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Oral History of Distinguished American Judges

HON. DIARMUID O'SCANNLAIN
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
An Interview
with
Michael T. Reynolds
Cravath, Swaine & Moore

September 30, 2017

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[START RECORDING]

MR. MICHAEL T. REYNOLDS: Judge

00:00:14 O'Scannlain, thank you very much for meeting with me today. As you know, I'm Michael Reynolds, your former law clerk.

JUDGE DIARMUID O'SCANNLAIN: One of my favorites, by the way.

MR. REYNOLDS: Thank you, Your Honor.

I am pleased to conduct your oral history for the Institute of Judicial Administration for the NYU School of Law. Let's start at the beginning, with your name. You have a very distinctive name, Diarmuid Fionntain O'Scannlain¹.

00:00:30

JUDGE O'SCANNLAIN: Correct.

MR. REYNOLDS: What can you tell us about that?

JUDGE O'SCANNLAIN: When it came time for christening, my parents were told by the good Monsignor that was

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about to perform the baptism, he was

¹ Pronounced DEER-mid FIN-tun o-SCAN-lin.

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not going to baptize anybody in the name of a pagan. Diarmuid was the last pagan king of Ireland, and my father and mother both spoke Gaelic

00:01:01 in the home, I grew up speaking Gaelic. So the compromise was the middle name. Fionntain is the name of a very pious monk who translated gospels in the Abbey of Iona in the Irish Sea. So that was the great compromise.

MR. REYNOLDS: So as a first-generation American, and the son of Irish immigrants, what can you tell us

00:01:22 about that impact upon your experience as a judge?

JUDGE O'SCANNLAIN: Well, I didn't really speak English until I was about five years old, because as a convention, my parents spoke Gaelic in the house. They were both Gaelic speakers. My dad was a revolutionary in the early days of the fight for independence of Ireland. He was a

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00:01:46 member of, not only the Irish
Republican Army, but he was also
cadre, which meant that he was part
of the IRB, the Irish Republican
Brotherhood. He met my mother in a
00:02:02 very interesting series of events.
Dad was actually arrested in
Manchester, England, in the act of
buying arms from a German agent; [he
was] brought back to prison in
Dublin,[and] managed to escape with
his cellmate to Derry city up in the
north, where he and his cellmate were
hidden in the attic. Well, it turns
out that the cellmate's sister, [who]
would
00:02:34 later become my mother, would go to
the door and say to the Black and
Tans,² "Oh no, there's no fugitives
here". All of that history, plus the
fact that my mother was the daughter
of the IRA chief in Derry city- this

² "Black and Tans" was a nickname given to the British government force of ex-soldiers recruited to serve in Ireland beginning in 1920. The name "Black and Tans" is a reference to their black and tan uniforms.

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is all, you know, during 1916, 1923-
a very active time in Ireland. All
of that obviously had an impact on
me. I was

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very much aware of how society
evolves and how important the idea of
freedom and independence was to them,
and ultimately to me.

00:03:20

MR. REYNOLDS: Looking back, how do
you think your childhood growing up
in New York City has affected your
world view?

JUDGE O'SCANNLAIN: Well, that
certainly was part of it. I can
remember, because at that time I was
still speaking Gaelic, I managed to
escape from the backyard of our house
in Forest Hills, [Queens], and made
my way down to the nearest subway
station. I

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think it was the 71st Avenue,
Continental Avenue station on the E
train or the F train. And [I]
somehow got down to the train
platform. I probably didn't pay the

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fare, because I was only five, and little by little, I guess I must have been obvious to a policeman, who approached me, picked me up, and tried to talk to me. And of course I was

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only speaking Gaelic, so he didn't understand what I was saying. I may or may not have understood what he was saying. Anyway, he took me down to the police station. Of course my

00:04:22

parents were frantic, called the police, and they went down to collect me. It turns out that the policeman who rescued me was Officer O'Flannigan, a good Irish-American himself, who was not able to detect that I was speaking the Irish language.

00:04:44

MR. REYNOLDS: Have you ever gotten a chance to go to Ireland and see where your father and mother grew up?

JUDGE O'SCANNLAIN: Yes, several times. In both cases, and as a matter of fact, the farm where my dad

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grew up is in Sligo, and it is still owned in the family. My youngest brother, Conn, has retired and lives on that farm right now. The house that my dad and uncle were holed up in is still there. It's a very pleasant neighborhood. It's Westland Avenue in Derry city, and that's still standing.

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MR. REYNOLDS: How can you describe your educational experience, elementary school and beyond, in New York?

00:05:21

JUDGE O'SCANNLAIN: The first years of my education, about four years, was essentially almost a private tutor. There was a neighbor who took in students. I was one of maybe about ten that could walk to the house, and it's sort of a combination of home-schooling and a private school. That went on for about four years, and then I went to All Hallows Grade School, which was a school run by the

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Irish Christian Brothers,³ in which I was able to go into the sixth grade, so I made a two-year gain in terms of education. But of course, I was still two years younger than my classmates at All Hallows. [I] graduated from there, went on to St. John's Prep in

00:06:18 Brooklyn, and then on to St. John's College, which at that time was right across the street until about 1955, then it moved out to its current campus in Queens, Jamaica, Queens.

00:06:30 MR. REYNOLDS: How much of a role did religion play in your early childhood?

JUDGE O'SCANNLAIN: Well, we were a religious family. Mom and Dad were both Irish Catholics in the traditional sense. Mom in particular was probably a super-Catholic. Dad was certainly observant, and I went

³ Also known as the Edmund Rice Christian Brothers, the Irish Christian Brothers is a community of Catholics partially known for their educational efforts.

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to Catholic schools: the Irish
00:06:51 Christian Brothers and then the
Vincentian Fathers at St. John's Prep
and at St. John's College.
MR. REYNOLDS: What do you recall
your career aspirations being when
you were at St. John's Prep or at St.
John's University?
JUDGE O'SCANNLAIN: I'm not sure I
had any fixed notions when I was at
St. John's Prep, but certainly by the
00:07:08 time I got to the college, I began to
think more and more seriously about
going to law school, and I had some
role models there. A very good
friend of mine was two years ahead of
00:07:20 me and was heading for law school,
and he had a lot of influence on me.
I was also aware of the fact that for
the first time St. John's had a
graduate, two years ahead of me, who
went on to Harvard Law School- that
was Andy Carlin. Somehow or other, I
decided I want to go to law school,
and I want to go to Harvard Law

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School.

00:07:42 MR. REYNOLDS: What kind of activities were you involved in at St. John's?

JUDGE O'SCANNLAIN: Quite a lot, quite a lot. I was involved in student government. I was involved in something called the National Federation of Catholic College Students. I eventually became the national president of that in 1957, which is the year in which I graduated. I was also one of the editors of the yearbook, actually I was the co-business manager of the yearbook.

00:08:01 MR. REYNOLDS: What about the military? Were you involved in the reserves at that point?

JUDGE O'SCANNLAIN: One of my friends at St. John's, his name was John DeCarlo, was in the New York Army National Guard, the 7th Regiment, and at that time -- this is right after the Korean War was pretty much

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00:08:33 closing-- but the draft was still on, and you could do one of several things. You could go two years active duty, four years reserve. Another option was eight years reserve and then no further requirement. I opted for that. I enlisted as a private E1 in the 7th Regiment right up on Park Avenue and 66th Street. A couple of years later through the National Guard, I went to OCS⁴ [and] was commissioned as a 2nd Lieutenant. Then, I stayed active in the Army Reserve for a total of 23 years. When I went to Harvard, by that time I think I was a captain, and a commander of an assault gun platoon in the Massachusetts Army National Guard. Somewhere in between, I went to Fort Benning to get qualified. That was the longest time of [my] active military service, ten weeks, and then

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⁴ Officer Candidate School (OCS), the United States Army's main training academy for prospective Army Officers.

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[I] eventually transferred to a unit where I now live. They had positions in the Judge Advocate General's Corps⁵ so I transferred to that, and then I retired as a Major with 23 years' experience.

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MR. REYNOLDS: Was there anything about your experience in the military that you think helped you become a judge or be a judge?

JUDGE O'SCANNLAIN: Well, I suppose just the whole idea of discipline, and regular order and routine. All of that had to play a part, obviously

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some of it is subliminal, but sure, I bet it had an effect.

MR. REYNOLDS: What did you do right after St. John's?

JUDGE O'SCANNLAIN: After St.

00:10:10

John's I had to work for my dad for a while. My dad had a small travel agency, and I'm sure I disappointed

⁵ The Judge Advocate General's Corps is a division of legal professionals within the Army qualified to represent the Army and soldiers in military matters.

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him, because I did not decide to stay with that. As a matter of fact, [for only] about two years after graduation. I'd still been active politically ... in some Republican efforts, and [I] became the general secretary of the 2nd Atlantic

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Conference of Young Political Leaders,⁶ which was sponsored by the American Council on NATO. I found out many years later that was supported by the CIA,⁷ but that wouldn't have bothered me anyway, that was just fine.

MR. REYNOLDS: Does your dad's travel business still exist?

