issues and then resolve it.

*Mr. Lane:*

Here's another really big complicated, touchy case that you wrote and it came out unanimous, Berkaw vs. Mayflower Congregational Church.

*Justice Smith:*

Oh, yes.

*Mr. Lane:*

How about that one? Here again, you went against the tide in the result, did you not?

*Justice Smith:*

Yes.

*Mr. Lane:*

As you had in the other case. The relief that was sought in the appeal was...well, the case was turned over...the Supreme Court of Michigan overturned a lower result, is what I'm trying to say. Now, that's the toughest, is it not, to get everybody to go along with putting a finger in the eye of the judge down below, some of whom you know where there's a personal acquaintance and all that? Did you work hard at this one, too, to achieve a...?

*Justice Smith:*

I really didn't worry about what was going to happen, either in the Fenestra or the Berkaw. I wrote it, as I say, as clearly or as plainly as I could. I must say, going back, making among the final comment on the Fenestra case, that when I finally finished that animal, that opinion, and we had a conference day and the Chief Justice called for Fenestra case, and the typical way was for the Chief to call for it, and the usual thing is if it were a tough case, some justices said, "Well, I want to hold that another month. I've got some things I've got to resolve. I'm sorry, but I just want to hold that.", and it would be passed. So, the typical question from the Chief was, "Okay, Fenestra", and there was a pause to wait for some justice to say he wanted to hold it and in the Fenestra, I remember so clearly, nobody said anything, and I was really surprised because I knew it was a big case, and I could have understood if somebody had done differently, but nobody said anything. So the Chief said, "Okay, Otis, I guess you'd better circulate it", so I signed it and sent the white around, the white copy around...

*Mr. Lane:*

The record copy.

*Justice Smith:*

The record copy. It went around, and of course, everybody signed it. I think Justice Black concurred in the result.

*Mr. Lane:*

Now, the result, by the way, there was, as to the recovery that the people from, the aggrieved party from Fenestra wanted...it was premature, was it not, to grant relief on that?

*Justice Smith:*

Yes, no matter how many fairs and punches and threats that were made, they really hadn't done anything to deserve the complete reversal of the case and the requirement that they, the party who had come from the outside dispose of all their assets, turn them over. I think they owned about 25%, something like that, maybe a little bit more, effectively had control, but they really hadn't done anything to deserve that, I wrote to reverse, and of course, the Court agreed with me. In the Berkaw...the Berkaw was fascinating because it involved a religious organization.

*Mr. Lane:*

Just in a nutshell, would you, for the benefit of the...

*Justice Smith:*

Well, the Berkaw case involved the famous issue of departure. The U.S. Supreme Court ruled way back, I believe, in the early 1800's that the courts couldn't tinker around with the matter of faith and beliefs of a church.

*Mr. Lane:*

Of a denomination...

*Justice Smith:*

Yes. All they could do was to test whether there was a departure from the tenets of the faith that the building had been or property had been dedicated to, and if it found that there was no departure in the organization or reorganization of a church, they couldn't touch it, and only then could they touch the property, disposition of property and so would follow the faith and beliefs of people who had established the church. In the Berkaw case, it had to do with many of the merges that occurred in the Protestant church in the U.S. after World War II. This involved the merger of the Congregational Church and the Evangelical and Reform into what is now called the United Church of Christ, and the case had been...a case similar to this had been heard and decided in New York and also in Arizona, and I think in Ohio, as I remember. It came up in the case of the Mayflower Congregational Church up here in the northwest part of Detroit, and the case was tried in the Wayne Circuit, and the doctrine of collateral estoppel was invoked which is to say this case has already been decided. The essential issues were before the Court, and the parties, in effect were before the Court in another case which was decided previously. In this case, it was Parks Memorial Church...Cadman Memorial Church in New York, and that decision was followed in Ohio and Arizona, as I remember it. That held...the cases that were decided following the Cadman Memorial case in New York, interpreted the New York case as having decided the issue of departure, and the truth is, they hadn't. They misread it, and they misread it because of the way...

*Mr. Lane:*

Decided in the negative?

*Justice Smith:*

Yes. They decided that there had been no departure, that what the Court was dealing with here is what the Court, not in New York which took up the issues...presumed to take up the issues but didn't...the way it was written was confusing in the Court of Appeals New York case, but in Arizona and I think in Ohio, they were reading the Cadman Memorial case for something it didn't say, and the only reason I got onto them was that in referring to the seminal case that tells you you'll end it up in review, it said in the Cadman case in New York, Cf. (confer), the old latin for "look at it". Everybody thought in Arizona and Ohio that that meant they were relying on it, and it was the law. They were saying, look at that review and be edified about what you read in that, but it was not the authority, and when I went back into reading the New York case, the Cadman case, a long opinion that was written by the trial judge in New York Supreme Court Trial Division and the equally long opinion that was written by the Appellate judge in the Appellate Division of the New York Supreme Court, it was clear that they had decided somewhat peripheral issues about pensions and trusts and things of that kind, but they had never really taken up the issue of departure. I said, "No, no, no. You've followed up the wrong thing", and I wrote to reverse the Michigan Court of Appeals, and I guess my colleagues on the Court found it was satisfactory, and they all voted for it.

*Mr. Lane:*

There was another aspect of your work that ties in here. You, it seemed to me, had a prodigious product. You wrote an unusual number of cases. I counted them up, and by referring to this Westlaw printout, and I say that just because of the notation that I'm using. On the left hand column, it recites the year of the publication of the report that contains the case. I counted up and I found that under 1963, you wrote 39 opinions. You're credited with that by Westlaw, anyway.

*Justice Smith:*

Is that right?

*Mr. Lane:*

And the output of the Court, in at least comparatively recent years, has been right around 110 or 120 cases, opinion cases. Now, it's true that, to my observation, many of the cases that you held are three or four pages, or five pages in the reports, but I think of that as testimony more to your method than to the fact that it was a two-bit case. What have you got to say about this?

*Justice Smith:*

Well, I think if you compare me or any other justice of my time with the justices of this time, you will find that we were all much more productive in the writing of opinions, and the simple reason is first of all, we had to, because there was no intermediate Appellate Court for at least about half the time I was on the Court. We were doing around 300 opinions a year on the Michigan Supreme Court.

*Mr. Lane:*

Were you?

*Justice Smith:*

Yes, and so I was probably, in terms of absolute numbers, I probably was the least productive.

*Mr. Lane:*

Holy mackerel.

*Justice Smith:*

I had a review of this done by my clerk in 1966 as I was approaching the election and I thought I'd be accountable for my work on the Court, and he found that of the 800 some odd cases that we had decided, I had written 108 opinions total from the time I was on the Court. He also found that several things... one is that in about 83%, as I remember, of the cases that were decided by the Court during my time on the Court, the decisions were unanimous.

*Mr. Lane:*

Is that right?

*Justice Smith:*

Oh, yes, and I remember there were about 11% that were splits of every kind, and only in about 6% of them were there the kinds of splits that the press often called partisan splits, over apportionment, over personal injury law, over the motion of practice, summary judgement practice and things of that kind where judicial philosophy may have followed to some extent political philosophy, but that was a very minimal number of cases that were what the papers called partisan dissents where all the Democrats wound up on one side and the Republicans on the other.

*Mr. Lane:*

Do you think you still have in that possession that analysis that was done by the clerk for you at that time? This would be an interesting historical document, I think.

*Justice Smith:*

I don't know.

*Mr. Lane:*

Do you have much of what he produced in those days other than what's in the reports? Do you save your memorandums?

*Justice Smith:*

I used to have it, but the 25 years or so since I was there...I'd look for it. I would have it in two places. I surely don't have it easily available....

*Mr. Lane:*

On a longer term basis, I would encourage, if I may, to consider whether, if this is lying around somewhere, and here is a repository for it.

