Malcolm Marsh
An Oral History

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
Malcolm Marsh was born in Portland, Oregon on September 24, 1928. From his mother’s side of the family, Judge Marsh traces his Oregon ancestry to the early 1850s. On her paternal side, Marsh’s Stephenson grandparents traversed the Oregon Trail in a covered wagon from Virginia to Oregon. In 1859, his maternal great-grandparents, the Roberts, sailed out of Boston Harbor bound for Ponape Island in the South Pacific. They founded a Congregational church, and in 1869 settled in The Dalles where Marsh’s great-grandmother was born. His mother, Elizabeth Myra Stephenson, was born in the Lair Hill neighborhood of Portland, and the family moved to McMinnville, Oregon in 1935.

Judge Marsh comes from an Oregonian background, a topic discussed in this oral history, but the practice of law also runs in the family. His father, Francis “Frank” Marsh, practiced law in McMinnville for more than fifty years, prosecuting bootleggers for the U.S. Attorney’s Office during Prohibition. Frank Marsh’s identical twin brother, Gene, was also a lawyer, and served as president of the Oregon Senate. Both brothers served as presidents of the Oregon State Bar. Gene did not have children and was very close to Frank’s family. As Kelly Zusman, long-term law clerk for Judge Marsh, wrote, “Frequent visits to a rustic cabin in the Steens Mountains and other trips provided a childhood that taught Judge Marsh the intimate details of the geography of the state. Judge Marsh knows the state like most of us know our own homes.”

Except for his stint in the Army in Japan in 1946-1947, Malcolm Marsh has spent his entire life in Oregon. He attended University of Oregon for three years as an undergraduate then transferred to the School of Law. He met Shari Long in Eugene and they married in 1953. Marsh graduated from law school in 1954, and Shari and Malcolm soon began a family. First came a son, Kevin, followed by daughters Carol and Diane. After law school, Marsh briefly went into practice with his father, but soon found his law partner, Ned Clark, with whom he practiced for thirty-three years. Marsh soon became an accomplished trial lawyer specializing in products liability cases and eventually attracted corporate clients like Volkswagen, the Professional Liability Fund, and many insurance companies. In 1979, he was inducted into the American College of Trial Lawyers.
In 1987, when Judge Edward Leavy moved to the Ninth Circuit Court of Appeals, Ronald Reagan appointed Malcolm Marsh to the federal bench. Marsh’s recommendation came from Mark Hatfield, a friend since the 1950s. According to Zusman, Hatfield had become aware of Marsh’s “impeccable reputation in the legal community—both for his skill as an advocate and his high ethical standards. He quickly earned a reputation for his hard work and diligence in deciding cases and issuing opinions…”

Judge Marsh’s judicial approach, sense of justice, and integrity, is evident in the interviews he conducted with Clark Hansen between January 27 and May 10, 2005. In these interviews, Marsh—best known for his role as the “salmon judge”—presents himself as a man deeply interested in theology, strongly committed to his family, and steadfast in his dedication to upholding judicial integrity. He recalls family history, childhood in McMinnville, University of Oregon Law School in the 1950s, and practicing law in Salem. Marsh's oral history reflects a truly Oregonian experience. His time on the federal bench is no less an Oregon tale, as he remembers Judge Gus Solomon, clerks of the court, and his law clerks. The cases he discusses are part of a larger Western story that includes salmon, Indian fishing rights, mandatory drug testing, and multiple cases involving the Rajneesh religious sect. He also discusses the ongoing issues of geographic representation on the bench, and the best method for selecting judges in the state.

Judge Marsh’s history connects Oregon to the rest of the nation as he recounts the phone call from President Reagan making him a federal judge, reflects on the federal justice system and judicial activism, and discusses changes in federal practice. Marsh offers his unique perspective on the Mark O. Hatfield Courthouse in Portland, having served as the court representative during its construction.

Judge Marsh took senior status in April 1998. Kelly Zusman concludes that the judge “represents the best that this country and, more particularly, the state of Oregon offers. He is, in the finest sense, a true son of the state of Oregon and makes one proud to be an Oregon lawyer.”

Donna Sinclair
November 27, 2006
Family History

CH: This is an interview with Judge Malcolm Marsh at the US District Courthouse in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen. The date is January 27, 2005 and this is tape one, side one.

I thought we might begin by going into your family background, Judge Marsh. How far can you trace back in your family, and where did they come from? How did they get here?

MM: Well the task was performed by my mother and her sister some years ago. Of course they’re both gone now. But they traced back many generations into Revolutionary time and brought forth both her and my father’s family. The Marsh family stemmed from the Fugelen in Norway, at Balders, Norway, of all places, and the Marshes of New England they settled in Decorah, Iowa, and that’s where the Marsh line got established before they came to Oregon.

CH: Do you have another understanding as to why they came to the United States in the first place?

MM: No. No. Some of them had already been in Maine and then the whole bunch came over to Iowa, and they were in Iowa until 1918 when my grandfather and grandmother and father and uncle came to Oregon. But their sister stayed in Decorah and she lived in Decorah throughout her life. But they came out in 1918 to Oregon. Compared to my mother’s side they were relative latecomers. There are still Marshes in Decorah, Iowa and I have a cousin in Chicago and a second cousin that still lives in Decorah.

My mother’s family started with two branches, the Roberts and the Stephenson’s. The Roberts, we traced back to 1825 with the birth of Ephraim Peter Roberts. He married Myra Farrington and the two of them sailed from Boston in 1857, as Congregational missionaries to the Ponape Islands. It strikes me many times, at that young age they would have been leaving from Boston with the full understanding that they would never see their families again and that’s really an incredible thought, the dangers of the trip. The thought has struck me what those two young people must have been realizing as they sailed out of Boston.

Anyway they came to The Dalles in the 1860’s and set up a home in Dry Hollow, and there’s still a house there. They started a ranch out of The Dalles, up on the hills toward the breaks into the Deschutes River, where they had a big wheat ranch. And that’s where the Roberts were.

One of their daughters, Anna, met this Stephenson family, which is the other side, my grandfather’s side, of my mother’s family, her father’s side. The Stephensons came here in 1853 from Virginia by ox-cart. They lost one niece out in the Nebraska somewhere, and my mother had a diary—
I've got it somewhere—that they kept as they crossed the Plains. When this teenage girl died, they buried her and then they built a raging fire over the grave, so that it was a mass of ashes. Then they drove all of the ox-carts over the fire pit the next day to obliterate it, so that no Indians would dig her up and find the body. And that's how they obliterated the grave that was out in the middle of Nebraska somewhere along the Platte River.

Anyway, they settled here at Moss Hill. My grandfather, George Stephenson, had a hop farm out towards Mountain Park. He also had a warehouse business downtown that is pictured in a lot of old pictures of the early Portland waterfront. And the site of his hop farm is now where the Stephenson Elementary Grade School is located. His warehouse down on the waterfront was between Salmon and Main and right on the waterfront, so when I look out the window of the office here, why I can see where his warehouse was. I know as a three–year-old I fell off the dock into the river there, I'm told by my parents, of course. So, I had been there. So when I looked at the pictures and see the dock I can see where I had one of my mishaps of youth. [both laugh]

An interesting side story and kind of a thorn in the side of family I guess, was that when the city of Portland decided to build the sea wall and the public market was down in that area and they later called it the Journal Building and such. They assessed that the abutting property owns 100% of the cost of the sea wall. My grandfather felt that was not fair and he lost his property as a consequence. He and several other property owners there were not paid for their property. Measure 37 would have done something considerable to that situation. [both laugh]

So I look down on that vacant spot, which is beautiful, and I like the waterfront of Portland but it came at the cost of the individuals so it's kind of a historical note.

One story that I would like to relate is that when the Stephenson train or part of the train was ready to leave St. Joe, Missouri, why two teenage boys approached them wanting to go West and offered their services to take care of cattle and assist in anyway they could with finding the firewood and other chores. So the Stephenson family took one of them. The other boy went to some other family and came west to Oregon with them. In any event, the one that came with the Stephenson family, his name was Henry Pittock, of later great fame here in Portland. My mother can remember the Pittock carriage picking them up on Kelly Street once or twice a year to take them up to the mansion for dinner because Mr. Pittock never forgot the Stephensons. So it was kind of an interesting little interlude in their trip.

George Stephenson and Anna Roberts were married September 22, 1898.

CH: I guess I should say that we're looking at this marvelous photograph album.

MM: Now Anna, my grandmother, had graduated in the class of 1896, Phi Beta Kappa, from the University of Oregon. I'm not sure whether that was one of the first
classes with women, but it certainly was one of the earliest classes to have a woman graduate. Her brothers and other sisters were all educated. They formed a place down in Eugene, which they called Camp One after the manner of shepherders, and one or two at a time would go down and stay in that house to go to school while the others would support them and get them through. A lot of the boys went to MIT, but there were one, two, three, four, five of them went to the University of Oregon. Then my mother went there, and then my brother and I were the third generation to graduate from the University of Oregon. So, it’s been a long relationship.

CH: So your grandmother originally went there?

MM: Yes.

CH: And she graduated in what year again?

MM: Ninety-six.

CH: Ninety-six. Was she involved in the suffrage movement?

MM: I don’t know. I remembered that she came back to the university in about 1946, I think, or ‘48, ‘49, somewhere in there. They celebrated the seventy-fifth year of the university, and she talked to the young co-eds in some dormitory about the walk-around as the dance that they had when she was in college.

CH: Wow.

MM: She also climbed Mount Hood in a long skirt and boots, you know. It was the custom of the time.

CH: Were they living in Portland?

MM: Well, no. At that time her family was living in The Dalles. The Stephensons were here in Portland. I never did know how Anna Roberts got together with George Stephenson, but they were married and had three children, my mother, my Aunt Ruth and my Uncle Ken Stephenson.

CH: What were the various professions of these grandparents?

MM: Ranchers, up around The Dalles, and merchants, warehouse and farmer, here for the Stephensons. George was quite successful farming. In fact, you know where Helmer Men’s Store [John Helmer Haberdasher] is up on Broadway?

CH: Oh, of course.

MM: That building, my granddad built in the late ‘20s on some poor advice and lost it in the Depression. He wasn’t the greatest businessman because he lost the waterfront property and the Helmer building, otherwise probably I would have been spending my life in a different manner than I did. [both laugh] Which was probably for the best. But anyway, it was a good family.

CH: And the hops farm, what happened to all the hops?
MM: There was a period, I think, when the hops really kind of went out as a crop around here. It came back years and years later, like with Ed Leavy's farm out around Butteville, and so it's strong now. But I think there was a period when it was very strong; then I think it kind of waned.

CH: What happened to the hops industry around here during Prohibition years?

MM: That might have been why they kind of went away. That could have been the reason.

CH: I asked Judge Leavy about that and he said that it was certainly no crime to raise and sell hops.

MM: Right.

CH: And I think that a lot of it was exported, maybe to Germany.

MM: Could have been. Yes. I don't know though.

CH: Okay.

MM: I remember my mother telling me that her father took her to the top of—was that Mountain Park? And I can remember as a child that it was bald. There were no trees on it at all. It had been completely logged off and was just a bald hill. But that's where she was taken by her father, with her brother and sister, to learn about directions and stars and things like that, to learn where the North Star is. That was their observatory.

Anyway, their daughter Elizabeth, my mother, was married to my father on November 27, 1924. This picture is the picture of that wedding with all of the two families there—my mother and father, and then my father and uncle, who were twins. The Oregon Historical Society, of course, knows about Gene Marsh because he was very much involved with the history of that.

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**Senator Gene Marsh**

CH: The president of the Senate?

MM: Right and Speaker of the House.

CH: A Speaker of the House.

MM: Yes, but he was very instrumental in the Oregon Historical Society and was on the Board for many years. He was the longest city attorney in history in McMinnville from let's look here.

I keep some of his memorabilia right in the office. Appointed in 1931. I think he resigned some forty years later. I can't recall, 1970-something that he resigned as city attorney. But he was [laughs], a character. He was the political strength of the family. He was very, very enthusiastic about being involved with government and was very successful. He entered the legislature when the new Capitol Building first opened its first session, I think in '38. And then was president of the Senate in '53 or somewhere like that. But in the meantime
he’d gone up in the House, to Speaker of the House and then to the Senate where he became president of Senate. And he was in the last hundred-day session. He was determined he was not going to have the session go past a hundred days and he ran it until 11:15 that night to do that. [laughs]

But here’s another great story. The two were identical twins and they often dressed the same. And so they both had the same suit and same tie, and they both lived in McMinnville, but Gene would stay in Salem during the legislature. My dad went over there one day early and they smuggled him in to the Capitol Building, without anybody seeing him. So when the House was called to order, well my dad walked out on the rostrum and pounded on the gavel and said, “The house will come to order and the clerk will call the Roll.”

About that time my uncle burst through the door at the back of the chambers, “That man’s an imposter.” And, everybody that knew the twins knew what was going on, but they didn’t know really which one was which. But, people who didn’t know them, why it was quite an uproar.

Then my dad said, “The Sergeant of the Arms will remove that man from the floor.”

So they had this big to-do and then everybody laughed. [CH laughs] I don’t think that kind of a joke has, before or since, been played during a session of the legislature. But they were a pair, for sure.

Gene lived to be ninety and my dad to ninety-five, and their father to ninety-two. Charlie Marsh, their father, always had an adventurous spirit and he and his younger brother went to Alaska. He decided that was not a life for him, so he came back early to his family. He didn’t desert his family, but it was kind of a chase after gold.

His younger brother was our Uncle Joe, a great monster of a man. He wrestled in Alaska for a year taking on all comers and never lost. He was a soldier of fortune, fought the Maori of New Zealand and traveled throughout the world. Whenever Uncle Joe came to town, why the women were shuddering and the grandchildren were just thrilled to death [laughs] to see Uncle Joe come. [CH laughs]

But Charlie, who was my grandfather, then came out to Madras and he started the Citizen Bank of Madras. They lived in Metolius, but the bank may have been in Madras. And that was a place with nothing but a future, he told my grandmother, because there was going to be irrigation coming. And of course the railroad had fought its way up both sides of the Deschutes River. The anchor point was at Metolius where the train would go by. At one time Metolius was a town of about a thousand people.

CH: Really?

MM: Yes, and so anyway he started his bank, which also went crash in the Depression and left them all without any funds at all. But my dad met the schoolmarm up there, who taught in Metolius, and that was Elizabeth Stephenson from Portland, a young schoolmarm. They
got married and then when everything went gunnysack-up there early in the Depression, Central Oregon had it’s Depression in the late ‘20s rather than waiting for the early ‘30s.

CH: What was the cause of that?

MM: Oh, I don’t know. The farming was just terrible. Irrigation didn’t come, you know, and so all the anticipation of that, I suppose, was part of it. But he gave the keys to the bank examiner and asked him if he really liked to fish very much and [laughs] took him down to the Crooked River to fish. [both laugh]

Then my dad came to Portland and went to work as an assistant US Attorney. He was an assistant district attorney over in Prineville. What county are we in there?

CH: Crook County?

MM: So he came over here and went to work under George Neuner for a while. My uncle went to Vernonia and started practicing law in Vernonia, and then he moved to McMinnville with the old Vinton and Tooze firm. My dad left the US Attorney’s office and went to work for Howell Beckett & Oppenheimer, which later became Mautz Southers Spalding, of good renown here in Portland. Gene went to McMinnville and the two of them really didn’t like to be apart and McMinnville looked more interesting to my dad than Portland. So in 1935 they moved the whole bunch of us to McMinnville. My brother was born in ’26 and I was born September 24, 1928.

So we bought a farm out of McMinnville on Baker Creek Road with twenty-three acres and I think the cost was $2,000 for the twenty-three acres and house and barn and the whole thing. That’s where my brother and I, from ages seven and nine, grew up. And we were learning about pigs and chickens and horses and cows and milking and all the rest and we had enormous experiences on that little farm. We went through the late ‘30s and through the war [WWII] with that. My brother going into the service in 1944 and I went into the service in 1946 and so that was—

CH: Could I go back and ask you a few more questions about your predecessors?

MM: Sure.

Family Religion & Politics

CH: In terms of religious upbringing, where did your various family members fall?

MM: Well the Roberts family was pretty solid Congregationalist and that influence was strong in that family and my grandmother was certainly very steeped. When we lived in McMinnville, I don’t know what the selection process was, but we were sent to the Presbyterian Church. My father never did go, but my mother went occasionally. My grandmother would go anytime she could get somebody to take her. And then she’d take us for Sunday School and such, so that’s kind of where
we had church experience. It’s interesting, at the same time, when I was in the second grade in Cook Grade School in McMinnville, they had Bible courses. They had Christian education in the school. And so we’d learn Bible verses and a Psalm or something like that and that’s why I’m not a fan of religious training in the public schools because I thought it was pretty meagerly done. For instance, I never could figure out in the twenty-third Psalm why when I said, “The Lord is my Shepherd. I shall not want,” why wouldn’t I want him? [CH laughs] And the Wise Men see a star in the East and go West and I’d—I don’t know [both laugh]

It was a difficult learning experience for me. My mother and father later joined the Episcopal Church and she was pretty much involved. My mother was a Victorian intellectual. And I don’t know, we used to talk about faith sometimes, but she was always just kind of politely listening to where I was, rather than committing where she was. But I haven’t ever met anybody that knew the King James Bible as well. As far as she was concerned there was only one rendition and that was the King James rendition. She was very, very knowledgeable, but I don’t know where she was faith-wise. By the time I came to a serious faith, she was in her later years and didn’t much talk about it.

CH: With such a strong intellectual foundation, how did she express herself on political and social issues?

MM: She was very conservative, very conservative, but certainly a woman of the times. She was the president of the Cancer Society and president of the Red Cross and then she was involved with all sorts of things. She always had half a dozen book clubs that she would be reading things with, and she read voraciously. She would often use Shakespeare as a means of discipline with my brother and I. My grandmother was also very literate. It was a letter-writing two generations that we don’t see anymore. They wrote letters all the time. There’d probably be ten or fifteen letters a week that would come from the aunts and uncles and in the family you know. And then they’d send them on to somebody else. It was an incredible experience to watch. I have some of those letters. One of them goes clear back to Henry Clay, to one of my great-grandfathers or somebody. But that was the way that they communicated. Email wasn’t around then.

CH: How did they have the time to do that?

MM: I don’t know. She would write maybe just a two-page letter and other times she would spend a Sunday when we were off hunting or something or fishing, why she would write all day long. I’ve got some of her memoirs where she’ll take a trip and she’d keep a detailed diary. I mean, what they had for breakfast. [laughs]

CH: Did you have help around the house?

MM: We did at times. We had a man we called the hired man—Lou Kelly—obscene beyond belief. I learned all the things that
I shouldn’t have learned from Lou, and I also learned how to drive a Model-T pickup, which he had. As a kid we used to drive that to work on the farm, you know, picking up bales or one thing or another.

Then we would often have a Mennonite gal from down around Sheridan come and work in the house. But it was kind of spasmodic because my grandmother would spend six months of the year, through the spring and summer, with us in McMinnville and then she’d go down with her other daughter in San Francisco and spend the other six months. During that interlude we’d have people or not have people.

We were in a house with an old sawdust furnace and my brother and I had our regular chores.

### Chores & Work

CH: What were your chores?

MM: Oh, keeping the fire stoked with the sawdust filled, picking all the apples and cherries, mowing the lawn, feeding the pigs and chickens, and milking the cows. I never was a good milker but we’d get it done. So, just cutting brush and digging tile ditches and such to drain the field or something. It was everything. Then when I was a little older—eleven years old—I went to work at a filling station, filling oil bottles and pumping gas and such, as a part-time job. I also worked at Safeway as a bag boy, but we were expected to at that time. Now it’s against the law, you know. [both laugh]

But all the kids in the summertime were picking beans or berries or one thing and another and it kept them occupied. When we were a little older, in our teens, school would be going to end on Friday and he’d say, “Where you going to go to work on Monday?”

“Well we’re going to go to work at Barney McPhillips’ ranch.”

“Okay, that’s fine.” And at the end of the summer when school was going to start, the Tuesday after Labor Day or something, why we could take off Saturday, [both laugh] But we were told to work and we worked. It didn’t hurt us.

CH: And what happened with the money that you earned from that?

MM: Well we bought clothes with it and you know, some frivolity. Bought bicycles because we rode bicycles to our school everyday, three miles and something. There were no buses going by there.

CH: What was the school like?

MM: Oh it was typical, kind of like the brick schoolhouse you know, with the center entry and three or four classrooms on each side, and a small gymnasium. There wasn’t much organized sports or anything like that. It was education.

CH: How many kids in the class?

MM: In my graduating class from high school I think there were eighty—

[End of Tape One, Side One]
School Recollections

MM: Discipline was sure and certain and sometimes corporal. It didn’t matter if you had thirty kids in the class; it really didn’t, because everybody sat in their seat and listened and if you were distracted you were soon called on it. So, that’s one of the things I notice with the concern on the number of students in classes today. I have a picture around here somewhere of a class of kids in a school in Zambia with the most wretched of conditions and they’re sitting there just as prim and proper and you know that discipline is not a problem there. They’re there to get some education. Anyway that’s kind of an aside.

CH: What other things do you draw from in these early formative experiences that you’ve used in your judicial career?

MM: One teacher—after I fretted over something, and I don’t know what it was—says, “Your problem, Malcolm, is you worry too much.” I’ve always carried that with me to try to keep from getting buried with details and worrying about things. I absorbed all the worrying for the family, I think, because my brother is the most laid back, easygoing, comfortable person you’d ever meet, while I stress on things and so I’ve had to keep her lesson before me a lot during my life.

One instance I’d like to tell you about that kind of comes to the fore later. My mother’s brother, Ken, lived in Pasadena. And she and my father went down there to visit him one time and she came home with these brochures about the La Brea Tar Pits and all of the findings there.

She had also kind of weaned us on what’s the title, the famous history of the world? Oh, I can’t think of his name now, the author. But anyway we took it from *Pithecanthropus erectus* through Neanderthal and Cro-Magnon man and all of the Darwinian type of movement of the human race. And my mother, she was convinced on that. Not that I’m not, but I mean she was very much involved with knowing about that. So she brings home all this stuff with saber toothed tigers and mammoths and that sort of thing, and so for what was a preview of show-and-tell, or whatever it was, I took all this to school. I was proudly expounding on all these things my mother had learned and so forth when the teacher stopped me dead still. She says, “Just a minute. We do not talk about that in this class and you put those away and I don’t want you to mention them again.”

So I learned, at a young age. That was my first introduction to the great debate between faith and reason. [both laugh] I was put on notice right then that even though we’re going to go down the hall in a few minutes to Bible class, we’re not going to talk about that. So anyway that was kind of an interesting memory. Anyway, growing up in McMinnville was a good, good experience. It was a good place to grow up. We weren’t very sophisticated, I guess, about urban society and that sort of thing but going into the service and being with everybody from across the country, why you kind of get that put into you pretty quickly.
McMinnville

CH: McMinnville seems, at least by the appearance of the older part of it, that it might have been somewhat idyllic.

MM: Oh, it was.

CH: It was. Did they have problems?

MM: No. And if they did, it had a community spirit that I haven’t been able to find an equal to. You know they started that McMinnville industrial area pretty much with Gene’s vision about it, where the steel mill is and the cookie factory was there and all those things, because the sawmills were leaving. Sawmills were closing down and they said, “We’ve got to get something new here.” They didn’t go off bemoaning the fact that the sawmills were going. They went off and found this new industry and it was very successful. And they took the World War II airfield that was built like many of them across the country and they turned it into a reputable airport, and even for a while had United Airlines flying in there.

CH: Oh really?

MM: Yes. And that of course attracted Dell Smith with all of the Evergreen Helicopters, and ultimately put in a wonderful museum that they’ve got now with the Spruce Goose.

Well they did the same internally with the society. The Elks Club was always the anchor of social activity during my growing up days and that’s where everything happened. The Elks Club was a fraternal organization, but it was also a very important part of the community and the segregation part of it wasn’t even known, because there wasn’t any black community in McMinnville. It wasn’t a factor to think about, you know.

When the young people were going to go off to fight the war, why those that were behind, there’s a great story that was, I think in the historical society, or in the Oregon State Bar, about my uncle and his group keeping the KP Lodge. You see, he had the wrong lodge name. There was the KP Lodge that they kept going and it was the Wednesday night mecca for all of the men who were the movers and shakers in downtown, and the whole purpose was to maintain it until those kids could get back and take over their lodge again. It still goes. But the KP Lodge and the Elks Lodge were the social centers [laughs], but none of them knew the rituals. [both laugh]

They had a tremendous growth in membership, which the national or international organization could never figure out.

I’ll tell you a story that I think is a classic example of McMinnville. After the Depression the bank examiners would come in. The Wortman brothers had the First National Bank of McMinnville. They drove the First National Bank of Oregon crazy because they tried to get that name, and ultimately did. They couldn’t get it as long as the First National Bank of McMinnville was there. The Wortman brothers would say, “Our father told us
if we take care of the bank, the bank will take care of us.” It was right across the street from the US National branch where Barney McPhillips was vice-president. He was a real influence in McMinnville and did great things for the state and hardly anybody ever heard of him, you know, but you go down to Pacific City and there’s McPhillips Road and McPhillips Beach that he gave to the state. He had this eleven hundred-acre farm out of McMinnville where we worked as kids for him.

Well, the bank examiners were coming and the First National Bank was lending to farmers as it always did, and it was a little bit touch and go on these loans. I don’t know which one but one of the Wortman brothers went out and he came to my dad with a $5,000 demand note and to my uncle with one and he went to Barney McPhillips who was vice president of the bank across the street, and Art King and Mr. Stulfier at the bakery and this guy and that guy and they’d sign these $5,000 demand notes. [laughs] Bank examiner would come: “Gosh, you’re in great shape. You got all this liquid. Yep, you’re fine.” And pass it through. Next day he’d go back, hand them back their notes. [both laugh]

But you know the community was not going to lose them and they would have paid those notes. There’s no question about it. They were valid notes and I’ve always thought that kind of epitomizes McMinnville’s community spirit to do that.

CH: Does it still persist today?

MM: I don’t know. I haven’t lived there for fifty years. But I know people down there and I think there’s still a lot of that flavor.

You know, from McMinnville, the road used to come down Lafayette Avenue from Portland. From Newberg, Lafayette and then Lafayette Avenue into, down to Third Street and then all the traffic went down Third Street before it would hit Baker Street and go on out toward the coast, or south. 99W went right down Main Street. That could still be the case if it wasn’t for the fact that McMinnville was willing to let traffic bypass the main street. The first time they did it was around to the west side of town and then later with the cut off down through Dayton and around the east side of town. But I’ve always admired the fact that it didn’t ever try to just stay unchanged. That it was open enough in its thinking to make two bypasses in my time around that town, I think speaks highly of it, too.

Anyway, off to college and off to the Army, and Japan. It was a fabulous experience, My timing couldn’t have been better. I was between World War II and the Korean War. I was in the Twenty-fifth Division, Eighth Field Artillery Battalion, and stationed at Nara on Honshu. If you drew a triangle between Osaka and Kyoto and Nara, it would make a triangle. Nara was the old ancient capital of Japan and has wonderful big old Buddhist temples, the Daibutsu-den with the biggest Buddha in the world or something, and all kinds of Shinto shrines and such, and the big deer park that’s in the town there. Then the capital moved from there to Kyoto where
the beautiful gardens and the formal palace residence are still.

The United States, thank heavens, didn’t bomb either of those cities during the war so they were kept fine. They flattened Osaka. People don’t realize, Osaka and Kobe and other towns looked just like Hiroshima. It just happened with thousands of bombs instead of one but they were just as flattened. I can remember coming into Osaka and being amazed at, in all these blocks of just rubble, the safes, the doors open that had been in the buildings, you know. And here would be six or seven safes in this block and four or five in this block, just sitting there. It was the safes that got my attention.

CH: And they were open?

MM: Yes, they were open. They’d been through a fire, and I suppose they got what they could out of them. But I suppose they had to get them open some way.

CH: Leading up to this period, first of all what was it like going through the Depression? What experience did you have of the Depression?

MM: That was interesting. You didn’t have much. You didn’t eat high on the hog. There was a lot of use of leftovers and modest means. My dad would often—some guy would come up with a pick-up of cord wood and dump it in the driveway and that was to pay a fee, you know, with cord wood, or it might be some other item, but that’s all he had to pay with. My mother and grandmother were great cooks and I can remember gleaning for peas. I can remember going out with them and following the pea harvester and picking them up off the ground, taking them back and shelling peas. We produced our own milk. My brother and I’d sell eggs and we’d make our own butter. [laughs] I drink nothing but skim milk now if I drink milk. Then it was considered a waste product and we’d feed it to the hogs. [both laugh]

Of course I grew up on raw milk and I survived it, but you had to be self-sufficient. You put up a lot of cherries and you made a lot of applesauce and you didn’t buy those things in the grocery store. And you cut your firewood.