00:11:00

JUDGE O'SCANNLAIN: No. Well, in a sense it does. My youngest brother, Conn, is still in the travel business on a more modified scale. He is retired, living in Ireland right now,

⁶ The Atlantic Conference of Young Political Leaders was an organization formed in 1963 by the Atlantic Treaty Association to encourage cooperation among politically active citizens under the age of 41 from nations in the North America, Central Europe, and Eastern Europe.

⁷ The Central Intelligence Agency (CIA).

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but still maintains a particular
service

00:11:15 for travel to Ireland, car rentals in
Ireland, tours in Ireland, that sort
of thing.

MR. REYNOLDS: And at some point you
became active in something called
Young Americans for Freedom?⁸

JUDGE O'SCANNLAIN: At Harvard Law
School. I was not able to go to the
Sharon conference⁹ for some reason, I
don't know why, because I was aware
00:11:30 of it. But I was one of the original
board of director members, and I did
go to some board meetings, which I
think were in New York. But one of
the national leaders was a year ahead
of me at the law school, and I think
that's how I got involved.

⁸ Young Americans for Freedom is a conservative youth political organization that was formed in 1960.

⁹ The Sharon Conference refers to the convening of a group of ninety young conservatives at the home of William F. Buckley in Sharon, Connecticut with the purpose of creating Young Americans for Freedom. On September 11, 1960 the group adopted the "Sharon Statement" to affirm certain core beliefs of their movement. See National Review, "The Young Americans for Freedom," Oct. 30, 2017, <https://www.nationalreview.com/2017/10/young-americans-freedom-sharon-statement-1960>.

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MR. REYNOLDS: What can you tell us about your experience in Young Americans for Freedom?

00:11:51 JUDGE O'SCANNLAIN: Well, it didn't last all that long. I was on the board for a few years, and after graduation from law school and

starting law practice, I was less and less involved, and of course when we moved out to the West Coast I really no longer was that active.

MR. REYNOLDS: What can you tell us about your experience at Harvard Law School?

00:12:08 JUDGE O'SCANNLAIN: I think it was very, very important, very influential. I relished it; I loved it. A lot of people don't like law school, but I really did. I was impressed by the intellectual atmosphere, made a lot of very great friends there. I can recall some specific courses that had a great influence on me. I was active in extracurricular activities as well. I

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was the president of the Harvard Law
and Graduate School's Republican
Club.

00:13:07 I succeeded Sheldon Taft, who was, I
believe, the nephew of Senator
[Robert] Taft. So it was fun.

MR. REYNOLDS: You mentioned some
courses that you particularly found
00:13:19 interesting at Harvard?

JUDGE O'SCANNLAIN: A couple were
really important for me. Number one
was administrative law under
Professor Paul Bator. Paul Bator to
my mind was one of the finest
professors I ever had, and
unfortunately because of the
evolution of something called
critical legal studies,¹⁰ he was under
00:13:41 a lot of pressure and eventually had
to leave Harvard Law School. Also
jurisprudence, I took jurisprudence

¹⁰ Critical Legal Studies is "a theory that challenges and
overturns accepted norms and standards in legal theory and
practice." For a summary of the theory:
https://www.law.cornell.edu/wex/critical_legal_theory.

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under Lon Fuller,¹¹ and that had an enormous impact on just the way I began to approach the law. He was the author of that famous article, or an essay, called "The Speluncean Explorers",¹² which essentially was a spinoff on the Donner Party¹³ in

00:14:09 California, where the issue was "when can one cannibalize another human being?" - that kind of thing, so it really made you think.

MR. REYNOLDS: That is interesting.

00:14:23 So you were active in Republican politics at this time when you were at Harvard?

JUDGE O'SCANNLAIN: Yes.

MR. REYNOLDS: What drew you to the Republican Party back then?

JUDGE O'SCANNLAIN: It's hard to

¹¹ Lon Fuller was a professor at Harvard Law School from 1948 to 1972, known for his books such as: *The Law in Quest of Itself* and *The Morality of Law*.

¹² Lon Fuller, *The Case of the Speluncean Explorers*, 62 Harvard L. Rev. 4 (1949).

<http://w.astro.berkeley.edu/~kalas/ethics/documents/introduction/fuller49.pdf>.

¹³ The Donner Party was a group of westward bound pioneers that were stranded on their way to California and resorted to cannibalism as a means of survival.

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00:14:40 tell. A couple of influences. My father was a traditional Democrat, most Irish-Americans were at that time. He voted for [Franklin D.] Roosevelt twice, but he did not vote for Roosevelt on the fourth term, he voted for Dewey.¹⁴ I think his reasons probably resonated with me, but more importantly, I had met a couple of people that had a lot of influence. One was Jack Casey, who was the national chairman of "Youth for Eisenhower", so I was involved in the Eisenhower

00:15:16 campaign at the young voter level. And he introduced me to Bill Rusher, who was the publisher of the *National Review*.¹⁵ Bill was probably the greatest

00:15:31 influence on me. We were long-time friends. He became the best man at my wedding, was the godfather of one of

¹⁴ Thomas E. Dewey was governor of New York from 1943-1955. He was the Republican candidate for president in 1944 and 1948.

¹⁵ *The National Review* is a semi-monthly conservative leaning publication.

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my children, just a great and wonderful human being. We stayed in touch even after he retired and moved to San Francisco.

MR. REYNOLDS: Looking back at your law school days, do you have any words of wisdom for students today who are in law school?

JUDGE O'SCANNLAIN: Absolutely. Take law school seriously. Put every energy you can into it. If you have difficulty understanding some of the concepts, follow up with your professor. I've spoken at many law schools now, either as a member of a moot court or as a speaker sponsored by one of the student societies, and I can assure any law student that professors are there to serve them and to help them in any way, so take advantage of it.

MR. REYNOLDS: No oral history of Your Honor could ever be complete without the recounting of how you met the extraordinary Maura Nolan. What

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can you tell us about that?

JUDGE O'SCANNLAIN: Maura and I met at Harvard, toward the end of my second year. At the beginning of the third year, school had started a couple of weeks after I got there. I was working for one of the professors.

00:17:00 My roommate and I wanted to paint our room. Well, it turns out that Maura was the executive assistant to Dean Bevins, who was in charge of all things non-academic. He ran the fundraising; he ran the military; he ran the dormitories. And so, we invited her to come and assist, notwithstanding the fact this was probably breaking Harvard Law School

00:17:27 rules, she helped us do that. Well, one thing led to another and we were engaged by Christmas. We now are celebrating our 54th wedding anniversary.

00:17:41 MR. REYNOLDS: Congratulations. That's wonderful.

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JUDGE O'SCANNLAIN: Thank you.

MR. REYNOLDS: All of your law clerks over the years have had the privilege of getting to know some if not all of your eight children. What can you tell us about the relationship between family life and being a judge?

00:17:55 JUDGE O'SCANNLAIN: Hopefully, mutually supportive. One of the features, however, of being a Ninth Circuit judge is there's a lot of travel. So I must say, I was probably away from home about five days a month, maybe six days a month, so that had *some* impact. I know that I probably put a little extra pressure on Maura, but it didn't get in the way really of having a wonderful, 00:18:21 close personal relationship with every one of the children, which exists today, thank goodness.

MR. REYNOLDS: Did you encourage any of your children to go into law?

00:18:30 JUDGE O'SCANNLAIN: I have to say

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[Laughter] that I *discouraged* the children from going into law. I had been a partner in a law firm and I could see how the transition of the practice had changed dramatically. Much more emphasis on billing and billable hours and the economics of the practice, and less and less the traditions of the law. But

00:19:00 notwithstanding my blandishments, three of my children have gone to law school. Brendan went to Georgetown, and is now a partner in the major law firm in Oregon, the Stoel Rives law firm in Portland. Kevin went to Notre Dame Law School and is senior litigation counsel for compliance and investigations, I think that's his title, with the Chevron Corporation.

00:19:32 He was in their world headquarters in the East Bay of California, but a couple of years ago was re-assigned to the general counsel's office in

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Washington, D.C.¹⁶ And then the
00:19:48 third is my daughter, Kate, who is a
partner -- who went to Notre Dame Law
School also and is a partner at the
Kirkland and Ellis firm., and just
two days before we had this
interview, [she] received notice from
the President of the United States
that she was going to be nominated to
become the Solicitor of Labor, which
is the position of General Counsel to
the
00:20:14 United States Department of Labor.¹⁷
We were all very, very proud of her.
As of the time of this interview, she
has not yet had her hearing before
the Senate ... it's not the Judiciary
Committee, it's a different
committee, something like the Health

¹⁶ On February 9, 2018, the White House announced that Kevin O'Scannlain had been appointed to serve in the Executive Office of the President as Special Assistant to the President and Associate Counsel to the President. See Press Release, White House, "President Donald J. Trump Announces Appointments for the Executive Office of the President," Feb. 9, 2018, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-announces-appointments-executive-office-president>.

¹⁷ Kate O'Scannlain was confirmed as Solicitor of Labor on December 21, 2017.

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and Human Services Committee.¹⁸

00:20:32 MR. REYNOLDS: And we can't exclude
the other five though.

00:20:41 JUDGE O'SCANNLAIN: We can't exclude
the other five. I was
going to mention that there are two
other lawyers in the family, but they
are spouses. One is Kevin's wife and
the other is Kate's husband. Number
one son, Sean, has turned out to be a
very, very successful businessman.

