NINTH JUDICIAL CIRCUIT

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ORAL HISTORY PROGRAM

JUDGE ROBERT BOOCHEVER

NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

125 South Grand Avenue
Pasadena, California 91105
(626) 795-0266

ORAL HISTORY

HONORABLE ROBERT BOOCHEVER
U.S. Court of Appeals for the Ninth Circuit

An Interview Conducted by

Judge Thomas Stewart
Juneau, Alaska
1990

In 1985 the Ninth Judicial Circuit Historical Society established an oral history program to document important events in Western United States legal history. Judges and lawyers throughout the Circuit area are interviewed to record their recollections. Oral history is a technique for the gathering of resource information through tape-recorded interviews conducted by informed interviewers. The transcript of the record is reviewed by interviewer and narrator for clarity and accuracy, corrected, and deposited in the Society's archives. An oral history transcript is not intended to present the complete, verified description of events; it is rather a spoken personal account given in response to questions. As such it transmits the narrator's thoughts, perceptions, and reflections; it is partisan, unique, and irreplaceable.

It is recommended that this oral history be cited as "An Oral History of [name of narrator]" conducted [date] by [name of interviewer], the Ninth Judicial Circuit Historical Society, Pasadena, California.

ORAL HISTORY

AND

CASE RECOLLECTIONS

ROBERT BOOCHEVER 1990

ORAL HISTORY OF JUDGE ROBERT BOOCHEVER

MINI-TAPE, SIDE A

This is October 30, 1990. I am Bob Boochever, Judge of the United States Court of Appeals for the Ninth Circuit. I am going to attempt to dictate a part of my oral history that for some reason was not recorded. In doing so I shall attempt to cover the same areas that Judge Tom Stewart covered when he interviewed me this summer in Juneau, Alaska. The part that did not record was my early history.

I guess the appropriate place to start is that I was born in Brooklyn, New York on October 2, 1917. My father was Louis C. Boochever. He had grown up in Albany, New York where his father had immigrated from Riga, Latvia. My grandfather, Samuel Boochever, was a furrier in Albany, New York. His father had been a rabbi, and my grandfather was known as a Talmudic scholar. My dad was one of six children. Although the family was far from wealthy, somehow all of the children graduated from college. My father was a member of the Cornell University Class of 1912, and two of his sisters were Phi Beta Kappa at Cornell.

My mother's maiden name was Miriam Cohen. She was born in Madison, Georgia, a fairly small rural town. Her father and grandfather had immigrated from a part of Poland, which at that time was a part of Russia. Her father, my grandfather, and his four brothers all settled in small towns in Georgia. My mother graduated from Bruneau College in Georgia, where she majored in

drama and music. She was an accomplished pianist and our house would often fill with sounds of classical music.

When I was one-year old my family moved to Madison, Georgia, where my father managed a Cheri-cola Bottling Plant. My brother was born in Madison two and a half years after my birth. His name is Louis Charles Boochever, Jr. We had a very warm and close-knit family. When I was four years old, we left Madison, Georgia moving to New York and then to Philadelphia. In 1927 my father was appointed Director of Public Relations of Cornell University and we made our home in Ithaca, New York until after the commencement of World War II.

My mother and father had a great influence on me. Mother was soft spoken and retained many fine characteristics of the South. Both she and my father had a good sense of humor, and there was a considerable amount of laughter and fun in the house. We also would discuss serious matters at our evening meals. My mother and father tried to inculcate a sense of high ideals. While they were religious in a sense, they did not adhere to the Orthodox Jewish traditions. We did attend temple for the Yom Kippur services and the New Year services each year. We also celebrated Passover in our home, and frequently Professor Harry Caplan, who was an eminent professor of Greek and Latin at Cornell, would officiate at the informal seder supper.

My mother and father both passed away within three weeks of each other in 1952. My mother had a coronary attack, and my father, three weeks later, had a cerebral vascular accident.

Mother was 58 and dad was 62 at the time of their passing. The loss of my parents was a great shock to me. For years, I found that in making decisions I would think what my mother and father would want me to do.

Ithaca was a wonderful place for a young boy to grow up. We lived near the Cornell campus and would attend the Cornell athletic events as well as many cultural activities that were available because of the presence of the university. I can recall attending a concern of Paderewski the famous Polish pianist, productions of Gilbert and Sullivan, watching Martha Graham dance, and attending a slide show of Father Hubbard, known as the Glacier Priest. Father Hubbard's show depicted his many explorations in Alaska where he was headquartered at Taku Harbor, a short distance from Juneau where I eventually settled.

We attended grade school at Cayuga Heights School, a very small school whose students principally were children of professors. My brother started there in the first grade but rapidly was promoted to the second, and then the third grade all in one year. I was active in the Boy Scouts and was a Life Scout lacking three merit badges to become an Eagle Scout. We attended the Scout Camp at Cayuga Lake and later went to camp in Canada, Camp Otter near Dorset, Ontario. At that camp, we would go on canoe trips through the Algonquin Park. The counselors would portage the canoes between the lakes, and the campers would carry the packs containing the food, clothing and bedding. I remember one time we had a very long portage to Wolf Lake, some four and a

half miles away, and I found it exceedingly exhausting. When we pitched camp that night, which was the first night after leaving our base camp, I found that some pranksters had put a large bucket of rocks in the top of my pack.

One of my best friends in Ithaca was Glen Allen, the son of Professor Arthur A. Allen. Professor Allen was perhaps the outstanding ornithologist in the country at the time. I used to visit the Allen home, which was located in a wooded glen and had a large pool in front of the house. There were numerous ducks on the pool and across the street there was a large area penned for ruffed grouse. Professor Allen was doing an experiment to ascertain the reason why ruffed grouse chicks were dying. He also had a Great Horned Owl and various types of pheasants, including the beautiful Amherst and Golden pheasant. I went on bird walks with Professor Allen and his leadership encouraged me to acquire a lifelong interest in bird watching. Also at that time, the foremost bird artist in the country, Louis Aggasiz Fuertes was teaching at Cornell. He gave a talk to us at boy scout camp that I still remember vividly, and shortly later he was killed when a train hit his automobile. The pleasure of attempting to identify birds and observing them has enhanced my love of the outdoors.

In high school I was a good student. New York State had regent's exams in each subject at the end of each year. I averaged in the 90s, and won a New York State regent's scholarship to Cornell, but my brother had an almost unbelievable record of 98½ average grades. We were both active in athletics. I won

letters in football, basketball, track, and tennis. I also gave the commencement address for my high school class.

From high school, I entered Cornell University. I took a liberal arts course with emphasis on English literature, poetry, philosophy, logic, economics, history. Trigonometry was the only mathematics course that I took. I also recall chemistry and physics. Chemistry was particularly hard because I broke a leg playing football in my freshman year and missed about ten days of classes, which were harder to make up in that subject than some of the others. My only claim to fame in playing football was the ability to break legs, and having them broken by All-American football players. In my freshman year during an intra-squad scrimmage, Brud Holland, who was a great, black player for Cornell in a day when there were very few black athletes playing football, broke my left leg as I was running with the ball. In my sophomore year, we were playing against Yale and I was playing end at that time. I took the ball on an end-around play, and after making a fairly good gain was hit by one of the Yale players. Another Yale player, Clint Frank, a famous All-American who was a Heissman Trophy winner, hit me from the other side and between the two Yale men my other leg was broken. I played again in my junior year, but after the Penn State game, which we won, I was ill for three weeks and lost quite a bit of weight. I was down to 160 lbs. from my usual 170 lbs. when we played Yale that year. I started the game but was twenty pounds lighter than the next lightest player on the field.

I had a difficult decision to make in my senior year whether to continue as an undergraduate for one more year or to transfer to law school, which was permitted by Cornell. In other words, one could take his senior year as the first year of law school. I decided to make the transfer which proved fortunate as I graduated in June of 1941, just prior to America's entry into World War II in December 1941.

I believe that I have discussed my attendance at law school on another tape. While attending law school I had a job coaching the Cornell 150 lb. football team. I was the assistant coach. I also played on the Cornell rugby team, which was not as demanding as the regular sports teams. It was not possible to play on the varsity football or tennis team and spend the time required for studies in law school. I did take one trip with the rugby team to play Yale. I was looking forward to playing against Whizzer White, the great All-American football player who later was a Rhodes Scholar and then went to Yale Law School. When we played the rugby game against Yale, however, Justice White spent the afternoon studying rather than playing the game.

