Edward Leavy: An Oral History
An Oral History

Edward Leavy

FOREWORD BY JUDGE OWEN PANNER

US District Court of Oregon Historical Society
Oral History Project
Portland, Oregon
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The Oral History Project of the District Court of Oregon Historical Society began in 1983. Through the efforts of Judge James Burns and his wife Helen, a gathering of lawyers, judges, and historians took place at the Society’s inception. The Honorable Robert F. Peckham, District Judge for the Northern District of California, discussed the Northern District Historical Society and the inspiration was born for Oregon’s District Court Historical Society, the second such organization in the country. The original Board of Directors of the Society was composed of twenty-one members with bylaws including the Presiding Judge of the Court, the Chief Justice of the Oregon Supreme Court, and the President and a representative of the Oregon State Bar. The original officers and directors included outstanding judges and lawyers – Judge John Kilkenny, Honorary Chair, Judge James Burns, Chairman, Randall Kester, President, Manley Strayer, Vice President, Elizabeth Buehler, Treasurer, Susan Graber, Corporate Secretary, and Robert M. Christ, Executive Secretary, along with many other top names in Oregon’s legal history.

The Society decided to collect, study, preserve, analyze, and disseminate information concerning the history, development, character, operations, and accomplishments of the United States District Court for the District of Oregon. It was therefore logical that the Oral History Project should be established to preserve the histories of the judges, law firms, and lawyers who actively practice in the Court. With the assistance of Rick Harmon and James Strassmaier, the Oregon Historical Society held seminars to educate volunteers in taking oral histories with a biographical and Court-oriented focus. The Oregon Historical Society has been most
cooperative in agreeing to maintain these histories in their permanent collection for study by scholars and other interested parties.

These oral history interviews have been taken by recording devices, and are either transcribed or transcription is underway. A transcript reproduces, as faithfully as possible, the original sound recording that reflects the special value of oral history, namely its free and personal expressiveness. Most of the transcripts in the District Court Collection have been lightly edited and reviewed for clarity and accuracy by the narrators. That process continues. It is through these wonderful oral histories that the story of the Court is told. We now have recorded nearly 120 individuals since the project began. The goal is to record the individual histories of all the judges of the Court, as well as those of participating lawyers. The Court has a rich tradition reflected in the activities of the judges and lawyers of the Court. The recording has been done not only by professional historians, but also by dedicated volunteers. As one such volunteer said, “The opportunity to interview someone that you always admired is truly an exciting experience.”

The history of the Court is being created by the men and women who have participated in its collection and activities. The Society’s goals are to collect as much of that history as possible, because is it the history of the law and those who make it that constitutes the moral development of humanity. All of us who are students of the law venerate it. We are also interested in the people who make it.

Judge Owen Panner
February 28, 2006
During the spring of 2004, Judge Leavy recorded his oral history with oral historian Clark Hansen. Leavy’s interview covers his early life in Oregon, his decision to study law, and his legal career from law school to private practice through several state court judgeships, and finally to his many years in varying positions on the federal bench. A distinguished member of the federal bar, Judge Leavy also holds the distinctive honor of hosting the annual U.S. District Court of Oregon Historical Society picnic at his family’s Willamette Valley Century Farm, where they have grown hops for over 100 years.

Edward John Leavy was born August 14, 1929 near Aurora, Oregon, to Patrick Leavy and Ella (O’Brien). Leavy was the tenth child in a family of ten, nine of whom lived to adulthood. Leavy’s father was born in County West Meath, Ireland, and his family immigrated to Oregon around 1900. His mother was born in Oswego, Oregon (now Lake Oswego) in 1887. By 1910, the Leavy’s settled in Marion County and began farming hops, even through Prohibition. Leavy learned to drive trucks, tractors, and combines on the farm. His skills were put to use driving a bus for a high school field trip to the Oregon State Prison’s dairy farm when his teacher was unable to handle the driving duties.

Leavy’s early schooling occurred at Butteville Grade School and then at Woodburn High School. One of his grade school teachers suggested Leavy would be a good lawyer, and by his sophomore year in high school he determined he wanted a legal career. The University of Portland was Leavy’s choice for his undergraduate studies. There he discovered that he enjoyed studying and debating religion and political philosophy, and led him to attend Notre Dame Law School. Edward Leavy and Eileen Hagenauer met during high school, courted, and were married in 1951. The first of their four children was born in South Bend, Indiana during Leavy’s final year of law school.

After graduating in 1953, the young family returned to Eugene, Oregon and Leavy joined Bert McCoy’s law firm. Later that year, Edward Leavy was selected to be a Lane County Deputy District Attorney, and in 1957 he was appointed Lane County District Court Judge at the age of 27, then the youngest judge in Oregon. During his tenure on the Lane County Circuit Court (1960-76), Judge Leavy ruled the nationally-watched case of student journalist Annette Buchanan. Her controversial article published in the University of Oregon Emerald newspaper on student marijuana use, and her
refusal to divulge her sources prompted Judge Leavy to fine her for contempt of court. Buchanan’s case subsequently influenced Oregon’s “shield law” for journalists.

In 1976, Edward Leavy was appointed as a U.S. Magistrate to the U.S. District Court of Oregon. Leavy joined George Juba and Michael Hogan in shaping the role of magistrates in Oregon and across the nation. That appointment marked the beginning of Leavy’s many years of service on the federal bench. President Ronald Reagan nominated Edward Leavy to the US District Court of Oregon to fill the seat vacated by Judge Robert C. Belloni in 1984. President Reagan again tapped Leavy, nominating him to the U.S. Court of Appeals for the Ninth Circuit after Judge Otto Skopil took senior status. Leavy recounts that the congeniality of his Senate confirmation process was soon superseded by the contentious confirmation hearing of Robert Bork to the U.S. Supreme Court several months later.

Judge Leavy heard several high profile cases over the course of his legal career. One involved the controversial tenure of the Bhagwan Shree Rajneesh and his followers in Oregon during the early 1980s. With tensions running high over land use issues, a salmonella poisoning in The Dalles, and various physical threats made on state, county, and federal officials, Judge Leavy handled the Bhagwan’s eventual deportation after being convicted of immigration fraud. His skill and diplomacy in handling that case did not go unnoticed.

Edward Leavy was called upon to mediate the prominent case of U.S. v. Wen Ho Lee. Sorting through the complex issues of the case, Leavy brought the case to successful conclusion that saw Los Alamos Nuclear Laboratory engineer Wen Ho Lee convicted of only one felony out of the original fifty-nine. Leavy’s decision continues to reverberate in cases involving a defendant’s right to have access to government evidence in pursuit of their defense. Edward Leavy was also appointed to the U.S. Foreign Intelligence Surveillance Court of Review, which oversees the implementation of the 1978 Foreign Intelligence Surveillance Act, or FISA.

Judge Leavy continues his gifted contributions to our federal legal system as a senior judge on the U.S. Court of Appeals for the Ninth Circuit from his chambers in the Pioneer Courthouse.

Janice Dilg
November 2013
Family History

CH: This is an interview with Judge Edward Leavy in his chambers at the U.S. District Courthouse in Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen. The date is Tuesday, March 2, 2004 and this is tape one, side one.

Perhaps you should state who you are.

EL: Right. I’m Edward Leavy, senior judge of the Ninth Circuit Court of Appeals. The court is of course headquartered in San Francisco. One of the requirements under the law is that there be a judge in regular active service from each of the nine western states that make up the Ninth Circuit. I have always lived here in Oregon and have had my chambers here in Portland since my appointment to the court initially in 1987.

CH: And you were born, when?

EL: I was born on August 14, 1929 near Aurora, Oregon, the tenth child in a family of ten. Nine of us grew to be adults, and the one who died at an early age was the firstborn, born to my mother and father in 1908 and lived only four days. There were nine of us in the home at one time, that is, nine children.

CH: Going back into your family lineage or history, your ancestors, how far back can you trace their roots?

EL: I can only go on my father’s side to my grandparents. My father came to the U.S. from Ireland in about 1886. He was born in 1864 and he came from County West Meath, a few miles east of Mullingar. In the year 2000, I made a trip to Ireland and located the grave of my grandfather and grandmother there. And saw the house that he grew up in.

Then he was joined a couple years later by an uncle of mine, Uncle Jim and they spent some time in New York. My Uncle Jim came in about 1888 and they spent some time in New York, and whatever brought them to Oregon I really don’t know. They came to Oregon around 1900 and started a dairy out in Sylvan, Oregon. One of the stories that I recall fondly is that my Uncle Jim delivered milk in a rowboat in downtown Portland during a flood in the early nineteen hundreds.

CH: Had they come from a family of farmers?

EL: Yes, if you can call them that. They were actually what amounted to shepherds and didn’t own land, couldn’t own land, and that’s what my grandfather did.

CH: Why was it that they couldn’t own land?

EL: Well, a Catholic in Ireland under British rule was limited in what they could do and so...
on. It wasn’t until later years that a Catholic became eligible to own land there.

CH: So, the dairy farm was located where?

EL: On Scholls Ferry Road just south of the intersection of Sylvan and the Sunset Highway; right where the Washington and the Multnomah County line is. It was almost there on that highway. And it was a rented place and they stayed there until about 1910. My father and mother were married in 1907 in Portland.

CH: And did they have their dairy farm there, the cattle and everything?

EL: Oh, yes.

CH: It’s hard to imagine a dairy farm there now.

EL: You know the Alpenrose Dairy is not far from there and that has survived in the urban development. But that was a rented place. They never owned any land there, as I understand it, and, of course, delivered milk—horse and buggy—into downtown Portland.

CH: And did they raise families there?

EL: My uncle never married. I think that it could have been that one of my older brothers—the firstborn was born there, that is, Nicholas, my oldest brother was born there and then I think maybe my brother, Matt, Matthew was born there or about the time they moved out to the area in Marion County. About 1912 is when they made the move to Marion County.

CH: And what was the reason for making that move?

EL: I think it was precipitated mostly by my Uncle Jim. He had the idea that that was good apple country and there was a big orchard that they referred to as the Fargo orchard which is—Fargo being a place, not even an intersection of road where there used to be a store. But it’s right along—the Oregon Electric Railroad went through there at a place just west of I-5 on the freeway and not far from the Champoeg exit. I think he had in mind, my Uncle Jim, was really the one who started in that direction and thought that they would raise apples.

CH: What kind of education did they have?

EL: I have no idea of the extent of my father’s education. He was well able to read, but I don’t know how far he went in school. Just as an interesting aside he was always interested in voting and given the distrust that he had he would vote in Butteville, and he would always write in the name of a neighbor named Sam Moy. He would write in Sam Moy’s name for some office and then he would go down the next day and he would check the results and if Sam got a vote he knew that his vote was counted. But that was his own way of being sure that his vote was counted. [laughs] He
did that for years and years and years. I really
don’t know how much schooling he had.

My mother—her maiden name was
O’Brien—Ella O’Brien. Her father, my
grandfather, Jeremiah O’Brien came to
Oregon in I think probably about 1881 maybe.
The story I hear is that he came by sailing ship
from Connecticut to engage in the iron activity
at Lake Oswego, and his fare was actually paid
by a company he worked for in Connecticut
to come to Oregon to work at Oswego. My
mother was born in Oswego in 1887. And that
was few years before the failure of the whole
enterprise that failed in about ‘93 as I get the
picture; part of the general U. S. recession or
depression, panic or whatever it was took its
toll on that enterprise. And she went to school
then at Ball Peak in Yamhill County out north
of Newberg where my grandfather—after
the failure of that iron industry—acquired
some land out there on Ball Peak and started
farming, orchards mostly and so on.

CH: I haven’t heard much about the journeys
of people that went around the cape or through
the straits there, is that the route that he took?

EL: That’s the route he took from Connecticut.
When he came from Ireland I just don’t
know in relationship to his departure from
Connecticut to Oregon. My grandmother
was Mary Beirne and I really don’t know
much about her family, but I think with some
effort I could probably pursue more about the
Beirne family. She was also an immigrant
from Ireland. So it’s all Irish immigrants in
my ancestry.

CH: Do you know from having heard stories
from family members or otherwise how people
made the decision as to whether they took the
ship around South America or came overland?

EL: The only thing that I know of is that my
mother made the point that my grandfather
came here two years before the railroad. I
assume that to mean the railroad into Oregon
because as I get the picture that came in—
I’m going say about ’83 maybe? Maybe
you know better than I, but that’s my hit on
it, that it was about ’83 that we had the first
transcontinental railroad into Oregon. So that
was I think the motive, is something other
than covered wagon, [laughs] particularly
from Connecticut.

CH: Yes, that’d be a long journey.

EL: That’d be bad. Well, of course, there was
no question they could have gotten by railroad
to maybe even San Francisco?

CH: At that point, yes, that’s right. Because I
think at that point the transcontinental railroad
was connected there and then they could
have come up the coast from San Francisco
probably.

EL: Somebody else was paying the freight,
paying the fare.
CH: On your mother’s side—that family was also Catholic I presume?

EL: Oh yes. I know very little about their origins in Ireland because O’Brien being such a common name and what little I learned about the O’Briens when I was there is that they were kind of politely called tinkers, a polite way of calling them thieves and scoundrels. [laughs] I don’t know how much I want to delve into that, but I will someday, maybe.

CH: Did you have a sense, these early relatives of yours here, what their outlook was like and how they felt about being here and their sense of community and things like that?

EL: Well, from the little I was able to pick up, now the only family immigrants that I really knew would be my Uncle Jim and my father and they were very proud, as I indicated, to be voters and to be participants and both read quite a bit. They were pretty well informed. Now, of course, I can remember when we didn’t have radio and we didn’t even have electricity in our home. So they were limited in their sources to newspapers. But there was always lots of newspapers around the house and my mother particularly was an avid newspaper reader, and participated a lot in discussions about politics. I can recall that my mother and father and my older brothers were all very attentive to politics and opinionated.

CH: Do you know how your parents met?

EL: No I don’t know that.

CH: And they were married when?

EL: January 1908. They were married here at the cathedral in Portland. So just how they would have gotten acquainted, I don’t know. By the time they were married probably my father and uncle were doing the dairy thing and my mother was living out on Chehalem Mountain out near Bald Peak, but I don’t know more than that.

CH: The house that they first lived in is that the house where you were also born? Were you born at home?

EL: I was born at home. But the farm was actually acquired—the farm ultimately three hundred and some acres of the farm—not too far from Champoeg Park out on Butteville Road was acquired in parcels over a period of time. The first house that they lived in was the one right on Butteville Road that my son occupied for a long time and my Uncle Jim occupied. But the house I was born in was located about a mile from there down Matthieu Lane off of Butteville Road, and it was a six-bedroom house with a basement and we had plenty of room even with the big family. That was acquired, of course, maybe in the mid-twenties because I was born in ‘29, born there in that house that my sister now has.

CH: What was their life like by the ‘20s?
Hop Farming

EL: By the time I can remember it was of course enormously hard work. My memory starts in about 1934. By then, we were raising hops, and had raised hops for I don’t know how many years before that. Everything was done by hand including picking and it took a lot of labor and I can remember men first starting the season by splitting wood in anticipation of drying the hops with wood. They would spend January and February splitting wood, and it would take about thirty cords of wood or more to dry those hops. And then when March came it was time to hoe the hops and then of course the strings had to be tied and they had to be trained on the strings and trained on the wire and cultivated and all of that. And it was all, you know, hard work some of it done by horses. I can remember when the first tractor came to the farm, I mean it sounds pretty primitive now and the 1930s are not that far away and it’s so close to downtown Portland that it’s hard to realize that that was the condition that relatively short time ago—a totally different era.

We harvested the grain. We not only raised hops but raised some grain and all that was harvested with the binder and put it in the shock and haul it to a thrashing machine. A neighbor had a big steam engine and thrasher and I can remember that big thrasher took nine teams of horses, one team to haul water to it and eight teams to haul bundles to it and that didn’t even get the grain away from the machine. They left it in sacks when they were done. So it was just enormously hard work.

CH: What were the years of Prohibition—?

EL: Well that ended in 1931? Maybe ‘32!' I have a recollection one time of going out into the woods near our home with my mother and she picked up what I thought was sawdust and fed to the chickens. I swear in retrospect that that was probably corn left over from somebody’s still.

CH: The mash.

EL: The mash or whatever was leftover. Now why that would stick in my mind I don’t know but I couldn’t have been more than three years old maybe at the time. But I have that notion that we did that; she and I did that one time.

CH: Beer would not have been prohibited?

EL: Oh yes, beer was prohibited also, but I think everybody made—beer can be brewed without alcohol I guess or you can have non-alcoholic beer. At least they do today and I think there was a non-alcoholic beer. But of course the hops always went into the world market anyway. So not only would some illegal brewers be using it but it could go into the world market.

CH: Were hops grown for any other reason than making beer?
EL: None that I know of, although I’ve heard claims that you could use it for medicinal purposes. I suppose you could use anything for medicinal purposes and anybody who had a conscientious objection to having anything to do with alcohol or booze could pretend like whatever they were doing was done for the hops that would go into medicine someplace. I’ve never heard what it cured. [laughs]

CH: So where would they sell their hops?

EL: There were always dealers in hops and they would actually buy in their own name. You didn’t use a broker to sell them to the brewers. These dealers would buy them up into their own inventory and then market them in their own way. That’s the usual way that I saw it done.

CH: Was there a cooperative at that time for the hops growers?

EL: No. Everybody was on their own and I can remember as a child seeing hops that were not sold dumped in the field after all of that effort to produce and pick them by hand, go out in the field and dump them in the field. No market for them. I can remember one time before the war we had some hops and we stored them in an old barn that wasn’t in real use, had nothing else stored in there. Here were those hops stored out there with no cold storage or anything, just stacked in the barn. And the war came along and suddenly a shortage of hops and those hops went into beer someplace. They went into the market. Sooner or later it seemed like most hops went into beer someplace.

CH: Did your family raise or grow their own food as well?

EL: Oh, yes.

CH: Did they feed the hops to pigs or—?

EL: The hops—no animal will eat them. The saying is they’re not even any good to bed a horse. So you either put them in beer or you forget them, generally the way they go. But, we always had, family cows and chickens and pigs and did the home butchering and all of that, smokehouse and all that bit. And, of course, during the Depression we didn’t know we were poor. We had no money but we always had lots of food from that standpoint.

CH: Could you tell from other people in the neighborhood, or when you came into Portland, were there signs of the Depression around?

EL: Oh, yes. There were people clamoring to go to work on the farm for two dollars a day. You had to turn people away. These were full grown men willing to go out with a sledgehammer and split wood all day for two dollars or work in the field by using posthole diggers and hoes and what have you. And if you wanted a ditch dug you dug it by hand. No power equipment.
CH: And what were your chores like, what kind of jobs did you have?

EL: Well, as a youngster I first can remember picking hops. We would be—me, my brother, sister would be assigned a row and we’d go out there and we’d pick hops and it wasn’t long until I learned to operate a tractor. By the time I was ten or eleven years old we had the tractors and so I learned to do that at age eleven and that was what I did mostly. I had brothers who were not interested in tractors, didn’t care to drive them and didn’t even want to do it. They would rather go and do something else and so I guess I had that extraordinary interest in doing it and I did that. And particularly after we got a combine and that would have been when I was about ten or eleven years old, I drove the tractor pulling that combine day in and day out it seemed like for six weeks each summer. We’d do some work in the neighborhood. We had a big one and could get a lot done with it. I look back at it and wonder how we were able to survive as youngsters, you know, just to be able to take the risks we did. But, on the other hand, anybody I saw who worked with horses very much were always the ones who were injured. Every one of my brothers, it seemed, and my uncle, they all had injuries that came from horses. So the tractors were, on that score, a little more safe, but I did a lot of tractor driving. And truck driving too. Hauling hay—you know as an eleven year old I could drive the truck in the field while the others would pitch the loose hay onto the truck and load it. By the time I was in high school I just had no inhibitions about driving.

One time in Ag class our Ag teacher was going to take us on a field trip to the Oregon State Prison to visit their prison annex where they had a dairy farm. And this Ag teacher went down to the downtown to pick up the school bus and he brought it to the school and he had trouble getting it in the driveway at the school. He got it hung up on the curb. So he asked me if I could drive it. I said, “Yes I can drive it.” I go out there and I get the bus off the street and get it around behind the school and we loaded up with my classmates, high school kids, and he said to me, “You go ahead and drive it.” So I drove that school bus to the Oregon State Prison loaded with my classmates. Now it would be scandalous, of course, today and probably would have been then too but that’s the attitude we had.

Elementary and High School

CH: What were your schools like, your grade school and—?

EL: I went to grade school at Butteville and when I started I was the only one in the first grade. It was a two-room school that had—oh, I don’t remember how many, but none of the classes had more than three or four—so maybe twenty some at the most in the whole school. You might think that would be pretty good, but in later years my grade school teacher told me
she never thought I would learn to read. I had a hard time learning to read. Very difficult for me and never did become anything but a slow reader. Now, in a way, that’s an advantage in the law, in a way it’s limiting too, but I am even today a very slow reader and was notoriously slow throughout my college years. You understand when I was going to high school that was right during the war years and a couple of my brothers were in the army. There was the attitude, well, you do what you had to do and I would take as much as two weeks and just skip school and farm. Just spend maybe two weeks in March or April running a tractor. I missed an average of thirty-five days a year in high school. And six of my sixteen credits for graduation were in vocational agriculture so I came out of high school with a very, very narrow, limited education by any standard.

[End 1, side 1]

EL: —fourth in the class. It was intimidating for me to start to college because I found myself surrounded by people from the big schools in Portland and they’d had foreign languages and they’d had one thing and another. And when I finished college I ranked about the same as I did when I finished high school. I compensated a lot by working harder and ironically enough I ranked about the same in law school. So it was a matter of working harder I think, that’s what it amounted to. I will admit that I was very intimidated by the people I was with. But on the other hand I had the advantages of being, if you will, forced to grow up at an early age. That’s what all of these experiences now that I look back on meant to me. That I was doing things that you wouldn’t expect a teenager to have done, certainly today or somebody in a city school to have experienced like I did. And as irrelevant as vocational agriculture might seem those Future Farmer of America chapters were all run in a very orderly process and everybody was almost compelled to be a speaker of some sort and the rules of parliamentary procedure were all obeyed in those settings, and I wound up as president of my chapter so I got exposed to that kind of thing. I look back on it as a plus that was purely a sideshow as far as agriculture was concerned.

CH: Did you have particular subjects that you liked or excelled in?

EL: I thought I liked the science classes. The principal of the high school was very, very critical of my decision to want to be a lawyer. He thought I had no business being a lawyer that I should be a scientist.

CH: When did you make that decision?

EL: I made that decision at the end of my sophomore year in high school. I decided I wanted to be a lawyer and at that time I was not acquainted with a lawyer, I didn’t know a lawyer and I—see the war ended at the end of my sophomore year in high school, 1945,
as a matter of fact on August 14, 1945, which was my sixteenth birthday, was VJ Day. And I had the view of the world that science had run its course [laughs] we now had the atomic weapon and who needed more scientists. And there was a greater opportunity for something having to do with the law rather than science. And that may have been a factor in it. But that was my attitude.

CH: Where did you get a sense of what a lawyer was and what type of—?

EL: Everybody thought I was kind of contentious and I think it was more the image of being contentious and my grade school teacher from the fifth to the eighth grade she thought I ought to be a lawyer. She said so and because I was contentious, I remember particularly in some biology course. But anyway it’s just pure happenstance I would say.

CH: So being contentious was actually a positive attribute.

EL: I guess. [laughs]

CH: At what point did you realize that you didn’t want to be in agriculture?

EL: I had a hard time reconciling myself even after I graduated from college. That first summer after I graduated from college and before I started law school I had misgivings as to whether or not I wanted to quit farming. I can remember distinctly working in the hop yard with the tractor and saying to myself, “You know, am I doing what’s right?” I enjoyed doing what I was doing, and had misgivings about it. I guess I never really reconciled myself that I wanted to get away from the farm until I was into law school. Kind of hard to explain the phenomenon.

CH: Were you involved with any other activities, hobbies, sports, music anything like that?

EL: No. I had no athletic skills and no music skill and I did not participate in any of that.

CH: How did you feel about not going into World War II?

EL: How did I feel about not going?

CH: It must have been a time when everybody was gone, a lot of people much older than you.

EL: Never thought too much of it at the time because of my age. I did toy with the idea of, and contemplated, joining the army in my senior year in high school because they would allow two military credits. If you joined the army you got two high school credits. And if I had joined the army sometime around November of 1946 I could have graduated from high school and would have been eligible for the GI Bill. I was seriously tempted to join the army before I finished my senior year in
high school and then for whatever reason decided not to do it. Because by then I had the ambition to be a lawyer and go to college and if you didn’t get into the army—or into the service by sometime in the fall of 1946 that’s when the eligibility for the GI Bill was cut off. Now whether they extended it after that or not, I don’t know. But anyway, that was kind of a decision-making point. And we had one member of our class who did join the coast guard; Bill Tremaine joined the coast guard and came back and graduated with us. But he probably joined before Thanksgiving. But, again, it was an attitude as to what counted. And nobody thought that going to high school was very important, at least learning anything. [*laughs*]

CH: Did you have any mentors among your teachers or other people in the community that helped guide you along the way?

EL: No. No. The greatest encouragement, of course, I got was from my mother. She was very encouraging; I was the first one and the only one that went to school beyond high school. All of my brothers and sisters—let’s see, my sister Mary and a brother, John did not finish high school, but all the others finished high school, We at least got that far, which given that era and that number was a phenomenon that that many of us would have finished high school. My brother Joe had the ambition to go to college, but he was fifteen years or so, fourteen years older than I, and there was no hope that anybody had any money that would permit him to go to school.

CH: And he didn’t have the GI Loan?

EL: Oh, no. Matter of fact he is one who did not go into the service because they left, you know, they left some to farm and there were two of my brothers in the service and two of my brothers were very active on the farm and they were saying some had to stay and farm. So the farming was thing was almost akin to being in the service in a sense, the war production. I look back with greater marvel at the fact that I have lived my life during this era and never been in the service or shot at in any war or anything else and that all is a matter of timing and happenstance.

By the time the Korean War came I was just finishing college. I went two summers and finished in three years so I graduated with my undergraduate degree in 1950. The Korean War started and I had already been admitted to law school, I went into law school and anticipated being drafted and made application for entry into the Navy and took their exams and everything in Chicago while I was in law school.

While the application was pending, when they had it all in order, for my entry into the Navy in their Office of Naval Officer Procurement they said to me, “If you get a notice for induction into the Army you have to tell us right away because this application has to be denied.” In June, after school was out, I
get a notice from the draft board saying, report
for induction.

I tell the Navy that I got this notice
for induction and they said, “Okay your
application for the Navy is denied.” So then,
the draft board said, “Let’s see your grades
from your first year.” Based on my grades in
my first year of law school they said you can
have another year in law school. And that’s
how near I come to being in the service. If I
had not been ordered to report for induction I
would have wound up, I hope, or think, in the
Navy and instead was allowed to go another
year.

After another year the Korean War was
winding down and that’s how fortuitous it is
that I was never in the military or shot at. And
that is a real marvel for me when I think of
what has happened during my lifetime by way
of military service. Maybe it’s why I have such
enormous respect for people who did serve.

University of Portland

CH: How did you decide to go to the University
of Portland for your undergraduate work?

EL: That again was because of my mother’s
influence. My father had died when I was
eleven years old and she was familiar with the
University of Portland as a Catholic school.
I had never been in Catholic schools. All the
time I had been in public school, grade school
there in Butteville and Woodburn High School.

I thought I would take a look at that and
decided to enroll there. That’s the only place I
applied for and the only place I was interested
in going. I became a boarding student there;
I actually lived on the campus for the time I
was there. Then I wanted to be a lawyer, of
course, and my impression was—now you
understand I was pretty much without much
counseling from anybody and I don’t know
whether it was just me or where I was or what
it was but I got very little counseling at any
time. I started college with the expectation that
you could go two years and that would be your
pre-law. That was the normal standard at that
time. I think Oregon and the other law schools
around would admit you with two years of pre-
law, any two years of college any place was
enough. And so I thought, okay, two years at
the University of Portland and then go to law
school for three years.

In my second year at Portland I kind
of decided, well, I really enjoyed being in a
Catholic school. It shed light on a lot of things
that I didn’t understand before. It was the era
of anti-communism and politically everybody
was critical of communism. I never understood
why until I started at the University of Portland
and actually studied some of the philosophy
of communism and some of the criticisms
of it from a philosophical standpoint. And I
understood why the philosophy of communism
could be very appealing intellectually if you
didn’t have a basis to criticize it and so I felt
that I wanted to be in a Catholic law school. If
I was going to a Catholic law school I’d have
to go outside of the state of Oregon so I said, “Well if I’m going to go outside the state of Oregon, I will go to Notre Dame.” And the congregation of the Holy Cross fathers are the same order of priests who run each of the two schools so it was natural thing.

By the time I wanted to go to law school there was some of the faculty at Portland back at Notre Dame. I applied at Notre Dame in my second year and they sent my application back saying, “We won’t accept anybody from any school outside of Notre Dame to law school unless they have a degree.” So that was kind of blow. Here’s two more years that I’m going have to spend before I can really get started to doing what I wanted to study. I put together a scheme to go two summers and graduate in three years. And that’s why I decided, well, this is kind of time I didn’t want to spend so I managed to do that.

By the time I graduated from Portland I had not a single credit that I did not need and I didn’t have a single credit in any category that I did not need. I had the bare minimum in my major in business administration, my bare minimum of total credits and my bare minimum of everything else and that was it. Notre Dame was the only law school that I applied to and was accepted. As I look back, now, I marvel at that, that I was accepted.

When I was in school at Portland, and even in law school, we had so many GI Bill war veterans that I was surrounded by people who were mature. As I look back the experiences I had, and the responsibility I had on the farm, coupled with the surroundings that I had when I was in school kind of forced my maturity if you will. I had decided when I was sixteen years old that I would never drink. Because as each of my brothers got of age I saw them abusing alcohol and I made up my mind that there was no way that I could be confident that that wasn’t going to happen to me so I decided I would never drink. I acquired a whole lot of status in high school as a non-drinker because anytime that any of my buddies wanted to borrow their family car they could represent that I was going to be there [laughs] and so I got to be very popular and reinforced, if you will, by my surroundings in not drinking. And I have not had anything to drink since I was sixteen years old, and feel that that was probably most valuable decision I ever made because given what I saw of my brothers I have no reason to suspect that I wouldn’t be doing the same as they did.

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**Role of Religion in Law**

CH: How religious did you consider yourself to be, or looking back, how religious do you think you were?

EL: I considered myself to be very religious. I never really contemplated entering an order or the priesthood or anything like that. I found the philosophy courses that I took—I took eighteen semester hours of philosophy—and I found that to be very, very valuable to me
and very helpful in the extent to which a person should be judgmental and the extent to which a person should not be. All of those things, I think, were very valuable. I realized at the time that I was fascinated by it and as it turns out there’s a lot of correlation between studying philosophy and studying law. I mean, conceptually you’ve got to work with the same tools. So that was very valuable and that’s why, I guess, I found the Catholic school a comfort to me.

I had been in the public school and at the time that we were studying social studies and world events, here was this naked criticism of communism in the public school, and I couldn’t understand it. I mean, here was Russia, our great ally and they had suffered so much in putting down Hitler, and immediately public opinion turned on them and everybody was very harsh in their judgment of the Soviet Union. A lot of people saying we shouldn’t have quit. We should have kept right on fighting until Russia was knocked over and if we hadn’t of done that it was going—and I couldn’t understand why.

I heard Archbishop Howard when I was a senior in high school, the Catholic archbishop, at confirmation class in Woodburn talk about the menace of communism. I had never heard it from anybody else in school and it was the first thing that I had heard that really made sense. So maybe I was buffeted from this event to the next rather than really counseled to anything but fortuitous? I don’t know. I wound up with some firm convictions about the order of things if you will.

**CH:** What was it about either your study of philosophy or Archbishop Howard’s address or wherever you found it, that was the underlying argument you saw against communism?

**EL:** Well, it’s denial of the dignity of a human person and its philosophy of morality that the only criteria about which they judge their morality was whatever was good for the state, and if that involved starving people or killing people, there was nothing immoral about it. I mean, you just had those concepts of morality, the inevitability of history, the philosophy about the nature of matter, and all of those things and how they turned a philosophy of idealism into a philosophy of materialism, and the basic fallacies of it from a standpoint of a totally satisfactory explanation of all of nature.

To see an effort to put it in place in the Soviet Union and then to see it collapse as a practical mode of economics and society within such a short span of history is testament more to its basic fallacies and flaws than the will of people who were trying to impose it. And, so it is kind of reassuring in the total picture that a scheme, a philosophy, a whole attitude toward society that is so flawed from a standpoint of basic truth that it won’t even work. Now, all that happening in such a short time is a marvel to me.

**CH:** In your study of philosophy and your understanding of law, what is the foundation of law in this society based on?
EL: I think it’s based on our value system and particularly our belief in the nature of a human being.

CH: And where does that come from?

EL: I would say immediately from the fact that this nation was put together by people who were theists as opposed to atheists, and that phenomenon, or that factor that the founders were theists accounts for their belief in the dignity and nature of a human. And that has been reinforced in my mind when we talk about in this country about civil rights, but when we go to talking about those rights in the world we talk about them as human rights. Basically, they’re the same rights that we’re talking about except we don’t say, “Well, they are civil rights because they spring from the governments of the world. We say they are human rights because they spring from the nature of a human being rather than something that is conferred by the form of government that the people happen to live under.

CH: Then why do we call it civil rights in this country?

EL: There’s an argument that there is no such thing. The dean of my law school, old Clarence Manion, would say there is no such thing as a civil right.

CH: And what would you say?

EL: I think I would agree with that. When you look at the language of our Bill of Rights it is not written in terms of giving rights. It’s written in terms of restricting the government, “Congress shall pass no law. No person shall be compelled.” Clarence Manion’s theory was that you didn’t have any threats to any of those rights until you created a government. When you created a government, now you’ve got to restrain it because it becomes the enemy of human rights that you already have. You wouldn’t have to worry about that right until you had a government and now that you’ve got a government you’d better restrict it. So it makes some sense and you’re not depending upon which constitution says what in which part of the world to look upon the dignity of a human being. And we live that out pretty well in our day-to-day life in the administration of the law in this country.

CH: But is it implied, or can you point to some place in the law where you don’t have to assume that there’s a theistical foundation.

EL: All right now, to be specific, let’s look at the language of the Miranda Decision. [Miranda v. Arizona 384 U.S. 436] The Miranda decision requires the policeman to inform the accused, the prisoner as if the restraint on the policeman is not a freestanding restraint but instead is a
right that this individual has perforce of the Constitution. So the policeman becomes the messenger of the good news, if you will.

CH: Okay.

EL: You have a right to remain silent. Now literally that isn’t what the Constitution says. The Fifth Amendment says, “No person shall be compelled.” It doesn’t confer an affirmative right, it announces a restriction. From a pure philosophical standpoint I’ve always had trouble fitting the Miranda Decision with the basic allocation of dignity if you will. That the Miranda Decision did not, did not generate a new right to remain silent. Now maybe I’ve said that wrong, the Miranda Decision sounds as if it did, In fact, if you presuppose that that person’s dignity would demand that he cannot be compelled to disclose what’s inside of him, then all you need is a restraint on the policeman. From a pure theoretical standpoint I have always had trouble with Miranda. Recently, as you know, the Supreme Court has said, “Well the Miranda Ruling is really of Constitutional proportion, it is not simply a mechanism to be sure that the police obey the Constitution.”

CH: Do they base that on the same part of the constitution on the Fifth Amendment?

EL: Yes. So no, from a pure theoretical standpoint, see, you arrive at the same place, probably.

CH: Is the Miranda Decision looked upon then as a clarification of what the Constitution said in the Fifth Amendment?

EL: Yes, it’s an expansion, but when it was decided it was never clear whether or not it was constitutionally necessary because there’s language in the opinion that says the states are free to figure out some other remedy. Unless somebody comes up with something better, we’re going to say that in order to protect the accused from the policeman compelling him to talk the law will require, the court will require, that the policeman tell him that he has this right to remain silent. As a condition under which the policeman would then not compel him because he would be aware that he couldn’t be compelled. It was a decision that says to even the states your agents have to do this so we are sure they do not violate the Constitution by compelling somebody. Now, from a theoretical standpoint, I had trouble with that.

CH: I don’t understand why you had trouble with that.

EL: If the legislature wanted to say it or—but to say that it is of constitutional proportion that
we go through this ritual in order to prevent the agent from compelling— is as if the right came from the government instead of being there without need of government having created it. All we needed to do was restrain our government. Those concepts remained in doubt, and that remained in doubt, until only a couple years ago when the court revisited that and said, “Yes, Miranda is of constitutional proportion and Congress cannot change these standards.” And they declared an Act of Congress that was passed in the late sixties unconstitutional.

CH: So if someone actually did confess to something and the Miranda Decision were not available to that person, say if it had never been made, how would you know whether he was under duress or not?

EL: Well that would be the usual question of fact; you would resolve that as a factual matter. I’ll just dwell on that for a minute more. When I was a circuit judge in Lane County, the Circuit Court in Lane County had general trial jurisdiction including juvenile. Part of the duties were to have a juvenile department of the Circuit Court, which was administered by the judges of the Circuit Court, we hired and controlled the director. When the Miranda Decision came along, and then was made applicable to juveniles, we would witness the spectacle of the police would arrest a youngster in the middle of the night, let’s say, and when they would arrest him they would advise this youngster: “You have a right to remain silent and anything you say will be used against you in a court,” and so on and so on. Then they would bring them into Skipworth [Juvenile Detention Center], which was the detention facility in Lane County, and it was the job of an intake counselor there to try to see if this kid can be sent home or does he have to go into detention, and so they would want to interview this kid. Before they would interview him they would go through the Miranda ritual, and if it was decided that he was to be detained he would be sent into the detention facility and when he would come in there the person in charge of detention would go through Miranda again.

Now if you’re a fourteen-year-old kid and ostensibly we’re supposed to be in the business of treating them differently from criminals, and we’re supposed to have some hope that we can do more with a youngster than with an adult by way of changing their conduct. We have Miranda warning, Miranda warning, Miranda warning to a kid fourteen years old. Now when I had responsibility there I said to the juvenile department, “Forget the Miranda warning when he comes into the intake counselor. Your job is as a social worker, or as a corrections officer, your job is not as a policeman. Your job is not to prove the case. Right? When the kid comes into detention you have other responsibilities other than trying to prove the case. So you deal with this kid on a counseling basis, on a one human to another basis and if the police can’t prove their case
that’s not your fault.” They’re supposed to know what they’re doing when they arrest him; they know whether they can prove it. And the only person therefore who can violate Miranda is a judge who had let in evidence if it didn’t meet the Miranda standard.

CH: In other words, if somebody at the detention center had in that situation given the police information that they heard about—from that kid and the police used it to convict—not necessarily convict but do something with them that would be inadmissible.

EL: It would be inadmissible because the policeman wouldn’t be witness to what the kid was saying and so on and so on. But the point is that if this counselor at intake is saying to the kid, “Okay, who were you with? Where did you get the booze, where did you do this, how did you do this, how did you do that?” And the kid, in responding to this, said something incriminating it wouldn’t be admissible. Who cares? The police have the job of proving the case and there is no violation of Miranda simply because it’s inadmissible. If you’re doing your job and counseling somebody what wrong have you done to this kid by asking him the questions?

CH: However, you just had this case recently where the person who is in prison, had been told to vent his feelings about whatever to his psychologist, said that when he got out of prison he was going to kill President Bush.

And even though he was talking to his therapist about this, this information was passed along to the authorities and that gave them the right, I guess, to keep him in prison longer.

EL: Well, that is all a decision that is made on admissibility. The point is that if it is not admissible, if it is not admissible, is there any harm in asking? I concluded from the Miranda decision there was not. That there was no separate wrong—for a policeman to break into a house and take some evidence would be wrong even if nobody was ever prosecuted. But just to ask the question is not a separate wrong, see what I mean? It’s the admissibility that makes it wrong and the judge who allows it in is the one who has the responsibility of doing the right thing and excluding it. Until recently, when this has been elevated to clearly a constitutional right, see? It’s a freestanding constitutional right whether it’s made admissible or not. See?

Instead of just being a rule to be sure that the police won’t compel, it has now reached the status of a constitutional—we know that now, but we didn’t know that for all these years. And the only point I make is—I guess to go back—it’s more of a philosophical consideration but it did have practical consequences for us. I thought we were doing a disservice to these youngsters by saying, okay, we’re going to repeatedly thunder the Miranda warnings and to me that would be a very, very upsetting and devastating atmosphere in which to throw a kid into in the middle of the night. It’s good.
enough if the policeman takes care of the need to prove that he’s guilty rather than for every social worker along the line to say, I’m going to give you this warning so that in case you do say something I can make it admissible. See?

CH: Right, right.

EL: I guess that was part of my attitude toward Miranda that it was not of that magnitude and as I say it was on the books for, what, almost thirty-five years before it was clarified.

CH: Going back to your feelings about the underpinnings of the legal system in the theistically basis of our understanding of the human being then how would you apply that to the situation we see now in various places about having the ten commandments displayed in courthouses. Do you see any problem with that?

EL: Whether it’s displayed or not?

CH: Yes.

EL: I think that’s a political decision. I don’t think it’s very significant at least from a value standpoint. It’s a political concern. That’s the way I see and people can be sensitive to anything they choose to be, [laughs] and once we know they are I think we’ve got to be careful because we can make important anything we want. If I know you’re offended by a certain thing—you get to choose what you’re offended by and I ought to try to respect that. That’s kind of been my attitude. Until we know somebody’s offended by something things are okay, but once we know a person is offended by it we’d better be careful.

Influential Professors & Courses

CH: You had mentioned a professor I think here at University of Portland, Clarence Manion?

EL: No that was the dean of the [Notre Dame] law school.

CH: What teachers or professors did you have that had the most amount of influence on the way you looked at the law or on your life in general? Were there any that stood out as being profoundly influential?

EL: Well, you know, I have a very fond recollection of a metaphysics course I took at the University of Portland and I can’t even name the professor. Now isn’t that terrible? I can’t name him, but I was fascinated by the subject, I was a sophomore, and just fascinated by it. And that course meant a lot to me. As far as law school is concerned I know that Dean Manion is discredited by a lot of people. Father Hesburgh, who became president of the university the second year I was there, one of his first acts was to fire Manion.

CH: On what grounds?
EL: That he was just an ultra-conservative, dogmatic, I guess, John Bircher, and just was restricting the law school in a lot of ways. Now, I found Manion to be a very, very interesting speaker, an interesting teacher, and he is the one that I referred to as dividing up into what is human and what is civil, that is by way of rights. He would probably be classified as a libertarian and taught a course called Fundamental Law that was good for credit at no other university in the nation [laughs] but required for graduation from Notre Dame. He was a tyrant, and if he flunked you in that you were not going to graduate. But that was a different era.

CH: What was it about Fundamental Law that was unique?

EL: He would take the Declaration of Independence, for example, and pull out every philosophical concept in it and made it almost sound like it was a religious document. He would take the Bill of Rights and go through and almost preach on how that was a philosophical document that embodied the philosophical values of the dignity of a human being all consistent with Christian tradition. He made the Declaration of Independence and the Bill Rights almost seem as if they were theological statements. And when you look at it—obviously it was written by people who had a value system that produced these concepts and there’s no denying it. I have felt that the general overall culture, if you will, and the philosophy of the people of the nation, the culture is a greater protection than any words that we might happen to have in a constitution. For example, because we’re tempted to change the meaning of them to conform to the culture and it’s the culture that really tells us how free we are more than what words we choose for the time being.

CH: Do you think it’s appropriate that the times define the way we interpret the Constitution?

EL: I have trouble with that, I have trouble with that.

CH: Is there a basic, bedrock cultural orientation that should not waver?

EL: I think it’s important that we try to figure out what the truth is here or there. And the truth is quite uncompromising [laughs]. In fact, conceptually I don’t know of anything that’s more intolerant or uncompromising than the truth whatever it is.

CH: How is the truth determined?

EL: I’m satisfied with the definition of truth that I was taught: that it’s the conformity of a mind to reality, and we should always be struggling to make our mind conform to whatever the reality is out there.

CH: Is there a reality that’s implied or an absolute reality that everybody can recognize?
EL: Oh, I don’t know that everybody can recognize it, and I don’t know that anybody has a superior grasp on it but we do know that we should be struggling for whatever the truth is and that is a very uncompromising concept. And that’s why I’m troubled with saying human dignity is different at one stage, or that the nature of a human being is different one place than another, or different in one era than another. See?

CH: What was your interest in metaphysics?

EL: Well, it was required and I just got into it and I learned a lot of little definitions in that that I found comforting. I’ve never articulated them from the bench, I don’t try to do that, but in the domain of being you have whatever is reality and whatever is potential and kind of an attitude that I’ve never—that we never condemn somebody for what they’re not. We’re all limited. So whatever a person is not you can’t condemn him for that. We all have a different measure of how accomplished we are, or not accomplished, and if somebody isn’t accomplished in a particular field you don’t fault him—or isn’t accomplished in some other way, you don’t fault him for that. You don’t condemn him for what he’s not. As a matter of general ethics, and then ultimately in legal ethics, I became morally convinced that the lawyer had the right to and the duty and a standing in good morality to defend a person when he knows that person is guilty of a crime. Now, a lot of lawyers will feel that those lawyers who are defending somebody and they know they’re guilty are committing some moral offence. From the very beginning I never had that attitude and I could go into it here, but I don’t know whether it’s worth our time.

Morality & the Legal System

CH: Well it was just interesting in that if there is a fundamental truth in a given situation how could one—if a lawyer saw as a fundamental reality in this particular case that the person was guilty, that they actually did pull the trigger and shoot this person how could they try to support this person in their claim that they were innocent?

EL: All right. Let’s just back up and take a look at the culture we’re in, totally aside from the law now. Because once we say that a lawyer is doing something wrong when the lawyer defends somebody knowing he’s guilty, we’re not passing any legal judgment on that lawyer, we’re passing moral judgment. True? We know under the standards of ethics that it’s permissible. We know that there’s no law against it. So once we start into the question, can this lawyer knowing that this person is guilty defend this guy in a criminal case and we say, “No he can’t,” or “Yes, he can.” Now we’re into morality.

Let’s examine the morality of a person who is accused of a crime. Let’s assume I have
stolen a thousand dollars and I come to you as my spiritual advisor, as my moral counsel and I ask you what to do. You would probably say—and because I say to you, “I want to save my soul from hell. I want you to help me. I want you to tell me what the morality is and how I’m going to keep myself out of hell now that I have committed this wrong of this sin of stealing.” Right? And as a moral teacher you would probably tell me, well, “Go pay back.” We’re pretty much agreed on that. The next step would be probably that he would have to feel sorry about it. The next step is he might have to resolve that he’s not going to do it again. And then in some disciplines we might say he had to confess it either privately or in some sacramental setting or something else and do that. Okay?

CH: Okay.

EL: Now that I’ve been advised to do that and I do all of that, what else should I do? I’m asking now my moral teacher, my moral counselor, “What should I do?”

CH: What would you, as a moral counselor, say to that person?

EL: Nothing. You don’t have to do any more. You’ve done the things that will rectify your conscience, right? You’ve repaired the ill, you’ve resolved not to do it again, you’ve done the confession or whatever discipline or whatever—now there is no moral teacher that I know of in the United States who is saying to a person who’s committed that wrong, “You’re going to go to hell unless you go to jail.” Now you go down and knock on the door of the courthouse and you find out what the penalty is for larceny and you go in and tell the judge, “By God I’m going to hell, judge, if you don’t send me to your prison. Now send me to your prison because I want to save my soul. I want to rectify my conscience.”

First of all, the reason we know that that is not the teaching is because it’s not happening. Any of us who go out here and runs a stop sign, don’t say, “Oh gee, I got to go down to the city hall and find out what the penalty is for running that stop sign otherwise I’m in big moral trouble.” Now what I’m dwelling on is the fact that we are not taught as part of our morality that going to jail is necessary in order to do the moral thing. Okay? I’m a lawyer and I’m defending this guy who has his moral problems that he can solve without me and without the state’s prison. We go into court—he has been accused of larceny—the judge will ask him how he pleads. Significantly, we don’t ask the guy to give his plea under oath. A plea of not guilty is never given under oath. The law recognizing that this guy has no duty to testify against himself, right?

CH: Okay, right.

EL: Because of his human dignity that we’ve embodied in the Fifth Amendment, okay? Now we ask him, “How do you plead?” If he
were to say, “Not guilty.” I don’t accept that as a representation of fact. I take those as words that we in the law assign to putting the case in issue. That’s the way I understand it. Otherwise I’d put him under oath and say, “What is the truth?” Now I can’t do that because of the Fifth Amendment and the Fifth Amendment is written, hopefully, in recognition of this guy’s dignity not to have to do that on behalf of the state. If he further chooses to say, “Judge, you’ve got your system, and you’ve got your problems and I’m not going to tell you how I plead, that’s your problem.” Then under the law the judge is required to enter a plea of not guilty for him, to put the case at issue. Recognizing again that we don’t go out and pull somebody in off the street and say make our system work. [laughs] We’re not dependent upon him. Our system will work without a bit of cooperation from him. If he won’t say anything we enter the plea of not guilty now we’re back in business. We’re going again.

Now we have a trial and the government puts on its case the lawyer is sitting there with a client who has no duty to go the prison. If you follow my ostensible moral teaching here that we’re getting from the moral teachers as a whole, this is not anything unique. Generally in this country there’s nobody saying, “Go to jail or go to hell.” And so he has no moral duty to go to jail, where does the moral duty come to the lawyer to put him there?

CH: Does he have a moral obligation to tell the truth?

EL: Yes.

CH: He could say, “Yes, I took the money, but I’m not guilty.”

EL: He could say, “I intended to pay it back and I didn’t intend it to be permanent,” if that was the truth. Or he can sit there and say, “I’m just going sit for the government to foul up in its ability to convict and I will suggest all the reasons why this policeman didn’t do it right, why he could have done it better, why the evidence would have been different if he were really dealing with a guilty guy, and I can do all of these things to suggest that they haven’t done it right, they haven’t done it right, they haven’t done it right.” And you can be anybody you want to and not testify and the jury comes back with a verdict of not guilty. Now why not guilty? They’re just not convinced that he did it. Now is that his failure? No that’s the state’s failure. They got to make the law, they got to choose who to prosecute, they got to draw the indictment, they were the ones who invoked the power of the court. I didn’t as an accused. My lawyer has no duty to send me in jail. Now I have always felt perfectly comfortable with the attitude that the person accused may be, for all we know, the most moral person in the courtroom. We don’t know, we don’t know. And this lawyer defending him is as moral as the lawyer who’s prosecuting him and both of them may be better off than the judge. We don’t know.
CH: Does the morality of the lawyer—should it even be a consideration?

EL: No not at all, not at all. So we don’t worry about who is morally justified in defending the known guilty. We don’t care whether he knows whether this guy’s guilty or not. Now that’s my sermon. And I think that in the total structure of the way this whole thing was put together, if you will, given the Fifth Amendment, given our burdens of proof, given our right to a lawyer, given everything else that it is consistent with that view of morality.

[End tape 2, side 1]

**Sentencing Guidelines & Reform**

EL: As far as what I have just said about the morality of defending the known guilty, at Notre Dame in law school we only had one priest who taught in the law school. And that was a Father Sheedy who was the Dean of the College of Arts and Letters and was a lawyer. He taught Legal Ethics and it was a two semester course and he made it pretty clear to us that he had more respect for the person who was practicing on the South Side of Chicago and defending people in that neighborhood over the people who were comfortably representing somebody where they could always swim with the tide.

Of course, he built on what we were taught in general ethics courses as it related to ethics in the law and that’s the way he articulated the duty and the right to defend the known guilty. Now, that doesn’t give anybody a license to commit perjury or do any of those things that would be a new separate crime, but it does give them the moral right and the moral duty to see to it that this person doesn’t have to volunteer to go to prison in good morality. I have always been comforted by the fact that I don’t have to sentence somebody to prison in order to say to myself I’m doing him some spiritual good. The government has its obligation to enforce the law and we as judges have our duty to protect society and do all of those things, but we’re not out here in the business of government saving souls. [laughs] You don’t hear that articulated very often, I’m sure.

CH: Not in that way. But I often wonder, and have asked judges, what they see as the cause and effect relationship between the law and its potential for a remedial resolution. What ability does punishment in our legal system reform the individual?

EL: Well, you know that is very difficult to answer. I learned a lot about prison from a next-door neighbor of mine who served some time in prison. He made it pretty clear to me that there were people in the prison who were doing nothing but planning the next crime, and that whatever time they were spending in prison was just the cost of doing business and
it was that simple. Made it pretty clear to me that if you sentence a person for a long prison term you are going to destroy that person’s family and he’s going to come out of prison without a family, you’re going ruin it. If you give him more than a certain amount of time you can expect his marriage is over, his relations with his kids, everything else that is all cut from him. He made a pretty good case for the short sentence; that a person never gets comfortable in serving time. It’s pure punishment while they’re there and once it goes beyond that they get pretty comfortably and it’s just a matter of putting in time.

Now I don’t know whether he’s right or not but he made a lot of sense. If you can punish people, if people who are committing crimes were certain of punishment and quick punishment it wouldn’t take too long, I don’t think. We talk about punishment, you know, even the death penalty it takes us so long to administer it that it becomes pretty remote in the thinking of anybody who would be tempted to commit a murder I would think, coupled with the hope that they’re never going to be caught anyway.

CH: It would be better for a judge to to have the description as to how to apply the sentence?

EL: I think so, I think so. Now I hear all this stuff about crime going down, but I think that if you just took the demographics of who is of what age and what is the crime-committing age you could have projected the decline in crime without housing a couple million people now in prison?

CH: One out of two hundred or something like that.

EL: Something like that. And that decline in crime was going to come with the demographics. I honestly think that the people who are setting up these heavy sentences were aware of it; they knew it would work politically because the decline of crime was going come. Now that’s maybe a cynical attitude towards some of the politicians who jumped on that bandwagon.

CH: If they knew that that was going to happen then what was their motivation?

EL: I’m afraid it’s political that’s why I say it’s a harsh judgment.

CH: Going back to your law school days, were you involved in other activities while you were there, the [law] review or anything like that?
Notre Dame Law School

EL: No. I don’t know whether it was that simple but, again, as I mentioned to you college and law school was very intimidating to me. When I got into law school there were only sixty-five of us admitted as a class in 1950 and Manion, who was the dean said, “Well now, last year we admitted twice this many.” I learned when we got there that half of that class was gone, half of that class had flunked out in the first year. He said, “We’ve been a little more selective, we think you’re going make it.” But I mean the purge was on. They were flunking second year, and third year students were flunking out. Manion, as I say, ran that place as a tyrant, and he concluded that they’d made some mistakes in who was there and they weren’t going let them get out.

