



Interviews with  
**Michigan Supreme  
Court Justices**

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## INTERVIEW WITH THOMAS E. BRENNAN

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

Conducted by Roger F. Lane

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**Topic 1: Justice Brennan talks about his family history, his father and mother, and attending Catholic school**

*Mr. Lane:*

This is Roger Lane with former Justice Thomas E. Brennan of the Supreme Court, and we're sitting in Justice Brennan's office. I am representing the Michigan Supreme Court Historical Society, and this is another in a series of tapes being made of former Justices recalling their years on the Court and associated events. The date is January 3, 1991. Justice Brennan, I would like to get this tape started by asking you to recall your earliest family background. I would think that people might be interested in where you were born including whether it was in your mother's bedroom or such and such a hospital, what part of Detroit if it was there, what sort of family circumstances were at the time. This would have been 1929 as I recall. The depression was coming on, so why don't you just recall a little bit about that earliest episode in your life?

*Justice Brennan:*

My name is Thomas Emmett Brennan. Emmett is spelled E-m-m-e-t-t. It was my uncle's name, my mother's brother, Emmett Edgar Sullivan.

*Mr. Lane:*

Sullivan?

*Justice Brennan:*

Sullivan, and his father was John Emmett Sullivan and John Emmett Sullivan was a lawyer in Detroit in the late 1800's who died along about 1911. I never knew him, obviously. He was a graduate of the University of Michigan law school. His father was a man named John Clifford Sullivan, and John Clifford Sullivan was a cigar manufacturer in the City of Detroit during the Civil War.

*Mr. Lane:*

Did you say "O'Sullivan" or "Sullivan"?

*Justice Brennan:*

Sullivan.

*Mr. Lane:*

Not Clifford O'Sullivan?

*Justice Brennan:*

Not Clifford O'Sullivan, John Clifford Sullivan, no connection with Cliff O'Sullivan from Port Huron, but I guess I start with this because I think it is through that branch of the family that they trace all the way back the American Revolution and I am certifiably a member of the Sons of the American Revolution.

*Mr. Lane:*

Do you have a certificate?

*Justice Brennan:*

No, but I have a certificate or something saying I am entitled to join. On the other side, the Brennans were much more plebeian folk and hadn't this kind of elitist background, if you will. I was the second son of Joseph T. Brennan, Joseph Terrance Brennan and Jeanette Sullivan Brennan. They were married in 1925. My older brother, Terry, Joseph T. Brennan, Jr. was born in 1926, and I was born, as you say, in 1929 on May 27th. At the time, my parents lived in a two bedroom bungalow on Elmira Street in Detroit on the west side, and they lived there until about 1935. They lost that house in the depression, an interesting story.

*Mr. Lane:*

Why don't you mention in brief how that happened?

*Justice Brennan:*

Well, they had purchased the house for about \$10,000 on a land contract from a builder. The builder didn't make the mortgage payments, and my father who was an Irish- Catholic raised with the very strong work ethic and sense of moral responsibility would not miss a mortgage payment to save his life. He made his payments but as I say, the builder did not, and in due course, the mortgage company came out and tacked a notice on the front door, and that's when my parents realized that they were about to lose the house.

*Mr. Lane:*

What year would this have been?

*Justice Brennan:*

Early 1930's...I am going to say 1933 or perhaps 1934, so...

*Mr. Lane:*

You would have been four or five years old?

*Justice Brennan:*

I would have been four or five years old. They would have been paying on this house for about eight or nine years at that point in time, and all they paid on it went down the tubes. All they really got out of it on the advise of counsel, that indeed I think the advise of the Circuit Court Commissioner or whoever handled the foreclosure, was to live out the redemption period and save their money during that year, and then get something else. In 1935, they bought a home at 10311 Morley Avenue in Detroit.

*Mr. Lane:*

M-o-r-l-e-y?

*Justice Brennan:*

Yes, on the west side of Detroit, practically in the shadow of the McKenzie High School, and it was in the same parish, Epiphany Roman Catholic Parish that their little house on Elmira was, so it was only about five blocks away, but I was in, I think, the first grade when we made the move. The house was...

*Mr. Lane:*

Was there trauma associated with this that is still embedded in your mind or is it just another kid's...?

*Justice Brennan:*

I don't know whether it was trauma so much. There was obviously...moving was kind of exciting. We were moving into a larger home. That was great. I remember we went to school that morning and were instructed after school to go to the new house. "Don't come back to the old house because we won't be living there anymore". I think more than anything else was it was one of those family stories that reflected on the way we thought about life and money and property and things like that.

I am not trying to suggest we grew up poor. My father had a way of saying, "We've got the best", and he was a very good provider and a very great anchor of security for all of us in the family. I never felt for one moment in my lifetime that there was any doubt about where my next meal was coming from or whether there would be a warm place to sleep or the security of a home.

*Mr. Lane:*

He was steadily employed all through this period?

*Justice Brennan:*

Yes, he was steadily employed. As a matter of fact, interestingly enough, he lost...he came home from his honeymoon in 1925 to find out that he had been fired from Studebaker Motor Car Company. He got another job, I don't know doing what, but shortly after that was employed at the Secretary of State's office through a relative of my mother's, a man by the name of Milton Carmichael. I don't know if you've ever heard that name, but Milt Carmichael was a great old Republican power in Wayne County many, many years ago and through him, my dad got a job at the Secretary of State's office which in those days, was a very...maybe still is today to some degree, but in those days, was an extremely volatile political job. When your party won, you were in office, and when your party lost, you were out of office.

*Mr. Lane:*

Did he run a branch office?

*Justice Brennan:*

Eventually, he became, I think, a branch manager, but it was one of those things that every two years, you had to go, and I believe in those days, it was every two years, you had to go to the well politically, and so my dad became active in politics at that point in time and became a Republican precinct delegate, though I believe his own family - my dad was one of four brothers and two sisters, an east-side family from St. Charles parish down around the Belle Isle area, and I think as I came to know them later in life, all his brothers were Democrats, so I'm sure that his being a Republican was largely a function of the fact that Milt Carmichael got him the job and he was expected because of patronage to support Republican causes.

My mother remembers in those days having to go out and buy a fancy dress to go to a political ball, political fundraising gatherings when indeed, she felt they could not afford it and the money would have been much better spent on clothes for the children and things of that kind. So, her recollections of politics were that they were very demanding and somewhat sacrificial.

*Mr. Lane:*

This was characteristic more of the time, was it not?

*Justice Brennan:*

Oh, yes. They were people of the depression, raising what was then a large family. There were five of us. I have two brothers and two sisters. My oldest brother is Terry, I mentioned before. Then after me in 1929, my sister Sally was born, Sara Joan...

*Mr. Lane:*

How do you spell "Sara Joan"?

*Justice Brennan:*

She never went by Sara Joan - Sally Brennan, S-a-l-l-y. She was born four years after I, so she had been born by 1933 and four years later, my younger brother Raymond, Ray Brennan was born, and he was born in 1937 and then six years after Raymond, our youngest sister, Mary Agnes was born in 1943, so you know, you go back through the 1930's and here is Joe Brennan and Jeanette raising a family on the west side of Detroit, a three bedroom home on a 35 foot lot. The home cost them \$3,500.00. At one point during those difficult years, the man who sold them the home on land contract wrote them a letter to say that he thought the payments of \$35.00/month were too onerous, and he was going to reduce the payments to \$25.00/month which he did.

Of course, in due course of time, my father paid off that house, and went from the Secretary of State's office into the automobile financing business, and he worked for General Finance at one time as I recall and then Associate Discount which was another automobile financing company and eventually in the early 50's, was employed by the Wabeek Bank, and he went through all of the machinations of the Wabeek Bank when Wabeek merged with the Detroit Trust Company to become the Wabeek Bank and Trust Company and then that merged with the Detroit Bank and it became the Detroit Wabeek Bank and Trust Company and ultimately became all just sucked into the Detroit Bank.

During all those years, because he was a very effective public relations and sales man who represented the bank to automobile dealers and who had a following among automobile dealers, he moved up the ranks and became an officer of the bank, I think what is known in that business as an Assistant Cashier or Cashier or something of that kind. He was very proud of that accomplishment. It was somewhat of an accomplishment. He never went to college. He was a graduate of ST. Joe's Commercial College in Detroit run by the Christian brothers down by Joe Muer's, if you are familiar with it on Gratiot Avenue, but it was basically a kind of vocational high school where the emphasis was on learning business, bookkeeping and skills of that kind. He was, I think, well-educated through secondary school but didn't have any college.

My dad was always a man that wore a suit and tie, and he was tall and stood up straight, and he had a very dignified way about him. To all the kids in the neighborhood, he was "Justice Brennan". Justice Brennan was kind of a figure. He did not drink. I knew him only occasionally to take a glass of wine and finish maybe 1/2 of it at Christmas or Thanksgiving around the table, and that stood him good stead because he would go to the MADA meetings, Michigan Automobile Dealers Association, and when they'd get all tanked up, Joe Brennan would drive them all home, and when I say he had a lot of friends among the automobile dealers, I think that was a large part of it.

He was a very agreeable man who had a wonderful sense of humor. You could see him at a party; one of the first times my wife Polly met him was on New Year's Eve. It was at some relative's home, and he was really having a great time. When we came into the place, he said to her, "Somebody spiked my ginger ale with ice", and she thought, "Boy, he's really blown away", and suggested later that I ought not to let him drive because he apparently was pretty giddy and of course, I howled because I knew that he never drank. Anyway, he was a remarkable man and one for whom I had an enormous affection.

*Mr. Lane:*

Did the family ties, did they continue to be very, very close right up to the time that you left home? Did you have ceremonial dinners?

*Justice Brennan:*

Oh, yes. My dad...everybody had to be home for dinner except when I got into high school and started playing basketball and I was home late because of basketball practice. I remember when my brother Terry went into the service how traumatic that was, and my mother would write letters to him and those are still kept in family archives, and they paint the picture of a family that was very close. My dad was a dominant father. The family would sit around the dinner table, for example, on Sunday, and my mother would bring the roast beef in or the turkey or whatever and set it down in front of my dad. He would carve it at the table and put the potatoes on the plate and so forth and pass the plates out one at a time around the table. It was none of what I came later to know as family style, the way most people ate by passing dishes around. We never passed dishes around. My dad sat there and put everything on every plate and passed it around. Maybe that came from a time in the depression where he had to be careful that everybody got enough or a share or something; I don't know. At any rate, the result of it was that if you sat on this side, to his left, and he started things going counterclockwise, your dinner would be cold by the time everybody sat down to eat or started eating. Anyway, but it was a ritual. When we came to dating, we brought the girls home, the guest, the lady would sit next to my dad on the left-hand side, my mother always on the right-hand side.

*Mr. Lane:*

Was he a hard disciplinarian at times?

*Justice Brennan:*

Yes, he was tough. He had a temper, tough temper. My mother was a very significant factor also. She was a...I think a very bright lady. She is still living. She is 88, pretty much mentally deteriorated in the sense that she does not recognize people though she is very pleasant. If you met her on a bus, you would think what a nice little old lady she is. Lots of wonderful opinions about things, and she will chat away, but if you ask her who her husband was or how many children she had, she would be guessing. She couldn't tell you. Anyway, that's now, but through her life, she was always a very bright lady, a good writer, wrote a lot of poetry, helped us a lot with English composition when we were in school.

*Mr. Lane:*

Did you do real well in school?

*Justice Brennan:*

Well, I was a good student. I was a good student in grade school, you know, "B's", and A's" mostly.

*Mr. Lane:*

If you didn't, there would be a response at home...is that true?

*Justice Brennan:*

Oh, yes. It was one of those things where I went to the Epiphany Grade School which was run by the IHM nuns, the Sisters Servants of the Immaculate Heart of Mary.

*Mr. Lane:*

IHS?

*Justice Brennan:*

IHM, Immaculate Heart of Mary. Wonderful, dedicated ladies.

*Mr. Lane:*

That's a teaching order now, is it not?

*Justice Brennan:*

Yes, what's left of them. They're out of Monroe, Michigan, a lot of retirees now mostly. Wonderful, inspirational women. We had one Sister Stephanie; I still hear from her every year and write to her at Christmas time. Sister Stephanie Mueller. We never knew their last names, though. When I was in grade school, that would have been like seeing them without the bonnet on, you know, and all the rumors that they shave their heads and so on, but she was wonderful. She'd be out playing ball with the boys, and the boys just adored her. We'd play, have these grade school football games and as soon as the game was over, we would rush to the convent and ask for Sister Stephanie and tell her how the game came out and give her a blow by blow description and so on. In those days, the nuns were very nearly cloistered. They didn't even get out to watch football games and things like that but of course, she had a great interest in all of our doings. I remember her telling me that I had a terrible case of braggadocio. "You've got a great case of braggadocio". I was a bit of a cut up in school, and she was great for dressing you down in front of everybody. She was good at it. She was the one, I think, who told me early on that I ought to become a lawyer, because I loved to argue. I loved to argue and debate so I ought to become a lawyer.

*Mr. Lane:*

How old were you, sixth grade?

*Justice Brennan:*

Sixth or seventh grade, yes, around there. As I say, I was a pretty good student and kind of outgoing in those days.

*Mr. Lane:*

Well now, wait a minute. Was that the time when you dressed up like an Indian and all that?

*Justice Brennan:*

No, no. That's much later. In 1943, I graduated from the Epiphany Grade School and followed my brother Terry to Detroit Catholic Central High School which was then located at 60 Belmont

Avenue within 150 - 200 feet of Woodward Avenue, east of Woodward Avenue. Now remember, I lived on the west side of Detroit, probably five miles from the school, so we traveled by bus, the Plymouth-Cunniff bus typically across town to the school. I always smiled about the great busing controversies that came later on. I was bused all through high school, and passed a lot of schools that were closer to my home. McKenzie High School was right across W. Chicago Boulevard from my home.

*Mr. Lane:*

Was it not true, though, that in this time, Catholic Central High School was sort of a shining magnet to the great majority of Catholic young persons in Detroit?

*Justice Brennan:*

Sure, of course it was, and interestingly, if anybody were to...you can't go there anymore because the buildings have been torn down, but if you could have a video of what those buildings looked like and what those classrooms looked like and what that "campus" of that high school looked like in those days, you would be flabbergasted to think that anyone thought that highly of it. You would be flabbergasted, for example, to see as I did just recently in some program for high school football game, or I don't know what it was - it was some football game, but it was a record of attendance at high school athletic events, football, and the largest attendance ever at a high school football game in Michigan; I mean the largest and the second largest and the third largest, I think, were all Detroit Catholic Central games, when they played Father Flanigan's Boys Town and when they played I think in the original Good Fellow games way back when in Brigg Stadium or Tiger Stadium which was then Brigg Stadium. I think 53,000 people almost.

*Mr. Lane:*

Is that right?

*Justice Brennan:*

Yes, and it was a huge thing, and they were a powerhouse. Detroit Catholic Central was regarded by those of us who came out of the parochial school system as the local version at the secondary school level of everything that Notre Dame represented at the college level, and of course, those were the years when the movie Knute Rockne of Notre Dame, I guess came out a little after that, but even the priests in our high school talked in terms of Notre Dame. We were deeply imbued in those days with the idea that Catholic education was important, and it's amazing to me as I look back that first of all, how much it has changed, the general attitude even among Catholics, but you know, the Catholic school system came out in the late 1800's particularly, out of a difficulty that Catholic immigrants had in being assimilated to the anglo-American culture, and finding, for example, that in the public schools, they were teaching the Bible, they were teaching the King James version of the Bible. It was long before Americans got united for the separation of church and state or any of those issues were ever raised by anybody. Nobody doubted the fact that the people in the community had a perfect right to teach the Bible to their children, and they taught the Bible according to the version that represented the majority opinion in the community. The Catholic bishop said, "No, you're teaching heresy to our kids. We can't go to the public schools.



We'll have to start our own school system". Unlike the way things are today, they didn't go the Supreme Court and say, "You can't teach the Bible to our kid" because the Catholic bishops never doubted that the Protestants had a perfect right to use the public school system to teach the Bible to their children, but they said, "We don't to teach your Bible to our kids. We're going to start our own school system", which they did.

*Mr. Lane:*

When did the Catholic school system pick up a good head of steam and be sort of systemic throughout the populated parts...?

*Justice Brennan:*

I'm giving you the motivation for its beginning was because the Catholic bishops felt that their people were being exposed to all this heresy in the public schools and of course, many of them were immigrants, Irish, German, French and so on, and Eastern European, and they wanted to maintain their own culture, but specifically, their own religion, so that was the reason why it was created. Because there was still in those days a tremendous flow of religious vocations, nuns and priests, who would work for nothing or next to nothing, it was economically possible to have a competing school system and make it work. I sort of came along - I was born at the tail end of this or maybe the apex of all this, and I remember the priests from the pulpit in August, late August or early September, preaching hard and vigorously to the people, the parents, that "you have a moral responsibility to the religious education of your children. If it is at all possible, at whatever great sacrifice, you must - you have a responsibility to send your children to Catholic schools", and you know, and the only...my sense of it was growing up, the only Catholics who sent their kids to public schools were people who came from mixed marriages where they had married a Protestant, you know, one of them or basically poor people, people who were simply too poor, and you had to be awful [expletive] poor because in the days when I went to Epiphany School, on Mondays, we brought our two dollars for tuition. That's the way the schools were. The kids brought their two dollars for tuition on Monday.

*Mr. Lane:*

Lunch money.

*Justice Brennan:*

Oh, yes. They went through the classroom and collected the tuition money, two bucks a head. The oldest one in the family brought the tuition money, so I mean, it was a shoe-string operation but a [expletive] good education. I mean, the atmosphere in the classroom was the same as the atmosphere at home. The nun,...I later learned that the legal expression was "in loco parentis", but she sure as hell was in the loco of the parentis and if she rapped you at school, you didn't go home and tell mother and dad because they'd rap you for getting rapped at school. I mean, it was part of it. But this carried into high school, and in high school, I met these marvelous priests that came out of the Basilian fathers.

*Mr. Lane:*

Say that again.

*Justice Brennan:*

Basilian, it's St. Basil, B-a-s-i-l-i-a-n, and the formal name of the order is the Congregation of St. Basil, CSB, and they're based in Toronto, Ontario at St. Mike's College, the base of the order, and they have now and then, I guess too, a number of places where they supply the faculty. They operate St. Thomas College in Houston, Texas and of course, St. Mike's College, St. John Fisher College in Rochester, New York and a number of high schools around.

*Mr. Lane:*

Do you know how John Fisher is spelled?

*Justice Brennan:*

I think it's F-i-s-h-e-r. But I remember, to give you an example now, I am 14 years old, and I am in my first year in high school. The priest walks into the English classroom, and there were five classrooms of freshman at this high school. I think we were on the third floor of the building. It was a third floor walk-up. The principal...I'll give you an idea of what this school was like. The principal's office was located on the landing of the front stairway. I mean, the building was designed; that was designed merely to be the landing where you turned around and the stairway would come up this way, turn this way and went back that way, but half of that landing had been walled off and made into the principal's office. That's where the principal's office was, and so it was not fancy by any means. I mean, we had no swimming pool. We had no lot of other things.

*Mr. Lane:*

Administration did not reign publicly.

*Justice Brennan:*

That's right, there was no gold spittoons, but in any case, and I'm guessing there were 60, at least 60 students in my classroom, my section which was 9...I think I was in 9- 3; 9-1, 9-2, 9-3, 9-4, 9-5. Those were the five freshman classrooms, so I was in 9-3, and the homeroom teacher was Father Matt Sheedy, S-h-e-e-d-y, a burly Irishman from Toronto who came in and had this absolutely new malicious laugh, and shake his head. "Poor fellow, we had a guy in here last year. He kept talking during class and he chewed gum. Poor fellow, boy it was just terrible the way it turned out for him", and he put the fear of the Lord into us. I remember there was a fellow who sat in the front row. His name was Sonnenberg, and I forget what Sonnenberg's first name was, but there used to be a wrestler by the name of Gus Sonnenberg, and so, of course, the first day he walked in there, Father Matt Sheedy nicknamed Sonnenberg "Gus". He was then Gus Sonnenberg from then on, and that's all we ever knew him by was Gus Sonnenberg. So, this particular day, a homework assignment had been given out. Father Sheedy comes in and says, "Well, Gus, why don't you read us your essay that you wrote last night?" and Sonnenberg sort of puts his head down and shakes his head back and forth, "Haven't got it, Father." "What do you mean, you haven't got it?" "Well, I didn't do it." "Gus, you're not telling Father you didn't do your homework?" "Yes, Father, I didn't do my homework", and so then Father Matt Sheedy begins to collect the homework from all the other students, starts in the first row and he goes down both sides collecting the homework from the boys and as he collects the homework from

each boy, he says, "Look, Gus, Bob got his homework. Fred brought his homework in. Here's the homework from Charlie. You're not telling Father you don't have your homework?", and he continues this monologue as he goes through the classroom. Now he comes back up between the third and fourth aisle. He is now approaching Gus from the back and continuing this monologue about people turning in their homework until he finally gets back to Gus again. Now he is standing, hovering over Gus and he says, "Come on, now, Gus, you really have your homework, don't you?" "No, Father, I don't have my homework" whereupon Matt Sheedy took his right hand and you know, he had been offered to play hockey for the Maple Leafs and he turned it down to go into priesthood, so he was an athletic guy. He whacked Sonnenberg across the back of the head, just one quick karate chop, I guess, and Sonnenberg's head went down on the table like it was cut off. He went out cold. Father Sheedy, I think, got a little nervous that he maybe had gone a little too far, and so he turned to the poor fellow who was sitting in the first seat by the door and he says, "Well, Willard, don't sit there. Go get him some water". Willard Graham gets up and out the door and he later said he didn't know what to do. He had no container with which to bring any water. He sort of went and stood at the drinking fountain wondering what to do, whether to get a handful of it or a mouthful of it or what, but in a moment or two, Gus began to come around. Father grabbed him by the hair and kind of held his head up like this and shook it. He was woozy and he was rolling around like this and Father says, "Now, you all right, Gus?" "Yeah, Father, I'm all right". He said, "Now, Gus, I didn't mean to hurt you, Gus, but you got to do your homework". So, now you can imagine. I'm fourteen years old, and I've just witnessed this scene along with sixty other boys. The fear of the Lord Almighty goes right down to our toes. I mean, we are not going to come to class without our homework from then forever, you know. It was just great. I believed then, and I believe now and I believe all my life that the experience of adolescent boys being taught by men is an absolutely unequalled thing and it has so many great advantages in terms of learning discipline, responsibility, sportsmanship, fellowship. In that setting, it was not uncomfortable for the priests to talk about loving, about respecting women, about being a caring person. In the presence of girls of that age, it would have been the source of giggling. It wasn't when the priests talked about it in front of the young men. Anyway, I credit those years as most significant point in my own personal development. I just discovered this morning that my secretary has typed up, apparently while I was on vacation last year, every speech that I ever gave that she has around here, and they go back to 1944; these big blue volumes...

*Mr. Lane:*  
Did you say "1944"?

*Justice Brennan:*  
1944.

*Mr. Lane:*  
You were fifteen years old.

*Justice Brennan:*  
Yes. We're talking about, you know, the influence of these priests and this school on me, okay?

*Mr. Lane:*  
Right.

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## **Topic 2: Writing speeches as a teenager, and urging for equal rights for African-Americans**

*Justice Brennan:*

And the first speech in the book was, the first couple were speeches I gave in oratorical competitions, and in my four years at Detroit Catholic Central, I won the oratory competition every year.

*Mr. Lane:*

Well, now, you're fourteen. You're talking about when you're fourteen as a take-off point. Now, you obviously,...you mentioned that the sister in sixth grade or whatever said, "you ought to be a lawyer. You like to argue so much". You also mentioned about braggadocio. Had it become a characteristic somewhat earlier, now I'm talking about prior to 14, that you were inclined in that direction and perhaps, was there some direct cultivation and careful cultivation by your father and your parents perhaps? Do you see what I'm trying to say? You must have gotten a real early start in way that wasn't maybe structured, but were you encouraged, for example, to play the leading role in the Christmas pageant or whatever the heck it was? You know, do you see what I'm trying to ask you?

*Justice Brennan:*

Yes, you're quite right, and from the earliest days, we were expected to get up and recite. When we went to family gatherings, when we were in school, our parents would say, "Now, Tommy, you get up and recite your poem or sing the song", whatever it was...

*Mr. Lane:*

And this was a parental encouragement.

*Justice Brennan:*

Oh, yes. They were showing off their kids to their aunts, uncles, nieces and everybody else, but that we were always expected to do that, to get up and as I look back on it, some of my cousins were much more reticent to do that. They'd be shy, but the Brennans and particularly myself and my brother, would get up and entertain at the drop of a hat, you know, sometimes not very well prepared, but we were never shy about getting up and doing it.

*Mr. Lane:*

As you look back, was there a certain sort of a gratification in this?

*Justice Brennan:*

Well, it was what your parents wanted you to do.

*Mr. Lane:*

They approved.

*Justice Brennan:*

They approved. They encouraged you to do it. Obviously, you got applause. That was recognition and so forth by older people. I don't know. It just...

*Mr. Lane:*

I didn't mean to dwell too much on this.

*Justice Brennan:*

Well, that's sort of where it came from but anyway, by the time I was in high school...it was in high school that I began speeches, and as I say, I won these oratorical contests every year. In my freshman year, the speech had to do...it was 1944...with the impending end of the war and my visions of the peace table and what the different countries were going to do and say and the positions that they were going to take at the peace table and so on, and as you would well imagine, what I...it's interesting...now, this is a 14 year old boy predicting what the United States of America would do when the war was over. "Last, of course, we would come to the United States with being a democracy herself will undoubtedly support world Congresses, world courts, world peace and a chance for the aggressor nations to get back on their feet. American hard in war and gullible in peace will probably feel that by killing a few of the more notorious enemies, the possibility of new world conflict will be destroyed. She will go out of her way to re-establish those little republics and kingdoms that were inaugurated after the first World War. As long as everyone else at the peace table is happy, the United States will be satisfied".

*Mr. Lane:*

What year is this, now?

*Justice Brennan:*

1944. I wrote that when I was 15 years old, okay?

*Mr. Lane:*

This, of course, would have been in part an extension of your instruction in the classroom about current events, and...

*Justice Brennan:*

Oh, yes, we were getting a good...but I never had a course in current events, never in my life. We had courses in history. We learned Latin but remember that I grew up...at a time when there was a war going on. You read the newspapers. I mean, we talked about it. We talked about it at home. We talked about it...I mean, the priests would talk about it in English class. They would use examples or they would actually get off the track and maybe talk about things that were going on in the world, but not because we studied "current events". We were learning English literature, you know, and so forth. Of course, as you can well imagine, my final paragraph, I urged that what ought to happen is that the Pope ought to be involved in the peace process. My sophomore year, I gave a speech having to do with "one of the most pressing problems that faces the nation when it has successfully concluded a war is that of occupying in a useful manner the discharged

members of its armed forces", and I went on and talked about what they ought to do with the veterans when they come back.

*Mr. Lane:*

This would be given to sort of an assembly of students as part of a contest to...

*Justice Brennan:*

Oh, yes, and like all of the freshman classes, the five freshman classes would be grouped together in the gymnasium. There would be four or five finalists. We would speak and they would select a winner. Junior year - now I'm 17 years old or thereabout - "God created man to his own image and likeness", it starts out, and it is all about...

*Mr. Lane:*

That's right out of the catechism, isn't it?

*Justice Brennan:*

Oh, yes. It's all about race and its all about "the white man's soul, the dark man's soul". It goes on to talk about "the American ideal, that the Negro be not only free and equal for freedom and equality are empty words unless backed by serious individual conviction, but that the Negro be given the opportunity to prove that equality, physical as well as spiritual must be a part of his make-up if he is an image of his creator. Can we call this principle idealistic, theoretical, unfit for practical use? I hardly think so", and so on. I think it's interesting because, you know, I think of myself and my own later political views and how I was regarded by people, that these were...in calling black people "Negroes" in those days was the appropriate word, I guess.

*Mr. Lane:*

Hell, in the United States Reports, they are Negroes until 1965 or 1966, I think.

*Justice Brennan:*

But, "When Christ said, 'Going therefore teach ye all nations', he didn't mean teach the white peoples of the earth because God sees through black skin as well as white when he probes the inner workings of the soul. We try to support our resentment of the Negro's equality by saying he is ignorant, not our mental peer, and yet we exclude him from our school which means merely that if we really believed him to be ignorant, we haven't the charity to teach him".

*Mr. Lane:*

They were excluded from your school?

*Justice Brennan:*

No, but I think there were maybe only one or two in my recollection.

*(End of side 1, tape 1)*

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### **Topic 3: Justice Brennan talks about racial prejudice, high school, and attending the University of Detroit Law School**

*Justice Brennan:*

And I'm talking about, you know, wrong to exclude the Negroes from our school. "We say the Negro is dirty, and yet we forbid him to enter decent places to eat, places that are clean and orderly and promote good manners, for what are manners but respectful courtesy for something that demands respect, and what respect is demanded by a restaurant that is dirty. Serious interrogation that finds us unable to explain fully our feeling of superiority and distrust of the Negro actually, it has come time for another migration to the New World, another Declaration of Independence, not a physical migration nor a verbal declaration but a need to rejuvenate our mode of thinking. Some ruminants of those years of the old world have survived. We cannot flee them this time. We must stay and cast them out. Racial prejudice is not innate. It must be learned. It must be cultivated in an atmosphere of arrogance. Watch the little children play. They haven't learned yet. Haven't lived in that atmosphere of arrogance long enough to feel guilty, feeling superiority", and then I go on to talk about little kids playing, Black and white, and getting along and so on.

*Mr. Lane:*

Did you, for example...were you on the athletic teams and were there colored, Negro players that you got closely associated with? In other words, was your thinking along this line somewhat stimulated?

*Justice Brennan:*

No, and I'll tell you...I'll tell you that...let me think now. This would have been my junior year...yes. I'm trying to think of my first association with Black people. I can't recall there being any black kids in my class at Detroit Catholic Central High School. There may have been some in the class, but there weren't any in my class, okay.

*Mr. Lane:*

They were excluded? It was just a matter of percentages.

*Justice Brennan:*

They weren't excluded but again, very few blacks were Catholic and very few could afford to go and pay tuition at a school, although today, there are a lot of them, Black parents are sending their kids to the Catholic schools because they want the discipline, what's left of them in the Detroit area. But, that summer, between my sophomore and my junior year in high school, I worked for the City of Detroit; got a job through the influence of my uncle, and I counted traffic. We used to go to different corners and sit there with a clicker and count the traffic because they were doing a survey as to where to build grade separations for the railroads, and I met a black fellow. He was on our crew. I forget his name, nice guy, but we had a lot of time to sit there

clicking and talk, and I can remember having many, many conversations with him and just comparing what it was like for him to grow up in Detroit and what it was like for me to grow up in Detroit. We just got to be good friends. We talked a lot, and I think that was part of it. Plus, clearly the priests, and this one particular priest, Father Norbert Clemens who was working with me at that time and was a counselor and a coach, speech coach.

*Mr. Lane:*

I heard about him from Justice Ryan.

*Justice Brennan:*

Clemens, C-l-e-m-e-n-s. He was my speech coach, and he also...I mean, obviously, my advocacy of civil rights was religiously motivated and oriented, and I talk in terms of equality before God, you know, as being made in the image, the likeness of God, so it wasn't...to me, it was a little bit based, as I recall, on having met this black fellow and worked with him the previous summer, but it was more a theoretical thing with me because I didn't have a lot of black friends. Then in 1946, in addition to my oratorical contest, speech, I began getting into oratorical competitions that were conducted by the Detroit Times, the Hearst newspaper oratorical competitions and they, every year, had this competition throughout all the high schools, and it was always based on a particular historical figure, patriot, an American patriot, and so I got into these things. James Madison was the subject in 1946. I always won at Catholic Central and I generally didn't get too much further after that. I would lose in the regionals or whatever.

*Mr. Lane:*

You must have had sort of a zest, then, for this kind of activity?

*Justice Brennan:*

Oh, yes, sure. So anyway, and there's a little story to that which I will come to. I graduated from Detroit Catholic Central in 1947. I was the valedictorian of the school, of the class, and went on to the University of Detroit. By that time, I had pretty much determined I wanted to be a lawyer. As a matter of fact, in the yearbook, under my picture, it said that "Tom Brennan will go to the University of Detroit and study law". Incidentally, you, being a journalist, may enjoy this: I was also the editor of the school paper while I was at Detroit Catholic Central. The Indian costume was that I had sort of a comic lead in one of the musical productions, and I played the part of Chief Squatting Cow. Now, I have to tell you about this, because it is an interesting thing. This Father Clemens that I speak of was a very able theatrical producer and he used to go down to New York in the summer time with a crew of two or three students, and they would select a current Broadway play that they wanted to put on at Detroit Catholic Central. They would buy the album so they'd get the music. Then they would go to the play two or three nights in a row, go back to the hotel room and re-construct the dialogue from memory, and that's how they'd get the scripts. They would then come back to Detroit Catholic Central in the fall and give the play a different name, use all the same music, same story line and to the extent that they remembered it, the same dialogue, but there would be some changes in dialogue, some dressing up of the dialogue, maybe to change it to be a little more appropriate. Men would play the parts of women,



like Hasting Pudding in that respect, I guess, and these plays were marvelous. They would go on for three or four days. They would have played to 18,000 or 20,000 people. They'd fit...I don't know, they'd fit 2,000 or 1,800 or something in the auditorium, so they would run it two weekends or seven performances or eight performances. It would get up around 12,000 or 14,000 people who would see it. I am exaggerating at 20,000, but maybe 12,000 or 14,000. So the particular play which I was the Indian was then running on Broadway under the name of "Annie Get Your Gun". When we did it at Catholic Central, it was called "Rifles Aren't Romantic", and instead of being Chief Sitting Bull as Ethel Merman would be singing with, I was Chief Squatting Cow and the part of Ethel Merman was played by the second string quarterback of our football team, a young man named Dervin Flowers, and Dervin did a very creditable job. In any case, I did not know it then, but one of the young ladies out in the audience was a girl from Immaculata High School by the name of Pauline Weinberger, and Pauline thought this guy in the Indian costume was the funniest and as a matter of fact, sang a song. I sang a song called the Mississnawa. It was about the river, the song "Went by the Miss-siss-siss-siss-siss-siss-siss-siss-sissnawa, da-da-da- da". It was humorous and had maybe a series of six or seven verses, choruses that were all very funny. In fact, I wrote the words to the song and a classmate of mine, Bill Dresden wrote the music, so we embellished "Annie Get Your Gun" with some of our own stuff. Anyway, all under the tutelage of Father Norbert Clemens who was a great leader and inspiration to all of us. So, now I graduated from Catholic Central, go on to the University of Detroit, and...

*Mr. Lane:*

What is the year, now?

*Justice Brennan:*

This is 1947, in the fall of '47. As a matter of fact, in that final year, I played basketball. I was...my only moment of glory was in the Christmas tournament. I scored a few points in the waning minutes of the game. We were winning anyway, but I was a second stringer and loved to play but wasn't that strong or aggressive. I had a good shot, but I was tall and skinny. I'd go up under the basket and get pushed aside by the sturdier lads, and finally when the state tournament started, we were going into rehearsals for "Rifles Aren't Romantic", and I had to make a choice between the play and the basketball team, and I left the basketball team, which is rather amazing when you consider that the coach of the basketball team was this Father Matt Sheedy who had been my freshman English teacher, and I was still scared to death of old Matt Sheedy.

*Mr. Lane:*

You grew up at 14 one day.

*Justice Brennan:*

Boy, yes. He died this last year, Matt Sheedy. What a great guy he was. Anyway, so in any case, I started the University of Detroit in the fall of 1947. There was a whole influx of young men and...mostly young men coming back from World War II. At that time, had just mustered out, had the benefit of the GI bill and were starting their college education or continuing their college education, so the colleges were bulging at the seams. The University of Detroit re-opened Dowling Hall, a building that was constructed in 1877 down on Jefferson Avenue.

*Mr. Lane:*  
D-o-w-l-i-n-g?

*Justice Brennan:*

D-o-w-l-i-n-g, and which had for some years before that, been open only in the evening for the evening College of Commerce and Finance, but in the fall of 1947, they re- opened it for the College of Arts and Sciences but only for freshmen, incoming freshmen. It was a curious kind of atmosphere at Dowling Hall in the fall of '47. You had a lot of people who were young men who were in the early and mid- twenties who were coming back from the war and some who were older than that who were married and starting college education, serious students. Then you had a gang of us who were 18 and who were just coming right out of high school, but in any case, there weren't any upper class men. It was all just freshmen in this building, and there was a great camaraderie that developed there in that year. A lot of friendships made and a lot of good things happened. That is where I met my wife and we met a full crowd of social friends who have been friends ever since. The next year, I went up to the so-called "uptown" campus at Six Mile and Livernois and continued my education. I was in Arts - Pre-Law. I remember that I was very pragmatic about going to school. I wanted to hurry up and get my law degree and get out and start making money.

*Mr. Lane:*  
At this time, did you get good family support? You did not have to work, did you?

*Justice Brennan:*

My dad said to me, "Tom, you're a good student." I graduated fourth in my class in high school, and I had a 92.5 average for the four years of high school. As a matter of fact, I recall in I think it was my sophomore year, I got all A's. It was the only year I got all A's, so I got mostly A's all the way through with a 92 average, and my dad said, "You're smart. You ought to go to college." He said, "Here's the deal I'll make with you. You can live at home for nothing, and that's your scholarship and while you go to college, you pay your own way, and you don't have to pay board except in the summertime when you're not going to school", so I thought that was a very generous proposition, and I proceeded to go to school.

*Mr. Lane:*  
Did you have to borrow for tuition?

*Justice Brennan:*

No. Nobody would loan you any money anyway. There was no place to borrow. I had no credit. I had no job. There weren't any programs like there are today where people can borrow money to go to school with the Federal government standing behind it. No, I worked in a bowling alley setting pins. I worked in the summertime obviously, I worked...the summer before I started college, I worked at the railroad, many times pulling double shifts, working loading mail onto box cars down at the old...what do they call it?...down there at 14th and Michigan Avenue. I want to say Union Station. It wasn't Union Station - Michigan Central Station, Michigan Central

Railroad Station, and I worked, I'd go in at 3:00 p.m. and work until 11:00 p.m. and oftentimes get a double shift and work until 7:00 a.m., so I saved up my money to go to school that way. Basically, during my freshman year, I didn't have to work because I had saved enough money to pay my tuition. Then in my sophomore year, between my freshman and sophomore year, I got a job at the Wolverine Stone Company. This was all like stone facing that you put on buildings, limestone sills and door steps.

*Mr. Lane:*  
Grave markers?

*Justice Brennan:*  
No, we had a little of that though basically not. Usually, that's granite. We dealt in limestone, sandstone, construction stone mostly though I do recall, we made fireplaces out of stone, and we used to set the fireplaces up and number the bricks, the stone pieces and we would draw a diagram for the brick mason who would put them all together on the job. In fact, one of my great...I worked there for three summers. One of my great accomplishments during that time was to carve a limestone fireplace which is somebody's home down in Detroit to this very day. I couldn't tell you where, but I literally carved it with a air hammer, you know, a chisel like this, and so those were my hard-working days. I drove a semi down to Indiana to pick up stone and things of that kind, and learned and discovered what the language of the working man is which was the combination of the language of the working man and the language of the dog-faced soldier because men I worked with were men who had served in the second World War and who brought back with them not only a spirit of American enterprise but a cultural whatever. So...

*Mr. Lane:*  
Were you on a combination course, two years of general arts and three of law or that sort of thing or were you?

*Justice Brennan:*  
I don't recall that. I was on a track where if I could generate 62 hours of pre-law credit, I could be admitted to the law school. I don't recall that I had to have any particular grade point average to do that. I do remember, however, that the course, my sophomore course in religion was not an acceptable credit to get into law school and I talked to my advisor. I said, "I don't want to take this. I don't need this to go to law school. I've already taken all the religion that the law school will accept for pre-law credit". The advisor said, "This is a Jesuit institution. You will take religion because everybody must". I had a priest called Father Madgett and the subject had to do, it was a speculative religion course having to do with what heaven was going to be like. I found the whole thing totally impractical and not particularly inspiring, and I did everything I could do to get kicked out of the class, and I finally flunked it.

*Mr. Lane:*  
How did Father Madgett spell his name? Do you remember that?

*Justice Brennan:*

M-a-d-g-e-t-t, I think, a sainted man of sainted memory who has gone to his eternal reward and I'm sure is now proving that everything he told me in that class was absolutely correct, and when due course of time comes and I meet my eternal reward, I am sure Father Madgett will say, "See, I told you it would be like this". In any case, I had a lot of fun, but I also worked. I worked in a burglar alarm company and my job was as a dispatcher, a night dispatcher. I'd go in on Friday and stay at the burglar alarm company until Sunday night. I had like a 30 hour shift, and there was a cot there to sleep on. What I basically had to do was to be there in case the phone rang, somebody would call and say, "You people have a burglar alarm that just went off on the corner of Meyers Road and Seven Mile Road" or whatever, and I would immediately call the police and dispatch the repairman to go out and fix it, because nine times out of ten, it would be the wind or something like that. We also had some silent alarms which became the state of the art afterwards, but we had a few at that time where the alarm came directly in on a ticker-tape, and you had to call the police and send them out. I remember that every Monday, I would go over to the alarm company which was only a 1/2 block away from my home and get my check, and the check was for fourteen dollars and twenty some odd cents. I would take the check and go up to the Bursar's Office at the University of Detroit and give them \$10.00 of the \$14.00 and the other four bucks was for me to live on for the rest of the week. A lot of fun. Anyway, among other things, to help me to operate, a 1928 Essex that I had acquired for \$75.00 the previous summer and when I got it home and we took the head off the engine, we found out that the #5 cylinder was completely empty. There was no piston, no rod, no nothing. You could see the oil pan right down through the darn thing. I spent all that summer trying to purchase a piston and rod for a 1928 Essex and believe me, there are not a lot of those around. You don't go to the K-Mart and say, "Give me one", you know, but it was a great old car. We finally got it running barely. It never went more than 32 miles per hour, but we got it up to 32, and I did drive it to school a few times in my sophomore year.

*Mr. Lane:*

I suppose that was before the time when you would apply to the government for a remedy and declare that you had bought a lemon.

*Justice Brennan:*

That's right. Well, we knew what we were doing. As a matter of fact, we told...Burt Baker was an automobile dealer on the corner of Grand River and Livernois. He had a big sign that said, "If you've got \$50.00, I've got a car". We went in and said, "We've got \$50.00". Actually, it was not my car because there was only one of us in our crowd that was old enough to buy a car. The fellow's name was Lloyd Penner, and Lloyd Penner was an orphan who had moved in with Mike Foley on the next block. Mickey and Jerry Foley, and the Foley boys, they picked up Lloyd Penner, I guess because Mike Foley worked at the Detroit Times, and he met Penner, and why or how, but Penner moved in with them. He was 21 or at least, he had proof to indicate that he was 21, and I was only 18, but I was the only one who had a decent job, and I had \$75.00 so I put up all the money, and we took title in Penner's name. But everybody knew it was my car regardless of the fact that the title was in Penner's name. Anyway, we had a lot of fun trying to get the car

going, and actually did get it running a few times that year. I'll come back to the car in a bit. Sophomore year - I'm still, even in college, being involved in the college version of the Hearst Oratorical Competition, and I think I won at the University of Detroit maybe once during that time, but I was anxious to go right to law school and in fact, I did start law school in the fall of 1949 after two years of pre-law study. I was then 20 years of age. I remember, I'd worked in the stone yard, saved my money. I was...fall of 1949...already dating Pauline Weinberger whose nickname is Polly and who has been my wife now for 39 years, so we were dating. I went down to the Penobscot Building. I wanted to get a job as a law clerk, so I went to the Penobscot Building. I didn't know any lawyers. My Uncle Emmett Sullivan was a lawyer by training but he worked for a bank. He worked for the City National Bank, and he didn't believe that anybody could make a living practicing law. His recollection from the depression was that was a wrong thing to do, and he really didn't have any particular connections or so it seemed, and in any case, in our family, you never went to relatives to ask them for anything, so I went to the Penobscot Building, and I stood there in the lobby, and I looked under "O" because I figured there was going to be some Irish guy, O'Malley, O'Toole, O'"something", and I'm going to walk in and say, "I'm Tom Brennan. I go to the University of Detroit Law School. I'd like a job as a clerk", and he is going to say, "Hey, Brennan, you sound like a good guy", and I'm going to get hired. So I go upstairs. There are no "O's". There are no lawyers that start with an "O", and right after the "O's" come "R", and there is a lawyer by the name of Roberts, and I said, "That's good enough". I go upstairs to Roberts' office, and I walk in, and as I'm going through the door, I notice the name Abbott is also on the door, something Abbott and Roberts and so on, so I say to the young lady, "I'm here to see Mr. Roberts", and she said, "Mr. Roberts is not here". I was very quick. I said, "Then I'd like to talk to Mr. Abbott". She said, "Who shall I say is calling?". I said, "Tell him that Justice Brennan is here to see him". She said, "Have a seat". I sat. A little while later, she ushered me in and behind this large desk was a lovely white-haired gentleman, somewhat pudgy, very benign face by the name of Arthur Abbott, and Arthur Abbott, I soon learned, had been an adjunct teacher at the University of Detroit for 25 years, ran the Abbott Bar Review course was his venture, and took a great interest and a very kindly interest in me. He didn't have any clerkships there at the law firm but he picked up the telephone and called the Detroit Bar Association Law Library because he was on the committee of the Bar that ran the library. He spoke to the librarian and anyway, she agreed to interview me for a job in the library and shortly thereafter, I was working in the Detroit Bar Association Library for the magnificent sum of \$0.50/hour putting books away and learning how to use the library. In any case, Arthur Abbott's son, John, later was the Dean of the Detroit College of Law for many years, so that was my first exposure to the Abbott Family. Anyway, I worked at the Detroit Bar Association Library in my freshman year in law school, and then in the summer between by sophomore and junior year in law school, I worked at the stone yard again, left the Bar Library and went back to the stone yard. That summer, I also had a second job. I worked at the stone yards from 7:00 a.m. until about 3:30 p.m., and then I dashed out, got on a bus and got across town to around Cass Avenue someplace where I picked up my truck from the Ludington News Agency, and I drove a truck for Ludington News Agency on the afternoon shift, delivering and picking up film from drugstores, particularly in the downriver area, so I can remember there was only a driver's seat in the truck, and on a couple of occasions, my girlfriend, Polly, would go with me, and she had to sit on a box that we would bring along that was there and ride along. That was a big date. She would ride along with me on the truck, and we'd go pick up films out in Wyandotte and maybe stop for a cup of coffee or something.