After graduating from law school, I took the New York State Bar examination which I successfully passed. The results of the exam, however, did not come out until after I was in the United States Army. I also started to practice law in New York City. I never intended to make that my permanent home, but it was generally considered that one could get superior experience by practicing in the big city. I went to work for the firm of

Nordlinger, Riegelman and Cooper. After I was with the firm for one week, I received greetings from Uncle Sam. As a result, I resigned from the firm in order to enter the army. I had a short period of time before reporting at Fort Niagara, New York on August 28, 1941. During that time, I played in a central New York State tennis tournament at Binghamton, New York, and was runner-up.

Tom Stewart asked me if I had suffered any discrimination as a result of being Jewish. I really cannot recall any discrimination as such, although in retrospect there definitely was some. As a boy I had several fist fights with boys who baited me about my religion. Also at Cornell, at that time, fraternities were almost entirely Christian or Jewish. I was a member of the Cornell Branch of Telluride Association during my sophomore and junior years. This was one of the few college boarding institutions that did not discriminate, although I was the only Jewish member. The Telluride Association was a very interesting organization that was founded by a man named L. L. Nunn. He endowed the association with the idea of training young men for leadership positions. Later, I am pleased to report that the group expanded to include women. The emphasis there was on scholarship. We had a weekly session at which members were required to give short talks on various subjects, and distinguished visitors to the University often stayed there. One other place where there was discrimination at that time was in

applying for law jobs in the large firms. None of the large New York firms accepted Jewish members at that time.

Aside from those factors, I grew up in a relatively small community and had no feelings of being discriminated against. My father and mother used to tell my brother and me, however, that the United States was a wonderful place to excel, where every person could reach his or her own goals, but that if one were Jewish one had to do a little better than the other person if he wanted to be successful.

As I mentioned before, I went into the Army on August 28, 1941, as a private in the infantry. From Fort Niagara, I was transferred to Camp Wheeler in Macon, Georgia, where I underwent infantry training. I can remember being with some other soldiers in a Macon bar when we received word on December 7, 1941 of the bombing of Pearl Harbor. Shortly, later I applied for Officer Candidate School and was selected to go to officer training at Fort Benning, Georgia. There was a thirteen week course for becoming a second lieutenant. It was quite strenuous, but after the second week, I came down with what I thought was the flu. After I was in the hospital three or four days, they diagnosed my condition as scarlet fever. I missed two full weeks from the training, but was able to keep up by reading the manuals and finished with my class, the tenth officer candidate class. I was commissioned a second lieutenant on April 10, 1942. Six of our class were sent overseas immediately after graduation from Fort Benning. Two of us were sent to Newfoundland, and four to

Greenland. I was sent to Newfoundland, and I recall arriving in St. Johns, the capital. There was a narrow gauge railroad that went from St. Johns to Argentia, Newfoundland where I was to be stationed. I remember that trip on the small gauge railroad very well. There were times when we had to get out of the train so it could go up a hill. Then when we were moving along, a group of soldiers got into a terrible fist fight on the train. I felt some responsibility as a second lieutenant, although I was not in charge of the men. In my best command voice that I had learned at Fort Benning, I shouted over the clang of the train "ATTENTION!" The men continued to fight. I saw that it was a hopeless cause and just moved into the next car for the rest of the trip to Argentia.

I believe I've discussed some of the rest of my time in Newfoundland in the other tapes so I think this is probably a good place to conclude this recitation.

TAPE 1, SIDE A, WEDNESDAY AUGUST 8, 1990

I am retired Judge Tom Stewart of the Alaska Superior Court, and I am going to do an interview of Judge Robert Boochever, Circuit Judge of the Ninth Circuit Court of Appeals. We are in his office in Juneau Alaska in the Federal Court chambers and are about to commence the interview.

(No more conversation on the rest of tape 1, side A. Tape 1, side B, has only a few words at the very end.)

TS: This is ----

RB: Oh, excuse me ----

Beginning of Tape 2, side A.

TS: Just as we concluded on the last tape you were taking a trip on a flying fortress out from your base in Newfoundland.

RB: We were flying along, and all of a sudden the fortress went into a very steep dive and there was an alarm signal that went off - I had been told that when that went off it meant we had to evacuate the plane.

TS: Were you wearing a parachute?

RB: No, there was another fellow and I in the nose of the plane and we struggled around and found the parachutes and strapped them on, not very well. We started to open the trap door that was there as an emergency exit. At that point the pilot stuck his head down from the cockpit above us and said, "We're just making a practice dive." I'm sure that if we had jumped out we would have killed ourselves because we weren't probably harnessed or anything else. It was a wild experience. The pilots there were pretty daredevil fellows I remember. For one thing, we had to, as infantry, prepare fortifications along the bluffs that adjoined

the camp, and we had the men out digging the trenches and we would be standing by, the officers usually didn't have to dig themselves. The planes would come up from the ocean at a very low level, I forget what the name of those planes were, and go right over us so that we had to dive down.

TS: The daredevil pilots.

RB: That's right. While we were there I had one leave, after about two years, and I went with one of the navy pilots and flew back to the United States. At that time, my dad was down in Louisiana, and I went down there for the one leave I had.

TS: Was he in the war effort too?

RB: He was handling public relations for an aircraft firm there. Then he became director of public relations for the National American Red Cross, and was doing that when I got out of the service.

TS: Two and a half years at Newfoundland?

RB: I might add that while I was there they made me the legal officer for the base. So I did do law work. I had to handle claims of Newfoundlanders against the army for running over sheep or that type of thing. We'd go out and investigate that type of

claim. Also court martial matters. For a while I was able to defend people on court martials and I remember I obtained an acquittal for a soldier, and the colonel ordered that I was no longer allowed to be the defense attorney.

Also, while I was there I had an assignment to meet the first contingent of nurses that came over. There were six nurses, and one of them was a very pretty, blond nurse named Colleen Maddox. We had a romance that led to my marriage. She's known as Connie, that is her nickname.

TS: Did that marriage take place at the base?

RB: No, we were married off the base in Newfoundland.

TS: What year was that?

RB: April 22, 1943.

TS: You had been acquainted six months or something?

RB: We had been acquainted about a year.

TS: Was this your first serious romance Bob?

RB: I'd had girl friends, but this was the first serious romance.

TS: So they allowed you to marry while you were in the service?

RB: It was not - you weren't supposed to - but we just went ahead and did. For officers they didn't have any requirement on it.

TS: Were you able to set up housekeeping then?

RB: No, we did not.

TS: You still had to keep separate quarters?

RB: Yes, that's right. And after we were married, approximately a year, Connie was pregnant and so she had to leave the base before I left the base because they would not keep her on after she became pregnant.

TS: Did she go back to your home in Ithaca?

RB: She went back to her home in Michigan.

TS: Was she trained as a nurse for the army or prior to that?

RB: She was trained as a nurse prior to the army and then enlisted to go into the army after getting out of nursing school at Flint, Michigan.

TS: This was about a year after your marriage - in '44 - that she left and you continued in your assignment.

RB: That's right, and then I left after 2½ years, in the fall of '44 and was sent to Camp Wheeler to train troops. I was engaged in that when the war ended in August of '45.

TS: In the meantime your first child had been born?

RB: Our first child was born in January '45, Barbara K. born in Michigan, and then Connie came down with my daughter to Camp Wheeler.

TS: At that point she was able to live adjacent to the base?

RB: That's right, we found a little place to rent.

TS: So you finished your military career at Camp Wheeler.

