



Interviews with **Michigan Supreme Court Justices**

INTERVIEW WITH JOHN W. SWAINSON

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

Conducted by Roger F. Lane

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Topic 1: Justice Swainson talks about his educational background, serving in all three branches of state government, and his election to the Supreme Court in 1970. He then discusses his first case on the Michigan Supreme Court, People of the State of Michigan vs. Jondreau

Justice Swainson:

To make it available, and then nobody wants to look at it. Oftentimes, I find myself in the same position.

Mr. Lane:

The red light is on, and that means...

Justice Swainson:

It's operating.

Mr. Lane:

It's operating, and this is former Justice John B. Swainson sitting at the end of the conference room table at the History Commission in Lansing and with him representing the Michigan Supreme Court Historical Society is Roger Lane, and this is one of the series of tapes being made in pursuance of the Society's Oral History Project. Today is October 17, 1990. I would like to suggest, Justice Swainson, that we start this off with a little bit of sort of background about how

it was that you came to the Supreme Court. I assume that when you went to, was it Duke University Law School...?

Justice Swainson:

No, Roger. I graduated from the University of North Carolina in 1951 with a combined A.B. and L.L.B. degree. I had sought to further my education in that area mainly because of the weather conditions. I had returned from World War II having suffered a grievous injury which necessitated the amputation of both my legs, and while I sought to further my education under the G.I. bill, it soon became apparent that the climate up here for a person just adjusting to prosthetic appliances was very tough, and I was advised by my orthopedist at the time that if I could be in a more temperate climate for a couple years, it might be easier to adjust and for the healing process to be completed, so I began to search for a school in the southern part of the United States and settled on the University of North Carolina. Frank Graham was the president of the University at that time, and although there was great pressure on all of our institutions of higher learning to absorb the returning veterans who were qualified to go on, wanted to go on under the G.I. Bill of Right for higher education, he made room for me at the University of North Carolina. I had attended Olivett College here in the state of Michigan, and met my wife whose name was Alice Nielson at that institution, and we fell in love and were married, and so when I went south, I took Alice with me and our two boys were born at the Duke University Hospital in North Carolina. The University of North Carolina at that time, did not have a hospital. They now have a Bowman Gray Hospital there, but the Duke University Hospital was a renowned institution, and Alice's obstetrician was on the staff of that hospital, so the boys were born at Duke University, and of course, now I'm going back a few years and talking about 1947 - 1949. Even though we traveled down there to avail ourselves of the climate, after the children were born and I decided to stay there and finish my legal education rather than to return back to Michigan. However, we did return to Michigan after my graduation in 1951, and I took a bar refresher course here in Michigan. I took the bar examination, and passed it, and began the practice of law in the city of Detroit.

Mr. Lane:

That was in 1951?

Justice Swainson:

I was admitted to the bar in 1952 in Michigan.

Mr. Lane:

During that period, did you ever give a wild thought to...in the way of an ambition that "someday, by God, I'm going to climb to the top. I'm going to sit on the Michigan Supreme Court or the United States Supreme Court"...did this kind of thought ever cross your mind?

Justice Swainson:

Not in a serious way, Roger. I think that any lawyer who is trained in our law schools that teach law today envisions himself writing opinions because you're studying opinions of justices on various points of law, but not in a serious way was I thinking about being a member of the Supreme Court or Circuit Court or any court at that time. I was a young aspiring attorney, and that was quite satisfying to me, although I must confess that from my law school training,

realized that the laws were made by men as they assembled in a legislative body, and that the executive of the state, the governor, participated in the law-making process and certainly understood how the judiciary within the state also affected laws that were passed by the legislature or advocated by the executive, so I was quite knowledgeable, I think, about the process of government and quite attracted to the life. I ran for the Michigan State Senate in 1954 and was elected to the State Senate and took my seat on January 1, 1955.

Mr. Lane:

At the risk of being premature, let me ask...you served in the legislative branch in the Senate. You were Lieutenant Governor. You were governor, Chief Justice of the judicial branch of government...that's the executive legislator...how many figures in Michigan history have scored the hat trick, shall we say?

Justice Swainson:

How do you put that in the idiom of today? As a matter of fact, I find myself and only two other governors who served in all three branches of the state government. One was a man named Epaphroditus Ransom from Kalamazoo who was governor in 1849 and subsequent to him was Alpheus Felch who served in all three branches of the government, and I believe that he was the governor in 1851. I have a membership in a very exclusive club. Only three of us have served in all three branches of the government.

Mr. Lane:

Excuse my interruption. You had just been sworn into the Senate...January, 1955, was it?

Justice Swainson:

Yes, and I must confess, I had visited the legislature on one previous occasion as an observer, you might say, while I was attending Olivett College...the occasion came up in our studies where an opportunity was provided to come to Lansing to see the Legislature in session which, of course as you know from your own experience, there are people in the galleries every day and particularly on Wednesdays when it seems that bus loads of students come into the capitol city, but I really had not been in the chambers, you might say, as a participant at any time prior to my election. I found it to be quite interesting. I think each one of us as new legislators, contemplate the types of things that might come before us, but we don't really have the actual experience until you're there. I found it to be very interesting, and I enthusiastically enjoyed the opportunity to serve in the legislative branch of the government. I think I amassed a record of never having missed a roll call in the two terms that I served in the Michigan State Senate, not that that is overwhelming importance, but it was a personal goal, and I'm glad that I was able to achieve it. Phil Hart was the Lieutenant Governor, as you recall, at the time, and when he indicated in 1958 that he was going to run for the United States Senate, I announced my candidacy for the office of Lieutenant Governor. Of course, at that time, we elected the Governor and the Lieutenant Governor separately, so I had to circulate petitions in the first instance, and then try to avail myself of the opportunities of getting around the state so people would know who I was. I think I was fortunate in the fact that G. Mennen Williams style of campaigning had been revealed, you

might say, to not only the people of the legislature but to all the citizens of the state of Michigan. There were many invitations that he could not possibly attend because of his schedules that made it possible for a person like myself to fill in to speak on those occasions and travel to those counties where he could not be. I entered upon a very vigorous campaign for Lieutenant Governor and was rewarded by the nomination and then election in 1958 as Lieutenant Governor of the state, which, of course, made me constitutionally, at least, the President of the Senate. Of course, that's a good course in parliamentary expression, and I enjoyed that very much also.

Mr. Lane:

You were then 32 years old, were you?

Justice Swainson:

Well, I was 33, I believe at the time. I was born in 1925, so I'd be 33 in 1958.

Mr. Lane:

In July, 1958.

Justice Swainson:

July 31st.

Mr. Lane:

You were 32 when you started.

Justice Swainson:

Okay, well actually, 30 years of age, I suppose...29 or 30.

Mr. Lane:

I beg your pardon for being so smart-alecky.

Justice Swainson:

No problem with that.

Mr. Lane:

Now, in 1960, there was an opening, right?

Justice Swainson:

In 1960, of course, after the nomination of President Kennedy, G. Mennen Williams was spending his time working on the national campaign and had already indicated that he was not going to run for another term of office. I presented myself as a candidate. Of course, I was faced in the primary process by James Hare who was the then Secretary of State. After the election was over, the nomination was over, I was the nominee of the Democratic Party for Governor in the year 1960. I was subsequently elected and of course, on the ticket that was of assistance to me was John F. Kennedy, because obviously, I was a relatively young man and so was he, and we took great pains to point out at times that the founding fathers of our country, who wrote our constitution and were the first officials elected under that constitution had an average age of 30 years at the time. Of course, we were going back to the 18th century, but that, I thought, could be

addressed as well in the 20th century and certainly by my previous experience in the legislature and as Lieutenant Governor...I might have overstated my importance in that position from time to time...however, we were able to convince a sufficient number of citizens that I was the person to replace G. Mennen Williams, and it came to be that that's what happened.

Mr. Lane:

Now, you were Governor for two years, and then George Romney defeated you somewhat narrowly, as I remember, in 1962.

Justice Swainson:

Yes.

Mr. Lane:

You then went into the practice of law, right?

Justice Swainson:

Yes. After my tenure as Governor, I had returned to Detroit to reorganize the law firm that I had been associated with prior to my election, and I began to practice law in earnest, and of course, that worked out fairly well. I enjoyed it, but I still had that disease, you might say, for political activity. At just about that time, or shortly after the 1964 I believe occurred or early 1965, one of the long-time members of the Wayne County Circuit Court, Miles Culehan had either passed on or retired. I think he passed away which created a vacancy on that bench and in counsel with many people, it was suggested that that might be a position that I would enjoy. I had obviously thought about that to some extent, but not specifically until the opportunity presented itself. I submitted myself as a candidate for the office of Wayne County Circuit Judge, and as it turned out, I was unopposed for that position. In fact, we kind of joked about it at the time...they had to keep some 700 voting sites open one day with only my name appearing on the ballot, and the cost to the county of Wayne to operate their election process for one election was much more than I would ever hope to make in a year. It was even suggested that if they'd offered me the money, I might have been tempted at least. But be that as it may, I was elected as a Wayne County Circuit Judge and sat on that bench for a period of five years prior to my election to the Supreme Court.

Mr. Lane:

For historical purposes, perhaps it should be pointed out, if I'm not mistaken, that during that period of 1965 and the succeeding years, for four or five years, there was a window period during which the Governor lacked the appointive power, was that not true, to fill a vacancy?

Justice Swainson:

Well, that's true. I think we could comment on that during the constitutional convention and with not just a little political partisanship, it was provided in the new constitution that a vacancy occurring on the judiciary of the state of Michigan would not be filled by gubernatorial appointment as it had previously done, but would be filled by the election process, so the

Governor could not appoint my successor, ironically, could not appoint anyone to fill that vacancy.

Mr. Lane:

But for that provision in the constitution, when Culehan died or resigned, there would have been an appointment made rather than you having an opening to run. Is that true?

Justice Swainson:

I think that's very true. I think the Governor would have been criticized if he had not availed himself of the opportunity to fill a vacancy on the Wayne County bench, because that certainly was the most active Circuit Court in the state of Michigan, and I would have then been faced probably with an opponent, an incumbent opponent, and I was still a relatively young man and had spent a great portion of my adult life as a political figure, either in the Senate as Lieutenant Governor or Governor, and not too much in the legal side of things, you might say, but as fate would have it, there was no incumbent. There was a vacancy. The Governor couldn't appoint, and I submitted myself as a candidate, and as I say, ended up not being opposed in my candidacy at all, so it was a relatively easy election, you might have guessed.

Mr. Lane:

This is just a footnote matter. The reason I wanted you to address that subject was that there is, in the course of the comment that former Justices on the Supreme Court are making...the selection process does come in for a lot of discussion. Some people think that the selection process..

Justice Swainson:

We have a hybrid system in the state of Michigan, and my knowledge of it is rather sparse, and I'm doing this from memory, not from anything before me, but it seemed about 1939, it was provided that the judiciary would be non-partisan, and it has been suggested that this was in reaction to the long tenancy of Franklin D. Roosevelt and his ability to carry the electorate in the state of Michigan that some people who were serving on the bench at that time, notably Ira Jane, as I understand it, suggested that rather than run as a Republican or a Democrat under the circumstances, they should run as non-partisan which might have brought up the quip from time to time that "a Republican is as non-partisan as a Republican with a guilty conscience", but be that as it may, we became non-partisan. How do you nominate a non-partisan? Non-partisans don't hold nominating dimensions in the state.

Mr. Lane:

Do you want to mention also the fact that the elections were provided to be held in the spring?