*Justice Smith:*

One other thing that my clerk, Mike Stafford, who is a lawyer in Lansing, found is that I had the highest persuasion rate of any of the justices in terms of the percentage of the cases that I wrote that became majority view. I was in the 80% group, and I think the next justice was in with 77%, both of which are pretty good, and I analyze that this way. You could say, here's a guy who really is overwhelming his colleagues. That wasn't true. I think for reasons we already discussed, I probably picked up votes because I didn't write with any particular personality, flare or color, didn't want to, and also that made it easier for the judges to agree with you. The other thing was that I think, although I used to consider myself a kind of a leading liberal, I think as it turned out, when I came to face issues, that I probably wound up in the middle of the Court. I was neither conservative...I was probably more liberal than I was...I'm sure people would say that, but I was more kind of a moderate liberal, I guess. If you focus on that, and you think you're going to build a reputation that way, you're going to be a bad judge. What you've got to do is call them as you see them and let the chips fall where they may, and then you find out later on what you are by what you've...

*Mr. Lane:*

What you've done.

*Justice Smith:*

What you've done, and then you say, "Oh, was I liberal. Well, I must have been, or was I moderate liberal, or whatever". I think that I satisfied myself that the reason I had a persuasion rate that high was because I probably philosophically fell somewhere towards the middle of the court, rather than on the left, so to speak.

*Mr. Lane:*

Do you remember the case...I'm sure you do, where there was a dispute involving some 5,000 Flint auto workers. I think the name of the case was Stinson. There had been a strike in Ohio. These fellows were thrown out. Remember that?

*Justice Smith:*

Yes.

*Mr. Lane:*

Okay. Part of it that I want to really have you recall is you disqualified yourself first time around because you had ownership, and there were two others on the Court disqualified.

*Justice Smith:*

Souris.

*Mr. Lane:*

Souris, and Adams had been as Attorney General, involved in the thing, and he disqualified for that reason, I think. Do you recall what happened there?

*Justice Smith:*

I think at that time, we were thinking in absolute terms. If you had any interest at all, and I had a nine shares.

*Mr. Lane:*

Was it eight. I thought you told me eight one time, but you said under ten.

*Justice Smith:*

Yes. When I was at Public Service Commission, I became interested in stocks for the first time in my life, really interested, because I had so much to do with it in rate cases, dealing with the rates of return, and so I was looking at stock. I remember buying some Dupont after the first opinion was announced in the Dupont case requiring Dupont to divest itself of the 23% interest it held in General Motors, and I remember all the caterwauling about that will destroy not only Dupont and General Motors, but that decision will destroy the stock market. I said, "Oh, boy. That's overstated". To make a long story short, I bird dogged the Dupont stock as it fell from middle 250's, 200 dollars/share down to about 168 dollars/share, and it started back up, and I grabbed off 10 whole shares for \$174.50 a share, and when the divestiture became final, I not only was able to sell my Dupont, as I think for something like \$230.00/share but in the divestiture, I got almost a share of GM for every share of Dupont I had owned, and at the time, I was holding nine...eight or nine shares of GM, and the thinking was that if you had a stock interest in a major corporation, you wouldn't participate in its cases.

*Mr. Lane:*

Well, the canons were quite explicit on that, were they not?

*Justice Smith:*

I don't think they were at that time. It had to do with an interest. What we did was we applied the Federal Court rule on rehearing.

*Justice Smith:*

It came up...it was 3:2, something like that, ridiculous.

*Mr. Lane:*

What happened was, there were three people who disqualified themselves, all were felt by Zwerdling, remember A.L. Zwerdling thought that he would have been the winner if you three did not vote, so it came out actually 3:2 and you had Dethmers, Carr and somebody else carried the day, and he lost, and so he hit the ceiling and made a lot of waves.

*Justice Smith:*

We had a rehearing on that, didn't we?

*Mr. Lane:*

You went back and changed the rules. The way it happened, as I recall, and you correct me if I'm

wrong, was that he asked for a rehearing, and it was denied, but then the Court, on its own motion, changed its canons that applied to Michigan. Then...sua sponte, I think, with Souris leading the charge, you entertained a rehearing without...on your own motion, so to speak. I don't know what happened. Do you remember what happened in the case?

*Justice Smith:*

No, I don't. I think we had a new vote on it, but the final results ought to be in the reports. I'm sure it is. I remember discussing the rule change. The way we had regarded it, the three of us, was too severe, for blocking us from deciding cases in which major corporations are listed with millions and millions of shares.

*Mr. Lane:*

288 millions at General Motors.

*Justice Smith:*

Is that what it was?

*Mr. Lane:*

I think so, and you had eight or whatever it was.

*Justice Smith:*

We looked for guidance, and I think we found it in the Federal rules about if stock is listed on a stock exchange, some percentage, a very small percentage...if you have less than that, you are qualified to participate in a decision affecting the fortunes, if you will, of that corporation.

*Mr. Lane:*

I wanted to bring up the matter of the selection process on the Supreme Court which has come under criticism for many years and for many people. At one time, Gene Black got pretty shrill, as did my words about this, and he not only criticized the way the Court was constituted, the make up, the manner of choosing, selection of Supreme Court justices, but he also criticized the matter of choosing within the Court a Chief Justice. What are your thoughts on this subject?

*Justice Smith:*

Well, I have done a couple 180 degree turns on this one over my forty years as a lawyer, starting out believing devoutly in the Federal system, having become acquainted with Federal judges over the years who were appointed, of course, and then having become acquainted with State judges, very often, who were elected, not only here, but in most other places around the country, and I guess my thinking was, for a long time, that both systems produced very good judges and very poor judges, and I came out kind of a Jeffersonian resolution of it, and said, "Well, if you follow the philosophy of Jefferson as much as you can, you make people in high public office accountable to the voters". My, I hope, final thoughts on it run something like this...I think that a fusion of the two probably produces the best system. I don't particularly go for the Missouri Appointment Commission is the standard by which many of these are based, simply because I think the intense politics would be played out in the Commission in a different way within the Commission itself. There being no better way that I can think of to do it, I would leave it up to the Governor to make the appointments. I like the California system, I'll say that. Let the

Governor make the appointments to major courts, and then to cut down on the campaign budgets and cut down on the politics, leave it to the people as in the California system to vote every six or eight years on whether they want to retain the judge. I like the thought of having judges who wield so much power in our system...

*(End of side 2, tape 2)*

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**Topic 5: Justice Smith continues to talk about the judicial selection process and relates it to the U.S. Supreme Court hearings for David Souter at the time. He then discusses the Mallory case concerning the right to counsel, his experience with criminal cases, memorable custody cases, the case of People vs. Lochriccio, and a Township of Pittsfield case concerning zoning. He also discusses his colleagues and their geographic dispersal, the selection of Chief Justice, the personality of Justice Gene Black, and racial classification in the United States**

*Mr. Lane:*

Here we are again on the matter of judicial selection. What about the election, the original election in Michigan? Do you approve of that? The theory is that....

*Justice Smith:*

I don't anymore. I think the best way to get a Supreme Court is to have them appointed by the Governor, and then have them, as they do in California, run against their record, so to speak about every six or eight years..."Shall Justice 'X' be retained?"...not have a live opponent. Essentially, that means that they are untouched by partisan politics unless that do something which, in the public mind, is so grievous over a period of time that it makes for a good campaign issue by groups or the media or combination of both who exploit that position of the person so much so that it becomes in the minds of the voters something that they don't favor. Now, there are people who say, "Well, the trouble with that is that you're always subject to the whim of some group or to the press". Well, I think the people have pretty good sense. They can be misled and are misled from time to time, but by and large, they figure things out pretty well. They may arrive at the right decision for the wrong reason, but they can dope it out because essentially, the press is free, and the ideas are free and people are naturally suspicious of any kind of campaign. They want to know who is behind it, and usually opposition exposes that, so I'm comfortable with leaving it to the people just on the question of whether the justices should be retained. I guess I wouldn't undo the Federal system and make it like that for the simple reason that the Federal judges usually cover wider areas and trying to get campaigns together, I think, would be very difficult, so I guess I'm a pragmatist, essentially, and if it works, leave it alone. But so far as the State system is concerned, I like the way they do the Appellate Courts, appointment of Appellate Courts in California.

