

Diarmuid O'Scannlain

SR 11214, Oral History, by Michael O'Rourke

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O'SCANNLAIN: Diarmuid O'Scannlain

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Session 1

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MOR: I'm here with Judge Diarmuid O'Scannlain today, beginning his oral history.

Judge O'Scannlain, I wanted to start by asking you about your background. Both your parents came from Ireland?

OSCANNLAIN: Yes, I'm a first generation Irish American. [clearing throat] My father came to this country in the 1920s, originally. My mother came with him after they were married in Ireland in 1936. My father was born in Sligo, which is a county in the west of Ireland. My mother was born in Derry, in the city of Derry, which is also a county; Derry City, Derry County is in the north of Ireland and still part of the U.K. It's the Northern Ireland separate entity.

MOR: Your father was involved with the IRA [Irish Republican Army] from a very early period of his life.

OSCANNLAIN: He was. Dad was born in 1900, and remarkably his father was a

member of the Royal Irish Constabulary; that's the RIC, which was the British police force that was in control of Ireland up until "The Troubles" began and Ireland won its independence.

Dad became very much involved in the movement for independence. He was a very serious Gaelic speaker but didn't have much formal schooling, having grown up on the farm. In the process he got very actively involved with elements that were dedicated to Irish independence, and in due course was a member of the Irish Republican Army and rose to cadre, which involved another organization, but it was inside the IRA, called the IRB, the Irish Republican Brotherhood.

In that regard, he became involved with Éamon De Valera, who eventually became Prime Minister of a newly independent Republic of Ireland and president of the country before he died. But Dad, in his role with the Irish Republican Brotherhood, was assigned the task at a fairly young age of obtaining arms for the movement. He was sent to Manchester, England, where he was able to acquire arms through dealings with German agents. We're talking now about 1918, 1919, close to the hostilities of World War I.

It was a high-risk occupation to be caught inside Britain consorting with German agents, but that was his role, and he regrettably got caught in the act and was sent back to Mountjoy Prison in Dublin, from which he escaped. He and a cell mate were able to tunnel out, and went up to the north of Ireland to Derry City—at that time it was called Londonderry, of course—and in the process first met, as it turns out, my mother. So this would be somewhere around 1919, 1920, something like that.

My mother used to tell the story of the Black and Tans coming to the front door of their house on Westland Avenue of Derry City, and she would say with a very sincere face, "Oh, there's nobody here, there are no fugitives in this house," and of course they were upstairs in the attic, and she was feeding them every day, sending food up.

Eventually things cooled down enough for him to get back into circulation.

MOR: He met your mother in the context of her providing shelter for him?

OSCANNLAIN: Yes! Absolutely. Her father was the head of the IRA in Derry. He was a tobacconist; they owned a tobacco store, cigarettes and that sort of thing, newspapers, but was acclaimed after "The Troubles" were over for playing a very important role in that part of the country.

In 1921, the British government offered Ireland a treaty, which was somewhat controversial. The people lined up on both sides, either to accept it or not. De Valera and my dad were opponents of the treaty because the treaty offered freedom or independence under a free state concept for only twenty-six out of the thirty-two counties of Ireland. The British would keep the north. On the other side was Michael Collins, who was the emissary that went to Lloyd George and negotiated the treaty, and he thought it was the best that could be done, so he supported it.

The signing of the treaty precipitated a civil war, and my father and De Valera were on one side, and Michael Collins was on the other. If you ever saw the movie Michael Collins, there a scene in it in which there is a battle being fought at the Four Courts, and on the interior of the Four Courts were my father and De Valera, and on the outside shelling the place was Collins. Collins prevailed, and as a result my father was interned again, this time by Irish Free State forces under Collins, and sent to a place called the Curragh, which is in Kildare, just below Dublin, and so for his troubles he was imprisoned twice. After the amnesty in 1923, all of the political prisoners were released, but my father, being on the losing side of the civil war, felt that there was no future for him in Ireland, so somewhere between '23 and '24, '25, somewhere in that period, he left Ireland for Canada.

He was very skilled as a carpenter, so he had jobs in construction. Eventually he came into this country; we're not sure whether it was legal or not, and I think of that when I sit on immigration cases. But he came in through Detroit and eventually found his way to New York, where he was reasonably successful, between his skill in construction and eventually deciding to buy a business, which he was able to do before World War II.

But at the height of his economic success, which would probably be in the middle '30s, right after the Depression, but by about 1934, '35 somewhere in there, he was able to go back to Ireland and renew his acquaintanceship with Moira Hegarty, my mother. After that lengthy courtship they were married in a suburb of Belfast in 1936, and Dad brought Mom back to New York, where they settled, and I was born in 1937.

Dad had, by that time, acquired a travel business, which he was able to buy from one of the people he got to know, William O'Dwyer, who later became Mayor of New York City. So Bill O'Dwyer and my dad were good friends. The travel business was doing very, very well until about 1939, when things started to go awry in Europe, and of course by 1941 it was all over. Dad was conscripted into service as a carpenter, in which he spent most of World War II. He was probably in his forties at that point. He spent most of World War II building Quonset huts for the United States Navy in a town called Quonset in Rhode Island.

MOR: You mentioned the phrase "lengthy courtship." Are you counting the time from 1920, then, through '32?

OSCANNLAIN: Oh, yes. We've assumed that somewhere along the lines of fourteen or fifteen years, but that would have been typical of Ireland in those days. I mean people had very, very long courtships.

MOR: So there was already a romantic spark in the air, maybe, at the time that she provided shelter for him?

OSCANNLAIN: I'm sure that the thought occurred to one or the other at some point.

MOR: Then you grew up speaking Gaelic for the first four or five years?

OSCANNLAIN: I mentioned earlier that Dad was a very serious Gaelic speaker, and he actually was eligible to wear what's called the *fainné*. The *fainné* is just a little round gold circle which is worn on the lapel, and that certifies that one is an accomplished Gaelic speaker, and Dad was very proud of that. In fact, that was one of the things that I'm sure enhanced the romance with my mother, because my mother was also a Gaelic speaker.

She was a schoolteacher. She went to Queens University—at that time it was called Queens College—in Belfast and got a teaching certificate. It would be something short of a bachelor's degree today. She was a schoolteacher in a town outside of Belfast, but she was a serious Gaelic student, and they decided as a convention that they would only speak Gaelic inside the house, so there they are living in New York City speaking Gaelic to each other. I come along, and that was the language I was brought up on until about the age of, what, four or five I suppose, when I started to mix with other children and had to do something about communicating with them. So that's how I got to speak Gaelic. I retained quite a lot of it through grade school, but after a while Mom and Dad just didn't do that so much anymore, and there was less of an environment in which you'd have a reason to keep it up.

I know my prayers in Gaelic. The sign of the cross is *In ainm an Athar, agus an Mhic, agus an Spioraid Naoimh*, and I knew the Hail Mary and the Our Father and that sort of thing, and I still know those today, although I can't get too far beyond *Conas ata tu?* which means "How are you?" to which the answer would be, *Taim go maith, go raibh maith agat, conas ata tu hain?*

If you press me beyond that, I think I'll turn dumb, [MOR chuckles] but it's a heritage, which I still treasure.

MOR: At the time that your parents were speaking just Gaelic in the house, were they both fluent in English?

OSCANNLAIN: Certainly they were both fluent in English, but they were quite fluent in Gaelic, and they just decided they wanted to keep that up. That was a tie to the homeland.

MOR: A political statement, maybe, too?

OSCANNLAIN: Less so, by that time the amnesty had soothed things along in Ireland. Everyone recognized that they'd never get the six counties back, or at least not in the near term, and I think it was 1937, Ireland was emancipated from free state status and actually became a republic.

So I'm sure there was that sense of loyalty and connection that they wanted to keep. Actually, Mom and Dad were both very much involved in an organization in New York called the Irish Arts and Literary Society. In fact, my dad became secretary early on, and I can remember he had a little printing press, which he used in connection with his business, and we were able to send out the meeting notices. I remember having to compose them and having to affix the labels. We had the labels of all the members, and we'd paste the labels on, and then I'd usually be assigned the job of putting them in the mailbox and that sort of thing.

That's how I met some great Irish legends. Padraic Colum, the great poet, was the president of the Irish Arts and Literary Society and was a frequent speaker. I met other people who were associated with the Abbey Theatre in Dublin who would be coming to

New York at one time or another, and other Irish figures who were in the cultural side of things. Not really political; I would say these would be people who were artists. James Reynolds, maybe, a great artist, and others of that nature.

MOR: Now, it sounds like both of your parents were intellectually inclined, then?

OSCANNLAIN: I would say so, yes, and that was remarkable for my dad. My dad was a very, very articulate person, but I don't think he ever got beyond the sixth or seventh grade equivalent in terms of formal training. I think between farm chores and his increasing involvement in the movement, why, I think he had other callings.

MOR: I guess in Britain, anyway, and probably Ireland, there's a tradition of working class people, even if they didn't have higher education, educating themselves.

OSCANNLAIN: Oh, that would be my dad, absolutely. He was very well read, and of course mastering a language that is as complicated and difficult as Gaelic is another element of that.

MOR: What was the neighborhood in New York where you lived?

OSCANNLAIN: I was born in St. Vincent Hospital, which is in Greenwich Village in Manhattan—still there, I've seen it recently, although about to close—and at that time Mom and Dad were living up on Fort Washington Avenue, way up on the Upper West Side. I think it must have been 1939, 1940, they were able to buy a house in Forest Hills, in Queens a very lovely piece of property, about 100' by 100'. A five bedroom house with very lovely appointments, and that's where my memories of growing up probably start.

My first memory, and this was Forest Hills, was the Battle of the Bulge during World War II. Mom took a great interest in an American general called Anthony McAuliffe. Tony McAuliffe was the commander of an American outfit that was surrounded totally by the Germans in Bastogne, a little area in Belgium, during the Battle of the Bulge and he's the guy that, when the Germans demanded his surrender, sent a one word message back to the emissary from the Germans saying, "Nuts!" That so appealed to my mother, she sat down right then and there and wrote a letter to General McAuliffe congratulating him and thanking him for what he did. Of course they survived; they were able to beat their way out of there, with the help of [General George S.] Patton. As a result about—within two years, anyway, it wasn't return mail, I can tell you—she got the loveliest personal letter from General McAuliffe. I'm not sure where it is. I hope maybe my brother has it, but it was a real treasure for her. But that would have put my first memory of Forest Hills somewhere in '44, or whenever Bastogne was. It could have been '45, somewhere in there, which would have made me seven or eight years old.

But I also remember very clearly April 12th, I think it was, 1945, the day President Roosevelt died. I was playing stickball out in the street with some other kids, and my mother came to the front door of our house in Forest Hills and made the announcement.

MOR: I don't actually know New York, but Forest Hills, I assume, is not an Irish immigrant neighborhood?

OSCANNLAIN: Oh, no. In fact, I think today it's probably about ninety-eight percent Jewish, but it was an upscale neighborhood, upscale meaning middle class, nothing beyond that, but upscale compared to an apartment on Fort Washington Avenue. Today it is almost entirely block apartments, ten, twenty story apartment buildings. Lefrak City is not far from that area.

MOR: Let's just take your father first, in terms of his personality—I already have some idea now—he was an intellectual person, but what else would you say about him as a person?

OSCANNLAIN: I'll answer that in a second, but back to the Gaelic point. When I was about four, which would be, what, '41, '42, and I don't personally remember this, but apparently it was written up in the New York Times. I went on an adventure in which I left the house—it was 110-39 71st Road in Forest Hills—and the back yard, and wandered down towards Queens Boulevard. Within three blocks of the house there is a station of the subway, I think it's the 8th Avenue subway, the E and F trains—the F was a 6th Avenue train, the E was an 8th Avenue train. For whatever reason, I wandered down into the subway and somehow got onto the track platform, watching these trains coming back and forth, and eventually someone figured out that there was something wrong and connected me with a policeman, who took me in tow. Not seeing any parents around he took me to the nearest police station, and by that time my father and mother were panicked. They didn't know what possibly happened, so they called the police and said, "By any chance is there a four-year-old boy around?" And they finally got to the right part of the police.

They said; "There is a young kid here, but he's speaking some language we don't understand." They had already called in interpreters, and they had a Polish interpreter, German, Yiddish, and nobody could understand what I was talking about.

Finally my father and mother, or maybe one or the other, collected me at the police station and disclosed to Officer Flanagan, the Irish cop that picked me up, that I was actually speaking Gaelic. That story got out, and as I say, there was a squib in the *New York Times* about it.

Okay, now, you had asked about my dad? I just wanted to be sure you had that little vignette.

MOR: No, I'm glad you told that story.

OSCANNLAIN: Oh, my heavens. Dad was a visionary and an idealist, who probably was more of a big picture guy. He had an enormous faith in the human ability to achieve anything that anyone set out to do. He felt that his calling was to excel in the travel business.

After World War II, for a little while, he was an insurance agent, but that was a transitory thing. By 1948 or so he was able to reestablish the travel agency and put his whole mind and effort into it. To a certain degree it was successful, but it's one of those kinds of businesses, which is very labor intensive. You spend a lot of time making reservations, writing out tickets, for a relatively tiny commission, and I think it took many years for my dad to figure that out. But he had great faith that one's highest and best use is to be an entrepreneur and to work for yourself or have people work for you, rather than you work for somebody else.

He had a very strong—as did my mother—commitment to education. I was home schooled in effect for a while because of that, but he made sure that we were sent to very good schools, and I'll talk about that some more later.

He also had a great love of Ireland, of Irish history, Irish music. If we were driving over to see my uncle, we would usually spend the drive—let's say it was about a half hour drive or less from Forest Hills over to Bayside—we would sing Irish songs in the car, The Minstrel Boy, the Irish national anthem [singing] “A nation once again,” that sort of thing, and he enjoyed it. It brought out the passion in him and it was very inspiring.

MOR: Sounds like he might have been a fairly social person, then, too?

OSCANNLAIN: Oh, gosh, he was very social, in the sense that he was very affable, loved to meet people, loved to talk on any subject. Just very outgoing.

MOR: And what would you say about your mother in terms of her personality?

OSCANNLAIN: My mother, first and foremost, was a very hardcore Irish Catholic.

MOR: And your dad not so much?

OSCANNLAIN: No, Dad was a practicing Catholic, but Mom was the one that really had the—what shall I say—the drive and the fear of God, to the extent that I'm sure I disappointed her greatly by not becoming a priest. In Mom's worldview, the most respectable people in the entire world were priests, bishops, cardinals, and the Pope. She never knew that I was later to be decorated by the Pope [Benedict XVI], and I can talk about that later, too, but she was very, very dedicated to religion, I would say, as her driving force.

But that was just intellectually. She also was very committed to the arts, especially traditional Irish music. I remember this only because of the home movies of it, but she was the pianist at the Irish pavilion in the New York's World Fair of 1939, and I've seen footage where she is playing at various events. I don't know how long the fair lasted, but from time to time there would be specific events, maybe some Irish leaders coming over, or Irish artists of one kind or another, and she was very much involved in that. She may have been in charge of it, for all I know.

One thing that she did take on was to do a retrospective and a testimonial concert in memory of an Irish composer by the name of Carl Hardebeck. He was Irish, although it was a German name. She was able to put together a concert at Town Hall in Manhattan with Irish musicians, tenors, pianists, violinists, and showcase all of the wonderful work that

Hardebeck was able to do to preserve—I won't call it ancient Irish music, but at least traditional Irish music. So she was very much culturally inclined, and that's not surprising from her background as a schoolteacher.

MOR: And so I assume that you and your parents attended church on a regular basis?

OSCANNLAIN: Oh, yes, absolutely. It was certainly a regular Sunday event.

MOR: Given your dad's background, I assume that he would be interested in politics as well?

OSCANNLAIN: In the general sense. He was never interested in politics in the sense that he might volunteer to work for a candidate or get involved in the local party. He was always a registered Democrat. He voted for Roosevelt in '36 and in '40, but then he voted for Dewey in '44—was it Dewey in '44? He did not vote for Roosevelt in '44.

MOR: Dewey, I think was, in '48. [Thomas Dewey was a candidate in 1944 and 1948.]

OSCANNLAIN: I can't remember who the Republican nominee was in '44, but anyway, Dad told me that he only voted for Roosevelt twice.

MOR: So he didn't vote for him in '32, then, either?

OSCANNLAIN: I don't know if he was citizen in '32. I don't know what year he became a citizen. He was a citizen by the time he married Mom in 1936, so it's conceivable he might have been a citizen in '32. I doubt it—I should say I just don't know. But in any event, he made a point of telling me that he thought it was very important to maintain his registration or his affiliation, I suppose, with the Democratic party, although probably beginning in '44,

he started to vote Republican, and as far as I know he never voted for a Democrat after that.

MOR: And do you know why his allegiance shifted at that time?

OSCANNLAIN: As I mentioned earlier, he was an entrepreneur, and I think he developed a notion that the intellectual base of the Democratic Party was much more inclined toward government protections, more government oriented rather than individually oriented, more anti-business than pro-business, all of those kinds of things. You would probably say politically speaking without regard to party, he would be conservative in his American politics, but he was never active politically in the sense that he was into political activities.

MOR: And your mother, was she tuned into politics?

OSCANNLAIN: Yes, but neither one was active politically. Mom could be counted upon being very conservative in outlook, but I'm not even sure that she voted that much, to tell you the truth.

MOR: Now, her daily routine, was she a homemaker primarily, or what was she up to in those years?

OSCANNLAIN: I'm sure she was a homemaker through the war. When Dad came back from Rhode Island she would still be a homemaker, but there was a time at which Dad was setting up the travel agency again, and somewhere in that time period she came into the travel business to help my dad. So my most consistent recollection is that Mom was really working in the travel business full time from 1950 on. I don't know exactly, but that was her major activity until she retired and went back to Ireland in 1975, '78, something like that.

MOR: And you mentioned a brother. I don't know for sure how many siblings you had.

OSCANNLAIN: I had three brothers. I also had two siblings who died shortly after birth, or in birth. Mom had an Rh negative factor, which in the late '30s and early '40s was a death knell as far as a child was concerned because they had no way of doing any a transfusion in those days. Now it's not an issue anymore, but in those days it was, and so she lost two children at birth.

I'm the oldest of four. My brother Fergus was born in 1939. Colm, who is now deceased, was born I think in '41 or so, and my youngest brother Conn I think was born on September 5, 1945.

MOR: What was your life like growing up in New York as a young boy? What things did you do, I mean besides going to school, which we'll talk about in a minute.

OSCANNLAIN: I mentioned that I was, in effect, home schooled for a couple of years. We had a neighbor, Mrs. Murray was her name, and she lived across the street, up a couple of houses, and she took in students. As a result of that I was able to do in four years—I studied with her for four years, and I was able to transfer into the sixth grade, so I got two years ahead of myself, which means that I graduated from grade school at the age of twelve, and then high school sixteen, college twenty.

I transferred in the sixth grade into an Irish Christian Brothers school called All Hallows in the Bronx, and I would spend a considerable part of the time commuting by train. It was about a forty-five-minute ride with a change of trains to get up to All Hallows grade school, which was very near Yankee Stadium, and I did that for two and a half years. Then I went to St. John's Prep in Brooklyn, and I'm sure I got at least a partial scholarship, if not a full scholarship, there.

Somewhere in that process I got involved in debating. It was at St. John's Prep; it wouldn't have been at All Hallows. I doubt there was a debating team in the seventh and eighth grades in grade school. By the time I went to St. John's Prep I was very much involved in speech and debate, and at the Prep got involved in student government and the yearbook. I was very extracurricular at St. John's. I think I was on the track team for a little while, but that wasn't a very major part of my life. I didn't regard myself as an athlete, but I did run track for a while.

MOR: It sounds like you were a good student, and you enjoyed school?

OSCANNLAIN: Yes. I was able to win the full ride scholarship to St. John's University because, I think, I finished first in my class. I was the valedictorian or the salutatorian, one or the other. I was salutatorian at All Hallows. I still have the medal, the second place medal for All Hallows grade school. I was first in my class at St. John's Prep, which meant that I got the scholarship to the university, which was extremely important. I hinted earlier that my dad was very dedicated to a business, which did not have a particularly great rate of return, so it was important that we have some assistance.

MOR: I assume most of your relatives were still over in Ireland?

OSCANNLAIN: Yes. Let me see if I can remember them. Uncle Bill, William Scanlon—Dad was born John Leo Scanlon, S-C-A-N-L-O-N, which was his father and mother's name. Somewhere in his Irish Republican activities, he changed his name to the Gaelic spelling, which is what you see today in me, O, without the apostrophe, but with a space, S-C-A-N-N-L-A-I-N. I was literally born Diarmuid Scanlon, and I have, somewhere in our safe, a copy of a change of name from Scanlon to O'Scannlain. That would have 1938, 1939, something like that.

Now, I was talking about my uncles and aunts. All right. On my father's side, Bill Scanlon came to this country in the '30s, also from Sligo, of course. He joined Metropolitan Life, and as far as I know retired from Metropolitan Life as an auditor or an accountant, and he spent his entire career with Met Life.

MOR: So there was an uncle in New York, then?

OSCANNLAIN: Yes, he was in Bayside, and we would trade visits. They would come to our house, we would go to their house; that was a very regular thing. I had three cousins: John Fintan Scanlon, we would call him Fintan, but he later on went back to John; Maureen would be next in line, and then Kevin would be my youngest cousin in that group. I have since seen Maureen, and I'm aware of where my cousin John Fintan is. He's retired now. He joined IBM and stayed with IBM his whole career, and he's living in Washington, DC. I reconnected much later with Kevin, who retired from the New York City Fire Department as a Battalion Commander and a hero in the 9/11 attack.

In Ireland there was Uncle Thomas, known as Toddy, and he stayed on the farm. He had some developmental issues. He had a very, very serious stutter, and I think it would be fair to say that he was a little—one has to be careful how to put this—but there could have been some mental constraints that he had to put up with.

Then I also had an Aunt Josephine, Babs was her name, who was a very, very powerful lady, very tall—about six foot two at one point—for a woman, and she and my dad were constantly in a state of tension.

MOR: And she was then also living in the New York area?

OSCANNLAIN: No, she would make visits to New York, but she was in Ireland. She worked for the Irish Land Commission, and it was a sore point when she was persuaded by my dad to quit that job, which carried a pension, which she then became disqualified for, to come work for the travel agency in Dublin. Dad had an office in Dublin as well as New York City, and there's a long story about—Dad was well enough off at one stage that he was able to buy not only a house in New York, but a house in Dublin, Ireland, as well. So he owned a house in Dublin and let his sister, Babs, stay there for so long as his mother was still alive, my grandmother, and then at some point Babs kept living there, and then that got to be an issue.

MOR: Did your dad travel to Ireland with some frequency?

OSCANNLAIN: Dad traveled a great deal. A great deal.

MOR: And did you accompany him on any of these trips as a kid?

OSCANNLAIN: The first trip I went on with him was in 1948. We went to Ireland, he took the whole family, my three brothers and me, and we spent the summer of 1948 on the farm in Sligo. We saved the hay and turned the turf and did everything you could imagine that a normal farm would get you into.

MOR: Did your parents and yourself travel outside of New York apart from going to Ireland, or were you mostly in the New York area?

OSCANNLAIN: I think we were mostly in the New York area. I don't think I started to travel until I was in college. I do remember as a debater we went to a debate tournament at Princeton University, at the Whig-Clisophic Society debating tournament, but that's about as much as I recall. I don't think I did much traveling until I got to college, and then I was very active in travel. I was involved in some organizations that involved travel.

MOR: We've talked about your parents. I might just ask you briefly what your relationship was like with your brothers when you were growing up. Did you spend a lot of time with them?

OSCANNLAIN: It was not without its complications. Mom and Dad, as I told you, were very much involved in the business, and so one of my extra chores was to be the senior officer present at home, and I had to—

MOR: I can see where complications might arise.

OSCANNLAIN: —I had to be in charge of my younger brothers and even had to deal with discipline when Mom and Dad weren't there and all kinds of things, and it complicated relationships. Now, that's all sorted out today, but I'm sure that my younger brothers did not regard me well during that period where I was spending a lot of time at home and Mom and Dad were working downtown, when I was in charge, I don't think that was a happy time for any of us.

MOR: Up through the high school period, were there any other people besides the family members we've already talked about that were close to you or were an influence on you in those years? Teachers or maybe friends or people outside of your family that you remember?

OSCANNLAIN: Oh, sure. There were teachers at St. John's Prep. Walter Mullen, I'll never forget, was a debate coach. He was an English teacher. He encouraged me very strongly to develop those skills. I remember the names of some of the Irish Christian Brothers, but I was only there for two and a half years, and that was the ten- to twelve-year-old period, so that wasn't so formative, but there were people at St. John's Prep. Father

Dunne was a positive influence. Father Cotter was the headmaster, stern at one level, but also very supportive, very encouraging.

I made some friends there that I held onto for a long time, but I suppose it really wasn't until I was at St. John's University when I began to blossom, so to speak. I was very much involved in student activities. I was number two in Skull & Circle, which was the honorary society. I got very much involved in an organization called the National Federation of Catholic College Students (NFCCS), which encompassed all of the Catholic colleges in the country, and there were several hundred at the peak. Then a lot of them started to decline, but certainly in the '50s there was a very strong representation, and I eventually became the national president, which involved a lot of travel.

I remember flying from New York, and I still lived at home, but I did a trip as national president to the University of San Francisco, Dominican College up in San Rafael, several other Catholic schools in California, which for me was the biggest solo enterprise I'd ever been involved in. That would have been between 1955 and 1957.

MOR: Was that your first trip out west, then?

OSCANNLAIN: Probably would have been, yes, although I was also involved in the National Student Association and went to meetings. I know I went to a meeting in Ames, Iowa, probably during that same period. I was a Big Man on Campus (BMOC) at St. John's when I was there, very much involved in that sort of thing.

MOR: You mentioned that you got a scholarship to St. John's. Was that the primary reason for choosing to go there?

OSCANNLAIN: My dad wanted me to go to Columbia, and I was happy to go to Columbia. In fact, I may have been admitted there, I don't know exactly that detail, but what

was significant was when I asked the headmaster at St. John's Prep to send my transcript to Columbia, the request was rejected. Father Dunne particularly said that the policy of the school is not to send transcripts to non-Catholic colleges. It was just flat-out that clear!

I also applied to and was admitted to the College of the Holy Cross in Worcester, Massachusetts, but that would have involved having to live on campus, and they only gave me a half scholarship, which was not enough. [Five of Judge O'Scannlain's eight children later graduated from Holy Cross.]

But it really rankled my father in particular; my mother wasn't that concerned. She thought that was a good enough reason for her, but Dad wasn't too pleased, and I think I took it in stride, actually. I had a great education at St. John's, I'm not complaining.

MOR: He wasn't too pleased about—

OSCANNLAIN: About the school's refusing to send the transcript to Columbia.

MOR: That does sound rather strange in this day and age.

OSCANNLAIN: Yes, it wouldn't happen today, but you know, that was 1952-'53.

MOR: When you entered St. John's, did you have any idea at that point what you wanted to do with your life?

OSCANNLAIN: No, not at the beginning, but I think there were some influences there that inclined me toward law school.

Could we take a break for a minute?

[Tape stops]

MOR: So you were saying that you didn't have any particular career ideas before arriving at St. John's, but that you started thinking about law during that time?

OSCANNLAIN: For some reason, I got involved in the yearbook at St. John's, and there was a former yearbook editor, and he wasn't the editor-in-chief, but he was one of the editors, who went from St. John's to Harvard Law School. That really piqued my interest and my curiosity, and I got to know about him. His name was Andy Carlin, and there was another one by the name of Tom Kaiser, who went to law school—he didn't go to Harvard, but he went to law school. Tom and I overlapped for a while, he was one or two years ahead of me. Carlin was I think three years ahead of me; I think I only met him the first year.

But in any event, that, plus if you were active in debate and speech and that sort of thing, one of the options is a potential legal career or law school, and somewhere in that whole milieu I just got the idea that not only did I want to go to law school, but I also wanted to go to Harvard Law School.

I should also say that totally unrelated to St. John's, this is a side bar, but a very important side bar in my life, I did get very much involved in political activities, unlike my dad, who had political interest which he did nothing about. I got involved in the 1956 Eisenhower campaign, and somewhere along the line I made the acquaintanceship of Jack Casey, John L. Casey, Jr., who was the national chairman of Youth for Eisenhower. He got me involved in that structure somehow, and I ended up being a lesser cog in that youth machine and eventually I became a member of the New York Young Republicans, got to Young Republican National Federation meetings. Then I met someone who was very important in my life, William A. Rusher, who became the publisher of *National Review* magazine.

As I was actively involved in things at St. John's, I was just getting involved in things Republican political, so that that was going on at the same time. I don't know that there was anything by way of a Republican club at St. John's that I would have been involved in. Whatever political activities I was doing would be off campus.

MOR: You mentioned your involvement in the Eisenhower's '56 campaign.

OSCANNLAIN: Yes. Reelection campaign.

MOR: At that early point was that more of a commitment to Eisenhower himself or was it because you were already firmly in the Republican camp at that point?

OSCANNLAIN: Oh, I would say I was a Republican, yes. I would consider myself an active Republican at that point. He was the standard bearer for the presidency, so sure.

MOR: So your interest in politics maybe even preceded that a little bit?

OSCANNLAIN: It probably did, but I don't think it manifested itself until about that time. I can't think of anything between 1949, when I graduated from All Hallows, and 1953, when I graduated from St. John's Prep in Brooklyn, that got me involved in purely political things. The political activities didn't start until during St. John's University, which would have been '53 to '57.

MOR: Let me ask you one more thing about St. John's. You obviously started gravitating towards law and got your sights fixed on Harvard Law.

OSCANNLAIN: Yes, that's true.

MOR: Were there any other subject areas that you particularly excelled at there? What were your favorite subjects?

OSCANNLAIN: Oh, I did pretty well.

MOR: In everything, across the board?

OSCANNLAIN: I think so. I don't know what my exact average was, but I was certainly way up there. The Skull and Circle Honor Society is the body that encapsulates the leaders of school activities and the leaders in academics, and it's a mix of the two, and I was elected Skull No. 2, and I think there were about fifteen skulls.

Skull No. 1 is someone I've stayed in touch with, John Paul Spuches who was probably my best and closest friend at St. John's College, and he went to law school immediately. He went to Columbia Law School. He and I graduated together from St. John's, but he went directly to law school, so I'm sure that had some influence on me, as well. He has since gone on to become one of the major lawyers for Japanese business, representing Mitsubishi and others, and he became a partner in the firm; it used to be Dewey Ballentine, now it's Dewey something else, but it's a big Wall Street law firm.

MOR: Any specific stories from the campaign trail during that '56 campaign when you were involved as a Young Republican?

OSCANNLAIN: Golly, I don't think I can contribute much there. I should probably dig out some old mementos and try to put some of that stuff together, which I haven't done in dozens of years.

Certainly during that time I got to meet a lot of people who were active, some Congressmen. I can fill you in on some things closer to '59 and '60 that were very active.

MOR: And by that time you were at Harvard?

OSCANNLAIN: No, I graduated from St. John's in June of '57.

MOR: Oh, and then this is about the time you got involved in the Army Reserve?

OSCANNLAIN: Maybe I should back up a little bit.

MOR: Okay.

OSCANNLAIN: I went to St. John's University in the fall of '53, and the most significant thing that happened next, apart from just normal school stuff and what I told you, would be 27 March 1955. At the invitation of a classmate of mine—actually he was a year ahead of me—John DeCarlo, I enlisted in the New York Army National Guard as a private E-1. John was a couple years older than I was, but we were in school together. He had already gone to OCS (Officer Candidate School), so he was a lieutenant, but we were very good friends, and he persuaded me that I should do this.

At that time there were a variety of different categories in the draft. Korea had just about wound down, but I don't know that the draft was totally gone, but there certainly was an idea that you should do something. I think I had a deferment when I was in college. But in any event, it just seemed to be a good idea for me to elect the option of eight years of reserve with no active duty. That was one of the options. You could do six months of active duty with something like four or five years in the reserve, or you could do two years of active duty and no reserve.

The option that I signed up for was no active duty, eight years in the reserve, which meant that I would go to National Guard drills four nights a month, every Wednesday night

or whatever it was, plus two weeks in the summer. I did that for '56, '57, I think '58, and then somewhere along the line, maybe it was '58, I signed up for Officer Candidate School. I went to the what was called the Empire State Military Academy up at Peekskill, New York, where I did two summers, which qualified me to become an infantry second lieutenant.

There were a lot of things going on in parallel here but in any event, I was never more than ten weeks on active duty with the military, even though I retired as a major twenty-three years after enlisting. I was four years as an enlisted person, and then nineteen years as an officer, second lieutenant, first, captain, and then major, and retired as a major.

MOR: And that was in '78 or—

OSCANNLAIN: In '78, exactly.

MOR: And so part of this military service occurred between St. John's and—

OSCANNLAIN: Two years during St. John's. I was in the Seventh Regiment, 107th Infantry, better known as the Seventh Regiment. It was a very historic building. The Seventh Regiment Armory was on Park Avenue and 66th Street, and the interior was—actually it brings back some memories of the Pioneer Courthouse—it was all gorgeous interior woodwork, very formal, very elegant.

I was in A Company. The company rooms were—we all had our lockers, but they were wooden lockers, and you couldn't believe it, just hand-carved walnut—very fancy. I never regretted that, except that there were times when I'd have to miss a drill and then make it up because once I got started in student activities, I traveled a lot. For example, when I went to California that time, I would have probably missed one or two drills, and I'd have to come back and do back-to-back drills with another unit to make up. [I met a life-

long friend in that unit, Robert White, the famous concert tenor, with whom I have stayed in touch.]

MOR: What year was it that you entered Harvard Law, then?

OSCANNLAIN: I applied to Harvard Law School in the fall of 1959. By that time I was encouraged to do so.