RB: Yes, I was company commander training troops there. I was still a first lieutenant, and I became a captain on separation in December of '45. I then went to Washington, D. C., where my folks were at the time, and I started to go into the United States Department of Justice there. I was interviewed and was tendered a job. At that time, we heard from a friend of ours from Cornell, Warren Caro, who had been aide to Governor Gruening. Warren was a

coast guard officer during the war in Juneau, Alaska. He was a Cornell lawyer who was in an earlier class than mine, but was a very close friend of my family. He wrote saying what a great place Juneau was, and that there was an opening in Juneau for an Assistant United States Attorney. Actually both the United States Attorney and his assistant had retired. There was no United States Attorney in Juneau at the time. So I went to see our then delegate to Congress, Bob Bartlett, who was later, as you know, a very fine Senator from Alaska, and he interviewed me and recommended my appointment. The Justice Department appointed me but it was through the delegate at the time. I had to do a little talking to convince my wife that we and our small child should head off to what were then just the wilds of Alaska about which we knew practically nothing.

TS: Did she know Warren Caro?

RB: No.

TS: So the magnet was for you and not for her.

RB: That is correct. She was nice enough to say she'd go up and see what it was like and give it a try. January 16, 1946 I flew to Alaska, Connie stayed behind and was going to come up after I'd found a place to live. Coming to Alaska, I flew up in a DC-3. Juneau was socked in with a heavy snowstorm, and we flew through

the White Pass which was appropriately named at the time. Couldn't see a thing! If I knew what the conditions were at the time, I'd have been really frightened. We made it through the pass and landed in Whitehorse, Yukon Territory. Pan American Airways was the only carrier flying to Juneau. One of the people on the plane was Bill Ray who was coming back to Juneau after service in the navy.

TS: He was a later friend in Juneau?

RB: That's right, and a very prominent state senator for many years. We over-nighted in Whitehorse. It was about 30° below zero, and the next day we worked our way into Juneau. That was my arrival.

TS: You would have come down the Taku Valley. As I recall Pan American had a weather station on Canyon Island in the Taku, probably came over Lake Atlin down through the Taku.

RB: I'm not sure whether we came that way or through the Skagway route.

TS: So this began your Alaska career. It's 11:15, we'll break now.

The time is now 2:00 pm on Wednesday August 8th and we're picking up again on the interview of Judge Boochever. When we

recessed for lunch three hours ago, we were talking about your decision to come to Alaska. Warren Caro, your old law school friend, had advised you that this would be a good place to come to start your legal career, and I would like to take that up next, except before we do, you may have something more to say about your experience in law school. Classes you took, your record there, and what you felt about the Cornell Law School program.

RB: Cornell Law School was, and actually still is, quite a small law school compared to many. I think that our class when it entered was close to one hundred, which was a fairly large class at that time. We graduated approximately sixty attorneys at the end of the three years. In our class there was one woman and she left before the three years were up. She transferred I think to New York or somewhere, which is a sad commentary on the times. We had, I thought, a very good faculty. Our classes were relatively small. Some of the teachers used a straight lecture format. It was all the case book method. Studying cases. Some of them used the Socratic format and you never knew what the correct answer was until after an exam. I had one unfortunate experience during my first year. We had a full year of Real Property and a test at the end of the year. I got through with the test way before anyone else and turned the test in to the professor who was a rather awesome figure named, Horace Whiteside. He was about 6'5" and had played professional football and was a very stern taskmaster. He suggested that I look the test over again. I went back to my

seat, reviewed the answers, went over it all and turned it in a second time. He said, "If that's the way you want it, that's fine." I left. It was only after the examination was over I found that there were four questions, not three, with the fourth question, that I had never seen, on the back of a page. So, I asked if I could take the test over and he said, "No way." As a result I got a D in Real Property which had a fairly substantial effect on my ranking right from the start. I did reasonably well in the other courses. I received some top grades and ended up ranking eleventh in the final comprehensive examination.

TS: Besides Horace Whiteside, were there other professors that you think affected your professional career particularly?

RB: I think they all did to an extent. Professor McDonald was our professor of evidence and he was a very colorful and exciting teacher. Professor Thompson taught contracts and revised the great treatise with Williston, the Revised Treatise on Contract Law. He was not an exciting teacher but he was a very thorough teacher. Professor Washington used the Socratic method entirely and we never knew where we stood with him. There was a Professor Laube who taught philosophy of law; Professor Stephens, Dean Stephens, was the dean of the school and everyone liked him. In constitutional law, we had a nonlawyer, the government professor at Cornell, Professor Cushman, and we had a Professor Wilson who taught torts, and a Professor Keefe. It was a close bodied school

and one acquired good friends in law school. We studied together a lot of the time. I really enjoyed the companionship considerably more than as an undergraduate at the University which was so large that one didn't have the opportunity to become as well acquainted with one's fellow students.

TS: You mentioned Warren Caro whom I knew also as an aide to Governor Gruening who had come to Alaska in 1939 and was governor in 1953. Warren was a particular friend of yours in law school?

RB: He was ahead of me in law school. Warren was three of four years ahead of me but was a good friend of our family and used to come to our house for dinner and he'd come around in the evening some, and he had followed my career with interest because of his close connection with the family. Warren went on, incidentally, to become the Executive Director of the Theatre Guild in New York City and was instrumental in producing many of the leading musicals and hits there.

TS: I know from our own acquaintance that you have for a long time been an avid bridge player. Did you take that up in law school or was it a wartime or postwar interest?

RB: I started playing bridge at about the age of twelve. My mother and father both played bridge well, and oddly enough there were a group of youngsters then who were interested in bridge. We

had a bridge club of youngsters and enjoyed playing together. One of the people who was the leader of that group was a fellow named Gus Nichols. He came through Juneau last week, and I saw him for the first time since I graduated from college, and he's still an avid bridge player.

TS: We have you now out of law school and into Alaska having survived a flight over the White Pass and arriving in Juneau in January minus your bride and first child. Why don't you recount some of your initial experience in Juneau. You were to be the prosecutor and you had no senior present?

RB: The United States Attorney who was appointed was Patrick Gilmore, who had grown up in Ketchikan, Alaska. Pat had just gotten out of the navy and he and his wife, Lena, arrived in Juneau a couple of days after I arrived. Our first case was an unsolved murder mystery. There had been a person who was found with his throat cut in, what was then, one of the best residential neighborhoods, I guess it still is today. In fact it was right in front of a house that I subsequently purchased and lived in. The house was being constructed by Harold Foss, an architect. The case was entirely circumstantial, and since we were a territory, the FBI investigated first degree murder cases for use. It was an FBI man named Eliason who did the primary investigation. He worked very hard in the area of S. Franklin Street which had a red light district. There was a man there who had been broke shortly

before the murder who was found in a fight in his room and the police, in breaking up the fight, found $1960, the $1900 in hundred dollar bills, under his pillow. The man who had been murdered, at first we couldn't find out his name, was wearing a Hickey-Freeman suit, which was a very fine suit and there was only one place who sold those. It was Behrend's Store and John Doyle Bishop was the manager of that store. He had to identify the body which he didn't like to do at all. It turned out it was a man named Campbell who had been involved in shingling homes on a housing project in Hoonah, an Indian village about one hundred miles from Juneau. There was a federal housing project there, and he had come to Juneau and had been flashing two thousand dollars in hundred dollar bills shortly before he was found with his throat cut and his pockets empty. Meeks was accused of the crime. The FBI did a wonderful job of detection on it. For one thing, Meeks had swapped a watch with a fellow named Skinner after the murder. Campbell had come from Seattle. Just on the chance that the watch that Meeks had swapped was Campbell's, the FBI checked all the pawn shops in Seattle for that number watch, and, lo and behold, Campbell had pawned the watch with the identical number on three different occasions. So at the trial we had the pawnbrokers there with their big pawn books and used the book entry exception to the hearsay rule to prove that Meeks had Campbell's watch after the murder. That was just one link in the circumstantial evidence. The trial lasted for three weeks. It was my first real trial other than the court-martials, and I participated equally in

it with Pat Gilmore. We got to the final arguments on March 7, and that was the date that my wife, Connie, and my little baby, Barbara, were due to arrive in Juneau. I couldn't meet the plane, and a friend of mine Keith Wildes, had to meet the plane because I was engaged in the final argument of the case. At that time in Juneau, we had capital punishment. The jury had a decision to make on first degree murder cases of either not guilty, guilty, or guilty with leniency. If they came in guilty, capital punishment was mandatory. If it was guilty with leniency it was life imprisonment. The jury stayed out overnight and came in with a guilty with leniency verdict. The defendant was sentenced to life imprisonment.