CH: Was there noticeable poverty in the community?

MM: Well, everybody was poor. I mean there were those people who obviously had more but they weren’t very many. The great mass just kind of lived on the same basis. They drove Ford automobiles or Chevrolets and the kids rode bicycles and you didn’t have sixteen pairs of jeans to wear. To get a new set of jeans was a major expenditure. So you were careful about them, I think, very frugal about how you took care of things and you didn’t waste things. But I never felt like I was hungry, or never felt that I was deprived in any way. It was an interesting time.

The Great Depression

CH: Leading up to this period, first of all what was it like going through the Depression? What experience did you have of the Depression?
CH: And your father always had enough, in terms of work?

MM: Yes. He was a busy lawyer and a very good trial lawyer. In fact he was the trial arm of the firm. Gene was the political and business arm of the firm and so they greatly complemented one another. Dad was always in a trial situation and Gene was more in an office situation or in a political thing. But when he was in the legislature he wasn’t paid anything in those days. That was pretty much volunteer work, you know. Both were elected president of the Oregon State Bar Association.

CH: Right.

MM: So everybody adapted to that, as you know.

CH: In high school were you a good student?

MM: No. I was an average student. I wasn’t, I didn’t catch on fire in high school.

CH: Did you have any subjects that you particularly liked?

MM: I liked the math courses, which I’ve never used. [laughs] I liked history. I think the only flunk I got in my life was in science and it was partly because I can’t spell. But I redeemed myself from that quickly because my mother was Phi Beta Kappa and my grandmother was Phi Beta Kappa, so that was not tolerable. [laughs] But I was okay. I was never in danger but I would say I was a strong “average.”

CH: What about activities or sports or clubs?

MM: Played football.

CH: Played football.

MM: Yep and that was an exciting time.

CH: Do you keep up with it, or anybody that you knew from that period?

MM: Yes. There’s a few couples down there and then of course an old chum of mine, Jim McDaniel who now lives over in Dundee. He and I were chums all through school.

CH: Did you have any teachers that had any great influence on you?

MM: Yes, the one that told me don’t worry so much. I think that she was Mrs. Sackler. Somewhere I heard and I was never able to confirm it when they were investigating me somebody talked to my second grade teacher. This would have been in the late ‘80s, you know. She had to be ancient if she were still alive and I can’t believe they went to such an extreme but that’s what I was told. So, they went that far to interview. No, the real influence of education came in college where I started going hard.
World War II

CH: Where were you when Pearl Harbor happened?

MM: I was walking up the stairs. I vividly remember. I'd been out hunting. Duck hunting. I was walking up the steps to the kitchen door of the house and my mother said, “Pearl Harbor has been attacked.”

And I said, “What’s that?” I didn’t have a clue where Pearl Harbor was.

And she said, “In Hawaii.” So that’s how I learned of the attack. It’s hard to describe how the world changed. The whole conscience of the country, from my perspective, focused on that. Just bang. There was no detraction, no protest, no, none of that. The whole thing focused. And sacrifice was not questioned. It was just a fact of life. You dug out all the old aluminum pans that you didn't need. You didn't have many that you didn't need, but you gave them. Gas rationing. Never questioned. No one, oh you know, there'd be an odd ball here and there but everybody played fair with it. So, and the stars started coming in the windows you know, and it was a tough time.

CH: Some people have compared that incident to 9-11.

MM: Yes.

CH: Is there a comparison or is it very different?

MM: There’s a comparison. It’s just that 9-11 kind of happened, but Pearl Harbor kept happening. You know the news was so terrible for days and I can remember my dad and uncle, and all the people he knew, they’d gather on the courthouse lawn with their deer rifles and were ready to go to Tillamook because they were sure that they were going to be coming ashore. I mean it was serious. I sat for years in the top of the courthouse as an airplane observer. You know, I would take my time twice a week for three hours or something up in the courthouse watching and identifying any plane that went by and calling it in. And then my brother went into the Navy.

So then my mother’s focus was very much on him and he would have been in the first wave to hit south of Yokohama. So I can remember coming home from somewhere and my mother said, “The United States dropped an enormous bomb in Japan.”

I think that it was clear that her son was safe, so if you want a proponent of atomic warfare, why she would have been one. She would have said, “You bet, drop it.” There would have been no question in her mind.

CH: How did you feel about it?

MM: Oh I didn’t realize the impact of it at that time. Of course there was the attitude, yes, anything, anything to end this war and stop the bloodshed. We’d gone through the newsreels of Tarawa and Iwo Jima, Normandy, all of those things my law clerks don’t have a clue of, you know. One time, I mentioned the
Bataan Death March and none of them had ever heard of it. Corregidor? No. So things that were just indelibly stamped in your memory are out of their lives now. That shocks me a little.

CH: How was it going through World War II and living in McMinnville and being in high school?

MM: Everybody worked a job because there were a lot of men gone, you know. So you had to. The farmers were just dying for help. They had been relying on Depression-age workers and they were gone. Sawmills that lost crews, you know. Even though there were exemptions, if you were in a critical industry like that, people didn’t take those exemptions. I was talking to somebody the other day. When I graduated from high school every boy in my class went into the service and it wasn’t an issue. I can’t figure that out.

CH: And you heard a lot of stories, too, about people that were extremely depressed and even cases of suicide.

MM: Yes.

CH: If they were rejected.

MM: Oh yes. Oh, if you were 4F it was like a scarlet letter on you. It was just unbearable. You’d do anything. [laughs] The way people got into the service by lying about this or that or faking this or that was just one story after another. So it was so different than the feel, of course we’re in a different kind of situation, so you can’t really compare, but patriotism was you know I study about the Revolution and I study about the Civil War. There was a whole lot of people that didn’t agree with either one of those in the country. Not this war. Not this war.

CH: Yep.

MM: Yep.

CH: Going on through this period of time, did you have an idea of what you were planning on doing with your life?

MM: Oh yes. I was going to be a forest ranger. [laughs]

CH: You were going to be a forest ranger. And why was your passion for this?

MM: I was in the Boy Scouts ever since I was twelve years old. Actually I was in the Cub Scouts before that. We had a very, very good—one of the first explorer posts in Oregon was McMinnville. And there were five of us that were just as close as glue and we would go camping every weekend we could. We built an old log cabin up by High Heaven and we’d go way up there, snow, rain it didn’t matter. Some of us became Eagle Scouts and all that. Well that just, you know I just liked the outdoors and I thought I liked the woods and I liked to be in the forest and I thought, well that’s what I ought to be doing.

CH: And you had that intent, until what point?
MM: Till I was lying on a ridge in Japan with artillery shells going over the top of me, and thought, I think that I’m going to go law school instead. And, I don’t know, it was just that quick. All of a sudden it was gone. I think it was good to think about when I did and I still think it’s a great calling, but somewhere I just decided, no, I’m going to go to law school.

And I think it was something to do with what I was doing, just talking to other soldiers about what they were going to do and higher education and they were almost all high school kids then but a few of them would have had a year of school or something like that. And then young officers fresh out of ROTC or out of the military academy and they were youngsters, you know. They seemed old to me, but I was seventeen when I went in.

CH: But you had graduated from high school.

MM: Yes. Graduated from high school and I was eighteen that following September.

CH: So what did that represent for you, that period of time during—well it was after World War II when you went over.

MM: Yes. What they really did was they rushed us in. They’d have the veterans in there with the kind of periphery occupation of Japan but they needed to let Japan know it was occupied and so I was shipped to Japan one month into service. I spent a month in Fort Knox, Kentucky and was on my way to Japan. I knew about as much about warfare as a pet dog, you know. [laughs] But they just flooded the country with several divisions and we would move throughout the countryside all the time and I’m sure the Japanese people thought there were 10 million of us.

And they were all raw recruits. That’s where we got our training, on the side of Mount Fujiyama, and the old Japanese military reserve would be about like Rhododendron on Mount Hood, you know. And that’s where the big artillery range was and we would go up there, spend a week and then come back to camp and go out to Lake Biwako to another artillery range. Then we’d go back up to Mount Fujiyama with the rest of the infantry battalions and regiments that were in the divisions, and have big maneuvers up there and such.

So we had gone through every test that the Army had for infantry division, including the artillery, every test that had been developed through World War II. We had completed all the exercises that were required so we were prime candidates for anything that happened. And so when I came home and Korea started, the 25th Division was one of the first right into the middle of that fray and the 8th Field Artillery Battalion. I can remember reading the newspaper articles of them being in the bowling alley—

[End of Tape One, Side Two]
CH: This is an interview with Judge Malcolm Marsh in his chambers at the US District Courthouse in downtown Portland, Oregon. The interviewer for the District Court of Oregon Historical Society is Clark Hansen. The date is January 27, 2005 and this is tape two, side one. You were talking about the outbreak of the Korean War.

MM: Right. Well, I remember this one article because there were names in the article of officers that I knew and had served with, and of course the individual units I was very familiar with. My position with the field artillery battalion was as a forward observer. That would not have been a happy time to be a forward observer. So anyway, as I said, my service in between those two wars was, I hope, providential.

CH: Then you were never called into the Korean War?

MM: No. Never. I did not join the Reserve, which is kind of an ironic thing particularly now with reservists. But no, I was through and I had the GI Bill and I came home and worked until school started in the fall of ’48 and went to the University of Oregon.

CH: And your intent at that point was to prepare for law?

MM: Yes, I was in pre-law as an undergraduate. One of the huge changes from then to now was that I went into law school at the end of my junior year, three years. Well I was in six years—three years in undergraduate and three years in law school. Now if you were to go in and look up the records of the law students, most of them have got one or two degrees and are much more educated as they enter law school than I was, but I was kind of typical of the time. By then the fervor to go into the service had waned and so I was with a lot of kids right out of high school. I was kind of an old-timer at twenty.

CH: There must have been a lot of people coming back from the war.

MM: Yes there were and old Dad Puckett was in our class in law school. He was a B-17 pilot over Germany, got shot down, captured and spent time in a prison camp. So we had everything. There were high school kids and there were Dad Pucketts.

Somewhere along the line—I have to compliment Ray Lung on this—I was pledged by the Beta house down there. I think probably because my brother was a Beta, and I was assigned, as my upper classman, to Ray Lung. And he taught me how to study efficiently, so that I stacked up my courses most of the time on Monday, Wednesdays and Fridays and then I had certain times on Tuesdays and Thursdays, that’s when I studied. It lit a fire under me, because I started getting good grades and
when I went into law school I was never off the Honor Roll. It was just easy for me. It wasn’t really easy, but it was fun for me. It’s hard work, law school. But when you enjoy it and you’re doing well at it, why then it was easy.

CH: What were you enjoying about it?

MM: I didn’t realize how abstract a thinker I was and I really like the abstract process. Working with the law and understanding the nuances of the law and being able to extrapolate from one area of the law to another with basic principles of the law was something that just locked into me very early in my first term in law school and that was good. I had been in pre-law and KJ O’Connell was my faculty advisor and he was the law professor. He led me very well in preparation for law school, with accounting and lots of literature and lots of history and philosophy, just drove me into the philosophy building.

With Aubrey Castell, I was close to having a philosophy degree by the time I got through all the courses. And I loved it. Helen Frye and I were in philosophy classes together with Aubrey Castell. Then when I went to law school the curriculum was rigid, very rigid. Core courses were it. You had an option between administrative law and tax law or one or two electives in three years. You know, now they’ve got ten a term. The core of the law was just absolutely instilled in you, particularly under Orlando John Hollis as dean. And we understood the roots of the Common Law from 1066 forward and there was no question about it.

I remember talking at the law school ten or twelve years ago about law clerks that I knew, and how much education they had, and how brilliant they were, and just plain smart. They said they have difficulty moving from a criminal case to an environmental case or from an environmental case to a patent case. They have to kind of go back to the first floor and start all over again. Well, my education gave me a foundation that allowed me to move from one area to another, as foreign as they were, with a certain amount of ease. The abstract nature of it was possible for me. So I said, “Don’t let those core courses get too watered down or become too unimportant.” And of course the bar exam surprises some of those kids because that does go into the core courses and if they don’t take them, why—[laughs]

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Orlando Hollis

CH: [laughs] Could you profile Orlando Hollis for me?

MM: Firm, brilliant, could rub you the wrong way, he was not a diplomat and so if you were looking for diplomacy from him there was very little. He was a precise teacher. Spoke precisely. I wrote an exam one time and I used the word irregardless. I can remember him saying to Professor O’Connell, “Have you ever heard of the word irregardless?” And I just shuddered. I knew what was coming. So he says,
“Irrespective or regardless but there is no word irregardless.” [CH laughs] Now if you look in the dictionary, it’s there, but it sure wasn’t there in ’54. [laughs]

CH: So you actually studied under him as well?

MM: Oh, yes. Oh, I took many courses. Common Law Pleading and one course after another with him, but he was punctual. You were in your chair, you were there, because he started. He didn’t care whether you were. And don’t come in late.

CH: Did he ever practice law?

MM: I don’t think so. No. There’s a picture of him in the album of graduates as a young professor at Oregon and he looked like he just graduated from law school, unfitting suit. But, you know, he was shrewd. He was an incredibly successful investor in the stock market, which was an anomaly at that time. My dad and uncle, they wouldn’t get within a hundred yards of the stock market. They’d gone through the Depression. Well he had certainly lived through the Depression, but he was a seer, I’ll tell you. And he made a huge amount of money in the stock market and left the bulk of it to the University of Oregon Law School when he died. That was a huge gift to the school.

But you didn’t ever see that. He was very modest in all of his living expense and that sort of thing, very modest. And very polite, very formal, extremely formal. I remember when Alger Fee would come down there and sit as a US District judge and sit in the mock trial room in the law school. Believe me, we almost fell out in dress blues when that was going to happen, to satisfy the dean that we should all look properly before a federal judge. [both laugh] And so law school was fun. I had some really close friends and I got married at the end of the second year and so my wife supported me in the third year.

Influential Law Professors

CH: Were you involved at the Law Review?

MM: Yes. Yes I was Note and Common editor of the Law Review.

CH: What did that entail?

MM: Ah, reading the articles that were submitted and kind of rating them and discussing them, discussing whether the topics merit publication, that sort of thing. It was hardly heavy-duty work. I must say that.

CH: Were there any topics or any areas that you particularly enjoyed or excelled in?

MM: The article that I wrote at that time was how the commercial code affected the law of negotiable instruments. Now that’s a thrilling title. [laughs]. And so the thing that it did for me, it really taught me the law of negotiable instruments and the change over to the commercial code, which was
really a plus. But Charley Howard, he’s one of the professors. Charley Howard was a tremendous man and he had it in his mind that there was a lot that needed to be understood to move from the old commercial law to the new commercial code and so he encouraged me to write this article, which is what I did.

Then I know that you had on the list Hans Linde. I was in Hans Linde’s first class that he ever taught. Constitutional Law. We were in our third year and after we took the final in Constitutional Law, there was a group of us, about six, we all went over to the college side and sat down and decided we had flunked the course. None of us had a clue what he was after. So we wrote down everything that came into our minds. Well we all passed. It was fine. And I still don’t know what the answers were to any of his questions. But Hans Linde’s mind works at such a level that you have to scrape and scratch and claw your way up to figure out where he is to really follow him. He’s very deep.

CH: Is this another part of this abstract reasoning?

MM: Yes. Well, he really takes that to a different power. [both laugh] I don’t always agree with the things that Hans Linde has written as a Supreme Court judge, but I do admire him for a great mind and as a friendly, concerned person. He still works down there at Willamette Law School and is a productive server.

CH: Do you see value in courts that have judges that come from very different backgrounds and very different callings? Like for instance, Hans Linde being an academic.

MM: Yes. Oh I think it’s absolutely necessary that we have variation. You know, there was a time when—Ed Howell, who was a trial judge over in Canyonville, Eastern Oregon’s just good round fellow—and Hans Linde and I lived at the top of Lorida Avenue, kind of a complex of houses called Bird’s Hill. Ed Howell lived about halfway up Lorida Avenue and so I’d come home from the office and here would be Hans and Ed and they were poles apart with their philosophy of law, out there just arguing ferociously in the middle of the street, you know. [laughs] And I’d slow the car down and open the window and says, “I assume you’ve reached accord?”

“Rauwh, rauwh, rauwh.” [both laugh]

And I’d drive on. They had a great time arguing their cases again in the middle of La Rita Avenue. You know, O’Connell had a great, great mind. KJ. O’Connell did things that I don’t think anybody ever realized. He determined during the war that there were going to be students coming back from the war to take the bar and would need to have refreshers, so he wrote a volume on land law and trust law, conveyances, and all that. They were blue-covered volumes about this big. I had them for years. They were the most detailed and perfect outlines of the laws in those fields I’ve ever seen anywhere. He did that so that these guys would be able to pick up the ball again and go.
He was one of the most instrumental people, along with my uncle, in the adoption of a replacement of the OCLA, the Oregon Revised Law—ORS, is what we still have today.

CH: Ah.

MM: Yes. OCLA was the predecessor and then ORS was what came out of that. O'Connell was involved in getting that done with the legislature and explaining why it was necessary to revise this. He was also an avid fisherman. Loved going. He would go ripping out of law school on a Friday afternoon with his fishing rod in his hand on his way to the McKenzie River to fish, and so I had some real gems for law professors.

CH: And he was a law professor?

MM: Yes. Yes.

CH: What did he teach?

MM: Property. All Property and Wills and Trust, and Real and Personal Property, and that sort of thing.

CH: Any other professors that you’ve had that had a big impact?

MM: None like O’Connell. Linde didn’t have as much impact because he was only there the last year.

Lacey. Professor Lacey. He had the most wonderful sense of allegory or analogy and such and a bicycle and a tricycle, not a cycle, but a bicycle and a tricycle, and he taught criminal law. He was a new professor, fairly new. I think he had been there maybe three years when I got there. But he was very good. And a generation closer than Charley Howard, and who was getting older. Charley Howard was in the area of contracts, negotiable instruments, and all that sort of thing so.

CH: What was taking the bar like for you?

MM: Well there was this group, and two other fellows particularly, that we would meet with before finals and we would kind of share the responsibility of detailed outlines of each course. We all did an outline, but somebody would really fine-tune it with everybody’s work and then we would sit down and roundtable discuss it, of course. We got in the habit of doing that for finals in law school and so we didn’t have a bar review course. There was no such thing, at least that I was aware of. So that was our bar review course, to take those old outlines and just go over them again. Bill Deatherage from Medford and Jim Hershner and Don Dunn and several others, and we would just work in a circle with them and then go off by ourselves and kind of do it. That was before the computer, of course, so you either wrote it or you typed it and I was able to type. The bar exam was held in the Senate and House at the Capitol Building in Salem

The writers were in the one room and the typists in the other and so the writers didn’t have that clatter going on. But I remember coming out of there
and thinking, I don’t know anything. I’ve
dumped it all out. [both laugh]

Every bit of knowledge I have
is gone because it’s all in there on that
typewriter. [laughs] But we passed a
hundred percent.

CH: Your group?

MM: Our class. And that was—some
people are critical of Orlando Hollis, that
he decided who was and who was not
going to practice law. Because our class
started out with sixty-three and thirteen
of us graduated.

CH: Wow.

MM: But we all thirteen passed the bar.
That was important. [both laugh] A lot
of our comrades of earlier days went to
Willamette and graduated and did fine.
They were great lawyers. So, his selection
process was a little too harsh, I think.
The only criticism I have of the dean is
he really was adamant that his graduates
were going to pass that bar exam. [laughs]

Not a lot of those around. And so it
worked. I had been living the year before
with Jim Hershner and Don Dunn in a
one-bedroom apartment. We had a three-
decker bunk in there and we’d take turns
cooking and doing the house chores and
such. And we studied together all the
time. So then Shari and I moved into a
little rental that wasn’t too far away, with
a wood stove in the basement. [laughs]
I can’t remember what it cost us but it
wasn’t very much. She went to work for
the First National Bank in Return Items,
and I think she was earning $180 a month
or something like that, and I worked
nights in the library at thirty-five cents an
hour and gave blood. [laughs]

Marriage

CH: [laughs] Going back a bit here, you
married after the bar?

MM: After the second year of law school.
Shari [Sharon Long Marsh] graduated
from college and we’d met a couple of
years before that. When was it? Fifties
I guess, 1950 or ’51? Fifty. And so we’d
gone together for quite awhile. It looked
like I was going to successfully get out
of law school, because I was doing well.
It was sort of preordained that I would
go to McMinnville and practice with my
dad and uncle, so I had a position to go
to. She was from San Mateo, California
and so she was a California girl. We had
a synergism from the start that has really
kept us safe you might say. We’re fifty-one
years married, you know.

As if you didn’t give enough blood
to Orlando Hollis, huh? [laughs]

MM: [laughs] Right. I’m O-negative and
so I am a universal donor. I remember they
had a big card down there that was Dr.
Furrers and somebody else and they had
all these dates. I’d filled up the card and
filled up the back they’d stapled another
one to it. They would call me on occasion
and say, “How do you feel?”

“Fine.”
“When did you last give blood?”
“A couple of weeks ago.”
“You feel okay though?”
“Yes.”
“Well come on down.” [both laugh]

So I’d get twenty dollars, a cookie and a coke and we would go to Crosstown for dinner and a movie. So that was kind of the high point of our lives. [both laugh]

First Law Practice

MM: We were married that summer and spent that last school year and then the bar. I never moved us back to McMinnville. My dad and uncle had a firm office over in Salem that Gene had established in the old, Congress Hotel, I think. Anyway they had a little hole-in-the-wall office there and Ned Clark had gone in there and so Shari, in her wisdom, she thought it was good to go to work for my dad and uncle but she said, “Let’s go to Salem so that you’re not always Frank’s boy in McMinnville,” which was wisdom. And so that’s what we did and that was clearly the right move, the right way to do it. And Ned and I struck it off in a very, very unique partnership that went for thirty-two-and-a-half years without a single disagreement.

CH: Really? This was Ned—


CH: And he had been associated with your father?

MM: Yep, for a couple of years. Yes.

CH: And the purpose of having the firm in Salem?

MM: Well, Gene generated so much business in Salem in the legislature, and so the original plan was that he’d spend a lot of time over there, but he didn’t. It finally developed that we were doing one area of work. The first couple of years I spent a lot of time in McMinnville and I’d go with my dad, learning trial practice and learning interviewing witnesses and doing research and writing some briefs for him and such as that. But slowly it evolved that we really were doing other work. And while my family name was on the door, why neither one of our names was on the door, see, so we said, “What would they think of us?”

And they were very supportive, both Dad and Gene. You know they just really set us up. He got all the furniture over there and everything like that, so we split off into Clark and Marsh. Then a few years after that we joined with Brian Goodenough and it was Goodenough, Clark and Marsh and we moved over to the Pioneer Trust Building and that didn’t last very long for reasons that aren’t important.

Ned and I just had a real connection. We also came to the realization, and we made a pact, that there would never be a Clark or a Marsh in Clark and Marsh, exceptus. We would not bring any children in. I’ve seen sons go in, daughters go in, with parents who are lawyers and make
a success of it, but I think it’s difficult. I think you need to have the autonomy and we both realized that. We also had an unwritten code that if either one of us didn’t agree to do something different, then it wasn’t done and so we just stayed the course. A change was a unanimous idea. It was never somebody being talked into it. I think that was the great part of the success of partners.

And then as we grew, with Lindauer and McClinton, now we got up to seven or so. That’s when I went out of there, in 1987. So we practiced together from ’54 to ’87 and that was the most difficult thing in coming here was the wrenching of that association. It was a long time to be able to move into something else.

I was a successful trial lawyer and so there was some anxiousness in particular by McClinton who was working with me all the time, and who was going to be able to pick this up. I had a hunch and I was right that, that it would really allow him to flower, and it did. When I was out of the way, why then he could become as good as he has. He’s an excellent lawyer.

And so I think those things all—nobody’s indispensable. [laughs]

CH: [laughs] But your practice there, I mean the types of law that you were doing changed quite a bit over the years, didn’t it?

MM: It really just evolved. It really did.

[End of Tape Two, Side One]
do with it. Well the amazing thing was, in those days we tried cases.

CH: What was amazing about that?

MM: Compared to today, when ninety-eight percent of them settle. In those days ninety-eight percent of them tried. So, you were always trying cases and you did it so quickly. It was also a trial by ambush. Discovery wasn’t part of the program then, so it was, if you had that secret witness [laughs] you never told anybody you had them. And of course you didn’t disclose policy limits and you didn’t disclose anything. It was just trial by ambush.

CH: Trial by ambush. [laughs]

MM: Right and it was fun. It was hilarious and it was uncertain. But it got as high as twenty-four and twenty-five cases a year that I tried for several years in there. Then it kind of started dwindling off, you know. But part of that dwindling off was they became much bigger cases and much more involved and so I wouldn’t say that I could have tried twenty-five Volkswagen cases in a year because that you couldn’t do it. But anyway it grew up into the mid-’70s with really heavy trial work.

And at that time I tried a case where a wheel came off a brand new Chevrolet pickup and the woman was hurt when the truck flew around and tipped over. And some very good lawyers up here in Portland sued Chevrolet for a faulty product and sued the dealer that they bought the car from. I represented the dealer. And we tried it before Judge Burns up here in the federal court and I really had luckily found an incredibly talented metallurgist who disproved their theory. And we won the case in front of a jury. And not long after that, as I understand it, somebody in the general counsel of General Motors called Volkswagen to ask them—or Volkswagen called General Motors to ask them if they had a lawyer who defended products liability cases in Oregon. And he said, “No but we did just have a case where we could recommend a lawyer.” And they recommended me. [laughs]

And so Volkswagen calls me on the phone and these engineers come out and these lawyers and they talked to me about these cases. So we started defending Volkswagen and all their work here in Oregon and I went down to Reno and tried a case for them once and did work in other states, but I never had to try anything in other states. And that was a big, new area of law. And we were involved in the case where the rule of products liability was adopted by the Supreme Court.

We tried several cases, and one thing I had to say about Volkswagen, if they felt there was something wrong with their product they would get the case settled. But, if they didn’t there was no settlement. You went to the mat and they would spend whatever they had to. And there were times that I thought, [moans] “We’re on thin ice here,” but no. It worked out and they’ve been very good. They would spend a lot of time. They would take lawyers from across the country back to New York and give us training, even to the point of going out with race car drivers.
to a race track to find out what the car can actually do. We really don’t know how to drive, you know. Those people know how to drive and you realize that a car has a lot more ability than you’d think it does if it’s handled right. And so it was an exciting time and I’d go back to New York a couple times a year, which I loved to do.

Then the PLF was getting started and we got involved and I got –

CH: PLF is?

MM: Professional Liability Fund. So I started trying cases for them defending lawyers. And I got sued as a lawyer myself and I remember the outrage that I felt. You know, a lot of hurt pride and all that. And so I thought I was a pretty good lawyer, and I came to the conclusion that I was a pretty good defense lawyer for lawyers and doctors and accountants and such because I had been sued myself. So, that would be one of the first things I’d tell a new client is, “I’ve been where you are. So I know what the anger is. You don’t have to tell me about that. I’ve been there.”

CH: Mm-hmm.

MM: And then we’d get along better and I was able to work with them. So I think it was good to have a little blood on your own [laughs] cheek.

CH: [laughs] What was the suit against you about?

MM: It was about a settlement that—and this is part of that day when nobody told anybody what insurance limits were. And the claimant on the other side thought, and maybe had been advised, that there was a $25,000 policy on the case. He was represented by an incredibly good lawyer. And he did too and so I said, “Well I’ll pay you $25,000.”

There was a $50,000 policy, and they had authorized me to pay $25,000. And I said, “I’ll pay the $25,000 I’m authorized to pay.” Well later, in a funny way, they learned that was not the insurance rate, so he sued his lawyer and he sued me, he sued the company. He sued everybody.

And the lawyer who represented him said, “Marsh didn’t deceive me of anything. I told him I wanted $25,000 and he said I’ll pay you $25,000.” Now you see, they couldn’t even have it today. Anyway the thing resolved and went away. But it was a good experience for me. Not at the time. I was really upset and I was touchy. I had not reached a point in my maturity of—I wasn’t very humble. I needed to have things knock some nails out of me and I was pretty proud and so I was hurt by that.

CH: Was that due to your having been fairly successful?