00:21:14 He built up a seafood distribution
firm based in Chicago into a national
enterprise now, with something like
\$200 million of sales per year. He
and his wife and their five children
live in Chicago. Jane is a licensed
social worker and is with the Kaiser
Permanente¹⁹ organization. She has
just gone into administration rather
than working directly with the
patients. She's now assistant

¹⁸ Kate O'Scannlain's confirmation hearing was before the Senate Health, Education, Labor and Pensions Committee.

¹⁹ Kaiser Permanente is a healthcare provider and insurer operating throughout the United States.

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administrator of one of the divisions
of Kaiser. Brendan I talked to you
about. I'm doing this in
chronological order...

00:21:53 and I also talked to you about Kevin.

Now, number five is Megan. Megan is
the global marketing manager for PC
products for the Intel Corporation.

00:22:18 Intel is based in the San Jose area
in California, but they have a huge

operation in Oregon, where she is
allowed to stay. So luckily, even
though she's at a significant

corporate level, she can stay in
Portland and lives only what, three
blocks from our house in Portland.

Who's next? Annie. I should mention
that all eight of our kids ... sorry,
seven out of our

00:22:45 eight children have gone on to
graduate school. The only one that
didn't is Annie, who didn't need any
graduate school, because she's very
successful in the fashion field in
Chicago. They have three kids. Next

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is Chris. Chris is a fiscal analyst and a banker with the Sumitomo Mitsui Bank. The bank is based in Tokyo, he works in New York, but his boss is in
00:23:20 Dublin, Ireland, believe it or not. I mean, this is a crazy situation. He's with the aviation division of the bank.²⁰ I understand the bank owns about 300
00:23:32 commercial airplanes, like the 737s and so forth. He's in charge of the creditworthiness of all of the airlines in the Western hemisphere that the bank leases planes to. So he's up and down to Sao Paulo, to Buenos Aires, Santiago, Rio and so forth, quite a lot. And plus, he has to go to meetings in Dublin, Ireland quarterly. So who's
00:24:02 left? I guess Kate is the last one, and I think I mentioned to you she's a partner at Kirkland, but presumably she'll move on to public service for

²⁰ Chris O'Scannlain is Senior Vice President, Credit Risk, SMBC, Aviation Capital.

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a while with the new administration.

MR. REYNOLDS: That's great, that's great. So where did you start your legal career after graduating from Harvard Law School?

JUDGE O'SCANNLAIN: I was

00:24:22 interviewed in my third year by the Standard Oil Company of New Jersey tax department. I was very interested in the fact that they were a world corporation and had far-flung

00:24:37 activities. They had a very sophisticated tax department made up of both accountants and lawyers. I accepted their very nice offer and became a tax attorney for them in New York. I might have stayed with them, except that after I finished my first year and had my review, which went very, very well, they wanted to send me to Caracas, Venezuela, to be in

00:25:12 the law department of that subsidiary of Standard Oil. Of course that's long since been nationalized. But it caused Maura and me to sit down and

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think, well now, what do we want to do? Do you want to keep a career with a very, very fine company -- it's now called Exxon, very successful -- which would involve going out to Caracas for let's say

00:25:36 three years, then probably coming back to Houston for three years, and then probably going to Riyadh, Saudi Arabia for one year, and then back to maybe Coral Gables, Florida for three

00:25:49 more years... that kind of thing. We decided "no". We wanted to settle down in a town, become part of the community and raise a family, notwithstanding the fact that the people that work for international oil companies live pretty well.

MR. REYNOLDS: And so you ended up in Portland, Oregon.

00:26:10 JUDGE O'SCANNLAIN: Yes. Well, let me explain. When Maura and I met, she of course was from Tacoma, Washington. We were engaged at Christmas, and then we were married

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in her hometown of Tacoma in
September of 1963. We came back to
New York for little over a year. At
the next Christmas vacation, we
stayed with her parents in Tacoma,
00:26:44 and during that vacation I talked to
law firms in Seattle, Tacoma and
Portland, because, you know, we had
this idea of settling down in a
smaller area. And I came back to New
00:26:58 York with offers from all three
firms, or all three cities, I should
say, and decided to take the one from
Portland. We never regretted it and
never looked back.

MR. REYNOLDS: Was that your first
trip to the Northwest?

JUDGE O'SCANNLAIN: The first trip to
the Northwest was to get married, and
then the second trip was to spend
00:27:17 time over Christmas and to do the
interviews.

MR. REYNOLDS: What was your
impression of the Pacific Northwest
when you first visited?

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JUDGE O'SCANNLAIN: Well, it's a particularly beautiful part of this country. Its natural setting is just really remarkable. We found it's very open, and I think maybe my own experience is a tribute to the fact that if you get involved, stay committed, maintain good relationships with people, you can become not only part of the community, but play a very significant role in the community.

00:27:39

MR. REYNOLDS: When you started out practicing law in Portland, Oregon, did you have a sense of where you wanted to end up professionally in the years to come at that time?

JUDGE O'SCANNLAIN: I think in the back of my mind was the idea that maybe I wanted to run for office. Remember, I was active in Republican kinds of things. When I was in that period between college and law school, I was on the national board of the National Young Republicans. In

00:27:52

00:28:12

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fact, I was the vice chairman for international affairs, and that itch stayed active for quite a while. Sure enough within ten

00:28:47 years, I was able to not only run for a seat in Congress, but to win the Republican primary, for what was supposed to be an absolutely safe Republican seat. So I now have

00:29:03 the distinct honor of being the first Republican nominee since statehood to lose the First District in Oregon, because that -- not to explain excuses -- but it was 1974,²¹ which was not exactly the greatest Republican year.

MR. REYNOLDS: Those were special circumstances.

JUDGE O'SCANLAIN: Yes, special.

[Laughter]

00:29:21 MR. REYNOLDS: What was it like transitioning from working in the

²¹ The 1974 congressional elections followed the 1972 Watergate scandal and the resignation of Republican President Richard Nixon.

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Republican Party in the Northeast to going to the Pacific Northwest and starting your career and also trying to be a part of the Republican Party there?

00:29:43 JUDGE O'SCANNLAIN: It was very easy. I started at the bottom. I was a Republican committeeman, a local ...
00:29:59 a precinct committeeman, so you got to know the county leaders. Very quickly you begin to know the state leaders. Oregon is still a relatively small state, it's only about four million people. The Republican Party had various kinds of divisions, and one thing led to another. I was able to bridge, I believe, the middle and the super-conservative wings of the party and eventually became Republican State Chairman.

00:30:32 MR. REYNOLDS: How would you say campaigning was different then in the '70's than it is as you perceive it now when you read about or see

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coverage of political campaigns?

JUDGE O'SCANNLAIN: I suppose, TV was certainly involved in the '60s and '70s, but somehow or other it didn't seem to have the same rancor that we have here in the 2016s and 2017s.

Oregon at that time was still

00:31:10

considered a Republican state. We had Senator [Mark O.] Hatfield, who eventually became Chairman of Appropriations. We had Senator [Bob] Packwood, who eventually became Chairman of Finance. Those

00:31:24

days have changed now. Oregon has become much more liberal, and it's really considered a Democratic state now, with only one out of five Congressmen a Republican and both Senators Democrats.

MR. REYNOLDS: Before you actually ran for Congress, you were involved as a lawyer at a law firm in Portland.

00:31:43

JUDGE O'SCANNLAIN: Yes.

MR. REYNOLDS: Is that right?

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JUDGE O'SCANNLAIN: Yes.

MR. REYNOLDS: What kind of work were you doing there?

JUDGE O'SCANNLAIN: Primarily corporate and business organization work, some trust matters. We represented the United States National Bank, and I was assigned some

00:32:07 duties to review a lot of the trust instruments that the bank had. I worked for a partner who had a variety of successful business clients, and we did a lot of work for

00:32:19 them. So I would say primarily corporate, very, very little litigation -- although I was asked by the chief judge of the federal district, District of Oregon, to take on some criminal representations. That thrust me right into litigation, which was good. I enjoyed that. I think it really gave me some breadth that I have treasured.

00:32:49 MR. REYNOLDS: Was that Chief Judge

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Solomon?

JUDGE O'SCANNLAIN: Yes, yes, yes,
Gus Solomon, there's a courthouse
named after him in Portland.

MR. REYNOLDS: How do you think that
experience helped you later on in
life as a judge?

00:33:08 JUDGE O'SCANNLAIN: Well, I have to
say that the experience of meeting
your client for the first time while
he's sitting in a jail cell kind of
focuses your attention. I think it
reminded me that lawyers deal with
real people. That probably stayed
00:33:28 with me, because every time I sit on
a case today, I know that I'm dealing
with real people. Not all criminal
defendants, but necessarily there are
human beings that are involved, and
you just have to keep that uppermost
in your mind.

MR. REYNOLDS: Did you stay
practicing law in a law firm?

00:33:50 JUDGE O'SCANNLAIN: I did for about
four years, but as you recall, I was

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active politically. We elected a brand-new attorney general, kind of on an anti-corruption platform. He asked me to come down to the state capital in Salem, Oregon to become his chief deputy, which I decided to do. So I did that for a couple of years. One of my assignments was to go to Governor [Thomas] McCall's daily

00:34:22

briefings. So I got to know the Governor, and I guess he got to know me. One thing led to another, and he asked me to become the Public Utility Commissioner of

00:34:38

Oregon. At that time the PUC was a single-commissioner agency, so I had the responsibility for regulating not only all the motor carriers, but also electricity, natural gas, telephones and aviation. Sometime after I left that position, the legislature decided to expand the commission to a three-judge commission, but I must say that was a particularly fine

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experience.