My school day was to go to the law school at 8:00 a.m., I was living off campus and my typical day would be nine-thirty at night before I’d quit reading, before I’d leave the library. And I did my work on campus in the classroom or in the library. And I didn’t work other than my last year there and in my second year of law school I never missed a single class. That’s how intimidated I was. [laughs]

CH: How did you support yourself going through undergraduate and graduate school?

EL: My family did that for me. I rationalize it by saying I worked hard on the farm like everybody else, but my brothers and my mother were all very pleased that I was going, and for what it was costing that was being paid for. I was married after my first year in law school and my wife worked the first year after our marriage and we didn’t live very high but we got by with the help, as I say, of my family.

CH: Maybe you could tell me about your wife Eileen?

EL: She and I met in high school. She went to the Catholic grade school, Saint Luke’s and was born in Gervais, I think it was Gervais out there in west Woodburn. Her mother worked in a cannery. Her father died when she was in high school and he had been a laborer I guess all of that is leading to say that neither of us had any money. And so we graduated together. We started keeping company while we were seniors in high school and she worked then after she graduated from high school for a car dealer in Salem. She worked some at the Woodburn cannery during summers in high school and then she worked also at MacLaren School for Boys, some clerical job there. She worked for a credit rating service in South Bend, [Indiana] when we were there.

Our first child was born as I was entering my final year of law school, and in the last half of that year I worked at Bendix Aviation Corporation in South Bend inspecting automobile brakes. [laughs] Bendix built brakes for all of the car manufacturers and they had plant in South Bend and I’d work
from three-thirty in the afternoon until about midnight, six days a week the last semester of law school because by then all I needed was a few more credits and I didn’t take any more than was necessary to make me a full time student. I got to cut clear down to twelve semester hours in my final half year.

CH: I’m surprised you got married during school at all. It seems like that would have been a distraction.

EL: As it turned out it wasn’t because as I said, that second year—the first year I was married—I never missed a class. [laughs] So, far from it.

CH: As you were going through law school did you have an inclination in any specialty of the law?

EL: No, not at all. I wanted to practice law, I visualized myself as a general practitioner I suppose. You may think by the time we’re done here I’m the luckiest person around, but in the early nineteen fifties out-of-state students were failing the Oregon bar exam to the point where it just looked like there was a conspiracy to see to it that nobody but somebody who went to school within Oregon would ever pass. The person ahead of me in law school ultimately—and from Notre Dame—failed. I don’t think there had been a Notre Dame graduate admitted to the Oregon bar the fifteen years ahead of me. Now I don’t know how many took it, but I know that the one guy ahead of me that I knew at the University of Portland and knew at law school, graduated a year ahead, took the bar exam and flunked. So what was the problem?

I happened to be in the library at Notre Dame and a book at eye level on the shelf caught my eye. Here was a book showing all of the requirements of every state on what they examined on. I, by chance, learned at an early age that Oregon examined on these twenty-four subjects. And there were places like Ohio I think, only examined on twelve. Well you could take a lot of electives; you hit those twelve you’re okay for the Ohio bar. But you take a lot of electives and there’s a whole a lot of these twenty-four that Oregon examines on that you don’t have a clue about.

When I graduated from Notre Dame I had all of the twenty-four that Oregon examined on. And when I took the bar I was like an in-state student. Now nobody at Notre Dame or nobody or anyplace else counseled me that this was what you should aim for. And if you wanted to be in Oregon you’d better have this full range because if you have half the subjects they’re examining on that you never
touched—what are your chances? I guess that was an era in which we were all innocent of any counseling from anybody.

CH: Whereas now it would be common knowledge.

EL: Oh I’m sure now they would say, “Where do you want to practice and here’s the history of who’s flunked and who’s passed and here’s this law schools history on that and here’s what these guys had when they passed and here’s what these guys had when the flunked.” But even today I don’t think the law schools really, really focus on bar exams like they should. Notre Dame had the attitude, “Well, even if you don’t pass the bar someplace your education is going to valuable.” Well, that’s maybe true but that’s not much consolation.

Early Legal Career

CH: Did you know at the time that you were going to be coming to Oregon and practicing?

EL: Yes I did. I knew I was coming back to Oregon, but I didn’t know exactly what I would be doing.

CH: What did you do as soon as you came back?

EL: I, fortuitously, wound up in Eugene and the way that happened was that a high school classmate of mine, Bill Tremaine—the fellow who went into the service before we graduated and went into the coast guard and came back and graduated with us—had then gone to stenotype school and was a court reporter. He was an official court reporter in the circuit in Eugene by the time I graduated and he was acquainted with the lawyers in Eugene. He suggested that I go down there and get acquainted with them and see if I could find a niche and that’s why I wound up in Eugene. So that’s how I wound up in Eugene and I went down there with a view in mind of being a general practitioner. There was an opening earlier on in the DA’s office in Eugene and I applied for that. A fellow from the University of Oregon was hired and then I went down there and started practicing in October of ‘53 after being admitted in September of ‘53.

CH: Where was that?

EL: With Bert McCoy as an associate of his. We weren’t in any kind of partnership or anything; I officed with him. I only practiced there I think—I did a few court-appointed criminal cases and I think I was only court on one civil case, and then by March or April of ‘54 I was hired as a deputy DA.

CH: What was appealing about the deputy DA position that drew you to apply to that?

EL: It was a job, most of all, and I found myself comfortably in prosecuting people.
That was okay. I had no big bent on being any criminal defense lawyer or personal injury lawyer or any of that. This was an opportunity to get into the courtroom and I’d seen enough of the prosecution work to know that you’re going get in the courtroom; you’re going be in there in a hurry and you’re going get there and you’re going get there a lot. And I wanted to do that. Nobody at that time—for the most part even today—saw that as a long-term career, just an opportunity to get some experience.

CH: What did you see that leading to?

EL: I thought probably private practice because that had been—the deputy DA’s went into the firms in Eugene and they were being hired out of there. As you know lawyers are notorious for keeping track of what other lawyers are doing and so that’s always an opportunity for a lawyer to have somebody observing their work and hopefully if they want to get into a firm it’s a way to go.

CH: It’s more expedient doing that than having stayed in private practice at Bert McCoy’s offices there?

EL: Oh, yes.

CH: Because you got more exposure?

EL: Not only that but I wasn’t making any money and here I went on the public payroll and got three hundred dollars a month. [laughs]

CH: How did that compare to what a lawyer normally was making?

EL: Oh, that was probably one fourth of what a lawyer was making.

CH: Even a lawyer just out of law school?

EL: No, I don’t think that’s true. No. I don’t know what that would translate into in hourly wage but it didn’t amount to much.

CH: What was the legal community, the bar and the bench like in Lane County at the time?

EL: There were probably only forty practicing lawyers and two circuit judges, one district judge. Maybe a DA and four deputies, that was about it.

CH: And what was Eugene like at that time?

EL: Eugene, of course, was a logging community. It had a university and it had a logging industry. And there was a lot of logging going on around Eugene at that time. There were lots of log trucks going right through Eugene and a number of sawmills around Eugene and so on that score it was pretty active and everything was dependent upon that logging industry. There was not much else except the university and logging.

CH: Weyerhaeuser was located there in Springfield.
EL: Yes, Springfield.

CH: And had you been familiar with the logging community when you were living in Marion County?

EL: No. I had driven a D-4 Caterpillar in the woods, yarding logs with my brother as a choker setter and I knew some of the risks, you know. I could have backed over him lots of time and it’s terribly risky, but I didn’t do much of that. We did that for a few weeks one summer. We had some guy with a log truck come in and we were working for a neighbor and our family had the tractor and so we had the tractor over in the woods. But I really had no knowledge of the logging industry. I think that when I went in the DA’s office there was a special position, it wasn’t assigned to any one of us but the state of Oregon gave Lane County an amount of money to fund a position for nonsupport enforcement. Along with everything else we all did we all had to do the nonsupport enforcement.

CH: You mention that for what reason? Did you spend a lot of your time doing that?

EL: I did my fair share of it along with everybody else, but I did quite a bit of it on support enforcement. I remember at one time I got twenty-four indictments in once batch of people accused of nonsupport. Because the requirement was that if a person was on Aid to Dependent Children that the mother of the children had to go to the DA and present the facts, and the DA was charged with enforcement.

CH: Sometimes they assign the DA’s cases more of one kind to one deputy than another. Did you have any particular?

EL: No. None of us did. There’s a certain amount of self-selection in there. The police, when they would come to the DA’s office with a police report would tend to try to see a deputy that they particularly wanted. And there was a certain amount of that going on. It wasn’t as if the DA always assigned the cases. It was sometimes the police would be timing it so they would get to the deputy they wanted.

CH: You had mentioned something the other day when we first got together, and this goes back then to your schooling, that you never took notes.

EL: That’s true. That’s true.

CH: How was it that you were able to do that and why was it that you did that?

EL: I tried to take notes but I found it distracting and I always found it more comfortable just to listen to what was being said and to engage in the give and take that was going on in the classroom rather than try to put it down. I always thought, you know, if you wanted to do this efficiently why wouldn’t the professor...
put it on paper and hand it out and say, “Now when this is over with here’s the notes. In the meantime you listen to me.” And so I just didn’t do it. I tried sporadically to do it but I would find myself distracted and so I just abandoned it and even some of the guys later on after I left the DA’s office said I did a lousy job of keeping notes in cases. [laughs]

So it’s just something that I fell into and in a way that mindset worked out for me as a trial judge because I was always focused on what people were saying. It was rare that I would ever have an objection that I wasn’t fully aware of what had just been said or what had just been asked or what had just been answered. I had that in mind and so it was that focus on what was being said and done that was okay for me as a trial judge. Then in non-jury cases, particularly here in district court, I had an understanding with my law clerks and I always had one in the room that I wanted them to do some note taking that I wasn’t going to be taking notes. Of course you always had the transcript but I never was any good at it and never felt that it was an advantage for me to do it.

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**Family’s Political Views**

CH: When you finally got to Eugene did you develop any interest in politics at all?

EL: No. It was important I think that anybody in a public office be registered to vote and that was a more or less a requirement that we be registered to vote. And I had not been registered to vote until I went to Eugene.

CH: Oh really. So you had not voted then either.

EL: No.

CH: And why was that?

EL: I was in Indiana and never put together the need to register to vote and I was only two years beyond voting age. I was twenty-three—I hadn’t quite turned twenty-four by the time I graduated from law school. You know that’s a relative early age. I was probably the second youngest in my class and we had some World War II veterans. We had one guy thirty-nine years old, former bomber pilot. We had a graduate of West Point who’d graduated, done his time in the war and was in law school.

Back to what I said earlier, surrounded with all these mature people. I was, as I say, not quite twenty-four by the time I got out of there. And the big election that came during my time in law school was the Adlai Stevenson.

CH: The people in your family, how were they registered?

EL: My mother was a Republican and my father was a Democrat. I think everybody in my family
was pro-Franklin Roosevelt, but my mother maintained her registration as a Republican.

CH: She was Catholic?

EL: Oh, yes, and was very critical of the Democrats, yet she would vote for Roosevelt.

CH: Did you have any inkling one way or the other in terms of by the time you got the Eugene as to—?

EL: I think, by then, I was a Republican.

CH: And why was that?

EL: Nothing very profound, nothing very stimulating. I have to acknowledge that I very much disliked Truman, to listen to him and to think of him of being a very small man in the range of things—

CH: And Stevenson?

EL: I was going to add, but every decision that Truman made I found myself agreeing with. When he fired General Douglas MacArthur I thought he was perfectly right. When he seized the steel mills I thought he was perfectly right, when he decided to do what he did with the Marshall Plan, I thought he was right.

[End tape 2, side 2]
big dental equipment supplier out of Newberg. He was in Butteville with us coming from Champoeg and he didn’t go to high school with us. He went to either Newberg or St. Paul and then Oregon State. He had some litigation in the district court over a patent. He had successful litigation in the U. S. District Court that I think really set the future of his company. Small world I guess.

CH: I was going to ask you about your grade school days when you were in that one room schoolhouse.

EL: Eight grades in two rooms.

CH: How did the teacher teach the classes?

EL: One class at a time. You were all in the same room, but you were hearing what she was doing with each of the classes and we had an old wood stove and somebody was assigned to haul wood from the basement to keep the thing going. And we had a hot lunch program that consisted of our lower room teacher cooking up some soup for us each day so it was pretty primitive but it was okay. During those years, I guess it would be the WPA [Works Progress Administration] did a whole lot of shifting of contours of the school ground. We spent a couple years in the mud. And of course it was during that era that the WPA was digging the ditches all around the community.

CH: Of the friends that you just mentioned, you mentioned Bill Tremaine. Was that Davis Wright Tremaine?

EL: No, no. He was not of that family. He was a court reporter and had learned that while in the coast guard and was doing that by the time I got out of law school and was in Eugene. He was an extremely competent reporter. He held the certificate of merit, was the youngest national president of the court reporters association in its history. He was known around the country for the people that he helped. He died at an early age but he was the best there was.

CH: During your life as a judge how much of a social life did you have?

EL: Among lawyers it came naturally that it degenerated almost to nothing. The only social contact that I maintained was with Bert McCoy with whom I had first been associated when I went to Eugene, not to the extent of intense social—we never traveled together or did anything like that, but at least we would visit each other’s home occasionally. And then Frank Bocci was another and he was a municipal court judge and was also practicing. But aside from that it just seemed so natural that there not be this social relationship. That it wasn’t because of any conscious effort, “I’m not going associate with lawyers.” Nobody felt comfortable, I guess, is the right way to say it.

CH: Aren’t there restrictions, though, for judges in terms of their contact with lawyers?
Parochial Schools

EL: Only to the extent that if you have the kind of contact that would make you biased it would disqualify you. Not having grown up in Eugene, I was free from a lot of the associations that my colleagues had that they felt would disqualify them from hearing a number of cases. I heard a lot of cases in Eugene that I might not have otherwise heard, particularly involving public schools because my colleagues were all somehow identified with the public schools. I heard a number of significant public school issues while there because I didn’t have the ties. And our kids were in Marist High School and St. Mary’s Grade School.

CH: And Marist High School, that’s where?

EL: In Eugene.

CH: And is that Catholic?

EL: Catholic school that is the successor to the old St. Francis High School that was in Eugene and was formed in 1968 I’m going to say, opened in ‘68.

CH: What were the reasons for having your kids go to the Catholic school?

EL: I had of course, gone to University of Portland, University of Notre Dame. Eileen had gone to grade school at St. Luke’s in Woodburn and so we chose, if we could, to have the kids in the Catholic schools. I guess it kind of come naturally to us to do that. And I was active in school, particularly at Marist. It was formed as I say in the ‘60s.

CH: What advantages do Catholic schools have over public schools?

EL: They have the advantage of having a freer hand in discipline. Now that’s a two-edged sword if you will. Selective as to who is there so they don’t have to cope with, ultimately, with the same problems of discipline that the public school would have to because they could be a little selective. If the going gets too tough; the kid is gone, and so there is that distinction. There was a lot of public support for Marist High School particularly just as a cultural alternative to the public school and the hope was that from the standpoint of people who didn’t have kids in Marist that it would make the public school better and hopefully it does. Parallel systems.

Judges and Controversy

CH: When you went onto the bench did you feel any sort of loss of freedom to do some of the things you might have done otherwise?

EL: I was not conscious of it. I can’t think of anything that I really wanted to do that I didn’t do because I was on the bench. I became convinced...
in my election process in 1960 that the public did not want a judge who was controversial and it doesn’t matter whether your causes are good or bad or whether you’re popular or unpopular. If they’re at all controversial it takes away from ability to be accepted, if you will, because I became convinced that when somebody was litigating they don’t want to be worried about the judges’ causes and how the outcome of their case might affect his or her cause. I was always a little reticent to do much by way of public assertion as to what was good.

CH: Were there controversial judges at the time?

EL: Oh, yes.

CH: Can you tell me anything about these controversial judges?

EL: The judge that I ran against, and ousted, was controversial in 1960. Circuit Judge Frank B. Reid. He became controversial and that led to his defeat if you will. I can start with the judicial selection process that led me to where I am, if you’d like to start from the beginning.

CH: Sure. That’d be great.

EL: I want to fill in the gap too about an event that occurred while I was deputy DA, but the judicial selection process came for me in 1956. At that time there was one district judge in Eugene. That was the court of limited trial jurisdiction with jurisdiction up to a thousand dollars in civil cases, and a year in jail in criminal cases, and it was the traffic court and small claims court. It was the successor to the old justice of the peace system because when they abolished the JP court in Eugene they created the District Court. The district courts were being created by the legislature on a county by county basis, originating or starting with Multnomah County and then other counties adding on. And the judge of the District Court was Kenneth Poole, and he had graduated from University of Oregon Law School, and was quite young and decided that he was going to quit and go into private practice. He had scheduled his departure in January and in the fall of ’56 there was a bar poll and I was the winner in that bar poll, and I think on the strength of that I was appointed to the district court by Governor Elmo Smith. Now that was Congressman Denny Smith’s father but he was governor and he had succeeded to be governor because I think his position maybe as speaker of the house or someway that he succeeded because—was it the death of McKay And so he filled the vacancy.3

CH: And then Paul Patterson was around that time too, and I think he died in office.

District Judge Appointment

EL: Maybe it was that. Anyway, Smith was there by succession and then interestingly
enough, just to show you how fragile judicial politics is—Ken Poole was scheduled leave in January after the inauguration of [Gov. Robert] Holmes. He wanted me appointed, so he accelerated his departure by a few weeks so that Elmo Smith would make the appointment. Poole and I were not close to each other. I had, you know, practiced in front of him as a prosecutor and that kind of thing but he was the decision maker on that. Now interestingly enough, John Jaqua, a practitioner in Eugene who you may know, was the first lawyer of any stature who was a supporter of me in judicial politics. He was a very influential person and still is in Eugene. In any event it was on the strength of that bar poll and bar support and that little bit of jockeying that occurred by Ken Poole that I became the district judge.

CH: How did he support you?

EL: By saying so among the bar. I’m sure he had some clout, if you will, statewide and with the governor and all of that. It was Jaqua who was the first one of stature that ever supported me. Ted Goodwin had been appointed to the circuit—I’m going say a year and half earlier at age, I’m going to say, thirty-two or thereabouts. So the attitudes of youngsters being judges, comparative youngsters was upon us. [laughs] I remember Doug Spencer who later became a circuit judge in Lane County saying if he’d have realized that Ted Goodwin was old enough to be circuit judge he’d have been a candidate. [laughs] But the assumption was that we were all too young.

CH: You knew Ted Goodwin from a very early point in your career?

EL: Oh, yes. From the very time I went to Eugene Ted was practicing there, as matter of fact, the last case that Ted Goodwin ever tried as a trial lawyer he tried against me while I was a prosecutor. He was defending a guy accused of driving under the influence and we tried it to a jury in the district court, and it had already been known that he was going to be a circuit judge. He whipped me, but I claim it was because the jury knew he was going to be a judge. [laughs] He reminds me of that occasionally. I tried cases in front of Judge Goodwin and of course he was a circuit judge for the eighteen months between the time he was appointed and I’m going to say July of ’55 until January of ’57, I appeared in front of him.

CH: Is it at all different when you’re trying a case, or you’re involved in a case as a lawyer or a prosecutor in this case, against somebody you know and somebody you have high regard for yet you’re friends on another level. Is there a certain kind of interaction of competition or lack of competition, anything different about those kinds of cases?

EL: I don’t know whether it becomes more competitive or not. I doubt it. But, any lawyer
will tell you that a good and competent opponent makes for more pleasurable work than if you’re dealing with somebody who is inadequate. I mean it’s just true. Now, it makes the work easier, everybody is more predictable, you know that if you’re prepared you’re not going to be hit by a bunch of nonsense and a whole lot of other stuff or irrelevancies and so on. And so just like trying a case against a very respected and competent opponent is more pleasant the same is true from the standpoint of the judge. The better the lawyer the more pleasant the day’s work is.

From my standpoint, lawyers who were the very best would never make the rulings any easier for the judge. I can think of trial lawyers who would want to establish a ruling, and they would force me to rule. They would find another way in the trial to make me rule again so that if I was going to rule against there was no equivocation as to what the ruling was; the record would be clear that they had protected themselves against any failure to preserve the right to appeal. I developed a respect for those trial lawyers that could do that. Everything wasn’t okay. They were real advocates. I am such a believer in the adversary system.

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**Qualities of Good Trial Lawyers**

CH: What makes for a good trial lawyer?

EL: They have to know what they want and why they want it and then they have to be well organized so that they can tell their version and they have to have a degree of confidence so that that spills over to the jury and it’s okay for them to be—and a good trial lawyer wants to be the center of attention. Wants to have everybody focused on him or her so that what they’re doing is significant.

CH: Doesn’t that then imply that there could be come real grandstanding and theatrics and things like that?

EL: Within limits. Overriding all of that is the matter of genuineness and sincerity and if you become a phony we’re all alike, we’re going to get punished for it once.

CH: I remember reading or hearing about Melvin Belli in one case he was doing—I guess it was an accident of some kind and the plaintiff had lost her leg in an accident and everyday as long as the trial went on he came into the courtroom with a false leg for an amputee and he would just put it on the table in front of him and during the entire trial he never once referred to that leg and yet the jury is sitting over here in the box, they’re looking at the leg every day. Do you think that that’s a clever and very acceptable way of getting attention?

EL: I presume that she had, what, had lost a leg?

CH: She had lost her leg but there was no
Leavy, Tape Three

EL: You know, that’s marginal for me, that’s marginal for me. I don’t know as a judge in that case I would have said you cannot display that until you identify it and make it relevant and we don’t know in that case for example what the other side ever said about it, asked the court to rule on. But it’s up to the other side to keep him, or at least ask court to keep him, within the bounds and in the adversary system you hope that will play out, that the other side will fall awake quicker than anybody to the showmanship that’s going on here and maybe irrelevant showmanship, right?

CH: Right.

EL: So you let that play out. As a trial judge I did not take it upon myself to say you can’t do a thing, or you have to do it a certain way unless I thought it was rather egregious, the other side wanted to let it happen, it’s up to them. Because sometimes they want to let something happen that they’re going to be able to outdo. [laughs] But there’s a lot of comfort for me in the adversary system because I was in the juvenile court before we had lawyers and before we have the challenges that come from the presence of lawyers. The presence of lawyers in the juvenile court made it a much better court.

CH: In what way?

EL: Because you just didn’t make any of the assumptions that everything was all right. And in the earlier years you had the police and the prosecutor, maybe, and you would have counselor and then you would have the youngster whose fate was at stake in his family and no lawyer representative. We all thought we were in this ostensibly for the good of the youngster, right? We all thought we were on the same team.

When it came along that lawyers were to be in there representing the kid there were some misgivings on the part of some lawyers. “What am I supposed to do here as a lawyer? Am I supposed to go in here and use the usual approach that you would use in a criminal case and get this kid off?” Lawyers occasionally would tell me they felt uncomfortable. I said, “Now wait a minute. The law says we need a lawyer. It didn’t say we need another judge. We don’t need another counselor. We don’t need another social worker of any kind. We don’t need any more police. We have all these, we need a lawyer. You go in there and behave like a lawyer.”

A case comes to mind where Judge Ed Allen kind of thought it was appropriate for Ron Husk, who was a civil practitioner in the firm of Butler, Husk and Gleave—civil practitioners in Eugene that represented all of the big corporations that had business in Eugene it seemed—to represent a kid in juvenile court. Ron shows up and he hasn’t been representing kids in the juvenile court. He has this kid accused of something and the
kid had been expelled from school so of course the disposition of the case contemplated that he wasn’t going to be able to go back to school. And the first thing that Ron did was he looked into the process by which this kid was excluded and found a fault in the exclusion process long before this kid ever got into the trouble that he was in. Went back to the school and said this kid could be in school. Well that left the court with the option of saying this kid is going to school instead of not be going to school. I thought, now there’s a perfect example of what lawyers could do and nobody else except Ron Husk probably would have uncovered that.

CH: How do you feel about a lawyer that’s able to, as they say, get his client off on a technicality even though it’s pretty obvious that the person was guilty?

EL: It’s okay. I spoke last week, when we talked about the morality, there was a lawyer in Eugene Don [Bock] who is about my age who challenged everything that any traffic court did. He challenged every complaint whether it was in road truck overload or violation of the basic rule or anything else, he challenged every complaint. I say he civilized the traffic court because he made everybody do it right. I was the prosecutor at a time when Don was defending people in traffic court and he sent us to the law books and we revised all of our forms and we did a lot of stuff and I was on the bench when he was still raising these issues and there were a lot things that were made right. You know, if lawyers just go along and say, “Well, it’s okay, my client’s guilty, I’m going to cave in” instead of doing what he did and I give him credit for having brought that court into line with the requirements of law. Now that’s one great service I think.

CH: And was that his motivation for challenging all the traffic infractions?

EL: He became identified in Eugene—if you had a truck overload you wanted to be represented by him. And there was some money at stake because the fines were pretty high and then of course it was his way, I presume, as a young lawyer of getting exposed to a lot of people that he represented that led.

[End tape 3, side 1]

Public Understanding of Judicial Process

CH: —public about their misgivings about people getting off on technicalities and things like that in a way that can understand the positive aspects of that?

EL: I don’t know. It’s a tough sell.

CH: Does the court try to do that?

EL: No. There’s no systematic effort on the
part of the court to explain and extol the virtues of lawyers who are getting people found not guilty.

CH: Or just of the court system itself?

EL: Not really. We don’t have much of a public relations thing going, never have. But it’s always interesting when you know a family who has some youngster in trouble, the first thing they want is a good lawyer and they are not eager to have this kid or their relative thrown to the wolves if you will. It’s a little like our attitude toward Congress and then our attitude toward our own congressman, you know. It’s easy to condemn people whom we don’t know, but when they’re in our own family or when they’re close to us we all behave alike. And I’ve seen that repeatedly.

CH: It seems like the public is so far behind the learning curve of how things have evolved in the courts that it might threaten the sanctity of the court, the special relationship it has within our system of government. People don’t understand why people do things they way they do in the legal system.

EL: I fault part of that to the lawyers, at least when I go in front of a group of law students I don’t claim that each one of them has some obligation to defend people accused of crime. But just because they don’t doesn’t make them morally superior and I try to make that point. You don’t want to do it and you think it would be wrong for you to do it, don’t do it, but don’t go around telling people you think somebody else is less moral than you are because you don’t do it. I think that the bar as a whole has a task here and maybe the law schools should, if you will, get into more of the—I hesitate to call it morality but at least social policy of saying lawyers who do these things are doing us all a favor. Because you know it’s an irony. When you look at, for example, the right to privacy, you ask anybody about the right to privacy they’re all for it. But who is enforcing the law in favor of privacy? It’s the criminal accused, and they’re the only real group that is enforcing the constitutional right to—at least under the Fourth Amendment.

CH: Or plaintiffs that are—

EL: —are actually bringing an action claiming an invasion. But, you know, it’s a very small group and the irony of it is we have left it to the criminal element in the country, if you will, to enforce the laws of what we think are our most valued rights. It’s kind of an odd allocation of the duty to enforce if you will.

CH: And yet are there any judges—that you know of, that have actually had it as part of their personal mission to let the public in their own constituency know why things have taken that course of evolution?

EL: Not that I know of. And it comes back again, speaking for myself, of my basic
reticence to become controversial? Because if I go out here and start talking about how great it is for these guilty guys to get found not guilty that puts a worry in the next case.

CH: You’re not advocating a position, but just explaining it.

EL: That would be okay, if you could do it.

CH: This is why this happens.

EL: And this is the price we have to pay. When I ran for election in 1960 I knocked on doors and I found an occasional person who would be very bitter toward the judicial process and get to talking about them and almost invariably it was somebody who’d been a witness for the state in a case in which the defendant had been found not guilty. This person knew what the truth was because somehow or another they were sufficiently close to case to know the truth and it turned out in the process that the truth did not prevail. That’s their view of it. Now that had to be a result of something that was false or corrupt about the process. But when it was all over, I didn’t hear people complaining about the outcome of their divorce or their mortgage foreclosure or their personal injury case, it was in that area. While we acknowledge that if we’re going to make our mistakes, we’re willing to make them there and we would rather have a number of guilty people go free rather than to imprison somebody who is innocent. We say that repeatedly. And it gave me a greater assurance in the total picture that things weren’t so bad.

CH: But how do you explain to people that it’s better to be biased on the side of personal freedom than it is of security for the public at large?

EL: Well, all you have to do is bring into focus the death penalty and say, how would we all feel if we executed an innocent person, you know? Better we err on the side of life imprisonment or the choice is life or death maybe even in the area of innocence and usually when one of those prosecutions goes haywire the prosecutors and the police learn a lesson. It’s a teaching process. I didn’t mean to get into this but even O. J. Simpson’s case has taught some lessons, right? You assume he’s guilty, and think he is, it’s taught somebody how to do it next time. [laughs]

CH: How do you feel about the death penalty?

EL: I don’t have any moral barrier to it but it is so expensive and time consuming and it is administered so much after the fact I doubt very much its value.

CH: Would that be a reason to—as far as sentencing goes for a judge to give a sentence of life imprisonment rather than the death penalty so you can avoid this costly process.

EL: No, I don’t think it’s up to the judge to
make that choice. If the law allows it and the facts require it—like even today the judge in Washington, D. C. sniper case has administered the death penalty at the recommendation of the jury. I would hesitate to see the judge carry the ball off the field just because that judge thought it would be more efficient, cheaper, or something. The public would have to be onboard on those decisions, and part of the problem is the public is so divided on the death penalty that it’s pretty hard to administer one way or the other. As you know Oregon during my tenure in the profession has gone from the death penalty, away from the death penalty, and back to the death penalty; food for thought. Tells you something about public attitude being unresolved.

CH: What do you feel the proportion is of judges who accept the recommendations of juries versus not accepting them in general? Can the jury recommend other sentences as well aside from having a death penalty or not?

EL: Normally, no. That’s the only area in which we hear the jury participate in the sentencing process. Probably the judiciary is as divided on the death penalty as the rest of the population. I don’t know. But given the fact that it is the law you have almost uniform willingness, or at least acceptance, of administering it according to the law. As you know we’ve had justices of the Supreme Court who thought it was unconstitutional no matter what their colleagues would say and resolving the issue the other way around would still feel free to say, “No, no, no, no.” But I don’t know of a judge of a lower court who has the responsibility for administering it who has said, “No, under no circumstances would I ever.”

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**Punitive Damages**

CH: For the most, part judges who oppose the death penalty will still administer the death penalty despite their misgivings towards it. You talked about malpractice suits and that’s one area that public, of course, has a hard time understanding the size of penalties and awards especially the large percentage that the lawyers take and then the fines that go so far beyond what would go to the person for their pain or that kind of compensation. How do you view those issues?

EL: Once again it’s back to who enforces the law for us. I was in the former Soviet Republic of Georgia and I went into the post office to buy a postcard, and I walked out the door and I stumbled over the threshold and almost wound up flat out on the sidewalk on all fours. I didn’t go clear down, but after I got through the door I looked and here was an inch and a half piece of angle iron across there as a threshold with the sharp edge sticking up. Now, no place in the USA would you have that. [laughs] And the reason you wouldn’t have it is because anybody running such a business would be sued. Now the fact that we have tort liability
means that we don’t have those kinds of almost traps in our doorways, see. Now who’s going to enforce the standards for us in medical care and in legal services and in a lot of other stuff other than the phenomenon of tort liability? When people get out of line, the jury is to say what the standard is based upon what they hear from experts, and so on. Of those verdicts, there may be some that we can all agree are out of line. A jury has done something sporadic.

But we’re also dealing with, in some instances, horrendous injury. If you go at it rationally and try to measure the dollar value of economic loss it gets astronomical. I’m not going to defend everyone. And maybe there are some that are out of line on the punitive damages aspect of it but, but, for the most part they’re okay. I do notice, I would add, that in the practice of medicine I think there’s a lot of unnecessary money being spent because doctors are not confident that they’re not going to be sued for not having done the next test and the next test and the next test. I wish we could do something about that where doctors particularly were practicing law instead of practicing medicine. I don’t know what we can do about that.

CH: Has there ever been any attempt, or is it even possible, for judges to award part or all of the punitive damage to—well either funds or organizations or whatever that help assist people who have had problems with that particular type of accident or disease or problem?

EL: Generally, in some mainstream proposition, no. I think now in Oregon part of punitive damages always goes to the state anyway.

CH: Really.

EL: I believe that’s the law. I’ve never had one under state law where—that is in recent years where a certain amount of the punitive damages goes to the state. Somebody would have to check that out for me to be confident on that. I recall in a criminal case onetime Judge Skopil, while a district judge, assessed a penalty against a company for customs violation or something like that, and assessed a penalty payable not to the government but a payable to some enterprise to help out in a way that was corollary to whatever this person had done wrong. But that was kind of innovative on the part of a judge to choose to do that. I’ve never been tempted to do that.

CH: Have you been tempted or have you exercised judicial innovation in other ways?

EL: I’m not an innovator when it comes to penalties or so on. I have, if you will, a narrow point of view that if the legislature wants a conduct punished in a certain way they ought to tell the public that that’s the way you’re going get punished. I’m not much for community service or any of those things that got to be popular because there’s a certain amount of humiliation that is attached to that, and I
think that a person who commits a wrong, and goes through the judicial process shouldn’t be gratuitously humiliated by a judge’s imagination. If the legislature says that it’s jail or a fine—that’s good enough for me. Now that may be “conservative” or not, but on the other hand I think we ought to know what the rules of the game are going in. If we have to be punished in other ways the legislature ought to consider it and we all get to get a chance to say “yes” or “no” to them before they impose it on us. That’s my view and I know others do it. Others were more innovative than I ever was, but it just wasn’t for me.

CH: An overall comment that people often levy at the courts is the one of judicial activism.

EL: Oh, yes.

CH: And maybe that applies, in some cases, to innovation but certainly in terms of how the courts have intervened in public policy, and in their view created public policy. How do feel about those kinds of charges?

EL: Well, judicial activism doesn’t mean anything because it’s used to suit whoever’s in—they want to criticize whatever court has done. And I hear as much criticism, so-called conservative activism as other kinds of, so-called liberal activism. So it doesn’t mean much to say that somebody is an activist. Now if you have to go into a new area where there’s no decision you have no choice. There’s not a case where a judge can say, “God I don’t want to decide this because nobody has decided it before.” You don’t have that privilege. Every case that comes along you have to decide. Now sometime that will take you places maybe that the law hasn’t gone before and if you have no choice, you go. And so who is to say that certain of these constitutional decisions that judges feel compelled to arrive at, that change the landscape, are activist or not. They’re cases that had to be decided.

CH: That’s certainly a big issue right now here in Portland with the decision in Multnomah County to allow gay marriages.

EL: Sure.

CH: Apparently the rational for the commissioners to push for that was their legal advice that it was an unconstitutional infringement upon gays and lesbians to do that. Is that a justifiable type of judicial activism, where it hasn’t been done before, and hasn’t been brought to the court before that they decide on those kinds of issues?

EL: You know, they’re going have to decide it one way or the other and they have no escape. It’ll be in front of them sooner or later. And the only thing you hope for is that whoever decides that will feel compelled by whatever,
or feel that the choices that are there, are not some personal bias or anything like that, but within the range of what they think the law means, and that’s all we can hope for. There is one school of thought that I once heard expounded that if a court decides something let’s say on statutory construction and the legislature doesn’t change it the next time around the court knows it was right because these things are all subject to future change. Hopefully if anybody gets too far out of line they’re going be drawn back. On the subject of marriage I had an actual case in which I ruled that there was no such thing as proxy marriage in Oregon.

CH: What is proxy marriage?

EL: That’s where a person sends an agent to the minister or JP [Justice of the Peace] to engage in a marital ceremony where the principal is not present. This guy in the case I had was in jail. Now he sent his friend down to the JP court in Cottage Grove to marry, on his behalf, the principal witness against him. And the JP performed the ceremony with this guy in jail and his proxy there in front of him in Cottage Grove, and they were married. And this witness was called in the case and the state said, “Well there’s no such thing as proxy marriage.” I ruled that there was not proxy marriage and compelled this witness to testify. Well, on appeal the Supreme Court of Oregon said, “Yes, there was proxy marriage in Oregon.” Of course, in law school I learned that Oregon had no common law marriage because there was a statutory procedure for getting married and that meant if you didn’t go through the statutory procedure you couldn’t be married in Oregon therefore there was no common law marriage. I felt very comfortable in holding there was no proxy marriage. Well, the Supreme Court—split decision—and maybe even Ted Goodwin wrote the opinion reversing that and it came back for a new trial. I tried it again and the guy was convicted without the testimony of that witness and then the legislature changed the definition of marriage so that there is no proxy marriage in Oregon. But it took a couple cases—it took a Supreme Court decision and some legislation. Now anybody can be labeled activist in all of that, right?

CH: Right.

EL: But it played its way out.

CH: So the system worked in that case.

EL: Well, it worked to whatever the public wanted. And if the legislature wanted, or the public wanted through its legislature, to have proxy marriage in Oregon we’d have it. [laughs]

CH: Although I guess if somebody didn’t agree with that they could still take it on to the Supreme Court as some kind of infringement against their constitutional rights.
EL: Oh, sure. But this was purely a statutory issue.

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**Campaigning for Judge**

CH: You know you mentioned something about talking to people that had feelings about the court system when you were campaigning door to door, and it made me think about the times you ran for your position as judge. I guess those were both re-elections because you had been appointed the first time to both the circuit court and the—

EL: No.

CH: Oh, the first time you did run against the—

EL: Yes, I was appointed first to the district court in '57 and then I ran unopposed for election to the district court in '58. I ran against an incumbent circuit judge in 1960.

CH: Okay. How do you feel about the election process?

EL: Well, I think it’s all right. The downside of the election process for judges is that you’re going have supporters and it could lead itself to cronyism, that’s the fear. You’re going have people contributing money; you’re going have people supporting you. Then that you’re going be intimidated in your day-to-day work, that you’re going be afraid that you’re going get defeated if you decide a case in a way that the public finds unpopular. From my perspective, what I have observed of the judiciary in the last fifty years that I’ve been a member of the bar that any incumbent judge ever was ousted for any decision they made. I don’t know of a decision that cost a judge their position. And as I worked in the state judiciary knowing that there was going to be elections I never felt that there was anything I was going do by way of a decision that was going to enhance or take away from my either having an opponent or winning. And those incumbent judges that I saw ousted I can see a reason for it, and there is only a handful of them where I thought that a very good judge, a very competent judge, and I am going to pass judgment and say good, was actually ousted.

CH: What reason?

EL: Just as an example. Okay? Loren Hicks was a circuit judge in Marion County and I got to know him quite well. He helped us out in Lane County a lot and I thought he did an excellent job. But Loren Hicks was appointed and then defeated. He was appointed by Governor [Mark] Hatfield but he was appointed off Governor Hatfield’s staff.

CH: Right.

EL: He was staff for Hatfield. I can understand why Marion County didn’t accept him as they would have had he been in practice in and
elected. And so I understand why it happened to him. Now, it’s sad that it happened. The only judge of the court of appeals who was defeated in his first election after the creation of the new court was again appointed off of the staff of a governor. He didn’t succeed in the statewide election. The incumbent judge, who I defeated, became controversial because of something that he had done and I can understand, and as a matter of fact he only got twenty-five percent of the votes in a three-way race in the primary. From my perspective, the lesson was, we don’t want controversy in our court. We want the court to run without this controversial personality in there. And then on a statewide basis Gordon Sloan was defeated in his effort to be on the supreme court. He was arrested for being drunk on the street in the bar convention.

[End tape 3, side 2]

CH: This is an interview with Judge Edward Leavy in his chambers at the federal courthouse in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen, the date is March 9, 2004 and this is tape four, side one. Go ahead.

EL: I was talking about the incumbent judges who were defeated. Then Vic Oliver in Linn County was defeated by Wendell Tompkins and Vic did some things that I think made him vulnerable. [E.K.] Oppenheimer in Portland, I think, was an excellent judge. He was defeated by Phil Roth. The only thing that Phil Roth did was say to the public, “If you elect Oppenheimer he can’t serve out because of his age—the full term—do you want to elect a judge or do you want the governor to appoint one.” He was just one too many times in running for re-election and that was the issue in that case. And Phil wound up being—now here’s a good judge defeated for re-election, and it’s sad but it’s understandable. It isn’t as if there was something in the process that was evil and intimidating or anything else. That’s just because Oregon had put in this compulsory age retirement thing and he couldn’t serve his term. And then Bill Fort it—was very unfortunate that he was defeated, I thought, in the statewide election after having been appointed to the court of appeals. But Bill had suffered a disfiguring fire and in spite of what a good lawyer he was and what an intellect he was and what a good leader he was I think his image just hurt him badly.

CH: Really. How were people even aware of that?

EL: Well, he put his picture in the voter’s pamphlet. Bill as a child was burned and very badly disfigured and it was striking. But after you knew him for a short while, that all disappeared in your relationship with him. Amazing.

I don’t want to go on the defensive for everybody who was defeated, but at least I want to illustrate that I don’t think it is the
treat. Let me add that when I was running to unseat an incumbent one of the fears, and one of the claims against him, was that he showed favoritism. And I felt that there was—the people who were supporting me were anti-favoritism. I always felt that if anybody ever detected that I had done them a favor for any reason then I would be as bad as they thought somebody else was. And there’s nothing that the court has to give away. You don’t have anything to give away. Everybody knows it, and once you think you have you’re in big trouble I think.

CH: It seems like one of the advantages in having to campaign is that you have the experience that you had where you’re going around and you’re talking to the average person who would never normally see a judge. You’re able to talk to them about their misgivings about the legal system and it puts the common, working day person in touch with the judge who then has a better understanding of where they’re coming from.

EL: It either confirms some of my biases or—

CH: Oh, that’s true too. [laughs]

EL: —or taught me a whole lot. And what I came out of that with was you do not make—as a judge, you do not make enemies by ruling. You’ll make enemies by not listening. But you will not make enemies by ruling and if you listen and you rule, even if a person were to think you’re wrong at least they’ll forgive you for it, see.

The other thing is, as I’ve already mentioned, they don’t want you to be controversial and there isn’t a whole lot you can hide in a county courthouse. People are better informed about what’s going on in a county courthouse than I was willing to give them credit for. I can remember one guy, he had appeared before me in a traffic case and he was accused of engaging in a speed contest on Franklin Boulevard, which is out there near University of Oregon. Had a non-jury trial and I find him guilty and fined him.

I’m out there knocking on doors one night and I knock on this door and my usual pitch was, “I’m District Judge Ed Leavy, I’m a candidate for circuit court and I stopped by to ask you to vote for me.” Then I would offer a card. This guy says, “Hell yes,” he says, “I know you. You fined me seventy-five dollars of the money I was saving for a down payment on this house. Come on in.” [laughs] I went in and he showed me every room in that house and we visited about that. We didn’t say any more about his case, but I remembered his case well and he knew he was guilty and so did I.

CH: Amazing.

EL: He got alongside of somebody at a stop signal, at a traffic signal on Franklin Boulevard and they took off racing, and it was that simple. When it was over he regretted it and thought he was maybe going be found not guilty and I
don’t remember the details of his explanation but when it was over with I found him guilty. It was okay. So you just kinda confirm that, you know, it’s okay. People usually know when they’re right or when they’re wrong, so go ahead and rule. The thousands and thousands of rulings that you have to make, I always did with a degree of confidence that I would never have had had I not been out there among them.

In running against Frank Reid, it was a three-way race; Doug Spencer and I in the primary. I knocked on enough doors to know that Spencer was going beat Reid, and that if I survived the primary my opponent was not going be Frank Reid, it would be Spencer. I felt that there was no need for me to say anything negative about Frank. I felt he was going be done, and all I was doing was listening to what people knew, or their image. That’s why I came away with the feeling that you can’t hide much in a county courthouse.

CH: One of the advantages of being appointed would be that a governor could appoint a very well-qualified lawyer that has great experience but would be otherwise unknown by the public, and therefore not suffer the defeat to a politician running for the position that is very well known.

EL: Well, that’s one of the intimidating factors in the appointment process because the governor doesn’t want to appoint somebody that’s going get whipped, nor does somebody want to take the position and then face defeat. That fits into the equation, and I think the governors, in their appointing, will look at it as, “Can I appoint this person and can that person survive?”

CH: Did very many judges not get re-elected if they are not controversial? It seems that most judges running for re-election are retained.

EL: Are unopposed as a matter of fact. They do. I’m trying to call to mind any— I’ve already mentioned Loren Hicks and I mentioned others who were first appointed. Reid had been appointed and elected unopposed in ‘54 and then drew an opponent in ‘60. So his wasn’t a first time out of the box defeat, but I think that’s a factor in the appointment process.

Now all of these various ways of selecting judges seems to work one way or the other and there are so many places that are satisfied with the way they’re doing it. Ours in Oregon is a constitutional requirement and a six year term and all of that. Maybe it’s a little bit of bias on my experience, but I’m not going knock the election process.

Bar Polls

CH: How do you feel about the polls—it would be the bar isn’t it—as to how they feel about lawyers running? How do you feel about that and how does that play into the process?

EL: Well, I have been the beneficiary of both and I think largely my judicial career is
the product of bar support. I have very little other constituency, if you will, not having had partisan credentials in the federal selection process the only thing I had going for me was experience on the bench and by polls, if you will.

CH: How do you account for your popularity, or at least your approval rating in these polls? Aside from your experience, are there any other assets that you have as a lawyer or a judge that would be well known to the bar association?

EL: I’ve come to realize that, as a trial judge, the lawyers appreciated the fact that I would rule decisively and quickly along the line in the course of a trial. I did not fully realize that I was a little different from others maybe until I start reading transcripts and I see how indecisive some trial judges are. As I say, part of that confidence may have come from running for election see. If you’re called upon to rule, don’t hide. You’re hired to rule. Rule and when you’re ready to rule do it, and don’t apologize. Don’t be sympathetic to every loser. It was never my style to compromise a ruling. If I thought a ruling was to go one way or the other it went one way or the other and I never looked for middle ground. Because you know that one is wrong. One or the other may be right but you’re sure both sides know you’re wrong if you try to find a middle ground when there is none. See. And then the other thing is there’s a whole lot more to the process than fighting with lawyers.

Lawyers were never a challenge to me in the courtroom. And back to a good trial lawyer, it’s okay if a good trial lawyer is the center of attention. That doesn’t take anything away from the court for this lawyer to be the center of attention. That’s that lawyer’s style. And to be a good lawyer they’ve got to attract some attention. So it’s okay.

CH: You liked that as a judge?

Effective Trial Lawyers

EL: Sure, I liked to see effective trial lawyers and I marvel at the ingenuity of lawyers and all that I see in them so I liked the good advocacy. And a lawyer with a good reputation who appeared from out of town was never a challenge to me. That was okay. It wasn’t a case of is he going run the court or am I? I never had that attitude.

CH: Can you recall a case like that, in terms of a nationally known or well-known—

EL: Not particularly. I’m thinking more of effective trial lawyers from out of town within the state. But there was a guy from San Jose, a guy named Heber Teerlink who was a flashy lawyer and I enjoyed him. He tried a case successfully. Matter of fact tried it and retried it in front of me and he was one of these absolute centers of attention, you know. The jury, I’m sure, was concerned about how he
was dressed on each occasion and all that kind of nonsense, but he had a style that was different from what you’d see in Eugene and he was successful with it.

I always thought that it was my responsibility that the court would be able to function without requiring that somebody else come in and make it easy. There was nothing that a lawyer could do or say to keep the court from functioning. There was nothing that an accused could do or say that would keep us from functioning and so it wasn’t as if everybody had to cooperate to make it easy. And then when I ruled I never heard more argument than was necessary for me to have reached what I thought was a decision. When I reached a decision I ruled. If anybody continued to talk after that I wouldn’t tell them to sit down to shut up. I would just tell them the court had ruled on that, here’s the next step you can take in the trial if want to take it and if you don’t take it will be his turn. And we just focused on the next step. That was all I ever did, and I come to realize after I left the trial court that the only weapon that the trial judge needs to keep control was to rule. And that’s the way you rule and then you focus on the next step. I never had a trial that lasted more than three weeks, but I don’t think I rushed anything.

CH: Do you have counter cases though where the decision is by its nature somewhat subjective?

EL: Sure. Absolutely. And there’s a whole lot that you do in the trial court that either way is right as far as the appellate court is concerned. Either way. Total discretion. And the important thing is do it one way or the other and move to the next step. You don’t fret over it, and you’re not going to be the first trial judge that’s wrong a hundred percent of the time nor, by God, are you going be the first one that was right a hundred percent of the time.

CH: How do you feel about being reversed?

EL: That happens. I look back at some cases in which I was reversed that I say, yes, they were right, they were right. I’m thinking of one of the early reversals I had on the termination of parental rights where I terminated a woman’s right and ordered her child to be adopted and then she had a right to appeal and as a matter of fact I appointed a lawyer for her to appeal. The lawyer was a little surprised that I would seek that lawyer out and say here’s the case and here’s the issue, and I want you to represent her and do this. He thought I was almost indifferent to whether I was reversed or not, but that was part of the process. She was entitled to a lawyer and I had to select one.

One of the things that a judge does in effect handling the case is to select a competent lawyer. You can’t select an incompetent and do your job. You’ve got to select a competent one. Anyway, I was reversed on that and that child was then not adopted and was ultimately
wound up in the care of her grandmother and a number of years later in connection with another judicial proceeding I saw that child when the child was six or seven years old and was just as happy as she could be so from a human interest standpoint I thought the decision was right, and then on the criteria that they employed or announced in the decision I think it was the right one. But early on, it was a new area of legislation and the legislature made it sound a lot more simple, or lighter burdens on the part of the state, to sever parental rights than the court ultimately wound up with. When you see the total picture, they were right. It’s okay.

Judge’s Role in Sentencing

CH: Do trial judges ever force the hand of the higher courts to rule on controversial or important issues by issuing a decision that will force the issue?

EL: Yes. I learned my lesson on that.

CH: How so?

EL: As a trial judge you don’t force the appellate court to do anything. They do what they want to do and if you contrive issues or rule in a way to force them to rule they’ll take care of you. [recording stops, then resumes]

CH: Go ahead. Okay.

EL: I had a case onetime where a guy was accused of five counts of nonsupport, five children. He had failed to support his whole family. It struck me without much advocacy from anybody that that ought to be a single crime. That one failure to support a family ought to be a single crime rather than five separate crimes. Because there are five separate children; this guy was accused in five separate counts, five felonies for failure to support his children. I, in effect, triggered that issue. I don’t know how I exactly got the lawyer for the defendant to raise the issue and then I ruled, one count. The supreme court got a hold of that and they reversed it and said, “Oh no, there’s five.” I look back upon that as saying I made that issue my issue and I ruled on my issue, see. And that was making that case my case. And once you do that as a judge you’re out of bounds.

CH: That’s inappropriate judicial activism?

EL: Right. Absolutely. Once I become an advocate for something I should quit judging. See? Because that case becomes my case and that I have studiously avoided. If an issue is going to be mine I’d better not be monkeying with it. Because you can’t be a judge in your own case and if you make a case your own you’ve got no business in there.

CH: But looking over your entire judicial career, I mean, how often have you had to decide one way in case where ethically, or
morally, or philosophically you would have decided had you been able to the other way?

EL: Well, I don’t know whether I’d be able to count the number of times but there’s a lot of times when you say, “If I were making the law, it would be different.” See? But you don’t get to do that and that doesn’t mean there’s anything immoral about it. It’s just that you have these feelings that if I were making the law the minimum penalty would not be as great as this. Right? I think some of the minimum sentences that Congress has imposed in certain of these federal cases are unfair, but, they’re not to the point where you’d say, “Well, this is so bad that I cannot morally do it” if you will. That’s not the point.

CH: Is there room for a judge, either in his or her decision or sentencing, to state his or her disagreement with the sentence being levied against a person?

EL: Yes, some do. I think it’s a mistake because there’s a couple things we should try to achieve. We should try to achieve that the public generally accepts the judgments of the court and it’s amazing, to me, how accepting the public is of judicial decisions. It’s rare that you have to use all the power of the government to enforce a decision. The courts have that kind of deference toward them that makes the decisions acceptable. Now if you’re making decisions at the same times you’re criticizing them then it’s a step backward I think. It doesn’t serve the parties very well either. It really—you rule against a party, okay, that’s bad enough. But then to tell the winner that the product is unjust is kind of self-defeating. Both sides come away saying, “What the heck, what’s going on here. This judge doesn’t like anything. He don’t like winners, he don’t like losers.” And so on. I think that in that context it’s a little self-defeating.

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**Good Oral Arguments**

CH: What makes for a good oral argument from a good trial lawyer?

EL: Well, you’re talking about one directed to the court or one directed to the jury?

CH: You as a judge, when you’re listening to the lawyers presenting their case, how do you decide their—not necessarily their merit according to law but whether they—that you see that they’re a good lawyer by the way they’re handling their case, presenting their argument?

EL: First of all, they have to know that case better than anybody in the courtroom and they have to go in there with the attitude that the judge is the last one who has to know anything. And it’s up to them then to take the court to where they want it to go. That means
being totally in command and a realization that a judge who will try to be well informed on their case isn’t going to know as much about their case as they do. And when a question is asked assume it is asked in good faith by the judge and that judge wants a direct answer that will be helpful. Once the judge starts asking questions that’s the tip-off that this may be important, and don’t try to hide an answer.

What I always like is a direct answer, and then if there’s an explanation necessary go into the explanation. But to start going on the defensive and start explaining before the answer comes is frustrating for me, very frustrating. And part of my attitude is that I feel that the refuge of a witness who doesn’t want to tell the truth is a non-responsive answer. And the refuge of a lawyer who isn’t answering my question directly is because it’s akin to the witness who doesn’t want to face reality either. I’m very, very skeptical of lawyers when they’re not very direct. And back to this business of knowing what you want and why you want it and why you’re entitled to it is all part of it. Then of course lawyers when they’re talking to the court ought to realize that there’s a different argument to be made to the court than there is to a jury. And when they’re giving a jury argument to me you see through that.

[End tape 4, side 1]

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**Venn v. Reid**

EL: When I was a deputy D.A. from about March or April of ‘54 to January of ‘57 that office was filled by Eugene C. Venn. He was the D.A. We had another deputy D.A., Ernest Lundeen. Venn was appointed when C. E. Luckey was appointed to be the United States Attorney for the District of Oregon. Venn had been a deputy and then was appointed by the governor to be the D.A. Frank Reid, who was later to be a circuit judge, was instrumental in getting Venn appointed as D.A. Now I’m going to go into this in some detail because it is a portion of Lane County history that has been neglected and I can understand why it has been because there’s a lot about it that is unpleasant.

I’m going to start out by saying that while Lundeen was a deputy D.A. he was accused by a woman of having gone to her home after she had come in and complained to him about nonsupport and seeking to enforce support. In her version of things, he engaged in some; let’s just say inappropriate, sexual conduct with her. She reported that to the state police, and the state police reported it to Bruce Avrit and me as a deputy D.A. Venn was out of town, and when Venn came back to town he interviewed the woman and he fired Lundeen. The woman did not want to have anything to do with prosecution. Frank Reid was still practicing law in Eugene and Lundeen hired Frank Reid as his lawyer.
CH: This is during what period of time?