Justice Swainson:

Oh, yes. That was another edge, you might say, that was provided because traditionally, less people voted in the spring than voted in the November elections, and that gave a little bit of an advantage to the incumbent or more than a little bit of an advantage. That, too, has changed in the constitution. This hybrid system, that people would go to either the Republican or the

Democratic convention or a lesser party convention and receive their nomination for the Supreme Court and then, the next day after convincing all the delegates on Friday night that they were the rip-roaringest partisan that they could ever hope to have to represent them, that immediately upon your nomination on the convention floor on Saturday, you magically turned into a non-partisan, and of course, it was very difficult to find out where non-partisans were meeting, because they didn't hold meetings, so you went to either Democratic or Republican meetings, and other groups that were favorable one way or another. You conducted a campaign in a very unique way and when you were in the throes of a partisan political campaign, the introduction of a candidate for a non-partisan office comes at the end of the list where most of the people have deserted the hall, so it was some sort of a challenge to even determine a method of campaigning for a non-partisan office in a state the size of Michigan. Name recognition came to bear, perhaps disproportionately, in such matters, and obviously, having served as Governor of the state and before that, as a legislator, I enjoyed good name recognition throughout the state.

Mr. Lane:

Now, you went on the Circuit bench in Wayne County in 1965, and you served through...

Justice Swainson:

Through 1970.

Mr. Lane:

Was there anything in that period that pointed you to advancement to the Supreme Court, or was this just sort of an osmosis kind of thing because of your success...?

Justice Swainson:

Well, let me say...I thoroughly enjoyed the opportunity to be a sitting Circuit Judge in Wayne County because every day was a new challenge. Certainly the case load was adequate to keep you busy. We tried mainly automobile negligence matters although we had jurisdiction over divorce matters and ancillary matters, had a criminal docket...a family relations docket, you might say, and it was just an enjoyable experience. I think, and people have asked me from time to time, "Did I enjoy being Governor or judge more?". That's a very difficult question to answer because I enjoyed both of them, but each of them were different. If you talk about power, straight power, obviously as a trial judge, you have the power on a one on one basis to determine a man's life, his estate, all kinds of things. As a Governor, you are the head of the state, so to speak, but you're in a position of making proposals, and the legislature dispenses what is finally done, and then you're given an opportunity to endorse that or to veto that, but for raw, naked power, there is nothing like a sitting trial judge. And so I enjoyed that very much, and I just was...in the idiom of today, "a happy camper", you might say. After five years, there is a great deal of sameness about the types of matters that you are hearing. You can see that sometimes the law has not kept pace with the actuality of events. I think that we were faced with this particularly at that time with the introduction of "drugs", and I use that with quotes around it, into our society, because at that time, it was merely the scourge of the 30's, something called marijuana that we were faced with and many of the young people coming before the bench and the law was very severe in the state of Michigan...provided for 20 - life sentence for providing marijuana to someone. Well, that could be handing a joint to someone, and that exposed you to very severe penalty, and so somebody had to change that, and the legislature had not given any indication that they were

about to change the statute. It seemed to me that the one area that could really, in a very deliberate way...address themselves to this condition would be in the judiciary and particularly, in the Supreme Court. Although at that time, again, flowing from the constitutional convention, we had an intermediate Appellate Court, but that was just getting started, and the Supreme Court still represented under our system of one court of justice, the final arbitrar in these matters. My interest was stemmed from actual seeing the deficiencies in many areas of the law, and then the opportunity in 1970 presented itself at a time, taken in the fact personal considerations...we were anxious to move into a new property that we had purchased back in 1964, a farm house in Washtenaw County, a little bit south and west of Ann Arbor.

Mr. Lane:

You bought that in 1964?

Justice Swainson:

Yes.

Mr. Lane:

And then for some years, it was not...

Justice Swainson:

We were not residents there at the time. We had purchased it with the long-term goal of becoming residents, but that was left sort of open as to whether we would do it because the constitution was very explicit in that if you remove your residence from the County, you also vacated your office, so...

Mr. Lane:

May I interrupt for just a moment to supply what was perhaps an omission or inadvertent omission...you wound up on the Supreme Court and in 1964, while you were practicing in Detroit, there was a new Court of Appeals being created. Were you tempted? Did you consider running for that court at that time, or did it not have any interest to you?

Justice Swainson:

It did not have any interest to me, as a matter of fact. In fact, at that particular time, my interest was not in the Appellate applications of the law. I liked the action of the trial court, and this new court which was struggling to become established was not of any great interest to me. Maybe it's because of my previous experience of practicing where we just assumed you went from the trial court to the Supreme Court. You had to, of course, petition the trial court for leave at the time, which made it very difficult to get to the Supreme Court, so there was a necessity for the intermediate Appellate Court to review the actions of the trial court, but it was not one of my main interests. It was only after having served on the trial court for a period of time that I became interested in the Appellate process.

Mr. Lane:

I get it. Now, we're back to 1970.

Justice Swainson:

Now we're back to 1970, and I was elected to the Supreme Court.

Mr. Lane:

What were the mechanics of this? How did the opportunity present itself? You mentioned some of the factors - the farm in Manchester, the fact that you ...there was a sort of a sameness that began to assert itself in what you did that you enjoyed a great deal at the start, but it began to perhaps become less attractive, correct, because it became repetitive? Here's a divorce, another divorce - holy cow...what are these?

Justice Swainson:

Or a condemnation case or something that takes a great deal of judicial time for a result that might better be obtained through an administrative process than a judicial process. I think there occurred about that time also the indication by Harry Kelly that he would not be a candidate, so there was a vacancy. There also...Justice Dethmers who had been on the Court for sometime was up for re-election, so those were the two positions that were vacant and of course, at that time, G. Mennen Williams had indicated his interest in running for the Supreme Court. I felt that was a good person to run with at any time. I'd been running with him for years. We became the candidates of the Democratic Party nominated to run for the non-partisan position of Supreme Court Justice, and of course, both of us, as former governors, had great name recognition throughout the state.

Mr. Lane:

This was August, 1970. Who were your opponents, do you recall?

Justice Swainson:

Well, T. John Lesinski.

Mr. Lane:

Was he?

Justice Swainson:

...also had indicated that he might like to move on, but I think, he was half-hearted in his attempt, you might say, because he was a Chief Judge of the Court of Appeals which was a court that he deserves a great deal of credit for organizing and establishing, and I can't think of other persons at the convention that were serious candidates.

Mr. Lane:

Who were the Republican nominees? Do you recall that? That actually appeared on the ballot.

Justice Swainson:

That's hard for me to...obviously, Dethmers...Justice Dethmers.

Mr. Lane:

He did run and was defeated, that's right.

Justice Swainson:

He did run and he was defeated, and I don't know who the other candidate was right at this time for the Supreme Court.

Mr. Lane:

At any rate, when votes were counted in November, you and G. Mennen Williams were big winners, and you led the ticket, as I remember.

Justice Swainson:

That's right. I, of course, had been a judge, and probably was a little better known by the legal community throughout the state and particularly in the southeastern part of the state as a judge at the time. I could be referred to as Judge Swainson quite honestly.

Mr. Lane:

It helped on the campaign side.

Justice Swainson:

And it helps on the campaign side, too.

Mr. Lane:

"Promote Judge Swainson".

Justice Swainson:

Or whatever it said at the time, it said it effectively enough that I was elected by many more votes than G. Mennen Williams which was a great surprise to some of the people that were advocating his candidacy because obviously, he'd become a deity almost within the state and certainly within the Democratic Party.

Mr. Lane:

I think there was a modicum of surprise for him, too, was there not?

Justice Swainson:

A modicum of surprise. I think that's a true statement.

Mr. Lane:

What do you recall about your first contact? Do you remember when you first walked into a conference, let's say, or perhaps as a guest in anticipation of your being seated? What was the atmosphere at that time?

Justice Swainson:

Well, Thomas Matthew Kavanagh was the Chief Justice at the time, and he made it...he welcomed us to the Court upon our election and said we were welcome to come in at any time to sit and see how they conducted their administrative affairs as well as their opinion discussion groups and what have you.

Mr. Lane:

At the time, had the Supreme Court moved from the third floor of the capitol to the law building?

Justice Swainson:

They had already moved. I think that was accomplished under Thomas E. Brennan when he was the Chief Justice for a short period of time that the move occurred, because the argument was parking fees, as I recall, whether we should be dubbed \$0.50 for parking.

Mr. Lane:

Now, Brennan was still sitting.

Justice Swainson:

Brennan was still on the Court at that time, Thomas Brennan, and myself, and certainly Gene Black was a member of the Court at that time. Giles Kavanagh was a member of the Court.

Mr. Lane:

Paul Adams?

Justice Swainson:

Paul Adams was a member of the Court, too. I don't know whether I've named them all or not...John Fitzgerald, I think...

Mr. Lane:

Came later.

Justice Swainson:

...came later to the Court as did Mary Coleman.

Mr. Lane:

When you actually were seated, was there a ceremonial occasion where you entered the courtroom from behind with your robe on and all that sort of thing? What was the mechanic at that time?

Justice Swainson:

It seems to me that there was a special session of the Court held on New Year's Day.

Mr. Lane:

You would have taken your oath, would you not, on New Year's Day out in front of the capitol on the steps and that sort of thing or was that not part of the drill?

Justice Swainson:

No, that wasn't part of the...you weren't sworn in with the other dignitaries, the partisan dignitaries. It was termed an induction to the Supreme Court, and a special session of the Court being held on that particular day...whether it was the same day or another day, I'm not sure at this time, but we were both inducted into the Supreme Court, and we invited our friends, obviously, and had a gala luncheon, as I recall afterwards over at the Olds Hotel, but we actually were robed and inducted on the Court by the other members of the Court.

Mr. Lane:

Was this either New Year's Day or shortly thereafter?

Justice Swainson:

Shortly thereafter, I think it would be. I don't think would have wanted to impinge upon the celebration of the inauguration of the Governor, either.

Mr. Lane:

Do you remember your first conference, and how you drew your first case? When you really put your toe in the water for the first time, what did it feel like? That's what I'm trying to get at.

Justice Swainson:

Well, I remember being impressed with the tremendous amount of reading that had to be accomplished when you're considering applications for leave to appeal, administrative matters and the briefs and records of the cases that were assigned to you. I was interested more in how the process was operating, but obviously, Justice Kavanagh had...this was a second occasion, I think, sitting as a Chief Justice...Thomas Brennan serving a brief tenure as Chief Justice prior to the election of G. Mennen Williams and myself.

Mr. Lane:

I was going to say...in the first conference, the first meeting, once you'd been sworn, was there not an election for Chief Justice?

Justice Swainson:

You could hardly call it an election. It was merely everybody agreeing that Thomas Kavanagh should be the Chief Justice. It was actually done, and I'm certain it is reflected in the minutes.

Mr. Lane:

He was then Chief Justice...he was not elected by the votes of you yourself and Justice Williams. He had been serving as Chief Justice or had Brennan immediately prior to that...

Justice Swainson:

I don't know. I'd have to look at the record on that. I don't know exactly, but...there was no electioneering going on that I recall. It was just assumed he would be the Chief Justice. He was

the senior member at the time, and has indicated his desire to sit as Chief Justice which was very helpful to both G. Mennen and myself because we were being inducted into a body that had a very set, whether by law or by tradition or by rule,...did things in a certain way. I recall at the time that I asked one question, "What was a WM?"

Mr. Lane:

What was what?

Justice Swainson:

A "WM". Everything was marked "WM-106" or "WM-285". "What's WM?" Well, it was explained to me that it was a window matter, although that wasn't much of an explanation. I said, "What do you mean, 'a window matter'?" Well, in the early days of the Supreme Court, certain of the files, briefs, the records were placed on the window sill in the old capitol building, and each one of the justices could take window matters. They might be asking for specific relief, less than a full hearing on a case...they were termed "window matters" or they were applications for leave to appeal, but as the Court became more sophisticated and as the population of the state of Michigan increased and the litigation increased and the appellate process was more utilized, of course this could not go on, and we changed that name to Commissioner's Reports, so they became known as Commissioner Reports rather than window matters.

Mr. Lane:

How did you pick your first law clerk or did you inherit one?