MM: Yes. I’m sure, because I was successful and I was very much involved, and happily so, in a lot of community activities and so I was known about town. I can’t remember if it was before I was made First Citizen of Salem, but I was proud. I didn’t like to be sued—[CH laughs]—my name in the paper and that sort of thing.
Role of Christian Faith

CH: You had mentioned at one point that you eventually, that eventually religion became more important in your life. And I’m wondering when that happened and what precipitated that?

MM: That happened in 1970 or ’71 when I was forty-plus. My wife started, she’s always had a spiritual nature but without any background to back it up. She’s just a spiritual person. She’s just sensitive to humanity. She’s got great antennae to pick up on where a person is if they’re hurting and such. And so she was searching for some kind of an anchor to put that sensitivity into and she started going to a meeting of women that was taught by a woman by the name of Marge Lottis in Salem.

Marge Lottis’ brother is Doug Coe, who is head of the International Foundation in Washington, DC. And Marge taught these women and it grew from somebody’s front room to a big hall. And Shari was really going regularly to that and was enjoying it but she didn’t ever crowd me with it. She would tell me what she was learning and such and I would look up. But she finally said, “Well you know, Saturday night,” or Sunday night, I can’t remember which, some night, “Marge is going to talk to some couples at So-and-So’s house. “Would you go?”

“And I said, “Well tell me what couples.” And so she named them off and there were some safe ones there and I thought, well I can chance this.

So I went and Marge talked to me and to the group. And it was the first time that I had ever heard anybody talk about the love of God instead of the wrath of God. And that kind of piqued my curiosity, I guess. You know I always held to the Boy Scout oath, you know, being reverent and the belief in God is there. So, I always had that sense that there was God, but religion was not an interest. And we’d gone to church in Salem at a little Presbyterian Church out in South Salem for awhile. And it was okay. I liked that pastor but there was nothing really growing for me, nothing alive.

Well this night kind of turned me to say, “Well, now look. Are you going to look at this or not?” Because that kind of intrigued me, the love of God and concepts of grace and kindness and compassion and that sort of thing, and you know I was spending each day in full armor. I was a warrior, you know. So to come to these sort of things well it kind of got my attention. And to jump ahead from now, one of the reasons that this attracted me is I’d decided I’d had enough aggression and conflict. I wanted to mediate and solve and quiet. That was the shift. But I don’t think I would have necessarily done that if I hadn’t had this experience with the Christian faith.

And I am a Christian. And that term is misunderstood by many.

CH: How so?

MM: Oh I think it brings about the vision of dogmatic, Right, Right, Right, Right-winged insensitivity, and I’m far from that. I do not believe in that. I think
that dogma in the hands of some is a very risky business. So you have to be careful. I really think our society has a lot to learn from true Christianity. That you can kind of make a quick comparison to the fanatical Islamic against the really peaceful Muslim. There's a vast difference and you should talk to the peaceful one, not the crazy one.

And so anyway, I went at this like a lawyer. And everyday, and I started on page one. “In the beginning.” [laughs] My wife just shook her head. She was trying to get me over into the New Testament and I was back in the Hebrew Bible and so I lay that out with a dictionary, Bible commentary and Englemeyer’s Children’s Bible book. I had never heard of it before. It’s a big book, beautifully written in very simple language of just the old classic Old Testament stories. And I just started on page one and I worked laboriously, Genesis, Exodus, Numbers, Deuteronomy and all the way. Because I just attacked it like a law book.

But I got in there and at the same time I was more and more around people who were moving in the New Testament and talking then, and I'd be over there reading, but that was my study, catching up with things. Then I got into the New Testament and I was reading and this is kind of a confession, if you will, but I was sitting there one night and I was reading in the Book of John and I said, “I believe it.” And I did. And I do.

CH: What evoked that response?

MM: I can’t tell you what the verse was. I’ve tried to think of that, but I’ve forgotten. Christ was talking about something and I caught his meaning. I just knew, and how you do that is something we could talk about for days. I caught his meaning and I believed it and it was just as if he’d said it to me in the room. So, then I really had a couple of things happen. Do you remember Corrie Ten Boon?

CH: Corrie Ten Boon.

MM: Corrie Ten Boon was a Dutch woman whose family hid Jews at the beginning of the war and she was caught doing that and put in the concentration camp and she had an incredibly strong faith. And she was on in her mid-to-late seventies when she came to America and spoke around the country. And she came to Salem and she stayed in our home while she was there, for several days, and so I really got to know her first hand.

If you see the spirituality that you do in Mother Teresa and people like that, well this is what you found around her. She reeked with it. It was really quite exciting, and she had some profound things to say. She said I reminded her of Moses, that he had everything for forty years, and I had everything for forty years, and they mean nothing for forty years, and so he could use him for forty years. And she was anticipating, “You’re going to get the wind knocked out of you,” [laughs] “and you’re going to find humility.” And that’s what really did occur.
Then I became more and more involved, and Shari and I become more and more involved with church and with teaching and education and retreats and things like that. And I always had a long and kind of nagging interest in the fact that, “Why do we have so much trouble communicating between the person with faith and the person without faith?” You know, and I was back to my second grade teacher. The faith and reason issue.

So I started really concentrating on that and in order to do that I had to kind of start where I’m sort of talking to you about. I had to start reading, what other people who did not believe, what were they thinking. And I found that very interesting. And you might say that I was testing my faith by doing that, really. I don’t think I was, but if I was, it tested well, because I became more and more convinced. And I adopted the old *fides quarem intellectum*; faith seeks understanding.

So that’s the course I took on with my study and digging in deep theologically to find out what happened. And it’s an interesting, fascinating story that takes you back to ancient times when words were written in scripture, and brings you into Middle Ages when people were still considering this world flat and finite. God was in his Heaven and Hell was down below and all the things that those Ancients and Middle Age people, that’s the only way that they could think about it. That’s the only way they could say it.

And so then Galileo comes on the scene and they don’t know quite how to handle it. Newton comes on the scene, a devout believer. Newton wrote a beautiful article in defense of the proof of God by nature, which he was a master of. And at the same time the Empiricists, Empirical philosophers were blossoming in the Age of Enlightenment and the Church didn’t handle that well. Dogmatism resists it. You read about the scary time in Puritan New England and scary times in John Knox’s Scotland and terrible abuses of the Church. And here was this kind of a poor defense against science, and at the same time there was something that was ringing through that I felt needed to be communicated. That’s what I set out to do a few years ago. I’ve been working on it.

CH: In what way?

MM: Why, I’ve written a long article on it—not published. This is for family and some people I know, and I’m in the process of getting responses to it from some people, because I’m dragging them into some thoughts that I don’t think are very common.

CH: Regarding science and faith and reason?

MM: Yes. Right. Right, and what we as human beings really think we are. You know the great Professor Hammer who says we are a lot of chemical reactions running around in a bag. [laughs] That’s pretty tough for me to go to. [laughs] I don’t believe that.
Balancing Faith and Law

CH: How do you balance your life in jurisprudence with your life in faith? It seems it has the potential to be somewhat schizophrenic.

MM: Oh clearly. And I’m tested on it daily. I guess I got some kind of reputation. Well, I was with Hatfield and I was with others that are kind of religious. You know, I’d take part in Governor’s Prayer Breakfasts, things like that. So when I came on the bench, my reputation was, “Ah we’ve got another kooky Christian up there.” [both laugh] But a lot of them, you know I’ll be trying somebody and am going to sentence them and I’ll get this sentencing memorandum with all sorts of Biblical references and such, [laughs] or I’ll get reminded by a lawyer about the compassion of the faith and so –

CH: These are people who know a little bit about your faith orientation. [laughs]

MM: Oh yes. Right, they know my orientation and they’re going to try their best to use it. [laughs]

CH: Does it work?

MM: No. Well it does sometimes. I think it does. I think I shouldn’t say no.

Another confession—when I came on this job my father gave me one piece of advice: “Don’t decide anything when you’re angry.” That’s the only piece of advice he gave me. My other rule was that I needed to concentrate on kindly authority.

CH: What did he mean by that?

MM: No. This is me. His advice was just don’t decide it while angry. I came to the other conclusion. It sank into me from some source. I don’t know what the source was, whether anybody said it or what, but all of a sudden the words “kindly authority” came to me. I never enter the courtroom without asking for that. Not once. I started to one time and had to close the door and back up. But I do every time. Wisdom, kindly authority.

CH: And does that evoke the sense of the ideal of a judge?

MM: It evokes, in me, the feeling that everybody out there, no matter how cruel and criminal they may be as a human being—I do have authority over them—and I have to deal with them kindly, but with authority. Sentencing is the most difficult thing that a judge does. Some may disagree with that. Most judges that I know would say that is the most difficult thing you do.

I have Mexican illegals appear before me all the time. It’s a lot of what I do now in senior status. And particularly the Mexican Indian, but generally the population, they stand before authority with their heads down. They look at the floor. And that bothered me. And finally I said to one of the, through an interpreter, “You don’t have to look at the floor. You and I ought to be able to just talk to each
other.” But I get them now to raise their head and look at me and I don’t let them stare at the floor.

CH: They’re doing that out of respect for you.

MM: Right. And some apprehension, but total submission to the authority. Well, I want them to know that I’m thinking that they’re a human being. And it works and they come up and their answers get quicker, they immediately get less timid if they can look you in the face. Anyway, we jumped way up there.

CH: This all began in the early 1970’s?

MM: Yes.

CH: And, obviously, it’s had a profound affect on your life and your career.

MM: Right.

CH: Do you keep up contact with the Coe’s?

MM: Not as much as I did. I used to spend some time with Doug every year. I’ve seen him almost every year, but very briefly.

CH: He’s in Virginia?

MM: No he was out here at George Fox two years ago, and he was here at another thing about a year ago. I saw him for just a brief minute. But he has led a miraculous life with his influence there with prayer groups in the House and Senate, and throughout the world. They’re very active. Doug is my age and so he’s getting to the point where you wonder how long this goes and we always have to remember –

CH: He’s still based in Virginia isn’t he?

MM: Yes. Yes.

CH: I was there once at five o’clock in the morning, interviewing him. [laughs]

MM: The Cedars?

CH: The Cedars, that’s right, and wasn’t it President Madison’s house?

MM: I don’t know whose mansion it was.

CH: I think it was the Madison’s mansion. Yes.

MM: Quite a house.

CH: Beautiful place. And then your connection with John Dellenback, how did that come about?

MM: That came from there and World Vision.

CH: And that began during what time?

MM: We got into World Vision more after I came here to Portland. We really started getting involved with—

[End of Tape Two, Side Two]
District Court Appointment

CH: This is an interview with Judge Malcolm Marsh at his chambers in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen. The date is January 27, 2005 and this is tape three, side one.

You’d just mentioned some of your contact with World Vision and Young Life. And you had mentioned moving to Portland. When was that and what caused that?

MM: Well I moved when I got this appointment.

CH: Oh, okay. So when you came on the District Court.

MM: Right. Came on the bench. And that started the first time that I was ever considered, if you will, for this bench. I’d been asked to serve on a state bench and it just didn’t ever interest me. Can I tell you a story about why I thought it would fit?

I was considered with a group of other candidates when Ed Leavy came on the bench in ’84. Actually I was considered earlier than that. When Panner and Redden and Frye came on the bench I was also considered at that time. And then Leavy came on and I was considered again at that time. And then the summer of ’86 I received a call. Well one of those two times earlier, is when I was taken back to Washington and had a long day interview with the Justice Department. They run you by about eight different guys who ask you questions. All come from a different aspect and I’m sure some of that was to find out where’s your political bent.

But anyway that kind of went away and then when I was—I knew that they had my name there and in the summer, in August of ’86 I got the call that they wanted to have me fill out some forms, that I was being considered for nomination. And so that’s when the big rash of forms started and that went through to January.

CH: What was causing that to occur at the time and who was precipitating it?

MM: Well the thing that was causing it was that somebody was leaving the Ninth Circuit and there was a spot opening on the Ninth Circuit. I think Otto went Senior or something. Otto Skopil, or John Kilkenny, I can’t remember who. So, Leavy was being considered to move to the Ninth Circuit, and that would empty a spot here. An unusual thing that actually happened is that we were both sworn in on the same day. In fact, some people worried if you didn’t have to have a vacancy before you fill the positions, and so, well we did for about two seconds. A lot of people wondered if you could do it that quick. Of course usually the gaps are there for months and months and sometimes years before they get filled and this one was filled instantaneously.
Anyway, I got this call and I felt it important to memorialize it. And so it was January 29, 1987. I’m just going to read it to you.

CH: Please.

MM: “This is a short summary of “the phone call, “about nine a.m. on the 29th of January 1987. The phone rang and it was an operator who said, “Mr. Marsh?”

And I said, “Yes.”

She said, “Just a moment please, the President of the United States is calling.” The first thought that comes to my mind is, what if I’d been out having coffee? [laughs]

CH: Right. [laughs]

MM: “The President of the United States is calling.”

Then there was a short break and the President came on the phone and said, “Good morning Mr. Marsh.”

And I said, “Good morning, Mr. President.”

And he said, “I have on my desk, a document, which if it meets with your approval, I would like to sign and submit to the Senate, and that document would nominate you to sit on the United States District Court for the District of Oregon.”

I responded something to the effect that, “It would be an honor to do so, Sir, and thank you.”

He said, “Well I am very pleased to do this and congratulations.”

I responded, “I appreciate your personal involvement and consideration.”

Whereupon he said, “Thank you and would you give my very best to your family?”

And I said, “Thank you, and please give my best to Mrs. Reagan, and God bless you.”

He responded, “Thank you very much. Good bye.”

I felt that was important enough to record and I think I dictated this pretty close, I’m sure. Because I did it right after the phone call.

CH: Is that common for a president?

MM: With him. With him. He called everybody he nominated.

CH: That is amazing.

CH: Did you know this was in the works, though?

MM: I knew it was. The election had to go by and things had to normalize. So, we were the first ones in that term of Congress to go before the Senate—Ed Leavy, myself—and what was his name, from New Jersey? But we all went back in March and appeared before the Senate Judiciary Committee and went through the process for district judges. That isn’t near as big a to-do as it is when you’re talking about Supreme Court Justice.
CH: This was in 1986?

MM: Spring of ’87.

CH: Spring of ’87 when you went before the –

MM: Right. Right. This call was January of ’87.

CH: And the process is that the senator from the state nominates and then the president appoints?

MM: It happens in different ways. You’re not going to go anywhere if those senators say no. That’s clear. And I don’t think the President ever nominates anybody that the senators haven’t said they’ll go along with, even though they might not be their choice but they’ve got to say they’ll go along with it otherwise it dies right there. [both laugh] So, you know it’s a choice situation that depends upon political contact. There’s no question about that. And the importance of that is to understand that once done, that aspect goes out the window.

I’ll read you something. This was when I was sworn in. And this is Judge Anderson, who’s now deceased, but he’s from Idaho and he came to represent the Ninth Circuit when Ed Leavy and I were sworn in. And this is an interesting thought that stuck with me. He says—this is Judge Anderson. Quote: “Judge Panner, Senator Hatfield, Congressman Smith, fellow judges, distinguished guests and all of you. It is a real pleasure and honor to participate in the Joint Session of the Court of Appeals in the Ninth Circuit in the District Court of Oregon. Our Chief Judge, James R. Browning is participating in and representing the federal judiciary and the Southeast Asia judicial conference so this fell to me under our court policies. Nevertheless, he sends his warmest congratulations and best wishes as does the circuit judge Ted Goodwin, who I am sure many of you know. Today we have acquired two new judges, one an appellate court judge and one a district court judge. It is truly a significant event in the Ninth Circuit, but it is, and it has been, and properly so, an Oregon event. When I was headed for the Boise Airport this morning, about to board my flight over here I stopped at my favorite service station and my favorite attendant, a man I’ve know for quite a few years said, ‘Judge, what’s going on today?’ I said, “Well I’m headed to Portland to participate in the ceremony to induct two new federal judges.” And he said, “My that’s sounds fine. But,” he said, “Judge don’t make the mistake of telling them what it’s really all about.” Well this is both a festive and a serious occasion. Please permit me in closing, a few serious and some personal thoughts. The language of good behavior. Which is over on that certificate.

“The language of good behavior, a lifetime appointment, an undiminished salary were designed by our founding fathers to give Article III judges maximum freedom from possible coercion and influence by the executive and legislative branches of government. Article III judges are not subject to control by any superior authority other than the Constitution and

Marsh, Tape Three, Side One
the laws of the United States, your oath of office and your own integrity. In short, I strongly suggest with all due respect, that as of this moment you owe nothing to your senator or to your President of the United States, except a thank you, if indeed you are thankful, [both chuckle] and the commitment to all of us and to them that you have undertaken by your oath of office today. Now you are a full fledged member of the independent federal judiciary, which is in all probability the most independent body in this nation and perhaps the world and has been for 200 years.”

Now, I keep that close at hand. [both laugh] So, but I appreciated that from Blaine, Blaine Anderson.

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**Judicial Activism**

CH: And all the criticism that people hear about, oh the independent judges and the, what is it, the term that is always used in terms of their rulings, their judicial activism.

MM: Oh, oh yes.

CH: And that somehow they’re doing something wrong, I mean it sort of harkens back to this independence that was built into this system.

MM: And I’ll tell you what my fear is about that. The polarization of this country that’s prevalent right now is so severe that it has, and it is, and it will be for me, not too much longer, but I’m afraid quite a while longer, it will influence every judicial nomination that comes before Congress. They’re looking at whether I agree with abortion or the death penalty or all the political hot-buttons, and so these people are being grilled about these matters and the questioning is made so dominant. My fear is that the candidates, the nominees may start to feel this should control how we look at things. And so, if they weren’t there, they’re put there and then when they get on the job they feel they better practice there. You see, my fear is, I don’t care how long a senator harangues along. I just don’t want to see that nominee change the reason that he reached the point where everybody said this guy’s qualified, and that would be his independence, and not feel duty bound to be a conservative or a liberal or an activist or whatever. Because we are getting some. We’re getting some activists and that, I think, is too bad.

CH: What is an activist?

MM: My job is to follow the Constitution of the laws of the land, not to decide what the laws of the land ought to be. That’s the legislative branch’s job. And so when I say, “Well that’s just great, but that’s not the way I’m going to hold,” then I’m driving the law. Or if I’m saying, “Oh that’s fine. I know I have to go along, but I’m going to find any niche I can to slide it sideways a little bit to make it fit with my philosophy.” I think I told you yesterday. That’s why I got off the salmon cases. I felt that I was starting to have my own ideas of where that ought to go. That’s not my job.
CH: And yet, a judge’s job is interpretation of the law, right?

MM: Yes. But on the district level, we look at what the Ninth Circuit said. We look primarily at what the Supremes have said. If not then we go to Ninth Circuit. If they haven’t said anything, which is almost never, why then we’ll look somewhere else, but we’re supposed to look in—you know when I first came on the bench we used to circulate our opinions before we’d issue any of it. And everybody would kind of look at it so that nobody got off the charts with silly opinions that everybody disagreed with. And we still do, with this latest ruckus on the guidelines. We sat down with Judge Panner’s opinion and some of us didn’t agree with all of it. Some of us agreed with parts of it. Well we discussed that but I think we’re all of a mind to not just make feminine decisions or make ecological decisions. We’re to make legal decisions. And I feel very, very strongly about that and that’s my greatest fear for the judiciary is that the insidiousness of this polarization is liable to be felt as proper within the judiciary.

Faith & Reason in Modern Society

CH: What’s causing that? What’s causing the polarization?

MM: Oh boy. [pause] This country suffers from an inverse morality, in my opinion. When you replace classic values with your own idea of what is moral you can justify anything. And so you can be a person honestly and thoroughly enraptured with environmental causes, but that should never invert itself to where you burn up log trucks, or the forestry office. You can be critical of the hypocrisy of the temperance union operator who’s found in a saloon or some misguided temptation that’s followed by somebody who everybody thinks is holier-than–thou, but that shouldn’t allow us then to say let me show how un-holier than thou I can be with smut and rejoice in the ability to spread on television or through any media outrageous conduct when you know full well that it’s really not the right of free speech it’s the desire to make a profit. And that’s inverted hypocrisy. So I think that in this country right now there are a lot of ships without anchors to tie—to let them know that there’s a bottom somewhere. If they want to stop, is there a bottom anywhere So rather than just drifting in any personal philosophy I think the human race needs a root.

I just think we’re becoming un-rooted. We’re loose cannons. And we are such slaves of technology. You can stand back and you can look at technology and you can say, “Wow look at what they’ve done in the last fifty years.” Let alone the last hundred years.

Did you ever read Ambrose’s book on the transcontinental railroad You know, here in 1865 and 1868 they had moved from transportation, which was in the Roman days, to the five-day passage across the country in a railroad car. Now they do it in minutes. Look at where it’s gone. Well, so technology has kind of taken over as if it’s the answer to everything and we rely
upon technology to solve things for us all the way along. Everything can’t be solved that way. At least not in my philosophy. And so I think what we need to do is—it’s why I write about communication. I refuse to be polarized. I refuse to be polarized. I have my own ideas and I have strong convictions. My prayer is that I’m not dogmatic about it. I like to be able to talk to somebody who comes at me from a totally, irreverent place even an atheist, if you will.

You have to realize the person who’s an atheist really has a faith. He’s got to have a faith. A strong faith. So why can’t I talk to him on a faith basis then? See Now the agnostic, he wants me to prove everything, probably scientifically and so I have more trouble with him because I can’t prove God scientifically. But why can’t we all communicate? And if we’re all poles apart and you’re all bad and you’re stupid and you’re out of date, all this sort of thing, you’re irrelevant.

I was walking one time and I said to myself—my grandchildren are between seven and seventeen. I’ve got seven of them in that category. I’ve got a very small window to have any influence on their lives like my three grandparents. One of them I lost when I was four but the other three were into my adulthood and had great impact on me. And so I swore right then, I am going to spend time with these grandchildren and if they feel I’m irrelevant they’re going to have to tell me so because I’m going to push them. [both laugh] And we have some wonderful, wonderful times. And so I just despair when I see such anger from either side. Believe me, I do not cotton to that person who thumps away with damnation and rage.

CH: And so what has our society to be rooted in then if it is rootless at this point?

MM: Yes. Seems to me that ultimate answer is God.

CH: In a multicultural, multi ethnic society being rooted in God has, in your view, what kind of parameters How far does that reach?

MM: Well I’m pretty broad-minded. I can say that. I was glad to read in the “Witness to Hope,” on John Paul, that he feels that God has lots of ways to bring us to him. So, you know I don’t cross off the Muslim. I don’t cross off the Jew. That’s not biblical even and it’s not good sense. It’s not spiritual sense but I do think that there are certain basic concepts that have come to us, whether through thought, reason, or revelation or what, they’ve come to us and they’re sound. They’re not dumb ideas and so to be so self-centered and so radically individualistic, yet the radical individual has no guidepost. He’s an individual. He’s going to be or she’s going to be that individual and not required to answer to anything.

CH: But radical in what sense? There’s definitely some radical Christians or other people who believe that they are
witnessing their faith in a perhaps a radical way, relative to the rest of society, but one that is still very consistent with their faith.

MM: Yes. When Alexis de Tocqueville wrote about the American democracy in 1835, he was talking about the basic concept of the American, this weird group of people who lived in such a different philosophy, and it was based upon the principle of individualism rightly understood and the pursuit of happiness tempered by—I can’t remember all the things he said. He got the idea of the pursuit of happiness from a fellow by the name of Francis Hutcheson who’s a Scot philosopher. And Francis Hutcheson said, “The pursuit of happiness is fulfilled most when it brings happiness to others.”

You can call that the golden rule if you want. Albert Switzer picked that up and said, “The happiest people in the world are the people who serve.”

So it’s the same kind of concept. Unfortunately, Thomas Jefferson left off that last part and if you leave off that last part you’re just left with the pursuit of happiness. You’re left with individualism that, if not controlled, leaves you to become nihilistic, totally self-centered, greedy, down the list you go. Now everybody isn’t greedy. There are many people who are on different poles that are not that way, but I think that if they all came to that position and acted under those precepts then we wouldn’t have this polarization. That’s where I come from. Now that’s more than you wanted to hear. [laughs]

CH: Oh not at all, especially in terms of how you make decisions and interpretations, and the ethics or the morality, the basis of our legal system. A lot has been said about the intentions of the framers of the Constitution but there are a lot of framers and a lot of intentions and it’s hard to discern what they were.


CH: And because our society is becoming so much more complex there, it seems like, it must be very difficult to find that common denominator, that common ground that most people can identify with as being their roots.

MM: Yep. And I think that it’s, if we spend a lot of time watching kind of mindless television and operating mindless video games—don’t get me started on the lottery. And, why then we don’t have time for—let’s just take the simplest example—family dinner. Where was the real instruction to children handed out except at the family table during a meal and the traditions of Thanksgiving and Christmas dinner or whatever it is. Those who grew up in that kind of a home have vivid memories of those times. I remember when my Grandpa Charlie told us this or that and they—what is it now It’s a quick fix and out the door and such a helter-skelter type of life that we don’t get an opportunity to do that, to sit around and after you’re done eating and sit there for another hour-and-a-half just talking. Nobody does that.
CH: No, there’s not enough time.

MM: No.

CH: So how do you bring society back into balance or how do you see this polarization being somehow mitigated or mended in our society?

MM: It would be my prayer that it would be done by having a fusion of communication between faith and reason.

You know it was amazing to me at 9-11, in this country that goes along so cavalierly and with criticism. My word there’s a huge segment that would attack the Christian faith in this country and yet 9-11 happens and what have we got the next several days with church services—

[End of Tape Three, Side One]

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**Human Compassion**

MM: —response at 9-11 and then the tsunami. When you think of what goes on every year with Northwest Medical Teams, Mercy Corps, Portland’s a hotbed of wonderful organizations like that. Habitat for Humanity, all this outpouring. What drives it? What drives it is not just a lot of do what I can for the Red Cross, what drives it is some kind of a deep, deep down spirituality of a command if you will, to be kind to others. You bring your happiness by bringing happiness to others. I think that Hutcheson was right on.

So, I could live my whole life without worrying about five little children in Uganda or Mauritania, but Shari and I support them. I doubt I’ll ever see them. We get mail from them. But I don’t do that just to be proud of it. I’m driven to do it. So is she, more than me. She just kind of drags me along with her enthusiasm, but I think that’s in us all.

I don’t care who you are. I’ve talked to person after person and somewhere along the line in the conversation they’ll make a reference, “Oh God, I didn’t think of that,” or something like that, but it’s there. Why use his name? And it’s not to swear. It’s not to blaspheme it’s just the way you express it. Well if that’s in all of us, and if at the same time we are given this incredible power of reason, why should those be anathema? They’re both built into us and it’s like fighting yourself. So that’s what I think the answer is, is we have to recognize that they’re both there. Some people flat deny that spiritual one and say we’re a bag of chemical reactions. That’s too bad, but I don’t think that most people are that way. I don’t think most people are that way because when something like 9-11 or the tsunami happens the bulk of people are driven to do something about it and I don’t think they really understand why.¹

CH: And yet there are a lot of people that are driven to help other people that may not, at least conscientiously, be thinking of any sense of overt spirituality—

MM: Yes, yes.

CH: —simply compassion for fellow human beings and compassion for suffering.
MM: And that’s why I say it is a latent existence within them that they don’t even realize. They don’t realize the source of it, but there isn’t an animal in the world that I’m aware of that sees things other than in shades of gray, dark and light. They don’t see rainbows and they don’t other color spectrums. Why are we given that gift I think we ought to think about things like that. We have this huge capacity to minimize all, you know.

Think of the computers in existence in the 1950’s, the size of block buildings and now you carry them around, every kid carries around one in his hand listening to 5,000 songs. This miniaturization ability has—whew. You have to but think, where’s it taking us See you have to always look and see. Do we have a down side to the fact that we’ve got technology, well yes. I go on the Web. When I go on the Web, I always have in the back of my mind that some nut is trying to find my identity and so we’ve created the source of great evil in the minds of some, with tremendous technological advances. And we have to find, I think, some way to realize and understand that technology itself can’t be our sole answer.

We’ve got to slow things down a little bit maybe, and I don’t mean to stop progress. But technology’s not going to answer the whole question. You know, we’re still fighting wars. We haven’t solved a thing. In fact we’ve got a worse kind of war now than I think the world’s ever had. Where did we bring that about?

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**Professional Ethics**

CH: So. [laughs] I’m going back here in my notes and trying to think of where we are in the chronology of your career, where you’ve talked about coming onto the court and actually, just to look back for a minute, are there other things There are a few other questions I wanted to ask you in terms of your years approaching the court. In terms of the bar, when you were a trial lawyer, what was your impression of the Oregon Bar and who impressed you and what lawyer did you work with or around that you most admired?