First of all—I need to fill in a gap for you. After I graduated from St. John's, I felt I had a moral obligation to work for my dad. My dad had this travel agency going all along, and it was a labor of love, but not an enormous success. He would spend himself just fifteen hours a day grinding away doing things, designing tours and then not really selling them out, and you know, things like that. But in any event, I gave Dad basically two years in the travel business, working for him. This would have been from June of '57 through the fall of '59; I was based in New York working for Dad.

But during that time I really got involved in Republican activities. I told you earlier I was in the New York Republican Club, which was a fancy Republican club on the East Side of Manhattan. John Lindsay was part of all of that. In the Young Republicans I began to rise, so to speak, I became a member of the National Executive Committee of the Young Republican National Federation. In fact, I was vice president of the YR's for international affairs, and as a result got involved in something called the Second Atlantic Conference of Young Political Leaders, which was co-sponsored with the Young Democrats. We were funded by the American Council on NATO, which I later found out was a CIA front, but that was okay; that wouldn't have bothered me in the slightest.

As part of that, my opposite number with the Young Democrats and I together ran this conference for the better part of a year. I was there full time, and I moved to

Washington, DC. We rented a building at 1707 N Street Northwest in Washington, which had living quarters upstairs and then offices below, and we put together this conference from those quarters. The conference itself took place in June or July of 1960, and in the events leading up to that I worked with the White House. I worked closely with Doug Price, who was on the White House staff. I met President Eisenhower. I met Vice President Nixon. Actually I spent a significant amount of time with Vice President Nixon and his Chief of Staff, who's passed away now, his name was Charlie McWhorter, and that really was a time when I branched out into a lot of Republican things. I got to be a very close friend of Bill Rusher, and that friendship exists even to the current day.

So that was a very, very active time for me. I was running this conference, which was made up of 140 political leaders, seventy from the NATO countries. There might have been one or two from Norway, maybe a half a dozen from England, a half a dozen or more from France, seventy from the U.S., including several Senators, Frank Church was one of them, a whole bunch of Congressmen, and together we put on this conference at which President Eisenhower officiated.

The whole idea was to bring political leaders from both sides of the Atlantic into closer contact so they could get to understand each other better in terms of long-range improved understanding for the country. In the fall of that season, September '59 to June-July of '60, I applied to Harvard Law School. I'm sure with the help of Roger Allen Moore, who was the General Counsel to the Republican National Committee, whom I got to know very well, himself a Harvard Law School graduate, and I know he went to bat for me at Harvard.

I also took the LSAT's and got a decent score, so I was admitted and wasn't sure about the economics of it, but made a pitch to the Financial Aid people, and God bless them, a wonderful lady, Irish American spinster by the name of Julia Casey, I think her name was, who gave me the best grant Harvard could give plus loan, and it came together.

Remarkably, one of the things that got me through Harvard Law School was my military commitment because right after I got to Harvard the Cuban crisis—the Berlin crisis or the Cuban crisis, one or the other—it was the Berlin crisis, I think, and followed later by the Cuban crisis. But the impact on me was I had to transfer to a National Guard unit near Cambridge, Massachusetts, and as a result the Pentagon put us on quadruple drills, whatever we were doing before, we had to do it four times. So that was a very significant source of income, which was used to pay living expenses and whatever I was short on for books and tuition. My assignment was Assault Gun Platoon Leader.

MOR: That time, just prior to law school in DC, must have been a pretty heady time for you.

OSCANNLAIN: It was. I just so thoroughly enjoyed that. I loved Washington. I know it had an effect on me. I got to see government up close. I went to the White House several times during that time to work on arrangements. I was working with people in the State Department, the American Council on NATO. For me—don't forget, I was still two years ahead of myself, I was just twenty-one and twenty-two.

MOR: I imagine you got some sense of international politics, too?

OSCANNLAIN: Oh, yes. Oh, absolutely. Absolutely.

MOR: Okay. You're now at Harvard Law.

OSCANNLAIN: Right.

MOR: How did you find law school?

OSCANNLAIN: Oh, I loved it.

MOR: From the first day, then?

OSCANNLAIN: From the first day. It was tough, very demanding. I survived. I was not at the top of my class, but I loved the challenge, loved the courses, really enjoyed getting to know my fellow students very well.

I had some very interesting classmates. Janet Reno, former Attorney General, was a classmate. Pierre S. DuPont IV, otherwise known as Pete, from the DuPont family, who became a Congressman and then Governor of Delaware and then toyed with running for President. He was a classmate whom I knew pretty well. A lot of friends of mine to this day are classmates from Harvard.

MOR: Did you focus at all on any aspect of the law at Harvard?

OSCANNLAIN: I was drawn toward taxation, believe it or not. I got a job as a research assistant, which involved getting me back to Harvard maybe two to three weeks early, where I was working for a professor of international taxation, Oliver Oldman. He co-authored a book with Richard Eder, E-D-E-R, who put together a book called Taxation in Colombia, the country of Colombia, and I did all of the research.

One of the things I did somewhere during this '55 to '59 timeframe was to go on international delegations to Asia and Africa. Then there was one that I did to South America with Luigi Einaudi, who I think was the grandson of the former president of Italy, and I gave a speech in Spanish at the Escuela de Derecho de Universidad Catolica de Santiago, Chile where I represented American students talking to Chilean students. I was representing the National Student Association, and there was an equivalent organization in Santiago.

Anyway, somehow or other that stuck, and so I was able to work on this—the materials were all in Spanish—so it wasn't that much of a struggle for me.

MOR: But you're not quite sure where you picked up Spanish?

OSCANNLAIN: I picked up Spanish in college. I took three years of Spanish, among other things. I took French and Spanish, Latin, which I highly recommend to anyone who wants to be a seriously educated person. Even today I think Latin would be worthwhile studying.

MOR: Sounds like you did quite a bit of international travel?

OSCANNLAIN: Yes, I did a lot of international travel from the time I was midway through St. John's and starting Harvard Law School, and I did some travel for my dad, too. My dad had a travel office in Dublin, and I spent the better part of summer working for him in Dublin. Two of my brothers actually lived in Ireland for a couple of years; Colm two years, Fergus lived one year and went to school there. I never did that, but I did make several trips to Ireland.

MOR: And you mentioned Africa and Asia, as well?

OSCANNLAIN: That was as a student leader. I went to the World Assembly of Youth conference in Accra in Ghana, and I think that was in 1955.

MOR: I think we're coming up on 3:30. If you want we can stop.

OSCANNLAIN: Let's pick that up next time, and maybe I can remember to fill in some other things.

[End of Session 1]

Session 2

2008 July 3

MOR: This is Michael O'Rourke continuing the oral history with Judge Diarmuid O'Scannlain in his Portland chambers.

OSCANNLAIN: July 3, 2008.

MOR: Judge O'Scannlain, we left off last time talking about your activities as a Young Republican and in various other organizations that you became associated with when you were in DC.

OSCANNLAIN: I think we mentioned that I had become the full-time Executive Secretary of the Second Atlantic Conference of Young Political Leaders. Did I go into the conference that was to be held in June of 1960? I can develop that, if you'd like.

MOR: The conference was held where?

OSCANNLAIN: In Washington, DC. President Eisenhower spoke—actually we all went to the White House, and he met with all of us on the White House lawn.

This was a conference made up of half U.S. and half European young political leaders. People from the U.S. included Senator Frank Church, who was a very prominent, but young, senator, and the people from Europe were young members of parliaments from the European countries.

Actually, this whole conference was sponsored by N.A.T.O. (North Atlantic Treaty Organization), or more specifically the American Council on N.A.T.O. It has been suggested, although it's never been proved, at least not that I know of it has been proved,

that the C.I.A. might have had something to do with some of the funding. But in any event, I was a very happy participant and spent from about October or November of '59 until June of 1960 preparing for the conference. It took a lot of putting together.

MOR: I think we did talk about that a little bit, [phone rings] although maybe you did offer some more detail just now. I recall also last time you said that you found out later about this possible C.I.A. connection, but you didn't know it at the time, is that right?

OSCANNLAIN: Yes. But it wouldn't have made any difference to me, anyway.

MOR: Right. I was curious to know how you came to know that there was this possible association.

OSCANNLAIN: There was a huge splash sometime in the '60s. You remember things got very agitated in the '60s, and somewhere along the line there was an exposé that the C.I.A. had helped support some of the international activities of the National Student Association. I was involved in that, as well. I think I told you I had done some of those trips to South America and Argentina—

MOR: You did talk about the trip to Chile, at least.

OSCANNLAIN: —and Chile, right, and it was national press. Of course, the C.I.A. wouldn't confirm anything, but I had the impression that it could be the case. But again, it's never been confirmed, but wouldn't surprise me. And as I say, it wouldn't have made any difference to me, anyway.

MOR: Once the allegations arose in the press, did it trigger any thoughts on your part that “Oh yes, maybe some of the people that I was involved with—.” [chuckles]

OSCANNLAIN: I'll tell you, there were some of my colleagues who were very distressed over that, who felt this was a terrible imposition on their good name and integrity. I never felt that way. I thought, "More power to them." We were in the middle of a Cold War, and the C.I.A. was trying to maintain contacts, both in friendly countries, as well as the Comintern, and to follow the movements of youth organizations.

Moscow had a very, very elaborate, highly supported budget for sponsoring youth organization fronts. There was the World Federation of Democratic Youth. This was made up of the Democratic Youth Federations of each of the Eastern European countries, all of which were run out of Moscow, and there were the same kinds of organizations in a lot of the countries which were considered to be Soviet satellites, and that were not necessarily part of Eastern Europe.

In response, the C.I.A. apparently encouraged the development of such organizations as the World Assembly of Youth (W.A.Y.), which was the antidote to the World Federation of Democratic Youth. I was a delegate from the U.S., had meetings in places like New Delhi, India, and Accra in Ghana, but it was made up of some communist countries, but mostly Western, and the comparison was always there. The idea was to develop policy and philosophical and publicity support for the kinds of student activities that were being supported by Western governments versus those that were being supported by the Soviet Union and its other operations.

So it was a very active time, particularly in the late '50s through the '60s. I had tuned out of all of that by the middle '60s because I had finished law school and I started work, but during the days of the Cold War, these were very, very deliberate efforts to try to attract the minds of up and coming young political leaders.

MOR: In this ideological battle between them.

OSCANNLAIN: Oh, very much so. Oh, absolutely.

MOR: One of my questions was once you realized that the C.I.A. might have been involved, did you think back on any of your colleagues in that situation that you might have identified as perhaps being more directly associated with the U.S. government?

OSCANNLAIN: Yes, there are some people. I don't think I'll identify them in this setting, but certainly there were two staff people, one in the American Council on N.A.T.O. and the other in the Foundation for Youth and Student Affairs, who I frankly expect were C.I.A. or C.I.A.-related folks. They were very patriotic people, who were very sensitive to people's needs and independence, and I thought they were doing a perfectly respectable job.

MOR: Did you suspect it based on their sophistication or age, or was there something else about them that made you think that they might have been the contact point for the government involvement?

OSCANNLAIN: There just seemed to be an unlimited source of funds. [MOR chuckles] In theory, these were supported by philanthropic grants and so forth, but in those days you didn't have the same disclosure that seems to be required these days, and so you just asked yourself the question, "Well now, where is this all coming from?" And you could certainly feel comfortable saying, "It must be that the government's involved, one way or another, [laughter in background] so what's the difference between whether it's the State Department or the C.I.A. that's funding?" Again, to me, it wouldn't have made any difference.

MOR: You were in New Delhi, too?

OSCANNLAIN: Yes, I was.

MOR: I don't know if we've talked about that. That was maybe still in the time of Nehru?

OSCANNLAIN: Yes. I believe there was one session where Prime Minister Nehru came to speak to all the delegates. I'm a little fuzzy on the details, but this would have been in 1956 or '57, '58 maybe.

MOR: I imagine India in those days would have been really different from what you had experienced here. [chuckles]

OSCANNLAIN: I haven't been back since the '50s, so I don't know what it's like today.

MOR: Ghana I suppose, also, was pretty different.

OSCANNLAIN: Yes. Yes.

MOR: At this period of your life what was it that cast your political identity at that time? What was it that made the Republican Party as opposed to the Democratic Party your choice as a young man?

OSCANNLAIN: I'm sure my upbringing had something to do with it. Mom and Dad were certainly politically conservative. Dad was a registered Democrat, and I think Mom was, too, if I recall, but Dad certainly was a registered Democrat all the way through his life. He felt that somehow or other that it was important for an Irish immigrant to maintain his status as a registered Democrat. Generally he voted Republican for the presidency after first voting for Roosevelt, and I can't remember at the moment which time that last time was. [FDR's second presidential election took place in 1936]

MOR: It sounds like you were busy with lots of extracurricular activities when you were at St. John's. [chuckles]

OSCANNLAIN: I was a B.M.O.C, I guess.

MOR: What were some of your major academic interests at St. John's?

OSCANNLAIN: My major was history and government, and my senior thesis was written on efforts of the Vatican to intercede in the Spanish-American War, which I found fascinating because you learn that even the Vatican has a vast network of diplomats throughout the world that function through the Nuncios. There was a role that the Pope could play, especially dealing with Spain, which was an overwhelmingly Catholic country and was regarded as a very strong faithful Catholic country, in dealing with the United States. And I think the U.S. State Department also had an interest in working with the Vatican in trying to achieve a peaceful resolution of things. And this is what, 1898, when all this was going on.

Anyway, that was my thesis. The professor I wrote the paper for was Professor Gaetano Vincitorio, and he was a great influence on my getting interested in American history, to a certain extent world history, and political science, just the way the government works and that thing.

And I was active in the student government. My closest friend at that time, John Paul Spuches, we were both involved in the student government. I think he was student body president, and I was vice president or something. In any event, it was an active time, and I was just enjoying life to the hilt.

MOR: Yes, it sounds like you had a great time. [chuckles] At some point you made the decision to go to law school. Was that during your time at St. John's, or had you already had your sights set on it?

OSCANNLAIN: There were some people at St. John's that influenced me. Andy Carlin was a legend at St. John's. He may have been the first St. John's grad to go to Harvard Law School. That really resonated with me, that's what I wanted to do, and somewhere along the line before leaving St. John's I knew I wanted to do that.

I couldn't do it right away because I owed my dad some time. Dad had the travel agency, as I mentioned, and when I finished St. John's I came back to work for my dad for, as it turns out, two years. at least under one theory I was going to take over the business. that did not develop for a variety of reasons, not the least of which was that I wasn't sure I really wanted to do that. [MOR chuckles]

So eventually this situation developed whereby I was invited to run this conference and to plan it, and that was a paid position. I was retained to do that and eventually had to move to Washington, DC to set up the headquarters and so forth. And I actually lived in Washington for at least six months, maybe a little longer, working up to the conference, preparing for it. That was the time I applied to Harvard Law School.

I had some good friends, one in particular, Roger Allan Moore, who was the general counsel to the Republican National Committee, but who himself was a very distinguished graduate of Harvard College and Harvard Law School, whom I admired intensely. Another very close friend, and still a close friend today, was William A. Rusher, who was the publisher of *National Review* magazine, also Harvard Law School.

All of this surrounded me, and I took the plunge, applied, and lo and behold, was admitted. So that was a great turning point in my life.

MOR: Yes, with all of this successful activity on your part, both at St. John's and after St. John's, and being admitted to law school, I imagine your parents were probably fairly impressed with their son.

OSCANNLAIN: I think they were pleased but of mixed feelings because I think I disappointed my father in not going into the travel business. I think that's something he had very high hopes for. And Mom certainly approved of the higher education. Well both Mom and Dad had an enormous respect for education.

MOR: Tell me about your first days at Harvard Law. Once you got there, what was it like in those days?

OSCANNLAIN: I was assigned to the Hastings dorm; I was in Hastings 23, I think was my first dorm. My roommate was Larry Elkins from Chicago, who has been practicing in Chicago ever since. I really haven't kept up with him at all, but he and I were roommates. Hastings Hall is the oldest hall at Harvard Law School and has very commodious large rooms, each of which has a fireplace, very attractive.

I was thrilled to be there, but terrified because I was absolutely sure everyone around me was smarter than I was. And the professors were daunting. I mean these were the best and the brightest in the country. Some of them are legendary. One was W. Barton Leach, who was an extremely vain but brilliant professor of Property, was the author of the case book that we used, and was a distinguished —what shall I say?—player as a civilian in World War II.

He headed what was called the Army Air Corps Evaluation Board, which was made up of civilians. As it turned out, my future father-in-law was in the same team as Bart Leach. Bart had the equivalent of a two star general, and my father-in-law a colonel, but they only

wore uniforms when they had to. They were in fact civilians, but when they had to do something around the military, or if they were going someplace that might risk exposure or capture, they would wear their uniforms, and it was a fascinating piece of history.

Their job was to evaluate the success of the bombing, particularly, in my father-in-law's case, in the China-Burma-India Theater. I think Leach may have covered a wider swath than that. But in any event, that was their function, to provide an independent, non-military review, which then, of course, was fed back through the civilian side of the Defense Department, and in those days it was the War Department. But Leach was one of these people.

John Mansfield was another brilliant guy. He taught Torts. I don't think he ever made a declarative sentence in the entire year of Torts, and that just scared the heck out of me because I was looking for the black letter law, and he wouldn't tell you. [MOR chuckles] He'd just state the case, and the student would describe the case, and then from then on question, question, question. "Why did this happen? Why did the court do this?" It just exposed you to the fact that a great deal of a lawyer's role in life is to question, and it doesn't really help to have standardized formal rules without understanding how we got there, and how, in many cases, the rules have exceptions and don't apply in certain situations. So that was very, very instructive.

My, who else? Oh, in Contracts we had a wonderful man who was on loan from Yale. His name was Friedrich Kessler, a wonderful, wonderful German-born professor who was the gentlest person in the world, but brilliant, and had his favorite descriptions. He would talk about Kadi jurisprudence; I remember that very clearly for some reason. Kadi, I believe, was in the Arab tradition, where these would be people who would sit under a palm tree and dispense justice. And the whole idea, of course, was to suggest that it was not entirely consistent or fair across the board. [both chuckle] And it was regarded as a suggestion,

"You didn't really understand enough about this case to get you beyond a simplistic level of practicing Kadi jurisprudence."

You're bringing back all kinds of memories now. That's when I met a student two years ahead of me, who, it turns out, would be a major factor in my life. That was Anthony M. Kennedy. Tony Kennedy was a third year student who was on the Board of Student Advisors, which was the body that administered the first year moot court program. All first year students had to argue, I think, two or three times during the year and prepare briefs in cases that would be given to them. But all of that was managed by students, not by professors. And I was one of twenty people assigned to Tony Kennedy, who had graduated from Stanford and headed back to San Francisco to practice, I think, with the Thelen Marin law firm.

Tony Kennedy was on the first panel that I ever argued before in the Ninth Circuit, and we nodded to each other because I think we recognized each other during the argument. But we met in 1961, and when we said good-bye in the spring of '61, I don't think either one of us ever expected to see each other again, because I was heading back to New York to practice, and he was heading to California.

Fast forward to 1986, and it turns out we are fellow judges on the United States Court of Appeals for the Ninth Circuit, and he has since gone on to be Justice Kennedy on the Supreme Court of the United States.

MOR: Right, right. [chuckles]

OSCANNLAIN: And I've stayed in touch with Tony Kennedy ever since we were on the court together, and we've done a number of things since that time. Most recently, last summer he and I were teaching over in Salzburg, Austria; he giving his course on

International Human Rights, and I teaching a course of Comparative Torts, but both sponsored by [Pacific] McGeorge Law School.

MOR: I guess another significant person that you met there was Maura Nolan.

OSCANNLAIN: Yes. [MOR chuckles] Maura and I met in the end of my second year. She was chief of staff to Dean Wesley Bevins, whose function in the Harvard Law School administration was everything non-academic. He was in charge of fundraising, of dormitories, in charge of, as I say, anything other than the academic side of things. And she presided over a fairly sizable staff. We met incidentally in the spring of my second year at a Harvard Young Republicans event. She came to some of those events and actually got elected secretary, even though she wasn't a student. [both chuckle]

Then in the fall at the start of my third year, I came back to Harvard early to work as a research assistant to one of the professors. Among her functions was to assist Dean Bevins on the dormitory functions, so I had to deal with her to get permission to come into my law school dorm room early, before the rest of the students had reported. I think I was about a week or two weeks ahead of everybody else so I could do this project for Professor Oldman. In any event, one thing led to another, and we saw a lot of each other in the fall, and we were engaged at Christmas of '62, and married right after law school in September of '63.

MOR: When you took the summer breaks at Harvard, would you go back and work with your dad, or what were you doing in those summers?

OSCANNLAIN: I think I helped Dad one summer, but the rest of the summer I spent as a tactical officer at the Empire State Military Academy. It was hard to get law jobs as first year students, and as a result I looked around for other options, and I was invited to do this.

A Tactical Officer is the hard rock type [chuckles] that disciplines student cadets and leads them in long runs and exercises [MOR chuckles] and supervises their non-classroom hours, and that was my function. When I look back on it, it seems so much out of character with me, except that I was in the military for twenty-three years, on a reserve basis, and the first summer at Harvard I served as a Tac Officer.

Then the second summer I went to Fort Benning, Georgia, to qualify for promotion to captain, and that was at the time when the Berlin and Cuban crises were developing. And even at Harvard Law School our units would do multiple drills, so we were very strongly involved in the military on the side while I was at Harvard.

MOR: I wanted to talk to you about your military career, too, but maybe we'll save it for a minute or two. You said that we had gotten derailed on your research projects?

OSCANNLAIN: The opening question you gave me was, "What was it like starting at Harvard?" and I mentioned some professors. One professor who was really an adjunct professor in a way was George Eder, who was an expert in international taxation, and Professor Oliver Oldman was a professor of international taxation. And between the two of them I was invited to be a research assistant to help Professor Oldman on his book on international taxation, which I think he worked on in conjunction with George Eder, and so got to know them very, very well. I spent a fair amount of time doing that in my last year at Harvard Law School.

I suppose the professor that made the most profound impact on me intellectually had to be Lon Fuller. Lon Fuller was a world-renowned professor of Jurisprudence, and I would have to say that he was probably more from the natural law side of jurisprudence than John Rawls or any of the pragmatist schools. There's a whole spectrum of views in jurisprudence, but I just loved every class Fuller taught and was just absolutely mesmerized

by him. I think it had a lot to do with my formation as someone who is on the traditional structural side of legal analysis, and has a pretty clear separation between the role of law versus the role of legislation. And I think I first got exposed to that, probably not as dramatically as that, but certainly the idea of the sources of law and ultimately roles of judges versus legislators.

MOR: Which we can probably talk about later. But the concept that legislators have a job and judges have a job, and sometimes judges maybe step over the line a little bit. [chuckles]

OSCANNLAIN: [emphatically] Oh, yes. I see that every day in my own court here.

MOR: [chuckles] But, like I say, we can hold that for maybe later. Before we move on beyond this period, you mentioned Bill Rusher a couple of times and that he was a friend. I'm just wondering what sorts of activities the two of you shared in those years. Did you have much actual face-to-face contact?

OSCANNLAIN: Oh, absolutely. I would see him at meetings. We were very much involved—he was one of the great patrons of the Young Republicans. He actually founded the Young Republicans of Harvard when he was at Harvard Law School, along with people like Charlie McWhorter, who eventually became chief of staff to Vice President Nixon.

Bill took a very active interest in the Young Republicans, mostly from the standpoint of helping to identify potential leadership afterward. I suppose there are some Young Republicans who were Young Republicans into their seventies, but I decided that was not for me. [both chuckle] I wanted to graduate and do some other things. And Bill was certainly someone who took a very strong interest in me, encouraged me to go to Harvard Law School, encouraged me to stay active in things.

He was the best man at my wedding. He came out to Tacoma, Washington, in 1963 to do that.

MOR: That's a close connection, then.

OSCANNLAIN: Oh, yes, and that remains true even today. He's going to have his 85th birthday on August 14, 2008, and I've already planned to be there for it.

MOR: Anything else you want to say about Harvard Law before we move on to other things?

OSCANNLAIN: I was president of the Harvard Law and Graduate School's Republican Club. Met people there like Sheldon Taft, who was part of the Taft lineage, Phil Rockefeller, who is a namesake of the vice president's, but not closely familially tied.

Janet Reno was a classmate of mine from Harvard. Pete du Pont—Pierre S. du Pont IV—Pete was a congressman from Delaware, and then ultimately governor of Delaware, and I think took a flier at the presidency at one point. One of my classmates is a judge on the Second Circuit Court of Appeals, Pierre Leval.

Not all of these people I knew well necessarily. I knew Pete du Pont pretty well but I didn't know Janet Reno that well until later. But you get the sense, I think, of the dimensions of just one class at Harvard Law School, and I'm not even mentioning all the people that went on to be billionaires. I didn't move with them so much.

MOR: [chuckles] Okay. Let's get back to Maura.

OSCANNLAIN: Maura, M-A-U-R-A.

MOR: Yes. So you mentioned that you were married in September of '63?

OSCANNLAIN: Exactly, September 7th.

MOR: Tell me about, well first of all, her family?

OSCANNLAIN: Okay. She is the daughter of Joe and Jane Nolan, who were married in Chicago, where Joe was a partner in the firm at one time known as Bell, Boyd, Lloyd, and then it was Bell, Boyd, Lloyd, Haddad & Burns, but I think it's the Bell Boyd firm, with whatever iteration.

Joe was born in East Boston of relatively modest circumstances. He craved education. He went to Boston Latin School. He decided he wanted to go to Exeter prep school. He showed up there in the end of August one year and was told that the class had been filled, so he said, "I want to stay." he persisted enough that they found an attic for him where he did stay, and actually matriculated from Exeter. And then went to Yale College and straight on to Harvard Law School. So this Irish Catholic kid from East Boston of very meager means did pretty well between Exeter, Yale, and Harvard.

He decided not to stay in Boston, because in those days, that would have been class of '32, Irish Americans were not particularly welcome in the upper reaches of the Boston law firms, unless they were going to be the bag man at the state capitol house, which he did not have any interest in doing. So he went to Chicago, became a partner in one of the top Chicago firms, and among other things was counsel to the management of Weyerhaeuser Company, which is based out in Tacoma, Washington. I'll come back to that in a minute.

Maura's mother was Jane Fortune, one of the grandchildren of the founder of the Fortune Brewing Company, which pre-Prohibition was one of the most successful

breweries in the Midwest. Her family, unlike Joe's, was very, very well situated. She grew up on the Gold Coast in Chicago on Astor Place, just about a block in from the lake.

She was sent to Smith College. All of her sisters and brothers went to fine schools. Uncle Jack went to Princeton, and the others went to similar schools. They all married very successfully. Maura's uncle was the head of the Leo Burnett advertising company, and another uncle was one of the top officers at the Hornblower & Weeks Company, which eventually became Smith Barney. Her Uncle Jack became president of the Saddle & Cycle Club, which was a very, very prominent club in Chicago.

So you can see the two different origins there. Maura was born in Chicago, grew up in Northfield, Illinois, a Chicago suburb.

I think I mentioned in an earlier context that Maura's dad was conscripted into the elite civil analysts group where he was sent to Calcutta and played a very significant role in the evaluation of the Air Force operations in the C.B.I. Theater, the China-Burma-India Theater. He came back after the War and continued to prosper in the law.

One of his assignments in connection with representing Weyerhaeuser was to help Weyerhaeuser locate the first in-house counsel that the Weyerhaeuser Company was to have. And the Weyerhaeuser Company was, I think even at that time, one of the, if not the largest, timber company in this country. After pursuing various prospects they came to him and said, "We want you to be our first in-house general counsel," and Joe reflected on that and decided that he would be. So he moved the whole family to Tacoma, Washington. He was general counsel to the company, worked very closely with F.K. Weyerhaeuser, and after that with Norton Clapp, who succeeded F.K. as president of Weyerhaeuser, and I think the last president he worked for was George Weyerhaeuser, who was, I think, F.K.'s son.

Joe was very successful there. He moved up through the ranks in senior management and retired at the mandatory age of sixty-five, having been the number two person in the company, senior vice president of the Weyerhaeuser Company. He had other functions, as well. He was president of the Weyerhaeuser Foundation.

One of his last projects was to manage the development and ultimate construction of their new corporate headquarters, which was moved from downtown Tacoma to a 1600 acre estate near Federal Way, Washington—which is about maybe twenty miles north of Tacoma, roughly halfway between Seattle and Tacoma—which still is very, very prominent today. If you drive up I-5 past Federal Way, you'll see South 320th Street and Weyerhaeuser Way. If you can keep your eye on the road but look back a little bit, you'll see this gorgeous estate with a very horizontal building surrounded by greenery, ivy, and that sort of thing, all growing on the different levels. I think it's about maybe eight levels, but it's extremely wide, but beautifully set off with plantings.

In any event, that was her dad's career. Her mother was very much involved in philanthropic and charitable kinds of activities in the Tacoma scene.

MOR: When you and Maura were courting during that '62-'63 year, what sorts of things did you do when you went out on a date?

OSCANNLAIN: We were pretty observant Catholics. We would go to Mass together. We were very much involved in the, me officially, the St. Thomas More Society, which was the Catholic students group. We had some friends who were pretty observant, as well.

That's the first time I met Father [Robert F.] Drinan, the Jesuit who was a law professor at Boston College, but would come over to Harvard once in a while and be one of the speakers. Monsignor Murray is someone that I have very fond recollections of that we visited with quite a bit.

We were very much attached to St. Paul's Church, which is—if you know the Harvard community—the church that's right next to Adams House and just down the street from Quincy House, opposite the Widener Library and not too far from the residence of President [Nathan M.] Pusey. But it was very much in the center of the entire Harvard community, and it meant a lot to us. We'd do that sort of thing.

We went to movies together. She actually typed one of my papers. Of course, I had to do a lot of study, and so she would be very tolerant about the fact that I would be studying and not doing something with her.

In any event, we got to love each other, and I don't regret a minute of it.

MOR: And at some point you started to get to know the rest of her family?

OSCANNLAIN: I met her dad; her dad came out in the spring. We were actually engaged on Christmas Day of '62, and her parents came out for a visit, I think, in January or February. That was the first time I had met them. They came to Boston and Cambridge; I think her dad on a business trip and so forth.

And that went well because I had to secure his permission to take her in marriage, and he very kindly gave the permission, and he used to kid about, "Who is this Armenian rug peddler that you're interested in?" talking to his daughter, Maura. And we finally met and we hit it off well and ever since.

MOR: And what about your family, how did they feel about this match?

OSCANNLAIN: Oh, I think they were very, very pleased. I brought Maura down to see Mom and Dad in New York, I think sometime that spring, and they were very pleased.

MOR: And then the marriage took place in Tacoma?

OSCANNLAIN: In September of 1963, yes.

MOR: And at that point you had graduated from Harvard.

OSCANNLAIN: I should say that during my third year at Harvard we all did the interview rush, and I talked to various firms and so forth and got an offer from the tax department at Standard Oil of New Jersey. I did take some extra tax courses, and I think that the Standard Oil people were particularly interested in the fact that I'd been doing some work in international taxation, and I was offered a position there, and I accepted it. Graduation might have been June 4th, let's say, and I think I started at Standard Oil on June 7th, something like that; just right away.

I was already employed during that time before the wedding, and took some time off to go to the wedding. We had already identified a place to live and that sort of thing.

MOR: Did you then take the New York bar exam?

OSCANNLAIN: Yes. I took it in the summer of 1963, and I took it again in the spring of 1964.

MOR: So you didn't pass in the summer, then? [chuckles]

OSCANNLAIN: I haven't advertised that, but it is a fact of life.

MOR: But you were able to accept your job at Standard Oil?

OSCANNLAIN: Oh, yes. I was admitted to practice in New York in '64.

MOR: Where did you wind up living, then, in New York?

OSCANNLAIN: West Seventy-Fifth Street on Central Park West, a five story walk-up, one bedroom apartment for \$94 a month. [MOR chuckles] It was considered a real buy at that time.

MOR: It sounds like real buy today, that's for sure. [chuckles]

OSCANNLAIN: Today I'm sure that same apartment is \$2,000 a month, because I've seen what my kids who lived in New York had to pay, and I'm quite sure. That's the enormity of the inflation.

MOR: Yes, exactly. Then you were there with Standard Oil for about a year?

OSCANNLAIN: Almost two—a year and a half at least. I started in June, and I apparently did very well there. They liked me, kept giving me more interesting assignments. And I had my first annual review, which went very well and I was told I was going to get a promotion and they wanted to send me to the law department at their Venezuelan subsidiary, Creole Petroleum, in 1964, in Caracas—late '64. And that caused Maura and me to sit down and think about what it is we really wanted to do.

An international oil company takes very good care of its employees. If we had gone, we would have lived very nicely, probably with household help and a chauffeur to get you from home to the company, because security was an issue. And we thought about it; it was very, very attractive, a significant pay raise, very nice conditions, moving up the ladder. But what it portended was a three-year assignment there, perhaps come back to Houston, Texas, for three years. Next international assignment would probably be Saudi Arabia for

a year or two, everyone seemed to have to do that for a while. Then probably come back to Coral Gables, which was the headquarters of their South American operations. Then perhaps back out again to either South America or maybe over to the Far East. But in any event, constant moving around, to a point where we really wouldn't sink roots anywhere, and while you would live very well and your family would probably be taken care of, it would be a nomadic existence, which we decided we would not prefer.

Instead, we decided I would talk to law firms in the Pacific Northwest. We went out to Maura's parents' for a two-week vacation around Christmas and New Years of '64-'65, talked to law firms in three cities. I got offers from firms in Seattle, Tacoma, and Portland. Took the offer from the firm that then was known as Davies, Biggs, Strayer, Stoel and Boley, now is known as Stoel Rives, and decided to take that offer and we came to Portland in February of 1965 and have never left.