00:35:16 For one thing, it turned out to be a fairly high-profile position, which I'm sure is probably what helped me win the primary in 1974.

MR. REYNOLDS: Were there any particular controversies while you were in that role?

JUDGE O'SCANNLAIN: I guess the most controversial was, I turned down flat a rate increase request from one
00:35:43 of the largest public electric utilities in the state, and that certainly sent some shock waves around. But I did it because they simply filed a sloppy application.

00:35:57 They didn't comply with the rules. I think there was a little bit of a history that, you know, this is kind of pro forma. No, it's not pro forma. The commissioner exists to be sure that the rate increases are fully justified, and the staff has to do the proper homework, which presumably the utility should have

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00:36:24 done. I was perfectly comfortable doing that. A few months later they came back and did it correctly, and they got their increase, but I have to say that was probably the most controversial.

MR. REYNOLDS: You had quite a number of experiences in the environmental or energy sector, the one you just mentioned and then some thereafter.

00:36:42 JUDGE O'SCANNLAIN: Yeah, I should mention that after the PUC, the same governor, McCall, asked me to -- the head of the Department of Environmental Quality had retired or resigned, resigned --

00:36:53 and the governor asked me to take that position. That was attractive because, unlike the PUC and being the Chief Deputy Attorney General, the office of the Department of Environmental Quality was in Portland, so I didn't have to commute any more. The commute to Salem was, you know, 47 miles, which sometimes

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would be 45 minutes.

00:37:16 [Laughter]

MR. REYNOLDS: Sometimes.

JUDGE O'SCANNLAIN: But luckily we didn't have to do that anymore.

MR. REYNOLDS: After your high-profile roles in Oregon government, did you return to private practice in Portland?

00:37:33 JUDGE O'SCANNLAIN: Yes, I did. I was with a small law firm for a couple of years, and then I was

approached by a good friend to help start a new law firm. His name was Ronald Ragan, no relation to the president. Ron and I and another

00:37:48 started the firm of Regan, Roberts & O'Scannlain. I was very happily ensconced in that for quite a while.

MR. REYNOLDS: What kind of law were you practicing at that time?

JUDGE O'SCANNLAIN: Again, more or less corporate, although regulatory. I did a lot of work involving environmental matters, but mostly

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regulatory matters. I was
00:38:12 representing the natural gas industry
in its fight with the electric
industry. It all has to do with the
fact that, in the Pacific Northwest,
the United States government owns
something called the Bonneville Power
Administration,²² and the question was
whether the rates were preferential
to electric utilities in a way which
severely disadvantaged the gas
00:38:40 industry. So I was in the middle of
all of that. It's a lot more complex
than that, but I was doing that.
MR. REYNOLDS: Does the law firm that
00:38:47 bore your name still exist?
JUDGE O'SCANNLAIN: Yes. Yes it
does. It well, it became Reagan,
Roberts, O'Scannlain, Robertson and
Neal, and then it became Reagan,
Tremaine, O'Scannlain, Shmear and
Neal, I think, and then that firm

²² The Bonneville Power Administration is a self-funded, nonprofit federal power marketing administration based in the Pacific Northwest.

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merged with what's now

00:39:14 known as Davis, Wright, Tremaine.

That firm is one of the largest law firms in the Northwest.

MR. REYNOLDS: It is today, yeah.

JUDGE O'SCANNLAIN: Yeah.

MR. REYNOLDS: So, you had experience in environmental and energy law during your private practice years after the government positions in Oregon. How would you say, if

00:39:30 any, that experience has impacted your ability to function as a judge and your activities as a judge?

JUDGE O'SCANNLAIN: Well, I

00:39:38 remember very distinctly that the Department of Environmental Quality was under pressure to lower the ... excuse me, to raise the standards for effluence from an aluminum processing facility, which was about to be built. But before they would build it, they'd have to be assured of the proper level of effluence they could physically

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00:40:17 do, just because of the state of
technology. Well, there was pressure
on the agency to simply come up with
an arbitrary number. I refused to do
that. I insisted that the scientists
that worked for the DEQ, the
Department of Environmental Quality,
which I was the director of, do the
underlying studies to validate a
particular number. And I was
00:40:53 absolutely convinced that that number
was different than this arbitrary
number that had been just thrown
around publicly. Again, there's a
lot of detail involved, but that
00:41:06 reminded me that when it comes to
government regulation, government has
to justify its conclusions, not act
arbitrarily. Later on, of course, I
would be dealing with the
Administrative Procedure Act, the
federal act, which is concerned with
arbitrary and capricious activity by
government agencies. But certainly
the Department of Environmental

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00:41:37 Quality experience really resonated
with me.

MR. REYNOLDS: So even though you
returned to private practice, were
you still involved in political
activities?

JUDGE O'SCANNLAIN: Oh yes, yes I
was. I eventually became -- this was
after, of course, having run for
Congress, so there was some

00:41:57 visibility there -- and I eventually
became in 1983 ... well, I should
mention that I was very much involved
in the Reagan campaign. In fact I
was co-chairman for Oregon, and in

00:42:14 1980 Reagan did very, very well in
Oregon and [Oregon] went for Reagan.
After that I became Republican State
Chairman, from 1983 until 1986. So I
maintained a fair amount of activity,
both in the presidential campaigns of
'80 and '84.

MR. REYNOLDS: Were you also involved
in the transition for President
Reagan?

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00:42:42 JUDGE O'SCANLAIN: I was. I was invited to come back in November of 1980, and came back to Washington, D.C., back and forth, until the inauguration on January 20th of 1981. I was assigned to the Department of Energy transition team. We were the ... we were given space within the Department of Energy where we could then work with the incumbents to see

00:43:17 what the state of activity was in various areas. One of the things that we did there was to draft the oil decontrol order.²³ My side was more in the personnel side, and I had

00:43:33 a lot to do with selecting ... or recommending, I should say, people for the assistant secretary of energy-level.

MR. REYNOLDS: Did you develop an interest at that time in staying in Washington, D.C.?

²³ On January 8, 1981, President Ronald Reagan issued Executive Order 12287—Decontrol of Crude Oil and Refined Petroleum Products which exempted all crude oil and petroleum products from price and allocation controls adopted under the Emergency Petroleum Allocation Act of 1973.

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JUDGE O'SCANNLAIN: Yes. I was ... it was made clear to me that if I wanted to stay, I could probably be
00:43:56 deputy secretary of energy, or chairman of the Federal Energy Regulatory Commission, both of which were very attractive. But we had a large family, the differential in pay between a government official, even at that high level, and what I was enjoying in Portland was significant enough that we just decided that that wasn't the time to move the family to
00:44:25 Washington, D.C.

MR. REYNOLDS: What were your impressions at that time of President Reagan?

JUDGE O'SCANNLAIN: I've always
00:44:31 been a fan of President Reagan. He was a remarkable political figure. He had an ability to communicate with the people at all levels. He was a conservative who understood what that really meant in terms of more limited government, and a stronger military

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to keep the peace, particularly
dealing with the Soviet Union and so
forth. So I'm a very big fan of his.

00:45:09

In fact, he gave me a set of
cufflinks which has the Seal of the
President, and I still have them here
now, what, forty years later
practically.

MR. REYNOLDS: Did President Reagan
also put you on certain commissions
or any other responsibilities while
you were involved in his early years

00:45:33

as president?

JUDGE O'SCANNLAIN: I was asked by
the Secretary of Energy, who is a
close personal friend of mine-- by
the way, his name is Don Hodel, and
we

00:45:41

still see each other-- to head up the
commission to study the location of
nuclear waste sites. That was
fascinating, because we were able to
inspect the sites in such places as
Stockholm, Sweden, [and] various
sites in France. We went out to

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Yucca Flats, or excuse me, Yucca Mountain in Nevada, and we met with all of the

00:46:21 experts in that field. We recommended, as a matter of fact, that the site be put at Yucca Mountain, but of course this turned out to be a very big political issue. I'm not sure we'll ever have a site that will survive so long as any state has a veto power to say, "put it somewhere else, but not in our state". That's a very serious problem, I

00:46:47 think, that we're just going to have to solve.

MR. REYNOLDS: Were you also involved in what's been called the Grace Commission?²⁴

00:46:52 JUDGE O'SCANLAIN: I was, yeah, I was. I was able to work with them on an evaluation of how to save funding

²⁴ Formally known as the President's Private Sector Survey on Cost Control, the Grace Commission was tasked with finding ways to curb federal government spending in the early 1980s.

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and to do things more efficiently.

Our recommendations went forward, but I regret to say that I don't think many of them were ever adopted.

MR. REYNOLDS: There came a day when you were asked to become a judge on the Ninth Circuit, what can you tell us

00:47:23 about that?

JUDGE O'SCANNLAIN: A fascinating story. I got a call at my office law firm from a friend of mine who happened to be a very close friend of Attorney General Ed Meese. He called to ask me a question. I said, "Okay, what is it?"