Justice Swainson:

No, I did not inherit one. This was a process that came as a surprise to me. It was something I had not anticipated, perhaps, but we received letters from various students of the law schools who were seeking a position as a clerk, and we made available to them an opportunity, personal interviews, and then selection after that process. It was a very private thing left to each of the justices to do. At the time, again, by tradition, we were allowed one clerk and yet, work load for one clerk is very tremendous for one justice, and it became necessary before my term was ended, my tenure was ended, that I have two clerks. I think G. Mennen Williams, prior to that being authorized by the court, was in a position financially to hire an extra clerk on his own, with his own resources.

Mr. Lane:

He had a personal secretary in addition to the authorized one, I remember that...maybe a clerk, too?

Justice Swainson:

Yes. I was accommodated in that regard, too, being a resident at that time of Washtenaw County.

The University of Michigan Law School made available to me an office in the library, and I had a secretary in Ann Arbor that would be there every day even though I might be up in Lansing on an administrative hearing or on hearing cases, and my secretary up here I inherited from Justice Harry Kelly who was a very competent person and aided me considerably in understanding the procedures of the Supreme Court, so I was well-served by a secretary in Lansing as well as one in Ann Arbor.

Mr. Lane:

Is that person who had worked for Kelly still with us?

Justice Swainson:

No, she expired. Velma was her name. I can't think of her last name.

Mr. Lane:

There have been suggestions in connection with this history project that at the proper time, it might be worth the trouble to look up some of these people who were not very much out front in the Court, but that did have significant responsibilities and see what their...

Justice Swainson:

Well, that would describe Velma very well, because my understanding was that Justice Kelly relied upon her to read the briefs and to develop the fact situation, you might say.

Mr. Lane:

That's unusual, and quite interesting, isn't it?

Justice Swainson:

Yes.

Mr. Lane:

This is a secretary, right?

Justice Swainson:

This was a secretary.

Mr. Lane:

Was she a lawyer?

Justice Swainson:

Secretary administrator...she was not.

Mr. Lane:

What was her name...Velma?

Justice Swainson:

I can't think of her last name, and it was somebody I knew so well.

Mr. Lane:

At this time, as I recall, Justice Kelly was ailing and away from the Court a lot of time. Is not that true, or do you remember that?

Justice Swainson:

Yes, I attended his funeral, of course. He expired, I think, soon after that election in either 1971 or 1972. He was spending most of his time at home at Otsego Lake at that time. He was in ailing health.

Mr. Lane:

Do you remember your first case and how you got it and what you did with it?

Justice Swainson:

Yes, I do, as a matter of fact. I think the first case that I got involved with that I had really an interest in was *People of the State of Michigan vs. Jondreau*, and Jondreau was an Indian fisherman. He was being charged under the law of violating the fishing game laws in the state of Michigan. We did a considerable amount of research in the old treaties in the state in regards to cessation of ceding of land by the native peoples to either the state or the Federal government, what they were promised in return, and how we should interpret that in the 20th century, even though that was done in the early 19th century. It required a great deal of research, but it was a very interesting point, and as a matter of fact, after that case came down where we sustained the position of Jondreau that he was not subject to the state laws, that was reviewed in *Law Week*, which is a publication taking all of the Supreme Court decisions throughout the state of Michigan and those of the greatest interest, reproducing them in their publication, and so *People vs. Jondreau* sort of led the state, and was cited many times thereafter when other states were faced with the same problems presented to us in the Jondreau case.

Mr. Lane:

Were these fishing rights or property rights?

Mr. Lane:

What kind of right?

Justice Swainson:

Fishing rights, and they tried to...the state...and in the discharge of their duties, the Department of Natural Resources, prior to that, the Conservation Department, would try to regulate the type of nets to be used, and the native Americans presented good testimony that they fish with gill nets. That's the way they fished in the 19th century and the other cases that we cited in support said those treaties should be interpreted in the light of the understanding of the people that signed them and so, of course, they didn't deal with fishing seasons. They didn't deal with all kinds of things.

Mr. Lane:

Was this the first of the gill net cases in Michigan?

Justice Swainson:

I think it was the very first of the cases. Well, they'd had an adverse decision, the native Americans. I think that was *People vs. Blanc* back in the 1930's, and this was the first time we had revisited it since then.

Mr. Lane:

Did you overrule with *Blanc*?

Justice Swainson:

Yes. We did.

Mr. Lane:

So you expressly overruled it?

Justice Swainson:

Expressly overruled it, and said if there was going to be any changes in the treaty, that would be a presidential function, not a subsequently created state.

Mr. Lane:

Was it just the luck of the draw that you should get a case like that as your number one piece of work on the Supreme Court, or did you...was there some other...?

Justice Swainson:

I certainly didn't ask for it. I don't know that any justices ever did that. It was assigned to me by the Chief Justice.

Mr. Lane:

Did the Chief Justice make the assignments?

Justice Swainson:

He made the assignments of the cases, and of course, that was after a period of discussion.

Mr. Lane:

You had a little straw vote, did you, to see...?

Justice Swainson:

Not a straw...well, yes, I guess you could call it somewhat of a straw vote, but...

Mr. Lane:

Some sense of the group...

Justice Swainson:

Yes, whether we should take the case or not, and let's vote forcefully one way or the other.

Obviously, we had the mind of the Chief Justice, too, so if a consensus of the Court seemed to be indicated one way, then he would pick a person who had espoused that position rather than one that did not, so...but it wasn't private conversation between myself, or a request by myself to the Chief Justice for that case. It was assigned to me in its proper order.

Mr. Lane:

How did the case come out? Did the Court go down the line on it, or was it a split decision? Do you remember anything more about it?

Justice Swainson:

I don't at this time, I must confess. I surely could look that up very readily, but...I think we had substantial majority on it.

Mr. Lane:

This was quite a challenging case to begin your service with.

Justice Swainson:

Oh, yes. I was at a period of my life where I enjoyed large challenges.

Mr. Lane:

But that isn't the steady diet of a Supreme Court justice?

Justice Swainson:

Oh, heavens, no. Of course not. You're assigned other cases that represent drudgery, both physical and psychological to get through them, but that's the nature of the position, and I enjoyed the position although, as I have indicated to you before, it wasn't the same as being a trial judge.

(End of side 1, tape 1)

Topic 2: Justice Swainson talks more about his first case on the Supreme Court, *People of the State of Michigan vs. Jondreau*. He discusses the case of Joe Smeekeens, his colleague Justice Gene Black, and the composition of the court. He then talks about the ramifications of *Roe vs. Wade* in Michigan, the case of *People vs. Sinclair* concerning sentences for marijuana possession, the issue of compensation for lawyers when representing indigent criminals, and other cases that he encountered on the Supreme Court

Mr. Lane:

Now we're on the tape again. That was quite interesting. I was talking to one of the other justices here not so long ago, and he got a slip and fall case, and he said that he got a call from a senior justice who wanted to swap him for a tough tax case.

Justice Swainson:
Oh, is that right?

Mr. Lane:
I asked him if he thought he was being hazed, and he said no, he did not. He acquiesced, and he got the tough tax case, but he didn't relish it. At any rate, that was your first case. This was...I see the citation here... 384 Mich 539, 1971. That probably would have been early in the year, wouldn't it?

Justice Swainson:
Well, I don't think we...

Mr. Lane:
That was a criminal case, right?

Justice Swainson:
That was a criminal case that came from the upper peninsula, the Bay Mills band of Chippewa.

Mr. Lane:
This issue is still with us today, isn't it, in some form or another?

Justice Swainson:
Oh, that, as it happened after that case came out, there was tremendous ramifications to many of the so-called Indian fisherman; were able to go to the bank and borrow the money to outfit a beautiful fishing boat because they were not subject to the rules of other fishermen, and the sportsmen, so-called, really objected to things that were going on. There was even some physical skirmishes relative to fishing rights in this state, Wisconsin and it was involved out in California, Utah, different places where you had significant settlements of native Americans.

Mr. Lane:
Did Federal concepts have anything to do with the decision in this case as you recall?

Justice Swainson:
It seems to me Noel Fox was sitting on a very similar case or had sat on one, but this was the first impression, that we actually overturned a prior ruling of the Supreme Court of the state of Michigan, changed direction, and recognized those fishing rights.

Mr. Lane:
The early Court had held that the rights had expired or were no longer...?

Justice Swainson:
Well, they sometimes went off on other issues, whether they were procedural or something, they didn't address the main issue as this one did.

Mr. Lane:
Do you remember some case that came down the line right after that one?

Justice Swainson:

Well, it's hard to pick out a particular case. I think, obviously if you mention a case to me and describe a little bit of the fact situation, I may or may not recall the case.

Mr. Lane:

Do you recall...this is something I meant to ask you about. Not exactly a traditional case...do you remember Joe Smeekens coming to the Supreme Court, asking to be licensed as a lawyer, and how that was all handled?

Justice Swainson:

I remember the events. I remember walking into my office one morning and he was sitting on the floor outside the office door. There were no benches or anything.

Mr. Lane:

Was this not long after you had come on the Court?

Justice Swainson:

Not long, it was the first year, it seems to me, and he was asking the Supreme Court to admit him to the practice of law...

Mr. Lane:

Excuse me, you said "sitting on the floor"?

Justice Swainson:

As an exhausted man would, in a crouched position, like it was a terrible chore for him to get from the parking facility to the office, and he was exhausted.

Mr. Lane:

Oh, was the door not opened?

Justice Swainson:

The door was not open at that time. It was early in the morning. I was just coming to work. Apparently the secretary had not yet opened up the office, and as it developed, he produced some x-ray material that indicated he was suffering from a terminal condition.

Mr. Lane:

He did this directly to you, not through the clerk's office procedures and that sort of thing?

Justice Swainson:

I don't know what he had done through the clerk's office, but he had least come...I had found him there, and when I asked him what he wanted, he revealed that he would wish to be appointed, notwithstanding his grades on the bar examination.

Mr. Lane:

He had taken the bar, and gone...

Justice Swainson:

It seems to me that he had taken it but not successfully, and that he only had a short period to live, and this would be a great boon to him psychologically, who knows? I know it was discussed very thoroughly, examined into by the Chief Justice, and I said, as I recall, in the private discussions of this, that it was sort of ironic that he was seeking my approval as well as G. Mennen Williams, the two people he had probably said the most harsh things about in his legislative career, and that we should not give that undue consideration. The net result was that we granted him the privilege of practicing law only to find out at a later date that it was all a put-up thing. He had used somebody else's x-rays.

Mr. Lane:

Was he serving in the Senate at that time, or had he concluded his...do you remember what the circumstances were?

Justice Swainson:

I don't particularly remember.

Mr. Lane:

I begin to remember. George Romney...no, that's not right, is it? At one point, George Romney fingered him, but that would have been years before.

Justice Swainson:

That would have been years before 1970.

Mr. Lane:

...and really was able to

Justice Swainson:

1971.

Mr. Lane:

...excommunicate him from the Senate because of the lay of the land politically and that sort of thing...he got the right fellow to run to take him out. Do you recall all that stuff?

Justice Swainson:

I was sitting on the Circuit bench at that time, and I was not too concerned with things that were going on regards George Romney's campaign or his attempt to be governor, but I knew they had clashed, you might say, over the governor's proposals on one thing or another, and they were not close friends by any manner of means. I do recall vaguely that George Romney exerted himself on behalf of his primary opponent, I think.

Mr. Lane:

That's a better way to put it, I think, than I did, but on this matter of being granted the right to

practice, what were the mechanics of that? Ordinarily, like you and I went through the examination process, then you passed the bar, and then...

Justice Swainson:

This was really just an appeal for charity, and that's...

Mr. Lane:

Your recollection is, though, that he had taken the bar.

Justice Swainson:

It seemed to me he had.

Mr. Lane:

He had gone through the process up to that point.

Justice Swainson:

Yes. It seemed to me that he had studied, he had worked, and he was now suffering terminal conditions...I'd have to go back and review it all.

Mr. Lane:

Did he actually appear before the conference?

Justice Swainson:

No, no. He, in turn, contacted each of us individually one way or another, but he did not appear in a formal setting at all.

Mr. Lane:

What was the mechanism by which the right to practice was granted? Do you remember that?