EL: This is 1955, ‘54 maybe. Then somehow or another Venn and Frank Reid had conversations, and Venn was insisting that Lundeen have some sort of counseling or treatment or something, and that there was going to be no prosecution. This got to be a matter of contention between Frank Reid and Venn, personal over this thing. Then Frank Reid was appointed to the bench. That would have been maybe ‘54. Lundeen started practicing law in Eugene and Frank Reid had some clients that he turned over to Lundeen to continue to represent. This issue of whether or not Lundeen was going to go without treatment, in Venn’s mind, became a big issue between him and Frank Reid.

A little later on a guy named Moses Moody was accused, along with a couple other guys, of a robbery of a grocery store. He was on the way out of town going north on Highway 99 and when he was arrested the police recovered some of the loot from the market. When he was booked into jail, some of this money was identified as evidence. Lundeen was representing Moses Moody because Frank Reid had represented Moses in a personal injury case. Lundeen went down to the jail and said to the jailers, “I represent Moses Moody and Frank Reid has told me how to get his money so that he can pay a lawyer and if you don’t turn that money over to me I’m going to accuse you of denying Moody’s civil rights.” The police turned the money over to Lundeen.

I was prosecuting the Moses Moody case and I received a police report showing that Lundeen had invoked Frank Reid’s name. One of the first things I did is I went over to Reid’s chambers and I said, “Here is what the police report says that Lundeen is saying about you.”

At that time Frank Reid told me, “Well, I have some of the loot.”

Reid had loaned Moses Moody fifty dollars. When Lundeen got the money out of the jail he paid Reid fifty dollars that Moses owed him.

CH: [laughs] This is so convoluted.

EL: Frank Reid says to me, “Of course, I don’t want it if it’s stolen.”

I was there only to say, “Here’s what Lundeen is saying about you.”

Lundeen shouldn’t be saying that and I guess I was tattle tailing, but certainly if some lawyer was out and about saying that about a judge I think the judge ought to know. I didn’t know anything about the fifty dollars until Frank Reid told me.

This battle between Reid and Venn got to be very personal—a back channel thing, it didn’t have anything to do with what was going on in the courtroom. In any event, Frank Reid started making statements like, “I made you and I can break you,” because Reid was instrumental in getting Venn appointed to be a D.A.

Moses Moody pleads guilty and he’s sentenced to the pen. We get word from the warden that Moses Moody is complaining
about not getting money from Lundeen in the settlement of his first injury case, and he wants to talk to the prosecutor. Venn and I stop by the prison and we see Moses for a while. He’s an illiterate and he’s making noises. He wants to buy glasses and he wants to learn how to read and so on. We get back to Eugene and we decided, there’s so much bitterness between Reid and Venn, and Lundeen and us, and Lundeen and Venn and this whole history that we’d be better if we’d ask the attorney general if would look at Moses Moody’s complaint. The attorney general agreed to do that thinking that this could be just a local feud between the D.A. and a circuit judge.

CH: Was this Bob Thornton at that point?

EL: Yes, Bob Thornton. He sent a deputy to do it and it’s all going to go its way. I read in the newspaper one day that Frank Reid has discharged a grand jury and has empanelled a new one and it’s at a time in the term of the court when that didn’t happen. When I went to work I asked anybody in the office if they knew anything about it. Now it’s just fortuitous that I happened to read it because that’s the kind of thing they used to publish as news in those days. [laughs.] A new grand jury had been empanelled. I asked them if anybody was there when it happened because normally there would be a deputy D.A. or a D.A. in the courtroom when the grand jury is drawn. That is the normal procedure. Nobody knew anything about it.

We got to looking into it and sure enough, the grand jury that was discharged had never heard a case. It was empanelled a little bit earlier at the usual time, never heard a case, was discharged, here’s a brand new grand jury. We get to looking at who’s on the grand jury. The foreman of the grand jury is the foreman of the Lane County Republican Central Committee, and that juror presumably has been drawn first to be a trial juror, and then drawn to be a grand juror. The foreman is appointed by the judge.

CH: Is this supposed to be a random drawing?

EL: Yes. And also on that grand jury is the wife of one of the bailiffs. And another one is either a daughter of a deputy clerk or a daughter of a court reporter, I don’t remember. But now this thing is incestuous, right?

CH: Yeah, right.

EL: We tell the attorney general, “Look at what’s happen to this grand jury.” And the ultimate fact was that Lundeen had settled Moses Moody’s personal injury case and then he had paid Frank Reid part of that as the fee because Frank represented Moody before Lundeen did, Lundeen then kept a portion of it as his fee and then kept some more of it as part of his fee for when Moses was sentenced to the pen, so Moses gets zero. He’s up there complaining about it, and his claim is of the nature of a larceny by bailee. Then there’s the other issue about receiving property from

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the products of the robbery that were stolen property and so on. This is the context in which all of this going on.

We asked the attorney general, “Do you want to get rid of this grand jury?”

They said, “No.”

“Well, if they say ‘no’ this is their battle, this is not our battle.”

Then, of course we realize that under the law at time there can only be one grand jury in the county and we had all of these other cases that were going to go in front of that grand jury. Even though we took ourselves out of the Moses Moody, Lundeen, and Reid situation this was our grand jury, if you will, to handle all of the dozens of cases that are otherwise going through the process. We decided among us we’re going to look into it. Well, we found that what Frank Reid had done is he had gone to the labor hall and put a legal pad on the table and said, “There are not enough labor people on juries, if anybody wants to be on just sign up.”

Of course that’s a shortcut and an illegal way of assembling jurors. They’re to be drawn randomly from voter registration roles, and so on. We’ve got this mess on our hands. It is a terrible mess. We decided to go ahead and try to get rid of the grand jury.

CH: That doesn’t happen very often.

EL: No, no, rare, very rare. We moved to discharge that grand jury on a bland assertion that it was illegally put together. We thought that once Frank Reid saw this and realized that we knew what was going on, and that we knew that he knew what had happened because he knew all about the progress of this investigation, that is because of the public newspaper reports of it and his hand in doing this. It was pretty obvious that it would be an embarrassment to him certainly if the fifty dollars that I spoke of, wound up in his hands, innocently or otherwise. That this business of Moody complaining that he was cheated out of all of the money that he got on the personal injury case and some of that wound up in the circuit judge.

We get to looking into it and this thing just looks illegal as can be and we thought, “Well, if Frank knows, we know.” He knows it’s illegal, he’ll discharge it. But he didn’t. He asked for Judge Dal King of Coos County to come and hear it. King came and heard the motion, and King—I don’t think believed that things could be that miserable. He asked Venn, the D.A.—Venn and I are in the courtroom on this motion—to make an offer proof as to what he could prove in support of this motion. Venn made a very articulate and precise offer proof.

Judge King told him, “Don’t name names, just tell me what happened.”

Within those limitations, he laid it out pretty clear. I think to this day King thought this guy was hallucinating, you know, couldn’t believe it. Denied our motion. Then we went to the supreme court on an original petition for mandamus. I’m going to give a copy of the opinion in which we sought a writ of mandamus from the Oregon Supreme Court
requiring that Frank Reid discharge that jury on the basis that he knew it was illegal and he had a legal obligation to discharge it. The supreme court split four to three against us. George Rossman, Hall Lusk, and James Brand were dissenters, and William Perry, Harold Warner, Lamar Tooze, and Earl Latourette were in the majority. Everybody has their view about who’s an intellectual giant and who isn’t.

[Laughs.]

CH: Lusk was eventually appointed as senator.

EL: Right. But Rossman, Lusk, and Brand. You’ll see the number of lawyers that appeared as amicus on both sides that the Lane County Bar was just thoroughly split on this issue. There was every way that lawyers were choosing up sides on this. Now, you gotta appreciate this was a raging controversy. You can imagine.

CH: It was in the news.

EL: Oh! Every day; to the point where people were nauseated with it.

CH: Did this ever enter into your contest then against Reid when you—

EL: Sure. Not chapter and verse, but this is the milieu that it comes out of. The net upshot of all of this is that this is the last word on it. We were whipped in the supreme court, and I’m going to say that was in June of ‘56—when we were whipped there I said to Venn, “We are done. We have done everything that any kind of responsibility would suggest that we have. We’ve gone public with thing, we’ve gone to the highest court with it, we know what the truth is; we’ve lost.”

CH: What about the court of public opinion? How did they view all this?

EL: It was split, it was split. Some people thought Venn was nuts, see, and you understand Frank Reid was a longtime resident of Lane County. He was legal aide in Lane County before there was legal aide. He did a lot of very good things. He was an excellent trial lawyer, see. A certain number of people thought Venn was nuts and maybe I was too.

Shortly after that, somebody, instead of Reid saying let’s leave this alone; they started a recall petition against Venn. That gives Venn another forum in which to start talking. Now he can go public, talk some more. He accused Frank Reid of cronyism and said that Frank Reid has his favorites and he even named a lawyer, Bill Huey as being a crony of Frank Reid’s. The Oregonian publishes some of the things that Venn is saying along with the Register Guard. The Register Guard runs an editorial entitled “Keeping Books for Moses Moody,” and it says how Moses got took for these sums of money, and who got what, and so on.

The recall failed and it’s six months after this that I’m about to be appointed to the bench, right? Now if anything could have broken my
pick, is this kind of controversy, right? But in spite of that, and I look back on this and I say, my God this was marvel that I didn’t get—talk about not wanting to be controversial.

CH:  Right.  Yeah, this is controversial.  On both sides.

EL:  Oh, serious stuff.

CH:  I’m surprised the third person running for the position didn’t get it just by default.

EL:  Of course, that’s four years later. This is ‘56.  I’m going to continue on here unless you’re in a hurry.

CH:  Not at all, please, this is fascinating.

EL:  Yes, I think it’s fascinating. After the decision by the Oregon Supreme Court Frank Reid decides, “To hell with this, I’ll discharge the grand jury.” He discharged the grand jury. That grand jury never heard a case and a new one was empanelled. Out of this utterances comes a lawsuit by Bill Huey or against Venn for defamation and Reid sues the Register Guard for defamation based on the editorial, not on any news accounts, but on this editorial.

CH:  What did they have to prove for defamation?

EL:  That it was deliberately false, I think, under the current standard.

CH:  They don’t have to prove any loss of income or anything like that.

EL:  Well, there are certain things that are per se libelous. If you accuse a person of dishonesty that’s per se libel and certain things are per se libelous. Now here comes the lawsuits against Venn by Huey, lawsuits by I’ve forgotten who—Huey, maybe, against the Oregonian. Reid against the Register Guard. At that time, I’m appointed to the district court and I’m out of the fray, thankfully. [Laughs]

CH:  [Laughs.] Technically.

EL:  Time goes by and Bill Frye, that’s Judge Helen Frye’s husband, graduated from law school in about 1956. By 1958, he runs against Venn for D.A. and defeats him. Here’s Frye, now the D.A. in Lane County and Venn is out of office. Everybody thought at that stage that Huey and Reid would say, “Well, now the voters have passed on my accuser and my adversary, this thing is over with, let’s go on and do the business of county.” Right? No such good judgment. The Oregonian, I think, settled the case with Huey first.

CH:  The Register Guard.

EL:  No, the Oregonian. And then Huey’s case comes up for trial against Venn, and Venn represents himself. Now you got to appreciate that half of the people thought Venn was nuts. Okay? Now my attitude toward him is he had
no good judgment but he was very, very honest in every detail.

CH: They thought that he was nuts because of this case or from previous things that made people think that?

EL: No, because of this case, and then they could probably fortify it by things that they thought he done in other cases. So that case comes on for trial before a jury in the Lane County courthouse, one of the earliest cases tried in the brand new building. They’d just moved into that Lane County courthouse in 1958 or thereabouts. Phil Hammond, circuit judge from Clackamas County, was assigned to hear that case and Phil was presiding over it; at the end of the case, directed a verdict in favor of Huey against Venn. This cronyism speech—remember the one that was after we had been whipped in the supreme court—and this is in connection with the recall business. I’ve told Venn I’m distancing [myself]; I have nothing to do with that. That wasn’t our work. Directed a verdict against Venn and after directing a verdict against Venn they argued the issue of damages and the jury returns a verdict against Venn in the sum of one dollar.

CH: [Laughs]

EL: If you don’t get a verdict for more than two hundred and fifty dollars in the circuit court at that time you didn’t even get costs. Venn winds up getting his costs.

Reid’s case is still pending against the Register Guard. By now it’s getting to be 1959. We’re approaching the time for election, and everybody says, “My God, he’s not going to try this.” But they go ahead and try it in 1959. And you understand that the defamatory publication was this editorial entitled “Keeping Books for Moses Moody.” None of the news accounts were the subject of any libel or slander action. It was the editorial. Knowing what I know I didn’t think there was anything untrue in that editorial.

In order to really understand what occurred in that case you had to know what the Register Guard had published in its daily edition, and follow it by how people acted in response to what was published. Nothing made sense in the abstract unless you knew here’s what the afternoon paper said on this day, and here’s what happened the next day, and then here’s what the newspaper said, and then here’s what happened and you could see all of the conduct of the party all reacting to what was being reported in the paper. Honest to God, I do not think that the lawyers representing the Register Guard really understood the significance of what was going on because they didn’t have this correlation. The end effect of it all was that the jury found in favor of Frank Reid that he was defamed by this editorial talking about the handling of Moses Moody’s money and they awarded him a verdict of five thousand dollars.

CH: Oh, gee.
EL: He gets five thousand bucks for being defamed. The Register Guard, I think, really wanted to appeal, but their lawyers let the appeal time slip.

CH: If they appealed they would be going before judges and not—

EL: —the supreme court on whether or not this measured up under all the standards that a newspaper is allowed.

CH: If a jury would be influenced by things other than judges would be influenced.

EL: Sure. Anyway, they didn’t get to appeal, so they paid the judgment. That’s the end of this story in 1959. Now it’s 1960, and I’m running for election, and Frank is running for re-election. You can see the horrendous controversy that is going on, and the net effect of this is the public had had this whole episode clear up to the eyebrows. They had defeated Venn in 1958; Frank Reid’s turn was next, and the whole way to get this behind everybody is to get rid of everybody from the barnyard see.

[End tape 4, side 2]

CH: This is an interview with Judge Edward Leavy at his chambers in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen, the date is March 9, 2004 and this tape five, side one. Go ahead, please.

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**Venn v. Reid, continued**

EL: I don’t know exactly where I left off here, but those cases were over in earlier in 1959. Do you have questions about that whole episode? What happened was we were in an era of sloppiness in the way juries were assembled, the county moved out of that to where now everything is done by the book as far as selecting juries. This whole episode between Ernest Lundeen, Frank Reid, the attorney general, and the D.A. is pretty much behind us by 1960. Interestingly enough, at the same time that this was going on in Lane County in 1955 and ’56 you had what amounted to a major scandal here in Portland involving the district attorney.

CH: Gambling.

EL: Yes, that kind of thing. All of this was going on in Multnomah County at the same time that was going on in Lane County, and between the two, Lane County was getting much attention. The attorney general had special prosecutors or deputies functioning in both counties at the same time.

CH: You would think this was Cook County, Illinois. [Laughs]

EL: [Laughs]

CH: Or Crook County.
EL: Yes. Earlier in 1959 Senator Richard Neuberger had died; Justice Lusk was appointed to the senate and that created a vacancy in the supreme court. That’s the vacancy that Judge Goodwin filled, and that left a vacancy in the circuit court in Lane County. Now here was a vacancy in the circuit court – no that wouldn’t have been in ’59, that would have been in early ’60. By then we knew Reid was going to run for re-election; we knew that Douglas Spencer was in the fight, and I was in the fight by that time as a candidate at the time. Here comes this other vacancy.

The question is put to me: “Am I going to be a candidate for that appointment or not, to the circuit court.” I allowed as how it was unlikely I was going to get it, but it would be no harm in my being a candidate. So I made myself a candidate for appointment to succeed Ted Goodwin on the circuit bench in Lane County in 1960. There was a tight time frame on that and if the Lane County Bar was going to have a poll they had to do it in a hurry. Mark Hatfield, of course, was governor. The bar assembled in Eugene in March, if I recall, and had a bar poll. Frank Reid thought that he could win against Spencer and Spencer thought he could win against Frank Reid. So all of their supporters became my supporters, [Laughs] and I run away with that bar poll big time. The only people that were a little bit frustrated with me were the people who were my supporters who thought that I was being a traitor to some cause, see. I knew I wasn’t going to get appointed because—

CH: Did you see this coming? The poll, how it was going to be playing out?

EL: I thought there was no harm in being in there. Like Bob Straub said once, “There’s no harm in losing an election until you win one.” [both laugh] I get this big result, see. The next morning Judge Bill Ford called me and asked me if I wanted to go to Salem because Ted was going to be sworn in. I said to Bill, “You know I would feel very awkward there because I know I’m not going to be appointed, and if I go up there it’ll look like I’m trying to get.” I decided not to go for that reason, knowing that I wasn’t going to be appointed. Sure enough, when Ted was sworn in, Hatfield asked Judge Roland Rodman to go up to his office. Hatfield announced the appointment of Rodman, which was very good appointment. All Hatfield said about the rest of us was that he wanted to let that one play out. Fine.

That launched the 1960 election and, as I said, you can understand why I have an aversion to controversial judges. I would hasten to add here that I have no reason to think Frank Reid was corrupt. He was a very good trial lawyer, a very generous man, and maybe he was stubborn, but when it was all over, after Spencer and I survived the primary, I won in the general election against Spencer in a very narrow race. I didn’t know I was a winner until the next morning. When they quit counting votes, on election night, we were only fifty votes apart at 18,000 a piece or something like that.
Out of that Frank Reid and I, oddly enough, remained friends. When he left office he was helping with whatever he had in his instructions files and one thing and another that could be helpful and I even testified in some of the trial and he privately told me one day, he says, “Ed, you’re the only one that told it exactly like it happened.” Later on, in one case I recall, Spencer was on one side and Reid was on the other side and I actually heard the case. [both laugh]

CH: That must have been an interesting arena.

EL: It was okay.

**Lane County Circuit Court Campaign**

CH: Everything that we’ve been talking about—did any of that come up in the campaign in 1960?

EL: No, no. I don’t think anybody’s mind was going to be changed by that. As I said earlier, in knocking on doors being convinced that Spencer was going to whip Reid and that if I was then going to be in the general it would be against Spencer. It was either going to be the two of them, or me against Spencer. There was no point in my saying anything negative, or suggesting anything negative, or bringing up this whole past because Frank Reid is out, I can use his supporters.

CH: If you have a certain number of votes in the primary—

EL: Fifty percent.

CH: Then what happens in the general election?

EL: You’re the only one on the ballot.

CH: I see. What about the *Register Guard* in terms of endorsements?

EL: The *Register Guard* wound up endorsing me. The editorial went for Leavy with a nod to Spencer. There was no knock on Spencer. Doug and I wound up being good friends coming out of it, too. Later on he was appointed to the circuit bench. In 1967 he became a circuit judge so he and I were colleagues there for a time on the circuit bench.

The reason that this has kind of been forgotten, if you will, is there’s nobody who wants to talk about it. The *Register Guard* doesn’t want to talk about, right? Frank Reid had no cause to; Lundeen had no cause to. There were indictments and hung juries coming out of the prosecution of Lundeen. The attorney general doesn’t want to talk about it because I don’t think they did a bang-up job of prosecution or anything else that came out of that that I thought was spectacular. It’s just been kind of sitting there. If somebody had the curiosity to go back and research this from
just the standpoint of what was published in the Register Guard it just went on and on and on and everyday it was something. [Laughs]

CH: In a way it prepares you for controversial issues you might have to rule on later on especially after you get up into the federal court.

EL: Maybe, maybe. Or maybe I was just naïve enough to not appreciate all the risks involved and all else that was involved. I’ve given you that opinion and it shows you that lawyers who were on each side amicus, see.

CH: I saw that, I saw that.

EL: That was not by any means an exhaustive list of all of the lawyers who were helping one side or the other.

CH: I marked Huey’s name in the one case.

EL: Keith Skelton, you may recall.

CH: Sure.

EL: Charles Porter.

CH: Charley Porter, right. He was not a congressman at the time, at that point?

EL: It was after—.

CH: Charley was in for one term, two terms?

EL: It seemed to me two terms, but it seems to me that Charley was not in yet. He was in later in the 50s or maybe into the 60s [1957-1961]. I know he was in Congress at the time of the Cuban Revolution.

CH: The Cuban revolution was in 1959, well ’59 and ’60.

EL: And was outspoken on that. It would have come a little later, and there were others who were helping us in the legal work.

CH: And Porter and Skelton were they helping you?

EL: They were amicus.

CH: Their political leanings had nothing to do with who they supported in this case.

EL: No. Partisanship wasn’t the criteria. But coming out of that controversy, see, and the accusations of favoritism, that’s what this was ostensibly about. I felt that that was the biggest charge—I had to be different from anybody who would show favoritism. You asked me about bar polls—back to that.

The newspapers ran some surveys of lawyers as to what they think about federal judges and this and that. I’m a product of the
bar polls, if you will, and the appointment, and election process. These spontaneous polls done by the newspapers just for the purpose of informing the public about the reputation of judges within the federal judiciary, I very much opposed that. No matter how good anybody is, or how good the group is or how bad the group is, somebody’s going to be on top and somebody’s going to be on the bottom. The person who is the bottom is wounded no matter whether they know better or not. You might have the five very best judges in the nation; one of them’s going to be fifth. And you might have the five worst and one of them’s going to be number one. What does it tell you? It just says, somebody’s first and somebody’s last.

Having said that, the one thing that I have watched for in the survey that was done while I was a magistrate by the Oregonian or the Oregon Journal, I’ve forgotten which one it was, the question was whether or not I showed any favoritism. At least for me, given the history of my origins, that one was significant to me and I always fared very well on that. [both laugh] Because I felt that that’s where the real expectations were. So all of those lessons were not lost. [laughs]

EL: You understand now, I was not a law school student of his. I got acquainted with Hollis in the years that I was a deputy district attorney when this whole Venn v. Reid [207 Or 617, 624, 298 P2d 990 (1956)] thing was going on. It’s fair to say he thought that the supreme court was wrong in what it did and of course that was reassuring to us that he had that view. Hollis was pretty well content with the way things were, to say the least. He was not for any new-fangled procedures or anything else. As you probably know, he kept the law school very small and there were only twenty people graduating from the University of Oregon Law School.

In 1953, when I graduated and was admitted to the bar, there were about twenty-three or twenty-four graduates of the University of Oregon Law School coming into the bar in Oregon. I became best acquainted with Hollis because as a traffic judge—somehow or another the legislature provided for a school for traffic judges—and Hollis took that on and would have a summer session for judges of traffic courts.

Orlando Hollis

CH: I think I showed you that quote from Hatfield where he had said that as governor—
These were judges not only of the district court, but municipal courts, and justices of the peace courts, and some of them were not lawyers. Hollis went out of his way to try to make the whole thing as understandable as it could be made for non-lawyer judges. He was very patient with everybody and he was very supportive of what they were doing. If you got a message from Hollis it was that what you were doing was important and it was important enough to do it right and so on.

I was active in that too being one of the lawyers in the group, of course, he would call upon me to make some presentations and one thing or another. We became what I’m going say is, pretty close. He was very, very kind to me in his personal attitude toward me and he was very, very supportive within the context of his acquaintances within Eugene.

As far as political rivals the only one I really had was Douglas Spencer. Spencer’s father was a member of the faculty I think at the University of Oregon at one time as a professor of law.

I want to tell a little story about Hollis. I was being sworn in, I think, as circuit judge in Portland for the court of appeals. The judges in Eugene wrote a letter to the presiding judge in Portland saying, we’re getting sick and tired of traveling back and forth up the freeway to witness the investiture of Ed Leavy in a new job. We’re tired of trying to honor a guy who can’t keep a job. [laughs] That was read as part of the swearing in, see.

Hollis read that and didn’t realize that it was all done in good spirit and good humor. He took offense at it on my behalf, and he called up Doug Spencer and he said to Spencer that he had no business—or it was published in the bar bulletin, or someplace and Hollis read it. I was very proud that Hollis came to my defense and I think I went so far as to call Hollis and tell him that it was all complimentary and good fun. [laughs] I maintained that friendship with him all along.

CH: Did you know his predecessor [Wayne Morse] as dean of the law school?

EL: I met him, had dinner with him, at a public occasion one time and got to visit him. That was when he was seeking to regain his seat. You may recall, by then he was actually—

CH: Wayne Morse was running against Bob Packwood.

EL: To get back in to Congress, and I don’t know what year that would have been. That would have been in the seventies.

CH: Well, Packwood was elected in ‘68 so it would have been ‘74.

EL: Sounds right.

CH: He died after the convention.

EL: He was ill at that time actually. But I never knew Senator Morse very well at all.
Hans Linde

CH: Another famous legal scholar at the time—and still around, Hans Linde. You must have known Hans.

EL: Oh yes. I know Hans. As a matter of fact Hans was appointed to the supreme court after I became a magistrate judge, and Bob Straub sent a message to me that he was considering me as well for that position. And the bar had poll in 1970, what would that have been ‘76 or ‘77, statewide, for the vacancy on the supreme court and I was number one in that bar poll. So I’m a veteran of all of the bar polls.

CH: By what criteria were you topping Hans Linde? Do you have any idea?

EL: It is a certain amount a popularity contest, you understand.

CH: For instance Hans Linde has a reputation for being an incredible scholar.

EL: You bet he does.

CH: Do they talk ever in these polls? Is it just straightforward?

EL: Just straightforward poll.

CH: They don’t rate people on like this person is a better scholar and that person has a better grasp of such and such?

EL: No, no. Hans, of course, had taught. I had never had him as a teacher, of course, but knew him and have had at various occasions to visit with him and his wife and very much aware as you travel around in academic circles his reputation on his scholarship.

CH: Do you think it’s important for various courts to have judges that sort of specialize in certain things, or have certain strengths that might not be represented on the court otherwise? Say for instance with Hans Linde and his scholarly understanding of law, not that the other judges didn’t have it, but that that he had the scholarly background, which was criticized by some people because it wasn’t the experience that got him there.

Varied Backgrounds of Judges

EL: I’m a firm believer that the court needs these various talents. You need practicing lawyers, it shouldn’t be filled with people who have been career judges. Hopefully there’s a place for somebody who’s been a judge a long time. I would hate to see all courts made up of people who entered the judgeship at the age that I did because you need the practicing lawyers, you need the academic people, you need the various specialties. We have very few special courts.

The Ninth Circuit everybody seems to be opposed to having any specialists on the court. But there’s room for everybody’s voice
and I make the observation from time to time that a person will know a whole lot more about a court the first day he or she starts working on that court because you get a reading on it from the outside. A lot of what Hans Linde did was not understood. When I was trying cases in the district court, I actually had parties stipulate to try the case with the law as it was before he wrote certain decisions. They were very difficult to understand, they were very difficult to argue, they were very difficult to instruct under and so that’s one of the consequences. I don’t know whether that happened in front of other judges other than that he’s had an impact on the thought processes, the reasoning process that go into a lot of constitutional cases, and particularly as it affects the state constitution.

CH: Why do you think that there were so many judges from Lane County?

EL: It was just fortuitous. I don’t think there’s anything particular about Eugene because I think, as I recall, the people who’d been appointed off the circuit bench in Lane County had a variety of backgrounds.

CH: How was your experience on circuit court different from district court?

EL: Of course, when I was in the district court it was not a court of record, it was limited in its jurisdiction. You moved through lots and lots and lots of cases. As a judge of the district court you were dealing directly with people. So many people were going through there without lawyers and you were dealing directly with police. I don’t think we ever had trials where the state would not have a deputy DA there, but in any event the police were coming in and filing complaints and you were interrelating with police directly on sharing dispositions and records and all of that with them.

I set up a system in the district court that caught on. What I did was—when the police would get ready to file a case they would send a request to the Department of
Motor Vehicles for a driving record that would be mailed to the court. By the time a person appeared I would have before me the driving record of everybody. As a trade off, we would report our dispositions to the Department of Motor Vehicles.

[End tape 5, side 1]

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**Personal Backgrounds & Court Opinions**

EL: —and then we were also systematically getting dispositions to the state police on the way out. That way they could keep a pretty good record of who was appearing, and for whom they would need a warrant, and all of that kind of stuff. But it was that direct contact with people that I started with, and then circuit court, you’re that much removed and then the federal court you’re further removed, then the appellate court you get almost out of sight.

CH: [laughs] I think a lot of the criticism toward the appellate court would probably say you were getting out of sight a lot, but maybe in a different way.

EL: [laughs] Yes; maybe in a different way.

CH: How much do you think that your personal background and experiences, your philosophical outlook on life, your religious views, political view, economic views, affected your decisions? Or how much did they play in the types of opinions and decisions that you wrote?

EL: Well there’s no real way to measure that that I can come up with. I can point to some attitudes that I have and I think I can figure out where they came from. One of the things that I got out of my experience in the DA’s office was that you do your own job and you don’t try to reach beyond that and tell somebody else how to do their job. I thought that District Attorney Venn, was too eager to tell the attorney general what he ought to be doing, or too eager to tell the judge what he ought to be doing, and that the judge was too eager to be telling the DA how he ought to do. And so I felt that you’d better be awfully careful. If you’re in a public office you just leave the other guy to do his job. One of the things that Venn told us as deputies: never ask a judge what to do. I never liked to hear people ask me what they should do.

CH: Why?

EL: He told us, “First of all if you ask the judge what to do you’re sending a message that you’re going do what he tells you.” And that may not be the thing that you wind up doing so there’s no use in offending him by rejecting what he tells you. Never ask a judge what to do. You do your job and don’t ask him because sooner or later you’ll have to offend that judge. I felt the same way.

Coming from the district court, where you’re dealing with limited subject matter,
you knew very well that the cases were not presented in a disproportionate way to the amount at stake. And so my attitude was you don’t worry about the case that could have been presented, you decide the case that is presented.

Back to my belief in the adversary system, if you do a lousy job of presenting your case or you don’t spend enough money and time on it and you think you can get by winning, go ahead and try. If you don’t win, I’m not going criticize you for not doing more. I’ll decide whatever case you present. I don’t get to go out here and tell you which cases to file or how to do it. I have carried that same attitude with me wherever I’ve been on the bench, as I never say, “Well, I wish this case was clear,” or “I wish this case had been done better.” I just am content to decide the case that is presented. So that has had an effect. Then as far as my value system is concerned, I guess it is what it is and we all have some value system whether we admit it or not and it plays its way out. I indicated to you earlier that I felt some comfort in realizing my limits as to what I’m to be concerned with as a judge.

**Pretrial Preparation**

CH: In terms of your work on the circuit court—and maybe in general, how would you describe your pretrial, pre-hearing preparation as a judge?

EL: Now talking about in the circuit court?

CH: In the circuit court because I presume—

EL: Circuit court for Lane County, are we talking about now or are we talking about the United States Court of Appeals.

CH: Yes, because it’s very different and as soon as I asked that question I realized that it’s probably very different.

EL: In the circuit court in Lane County. The preparation was practically nil. We functioned off of a central calendar, we would have 2.2 cases per day per judge set for trial with the realization that a lot of those would settle. They would be settling right up to the morning of trial and it was frequent that I would not know which case I was going to be trying until ten minutes before the trial. Now that works for ninety-nine percent or more of the cases. Occasionally a case would be assigned earlier and you’d do some preparation in it. That’s a far cry from what happens as a trial judge in the district court. And the nice part about it from the standpoint of the state circuit court is you didn’t have occasion to form any opinions beforehand. You were hearing these things new just as the jury was hearing them, just as everybody else was hearing them. You didn’t get yourself into a decision making process very early, and in some instances maybe, if I look at what can happen in the federal court, too early.
CH: How do feel about the competency of juries?

EL: I’m a believer that they’re competent. That doesn’t mean that all twelve have to be competent at the same time. [laughs] You generally have a composite of what I think is pretty good judgment there. I’ve seen some pretty sophisticated verdicts, some incisive verdicts. I’m thinking of a case particularly where a person was engaged in a fight at the Lane County. Now this is purely consensual. They went out in the dark and started fighting. One of them got on the ground and the other one kicked him and hit his eye and it cost this guy his eye, and he’s suing his combatant for negligently kicking him in the eye. Under that theory he could get the insurance coverage in for the other side, see, because it wasn’t a willful assault, it was negligent.

Somehow or another he figured if I’m going get a verdict I want to get it as a negligence case, and so he accused him of negligently kicking him. And the defense to that is, of course, contributory negligence. You were guilty of contributory negligence and agreeing to go out there and fight. That’s not in keeping with your safety. I think if that had been an assault theory that this guy when he kicked him went beyond anything that he had consented to and it was an assault. But, since it was in terms of negligence with the defense of contributory negligence, here comes a verdict for the defendant.

CH: But can’t you as a judge assign, or the jury assign a certain degree of negligence.

EL: You can now.

CH: You can now, but not then.

EL: I thought that one was a pretty insightful. And then just another illustration; I had a case in which a woman was accused of welfare fraud. This was another Eugene case and there was a pretrial motion to suppress evidence, and in that hearing a police report was offered and received in evidence. After that hearing I denied the motion to suppress, then sometime later the case came on for trial. The file comes back into the courtroom along with this exhibit that had previously been received in the courtroom. When the case goes to the jury the usual thing is the clerk picks up every exhibit that’s marked and received, which it had been, and it goes to jury room.

Now in the trial there’s no mention of that exhibit, of that police report. Included in that police report is a rather detailed description of her activities as a prostitute and one thing and another. We’re an hour or so into the deliberation and I get a note from the jury with this exhibit attached and the question is, “Should we have this?” I thought
that’s pretty clear that that jury realized that this was not part of the trial, they shouldn’t have it, and it wasn’t evidence of anything. If that jury hadn’t been smart enough to catch that I’d have never caught it, the lawyers had never caught it, and that could have gone clear by because it was just one of those accidents that occur.

All in all, I feel pretty good about the jury. There’s only one jury verdict that I ever tampered with on the basis that I thought it was too much and in the state system we did not, I don’t think they have now, the power of additur or remittitur. In the federal court we do. I never thought I’d bring myself to that, but I had a million dollar punitive damages award against an international labor union in a case involving what they called labor union members “bill of rights” and I just thought that was just grossly disproportionate. I ordered that the plaintiff either take a couple hundred thousand dollars or something like that or we would have a new trial. That’s the way it works. Well, after I did that the case was ultimately settled for something more presumably than I had ordered but something less than the million that the jury had. But that’s the only jury verdict that I ever said I’m going change. I have granted a judgment notwithstanding a verdict but that has nothing to do with whether you think the verdict is too big or too small. That deals more with whether not you think as a trial judge you made a mistake.

Competency of Legal Counsel

CH: Do judges—if they feel that a client has not been served appropriately by his or her lawyer, that their lawyer was incompetent—ever communicate that to the client, the plaintiff or the defendant?

EL: Never in a civil would I do that.

CH: In a criminal case?

EL: In a criminal case, as I view it, when a judge appoints a lawyer to represent somebody a judge is making the ruling as to who to appoint, and has a responsibility to appoint somebody that can do it. I have, in the course of a trial, asked the lawyer in the absence of the jury what they’re doing. And that they realize that something was objectionable and they didn’t. I can think of occasion when the lawyer will say, “Yes, I knew that, and I know that but here’s my strategy, Judge, here’s what I’m doing.” And I say, “Okay.” Sometimes they want somebody else, they want to feed somebody some rope and let them hang themselves with it and so they know what they’re doing and as long as somebody says, “I know what I’m doing.” It’s okay with me. I think a trial judge has a lot of responsibility there to see to it that even with a retained attorney there’s a certain amount of responsibility there.

CH: So if you were presiding over the trial
against Martha Stewart would you suggest to Ms. Stewart that her lawyer was incompetent by not allowing her to take the witness stand?

EL: No. I don’t think there’s anybody who even suggests that he made a mistake because you don’t know what she would have had to say when she’s under oath on that witness stand. For all we know she’d have been put under oath and had to confess right there. Now her chances are zero.

CH: Or she might perjure herself.

EL: Worse yet; and so there we are. We don’t know. It’s a cheap shot for people to be trying to figure that out at this stage.

CH: During this period of time you had gone to the National College of State Trial Judges and also then became faculty advisor to National College. What were those experiences like?

EL: My attendance was at the National College of State Trial Judges at the University of Pennsylvania in Philadelphia and that was very rewarding. I was very impressed by the approach the whole thing was of no nonsense. It was a full four weeks of very demanding study. By then I had been on the bench ten years and was listening to a lot of very experienced lawyers and was opinionated about this procedure or that.

The next year I went to the University of Nevada as a faculty advisor. The routine there was you would spend Sunday night in a seminar and then each night of the week through Thursday night with several hours in a group of about ten. Then you would spend the days, four or five hours, in lectures. When night would come you would go back and you would discuss what had been the subject matter of the various lectures and then you would talk about things in anticipation of tomorrow. I found it to be very hard work. I was willing to do that for a couple summers, but then I realized you can’t very well do this and take a vacation away from your court. I thought it’s just too hard of work, frankly, and that’s what kind of took me out of that. I really value those experiences but I didn’t want to latch into that as an ongoing thing, year after year.

CH: What did you learn about the legal system being a district and circuit court judge that you didn’t know as a lawyer or as a prosecutor? Or a way that your legal philosophy evolved or experiences that you had that changed your ideas about things?

EL: No, the National College claims that there is no school solution to anything. They were there to share experiences. Now as to whether or not they might have had an agenda I can’t say, but they focused on expansive jurisdiction, long-armed statutes, and one thing or another.
What I took out of that was the experiences of people in various parts of the country.

If anything, you realized that some of the judges in the South, let’s say, things were happening there, that they had no control over. I remember one judge telling me, “I can’t get a Black on my jury.” Here was judge who saw Blacks being excluded—nothing he could about it. His perspective was that a lot of times a Black would be accused of committing a crime, and more often than not the victim would be black. Black people wanted the law enforced just like anybody else did, but they would have a better chance in front of an all white jury who found somehow removed from it and would be indifferent. He saw that going on systematically. So you see these claims that the judges are doing some things, the guy from Alabama he was very concerned, just no Blacks on his jury, and he understood it in that context. Those are perspectives that never would have occurred to me, but you get a different perspective and then you see some techniques that are used elsewhere.

We wound up using a technique in Lane County that came from Orange County, California as a result of the National College. We were on that central calendar system and we were assigning cases the morning of trial. That meant that you didn’t know who was going show up for trial, who was going settle, or who was going change their plea until the morning of trial. What we did as a result of what I was told they did in Orange County was every criminal case that was scheduled for trial during a given week, Monday afternoon at three-thirty, we had a call of every one of those criminal cases.

We said to the prosecutors and the defense lawyers, if you have compromised the case, and there’s to be a change of plea, we’ll hear it right then. We’re going bring every prisoner up from jail so they’re in the courtroom on every case that’s going be tried. If you have an appeal in a traffic case and you failed to appear at that time that means your bail is forfeited, we’re not going assemble a jury and then have you not show up on Thursday morning. It’s either then or never.

That functioned real well. And we said if you’re not going compromise this criminal case, if you’re not going do anything with it by three-thirty in the afternoon on Monday you’re either going plead guilty to every count in this indictment, or state you’re going dismiss the whole thing. There’s nothing in between. If you want to compromise you do it then.

We made that work. You can see why we saved a lot of jury wheel spinning in assembling a jury to find out that this guy’s going change his plea this morning. Or we have a jury here to try a driving under the influence appeal and this guy’s going to forfeit bail.

That was a direct product from the National College. There was no change in attitude it was just mechanics. There are some mechanics that are used elsewhere in the country that, you know, you might not want to buy into. In New York and certain places can select juries without even having the judge present, but they get away with it. They make it work.
CH: But in a larger scope in terms of your overall years on the bench in district court and circuit court before going on to the federal court, did your understanding of the law change from all that experience?

EL: No, I can’t say so. Not in my understanding at all. You understand that era, during those sixteen years that I was a circuit judge we had all of the Warren Court, we had stuff coming along every summer that was new and different. That was in the era when the National College was functioning and I can recall that when we were in Philadelphia we were right on the heels of *Miranda* and the *Safe Streets Act* whenever it was, ‘67. As time went by you had all of these various decisions that were being brought to the juvenile court so there was lots to study and there was a lot of apprehension as to how you handled those things. A lot of people thought the world was going to come crashing down with certain of these rules.

**Federal Rulings in State Courts**

CH: Were there any civil rights cases in your courts?

EL: No, not in the circuit court. That really came into focus after I got here to the federal court.

CH: What other federal decisions affected the state courts; aside from *Miranda*?

EL: All the “search and seizure” became a matter of federal law. Interestingly enough there was a time in Oregon where the Oregon Supreme Court dealt with illegal search and seize something like twenty-seven or twenty-eight times. But every time it dealt with it, it always found the search legal, so had never excluded evidence as illegally seized. You could actually make a case for saying—I don’t know whether Oregon has the exclusionary rule or not because it’s dealt with it twenty-seven times, but it’s never excluded anything.

Then here come *Mapp v. Ohio* [367 U.S. 643 (1961) 367 U.S. 643] saying it’s a matter of U.S. Constitutional law the states were required to exclude illegally seized evidence. Then we, of course, had *Miranda*. We had lineup cases dealing with the conduct of lineups. Then we had the *Gault* decision [*Re Gault* - 387 U.S. 1 (1967)], which affected the juvenile court. Those are the major ones that come to mind.

Then you had the issues of which ones of these would be retroactive and which ones would not. *Mapp v. Ohio* was not retroactive but *Gideon v. Wainright*, [372 U.S. 335 (1963)] the right to a lawyer was retroactive. I just kind of rationalized it as, if it went to the fact-finding process it was going be retroactive, if it went to policy considerations, but had nothing to do with the truth it probably wouldn’t be retroactive. Now the only exception to that that comes to mind is lineup cases but anyway.

CH: *Gideon’s* triumph affected the Oregon decisions?
EL: Oh, yes. Made the lawyers far more widespread. Even when I was first admitted they were appointing lawyers, but it affected everybody’s attitude, it affected the rituals, as I recall, by which you resolve the issue whether or not there was a waiver of a lawyer. The mechanism by which a person pled guilty and the extent to which the record had to show certain things, it affected it. It had an enormous practical effect.

CH: What about the decision on Baker v. Carr [369 U.S. 186 (1962)]—the one man one vote decision that affected a lot of the legal jurisdictions of representation?

EL: I’ve only had one such case and that was recent, a couple years ago, in the federal court. The statute calls for putting together two district judges and a circuit judge. I was on one of those panels here for Oregon and actually heard some of the contest here a couple years ago over redistricting in Oregon. But that’s the only redistricting case, thankfully, that I’ve had. [laughs]

CH: Do you have any other thoughts in terms of your involvement on the state courts? You didn’t go from the circuit to the court of appeals or the supreme court?

EL: In Oregon?

CH: In Oregon.

EL: I was a pro tem for a couple months in 1974 for the Oregon Supreme Court and that was because Justice Denecke was on sabbatical, I think, teaching someplace in Arizona, Arizona State maybe. Judge Val Sloper was sitting in his place on the Supreme Court and then Judge Ralph Holman was disqualified from hearing a case of Tanzer v. Lee, and I was then appointed by the Supreme Court to sit with them for that specific case, and then in the broader context for two months with them. But the major case we heard was the Tanzer v. Lee [270 Or 215, 527 P2d 247 (1974)]. That was the case brought by Jake Tanzer against Jason Lee over the election to the Court of Appeals in 1974. Interesting case.

Judicial Colleagues

CH: This is an interview with Judge Edward Leavy at the U. S. District Courthouse in Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen, the date is Tuesday, March 16, 2004, and this is tape six, side one.

A moment ago you were talking about Otto Frohnmayer and Judge Goodwin and some of the others; describe the encounters with them recently.

EL: First of all, Otto Frohnmayer was a pro tem circuit judge in Lane County in the years
when we were short of help in Eugene. That would have been in the early sixties as a matter of fact and I got acquainted with Otto as a colleague. He repeatedly helped us out as a pro tem. Then of course John Frohnmayer practiced in Eugene, presented cases in front of me. Mrs. Dave Frohnmayer, that’s Lynn, was a Children’s Services Division worker and presented cases in the juvenile court while I was there so I got pretty well acquainted with the family. Through that I became acquainted with Dave, and the University of Oregon Law School awards a Frohnmayer Award for public service. The first recipient of that was Frohnmayer and it bears his name, he having been dean of the law school before he became president, and maintains a position as a professor of law at the law school. I don’t think he teaches any in the law school but he maintains that status. That award in another year was presented to the attorney general, Hardy Meyers. This year it will be presented to Ted Goodwin, of course, who is not only a graduate of the University of Oregon Law School but was a circuit judge in Lane County for a lot of years and was a circuit judge starting in about 1954 I’m going say.

CH: Is the award reflective of their entire career or is it oriented toward a specific—

EL: No, I think it’s a cumulative thing for public service. All three of them have a long history of public service indeed.

CH: While you were in the state court system in Oregon, who else impressed you most on the bench?

EL: You mean as a judge?

CH: As a judge.

EL: I thought Bill Fort was an exceptional leader. When I became a circuit judge he became the presiding judge for Lane County and he had a lot of ideas that he put into effect with the support of Judge Roland “Rokie” Rodman and me. He revamped so much of the procedures in Lane County and we’ve made a transition from what was a small town circuit court to something that resembled what was more in mind with expectations of principled judicial administration. And he was national president of the Juvenile Judges Association, quite a leader. Rodman, I thought was an excellent judge, really, really pleasant colleague to work with throughout. And then at the state level during a lot of that time—I’m trying to think of the chief judge who was of the supreme court.

CH: During what period of time?

EL: Early on, in the sixties.

CH: Holman?

EL: No, he was never chief.
CH: He was just on the supreme court.

EL: I’m thinking of [William M.] McAllister as one who did a great deal with what he had. For some reason McAllister got the cooperation of every circuit judge in the state. I don’t think there was a time when circuit judges throughout the state did not contribute more than under his tenure. For example, we were short of help in Lane County and we got help from all over this state. I probably was as well acquainted with circuit judges as anybody in the state because of being in Eugene and having received all this help from elsewhere. The only county that really didn’t give us help, and couldn’t, was Multnomah County. But all the other counties, it seemed like, we borrowed from them a lot.

CH: How did you borrow from them?

EL: The judges would have spare time because of their case load. Let’s say in Klamath County, or someplace else, they would give us a week or two at a time, and they would come and sit with us. That’s how I got acquainted with Ralph Holman, he helped us out while he was in Clackamas County. The judges in Washington County did the same. Even Val Sloper from Salem, occasionally, and Charley Foster from Lakeview, and I’m thinking of the judges from Pendleton and all over. Douglas County helped too. We were getting more help then. I never sat outside of Lane County as a circuit judge—maybe on one occasion in Salem, but that was about it that comes to mind. Douglas County once but I never got out and around much.

CH: Judge [James M.] Burns was a circuit court judge, I believe,

EL: In Multnomah County.

CH: That’s right. When he was in Burns he was district attorney.

EL: District attorney. I don’t recall that Jim actually tried any cases in Lane County, he may have, but it wouldn’t have been on any sustained basis.

CH: You were referring to the state courts, and the Court of Appeals, I don’t think actually began until ‘69?

EL: That’s right. And Bill Fort was an original member of that court. And Judge [Herbert] Schwab who became the chief of that court actually exercised more leadership in the judiciary than the chief justice did because the chief justice allowed him to go ahead and speak on behalf of the judiciary. I think that Judge Schwab was more visible as a leader than the chief.

CH: And he had played a fairly significant role in the community and community issues here in Portland, the racial situation—I guess it was with Portland Public Schools that he oversaw. And he had certainly a reputation for being a top judge too.
EL: Oh, yes. As a circuit judge, too, and a very, very high producer, very, very efficient. I saw him not too long ago. He seems quite well. Saw him within the last year or so.

CH: He moved back from the coast, didn’t he?

EL: I don’t know whether he did, but after he left the court of appeals he went down there and was a municipal judge in one of the cities on the coast for a time.

CH: Couldn’t stay away.

EL: No, he was good.

——— Retired Judges as Mediators ———

CH: How do you feel about the tendency for judges when they do retire from the court of appeals or supreme court to work in arbitration and things like that.

EL: I think they fill a great need. As you may know I do quite a bit of mediation and have done a lot of it over the last twenty-five years. Sometimes I wonder if we who are in judgeships should spend that much time because that service is available to private parties if they want to pay for it and hire people who are skilled at it and a lot of the former judges of the state system are available, and excellent at it. We joke occasionally that we’re taking work away from them, but I think it’s great. Oregon has as I recall a seventy-five year constitutional maximum age, compulsory retirement. Is it seventy-five?

CH: I think so but they can do mediation.

EL: After they’re out of office they can do that and the nice part about doing mediation is they don’t do it unless somebody wants them to. [laughs] If they’re viewed as too old why—I’m soon to be seventy-five, and if people didn’t want me doing it they wouldn’t be asking me, so that’s reassuring.

CH: But since you’re still on the bench, why would you go outside of this system to do this other work when you could probably take on another case or whatever within federal court?

EL: That’s a hard question to answer. There’s always more and more work to do, more cases to do, and that would argue against a judge ever sitting outside of the circuit. I guess after a period of time, for the variety of subject matter, you go ahead and do those things and we’re all prone to want to do a variety of things and in some sense time spent on mediation, if it really means the difference between settling a case and not, is time well spent in proportion to what it would take to litigate the case.

CH: And you’re doing that within what court?

EL: I do it in the U. S. District Court. Most of the cases that I work with are pending in the
U. S. District Court. There are a few that are pending before the Ninth Circuit and I do some that are pending in a state court when asked by the parties to do it.

CH: Are the parties obliged to accept the outcome of the mediation?

EL: Oh, no, it’s all voluntary and I assure people at the outset that I have no authority and they know that, but I reassure them of that. I also hasten to add that given no authority I have no responsibility for anything they do. I can do anything I want so that makes me at liberty to say anything that comes to mind. I think that especially important in discrimination cases because anybody who feels like they’ve been discriminated against and are bringing an action based on the claim discrimination, I think, are apprehensive that they’re going to be victimized again from their standpoint. They’re guarded against that. To assure a person like that in mediation they’re in absolute control, they cannot be victimized, their weapon is to say no is reassuring and let’s everybody relax.

CH: But as a sitting judge—I presume that if the case then did actually end up in court that you would have to recuse yourself?

EL: Oh, yes, by all means.

CH: You have all this contact with the other judges in the court system who respect your opinion. Could they be in affected by—

EL: But we don’t share what has gone on.

CH: Okay, it’s all closed.

EL: Whatever goes on in mediation—the judge who tries that case has no idea the status of it, what numbers were talked about if any, and as far as I’m concerned nobody is at blame for not settling the case. There’s no such thing as fault for not settling the case. We don’t expect people to humiliate themselves and it’s not that others wouldn’t like to do so in negotiation, but nobody’s going to do it and so it’s okay. I try to make that clear that if people are going settle they don’t have to do it to appease a trial judge or me or anybody else. They pay their fee, they pay their lawyers, they go in and—I made a living for thirty years trying cases and I make it clear to people that I don’t knock it. [laughs] If they have to try them, that’s it. And in some areas there are not enough cases tried.

CH: In some areas of the law?

EL: In some areas of the law, and some areas of what’s going on. For example, I don’t think there are enough of the claims against policemen for excessive force, and so on, that are actually tried. I’d like to see more of those cases tried. You don’t know what to do in negotiation unless you have some measure

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**Need for More Trials**

EL: In some areas of the law, and some areas of what’s going on. For example, I don’t think there are enough of the claims against policemen for excessive force, and so on, that are actually tried. I’d like to see more of those cases tried. You don’t know what to do in negotiation unless you have some measure

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against how these cases are turning out, and so there gets to be a lot of uncertainty and guess work in settling cases unless you have a pretty good stream of cases being tried. I even used to reassure jurors that when we spend a lot of time trying a case we not only get a result in that case but we tell others in the ninety percent of cases that are settled what the ground rules are. So it all has its place. Now if we undertook to settle every single case and never tried a case we wouldn’t know what we were doing, right? That’s the way I see it.

CH: Because the outcome of those cases would never really be fully known.

EL: You’d never know. And you know that certain subject matters and certain kinds of injuries are sustained in a certain context will call for more damages than if they arose in another context. For example, an injury in an air crash will result in larger recovery than an injury in an auto crash. Whether that should be true or not, I don’t know, but it is the fact.

CH: Isn’t one of the main benefits of mediation to reduce the case load of the court?

EL: Oh, yes, but I can remember before we had mediation that we tried roughly ten percent of our civil cases in the circuit court in Lane County. Now you could see those ratios shifting if you attempt to try the cases too soon, you’ll try a higher percentage of them. A case has to be filed and be a decent age before people are willing to settle it. You don’t try to resolve it while people are still angry enough to be filing lawsuits. In injury cases it takes some time for people to stabilize as far as their injuries are concerned so if you were to force people to trial early on you’d try out a pretty high percentage of cases. Conversely, if you said our waiting period is five years you could get down to where you only have to try three percent of your cases or less—and there are parts of the country where they only—at one time I recall in Chicago they were only trying three percent of their civil cases. Well, they were four or five years old and I have an idea that they were the most convoluted three percent that you could find and somebody was able to wait three years, or five, or whatever it was, to get a result. For some arbitrary reason it stuck in my mind, let’s say in a typical civil case, if you try it any sooner than about nine months it’s counterproductive.

CH: And how does one force a case to trial? By what means can they do that?

EL: In the federal system I have facetiously observed that the federal rules of civil procedure do not contemplate the case ever end. Because you never know when you have enough discovery, and discovery, in some ways, is to litigation what prayer is to theology; there’s never too much. [laughs] So to tell somebody that you don’t need to know anymore about your case before you try it is almost heresy, let’s say. So in order to keep
cases moving the federal system you have to have a pretty strong trial judge. And saying, here’s how much time you’re going get for this—to be ready in this case, and we’re going give you a trial date down the line, and that’s a virtue of a individual calendar in the federal system because if a district judge does not maintain control over that calendar those cases will languish for years. Everybody will be busy with that case thinking that they’re doing something, if you will, because there’s always something more to learn or something to do. I think that the best way to economize, and the best way to be efficient, is within a degree be somewhat arbitrary.

Judges with Trial Experience

CH: In terms of the federal court and the Oregon District Court or the Court of Appeals, how many judges have you known that have had as much trial experience as you have as a judge?

EL: There are a number around. Judge Richard Barber in Marion County, lots of years. And I’m sure there are others in Multnomah County that should come to mind. I had thirty years as a trial judge and there are quite a number who have had thirty years. I’ve been away from the state courts for almost twenty-seven years now, and there’s one or two still in the state trial system. Judge Albin Norblad maybe in Marion County, Brian Hodges in Lane County, they’re about the only two that come to mind.