MOR: Given that you were already such a political person from your Young Republican days, the year or two preceding your trip to Oregon, was a tumultuous time in terms of world events, and also in terms of—

OSCANNLAIN: Vietnam, certainly.

MOR: Yes, Vietnam, the assassination of John F. Kennedy, the Cuban Missile Crisis, the highly accelerating arms race at that time, so I'm just wondering—

OSCANNLAIN: Cuba was '63 or thereabouts [1962].

MOR: —I'm wondering what you thought about those times at that point, given that you lived through World War II, and maybe the world didn't seem that stable in the '50s, but all of a sudden here we are in the '60s, and all of this upheaval.

OSCANNLAIN: In a sense I was part of it because I was in the military the whole time.

MOR: Right.

OSCANNLAIN: I was in the Army Reserve or the Army National Guard for twenty-three years, from November 1955 until 1978. I enlisted at the tail end of the Korean War, when one could do that with no active duty requirement beyond the two weeks every year, but with an eight year commitment. That's what I signed up for. Eventually I did a lot more active duty than that because I went to Officer Candidate School, and then eventually did some other things that added up. I went to Officer's Basic, which was a ten-week course at Fort Benning, Georgia, in 1962, I believe it was, and then did a two-week assignment at Eighth Army Headquarters in Seoul, Korea about 1972.

In any event, during the Cuban crisis I was at Harvard, and we were doing multiple drills. Whatever we were doing, we multiplied it by four. There was always the risk that our unit could be activated. Luckily, it had not been, but that was very certainly an issue. And then, of course, along came Vietnam. I'm trying to think exactly what time that would have been. I think I was with the Civil Affairs Headquarters Area B unit in Portland during a good part of the Vietnam War. We always had the impression that there was a chance, not a high chance, but certainly a chance that we could be activated and be sent over, but it never happened.

MOR: And you stuck with—

OSCANNLAIN: I wasn't a protester, if that's what you mean. [both laugh] No, I was very much resigned to the role that had been carved out by our leadership, whether it was JFK, who sent the first troops to Vietnam, or Lyndon Johnson, who had the massive escalation of troops in Vietnam, or Nixon, who in effect brought them home.

MOR: Right, right. You used the word resigned. Did that you mean you had some question as to whether this was good for the United States?

OSCANNLAIN: No, I believed in the domino theory. That was the philosophical concept articulated certainly by Johnson and other folks in Congress—

MOR: And Henry Kissinger.

OSCANNLAIN: Henry Kissinger, sure—that Vietnam was crucial in terms of the whole exposure of Southeast Asia, and then the role of China behind it. Although, I think as it turned out Russia was more involved in Vietnam than China was. This following Korea, we were all very much aware of the potential of what was going on there. The Cold War was still part of reality, and this was what needed to be done to resist Communist expansionism.

God knows there were a lot of mistakes made in the process, but the cause seemed right, as far as I was concerned—I suppose about half the country, the country was very split.

MOR: Right.

OSCANNLAIN: There were certainly some who just felt this was a total blunder and had no meaning whatsoever, and that we can deal with the Communists and come to some resolution and we didn't have to be in a shooting war. That was the divide.

MOR: Mm-hmm. Obviously your legal career was quite successful, and you had some success, as in the Reserves and stuck with that for, as you said, twenty-three years.

OSCANNLAIN: Yes. I retired as a major in the Judge Advocate General's Corps. I think I mentioned earlier I was commissioned in the infantry and stayed in the infantry on a

number of assignments until I came out to Oregon, where I joined the Civil Affairs Unit in a Judge Advocate General's slot for which I had to do a branch transfer. Eventually that happened and I was able to qualify for it, and then by the time I finally retired I had been promoted to Major.

MOR: Was there ever a point when you thought seriously about a career in the military?

OSCANNLAIN: Not really, no. I never really did think about that.

MOR: But obviously it had enough attraction for you that you were able to give a considerable amount of time to it.

OSCANNLAIN: It's one of those things you get started in it, you have the eight-year commitment to begin with, and then at some point you become an officer, and I'm not sure if that had an additional commitment or not. But in any event, when I was going to school and that thing, I didn't mind it. Among other things, it was a significant source of income.

MOR: Right, yes that's right.

OSCANNLAIN: I was an officer during most of that time, and even by the time I came out to Oregon I had built up some rank. I was a captain by then, and then eventually a major, and that adds up.

I should just say one more thing. For those who don't know it, for someone who has served in the Army Reserve or Guard for twenty "good" years, that means a year in which you've achieved the minimum number of points that are required—I had twenty-three years total service, but only twenty "good" years, but that was significant. I had twenty "good" years, which means that I became eligible for a pension, which believe it or not I started to draw at the age of sixty, and it's still coming in. And it's just a reminder every once in a

while of all the time that both Maura and I, together, committed, most often on one weekend a month, that it at least had such a nice outcome.

It's not a huge pension, I can guarantee you, [both chuckle] but at least it's something.

MOR: Sure. Obviously if you're approaching that point, then that's a motivation to stick around for a little while longer.

OSCANNLAIN: I think once I got into fifteen, sixteen, seventeen years, then it's, three more years and you qualify, and that's probably how this all played out.

MOR: Okay. Anything else you want to say about anything we've talked about today?

OSCANNLAIN: I can't think of anything else at the moment. I'll reflect on it and maybe catch it during the next interview.

MOR: Yes, that's great. We'll take off next time with Oregon and your career there, which I know is long and continues to this day. [both chuckle]

[End of Session 2]

Session 3
2008 August 28

MOR: This is August 28, 2008, and we're continuing the oral history with Judge Diarmuid O'Scannlain in his chambers here in Portland.

Judge O'Scannlain, when we left off last time you told me about your decision to not stay with Standard Oil, despite the fact that they were offering you promotions, and made the decision to come out west and look for a position out here. And you wound up at what became the Stoel Rives law firm.

OSCANNLAIN: Right.

MOR: And Tom Stoel was there, but not Rives yet—or maybe Rives was there, too.

OSCANNLAIN: At that time it was known as Davies, Biggs, Strayer, Stoel and Boley. And Mr. Davies was there, Biggs was there, Manley Strayer was there, Tom Stoel was there, and Paul Boley. All five named partners were there. And don't forget, that was in the era when the state of Oregon law required that anybody whose name was in the firm had to be alive and actually active in the business. You couldn't have these institutional names which are convenient today. Covington & Burling, for example, the famous Washington, DC law firm, Mr. Covington and Mr. Burling are long since gone.

MOR: Miller Nash here in Portland, also.

OSCANNLAIN: Miller Nash is a good example; neither Mr. Miller nor Mr. Nash, both of whom I knew quite well are around, and nevertheless the firm has the continuity which goes back to—my heavens, it was the King firm and who else?

MOR: That's right.

OSCANNLAIN: Wally McCamant was in that firm, former judge of this circuit, as a matter of fact. But in any event, that [Davies, Biggs, Strayer, Stoel and Boley] was the name of the firm when I came in February of 1965.

MOR: What were your first days like with that firm, and did you have any misgivings, or did it look like you'd made the right choice?

OSCANNLAIN: I think part of the picture was our family situation. Maura's parents lived in Tacoma, Washington, and Maura's dad, quite frankly, was a very prominent citizen. He was the first in-house general counsel that the Weyerhaeuser Company ever had, and eventually became the second highest officer in the Weyerhaeuser Company and was senior vice president and ultimately president of the Weyerhaeuser Foundation. He strongly encouraged me to look at professional opportunities in the Northwest, and at Christmas of 1964 he arranged to have me talk to law firms in Seattle, Tacoma, and Portland. So we took a vacation in the latter part of December of '64, stayed with Maura's parents for that two-week period, and I talked to law firms in those three cities. Came back to New York with offers from all three cities: Lane Powell in Seattle, the big law firm in Tacoma, and Davies Biggs, now Stoel Rives, in Portland.

In some respects I had hoped to settle in Seattle, Washington, which seemed like a safer bet at that time. It was a little more urban than Portland. [papers rustle] It would be forty miles from our in-laws. But I had my heart set on the firm that represents the Boeing Aircraft Company, which was then known as Perkins Coie, and that is a firm with which I interviewed but did not get an offer. So looking at it from the standpoint of the firms that I had to choose among, the firm that stood out as being by far the most attractive was the Davies Biggs firm in Portland. And so we took a bit of a gamble in terms of the city choice, but came to Portland based primarily on the law firm not the attractiveness of the city.

Well now, having lived now in Portland for forty-three years, I think we were very serendipitous. Portland today is a much more attractive city than Seattle, and we are extremely pleased with our choice.

Now, the question that got started in this area was that you were asking me about—

MOR: Your first experiences basically in the firm and whether it met your expectations. In fact, maybe I should just ask you what was it about that firm that made it the number one choice?

OSCANNLAIN: The leaders of that firm were just an exceptionally able group of people, all with fine professional pedigrees, all very articulate people, all commanded the allegiance of great clients. From my father-in-law's perspective, the feedback from the clients' side was absolutely outstanding. And all of those ingredients went into my selection, and I would have to say that they were all borne out by my experience.

In the first year, there were about four or five of us that came to the firm about the same time—this would be either fall of '64, spring of '65, or fall of '65—and remarkably the five of us have stayed in very close contact for that entire time since. Among our very close friends are Dennis Todd and his wife Nancy, Phil Chadsey and his wife Helen, Marianne King, and Bob Geddes. All five of us were associates at the Stoel Rives firm during that time.

One by one we would all make our ways separately, but for several years we were together as associates and that created a bond, which still exists today. The five of us belonged to what we called the Gourmet Group, and we would have usually a high-end gourmet dinner prepared by one of us—in my case it's my wife, not me. [MOR chuckles] But we would have a wonderful meal together about every six weeks to two months, on a regular basis, and we've been doing this for forty-three years. So that bond has continued.

One by one, people would go off to do different things. Before getting into that, I would say that in terms of our practice, we were all assigned to different partners to work with. I began to do a lot of work for Fred Torp. Fred has since passed away. Fred was an extremely influential mentor to me and focused my professional skills in a very, very strong way. He was an outstanding lawyer. He would still have remained a partner at that firm, but for a conflict that developed between one of Fred's very long-term clients, which turned out to be the Oregon Bank, and a long-time existing major client of the firm, the U.S. Bank. And the time came when the firm could not represent both clients, so that Fred elected to form a new firm, the Tonkon Torp firm. This happened after I left, but I say it only because I have always maintained a very, very high regard for Fred, who has since passed away. But that was a very important influence in my life. And some of the others were, too.

My first litigation experience was sitting at the foot of Manley Strayer, who was one of the legendary litigators in the entire state of Oregon. He taught me just how to look at the whole litigation process, the importance of facts, the importance of writing in such a way as to emphasize the facts that were relevant, and the importance of continually thinking through the impact of any new development. If we discovered there was a new development in terms of a new wrinkle through discovery, or the facts were going to be changed slightly, whatever, it was just a continuum of always analyzing and re-analyzing exactly where you were until the very moment of trial. In this particular case it was a motion for summary judgment and was decided that way. But it had a huge impact on me.

MOR: And that was your first litigation experience?

OSCANNLAIN: Yes. I must say that that was a federal district court case. I think we had Judge [John F.] Kilkenny as the judge on the case. And it never dawned on me that I would end up being a federal judge, to say nothing of being a federal appellate judge, but looking back on it, it's clear that that litigation really had an impact.

I worked for almost all of the main partners. I did some work for Mr. Davies involving trust department of the bank matters. I worked with Hugh Biggs on another case involving the railroad. I worked with Tom Stoel on some tax and corporate matters, and I worked with Mr. Boley on a Tektronix matter. As a matter of fact, it had to do with the profit sharing plan that Tektronix had, which involved a huge amount of money, but also a continuing complexity involving the tax treatment of various transactions within the employees trust and the continuing changes in the tax law, rulings so forth, and so I was involved in that.

Most of my experience I would have to say would be on the corporate versus litigation side. While I did have some litigation experience, most of my work at Davies Biggs was on the corporate side.

MOR: I may have been a beneficiary of your Tektronix work. I was an employee there for several years.

OSCANNLAIN: Oh, you were? Oh, my, my, my. [MOR chuckles] Jim Castles was someone that we worked with all the time, and then Emerson Hookstraat. Do you remember that name?

MOR: No, I don't. I remember Castles.

OSCANNLAIN: He was the manager of the employee trust fund—or the plan, he was the Tektronix officer who managed all of that area.

MOR: All the profit sharing?

OSCANNLAIN: Profit sharing, yes.

MOR: That's interesting. [both chuckle] Portland's a small town.

OSCANNLAIN: Oh, it is. That's another reason we love it here.

MOR: Then from fairly early on after arriving here you became involved in politics, given your background?

OSCANNLAIN: Oh, sure. One other thought before we go to that.

MOR: Sure.

OSCANNLAIN: I did have some additional litigation experience while I was at Stoel Rives. These were not necessarily clients of Stoel Rives, but I suppose inferentially they were. The chief federal district judge at the time, was Gus Solomon. And for whatever reason Chief Judge Solomon took a shine to me and gave me several criminal defense appointments. And it was interesting that here's somebody who's really on the corporate side, but I was doing several of these matters and got to interview clients in the holding jail over at—it was on the east side, the old jail, it's not there anymore. [Rocky Butte]

But that was an experience for me. I'd never been in a jail before, and I had to go see my client and work with him on trying to get the best resolution of his federal criminal problem, and that was quite an eye-opener. And I always credit Judge Solomon with getting me involved in that side of the law practice picture, which I had never expected to be part of at all.

Now, sometime subsequent to that era the appointment process ended because there was an establishment of a federal public defender, and then the federal defenders took over all of that. They didn't need essentially volunteers from the general bar. But I never regretted that work.

MOR: So this was essentially pro bono work for the Davies Biggs firm?

OSCANNLAIN: Oh, absolutely. Oh, yes, it was pro bono, by appointment of the federal district judge. And I accounted for it in my billing sheets or time sheets, but the firm was not compensated.

So now politics, okay.

MOR: Since you did spend some time with Judge Solomon—what would you say about him? What was he like in those days?

OSCANNLAIN: I've got to say that because there are a lot of people around town that did not particularly appreciate Gus Solomon, I did. I took him for what he was. He was a tough judge who didn't put up with a lot of nonsense. He expected lawyers to be prepared. He was always more prepared than the lawyers. Because I used to go to call in the Federal District Courthouse [clears throat], and I could see how he related to other lawyers in the community, and if you were up on your case and you had knowledgeable responses, you were doing fine. But the people that really caught his ire were the people that were trying to procrastinate, or come up with rather dubious excuses for not being ready to go on trial on a certain date, or not knowing what was in the record, or whatever.

As it turned out, both Gus Solomon and I were members of the Multnomah Athletic Club, and our lockers were within four locker doors together in the same big locker room. And so I would see him quite often, actually—until shortly before he died. And he very kindly agreed to speak at my investiture in 1986.

But I respected him immensely. I gave him a lot of slack in terms of the way he dealt with people in the courtroom. Outside the courtroom and in a personal way, he was just a

very, very friendly person who really cared about you, cared about what you were doing, was always interested and was just a very colloquial, congenial person.

MOR: Were any of these criminal defenses that you mounted for these federal offenders, any of those cases, notable?

OSCANNLAIN: No, these were very minor characters. I would have to believe that if they were [clears throat] very, very serious crimes, why, they'd probably find somebody with a little more experience than I had. But at least I was trusted with these matters, and most of them were plea negotiations. No front page news story clients.

MOR: Dealing with the corporate sector as you did then, I suppose you found yourself in all the courts at various times? Or maybe you didn't do actual litigation within that connection?

OSCANNLAIN: No, the young associates in the firm took turns going to court, I don't believe I had very much state court exposure at all. This was all federal.

MOR: Okay. And you said you appeared before Judge Kilkenney?

OSCANNLAIN: In another case. That was a civil case. It was basically a libel case.

MOR: Any of the other judges on the federal bench that you got to know at that time?

OSCANNLAIN: No. The only two judges I knew were Chief Judge Solomon and Judge Kilkenney.

I think at some point I met Judge [Alfred] Goodwin. And in a totally non-judicial connection met Judge Jim Burns, but that was mostly on a social or collateral basis. I don't think I had any matters in front of Judge Burns.

MOR: Now we can move on to the political.

OSCANNLAIN: Okay. Now, this is the Stoel Rives, Davies Biggs sequence for me, which would be 1965 to 1969.

MOR: Right. And '69 is when you got your job as deputy attorney general?

OSCANNLAIN: Right. I should go back further. I had always been somewhat politically active, going back to college days. I was involved in student politics and became the national president of the National Federation of Catholic College Students, and that exposed me to a lot of other things.

MOR: Yes, you told me about some of the international things you participated in.

OSCANNLAIN: Right. But I got involved in the National Young Republicans, and I think I mentioned that.

MOR: Right.

OSCANNLAIN: But in any event, I just used that as a bit of a background, because coming to Portland I already had this political interest, and I got involved with the local Republican Multnomah County Central Committee. I became involved in some campaigns, Bob Packwood and others, and then an organization called Trumpeters.

Trumpeters is very interesting, and this is where the Jim Burns connection comes. Trumpeters was established, I think, in the '50s by some politically active people including, before he was a judge—obviously he had to step back from it after he became a judge—but people like Jim Burns, Vern Smith, Bob Elliott, Bob Packwood. It was an organization that was built around the Toastmasters format. In other words, we would have a one-hour meeting over breakfast every Friday morning from seven until eight at a downtown Portland venue. For a long time it was Hilaire's Restaurant, which is no more, and then at the Timber Topper Restaurant, which is no more. Now apparently they meet at the Multnomah Athletic Club, but I had to resign when I came on the court twenty-two years ago. But I stayed active in that organization from the time I became a member, which I think was late 1965 to '66, until I resigned in 1986, and actually became president of Trumpeters for a term. The terms, I think, were six months.

But that immediately gave you exposure to everybody who was politically active on the Republican—not necessarily conservative, but certainly Republican, because there were a lot of liberal Republicans, as well as conservative Republicans. But it was a very, very happy group that were united under the Republican banner, and I relished that. I enjoyed it immensely. I got to know just about everybody who was active politically, got to do some things, got involved in the Nixon presidential campaign in 1968, and eventually became a member of the Oregon Executive Committee of the Nixon campaign in charge of Youth for Nixon for Oregon. I got to work closely with Ted Gamble, who was the state chairman, and knew Dan Kingsley, and some other people that were very active in that whole effort.

MOR: And you mentioned Packwood's campaign. Was that the campaign against Wayne Morse, then?

OSCANNLAIN: That was 1968, I believe. I was very much involved in that. A lot of Trumpeters were involved in that. And if you look at the debate, the Packwood-Morse

debate in the fall of 1968, you will see that I asked one of the questions of Packwood, as it turned out. A lot of us were eager volunteers to ask—what shall we say—probing if not provocative questions of either Morse or Packwood, depending on what would support the effort best. And I can be seen in the videos of that.

That debate was seen throughout the state, and I'm sure beyond the state, and rerun quite often because it really put Packwood on the stage as someone who was very, very articulate, very capable, and could be the giant killer to take on, and eventually defeat, Wayne Morse. So that was very much part of my history. I was happy to do that.

Another member of Trumpeters, by the way, that I got to know very, very well who was a state legislator, was Lee Johnson.

MOR: Oh yes.

OSCANNLAIN: And that was what drew me away from private practice. Lee Johnson also got elected in 1968, but he had an election contest, a legal contest, which wasn't resolved until about July or at least the late spring of '69. I don't think he took office until about July of 1969. I could be off a few months here and there, but in any event, I joined him as his chief deputy.

The lawyers in the Attorney General's office were known as Assistant Attorneys General. There was only one deputy, and that was reserved for the person who was in effect the chief of staff and senior-most lawyer in the department, and Lee invited me to come to Salem to do that [Deputy Attorney General], and I very happily did so.

I remember having a conversation with him once about burning bridges, and it focused me on the significance of that term. I hope I never ever burned any bridges, other than to feel comfortable in the choice that I made, and I was happy to do that and leave

the law firm. I didn't think I was leaving necessarily permanently, and I could always come back, or at least talk about coming back. It was not an unhappy separation at all. It was my need to try out whether I had some political abilities or not, in the sense of being able to take a high position in state government, and that all came together very well. I was very happy to do it.

MOR: Had your position changed at all in the Davies Biggs firm at that point?

OSCANNLAIN: No, I was still an associate. I've forgotten exactly how long it took to become a partner. I have a recollection it was about six years, and I left in my fourth year, or roughly at the end of four years. So I would have had to have been with the firm for two more years to become partner. But I was young and foolish at that point and decided I'd take a flier at going into public service before nailing down the stature of being a partner.

I know my father-in-law was not particularly pleased with my decision. He obviously looked at it from the standpoint of his daughter and his grandchildren, and he wondered why I would go and do something as foolish as public service. [MOR laughs] I respected that, but I always held closely to the idea that one still had to maintain top professional ability, and I hope that that was always there.

One of the things that I did as Deputy Attorney General was to supervise the whole opinions issuing process. The Attorney General of the state issues opinions on request of legislators or the heads of state agencies or so forth. And I think I did have a lot to do with upgrading the quality of that analytical work and giving the opinions a lot higher level of respectability than perhaps they might have had in the past.

MOR: Yes, I imagine the nature of your work changed once you became, essentially, the one of the State's lawyers. Tom McCall became governor in '66.

OSCANNLAIN: Mm-hmm.

MOR: Did you know McCall?

OSCANNLAIN: One of my jobs as Deputy Attorney General under Lee Johnson was to participate in the governor's staff meeting every morning at eight-thirty. Now, this was a role that was reserved to the Attorney General, but Lee Johnson was not particularly attracted to going to the staff meeting every day, so he delegated that chore to me. Now once in a while he would go, particularly if there were matters of interest on the agenda, or he had something to raise with the governor and the senior staff for the state, but as it turned out I had that chore and would spend many, many mornings at these staff meetings.

I got to know the immediate staff members around the governor, and Tom himself, who was a very charismatic guy, interesting personality, mercurial at times, but a very engaging person who just lived the office of governor. Larger than life, and thought big things—had just a wonderfully wide ranging approach to being governor.

I saw that. I think we hit it off pretty well. We developed a mutual respect, and one thing led to another, and when the vacancy in the office of Public Utility Commission (P.U.C.) developed in 1971, Tom asked me whether I'd be willing to take that on.

His chief of staff was Bob Davis, a former member of the state legislature—either a state representative or a senator, or maybe had gone from one to the other—in any event, he came from the legislature and was a very impressive guy. I had a very high regard for Bob Davis. I think he was of tremendous value to Tom McCall after Ed Westerdahl, who had been his initial chief of staff, left. In any event, we had a lot of matters back and forth that we worked on. And eventually [hand clap] this came along, and I accepted. I think it was July 1 of 1971 I became the Public Utility Commissioner of Oregon.

At that time, by the way, it was a single commissioner position. My predecessor was Sam Haley. My successor was Dick Sabin, but shortly after Dick Sabin became commissioner, the legislature changed the structure and made a three-person commission, made up of three commissioners, with a chairman of a board of commissioners, in effect. But so long as I was there, I was the sole commissioner, with responsibility for electric, natural gas, telephone, motor carriers, railroads, [laughingly] and aviation regulation within the State of Oregon, and that was quite a span.

I relished it. I loved that job, and I think it probably was a precursor to the role I have now as a Ninth Circuit judge. It involved great scope. It required an intense study of economics of the statutory structure that governed the regulation of all of these enterprises under state law, and just the whole decision-making process in which the commissioner in the end had to decide whether a rate increase was justified or not. And that meant getting deeply involved in very technical stuff: records of bookkeeping, accounting, rate structures, allocation of costs, all of that.

That, in many respects, is what an appellate judge does today. We focus on what is in the record of the proceeding, and we have to be persuaded that the decision made is supported by the showing that was made by the litigant. In this particular case it was whether the telephone company, or Portland General Electric, or one of the gas companies had marshaled its case that the costs that they were incurring justified an additional increase, and that was quite a chore.

MOR: How big was the commission staff in those days?

OSCANNLAIN: The largest part of the staff were administrators of the weight-mile tax division. I think the total staff was probably a couple hundred people.

MOR: Mm-hmm. And you had managerial responsibility over—

OSCANNLAIN: Of the whole thing, yes. One of the responsibilities of the public utility commissioner at that time was to collect the weight-mile tax, which is what the truckers pay for the use of roads in Oregon. And if you see those truck stations along the major traveled highways, you will notice that there are weight scales that will trigger a computation which results in a tax which then gets paid to the State of Oregon, and the P.U.C. actually administered that.

So that was the largest part of it. That was, on the other hand, fairly mechanical. I mean that was just a matter of being sure that people were doing their job properly and the stations were working correctly and that thing. I would go around and I would tour some of the stations, and it would really be an eye-popper for some of the folks to see the commissioner himself had actually come by, because that hadn't been done very much in the past. But I did that.

The rest of the commission staff I would have to say was fairly small, probably well under a hundred for all of the rest of the functions, which would be the energy division, which would regulate, or at least handle, the administration of natural gas and electric power, and then communications, which would handle all of the telephone companies—and in Oregon at that time there were a lot of telephone companies. there Pacific Northwest Bell, and it had the franchise for the major cities. When you got into the rural parts of the state of Oregon, there were all kinds of small companies, some of whom were either mutual companies, some of whom were privately owned by families. But except for the mutual phone companies, they were all subject to regulation by the commissioner.

Water companies, too, by the way; I forgot to mention the water companies.

MOR: In Portland it was city water but elsewhere—

OSCANNLAIN: That was a municipally owned system, but the private water companies, around Salem there was a private water company, and there were quite a few throughout the state that were under regulation.

MOR: And there are still a few, I think.

OSCANNLAIN: There could be. I've been away from it for a long time. [chuckles]

MOR: Maybe it was a little too early for this to have come before the commission, I'm not sure to what extent you would have been involved, but this was a tumultuous time in the electric power industry because it was the time when the Bonneville Power Administration (B.P.A.) thought they were running out of hydropower to supply new customers. And it was the time of the Washington Public Power Supply System [W.P.P.S.S.] being funded by Bonneville and later by lots of private utilities, as well. And we know that that's turned out to be quite controversial.

OSCANNLAIN: I should mention in that connection that one of the ex officio functions of the Oregon P.U.C. at that time [footsteps as someone enters room] was to serve as a member of the Nuclear and Thermal Energy Council, N.T.E.C., which—

Could we interrupt for just a minute? I've got a phone call.

MOR: Sure, we can pause. No problem.

[Tape stops]

MOR: Okay. We're back on tape, or on chips, or whatever. [chuckles]

OSCANNLAIN: At the interruption, I think I mentioned that one of the duties of the public utility commissioner was to serve on the board of directors of the Nuclear and Thermal Energy Council, and that was the body that was created by the Oregon Legislature to review the siting of the nuclear power plants within Oregon. And we've only had one, and that was Trojan. And we had that matter in front of us.

There's an interesting overlap of jurisdiction. On the one hand the Nuclear Energy Regulatory Commission, N.E.R.C., which is a federal agency, regulates that whole area, but the state has still some function, and the Nuclear and Thermal Energy Council of Oregon was the state agency that represented the state's concerns in dealing with the placement of sizable energy facilities. We had applications for siting of other energy generating facilities within Oregon, and we had very extensive reviews of everything from seismic studies which might affect the area around a potential power plant, to traffic studies, the need for power, all of these things were part of that function.

And then, in addition to that, I also served, again ex officio, on the Pacific Northwest Energy Council, or something like that, in which there were representatives of four states: Montana, Idaho, Oregon, and Washington.

MOR: Maybe known as the Northwest Power Planning Council (N.P.P.C.)?

OSCANNLAIN: N.P.P.C., Northwest Power Planning Council, and I was on that.

MOR: I think they changed the name recently to something slightly different.

OSCANNLAIN: Right. Right. I was involved with that.

MOR: That must have been later, though, right? I think they were created by the Northwest Power Act, which was passed in Congress in 1980, I believe.

OSCANNLAIN: Right. Right.

MOR: Although there was, during the time you were here—

OSCANNLAIN: My term as public utility commissioner was from 1971 to 1973, and during that time I served co-extensively on the Nuclear and Thermal Energy Council, which is a state agency. And when I left the P.U.C. to take another appointment from Tom McCall, although it also involved a board—I'm trying to recall now, I should check this out—but it could very well be that I stayed on that because I became the head of the Department of Environmental Quality (D.E.Q.), which was also a part of the Nuclear and Thermal Energy Council.

MOR: You'd be involved in that—

OSCANNLAIN: Yes, right.

MOR: —from the environmental angle, yes.

OSCANNLAIN: Which would have brought it up to the spring of 1974.

Now, the Northwest Power Planning Council is a totally different issue, and I was involved with them to a certain extent in a private capacity as a practicing lawyer, which I returned to later, which we can get to. But the issue of W.P.P.S.S., the Washington Public Power Supply System, was very, very much alive from 1971 to 1973. I remember I had meetings with Don Hodel, who was the administrator of Bonneville Power, and we were very, very much involved in this whole question of getting the power that we needed, but then asking the question, do we really need the power? It was almost a circular conversation, but it was very animated.

MOR: Yes I'll bet, [chuckles] especially given what happened a few years later.

OSCANNLAIN: Oh, absolutely. Sure, sure.

MOR: Now, you were appointed, then, as D.E.Q. head by McCall?

OSCANNLAIN: I was recommended by Tom McCall to the Environmental Quality Commission (E.Q.C.).

MOR: Okay.

OSCANNLAIN: The D.E.Q. actually has a director, but it is subservient to the E.Q.C. The commission doesn't get a lot of attention; the director normally gets the press attention. But the commission had on it some very, very powerful members. Barney McFarland—no—oh, lordy, I've forgotten his name, but he was a fascinating character, a total environmentalist, but with a very wonderful manner about him. He was a very, very active member of the commission, and I would report to him on all the big issues, even though I was the director of a state agency during—I think it would be about July of '73 into '74.

MOR: Mm-hmm. That's what my notes said, '73 to '74. So, you worked as head of D.E.Q.? D.E.Q. was a fairly new organization at that point, wasn't it?

OSCANNLAIN: Oh, yes. I was the second director. The first director of the D.E.Q. as such was L.B. Day—

MOR: Yes, I was trying to remember.

OSCANNLAIN: —a very large character in the annals of Oregon history, a larger than life guy who knew how to get things done. He came from the background of being the head of the Teamsters Union, and he was also a legislator. Governor McCall wanted somebody who had those attributes to take over his number one cause, which was the environment, and L.B. left quite a sizable set of shoes to fill.

MOR: [chuckles] Now, you were still the director of D.E.Q. when McCall left office?

OSCANNLAIN: No. Sometime in early '74 the congressman from the First District, Wendell Wyatt, and the congresswoman from the Third District, Edith Green, jointly announced that they were retiring from Congress, and I lived in the First Congressional District. By the time of early '74 I had developed a fair amount of public image, and it seemed feasible to at least some people who understood the inside of politics to feel that I could be a prospect to run for that vacancy.

So in the spring of 1974 I announced my candidacy to become the Republican nominee for the First Congressional District. There were several candidates involved. The real contest was between David Frost, who was a state legislator who lived in Hillsboro, and myself, and a third person who was a commentator and announcer on KGW Channel 8, the NBC affiliate. And I won that primary, so I was the elected nominee for the Republican nomination for that '74 election.

The only problem is that meanwhile, back in Washington, Richard Nixon was up to his high jinks—

MOR: [laughs] Yes, that's right.

OSCANNLAIN: Watergate was percolating. I'm told that I had a perfectly fine background between the tough but fair regulating of utilities and the administration of the

environmental enforcement agency, but the climate wasn't all that amenable to Republicans.

qMy opponent, who also won a primary, was Les AuCoin, a legislator, and he and I had several debates. We had a very vigorous campaign. I remember seeing some stories about the fight of the young lions or something like that. [MOR chuckles] We had strong supporters, each of us, from our respective political bases.

But I was not aided at all by the fact that, first of all, all the Watergate stuff was going on. I was perceived as not anti-Nixon enough; I probably did not create enough of a separation there. And when Nixon resigned in August, that actually looked good because that whole issue was going to go away, and we were encouraged. I think that was August 9 of 1974, and we were encouraged that I might have a chance at that point because Nixon was now off the table. But by very shortly after that, I think maybe around Labor Day, President Ford issued a pardon of Nixon—

MOR: [chuckles] Stirred the pot again.

OSCANNLAIN: —and that was not well received by the general public. And we could see, in terms of our own internal polling, that once the pardon was issued the chances of Republican nominees really went down dramatically. And as a result, Les AuCoin beat me, I think, something like 55 to 45 [percent].

I think it was, to say the least, a learning experience. I determined shortly after that I didn't want to run for elective office again. My family was extremely tolerant. I think I put them through a lot of pressure, including the economic anxiety of having to take off. And during those days you had to be very, very careful about potential conflicts, and so instead of going back to law practice, which I could have done in early '74, I elected not to. I had accumulated some money in the P.E.R.S., Public Employees Retirement System, and I just

withdrew it, and we lived off that for the rest of the year until after the election, when I started thinking about going back to practice.

That was a very active time. I think my children got exposed to the process in a closer quarters position than they expected to, and God bless my wife for putting up with me during all of that.

MOR: [chuckles] I imagine you traveled quite a bit?

OSCANNLAIN: All over the district, oh yes. Down to the coast, up to Astoria—we covered every nook and cranny. In fact, going up to a little—it wasn't even a town—I remember Buxton, B-U-X-T-O-N, [train whistles] a little town not too far from Manning, just before you start going through the Van Duzer Corridor on Highway 26 to the coast—western Washington County, I think, or it may have been in the next county, and I spoke to every single person in that little township, and I think that meant seventeen people. [both laugh]

But the voters had their way, and I did not succeed, and in many respects that probably was for the better.