Another interesting aside on that case was that during the course of the trial, the defendant was being defended by Henry Roden, who was a grand old lawyer in Juneau, Attorney General for a number of years, and Bill Paul, Jr. During the course of the trial there was a person wearing sneakers delivering telegrams for the Alaska Communication System, that handled telegrams then. He became interested in the trial and decided that he would come in and help defend the case. His name was J. J. O'Leary, and he had been a great trial lawyer who had participated in the trials of the Teapot Dome oil cases. He was a very fine criminal lawyer. He had become an alcoholic who hit the skids, and he decided that this case was a good one to make a comeback. He had never been disbarred, so he could be admitted, and he was tough. He would bate Judge Kehoe, who was the visiting judge who was trying the

case, and at one point Judge Kehoe said, "If you ask that question again Mr. O'Leary, I'm going to hold you in contempt." A few minutes later Mr. O'Leary asked it in a slightly different form, and before the jury Judge Kehoe said, "You're in contempt of court, you're out of this case." Out he went in front of the jury. The case was appealed to the Ninth Circuit which reversed on that issue. We had to retry it. By that time, I was in private practice, and the Attorney General appointed me as a special Assistant Attorney General to assist in the retrial. The retrial took three weeks again. It was a very difficult case. Judge Folta was on the bench, and the result was exactly the same. The jury stayed out overnight on whether to give capital punishment or not and came in with first degree with leniency.

TS: That's a fascinating case. I don't remember that detail at all. That year would have been

RB: 1946 for the first trial and 1948 for the retrial.

TS: 1946. I guess I was probably here then but I don't remember it. So, you entered practice here with the U. S. Attorney's Office and your bride and baby arrived on the 7th of March. Why don't you take this time for a moment to tell us a little about Connie.

RB: Connie was born in Illinois and grew up in Michigan. Her grandparents were fairly prominent in a small town of Oakland in Illinois. Her grandfather was mayor there. Her father was a rather hard-to-discipline young man who left high school in his senior year and married Connie's mother. He developed into a very steady person and a very fine man, who died unfortunately at the young age of 56. Connie grew up mostly in Mason, Michigan. Graduated from high school there. Then went to nursing school and after graduation from nursing school went directly into the army, which is where I met her. In Juneau, Connie became very interested in theatre, was very active in a number of projects. She was later chairperson of the Alaska State Council for the Arts. It would take a whole other interview to discuss her various activities.

TS: I take it that once she arrived in Alaska, uncertain about what this life was going to be, that she indeed adapted to the scene.

RB: That's right. First of all, we had four children which kept her plenty busy to start with. She had to take care of the home and the children. At that time we weren't liberated enough to have a complete sharing of those functions. Although I did help to a considerable extent with the various chores and pleasures that went with it.

TS: How long did you stay with the prosecutor's office?

RB: I stayed about a year and three quarters. We had a fairly active time. Cases were tried very promptly. We'd bring the cases before the Grand Jury and once the indictment was made, the cases would be tried promptly. If a person missed the Grand Jury often they stayed in jail quite a while before they could have the case brought on.

TS: The Grand Jury met only periodically.

RB: We also had an annual court session in Ketchikan in the fall. We would go down there for the Grand Jury and try cases down there. There was a great deal of trial experience that one was thrown into very rapidly and against some pretty wiley lawyers in some of the cases.

TS: That was really the first time you had been into private practice independently as it were. The time in New York was too brief.

RB: Yes, so it was really my initial experience. I should back up and say that I took the bar exam in June '41. When I got into the army the results of the bar had not yet come out. They came out shortly after that but I couldn't get a leave, and one had to go before a Character Committee to get admitted. It was not until

I got the leave from Newfoundland in 1944 that I was able to be sworn in to the New York Bar, because I couldn't get away from the army before then.

TS: When you arrived in Alaska, were you given reciprocity? Were you able to join the Alaska Bar as a result of your membership in the New York Bar?

RB: No, I had to take the Alaska Bar Exam. At that time, there was no one else in Juneau taking it. It was a very small Bar in Alaska. The whole population in the territory was 125,000. The Juneau area Juneau had a population of about 7,000. This was in 1947 that I was admitted to the Alaska Bar. I took the exam in my office, although it was not an open book exam. It was graded and I passed and went before the judge. We supposedly had an oral examination before the judge but it was perfunctory, and then I was admitted to the Alaska Bar.

Tape 2, Side B

TS: Was this Judge Kehoe or Judge Folta.

RB: Judge Kehoe was only a visiting judge. Judge Kelly was the original judge here -

TS: Kelly was after Folta. Judge Raymond J. Kelly from Michigan was the judge that succeeded Folta when Folta died.

RB: It was Folta.

TS: Folta became a judge in the late forties and then died in 1953.

RB: I tried a lot of cases before Judge Folta. He was a very able judge but a very tough judge.

TS: You took the exam when you were still a prosecutor?

RB: Yes, I was still in the district attorney's office.

TS: How much time did you have as a prosecutor?

RB: About a year and three quarters. At the end of that time, I was approached by one of the two major firms in Juneau, each of which at that time had two partners. They were the largest firms. That was Faulkner and Banfield. Herbert L. Faulkner and Norman C. Banfield. They asked if I would join in practice with them. I talked it over with Connie and we discussed it quite a bit because it meant a major decision of whether we would stay or go back to the lower states. We decided that we would stay, that we liked Juneau. I never had any question, but Connie had more trouble with the rain and the rough weather in the winters than I did. But we decided to do it and so I went into practice with them. As

I say, at that time, there were just the two of them. I can remember when starting out I felt that as the new young lawyer, it was my job to be there first and leave last. The first day I got there at a quarter of nine and Herb Faulkner was already working away. I stayed til five thirty and Herb Faulkner was still there but I knew I had to get home or I'd be in trouble at home so I left. Next day I got there at 8:30 and he was there. Next day I tried 8:15, and then I gave up. Herb Faulkner practically lived in the law office. He was a great gentlemen. He had been a U.S. Marshal and was self taught in the law. He was the one that arrested the Bird Man of Alcatraz. He was Deputy Marshal then when the Bird Man committed his first murder. It happened in Juneau right behind where our office subsequently was located.

TS: I remember hearing about that case. The incident happened before my time.

RB: The practice of law was very exciting in Juneau at that time. We represented a number of the large companies, but the Bar was small enough so that in order that people could be represented you had to take on a lot of cases. In other words, they would visit other firms and couldn't get an attorney and they needed an attorney, so you would do it even though it was not a very lucrative case.

TS: Just to pin this down now. You said a year and a half, so this must have been the summer of 1947.

RB: It was the fall of 1947 when I began.

TS: You were in that firm until you went to the bench?

RB: That's right. Twenty-five years of private practice. The firm gradually grew to ten members when I left, and now I have no idea how many members they have because they have branches in Seattle and in Anchorage.

TS: The firm name still exists. Faulkner, Banfield as well as some other names. Your name, of course, had to be dropped when you went on the bench. You were with the first two that launched that practice.

RB: That's right. As I said it was an interesting practice. We had a great variety of cases. Some of them were of major importance. One of the first cases under the National Labor Relations Act, the Juneau Spruce Corporation case, went to the Supreme Court, a suit against the longshoremen's union for a secondary strike was of major importance. I had a number of cases involving the territory and later the state. We had quite a bit of legislation, I guess you'd call it, local boy legislation, where they were trying to have fishing licenses only for residents

and not allow nonresidents to fish off the shores of Alaska. Then there was a limited entry case. The first case was tried by a three-judge federal court. They had then a means of limited entry into the fishery whereby only those who had previously fished in the area were eligible for licenses, and I tried that case which I argued before the United States Supreme Court. I remember that Justice Douglas had had surgery, I guess it was a tracheotomy, and there was a whistling noise that would come out of his throat. He left the bench about half way through the argument and then wrote the opinion which was based on the Supreme Court abstaining until the Alaska Court decided a question under the Alaska Constitution requiring equal rights in the fisheries. We had to reargue the case in the Alaska Court and won there and that ended the case. Later they amended the Alaska Constitution and eventually had a type of limited entry approved.

TS: As a result of the constitutional amendment as a consequence of the case?