CH: What about in the federal court?

EL: In the federal court, nobody comes to mind that’s had thirty years of trial court work all in the federal court. Judge Solomon would have.

CH: Or in terms of if it had been in their respective states that they were able to have thirty years of trial experience, or even on the state level and federal combined. You hear about many judges that are either promoted at an early age or have an academic background or whatever and so is it unusual?

EL: It’s a little bit unusual, but it’s not totally rare. Sixteen years used to be norm. That’s what was contemplated in order to get a retirement as a circuit judge. It was contemplated that that people would enter the judgeship at something near fifty and by sixty-five or there about they’d have their sixteen years. This whole idea of judges being younger and younger and younger is a phenomenon that I think crept in over the last thirty years or so.

CH: What is the reason for that?

EL: I know that as far as the perspective of the people around me—when Ted Goodwin was appointed at an age of thirty-two or thereabouts in Lane County I recall some people saying if
they had known that people that young could be appointed they’d have been candidates. And there were a couple of others at an early age. I started when I was twenty-seven after Goodwin was appointed to the circuit court at age thirty-two; for me to be a district judge at age twenty-seven was not clear off the chart I guess.

Then we have seen more of that. I think the judges as a whole are getting younger and we don’t see as many of the established practitioners being appointed to the bench around age fifty let’s say. That’s a big loss; big loss. There’s an enormous need for accomplished trial lawyers to be appointed to the court. We need people from various perspectives. The academics have their place, and longtime judges, like me, have our place.

A practitioner who has been working before the court will really know more about how the court is satisfying the needs of the community better on the day he’s appointed than he’ll ever know later on. Judge Otto Skopil is prime example of that. He came to the court wanting to make some changes and had practiced in Salem. It was awkward and inefficient for a practitioner in Salem to have to come to Portland on what they called the third Monday of every month to report on the status of any pending case he had. He thought that was arbitrary and one of the things that he wanted to accomplish as a district judge was to change that system and he did. He, I think, is primarily responsible for the transition in the district court of Oregon to be a friendly place for people to practice.

Otto Skopil & Court Reforms

CH: How did he do that? What kinds of things did he implement?

EL: Well, first of all he was a strong supporter of the magistrate system and he later became the chairman of the Judicial Conference U. S. Committee on Magistrates. Instead of having all the lawyers who had pending cases appear in court on the third Monday of each month to report on the status of all of those cases and administer the timetables in that way, he set up a system by which the parties would have conference with a magistrate after the case was at issue or a decent time after its filing and then a schedule would be projected for the completion of discovery and the pretrial order. He made it then a matter of administering each case on an individual basis, and that has come to be the mode under Rule 16, I think it is, the district judges all administer their own timetables and their own cases.

As far as I can tell, there is no burden unnecessarily placed on some lawyer or party who’s outside of Portland, finding it awkward. Of course coupled with that has been the presence of the federal court in Eugene and in Medford and Pendleton. Now we have the two resident district judges in Eugene with a magistrate there and a magistrate in Medford and a magistrate in Pendleton. Wherever anybody is in the state they can litigate in a federal court.
as efficiently as somebody who’s here in Portland.

CH: When Skopil came to the court, were people aware that he had a mission in mind?

EL: He made it known. And he made it known to Judge Solomon. Judge Solomon was devoted to the other system and Judge Skopil felt differently, let everybody know that he felt differently, let everybody know that he disagreed with Solomon, and talked to Solomon openly about it and they discussed it with each other on lots of occasions and were the best of friends.

CH: Really?

EL: Yes. I recall, even on public occasions, Skopil saying how much he disliked what Judge Solomon was doing and would have Judge Solomon sitting right along side of him, and in the course of the same things express their friendship, and it was always close. But interesting in that Skopil had that easygoing personality and he did a lot to establish the magistrate system in the nation and made the magistrate position in Oregon one of the most desirable judicial positions to hold, pleasant work to be a magistrate judge in Oregon. Viewed in the rest of the country as the model of what can be done with a magistrate system.

[End tape 6, side 1]
Committee, and what was happening during the early years of the ‘70s. After I got here in ‘76 Belloni’s attitude was whatever the law did not prohibit, the court would have magistrates doing.

CH: Could you distinguish between the magistrate and the federal judge? So many of their paths coincide in so many areas.

EL: The district judge is referred to as an Article III judge because Article III of the U. S. Constitution says that the power of the judiciary is in one Supreme Court and such inferior courts as Congress shall create, and the judges shall be appointed for life. Any judge who is not appointed for life is not an Article III judge. And the judicial power ostensibly is residing in those courts with those judges.

A magistrate appointment cannot be for life and is not an Article III judge, so what is the judicial power of that judge? Under the law, as it existed before 1970, a magistrate could do what an old commissioner could do. They could issue search warrants and arrest warrants and try certain petty offences and certain offences that occurred on federal enclaves, let’s say a military reservation or something like that. But to enter a judgment in a civil case in the United States District Court is beyond their power. In order to allow magistrate judges to do anything beyond this very limited petty crime commissioner work of issuing search warrants and arrest warrants and that kind of thing the district court started out with the proposition, if parties consented to have their cases tried before a magistrate, even though the law didn’t provide for it, it was being done in Oregon. So we were trying cases, civil cases, with the consent of the parties.

CH: How long have there been magistrates?

EL: About 1969 was the pilot program. Oregon was not in the so-called pilot program, but before that it was what they called, commissioners, the position that I’ve tried to describe. The magistrate was the successor then to the position of commissioner. Then, we started here in Oregon trying cases. A lot of people thought that was illegal.

CH: That was the first district to try it.

EL: As far as I know, there was not another state. And it was the mind set of Belloni as chief judge, and with of course the enthusiastic support of the other judges, Judge Burns and Judge Skopil. Then I came along in ‘76 and Skopil actually went so far as to let everybody know in Portland that I would be available to try cases. I had by then twenty years in the state system and Juba had these years in the state system, and so we were trying quite a few civil cases. The experience in Oregon, with Skopil, and with the cooperation of Griffin Bell—who knew Belloni and who had worked with Belloni in connection with prisoner litigation—by then, is the attorney
general under President Carter. Legislation was passed to, in effect, make national policy what the practice was in Oregon in about 1977.

CH: Would say that up until the time that magistrates started trying cases that really the magistrate’s role was an extension to administration wing of the court?

EL: Not exactly because he was a judicial officer, and functioned as a judicial officer in issuing a search warrant.

CH: Did anybody challenge the trying of cases by—?

EL: Oh, yes, we’ll get around to that a little later on. In a case that Judge Juba tried, the name of which escapes me right now, the loser appealed to the Court of Appeals for the Ninth Circuit and the Ninth Circuit reversed it holding that a magistrate, as they were called at that time, did not have the power to enter a judgment even with consent with the parties.

CH: And this was in what year?

EL: Around 1970. A three-judge panel of the Ninth Circuit said, “No power.” Judge Skopil by then was on the Court of Appeals and that case went en banc and the en banc court held that the three-judge panel was wrong and that a magistrate judge did have the power to enter a judgment with the consent of the parties. Now that’s how fragile this whole setup was, and it was kind of an interesting thing because it was an interesting academic proposition as to what a magistrate could do legally. Once the Ninth Circuit said, “No power to enter a judgment,” all of a sudden the magistrates in this circuit had a whole new constituency because whatever a magistrate could not do, a district judge had to do. [laughs] You have all of these district judges in this circuit realizing that if these magistrates can’t do a full measure of work its all going have to come to the district judges. I found it kind of interesting that there was a sudden widespread support among the district judges around the circuit as to what the magistrate’s position could be. The Ninth Circuit en banc overruled the three-judge panel, and said the magistrates could do it and that case was rejected on a petition for cert as I recall, so that become the law.

As far as Oregon is concerned, Judge Belloni and Judge Skopil and Judge Burns, and I gotta say, Judge Solomon also, even though he was senior judge, he was very supportive of the magistrate position. All of them wanted to see this magistrate position become as fully useful as it could be. They pushed it and they had in mind making this position what it turned out to be and they were very careful in the selection process, I hope, to get experienced people who would be acceptable to the bar. Here’s a guy that was trying cases for twenty years, and here’s Juba who’s been trying cases and has been around and visible here in Multnomah County.

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CH: Plus they must have known that they were being looked at very carefully as to what was going on here.

EL: Oh, yes.

CH: That it would be reviewed.

EL: I think elsewhere in the country the district judges did not see the potential for the magistrate system. They saw its limitations and they were not making appointments with the view in mind that this is the kind of work we expect them to be doing. It’s kind of an interesting phenomenon because Oregon rightly got credit around the country for pushing the position and today you can look at the day to day work of a magistrate judge compared to the day to day work of a U.S. district judge and from a standpoint of what they have to do the subject matters are more fascinating that come before a magistrate.

CH: Why is that?

EL: Because a magistrate does not have to try any of the felony cases. If you get a steady diet, as a trial judge, of narcotics cases there is very little intellectual stimulation in listening to the trial of a drug case, the possession, the conspiracy to possess or sell, or do whatever they do with drugs.

CH: Plus the sentencing guidelines.

EL: Plus the sentencing guidelines. A magistrate is going to be trying civil cases that you find all kinds of fascination in that whether it be in metallurgy or medicine or whatever is there. There is a full range of curiosity in each of those cases. In that sense, the magistrate’s position is a very interesting position and that’s why it’s so attractive. We have magistrate judges in the district who have had so much experience in the state courts and Chief Justice Peterson one time complained that the district court was taking too many of the trial judges that had been so successful in the state system.

It’s an interesting twist of fate, and I will acknowledge that I would never have left the circuit court in Lane County as a judge of a court of general trial jurisdiction to become a United States magistrate unless I was very well acquainted with Judge Skopil—who had tried a lot of cases in front of me as a trial lawyer. Burns had been a colleague on the circuit court, and Belloni who’d been a colleague on the circuit court.

As a matter of fact, when Belloni was first appointed to the circuit court Lane County was within his circuit because Coos and Curry and Douglas and Lane County were all in one district. That was split after he became a judge. So I was acquainted with all of them, I knew what they wanted to do with the position and, of course, moving back to Portland was coming back closer to family and all of that.

The point I really want to make is the role of Skopil in all of this, as well as Belloni.
Belloni was the real leader in this from a national scope. One of the features that Griffin Bell wanted to put into the law was that the appeal from a trial of a civil case by a magistrate would go to the district judges. In Oregon that would have killed it because to have to go before a magistrate and consenting to try the case, then appeal to a district judge on the record, and then appeal to the court of appeals would have built in an expense and a cumbersome layer of review. That would have made it nonsense for the district judges to want to have cases tried by a magistrate. They would rather try it themselves.

At Skopil’s urging, Griffin Bell agreed that even though he didn’t give up his position that the appeal should go to the district court, he made it optional with the parties. The parties could, in their consent to trial by magistrate would designate whether the appeal was to go to the court of appeals or to the district court. Well, it became known right away that if you consented to trial by magistrate with appeal to the district court, the magistrate wasn’t going to try it. The district judge would try it. That was equal to no consent. Now the law is uniform that the appeals go to the court of appeals across the country. That’s been changed in their correction. I thought it was pretty fragile. If Griffin Bell would have had his way, and if the three-judge panel had had its way it would have put an end, and so on. [laughs]

CH: Was Judge Skopil on the en banc group?

EL: As I recall he was.

CH: Do you recall anything of his argument before the other judges?

EL: No, I don’t recall specifically. I think all of the arguments were just practical and that the power to enter the judgment—there may have been a mechanism by which the magistrate judge didn’t actually enter the judgment, but the circuit judge actually signed the judgment although I’m not sure. But it was purely practical. If the parties wanted to consent to this and confer that power, and use this vehicle they should be free to do it. One of the concerns in Congress was that somehow or another rich people would try their cases before a district judge and poor people would try their cases before a magistrate. That was a phony argument because nobody would try their case in front of a magistrate unless they consented. Early on there was a great deal of prohibition in the law that district judges could not, if you will, try to urge, or extort, or whatever—Congress was afraid of what they would do to get the consent to send them to magistrates. I think all of that is gone now.

CH: Did the Supreme Court ever weigh in on this on have anything to say about the magistrates?

EL: Not that I recall directly except to deny review of any of these cases challenging it.
don’t remember that there’s a Supreme Court saying, “Yes, it’s okay.”

CH: Somebody did try to take it to the Supreme Court?

EL: I can’t be positive. If I were to say yes on that I’d have to do a little looking, but that’s my give on it.

CH: And Congress never—

EL: Congress has been very pleased with this and the magistrate system has grown. Where we started with two—well one and then me in seventy-six. Judge Hogan, part-time magistrate, part-time bankruptcy judge in Eugene shortly before I became a magistrate and then full-time magistrate in Eugene, now full-time in Medford, now full-time in Pendleton, and what is it, three here in Portland now?

CH: I think so.

EL: If you didn’t have the magistrates the system nationally would be overloaded and then it doesn’t take an act of Congress to create one of those positions. Congress appropriates money and the Judicial Conference U. S. decides where there is to be a magistrate and so it gives a little flexibility there.

CH: But the limit on it is basically through the fiscal restraint.

EL: Yes, it’s the way Congress handles it.

CH: How did you first become interested in getting onto the federal bench?

EL: You mean as a magistrate?

CH: As a magistrate.

EL: Solely through Judge Skopil. He was trying a case down in Eugene as a district judge and he stopped by to see me while I was circuit judge saying, “We were going to have this new position, do you know anybody who’s interested in it? and I decided I’d be interested in it?” By then, I had been sixteen years in this one courtroom and I was twenty years away from being eligible for retirement or thereabouts and I’ve always had the attitude if you don’t try to make yourself better everyday you’re going get worse. [laughs] You don’t level off, you either try to get better or you get worse. Now if I’d had another ten years to go I’d have stayed there, but I thought, you know, this is an opportunity that I might want to take and get a variety, if you will.

CH: What was the appointment process like?

EL: At that time there was no law governing it. It was an appointment made by the district judges. I was the only candidate and I was appointed. Part of the legislation that defined this position and gave it some power provided for a very elaborate scheme of appointment.
Even though the appointments are made by the district judge it has to go through various levels of committees and the district judges are to select from that group of candidates. The bar has say in it and these committees have a say in it similar to what the appointment process is for bankruptcy judges because the bankruptcy judges are appointed by the court of appeals, but likewise there’s a very elaborate procedure.

In a sense, the selection process for magistrates and bankruptcy judges is so unmanageable from a standpoint of cronyism that the selection process there is more idealistic than the selection process for Article III judges. It is no wonder that we have, what I think, are such a strong group of professionals, lawyers and judges in the positions of magistrates and bankruptcy judges. Magistrates have an eight-year term then they’re subject to reappointment or not. There’s another process by which the public gets to say what they don’t like about these guys. And the bankruptcy’s are fourteen years now. I think the reason for that was that somebody in Congress wanted to make sure that wasn’t going happen and nobody was there to oppose it. It was okay. But in the real early appointments, in the era when I was appointed, there was not this elaborate process, and that’s why I’m saying that in this district there was a consciousness: “Let’s get experienced trial judges,” where someplace else they weren’t thinking of what they might make of it.

CH: You were mentioning about Judge Skopil and the mission he came to the court with. Did you have any kind of mission or sense of what you wanted to do once you came to the federal court?

EL: No, I didn’t come as a so-called reformer or anything like that. Judge Juba and I had a different view. Judge Juba was not enthusiastic about what Skopil was doing.

CH: You were talking about the cronyism. Why was that such a factor?

EL: You mean to avoid it?

CH: Yes.

EL: Because Congress was leery of this position, see? Here you had appointed judges who were going to be doing their work, right? And it’s fraught with all kinds of possibilities that you could use this as a little fiefdom of your own so Congress wanted to make sure that wasn’t going happen and nobody was there to oppose it. It was okay. But in the real early appointments, in the era when I was appointed, there was not this elaborate process, and that’s why I’m saying that in this district there was a consciousness: “Let’s get experienced trial judges,” where someplace else they weren’t thinking of what they might make of it.

CH: [laughs] Political compromise.

EL: I think so. That’s where that fourteen-year came from because that’s an extraordinary term and kind of an odd number to pick, but that’s the origin of that as I understand it.
CH: Really?

EL: Because he was of the Judge Solomon school, the third Monday call was okay with him, and the procedures were okay and he was not as supportive, if you will, or eager to change.

CH: And he was a magistrate.

EL: Oh, yes. But everybody was respectful of all of that and nobody knew for sure what was going to work and what wasn’t going work, if you will. You can look back and say it was all pretty fragile as far as the law was concerned. The legislation that really defined the position was passed during Griffin Bell’s term and while Judge Skopil was the chairman and the testimony in support of the changes came from Judge Skopil, from Judge Juba, and from Cap Evans, a practicing lawyer here in Portland. The real support for this came from Oregon and the congressional testimony came from those three.

**Being Appointed Magistrate Judge**

CH: How long of a process was it for you from the time when you first said that you were interested to the time when you actually sat down in your chambers?

EL: From about mid-June to October. I did not tell my colleagues that I was leaving until I said so publicly in Eugene. I did not want to have it debated as to whether or not I should be leaving a court of general trial jurisdiction and a position of being a judge of that court to being a magistrate judge, which on paper was of very limited power. There were people who stood right in front of me and said I was nuts.

EL: Because of the limited power and all that. Cut in pay.

CH: Oh, really, there was cut in pay too.

EL: Not much, but some. From my perspective it was knowing what the expectations were of me and what the expectations were of the position, and knowing that Judge Juba was trying cases with consent of the parties and all of that.

CH: When you actually began in those first few years, was it what you had anticipated, or expected, it to be?

EL: Yes, it was. I got into doing more of the individual case conference, see, and the setting of schedules. I was seeing all of these civil cases at a relatively early stage for the purpose of setting schedules and one thing and another. It was in that that I fell into starting to do mediation, because of seeing parties then—I had no ambition to do mediation, I had no skill.

A case that was the monumental one
from my perspective that came along in that setting, an interpleader case, in which an insurance company had taken all of the money that it had under its policy and deposited it in court and then named as defendants all of the claimants to this insurance proceeds. The claimants were victims of a horrendous accident, auto accident in which there were kids—

[End tape 6, side 2]

**First Interpleader Case**

CH: This is an interview with Judge Edward Leavy in his chambers in the federal courthouse in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen, the date is March 16, 2004 and this is tape seven, side one. Go ahead.

EL: You asked if it was emotionally trying to encounter a case like that and certainly it was. And that one I get very emotional about because the injuries were so severe. All the parties were served and I’m going say that I had fifteen lawyers in the room representing various claimants. The reaction was, let’s quit doing any more legal work, no more pleading, no more discovery about the accident, nothing, do nothing. Let’s just find out if this is all of the assets. Is this all there is? And everybody in the room agreed, that’s the way we’ll do it. We’ll find out is this all there is? One of the lawyers—and these were all very experienced lawyers, you can imagine the caliber of people from this Portland bar, and one of the lawyers then took it upon himself to explore whether or not this boys club had any assets, whether there was any other potential insurance. That’s all the discovery that was going be done.

After that was done then there was going be an effort to resolve the division of the money among the claimants. Once that was done we reached a point at which some of the parties with claims for wrongful death gave them up because there were so many serious injuries and such little money that needed to go there. That money was divided in a way that was very efficient. The attorneys fees were practically nil and I just view it as kind of a reassurance and another chapter of what I saw the bar doing that was so noble—if you litigated that thing, I forgotten the amount of money, it couldn’t have been more than a couple million dollars available—but you could use that up and it didn’t happen. That was as efficiently done as it could be done, and that was the first real mediation that comes to mind. I was in the midst of very willing parties and there was no great stroke of doing anything spectacular, but it was just that that setting arose and it happened that way and it’s a source of pride to me that case stands out, for every lawyer that was there. Then as time went by I got into a few more and it grew from there. I never took any training in mediation or anything, I just kind of fell into it in that way.
CH: Is that an exception, that kind of case in terms of how people cooperated and the lawyers reduced their—

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**Capital Consultants’ Case**

EL: No, it’s not the exception. In fact, you may know I did the mediation in this Capital Consultants, which is big league as far as amounts of money and what lawyers did in that case. I’ll talk about that one if you want, that’s a little ahead of this sequence.

CH: You can talk a little bit about that now but maybe later as well?

EL: Capital Consultants was the investment agent for a number of labor union trust funds, retirement and health and vacation trust funds. I’ve forgotten the number of trusts, but it was sixty or seventy maybe, involved. And it was five hundred million dollars or thereabouts invested in what it called its “collateralized notes” program, which turned into being a Ponzi scheme. When it collapsed there were class actions by the membership against the trustees in certain of these trusts. We had class actions by the trustees. Same time we had an action by the Securities and Exchange Commission and the Department of Labor against Capital Consultants seeking the appointment of a receiver to liquidate the assets of Capital Consultants. At the same time the trusts, through the trustees who on the one hand were defendants in the class actions, the trustees now asking on behalf of the various trusts formed a consortium to pursue the claims against Capital Consultants and against Capital Consultants’ lawyers and Capital Consultants’ accountants, and against the borrowers from Capital Consultants’ and their individual principals.

CH: So the assets were quite large then.

EL: Oh, five hundred million was the amount of the investment and against lawyers for the borrowers and accountants for the borrowers. In addition to the class actions, we had these actions by the consortium of plaintiffs against five law firms and three accounting firms and Judge Garr King had some of the cases, Judge Aner Haggerty had some, and Judge Dennis Hubel had some. Judge King asked me if I would consider trying to do mediation in that and I said I would. He ordered them into mediation and he shut down all discovery other than the exchange of documents.

CH: Did Judge King oversee the entire case?

EL: In practical effect he did. I think the actual assignment of the case as I recall, some of the class actions were assigned to Judge Haggerty, and I don’t remember now exactly which cases Judge Hubel had. The attorneys supplied me a list of lawyers who were involved for telephone directory purposes and I had a hundred and thirty-five lawyers. Now these are
not lawyers who are sued, these are lawyers who are representing somebody in all of this.

These trusts were situated from the West Coast as far East as Cleveland and clear into Arizona. It isn’t a very hopeful prospect that you’re going get much settlement in all of this. The first meeting we had was to assemble everybody who was interested in one of the courtrooms and let the plaintiffs lawyers say anything they wanted to about their claims against everybody. And, let anybody else talk if they wanted to talk, any of the defendants if they wanted to say anything. Now the defendants were little reluctant to do much talking. For example, in the class actions against the trustees, the Department of Labor also has the power to pursue claims against the trustees and the Department of Labor wanted to have some of these trustees not only pay money and damages but be barred from ever serving as trustees again. Some of the plaintiffs were not similarly situated because some of them were private investors and some were of the trust money. And some of the trustees had misbehaved so some of the defendants had as a defense that it was corruption on the part of the trustees that gave rise to this damage. So the defenses were not identical. The legal theories on behalf of some of the plaintiffs were different because the private investors had legal theories under Oregon securities law, which is very favorable to a plaintiff in that situation, whereas the trustees could have been limited by the amounts of damages allowed under the ERISA Law. I’m just illustrating the complexity of all of this.

So we start negotiating and obviously any defendant who settles wants to settle in a way that will mean there is no threat from any other defendant who does not settle, that that defendant will seek contribution or indemnity from him. Then you had insurance companies who were insuring various people in this whole scheme and one insurance company might want to exhaust its policy in one setting so that it would invoke secondary coverage in that setting and then that same insurance company who wanted to exhaust its coverage here would want to hold back its payment on another policy where it was primary. You had insurance companies jockeying for position and I speak about this because in order to ultimately work anything out it required mediation among insurance companies as to which one was going to step up to the plate in which case. These insurance companies had experience with each other in other settings and they were distrustful of each other and, probably for good reasons, for what had happened someplace else.

The plaintiffs were not similarly situated so we had to do negotiation among the plaintiffs as to how to divide up anything that would be coming to the plaintiffs. In order to get certain plaintiffs to say “yes” to any settlement, because they all had to settle or nobody could, then we had these defendants worrying about who was going to sue them
later on if they settled. What we had, in my view, was a house of cards. We start out getting tentative settlements from maybe one party and then tentative settlements from another and tentative from another and another and another and another and you kept putting this together until finally you get to the point where all of them are going to work because now the plaintiffs can say, “If we sue anybody in the future we’re going to hold any of the settling defendants harmless from anything that will happen to them in the future litigation.”

The Department of Labor then had, as I say, its own responsibility. Sometimes it would be satisfied with the amounts of money that were being paid on behalf of the trustees, but would want additional remedies by way of disqualification and the insurance company would be compelled to defend that person on the claim of disqualification. If they were going pay the money they wanted to resolve that too. My perspective on it was among these hundred and thirty-five lawyers everybody was at everybody else’s mercy. We wound up settling as to five law firms and three accounting firms and resolve the issues among the plaintiffs and resolve the issues among the insurance companies. There were even issues between the insurance companies and their own lawyers because when they were paying their lawyers for defending these cases it was diminishing the amount of coverage so they would have to know how much do we have to pay.

When we got done, there was some-where in the neighborhood of a hundred and forty million dollars changed hands. The attorneys’ fees were less than seven percent and we got to that point before any deposition was ever taken. These were lawyers from New York, Washington, New Jersey, Phoenix, Los Angeles, San Diego, San Francisco, Oakland, Eugene, Portland, Seattle, Reno, Denver, and Chicago. This was not some little provincial group of lawyers.

CH: How significant was it that they might run out of assets and therefore it was advantageous to settle?

EL: Oh, it was critical. Critical. We had one insurance company fail, financial failure in the midst of it, and that’s still being litigated.

CH: Which one is that?

EL: Legent Clearing.

CH: Legent, out of Pennsylvania.

EL: I made two trips to D. C. to visit with the Department of Labor. This went on over a period of eighteen months and now when you ask me about that interpleader and whether this was unusual among lawyers, I’ll tell you: I’ve never been more proud to be a lawyer than to see what was done here because if anybody wanted to perpetuate that litigation for a period of ten years it could have been done, it could have been done. On top of that, I don’t think
there has come to be any kind of a remote feud among the bar in Portland over this even though there were firms sued. There were all of these convoluted relationships and things that had to work in order to make anything work and I'll say it again, I'm very proud of what happened. Why I think it speaks so well for the profession is because it was so encompassing of so many lawyers from so many places and it’s representative of the profession.

There was some people who went to prison in connection with it. There’s still a pending criminal case or so. When we got all done with the things that were all contingent upon each other, that is, the house of cards was put together if you will. There are also some claims by the trust now against their own lawyers and some of those we’ve settled, and against their own in-house accountants and auditors. The thing just doesn’t quit.

To the extent that the trustees themselves were not sued in class actions by the membership—the Department of Labor has now brought some claims against some trustees. There’s some of those that are not resolved in Minnesota and in Ohio and I may be a part of that in the future. We’re trying to work those out without a formal get-together. Then there’s maybe two cases that involve in-house people that may be tried, but it has nothing to do with the contingencies. I think they’re at a point now where somebody’s saying to themselves, “Well, let’s try just one case, see how it goes.” But I think the beneficiaries—by the time all of them are wrapped up, some of these participants are going come out with ninety cents on the dollar if you measure it by money out and money in. If you don’t add to that what would have been the income from that money over a period of time but just money out and money in. I think everybody’s going come out with at least sixty cents on the dollar.

CH: And had it gone to trial?

EL: Who knows, who knows. There were so many legal issues there, so many legal and factual issues, I mean the legal issues just do not quit.

CH: How long is this thing going on?

EL: About three years. But a lot of this money has already been distributed. This is the first time in my legal career that I’ve ever seen, for example, a defendant in one of these cases be concerned that they get this settlement buttoned up and get this insurance company to pay on their behalf, to discharge them before this insurance company runs into any financial trouble. So the defendant—when you say, “Was there urgency?” There was urgency, yes, everybody was saying, “Let’s get the money into Oregon, get it into some account so that it can’t be subject to somebody’s financial failure by disaster someplace else.”

CH: There was actually an Oregon team, so to speak, or strategy?
EL: Once we got around to these cases being settled; now let’s get the thing buttoned up and let’s get it done.

CH: When you were first involved in it did you understand what the scope of it was going to be and the complexity?

EL: No, I had no idea.

CH: When Judge King, or the rest of you that were involved in this were looking at how to organize it, did you look to any kind of precedent, any of the previous cases that might have given you some help?

EL: No. Without the leadership of Steve English who was the spokesperson on behalf of the consortium this would never have come together because he had enough stature, the confidence of enough people, that he could serve as a leader, if you will, of that consortium.

CH: And was the consortium formed solely for this?

EL: Yes, it was.

CH: And it was his idea?

EL: I don’t know whether it was his idea to form the consortium, but he certainly was the spokesperson for it. He represented some people within that group and he had the lawyer for them and he was at odds with others on occasion and, I will say, I had some pretty harsh exchanges between me and lawyers in that setting, more harsh than I have ever had in the courtroom setting.

CH: Really. Over what issues?

EL: Well I don’t want to—

CH: No, no what kind of issues.

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**Capital Consultants’ Case Complications**

EL: Let’s say a party is insured and the insurance companies are ready to pay millions of dollars. One of the named insured or insured, might also be an investor of, let’s say, fifty thousand dollars. If he’s an investor he has a claim against the recovery, right? Okay. Now if you want to be real indignant you can say, “I think that person has done something wrong and he should not be a claimant for that fifty thousand dollars or thereabouts. In order to get this settlement he has to give up that claim.” If he says, “No I will not,” right, you’re not going get your millions and millions of dollars from the insurance company, alright?

CH: Because?

EL: Because he’s one of their insurers and if you don’t agree to release him unless he releases fifty thousand he’s still their insurer.
Right? Let’s say it’s a law firm or accounting firm and each of the individuals. If you don’t get a settlement with this defendant and all of the insured within that group, if you view the defendant as a group, then you can’t satisfy the contingencies as to the settlement with this other group because if you’re going litigate with these then they’re going name them as contributors or indemnitors. Now you’ve got tens of millions of dollars tied up in whether or not somebody gave them that pays fifty thousand. [recording stops, then resumes] I was talking about fifty thousand dollars in relationship to tens of millions of dollars.

CH: Right.

EL: If you sit down and think of how much the income on tens of millions of dollars, let’s say you get to forty or fifty million and you’re holding it up over fifty thousand, as long as you delay that a matter of days you’ve recouped your fifty thousand in interest income at a modest rate. At some point you say you can’t afford to be indignant, you can’t afford to be righteous about everything, you’ve got to be very practical. When you get to pointing out if might that this is kind of stupid and self-defeating and all of that you can get into some pretty hot arguments about who’s on the side of the good guys and who’s not, you know.

CH: Wouldn’t that become self-evident to these very practical people?

EL: It took time, it took time. I don’t know whether they were of a mind set, “Yes, we’re going cave on that later on and we’re not wasting any time in insisting on it in the meantime,” but it was frustrating that you couldn’t move from one subject to the other, and so got to be a contingent. Another area of contention that I found very, very frustrating was that among the plaintiff’s they were not similarly situated. Certain of those plaintiffs thought they had to have a slightly higher ratio, okay? Finally everybody agreed to that. Then it got to the point that certain groups had to have their money early on. How do you finance their getting their money early on at the expense of the other plaintiffs, that is, the other plaintiffs have to delay? Well we had a portion of the plaintiffs who wouldn’t agree to delay in their recovery. So a smaller portion of them had to agree to take out of the settlements, a larger amount of money and delay their recovery a little bit. In a way it was kind of frustrating to see people with leverage—everybody had a lever to say” no” and anytime anybody said “no” they had lots of power.

CH: But some people had more leverage than others.

EL: Yes, that’s true but you had to work around. As it turned out some of these issues that became important by events and by recoveries and by timing and one thing and another all became irrelevant after the fact, but at the time
it was crucial to get them resolved. I mention all of this to illustrate again how convoluted this all was and what a miracle it is that you could get people of a sufficient mind set to want to move forward and to have that many lawyers involved and that much potential for huge amounts of fees and for all of the projection—

[End tape 7, side 1]

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**Capital Consultants’ Case Consortium**

EL: —have this public image that everybody wants to talk about of lawyers being so mercenary and it simply isn’t true. In this context I couldn’t be more proud to be a lawyer than to be a part of this. Now you had another question.

CH: I was asking about the consortium.

EL: How was a consortium formed?

CH: Yes.

EL: Strictly voluntary.

CH: Is it bound by any kind of legal precedents for them?

EL: Oh, yes, I’m sure they’ve done this, but what they decided is that they’re going get together—discovery on behalf of one is discovery on behalf of the other, and they’re going to each keep track of their attorney time and maybe one law firm is spending a lot more time than another and that’s okay. When it all washes out they generate a fund that’s going be divided on certain ratios, or targets, or amounts, or whatever, and then they will assess against that whatever costs there were and some attorneys within the group will be paid more than others because they will have spent more time.

CH: Are there formulas for that?

EL: No, it would be their own devices.

CH: Was there one consortium or several?

EL: One only.

CH: Were there others that did not join the consortium?

EL: No. You had the consortium as a whole, then you had the class action people—they were separate—and then the Department of Labor had its separate responsibility, or agenda, or whatever you want to call it. Since the law allows the Department of Labor to bring the same actions that the consortium or trustees were bringing the settling defendant didn’t want to settle with the trusts without
knowing that the Department of Labor was signing off on this too. You had to have Department of Labor signing off and if you had a provider of services in ERISA context, let’s say an accounting firm; the Department of Labor had the power to bar that accounting firm from ever participating in it. Let’s say an accounting firm paying money— what does the Department of Labor want by way of an amount of money that they’re going say is okay to be paid to the trust and what is the Department of Labor going say about future discipline of that, see? You had all of these things to work out and everybody had a responsibility and there was so much intertwined power it just was staggering.

CH: It must have been impressive being involved in it.

EL: It is, it is. I don’t know that any one person can sit down and say, “Here’s what happened, here, here, here, and here.” Fortunately, as a mediator I don’t have to know too much about the merits of a case because it’s not up to me to say, “Department of Labor it’s fair that you do this,” or “Consortium it’s fair that you do this,” or “Insurance company it’s fair that you do this.” These are all intricacies that won’t quit and nobody’s going have a handle on them and that is another reason why this thing could have been litigated for years and years and years.

Judges in Capital Consultants’ Case

CH: How many judges involved in the—?

EL: There were three in the district court. It’s a fascinating thing to me, and Judge King had the initiative to go ahead and order it into mediation when probably, to everybody, it looked hopeless. The leadership we had, not just limited to English, but certainly English, was the linchpin of it all. It would never have happened. He did in effect quite a bit, if you will, mediation too.

CH: What did you learn from this personally? And from the standpoint of being a judge, what did you learn from this particular case?

EL: I think I was naïve in the administrative decision-making process. The Department of Labor’s decision-making process is very complex. I finally reconciled myself to the fact that that’s the way bureaucracy’s function and they’re not easily intimidated by anybody. [laughs] I’ve known all along, of course, the government is a very powerful litigant when you’re opposed to the government, but just the decision making process in the Department of Labor, for example, was an eye-opener to me.

CH: How much did they actually lean on the judges in terms of getting certain actions and
decisions made and getting their point of view heard?

EL: There was only a limited time hey had to go into court, and one of the ultimate issues, and the only issue that really is much contested, is the receiver’s report on how to divide some of the receivership money. Judge King accepted the receiver’s formula on certain divisions, particularly not of money that comes to the consortium through the settlements with the external parties like Capital and Capital’s lawyers and Capital’s accountants and the borrowers’ lawyers and accountants and so on. Instead, how to divide some of the money that is recovered in-house by each of these trusts from their own in-house lawyers and their own in-house accountants and how that is to be divided among the consortium.

That issue is on appeal to the Ninth Circuit. That is a very discrete issue on how to treat certain of the recoveries and has nothing to do with what I called the bigger picture and all of the interlocking stuff where the settlements were so contingent upon each other. Certain of the trusts made claims against their own lawyers and their own auditors and recovered some settlements. Now, how is that to be accounted for and divided among others in the group, in the consortium? Either way it’s okay on that as far as any contingencies are concerned it isn’t going affect anybody’s settlement or anybody’s piece.

CH: I’ll come back and ask you a few questions later on.

EL: Okay. I’ve hope I’ve made that sufficiently confusing. [laughs] It’s staggering in its complexities and not only in settling in cases, but there were certain occasions where assets were being bought and sold so it was no end. Anyway that’s enough about how I got into, and do, mediation. I do lots of cases. I spend more of my time now doing that than actually hearing and deciding cases.

CH: We started our conversation today more or less about mediation—it sure gives me a wonderful background as to how you got involved and the important part it’s played in your career.

EL: The only other major one that has a lot of visibility is the Wen Ho Lee Case, I don’t know if you’re aware?

CH: Oh, yes, and I planned on asking you about that as well.

EL: Okay, we’ll get back to that.

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Magistrate & Article III Judges

CH: After you got on the court as a magistrate what was your role, and the role of other magistrates like, with the sitting district court judges?
EL: That was one of the things that was made very clear is that the magistrate judges in this district were treated professionally, just like district judges. Every one of the district judges was uniform in that. Judge Solomon as the senior judge was very supportive of the magistrate position, was very accepting of magistrates socially and professionally and in every other way. That was true with Judges Skopil and Belloni and Burns, and then when Panner and Redden and Frye came it was the same way. It was the same way as it always was.

I had worked with Helen Frye in Eugene. Her tenure overlapped mine, and so I knew her reasonably well. Panner was, of course, a practitioner. Panner came to the court with something of an agenda, I think he would acknowledge. He was frustrated with the inefficiency of the court, if you will, and he’s a very strong administrator and a very strong manager of cases and probably has taught a lot of people a lot about how to manage a case.

CH: When you came onto the federal bench did you feel the need to prove your judicial abilities in any way?

EL: No that never occurred to me. I will say that as a circuit judge, as a trial judge in the state court, I was very confident. I had reached a point where I felt that there was nothing that would come along that would threaten control that I would have over the courtroom and that was never an issue with me. I was always comfortable that whatever came was okay and that if I needed some time to make a decision I could take the time. If I was ready to decide I’d decide and all of that.

I did the same thing here except that I will say that in reading cases from the state system you’re dealing with so much law that has its origin in the common law that it all kind of makes reasonable sense. If you read a case you thought: “Well, that’s a reasonable result,” and you’d hang onto in your mind as something that was reasonable. In the federal court, so much of what we’re dealing with is statutory, and sometimes these statutes don’t have a ring of reasonableness. They’re the product of a lot of political compromise and one things or another. Some stuff is left vague deliberately because Congress doesn’t want to deal with the politics of making it more precise and they’ll say, “The courts will take care of that.”

CH: Then they complain about judicial activism.

EL: Well sure. [laughs] In reading federal law and remembering it and going into the courtroom and seeing these issues—I never achieved the level of comfort in the federal court that I did in the state court.

CH: Really?

EL: Because of the different, if you will, maybe my own mental approach to it, see?
In that sense, being a federal judge is more difficult, at least was for me, than being a state judge. You get over early on, the proposition that you’re going be the first judge that was right a hundred percent of the time, or the first judge that was wrong a hundred percent of the time. Sometimes you’re going be wrong, and that’s okay, that’s part of the experience.

CH: Sometimes don’t judges assume that they’re going to be wrong and want a higher court to illuminate on that particular issue?

EL: I’ve seen judges think that they’re going to force the courts of appeal to rule, but I don’t think a person can out “supreme court” the Supreme Court or out “supreme court” the appellate court. They do what they’re going do so I’ve never had any luck in saying, “Here’s an issue I want them to rule on so I’m going rig it so they have to.”

CH: Were you assigned certain types of cases?

EL: No. I don’t think so.

CH: How was the district court administered at the time?

EL: At the time I was a magistrate judge there was a central calendar and cases were not assigned at the time of filing to a particular judge. They were part of a central calendar and there would be a certain load of motions that had to be heard and decided, and they’d be divided up not on the basis of whose case it was but just dividing up the work. When the cases were ready for trial it might be that a case would be assigned for trial at some short time before trial. It was all done centrally and that’s one of the things that was changed when Judges Panner and Redden and Frye came.

There was an early assignment of the cases. The court was very shorthanded before Judges Panner and Redden and Frye came. Judge Belloni and Judge Burns were the two district judges and two magistrate judges and more work than we could handle. I shouldn’t omit that in Eugene we had Judge Hogan as a magistrate judge there too. The district judges were spread very thin, very thin.

CH: In that case, to what extent was your productivity emphasized and monitored?

EL: There was no actual measurement of productivity. I think that that was just a matter of observation if you will. If you had a case that was assigned to you for trial and you didn’t get it tried there was some reporting that every judge has to do about cases that get too old. But other than that there was no effort, I don’t believe, to monitor the production of any one of us on any structured basis. We all knew who was more efficient maybe than the other among ourselves, but not on any official or disciplined criteria.
Weekly District Court Meetings

CH: In respects to your calendar, how often did you meet with the other judges in the district—well, I guess they are spread out now aren’t they so—

EL: We would meet weekly.

CH: Monday luncheon or something.

EL: Yes, and that still goes on and then we had an informal Friday lunch. We had business to do on the Monday, and then to avoid talking about stuff other than business we had another day of the week that we would have lunch so we would talk about nothing but non-business, just pure social.

CH: That was on Friday.

EL: And that continues to this day in the district court. In fact, lots of times I joined them for lunch on either of those days.

CH: How important are those informal contact—well, it’s not as formal as it could be but would you consider that to be a rather informal gathering?

EL: Oh, yes. Very informal, but I think that the District Court of Oregon has had a history of collegiality that has been unmatched. A tradition that goes back to Gus Solomon of being very collegial here.

CH: What was it about Judge Solomon—how was he a precedent setting judge in that era?

EL: Well, he’d not only invite you to lunch, but he’d prepare the lunch, or his staff would prepare the lunch. He might even go so far as to invite somebody from the community to join the judges if it was one of those informal sessions. He might have the mayor of Portland for lunch with us and just chat. Or the director of the Bonneville Power Administration or somebody from outside the court would occasionally join us because Solomon invited them and he was cooking the soup. [laughs] Solomon really made that point repeatedly how important it was socially that we be together. You saw that then in other districts where that wasn’t true, and some of it maybe because of their size but, I know, that in a place like Los Angeles it’s unheard of to do what they do here in this district. I think it also contributed to this status of the magistrates of being part of the total picture, see, because nobody got to be strangers socially and professionally. Everybody was listened to pretty good.

CH: Were there agendas for those meetings?

EL: Occasionally.

CH: Or themes?

EL: Occasionally, it might be over some new requirement of the judicial council for the circuit or governance or something. There
got to be a sentencing council where as district judges you would get together before sentencing and share ideas with each other, hopefully to keep anybody from being totally out of line. That was before the days of the guidelines.

CH: How did you put together a staff and did you have clerk?

EL: I never had a law clerk when I was in the state court. Some of the judges were beginning to have law clerks, but I had an old time bailiff and was comfortable with that. As a magistrate judge we had one law clerk and that law clerk served for a year and my first law clerk was a young man named Tom Fenner who’s now the legal counsel for Stanford University. But magistrates had one. They were paid much less than law clerks for district judges and had to work very hard. All that work was very hard.

As a district judge we were allowed two law clerks and a secretary. And as magistrate a secretary who also served as in-court clerk and maybe early on we had one who was a secretary and one who was an in-court clerk, but who served also on the magistrate staff. So effectively we had two people for clerical work and a law clerk.

CH: How did that period—you’re being a magistrate—evolve between there and the point where you were then appointed to the district court.

EL: After we got settled in, after the court had decided that what we were doing was legal, it fell into a pretty good routine. By then Judge Skopil was on the Court of Appeals as things evolved, and then you had Judges Panner, Redden and Frye here and that sped up the activity. I continued to do that early on scheduling and conferencing until we went to the individual calendar. They have fully the individual calendar and magistrates are right in the assignment circle with the district judges on civil cases. If a person files a case it can be assigned to either a magistrate judge or to a district judge depending upon who’s next up on the so-called wheel, or whatever.

CH: That process of assimilation of the magistrates in with the district judges is a continuing process.

EL: Yes, and there is no place where it’s any stronger than in Oregon today. Oregon still continues with the leadership in that. I don’t know of another district where if you file a civil case the day it’s filed it may be assigned to a magistrate judge because it’s that judges’ turn, and they go through all of the magistrates and all the district judges and just keep assigning them. In those cases in which the assignment is made to the magistrate, if there is a consent, then the magistrate takes it right through the trial, if it is not, then it has to go to a district judge.

CH: Why wouldn’t district court judges
around the country see the advantages of the magistrates and embrace them wholeheartedly and move that process along?

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**Magistrate Judges in National Judiciary**

EL: Oddly enough I think there was a mind set in some places that the magistrate’s status posed a threat to district judges.

CH: Oh, really.

EL: There was hierarchy here that nobody wanted to monkey with. That these are judges of the United States according to the definition of the statute and a magistrate is not within that definition and so there was a discrete difference in the pecking order and nobody’s allowed to forget it. I’ve been told that there are places in this country where a magistrate judge cannot ride on the same elevator with a district judge. I don’t know whether that’s all true or not, or still true, but I saw a magistrate from San Diego one time, met him in Hawaii at a judicial conference. His district judge said something publicly over there and he said, “I didn’t come all this way over here to be insulted.” So there was that kind of mind set, it’s petty. There are other districts where let’s say you have a magistrate that has done a lot of prisoner work and you have lots of prison population in the district, there is so much of that work that has to be done by magistrates that the district judges don’t want to take that work away from them by giving them other work. There are some where they’re limited in what they’re doing because there’s so much of it to do, see?

CH: That’s where I would think that these judges would just embrace the system wholeheartedly.

EL: But they don’t give them cases to try, which I think, the magistrates would like to do as opposed to doing repetitious prisoner cases. Somehow or another, the magistrates position is more dependent upon the attitude of the district judges than it is on either the quality or efforts of the magistrates. The magistrates are helpless if the district judges are going say, “They’re not worthy, or we don’t want them to try the same cases that we’re supposed to try.” Can’t have that; whatever the mind set is. If the magistrate position is not, in effect,” sold” to the profession by the district judges it isn’t going amount to much.

CH: What is the system here like compared to the other districts in this circuit? In the Ninth Circuit with the California and Washington?

EL: Well, as I say, the magistrates are doing all of the civil cases, are right in this assignment.

CH: Throughout the whole Ninth Circuit.
EL: No, no, not true.

CH: No, I was just asking how it would compare to these other districts.

EL: Well, there’s no district that uses the magistrates for trying the volume of cases that we do here in the District of Oregon. Others may be getting there, or are trying to get there, but everybody views Oregon—now it may be that by now some are actually there, but I know they’re not there in San Diego, and I know they’re not there in Nevada for reasons that may relate to them. And then if you have border districts where you have so many criminal cases coming in, the immigration cases, the illegal entry cases and that that it just keeps the magistrates busy in those criminal cases so much.

CH: Do you see any biases from judges in the court of appeals against any cases coming up from magistrates?

EL: No, because as a matter of fact now there are two members of the court of appeals who were magistrates. I as a former magistrate and then we have another from Arizona who went right from the magistrate—

[End tape 7, side 2]
tried. At the end of trial both sides moved for a directed verdict. Under the law, at that time, if both sides move for a directed verdict it amounted to a waiver of the jury trial—after the jury heard the case through which both parties move, and it waived the jury.

The plaintiff had taken the drug to treat a form of arthritic condition. It was discovered that the drug that was being used in high dosage was effective in caring for *Lupus Erythematosus* and arthritic conditions, but it was originally selected for control of malaria. All of the U. N. troops in Korea, all of the airline personnel, were using this drug throughout the world and it was discovered that people who were taking the drug in high dosage were experiencing blindness. There was no test for it, but in low dosage it was widely used. But in high dosage it was effective on these diseases.

In any event, at the conclusions of the arguments, I had my mind made up, I had decided the case. I announced the decision from the bench out of respect for the lawyers involved; I wasn’t going go and write them a disposition. I felt that the case had been so well tried by everybody that I owed it to them to decide the case in their presence. I know that Elmer Sahlstrom was very disappointed, but I felt it was almost cowardly not to do it in his presence. It was a fascinating case from a medical standpoint and we had so much knowledge in Oregon at the University of Oregon Medical School and we had very knowledgeable people in Eugene. We brought witnesses from New York and Florida and Cleveland, but even at that, from a standpoint of knowledge, it was probably best tried right here in Oregon because the most recent update of all the cases, that had been reported around the world, of blindness from this drug was compiled by the University of Oregon Medical School.

It was in the early era of products liability. I made a factual finding that the drug caused the blindness, but in spite of that finding of causation I ruled in favor of both defendants holding that the doctor was not guilty of malpractice, that is, of failing to meet the standard of care in Eugene for a practitioner such as he was. The reaction that the patient had was a result of an idiosyncrasy, and in any event it was affirmed by the Supreme Court of Oregon. But that drug has since disappeared, I think, completely from the market.

CH: The name of drug again was?

EL: The drug was Cloriquine and it was brand named Aralen and it was manufactured by Sterling Drug, which was a big drug company producer of Bayer aspirin and other known products. But it was for me a fascinating case. The medical testimony was very interesting.

CH: Were most of the witnesses expert witnesses?

EL: Yes.
CH: Were there any witnesses from having taken the medicine, the people that had blindness?

EL: No. Those cases were all reported in the medical journals and I ruled that whatever was being said about the drug in the world, Sterling Drugs should have known about it because it was marketing it worldwide. I let into evidence all that was being said worldwide about this drug. Of course, did not allow the jury, or the trier of fact, as it turned out to be me, to consider that in deciding the standard of care for the practitioner in Eugene, Oregon. He isn’t charged with the need to read everything in the world; he’s practicing in Eugene and his standards are related to standard of care in Eugene. It was the successor to quinine for the control of malaria because they had used another drug when the quinine supply was cut off and that gave the Japanese a lot of propaganda value because it turned some of the soldiers appearances to be yellow and they propagated them to the effect that they were going be sterile and one thing and another and finally they come up with this drug that served the purpose of being a malaria control. But people from the Cleveland Clinic testified that if the drug was to go off the market there would be people who would lose their lives because they were being managed by the use of this drug for the condition of Lupus Erythematosus, which is a related disease to arthritis; same group of diseases.

CH: Was it ever tried in any other court?

EL: Oh, yes, there were cases tried around the country afterward where the results were different. All that law was emerging at that time; the law of products liability was relatively new, and that’s why aside from the medical testimony the case was memorable for me.

CH: How often does it occur where the jury’s judgment is rejected at the end of the trial? Is that very rare?

EL: It’s rare. The only reason that it can be done is if either the trial court or the appellate court finds that the evidence cannot support the jury verdict. The evidence is so clear or lacking that no reasonably juror could disagree. You just can’t go and file a case and not present any evidence and rest and say, “I want my jury to decide whether or not I win.” The court won’t allow that and that’s the extreme illustration of why there has to be a certain standard of proof in order to present a question of fact. Absent that, the jury verdict is it.

CH: Going back to your thoughts on the trial lawyers; did any of these trial lawyers that you were associated with at the time go on to distinguish themselves in the legal field?

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1960s Criminal Cases
EL: Of course Judge Gordon Cottrell tried cases in front of me. Judge Malcolm Marsh tried cases in front of me. I don’t want to leave anybody else out but there was a lot of—Douglas Spencer tried cases, Wayne Allen tried cases in front of me and then of course Joe Richards went on to be the leader in the legislative process. Otto Skopil tried cases in front of me. Of course, he was from Salem, and that’s how Judge Skopil and I became acquainted. Our first acquaintance was him as a trial lawyer in front of me. I hate to leave anybody out here because there were just lots of them. Hale Thompson became president of the bar. I think Bill Wheatly was president of the bar; Arthur Johnson did a lot in the bar, a lot of leadership roles.

Herb Schwab, the chief judge of the Court of Appeals observed that the Lane County circuit bench had lawyers that were more aggressive on legal theories in one thing and another than anyplace else in the state. I don’t know whether it was just a fortuitous circumstance or that it was the presence of the law school or what it was but he said that particularly in the criminal law in the era of the sixties that it was very aggressive.

CH: What types of criminal cases were occurring most often in the 1960s?

EL: The whole drug phenomenon exploded on us and then we had a fair smattering of Black Panther cases around the city of Eugene. I had a case involving a guy who attempted to set off a stick of dynamite in the headquarters of the Democratic headquarters in Lane County on the night Hubert Humphrey was nominated in whatever that was, ’68.

He went in and hung a stick of dynamite over the transom and lit a fuse to it and had the fuse running down the hallway onto to the stick of dynamite, and for some unexplained reason the fuse burned out. After he was sentenced to the prison—he waived jury and I tried him. He’s about the only person that I ever received a letter from while he was in the penitentiary telling me that he was thankful that his life had been changed and he wrote in effect saying that he was thankful that he went through this and was glad that he was stopped from the kind of the life he was entering into and didn’t ask me for a thing. Just wrote the letter telling me that. As I recall, he was from a family in Albany. But anyway, we had some tough stuff as everybody did in the 60s.

CH: And you got to know Bob Straub?

EL: I got to know Straub when he was running for Lane County Board of Commissioners and I think that was in 1954. He had an old Model T and he drove it around Eugene saying the county cannot continue at this pace. [laughs] That was his.

I was a deputy DA at the time and the DA was the legal advisor to the county commission and I remember Bob was always rather impatient with lawyers who talked
too much. Whenever he had a legal issue he wanted an answer. He also observed, and I’ve quoted him a number of times saying that, “It never hurts to lose an election until after you have won one.” [laughs] That was a bit of wisdom from Bob.

CH: There were a few other things that you wanted to mention too as we were getting back up to where we—

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**Annette Buchanan Case**

EL: I wanted to mention the Annette Buchanan case. We don’t have anything on that on this tape do we?

CH: I don’t believe so.

EL: In 1966, Bill Frye, who was the district attorney for Lane County, was running for Congress. I don’t know why this is relevant, but he was running for Congress, but certainly all the publicity surrounding the Annette Buchanan case made note of that fact.

Annette Buchanan was a student at the university, and she had written an article that was published in the *Oregon Emerald*, the student newspaper, about the use of marijuana on the campus. She had published this account that said she had interviewed six or so students and when that was published Bill Frye, the DA subpoenaed her before the grand jury. She went in front of the grand jury and refused, on the strength of journalistic ethics, to give the names of the persons that she had interviewed.

She was brought before me as a circuit judge and I ordered her to answer. She went back to the grand jury and refused to answer. Then she was brought back in front of me and accused of contempt for having disobeyed the direct order to testify, and we had a trial. Arthur [Art] Johnson represented her and Bill Frye prosecuted it. At the time Tom McCall was governor—does that sound right in ’66?

CH: In ’66 Hatfield would have been—

EL: Still governor.

CH: He was elected in ’66 for the Senate and would have departed in early ’67. Then it was McCall.

EL: McCall came a little later then.

CH: Came in ’68.