MM: I saw that on your outline. What did I do with that [paper shuffling] I made a couple of notes on that. These are professionals. I give this speech sometimes. Do you know how many professions there are There are five classic professions. The law, medicine, ministry, teaching and the surprise is foreign service or military. And those are the profession. In the English squire’s family one went into the business and one went into law and the guy that went into business was supposed to support all the rest of them. That was kind of a system. And the reason they were professions is that people professed to do something. I profess to practice law. And if I profess to do something that means I can fake it.

CH: You can fake it.

MM: I can fake it. I can counterfeit. [CH
And we have great and funny stories of guys who practice medicine for years before they're finally found out. Try and fake being an electrician. You get zapped somewhere. [CH laughs] But you can fake those, which means that they must be controlled by some kind of a standard and we call that ethics. That's what keeps the faking from getting out of control. When I came into the Bar it was a disbarring offense to put your name in an ad, you know. You couldn't advertise. If you did you were disbarred. And now the phone book is full of them. Well, what was right See, what was right There's a great book written about that.

My upbringing by my father and uncle was very much ethically oriented and very much employee sensitive. Have a good happy staff. You're not God. Act like a human being with everybody. Well these are lawyers who epitomized that. First of all my partner, Ned Clark. There was a great lawyer in Salem by the name of Roy Harlan. Roy Harlan was known by everybody and liked by everybody and was respected from every aspect and he was a mentor to every lawyer, young or old who ever talked to him. He just exuded professionalism. Roy Shields up here in Portland, fantastic person, affected me. Burl Green, a close friend of Ned Clark's who became a friend of mine, and Burl was, if there's such a thing as an activist lawyer, he was. He was out for the little guy and he had learned that from his father. In Eugene, Windsor Calkins, Otto Skopil and Bruce Williams in Salem, and Asa Lewelling down there. Yes I could go on naming more and more lawyers. There's one lawyer by the name of Parker Geise who died when he was probably about fifty-five, but he was the absolute icon of take-it-easy. Don't get too caught up in your cause. He used to say lawyers should never represent friends, family, doctors, or those who ride motorcycles. [both laugh] And so I just remembered him for the short time that I knew him before he died and he was a small town lawyer, was Parker Geise. Great guy.

So those are a few. Otto Skopil and I are very close. Otto Skopil has a deep faith, very deep faith and we can have marvelous discussions, and do. You know there's a ten-year gap between us but we're very, very close, so it's good to have him.

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**Senior Status**

CH: Is he still in senior status?

MM: Yes he is and he's trying to go through the throes that I'm going through, that we're irrelevant. Where can you do something that is helpful and not just in the way, you know. I do not intend to be around that long, God willing I'm here at all. But no, I didn't dream that I would still be doing anything at age seventy-six. I have so many interests that lead me astray—but you know, it's kind of back to what we were talking about. When you come on this job there's an infection you get and you have to really watch it because it can go to your head because [whispers] you got a lot of power. It's got to be carefully handled. And so, just as it's easy that it comes, it's
hard to shed that. You don't like to give up that role, you don't like to give up going out there and sitting there. So it's kind of a lifetime infection I think you take on.

But I think it's our responsibility to consider our productivity. It is certainly. I'm committed to the fact that I'm not that important. I humble myself a little bit. You can do other things. You don't have to drag this out.

I drove my poor wife crazy the first few years we were up here. I was into this so heavy. Oh, every day, every night, every weekend. We had a case load that was frightening at that time. And so she's rooted out of her home in Salem and she's brought up here and she knows a few people, but she's not part of Portland, you know. And the friends she does have are very gracious but she's really trying at the same time to re-anchor herself faith-wise with new friends and I'm off doing my duty for King and Country you know. I wasn't sensitive to that. I was not good about that and finally we had a really good session—we just had to talk that out. I'm sometimes a slow learner but I do. [laughs]

CH: How much does your job define who you are?

MM: Gosh, I hope very little. I hope very little. I wouldn't want to have anybody say that he's this and that because he was a judge or is a judge. But it certainly affects your life and I walk down the street and I see somebody coming toward me and I'm like, "Oh, what's his name, what's his name?" I can't remember, you know.

And he has the privilege of saying, “Hi Judge,” and I don’t. [both laugh] So yes to that extent, and when you come through the door and the CSO's all greet you, “Your Honor,” and things like that, why it does represent your life to some extent.

CH: But more than that, just the raison d'être, the reason for being, the sense of belonging, of accomplishing things, of spending your time constructively, I mean how much does that occupy your mind when you consider these other pulls that you have That maybe you might not have as much influence on things as you do right here, but your ability to do things constructively, or just your sense of purpose here.

MM: Yes. I do think it is valuable from the standpoint of education, going to schools, talking to kids. I try to talk to a lot of kids. And I think that you do have this status that they listen. They haven't seen a federal judge before and so they want answers, and they've got marvelous questions so, I think that it's a benefit. The way I operate, though, is I'm probably at my most comfortable moment, not in research and in writing but in a trial situation, which I don't do much anymore. But there was nothing about the courtroom that threw me when I moved up and sat on the bench. I knew what the lawyers were doing. I knew exactly what they were doing and I was very comfortable knowing. And I could rule quickly—that part I did well. I don't say I'm the smartest judge up there but I was so used to trial practice that there was nobody that brought anything new to
my mind, that really kind of, “Oh, he got away with that one.”

CH: Do you think there is a time when judges should retire?

MM: Oh yes. Absolutely. I think there’s a time when lawyers ought to retire and I think judges, too. What I’ve tried to do is pull back from things where I feel it would just bring too much stress on me, or too much discomfort. I’m not going to go into a whole new area, and do the things, which I should not do.

I have a rule. Somebody was laughing the other day. His rule is he’ll do anything you can do in forty-five minutes and that’s basically about right. And I’ve just cut it back like that. Now part of this is health. Part of this is health. I had bypass surgery in 1993, which was a wake-up call. That really gets your attention. And it changed my life in a lot of ways, dietary, exercise and all that sort of thing.

And unrelated to that—but also in the heart—I suffer now and then from atrial fibrillation and so I can’t be sitting on a bench and go into a fibrillation. [laughs] So I’ve had to tailor my work here in a way that I can do it, not just to hang around, but I still think it’s valuable for me to keep my mind active, to be around the collegiality of the situation and to know the lawyers and to do something that off loads the other judges, that they don’t have time for that forty-five minute thing. That’s why I try to take things to relieve them. You know I’m about to leave for two months for Hawaii so that’s hardly something that’s just nailing me to the wall. [laughs]

CH: [laughs] Well what is that point How do you determine what the point is when a judge should retire?

MM: Well I don’t think Owen Panner ever ought to retire. So it depends on the individual.

CH: Mm-hmm.

MM: He’s just gung-ho all the way. A-type personality and you know ready to leap into the most complicated of things, so certainly not now for Owen. For me, I have these other interests that I’ve intruded upon just being a judge and those kind of were flags that told me, okay you had a reason that you came here. Now can you have a reason for fulfilling yourself, the rest of life, whatever that is. And that’s where my attention is more and more going, but it is difficult for me yet to get up on a morning and say, “Well I’m not going down there today,” and plan not to go down there, you know. I’ll have a blank day or two, or week, on the calendar and I always feel like I’m playing hooky or something [laughs].

CH: Do you have a sense of panic?

MM: Yes, gosh sakes I’m supposed to be down there. Well, no, you don’t have to be down there, and that’s why the system allows us to pull back. It’s a gracious system. Almost a third of the judicial work in this country is done by senior judges, see, so it’s a service. But it shouldn’t—you know, I go into courthouses, and I talked to you about being on the Facilities Committee.
I go in and here are all of these pictures of these judges on the wall and so many of them died with their boots on. I don’t think that’s necessary. For some it is. For some that’s the way it ought to be but not for everybody so you shouldn’t just say, well you’re appointed for life. Serve for life. So that’s my philosophy. [laughs]

CH: [laughs] Well was there anything else in terms of your impressions of the legal community?

MM: Well it was small when I started, you know. And it was very collegial. You’d go to a bar convention and all the lawyers—my wife was amazed at how the lawyers got along. You know, we’d be trying cases all week long then go to a bar convention or a CLE meeting or something and go out to dinner and regale one another with stories and that, with the size of the bar now, is impossible. And at that time you would try cases with probably twenty-five lawyers that you tried cases with all the time and you knew them very closely. Now a trial lawyer might run into the same lawyer on the other side once every six years or something. So you don’t have that constancy that really led to a collegial association. The bar conventions were town hall meetings.

Now they’re delegates and probably necessary. I wouldn’t say that is all good but it takes away the ability, the importance of saying, “By gosh we’ve got this issue coming up,” let everybody turn out and go there. That’s when they used to have the tent shows, which they tried to copy this year, and it was fine but it didn’t have that same familiarity with everybody knowing everybody that it used to have.

CH: You were admitted to practice in federal courts when?

MM: In ’54.

CH: In ’54.

MM: Yes.

CH: Quite early. And did you actually start taking cases to –

MM: I came here a few times with my dad and then later on—I wasn’t in here a lot until the ’70’s. Then I started coming more to federal court on several different cases.

CH: Was that ever the asbestos cases?

MM: Asbestos and Volkswagen and PLF and there was some contract work, big contract cases that I had out of California. So that’s kind of where I got going more with the federal system and I enjoyed it. There is a difference. And I hate to say it’s an important difference, but there’s something about going to federal court that is different and so maybe that’s what enamored me about being a federal judge. There’s a certain dignity, which I think needs to be maintained, not only in the structures, but in the people and in the practice that is still here.
Judge Solomon

CH: Did you ever go before Judge Solomon?

MM: Oh yes.

CH: What were those experiences like?

MM: The first time I met Judge Solomon, other than hearing about him from my dad, was when I came to be admitted to the court. Gus Solomon ran what he called a thirty-day call, and he called the whole book of cases. I don’t mean that derogatorily. He had the whole book of cases so that he knew where every case was. Then he’d sign it out to Belloni or East, or somebody, but he ran the show. And so this thirty-day call would be a Monday morning, and every lawyer who had a case pending was to be there to answer what’s going on. And the amazing thing was that Gus Solomon knew what was going on. And so you didn’t go there unprepared.

Many of the larger firms would send some younger fellow over who would not know quite all about the case. The next thing to occur would be that somebody would be summoned to his court to explain what was going on and, “Why did you send him over here? You’re the one in charge of this case,” and that sort of thing.

Well it was going on this day and we “kids,” were wide-eyed watching this go on, and so a lawyer presented a paper, which I don’t know what it was about. But it didn’t fit the rules and it certainly didn’t fit Gus Solomon and he just tossed it off the bench. A shower of papers and this poor guy’s grabbing at these papers and all of us in the back of the room almost got up and went out of the room because [laughs] we didn’t want to appear before him. So that was my introduction to him.

I had a case out of California and the court had jurisdiction over my client’s property up here but they didn’t have jurisdiction over my client who was in California, and she was not about to come to Oregon. Fred Starkweather, from Gold Beach or Brookings, was on the other side and we had a thirty-day calling come up and Solomon just dressed me up one side and down the other about, “How am I supposed to decide these cases when you won’t even get your client in here?” I was just shocked and demoralized. I felt, my gosh, should I go in and apologize to him How have I so offended him So he sets it for the next thirty-day call. And so my client won’t come up. I go up. I’m ready with a toothbrush to go to jail. I don’t know what was going to happen. He didn’t pay any attention to me.

He turned to Fred Starkweather and said, “Why would you file a case when somebody doesn’t have to show up? Why don’t you go to California and file your case if that’s where the other client is?” He takes off on him. So [laughs] he evens it out. [CH laughs] He evened it out.

My closest association with him occurred when I was associated with the Governor’s Prayer Breakfast. I wanted to have Rabbi Rose speak, so I went to Gus about having the Jewish faith represented there. I’m an Old Testament scholar. I have a lot of interest there. Prior to that
I served as chairman of the Continuing Legal Education Committee to the bar. We decided we ought to have federal practice be the topic. It had never been done. And so I came up to ask Judge Solomon what he thought. Well, Gus Solomon thought that the Messiah had arrived. He was overjoyed with the thought of having federal practice be the main topic of the CLE of the year. We held it down in Eugene. Judge Belloni was new on the bench, and he talked. We had all the big federal practitioners talk, and Gus Solomon talked and it was just marvelous. We put out a great book on it and it was it was used for years. I’ll never forget at the end, we were having lunch the Saturday after the board session and Gus says, “And next year what we’re going to do is more on federal practice.” [both laugh] Every year from now on it’s going to be federal practice—[both laugh]—enough with this other stuff. Unfortunately, he died the month before I came on the bench.

CH: Ah.

MM: You know one of his stories was with clerks. Somebody should get a book made from the stories of his clerks and how he would edit their work, you know, with lines such as, “I didn’t know English was your second language.” [laughs]

CH: [laughs] You have to wonder, who in their right mind would want to clerk with Judge Solomon?

MM: Oh yes.

[End of Tape Three, Side Two]
Becoming a District Court Judge

CH: This is an interview with US District Court Judge Malcolm Marsh in his chambers in downtown Portland, Oregon at the US District Courthouse. The interviewer for the US District Court Historical Society is Clark Hansen. The date is January 28, 2005 and this is tape four, side one.

So Judge Marsh, I was wondering what it was like when you first got appointed to the court, what you found unusual about the experience, in setting up your staff or getting used to the job. What was that like?

MM: Well, it was a new experience. I think I told you yesterday that I took Judge Leavy’s place. So, when he went on the circuit, why rather than having different judges assigning too many cases, as is the normal course with a new judge that’s an additional position, each judge will kind of pick some things to start him out with. But I started out with a full load right from the start because I got all the things that Judge Leavy had. And it isn’t something that you look at like a pile of files. You really can’t quite get the feel of how big it is because so much of it is in other rooms in the courthouse.

So I had a box of pending motions that were due to be argued in the next couple of weeks after I arrived and with the arrangement with the other active judges I said, “Let me kind of work into this. I want a few days to just read through these files and find out what they’re about and kind of get my sea legs if you will,” which they were very gracious to do. And I immediately ran into the fact that I was going to be doing more reading than I’d ever done in my life. The volume of papers really kind of surprised me. I just hadn’t had that experience with the practice of law.

The other thing that—it wasn’t a surprise necessarily—but the extent of it was, that it would deal with such diverse issues. I was used to trying intersection collisions or things like that, all of which you could put in a bucket. Or products liability cases that you could really categorize quite easily. But to move from admiralty and patent to something else was really new. So it took a lot of my time to get, as I say, my sea legs. The collegiality with the judges was fantastic. Judge Belloni, who I had practiced before, and had a passing acquaintance with, immediately sent to me one of his seasoned clerks and said, “You might want to have some clerk that has the knowledge of how the courthouse works and that sort of thing and if you’d like to hire her, why that would be fine.” Which I did, and she worked for me for two years and was really instrumental in breaking the ground and letting me know, this is what you do next and this is how we prepare minute orders and opinions and everything else, all the little details.
Court Personnel

MM: My secretary, I brought from the law office and she had worked for me for years. She didn’t have any experience in the federal court, but she was an exceptionally qualified secretary and she served as my secretary until 1997 when Connie came to work for me. Connie Armstrong. And although they’re different they are both the epitome of being dog loyal and dependable and so each of those—they call them judicial assistants—were really prime and very valuable to me.

I was also assigned a court deputy, Diane Blake, who had experience with several judges and was very easy to get along with and start, and she and I figured out pretty quickly how to handle the case load and the controls and keep the inventory up.

Then I had an experience with a young woman who had worked for us in the law firm when she was fourteen, as kind of a gopher, and then she went to law school and clerked for the law firm while she was in law school. Then she went as a clerk to the [Oregon] State Court of Appeals and I kind of pirated her away from the court of appeals and she came to work for me as the other law clerk. Her name is Jackie Holly and Jackie worked for me for two years and then she went out into private practice for a period of time and then came back. And she still works as the Pro se clerk for the court here.

CH: Pro se clerk?

MM: Yes, litigation that’s brought by individuals without lawyers. And so they serve themselves and she knows the sort of things from a due process standpoint as well as the law of how to handle Pro se cases. They’re usually prisoners who are contesting their convictions, time, and so forth. So she still works here in the courthouse.

One thing about Jackie, she’d been trained by her mother who worked at the [Oregon] State Supreme Court and she was a true authority on what we called the blue book of how you cite cases and make references and things in opinions. And she just knew that backwards and forward, and still does. So that was a big a help to me. But the two of them worked very well together and slowly I started getting a routine. And of course at that time we were trying more cases than we do now, so as I said, the actual trial part was not difficult for me. I wasn’t used to being an arbiter, so to speak, on the preparation of instructions because I had always been an advocate in preparing instructions, so I had to modify my thinking there to make sure that I was even-handed with instructions, but I developed, I think, good rapport with jurors and hopefully with attorneys.

I found that the quality of attorneys in Oregon was very good. I had known many of them but I wasn’t familiar with the criminal attorneys either defense or from the federal defender or private defense attorneys. Nor was I familiar with those in the US Attorney’s Office so I had a kind of new cadre to learn there. And I soon was incredibly impressed about
how open the US Attorney’s Office was in discovery matters and how dedicated the federal defenders and private defenders were to protect the rights of those accused. And, as I think I’ve said, the government’s got enough good cases. It doesn’t have to bring bad cases. And so most of the time the defense lawyers ultimately lose the case. Their client is convicted and then sentenced and yet that doesn’t seem to ever blunt their enthusiasm to take the next one and do whatever needs to be done for it. I have come to a tremendous respect for the Federal Public Defender’s Office and these other defense attorneys in town. And I’ve also a great respect for those in the US Attorney’s Office, because I think they’re absolutely fair in the way they handle discovery and bring cases. When you have an outside prosecutor from the Justice Department or somebody comes with a kind of a different hard ball attitude you immediately see how well the attorneys in Portland or in Oregon really, really get along on different sides. And, it’s admirable. I think it’s wonderful.

**Judicial Collegiality**

MM: The reading just kept increasing and I thought, I have to learn to speed read. I have to learn to really be able to adapt to hundreds and hundreds and hundreds of pages of reading a week. And so until I got better at it, it took an awful lot of time. I think I mentioned that was a tough time for my wife because I was buried in this new venture, which was so exciting to me. And it was exciting. I was thrilled about it, but it was really hard work. Ed Leavy told me, “This is going to be harder than you think.” And he was right, absolutely right. I’ll never forget one of the first days I was here. Somebody from the US Attorney’s Office presented me with a request to arrest a vessel. If he had come in and asked me to explain nuclear physics, it wouldn’t have been any further away: “What do you mean arrest a vessel?”

And so that is the way I was just kind of dumped off in the deep end with things and had to learn to swim with it. But as I look back on it now it was a cherished time. It was really wonderful. All the judges, as I say, assisted me in any way they could and were very supportive. It was a time of renewal, kind of, with my old acquaintanceship with Owen Panner, because I had known him for years but it gave me an opportunity to be around him on a day-to-day basis and see his unique wisdom and energy. He does things different than I do in certain situations but I have to admire the sincere definiteness with which he deals with matters. I knew Jim Redden only slightly. I had met him a couple of times, but really just knew him by reputation. Jim was a life long Democrat and I was a life long Republican and we were always, I suppose, canceling one another at the poles. [both laugh]

But we started to get closer and closer in just talking about things and periodically going to lunch and over the years that grew into a significant friendship. Weekly we’d generally go to lunch at least once, and we’d talk about anything and everything. And we both are able to express our views without either
one of us polarizing, if you will. I guess that’s one of the things that got me started; here are two people who politically really have different philosophies and yet we have wonderful discussions about things.

Last June I said to him, “You’ve got so many months to convince me to vote for Kerry, and he took the challenge. He didn’t win, by the way, but [laughs] anyway it was a fun time and we really get along marvelously.

I’ll meet with him this noon to kind of let him know what things I’m leaving at loose ends and he’ll pick them up while I’m gone and we’ll be in touch with one another. I have great admiration for Jim. I think he’s one of the deepest in understanding the political scene and what’s going on from that standpoint. I really admire his knowledge there.

Jim Burns was very helpful. He was the one that led me into the first sentencings and showed me how he did that sort of thing. Helen Frye was always available and always ready to talk out any case with me. So it was a very close group.

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**Magistrate Judges**

MM: And the magistrates—that’s something else I need to talk about are the magistrates in the Oregon system. It’s getting bigger now so that you can’t have as much close collegiality when you have sixteen people as when you have eight, but it’s still the desire of everybody to have a really collegial and good court. And as new judges have come on, Mike Hogan I knew as a magistrate when I practiced and he was a magistrate after I got here for a while. Then he became a judge and I’ve known him and known of his talents. Mike King and Mike Mossman, and then I cannot just include within the same paragraph, Aner Haggerty.

Aner Haggerty is an amazing person. He has a calmness in confronting troubled situations and a deliberateness and a resolve that just speaks of a deeper wisdom than perhaps many think of with Aner. He has been our chief judge here in the last few years, during a time of really heavy transition and I think he’s done an amazing job. Jim Redden before him and Owen before him, they really restructured this whole system in the District Court because it had been under the kind of monopolistic rule of Judge Solomon. And, so there were a lot of things that were kind of hanging to wait for him to decide where it should go.

When Owen Panner became chief, they started individual assignment of cases so that each of the judges were given their own bucketful, if you will, to deal with. And it taught everybody case management instead of just having one person in case management. It was a great step forward. Of course they cleaned up a somewhat slow docket and really moved cases along and got us into a situation where cases pretty much get resolved within a year instead of years like it had been.

As great a judge as Judge Solomon was, I think the three, Panner, Redden, and Frye, when they came on here in ’80, I think it was or ’81. When they came on, why the court took a real swing in a different
direction. And of course Ed Leavy came on after being a magistrate, and he was a tremendous and still is a tremendous asset to the court. Then there’s Anna Brown and Ann Aiken and all of them have come on board, why it’s been an interesting kind of parade for me to watch.

CH: How many are there now?

MM: Well there are six active judges and right now there are four, well, I forgot to mention Bobby Jones. A tremendous legal mind that had developed his sense of evidence that I don’t think anybody else had ever amassed and served well on the Supreme Court. I think he always had a dream of being on this court and it was fulfilled and he’s been an exceptionally productive member of the court. And you know his wisdom in evidence, he can answer the questions right off the cuff and he’s very, very good at trial situations and such huge experience in the State Circuit Court in Multnomah County to the State Supreme Court and then here.

We were talking one day. We were having one of those sessions on some historical case, and I was sitting there with Owen Panner and Jim Redden and Bob Jones and myself. And in the four of us, there was over 200 years of legal experience.

CH: Wow.

MM: And that’s a lot of experience. [laughs] Helen Frye, unfortunately, had to pull back and we all miss her. She was the first woman on the court. She was wonderful, levelheaded, and we miss her.

But anyway it was quite a roller coaster ride on occasions, but very good. I would like to spend a little time on the magistrates. On my service on national committees across the country, on the Facilities and the Securities [committees], I meet judges from every circuit and every geographical region of the country. And as you’re talking about just how they operate and case management and such, you realize that very few of them come close to the system that Oregon uses with magistrates. In some districts magistrates are really flunkies. I hate to use that word, but they are there to do menial little tasks and never have the opportunity to really do a finality on anything—they’re chore runners.

Here we look at them on the same plane as an Article III or district judge, because we assign them cases. We can’t assign them criminal cases. They can’t try criminal cases. They do the preliminary hearings and arraignments and such in criminal cases and whether or not there’s going to be bail or release pending trial. They can do that but they can’t try criminal cases. They can try civil cases. The only thing is they need to have the consent of the parties for them to try a civil case.

Well, this started before I got here when they were kind of rearranging. They assign a pool of cases to the magistrates there on the calendar just like a district judge. So when their turn’s up they get that case no matter what it is, so long as it isn’t a criminal case. Then if the parties consent they can take it all the way through trial. If the parties don’t consent, why then the rulings along the way on summary judgment or other motions are by findings
and recommendations, and then those can be appealed to a district judge who is the backup judge on their files. And then the district judge looks at the whole thing over again *de novo*, or from the beginning, and decides whether or not the right findings and recommendations are correct.

So I’ve done a lot of those. I’ve reversed a few but very, very few. And generally they’re well thought out. Their legal minds are very quick and they’re very qualified. Now the benefit of that isn’t just in the courthouse. In fact, I think the biggest benefit of that is to the public because we in effect enlarge the numbers of the court in the civil case load by the use of magistrates. And once the magistrates realize that they’re not just going to be running errands, then highly qualified people apply for the job. And we, unfortunately for the state’s system, drain off some of the best circuit judges and appellate judges that have come on this court as magistrates, and of course, their reputation is far and wide so they in almost all cases get consents, because the lawyers have as much trust in them and perhaps more, you know, to try their cases. So the pool of judges swells immediately and litigation moves much quicker. Trials are spread out with all the different magistrates and judges and I think that’s one of the most important adoptions of procedure.

It came out of Belloni’s mind basically. I don’t think that the society, so to speak, really understands the significance of that. The lawyers do. The lawyers see the quality of John Jelderks and Donald Ashmanskas and Jan Stewart and all of the magistrates, Denny Hubel, you know. Denny Hubel was one of the prime lawyers in all the asbestos litigation. And so when he came on as a magistrate, why there were dozens and dozens of lawyers that knew he was a good lawyer. And Jelderks had been a judge in Hood River for years and years and Ashmanskas in Washington County, and Janice had been in practice with one of the better firms and I hope I’m not forgetting somebody. But it really is a system that works and continues to work.

CH: Thomas Coffin?

MM: He’s in Eugene. I should mention Tom. And Jack Cooney, in Medford.

CH: Let’s see. Now there have been some changes here over time, but George Juba was the first magistrate.

MM: George Juba was here for a long time—most efficient judge in the world. He could get more done in a day than anybody. And Bill Dale of course was really a strong one.

CH: And Diarmuid O’Scaill, of course, is up in the court of appeals, right?

MM: Yep.

CH: Do you have much contact with the appeal court judges?

MM: Not as much as I used to, but we see Diarmuid now and then.

CH: Why did you used to have more contact with them?
MM: Oh because I would sit on the Ninth Circuit now and then. We all couldn’t be assigned to—you can make yourself available to go and sit on the Circuit for a week or three days or something. So then you do meet the circuit judges more and I don’t do that anymore and so you kind of get removed from the circuit judges. They’re all in the building here now, because they’re redoing the Pioneer Courthouse so we see them more here in this courthouse. Otto Skopil will stay here until he quits.

CH: [laughs] What is your best opportunity for contact with the other judges?

MM: Well, we have a regular Monday lunch and we have a Friday more informal lunch that is just kind of who wants to be there. And that one is, you know, ending the week and fellowship and a good time and for laughing and thinking about things. The Monday one is the business meeting and it’s important to be there. I try to make those Monday morning meetings and Friday when I’m around.

CH: Is that when you have your best chance for collegiality?

MM: Yes, that and just going to lunch, and then I think there’s a good opportunity at the Ninth Circuit conventions to have a lot of contact, not only with your own judges, but with the lawyer representatives from Oregon, and then judges from other jurisdictions. So that’s a good time. It is somewhat of a monastic life you know. We can’t be out “hail fellow” with the lawyers as we could when we were practicing. We’ve got to be the circumspect in those things.

CH: Do you have any contact, a friendships with lawyers?

MM: Yes. Of course, I’ve always had the rule that anybody connected with my old firm I would not sit on any of their cases, even though it’s been eighteen years almost. I just felt that was the site of a possible impropriety. Just as the lay public doesn’t understand that lawyers can be friends and they’re supposed to be advocates at all times. But there are lawyers in town—there’s one lawyer that I have a regular meeting with every week, with a group of men. I wouldn’t handle any of his work, because I do know him closely. He and his wife socialize with Shari and myself. So you have to decide that that’s off limits.

CH: When you do meet socially do you discuss theoretical issues of the nature of the court, problems facing the court and –

MM: No, hardly ever. You know we go to the Pops [Symphony] together and we’ll usually have dinner over at Higgins before we go to the Pops, but it’s just a social time. He doesn’t talk about his law business and I don’t talk about the court business.

CH: Who was the administrator of the Court when you came on?

MM: Bob Christ was the clerk.

[End of Tape Four, Side One]
Clerk of the Court

MM: And it was easy to call on Robert Christ. You could call in and get advice from him and if you weren’t used to federal practice and such, well he was a source of comfort. He still shows up at some court functions when they occur, so he’s never lost his zeal for the court, but I think he’s enjoying retirement. I didn’t realize it until this last fall that he and I were both entered into the practice here in 1954, so that was our fiftieth year commemoration with the bar and I don’t know why I didn’t know we were admitted at the same time. He didn’t go to Oregon law school. I went to Oregon and I don’t know whether he was at Lewis & Clark or Northwestern then or what it was. Anyway.