RB: Right. When we arrived, as I said Juneau was a very small town, it was the capital, and as a result we had a lot of interesting people that came through. Senators, the Kennedys, Nixon at one time, and Governor Gruening was a very genial host. He and his wife, Dorothy, were in the governor's mansion, an imposing Colonial building, and he invited us there on a number of occasions. I can remember one time when Senator Saltonstall and

some other senators were visiting, and we had an Attorney General, J. Gerald Williams, who was quite boisterous and had a very loud voice. He got in a good-natured argument with someone else during the course of the dinner, and they started throwing a turkey leg back and forth. Governor Gruening did not like that at all. It was a rather embarrassing incident.

TS: Was the practice with Faulkner, Banfield mostly a civil practice or did you continue with criminal matters?

RB: I had a few criminal matters but it was primarily civil. I had one very difficult case where a priest from Sitka was accused of sexually molesting a young girl and that trial was before Judge Folta. It was a most difficult trial in which I was almost held in contempt at one time. We lost that case and then had a decision whether to appeal and the Church decided that it was better not to appeal. They did accept the priest back after he served a sentence.

TS: I had forgotten that case. Is there a name to it that ought to be mentioned.

RB: I'm not absolutely sure of the name and I don't want to say the wrong name. I also had a case involving J. Gerald Williams, the Attorney General. He had a house adjoining a lot on which a large apartment building, the Mendenhall apartments, was built and

as a result of the blasting for the foundation, he contended that his house was severely damaged and brought suit. Ray Plummer who later was the United States District Judge came down to try the case on his behalf and I defended. One of the claims was that the house became very drafty after the blasting. I located a person who was a tenant before then who testified that she remembered leaving a wash rag in the bathroom on the floor one night and coming back in the morning, this was before the excavation, and it was frozen because of the cold air coming in. Jerry Williams didn't much like that, and he was quite hostile to me for quite a while.

TS: It sounds as if that period, over 25 years when you were in private practice, was a very active one professionally.

RB: It became more and more active as I went along. We handled just about everything. We'd handled formation of corporations, nonprofit corporations, we would have to give tax advice, prepare wills, and then I got more and more into the litigation end. Particularly towards the end of my time there were some fairly substantial aviation cases. Fairchild-Hiller and Bell Jet Rangers, were the first jet helicopters, and we had a very serious, fatal crash when a Fairchild-Hiller copter was working on a power project at Snetisham, near Juneau. The helicopter took off in a snow storm, and our theory was, the engine flamed out causing the helicopter to crash in the trees. We were able to

establish that they had a number of other similar accidents that first winter they had used the jet engines. I got into several of those cases involving those same helicopters which involved taking depositions all over, including Pennsylvania and Calgary, Alberta. We finally settled the main case.

I had another aviation case where a pilot in a small plane was flying over southeastern Alaska and gave a May Day call, "May Day, May Day, May Day, Helm Bay." The plane was found crashed near Helm Bay. Tests were made of the deceased pilot's blood. He was found two or three days after the crash, and there was a very high level of carbon monoxide that was detected which would have rendered him unconscious. The muffler in the plane was broken. I was defending, and the plaintiff's theory was that the muffler was defective causing carbon monoxide to escape and causing the pilot to become unconscious. We had a pathologist to testify that the carbon monoxide probably came from the deterioration of the pilot's body after he had crashed. Also there were some eagle feathers in the wreckage so an alternate theory was that the plane had hit an eagle and crashed. I had other pilots who could testify as to the danger of hitting eagles. We started to try the case in Ketchikan, the home of the deceased pilot. After picking the jury, we settled the case.

(The following discourse is not on the tape but was added on November 2, 1990.)

In another matter, we had a very nice native lady who baby sat from time to time. One day she called my wife and was very

distraught because her husband had been charged with driving while under the influence and was due to be tried by the magistrate that afternoon at one thirty. She asked my wife if I could represent him. Although I was very busy, I took time to read the file and met my client outside the building that was then used by the magistrate to hear such cases. It was a handsome building that was erected on the top of a hill overlooking the Juneau Harbor. It had at one time served as the capital building. When the new territorial capital building was constructed the old building was utilized as a jail house with a magistrate and city courtroom on the second floor. The third floor was occupied by U.S. Marshall Mahoney and his family as their living quarters. The marshall served as chief jailer. In any event, I met my client outside the building and had only a brief opportunity to talk to him before we entered the courtroom for the hearing on the case. I had noted that the evidence syndicated in the police report indicated that the basis for concluding that my client had driven while under the influence of liquor was that there was an odor of alcohol on his breath and that he slurred his words when talking. There were no other indications of drunkenness. After the policeman had testified, I called my client to the witness stand and asked him a few questions. He slurred noticeably in answering the questions. I then argued to the court that this was his method of speech and that it was no indication of drunkenness. The court promptly acquitted my client. When we walked outside the building, my client came close to me to express his gratitude. I then noticed

an overwhelming odor of liquor and it became obvious to me for the first time that he was drunk as a skunk.

(Resumption of tape)

TS: In this period now, let's turn a little bit to your family life. You said you had four children born. Were they all born in Juneau except the first one?

RB: That's correct. Two of them were born in Juneau on September 2, and one of them on September 3. Three years apart. I would like to say it was very careful planning. All four are daughters, and all four of them still reside in Alaska. One of them is in Anchorage with her family and three in Juneau. One has just left Juneau because her husband is taking an MBA course at Yale and she will be teaching in Connecticut while he's taking that course.

TS: Why don't you just identify them by name and tell us a little bit about them.

RB: Barbara is the oldest, she went to Cornell. She was captain of the women's ski team there and she has worked for Alaska Airlines for many year as a supervisor at Juneau. She is married to Craig Lindh who is a land expert with the governor's office. They have one daughter, Hilary Lindh, who is an outstanding skier, in fact the number one U.S. downhill skier and was in the last Olympics. She is presently getting ready to go to Argentina to ski in the Pan American World Games. The second daughter is Linda

Lou, who is married to a doctor in Anchorage. Linda was executive vice president of the largest advertising agency in Alaska, but resigned two years ago to spend more time with her children. She has three boys, the oldest of whom will be a senior in high school this year. The next daughter is Ann, the one who is now back in Connecticut. Ann has three children and her husband has a daughter also so they really have four children to care for. He is going to Yale for a MBA and she is going to teach music. The youngest daughter is Miriam, known as Mimi, who is married to Sherwood Walker here in Juneau. She is teaching kindergarten. Sherwood is known as Woody and he is with the state labor department in charge of veteran employment.

TS: Three of them have really made their home in Juneau and one in Anchorage. They've really become settled Alaskans. Now, your life in Juneau, other than professional - of course we've already talked about your interest in tennis and briefly to your interest in fishing. Has this life enabled you to have an outdoor life as it were?

RB: Yes, it has. Of course, Juneau is a marvelous place to enjoy the outdoors as long as one isn't too picky about the weather. We can get into really, virtual wilderness in five minutes from almost any spot in Juneau. I've enjoyed hiking. At one time I did a certain amount of hunting. I don't hunt at all anymore. I just don't like to kill animals or birds although I don't condemn

people that still do it. There were lots of opportunities to get out here. In the winter I used to go way up the mountain in back of Gold Creek, up Perseverance on snowshoes hunting ptarmigan, which get white in the winter and are very hard to see. You often have to follow the tracks before you could even see the birds, they would blend so well with the snow.

TS: You talked about your granddaughter, and your daughter and son-in-law, Craig and Barbara Lindh. They are well known in the community as skiers. Did you get them started in that activity?

RB: I didn't have anything to do with starting Craig in it, and I really didn't have anything to do with starting my granddaughter, Hilary, but I did with all four daughters. We had a rope tow that was located up the Douglas Mountain behind, almost in the city of Juneau. It involved a three-mile hike up to the top area. There was a lower area which was about a mile up. I used to hike up and carry the girls' skis. We also had a snowcat that would take us up there. I used to ski with the children and had many very happy weekend days doing that. We would ski down the trail from the top which was about three miles, and I used to wait at each turn for them, but pretty soon they whisked by me and it was goody-bye dad. I remember you did some very fine skiing Tom. You were a much better skier than I was.

TS: I know that we had a lot of fun skiing together from time to time. Did you have some memorable outings that you might want to comment on?