EL: In any event this was the perfect case for the advocates of the rights of a newspaper reporter because she was a student, she was a very decent youngster. The first thing that Art did is he moved for a jury trial and I ruled that in a contempt case such as that she wasn’t entitled to a jury trial. Then he sought to bring before me a resolution of the Oregon Newspaper Publishers Association and I had to rule that whatever they had to say was irrelevant. Then he attempted to have the
testimony of Bob Chandler who was the editor and publisher of the *Bend Bulletin* testify in her behalf about her standards of ethics and so on. Bob Chandler was also at that time the chairman of the Judicial Council which was a group appointed by the chief justice to be a citizens’ group dealing with the administration of justice in this state, an advisory group or advocacy group for the judiciary. I had to rule that what he had to say was irrelevant.

Then he made the claim that she had the constitutional right under the First Amendment to refuse to disclose her sources. I ruled that there was no such constitutional right and found her in contempt and fined her three hundred dollars.

U. S. Senator William Knowland from California was the owner of the *Oakland Tribune* and he publicly made a showing that he sent her the money to either pay the fine or help pay for an appeal. It was quite a public furor over this, and it got national attention. I got letters from all over the country, almost all of them were critical because the newspaper reporters are pretty articulate and they have ways of saying things that if they want to insult me they know how. In any event, it was in appeal to the Supreme Court of Oregon and Judge Alfred Goodwin wrote the opinion affirming it. Then he put a line in there saying that if there was any remedy it was to come from the legislature.

McCall was governor by that time and McCall had been a reporter here for the TV stations in Portland so he was very much in support of the Shield Law. Coming out of that case was the “Shield Law” for Oregon and we now have the “Shield Law” as a product of that case. But that was very intense to say the least. I got calls from, the national media, NBC news, and one thing and another and was thankful that I never said anything [unclear], That reinforced my attitude of being very careful about what I ever said to the press because my experience had been in running for office that the public doesn’t want controversial judges and to the extent that a judge talks too much, you cause fears in litigants; they may worry about how the decision in their case is going to advance some cause that the judge has. I just think it’s kind of risky.

CH: I do remember your talking about some of this, but there’s some details there that you didn’t mention before. I was wondering because of the controversy of this case when you went on to other judicial positions did this issue ever come up in testimony or consideration of your appointments.

EL: Not that I recall, in fact I think the *Eugene Register Guard* wrote an editorial saying in effect, in spite of the criticism I was getting I was just following the law. There was an editorial actually supporting not the result, but saying lay off the criticism of me. I would never have been appointed to the United States District Court as a district judge without the editorial support of the *Oregonian*. 
CH: Oh, is right?

EL: Never would have happened.

CH: It’s that strong?

EL: It was. They wrote an editorial very strongly in support of my appointment to the district court. That was the catalyst around which a lot of lawyers in Oregon rallied to my support because the editorial suggested I was not going to be appointed. We can get to that in a little more detail if you’d like. In spite of this furor about that ruling in the newspaper-reporting world it didn’t spill over to any editorial criticism of me at all.

CH: Which is surprising isn’t it?

EL: I am firmly convinced that a judge does not make enemies by ruling. You make enemies by not listening or by being out here with some gratuitous criticism of somebody that has nothing to do with the outcome of the case. There’s no use in going out of your way to use the bench as a forum, or as a podium, for criticizing anybody. Somebody’s going to go out a winner and somebody’s going go out a loser, but you don’t have to insult the people on the way out, or apologize, or anything else.

I always followed the practice that if I committed a youngster to a reform school to MacLaren or Hillcrest I never suggested that child was going because of lack on the part of somebody else, on parental fault or school fault or anything else. I focused on the reasons that he was going. You can make a lot of enemies that are just unnecessary and it’s not by ruling that you make enemies. At least that’s been my perspective, and I was always pretty confident that whatever I ruled nobody was going kill me for it or run me out of office for it.

CH: In this case, it seems like you ruled so much testimony as being inadmissible—wouldn’t that have irked people like Bob Chandler even though he’s a very respected editor?

EL: Bob Chandler and I had some disagreements about other things. We had some disagreements before the legislature on some proposals that had come from this commission he was on. He was very outspoken, blunt with me, and yet when I was appointed to the district court he was an advocate of my appointment. I think he was in the group that had a hand in deciding the selection of the appointees in 1980, in fact he came to me in 1984 and told me how he had gone to bat for me with Senator Hatfield. And Bob and I were—I couldn’t count him as a close friend in the sense that we had any social contact, but I had a lot of respect for him. He was a pretty strong character and I always felt that he had the same for me. We could disagree over—in fact, when he was going to quit the council he called me on the phone to tell me he was going quit.

“‘I’m getting sick and tired of
everybody seeking to defeat everything that we propose that is of this commission. You never seem to be in favor of anything except pay raises.”

I said, “Well I think you’re making a mistake.”

“Well, you’ve made a lot of mistakes in your life. I just want to let you know that I’m quitting.” [laughs]

That’s the last of that conversation. Then we went to be respectful, and the last time I saw him was at the retirement dinner in Pendleton for Judge Bill—I’m drawing a blank on his last name.

CH: When you mentioned Pendleton I immediately thought of Bud Forrester.

EL: Before that. I think Art Barrows offered in evidence something Senator Knowland had to force me to rule on because I knew what was going on and Art knew what was going on. This was the perfect case for this promotion of this idea and so the more they can get me to rule against good things like jury trials and resolutions of the Newspaper Publishers Association that all added to the political strength to the claim that there ought to be legislation—

[End tape 8, side 1]

Journalist’s “Shield Law”

EL: —it had generated enough attention that the result of that trial was reported on Huntley-Brinkley Report that night—the national news—that she was found in contempt.

CH: How much did the fact that it had to do with marijuana, drugs, and college campuses play into the popularity of—

EL: I don’t think that was a factor. That was a factor in my mind in assessing the penalty because we were putting people on probation for doing that and I was not about to put her in jail for her role in all of this. I know afterwards it was a disappointment to some that I didn’t put her in jail, but I just felt that on the scale of what she had done and the importance of what was at stake that it would have been disproportionate to put her in jail for that. The penalty reflected the power of the court to enforce its orders and it reflected the proportion of the offence. If we weren’t going send people to jail for possession small amounts of marijuana why send a reluctant witness to jail so it was that simple to me.

CH: How was the “Shield Law” actually put together and passed?

EL: Judge Goodwin in writing the opinion affirming it, in effect holding there was no constitutional right, put in a line saying the
remedy for this is with the legislature. Those words were editorialized on and introduced in the next session and with the support of the governor, and all of that, it passed.

CH: How did you feel about this issue?

EL: I don’t really care except that from a pure theoretical standpoint free speech should not be measured by whether or not a person owns a printing press or who they work for. If my neighbor and I want to talk over the back fence freely, and some newspaper reporter has the right to refuse to disclose sources as to what they have been told unless they have more free speech than I have talking to my neighbor across the back fence, why shouldn’t I be permitted to refuse to tell what the neighbor is saying? That’s the irony that I find in this whole “Shield Law.” There have been a couple of instances where people have written fiction and claimed that they had an undisclosed source. Wasn’t there a case in Washington, D. C. where somebody got a Pulitzer Prize and then later it was disclosed that the source didn’t exist?

CH: Right, right.

EL: We allow police to use anonymous sources or confidential reliable informants to get search warrants, but once a judge does that you have to absolutely trust that policeman. I have had judges tell me from other parts of the country that they would never permit a policeman to use a confidential reliable informant because they’re afraid that if they did that the police would make it up if they didn’t have to disclose.

Now to the extent that you have news in circulation without the requirement of disclosing sources you run the risk that somebody’s going to be lying and you have no way of testing it. Normally when we think of testimonial privileges we’re talking about relationships that are confidential, and instead of me going out on the street and telling the world what my wife is saying, hopefully, I would keep my mouth shut about that. If called upon to testify I would say, “No, I’m not going tell you.” Or a patient/doctor or attorney/client, you don’t expect the doctor to go out and say, “Now here’s what my patient told me.” When he comes into court he gets a privilege. He doesn’t go out and tell about it. He keeps his mouth shut there and he keeps his mouth shut in court.

This privilege of reporters is a little extension of “I can talk all I want as a reporter publicly, but I’m not going tell you in court who my source is.” See? Now there are value judgments here, and political judgments. After telling you I really don’t care, I thought quite a bit about this and if I were running a newspaper I don’t know whether I would put on my banner, “All of my sources are real and we never claim a privilege of anonymous sources.” You might have more credibility if you said that, right?
CH: [laughs] The news might not be as interesting.

EL: [laughs] That’s true. And you might not have as much of it.

CH: Right. But if you fast forward to these days as you’re sitting on the Surveillance Court of Review and talking about the rights of the defendant don’t some of these issues come into play there as well?

EL: Oh sure. Absolutely. If you want to talk about that now we can.

CH: No we don’t have to talk about it now but it certainly is interesting because a defendant doesn’t have the access to the—

EL: Access, exactly.

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**Personal Views versus the Law**

CH: Right. Was there at any point in your judicial career where you felt inclined to make a decision that was contrary to the law at issue because the law said one thing and you felt another way as being really right? Did you ever make any decisions that were in conflict with the law at issue?

EL: Not consciously by any means. If I felt that I had to, in conscience, decide something against controlling law that would be a case where I would feel disqualified. It’s rare that I have ever disqualified myself because of subject matter. In fact, only one case comes to mind in all of the cases I’ve had because of the subject matter I wasn’t going sit on it. That was the case in the State of Washington—while I was on the Ninth Circuit—that a person had a constitutional right to physician-assisted suicide. Some parties in Washington filed that case in the district court and prevailed in the district court. The district court, in the western district of Washington, said that the law in Washington, which criminalized assisted suicide, was unconstitutional, as it would apply to a physician.

That case was calendared for argument in Seattle before the Ninth Circuit and I was drawn to be on that panel. Oregon had recently passed a physician assisted suicide law and I had said enough within my family, and nothing ever publicly opposing that, and I felt that that was a case that I could not sit with an open mind on and so I elected to disqualify myself. Now that is the only time where I said a subject matter as such that there’s one party who might come in front of me who would come in front of me with no chance of winning. That’s a poor position to be in when you’re in there litigating your case and you’re already facing the proposition there’s no hope of winning. That I had no business hearing and I didn’t.

CH: Did you feel that strongly about the issue—

*Leavy, Tape Eight  115*
EL: Yes.

CH: —that you could not have—

EL: I would not have, and could not have, and that ultimately became the decision of the U. S. Supreme Court.

CH: The decision was for?

EL: Was that there is no such constitutional right. That is, that the Washington statute prohibiting another from assisting in the suicide of another is constitutional. The three-judge panel that I would have been on was reconstituted and there was a judge took my place, that three-judge panel ruled that the law was constitutional. Then it was heard en banc by the Ninth Circuit and a majority of the en banc court said it is unconstitutional. Then the Supreme Court took it and reversed the en banc court and reversed the district court and reinstated in effect the position of the two-judge majority of the three-judge panel saying that, “Yes the law in Washington prohibiting assisted suicide is constitutional.” So it had a convoluted history; well, not convoluted, but at least it went through the regular steps and as I recall the U. S. Supreme Court was unanimous on that. If you will, my bias was vindicated. [laughs]

CH: Where did that particular belief come from? How did you come to have that feeling? Was it based upon your religious faith?

EL: Undoubtedly my conscience was formed by that, you know. I have no reservation about that whatsoever. But my conscience was formed by that teaching, certainly.

CH: Were there any other issues like that?

EL: Not that I have ever been called upon to adjudicate. You can get some of these hot button issues, in a tangential way, that really have nothing to do with the basic issue.

CH: How would that come about?

EL: Look at all of the abortion issues you have for example.

CH: I was going ask you about that.

EL: It might be an issue of free speech rather than abortion. You get all kinds of issues that relate to a tangent of this, but it has nothing to do with the basic issue. You might have a case involving free speech around the issue of assisted suicide. Well that doesn’t say anything about what you believe about the basic issue. It says something about what the law is with respect to free speech and so it’s only when you get to the core issue that those values, if you will, would come into play. Maybe there’s more legitimacy for a person having those kinds of beliefs if they’re on a court of last resort and you’re making law for the country and all of that kind of stuff. Anyway, that’s the only case that I can think of in my judicial
career where I’ve said to myself there’s no hope that this party can win and I shouldn’t sit on it.

CH: You never had to decide on anything regarding abortion, or you didn’t have any cases that dealt with abortion?

EL: Not where the core issue was ever involved. I’ve had, as I mentioned, I’ve had free speech on that issue.

CH: Yes.

EL: As recently as last week.

CH: Oh, is that right?

EL: But free speech can come along on any subject. [laughs]

Views on the Death Penalty

CH: What about the death penalty?

EL: The death penalty, I have no strong feeling on that. I feel comfortable in following whatever the law is on that. I don’t know whether I should say comfortable, you know, a death penalty doesn’t lend much to your comfort. It’s a job that I can do and have done. In fact, I was designated by the court of appeals to be the death penalty coordinator for the court which meant that when there are pending executions I would be the one that would set the timetables for voting on certain calls for en banc and so on, and so on. That meant that whenever there would be a scheduled execution I would have to handle that right up to the time of the execution and if some judge made a call for a vote I’d have to set the time limits on when the vote had to be complete and one thing or another.

You have to have somebody like that on the court just available to say, “Okay, if one judge calls for an en banc review of what three judges have just decided, then the execution is scheduled for a time certain, how much time does everybody have to vote on that given the fact that there’s no stay for an extra hour or two or whatever it might take to do it in a more comfortable fashion.” Everybody on the court who has a vote is alert that this is going to come and it may mean that all the judges have to be in their chambers while that time is approaching so they’re available to vote.

CH: Do you have a means by which people can get in contact with you at any time?

EL: Oh yes. Sometimes they can even do it by phone, and on occasion I would actually be in San Francisco so that you had all the communication set up there, to get in touch with everybody. We all have e-mail, the clerk has the phone numbers of everybody so that everybody can be sought out. They might tell the clerk, “Well I’m going be at my residence and here’s my phone number if you need to
reach me. I’ll answer the phone and be right by it when you call.” There is always, it seems, a flurry of communication at the last minute.

CH: It was okay for you to be in that position?

EL: Sure.

CH: You didn’t have any qualms.

EL: None.

CH: In that position it sounded by the way you were describing it there wasn’t any judgmental aspect to it. It was simply organizational.

EL: As an active judge I had a vote just like everybody else did, but I had the organizational responsibility, as you say, exactly. Somebody has to set the time tables and try to give as much time to everybody as you think they need. Yet move it on to where you don’t run into having a call out here and people voting and then have the execution go before people can get a chance to or be told they have to vote.

CH: That’s never happened?

EL: Never happened.

CH: There are enough safeguards in place to keep that from happening.

EL: Yes. There are enough safeguards.

CH: Were there any situations in which you voted that the person should not be executed and they were?

EL: I can’t think of one where I voted no and they were. I can’t think of one. I’m trying to think of where I voted yes, and they were not, and I don’t think of one.

CH: But there were times when you had to vote yes for that.

EL: Oh yes, oh yes.

CH: What was the deciding factor in those cases? Was there something that particularly would put it over into the death penalty side?

EL: You don’t vote on what you would like to see happen. The federal role in this is to look at what has already been done by the state and decide whether or not what the state has done, or what the state seeks to do, violates the United States Constitution. Unless it does, the state is the decider of that. As a federal judge you’re in the position not of deciding whether or not this person should have been executed or not, whether the jury should have found one way or the other. The question is always, “Did the state do something, or permit something, or fail to do something that denied to the accused a federally protected constitutional right.” We’re focused on what is the constitutional right and his claims are always, “A United States constitutional right was violated in the
procedure that led to my conviction and death sentence” And unless we find that it’s not our business.

CH: Is that pretty clear to you, whether their constitutional rights have been violated or not?

EL: Not always.

CH: Is it pretty straightforward?

EL: Not always.

CH: What kinds of things can be uncertain about that?

EL: You get adequacy of counsel. That’s almost a regular one. When you’re looking at things what do you look for, perfection? Well, no. If you do find a lack of care, or a lack of competence or whatever a lack of assistance then the next step is; “Did it affect the outcome?” Those are not cut-and-dry. Then you have to have both in order for there to be a violation of a constitutional right. Did you have a lawyer doing something that was done deliberately as a matter of tactic; could have been done a lot of different ways; he did it this way; he lost the case. Now if it’s a matter of tactics he’s got some range in there to decide: “I’m not going raise this issue because I’m going to get hit harder if I raise that issue than if I leave that one sleep,” see. When you lose you say, “Should I have raised the issue?”

Should the defendant take the stand? If they don’t take the stand and they’re convicted you’d say, yes, maybe he’d been better off if he had. You don’t know that, and that’s a judgment that has to be made in every case. Or this guy did take the stand. Should he have not taken the stand and does that relate to competency of counsel. They’re not at all cut-and-dry.

A case come to mind where I wrote the opinion for a three-judge court that set aside a death penalty in Montana because we held that the lawyer had a loyalty to a person other than the accused. You can’t have a divided loyalty; no matter how you cut it the lawyer’s got to be loyal to that one. Let’s say there were five or six accused of murder. He represented one of them and the one he represented was found not guilty, cleared. The other defendant was found guilty and on appeal to the supreme court of Montana that conviction was reversed and it was remanded for a new trial. When it come back for a new trial the lawyer who’d represented the guy that was acquitted now represented the guy who was on trial for the second go around. The claim was that in representing the guy on the second go around he should have been suggesting to the jury that his former client committed the crime, and he allowed as how he wouldn’t do that. We allowed as how this guy was entitled to a lawyer that would, right? That one to me seemed pretty simple, but that’s the kind of thing you’ll run into.

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DNA Evidence

CH: One of the hot issues on that today, of course, is the evidence on DNA.

EL: Sure.

CH: Normally in the court of appeals you wouldn’t be looking at evidence because it’s a court of appeals.

EL: That’s true.

CH: When those issues come up where somebody is in prison and they do find DNA that exonerates them then—

EL: The vehicle, under federal law, to get back into court is on a claim of actual innocence. That’s the category that you see on a lot of these issues are procedural. The case I just described to you on the conflict, that guy doesn’t even have to make the claim that he’s actually innocent. He makes the claim, “My lawyer was inadequate. I don’t have to tell you anything about my innocence. I’m just telling you that I’m entitled to a better lawyer than that.” That’s good enough. Now after all these things are litigated then under the law he’s told, “You don’t get to come back to federal court anymore unless you come back and make the claim you’re actually innocent, and in spite of all else you’re actually innocent.” See? That’s how you have this safety valve always. That issue is never shutout.

Ch: Then it goes back to the trial court.

EL: It goes back to the state court. What a person would do is present that issue first to the state court and then somehow or another if the state court did not give him an adequate hearing or something then we would say, well, there was a denial of due process because even though he’s back, and he’s back, and he’s back, he’s making now a claim of actual innocence and he has enough support for it that you should have heard it. None of its easy, I’ll tell you, and of course you have all these considerations of sovereignty and how much of everything is run by the federal government as opposed to how much is in the states area of responsibility.

Magistrates Act

CH: You also had wanted to mention some more things about the magistrate and issues around that. I didn’t know if there was anything else.

EL: No, not really. I did find the legislative history on the Magistrates Act and the testimony of Judge Skopil and his leadership role as a member and later chair of the Judicial Conference Committee on administration of the magistrate system. At one point he and Judge Juba and an attorney from Portland, Cap Evans testified in support of the Magistrates Act that ultimately became
Leavy, Tape Nine

CH: This is an interview with Judge Edward Leavy in his office in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen. The date is March 23, 2004, and this is tape nine, side one. You were talking about the magistrates.

EL: Theoretically the government of the United States is supposed to be a government of limited powers. To the extent that its courts have unlimited power, or think they have, that’s obviously off the chart. I refer to the circuit court for the state is a court of general jurisdiction. The district court is not; it has jurisdiction only where you can find something in the law that says we have the power. You come from a different mind set, but I wouldn’t say frustration was the word. I think we all had to be conscious of the limited power we had. The magistrate does not have the power of an Article III judge, one constitutionally appointed.

CH: During the time that you were a magistrate, what were your most significant cases or actions?

EL: I tried a number of civil cases. I don’t know that I can say that any of them stand out to the degree that I mentioned some of the cases on the circuit. I heard a number of products liabilities cases, metallurgy cases,
and alleged defective automobile design or manufacture. But nothing that really stands out as far as I can recall. I heard a number of maritime cases and longshoremen injuries and that kind of thing. The grounding of a ship in the Columbia River, I think I got reversed on that at least once, and ultimately it was retried or redone and I was affirmed. We had a ship go aground in the Columbia River and a claim against the government for having miss marked the channel.

CH: In negligence?

EL: Yes, but I don’t think that there was anything in those years that stands out. I was becoming more accustomed to products liability cases and engineering and medicine and one thing or another to the point where the law was getting to be more settled and so there weren’t quite as memorable as the one I mentioned, the Cochran v. Brooke.

CH: Anything else happen during those years that was significant within your profession or family?

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**Family Tragedies**

EL: No. Family wise Eileen and I experienced the death of a child in 1966, our daughter died of coronary occlusion which is a plain old, old-age heart attack at age three and half with no warning whatsoever. In 1977, two of my brothers died of heart attack on the same day so those are the kinds of things we’ve had to survive. Naturally, being the youngest of a big family I’ve had more of the obvious fair share of the losses as time went by. But the two brothers were both at one time alcoholics, and each of them had lived the last years of their lives without anything to drink, and I don’t understand alcoholism, but I do view anybody who can overcome it as having done something heroic.

CH: Any way of connecting the two deaths on the one day?

EL: No. One died in his sleep and the fact that he was dead was in the newspaper. The other died that evening, my brother Joe was found dead in the morning and my brother Leonard died that evening while talking to me about arranging for the funeral of our brother Joe. He died right in my presence. He had had a stroke and had had some surgery and was not in very good health, but they were not real close in life. What made it difficult was people would call me to offer their sympathies knowing that Joe had died and then I would have to tell them, “Yes, and then Leonard died too.” That made it difficult. If they had died simultaneously then everybody would have known it would have been easier than the sequence. Even though they died on the same day they died at different hours of the day. Our daughter she was one of twins, and she was a very happy youngster, and you don’t get over that by any stretch of
the imagination. But we were thankful we had her for those three and a half years and those were as happy years as we’ve ever had.

CH: Did you have any understanding as to why it had happened? Was there a heart defect?

EL: Yes, when they were to be born the doctor told my wife Eileen a week before they were born to make no preparations for two. That one would not survive. No way would one of them would survive. They did this with X-rays or whatever they had. And they said, “Now just be prepared, there’s only going be one.” When the time come, the two of them were born, one weighed six pounds, six ounces and the other weighed six pounds, nine ounces and they couldn’t find a thing wrong with either one. I never really got into why didn’t you think otherwise? I didn’t care whether they saw it otherwise, just okay.

Then after she died the medical examiner said that he had never experienced it in a youngster under the age of eighteen. Then we were told that if she had been chronically ill, and they had gone through exhaustive medical exams they might have detected what was wrong. But absent that there was no reason to look for anything wrong and they had their annual medical exams on their birthday, which was February 28th, and she died on July 24th. We have no way of knowing and I don’t know that any further enquiry would help.

CH: What was happening with the rest of your family, children, and where were they during this period of time?

EL: They were all at home of course. She was the youngest of five. The oldest at that time was in the eighth grade and her twin brother we had him examined that same day—not knowing at all what was wrong, the doctor came and checked him out right away. There was nothing wrong him at all. It’s not uncommon, but death out of sequence is hard to accept.

CH: How did that affect, or did it affect, your being a father at the same time, or the time you could spend with your children or things you could do?

EL: I think that Eileen would say that I spent a lot of time away from home. You always had your fair share of evening meetings and one thing or another. There was a lot of that going on. There was a lot of phone calls early in the morning from the juvenile department or something like that and so there was quite a bit of time demands. But all in all I don’t think it was any worse than anybody else with a full time job.

Appointment as Article III Judge

CH: How did you come to be appointed as a federal judge?

EL: As a federal judge?
EL: Naturally ambition is natural to all of us and I viewed being a United States district judge as the premier trial judge’s job, and pecking order of things, and I very much wanted to be that particular being in the court. I became a candidate for appointment in 1980 at the time when Judges Panner and Redden and Frye were appointed. President Carter had set up various committees, and John Schwabe, a practicing lawyer here in Portland of leadership caliber, was in charge of that for Carter. They had a number of candidates that they interviewed and I was interviewed in connection with that. Edith Green was on that and I think Chandler was on that too. Then there was a statewide bar poll and I was first in that bar poll and I had earlier been first in a bar poll for a vacancy on the Supreme Court of Oregon in 1976, I think it was. In any event, Judges Panner and Redden and Frye were appointed and that is all understandable from the standpoint of why they were appointed.

I had somewhat reconciled myself to the proposition that I wasn’t going be appointed as a district judge. That’s it. When Judge Belloni took senior status again there was this opening up for candidacy and Senator Hatfield and I met in about July of ‘83 in his office in Pioneer Courthouse and he told me that I was not going to be appointed, that he wanted Malcolm Marsh appointed. Malcolm was a successful practitioner in Salem. He was one of the eight or so that were judged by the bar committee at that time, that is the Board of Governors and a committee of the bar as being qualified for the job and Senator Hatfield was chairman of Senate Appropriations, and if the senior senator from your district or your state tells you that he’s going to seek the appointment of somebody else it looks like your chances are nil. Right?

CH: Right.

EL: Again that seemed to be the way it was going go. I got a call from a lawyer who would not identify himself. He says, “I’m a lawyer,” and, “The Oregonian is doing a whole lot of enquiry about you. They’re calling lawyers around town and they’re inquiring about you.” A little while later the Oregonian published an editorial saying that I was not going be appointed, that Malcolm Marsh was going be appointed and kind of lamented that fact, editorially. [laughs] And that kind of set off a reaction in the bar here that the assumption was that I was going be appointed and that editorial, in effect, said I wasn’t going be appointed.

Then the bar started to rally in my support by writing letters to Senator Hatfield and so on. What is absolutely fortuitous and, this is the picture of I have of what happened, is that Senator Hatfield was running for re-election in 1984, and my appointment or not had nothing to do with whether or not he was going to be re-elected. He didn’t need
to appoint me to get re-elected and whatever was going happen on this appointment was not going to affect his re-election. In any event Edith Green was co-chair of his re-election committee and Wendell Wyatt was co-chair, I think that was the two. Somehow or another when the discussion of this appointment came along each of them were advocates of my appointment. Senator Hatfield, as he did on so many occasions would send more than one name to the White House, and somehow in the White House my name and Malcolm Marsh’s surfaced and the view I get is the White House come back to Hatfield and said they would chose to appoint me. Edith Green and Wendell Wyatt prevailed upon Senator Hatfield to let it happen.

CH: Is it common that the senator send more than one name?

EL: It was not common but it was common for Hatfield to do that.

CH: Why?

EL: I don’t know. Whatever he did to convey his preference among the names he submitted, I don’t know. That is as shaky as that whole event was, and Chandler told me that he was an advocate with Hatfield on my behalf. I view all of the judicial politics; it’s all cumulative. So whatever happened in ‘80 had an effect on ‘84. See? And that’s why I mentioned what Bob Straub, “It never hurts to lose an election until you win one.” [laughs] There’s a lot of things that happen that are cumulative.

I was very thankful, of course, to be appointed and then was nominated and my hearing consisted of nothing other than going before the Senate Judiciary Committee with only Strom Thurmond present. He asked me a few questions and Senator Hatfield and Senator Packwood were with me and Strom Thurmond said to me, “You are going be confirmed.” That’s the way the hearing started because you have on one side of you the senator who is in charge of collecting all of the money because Packwood was chairman of Taxation.


EL: Whatever it is in the Senate. Hatfield was chairman of Appropriations and he said, “You have one in charge of collecting it all and one in charge of spending it all, there’s no way you’re not going be confirmed.” [both laugh] And it was that simple.

CH: Did that take some pressure off of you?

EL: Oh, yes. I had no reason to believe that there was anything controversial about it at all. A Republican nominating and a Republican Senate and nothing to get anybody excited about. That was an interesting phenomenon and I’m not that well acquainted among the people at the Oregonian, but I think without that editorial it would not have happened. And then the Register Guard ran an editorial

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agreeing with the Oregonian and then the capital, whatever the—

CH: Statesman Journal.

EL: The Statesman ran an editorial saying, “Well we’ve got Malcolm Marsh and he ought to be appointed.” So we had this editorializing before the appointment, which is also very unusual.

CH: Why do you think it happened then?

EL: I don’t know. I’m reasonably certain that a person who is a law clerk in this court went to the Oregonian and said, “Are you going write an editorial before the appointment or are you going write an editorial after the appointment.”

CH: And they wanted one before.

Joining the Court of Appeals

EL: They wanted one before. I don’t know whether the Oregonian really views it the way I do, but I view it as absolutely critical. I just might as well go on and add my perspective on why I got to be at the court of appeals.

CH: Please.

EL: Some time passed and the number of judges on the Ninth Circuit Court of Appeals was increased from twenty-three to twenty-eight so it meant five Reagan appointments to the Ninth Circuit in the mid-80s. Senators Hatfield and Packwood wanted an additional judge from Oregon on the court because Judge Goodwin had moved from Portland and was residing in Pasadena, and with the number of judges that there were, the senators decided there should be another from Oregon. They started casting around for candidates and the situation there is that the administration decides who they’re going to appoint to the court of appeals. The senators have almost absolute say for the district court but not for the court of appeals. They have to confirm, of course, and they have some leverage there but it isn’t like the district court where the senators says to the president, “Appoint this guy” and the president will.

The question came to me, “Would I go to the court of appeals?” from the senators. My response was, “I wouldn’t seek it.” The only thing I would do is I would accept an appointment if it fits into the senators’ plans. Senator Hatfield could have told me “no” in 1984 with total impunity. He could have done whatever he wanted to do and it wouldn’t have cost him a vote, but he didn’t. My attitude was whatever his plan is, or whatever their plan is. Then I was told by the fall of that year that I was going be nominated, but the nomination would not be made until after the first of the year because the new Senate would be formed in 1987.

It also created a vacancy on the district court. Malcolm Marsh is appointed to succeed
me so when the time comes in January of ’87 I was nominated to the court of appeals and Malcolm was nominated for the district court, simultaneously. Those hearings were set, and his and mine were one of four that were set for hearing before the Senate, which now is in the control of the Democrats for the first time during Reagan’s tenure. Nobody knew what was going happen; nobody had any idea. There were nineteen that the president nominated all at once in January, and four of the nineteen were selected for hearing because we were supposed to be non-controversial; both Judge Marsh and me and a nominee to the Third Circuit, I think, and a nominee to the district court in Illinois. Our hearing consisted largely of the senators congratulating each other for getting something done. [CH laughs]

It was a new era, everybody was anticipating there would be a lot of fights and so each of them gave a speech saying how good it was that we’re getting some nominees and we’re getting some confirmations going. The Justice Department was very, very apprehensive about what might come because everybody expected a fight and sure enough—we were confirmed in about March, April, somewhere in there and by September that committee was fighting over Robert Bork. Everybody could see the fights coming and we were glad to be in and out of there. But it was an interesting experience to have gone through. One of my favorite lines to Malcolm Marsh was before we went to the hearing we were having lunch here in Portland and I said, “Malcolm, if they give me a tough time I’m just going tell them I don’t want the job.” [laughs]

CH: How was your relationship with Judge Marsh during all this?

EL: Very cordial, very cordial. See Malcolm, once again, is one of those lawyers who appeared in front of me from time to time, quite a bit in the asbestos cases that I was handling as a magistrate and he did a lot of work in cases that I had. He and I had every reason to be friends and we were. Malcolm is a real fine gentleman.

CH: Was there any awkwardness during that point where you were appointed to the district court when—

EL: No awkwardness.

CH: Nothing at all. Was there anything in your background that made you more appealing to the newspapers or to the White House in selecting you over Judge Marsh? Why would they have chosen you?

EL: Oh, I don’t know except that I had—and my constituency really was lawyers—no partisan credentials, I had nothing going for me in that respect, I had no governmental experience other than having been a deputy
DA and I’ve had no real political connections in any way, but I had been first on a couple of statewide bar polls and I had bar support, really, and that’s all I had. Then by the time it gets around to appointing to the court of appeals the administration had already appointed me once, they couldn’t very well say “We don’t want him” unless they’re going admit making a mistake. I don’t know.

It’s kind of unusual for a judge of the federal court not to have some close personal or political tie to the appointing authority some way or another. I’ve been very fortunate. Maybe it’s longtime tenure as a judge in not only the state court and the federal court but the state court in one part of the state and the federal court in another part of the state so I had, if you will, exposure to the bar in a pretty good segment of the state.

CH: For your district court position when the suggestions from Hatfield go to the White House does it go with a lot of information about both candidates?

EL: I don’t know. I presume it does, but I don’t know the workings of that. I gotta say that in connection with the court of appeals, but not the district court, I was interviewed for a full day in the Justice Department. I don’t know whether Malcolm would have been or not for the district court and whether that was—but I wasn’t interviewed—

[End tape 9, side 1]

Justice Department Interview

EL: I was interviewed in the Justice Department by various lawyers. One was a professor of law and one was head of the civil rights division, and I’ve forgotten who else, but it was a full day interview.

CH: What were they asking you?

EL: Just general things. I think it was aimed more at attitude and competency. One of the questions asked of me at the end of the day was if I had strong feelings about something would I stick up for it and advocate it and stand by it. I answered by saying, “I don’t know. I’ll tell you this. That I’m not going to dump my private, firmly-held views into somebody else’s lawsuit.” That’s all I said. That apparently was satisfactory. [laughs] But, you know, that’s back to my attitude that if you make a case your own you shouldn’t be judging it. Right?

CH: It seems that way.

EL: Once you reach a point where an issue becomes your issue you can’t judge it anymore than you can be a judge in your own case. I don’t know whether that was something they would have viewed with respect or disappointment or just how they looked at that, I don’t know. On substance they listened rather than giving any indication that they wanted anything specific. And I think it was partly just the fact that they
had some scholarship there they were kind of testing you for your scholarship as opposed to not.

CH: You said that most of the questions were aimed at determining how competent—

EL: They’d talk about certain features of the law and just an open discussion of the law on some subject. I don’t know whether there was something they were looking to hear. But it was just a range of discussions about some constitutional provisions and one thing or another.

CH: President Reagan was from California obviously and most of the Ninth Circuit judges are from California aren’t they?

EL: Yes.

CH: What was the reputation of the Ninth Circuit at that point?

EL: I don’t think it had the reputation of being a liberal court. There was no sense that something had to be done to it to either make it one way or the other. You understand that those five that were created—maybe I didn’t complete what I was thinking about—but Senators Packwood and Hatfield wanted another one from Oregon. They went so far as to say, “We’re going to hold up these five” that Reagan had nominated. One was from Nevada, maybe the rest were from California and they were going to hold them if they didn’t give Oregon one. Then the deal was Hatfield and Packwood would let those five go if the next one would come from Oregon. I think that by then Reagan had already appointed at least seven to the Ninth Circuit by the time I was appointed. Diarmuid O’Scannlain preceded me and Robert Beezer in Seattle preceded me as a Reagan appointee, and then I think there were five more. I would say at least eight. I don’t think that was the issue that it looked like today.

CH: Do you think there was anything that Senators Packwood or Hatfield were looking for in supporting someone to the Ninth Circuit?

EL: No, I don’t think they had any criteria on issues. I don’t think they were looking for somebody to advance any issue. I never had that sense at all.

CH: You said that the difference then between the district court and the court of appeals in terms of the nomination process is coming from the White House in the court of appeals. Do you think that they nominated you because of their agreement with Hatfield and Packwood that it would be someone from Oregon.

EL: I know it had to be somebody from Oregon.

CH: Who do you think the other candidates for the court of appeals were in terms of the White House consideration of the matter?

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EL: I don’t know. It might be unfair to even suggest who the other candidates might have been. My assumption is that Judge Panner would have taken it if he’d been appointed. I don’t know who else. His is a name that somehow sticks in my mind that was considered. I don’t know whether that’s even fair to him to say that and I don’t know whether he did anything to seek it or not but in any event that’s an impression I have.

_Eattles Court Judicial Diversity_

CH: Are judges ever appointed to the court of appeals that have not already served in the federal court at a lower level?

EL: Oh, yes.

CH: So from a state court.

EL: Oh yes or from private practice or from the academia.

CH: Really. Of the people on the Ninth Circuit how many were in that category of not having been on the federal bench prior to their appointment?

EL: I’m going say roughly half.

CH: Really, I had no idea.

EL: I can pull a book off the shelf in the other room because it identifies every judge of the court of appeals on whether or not he’s been a district judge. I’d say more than half probably have not been district judges.

CH: Is there a reason that they want to have that kind of representation on the court?

EL: I don’t think it’s either a disadvantage or an advantage to have been a district judge. Being a district judge doesn’t get you anything. The appointment to the court of appeals has more to do with partisan politics than the district court.

CH: And is it partisan in terms of—

EL: That’s why it is somewhat unusual. By the time a person gets to the court of appeals you’d better have some partisan credentials. Normally you do have. I don’t think Goodwin had much of anything, but more so than the district court, certainly. We have judges who have been active politically. You’re not conscious of that so much in the district court that people come from an active political background, but it’s there with the court of appeals.

CH: Once they’ve become a federal judge they’re not active politically in any way.

EL: Oh, no. No, no.

CH: It’s from earlier in their career.
EL: Earlier.

CH: Some people have speculated in the terms of the U.S. Supreme Court that more recently it’s better to be coming from an obscure place in terms of controversy or politics. Justice David Souter, for instance.

EL: Well yes. But that only tells you who’s going get to be confirmed. And that’s not necessarily what a president should look at solely, “Who can I get confirmed?” That’s not it. There is some policy to be made at the Supreme Court level and that’s why we choose presidents. One of the things that presidential candidates talk about is who they’re going appoint, who their ideal is. In the case of George W. Bush, he’s identified to us his ideals, right? That plays into whether or not people want to vote for him.

Just as an aside, one time I was standing in my office and I was looking at the vote on an en banc call. I was identifying with my secretary Jane Glenn at the time that everybody who’d been appointed by a Republican president voted one way and everybody who’d been appointed by a Democrat president had voted the other way. I said to her, “Doesn’t that seem scandalous.” And her reaction was, and I think it was a bit of wisdom, “Well, maybe the presidents knew what they were doing.” [laughs] That’s one way of looking at it, right?

CH: [laughs] Right.

EL: I can only think of the one occasion, and I don’t even remember the case, but it just seemed like everybody appointed by one party was one way and everybody appointed by the other was the other way. I don’t know that it was even a political issue, it was just a value judgment.

CH: Through the rest of your career on the court of appeals; did you see votes splitting on the Ninth Circuit in that manner consistently?

EL: Not right down the line. As I say, that’s the only case that comes to mind where it happened right down the line. There are issues where you can predict which way certain judges are going go because you know them, and you know what their values are and what their attitudes are in certain subject matter areas, and you can get a pretty good feel of what to anticipate. But there is nothing in the court that tries to keep anybody organized or reliable.

CH: Any other factors that you can think of that might have affected your appointment either to the district court or the court of appeals?

EL: No I can’t—you can readily visualize how thankful I am for the opportunities I’ve had, and how unmanageable all of these things are and then to have had the variety of experiences that I’ve had. If you tried to managed it all, you’d break a pick pretty soon.
CH: Did you celebrate after your appointment?

EL: Oh, no not so much. The only thing I did for the court of appeals confirmation process I took seven members of my family and friends back there. I just wanted to be with them and have them see it. The kids were there. In the first hearing for the district court I just happened to be in Washington, D. C. on another event, and they scheduled the hearing while I was there. I was there, and there was Judge Ed Allen’s son and another youngster from Eugene happened to be there in D.C. at the time and they accompanied me to the hearing, but my family wasn’t there.

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**Being on the Court of Appeals**

CH: Did anything change in your life after your appointment to the court of appeals?

EL: Nothing other than the nature of the work and the travel.

CH: Travel to San Francisco.

EL: Or in Pasadena and Seattle, Honolulu and Anchorage, and the whole bit. I was also on a judicial conference advisory committee on bankruptcy rules so I was doing a lot of travel. I was making an average of two trips away from home every month; some as long as a week. It’s tiring.

CH: Are there certain kinds of cases they hand to freshmen members of the appeals court?

EL: Nope. All random. Everything about it is random.

CH: Even the expertise you might have in a field?

EL: We don’t want any expertise. We’re not a court of experts. We’re a court of generalists and we do not gear our cases to anybody who has a background in any subject matter. I am no more likely to sit in a case in Pasadena than a judge who lives in Pasadena nor am I more likely to sit in Portland than a judge who lives in Anchorage or Honolulu.

CH: Is it truly random, I mean, it’s out of the hat?

EL: Truly random. Now when you say truly random if I were to say to the clerk a year in advance, “I want to be in Pasadena in January of next year.”

CH: For the Rose Bowl. [laughs]

EL: Yes. They might jerry rig it so that I would be there during that month. By then I would have no concept of which cases are going to be there or anything else and the last thing that anybody wants to do or be accused of doing is to figure out a way of sitting on a particular case.
We don’t want court to become provincial. We
don’t judges to sit close to home and not know
their colleagues elsewhere or not know what’s
going on elsewhere. They will cut you a little
slack and they did for a senior judge or two who
is in somewhat ill health who would say, “I can
hear cases if I don’t have to travel.” There’s no
reason to think that there’s any jerry rigging or
anything else and why not say, “We’ll let you
sit in Seattle as opposed to not at all.” I cannot
represent that it’s a hundred percent pure, see,
but it’s so near pure that there’s no room to
manipulate. That’s the main thing; either on
subject matter or cases or parties or anything
else. It’s beyond the reach.

Various Paths to the Bench

CH: Looking back over your entire judicial
career it seems like you’ve gotten to the
various benches by so many different means,
appointment, election, the Senate and so on.
How do you feel about the whole process of
becoming a judge looking back on all of this?

EL: The very thing you’ve mentioned has
occurred to me that I have been appointed by
a governor, elected by people in Lane County,
appointed by the United States District Court,
appointed by the Oregon Supreme Court,
appointed by a president on two occasions
and confirmed by a Republican Senate and then
appointed by the Chief Justice to the Foreign
Intelligence Surveillance Court and I feel like I
have not worn out my welcome with anybody
yet. [laughs]

But I have a fondness for election of
judges. I don’t condemn it. I never felt that as
an incumbent judge in a court where the judges
were elected that I was going be punished for
a decision and I have never felt in any context
that I would be punished for a decision as far
as my selfish career ambitions or anything
else were concerned, see. Some of that goes
with the territory and that’s part of the reason
why there’s this lifetime appointment. You’re
not supposed to be worried about that. You’re
not supposed to be worried about the reactions
to it. I didn’t have that fear in Lane County
when I was deciding cases that I was ever
going be punished. And that was reaffirmed
by what I heard in knocking on doors. I had
been a judge of a traffic court, as I said, for a
time and you can’t go down fifty houses and
not run into somebody that you haven’t had
in your courtroom and it just doesn’t turn out
that there’s hatred or revenge or anything else
present.

CH: Do you have any tendency to think that
one means to the bench is better than another?

EL: No, not necessarily. First of all, I marvel
at the competency and the work ethic of
Article III judges. Now here’s people who
are appointed for life who can only be ousted
by impeachment. If anybody chose to be lazy nobody would spend the energy to oust them, right? And yet we have judges who just work, work, work, and the expectations among colleagues are that everybody will do their share. That amazes me, really. But the only thing I say along that line is that not everybody works at the same pace and sense of efficiency and you have some judges who are more thorough.

You need all of those, you need somebody to be real thorough on a certain subject matter that’s going keep everybody else honest. Right? If a three-judge panel is cavalier in deciding a case there’s somebody on this court that will take a look—and everybody has their own interest in subject matters—and they will look at certain issues and call into question. It’s a healthy mix.

Back to the selection, when I say I marvel at Article III judges, the magistrate judges are selected now through a very, very elaborate system where there is no room for cronyism. The district judges make the appointment, but they have to go through certain steps in order to open the process up, notices and certain bar committees and one thing and another. Then the court of appeals appoints the bankruptcy judges and that goes through local committees and then committees of the court, and pretty well kicked around, once again, unmanageable as far as cronyism is concerned. I have every reason to believe that in the magistrates position and in the bankruptcy positions you’re going to have the finest lawyers that you can lay your hands on. Those positions are very strong because the selection process is so pure. I’m not going knock the political process because I’ve already said that I marvel at what the Article III judges do.

Each selection process has its virtue. When it comes to election of judges we speak of the independence of the judiciary and I have been of the feeling that it is important that judges not only be independent from another branch of government, but to a degree they be independent of each other, in the sense that one court is not managing the other court. Now, the court of appeals appoints the bankruptcy judges but those judges are really doing the functions what would otherwise be district court work. The court of appeals can affirm or reverse the district court but it should never be in the role of managing it, and we shouldn’t be agents of each other.

That’s one of the downsides of making so many rules of law federalized is because too many courts have to be obedient to another court on issues that do not necessarily have to be federalized. You ought to have less federal crime, let localities decide what they want to make criminal and not have it all federalized. That’s a view I have that the judiciary could be dangerous if one court could make another court its agent instead of just saying, “You decide the case, we’ll decide whether or not to affirm or reverse but we can’t manage it.”

CH: Have you ever seen a court in danger of
losing its independence from other courts?

EL: I’m thinking these instances where you have these continuing decrees where if an appellate court were ever to say, “Here’s what you have to do” in a continuing decree and whether it’s managing a prison or something like that; I think that’s dangerous. When you get into some of these remedial decrees then I think there would be some danger. I cannot specifically say that I have an illustration of a court of appeals dominating a decision and making the district court an agent to carry out this decree, but I think those are the kinds of risks that I’m talking about, that we don’t want to link the judiciary too tight together. And so I guess that says something for the election of judges doesn’t it. [laughs]

CH: [laughs] You’re in a better position to talk about this process than just about anyone I would think.

EL: When I was in Eugene the legislature contemplated revising the motor vehicle code in the mid-1970s. And that legislature did not create any additional judgeships for the state. It said, “We, the Legislature, will appropriate some money for pro tem judges. Where there is a need we can have pro tem judges.” The next session they were going revise the motor vehicle code they didn’t know how many judges they might need so they weren’t going create a bunch and then not need them.

The first half of the biennium the money went to the courts that needed pro tem help. Then somehow or another the emergency board or somebody decided that they were not going to give any money for pro tem judges until the judges in each of those places asking for helped reported to Salem as to how hard the incumbent judges were working. The Chief Justice said to all of us, “We want a report at the end of the month about how many days you are away from work and whether you went to the dentist or why you were absent.” I said to Justice Kenneth O’Connell, “Have you ordered this?”

He said, “No.”

“I’m glad to hear that because,” I said, “I don’t know how I would respond to that because the legislature doesn’t have to give pro tem money to reward or punish me. If they’re doing it for my reward they’re wasting their money. If they don’t see a need for it they shouldn’t do it to reward me. And furthermore, I didn’t hire out to anybody in Salem to do a days’ work. I hired out to the people Lane County that elected me and it’s my job to see to it that I’m doing a days’ work. It’s not up to somebody to hire somebody else to figure that out. That’s my job.” I never did file a report.

CH: And you never heard anything back?

EL: No, but I was hoping that none of the judges would. But there was only one other that didn’t and I think he just did it inadvertent. I don’t know why, that just doesn’t make sense from a standpoint of responsibility.
CH: It must have seemed somewhat condescending from a judge’s point of view that they would be asked to do that.

EL: Absolutely. I thought somebody doesn’t think much of this job, that you don’t think that the guys in it ought to be responsible for— you know? [laughs]

CH: At this point you had been elected, right?

EL: Oh yes.

CH: So it’s not like there wasn’t a recourse by the people if they thought you were being lazy if you ran for —

EL: If I ran for re-election somebody could accuse me of being lazy if they wanted to. But in any event I just thought that was demeaning and I thought somebody’s view of this position and why somebody in leadership at the state—

[End tape 9, side 2]

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**Bhagwan Shree Rajneesh Era**

CH: This is an interview with Appeals Court Judge Edward Leavy in his chambers at the U. S. Courthouse in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen, the date is March 30, 2004 and this is audio tape ten, side one and video tape number one. I thought I would begin asking you about some of your most significant judicial cases and in terms of chronology the ones that we had discussed previously off tape, the one involving the Bhagwan Shree Rajneesh would have been the first one then of those that we talked about. Could you give me a background as to what this case was all about?

EL: My knowledge of the background of Bhagwan Shree Rajneesh is largely what was reported publicly and of course he was a guru of some sort that attracted a great following, and attracted great wealth, and set up this commune in Wasco County, and was rather abrasive, to say the least, with the political structure in Oregon. It’s my impression that the greatest friction came over land use and what he wanted to do at this commune. He was in effect accused of an effort to take over the small town of Antelope; to capture, in effect, the government. He formed a city of Rajneeshpuram, I think is what they called it, and it was a city within the governmental structure and his followers had control of that governmental entity.

As time went by he was in effect accused of wanting to take over the county through the elective process. Throughout all of this it was controversial. My attitude was that he wasn’t hurting anybody and that the reaction was disproportionate to whatever threat there was. You heard all of these rumors about things that were going on there and I thought they made for interesting rumors, but
nobody had really offered any proof of it.

When I got involved was when he undertook to invite homeless people from around the country to come to his commune. The reaction to that was that he was seeking to have them register to vote and that they would then become such a political force that they could in effect take over the county politically.

CH: What year would it have been?

EL: I’m going say in 1984 probably.

CH: And you were a magistrate?

EL: I was a district judge. Now whether I had anything to do with them as a magistrate I don’t remember, but if it was it was not very memorable or significant. The first case that stands out in my mind was then Norma Paulus’ adoption of an administrative rule while she was Secretary of State. She took the reports that he was bringing in people and seeking to have them registered to vote coupled with treats from people in the Albany area that if you were going to do that they would just go over to Wasco County from Albany, Oregon and register and vote and in effect neutralize it. She was faced with what was the prospect of real serious election fraud. The normal rule was, under the statute, that a registrar of electors could not deny to any person seeking to register the right to register on the basis that they may not be registering in good faith or that they might not be a resident unless that registrar had some cause to challenge and require this person to go through the hearing process.

What Norma Paulus did is she adopted this administrative regulation that said given these various treats that for Wasco County, Oregon, anybody who sought to register would have to make a showing, even though there was not any specific cause to challenge the applicant. Well, that immediately drew a federal action against the Secretary of State claiming that that administrative regulation was an undue burden on the right to vote, an unconstitutional burden on the right to vote and that it was motivated by religious bias. I’ve got to say that I took the whole movement as very serious as a religious phenomenon. I had no attitude that it was not a religious phenomenon. Their contentions I took very seriously that they were being singled out for discrimination.

In that case they asked for an injunction against the rule. I actually heard that application on a Saturday because there was some urgency about it. The secretary of state was represented by the office of the attorney general and the Rajneesh were represented by members of their commune who were lawyers, and as a matter of fact excellent lawyers within that commune, and I heard it.

When that was over I really had wished that what Norma Paulus had testified to from the witness stand in that case would have been seen by everybody in the state because it struck me as a very evenhanded way of
handling the situation. There was some proof of actual fraud in some specific registrations in that case. They had evidence that some people had forged either cancellation of registrations or re-registration of some residents of Wasco County particularly The Dalles.

CH: Was there a connection on the fraud to the individual registering or to the Rajneeshpuram group that were doing it on their behalf?

EL: As I recall, it was individuals doing the registering. I don’t remember whether they were members of the commune, or not, but in any event there was evidence of specific fraud, forgeries in some of these registrations. What her administrative regulation required was that anybody seeking to register to vote in Wasco had to make a showing of good faith. I don’t remember whether she testified to it in the trial or not but I know that she arranged with Cliff Carlson to recruit a lot of lawyers from Portland who were willing to go to serve as hearings officers in Wasco County and a couple bus loads of people actually went to The Dalles to serve as hearings officers in those cases. Anybody who wanted to register would immediately get a hearing to go ahead if approved under the process to be registered. She did this in a way that enlisted all of these volunteers and I think that’s in retrospect a proud history of the willingness of members of the bar to serve a public purpose without ever being paid for it, and she and Cliff Carlson put this together in a setting in which she got the idea, as she told me later on, in just being in downtown Portland thinking about how she was going to solve the problem of having enough registrars.

CH: Cliff Carlson was—?

EL: A lawyer here in Portland, since dead, but I don’t know what friendship existed between Norma Paulus and him before this all came, but I’m sure they were well acquainted. I ruled that the regulation was a reasonable exercise of government power and was not unconstitutional, was not an unreasonable burden on the right to register or the right to vote and that it was not motivated by anti-religious bent. And that was about a year before any of these arrests started. So that was in the election year before the collapse. So it seems like that would have been 1984 and then the criminal cases came along, as I recall, in eighty-five.

CH: And the attorney general at time was?

EL: Dave Frohnmayer. Frohnmayer was challenging, in addition to that— I think that case went to Judge Frye—the legality of the city itself as simply an appendage of a religious organization rather than a truly legitimate governmental entity.

CH: Wasn’t part of the issue going back to the land use factor that their main business enterprise was publishing books of Bhagwan
Shree Rajneesh and his teachings and his lectures and that it was a sizeable publishing venture because he produced many, many books and tapes. That to do that from their home where the commune was would be a violation of land use rules because that was zoned as farming, agricultural land. Didn’t that prompt them to move to Antelope as a way of being in a recognized urban setting?

EL: I believe all that to be true. That never came into focus in any case that I was hearing. I was simply aware that it was land use planning that was the motive for their action, in connection with gaining control of Antelope and, hopefully, from their scheme of things, the whole town.

CH: Antelope had a population of thirty maybe at the most.

EL: I guess that was about it; a few miles away from the commune. That was the first real encounter I had with a case involving them. About a year later came the criminal cases and I think it was pure random assignment again that caused those cases to be assigned to me, that is the prosecution of the Bhagwan Shree Rajneesh himself. During the course of that I had the impression, and I’m sure it’s the fact, that the U. S. attorney was quite tenacious in seeking to prosecute for him for what they saw as violations of the immigration law.

CH: Who was the U.S. attorney?

EL: The U. S. Attorney at the time was Charley Turner, but I think that the assistant U. S. Attorney that had a big hand in all of that was Bob Weaver. Frankly, my perspective on it is that without Bob Weaver there would have been no prosecution of the Bhagwan Shree Rajneesh himself.

CH: Was that after he was trying to leave the country and they caught him in an airport.

EL: Weaver had been pursuing this before that ever happened. I think that when the Bhagwan Shree Rajneesh left that was in expectation of the fact that he was going to be prosecuted. He left Oregon and moved toward the East seeking to leave the country and stopped in, I think it was North Carolina, and was then arrested on the charges of having counseled and shammed marriages and a number violations of the immigration law. He had a bail hearing when he was arrested in North Carolina before a U. S. Magistrate there. Then he was returned to Oregon and, as he had a right, had that bail issue reviewed in front of me. My first handling of that criminal case was to consider the issue of bail or any form of conditions of release before trial. He presented evidence during the course of the full day.