*Mr. Lane:*

It's interesting. In the Appellate Court system in Michigan, if I am not mistaken, there has never been an incumbent defeated.

*Justice Smith:*

I don't believe so, except the Supreme Court.

*Mr. Lane:*

In a Court of Appeals, I meant. On the Supreme Court, of course, we have had some...

*Justice Smith:*

Lots of defeats.

*Mr. Lane:*

Well, quite a few, and a lot of them have been...well, now in your case, it's pretty tough in this state to run against a Brennan.

*Justice Smith:*

Oh, good God, what a good Irish name...

*Mr. Lane:*

A Riley, a Kavanagh...

*Justice Smith:*

Fitzgerald.

*Mr. Lane:*

Well, yes.

*Justice Smith:*

You know the history of the Michigan Supreme Court. Harry Kelly took on Clark Adams in 1953 and beat him. Mike O'Hara took on Paul Adams in 1962 and beat him. Thomas Giles Kavanagh took on Mike O'Hara. That was interesting, in 1966, I think it was, and beat him.

*Mr. Lane:*

1968.

*Justice Smith:*

It was 1968?

*Mr. Lane:*

Yes.

*Justice Smith:*

And there have been...well, Dorothy Riley took on Thomas Giles and beat him, you know.

*Mr. Lane:*

Well, that was a pretty unusual set of circumstances that was, I think in the voters' mind, in that case...would you not think so?

*Justice Smith:*

Yes.

*Mr. Lane:*

What went on...

*Justice Smith:*

I think they just felt she got a raw deal.

*Mr. Lane:*

Well, and do you realize that when she ran, the year of her appointment, two or three months or several weeks before her appointment was announced, she had run within, I think, 10,000 or 15,000 of Mike Kavanagh in a state-wide race.

*Justice Smith:*

Yes.

*Mr. Lane:*

The idea that several people have expressed is that there is something radically wrong with the proposition that you are nominated one day by a political convention and the next day and from then on, you're non-partisan. That's pretty hard to...

*Justice Smith:*

I prefer not to do it that way. Given the power of decision on that particular one, I would opt in favor of doing it a better way, I would think, and I think from all the ways I've seen it alternatively, I could go with the peer appointment for life. I am enough of a Jeffersonian that when it is practical to get the voice of the people in it, I would do that, and I think I like, of all the systems I've seen in the states, I like the California system best.

*Mr. Lane:*

If you were in a position of Judge Souter at the time that he was tapped for the Supreme Court, knowing what was ahead, would you have accepted the ordeal of...?

*Justice Smith:*

Oh, sure.

*Mr. Lane:*

Would you?

*Justice Smith:*

Yes.

*Mr. Lane:*

That's pretty tough, though.

*Justice Smith:*

Well, I don't know. He was a smart guy. He did it just exactly right. My impression is that Justice Souter is Justice Souter, and he is bright enough, and I think he outsmarted everybody. He outsmarted the President, who I think was hoping that he would be more right-wing conservative than he actually turned out to be. I think the other people who were hoping for that were disappointed. He essentially, in a very careful and almost crafty way, he spoke his mind. He let people know...

*Mr. Lane:*

Up to a point.

*Justice Smith:*

Up to a point, yes, and he flagged out on the ones that were of the high political moment where they wanted to get into abortion or something like that, but he did answer the question that he thought implicit in the constitution of the United States had a right of privacy in it which, of course, is the foundation of the Roe-Wade case, so he reveals something of himself, but he wouldn't get into a discussion of Roe vs. Wade, and I wouldn't either. If I had been smart enough, I would have had it just the way he did.

*Mr. Lane:*

He knew when to end a sentence, didn't he?

*Justice Smith:*

Yes, he certainly did.

*Mr. Lane:*

I wanted to ask a question about late in your service, there came a bunch of cases relating to the provision of counsel which has been a thorny proposition for many years. One time, as I recall, did not the Supreme Court during your period of service, extend the right to counsel to misdemeanants?

*Justice Smith:*

Yes.

*Mr. Lane:*

And then it pulled back, right? Was that not true that it...?

*Justice Smith:*

I don't think when I was there, it did. It may have, but I don't recall if it did.

*Mr. Lane:*

I was going to ask you about the Mallory case which I thought was during your period, and that was where some fellow wound up in prison for a parole violation. I think there were several of these cases together, and he wanted counsel on appeal, and he started out as a misdemeanor conviction, and the Court held that under the circumstances of this fellow, that he was in prison and he wanted to get out, that the misdemeanor was at the root of it, that misdemeanants should be afforded counsel. I just wondered where you think we are now. Is this issue under control? There is an initiative that just went through the legislature. I didn't even know about this. Justice Swainson pointed it out to me, and it provides...it has to do with the abortion controversy, and it now provides, it's a law of Michigan effective next April, that if a female minor under 18 should become pregnant and want an abortion and be unwilling or unable to get parental consent, that she could then have a right to go to court. The initiative provides a lot of stuff, but one of the things is that she shall be provided counsel. If she is dissatisfied with the result, she will be provided further counsel for an appeal. Is this within the....we had paternity cases, the same thing. Counsel is provided. Where does this end? Is this good or bad or what?

*Justice Smith:*

Well, you know, if you take the principle that when you have legal rights to be vindicated, that you need a lawyer to help you vindicate your rights, and you follow that right on down through to the nth degree, I think you can get pretty absurd about it. I think that principle can be and it should become a pragmatism. There are no absolutes that I know of anyplace, anywhere. There are temporal truths that we operate under, and they look like absolutes, but they are always subject to test application and if they don't work out in some agreeable way, they should be changed. I think you can take it so far and you can really run it in the ground. Clearly, when major rights are at stake, they ought to be some help if a person is truly indigent. If they have to pay for it on time, and they can afford to, they ought to be allowed to hire their own counselor and pay for it. If they're truly indigent and the rights to be vindicated are major, that have a great lot to do with health, welfare, freedom, I don't have any problem with providing counsel, but I wouldn't provide counsel, I don't think, in an assault and battery case, for example, a whole bunch of...where, you know, you're looking at ninety days and the system sort of takes care of it. I don't think I would burden the taxpayers with the responsibility of always providing counsel in everything that appears for a case. Even where people are indigent, I think that there are ways of addressing that. We have, of course, Legal Aid defendant systems in place in many places. We have a bar that usually is willing, in most cases, to provide counsel where nothing else is available. The Bar Association was doing that long before they had Legal Aid defend the lawyers. The County Bar Association had legal aid committees that provided an awful lot of free services. I remember that. That Legal Aid defender thing took off in the middle 50's when I started practicing. The Bar Association thought it was its responsibility to provide counsel. They didn't cover it as well as they do now, but they...

*Mr. Lane:*

When you were practicing in Flint, could you find yourself in a courtroom with a judge sitting up there and saying, "Mr. Smith, will you approach the bench please. This man needs counsel. I

want you to take him out there and give him some assistance. He is charged with assault and battery" or something. Did you ever encounter that?

*Justice Smith:*

I was sworn in on a Monday, and on Tuesday, I was appointed to defend a person who was in jail, in my absence, I was appointed. On Wednesday morning, I had to face the jury. Yes, I had a lot of that happen to me, sure.

*Mr. Lane:*

Was this a good thing or not?

*Justice Smith:*

Well, the way I saw it function in Flint at that time, it worked out all right.

*Mr. Lane:*

Do you remember somebody...didn't somebody give T. John an appointment like that under highly charged circumstances, and T. John said...this was a punitive appointment, I think. I don't remember.

*Justice Smith:*

Well, you wouldn't take a commercial lawyer and put him on a murder case. No, you'd put somebody who knows a murder case.

*Mr. Lane:*

That brings me to something else. As I skimmed through your...what do I call it? Work product?

*Justice Smith:*

I suppose, yes.

*Mr. Lane:*

Okay. I didn't see hardly any criminal cases. Was that because of the luck of the draw or was there some way that these wound up with somebody else when you were on the Court?