RB: Near Juneau there is a river that goes back up into Canada, the Taku River, that has several other rivers that come into it, and actually goes back several hundred miles into Canada if you follow the whole chain of it. We used to go exploring into Canada, fishing and exploring, with river boats. You and I owned a river boat together at one time that was a specially made wooden one. With the old motors that they had it was really an adventure every time we went up there. The currents were fast, the water was silty so that one couldn't see the bottom, and if one got off the channel the least bit, the next thing you were minus the prop of your motor boat and whirling around going the wrong way down the river. We also had to line the boats up through the shallow parts with ropes. We would get out on the shore or in the shallower water and two of us would pull and another one would try to guide the boat as we went up through those parts. We took trips up to where the two rivers, Nakina and Inklin came together to form the Taku, and then we went on up the Inklin. There was what was known as the Box Canyon there that I think was seven miles long and had steep cliffs, and the water converged, running very fast through there. It had a sort of comb that would come up in the middle, and the first time we got up there we started to go through and we thought better of it because we really didn't have

enough gas to get us all the way up and if anything had gone wrong we would have been in terrible difficulties. We were by ourselves. You and I and Joe McLean on that trip. There was no one around anywhere in that area. So we turned around and went back. Not that many years later they started having jet engines which meant that you could go in a much shallower draft than previously. You and I went up again with Bill Cope, Joe McLean, and "Spec" Paul. We went all the way through the Box Canyon to where the Nahleen River came into the Inklin. The Nahleen and the Shesley formed the Inklin. I still remember there was tremendous fishing at the juncture of those two rivers, in the backwater, where one would get huge King Salmon as well as big Dolly Varden trout.

TS: They were on their way to spawn but not yet in the spawning condition.

RB: Then of course we came down. We were in two big flat-bottomed, aluminum, thirty-two foot long boats. We got halfway through this fast-running Box Canyon when we noticed that the boats were splitting apart in the middle. By good fortune we found practically the only sand bar that one could pull out on in that canyon, and we pulled up there. With the mechanical abilities of several of the other people, not me I might add, they were able to take pieces of wood and bolt them together to hold the side of the boat together and we then limped back to Juneau.

TS: This is sort of the situation of the traditional comment, "Up the creek without a paddle." As I recall we were seventy-miles or a hundred miles in the wilderness with the nearest person fifty miles away. No way to move along the shore. We would have been there and had to have been searched for by airplane if we had not been successful in repairing those boats.

RB: That was one of the more hairy adventures.

TS: So your active life as your family was growing involved a lot of outdoor experiences of that kind?

RB: Right, we did a lot of picnicking with the family and I had a small boat on which we would go on expeditions with the family as well as on a certain number of them that I went off with you and some of the other fellows.

TS: Apart from those recreational activities and outside of the immediate practice of the law, did you get involved in local, city or territorial political affairs.

RB: Not very active in political affairs. I did one time speak on television on behalf of Governor Eagan. I became very active in a number of local, I don't know if you'd call them, political affairs. For example, initially we had separate school districts

for the City of Juneau, and the companion little city on Douglas Island, and I was one who was most active in getting the two consolidated as one school district and in getting rid of the overlapping administration. Similarly, we consolidated the municipality of Juneau and Douglas and the Juneau-Douglas Borough into one municipality. These were all rather bitter local fights. Then on the larger scale there was the fight for the capital. As soon as Alaska became a state, Anchorage started an initiative to move the capital, and it was a very tough, tough fight because Anchorage had almost half the population in its immediate area. One of the events that I participated in was a debate against a state senator from Homer that was on the other side. You assisted me in that debate, and I think it was the first televised debate in Alaska. We debated in Anchorage before the Anchorage Chamber of Commerce. It was televised and played all over the state. I also went up to Nome and Fairbanks to talk. I was very active in that campaign. We were successful at that time, and two years later they started another initiative. We fought that one off. We also filed a suit to attempt see that the capital could only be changed by constitutional amendment, which was a much more difficult process. The case went to the Alaska Supreme Court which at that time had three persons on it. That was one of the toughest cases I ever lost. It was a two, one decision. The Chief Justice, Buel Nessbeit, was very much for moving the capital. Judge Ahrend voted our way that it had to be by constitutional amendment and Justice Dimond, who was a Douglas

resident and very much for keeping the capital in Juneau, thought that the better arguments were that it could be by initiative.

TS: Other than for that major effort concerning the capital move in Alaska which extended over a substantial number of years, were you involved in governmental affairs particularly?

RB: I was on the Alaska Development Board appointed by Governor Gruening, and worked on that with George Sunborg, who was the director for a number of years.

TS: What was the thrust of its work.

RB: Trying to encourage industry and development of Alaska at the time. I also was very active in the Chamber of Commerce. I was president of it twice. I was president of Rotary. I was on St. Ann's Hospital Advisory Board. I was on the Advisory Board of the Salvation Army, Chairman of the American Red Cross for a number of years, the first chairman of the Planning Commission. The first time Juneau had a Planning Commission. I chaired that for five years. We developed the first general overall plan for the City and Borough of Juneau. In a small community one just became real active in most of the issues.

END OF TAPE 2, SIDE B

TAPE 3, SIDE A, WEDNESDAY, AUGUST 8, 1990

TS: When we concluded on the last tape, Bob, you were talking about whether or not you had been involved in running for office for election, or otherwise in political office.

RB: I did not believe that it was really proper for me to run for the territorial or state legislature. The reason was that our firm represented a lot of the large corporations that had an interest in legislation. We represented a number of the canned salmon companies, a number of the mining companies, and others that had stakes in the legislation. I thought that if I were a member of the legislature I could only do it on being independent and voting the way I believed the issues should best be resolved for the state, which was not necessarily my clients' views. I did not see that it was appropriate to have that type of a conflict of interests.

TS: During the period that you were in private practice, as we've already noted, between 1947 and when you went on the court for the first time, the statehood movement came, and statehood became a reality. Were you involved in that effort in any way?

RB: Only peripherally. The Juneau Chamber of Commerce, when I first was here, was a very conservative organization. I helped, I think, to have it adopt a more neutral posture. I and others

prevented it from taking positions opposing statehood which I think they might otherwise have done. There was a strong movement in Juneau against statehood because they believed that the territory was not capable of supporting a state government. I believed that statehood was probably feasible, although I was far from free of doubts as to whether we could manage once the strings with the federal government were cut. Actually it was the discovery of oil immediately after statehood that was the salvation. Without it, I still have grave doubts as to how we could have supported a state government.

TS: Economically that is?

RB: Yes. Of course, Governor Gruening was a firm believer in statehood. He was convinced that once we had two voting senators and a representative there would be enough things coming to Alaska for it to get along.

TS: So you had a relatively close, personal association with Ernest Gruening didn't you?

RB: Yes, I visited with him on numerous occasions. We played tennis together, and I greatly admired him. He also played bridge with us. He and my partner, Norman Banfield, did not see eye to eye on just about anything, but they got along at the bridge table.

TS: I think we've touched sufficiently for these purposes on your activities professionally, socially and personally and the development of your family. When did you first become interested in the possible judicial aspect of a career?

RB: I think almost from when I started the practice of law. I had admired judges and had hoped that eventually that I could become a judge. So I could say that, while it was not an active goal, it was something that was in the back of my mind. After I had practiced a number of years, an opportunity arose for a position as United States District Court Judge. I put in for that. The three that were in the final running were present Judges James von der Heydt, James Fitzgerald, and I.

TS: This was after Alaska had become a state, probably about 1966?

RB: That's probably about correct.

TS: I remember an incident in that connection that I might relate to you and see what kind of comment it prompts from you. On that second trip that you described that you and I, and Joe McLean, and a couple of friends made on the Taku River, at that time it was in August 1966, I was the State Court Administrator. I came down here to make that trip with you and it was about that time that a

vacancy opened in the United States District Court for the District of Alaska. You expressed to me your interest in that position, and I think I told you that I had a good friend in Washington who was in the Justice Department, I think in the Johnson Administration. It was after Kennedy had been shot in 1963. So Johnson was the President and Nicholas Kotzenback, I think was the Attorney General, and my friend was a man named Ernest Frieson, who was Assistant Attorney General at that time and in charge of administration. I asked you if you thought it might be helpful if I were to call Ernie Frieson, whom I'd known as a fellow court administrator, on behalf of your candidacy. I don't remember whether I confessed to you or not at the time, but I called Ernest Frieson and said I was calling on your behalf for your candidacy for the U.S. District Judgeship. He said, "Well who's the best trial judge in Alaska?" I said there was a fellow named von der Heydt in Juneau that I know well, who's a trial judge. He's an applicant too, but I'm calling about Boochever. He said, "Thank you very much." Judge von der Heydt was appointed.