Now, just a little incident there, I had seen pictures or drawings of his appearance in the courts in North Carolina during which he was wearing a hat. When he appeared in front of me he was wearing a hat. Normally we don’t allow people to wear hats and I had
handled some Black Panther cases in Eugene and you know one of their symbols was to wear that little beret of sorts.

CH: Oh right.

**Bhagwan Shree Rajneesh in Court**

EL: I was anticipating a case that involved them and during the weekend I knew that one of them was going to be appearing on a Monday for arraignment. I thought he would be accompanied by a lot of his colleagues and they’d all be wearing hats. If I told them to take off the hat and they told me they wouldn’t do it then I’d have to be willing to fill up the jail with people for not taking off their hat, and I wasn’t willing to do that so I decided I wasn’t going to make an issue of the hat.

CH: What is the logic on the hat?

EL: I guess it’s a matter of respect I think.

CH: Not that they’d be hiding something.

EL: No security reasons it’s just customary that people don’t wear hats. Anyway, I entered the courtroom there was a whole room full of people and we had one of them accused of a serious assault with a dangerous weapon, which was typical of charges made against them, and there were a couple of these fellows in the back of the room that were wearing a hat. In the midst of it I said to myself, “Don’t allow the hats.” I stopped what we were doing and I said to them, “You two fellows in the back of the room are going have to take off your hats.” And they did.

Here the Bhagwan Shree Rajneesh is appearing and I thought, if I’m going be evenhanded, right? They were respectful enough to do what I asked them to do and I thought, you know, even though this is four or five years later I thought that hat was significant to me because of the thought processes in respect to the Black Panthers. I said to the attorney representing Bhagwan Shree Rajneesh, “Your client is going have to take off his hat.” I didn’t tell him to take it off. I said, “Your client’s going have to take off his hat.” The attorney turned to him and told him to take off the hat and he did. So that’s just a little personal aside that may not be significant to anybody else but it was to me.

CH: I know that sometimes hats by gurus are worn for religious purposes.

EL: If he wanted to make that claim he could have.

CH: The Sikhs, for instance, have the turban.

EL: If he wanted to make that claim he could.

CH: And that would have been okay.

EL: I would have heard it.
CH: When Sikhs appear in court do they allow them generally or not?

EL: I would say that if they’re worn for a legitimate religious purpose and it is significant in somebody’s discipline that’s something the court should allow. But I think a person who is going to distinguish himself by claiming to have the right to do it ought to make the claim. He never made the claim. I never told him to take off the hat, his lawyer did. I’ve said on occasion I owed it to those guys in Eugene to be evenhanded because they were very responsive.

In any event, I heard the bail hearing and at the end of it set his bail at I think five hundred thousand dollars and allowed him to go at large, if you will, or released with some conditions on the bail. Now, the U.S. attorney was very disappointed in that and made noises like they were going to appeal. They never did. But you had to understand this man was accused of immigration fraud. He was not accused of any violent crime. The crimes that he was accused of were immigration.

CH: Just the fact that he was accused of this immigration crime, and he’d been trying to flee the country. He had many millions of dollars at his disposal and probably fifty or sixty Rolls Royces parked out in front of his place. Wasn’t there good likelihood that he might run having the chance to do so on bail?

EL: I never felt it was sufficient risk. First of all five hundred thousand would go a long ways in financing pursuit of him and given the fact that he was so conspicuous that any effort to leave—I think there was some restrictions, and I don’t remember what they were, but certainly not to have any airplanes at his disposal was one of them. If you couldn’t escape by air I think his chances of getting out of the country without that kind of opportunity would have been pretty remote. In the total picture the government was pretty glad to see him go. [laughs] In one sense it wouldn’t have been all that bad from a standpoint of who’s here and who isn’t here. If he weren’t here, and ultimately, when he pled guilty, one of the conditions was that he leave the country and stay away.

CH: They wanted him to plead guilty first.

EL: Oh sure.

CH: Otherwise they would have just let him leave the country.

EL: That’s true. It’s a good use of the purpose of prosecution to vindicate the government’s power to enforce its law and it did. Anyway I recall that he produced a stack of papers that was fully a foot high that went into his medical records about him needing to be released because of his back condition. On the airplane he even had this particular chair that he sat in while on the airplane. While he was fleeing, and that issue of his bad back, was prominent.
in the bail hearing. I asked his lawyers, “Do I have to read that whole thing before I can decide this issue?” He told me, “no,” and I said, “Well, if I had to read that before I could decide whether or not to release him that would keep him in jail for a long time. There was a lot of reading material there.

There was a lot of tension surrounding that whole phenomenon because by then there were all these accusations of various kinds of fraud. I don’t remember whether the public accusations had been made against others on the salmonella poisoning in the salad bars in The Dalles, but it was very serious, very tense. The day that he was released on bail was the same day that it was reported in the newspaper that a person accused of rape was released in one of the local courts because there was no room in the local jail. That confirmed my sense that there was something proportionate about a person accused of immigration fraud being permitted to go outside the jail at the same time we didn’t have room in the community to hold people accused of rape.

It wasn’t long after that that the lawyers all came to me and said they had this proposed plea agreement. They presented it to me, which they had to do in order to get my approval because they were agreeing to not only a plea of guilty, and the disposition of some cases, but the actual sentence. Before that could be achieved I had to agree to it otherwise it wasn’t going to fly. It included a requirement that he pay a fine of four hundred thousand dollars, that he be sentenced to prison for a term of five years, that the execution of that judgment of imprisonment be suspended on the condition that he leave the country and stay away. My reaction to it immediately was, “Let’s do that right now. Let’s do it today.” I thought that was a perfect disposition of the case. You cannot, in a typical case, banish a person. I never had entered a sentence saying, “You’re on probation, get out of town,” but this guy was a non-citizen committing immigration fraud, agreeing as part of his sentence to leave.

CH: This was in a full courtroom?

EL: That he agreed to all of this?

CH: Yes.

EL: Yes, but preliminarily, before we assembled the court for his guilty plea I had met with the lawyers in chambers and said I would agree to their proposal.

CH: Was there a representative from the government as well?

EL: Sure, oh, yes.

CH: Did you have to take time to think about this, or did you do it spontaneously?

EL: My reaction to it immediately was that this is the perfect disposition of the case. From
a standpoint of what he had done, it was a substantial penalty to fine him four hundred thousand dollars. I know that that may not have been his personal money but that’s not up to us always to figure out how he came by the money as long as he came by it lawfully.

CH: Why was it four hundred thousand?

EL: I don’t know how that formula was arrived at through the agreement. That left him a hundred thousand dollars to do what he chose with out of the five hundred that was on deposit. As soon as that judgment is entered that four hundred thousand dollars goes straight to the Treasury of the United States. By the time he came in the courtroom, entered his plea, was sentenced, left the courtroom, went right to the airport, got on a plane was gone, four hundred thousand was in the Treasury of the United States.

You didn’t have the phenomenon of an expensive trial. I know that if he was to be tried there would have been a motion for a change of venue and that would have posed a lot of difficulty. I have no idea how I might have ruled on that, but at the same time some of these members were being prosecuted in the courts of the State of Oregon and there was no place to go except someplace within the state for them to be able to try those. Somebody would have to conclude that they were going get a fair trial within the borders of Oregon. If the federal court had been ruling that he couldn’t get a fair trial in the District of Oregon and moved it elsewhere it would have been a suggestion that the others couldn’t get a fair trial in Oregon. As it turned out we never faced those issues, but that was in the works certainly.

[End tape 10, side 1]

Rajneesh Guilty Plea

EL: —Later developed that Charley Turner was the target of a conspiracy to kill him, and that was prosecuted a number of years later. I’m sure that Turner was aware of their attitude toward him and that he would have been a target like so many others were of violence, and yet he kept a level head in all this. He exercised what I thought was good judgment in working out this plea arrangement with him.

CH: What kind of interaction did you have with Bhagwan Shree Rajneesh during all this?

EL: Very little. In entering the plea there had to be a direct verbal exchange between him and me. When I asked him whether or not he understood that by this plea agreement he would never be permitted to reenter the United States instead of saying, “Yes, I understand.” He said words like, “Well, I would never want to come back.” I made the point of saying, “It wouldn’t matter whether you wanted to come back. I want you to know that by agreeing to
do this you’re not going to be permitted to come back.” You have to be pretty precise in those exchanges.

I think he entered what was called an Alford Plea, I haven’t checked that but what he said was, “I acknowledge that the government has this evidence against me. I acknowledge that I want to plead guilty knowing that the government has this evidence against me and that I would likely be convicted.” He doesn’t have to say the words, “I am guilty,” under that scenario. I think, as I recall, that was the kind of plea that he entered. And that’s not an unusual plea because—but otherwise if a person pleads guilty they have to tell the court what are the facts that make you guilty, what did you do to make you guilty. He is relieved from the duty to say that by simply having the prosecutor tell the court what the evidence would be and then him acknowledging, “Yes, they have this evidence and yes, I want to plead guilty.” Just a little nicety, if you will, that lets him point to a little bit of dignity when it’s over.

A little fact of an unusual arrangement, one of his lawyers was Brian O’Neil from Los Angeles. I mentioned the assistant U. S. attorney handling most of this was Bob Weaver and of course I as the judge, all of us are graduates of Notre Dame. [laughs] Now that was a coincidence that you wouldn’t see arranged randomly very often.

CH: What was your impression of Bhagwan Shree Rajneesh?

EL: I could never understand what power he had to attract people. I was traveling from Portland to San Francisco and one of his attorneys was on the same plane, after the fact. It was a rather empty plane and we were seated far apart but he either joined me or I joined him and we started visiting. This was a gentleman named Nunen and a very bright man.

He said, “I noticed during that bail hearing that you were fascinated by him. You looked like you were studying him.” He said, “Did you ever have the sense that you were sentencing an innocent man.”

I said, “Absolutely not.”

Then he asked me why I seemed to be studying him.

I said, “It was because I was trying to figure out his attraction. What about him would attract so many followers?” I couldn’t figure it out, frankly just in what little I had observed of him. A few weeks later I got a letter from this lawyer—now this is much after the fact saying that he had reported to the Bhagwan Shree Rajneesh what I had said about him and the Bhagwan Shree Rajneesh had concluded that my soul was dead. [laughs]

I received this letter and didn’t respond to it and then of course Bhagwan Shree Rajneesh died some time later, I think he died in India. I got a letter from the same lawyer that he wrote that earlier letter at the direction of his client that he wasn’t speaking for himself at all, and said some very respectful things about me. I thought, you know, it’s a case where maybe I
shouldn’t have just sat down with this lawyer and talked lawyer to lawyer about a case that was long since over, but I have no real regrets about what I said to him.

CH: I would imagine that you or any judge would study the person that they were dealing with to some extent.

——— Trials of Rajneesh Followers ————

EL: I think that you can’t avoid it. In fact, I’ve made the observation that from a human standpoint it’s a whole lot more impersonal if a person comes in and pleads guilty and is sentenced and goes. But if you sit in the courtroom with anybody for a week-long trial, and that person is found guilty even though you may never have said a word between the two of you your relationship is different than if they just come in and are sentenced and go.

Now you can’t help it and maybe it’s a good quality of a human being that we pick up those relationships even without talking. His being there and my being there in the courtroom for a full day, even though during that day of the bail hearing there was no exchange; it was during the plea that there had to be the exchanges. I marvel at how people were attracted to that phenomenon, put in so much money and all of that.

Then, of course, later on came the plea of Ma Anand Sheela and some others and these were all agreed upon pleas, even as to the sentences. Sheela pled guilty to what amounted to the first prosecution in the country under the Tylenol Law. I don’t know whether you recall that there was in Seattle the Tylenol that was tampered with and there was some poison put in that.

CH: Right.

EL: That Tylenol event in Seattle was done before there was any federal law on tampering with a product that is in interstate commerce. When you had the salmonella poisoning in The Dalles, of course, that was prosecuted under what they called the Tylenol Law. It was the contamination of a product that was being sold in interstate commerce and the salad bar in The Dalles on an interstate highway is obviously goods of interstate commerce. That was amazing that somebody would have the idea that they could contaminate the water of a whole city, sicken so many of the voters on a given election day that they could then control the county by having a widespread sickness and this thing in putting the salmonella poisoning in the salad bars was an experiment just to see how well it would work.

All that was cultured in laboratories at the commune with people who had the skills to do it. They had enormous skills at that location. They had people with scientific skills, they had the lawyers with enormous skills, and bright people and yet get drawn into that. I don’t know whether if you really put all of that movement to scrutiny whether it would
measure up as being a religion or not, I don’t know. Nobody had to make that decision. As I said when I first started hearing these cases I took their claim that they were a religious entity as a very serious one.

CH: Did you enjoy the case?

EL: I guess I’d say I would. It was obviously one of interest. As far as a volume of work that had to go into it, it didn’t take a lot of work to receive a number of guilty pleas as opposed to having a complex trial and make all of the serious rulings. The only ruling that I made, well there was a couple, but the ruling I made on the bail was one that, you know, I don’t know whether I can look back and say it could have gone either way. It’s pretty clear to me that I have no regret in having released him on bail and in a similar case, I think, for the criteria that we’re to go by he should have been released on bail, given the charge, given the risks and so on. And then there was one of those convicted along with him was the man who was the mayor of Rajneeshpuram. He was this rather striking, big man and I can’t recall his name now. He was the mayor. He was also convicted of immigration fraud and he was represented by Des Connell and they came to me with a plea agreement that would have called for him to be on probation and I rejected that.

CH: On the grounds of?

EL: That here was a very well educated citizen of the United States being convicted of an immigration offence. He was being offered probation at the same time the usual penalty for somebody entering the country for the second time illegally was two years even though he might be an uneducated, non-English speaking person. It just struck me that it was disproportionate to say that this man could get probation and those others were being sentenced at that level.

CH: The immigration issue being not of his coming and going, but with Bhagwan Shree Rajneesh?

EL: Yes, with respect to his, I don’t remember the detail of what he had done, but I think it was these sham marriages and one thing or another that he was a party to counseling or conspiring to do. I don’t think he was accused of entering into a marriage fraudulently with somebody for the purpose of giving them some status under the immigration law but instead just part of the phenomenon. I said I would not sentence him to probation and he ultimately pled guilty and I sentenced him to two years in prison out of a sense of proportion and evenhandedness if you will. Now he was very instrumental in helping the state of Oregon prove that this city that was created was actually an appendage of the commune and was dominated by that commune. One of the contentions that the state was making, I think, either to dissolve
it or to keep it from getting law enforcement assistance and whatever of tax money and whatever else it got as a city within the state of Oregon. When you look back, all these things that people were accusing them of publicly that I kind of discounted at the outset all panned out to be pretty much true. All of the conspiratorial things that they were doing and all of the illegal things that people were suggesting that they were doing all turned out to be true. As difficult as it is to believe that anybody would think that they could engage in that kind of criminal conduct and pull it all off and make it work. Then we had all of these wiretap cases where they were wiretapping each other. It was not wiretapping of somebody else, but it was each other because of the internal friction that was going on. Those I put on probation. There was no jail time that came out of the wiretapping because it was all purely intramural. The jail time came out of these serious efforts to poison and all of that.

CH: The election that they might be influencing was an election on what?

EL: County officers.

CH: County officers for Wasco County?

EL: For Wasco County.

CH: In The Dalles—how was that going to influence what was happening with Rajneeshpuram?

EL: I think they would get control of that county for the purpose of doing whatever they wanted to do with their zoning laws and all of that kind of thing. That’s the impression I had, that that was a real basic motivating factor for wanting to take over the county.

CH: I would wonder what would have happened had they been left on their Big muddy Ranch, or whatever it was called, and allowed to publish their books from the site there and there was never ever any confrontation between them and Antelope and Wasco County? Whether any of these other things might have happened? It seems like it was all predicated on their need to influence the public process so that they could be able to do what they originally wanted to do.

EL: I have no idea except that, given the way the thing unraveled, I don’t think it would have been long before there would have been such internal battles and struggles that it would probably have collapsed. In retrospect, I think that if he had been in jail it would have been easier for him to maintain his standoffishness with the government, and so on, and he would have been more comfortable there than being in the midst of the people that he had tried to run away from.

CH: Interesting.

EL: That’s speculation on my part, but if other things being reasonable I would think

Leavy, Tape Ten
that being in jail, complaining about being a martyr, being unjustly treated and all of that would have been a whole lot more comfortable than trying to sit there and say, “Well, yes, I tried to run away from you people after you gave me all this money.” Right? [both laugh]

EL: I don’t know.

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**Media Attention to Bhagwan Shree Rajneesh**

CH: Was there much in the way of national media attention focused on this?

EL: Oh, yes.

CH: And so the [media] stations were parked outside the courthouse?

EL: All of that and there was a prolonged demonstration around the courthouse one day after he was returned here; an endless stream all around the courthouse and they marched for several hours around.

CH: Bhagwan Shree Rajneesh supporters?

EL: Yes.

CH: They all wore a kind of burgundy outfit, didn’t they?

EL: Any shade of red I understand.

CH: [laughs] In Portland they also had a hotel and a restaurant and actually a disco I believe so there were a lot of Rajneeshees in Portland, and they were all wearing similar colors. They really stood out in a way.

EL: They did. And a lot of relatively young people, very attractive people, very smart people all of that. Really amazing. I don’t know whether they got their money’s worth as a pastime or they got their money’s worth of what they would label as religion, but I don’t have too much sympathy for anybody who gave them large sums of money probably they got their money’s worth.

CH: All I can remember is that there were a lot of burgundy colored clothes in the used clothes stores after. [laughs]

EL: Was that so? [laughs] I think it’s Dave Frohnmayer who makes the point repeatedly that not a single Oregonian raised a hand in violence against any of them. There was an explosion at the hotel, but that was carried by a California resident who was here and set off an explosion there of what magnitude, it wasn’t all that great. In any event that was not an Oregonian who did that. I think that it is rather a proud chapter, if you will, that there was no violence. The most threatening thing that any Oregonian did was those people around Albany, as I recall, who threatened to go over there and register and commit the same kind of fraud that they attributed to the Bhagwan
Shree Rajneesh to neutralize it. That’s what Norma Paulus put a stop to, see.

CH: Is there anything else you’d like to say on this case?

EL: No, that’s all. There’s some commemorative coins that some private entrepreneur struck, I don’t know whether you’ve ever seen them.

CH: No, I haven’t.

EL: There’s a set of coins about this Bhagwan Shree Rajneesh phenomenon. I bought a set for each of my kids and maybe a set like that ought to be part of the District Court historical record. One of them, for example, shows a Rolls Royce and the Bhagwan and it has the label, “We bag the Bhagwan.” Another one says, “Bye, bye Bhagwan.” It’s quite a collection of coins. I think some guy in Eugene did that.

CH: I think that probably most people at the time probably the most recognizable figure after Bhagwan Shree Rajneesh was Ma Anand Sheela who was on a number of news programs and television programs and had even though she was I think Indian had a good command of English swear words.

EL: Oh, yes. It was interesting that she pled guilty, and I sentenced her to several years in federal prison. After she was released from prison she went to someplace like Switzerland that had no extradition treaty with the U. S., and the U. S. sought to get her back and prosecute her for the conspiracy to kill Turner and were unsuccessful in getting her back. Some others were prosecuted in that by staff from the attorney general’s office, but that was a couple years or more after. That was after I left the district court that those cases were prosecuted as they affected Turner, and I think even after Turner left the U. S. attorney’s office.

From a standpoint of governmental reaction and law enforcement that thing was handled pretty well. I don’t see any reason to regret the fact that he was gone and once he was gone the whole thing collapsed and from a standpoint of having it over with. I don’t think anybody can look back and say somebody was discriminated against because of their religion, or somebody was run out of town because of their religion, or anything else.

CH: Would you like to go on to your next case?

EL: We can keep right on going.

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Appeals Court Administrative Changes

CH: In terms of the cases that we talked about off tape the next one chronologically would have been the Wen Ho Lee case, is that right?

CH: You were appointed then to the surveillance court after that.

EL: After that, yes.

CH: You had also said that by this time had done other things on the appeals court. There was your involvement within the administration of the court on screening and also you had mentioned the Proposition 209 in California, which eliminated affirmation action. Did that take place before Wen Ho Lee?

EL: Yes. First of all with respect to kind of my experience as a trial judge, I had been a trial judge for thirty years by the time I was going into the court of appeals. The first meeting I attended of the court of appeals judges there was a discussion about a long-range plan as to how the clerk’s office was going be organized twenty-five years down the line and a lot of other discussions about how the court was going respond to the needs of parts of the circuit. When we got about finished the Chief Judge James Browning mentioned that the court was something like four months behind in deciding motions. My reaction to that was that was the most significant problem the court had and we shouldn’t be worrying about what was going on twenty-five years down the line if we couldn’t take care of what was happening right in front of us. I made the observation that if it were up to me, I would just sit down and start deciding motions.

With the way the court of appeals works as a collegial court one judge can’t do it, you have to have three judges really to do much by way of disposing of a case. When I got home a day or so later the chief judge called me and he told me that Judge Arthur Alarcon had agreed that he would sit down with me if Judge Browning was willing to sit down and the three of us would start deciding motions. He asked me if I would participate in San Francisco and I said I would. I went down to San Francisco and started on a Monday afternoon and we had a scheme where the three judges would simply be in a room with all of these files where there were pending motions and one or the other of us would pick up a file and look at the file until we understood what was at stake and then get the attention of the other two, explain it, and we would try to rule on it if we could and move on. Well, the next day there were three more judges who happened to be in San Francisco and they started doing the same thing and then by Wednesday I think we had three panels doing it and by Thursday we ran out of work.

At that point the chief judge said that if those of us who were there, would agree that we would keep the court current on motions he would suspend the other procedure. The previous procedure was to have a staff attorney write a memo about every motion instead of the judges constituting the panel assembling they would all be in their home chambers and these matters would be mailed to a member of the panel in Seattle who would pass on it and
mail to a member of the panel who might be in Arizona and then that judge would mail it to another judge who might be in Los Angeles. That judge would pass on it and then that judge would mail it to the clerk who would file the order. Instead of doing all that we just sat down and decided these motions. The chief judge asked if those of us in San Francisco would be willing to make a commitment to keep the court current on its motions he would take it upon himself to suspend the other procedure until we could go back to the court and get general approval of it. So we did that and the court approved it for a one-year experiment. We did it that way for a full year and then it was adopted by the court and that’s the way we keep ourselves current.

At any given time if there are three judges of the court who constitute the motions panel, they meet in San Francisco and they decide all the pending motions and keep the court current. They also serve as any emergency motion that comes up they can be reached at their chambers and they can communicate by telephone or video and they can decide anything that has to be decided momentarily. As an outgrowth of that, we now screen out cases based on their simplicity. And probably a hundred and fifty cases a month are identified as what we call screeners because—

[End tape 10, side 2]
as an unpleasant chore, and some view it as better work than having to hear certain cases in argument every month. That’s something that I’m either blamed for or given credit for depending upon everybody’s perspective of it.

CH: How much of the administration of the court is integrated with the way the other districts are administered, or the other circuits are administered?

EL: Not very much. You take a look at what others are doing, mechanically, to handle things, but it seems like every circuit has its own view of how to handle cases. Part of that is based on the geography because some circuit courts only hear arguments in one place. All of the judges of that court are situated in that one place and you have a different level of communication than we do in a circuit this big.

One of the requirements for this circuit is the law contemplates that there be a judge from each of the nine states in regular active service on the court. Now part of that is to make the court responsive to whatever the needs are throughout the circuit. I think it’s a good rule, and I say to the lawyers here in Portland, “If you have a case that you think the court has lost track of, call it to my attention and I’ll find out where it is and whether or not it’s fallen off the chart because of a case delayed a long time.” It’s pretty hard for a lawyer to start poking around, but has some obligation to know that the case is at least on track to get decided sometime.

CH: How much does the Ninth Circuit decide, or organize, or dictate the administration of court cases and court procedures in the individual districts within the circuit?

EL: Not at all.

CH: So those are left up to the district?

EL: Yes, the district court. Whether, for example, a district court has an individual calendar or a central calendar, it’s all up to that district court. How it uses magistrates, it’s all up to that court. The only real handle, if you will, other than either affirming or reversing cases that the circuit court has on the district court or a district, is the circuit court does make the appointments of bankruptcy judges, and makes the appointment of the federal defender.

CH: Is that true in other circuits, that they allow the districts within their circuits great leeway as to the administering of their court?

EL: Yes.

CH: How about the administration of the circuits, does the Supreme Court or any other entity in the government dictate or have control in any way what’s going on in the circuits?

EL: No.
Leavy, Tape Eleven

Ninth Circuit Judicial Council

EL: Does not. I want to make one thing clear. When we’re talking about the circuit court there is a separate entity, if you will, that we call the judicial conference of the circuit court. That’s an assembly, or an entity, that includes all of the judges in the circuit: district, circuit, magistrate, and bankruptcy judges, and even includes when it assembles the U. S. attorneys, the federal defenders and certain lawyer representatives. It’s a big group.

Then there is a judicial council within the Ninth Circuit that has membership of district and circuit judges. That’s distinguished from the court; it isn’t the circuit court, it’s the circuit council. It has certain governing responsibility. For example, that is the location to which complaints of judicial misconduct might go, but that’s not because the circuit court is running the district court.

This council has an even number of circuit judges and district judges with the exception that the chief judge of the circuit is the presiding officer, so to that extent the district judges are outnumbered. Then it has a representative non-voting member who is a representative of senior judges of the circuit. Then it has another non-voting member, I think, who is a representative of bankruptcy, and another non-voting member who’s a magistrate. There’s an administration of the circuit and if somebody wants to have extra money budgeted for a given purpose in a district, it would be that entity that they would go to not the circuit court. I don’t know whether that makes sense or not.

CH: They would go to the judicial conference or to the—

EL: Judicial council.

CH: —council for clarifying administration.

EL: Yes. For example let’s say you needed an additional part-time court reporter in the District of Oregon. You would want to make your case to the council, see. From a standpoint of what a circuit judge does in relationship to the district court, if you’re not a member of that council you have no administrative responsibility with respect to the district court.

CH: Have you been a member of either the conference or the council?

EL: I was a member of the council and all of us are members of the conference.

CH: Oh, that’s right because it includes everyone. How often does the council convene?

EL: Probably on an every-other-month basis—regularly—and has quite a bit of business.

CH: Really? Have there been cases of judicial misconduct.

EL: Yes.
CH: Are those ever publicized?

EL: I don’t remember. I think so. For example—yes, I think so. For example if a judge became incapacitated and did not resign, or take senior status, or do something to get himself out of the loop, it would be the judicial council that would hear and decide whether or not that person should be forced to take senior status, or forced to go on disability until he got well enough to, in their view, to be back hearing cases. That’s the mechanism for controlling that. We’ve had instances where the council has publicly reprimanded a judge.

CH: Have you sat on any of those cases?

EL: I’ve never sat on a reprimand.

CH: Or an incapacitation?

EL: No. With one judge, I was designated by the chief judge to go and suggest that that judge take senior status because of what was probably going come a hearing on his capacity, and he agreed to take senior status and avoided that. But that’s a mechanism that has to be in place. And it’s a serious thing. I think that on balance at least, speaking selfishly, I think the judges cut each other too much slack in allowing judges to go beyond time or beyond their capacity and allow them to stay out there doing things publicly that would diminish their career. I think we should be a little more attentive to it. I don’t think we do each other a favor by letting each other do things that we shouldn’t be doing beyond our capacity, age, or mental condition, or whatever it is. The conference does—I’ve forgotten which one has a committee that deals with this subject, how should we react to people who are of diminished capacity?

CH: There are committees of the conference?

EL: Oh yes. These things are serious and looked at and we would hate to be in the position where one judge had to petition the council to in effect remove the work from another. Once the person is senior, as opposed to a judge in regular active service who is starting to have diminished capacity, the court then can control all of that by just not assigning work. None of us as seniors can do anything that isn’t assigned to us. We can’t go out here and solicit our own work. So that’s a way we have of keeping control.

CH: I see. I think the public has the impression that once a federal judge, always a federal judge and there’s virtually nothing that can occur that can affect their terms on the bench.

EL: Well, it doesn’t affect the term. The appointment still goes on for life and it isn’t as if we’re going say to somebody who’s incapacitated, “You’re out. You’re no longer a judge.” But you have to be in a status that
doesn’t allow any cases to be heard by you and you don’t kick the person out of office. They still get the pay so it isn’t as if you’re penalizing them in any way. It’s just to protect the public from an incompetent judge and by correlation, to prevent a judge from doing things while they’re in a condition of incapacity that diminishes their stature for what they’ve already done. I think it’s a cruel fate to allow somebody to go on when they shouldn’t be going on. It’s a responsibility of the rest of us to see to it that it don’t happen and I would hope that my colleagues would never let it happen to me if they saw it coming.

CH: Given the extraordinary abilities that so many federal judges have, and keen intellectual capacity, it seems like it would be a very sensitive point in their career for them to relinquish the control they have over their workload, and the cases they get, and have that controlled outside of their ability to influence it. Are there often cases where judges are hesitant to go at that point onto senior status?

EL: Yes, I think so. It’s not widespread, only one case really comes into focus and that judge took the step necessary. Several months after the fact, he said to me something very complimentary in connection with my role in getting him to take that step, and I thought he absolved me of any awkwardness in that. When he was being honored on the occasion of taking his senior status he mentioned that he became concerned about the shadow he was casting; that’s the way he put it. He was perceptive enough to know that there were things that weren’t quite right. Part of that comes from my having been a judge of a probate court and I heard a lot of mental hearings. While you hate to institutionalize people you don’t do people favors by neglecting them. I had people who I had committed to the mental institution see me and tell me later how well they were and all of that. You assume that people are going to be feisty about it and it’s not necessarily true.

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**Ninth Circuit Case Assignment**

CH: Another question on the administration, on the district court level isn’t it the chief clerk that really handles a lot of the distribution of cases?

EL: They have formulas and for example in the district court they go on a rotation. A case is filed, assigned to one judge, and the next case filed is assigned to the next judge and they go through a rotation, a wheel they call it. They have some exceptions to that where related cases are assigned to a judge who already has a certain case and if a new one is filed [and] it’s related to that, it will go to the judge who has that subject matter.

With respect to the court of appeals the
clerk randomly, with the use of a computer, assigns the judges to sit in certain locations at certain times. The cases that are ready for calendaring are calendared in the sequence in which they were filed, not necessarily in the sequence in which they became ready for argument, and they are put on various calendars depending upon the locations that they come from. For example, cases in Pasadena all come from the central and southern district of California. All the cases from Arizona go into San Francisco. They’re calendared, or put on those actual argument calendars, based upon their case numbers and a certain amount of statutory priority. A criminal case will have some statutory priority. If the court has a backlog it can’t let its criminal cases languish as it does some of its civil cases. She’s got all of those things to watch out for.

CH: I see. On the judicial council is that entirely en banc?

EL: Yes.

CH: All the members comprise the en banc?

EL: Yes. But you don’t look upon that as if they’re hearing cases in the ordinary sense. They’re hearing issues that relate to the administration of the court including capacity in those cases where it would come to that.

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**Role of Chief Judge**

CH: How much does the chief judge of, say the Oregon District Court, or the Ninth Circuit Court, how much involvement do they have in the administration of the court?

EL: A lot. The chief judge of the district is the spokesperson and the advocate for whatever the needs are of the court, is aware of certainly of every issue that affects the administration of the court. You expect that the clerk will be very attentive to what the chief judge wants. In our situation on the court of appeals the chief judge is always a member of every en banc panel. There are eleven judges of the en banc—I should say instead of panel en banc court, there are eleven members always with the chief judge one of those eleven. That has been the subject of some argument among the members of the court as to whether or not that gives the chief judge more power, which it does, in the actual decision of given cases than a judge who is not the chief has in the decision of cases just by reason of her participation in every one of those cases. Occasionally, the chief judge cannot participate, for whatever reason, and the most senior judge of the en banc panel would preside.

CH: Does the administration of the court change that much from one court administrator to the next, or one chief judge to the next?
EL: Yes. You have judges who really almost have a second calling of court administration and study it worldwide, at least in the case of our Judge Cliff Wallace. He was interested in how courts are administered in China or any other place in the world and really, really almost made a science of court administration. I thought he was very attentive to it. Then you have others who are in the role who really have no patience, if you will, or no admiration for bureaucracy and all of that. I can sympathize with that point of view, but I think everybody brings their own strength to it and their own style. James Browning was a great one for having everybody participate.

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**Work of Appeals Court**

CH: When you went onto the appeals court how did your life change, and how did your work change, from the experience that you had on the district court?

EL: In the change of the work. The subject matter was pretty much the same as far as—the only thing that the court of appeals has that district court doesn’t have is immigration cases or appeals from some of the administrative bodies including rate cases from Bonneville Power Administration. The court of appeals has the direct review of that. It doesn’t go through the district court and then to the circuit court. Immigration cases go directly to the court of appeals instead of to the district court first. We do not have any jurisdiction in patent cases; they go to the federal circuit. The district court does. The correlation of jurisdiction or subject matter is pretty much the same, so it’s largely a matter of mechanics.

As a district judge I felt that I had to be ready to spend every day in the courtroom trying cases. You have a fair measure of motions for summary judgment and sentencing, which, at the time I was in the district court, was always done on Monday. As a practical matter it meant that I spent either Saturday or Sunday, a full day every week, reading.

On the court of appeals where we set our arguments in batches of one week at a time, and , we might go to Seattle or Pasadena or San Francisco and hear thirty cases in one week, it means the rest of the days of the month you don’t have any cases to hear. You have a lot of work to do during that time but you can do it in the middle of the night, or you can do it when the mood strikes you, and you can do things in the day that you might not be able to do as a district judge. It gives you this great flexibility in your personal schedule that you never had as a district judge.

CH: What is the workload in terms of the number of hours you actually put in comparing the district to your appeals court position?

EL: I’d say it’s about the same. Maybe not as much, in my case, as a circuit judge; I viewed
the work of a United States district judge as the hardest job I had ever in my career.

CH: For what reason?

EL: Because of the need to sentence so many people, to rule on so many motions for summary judgment, to rule on appeals in social security cases which involve substantial records and then to be ready to try cases all day, all week. Once you’ve set a case for trial and you get into a trial, everybody trying a case schedules around the expectation that you’re not going take half hour off early on a given day or an hour off on a given day. You’ve gotta be predictable that you’re going be there all day, every day, during that trial so people can schedule their witnesses and all that in accord with that expectation. I think it’s a pretty heavy load that a district judge has to carry. That’s my view.

CH: Could I ask how many hours a week do you think you probably put in as a district court judge?

EL: Oh, no, I’ve never really thought of that.

CH: Did you have to work on your weekends?

EL: Yes, it probably runs to sixty hours or something like that, typically, in a week. I think that there’s a false view of the demands that are on a judge, even in the bar. I don’t think that you fully appreciate it. One of the things that came as the biggest shock to me when I first became a judge is the magnitude of the record keeping process. I was just shocked at the amount of work that goes in to keeping the records of the court. I became convinced early on that a court can be no better than the records it keeps. No way on earth that you can be better than the records. I remember one time when I was a district judge in Eugene. I got a call at home from the sheriff of Marion County.

He says, “We have a guy in jail on an order from your court for nonpayment of a fine,” and “This guy claims he paid it.”

My reaction was, “He can’t be right. Our records are good. He’s lying to you.”

Just as soon as I finished talking to him, I jumped in the car and I went down to the courthouse. I got into the courthouse and to get into the Clerk’s office I had to crawl through a window, literally, from the hallway into the clerk’s office, and got the lights on and got out the record, and sure enough this guy had paid the fine. And he was in jail for not paying. Well naturally I got on the phone to the sheriff and I said, “Yes, the guy’s right.” See? Early on I became very much aware that people are in jail, or not in jail, depending on the accuracy of our records.

You can have fantasies about how good your work is as a judge, but it doesn’t amount to anything unless that record of whatever you did is accurate. All you leave behind when you go home at the end of the day is a record of what you did. Now how can you be better than that record? No way on earth. That’s one of
the first things that I try to impress on people when they’re record keepers is they may think this is routine work, but it’s critically important. I have been very respectful of the record keepers and as helpful as I can be to do whatever I do clearly so that they’re records are clear and maybe that little lesson early on was worthwhile. I’d still be feeling guilty if I hadn’t gone down there and looked even though I thought I was confident that we had to be right.

CH: When you went onto the court of appeals what was your relationship with the other judges. There are, what, twenty-seven judges on the appeals court?

[End tape 11, side 1]

Cases Heard en banc

EL: —and you get acquainted with the judges personally and you interact a great deal with them socially. You don’t get linked up with them in deciding cases like you do in a court that collegial. Whenever you’re deciding a case you’re bringing yourself in accord with someone else’s thinking, or you’re trying to bring them into accord with what you’re thinking. One of the great experiences of this motion and screening, is you sit down with your colleagues and right in the midst of the decision making process you’re exchanging ideas. You’re relying on the experience and scholarship of the person sitting alongside of you, and that’s one of the reasons why I feel some comfort in deciding those cases in this three-judge oral screening process is that you have the benefit of all of these experiences. Now, you also get a better sense of the attitudes of your colleagues, and you pick up a pretty good reading on what their attitudes are going be toward certain subject matters. You also pick up a pretty good idea of their strengths.

I wish we had a way of figuring out so that we could use the strengths of every one of the judges instead of saying everybody has to decide an even number of cases. We distribute the workload on the basis of number of cases that go to everybody. Everybody sits on so many calendars a year. Everybody has so many cases per year and we pass around the work on death penalty cases in an evenhanded way. We pass around the work on en banc cases in an evenhanded way. That doesn’t mean that everybody works at the same pace. A guy who is working every bit as hard as somebody else may produce a lot less cases. But they do it in a different way and they do it with more intensity and so that judge, if you will, keeps those who are a little more efficient or rapid honest on how deep they have to go. Every one of these strengths is used, but I wish we could use it better. That’s one of the regrets I have, but I don’t know how to do it.

CH: Were you also on en banc cases with the appeals court?
EL: Oh yes.

CH: How often would that occur?

EL: During my term in regular active service we probably had thirty votes a year, and of those votes, maybe fifteen would go en banc, half of them. That would mean there would be one en banc court every month and just on the numerical likelihood it would mean that maybe a given judge would sit every other month on an en banc court. That always involved a special trip to San Francisco or to Pasadena. I think the level of en banc activity now is higher than that. I think they’re probably averaging three a month that actually are heard. They always do it in connection with a court meeting so that those cases are all heard in a given week. And if there is to be a court meeting, the court meeting is to go in that week. Sometimes a judge will go to San Francisco and have two en banc cases and a court meeting all in one trip. They’re working out some more efficiencies. I haven’t sat on an en banc for now seven years or more, thankfully. [laughs]

CH: They would handle more than one case at a time when they would get together.

EL: But each of those en banc courts are randomly drawn so the en banc court, even though there’s two cases set to follow each other, the makeup of the court will be different in each case. There’s a random selection, and if a judge has not been on an en banc court after two or three have been called that judge will be on the next en banc court automatically instead of randomly. That’s a way of keeping all of the judges active in en banc decisions and of distributing the workload. If somebody gets lucky and isn’t drawn that don’t mean they’re immune, they’re going to get their fair share of turns. It’s a well thought out scheme and it’s amazing how much detail there is in all of this and how much almost rigidity there is in how the court is run. Part of that is to keep it from being provincial and to keep it anybody from being a self-appointed expert in any field and to bring the judgment of the whole court to bear ultimately on whatever we do.

CH: When you’re on a panel or en banc, what are the main factors involved in influencing another judge’s view on a case? When you’re trying to broker a decision is it their expertise or their seniority or their capacity for logic and reasoning, craftsmanship?

EL: I don’t know that I can shed any light on that because it all happens almost haphazardly. You become aware that a judge, in the course of questioning, will be asking questions to support his point of view, in effect giving the lawyers an opportunity to talk about things that this lawyer wants to get to say to his colleagues, right? You become aware that this judge is asking questions for the benefit of asking the lawyer to point out certain facets or issues, and so on, so that these colleagues can hear it. Some judges, by experience, are very persuasive given what
they know about, let’s say, government works. If you have somebody with experience in the Justice Department they may be able to point out things that are significant in the way things work in practicality. I guess the person will bring all of those skills to bear, if you will, to try to be persuasive. Now that happens in far less cases than you might assume.

There aren’t very many cases in which a judge gets caught up in trying to persuade the others to his view. You decide and if the others don’t agree with you, you note a dissent and that’s all there is to it. It isn’t that you want the case to turn out a particular way, it’s just that you realize you can’t agree with them so you dissent and you don’t spend much time trying to persuade them it’s the other way around. Not identifiable. Maybe I’ve mentioned this already, once you’ve made a cause your own, you better not be judging it because you can’t be a judge in your own case. I’ve not gotten too caught up in trying to fashion the law to my own attitudes.

Exemplary Judges

CH: Of the various courts that you have sat on and there’ve been quite a few—

EL: Quite a few.

CH: —who have you most admired in their judicial ability?

EL: I’m a great admirer of Judge Skopil for what he did to the district court here.

CH: On the magistrate—

EL: On the magistrates and the whole business of the mechanisms by which it made the court more assessable, and I will say, a more party friendly court. Not particularly because he decided cases better or differently than somebody else, or that I would necessarily always agree with, or anything like that. Just that the power of his leadership and personality allowed him to make the court more reflect, in my view, the needs of the litigants.

I would say the same about Bill Fort in Eugene who really transformed the circuit court in Lane County into a modern court. He was somewhat controversial, but that’s okay. I think that strong leaders will occasionally be a little bit controversial and if you are going to be a strong leader you’re going have to push for things and he did that. There are so many others that I just admire for their personality and efficiency and all of that but I hesitate to just start naming people for fear I’d leave some out.

CH: Thinking about the judges on the district court, Judge Goodwin had already gone to the appeals when you came on the district court.

EL: Right.
CH: And Judge Skopil had as well?

EL: No. Judge Skopil was in the district court during my entire tenure as a magistrate judge and then, I want to correct myself, he did leave before I became a district judge, but he was here all that time from, let’s see, ’76 until about ‘79 went on the Court of Appeals?

CH: President Carter appointed him. From ’76 to ’79 he was the chief judge at the district court. Is there much contact between the court of appeals judges that are here with the district court judges?

EL: Yes.

CH: Is there a lot of social contact as well?

EL: Yes.

CH: How important is that social contact to your ability to be a better judge?

EL: I don’t know that I would say it’s ability to be a better judge, but it’s an awareness of the day-to-day problems of the district court, and the day-to-day concerns of the district court. I make it a point, when I’m here and it’s convenient and I know I’m welcome to attend every one of the district judges meetings on Monday. I just pop in there, knowing I’m welcome, knowing that if I have anything to say about the issues that are in front of them they’ll let me say it. They also get to criticize the court of appeals. They have a kind of a license to tell me how much they disagree with any decision of the court of appeals and maybe that’s healthy to know how they’re reacting to what we’re doing, what they think. There’s a majority of the judges of the district court in Oregon who would like to see the circuit split.

Splitting the Ninth Circuit

CH: I have planned on asking you about that so since you’ve brought that up; how do you feel about that issue?

EL: There was a time when I was very much opposed to it, and I’ve been at a point now for a number of years that I don’t care. I say so publicly, that I don’t care. I am aware that if the court is split along any formula that has been suggested so far the Ninth Circuit will still be too big by anybody’s standard, if somebody really has a standard as to how big a court ought to be. If they split the Ninth Circuit they will abandon any experiment on how big a circuit can be. Now if you keep splitting circuits over the indefinite future how many circuits are we going have? Literally, what, a hundred?

I don’t think it’s a matter of size; I think it’s a matter of discipline. We can actually keep our cases consistent given our research tools and what the computer will tell us about what has already been decided in a way that will allow a court to grow indefinitely. I don’t
think we’ve reached a point where we say a court cannot function because it’s too big. I don’t think we’re there yet. The fact that the Ninth Circuit is reversed more frequently than some others, if that’s the case in a given year, I think is a function of size. I think it’s the fact that many of the issues that are going to arise are more likely to arise in a big one than in a small one. If we have a new issue of constitutional law, or environmental law, or whatever, it’s more likely to arise in the Ninth than in some other smaller circuit.

CH: However, the popular opinion is that they get reversed more often, if they do, because of some nature of the judges that compose that circuit, particularly the California judges.

EL: I don’t know whether that’s true or not, but if it is true, by splitting the circuit there’s still going be judges and they’re still going be deciding cases. Right?

CH: Right.

EL: To split the circuit doesn’t either add to or subtract from that problem, if it is a problem. The perception that it’s the California judges that have caused the Ninth Circuit to be reversed more than some other circuit is not true. The whole idea that it’s a group of liberal California judges probably doesn’t bear out when you get to studying the actual cases that were the cause of the political alarm. I think that some of the environmental cases that got the most attention on issues to split had a fair number of non-California judges on it.

The major case that is now in focus is the Pledge of Allegiance case and while there were two California judges on that and one non-California judge, Ted Goodwin who actually wrote the opinion, one of the California judges dissented. You can just say, “Well it’s because they’re from California” they do a certain thing. Just because they’re not from California they do a certain thing. It doesn’t work. What got Alaska all excited was a decision, as I recall, written by a California judge but participated in by others I can’t draw that correlation.

CH: Would there be other reasons that people might want to see the court split?

Keeping Current on Decisions

EL: If somebody could make a good case for the judicial administration for wanting it split—now the district judges will tell you that there are so many cases coming out of the Ninth Circuit that they cannot keep up with the reading of what the court is saying. If you were in a district court and it was a smaller circuit and it was turning out half the opinions that the Ninth Circuit was turning out then you could keep abreast of what it was saying. I will say that as a circuit judge in Lane County I could read everything that the Supreme Court was saying and everything that the Court of
Appeals was saying. I could read that, I could keep up. I have to admit that I cannot read everything that the Ninth Circuit is saying and keep up with what I’m supposed to be doing in deciding cases. If I were a judge in regular active service it would be hopeless.

CH: Do judges use their clerks or other people on their staff to help them keep up with that material?

EL: Sure.

CH: Giving them a synopsis of—

EL: I don’t do this, but I’m sure there are others who do, who have an expertise or an interest in a certain subject matter will have staff or externs reading everything that the court is saying on that subject matter and calling it to the attention of that judge. That’s okay that somebody is doing that, but we all don’t need to be doing that, see. If somebody has an interest in a subject matter that they want to keep track of everything the court is saying about that’s fine. It’s healthy. That’s one of the things that we’re very jealous of, nobody tells anybody else on the court how to use their staff. Once a judge starts suggesting that another judge ought to use his staff in a certain way you get shut down pretty quick. [laughs]

CH: [laughs] Did you get a chance to get to know every one of the Ninth Circuit judges?

EL: Not real well. We have about three major social occasions a year and we have the Ninth Circuit Judicial Conference, summertime. That’s a big one, probably seven or eight hundred people attend. That’s the one including lawyers and defenders and prosecutors and judges of every level, and we usually have a Supreme Court justice who visits during that time and is part of the program. There’s a chance to renew acquaintances with everybody you know in the circuit.

We have our holiday party in December at a court meeting there is this party that includes spouses. We have annually what we call a symposium, and just judges of the Ninth Circuit meet for three days and usually spouses are there for the social events that surround it. This is a time at which no business is done, no motions are made, no votes are taken, nothing is decided and it’s a chance for anybody to just talk about anything that they want. Somebody’s in charge of an agenda and you can get your item on the agenda and you can talk about that if you want. For example, right now we have an extraordinary number of immigration cases coming in because the administration has streamlined the procedure to move cases through the administrative level more rapidly. They’re hitting us; how are we going handle those? That’s one of the issues we’re going talk about at the symposium and give everybody an opportunity to make suggestions as to any new procedures that we might employ, or way of handling those cases.
I’m sure everybody has some ideas. After that, at court meetings we will have some proposals that may come out of the experience.

Death Penalty Cases

CH: Of the cases that you’ve been a part of, or heard, on the Ninth Circuit, which ones stand out as being the most important?

EL: Every death penalty case, of course, has an importance of its own. Aside from that a case that I participated in that got a lot of attention, had far reaching effects probably in the day-to-day life for a lot of people, was the issue of the constitutionality of Proposition 209 in California. An initiative measure that amended the California constitution that would in effect, not by its language, but in its effect, put an end to affirmative action in California government.

CH: How did you feel about the issue?

EL: It was a more difficult issue than I thought it was going be. When I first approached it and you see on the surface of it a constitutional amendment that in effect calls for equal treatment, you think, that’s gotta be great stuff. But that can run afoul. If you take a racial issue and single it out for different political treatment solely because it’s a racial issue and you don’t take the whole subject matter that surrounds that governmental issue than it can run afoul. There’s a couple of cases that have so held. The focus you have to have is an evenhanded treatment of a racial issue or is a racial issue singled out for different treatment?

CH: Do you believe that the racial issue in and of itself has more gravity to it, or more importance in some way, than certain other types of issues?

EL: Oh yes.

CH: Why is that?

EL: In the law there is what are called “suspect category” and race is a suspect category in the sense that any effort to treat races differently has to be supported by not just a rational basis, but a compelling governmental interest to permit any form of discrimination on the basis of race. So it becomes more important because it’s treated differently in the law and the reason it’s treated differently in the law is the historic treatment of that issue in this country and, as I understand it, a lack of political power. That can be a reason for saying we have to look at a certain category. Certainly religion and race and national origin are all suspect categories and are therefore scrutinized more closely than discrimination that you might have in other areas. It can be very simple: we discriminate on the basis of age when we say a kid under sixteen can’t get a driver’s license.
CH: Or that somebody has to retire when they’re sixty-five.

EL: We do it all the time. Now the only thing the law requires is that it have some rational basis for doing that. If you get into race and there’s any discrimination it is not enough to say, “Well it’s rational to do that.” You have go beyond that and find a compelling governmental interest.

That wasn’t exactly the issue in the Proposition 209 case because there you had cities deciding to treat race as a factor in certain of their governmental activities. Along comes the state and, in effect saying to cities, “You can’t do that.” Now you’ve got to be careful that you just didn’t take that issue from one political arena—that being the city—and moving it over into the political arena that is statewide because it’s going be treated differently statewide than it would be by the city. That’s a way of treating a racial issue differently when you’re not taking the whole subject of highway contracting along with it, see. That’s the kind of thing you’ve got to be careful of.

It wasn’t as easy a case as you might think on the surface, just to say equality is equality and that’s sounds good. Equality can be a device too to say we’re going shift around these racial issues to a different political forum.

CH: Were there other elements in your decision or opinion?

EL: I don’t remember. That to me was decisive as I recall because the Supreme Court had spoken on, for example, moving bussing for racial integration in a school district to a statewide level in Washington, but not taking the whole subject of schools statewide, see. Just take a single issue and move it; can’t do that. Anyway not a simple a case as you would think.

CH: Was that a panel or an en banc?

EL: That was a three-judge panel, and it did not go en banc. The Supreme Court rejected review of it, so it stands.

[End tape 11, side 2]
that we are to hear on Friday. That’s one-day’s cases. A judge in regular active service, when he or she goes someplace to hear cases, will hear a five-day calendar which means that of course, there’ll be five times that amount of stuff. That does not include any of the excerpts of the record of the district court or agency that we’re reviewing. We can’t, as a matter of fact, read the entire excerpts but I am impressed with this court’s success in reading the briefs. It is not unusual that the presiding judge of the panel will announce to the lawyers, “We’ve read your briefs. Now you don’t need to read them to us in your argument,” and that is true. This court has what I think, among the lawyers, an excellent reputation of being informed about the issues before they ever make their arguments. It’s a challenge to keep up.

A judge in regular active service on the Ninth Circuit participates in something like four hundred cases on the merits every year. That includes the screening cases and all that. It does not include those cases where the judge is keeping himself or herself abreast of what’s going on in the *en banc* voting and so on. That’s another chore. I view the judge in regular active service in the Ninth Circuit as having a crushing load, and that was one of the eagerness’s I had to become a senior judge; to cut that load down to something that’s manageable.

CH: How did you go about doing that? Or how do you suggest going about doing that? Cutting the load down? Is it actually reducing the number of cases?

EL: No I’m just talking about going to senior status where you don’t have carry the full load. That was the eagerness I had to become a senior judge.

CH: Do you have thoughts or opinions about how to streamline the court or to reduce the workload on judges at either the district or circuit level?

EL: Not any further than we’ve already gone. I think we’ve pushed the streamlining almost to the limits of what is acceptable. As I say, we do our oral screening, which means that in those cases we’re relying on staff to point us to specific issues. We’re relying on staff to assure us that these are cases of single issue. We’re spending a limited amount of time on them and I think if we streamline anymore it will go more to the level of being a bureaucracy than being decision makers. In the last year or so, I have been one who has not advocated that the judges increase the number of cases they put on calendars.

CH: Is it a matter of appointing more judges?

EL: I think it’s a matter of Congress creating more judgeships We’re in an era right now where we have quite a number of senior judges because the court was expanded in the late seventies and early eighties and new appointments were made and now we have twenty-some senior judges. I don’t think we’re going have that ratio over the long haul.
CH: How did the concept of senior judges evolve?

EL: I don’t know exactly, but a person becomes a senior judge only because the law allows it. Congress, I think, computed that rather than to see all these lifetime appointees hang around and carry full loads as long as they’re alive, Congress fixed it so that after a certain age and a certain number of years you can elect to take senior status, which means that the president can appoint your successor. You can go on and carry as much or as little work as you want to do and you get the pay of the office for the rest of your life. There’s no incentive for doing other than take senior status when you’re at an age when you don’t feel comfortable in carrying a load or you just feel like I did that, enough is enough. I think it’s worked out quite well. I think on balance over the country that a senior judge carries approximately half a load. While they’re getting the pay of the office for the rest of their lives they’re also contributing substantially to the workload.

CH: And also you’d mentioned something just before we went on tape where sometimes lawyers, or people in the court, presume that the judges know more about the law than anyone else there. You said, they don’t and can’t. When you combine that with this huge volume of material that you have to understand before a case, what ability do they need to have that can compensate for not knowing all the laws and not being able to read all the material?

EL: I’m speaking for myself now in the comfort that I have in hearing a case, and that is that I am a firm believer in the adversary system. I think it is superior to any concept that judges can take a factual situation and fashion it into something that they ought to be deciding. If you let the adversary system focus on what is important and let the lawyers have the responsibility of focusing the court on what is important to decide that case, the system will work very well.

I was a judge of the juvenile court before it had lawyers, we all thought we were doing the right thing, but when the requirement that lawyers be there and the adversary system flourished I thought the court became better. I have a great deal of comfort with the adversary system. That means that I take it in these cases that the lawyers are using their briefs to focus us on what they think the issues are and what they think is important. When they’re arguing then I expect them to focus the decision makers that they have right in front of them, and they have this limited amount of time to focus every one of the decision makers on the issues that they think are important.