Justice Swainson:

I don't know...they were probably operating under the 800 pound gorilla rule which, as you know, means if you're an 800 pound gorilla, you can do anything you want.

Mr. Lane:

Was Gene Black sitting on the Court then?

Justice Swainson:

I'm sure he was.

Mr. Lane:

Do you remember...how did he receive this?

Justice Swainson:

I don't recall...I just recall that one little bit that I opined that it was passing strains of (unclear) believed the views the most. He was now seeking their succor without giving any more thought than that, so obviously people who were on the Court at the time, a sufficient majority, thought that this act of compassion was justified and was simply that: an act of compassion.

Mr. Lane:

And probably not examined into with the meticulousness that you might think.

Justice Swainson:

No, we didn't say to him, "If you're only going to live six months, let's wait six months to see whether you make it."

(Editor's note: The record shows that former State Senator John P. Smeekens was admitted to the practice of law in the Supreme Court on December 9, 1971. He was assigned number P-20607. He attended class at Detroit College of Law. He did not take the state bar examination. An interim order of disbarment was entered on August 14, 1975. The Grievance Board order revoking Smeekens' license was affirmed by the Michigan Supreme Court June 3, 1976 by a vote of 6 to 0 (Williams, J. taking no part). The Court upheld a finding of "misconduct" apparently related to misrepresentations, 396 Mich 719. On February 11, 1977, the U.S. Supreme Court entered an order dismissing Smeekens' appeal and denying certiorari. R.F.L.)

Mr. Lane:

Well, that was an epochal event in the political life of this state given the personality that we're talking about. That's enough of that, I think.

Mr. Lane:

How about...I mentioned Gene Black. What kind of...do you remember your first contact with him? Had you known Black before you came on the Court?

Justice Swainson:

I'd known him vaguely from 1955 on. He was the person that...in fact, I think he came onto the Court in 1955 with the support of the Democratic Party.

Mr. Lane:

You're right. He was appointed...

Justice Swainson:

...by G. Mennen Williams and with the support of Neil Staebler and I remember feeling at the time that was perhaps the zenith of the Democratic Party. They had an election in 1954 when, for the first time, the governor had elected...had accomplished not only his own election but a complete Ad board and...but feeling pretty good that we were able to do that. Gene Black was presented, as I recall, and introduced to me while I was on the Senate floor and not while the Senate was in session, and I had trepidation at that time that if you're successful politically, you take no prisoners, and we have had the example of the Republican as before us when they took over everybody else that was left, and I didn't see any reasons to change, that we should be magnanimous.

Mr. Lane:

Now, we're talking about a man who was a former Republican....

Justice Swainson:

Attorney General.

Mr. Lane:

...Attorney General by election as a Republican, correct?

Justice Swainson:

Right.

Mr. Lane:

And then he sat on the...he fell out with his people, did he not?

Justice Swainson:

He was more progressive than the party, I believe is the way he expressed it.

Mr. Lane:

But at any rate, there was this conversion, correct?

Justice Swainson:

Well, I don't know. The biggest appointment came before the conversion. At least, it was felt that he would be an addition, have some insights that would be beneficial to the people through the Supreme Court, but I had had no contact with him in a personal way and certainly not in a political way.

Mr. Lane:

Were you able to work with him well?

Justice Swainson:

Oh, I thought so. He was a very unique person. I had a great deal of difficulty reading his opinions. I always strove my opinion writing to be very specific and to deal with the law and not with any other surrounding material that may or may not be relevant to the issue before the Court, and he seemed to really rejoice and excel in writing long sentences that implied that there was some mysterious, sinister pool of conspiracy, at times, to do things. Like there was some unseeing, guiding hand manipulating all of us which, to me, was the furthest things from the facts as I knew them that there could be, but he would always interject his opinions, almost personal beliefs, and I thought that was not...

Mr. Lane:

Do you remember the two year voting case where it was instituted by a challenge of the constitutionality of the requirement to re-register or otherwise account for yourself every two years by the UAW Community Action Counsel, I think, went in on an injunction proceeding of some sort, and when that was decided by the Supreme Court in 1972 in the spring, there was a case where Black, in a dissent posture...it was a 5:2 decision, but Black, really without using

names, was very severe on...this, of course, I'm interpreting a little bit...on yourself, G. Mennen Williams, Adams and Kavanagh. He talked about two former governors, two former attorney generals "behold to the Democratic Party" and all that. Was that kind of hard to take or what was your reaction to that?

Justice Swainson:

You know, I don't specifically remember that case; the changing of registration matters. Keeping people registered longer, I presume, would be the position that we would be taking rather than limited their registration as it affected people that maybe lived in rental units and moved around more so that other people did. I could say, if that was the posture of the case, I would be for extending the registration and having it transferred readily if that were the case, but of not denying the person the right to vote if they otherwise were qualified by some technical rule, and I don't even remember the dissent, because I think about that time that to me, at least, he was on the Court, but he wasn't really a factor in the Court.

Mr. Lane:

This was his last year, and there had been some, as I recall it, abrasive public discussion, I think, over apportionment for one thing, over the selection process, judicial selection and that sort of thing, and he had, if I recall correctly, he had said that he would resign. He was not going to run again. Either his health was failing or he was constitutionally not qualified or for whatever reason, he knew that 1972 was his last year, and early on, it seemed to me, he said publicly that he would get off the Court under certain conditions: if Milliken would make...appoint a certain kind of successor and that sort of thing, but this was not forthcoming. I just wondered if you felt at this point, he began to behave in a fashion that was just not characteristic of him, that he was...or whether this was just Black, the way Black...?

Justice Swainson:

I don't really have a close association to know if he underwent any kind of a change in his personality. As it appeared to me, he was more interested in personal vendettas in many instances rather than what was before the Court, and his babbling on some of those opinions, as I term them, were not instructive to either the lawyers or the general public of the state, so why clutter up the opinions with that sort of thing. But I held no rancor towards the man. I know one of the things he prized as sort of a symbol of the old Court was the clock that was set in the bench, West Clock and was no longer being used, and he had expressed an interest in it, and I suggested that we make him a gift of that upon his retirement, that clock, which we did.

Mr. Lane:

Was this a wall clock or like a grandfather's type clock?

Justice Swainson:

It was smaller than a wall-size clock. It was one that was set into the bench which would remind the lawyers if they had a half hour to present their case, that was the clock that we went by, the one that was the official clock of the Supreme Court, and he remembered that well, and it was in

storage at the time, had been removed from the old Supreme Court chambers and not installed in the new chambers, so was available, and I thought if he had such an interest in it, then certainly we could make it available to him which, as far as I know, was done, and he was appreciative of it.

Mr. Lane:

You were not, of course, his favorite target on the Supreme Court. I guess there were others who found it very difficult to get on with him, and there were some incidents...I guess that's enough on that part of it. How did you get on with other members of the Court? You sat with Brennan for a while. Your philosophy and Brennan's were not necessarily in sync, were they?

Justice Swainson:

Thomas Brennan and I had sat together as Wayne County Circuit judges, and I knew Tom and his wife, Polly, very well from social occasions that occurred while I was on the court, the Wayne County Circuit Court. I certainly knew many of the other persons on the Court from having been in political life in the state of Michigan, and I think I got along well with all of them. I certainly felt we were all individuals, and we did our very best with the materials that were presented to us and sought the support of others for discussion, at least, if they felt that you were not expressing that which should be the law, and I didn't really have any difficulties with any members of the Court, whatever their previous backgrounds. I think we all recognized we came from different backgrounds.

Mr. Lane:

That's part of the chemistry, is it not, of your last Court of Appeals?

Justice Swainson:

Court of Last Resort should be your representative of the entire community of the state, I should think, as any democratic body should be, and we certainly were elected people. I think during the time, one argument was provided about efficacy of a person running for the office while holding onto another office came before us and interestingly enough, with my own exception and probably G. Mennen William's, every member of the Court had been appointed while they served in another capacity, and that, of course, is understandable.

Mr. Lane:

Is that good or bad?

Justice Swainson:

I think it's good to a degree. Obviously, you know, say Thomas Matthew Kavanagh as the Attorney General was appointed to the Supreme Court; nobody would raise their eyebrow about that. I don't think anybody would say, "Well, I elected you to serve out your full term as Attorney General. Therefore, you should not be considered for anything else until after that term is completed". I think people say, "Well, obviously he is doing a good job. A different position is being rewarded by an appointment for this very body that we call the Michigan Supreme Court

although we provided for their election", and so G. Mennen Williams and I, of course, were elected, not appointed; not that it gave us any more security or anything because you had elections every two years, and obviously, the body electorate changes their minds at different times and become more or less familiar with what goes on in the Supreme Court. Generally speaking, I'm....very, very uninformed about the operation of the judiciary and how we elect the members.

Mr. Lane:

Before it escapes your attention or mine, I wanted to ask about the ramifications in Michigan of Roe vs. Wade. This came down in Washington, did it not, during your early service on the Supreme Court?

Justice Swainson:

1973, I believe, the case came down, and of course, as is provided in the United States Constitution, every subservient court in the land will follow the Supreme Court of the United States and so on one Tuesday morning, as I recall, we wiped out all of the abortion laws in the state of Michigan to conform to the provisions of Roe vs. Wade. This was very difficult for both Thomas Brennan who was an active, practicing Catholic as well as the Chief Justice, Thomas M. Kavanagh, who was the Grand Knight of the Knights of Columbus and closely associated with the Catholic Church to preside over the Supreme Court that by their actions, were going against the orthodox view of the church, and yet, I'm proud to say that those two gentlemen, although I'm sure it was a bitter pill to swallow, recognized that compliance was necessary and whether they wrote anything in dissent or not, I don't know.

Mr. Lane:

What were the mechanics of that? Did the Court ...?

Justice Swainson:

No, I think we had a matter before us...

Mr. Lane:

Pending that you could use as a vehicle...?

Justice Swainson:

Right. That's my recollection, but we had to specifically save those statutes under which this case was brought, and henceforth, the law of the land is that which is expressed in the Roe vs. Wade.

Mr. Lane:

Was it necessary for the Supreme Court to do anything further on it or was the rest of it kind of administrative?

Justice Swainson:

Sort of administrative.

Mr. Lane:

The Health Department, for example, had to get up some rules and that sort of thing.

Justice Swainson:

Well, yes. That would not be within our domain to be concerned with. It seems to me that subsequent to that decision, other cases came before us: a person injured while carrying a child. Does the child have the right to sue? When does a child become a child, you know? At the moment of conception or one thing and another. You could see sometimes that those cases were being brought just to either find us in an inconsistent position or to answer more than we cared to answer at the time, so I, of course, must confess that I feel the right of privacy of a woman to make her own decisions is paramount to any laws that should or could be passed in this regard, and I still feel that way. I think it's a tragedy that we have what's going on now, that each state is going to make up their own minds how far they want to go in this direction or not, leading perhaps to the overturning of *Roe vs. Wade* which I think will cause a great deal of consternation. Even as we sit here, which happens to be on October 18, 1990, we have an election less than three weeks away, and whether it will have an impact on this election or not, I don't know. I think it might because it seems to me each candidate has taken an opposite position. Now, whether that can be determined or not after the election, I don't know.

Mr. Lane:

As to the precise proposition of overturning *Roe vs. Wade*, is there not something fallacious in that proposition as stated? Is it not that if there is going to be a further shift in the law, the laws of the states in the land in this area, it will not probably come, will it not, in an outright reversal, but will it not come in modifications...?

Justice Swainson:

Well, I think what we see at this time is it has been weakened in some areas, and states have been given the opportunity to pass their own laws unless they were found to be constitutionally impermissible under *Roe vs. Wade*, but an eroding of the directness of that decision, and I think that we're not in any imminent danger of having that case before the Supreme Court which will cause immediately the overturning of *Roe vs. Wade*, but I would not hazard a guess of where we will be ten to fifteen years down the road on that. I just don't know. I'm less concerned today than I might have been at a previous time.