"How would you like to be on the Ninth Circuit Court of Appeals?"

00:47:49 And I said, [paraphrased] "That's crazy. I've never wanted to be a judge. I had never any interest in doing that. I wasn't a litigator, so I didn't have that side of practice. And as a

00:48:00 matter of fact, I was still

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Republican State Chairman at that time. I wrote a letter recommending so-and-so who really does want to be on the Ninth Circuit".

He said, [paraphrased] "Well, that's why I'm calling. We got your letter, but we decided we don't want so-and-so, we want you."

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

He said, "No, we are not kidding."

Well,

00:48:22

obviously that caused us to sit down and think about what to do. As you mentioned, I was interested in staying, doing some public service in Washington, D.C., but decided that we had to stay in Portland. This was ideal from that standpoint, because we could stay in Portland, and serve in a very, very high public service capacity. Maura and I thought it

00:48:51

through. At that point it represented a very significant reduction in income, I think a 60% pay cut, if you can imagine that, and

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[I] decided, notwithstanding that,
that I
00:49:09 would pursue it. I am sure there are
other side ramifications about why
the attorney general decided to call
me. It may have had something to do
with getting somebody else confirmed,
and since the senator in my state was
the Chairman of Appropriations, maybe
that all came in a package someplace.
But as far as I'm personally
concerned, I said "yes", started the
00:49:36 interview process, was interviewed in
Washington, D.C. before various
members of the Department of Justice
Office of Legal Policy. Apparently I
passed that test, and lo and behold,
on August 8th, 1986, the phone rang in
our house. About 7:30 in the morning.
I was just coming out of the shower,
Maura was downstairs preparing
breakfast for the kids and myself,
00:50:06 and she shouted upstairs when the
phone rang and said, "It's for you."
And I said, "Who's calling?" And she

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00:50:17 said, "I think it's the press." And I said, "Well, listen, tell them I'll call back." Well, apparently the operator at the other end of the call said, "Madam, it is the Press-ident of the United States calling."

[Laughter] And I said, "Okay, I'll take that call." President Reagan never appointed an Article III judge that he didn't personally meet or talk to, and I was just one of the many that he appointed. He was so cordial on the

00:50:49 phone. He put it very innocently. He put it this way, he said, "I'm calling to be sure that I have your permission to sign these papers which will nominate you to become a judge in the Ninth Circuit."

I said, "Yes, Mr. President", we had a nice little chat and there you have it. We went on there, of course, through the confirmation process. I've got to

00:51:19 say that I'm one of the luckiest

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federal judges in the whole system.

President Reagan called on August 8th.

The nomination got to the Senate

Judiciary Committee on the 11th. My

00:51:29

hearing was September 20th, it lasted

about twenty minutes or so, where

both sides were very cordial.

Senator Strom Thurmond was Chairman,

and he spent most of the day saying,

"What a lovely family you have". And

then the minority Senator was

perfectly appropriate, he said, "I

understand from looking at your

papers that you have very little

experience in

00:51:58

criminal law." And he said, "What

are you going to do about that?"

Well, I pointed out that I did have

these criminal appointments under the

old system. Now there's a Federal

defender and all of that, but in

those days there wasn't. And in any

event I would take those courses at

the Federal Judicial Center that are

specifically designed for newly-

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00:52:20 appointed judges²⁵, and ...he was
satisfied with that. Five days later
I got a call from our senior Senator,
Mark Hatfield, who said, "I'm calling
to let you know, I'm on the floor of
00:52:36 the Senate. We just had a unanimous
voice vote confirming you to the
Ninth Circuit." So, from the time of
the President's call to the time of
my confirmation on the Senate floor
it was probably about six weeks.
That doesn't happen today,
unfortunately. It's very, very sad,
but that does not happen today.
MR. REYNOLDS: That's extremely
00:52:55 different from the most recent past.
JUDGE O'SCANNLAIN: Exactly.
MR. REYNOLDS: After you took the
bench, was there anything you found
particularly surprising about the
role that you were assuming?
JUDGE O'SCANNLAIN: I think what I

²⁵ One of the judicial education programs made available by the Federal Judicial Center to Article III judges is the Institute of Judicial Administration's New Appellate Judges Seminar (AJS) at NYU School of Law. Judge O'Scannlain has been on the AJS Faculty for over twenty years.

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noticed most was the utter silence of
the place. It was ... the phone
doesn't ring. Most of the work we did
00:53:16 was reading, editing. Of course I
work with my law clerks, and that was
very enjoyable, but it was a totally
different pace: heavily intellectual,
not very much involvement with
helping
00:53:37 clients out or taking their calls at
different times of the day and night.
That was the most significant
atmospheric change, I could say.
MR. REYNOLDS: What would you say in
your prior experience at that time
best prepared you to be a judge?
JUDGE O'SCANNLAIN: Well, I would
have to go back to law school at
00:54:00 Harvard. I mentioned earlier
Professor Bator, I think was a heavy
influence. Professor Fuller. I think
when I was Public Utility
Commissioner that probably came
closest to what an appellate judge
does. We had a hearings officer that

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took the testimony. There was a draft of an order, which then I had to review and edit and satisfy myself by going back to the underlying exhibits to be sure that what was said in the draft order was really supported by the material. And I think that may have had more influence than I really realized.

MR. REYNOLDS: What about your experience in the military, and the impact on how you went about becoming a judge and setting up your chambers?

JUDGE O'SCANNLAIN: Well, the military, of course, trains you to be disciplined, to work efficiently. The hierarchy aspect is less evident in the judicial system, except we only have three rungs. There's the district, the court of appeals, where I was, and the Supreme Court. So there was really only one superior officer, and that was the Chief Justice of the Supreme Court.

MR. REYNOLDS: So you've been a judge

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now for thirty-one years. How would you describe your judicial philosophy?

JUDGE O'SCANNLAIN: Well, I suppose

00:55:28 I'm in the tradition of the view of Justice Scalia.²⁶ I believe that the Constitution limits the role of the federal judiciary to deciding cases and controversies. We have limited

00:55:48 jurisdiction, and we need to function with that in mind. Hamilton²⁷ in Federalist 78²⁸ mentions that the judiciary has neither force nor will, in comparison to the other branches-- the political branches-- and also emphasizes that where a judge substitutes his own personal opinion for what the law says, the judgment he renders is really the judgment of

²⁶ Justice Antonin Scalia served on the Supreme Court from 1986 until his death in 2016.

https://www.oyez.org/justices/antonin_scalia

²⁷ Alexander Hamilton was one of the "Founding Fathers" of the United States. He was New York delegate to the Constitutional Convention, author of the *Federalist Papers*, and first Secretary of the U.S. Treasury.

²⁸ The *Federalist Papers* were a series of 85 letters written by Hamilton to the New York press in the 1780s in support of the ratification of the Constitution of the United States. [Federalist Paper No. 78](#).

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00:56:32 a legislature, not the judgment of a judge. And those concepts I think really resonate with me greatly.

MR. REYNOLDS: Would you say this description of your judicial philosophy today is something you would describe you held as a view back thirty-one years ago when you were asked by President Reagan to join the Ninth Circuit?

00:56:52 JUDGE O'SCANNLAIN: Maybe it was subliminally, but over time it certainly was reinforced. I think I was influenced by one of my colleagues who has now passed away,

00:57:03 Judge Joseph Sneed,²⁹ who incidentally is the father of Carly Fiorina,³⁰ a lot of people don't know that. But he was certainly representative of that tradition, and he and I would spend long hours together- he was in the courthouse in San Francisco, and

²⁹ Judge Joseph Sneed III served on the Ninth Circuit Court of Appeals for 35 years.

³⁰ Carly Fiorina was the former CEO of Hewlett-Packard, a technology corporation, and a candidate for the Republican presidential nomination in 2016.

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00:57:32 of course I was up in Portland- but when I came to San Francisco, which was quite frequently. I probably made at least six or eight trips a year to San Francisco during most of my career, and I always looked forward to the chance to chat with Joe. We discovered that we were really very close in our philosophy.

MR. REYNOLDS: Were there other judges of the Ninth Circuit with whom you became friendly in your early years on the court and who helped you to understand the role that you'd be playing on the Ninth Circuit?

00:58:00 JUDGE O'SCANLAIN: Oh sure, Arthur Alarcon, who was appointed by President Carter, was a very good friend and simpatico, I would say, in terms of the way we go about judging. Certainly John Noonan was a good friend. Let's see, there are probably others that were appointed more or less the same time that I've stayed very friendly with, Judge [Consuelo]

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Callahan, Judge [Alex] Kozinski.

00:58:52 Judge Kozinski and I knew each other before either one of us was appointed. In fact, we were appointed fairly close to each other in time. But he and I shared the same philosophy pretty broadly, except he's more on the Libertarian side than I felt comfortable in being. So you can't help but acquire a lot of influence from your fellow judges, and some become more influential than others. The most influential I would say was Joe Sneed, Judge Sneed.

00:59:22 MR. REYNOLDS: Did you interact much with the Chief Judge of the Ninth Circuit when you joined the court?

00:59:29 JUDGE O'SCANNLAIN: Yes, and I was very, very fond of him. His name was Jim Browning, and he was probably Chief when you were clerking for me?