*Justice Smith:*

I think it was mostly luck of the draw, I suppose, unless something happened behind my back I didn't know. I participated in all the criminal cases, obviously, and there is a small story in that, too. That is that I found out I had limits on what I was willing to do for criminals. I remember a guy whose name was something like Vishnesky (sic) who was a lifer at Marquette. This guy was a very bright guy, and he could write some of the most beguiling applications for habeas corpus ad testificandum you know, and as soon as the Court would dispose of one, he would have another ready, and they were well-written, and they were teases because he'd always say, "Well, you know, you didn't really consider this, so let me give you a new issue to chew on". I became acutely aware of Mr. Vishnesky always on the Court, and I took the trouble to check and found

out that before I had arrived on the Court, he had petitioned the Court seven or eight times unsuccessfully, and while I was on the Court, he was petitioning about every time we disposed of one, there was another coming. I think about the third or fourth one before the Court during my time, I said to my colleagues, "I'm going to tell you something. I have given Mr. Vishnesky all the due process I'm going to give him. I'm not going to take my time away from other cases to go through some craftily worded petition. If he hasn't been able to convince us in ten to twelve times, I just assume that he can't. He's had his due process with me so from now, the answer so far as I'm concerned is 'No.'" I did that a couple times while I was there. Or we had a case in Detroit here involving replevin action for some guy who was an obvious fence, and we got all wound up in high principle on that. I said, "Pragmatically, I'm going to tell you, fellows. I'm not going to put him back in the business of being a fence. I'm going to replevin action". I voted with the lower court, and by 4:4 split decision, somebody was allowed to replevin all that four or five dozen new tires and clock radios by the dozens and all kinds of stuff that he had in his possession that was actually discovered because the cops suspected he was a fence, and they waited for the opportunity one night when he was opening the door to let somebody in with a whole bunch of stuff, and they could see, they said, from the outside that his whole room was filled with shelves, and it was the store. This was actually a private home. I said, "Oh, no. No, no, no. I know what the principle is. I understand it probably better than you do" because I really had had more criminal experience than anybody there.

*Mr. Lane:*

Oh, had you.

*Justice Smith:*

Oh, definitely.

*Mr. Lane:*

I didn't know that.

*Justice Smith:*

I had been Assistant Prosecutor.

*Mr. Lane:*

That's right.

*Justice Smith:*

But also, I'd done a lot of defense work. If you check the Flint Genessee County Legal News in the fall of 1955, I had more felony cases pending as a defense lawyer than all the other bar combined.

*Mr. Lane:*

Is that true?

*Justice Smith:*

Oh, yes. I had a fair amount of criminal work.

*Mr. Lane:*

I didn't know that.

*Justice Smith:*

I finally got weary of it in the last several years of my practice there, and I just gave up most of it. I mean, when I was practicing, I used to do a good bit of it as a part of the general practice of law.

*Mr. Lane:*

Gee, I didn't know that.

*Justice Smith:*

So I was familiar with the rights of the accused, and I thought they ought to be protected, but I thought, again, apply common sense to it. My judgement was a number of the cases that we had probably gone overboard a little bit.

*Mr. Lane:*

In your time, were the cases drawn by lot or was there assignment by the Chief Justice, or how was that done?

*Justice Smith:*

Well, the Clerk of the Court was to do it in absolute rotation. When the briefs and records were filed in the Court, he was required to put the number of the Justice on it. If you were Chief Justice, it would have been #1, and then in order of seniority, #2, 3, 4, 5, 6, 7, 8. So all the time I was there, I think I was either 8 or 7. I think I finally got to 6 because of...with Edwards leaving in the first two months I was there, and Adams coming on, and then Adams losing the election in 1962, and Mike O'Hara coming on, and then Carr leaving in 1963 and Paul Adams coming back on in 1964. I think I was 5 or 6 or something like that, my number was, but we were all assigned in absolute rotation. That didn't mean that you couldn't switch cases by agreement.

*Mr. Lane:*

That was Huey Carpenter...was Clerk then, was he or was it Don Winters?

*Justice Smith:*

Don Winter.

*Mr. Lane:*

And your number would come in rotation. If #4 got the last case, #5 would get the next one, is that it?

*Justice Smith:*

Yes, 6, 7, 8 and the back up to 1.

*Mr. Lane:*

When I was looking through this material, I was in the library, long comes Gene Krasicky. Do you remember Gene?

*Justice Smith:*

Eugene Krasicky, yes.

*Mr. Lane:*

I said, he had been on some of these cases. You'll see his name on as Assistant Attorney General, you know. I said, "Gene, what do you remember? Do any of these cases jump out at you?" He didn't help me very much, but what he marked is *Osius vs. Dingell*, and that was a parol trust by a babysitter on behalf of the child of the people that...she was an older woman. She became attached to the child and the family there where she babysat, and she got a couple hundred...does that ring any bells with you? Was that a case of significance in your view?

*Justice Smith:*

I remember *Osius vs. Dingell* by name, and I don't remember those facts. I remember *Mather* case that was a cause celeb. when I was on the Court. *Pearl Gene Hatmaker* case vs. somebody, and that was a bitter case that ran for years and years and years, and I drew the horror of writing the first opinion in that one, and that one was highly controversial. It had to do with what some people called the rights of the parents against the rights of children, asking for the clarification of the best interest of the child, what that really meant.

*Mr. Lane:*

And it's still being clarified, I think.

*Justice Smith:*

I'm sure it would be. I found out nothing can get the Justices stirred up more emotionally than a custody case.

*Mr. Lane:*

Well, you were a father of four sons?

*Justice Smith:*

Yes.

*Mr. Lane:*

You got stirred up, too, didn't you, on some of those?

*Justice Smith:*

Well, yes, I was stirred up, but I finally got angry. Some of them really got angry about what they considered opinions and beliefs that were either pro-parent or pro- children, and so we had some real, real emotional sessions over that, that *Hatmaker* case.

*Mr. Lane:*

Was that a custody case.

*Justice Smith:*

Well, it was actually...oh, briefly, it was a case of a young woman who was described as dull normal who came from up in Gratiot County way, and who had been married, divorced with two kids, and after the divorce from the first husband, she had come to live with a sister in the Detroit area, and she had first one and then two children out of wedlock, and the first child, she put out for adoption successfully, and the second child, when she had the child, she thought she wanted to adopt the child and while she was still recovering from childbirth in the hospital, she let the Michigan Children Aid Society keep the child temporarily, and then when she got out of the hospital, she started to think more about it and decided she wanted the child, and she pursued this for a very long time. She tried to get a chance to see the child, and the agency decided that it wasn't in the child's best interest or the parent's best interest to have her see the child. What really got complicated was that the agency had prospective adoptive parents for this child, and they kind of put the child on a loan. All this was without benefit of any legal proceeding at all, put the child on loan to the prospective adoptive parents who became very much attached to the child, and while the natural mother was trying to see the child and then ultimately in Court, trying to get the child back from the prospective adoptive parents, who fought it all the way along with the Children's Aid Society, it got to be a real..., and what they really did was the mother went back up north and got counsel from Saginaw, a couple brothers who were very, very determined lawyers and for eight years, they ran up and down the highway from Saginaw County to Washtenaw trying to get the baby back. Of course, by that time, the child is grown up, seven or eight years old, terrible thing, but of course, I wrote ultimately, when it came to the Court, to return the child to the mother, because she had shown she was capable. She had shown her interest. She was not neglectful, and so I didn't know what other thing you could do other than justify kidnapping, because it was almost a kidnapping. So, a couple Justices didn't think much of that, and I remember your papers, the old paper...the Free Press...no, you went with AP, but the Free Press...well, you were with the Free Press.

*Mr. Lane:*

Ultimately, yes.