CH: Mm-hmm. And the administrator now is –

MM: Is Don Cinnamond.

CH: Alright.

MM: Don has a vast experience. His efforts in the building of this courthouse and the efforts in Eugene that have been going on, he really understands how GSA and the Administrative Office works in construction projects. And he gets the most mileage out of those things. He’s very competent.

CH: Would he be involved in streamlining efforts as well?

MM: Yes. Yes, but most of them are, well I’m sure he has experience that I don’t even know about, you know, internal matters in the clerk’s office that are probably handled better, and personnel changes that have happened, which are his bailiwick. But the more substantive changes generally come out of some kind of conference of the judges, an idea of the chief judge.

CH: Let’s see. And then some of the other judges that have gone on to the Court of Appeals that I was wondering whether you’d had much contact with. I know you mentioned John Kilkenny and Ted Goodwin, and of course you’ve mentioned Otto Skopil.

MM: And Susan Graber.

CH: And Susan Graber, that’s right.

MM: I knew her has an attorney and on the Supreme Court. Again, federal court kind of drains these highly qualified people, you know. But it’s a great opportunity. And so she was a great addition I felt to the court.

CH: Mm-hmm. Mm-hmm.

MM: John Kilkenny was my dad’s generation. He was a little younger than my dad, but kind of that school, and my father and mother were real good friends of he and his wife. So I kind of grew up knowing John Kilkenny. When I came on the bench he was in senior status on the circuit court but he was very gracious and welcoming to me and so that was kind of fun.
The Ninth Circuit

CH: The district courts were one of the first governmental bodies organized on a regional basis and I was wondering if you see your job as a sort of an intermediary between local and federal interests, or more as an arm of the federal government?

MM: Well, I think it is clearly an arm of the federal government. It is the third branch. But I really feel that it is important that the attitude, the community attitude, the culture of the district has to play in effect. I think it would be very difficult for somebody from South Carolina to come into Portland and sit suddenly as a district judge in Portland, because we have such different things that we deal with, any more than if I was to go with South Carolina. I’d be lost probably. So I think we should mirror an unbiased, but kind of general, flow of where the community spirit is. But, always subjecting it to what our real authority is. Somebody asked me, who do I answer to, and I said, “The Constitution and the laws.” They were a little bit surprised that I didn’t have somebody that could kind of read over my shoulder and critique what I do. A circuit can reverse me, but nobody can tell me how I am to do it in this room, except those two pieces of paper and they speak very loud to me.

CH: What do you think of the efforts then of splitting the –

MM: I’m in favor of splitting. I’m interrupting you, but I am, I have been, I am and I don’t think there’s any question that it needs to be done.

CH: Could you explain your reasoning for that?

MM: It’s just too big. I think it is awkward in the way that it operates and I think it has inefficiencies. I think it drains away the very thing we were just talking about, of regional perspective. You have to remember that it is so dominated, just numerically, by Southern California, Los Angeles and San Diego. And that’s not to be critical of them. You go down there and try cases or work with those lawyers, they work with a little different, genre if you will, of ideas that come out of that area and they probably should. But I think they don’t understand the same sort of thing that comes out of Alaska or Washington, or Oregon, Idaho. And so I think to cure the very thing we were just last talking about in the Ninth Circuit, it ought to be split up. Whether it should be split into two or three pieces, I don’t get into that debate, although I have my leanings, but I’m not sure that I could explain them very well. My leaning is that Oregon, Washington, Idaho and Alaska ought to be in one circuit. Many put Idaho with Montana and with Nevada and Arizona, but I always look at Idaho as more like Oregon and Washington. I just think it would be better.

CH: And California off by itself?

MM: No. California would have Hawaii and all the Pacific Islands. It would still
be the largest circuit in the whole country, even with all that drained off. But it’s been an interesting debate and of course whoever was the chief of the circuit didn’t want it to happen in their watch, so [laughs] so it kind of perpetuates itself. I’ve put it down several times. Well it’s just not going to happen. But this last run seems to really have a head of steam and I think that if it’s going to be split it’s going to be split by this Congress.

CH: And who’s opposed to it?

MM: I don’t know. I have my own analysis. When it comes to a vote, as I say, there’s this huge block in Southern California. Now if you are a judge in Arizona or in San Francisco and you think this is going to be split off and all those influences that you’re in line with that come out of the Northwest are gone from you and you’re left with Southern California you vote against it. And if you’re in the Northwest you vote for it because you feel kind of safe that you’re not going to be stuck with California. [both laugh]

And I think that dynamic has played in the polls where people really think it probably ought to be split, but it’s not leaving me here. That sort of, “not-in-my-neighborhood” mentality. Well let me tell you the reason, and I’m somewhat criticized for this, but when a circuit is as big as this one is, when it hears 3,000 or more cases a year—you know the Constitution says we’re going to have one court, one Supreme Court and such minor courts as Congress from time to time decides is necessary. But the theory of that Constitution is that all these issues can get to that one court so that we have uniformity. Now when the Supreme Court takes a hundred to a hundred and fifty cases a year and the Ninth Circuit has 3,000 or more that it’s deciding, the possibility of a case that you sit on in the Ninth Circuit being appealed to the Supreme Court is so remote that there really is no threat of appeal. And when you crank into that formula the fact that there are twenty-eight active positions on the court, plus heaven knows how many senior judges, the makeup of a three-judge panel is so diverse that the odds of you being appealed are remote. Now when I decide a case—fifty percent of the cases a district judge decides go to the court of appeals. That’s the last statistic, but it may not be the right one now but the last time I heard—

CH: Is that a lot?

MM: Yes, that seems a lot to me, but it sure tells me I better do my best because half the cases are going to go up there and have somebody else look at them. It gets your attention to follow the rules but if you don’t have that threat, now that’s one of the dangers of a huge circuit that I think needs to be addressed.

CH: For the Supreme Court, if they hear a hundred and fifty cases a year, does it make any difference how many are—they don’t apportion them out according to districts?

MM: No, they look at the hundreds
that come to them. They pick them out and allow *certiorari* or not. Very few are automatic appeals to the Supreme Court. They get to pick and choose, and should. But you see that dwindles down to so small a bunch.

CH: Mm-hmm.

MM: I think every judge, except the Supreme Court justices, should have some threat over their head that they can be reviewed. I don’t say I shouldn’t be reviewed. I take great comfort in the fact when I have a hard decision that somebody else in a more calm climate, with time and with research, can take a look at what I do and see whether I did it right in two seconds.

CH: Has there ever been a case of the Supreme Court reaching down to take a case that has not been appealed to it? Can it do that?

MM: Yes. In fact, I’m trying to think of what it was, but they did something and it automatically was a reverse of a Ninth Circuit case. I can’t remember what it was about. Certainly they don’t do it often, but I remember there was one instance of that, where they just said no and wrote a very short *per curium* opinion that reversed it.

CH: What is the relationship between the various district court judges within the Ninth Circuit, outside of this district?

MM: I think it’s very good. Yes. I don’t find any problem there. I’ve friends in Los Angeles and San Diego and Arizona and Hawaii. I have them all over that I just think the world of. They’re great people, they work hard and are very sincere and dedicated. And if you take time with an individual circuit judge you know, it’s a really good time. You have a good time talking to him and such. There’s something about collectivity that spoils it somewhat. [laughs]

CH: [laughs] You ever have the chance to talk to them about this issue?

MM: Yes. Well I’ve talked to Diarmuid, of course, he’s a good listener. But no, I’ve said that I think that they’re too big and they’re unwieldy and so.

CH: It seems like they would welcome the opportunity to be able to reduce their territory that they would have to administer and –

MM: I don’t know what the source of that turfdom is, but it’s sure there.

CH: I mean I’ve certainly heard, particularly because of environmental issues that there are a lot of people that are concerned that if Oregon and Washington or Idaho were to split off that there might be a much more conservative stance that the court would take that people in California might object to, or even in Oregon.

MM: Yes. If that’s true, I don’t see it. I know within this court there are different philosophies on environmental issues, more liberal, more conservative, however
you want to put it. That’s not going to change. That’s the way they’re deciding them now, you know. So I don’t look at that as a problem.

CH: Would splitting the Ninth Circuit diminish the influence of the remaining Ninth Circuit, the California court. I mean it has a reputation for being on the very liberal end of the spectrum. Would that somehow change?

MM: I doubt it. I doubt it. I think that would remain in that because I think that’s where that’s centered. And it’s just a flat fact that the incredible mass of the judiciary’s business in the Ninth Circuit is centered in California. That’s where it is.

CH: Mm-hmm. Have you traveled much into other districts?

MM: I haven’t been a great one to do that but I used to do it every year and go to—I sat at least once a year on the Ninth Circuit, but I did go and sit in San Francisco on a case and one in Tucson, Arizona. I was going to go to Hawaii, or to Alaska and didn’t, so, but I’ve not done a lot of that. I’ve always had plenty to do right here.

CH: Does that give you a different perspective?

MM: Yes, it does. It does. The experience on the circuit is a good experience because you see how circuit judges think and what they’re looking for, so it kind of tells you how to keep your record from the standpoint of how the Ninth Circuit’s going to look at it and that’s very helpful. I think that every district judge, at least until they get to be senior, should do that regularly.

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**Pretrial Preparation**

CH: In your work, when you came on this court, how would you describe what kind of pretrial preparation you did? You had weekly conferences and petitions for review and, I mean did you –

MM: You mean on my own?

CH: Yes, in your own court.

MM: I work very close with my law clerks and we have a system where they keep a book and a running commentary on everything that’s happening. So I’ll have something like three or four pages that look like this, with little paragraphs on it that say in September we did this and November we did that, and so forth. And this summary judgment was heard and this was the ruling, kind of summarized. So when something else comes up I can take that and I just kind of quickly bring the history of the case back into my mind and have it there. And so one of the responsibilities of the clerks is to keep that pretty detailed. Then we’ll sit down and we’ll talk about things. Summary judgments, of course as the briefing comes in you look at it and then your clerks do their own research and you do your research that you have to and you review all the research of your clerks and
my practice was to then come down with a series of questions so that I didn’t go out there for an argument to just hear the briefs I had already read. I went out there to have specific questions answered and I would sometimes write those questions out for them and hand them to them and give them twenty minutes to look at them before we have them respond. It’s sometimes hard to try and hold them within that box, but I got pretty efficient at it because—and if I didn’t have any questions then I would say oral arguments are unnecessary. If their briefs answered everything I didn’t want to just have them regurgitate the same information for me.

CH laughs

And I think the lawyers kind of worry about that sometimes. They feel that oral argument is very important and I understand that feeling, but I also think that if they see that I know what they’ve given to me and they know that I’ve gone over it and they know that we’ve given it a careful review, then I think they’re satisfied with it. I don’t think they need to have an argument every time. And then when you get to trial I’m very sincere to look at all the exhibits and we go over it with the clerks and I ask for objections to exhibits so that I know if there’s a question and I look at the two sides of that. I ask them to give parallel requested instructions explaining why theirs is better than the other one and such. And so many pretrial conferences that I have are really quite short in duration because I will say, “These exhibits are admitted. These I reserve ruling on until I know what the evidence is,” and “Tell me a little bit more about this one. Why do you need this one,” or “Why don’t you need it?”

And the same with instructions and so by the time a trial would start the exhibits, they knew the exhibits that were going in. They knew the instructions I was going to be given. I probably had given them a first draft of the instructions to only be modified as I listen to the evidence. And so I try cases very quickly because of that. There’s not a lot of time standing around.

CH: Do you have a particular approach to hearing cases?

MM: Well, that I should know what I’m going out there to hear so that I’m not surprised by any evidence, and I understand what the purpose of every exhibit is going to be. If you’ve got a case with thousands of exhibits, why you can’t deal with the minutiae of everything, but you at least know this notebook of exhibits deals with this issue and so if they haven’t had an objection to it, why then I’m not going to. I say to myself, you’ll have notebook after notebook after notebook of exhibits coming in and I’ll often say to attorneys, “Okay, you’re going to put all those into the record but I want you to realize the jurors are probably going to look at about fifteen papers when they get in there. Why don’t you really concentrate on the ones that you want to make sure they look at and see where that is.”

And they do. They’re not naive about that. They realize it. Now some jurors, I swear, go through every notebook and what that does for them, I don’t know but, and I trust them. One of your questions
was whether I ever disagreed with jurors. I can’t think of a time that I didn’t think they had a reason for doing what they did. I’ve sometimes said I wouldn’t have done that but I can’t be critical of them and I have enormous faith and I think that generally they are very accurate.

CH: You don’t have any qualms about the competence of juries.

MM: No.

CH: Why? Some of these complex, quick cases, they just involve so much detail.

MM: The perfect example is, I had a patent case on compound bows. And the science of a compound bow I didn’t know until I tried that case, why that generates such accuracy and strength, but it was really technical. And this jury just sat there and just soaked it up and when they came down with their decision they hit everything right on the head and I just thought, you couldn’t have put a group of judges together and have them come that close to the mark, I think. It was just incredible. And I think they do that often. They’re great at sizing up human beings. They really are. They can smell out the truth. And you know I was fascinated one time. I selected a jury. This was about three or four years ago as I remember. And I was comparing it with fifty years ago when I started practicing law. And here I had a female police officer, two that had significant others in the same sex, one a male nurse, a Vietnamese person and I can’t remember, there were a couple of others but out of eight of them, I couldn’t think of one of them that would have existed in a 1954 jury. [CH laughs]

Now demographics had moved that far, you know. That’s really exciting because that tells me that the jury system is keeping up with the society. It’s not lagging back there in some old black knit stockings. It really keeps its head right current. That was fascinating to me.

CH: Have the rules for selecting juries changed at all?

MM: No. Here the judge does the *voir dire*. We will give attorneys an opportunity to kind of pick up loose ends but I’ve restricted them to ten minutes of *voir dire*.

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**Difficult Judicial Decisions**

CH: Mm-hmm. Do you ever have any difficulty making decisions?

MM: Oh yes. Yes.

CH: What have been some of the hardest decisions or circumstances, areas, topics, or specific cases that have been most difficult for you to decide one way or the other?

MM: Well I’ve had difficulty with some really tough patent and trade-dress, trademark issues. I didn’t feel that I had the scientific knowledge to be comfortable and those have been hard and I’ve had to just take my time with them. But the
most difficult is in sentencing. I’m not in favor of the guidelines, and I think that it’s going to be interesting over the next year-and-a-half or two what the impact of the Blakely and Booker and Fen-Phen cases are going to have on sentencing because it’s a little chaotic.\textsuperscript{3} It’s been really chaotic the last year. But I was never a champion of the guidelines. I had a period of time after the old system of sentencing before the guidelines came on so I could make the comparison.

And I found myself very jealous of the discretion that district judges have. I didn’t want to lose anymore of that discretion and that was being drained away by the sentencing guidelines. But, I took an oath. And that said you’re going to follow them so I followed them religiously. I didn’t ever—I can’t think of a time that I just thought, “No that’s just nonsense here and I’m not going to do this.” But I have had individuals that for some reason or another, I was led to see something very different in them that made me really do something different in the area of sentencing.

I had one seventeen year-old girl in North Portland, black girl. Picked up with her boyfriend, or ruler I should say, selling crack. And she was just a ball of fire. Angry, uncontrollable, put her in the halfway house and she got in a fight with the administration within two minutes. It was just—and she was always face down and angry—

[End of Tape Four, Side Two]
Diversion of Defendant

CH: This is an interview with Judge Malcolm Marsh in his chambers in downtown Portland, Oregon. The interviewer for the Oregon Historical Society is Clark Hansen. The date is January 28, 2005 and this is tape five, side one.

You were talking about a case.

MM: Well, I just was watching her and she was staring at the floor, and I said, “Somewhere we’ve got to think about what’s best for Angie.” And just for a flicker, she looked up at me and I thought, oops, we’re about to miss something here. And so I recessed until, I can’t remember the chronology, the next morning or something, and I called a couple of people out in North Portland that work with youngsters out there and some other folks and what was discovered—she was arrested as an adult and then they discovered she was seventeen. That’s it. And so where she was headed was for the California Youth Authority and I was thinking, no, when I saw this reaction from her, I thought, we’ve got to do something different here. So I called this meeting and I had some people that knew about education and knew about the mentality of kids in North/Northeast Portland and I was sitting across the table from her, a big conference table over in the old courthouse. And I said, “If I put you on a program of education and preparation for work, will you promise to follow my rules?”

And she said, “Yes.”

And the lawyer who was representing her was getting a little excited, because they didn’t want me to be interfering with what her decisions were, and the US Attorney was upset because he was thinking I was going sideways on this. And I was. And I said, “Well, this is going to start next Monday.”

And she said, “Well, can I ask you a favor?”

And I said, “Go ahead.”

And she says, “Can I go up and visit my grandmother in Seattle over the weekend?”

Everybody in the room went, “Oh for crying out loud!” You know, just appalled at it.

And I said, “Well, we’ve got to start trust somewhere, so will you be back at eight o’clock Monday morning?”

“I will be back.”

She was back at seven-thirty. She went through high school; she was given a job out at the Bonneville Administration. She called me one day and said, “Judge Marsh, I have my own phone here and I can call you anytime I want to.” [both laugh] And my wife and I would go over and meet her in the Lloyd Center and have lunch with her.

CH: Really.

MM: And finally she moved up to Seattle to be near her grandmother and got work
up there and she’s been straight as a string ever since.

CH: Wow.

MM: Just a glance.

CH: That must have made you feel really happy.

MM: Yes. But that doesn’t happen often. That’s far and few between. I had one that I let go against my better judgment for a while and to report on a sentence and the night before he was to report he was shot and killed. If I had kept him in he might be alive today. Things work out good and things work out bad sometimes, but it’s in that area that it’s the hardest decisions to make. You have to look for those opportunities to be a little more humane.

Sentencing Guidelines

CH: Do you think that the Blakely and Booker decisions, and maybe you could explain a little bit about their impact on this process, do you think that it is a step in the right direction to changing sentencing guidelines?

MM: I think it’s a step in the right direction to make them advisory and that should have been that way in the beginning, but I don’t think there was anything invalid in their giving judges the authority to look at the differences between people and reaching sentences without the jury looking at every one of those issues. The most obvious example of that is when somebody is being tried for bank robbery you can ask him if he’s ever been convicted of a felony before, but you can’t go and tell the jury about eight other bank robberies. Of course, the danger of that is, well if he did it once he surely did it again this time, see. But that shouldn’t have an impact on the sentencing, without the jury deciding beyond a reasonable doubt that he was guilty of the previous eight. He’s been tried on them.

Well that’s the easiest one to deal with, but if somebody carries a gun and doesn’t use it, but has it there and that’s an enhancing factor, I don’t see why a judge shouldn’t be able to consider those things. The fear that drove the guidelines to begin with, and I think the fear that still is a problem, is that judges are going to go off on wild goose chases. Well I don’t know that they did before but if they did they did it because departures were so varied across the country.

I think there should be diversity in sentencing because you’re sentencing an individual, not a mass and they’re not all the same. Some of them you can deal with and some of them you can’t. Some of them are really responsive to things you say and some of them are just hard as rocks when they come in and when they go out.

I was just looking at a document that came from the Administrative Office. Today the Bureau of Prisons is doing away with its boot camp program, which was for first offenders. It could reduce a thirty-month sentence to six months by serving in this intense program, literally a
boot camp. Up at six or at five o’clock and the whole kind of military regiment. Well they’re quitting and the reason was their statistics showed there was no difference in recidivism with those that went through that or those that didn’t. Well that was a surprise to me. I would have thought anybody that went through that might change, but—so we’re not finding all the answers.

CH: It’s interesting in talking with Janice Stewart’s brother, he ran a program through the Deschutes National Forest over in the Bend area and he had touted a number of times how successful it was because the recidivism was like five percent or something like that, or less than five percent and how much better that was than the other rates.

MM: Yes.

CH: So maybe there’s a variation in programs or types of people who go into them.

MM: I don’t know.

CH: Yes.

MM: But that surprised me.

CH: I bet.

MM: Because I do think that the camp program has proved successful, because those people, if they repeat they never can get in the camp again and so I think that—and there’s a lot of requests, particularly white collar—to send them to a camp rather than the tougher prisons. But, anyway, if those programs are not doing it, who’s best qualified to look at the whole case, have two competent lawyers tell them what’s going on and then say what I think is the right way to do this, within certain controls, you know. You’ve got maximums, you’ve got some minimums and I’m not for minimums, but you’ve got some maximums and you’ve got comparisons to make with other cases, particularly after years of doing it. I think that person sitting there in the black robe is probably the best person to say this for this and that for that.

Federal Prison System

CH: How much leeway does a judge have in terms of sentencing as to where the convicted person is placed?

MM: We can recommend, but the Bureau of Prisons has absolute authority to decide that.

CH: And why is that?

MM: I don’t know. I don’t know that I’m qualified to say where somebody ought to go, but they are. If you go into the prison system, the federal prison system and you talk to the wardens and you see how they run those institutions, they are good at their work. They are really efficient and good and they know, they can read these people better than most. And so there’s a lot of shuffling around just to avoid
conflicts that they can see developing and things like that. And I think they should be able to do that.

Now some of it, if you’re here, why there’s an institution up in Sheridan [Oregon] and that’s a very good one so we often get requests for Sheridan. And in the immigration cases, for instance, like if the whole family lives in Woodburn and that sort of thing, and so how about Sheridan so there’s visitation. He goes to Texas. And that one goes to Texas because in their matrix system or something, why he doesn’t qualify as this level of prisoner and so forth and so maybe one out of a hundred of those recommendations happens. It’s very rare.

CH: Really.

MM: Yes.

CH: Really, it’s that solemn?

MM: Yes.

CH: Boy. Because it seems like if you’re limited in sentencing, you have a minimum that you have to follow and you see that you send a kid to some high security or medium security prison in Texas, that it’s going to have a huge impact on him that may be negative, that if you had some choice in being able to send him to Sheridan that it might be better for him to have family contact and all the rest of the stuff.

MM: I think traditionally that’s always been left up to the sheriff or the State Police or the Bureau of Prisons, or the State Prison Bureau, but it’s never been a directive of the judge that I’m aware of.

CH: One of the most interesting cases that I’ve heard of recently is the—and we’ve talked a little bit about Indians, but this was off tape in our first meeting—the attempts by some of the tribes to actually impose their own sentences on tribal members, that it would have a better impact on them than if they went through the state or federal system. Have you ever been involved in a case like that?

MM: I have. Where they carried out their own thing and the government just kind of pulled back and let them handle it and I think they handled it well. The government has the trump. It’s got the trump card and it can play it anytime it wants to but I think they try to encourage the Indian courts to be respected and have some authorities. If they don’t have authority from the federal government how are they going to have authority from the Indians, the tribal members?

Salmon Cases

CH: Well maybe we could talk about some of the cases that you have handled that you would like to describe for the purposes of this history.

MM: Of course, the salmon cases were the predominate case that I had for fourteen years. It was a wonderfully ex-citing scenario of case after case after case. It
was an educational process for me to learn what I could about anadromous fish and be able to talk to people and experts. By the way, from Judge Belloni’s day and then Judge Leavy, I had a mentor on the case. I used Howard Horton who was a professor emeritus from Oregon State and learned in fisheries and such. And he was, with the agreement of the parties, he was here as a dictionary for me. And I could just have him educate me on what happens to a fish when it goes over the spillway, what happens when it goes through the turbine, what happens when it’s pumped around or when it’s bussed or barged or trucked, what happens to the fish? It was a real educational process to find out about that. What, you know, the average person thinks of migrating fish as salmon leaping up over waterfalls as adults and I guess the downfall of it is where all the real hard work has to be done of getting a smolt into rivers. And when they go downstream backwards, as I understand, and so when you turn the river into a series of lakes, there’s very little current. They have had to work harder to get to a dam to go over it or around it or whatever than they would as a natural fish but they’re incredibly, resourceful I guess is the word, because they get around it and by the millions.

You know bizarre things would happen in a case. One was when they, after Mt. St. Helens, they created a new island in the middle of the Columbia, down—I can’t remember the name of it but several miles up and it really was where the brackish ocean water, and the tides and the freshwater were kind of in a meeting place, which would drive the fresh water up on the top, or I can’t remember which, the salt water on the top, one or the other. But it was also at that point where the smolt were making those phenomenal transitions from needing salt out of the water, to keeping salt from coming into their system, which allows them to go into saltwater and they—I think it was the freshwater—and so they would kind of keep up on the top. Well the island had become the favorite nesting place for the birds.

CH: I believe the Arctic Tern.

MM: Right. The Arctic Tern. And they were just scooping up the smolts.

CH: The Arctic Tern was an endangered species.

MM: An endangered species, and the Audubon Society says, “Don’t touch those birds.”

And everybody with the fish is saying, “Kill all the birds,” and send them back down to some island they used to nest on at the mouth of the Columbia. And everyday the protected sea lion is scarfing up every salmon and steelhead and smolt that they can get and so you’ve got all these things and mankind fussing with nature and it’s really quite an exciting thing to be involved with and try and pick your way through it and say, this is fair and this isn’t.

CH: Did they eventually, I don’t know if it was the final solution or not, but wasn’t one of their solutions, setting off charges to scare the birds away?
MM: It was turning dogs loose to just keep them off there and also planting grass, was what did it. They had to nest on bare sand, and with all this dredged material from St. Helens a big sand bar was created there but once they planted it I think that’s when the solution worked. [both laugh] But that was a hot afternoon. I tell you they were really at one another’s throats. [both laugh]

But the whole thing, though, was an education that I don’t think many people in the Northwest have [understanding] the significance not only of the fish industry, but Indian rights. You know my wife and I took one of those little cruise ships up the Columbia to Lewiston and Clarkston, up the Snake River, and so you go through all the dams and you go up into the Snake River. And I remember getting up one morning and we were up in the Snake River area and here for miles and miles and miles are these fabulous apple orchards, and all this agriculture along the river, which is all supported by the irrigation of these dams. And so when somebody says tear out the dam, you can’t just say that. You’ve got to say, okay then tear out 10,000 apple trees, you know. It’s a really complicated issue and there’s not an easy answer. Then as much as you deal with it within the stretch of the Columbia River from Coulee down—actually above from the standpoint of supplying water—once you deal with it, what happens for three years out in the ocean? And you have no control over that.

MM: And you can put a little pin in their nose and follow where they go and see how they migrate, but so what? [laughs] They’re on their own you know and you could say, well don’t fish them as much off Alaska or something but is there an upwelling of nutrients? Is there not, you know? Are we in an El Niño or what season are we in, because they all affect it.

CH: Right.

MM: And so nobody can say, well it’s fifty percent in the river and fifty percent out or any other division, you know. It’s just very complicated.

CH: I think one of the arguments, though, was that, whether than try to decide who gets the remaining fish, and I think it was a Boldt decision that decided the Indians would get half of the catch.

MM: Fifty-fifty.

CH: Yes. But to focus then more on enlarging the pie, rather than just how it’s divided.

MM: Yes.

CH: Are those issues that you had to deal with at all?

MM: Yes. And another thing that isn’t realized is that all the commercial and sports fishermen are not just standing on the same bank with the tribal interests. They’re fishing from just inside the bar all the way up the river, and so most people don’t realize the positive agreements that were reached by the tribes and the other
interests in dividing the zones of the river. So that the Indian fisheries are within a certain tribal fishery area, commercial fishing is in it, and sports fishing is in its own area. Now that’s great, but how do you know then that the gill nets down at the mouth of the Columbia are not letting enough go through so that fifty percent of the available fishery goes through that tribal area?

CH: Right.

MM: And that’s a great balancing act that a lot of the effort goes into how to do that and how not to do that. So it’s a fascinating thing. But you know it’s providential. My understanding is that Harold Ickes, when they were designing Bonneville Dam and somebody mentioned a fish ladder, he said, “We’re not nursemaids to fish.” Thank heavens somebody had the wisdom to put, as primitive as it was, the first fish ladder at Bonneville Dam because if they hadn’t—

CH: Everything else would have been—

MM: Everything else is moot.

CH: Right.

MM: Because on your example is Coulee, of course. [Grand Coulee Dam]

CH: Right.

MM: Because the big June hogs got up there and butted their heads against the Coulee Dam that race is gone.

CH: Yes.

MM: Yes, and so that’s a shame, but it should be a lesson that we always keep in our minds.

CH: Mm-hmm.

MM: And the narrow escape that we had at Bonneville, I mean it’s beginning.

CH: Boy.

MM: So.

CH: And then the issue of anadromous fish and whether to include hatchery fish in the formula and the very odd, seemingly, from my point of view, the conflicts between environmentalists and Indians on issues such as hatchery fish. But, what about the underlining issue of Native Americans being able to fish in all the usual and accustomed places that was guaranteed to them in the 1855 treaty?