MOR: Mm-hmm. [chuckles] You found another good career after that.

OSCANNLAIN: That was quite a bit after that. That was 1974.

Is this a good place to stop, do you think?

MOR: It's okay with me.

OSCANNLAIN: Is there anything else we need to cover with respect pre-1974, or any of those positions?

I do have some things to say about D.E.Q. I did not like the D.E.Q. job, mostly because you were dealing with imponderables. When you're a regulator of utilities you're dealing with balance sheets and revenue statements and quantifiable issues. When you're dealing in the environmental area, particularly on the front end like that, there are a lot of unresolved issues.

There was a big question about the Alumax plant, which was proposed for a little town called Warrenton, near Astoria, Oregon. And I remember the big issue was what should the standard be for the permissible amount of hydrogen fluoride. Where do you start? There's no magic number out there. So you ask the company, and the company says, "The best we can do is, let's say, two parts per million."

One approach to that would be, "Chris, the company says they can do two." Then the standard, which we would set, has to be less than that, and we'll just arbitrarily say it will be one part per million. I felt uncomfortable about that because on the one hand I certainly understood the substance of trying to put pressure on a polluter to be cleaner, but on the other hand, if we're establishing a standard, there ought to be some due process to permit an objective examination of what was chemically possible.

Now, if the company is fooling us, that's one thing. But none of our technical people were able to come up with a defensible scientific basis for doing better than the company said was the best that they could do, using all of the best available technology, which was, I think, the federal standard.

So there was a lot of that, [hand clap] and a lot of pressurizing rather than objective determinizations, [chuckles] if you don't mind my using that funny word.

MOR: Mm-hmm.

OSCANNLAIN: It was a less comfortable position; in terms of all the positions I've had in public life, that was probably the least comfortable.

The one I enjoyed the most before becoming a member of the Ninth Circuit was by far the P.U.C.. I really enjoyed being the Public Utility Commissioner. And I also enjoyed being with Lee Johnson as his Deputy Attorney General. That was a very inspiring time. I thought Lee Johnson was an outstanding public official. He had a great understanding of how state government runs, how it can be improved, how the Attorney General administers the law with respect to the agencies of the State, how the Attorney General represents citizens, as in terms of other categories in dealing with consumer fraud, for example, and lots of other areas. He was a very inspiring leader, and I just relished the time I was with him.

MOR: Were there any interesting matters that came before the Attorney General during that time that you were involved?

OSCANNLAIN: Oh, we had a host of things, just one thing after another. A lot of questions to be raised by the legislature. We had a major administrative reorganization. We came into office with one hundred seven assistant attorneys general, and I was in support of the Attorney General when we had the very unattractive challenge of reducing that number, I think, down to about seventy. It was a major challenge, and at the same time to establish an honors program to attract the best and the brightest lawyers to come in and help.

The main thing that Lee Johnson accomplished was to take the assistant attorneys general, who had been spread around into the state agencies, and put them all in one building, in the Attorney General's office itself. And so the Attorney General of Oregon

functioned very much like the Attorney General of the United States, where everybody was part of the same organization in the same physical location.

MOR: Getting back to your political run, you left the public utility commissioner job then right about the time that Tom McCall left office and Bob Straub became the governor?

OSCANNLAIN: No, Tom McCall was still in office.

MOR: Oh, he was? For some reason I had the impression that you served at least briefly under Straub, but maybe not?

OSCANNLAIN: I'm just trying to think if I did or not. Maybe there was just a tiny overlap there because—

MOR: Straub became governor in January of '74.

OSCANNLAIN: '75? No, it couldn't be '74.

MOR: '75, you're right.

OSCANNLAIN: Okay. All right. Tom McCall was governor when I became the head of D.E.Q. I left D.E.Q. in '74.

MOR: Okay.

OSCANNLAIN: So Tom McCall was Governor the whole time. I never served under Straub, but I liked him. He was a fine man.

MOR: He was treasurer during part of that time, too.

OSCANNLAIN: Yes, and of course, you know, when you're there in the capitol, everybody gets to know everybody. And I knew Norma Paulus and Bob Straub and Clay Myers, all those folks.

MOR: Apart from its impact on you personally in your political race, what did you think of the Nixon meltdown after being an ardent supporter here in Oregon during his campaign?

OSCANNLAIN: You're right, I was an ardent support in 1968. And I certainly helped to a certain extent in—I actually didn't help in '72 because I was the P.U.C. and I was out of politics during that time.

It was just an enormous betrayal, really, of the trust that you put in somebody who you think is going to do the right thing and then as drip, drip, drip, the revelations of Watergate and what the White House did to cover it up all came out over a long, extended period of time. And there was the cover up and then the cover up of the cover up and all of that, it just drained you. And I found it depressing and very disappointing because I still do have pretty high respect for public office, and I just don't like to see it abused, and it was just awful that all of that happened. And it was a great loss for the country because Nixon actually did some good things. This whole opening of China was his creation.

MOR: Yes, that's right.

OSCANNLAIN: There were some other things. He created the E.P.A. (Environmental Protection Agency), or at least pretty much got that started.

MOR: The Clean Water Act was passed.

OSCANNLAIN: The Clean Water Act, all of that.

MOR: Clean Air Act, too, I think.

OSCANNLAIN: Yes, I forgot exactly when the Clean Air Act came in.

But in any event, all of that happened during his time, and it was just a real let down.

MOR: And unfortunately [chuckles] you collided with it at the wrong moment when you were trying to start your own political career.

OSCANNLAIN: Yes. It did not inure to my benefit in terms of running as a Republican for a congressional seat while all of that was coming to its head.

MOR: Okay. why don't we leave it here today.

OSCANNLAIN: Okay.

MOR: And when we get together next time we can talk about your returning to practice, and then the Reagan campaign and the Reagan years.

OSCANNLAIN: Terrific, thank you.

MOR: Well thank you very much.

[End of Session 3]

Session 4
2008 September 30

MOR: We are on tape with Diarmuid O'Scannlain today, September 30, 2008 and continuing the oral history.

Judge O'Scannlain, when you left off last time I had talked to you about your service in Oregon State government in the D.E.Q. and Public Utility Commission, etcetera, and we ended up with a brief discussion about the Nixon administration's troubles. [chuckles]

So today I'd like to pick it up in the chronology with after you left state government. You entered a law practice with the firm Keane, Harper, Pearlman & Copeland, is that—

OSCANNLAIN: Did we cover the election, my running for Congress and the winning of the Republican primary?

MOR: Yes, we did do that.

OSCANNLAIN: And then the election of '74? Where I lost to Les AuCoin.

MOR: Right. We did talk about that.

OSCANNLAIN: All right. Well, after the election, I found myself unemployed. As I look back at it, I think it was an enormous mistake on my part not to reconnect with the Davies Biggs law firm, now the Stoel Rives law firm. But I had left the firm in 1969 and might well have returned in 1974.

The attitude of the firm toward public service had modified somewhat since the time I left in 1969, and it was quite possible that I might have gone back. The blame is all mine

because I never pursued it and never asked. As a matter of fact, I thought that it would improve my electoral chances if I were free to campaign on a full-time basis from stepping down at the D.E.Q., in about February or March of 1974. Then there was a primary in May, and from February until the end of the year I was unemployed until after the November election. Only at that time did I start to look around.

My attractiveness to any potential law firm was probably substantially diminished at that point because I'd gone through a very high profile election, and lost. Two problems would arise: number one, "Does this guy intend to run again? In which case, we're not terribly interested in him." And then I suppose the obvious one: "Even if he doesn't intend to run again, someone who has run and lost is not as appealing [both laugh] as someone who has retired at the peak of his game."

In any event, [clears throat] I pursued different prospects and finally accepted the invitation of a very good friend who has regrettably passed away since then, Don Pearlman, to join him in the Keane, Harper, Pearlman law firm. And that's what I did in probably around the first of the year in '75, if not very, very late in '74. And I was at that firm for about three years doing work in the regulatory field.

My biggest case during that time was representing the Port of Astoria in a case involving the Alumax aluminum plant in Warrenton, Oregon, near the mouth of the Columbia River. I was hired to help the Port and citizens' groups in the area to keep the plant after the Bonneville Power Administration had determined that it was going to withdraw its power sales contract. Our effort was to try to get that turned around, and we brought litigation against the Bonneville Power Administration [BPA].

Don Hodel was the [BPA] administrator at that time, and it took an exceptional amount of work. Eventually, we had our day in court in front of Judge [Otto R.] Skopil, who is now my colleague. [chuckles] But at that point Judge Skopil was the District Court judge,

and he denied our motion for summary judgment. We took it up to the Ninth Circuit Court of Appeals, and I argued that case in the Ninth Circuit in front of a panel which included now-Justice Kennedy, Judge Tom Tang, and I believe it was Judge Russell Smith, from Montana.

In due course we had a judgment which, as I recall, reversed on the merits of whether or not the National Environmental Policy Act was violated, but affirmed on the remedy. Our remedy that we had sought was to order the contract reinstated. The Court of Appeals concluded that even though we were right, that there was a violation, the remedy was something other than that. So that was the end of that litigation.

MOR: So they didn't get the power from Bonneville?

OSCANNLAIN: No. The net result was to maintain the status quo, and the plant never got built.

MOR: Okay, yes.

OSCANNLAIN: So it was disappointing. It was a very interesting intellectual challenge to try to find a solution for the people of that part of Oregon, who were very much struck by the economic impact of what they regarded as a super-technical environmental objection to the plant.

In time it would turn out that the plant could very well have been built within environmental standards, but that wouldn't happen until much later. And at that point the company was no longer interested in building a plant, for, among other reasons, the whole economy of aluminum prices had shifted.

MOR: Right. Several of the plants that were already operating out here in the gorge shut down.

OSCANNLAIN: That's right, some of them closed down, so it didn't make much sense [both chuckle] if the existing plants were cutting back to build a new one.

MOR: Yes, so your plaintiffs maybe were lucky in that it didn't—

OSCANNLAIN: Maybe. [MOR chuckles] Maybe there's a silver lining, after all, I don't know. But no attorney likes to lose a case, you know.

MOR: Of course, yes. [OSCANNLAIN laughs] Now, you accepted the offer of the position with Don Pearlman's firm.

OSCANNLAIN: Yes.

MOR: But you said that it was a mistake on your part not to go back to Stoel Rives?

OSCANNLAIN: It was a mistake not to pursue Stoel Rives back in February of 1974. In other words, I elected to stay unemployed, other than campaigning full time, and as I look back, I think that was a mistake. There was no need for me to have done that. I thought it was the right thing to do. In retrospect, I think it was a very silly thing to do, given the fact I had a number of children at that time, and our savings weren't all that great.

We did use up my P.E.R.S. account, which again with the brilliance of hindsight was a disastrous economic decision because that amount of money left in since 1974 until the peak in about 2003 or so? Whenever the P.E.R.S. fund peaked, it would probably have been worth several hundred thousand dollars at that point. [both laugh] Hindsight's a wonderful thing, isn't it? [both laugh] But one doesn't regret, one just moves on. I do find it

interesting to speculate, but on the other hand, my kids and my wife all remained healthy, as did I, and we had other challenging things to do and all went well.

MOR: I guess you didn't think of Stoel Rives in 1975, then, when you went to work for Pearlman?

OSCANNLAIN: I just got the feeling that there wasn't very much interest there.

MOR: That at that point your opportunity had passed, to go back?

OSCANNLAIN: I didn't figure that out until after the election. It's one of those things that you don't necessarily force it, but on the other hand you can read tea leaves, and not sensing an overwhelming desire to rush to make me an offer, I didn't pursue it any further. I looked in other directions. Whereas I think things would have been much different at the time I announced I was stepping down, at a very, very high profile position with great statewide notoriety—the head of D.E.Q. got a lot of press—I even got a lot of press when I was public utility commissioner. And as it turns out, of course, that firm and many other firms had developed a very, very successful environmental law practice, and so having the person who was in charge of enforcing environmental law in the whole state of Oregon come to the firm would be an attraction. And it brought business to the firm I eventually joined.

MOR: And so was that Alumax case that you brought up to the Ninth Circuit, was that your most significant case when you were with that firm?

OSCANNLAIN: Oh, I would say so, yes. Absolutely.

MOR: And then in '78, you went to another firm, Ragen Roberts?

OSCANNLAIN: Yes. I was approached by another longstanding friend of mine, Ron Ragen, who indicated that he and a couple of other lawyers were leaving another large law firm to start a small firm on their own. And they approached me about joining them, and I gave it very serious thought. I wasn't entirely comfortable with the Keane Harper firm for various reasons we don't need to go into.

But when I was approached by Ron Ragen and Dick Roberts I was very much taken by what they were trying to do. They offered me a name position, which I'm sure appealed to my vanity. So the firm that I, in effect, helped create was Ragen, Roberts & O'Scannlain. In due course that firm would grow significantly by merger, and at one point was Ragen, Tremaine, Roberts, O'Scannlain, Robertson & Neill, I believe. And now that firm is Davis Wright Tremaine, which is one of the major law firms in the country. It's based in Seattle, but it has a presence all the way up and down the Pacific Coast, China, I think Japan, and elsewhere.

MOR: I know it was probably two or three years later that you got heavily involved in politics, but were there any cases there at that firm that—

OSCANNLAIN: I maintained an interest in politics, never as a candidate again. I suppose I could have sought reelection in 1976, but decided that I would not. [laughingly] I think I was pretty much impressed by the fact that I had a large, growing family, and political office, or elective office, was not exactly the most stable basis [both chuckle] for a breadwinner. And I eventually became content not to be the candidate, and since 1974 never ran for political office again.

I did stay active politically to the extent I was involved in the Republican Party. And I should say I did, in fact, run for office within the party. Maybe that's an exception, but I was doing two things. First of all, in 1976 I was very much involved in a small group of Oregonians that were Citizens for Reagan. Governor [Ronald] Reagan, at that time of

California, was anxious to see what his potential would be as a candidate. Did I say '76? I'm sorry, I'm going back to 1968. Did I talk about that in respect to 1968?

There was a time in 1968 when Governor Reagan ran against Nixon for the presidency and came into Oregon and almost beat Nixon in the Oregon primary without ever stepping foot in the state. I was among those, including Don Pearlman, and, as it turns out, Don Hodel and Bob Hazen, Fred VanNatta, that group, that helped put on a campaign which turned out to be almost successful. And if it had been, that would really have been an earthquake jolt to the national scene. But as it turned out, Nixon won by a very narrow margin, and those of us who were involved in that remained very good friends and did some other things together.

So I'm sorry to go back to '68 on you like that.

MOR: Oh, that's quite all right. No problem.

OSCANNLAIN: In 1976, some of the same folks were involved in the Reagan campaign after President Ford decided to run for election—I won't say reelection because he was an appointed president. He was never elected in his own right. But I was among those at that point who thought that the incumbent president ought to be supported, and so I became a Ford delegate to the national convention in 1976. And I think that was in—was that Detroit? I can't remember where it was, but wherever the Republican National Convention was in 1976, I went there as a Ford delegate.

MOR: I can't remember for sure, but did Reagan toss his hat in the ring in '76?

OSCANNLAIN: Oh, yes. He was a very active candidate, and again almost beat Ford in the Republican convention, but Ford prevailed.

MOR: That's right, '76 was the year when he really made a serious bid.

OSCANNLAIN: He really made a strong effort at it, but failed. But in the process built an enormously strong base for four years later, for 1980, in which he did run and obviously successfully attained the nomination.

MOR: So in '76 you found yourself supporting President Ford over Ronald Reagan?

OSCANNLAIN: That's true. I just felt persuaded that one shouldn't precipitously throw out the incumbent president, notwithstanding the fact that he got there through a curious route. [both chuckle]

MOR: Right. After a couple of vice presidents in the Nixon administration.

OSCANNLAIN: Yes, exactly.

MOR: Then by 1980 you were very active in Ronald Reagan's campaign.

OSCANNLAIN: Yes. After Carter won in 1976, I stayed active in the Republican Party in different responsibilities, and the Reagan campaign got organized and started to get good funding to make a run for 1980. I was very much involved in that. I was on the Executive Committee of the Oregon campaign for Reagan, and in the end became co-chairman of the campaign under Diana Evans, who was the state chairman.

MOR: I can't quite remember how Oregon turned out.

OSCANNLAIN: Oregon voted for Reagan.

MOR: Oh, I know why I can't remember, because I was out of the country for that race.
[laughs]

OSCANNLAIN: Oregon supported Reagan. And Reagan won overwhelmingly, so much so that it changed the Senate, and that's how Mark Hatfield and Bob Packwood became so powerful. Mark Hatfield then became chairman of Senate Appropriations, and Bob Packwood became chairman of the Senate Finance Committee—both very, very powerful positions, and that really put Oregon on the map in terms of Washington, DC politics.

MOR: Right. Well the whole Northwest had a lot of really powerful positions in the Senate at that time. Senator Magnuson and—

OSCANNLAIN: The Northwest power before that was pretty much Senator [Henry M.] Jackson from Washington and Senator [Warren G.] Magnuson. Those were very powerful folks, but they didn't do much good for Oregon. Oregon really had very little power until 1980, when we had two top Senate chairmanships, and that had never happened before.

MOR: Yes, and that lasted throughout the Reagan administration.

OSCANNLAIN: No, it lasted through '86. Because the Senate turned Democrat again in the election of '86. So in January of '87 power changed in the Senate.

MOR: Yes. So the campaign in Oregon was successful, and Reagan became President.

OSCANNLAIN: Right. And then at that point I did take a short leave from Ragen, Roberts & O'Scannlain to go back to Washington as a member of the Reagan presidential transition team, and that was a fascinating experience. In fact, I gave a talk about it to the [Portland] City Club after I came back.

I went back there in the middle of November and stayed there until the inauguration. I was home back and forth a couple times, but I did a lot of work back there in the energy field with the Department of Energy transition team. I also ran the N.C.U.A., the National Credit Union Administration transition team, and cemented a lot of relationships with friends who I'd been working with politically.

MOR: What sorts of issues did you deal with as a member of the transition team?

OSCANNLAIN: Drafting the oil deregulation order, which took place on the twentieth of January. That was one of the first things the President signed. That was all worked up in the transition team. Dealt with personnel selection for positions in the Department of Energy, talked about trying to get a better approach to nuclear power, the beginnings of trying to solve the nuclear waste issue. Looked at Bonneville—did Bonneville really belong there rather than back in the Department of Interior? Should the Energy Department be abolished and its parts reassigned to other Cabinet agencies? I mean, all of that was going on. We recommended the abolition of the Department, but the White House in the end declined to pursue that, and so the Energy Department has continued ever since.

Don't forget, Reagan ran on a platform of abolishing the Energy Department, and we worked on the design to make that happen and specifically suggested where different things should go.

MOR: Was it because energy, at that point, didn't seem important enough?

OSCANNLAIN: It didn't seem as if it was really contributing to the solution of energy independence, creating an economic climate which would encourage the development of new resources, creating a climate in which nuclear power could be seriously pursued.

This was all during the time of the [President] Carter approach, which was very heavy-handed and very restrictive and not particularly supportive of the production side. Certainly there were regulatory issues that were appropriate, but there was nothing—and I think this was one of the elements in the campaign—there was nothing that was oriented toward developing of new sources of energy in a serious way. There was a lot of chatter about it, but nothing really going on.

MOR: And it was decided that maybe you could get more focus on these issues if they were administered by different Cabinet departments?

OSCANNLAIN: Yes, that was some of the thinking. The Energy Department had the image of being a super regulator, whereas there already was the Federal Energy Regulatory Commission (F.E.R.C.) in and of itself, which presumably could have handled the regulatory side of it. The rest of it should have been promotional rather than restrictive, and that was the attitude in the fall-winter of 1980.

MOR: And nuclear power had gotten a few hits, with Three Mile Island, in particular.

OSCANNLAIN: Oh, yes. Sure.

MOR: You mentioned that Carter wasn't supportive on the production side, but he had real concerns about pursuing the so-called advance fuel cycles.

OSCANNLAIN: Oh yes. Yes.

MOR: The breeder reactor that they were going to build in Tennessee.

OSCANNLAIN: We were dealing with that. One of the people on the transition team was quite an expert in that field. It wasn't my expertise, but it was interesting to work with.

MOR: And ever since nuclear power has failed to rebound, although there's more talk about it today.

OSCANNLAIN: In the year 2008, people are taking another look. Eighty percent of France's electrical energy is produced by nuclear today in 2008. In fact, it's even higher than that.

MOR: Yes, they're the nation that has pursued it the most ardently, that's for sure.

OSCANNLAIN: Right. Exactly.

MOR: You attended the inauguration?

OSCANNLAIN: I did.

MOR: I bet that was an exciting event for anyone that was involved in the campaign, especially. Then after your work on the transition team was over, what was next for you?

OSCANNLAIN: I was still a partner at Ragen, Roberts & O'Scannlain, and at some point we merged with another firm to make it Ragen, Tremaine, Roberts, Schmeer, O'Scannlain & Neill, or something like that. [laughs] It went through several emanations, but it was the old Tremaine law firm; [Black, Kendall,] Tremaine, Boothe & Higgins, I think was the origin of that other firm. But Stewart Tremaine was the lead partner, and he and our lead partner, Ron Ragen, put together a merger, and at that time the firm was starting to take on significant size. In any event, I remained with that firm all the way through 1986 when I came on the Court.

MOR: Right, but you wound up doing more work for the Reagan Administration after the transition team, right?

OSCANNLAIN: Kind of on a volunteer basis. I was asked by Secretary [Don] Hodel at that point—he was Secretary of Energy, in addition to being Secretary of Interior later—he asked me to chair an advisory committee to the Secretary of Energy on the disposition of nuclear waste.

The real problem in nuclear is what do you do with this high level radioactive waste, which has a half-life measured in thousands of years.

MOR: Right.

OSCANNLAIN: It's diminishing the whole time, but still it is a very, very serious hazard and needs to be dealt with in an appropriate technically competent way. As it boiled down, what you need to do is to have a nuclear waste storage site built to great specs, presumably built considerably below the surface level, and in particular rock or limestone, or as it turned out, salt formations, which would ensure that the radioactive material would never get loose. In fact, one of the attractions of the salt formation was that salt, while it's a strong barrier, it also is malleable and in time would totally encapsulate the waste materials. The waste materials would come in barrels, let's say, or something that looked like a barrel, and they would be stored several thousand feet below the surface of the earth in these salt caves. There was one option down in New Mexico, and then there were a couple of others, but the one that seemed to make the most sense was the one at Yucca Mountain in Nevada.

MOR: Right, which we're still looking at.

OSCANNLAIN: Which we're still looking at in the year 2008. Nuclear is a very—what should I say?—radioactive issue, as well as being radioactive material. [both chuckle]

MOR: A toxic issue. [chuckles]

OSCANNLAIN: It provoked a lot of public resistance. And the long and the short of it is that one of the things we did was to go to Europe to inspect just what the Swedes do with it, what the French do with it, and how the Brits were dealing with their program. I think we also went to Bonn in Germany. It was fascinating to see, particularly in France, how it was a non-issue. There was just no public opposition whatsoever. On the other hand, I wasn't overwhelmed with what I saw in terms of the disposition of this material compared to the kinds of plans that were underway for Yucca Mountain. The way the French were dealing with it didn't inspire total confidence. I'm sure that they're still working on it.

In any event, it was a very satisfying extracurricular activity. It involved a few meetings and some trips spread over a year, or so. Eventually, we published a report which we made to the Secretary, and that became public and is one of the documents that people still look at in terms of trying to decide what to do.

MOR: And that report laid out some recommendations for a process to determine the waste site?

OSCANNLAIN: Oh, yes. Very much so.

MOR: I was, at that time, doing of journalistic work around the Hanford Reservation. And of course, the other side of this is that, apart from trying to pursue the safest, most secure site, was that there was a budget attached to it, of course.

OSCANNLAIN: Oh sure.

MOR: And I know that the Hanford folks were really vying to become the national repository, as well.

OSCANNLAIN: We went to Hanford. Yes, that was one of the options.

MOR: Did you feel comfortable with radioactive waste being stored on the banks of the Columbia River?

OSCANNLAIN: No. [both laugh]

MOR: I think a lot of people didn't feel too comfortable with it.

OSCANNLAIN: Not at all. We were briefed on the leakage that was already underway into the Columbia River. We were very much aware of the fact that you're talking about eons here. You have to think in terms of hundreds, if not thousands of years.

MOR: Ten thousand years, I think, is the half life of plutonium.

OSCANNLAIN: And you have to believe that over such a span of time the proximity between a storage vault on the Hanford Reservation and the Columbia River is a serious, serious issue, to say nothing of the aquifer below the river. That was not our number one recommendation.

On the other hand, none of those issues seemed to surround the Yucca Mountain option, and that's the one that we recommended.

MOR: If I recall, at that point in time the State of Nevada was quite willing to accept the—

OSCANNLAIN: The politics on that, of course, was outside our domain, but it shifted dramatically, and now apparently—

MOR: Now they're resisting it, I think.

OSCANNLAIN: It's been labeled a dumping ground, and Nevadans have been whip-sawed politically by candidates on the right and the left who try to put it in terms of being an insult to store this material in Nevada.

MOR: Yes, they were more enthusiastic about it, I think, in the '80s. [chuckles]

OSCANNLAIN: Right.

MOR: If I remember correctly, it probably was the process that you helped develop, but there was going to be either ten or eleven sites considered.

OSCANNLAIN: Yes.

MOR: And then when that process broke down, I think Congress actually intervened and said, "The site will be Yucca Mountain," without going through this process.

OSCANNLAIN: Mm-hmm. Yes, right.

MOR: Were you involved in that at all later?

OSCANNLAIN: No. We finished our work when we submitted the report. And I can't remember exactly when that was, maybe '82, '83, somewhere in there.

MOR: Right around that same time, then, you also served on the Grace Commission to streamline government and cut some of the waste out?

OSCANNLAIN: That's right. I don't think I was on both of them at the same time. I was on one, and then I got invited to do the other, and I can't quite remember the sequence. But I was also a member of the [hand clap] Grace Commission team that was looking at energy.

MOR: And all this time you were still residing here in Oregon?

OSCANNLAIN: Oh, yes, and having a very active, successful law practice. Most of my work was in the regulatory area. I was doing a lot of work representing clients with environmental issues.

I represented the regional natural gas distributors, who at a certain point discovered that their growth was being hindered by policy set by Bonneville Power Administration in terms of electric rates. One of the things that I had to do was to pursue the pricing issue to point out that, while there was some subsidization going on on the electric side, it had the effect of creating, whether we wanted it or not, a policy that electric power was being preferred as a heating source over natural gas, which is a much more efficient source of home heating. And I think keeping the pressure eventually forced a recalculation to a position in which now the tables have turned. Natural gas is the primary source of domestic home heating in the Northwest. In fact, in terms of new home construction, it's a very, very high percentage compared to twenty years before when the ratio was reversed. Electric baseboard heating and other kinds of very inefficient forms of electric heat were the lead source.

MOR: Right. But of course, that was probably also partly driven by cost.

OSCANNLAIN: Then the whole W.P.P.S.S. business came into play, right.

MOR: Yes, prior to the energy shortages of the '70s and the W.P.P.S.S. debt that Bonneville took on when electric rates went up precipitously. [chuckles]

OSCANNLAIN: My natural gas clients were not at all unhappy about that.

MOR: No, I'm sure they weren't. [both laugh]

OSCANNLAIN: As a matter of fact, from their point of view it was simply bringing things to an appropriate equilibrium when the true costs were being allocated to the costs of wholesale electric sales in the Northwest. And that leveled the playing field, so to speak.

MOR: Mm-hmm. Yes.

OSCANNLAIN: So most of my practice with the Ragen Tremaine firm was in the regulatory area. I represented some water companies, dealt with corporate issues, generally a corporate and regulatory practice. Very little litigation, although a fair amount of regulatory hearing work. It could be called litigation in a loose sense, but it was in front of the agencies rather than in front of a court.

Okay. All right. Does this bring us up, then, to about 1986, more or less?

MOR: It's close. The only questions I would have prior to your being appointed to the Appeals Court would be maybe just more information about your work on the Grace Commission and your knowledge of the Reagan Administration and the people that were part of it there in Reagan's first term when you were—

OSCANNLAIN: Oh yes, yes.

MOR: —working on the [...] You must have worked with Ed Meese a little bit—

OSCANNLAIN: Yes.

MOR: —and some of the others. So we'll just save that for next time.

OSCANNLAIN: Up until then I had been active in the Republican Party, but in 1983 I actually was elected Republican state chairman for the State of Oregon, partially at the behest of Governor [Victor G.] Atiyeh, who urged me to do that. And there's a whole side story about some of the turmoil inside the Republican Party in Oregon.

There was a longstanding feud between people who were motivated by an evangelical approach to getting active in politics, which was perfectly respectable in some circles, but was regarded as anathema in others. And I was elected as someone who could have access both to the liberal side of the Republican Party and to the conservative and super-conservative side. And I think I've played a role in, first of all, reducing the decibel level [both chuckle] of internecine conversation, and refocusing things on the basic activities of organizing to run telephone banks and house-to-house campaigning, the kinds of things that got away from philosophical discussions and more on just helping to elect Republican candidates.

And again, that was a volunteer activity I continued the whole time. And I must say I feel very gratified that my partners in my law firm would regard that as something that they were willing to give me some slack on. I suppose to the extent I was doing that I probably was not billing hours, although I billed a lot of hours. [both chuckle] I'm not shy about that. But it did take some consent on the part of my colleagues, and I'll never forget their willingness to do so because I think it certainly helped me maintain some side interests in public service that I've always had.

MOR: Why don't we pick it up again on our next session?

OSCANNLAIN: All right.

MOR: Thank you very much for the interview today.

OSCANNLAIN: Okay, sounds great.

[End of Session 4]

Session 5
2008 October 31

MOR: We're on tape, so to speak, with Diarmuid O'Scannlain in his chambers on October 31, 2008, continuing the oral history.

Judge O'Scannlain, when we left off last time you mentioned the fact that you became chair of the Oregon Republican Party in 1983, and that you were, to some extent, seen as a figure that could bring the growing evangelical wing of the party together with the more traditional wing, and probably there's lots more to say about it besides that. [both chuckle]

OSCANNLAIN: Alright.

MOR: I guess it was Governor Atiyeh that had spoken to you about assuming this position. Maybe we should start first by asking you how far back your relationship went with Vic Atiyeh.

OSCANNLAIN: First, my activity in the Republican Party probably began right after we came to Portland in 1965, '66—getting started in the Multnomah County Central Committee. And I went to many state meetings of the State Central Committee and state Republican activities.

I [recording stops, then resumes]— knew Governor Atiyeh when I was in Salem from 1969 through 1973 as the deputy attorney general under Lee Johnson, and then as public utility commissioner. Somewhere along the line I'm sure that my official roles involved then Senator Atiyeh, and I know that he and I attended meetings of the Trumpeters on many occasions over the years. In fact, there was a time when I was the president of Trumpeters, which again was an avenue to meet a lot of other statewide officials.

But with respect to becoming state chairman, Governor Atiyeh specifically asked me to take on the project. What he failed to point out, of course, was that one had to get elected to that job, it wasn't an appointed job. So while he encouraged me to become state chairman, I was on my own to put together a campaign to win election to that position. And that involved a fair amount of persuasion of people from the other thirty-five counties in the state, because the Central Committee was very, very much structured to give almost equal representation to every county. There were a lot of people from all corners of the state I would not have ordinarily been in close regular contact with that I had to persuade to get elected.

I was successful in getting elected, without a lot of help from the governor, after he talked me into doing this, but that's fine. [both chuckle] We worked together afterward, and I think the major contribution that I might have made there, and maybe one of the reasons I did get elected, was that I think I was trusted by people across the spectrum. I highly respect the evangelical members of the party leadership. We shared an active commitment to Christianity. Their denominational background is different from mine, but we had a lot of things in common. And I wasn't in the slightest bit afraid to sit down and talk to people like that because I never felt threatened by them, and I'm sure they learned not to feel threatened by me.

There are some people in the Republican Party who, I suppose, are fundamentally secular, and are very suspicious of anybody who wears religion on his sleeve. And I think some of the evangelicals are very outspoken about their views. In fact there were many times when people that were active in the party leadership would state that they were there because they thought this was part of their evangelization ministry and that they felt that as active Christians they had to take an active role in their party.

It's a perfectly respectable motivation, and I think I dealt with folks on that basis. I personally think that some of the seculars are, frankly, intolerant of believers, and they should moderate their views accordingly. In my case, I think I was successful in developing a rapport, and together we channeled our efforts toward the real focus, which was organizing and electing members of the state legislature, both House and Senate, as well.

This was during the time of President Reagan. I know that it certainly helped my credibility to be highly identified with the Reagan campaign of 1980, when this vacancy occurred in 1983. And I stayed active in the Reagan campaign while I was Republican state chairman, and I think we had some pretty good results in the process.

I worked very closely with Speaker Larry Campbell, who, I think, now has his own political affairs consulting group based in either Eugene or Salem, and is still active in dealing with the legislature. I felt that my major commitment was to work closely with the elected officials, and the real contact point for me was Larry Campbell. Although I also dealt directly with lots of other elected officials, not only at the state level, but through the Republican National Committee dealing with presidential people, as well as in the congressional campaigns affecting Oregon.

MOR: This might be a more germane topic when we actually get you to the bench, but one question that occurs to me is with respect to the more traditional wing of the Republican Party versus the emerging evangelical segment, and since, ascending, I would say. What would you say about a politician in the campaign, being identified in that way would, as you say, be perfectly reasonable and respectable, but what about the issue of separation of church and state that's in the Constitution? Do you think that maybe things have gone too far?

OSCANNLAIN: In 1983 to 1986?

MOR: In '83, probably not then, but that was the beginning of the movement.