MR. REYNOLDS: He just stopped before, I believe.

JUDGE O'SCANNLAIN: Oh, just stopped,

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okay. I still think, even today in 2017, that when I came on the court in 1986, he probably influenced me most

00:59:54 in terms of just the cordiality that is necessary in a multi-judge court. He was a stickler for being respectful of each other. You know, we have this very elaborate electronic mail system, so that if a judge sends a note, it goes out to all, now today, forty three judges, and if he saw something that was sarcastic or was simply rude- which has happened-

01:00:38 why, he would call that judge right then and there and say, "Hey, can't we put it in a little different [manner] ... I mean, you may disagree with your colleague, but you don't have to be

01:00:47 disagreeable about it." He was the absolute apostle of that view, and that remained with me, that's very strongly with me.

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MR. REYNOLDS: Judge, some of the most vocal voices on both sides of political issues, liberal, conservative, are present on the Ninth Circuit and have been for many years. What can you tell us about how it is

01:01:10 to interact as a judge with the other members of that court who may share views that are different from your own?

JUDGE O'SCANNLAIN: Well, there's no question there's a spectrum of views on our court, but remarkably we have a high degree of collegiality, and I trace that back to my first Chief Judge, who was Judge Jim

01:01:28 Browning, who really made it a fetish almost to be sure that people could disagree. As we frequently do, there are a lot of dissents that are written in Ninth Circuit cases, but ...

01:01:42 the cordiality between judges is still there. We really make the effort to respect each other. We'll

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certainly push hard for a point of view. We may decide that that's not going to work, so we'll write a dissent. But most of the time, I think the dissents are remarkably free of invective or any kind of rancor. You know, I'm sure that

01:02:15 there have been a few that don't qualify for that description, but by and large, I feel very comfortable with the atmosphere. Even those judges with whom I almost always disagree, and there are a couple in that category, we still have very appropriate social relationships. In fact, one of my colleagues, Judge [Stephan] Reinhardt, and I'll mention his name,

01:02:39 he and I, it turns out, have almost identical views on court administration. So whenever there's a court administration issue, he and I are always on the same side. We're

01:02:49 not always on the same side on some constitutional issues though.

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MR. REYNOLDS: You've written that in your view, judges fit into our democratic framework not because they choose to exercise their power in popular ways, but because they do not actually exercise personal power at all. What can you tell us about that view?

01:03:09 JUDGE O'SCANNLAIN: Well, the judge is to interpret the law, decide cases based on the law. It's not the judge's personal view that should be coming into the decision in the case. It should be, "What does the law say?" Is it a statute? Then look at the text of the statute. If it's an old statute, what did the words mean at the time the statute

01:03:34 was passed? The whole enterprise is to remove the tendency of one's own views to influence the outcome of the case. We wear black robes because we're meant to hide our

01:03:58 individuality, and I carry that view very, very strongly.

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MR. REYNOLDS: Which mentors over the course of your life could you point to who have helped inform your view of the proper role of the judge?

JUDGE O'SCANLAIN: Well, I would say Judge Sneed, certainly, on my court. I mentioned him earlier in our conversation. Certainly Justice

01:04:24

Scalia had a lot of influence in my view, and I think to a certain extent Justice Kennedy.³¹ Justice Kennedy and I were at law school together. When we said goodbye, he was a year ahead of me at law school, or a couple of years ahead of me at law school, and we said goodbye at the end of my first year, his third year.

01:04:52

Incidentally, he was my direct mentor as a 1L student at Harvard Law School, because he was on the board of student advisers, which runs the moot court program. And so we got to

³¹ Justice Anthony M. Kennedy served on the Supreme Court of the United States from 1988-2018, and on the Ninth Circuit Court of Appeals from 1975 to 1988.
https://www.oyez.org/justices/anthony_m_kennedy.

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01:05:05 know each other. When we said
goodbye, we never expected to see
each other again. He was going back
to Thelen Marrin in San Francisco, I
was a 1L and I was more or less
expecting to go back to New York at
some point. At any event, lo and
behold, some years later we both end
up on the same court. So we
overlapped for about two years, and
he had a lot of influence, I think,
01:05:27 as well.

MR. REYNOLDS: Were there judges
whose opinions you read who may have
passed on before you became a judge?
Did they influence you at all, or
were they the kinds of opinions you
thought as a judge you might try to
emulate in some way?

JUDGE O'SCANNLAIN: I think the
single most influential justice that
01:05:52 would fit in that description was
Justice Felix Frankfurter.³² When I

³² Justice Felix Frankfurter.
https://www.oyez.org/justices/felix_frankfurter

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01:06:10 was at Harvard Law School, he was very highly regarded. I quickly felt persuaded by his relatively limited view of the role of the courts, and I was filled with that view at law school. Some of his famous, in fact, dissents rather than majority opinions, reinforced that. I think that would be the leading name.

MR. REYNOLDS: How would you say your experience of being selected to take part in the Master of Laws in Judicial Process program at the University of Virginia School of Law affected your view of yourself as a judge?

JUDGE O'SCANNLAIN: It had a lot to do with my attitude toward judicial administration. That allowed me to write my thesis on the role of the judicial conference, and in the process I did a lot of research having to do with the possible restructuring of the Ninth Circuit.

01:06:59 As it turns out, today I am one of

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the most active judges in support of
a restructuring in the Ninth Circuit,
and I was able to come to that
conclusion

01:07:17 by a lot of research of what went on
in 1973 and '74 with the Hruska
Commission³³ and then the White
Commission³⁴ in, I think, 1990. That
experience focused me on the
administrative side of running the
court, and I think that has stayed
with me.

MR. REYNOLDS: Why would you say it's
been so important to you over the
01:07:48 years to advocate for a restructuring
of the Ninth Circuit?

JUDGE O'SCANLAIN: Well, I just
think it's out of sync structurally
with the rest of the country. Right
now we are the largest court in the

³³ The Commission on Revision of the Federal Court Appellate System. The Commission was referred to as the Hruska Commission after its chairman, Senator Roman L. Hruska.

³⁴ The Commission on Structural Alternatives for the Federal Courts of Appeals. The Commission, which issued its final report on December 18, 1998, was referred to as the White Commission after its chairman, Supreme Court Justice Byron White.

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country. We represent 20% of the cases, 20% of the population, whereas the remaining eleven Circuits share the [remaining] 80%, roughly 7% per

01:08:22 Circuit. Why does it make sense to have one Circuit have 20%, and all the other Circuits each have more or less 7%? It's just out of sync, and it's simply a question of

01:08:33 the normal growth. I mean, after all this is the westernmost Circuit. When it was established, it made a lot of sense because there weren't that many people way out on the west side of the country. Over time, no adjustments have been made to accommodate the huge influx into Arizona, and in California particularly, as well as the rest of

01:08:58 the nine states that are in our Circuit. I'm not new to this problem. It's been identified by academics and by judges in the past. It's simply a matter of adjusting to what the national structure ought to

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be.

MR. REYNOLDS: How has your caseload as a judge on the Ninth Circuit changed in the thirty-one years that you've been on

01:09:26 the court?

JUDGE O'SCANNLAIN: Well, it's tripled in terms of volume. When I came on in 1986, each judge was doing about one hundred eighty cases a year, meaning that

01:09:35 you were responsible for about sixty opinions or memorandum decisions. I think as of last year we were at about five hundred forty cases per judge, which means that you're responsible for, you know, roughly one hundred eighty opinions. Now, part of that, I have to say, comes from the screening panel, which involves cases which are identified as being single-issue covered by Ninth

01:10:04 Circuit law, and are almost all prose. These cases are worked up in the

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staff attorney's office down in San Francisco, but it's still part of the routine that we have. And probably out of the five hundred forty, that probably represents maybe two hundred fifty cases.

MR. REYNOLDS: Over your years on the Ninth Circuit, you've been fairly active in the en banc process. What can you

01:10:37 tell us about your views on the en banc process in the Ninth Circuit?

JUDGE O'SCANLAIN: Well, first of all, one has to recognize that we're the only Circuit that does not sit with a full en banc court. We only sit with eleven judges out of the twenty nine. No other Circuit does that. We do it under a statute which allows it, and it was the vote of our court to do that. Obviously, if we did sit with twenty nine judges-- and there are two courtrooms: one in San Francisco and one in Pasadena that would allow that-- it would make for

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quite a

01:11:12 circus. Because if judges would like to get their questions in, the poor oralists, the attorneys representing each of the sides, would be bombarded with questions from all over the place. It would provide for a very, very difficult conference afterward. So, it does make sense to elect the smaller option, which for our court is eleven. On the other hand,

01:11:47 there's a serious question about that. It means that in a 6-to-5 case, a 6-to-5 decision, let's say, six judges can bind twenty nine judges, and there's a

01:12:05 real problem with that. Sure, we could go full en banc. In my thirty one years I believe we've only had a call to do that twice. Both calls failed. One was the State of Washington case which raised the question of whether hanging as a form of execution was cruel and unusual under the Eighth Amendment [of the

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U.S. Constitution].³⁵ There was a
call there because I believe the
result was 6-

01:12:34 to-5 to allow it. It made sense,
obviously, with that kind of a tight
decision, maybe the full court should
have reheard it, but we didn't ...
there were not fifteen judges who
would vote to do that.