*Justice Smith:*

They wrote a series of articles about the rights of children against the rights of parents. I don't think they liked my position because the way I wrote it, it was like they thought I favored the parental rights. I didn't have any kind of brief for that one way or the other. I thought the best interest of the child lay originally with the mother who was still there, and although there was traumatic kind of removal from the arms, so to speak, of the only parents she had known, that was occasioned by the fact that everybody fought it so damn long, but the referee in Probate Court in Washtenaw County decided originally the right way. He said there is no legal proceeding. It was only a year or fourteen months after the child had been put out to the agency for possible adoption. He said, "Nothing here. Give her back to the mother where she belongs". That was in the second year of the life of the child, as I remember, but everybody else was so determined to make this woman look terrible, said she was an unfit mother, she had married, and she got a guy that really loved her, offered to adopt the child, and he had adopted her other two

children. He was a very good husband, worked for the shop here, and they were doing fine, and she had recovered from a nervous breakdown that she had when they wouldn't give her the child back. It was an awful case. It was tough to decide, and it would have taken Solomon to decide that one. I suppose he would decide it the same way.

*Mr. Lane:*

People vs. Lochriccio. That's the tip sheet case. Do you remember that one where there was a fellow that had a...I think you called it the equivalent of racing form, only it had to do with numbers, and I think you enjoyed that case a little bit. You said that the tip sheet paper, whatever the heck it was, the numbers, did not qualify as gambling paraphernalia. It was more for the spiritual.

*Justice Smith:*

Do I have that?

*Mr. Lane:*

No, you did not use the word "spiritual".

*Justice Smith:*

I don't remember that. I remember the name of the case, but I don't remember that.

*Mr. Lane:*

Well, I saw the name and I looked at it because of that, and Krasicky at my elbows, and my God, the world if full of Lochriccios. You're thinking of the one at Pine Knob, so it was just a two-bit case, I guess. Some poor guy had...he didn't have dice and the actual numbers sheet or how you play the numbers, but he had some counsel, some written advise to people who were interested in this, about some hot numbers, hot in the sense of astrology. Use your birth date, or...

*Justice Smith:*

Oh, yes, the old numbers business.

*Mr. Lane:*

And this was related to the numbers kind of gambling, and this guy just happened to be an enthusiast, I guess, and he had the literature but not the paraphernalia.

*Justice Smith:*

I don't remember that.

*Mr. Lane:*

That was probably a three or four page case. Are there any others that you think of?

*Justice Smith:*

Let me see your sheet here for a minute.

*Mr. Lane:*

That's all the affirmative cases, you know.

*Justice Smith:*

In re Mathers, that's the case I was talking about. Let's see...oh, boy. All these names look awfully familiar. Some I remember, some I don't. I wrote a...the Township of Pittsfield case. That was an interesting case.

*Mr. Lane:*

That was a zoning case, was it?

*Justice Smith:*

Yes. That's the case in which the zoning authorities illegally granted the permission of the municipality to build a dog kennel at a place where it was not allowed, because the guy built a kennel and it was discovered in litigation that they...

*Mr. Lane:*

Building inspector issued a little permit.

*Justice Smith:*

Yes, issued a permit contrary to law. Of course, that was controlled by the Highland Park case that was a similar case on that issue. When people in authority, in government misread the law, does that change it? Of course, the obvious answer is "no", so it isn't enough to simply go up and petition the authorities to act. You'd better be damned sure that they're on sound ground when they do act because if anything happens, prepositional to some other party, they can simply point out that they acted contrary to the law, and the Courts are not going to say, "Well, that's too bad. We're just going to change the law." We didn't have the authority and so whatever you did including, in this case, the guy spent all the money.

*Mr. Lane:*

Doing a lot...

*Justice Smith:*

Spending for a dog kennel...

*Mr. Lane:*

Forty or fifty booths, or whatever...

*Justice Smith:*

He had to tear it down, and I remember, that was based upon a case that Judge Carr wrote coming out of Highland Park sometime earlier.

*Mr. Lane:*

What was your feeling about Judge Carr? I mean, you served two or three years with him, didn't you?

*Justice Smith:*

Yes, I served with him until he left the Court in 1963, I think. I had great respect for him. I had respect with everybody. I got along with him fine. We used to talk. I used to go into talk to him about cases, and Dethmers, occasionally Gene Black up in Port Huron, who wasn't there, but for the people who were there, Justices who had their offices in the capitol as I did, particularly Mike O'Hara...Mike and I were neighbors west of Lansing, and when he came on the Court, we were not only neighbors, we used to talk a lot about cases. We'd just go right on home talking, stop by his place, and of course, I knew his family and he knew mine, and we'd discuss matters a lot. Sometimes, we'd agree. Sometimes, we wouldn't, but we sure got a lot of discussion in. O'Hara, to me, was someone like Tom Burns was to me when I was on the Public Service Commission. He was a person who was reasonable, and you could discuss things with, and he loved to discuss the law, and he respected your opinion and I respected his, and so we very often hammered out things between us that otherwise we probably would not have agreed on because we understood the positions.

*Mr. Lane:*

Does the Court, in present day, in recent years, suffer from the dispersal of the members of the Court which is, I think, more pronounced by a good deal that it was even when...?

*Justice Smith:*

I don't think you can have a true collegial Court without having people be in the same geographical location. I'm all in favor of the tenure for the Justices where they feel they don't have to maintain residences in their power centers where they have all the support, say in Wayne County, if they're from here, and I would have a requirement that they all live in Lansing.

*Mr. Lane:*

Do you remember there was a time, I guess it was after you left the Court, when the legislature tried, in the interest of getting everybody to come to Lansing, wanted to take the cars away from the members of the Court, and Kelly said you couldn't do that. Once the Court got the money, it could spend it the way it wanted to.

*Justice Smith:*

Yes, well the legislature tried to determine how we would elect the Chief Justice, for example, and we ignored it when I was there. We said that is a separation of powers doctrine, takes care of that. We will decide how we shall do it, and I think that...

*Mr. Lane:*

What do you think about the way that...

*Justice Smith:*

Chief Justice? I would just as soon have it the California or the Federal way. I think that it would take some of the internal politics out of the Court just by having somebody else decide who was the Chief. I worry a little bit about when somebody gets...but if they can't run anyway...so long

as they can't run after they reach age 70, that will take care of that, and so that wouldn't bother me.

*Mr. Lane:*

Some states, it's not by seniority, is it not, or rotation?

*Justice Smith:*

Yes. Rotation...I don't...I think if they would do it by rotation by seniority in long enough intervals to give a person a chance to really get deeply enmeshed in the administrative side of the Court which is ever growing. It is a lot of work, and to be able to work with the Court administrators and so forth of the lower court, Judges, Judges Association and Chief have so much to do, I would opt in favor of a Chief maybe serving like a term, say six or eight years or something like that, and then move. They probably would agree that except for the honor, I'd just as soon not do it, you know.

*Mr. Lane:*

Well, but the honor is important to some of them.

*Justice Smith:*

Oh, yes. We're all humans, and of course, being Chief is a little bit better than being a Justice, that being an Associate Justice, so there is a lot of status to it, but there is a lot of work to it, too. They work...of course, I'm sure they relieve them of some of the case load.

*Mr. Lane:*

I think they take a half case load, at least in the most recent times. I'm not acquainted with how it is right now, but it has been that way when I was over there on the staff. What about Gene Black? What would you say? How would you characterize this man? You said that you had great respect for Carr, and you got on with him. Black was a difficult man, was he not?

*Justice Smith:*

He was a difficult man, and when he was not passionately involved in something, he could write with great power and force, and he had a very great knowledge of the law, particularly in some areas. He was certainly an ex-great trial lawyer, from all accounts that I've heard. He was at his best as a trial lawyer. He was an advocate by nature, and sometimes, he exhibited that on the Court, but he was, in four or five different areas of the law, you know, as I say, when he wasn't passionately interested, he could be a powerful judge, write powerfully on things.

*Mr. Lane:*

What would you say, though, of his practice of quoting from the memoranda of other Justices and filing opinions, supplements to opinions after the results were in? Is this good practice or a defensible practice?

*Justice Smith:*

I don't think it's good practice?