OSCANNLAIN: That introduces a whole separate issue. Everybody is in public life based on some motivation, and if your motivation is personal greed, that's a highly tolerable motivation because there are a lot of people in politics that are in it because of personal aggrandizement. It increases their potential for earning, and they enjoy being in the limelight. Other people are motivated by public service, the idea of serving your fellow man. Other people have that motivation because of their religious background, whether it's Orthodox Jewish, or evangelical Christian, Catholic or what have you—or any motivation based on notions of obligations to your fellow man.

I don't see any a constitutional issue, if there is one, to say that you can run for office because you don't belong to any religion, but you who are very active in a religion and talk about it in public can't. That's unconstitutional.

MOR: Sure. That makes sense.

OSCANNLAIN: And the way that this issue is drafted and presented by a lot of pundits, and a lot of people who like to be very ponderous about this, is actually silly, in my view. The problem is that people who are very voluble about their religious beliefs, or for that matter their ardent political beliefs, tend to turn other people off. And just like the perpetual, professional liberals who are always telling you how to behave and what's right and what's wrong, there are people on the other end of the spectrum who might be very public in their advice about what you can do and what you can't do, but that's life. That's the nature of the beast, it seems to me.

And for whatever reason, we've now—even back in the '80s and now still—seem to be creating artificial barriers almost on thought control. You're allowed to say certain things, but you're not allowed to say other things. That's not what the Constitution is all

about. Free speech means free speech. And if you get turned off by what somebody has to say, that's fine, don't vote for that person. I think that's the response—not to silence them, but simply not to vote for them. And you certainly have the right not to listen. You have the right to engage in debate and discussion. But you don't have a right to say that that person shall not be heard. Anyway, that's my view.

MOR: Sure. I can see that in terms of identifying yourself in a campaign, but what about if you're a lawmaker or if you're an enforcer of laws, once you're in office, is there an issue there in terms of campaign promises in terms of trying to appeal to one segment or another of the electorate, particularly with respect to the church and state issue?

OSCANNLAIN: You'd have to give me an example of how this would arise. Once elected or appointed through the proper channels, a public official has a duty to enforce the law according to the Constitution of the United States, and if you are in state office, of the State of Oregon. And those provisions are all laid out. As I said earlier, your motivation may vary, or it may encourage you to be more or less aggressive in a particular area. But again, that's the notion of political choice making. I don't see where the church and state issue comes up.

If, you're going to say that if you're the elected governor of the State of Oregon, in your administration, that you're only going to hire members of the Foursquare Baptist Church and nobody else, all right, now you've got a church and state issue, very clearly. And that would be a pretty clear violation of the Establishment Clause. You cannot have a religious test to hold an office.

But I don't see that going on. If it is, it's certainly going on below my radar. But if anything, I think we hear more examples of people being discriminated against because of strongly held views. And again, as long as it's not in the category of a test oath for public office, you know, that's the yin and yang of politics.

MOR: Mm-hmm. Okay.

Bringing us back to the beginning of this question, I asked you about your relationship with Vic Atiyeh. It also occurs to me that Tom McCall has never come up in our conversation so far, and you were active in the Republican Party when he was governor. There was that campaign when he ran as, I think, maybe an independent candidacy, when he tried to return to office when Straub and Atiyeh had their first race.

OSCANNLAIN: That's after my time, but I'm glad you brought up Tom McCall. Tom McCall and I got to be very close, which is not generally known. But right after I became the deputy attorney general under Lee Johnson, Lee assigned me, among other duties, the duty to attend the governor's staff meeting at 8:30 every morning in the governor's office. Every once in a while Lee would go himself, but in terms of the routine, he asked me to go to that meeting, which I did for two years, essentially.

MOR: I think we did talk about your attending those meetings. I'd forgotten. [chuckles]

OSCANNLAIN: Okay. [laughingly] I hope I'm not contradicting anything I've already said.

MOR: No, I don't think you are.

OSCANNLAIN: That was a time when I got to know the governor and the governor got to know me. I think we developed a healthy mutual respect, which resulted in my being appointed as public utility commissioner, and eventually head of the D.E.Q. And Tom, very kindly, endorsed my congressional election campaign and was very, very loyal to me, and I hope I was loyal to him.

MOR: Did you spend social time with the McCalls?

OSCANNLAIN: Not particularly. Not when he was in office. To the extent we saw them socially at all, it would have been afterward, because, as it turns out, he and Audrey lived about a hundred yards away from our house in Portland Heights. We were at 2421 Southwest Arden Road, and they were on the intersection of Broadway Drive and Sherwood and Edgewood, which was the very next block. So we'd run into one or the other at Strohecker's, the local grocery store, and we would see their son every once in a while. Their son was a little troubled, but we had casual contact with them.

MOR: Okay. Why don't we, move on now to some of the work and personalities that you encountered when you were doing things for the Reagan administration?

OSCANNLAIN: Sure.

MOR: In particular the Grace Commission was one of your major assignments?

OSCANNLAIN: That goes back to 1980. I think we did talk about my being active in the first Reagan term election in the fall of 1980.

MOR: Yes, we did. You were the Oregon chair.

OSCANNLAIN: Co-chair. The chair was Diana Evans.

MOR: Okay.

OSCANNLAIN: The election occurred in November, of course, of 1980, and a few weeks later I was invited to come back to Washington, DC to join the transition team for the presidential transition. And that's something I thoroughly enjoyed. It was a chance to

just be with all the people that were going to end up running the administration. And my particular assignment was to work in the Energy Department transition identifying people for consideration for presidential appointments to the top level of that Cabinet agency, as well as developing policy.

I had a very minor role, but at least I was around for the drafting of the original order, the oil deregulation order, which was apparently adopted within a few days after January 20, 1981. That's the thing that was going on in the Reagan Energy Department transition team.

In addition to that, I was also asked to take on the transition for a very small agency called the National Credit Union Administration. There I was able, in a fairly short period of time, to help with some selection of personnel, as well as to review agency policy. The N.C.U.A. is the organization that is the federal regulator of the credit unions around the country. All credit unions are chartered through the N.C.U.A., and the federal government retains a supervisory role over their financial practices, and I had something to do with that.

MOR: And at least nowadays it also insures deposits.

OSCANNLAIN: Yes.

MOR: A parallel system to F.D.I.C. (Federal Deposit Insurance Corporation)?

OSCANNLAIN: For the credit unions, yes, that's right.

MOR: And were there any particular issues with respect to that—any stories?

OSCANNLAIN: I really can't think of any. I think everybody felt that it was an agency that was reasonably well run, no huge complaints, no suggestions of improper financial

practices of the kind that we're hearing about in 2008, twenty-eight years later. And I was satisfied that it was reasonably well run, and our advice was to stay on track and keep on tracking.

MOR: And what else besides those two assignments?

OSCANNLAIN: In transition?

MOR: Yes. Anything else?

OSCANNLAIN: During the transition time—you know, after Thanksgiving until Christmas, and then after Christmas until Inauguration Day—you're just rubbing shoulders with a lot of VIP's and a lot of people who were active in the campaigns and who were heading for different roles in different agencies.

I suppose I probably should disclose is that all of us were being looked over in terms of potential future assignments, invitations to join the administration. And there were two in particular that were proposed to me. One was chairman of the Federal Energy Regulatory Commission.

MOR: That would have fit in with your background.

OSCANNLAIN: Exactly. They were very interested in the fact that I had been the P.U.C. And then the other, since I was at the transition for the Department of Energy, would be the deputy secretary of the Department of Energy. I came very close to taking the deputy secretary role. There were a lot of very attractive features to doing that. There were some counter-indications, as well.

We were there, in part, to recommend the abolishment of the Department of Energy, so that at least at the time the discussions were going on I would be expected to carry forward a policy to undo the creation of the Department. And, of course, that takes congressional action, you'd have to propose it to Congress and defend your proposal, and Congress would have to agree.

As it turns out, the Reagan administration dropped the idea of abolishing the Department of Energy, so that was never a real issue, but the chance to come into the federal government at the deputy secretary level was very attractive. As I say, I came close to doing it. But I had some misgivings, and decided, in reality, I had children who were in private schools. If we were to move back to Washington, we would have to live at an income level which would not permit that thing, so far as our family was concerned. I had eight kids, and it just didn't seem to make a lot of sense.

MOR: So this was due to the cost of living in Washington, or would you have had to take a step down in terms of pay?

OSCANNLAIN: The cost of living in Washington certainly was higher than the cost of living in Oregon, and we'd have to decide whether we to sell our house in Portland and look for something in probably suburban Virginia or suburban Maryland. But I certainly wouldn't have done something like that unless the whole family were to move, and that just seemed to be a very tall order, and I declined. Obviously I was very appreciative to be considered for both of those spots.

I was less attracted to the F.E.R.C., notwithstanding the fact that my background was probably more suited to that because I'd already been a utility regulator, and the F.E.R.C. regulates the electric and natural gas utilities, primarily, [clears throat] so it was a good fit. But on the other hand, even to be the chair of, I think it's a five person commission,

somehow or other wasn't quite as attractive as being in a sub-Cabinet position with a Cabinet agency, even if it were going to be abolished as soon as I got there. [both laugh]

MOR: It could have been a position of eliminating your own job?

OSCANNLAIN: Yes. I'm quite sure that if we ever pulled that off there would be another spot for me someplace.

MOR: Well, of course, yes.

OSCANNLAIN: But on the other hand, it all went into the mix.

So we stayed. I came back home, and I gave a talk at the City Club, I remember, not too long after getting back. The City Club was interested in my transition experience, and I gave a talk describing what we did.

MOR: You mentioned that you were meeting a lot of folks and getting to know a lot of people back there. Who were some of the people that you became closest to?

OSCANNLAIN: Oh, my. I suppose Senator [James A.] McClure. I got to know Senator Hatfield on a much closer basis than I had known him before. There were people on the House side, a lot of staffers, a lot of White House officials. I had already known Ed Meese. I got to know people like the White House political director—let me just think for a second of his name. We see him on C.N.N. (Cable News Network) in 2008 as one of the political pundits. [snaps fingers] [laughingly] Lordy—why am I stuck on his name right now?

MOR: That's okay. It was twenty-seven years ago. [chuckles]

OSCANNLAIN: Ed Rollins. And there were quite a few other people, as well. Danny Boggs, who did take the deputy secretary of energy position and eventually was nominated to the U.S. Court of Appeals for the Sixth Circuit. I got to know Danny very, very well while I was there. Some of the other people I worked closely with a dynamic oil man by the name of Mike Halbouty—very, very successful wildcatter on his own, he had his own oil company. He was a close friend of President Reagan's, and he headed up the transition team. I went back to several reunions of the transition team which Mike set up. That was very special.

Anyway, when you're there, you meet a lot of people that you enjoy and stay in touch with.

MOR: Are there any stories associated with some of these people? For instance, Senator McClure? Apparently you didn't know him before this time, is that right?

OSCANNLAIN: No, but I do remember that he was a very approachable guy. We went to dinner together, in a group, several times. I had never really been in a situation before then of sitting down next to a senator talking about direct issues that affected policy, and in a position to affect policy choices.

MOR: I assume there was an intersection between the issues that you were working on and what he was involved with?

OSCANNLAIN: Oh, yes. this is when I was on the Energy Department transition team.

A lot of things happen on a casual basis. It isn't all where there's an established meeting, and there's a formal notice, and all that thing. A lot of work gets done on the telephone, it gets done over lunch and dinner. When you're in a situation like that, there's

always something going on. Somebody's got a reception somewhere, and you go to it and get to meet so-and-so.

MOR: And Senator Hatfield, you knew him earlier, but you said you became closer to him in that period?

OSCANNLAIN: I probably didn't know him quite as well, but I did get to know him better as a result of being in Washington for about a month, on and off, during the transition. He became very, very, very powerful as a result of the Reagan election because Reagan took with him enough senatorial seats to put the Republicans in power. So after serving prior to 1980 in the minority perpetually, he thought, or a lot of people thought, in 1980 all of sudden Mark Hatfield of Oregon became the chairman of the Senate Appropriations Committee, which is extremely powerful.

MOR: Right, a very powerful post.

OSCANNLAIN: My good friend Bob Packwood became chairman of the Finance Committee, and a lot of other folks who didn't expect to walk into those levels of power all of a sudden became very powerful and were able to stay in the majority for six years.

MOR: Right, giving Oregon way more clout than the state had previously had.

OSCANNLAIN: Absolutely. Sure.

MOR: You mentioned Ed Meese. Now, you said you knew him previously?

OSCANNLAIN: I knew Ed previously. Diane Evans and I interacted with him, among others, during the campaign, which took at least a year. I think we got really started on it in 1979 sometime. One meeting I remember very well that Ed was at, but it was presided

over by the campaign chairman, who eventually became the head of the C.I.A. [snaps fingers] Tall New York City lawyer. Lordy, that name is escaping me at the moment. [William Casey]. But anyway, he presided over the meeting, and President-to-be Reagan was there, and the question was who should Reagan select as the vice presidential nominee. This was all pre-convention.

I was very privileged to be part of that discussion. This meeting occurred, I believe, in Los Angeles, in or close to the building where the campaign headquarters was. It was right near Los Angeles International Airport. And we were invited as the senior active people in the campaign to provide input to Governor Reagan on the pros and cons of going with one person or another. And, of course, that was the time when we made fairly clear that George Bush would be a good selection because he represented a part of the party that would feel more committed to supporting Reagan, as opposed to people like Anne Armstrong, who was certainly considered. She would have been the first woman vice president in American history, and she came very close to being picked by Reagan.

The other contender was Jack Kemp. And there were some very good friends of mine who were leaning more toward Kemp on the theory that he was more traditionally conservative than George Bush. And that was the way that the conversation developed.

MOR: What was your impression of Reagan himself in those days? How would you describe him?

OSCANNLAIN: I really loved the guy. He had enormous presence. He had just a commanding way about him. He had the ability to synthesize things very quickly and translate everything into communicable phrases and concepts. And this, I think, was the great talent that he brought. He was very personable. He was very focused on the whole political and electoral process. He did not sweat the details. He had some very top people who were very smart and very efficient, folks around him who would take guidance and

take care of the implementation. He articulated the general principles that he had, and he stuck with them. There was no shifting back and forth. He had some fundamental ideas that he never strayed from.

Now, some people criticized him because they thought that's all he had, that he was incapable, or not very smart, or a prisoner of his own mantra. But that wasn't Ronald Reagan. Ronald Reagan was a very, very savvy guy, who knew what he was doing, had an idea of how one can communicate with the American electorate, and succeeded mightily.

MOR: The fact that he's still, despite all the negativity that came out in his second term, is still well remembered, and the airport there in DC is now named after him. [chuckles]

OSCANNLAIN: Oh, yes. Oh sure.

MOR: Even people who have maybe been turned off in the interim about politics, he's certainly the respected former president.

What about Meese in those days?

OSCANNLAIN: Ed Meese?

MOR: Yes.

OSCANNLAIN: Ed was always known as the “keeper of the flame”; that was his nickname. Ed was the true believer in the conservative approach. And I was a very happy foot soldier to a very large extent, except that I think I was able to communicate some concepts on a broader level. Ed was extremely loyal. He was also very consistent in terms of the advice that he would give. He developed an extensive network of people who felt that we needed a change in 1980 from the leftward drift that had been going on with the

Carter days, and the way to do it was to have a consistent philosophy that could be implemented.

I think the early White House in which the big three was—let's see, Jim Baker was the chief of staff, and he's the guy that made the trains run on time. He was just a superb administrator, understood the workings of government superbly, and to his credit, largely, I would say largely carried out the philosophical approach that Ed Meese would develop as counselor to the president. And then you had Mike Deaver, who was the keeper of the body, and he was the one who was just the master publicist, the incredibly sophisticated architect of developing the ways of communicating most effectively. First he had the greatest communicator in the world in Reagan himself. But Deaver knew how to showcase that talent and always, always was thinking in terms of what's the best way to put the president in the best light, and he was very, very successful in that.

I did meet all three at various times. Of the three, the one I knew, and still know the best, is probably Ed.

MOR: In terms of your describing him as the keeper of the flame, maybe that's a segue into work on the Grace Commission, which was—

OSCANNLAIN: Yes, that was a little later. There were two things, the Grace Commission, and then the study on nuclear waste storage. Did I mention that to you earlier?

MOR: You did, actually, and we should talk about that.

OSCANNLAIN: Okay. Those are two things that I did during the Reagan first term.

MOR: Right. The Department of Energy embarked on trying to find the site, and even the Hanford Reservation was considered.

OSCANNLAIN: Exactly.

MOR: I forget the details of that, but was it the Reagan administration that just simply identified the Yucca Mountain site?

OSCANNLAIN: No, what happened was that in due course there was an Energy Secretary—I forget his name already [Gov. James Edwards]—but he went back to South Carolina and he was succeeded by Don Hodel, who was a long time personal friend of mine, still is. And it was Secretary Hodel who asked me to head up a special advisory committee on the alternate methods of storage of nuclear waste.

This is a project that lasted, I'm sure, the better part of a year, or maybe more than a year. But in the process this committee, which included some nuclear engineering experts and all kinds of folks, evaluated potential sites and visited them. First of all we visited sites outside of Stockholm, Sweden, in France, and in Switzerland or Germany. It may have been Switzerland, I can't remember. We physically went down thousands of feet into the earth and looked at the different ways in which nuclear waste was then being stored.

Then we looked at some options in Southern New Mexico and in Yucca Mountain, and based on everything that we had looked at we felt that the least undesirable [laughs] was Yucca Mountain, and that would be the best of the alternatives. Every alternative had some pluses and some minuses, and we looked at all of that and reached that conclusion.

Then eventually, of course, that would be recommended to Congress, and then Congress, got into a very political dispute over it. Eventually, the delegation from Nevada

decided that they didn't want to be the nuclear waste receptacle for the rest of the country, and there you have it. Here we are in 2008 and I don't know that we've made any progress at all since that time.

MOR: No, that's right. It's been stalled for twenty years now. [chuckles]

OSCANNLAIN: And that is the biggest issue in nuclear power. I happen to think that nuclear power is a very, very efficient way to go for base load electricity. And I think the best example is the European example, particularly France. Eighty percent of France's electricity is generated by nuclear power, and there isn't a peep out of anybody over there in terms of its dangers or anything else.

I think we're starting to get back on reevaluation. Three Mile Island, obviously, was a huge problem and a huge issue. But again, like so many things, we overreacted and didn't try to contain: "What was precisely the problem at Three Mile Island?" As opposed to saying, "Oh, it's nuclear, therefore let's drop all nuclear."

MOR: The country's shock at Three Mile Island was reinforced seven years later when the Chernobyl disaster occurred, which was much, much worse than Three Mile Island.

MOR: Yes, but you know, I don't think most Americans had a particularly high regard for the engineering coming out of the Soviet Union. I think we weren't at all surprised that what the Soviets were trying to do would keep blowing up in their face. It was true of their military, it was true of anything else they tried. There were all kinds of bloopers and mistakes, and this was just another one of them.

MOR: Certainly the U.S. power plants were much better designed than that one.

OSCANNLAIN: Of course. Oh, yes.

MOR: But it was the death knell of the Hanford N Reactor, which had a pretty similar design to Chernobyl. [chuckles]

OSCANNLAIN: Yes, exactly.

MOR: Anything else to say about Ed Meese? You said you knew him pretty well. Did you actually interact with him socially much?

OSCANNLAIN: On occasion, yes. Today he's involved in the Heritage Foundation, as well as the Hoover Institution, and I've seen him at Heritage a number of times. Not at Hoover, but at Heritage.

MOR: We still haven't actually talked about the Grace Commission. That was the initiative to make government more efficient?

OSCANNLAIN: Yes.

MOR: And what was involved there? First of all, was that where the genesis of the idea of abolishing the Department of Energy came from?

OSCANNLAIN: No. I'm trying to remember the year. Do you recall the year we're talking about with the Grace Commission?

MOR: I probably have it here. Let me take a look. I know I've got a paper here about it somewhere. [paper rustling] I've got the report, maybe. [chuckles]

OSCANNLAIN: I'm just trying to put it in perspective and I'm not quite sure.

MOR: Yes, this is it. Looks like it was in 1984, President's Private Sector—

OSCANNLAIN: That's it. That was the name of it. It was the Grace Commission. It was called the President's Private Sector Survey on Cost Control. Okay. The mission was very simple; that was to try to identify sectors of the Executive Branch that could be either eliminated or cut way back, expenditures that were being made that could be ended, and that sort of thing. There were a lot of areas where we considered things to do. I can't remember the details right now, but I know I was on a team that was looking at some things in the energy and regulatory area.

That process didn't last all that long. It wasn't as extensive as the nuclear waste committee, at least in terms of time commitment. But it certainly was something that was pretty high up on the president's agenda. If I'm not mistaken, it was not all that successful because when it came time to bring these recommendations to the Congress, Congress wasn't able to fend off the interest groups that were supporting each individual area, and that's the problem. Every single program in the federal government has its own constituency, and it's very, very hard to abolish something, even when there's no generalized rationale for it, because there's some entity out there, some cluster of people and companies that think, "Oh, no, this is something that we need, and we're going to keep it." And all it takes is influencing a couple of members of Congress in the Senate or the House that happen to be the key people, and it just gets eliminated from a list. And it's so easy to do. If the bill says let's eliminate the following ten things, senator so-and-so will say, "Don't eliminate number six," [MOR chuckles] and then some other senator says, "No, don't eliminate number four." I mean [hand clap] that's just the way the system works, I hate to say, but that's very true.

MOR: Was the thrust of it, then, to try to privatize some of the functions of the federal government?

OSCANNLAIN: Oh, yes. I'm not familiar with the details at this stage, it was a long time ago—but yes, that was part of it. And I think there were some successes, but my overall recollection is that there were just too many entrenched interest groups that got in the way of the overhaul that the Grace people thought they were going to be able to do.

MOR: Is there anything else to say about your work with the Reagan administration, or interaction with them prior to your appointment to the Ninth Circuit, which I do want to talk to you about?

OSCANNLAIN: Maybe we can do that on the next visit.

MOR: Sure. We could do that.

OSCANNLAIN: Just to finish up, I had a lot of dealings with Ed Rollins in the White House and with other people on the White House staff in various areas. But you know, I was Republican state chairman, so a lot of that had to do with helping with events of one kind or another, or helping people get considered for positions and that thing.

This is probably a good stopping point.

MOR: Okay. thank you very much for the interview today, and we'll continue.

OSCANNLAIN: To be continued.

MOR: [laughingly] Alright. Okay, great.

[End of Session 5]

Session 6
2008 November 17

MOR: We're back on record here with Diarmuid O'Scannlain on November 17, 2008.

A couple questions from your days in the Reagan administration. We talked about some of the people you worked with, like Ed Meese, and I think Senators Hatfield and McClure, and you mentioned Ed Rollins many times. What were some of the things you did with him and what was he charged with?

OSCANNLAIN: When I was Republican state chairman, and even before that, when I was involved in the Reagan campaign, I worked with Ed Rollins because he was one of the high ranking campaign directors for the Reagan campaign. Rollins became assistant to the President in the White House for political affairs, for a while. And during those days I got to work with him on a number of things, clearing names of people for appointments, and stuff like that.

MOR: Okay. And Danny Boggs?

OSCANNLAIN: Danny Boggs was on the transition team with me. He was mostly over at the Federal Energy Regulatory Commission.

MOR: And you were looking at a position there.

OSCANNLAIN: Yes. It was made clear to me that I could be the chairman of F.E.R.C., and I did give that quite a lot of thought, actually.

But Danny ended up joining the Department of Energy (D.O.E.), and I believe he was the deputy secretary of the Department of Energy for a while. And then after I was

nominated to the Ninth Circuit Court of Appeals, he was nominated to the Sixth Circuit Court of Appeals.

MOR: Okay.

OSCANNLAIN: And I remember during the time he was deputy secretary, he was over at the Department of Energy building. And once he resigned as the deputy secretary to take the appointment as a member of the judiciary, they found him some space in the D.O.E. building for him to function as a Sixth Circuit judge while they were handling the transition of his getting settled in a building in Louisville, Kentucky, which is where his chambers are.

MOR: So temporarily they were in the D.O.E. building? [chuckles]

OSCANNLAIN: [laughingly] They were for a little while. Yes, that's true.

MOR: And I suppose you worked with him on some of the nuclear waste siting issues or anything like that?

OSCANNLAIN: No, on those things I worked directly with the secretary of energy for at least a significant part of the time was Don Hodel.

MOR: He was next on my list.

OSCANNLAIN: Oh, okay. Don and I knew each other from almost the time we came to Oregon. He had been in the Stoel Rives firm and left very shortly before I arrived there to become house counsel to Georgia Pacific Corporation.

In any event, we got to know each other, and we got to be very, very good friends. After he became secretary of energy—he had a lot of positions in the Reagan administration; he first was the deputy secretary of the interior, then I think he became secretary of energy, and then came back and was the secretary of interior.

MOR: And he was head of B.P.A. for a while, too.

OSCANNLAIN: Before he even went back to Washington, he was the head of the Bonneville Power Administration. I'm trying to recall how that worked. I think Ford must have appointed him to that.

MOR: And he went from there to energy secretary, I think, or was it interior secretary?

OSCANNLAIN: No, his first job in the Reagan administration was deputy secretary or under secretary of the interior.

MOR: Okay. But you knew him from way back?

OSCANNLAIN: Oh, from the '60s.

MOR: When he was part of the Stoel Rives firm?

OSCANNLAIN: From the time he just left. He had just left as I had arrived, but somehow or other we had that connection. And when we did meet, we became fast friends, and we've stayed in touch ever since.

MOR: I imagine your paths have crossed in various circles in the Oregon Republican Party, too?

OSCANNLAIN: Yes. As I recall he was Republican state chairman for a while back in the '70s maybe. I don't know, somewhere in there. We did a lot of things politically together. We were involved in the Reagan effort of 1968. I think I did talk about that, didn't I, before?

MOR: Yes, you did say about that campaign. That was the one against Nixon.

OSCANNLAIN: That was the campaign in which Ronald Reagan was governor of California, but he never stepped foot in the state of Oregon in 1968, and ended up almost beating Nixon in the Republican primary. We had a terrific group of people that almost pulled that off. Bob Hazen of the Benjamin Franklin Savings Bank was the chairman of our committee. Fred VanNatta, a very effective political guy here in Salem. Don Pearlman, a lawyer, very good friend of Don Hodel's, and a good friend of mine, was involved. Diana Evans, who ended up being the chairman of the Reagan campaign in 1980, was very much involved. John Graham. This was the group in 1968 that stuck together. Reagan ran again in '76 and lost to Ford in the primary.

And then, of course, he ran in 1980 and won hugely.

MOR: Right, and then Ford lost to Carter in the main election.

OSCANNLAIN: Right, right. Carter was elected in '76, after having beaten Ford.

MOR: That's right. In '83, you became chair of the Oregon Republican Party and you mentioned last time that it came about in part because the party was already splitting into the evangelical wing and then the more traditional Oregon Republicans. And that you were somebody who talked to everybody. [both chuckle]

OSCANNLAIN: I guess I got along well with everybody, and I felt that there was a place for everybody in the party. And I know that some people are very edgy about anyone

who has a religious motivation for getting involved in politics. I've never felt that was inherently wrong; in fact, I thought it was a perfectly acceptable explanation of why you do things, so long as it was kept in check and people would understand what's Caesar's is Caesar's, and what is not can be handled in church on Sunday, but not necessarily in a political campaign.

MOR: Right.

OSCANNLAIN: Anyway, I think we were able to communicate and everybody came together. And one thing led to another, and in 1984 Reagan did the impossible by winning Oregon again, which was just unheard of.

MOR: I assume you were part of that campaign, too?

OSCANNLAIN: Oh, very much so. Diana Evans was the chairman, and she ran the Reagan for President side, and I was very much involved in the Republican National Committee effort on the party side.

MOR: During your time as chair of the Oregon Republican Party, I imagine you had some influence on the fortunes of the Republicans in Oregon?

OSCANNLAIN: I don't know. I think the role of party chairman is vastly overstated. Very often the active political leaders, the people who actually get elected to office, just hope that the party doesn't get in their way [MOR chuckles] in terms of being able to appeal to a broader sector. But I think that with people like Larry Campbell, with whom I worked very closely—he was the Speaker of the House during those days—we were able to integrate a lot of the successful programs of the Republican Party nationally, and channel them in supporting the state office campaigning, as well. I must say I did have a lot to do with that, and I enjoyed it, and I think we did some good things.

MOR: What were some of these things specifically?

OSCANNLAIN: Part of it had to do with sharing lists and allowing mailings to go to certain categories that the candidates had. There was a climate of a lack of trust. The candidates didn't want to have to do anything to do with the party because the party was perceived as not being very competent, frequently getting in the way of progress, and not really having much by way of tangible support to offer.

That wasn't true in the middle '80s. The National Republican Party had money, they were able to channel it in ways that I was consulted on, but working closely with Larry Campbell, who really was the political genius. I was just happy to go along and be part of that effort. But it did take a fair amount of coordination to make it all come together.

MOR: And you're referring to victory, then, in '84?

OSCANNLAIN: In '84, yes.

MOR: What did you do in the period, then, from '84 until the time you were appointed to the bench? Were you still working with the Reagan people on projects?

OSCANNLAIN: I had my law practice. Somewhere along the line it became obvious that I was being considered for appointment to the Ninth Circuit. And I can't give you the date off the top of my head, I can look it up, but at some point in early 1986 I stepped down as Republican state chairman. It might have been March or April.

MOR: I thought maybe you were just chair for—

OSCANNLAIN: I was chair from 1983 into 1986. But knowing that it was quite likely that I was going to be nominated to the federal bench, I just felt it was inappropriate to still be party chairman at that point, so I resigned as party chairman. As I say, it was in the spring of '86, because somewhere into that time the process was starting, and I was interviewed back in Washington. I wish I could remember when it was, but it was probably later that spring. I went through the gauntlet at the Department of Justice, where you're interviewed by a whole series of people about qualifications and so forth.

MOR: What were the first indications you had that the appointment was coming?

OSCANNLAIN: [laughingly] That's quite a story I'm not prepared to put on the record yet, until there are very strict controls on what I would be otherwise willing to say, because the players are still alive.

MOR: Mm-hmm. I'll pause for just a second.

OSCANNLAIN: I think it must have been in the end of '85 sometime I got a call from Washington, DC. I believe it was on behalf of Ed Meese. It wasn't Ed Meese himself, but one of his folks called and said, "How would you like to be on the Ninth Circuit Court of Appeals?"

And I said, "I don't want to be on the Ninth Circuit Court of Appeals. I've never thought of myself as being a judge and never really had any ambition to be a judge; in fact, as Republican state chairman a little while ago I wrote a letter recommending so-and-so, who really did want to become a member of the United States Court of Appeals for the Ninth Circuit."

And the response was, "We got the letter, but we've decided we don't want him, we want you."

So I said, "You've got to be kidding."

And they said, "No, no, we want you to think about it and get back to us, and talk to your wife and think it through."

I said, "It sounds to me like you're really serious about this; are you?"

"Absolutely."

So I took that to my wife, Maura, and we sat down and we talked about it, and we looked at a lot of aspects of it. There were a lot of pluses and minuses involved. The attractiveness, I suppose, is that it is a major responsibility; it's a position in government which gives you a lot of potential for doing good.

It is a lifetime appointment. Now, that particular part is both good and bad. The good part about it is that under Article III of the Constitution, your salary can never go down, even after you've stopped sitting on the court, because you're appointed for life—you're appointed during your good behavior, but as long as you meet that standard, which isn't a very high threshold, why, it's a life appointment.

The down side, of course, is it was a very, very significant cut in pay in terms of what I was making as a partner in a successful private law firm. But when I raised that with the folks in Washington, they said, "Don't worry, there is a presidential commission which is going to recommend significant salary increases for top officials of the government in all three branches, and that will take care of the problem."

As it turned out—this part I never knew because this all happened after I had been appointed, and it was a few months after that when this all came crashing down—but,

indeed, the presidential commission recommended about a \$50,000 increase in the salary of a Ninth Circuit judge from where it was at the time I was appointed. And that was all very promising, [chuckles] until when it finally came time for the White House to sign off on it. President Reagan was in the hospital at Bethesda Naval Hospital. And there was a guy who was chief of staff, Donald Regan, a name that will live in infamy [MOR chuckles] because he was the one that single-handedly—representing the President, in my view, without consulting him—because Ed Meese said the President never did sign off on this, knocked it down to a pittance. Instead of a very significant increase, it was maybe a three percent increase, I mean just something that wasn't even worth all of the panoply of creating a presidential commission and raising the expectations of everybody and so forth. So it collapsed. But at that point I was on the court, and unless I simply wanted to pick up and leave, which I thought about doing several times—I didn't, I decided to tough it out. But that's a side issue.

The considerations of whether to do it or not, I finally balanced with my wife on the idea that this would be a way of service to our country in a highly respected way, but without having to leave Portland. These other positions that we'd been talking about before, deputy secretary of energy and chairman of the F.E.R.C., were all in Washington, DC, which would involve moving eight kids back East, and the additional cost of living in a high cost area like Washington, as compared to a lesser cost area in Portland.

So, I finally indicated that I would be willing to allow myself to be considered, and in the spring of '86 went back for the interviews at the Department of Justice, where I was interviewed by people like Carolyn Kuhl, Doug Kmiec, Grover Rees—Rocky Rees, who was a special assistant to the Attorney General and to the Assistant Attorney General Steve Markman. [laughingly] Those interviews must have gone well because sometime later I got word that I would be nominated, and eventually got the call.

President Reagan had a policy, he would never appoint a federal judge that he hadn't personally met or talked to, and even though I had met him several times, he still called me personally on August 8th. He called me about ten o'clock, a respectable hour in Washington, DC [both chuckle], but it was seven o'clock in the morning our time, and Maura got the call. I was upstairs taking a shower, and the phone rings, and she shouts upstairs to me and said, "There's a call for you."