MM: And they’ve kind of agreed—we’re not going to enforce it. They could come back and, you know, Sohappy—you just go up to Oregon City and fish there. Well I think the tribes said, “Okay we could go anywhere, but to make this work you give us this area and don’t you come into it.”

So, I think they’ve wisely kind of modified that, if you will, without it being totally binding. They could back off and say no that’s what we did last year but not next year, because they have to come up with these fish management agreements. [laughs] I had a deal with one and it would
get appealed to the circuit and the circuit would reverse me on something or affirm something and send it back, and by then I had the next one so it was moot. [both laugh] And so I would go and—but it was a real fun time.

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**Appellate Review of Rulings**

CH: Would you resent being reversed by the court of appeals?

MM: Not if I thought they were wrong. [both laugh] But no, as I said, I really feel that the right of review of the appellate court and the Supreme Court is a very important element within our system, and I’m not infallible. I think that there were times it would take us too long, but I could take you through a case where they reversed me on something and only about two cases later said, whoops, we were wrong, and kind of backed off from what they had said. So you get vindicated sometimes. [laughs]

CH: [laughs] Is your rate of reversal higher or lower than other judges?

MM: I haven’t ever looked at it. I don’t know. I do have one high point; that was the Vernonia case where I held that the drug testing of the football players, the sports players, was justified. And the Ninth Circuit just slapped me down and said I was all wrong and they got slapped down by the Supreme Court. [laughs]

CH: What were the issues in the Vernonia case?

MM: That was a high school student who was asked to do a drug test. They had a random drug-testing program and—you have to back up. They had a really significant drug problem developing, and in Vernonia the kids are just like everybody else. That’s a pretty independent bunch of people up there. But the one thing they all liked was sports and it was very important to be on the high school team for any sport, and so the best discipline would be you can’t be on the team if you drug test positive, see. That put a damper on drug use, in my opinion, that was really significant.

So the issue is of reasonableness or unreasonableness of search in taking that test. And I said in this situation, I think it is reasonable and I upheld their drug testing. The Ninth Circuit said, “Oh no, no, no, no, that’s totally unreasonable.” Well the Supreme Court went way past me. They opened the door to drug testing in high schools without it being the important community issue or anything like that. They just opened the door wide. But I did have my moment of redemption, I guess, when they reversed the Ninth Circuit.

CH: So the Supreme Court reversal of the appeal’s decision, was on your case specifically?

MM: Yes. Right. Yes.

CH: Mm. Have you ever had any other cases go to the Supreme Court?
MM: No, that’s the only one. I’ve had others go to the Supreme Court, I can’t remember what, but that’s the only one that comes to my mind. I’ve had patent cases go to the Court of Claims that—this is kind of an odd system but they’d take those rather than the Ninth Circuit. But no that was a good one to go on to. [laughs]

CH: [laughs] And you also had some cases involving Rajneesh, going back into the 1980’s.

MM: Right. Judge Leavy had them in the beginning and I picked up all his files and so most of the charges were for the wiretap situation out there. Then there were some state claims that I think Judge Jelderks handled as a circuit judge in Hood River on the food poisoning, so—

[End of Tape Five, Side One]

Rajneesh Cases

MM: Then there was the conspiracy to murder Chuck Turner, the US Attorney. There were a number of the Rajneesh that were indicted in that case and many of them fled the scene. [Ma Anand] Sheela was the prime defendant named and she was in Switzerland. There were a couple in Germany, and a couple in South Africa, and some in Asia. Some of them appeared and plead to lesser charges or were of assistance in the investigation, and so a lot of them were taken care of by pleas.

But two women, [Sally-Ann] Croft and [Susan] Hagan, went to trial and by their own testimony, they did not testify, but by their own position they were in the higher echelon of the Rajneesh situation, and in the inner circle of Ma Sheela and would attend her morning conferences. They were very intelligent women, had a lot of human interest in them, cause-oriented human situations and such. For some reason the Rajneesh program became very important to them and they got under the delusion that was the right way to go.

So the evidence was their connection with the conspiracy, in that they knew about it. I sentenced each of them to five years and they were pre-guideline sentences. I said that they had to serve a third of the sentence before becoming eligible for parole, even though they were tried after the guidelines came in. The indictment was pre-guideline.

Later on, when they went to prison, I think it was in California, they both became involved in the educational program in the prison and the prison authorities were astounded how they could take other prison women and get them educated and motivated to have education. They ran a successful program in prison. Well, then one of them, her father or some relative, I can’t remember, became very ill and was dying in England and I reduced their sentence to time served and that came in ’98. So they had been in jail from ’95 to ’98, some three years. And I brought them in and reduced their sentence.

They’ve been model citizens in England ever since. They’re prohibited from coming back into this country and that sort of thing but they went home.
I think they had come out from under the anesthesia of the Rajneesh program. I think they understood what—but you know it was, yesterday I was talking about inverted morality. That’s a classic case of it. Very, very sincere people who took on their own standards of what’s going to rule the day and that’s a very dangerous thing to have around. So, anyway—

One of my favorite stories, and this happened just a couple of years ago, one of the two that was in South Africa, she was a Jewish lady and when she joined the Rajneesh her parents were understandably distressed. And her brother risked life and limb by trying to get her out of there once, but he couldn’t do it. But he stuck by her and he kept working with her and finally he talked her into coming back and voluntarily surrendering. South Africa wouldn’t extradite them and so she came back and submitted voluntarily to me and I gave her a sentence. I can’t remember, a couple of years or so.

But the high point and the reason I tell you that story is after I sentenced her and after the press left I asked her attorney if he would mind bringing her back to the jury room. And when I got her back there I laid in front of her all the brochures of Young Life’s Reestablishment of the camp to let her know what was happening there. She was incredibly impressed. Really thrilled to see that the Rajneesh Compound was being used for youth.

CH: Did she ever have any kind of relationship with the Young Life Program at any point?

MM: No. But you know, it’s a garden place now, beautiful green expanses of lawn. Have you ever been over there?

CH: No, well I haven’t.

MM: You should go.

CH: I would like to.

MM: Yes, you should go.

CH: Do you have to have an appointment to visit?

MM: Yes. It’s an exciting place and you know in the summer time it handles above 500 kids a week in that program over there. It’s amazing. It’s amazing.

There’s a book being written by Jane Kirkpatrick. She’s just coming out with a book on the ranch. You’ll have to read it. Anyway, there’s a thousand stories about the Big Muddy, but that’s not what we’re talking about right now.

Patent Cases

CH: [laughs] What other cases would you like to talk about that you feel have been notable in your career?

MM: Well I really thought that, as odd as that may seem, I did like patent cases
and I had a really exciting one that started me out with the Gunderson's centerbeam lumber-carrying flat cars and the battle with others that design centerbeam cars. Tried it in one of the big courtrooms over in the old courthouse and we had all these model trains and things in the room. Then the one on the compound bows was interesting. And then Leatherman, the trade dress of the Leatherman Tool and we had the courtroom full of tools. And those were just really good trials and I just enjoy them all the time.

I had one very large drug conspiracy case. It's the only time in my history that I gave life sentences and I gave two of them in that case. Later one was reduced. They were very, very dangerous people and it was a large conspiracy and I think it had an impact on the price of heroin in this town for awhile when they went down.

But to try a really big case, and Chuck Turner prosecuted that case, and I tell you he did an excellent job. There were appeals by the dozens of issues and I thought, my gosh how can you try a case for weeks and not have some error in it? But the Ninth Circuit, bless their heart, they affirmed me on all of the issues in that case.

Judicial Philosophy

CH: Have you had any capital cases?

MM: No. You know, I always kind of had a knot in my stomach about getting one, because I don't know, I'm not for the death penalty, but that doesn't mean I wouldn't enforce it. But I didn't want to have that issue. I wasn't looking for that issue.

CH: Could you have turned it down had it come your way?

MM: I don't think so. No. That would have been a tough time, I tell you. And when I went on senior status—and they do have these capital cases coming in now—I said no. I couldn't take that.

CH: Because on senior status you can then?

MM: I can. But that would have been the most difficult stretch of my principles I think.

CH: But you do believe in capital punishment?

MM: No.

CH: You don't believe in it.

MM: No. But I think I would have enforced it.

CH: Has that been an opinion you've held your entire life?

MM: No.

CH: How has that changed then? Why did it change?

MM: I don't know. I could put a whole lot of reasons on it. I just, I don't like the thought of killing people and I don't—but you can be more mercenary than that and
just say it’s hardly worth the expense we go through. You know, the millions we spend on appeals and hearings and court time and all of that on people. I don’t think it deters anything. I think that murder still goes on, from way back.

CH: Mm-hmm.

MM: So— [laughs]

CH: You were saying that sometimes when the briefs are filed that if they’re complete enough then it’s not necessary for an oral argument, but do you think there’s a real place for oral arguments in the court?

MM: Clearly, as I said, I might just have a question. I really, either I don’t understand the position or I don’t understand the facts or something, and I’ve got to have somebody explain it to me so I can feel comfortable in making a decision. And so that’s where I feel it’s very important. I also think it’s very important in a jury trial to have argument to the jury. But that shouldn’t be in voir dire and opening statements. That should be in final statements, but then the lawyers ought to be really given the open door to advocacy and that’s where it works the best.

CH: Are there any en banc cases in a district court?

MM: We had one with the redistricting of Oregon where three of us sat on the decision of how the State of Oregon was going to be redistricted. I don’t know why that was en banc but it was.

CH: And who made that decision then, the chief judge?

MM: No I think it was assigned because Judge Fletcher from Seattle on the circuit court and Judge Redden and I sat on that case. I don’t know. I was just told, “You’re assigned,” so away we went.

**Difficult Cases**

CH: Of the cases that you’ve talked about are there other cases that you consider to be the most difficult that you’ve had?

MM: I’ve had a lot of difficult cases. The employment/civil rights kinds of cases. I think most of those try—well, most of them settle, but most of those that do try, try because there is such heat in the situation. Something really insulting or bad happened and it’s more than a smoking gun. It’s really some bad activity and sometimes it takes a trial to just put that to rest. But they are not my favorite case by a long ways, but they’re interesting. The employment discrimination cases, I just, I have more difficulty with those. Not because I don’t think they’re valid but I just think they’re harder to deal with. It’s harder to get the parties in any kind of a mode of cooperation.

Civil Rights cases I find quite interesting. I did have a great case out here with longshoremen and the stevedores
and the loading and the unloading of ships out here where the unions and the shipping companies really got into it. And I couldn’t see where we were ever going to get any kind of a consensus on it. And I called my old partner, Eric Lindauer and I said, “Eric, if I can get these people to a settlement table will you do it?” And he said he would, so they came and he spent days with them, but he got it. Finally it cracked and they settled it. But, boy there was a lot of heat in that one. It was interesting.

CH: Do you have a feeling about decisions that you’ve made that will have a lasting impact?

MM: Well I know that Judge Redden said to me one time not too long ago, when he was working on a different aspect of the salmon problem, he took out my ‘88 opinion, or whatever it was. My original one where I said in my enthusiasm, I made some statement to the effect that it needs a complete overhaul. [laughs] And so that opinion is still working its way along through the salmon case.

CH: What was the decision in that case?

MM: I ultimately approved their fish management plan, but I was telling them, “You can do better and please do.” And they’ve been working ever since. I’m not sure they’re doing any better, but it was my first real examination and education on the thing. Gosh it was long, about an eighty-page opinion. I was exhausted by it.5

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**Law Clerks & Writing Opinions**

CH: Do you have any particular approach towards writing opinions?

MM: Yes. This one clerk, Kelly Zusman, who was with me for fourteen years, she was my clerk on all the salmon cases. I think of all the human beings walking the earth, she probably knows more about that issue than anybody because she really dove into it and made great big charts for me and we would sit down and she would go through these kind of comical charts. I’ll show you one in a little while. And kind of walk me through the different things that I would have to be dealing with just to get it organized. It was such a massive issue with so many internal issues. So I learned in doing that I would sit down in any case and start just discussing and see where they were.

One time, I said, “Well why don’t you give me an opinion this way and this way and this way—three different opinions.” And so she went off and wrote three different drafts and came back, and I looked at them. In the meantime, I’d been thinking about it and working on it myself so that I could pick one or the other. But my order to clerks is to read the briefs carefully and check all the citations in the briefs and then you do your own independent research. In other words, you don’t just stop with what they give you. You go in then like a new advocate and decide what really is the law here. And I find that that’s very productive. And of course they all rejoice when they
find some miscitation or something and can bounce that back. [both laugh]

But anyway, I work very closely with my clerks and I think they’re very important to judges. I would hate to see any tinkering with the clerk system because there’s just too much volume for one person to keep track of.

CH: How many drafts do you go through before you get to a final opinion would you say?

MM: With many, none.

CH: Really?

MM: Yes, because we’ve talked it out. I know where it’s going. And some of them, like you’ve read a lot of Social Security opinions and it goes through certain steps that are kind of rote and then you come into an examination of particular facts there. Well we’ve talked that out before, we’ve looked at those facts and said, “Well, he was okay?” In Social Security it’s not my job to decide whether the person’s disabled or entitled to benefits. It’s whether or not the administrative judge did it right. And I don’t second-guess their opinions if they did what they were supposed to do, but they often don’t so I’ve reversed a lot of those.

CH: You said yesterday that you used to circulate more opinions.

MM: Yes.

CH: Why has that changed?

MM: Too many judges took too long and it was too big a burden on the other judges. Instead of getting three opinions a week you’d get thirty so you just didn’t have the time.

CH: Would you ever run opinions by?

MM: Oh yes. Yes. Not really run it by, but just kind of at lunch say, “What do you think about this issue?” You know, and kind of get a feel. I think it’s very important that we keep our own autonomy and they realize that. It’s my name that goes on the paper and so it’s not their decision.

CH: Are there judges that specialize in certain areas that you think is—

MM: No. I do now. I do now because I take these hundreds of, well not hundreds, but dozens of immigration illegal reentry cases and handle them. It’s one of the efforts I do to try and off load judges. They’re not long and involved, but they interrupt their days. And they’ve got to do them and there’s a lot of them.

CH: What are the issues in the immigration cases?

MM: Whether or not they were correctly deported before and whether they were, they may have a felony background and where that was and was the record clear. You don’t retry those issues but the federal defenders are pretty careful to make sure that if he’s on an illegal reentry that the last shipment out was valid. Once those things are found to be valid, why
then there’s really hardly much defense from the person standing here. He’s not in Mexico or in Columbia anymore. He’s here and so most of them, almost all of them end up in a plea. They have kind of a matrix that the US Attorney and the Federal Defender have agreed on that kind of spreads it out over from six month sentences to two-year sentences to thirty-month sentences, and thirty is the top for the worst ones, I guess. I don’t fault that system. I think it’s okay.

CH: Have you followed the careers of the clerks that have worked for you? Have you kept in touch with them?

MM: Yes. Yes. One of them went from here to the County Defender’s Office. Now she’s with the federal defenders and she’s one of their good, working federal defenders. And there are some people that might think that my conservative nature is that I’m kind of hard on defendants, but believe me, when she was a clerk nobody could say that because she was quick to pick up on the Constitutional rights, and I think that kind of advocacy is necessary in a federal or state public defender. They really have to get that sense. I can handle it when they’re clerking for me because I don’t let them decide the cases but it’s interesting to see the different philosophy of clerks on different issues. I’ve had some that were very, very environmentally conscious and wonderful clerks. And I’ve had some that were kind of slow on that, so it’s interesting.

CH: Do you think that there’s too much tendency to cite Constitutional issues?

MM: No. I think if there’s a Constitutional issue it ought to be there. That doesn’t bother me. I’ve never thought about that.

CH: How would you describe the influence you’ve had on clerks?

MM: I hope very good. They seem to like my style. I’m very close to them. I want them to feel free to talk to me about anything, personal problems or anything else. I want to have a happy situation. If somebody’s mind is off on some family tragedy or something, move on it or go spend time on it. So they’re very free to come in anytime. It’s an open door policy. They can come in and they can sit down and say, “I’m having trouble with this or my baby’s sick.” I’ve changed believe me, because when Kelly Zusman had her baby Grace, why Grace was in here in a bassinet in the other room [laughs] and I just didn’t think there would ever be a day I’d allow somebody to bring a baby in. [both laugh]

You have to change with the times.

CH: Do you feel that you are training your clerks? Do you feel that you are preparing them for their own careers?

MM: I hope so. And I prepare them to think about other things, too. I don’t come at them with religion. I mean, if they bring up religion I’ll talk to them about it, but I do prepare them for the philosophy of practice of law, and how to get along. And I’m very conscious of where they go and
so they’re an integral part of the system. When you have one as long as I had Kelly, well then you don’t have a batch of them all the time. And I staggered them for awhile, one new one each year, so that you always had somebody that kind of knew what they were doing but you’re spending an awful lot time interviewing and then for the first six months they’re here they’re learning. The last six months they’re here they’re getting ready to go and so you really got about—so I went to permanent clerks and that worked better.

CH: Is there more of a tendency toward permanent clerks?

MM: Oh yes. Much more. In a way that’s too bad because so many thousands of law students apply for these jobs and they’re plums when they get them. But more and more judges are just saying, “No I’m going to stick with this one.” They may have one that rotates but a lot of them lock onto one permanent clerk.

CH: Right. Right. And that probably provides a certain amount of consistency among the other staff as well.

MM: Right.

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**Qualities of Good Judges**

CH: In your view on the qualities that make up a good judge, what are the factors that you consider to be most important?

MM: Humility. I don’t think there’s any other credential more important than humility. You’re clothed with such enormous authority that if you’re proud about it, it could be very dangerous. I think you have to constantly dress yourself with unbiased thinking. You have to be ready to get the most obnoxious lawyer you’ve ever met in front of you and still not lose it with them in front of the jury. You cannot humiliate somebody out there, and you have the power to. It’s devastating in front of a jury. It can change a whole case, and it may be a valid case and the lawyer makes a terrible mistake so you have to be able to stop. Let it settle down and if it doesn’t settle down right away, why you just call recess and then you might have to have a pretty tough heart-to-heart discussion, so you have to have the ability to maintain control of the courtroom and not do it in a manner that jeopardizes either party’s case. You can’t. You have to be very sensitive. You can’t overrule with a snarl, you know. And, “Well I told you not to do that or that.” You have to be very quick to catch yourself on that. And you can bring them in here and you can set them down and have a real good discussion with them and then it usually works. Some of them are just going to be obstreperous and that hurts their case but I didn’t hurt it. They hurt it themselves. And so, anyway, you have to be unbiased—

[End of Tape five, Side Two]
Qualities of Good Judges

CH: I am here with Judge Marsh in his chambers in downtown Portland, Oregon at the US District Courthouse. The interviewer for the US District Court Historical Society is Clark Hansen. The date is January 28, 2005 and this is tape six, side one. We were talking about the qualities of a good judge.

MM: Now those are kind of personality aspects, but then you’ve got to be willing to dig out and understand the law. If you don’t know what the law is, how do you make a ruling on anything? So you’ve got to spend a lot of time learning the law and getting used to it. Oftentimes, I’ll go back to an old outline where I’ve gone through all the steps of a certain legal issue and reacquaint myself with it, because I don’t have the kind of mentality to hold thousands of cases forever. You know, you just have to go back and reinvent the wheel sometimes, but you have to be willing to do that. And lawyers have to sense that you know what the law is. I think it gives them great confidence. While if you’re woolgathering, why they don’t know where to go, they kind of lose their direction too.

CH: What about areas like expertise, leadership, and seniority. Are those factors?

MM: Well I don’t think that gray hair hurts you in this trade and I think you do have to be—well I told you yesterday, kindly authority. That’s my hallmark of what goes on. And I try to instill that completely in the staff and the clerks and all the assistants that that’s what our job is here, to be the monitor of the process of justice and letting it happen as it should.

Appointing or Electing Judges

CH: What is your view on the Judicial Tenure Act?

MM: Which one?

CH: Well there have been some revisions haven’t there in judicial tenure?

MM: Yes.

CH: Is it recent years that there have been revisions or—?

MM: In the state.

CH: In the state.

MM: Well, I don’t think you can, with good sense, just do it geographically. Like it or not the bulk of humanity in the state of Oregon lives in the tri-county area up here and a huge talent pool is up here too. I wish it were more spread out, but it’s not, and so you can’t just say, “Well we’re always going to have two from Eastern Oregon,” or something like that. But when there is an opportunity with a John Kilkenny out
of Pendleton or Owen Panner out of Bend, well then make sure you don’t miss those opportunities by getting too focused on just Portland and the Portland area.

CH: Right.

MM: But I don’t think you can do that with a mandate. I think you’ve got to let the talent surface and people know about the Owen Panners and the Kilkennys and the Otto Skopils. They know where the real talent is in all these areas. And so I’m not for that. Now as far as election of judges, there’s a whole bunch of arguments for it but I think that really the finest selection system is the federal system. You’re scrutinized, you’ve got to have some credentials, you’ve got to have some support from people in the political area and you’ve got to have the willingness of the president to get you there.

But you can decide things independently. You really can. I never felt political pressure on me on the salmon cases. And I think that if I had been a judge on the river somewhere, elected by the people on the river, I would have been in danger of feeling the political pressure. I never had that feeling. There was a case of a grass fire next to the freeway down around Albany and a whole bunch of people were injured and several killed, including two people who were French. And there were a number of cases filed in the state court, but the French claims were brought here and they were assigned to me. One of the issues that started to raise its head—these things all eventually settled, but one of the things that was raising its head was the fact that the Supreme Court of Oregon had held that if you are burning a field and your fire gets loose onto other people’s property, you’re absolutely liable. Well this wasn’t fire, this was smoke. And the question was, if you allow smoke to go across the highway, are you absolutely liable? Now between the judge sitting in Linn County and a judge sitting on the federal court, which one would you think ought to decide that issue? You see?

CH: Mm-hmm.

MM: So there’s clearly times when it is the best system. It’s not the only system, but it’s the best system.

CH: Mm-hmm. So, in other words, you’re not in favor of election of judges.

MM: I’m not against election of state judges, but I sure don’t want them ever to think about electing federal judges.

CH: Mm-hmm. Because of keeping their independence.

MM: Yes. Right. Right.

Federal Rule Changes

CH: Right. We’ve talked a little bit about streamlining the court here and there, but I was wondering whether you had other thoughts about it. I mean the nature of cases coming into court has varied so much over the years or after World War II all the Constitutional cases, civil rights,
etcetera. And then in more recent years, all the drug-oriented cases that came that just kind of overwhelmed the system. Are you satisfied with the efforts being made to streamline the court and make it more efficient?

MM: I’m not a favorite of the Federal Rules of Procedure. I follow them, apply them all the time, but I think that what happened over the decades of the ’70s and ’80s in the development of the current Federal Rules of Civil Procedure has led to a phenomenon that we wouldn’t have understood thirty or forty years ago, and that is that practically everything settles. Trial practice is almost a thing of the past and that means that the jury system is almost a thing of the past.

CH: Mm-hmm.

MM: Now that’s a real danger point. And there’s so much emphasis on alternative dispute resolution, settlement, mediation, arbitration and all those things that we’ve moved away from the classic jury trial. And I know there are judges that don’t try a case a year, or two cases a year. Sometimes you get a rash of them all of a sudden but there are many, many times that—and that’s because there’s so much emphasis on settlement. One of the things that brings that about is total open discovery, which you’ll find advocates for all over the country, that you’ve got to tell me everything. Well then when you know everything, then you get the sense that you ought to be able to decide it yourself instead of bringing in the common sense of the juror. And so I think I said to you, we used to have trial by ambush. There’s no ambush anymore.

Owen Panner, I know, feels absolutely dedicated to the fact that we ought to be trying more cases. There are a couple of books out about the loss of the jury trial and I kind of lay that at the feet of the way that Federal Rules of Procedure have required a different kind of process. It removes advocacy. It makes everybody just kind of delivery women and men of whatever I’ve got. And if I don’t give it to you, I can’t use it, no matter if I found it yesterday, I can’t use it, you know. Now you have to say, “No go ahead and use it,” and you have to adapt to it. But the outflow, the general outflow is the jury system is disappearing and I think that’s terrible.

CH: And the Civil Procedures, they were established I think in 1966 originally weren’t they?

MM: Oh yes. They’ve been growing but the real discovery part came as late as the early ’90s, this open total discovery. It was developing through the ’80s with more and more emphasis on discovery but the rule that you tell everything came in the early ’90s.

CH: And this increased, then, security litigation, securities litigation and product liability litigation.

MM: Oh yes. Oh yes. Yes.
Tort Reform

CH: And there are efforts now in Congress to try and limit some of that liability litigation.

MM: Right.

CH: And the current Congress—actually, isn’t this one of the main thrusts of President Bush?

MM: Yes. That’s directed more to the medical malpractice cases. But that’s an issue you sure can debate on both sides. You know I had an interesting experience. I had a case that involved a side impact on a General Motors pickup and the problem with the sidesaddle gas tanks that would explode and result in terrible burn injuries and a death. And so they were suing General Motors, and, gosh it was right back in my old bailiwick and I was feeling so comfortable with that case. And good lawyers, they were from clear across the country on those GM cases. We came up to the time of trial and we picked a jury and I was all ready to be there for a couple of weeks and I came back from lunch after picking a jury and they’d settled and I was heartbroken. [both laugh]

They had settled and, “Oh no, we’ve gone through all this hard work.” But of course that was the thing to do. [both laugh] Here was a case in which I was totally familiar with the law, totally familiar with how you go.

CH: But the pressure to settle is also part of the load on the court that, they’re trying to get through their dockets and it must be—

MM: Some judges think that every case should have a settlement conference. I was in one jurisdiction where within thirty days after filing you had to have a settlement conference. Well, you wouldn’t even know what the case was about in thirty days, so it didn’t work.

Speedy Trials

CH: And what about the Speedy Trial Act that required all defendants in custody to go to trial within a hundred days of their arrest. Is that something that you supported or not?

MM: I think that we should move cases along. That’s an artificial date, which is hardly ever followed. Not because the court moves it, but because the defendants are still investigating, or the government. The government can’t move them without the defense going along with it. But time and time and time again we get requests from the defendant to set it over and I have to get the poor fellow in and say, “Do you realize you have the right to have this case tried within this month or whenever the date is and that I will have to extend that time?”

“Oh yes, I understand that.”

It’s artificial. I’ve used it. I’ve said, “That’s not a good enough excuse so let’s go to trial,” but that’s very seldom.

[End of Tape Six, Side One]
Court Administration

CH: This is an interview with US District Court Judge Malcolm Marsh in his chambers at the US District Courthouse in downtown Portland, Oregon. The interviewer for the US District Court Historical Society is Clark Hansen. The date is May 10, 2005 and this is tape seven, side one.

In our last session we were talking about some aspects of streamlining the court and I wanted to ask you a few more questions about that subject. One had to do with Judge Solomon, which was before you came onto the court, I believe.

MM: Yes.

CH: But he had scheduled time, certain appointments for lawyers and reduced discovery time before trials, and lawyers had to prepare all of their direct testimony of expert witnesses in writing, which went to the opposing lawyers. Have there been other streamlining efforts that you know of since his time that have gone beyond that?

MM: Well I think the major change, and he passed away just a month before I was entering the court, but I did practice in front of him during my years of practice. The biggest change was the fact that during his tenure he kept the whole calendar himself and then as things got ready for trial, why he would sign it out to another judge or to a magistrate if there was a consent to a magistrate. 6

Through the efforts of Judge Panner, Redden and Frye and kind of as a carryover from Judge Skopil and Ed Leavy, they changed that procedure where instead of a single calendar, each judge had their own case assignments so a random assignment system was developed in that time in the ‘80s, so that instead of waiting for a single chief judge to say, “Go do this,” each judge and each magistrate had specific assigned cases that were just done on a wheel. And that’s still the system, so that the chief judge wouldn’t know where a particular case was. He could always find out of course, but every single judge was responsible for his or her calendaring and discovery and also it gave room for kind of individual form, if you will, so that a particular judge could move without it binding every other judge to do it the same way. It proved to be an extremely efficient system and it’s still used in the court today. So that was the biggest change that I was aware of when I came on the bench.

I just sat down in Judge Leavy’s chair and had Judge Leavy’s files and that was the way I started. And he, of course, had a few things under advisement, which he finished up, but basically I didn’t receive cases from other judges. I just had what Judge Leavy had and it was bang! It was off in the deep end right at the beginning. So that was kind of a cultural shock for me, but that was a good learning experience.