*Mr. Brennan:*

The purpose of my working the second job was to save money for an engagement ring. By the end of the summer, I had stashed enough money away to buy a diamond engagement ring, and in the fall of 1950, my brother was married. He was married in September. On October 7th, Polly and I went down to pick out the diamond ring in the morning. We ordered it from the jeweler and that evening, my parents had their 25th wedding anniversary celebration which we kids worked on and put on for them. Four days later, Polly's father died. Now, I'm going to take a moment to back off and tell you a little bit about my wife. Her dad was an immigrant, and her mother was an immigrant. Her dad came from Germany. Her mother came from Muckryn, Hungary at the age of 14 or 15. I can't even spell it. It sounds like Muckryn. She came at the age of 14 or 15 alone, worked as a house servant for a dentist in Philadelphia, saved enough money to send for her family and brought them over, her mother, her brother and sister. In the meantime, Fred Weinberger, my wife's dad came from a large, somewhat upper crust Jewish family in Germany. His father was a military man, I think, and his grandfather raised horses for the German army. He came here in about 1905. In about 1912 or 1915, his mother wrote to him and told him to come home and fight for the fatherland. He made application to leave and then couldn't get out, and his citizenship was held up for several years because of that, but ultimately, he became a citizen. He worked at the Detroit News. He was a stereotyper for the Detroit News as was his brother-in-law, Polly's uncle, Joe Lobb, and they were both very active and on the board of the Detroit Newspaper Industrial Credit Union which you may recall back in the old days. The printers and stereotypers put them on the in and the reporters and photographers took them on the out. Roy Marshall was the head of it, but Polly had two older brothers, Joseph Weinberger and Emmanuel Weinberger who were maybe eight to ten years older than she was. Her oldest brother Joseph was killed in an automobile accident in 1936. He was 20 years old. Two months later, her mother committed suicide. That would have been in 1936. Her grandmother then lived with her and her dad and her other brother, and I think maybe in the late 1930's or early 1940's, the grandmother died. Her second brother was killed at Salerno. He was a paratrooper killed in 1943, so where she had grown up as the youngest child and only daughter in a family with two brothers, dad, mother and grandmother, a house full of people; by the time I met her in 1949, she was just her and her dad. As a matter of fact, the father had had an unhappy marriage after the mother died and was divorced and so on. Curiously, she did not know that her father was Jewish. He was a Catholic. He went to Catholic church and sent her to the Catholic schools, insisted that she get her Catholic education and so on. He was somewhat an antisemitic fellow, strangely enough. We didn't know much until much later. We were somewhat estranged from his family, but in any case, on October 11th, I got the phone call. She was home alone with her dad, that he had just died in her arms. So we put off the announcement of the engagement for a little while, but about a month later, we got engaged, and then began to make more specific plans to get married. We were going to wait until after I graduated. The Korean War was heating up, and they were deferring young men during the war to finish their education, so in my junior year of law school, I was married.

*Mr. Lane:*

This would have been 1950, would it?

*Justice Brennan:*

1951. In 1951, I was married in April, April 28th. In my senior year, my son Tom was born in 1952. He was born in March. That senior year, I got into the Hearst Oratorical Contest again, and I won it at the University of Detroit and then I went to the tournament at the old Savognard Club, I think it was...no, it was a club up in the top of the Penobscot Building. I can't tell you the name of it, but anyway, they had the finals there. College representatives were all there. The judges went back. They came out and were about to announce the winner when Harry Tayler who was the guy from the Detroit Times who ran the contest had this whispered conversation. The judges went back in and then came back out and announced the winner, and it was the guy from Wayne State or whatever, and then they came over and told me that I had won by the vote of the judges but that Harry had had a ruling from the home office of the Hearst People, that I was ineligible because I was a fifth year student. Well, I was still an undergraduate. I had never gotten a degree of any kind, and originally thought I was eligible for the competition. They had gotten this ruling that I was ineligible so they had to take it away from me, okay. But they were kind enough to give me the same savings bonds that I would have received had I won, but I didn't get to go on to New York to the next level of competition. That was, in a way, not a bad thing because you know, oftentimes, good comes out of evil, because I think the Detroit Times, Harry Tayler, felt very badly that they had sort of misused me this way. The decision had been deliberately made that if I didn't win, it didn't matter so they weren't going to say anything but if I did win, they were going to have to take it away, so a day or so later or the next day in the Detroit Times, a big picture of Tom and Polly Brennan at the dinner, at the banquet and so on and so forth and the story tells the winners of the competition and so forth, but there was also this young law school student at the University of Detroit who happens, at this time, to be a candidate for the state legislature, which I was in 1952. I was then working at Burton Abstract and Title Company as a loan closer, and I had decided to run for the state legislature. I walked across the street to the City County Building, and I saw old Judge John V. Brennan, and I told him that I was going to run for office, and I expected I'd get a lot of votes because of his popularity and what he'd done for the name, but I would hope that I would not sully the name of Brennan in politics, and he was very impressed with that and my coming to see him. I went out and then got 300 signatures, because I didn't have \$100.00 to file a filing fee so I had to get the signatures. That's how I got on the ballot. I ran for the state legislature. Anyway, the Detroit Times, I suppose felt so badly that they had gyped me out of my victory that they gave me a little bit of press and attention. That summer in the primary election, I came fifth out of 80 candidates for 21 nominations to the state legislature. You may not recall this but back in those days, the City of Detroit was one legislative district and had 21 representatives elected at large from the city and of course, the 21 representatives were all Democrats. The Democrats had something like 110 candidates for the 21 positions, and the Republicans had 80 candidates for the 21 positions on the ballot. I came fifth out of the 80 and was nominated whereupon the Detroit Times did an editorial about what...it was called "A Healthy Political Sign", and the gist of the editorial was here was a young man who had gotten his start in politics in part, largely though the aegis of the Detroit Times' Hearst Oratorical Competition and that he had recently competed speaking about Henry Clay. Henry Clay was the subject of the competition and how ironic it was or coincidental it was that Henry Clay had gotten his start in politics at the age of 23, and here was this young man Brennan

getting started at the age of 23, and he had demonstrated his abilities, etc., etc., and his dedication to the American tradition by his involvement in the oratorical competition which was what they were trying to do with the college students, encourage them to get interested in government and politics, and now he had proven that he had the practical ability to translate all that academic into the real world and that they predicted a bright future for this young man. Anyway, my mother saved that editorial, and of course, I have it. It's around some place.

*Mr. Lane:*

Did it do you any good on November 5th?

*Justice Brennan:*

Well, of course it didn't, because you know, the Democrats were going to elect all 21. Everybody knew that. Anybody with any sense knew that. I didn't have any sense, and I thought that if I campaigned hard, I might win so I took my vacation and I went out to the Ford Rouge Plant and stood out there and gave my cards out to people and some of these union guys, the Polish and the Tennessee rednecks and the blacks coming out saying, "What are you doing here? You Republican? What are you doing here?". I'd just keep smiling and handing out my cards and waiting it out. In any case, I ran fifth among the Republicans in the run-off just as I had in the primary and all of the Republicans ran behind all of the Democrats in the run-off as you can well imagine, so that was my start. In 1952, my son Tom was born. I ran for the state legislature. I met Dwight Eisenhower. Eisenhower was the inspiration really for me to get into politics at that time, and...I shook his hand. It was one of those memorable things for a young man, but I do remember being out with my brother campaigning and putting my cards on the windshields of cars in the parking lot outside of the Masonic Temple where they were having a big rally for Eisenhower, and he was inside making a speech, and I was listening to him on the radio in the car, and he said, "I will go to Korea", and I remember that statement and the tremendous impact that it had on me as a young man liable to the draft and perhaps to go there.

*Mr. Lane:*

That's where he made the declaration?

*Justice Brennan:*

That's where he made the declaration, at the Masonic Temple in Detroit.

*Justice Brennan:*

That was the total content of the campaign. Oh, yes, and the American people believed that if Dwight Eisenhower would go to Korea, this thing was going to end, you know. He'd find a way to do it. It was a very dramatic and visual way for him to state his objectives, and maybe had nothing else in mind except that he was going to go over and see what this thing was all about.

*Mr. Lane:*

You don't happen to know the political genius of that just by chance?



*Justice Brennan:*

No, I don't know where that came from.

*Justice Brennan:*

That was a stroke of genius.

*Justice Brennan:*

Oh, yes, no question about it. He was like "Read my lips". So anyway, I went on and graduated...

*(End of side 2, tape 1)*

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**Topic 4: Justice Brennan discusses opening his own law practice, various unsuccessful political campaigns, his children; campaigning and being elected for Common Pleas Court**

*Mr. Lane:*

This is tape 2, and let's get on with the graduation.

*Justice Brennan:*

So anyway, I graduated from law school in 1952. I was then working at the Burton Abstract and Title Company. I took the bar examination that summer past and was admitted to the State Bar of Michigan in January, 1953. During 1953, I simply worked at the Burton Abstract and Title Company. Polly and I bought a home on Silverlawn Street on the west side of Detroit. It was an older home. It was owned by the Masonic Association because the widow had deeded it to the Association, and she was being taken care of for the rest of her life by them. I think I paid \$9,800.00 for the house, had to borrow the down payment from my employer, Burton Abstract, sold the car that we had that Polly had inherited from her father and spent the next year or so going to the store with a little red wagon to bring home our groceries. I remember waiting for the bus in front of Sears and Roebuck Company in the rain and cold, thinking to myself, "Any kind of a car, Lord, any kind of a car", and every car that would go by, the worst old rattle-trap, that guy would be in his car going to work and I'd be standing on the corner. Anyway, but we struggled, worked hard on the house, painted and wallpapered and fixed up and that sort of thing. Then in 1954, I ran for the state legislature again. This time, they had cut the City of Detroit into districts, so I was running from a west-side district where three candidates were to be elected, and again, I led the ticket with the Republicans, among the Republicans, and the Republicans all lost to the Democrats in the run-off. That was in 1954.

*Mr. Lane:*

Did you file by petition in that campaign?

*Justice Brennan:*

No, I think in that case, I filed \$100.00 filing fee. In 1955, early in 1955...well, late in 1954, I got

a phone call from Bob Waldron whom I didn't know but he told me that it had been suggested to him that he call me by Art Bonk, a mutual friend.

*Mr. Lane:*

Bonk, B-o-n-k?

*Justice Brennan:*

B-o-n-k, and that Bob had recently been elected to the legislature, had a small law office in downtown Detroit, was looking for an associate and was I interested. It happened that I had a little bit of business, law business of my own. Largely, one of my best clients was my wife's uncle who had a piece of property that he had to foreclose on or something, and I had a fee coming in from him on that, so I agreed with Bob to go into the law practice. On the first of January, 1955, I started into the law practice, just the two of us. We had a two-room office, one office for the lawyer and an outer office for the secretary. Of course, we didn't have a secretary, and I sat where the secretary would be whenever Bob was in town and when he wasn't in town, I could sit at the lawyer's desk. We would have secretaries from other law offices come in in the evening and do our typing for us and so on. That's where we started out. We were there for a little while and then we moved over to the First National Building where I had my own office which was a wonderful thing, 1955, and I remember the first month in my law practice, I had been making \$325.00/month working for the law firm of Kenney, Radom and Rockwell when I left at the end of 1954, and in my first month in the law practice, I grossed \$950.00. My expenses were \$240.00 so I took home or grossed around \$700.00 which was twice what I had made working for Kenney, Radom and Rockwell. I was ecstatic. I said, "How long has this been going on? Where have I been all these years?"

*Mr. Lane:*

How do you spell Kenney, Radom and Rockwell?

*Justice Brennan:*

The owner of the firm was Mr. Frank E. Kenney, K-e-n-n-e-y. Radom, R-a-d-o-m, and Rockwell, R-o-c-k-w-e-l-l. So anyway, the second month, however, I only grossed about \$270.00 and my expenses were \$240.00 so that all of a sudden, it didn't look so good, but we did all right and kept body and soul together in 1955. Well then in 1956, my twins were born in March of 1956, and I was still practicing law with Bob Waldron at the time. I think perhaps by then, my brother Terry had come with us. He had been working for an insurance company and I persuaded him to come into the law practice with us.

*Mr. Lane:*

He was a lawyer?

*Justice Brennan:*

He became a lawyer. He went to law school after I did. He was older, but a little later getting started. Then came...okay, the twins were born, Peggy and John were born in 1956. We were struggling. I had to give up my home, the house we bought. Polly went to work teaching. That was before the twins were born, and we rented an upper flat near Six Mile and Wyoming on Cherrylawn Street. We lived in that two bedroom upper flat when the twins were born so there

we were with three children in a two bedroom upper flat. Then in 1957, I ran for Common Pleas Court Judge. Oh, I left something out. In 1954, I ran for the state legislature. In 1955, I ran for the United States Congress.

*Mr. Lane:*  
16th District.

*Justice Brennan:*  
In the old 16th District when John Dingell, Sr. died and his son was a candidate for the Democratic nomination and was nominated by the Democrats. John Dingell was 29 years old. This was not a special election.

*Justice Brennan:*  
It was a special election. The election occurred in December, 1955, and I was 26 years old, and there was a newspaper strike during the campaign, and as a matter of fact, I think John Dingell was elected with 19,000 votes and I had something like, I don't know, 5,000 or 6,000 votes or something like that, but that was the whole thing. I could talk a lot about that campaign, but for example, I was making somewhat of a fuss about the Emmet Till case at that time which was a lynching case in the South, we're talking about. I remember one of the things of my campaign was it's all right to have state's rights but what about the state's responsibilities. For every right, there's got to be an equal responsibility. I talked in terms of constitutional amendments detailing state's responsibilities with respect to civil rights and things of that kind. I was regarded by some people out in Grosse Pointe as a communist and they referred to me as a communist or a communist leaning, pinko, liberal character. As a matter of fact, one time when all the Republicans were going to come into this special district and help work on the campaign, there was a certain group of Republicans in Grosse Pointe telling people not to get on the bus, literally were there physically urging people not to go on the bus. So anyway, we lost. That was 1955. In 1956, the twins were born. In 1957, I ran for Common Pleas Court Judge. I ran fifth in the primary. Elvin Davenport was elected the judge.

*Mr. Lane:*  
This was non-partisan.

*Justice Brennan:*  
Non-partisan election.

*Mr. Lane:*  
So when you were fifth, you were #5 on a...

*Justice Brennan:*  
On a list of maybe 20 candidates or so that were running for the job. Number one was Elvin Davenport, a black man, the governor's appointee to the Common Pleas Court who was running to keep his position. Number two was Charles Kaufman who was later elected Common Pleas

Court judge, and I can't recall...number three may have been Clarence Reid or Joe Maher and I think maybe Reid was number four and I was number five. Reid had been Lieutenant Governor and Joe Maher had run for judge a number of times, so I figured, well, I'm making progress. You know, I've got a ways to go but I campaigned mostly in my own neighborhood and did very well in the few precincts where I was able to do a fair job of campaigning. In 1958, my son Billy was born. 1958 was a tough year. My dad died. My son Billy was born, and my mother sold us the house on Morley Avenue where I grew up after my dad died.

*Mr. Lane:*

Did your dad die suddenly or had he been sick?

*Justice Brennan:*

Yes, quite suddenly. He hadn't been ill, but he got pneumonia, had a heart attack and died. In those days, that sort of thing happened rather quick. He was a smoker, not in good physical shape, 58 years old. It was a blow to me, it really was. Anyway, my mother sold us the house which was a blessing because we were then three and about to be four children in this two bedroom upper flat, and she sold us the house for \$11,500.00 as I recall, and gave me \$1,000.00 towards the down payment. Out of Dad's insurance money, she gave each of the five of us \$1,000.00. Mine was by way of something on the down payment toward the house. So a few months after my dad, or actually, Dad died in April. My son Billy was born in June. We moved into the house in July. In 1959, I ran for Common Pleas Court again, this time again I ran 5th, but there were four to be elected, but the 4th slot was to be a replacement because somebody was not running for re-election. I believe Judge Jeffries was too old to young...it wasn't Jeffries, somebody else, Cartwright or Liddy or somebody.

*Mr. Lane:*

The people that listen to this tape should be informed that the judicial elections in those times were in odd years, right?

*Justice Brennan:*

Yes, they were not only in odd years, they were in April. They were in April of the odd numbered years, so I had run in April, 1957 and this was April, 1959. The primary election would be in February and the run-off in April so in February, 1959, I ran 5th behind Charles Kaufman and three incumbent judges, and I was only a couple thousand votes behind Kaufman and figured I could perhaps beat him in the run-off so we worked very hard, spent a lot of money, borrowed money and everything else, and I lost, again...

*Mr. Lane:*

Quite closely...

*Justice Brennan:*

No, the margin was substantially broadened between Kaufman and me in that run-off.

*Mr. Lane:*

But at any rate, you had the sense of progress at that point, somewhere in there...

*Justice Brennan:*

I did, yes. I had a certain amount of encouragement, but I was disappointed because I had gone past Clarence Reid and Joe Maher who...and Bob DeMascio was also nominated that year. He was later a Federal judge, but in any case, I lost to Charles Kaufman in 1959. I remember waking up in the hotel room the next day and being very, very down and discouraged, being in debt and having to go back and rebuild my life and my law practice and so on. In 1960, my daughter Mary Beth was born and then in 1961, I ran for office again, and this time I was elected. This time, I ran fourth out of four to be elected.

*Mr. Lane:*

This was for Common Pleas Court?

*Justice Brennan:*

This was for Common Pleas Court and so I was elected by something like 500 or 600 votes over Andy Wood who was a long, well-known, long-serving Detroit Traffic Court referee, and I was 31 years old.

*Mr. Lane:*

Was this the famous kids campaign?

*Justice Brennan:*

Kids campaign. We campaigned a lot using high school kids, grade school kids.

*Mr. Lane:*

How did you recruit them? What was the appeal?

*Justice Brennan:*

The appeal came out of that whole parochial school system. I was raised by the nuns and taught by the priests and so on, and we went to the parochial schools. We organized the city by parishes. Oh, yes. There were no precincts. It was parishes, and you got a committee in every parish, and we would go into, sometimes go into a Catholic school and teach the kids some Civics and so forth and then before we were through, the nuns would be passing out our postcards and the kids would be addressing them for us, and we'd walk out of the school room with several hundred postcards all addressed, so we did a lot of that. We did a lot of direct mail work with brochures and so on. I also had billboards. I remember the great billboard episode. One of them was...there was an old Democrat from the east side of Detroit named Burt Donlin and Burt had...

*Mr. Lane:*

How do you spell Donlin?

*Justice Brennan:*

D-o-n-l-i-n, and Burt had suggested to me that what I needed to do was to make hay with the fact that Brennan was a judicial name, so he had suggested to me that I have, and since I had run before and I had supporters already in the community, this was a legitimate thing for me to put on my billboard... "Keep supporting for your Common Pleas Judge Thomas E. Brennan", so the three words that when you were coming down quickly in your car was "Keep Judge Brennan", okay, but the full message was "Keep Supporting for your Common Pleas Judge Thomas E. Brennan". Well, I thought, gee, that sounds pretty good, so we bought the billboards, and we hung them up and so forth and old Judge Cartwright who was one of the candidates who was an incumbent judge was going home on the bus and he saw this billboard, and he just went into a rage, called the Bar Association and the Ethics Committee and we suddenly had the phones ringing off the walls. Louie Rockwell who was a partner in Kenney, Radom and Rockwell was my campaign finance chairman, and a good man and a good counselor. I remember him with this crisis meeting we were having around the table, and Louie saying that we were going to have to take the billboards down and me saying, "They cost us too much money. We'll never be able to raise the money", and he insisting that we'd somehow finding the money to re-do the billboards, so in fact, we did. We re-did the billboards, and what it basically did was it said, "Thomas E. Brennan for Common Pleas Judge" so from a distance, it changed the message from "Keep Judge Brennan", to "Brennan Judge". That was the main push, but at least it was a legitimate billboard. They couldn't stop us from doing that, but I remember that. It was also the campaign in which, toward the end,...I think it was perhaps in the primary because it was very cold weather. I had a group of fellows from the Polish Legion of American Veterans, Post #4, the Abraham Lincoln post down on the west side of Detroit near Michigan Avenue, and they were great supporters of mine, and we got a bunch of hard hats, construction hard hats, and we made these signs on maybe seven or ten foot poles, and the signs themselves were, I'm going to say, 2 x 2 squares, 24" x 24" squares, and each square had one letter of my name in it. We were using the papers left over from the billboards, okay, and so there were seven of them, and they spelled out the name "Brennan" and on the back of those signs spelled out the word "Judge", and I guess one of them said in small letters "for", and then there was a blank, and "Judge", so there were seven billboards as well on the back, so these fellows would march in a row, single file, and as they carried the signs, it read "Brennan", and on signal, they would twist the signs in their hands, and it would change like a walking venetian blind, it would change and say "for Judge", "Brennan" "for Judge", "Brennan" "for Judge", so that was great. We then took this little entourage to the freeway going downtown Detroit and the pedestrian overpass down near the Herman Kiefer Hospital...Ford Hospital and that area near the Boulevard, and there was one great stretch there where there was this pedestrian overpass that probably 3/4 of a mile with straight away with no bridges or overpasses to interrupt you where you could see this pedestrian overpass coming up, and at a strategic time at about 7:00 a.m. on a busy work day, we got this little army of hard-hatted Polish veterans to march back and forth over the freeway with the signs, twisting in their hands on command to read "Brennan" "for judge", "Brennan" "for judge". Well, the result of it was as the motorists approached the overpass, they were curious of this doing up on the overpass, and they would tend to slow their vehicles down and look up through their windshields to see what was happening. If you can imagine on a busy weekday morning, the traffic which normally goes through there at 50 miles/hour is now going through at about 25 miles/hour and they're backed up from the Ford Hospital at Grand Boulevard all the way out to Eight Mile Road, and it is a massive traffic jam. In due course, a police officer arrived on his motorcycle and tells

us to get off of there, "Get off that overpass. What are you doing up there?", and Dick Maher, my campaign manager and law partner and I are there to tell the officer that our friends are merely exercising their constitutional rights, and they will not get off the overpass. He huffed and blustered a little bit but of course, we told him we were lawyers, and he wasn't going to bother us. Very shortly, the squad car shows up and after that, the sergeant shows up. After that, the lieutenant shows up from the station and "What's going on here?", and all the same story we go through. Well, in due course, channel 4 showed up or channel 7, whoever, and they got the T.V. pictures of these guys walking over the overpass and so forth and the sign changing from "Brennan", to "for judge". Well, once that happened, we were ready to come off the overpass and let the traffic go. They hauled us in to the station and gave us a lecture. In the meantime, they had lawyers downtown trying to figure out what we were doing that was wrong, and they had nothing to charge us with so they let it go, so that, of course, hit the news that night, hit the newspapers, attracted a lot of attention from a lot of different people.

*Mr. Lane:*

This was 1961?

*Justice Brennan:*

This was 1961.

*Mr. Lane:*

Now, who conceived the idea or was it just a lucky hit that somebody said, "Well, why don't we try this?", and then it really worked.

*Justice Brennan:*

Well, it was my idea, you know, but I...and I didn't have the scenario in mind that we were going to...I didn't think we were going to hold up traffic. I hoped that somebody would notice, you know, and it certainly didn't occur to me that we were going to have police and T.V. cameras there, but once the thing got going, I said, "Hey, this is going to be all right". I began realizing that we were creating a stir, so in any case, that was that story.

*Mr. Lane:*

Did that help a lot?

*Justice Brennan:*

I don't know.

*Mr. Lane:*

This was a state-wide...

*Justice Brennan:*

A city-wide campaign. You're talking about, in Detroit in those days, was 1,800,000; nearly 2

million people, and we got in the neighborhood of 60,000 votes in February, well in March. I think in February, we were talking 20,000 or 15,000 votes would be a good vote.

*Mr. Lane:*

In those days, you got a lot more newspaper exposure, too, would you not? Would you get the same thing today?

*Justice Brennan:*

I think so. Probably. In any case, that was my first winning campaign, and it was a very close race. But then...I was elected in April, but I wasn't sworn in until December and took office the first of January the following year, so I had a long incubation period during which, I cranked down my law practice. I got involved in the election of Jim Brickley for the City Council, worked on his campaign.

*Mr. Lane:*

Was it your idea to develop the billboards made out of bricks to emphasize the Brickley part?

*Justice Brennan:*

Yes, that's right. I had a kind of a flare for public relations and that sort of thing, and as a matter of fact, I wrote a whole design for his campaign, why he would be elected, how it was to be done, what the theme of the campaign was and etc., etc.

*Mr. Lane:*

Do I recall that during this period, the Brinkley-Huntley news team was in much focus and that the Brinkley part of this turned out to be a very...

*Justice Brennan:*

People kept calling him "Brinkley" because Brinkley was on the T.V. so then...Jim and his wife and Polly and I went up to Jim's father's cottage at Higgins Lake after the primary election. He had won in the primary and it was just kind of a crank down thing and a brainstorming session and I remember the three of them were all napping one afternoon and I was sitting at the kitchen table, laboriously drawing up the name "Brickley" made out of bricks, and I liked it the way it looked. Ultimately, we used that for the billboards, and we used it for bumper stickers and in addition to the name "Brickley" in red bricks, the phrase underneath it was "is the new man for Council", and the "new man" became his theme. That was an interesting thing and at the same time, I was involved in managing a campaign for two Republican candidates to the Constitutional Convention of 1963 which was being elected that very same summer. I managed the campaign of a fellow named Bill Cudlip who was a principle member of the firm of Dickensen, Wright, and he had a pretty easy time. He was being elected from Bob Waldron's Grosse Pointe district.

*Mr. Lane:*

He also was pretty well-known, was he not?

*Justice Brennan:*

And pretty well-known, but the one who had the tough campaign that I was very pleased with



having engineered a win for him was Rockwell T. Gust, Jr. because Rocky Gus was a candidate in a district which had always been held by the Democrats, and so we managed to get a victory for him, and that was quite an accomplishment.

*Mr. Lane:*

Would this have been in 1961?

*Justice Brennan:*

Yes, 1961, and in that same year, Jerry Cavanagh was being elected mayor of Detroit, and he was elected in the fall, in the fall municipal election.

*Mr. Lane:*

You just must have had an extraordinary zeal and taste for this kind of political activity. You just loved to...

*Justice Brennan:*

Well, I loved it, but you have to understand, Roger, that I didn't have a lot of other options. I mean, what were my assets? I was an Irish kid from the west side of Detroit. I didn't know any lawyers. I didn't have...nobody in my family that was in business. I knew no one in particular that would be a client, you know, a business client or anything like that. I suppose I could go out and chase ambulances or whatever it is and try to get cases, but in terms of getting business, there was no way for me to get business except to be out and about in the community, you know, and be active.

*Mr. Lane:*

This was an inviting role to progression...

*Justice Brennan:*

To get to be known, yes. It was one of the ways you could go to get to be known would be to get involved in politics.

*Mr. Lane:*

I was talking to Otis Smith, and he said in his childhood, the slogan was "Be somebody".

*Justice Brennan:*

Yes, and that's sort of what this was all about, although oddly enough from the law practice standpoint, it took away from your law practice. You didn't have the time to be with it. You always had people coming in wanting to have you represent them in drunk driving cases because they helped you in your campaign. It was a quid pro quo, you know..."I'll work for you in your campaign or I'll give to your campaign in exchange for you being my lawyer", you know, so it was a very difficult thing to be a successful lawyer. My brother stuck to the last as far as the law practice is concerned, and did very, very well, and he often had admonished me and said, "Why don't you give up this crazy politics thing and be a lawyer, concentrate on being a good lawyer?",

and I can remember before that 1961 campaign one time stopping in a church one night when I was agonizing over the decision as to whether to run again after I had been defeated five times, and praying in the back of church, "Lord, either let me win or take this [expletive] ambition out of my head, because I'm ruining my family, my finances and everything else", and my wife was absolutely torn up with the thing. In any case, we did win and that made a difference, although I remember going out the week after I was elected, going to the bank. My banker relative Emmett Sullivan, and borrowing \$12,500.00 to pay off debts from the campaign which will give you some kind of an idea representative of 2/3's of the salary of the job. The job paid \$18,000 and I borrowed \$12,500 to pay off the bills.

*Mr. Lane:*

In those days, did you have to clear up your debts within so many days after the electoral, date of election? Like is now the case, is it not?

*Justice Brennan:*

I'm not aware of it, and quite frankly, I think clearing up the debts even today is largely a matter of paper shuffling. I'm sure...

*Mr. Lane:*

Remember what happened to Alice Gilbert?

*Justice Brennan:*

No.

*Mr. Lane:*

You don't. Well, anyway, she ran a campaign...maybe it was Supreme Court. Wasn't it Supreme Court? Didn't she run one time?

*Justice Brennan:*

Yes, she did.

*Mr. Lane:*

And she apparently couldn't account for all the money that she spent, and she...somebody rubbed under her nose the provision in the canons that say that within such and such a period of time, you've got to pay your debts or you cannot accept contributions.

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**Topic 5: Mr. Brennan discusses his experiences in practicing law as preparing him for being a judge and a court case illustrative of injustices in the legal system at that time.**

*Justice Brennan:*

Oh, yes.

*Mr. Lane:*

So she went down to the bank and she got a \$72,000.00...how did she pay it off, and she had a real problem.

*Justice Brennan:*

It was the same way then. The campaign was over, and I don't know that there was any rule that we couldn't have a fundraiser, but as far as I knew, nobody ever had a fundraiser after an election other than maybe within a week after the election, you know, a victory party, and you tried to raise money then, but that would be it, so basically, I had to bite the bullet. I went out and borrowed what amounted to 2/3's of the salary. It would be like a fellow elected today to the Supreme Court which pays \$100,000 and going out and borrowing \$66,000 to pay off his campaign. Anyway, we went from there, and remember at that time, I had five children. So now it is 1961, and I win the election. In 1962, I was a Common Pleas Court judge. In 1963, Governor Romney appointed me to the Circuit Court. In 1964, I ran for the full term as Circuit Court judge. In the meantime, and that was one of the only windows in the whole history of the state, I did not have a designation as an incumbent though I was an incumbent. Because of the constitution of 1963 which took the incumbency designation away from appointed judges, I did not have a designation. Charlie Kaufman who was still a Common Pleas Court judge made the statement that he was going to run for Circuit Court against Brennan and he was quoted in the paper as saying, "I beat him before, and I'll beat him again". That challenge kind of got my Irish up and anyway, that was a great campaign in 1964 but I led the ticket and I defeated Kaufman.

*Mr. Lane:*

How did you take to being a judge? You know, here you go in and some guy fits you with a robe for the first time. Do you remember what the sensation was? People coming up in front of you...

*Justice Brennan:*

First of all, I took to it very well. I took to the profession well for a lot of reasons, I think, and I think a lot of it had to do with my upbringing and my education. The people who taught me and for whom I had great admiration and respect all wore robes. They were nuns and priests. They were the hierarchy of life, you know, in that sense. Ceremony was something I grew up with, religious ceremony - I was an altar boy, you know, so the idea of ceremony was something I was comfortable with and understood, and of course, I was a lawyer and had practiced in the courts so I was very familiar with what happened in the courts and spent a lot of time in the courtrooms. No, I felt very comfortable with it right from the get go.

*Mr. Lane:*

On Common Pleas, what was the normal diet of a day on the bench?

*Justice Brennan:*

Well, Common Pleas Court was basically a Civil Court with jurisdiction up to \$10,000. It may have been \$3,000 originally but it got to \$10,000. I think it is \$20,000 today, I could be wrong.

*Mr. Lane:*

A lot of replevin and that sort of thing?

*Justice Brennan:*

Replevin, basically but the typical thing would be a debt, a business debt, a consumer debt, and one of the things we used to...when I was at Kenney, Radom, Rockwell, the firm did a lot of collection work. That was their big thing and one of our jokes was that the typical defense of a business defendant was "I never ordered the merchandise. It was never delivered. It wasn't what I wanted and besides, it was defective". There were a lot of routine cases. Every morning at 9:30, Joe Kopecky would have a huge room full of people.

*Mr. Lane:*

He was the clerk, was he?

*Justice Brennan:*

When I was a young lawyer, and later Pais Getcho was the clerk, and I can't recall who came after him, the assignment clerk. The Clerk of the Court was a man named Ed Hackenjoss who was a shirt-tail relative of mine.

*Mr. Lane:*

Ed...?

*Justice Brennan:*

Ed Hackenjoss, H-a-c-k-e-n-j-o-s. His sister Rhea, married by uncle, Pat Brennan. He was a wonderful man. He was a public servant of the old guard, started out as a young boy working as a clerk and writing down everything he learned about the way the court operated and everything the judges told him and every statute he would check and learn about and so on, and it was all carefully filed in his little black books which he still had when I met him. That little brown book up on the shelf he gave me is the procedures of the old Detroit J.P. Court, I believe, which was the forerunner of the Common Pleas Court. He knew the history of the Common Pleas Court. He could tell you of the election of the judges and had all that stuff recorded in his little book. Wonderful, wonderful public servant. Anyway, so I had people in the court to help me get started as a judge, and I had my own ideas about how a judge ought to operate, because I had been a young lawyer before the judges, and I suffered some the indignities of being put down by the judges. There were many instances that I still think were horrible examples of judicial conduct, arbitrary conduct by judges. I remember a case where one of the old judges, Ralph Liddy who was kind of a character. It was rumored that when he performed weddings that people paid him \$10.00 for the wedding that he would take the money and wash it off with soap and water because it was dirty. He didn't want to handle it.

*Mr. Lane:*

L-i-d-d-y?

*Justice Brennan:*

L-i-d-d-y. He had printed up a little thing that was Judge Liddy's ruler, and it was actually a ruler, but in addition to the inches and so forth on the ruler was Judge Liddy's formula for

stopping time of a vehicle, and based on vision and distance and speed and reaction time and etc., etc., he had this mathematical formula that we were supposed to know and be aware of and so on, and he loved to pontificate about his formula and use it wherever he could to decide cases. He was an extremely arbitrary man. There was...at one time when I was practicing, I representing a doctor, my own personal physician, Jack Ronayne, who was owed a bill by a man in Highland Park, and the fellow wouldn't pay him and finally the doctor said, "I'm going to sue him. I think he should pay it", so I sued him. A lawyer came in and represented him, Maurice Cherry, I think his name was, who had a withered arm, and he represented the patient, and I think the bill was \$80.00. It wasn't worth the trouble to sue or certainly the trouble to have the doctor come down and yet the money was owed, so I used the Court rule for summary judgment and I prepared a motion for summary judgment and had the doctor sign an affidavit that he really performed the services and that if called to testify, he would say so and so on, and that the bill was reasonable and the amount of it that hadn't been paid. I followed the court rule and I filed the motion. Maurice Cherry on behalf of his client did not file an affidavit of merit as the Court rule required and so on motion day, I went to Judge Liddy, and of course, you didn't argue motions in open court in Common Pleas. They were all decided on the paper work back in the judge's office, but I went in to try to get to see him because the Clerk came out with the file stamped that the motion was denied, and then I tried to get into see him. "Why had he denied it? How could he deny the motion? We followed the Court rule." He wouldn't tell me. He wouldn't talk to me about it. He wouldn't respond, but he denied the motion and awarded \$10.00 or \$20.00 cost to the defendant. Well, that meant the case had to come down for trial. So I called the doctor. I was so mad. You know, the system wasn't working, and it was made to do that for this very purpose. He said he would come to court. He was as mad as I was, and he agreed to come to court, take off from his busy practice and so he did. The case was assigned to old Judge Tom Kenney who is a nice old guy appointed by Harry Kelly, the governor, as a matter of fact, had been Harry Kelly's legal advisor. I later, when I served with Harry Kelly on the Michigan Supreme Court, told me that he called Tom Kenney in and he said, "Tom, I want to appoint you Common Pleas Court judge, but I've got to have one promise from you". "Anything you want, governor". "You'll never touch another drop to drink as long as you live", and he said, "You've got it". He made the promise, became a Common Pleas Court judge and never walked into his office any day in the morning without looking towards heaven and thanking God and Harry Kelly. He was a happy man. He loved his job, and he was a nice man. He was a kindly man, and he was a good judge but he was, like the others, kind of arbitrary, very arbitrary, mostly because kind of rules of thumb that he had developed through the years as being a judge, so I'll tell you the story. We're now assigned to Judge Kenney. I've got my client with me. Maurice Cherry is there. He doesn't have his client with him. The case is called and goes to Tom Kenney. It's about to start and Cherry stands up and says, "Your Honor, before we begin, the counsel made a motion for summary judgment before Judge Liddy that was denied and Judge Liddy awarded my \$10.00 in costs and the costs have not been paid. I don't think that I should be forced to defend this case until counsel and the plaintiff pay me my costs". Kenney says, "Pay him his costs. I'm not going to hear this case unless you pay him his costs". I said, "Your Honor, I should have won that motion, and we're about to try the case, and it's going to prove that I should have won the motion because he doesn't even have a witness with him". "Pay him the costs or I'm not going to hear the case". I took out my checkbook, and I wrote a check for \$10.00 to Maurice Cherry and I handed it to him right there in open court. We then proceeded to put my client on the witness stand. He testified that the bill was owing and had never been paid, that the services were performed. Cherry gets

up and he says, "Doctor, when you were called to this man's house, was he conscious or unconscious". He said, "He was unconscious. He'd had a heart attack". "What did you do?". He said, "I examined him and called the hospital and had him admitted as a heart patient." "Then what did you do?" "Well, nothing. I saw him in the hospital one time and then I was relieved of the case because the family doctor got there to take over. I was just on emergency duty". "Well, did you ever talk to the man?" "No, I never talked to the man. I never saw him awake, never talked to him". "So you never made a contract with him for services?" "No, I didn't. The judge said, "Wait a minute..."

*(End of side 1, tape 2)*

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**Topic 6: Justice Brennan continues talking about the court case from Side A. He also talks about being appointed to the Circuit Court by Governor Romney in 1963, instituting an "anniversary system" to handle cases in his court room, and other issues of judicial administration and credibility**

*Justice Brennan:*

The judge said, Kenney said, "Well, that's no defense. There's an implied contract. The man is sick with a heart attack and a doctor is called. There is an implied contract for medical services. Is that all the defense you've got, Counsel?" "That's all I've got". "Well, I am going to award judgment for the Plaintiff, \$5.00 cost". I'm on my feet - "Your Honor, I just paid the guy \$10.00 in cost for the motion". "Oh, that was the motion. You lost the motion but you won the trial". I said, "I can't win the trial and lose the motion because the motion was that there shouldn't even have been a trial because there is no defense". "That's right. There's no defense and you win. That's all. Judgment for the plaintiff", and he starts off the bench. I said, "Your Honor, can I make a motion?" He says, "You can do anything you want", so I rushed back to my office. I got out the statute. The statute says among other things that if a motion for summary judgment be made and denied on the basis of an affidavit of merit even, and it should then appear at the trial that the motion should have been granted because in fact, there was no defense, then not only should the plaintiff have judgment but he shall have treble costs as a discipline for the improper affidavit of merits having been filed. So I prepared my motion, I want treble costs. I go back and file it with Kenney and show him the statute in the court rule and so forth that entitles me to it. He said, "You're not going to get that from me. If you want to take it up to the Circuit Court, they read all those books and they do all that law stuff up there. I just make decision about people's cases, between the good guys and bad guys, that's all I do. We don't do those fancy things in my courtroom." That was the way it came down. Well, I went back to the office and of course, the only thing I could do. We were never going to collect a dime of this \$80.00 from this deadbeat anyway, but I called the bank and stopped payment on the check, so I at least saved the \$10.00, and at this time, I was working for Kenney, Radom and Rockwell. In due course of time, Mr. Kenney himself came into my office a month later, and he said, "You stopped payment on a check you gave to a lawyer in open court?" I said, "I sure did". He said, "You can't do that. That's

unethical". I said, "The hell it is. What's unethical is this lying son of a [expletive] that comes into court and defends when he hasn't got a defense and doesn't file an affidavit of merits when the court rule requires him to do so and then insists that he won't go forward until I pay the costs that he is not entitled to." "Well, I never heard of such a thing, stopping payment on a check to another lawyer". I said, "Well, sue me". I understood years later that old man Kenney made up the \$10.00 to this guy Maurice Cherry, but they never got it out of me. Anyway, I tell you this story because a young lawyer, the perspective of a young lawyer in a busy court like that was that there was a lot of injustice, and there was. The game wasn't being played by the books. It was being played by the guts of these old timers who by and large, administered pretty decent level of visceral justice. It was self-government in its raw form. It worked. These people were being re-elected year after year. They were popular. They had the prestige of being judges. They did get the cases decided and moved the docket, cleared out the assignment clerk's room full of people every morning, but it was very unsatisfying to a young lawyer who thought that the thing should have been played the way he learned it in law school. One of the things that I decided was that when I got to be a judge, I was always going to make a statement from the bench about what caused me to make the decision that I made one way or the other, and...

*Mr. Lane:*

As the constitution requires you to do if you're a Supreme Court justice?

*Justice Brennan:*

That's right. I'll just finished that little observation with the thought that I learned later that I was appealed more than any other judge of the Common Pleas Court during the two years that I was there. I wasn't reversed, but I was appealed, and I came to realize that the reason I was being appealed was because I gave so much explanation as to what I was doing and why that I gave people a lot of things to shoot at, that the other older judges, more-experienced judges realized was not a good idea, at least they didn't think so. If you just said, "Judgment for the plaintiff", it was sort of a like an umpire in a game saying "safe" or "out" or whatever. Anyway, or a jury verdict which gives you nothing to quarrel with, but when the judge tells you why he felt this way and that way, you want to argue him out of his position. Anyway, moving along...Romney appointed me to the Circuit Court. I ran for that job. I served a couple years on the Circuit bench.

*Mr. Lane:*

Did you find that a lot more challenging?

*Justice Brennan:*

Yes, I liked that work. Circuit Court judge is the highest nisi prius court in the land, and you get all kinds of cases at the factual level. I took some interest in administration when I was on the Circuit Court, and we went through a time when the Supreme Court ordered us to divide up our docket. The Circuit Court in Wayne County had a common docket where all the cases were simply assigned to the first judge who was available as they were ready for trial, and the big quarrel was should we have the individual assignment system. Well, we didn't want it, but the Supreme Court wanted us to do it, and finally they ordered us to do it. So I undertook...I did a

couple things in connection with that. The first reaction that our judges had was "well, it's going to take six months to a year to take all the cases in the court and divide them up among the twenty judges". They had some idea that there was going to be some sort of bureaucrat who would examine each file and say, "This one goes to Judge so-and-so. This one goes to Judge so-and-so". Finally, at one of the judges' meetings, I said, "Look, why don't we simply use the case numbers to divide the cases. It will all come out in the wash statistically. We are all going to get 1,000 or 1,500 cases, so you'll get your fair share of divorce and your fair share of personal injury cases and so on. It might be off by one or two, but who cares? It will all come out". "Well, how can you do that?". I said, "Well, obviously, you've got twenty judges and you've got only ten digits, so you can't say everybody takes all the cases that end in 1 or 2 or 3, but the code very simply is you take the last two digits, and if the case number ends in an even number and then a two, it goes to Judge so-and-so, even number and a three, it goes to Judge so-and-so. If it an odd number and a two, then it is so-and-so". A very simple twenty digit system, and oh, my, you'd have thought I invented the IBM computer, you know. These people..."Oh, what a wonderful idea", so we published a notice in the Legal News that this was the scheme and within a week, we had divided the cases among all the judges. I took my 1,500 or so cases and I told the clerk to go get them. I wanted to see the files. I wanted to see what 1,500 case docket looks like.

*Mr. Lane:*

You mean to bring the record into a certain room?

*Justice Brennan:*

Yes, bring them all up to me.

*Mr. Lane:*

Of course, the records were smaller, I guess.

*Justice Brennan:*

It's like a file. You know, 1,500 files is a pile. I don't think I had all 1,500 at one time, but I had them come up by hundreds or two hundreds and I went through them. I shortly discovered that the cases were in all states or preparation. There were a vast number of them where the file showed nothing except that the case had been started and a year or more had gone by and nothing had happened at all, and there was nothing in the file to indicate what might be happening or have happened. So I decided upon a system, and I have always had a great interest in systems, and tend to think in terms of systems, and my system was that I wanted to get every case up for trial within a year of the day the case was started. So I devised what I call the "anniversary system", and the anniversary system very simply said that every case on my docket would be set for trial one year from the date on which the case was started, and two years and three years and four years from the date on which the case was started. In other words, every year on the anniversary of commencement of that law suit, the case would be set for trial if it hadn't yet been disposed of. Now, what did that mean? Well, it meant that every day of the year with 1,500 cases, there were probably 200 to 220 working days of the year, I had probably seven or eight. Let's see,  $200 \times 10$  would be 2,000, so it wasn't 10, but it was probably seven cases set for trial.



*Mr. Lane:*

Actually notice went to the attorneys?