And I said, "Who's calling?"

She said, "I think it's the press."

I said, "Listen, tell them I'll call back, I'm taking a shower."

Anyway, she goes back to the phone and says, "Can we call you back?"

The White House operator must have heard it because she said, "Madam, it's the President [emphasizes "Pres"] of the United States calling." [both laugh]

MOR: She just heard the first part.

OSCANNLAIN: She was very anxious and said, "Diarmuid, it's the President calling."
[MOR laughs]

So I said, "I think I'll take that call." [both laugh]

MOR: You put on a towel or something and ran to the phone. [laughs]

OSCANNLAIN: We've had a lot of good laughs about that.

But anyway, President Reagan was just his most affable self. He put it in a very nice way. He said, "I've got some papers on my desk that I would like to sign, but I didn't want to sign without your consent. I'm calling to find out whether I have your permission to nominate you as a United States Circuit Judge for the Ninth Circuit."

I said, "Oh yes, Mr. President. That's an enormous honor, and I'm very, very grateful for this high trust," and so forth, and we had a nice conversation.

Anyway, the nomination got to the Senate on the eleventh of August, 1986. My hearing was September twentieth. It lasted about twenty-five minutes. Extremely cordial. The chairman of the senate committee was a very courtly gentleman from South Carolina—Strom Thurmond. Strom Thurmond spent a good part of the hearing telling me what a gorgeous family I had, and he insisted that they all be introduced, the ones that were there. Not all my kids came to Washington. Two of them came because they were both students at the College of the Holy Cross at the same time, and so they were there for that.

MOR: Which two?

OSCANNLAIN: It would have been Sean and Brendan, I believe. Now, I've got to go out and look at the picture in the hall to be sure I've got that right. [MOR chuckles] Anyway, the key is there were some kids there, but not all because it would have involved my flying the whole family out just for a half-an-hour hearing.

In any event, he was very, very gracious. Representing the minority was Senator Paul Simon of Illinois, and he was also very gracious. He said some very nice things. But he did say, "I notice that your experience has been primarily on the civil side; you don't seem to have a lot of criminal experience. What are you going to do to prepare yourself for the criminal cases?"

I responded essentially along the lines that, as a matter of fact I did have criminal appointments through Chief Judge Solomon, who appointed me quite a number of times to take criminal cases. That was in the days before the federal public defender and that thing. So I had that, and I also indicated that obviously I would be taking the courses at the Federal Judicial Center for newly appointed judges, and they would certainly cover all of that and so forth. He seemed to be perfectly content with that.

It was six days later when I got a call from the floor of the Senate from Mark Hatfield, who was calling to tell me that my nomination had been approved by acclamation. Incidentally, I must say that both Senator Hatfield and Senator Packwood were very, very strong supporters. They came to my hearing.

It was funny; Strom Thurmond, again he was very courtly, but a little mischievous, he said, "I see we have a candidate here from Oregon who is going to be appointed to the court. All I can say in advance is that I know he's going to get confirmed, and the reason I know is because he's being supported by the chairman of the Appropriations Committee, Senator Hatfield, who raises all the money, and by the chairman of the Finance Committee, Senator Packwood, who spends all the money. So this guy must be okay." [MOR chuckles] I thought that was cute. I didn't do justice to the flourish. Actually the video, I think, is still available of that hearing, and I've got it stored away someplace.

MOR: Well great, I might like to take a look at that sometime.

OSCANNLAIN: Sure. Oh, absolutely.

MOR: And your wife was there?

OSCANNLAIN: Yes, she was there.

MOR: That must have been an exciting day in your career.

OSCANNLAIN: It was very special, very, very special indeed. We went out to dinner with some friends and celebrated the event.

But you know, it's remarkable, from the day the President called until the day I was confirmed unanimously by the Senate, it was about six weeks. I think of that when I consider colleagues of mine, like Judge Willie Fletcher, who, I think, waited almost four years to get confirmed. He was nominated in the first Clinton term and wasn't confirmed until the second Clinton term, and that's excruciating.

If that had happened to me, I would have had to turn it down because you couldn't possibly maintain a law practice while you were publicly under consideration for appointment to a judgeship. Your clients just wouldn't want to deal with you because they wouldn't know whether you were going to be around to take care of their problems. Your partners, more specifically, wouldn't put up with it because you are a wasting asset, as far as they're concerned, and they don't want to keep you in the style to which you'd been accustomed [MOR chuckles] if you're not continuing to bill at the old rate of your old custom. [laughs]

MOR: They don't want to cut you in when you're not on the job the same way as they are.

OSCANNLAIN: Exactly, exactly.

MOR: You were on the cusp of—not that there haven't been periods in the past when judicial appointments have been contentious.

OSCANNLAIN: This was September 26 when I was confirmed of '86—I think I must have been one of the last judicial appointees before the rancor started in '87. What I'm referring to is the nomination of Robert Bork to the Supreme Court.

MOR: Oh yes.

OSCANNLAIN: That position came open in '87, and when that occurred. First of all, the Democrats were in charge of the Senate at that point. The Republicans had the Senate from 1981 to '87, until January of '87. Then the Democrats had it for two years, or maybe longer, I can't remember. But it changed the dynamics. And I think a lot of the interest groups got very agitated about Supreme Court appointments in a way that they had not become quite so agitated about the same time I was going through. Justice—well at that time, Judge [Antonin] Scalia, who had been on the DC Circuit, was being nominated to the Supreme Court, and Justice [William] Rehnquist, who had been one of the justices, was being made Chief Justice.

So Rehnquist, Scalia, and I all went through confirmations at about the same time. It was about August, September of '86. And boy, once the new Congress came in in '87, things really changed.

MOR: And have remained pretty partisan, I would say.

OSCANNLAIN: I think it's been partisan on both sides ever since.

MOR: Yes, exactly.

OSCANNLAIN: The D's were very partisan about Bork—in fact, they made a verb out of it. To "Bork" somebody is to [MOR chuckles] be extraordinarily intolerant and chastising

and critical of a nominee, and being particularly scrutinizing of every little piece of history in that person's background.

MOR: Right. And Clinton had trouble getting his nominees confirmed, too.

OSCANNLAIN: There were some nominees to the Cabinet that ran into trouble because they had illegal nannies.

MOR: Yes, Nanny-gate. [chuckles]

OSCANNLAIN: Nanny-gate, which was an enormous overreaction in my view. But he did get his Supreme Court nominees through, both [Ruth Bader] Ginsburg and [Stephen] Breyer, who were terrific nominees, I think to his credit. I guess the Republicans had the Senate by that time, and they essentially joined in approving both of those. There were a few no votes on both cases, but they got through fairly easily.

MOR: You were mentioning your family and the difficulty getting them all out for your confirmation hearing. We haven't actually talked about your family since the beginning when I asked you about your marriage. In the meantime, you had raised quite a large family, and some of them were in college at that point. Maybe just in a nutshell, what were various family members doing during this same period when you went through your career as a lawyer and finally got on the federal bench? And what was your family like around that period?

OSCANNLAIN: We have eight children. The youngest was born in 1977, so she was only nine when I was appointed. All the others, of course, were stair steps older than she.

They went to different grade schools in Portland. Some went to parochial school, St. Thomas More or Cathedral; some went to public school, Ainsworth and Robert Gray

Middle School. Some went to O.E.S., Oregon Episcopal School. One went to Catlin Gabel School. Two went to St. Mary's Academy. One went to Lincoln High School. Five of them actually went to Jesuit High School.

I have very, very high regard for that institution. It is, in my personal view, the strongest high school, not only in the metropolitan area, but I think in the entire state. It has a fabulous faculty. It enjoys great monetary support. It is certainly a Catholic school and is run by the Jesuit order, but I think in terms of student body it's only about sixty or seventy percent Catholic, as far as I know. They draw very broadly from the community. It's very rigorous. It's a clearly established college prep curriculum, and I think they tend to get a 99.9 percent college admission rate from that high school. I'll bet it's really 100 percent, but 99 percent actually go. And it's been very, very successful.

I've been privileged to be on the board of trustees of that school for two terms. And then, since my daughter was graduating, they let me stay on a seventh year, so I was a trustee of Jesuit High School for seven years. And I was on the board when Jesuit went from an all boy's school to a co-ed school, and it took about three to four years of discernment and preparation to make that happen because it was very controversial, certainly among the alumni. And it took a while for the faculty to be fully comfortable with it. But it was clearly the right decision to go to, to make it co-ed.

The bonus for us was that our daughter, Kate, was able to go there for two years and graduate from there. And she has ever since, even after graduating from law school, she credits her two years at Jesuit as really putting her on the straight and narrow path toward success in the academic field.

MOR: And she transferred there from another high school?

OSCANNLAIN: From St. Mary's Academy, yes.

MOR: It sounds like your kids exercised some choice in terms of where they went to high school? Or was it geographical?

OSCANNLAIN: Within reason, yes, I would say so, sure.

Our daughter, Megan, was a very strong competitive swimmer, and it made a lot of sense for her to go to Lincoln High School because the Lincoln swim team trained at the Multnomah Athletic Club, which is right across the street, and that was an ideal situation.

Both Annie and Katie were swimmers. Annie swam for a couple of years. Katie swam her entire time, both for St. Mary's and for Jesuit for two years. And it was more difficult for her to get her swimming time in because Jesuit did not have a swimming pool, and so she had to get her swimming, I think, partially at the Multnomah Club, and then partially at the aquatic team that she belonged to out at [Tualatin Hills Aquatic Center] out near Cedar Hills.

MOR: You said Kate went on to law school?

OSCANNLAIN: It's a matter of great pride to Maura and to me that all eight of our children graduated from college in four years, including the one that went to Berkeley—and there aren't too many people who graduate from Berkeley in four years, it usually takes five years or longer; seven out of the eight kids also obtained graduate degrees. So in terms of the number of degrees in the family, we've got fifteen total between the seven master's degrees, or law degrees, and the eight college degrees. Nineteen total if you include Maura and me.

The oldest, Sean, went to Holy Cross, became interested in business, went to the Kellogg Business School at Northwestern University where he got his MBA, worked for a

while on Wall Street affiliated with a national CPA firm that serviced a regional seafood company. He was put on that account and eventually he ended up starting his own seafood company, which is now quite successful. It's Fortune Fish Company based in Chicago, but it serves Southern Wisconsin, Eastern Iowa, Western Indiana, and all of Illinois. He and his Chicago-native wife have five kids, and they live in Chicago, and they're very, very much a part of the scene there, where he's CEO of his company.

The next oldest is Jane. She also went to Holy Cross, became active as a volunteer in the Jesuit Volunteer Corps (J.V.C.), and her assignment was in the Central Valley in California, where she worked with underprivileged people in battered women shelters. She met her husband there, who was a J.V.C. volunteer from Creighton University. They came back to Portland, got married, and she actually stayed on with the J.V.C. as an executive; she was the Northwest Director for a while. And then eventually she went to get her masters in social work degree at Portland State University, where she is an alumna, and now she is a social worker with the Kaiser hospital system.

Third is Brendan, also went to Holy Cross, worked in New York City and in Washington, DC. He worked for a law firm in New York; in Washington, DC he worked for the Policy Review magazine, which was one of the publications of the Heritage Foundation. He went to Georgetown Law School, came back to Portland, and is now a partner at the Stoel Rives law firm, something that I feel very, very happy about because that's the firm that I started with when I came out in 1965. He has three children at the time of this conversation. There's one more on the way. He has a very successful practice in the business organization field, doing mergers and securities work.

Number four is Kevin. He also went to Holy Cross and went on to Notre Dame Law School. Came back to Portland, worked with Tom Tongue's firm here in Portland. He had an opportunity to go back to Washington, DC, where he became chief counsel to Chairman [Orrin] Hatch of the Senate Judiciary Committee, a very responsible position, and one that

turned out to be a life-changing experience because he and Senator Hatch became very good friends, and they have good mutual respect for each other. Kevin is now counsel to, I think it's the second largest law firm in the world, called DLA Piper, and he is in their Washington, DC office. [He later became Senior Litigation Counsel at the Chevron Corporation]. He is married to Dawn. No children yet.

Number five is Megan. She actually swam varsity at Cal and took a job in Minneapolis, Minnesota with Musicland Corporation and Sam Goody—they're all owned by the same company—in marketing. She met her husband-to-be there. Eventually she went to Kellogg, also, to get her MBA, and then came back to Portland, where she joined Intel, and she's been there ever since. She's a marketing executive with Intel and does a lot of work with their Chinese customers and colleagues. They have two kids.

Next is Chris. Christopher went to Holy Cross, worked in Chicago with an Internet company for a while, and then decided to get his MBA, which he got at Michigan. And then his first job out of Michigan was with U.S. Airways in their treasury-finance division at corporate headquarters, was recruited from there to become an equity research analyst for Citigroup Smith Barney, where he was a specialist in airlines and in air frame companies and aircraft leasing. Regrettably he's a casualty of this recent financial debacle back in Wall Street, and after surviving three cutbacks, they got him on the fourth one at Citibank. There have been two since, by the way, so even if he survived the fourth, they would have got him on the fifth. In any event, they gave him a very nice severance package, so he's reorienting himself to looking for another position, which may not occur for a little while, but he's very optimistic. [He later became a Vice President at Sumitomo Mitsui Bank, Aviation Division, in New York].

MOR: Yes, not in the financial sector, at least for a little while.

OSCANNLAIN: But it's tough at the moment, as we have this conversation.

Number seven is Annie, Anne Lacey O'Scannlain. She was a chambermaid at a very, very high-end dude ranch in Southern Wyoming called A Bar A Ranch. It was a great place to have a summer job, which she did a couple of summers while she was at Wittenberg University in Springfield, Ohio.

She met someone at the ranch, and sure enough, ten years later, and after deciding they weren't for each other for two years, they decided that they were, and they are now married and living in Chicago. Her husband is Dan Barlow, and he is a private equity guy, and Annie is in the fashion field. She works with designers for high-end fashions and loves it.

Last one is Kate. Kate went to Notre Dame undergrad, got a job after college with Arthur Andersen, and has the distinction of being one of the last employees of that declining institution. She resigned, I think, about a month before the company totally collapsed and went to Notre Dame Law School, where she graduated. She and her husband are now in Washington, DC, she with Kirkland & Ellis. She did live in Chicago for a while, met a young man who was living in Chicago, who was actually from Texas. His name is Matt Johnson. He, as it turns out, followed in the steps of our son Kevin and is now chief counsel to Senator [John] Cornyn of Texas, and Katie's work is in litigation. Katie and Matt just had a baby in May of '08, and as of this conversation has just gone back to work at Kirkland & Ellis in Washington, DC. [She later became a partner at Kirkland & Ellis; he later became a principal at the Podesta Group].

So that's the whole gang. I'm sure I burned up a lot of tape on this one. [MOR chuckles]

MOR: That's alright. Obviously, quite of few of them went on to legal careers.

OSCANNLAIN: Oh, yes.

MOR: One question I was going to ask is in this earlier period when they were just growing up, did any of them work on your political campaign, for instance, or show interest in that?

OSCANNLAIN: Oh, Sean certainly did, and so did Brendan. The others were much too young to be involved in that. Actually, two of them weren't even born. Number seven was born during the campaign, as a matter of fact. [chuckles]

MOR: When your kids were growing up, what sorts of things would you do as a family on your days off?

OSCANNLAIN: We loved Black Butte Ranch. We would go over there as often as we could. We did not own property over there, but I had lots of friends that we could rent from, and we were happy to do that. It was a very great bonding experience. The other thing we did on a regular basis was go up to Maura's parents', their grandfather and grandmother's house in Tacoma, Washington.

They had a very lovely home, and they were so hospitable to us. We would arrive with eight kids, and somehow or other there was enough room for everybody, [MOR chuckles] and everything worked just well. That was a major, major part of their growing up. They really got to know their grandparents very, very well and I know that had a huge impact on their lives.

MOR: Okay. maybe we'll just leave it here today. And then we'll talk about your time on the bench in some detail.

OSCANNLAIN: Oh sure. Okay, great.

[End of Session 6]

Session 7
2009 May 14

MOR: Judge O'Scannlain, where we left off last you had told me a bit about your confirmation process and how smoothly it went, but you were maybe one of the last to be blessed with such an easy confirmation. I know that you have since given an address at Lewis & Clark Law School concerning the way the confirmation process has evolved in the last two decades now almost, to become a rather contentious process regardless of which party the president is at any given time. It's just become a way in which the political factions can try to make hay, I guess. [chuckles]

OSCANNLAIN: You're very kind to use the word blessed because I think that's exactly how I feel about it. I think that I was very blessed to have such a short confirmation process.

President Reagan called me on the morning of August 8. The President was, as he always was, just a very, very gracious, wonderful person, and he put it in a very interesting way. He said, "Now, I have some papers in front of me, which, if I sign them, would make you the nominee for the United States Court of Appeals for the Ninth Circuit, and I didn't want to sign them until I had your consent," which is a very nice way to put it. He said, "I just want to be sure that that's all right with you."

I can't remember the details of what I said, but I obviously was very flattered and felt very gratified that the president himself would call. We had a nice chat about courts generally and so forth, and he signed off, and one thing led to another.

A few days later—that was the eighth of August, this is 1986—on the eleventh those papers got to the Senate. A few days after that I got a call from the Senate Judiciary Committee setting my hearing for September 20, and the hearing itself was blissfully brief.

The chair of the committee was Senator Strom Thurmond, and he, I must say, treated me like visiting royalty, rather than as someone who was going to be up for target practice. It was very, very gracious. He introduced my family, and then he called upon my two escorts, Senator Hatfield, who at that time was chairman of the Senate Appropriations Committee, and Senator Packwood, who at that time was chairman of the Finance Committee. I don't think the hearing lasted even half an hour. It was very, very pleasant.

Then six days later I got a call from Senator Hatfield from the floor of the Senate to let me know that my nomination had been approved unanimously. And what was that? About six weeks from the day the president called to the day that Senator Hatfield called with the news that the whole confirmation process lasted.

Now, you compare that with some of the awful experiences that some of my colleagues on the Ninth Circuit have had to go through. Judge Willie Fletcher, who was nominated by President Clinton, was nominated in one session of Congress. Nothing happened until the following session of Congress. And then it was a very contentious business involving, among other things, his mother, who was also a colleague of mine, Judge Betty Fletcher, agreeing to take senior status to avoid any notion of nepotism. There was no formal statute prohibiting a mother and son serving on the same court, but that accommodation was made as a way of resolving some political objections.

But Judge Willie Fletcher was under nomination for, I think, three years, which is awful. I had six weeks, he had three years. Luckily for him, he was a professor at Boalt Hall, the University of California at Berkeley law school, and was not subject to what somebody like I would be. In other words, when you're a partner in a private law firm, when the word gets out that you're about to be nominated, you get all these congratulation calls from your clients, and before they hang up, they say, "Oh, and by the way, I've got a matter I need to talk to somebody about; who should I be talking to?" Obviously they don't want to talk to you, you're a short-termmer.

In any event, the process for me went so well. Judge [Richard] Paez also had a very excruciating process that took a long time, and I must say it's sad for me to see what goes on today. Both parties play this game; they're very, very strident about scrutinizing nominees, particularly to the Courts of Appeals and to the Supreme Court, less so for the trial courts and the district court. But it is very sad, and I often wonder why that is. Why, for example, did Justice [Clarence] Thomas have to go through all of that horrid affair? Why did my colleague, Judge Willie Fletcher, have to go through what he went through?

And, of course, the most famous case, I suppose, is Judge Robert Bork, from whom the term "Borking" comes. In other words, to sufficiently devastate the nominee with criticism, innuendo, accusations, whatever, that the nominee can't even get a majority of the Senate to vote in favor of his confirmation.

I wonder why that's happening, and it seems to me that maybe it's a sign that the courts are so important in terms of American social policy. It shouldn't be that way, but I think it is. Because, if courts can decide, for example, that the death penalty is perfectly okay, and turn right around in the next session of the Supreme Court and say, "No, we've changed our mind, the death penalty is no longer constitutional, unless A, B, C and D are done." Or, the obvious big example is abortion. If a decision like that can be made by judges rather than the elected representatives, maybe we should take a closer look at who serves on the courts. For example, in current days this whole area of gay rights, same sex marriage, those issues, again, one would expect should be decided by legislative bodies, not the courts. And if the courts are going to have it because the legislatures would rather not touch it, well then again, a good reason to pay closer attention to who's being nominated to those levels of the courts, my level and the Supreme Court, where we have the power to issue precedents which have the force of law.

MOR: I guess the Supreme Court and the Federal Appeals Court do get involved more often than other courts in social-political matters.

OSCANNLAIN: That's absolutely true. I'm not sure that's the best thing for the nation, but I think it's a fact. And you'd think on the one hand Congress would be more jealous of retaining its own powers to make those cosmic decisions, but I'm afraid to say that more and more you see Congress perfectly happy to let the courts make those decisions because then they don't have to.

MOR: Don't have to take the political heat.

OSCANNLAIN: Yes. Absolutely.

MOR: You've talked about this in at least one paper that you presented. I forget before which forum.

OSCANNLAIN: You may be referring to the graduation lecture I gave at Lewis & Clark Law School one year when we talked about the confirmation process.

MOR: Right. Also there was another, it may have been an address or maybe it was submitted to a review in which you talked about judicial activism.

OSCANNLAIN: That was published in Open Spaces. Yes, that term is still kicking around. I think I wrote that, oh, my heavens, at least fifteen years ago, maybe longer, twenty years ago, and people still talk about the term. People still tell me that they've come across that article; you can pick it up on the Internet very easily.

That deals with the related issue, and that is to what extent should courts stay within the boundaries of just deciding cases, rather than going beyond the normal boundaries

and getting into deciding issues of public policy? That's where this idea of judicial activism begins to play a role because if all you're doing is deciding where this particular case in front of you falls given the prior precedents, why, that's fairly uncontroversial. But if judges allow themselves to be drawn into deciding broader issues than what is presented to them in a particular case, there's a very serious question as to whether that's an appropriate function of the judiciary.

MOR: If I remember correctly, in that article you talked about the power of a federal judge and about the fact that it requires the concurrence of fifty-two people to appoint a federal judge, and so from that standpoint you'd think they'd be quite powerful. But then you go on to make the argument that really the power does rest in the hands of the executive and the legislature, and that the judge's role is simply to determine whether a law that legislature passed—

OSCANNLAIN: Exactly.

MOR: —has been adhered to, and whether the executive has prosecuted it properly.

But, my question is: Can a judge in your position, when they're asked to decide a case on abortion or one of these controversial issues, can you really just decide the case on the merits? How do judges get pulled into doing this?

OSCANNLAIN: You've raised several issues in your question. [MOR laughs]

MOR: It is a bit of a run-on question. I'm sorry about that.

OSCANNLAIN: The reference to fifty-two people, of course, refers to the fact that the president is one, and it takes fifty-one Senators to make up the confirmation side. So, in a

sense, only fifty-two people get a chance at the decision of who gets to be a federal judge for life. And that struck me as a very, very important datum.

We are appointed in a democratic system in which there are separation of powers among the three branches. I think that's fundamental. The Constitution is very clear on the establishment of the coordinate branches. And I've certainly come, early on and ever since, to the view that the function of a judge, who is not elected, who is not subject to review every two or six years, has to be limited if we are faithful to the democratic substance of our society.

The Constitution, I think, is a brilliant assignment of responsibilities. But like anything, if one or the other branches gets too far out of its own sphere, that is deleterious to the constitutional assignment of powers. Particularly when it's on the judicial side, when you're talking about lifetime appointed judges who are subject to no sanction, effectively, short of the sanction of impeachment. It weighs on me to remember that my function is a delineated one, not a free-ranging, roaming assignment to go out and make policy for the good of the world. So that's a heavy motivator for me.

MOR: One of my questions about that paper, which I did take a look at, was whether or not it's always clear to a judge who is sitting in judgment when you've got attorneys on both sides citing precedents that support their case, and sometimes the laws are not necessarily drafted specifically enough. There must be some times when a judge does have to make his own call.

OSCANNLAIN: Justice Oliver Wendell Holmes, the famous Supreme Court justice at the turn of the century and early twentieth century, had a description in which he says: "Judges do not make law, except interstitially, in which case judges do make law because they are filling in a gap between what is either in the Constitution or in a statute, or

whatever the applicable principle is, and it hasn't been decided yet." And that's our job; our job is to fill in the gaps very often.

Now if it's a case which turns on whether or not, let's say, particular criminal conduct is within the statute or not, it's pretty conventional to be able to figure that out. You first go to the language, then you go to the precedents. If the language is ambiguous, then you will look at collateral ways of interpreting what it might have meant, the meaning of the words when the statute was passed.

But our challenge is to do the very best we can to decide cases on a principled, consistent manner which, hopefully, is pretty predictable. I mean, the whole idea of putting faith in judges and faith in courts is that you expect them to apply the law consistently and faithfully. And if you succumb to the temptation to say, "in this case we'll put our thumb on the side of the defendant, or in this case because the defendant did such a heinous deed, we'll put our thumb on the side of the government, the U.S. Attorney, the prosecutor," then you're not judging, you're taking sides, and that's something to be avoided at all costs.

MOR: But if you're called upon in a case to make some of this interstitial law, I imagine that you then do have—

OSCANNLAIN: Oh, we do it.

MOR: —to fall back on your own instinct and your own experience or view of the world.

OSCANNLAIN: I think that a judge's life experience does play a role. In fact, there are some sociological studies going on now which try to identify what are the motivators for, particularly, federal appellate judges, who have the greater scope here. And I'm interested in seeing what comes out of that. But hopefully, on a diverse court, you'll have enough of a variety of lifetime experiences that when any random three judges—and of course, as

you know, I always sit with two other judges, we always sit in panels of three, except when we sit en banc—in a typical three judge random combination, hopefully you'll have some diversity of experience that will blend together in such a way that the decision will be the right decision.

MOR: And how does one judge if it's the right decision or not? [both laugh]

OSCANNLAIN: We have professors in the law schools who will be scrutinizing every word that we say, and they'll tell us. We have editorial writers who will tell us. We'll have the attorneys, both sides in the case, who will tell us. One attorney will file a petition for rehearing and say, "Oh, no, that's not the right decision because you forgot this, or you didn't read that, or you misinterpreted such-and-such." And, of course, then the prevailing attorney will probably come to our aid and say, "Oh, no, you got it just right." [MOR chuckles]

Then we look at those two filings after the case. And I've had a number of cases where my mind has been changed because of the post-opinion petitions for rehearing that have been filed. And I can't remember precisely, but I know there's been a case where there was a precedent out there that neither side brought up, our law clerks didn't catch it, but it was obviously crucial. And it was found, we considered it and applied it, and it modified the result.

So there are some safeguards built in here. I'm not saying that what judges do is perfect; it's certainly not. But there's an enormous conscientiousness about trying to get the law right, get to the decision that is fully supported by the language of the statute, by the language in the contracts or whatever it is, the insurance policy, or whatever it is that's at stake. We really, often agonizingly, go after that in a way where you're trying to reach the result which is the proper result given what the record says.

MOR: So the adversarial process ensures that everything that needs to be considered is?

OSCANNLAIN: When the adversarial process is at its best, the attorneys on both sides will have, first of all, given us a record which is complete. They will help us identify which portions of the record are the most relevant to the issues that have been raised in the appeal, and then will argue the application of the cases or the language, whatever it is.

I wish I could say that was the typical case. It is probably far from typical because the quality of lawyering is not as consistent as we judges wish it were.

MOR: So sometimes one side or the other maybe doesn't get the same representation?

OSCANNLAIN: Exactly. Exactly. And sometimes neither side gets very good representation. I've seen a number of cases in that category, as well.

MOR: Do you have an example of a case where the subsequent examination of one of your decisions resulted in your changing your mind?

OSCANNLAIN: Yes, I'm sure there are several. I'm not going to be able to tell you the names of the cases right now, but there have been cases. I've been on the court now over twenty-two years, and there have been cases where my mind has been changed—not very many, not very many—but they fall into that category where a crucial element in the analysis didn't reveal itself until the post-argument process or the post-filing process, and it made a difference.

MOR: If you think of a case between now and our final session, maybe we could talk about it.

OSCANNLAIN: Sure, sure. Okay, all right.

MOR: We got into that slightly before I thought we would today. [both chuckle] But let me just get back to your own personal experience of becoming a judge.

OSCANNLAIN: Okay.

MOR: What was it like in your first days sitting on the bench? I assume, probably, the other judges on the court are there to help you and to get you going?

OSCANNLAIN: I must say, our court, the Ninth Circuit Court of Appeals, is a very, very welcoming, supportive collection of wonderful human beings. We're up now to about fifty judges, believe it or not. There are twenty-nine positions on the Court of Appeals right now, two vacancies, and I think we have about twenty-one or twenty-two senior judges, almost all of whom are sitting regularly on cases.

But when I came on, I was just embraced, literally embraced by Chief Judge Jim Browning. Browning was chief in 1986 when I was confirmed, and was chief for quite a few years after that. I think I can pin down the exact year. But he, more than any other judge reached out to me, to welcome me, to steer me toward all the resources that are available within the court, as well as outside the court. He would call on me once in a while when I least expected it. [hand clap] He'd say, "Are you settling in okay?" It was wonderful. It was a very avuncular role that he played, and I shall never forget it. It was [clears throat] really actually inspiring. I have the highest personal regard for Judge Browning, probably more so than any other chief that I've served under.

Other colleagues were equally supportive. Right here in the Pioneer Courthouse, of course, my colleague Otto Skopil was right down the hall, checking in every once in a while. I could always call him for anything. He organized the investiture proceedings, made

sure that our family was all included and people that I wanted to be part of the investiture were included. And then other judges from other parts of the circuit came to the investiture, which I didn't expect. Quite a few judges from California came up. Judge Betty Fletcher came down from Seattle. Judges came from elsewhere, and it was just a great start.

Now, in terms of the case work, my immediate chore was to line up law clerks. [clears throat] At that time we had two secretaries, three law clerks. Now we have one judicial assistant and four law clerks. I was able to hire terrific clerks, even though I was coming on at a very odd time of the year. I was confirmed September 26, and I took the oath on, I think, the end of November. So clerks came onto my chambers in the end of November, when they normally come on [clears throat] sometime in the summer. So Judge Skopil recommended someone who had been an extern in his chambers. His name was Bob Hogfoss, and he was one of my first law clerks. Judge [Alex] Kozinski recommended someone who had been an extern in his chambers, from Harvard, and that person was in the original group. And the first woman clerk that I had was among the first three, and she had been in private practice and had been away from private practice for a while but wanted to come back in, and had terrific law school achievements, [hand clap] and I invited her to be my third law clerk.

So we got off to a good start. And the five or six of us including the judge and the other five, really started digging into the cases and started to deal with this enormous flow of paper that comes in from the circuit headquarters in San Francisco.

MOR: So it was even pretty busy back in those days?

OSCANNLAIN: We were fully engaged in those days when we were sitting on maybe 180 cases a year. Now to put that in perspective, if I, as one member of a three-judge panel, am sitting on 180 cases, the probability is that I will be writing 60 opinions. In other words,

the workload is pretty evenly distributed, so that the normal rule is that each judge would have one-third of the load.

So in 1986-1987, I might have been involved in that many cases. Today we're sitting on over 500 cases per judge.

MOR: Wow.

OSCANNLAIN: My productivity has tripled since 1986, '87. And the bad news for the incoming judge is that instead of starting at 180 cases a year, the incoming judge is starting at 500 cases a year. So the newly appointed judges these days are running a lot faster in place than I did when I came on. As I said, it was a full-time job [laughs] at the beginning, but it just builds and builds and builds. And unfortunately, and I'm critical of our own court leadership on this, we have not succeeded in persuading Congress that our load is too heavy for us to be doing the very best job.

I feel that very strongly, by the way. I think that because of the heaviness of the load I can't be as confident today in the end product of what we do as I would have been, let's say, ten or fifteen years ago when it was a little more bearable. But for whatever reason we are working three times as hard today than we were when I was appointed over twenty-two years ago, whereas the Supreme Court of the United States has reduced its load. When I came on in 1986, they were doing well over 100 cases, maybe 150 cases a year. Today they're doing somewhere in the high 60s and 70s, hardly 80 cases. So their workload has come down by close to 50 percent, while ours has gone up 300 percent, in the same period, without any changes in the number of judges assigned to do the work.

What has happened, of course, is that the number of filings in our court has increased dramatically, and the population within the Ninth Circuit has increased very, very dramatically, without any response by Congress to deal with that on a sound basis.

MOR: Not an adequate response, anyway?

OSCANNLAIN: No. No, we are probably the most overworked—with the possible exception of the Eleventh Circuit, which is Southeast U.S., Georgia, Florida, Alabama—I think we are the second most overworked circuit, whereas there are some circuits that carry about a quarter of the load that I do. The DC Circuit, for example, in Washington, DC, or the Tenth Circuit, which is based in Denver, and it has five states in that area—their workload per judge is roughly a third of what my workload is, or what my colleagues' workload is, and Congress has got to do something about that. That just can't go on forever.

MOR: You said that your productivity, essentially, has increased by a factor of three since those early days.

OSCANNLAIN: Yes.

MOR: Even sixty opinions is more than one a week, which doesn't sound easy necessarily.
[chuckles]

OSCANNLAIN: No.

MOR: So how have you managed to streamline things to be able to increase your efficiency that much?

OSCANNLAIN: The secret is in the law clerks. I think I mentioned earlier, I gave up a second secretary; about ten years into my appointment I traded a second secretary for a fourth law clerk. So I have four very, very bright young lawyers from the top schools in the

country, many of whom go on to clerk for Supreme Court justices: Scalia, Thomas, Souter, Kennedy; Chief Justice Rehnquist had one of my law clerks.