Mr. Lane:

Where did the Court, in your time, leave the matter of the right to sue of an unborn baby, that kind of legal issue? Do you remember?

Justice Swainson:

I don't think we granted leave to appeal from a decision made by the Court of Appeals.

Mr. Lane:

Did you catch any obscenity cases while you were on the Supreme Court? Do you remember?

Justice Swainson:

I don't recall specifically any obscenity cases. I recall one case where we threw an administrative order of the Supreme Court, turned some 158 persons one Saturday, released them from incarceration in the State Corrections system based on the marijuana laws. If they were only in there for marijuana.

Mr. Lane:

Let me ask you specifically...there was the Sinclair case was the instrumentality of change there, was it not? Do you remember that?

Justice Swainson:

Yes, I remember the Sinclair case. I started out writing a dissent and found out I didn't have to write the dissent.

Mr. Lane:

Did your opinion become the opinion of the Court?

Justice Swainson:

I think so.

Mr. Lane:

You know, maybe you will recall, that when your portrait was hung some years later, Perry Bullard appeared and made specific mention that you should be commended for your leadership or however he put it in the matter of Sinclair, and we all know, I think, what his position is.

Justice Swainson:

Well, Perry Bullard was a clerk to Justice Adams at the time that position was being developed, and had some input into it.

Mr. Lane:

Oh, I see. That would have been...this would have been while you were on the Court? It would have been later than that, wouldn't it?

Justice Swainson:

No, no. While I was on the Court. In fact, I think in a footnote of that decision, we quoted one W.P. Bullard.

Mr. Lane:

Is that right?

Justice Swainson:

...who had done something, research into the area.

Mr. Lane:

I see, and this was in his role as a clerk to Justice Adams.

Justice Swainson:

Well, obviously, as you will understand, Roger, the clerks sometimes talk to each other.

Mr. Lane:

Sometimes.

Justice Swainson:

They sometimes then come back to their individual justice and express to him what has been discussed by the other clerks, and this is just something that you know goes on, but I was...like some of the other persons on that Court, had, within my own family, a touch where my own son had been arrested for possession of marijuana, and to see the real harm that can be done to a young person by our rather draconian laws at the time obviously caused me to feel that this was a place where I could make a real contribution, certainly save many young lives by saying that, as I openly did, that the incarceration of John Sinclair for a period of eleven months, 29 days to ten years, was violative of the indeterminate sentence.

Mr. Lane:

I find a note here, a penned note on my sheet here that shows People vs. Sinclair 387 Mich 82, but I don't find it in the credit list. Your recollection is that...this would have been in 1973...

Justice Swainson:

1973.

Mr. Lane:

1973, right...387. That volume had 73 cases in it...you recollection is that you probably wrote the majority opinion.

Justice Swainson:

Well, I really don't know. I remember struggling with that particular opinion, my opinion, and what I said to you...I had written what was going to be a dissent, and I had termed John Sinclair as being likened to the pied piper leading our children away from us, and we were going to punish him when maybe we better examine into what's really going on and not try to say this one individual had so great a power that he had to be dealt with in this manner, but I didn't have to do that. I think that, as it turned out, someone had expressed maybe my feelings in a little more diplomatic terms, and I could support them rather than file my dissent, and as I recall, I didn't, so I don't know whether it's in my file that my secretary kept or not.

Mr. Lane:

The majority opinion represents in great...

Justice Swainson:

That was cruel and unusual punishment to put somebody in for twenty years to life for such an infraction, and of course, that is the role of the legislature to make a change thereafter, too.

Mr. Lane:

Do you recall in the same period, In re Meizlish? That's the one that has to do with the compensation of lawyers, and this case came out of Wayne County, for representing indigents. You wrote an opinion on that case saying that at the time this was before the Court, the Wayne County practice was at least constitutional. I don't think there were any...this was the...the rule was in Wayne County, you probably recall, that a lawyer assigned to take an indigent case, the case of an indigent defendant, could collect compensation on a certain schedule of fees, \$50.00 for this, \$50.00 for that, and Meizlish, who excused himself from representing somebody in a proper way, under the law of cases at the time, came in and asked for a good deal more than the fee schedule provided, and he said he was being deprived without due process of the fruits of his labor, and all that sort of thing. That one doesn't ring any bells?

Justice Swainson:

It doesn't ring any bells with me although I remember one time, inquiring of the clerk in Wayne County as to what the cost of the County was in providing counsel for indigent criminal defendants and being somewhat amazed at the amount of money being expended in that regard at that time.

Mr. Lane:

Do you think this whole problem is under some kind of reasonable control, then or now?

Justice Swainson:

Well, that's hard to say, because I thoroughly believe that everyone has a right to be represented by counsel, and then that gets to be very expensive as inflation increases the fees that we pay the counsel and one thing and another. Then we have the Headley amendment which provides if you mandate the counties to do something, you should provide the money from them to do it with, and that isn't being done, yet the vote whether you have a right of counsel or who is going to pay, it's a "leave it to the tax payers and the community tax payers". I think it hasn't been solved yet, and the most recent thing I just read was the initiative that was adopted by the legislature for the purposes of this campaign saying that any person under 18 who finds themselves pregnant has a right to counsel without cost and without spelling out who is going to pay for counsel for that.

Mr. Lane:

Wait a minute...you say this is past the legislature?

Justice Swainson:

Yes.

Mr. Lane:

Oh. Has this been in the newspapers?

Justice Swainson:

No.

Mr. Lane:

Oh, excuse me, sir. As a former newspaper man...holy cow. Has the governor signed this?

Justice Swainson:

The governor was prevented from signing it. As you recall vetoed it.

Mr. Lane:

Oh, he did? Just recently?

Justice Swainson:

Just recently, and then they circulated...the Right to Life people circulated the petitions to bring it to the legislature as an initiative, and the initiative, when it was presented to the legislature, they voted on it without very much discussion and passed it, and it goes into effect April 1st.

Mr. Lane:

Next year?

Justice Swainson:

Yes. I was thinking as an aside here, very active with an organization called the Senior Judges Association of Michigan, and we have approximately 80 - 100 persons that have retired from the bench that would be interested in performing judicial service, and actually passed a law this year to provide a method for which we could be appointed to sit as judges, but I was thinking and am still thinking about it, that we should present to the Supreme Court a proposition that perhaps the people of the state of Michigan would be well served by appointing retired judges to act as acting Probate judges to hear these matters, and that would have some benefits. It would be cheaper than hiring another judge where you have to pay for his retirement as well as his hospitalization. You don't have to do that in the case of us retired judges, and that we wouldn't be facing re-election in the future so could act perhaps a little more independently from the political process and generally speaking, would all be a little older and having a little more worldly attitudes, perhaps, because of our maturity and certainly that we would be able to provide some very good statistics as to how many applications were made, how many were turned down, how many were granted, what process did you go through to ascertain whether or not the parents would consent to this procedure if they were but informed of it. All kinds of things could be developed, but then when I read that the persons would be provided counsel without cost to them, I thought well, now maybe I should get back into the practice of law and have a specialty. What it is going to cost, I have no idea. How the effect of the Headley amendment would work on that, I have no idea. I happen to be at a meeting were Margaret O'Connor, Representative from the 52nd District of the state who happens to be my representative where I live in western Washtenaw County, and she spends most of her time voting against things that she feels are a waste of state's money. I asked her her position on that, "who's going to pay", and she said, "Well, it's free". I said, "Margaret, nothing's free. Somebody pays. There is no lawyer that is going to take the time preparing the petition, appear in court and everything without compensation. Who is going to compensate?" "Well, I don't know. The state, I guess", and I said, "Well, that's what I'm asking. How much is it going to cost? How much would you appropriate for representation for these people?". The provision also in there is that they must be filed, and the Probate Court must act upon them, I think, within 48 hours, and then if it is an appellate situation to the Court of

Appeals, that must be accomplished between 72 hours after a petition is denied by the Probate Court. Well, what are the procedures to be followed in this? Nobody seems to know, and as I say, it becomes effective on April 1st, I believe, in 1991.

Mr. Lane:

I feel like Rip Van Winkle when you say all this stuff.

Justice Swainson:

Well, I just happened to be reading about it in the paper, and it passed by a vote...I can't even tell you the numbers of the vote...not overwhelming, and it was just acted upon immediately whereas when the initiative is presented, hearings are usually held. They can modify it and then pass it as a legislative act, pass it as presented or not pass it, whereupon, it goes to a referendum of the people because it was started by initiative petition, but to make a point, because of the overbearing interest of people in the abortion laws, they passed it without any debate, and it has all these provisions in it.

Mr. Lane:

Let me get back...Gosh, that was a digression. Let me get back to some of the cases that came along during your period on the Court. Do you remember *People vs. Turner*? That's the entrapment case, subjective test. I don't know whether you wrote that one.

Justice Swainson:

I think I was the author of that one.

Mr. Lane:

Do you remember that? Does it ring bells in your mind?

Justice Swainson:

Yes, it rings bells in my mind because we were holding what we came to know as a "Turner hearing", and it was called a Turner hearing because of what had been designated the "Miranda hearings". In other words, the judge could conduct a hearing prior to the trial to determine whether or not that person had been entrapped, and if it was his decision they had been entrapped, then there was no trial. The person was released, and particularly in dealing with contraband drugs, from, again, my past experience on the Wayne County Circuit Court, there was a lot of entrapment. This was an easy arrest to make. Persons were galled into things. This, I think, case rose out of Adrian.

Mr. Lane:

You're right.

Justice Swainson:

And this was a person who had simply refused to provide this contraband substance although he was being constantly asked by the undercover police agent to do so, and finally the undercover

police agent had told him about his girlfriend who was hooked and needed it, and it was going to ruin his romantic life if he couldn't provide his girlfriend with this substance. Would the guy please do it and finally after a year and one half of cajoling him, of begging him, the guy provided him with something, and then was arrested. Well, was he entrapped was, of course, the first issue. Well, if I have to go on trial and yet I know, subsequently, the trial is going to be a waste of time because the entrapment would prevent the trial in the first place, let's have a judicial determination of that prior to is, and that was my thinking in the development of that opinion which I think was supported by most of the Court.

Mr. Lane:

The case was decided under the Michigan constitution, was it not?

Justice Swainson:

Yes.

Mr. Lane:

As a more liberal, if that's the right word, view of the problem of entrapment that the United States Supreme Court...

Justice Swainson:

That's right.

Mr. Lane:

...had decided on in its cases in Washington.

Justice Swainson:

That's right...to have a separate hearing and not before the jury, because juries sometimes lose the essence of what entrapment is or is not.

Mr. Lane:

Do you remember *People vs. White*? That was the combination case where the accused...there was a kidnapping charge and a rape charge because there had been a county line crossed essentially...I think it was Wayne County to some other neighboring county. There was a double jeopardy question that arose there over the handling of the case, whether the two transactions should have been charged in the one county?

Justice Swainson:

I can't specifically recall that case, but, as you describe the fact situation, it seemed to me that one portion of the trial was in Recorder's Court in Detroit and another portion of the trial was going to be held west of Detroit, maybe in Washtenaw County or Livingston County or something, and you were subjecting the man to a trial on the same facts in two different jurisdictions that I thought to be impermissible.

Mr. Lane:

Do you remember Hardy vs. Singer? That was a civil service case, one of the few that made its way to the Supreme Court. That was where...

Justice Swainson:

Otis Hardy.

Mr. Lane:

Okay, do you know Otis? Did you ever hunt with him?

Justice Swainson:

I never hunted with him, but I know who he is, and I know his wife, Gay.

Mr. Lane:

She is the Solicitor General of Michigan.

Justice Swainson:

That's right. I didn't know that specifically, and I know Otis. I forget what the issue was in the case.

Mr. Lane:

Well, putting it in real simple terms, he was demoted under the guise of being transferred when there was a new boss hired into the Civil Service Department, and he had been the close-in assistant of Frank DeWald, the prior director of Civil Service. Does that come to mind now?