To the extent that a lawyer cannot keep him or herself focused, and cause the court to focus, then they’re losing the opportunity. It’s back to this ability to pick and chose what it
important, and I think in the study of law one of the things that you have to learn is to figure out what fact is important, what is neutral, what is meaningless. That’s the struggle all the time.

**Being Decisive on the Bench**

CH: Another thing you mentioned off tape is the need for judges not to be indecisive.

EL: Oh yes. First of all, as a trial judge, I thought that lawyers could cope with a decisive result. As the trial went along, rule and let the lawyers react to the ruling by either changing their approach or whatever they have to do. I’ve always felt that parties can cope with, and I go so far as to say sometimes even a wrong decision is better than they can cope with no decision.

As we go along and with our case load at the court of appeals level we have some obligation to keep our calendars current. Anybody who has business in front of the court can cope better with a decision rather than endless indecision. We know how the stock market hates indecision. We know how we hate it in our private life. We can deal better with something that been decided and live our life around that phenomenon rather than having uncertainty around us all the time. You make some trade-offs I guess and you can say, “Okay, if we wait until we are perfectly well informed on every case before we decide it we can slow this process down to the point where we’d have years of backlog, which would be just killing to anybody with business before the court. I think we gotta make some trades and we’ve gotta try our best to keep going.

The Ninth Circuit, over the last fifteen years, has done a real good job in increasing its efficiency and output. I’m not an advocate that we streamline it any more. I think it’s up to the Congress to do something more.

CH: At the end of our last tape we were talking about Proposition 209. Was there anything else that you wanted to say on that?

EL: As I say, that was significant, drew a lot of attention and a lot of things that California sets up national trends. [laughs]

CH: Why is that do you think?

EL: I don’t know. It just seems to me if there’s some fad, if you’re going have a hula-hoop fad it’s probably going start in California. So many of the things that happen in the country—you look back at the protests in the 1970s over the Vietnam War started in California, right? You look at the racial riots, started in California. So many phenomena in this country start in California and that is maybe because it’s relative immigrant population from other parts of the country, I don’t know. It’s been a long time that way.
CH: Would you like to talk about the Wen Ho Lee case?

EL: That’d be fine.

CH: Could you give some more background on the history of the case before it came to you and then your handling of it?

EL: Wen Ho Lee is a United States citizen, born in Taiwan, was a nuclear scientist at Los Alamos National Laboratory, and had been for a number of years. Los Alamos is set up so that certain people have access to certain portions of the laboratory. He had visited China and there had been visitors from China to Los Alamos. From what I gather in published reports, the U.S. became convinced that China, in their nuclear program, had access to technology that was similar to what they refer to as the W88, which is the science that allows the U.S. to have multiple entry warheads on a given rocket. For example, you can have ten separate weapons on a single rocket each targeted separately on reentry. The key to that, from what I’ve read, and what is publicly known, is that this has to do with the ability to miniaturize or make very small the ignition mechanisms.

The U.S. concluded that China’s knowledge originated in Los Alamos. They focused on Los Alamos as the source of whatever China knew. Out of that came some focus on everybody there—this is my general impression—and focused on Lee, and discovered Lee had taken from a secure computer—the data—to another location in the laboratory, and then downloaded it onto ten tapes. The ten tapes that he had included enough data which, if printed out, would fill 400,000 pages of written material, and in the hands of a knowledgeable person would be enough to make an atomic weapon.

In this investigation they did a lot of surveillance of him. They followed him from place to place and maintained constant surveillance over him for a long time, and ultimately indicted him on something like fifty-nine counts of mishandling data. What is significant here is that he was never accused of delivering it to a foreign power. The counts said that he mishandled it, and just mishandling it is a felony, just by moving it to a non-secure location, to print it out on tapes is a ten-year felony. If a person mishandles it with intent to harm the United States or help a foreign power then it carried a life sentence. Some of those counts accused him of mishandling it with the intent to injure the United States, or help a foreign power, and some of the counts were simply to mishandle.

He was arrested in December or so of 1999 and had a bail hearing or a release hearing at that stage. The government contended that he had on these tapes or had access to what amounted to what they called the “crown jewels” of the nuclear secrets of the United States. That he was not to be trusted to be out of jail, and that he had to be confined in such
a way that limited his contact with the outside world. That was the condition up until about August of 2000 when I became aware of the case.

In about August, he asked for a new bail hearing and claimed that he additional facts he wanted to present to the court on that issue. The judge conducted another release hearing and in the course of that hearing one of the FBI witnesses acknowledged that in the first hearing he had said to the court that one of the coworkers of Lee had been asked by Lee for permission to use his computer because Lee wanted to download a resume. In the new hearing, the agent said that he was wrong in saying that that’s what the coworker had said, but in fact the coworker had said that Lee wanted to use the computer in order to download a file. In the nuances of all of this the difference between those two words is significant because in one instance you can say he was lying and in the other instance it wouldn’t necessarily be a lie; if the guy’s a liar that makes a difference.

There was some evidence at the second hearing from scientists, generally, that this technology was not all that secret. This technology was known broader in the world among scientists than the government was claiming. It put a slightly different light on it, and by then there had been a lot of political wrangling around the country about who was mishandling the secrets and all of that.

At that stage is when I became involved. This background is stuff that I have read in publications, and it was nothing that was imparted to me in the course of my work with the case. In fact—well I can’t say for sure—but none of the science that I learned anything about in that whole thing is classified. Whatever I know about the mechanics and everything is totally unclassified, at least it’s available, I read it in the public domain. It was suggested that there’s some of the stuff that I know is classified, but in any event I feel comfortable in talking about it because there’s only a fragment of what I know that would under any stretch be classified.

CH: Thinking ahead to what we will eventually talk about on this Surveillance Court [FISA] I was wondering whether any part of this came before the surveillance court in the government’s pursuit of information for following him and observing him and getting information to support their case. Was the surveillance court used at all?

EL: No. But interestingly enough, in the case that I heard in the surveillance court, there were two investigations one done by the Justice Department internally and another done by the General Accounting Office as to what went wrong in the Wen Ho Lee case. That was included in the record of the Foreign Intelligence Court case that we heard and both of those investigations criticized the investigation of Wen Ho Lee because the investigators in Wen Ho Lee thought that someplace down the line they might want to
ask for an order from the Foreign Intelligence Court. Because the Foreign Intelligence court was prohibiting foreign intelligence investigators from conferring with lawyers in the criminal division of the Justice Department those investigators did not confer with lawyers in the criminal division of the Justice Department about the investigation.

CH: But this changed the later?

EL: That changed as a result of our decision two years later or a year later. In any event, if they had gone ahead and conferred that they wanted access to Lee’s computer, and if they had conferred with lawyers in the criminal division they would have learned that they didn’t need an order to do it because Lee had already signed waivers. The computers that they were seeking access to all belonged to the government, and as I learned later, which I didn’t know going in, that nobody can own classified information of the United States. There’s no such thing as private ownership of it.

CH: I guess that would make sense, wouldn’t it?

EL: Yes, it would make sense. [laughs]

CH: [laughs] Except the government could be the owner couldn’t it?

EL: Oh yes. I’m getting ahead of myself a little bit. That played out when Wen Ho Lee wrote a book. He couldn’t publish it until the government read it and was satisfied that there was nothing classified in it. I presume that every former governmental agent who has access to classified material has to submit their publications to the government to be sure that whatever they’re saying is not classified. It makes sense, but I never focused on it.

CH: When the case came before you, how did it evolve?

Mediating Wen Ho Lee Case

EL: First of all, the District of New Mexico is outside of the Ninth Circuit. I did not know Judge James Parker, but from what I understand he decided that the parties might be willing to negotiate the subject of release rather than for him to have to decide it. He was having the hearing on this new request for release, and the conditions of release, if he was to release him. The parties might be able to negotiate a release and the terms of a release so he took it upon himself to find five people around the country who might be willing to serve as a mediator.

CH: He was the chief judge?

EL: He was the trial judge to whom it was assigned.

CH: Was he also the chief judge for the district?

EL: I can’t remember that. He might have been
by then. The case was reassigned from one judge to another, but I don’t know whether it had anything to do with one being chief or not. I think it had to do with one becoming senior. I get the picture that he called Proctor Hug, who was the chief judge of the Ninth Circuit at the time, and asked for some recommendation about somebody that might be a mediator from the Ninth Circuit, and that’s why he became aware of me. Judge Parker called me and asked me if I would be willing to do it if the parties wanted me to do it and I said I would. He was going to go ahead and contact four others and then let the parties choose.

CH: The reason again for going outside this district to get judges to sit on a case in that district—

[End tape 12, side 1]

EL: —Rule 11 of the Federal Rules of Criminal Procedure prohibits a trial judge from participating in negotiation of a criminal case. The judge can’t do that. The idea is the further removed you can get from your own court and find a mediator the less taint that it has any element of any kind of coercion, if you will. Theoretically, the trial judge could coerce somebody. The further you get away from the trial judge and authority and the better off you are from that standpoint. There were others, and interestingly enough I knew a couple of the others in other contexts, the other judges names who were presented to the parties.

I asked Judge Parker—I wanted to know when the selection was made so that if somebody was selected other than me that I’m free to make other plans. The next thing I get is the lawyers in a conference call and they wanted to negotiate this release. I said of course I would and we agreed upon a time that I would go to Albuquerque very soon after the conversation. I went to Albuquerque and I got into town and I checked into the hotel and I turned on the TV and it said that Judge Parker had ordered Wen Ho Lee released on certain conditions.

CH: How did you feel?

EL: I thought maybe I was there and everything was moot.

CH: You were somewhat preempted it sounds like.

EL: Yes, that was okay. I felt like if there’s nothing to do that’s fine. If he’s already made his decision and so on, okay. I met with the parties the next morning. Judge Parker had mentioned the possibility that they might be willing to negotiate on the merits, on the ultimate disposition of it, but his idea was that there might be two separate mediators, one for the release and one for the merits, the ultimate disposition. When I met with the parties there was no immediate pressure on doing anything and so we started talking about things, just allowing me to get familiar with the attitudes and with the issues and so on, and nothing was to come of it. I did know that they would be
interested in going to the merits, and before I left we scheduled a return for me to come back and we would talk about the merits.

In the meantime, the government is opposing the release and they’re appealing the release order to the Tenth Circuit in Denver. By my being down there I got an outline of the issues, the magnitude of the complaints and what bargaining position each party had and so on. Over the period of time until the next meeting, I got myself convinced that that darn case could be settled because there were so many possibilities. There were ten tapes involved, seven of those were still in Wen Ho Lee’s hands; the government had recovered only three. The government wants to know what happens to the other seven. He had been held in essentially solitary confinement for eight months and the attorney general was being criticized for having him in solitary confinement pre-conviction.

CH: But the government did not know where these other tapes were?

EL: Exactly. Fortunately, I didn’t have to become very judgmental about whether or not the criticism of the attorney general was legitimate or not. You can make a quick case that somebody who’s presumed to be innocent shouldn’t be treated as a felon. Right?

CH: Yes.

EL: On the other hand, if you know this guy’s got seven of your tapes, and they contained all of this classified data. Anybody that was going to criticize her, I think, ought to be compelled to identify who do they want him communicating with.

CH: You’re saying he was in confinement for how long, how many months?

EL: Eight months.

CH: Eight months. It seems like the government would have done everything it could to speed the process up as fast as they could so they could get to the point of finding the tapes and make sure they weren’t leaving the country. Did they do that?

EL: I don’t know. They were litigating this case and Lee is making the assertions that he was singled out for discriminatory treatment because he’s Asian, Chinese. He has a certain constituency that is politically supportive of him. He’s also contending that if they’re going accuse him of mishandling the secrets they’ve got to tell the jury which secrets he’s mishandling.

CH: Did they know if the tapes are missing, or is it just the process of having, as he said, moving the tapes from one spot to another?

EL: No, he moved the data. He created the tapes when he downloaded it onto tapes, see. This is the picture I have; he’s got the data
and when they arrest him they only come up with three. There are seven so-called missing tapes. The rules under a procedure they call the Classified Information Procedure Act is that when the government is in the position it was, of prosecuting him, if the court will permit the government can make a summary of the data, and in the trial it’s a summary that’s used. If the judge concludes that a summary, instead of the real thing, will still allow the defendant to have a fair trial. The judge has got to make that decision.

That decision had not been made so the government doesn’t know whether it will be faced with a ruling that says you can’t try this case unless you tell the jury what the secrets are. If the court rules that way the government is going to say, “We dismiss because we’re not going tell the world these secrets in order to prosecute this guy for mishandling.”

There is the pending motion on the alleged racial discrimination. Then there is the shift in the testimony from what it was in the first bail hearing to what it was in the second bail hearing. As minor as that may sound, it makes a difference because if this guy is telling his colleague, I want to use your computer to download a resume that could be proven to be a lie, I presume. On the other hand, if he’s saying I want it to download a file that might be the truth, see? There we are.

Anyway I’m sitting at home and I’m thinking there’s lots of possibilities. I know what the government wants; they want to know what happened to the tapes, what damage has been done, if any, to their secrets. They run the risk of never knowing that. Either the court would rule that it couldn’t try him without disclosing the secrets or they tried him, convicted him, put him in jail and he still doesn’t have to tell them. Right? Lee has some bargaining power.

CH: I was just going to say there would be some bargaining power with him being able to give over the material they wanted if they could change their stance towards him.

EL: On the other hand Lee is facing fifty-nine counts, some of these counts carry life in prison and just on the surface of it if somebody is doing this with nuclear secrets why in the world is he doing it? If he’s doing it to hurt the United States, or help a foreign power, he’s now in prison for life. Are you going to have suppress evidence that he did it for that purpose? Well, maybe not. But could a jury infer that he did it for those purposes? Probably so. Now if he didn’t do it for those purposes, why did he do it? If he didn’t do it for one of those purposes was it a bizarre purpose or some screwy purpose, see?

CH: How often in cases similar to this—if there are cases similar to this—can the motive be ascertained?

EL: You have to do it by inference. Like any
other case where intent is an element, and in many cases specific intent is an element, of the crime and you have all of these assaults with intent to kill. If you have an assault of a certain nature, and you have somebody laying in wait and blazing away at somebody with a shotgun in the middle of the night, you can let the jury infer that he was doing that with intent to kill somebody. He wasn’t doing it with the intent just to entertain himself. You know what I mean? Or assault with intent to rape. There would be evidence of what this person did that would let you infer that he intended to rape. That’s not uncommon.

I go back there for the second time, and we talk about specific possibilities. Would it take a guilty plea to ten felonies? Would it take a guilty plea to ten misdemeanors? What is the defendant willing to do? What is acceptable to the government? What kind of disclosures can Dr. Lee make? If he makes some disclosures headed toward a plea of guilty, how does the government handle it in the event that they figure that the information they’re receiving is either not valuable, or is not true, and decide to prosecute him in spite of the disclosures. How do you handle all of that? Well, in this case there was enormous distrust because there were utterances being made in Washington about this guy being a spy and he was never accused of being a spy. But all of the publicity was: it’s the Los Alamos spy case. Right?

CH: Who within government was making that—

EL: I think it was the Department of Energy.

CH: Not the Justice Department?

EL: Not the Justice Department.

CH: Would it be more serious if it had been in the Justice Department?

EL: Probably so because the Justice Department is in control precisely of what they are charging him with. There were some other events going on and Lee was accusing the government of disclosing certain classified information in another context and nobody was being prosecuted for it. There was a lot of this kind of thing going on.

On the second occasion down there we come up with some scenarios that said Lee would make certain disclosures, that somebody in the Justice Department would be able to listen to those disclosures and make a determination as to whether or not the government believed him or they were valuable. Then make the decision as to whether or not to prosecute. Somehow there would be some mechanisms that would be barriers within the government so that the persons receiving the proffer from Lee would not be able to share it with the people who are going to be in charge of prosecuting him, if they tried the case. Whatever he says cannot somehow be used either directly or indirectly against him. The government makes it pretty
clear that they do not deal for information until they get the information and decide whether or not they want it, or whether it’s true.

CH: Is that usually the case?

Mediated Resolution Jeopardized

EL: That’s usually the case. If one defendant is going to turn on another you make these proffers and then the government makes the decision. So we started talking about the mechanism for doing it. Then we talked about what the defendant might do by way of pleas and how many and all of that kind of stuff and talked about what might be acceptable to the government. We were talking about so many possibilities and plausibilities that nobody on the scene could make the decision. Everybody had to go back—particularly the government—to whoever the decision makers were. I didn’t need to know how many people in the government had to sign off on this but my assumption all the time was that the Attorney General herself had to, that the Secretary of Energy had to, that probably the CIA had to, and the director of the FBI probably too. Whether there was White House involvement, I don’t know, and didn’t need to know.

Over Labor Day, we decided we would have another meeting, and scheduled another time for me to go back. In the meantime, they could go back and talk about what they wanted to do. I’m home for a while, and a few days before I’m scheduled to go back, I get a call from the defense lawyers saying, “We don’t want to deceive you, and so we better tell you that there may be no reason for you coming back because whatever we’ve talked about before isn’t going work. People in the government have been making these statements to the press, and we cannot think of any mechanism by which we can make any disclosures that would give us any assurance that any of this is not going be used against us when they say ‘no,’ and we’re not going ask you to come down here because it may be all off.”

I said, “I’m coming down anyway.”

I get down there, and the night before we’re to meet I get a call from the government and they say, “You’re aware that we’re into this difficulty.”

I said, “Yes, I’m aware of it. We’re going get together.”

We got together, I think, all day on Thursday and all day on Friday and by the time we were done we had an agreement. The scheme was that instead of Lee making a pre-plea disclosure of everything and then the government doing its usual thing, Lee would, in the agreement, agree that he would tell the government what he did not do so that government would be assured that they were not dealing with a guy to get the truth and the truth would turn out to be that he was a foreign spy, or that he had turned this data
over to a foreign power. They knew then that according to his agreement he was going to swear under oath that that didn’t happen. They were not going to be faced with the ultimate embarrassment of having made a deal with a guy who should be facing a death penalty.

Part of the deal was that Lee would enter a plea to one of the counts in the indictment which was important to the government. Not just a count that was contrived to satisfy the need to make a deal, but in fact one of the counts in this very indictment that he was indicted on, and that the government would agree to dismiss all the other charges and agree to a sentence of time served. The eight months that he’d been solitary confinement.

The sentencing guidelines would have called for something like thirty-four months instead of eight, and that Lee would submit to examination under oath for sixty hours, I think, over a period of time by the government prosecutors. He would agree that if the government could at any point prove that he attempted to mislead or that he lied to the government in the course of this examination than all the counts in the indictment, plus all the crimes that he would be committing perjury and lying to the government, would all be back into the play. In addition to submitting himself to that extent of examination, he would also cooperate otherwise for a full year with the government and agreed not to travel outside the United States during that year. That was what we were agreeing too. In addition he would also supply an affidavit between the time while he was in the courtroom, entered his plea, and the time that he was sentenced, he would deliver to the government an affidavit saying what he had done with those tapes. The government, from the standpoint of its own self image, could at least say that by time he was sentenced the government knew what he had done with the tapes. Now he didn’t have to go into the detail, of course, that the government was going to put him through in the examination.

My point throughout all of this was that to know what happened to this data and to know what damage, if any, was done to the nation’s secrets was of far more value than having one more jail cell, full or empty. I repeatedly made that point to them that, you know, if you can achieve both vindicating the government’s power to enforce the criminal law and not let this guy get away with this without punishing him, or convicting him, and at the same time deal with the secrets that that’s what government ought to be doing. That’s essentially what the agreement was.

Now that was on a Friday evening. The deal was that he was to plead guilty on Monday and since it was Friday evening I felt there was no point in my hanging around until Monday for the plea. They were going to put this in writing in the usual format of a plea agreement that they used in that district, and so I decided to come home. The idea was that the press would be made aware of this on Sunday evening so that all the newspaper people and all the press would not be in Denver when this
appeal was to be argued on Monday morning before the Tenth Circuit. Instead of saying, “Go to Denver, that’s where we’re going be arguing this.” They could go to Albuquerque and say, “This is where this guy’s going be pleading guilty.” See? The scheme was to do it that way.

I’m at home, Sunday night comes, and I see on the TV the report Wen Ho Lee is going to plead guilty Monday morning. Fine and dandy. Get up Monday morning and here’s the report, it’s been delayed. I come to work and at the end of the day I learn that they’re having a quarrel about the agreement. The next morning the newspaper says it didn’t happen because of this disagreement. I said to Eileen, “I’m going pack my clothes, I’m going down to work and I’m going call down there and find out what’s gone on and I may go back down there.” I did that and I called down there and I found out that there was a serious problem.

Now this has been reported publicly, and it’s not anything that has to do with anything that’s classified, but you know in doing mediation you don’t like to talk too much about what the problems were. Anyway, it was a serious problem. They were accusing each other of deception and one thing and another. I decided to go back down there and I asked the parties to meet me at six o’clock in the evening in the courthouse. I left here in the afternoon, got down there by six o’clock and they come in. We started all this by the defendant’s attorney saying, “We can make this short and sweet. We’re tired, we’ve got a motion to argue tomorrow morning at nine o’clock and we’ve got to prepare for that.” In effect, saying it’s over before we start.

A little bit of time went by and the first thing you know someone started apologizing each other for the things they’d been saying about each other, you know, all this distrust and accusations of dishonesty and all of that kind of stuff. We wind up actually negotiating and by about nine o’clock we had the agreement back on track. But it required redrafting of it and we decided this time we were going stick with it until we had it on paper. By about 2:00 a.m. we had it on paper and we had told Judge Parker that it was back on for a plea of guilty instead of the motion and it was supposed to be at nine o’clock.

Nine o’clock the next morning it was necessary, of course, for the lawyers to go over the plea agreement in detail with Doctor Lee so that when he pled guilty and he answered the judge’s questions about all of the things that are necessary in order for a judge to accept a plea that he would know what he was doing and all of that. That took some time. The night before, after we had reached an agreement, one of the lawyers asked me what I thought when I found out that this thing had fallen off the track after I was home.

I said, “I was reminded of the story about the fox and the goose and the corn and the guy who can take only one them across the river in his rowboat and he can’t leave the fox and goose together because one will eat the other and he can’t leave the goose and corn
together because one—“You know the old story.

CH: What happens with the goose and fox?

EL: If the guy has to take the goose and leaves the fox and corn. Right? Then he goes back and he gets the fox. Then he takes the goose back and he takes the corn over and then he comes back and gets the goose. Okay?

CH: Okay, all right.

EL: That’s the scenario. It reminds me of the story of the fox and goose and corn. I leave you guys here in Albuquerque and this is two times that I’ve gone home and in each occasion you said it’s all blown up.” The next morning when they’re going through this with Lee we have this first scheduled for nine, then it’s rescheduled for ten, and then it’s rescheduled for eleven, and I’m hanging around the courthouse. The assurances that I would get from the lawyers periodically to assure me that everything was still okay was, one or the other are going tell me that the fox [laughs] is not eating the goose. The goose is not eating the corn, and this is their way of assuring me that everything was okay. [both laugh]

[End tape 12, side 2]
that he felt that he had been misled in the first
bail hearing, which he conducted sometime in
December of 1999, and then he had reheard
that issue in August or so of 2000. He felt
that he had been misled by the government.
His words were an apology to Wen Ho Lee
for what the government had done to him. He
went on to say that by reason of his conviction
he would not be allowed to vote in the future
election for or against, if you will, whoever
had done this to him. He went on to say that he
didn’t know exactly at what levels the decision
to prosecute him, and to handle him in the way
he was handled was made, and he it suggested
that it went clear to the White House level.

The government was represented by
George Stamboulidis. He was an assistant U.
S. Attorney from the District of New York on
loan to New Mexico. At one time Stamboulidis
stood up and objected to some of the things
that Judge Parker was saying on the basis
of simple accuracy. I thought it took quite a
bit of courage and it spoke well for him as a
lawyer to have the willingness to do it. When
the thing was over, and the court recessed I
went to Stamboulidis and congratulated for
having that authority. I know Judge Parker felt
strongly about it.

CH: This was then the very last statement in
the case?

EL: Yes, and actually it was after everything
pending before the court was completed. There
was nothing pending before the court when he
made the statement.

CH: Have you ever ruled one way according
to the law that felt that the law was flawed and
needed make some kind of statement?

Judicial Statements in Court

EL: No, I’ve never apologized in the sense or
criticized the law. There are times and there
are instances where—for example, if a judge
allows a motion to suppress evidence, which
I have done on numerous occasions—what
you’re doing is you’re saying, as a matter of
policy, and to keep the police from doing this
in the future, we’re going exclude the evidence
that they have assembled even though it tells
the truth, and you’re saying as a matter policy:
“We don’t want this. No matter how guilty it
shows an individual to be.” Now in a sense
courts usually say, “We want the power to find
out and know the truth. We want to decide our
cases based on the truth.” Here is an instance
where we’re saying, “We don’t care what the
truth is. This other value is greater.” From a
standpoint of the party in front of you he is
not necessarily one to be sympathized with but
he gets the benefit of this ruling. There is no
point in saying, “Okay, I am obeying the law
and I feel comfortable in doing it” and then
turn around and criticize the person in front of
you for being so guilty when he’s not under
the rules that will allow us to find out. So sure.

Then in the juvenile court a lot of times you feel that more might have been done by the government for a youngster by way of counseling, or earlier intervention, or whatever. Anytime I ever sentenced a youngster, or sent a youngster to a training school, I never apologized or criticized his parents or his school or his community. I wanted him to focus on what he had done and to have the sense that he was going to the institution for what he did, not for somebody else’s failure. He may think that but I don’t want to reinforce that so that he spends all of his time resenting somebody else. During my tenure as a juvenile court judge the law was changed so that it was no longer possible for the court to commit a youngster to an institution for having run away from home. A lot of time a youngster would run away from home and while run away from home would commit burglaries or robberies or serious crimes and instead of making a record out of him for being committed to MacLaren for having committed rape or robbery in what somebody’s view of gentleness was, the accusation would be simply running away from home. Then he would be committed to the institution for running away from home.

When the legislature changed it those youngsters were brought back before the court, then they were charged with the felonies that they had committed. If they were to be sent to MacLaren they would be sent to MacLaren for one of these felonies. I don’t know whether that was good or bad. From a pure civil liberties standpoint you could say, “We shouldn’t be committing kids to MacLaren for running away from home.” On the other hand if labeling is important you’ve pinned some pretty heavy labels on these kids in order to follow the law. I was not too sympathetic with that.

CH: When a judge has a problem with the law, the way it’s written or the way it’s generally being applied, or the conduct of an agency, what is the best way for the judge to communicate his remedy for that situation?

EL: My attitude was if you didn’t like a law the way it functions, the way to get it criticized was to obey it and put the results out there for somebody to criticize the result. If you shave away at obeying it, the reality of how bad it is, if you will, it will never be in focus by the public. One of the things I like to say is I was never going tell a lie that made anything work. If a law was impractical, or if something was haywire, you obey it and then the results are out there for everybody to realize. I was never too sympathetic about the rules that said we were to expunge traffic records of drivers under certain circumstances. I tried my best to obey that, particularly in the juvenile court, so that the reality of what we were doing would be apparent.

CH: Are there any other venues where judges are able to communicate some of these things to lawmakers?
EL: Sure you can. We are permitted under rules to speak out in the name of improvement of the law, and I testified on a number of occasions before the Oregon Legislature. I even spoke out in opposition to some of the proposals that were being made by the Chief Justice Kenneth O’Connell at the time for the so-called merger of the district and the circuit courts to have a one level trial court. I felt that it was okay for me to speak out publicly on that and I did. I spoke to the Lane County Bar Association in opposition to the proposals, but I felt once I had said my piece I didn’t need to prolong it because I didn’t want to get in controversy. If nobody wanted to be persuaded by what I had to say and pick up the cause if you will, if the lawyers thought it was alright, okay. But I felt some liberty, if you will, in speaking, but I also felt that you shouldn’t make yourself controversial and you didn’t hire out to fight with another judge and particularly with the chief. [laughs] Right?

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**Wen Ho Lee Plea Agreement**

CH: What happened then after the Judge Parker sentenced Lee?

EL: In the plea agreement, I had some residual responsibility of resolving disputes over the implementation of the requirements that Wen Ho Lee cooperate and that he testify under oath for sixty hours I think. That was a little unusual in that I don’t know of another case that comes to mind in which I accepted some responsibility after being a mediator, but there was nothing pending in the district court. When that case was over all of the other counts had been dismissed. Lee had been sentenced to time served. He had finished his time served. He was not under any kind of probation or other form of court supervision. There was nothing pending.

The plea agreement did provide that if he lied to the government they could go back in and move to have the counts reinstated if they could prove it by a preponderance of the evidence. And so the parties in the midst of the negotiations suggested that I have some responsibility, and I said I would accept it absent, you know, somebody else. I had that responsibility over a period of the following year and resolved a couple of little disputes. It didn’t amount to anything of substance, but somebody had to resolve them. As far as I know Lee cooperated to the satisfaction of the government because the last words I heard from either side is nobody had any remorse about the agreement. I read in the paper where—during the course of the year the FBI had searched some garbage dumps in the Albuquerque area so I suspect that Lee was telling them that he had disposed of some of the tapes by throwing them in the garbage. Hopefully, he erased them before he did that. [laughs] I don’t know. In addition to all else, Lee was writing a book during that year and something I learned is that nobody can have a proprietary interest in any classified information that the government has.
The government had to, in effect, say to Lee that he could go ahead and publish his book because nothing in there is classified.

CH: How did you feel at the end about Lee in terms of his guilt or innocence on those charges?

EL: I felt that Lee was guilty of precisely what he pled guilty to, that he was rightly, truthfully a convicted felon. I have no reason to suspect that he was guilty of any of the more serious charges, the one that said that he mishandled the data with intent to harm the United States or help a foreign power. I have no reason to believe that. My perspective on it is that it turned out truthfully and I personally am not critical of the government in the way it handled the whole negotiation. As far as the prosecution is concerned, I didn’t have to know all of that that Judge Parker knew and he had a different perspective on it than I did, and I’m not even going say that he was inaccurate in what he was doing. It’s just that he did something that was different from my style. [laughs]

CH: That was the end of the Lee case.

EL: Before we get away from Wen Ho Lee, I want to say that what really made that a rewarding experience for me was the quality of the people involved that I had to deal with. I never met with Wen Ho Lee personally but he was represented by three lawyers with whom I dealt mostly. One was Mark Holscher from Los Angeles, a former assistant U. S. Attorney. Another was a gentleman whose name is—boy, can I think?—I’m not sure I’m pronouncing it correctly, a former assistant U. S. Attorney from San Francisco, and then John Cline who practiced in Albuquerque but had practiced earlier on in Washington, D. C. As a matter of fact, he represented Oliver North in Oliver North’s appeals, and the prosecution of Oliver North, and is generally viewed as a genius. He was here in connection with the program put on by the U. S. District Court Historical Society on the Foreign Intelligence Surveillance Act in the court, and who I view as a first-rate lawyer. Stamboulidis, who I’ve mentioned, made his reputation by prosecuting organized crime in New York, and so none of these lawyers were shrinking away from trying the case. I think that any of them would have delighted in trying the case if they have to and nobody was intimidating anybody and that was the neat part about it. They were in there and they were feisty with each other on occasion, but it was alright. That’s generally true from a judge’s standpoint, if you’re trying a case with good lawyers on both sides the work is a whole lot more rewarding and interesting and easier than if you’re trying cases with people who are not confident in what they’re doing.

CH: Was there any kind of precedent or landmark set in how this case was handled and what it covered?
EL: I don’t think so. It was interesting because at first the parties did not even want to acknowledge that they were negotiating. One of the concerns was that we do this in a place where I wouldn’t be known at as a mediator and that could go to Albuquerque and be there and nobody would conclude that they were negotiating. That was one of the reasons why we chose to do it there instead of their coming here. It was an interesting phenomenon that—

CH: But that was rather unusual wasn’t it?

EL: That’s rather unusual, but somehow or another the dynamics of it was that neither side wanted to acknowledge that they were giving an inch or willing to give an inch. [laughs]

CH: It’s amazing that without acknowledging that, they were able to find closure.

EL: It’s because of the bargaining power of each. Wen Ho Lee couldn’t be guaranteed that he wasn’t going to be found guilty of one of those counts that carried life in prison. On the other hand, if the court had ruled certain ways on its classified material as to whether or not it had to use it, the government would be faced with the choice of having either to disclose what it claimed were its secrets, or dismissing. Then you could have convicted Lee of something and Lee never makes any disclosures and we still wouldn’t know whether or not any damage had been done. On balance, I felt, in retrospect, that not only did the case turn out truthfully but it also served the government very well in vindicating its power to enforce the criminal law plus find out what damage, if any, was done to the secrets. If you want government to behave in some ideal way you would want them to achieve all that.

Court Officials and Proceedings

CH: You were talking about how excellent the quality of the people were involved in this case, how well they handled themselves. What is it in this case, or in other cases you watched, that really makes an exemplary prosecutor or an exemplary defender?

EL: It’s a matter of being able to pick out what is important and what is not important. If a lawyer is not confident, for example, that some issue is not important; is not confident enough to leave it alone or confident enough to know that he’s safe on that issue and focus on the issues that are really in play, then the parties will treat all issues as if they are equally important and with no confidence that something is all right. I revert to the proposition that if a person doesn’t know when they’re safe they’ll really never know when they’re at risk, and the most dangerous person to be around is somebody who doesn’t know when they’re safe. It’s true in the courtroom. If a lawyer is confident enough to know they’re safe on an issue or confident
enough to know they are winning then they don’t have to overdo it, they don’t have to flail away at the underbrush if you will. That’s the way I see it.

CH: How often is it where both sides agree as to what the main issue is, or main issues are?

EL: It’s not unusual. It’s more often than not both sides will be focused on what is important. That’s what I see more of as I’ve gone through the various courts, you expect inexperienced people not to have that kind of confidence.

CH: What rule does a judge play in that, if any, in helping people to focus on what is the main issue?

EL: You try your best within the adversary system. If somebody is bent on flailing away at something that is irrelevant you can’t stop them, you know, you can only go so far, but I think that for the judge to be focused is just as important. I would say, just as a glaring example of what I observe to be a lack of focus was in the O. J. Simpson case. Now the judge went out of his way to sanction lawyers and went out of his way to unsanction lawyers making it all rather irrelevant. From a standpoint of maintaining control, and everything else, all that the trial judge has to do is rule on an issue and you, in effect, for the parties to abandon that, it’s done. If they want to take the next step in the trial they get to, or they’ll miss the opportunity to take the next step. You focus on what you’re going to do next. Instead of going back and trying to figure out who was at fault for something that went on the last hour, or the day before. That was a prime example of the judge not asserting leadership.

CH: You talk about how important it is for lawyers coming before the bench to help illuminate the issues for the judge. Is it common during a trial for a judge to be asking the lawyers questions for his own understanding?

EL: It’s not uncommon at all. We do a lot of that at the appellate level and sometimes we will start out by telling the lawyers, “Okay, you have a limited time to argue. We’re telling you we’re interested in a certain thing,” and that is very helpful, and lawyers appreciate that. In a trial court I always had a way of— lawyers who tried cases in front of me regularly knew when I wanted to hear argument and when I didn’t want to hear argument. I’ve had lawyers tell me. If I would rule quickly that meant that I didn’t want to hear argument. I’ve had lawyers tell me. If I would rule quickly that meant that I didn’t want to hear any argument. If I wanted to hear arguments on let’s say an objection I would signal to the parties that I wanted to hear it. The lawyers get to read you pretty well. [laughs]

CH: How common is it for lawyers, especially at this level, on the court of appeals, but even at the district court level, to find constitutional issues in a case?
EL: Oh, it’s frequent. Particularly in criminal cases, we have constitutionalized the rules of evidence in large measure by way of confessions, by way of search and seizure, by way of even discovery. If the government does not turn over something that might be labeled as exculpatory, you have a constitutional issue. Every interrogation involves the constitutional issues of compulsion, or lack of compulsion, and every trial involves the constitutional issue of adequacy of the defense council. Everything is constitutionalized in the criminal field, and that all arose really during my tenure as a judge. In the ‘60s we had the Warren Court telling us what was emerging as—

[End tape 13, side 1]

Finding Constitutional Issues in Cases

CH: Why did there become more focus on the constitutional issues in that case?

EL: Because we had to apply them in every case. We had to. For example, in Oregon, when I started practicing, the trial judge would make the decision as to whether or not a confession was voluntary. We were never focused on whether or not the jury made that finding separately for itself. Under the rules that emerged it took a finding by both the court preliminarily, and by the jury under disciplined instructions, that the jury had to make that finding also. Even in the plea of guilty the Supreme Court was requiring this interchange between the judge and the defendant personal. The judge could be assured that the defendant himself was acknowledging the facts that made him guilty.

It used to be that a defendant would be asked, “How do you plead?” If he said, “Guilty.” that’s it. Now we have the further requirement imposed by the Supreme Court that we have to address the defendant directly. Each judge has to address the defendant personally to be sure that that individual is fully aware and is doing whatever he is doing voluntarily. In some respects we have exalted ritual to the point where the ritual becomes important, and if the record doesn’t show that we followed a certain ritual than the plea is subject to attack.

What happens is, and this is what I’m afraid of on occasion, everybody becomes aware of what the ritual has to be and then the defendant goes through that ritual, and then if anything is really wrong the record has him renouncing it, and it would be harder to take what might be the truth and attack it because the ritual is so overriding. I always felt that in going through certain of those rituals who am I really looking out for? Am I looking out for myself so that nobody can say I’m wrong? Or am I really looking out for him to be sure that he is doing what he knows he wants to do and that whatever he’s doing
is based upon the facts? In some ways, it’s a necessity for everybody to do it, but I used to say to myself, “Who am I doing this for, me or him?” [laughs]

CH: Is there a difficulty in balancing the constitutional rights of criminals versus protecting society and the rights of victims?

EL: Oh sure. But we acknowledge we’re willing to make those trades and in the scheme of things we express our values by saying, and you’ve heard it said lots of times, “We’re willing to let ten guilty people go in order to avoid convicting one innocent person.” We make our factual compromises, if you will, in favor of the accused. That’s a value judgment that society, I think, is comfortable with for the most.

CH: The Wen Ho Lee case was completed in what year?

EL: The plea was entered in September of 2000, and then he continued on until ’01; that is continued his obligation to cooperate until an anniversary in ‘02.

CH: Were you overseeing anything through that process?

EL: No. The only thing I did is I resolved a couple of little disputes that they had on implementing the plea agreement.

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**Foreign Intelligence Surveillance Court of Review**

CH: Could you tell me then how you came to be appointed to the Foreign Intelligence Surveillance Court of Review?

EL: The first I knew of it is I received a call from the director of the Administrative Office, Ralph Mecham. He asked me if I would accept an appointment to that court, if I were chosen, and that is the first awareness I had of the existence of the court, frankly.

CH: Why do you think it was so obscure?

EL: It had never heard a case. The law required that there be such a court. When they passed the act [Foreign Intelligence Surveillance Act, 1978] they set up the lower court, if you will, with seven district judges, and then they had this court of review, but it had never heard a case. At that time there were rumblings that the court might have to hear its first case and that was part of the conversation with Mecham. He says, “You may have some work to do now.”

I told him I would, and then it required another FBI background investigation, which was probably even more thorough than the three that had been done on me before. That was the fourth one in my career that was being done. When that
was completed, the chief justice appointed me to a term that expires, I think, in ‘07.

Now to be a judge of the Foreign Intelligence Service Court of Review a judge has to be either a judge of the district court or a court of appeals. To be a judge of the Foreign Intelligence Surveillance Court, the lower court, the one that does all the work, the person has to be a district judge. Recently the number of judges on the Foreign Intelligence Court has been increased to eleven because of the workload. Those judges sit only one at a time because it only takes one of them to decide anything, and a certain number have to live within a certain radius of Washington, D. C., and then the judges take turns going to D.C. on a week-long basis so that there’s somebody available at all times. If there isn’t one of them actually in D. C. in the Justice Department building on a given day, there’s somebody within a certain radius that they can call upon to act. They’re handling in the neighborhood of a thousand cases a year.

CH: Is this a result of the 9/11?

EL: Sure. The Foreign Intelligence Surveillance Court of Review, frankly, I thought I was being appointed to the perfect court. Never have to hear a case. [laughs] My guess is that I was appointed based on the fact that the Chief Justice may have become aware of me, or the Administrative Office became aware of me because of my role in the Wen Ho Lee case.

CH: How much is there in terms of statutes and other legal issues in this realm that a judge coming in for the first time has to familiarize himself with?

EL: There’s the whole Act, and it was passed in 1978. Some will say it’s vague, but I was struck by its precision. It has a whole series of definitions; they define their own terms to suit the needs in that act. For example, it defines “foreign power” in six different ways. On the surface of it I thought I would know what a foreign power was, we think of as foreign nations. But there are six ways that an entity can be a foreign power.

One of the ways that an entity can be a foreign power—and this was put in the Act originally—is to be a group engaged in international terrorism. An international terrorist group is a foreign power for the purpose of that Act. Then they defined “agent of a foreign power” in a certain way and they defined “foreign intelligence” in a certain way, and so you had a lot of things to work with that you didn’t have to guess about, they’re there. And that’s what I was impressed with.

The legislative history I read in connection with the case, I think I read the entire legislative history, which is voluminous, passed with the support of the whole spectrum of political views. The legislation was actually sponsored by Senators Ted Kennedy and Strom Thurmond and everybody else in between. What had happened is that everybody felt at
that time that there had been abuses of wiretap by the administrative branch in the name of national security. Whatever president you want to, you can pick your villain, because I think there was a lot of it going on by a number of administrations. The people who thought that the president had the power to tap a wire in the name of national security were afraid that the court would say, “No he doesn’t.” The people who thought he did not have that power were afraid the court would say, “Yes, he does.” Everybody decided, whatever it is, we’re going to control it by statute. It got a lot of hearings, there was a lot of compromising going on, there were a lot of constituencies that were heard from, there was a lot of testimony. It was supported by both the Carter administration and those who had been in the Ford administration, so it had widespread support.

It has differences in the showings that have to be made between domestic law enforcement and foreign intelligence surveillance. But this act requires that the attorney general certify that any application conforms to the law and that another presidential appointee confirmed by the Senate, somebody at a high enough level in the government, certify that it is being done for a foreign intelligence purpose. Then it can be submitted to the judiciary who has to pass on it to decide whether or not there are the sufficient showings of probable cause that the target of this is, in the case of a U. S. person, an agent of a foreign power, and that that agent is using a specific facility. Then the court, with those two showings of probable cause, can issue the order.

Congress built into it a need for congressional oversight. What they did is, in effect, said all three branches are going have responsibility in this area: the administrative branch at the high level, the judicial branch in passing on the issue, and Congress in periodic review to see whether or not this thing is abused. I don’t know of any other field where you have that much responsibility put on the line in every application. Now that’s because everybody was aware that this doesn’t have to have the same kind of showing for a domestic law enforcement wiretap. The reason our case came into focus was before the Act was passed the Fourth Circuit had decided a case under facts that arose before the Act was passed, but the decision was actually made after the Act was passed so it was government by pre-Act law.

A person had been accused in a criminal case of being an agent of the North Vietnamese in connection with the negotiations to end the Vietnam war that were going on in Paris. This person was accused of being within—I’ve forgotten which agency of the United States—and passing secrets to a woman and then to the Vietnam negotiators in Paris, on the U. S. position in the negotiation. Little did he know that the person that he was passing this information to as a courier to take it to the North Vietnamese in Paris was actually an agent of the U. S. They continued to collect
information from him over a period of months knowing that he was doing no harm.

The trial court ruled that the government had enough information on him, let’s say in July, to prosecute him for his acts of espionage. Instead they strung him along for another six months. The court ruled that since it became a criminal prosecution in July, what they did after that was not admissible against him because it turned from a foreign intelligence investigation to a criminal investigation and set up, in the mind of the court, a dichotomy between foreign intelligence and criminal law enforcements.

CH: What was the turning point in that away from foreign to domestic?

EL: When the government had decided it was going prosecute him.

CH: Why is that decision?

EL: They said that you could wiretap in the name of foreign intelligence and to protect the government against espionage, but you couldn’t do it without a warrant for pure domestic criminal law enforcement.

CH: And in this case would it be pure domestic?

EL: That’s what the trial court held. The guy was convicted, and then the defendant appealed to the Fourth Circuit. The government did not appeal, and could not appeal, the exclusion of that evidence that they’d gathered from July to January, as I recall, that period of time. That wasn’t an issue. The issue was whether the government could use all that it had acquired without a warrant up until the point at which the court said, “Now it’s a law enforcement.”

The Fourth Circuit affirmed that conviction, but they said the trial court was right in excluding the rest. Now that’s a voluntary statement from my perspective because it was not an issue. The government wasn’t saying, “The trial court was wrong in excluding it,” because the government at that stage didn’t care. They’d convicted the guy, right? They’re not appealing. They’re not complaining that the district court has done anything wrong. Then out of that case comes this concept that foreign intelligence is one thing, and law enforcement is another thing. Other circuits then cited that case after the Act was passed. Never did a court of appeals ever hold that whatever the government did by way of gathering evidence under this Act, and using it in a criminal prosecution, was illegal. Every case said, “Whatever they did was okay” including the Ninth Circuit. In a case, the name of which I’ve forgotten but was written by Judge Skopil, which said, “We’re not going buy into this distinction between foreign intelligence information and criminal law enforcement.”

Under the administration of [U.S. Attorney General] Janet Reno, the Justice Department set up a procedure that said FBI agents who are investigating foreign intelligence cannot confer with lawyers in the
criminal division of the Justice Department without the supervision of another department in the Justice Department, which they called the Foreign Intelligence Policy and Review Department. Whenever any FBI agent wanted to confer with the criminal law division member in the Justice Department you had to have another person there to see what was being said. The Justice Department referred to this facetiously as the “chaperone requirement.” If one of the persons from that department—that is the Foreign Intelligence Policy and Review—was not present they had to make a memo as to what they said to each other.

The Foreign Intelligence Surveillance Court bought into that and ruled that there was a danger that somebody in the criminal division would take charge of the investigation and turn it into a criminal prosecution instead of foreign intelligence gathering. The law does not contemplate that division; the legislative history does not suggest it. In fact, in some of the legislative history it is said that foreign intelligence and domestic law enforcement at some points merge. That’s part of the legislative history.

Interestingly enough foreign intelligence is defined to be information necessary in the case of a U. S. person to the protection of the country from espionage, sabotage, and so on all defined in the criminal law and some other purposes of preventing attack. The agent of a foreign power, if he’s a U. S. person, is defined as somebody who is acting on behalf of one of these foreign powers and in doing so may be violating the law of the United States. In the case of an international terrorism group they are defined as a group engaged in conduct which is dangerous to property or human life and which, if done in the United States, would constitute a violation of the criminal law. You have all of these definitions under the Act incorporating U. S. criminal law. At the same time the court is saying these foreign intelligence investigators cannot confer with lawyers in the criminal division, the experts on criminal law for fear that it’s going to turn into domestic law enforcement rather than foreign intelligence.

Therefore, the lower court issued an order in our case and incorporated all these restrictions against conferring. The government then appealed to us saying, “We don’t want the restrictions.” And we can only hear a case where there is a denial of the order. We treated the restrictions as a sufficient partial denial to give us jurisdiction to hear it as a denial. All that we held was that the Act and the Constitution permits the investigators in foreign intelligence to confer with lawyers in the criminal division, that’s all we have, and that does not poison the purpose to make it law enforcement.

And say to myself, “If on nine-ten foreign intelligence investigators uncovered a conspiracy to hijack airplanes and ram them into the Trade Tower and ram them into buildings in Washington, D. C. what would we have wanted them to do? What should they have done on that day?” Well we would hope
that they would arrest them, right? If you’re going arrest them what’s wrong with conferring with the lawyers in the criminal division along the line as you’re doing these investigations. You wouldn’t say, “You can’t arrest them. You can wait until they take off and then you can shoot them down” or something else. This whole business of a dichotomy between foreign intelligence and local law enforcement or domestic law enforcement was lost on me. And that’s we have, that’s all we have.

Now the Patriot Act, interestingly enough, expressly permits what we said was lawful. We in effect said, “Under the prior case law it would have been lawful even without the Patriot Act.” And the Patriot Act posed more problems to us than it solved because the Justice Department went to Congress and asked them to amend the Foreign Intelligence Act to permit the conferring and therefore wasn’t the government acquiescing in that interpretation that the lower court had engaged in. Of course the government argued in front of us that you didn’t need the Patriot Act and it would have been lawful without the Patriot Act, but nevertheless here comes the Patriot Act. It expressly provides that people in foreign intelligence can confer with lawyers in the criminal division and that that does not preclude the purpose from being foreign intelligence. It also says that instead of having the purpose of foreign intelligence it says, “One of the significant purposes of the wiretap has to be foreign intelligence,” so it just throws in significant purpose.

Now that’s probably more than you wanted me to get into, but it’s kind of interesting today the hearings are going on in connection with 9/11 and I heard the former director of the FBI make reference to the Foreign Intelligence Review Court decision as it affects the ability of the various departments of government to share information. Illustrative again of, I guess, from my standpoint just sitting here in Portland it is a smaller world than I would have thought of.

Speaking of small worlds as part of the presentation in the foreign intelligence case there were two reports done on what happened in Wen Ho Lee made part of the record in the foreign intelligence case. One investigation done internally by the Justice Department as to what went wrong in Wen Ho Lee, and another done by the General Accounting Office on behalf of Congress as to what went wrong. Both of them focused on this so-called wall between foreign intelligence and law enforcement, and specifically, as I understand it, in the Wen Ho Lee case there were foreign intelligence investigators. They were investigating him as if he were a suspected spy, and they thought that down the line they might want a wiretap under the Foreign Intelligence Act because they wanted to get to his computer and see what he had been doing in his computer.

They did not confer with lawyers in the criminal division of the Justice Department thinking that if they did so it would poison their application, thinking they might want to apply. And the irony of it is that had they conferred
with lawyers in the Justice Department they would have learned that they didn’t need a warrant and they could have sped up their investigation by a full year because Lee had signed off allowing the government to go into his computer at any time, and the law is that nobody can own government secrets. Whatever was secret in his computer the government owned and they owned his computer and the whole thing and he knew the ground rules were because he signed up for it when he was employed.

CH: Why didn’t they know that?

EL: Because they didn’t confer.

CH: Why wouldn’t they have known that anyway?

EL: I don’t know.

[End tape 13, side 2]
and John Cline who not only had been the lawyer for Wen Ho Lee, but had also been the author of the *amicus* brief filed on behalf of the Association of Defense Lawyers in the country. Judge Ralph Guy who was, and still is, the chief judge of the Foreign Intelligence Surveillance Court came out to Oregon to visit me and to attend a University of Michigan football game at Oregon on the Saturday before this get together. He left Portland the day before this get together. I suggested that he stay the extra day to be part of this, but he had to go home. It would have been interesting if the two of us could have been there.

The third judge of the court was a senior judge of the circuit court for the D. C. Circuit and he had been formerly ambassador from the U. S. to Yugoslavia I think, and formerly in the Justice Department, and now is co-chair of the commission that has been appointed to look into the condition of intelligence leading up to the Iraq War. His term on the Foreign Intelligence Court has expired. Judge Laurence Silberman is his name, but he is quite an experienced person in both administration, foreign relations, and foreign intelligence is and now co-chair of that commission.

CH: Did this discussion you were referring to illuminate some of the issues at all?

EL: Absolutely it did. I thought it was an excellent presentation and I thought it was really quite a phenomenon to arrange, right here in Portland, Oregon, so many knowledgeable people. There were a couple people there from the Justice Department one of whom had been in the Justice Department in, I think, the Ford administration under Attorney General Edward Levi, and had some knowledge of how this Act evolved.

CH: Was he one of the ones that was sitting in the audience?

EL: Yes. He said there was intended to be a wall between foreign intelligence investigators and members of the Criminal Division of the Justice Department. That was his perspective historically, see. I’m kind of curious because I think when they were doing it before the Act there was a lot of things that they didn’t want to make public in any way, and didn’t want to get into criminal law enforcement with it. If there were any abuses, see, before the Act would we assume the abuses were in truth done for foreign intelligence, or in truth done for law enforcement, or were they simply done for political purposes. See? To the extent that there was any abuse under the guise of these other things, but for political purposes, they would never see the light of the day and the last person they would want to confer with would be somebody who had the job of enforcing the criminal law. [laughs]
Now that’s one person’s perspective on it; it doesn’t tell us very much who the wire tappers—before the Act—were willing to confer with. Chances are if there were real abuses it was nobody.

I’ve gotta say that one other perspective I have on this is I was a prosecutor and I had to advise police as to what they could do. I think if you have investigators conferring with lawyers, for the most part, that advice will be to conform to the law. In one way, to allow the investigators to confer with lawyers is to restrain them, because if you have investigators out here who are running at large without being restrained by lawyers who are going tell them, “This is illegal, this is unconstitutional or this is inadmissible” you’ve run the risk that they’re going go further than they might if they were actually conferring. That’s a twist of irony, if you will. Those in the name of civil liberties are saying, “Don’t confer with these lawyers in the criminal division because we don’t want them to take control” for fear that they’ll turn it into a prosecution instead of something else.

CH: Was Mr. Cline more insistent on the need for a stepped-up firewall between the—

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re: Sealed Case

EL: Oh yes, that’s what that brief argued, that this Act should not be used for criminal law and domestic law enforcement. We used the term foreign intelligence crime because we used that phrase in our opinions: foreign intelligence crimes. Some of the information gathered is foreign intelligence, but some is evidence of crime, namely espionage and sabotage or whatever else it might be, and treason and you name it, all of which are crimes. It just becomes very difficult for me to appreciate this dichotomy between this world of foreign intelligence and this world of criminal prosecution. The case was actually presented to us by the solicitor general himself to the Foreign Intelligence Court is in the Justice Department building in Washington, D.C., and you go through a steel door there that seems like you’re going into a safe. I’m told that the whole interior wall is lined in such a way that there can be no transmission in or transmission out of that room. Our argument was heard in that room. It is nothing like a courtroom. It’s just a big table arranged in a square.

We heard the case in September one year after 9/11—almost to the day, I think we heard it on 9/9 of 2002. We didn’t set it in regard to the anniversary of 9/11. We just did it as a convenience and since the presentation was made by Ted Olson, the solicitor general, it was fortuitously okay that it wasn’t done on the anniversary because his wife was one of the passengers on the plane that hit the Pentagon.

CH: You’re referring now to the Sealed Case?

EL: In re: Sealed Case.

CH: What more can you tell me about what the Sealed Case was dealing with.
Leavy, Tape Fourteen

EL: That’s it. The facts continued to be classified, and the facts are omitted from the decision as published. That it’s not up to us to say what is classified and what is not classified, and that was de-classified by somebody else. It was written in a way so that you didn’t have the facts intermingled in every part of the opinion. And it’s a per curiam opinion in which all of the judges take responsibility for all of the language in it. That’s about it.