RB: There was one other aside on that. All three of the candidates, Judge Fitzgerald, Judge von der Heydt, and I, were on friendly terms with our two senators at the time, Senator Gruening and Senator Bartlett Back in the territorial days, well I'm not sure if it was the territorial days or early statehood days, there had been some bitter fights in the Democratic Party. There was a

convention to be held at Petersburg, and there was one group, led by Helen Monson the publisher of the Juneau Empire a conservative group, and the Gruening group of Democrats on the other side, more or less. This is oversimplification. Bob Bartlett was anxious to have someone chair that meeting and not be pro one side or the other and asked me if I would do so. I was reluctant to do so, in part, because again of the clients in my office and the problems that might arise from a conflict of interest. So, I did not accept his offer to chair the Petersburg Convention. Klaus Naske, who is an historian at the University of Alaska in Fairbanks, advised me that, in going through the records in his research for a book about Bob Bartlett, he found out that my refusal to chair the Petersburg Convention was a factor that was against my being appointed at that time. In retrospect, I'm very glad I didn't get it then. I don't think I was ready for it and financially it would have been a very difficult transition to make.

TS: That was your first look at a judgeship in 1966. Eventually you did go to the Supreme Court for the State of Alaska. Was that your first judicial position?

RB: Yes, in 1972. As you know, because you had a lot to do with it, in Alaska we had the Missouri Plan where a Judicial Council sent names to the governor and the governor must select from those names. We don't have the election system as existed in many states. I don't think I would ever have attempted to run in an

election for a judgeship. The Judicial Council nominated me. I received high ratings from the lawyers who were polled for their views of the candidates.

TS: What was the vacancy that had been established?

RB: Justice Dimond retired because of ill health. He was from Juneau. The only justice from Juneau. There were five on the court at that time, and, of course, I was from Juneau. I don't think that was a major factor. Governor Eagan saw fit to appoint me and I went on the court. The Chief Justice was George Boney, who died in a tragic boating accident about a year later.

TS: I think it should be noted on the record of this interview that although you had not been out front, active, in partisan, political affairs, you must have had some identity as a Democrat because these appointments for which you were considered, the federal appointment and the state appointment by Governor Eagan were by Democratic executives.

RB: That's true. I certainly made no bones about the fact that I was a Democrat and politically was so inclined.

TS: Isn't it true that even though Alaska had this, as you described it the so-called Missouri Plan, the merit system for a selection of judges, nevertheless, the executive, when he actually

made the appointment, might have been tempted to lean towards persons of his political party.

RB: I think that doubtlessly is true. The records show that the governors have appointed people from the other party with a certain degree of frequency, but by and large they are from the same party. At the time that we're talking about, for some reason most of the people who were generally thought to be qualified for judicial office happened to be Democrats. I do think there were a larger number of them than there were Republicans who were prominent in the bar and had the type of reputation that would seem to make them fit for judicial office. I certainly want to make this clear. I'm not saying anything against the Republicans, because there were some very able Republicans, and some of them were appointed.

TS: My own recollection is like yours, that that period in Alaskan history probably the more prominent political figures and often in the bar were Democrats. It may not be so today.

I think we might have missed over a little bit, before you actually went on the court. Were you active in bar association affairs.

RB: Yes, I was President of the Juneau Bar Association at one time, and in 1962 I was President of the Alaska Bar Association.

TS: This was not too long after the formation of the integrated bar?

RB: That's correct, and it was also shortly before a major fight between the bar association and the judiciary, the supreme court, principally Chief Justice Buel Nessbeit.

TS: It may be worthy of note on this record what you observed of that affair.

RB: It started actually in a matter that came before the Board of Governors when I was president. That was a grievance complaint against an attorney named Neil McKay. He was accused of overreaching a client in the purchase of some real estate from a lady of foreign extraction. He contended that he did not overreach her that it was an arms length transaction, although he was her attorney in other matters, and that he had her go to another attorney to notarize the papers. There was no question the papers were notarized before another attorney. The Board of Governors thought it was a close issue and voted four to two not to discipline Neil McKay. I did not vote because as president of the bar, I only voted in case of a tie. Our by-laws stated that. Actually I thought that there should have been some kind of, at least, a reprimand. I didn't think it was the type of conduct that should be countenanced, although it was not a flagrant violation. The matter somehow got to the supreme court and the

court decided to disbar Neil McKay. By that time I was no longer president of the bar association, and the association felt the supreme court was taking over the function of the bar which was to have the initial decision on disciplinary matters and then recommend a disposition of the case to the supreme court. This involved a very bitter fight. You were court administrator at the time, Tom, and participated in some of it including the most dramatic part of it which was when the Chief Justice ordered you to take over the bank account of the bar association. As I recall you went to the bank and the attorney for the bank, who was interested in the bar association side, ordered the teller not to turn over the funds to you unless you had the state trooper pull his gun. The trooper drew his pistol and the funds were turned over.

TS: That's right. A notorious incident when the newspapers claimed that the supreme court had held up the bank. So you were active in the bar association and had expanded through that means, I would suppose, your contacts widely throughout the profession in the state beyond Juneau.

RB: That's true. I'd also had many cases that took me to the various parts of the state. Particularly to Anchorage, Fairbanks and the cities in southeastern Alaska.

TS: So when the court appointment came up in 1972, the supreme court opening, you had wide-spread support in the state.

RB: That's correct.

(The following was dictated on November 1, 1990 to be included in this portion of the oral history.)

There was some property in the outlining area of Juneau known as Indian Point. At the time this incident occurred, the property belonged to the National Park Service, though later it was turned over as private property. For some reason, two state troopers were on the property making an investigation. The park ranger came up to them and demanded to know what they were doing there. They became outraged, and one of the troopers grabbed the park ranger and the other one socked him in the face. It was only later that they found out that the park ranger had every right to be there and to ask them the question. The park ranger came to me and we brought a suit against the troopers. They were highly indignant about the matter, and I was ready to go to trial which might have had serious repercussions on their retaining their jobs. My client, however, wanted to settle the case and agreed to settle for payment of his medical bills and a nominal attorney's fee for me. It was some years later that my name was put in for the Alaska Supreme Court. I found out, long after my appointment, that one of the officers had written to the Judicial Council stating that I would not be a good judge because I had pot parties at my house. This was a complete lie. I have never smoked

marijuana, and in fact have never smoked a cigarette since I was nine years old. Fortunately, the majority of the Judicial Council did not believe the accusation, and my name went in to the governor. I learned of this incident from a member of the Judicial Council, who had voted against me, after I had chaired the Judicial Council as Chief Justice. He stated that he regretted his vote and realized that he had been misled.

(The taped interview now follows.)

TS: Moving then for the first time from twenty-five years in private law practice to the judiciary, did that thrust substantial change on your life style?

RB: It was a very substantial change. As I mentioned I'd had numerous outside activities. I had a practice that kept me just busy as could be. I worked most nights, although I spent plenty of time with my family, as much as I could. When I went on the court, instead of having the phone ringing every few minutes, that's an exaggeration, ringing a great deal, having people come in to see me, I found that I was sitting there alone. The phone wouldn't ring, nobody came to see me. I was all by myself. It was very hard to maintain the level of concentration sitting there reading the briefs and working on a draft without the liveliness that I'd been accustomed to. It also affected our social life to a certain extent. There were a number of activities in which I could no longer participate. My wife felt it too. She probably

felt it more than I did, that we were isolated. I had the work at least, and the pleasure of working with the law clerks and the other justices, and she felt that there was an isolation socially. Although I didn't feel it should have affected her that much.

TS: By this time your children were fairly grown?

RB: Yes.