*Justice Brennan:*

Oh, yes. They were informed - "Your case is set for Tuesday, October 3rd. Your case is set for Tuesday, October 3rd". Both sides were informed, and so when Tuesday morning dawned, I have seven cases. Of those seven cases, four of them are on their first anniversary. One of them is on the second anniversary or whatever, and let's say most of the one year cases - none of them are ready for trial. The two year case is ready to go to trial. It is just about right, you know, they're really ready, there's starting to get a little antsy. The three year case has been ready for trial for a long time, but there's problems on it. The four year case isn't ready for trial at all. The preparation hasn't been done. There are serious problems in terms of proof or the lawyers are incompetent or the lawyers are kicking the gong around for one reason or another, and there are problems on the case, or maybe there is a five year old case, and it is really ripe and over-ripe to go to trial, you know. So starting with the oldest case, call the cases. You start with the five year old case, and I am now struggling with the most difficult problem of all. This case has been five years trying to come to trial. What am I going to do with it? I try to settle it, and I jawbone the people and everything else, threaten to dismiss if they don't go ahead. Maybe I set it for trial and actually start trying the case or threaten to try the case, but surprisingly, the reality of today's doomsday, oftentimes, I'd get rid of that case, and then by 10:30 a.m., I'd go back out to the lawyers and say that I'm ready for the next case. That's the four year old case. In the meantime, people who've got the younger cases are saying, "Well, he's never going to get to us. What can we do? We'd like an adjournment. Can we get a week adjournment, two week adjournment, month adjournment?" The clerk is well-instructed by the judge that he says, "Gentlemen, any of you can have an adjournment right now. We're not going to reach you, but the adjournment will be for one year until the next anniversary". "Oh, my God, you can't do that. I can't wait that long". "Well, we're sorry. Every case on the docket gets its day in court, and its day is the anniversary. That's the only day you get is the anniversary day, and that's the day you get the judge's attention. Other than that, we can't book it because we have seven other cases on any given day you want to mention". Well, a surprising number of cases then would be settled because nobody wanted a one year adjournment and it sometimes put the ball in the other court depending on who was benefitted by delay and who was hurt by delay. The system, I thought, worked fairly well. I wish I had been able to stay with it long enough to really work out all the kinks and see if it couldn't be made to work. Unfortunately, about two months or so into the system, I suddenly had a case that was ready for trial, both sides ready for trial and it was a three or four year old case, and we started trying it. We tried that case for six or seven weeks, and every day for six or seven weeks, I had seven sets of lawyers in my courtroom in the morning saying, "We're here. It's our anniversary day". "The judge is trying a case". "When is he going to be through?" "Don't know. It will be a couple weeks at least." "Well, okay, you mean we'll be ready in two weeks when he is finished with the trial?" "No, because the judge is busy and can't take the case, the only thing we can do is adjourn your case for a year until the next anniversary day". "My God, the case is three years old. You mean I'm going to be four years?" "Yep, you're going to be four years old." "I can't..." "I'm sorry. There's nothing we can do. The system doesn't

allow it." Some people would settle, but then some people started raising sand with the Supreme Court and everything about this guy has this crazy one year system and its causing all kinds of problems and everything else. So eventually, realizing that it was difficult for me to keep up when I had...there was nothing you could do with a big law suit, I changed the system and sort of got into the mold with everybody else, but it was an experiment in judicial administration which I have not forgotten and I think better than a lot of other things, it demonstrates the real problem of judicial administration and that is that the system, our system of administration of justice is physically unable to try and settle, adjudicate, settle by adjudication, determine by adjudication all of the disputes that are brought to us. We are physically economically unable to adjudicate more than probably 5%, 1 out of 20 of the cases that come to court, but the strange Catch 22 of the thing is that we're only going to be able to get voluntarily settled those cases where we present to the parties the apparent ability to adjudicate. If you have the apparent ability to adjudicate and willingness, you can force settlement. If you do not have the apparent willingness and ability to adjudicate, settlement doesn't come because one side or the other is not being brought to the table, and they have tried everything imaginable to create artificial doomsday, to create artificial last moment to settle voluntarily before the axe falls, and they can't do it because everybody knows the axe isn't going to fall. The system can't try more than 5% of the cases, so I remember I used to laugh about Horace Gilmore who is now the Federal Judge down in Detroit when he was a Circuit Court judge, one of my colleagues on the Circuit bench, and Horace used to say when he would be laboring to try to get the parties to settle a law suit, and he would finally say in exasperation, "That's it, gentleman". He would pull on his robe and say, "We're going to have a final pre-trial". The worse thing you could threaten them with was a final pre-trial conference. It sort of reminded me of the old joke about the guy, the debtor who came whistling down the stairs and his friend said, "What are you smiling about?", and he said, "Well, I owed this money to the credit card company, and I'm glad I've heard the last of them". He said, "You paid them off?" He said, "No, but I got my final notice today". Anyway, ...

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**Topic 7: In 1966 he was nominated for the Supreme Court and he discusses the election process for Supreme Court justices, the myth of non-partisanship, and the nature of democracy**

*Mr. Lane:*

Can you distill out of it?

*Justice Brennan:*

Yes, I can distill out of it because when I was Chief Justice, there was a rumble out in Oakland County and a bunch of motorcycle type guys got into some big rhubarb, and I forget what it was, but it was a real affront to the peace and good order of the community, and they were all arrested and charged with misdemeanors, and I forget what the misdemeanor was, whether it was noise or something, whatever, traffic or something and so they hauled in these 200 or 300 young people, and they were ruffians and they were high spirited young folks, shall we say. I think they may

have been using marijuana or something. I forget what the gravamen of their defense was but a young lawyer of their acquaintance and of their disposition, apparently, got himself involved and began representing these people one after another and demanding jury trials, and the message...the story was in the newspaper and the message got to me here in Lansing that these people were demanding jury trials, and the lawyer was bragging that it would be three years before these people were all brought to trial. They were just laughing at the fact that there was never...really, nothing was going to come of all this. Of course, that brought the whole judicial system into disrepute, and it was an affront to our capacity to govern ourselves, and so as Chief Justice, I ordered the Court Administrator to get on the telephone and round up every District Court judge he could round up within so many counties, and every courtroom that was available, and if need be, get high school gymnasiums. I want to be able to try 200 cases in Oakland County in the next three weeks, jury trials, and we'll get citizens by the bus load to sit as jurors and everything else, but we will try those cases en masse, not en masse but on time and immediately. Everybody gets a speedy trial, and the system is going to be able to handle it. The whole problem went away just like that. We showed the flag, we showed them that we had the capacity and the will to try the cases, and suddenly, they were all settled. They all pled guilty, paid their fines and it was over, but the lesson learned was that the judicial system lives on credibility. If you haven't...and in order to have the credibility, you sometimes have to marshal the forces and do extraordinary things, but if you're willing to do that and capable of doing that, most of the time, you won't ever have to do it. The credibility is there and things roll on. Anyway, that was the lesson.

*Mr. Lane:*

As far, though, as being able by a scheduling technique to work off cases otherwise that were stagnating, and these are, you know...I'm characterizing this in a certain way...was there, for example...even though you didn't get to follow this thing through and make the various adjustments that perhaps you would have, was there some essential lesson beyond...as to the technique itself, how it might have been adapted? For example, within so many days after discovery begins or something like that, then you start your timetable running, you know...?

*Justice Brennan:*

No, I never distilled, Roger, any sort of conclusory principle out of the thing. I established that based on certain predilections that I have and assumptions, theories that I have which to my knowledge, have never been...are not being tried or used and haven't been, but my sense of it is that the only deadline that ever counts is the trial day. I believe, and I have believed for a long time, and now people are beginning to come to the view, but I have believed for a long time that our modern pre-trial, what we now call lawyering before trial process, is counter-productive, counter-productive for justice, certainly counter-productive for speedy justice, and counter-productive of affordable justice by a long shot. It really makes...it really introduces an element of gamesmanship into the litigation process so that...lawyers talk about papering the other side to death, you know, and motions and demands and all...all of these things were designed in the 1930's by so-called forward looking liberals whose concept of the system was that somehow it could be made utopian, and that we could have a perfect system of investigatory justice where the judge and lawyers on both sides were all engaged in a common search for the truth and we could take surprise out of the trial, and we could take...we could have better preparation by the lawyers and better...etc.,etc. I could have told you that as many lawyers did, knew that surprise is

a great strategic technique. It is also a great insurer of truth. You catch people in a lie, you trap them in a lie, and you prove who is telling the truth and who isn't sometimes with surprise, it will do that for you. That the process of preparing the lawyers is also a process of preparing the witnesses, getting them to rehearse their stories and getting them to recite their stories in certain words and so on so that it becomes artificial, concocted, if you will.

*Mr. Lane:*

Is there anything to be learned from the British system where things seem to be moved with great dispatch and where authority looks down, it seems, on almost all controversy with great rigidity and power...?

*Justice Brennan:*

Well, I think there's something to be learned from that. Candidly, I said and still believe that there is a great deal to be learned from what was then the Common Pleas Court trial system where a day certain was given, and I mentioned the Assignment Clerks and the roomful of people, and he would call out case and send it to Judge Kenney, call out a case and send it to Judge Dingeman, and when your case was called, you went, and there was no..there was no discovery, there were no interrogatories, there was no pre-trial preparation. The day you were served with a summons, you were told your day to come to court. It was like going to Traffic Court, and well, let's say...you could do that with little cases, you know, and that amuses me because if the process of pre-trial is so productive of a better quality of justice, by what right does society reserve a better quality of justice for larger cases? I mean, to a poor man whose case is \$100.00, isn't he entitled to just as fair a hearing and so on? If it is unfair to have a trial without pre-trial discovery, then why is this unfairness visited only upon the poor people?

*Mr. Lane:*

Did you happen to catch in the Bar Journal about two or three years ago Bill Peterson's article that was not displayed well - it was way in the back of the magazine. It had originally been titled something about judicial pollution, the idea being that trying to transfer the idea of environmental pollution...so much brick-a-brack, baloney, and posturing and delay that is cynical or contrived that all the numbers become fallacy. You talk about numbers, you don't talk about the substance and he said there are cases that ought to be tried and tried promptly, and there's a lot of stuff that by judge made law and for other reasons, it's just jamming up the system.

*Justice Brennan:*

Oh, I agree with him, and Bill Peterson is a very able man and a very perceptive man, and I think that he has certainly been in the trenches trying law suits up in Cadillac for a long, long time.

*Mr. Lane:*

I didn't mean to digress...

*Justice Brennan:*

I would certainly give it a lot of credibility. Anyway, we were sort of talking about my years on

the Circuit Bench. There came a time in 1964...I ran for election, and I think I told you I led the ticket and all that and being elected to the Circuit Bench. Then in 1965, my daughter Ellen was born, and in 1966, Governor Romney called me when I was over at my cottage, my mother's cottage, and asked me...or Bob Danhof called on his behalf and asked me to come and visit the governor at his home, and he asked me if I would run for the Supreme Court, accept the nomination of the Republican Party which was about to be bestowed on somebody within about 48 hours of that moment.

*Mr. Lane:*

You actually did go to Romney's home?

*Justice Brennan:*

I went to Romney's home over in Bloomfield Hills, right there near Long Lake and Woodward, and he said, "You know, you can't win probably, but two years from now when Ted Souris runs, you can have the nomination. You do your duty now, and you can have the nomination". So I said, "Fine, Governor, whatever you want. You put me on the Circuit Court. I'm happy to do whatever you feel is the way for me to serve the people", so I undertook the assignment.

*Mr. Lane:*

That was really double-time, wasn't it? The convention was going to be on a Saturday, and this was like a Thursday?

*Justice Brennan:*

Yes, this was Wednesday or Thursday.

*Mr. Lane:*

And up until that time, had there been anybody that was front and center for the nomination?

*Justice Brennan:*

There were a few people poking around trying to get the nomination, but I think one of them was John O'Hara, Jr. Old John P. O'Hara used to be Records Court judge, and I think John, Jr. was looking for the nomination as well, but anyway, they asked me to run, and I proceeded to jump in.

*Mr. Lane:*

That would have been in August?

*Justice Brennan:*

That was in August, and I was...I don't see it...I thought maybe I had a copy of my talk when I accepted the nomination, but I do remember that I paraphrased Fiorello LaGuardia's famous comment when he said, "My only qualification for public office is my monumental ingratitude", and I said, paraphrasing that, I said, "I want all of you to know", and I'm addressing 2,000 Republicans at a convention, "that my only qualification for your partisan nomination to the Michigan Supreme Court is my monumental non-partisanship", and I told them then that I thought that the parties shouldn't be nominating candidates for the Supreme Court, but I would

take the nomination and run on that standard. Eventually, because I was just reviewing...we were talking about getting ready for today's discussion...

*Mr. Lane:*

Did you get a guarantee of so much money to fund into your campaign?

*Justice Brennan:*

No, there is no guarantee of so much money. They said they'd help me and before it was over, I guess I did get about \$60,000. I also tried to raise some money myself. I had conducted a series of luncheons in Detroit. I figured if I could succeed well enough at that, I would make enough money to get out of town, and that would have made a lot of people happy, but...

*Mr. Lane:*

Would it be fair to call these lawyer luncheons?

*Justice Brennan:*

Yes, basically they were...yes. I took after Tom Kavanagh and Otis Smith, but mostly I mentioned Tom Kavanagh, the then Chief Justice. Because the Michigan..the constitutional revision of 1963 had just been made and come into effect. It was the first election to the Michigan Supreme Court under the constitution of 1963, and what that constitution did that the previous constitution did not do was it permitted an incumbent justice of the Michigan Supreme Court to nominate himself or herself by an affidavit, and I said in one of my speeches during that campaign that this was the first chance that any Michigan Supreme Court justice has ever had to stand tall in the dignity and nobility of his judicial robes and say, "I'm not the Democratic candidate. I'm not the Republican candidate. I am an incumbent justice of the Michigan Supreme Court running for re-election on my own record of impartial non-partisan public service. I seek the support of men of good conscience in both political parties, not because I am philosophically identified with them nor because I have favored their interests but precisely because I have favored no man and feared none". We didn't hear that from the Chief Justice, did we? He filed his affidavit of candidacy as did his running mate and then they went to the state convention of the Democratic Party and proceeded to add its partisan nomination to their own. Sure, it was politically smart, a candidate for public office likes to have all the endorsement and all the support he can get. I'll buy that, but if this was the only reason why they went to the Democratic convention, why didn't they come to the Republican convention, too? George Romney walks in Labor Day parades. Why couldn't Thomas Kavanagh, if he is a non-partisan candidate for a non-partisan office, come and talk to a Republican caucus and ask for support? You know, people laugh when I suggest that the incumbent justices should have come to the Republican conventions. They do. They laugh. They give me the elbow and say, "Aw, come on now. Who are you trying to kid? Republicans know that Kavanagh is a Democrat, and he knows that they know it. He wouldn't have gotten to first base". That laughter worries me. The fact that people laugh at such a suggestion proves to me how deep-seated is the public's cynicism about the myth of non-partisanship on our high court. The plain truth of the matter is that there is nothing strange about the idea whatsoever. The facts are is that it is being done all the time here in Wayne

County. I can cite you example after example in Wayne County of judges who were once active Republicans and who enjoy the support of the Democratic party in non-partisan judicial elections. I can cite you example after example of former Democratic office holders who are enthusiastically endorsed by Wayne County Republican organizations in non-partisan judicial elections.

*Mr. Lane:*

Did that get any newspaper attention?

*Justice Brennan:*

[Expletive] little.

*Mr. Lane:*

Practically none.

*Justice Brennan:*

Practically none. I thought it was a great campaign, and I started off..I talked about how I'd run for office in Detroit and it was always a popularity contest, and we sent out post cards to our friends and I said, "I'm going to do something unusual for me and for all of us who have been active in Wayne County non-partisan judicial politics. I'm going to talk about the issues, and there are issues", and then I started off. That was one of my biggest issues was the fact that here was the Democratic candidates, the candidates, the incumbents who had the right to nominate themselves who had gone only to one party and asked for that nomination and ignored the other party. I guess I told this...talking about non- partisanship and the public conception of non-partisanship. They tell the story of a man who lost his first wife and then after a while, he remarried. He lived with his second wife for a number of years and then she, too, passed away. He buried her a little distance away from the first wife in the same cemetery plot. When the man himself died, they found this instruction in his will: "Bury me exactly between my two beloved wives, but tilt me a little towards Tilly" A lot of the people have the same foolish idea about judges. They want them placed squarely in the middle, but tilted a little one way or the other. So then I went on to say, "I don't like the present system of nominating Supreme Court justices, because I don't believe there should be such things as non-partisan Republicans and non-partisan Democrats. It is a contradiction in terms", and so forth..."Nevertheless, I have the Republican party's nomination for the Supreme Court" and this is where I told them that I had told the delegates the Fiorello LaGuardia..."My only qualification for their partisan nomination is my non-partisanship", and so on.

*Mr. Lane:*

Now that we're on the subject, let's finish it. I intended to bring this up, you know. Why is it...first off, is there any way to get the kind of message that you were trying to project...is there any way to get public attention for that, and do you think if there is not, then what hope is there to get away...My God, I suppose you read the papers the other day about the latest development

on partisanship on the Michigan Supreme Court where we have a man who was fore-ordained by the demand of his predecessor to be of a certain race, who turns out to have been the governor's...

*Justice Brennan:*  
Legal advisor.

*Mr. Lane:*  
All right, staff man, who is going to be sworn in in Detroit at the Art Institute. For some reason that escapes me, but it sure has very little to do with service on the Supreme Court in the State of Michigan, but anyway, that's only the latest in a succession of events that we could sit here and enumerate for a long time, but do you have an answer? Do you see anything that is hopeful, at least, to our getting away from the evils of what you just described?

*Justice Brennan:*  
Well, I think the most obvious thing which I have said and repeated and continue to believe is true is that we need a simple, non-partisan primary election for the Michigan Supreme Court.

*Mr. Lane:*  
But you never got anywhere in the legislature with this.

*Justice Brennan:*  
The legislature never got anywhere. I got kind of grudging interest from some newspapers when I started out with what I called the Committee for Constitutional Reform some years ago, and I had about four or five constitutional issues including term limitation which is now getting to be a common thing.

*Mr. Lane:*  
Did you get my little note?

*Justice Brennan:*  
Yes, I got your nice note, but I was way out, way ahead on that one, but the non-partisan primary makes all kinds of...you know what happens, Roger? You go out and you say, "This is what we want to do. #1 - There is nothing sexy about constitutional reform. It doesn't put money in anybody's pocket. The average business man, the average wealthy person, what are they going to donate money for? Is this going to do anything good for anybody directly, you know? It is going to get me any ears that I can whisper into in the Capitol? Can I influence legislation? Can I affect my cost of doing business in Michigan? The union guys want to know does it put any money in our guys pockets? Will it raise their unemployment or their pension funds or protect their jobs from being washed out because businesses are being closed or whatever. It isn't going to...they want to talk economics, dollars and cents, taxes and so on, and they want to talk about who, in terms of personality, the newspapers do, is out there. [Expletive] it, Roger, I read these speeches, and I say those are thoughtful statements of...discussions of public policy. I talk from experience about what is good and bad in terms of the way to do...when I give a speech and when I prepare a speech like this typically, you can hear a pin drop in the room. People don't fall asleep when I'm talking and I can talk sometimes for a fairly good length of time. They will come up to me afterwards and tell me what a wonderful speech it was and how interesting it was and persuasive



and so on, but two things - they don't interrupt me with applause, and they don't quote me in the newspapers. What I sort of end up discovering that I am, is a pretty good teacher, maybe. I am able to state things...hey, I read them and I say, "That sounds pretty good, you know. Makes sense. It is well stated, clearly enough stated", but it's not sexy enough or simplistic enough to get people to respond to, and when I go out and talk about a non-partisan primary or Committee for Constitutional Reform and whatever else, newspapers want to know if I'm running for governor. That's all they know. They don't care..."Who's running against you, then? Is he a good guy? What bad are you going to say about him? What bad is he going to say about you?"

*Mr. Lane:*

Let me try to drive a point here. Suppose you took that speech and you went and it's in the appropriate season, not football Rose Bowls or something like that. You went and gave it at East Lansing High School on the proper convocation or whatever they call them, gave the same thing at Sexton High School, and if it were possible to get some kind of cooperation with the people in one of the schools to say, "Now, we're going to have tomorrow...we're going to have somebody with the opposite view, and he's going to give another talk about the same subject matter and then on Friday, we'll have a vote on this matter, or we'll have you all write two page essays on the merits of this proposition", what would be the response. Would you get any more response from that kind of an exercise, and are we talking about something that is so rotten in the system of public awareness, education, political participation? You say what it is, but what the hell is wrong?

*Justice Brennan:*

Well, what's wrong is that...what's wrong is that the Greek democracy doesn't work, and didn't work in Greece and won't work here, and the founders of this nation didn't envision a Greek democracy, a totally participatory democracy, because you can't conduct a meeting of 250,000,000 people with Parliamentary procedure. You can't, and it's getting to the point where it is questionable that a 480 people in the United States Congress and House of Representatives is a body of appropriate size to conduct business in a parliamentary fashion. It certainly can't do it with 2,000 delegates to the Republican National Convention. I mean, this country was designed to be a representative democracy, a Republican form of government whereby people functioned through their representative. The representatives can understand this kind of thing, and they can vote...

*(End of side 2, tape 2)*

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**Topic 8: Justice Brennan discusses the process of voting on the 1963 constitution in regards to his previous remarks on democracy. He then talks about running for the Supreme Court in 1966, the composition of the court at that time and, after his election, the "showdown" for Chief Justice of the Supreme Court, involving most prominently among the justices Mike O'Hara, Thomas Kavanagh, and John Dethmers.**

*Mr. Lane:*

Now we're talking.

*Justice Brennan:*

I think when it comes to talking to the general public and getting the general public to respond favorably or unfavorably to something, they you're got to get into slogans, you've got to get into simplistic presentations and look at the constitution of 1963. People...we adopted a new constitution in this state in 1963, and a lot of good work was accomplished by that convention, and there were excellent people at that convention, and they did a lot of very fine things through the art of compromise and persuasion and whatever else. When it came down to it, the people voted on a new constitution in 1963, and they didn't vote on the specifics on the judicial article or whatever. They voted on conceptually, did they feel we needed a new constitution or was the old one sufficiently described as "horse and buggy" so that the new one was modern and streamlined and so on. Romney went around the state "we're going to have only 19 executive departments. We're going to streamline state government. It's going to be more efficient, going to serve you better". They went with that as the conceptual notion as to why they approved the new constitution, not article by article and line by line how did it improve our form of government. The same thing is true about a non-partisan primary election system. I don't think that the general public, if you were to run a referendum on that subject...maybe they'd fly with it if you could create an ad campaign that would simplify the issue but by and large, those are the kinds of things that ought be included in a convention setting where there is competent representatives working out these problems. That should have been solved in 1963 and wasn't.

*Mr. Lane:*

Let me tell you another...fly off the subject. I've lived in the same place for 20 years now. It is in Lansing Township. A bunch of tennis courts down at the end of the block. They're deteriorating and going to hell. I politely called attention to Phil Pittenger and various others since then and when I finally get to talk to somebody, they said, "Oh, you've got to come out to the township meeting". Well, I go out there and I discover that this isn't the township product at all. They say, "Well, we got grant money for that, free money from Washington, and we can't do anything about it. We can't wedge \$400.00 to paint the lines or do anything like that. We're not in a position to do that. If we could only get some grant money. If we could only get somebody to give us a gift or a citizen". I don't know what. Bicycle paths are coming out of Washington. I used to...in the early days of my residence there, people would knock on the door once in a while and a guy would say, "I'm your committeeman and there's an election coming up. I just wanted to see if you were satisfied with the way your problems are being handled". That doesn't happen anymore. What I'm trying to say is there something about the way the system is decayed or deteriorated or changed, has this got a lot to do with it or am I just sort of picking out some insignificant little straws flying through the wind?

*Justice Brennan:*

I think that's an important...I think there's been a lot of de-communitizing of our society, of our culture. Certainly, you just drive through any community today and look at the way they're developed. You have the strip and the McDonald's and so on, and how many people you talk to of your age or my age and say, "Well, how's your kids, your family?". "Well, I've got four kids and this one is in California and that one is in South Dakota", etc., etc. The sense of community

and of people taking roots and having roots, I think has changed. Looking to the national government for the solution for everything, and the willingness and readiness of the national government to spend money for local projects, to legislate in local affairs has been, from the days of Franklin Roosevelt, a growing proposition in this country, so yes, I think the nationalization of government and the weakening of local communities which were held together by churches, etc., etc., that are all becoming unglued, is all part of package you're talking about.

*Mr. Lane:*

Okay, it probably took too much...

*Justice Brennan:*

So Romney asked me to run for the Supreme Court in 1966. I did, and let me do this if I can...I'd like to just talk a little bit about that campaign and then I want to talk about the first thing that happened when I went on the Michigan Supreme Court. At that point, I think we can sort of stop. The campaign, as I say, began with a series of luncheons that I held down in Detroit in which I criticized the Chief Justice. Over the next couple months, it became Brennan vs. Kavanagh, Kavanagh vs. Brennan. "Brennan says this about Kavanagh", "Kavanagh says this about Brennan", etc., etc., and Otis Smith got lost in the shuffle, and it happened that I ended up coming in second, Smith came in third and I was elected.

*Mr. Lane:*

You won by 101,000 something, didn't you.

*Justice Brennan:*

Yes, as I remember, I had 700,000 and he had 600,000. Tom Kavanagh had 1,000,000, so I wasn't even close to him, but for a 37 year old Circuit judge from Wayne County, I did very well. I remember Michael O'Hara was on the Court at the time, and I remember bragging about my performance in the upper peninsula, how I had defeated Tom Kavanagh in Luce County, and I said, "I've never even been in Luce County", and he said, "Well, don't brag about your results in Luce County.". I said, "Why not?" He says, "There's only one thing up there and that's the insane asylum at Newberry". Anyway, but I ran well in Wayne County and I ran well in a number of other places around the state, and I won the election. Otis Smith was very gracious, urged me to appoint his secretary as my secretary which I did, and she served me on the Court during a number of years until she retired. She was a lawyer. Mary Lou Shepherd was her name.

*Mr. Lane:*

She is still around, isn't she?

*Justice Brennan:*

Oh, yes, she is still around. She had graduated from Leland Carr's school of legal studies and had taken the bar as did Mike O'Hara. That's how he took the bar. As a matter of fact, when I went on the Supreme Court, two colleagues of mine had not graduated from Law School, Mike O'Hara and Gene Black. Black spent one day at the Detroit College of Law, didn't like it, went home and

studied law in somebody's law office, and I think Mike may have had a year at Notre Dame Law School, but he never graduated from law school, and he actually studied under Judge Carr before he became a lawyer. As soon as I won the election, I began getting phone calls from Gene Black who was a marvelously conspiratorial gentleman, you know, and had some very strong feelings about the court. The man literally lived the Michigan Supreme Court. He had no other life, no other interests, and he was very concerned about Tom Kavanagh. He was unhappy with Tom Kavanagh, and the Court in those days just before I came on was full of bitterness and divisiveness, rancor. There was a case called...I want to say Triple X...I may be wrong.

*Mr. Lane:*

Triple X is right. Triple X is the pharmacy case?

*Justice Brennan:*

Yes, which had occurred within a year or two before that, and it was a case in which the Court, then having eight members, was divided down the middle, and as I remember hearing about it, half the Court ordered the clerk to issue this kind of an order and half the Court ordered the clerk to issue another kind of an order, and the clerk, being smart, didn't do anything, which is probably the only way he could save his job. So, that was a good example of the kind of thing that occurred.

*Mr. Lane:*

Let's enumerate who these people are now.

*Justice Brennan:*

Who was on the Court in 1966...

*Mr. Lane:*

We can call them off - Carr, Dethmers, Kelly...

*Justice Brennan:*

No, Carr is not there any longer.

*Mr. Lane:*

Did you say in 1966?

*Justice Brennan:*

1966 when I ran for the Court, the Court consisted of Thomas M. Kavanagh, Chief Justice, Harry Kelly and John Dethmers, Michael O'Hara, Paul Adams, Ted Souris,...how many have I named.

*Mr. Lane:*

You haven't mentioned Black.

*Justice Brennan:*

Eugene Black.

*Mr. Lane:*

That would be six. You wouldn't have been on then...Are you sure Carr had gone by then?

*Justice Brennan:*

[Expletive] it, I can't tell you...Oh, Otis Smith. Did we name Otis Smith?

*Mr. Lane:*

No, we didn't. You're right.

*Justice Brennan:*

So that's the Court. That's the eight people. Let's go over it again. Thomas Kavanagh, Harry Kelly, John Dethmers, Paul Adams, Ted Souris, Gene Black, Otis Smith,...and...there were three Republicans - O'Hara, Kelly and Dethmers. There were five Democrats - Kavanagh, Souris, Adams, Black and Smith.

*Mr. Lane:*

Right, if you call Black...

*Justice Brennan:*

Black was a D...he was nominated with the Democrats. He had been a Republican Attorney General, and he was clearly a maverick on the Court, but you could call it then four...

*Mr. Lane:*

It went 4:4.

*Justice Brennan:*

Four Democrats, and he frequently signed with the Republicans on issues, and as he got older, he became increasingly conservative on many, many things. All right, so that was the Court as it existed during my campaign. There were many, many instances of very strong language between Gene Black and Ted Souris. They were just like oil and water. They didn't mix well at all, and they were given to do some, engage in some very strong banter back and forth in the opinions, as a matter of fact. Black, I think, more than any of the others, tended to be a loose cannon on the deck in terms of his rhetoric, and that was one of the things that I said in my campaign, that I laid at the feet of the Chief Justice.

*Mr. Lane:*

I remember. I was going to ask you about that.

*Justice Brennan:*

That I said he was responsible, at least, for not being able to control that kind of language as it was coming out of the Court, so obviously when I was elected, I started immediately getting phone calls from Gene Black who wanted to make me the Chief Justice. That idea I found almost bizarre. I was 37 years old. I had never spent even a day on the bench in the Supreme Court. As I

told him, I didn't even know where the bathroom was, and he wanted me to be the Chief Justice. I said, "I'm not opposed to being Chief Justice but not now, certainly". Well, then who will be Chief Justice, and I certainly agreed with Gene Black that it shouldn't be Tom Kavanaugh. I said, "Well, the logical person is Mike O'Hara". Dethmers had been Chief Justice. He was very much of a laissez faire Chief Justice. He wasn't good on the administrative end of things. He wasn't a good man to go and get money for paper clips from the legislature, you know. He perceived the office of Chief Justice to be more of a ceremonial thing and that sort of let the Court Clerk run the Court in terms of its administrative efficiency. Tom Kavanaugh had been a bull in the china shop and he was one of the reasons that Gene and I were in cahoots trying to change the leadership. Harry Kelly was an invalid and on in years and had no interest at all in being Chief Justice. Gene himself knew himself and knew that he was too iconoclastic to be a Chief Justice and besides, he lived in Port Huron and he kept his office on his back porch in Port Huron, and he was simply not a good politician, a very painfully shy person who would never be any good at being even a ceremonial chief justice, so it pretty much came down to either O'Hara or myself and since I was brand new on the Court, all the arrows pointed at Mike O'Hara. So I began talking hard to Mike, and Mike and Mary had invited Polly and me up here to East Lansing shortly after the election. I think that I, or maybe during that campaign, we were their guests for the great Michigan State-Notre Dame 10 to 10 football tie. That was the first game I saw in the stadium there as a matter of fact, but I began working on Mike. I said, "You've got to take it. You're the logical one".

*Mr. Lane:*

Had you known Mike before that?

*Justice Brennan:*

No, I really didn't know Mike until that campaign, so I really didn't get to meet him until after the election and we became good friends almost immediately because he was that kind of a person.

*Mr. Lane:*

Yes, he is a decent guy.

*Justice Brennan:*

But I was the point man. I talked to Dethmers. I talked to Kelly, and I lined up the votes.

*Mr. Lane:*

This was...you weren't even on the Court.

*Justice Brennan:*

I wasn't even on the Court. I had never sat with the judges at all. I was just between the election and the first meeting of the Court, and I was out there really working at it. Finally, January rolled around, and it was time for the Court to meet. I came up here and I think in those early days, I used to come and stay either at a motel or at the YMCA. Sometimes I stayed at the YMCA but this particular night, I was out with Mike, and we closed the bar at the Jack Tarr Hotel or Olds

Plaza or whatever it was called. I was working very hard on selling him on becoming Chief Justice, and he was being very reticent and finally when they closed the saloon at 2:00 a.m., I had reached the point of being able to persuade him at least to commit to me that he would think about it.

*Mr. Lane:*

What was his reluctance?

*Justice Brennan:*

I'll tell you, but finally at 4:30 a.m., I get a phone call and it's Mike and he said, "I can't take it". "Why can't you take it?" "I can't tell you, but I can't take it". So I go into the meeting of the justices for the first time. I greet my colleagues and I sit down, and the first order of business that the Chief Justice announces is the selection of the Chief Justice for the next two years, and Paul Adams, as I recall, made a motion that Thomas M. Kavanagh be re-elected for Chief Justice for the next two years and Ted Souris seconded the nomination whereupon Tom Kavanagh said, "All those in favor, signify by saying 'Aye'", and there were three votes, three affirmative votes. As I recall, he didn't even take the negative votes. He looked around the room and said, "Well, what do you guys want to do?". He realized he had only three votes. "What do you guys want to do?" Now, I had not had a chance to talk to Gene Black or Kelly or Dethmers about the fact that O'Hara was not a candidate and those people were all expecting me to nominate Mike O'Hara, and O'Hara is looking at me and glaring and giving me the negative head shake, and Black is looking at me and looking at O'Hara and looking back at me and trying to figure out what is going on, and I'll bet you the silence in that room lasted for four or five minutes before anybody said a word and finally, Gene Black said in the most exasperated tone of voice, "God [expletive] it, John, I didn't like the way you handled the job of Chief Justice last time, but you're certainly better than Tom is (pointing to Tom Kavanagh), and so I guess we're going to have to make you Chief Justice again. I'll nominate John Dethmers". Harry Kelly...you could have knocked him over. He had no idea what had just happened, but basically, he was...Harry, Kelly and John Dethmers were of the old Republican school, you know, it was a team program for them, and so Dethmers was totally shocked, taken aback, stood up with tears running down his face, and told us all how thrilled he was and how flattered and how appreciative he was that the Court was now about to give him back the Chief Justiceship, or as a matter of fact, I guess we voted before he made that speech, so he became Chief Justice and then he made the speech, but he was clearly deeply shaken and touched by the whole thing, loved being Chief Justice and in fact, had been Chief Justice longer than any other Chief Justice in the history of the state, I think.

*Mr. Lane:*

Could be.

*Justice Brennan:*

Because Dethmers had been chosen Chief Justice when he was a relatively young member of the Court and given the responsibility to get the papers and pencils and do all the administrative things at a time when the Carrs and the Kellys and all the other old guys didn't want to be bothered with any of that stuff, so he had had the honor and the glory of doing it, and he...he looked like a justice with the white hair and the deep voice and the very severe demeanor, so anyway, he took back the job. He was an ineffective Chief Justice, to say the least. During his

term of office in 1967 and 1968, the first meeting of the State Officers Compensation Commission, formed under an amendment to the constitution, came to be, and he went to...we asked him, the Court instructed him as our representative, our leader, to go down there and put a pitch in for salary increase because we hadn't received one in some length of time, and the Court, members of the Court were then getting \$35,000 which was, I think, less than what maybe some of the Circuit Judges were making, at least not a lot more. John Dethmers went to the State Officers Compensation Commission and made a presentation which...if I don't quote it, would paraphrase it very close, okay...he said, "Well, ladies and gentlemen, my colleagues want me to come down here and ask you for some more money. Now, personally, I am very satisfied with the pay. I don't have many wants and needs. I get along nicely, myself and my wife on what you folks are paying me, and the people of the state of Michigan are paying me, but my colleagues; they want some more money and so they'd appreciate a raise". That was his whole presentation, and of course, it resulted as you can well imagine in zero, nothing, though I'm not too sure that the governor didn't get a raise and the legislature, but the judges got nothing.

*Mr. Lane:*

I think I was there that time, and Gus Scholle showed to the legislature his new full-time legislature...Joe Kowalski...and Gus made a pretty good pitch and of course, these people, most of them, were quite amenable, either for political reasons or his personal charm and all that.

*Justice Brennan:*

Well, anyway, that's what happened, so two years later, in 1969 when...end of 1968 and the beginning of 1969 when the Chief Justiceship was up again, I was determined to go after it because I felt...one thing I had to do was to do something about the salary. We hadn't gotten a nickel of raise.

*Mr. Lane:*

You had Black's support.

*Justice Brennan:*

I had Black's support and in the meantime, the Court had gotten down to seven players, and something else happened. Mike O'Hara had been defeated. Duplicate, or should this be Mr. Lane?

*Justice Brennan:*

T.G. Kavanagh?

*Justice Brennan:*

T.G. Kavanagh defeated him. Now, you asked me before about why O'Hara wouldn't take the Chief Justiceship. Before I came on the Court in January, 1967, it had been the practice of the justices, almost all of them, to go to the Lansing City Club every day for lunch or frequently for lunch and have a drink oftentimes at lunch. Thomas M. Kavanagh was a frequent participant in that luncheon group. From the day I went on the Court, he didn't go to lunch with the group. I



did, Souris, Adams, O'Hara, and Dethmers; all of us went. Harry Kelly generally didn't go because he couldn't get around very well. He was in a wheelchair, and Tom Kavanagh didn't go, but the rest of us were there. Now, 1968 rolls around and O'Hara is defeated by Thomas G. Kavanagh. It's his last day, let's say December, 1968, the last day the Court is meeting with O'Hara as a member of the bench. I'm sitting on the end of the bench. John Dethmers is the Chief Justice. Between Dethmers and myself is Thomas M. Kavanagh, sits next to me. I passed him a note, "Tom, today is Mike's last day. Won't you please make an exception and join us for lunch?" I shoved the note over to him. He takes the note, leans back in his chair and wheels around so his back is facing me, reads it, and a long, long time passes. Meanwhile, counsel is arguing some law suit or another, and suddenly Tom sits straight up in his chair and wheels around to me and leans over so his face is away from the bench, the lawyers arguing the case, and he says to me, "Tom, I have nothing against you personally, but he double-crossed me". I said, "He did?". He said, "Yeah, he did", and that was sort of the end of it. Well, I began piecing the story together with conversations with other people, and the story basically was this: Back in the days when Leland Carr was on the Court and Tom Kavanagh, and we're talking about in the 50's, Tom was elected to the Court and very ambitious to be Chief Justice. Dethmers had been Chief Justice for years. Finally Tom Kavanagh had enough votes to keep Dethmers from being Chief Justice, but he didn't have enough votes to get himself elected Chief Justice. It was a 4:4 standoff, and he pulled the string and ordered his troops to vote for the standoff which they did, and I can't tell you the year, but I'm guessing it was about 1959, around in there. There was a very long period of time when the Court did not have a Chief Justice appropriately elected. Dethmers continued to function as Chief Justice as a hold-over but there was still no Chief Justice. In fact, maybe I can even give you the date on that because there's going to be something in the front of the book to explain that...let's us set the record straight...

*Mr. Lane:*

You mean there's a footnote on the page that describes the membership of the Supreme Court and who was Chief Justice, that says precisely what the fact was?

*Justice Brennan:*

I think we may...with a little bit of luck, I may be able to nail down a date or two just to sort of prove that I know what I'm talking about. Maybe to correct a mis-statement if I'm in the middle of making one. I can see already that I'm way off on the timing. Hiram Bond...I see his name...

*Mr. Lane:*

Well, one thing to consider is that Mike O'Hara didn't come on until about...was it 1962? Who did he beat?

*Justice Brennan:*

I'll tell you. That's the story. I'm trying to put it together. Let me put this story together. You'll hear all these...

*Mr. Lane:*

Mike O'Hara beat Paul Adams.

*Justice Brennan:*

Yes, you're right. That's the story. You just...you just ended it here. Wait a minute...okay, I'm getting closer now. It's one of these, I think, where it happens. We have this stalemate, and the stalemate, I'm going to tell you, is...here it is.

*Mr. Lane:*

Which volume is it?

*Justice Brennan:*

At the beginning of volume 366 of the Michigan Supreme Court Reports which covers a period from March 16, 1962 to July 2, 1962, the front page, the front piece or whatever it is called says Supreme Court and at the top, it says Chief Justice. "John R. Dethmers of Holland. Term expires December 31, 1969", and after that, a footnote #1 and it says at the footnote, at the bottom of the page, "to April 3, 1962", and right underneath that, it says "Leland W. Carr of Lansing, December 31, 1963. His term of office expires" in the footnote #2, and down below, it says, "From April 3, 1962", so on April 3, 1962, the Court broke the deadlock that had existed for at least from January of that year in the office of Chief Justice. Dethmers, Carr and Kelly and Black and Paul Adams...Dethmers, Carr, Kelly, Black and Paul Adams voted for Leland Carr so that Adams joined the maverick Black to vote for the Republican.

*Mr. Lane:*

Where does O'Hara come in?

*Justice Brennan:*

Wait a minute. O'Hara isn't even on the Court.

*Mr. Lane:*

Yes, okay.

*Justice Brennan:*

So now, we have Leland Carr as Chief Justice and Paul Adams is up for election, and Thomas M. Kavanagh is so angry and so offended by the fact that his friend, or his co-fellow Democrat Paul Adams has stepped out of line and voted against him for Chief Justice that Thomas M. Kavanagh went to work on it, and supported Michael D. O'Hara, the Republican nominee for election to the Michigan Supreme Court, took him all over the state to the Knights of Columbus and put in all kinds of endorsements among other such groups to get him elected, and I think also used his influence with the unions to dump Paul Adams. So Adams was defeated and now, I'd have to take a look at exactly when that occurred, but Adams...

*Mr. Lane:*

This was in an election or...

*Justice Brennan:*  
1962?

*Mr. Lane:*  
Yes, ...

*Justice Brennan:*  
1962.

*Mr. Lane:*  
Sure, because remember O'Hara ran in 1968 and got beat.

*Justice Brennan:*  
Okay, so it would have been what...a short term from 1962 to 1964?

*Mr. Lane:*  
See, Adams had been appointed, and he had, as I recall, he had to run.

*Justice Brennan:*  
Yes.

*Mr. Lane:*  
And then the constitutional script came in there, but I'm almost sure that Adams was beaten by O'Hara.

*Justice Brennan:*  
Oh, I know he was beaten by O'Hara.

*Mr. Lane:*  
It had to have been right in there because Adams came back on...

*Justice Brennan:*  
Adams came back on as a result of an appointment by Swainson, wasn't it?

*Mr. Lane:*  
You're right, and he came on in probably the end of 1963 or the early part of 1964.

*Justice Brennan:*  
No, because Swainson was elected the year of...Swainson was elected governor in 1960.

*Mr. Lane:*  
Oh, Adams ran in one, didn't he? I think Adams ran in one.

*Justice Brennan:*  
We could check it out.

*Mr. Lane:*

He was appointed once.

*Justice Brennan:*

Yes.

*Mr. Lane:*

And then he...but you make the point.

*Justice Brennan:*

The point is that Tom Kavanagh dumped him, and he came back on the Court chastened and never from that day forward in all the time that I was on the Court did he ever waver in his support of Thomas M. Kavanagh for Chief Justice. He had been taught a lesson.

*Mr. Lane:*

Boy, oh, boy.

*Justice Brennan:*

In any case, Thomas M.'s view was that Michael O'Hara had doubled-crossed him. I'm going to finish that story, though, by telling you that he did come to lunch, and it was nice. But it does show you, as I learned on the Court, that the politics of the Chief Justiceship are enormous, and they affect the politics of the state in ways that I think are subtle and things that we don't realize, that there's that much division and partisanship, really, in the whole process.

*Mr. Lane:*

Does it all flow directly out of apportionment, or is there a lot of things?

*Justice Brennan:*

No, because what I described to you was before the Supreme Court ever had anything to do with apportionment.

*Mr. Lane:*

Well, in a way. You know, you had that Scholle vs. Hare thing that stirred the waters early.

*Justice Brennan:*

Yes, I guess that's true.

*Mr. Lane:*

In fact, you know, the newspaper scuttle probably, very possibly erroneous, was that Souris got the appointment that Adams would have gotten if he had flown right on Scholle vs. Hare, and Souris told me, and I think this is the literal truth that he had been informed by whoever the appropriate person was, Horace continuity, is what follows Lane or Brennan?

*Justice Brennan:*

Gilmore or somebody, that Adams had been chosen to be appointed to fill the vacancy from Voelker on the Supreme Court, you know, upper peninsula and all that jazz, and that Souris had been told that he was to be appointed Attorney General in Adams' place. That night, Williams came to Detroit, took him out to the country club and said, "You're going to be on the Supreme Court", and Williams later gave some kind of a explanation of what happened because the papers were full of Adams. All the speculation and all that sort of thing, and there had to be some explanation why he'd go down and pick this 33 year old Circuit Judge that served less than one year, and the best explanation, the popular explanation was that Adams was cross-wise with Scholle, and this was denied, and Williams' explanation was "Well, he's so valuable as Attorney General, we're going to keep him there". Maybe that's it for right now. Should we knock it off for now?

PG 83 in transcript, there is a note "starting here"?

*Justice Brennan:*

Okay, I got O'Hara coming on...

(break in tape)

*Mr. Lane:*

Justice Brennan, this prompts me to ask you whether, in the light of the strife and the discord that has been engendered in the selection of Chief Justices, not only the time we're just talking about but on other occasions...do you think that this is a problem that has an answer and something that perhaps should be done, or something needs to be done about it?