If we didn't have their services, this would be an impossible job. It just cannot work without the assistance of law clerks. And the answer to your specific question is the efficiency, you just have to work as efficiently as you can, at the same time maintaining, hopefully, top quality control. I think the quality control that I look to is the credentials of the law clerks who come to work for me for one year each, plus the amount of time that I put into working and reworking and reworking again every opinion, or memorandum, disposition that I'm assigned. I'll tell you, you can't do that in a 9:00 to 5:00 job. It's just impossible.

MOR: So you're working longer hours?

OSCANNLAIN: Oh yes. I've been working longer hours in public service than I was in a very successful private law practice, but I'm enjoying it more, [MOR chuckles] much more. And I don't have to keep time sheets, either, which is another major change.

MOR: But probably making less money though?

OSCANNLAIN: I would say probably on the order of one-quarter to one-third of what I would be making if I were across the street in my old law firm.

MOR: Mm-hmm. [chuckles]

I imagine you knew some of the people on the Ninth Circuit prior to your joining?

OSCANNLAIN: Rally not all that well. I knew Judge Skopil, and I knew Judge Kilkenny, but socially, pretty much.

I had argued a case in front of Judge Skopil when he was a district judge, and I had argued a case in the Ninth Circuit in a panel which included an acquaintance of mine from law school, Judge Kennedy, now Justice Kennedy. Kennedy and I overlapped for about two years before he went on to the Supreme Court. But I can't really say other than from the time that I had known him as fellow students, or that one occasion when I argued a case in front of him, that I knew him that well. But it doesn't matter; once you get on the court, everybody is your best friend, and it is mutual. I mean it's a very, very reinforcing experience.

MOR: I imagine you're probably closer to some of the judges in the circuit than you are to others?

OSCANNLAIN: Probably.

MOR: Are there particular ones that you would identify as having a pretty close relationship with, and what would be the nature of the relationship between judges that are on the circuit that know each other well and rely on each other?

OSCANNLAIN: I guess it happens at different levels. At the, let's say, philosophical level, there will be some judges that you will probably identify with more so than others. On a purely social level there will probably be some judges that you'll identify more with than others. And those lines crisscross; I mean some judges that you consistently vote against in *en banc* votes can still be very close personal friends, and that's certainly true in my case.

I suppose one of my most favorite colleagues is my colleague right here in the building, Ed Leavy. Judge [Edward] Leavy is, I just think, a judge's judge, and one of the

most warm and inspirational people I've ever known, and it's just a great pleasure for me to count him as a friend.

Another great colleague is my other colleague right here in the Pioneer Courthouse, Judge Susan Graber. We knew each other before she came on the court, and then she's been a great colleague to work with since we've been here.

MOR: And are some of these social relationships, too, would you say?

OSCANNLAIN: I suppose so. When we go to Seattle, for example, we really make it a point to look up Judge [Robert] Beezer and Judge [Richard] Tallman, even if there's nothing tied to anything judicial at the time, because they've become good friends over the years. Same thing in California. We try to see the Wardlaws, my colleague is Kim Wardlaw, and her husband Bill. We have seen them socially in different settings. Some of my colleagues have come to the weddings of our children, you know. There's a fair amount of that that goes on.

MOR: And you said in some cases judges you consistently vote against *en banc* are nonetheless good friends?

OSCANNLAIN: Oh, sure. Oh, absolutely.

MOR: Are there any specific examples that you'd care to name in that category? [both laugh]

OSCANNLAIN: This gets to be a little touchy, I suppose. But you know it's funny—I'm not going to answer your question directly, but the *Los Angeles Times* wrote a big piece about what's really going on in the Ninth Circuit, and they had a picture of three judges: Judge [Stephen] Reinhardt, who is probably, if not the furthest left, is close to the furthest

left judge on the court; the chief judge, who's the chief; and me. And I've been identified as being on the conservative side of the court. I don't think I'm the most conservative judge on the court. But the three of us were identified, and it is quite true that Judge Reinhardt and I rarely, rarely agree on the philosophical disposition of a case. We read the Constitution differently, we have dissented from each other in a number of cases, some pretty high profile cases, but I must say there are areas on which we can agree. And as it turns out, when it comes to issues of judicial administration, Judge Reinhardt and I will be together, and other judges whom you might expect to be on one side or the other are not.

So, I think what we try to do is to look for those areas where we can agree where possible. From time to time somebody will get cantankerous and probably say something that he or she wishes hadn't been said, but there has been a fairly good remedy.

When Jim Browning was chief, the minute something like that might have been said, and it's easy to say it because of our reliance on the Internet e-mail system, Judge Browning would be on that issue immediately. He'd call the offender, he'd call the recipient of the offense, he'd get them together, he'd massage both ways, and you know, all of a sudden it's gone, it's not an issue anymore. That was Jim Browning's genius. He just had a talent to do that thing.

His successors have not been as successful. There have been a couple people in between who frankly would just let the chips fall where they may and say, "you're all grownups, you handle it," thing, which was not very good for order on the court. It let animosities fester, and that was very unfortunate.

But I think there's enough of a tradition that even though we're such a high profile court, the country knows that we are, by far, the most liberal court, and every time you turn on the evening news, if it's a Ninth Circuit case it's "the liberal Ninth Circuit decided today

that . . ." [MOR chuckles] And it's true of NBC or Fox or Associated Press, whatever it is. I mean, it just happens that way.

Notwithstanding all of that, I think there is an effort at one level, at least, to maintain social, civil discourse. And when somebody offends, it's not received well. Now, sometimes there's nothing done about it, but it's certainly not received very well. And there have been cases where people have been hurt by what another colleague has said. Very often it will be said in an e-mail, although I must say it's also been done in opinions which have been printed and are permanently [exasperatedly] [MOR chuckles] in the records of the judiciary for all time.

We don't need that, and I think it's so important for a chief judge to make that his or her number one priority, to be sure that never happens.

MOR: We were just talking about philosophical differences and that you and Judge Reinhardt view the Constitution differently. To start with, you had to develop a judicial philosophy, although maybe it's not that much different than the philosophy you had as a lawyer.

OSCANNLAIN: It's not like going out and building a second home, where you have some plans and then you add the cement, and then, you know, the studs and the roof and all of that. It's more of an orientation toward how you read words, what you believe to be the embedded history of the Constitution, the extent to which the Declaration of Independence sheds a light on that, the extent to which you regard the writings, the Federalist Papers, for example, or contemporary comments made by political leaders at the time, as influencing what these words really mean in the Constitution.

I suppose it can be said that I probably had some developed instincts about what the Constitution says and what it means. But over time, as you become more deeply

acquainted with the precedents, usually out of the Supreme Court, you begin to regard some of that judicial structure in a pretty reverential way. I just think courts have to be consistent. I think they have to follow precedent. I think they have to be open and honest in deciding what it is that they are presented with.

I did give a lecture at Marquette University on different ways of approaching constitutional interpretation. The one I think I'm closest to is the notion which Justice Scalia and the late Chief Justice Rehnquist had, and Justice [John Marshall] Harlan before him.

My great idol when I was at Harvard Law School was Felix Frankfurter. Felix Frankfurter is long since dead, but he was an appointment of President [Franklin] Roosevelt, and was still sitting on the bench when I was at Harvard. I think I was imbued in Professor [Paul] Freund's classes with a very high respect for Frankfurter, who was a traditionalist. He felt that the role of the courts was a defined role. It fit within a pattern in which, for the sake of the judicial branch, it should stay away from purely political, purely sociological issues.

So I had that coming with me as part of my life experience. And it, I'm sure, was triggered or activated when I was sitting on cases even right after I was confirmed.

MOR: Would you say that over the years your philosophy has changed much?

OSCANNLAIN: I think it's been embellished. It's probably more profound in the good sense; in other words, it's deeper, it's more broadly enhanced in a way.

For example, I have never felt that it was the role of the courts to willy-nilly go around declaring acts of Congress unconstitutional. Now, in the rare case we may have to do that, but it's not something we do routinely. And it is not up to us, for example, under the guise of the Due Process Clause [or the Equal Protection Clause], to read anything we want to

into a governing statute or other principle of the Constitution to achieve a result which may be the result you'd like to achieve personally, but which doesn't have any substance in law or cases or respected interpretation.

So I doubt very much that I have moved terribly far in my philosophical orientation. It was probably center-right to begin, and it's probably still center-right.

MOR: You, of course, had been in the courtroom often enough to know what judges do before you became one yourself.

OSCANNLAIN: Oh, yes.

MOR: But was there anything about the job that surprised you, or that tested you, in a way that hadn't happened before?

OSCANNLAIN: This is a very cerebral job, and it's a writing job. I am on the bench a teeny, teeny fraction of my working time. Now, you contrast that with a trial judge; a trial judge is on the bench an enormous portion of his working time. Even today, when more and more cases settle, a trial judge is still up there dealing with motions or whatever, which will keep him on the bench and have him in direct interaction with attorneys.

I think what surprised me the most was that on the Court of Appeals it's like going into the monastery. [MOR chuckles] You live in these cells that are totally isolated from the rest of the world. The phone never rings. [MOR chuckles] You deal with hordes and hordes of paper that comes at you, whether it's records in a case, or pleadings of one kind or another, briefs, motions, all of which you deal with sitting at your desk. Now, you have law clerks that will help you structure it and organize it and maybe do a first draft, but it's a lonely job, and you don't see many people.

You will eventually see your colleagues on the forty-five days a year when you will actually be sitting on the bench. We sit nine times a year, typically in five-day sittings. Now, there are variables. We have *en bancs*, but you don't see your colleagues very much, other than the ones in your own courthouse. And even then you don't see them every day; you might see them once a week.

So the answer to your question is the loneliness. This is a very solitary life, believe it or not, [both chuckle] for an appellate judge. You interact with other judges, and with the attorneys, all by writing.

Now, you'll come off the bench from an oral argument, and you'll spend maybe half an hour, or at the most typically an hour, discussing the cases that we just heard. And that's the end of it. You won't talk to those judges again.

MOR: So it's mostly just you sitting at your desk here in these chambers?

OSCANNLAIN: Yes. Shifting a lot of paper, receiving a lot of paper, and sending a lot of paper.

This is an enormous paper-shuffling job, although that's not a fair description. It's accurate in the sense that everything moves on paper, but what moves on paper is the written work that you produce. Every case will result in a disposition of some sort. If it's for publication, it's called an opinion. If it's not for publication, it will be called a memorandum. But it will involve the literal handwriting of each judge. Now, as I say, frequently from a base of a draft from a law clerk who's been briefed by me on my approach to this case, what I learned at oral argument, and what my conclusion is.

Actually after every case I write a memorandum memories of my co-judges, the other two judges, and that is the basis from which my law clerks get started to draft

something. I work from that, and then, eventually, I'm satisfied with something that I can put my name on and send it to the other two judges. Most often they very cordially agree that that's what they would like to see and put their names on it, too, and then it gets filed.

MOR: Let's pause here just for a minute.

[Tape stops]

MOR: We were just talking off tape about your busy schedule. Can you describe again about last Friday?

OSCANNLAIN: You know, as I said before, this is not a nine-to-five job. And even when you're sitting on panels, other things come into play.

Just last week I was sitting on the Pasadena panel with two of my other colleagues, and we rearranged the schedule in such a way that we pushed the Friday cases off to earlier days, and on Thursday morning we had our last case and came off the bench about ten-thirty. We had our conference, and at eleven I headed for Los Angeles International Airport to fly to JFK, Kennedy Airport, in New York, where the next day, Friday, I spent with Justice Kennedy and Judge [Donetta] Ambrose from the Western District of Pennsylvania, where the three of us were the panel to select the Devitt Award.

The Devitt Award is given to an outstanding federal judge who represents the highest ideals of the judiciary and has been recognized for that. And it was a special treat, first of all, to be invited to be on that panel, and then to spend a day and a half with Justice Kennedy. We made our final decision on Saturday morning, and then I got on an airplane Saturday evening and flew back home to Portland.

That's all in a week's work. [MOR chuckles] It's not just sitting on the oral arguments and working on the cases; we do an awful lot of other things that are judiciary related, but are beyond your base requirements.

MOR: Mm-hmm. And that award, has it been announced yet?

OSCANNLAIN: Yes. It was just announced two days ago. It was given to Judge [David] Brock Hornby, who was the chief judge of the District of Maine. He is the winner for this year, and I've just been told that I've been invited to go back in a couple months to actually present the award. Justice Kennedy, and I, and Judge Ambrose will together present the award, probably in Portland, Maine, sometime in the next couple months.

MOR: Will that be at a public ceremony?

OSCANNLAIN: Oh, very much so. This is a very highly respected award that is given to one judge every year. It can be a senior judge or an active judge. It can be an appellate judge, or it can be a trial judge. In this case it was given to an active trial judge.

MOR: And what are the criteria for the award? How did you decide who the honoree should be this year?

OSCANNLAIN: Commitment to the support of the judiciary, exemplary performance on the bench, respect of colleagues, breadth of activity. This particular judge was very active in the Judicial Conference. He worked with the chief justice on matters having to do with the judicial branch generally. He's written any number of law review articles. He has spoken at graduations. He has mentored other judges. Just an all around judge's judge, someone who has engenders a lot of respect and fulfills the ideal of a good district judge.

MOR: You had met Justice Kennedy before, or had you?

OSCANNLAIN: I've met every member of the Supreme Court, and quite a few of them on a more frequent basis, but Justice Kennedy and I go back to Harvard Law School. 1961.

MOR: That's right, you mentioned that earlier.

OSCANNLAIN: He was class of '61, I was class of 1963. But when we met it was, I think, in the fall of 1960 or maybe the spring of 1961, during what's called the Ames Competition [Moot Court]. He was on the Board of Student Advisors as a 3L, and I was just a lowly 1L, and he was mentor to twenty people. Each member of the board had twenty first-year students assigned to him to bring them through the moot court process. He would help us by telling us how to write a brief, what the moot court process was like, oral argument, all that thing, and just generally being supportive to us as first-year students.

We got along very and when we said good bye in the spring of 1961, we never expected to see each other again because he was going back to San Francisco to a law firm there. I had two more years in law school, and my expectation was to settle in New York City, where I'd grown up, and so we had no reason to expect we'd ever see each other again.

Then lo and behold, I move out to Portland, Oregon. [hand clap] I'm practicing law, and I have a case in front of the Ninth Circuit which I argue, and who's presiding but Judge Kennedy. And what do you know, maybe eight years after that, we end up on the same court. We overlapped by about two years, were fellow judges for about two years, and then he went on to the Supreme Court. But we've stayed in touch fairly frequently over that time.

He's now our circuit justice, so we run into each other at least once a year because he always comes to our circuit conference. And he has been very supportive on issues of

restructuring. For example, he is publicly in support of the idea that the Ninth Circuit should be realigned, restructured somehow, and that happens to be a position I've come to.

When he came to Lewis & Clark last year, we had him and his wife up to our house for dinner with some other mutual friends, and it was just great. He's a terrific guy.

MOR: So would he be one of the justices, then, that you have had a closer relationship with, or are there others that you go back as far with? [chuckles]

OSCANNLAIN: I suppose he'd be the one I've known the longest. And the second longest would be Justice Breyer, because he was a year behind me at Harvard. I was '63, he was '64. We first met when he was a 2L and I was a 3L, and he was a professor and somehow or other there was some contact. As it turns out, he and my wife, Maura, were classmates at Stanford, undergrad, and so there was that connection.

I've probably known Justice Scalia the next longest. As it turns out, his son, who is a priest, Father Paul Scalia, and my son Kevin, [laughingly] who is not a priest, were roommates in college together at Holy Cross College in Massachusetts. I can't remember exactly, but I know that we certainly met at the graduation because their son and my son were in the same class and were roommates, so that was a good social beginning. And then over the years I've gotten to know him quite a lot better.

I was acquainted with the old chief justice [William Rehnquist] from the moment I was confirmed. I got a very warm letter from him, and then he appointed me to a Judicial Conference committee, and then later to the board of trustees of the Madison Foundation. That was a six-year term which is just ending now at the end of this year.

Then the new chief justice appointed me to the Federal Judicial Center committee on appellate judge education; he appointed me chair of that committee. As a result of that,

I ran the appellate judges' seminar for federal appellate judges in Washington, DC last November, and luckily was able to say that seven out of the nine justices appeared in our program, which was very gratifying. It was just terrific.

But as I say, at this point I've met each one of the justices, and it's a great honor.

MOR: Had you known [Chief Justice John] Roberts previously?

OSCANNLAIN: No, I had not known him. We got acquainted on several occasions after he became chief.

I do remember, once, a very nice comment that he made to my son. My son was chief counsel to Senator Hatch when Roberts was going through the confirmation process, and he said some very nice things. When he ran into my son, Kevin O'Scannlain, he said, "Are you related to Judge O'Scannlain?" And Kevin agreed, and he said some nice things about Judge O'Scannlain, so that was nice. So he probably knew more about me than I knew about him.

MOR: Your son is in Washington, then?

OSCANNLAIN: I have two children in Washington, and two children in law. My son, Kevin, was chief counsel to Senator Hatch and is now of counsel to the firm of DLA Piper in the Washington office. He's married to a woman who is literally a rocket scientist, because she works for the guided missiles division of Boeing Aircraft Company. [both chuckle] She's also a member of the bar, and I think she's going to be gravitating toward the patent side pretty soon.

My daughter is a litigator with a firm in Washington called Kirkland & Ellis, and her husband is chief counsel to Senator Cornyn of Texas. So they've had these contacts with the Congress.

MOR: Yes, Washington ties there.

OSCANNLAIN: Oh, yes, very much so.

MOR: I think you actually told me about them last time, about your whole family.

OSCANNLAIN: Since then it's grown by two grandchildren. We now have fourteen grandchildren. [Nineteen, as of December 2, 2014].

MOR: Going back to Supreme Court justices, then, did you know Justice Souter?

OSCANNLAIN: Yes. Justice Souter hired one of my former law clerks, Kevin Newsom. I must say when Justice Souter had a running accident—I think he was actually mugged—he's a very avid runner, and he was running in Washington, DC and was mugged, and that got a lot of press. And I just wrote him a note expressing sympathy and [hand clap] hoping he gets well and so forth. And he wrote back just the loveliest letter, which I have in my file, and I'll never forget it. It was very, very touching on his part. I didn't expect any a response; I just thought it was something to do, and he wrote me a very gracious letter back.

MOR: I was a little surprised, to see him step down, actually. I had read something about him in the book, *The Nine*, and it didn't sound like he was, necessarily, completely at ease in the Supreme Court.

OSCANNLAIN: I think he was more at ease on the court than he was in the community. He was a very active participant on the court.

MOR: Well I knew took it pretty seriously.

OSCANNLAIN: Yes, quite seriously. But I don't think he ever assimilated into the political culture of the city of Washington, DC. I think he felt quite removed from that, and he would go home to New Hampshire every weekend he could and would retreat for the summer and no one would hear from him for eight weeks.

MOR: Mm-hmm. [chuckles]

OSCANNLAIN: From what I understand, he wants to have an active retirement in which he's doing outdoor things and is not tied down to the chores that we judges have to put up with.

MOR: So when you say active, you mean just what you said. Get outdoors and be physical? Or do you think he'll be an active—

OSCANNLAIN: That word active is interesting in a different sense. As a retired justice, he is considered a senior judge, and senior judge means something in the federal statutes. A senior judge still serves as a judge and can sit on cases on the lower courts. So he can sit with us, just like Justice [Sandra Day] O'Connor sits with us, or like Justice [Byron] White sat with us after he retired from the Supreme Court. And so long as Justice Souter maintains the equivalent of a twenty-five percent load when he was on the Supreme Court, he can participate in any cost of living raise—assuming we get them, they always forget us, Congress takes theirs, but they don't necessarily give us ours—and he would be eligible to have his retirement pay increased by that amount so long as he maintains that level of

activity. And, of course, he can do that from his farm. It means he's got to go to a courthouse and sit and hear cases every once in a while, but it's not heavy lifting.

MOR: Mm-hmm. [chuckles] Not like your job.

OSCANNLAIN: Exactly.

MOR: What about some of the others on the Supreme Court, as long as we're on this topic? We've talked about Breyer, we've talked about Souter, we've talked about Scalia, Roberts, Kennedy.

OSCANNLAIN: Justice O'Connor is one that I really got to know quite well. She was our circuit justice, and she's been to the Pioneer Courthouse three times.

MOR: She was here last year, or earlier this year.

OSCANNLAIN: She was here in the fall on the same program at Lewis & Clark Law School that Justice Kennedy was on. And it was just a delight to have her here; she was so gracious. She sat right here in these chambers, and we had a very, very nice visit. I introduced her to my law clerks and showed her the building. She was very impressed with it. She knows a lot about this building because she's been told about it in the past, and then she's always asking when I see her at judicial meetings or something, she'll ask me about how the Pioneer Courthouse is doing.

Justice [Ruth Bader] Ginsburg is a very, very shy person. She's a lovely person, but she is very reserved. Now, she can be quite articulate and can speak her mind, but in person she's very—you would almost say meek, she is that shy. And she's tiny. She's a very, very tiny lady, but she is a mental powerhouse. She is a brilliant lady. She is very cordial. She's also been to the Pioneer Courthouse. She gave a talk at Temple Beth Israel,

where my colleague Judge Graber is very active. And Judge Graber brought her to the Pioneer Courthouse, and Judge Leavy and I met with her and had a very, very nice visit.

[Justice Samuel] Alito. Now, Alito I know from circuit judges meetings. He and I were appointed very close to each other. I think I was senior to him just a little bit, but he was appointed in the late '80s, as far as I know. It was either late Reagan or early Bush I [George H. W. Bush]. And we would run into each other at meetings. Sometimes we would end up on panels at the Federalist Society or at Federal Judicial Center seminars. But I met him fairly early on and have come to respect him very highly. He's a solid judge, very, very conscientious, a terrific person.

MOR: Clarence Thomas?

OSCANNLAIN: Yes, Clarence Thomas. I'm very fond of Clarence Thomas. I just think he's one of the most likeable people there is, and he's certainly, at least on one level, the most likeable person on the Supreme Court. He has the most hearty laugh of any human being I've ever met. If you're in a conversation with him and there's any joviality at all, he will laugh in such a way that his whole body shakes. Then, you know, he's got that very, very deep voice, too.

He's a remarkable man. I'm very fond of him. He has done me the honor of taking three of my law clerks over the years. [Seven as of 2016]. He is a mainstay. I think some of the best writing—I don't think he gets credit for the quality of the writing that comes out of his chambers. The dissent in the Appointments Clause case, the term limits case, I think is probably one of the best pieces of legal writing I've ever seen. It's something that law professors will begin to respect more and more over the years. He is a great human being, a wonderful person, and we're good friends.

MOR: So you've known him for a while, too, then?

OSCANNLAIN: Yes, I'm just trying to think when I—no, I met him when we were both on the same level. He was on the DC Circuit before he was appointed to the Supreme Court. And we met at some occasion, but it was before he was on the Supreme Court.

MOR: We've left one off here. [chuckles]

OSCANNLAIN: Justice Stevens, John Paul Stevens. Stevens is a remarkable man because he is 89 I believe now, late 88 or early 89, but he is in remarkable physical shape. He is smart as a whip. He's physically robust. He is a very, very gracious person. He's always been extremely kind to me, and I have run into him at some events.

I must say the one thing I remember about Justice Stevens—now, [clears throat] this is not self-deprecating, maybe I should say that—but there was an event back in Washington shortly after the Supreme Court decided *Montana v. Mosbacher*; it was the Secretary of Commerce, [Robert] Mosbacher. And the issue was, should Montana get two congressional seats or one. There was a three-judge district court commissioned to entertain that question; I was appointed to it. Under the rules, there has to be one circuit judge, and the district judge from the district in which the case is filed, plus one other district judge to be appointed by the circuit judge. And I was appointed to that panel.

We heard the case, I think, in Missoula, Montana. And as it turned out, the majority of our three-judge panel, the two district judges concluded that they were entitled to two, I concluded they were entitled to only one. This all has to do with the allocation of fractions under the reapportionment formula. It goes up to the Supreme Court of the United States, and they reversed the three-judge panel. Justice Stevens wrote the opinion and said something nice about Judge O'Scannlain, the dissenter, in his opinion.

I think about within the year I had occasion to run into him at some reception someplace, and I said, "Justice Stevens, I just want to tell you how much I appreciate your very kind comment in the opinion." And he said something very, very nice, so I won't repeat it. But it was fun that, first of all he'd remember, and then secondly that he would go out of his way to say something about it.

MOR: Especially since you were in dissent. [chuckles]

OSCANNLAIN: No, he adopted the reasoning of the dissent and specifically referred to the O'Scannlain dissent, "which we follow," or something like that.

MOR: Oh I see, you were in dissent in the original panel then?

OSCANNLAIN: Yes. Then the Supreme Court reversed the panel and followed the dissent.

MOR: I get it now. Okay.

This has come full circle for this interview, maybe, because we were just talking at the beginning about judicial confirmation hearings. In the case of Souter now, of course, we're going to have another go-around in the Congress.

OSCANNLAIN: At the time we're talking, we don't have a nominee yet. We don't know who President Obama is going to nominate. I've seen lots of lists, actually. Some of the lists included some of my colleagues. Judge Graber has been mentioned. Judge Wardlaw has been mentioned. Now, she's down in Los Angeles. Judge [Marsha] Berzon, who's in San Francisco, has been mentioned. Judge [M. Margaret] McKeown in San Diego has been mentioned, and Judge [Johnnie] Rawlinson in Las Vegas, which is the state where the Senate majority leader comes from. Judge Rawlinson has also been mentioned.

So five of my colleagues have been actively mentioned at one time or another, and from day to day the lists change. In today's list I didn't see any of those five on it, but tomorrow's list could be different. [chuckles]

MOR: Do you expect the confirmation process to be any different, or do you think it will still be as contentious as it has been in recent?

OSCANNLAIN: I think it will be profound. Contentious, hard to tell. It will depend a lot, I think, on the label the nominee gets. If the nominee is labeled as someone who's very activist, left of center, that person could attract a lot of resistance. If the person is more of a centrist, it's conceivable, with some good political preparation, that the nominee may not have too much of a challenge.

Don't forget, the last two appointees of a Democratic president, that was Clinton's two nominees, which were Breyer and Ginsburg, both of those were nominated when it was a Democratic president and a Republican Senate, and I think both of those were confirmed with very heavy majorities.

Now, the difference today is that the Senate is now in the hands of the Democrats, so the chances are that the nominee of a Democratic president would start with a baseline of 58 votes, or whatever the number is that the Democrats have, and again will likely pick up a lot of Republicans if the person is identified as fairly centrist. But if the person is identified as very far left, why, maybe not. Maybe some Democratic Senators may jump ship, who knows. But I would expect that there will be very serious hearings, there will be lots of very probing questions, [MOR chuckles] and I would doubt, seriously, that the confirmation will happen until Labor Day at the earliest. And here it is May.

MOR: [chuckles] Not six weeks?

OSCANNLAIN: No, not six weeks. [Justice Elena Kagan was confirmed on August 5, 2009].

MOR: Okay, Judge O'Scannlain, we're at the end of our time. Thank you very much for today's interview.

OSCANNLAIN: Thank you.

[End of Session 7]

Session 8*2009 June 9*

MOR: We're back on tape with Diarmuid O'Scannlain in his chambers on June 9, 2009, continuing the oral history.

Judge O'Scannlain, we talked last time about some of your experiences when you were first on the bench, and today I thought we would talk about some of the specific issues and cases that you have been involved in.

Just before we turned on the tape we were talking about the three Establishment Clause cases, and maybe that would be as good a place as any to start. These are, I know, significant cases, and that case comes before the courts fairly often.

OSCANNLAIN: We get a lot of constitutional law cases on the Ninth Circuit, and quite a few have been in the First Amendment area. The First Amendment has two sides to it, and one is the free speech side, and the other is the religious side. On the religious side you have the Free Exercise Clause and the Establishment Clause. Under the Establishment Clause, of course, Congress can make no law establishing religion.

There are three cases that I wrote which were in the Establishment Clause area, which I think were very interesting, and they remain the law of the circuit as of today.

One was the case of *Cammack v. Waihee*, which was the question of whether the State of Hawaii could adopt Good Friday as a public holiday, in other words a holiday that was binding on public workers. [*Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991)]. Now, Good Friday is a very important day in the Christian religion, and the question was is the state barred? Because it's a day of significance to Christians, does that mean the state could not adopt it as a public holiday, as well?

It was very well argued, and there were lots of arguments to be made on either side. But our panel concluded that because there was a secular purpose to adopting Good Friday as a public holiday, it did not violate the Establishment Clause. And, of course, the secular purpose is to simply have another holiday for public workers. And it turns out, when you get into the case, that the movement to have the public holiday was nothing to do with any church leaders, it had everything to do with union leaders, and the union leaders wanted to have a holiday in that part of the year. They had President's Day in February, and they had Memorial Day, but nothing in the March-April area. So that was an acceptable purpose, and we determined that that was not a violation. That was the first one.

The second case involving the Establishment Clause was *Kreisner v. San Diego*, and that had to do with whether the city could issue a permit to a group which put on a nativity scene in the month of December in Balboa Park, which is a public park in San Diego. [*Kreisner v. San Diego*, 1 F.3d 775 (9th Cir. 1993)]. And we held that there was no violation of the Establishment Clause there, either, because under the permitting process anyone could apply for a permit. And the permit had to do with maintaining the integrity of the park and cleaning up afterwards and taking care of any of those kinds of rules. There was no restriction on the display, nor could there be, because then you'd be involved in the other side of the First Amendment, and that would be the free speech side. So we reached the conclusion that that was acceptable under the terms of the city's permitting process.

I guess the last one that I suppose could be mentioned was the *Newdow* case. [*Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002)]. Now, that's a very famous case because that was the case that held that the Pledge of Allegiance was a violation of the Establishment Clause. It was a two to one decision in the Ninth Circuit, and I wrote a dissent from our failing to hear it *en banc*, and the Supreme Court reversed it unanimously.

Let me just see for just a moment. Could we stop the camera for just a moment?

MOR: Sure.

[Tape stops]

OSCANNLAIN: As I was saying, I wrote the dissent from the court's failure to rehear that case *en banc* within this court. And it went up to the Supreme Court of the United States, which reversed the decision unanimously on standing grounds. In other words, that Mr. Newdow did not have standing to raise that issue in the school district context when he brought it.

So those are three Establishment Clause cases where I had a pretty active role, and I'm happy to say that the results in all three cases remain the state of the law today.

MOR: In that last case, Mr. Newdow was a father?

OSCANNLAIN: He was the parent, the father of a daughter, who was in the Elk Grove School District in California. And, on her behalf, he challenged the practice of the school district of saying the Pledge of Allegiance every day at the beginning of the school day. And as I mentioned earlier, our court ruled in favor of his view that that was an Establishment Clause violation. In other words, it forced a student to say "under God," because that was in the Pledge of Allegiance.

That [clears throat] case might have been reheard *en banc* within our court, but there were not enough votes for that. So it went up to the Supreme Court of the United States, which reversed the case and held that Mr. Newdow did not have standing because it turns out he did not have custody of the daughter when that case was brought. [laughingly] And as a matter of fact, the daughter was not objecting, nor was the mother

objecting. So the Supreme Court nullified the effect of the decision that came out of our court, which is the one I wrote the dissent from failure to rehear *en banc* on.

MOR: And, obviously, important cases in terms of trying to settle this question of exactly where the line is in terms of—

OSCANNLAIN: I don't think the Pledge of Allegiance issue is totally over. I think there very well may be another challenge somewhere else at the district court level within the circuit. Where that is exactly as of today in June of 2009, I just don't know.

MOR: Right. But the door is still open because they threw that case out based on his standing rather than—

OSCANNLAIN: In other words, they did not reach the merits in the Supreme Court. They held simply that Mr. Newdow did not have sufficient judicial standing to bring the case.

MOR: You mentioned that you were also involved in a couple of affirmative action cases, too, which is also something that—

OSCANNLAIN: Oh, that's another hot button area. The Ninth Circuit gets an amazing array of constitutional challenges in very controversial, very high profile areas. And there were several that I participated in over the years, and I think the subject keeps coming up. But specifically we had the case of Coalition for Economic Equity v. Governor Wilson of California, which is better known as the Proposition 209 case. [Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997)].

That's the proposition which passed the voters of California, I think, by sixty-forty. The proposition provided that the State of California could not discriminate in education or

in government employment. And I think the specific word of the proposition, as I recall it, was that the State shall not give any preference in public contracting or in public education. And that was challenged on the theory that affirmative action was permissible.

The challengers were concerned that existing programs, which granted preferences, minorities, gender-based preferences, other kinds of preferences, were important and needed as a matter of public policy. As a political issue, of course, that can be debated. But from the standpoint of the Constitution of the United States, we have the Equal Protection Clause in the Constitution, which prohibits discrimination of any kind, and that's what we concluded in the Proposition 209 case, and held that all that the proposition did was to carry out the language and the purpose of the Equal Protection Clause in the Constitution itself, and therefore it was perfectly legitimate, and therefore the will of the people, the vote of the California voters was upheld.

That was one affirmative action case, and the most recent one of national significance—and by the way, the Proposition 209 case, [clears throat] was petitioned to the Supreme Court of the United States, but *certiori* was not granted in that case. So the Supreme Court had an opportunity to take it and declined.

MOR: Left your ruling intact?

OSCANNLAIN: Which then left our decision in place, which upheld Proposition 209.

Another case involving affirmative action, of course, was the Parents Involved v. Seattle School District. [Parents Involved v. Seattle School District, 377 F.3d 949 (9th Cir. 2004)]. That was interesting because the Seattle School District, in its desegregation plan for Seattle, included such things as bussing and so forth, also had a provision regarding the allocation of places for the popular high schools. They had an open enrollment throughout the city, so if you lived in one high school area, but you wanted to send your

children to another, you could apply, but they had a rule that set up, in effect, quotas for each of those other high school areas, so that a certain racial balance was being maintained. But the provision that was involved in this case was what they called the racial tie-breaker; in other words if, everything else being equal, the applications of two people came to a point where there was only room for one, then the application which would have maintained that racial balance was to be preferred.