Justice Swainson:

I don't remember specifically on the thing. Excuse me, let me see what our timing is like.

Mr. Lane:

Well, I was going to say. This thing is about to run out...

(End of side 2, tape 1)

Topic 3: Justice Swainson discusses drug prosecutions, the case of People vs. Matish, and the Detroit Police Officers' Association vs. City of Detroit and his involvement with their arbitration after his court term. He then talks about the election of judges, the geographic dispersal of judges, and the impact of the creation of the Court of Appeals in 1964. He begins to talk about judicial history and its preservation

Mr. Lane:

Red is it? This is another oral history project taping with former Justice John B. Swainson. We're

sitting in the History Commission room in Lansing in the new library museum building, and with him is Roger Lane of the Michigan Supreme Court Historical Society. To start, I want to correct an error in the first tape that I made yesterday. I established a date...it should have been October 18, and I think I said the 17th. Justice Swainson later on in the taping observed what the right date was...just to clear that up. Today is October 19th, Friday, and we'll go on where we left off yesterday.

Justice Swainson:

Roger, let me clear one thing up also. I recalled during our colloquy yesterday that we were trying to determine my age at the time I took office and thinking about it on my drive over here this morning, I decided I was closer to 29 than I was to 30 when I took office first in January, 1955, so I was 29-1/2 years old.

Mr. Lane:

Boy, this is really going to be authentic history by the time we're through. You know, one thing that just occurred to me overnight that I wanted to again bring up before I forgot about it. There was a case...this was not one of your cases, but I think you're the only presently surviving member of the majority, and this had to do with a very unusual procedure. It had to do with the way education, public education is financed in Michigan. It was a case entitled something like "Governor vs. State Treasurer", and Milliken then being Governor, through some chemistry that I'm not too familiar with, was moved to take this initiative to challenge before the Supreme Court, and I think it was one of these direct proceeding where they sent it out to make a little bit of a record and then bring it back and decide...whether or not there was the financing scheme based on the property tax was constitutionally viable in Michigan, and this thing came down...the case came down on the 2nd or 3rd last day of Justice Adams' tenure. He was about...his term was going to expire. What the reports show on this is that Justice Brennan had drawn the case to write it. He thought he was writing an opinion of the Court, and he recites this with some evidence of annoyance in what becomes a dissent. He got the case, he wrote it. He circulated it, and all that stuff, and then towards the end of December, let's say the 20th, or maybe my date is wrong by a week or so, that he then received as the other justices did a draft opinion from Justice Williams, and the day after Christmas, he got a call and said, "We've got four votes. This is going to be the opinion of the Court". Now, this is all written by Justice Brennan in his dissent. He, Brennan, attributed the quick action that occurred that I'm describing now to the fact that Justice Adams was going off the Court, and the inference was that without his vote, the result wouldn't be the way it was going to be. After the next year, this was immediately reconsidered. You had different members on the Court. There was a case; Washington Rodriguez out of Texas. The State Supreme Court upheld Rodriguez, and then, in the Michigan Report somewhere, there is a one paragraph entry that says, "On order of the Court, we hereby vacate all..." this other stuff. Do you remember how that all came about? Does this ring any bells?

Justice Swainson:

I've listened to your narration of those events, and I do not have any recollection of them. The only thing I could think of that might have been before us at the time was the so-called Proposition C that was on the ballot in the 1970 election. Basically, as I recall it, that would have allowed monies, public monies to be used for private education, and whether that came before us

by designation of the Governor to have the Court give him an advisory opinion more or less, which he has the ability to do, I do not recall.

Mr. Lane:

I was thinking of a different proceeding. Now, what you referred to, we called parochia. That's the same thing, isn't it?

Justice Swainson:

Yes.

Mr. Lane:

And I do recall that the Court did have an opinion on that and found that the Proposition was viable if you take out certain language. That's not a big thing, but certainly with your service on the Court, I thought that because the others who...incidentally, Justice Adams, apparently from the early contacts I've had with him, is not going to be able to participate, for reasons of health.

Justice Swainson:

Oh, I'm sorry to hear that.

Mr. Lane:

Another thing I wanted to ask you about was the...it seemed to me that during your period on the Court, there was sort of a rash of cases that dealt and turned on elements in criminal procedure. We talked a little bit about entrapment yesterday and about double jeopardy. Do you recall that this seemed to be a watershed period for that sort of thing, or what?

Justice Swainson:

Well, I don't know. Obviously, my tenure on the Court was five years. Whether or not during that five year period, different numbers, whether they were more or less on one particular phase of the law, I'm not at all clear on that. I know that myself, having had the most recent experience sitting as a Circuit Court judge, would probably have been somewhat more active in the discussions, at least, concerning the application of the law or the trial of cases and the elements of the charges being specifically proven, but I can't say there were more or less during my tenure on the Court than the five years preceding or the ten years before that.

Mr. Lane:

To illustrate, I just happened to think of two cases that came sequentially that had to do with...they were drug prosecutions, and they turned on the fact that one of the elements of the crime was for the accused to not be licensed. He didn't have a license to do this stuff. The prosecutor, apparently, in each case had neglected to offer affirmative proof that the guy was unlicensed, and this became the basis, as I recall, for overturning it. It's that kind of thing. You know, we had the guilty plea...you weren't on there during the guilty plea?

Justice Swainson:

No, that was before my time.

Mr. Lane:

It's that kind of thing that I'm bringing up.

Justice Swainson:

Well, I think that as a general statement, I could say that we had drug cases coming before us in greater numbers than they had ever come before any previous court just because of the nature of the times. We're talking...we just emerged from the 60's, you might say, and as we all know, certain attitudes were held near and dear to the hearts of many of our citizens were being overturned by their very own children, and so there was a drug culture that was developing. We were aware of it, and some of our laws were quite draconian in their addressing the problems. That worried a number of us who had children of that age, you might say. I always commented on the fact that as I got on that Supreme Court, I was sitting with my father's generation in many instances, people old enough to be my father, and they would be grandfathers of children that would be involved in the 60's thing. Yet, I was a parent that had a child that was of that era who graduated in 1965, and I think my reactions to some of the things that were happening, and probably quite reasonably, would be conditioned on my own actual experiences.

Mr. Lane:

Well, I think it was some very distinguished United States Supreme Court judge, Justice Cardozo or one of those who had said something about the court follows the election returns, that kind of thing.

Justice Swainson:

That's that famous Dooley. We don't know where he came from but Dooley said that the Court follows the election returns.

Mr. Lane:

I was going to give this to Cardozo...

Justice Swainson:

And that probably has a great deal of truth in it, too.

Mr. Lane:

Custodial interrogation, insanity instructions, contempt - attorney failed to appear on trial date, People vs. Matish. Is that the Matish that later came to have some public office in Michigan.

Justice Swainson:

George B. Matish, I believe. He was the state employee, the Office of State Employer, subsequently. That's an interesting case. I think I wrote the opinion on that. Judge Frank Szymanski of the Detroit Recorder's Court was the one that cited Mr. Matish for not appearing in his courtroom at a particular time for a particular purpose although I think, in reviewing the evidence of the matter, it was very clear to all of us that this was an inadvertent error on the part

of Mr. Matish and not a contemptible act on his part towards the Court. I think the very day that that case was argued before the Supreme Court, we rendered our decision.

Mr. Lane:

Is that right?

Justice Swainson:

In fact, I wrote the decision and everyone signed it, and before George Matish arrived back in Detroit, he had the result from the Supreme Court which was highly unusual.

Mr. Lane:

I was talking to Justice Fitzgerald the other day. He recalled that in the Poletown case...you remember that, I take it? That was the big condemnation proceeding, presumably authorized by law down in the Hamtramack area so that General Motors could get a site cleared for...

Justice Swainson:

That was subsequent to the time I was on the Court.

Mr. Lane:

Oh, yes, but he was very sensitive to the fact, Justice Fitzgerald, who was in a dissenting mode, that the case was heard and ten days later, this massive proceeding was decided. He thought that was pretty fast, but he didn't know about your case. Here is another one. Do you remember the Detroit Police Officers' Association vs. City of Detroit? Was that strictly a residency dispute or?

Justice Swainson:

Yes.

Mr. Lane:

What do you recall about that?

Justice Swainson:

Well, I wrote the opinion that I think became the majority opinion which basically said that you have the right to live anywhere you want to live in the United States at any time, but you do not have a right to be a Detroit police officer, and if you chose to become a Detroit police officer, then you will submit to the residency rule that they have. That turned out to be the position of the Court at that time. I think it's interesting that since I have left the Supreme Court and pursued more or less the practice of law, I have been called upon to be an arbitrator between the City of Detroit and their police organizations, and in each arbitration, the issue of residency has come up again. It's always negotiable, and I have fully informed both parties prior to sitting as an arbitrator that I had written the opinion.

Mr. Lane:

And they still took...

Justice Swainson:

And I had not yet been convinced that it was an erroneous opinion in any regard. Be that as it may, they still selected me as the arbitrator in the matter.

Mr. Lane:

That's very interesting. That's a long time ago. Wasn't there a distinction made as between the police officer and other employees, or am I...?

Justice Swainson:

Yes, there was. In fact, I pointed that out in my opinion that in effect, the police officer belongs to a semi-military organization and he is required to be armed 24 hours/day and the purpose of the requirement of him being armed is so that he can perform his duties as a peace officer at any time he is called upon, and certainly if there were a civil disturbance that required reinforcements, if they lived within the city, they would be more readily available than if they lived outside the city and had to travel in to answer the call. Since they did require them, I used that as an illustration of the semi-military nature of the police force and the discipline that must be maintained within that force.

Mr. Lane:

Do you remember the...you had a couple of advertising zoning cases. Remember the placing of advertising signs along highways was big in that time. I don't know where all that stands lately, today. Do you recall a case where the city of Ann Arbor had adopted an ordinance that was very restrictive and it came to the Supreme Court for interpretation, and it seems to me that the Court held that the ordinance, under the guise of regulating, prohibited. Do you recall that case?

Justice Swainson:

I do recall that case. I don't recall it with any great specificity, though, but I do recall the matter being before us, and the concern that was expressed by the members of the Court as we addressed ourselves to the problem.

Mr. Lane:

Does that sound like the way it came out?

Justice Swainson:

That sounds like the way it came out.

Mr. Lane:

There were some other...it had to do...usually the advertising was tied in with zoning, wasn't it? That's the way you regulate it by establishing zones?

Justice Swainson:

Right. They have setbacks, and they also have size of signs, and you get into a First Amendment debate whether or not a person has a right to express themselves, and whether it should be restrained in any way, and I think that all of us felt that reasonable men could differ on the matter, and that anything that was a reasonable exercise should be permitted.

Mr. Lane:

I find it here...Central Advertising vs. City of Ann Arbor, and then there is Dingeman Advertising vs. Algoma Township, and a couple of others. So much for that. Big name bingo...does that ring any bells? This case is Paley vs. Coca-Cola, and...oh, I think that was more of a....this was a class action...?

Justice Swainson:

Class action which is always a very difficult matter, and it was a person that won in one of their contests, I believe. There were certain symbols underneath the cork in a Coca-Cola bottle, and I forget how the matter came before us, that examination of the procedures would have indicated that they were less than fair to all of the people participating, and therefore, damages were being sought as a class action, but the proofs would be very difficult in a matter like that, and I forget just how we resolved the matter.

Mr. Lane:

I think the position was the claims all had a limit of \$100.00. That was the top prize, I guess, and the question was whether you could aggregate the small claims for the purpose of meeting jurisdiction requirements for class action suit. That's not so hot. I wanted to, while I'm thinking of something else that might need talking about here...I wanted to go back to the matter of judicial selection. In yesterday's conversation, this was discussed to some degree, but I would like to have your thoughts on this from a standpoint, having an elected judiciary, you have the problem of ever diminishing voter turnout plus the fact that in a judicial race usually is a fall out of, I think, maybe 1/3 below the turnout, and then you have the matter of blurred or no identification. This has been pointed out by others. Do you think that this is enough in the way of a negative to overcome the virtues of popular selection, democratically selected judiciary.