(interruption in interview)

*Justice Brennan:*

I guess...the quickest way to answer that question, Roger, is to say no, I don't think it's a problem, but that doesn't do justice to the depth of your question. I think you are, as you asked the question, you had in mind the machinations of politics and personal ambition. The carrots and the sticks, all of the accoutrements of human motivation and manipulation that go into achieving power, and perhaps you're wondering whether or not all of those things are not destructive of the institution or somehow interfere with the functioning of the Court. My view of the matter is related, I think, to my concept of human nature and of human society. As we talked yesterday, I think it's pretty clear that my background is as a Roman Catholic and one, I suppose, would assume that means I have a certain respect for authority and kind of the ecclesiastical dictatorship, if you will, that the obvious papal infallibility that we believe in, and certainly the Catholic Church is a structure that doesn't have a particularly Democratic tradition, but the fact of the matter is that while I'm a Catholic and a Roman Catholic in terms of my...the discipline, the faith that I profess, I'm also an American, and I think maybe I embody a whole group of people who are American Catholics in the sense that they have a very strong commitment to and a philosophical connection with the story of the founding of the United States of American, the constitution, the Bill of Rights, our revolution, the Articles of Confederation and so forth, and

philosophical idea that the power to govern flows from the consent of the governed. I remember at the University of Detroit in political science classes being taught that Almighty God made people as, among other things, social animals, and our need and our desire to come together in society and in groups is something that is inherent in our nature, as the Almighty created us, and in that sense, in that derivative sense, authority comes from God, not in the way that we used to think the divine right of kings, but derivatively through the way the Lord made us to be social people, to need structures, to need civil authority and so forth, and that is a concept that is very consistent with the belief that the best way to do that is through the consent of the governed and through Democratic structures. It always brings me to the idea that I am not comfortable with the elitist notion that somehow or another, we can find a selection process that will get us wise and benign and competent leadership. A selection process outside of working through the consent of the governed, and I know the failings when you work through the consent of the governed, and I know the failings of the Democratic process, and I've watched it happen not only in the broad governmental situation but in the micro- governmental situations of Boards of Directors, committees, groups, courts that I've served on, the Common Pleas Court, the Circuit Court and ultimately, the Supreme Court. When I went on the Common Pleas Court in Detroit in 1961, I was 31 years old, and I thought this was the epitome of activity here, human professional, social activity, and I remember my very first judges' meeting which was hastily convened down the back hall with judges with the robes flowing, dashing into Judge Conley's office who was then the presiding judge, and we were talking about the business of the Court, whatever was urgent at the moment, and I remember Harry Dingeman coming in and he had a newspaper story, a big picture from the back of the News or the Free Press, I forget which, of Horace Gilmore, then a Circuit Court judge administering the oath of office or enrobing one of a number of municipal judges at a ceremony that was written up in the newspaper...*(End of side 1, tape 3)*

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**Topic 9: Justice Brennan discusses his concept of human governments, citing examples from his time as a lawyer and as a judge, and the nature of leadership**

*Justice Brennan:*

Municipal judges, we have to remember that this is under the old constitution, were not full-time judicial officers. Most of them served part-time. They weren't prevented from practicing law. They were sort of descendants of the old Justice of the Peace system, and I gathered that what Horace Gilmore was doing on behalf of the Circuit Court was attempting to somewhat professionalize these people or upgrade them or enhance their public image or whatever. Well, Harry Dingeman came in and he held this up when we came to new business in the meeting, and he said, "Look at this. Look what our Circuit Court judges are doing in this county. They're putting robes on these part-time municipal judges out there. They're making it as though these are important judicial officers. Here we are, full time judges in the Common Pleas Court, right downstairs from these people, and the Circuit Court judges on the high and mighty...What do they do for us? Why, the first time we turn our backs, they cut our balls off". I'm sitting there as a young lawyer, not a young judge and expecting that I'm going to be surrounded here with the

dignity of the bench, and I listen to this tirade which first of all, was somewhat amusing to me because it seemed to me that if one was going to surgically remove somebody's testicles, they wouldn't do it from the back, you know, so...in any case, that was an experience. I have to back off and tell you that I seem to have had a lot of experiences in my life with judges not acting the way I expected them to. When Polly and I were engaged back in 1950, I think it was, or before we were engaged, I guess...we were going to the light opera at the Masonic Temple. We stopped at the Sheraton Cadillac for a drink at the old motor bar, and while we were sitting there, in came this little white-haired man, and he staggered around the room, and he pinched the ladies on the cheek, and he interrupted people at the bar, and he was making a fool of himself, and we kind of looked over and giggled about him a little bit, and then went on with our looking into each others' eyes and our conversation and then suddenly, I felt this slam on the top of my head and I turned around and here's this little guy, and he's got a pair of rubbers in his hand with which he has just struck me on top of my head. I get up from my chair, and I look at him, and he's probably a foot shorter than I am anyway, or eight inches shorter, and I said, "I beg your pardon". He looks up at me and he says, "Take off your glasses". Well, I wasn't wearing any glasses. About that moment, I forget what I may have said or done, but before I was able to hit him, the bouncers came in or the waiters came in, grabbed him and hustled him out and then the maitre'd came over and apologized and sent us a drink and so forth. Well, minutes later, a lady came over from the next table and said, "You know who that was, don't you?", and I said, "No". She said "That was Vincent Brennan, the Circuit Judge". He was quite a notorious guy. Here is was a law school student with the name of Brennan, and as I told you yesterday, later on, I had gone to see old John V. Brennan who is a very decent and honorable upright public servant, but old Vincent was a lush of the first order by the time I came on the scene, and that was somewhat disillusioning. Anyway, to get back to my story about human governments which is a story about my concept of human governments because you asked me about the method in which we select the Chief Justice and while this may seem somewhat convoluted and off the point, I want to stay with it. After two years on the Common Pleas Court, I was promoted to the Circuit Court by Governor Romney and then I said to myself, "Now, I'm going to be with the real judges. Now I'm going to be with the people whose councils will be conducted with dignity and decorum and I'd better be on my toes". So now the Circuit judges, unlike the Common Pleas Court judges, did not meet in furtive little back hallway mid-day meetings. They met in a hotel over dinner, and so this was great, and we went and had a few drinks, got around the dinner table and there were twenty Circuit Court judges at the time, and I would say most, if not all of them, were there. After a couple drinks and some conviviality, the meeting was called to order by then presiding judge Thomas Murphy, and Tommy Murphy was a very delightful and warm and fuzzy gentleman who had been presiding judge for a number of years at that point, since I think Chet O'Hara had passed along, but by this time, everybody has had a few pops, and so the conversation is loud and people are interrupting one another, and you may remember Lila Neuenfelt who was on the bench at that time. Lila was a female lawyer in days before female lawyers were what they are today. I mean, she obviously went to law school when she was the only woman in the class and survived and succeeded in the law as a lawyer and a judge, sort of against the grain of the day. Well, she was a tough gal, and she could cuss with the boys and drink with the boys, too. There were some stories about that, but I can remember, you know, Carl Weideman "God [expletive] it, Lila, will you shut up?", and on and on, and they were all interrupting each other. I came away from that meeting thinking to myself, "Well, my goodness, it doesn't seem to make any difference where you go, the councils are all conducted about the

same". Well, then, two or three more years pass, and I'm elected to the Michigan Supreme Court, and now I'm going to sit around a table with seven jurists of absolute eminence who are state-wide, political based, former governors, former Attorney Generals, people of just great prominence, and I'm thinking to myself, "Now, I better be ready for the real high-class operation". I discovered that tempers are tempers, that people are rude to one another in even that circumstance. Stories you may have heard from others about...this happened before I got there...of Otis Smith pounding the table and breaking the glass on the table at one point in time. I saw through the years justices get up and walk out of the room in a fit of pique over something that was said or done, and it...I became of the opinion that probably if you were to sit in the highest councils of humanity, the Security Council of the United Nations or whatever, expecting it to be so dignified, they'd all be speaking in French, that they'd be cussing at each other, and they would be beset by all of the human emotions and foibles that we all suffer around our own dinner tables. That's just an observation. I believe that in all human affairs, there is leadership. Leadership is a natural instinct of human beings. Some people have it in greater quantity than others. Everybody seeks it, and we have an innate inherent need and urge to have leaders. We give the responsibility to do jobs to the chairman of the committee. We delegate authority. We do that instinctively in our own lives, to our children and so forth, so I believe that the idea that if you put any twelve people on a desert island, they're going to organize. Pretty soon, you're going to have a chairman, vice-chairman and secretary and treasurer.

(interruption in tape)

*Justice Brennan:*

I guess what I'm trying to say is that leadership is the natural thing, and it exhibits itself naturally in every group of people; the mafia, you know, the tribal communities, whatever, and I...I think the processes we've developed, Roberts Rules of Order, the Constitution of the United States, these traditional ways in which men and women organize themselves into social bodies are the civilized overlay over these basic instincts to assimilate and exercise power over one another, so given all of that, I am a believer in democracy, and I am a believer in democracy as the best way of selecting leaders. I believe that all leadership generally begins with the desire of the leader to become a leader. They may not express it, and they...like old George Washington, and they'd always be saying, "I don't want to do it", but nevertheless, that instinct that I know which way this bus should be heading and trying to convey to other people what that image is and get them to get on the bus and go is...I mean, that's what George Washington did. He exercised leadership in his speeches and in the counsel that he gave to his compatriots, and then they recognized that in him and wanted to give him the mantle. I mean, he may have been secretly going home and saying, "Now, I've got so and so's vote today and I got so-and-so's vote today", but when they asked him what he was doing, he'd say, "Oh, I'd rather be retired and living at Mt. Vernon". So I've watched this thing. I watched it when I was a Circuit Court judge. Tommy Murphy was presiding judge. There were several of us young guys, particularly Jim Canham, and myself. Ned Piggins was not that young, but we felt that Tommy Murphy was kind of a bland fellow who wasn't exercising leadership and particularly was not standing up for our Court against the Supreme Court which seemed to be coming and telling us what to do, and we sort of felt that they didn't know what they were talking about because there weren't that many experienced trial court judges on the Michigan Supreme Court. Murphy had what we used to refer to as the 30-



year rule. If you ever asked Tommy why we did a certain thing, he'd say, "Well, we've been doing that way for 30 years". That was the 30-year rule. I remember Jim Canham and I going one time to see Ed Piggins and we had been going around from judge to judge in the corridors lining up votes to get somebody new as presiding judge and Piggins was our candidate. We had the list and the two of us had calculated who would vote with us and so on, and we were persuaded that we had the votes to put Piggins in as presiding judge. We went to him and said, "Ed, we got the votes. We've got so-and-so, and so-and-so-, and so-and-so". There were twenty on the bench, and we probably had 12 or whatever number of votes. Piggins said some curious. He said that he wouldn't take it unless it was unanimous and unless every judge on the bench wanted him to be the presiding judge, he would not accept it. Jim and I left his office. We used to play squash every day at noon. I remember talking about it while walking over to the Lafayette Building to play squash and talking about Piggins' failure to grab the brass ring of leadership. Here was an opportunity for him to grab the brass ring and be the presiding judge. We brought him the deal and handed it to him. Now, he would have had some people on the court that wouldn't vote for him, but he would have had a majority, and a working majority, but he didn't want it. What I heard him say was, "I don't want the hassle of trying to lead when people are trying to shoot me down". In other words, "I want the obeysance of all my subjects before I become the king". In a way, that's a little scary. That's not the kind of leadership we're accustomed to in this country, really, and maybe he just figured "I don't want to be bothered with the thing unless everybody wants to go the way I want to go". In due course, I made an effort to try to see if I couldn't get a majority of the court to support me and I was unable to, but then Joe Sullivan came forward and was elected presiding judge and was for a number of years thereafter, but the process by which that occurred was the typical process of pushing and shoving and lining up votes, etc., etc. When my time came on the Supreme Court after Dethmers had been Chief Justice for two years, and I don't know if I told you yesterday the story about the SOC Commission...

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**Topic 10: Mr. Brennan describes the selection of Chief Justice in February 1969, which he won, his opponent Thomas M. Kavanagh, and his accomplishments during his administration**

*Mr. Lane:*  
Yes, you did.

*Justice Brennan:*  
And Dethmers going down and saying we wanted a raise. I was so annoyed about that that I was going to run. I decided I would run, and then I started lining up my votes. Gene Black was all for me. He became my campaign manager or my principle advisor and co-conspirator. He thought it was delicious to put in the youngest member of the Court and somebody who was then not 40 years of age. I think I was 38 and so when we were conspiring, maybe 39. They say - I don't know how true it is - that I was the youngest Chief Justice ever in the history of the Court, so I

had Black and myself. By that time, there were only seven on the Court, so basically, I needed two more votes. Well, the two votes I needed were Dethmers and Kelly, so I had to get John Dethmers, the then Chief Justice to in effect, step aside and vote for me, and I had to get Harry Kelly as well. Well, I won't bore you with the details of weeks of telephone calls and meetings and visits and discussions with other people including George Romney, talking to some people and so on, but to make a long story short, by the time the meeting rolled around when the decision was to be made...

*Mr. Lane:*

That would have been January, 1969, right?

*Justice Brennan:*

Well, I just checked my diary. It wasn't January of 1969. I was elected Chief Justice of the Michigan Supreme Court on February 3, 1969. The meeting wasn't held in January. It was a month later. Apparently Gene Black was not feeling well, and we cancelled the meeting of the Court.

*Mr. Lane:*

It was the first meeting...

*Justice Brennan:*

It was the first meeting of the Court administratively, but I think we held court in January without having administrative meeting. So we met. Harry Kelly was in Florida on that day, and in any case, we reconvened and Dethmers had not given me a commitment. I knew he wouldn't vote for Tom Kavanagh. I doubted he would vote for Tom Kavanagh, and I didn't think anybody...I knew that nobody was going to nominate John Dethmers. Basically, he was going to have to decide between Tom Kavanagh and me unless he nominated himself, so the day came and Dethmers said, "Well, the order of business today is the selection of the Chief Justice. How are we going to go about this?" I believe it was Thomas G. Kavanagh who was then on the Court who said, "Well, I nominate Thomas Matthew Kavanagh for Chief Justice". Paul Adams said, "I support the nomination", or I guess there was no support. He just nominated and that was it. Gene Black then said, "I nominate Tom Brennan as Chief Justice", and then Dethmers said, "Are there any other nominations?" and nobody said anything. So he said, "Well, we'll go ahead and vote".

*Mr. Lane:*

Do you have seconding in this process?

*Justice Brennan:*

No, there wasn't as I recall. There was just nominations and that was it. So he then proceeded to take the votes.

*Mr. Lane:*

Was it done...was there anything to the manner in which it was done alphabetically or by seniority or...

*Justice Brennan:*  
Around the table.

*Mr. Lane:*  
Which is a seniority concept?

*Justice Brennan:*  
Not necessarily. I don't...I can visualize where everybody was sitting.

*Mr. Lane:*  
Okay.

*Justice Brennan:*  
But...I can visualize where everyone was sitting, but I can't say that it was by seniority. Dethmers sat at the head of the table. He was Chief Justice. Immediately to his left and around the corner of the table was Gene Black. To Gene Black's left was Thomas G. Kavanagh. At the foot of the table was where I was sitting. To my left around the corner was Paul Adams. To his left which would be to the Chief Justice's right was Thomas M. Kavanagh.

*Mr. Lane:*  
There's one you haven't accounted for. Oh, Kelly wasn't there.

*Justice Brennan:*  
Kelly wasn't there, so Gene Black said, "I vote for Tom Brennan". Thomas G. Kavanagh said, "I vote for Tom Kavanagh". I said, "I vote for myself". Paul Adams said, "I vote for Tom Kavanagh", and Tom Kavanagh said, "I vote for myself", so at that point, we had...I had two votes, and Tom Kavanagh had three. Chief Justice said, "Well, let's find out how Harry Kelly votes", and so they summoned Harry Kelly's secretary...Lord, what was her name?...Velma.

*Mr. Lane:*  
She was the one that did the...she was a terrific administrative...she wrote opinions, you know, did a lot of law work, didn't she?

*Justice Brennan:*  
I don't think so. I don't think she did, no. I think she was an excellent secretary and took good care of Harry but I never knew her to do any legal work as such. He had law clerks, a long-standing law clerk. At that time, his law clerk was, I think, Wes Hackett, but in any case, I'm pretty sure her name was Velma. There was a Velma, and I think that's who it was. So she was summoned, and she had been in contact with Harry and of course, he knew what was happening and who he was going to vote for. She entered the room and John Dethmers inquired of her how her boss was going to vote, and she said that Justice Kelly votes for Justice Brennan. Now, the score is 3 to 3 and it now comes to the Chief Justice to make his decision, and he stands up, and he stands behind his chair and he begins to talk about the Court and his years on the Court, and

how he had been the Chief Justice the longest of any other person and so on, and the accomplishments of his time as Chief Justice and so on, and how he had felt that he had always done a good job and etc., etc. After saying all these things, he said, "But, it seems that others around here don't feel as I do that my job has been so able, and so it seems the Court is going to appoint someone else rather than me to be the Chief Justice. So now it comes to me to vote for one of the two candidates, and the two candidates are Justice Thomas Matthew Kavanagh, and Justice Thomas E. Brennan. And both of these gentleman have the first name of Thomas, so I am going to tell you all now", and he is dragging this out, dragging it out..."I'm going to tell you all now that I will break the tie between Justice Thomas Kavanagh and Justice Thomas Brennan, and I will break the tie by voting for Thomas...", and he paused, and he looked around, and he let it hang there for about thirty seconds, and then he smiled and said, "Brennan". Well, I thought to myself what a show this guy put on, you know. I got up and thanked everybody for their support and took the chair at the head of the table. Because I was young and because I was anxious to do a good job and certainly didn't see myself as somebody who could begin dictating to all these senior justices the moment that I took over, I jumped right into the business of the Court, and since we had no administrative meeting in January, we had two months of administrative business to attend to including cases and applications for leave and so forth to review and to decide. I jumped right into the agenda for the day, and kept the judges there through the lunch hour which was rare. We never did that in those days. I sent the clerk out for sandwiches and paid for it out of my own pocket and kept them working right through until about 4:00 p.m. Well, I suppose the capitol press corps knew that today was the day for the Chief Justiceship, and I don't know whether they had any idea that there was something going on but by mid-morning, the Court was issuing orders and things were coming down, and they were being stamped by the Clerk of the Court, "Thomas E. Brennan, Chief Justice" for signature, and that is how the press first discovered that there was a new Chief Justice in Michigan. I suspect that they realized it was a somewhat stunning or interesting development at least that this youngest member of the Court was the Chief Justice, so they were anxious to find out the story. The message came in from the clerk that the press wanted me to meet with them and so forth. I said, "I can't. The Court has a lot of work to do today. I'll meet with them tomorrow. You may set up a press conference in the morning". We worked late and that night, I went over to the hotel. I don't know whether it was called the Jack Tar or what in those days to have dinner, and I went there with Thomas G. Kavanagh, and on the way through the lobby at the hotel, I ran into Al Sandner. Do you remember Al?

*Mr. Lane:*

Oh, yes.

*Justice Brennan:*

He was then, I think, with the News though later he was with the Milliken administration, and he came up and chided me over the fact that I had snubbed the press by not coming out and telling the story of what happened, and if was a sign of the kind of Chief Justice I was going to be, I was going to have trouble with the press during my administration and so on. Well, I said, "Al, you have to understand. I was just elected today as Chief Justice. I am the youngest member of the

Court. We had a big agenda, and I just felt that I couldn't break the meeting. It would have been very kind of egotistical of me to break the meeting and come out and announce my victory to the world. To tell you the truth, I like to get my name in the paper as much as anybody else, but I have my job to do, and we'll meet tomorrow morning, and I'll answer all the questions and take all the time it takes to give you a complete interview". What is in the paper the next day? A story by Al Sandner - "New Chief Justice likes to get his name in the paper". So there's how it began, and I began to learn something about the press. I don't know if I told you the story about Thomas Giles Kavanagh coming to me after I was elected Chief Justice, congratulating me, extending his hand, the hand of cooperation and said, "I supported Tom Kavanagh. I think he should be Chief Justice, but now that you're elected, I want you to know that I'm going to help you and do what ever I can...let me know" and so on. It was a very gracious, generous offer, and I said, "Well, I appreciate that. I think the first thing we need to do is to try to placate our brother Tom Kavanagh who is quite unhappy about not being Chief Justice", and he said, "Oh, Tom's a good guy. He'll come along. Why don't we go down and talk to him". So Thomas G. and I went down to see Thomas M. In the confusion of having two Tom Kavanaghs on the Court, I have to tell you, was a real problem. Those of us who were on the Court eventually came to have different ways of saying it. It was "T.G." or "T.M.", Thomas Giles or "T.G.", we sometimes referred to as "Thomas the Good", and "T.M." was sometimes referred to as "Thomas the Mighty". He was also referred to as "Fat Tom Kavanagh", and as "Carson City Fats". Those were the terms of endearment that we developed for him, but he was quite a guy. We went down to Tom's office, and we walked in and Giles Kavanagh said, "Well, Tom, Tom here is our new Chief Justice, and I have just been talking to him and I told him I am going to support him and help him in any way that I can because the Court has a lot to accomplish over the next couple years and I think pulling together, we can do a lot", and so on and so forth, and "I told him I thought you would be generous to work on the team and have a team spirit" and so forth. "Carson City Fats" didn't even look up from his desk, shook his head and said, "He'll get no help from me". "Thanks, Tom, it was nice talking to you", and so we left. I can say this about him. He was a partisan. He was a Democrat to his toes. He was a Roman Catholic to his toes, and a big shooter in the K of C and so on and so forth, a family man, revered by his family. His wife, Agnes, was a saint; tough-minded, decisive, always told you where he was coming from and never varied, never deviated from what he said he was going to do or how he felt about something. I think it was Ted Souris or somebody who said of him, "Tom Kavanagh has been wrong plenty of times, but he has never been in doubt".

*Mr. Lane:*

That's a good one.

*Justice Brennan:*

It is a good one, and it was a great way to describe him. He was a fighter. He was a hard worker who was always thoroughly prepared for everything he had to do. He was pompous and sort of repetitive when he was presiding at a meeting and making the formal statements and so forth, but he would develop kind of the jargon of the presiding officer with all the appropriate "Harumps" and so forth thrown in. He had a deep sort of stentorian voice which aided in that process, and

like most people who are sort of big and solid as he was, stout, he had a way of being, even though he was quite short in stature, of presenting an imposing picture when he was presiding. And when he came to discuss cases and he told you where he stood on the case or how he felt about it, he didn't have to say it twice. He told you where he was coming from, and you marked him down on your book and went on from there because it wasn't going to change. He didn't have a lot of stomach for dialogue and brainstorming or sort of "committee of the whole", gossip or conversation about things. It was either this or that and that was all there was to it. I will jump ahead because I am focusing on Tom Kavanagh for a moment. I visited him in the hospital, I think, a day or two before he died. I remember that, and I remember telling him of my respect for him, and him expressing similar sentiments with respect to me. We were adversaries in so many ways, and on lots of issues. On some issues, we were on the same side. I found him to be a marvelous cohort in the ranks when you were fighting, and I know why the Democrats loved him because he was a guy you wanted to have playing guard if you were playing tackle, you know, whatever. He was a good, solid fighter. We were together on the parochial issue, as I recall, and some others on the Court. He was a good, tough fighter and thorough in his preparation. He was a good man. Anyway, not to say that he was right on a lot of things, or at least in my view. That was the way I became to be elected Chief Justice, and it was a tenuous majority. Quite unlike Ed Piggins, I didn't hesitate to grab the brass ring even though I could only see about a third of it, and get a couple fingers on it at one time. I set out as Chief Justice to...I suppose if I were going to say what was my agenda...my agenda was to try to get the Court to decide some cases for one thing. I felt that we had too often filed multiple opinions where we weren't giving the Bar guidance as to what the law was, and I really felt it was pointless for us to even take cases unless we were in a position to decide them with some authority. As a result, one of the things I did was I held up a lot of cases. I think if you were to look at the productivity of the years 1969 and 1970 when I was Chief Justice in terms of decisions for the Court, it was down, and quite deliberately so. I simply wouldn't release opinions until I was sure that we had tried to hammer out an authoritative majority opinion if it was all possible. If it wasn't possible, I tried to get the judges just to dismiss the case as improvidently granted leave. What was the point in displaying to the Bar that we were seven lawyers who couldn't agree what the law was? And add to our disagreement on the substantive issues our disapproval of each other by the words we were using in expressing our opinions. So I tried very hard to cull some of that stuff out of the books during my period in office. And the other thing that I did quite instinctively, and I don't think I intended to do it as Chief Justice. If you would have asked me what my goals were, I would have said my first goal was to get a raise for the Justices. My second goal was to try to do something about the way we wrote our opinions, but I did discover, I think in those years, that I had somewhat of a knack for innovative administration, and I enjoyed it. One of the first things I did with respect to the SOC Commission for example, I employed an economist from Michigan State University to prepare a report and recommendation to the SOC Commission on behalf of the Supreme Court, and he came in with a big book about that thick. I don't know what it cost us, a couple thousand dollars or whatever for his work, but he had accumulated all the statistics of what lawyers make and what judges make and projected the economy and had done historically the relationship between salaries of judges and salaries of other people and so on, and did a wonderful job which resulted in our getting one of the largest raises we ever got. It went from \$35,000 to \$42,000 which was a 20% increase. It was belated and I think much deserved but nevertheless, it was an accomplishment of my administration, I felt. We did some other things. We put the first...I think

we put the first black on the Board of Law Examiners a little before that. I'm not certain, but it was about that time that Stuart Dunnings went on the Board of Law Examiners.

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**Topic 11: Justice Brennan recalls appointing Stuart Dunnings to be the first black on the Board of Law Examiners and the establishment of the State Appellate Defenders Office and the Attorney Grievance Panel**

*Mr. Lane:*

He was a good one, too, wasn't he?

*Justice Brennan:*

Yes, an excellent man, and...but it does seem to me that it was during my Chief Justiceship that we put the first young lawyer on the Board of Law Examiners. It was sort of customary to have people of some maturity and stature in the profession, which is good, but there was some sense that the Bar Examination maybe was not being fairly handled. One of the problems was that it wasn't being corrected fast enough. People would take the Bar Examination in July as I did and have to wait until Christmas time to find out if they passed. So another thing we did was that we authorized the employment of readers to assist the Bar Examiners to get the job done, to correct the examinations, but we also appointed Dick Spindle who was a nominee or a recommendation of the Young Lawyers Section of the State Bar, S-p-i-n-d-l-e, later was tragically killed in an auto accident as a young man, but he was the first Young Lawyer Section representative, member of that board. During my time as Chief Justice, we established the SADO, the State Appellate Defenders Office, and that was an interesting thing. That State Appellate Defenders Office was established, was created by a resolution of the Michigan Supreme Court, an administrative order, and we said...it read like a statute. We said, "There shall be... and the Governor shall make an appointment ...and the other person should be appointed by the Supreme Court...and they shall have terms of...", whatever. In other words, we went through and created this whole agency which was funded originally by a grant from the Federal Government because there was a need to get competent lawyers to represent indigent defendants in their appeals. It wasn't a problem at the trial level, but none of the lawyers wanted to take these appeals. They weren't expert in it, and there was very little money in it.

*Mr. Lane:*

Were you the leading...the point of this whole effort on SADO?

*Justice Brennan:*

I drafted the administrative order.

*Mr. Lane:*

That's what I really wanted to know. I somehow got the impression that Thomas Matthew was accorded the...

*Justice Brennan:*  
Credit for it?

*Mr. Lane:*  
Well, my memory could be...you know...

*Justice Brennan:*  
Thomas Matthew Kavanagh, I told you, was a tough fighter and a partisan guy and wonderful adversary who never hesitated to take credit for things he didn't do, and if he took credit for that, I'm not at all surprised, but obviously, he would have been on the Court that voted for it, and I'm sure he was in favor of it, but let's put it this way. It was my idea. It was my idea. I drafted the SADO resolution and the matter was...we created it. Bob Krinock who was my appointee to the Court went out and got the Federal money to do it with, and I regarded it as one of the major accomplishments of my administration as Chief Justice. It was also during my time as Chief Justice that we created the Attorney Grievance Panel.

*Mr. Lane:*  
I was going to ask you about that. May I interrupt just a minute?

*Justice Brennan:*  
Sure.

*Mr. Lane:*  
On the SADO, was the judicial statute if that's what the proper name is, that you drafted...was this later, subsequently supplanted by legislative enactment?

*Justice Brennan:*  
You know, I don't know. I suspect it probably has been in the intervening years. We're talking about twenty years ago.

*Mr. Lane:*  
Oh, yes. Okay, well...

*Justice Brennan:*  
Let me just take a look here.

*Mr. Lane:*  
The reason that I bring this up is that when I arrived in early 1976 and T.G. Kavanagh was called over to the Appropriations Committee and they scrubbed him over pretty good about the amount of money at that time that was flowing into this thing and one of the beefs was, on the part of...

*(End of side 2, tape 3)*

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**Topic 12: Justice Brennan talks about the creation of the State Bar Grievance Board in 1969, his Law Day address to the state legislature on the matter, and the creation of a "Crash Program" to handle the case backlog from the 1967 race riots in Detroit**

*Mr. Lane:*

...book we're in...

*Justice Brennan:*

This is from Volume 383 of the Michigan Reports, and it is in the front part, the appendix or whatever they call it...

*Mr. Lane:*

The Roman numeral..

*Justice Brennan:*

The Roman numeral..that looks like XXXVI, and it says "The administrative order 1970-1, adopted March 13, 1970...", so that was when I was Chief Justice..." ...in the matter of establishment of state-wide defender system whereas the Michigan Commission on Law Enforcement and Criminal Justice..." of which I was a member. As Chief Justice, I sat on that Commission. "...has approved a grant of \$40,000 and indicated its intention to provide an additional \$30,000 for the establishment of a state-wide appellate public defenders system conditioned upon the establishment of a commission, pursuant to the rule making and superintending control powers of the Supreme Court. It is ordered that a state- wide appellate public defender commission be established subject to the superintending control of the Supreme Court composed of three members to be recommended by the Supreme Court, one member by the Court of Appeals, one member by the Michigan Judges Association, two members by the State Bar of Michigan and appointed by the governor for terms of two years each". There's the order, and if that doesn't sound like legislation, I'll buy you a new hat, but it was quite a bold and I would say in one sense, liberal thing to do. In the area of administration, I was a very liberal sort of guy. I mean, I was a doer. I felt I was, anyway.

*Mr. Lane:*

Did Milliken then appoint the members?

*Justice Brennan:*

Oh, yes, he cooperated fully and appointed two members of the State Bar of Michigan and one member of the Michigan Judges...two members of the State Bar of Michigan and appointed by the governor for terms of two years. Then in the very same volume, 383, there is a substantial amendment adopted December 15, 1969 and effective March 1, 1970 of the standards of conduct for lawyers, and Rule 15 which appears on page...that looks like about...I don't know if I'm that good at reading these things..."XLIV". What would "XLIV" be?

*Mr. Lane:*

That would be 94? Is "L" one hundred? No, "C" is one hundred. "XL" would be 44, wouldn't it? "L" is fifty?

*Justice Brennan:*

I guess, so that's forty-four. Okay, I see what you're saying. It's "X" before "L" and "I" before "V", so it's ten short of 50 and one short of five, so you're right, 44. On Roman numeral 44, Rule 15 preamble: "There is hereby created within the State Bar of Michigan the State Bar Grievance Board which shall be and which shall constitute the arm of the Supreme Court for the discharge of its exclusive constitutional responsibility to supervise and discipline the members of the State Bar of Michigan", so then the board is created, the composition and here's the interesting thing..."The State Bar Grievance Board shall consist of three lawyers appointed by the Commissioners of the State Bar, two lawyers appointed by the Supreme Court, and two laymen appointed by the Supreme Court". We were the first state that I know of to have laymen on our State Bar Grievance...Lawyer Grievance and Disciplinary body. That...

*Mr. Lane:*

Excuse me, I'm beginning to see some things now. I'm a good friend of John Murray's. You appointed him, and probably he was T.M...

*Justice Brennan:*

He was T.M.'s appointee, I remember.

*Mr. Lane:*

You see, there would be a form of distortion that would come through...you're the Chief Justice. Here's this guy. What the hell does he know about John Murray, but the point is...

*Justice Brennan:*

Obviously, the Court all agreed to this thing and participated in it.

*Mr. Lane:*

Certainly.

*Justice Brennan:*

And I recall now that Tom nominated...suggested John Murray and nominated him. I thought he sounded like a good guy.

*Mr. Lane:*

Oh, he's a heck of a guy, and he was a great credit to that operation. But you know, I'm going to ask you before we get off of this, if you won't for the tape, provide the setting a little bit of why this was necessary, what did it accomplish, how it came about...

*Justice Brennan:*

I'll be glad to do that, Roger. The background, and I don't know how accurate my details are going to be, but in broad-brush, there was a lawyer in Howell by the name of Martin Lavan.

*Mr. Lane:*

A rascal.

*Justice Brennan:*

His reputation was as a rascal. I cannot tell you any of the details of what kind of mischief he was involved in or allegedly involved in. It seemed to me that it had to do with probate cases or a probate case which was either...where the estate was open too long or where the lawyers were alleged to have gotten too large a fees or diverted assets or whatever they were supposed to have done, but Howell in Livingston County in those days, and I think probably still is, is one of those places where confrontation seems to flourish and prosper. I don't know why, but there are certain parts of this earth where human beings tend to be more confrontational than others.

*Mr. Lane:*

Well, the Ku Klux Klan does pretty well down there.

*Justice Brennan:*

I don't know. That's possible. In any case, and that may have been part of it, too. I don't know...Lavan, I think, was Catholic, and I don't know if they had any of those in Howell before he came, but suffice it to say that he was in big trouble and that the Free Press or somebody had gotten on that thing, and what came out of it was a series of articles, among other things, criticizing the way in which lawyers discipline themselves, and up until that time, we had to go to the Ethics committees and the State Bar of Michigan was involved in the discipline of lawyers, and they had a somewhat complicated process of voluntary lawyer discipline. It was done by unpaid lawyer volunteers who would be selected to serve on these various panels of hearing officers and so on and so forth. I seem to recall that the story of the Lavan case was one of State Bar discipline which was extraordinarily slow, bureaucratic, repetitive, and the cry was white wash, that this was a white wash, that the Bar was not being responsive and responsible to discipline its members, and that was of a hue and cry which would have been going on in late 1968, maybe early 1969, and it was part of the background for the speech that I gave to the State legislature on 5/1/69. Let me tell you a little bit about that because that was another of the somewhat substantial accomplishments of my administration. I asked the legislature if they would hear me give a talk to them on Law Day. I felt I had a lot of things to say to the legislature about the courts and so forth, and I started off by expressing my appreciation for their invitation.

*Mr. Lane:*

Excuse me. Did this idea spring just fresh out of your head or did you...was there some inspiration for it or did somebody suggest it or...what was the origin of it from that sense? This was the first time, right.

*Justice Brennan:*

This was, to my knowledge, the first time that this was done, and it was my idea. I said...no, apparently it was not because I started off by saying, "This is not the first time a Chief Justice

has come down to this chamber to speak with the legislature. I hope it will not be the last". It seems to me that Dethmers told me that he had made a speech to the legislature at one time. "...I hope it will not be the last for it seems to me that the judicial branch of the government is equally as important as the executive and the legislative, and it seems to me that communication between the judiciary and the other two departments is not always what it ought to be. Just as it is desirable for the Chief Executive to come here annually and describe the state of the State, so also I believe the Chief Justice should be willing to come from time to time and share with you some thoughts about the state of the law. Law Day, this day set aside for all Americans to consider and grow in their appreciation of the rule of law is a proper occasion for us to look at the state of law in Michigan". Then I went on to talk about how things were going, and incidently, I had invited all the judges in the state to come, to put on their robes and the whole legislative chamber was ringed with these black-robed folks. Interestingly, I said "reforms in the administration of justice do not come easily or quickly nor should they. New Jersey's former Chief Justice Vanderbilt was fond of saying that judicial reform is no sport for the short-winded". I went on to talk on that occasion about, among other things, the discipline of the bar. Let me see if I can find what I said about that, because this sort of was just before or just after we adopted this new grievance procedure. I want to see what I said to the legislature about that.

*Mr. Lane:*

What is the date? Is this 1969 or 1970?

*Justice Brennan:*

1969.

*Mr. Lane:*

Was it 1969?

*Justice Brennan:*

Yes.

*Mr. Lane:*

You'd only been Chief Justice for a couple months.

*Justice Brennan:*

I'd been Chief Justice for a couple months, yes. Oh,...because of this Lavan episode, there was a call in some public circles, newspaper editorials and among some legislators for the adoption of Attorney Licensure provisions...let's put the lawyers under the Bureau of Licensing, Professional Licensing, and if you were uninitiated, uninformed, and you read the newspaper, you might have the feeling that lawyers weren't licensed, and that somebody was trying to make sure you had to have a license to practice law.

*Mr. Lane:*

Well, I think Tom Sharpe had a billing in all this.

*Justice Brennan:*  
Possibly did.

*Mr. Lane:*  
See, that was his territory.

*Justice Brennan:*  
Exactly, and so I wanted to make sure that the legislature understood that...it wasn't necessary for them to pass a law to license lawyers. I said, "No one is permitted to practice law in this state without a license. The license to practice law is issued by the Supreme Court of Michigan only after proper proof that the applicant has the qualifications of education, aptitude and moral fitness which would equip him to accept employment from members of the public as an attorney and counselor and which ready him to participate in the administration of justice as an officer of the court. That license to practice law is a privilege and not a right. It can be taken away for good cause at any time by the same authority from whence it was granted - the Supreme Court, acting through the State Bar of Michigan. No other profession is regulated as completely or judged as sternly as the practice of law. Lawyers by their calling are engaged in continual conflict. In every law suit, one side wins and the other side loses. Dissatisfied clients are a natural occupational hazard for attorneys, distinguishing between legitimate and improper complaints against lawyers is always a delicate matter. Nevertheless, the number of lawyers annually disciplined, suspended and disbarred far exceeds the number in other professions. Like no other profession, lawyers accept their just debts of professional honor. They accept their responsibility to be literally their brother's keeper. They recognize that no lawyer can enjoy public esteem and public confidence so long as some few members of the profession violate sacred private trusts or fail in grave public duties". Here again, I talk about what we just said. "Only recently the Supreme Court again demonstrated its concern for the integrity of its Bar by adopting new rules requiring that formal disciplinary actions against lawyers be made public". The Court directed that first. Until that time, even the formal complaint was in camera. "The Court directed that further, more far reaching renovations be set in motion so that the workings of professional discipline can be more efficient and more worthy of public confidence". I had been talking about "being tarred with the same brush" as somebody, okay, and I talked about it in the context of judges because there had been some criticisms of judges. I don't know...and the Tenure Commission had just been created to discipline judges. I talked about the fact that..."We now have the best, most modern appliances to clean our own house", talking about the judges, now..."If the courts fail to gain and hold public respect because of the misconduct of a few judges, we will have only ourselves to blame, and the wide tar brush by which our public reputation is sullied will mark us all with equal cause". When I'm talking about the lawyers, I said, "Here again, the wide tar brush of public disapproval which marks us all marks fairly. We cannot escape its stroke so long as we have skeletons in our closets and the keys to the closet doors in our own hand". So,...

*Mr. Lane:*  
That's a little poetic touch.

*Justice Brennan:*

Yes, I guess so. But at any rate, what I was trying to say was that it's our baby and we'd better fix it and be responsible for it. This reference, I think, had to do with Lavan. "Neither can the courts escape responsibility for the pernicious evil of justice delayed. Estates which hang fire year in and year out damage actions which await the enpanelment of juries while seasons slip by. Persons accused of crime who languish in jail for months on end and a suffering public which must endure continued harassment by criminals out on bond, all of these things fall like a guillotine on the neck of the judiciary". Then we went on to...

*Mr. Lane:*

If you'll pardon the observation, it sounds like you wrote your own speech.

*Justice Brennan:*

Oh, I did. I wrote every word of this and all these other volumes of speeches. I love to write speeches.

*Mr. Lane:*

Well, you know, my observation is not just a throw-away remark. This is intended to inform people that may be listening to this someday that this is not entirely the custom nowadays.

*Justice Brennan:*

I guess. It's one of those...

*Mr. Lane:*

Nor is it the custom for Justices of the Supreme Court always to write their own opinions really, in the sense that it used to be.

*Justice Brennan:*

Well, I always did that, and maybe we'll have time to get to that before we're done here, but I may say just as an interesting sort of side observation a couple things. In that speech, I talked about the consolidation of Recorders Court and the Common Pleas Court and so forth. Later on, while I was Chief Justice, we created the Crash Program down in Detroit. Bob Krinock who was my assistant and I went down and literally opened up the old Recorders Court Building. The Frank Murphy Hall of Justice had been constructed next door to it, across the street, rather, and the old Recorders Court Building was empty. There were literally thousands of criminal cases pending in Detroit that were the sequelae of the 1967 race riots, and here we're talking 1969. It's two years later, and these cases haven't been disposed of, and it was a scandal. I set out to have what was called a Crash Program. I mean, Bob Krinock and I invented the word, the phrase "Crash Program", and we got the Supreme Court to give me the authority to go ahead and get on with this Crash Program. I appointed...

*Mr. Lane:*

Was this 1969 or 1970?

*Justice Brennan:*

1969. And I remember the day we went down to the old Records Court Building and knocked on the door, and the caretaker came to the door. He was the only person in the building. I introduced myself as Chief Justice of the Supreme Court and Bob Krinock as my assistant, and I said, "We're here to look at the courthouse to see what we can do to re-open it and use it for the Crash Program to hear these criminal cases". Well, this fellow had no idea what was going on or whatever except that he was in the presence of the Chief Justice of the Michigan Supreme Court, and he was full of "Yes, sir's", and "No, sir's" and "Please" and "Thank you", so I went through the building with Bob taking notes and saying, "Now, Bob, we'll move this wall and we'll do this, and we'll open that door, and that can be locked off, and we could have the elevator on it to here and to there and so on". "Got that, and got that". This caretaker, he is running around making notes right and left, and no question as to whether or not we'd ever talked to the mayor of the City of Detroit, whether we'd ever...had the approval of the City Council. I mean, this building belonged to the City of Detroit, and it was closed. I was about to re- open it without so much as a by-your-leave from anybody, you know, or any money or any budget or anything like that, so you know, we got through with the building and I said, "This will be fine. Now, Bob, what we're going to do is we're going to get all these district court judges from Wyandotte and Oakland County and St. Clair, Michigan, and Grosse Pointe, and Livingston County, circuit judges, whoever can spare us the time. I want all these people signed in here. I want every one of these courtrooms filed". "Where are we going to get the bailiff?" "They'll bring their own bailiffs. They'll bring the police officer from Inkster and the police officer from River Rouge and so forth, can come with them, and they can bring their own clerks, and if we have to hire court reporters, we'll get them out of the yellow pages of the phone book", and I'm just going around, you know, announcing all these things. Well, you know what? We did it. We did exactly all those crazy things that nobody really questioned that we had the authority to do it. I mean, the Supreme Court gave me sort of a blanket mission to go down and do something about these cases. Within a few weeks, we had the building open. We had literally a dozen or so, at least a half-dozen, maybe eight or ten judges sitting down there. In due course of time, we promulgated or Bob Krinock promulgated at my request what was called the Krinock plan which was my long-standing scheme to try to administratively bring the Records and Circuit court together, even though by statute, they still weren't one court but just to get them being administered as one court. I can remember Bob DeMascio was the presiding judge at the Records Court and Joe A. Sullivan was the presiding judge at the Circuit court and I remember one occasion where Bob Krinock and I had lunch with Bob DeMascio and Joe Sullivan at Carl's Chop House down in Detroit in an effort to try to get the two courts working together and what I was trying to do was to get the two courts to appoint a czar, and I wanted Joe Sullivan to be the czar. That meeting went through lunch with a couple of drinks and then a few more drinks and the meeting continued. Pretty soon, we were having cocktails before dinner, and then we were having dinner. I say the meeting went on from about noon until maybe 10:00 p.m. I can't tell you that we accomplished a great deal but we did make some progress. The Crash Program really continued, I'd say, for maybe a year or eighteen months anyway and significantly cleaned up the criminal cases remaining from the riots, and again, it became, the Crash Program became an institution. You know, where there was the Crash Program; we all knew about that, you know, and the legislature had to provide money for the Crash Program. Well, the Crash Program just became a fait accompli and an established part of our administration of justice for that period of time. Really the only thing that got it going was a certain amount of chutzpa.

*Mr. Lane:*

How do you spell chutzpa?

*Justice Brennan:*

I think it starts with a "ch". Anyway,...

*Mr. Lane:*

Before you leave the subject, I think it's...I would like to hear your evaluation of the importance of that change in the grievance machinery and the fact that this has a continuing problem that today, or you know, in recent times and certainly in the future will continue to get attention for the serious problem that it is. I just thought it necessary to point this out.

*Justice Brennan:*

One of the problems...one of the phenomena that I observed all these years and these things...to be sort of common is the human tendency to address process as a means of resolving difficulties. When you have a Martin Lavan who filches money out of an estate, let's say for example, and it gets bad press and something has got to be done about it, there is on the one hand a human cry to draw and quarter Martin Lavan and oftentimes, the person who is in trouble does in fact get run out of town on a rail or whatever. But at the same time, there is this thrust to improve the process. "Let's create a more powerful grievance board. Let's put lay persons on the grievance board so that in the future, these things won't happen, so that the layman's point of view will be expressed. Let's, as we did, increase the bar dues from a nominal \$35.00/year or whatever it was to a \$100.00/year so we can afford to hire full-time professional grievance investigators and administrators, so that these things won't happen again in the future". Now, we did, and at the time, it was hailed or at least recognized as a responsible and reasonable thing to do. In my opinion, the Court after I left it, made a serious mistake by chopping the grievance board in two. They bifurcated the process and what they did was, somebody said, "Well, we can't have the grievance board prosecuting people and at the same time sitting in judgment on those people, so we've got to have an attorney grievance panel or grievance administrator who is sort of like the prosecuting attorney and over here, we have to have the attorney discipline board which will be like the judge and sit in judgment on whether or not the attorney ought to be disciplined". In my opinion, that was a mistake. In the first place, there are all kinds of administrative agencies that function in a quasi judicial fashion, and every prosecuting attorney has to decide whether he thinks somebody is guilty or innocent before he decides to issue a warrant, so in the sense of deciding guilt or innocence, everybody connected with it. The policeman who stops you on the street has to make a judgment about whether you're guilty or innocent before he proceeds with giving you a ticket, but that's not the determination of guilt of innocence that really counts. Eventually, some kind of judicial officer has to make that judgment, and in the case of lawyers, the decision is made by the courts as I said in my speech. It is courts who issue the license. It is the courts that take it away, that take it away, and the function of the grievance commission is to ferret out those lawyers that need to be disciplined and recommend the discipline to the Supreme Court. The Supreme Court may or may not buy what the commission is coming to them with, but the commission has done its job if it prosecutes the people. But somehow or other they got the



idea in their head that the Supreme Court doesn't do this, "we've got to have this attorney discipline board which is disciplining the lawyers". I don't...in the long run, I don't think they can really do that. What they've done, however, is to make the process more complicated and more expensive than it needs to be, and perhaps it is now being dragged out longer. But to get back to this proposition process. We created the process. While I don't like the bifurcation of it, the Attorney Grievance Commission remains, if you look at just that half of it, substantially as we created it back in 1970. But it doesn't mean it is always going to work. I mean, the fact that you have a wonderful constitution for the United States and a wonderful set-up for government for Congress and the Senate and the President and so on doesn't mean you're always going to get good people or the people who are elected are chosen to serve us in those capacities are always going to discharge their duties responsibly. Bob Waldron and I are fond of saying to each other a phrase that we picked up somewhere along the line, "You got to get up early in the morning and fight for freedom, and you've got to fight for freedom all day long until you're tired and go to bed at night and then you got to get up in the morning the next day and fight for freedom all over again", and it's kind of an amusing thing, routine that we do, but the concept that eternal vigilance is the price of liberty is very real in ordinary, in the ordinary affairs of men, and eternal vigilance, watchfulness over the activities of the Court or the Attorney Grievance Commission or anything else is simply a necessary reality. I don't think...my point is that I don't think improving the process is always the answer. I think if you get a decent process in place, you'll get good people.

*Mr. Lane:*

This is in accord with your, in a general way, with your response to my question about selecting a Chief Justice. At least the implication in that question that maybe there's a better way, you said process, the mechanics of it, well, if they work at all, depending on the people and the workings of our system, they'll be okay, in so far as it...

*Justice Brennan:*

I don't mean to suggest that the process can't be improved, and probably should, you know...should always be under review or reconsidered, can it be improved in one way, shape or form. I'll give you an example. I think passive restraints have some value. Certainly, the best way to control the flow of traffic down the avenue is to time the lights. Time the lights and people will all drive 35 miles/hour because who wants to rush up to the next light and put on the brakes? The people who are the total experts in passive restraint and moving people and so forth are the people down at Disney World. You go down to Disney World, and you don't wait in line. You're moving up and down these rows, roped off areas, and it doesn't feel like you're standing in line for a long time at all because you're always moving, and they're aware of that, and they can manage the herd by putting you into those things, and people are moved onto this ride, and moved off, and the speakers are announcing at all times, and "keep to the right", and this and that, and I'm sure that those...you get human behavior to follow certain patterns with good process, and I think the people who founded our country and wrote the Federalist papers had a real good sense of process and how best to maneuver people within certain structures. So I don't mean to suggest that process can't be improved and that it shouldn't be improved, but at the same

time, there's this other concept that good people will make any system work and that bad people, regardless of how good the system is, will not do well.