*Mr. Lane:*

You know what I'm talking about?

*Justice Smith:*

Yes, I do. I don't think that's good practice.

*Mr. Lane:*

I remember there was a time, now I don't know...this was about when you were leaving the Court, I think, and it had to do with the Mallory case where there was counsel provided for this fellow in Jackson who was there on parole violation. There were four members of the Court and for some reason, you were not accounted for in my notes, anyway....

*Justice Smith:*

That's probably when I was out having an appendectomy.

*Mr. Lane:*

Yes, I think...you were off, you had some illness or surgery or something like that.

*Justice Smith:*

I had a fouled up appendectomy, and it caused me to comment when I got out of the hospital that I had received a telegram from the Court that read as follows...it was directed to me from the Court..."The Court, by a fourth revoke, wishes you a speedy recovery".

*Mr. Lane:*

Well, there were four members...

*Justice Smith:*

I missed a couple cases, probably a half dozen, I think. I had more than an appendectomy. I had adhesions that developed, and I was in intensive for about nine days, and I was out for a better part of the summer.

*Mr. Lane:*

I have from my own stuff what I wrote about this thing in the rough. I don't have the...

*Justice Smith:*

The Mallory case?

*Mr. Lane:*

Yes, and it said that there were...these are my words..."In a rare review, four Justices quoted Canon 19 of the Canons of Judicial Ethics which they indicated was applicable to Black's angry dissent", and this was a case where he apparently took a shot of some sort at Ted Souris and revealed that Souris had been on one side of the deliberations at another stage and then took a different position, and the, I guess, the inference was not flattering to Souris, but then I have that

Black and O'Hara dissented and said the majority included so and so. "The rebuke of Black was signed by Souris and Kavanagh (Thomas Matthew), Dethmers, and Adams", apparently was so offended.

*Justice Smith:*

What year was that?

*Mr. Lane:*

It would have been 1966, I think. It's something that you...you can touch a little history. It's the kind of stuff that comes out of the typewriter, and I don't have...I think it would be possible to go back and look at the reports and to find the foundation for that statement. I don't have any doubt about its accuracy. I just don't know the facts in terms of...What caused him to be...was there a personality trait with Black that made him...is there any explanation why a man with such obvious brilliance and power...he was a heck of an advocate, wasn't he?

*Justice Smith:*

Yes, I think, you know...

*Mr. Lane:*

Did it have anything to do with his traveling back and forth to...

*Justice Smith:*

I don't think so. I think Gene could get wound up in causes, as I said before, that he believed in passionately, and he would write with great force about that, I guess, beyond...

*Mr. Lane:*

What I have further in my hand here...do you remember when Jack Crellin wrote an article about you? This is long after you left the Court.

*Justice Smith:*

Oh, yes. I was at G.M.

*Mr. Lane:*

Do you remember the substance of that article, and did it agree? Was it, in your judgement, a faithful representation as far as your views on matters? I don't want to go into all the detail of the thing, but here is a couple pages. It had the nickel, what was it...the nickel?

*Justice Smith:*

I remember Jack writing...about one of the things about me...

*Mr. Lane:*

He had a high regard for you.

*Justice Smith:*

Yes, I think Jack came in with the idea that I was somehow heroic for having done what I did as an African American, and I didn't see any great heroism in what I did, and I tried to disabuse him of it by saying that I was in large, a part, a creature of history, and that all I could say for myself was that I hoped I was adequate for the responsibility given me. I was, of course, grateful for the opportunity, and I would have been grateful if I'd been stone white. I mean, anybody allowed to do all the things I've been, you know, Chairman of the Public Service Commission, Auditor General of Michigan, State Supreme Court Justice, General Counsel of General Motors...I mean, God, that's a....

*Mr. Lane:*

Weren't you a regent, too.

*Justice Smith:*

Regent, yes...

*Mr. Lane:*

And other offices, a lot of them.

*Justice Smith:*

Yes, I've been a lot of things.

*Mr. Lane:*

You sit on the Kroger Board. Do you sit on any other.

*Justice Smith:*

Detroit Edison.

*Mr. Lane:*

Do you?

*Justice Smith:*

Yes. I mean, those opportunities come, and they're rare for anybody, and all I hope is that I discharge the responsibility well and justify the confidence of the people who put me in office. That's what I really think about, and I don't really think it is especially heroic to have been selected, or that that is anything really heroic about my having done reasonably adequately in these things because of my racial strain. Yes, I am, as this article says...I'm part European, part Indian and part African. That's true, but I only say that to put it in a frame of reference that is face.

*Mr. Lane:*

By the way, that brings me...on the classification business...you refer...who is classified thus and so. In some of these Indian cases. You know, there are certain Indian cases that are be asserted or resurrected and so on, and I have read or heard, or gee, I don't know, in the case of an Indian...suppose you're a Chippewa or Iroquois or whatever it is, you have to establish a certain sort of blood level, and if you got whatever the heck the percent is, a 1/4 or...

*Justice Smith:*

There's a Michigan Supreme Court case on that.

*Mr. Lane:*

There is?

*Justice Smith:*

Yes, way back...it has to do with African Americans, and it was decided sometime after the Civil War, I think in the 1870's, 1880's in which the Michigan Supreme Court held that anybody who was less than 1/4 African was white if the rest of the blood was white. I kind of go along with the idea that you are what people call you for purposes of classification in the U.S. where race is a primary classification. Other places, it's religion, what I call the group of primary identification. Here, it is race. Other places, it is religion...Hindus and Muslims, say, in India or Pakistan. I guess in many places in Europe when it was significant, it was Protestant and Catholic or something like that

*(End of side 1, tape 3)*

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**Topic 6: Justice Smith talks about his colleagues Justices Harry Kelly, John Dethmers, George Edwards, Theodore Souris, Thomas M. Kavanagh, Mike O'Hara, and Paul Adams. He then summarizes his time on the court mentioning the seriousness of the court, inherent issues with consistency, and the chemistry of the court**

*Mr. Lane:*

Okay, here we're on the tape again now. I mentioned to you...I asked you about some people you served with and one of them, I remember was Leland Carr. How about some of the other Justices. Harry Kelly...I understand you had sort of fondness for Harry Kelly.

*Justice Smith:*

Yes, I had a particular fondness for Kelly. It started out in an unusual fashion. I came to the Court remembering really the bitter gubernatorial campaign of 1950, I think it was, in which Harry Kelly was running against Mennen Williams, my old friend and political saint, and as I saw it most of the time, and I came prepared not to be particularly fond of Mr. Kelly because of some of the rather harsh things he had said about my friend, Mr. Williams during the 1950 campaign, but I found not long after I got to the Court, that Harry was not as I thought he was. He was...sure, he was a conservative guy, and sure, he had his sense of values, and he had this tremendous experience growing out of his age, and he had been in World War I, and had lost a leg in combat in World War I, and he had come through the wars, in Illinois where he was from, where incidently, he had known August Scholle...who was from the same town.

*Mr. Lane:*

And Lockwood, maybe.

*Justice Smith:*

Yes, and so anyway, he had come here to practice law in Detroit with his brothers, and he became Secretary of State and Governor during the war years, and I found out he was full of happy memories about people and things, irrespective of who they were, and he was a generous person in spirit.

*Mr. Lane:*

Great family man, wasn't he?

*Justice Smith:*

Great family man, yes. I remember him saying at one point at the end of a conference when we had had a long, tough couple weeks of working, and we were just chatting about little things, and he said, "Next week, I'm going to marry off my youngest child. Then, I'll be through. I don't want a share of stock or anything. I don't want anything but a little log cabin up in Gaylord, a little house. I'm a rich man".

*Mr. Lane:*

Did you visit him at his place in Gaylord?