CH: Can you tell me a little more about what the issue was?

EL: The issue is just as I described it. To be more specific, what the lower court did is it put in this prohibition against conferring into the order in the name of what is called “minimization.” Now there’s a portion of the Act that requires that the attorney general have a plan in every case to minimize the collection, retention, or dissemination of private information. That prohibition against acquiring, storing or dissemination of non-public information I think is the word, would be absolute. In other words, you couldn’t collect anything, couldn’t store anything, couldn’t disseminate anything, except the last words in it says: “consistent with the needs of the United States to gather foreign intelligence information,” I think are the words. Anything that is inconsistent with the need to gather foreign intelligence information, if it is acquired or stored or disseminated, is to be avoided. It might be that the government in implementing an order would assemble or collect some non-foreign intelligence information. This procedure has to require that it not be stored.

CH: It has to be expunged?

EL: Or more practically, the way they do it is they don’t index it so it cannot ever be located. That’s what the trial court did; it said, “This minimization procedure has to include the prohibition against conferring between the investigators and the Criminal Division of the Justice Department. They did not focus on purpose, they focused on the minimization part of the statute.

Even though their decision was made after the passage of the Patriot Act they never dealt with the language of the Patriot Act because they put it under that phase of the law. Even in the minimization procedures there is a procedure that says, “If—if—evidence of crime is collected the attorney general can turn that evidence of crime over to a prosecutor.” If in the name of foreign intelligence you’ve got a legitimate warrant, you’re doing it for foreign intelligence, and they found out that somebody had committed a serious crime that’s an exception to the minimization that says you can store it, and you can’t disseminate it, and the attorney general can then disseminate evidence of a crime if it’s picked up incidentally. But the prosecutors cannot use it without the express consent of the attorney general for fear that it will disclose a source or something like that.

It’s a balancing act at every stage.
found this whole body of law to be very, very fascinating and it took quite a bit of study on my part to understand it and maybe I’m not making myself very clear in just trying to describe it.

CH: This is an *en banc* decision by the three judges—

EL: Three judges.

CH: —on that panel? I presume after you heard the case you went off on your own, the three of you and—

EL: We followed the usual procedure. We confer with each other and share our views.

CH: Privately. What was that process like?

EL: We went through the order of each one of us expressing our view. I, as a junior judge, was first, as is typical, at the appellate court level, and then each of them added theirs. We all participated, it was probably six weeks in the drafting. I learned how to handle classified information in the course of that, had some of that material here in Portland. We had a safe available to us in the FBI office and all of my staff had the necessary clearance. I learned that we could not have any of that material out of our presence. If you had it in your presence and you’ve decided to go to lunch you were to take it with you. If you go to the bathroom you take it with you. You never let it out of your sight.

CH: Unless you put back in the safe.

EL: Unless you deliver it back into the safe.

CH: Were there any significant differences between you and the other judges on how to rule?

EL: I had an opportunity to get at that once before and I avoided it. I’m not going get into it—we wound up unanimous in the opinion and it was a *per curiam*. All I’ll say is we had quite a bit of exchange and participation by everybody.

CH: Was there participation by the defendant as well?

EL: Oh no. The nature of this is that the government is the only party and that’s true in every search warrant. As a U. S. Magistrate for the District of Oregon I issued a lot of arrest warrants and search warrants and wiretap orders and what have you. Pin register requirements and all of that from my home. That’s how private it was. That’s going be the nature of these things. The defendant doesn’t get to be heard from. Now, if there is never a criminal prosecution the target of these orders will never know that he was a target.

That’s different from domestic law enforcement. The target will know sooner or later, but in this they don’t know. If a person is prosecuted with information coming out of the foreign intelligence then the defendant does
not get to examine the affidavits that led to it. All he gets to do is challenge it when he’s being prosecuted in a district court someplace and this evidence is being used.

The district judge will then examine it in camera for a determination of whether or not the district court thinks it is lawful. If there is a criminal prosecution with the use of any of this evidence the legality of what is decided once again by the district court. It’s either going admit the evidence or not. Then that can be reviewed any one of the court of appeals in the country. Our opinion has binding effect, or precedential value, if you will, only in the Foreign Intelligence Surveillance Court, and in our court, but it doesn’t purport to bind any district court or any court of appeal. The procedure is different and the procedure that allows for this in camera examination without any participation by the defendant, even if he’s accused of a crime, has been held to be constitutional. So there are profound tradeoffs.

CH: But can they review the evidence against them during prosecution?

EL: They will hear the same evidence that the jury hears but they won’t be able to look at the affidavit as to whether it measured up to the law or not. Only the district judge will get to look at that. Now in a domestic law enforcement case they would get to look at the affidavits and they would see the same thing that the magistrate judge, or in our case, the Foreign Intelligence judge was looking at.

CH: What happens when the defendant appeals because of due process?

EL: Then the appellate court could look—it’s the same thing that the trial judge looked at. But again, the defendant wouldn’t get to see it. He wouldn’t get to argue that this affidavit was insufficient because it lacked the showing of probable cause. He would be told by the judges who examined it in his absence and while he’s excluded that, yes, it’s okay. That’s all he gets.

CH: What about if the defendant moves to suppress the evidence—[recording interrupted, then resumes] so it’s the same for each one of those.

EL: That’s why I think Congress felt that it was necessary, right? Let’s put—the administrative branch, the attorney general, and other presidential appointees confirmed by the Senate— their signatures and responsibility on the line in every application. Have a judge pass on it and then have Congressional review because there are shortcuts. This is their way of saying, “Yes, there has to be shortcuts if you will, and this is how we’re going to weigh on the side of trying to protect. It’s done anonymously, or it’s done by some low-level person,” or something like that. Can’t do it. No escape.

CH: Do you feel satisfied that the way the law has been written, and the court organized, that everyone’s interests are well represented?
EL: As well as can be given the nature of foreign intelligence, and how they function, and how they have to protect their sources, and how they have to cooperate with foreign nations, and how if they disclose sources somebody’s going get killed sure as the world. If they don’t do that they’ll never get the kind of information that is necessary, and so you make these trades. We’re back into policy because, as I said a little earlier, when you get into Fourth Amendment exclusion of illegally seized evidence it isn’t because it tells you a false story; it tells you that it is our policy to have our police obeying the law and behaving. So we make those trade-offs in domestic law enforcement and we make some other trades when it comes to foreign intelligence.

CH: Did you have any other case come before you at the Court of Review?

EL: No. That’s the only case we’ve ever had. Hopefully, it will be the only one we’ll ever have after the court existed for whatever it was, twenty-four years or so, one case. I think there’s certainly more visibility on the part of the court now than there ever was before. That is awareness that it exists. I don’t know of another judge of the Court of Review who has been from the Ninth Circuit. Now we have had judges from the Ninth Circuit that have been part of the lower court, and that appointment is always made by the Chief Justice.

Thoughts on Patriot Act

CH: How do you feel about the Patriot Act?

EL: I have no strong feeling about it. I haven’t gone through and studied it as to what it does here and what it does there. I know there’s a lot of misinformation about it. For example, in the area of foreign intelligence, the Patriot Act is criticized for some of the features of the Foreign Intelligence Surveillance Act that had been in place for all these years. It isn’t the fault of the Patriot Act. It’s those senators and congressmen in 1978 that saw abuses and thought they were going regulate it. It isn’t the fault of the Patriot Act. And so the Patriot Act is getting criticized for some of these things that are part of the Foreign Intelligence Surveillance Act.

In every one of those instances where you want the law to be something else you say to yourself, “What do you want instead of?” I’ll be curious as to how these hearings sound today. As I said, there have been some references to the Foreign Intelligence Court decision in hearings surrounding 9/11 now. In the event at the District Court Historical Society I avoided trying to defend the Patriot Act. That’s not my business to either defend it or criticize it. I think I started my remarks by saying, “I’m not going defend our decision. It either defends itself or it’s indefensible.” You look to the words of that decision to defend it. You shouldn’t have to go out and say, “Oh yes, it’s better than the way it’s written.” [laughs]
CH: [laughs] I guess so. Going back to your tenure on the court of appeals, which cases stand out as being the most significant that you’ve heard on the court?

EL: Probably the most far-reaching case was one that I didn’t write, but I was a member of the panel along with O’Scannlain and Kleinfeld, and it dealt with a proposition by the voters in California which affected—

[End tape 14, side 1]

Approach to Writing Opinions

CH: —case on Proposition 209 in California on affirmative action.

EL: I’m trying to think. Maybe one involving sentencing guidelines after the Supreme Court had ruled on a case arising out of the Rodney King—the actual prosecution of some of the police involved in that. We had another case that came to apply that case, and I wrote for the court giving the district court judges a little more discretion than they had before that decision. As a dissenter said, “District judges would like that decision.” I’ve forgotten the name of it now. And then that’s about it as far as far-reaching decisions. You know you have some important ones you think of like three of us had the issue of whether or not the Navy had to conform to local environmental laws.” I don’t know why they’d do that; probably some of the opponents of having a home port for the aircraft carrier wanted to make it that much more difficult. Who knows? But it’s there.

CH: In general what is your approach towards writing opinions?

EL: I avoid any pretense of humor. I don’t think I have ever written anything that would suggest humor in somebody else’s lawsuit. I have a feeling that we shouldn’t be saying any more than we need to say, and it’s amazing how those attitudes develop. I’ll tell you where that attitude developed mostly was when I was a judge of a traffic court. I found that if somebody ran a stop sign, for example, and pled guilty to it, they were willing to pay their penalty, and they knew that they’d done something wrong. If I sat there and told them how dangerous it was and how they had to stop it and start making a lecture about it, see, the suggestion is that I have some attitude about running a stop sign that prevents me from being fair to them. Right?

CH: I guess somebody could see that.

EL: You just run into all kinds of problems. When a person knows they’ve done something wrong and they admit it and they have some indication that they regret it and intend to do better and then you load upon them some cheap sermon, if you will, then that person goes
away saying, “Well, I wonder how I would have been treated if I hadn’t had that eccentric guy who thinks that running stop signs is so horrendous and has a totally disproportionate attitude toward it.” You make the person then suspicious that you’ve dealt with them unfairly. That’s what I observed repeatedly in the traffic court.

I feel the same way in opinion writing. You do all this mischief and then if you come up with too many novel phrases that have been used repeatedly, if you deviate from that then somebody can argue, “This opinion has a different meaning.” For example, if somebody circulates an opinion and a colleague concurs with one line concurring in that. If I’m the third one to concur, I will use the precise language of the one who just concurred ahead of me so that the author knows that I have not got some little twist that makes me think differently. I think that we have so many rules that are well settled. We have so many words that have rather settled meanings that you don’t try to be too innovative and creative in creating new words. You don’t serve anybody very well. Now that’s an attitude that I have toward opinion writing.

If you’re working with your staff, and I worked a lot with staff—we’re entitled to five staff members, two secretaries and three law clerks. I think that a law clerk drafting an opinion is tempted, sometimes, to be more critical of lawyers than I ever want to be. I think this true in courts that if judges get into exchanges or criticisms of lawyers, getting excited about what lawyers do that may not quite be right, the staff will always want you to come down hard. Any judge who holds anybody in contempt, or anybody criticizes anybody is always going have staff as supporters, and I think a person’s gotta be very careful.

CH: Why is there that tendency?

EL: I don’t know. Maybe it’s because of idealism, if you will, see? Maybe somebody hasn’t behaved ideally. It’s bad enough if a person knows they lose their lawsuit without piling on them, right? That’s the way I feel, and if you rule against somebody, you didn’t need to say he was no good on top of all else. You just ruled. That’s the attitude that I have and I hope it comes into my work.

CH: Would you have any idea how many drafts you would issue before writing a final opinion?

EL: No way. It’s all relative. Unless something becomes important to another judge you’ll go along with something. Everybody’s going to express themselves differently and unless you find some reason to really say it should be different. And whoever you’re sitting with, you know that every one of them has a different style. Some are more wordy than others, some are good at humor. I think they pay a price in cases for it. I never really ever tried to say, “I’m going fix this so it means something in
the future.” Usually that’ll take care of itself.

When I was a circuit judge in Lane County, particularly on certain worker injury cases, there were so many decisions by the Oregon Supreme Court on this subject that you could find language that would take you anyplace you wanted to go. So lawyers in those cases I said, “Do not quote any language from any opinion. You only tell me what the facts were and tell me what the result was. I don’t want to hear any more quotations because you can quote them for any result that’s possible. Just tell me what the facts of that case were and tell me how it turned out.” There were dozens of cases on a particular subject that I remember saying to the lawyers, “It’s hopeless.” That’s what I think you can get into if everybody gets to express themselves on a certain subject and they just keep doing it and keep doing it, pretty soon you can’t understand.

CH: How important are clerks’ contributions in writing?

EL: Absolutely essential. One of the obligations that I always felt strongest about for the person who’s going to be the author, you are in effect telling the other two that there’s nothing in this opinion that is factually erroneous, and the record supports every word that’s here. You don’t have to say, “Well, if I use the color blue in this opinion you don’t have to worry that that’s going turn out to be green when you look at the record.” I think we would all be embarrassed if we’re deciding a case and we don’t know what the facts are, and so each of us does not have the time to say, “Okay, you put in a certain sentence saying that something happened on such and such a date. Do I have to go check that date?” Not at all; I’d better be able to rely on you, right? That is one of the major obligations of the author of an opinion, that nothing is going to serve to embarrass the court by being factually wrong. That’s the easiest thing for somebody to pick up and say, “Well they’re factually wrong.” Now what does tell you about everything they’ve said? See. There’s where you can really do mischief.

CH: On the court of appeals are there concurring opinions in the affirmative or—?

EL: Very rarely, but there are. Part of that, I suppose, is a function of time. We are a high volume court and everybody has to turn out a lot of stuff.

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EL: A judge in regular active service participates, I think, it’s something like four hundred cases a year on merits. Some of them are the most simple and some of them are very, very complex; either environmental or death penalty or antitrust or whatever, but are just enormously tough stuff.
CH: How much do you rely on staff to distill this information?

EL: A lot. A lot. Justice Kennedy keeps reminding us that that’s one of the advantages of being on the Supreme Court that they are able to take their cases and get them focused, see. That is always the problem is how do you take all this stuff that is involved in all these cases and get yourself focused on back to what is important and what makes a difference and what is irrelevant and all of that kind of stuff and that is the major chore, and staff has to be critical to that. To the extent that we rely more and more and more on staff we become more and more and more like a bureaucracy. We have a requirement that our central staff is turned over about every five years so that the staff doesn’t build up an agenda of its own.

CH: Oh, really?

EL: You lose a certain amount of your efficiency.

CH: Every five years.

EL: About five years. We have a couple people who’ve been on for longer, but I think that unless a person gets into some higher supervisor role, they’re turned over. We have no career staff people.

CH: No career clerks.

EL: Now in our chamber we can have career clerks. But at the central staff—

CH: I see, okay.

EL: Central staff. We sacrifice some efficiency for that, and we have difference of views on the court as to whether or not we should have more staff people, but that tells you that we’re relying on staff quite heavily. If we didn’t, we couldn’t conceivably keep up with the volume. I’m going say it’s in the neighborhood of one-third of all of our cases are filed pro se.

CH: Pro se?

EL: No lawyer for the appellant. Some of this stuff is written in unintelligible but somebody has to look at it and so our staff spends a lot of time with those pro se cases. For example, looking at every one of them to be sure we even have jurisdiction. Because a pro se appellant may be trying to appeal something over which we have no jurisdiction for a number of reasons, either there’s not a final judgment in the lower court, or the times have expired for filing the notice of appeal, or some other defect in the jurisdiction.

That’s one thing that the federal courts are very, very conscious of in every single case because we view the federal government as a government of limited power. You can’t have a government of limited power if your courts are going be all-powerful. Right? So
we have to look on every occasion that we’re not trying to use power that we don’t have. That is not the attitude in the state court. We didn’t even have to make any jurisdictional allegations. If you had a case and you filed it in the state court we presumably had jurisdiction until somebody pointed out that we didn’t. But in the federal court you look for that on every occasion.

CH: Is there an equivalent of a public defender for the court of appeals?

EL: No. We don’t have such an institution of appellate public defenders like the state has in its appellate practice.

CH: In the whole federal system.

EL: Don’t have it. Each of them is district by district and the defenders in the district handle the appeals to the court of appeals.

CH: I see. And do you tend to circulate opinions among the other judges on the court of appeals?

EL: Our circuit does not. We only circulate among the judges on the panel, and if there’s an *en banc* court they’re circulated within that group and not to the rest of the court. I have only circulated a proposed opinion to the full court in one case and that is in a case where the Ninth Circuit had ruled and the Supreme Court had decided a case in the meantime that wasn’t precisely on point with what the Ninth Circuit had ruled. I thought the outcome was governed by the Supreme Court decision, but in reaching that it probably meant ignoring a three-judge panel opinion of the Ninth Circuit. I circulated it to everybody to see what they thought of that and nobody raised an objection that I wasn’t following Ninth Circuit law and so that one went without too much fanfare

Other than that we just don’t have time for everybody to look at what everybody else is doing before they do it. Now once they’re published, once they’re out, then any judge can say, “I want an opportunity to call for *en banc* and I want to be allowed time in the event that there is not a petition for rehearing by the parties and it calls for *en banc* consideration. I want to be able to do that on my own because of what is said in this opinion.”

Then if there is no petition for rehearing that judge who has given notice to the panel that I’m interested in this will be given an opportunity to call for *en banc*. If, at that stage, a judge doesn’t say anything and they petition for *en banc*, then the judge can read the *en banc* petition and the off-panel judge can decide whether to call for *en banc*.

So there are two opportunities, and some judges in some cases you want to take advantage of the first opportunity because there may not be a second opportunity, see. It all works out to allow everybody to have ultimately their say. Sometimes when a judge is threatening to call for *en banc* in a case he will suggest what the problem is to the
panel and the panel may amend the opinion to accommodate his concerns to avoid *en banc* call, or may acknowledge that the off-panel judge is right. You can get in your say in anybody’s case, but you can’t do it normally until after it’s filed.

It’s an amazingly complex system, but it works. I say it works to the satisfaction of everybody who thinks the circuit shouldn’t be split. [*laughs*]

CH: In that case, how do you feel about the circuit being split?

EL: Early on in my tenure as a circuit judge I was opposed to it. Now I’ve reached the position where I really don’t care at all. We will have the issue with us continuously until it’s split. Anybody who doesn’t like anything that the Ninth Circuit does or says is going to say, “Let’s split it.” There apparently is good politics on behalf of those who want to split it. If, for example, Alaska had a decision of the court of appeals that a lot people in public office in Alaska didn’t like and they got a lot of mileage out of criticizing the Ninth Circuit. Where issues that have come before the Ninth Circuit are so important to the economy of the State of Oregon, or any other state in the Northwest, as it affects timber, for example, naturally the court can’t avoid the controversy and sometimes Congress doesn’t help. They pass the laws and then when we enforce them they criticize us. They have the power to go right back there and change the law any day they want. But instead of being able to do that they’re able to criticize us and they get the mileage out of it.

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**Selecting Law Clerks**

CH: How do you select your clerks?

EL: It’s strictly on an ad hoc basis, I don’t engage in any grand scheme. I have hired what I think is a disproportionate number of graduates of local schools. My belief is if you get the top people out of local schools you’re going to get good people. I haven’t focused on the need to get graduates of any particular group of schools, or anything like that, and I don’t mind hiring people who have had experience. They don’t have to be brand-new out of law school. If they have clerked for somebody else, and they want to continue to clerk, I’ll consider them. I’ve had some very, very bright people as law clerks and I’ve had them from a number of different schools around the country and am very pleased with them. I don’t get too caught up in the personal relationships between myself and clerks and don’t maintain contact with them after they leave. I like to see them succeed, but I don’t seek them out and don’t encourage them to seek me out.

CH: Do you have any idea what kind of influence you’ve had on them in the process of their working for you?
EL: I have had law clerks who wanted to go on to be law clerks for somebody else and I’ve discouraged them from that and, I shouldn’t say pushed, but advised them to go into practice. I’ve had some of them thank me for that; they’re now very happy in practice and remind me that I suggested that they go into practice. I’ve had some Hispanic law clerks who in every instance I view as very, very bright, and encouraged them to go into practice, because so many times you have minority lawyers in government. That’s okay, but we don’t have enough of them in private practice and I’ve encouraged them to do that. I have one who is a counsel for Delphi Corporation—that big corporation—for all of its Central and South American operations. A guy who speaks four languages. Another law clerk who didn’t learn English until he started the first grade, picked up English and succeeded in school and law school. Some of them are, as I say, extremely bright.

I have now two career law clerks in my chamber, one is a full time and one is halftime. I wouldn’t be allowed to have two full time career law clerks. As I recall one is a top grade getter at Lewis and Clark over a span of ten years, another was second in her class at Oregon. I’ve had quite a string of women law clerks. Just happened that way, I didn’t seek them out, didn’t intend to necessarily have it one way or the other. It just worked out that way.

CH: Any special skills you’re looking for or specialties?

EL: The only thing is that I don’t really need is anybody who is an advocate of anything. I would feel that we were hurt if we had somebody who was an advocate of something, and who doesn’t have a sufficient open mind that they can go either way in any case if they were called upon.

CH: I’ve heard that the judges in the Oregon Circuit Court that there’s a lot of congeniality among them. Is that true?

EL: Law clerks?

Court of Appeals Collegiality

CH: Among the judges.

EL: In the federal court?

CH: In the federal court, yes.

EL: Yes, that has been historically true.

CH: Is that also true on the court of appeals?

EL: No, there’s a difference. I think it goes to the selection process. The selection process in the Court of Appeals is more partisan. The selection calls for essentially the senators to have their say, and if a senior senator is the same party of the president I think that senator can have whoever he or she chooses to appoint. When it gets to the
Court of Appeals, or the Supreme Court, you get into a decision being made by somebody other than the senators, initially. In doing so that means that somebody has surfaced in partisan politics, and so you have more partisanship at that level.

Then you have more relationships that are known—more people know each other before they ever get to the court and they have been political colleagues or political rivals or something else. You have more of that on the Court of Appeals. Having said that, that doesn’t mean that people aren’t professional and don’t get along with the measure of professional courtesy in all of that, but you don’t have the congenial relationships and collegiality that Oregon has historically had.

Some of these big district courts like Los Angeles and so on, you find more friction among the judges personally than you have historically here. I hope that the District of Oregon can maintain that. It’s something to be worked for. The circuit judges will tell you that the quality of lawyering in Oregon—that the Court of Appeals sees—is better than you’ll see in most other places.

CH: Why is that?

EL: I think that in places like Los Angeles there’s more anonymity in the practice of law. People don’t repeatedly see each other and they can be more abrasive with somebody and get away with it because they’re never going see them again.

[End tape 14, side 2]
decision in the immigration field. So those are changes that have been forced upon us by the nature of things.

When I first was appointed I learned that the court was several months behind in its handling of motions, and suggested that if it were up to me as an old time trial judge I’d just sit down and start deciding motions. Out of that came a procedure that has been instituted now, for whatever number of years it’s been that I’ve been on the court, of three judges sitting down as a motions panel on a monthly basis meeting sometimes as many as two times in a month and keeping our court current on its motions.

As an offshoot of that we also have what we call our screening program, which is that same panel also hears cases that are screened out for their simplicity; probably a hundred and fifty cases a month are decided in that screening context. That means that the panel sits down with central staff in San Francisco typically, and that staff member is fully aware of everything about this case. The judges with no prior knowledge about the case are told about the case and the issues and are supplied with the brief, and this staff attorney is prepared to answer any question about the record. Then the judges, once they’re assured that they understand the case to their satisfaction, can decide it right then and there without argument, without any further study. As I say, those cases are cases where the law is controlled by relatively recently published Ninth Circuit authority, the issue is usually a single one and just as an example, it might be that the trial court has denied two point reduction in the sentencing scheme on the issue of whether or not the defendant accepted responsibility for his actions. Well, you can only argue about that for so long. Once you know what the fact is you decide it one way or the other.

Others might be issues of statute of limitations, or might be a question on sentencing, whether or not there was more than so many participants or whether or not this person was in the role of leadership or whatever it might be. Those cases, if they weren’t decided in that context would go on an argument calendar. Maybe they wouldn’t be argued, but there would be that bulk of paper that would have to go and there would be another case that a judge had to get into before hearing the arguments.

Now the next effect of that is that by screening out some of these so-called single issue and simpler cases our argument calendars are more difficult. The cases that come up on the argument calendar are, whether ultimately argued or not, a more complex mix of issues than we would have if we didn’t have some of those diluting the seriousness of what we’re dealing with. So the workload has gotten more difficult in the argument calendars.

A typical argument calendar means that judge, in regular active service, will hear five successive days of arguments and during that time will hear arguments, or have submitted for decision on the merits, something like
thirty cases. We have this kind of point system that tries to even out those calendars so they’re equally distributed among the judges as far as work is concerned. But if you do eight of those argument calendars in a year, plus at least one month on that screening and motions, plus all of the stuff that you get in petitions for rehearing *en banc* of some other panel’s cases, plus voting on the *en banc* calls, plus participating in the *en banc* decisions, it keeps a judge in regular active service enormously busy.

The only advantage of being a judge of the Court of Appeals as opposed to being a district judge at least as a court of appeals judge you have some control of your time. If you want to quit at four o’clock in the afternoon you don’t have to worry about what am I going do with this jury and what am I going do with this witness who wants to finish his testimony today? Whereas, a district judge, or any trial judge, has to be very predictable, very punctual, and very committed to a full day, every day. On the Court of Appeals you can work middle of the night if you want; you can work regular hours or whatever you want. It is that flexibility that I found satisfying; to be able to do that rather than to make the kind of commitments that a trial judge has to make. When I hear court of appeals judges saying, well, it gets to be a tiring day if we have to hear arguments all day, or if we have to sit in screening all day, or we have to sit in motions all day, I am just reminded that’s what a trial judge does almost every day. You have to have that kind of endurance. I guess every place you turn they are trades, right? [laughs]

CH: It sounds like the screening panel is, in its effects, somewhat similar to an out of court settlement?

EL: No, no. You’re deciding that with all the authority and power that you have. That decision is a judgment of the United States courts. While it’s decided and it’s the same kind of use of power it’s simply that those cases do not lend themselves to the need to hear lawyers talk for a period of time whether or not this judge was right in concluding that this guy did not accept responsibility for his crime or something like that. It’s just that it would be disproportionate. Now the same is true with certain other categories of cases. We have a lot of immigration cases that are submitted without argument. We have a lot of Social Security cases that are submitted because our scope of review is so limited. If there’s substantial evidence supporting whatever the administrator did that’s the end of the case, that’s all we’re looking for: is there substantial evidence to support whatever was already done? Then there are certain things that are non-reviewable. If somebody’s exercised their discretion we can’t touch it no matter whether we think it’s right or wrong. That’s their call. I’m going say more than ninety percent of our decisions are, “affirm.” High rate. Now district judges will focus on the times they’re reversed, but the truth is they’re affirmed lots of times.
CH: Has there been an increase in class action suits?

EL: The class action had its heyday before I became a district judge. There was more effort at class action then, and I think that has somewhat diminished and has stabilized. I wouldn’t say they’re on the upswing. We’ve had massive, massive issues decided in class actions, but I don’t think the numbers are running wild.

CH: Some of the other judges I’ve interviewed on the district court have talked about the enormous increase in workload because of the drug laws. Did that increase find its way up into the court of appeals as well?

EL: By all means.

CH: Is it still a large part of the work?

EL: It’s still a large part of the work. I don’t know what the numbers of people in our prisons are, but the number who are either there for drug convictions, or are there for crimes committed arising out of drug addiction, is extremely high. Another thing that I don’t think people are conscious of is the fact that somewhere in the neighborhood of thirty percent of the population in the federal prisons is aliens. Boy, that’s hard to take when you realize that, for example, that in any district in the circuit a lot of Mexican nationals are being sentenced to our prisons for drug offenses. What are we going do with them when they get out? They’re going be deported after we spend twenty-four thousand dollars a year on them for a lot of years. The reality is that for every one that’s sentenced there’s a whole lot more that are ready to come, right? So it’s tough, tough proposition. Whether we’re effective in what we’re doing is hard to know.

Speaking with effectiveness, I was at the University of Pennsylvania in 1967, at a national college of trial judges. While I was there, There was rioting going on—race riots—in various parts of the country. I drove through Detroit on the way home with my family, with National Guard on the streets, truckloads of National Guard people, burned out block and one thing or another. I say to myself, “Well what affect is law enforcement having?” Look at how irrelevant law enforcement is to what’s going on. I had misgivings about what we were doing as judges and law enforcement people, imprisoning people and all of that. Things were out of hand until a few years later when they had the big power failure in the eastern seaboard states, and then you had all of the looting, I don’t know whether you remember.

CH: I do, yes.

EL: Just the image of the looting that went
on. I thought, “You know if we weren’t doing what we’re doing it would just like what was happening when the lights went out.” You get demoralized and then you come back to saying, “Well, yes, maybe we’re having some effect.” It all counts.

CH: The increase for immigration cases, why are there so many? Is it just because there are more people coming into the country?

EL: Yes, obviously we have a lot from Mexico, but we also have a lot from India, from Central America where they have had domestic upheaval. We have people claiming asylum here for political reasons, that they’re being persecuted because of their political views, or even religion, a lot of cases from India. It’s not confined to Mexico, and you don’t have the applications for asylum from Mexico that you have from some of the other places that have had more domestic upheaval.

CH: How do you feel about the cases of the people being held at Guantanamo Base in Cuba?

EL: I have no real feeling on that. I know that there are people who feel strongly about it and I just reconcile myself to the fact that sooner or later a court is going to decide all of that. They’re working their way into the courts. What I find interesting is that in the case of the Japanese interment during World War II, the Supreme Court ultimately passed on that. The focus of anger, even at this stage, is not so much at the Court is at the [Roosevelt] administration that did it. One of the judges of our court who was as a youngster in one of those camps, I asked him, “Where do you focus the blame?” He focuses on the administration. I would have thought that he ought to focus it on the court. My attitude is, whatever is done there is going be done there, and the court that decides that it’s okay, if that turns out to be, if anybody’s to be angry they ought to be mad at that court. Throughout all of this I’ve said to myself, “Well, no use in getting excited about it, some court will decide.”

CH: Wasn’t there the Speedy Trial Act [1974, 18 U.S.C. §§ 3161-3174] that said that all cases should come to trial within a hundred days of arrest?

EL: But these persons are not being held as people who are being prosecuted under the criminal law of the United States. They don’t get the benefit of the act. The question is whether or not they get any measure of due process. The major question is whether or not the administration is the sole labeler of them as foreign combatants as opposed to something else, or not. Does the court even review that determination? I’ve not really focused on whether or not they’re being treated justly or unjustly. I understand we had U. S. citizens who were prisoners of war in World War II, not an unheard of phenomenon.
I unseated a controversial circuit judge in Lane County in 1960 and his defeat was understandable, I think. He made himself controversial and paid for it. I never sensed, ever, as a judge in the state system, that I had to worry about how I decided a case, that it was going affect my election unless I went out of my way to borrow trouble or make myself controversial. I felt I had confidence.

With the appointment of federal judges I know that there’s a lot of politics involved in that, depending upon some partisan credentials in some instances, and support for senators or politicians along the way. Having said that I am very pleased with the quality of people that are on the federal bench. What is even more striking is the willingness of so many to work so hard. We have judges on our court that just work, work, work, and I know as a district judge I had to work either Saturday or Sunday all day to keep up. I had to do that.

I find in the preparation of my colleagues when I go to hear argument I feel I better be prepared because I know they will be and if I’m not I’m going distinguish myself by being unprepared. It’s all of that. You asked about the volume of drug cases, as I sometimes facetiously say that the lifetime-appointed judges are busy trying to stop the illegal drug business whereas the bankruptcy judges are managing all of the productive wealth of this nation. [laughs]

CH: [laughs] Are there factions, or blocks, on the court of appeals that you’re aware of?
handling a lot of cases that I wanted to witness and be a part of. They had a scheme by which you heard a whole bunch of arguments and then you went into your session, or conference with staff—right there while you’re conferring. You’d try to dispose of—it was a high volume operation that they were using and seeing whether or not we wanted to buy into that.

CH: Do you think there’s a value in judges going to other circuits to see how things are done differently?

EL: Oh yes, I do. What is reassuring is that so many things will work. That’s the thing I’m always struck by and everybody seems to be happy with their own, which is a perfect world. [CH laughs]

CH: What about informal contacts, how important are they for judges on the court?

EL: I always value that, I treasure that. We do have a couple of occasions normally when we get to do that. Among the judges of the Court of Appeals we have about four meetings a year, and then we have two meetings that add some social contact. But to get acquainted with the district judges is valuable and to realize that everybody is struggling with the same issues. Occasionally you hear something from somebody that you think might work. I know going to the National College of Trial Judges there were a couple of things that I learned that we actually took home with us. One procedure we used in Lane County we took directly from Orange County, California. Saved us a lot of time. So those kinds of things are helpful.

CH: How do you feel about the trends towards indeterminate sentencing or uniform sentencing versus—

EL: Away from the indeterminate sentence. You know the trouble with it is you sit in certain cases, and you see what you think is clearly an injustice coming out of it, and there’s nothing you can do about it. If we can deal with things proportionately on every occasion it would be ideal but sometimes the mechanics of just throwing—

[End tape 15, side 1]

Indeterminate Sentencing

EL: I was more comfortable dealing with cases before the sentencing guidelines from a standpoint of a sense of doing what was fair. For those politicians who got on the bandwagon of harsh sentences, and then a few years later claimed to be correct because the crime rate went down, they could have known that several years in advance that the crime rates were going down because of demographics. We’ve seen it happen because of the demographics and at the same time we’re inflicting what I think are some pretty serious injustices.
We see the proportionate number of women that are in prison. I am not convinced that that’s necessary. Maybe the drug phenomenon has equalized all of that and is as common among women as it is among men and that’s why there’s so many given that fact that we’re imprisoning so many concerning drugs; that may account for it. But we used to have a very small percentage of prisoners that were women. The federal system is going to have some prisons, and has prisons today, that are nothing but geriatric wards. Terms have not expired, these guys are totally harmless, senile, but still in prison. That seems a bit much.

A case comes to mind where a guy was driving down the street in Los Angeles—police had somebody—and he started complaining to the police about blocking the road and getting into some hassle with the police. The police said, “If you don’t move on you’re going get yourself arrested for disorderly conduct.” He persisted in giving them a bad time and he got arrested for disorderly conduct. They found in his automobile a gun, and that he had previously been convicted of some violent crime, and prosecuted him for the gun. The mandatory minimum sentence is fifteen years in prison, and he’s in prison fifteen-year sentence with no parole. This guy violated the law and he was a fool and he was everything else, but it just struck me in hearing that case and we had to affirm it, we did, and he’s serving his fifteen years. Now that would be more than I would have sentenced him to if I’d had a free hand.

CH: Do you feel the court is influential on public policy?

EL: No, not very. I don’t think judges have much political power—you mean in the political sense in public policy other than as our decisions affect public policy. I don’t think courts have much political clout at all.

CH: And they’re not meant to.

EL: Not meant to, don’t try to.

Evolution of Judicial Philosophy

CH: How would you describe how your judicial philosophy has evolved over the years? Or has it?

EL: I don’t know that it has changed much. I was influenced most by my early experience, and I consider my experience in traffic and small claims to be invaluable. I think it’s had an effect on the mediation I do because it was dealing with people directly. I’m thankful for the attitude that I have toward those who defend people who are accused of crime. I have enormous respect for people who defend the known guilty, if you will, and I see the good morality of it, and I don’t have any problems with it. I think all of what
EL: Not in that sense. There are judges who have value systems or views of the law that are similar, and you’re aware of that; you know that. But that’s not anything you would call a “faction” in the sense that it’s unhealthy. I recall one occasion when I was looking at the votes on the issue of whether or not a case should be heard en banc. Everybody who was appointed by a Democrat president voted one way and everybody who voted the other way was appointed by a Republican. I was talking to my secretary, Jane Glenn about it and I said, “Now doesn’t this seem like a scandal?” Her response was, “Maybe the presidents knew what they were doing?” [laughs] There’s always that possibility. I suppose there’s going to be a certain amount in the nature of the thing. Now you would expect that people appointed by different presidents would be selected for different reasons and maybe would be more of one mind than a random selection.

CH: Does the role of chief judge on the court of appeals have affect on the decisions or whatever?

EL: The chief judge does not get to assign judges to any cases—does not have a hand. The chief judge is always the presiding judge in every en banc argument or en banc case. In that instance the chief judge exercises more authority in the decision making process than any other judge of the court. Other than that, the chief judge does not have much influence on the outcome of any case. It’s a very busy position in that there’s a lot of administration that has to go on, budgeting and you name it, all of the personnel problems that come along, and trying to preside over a meeting of lifetime appointees can be challenging. Fortunately we have some people who are very good at it. Judge Mary Schroeder is now our chief. Judge Cliff Wallace thoroughly enjoyed doing what he was doing. James Browning thrived on it. Ted Goodwin didn’t care for the bureaucratic part of it. I don’t think Ted really enjoyed dealing with the bureaucracies. Proctor Hug was very good at it also. Thank goodness we have people who are willing to do it because it’s a chore.

Visiting Other Circuit Courts

CH: Have you traveled much outside the circuit?

EL: Not to hear cases at all.

CH: Do other appeals judges?

EL: Oh yes. We’re invited to go. As a senior judge I could go if I wanted to go. Right now the Sixth Circuit has lots of vacancies and they solicit help from everywhere. They sit in Cincinnati. I did go to Denver to sit with the Tenth Circuit one time and that was only because they were doing a specific mode of
I have seen done by the profession, I feel proud of. I tell people it doesn’t matter where you learn anything you can even learn things doing mischief that are going be of value to you in the legal profession. [laughs] So in a way, growing up in a rural community at a time when all the legal structure and all of government were pretty remote is okay too.

CH: Where do you think the most difficult issues for the court are going to be in the future?

EL: Oh, I think probably having to do with the origins of life, and we’re also seeing it all in the abortion field now. How about the research dealing with the beginning of life, and maybe the end of life too, the suicide stuff and mercy killing, and what have you. Those are going to be tough.

CH: Do you think that because of the aging population there’ll be a lot of cases coming through the court, or do you think that certain basic issues will be decided—?

EL: I think certain basic issues will be decided, I really do. I thought for a time that the issue of physician-assisted suicide would get more focus than it has. I think that from the standpoint of policy there’s a lot of rethinking of that and maybe physician-assisted suicide is not going—or mercy killing worse yet, is going be a phenomenon. I think there’s some rethinking and backing away from that.

Rewards of Judicial Career

CH: What’s been the most rewarding part of your judicial career? What have you enjoyed the most?

EL: If I had to put just a “feel good” label on anything it comes out of the mediation. You know it’s pretty hard to say that you feel good about sentencing somebody to prison, or that you feel good about entering a big judgment or a little judgment, or no judgment in some cases. But in a few cases in the mediation, I have had the sense that maybe it wouldn’t have happened without a mediator, and maybe I had a role in it. I feel that way about Wen Ho Lee. It would not have happened had they not had somebody to mediate that case. Both sides acknowledge it and they’ve expressed their appreciation for it.

I’ve had some other cases in which I felt it makes a difference. Just last week I was the mediator in a case involving the Warm Springs Indian tribe and the Bureau of Indian Affairs. A dispute that has been going on for at least twelve years, and has been to the federal circuit and back and through the Court of Claims twice; two more cases, one pending in the Court of Claims and another pending in the District Court here, and we settled up all three of those cases. The attitude going into that was that the parties wanted to resolve this and they wanted to do it in a way that would not only get rid of this litigation but would restore the relationship that the Bureau of Indian Affairs
and the Warm Springs Indians had before this dispute arose, which they thought was an ideal relationship. If you have a part in that, and you think you made a difference, that’s rewarding.

I don’t ever have a greater pride in being a lawyer than I see what happens in these settlements when lawyers encourage and facilitate, and in some instances cause, the settlement of a case that would be far more lucrative to them if they could keep it going. There would be no reason why they couldn’t, with very little genius, keep it going for lots of time. So that’s important. I just fell into that without ever planning to do it.

CH: That was the class action case that you have—

EL: All of mediation, I just fell into mediation, to doing it, without regard to planning it or studying it or any of that kind of thing, or even advocating it. It just arose because of seeing so many people when I was a Magistrate.

CH: How did you decide to take senior status?

EL: I decided to take senior status long before I was eligible because I just got tired of that heavy, heavy case load. I just think it’s so demanding and I marvel at those—on our court we’ve got about three of them who are eligible for senior status but don’t take it. No, I’d have to be awfully motivated about what I had to say in opinions, and so on, to think that I could be of more service by writing more opinions or having some impact on the law or something like that. I never felt that that was important to me to hire out as a guardian of the condition of law, [laughing] and I don’t say that about the others. They’re in good health and they’re willing to do it.

The irony of this is that, in most instances, by the time a judge has enough seniority on the Court of Appeals to be chief they’re eligible for senior status. But if they’re senior they can’t be chief. So we have Browning, and we have Goodwin, and we have, I think, Cliff Wallace, Proctor Hug, all of those who have served during my tenure as chief judges—except for Mary Schroeder—all of them would have been eligible for senior status. They delayed taking senior status so they could be chief judge. Browning continued into the era in which he could have been senior. You have to be sixty-five to be eligible for senior status, and you can’t be chief beyond your seventieth birthday so those who are chief are carrying a load, and being chief at the same time while they could be senior judges. That’s quite a chore.

Retirement of Judges

CH: Do you think a judge should retire at a particular point?

EL: Oregon has the compulsory retirement—I think it’s a constitutional requirement—at age seventy-five. I’m going be seventy-five in
August and I say to myself, “What should I do?” I’ve decided I’m not going retire in the sense that I’m going quit doing what I’m doing. I’m just hopeful that we will all have courage enough in our surroundings that if anybody is serving too long they’ll try to prevent them from doing it. Because your judgment about whether or not you should be continuing is going go before your good judgment in cases may go. So it’s a tough question and I never thought that I would still be hearing cases at my age. When I took senior status I did not think I would continue.

CH: What year did you take senior status?

EL: ‘97.

CH: Why wouldn’t you retire at seventy-five? What’s your motivation at this point?

EL: What else are you going do instead? It’s a lifetime appointment, in a sense, it’s a lifetime commitment. There’s plenty of work to be done. I have no desire to retire and go practice law or go do something else on a private basis, so I would continue in senior status, but not hearing cases. You’re getting the pay of the office for the rest of your life, we’re getting paid full pay of the office, I’m getting paid as much as somebody who’s carrying a full load and I think everybody is happier and lives longer and all of that kind of thing if they’re doing something. The only reason I would not want to do it is running the risk that I would continue too long and not be well enough to do it mentally.

CH: Do you think you have some friends or advisors that are close enough to you that they would be able to broach that subject?

EL: I don’t know. I don’t know because I think we’re too deferential to allowing people to go on when we should do everything we can to stop it. I’ve seen instances where people have gone too long and it’s not good for them, it’s not good for the court. We do have a structure in the Ninth Circuit, we have a Wellness Committee, and the goal is to be aware of who’s needing help and who’s in bad shape. There’s more going on there than there used to be and that’s emerged in the last five or six years. This disciplined or responsible look at who needs help, in the sense that they shouldn’t be deciding somebody else’s cases.

CH: Is that for the—

EL: The whole circuit.

CH: The whole circuit, all the district courts. Was there anything that prompted that?

EL: I can’t say that there was something that specifically prompted it. I think we always have this ongoing business of people getting older and maybe too old and all of that.
Future of Judicial System

CH: How optimistic are you about the future of things in the country in terms of where we are now and the directions that we seem to be headed? Do you feel reasonably optimistic that the system we have is—

EL: About the system we have?

CH: About the system, and that it’s capable of adjusting to change and those kinds of things?

EL: I think the only thing I would fear about the whole system is the diminution in the jury trial right. If I had my way there would more and more jury trials. People can be penalized very heavily in the name of civil penalties instead of criminal penalties, and every time I see the trend toward civil penalties as opposed to criminal penalties I see it as a threat.

CH: A threat in what direction?

EL: A threat to liberty.

CH: How so?

EL: If I can only convict you beyond a reasonable doubt and I have to abide by all the rules of criminal law to convict you, right? You’ve got some tools at your hands. But if I can get you into a simple proceeding and threaten you with big fines and expensive litigation and I can penalize you enough to put you out of business, or put you into poverty, and you don’t have any of protections of the criminal law then I can get away with a whole lot more, right? I can do you an awful lot of damage. Now to the extent that we have all of these big civil penalties—I don’t want to speak on behalf of pornography on the airways, but you know that that’s all being done with civil penalties, right? A lot of the environmental laws are enforced through civil penalties. Now we have the traffic law enforced through civil penalties.

When I started out if you wanted to prove that somebody was guilty of speeding you had to prove it to a jury beyond a reasonable doubt. If you wanted to take away everybody’s liberty the way you do it is you quote “decriminalize it.” That, to me, gives the government a whole lot more power than if they have to say, “Okay, if we want to punish you we’re going have to bring you into court and prove.” It used to be if somebody misbehaved in connection with the relationship to the court it was a charge of contempt with all of the trappings that went with being accused of being of contempt. It had to be willful and it had to be done in defiance of the court, either directly or indirectly, and you were entitled to a trial and you were entitled to all of the protections of a criminal accused. The court had to be very careful that it went through every procedure that it was necessary in order for this to stand up on appeal. Now we have what we call “Rule 11” and if you certify to something that isn’t true now we can punish you under Rule 11.
CH: Punish you in what way?

EL: Fines, and so on. None of the protection of contempt, and I view some of these punishments that are permitted under the rules as a cheap easy end run around the cumbersome procedure of contempt. I’m not all that necessarily pessimistic. I don’t know whether to put it in terms of pessimism or optimism, but I think the jury trial is so important and in order to get the jury trial the proceeding against you has to be criminal. Now in a case of contempt you don’t get a jury trial unless the penalty can be more than six months in jail. I think that’s a matter of necessity because if the federal courts wanted to have any power in every part of this nation they have to be able to punish somebody without a jury trial because there’s some parts of the country where the court would enter an order and there would be no way in the world that a local jury would enforce it, right?

I think as a practical matter there has to be some residual power in the court. But that would still mean that the court would still have to go through the elaborate procedure of contempt. That’s why I hated it so much when Oregon moved away from the criminal enforcement of the traffic laws. Now you get a citation and you can’t have a jury trial, and can’t go to jail, but you can be fined. I thought the jury trial meant that every policeman out there working knew that whatever he did would be subject to jury trial. If he did anything, or said anything, in the presence of the accused he was going to have to repeat that in front of a jury, and the jury served as kind of an open window on what was going on in the middle of the night in law enforcement.

The same was true with me as a traffic judge. I knew that if anybody wanted a jury trial they could have it on any simple traffic case. Well, that was protection that everybody had to keep me from being a tyrant if I wanted to be. And furthermore, if you enforce the law in front of a jury, you get the community’s answer to how they want the law enforced in every time they return a verdict. If you want to prosecute a lot of people for being drunk on the street in Oakridge, Oregon, right? You have to be able to do it in front of a jury of people who live in Oakridge. And if they want to be a little more tolerant than somebody in Florence, Oregon or Junction City, Oregon, that’s okay. You get a reading on what this community wants.

I think you would have better law enforcement in Portland, for example, if somebody who committed a crime in any specific neighborhood in this town had to stand trial in that neighborhood. Then you couldn’t rely on somebody from the other side of town to say it was okay. Whatever you did in any community you would have to face the music in that community. And that means it’s going to be a little different, but I think it’s important. And what more basic thing could be right than
the idea that idea can’t put you in jail unless the citizens say you go. You can’t go just because a judge who was selected in a certain way says you go. You gotta go only if the jury says you can go. Now if you get the right to a jury and the right to a lawyer all of the rest of the rules are just window dressing as far as I’m concerned. Those two basic things are the real, real basic significant things that count.

CH: And that’s being eroded to some extent?

EL: To some extent.

CH: In terms of personal freedoms, and there’s a lot of discussion about that today?

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**Defining Privacy**

EL: Oh, yes, that’s always a struggle. The decision of the Foreign Intelligence Surveillance Court has been criticized on the basis of freedom, and we make those trades. Privacy is always going to be an issue. I don’t know what privacy is left anymore. I don’t know what’s left. As long as we’re willing to use credit cards and—I called my cable company the other day and said I was having a little trouble with it and this woman says, “I’ll push a button to turn it off,” and she turned it off. And she says, “I’ll turn it back on again,” and she turned it back on. She’s way away from—I don’t know where she is the world—she can do all that in my home. I have no reason to believe that privacy is gone, but I don’t doubt but what there’s a record of what I did. As a matter of fact she asked me which button I pushed to do a certain thing because she wanted to put in the computer so she would know in case I had trouble again. [laughs]

CH: Privacy as far as a constitutional issue, isn’t that more defined by what is a reasonable or unreasonable intrusion into people’s lives by the government?

EL: The only right to privacy there is as far as the Constitution is concerned, is in the Fourth Amendment where the prohibition against unlawful search and seizure. Now as a freestanding right, the right to privacy is not expressly referred to the Constitution. It’s the product of the judicial process. Privacy, I guess, should be in proportion to what we expect to have. As long as we don’t expect any privacy we just behave on that assumption.

CH: You get these conflicts where somebody is talking on a corded line versus a cordless phone and one is considered private and the other one is not. How do you feel about that kind of a distinction?

EL: Well, it goes back to the expectation, see? If you know you’re vulnerable to being listened to you behave accordingly. And a lot of our law is based on reasonable expectations
of privacy. If there is a reasonable expectation of privacy than the government should honor it, at least the government should.

CH: Which is now becoming more of an issue because of identity theft.

EL: Oh yes.

CH: There’s so many different ways of getting into someone’s personal—well, anything else that you would like to add to the things that we have talked about?

EL: The only thing is I want to talk a little bit more about my family. We discussed that early on and I’ve already said I’m the youngest of ten so I have witnessed a lot of loss in family.

[End of tape 15, side 2; End of interview]
1. Prohibition ended with the ratification of the Twenty-first Amendment, which repealed the Eighteenth Amendment, on December 5, 1933.

2. The John Birch Society was named after a U.S. Army military intelligence officer and missionary John Birch who was killed by armed supporters of the Communist Party of China in 1945. Birch was considered a martyr by political conservatives and the Society was formed by Robert Welch, Jr. and others in 1958 as a Christian-based education and advocacy group with chapters in all 50 states that lobbies for limited government, personal freedom, adherence to the Constitution, and against Communism. Clarence Manion was on the Society’s masthead during the period mentioned by Judge Leavy.

3. Elmo Smith was the President of the Oregon State Senate when he succeeded Gov. Paul L. Patterson after his unexpected death in 1956.

4. The sniper attacks took place during three weeks in October 2002 in Washington, D.C., Maryland, and Virginia. Ten people were killed and three other victims were critically injured. Eventually John Allen Muhammad, and one minor, Lee Boyd Malvo, were apprehended, tried, and convicted on multiple murder counts. In September 2003, Muhammad was sentenced to death. Boyd Malvo was sentenced to six consecutive life sentences without the possibility of parole. On November 10, 2009, Muhammad was executed by lethal injection.

5. “Additur” and “remittitur” are two ways to change a verdict for damages in a personal injury or other civil law case. Additur increases the amount of damages awarded, while remittitur reduces the amount of damages awarded. Although both additur and remittitur are used in some states, U.S. federal courts do not use additur to increase damages amounts, instead a judge can grant a new trial their determination is that the amount awarded was not adequate or

6. A long-armed statue is a state law that allows the state to exercise jurisdiction over an out-of-state defendant, provided that the potential defendant has adequate connections with the forum state.

7. From 1953 to 1969, Earl Warren presided as chief justice of the U.S. Supreme Court. From 1953-1956 much of the time of the Court was spent on school desegregation cases, for example
Brown v. Board of Education. The years 1957-1961 held few controversial cases and decisions. The years 1962-1968 are often referred to as the “heyday of the Warren Court” when issued opinions on numerous constitutional issues ranging from racial to civil rights, to legislative apportionment, to church state relations, to freedom of speech, to criminal justice.


9. The Omnibus Crime Control and Safe Streets Act Pub. L. No. 90-351, 82 Stat. 197 (1968). The Act is comprised of ten titles that address, among other legal issues, the admissibility of evidence, a U.S. citizens’ right under the Fourth Amendment to be free from unlawful search and seizure relative to wiretapping. The bill was enacted “to assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes.”

10. Prior to the passage of the Federal Magistrates Act in 1968, the United States commissioner system, established in 1793, was previously used in federal courts to try petty offense cases committed on federal property, to issue search warrants and arrest warrants, to determine bail for federal defendants, and to conduct other initial proceedings in federal criminal cases. The Federal Magistrates Act of 1968, as amended, was enacted by the Congress to create a new federal judicial officer who would assume all the former duties of the commissioners and conduct a wide range of judicial proceedings to expedite the disposition of the civil and criminal caseloads of the United States district courts. In 1979, Congress expanded federal magistrates’ authority to include all misdemeanors recognized by the federal criminal code. Magistrates’ titles changed again in 1990, when they became “magistrate judges,” symbolizing the ever-increasing importance of their work. The system has worked relatively well in the last 30 years, and has tended to shift the federal courts’ caseload to the desired balance.

12. Oregon Revised Statute: “Media Persons as Witnesses,” ORS 44.510 Definitions for ORS 44.510 to 44.540 defines the confidentiality of sources and other protections afforded to newspaper personnel who are called to testify in legal proceedings.”

13. “In an Alford Plea, the criminal defendant does not admit the act, but admits that the prosecution could likely prove the charge. The court will pronounce the defendant guilty. The defendant may plead guilty yet not admit all the facts that comprise the crime. An Alford plea allows defendant to plead guilty even while unable or unwilling to admit guilt.” http://definitions.uslegal.com/a/alford-plea/, accessed August 31, 2012.

14. Proposition 209 passed with a majority of California voters approving of the change to the state constitution in 2009. The first complaint against Prop. 209 was filed in U.S. District Court in 2010, and the case was first brought before the Ninth Circuit Court of Appeals in 2011. The full text of Proposition 209’s amendment follows and more documents from the case can be found at http://affirmative-action-legal-defense-fund.org/legal-work/affirmative-action/california-prop-209/

15. “Congress in 1978 established the Foreign Intelligence Surveillance Court as a special court and authorized the Chief Justice of the United States to designate seven federal district court judges to review applications for warrants related to national security investigations. The provisions for the court were part of the Foreign Intelligence Surveillance Act (92 Stat. 1783), which required the government, before it commenced certain kinds of intelligence gathering operations within the United States, to obtain a judicial warrant similar to that required in criminal investigations. The legislation was a response to a report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the “Church Committee”), which detailed allegations of executive branch abuses of its authority to conduct domestic electronic surveillance in the interest of national security.” From: http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html, accessed September 5, 2012.