*Mr. Lane:*

In part, you were saying, if I may paraphrase it, there's an excessive public naivety and faith invested in jiggering with the mechanics of something. Once there's been a failure and it's recognized, and as you say, draw and quarter the guy, then they've got to do the fix-up and people have a naivete about the human capability of a fix-up to solve all problems forever.

*Justice Brennan:*

I agree. I think that's a good point, and I was trying to struggle with what you said better and faster. Where are we now? What are we talking about?

*Mr. Lane:*

Well, we were in the speech in 1969, the speech, and you mentioned the SADO, the Crash Program and I think you want to say in connection with that speech, the recommendation or whatever you said about statewide financing or reorganization of the courts on a state-wide basis. Didn't you want to bring that into it somewhere?

*Justice Brennan:*

That was the gist, as I say of the Krinock program and of course, and...

*Mr. Lane:*

Was that related only though, as I thought you explained it to the Detroit and Wayne County problem? Beyond that, did you not suggest to the legislature that it was time to consider appropriating for the financing of courts everywhere through the state process, or have I misread something?

*Justice Brennan:*

I will not say that statewide financing was my baby. In fact, it was talked about and I think we...some of the first steps toward statewide financing were taken during the time I was Chief Justice, but I have to believe that it was probably somebody else's idea. I was never really crazy about it although I can see where it has some value, and I certainly...I think politically it had value because if you wanted to influence the way things were being done in Wayne County or someplace else, the best way to do that was to come up with the money, and if you were talking about coming into Wayne County with a bunch of dollars to support their system, then you could have something to say about how that was going to be.

*Mr. Lane:*

I think I got my cue from Devine. Mike Devine said, "On May 1st, Law Day, in the inaugural State of the Judiciary Address before a joint session of the legislature, governor and robed judges throughout the state, Chief Justice Brennan proposed statewide financing of the Court system, including employment of all court employees by the unified court employer.

*Justice Brennan:*

Yes, that's...I don't think...maybe I'm wrong, but I don't think that my emphasis was so much on

financing as it was on organization. What I...let me see...just hold on a second and let me take a look over here...

*Mr. Lane:*

I didn't want to get misplaced emphasis on something. I just thought that this was a subject area that you'd want to at least recognize as part of your speech on that occasion if it were true.

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**Topic 13: Justice Brennan reads portions of the speech given to the legislature in order to explain his court's proposal for statewide organization of the court system and the establishment of a Circuit Court in Detroit**

*Justice Brennan:*

Okay, I'll tell you. We're talking about judicial reform, and...I said, "Our task is to make those changes only which seem fitting and necessary to make the machinery of justice a more practical and useful tool in our times, bearing in mind that we have the high and undeleagable obligation to pass along to our children not the best system we are capable of devising but the best system that men have been able to devise from the dawn of history to the day of our children's maturity", which is a way of saying we don't have an obligation to sit down with a blank piece of paper and do the best we can in terms of creating a system. Our obligation is to preserve what's come before us, the wisdom of mankind and add to it whatever we're...we fairly believe needs to be added to it..."In making the machinery of justice serve us better, we're interested in two things: its efficiency and the quality of its product, and these two areas, efficiency and quality, much has been done in recent years, and the people of Michigan have a right to be proud of these accomplishments. By mandate of the 1963 constitution, a single court system was created in this state. Justices of the Peace and Circuit Court commissioners were abolished. A four tier structure was launched...", and so on. I compliment the organization of the Court of Appeals and talk about how well they've done, talk about changes in the Circuit Court,..."A new generation of Circuit judges taking office...the creation of the new District Courts by the legislature", and I say in that regard, "In the creation of the new District Courts, this legislature was given a tough assignment. Not only was it necessary for you to harmonize the varied interests of diverse communities throughout the state, placate concerned local officials, protect the rights of court personnel and establish agreeable election districts, but you had to do all these things by a 2/3's vote of your own number. You are certainly to be congratulated for adopting Act 154 of 1968 in the face of so many obstacles. You have created and by its rules, the Supreme Court has implemented a statewide system of lower court justice which ought to be the envy of the nation. The people have given us good judges in the District Court. They are able and dedicated men and women", and so on.

*Mr. Lane:*

Okay.

*Justice Brennan:*

Just one moment here...the judicial tenure commission. Somewhere I talk about the abolishment of Recorders and/or Common Pleas Court, and particularly, the question, the racial question involved in that. Let's see what I said here...because I think it's...all right, here we're talking about financially ..."Not sixty days ago, the Supreme Court presented to a committee of this House of Representatives an expanded judicial budget and including among other things a request for the necessary funds to put in motion a temporary Crash Program to clean up civil and criminal dockets in Detroit and Wayne County. This Crash Program would represent the first large-scale use of another new constitutional tool in the administration of justice, the use of former judges on special assignment where no vacancy exists. Just last month, the court sent to you its recommendation for the consolidation of the Recorders Court of Detroit and the Circuit Court of Wayne County including an outline for a much needed District Court in Detroit", that would turn out to be the 36th District Court..."The goal of making a Wayne County Court system uniform with that of the rest of the state is one that has been long sought, long studied, long recommended and long awaited. The technique which this legislature devised in the District Court Act to protect pension rights, transferred judges, secured the constitutional designation of incumbency on the ballot and bring off an orderly transition of judicial business will be significant and useful in this undertaking".

*Mr. Lane:*

That actually occurred ten years later, right?

*Justice Brennan:*

Yes. I talked about establishing a criminal division within the Circuit Court that would take advantage of the expertise of those judges, and...as a matter of fact,... "The second half of the Supreme Court's recommendation for restructuring the courts in Detroit is equally urgent and significant. It contemplates the creation of a District Court in Detroit having two divisions, a Civil division with judges to be elected by the people of the city at large and a criminal division, the judges of which would be chosen by districts within the city". Now, here we were trying to do a couple things. One was to preserve the jobs of the Common Pleas Court judges who were elected at large in the city. At the same time, we were trying to provide a system where there would be more black judges elected because that was a sticking point in terms of the consolidation of the court and the creation of the District Court. There was the concern on the part of the black lawyers and the black community in Detroit that if they went city-wide, they would have most white judges.

*Mr. Lane:*

County-wide?

*Justice Brennan:*

City-wide.

*Mr. Lane:*

I beg your pardon.

*Justice Brennan:*

Remember, this is still back in the 1960's, and even at that point in time.

*(End of side 1, tape 4)*

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**Topic 14: Continuing to read from his 1969 Law Day speech, Justice Brennan talks about the election process for judges in the Detroit area in regards to concerns about racial equality and the establishment of a Criminal division of the Detroit District Court. He also describes the experience of giving a similar speech that elaborated on the issues with civil government to students at Michigan State University**

*Mr. Lane:*

City-wide.

*Justice Brennan:*

Yes, city-wide. We're talking about a period of time when Jerry Cavanagh was still mayor of Detroit and after Jerry, it was Ray Gribbs so a city-wide election still in those days generally resulted in a white person being elected. If you looked at the racial composition of the Common Pleas Court of Detroit at that point in time, I think it was still largely white. As a matter of fact, I suspect that their names are right in here.

*Mr. Lane:*

But as they say, the demographics of the city were changing rapidly and people understood that, and there was a lag of this in the electoral results and what was actually happening in the neighborhood.

*Justice Brennan:*

Well, that was true, and what we were trying to do, I suppose, was to get out in front of...

*Mr. Lane:*

Or at least keep up with...

*Justice Brennan:*

...the process by providing a method for judges to be elected where there would be likely some black representation. This is in the front of volume 382 of the Michigan Reports from May to December, 1969. Let's take a look at the composition of the Detroit Recorders Court which was then elected city-wide: Colombo (white), Crockett (black), Davenport (black), DeMascio (white). That's 2:2. Evans (black), Ford (black)...that's 4 black, 2 white. Gillis (white), Heading (black). That's 5 black, 3 white. Leonard, Maher and Olson, all white. That's 6 to 5. Poindexter and Shemansky, that makes it 8 to 5, so at that point in time, you had still a predominance of white judges on the Recorders Court and I'm going to guess that while they're not listed here in

the front of the book that the judges of the Common Pleas Court probably represented about the same distribution. Traffic and Ordinance - Bill Haig who was black and John Kerwin, and Andy Wood were both white, so it was a 2/3's.

*Mr. Lane:*

That's a pretty good approximation.

*Justice Brennan:*

All right, now, so we were shooting at a system that would, in effect, guarantee the election of some black judges and as many proportionately as one would expect in the city of Detroit because among other things, what was happening and I think...I'm not sure just when...I think in those days, the judges were still being elected in off-year elections, or maybe the elections were then beginning to phase out, but in judicial elections whether off year or otherwise, there is always a great fall off on the ballot from the major political offices and judicial offices and local judicial offices and so forth. There has always been the tendency for the black voters to go in and pull the Democratic lever and leave whereas the voters in out in what was called the 22nd Ward and the 21st Ward, the far east and far west side of Detroit, to vote all the way down the ballot. In any case, so what I'm trying to say was that the whites were more...were more represented in elective office that their population would have called for in the community. All right, so we talked about a Civil division with judges being elected city-wide presumably where the whites had the advantage and a criminal division, the judges of which would be chosen by districts within the city which where the blacks would have had the advantage. I go on to say, "The purpose of the dual election method is simply this. The Civil division should embrace the present judges of the Common Pleas Court assuring them the continuation of their terms of office, and valid designation of incumbency in the same fashion as the judges of a Recorders Court who would be transferred to the Circuit Court. The Civil division should utilize the entire staff and experienced personnel of the Common Pleas Court and should continue its centralized operation for the convenience of litigants and jurors and for efficiency in maintaining its partial payment docket and other programs of service to the general public. The Criminal division of the Detroit District Court, however, would be staffed by no judges, and these ought not only to be elected by districts within the city but considering the nature of their work, these judges ought to be sitting and hearing their cases in various locations throughout the city". We were talking about kind of a local city hall or whatever type of thing that was coming in. "I can think of no single step which holds the promise of so much impact on the urban crisis as the creation of this kind of court. The function of the district judge in criminal matters is to adjudicate misdemeanor cases, both traffic and non-traffic, to issue warrants for the arrest of person suspected of crime, to set bond upon persons arrested on felony charges and to conduct examinations in felony cases, testing whether there be sufficient cause to hold the accused for trial. In no other court is there so much contact with the public. From no other court does the public derive so much of its opinions and attitudes about the law, the courts and the administration of justice. Upon no other court does the establishment of harmonious relationships between law enforcement officers and the community so vitally depend and no other court is more directly responsible for the carrying out of those firm and fair policies that discourage crimes in the streets of our cities. Is it any wonder that the Supreme Court has said to you that the judges of this court should be elected by districts carved out of the city? An unshakable faith in the intuitive wisdom of the good and free people tells us that there is no neighborhood community in Michigan which does not have the capacity to police

itself."Think about that. "An unshakable faith in the intuitive wisdom of a good and free people tells us that there is no neighborhood community in Michigan which does not have the capacity to police itself."

Think of that in terms of Cass Avenue. Think of it in terms of what we used to refer to in Detroit as "Black Bottom", and I really believe that. I mean, I believe that people are capable of governing themselves and policing themselves. They don't have to have white police officers from Livonia. They don't have to have judges from Grosse Pointe. If the rest of the world was blown up with an atom bomb and there was nothing left but that section of Detroit from Woodward to Livernois and from Five Mile to the river, they'd have to govern themselves, and they would somehow. I mean, they'd find...leaders would emerge, people would judge each other, people would put each other in jail, and it would happen. That's what I was trying to say here. I think if you're going to do anything about the urban crisis, it's got to come from within. You can't bring in the National Guard and make the people...to make the streets of the city of Detroit safe. The people who live in those streets have to make their own streets safe, and the way you begin with it is to begin with civil, the organization of civil government which is the beginning...which is the local courthouse, and local officials. "There is no segment of our people so alienated from society that given a local judge on a community court, it will not keep its own house in order. For too long have the black people in our city been smeared by the wide brush of public reaction to the crimes of some black men without having in hand the tools with which to discipline their errant brothers. It is time we gave them the tools. It is time we give the people of Detroit, neighborhood by neighborhood and precinct by precinct, the judges and the courthouses to do the job which must be done if our children and our children's children are to enjoy the fruits of urban civilization".

*Mr. Lane:*  
This is May, 1969?

*Justice Brennan:*  
May, 1969.

*Mr. Lane:*  
What was the response?

*Justice Brennan:*  
Nothing.

*Mr. Lane:*  
Did the newspapers ignore this?

*Justice Brennan:*  
Yes. The newspapers...I thought it was pretty [expletive] perceptive stuff, and candidly, it was a

prescription for something. I mean, I'd experienced the rioting in the streets of Detroit and so forth.

*Mr. Lane:*

You, in person, delivered this to the legislature?

*Justice Brennan:*

Oh, yes.

*Mr. Lane:*

Were the seats filled?

*Justice Brennan:*

Oh, sure. The place...

*Mr. Lane:*

...not for the judiciary speech anymore, you know.

*Justice Brennan:*

Oh, no. They were hanging from the rafters that day.

*Mr. Lane:*

They were?

*Justice Brennan:*

Oh, sure.

*Mr. Lane:*

I'll be [expletive]. So it wasn't that there was some kind of...everybody gone to sleep.

*Justice Brennan:*

No, but it's interesting, because I gave two speeches that day. I gave this speech which I labored over in Florida and another one which I also labored over, later in the day, and the second speech I gave out at Michigan State University. I can remember the State Police didn't want me to go. It was 1969 and it was...you know, anti-Vietnam War thing and so on, and I had to give this Law Day speech, and oh, man, they hustled me in the back door and they were terribly afraid I was going to get mauled.

*Mr. Lane:*

Kellogg Center or someplace like that?

*Justice Brennan:*

I think it was Fairchild Theatre. The room was...and that morning, I had been before the



legislature with all the robed judges, the cameras and whole ball of wax. Now in the afternoon, I am out there at Fairchild Center and the room is about 2/3's full of college students smoking cigarettes, beards, their feet up over the chairs, in the God awful costumes of the 1960's and in the unruly and surly manner that they had adopted in those days. I go in with this speech, you know, the Law Day speech, of all things to talk about...the rule of law to people, you know,...and so I went after it, and I spoke about the cry for justice and "Where do they look for justice? To the government. The government must prevent crime. The government must quiet the students. The government must becalm the ghetto, satisfy the teachers, meet the demands of the policemen, firemen and lower the taxes. The government must abolish racism. The government must eliminate poverty. The government must heal the sick, feed the hungry, clothe the naked, comfort the afflicted and rehabilitate the criminal. All around us, men look to the government to secure their happiness. Happiness without sacrifice, pleasure without pain, freedom without responsibility and why shouldn't the people expect the government to make them happy? Have not their ministers and priests and rabbis permitted them to believe that the millennium is upon us? Have not political candidates led them to believe that whenever government fails to secure their happiness, it is the fault of those rascals on the other side of the aisle? Our forefathers were wise enough to recognize that government...among men to protect life, liberty and the pursuit of happiness. It was left to our generation to pronounce in the constitution of one our sister states, California, that government is designed to achieve happiness for all men. Oh, my friends, a government which is expected to achieve happiness for its citizens is a government which is destined to fall. No government is eternal. None is all powerful. None is all wise. Governments are human institutions guided by trembling human hands, depending on imperfect human wisdom, speaking through halting human voices. When people collude themselves into believing the government can answer all their prayers, they make government their God and they become its preachers and its slaves." Who said that? De Tocqueville. "By wishing the government could be God-like does not make it so. Sooner or later the people will realize that it is a false idol, a golden calf, more human than divine, more fallible than infallible, more imperfect than perfect, and they become disenchanted. They become disillusioned and disaffected. So long as government can bestow its bounties upon them, they give it their support, but when its power wanes and its fortunes are reversed, its money cheapens. They recognize no further cause for loyalty, and they see that government as an alien power structure, an impersonal establishment, a yoke to be roughly cast off and thrown aside. On this Law Day of 1969, we are a free people in imminent peril of losing our freedom. For too long have our people flirted with the deification of civic government. For too long have we who are in public service flattered ourselves into thinking that if we studied long enough, if we consulted enough experts, read enough reports, held enough hearings and attended enough seminars, we could adopt perfect laws, dispense perfect justice and achieve a perfect social order in which all wants would be satisfied and all men would be happy. There is still time to see ourselves as we really are".

*Mr. Lane:*

Did you get a hearing there?

*Justice Brennan:*

Jackie Teare thought this was a better speech than the one I gave for the legislature, and she said this one had some pizzazz and some heart and so whereas the one I gave to the legislature was dull, boring, so this was not John Teare but his wife, Jackie.

*Mr. Lane:*

Did anybody get up and give you the raspberries?

*Justice Brennan:*

Oh, yes. They interrupted my speech. They booed, they hissed, they yelled, and so on and so forth, at different times, mostly in the question and answer period, because my sense was when I was giving this, they kind of listened in a sullen sort of way, but at one point in time, somebody wanted to make a speech something like that and shout me down and whatever, and I said, "Look" ..and I had the microphone so I could make more noise than any of them, you know, and I just said, "Look, I'm the Chief Justice of the Michigan Supreme Court. I worked my [expletive] off to get where I am, and I've got the microphone, and I'm entitled to speak because I'm here, and I am where I am. Someday you get to be the Chief Justice, you can have the microphone". Candidly, I went nose to nose with them, and I thought that that came off all right. I mean, it was one of those things that...

*Mr. Lane:*

This was a night time group?

*Justice Brennan:*

It was an afternoon thing. It was like about 4:00 p.m, 3:00 or 4:00 p.m.

*Mr. Lane:*

I don't know where I was during this period of time. I have no recollection...

*Justice Brennan:*

You missed some of the fun.

*Mr. Lane:*

Well, I did.

*Justice Brennan:*

You missed some of the fun. Anyway, I thought this was pretty good stuff. This was the best I was able to do, and I look back on it and I say to myself, "Well,..."

*Mr. Lane:*

I think it's worn pretty well.

*Justice Brennan:*

Yes, it's worn well in terms of things that have come to pass since then. I re-read this Law Day speech that I was just reading to you a moment ago about the problems with civil government and its limitations, and I think to myself, "Hey, those words still have value" Obviously, de

Tocqueville said much the same thing, and I think of it terms of our current economy. You know, the fact that we're looking at the recession of 1991. People say, "Well, what happens if we have another depression?" I read somewhere recently that somebody took a survey and said that over 50% of the American people are currently expecting a downturn in the economy on the magnitude of the Great Depression. Now, when you get that spinning in your head and think that people no longer expect prices to go up, no longer expect that you can buy a house for \$50,000 or \$100,000, it's going to be worth \$150,000 and \$200,000 and \$250,000 down the line; no longer think that if I'm making \$40,000 this year, I'm going to make \$44,000 next year and \$48,000 the year after, and I'm going to plan on this continued increase in personal revenue but are starting to think in terms of "I buy this house and it's going to worth less. I take this job, and I'm going to make the same or less in the future". If those are the expectations of people, you can imagine what's going to happen.

*Mr. Lane:*

Are...

*Justice Brennan:*

Well, let me just finish this point because I think it's important in terms of this speech. The difference between 1990 and 1930 is that in 1930, the government had not guaranteed the economy but in 1990, the government has guaranteed the economy. Think about that. The full faith and credit that our government stands behind FHA loans, guaranteed student loans, all kinds of...the FDIC, the SL whatever it is DIC, the Savings and Loan Deposit Insurance Corporation. They're saying in the newspapers today that the FDIC only has about enough money to last another year with the number of bank failures that are expected.

(break in tape)

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**Topic 15: He continues on to discuss government, economic stability, civil disorder, and the 1967 race riots in Detroit. He concludes by recounting the Senator Joseph Smeekens story from 1971, which concerned a fraudulent attempt to be admitted to the Bar**

*Justice Brennan:*

With...if the...you get to the point where if there is no money in the Federal Deposit Insurance, and there is no money in the FHA and all the rest of these things, what we're going to do if the government attempts to keep its full faith in credit is we're going to print money, and what was the line in here?...you expect government to do everything, to be able to do everything, and it really can't, but when it attempts to do so...where is my prediction, my dire predictions, okay? Yes, "So long as government can bestow its bounties, they give it their support. When its fortunes are reversed, when its money cheapens, they recognize no further cause for loyalty". Does anybody really think that the patriotism of the people of the United States of American, that their dedication to the constitution that was adopted in 1789 would last for five minutes if

they got hungry? Does anyone doubt that the people of this country are as capable of rising up against the two hundred year old government that we celebrate and smashing it and putting in its place a dictatorship or whatever if times get tough enough? I mean, you go right...the average guy in this country is Mr. Pragmatist. I mean, they don't give a hoot about the process than the man in the moon. They pay lip service to the process as long as it doesn't interfere with their own pocketbook, but boy, they'll go right to the bottom line real fast, and the bottom line is, "Hey, I can't feed my kids". The bottom line is, "They're shooting at me from across the street", or "There's a [expletive] tank rumbling down in my subdivision". He couldn't care less about Thomas Jefferson or Alexander Hamilton or any of those dudes, you know. He's got a shot gun, I can guarantee you that, though...I really worry about...I really worry about civil disorder coming about in connection with the economy in this country with the government having overextended itself. You know, I remember the riots of 1943 as a kid in Detroit, and I remember the riots of 1967 when we could smell the smoke and hear the gunfire. It was only a block from our house, and we saw people driving up in their cars on Moorington Drive and opening the trunk and getting out and walking between the houses into the back of the stores that were being looted, coming out with television sets and putting them in their car and driving off. The same car would be back twenty minutes later for another trunk full. You know, people act like animals when civil society breaks down, and it breaks down when it loses its capacity to have credibility, and you know, I remember going down to Detroit when I was on the Supreme Court during that riot...

*Mr. Lane:*

You were just...

*Justice Brennan:*

After a couple days...I had just come on the Court. It was in 1967. That was my first year. We were living in northwest Detroit near Seven Mile and Livernois in a big old house with six bedrooms and five bathrooms and four fireplaces which I bought for \$47,000, and I, with all this going on and the smoke just a block away and I had to go to Lansing to meetings of the Court, I didn't want to leave my family there alone. I finally decided to move them out of town, so we locked up the house and drove out. Some of the main streets were blocked. We found some side roads and eventually got on the highway and drove up to Lansing. I put them, put the family in a motel up...down near Cedar Street some place, Cedar and the freeway.

*Mr. Lane:*

Did you leave anybody in the house?

*Justice Brennan:*

No, locked up and Polly said she was afraid as we left that we may never see the house again, you know. It was that much of a concern. I wasn't that concerned about it, but I would have felt a lot more comfortable having my family, and I had to go to Lansing anyway, so I thought I'd bring the family up there with me. So, I got them ensconced at the motel and the first thing I did was to turn around and go back to Detroit. I went downtown to the Records Court and Vincent

J. Brennan was then the Recorder and judge of the city of Detroit, of the Recorders Court and I believe the presiding judge as well. You know Vince?

*Mr. Lane:*

Oh, yes.

*Justice Brennan:*

Massive, imposing man with this deep voice and a lot of common sense, later became a judge on the Michigan Court of Appeals. We're not related. I used to say Vince is the good-looking Brennan and I'm the smart one, and he would laugh, or I would say Vince takes care of the east side and I take care of the west side, but...and he was kind of late to get married. Karen and he were married when he was probably 35 or so, and for those years between, and I was married at 21, so I was married maybe 14 years before he was, and those years, every time we'd go out to a restaurant or a saloon in Detroit and run into Vince Brennan, the most popular and sought after bachelor in Detroit, the wives of us old married guys would swoon and say, "There's the catch of the year", you know, and I think her heart was broken when he got married. That...Vince was no longer around to chat with. But in any case, Vince, a great man of common sense, had set high bonds, surety bonds. The whole system of checking the people out and I.D.'s and everything else had broken down. They didn't know who they were rounding up. They were rounding up people that were giving them all kinds of names. They didn't know...they didn't have time to book them all and so basically they just decided that they were going to set high surety bonds on everybody and the only way you could get out of jail was to have enough substance that you could come up with a \$10,000 bond or whatever the number was, right across the board.

*Mr. Lane:*

Did you go down there on impulse?

*Justice Brennan:*

I went down there because I was informed that Theodore Souris on our court was down there and was representing to Vince Brennan that the Supreme Court was very unhappy with his uniform high bond policy, that they wanted...that he was going to be expected and the Court was expected to be releasing people on personal recognizance, you know, to go back out on the street. Vince was saying, "I ain't going to do it". My message to Vince was, "This guy doesn't speak for the Supreme Court".

*Mr. Lane:*

Was he in fact there?

*Justice Brennan:*

Was Ted there?

*Mr. Lane:*

Yes.

*Justice Brennan:*

Oh, yes he was, and when I got down there and walked past all these guardsmen and so forth

with guns and standing around and identified myself as the Justice of the Supreme Court, back through this check point and that check point and on into the court and up to the presiding judge's chambers, and the newspaper guys are around, and it was the bunker. I mean, it was where all the action was going on at that moment in time. I was ushered into the room and there was the Chief Judge Vince Brennan along with a couple of other of the senior judges of the court and my good friend, Theodore Souris from the Michigan Supreme Court sitting there, and the meeting was exactly as I had heard it was, and Vince was being lectured by Souris about how to handle the bond situation. Souris...I mean, he was not delegated by anybody, and we had not met to discuss it at the Court, and so I just barged in and said, "Vince, I want you to know that Ted here doesn't speak for the Court, and as far as I'm concerned as a resident of the city of Detroit, with the bite of smoke still ringing...still in my nostrils, I'm [expletive] glad you're setting high bonds. You keep it up".

*Mr. Lane:*

Would this have been like on the Monday or Tuesday after the rioting began?

*Justice Brennan:*

I couldn't tell you. I think it would be like Monday or Tuesday, yes, after the rioting began. We had taken a priest friend of ours to the airport when the rioting broke out. We knew nothing about it when we took him to the airport and when we returned, began to hear some reports on the radio and arrived back to our own neighborhood to see...

*Mr. Lane:*

Smoke.

*Justice Brennan:*

...smoke, and the windows were blown out of Jacobson's and these other places, and street lights smashed and glass in the street, people running around. So anyway, I had these experiences, and I worry about what can happen in our society if things go sour economically. But...that was the great Law Day, the two speeches.

*Mr. Lane:*

Let me...you know, there are some things that are not going to get covered here, and we're going to have to make some arrangement...

*Justice Brennan:*

I'd be happy to come back with you and let's talk some more.

*Mr. Lane:*

I assume that you probably want to go out for lunch, right?

*Justice Brennan:*

Yes, would you like to go and have lunch with the two of us?

*Mr. Lane:*

That would be fine. The only thing is that I want to accommodate, and you've got maybe fifteen minutes here, and I want to fit it in. That's all I'm talking about, and it's a question of how to fit, and I'm wondering whether I should suggest a couple of hit and run topics.

*Justice Brennan:*

Why don't you do that now, spend fifteen more minutes, and then we'll go get a bite to eat and then if you don't mind, we'll adjourn for the rest of the day because I've got some things I need to do.

*Mr. Lane:*

Good, okay. Here's a real change of subject. What do you remember about John P. Smeekens?

*Justice Brennan:*

"Smeekens never weakens".

*Mr. Lane:*

That's a good start.

*Justice Brennan:*

Yes, the Smeeken story is this. Well, you know that Smeekens was a state representative or...

*Mr. Lane:*

Senator.

*Justice Brennan:*

...senator for many years.

*Mr. Lane:*

Aspired to be a chairman of the party.

*Justice Brennan:*

Whatever, I guess.

*Mr. Lane:*

And Larry Lindemer just beat back his...

*Justice Brennan:*

As I recall, he was Catholic, a conservative, father of a large family, and outspoken, noisy, and had been around a long, long time. He went to law school. As I recall, as a commuter, he went to the Detroit College of Law and graduated, and this whole episode began, as I recall, with a request that Brother Smeekens be allowed to take an oral Bar examination and in fact, as I remember, Stanley Beattie who was then chairman of the Board of Law Examiners, importuned me on behalf of Smeekens, and said that he had approached him and asked that this be done and so on, and Stanley in his wonderful way with his imitation Harvard accent said, "And Mr. Justice Brennan, if there is any way that you can do this consistent with your responsibilities, I should be

delighted to establish the examination". So anyway, the issue came up. The background of it was this.

*Mr. Lane:*

We're talking about the first days or months of 1971, is that correct?

*Justice Brennan:*

I'm guessing it would be, yes, 1971. It was after I was Chief Justice.

*Mr. Lane:*

And Swainson and Williams had come on the Court?

*Justice Brennan:*

Yes, Swainson and Williams were on the Court, exactly. But the story was that Smeekens had taken and failed the Bar examination maybe twice or three times or some number of times before that, that he was a man getting on in years, that he was ill, that he had cancer and that he was expected to die very soon, and that the business of becoming, the goal of becoming a member of the Bar was a goal that he had long sought, that he had gotten his legal education with great personal sacrifice, commuting despite the burden of his duties in the legislature and the burdens of his large family and all these other things.

*Mr. Lane:*

How did this word reach you, do you recall?

*Justice Brennan:*

It reached us with a letter or a petition of some kind or another from Smeekens or perhaps it was from the Board of Law Examiners requesting permission to give him this oral examination. And to do it out of season. I mean, not to do the examination on the next time the Bar examination is given, but to literally call him in and have an oral examination right then and there or very soon, as soon as the Court would give it the green light. The speeches were made around the table, particularly by the old-time politicians that you know, good old Joe Smeekens was a great old guy, and he was an adversary and we never agreed on anything, but he was always an honorable politician, and his word was his bond, and all the rest of that stuff that they say about politicians which is generally quite true.

*Mr. Lane:*

Who carried the ball?

*Justice Brennan:*

I can't tell you who carried the ball. I know that the sentiment was universal around the table, "Aw, we ought to do what we can for old Joe", okay? They were ready to just say yes to the petition that had been presented by the Board of Law Examiners, let them give him an oral examination and pass him. I said, "Wait a minute. I'm as much as the rest of you people anxious



to do something for old Joe Smeekens. He is a good old boy, and he's going to die. Let's give him the honor that he wants" and so on and so forth, but I said, "Gentlemen, we don't have to have a bar examination to do that. This is the Supreme Court of the state. We are empowered to license people to practice law, and we don't have to have anything but our own, four votes out of at least seven guys is all it takes to become a lawyer. We could pick Joe Schlunk off the street, call him in here, give him a bath and say, 'You're a lawyer', so let us not...let's not demean our Bar examination system which is designed to discover who has achieved that level of academic accomplishment and knowledge of the law so that we can confer upon them the license to practice law. Let's not demean that process by saying 'Okay, we're going to do a verbal examination', because don't kid yourself. The verbal examination isn't a real examination. I mean, it's a deceit, a creation to give this guy an honorary law degree and if you do it for him, you're going to have to do it for everybody. You're going to have every guy that has got a disease or an excuse or whatever come in here asking for a verbal examination and how are you going to justify the fact that you're turn the next guy down when you did it for old Joe, and pretty soon, you've attacked the integrity of the whole process of examining people for the Bar. If you want to do this thing as a gesture to good old Joe, hey, you've got my vote, but let's do it flat out with no pretense that he's passed the Bar because he hasn't passed the Bar". "Okay, well, can we do that?" "Yes, we can do it". We all agreed we could do it. Gene Black was a great one to say, he always pronounced the 900 pound gorilla rule, in these words, he would say, "If we do it, who is there to gainsay us?", and that was the way he described it. So we passed the resolution and we simply admitted Joe Smeekens to the Bar, period. We ordered that he be sworn in as a lawyer, and we held a ceremony in the Supreme Court of the state, and Joe and his family came and he tottered down the center aisle of the courtroom looking as much as possible like a man about to be called to his maker, so that we all were adequately moved to express our approval of his accomplishments and welcome him as a brother at the bar. Well, of course, it wasn't very long after that we discovered that a miracle had occurred, and that Joe had miraculously gotten well and in fact, the letter from the doctor didn't really say he had cancer but just sort of said that maybe he might have, and that in fact, the wool had been pulled over our eyes, and when all that was discovered, the Court, as promptly and unceremoniously and as arbitrarily and capriciously as they had granted the permission to practice law, withdrew it by an administrative order, and Joe went back to being a non-lawyer after a short honorary time at the Bar. That's the Joe Smeekens story.

*Mr. Lane:*

There was some recognition paid to appropriate process, though, in de-shingling him, was there not? You know, the record shows that it wasn't until 1977 that the Court finally completed the process of disbaring him.

*Justice Brennan:*

You mean they gave him due process before they took his license away?

*Mr. Lane:*

I would think so from what evidence I've been able to...I haven't examined into the thing, you know.

*Justice Brennan:*

Let's put it this way. I was not on the Supreme Court in 1977, but if I had been, the process of lifting it would have been as short as the process of granting it.

*Mr. Lane:*

396Mich719. Do you want to see it?

*Justice Brennan:*

396Mich719. Let me have a look. It would be interesting to see if there was a grievance procedure or what. 319Mich.

*Mr. Lane:*

No, no, did I say 319. I didn't say that right.

*Justice Brennan:*

Give me the number again.

*Mr. Lane:*

396Mich.

*Justice Brennan:*

396Mich, okay.

*Mr. Lane:*

396Mich719.

*Justice Brennan:*

396Mich719, because I mean this was a matter of a fraud in the inducement. This guy defrauded the Supreme Court of Michigan.

*Mr. Lane:*

And the people of the state.

*Justice Brennan:*

I mean, in granting him a license, so I would not have given him five minutes worth of due process. 719 - State Bar Grievance Administrator vs. Smeekens.

*Mr. Lane:*

What's the date on that?

*Justice Brennan:*

It is dated...decided June 3, 1976, rehearing denied.

*Mr. Lane:*

I'm sorry. I had the wrong date.

*Justice Brennan:*

"State Bar Grievance Board found Smeekens guilty of misconduct and revoked his license to practice law, and he appealed". You see, that's what happened. In the bifurcation of the Grievance process, the Grievance Board has been apparently granted power to revoke people's licenses, so it isn't done by the Supreme Court, it is done by the Board, and the Supreme Court only sits as an appellate body. This is actually an opinion in the Supreme Court.

*Mr. Lane:*

Not a very lengthy opinion and doesn't say very much, but there it is, and this was the instrumentality of...

*Justice Brennan:*

Kavanagh, Chief Justice, Levin, Coleman, Fitzgerald, Lindemer and Ryan.

*Mr. Lane:*

What does it say about Williams.

*Justice Brennan:*

Williams took no part in the decision.

*Mr. Lane:*

Okay.

*Justice Brennan:*

Faithful to the end to his political honor.

*Mr. Lane:*

But actually, Smeekens was accorded ceremonial treatment in the courtroom of the Supreme Court.

*Justice Brennan:*

Oh, indeed he was.

*Mr. Lane:*

I didn't know.

*Justice Brennan:*

As a matter of fact, I wouldn't be surprised if it wasn't in the front of the books. I wouldn't be surprised.

*Mr. Lane:*

Back in early 1971. I have the date somewhere, but anyway, I didn't want to belabor that too much. That was something to...

*Justice Brennan:*

Interesting.

*Mr. Lane:*

Let's see if there's a short one here. What's your attitude generally...I put this down and then found I couldn't confirm that you had much activity in this, but advisory opinions...the Supreme Court had made a rule there...I know the constitution provides for them, and they got to be quite numerous in requests in the late 70's and early 80's, and the court was being asked to do all kinds of things and began to show some reluctance. What do you have to say about advisory opinions?

*Justice Brennan:*

I'm not really thrilled with advisory opinions, quite frankly. I'm kind of a traditionalist, and I think the case in controversy concept in the United States Supreme Court is a good one and should generally be followed. I had to write an advisory opinion early on in my days on the Court, and I struggled with it. It's very difficult because the advisory opinion has to focus on something. What are the issues? If you're being asked about the constitutionality of a piece of legislation, you can only consider those allegations of unconstitutionality that occur to you, or occur to somebody...

*Mr. Lane:*

Frank Kelley..

*Justice Brennan:*

But there being nobody there saying that it is unconstitutional for this reason and this reason and this reason, it is very difficult for you to conclude that it is constitutional in any sort of meaningful way because you can only say if this question is raised, we will come down this way and if that question is raised, we will come down this way, but we haven't answered any other questions because it never occurred to us to do so. I think that that's a problem. I'm not really thrilled with them, and I think the idea of trying to use the Supreme Court as the office of the Attorney General is not a good idea.

*Mr. Lane:*

Is there anything worth saying about the quasi-rude ejection of the Supreme Court from the Capitol?

*Justice Brennan:*

We could do an hour on the \$0.50 parking episode.

*Mr. Lane:*

Well, that's part of it.

*Justice Brennan:*  
But it was part of...

*(End of side 2, tape 4)*

**Topic 1: Justice Brennan discusses the impact of the Boykin vs. Alabama U.S. Supreme Court case on Michigan court cases**

*Mr. Lane:*

This is tape 5 in the series with Justice Thomas E. Brennan for the Michigan Supreme Court Historical Society. Today is January 29, 1991, and we're going to start out, Justice Brennan, I hope talking about the Boykin problem that arose on the Court during your period of service there in about 1972 or 1972, when it came to a head, and I refer, of course, to Boykin vs. Alabama, 1969 United States Supreme Court case. The gist of it was that if a judge is going to take a plea of guilty in a felony type case, there has to be demonstrated on the record the fact that his rights were safeguarded in certain respects. It had to be shown that there was counsel, that he knew he was entitled to a jury trial and that sort of thing. Now, in 1972, the Court began to have some growing problems about this and you were for sometime sort of a voice crying in the wilderness, saying, "Hey, Court, we're going down the wrong road here", and what the Court was doing was extending the Boykin doctrine quite wide to the point where a lot of persons who serving long periods of time in Jackson on guilty pleas suddenly began to sense that they could get another trial even if they'd been convicted 20 years ago. Do you remember...what do you remember about this?

*Justice Brennan:*

Well, I remember that the Boykin case in general, held as you state, that in order to take a guilty plea, the Court was required to ask certain questions of the defendant. You've just handed me People vs. Jaworski, and my dissent.

*Mr. Lane:*

You waxed a little eloquent.

*Justice Brennan:*

Well, the thing about it is I am 20 years away from this stuff. I pick up things I wrote and I say to myself, "Did I write that?" This particular opinion, I remember only vaguely but I apparently had divided Boykin, what I called "Boykinism", into three categories, and the first was "Pure Boykinism" which holds that the record of a guilty plea to pass constitutional muster, must contain a statement of advise by the judge to the defendant that he has three constitution rights: trial by jury, the right to confront his accusers, the right not to be a witness against himself and then secondly, a statement by the defendant, separate and apart from his guilty plea by which the

defendant expressly waives each of these rights on the record. Then I talked about "Orthodox Boykinism" which called the guilty plea itself the waiver, but insists on a judicial statement of advise, and then finally, I refer to a thing which I called "Ecumenical Boykinism", which does not require the judge to play the role of the defense attorney, merely requires a recitation of the constitutional rights, either on the record or on a piece of paper duly signed in the defendant's own hand. This particular controversy troubled me substantially because the Court was getting into a kind of formalism that almost marked the Courts of Common Law centuries ago where they were departing from substance. I mean, it may be a confusing concept, but procedural substance, that is, the substantive reason for the procedural rights that we afford defendants of criminal cases. When a person pleads guilty, they voluntarily place themselves within the jurisdiction of the court and the power of the court to send them to prison or deal with them as a person who is convicted of a crime, and it is obvious that we don't want people pleading guilty who aren't guilty or whose decision to plead guilty has been affected by fraud or duress or anything other than a free and voluntary choice on their part. But of course, all human beings who had their faculties, are made with the faculty of free will, and they all have the capacity to make free choices. Some people make much more intelligent, informed, careful, prudent choices than other people, and in most instances, the people who are defendants in criminal cases are not among that category. In those cases, the people who are accused of crime and who are pleading guilty in criminal cases are people whose intellect is not among the top, who are certainly free individuals and sui generis in the sense that they are responsible for their own actions, but in the eyes of an educated jurist, they may have an extremely simplistic view of life and simplistic view of their own dilemma as they stand before the court, but I'm not prepared to say that that simplistic understanding of their predicament isn't adequate for a human being to make a free and voluntary judgment, so what I'm saying is you could stand there all day long and lecture some of these defendants about the constitution and their rights, but communication is a two way street. It is not just what is said, it is what is understood, what is received. A sender and a receiver, and anybody who has taught in a school or a college or addressed a jury has to know that what you say isn't always understood by the people you're talking to in the same sense in which you say it. Now, I think a lot of this Boykin controversy was an attempt on the part of some of our judges to have this kind of perfect understanding of the defendant's predicament from which he would have this full and totally informed capacity to make a judgment and his judgment about being guilty or not guilty was made in that context. In my opinion, it was an attempt to achieve some perfection of human nature that doesn't exist. The constitution provided that people are entitled to counsel, in the VI amendment, I guess it is, and these people all had lawyers. Well, what is the function of the lawyer? The function of the lawyer is to advise the client. That's what he is paid for. That's what he is educated to do, and presumably, he advises these clients in the language that they can understand. He dialogues with the client in the jail and if the man speaks in broken English or if he speaks in ethnic patois, maybe the lawyer dialogues with him in street talk, in the same way that he understands things, but it is the responsibility of the lawyer and the thing he is trained to do to make sure that he conveys the information to his client about what his rights are and what his choices are. It used to be in the old days that the lawyer stood before the judge and said, "Your Honor, I have advised the defendant of his constitutional rights. He fully understands them and he wishes to enter a plea of guilty". That statement was given weight. It was regarded as a significant statement on the record proving, in fact, that the defendant was advised of his constitutional rights. Well, Boykin said "We don't trust the lawyer and we're not going to accept the lawyer's representation that he has informed

the defendant of his constitutional rights. We're going to inform him of his constitutional rights from the bench and put the process of informing him on the record". Well, the process of informing him on the record is a formal juristic statement of rights, maybe completely accurate within the constitution. I assume it assuredly completely accurate within the meaning of the constitution, but always done with the pomp and sterility of judicial discourse, and done in open court in front of a crowd of people, on the big day when a man is in court before the judge, and his heart is pounding in his throat, and the idea that he is going to understand what he is being told or that that is a circumstance in which you were going to be able to give him information and have him exercise intelligent choice on the basis of it is ludicrous, absolutely ludicrous. But we went through this whole charade, and we're still going through the whole charade. We do it for whatever reason. In my opinion, what we were doing then, and none of the judges would admit it, none of the justices on our Court would admit it, and the justices of the United States Supreme Court wouldn't admit it, but what we were doing, as far as I'm concerned, was we were trying to find a way to get involved in sentencing, in sentence review. When a person was sent to Jackson prison for 20 years on his guilty plea, and he had been up there for 15 - 18 years, the only way he could get out was to attack his conviction and since he pled guilty, how were you going to attack the conviction. The only way you'd get anybody to resentence him or to review it is time in prison, and there was a feeling on the part of many of our judges that some of the sentences were too severe. They had no track to get to that other than to order re- trials and guilty pleas. In my personal opinion, that's what they were doing.

*Mr. Lane:*

You know, it's fair to assume that you were explaining your attitude to your fellow justices on the Supreme Court somewhat in this manner.

*Justice Brennan:*

In this manner and in stronger words.

*Mr. Lane:*

All right, now Jaworski you were just reading from. That's 387. Now, in 389, what happens on one day here? Do you remember this particular day?

*Justice Brennan:*

There was a whole raft of guilty plea reversals, and it was done as part of the administrative work of the Court. They were not all formal appeals, so it appears in the back of the book, just among the miscellaneous matters attended to, and I made a point in my dissenting from the decision of the Court to say that I dissented from this of second guilty plea reversal, the third, the fourth, the fifth, and in fact, there were seven on one day.

*Mr. Lane:*

These were all Boykin cases?

*Justice Brennan:*

They were all Boykin-style cases, and I was making the argument that the Supreme Court of the state was swinging wide the doors of the prison.

*Mr. Lane:*

Now, that was on January 29th. On February 28th, something had happened by then, and is it not true that Justice Levin who had just come on the Court, through some chemistry that maybe you can explain, was given the job at some point of saying, "Hey, this is...we're going diametrically in the opposite direction of where we should be going and we're going to do...", what you just said..."that we're going to turn all the prisoners in Jackson or most of them, out of jail and give them new trials". Do you remember how it happened that once these two new members came on the Court...you'll notice that on January 29th, Justice Coleman had just come on and she joined you in a couple of these. Prior to that, I take it you dissented by yourself without bringing any of the other members of the Court along.

*Justice Brennan:*

During 1971...

*Mr. Lane:*

1972.

*Justice Brennan:*

...and 1972, I was definitely a voice crying in the wilderness. In 1973, I guess Mary had come on.

*Mr. Lane:*

In January, that's the first month she was on the Court...in the second month, two new members were on. Levin is assigned a job apparently from what I was able to determine, inquiring as a reporter, there were these orders issued on February 28th that said to those who were affected by the January 29th new trial orders that, "Hey, wait a minute. Don't do anything. Those orders we issued four weeks ago...we don't want you to act because we're going to do something else". Then on the 28th, four weeks later, they were all quashed. "Quashed" was the word.

*Justice Brennan:*

In those seven dissents that I made? You mean they turned them around? I'd forgotten...

*Mr. Lane:*

On February 28th, four weeks later...

*Justice Brennan:*

All seven of them were turned around?

*Mr. Lane:*

Well, four of them in one batch. Now, I don't think probably any of them survived as orders for new trials, but I wondered if you recalled what was going on inside the Court at this time? You had been shouting from the steeple rooftop or whatever, saying, "Hey, stop, stop stop. This is all



wrong", and then, having done that for quite a long time, several months or a couple years, suddenly your colleagues seemed to hear you or accept your argument where they had ignored it before and they reversed field, just like football players.

*Justice Brennan:*

I would say that my good friend, Roger Lane, who was at that time a distinguished reporter for the Detroit Free Press, probably hit the nail on the head when he wrote in this article, "A highly qualified neutral observer..."

*Mr. Lane:*

I think it was Ron Dzierbicki.

*Justice Brennan:*

I don't know. You could have been the neutral observer yourself...

*Mr. Lane:*

No, no.

*Justice Brennan:*

"...saw political rivalry as figuring importantly in the Court democratic majorities studied, disregard of Brennan's protests. They tend to turn off on Brennan. He opposed the rule of law that the majority expressed in the leading cases in this area and they probably felt that 'he was just against us from the beginning and simply ignored him', the observer said". My recollection of the matter is very skinny. I can't tell you exactly why the Court turned around, but I would be fairly confident in saying to you that I would not party to it, that whatever persuaded the majority to back off, it wasn't the fact that I dissented. That would have been a reason for them not to back off because if they backed off after I had dissented and then said, as I did, and you quoted it in the story, that "the Court has this day fallen out of its tree". I mean, I criticized them. For them to back off after my criticism would appear to make my criticism justified, and give me an "I told you so", and they didn't want to do that, so I would say that if they backed off, it would have been not because of my objections but in spite of them and because they probably were pushed by public story, newspaper stories.