MR. REYNOLDS: Was that the Campbell
case?

JUDGE O'SCANNLAIN: I think so, yes,
yes.

01:12:54 MR. REYNOLDS: And there was one
other time that it happened? Where
there was a call for full court?

JUDGE O'SCANNLAIN: Yes. I'm a little
rusty on that one, I can't

01:13:01 remember which one it was.

MR. REYNOLDS: Right.

JUDGE O'SCANNLAIN: But it's only
been twice.

MR. REYNOLDS: And it never happened?

³⁵ Campbell v. Wood, 20 F.3d 1050 (9th Cir. 1994).

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JUDGE O'SCANNLAIN: No, it never happened, we have never sat full court en banc since it was allowed in 1980.

01:13:12 MR. REYNOLDS: Now that you've taken senior status, do you miss the chance to call cases en banc?

JUDGE O'SCANNLAIN: Well, actually I have the right to call a case en banc, but I have no right to vote; and, I cannot sit on an en banc panel, unless I was on the three-judge panel and I put my name in the device that we use to pick the eleven. But I can

01:13:40 participate in the exchange of memos.

I've done that in one case only so far ...since I've been senior. And I may or may not be that active. I certainly was active until I

01:13:58 became a senior, but now I'm beginning to enjoy the prospect of not having to work quite as stridently.

MR. REYNOLDS: Can you tell us how

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you approach oral argument, and whether you often have formed a view beforehand, or if you're influenced by the oral arguments themselves?

JUDGE O'SCANLAIN: I would say

01:14:17 that I have a tentative view of the resolution of a case in about 95% of the cases, and the reason for that is, that we have the briefs from both sides. We are privileged to have very, very bright law clerks, who will help us distill those briefs, bring them down to the date of the oral argument with respect to any current or very recent developments,

01:14:45 and to help us get to the specific fulcrum issues that are going to decide the case. So with that benefit, and the fact that my law clerks are preparing a bench

01:14:57 memorandum for me, while they review the briefs, I review the briefs independently and make my own notes. And then seven days before oral argument, I sit down with the law

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clerk on that case and we go through it. Just step-by-step be sure I have a full understanding of the relevant facts and the specific legal issues that need to be decided. And

01:15:20 when you go through that process, you pretty much know the way that the case has to be decided. Because we're looking at the precedents. We're looking at the text of the statute. And once you apply the precedents and apply the meaning of the words in the statute, it's fairly likely that the oral argument will not change things very much. Although

01:15:51 I must say, at oral argument, I very often- having come into the oral argument with a view to affirm or reverse, let's say- I tend to use the oral argument as a way of testing my

01:16:05 preliminary views. I will often press the side that I think should prevail on the merits with questions that are a challenge to that side, just to reassure myself that, yes, I've

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understood the issue and this is the way it has to be decided.

MR. REYNOLDS: You mentioned the role of your law clerks in your chambers.

JUDGE O'SCANNLAIN: Yeah.

01:16:31

MR. REYNOLDS: What traits do you look for in the law clerks whom you hire?

JUDGE O'SCANNLAIN: First of all, the ability to write. I'm very privileged to get very, very fine law clerks from the top law schools in the country, and they come to me highly recommended by their professors. We do get a writing

01:16:53

sample, but I tend to lean more on the professor's recommendation as the crucial element. Of course, there's an interview, and unless the law clerk is simply antisocial, that's usually not a problem.

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MR. REYNOLDS: What kinds of things do your law clerks do after they leave your chambers?

JUDGE O'SCANNLAIN: Well, my chambers

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are in Portland, Oregon, but very few
of my clerks stay in Portland. They
go off mostly to New York, like
yourself, and to Washington, D.C.
Quite a few

01:17:31 of them, I guess twenty-five by now,
have gone on to clerk for justices on
the Supreme Court. They've clerked
for the late Chief Justice
Rehnquist,³⁶ current Chief Justice,³⁷
and the late Justice Scalia. Quite a
few of my clerks have clerked for
him. Justice Kennedy. Justice
Souter.³⁸ Justice Gorsuch³⁹ has just
hired one of my law clerks for a
future term. Two of my

01:18:03 law clerks right now are clerking for
Justice Alito⁴⁰ and Justice Thomas,⁴¹
and I obviously am very, very proud

³⁶ Chief Justice William H. Rehnquist.
https://www.oyez.org/justices/william_h_rehnquist.

³⁷ Chief Justice John G. Roberts, Jr.
https://www.oyez.org/justices/john_g_roberts_jr.

³⁸ Justice David H. Souter.
https://www.oyez.org/justices/david_h_souter.

³⁹ Justice Neil Gorsuch.
https://www.oyez.org/justices/neil_gorsuch.

⁴⁰ Justice Samuel A. Alito Jr.
https://www.oyez.org/justices/samuel_a_alito_jr.

⁴¹ Justice Clarence Thomas.
https://www.oyez.org/justices/clarence_thomas.

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of their being selected for that.

After that, they tend to go into one
of two

01:18:22

directions. One, which is the most
prevalent, go to one of the top law
firms in the Washington, D.C. area or
the New York City area, or to go into
public service. Quite a few have gone
into the Department of Justice, for
example. That tends to be an option
as well.

01:18:44

MR. REYNOLDS: Would you say over the
years that you've encouraged your law
clerks to consider public service?

JUDGE O'SCANNLAIN: I think so. I
think, first of all, the mere fact
that they have decided to apply for a
clerkship, and then accept and
perform the role as a clerk, means
that they've had a taste of public
service, and it's an easy sell for a
lot of people to be able to encourage
them to sort of build on

01:19:06

that.

MR. REYNOLDS: Before I ask you about

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some of your most influential
judicial opinions, are there any
perhaps lesser-known opinions that
01:19:14 you would like to mention?

JUDGE O'SCANLAIN: Hmm. I'm asked
about my opinions, and I must say
that I don't keep them very readily
in my head. I can tell you that one
opinion was the favorite of my wife,
where the issue of a regulation of
the Department of Agriculture came
up. The question was whether a
regulation which said that frozen
01:19:54 chickens can be sold as "fresh", so
long as it's sold within so many
days, didn't make sense.⁴² I had to
allow that, because the Department of
Agriculture had done everything that
was required under the Administrative
Procedure Act. But I wrote a separate
concurrence in which I really waved
the flag about how silly this was,
that they were allowing

⁴² National Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994).

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01:20:19 this to go on. I'm happy to say
that, I think within about a year,
the Department of Agriculture changed
its position on it, and now frozen
chickens have to be identified as
frozen, and only

01:20:30 fresh chickens can be sold as fresh.
MR. REYNOLDS: It is a distinctive
aspect of your judicial opinions that
they routinely begin with the
question presented. What can you
tell us about the origin of that
practice on your part?

JUDGE O'SCANNLAIN: I followed that
from the Supreme Court. If you look
at the Supreme Court opinions, they
01:20:48 have a very short opening paragraph.
"We are asked, in this case ... We are
asked to decide whether the
Department of Justice can do such and
such..." I designed that opening
paragraph less for the parties, but
more for the general public. I know
that the press is very interested in
seeing that, because they can spot

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01:21:25 right away a case they might want to pursue, or they'll see a case that maybe has a lot to do with internal agency procedures or something and would not be of general public interest.

01:21:35 MR. REYNOLDS: Some of your most famous opinions have been dissents, from the denial of rehearing en banc by the Ninth Circuit-- I think you mentioned some of these already-- but when you do that, are you writing for a particular audience, like perhaps the Supreme Court?

01:21:54 JUDGE O'SCANLAIN: Well, I think it's fair to say I'm not unaware of the fact that the Supreme Court may see that dissent, but I must say that in some of those cases, we call it a "dissental." This is a term that my colleague, Judge Kozinski, came up with, and I accept it. Some other colleagues reject it, but I think it's a good term. It's a "dissental". There are some cases in which the

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losing party never bothered
01:22:23 to file a petition for certiorari,
which kind of disappointed me,
because I thought that maybe the
Supreme Court might want to take a
closer look at this issue. Not
01:22:37 necessarily to follow the analysis I
had given, but at least it was being
teed up. Of course, the dissental
will never come before the Supreme
Court unless the losing party takes
it up, and there's a grant by the
Supreme Court of the case.

MR. REYNOLDS: Over the years, Your
Honor, a number of your dissentals,
as you call them, have been followed
01:22:59 by the Supreme Court in reversing the
Ninth Circuit's panel decision. Can
you think of any particular examples
of that, which you can tell us about
today?

JUDGE O'SCANNLAIN: Well, I suppose
one of them that was of particular
general interest was the physician-

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assisted suicide case.⁴³ Eventually,
it was called the Glucksberg case. It
01:23:22 was under a different name when it
was in our court, but I was on the
original panel that held that there
was no constitutional right to
physician-assisted suicide.
01:23:38 Certainly a state could pass a
statute which allowed that, but that
wasn't what we had in this case. It
went to the en banc court. There was
a call which was successful, and it
was reheard en banc, and the en banc
court came out the other way: eight
in favor of the right, three against.
I wrote the dissent. As a matter of
fact if I'm not mistaken, I think
01:24:01 you were my law clerk that helped me
on that. Obviously the Supreme Court
took the case and held unanimously
that the en banc court should be
reversed, and kind of scolded our
court a little bit by saying, if

⁴³ [Washington v. Glucksberg, 521 US 702 \(1997\)](#).