I think that with Judge Panner and
Judge Redden and Judge Frye, to some extent—she’d been on the bench, on the State bench before she came here. But, there was a long career of attorney work by Panner and Redden and so they knew what could happen from the lawyer’s standpoint, and I think they were very efficient at bringing that vast experience into how we looked upon discovery and scheduling and things like that. Judge Panner, for instance, his emphasis is just, give me a trial date and we hold it. The pressure then made the attorneys comply with that and he always was working for very high efficiency, so he tried cases much quicker than many judges. And so it was a good learning experience for me to come on the bench with a lot of lawyering in my background, but no judging, to see how other lawyers did it on the bench and that was a great help to me.

CH: Did you make any contributions on streamlining yourself?

MM: Oh, I don’t know. Maybe subconsciously, but I kind of picked up the idea that, well we have a certain system called a Rule 16 conference, which is supposed to happen quite early in the case’s history. While most of the rules are requirements to the lawyers to do things within a certain time frame, the Rule 16 conference is directed toward the judge, to kind of say to the judge, it’s your responsibility to get this thing scheduled and get it terminated. And so the Rule 16 conference was to bring the lawyers together early, find out what reasonable times for discovery were, what are their problems if they have any. Try and work through any obvious things that are hanging things up and then I always use that to set a trial date, because I’ve got the attorneys to commit that this is going to be long enough. We can do it in this time frame and we’ll give this much time for motions and so forth and then here’s the trial date: “Now, look at your calendars. Is that date open for you?”

And then I have each side say yes, “I can try it on that day.” Then they can’t come to me later and say to me, “Well I have a conflict I didn’t realize.” And we really started a rule here in the courthouse, because at the same time these same lawyers would be appearing in state court, or perhaps in front of some other judge here. So the rule we developed was that whoever set the case first had priority, whether it was a state judge or in-house, but we all started moving and I certainly did, to try and have a definite trial date. I found that there’s nothing that resolves cases more than two competent sets of attorneys and a set trial date. That’s what gets cases out of here and it worked.

CH: Were there any streamlining efforts that were used in this court that then got adopted by other courts? Or do you know?

MM: I’m not positive, although I think so. The one big streamline, of course that I omitted to talk about was the magistrate system.

CH: Oh yes.

MM: We assigned civil cases to mag-
istrates from the beginning just as we did to Article III judges. That was innovative across the country and was the brainchild of Judge Belloni. And that was really innovative and I’ve talked to some judges in other jurisdictions who can’t figure out how that could possibly work. And the charm of it, of course, was when we ever had an opening for a magistrate we had some of the great talent of the state apply for the job because they knew it was not just going to be doing routine little matters, it was going to be a significant part of the court system and that was truly innovative and truly successful and it still is today.

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**Streamlining Court Processes**

CH: What about AWOPS and footnotes and page limits and elements like that as far as streamlining goes?

MM: Well I think we all kind of let it be known we don’t like footnotes and that we would give a limit on pages, thirty pages. And I remember Judge Leavy had somebody hand in a paper that was fifty pages instead of thirty and he handed it back and said, “I’ll let you resubmit this or I’ll just pick the thirty pages I want to read and ignore the rest.” [both laugh] So that was kind of a humorous way to kind of have the lawyers realize that we did think they could say it more concisely than they often did.

CH: What about legislative efforts for streamlining? I think *de novo review* was one effort?

MM: Yes and I really don’t think that we had a whole lot of impact on legislation in the civil procedure or criminal procedure, and I’ll tell you why from my standpoint. I don’t think that basically we agreed with the Rules of Civil Procedure. I think we thought they were too demanding and reached too deep into areas that should be left for the lawyers to work out. You know it wasn’t a matter of open discovery, it was more a matter of trying your case without a jury. So, lawyers that were exceptionally skilled in discovery over perhaps a new lawyer or one that is not in the court as much, I felt there was an imbalance. And you kind of had to try and level that out and say, “Well you’ve got to do the same, you’ve talked them into giving you all their e-mail, now what are you going to do about yours?” I think it pushed us into a position more of being mediators of discovery rather than really getting a case set for trial. It was a far cry from what I grew up with, with the trial by ambush. And I think I’ve mentioned that before, that nobody knew what the other side had until you were in the courtroom. Well there was a certain kind of charm and excitement about it, but maybe not always to the ends of justice, so I think limited discovery is meritorious. I think that just total discovery or regurgitating everything you know because then you really don’t know what you know.

You don’t know whether you’ve given it all or not, and if you are sanctioned by holding back something, everybody will accuse you of holding it back whether it was totally innocent or not. So, I just think they went too far.
US Attorneys

CH: We’ve talked about some of the court personnel who played major roles in the US District Court here, but we haven’t talked about the US Attorneys. Sid Lezak was US Attorney from 1961 to 1982, and then Charles Turner from 1982. Were you familiar with them?

MM: More with Sid Lezak than with Chuck Turner. My experience with Chuck Turner was to try a very significant drug case where he took the lead chair. For the US Attorney to really sit in the first chair was not all that unusual because they had so many administrative duties to carry out. But he was in charge of that case from the beginning to the end; did a masterful job with it. It was a very complicated case, which he had to really finesse his way through the minefield of a whole lot of objections. There were several defendants and so several very talented defense lawyers were always working to make sure it was done exactly right. When it went up on appeal there were—I can’t remember how many assignments of error—and we were affirmed on all of them. Now I don’t say that I was affirmed on all of them. I think it’s the way Chuck Turner put it in and got it done right so that the rulings I made just kind of said this is the way it’s going to go.

I tried the case with the Rajneesh where their conspiracy was to kill Chuck Turner, and that necessarily kind of distanced us because I couldn’t—he felt very strongly about that case and I think he still does and I don’t blame him. But it kind of made me pull back from any contact with him because he was clearly a principal in a case that I was involved with, so that was kind of a heart rend. By the time that was over, why he was moving out and a new administration was in and a new US Attorney. So that was kind of a limited experience I had. I still see him occasionally and I still think he’s an excellent lawyer.

Sid Lezak is a classic. You just don’t find US Attorneys that can survive changes in administration like he did, without a ripple in the water. And it was just his personality. He’s still deeply involved in the progress of the legal profession and a character if there ever was one. So he was an exciting guy to be around. I appreciated him even though I didn’t ever try a case against him.

CH: He just won an award recently, didn’t he?

MM: Yes he did. I can’t remember what it was. He had a big celebration for his career.

CH: Didn’t the federal courts get overwhelmed with drug cases at a certain point?

MM: Oh yes, still are.

CH: What brought that about? Was it just the amount of drugs being used or was it a change in the law that brought more of the cases into the court?
MM: Well I think certainly, the guidelines and the enhanced penalties for drugs, which at that time you counted up the drugs after the trial, and that’s what determined—this is what the Blakely case dealt with from the Supreme Court. If there were a lot of drugs, why it was a lot of time in prison. The attorney general started out with the idea that we were going to go after these drug dealers and I think that’s correct. It was rampant and it’s a terrible scourge on the population and now Oregon is witnessing the meth epidemic. And it’s just a new drug, not really that new but it’s a new kind where the concentration for a while was on cocaine and crack and then before that on marijuana and such.

I think the US government just kind of took over that phase of criminal law because I think it was too much for a single state to really have any impact on it. And so I think they made a deal that if it was a certain level of drugs, why then the US Attorney would take the case and prosecute it, even though the whole thing happened within the State of Oregon. It was always a commerce connection to get it here so there was just an emphasis, like in the last few years the emphasis shifted more to guns.

**Uniform Sentencing**

CH: Right. Well then the uniform sentencing guidelines that came out, that must have had a big impact then on the courts and obviously the prisons.

MM: Right. Huge impact.

CH: And what did you feel? How did you feel about uniform sentencing or indeterminate sentencing?

MM: Well I had a couple of years experience under the old system and I felt comfortable with it. And then when I had guidelines come along, that really weren’t guidelines, they were mandatory, I felt like I thought a couple of mistakes had been made and I became convinced that I’d lost a lot of my discretion. And, unfortunately, a lot of that discretion didn’t just disappear it ended up in the US Attorney’s Office. Not that they asked for it and that they mismanaged that, but it just doesn’t belong there.

The other thing was that I became very jealous of the discretion I still had and would buck any attempts to erode it any more than it had been eroded.

CH: What was that? What discretion did you still have left that you used?

MM: Well I still had the power within the guideline range so there was a lot of pressure to always drive us to the bottom of the range and I remember saying to the public defender one time, “My discretion is in that range. I’m not going to promise you I’m going to always sentence at the bottom, because every case isn’t the same. Some ought to be in the middle, some ought to be at the top and where merited they ought to be at the bottom, but that’s my discretion.”
And I didn’t want to give it to the government to agree with the defendant that this ought to be at the middle or bottom because it always ended up at the bottom, and I just didn’t think that was correct. I also felt, and this is my conservative side, I thought that the guidelines were an infringement on the separation of powers. I did not look at them as Constitutional. So when—what is it—Restrepo became the law that it was constitutional, why then—

That was a lesson for me to learn that, well my philosophy isn’t in command here. I’m to follow the law, so I learned the guidelines and I followed them religiously and applied them as they were written. And I didn’t fight the fact that I felt uneasy about their existence underneath. And when it started to go back and it was looked at that from what it did, why they looked at its unconstitutionality in a very, very different place than I would have looked, so it was kind of a surprise to me.

CH: You mentioned conservative and yet wasn’t it the conservative forces that actually were driving uniform sentencing and mandatory sentencing?

MM: Well I don’t know. I always get confused.

CH: Get tough on crime and—

MM: Yes. Well that’s true. And there was the perception that there was a great disparity across the country in sentencing. The answer to that, of course, is there’s a great disparity between individuals and so you can’t just paint everybody the same color and you can’t—we’re not fungible.

CH: Wasn’t part of the criticism against the liberal judges who were letting criminals off for sentences, some light sentences?

MM: Yes. Right. And you see the pressure is on a judge always when you see the instance where you think it’s not going to do any good to lock this person up. It’s going to do a lot of good to put them out under some kind of structure and bring them back into the community. And when you do that and it works and they’re a total success and you really are thrilled about it, why you know that should be in the mix somewhere. And it’s perhaps not enough. I think I was probably more tough on crime when I came on the bench than, well I’m sure, than I am now.

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Immigration Cases

CH: And what changed that?

MM: I guess just watching a whole lot of humanity and realizing it’s different.

You know I do many, many of these immigration cases and why is the fellow here from Nicaragua or Mexico or Columbia? And where’s his family and what’s going on here? Of course it’s a tremendous public debate now—immigration—fueled mainly by 9-11, but we had the issue way before that.

CH: Yes. And do you see any of those immigration cases?
MM: Yes. I see a lot of them.

CH: Do you have views that you would express on what you think should happen to immigration laws, or reform?

MM: I don’t have a fix for that one. I really don’t. I think it’s a real problem. It’s a real problem partly because there’s such a discrepancy between the wealth of the average person in this country and the wealth in Mexico. You can see why they try and come North. And the bulk of them—think of the thousands and thousands of Hispanics in the State of Oregon and so we have hundreds in the criminal system but—there’s an awful lot out there that are doing work that nobody else in our society wants to do. And so I think there must be a way. I hate quotas and that sort of thing, but there must be some way to share the wealth, if you will. There’s clearly a difference between the worker in Mexico and the worker in the United States, and so you can get excited about the millions and millions of dollars that are shipped out of this country to Mexico. Well maybe that’s in place of this government doing something positive from a social standpoint to even the situation.

I don’t worry about the money going out. I worry about individuals and how they act here. If they misbehave themselves, if they come here to sell drugs and things like that then the hammer will come down on them, but if they’re out here doing all the lawn mowing and landscaping and stoop work, if you will, on the farms, picking things, why you know, go up to the Hood River Valley and who’s picking all those apples and pears?

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“Baby Judge School”

CH: Right. How do you feel about special training for appointed judges in areas like admiralty cases or patent law cases, security, antitrust, things like that. Do you feel that judges should have special training for those areas?

MM: Definitely. And they don’t. The Baby Judge School, as we call it when we’re first inducted, or sworn in, was very important, very good. I thought it was excellent training. One session pretty much basically on civil law and one on criminal law and the two sessions together were extremely valuable. Not to mention just the books that you got that you could go back and reference from. But patent law—maybe I told you one of the first things that happened to me as a judge was when US Marshals came in with a request for a warrant to arrest a vessel. That was way far remote from an intersection collision for me to understand what they were talking about. [both laugh]

And so, arrest a vessel? It didn’t mean anything. So the admiralty field was completely new to me. I had to just dig into the books and learn it. Patent was the same. I hadn’t ever been near a patent and some of the first major cases I tried were patent cases regarding Gunderson Railroad Cars and Browning Bows and
Leatherman Tools and things such as that, and really significant cases that I just—I had to learn all about railroad cars. I had to learn all about bows. I had to learn all about Leatherman Tools. I liked the cases but I sure had to admit I was in the first grade when I started with them.

Luckily, I had some very good patent lawyers practice before me, and the first case that I tried by the time we worked out the jury instructions in that case, I decided I could use those jury instructions in almost any patent case. And from then on out on with a patent case I would just copy those instructions. I’d hand them to counsel on both sides and say, “Tell me why you shouldn’t use that in this case.”

Most of the time there were very few little nits picked with those instructions, so I was very lucky there.

CH: Areas like admiralty and maybe even patent cases, does that begin to intersect with international law then?

MM: Oh you bet. Yes. Yes. And the damage issues run globally, you know, of whether the sales would have been the same in India or England or wherever you go. So, yes, it does carry globally.

CH: Do you think that there is too much emphasis placed on bright clerks and expert witnesses in dealing with some of these specialty issues?

MM: Well, you can’t have too much emphasis on bright clerks. [laughs] You know we’d go beneath the water if we didn’t have really bright clerks that were committed to this work and I think it’s a huge learning experience for them. They are invaluable and I think that the State system without clerks really, really puts a terrible load on judges to be doing all their own research.

CH: What do they bring to the court aside from this dynamic energy that they have coming out of law school?

MM: They bring a very strong sense of social welfare. I don’t mean that in use of the word welfare in that sense, but just for the good of society. I notice in the generation of clerks that I’ve had in the ‘90s and up till now, they’re very interested in social issues and so they bring—I don’t know, you have to watch them because you might have one that’s incredibly environmentally oriented and you might have an environmental case and they have to be able to put down their driving philosophy and follow the law. That’s often difficult for them because they feel so strongly about it. So it’s part of the training session to let them kind of cool off on that for the time being.

[End of Tape Seven, Side One]

Law Clerks

CH: How often do you use them [law clerks] in the writing of your opinions?

MM: Almost universally. Now I edit a lot. I had one clerk, Kelly Zusman, who worked with me for fourteen years. And when she first came to work she
had a style of writing and I had a style of writing but it got so you couldn’t tell whether she’d written it or I’d written it. I think we both moved; probably more me than her. But she knew how I thought. And there was one instance where we would discuss a case and she wrote four different opinions and laid all four in front of me at the same time and I went through them. We worked from one of them and came to a decision.

CH: How persuasive have your clerks been on you?

MM: Well they’re persuasive, but it’s not their name on the bottom of the page, it’s mine. So I have to be content that I’m not—

CH: But can they change your opinion about something?

MM: Yes. I remember one time I changed my own opinion because I did follow the lead of a clerk. Got to thinking about it and pulled the opinion back and said, “No that wasn’t right” and changed it.

There was an article in the newspaper about that. One of the lawyers said, “I’d never seen a federal judge do a thing like that before.” But my conscience just—I was sleeping and I missed a point and I just—I wasn’t sleeping in court—I was just sleeping at the switch on this one issue, and when I realized that I’d left that out of the computation, why I had to change it. It was not a good verdict from good judgment so I pulled it back and changed it.

**Thoughts on the Judiciary**

CH: Have you ever felt compelled to decide in one way by your conscience but the law was actually pushing you in another direction?

MM: Yes. Yes.

CH: How would things end up under those circumstances?

MM: I followed the law. That was my oath. And that’s not easy. When you’re really confronted with your feelings about it, but I don’t think anybody’s going to accuse me of being an activist judge because I didn’t go off, I don’t think, on my own tangents with decisions.

CH: What do you think about the so-called trend towards judicial activism or as critics put it, judicial legislation?

MM: Yes. Shouldn’t be done. I’m against judicial activism.

CH: What do you mean by that? What is judicial activism?

MM: Judicial activism is when you go on your own philosophy and your own feelings and you do not follow the law. You try and change the law. You try and find something about this particular case that gives you an excuse not to follow the rules.

CH: But aren’t many laws sufficiently vague so that they need to be interpreted?
MM: Yes, that’s interpretation, that’s not activism. There’s a big difference. I don’t believe a judge should have an agenda. And you might if you’re on the Supreme Court, but certainly not on the trial bench and certainly not in the court of appeals. And I don’t know if I mentioned this to you, but the tragedy of this whole emphasis on activist judges, which may not be activism. Some people call me an activist judge because I don’t do that. The whole point is that to have an independent judiciary what you should be looking for are people who are skilled in the law, are fair minded, are humble in spirit and who really want to bring about justice. Now if you tell them that their qualifications for appointment or confirmation particularly, are bent on their philosophical ideas about this and that and this rule and that rule, whether it’s a social issue or what. When that becomes the whole conversation about whether they are confirmed or not, or appointed or not, then they start to think maybe that is important. And then so when they are confirmed they think, well I’m confirmed to do that. You see?

CH: Mm-hmm.

MM: Instead of, as I was advised on the day I was sworn in, you don’t owe anything to Congress now. You are an independent judiciary. All you owe them is your thanks.

CH: Do you have an opinion about the process by which, well not necessarily the way the judges are selected, although that too, but do you think, as some people suggest, there should be an election eight years later or some kind of review or re-appointment or something other then an appointment for life?

MM: No. [pauses] Did I tell you the story about the fire case down in Albany? There was a field burning down there and the smoke ran across I-5.

CH: Oh yes. I remember that case.

MM: Okay. Tragedy, you know. Many people injured and a French family, two of them lost their lives in that.

CH: Yes.

MM: So those who represented the French family filed here in federal court and everything else was filed down in Linn County. And I met with the judge from Linn County, Jim Good; wonderful guy, wonderful judge. And Oregon at that time had a case that said if fire escapes in your burning, there’s absolute liability but never had decided whether smoke escaping brought absolute liability. Now then, what judge should decide that issue? One who has lifetime appointment or one who’s elected by grass farmers?

CH: I think you’ve answered the question.

MM: So, I am sure there are times. And one of the issues—you know age can really debilitating a person. I don’t feel competent at my age to try really complicated cases. They just tire me out too much. So age is
a factor, but that’s one of the reasons that they put in the idea of senior judges, so that the senior judge who doesn’t have that physical capacity can kind of pull back and hopefully when they don’t have the mental capacity they have enough sense to quit. But the physical capacity, you can really adjust your time back more and more and more. That’s what I do. I know some senior judges that work as hard as they ever worked and bless their hearts. That’s not me.

CH: You feel that there’s a time that a judge should retire?

MM: Individual, you know. I look at Otto Skopil in his mid-eighties, and I think, why should he retire? He’s contributing. Owen Panner’s eighty. Redden and I are getting close. I will be seventy-seven in September. I had no idea that I would be doing any type of work this late in my life. And I still think that I contribute something here, but I don’t pretend to anybody that I’m going to carry the full load of an active judge.

CH: In that book, First Duty, about this court that said, to quote, “One might wonder why a federal judge would continue pursuing a difficult job at an advanced age when full pay would accompany a more relaxed life.” Why is it that at age seventy-seven you would be still sitting on the bench?

MM: My wife’s been asking me that [both laugh] for a few years now. Part of it is what I call the hooky syndrome. You work fifty years and you don’t go to work you feel out of sorts, you’re playing hooky in some way. And part of it, I think, is, and I hope this is not a factor in my life, is pride. You don’t want to give up the position. And I really think I can give it up. But that causes you some soul searching along the way.

I also think that we all feel a responsibility, an unwritten responsibility to the rest of the court. The things I do, I try and pick things that take away from the active judges, the things that bother them like a fly in the room, but are not very important. Well they’re important but they’re not time consuming and they’re not worrisome, but they bother your docket and that sort of thing. Well I think that I can help the active judges in that manner. And if I don’t use my clerks to full time I let those clerks work for other judges and do chores for them and I think that’s good experience for them. It broadens their experience as clerks but it also helps the other judges to have more resources.

So, there are reasons to stay. But I don’t have a die-with-your-boots-on syndrome that I walk around with. I will not be denying the time I have left, God willing, I’m a mortal. But if He gives me time I will not be around here very many more years. I’ve got other things to do.

CH: What led to your taking senior status? Is there a mandatory age on that?

MM: No, it’s not mandatory. In fact, there are some that literally go to their graves on active status. Senior status has some real financial benefits. There’s a huge swing you know in stopping contributing to
social security and receiving it. But I guess I felt that I had put in what I promised to do and I still felt, and I carried a regular load for quite awhile. But I just wanted to have a little more freedom to pick and choose. There were some things that I really didn’t like. Some things that I didn’t want to have the chance of being faced with. I would not have wanted a death penalty case. Graciously I was not subject to that in the time I was an active judge but that would have been a very, very difficult thing for me to deal with.

CH: Would you have been able to turn that down?

MM: I think I would have gone to the chief judge and said this is really a moral problem with me and see if he would change it but I didn’t want to have to do that and luckily I didn’t have to do that. But now, I can just say don’t put me down on any death penalty case. It’s part of the benefit of a senior judge.

CH: And the system, the way it works, are you happy with it? Are most people happy with it? Are there any changes that you’d like to see in it?

MM: I don’t know how you can be unhappy with it. I think it’s one of the best systems. You know, initially I think Franklin Roosevelt started the idea of senior judges in order to get newer blood on the court and give the old curmudgeons that were around that were going into their nineties a way to relax. The benefit now is much broader than that. It isn’t to get new appointments to the court, it’s to really recognize that there’s been long-term service and so it a marvelous system. I can’t complain about it at all, at all.

CH: Do you regret not having gotten an appointment to the appeals court?

MM: No, never wanted it.

CH: You never wanted it.

MM: I like the trial court. I was a trial lawyer. I liked being a trial judge. I had no desire to be on the court of appeals. I was never asked, so. [laughs]

CH: [laughs] How has federal legislation affected the court over the years, would you say? [pause] In general?

MM: I think it mirrored the American society—to find a remedy for everything and so here’s where you come to get a remedy. So it’s overloaded in lots of areas but maybe that’s okay. Certainly it’s become the forum for some social issues that might well have been dealt with elsewhere. I’m not in favor of the courts being involved in moral issues. I think that’s society’s role and they do it through legislative bodies, not through some fiat from a court but I do think that a lot of legislation—my word, when I went through law school, and I compare the curriculum to what students in law school now have for curriculum, we didn’t have a tenth of the classes. Well that just signifies this huge growth in remedies in all kinds of areas, and maybe they’re right. Certainly a lot of the social issues that
for the disabled people for discrimination, we didn’t have any courses on that in law school. We probably had the problems in society but we certainly didn’t have it in the courtroom.

And so that has just ballooned, the jurisdiction of federal court particularly. And of course there’s been an inroad on state’s rights by the federal legislation, which brings more things here. And I think some real revamping could be done there. I think that the rule of diversity jurisdiction is pretty much a fiction now. But I don’t see any tendency to try and go in and redesign the system. I think it’s stuck where it is and it’s going to get bigger and bigger and more complicated.

CH: There’s a lot of talk about tort reform. Where do you see that headed? And how do you feel about it?

MM: I think it will be very slow and I don’t know which way is reform. I think that we do encourage, to some extent, our society to be a litigious society. I think that it is part of individualism in our society, where if you’re hurt the whole thing you look at is the effect on you as an individual and somebody ought to pay for it. That doesn’t necessarily mean that’s the common good. And certainly there are areas where there always have been remedies and there always should be remedies, but there are a lot of places where I think a remedy takes the place of common sense that we all walk with some danger in our lives. We all walk with some risk in anything we do and if something happens that we didn’t foresee or didn’t even intend, why that doesn’t mean that somebody else ought to have to pay for it.

That’s my philosophy. So I’m slow to open the door. I’ve had things in my life that say to me—I get a notice that I could be part of a class action. I never return them. I made my own decisions. I didn’t rely upon somebody else. So I think those can go too far but I think there are other times class actions are the only way you can address a big problem, a really big problem. More clearly there was some fault in there and so there’s a place for class actions but just not for everything that just happened to go awry with a certain industry.

CH: Are there certain laws that you have a problem with that you would like to see addressed?

MM: I hadn’t thought about it that way. There must be. [both laugh] There must be, but I can’t bring one to mind right now.

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**Americans with Disabilities Act**

CH: Are there specific laws that have given you problems in your court, that have made things difficult for you in your career?

MM: Yes. Let me take one. [pause] I have a niece who was born with a significant cerebral injury. She has never been able to walk or talk and she cannot feed herself. She is totally dependent on total care. She is disabled, if I ever saw anybody disabled.
CH: Is she aware?

MM: Oh yes. She’ll write you a letter with her computer that she runs by touching a switch with her head as the computer cycles through. She’s graduated from high school and she’s taking college courses. While she has 24-hour care, she wants to have her own life in her own apartment. She has a huge sense of humor. But for the fact that she was born to this incredible family, she probably would have been institutionalized and never listened to, heard, or anything else.

I also had a cousin who had TB of the spine as a young teenager and he was left with one leg about six inches shorter than the other before they stopped the growth in that leg. He was one of the first civilians to receive penicillin, which knocked out the TB but it left him terribly crippled. For years he walked with this decided limp with a riser in his shoe about three inches high. Then he walked slowly, with a walker and then finally in a wheelchair. He’s passed away now. And so I listened to him because in his later years, his adult years, he was severely disabled.

And I don’t want to be insensitive about this and I don’t think I am, because I have had an awful lot of compassion for those two people—he’s gone now, but for Laura still, and empathy, although, I can’t put myself in their place. And so we passed a law, the Disability Act.7 And I think there are really good things about that law but to what extent? In designing this courthouse, for instance, we made disabled access in two courtrooms. That’s what we were required to do at that time. I’m talking about lifts in the jury boxes and things like that, and all other aspects of access to the building with ramps, elevators or whatever. Here we have two courtrooms that have witness chairs, which can raise a witness in a wheelchair, and another ramp can raise a judge in a wheelchair to get to the bench and ramps to the jury boxes. The present rules today would require every single courtroom has to be fitted that way. In my eighteen years on this bench I had one witness that was in a wheelchair and I haven’t any question but what I could have asked another judge if I could borrow his or her courtroom because I’ve got someone in a wheelchair. That’s the way we designed it, with the understanding that everybody would find out ahead of time if they had somebody that was disabled whether party, witness, juror or judges and then we would accommodate that by exchanging courtrooms. It really made very little sense to require that every single courtroom be so equipped and for the government to spend over $50,000.00 for each courtroom to do that, nationwide.

But the kicker was when my cousin was here and I said, “What do you think of that?”

He said, “You couldn’t get me in that. That’s the most demeaning thing I can think of. I don’t want to be lifted up that way. I’ll testify right from here on the ground floor.”

Well, that probably doesn’t speak for every disabled person but it did say that some of them are thinking differently about that issue than one might think. And so you asked me if there was a law that I
think is wrong. I don’t think it is wrong, I think it goes too far and I think maybe it doesn’t even represent a lot of those who are disabled. But I don’t think we looked at that very carefully. So, enough said about that.

CH: What do you think the court’s influence has been on public policy?

MM: I don’t know. I don’t know. In that area we were never asked, we were told. So, I was on that committee for nearly seven years and when those things came up, nobody asked. And I thought, no, there should be attention paid to the issues of the disabled person. We shouldn’t build things without any thought of them at all. And I think that’s a good part of that law. It’s really very constructive that way but it’s just, the extent of it that I think is problematic.

Judicial Philosophy

CH: You had mentioned earlier that in some ways you weren’t quite as tough on crime just because you’d seen the humanity in certain cases. How else would you say your judicial philosophy has evolved over the years, if it has?

MM: Well, I’m sure it has. I think I’m much more socially conscious. I think I have a much greater understanding of other ethnic groups than my own. I grew up in McMinnville. There wasn’t a Black in town. The only Asians were a couple of Japanese maids that were interned during the war. I didn’t have any experience or contact or knowledge or anything else, and then I came up here to Portland and I started having association with wonderful, wonderful black community in Northeast Portland and meeting people there and that was an eye-opener for me. It was an education. I really needed that education, too. You know you might say I was born without ears because I didn’t hear anything about it. It wasn’t an issue that I ever was faced with until I came to this job. And both my wife and I felt very conscious of the fact that we were in a different community here than we were used to. We had to learn about that. So, I’ve been very much more involved than I ever thought I would be with that, trying to have contact there.