*Mr. Lane:*

You know, my knowledge of this, I think, started with Jim Ramsey. You remember Jim? He was a former Assistant Attorney General, and then he retired and he went over to the Ingham County Prosecutor's Office and started handling appeals, and one day, he said, "My God, what's going on over there?", and then he started telling me about this. He had discovered, and he transmitted to the Court...he was the attorney, he was the prosecutor in one of these cases, represented the prosecutor, Mauch, and he said, "If you people go down this road that you're going down ever more rapidly, you're going to turn 1,000 or 1,200 people out of Jackson and the other prisons. My authority for that is the Director of Corrections who has run a count of this". Now do you suppose that is what sort of awakened or, you know, caused...

*Justice Brennan:*

It could be. I think the Court was certainly sensitive to bad press. It's always been sensitive to bad press, and either bad press or the prospect of bad press, more than anything I would say, in a conference, would change their minds.

*Mr. Lane:*

But the...some of us...I was a layman at that time. I now could claim to be a lawyer, but the idea that by sitting around in a room in the capital and four or five people get a certain notion and start to put their signature on orders can have an effect almost boggles the mind, if this is a proper representation of what actually was being done, and I think the ordinary layman wonders, "My goodness, what is going on in the minds of these eminent jurists as they go about this sort of a process?"

*Justice Brennan:*

And I think again, your statement is so true, your quotation from whoever it was you were quoting, that "the Supreme Court, being far removed just are insensitive to the guilty plea situation and trial court procedures generally. They just don't see these things. Their lofty isolation takes away perspective. They're up on Mount Olympus and when they look down, all the people look like ants". That's a very interesting and I think cogent observation.

*Mr. Lane:*

I think I'm quoting Ron Dzierbicki, who was an extremely well qualified person to make a judgment in this.

*Justice Brennan:*

Whoever it was.

*Mr. Lane:*

And he was to one side, he was clerk at the Court of Appeals at that time.

*Justice Brennan:*

Whoever it was knew what they were talking about, because that is quite true, and you had people who were able to debate the niceties of legal procedure in a vacuum with almost no realization or ability to project into real life how that would work, how that would be once you put it into effect, and...

*Mr. Lane:*

Is this an argument, then, for trial lawyer and trial judge experience as a qualification to sit on the Supreme Court, or doesn't it...?

*Justice Brennan:*

Well, I certainly think trial work as a lawyer or a judge is helpful.

*Mr. Lane:*

Okay.

*Justice Brennan:*

It's also helpful to have people who have just lived a little in terms of had some experience out there. I don't know. It's endemic to the human condition, I guess. People get the God complex when they go on these courts.

*Mr. Lane:*

Well, I didn't want to beat this to death. Maybe we've gone on too long on this thing. I wanted, on another possibly related subject, to ask you about something that was said during the portrait presentation ceremony and this was done in 1980 after you'd left the Court, and your former assistant, Mike Devine came over and talked as one of those who took part in the ceremony, and he referred to a time when there was a problem down in Oakland County that had to do with a grand jury. Do you remember that? He said that you decided, you were then Chief Justice, to reconstitute the Court. What the heck...do you remember what that was about?

*Justice Brennan:*

Yes, not a lot of the details, but Mike talks about it in this speech, and as I recall, it was a hot potato grand jury. The Attorney General was asking for a grand jury in Oakland County, and I forget who was being investigated or why exactly, as I recall. I seemed to me that it involved a man by the name of Lazaros.

*Mr. Lane:*

Yes.

*Justice Brennan:*

And he was a...

*Mr. Lane:*

Slippery guy.

*Justice Brennan:*

...very slippery character with a very shady background who was capable of lying about anything, and one of the things he did every time he would get in trouble with the law was he would start telling stories about judges, and people in high places, and how he knew this one was corrupt and that one was on the take and whatever else, and he'd make the most bizarre allegations but for some reason or other, he had the ear of some people in the State Police, and they tended to believe him, at least to the point of wanting to investigate and in fact, there was a request for a grand jury in Oakland County. I think in that case, Lazaros had probably pointed the finger at some people in Oakland County. Curiously enough, something makes me think that one of the people whose name was mentioned at that time was Jerry Bronson, but I'm not sure. It could very well have been that his name was...

*Mr. Lane:*

He had come through Oakland County. He had been prosecutor.

*Justice Brennan:*

Prosecutor out there, and whether or not it was something he did or was alleged to have done when he was prosecutor or a judge, I can't remember. I don't think Jerry was a Circuit judge. I think he went right from being prosecutor to being on the Court of Appeals, but anyway, for whatever reason, the Oakland Circuit judges, one after another, began disqualifying themselves from hearing this petition, and I got the message as Chief Justice that there wasn't anybody in Oakland County that would accept this grand jury. There wasn't any one of them who would be the grand juror, and I became very concerned that the justice system was going to break down in Oakland County, and we, the Courts, were going to get a very bad black eye for simply not acting on the Attorney General's petition. Since it was local stuff that was being alleged and so forth, I felt that maybe some outsiders would be better off handling it, so I conceived of the idea of completely reconstituting the Court which meant taking all of the Oakland County circuit judges and assigning them for one day into other counties...Lapeer, Wayne County, Washtenaw, Monroe...just sending them off to do a day's work someplace else, and bringing in a whole bench of outsiders who would then pass on, make judgement on the petition for the grand jury and appoint a grand juror being one of themselves, because, as I recall, the statutes said that the bench was to appoint one of their own members to be the grand juror and since nobody in Oakland County wanted to do it, we had to have a new Oakland County Circuit Court. That's just what we did. That bench...I forget who all was on it, but there were a lot of judges from Detroit, as I recall, and one of them was Judge Bob Colombo, and he was appointed the grand juror. I guess the newspapers, as Mike Devine recalls, were making a lot of noise about this and demanding this grand jury be empaneled.

*Mr. Lane:*

This Lazaros, he had a great appeal for the newspaper and some of the reporters, I guess.

*Justice Brennan:*

Well, because it was very scurrilous, what he would be claiming. It was almost tabloid stuff, but that was an interesting little episode.

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**Topic 2: He then gives a description of a court case that led to the reconstitution of the Oakland County Circuit Court and the case of Governor vs. State Treasurer in 1972, regarding the financing of education**

*Mr. Lane:*

Here's another thing that I wanted to bring to your attention. This is the case of Governor vs. State Treasurer. Why don't you describe a little about what this represents? That was 1972. Do you remember this case?

*Justice Brennan:*

Yes. Let me just take a moment...

*Mr. Lane:*

My guess is that it is pretty well summarized in what is labeled "Addendum" which is a couple pages that preceded what you filed as an opinion.

*Justice Brennan:*

Yes, I'm just kind of reviewing this, because I remembered it but some of the details I didn't recall. This was a very unhappy thing. First of all, I didn't think the lawsuit was really an adversarial proceedings. It was, in my opinion, a "sweetheart law suit". Milliken vs. Green. Milliken was the governor. Green was the State Treasurer appointed by Milliken. They weren't mad at each other. They weren't fighting with each other over anything, but it was a vehicle whereby the governor could place before the Court the question of the constitutionality under Federal constitutional standards of the Michigan constitutional scheme for the financing of education. By the luck of the draw, I was assigned to write the opinion in the case.

*Mr. Lane:*

Excuse me, before you go on, do you have...did you have then or do you have now a pretty good notion of the behind-the-scenes origin of why Milliken was moved to do this? Who...did somebody have a bayonet in his back or did he do this for philosophical reasons? This is ordinarily something...

*Justice Brennan:*

No, this...of course, the whole process of state financing of education and the financing of education in the state of Michigan and elsewhere had been a reasonably hot political potato for a long time. There was a case out in California, I believe, called Serrano in which the California Supreme Court declared that the California educational financing system was unconstitutional under the Federal constitution and so they threw it out and mandated that the legislature enact a different method of financing the schools. That successful effort in the courts, I suppose, emboldened our governor to try here. He had certainly tried for a long time to get the legislature to adopt various changes in the way in which schools were financed, and the School Financing Formula, that is, the formula by which the states would pay money to the school districts, it tinkered with every term, every term of the legislature. It's always designed to try to get the local bodies to tax themselves to a maximum, to reward them for taxing themselves, to equalize the effect of their taxation on education since in some so-called poor districts, people might pay a high tax and yet generate very little money for the schools because there isn't that much property in the area, so the whole idea of the state formula was always to try to equalize and make up for these variances. I think Milliken started the lawsuit because he was frustrated. He couldn't accomplish things in the legislature and he thought a quicker, easier, more effective way would be to go to the courts, emboldened, as I say, by a success in California and other places. Remember, this was 1972 and it was a time of judicial ascendancy and extreme judicial activism, both at the federal and state level.

*Mr. Lane:*

There are some people, by the way, who may not remember at this late date, that when Milliken became governor in 1968, he did it with the flourish to become the education governor. Do you remember that? He created a commission that met up in Leland and all that sort of thing?

*Justice Brennan:*

*Mr. Lane:*

There still may have been some aura, now long hardened, that...

*Justice Brennan:*

I think you're quite right. I think that he...Bill Milliken was interested in education and he made an effort to try to identify himself and his administration with it. In any case, here we had this lawsuit which at least in form, was a controversy between the governor and the state treasurer, in effect saying to the state treasurer...I don't know what...wanted the Court to say to him, "Thou shalt not pay out money under the current statutes because everything is unconstitutional". The case was assigned to me, and I proceeded to write an opinion which I circulated among the members of the Court in July of that year. I received the assignment on June 6th, the case was argued on June 6th. My opinion was circulated about a month later, six weeks later, July 27th. I held in my opinion that the constitutional method of financing schools in Michigan was not unconstitutional under the federal law, that the Michigan constitution established a method for financing public schools which was essentially through a system of school districts, each one being autonomous in some respects and responsible, largely responsible for its own financing and given the power to tax, real property taxes. In December of that year, after nearly five months after I had written my opinion, Justice G. Mennen Williams circulated what he called a discussion draft which was in effect, a opposed opinion holding that the Michigan method of financing the public schools was unconstitutional under the federal constitution. We didn't have a meeting of the Court scheduled between then and the end of the year. Justice Paul Adams was going off of the Court. Mary Coleman was coming on. That had all been decided in the election and so on. There was almost no internal procedure with respect to the Williams opinion.

*Mr. Lane:*

Discussion draft.

*Justice Brennan:*

We never had a meeting to discuss it. It was called a discussion draft, but we never had a meeting to discuss it, and then all of a sudden on December 26th, the Chief Justice informed me and other members of the Court that there were four people on the Court ready to decide, to sign the Williams opinion. So it was signed, and it was issued.

*Mr. Lane:*

Do you remember the date, probably the 29th or 30th?

*Justice Brennan:*

It was right at the end of the year. I can't recall exactly the date on which it went down, but it would be in the books. I was stuck with this formal so-called majority opinion that I had written that didn't address the Williams opinion at all, didn't dissent from it. It simply presented an entirely different point of view. I filed that as my dissenting opinion, mostly because I had done

the work and I thought whatever scholarship was involved there should be given the light of day and let the profession use it or not use it, as they chose, but then I wrote and added to my opinion a so-called addendum in which I attempted to address the Williams opinion as best I could on very short notice. I ended up pointing out that in my opinion, the majority opinion was not good law. It was not even law. It was a position paper, a political position paper, really, and I felt the whole issue was political to begin with. Obviously, it is still before us, 20 years later, debating about how to finance public education.

*Mr. Lane:*

Do you remember what the sequel was to the filing of that opinion on December 30th?

*Justice Brennan:*

Yes, the sequel was that after the new year, January, 1973 when Mary Coleman came on the Court, there then was a quick shift, and I believe at the behest of Justice Levin who made the motion, the Court sua sponte, reconsidered the opinion in the case of Milliken vs. Green and reversed its opinion, in effect...

*Mr. Lane:*

That happened in January, what you just recited, but it's interesting...if you go through the reports, I believe you find this -that in August or September or somewhere later in the year, there is...without any title or headnotes or anything, there is a one paragraph thing that is in the form of a order of the Supreme Court. What that said, as I recall, was that such and such things, having happened, including the opinion of the United States Supreme Court in a Texas case, Rodriguez, that we now expunge...it think that word was used...from our records the opinion filed in December. If it didn't use the word "expunge", it was something equivalent to that, that we said it naught vacate, and attached to that little order, as I recall, was something that bore Levin's signature that was quite a broad and thorough analysis from his viewpoint, somewhat along the lines of yours, that this was kind of an opinion in a vacuum that didn't do anything and didn't decide anything. It said what the legislature had ordained one and a half years before was out of order, but that now there is a new year, and a new school aid law and that if...it invited the Court or invited anybody to come back to the Court...Do you recall that part of it?

*Justice Brennan:*

In just sort of general terms, but you see, that whole process...I don't know...I think the Court is still doing it because people are still on the Court who believe that it's the proper function of the Court do to these things and I think the principle, one of them, is Justice Charles Levin. I think Justice Levin sees the Court as a kind of body with a constitutional mandate to make decisions, make decisions about anything, about government, about life, about people, about the way we live and the way we are, the way we finance things, the way we pay for things, whatever. I don't think he has the same sense of a limited role of decision maker between litigants that I have. I mean, I think a judge in a Court decide cases, cases and controversies, and that they decide them in accordance with some traditional limitation of what kinds of decisions that they can make. I think Justice Levin is probably what I might call of the Solomonic view, that is, you can be inventive. You can make things up when people come before you and if a case is presented that sort of highlights a problem in society, you can directly address the problem in society, and in

effect, issue orders to the world which you hand...pin on the door of the courthouse and make everybody come and see.

*Mr. Lane:*

Do not the rules or does not the constitution limit the Court, circumscribe what it can do?

*Justice Brennan:*

Oh, yes, but can you conceive of a judge saying to people, "Bring us a case. We invite you to bring a case to our Court". Why? Why in the world would a court ever say to the world "We invite you to bring us a case?". I mean, the reason they say that...what we want is an excuse to make some law here. We have an idea about how the world should be and how things should be run but unfortunately, we have...

*(End of side 1, tape 5)*

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**Topic 3: Reconstructing lost footage because of a mechanical malfunction, Justice Brennan talks about judicial activism and the prospective vs. retroactive changing of Common Law in relation to a court case concerning immunity for negligence committed by eleemosynary (or charitable) hospitals**

*Mr. Lane:*

Here we are again.

*Justice Brennan:*

All right, now Roger, I understand we are reconstructing side B because we had a little mechanical failure, and we'll do the best we can with the help of your notes and what we've been able to glean from the side B that was lost. This is tape #5, right?

*Mr. Lane:*

Right, #5B.

*Justice Brennan:*

You said that at the end of #5A, we were talking about...had we gotten into Governor vs. Green?

*Mr. Lane:*

Yes, we had pretty well finished with that, and as I recall, right at the end, you were saying is what this adds up to is that the Court was begging litigants to come on in and bring us a case so we can make some more law.



*Justice Brennan:*

Okay, good. Well, and I think that that sort of led me into a discussion about the judicial activism, about prospectivity of decisions.

*Mr. Lane:*

Exactly, and I think I mentioned Shavers, although Shavers actually was decided finally, somewhat, some years after you left the Court in 1978, but you had already got a taste of it, I think, in the advisory opinion, and if you remember, in Shavers, the court said, "Well, this thing is not quite right, but we'll let it sit there for one and a half years. The legislature will fix it up and then we'll apply the constitution on it".

*Justice Brennan:*

The case that I remember, and I wish I could bring to mind all the facts - one of the cases by name, I believe was Meyers. I don't think the Meyers case was the one I participated in. I think that was the one that had occurred before I came on the Court, but there was a series of cases having to do, if I'm not mistaken, with the principle of the liability of eleemosynary institutions for their torts of negligence. The old common law rule having been that eleemosynary institutions were immune for liability for negligent actions. Apparently the thought was that it was a way to encourage the good nuns and other groups of people to establish in hospitals and other facilities for the poor, and you didn't want to visit on them civil liability for having failed to do their good works in a completely non-negligent fashion. It would be similar, I suppose, to legislation that we have enacted recently, the so-called Good Samaritan laws, the policy being that you want to encourage people to be the good samaritan, to assist someone they find to be in trouble without worrying about being sued. So that was the old common law rationale for the immunity of eleemosynary institutions in end of late 50's and 60's here in the state of Michigan, that if you came up in connection with hospital liability and malpractice and so forth. There were some decisions by our Court which, as I recall, established the rule...changed the common law rule and established the rule that these institution were, in fact, liable for their negligent torts. Again, I'm doing this from memory. It seems to me that this was the principle of law involved. One of the debates among the judges was if you're going to change the common law by a Court decision, should you do it prospectively or retroactively? There was always the argument that a great many people relied on the law as it then existed, that insurance contracts were written based on the law as it had previously existed, and that there was a certain amount of equity or fairness on the side of those who relied on old court decisions and so forth for making their business judgments. You really had about...you really had three different ways in which the courts talked about changing the common law. One was simply to decide the case in favor of the plaintiff and say, "We're changing the common law. You can now sue a hospital", and because the old law doesn't apply because times have changed or because the old law was a mistake in the first place or whatever, but "we're going to do that", and simply not say about what cases it applies to at all, which would basically mean that anyone who had a claim against the hospital that wasn't barred by the statute of limitations, that is, anyone who had a claim against the hospital that was no more than two to three years old could come in and start their lawsuit and the courts, if they followed that precedent, would listen to them. The argument there would be,

for the defendant, would be, "Hey, we bought an insurance policy based on the old law, and we didn't cover our negligence because we weren't liable in the old days. Now you're going to make us pay for these torts of malpractice out of our own pockets because we're not insured. Had we known you were going to do this to us, we would have insured ourselves". In the face of that argument, the courts did two other things. One was to say, "All right, we will decide this case before us, this case of Jones or Smith or whoever it was that was the lead actor, the ground breaker who brought the case and who made the argument for overturning the common law rule and making a new common law rule, and in his case, we would let the plaintiff win, but we would say to the world that we're not going to do this except for other cases that occur or the case itself, the injury itself occurs after today's date", so all those cases that would be in the pipeline of three years, the last three years, those people are out of luck but anybody who has the good fortune or misfortune of being the victim of malpractice from today forward will have a lawsuit. That was another approach that they took. Of course, the logical problem with that was that the plaintiff in this case did not have a claim that arose after this date, so the plaintiff in this case, his claim is two to three years old. In effect, you are holding in favor of the plaintiff on a case that is two or three years old in one case and then saying to the world that everybody else who was injured the same day this guy was isn't going to be able to collect. By definition, you're creating an unfair and inequitably and discriminatory application of the common law rule. Well, among the arguments that some may have made about that was, "Well, that's true. It is discriminatory. You're treating this man different than everybody else who was injured the same day in the same place or whatever, but it is a reward we're extending to this particular plaintiff for having taken the trouble to come all the way to the Supreme Court and he is sort of...the prize he gets is that he gets to win his case whereas everybody else injured the day he was injured cannot win". I always thought that was a ludicrous argument and it had nothing to do with the justice of the cause, you know, to say that somehow you're going to reward this person for having overturned the law. So with that logical difficulty, there were a group of people who took a different view and they said, "Yes, that's true. It would be unfair to reward this particular plaintiff, and let's be logical. Let's say this: From this day forward, everybody who is injured by the malpractice of hospital has a claim, but this plaintiff doesn't have a claim and anybody whose claim arose before this date doesn't have a claim, so we're going to hold in favor of the defendant hospital in this case. We're going to deny this plaintiff's claim, but we're going to announce that from today forward, the rule will be different". That was the so-called true prospectivity type of a decision. Now, think about that. Here's a court of seven elected justices deciding this case in favor of the defendant. You ask "What was their decision?". Their decision was that the eleemosynary institution is immune from liability as it has always been under the common law. That's the rule of law which they applied to the facts in this case, and that's how they arrived at their decision, but now, having done so and having carried out what they're paid to do as judges and having done it in the great tradition of the common law by using precedent, they now say as an addendum or whatever, "But the next time a case like this comes in, if the injury occurred after today, we'll make a different decision". Think about that. I mean, they are telling the world what they're going to do in the future in a different case, that is, if dicta means anything, that's dicta, okay? They might as well right a Law Review article.

*Justice Brennan:*

They might as well go to a banquet someplace and all seven of them stand up and say, "Next time we get a case like this, we're going to make this decision". It's improper for them to announce their decision in classes of cases that aren't before the Court. If a judge got out and made that statement on the stump when he was running for election, the Bar Association would be all over him for being unethical. He has no business announcing to the public what kinds of decisions he is going to make in what classes of cases in the future. I mean, that's pandering for votes based on how you're going to decide your cases, and yet the Court does it and has done it many times in the books where they do this so-called true prospectivity. It's an absolute abomination. It is an absolute perversion of the judicial process, okay, and it was in that context that I said...oh, George Edwards wrote such an opinion, a true prospective opinion in which he said...he began the opinion, "From this day forward" were his words, okay? It was a pronouncement, it was an edict. It wasn't a damned decision. It was an edict that attempted to change the law prospectively. Now, after the Edwards edict, and whether that was the Meyers case or what, but on this subject, along came another case, some other plaintiff, through ingenuity or perseverance or whatever, worked his way up to the Supreme Court, and his injury had occurred prior to the day that Brother Edwards had announced was the effective date of this new rule, and what did the Court do? They decided the case in accordance with the new rule, so despite George Edwards' announcement that as of today, the rule is going to be different for all future cases, in due course of time, when a case came up that was, had begun prior to that date, the Court decided in favor of the plaintiff, in effect ignoring Edwards' prospectivity pronouncement. Now, I cited that to show that when Edwards announced that the rule was being changed today from this day forward, that it was sheer nonsense or poppycock, and that was the basis. I called it that in my opinion. I said, "This is sheer poppycock. The Court cannot announce future decisions. They can't bind future Courts, and so it is sheer poppycock". Hiram Bond who was for many years the reporter of the Michigan Supreme Court decisions, the person responsible for the editorial clean-up work and the management of the printing and publishing of the opinions, was a wonderful kindly old and scholarly old gentleman with the Court for many, many years before I came, and Hiram was a stickler on grammar, pronunciation and so forth. After you wrote your opinion and circulated it to the other justices your draft, a copy would go to Hiram and he would read it and you'd get a memorandum from Hiram about corrections that he was suggesting you make, always very polite, always very deferential but always very firm that it was improper for you to do this or whatever. He recommended highly that you don't use this phrase or that, whatever. In this case, Hiram's memorandum said that, challenged the use of the word "poppycock", and I think, as a matter of fact, he phoned me. I don't think it was in a memorandum. He phoned me because I remember him telling me that the way in which words were used in Supreme Court opinions was one of the sources that lexicographers go to get the information for dictionaries and are able to say "This word has found acceptance in the language" and so on and so forth. If it is being used in Supreme Court opinions, that is very good evidence that it is accepted in the language. He said, "You don't want to use this word because the word 'poppycock' means soft dung". He sort of suggested it was crass and perhaps inappropriate word for a Supreme Court opinion. I said, "Hiram, that's exactly what I meant to say" and I left it in. If poppycock or soft dung becomes in the next edition of Webster's dictionary as a common usage to indicate, to mean nonsense or foolishness, maybe I had some contribution to that cause. Anyway, where were we? Does that cover that whole thing?

*Mr. Lane:*

Well, but remember, you had some other observations to make about this kind of...I remember the City of Detroit vs. Jaxon. Is that...?

*Justice Brennan:*

I don't know how we strayed from the poppycock story into Jaxon. Possibly it had to do with...there was a stream of consciousness in our discussions on the tape previously. It may have been that we were talking about opinions and words that you use in opinions and that might have brought me to talk about the City of Detroit vs. Jaxon because the City of Detroit vs. Jaxon is an opinion which I can even give you citation for because I happen to have pulled it down off the shelf. It appears in 379Mich405, and I'm glad I got it down because my recollection of the case was not accurate, and having refreshed my recollection, I can give a better statement of what the case was, but I had referred to Detroit vs. Jaxon on a number of occasions because it was my one excursion during my service on the Supreme Court into the area of judicial humor, and my one attempt to be funny which I'll tell you what the result of it was.

*Mr. Lane:*

This was the case about the woman that stepped off the streetcar?

*Justice Brennan:*

It's the lady that stepped off the bus. The bus driver stopped, and instead of stopping where she could step onto the curb, she stepped down into the street so instead of having perhaps 10 or 12" to step off of the last step of the bus to the ground, she had to go about 16 - 18" down to the street level. I tell the story of her fall very matter of factly in my opinion until I reach the bottom of page 409 and I said, "She apparently expected to step onto the curb but alas, there was no curb underfoot and the plaintiff went a'tumbling". Then I say, "Mrs. Jackson fell victim to Fetridge's Law". There's a footnote there, and then...I don't know if you want me to read this footnote onto the tape, but the footnote refers to Claud Fetridge, an employee of NBC who conceived the idea of broadcasting the whir and flutter of the eager wings of the swallows departing the mission of San Juan Capistrano in Southern California on October 23rd which is St. Johns Day, and that was traditionally supposed to be the case except that when they got all set up with their equipment to record it and broadcast it, they discovered that the birds had left the day before, so Fetridge's Law came to be known in the circle of humorists where they had these so-called laws of probability to be stated as follows: The principle of Fetridge's Law - "That important things which are supposed to happen do not happen, especially when people are looking", all of which can be found in a book by H. Allan Smith called "A Short History of Fingers".

*(interruption in taping)*

*Justice Brennan:*

I won't belabor it. Elsewhere in that opinion, I made reference to Gumperson's Law which is generally stated that "the contradictory of a welcomed probability will assert itself whenever such an eventuality is likely to be most frustrating". Anyway, I played around with these two humorous rules of probability, and fortunately or unfortunately, I managed to get a majority of the Court to agree with the result of my decision, at least, though not the words of my opinion, except that I got a lesson taught to me by Justice O'Hara who dissented in these words: He said, "I am uninstructed in Fetridge's Law and Gumperson's Law. Insofar as negligence law is

concerned, I accept the statement of the Court of Appeals..." and he goes on from there, so the embarrassment of having attempted to be humorous stuck with me for a long time, and I have occasionally used that to admonish young judges not to try to be funny in their opinions. That was that reference to H. Allen Smith.

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#### **Topic 4: Mr. Brennan and Mr. Lane discuss if Catholicism is an issue in performing his public duties and the role of conscience in government**

*Mr. Lane:*

I think I had asked you...

*Justice Brennan:*

Was that on this side?

*Mr. Lane:*

Yes. I had asked you, and we're switching subjects now...about whether you found any problems in connection with your Roman Catholic faith in discharging your public duties, and I had averted to the issue that was raised in 1960 against Jack Kennedy when he was running for President, and the gist of it seemed to be people who opposed him because of his Catholicism and said, in effect, "Well, if he gets in a jam, he'll call the Pope and the Pope will tell him what to do, and this isn't the way the country ought to be run". You have confronted in your service issues like abortion or obscenity, parochial things that have a great interest for the church, whose faith you profess. What do you have to say about this? Does this ever inhibit you or cause you...do you think it affected your service?

*Justice Brennan:*

Well, I think among non-Catholics, there is a perception that the Catholic church is a very authoritarian organization and that somehow or another, persons who, Christians who profess allegiance to the Roman Catholic tradition are subservient to ecclesiastical authority in all things, and I think to a degree, we probably bring that on ourselves, oftentimes by talking about what it was like to go to parochial school and be reared by nuns and priests who rapped your knuckles and kept you after school and did a lot of things of that kind. I think at some point in these tapes, I talked at some length about the priests at Catholic Central High School and Father Sheedy knocking Gus Sonnenberg out and things like that, and I think that among non-Catholics, there is a sense that Catholics are...they march to the beat of the papal drum and in fact, that the Pope or ecclesiastical authority speaking for the church could, in fact call up a Catholic politician, judge and tell him how to decide his cases. I think that the action of the Cardinal out in California recently who...what's the word for...kicking somebody out of the church...

*Mr. Lane:*

Excommunicated?

*Justice Brennan:*

Excommunicated or threatened to excommunicate a state legislator who was vocally pro-abortion and deny her the sacraments of the church or him or whoever it was, that that is taken by non-Catholic Americans to be an interference with that politician's ability to represent his or her constituents. My sense of it is that I am a Catholic, not because I have Catholic blood in me or that I am a subject of ecclesiastical authority in the sense that I may be a subject of the government of the United States or as someone is the subject of the king of England. I am a Catholic because I believe in the teaching of the Catholic church, and when I go to mass on Sunday, I recite the Nicene Creed as part of the statement of my beliefs, and I really believe those things, so if I decide a case or if I act consistent with the teaching of the Church in some area, it is not because the Church tells me I have to do that. It is because I believe that I have to do that. That's my conscience telling me. You get into a kind of semantic problem of the difference between being instructed in one way or the other and being informed. It is my view that not only Catholics but all rationale human beings have a responsibility to have an informed conscience. We are not...we have in our make-up, the Lord gave us the responsibility to act in accordance for the right reason, to do what is right as opposed to what is wrong in all of our actions. This is fundamental tort law, you know. Act as a reasonably prudent person would under the same or similar circumstances. We all have that built into our rationality, but part of that rationality says you can't blind yourself to information and then pretend that you're exercising rationale judgment. If I have a shot gun or a 30/30 and I'm out in the woods, and I hear some movement back there among the trees, I can't just fire my gun assuming or hoping that it might be a deer that is in there. I have some responsibility to take a look and see if that is another hunter, and my conscience can only be guided, can only guide me if I am faithful to my responsibility to inform my conscience about the facts and about the principle. So the same thing is true with respect to a Catholic's relationship to his church. We have, as individuals, responsibility to inform our consciences. The church is in the business of teaching about right and wrong, and it is a resource, a source that a person of good conscience, has an obligation to explore, just as you have the obligation to read books, to consult, whatever, and there are many Catholics, I'm sure, whose consciences tell them something different that what the Church teaches, but they've read Thomas Aquinas, and they read Augustine, and they've read other philosophers and theologians and so forth, and they've come to some sort of a conclusion that they're happy with, that they believe is correct and true, and they don't think that they're out of the teaching, the mainstream teaching of the church, so they go about their way and they do what they do. What's important is that they have instructed, informed their conscience about these things. For most of us, day to day Christians, we haven't got the time to go to the library and dig out theological books. We basically have to have a ready source of counsel and information, so you know, you read some literature, maybe the weekly Catholic magazine or newspaper, and you listen to the sermons on Sunday, and you inform your conscience. That's not the same thing as taking orders. It's not the same thing as taking orders. An adult, mature Christian has that responsibility and it wouldn't make any difference whether you are Catholic or what you are. You have a responsibility to inform your conscience and make up your mind about what is right and wrong. I think that is something that may not be well understood by non-Catholics.

*Mr. Lane:*

In an adjudicative context, this can also be distinguished from the policy-making role of an executive, can it...or much more confined public duty, so to speak?

*Justice Brennan:*

Yes, and I think an executive role, it may not be very far from such things as the duty of a military officer, for example, to carry out the orders of your superior. I think you have less running room to substitute your personal judgment for the judgment of your superiors in the executive department than you do in the judicial department. A kind of folksy analogy that I frequently use about the three branches of government, executive, legislative and judicial - I have often compared with three aspects of human personality, that the executive is like the physical aspect...human nature...man is a rationale animal. He shares with the animal kingdom his animal aspects, but his rationality exists because he has a soul, and the soul is really two things, free intellect and free will, so the nature of human life is physical, intellectual and free will, those three concepts and I compare those three to executive, legislative and judicial. The executive is like the physical life, it's your hands, your feet, the way you carry out things, the way you do things, the way you interact with the outside world. The judiciary is parallel to the intellectual function of human life. It is the function of judgment, of thinking, of deciding, of judging, not necessarily deciding, and then finally, the free will is parallel to the legislative function in government. We often hear the phrase that "the Congress will work its will". It's a different thing from making its judgment or making a decision about something based on intellectual principles or right reason. A legislator can always vote his conscience. I mean, if he wants to hang onto his job politically, he probably votes the conscience of his constituents or what his constituents generally want, but when a legislator votes aye or nay on a bill or resolution in the House or the Senate, that person has absolutely no constraints. He is not constrained by the constitution. He is not constrained by his church or by anything or anybody. He literally does what he wants to do, whatever he wants to do. It's the Latin, *voluntas*. It's free will that he exercises, and it's a matter of choice, and frequently, that's exactly what the legislator has to deal with. He has the better of two evils to select from. "Do you want green or do you want blue?" It doesn't make any difference. They're just two colors. Which do you prefer, so very frequently that's what the legislator does, and that's the concept. If you think of this parallel and you think in terms of a human being working for the government or being involved in the process of government, either executive, legislative or judicial, you can see that the role, the conflict between personal preference or personal conscience may be quite different whether you're in executive, legislative or judicial department of government. In the executive department, there is the least tension between...there should be the least tension....no, the least or the most...maybe I want to say it this way: The executive department tolerates the greatest tension between personal conscience and duty in the sense that if you're the hangman and you're paid to be the hangman, you've taken the job, then you hang everybody that they bring you, you know. If your duty as a public officer is to sign this check, then you sign this check, irrespective of what the money is being spent for. It is not your decision. Your job as the treasurer is to sign the check, make sure the accounts are proper, make sure the accounting is made to the public authority, whatever that may be. Thinking in terms of the Registrar of Deeds. He must record every document that is brought to him. He doesn't make any judgment of what is in those documents or whether it is good for society or whether it is what God wants him to do. He just does what he is paid to do, so the preference to do the public duty over private conscience is enormous in the executive department. As I say, in the legislative

department, it is almost non-existent. You pretty much do whatever you feel like doing when you're voting as a legislator. But in the judicial department, there is the greatest need or desire, or logic to meld the two, to meld your public duty and your private conscience because basically, the public duty and the private conscience both flow from the same thing. They flow from reason, from human reason and Thomas Aquinas said "the law is a rule of reason ordained by proper authority and promulgated for the common good", and if you are following that law by that definition, you're following your reason, and if you're following your reason, you're following your conscience, so there's a great melding of the two in the judicial department, and what is important and necessary for an Appellate judge is that he express his views on the law rationally and logically and in a way that relates to public policy, never says, "I got to vote this way because I'm a Catholic. My Church tells me that this is what I must believe". That may be good enough for him to inform his conscience in his private affairs. You know, "I do not speak ill of my neighbors because my pastor tells me that's a sin. I don't personally see anything wrong with bad mouthing a few of my neighbors. They deserve it, but because the pastor says I shouldn't do it, I won't do it". You can't have that kind of logic as a judge. You can't bring your church or your religious discipline in in that way. You must say, "We should not speak ill of our neighbors because it is not good for society and..." and whatever law or whatever you're dealing with if that's the principle involved in it, you have to have a reason for it which is unrelated to religious discipline. Anyway, I guess I've talked enough on that subject.

*Mr. Lane:*

As sort of a back light, as I would phrase it or describe it, to this whole discussion of principles that we've been talking about, you raised the question, sort of antidotally about what happens at the end of a dinner where you have a bunch of people sitting around disposed to chew the fat a little bit and what is the proposition that you put before them?

*Justice Brennan:*

Oh, yes. I don't know whether that goes onto to this next tape. If it does, maybe we started it here, so I'll...we'll continue. The issue that I like to pose around the dinner table after supper with good people who are intellectually astute and articulate and so on is to put this proposition out: "Resolve that no persons should be elected President of the United States unless that person is capable of committing murder". When you state the proposition in that fashion, there is a certain shock-wave that goes through the group, but then the discussion starts to get lively. The first general reaction is that we don't want a murderer as a president. That would be terrible. Then you begin to put certain specific hypothetical situations before them, and they begin to back off and start to have doubts as to whether their first reaction was correct. For example, if I were to say..."If George Bush were a murderer, would you want him to continue as President?" They say, "No. We'd want him out of there. We don't want a murderer in there as President". "Suppose he doesn't commit the murder himself but orders somebody to be murdered?" "Well, I don't want that either. That's the same as murder. You're talking about a mafia don who orders people killed". "Well, suppose he ordered Saddam Hussein killed?" "Oh, that's good. That would be wonderful if he did that. That would get this war over with and there would be less loss of life and ...", etc., etc. Then people realize that the question of whether they want their president to be



a murderer or not really depends on who it is he is going to murder which sort of reminds me of the rule of law that John Dethmers, God rest his soul, gave me one time with respect to murder cases. He said the first rule in every murder case is "should the deceased have went". That's the first question in every murder case - should the deceased have went, and when you stop and think about it, that probably is the single consistent strain through most murder trials. But in any case, that whole idea of whether a President of the United States, whether the people of this country want a President of the United States who will violate the law in their behalf is a very interesting concept. After all, public opinion is outside of the constitution. Public opinion is not controlled by the constitution. The constitution says that every person is presumed innocent until proven guilty. Public opinion doesn't have to presume them innocent, and rarely does. The constitution says that every person is entitled to freedom of speech, but the public opinion is that some people shouldn't be allowed to talk at all because what they say is unpopular and undesirable, so while the constitution may say that people cannot have their property taken away from them without just compensation, the public opinion might be that the president could seize the steel mill and not give those rich steel mill owners anything at all if it was in...was for the benefit of the common good.

*Mr. Lane:*

Some kind of a war time emergency or that sort of thing.

*Justice Brennan:*

As far as the public is concerned, they wouldn't even need an emergency. I mean, all they really need is some sense that it is to their benefit to have this thing done, and they're happy to do...

*(End of side 2, tape 5)*

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**Topic 5: Justice Brennan discusses making decisions by law or by conscience in a judicial context, the UAW's role as an active litigant in court cases, and adopting opinions from lower court decisions**

*Mr. Lane:*

Here, now we're on again, Justice Brennan.

*Justice Brennan:*

Anyway, let me just conclude the thought which was do we want a President of the United States who is capable of killing, committing murder, and it's interesting to find that many, many people that that is what they want. When you get right down to discussing it, they don't want a president who is too squeamish to commit crimes in the service of the nation. Every president has to deal with the question of when his or her conscience says "no" and what do you do when either your official public duty or what the people expect or desire of you are in conflict, and frankly, I think Kennedy's reaction was very correct and so would anybody. Any president worthy of being

elected to that office should say "When my conscience offends against my so-called public duty, I am going to follow my conscience, and I'm going to either do what my conscience says, and if I can't do it and be consistent with my public duty, I will resign from public office".

*Mr. Lane:*

Well, in an adjudicative context, though, are you...is it the same thing or in an adjudicative context, you have a controversy before you and it's come up in the right way and it has to be decided. It goes against your conscience if it is decided one way. Do you then decide it on the law or on conscience? Am I saying it right?

*Justice Brennan:*

I think...you raise an interesting question. Had I been on the Court after *Wade vs. Roe*...I may have had a case like this. I don't recall. Had I been on the Court and confronted with literally a *Roe vs. Wade* situation, where somebody was making the exact same argument about the Michigan statute as Mrs. Roe had made about the Texas statute that led to the U.S. Supreme Court decision, now the case is before me or us on the Supreme Court, and I am one out of seven people to vote on this issue. What is my public duty and what is my conscience duty with respect to the thing? My first reaction is my conscience duty has no bearing at all on the thing because if I can't...if I don't have an argument on the basis of public policy and my role, my proper role as a judge to make, then I can't decide. I can't say...I can't vote to overturn this statute because my church...because I belong to a church that is against abortion, so I am going to recuse myself from sitting on the case. I can't do that, and I don't have to do that because I could say very easily, regardless of what my church says, I'm sworn to do my duty, and this is the law of the land, and I am sworn to uphold it, so I'm going to uphold it and be done with it. But there's a third thing that a person can do and in my judgment, should do. I would, anyway, and that is this: the decision of the Supreme Court of the United States in the Texas case, while it is precedential, while it is guiding in the sense that it is something we should pay some attention to, it does not bind the Supreme Court of Michigan in another case. It's not *res judicata*, *stare decisis*, yes, but not *res judicata*, and *stare decisis*, the difference between those two things is very important as you well know. They haven't decided the Michigan case yet. The Michigan statute may be different or the Court may want to review its decision in *Roe vs. Wade* for one reason or another, so I'm sitting there and I'm saying I'm going to decide this case according to what I think the law is under the circumstances, and I have as much right to interpret the Federal constitution as the federal judges do. I was sworn to interpret the constitution of the United States as well as the constitution of the State of Michigan, so I could very well write an opinion saying I think the Michigan statute written in 1946 is valid, and say, "There you are gentlemen. There's my decision, and if you want to take it to the United States Supreme and if they want to reverse me just like they reversed the Texas judge, let them do it". I think that is not an invalid thing for a judge to do. I think it may be somewhat controversial in the sense that a lot of people would say, "Well, you've got an obligation to follow the United States Supreme Court". I don't think it's a legal obligation. I think it's kind of a traditional obligation.

*Mr. Lane:*

A judicial officer sitting on an Appellate Court in a state is in a different position than, say, from an executive officer who is given the order of marshall or somebody to do this thing, and the guy either does it or not, and he is sworn to do what marshall tells him or...?

*Justice Brennan:*

Yes, I think that's a good distinction.

*Mr. Lane:*

Let's get onto...do you remember...were you sitting on the Court when the four year registration case came up for decision, UAW Community Action Council...

*Justice Brennan:*

I don't remember it.

*Mr. Lane:*

Well, that was the four year registration, 387...that would have been your time, wouldn't it?

*Justice Brennan:*

Yes.

*Mr. Lane:*

Well, if you don't remember it, why should we go into it?

*Justice Brennan:*

Well, maybe if you've got a question about it, you can raise it.

*Mr. Lane:*

Well, this was again, I thought, the sort of block voting that seemed to be evident, let's say in the Governor vs. the State Treasurer.

*Justice Brennan:*

Yes, the four year registration case...using the Secretary of State as the registrar as well as the driver's licenses?

*Mr. Lane:*

Well, that's right. He administers the election laws and so the form of the case, the style of the case was UAW Community Action Counsel and NAACP and various other people against the...whoever was...Austin or whoever, Secretary of State.

*Justice Brennan:*

1972?

*Justice Brennan:*

Right, and said it is contrary to...it is an unconstitutional burden on the right to vote to require people to renew their registration every two years even though, and there are various provisions in the statute...now does that bring to mind?

*Justice Brennan:*

And they concluded that certain people had voting patterns, and they voted in the presidential election every four years, and that that was a valid voting pattern, and therefore, you had to keep people on the rolls. I would guess that I dissented from that.

*Mr. Lane:*

You sure did.

*Justice Brennan:*

Just as I dissented in the case that Swainson wrote in which they concluded that all the kids at Michigan State University had to vote in East Lansing and all the university kids had to vote in the towns where they were going to school which was, in my opinion, those were just pure political decisions where the Court was using its power to enhance the political position of their fellows.

*Mr. Lane:*

Okay, well, then you would agree...Black just tore his hair out on this one, and he, in the most emotionally charged passionate terms told his colleagues on the Court that they were paying political debts rather than performing a proper function as a justice of the Michigan Supreme Court, and he recalled who has been owed his nomination and who would, the next time around, owe his nomination to the people who were trying to get the election laws...

*Justice Brennan:*

Well, the UAW's role as a litigant, and of course, you had Gus Scholle's case back years ago on the question of apportionment and so on, but the UAW...I mean, was an active litigant, and they were an active litigant in the sense that litigation was deemed to be a means of affecting public policy, so to the same extent that the UAW was active as a lobbyist, it then became active as a litigant whenever someone concluded that the courts could be importuned to achieve what they couldn't get in the legislature. One of the things that began happening after Soapy Williams and John Swainson came on the Court that I had never seen before and which I found troubling was the manner in which the UAW communicated with the Court. For a long time, as long as I could remember, the pleadings filed by litigants would go to the clerk, and the clerk would make copies and distribute them and when they were distributed, they would go to each Justice, and each Justice's secretary knew what to do with them. Typically, she would turn them over to the law clerk for some processing and eventually, they'd get on the judge's desk. The UAW took to sending copies of the pleadings directly to the Justices. They would file their statutorily or court-ruled required eight or ten or twelve copies with the clerk as they were required to do but in addition to that, they sent copies directly to all the Justices through the mail, and your mail was processed differently than the inter-office distribution of opinions. Your mail, today's mail got in today's mailbox, so if the UAW was the litigant, you got...you read their pleadings a week or two before you otherwise would have. I had my reasons to suspect why that was happening. I can only say that they were the only litigant that did it.

*Mr. Lane:*

I was talking to former Chief Justice Coleman not so long ago, and she said she was astonished one day in conference when she hadn't been there very long, and somebody knocked on the door and it was a message for one of the members of the Court sitting there urging the support of a piece of legislation that was apparently at some jeopardy over at the legislature. She took some umbrage that this was a way of communicating. I hadn't heard of that, by the way, for people who may be listening to or reading this in the future, the conference room on the Court is sort of a quasi-sacred place, and the Court usually met there without the presence of anybody else, and if there was somebody else there, it was a clerk or somebody that was invited expressly for some, had some connection with what the Court was arguing and considering at that moment. Well, so much for that. This was...the reason I thought you might recall this was that Gene Black reacted in a way that...you know, he could get his histrionics up pretty fast, and in this case, it was the most strident, ferocious kind of discussion that I ever saw come from him and wind up in the reports. So much for that, though. One little thing to maybe...I wanted to ask you about and could be disposed of, perhaps, very quickly - there was a case in 387 that you drew to write the opinion in something like somebody's plumbing and heating vs. Cadillac Sands which is a hotel up in Cadillac, and it was a two-bit sort of a contract case. I don't really remember why it wound up on the Supreme Court. You wrote...this is a contract case come to us through such and so...this case was decided in such and such a manner by the Wexford County Court and here is what Judge Peterson had to say about this - "this is an excellent discussion of the case. I adopt this as my opinion for Michigan Supreme Court in reviewing it" and then I think everybody else signed it, too. Do you remember that? Was there any particular reason why you...?

*Justice Brennan:*

I don't specifically, but I do remember having done something very similar to it in another case, but I couldn't tell you what case it was. I vaguely recall that. Bill Peterson is a man for whom I had great respect. He was a very good judge, and he wrote good stuff, and I think it was one of those things where his opinion simply said it all, and there wasn't any point in our trying to embellish on it and frankly, I had been a trial judge, and I think I had some concept of how a trial judge would feel to see his opinion in the books, and Bill was certainly somebody who was every bit as bright as the people on the Michigan Supreme Court and had the chips fallen differently in his life, he might very well have been a member of the Supreme Court and a good one, so I kind of thought if there wasn't any reason to try to improve on it, why not give Bill the byline. I did the same thing one time in an argument by a lawyer. I think his name was Nelson. I think it was Roy Nelson who made an argument in court one day, and whether it was a dissent or...I think it was a dissenting opinion. I simply said that I could not make a better, give a better reason for dissenting in this opinion than to state the argument of counsel, and I simply stated it verbatim. On another occasion, I wrote a very short opinion, dissenting opinion in which I said I dissent from the majority opinion for the reasons given in the majority opinion.