*Justice Smith:*

Oh, yes. I'd go north. Ordinarily, I'd stop in. I'd call before, of course, and then stop. He had a place in town where he had his library. He and his wife Ann, lived there. He took me out one time, up to his place on the lake where he had a log cabin, very big one, which he had built way back when his kids were growing up, because I think he had six children, he and his wife did, and he had been there. He said, "This is my Shangri La", and he had pictures of himself on a boat, on a little lake just out from the place...it was a hunting club location just outside of Gaylord. He was a wonderful fellow, straight arrow. He did what he thought was right. He worked hard. He asked no quarter in terms of relief from his cases when he wasn't feeling well, and that was fairly often because he was getting up in years, and he was diabetic, and he, of course, the leg was off, and he didn't always feel too well, but he would come to the sessions of the Court, and he would struggle up to that bench and sit there and listen to the arguments, and he would go out and do his work. He worked from his office in Gaylord.

*Mr. Lane:*

Since you were seat mates, weren't you?

*Justice Smith:*

Yes, because I was a junior member of the Court, I was supposed to sit on the end, and of course, it was more convenient for Harry to sit on the end because he had to get off from time to time, so I sat in his old place, and he sat in mine. I would offer to help him on and off, but more importantly, we had a good speaking relationship, and when we discussed the cases, I always was interested in what Harry had to say because he had a lot of experience, and he had a lot of

good common sense, and I liked to hear what he had to say about anything before I made up my mind.

*Mr. Lane:*

How about the famous Dutchman, Chief Justice Dethmers? He was Chief Justice, was he not?

*Justice Smith:*

Yes, let's see...he had been Chief Justice. I think Leland Carr was Chief Justice when I got there, and then Kavanagh succeeded him, Thomas M. Kavanagh. Well, John and I, of course, we both lived there in Lansing, and we had adjoining offices, and so I visited with him. I got to know him pretty well. He used to say I was born in Iowa, the Dutch community out there, and I was sent to Calvin or Hope College, I've forgotten which one, to become a minister in the Lutheran Church, and I decided to become a lawyer. Of course, John came from that area of the state, and he had been Attorney General, and he had been on the Court for some time. As a matter of fact, I think Harry Kelly appointed both him and Carr to the Court when Harry was Governor from 1944 through 1948, I think somewhere in there.

*Mr. Lane:*

Was George Edwards on the Court when you...?

*Justice Smith:*

George was there when I arrived, and I always say he took one look at me and decided to leave. Actually, I arrived in October and George left about the first of the year, and what had happened, Jerry Cavanaugh had been elected mayor down in Detroit, and somehow, they had an understanding that Cavanaugh wanted to appoint Edwards to become Police Commissioner, because there was tremendous issue of the treatment accorded Black citizens in Detroit by the then organized and administered Police Department of the City of Detroit which was considered to be heavy-handed and not really fair...George left the Court to become Police Commissioner of Detroit, later going on to the Sixth Circuit, of course, where he is now. But, I was just absolutely stunned, that when he came around to say he was going to leave the Court and go with the Cavanaugh administration as Police Commissioner, the very idea that somebody would leave the Michigan State Supreme Court and go to the City of Detroit Police Commissioner's job was almost unbelievable to me. Nothing wrong with that job, just that it was a huge step down, and he said his mission was to prove that you could have vigorous law enforcement within the Constitution; that was his mission, and boy, did he work at it. He campaigned as if he were running for office. He was not, but he really went around to every place he could get access to to give that message that a big-city police department can stay within the Constitutional laws of the country and still be vigorous with prosecution and criminals.

*Mr. Lane:*

He got the Police Department started in the direction...

*Justice Smith:*

Oh, yes. He made a lot of changes. He occasioned the reservation of some of the, what were considered then as hard-liners. I don't know about the merits of it but he got, I believe, effective control of the top echelon of the Police Department and initiated a lot of changes. George was a great fellow, and he had great energy, of course.

*Mr. Lane:*

Ted Souris, was he also sitting when you arrived?

*Justice Smith:*

Yes, Ted arrived, of course, the early part of 1960. He took John Voelker's place, and I arrived in the latter part of 1961. Of course, we were the baby judges, if you will. Ted,...I think Ted's about 2-1/2 years younger than I am. I was 39 when I arrived. I think Ted was about 36, going on 37 when I arrived, and Ted was, as I've often said, he was the single most effective Justice on the Court during my time. I think Ted, because of his very hard work, his very good mind and his exquisite preparation of every motion, every application for leave, of every case, Ted probably changed more minds at the conference table - I know he did - than any of us, and probably more than all of us combined over the period of time I was there, five years or so.

*Mr. Lane:*

Was it because of his hard work or his sheer intellectual power or...?

*Justice Smith:*

It was a combination of both. It was a combination of both. Ted would take some obscure motion of somebody to do something, and it would look on the surface as like it may have been like a 100 others we had seen, because we did an awful lot of these things, and had to do them very hurriedly because we had almost no staff...we were the staff at that time, that is, the Justices were...and Ted would have it better prepared than most of us, nearly all of us, and sometimes we were headed in one particular direction, and he said, "Well just before you make up your mind or something like that, let me just speak to that for a moment". He would say, "This is not as it appears. It is something a little bit deeper than that. If you will notice, there is a phrase here or a clause there. I think is something we want to take another look at. My belief is that we should do this rather than what you're proposing in your motion to do". We listened to the argument, and I...

*Mr. Lane:*

He was often persuasive.

*Justice Smith:*

He was often persuasive, and we would say, "That sounds pretty good, Ted", and we would change our minds. He was a hard working and innovative.

*Mr. Lane:*

He was a hard worker, was he not?

*Justice Smith:*

Oh, yes. Everybody was, really, pretty much. Everybody worked pretty hard at it. As a matter of fact, the most undying impression I have of the Court is something that happened, I think, in the first month or so I was on the Court. We were at the end, we were holding Court in quarterly terms at that time, and that time, we would have hearings once a quarter for usually a couple weeks at a time, and we came to the end of the hearing session which was about two weeks, and there was something that was brought up, and boy, we were all tired. We had been listening to six or seven arguments a day, five days a week, for two weeks, for ten days, and we all wanted to go back home and get out of there. We were just tired, and George Edwards had not left the Court at that time, so it had to be before the end of 1961. He said, "Wait just a minute. I don't think we should leave until we decide this", and he was insistent that we take this matter up even though we were tired, and make a judgement about it before we left. He was so insistent, everybody who was getting up to leave sat back down, sort of resignedly, and took up the matter later in the afternoon or early evening and spent another 1/2 hour or so that we would not have spent at that time resolving the matter.

*Mr. Lane:*

You also served with Paul Adams and Thomas Matthew Kavanagh.

*Justice Smith:*

Yes, and Mike O'Hara.

*Mr. Lane:*

And Mike O'Hara.

*Justice Smith:*

Well, Thomas Matthew had, I guess I would call, the instinct for justice. He had a feel for things. Tom could read the facts of a case, and pretty much tell from the way things were arrayed as to what he thought was just or unjust about a situation. His bias, if you will, was in favor of the little guy, and I think he came by it honestly. I think he was pretty consistent in his approach to, the great contest between man vs. man and man vs. institutions, I think Kavanagh felt most keenly about the little guy and whether he was getting hurt in the melee and not being able to get justice. I think he was very sensitive to that.

*Mr. Lane:*

How long did you serve with Mike O'Hara? He came on toward the end, did he?

*Justice Smith:*

Mike was in that election of 1962 running against Paul Adams, and he defeated Paul in the fall election of 1962, and therefore, he was seated...Mike came on the Court the first of 1963 which was about 14 months after I arrived there, and he moved from Menominee, Michigan where he lived, down to Detroit, and he moved in the same neighborhood that I lived in. I had moved into...just about a year earlier. We became neighbors and good friends, and discussants. We'd be

arguing, when we left the chambers of the Court, we'd go home in our separate vehicles, and I'd stop very often by his place because it was on the way to my home, and I'd stop in for an hour or so, and we'd continue the discussion very often. Mike had the fine balance between what people call the liberal and the conservative philosophies, and he loved to write. Mike really loved language. He loved the sound of words...

*Mr. Lane:*  
Embellishment.