Justice Swainson:

Well, I basically would say that the people who vote for the Governor of the State of Michigan should be aware that he has the power to appoint in the case of a vacancy in any judicial position, and that if you have faith in your selection of that person, then you must also have faith in choosing the members of the judiciary when the occasion demands, so I would not take the gubernatorial appointment away. The election that we follow after a gubernatorial appointment, of course, gives that person appointed a tremendous advantage because he is an incumbent, and anybody seeking to unseat him has a tremendous chore. We also are aware, from past elections, that certain names are more politically potent than others. Maybe some person had distinguished himself at a former time and carried a name. That name, by another person or another person using that name that might not have any qualifications, but just a matter of confusing the public. That, of course, is a byproduct of the democracy, too. I think that until a better way is pointed out, I think that we go along with our very unique system here in Michigan, and I have faith, and I know, of course, that most persons are on the Appellate bench because of appointment, gubernatorial appointment. There are only a few of us that got on in a different way, but that's because of our past experience, and I would have to say that the public knew we knew whereof

we came, and I speak particularly of myself and G. Mennen Williams who had served as Governor, governors of the state.

Mr. Lane:

What about elections at the county level?

Justice Swainson:

They're getting more difficult. They're getting more expensive with the advent of the television tube. It almost can be equated that the more money spent on television advertising, the better your chance of being elected, all things being equal, and so I think that at sometime in the future, we might have to address that phenomenon and decide whether or not we wish to change our matter of selection of judicial figures, whether election is the best way or whether there should be a different way. I, for one, would object to hand it over to the Bar Association. I think they have an input, and they can make recommendations, but I don't think that they should be the last persons to decide.

Mr. Lane:

You wouldn't have much use for Missouri Plan?

Justice Swainson:

No, I don't think so. That gives a tremendous advantage to the incumbent when his name is placed before the voters, and they can only vote yes or no, and there is no opposing candidate, obviously. All things being equal, the person would be retained unless there was some outrageous action on their part that the public was aware of.

Mr. Lane:

You had an interesting example of this principle in California not so many years ago.

Justice Swainson:

Well, the person you're talking about is the Chief Justice whose name was Bird, I believe.

Mr. Lane:

There were three, I think, actually that were not retained at one time. It kind of threw the Court, I guess, into a...well, you could see what it would do. First off, those election returns that Mr. Dooley was familiar with, and it did have an influence, I think, on the Court's...what they like to talk about...chemistry, you know.

Justice Swainson:

Well, I'm sure it would. As I recall the circumstances, however, the Bar Association together with the media out there, had a concentrated campaign against the Chief Justice that she was not able to overcome, and of course, there are always regional issues that have to be considered, too, and I couldn't, for the life of me, tell you exactly what she did or did not do that caused such an uproar in California, but I don't think it does have anything to do with the proverb or axiom that the Court follows election returns. Obviously, if we elect a liberal person, he would be more inclined to appoint liberals, people that he had associated with at different times who were

qualified in the law than he would to pick somebody with a completely different philosophical basis than he has, so I guess broadly speaking, yes. The Court follows election returns.

Mr. Lane:

Well, in this case, if you will recall, the political winds blew and suddenly shifted in California and the rather conservative Republican governor was elected, Duke Mejian, and he had the appointments to pick the successors to the people that, Rose Bird, and the others, so it accomplished quite a shift in a relatively short time, but it was a strange way to go about it. That's really what I was bringing up here.

Justice Swainson:

(unclear) believe in democracy, that could happen quite often if everybody were more attentive to the duties to participate in the democratic process of election.

Mr. Lane:

Let me ask another question specifically about the Supreme Court in Michigan. Is there sufficient use made or is there some way to better utilize the talent of people that have served on the Court than is presently done? There is provision, for example, to...say you're a retired Circuit judge. You can be called out to sit on a Court of Appeals by appointment and that sort of thing. This is very, very sparingly done, as far as I know though, as far as I know, in Michigan as far as Supreme Court justices are concerned, is it not?

Justice Swainson:

Very sparingly done. I think that there have been a couple of occasions where former Supreme Court justices have been asked to sit as a master in a matter, but I think, from my own experience and others I know, that there are many retired judges who are quite capable and willing to make available their expertise as visiting judges or to relieve dockets in some instances, or whatever might come up, and that they should be utilized more than they are. I think that economically, it is sometimes easier to appoint an acting judge or a former judge to sit rather than to pass legislatively, the increase of a bench. They come more inexpensively. In other words, if I were to be appointed to sit as a Circuit Judge, the going daily rate would be \$350.00 or somewhere near there. That would be my salary, but I would not have any perks or any benefits such as hospitalization or retirement or anything like that, so I think we could perform services that are now chiefly ignored.

Mr. Lane:

Did anybody ever propose...for example, when a president of the United States leaves office, there have been people that have said that he ought to be given a seat...

Justice Swainson:

Given a portfolio...

Mr. Lane:

...on the Senate or that sort of thing. Has anybody, as far as you know, ever discussed the possibility that the retired or no longer serving justices of the Michigan Supreme Court should automatically become part of some kind of a Counsel of Elders to meet once a year and make recommendations or anything like that?

Mr. Lane:

Have you ever heard that?

Justice Swainson:

I've never heard that, such a use being suggested. I think the reason why at this particular time, there are a number of capable retired judges, is because the retirement age was lowered to 55 and for some persons that are otherwise qualified at 55, but for many different economic reason, it is better to take than pension that is available to you and enter upon a different phase of your legal career. Some seek retirement, obviously, for many reasons best known to themselves, and are not available, but those that are available and capable, I think, should be utilized, and not only Supreme Court judges but all judges.

Mr. Lane:

I was thinking particularly of the Supreme Court...

Justice Swainson:

I realize you were, but I've never heard it suggested, and I think it would be resisted. We don't need two Supreme Courts.

Mr. Lane:

You know, you think from time to time, you have these commissions that are set up and a lot of nominal attention, at least, paid to problems that come along with the changes in society and all that...

Justice Swainson:

Well, doesn't that admit to a lot of things, too, though, and some judges, retired Supreme Court justices would not be capable because of physical or other reasons and some would, and so do you limit yourself to some of the former justices and does that not give them greater recognition, perhaps, than they, in the scheme of things, should be accorded? I don't know. I could see if they had some specific assignments, to sit as a law review counsel or one particular phase to make some judgments, and place them in the form of recommendations to the Supreme Court, but I have not heard it suggested or am I aware of anybody seeking such a utilization of the retired Supreme Court justices.

Mr. Lane:

May I bring up another matter of the functioning of the Court? Back when Gene Black first sat on the Court, there arose some controversy over the fact that he made it a rigid practice to drive

back and forth from Port Huron, had his own office in Port Huron, and from that beginning, at least some people think that there's grown a pattern of dispersion of the members of the Court. Now, you are aware, of course, of all the...when Brennan was elected, he wanted an office in Detroit and all that sort of thing. Is this a fairly serious systemic problem in the operation of the Court?

Justice Swainson:

Oh, I don't think so. Today, with the highway system available to us, comfortable modes of transportation, relative closeness. The Supreme Court is not a court that has to act today, or tomorrow or by Monday, nor should it be. Everything should be deliberately considered. I've heard the story relative to Justice Black, and have heard him say to myself that he, during the term of his marriage to his wife, they had never spent a night apart. That's a fine record, and certainly one to be commended, but it also required him to drive two hours to Port Huron every day twice, and in fact, I even heard some wife say at one time that it took so long to get Michigan Route 21 resurfaced because people from the Highway Department had an antagonism towards Justice Black and they put that on the lowest priority knowing that he drove it twice every day, but be that as it may, I don't think it really has that much of an effect on it. I think the administrative judge, whether you call him the Chief Justice or whatever, should be in Lansing and immediately available to contact the other members of the bench on the administrative matter that might come up, but I know that when Justice Giles Kavanagh was Chief Justice, he maintained his residence in the Oakland County area, and I don't think the Court suffered because of that.

Mr. Lane:

He drove with great frequency back and forth, too, didn't he?

Justice Swainson:

I would suppose he would. During the week of oral arguments, he did not drive. None of us did. We felt we'd better use our time reviewing the cases that we were hearing that week, but certainly those that wanted to drive...you know, driving is therapeutic to some and a necessary evil to others. I, myself, when I drive from where I live at this time, where I reside in Washtenaw County, to Lansing, it is an hour and ten minutes, and I enjoy that hour and ten minutes to sort of organize my thoughts, maybe to hear the news or the weather reports or all kinds of information, and I don't find it a chore at all. I find that where I live, I'm equidistant from Detroit and from Lansing, and so if I head towards the west, it takes me an hour and ten minutes to get to Lansing. If I head east, it takes me an hour and ten minutes to get to Detroit, and I don't find it onerous except sometimes you have to pick your times to get into the driving pattern because it makes as much as a ten to fifteen minutes difference in your arrival time going into the metropolitan area.

Mr. Lane:

Talking about onerous, did you ever, in your tenure, on the Supreme Court, discipline one of your Circuit Judges, District judges in Detroit by assigning him to the Mount Clemens area to check in at 8:30 in the morning in the face of the morning sun.

Justice Swainson:

Well, I suppose that could be a method of discipline that was not available to us at any time, utilized to my knowledge.

Mr. Lane:

I think I heard this discussed one time, but I'll leave it at that. How about the judicial contribution to the burden of Appellate docket? There is much talk from time to time about the litigious society, the multiplication of cases, the docket backlog and all that sort of thing. In your judgement, does the Appellate judiciary contribute significantly, particularly the Supreme Court, to the size of the burden by some of the procedural decisions it makes and such things as like going to comparative negligence, reviewing of sentences...do you have any thoughts on that subject?

Justice Swainson:

I think that a great step forward was made when the Appellate Court in the state of Michigan was created in the constitution in 1964, an intermediate Appellate Court. I think every trial decision should be reviewed by an Appellate Court. I think it is a matter of right, and we certainly accommodated that matter of right. I think the Supreme Court, on the other hand, has to be more selective in their cases that they grant leave to appeal on so that they can make their will known and have it before the members of the whole judiciary.

Justice Swainson:

Times change, and our population changes, mode of life changes, and I think your Supreme Court should be able to accommodate those changes. I don't mean suddenly, but to consider them, and the things that you discussed...more litigious society, that's true. Procedural laws that are sometimes undertaken by the legislature is sort of an encroachment on the judiciary's function and sometimes they cause Appellate review, but that is to be expected. Certainly we're not 100 years ago in 1890. We're in 1990, and when we had our first Supreme Court, the Circuit judges...there were only three in all of the state of Michigan, sat as a Supreme Court also, and if you read some of those early cases, they were discussing who owned livestock that was running loose, and that was a major concern, apparently. Our concerns are much greater and particularly with automobile negligence litigation that is constantly increasing. There are more automobiles produced, more people become drivers that travel the highways. This is an area of the law that has developed to more or less take something like 40% of the docket to my knowledge, but I think when we get into comparative negligence, that we have had experience with the form of justice where if you showed any sort of negligence on the part of the plaintiff, he could not recover. I think comparative negligence is a much fairer doctrine to apply, and of course, that was done during my term on the Supreme Court, also.

Mr. Lane:

That was Placek vs. Sterling Heights?

Justice Swainson:

I can't recall the names.

Mr. Lane:

What would you say of this, though, the fact that when the Court of Appeals was instituted in Michigan in the 60's, it was determined that nine judges were necessary. Now we've got 24, and I've heard it said they're are going to be at 45 here in a couple years. What do you make of that?

Justice Swainson:

Well, I don't know absolutely the figures that you're discussing but I think at the beginning, if I understand what was happening and this was all by heresy, that in order to get it passed, it had to be started out small, and the salaries depressed to that every Circuit judge in the state wouldn't run for the job, so these things were accomplished, and then the expansion began, so I can...you can probably say it was sort of an empire building process that was going on.