*Mr. Lane:*

What was that case? Do you remember?

*Justice Brennan:*

I can't recall it, but I know I said it. I mean, it was a situation where they gave so many good

reasons for going the opposite direction than they did, I couldn't have said it better, so I just said I dissent for the reasons given in the majority opinion.

*Mr. Lane:*

Bill Peterson was mentioned from time to time as a very possible appointee when a couple of these vacancies, I think maybe when your vacancy occurred.

*Justice Brennan:*

Possibly.

*Mr. Lane:*

Because he was a Republican judge, and...

*Justice Brennan:*

From Wexford, Cadillac, Michigan.

*(interruption in taping)*

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## **Topic 6: Mr. Brennan and Mr. Lane discuss the case of Dorothy Riley, a Michigan Supreme Court Justice, and his attempts to prevent her removal from the court**

*Mr. Lane:*

Now, Justice Brennan, I would like to have you discuss your activity on the Dorothy Riley case, and I refer, of course, to the litigation that occurred after her appointment in 1982 in November.

*Justice Brennan:*

All right, now, you understand that I had left the Court at the end of 1973, so I was, at that point in time, some nine years off of the bench. The Riley case came up when Justice Dorothy Comstock Riley was appointed by Governor Milliken to the vacancy created by the death of Blair Moody, Jr. Blair Moody, Jr. died the day or two days after Thanksgiving

*Justice Brennan:*

He had just been elected to a full term of office which would have commenced the following January 1st. Governor Milliken had not run for re-election and was, of course, no longer going to be governor after the first of the year. James Blanchard had been elected governor, would take office on the first of January, 1983. Apparently, the Blanchard administration and some others concluded that Dorothy Comstock Riley's appointment should only last until the 31st of December. The paper that Dorothy Riley received from Governor Milliken said that she was appointed until the first of January, 1975 which would have been the...

*Mr. Lane:*

Excuse me, sir, not 1975 in any event...

*Justice Brennan:*

In 1985.

*Mr. Lane:*

Could have been until the election next succeeding the start of 1983?

*Justice Brennan:*

Yes, the next regular election at which justices of the Court were to be elected, was the November, 1984 election, and I may be mis-stating this, but I don't think I am. It was my recollection...it is my recollection that the appointment specified January 1, 1985 though it may have said the first of January next succeeding the next election. That's what the statute says. Maybe it's the constitution, I don't know, but anyway, there is language that specifies how long the appointment lasts, and it does say it lasts until the first day of January next succeeding the next general election at which the successor is to be elected. In any case, a lawsuit was commenced by the Attorney General of the state which is known as a quo warranto action. Quo warranto is an old legal writ which is used for the purpose of questioning the authority by which a person presumes to exercise a public office, and traditionally, at the common law, the quo warranto proceeding, if successful, results in an ouster or a writ or whatever, ousting someone from a public office, removing them from the public office. And the purpose of this lawsuit was to remove Dorothy Riley from her office as a Justice of the Michigan Supreme Court. I was very, very unhappy with the Attorney General's lawsuit. I felt it was very political. I felt it demeaned the Court. It certainly did a tremendous injustice to a lady who was a distinguished jurist and who had been appointed, in my opinion, quite properly under the law and should have served until the next election. It was, I felt, a very political move in an effort to get an appointment to the Court by a friend of the new governor, someone that the governor would want to appoint based on whatever reasons he may have had, and the claim was made that this should have been Jim Blanchard's appointment because, in fact, if I'm not mistaken,...had Moody defeated Dorothy Riley in the election?

*Mr. Lane:*

She ran third to Moody, Mike Cavanagh, and then she ran about 11,000 or 12,000 behind Mike, I think.

*Justice Brennan:*

Yes, so she had been defeated by Moody and Cavanagh, but in any case, she had not been elected. I think there was still the kind of partisan sense or feeling around and about over that, and the concept that well, the Democrats had run the election. A Democratic nominee to the Court had been elected, therefore, putting the Republican nominee in and having that person serve for two years was wrong. It didn't feel good. It didn't seem appropriate, at least to the Democrats. I read the constitution, the statutes very clearly that she was to serve until after the

next election, and moreover, when this lawsuit was started, I seemed to recall that there was a constitutional provision prohibiting the Court from removing a judge, and I looked it up and sure enough, there it was in so many words: "The Supreme Court shall not have the power to remove a judge". Now, it seems to me that that language means what it says. If the people of the state of Michigan wrote that into our constitution, we wrote it in for a purpose, and whatever the purpose is, clearly the intent of the people was that the Court could not remove a judge. Now, this lawsuit then continued. Dorothy Riley was to her everlasting credit, very quiet about the thing, didn't take a public position, tried to continue doing her job. I learned later through a number of sources that she was treated very poorly on the Court, very disrespectfully by some members of the Court who did not keep her posted on things that were happening within the Court and so forth, though no one really challenged her right to sit on the Court. The other members of the Court didn't say "you don't belong here. Get out", but she disqualified herself from participation, obviously, in the case that involved her. I can't remember whether she recused herself from participation in all cases or not. She may have for a while though I'm not sure. In any case, that's of no consequence. I can't tell you what triggered my decision to become involved, but something inside of me said "you've got to do something about this. This is a travesty of justice. The Court is embarrassing itself". The Court was getting bad publicity and ink and so forth. I'm not sure now exactly of the sequence of events, but it came...there came a time when the Court heard this quo warranto petition by Kelly, the Attorney General and decided by a split vote to deny the petition, and this occurred on a Thursday or Friday and the following Monday, the Court reversed itself and decided to grant the petition and issued an order ousting Dorothy Riley from membership on the Court. I am going to guess that this is probably well into February if not March or later.

*Mr. Lane:*  
February.

*Justice Brennan:*  
...of that year in 1983. I can't tell you again exactly where, at what point I became involved but I remember that that episode of the switch, change of decision on its own motion, was just another straw that breaks the camel's back as far as I was concerned. I embarked upon a public relations campaign or a public effort to try to generate popular opinion in support of Dorothy Riley and to create a public demand that the Court reconsider what it was doing or had done.

*Mr. Lane:*  
Prior to that, you had appeared before the Court and made a legal argument, did you not?

*Justice Brennan:*  
No.

*Mr. Lane:*  
You had not?

*Justice Brennan:*  
No. I don't think so. I think I thought of that as...you know, I could be wrong about the sequence of things. Let's see. Why don't you give me some hint here...I remember holding a press



conference over in the state capital in which I said the Court was wrong in attempting to kick her off, or that the lawsuit was wrong. I can't recall exactly.

*(interruption in taping)*

*Justice Brennan:*

It was, as I believe, before the decision was made in the lawsuit, that I began to mount this public relations campaign and I remember that I put together a rather extensive book called "Supreme Court vs. Dorothy Riley" or "The Matter of Dorothy Riley" or whatever it was called, and it was copies of all the litigation papers, etc., etc. One of the things that I accused the Attorney General of doing was deliberately hiding from the Court the particular constitutional provision that I quoted that says the Supreme Court shall not remove a judge. This whole case went to and through the entire Supreme Court. The decision was made to take her off the Court, and yet, nobody in the Court had ever argued that constitutional provision. It was never mentioned in the briefs or anything, and I pointed out that in the brief of the Attorney General, they had come right down to it. It even dealt with the same section or the section right before it, and had come right down to that language that said the Supreme Court should not have the power to remove a judge, and they stopped quoting the statute or the constitution, almost as though they were deliberately trying to keep these words away from the Supreme Court by hoping they wouldn't find them in the constitution, and apparently, nobody did because there isn't any evidence at all, no record whatsoever, in the oral arguments or the briefs or in the opinions of the Court or anything that anyone ever dealt with that language. Had the Supreme Court said, "Yes, we know that the constitution says the Supreme Court shall not have the power to remove a judge, but we don't think it applies in this case for this reason and that reason and that reason", at least they would have created a little film or veneer of judicial interpretation, but there was no effort to do that at all. The only conclusion you can come to looking at this whole thing was that nobody...either nobody saw that language or if they did, they didn't want to talk about it. So in any case, I went out to the law schools around. I went to the University of Michigan Law School, Wayne State, Detroit College of Law, and here at Cooley and every place I went, we put up notices around that ex-Justice Brennan was going to be here talking about the Dorothy Riley case which was big news at that time. So we got good turn outs among the various students and the press covered us. It was like a teach-in. I was going around lecturing about the constitution, what it said, how this whole thing had come to pass, what a travesty it was and what should be done, hoping that I would generate some popular support for Dorothy Riley and some public opinion that the Court was making a mistake to back them off. Whatever I did, I didn't do enough of it. It wasn't that successful. My sense was as I went along that the press basically treated the matter as Republicans vs. Democrats, and all of my nice arguments about ignoring the constitution and not being faithful to oaths of office and all the rest of it was just rhetoric, that all had to be understood in the context that I was a Republican and so was Dorothy Riley, and that the Democrats had won the election, and this is what Kelly, the Democrat and Blanchard, the Democrat and Soapy Williams and Mike Cavanagh and all the other Democrats on the Court wanted to do, and you could talk until you were blue in the face and you couldn't persuade the newspapers that in fact, there were high principles at stake than just that to the winner goes the

spoils. Nonetheless, after this attempt at revving up public opinion, I finally concluded that my only shot and my last hope was to try to lay a guilt trip on the Court and see if maybe the justices themselves would back off, if they could appreciate the enormity of what they had done. I announced at a press conference that I was going to be at Court at the opening of Court in the March session. In the meantime, I concocted a writ, an application for a writ which is probably not been seen in the courts of this land in several centuries, but it was a legitimate writ from the old common law called an Application for Writ of Coram Vobis, and coram vobis means "our hearts", Whether it is coram vobis or ad coram vobis, I forget. I think it is coram vobis, and it was a writ that was sort of used in the old days as a last resort. You could call it the St. Jude writ, you know, the case of the hopeless case, the patron saint of the hopeless cases, but it was a writ that addressed itself to our hearts, that's where the...the word coram means heart and vobis means us or our, so it was a writ that appeals to our hearts, and it was an attempt to get the Court to review this matter down deep in their own guts and re-think it. I filed it with the clerk, and I don't know if I paid a fee or they didn't know what kind of a fee you'd pay for such a writ. I think the clerk just accepted the writ and made copies and delivered them to the justices, and so there I was asking the Court for this writ, and of course, there was no procedure for me to appear to anything like that, no Court rule that covered this situation, so just went and sat in the courtroom as I had said publicly I would do, and somebody in the press asked me...can that machine hear me if I talk loud as I walk?

*Mr. Lane:*  
Sure.

*Justice Brennan:*

Somebody in the press asked me what I would do if the Court did not recognize me when I showed up and I said, "Well, I think what I will do is simply sit underneath the clock and stay there until they see me". Well, I didn't have to do that. When I got to Court that day, the first case was a case in which George Bushnell, former president of the American Bar Association, was counsel, so it was his case, and he was the first speaker, and I asked him if he would allow me to take the podium, and he said yes. In the meantime, the Court had met and talked about my writ and apparently had decided they were going to listen to me, so Justice Williams who was then Chief Justice called on me and I proceeded to speak. I'm now looking through some of my speeches to see if I have my remarks on that occasion. I thought it might be here, but maybe it isn't. I might be among my Dorothy Riley files. I had quite an extensive file on this whole business. No, I'm afraid I don't have it here. It must be with some other files.

*Mr. Lane:*  
Was that kind of a last salute, you might say, in this campaign?

*Justice Brennan:*

Yes, I didn't...at that point in time, I realized that the public campaign was not likely to succeed, that basically what I had to do was make my pitch to the Court to try to persuade them to undo what they had done, and if I was unsuccessful in that, I really didn't have much recourse.

*Mr. Lane:*

The vote stood, after the Court settled its mind, stood 4:2, didn't it? You remember, it had been 3:3 and Levin who had taken sort of a straddle, through in with what became the majority.

*Justice Brennan:*

Of course, it was 3:3 because Dorothy had recused herself from acting in the cast, so there were only six justices acting, and you had Brickley...

*Mr. Lane:*

Brickley and Ryan on the one side.

*Justice Brennan:*

Ryan, and who was the third.

*Mr. Lane:*

It would have been Levin because Levin took the position that was very different...

*Justice Brennan:*

Yes, Levin had voted with Brickley and Ryan the first time around to deny the writ or at least, not to grant the writ, so there being only three votes to grant the writ and three votes not to grant the writ, the writ was not granted.

*Mr. Lane:*

Correct.

*Justice Brennan:*

And then over the weekend, Levin changed his mind.

*Mr. Lane:*

How do you explain that or doesn't that require an explanation? A person can change his mind in any kind of a legal proceeding, I suppose, or was there something about this? His explanation, as I recall, was that is intolerable to have this situation that then existed, and "so I decided to break the tie and settle the issue into a clear-cut conclusion".

*Justice Brennan:*

Of course, it was brought to a clear-cut conclusion the previous Friday.

*Mr. Lane:*

Okay, that certainly...

*Justice Brennan:*

Even though it was a 3:3 vote, the conclusion was clear-cut because the law is that you have to have four votes to issue the writ and since there were three votes to issue the writ and three votes

not to issue the writ, the issue did not writ. The matter was settled, and the case was over. As a matter of fact, Dorothy Riley was in Mike Cavanagh's office on that following Monday, and they had been colleagues together on the Court of Appeals. They were now colleagues on the Supreme Court. They had just gone through this traumatic experience in which Mike had voted against Dorothy to stay on the Court. She was apparently conceding to him the sincerity of his position, and he was trying to make her understand that it was not something he had against her personally that caused him to vote as he thought he was obliged to do, and they were sort of mending fences, and then Dorothy left and returned to her hotel room. Within an hour, the clerk of the Court arrived with a piece of paper and handed it to her saying that she was ousted from the Court. What had happened in the meantime between the time that Dorothy left Mike Cavanagh and the time she was ousted was that Cavanagh was summoned to Chief Justice Williams' office and told that Levin had changed his mind and they now had the votes to oust her, and of course, this meeting of the Court occurred at a time when Justice Ryan was teaching at Cooley Law School that evening. There was no scheduled meeting of the Court. He called, apparently, just to touch base to see what was happening after he got out of class, were there any messages for him or whatever, and then he was informed that this meeting was taking place, and he promptly raced over to the Supreme Court chambers and burst into the Chief Justice's offices where the others were sitting, and gave him an earful of his opinion as to what the...the impropriety of what they were doing. The whole story of the Dorothy Riley thing was so political and so filled with those kinds of pure power plays with no procedure and no propriety, not even an attempt to appear to be proper, just raw power. You've got the votes, shove it down everybody's throat type of thing. It was an embarrassing chapter in the history of the Supreme Court. No doubt about it.

*Mr. Lane:*

The irony of it is, of course, two years later she ran again and was elected, and defeated one of those that...

*Justice Brennan:*

And defeated an incumbent justice who had voted against her.

*Mr. Lane:*

And I think the public perception was that that was a big part of what the whole campaign was all about, the political race on that occasion.

*(End of side 1, tape 6)*

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**Topic 7: Justice Brennan continues his discussion of Dorothy Riley's case and his thoughts on its origin and motivations, including a discussion on the selection process for Chief Justice**

*Mr. Lane:*  
Excuse me...

*Justice Brennan:*  
I think Dorothy's decision to be quiet throughout that whole thing was well taken.

*Mr. Lane:*  
Oh, yes.

*Justice Brennan:*  
And it certainly helped her in the election. At the time, I wasn't that sure that it was well taken.

*Mr. Lane:*  
I think every where she went, people would bring it up, and that was the better way for it to be brought up by somebody saying, "Well, now, would you please tell us what this was all about?"

*Justice Brennan:*  
But she wouldn't. She wouldn't talk about it, and her view was that she was going to be above the fray and as I say, it may have worked out well for her. I recall, however, having had been very annoyed, for example...I was annoyed at her counsel. She had Fred Buesser's office representing her in the quo warranto matter, and I remember talking to Fred, Jr. or Fred, III about it and being quite upset over what I thought to be a somewhat less than aggressive attitude on their part about the defense. I think that was part of their strategy was to keep her appearing very lady-like and very non-aggressive and not all that assertive, but on the other hand, the argument about the Supreme Court shall not have the power to remove a judge was never raised by her lawyers, and I expressed some surprise about that. It cost me a couple years of very long-standing friendship with Fred Buesser.

*Mr. Lane:*  
You know what struck me about this, if I may volunteer, here's a political activity going on when Kelly...you know, the day after the appointment, this was raised, and Blanchard wasn't even in office, and I'm talking the validity of the extended appointment, lasting beyond the start of the Blanchard gubernatorial period, but I thought if you're talking about political forces and political rights and all that which was bubbling right below the surface. This was not your standard lawsuit.

*Justice Brennan:*  
No, it wasn't, and I'll say this quite frankly - I didn't have real hard evidence but I had some evidence, and I was convinced of it and I am convinced of it to this day, that the genesis of that lawsuit was in the office of the Chief Justice. The first drafts of the lawsuit were done by people working for Soapy Williams, and it was shifted from there to the Attorney General's office and from there, got massaged and came out as a lawsuit.

*Mr. Lane:*  
That's really something.

*Justice Brennan:*

And the reason that Soapy was concerned about it was because Soapy wanted to be Chief Justice. He had wanted to be Chief Justice for years and in fact, had kind of stepped up to the plate on a couple of occasions and then counted noses, and Mary Coleman won it so he backed away trying to appear gracious, but he still wanted to be Chief Justice. This was his year, okay, and he had the votes lined up and was ready to go. Now, all of a sudden, Blair Moody died, and it was a new ball game. Milliken comes in and appoints a Republican, and you've got Brickley, Ryan and Riley at that point and Fitzgerald.

*Mr. Lane:*

Fitz would have been off in January.

*Justice Brennan:*

He would have been off in January, but in December, Fitz was still there and in fact, the four of them elected, because Mary Coleman had left, elected John Fitzgerald as Chief Justice, and John was Chief Justice for about a month or so. Two weeks is all?

*Mr. Lane:*

Two months until the end of year.

*Justice Brennan:*

Two months from the time of the election until the end of the year.

*Mr. Lane:*

Well...

*Justice Brennan:*

Let me just finish the thought. The concern there was that if, after January 1, it was going to be three Republicans and the four Democrats again, that the same stalemate that had existed which had caused Mary Coleman to be elected, would operate to elect some other Republican. The fly in the ointment than still being Chuck Levin who, himself, wanted to be Chief Justice, and wasn't very fond of Soapy Williams at all to begin with.

*Mr. Lane:*

At one time, Black, Gene Black in his fulminations against the political reach into the Court of political forces, condemned the idea that the Chief Justice should be chosen in this fashion by other members of the Court. What observation would you make about that? He talked...he called it, I think, an evil system that every time the number came up that it's time to elect one again, that there were real serious problems. Does that make any...?

*Justice Brennan:*

I do recall that was Gene's attitude. Gene was a populist on some things. On other things, he wasn't in favor of self-government at all. My sense of it is that democracy is the worst form of

government except for all the other forms of government. In terms of a selection process, I feel the same way about selecting the Chief Justice as I do about the election of judges in the first place. You can talk about all other kinds of systems or ways of selecting a Chief Justice, and every one of them has problems. This one has problems. The members of the Court select their own leader. Well, I guess that's pretty good unless God's going to come down and appoint a leader for them or the governor is going to appoint a leader which is certainly going to be political, or you're going to rotate the leadership which is not going to give you leadership at all, it's just a kind of interim secretariat Chief-Justiceship. You could draw the names out of a hat, but you know, what other method is there that assures that the person who is the leader of the Court or who speaks for the Court, is the recognized head of the operation...what other system is there that assures that that person has the support of the people on the Court?

*Mr. Lane:*

Doubling back, this business that you mentioned of the report or your knowledge or whatever it was that you had determined to your satisfaction that the original legal paperwork that resulted in the Court's decision coming through Kelly's lawsuit originated in Williams' office. Is that...I have never heard that before. Is that pretty good knowledge as far as you are concerned?

*Justice Brennan:*

It was out and about, and I--

*(interruption in taping)*

*Justice Brennan:*

...inside information with respect to that. If I recall correctly, and it's a little vague in my mind now, what it was was a memorandum of some sort, a legal memorandum generated by one of his staff supporting the idea that her appointment was improper or illegal.

*Mr. Lane:*

Maybe not the first draft of the suit?

*Justice Brennan:*

Oh, not necessarily the first draft of the suit but I'm saying the genesis of the suit in the sense that it was the first time that the legal arguments which ultimately became the brief filed by Kelly had been put down on paper was the theory of that lawsuit was developed at that point. I think that's probably true.

*Mr. Lane:*

Well, is there anything more to say on the Riley episode?

*Justice Brennan:*

No, that's really...

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**Topic 8: Justice Brennan talks about how the process and starting Cooley Law School in Lansing came about**

*Mr. Lane:*

Okay, well...then I would like you to talk a little bit about the origination of the idea for Cooley Law School and how this entered into your activity while you were sitting on the Court and then it caused some friction later on and all that sort of thing. Would you deal with that for a while?

*Justice Brennan:*

Okay. Of course, I had been Chief Justice. I went off as Chief Justice in the end of 1970 and found myself with a good deal of time on my hands. I was accustomed to working 16 - 18 hour day as Chief Justice, and suddenly all I had to do was to take care of my own opinions and do my own thing.

*Mr. Lane:*

File dissents.

*Justice Brennan:*

And file dissents. I had a lot of dissenting opinions to write, no question about that. But even there, a dissenting opinion is not nearly as much work as a majority opinion because you don't have to...you don't have to do the original scholarship. You just sort of have to take a pot shot at what the other person does, and say why his arguments or her arguments don't make sense.

*Mr. Lane:*

Sort of a counter-punch.

*Justice Brennan:*

Counter-punch, which is easier. It's shorter, generally, and there is not nearly as much discipline in the writing of dissents. Anyway, I set about to build a kitchen in my house, and for about six to eight months, I was very much involved in that. In due course of time...I can't tell you when it was, but I used to get a lot of telephone calls from people who wanted me to help get their sons or brothers or cousins into law school, and they'd usually say, "Judge, I helped you in your election campaigns, and now it is time for you to do me a favor. Have you got any connections at the university?" I would make phone calls on behalf of friends and supporters and say to the dean of the law school, "Can you do any good for this person?" or whatever. Typically, the answer came back...I remember one time being told that there were 6,000 applications for 300 seats at the University of Michigan Law School, and it was just a terrible crunch, and there wasn't a prayer of getting anybody in. One particular time, I was calling a fellow back to tell him that I couldn't help him. As a matter of fact, he is a bondsman out of Detroit by the name of Charlie Goldfarb, Chuck Goldfarb, and we were having this conversation and I said, "I can't help you". I think it was his brother he wanted to get into law school, and I said, "You know what I ought to do? I ought to start a law school up here in Lansing. We could really use one".

*Mr. Lane:*

Just spontaneously, off the top of your head?



*Justice Brennan:*

Just one of those off the cuff joking, half-joking comments, you know, and he sort of laughed, and he said, "You know, you do that judge, and I'll send you your first \$1,000.00". So we both laughed and hung up the phone. I sat there thinking about it and thinking about the crush of applicants to the law school and so on, various law schools. I called in my law clerk, then a young man by the name of John Gibbons, and I said, "John, what do I have to do to start a law school?". He said, "I don't know". I said, "Find out".

*Mr. Lane:*

This is 1971?

*Justice Brennan:*

This is 1971, so he went and he came back in about an hour and he said, "If I'm correct, judge, as I read the law, all you need to do is to form a non-profit corporation". I said, "What do I need for a non-profit corporation?" He replied that I needed three citizens and a \$20.00 filing fee, so I said, "Well, John, there's you and I, and I'll get a third fellow". I called my friend, Louis A. Smith who was a local attorney, and I said, "Lou, I'd like to start a law school. Would you like to be on my Board of Directors?". He said sure, and I said okay.

*Mr. Lane:*

What was the law clerk's name?

*Justice Brennan:*

John Gibbons.

*Mr. Lane:*

Just like it sounds?

*Justice Brennan:*

Yes. Lou Smith agreed. I then prepared proposed articles of incorporation for a law school to be called the State College of Law, and gave it to John Gibbons to file over in the Corporation and Securities Division, and John put up the \$20.00 for the filing fee. The first thing that the lady did at the Corporation and Securities Commission when she received the articles was, seeing what had called for the creation of an educational institution was to put the application for a charter in her drawer instead of routinely stamping it and issuing the charter because she understood under the law that there were certain requirements that had to be met and that the State Department of Education would have to pass on this thing. Well, then we heard from the Department of Education. I believe at that time that John Porter was the Superintendent of Public Instruction, and the first thing they told us was that we couldn't use the name "State College of Law" because it inferred that the state had some role to play in our college, and that the word "state" was a word of art in these things and the only time you could use the word "state" in the name of a school was if, in fact, it was a state university or state college. So that was fine. I had written a letter to Stanley Beattie.

*Mr. Lane:*

How do you spell his last name?

*Justice Brennan:*

B-e-a-t-t-i-e.

*Mr. Lane:*

He was the Chairman of the Board of Law Examiners, was he?

*Justice Brennan:*

He was at one time the Chairman of the Board of Law Examiners for maybe 17 years. He was an adjunct professor of law at the University of Detroit and had taught me. I wrote to him and the other members of the Board of Law Examiners talking about my idea that we should start a law school in Lansing. I got a lovely letter back from Stanley. All of this is in a file which I thought I could find in my drawer, but I can't. My secretary has it someplace. He wrote back and said, "It's a great idea. You need \$2 million and a fine faculty". Of course, we didn't have the \$2 million or anything like it. So...well, I could truncate this story, but...

*Mr. Lane:*

Excuse me. At this time, had you seriously began to discuss this and think about who you could get to come and teach classes, or was this still sort of a...?

*Justice Brennan:*

I think at this point in time, when I first filed the articles, it was my concept. If you'd have asked me what I really was thinking about, I would have said, "Well, maybe John Fitzgerald and I and maybe a couple of other judges would rent an old house in downtown Lansing". I'd put my personal law library in it in the dining room and we would have 12 students, sort of like Leland Carr, the old Circuit Judge had down here in Lansing, and if, over a period of years, after I died, it would become a real law school, what a wonderful thing to have been part of the creation of that educational embryo, but what happened was the Michigan Department of Education appointed a committee of scholars, and the committee of scholars took a very hard line with respect to the thing.

*Mr. Lane:*

What was the purpose of this committee? To ascertain what?

*Justice Brennan:*

The purpose of the committee essentially was to ascertain, I suppose, whether our objectives were legitimate. Whether in fact what we proposed to do was legitimately an educational institution, I guess. They took the position, and I think absolutely wrong, but they took the position from the get-go that they would not approve our charter for filing unless we proposed to conduct a law school that would be accredited by the American Bar Association. Now, think about that. Here is an American state, one of the fifty states of the American union in which we have all these freedoms and so forth, freedom of religion, freedom of speech, freedom of assembly. In Michigan, we specifically refer to freedom of association...and we're being told that we cannot start a college, an educational institution unless we are approved to do so by a private

organization, much as though if you had wanted to start a church and you were told by the Michigan Church Commission that you can't start a church unless you get approval of the Council of Churches or something like that. Now, I can't conceive of any activity, short maybe of starting a church or a newspaper which is holy, of course. There's another example. Suppose you tried to start, incorporate a newspaper, and the Michigan Newspaper Commission told you you couldn't have a charter to start a newspaper in Michigan until you were approved by the Associated Press. That would be a perfect example. Well, that's what they told us. Well, I suppose I could have argued from then until doomsday about the propriety of their saying so, but what I did was I simply said, "Okay, you want an ABA approved school? We'll give you an ABA approved school", and I proceeded to get the ABA regulations and contact the American Bar Association and get an outline as to what we needed to do in order to operate a school that was approved by the American Bar Association. The first rule was that you have to have a full-time dean. You had to have six full-time faculty members, and you had to have so many books in your library, and those were the basic rules. There were a lot of other things, but those were the hard quantitative things that you had to meet. I said, "That's doable", so our prospectus began to grow every time the committee had a meeting and they put more and more demands on us, we built our prospectus and said, "Yes, we'll do that. We can do that. Yes, we'll do that", so pretty soon, within a period of months, the prospectus had now grown to be quite a substantial thing that we intended to do, and that was to create a law school that would be approved by the American Bar Association. During that whole period of time, Stanley Beattie had suggested after we were told that we couldn't use "State College of Law", he had suggested that we use the name Thomas Cooley, and that was a good one, and we amended the articles of incorporation, petition for charter to change the name. We finally reached a point where the Department of Education said, "Well, now you're looking pretty good here, but the statute says in order to get a charter that allows you to grant degrees over and above the Bachelor's degree, you need a university charter, and a university charter, under the statute, you must have at least \$1 million in capital to start a university", and I did a little research and I came back to them and I said, "Well, that's true. That's what the statute says, but the statute also says that the State Department of Education may make rules and regulations whereby they extrapolate guaranteed annual income against the \$1 million" so that if you had an income of a certain number of dollars, they would say that takes care of the \$1 million requirement, and the State Board of Education had, in fact, adopted such regulations and the regulation simply was that they would treat income at a rate of 33:1. I think that was it, so that all we had to do was to prove that we had, that we would have a guaranteed annual income of \$30,000 in order to meet the \$1 million requirement.  $\$30,000 \times 33$  would be \$1 million, okay. I said, "Well, it's very simple. We're going to have...here are the names of our applicants. We're going to have a first class of 75 students in it. They're going to pay us \$50.00/credit hour, so we're going to get so much dollars from each one of these. In the very first term, just by June, we will take in \$42,000.00, and so we're going to have a guaranteed income of substantially more than the \$30,000 from our students".

*Mr. Lane:*

You jumped ahead and got 75 applicants. How did that happen?

*Justice Brennan:*

Okay, we'll come back then to the dollars, the dollar problem. Somewhere along the line...who was the old Lansing reporter? I can see his face...

*Mr. Lane:*

Howard Rugg?

*Justice Brennan:*

No.

*Mr. Lane:*

Bill Baird?

*Justice Brennan:*

No.

*Mr. Lane:*

Was he a...

*Justice Brennan:*

Starts with a "C".

*Mr. Lane:*

You don't mean Elvie...?

*Justice Brennan:*

Kulsea.

*Mr. Lane:*

Bill Kulsea.

*Justice Brennan:*

Bill Kulsea wrote an article "Judge Brennan to Start Law School in Lansing". I have to say that amuses me because at the same time that I was in the process of starting the law school here, Michigan State University was trying to get a law school out at the university, and every time there would be a little story in the paper, "Judge Brennan to Start Law School", "Judge Brennan Files for Charter", "Judge Brennan does this"...it would be a little tiny article and every time Michigan State University was even suggested..."Study to be Made", "Study Recommended", nothing happening, no steps, no progress, just another speculative story about somebody saying it was a good idea to have a law school at Michigan State University. They'd get a headline, and we'd get these little squibby stories, but the little squibby stories began to be noticed by people, and I would get letters from people - "When you start your law school, Judge, I want to go there". Pretty soon, I had 300 letters from people, and I had a standard form that I had my secretary send out - "The Judge thanks you very much for your interest. If and when the school is started, you will be sent an application, an opportunity to apply".

*Mr. Lane:*

At this time, you're still operating out of your back pocket, so to speak?

*Justice Brennan:*

Well, I'm operating out of my office as a Justice of the Court. We have no letterhead, we have no nothing. It's just me doing this thing there, you know.

*Mr. Lane:*

Where are we in the course of calendar time, now? 1972?

*Justice Brennan:*

No, this would be 1971. In 1971, the first letter that I did...the first time anything is written on a piece of paper was my letter to the Board of Law Examiners in May, 1971, and shortly after that, I believe in the spring of 1971, I filed the Application for Charter, and the thing I'm talking about, this business with the Board of Education and the Committee of Scholars who were representatives of the other law schools in Michigan; that's who they were...two from Detroit College of Law and two from U of M and two from Wayne State plus a couple from the Board of Law Examiners...this all went through the fall and winter of 1971 and these negotiations about the \$1 million and so on, and I was telling that story. We needed to prove \$30,000 of income, and we satisfied them that we would have enough students to do that. Then they came back with one final necessity, and they said, "Okay, you've got the \$30,000. You can prove that you've got that, but there's another regulation which says you must have at least half of your guaranteed annual income paid and in cash. Now you need \$15,000 cash. No other excuses". We didn't have \$15,000 in cash. I had opened a bank account at the Michigan National Bank with a \$50.00 check of my own money, and I said to Bob Fisher who was then at the bank, "This is to start a law school with. If we never start the law school, any money in this account with go to Detroit College of Law", so I had, in fact, created a trust account for legal education, and my \$50.00 plus \$500.00 from a Detroit lawyer by the name of Hugh Ross, and I can't tell you why I got \$500.00 from Huey. He was an old friend, and I probably mentioned it to him at a cocktail party or something, and he said he would send some money and he did, and \$1,000 from the Clark Equipment Company in Buchanan, Michigan though Dick McCormick who was then the general counsel over there, so \$1,550 was all I had in the bank, and it was these three contributions. When the Board of Education said I had to have \$15,000, I called up Bud Stoddard, then the president of the Michigan National Bank, and I said, "Bud, I need \$15,000 to start a law school", and he said, "Judge, you've got it. Don't worry about it", and I shortly had, from Michigan National Bank, a letter of credit for \$15,000, and I filed the letter of credit with the Department of Education, and they felt that covered our situation in terms of having the \$15,000. In due course, a vote was taken by the State Department, Board of Education. Jim O'Neill was on it, used to be at Ford Motor Company, a Republican. Tommy Brennan was on it.

*Mr. Lane:*

Who?

*Justice Brennan:*  
Thomas J. Brennan.

*Mr. Lane:*  
Oh, yes. I remember him.

*Justice Brennan:*  
Out of Detroit, a Democrat who is now on the Court of Appeals. He was on it, and I remember that night. I came up and kind of cracked open the door and gave Tom the signal and he came out and talked to me and "How's it going?" and this and that and so forth. There were a lot of speeches made. There were some people on the Board of Education who were deathly opposed to all private education. I forget her name...Marilyn Kelly who is now a judge was one of the people who was negative...Anita Miller was the one who was absolutely death on private schools and independent schools. She was absolutely opposed to the organization of a law school, but suffice it to say we got the votes. We got the thing passed, and we got the charter issued. The charter was issued on...

*Mr. Lane:*  
Did you get five, five votes out of eight?

*Justice Brennan:*  
Whatever it was. I forget the number. Whatever we needed. The charter was issued on 6/19/72. I went to see Bob Fisher, and I said now we can use the \$15,000. He said, "Bud Stoddard didn't mean to give you \$15,000. He just meant that if you go broke and you're \$15,000 in the red, we'll make it up, but in the meantime, you have to make it on your own".

*Justice Brennan:*  
We rented this building, this upstairs of this building for \$100.00/month.

*Mr. Lane:*  
Had you begun to get static from the other schools at this point?

*Justice Brennan:*  
No, other than the static that we got from the other schools in the process of the charter being issued.

*Mr. Lane:*  
Well, was there fierce resistant at that point or?

*Justice Brennan:*  
Fairly fierce resistance. As a matter of fact, I seem to remember that one of the people on that committee was Roy Profit from the University of Michigan, and I remember it this way because there is a certain poetic justice or injustice to it...I was told that the committee had voted and I saw the report that the committee had voted against issuing a charter to Cooley Law School. The committee said absolutely not, and here was there reasoning. They said...

*Mr. Lane:*

This is the committee, not the Board, right?

*Justice Brennan:*

This is the committee of scholars appointed by Porter...I just used the name...Dick Porter.

*Mr. Lane:*

John Porter.

*Justice Brennan:*

John Porter...this was the committee of scholars and after much deliberation, etc., etc., they came back and said, "What Judge Brennan proposes to do is valid. If he does what he says he is going to do, it will be perfectly fine and legitimate. However, we don't think it's feasible. It won't work. I won't fly. It's a bumblebee. The wings aren't big enough. It won't work and therefore, we recommend that no charter be issued because it is not a feasible proposition". That's when I became angry, and I wrote a blistering letter which I cannot find. It's gone. It's lost in my archives, but I wrote a very strong letter to John Porter and I think, I recall that the thing was made public and in fact, there was something in the press about it, but I said, "It's nobody's damn business whether it is feasible or not except those of us who are involved in the enterprise. We are the ones risking our reputations and our time and our energy and our resources to create this institution. If it isn't feasible, if it won't work, it will be our failure and nobody's business but our own". "Moreover", I said, "this whole business of a committee of scholars appointed, representatives of the other law schools, to decide whether we should be allowed to exercise our constitutional right to form an educational organization, is ludicrous. It is a conflict of interest to have those people sitting in judgment. It would be like having to ask every dairy in town as to whether you can start a dairy or whatever." So Roy Profit blew his stack. Roy is a wonderful man with high integrity, etc., etc., and it would never occur to him that he might have a conflict of interest or that he might do anything wrong, and I'm sure in his whole career, nobody ever said publicly at least, that he did anything wrong, and he didn't take to it very kindly, and he wrote me a blistering letter. I can't find that either. I know it was written, but he insisted that there was nothing improper at all about the committee's decision or these deliberations or...anyway, it was against that background that we had this meeting with the Board of Education where Tommy Brennan went to work for us and O'Neill and the others backed us up and managed to get the thing passed, but it was a very tense and a very controversial thing at that point in time.

*Mr. Lane:*

Was that the high hurdle?

*Justice Brennan:*

No, not by a long shot, but that was the first hurdle, and we got by that in the spring of 1972. Then things got quiet for a period of time because after we had gotten the charter...but after all, they had said it wasn't feasible. They had said it wouldn't fly. They had said we couldn't do it, so

then they were stuck with their own predictions, and I'm sure they believed their own predictions and so, "All right, Brennan's got a charter, but he'll never start the law school. It will never work", so they sort of paid no attention to us, and during the rest of 1972, we did the things. We rented the building. We prepared the application. We contacted the 300 people who had written to us. We hired teachers and ordered law books and went out and got chairs and blackboards and other things to get started with. In January, 1973, we began with our first class. It was a night school class with 75 students. Still, hardly anyone paid any attention to us, but there was a little story in the paper that Cooley had opened and congratulations and that sort of thing. Then the opposition began, and I think the principle source of the beginning of it was a professor of law at Wayne State University whose name escapes me now. It's Maurice something.

*Mr. Lane:*  
Kelman?

*Justice Brennan:*  
Yes, K-e-l-m-a-n?

*Mr. Lane:*  
Yes.

*Justice Brennan:*  
Yes, that would be it.

*Mr. Lane:*  
Had you ever crossed his path in your earlier career?

*Justice Brennan:*  
No, except I think he may have been on the committee of scholars. I think he was one of the people on the committee of scholars, so he had some lingering annoyance over the fact that we outmaneuvered them on that, but he proceeded to write some sort of a...oh, let me back off. I don't think that happened. Still, nobody paid any attention to us in January, but in April, 1973, just three or four months after we started the school, Thomas Cooley Law School got a letter unanimously signed by all the members of the Michigan Board of Law Examiners that our school was reputable and qualified and that our graduates would be able to take the bar examination in Michigan. Now, that was a wonderful story how that came about. We had a dinner here in Lansing. We had then organized our board, and we now had a dozen or so people on the board, and we had a dinner for them at Walnut Hills Country Club, and Millard Rudd who was then the consultant to the American Bar Association who was out of the University of Texas came here to speak to us, to tell us about what we needed to do to become an ABA accredited school, and I brought in a mystery guest to speak and participate in that dinner meeting that I didn't tell my board who it was, but it was a man named Thomas M. Cooley, II, who had been dean of the University of Pittsburgh Law School and had been a faculty member there for a number of years and who was a grandson of Thomas Cooley after whom our school was named. Well, we had a wonderful evening, and we heard from Millard Rudd about all the pitfalls and the problems of getting ABA accreditation, and we heard a nice talk from Tom Cooley who told us how his grandfather would have been proud of what we were doing and all this sort of thing, and



he was just generally very encouraging. That was on a Friday night, and I think early the next morning, I put Professor Cooley back on the airplane, but I remember I had breakfast the following morning at the old Jack Tar Hotel with Stanley Beattie...and oh, also our guests invited to this thing were the members of the Board of Law Examiners, so Stan was one of them, and Doug Roche, whose father was Chairman of General Motors...I forget his father's name but Doug was a young attorney at the Dickenson, Wright law firm in Detroit.

*Mr. Lane:*  
R-o-c-h-e?

*Justice Brennan:*  
R-o-c-h-e, but his father was Chairman at General Motors. Doug is a nice man, but hadn't been on the Board of Law Examiners as long as Stanley was and wasn't the same...didn't have the same confidence that Stanley did in what we were doing, but I had prepared a resolution of the Board of Law Examiners, "Be it resolved that Thomas M. Cooley is reputable, qualified under the statutes"...etc., etc.,..."and their graduates can take the law exam", and I asked Stanley to sign it. "Certainly", he said, "no problem", and he signed it. I said, "Now, Stan, we're going to have breakfast with Doug Roche, and I'd like to see if we can get Doug to come in on this with us", so we had breakfast and a long chat and back and forth...or maybe Stanley signed it at breakfast after talking with Roche; I don't know, but anyway, I came away from that breakfast with two signatures, Doug Roche and Stanley Beattie. The next day, I drove...it was a Sunday...I drove to church at Jesu and went out to Leonard Hyman's home in Oakland County. Leonard Hyman was a third member of the Board of Law Examiners, and I brought him the original document and he signed it. I then came back to Lansing on the following day which was a Monday and went over to Stuart Dunnings' office here in downtown Lansing, and Stuart signed it. Then, in the meantime, I had called on the telephone Dick Spindle who was the fifth member of the Board of Law Examiners, and a young lawyer from Grand Rapids, and I sent my son, Tom to Grand Rapids with the original document to have Dick Spindle sign it and he did. By supper time on Monday, I had all five signatures on that resolution. That really was what started Kelman and company going because at that point in time, now it was no longer an unfeasible little experiment, store-front law school. We were here to stay. Our graduates were going to take the Michigan Bar examination, even if the ABA didn't approve us, we were an existing law school whose graduates could become lawyers. As far as I was concerned, that was the real assurance that we were off and running. Shortly after that, Kelman wrote his memorandum in which he accused me of a conflict of interest.

*Mr. Lane:*  
That's your first horn sounded on that subject, right?

*Justice Brennan:*  
Yes, other than the sort of prophetic use of the phrase "conflict of interest" coming out of my pen when I accused those people on that board of having a conflict of interest, so when the phrase came back later on and hit me in the head, well, I thought to myself, "You live by the sword, you

die by the sword", so I suppose one ought to expect it. But in any case, Kelman wrote this, and this was his theory, if you remember...his theory was that I was a Justice of the Michigan Supreme Court, and that I was using the power and prestige of my office for personal gain by creating this law school and that I had used the power and prestige of my office to lean on the members of the Board of Examiners who, in effect, work for the Supreme Court to get them to approve the law school. What's amusing about that is that it is half right because yes, I was a Justice of the Supreme Court. Whatever power and prestige and respect that office carried, I did lend to the creation of a law school. I mean, I went out front. It was Judge Brennan's law school that Judge Brennan was starting. That was why people wanted to come to school, and certainly there is no question in my mind that one of the reason Stanley Beattie and the rest of those guys signed that resolution was that former Chief Justice of the Michigan Supreme Court was one of the organizers of this law school, and there were other judges and people of prestige. Anybody we got on the board had to be somebody. We wanted people with good reputations, with good standing in the community. Why? So that their respect and standing in the community would reflect favorably on the school and would help the school, so of course, my prestige was being used to help the school, but that was no conflict of interest. It was not for personal gain. It was to accomplish something for a charitable educational institution. At the very same time, I was doing this, Bill Richardson who was the Chief Justice of the State of Hawaii was using all of his influence and power to start a law school in Hawaii which later became...

*(End of side 2, tape 6)*

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**Topic 9: Justice Brennan continues recounting the creation of Cooley Law School and issues raised by others concerning a possible conflict of interest with his occupation and his later decision to leave the court to run the law school. He then discusses its aim for practical scholarship, how it compared to other top law schools at the time, and issues with diversity**

*Justice Brennan:*

So I was just finishing the thought that in fact, not only did Chief Justice Richardson assist in the creation of the law school at the University of Hawaii, but it is now known as the William Richardson School of Law of the University of Hawaii, so the involvement of judges in legal education is historic, it's traditional, it's very proper. It is laudatory. It is not something that is bad for a judge to do.

*Mr. Lane:*

Cooley and Campbell were leading professors at the infant U of M school, weren't they?

*Justice Brennan:*

Certainly. I am fond of saying that Cooley was the first dean of University of Michigan Law

School. I don't know if that is literally true, but I think he was the first professor of the Law Department, and Kelman ought to have known better than that, but yet he made the claim.

*Mr. Lane:*

Was he carrying water for somebody other than himself?

*Justice Brennan:*

Well, I don't know. I'll say this - that there were a lot of other people to get in on the water carrying because the next thing that happened was, among other things, Stanley Beattie told me that he was one time attending a meeting of the Harvard Alumni Club in Detroit at the Detroit Athletic Club and he was there accosted by Wade McCree who later became Solicitor General of the United States and a judge of the VI Circuit Court of Appeals and all that who immediately confronted him, accosted him and wanted to know, "Stanley, how come you are approving Brennan's store front diploma mill up in Lansing?" Stanley, of course, defended what he had done. The next thing that happened was that Stanley Beattie claims that...I don't know how well you knew Stanley. He had a wonderful phony Harvard accent that he used to put on. He was just an east-side Detroit kid that grew up but he went to Harvard and learned how to talk fancy, but he would say things like, "I was summoned to Armageddon, I was summoned to Armageddon", and that was the time he was asked to come to Brighton, Michigan to lunch at the Canopy Restaurant with then Chief Justice Thomas M. Kavanagh, then dean of the University of Michigan Law School, the labor guy, St. Antoine, Ted St. Antoine and then dean of Wayne State University Law School, Don Gordon and...

*Mr. Lane:*

Don Gordon?