*Justice Smith:*  
Yes, and he'd like to put his heart and soul into the opinions, and he did, if you read his stuff. It's poetic to some extent. It's lyrical and poetic kind of a thing.

*Mr. Lane:*  
Paul Adams...how about Paul?

*Justice Smith:*  
Paul is everybody that always...reserved gentleman. He is reserved in personal habits. He is reserved in matters legally. As I said before, I think that Paul and I probably were close to the center of the Court philosophically. We arrived by different routes, but I was just cautious. I think Paul, by nature, was reserved and probably philosophically moderately conservative or moderately liberal, whatever you want to call it.

*Mr. Lane:*  
What can you tell me about the report, let's call it, that he was kept from one of those vacancies on the Court because he, as Attorney General, had been unfriendly toward the Scholle apportionment initiative? Do you have any knowledge of that?

*Justice Smith:*  
No, I know from everything that was said around there that Paul was interested in going to the Court. It was clear from the Williams days and from the Swainson days as well. Paul, of course, took the place of Thomas M. Kavanagh when he was seated, is that right?

*Mr. Lane:*  
No, let's see. He...let me see if I can...he came on once in 1962.

*Justice Smith:*  
He took the place of Tom Kavanagh...no, no...wait a minute. Paul took the place of George Edwards.

*Mr. Lane:*  
Right.

*Justice Smith:*

What I was trying to say was that Paul took the place of Tom Kavanagh as Attorney General.

*Mr. Lane:*

Right, that's true. And then later on, he was defeated by Mike O'Hara in 1962, but then he came on again in....

*Justice Smith:*

1964.

*Mr. Lane:*

1964.

*Justice Smith:*

That was because Judge Carr could not run again.

*Mr. Lane:*

Right, he had...

*Justice Smith:*

Paul ran in the last spring election to be held in Michigan for Justices, in the spring of 1963, and he was elected quite easily, and he came back on the Court the first of 1964.

*Mr. Lane:*

And served through the fall, eight years of his term, is that right?

*Justice Smith:*

I understand that he did, right? Paul and I were very good friends. When I had my serious operation for appendectomy that followed up having adhesions, and I was pretty weak coming out of the hospital. He took one look at me and said, "Go somewhere and get some rest", and he handed me the keys to his cottage on the St. Mary's River, way up north, and I went up there for a week and came back revived, renewed.

*Mr. Lane:*

That was interesting. That is not the image of him that one would get from, oh, I guess, the common report about him and the pictures of him. He looks to be quite austere, aesthetic.

*Justice Smith:*

Yes, I think that he is essentially that, but he's a very gentlemanly kind of person, and he was certainly capable of warm sentiments, and I think it shines though in some of his opinions. He writes with considerable clarity and brevity.

*Mr. Lane:*

I noticed, too, that he is not above classical illusion now and again in his opinions. He will pull a text out of...one doesn't come to mind right now...Shakespeare or whatever, and he will find wisdom in that that applies to the case.

*Justice Smith:*

He is well-read. His wife was a university professor, and Paul was introduced, I believe, to literature way back in his life, and I think he was always a reader of classical literature.

*Mr. Lane:*

Well, summing up your experience on the Supreme Court...a man who has had about as full a career as I can really think of in terms of public office, high position in business, was there anything that you sort of took away from the Court that you didn't have before you went there? Some lesson, some inspiration of how to...collegiality and that type of thing? You had experienced a lot of time prior to your time on the Court. You were used to that, weren't you, the decision-making?

*Justice Smith:*

Yes, I was in a collegial setting, and I'd had some experience with that. I guess several things that I came away with from the Court with. The first thing would be epitomized by that insistence that...George Edwards that I mentioned before, that we take up the issue now. I found to my great satisfaction that people I worked with never took any case lightly. Everything was serious. They were damned serious about everything that came up, application leave, they may have had varying degrees of energy of which to tackle it, but nobody gave anything kind of a lick and a promise, sped through it and dismissed it. There was always somebody who would say, "Wait, I've looked at this with some case, and I have a thought about it", and they would be very careful about what they wrote as final precedent. I think we were all aware that the Michigan Supreme Court, for eighty or ninety percent of all litigation in Michigan, is the final word. There are not many Federal questions, and with the state law ranging from A - Z, from everything from abandonment, the law of abandonment of vehicles, or of children, down to zoning, it is an awful responsibility to have, to be the final arbitrar of people's dispute of any state, but in a state as large and as complex as Michigan, so it was a great pleasing thing to me to know that they took everything seriously. You might disagree with the result, but they didn't treat anything lightly. I learned, you know, one other thing that might be of some benefit, and that is that in a small group of people such as a Court, a collegial Court, particularly one where the membership doesn't change. I'm not talking about panels of the Circuit Court where they're all forever changing, but a Court that has the same membership facing each other every day, day in and day out, week in and week out, year in and year out, by the very nature of the beast so to speak, there will be frictions, and usually the frictions are not so much based upon personal things or political things but upon a kind of an observation that you'll make from time to time - you're considering a particular case, and it is approximately what you've had maybe two or three months before in principle, you think, and you will think you will know where each justice is going to come out or where they ought to come out based upon prior decisions, and what you'll find is that people don't see precedent the same way. Consistencies, personal consistencies seem to be always in question, and you'll find that not only Michigan Court but I noticed that in talking with Judges all over the country when I was there and even since that time, that they'd always find some problem with one of their brethren who could decide Jones vs Brown three months before one way, and the decide McCormick vs. Hare three months later a different way when it involved the

same principle. The old thing about consistency would trouble people. Not that they were dishonest but that they didn't see it or they weren't quite looking at it hard enough or something, and it would sort of trouble other members, and you'd always say, "Well, why is he doing that? That's a dumb thing". It came up time and time again, mostly because you'd view the particular case as one either unlike the case of before or just like it, and you don't know why the other Justice decided the way he does. That causes, for some, a little friction. The other thing I learned about that kind of a close harmony decision process is that even when there were eight, and I'm sure whether it is nine or ten or twelve or whatever may be the number, if you change the personnel once, take one person out and put another one in, it changes the whole chemistry. That person brings to the Court certain views which are shared in part by some and objected to by others. It brings a certain style, certain personality, certain expertise, you might call it, of things that they've done a lot of before, and they have acquired a considerable body of authoritative knowledge about something. That's brought it. That changes the chemistry of the Court. Each time that it changed while I was there, the Supreme Court did, both by the leaving of Edwards...not both, but all the time, but the leaving of Edwards and the coming of Adams and then the leaving of Adams and the coming of O'Hara, and then the leaving of Carr and the coming back of Adams. Every time that would occur, somebody would leave and somebody else would come on, it would change the temperature of the Court a little bit, change the chemistry, the decisional process was affected by one person. I learned that as well.

*Mr. Lane:*

Is there any sensible way that you think of to keep the change at a minimum or is change of that sort inevitable and valuable?

*Justice Smith:*

I think it's inevitable, and probably valuable. I don't know whether it's just...I don't think it's something that has to be valuable. It can be destructive, but it certainly...I don't think there's anything you can do to do it differently unless you're going to remake people.

*Mr. Lane:*

Or remake the whole system...like the United States Supreme Court...they're all life-time and so you have less change there, presumably. It can only occur because of resignation or death rather than for electoral reasons...or impeachment, I suppose.

*Justice Smith:*

I rather like the idea that we have here, the requirement that you cannot run after 70. There are some few, very few, as you know, exceptional people, who have almost a full mental and physical powers after...I won't even say 70. I'll say 65 or 70, but most of them slip a little bit in terms of energy, mental and physical and you really need the top minds and the top energies for Court. You need experience, of course, but I think the optimum range is about where they put it, and you shouldn't stay around any longer.

*Mr. Lane:*

That's interesting. Should we conclude it on that note, or have you got something else that maybe ought to be said?

*Justice Smith:*

No, just stop it for a while, and let me see if I can think of anything else.

*Mr. Lane:*

This is the end of tape 3 of Former Justice Otis M. Smith on October 25, 1990.

*(End of side 2, tape 3)*