CH: Do you feel that there is really an urban/rural divide in this state?

MM: Yes.

CH: And do you feel that the court is sensitive to those issues?

MM: I think so. I think so. Luckily this court has got a pretty broad background, a diverse background. You know, we’ve got East Coast, like Ashmanskas and Redden from Massachusetts. We’ve got Eastern Oregon represented, we’ve got Southern Oregon represented, we’ve got the Valley represented, we’ve got Portland represented—

[End of Tape Seven, Side Two]
Victim’s Rights

CH: This is an interview with Malcolm Marsh in his chambers in downtown Portland, Oregon. The interviewer is Clark Hansen. The date is May 10, 2005 and this is tape eight, side one.

I'll ask about some of the other issues that come up in the courts these days. You hear a lot about safeguards for the rights of criminals and also victim’s rights. Has that been much of an issue in your court?

MM: Not in mine. The victim’s rights rules that are new, I haven’t had them applied in any case that I’ve had. I hope that works out well. There have been a few occasions, usually it’s sentencing, that I would have some. Maybe it was just a finance officer of a bank that had just been robbed or maybe it was the teller that had been robbed. I’ve had others, family members of course. And you know, the families of the convicted person, they’re victims, too. They pay an awful price to see their son or daughter sentenced and sent away. A lot of soul searching. What did I do wrong, or what could I have done? That sort of thing. So they’re victims too.

What is the point of having somebody come in and say what everybody in the room already knows?

You’re a victim of rape and you’ve been terribly violated, it’s a heinous, miserable, insulting crime. I don’t think there’s anybody in the room that doesn’t already know that. They would have to be awfully crass to not know that. I hope this is done very artfully with these opportunities to confront and speak, and I hope there’s no danger that arises out of it. I’m just going to be watching and waiting to see how I come down on that one.

CH: How do you feel about the tendency that some judges have of finding Constitutional implications in cases? Do you think there’s too much of that going on?

MM: I don’t think so. I rely entirely upon Constitutional issues and criminal cases being raised by very, very competent defense lawyers. If it’s there, they’re going to bring it up and I don’t have to go looking for it. I think I’m quick to deal with a Constitutional issue. I don’t have trouble understanding it, but I don’t have to go around looking for it, because it’s brought to me.

CH: So you’ve never been in a case where you’ve actually had to—are judges ever in a situation where if a lawyer is not bringing up a certain issue?

MM: Oh yes. I think that judges that were trial lawyers are perhaps more adroit at that. I think we have a better reading of what’s going on between the lawyers and what’s happening, where’s he or she going
with this, and being able to either cut it off or undo the harm by leveling the field in some manner. But you have to be awfully careful how you do that to keep from being read as favoring to one side or the other.

CH: Do you feel that a judgeship should be the terminating point in a lawyer’s career?

MM: Not for everybody. No. I think I told you that I just kind of burned out of advocacy and the fire-fights, if you will, that I was going through and I just wanted my life to be more reconciling of things, rather than arguing about things. So it was a natural for me and I hope I’ve carried that out.

You were asking about constitutional issues and in one case—did we talk about the Vernonia drug-testing case?

CH: Yes, we did.

MM: That was as deep as I think I ever examined constitutional issues to really figure out where to go with that case, so yes. That wasn’t brought to my fore. That was the whole thing.

CH: As I recall, it was a rather young student that was standing up for his rights. When you think about all the peer pressure that people go through when they’re adolescents and being able to go through something like that must be—

MM: Well, parents were clearly in that mix.

CH: Mm-hmm.

MM: Yes. There was a lot of action in that case instigated by the parents who were offended by what was going on there and they had a very new and a very good issue to raise and it went all the way up, so it was hardly something that had already been decided or they were trying to twist around to something novel. No, they were just confronting a very, very new institution there. That’s how it got all the way to the Supreme Court.

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**Sentencing**

CH: Right. What would you say the hardest part of your job has been?

MM: Sentencing.

CH: Sentencing. Yes.

MM: You deprive somebody of their right to walk around the streets here, you’re really getting personal, and particularly if you don’t really see a physical danger to society. If there’s a physical danger, why then that’s different. It’s not easy, but it’s different. But a lot of people in the federal penitentiaries are not physically hurtful to others. The answer to that quickly is, no, but left to their own proclivities they would cause a lot of indirect and monetary harm to a lot of individuals, so you have to remove them from the opportunity to carry that out. That’s true.
CH: In light of that, would uniform sentencing, be a relief in some ways?

MM: Well, you bet it’s a relief. Oh, it sure is. Yes. I just did what that book said I had to do. But that really tears at me. [laughs] I don’t like that. It’s not what I pictured as the manner of justice. I don’t think that’s being judicious. That’s just rote, almost compared to following a game. You’ve got certain rules and you—

Judicial Rewards

CH: On the opposite end of the spectrum, what would you say the best part of having been a judge is?

MM: Oh the education I’ve received of the human race, just the diversity, the wonderful people that have come in front of me, the jurors that I just think so highly of, who are so dedicated. There’s just hardly an instance when I’ve felt a jury was influenced by somebody who wasn’t quite getting the job of a juror.

And the lawyers—I’ve had just a couple of occasions where I had to do something about the lawyers. Usually they understand that I’m prompt, that I don’t want to hear long arguments, that I want them to be polite. I don’t want them coddling up to the jury. So I think that they learn about me and where my limits are pretty quickly; but I admire their skill and I admire their hard work. I think they’ve got a tough job and in a profession that is often maligned; you know, the old lawyer jokes are rampant. But just meeting the diverse people, in the building, dedicated federal employees that, you know, will just do anything you ask of them. The marshals serve as security officers, you know, they’re dedicated people. Everybody that comes in front of me teaches me something new about the human race and so that’s good.

Individualism

CH: How do you feel about the relationship between punishment and reform?

MM: Okay, I’ll tell you. I think until this nation philosophically comes off its rampant individualism that it will be very difficult to reform a person who is brought up in a society that teaches them to do their own thing. If we’re going to be in a society, then there’s got to be some limits. And one of the greatest singers of all time has as his theme song, “I Did It My Way.” Pretty hard to reform that kind of a mind set.

CH: And yet isn’t so much of our Constitution based on that?

MM: I had no idea so much of it was based on that very thought of individualism.

CH: Right.

MM: Did I talk to you about that? About Francis Hutcheson?
CH: We talked a little bit about some of the early Constitutional framers. I’m not sure if we talked about Hutcheson or not.

MM: Francis Hutcheson was a little known Scot philosopher. And he said that the great mission of the human being is the pursuit of happiness, comma, which is best fulfilled by bringing happiness to others. The latter half was left out of our Declaration of Independence. It just was the “pursuit of happiness.” And at that same time the Enlightenment was bringing all of the empirical thought that we decide everything by what our senses tell us and then we rationally consider without thinking about some innate standards.

And so innate standards become vague and they start to drop out of the picture and individualism then becomes self-centeredness and nihilism. I admire the strong individual but I don’t admire the person who runs roughshod over other people for their own delight. Now I think that is a major, maybe not predominate, but a major influence in the philosophy of our society as a whole. And as long as that’s there we’re going to be frustrated enough to lock people up until we have far too many people in jail, but we’re not very successful in changing that mind set because we believe it.

CH: Is there a religious component?

MM: Oh there can be, yes. I think that my foundation of those things certainly comes from a religious standpoint. But, you know, I can see somebody who has no faith base at all who feels the same way I do about it.

CH: Well the Communist system is based on one for all.

MM: Yes. Right.

CH: So— [laughs]

MM: [laughs] But it didn’t work. It was supposed to solve all that. Karl Marx thought that his utopia where we do away with private property and we do away with all those capitalistic things, which put people under the thumb, brought about the most tyranny the world has ever seen. So it didn’t work. Why didn’t it work? What was the fault? Well, it didn’t deal with that second half of Hutcheson’s statement. It just shifted who’s pursuit of happiness was in control. So power just moved from one phase to another phase and somewhere you have to get that second aspect in.

Really the happiest times I have are when I’ve made somebody else happy. When I go over there to Big Muddy and work over there I’m making kids happy and that’s a pursuit of happiness for me, so. I’m not always that pure. [both laugh]

CH: There are those golf trips to Hawaii. [laughs]

MM: Oh yes. That’s right. I pursue a lot of happiness that’s pretty self-centered.

CH: Well, it seems like you’re certainly
justified in having that with as much time as you’ve put in on the job here. What effect did being a judge have on your relationships with friends and other people around you?

MM: Well it diminished my ability to be close friends with lawyers I knew, because I often had them bring cases before me so I couldn’t be in that fellowship with lawyers like I like to be. With my friends in Salem it’s been very strong. We’ve kept a very good relationship. Particularly at the behest of my wife who thought—I uprooted her out of her life of thirty years in Salem to bring her up here where she knew very few people. She had some old school chums and such that she still sees here and enjoys, but the main block of her friends was centered in Salem and even down to Eugene.

I was thrown in with a new cadre, so to speak, and I had my fellowship with all the judges. We ate lunches twice a week together and we talked all the time and so within the monastery here. [laughs] Why, I had my own group and so I didn’t need it as much as she did and so that was something I had to become sensitive about. She really paid a price.

CH: What about your family? Did they pay a price at all?

MM: No. They were all gone out of the house, and so they were in their own families by then. They have just kind of sat back and watched with amusement [laughs] all that’s gone on.

CH: [laughs] What about civic and professional affiliations, things like that?

MM: Well I’ve kept the professionals, you know, the ABA, College of Trial Lawyers and I just went inactive on the bar because I had fifty years and I wasn’t taking part anymore in bar functions and such. Oh, but not like I used to be where I was on committees all the time and dealing with it.

CH: What were you doing on the bar? I mean what kinds of activities?

MM: I was on the Legal Education Committee.

CH: ABA or Oregon Bar?

MM: Oregon Bar.

CH: Oregon Bar. Mm-hmm.

MM: And I was on some committees for the College of Trial Lawyers, and a lot of CLE—Continuing Legal Education—throughout my whole career as a lawyer. I always went to bar conventions and I had positive ideas about where the bar should go. I took a great interest, and still do, in ethics. But, oh, the change from the old town hall system in the bar to House of Delegates, it just kind of shifted all that.
Judicial Collegiality

CH: You mentioned the congeniality or collegiality that you have with the judges. How important is it to have that informal contact between judges in terms of understanding your role and your function in the court and what goes on, the issues of the day?

MM: I think it’s mandatory.

CH: Mm-hmm.

MM: I think we’re very quick to, in a kidding manner, bring somebody up short, you know. We’re pretty frank with one another and I think that’s good. We’re very close. It’s been incredibly collegial and so I can walk down the hall and Redden and I are on the same floor here and I can walk down the hall and talk to him about anything and he feels the same about coming down this way. And every week we usually go to lunch one noon and just kind of chat about everything, including politics.

CH: Do you ever circulate decisions?

MM: We used to, but it got too onerous because it got too many to read. You had enough to read yourself without reading everybody else’s work. But we did when I first got here, for the first year or two, why we passed around everything we wrote before it went out.

CH: Was that educational?

MM: Oh yes. Right. Yes.

CH: I bet it would be very interesting.

MM: It was. It was very interesting. I wish we could do it’s just not practical to do it anymore.

CH: What would you say the biggest problem facing the court today is?

MM: I think the same old problem. There are such varied areas of law, and so much to read, and so much to work into your thinking that it wears you down. It really does. I had no idea that I’d be reading a thousand pages a week or something like that. And I don’t know of any way to avoid that or get out of it. I just think that you have to realize that’s what it’s going to be and face it. But that’s going back to the help of clerks; without them it would be very difficult.

CH: Yes.

MM: They’ve got to sort through to a certain extent and say, you should look at this, this, this, and this. And you hope they haven’t missed that. But, you know, if you look at Social Security transcripts that are a foot deep and you’ve got fifty of them to do, how do you do it?

CH: You had said that you had a clerk that was here for fourteen years, and I’m
wondering, is that a new trend, to have clerks that are pretty much professional clerks?

MM: Yes. Originally—and still some judges do—some judges only kept them for a year and I don't see how they ever got them to the point that they were really productive. I always felt it took six months to kind of train them and if you kept them two years, why then the first six months you were training and the last six months they were thinking about where they were going, you had a year's good productivity out of them. So I tried to stagger them, overlap them but I learned in a hurry that when I really got a clerk that just was meant for the job like she was, why then I thought I'm not going to go through that when she wants to stay. And about that same time across the country, it got more and more to the career clerk concept.

CH: Mm. And why do you think, what caused that trend?

MM: Just so that the judges didn't have to go through so much training and revamping and starting out a new with somebody they didn't know really. But unfortunately—you know it's a huge step for a fresh-out-of-law-school person to have a couple of years experience right next to the bench. And then they go out into a firm and they know more about federal practice than the old partners in the firm know, and so it's really worth a lot. But there's also something about the really good clerks that I'm not sure they're meant for that rough and tumble area.

CH: How do you mean?

MM: Well, first of all, they're highly principled to the law so that doesn't necessarily make them good advocates.

CH: Really.

MM: They might be on the wrong side, you know. [laughs]

CH: What is the conflict between being highly principled towards the law and—

MM: Well, because if you are an advocate you can't have the exactly the same look at what the law ought to be from two advocates that are fighting over it and they're on one side or they're on the other side and they might not be on the side they wanted to be on, and so it happens in debating all the time in college. I wish I had that point of view instead of the one I got.

CH: [laughs] Right.

MM: Well, some people just can't handle that.

CH: Mm-hmm.

MM: And so, my clerks, I always taught them, well read those memorandums but
then you make your own independent research. We’re not just going to be convinced by this one or that one. We’re going to make sure that there isn’t a third position that we really should be on. And so they had to have their own research, every issue and then we’d sit down and we’d talk about the different things and I’d read the memorandums and I’d read their notes and then it would start to formulate. And, this is really where the issue is and this is really where the law is and then you can go ahead and make a decision.

CH: Why would a clerk want to stay around for so many years?

MM: Oh a lot of them don’t, but you know there are several in this courthouse that have been here longer than fourteen years and they’ll retire probably in that position. It’s just, it fits their personality better, I think. And there’s a certain personality. You can say they won’t go out and face the real world, but I don’t think that’s true. Some of them are bent to not have their performance based on billable hours, but on the quality of their work. And so it’s a personality difference. Where Kelly is now, she’s wonderful. She’s with the U.S. Attorney’s Office and doing very well and she’s in litigation and she’s in a new career and that’s wonderful. And so I think it was really, probably providential that I wasn’t doing enough to really keep that kind of a mind busy and so it was time for her to move on.

Judicial Pay

CH: Are the salaries in those fields sufficient enough to be able to attract the good talent?

MM: Yes, they are. They go up over a hundred thousand but they’re not, they’re kind of stuck there. They’ve hit the glass roof, not the glass roof, but the real roof. Because they hit the top of the wage scale that they can be in and then all they can look forward to is cost of living or something like that. So they’re kind of locked in.

CH: As far as that goes, what about judges? Are the salaries for judges sufficient enough to justify their maintaining the course?

MM: For me, absolutely. But if I had three kids in college and I could have been making three times that much down the street, that’s different. So it’s an age factor again. I think that if I lived in New York or San Francisco where the cost of living was sky high and you couldn’t afford to buy a house, not that you can buy one here, but I think in some measure the federal judiciary is underpaid but not as senior judge like myself. The state judges are grossly underpaid.

CH: In that case too you also do have state judges that do leave the court even chief justices who leave the court and go back to their practice.
MM:  Right.

CH:  And it's probably a good salary difference there when they leave.

MM:  Right.

CH:  And also it seems to be a trend towards judges getting involved in arbitration and mediation.

MM:  Yes. There's a whole book of them.

CH:  Yes.

MM:  It's really amazing how many are in that business. And a lot of them are kind of retired but they like to keep something going. Some of them, you know, like my old partner Eric Lindauer that's all he does is mediations and arbitrations and he's known internationally for that.

CH:  Wow.

MM:  So that's what his business is.

CH:  I would imagine that judges would be well suited for that, having had so much experience in the courtroom.

MM:  Some would and some aren't.

CH:  Ah—

[End of Tape Eight, Side One]

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**Awards & Honors**

MM:  Being able to bring people into an accord is a real gift and it's not universal to judges. Some judges are good settlement judges; others are kind of so-so.

CH:  What honors have you received over the years in your profession, or even outside of your profession?

MM:  Well in my younger days I was very active in civic works in Salem and so I had several accolades there, ending up with the First Citizen's Award in Salem in 1982.

CH:  What was that based on?

MM:  Well, the primary thing, I think, was the redevelopment program in downtown Salem that I took a major part in. For establishing Nordstrom's and the shopping center downtown, to try and keep the core from just going to seed and having things outside, surrounding the city. And it's really been quite successful and that was twenty-five years ago, no, thirty years ago. So there was a lot of that that I liked. I was involved with Scouting to some extent down there, and I was involved in my church in the later years, not that those were awards but those were my interests.

In the law, I suppose, the biggest honor was being elected to the College of Trial Lawyers. I was chairman of the State Bar Continuing Education Committee. I also felt that service on the National
Committee on Security and Facilities was an honor. I served on the Executive Board of the Ninth Circuit Conference.

Mark Hatfield Courthouse

CH: Didn’t we talk about a little bit about that? You had a lot to do with the security design for this courthouse.

MM: Yes. I was a liaison, if you will, between the Court, the General Services Agency, and the architects and engineers and the construction companies. I spent I don’t know how many hours. But almost everyday I had some time concerned about this building in its design and construction stages.

And it was a valuable storehouse of information when I went to the national committee. I think it was in ’94, and by then we had designed this place and we were starting the construction and so I’d had enough experience about that, that I could speak with some knowledge about design and facilities for courthouses. So they gave me a second term of that. I really liked that. I went to forty-some courthouses across this country, and it was not a boondoggle. It was really thinking out what are we doing right or wrong with these things. Some of them were pretty incidental. Some of them I’d been into when I was a trial lawyer, but I did learn an awful lot about courthouses.

This courthouse is unfortunately a dinosaur. You’ll never get another one. Already they’re pulling in the horns. They stopped courthouse construction for this biennium at least and the design guides are being pulled in, which is not all bad. We have a big conference room in there that’s in each chambers and it’s the library. We’ll you don’t use books like you used to. And you don’t use conference tables like you used to. And if you needed a conference table you’ve got one in the jury room, if not the court room itself, or the arbitration room down the hall.

As I say, the court space is going to be smaller in the future because they are conscious of the rent cost and that sort of thing, which they should be. You won’t see another Minneapolis. You won’t see another Seattle, or Portland, or Sacramento—courthouses like this—that were in the right time and were built for the right length of time. You can’t design a courthouse for ten years. It takes you ten years to design it and build it. By then if it’s a design for ten years it’s obsolete. This courthouse will last a hundred years. You know. We can expand from sixteen courtrooms to twenty-one. It moves the people around in the building but the floor space is there and the height of the ceilings are there and so it’s planned to grow and so if this court was twice as big as it is right now, this building could handle it.

CH: Really.

MM: And I think that’s foresight.

CH: Do you regret that the federal—well, I don’t know if it was actually a prison—that was going to be built across the street was not built?

MM: Yes, I think that was a mistake.
In the first place it makes no sense for the federal marshals to be housing prisoners in Multnomah County when they can’t hold their own prisoners. And to have a jail down in Sheridan, which is fine, but how do defense lawyers have access to their clients when they’re—you know that’s one of the slowest drives in Oregon to go through Newberg and Dundee and McMinnville. So that doesn’t make any sense and it was all there. Unfortunately, unfortunately that was the end of Senator Hatfield’s time, otherwise it would be there.

CH: Because didn’t it have the money for it?

MM: It had the money and GSA went elsewhere with it. They had their own reasons, but it should have been over there. Then all you had to do is tunnel.

CH: Mm-hmm.

MM: You’d never have anybody, you know, a van coming down the street. You’d have them all going—you could have even tunneled into the Justice Center and cooperated with the county. It had all pluses. There was a vacant parking lot, there wasn’t a building—it wasn’t like you were tearing down low-cost housing or something like that. It was there. That was a tragedy; really a tragedy.

CH: I couldn’t believe it when it happened. It was amazing to me.

MM: Yes. Well.

Role Models

CH: You mentioned Senator Hatfield, but I mean you’ve met so many wonderful people in your career and are there certain people that really stand out as being just extraordinary human beings?

MM: Yes, I’m sure I’ve mentioned them. Senator Hatfield, John Dellenback, ooh, such premier human beings. And Otto Skopil and Ed Leavy and all the judges you know. I just think they’re great, great people. The wonderful, wonderful people, Rich Stearns, Doug Coe and Marge, his sister, and LuAnn Yocky and [pause]—the list goes on and on. Kathy Williams, who we lost this last winter to cancer and they had an auction in her memory to raise funds for Mongolia. Her legacy goes on way past her death, you know. People like that.

You know I met a young lawyer today for the first time. A young, thirty-six year-old Black from Wisconsin. “How did you get out here?” You know? We went on a kind of a tour of Portland State University this morning and went around and saw different phases of the curriculum there and he was in a small group, about a dozen of us. But I just thought his principles are so strong. He’s so with it and so capable and so unabashed by the coming into a totally new environment and community and picking up his work as a lawyer. I expect to spend some time with him and I don’t know anything more that I could learn from talking to him for about a half an hour, but I just sensed something was really strong in him. So there are those of
great, political clout and I’ve left many out. So, I guess if I come back to Mark and John Dellenback, why those are pretty tough people to beat.

CH: Well I know that we’ve covered a lot of territory in this but there’s I’m sure a lot of other things that we haven’t talked about. Are there issues, other topics, things that you would like to discuss?

Marriage to Shari Long

MM: Yes, I would like to say that, you were asking about honors. The biggest honor of my life was the marriage to Shari. Our growth together, it will be fifty-two years the end of August, and like any marriage we’ve had [laughs] rough roads at times but we’re closer together now than ever. And she is so supportive and patient that she has to go to the top of the list of the human beings I know that I really admire. It’s tough to get along with me. Particularly thirty-five years ago, I was a different person. I was a pretty judgmental, harsh individual and I just had to get all of that knocked out of me and she was patient through the whole time.

CH: She wasn’t the one that was knocking it out of you? [laughs]

MM: No, she wouldn’t tolerate it but she just, with her quiet spirit she just eventually got my attention too. And we have a joint faith walk which is pretty difficult to be, as the scripture says, “unevenly yoked.” [laughing] I just thought that was—

CH: “Unevenly yoked”? 

MM: Yes. “Unevenly yoked,” and I just picture the oxen with the big yoke on one and a little goat or something, you know. Unevenly yoked. And so to walk the same and have the same discussions, to drive over like we did Friday and talk about spiritual matters on the way to Big Muddy and drive home Sunday talking about those same things and being on the same page, I think that’s a blessing. Whether that would be the page anybody else would be on or not, that’s not the point.

CH: Mm-hmm.

MM: When you can see a couple that is that tuned at this time, well that’s a blessing.

CH: And the “joint faith walk” that you’re referring to, is that a metaphoric phrase that you use of your walking your faith together?

MM: Yes. Yes. We both feel very strongly about our, I use this advisedly, Christian walk, because I think that is so misunderstood and so abused and I don’t identify with the right or the left of that at all. I’m not a fundamentalist, but I am very strong in my faith.

CH: Well you mentioned about John Dellenback. When you see John Dell-
enback’s faith as it’s manifested through World Vision, it’s hard for anybody to argue the benefits to humanity.

MM: Yes. Well, that’s why we’re involved with World Vision, is partly John. Well, and look at the principles of Mark Hatfield, how his faith has kept him from falling into the usual traps.

CH: There must be difficult times in life when your faith is in conflict with either social norms or other decisions that you have to make.

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Schism of Faith & Reason

MM: My biggest conflict is I just hate to see the tension between this fierce debate of faith versus reason. That’s a dichotomy that should not exist at all. There’s no reason you can’t be reasoned in your faith and there’s no reason that someone who’s deep into trying to figure out the essence of everything can’t have a faith element in their life. I would do anything I could to break down that division, which when somebody goes off and figures—I don’t think the scientists did this. I blame the philosophers not the scientists. But when they go off and think that everything has to have a scientific proof or it can’t be, that’s too bad. And when somebody thinks that the only way that you can look at this is totally spiritual without realizing that the world is round, well neither one of those courses take us anywhere. They take us to this division of faith versus reason and I think faith and reason are very good partners to walk together.

CH: Well are there others? Is there anything else that you would like to add?

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Importance of Family

MM: No, I think if I had any other advice, and maybe I said this all earlier—I think there’s a great strength in a family. And the more that family can be cherished and understood in kind of a classic sense, the better off the family is. I just think of the time when I realized the short, very small window that you have to do anything influential with your grandchildren. It’s got to be in the few years between when they really start to listen to you at all and understand you’re talking about things important and when they move out and go on their own and then you’re kind of something they see maybe once a year and love and appreciate but this is the time of influence.

And so when you can have discussions with them about all sorts of things, careers and sports and faith, and you name it, anything. Why it surprises me when a year later they’ll say, well I remember you talked to me about such and such. Then you realize that it did have some impact. They might have been quiet at the time, but they were listening, and so I think it’s very important for generations to not isolate themselves, but mix with not only your children, but your grandchildren. And children ought to be
mixing with their grandparents. And so that’s family, and it’s very, very important to this country I think.

We’re not all irrelevant. We’ve still got some sense to speak to issues, but if we’re looked upon as just irrelevant old people, why that’s the way we’ll come across.

CH: Family is being more broadly interpreted these days.

MM: Yes.

CH: And is that okay too?

MM: Yep. I think that anything that brings human beings together, I like to—you know there’s a group of young families out here around, gosh I don’t know, Lloyd Center somewhere. And there must be ten families and those parents and kids all get together. The kids look on all the other mothers and fathers as if they were aunts and uncles and you know, it’s the strongest cadre of young couples that I’ve been around in a long time. And they all know each other’s names. Everybody knows the names of all the other kids, so there’s a family there. And it’s just a larger family.

We were, last weekend, with a young girl, not young anymore but in her low forties that was a high school friend of our daughters. We hadn’t seen her in years, but we still remember her well and were thrilled to death to see her and she was thrilled to see us. So these things do carry on. They don’t just dissolve.

CH: Well, thank you, Judge Marsh, for your time.

MM: Oh, Malcolm is a better way to do it.

CH: Malcolm. Malcolm, thank you so much for your time on this. It’s a big chunk out of your schedule to sit down and to do this and just to give you fair warning it’s going to be even a bigger chunk when you have sit down and review the transcript. [laughs]

MM: And think, oh my gosh, did I say that?

CH: And here you had all these complaints about all the stuff you had to read. [laughs]

MM: You hit my vulnerable spots, well particularly I don’t want to come across—like on talking about the Disability Act, while I have criticisms of it, I don’t want to come across as if I’m a bigot on the point—but I think we have to face things like that.

CH: We will be back to you with the transcript in due time.

MM: All right.

CH: And, again, I’d like to thank you for this contribution.

MM: You’re welcome.

[End of Interview]
Endnotes


2. The first reference is to the series of suicide attacks by terrorists on the United States, September 11, 2001 when four planes were crashed, two into the two tallest towers of New York’s World Trade Center, and one into the U.S. Department of Defense Headquarters at the Pentagon in Washington DC. The fourth plane crashed in Somerset, Pennsylvania, following passenger resistance. The official death count was 2,986, including the hijackers. The second reference is to the December 26, 2004 Indian Ocean earthquake that caused the deadliest natural disaster in recorded history, a tsunami that killed between 170,000 – 275,000 people across South and Southeast Asia.

3. The three cases noted above are: *Blakely v. Washington*, 542 U.S. 296 (2004) was based on the case of Ralph Blakely, Jr. that ultimately overturned the federal sentencing guidelines, which granted a judge the power to increase sentences based on facts not confessed to nor found by a jury. In *United States v. Booker*, 125 S. Ct. 738 (2005) the court held the federal sentencing guidelines unconstitutional in the case of George Booker. Fen-Phen (short for a combination of fenfluramine and phentermine) were prescription diet suppressants that were eventually withdrawn from the market in 1997. Medical studies indicated that people using the two drugs in combination experienced increased risks of developing valvular heart disease that can lead to heart attacks and lung disease.


6. One of the guidelines in the magistrate system requires that defendants sign a consent form that indicates they have agreed to have a magistrate (versus an Article III judge) try their case. The explanation given by several magistrate judges assigned to distant regions of Oregon is that most defendants, and their lawyers, prefer a magistrate located in or near their community rather than have to incur the expense of traveling to Portland for their trial.