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there's to be a new constitutional right to be identified, it will be up to the Supreme Court to find that right, not

01:24:31 a lower court to find that right. I must say that was a very gratifying experience, and it kind of encouraged me to sort of keep doing this.

MR. REYNOLDS: You wrote for the majority in an influential case called Coalition for Economic Equity.⁴⁴

JUDGE O'SCANNLAIN: Oh yeah.

MR. REYNOLDS: versus Wilson. What can you tell us about that case?

JUDGE O'SCANNLAIN: Well, that was the decision that involved Proposition 209, which was a ballot measure passed by the people of California which prohibited discrimination in education and in contracting. The case really presented the question of affirmative

01:25:01

⁴⁴ Coalition for Economic Equality v. Wilson, 110 E3d 1431, 1434 (9th Cir.1997).

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action. We concluded that all that the ballot measure did was to comply with the Equal Protection clause of the Constitution. In fact, I think I recall a line from the opinion that said, "The Constitution does not require what it barely permits." And I have to say there was quite a storm over that. I know one prominent professor was very displeased over that, that was Erwin Chemerinsky, who is a very well-known professor and he was very vocal about it. But there was a petition filed before the Supreme Court for certiorari, and the Supreme Court denied the cert. So that opinion of mine is still valid.

01:25:37

01:25:51

MR. REYNOLDS: You've also written a number of opinions for the--

JUDGE O'SCANLAIN: (Interposing) And, excuse me, if I can interrupt.

01:26:16

The issue was presented again in the State of Michigan in the Schuette case, and there the Supreme Court did

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take it⁴⁵ and decided exactly the same way we decided in the Ninth Circuit.

MR. REYNOLDS: You've written for the majority in a number of cases involving the establishment clause of the Constitution. What can you tell us about some of those cases?

01:26:38 JUDGE O'SCANLAIN: Well, I think one of them came out of Hawaii, which had to do with whether the state could declare a holiday on Good Friday.⁴⁶ Now obviously the question

01:26:53 came up, well, is this establishing ... is this the government sticking its nose into religion and establishing a holiday based on a religious occasion? But what turned out was, this was a statute passed by the Hawaii legislature based on a resolution that came out of a collective bargaining agreement, and what they were looking for was a new

⁴⁵ Schuette v. Coalition to Defend Affirmative Action, 572 US 2014). <https://www.oyez.org/cases/2013/12-682>.

⁴⁶ Cammack v. Waihee, 673 F. Supp. 1524 (D. Haw. 1987).

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01:28:46 like Justice Kennedy. ... Just like
the case that came down in 2016
involving the establishment of a
playground using rubber tires from
the State of Missouri.⁴⁷ The Supreme
Court validated that particular
ground. They held that the mere fact
that the playground was being
01:29:25 built on a religious school property
did not mean that that was
establishment. It was simply a
uniform application of a statewide
policy that went to all schools,
01:29:38 regardless of their origin.

MR. REYNOLDS: You've been eligible
to take what is called senior status
for some number of years, and you
recently decided to do so back last
September. What can you tell us
about that decision?

JUDGE O'SCANNLAIN: Well, I had been
on the court by that time for thirty
years. I looked to the next

⁴⁷ [Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 US __ \(2017\).](#)

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01:30:02 presidential term, which would have been the election of 2016, and decided that there was no need to delay, because no matter what, I probably would have taken senior status on my 80th birthday anyway. So it was a convenient time on my 30th anniversary. In fact, you were there at our reunion where I made the announcement. I made the

01:30:32 announcement on September 26th of 2016, during a period when the general public assumed that the next president would be Hillary Clinton. Of course that's not what came out in

01:30:46 the election, but I had made that decision regardless of who the incoming president was going to be, and felt that I had made my contribution over thirty years. It was a very convenient time to make the election, and I'm very comfortable with it.

MR. REYNOLDS: You're widely considered to be one of the most

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01:31:06 active Ninth Circuit judges in your career on the court. How can you describe your transition recently into senior status?

JUDGE O'SCANNLAIN: Well, it's- I must say- a relief, not to be as intense as one has to be as an active judge. I have agreed with my chief judge to take a 50% caseload, which under the rules of our court means

01:31:31 that you can keep your chambers and you keep your law clerks. That's working out very well. I do follow the cases that come through the en banc process. I may or may not get

01:31:47 involved in one or two of those cases, unlike the very active role I played before. But I hope I've made my contribution by now, and I can start to enjoy the pleasures of being an octogenarian.

MR. REYNOLDS: Do you feel optimistic about the future of the federal judiciary in this country?

JUDGE O'SCANNLAIN: I would have to

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01:32:10 say cautiously optimistic. I'm very nervous about the politicization of the federal judiciary, and of course that starts at the Supreme Court level, but unfortunately it has really infected our level as well. Maybe even in some cases the district courts, but certainly our court level. The court of appeals level involves a lot of political activity

01:32:40 with respect to judges being nominated; judges being grilled during the confirmation period. I have to agree with Justice Scalia that what's happened-- and maybe this

01:32:58 started with the Bork nomination back in 1987--- is that the federal courts have become much more visible in deciding political cases. Now, I feel very strongly that is not our job. Our job is to decide cases and controversies, not to ... to find new political or constitutional rights. As far as I'm concerned, Congress should do a better job in

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01:33:34 identifying ... or in resolving
political disputes, and not tossing
them to the courts. I am aware that
there are Congressmen who are
perfectly comfortable saying, "Well,
we can't get to an agreement on this
issue, let's toss it to the courts."
That is very, very unfortunate, and I
think long-term, would be very
destructive to the separation of
01:33:58 powers, which I feel so strongly
about and which are represented in
the Constitution.

MR. REYNOLDS: How would you describe
your influence in the Ninth Circuit
over

01:34:06 your thirty one years on the court?
JUDGE O'SCANLAIN: Well, that's hard
to tell. I've certainly made friends
across the spectrum. I hope I've set
a tone which others will emulate, and
I suppose some do. I had a lot to do
with the training program that we
have for incoming law clerks. I put a
lot of effort into getting that

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started under Judge

01:34:40

Browning, and I think that may be something that is lasting. That is still very active, and now we're able to get our Circuit Justice to come to that. It's a two-day program for newly-appointed law clerks, all of whom come into San Francisco for that training. And I'm very, very proud to have been associated with that.

01:35:06

MR. REYNOLDS: Would it surprise you to learn that over the course of your thirty years as a judge in the Ninth Circuit, the Supreme Court of the United States has agreed with your opinions more than with any other

01:35:16

judge of that court during that time period?

JUDGE O'SCANNLAIN: Well, I have to say it's very gratifying. I guess I'm not surprised, because I know the numbers, but it really has encouraged me to maintain an active role, and I would hope to continue to be, in senior status, still active. Active

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01:35:46 is a term of art in terms of the role of a judge in the federal system, but I hope to be able to continue to do that.

MR. REYNOLDS: Over the years you've been very active in providing guidance to new judges, including in your capacity as the chair of the Federal Judicial Center's Committee on Appellate Judge Education, to which you were named by Chief Justice Roberts, and of course your

01:36:07

longstanding participation here at NYU School of Law Institute of Judicial Administration New Appellate Judges Seminar. Can you tell us

01:36:16 some of the key guidance you've offered over the years to new judges?

JUDGE O'SCANLAIN: I think I emphasize collegiality as a very, very important function for judges on an appellate court. Now, these are all judges who sit in three-judge panels and in some cases the state supreme courts set five or seven

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01:36:42 judge panels. But the point is that it's a multi-judge panel that has been presented with a legal issue that needs to be resolved. Now, you can simply be very political about it and like so many legislatures where you just count the votes and that's the end of it. What the judges need to do is to pay attention to the underlying text and precedents and resolve the case on that basis.

01:37:10 Sure, judges will disagree and sometimes there will be dissents, but it's so important to have that disagreement to be agreeable. So, do not in your dissents say mean things

01:37:27 to the majority, or to accuse them of simply not being able to read the English language, or whatever. There are lots of slights that one has seen over the years in different courts. I think we've been pretty successful in the Ninth Circuit in keeping that collegiality as a reality, I suppose I should say. In terms of the NYU

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01:37:52 program, I am very privileged to be invited back every year to be one of the judges to participate on the faculty. While we spend a good part of the time on the mechanics, opinion-writing, for example- we have an excellent, nationally-known professor from Emory Law School who teaches that⁴⁸-- we do have some other presenters on the substantive aspects of judging ... and that could be

01:38:23 criminal law, it could be administrative law, whatever-- but what I like to emphasize in the craft of judging part of the course is the importance of recognizing the

01:38:40 function of encouraging an atmosphere in which judges can share their views, do it in a comfortable, non-threatening way, and resolve the case that's in front of them.

MR. REYNOLDS: Judge O'Scannlain, on behalf of the NYU Law School

⁴⁸ Timothy P. Terrell.

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Institute of Judicial Administration,
it's my pleasure to thank you for
taking part in this oral history
01:39:04 project. It has been a great
pleasure for me to interview you.

JUDGE O'SCANLAIN: Thank you very
much.

[END RECORDING]