Mr. Lane:

You were demonstrating your legislative wisdom.

Justice Swainson:

I think we should keep in mind the personalities that were involved in the establishment of that Court, notably one T. John Lesinski who, I think, could verify or corroborate what I have just implied, that they weren't anxious to have a big court or a big salary at the time. They wanted to establish it first.

Mr. Lane:

This is wisdom for the ages. A lot of people don't understand things like that any more than they understand how we're repairing the budget deficit.

Justice Swainson:

How, by raising the salary of the Attorney General and the Secretary of State, that everybody in the state will get a raise.

Mr. Lane:

Is that thing flickering?

Justice Swainson:

Then it stopped flickering that I could see.

Mr. Lane:

Let's see. Where are we? I've been sort of jogging you here, punching you, pressing you.

Justice Swainson:

Most helpful.

Mr. Lane:

Is it? Thank you.

Justice Swainson:

Well, as I explained to you, it's been 15 years since I served on the Supreme Court, and my life has been very active during those fifteen years, and I have not given thought to some of these matters until you bring them to my attention, which I appreciate.

Mr. Lane:

It might be a good time to organize a little comment on this matter of judicial history. You remember, we had a brief exchange on this in our conversation on the telephone, but let me put it this way. Part of the premise, I think, of why we're here today, is the feeling...I found it very well expressed by former Justice Jim Ryan when he was on the Court, had one of these portrait presentations...he pointed out that the judicial, of the three branches, is the least visible, that its function is to make words in a sense. There are no dramatics, no great buildings erected or bridges built and that sort of thing, and that the only outward symbol of the function of the judiciary in our society are these words that, of course, have great consequences sometimes and paintings, pictures of the people that write the words. He saw in this a need...first off, he saw justification and this was the narrow premise that we ought to bring the painting collection in the Court up to date, get paintings of people that should have been represented there but were not only because of breakdown in tradition and that sort of thing. Now, that was what Ryan felt, that there should be systematically more attention paid to this part of our government's function, and here we have now one little take-off on that premise, as I would put it. We also have other people in the field, and you are the President of the Historical Commission. We have the Bar doing some markers. We have oral history ideas seem to be coming on very strong. I think you mentioned there is a counsel now on oral history. There is the history publication of the Commission or the division of History of the state. What would you offer as some thoughts on this subject? You're interested that there should be better understanding of the people on the part of what the judges do and that sort of thing?

Justice Swainson:

Well, certainly as the President of the Michigan Historical Commission, our charge under the statute is to preserve and interpret the heritage of the state. We gather artifacts. We cause displays to be made. We have a museum division. We have an archeology division, preservation division, publications division and what have you, and all to the one end to better interpret the history, so obviously when an organization, a private organization such as the Supreme Court Historic Society feels that the members of the Court over the years have made a contribution to the life of the state of Michigan, we should preserve that. We do preserve their opinions, obviously for reference purposes in the Michigan Reports, but to get a better understandings of the persons and the times.

(end of side 1, tape 2)

Topic 4: Justice Swainson continues to talk about the preservation of judicial history and William A. Fletcher, the first Chief Justice of the Supreme Court. He offers his view of televised trials, talks about the portraits of former Justices, and concludes with his view of the function of the judiciary in the state of Michigan

Mr. Lane:

Is the light going?

Justice Swainson:

Yes, it's red.

Editor's note: The preceeding comments were lost at some point in the duplication process, after they had been transcribed.

Mr. Lane:

You were talking now about...

Justice Swainson:

Well, I think it's important to preserve and interpret the history, to have as much information available to you as you possibly can, and the very fact that we are here today and you are recording my statements and our discussion might give insights to other persons at different times as to what impelled me in one direction or another on specific matters that came before the Court while I was a member of the Court. I don't know who else would preserve it. Certainly, we do not have the capacity nor the funding to do that on the state level by the Commission, you might say. It would be nice if we could have such a program, but I don't see it in the near future, and certainly the volunteer association of lawyers to preserve the actions of the Supreme Court over the years is well worthwhile, and to get this little discussion with the persons that are still available and had the experience of being on the Court, I think, would be invaluable. I would have liked to have heard what the first justice, Chief Justice of the Supreme Court would have said. That was William A. Fletcher. He never completed his term. He was a man that had come to a territory of Michigan from New York state and if you read the history of the man, he'd apparently left a wife in New York and came out here after her fortune had provided him with the legal education, and I suppose that has happened in the past and will happen in the future, but he codified the laws of the state. He also got involved in political disputes, and he left office in somewhat disrepute, and it would be nice to have been able to maybe interview him.

Mr. Lane:

Was this the dispute over the punishment of Mundy, was that the episode?

Justice Swainson:

That's right. He was Lieutenant Governor at the time, very strong partisan for statehood, and I think that's what...he got into fisticuffs with the person and was charged with assault, and Justice Fletcher gave them a very minimal sentence which was objected to by the persons of the area and that redounded to a great deal of discussion about the qualifications of Justice Fletcher, his

objectivity, perhaps. He was appointed by Stevens T. Mason to be the Chief Justice. He also had an association with a young lady that I guess was a social blemish on him at the time, and as I say, it would be interesting to have his words to hear what some of the challenges were in his day when we were just beginning as a state.

Mr. Lane:

What do you think of the idea that has gained great currency in recent years that trials should be televised, or that this should be permitted?

Justice Swainson:

Well...

Mr. Lane:

Does this do anything, first off, for the public understanding? You know, it's argued that people don't know enough about what the courts are doing and so here, we'll show them. What about that argument.

Justice Swainson:

I don't think that's a very valid argument. I think it would probably be proven so. Most trials are not dramatic. They are tedious. I'd hate to see a situation develop where you would end one day's trial with some testimony accusing the defendant of unconscionable acts and then see it on TV that night without having that rebutted or a balanced picture of the whole situation. I think that would be a problem, but I think we have something available to us now called C-span where you can turn it on, it's a cable presentation of the Congress in action. I would just suspect that the listener/viewer/audience of C-span is very negligible, if you can imagine listening eight hours a day to the actions of Congress and you still don't know what they're talking about. I think that would probably be the same situation if you listened to eight hours a day of testimony in the typical case that you would have a very good idea of what's going on or what's not going on. But I think the function of the Supreme Court, obviously is much different. It's administrative as well as judicial in the fact of writing opinions on cases. I think we should utilize the availability of video production. I read a story not too long ago that arraignments were being held via video. Certainly, the county could point out the reduction of cost of transportation of persons that had been detained in the jail pending an arraignment, what have you, but this could be done just as easily by a judge and the individual miscreant, if that is the case via video, and I think where that has proven to be true, we should utilize it.

Mr. Lane:

Well, that's close circuit use of the technology, though, it is not?

Justice Swainson:

Right.

Mr. Lane:

I was thinking more of public education.

Justice Swainson:

Well, I think that in order to be successful in the use of the media for public education, you have to dramatize certain things to make your point. That doesn't happen and shouldn't happen and cases should be dispatched. We don't have Perry Masons in every county. We don't have the investigable devices that he purportedly uses, different things that go to fictionalize what actually happens, I think, does a disservice.

Mr. Lane:

Getting back to this business of the visuals that are so limited as to function of the courts, we have these paintings, for example at the Supreme Court. I came after you were gone there, and I was put to work trying to remedy this problem of the omissions, let's call it. Is there something better to do with those paintings than to hang them in the corners over there? You talked about the inspiration you got from Epaphroditus Ransom, correct?

Justice Swainson:

Correct.

Mr. Lane:

And he was hanging on your wall. Somebody put him there.

Justice Swainson:

He very sternly looked over my office.

Mr. Lane:

Is there some...you mentioned displays as being one of the missions of the Historic Commission.

Justice Swainson:

Well, we have temporary exhibits that we feature from time to time on different phases of the life of the state. The current one is underwater archeology which people have expressed a great deal of interest in of late because, again, with our better technology in locating the ship wrecks of the 19th century. I can't, sitting here with you today, envision that we would have a display of all former justices of the Supreme Court and what occurred during their tenure on the Court. Perhaps such an exhibition could be arranged in some very specific areas, but whether, in the priority of things, it would be very high or not, I'm not so sure.

Mr. Lane:

I was thinking more of a law school, perhaps, could have a few paintings.

Justice Swainson:

Oh, I think those paintings that you have described, I suppose as time goes on, you'll run out of wall space, and if they could be loaned out to a law school or otherwise displayed, I think that would be helpful. I wish...when you have to get down to the ordinary thing...who pays for them? You can't...my experience has been is that it is about a \$5,000.00 expenditure to have a portrait

done of the size that would be uniform with the other portraits, and fortunately, some people, myself included, have friends who were willing to donate to such a project, but should we leave it to that? I don't know, and yet I can't see legislature looking at that item in the judicial budget called portraits of former justices, and thinking that was the best expenditure of funds.

Justice Swainson:

Well, we don't have such an item yet. You, I'm sure, are aware that so far, this has all been handled by friends of the former member of the Court with a little stimulation from time to time.

Justice Swainson:

Yes, well I am aware of that.

Mr. Lane:

What else comes to mind? There must be...maybe some thoughts that I haven't brought up about the...maybe the way the Court functions, the staff work in the Court...do you remember back when some of the people in the legislature trying to enforce the idea that the Court should meet at the seat of government, wanted to...in fact, the legislature at one time said "no cars". Do you remember that? And no offices financed by state funds at other locations. The Attorney General of the state that you would seem to be responsible for it said..."You can't do that. Once the Court gets its money, it spends it the way it finds it is necessary under the constitution of Michigan." Do you find any fault with...?

Justice Swainson:

No, I recall part of the arguments of dealing with cars, but I think that just popular wisdom would suggest to you that most of us transport ourselves through the use of an automobile, and it makes us much more mobile and in a better position to discharge our functions than not. It is a necessary evil, perhaps. We are not living in the 19th century where it would be imperative for persons to meet on a specific day that they would have to plan a travel time of a week or more to get there and what have you. If it enables the justices to better discharge their functions, I see no objection to it. If offices are maintained close to their residences, I see no objection to that. We have available to us now telephones, fax machines, modems, and all kinds of things that really the requirement that you live in one specific area is sort of archaic at this time.

Mr. Lane:

Except with the...

Justice Swainson:

Administrative functions.

Mr. Lane:

...before that, that the Chief Justice is well-advised to be here a lot more than...

Justice Swainson:

The day to day load on the executive officer of the Court which is the Chief Justice is such that I think it would be better for him to be immediately available at the seat of government which is Lansing by the constitution.

Mr. Lane:

I remember that line well.

Justice Swainson:

I recall that being discussed when I was in the legislature in the 50's...buildings are going to be built in Ann Arbor or some other place and that scared everybody that somehow, Lansing would cease to exist as an entity, but I don't think we're in any danger of that.

Mr. Lane:

Not imminent. Well, did you think of other thoughts that you might want to express?

Justice Swainson:

I think that as I view the function of the judiciary in the state of Michigan, I think that the Supreme Court and the legislature meet the challenges in a timely manner. It might not be as quick as I would want to see them, but I also realize that any action has to have the support of the public, and that takes time to gain that support for any innovation that is an innovation, and I think that the people of the state of Michigan are well-served by their judiciary in the state, and I am certainly supportive of the one "justice system" that we have here in the state of Michigan where the Supreme Court is the supreme law as far as the functioning of the judiciary is concerned. I don't think legislators are very well-equipped to mandate certain things that might be popular at the time. They add problems rather than solve problems, but I think we have been well-served, and I'm very, very happy to have had the opportunity to serve both as a trial judge and as an appellate judge in the state. I think I've been very fortunate in many ways to serve in the executive and in the legislative and to now have a chance as the president of the Michigan Historical Commission to reflect on not only my times but all the times of the state of Michigan.

Mr. Lane:

I think that's a good place to end it, don't you?

Justice Swainson:

Fine.

Mr. Lane:

We consider that the end of tape number two of former Justice John Swainson.

(end of side 2, tape 2)