And again, the same question came up, that you can talk about public policy, whether that's a good or a bad thing, and from a political standpoint, obviously, there are several points of view on that, but from a constitutional point of view, the same issue arises. If we have the Equal Protection Clause, that prohibits the government making decisions based on purely racial grounds.

That's what the original three-judge panel held, for which I wrote the opinion. Then, that case had an interesting history. After that, we sent the case to the Washington State Supreme Court to determine whether a more recent provision, like Prop 209—in that case I think it was called Ballot Measure 200—would have any impact. The Supreme Court of the state ruled, and it came back to us. And then the case was taken *en banc*, and by I think it was an eight to three decision, the *en banc* court overruled our three-judge panel. In other words, it overruled the opinion that I had written.

After that, it was taken up to the Supreme Court of the United States, which then overruled the *en banc* court and specifically quoted from the opinion that I had written several years before, which was the majority in the original three-judge opinion, which came out the same way, and said, “No, various programs are perfectly acceptable, but to the extent that they turn on race only, then they violate the Equal Protection Clause of the Constitution.” And that's what the Supreme Court eventually did.

MOR: There's a couple other cases we might talk about on this list.

OSCANNLAIN: Sure.

MOR: But before we talk about the specific cases, I know that you have spoken out before on this issue of judicial activism—

OSCANNLAIN: Oh, yes.

MOR: —and it seems like that issue also is related to the personal background that a judge brings with him to the bench. I noticed that in one of the publications about you that was mentioned in the summary you gave me a while back, Steve Alpert said that your own personal judicial philosophy is anchored in religious family values, and that you're a conservative and pragmatic judge. Would you agree with that statement?

OSCANNLAIN: I don't think I can disagree. I think everyone brings to the bench his own history, which may give him or her an approach which represents the values in which he was brought up. And I'm talking going back to early parenting, grade school, high school, activities in college, and the practice one engaged in as a lawyer before coming on the court. And all of that, I'm sure, has some aspect which will probably surface sometimes in a very indirect way. But I don't have any problem with the idea that your own upbringing helps shape your approach.

I think that when it comes to the jurisprudential philosophy that one develops, that becomes a much narrower issue. Sometimes that could mean that, for example in the religious area, you might feel closer to the accommodationist side of the spectrum on the Establishment Clause issues, for example, than you might on the strict separation or secular, purely secular side. Because the decisions of the Supreme Court represent quite a range, quite a spectrum. And within that spectrum I probably would be closer to the [Justice] Kennedy view, which has been labeled pretty much an accommodationist view. In the free exercise area, for example, that it's perfectly okay for the president of the United

States to say "God bless America." There are some people in this country, and maybe even in this state, who think that's a violation of the Constitution when he says that. I have no trouble concluding that that is not a violation.

As far as conservative and pragmatic, that's probably accurate, as well. I tend to be on the more traditional side of jurisprudence. I think that the closer we stay to stare decisis, the closer we stay to the honest interpretation of the words in the statute, the words in the Constitution, or even the Declaration of Independence, the better off we are.

I do not feel comfortable reading in words that aren't there. For example, we had the case of doctor-assisted suicide. That had an interesting history. I was on the original panel which held that the Constitution did not provide a right to doctor-assisted suicide in a case that came out of Seattle. And the argument there was that even though the state had a ballot measure a few years before, which specifically rejected doctor-assisted suicide, the sponsors came back into court and said, "Hey, wait a minute, what the voters did really is irrelevant because there is an actual constitutional right in terms of privacy and notions of autonomy that guarantee doctor-assisted suicide." I couldn't find the word autonomy, [laughingly] and I couldn't find the word privacy in the Constitution [MOR chuckles], so I was in the majority that held there was no such right.

Then that case came to the *en banc* panel, and once again the *en banc* panel reversed us. I did not write the three-judge case, I joined in it, but I didn't write it. And that panel reversed us pretty lopsided; it might have been eight to three, nine to two, something that was a pretty one-sided reversal.

That case goes to the Supreme Court of the United States, and by a nine to nothing vote the Supreme Court of the United States reversed the *en banc* court and said, "No, there is no such thing as a constitutional right to doctor-assisted suicide," and chided our court, as well as any court in the country, for reading in rights that simply aren't there.

I should, while I'm talking about this, emphasize that we're not talking about a statute adopted by Oregon or Washington. Oregon has since adopted a doctor-assisted suicide statute, which was challenged in our court, and our court quite properly upheld the state statute because it was a vote of the people, and it did not trammel on any other protected rights in the Constitution. So, faced with a statutory adoption of a right to physician-assisted suicide, I would have upheld that, and that's the difference. And that's what the Supreme Court was telling us: Don't read it in if it's not there, but if a legislature adopts it, there is no prohibition that can be found in the Constitution against it.

So there you again have the spectrum.

MOR: It was interesting that the two Supreme Courts in Washington and Oregon were asked to decide opposite questions. [chuckles]

OSCANNLAIN: Yes. Yes.

MOR: No doubt there are cases that come before you where maybe there isn't a clear path to follow, in terms of precedent, or the law, as written. And I suppose that might be the place where a judge would bring a general background and way that they see the law to arrive at a decision.

OSCANNLAIN: There could be some play in the joints there, but don't forget, we're always construing language. It's either the language of the ordinance, or the state legislative statute, or the congressional statute, or the Constitution of the United States. And to the extent that we have the language in front of us, we need to read it and decide first whether it's clear or ambiguous, and there is lots of language that's ambiguous. And once you reach the conclusion that it's ambiguous, then there's a little more of a range, a little more scope to deal with.

I guess if you look back over the statutory construction cases, which would include constitutional provision construction, I've probably tilted more toward the conclusion that the words are there and they mean what they mean, as opposed to saying, the words are there, but that's what they might have meant, but now we're in a different era and we can read them to mean whatever we want them to mean. I'm not in that category at all. I'm in the category that one would, again, say is on the more traditional side. Maybe it's conservative, but I tend to stick to the words and give them the meaning that's there.

MOR: Can you think of a case where, due to the subject matter being strictly, from the twentieth century, where you were at a loss maybe to see in the law as previously written—I mean, are there areas, in other words, where there is really nothing that's been said about an issue where you have to still make a decision?

OSCANNLAIN: I can think of one case which could be of interest, and that is the Jordan case out of Washington State. [Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993)]. It was here on a habeas challenge, and it had to do with whether a female inmate, had to undergo a search by a male guard. I'm talking about a body search.

There was no question that this person was in the category where body searches were appropriate. The question was, did she have a claim that it would be cruel and unusual to have the body search done by a male when there were plenty of female officers in the prison who routinely would do this?

[Laughingly] As it turned out, this was provoked by a union jurisdiction dispute within the penitentiary, and it had to do with which category of prison guards would be assigned to this duty. You put that off to the side. The real question is, assuming that the person could bring a challenge against the government in a penal situation—the Eighth Amendment is triggered—could the government be required to adopt a policy which did

not violate the Eighth Amendment. And that's what we concluded, that since the penitentiary had plenty of female officers who could do the search, we held that this person was entitled to that right.

So far as I'm aware, this was the Jordan case, there was no other previous history of someone raising that question. Could you have a person of the opposite sex go over your body looking for contraband? And I'm talking about every part of the body. So we concluded that, notwithstanding the fact there wasn't anything out there, that this was inappropriate and a violation of the Eighth Amendment.

MOR: Okay. Another question I had for today was your relationship with the Supreme Court. And we did have an extensive conversation last time about the justices and your own personal contact with the various justices. But in some of these cases we've discussed, apparently your philosophy, the way you've decided cases, has coincided closely with the Supreme Court's view. And you just mentioned before we started that you had twelve out of twelve [chuckles] in the recent past, is that right?

OSCANNLAIN: [laughingly] I must say I've been blessed with a very good record over the last three Supreme Court terms. I've had twelve cases, which I have participated in here in the Ninth Circuit that have gone to the Supreme Court where they were granted certiorari and the Supreme Court rendered opinions in them. And in most of these cases I was the dissenting judge in a panel, or I had written a dissent from a failure of our court to rehear a case, or I had joined somebody else's dissent for a failure to rehear the case. And in terms of the last three terms of the Supreme Court, I'm twelve for twelve; four for four this year, two for two last year, and six for six the year before that.

So that's very satisfying because it helps me maintain confidence in what I'm doing. And the positive reassurance that comes from the Supreme Court validating what you do has really meant a lot to me. It's one of the things frankly that keeps me going. I could have

walked out seven years ago, literally. I mean, I could have simply said, "All right, I'm sixty-five years old, I've been on the bench for fifteen years, I'm going to quit." And if I did that, I could have taken retirement at full salary, the salary as of that age of sixty-five, but I haven't done that. I have stayed on as an active judge, and one of the reasons I'm doing that is because I really believe that I have a role to play in helping to keep the Ninth Circuit honest, so to speak, keep the Ninth Circuit focused on what the Supreme Court of the United States expects. As I say, it's very reassuring to keep getting some validation that not only have I helped to bring these cases to the Supreme Court, but I've been lucky enough to have predicted properly [both laugh] what the Supreme Court would do.

We really work hard to read the Supreme Court cases, and to a certain extent the tea leaves that are there, [clears throat] to keep a balance on our own court. Because, as you know, our court has the reputation of being the most liberal circuit in the country, which it clearly is, and I have colleagues who fundamentally believe that it is their job to push the Supreme Court to the left because they think that it's not performing properly.

Whether it's performing properly or not to me is not the issue. The issue is, are we doing what they're telling us to do? We have nothing beyond that. We are an inferior court. Now, we're not inferior in ability or anything else; we are inferior only because we are a step below the Supreme Court, and then the district court is a step below us. And each of us, depending on where we are on the ladder, are hemmed in by the strictures that establish the judicial branch under the Constitution.

So as far as I'm concerned, my job is to follow what the Supreme Court tells us and not to try to preach to the Supreme Court, or tell them that what they're doing is wrong or they ought to be a lot more liberal. That's where I am.

MOR: You used the phrase "read the tea leaves." I imagine that's part of it, too, because the Supreme Court changes, or evolves, depending on the way the winds are blowing.

OSCANNLAIN: Oh, sure, there's been some evolution. Sure, absolutely.

MOR: I guess another question I have relative to the Supreme Court was your own notoriety as a potential Supreme Court nominee, and you've been close to being nominated once or twice?

OSCANNLAIN: It's been very, very nice to have been mentioned and to be considered at one level or another. It's obviously something I appreciate, but [clears throat] there's a certain amount of lightening striking and timing involved. I suppose to the extent that I might have had a serious opportunity it would have been during the tail end of the Reagan administration and Bush 1 or early in Bush 2.

I did get a call from Washington while President Reagan was still in office, and someone asked me about my being willing to be considered, but it was very shortly after I was appointed to this court. As a matter of fact, I was sitting in my chambers—my chambers were on the second floor at that time—and I was in a meeting with my law clerks, and this call came, and I just said, “Oh law clerks, you stay where you are.” And I took the call, and I was asked whether my name should be put on the list.

I said, “I'm sorry, but I just came on the court.” It was about a year after I came on the court. It was just before Justice Kennedy was nominated. Remember, there was a time when Judge Bork was nominated, and then he got voted down in the Senate. It was around that time when I got the call. And that was, as I say, roughly about a year or so after I came on the court. And I said, “No.” And my law clerks were sitting there, and I told them what happened, and they were all totally crestfallen [MOR chuckles] because they said, [emphatically] “There goes my chance to become a Supreme Court law clerk.” [MOR laughs]

I'm sure we're all reading too much into any of that, but it was very nice to have happened. I think had I had the same call five years later, [clears throat] which I did not get, why, I think I would have answered it more enthusiastically, but that's life.

MOR: I suppose it would involve of sacrifice on your part because you'd have to move away from Portland.

OSCANNLAIN: That is true. In fact, that's one of the things I told the caller that was in the picture.

Actually there was a time during Bush 2, or just before Bush 2, the tail end of the Clinton administration, when they were putting together lists, and I was on that list. You probably saw there's an article referred to here that talks about my being on a list which included now Justices Alito and Roberts. And those names were on that list, along with mine. But I think what probably happened was by the time the election was over and the new team was in office in 2001 and they were culling the lists, the fact that I was—at that point I would have been sixty-four—that I was really out of contention, because I think most presidents want to appoint somebody in their fifties. And so like it or not, if I had a chance it would have been either in late Reagan or early Bush 1.

MOR: Back when the call came.

OSCANNLAIN: Right.

MOR: I guess the reason that presidents want to do that is they want their nominees to be on the court for a good long time.

OSCANNLAIN: Oh, that's true. Oh, I think so, yes.

MOR: There's a number of issues that you've written about in some cases, and others maybe you haven't written about but you probably have opinions about. And one of the former is you have written on more than one occasion about splitting the Ninth Circuit.

OSCANNLAIN: Oh, yes.

MOR: I guess maybe we've even talked about that previously.

OSCANNLAIN: I can just summarize. My views, remarkably, are quite similar to Senator Mark Hatfield's views at the time I came on the court. But at that time I did not agree with Senator Hatfield because I thought that the plan to split the Ninth Circuit was born of the politics of keeping California judges out of Northwest environmental cases.

I'm not sure [clears throat] how many people remember it, but we had the case of the moth that was eating forests.

MOR: Oh yes. The gypsy moth.

OSCANNLAIN: The gypsy moth. And there was a panel out of the Ninth Circuit which essentially upheld the rule that you couldn't take any steps [clears throat] that would have an anti-environmental effect. I'm not really summarizing that elegantly, but the bottom line is that a lot of the Northwest delegation, through pressure from the timber industry, maybe even some of the surface mining industry people, and others, were trying to keep California so-called liberal judges off Northwest environmental cases.

One footnote, one of the judges on that panel that was the target of all of this criticism by industry included a judge from the Northwest. But all of those considerations, I felt, were inappropriate, so I resisted the idea of supporting a split.

But a few years later, I was selected to get an LL.M (Master of Law) at the University of Virginia Law School in judicial process. And as a result of that program, it was a two-year program, it meant that you had to do two six-week summer sessions in Charlottesville, Virginia, which I did do while maintaining my caseload. There were a lot of blue bags [post-free judicial mail] going back and forth with cases. But in addition to that, I had to write a thesis. And in the process of doing research I did a lot of research about judicial administration, judicial structure, and independently reached the conclusion that, as a matter of judicial administration, that our Court of Appeals was getting much too large; in fact, it was too large already.

Today as we sit, if all the vacancies are filled we'll be at fifty-one judges on this court: twenty-nine active judges, and twenty-two senior judges. And most of those senior judges are pretty active in the sense that they sit on regular panels. You compare a court of fifty-one judges with the rest of the country, and you find out the smallest circuit is the First Circuit, which is New England, and they have only six active judges, and I think something like another six who are senior, so that's a total of twelve. All right, if twelve is the smallest and fifty-one is the largest, well where do the rest of the circuits fit?

You find out that the average size of all the other circuits is only twelve active judges. And if you add the seniors to that, it might bring it up to maybe seventeen, eighteen, nineteen, something like that. Which means that we're way, way, way out of proportion with the rest of the country, and I've never been able to put my finger on it, but there's a point at which a decision-making body gets so large it loses its ability to represent the individual determinations of each member.

Now, when you're sitting as a panel of three, the views of all three judges are clearly going to be considered. And even when you sit *en banc* in a typical court, which might be twelve, thirteen, fourteen judges there's a good chance that all thirteen, fourteen, fifteen, whatever, judges are having input into it. But when you sit with twenty-nine judges, you

know, something happens in that process, and I notice it in our court meetings. The court meetings are very peremptory. They are not really the product of individual considerations. It's a couple of people with very strong views who will utter some edict, and there will be a couple of amens to that—probably not amens, but endorsements—and the rest will stay silent, and that will be it, on to the next question.

I think human conduct is such that you can understand how decision making in larger groups is not going to be the same as decision making in smaller groups. And that's why I have come to the conclusion that we are large enough now to be restructured, and if indeed we get the five new judges that are in the bill that is sponsored by Chairman Pat Leahy, who is chairman of the Senate Judiciary Committee, that will put us up at fifty-six, fifty-seven judges, and there's something wrong with that. I mean, that's no longer a court, it's like a mini-legislature.

MOR: Mm-hmm. [chuckles]

OSCANNLAIN: And maybe that's one of the reasons we get reversed by the Supreme Court all the time. On the day we're doing this taping, we have a total of sixteen cases in the current term of the Supreme Court, and they've decided eleven as of today. There are five more that are going to be decided over the next three or four weeks. All eleven Ninth Circuit cases have been reversals, so we're zero for eleven, and I'm not going to predict what's going to happen with the other five cases. But the point being, that when you're reversed so heavily in so many cases, and a significant number of those cases are unanimous reversals, there's a signal there, there's a message to us. And I think the message is, hey, when you are so large, you can't police your own work better than to have the Supreme Court have to take fifteen or twenty, or in one case twenty-nine cases a year, almost all of which are going to be reversed, maybe you should ask yourself what's making that happen. And one of the reasons that that is happening, in my personal view,

is that the court is so large that it can't do as good a job of maintaining the consistency of law that it should.

So I have come to the conclusion that we should be restructured. We could have a Northwest Circuit made up of five states, which would be perfectly appropriate. The number of jurisdictions in the courts varies. We start with the smallest one, which is the DC Circuit, which has only one court below it, and that is the district court of the District of Columbia. You could call that a one-state circuit. We have the nine-state circuit, which is the Ninth Circuit, but everything else is in between. And there are quite a few three-state circuits or four-state circuits. And so somewhere along that line, maybe three or four states in one circuit, three or four states in the other would make sense.

The biggest problem, of course, is California, which represents over seventy percent of the caseload of our circuit today. And if that's the case, that means that if you have twenty-nine judges, twenty-one maybe have to come from that one state if you're going to keep a proportionality. That has skewed things, and that is a real problem.

MOR: So are people talking about splitting California?

OSCANNLAIN: Yes, that was proposed in 1974 when the Hruska Commission recommended that both the old Fifth and the present Ninth be split. They recommended that the Fifth be split three to three—keep Texas, Louisiana and Mississippi, but spin off into the Eleventh Circuit Georgia, Florida, and Alabama. That was done in 1980.

What they recommended for the Ninth Circuit was to split California, so that the Northern and Eastern districts of California, that's San Francisco and Sacramento, [clears throat] would be attached to a Northern Circuit, which would include Oregon, Montana, Idaho, Washington, and Alaska, and then a Southern Circuit, which would be Nevada, Arizona, Hawaii, and the Southern and Central parts of California.

That made perfect sense because that would have split the present circuit into two equal sized circuits, equal in the sense that—

[Tape stops]

OSCANNLAIN: —would have resulted in two equal sized circuits, size of population, size of caseload, and it was very prescient because that was true in 1974, and it's still substantially true today. The two circuits, if they'd actually split, would be similar in caseload and similar in population because of the growth patterns.

I don't think that that proposal is going to make much progress. For one thing, Senator [Dianne] Feinstein, the Senior Senator from California, is opposed to it. I think there's a bit of skittishness about doing anything which puts California into two parts because that might spark an effort to create two states out of California, although I think that's really remote.

So even though I prefer that arrangement, I have not been promoting it because I just don't think it's very pragmatic to do so. It just doesn't have a prayer of coming into existence. I think more likely is a plan which would split off the Northwest Circuit, the five northwest states, maybe take in Hawaii and the Pacific Islands to acknowledge that it's separated, just like Alaska is, leaving then a three-state Southwest Circuit, California, Nevada, and Arizona. Something like that. [laughingly] Maybe we'll flip a coin to see who gets Hawaii, I don't know. [MOR chuckles] But it will be something like a Northwest-Southwest that would have to result.

There's no question that the Southwest Circuit would be a lot larger than the Northwest Circuit, contrary to what would have resulted if we had split California, but that's where you are in terms of population and caseload.

MOR: Would the Southwest Circuit still have the same problem of being too big?

OSCANNLAIN: There are four judicial districts inside of California—but one state, if it were made a circuit, and I am not opposed to having a California circuit. In fact, there was a California circuit back in the 1800s—one state, one circuit—but there is concern that you shouldn't have a one-state circuit because you might want to encourage the leavening that comes from having more than one state in the same circuit. We have a one-state circuit, so to speak, in Washington, DC, that's the District of Columbia Circuit, so I don't think that's a very powerful argument. But if California were its own circuit, it would start out being the largest circuit in the country. It would be larger in caseload than the Fifth Circuit, which today is the second largest, or the Eleventh Circuit, which would be the third largest.

So no matter what you do, the first building block is California. And California being the largest state in the country, being so large that by itself it would be the largest circuit, is where you have to start. So I have no trouble having a California-only circuit. I think that would make a lot of sense. You could then have all the remaining eight states which surround California, which Judge Chambers called the horse collar circuit, be its own circuit. And you could have the headquarters maybe here in Portland, that would be nice, or Seattle, if that were the way that the politicians resolve it. Nothing wrong with that. They would all have that common heritage of being part of the Ninth Circuit for so many years, but it would be much more manageable because it would require far fewer judges, it would represent roughly thirty percent of the old circuit, and would be the largest circuit in number of states, but it would not be the largest in number of cases or number of population, but well within the middle rank there, larger than the First Circuit on every score.

MOR: Do you think things are building to the point where there will be some action on this?

OSCANNLAIN: I think it's only a matter of time before our court gets to be so big that it will collapse of its own weight; it's hard to know what the catalyst will be. I have heard, for example, that if this bill to increase the number of judges throughout the country gets a hearing—and that's the bill that would give the Ninth Circuit five more judges, we're entitled to ten more judges in terms of the numbers because of the [clears throat] proportion of cases we have compared to other circuits—if that gets a serious hearing, it wouldn't surprise me if some Senators would say, "Hey, wait a minute, we shouldn't be making the Ninth Circuit so large that it makes the problem worse. Maybe this is the time to look at prospects to do some restructuring now. Let's add five more judges to that area, but let's restructure the area in such a way as to make it more manageable," instead of having fifty-six, fifty-seven, maybe, who knows, eventually sixty judges on the same court. Which is, in my personal view, absurd. And I'm quite sure other senators might feel it's absurd, and that maybe the time will come to take a look at it.

[Tape stops]

MOR: We're back on tape with Diarmuid O'Scannlain on June 9th.

Just a couple of other issues that you might have some thoughts on. We've heard a lot about the challenges posed by the war on terror. [chuckles]

OSCANNLAIN: Oh, yes.

MOR: There was some talk during the Bush administration which seemingly was resisting having certain things decided by the courts and asserted executive privilege in a more assertive way than has previously heard. There was some talk about the independence of

the judiciary. I've even heard at least one judge talk about it. So what are your own thoughts about that? Do you think there was ever any threat to the judiciary posed by expansion of executive power?

OSCANNLAIN: The word expansion presupposes that it exceeds some existing limit. I'm not sure that's been demonstrated because the Supreme Court did two things. First, it held that the military commissions law, which was passed by Congress, which would have provided for military commissions, was perfectly okay. [United States Military Commissions Act of 2006, also known as HR-6166] So was that an expansion? I suppose the more studied answer would have to be, no, not if it was approved by the Supreme Court.

Now, the Supreme Court also held that certain of these prisoners were entitled to protections of *habeas corpus*. Certainly the U.S. citizen defendants, I think there were a couple of those, and others who were going to be tried on the basis of existing statutory law would be subject to *habeas corpus*, which meant that they were entitled to all of the procedural rights that would be attendant to any prisoner under civil law.

I'm not convinced that this was a necessary conclusion by the Supreme Court. It was a split decision, but it's the law of the land, so we're going to see how it works out. We're now in a position where there's a lot of political resistance to closing Guantanamo, a huge amount of resistance to bringing the Guantanamo prisoners onto the mainland to be tried here or to be imprisoned here, and it's back in the political arena now. It's not a judicial issue at the moment, it's more a political issue.

So we'll just see how that plays out. I don't really have any very strong feelings about it.

MOR: Okay. Another constant hot button issue, whenever there's a nomination to the Supreme Court, is the abortion debate, which has been hot and heavy for a very long time.

OSCANNLAIN: Oh yes. Sure, sure.

MOR: A lot of people think that there may come a time where *Roe v. Wade* will be overturned by the Supreme Court, although it hasn't happened yet. [*Roe v. Wade*, 410 U.S. 113 (1973)]. What do you think about that?

OSCANNLAIN: You say it hasn't happened yet; to a very significant extent *Roe v. Wade* has been cut back.

MOR: Yes.

OSCANNLAIN: The *Casey* case, in which Justices O'Connor, Kennedy, and Souter carved out a holding which kept the essence of *Roe v. Wade*, but which allowed considerable changes to the original *Roe v. Wade*, is now the law of the land. [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)]. In other words, some procedural steps can be adopted by states, such as some notice, some waiting period, some advice, other provisions which cut back on the sweep of the original *Roe v. Wade* case are there. And it seems to me that you'll probably continue to get some pressure there.

I suppose the real question is what will eventually happen in terms of what is called partial birth abortion or late term abortion. That's where the focus is right now, and we'll see what happens.

MOR: And maybe the last one I'll ask you about is the very famous case from the 2000 election, *Bush v. Gore*. [*Bush v. Gore*, 531 U.S. 98 (2002)]. [chuckles]

OSCANNLAIN: Oh yes.

MOR: What did you think about that? I think a lot of people felt that somehow the Supreme Court had handed the election to George Bush.

OSCANNLAIN: There's no question that the Supreme Court precisely did that and handed the election to George Bush. But the real question is whether that was appropriate or not. Some people who use that description by implication feel that somehow the decision was without foundation, or somehow improper.

I think when you look at it more carefully, you begin to realize it was a little more complex than that. First of all, there was a majority of seven to two—not five to four, but seven to two—which held that the Florida Supreme Court had erred in its analysis of how the election was being administered. And there was a majority of five which decided not to send it back to the Florida Supreme Court, but that the election in effect should end there.

As it turns out, that was a prescient decision because if it had gone back to Florida and the remaining votes were counted the way they were supposed to be counted, or at least in terms of the proper procedure, Florida would have gone for Bush, anyway. And that all came out a year or two later. I think the Miami Herald made a very careful analysis of "what if?" and reached that conclusion after a lot of research.

[hand clap] It's unfortunate that we had to have a Bush v. Gore case. I would have assumed that our elections mechanics were sufficiently reliable that we didn't have to get the courts involved. But as a matter of practical fact, courts do get involved every once in a while. As we speak, we still have the case of Minnesota—

MOR: That's right. [chuckles]

OSCANNLAIN: —which is holding up the certification of a senator from the State of Minnesota. Here it's June 9th, the election was held back in November of last year, and the mechanics of the vote counting have long since been completed, but the appeal process to the Minnesota courts has not.

We'll see how that plays out, and one of these days the Minnesota Supreme Court will be accused of handing the election to X. Whoever is deemed to have achieved the countable majority will be determined to be the winner, and like it or not, the court will get the credit for picking a senator. It's still the people who voted. The role of the court is a narrow one to determine that the law of counting, the law of elections was complied with. And to reach that conclusion, and one candidate or the other is going to be the beneficiary of it.

MOR: Back to the war on terrorism cases. There's one that I believe that—and maybe because of this you won't be able to talk about it—but I think it's before the Ninth Circuit here in Oregon right now, the Al-Haramain case. And that's an interesting one that involves an Islamic charity in this other part of Oregon.

OSCANNLAIN: Oh, yes.

MOR: And part of the issue is whether or not the Al-Haramain can have access to records that the government deems to be too sensitive.

OSCANNLAIN: Right. Exactly.

MOR: And subject to national security censure. So do you have any thoughts about that one? Or have you been following that at all?

OSCANNLAIN: Not really. There is a companion case in the Northern District of California in front of Judge [Vaughn] Walker which involves the same principle of access to secret documents that is presently active. I don't know exactly where we are on it. I think Judge Walker, who's chief judge of that district, has served notice on the Department of Justice that they have until a certain time to decide whether or not they're going to allow the access, and if they disallow the access, then presumably that will come up to us to review. And no matter what our court does, it will probably go to the Supreme Court, but I'm not in a position to comment.

MOR: Okay. Can you comment in general on just the difficulty posed by national security concerns and secrecy?

OSCANNLAIN: Almost every judge at our level will probably have had some national security cases. I have. I was on a case at least ten years ago now, when I had to read top secret documents with a C.I.A. agent sitting within ten feet of me to be sure that I didn't lose any of the pages or whatever.

MOR: Xerox them? [laughs]

OSCANNLAIN: Right, right. And I read what I had to read to reach the conclusion as to—and I can't remember precisely the issue, whether it was admissibility or discoverability or whatever, but I had to do that. And all of the rules with respect to exposure of classified information were followed.

The C.I.A. sent this agent out from Washington to my chambers here in Portland, Oregon, and I looked at the material. It didn't take very long, probably an hour or so, and then he picked it all up and took it back to Washington with him.

So that's how these things play out. I think it would be very useful to talk to my colleague, Judge Ed Leavy, who was on the Foreign Intelligence Surveillance Court of Appeals. And in that capacity he went back to Washington to sit on an appeal of a case involving classified documents, in which the appeal was argued in a totally safe, lead-lined courtroom—I think it's in the Department of Justice someplace, or maybe it's in the Prettyman Courthouse, I'm not sure. But in any event, it is a small courtroom reserved for the specific purpose of either taking testimony which involves top secret material or information, or arguing cases which will involve the exposure of top secret information.

We take our laws very seriously in that area, but at the same time we have all of these built-in protections which are observed. There is judicial review. There is a statute which exempts a very specific category. And it probably means that there are some potential defendants, or actual defendants in the past, who have not been prosecuted or whose prosecutions have had to have been vacated because there was no other independent evidence other than classified information, which in the interests of the United States should not have been disclosed and wasn't, but that's our system.

You remember the famous expression, "Because of the constable's blunder, the thief went free." We have the Fourth Amendment, and if the police don't do their job right, it means that certain people who are guilty as sin will not get convicted because it's more important for us to have the laws which prevent unreasonable searches and seizures than it is to ignore that right somehow to get a conviction.

MOR: You mentioned this room in Washington that was lead-lined. Is that to prevent electronic transmission?

OSCANNLAIN: Yes, any eavesdropping, yes.

MOR: Mm-hmm.

OSCANNLAIN: Apparently in Washington there's all kinds of cyber theft that's going on back and forth, whether it's through the internet system or through radio techniques or infrared or what-have-you, way more complex than I probably will understand. But there's a lot of espionage that's going on, and we do the logical thing, and that is we defend against it so that we can protect our information, which usually involves sources. I mean these are people who are placed high up in organizations in foreign countries, which if they were to be exposed would mean they'd be instantly killed. And the results of building a network of information sources would have been just wiped out in an instant if somebody made a mistake. That's very, very sensitive stuff.

MOR: Right, then you have to defend against resources of other nation states essentially.

OSCANNLAIN: We have treaties and understandings with other intelligence services which—I mean if they placed a source someplace, we want to be absolutely sure that we don't, through any mishandling, reveal that source. It's not one of our agents, but it's an agent of a friendly country. I'm sure we'd have the same rule, that we would rather that the defendant go free than to release that information.

MOR: When you encountered that C.I.A. agent in your own personal case, were you allowed to take any notes, or did you have to keep it all in your head, or make a decision on the spot?

OSCANNLAIN: The nature of things was that I didn't have to take any notes. I could, but the notes could not reveal the names, places, or what-have-you.

MOR: Okay. I'm not sure how many hours we've recorded here. [chuckles]

OSCANNLAIN: We've recorded quite a lot.

MOR: We have indeed, and I'm starting to run out of questions.

OSCANNLAIN: [laughingly] Okay.

MOR: Do you have any final thoughts or things you might want to say about your career?

OSCANNLAIN: I'm not quite sure where we are in terms of the career. I've been on the court now for almost twenty-three years. I was appointed in September of 1986, and here we are in June of 2009.

I've maintained active status during that time. I don't have any plans to take senior status, which I'm eligible to do, for the foreseeable future. I assume someday I will, but I've been blessed with good health, I love what I'm doing; it is very satisfying work. I'm blessed with great staff, wonderful law clerks, whom I get every year.

By the way, I think this will be the first time I've had three former law clerks on the Supreme Court at the same time. I've got one law clerk who will be clerking for Justice Scalia starting next month, and I have two more who will be clerking for Justice Thomas in August, so I'm very flattered by that. I think those are the thirteenth, fourteenth, and fifteenth law clerks of mine who have clerked for the Supreme Court, and I take a great deal of pride in that. And as long as I continue to merit applications from top law students, I'll continue to do what I'm doing.

MOR: Who are these three?

OSCANNLAIN: One is right here in chambers, he'll be here for another month, and his name is Dan Sullivan. He's a graduate of University of Chicago law school. Then I have a clerk from last year who was editor-in-chief of the law review at Notre Dame, that's Brian

Morrissey. And a clerk from two years ago who is from Yale Law School. So we've got three different law schools, and three different years of clerks involved.

MOR: What was the name of the one from Yale?

OSCANNLAIN: Marah Stith.

MOR: It sounds like you've got a good track record in that area, too. [chuckles]

OSCANNLAIN: I feel very blessed, there's no question about it.

MOR: I want to thank you for taking the time to do this, Judge O'Scannlain. I know that you're very busy and it's been a pleasure on my part to record your oral history.

OSCANNLAIN: Maybe we can do it again, or at least do a postlude when I take senior status. And as I say, I have no idea when that's going to be.

MOR: Okay. That would be great. I'd be more than happy to do that.

OSCANNLAIN: Great. Thank you.

[End of Session 8]

Session 9

2010 April 10

[This section is restricted until 2037]

[End of Session 9]

[End of Interview]