*Justice Brennan:*

Don Gordon, and for some reason or another, John Swainson who was then a justice of the Michigan Supreme Court, so that group of six people was gathering and had invited Stanley Beattie to meet with them to explain why he did what he did. Now, the interesting thing about all of this was from the very first moment that I even thought, even thought of starting a law school. I think it was my first letter to the Board of Law Examiners. I had shared with my colleagues on the Michigan Supreme Court. I shared with them every step of the way everything we did in terms of applying...the development of the prospectus, the application for the charter, everything we were doing, and as a matter of fact, it was very common when I would come into the conference room for a meeting of the Justices of the Court for one or more of the justices to say to me, "Well, hi, Tom, how's the law school coming?", and I would give them the latest blow-by-blow as to what was happening. I think, in fact, that some of them thought it was kind of amusing, that it was pretty hopeless and foolish and silly idea that I had and I'm sure behind my back, there was a certain amount of tongue clucking over this goofy idea of Brennan's that he was going to create a law school out of thin air, but nonetheless, there were no secrets. And to his everlasting credit, Tom Kavanagh, when this Armageddon meeting occurred, was not persuaded that he needed to anything or should do anything. He said what Brennan does on his own time is his own business. "He's not doing anything wrong and we're not going to take any position on it at all".

*Mr. Lane:*

With the apparent hope that he would become a lever to get your enterprise off the track?

*Justice Brennan:*

To get me to drop the thing, to get me out of it. To get me to leave the law school alone, you know, and just drop it, and either to stop doing it or at least, turn it over to other people and get out of it. That was the gist of it. Ted St. Antoine, the dean of the University of Michigan Law School had written me a long letter, a two page letter in which he opposed the starting of the Cooley Law School, he would always oppose it. There was a need for a paralegal institute if I wanted to train legal secretaries or legal research clerks or something like that but not a real law school, and I replied to him, and I said, "You're a nice guy, Ted, and I'm going to save your letter because some day, you'll want to eat your words and I'll serve it up with a pate foie gras at a Bar Association Meeting", or something. I forget what I said. It was some wise remark like that, so the attempt was made there to get the Court to take a position to get me to drop the enterprise. I later recall a luncheon at the Lansing City Club with Chuck Levin and Tom Kavanagh, Thomas G. Kavanagh at which Levin...

*Mr. Lane:*

Would this be now in the middle of 1973 or later?

*Justice Brennan:*

This would be probably...we're now into 1973. We're into maybe spring of 1973 at which Levin told me and Tom Kavanagh apparently supported the concept that I really ought to get out of the law school and there was trouble brewing and that I was going to take some hits. I didn't know what those hits were, and Levin was very vague as to what they were, and I didn't know how he had any knowledge as to what the hits would be. At that point, that day, as I remember as I look back on it, it was my understanding, it was my perception that what they were trying to do was to tell me on behalf of the Court that the Court was going to back me off, and I told them I didn't think so. I said, "I don't know what votes you guys are counting, but the way I count the Court, the Court isn't going to make me back off at all" and so maybe I missed the track because maybe they were trying to warn me about some other things, bad things that were going to happen. What I later learned, probably you know this better than I, was that Kelman went ultimately to the Detroit Free Press and was able to persuade somebody - I'm assuming Ludtke or someone there, that the Court was not doing what it should do, that in fact, Brennan was operating some kind of a store front illegitimate bad thing law school, though I don't know why an educational institution is ever a bad thing, but they seemed to think it was, and that it was the public sacred duty of the Detroit Free Press to call this matter to the public's attention and shoot this enterprise down. Ludtke calls in one of his best hatchet men, Remer Tyson and sends him up here to work me over. We have, first of all, a meeting at the Savoyard Club, I believe it was, down in Detroit, and something makes me think that Bruce Donaldson was present as a go between or a host or whatever, but nonetheless, we had a good long chat down there.

*Mr. Lane:*

On this subject, with...?

*Justice Brennan:*

With Remer Tyson in which Tyson asked me lots of questions and so on and very probing questions about the law school and my relationship with it.

*Mr. Lane:*

Did he set up the lunch? Did he ask you to appear down there and talk with him?

*Justice Brennan:*

I believe so, though I'm not sure that maybe there wasn't...that Donaldson was maybe an intermediary there because Donaldson was the only one I knew that belonged to that club unless Tyson did. I don't know why I went there. Something makes me think there was somebody else at the table.

*Mr. Lane:*

How do you spell that place, Savoyard?

*Justice Brennan:*

I don't know.

*Mr. Lane:*

Okay, my problem.

*Justice Brennan:*

I don't know, so then...out of that luncheon, we made kind of a tentative date that he was, Tyson was going to come to Lansing. I wanted to show him what we were doing. As a matter of fact, I remember it must have been around the spring or early summer of 1973 because we had just about that time gotten a lease on the Masonic Temple building. We were leasing the basement for our library and we had an option to buy the entire building, so he came up here. I showed him everything. I showed him our books of account. I showed him our files, anything he wanted to see. I took him through the Masonic Temple building. I was so proud of that building, what a wonderful school this is going to make, and I was showing him, "Now, here, we're going to be able to have an auditorium and here, we're going to have this nice big classrooms, and over here will be this and over here will be that", and I mean, I was just reveling in the whole thing. Of course, I was, I suppose, hopeful that we'd get some positive publicity. This was a school starting. It was a nice thing, a good thing for the community and so on. Tyson began writing his articles, and it was obviously clear to me from day one that his whole thrust was to kill us, and everything he wrote was negative. Everything he wrote was an attempt to paint me as some kind of an opportunistic character who was stealing money from young people under some false pretext that they were going to become lawyers some day and that I was just using my position as a justice of the Supreme Court, to cash in, to line my pockets and this was nothing but

Brennan's retirement fund or get-rich-quick scheme or something like that. Despite the fact that I received no salary for working. I had received not a dime of compensation for organizing the school, for anything that I had done. I came down here on Sunday and kept the books. I mean, I did it in long-hand myself. We put on the fundraiser with Raymond Burr that spring, came into town, and we raised money for the so-called Founder's Society, and we tried to raise some money. We didn't raise a lot but we got some. I was granted by the school, by the Board of Directors, an expense account of \$10,000 just to pick up for my travel and the other things I was doing, and whatever of that I didn't spend, I would have had to pay income tax on, and in that sense, you could say I suppose, I was getting \$10,000, but that was an expense account if I...I'd have to look up my income tax returns, but I guess it that I accounted for at least that much in terms of expenses that I had in connection with the law school.

*Mr. Lane:*

Did this figure in Tyson's article? Do you remember? I don't think I ever knew that he had been sent here until I read the paper...it was a Sunday, wasn't it?

*Justice Brennan:*

I don't know what day it was when it started, but it became then a series of articles, and it was one thing after another that...I mean, it was like he wouldn't let go of it. He was always coming up with a new quote from somebody or a new attempt at a revelation, etc., etc. Then, of course, he went and got a quote. He went and got a quote from Milliken in which Milliken said he thought that I should choose between either the law school or the Court, and in fact, the Detroit Free Press, I think, had written an article, an editorial demanding that I resign from the bench or from the school or something like that. I forget what it was.

*Mr. Lane:*

Where are we now? How far into the year?

*Justice Brennan:*

We're into summer of 1973, and the Detroit...the State Journal, to its everlasting credit, came to my defense and said, "Hey, what's all this about a conflict of interest. Brennan isn't doing anything wrong. We've reported every step of the way everything he did to create the law school. Nobody was complaining of the fact when he opened the law school in January. There wasn't a word about any conflict of interest or anything. We just think this is a tempest in a teapot. There is nothing to it". In some sense, in this local community, it wasn't so ill-regarded, but the Free Press kept after it. Then, at some point along the line, it became, whether because of a press conference I had or something, the fact that my son was working in my office in the Supreme Court came to light and now, not only conflict of interest but nepotism was another word that could be used against me, and that "Judge Brennan was guilty of nepotism. He had hired his son". Well, I hired myself as a gopher, at a gopher's wages, whatever it was, and candidly, that was a mistake that I was not aware of. I was not aware that there was a specific canon of ethics that judges shouldn't be guilty of nepotism, they shouldn't hire their relatives. There is. I mean, it's a no-no. You're not supposed to do that. Of course, when I realized it, I told Tom he was through, wrapped up, and so he quit. It was not anything that I was embarrassed about. I personally felt it was a good faith thing that I did but it was obviously something for which I was criticized and could be criticized.

*Mr. Lane:*

Which brings me to interrupt and remark that I saw you quoted somewhere as saying in this general broad context, "Around our house is the saying the a conflict of interest is better than no interest at all".

*Justice Brennan:*

That's right. I used that. I also used the line, "Nepotism is better than having unemployed relatives", but part of that was a certain bravado, when you're getting buffeted about by the newspapers, to, you know, laugh it off, because there isn't anything you can do about it when you're criticized in the press. Somebody said you can't fight a newspaper unless you own a newspaper and then you can fight back.

*Mr. Lane:*

I think you had probably been criticized in newspapers sometime before this.

*Justice Brennan:*

Oh, sure. I had been many times, many times with considerable impact, but nevertheless, that was a pretty serious blow in the sense that my board began getting nervous. My board began getting nervous and one of the things, I mean, people with reputations. We went after people who had reputations and public posture and so on, and even those who weren't public people, one of the reasons they were on the board was because it was such an honor to stand alongside Justice Brennan, you know. "I'm on the board with Justice Brennan. I know him by his own first name. We drink together". I mean, there is this element of importance by association. Well, if this person, this important person with whom you're associated suddenly starts getting bad press, you want to start putting some distance between yourself and him real quick, and that began to kind of surface a little bit. "Isn't there some way you can kill all this bad press?" I began to think in terms of I had to do something to resolve this thing. Well, at that point, I was running the law school, and we began to think if we could get another dean for the law school, so that...

*Mr. Lane:*

Did you then have the title "dean"?

*Justice Brennan:*

Yes, I was the dean or acting dean. I think it was dean.

*Mr. Lane:*

Were you salaried as a dean?

*Justice Brennan:*

No, I received. As I said, the only thing I was getting was \$10,000 in expenses, so we began to look around for somebody that we could put in as a dean. We had hired a man as one of the first full-time professors at the law school who had an extensive history of publication and legal books and so forth and a fairly well known name in legal circles by the name of Roger Needham,

and I didn't know him all that well. I knew he had been practicing law in a small office and was quite eager to take on a teaching position with a regular salary, and so I concluded that the best quick fix was to appoint him as dean, and then I could be Chairman of the Board, and I could back down and just be a figure in the background and take some of the heat off the law school. I, in fact, asked him if he would do it, and he said yes, and the board all agreed, and we were ready to take that action, at our meeting, I believe, in September of that year, which would have probably been about the middle of September. I'm still talking now in August, early in August. About the third week in August or second week of August, I took my son, John back to the seminary outside of Columbus, Ohio. He was in the high school seminary there, and on the way down, we stopped at a little restaurant, a Country Kitchen restaurant which was kind of a cutesy place...Dutch Kitchen, I guess it was called, a cutesy place with the cutesy little accoutrements and decorations, but when we got in there, the floors were dirty, the service was bad, the food was cold. It was just a poorly run operation and we got back in the car and we were on the road for about 50 miles and finally I turned to my wife and we had talked about how awful this restaurant was and I said, "You know, there's an example of somebody with a good idea and establishes a successful restaurant, and then they try to franchise it and go national, and they don't have the same kind of management at the branches that they do at the home office, and the thing falls apart". And then I'm thinking and thinking silently, and then finally I break the silence again and I said, "You know, that's what I'm afraid is going to happen to the law school, that they're won't be somebody there who knows how to run it the way I foresee it being run and it will fail. I think my duty is clear.

*Justice Brennan:*

I am going to leave the Court and run the law school". She was a little concerned about it since I still had a year to go on my term and probably a pretty certain re-election as a justice of the Court, so it would be a long-term safe job that I would be giving up to throw in with a neophyte institution. Anyway, then...and you know the story from there. We called a press conference when we got back, late in August, and announced...

*Mr. Lane:*

Is it that early in the year, August?

*Justice Brennan:*

In August, yes, that I was going to leave the Court at the end of the year. I wasn't leaving the Court then, but I was going to leave the Court at the end of the year and January 1st, I would become the full time dean of the law school.

*Mr. Lane:*

I remember vividly how you had those tables set up and ...

*Justice Brennan:*

And the whole family there...



*Mr. Lane:*

Yes, and played the kids in all dressed up, just had a bath, and I need to bring something up here, though. You remember how we started the recital of this whole chapter of the school and how it began. Now, you, at no point yet, really expressed in clear, firm terms the truly serious concept that you were...to my view anyway, that you came to have or that underlaid the whole business. You remember how at the start somebody called you up and "What the hell, I'll start a law school of my own".

*Justice Brennan:*

It sounds kind of flip, doesn't it. It sounds almost cavalier.

*Mr. Lane:*

Well, it sounded like a snappy comeback, like you really didn't...

*Justice Brennan:*

Well, a couple of things you have to understand: 1) I had wanted to teach law when I left law school. I wrote to the University of Chicago about getting a job down there, and they didn't take me seriously. I had taught at the University of Detroit, not in the law school, but in the undergraduate school, and I taught a course called the "American Constitution", and I enjoyed teaching, and really, as I said, my concept as I began to flush it out in early 1971 was not to have a great big full blown law school but really to have a little evening part-time, makeshift operation which would be, you know, a few students sitting at the feet of Socrates. Here, you're going to have some justices of the Supreme Court who were going to have a very one-on-one or one-on-five or one-on-twelve relationship with some people who wanted to study law, and frankly, I thought that was great. It was very practically oriented. They were talking to people who were in the real world of judging and practicing law and so on and they were passing the torch of knowledge to the next generation in a very practical sort of setting.

*Mr. Lane:*

There came to be, though, as the events unfolded, some dialogue that you had, as I recall, with St. Antoine wherein the word "elitist" figured very prominently and you were going to start a school for, as I recall your phrase, juryman lawyers, the guy that could go up about the storefront in Ironwood and carry on a law practice, if that was the way the cards fell.

*Justice Brennan:*

Precisely so, and I mean...but the articulation of the dream, the articulation of the mission of the school was really left for the time that he began to develop this prospectus because that was one of things they asked, "What is your mission?". Well, I said, "Isn't it enough of a mission to have a law school, a real law school?". I mean, I went to law school. Nobody told me what the mission of the law school was other than to educate people to become lawyers. Does it need more of a definition of mission than that? How much do you have to say about it? As time rolled around, the concept that it was a populist law school, that it was a law school dedicated to practical scholarship in the law; those things became the articulation of a mission which really was sort of unspoken at the outset. It was more a reflection of the kinds of people we got involved, and what their attitude about learning and education was, more than any stated mission on which everyone signed off and said, "Yes, I agree with that statement of the purpose and that I will do".

Our purposes under the corporate charter were simply to operate a law school, to be fully accredited and those kinds of words. We didn't talk about it as being populace as opposed to elitist or whatever else, and I suppose...not I suppose, I can tell you flat out, there have been people come to Cooley Law School who are as elitist as anyone in the world. I mean, we don't run a personality check on these folks, and we don't ask them whether they agree with our philosophy about whether you are a populist vs. an elitist. We had one guy in here...oh, he was maybe somewhat populist, but he was a member of the Mensa Society, okay, so he was intellectual with this big brain power, whatever kind of numbers you have to blow on the IQ to be a member of the Mensa Society, and he was one of our students. He sent me a letter. He wanted to get involved in the credit union here, wanted to be on the Board of Directors on the credit union. He gave me his background which was good. He had been a banker before he came to law school and so on, but he mentions in there that he was a former member of the Mensa Society, so when I interviewed him, I said, "Well, Brian, I see here you're a former member of the Mensa Society. What happened? Did you get dumber? Did you lose your ability..."

*Mr. Lane:*  
Flunk out?

*Justice Brennan:*

Yes, "Did you flunk out? That's hard to do." He laughed and he said, "No, as a matter of fact, I sort of gave up on those people. They're all either psychiatrists or cab drivers", so it was a curious way. No, I...the philosophy as we developed it really was, first of all a reflection of how those of us who were involved in the law school felt about legal education and it was a philosophy that grew out of the response that we had from different people. I mean, the people themselves who came here began to define the institution, and our definition of the institution drew from the people who were here, the Roger Lanes, the old Detroit newspaper, Free Press guy who goes to law school in his senior years, the gal, Jacqueline...I can't think of her last name...Jackie...one of the very first classes...lived across the street from Wayne State University's Law School, and came up here on the Greyhound Bus every day, one and a half up and one and a half back. She couldn't get into Wayne State University Law School, but this place gave her a chance to go to law school, and she was a good student, and she has done well, but basically what we were doing was to offer people a chance to go to law school who couldn't otherwise go. The reasons they couldn't otherwise go were myriad, because they were stuck in Lansing and couldn't commute all the way to Detroit was one of the main reasons in the early times. We had a lot of people with high academic credentials who were just here in Lansing and always wanted to go to law school. We also had people who had applied to every law school in the state or around the midwest who couldn't get in and came to us, and were capable of doing the work.

*Mr. Lane:*

Excuse me for interrupting, but did you become very acutely aware and disapproving of the practice that particularly at the University of Michigan Law School, where I think you recited some figures not so long ago where if there are three or four hundred slots for new students,

there are thousands of applicants and those applicants are screened pretty much in quite a rigid way in terms of their scores on the aptitude test, or do I have it not quite right? Do you see what I mean?

*Justice Brennan:*

No, I think there's no question that you have it right that that's what they do.

*Mr. Lane:*

And so here's a person of great merit. Let's take a minority guy that was sort of held back for a while and he's bursting out into the clear in an intellectual way and he wants to go. He can't hit 800 or whatever the heck it is on that test, therefore, he is shut out. My example might not be too good, but what do you have to say about that?

*Justice Brennan:*

Well, your example is a good one because it is not just the University of Michigan, although the University of Michigan is a top school in the country. When they name the top law school in America, University of Michigan is generally among the top ten that are mentioned. How do you get to be top? Well, the definition of a law school generally comes from three things: your physical plant which includes library, buildings and computers and whatever else you have that is impressive, you know. That's sort of the least important prestige factor, but that is a factor. Your faculty which is in some circles regarded as a very important prestige factor. Do you have faculty who are well-known, who are well-regarded, who are the man who wrote the book type of thing. Are they being tapped all the time by Washington to go down there and be advisors and take leave of absence from your faculty to be the head honcho or whatever. Are they being drawn from former clerks of the United States Supreme Court and all that stuff, and that's probably a secondary though very important basis on which "prestige" of law schools is established, but in the law school world, to the extent that there is a pecking order of better schools, the key factor is always what are your LSAT scores.

*Mr. Lane:*

Is that true, still true?

*Justice Brennan:*

Yes, absolutely. Absolutely. As a matter of fact, the operative buzz word in educational circles is how selective are you. They don't use the word "elitist", how selective are you, and a more selective school is the harder school to get into. If a school is impossible to get into, it's a wonderful school. You know, the less chance you have of getting educated at that institution, the better that institution must be, the less chance you have of getting into is. So only the top students, only the most brilliant students, only those who least need to be taught anything are admitted to your institution. That makes you the finest educational institution in the world. Now, I don't understand that. It's like having a hospital that only takes the healthiest people. This is a wonderful hospital because nobody ever dies in it and nobody ever dies in it because nobody ever comes there who is sick. Everybody who goes there are people who are in wonderful good health and say, "I go to Mayo Clinic", but then, of course, I had to pass many physicals locally before I ever got to Mayo Clinic because they had to know that I was perfectly clear before I ever got there. I mean, that, to me, is a ludicrous measure, but it is the standard measure of

excellence in educational institutions. How smart are your kids? How smart are your kids? If they're the smartest kids in the world, then you've got the best school. Now, given that, the schools, for whatever reason, I suppose for a combination of things, all aspire to be that, to be the best by that definition and therefore, what you do when you go to fill your class, you rank all of your applicants according to the academic criteria, which in this case in the LSAT score or some combination of LSAT and undergraduate grade point average, typically, that's what you're going to do creating an index score. You rank them according to that index, and then you go down the index as far as you have to go to fill up your class.

*Mr. Lane:*

Maybe in the case of the University of Michigan, 11% of the way or something like that?

*Justice Brennan:*

It's never any further than that. In the case of the University of Michigan, let's take on LSAT scores which now are between 10 and 49, they won't take anybody less than a 40 and probably they're only just reaching down to get maybe the last few people to get a 41 or a 40. Everybody else is above that probably. Now, that's great, but one of the things that happens when you do that is you almost certainly assure that your entire class is going to be Caucasian or Oriental. I mean, there aren't going to be many Blacks in that class or very few by the numbers. There are going to be very few ethnic Italians, the children of the artisans, the children of the police officers, the people who are the first college graduate in their family, the Poles, the Lithuanians, people who are second or third generation here in the country. You're going to have a lot of Jewish people, a lot of them because they're going to be at the top of the list, so that's the kind of student body you're going to have.

*Mr. Lane:*

You're aware of all of this very keenly, and you were...

*Justice Brennan:*

I've been in this business for 20 years. I've seen it. I've read, you know...I've studied. I've seen statistics and what I'm giving you is just the assimilation of a lifetime of doing and being involved in this business, and maybe I'm just spitting out a lot of prejudices that I've developed through the years, but I think the statistics would bear out what I'm trying to tell you, so the problem, then, is that if all you're going to do is go down so far in the barrel, you're going to have a selective student body. It is not going to be a diverse student body. It's going to self-select according to these standards. So, now what are you going to do? You've got to have minorities because you're denying the opportunity for education to minorities so what do they do? They dip down into the barrel for only particular people. They're going to run down from an index of 80 to an index to 40 or 50 and it's only going to be for a Black guy. It's only going to be for a Hispanic. It's not going to be for a white guy. Now, what's happening here? You take some kid whose academic credentials don't hold up to the rest of the class, and you bring him in because he was an Eagle Scout and because he worked hard and because he was an athlete or whatever else, he showed leadership...you fuzz it all over with all of these artificial criteria that are not the criteria

that you would normally use to select people, but you build a case that this person is acceptable because of all these special things, and then you bring him in. Now, he's not going to do well in school. He can't keep up, so you don't want to flunk him out because now you're only flunking out the Black kids and now your academic attrition becomes discriminatory because it's always the black kids that flunk out, so you get him a tutor. Now the Black kid comes and he sits in the dean's office and he carries a sign, and he says, "It's unfair. You make me go to tutorial classes. Nobody else has to go to tutorial classes. It's racially discriminatory that I have to go to the tutorial classes", so now you don't make him go to tutorial classes, but you don't want to flunk him, so you give him a little extra consideration on the examination. You'll let him write an extra paper. You'll let him have whatever else, you get subjective about your grading system. Now, you end up giving two kinds of diplomas on the stage at graduation, the regular diplomas which have been earned according to the standards of the school, academic standard, and the special diplomas that are being awarded to those special students that you've given a special admission and a special academic standard to as they go through school. So now, what have you got? You've got a graduate out there and everybody knows there are two kinds of diplomas. The trick is can you guess which one, which kind of a diploma this graduate of the University of Michigan who is applying for a job at your law firm, which kind of a diploma does he have, first-class or second-class? You've got only one thing to go on, the color of his skin, and that's the guess you make. This guy probably isn't as well educated as that guy because this guy has a black skin. So you perpetuate prejudice. You perpetuated discrimination and you have demeaned this individual who could easily have gone to a school with white kids who had a 50 index or a 51 index who were no smarter than he was, who would have participated in the class. He would have fought for grades and competed for grades against those other kids. He would have gotten a first class diploma, and he would have gone out and been able to do with it just like the other kid next to him. My argument is that the elitist system has created more problems that it has solved, and the problem as far as I'm concerned is the elitist system. It's the idea that educational institutions are only for the top selected people. Now, I suppose Harvard, the University of Chicago, the private schools, if they want to start a private school and only educate the Mensa Society, that's their business. It's private dollars, private time and energy - let them do it, but certainly public schools shouldn't do it, and certainly there ought to be some private schools like Cooley whose mission it is to have an open door and to teach everybody who wants to come, everybody who has got any reasonable chance of getting through. Anyway, this is not history...

*Mr. Lane:*

The last thing, the last couple of sentences, though, are the affirmative statement of what you are doing with respect to Cooley against this background of what was happening elsewhere, and you, in effect, if I understand it just in a summary fashion, opened the doors, give these birds a chance that were not in the top 11% when they applied at the University of Michigan, and they're good solid law school material.

*Justice Brennan:*

...were journeymen, yeoman, whatever you want to call it. It is interesting, though, among the people we get who come in here, maybe without the top credentials, are people who do very,

very well in law school, who pass the Bar examination on the first shot. You know, in the history of Cooley Law School, anybody who graduates from around here with a "B" average or better has like a 99.9% chance of passing the Bar examination on the first try.

*Mr. Lane:*

A "B" average is something to get, though, in your school.

*Justice Brennan:*

Okay, but that's likely that they didn't have a "B" average in undergraduate school, so what makes them think they're going to have a "B" average in law school. It's harder than undergraduate. But, here's the story I want to tell you about the elitist. I wrote a letter to Chief Justice Berger when he was Chief Justice and I said, "Mr. Chief Justice, you ought to have a national competitive examination for U.S. Supreme Court clerkships and have everybody have a chance to be a clerk in the Supreme Court, and if they do well on the examination, fine, then give them an interview, and it's an honor just to be on the list". So he writes me back and he says, "Well, I've always selected my law clerks by having a committee of my former law clerks do the screening and give me...". Well, naturally, they were getting people from their own colleges and their own law schools. I then contacted this man who was the PR man for the Supreme Court, and I said, "In the last so many years, how many clerks have you had? What schools did they go to?", and he gave me the last 15 or 20 years, and 75% of the clerks in the United States Supreme Court came from eight law schools. I wrote back to the Chief Justice, and said, "I'm sorry to bother you, Mr. Chief Justice, but these are the statistics your own people give me that 75% of the clerks came from eight law schools. It cannot be that eight out of 175 law schools in America are educating 75% of the top legal quality, and the Court is being denied the services of these top people because of the system of selection that you have, so I urge you to consider the competitive examination", and blah, blah, blah.

*Mr. Lane:*

Did you get a response?

*Justice Brennan:*

Two months, it took him, or three months to answer to me, and he finally came back with some double talk which said he was going to appoint a committee and even though it wasn't probably completely fair and logical, it was still traditional, and they were going to continue to do things the way they had done.

*(End of side 1, tape 7)*

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**Topic 10: Justice Brennan talks about case regarding the apportionment of the legislature in the 1970s, having his portrait presented to the Supreme Court in 1980, and his activities since leaving the court in 1973**

*Mr. Lane:*

Now, we're going to another side. This is side B of tape 7, Justice Thomas E. Brennan and Roger Lane with him in his office, and today is February 14, 1991, and we're nearing the end of the audio taping of Judge Brennan. How about apportionment. We haven't had anything to do with apportionment yet.

*Justice Brennan:*

Okay, I just got the case out, Roger, to sort of refresh my recollection, and the case I participated in is in 387Mich442. It was In Re the apportionment of the legislature. To set the scene, the situation was that the constitution of the state of Michigan established an eight member apportionment commission consisting of four Democrats and four Republicans. I'm not sure whether they were chosen by their respective parties or whether they were nominated by the governor...

*Mr. Lane:*

By the parties.

*Justice Brennan:*

By the parties? Well, in any case, they represented the two parties, two major political parties, and their job was to come up with a new map of the state of Michigan showing the senatorial and legislative districts for the state of Michigan. Every ten years when the census was taken, the commission met and every ten years, the commission managed to stalemate predictably because of the split between four Republicans and four Democrats in the membership of the commission. They did so in 1972. Under the constitution, if the commission was unable to agree on an apportionment plan, the members of the commission who had drafted proposed apportionment plans would take their plans to the Supreme Court and the Supreme Court, under the constitution, would decide which of those plans most nearly conformed to the constitutional requirements. What happened was that the Republicans and the Democrats both submitted plans to the Michigan Supreme Court. The Republican plan had a smaller ratio of...a small divergence within the population of each of the districts than did the Democratic plan. The way these things were presented, the ratio was spelled out as 1.003 or 1.005 or 1.007:1 so in effect, the largest district would be 3 or 5 or 9:1/10,000 larger than the smallest district or maybe the average. I forget how that was calculated, but it was a very minimal standard. We, the Court, during the course of the pendency of the litigation that came to us under the constitution, allowed the Democratic side of the apportionment commission to amend their plan and submit a new plan which had a still lower ratio of divergence among the population of the districts.

*Mr. Lane:*

This happened, as I understand correctly, after the formal declaration of deadlock that triggered the Court's role?

*Justice Brennan:*

Exactly. It happened after the case had already been brought to the Court, and if I am not mistaken, it was some sort of an order allowing or permitting additional time or holding the case in abeyance while this was accomplished. The Democrats then came in with a report that had, in fact, a smaller numerical divergence factor. The Republicans then asked for time to revise their

bid, their program downward, I suppose, to see if they couldn't produce something that was even closer to dead even. The Court refused to give the Republicans time to do that. Having then done so, the Court took under consideration the case and heard the arguments of counsel and concluded that our duty as a Court to decide which plan most nearly conformed to the constitution was a very mechanical duty. It was simply to look at the divergence ratios and pick the lowest one.

*Mr. Lane:*

What did you call that? I think you had a phrase for that. Doctrine of relative, was it?

*Justice Brennan:*

Well, I had a phrase for the concept, what I called "new-born" constitutional concept of relative constitutionality because the constitution of 1963 said that the Supreme Court shall chose the plan which most nearly complies with the constitution. The Supreme Court shall determine which plan complies most accurately with the constitutional requirements. That's what the constitution said, and I said in my dissenting opinion that "the constitution seems to contemplate that we apply some new-born standard of relative constitutionality". I went on to say, "I never heard of one law being more constitutional than another. Constitutionality is like pregnancy. Either you is or you ain't". That was the comment about relative constitutionality. But then I went on to say, "Nevertheless, that's our job. That's what the constitution tells the Court to do, so we have to try to do it", and then I conclude, "Well, if you're going to pick the lowest bidder, the lowest population ratio, that's at least an objective standard that every one can understand. It is easy to apply. It will work". I pointed out that it doesn't mean anything. It literally doesn't mean anything because the ratio is so tiny, so minuscule that either the census itself isn't that accurate or even if the census were that accurate, just the normal change in people's residences that would occur in a matter of weeks and certainly months between the taking of the census...we were dealing with the 1970 census and this law suit was in 1972, so two years had gone by. There was no question at all but that the districts as they existed out there in reality on the real estate in the state of Michigan, the people living in those districts were different from the numbers of people who were in the census in 1970, certainly by substantial numbers as opposed to these tiny, tiny fractional differences, so it had no substantive reality to it, but it was still, if you're going to play games, it was a game you could play that would be fair to everybody or it could be fair to everybody. Then I pointed out, "Okay, if what you're going to do is simply let the contract to the lowest bidder, you're going to simply allow the political party that comes in with the lowest population ratio to set the districts, then at least you ought to take sealed bids. You ought to give both sides a chance to give it their best shot and go from there". I suggested that if, in fact, they both came out with a perfect plan so that there was a ratio of 1:1, dead even, then you would then refer to the number of political units of government that were divided in the apportionment plan and use that factor to break the tie. What I was looking for, quite frankly, was a way for the Court to be an impartial arbitrar between the two divergent forces on that commission and simply to set some rules that applied to both of them that we could enforce impartially that would help them to get their job done and function on behalf of the people in the state of Michigan. Subsequent to that decision and in years since then, I developed a rather intricate...not



really intricate but comprehensive approach to the apportionment problem which built on what I said in my dissenting opinion. In other words, instead of a process whereby both parties would make a complete apportionment plan and then submit them in sealed bids, I had come up with an idea that a legislative districting map could be drawn seriadim in an adversary proceeding so that you...like you play a chess game...you could have one party draw the first district, then the other party draw the next district, and pass the map back and forth between the two parties with certain time limits like you would in an international chess match, and certain parameters of legality that would be established by the Court. In other words, the Court could say that the ratio shall not be more than 1:1.009 or 1.006 or whatever you wanted to do, and that the district must be contiguous to the district already on the map, or that the district cannot leave an island that is surrounded, all various little rules that you would develop. You could even have a gerrymander rule that would prohibit a district from being too long or skinny or whatever, and ultimately achieve a map which was drawn through the adversary process where the Court's function would be to be the honest cop between the two political parties. That never caught on, and I'll tell you why, I think, in my judgment. The drive for political power and the desire to control the machinery of government is so intense and overpowering that it sweeps almost all attempts to be non-partisan out of the way. You just don't have Republicans or Democrats who want to have a fair system of apportionment. Active Republicans want the state apportioned to benefit the Republicans and active Democrats want the state apportioned to benefit the Democrats. You can talk until you're blue in the face trying to get them to come together on a system which is fair to both. They don't want fairness. They want to win, and unfortunately, that win mentality infects the way they feel about the Court, and so they conclude that the Court's role as the arbitrator or the ultimate authority in the area of apportionment, their conclusion was that the Court was thrust into the Republican vs. Democrat milieu and they went out and elected people, nominated people to run for the Supreme Court and they gave money to assist people to get elected to the Supreme Court on the basis that they wanted to have votes on the Supreme Court when it came to apportionment because that decision would establish control of the legislature for the next ten years, and you saw the Democratic nominated members of the Court vote for the Democratic plan, not only vote for the Democratic plan but in my judgment, prostitute themselves by giving the Democrats one last chance to revise their plan before they heard the case. The Republicans weren't a whole lot better in terms of their chauvinism because the sequel to this case I cited in 387Mich was that the Republicans, having lost in the State Supreme Court, then went to the Federal Court in Detroit, and I think maybe Jon Feikens got the case but it went to a Federal District Court judge in Detroit, and oh...I'm sorry...I'm getting ahead of myself...before they went to the Federal Court, they came back to our Court with a petition to throw the whole commission out, with a petition to determine that the commission was unconstitutional and you'll remember that that argument ultimately carried the day in the 1980's.

*Mr. Lane:*

It had one vote in that book that you've got open in front of you, and that was from T. G. Kavanagh, and he paid dearly for it, remember, four years later.

*Justice Brennan:*

Well, to a degree, I think, yes, although I don't think that was the real thing that did it.

*Mr. Lane:*

No, but he did take the position in that case.

*Justice Brennan:*

Let me just review that for a moment.

*Mr. Lane:*

...that the commission was unconstitutional.

*Justice Brennan:*

Yes, he concluded...he said, "We have no proper function at all in this matter..."

*Mr. Lane:*

That was pretty big heresy.

*Justice Brennan:*

But he quoted Justice Souris who said in the 1964 case, "Having concluded that the apportionment and districting provisions for both the Senate and the House were violative of the 14th amendment, it was my conclusion that Section 6, Article IV which established the commission, likewise had to be held void. Section 6 in my view is so dependent upon the continuing validity of the preceding sections by which the commission's duties were specified and expressly limited that it could not survive alone", so Souris had written in the 1964 case that the commission should be thrown out. T.G. Kavanagh agreed with him in 1972, so that opinion had been expressed at least on a couple of different occasions and ultimately, as I say, carried the day, but after this decision was expressed and...now, let's just flip back through the opinion for a half a moment and see where we were...after that opinion was expressed...we're talking May of 1972,...let's see...T.M. Kavanagh, as Chief Justice had written the majority opinion. Adams, Swainson and Williams concurred, so he had four votes. Okay...the Republicans came in after this case and wanted a re-hearing and wanted it on the basis that the commission should be thrown out. I don't know who they thought was going to change his mind unless they felt that if it got to be 3:4 that somebody would, I don't know.

*Mr. Lane:*

Adams was a short-timer, then, wasn't he? He only had a few months to go in his term...

*Justice Brennan:*

Yes. He had the rest of the year. It was May, so he had the rest of that year. But in any case, they came back and they wanted the re-hearing and they wanted to get it on the basis that the commission ought to be thrown out. I voted to deny the re-hearing.

*Mr. Lane:*

You paid for that, didn't you? Didn't you...weren't you, when you ran subsequently in the primary...

*Justice Brennan:*

For the United States Senate in 1976...

*Mr. Lane:*

Weren't you denounced by some of your...?

*Justice Brennan:*

I was denounced, among others, by a man by the name of Keith Molin who was a functionary of Governor Milliken and it was the first time it had ever dawned on me that there were people in the Republican party who thought I had done something bad by voting my conscience and my view of the law in a case, and I was pretty naive, I guess, not to realize that as far as the politicians were concerned, there is no such thing as judicial decisions. There are only favorable and unfavorable decisions as far as their interests are concerned.

*Mr. Lane:*

Specifically in this subject area, right?

*Justice Brennan:*

Oh, yes, and this thing...this was not even regarded as a judicial matter. This was, you know, who are you and where are you coming from? So, that speck ogre was raised and talked about. I don't know that it made any difference...when you say I paid for it, I don't know that it made any difference in terms of support I got from the Republicans. It might have. That's very possible, I suppose, but in any case, I made the decision that I did. They later went to the Federal District Court, and the feds also denied their petition.

*Mr. Lane:*

Was it a split vote? Do you remember? Three judge court, 2:1?

*Justice Brennan:*

Out of Detroit? Yes, they must have gone to Cincinnati, and it may have been a split vote down there.

*Mr. Lane:*

I think Ted Swift handled that, didn't he? I seem to remember something about that.

*Justice Brennan:*

It's possible. I don't know whether he was...but anyway, that's the story with apportionment. It's never a pleasant bit of business because it is so political and it always leaves scars in terms of the Court and the relationship among the justices and so forth. Yes, I see that the Foster Swift firm represented some of the commissioners. It doesn't say Ted Swift...Peter F. McNenly was counsel on the record, anyway, in the arguments in our Court. Anyway, that was that. What else?

*Mr. Lane:*

Well, just one last word on apportionment. Now, in 1982...this is getting beyond your...

*Justice Brennan:*

Can we turn it off just for a...

*(interruption in taping)*

*Mr. Lane:*

Well, I'm going to withdraw the suggestion about the 1982 aspects or the 1992 of apportionment...

*Justice Brennan:*

Well, in I believe it was July of 1980, a portrait of me was presented to the Michigan Supreme Court, and on that occasion, there were a number of speakers. I've embarrassed the president of the State Bar of Michigan spoke on behalf of the Bar. Lieutenant Governor Brickley spoke on behalf of the State of Michigan, I guess, and brought the greetings of Governor Bill Milliken. My son, Thomas E. Brennan, Jr. spoke on behalf of the family, my family, introduced them and all. Then Judge Richard M. Maher who was then a judge of the Court of Appeals was introduced, and he spoke about the years that he and I were in law practice together with several other people, and then Mike Devine who was my administrative assistant when I was Chief Justice spoke about those years and his recollections of some of the things that we had done and accomplished, and thereafter, Louis A. Smith was introduced, and he spoke about the years that I was associated with the Thomas Cooley Law School. Finally, at the conclusion of that, the portrait was unveiled and Justice Ryan commented on behalf of the Court with respect to the portrait and my being there, and finally, I was given an opportunity to say a few words on the record. I made the comment that I had never known of an Irish wake where the corpse got up and spoke, and I also said that "I confess that I was somewhat amused to fancy myself to be the youngest ghost to haunt the bench and Bar". I had been called the youngest Chief Justice in the history of the state and so forth, so I found myself being the youngest ghost to haunt the bench and Bar. I also made the comment that it was particularly flattering to realize that I was the only living former Chief Justice whose picture was being hung in the Court chambers. I had presided at the last session of the Supreme Court in the old Capitol on the third floor, and I also presided as Chief Justice in the first session in the Supreme Court in its present quarters in the law building, so I had, as I mentioned, a special affinity for that place. I concluded my comments with a paragraph that I have read and re-read a number of times and thought so often how well it expresses by feelings about my own life. You have to remember that I was 31 when I was elected to the Common Pleas Court. I was 33 when I was appointed to the Circuit Court. I was 37 when I was elected to the Supreme Court, 39 when I was made Chief Justice, and, well, only 43, I guess or 44 when I resigned from the Court to start the law school, and when I was elected to the Supreme Court at the age of 37, my friend Dick Smith from Bay City called me up the night of the election and he said, "Well, now remember, Tommy, my boy, early ripe, early rot", and I thought about that. But anyway, against that background of having risen to what is, I suppose the top of our profession in this state, Chief Justice of the Supreme Court at the tender

age of 39, I said this, "I cannot sit down without a public acknowledgement of my gratitude to almighty God for the life he has given me.

*Justice Brennan:*

To have lived in the United States of America in the middle of the 20th century, of all nations and of all times, the most hospitable to freedom, progress and human happiness, to have been born and to have resided in the state of Michigan, of all places on this earth, the most beautiful and bountiful, inhabited by good and decent people, alive with activity and beaming with hope and opportunity, to have been blessed with loving parents, a devoted wife and children, caring teachers, stimulating colleagues, trusted counselors and loyal friends, to have been privileged to read the law, that jealous mistress of the intellect which teases the mind with truths half-revealed, logic tempered by experience, and the promise of touching from time to fleeting time the incomprehensible form of justice itself, to have enjoyed the incomparable gift of time in such abundance of event-filled days and hours that I can stand here today, listening to the echo of my own footsteps. These unearned blessings have come at the hand of a generous Creator, not through any merit of mine but through his grace and to suit his purpose, which it shall ever be my goal to serve as best I can". You know, I think sometimes as I re-read that, and try to give it the feeling, the sense of involvement that I had at the time I wrote it, that it would do me well to read that every day. It would do me well to remind myself of how blessed I am and how happy I ought to be, content I ought to be, but it is funny. I've gone on to do a lot of different things, started the law school. I have been busy here now for 17 - 18 years. In the process, I had lots of flirtations with different things. I was involved with a committee for constitutional reform, and I chased that butterfly for a while. I ran for the United States Senate. I ran for Lieutenant Governor which was the craziest thing I ever did, after having achieved what I had achieved, to kind of go back...I might as well have run for dog catcher if you think about it, but I've, in the last few years, gotten involved in computers, of all crazy things, and have learned a lot about the whole business of electronic communication and what those machines are capable of doing. One of the things I did with the computer just as sort of fun was I created a little program which I call mood check and the mood check is a thing that I did at first just sort of to tease my wife a little bit, but I listed a whole bunch of words, every one having either a positive or negative connotation, and I tried to set them in pairs, so I had on and off, up and down, in and out, happy and unhappy, fat and thin, pressured and relaxed...all of these different words, and then I scattered them so that the opposites did not pair up as you saw the list, and then I created this program which asks the reader and operator of the computer to punch a key representing 0 - 9 as you feel that word describes your mood at the moment, so if you see the word "unhappy" and unhappy describes exactly the way you feel, you give it a 9. If it doesn't describe the way you feel at all, you give it a 0. If you're a little unhappy, you might give it a 2 or a 3. If you're not very unhappy at all, you might give it a 7 or 8, and just do it quickly and sort of responsively as these words flash on the screen, and then I have a calculation built into the computer program which will take all of your positive responses and divide them into the difference between your positive responses and your negative responses so that if every response you make is a positive response... let's say you have...and it doesn't make any difference whether you score it 3 or 9, what really matters is whether...is the ratio of the difference to the total, so if, for example, your positive points total

180 and the difference between your negative points and your positive points is also 180, so you gave a 0 to every negative word, you would get 100%, so you're feeling, your mood is 100%. You couldn't feel better. You feel great.

*Mr. Lane:*  
Top of the world.

*Justice Brennan:*

Top of the world, but every time you shade it, every time you say you're a little unhappy or a little this or a little that, it comes down. I have run this thing with some of our employees around the school here. I've run it with members of my family, and it is fascinating to see what kind of numbers people get. The happiest people, the most positive, get the job done, do it cheerfully, agreeable, etc. sort of folks, my secretary is one for example, had a 93% or 91%. Stephanie Greg, our Director of Admissions who is a very positive, very warm, outgoing person which was one of the things that we wanted in the Admissions Office, somebody who made an excellent, friendly impression on people...she got a 93%. My daughter-in-law, 91% or 92%, Tom's wife. She is one of these bubbly people, always get the job done, can do, never too busy to run an errand for you or do whatever you ask her to do and so forth. On the other hand, some people who work here have gotten some very unhappy scores. There is a lady here whose husband is in prison, who has an elderly invalid mother living with her, dependent upon her, teenager daughter who is pregnant, a teenage son who is kind of unemployed and so forth and dependent on her. She is deeply in debt, etc. She took the test, and did so poorly on it that she didn't even leave it on the machine. She took it off the computer. Reputedly, I heard from other people because this wasn't an exercise that the employees were required to do. We were just sort of doing it for fun, but I heard from other people that her score was a -25%, so she really was unhappy, but other people - 59% here, 28% here, and different scores, and as I began to match them up, I said, "Well, yes, some of these folks aren't too happy". My score, and it doesn't seem to make any difference what my mood is or how I try to fool the machine, if I get into it and I take the thing with any sort of integrity at all, my score will invariably be between 65% and 70%. I am about 2/3's happy. Even today, I am about 2/3's happy, and I look at the other people around the office and in the family who score about as I do, and my sense of it is that there's a little antsiness, fidgetiness about us, that there is more to be done...there is something going on. Sometimes I'll be driving with my wife and tapping my hands on the steering wheel of the car, and she says, "Can't you just relax? Calm down", because my mind is going a million miles an hour and I'm thinking...I'm a person who doesn't sleep very well. Like last night, I was probably awake off and on two or three hours during the course of an eight hour period in bed, but I'll wake and sleep fitfully and then I will be thinking of things during the night, sometimes get up and write speeches or letters during the night or make "do" lists for the next day, things that I want to do to remind myself, and when I see a list of words and I see the word "unsatisfied", I know that unsatisfied is a negative word. I put it in there as a negative word. You're not supposed to be unsatisfied. You're supposed to be satisfied. If you're happy, you're satisfied. If you're unhappy, you're unsatisfied. Every time I see that word, I say to myself, "Yes, I'm unsatisfied about a lot of things, and I don't think that's so bad to be unsatisfied. I'm going to give myself a 4 or a 6, you

know". I think the sense of being incomplete, unfinished, sort of antsy...there is work to be done, there is something to be accomplished, not a bad sense, and really in terms of real human happiness, I think it probably is an important factor. You know, without backing away from one whit or comma of what I said to the Court in 1980, that I am thankful to the Lord for all of the blessings I've had, and I think one of the blessings is to be a little unsatisfied

*Mr. Lane:*

This marks the end of the Brennan tapes, particularly tape 7B.

#### APPENDIX

**Editor's Note:** The dialogues entitled "Interview with Thomas Brennan, October 3, 1990," are appended to Volume 2 of the Historical Society transcripts, mainly for their content relating to the Thomas M. Cooley Law School. The founding and development of this institution by Brennan immediately followed his service on the Michigan Supreme Court and established Brennan as an authority in legal education, and the interview material thus is considered pertinent to his judicial service. By the state constitution and statutes, the Supreme Court, through the State Board of Law Examiners and other agencies, oversees training and discipline of the legal profession in Michigan. A predecessor of Brennan, the late Justice Leland W. Carr, had operated an informal law training program for attorneys while an Ingham County Circuit Court in Lansing. It is even considered noteworthy that former Justice Brennan, as a legal educator, finds significant influence on national economic policy resulting from the Federal government role in encouraging debt financing of professional training for lawyers.