TS: You could still maintain your interest in fishing, tennis and skiing in the winter, but it limited what you could do in the community?

RB: That's right.

TS: I think that it might be worthwhile to touch upon an aspect of your service on the supreme court that has affected the character of the court. When you were appointed, you and your predecessor, Justice Dimond, lived in Juneau. There is no longer a justice of the supreme court in Juneau. I think it might be well to have something on the record about the circumstances because the court was sitting the majority of its time in Anchorage. How did that affect your conduct of the office?

RB: I didn't really feel that it was any handicap. Justice Rubinowitz lived in Fairbanks. I lived in Juneau, and the other

three justices lived in Anchorage. We sat where the cases arose. Of course, Anchorage with over half the population in that area had most of the cases heard there. I would fly to Anchorage for the hearings and for the conferences that took place there and then would fly back to Juneau to do my work in my chambers during the rest of the time. I thought there was a certain advantage in our court having justices in different places so that we all weren't reading the same newspaper every morning and subjected to the same group of associates to the extent that that influences one's way of thinking. How great an extent that is, I don't know. But I thought it was healthy in a state as large and divergent as ours to have justices who resided in different locations.

TS: Reflecting back on it would you still feel that way or do you think it's better to have everybody in one place.

RB: It makes a little more work for the justice who is not in the same location where most of the work takes place, but it isn't that much of a burden. With the air traffic it takes a few hours to go there and a few hours to come back. When I was chief justice, from 1975 through 1978, it was more of a burden. I purchased a condominium in Anchorage so that I would have a place where I could stay and where Connie could come up with me. Then I could stay a week or two weeks at a time as needed to handle the work.

TS: This is the administrative aspects of running the court.

RB: The chief justice is the chief administrator. Of course, he has the administrative director of the court system, but he is the titular chief administrator of the whole court system in Alaska. This included not only the Superior Court and District Court, the regular trial courts, but also the magistrates, which handled arraignments and trials in the small communities throughout the territory. One of the first things I did as chief justice was to take a trip up into the outlying areas, to Bethel, and to the various small communities on the Kuskokwim River and become acquainted with the way of life of Eskimo communities there. Their understanding of the legal system involved some drastic changes from the way that we understand it. For example, the concept of "guilty" isn't even in the Eskimo language. So when a magistrate would arraign a person it was very difficult to give the right words so that you could be sure that the person understood what the procedures were. We had to develop training programs for the magistrates in these outlying areas, and usually the magistrates were members of the community and of the same race. I think there are over twenty-two dialects alone spoken in Alaska. It's a major problem of bringing justice to the different communities. I can remember one village that had a practice that if a person was found drunk the fine would be twenty-five dollars, the second time it was fifty, the third time it was seventy-five, the fourth time it was a hundred dollars, and the fifth time it

went back to twenty-five dollars because nobody had over a hundred dollars.

TS: So that three-year period from 1975-78 when you were the chief justice involved quite a lot of responsibility beyond the determination of specific cases.

RB: Yes, there were a lot of administrative decisions. We had new court houses that had to be constructed. There were many decisions that had to be made. Judges would have quarrels about their turf one might say, and the chief justice would have to get involved and arbitrate and try to work those matters out. Also the chief justice had to make public appearances and talks before different groups.

TS: That involved legislative negotiations about salary and budget and that kind of thing?

RB: It involved giving an annual talk to the legislature, but I did not think it was appropriate for me as chief justice to engage in actual lobbying as such. We did have the executive director of the court system who did have to work with the legislature in trying to see that various programs went through. Art Snowden, our administrative director, was very good at that.

TS: During your tenure on the court, either as chief justice or as one of the justices, considering the policies and functioning of the court system, were there any particular issues that you might want to highlight.

RB: There were a couple. Once there was a case that came up involving the location of the capital again. As soon as I saw what it was about I thought it was inappropriate for me to participate and I recused myself. The next day there was an editorial in the Anchorage Times, the largest paper in the state at the time, accusing me of not being impartial and that I should recuse myself from the case. They had failed to check that I already had recused myself. They were good enough to put in a retracting editorial. We had another very highly charged political case in which there was an extremely close primary race in both the Republican and Democratic primaries. Former Governor Hickle had a close race which was won by Governor Hammond, I think by something like 85 votes. On the other side Chauncey Croft barely nosed out Ed Merdes, who had been a long-time friend of mine, by a couple of hundred votes. They challenged the primary on the grounds that there had been numerous errors and omissions which they contended should require a new election. We had to decide this before the general election which was coming up very soon. I called the supreme court together and there were about five or six issues and we divided the issues up between the different members of the court. We all stayed and worked until

after midnight, each of us grinding out our separate parts of an opinion. We conferred and reached complete agreement on it, deciding that there had been mistakes and errors made but that none of them was of the type that substantially would have affected the result of the election, and there was no indication of corruption. We upheld the primary election, and the general election was able to go on. That was a highly charged case, and I was particularly pleased that we all agreed. It was a most difficult case for Roger Conner, one of the justices who had been appointed to the bench by Hickle and was a close friend of his. In Alaska it was impossible not to sit on cases where one had close friends. Certainly we all knew the attorneys very well initially before the bar expanded. You just couldn't disqualify yourself every time a friend appeared as an attorney.

TS: Is there anything else that you might think about with regard to your career as a Justice of the Alaska State Supreme Court or as the chief justice with its administrative responsibilities?

RB: I might say one thing about just the nature of the job. I was appointed in 1972.

End of Tape 3, side A

Beginning of Tape 3, side B

RB: One of the first things that the Alaska State Supreme Court did before I was on it was to rule that it would not be bound by the prior decisions of the territorial court or of the U.S. Court of Appeals for the Ninth Circuit, which handled all of the appeals from the territorial court. Incidentally, I'll make an aside here. As a result of the 9th Circuit Court of Appeals hearing all appeals from the United States District Court for the Territory of Alaska, I had a very extensive appellate practice with the 9th Circuit when I was in private practice. Probably as extensive as almost any of the attorneys from the large firms on the west coast, because we had all of our cases appealed there since there was no state appellate procedure, or any other court system.

TS: You were grounded in the operations of the 9th Circuit.

RB: To a certain extent that's true. Getting back to what I was saying, we were a new state with practically no precedent behind us. As a result, as we got legal issues we were able to look at law review articles and try to formulate what we thought was the best rule of law for the new state, as far as the common law was concerned. This was an unusual opportunity. On the 9th Circuit we, of course, have a tremendous backlog of decided cases, and we're bound by everything the United States Supreme Court says on subjects. As a rule, our decision making process is find what the

prior precedent is and then follow it. There are the gaps in there, interstices, I guess one could call them, where one has to decide well this case says this, this case says that, and this is somewhere in between, and we have to make the decision. Those are where the flexibility arises in the federal court of appeals. Once in a great, great while we may have something that is really a novel issue. It's very, very rare. While in Alaska, almost every case that came up to us, at first, was the first case for the state on the particular issue. Were we going to have, for instance, contributory negligence barring recovery, or were we going to adopt a comparative negligence rule. We adopted comparative negligence. There were other things on applying the equal protection doctrine under the Alaska Constitution. We always had to give all the rights that the United States Supreme Court ordered under the United States Constitution, but we were free to decide the Alaska Constitution, and in some cases decided that the Alaska Constitution required more rights than the Federal Constitution. For example, Alaska had an express right of privacy provision, which isn't in the Federal Constitution.

TS: So the experience on the state supreme court was uniquely different than your subsequent experiences as an appellate judge, not only because of the administrative aspects that you had to address, particularly as chief justice, but also because of the fact that being a new state there was not a large body of common law that you looked to. You really decided what directions that

common law should take. I should think that that might have, in some ways, made that work more challenging and more interesting.

RB: It did from the standpoint of allowing for some originality and allowing fresh examination of questions. On the other hand, many of the 9th Circuit cases are immensely complicated, involve very significant matters, huge sums of money in some cases, important rights in others. So it balances out that one feels the work is very significant, even though one may feel more bound to follow a precedent even when, if one were free, one might select a different rule.

TS: A little bit about the operation of the Alaska Supreme Court during your tenure on it. How did you find the conditions of what you might label collegiality, of working together with four other people.

RB: I found it very good. Generally speaking we got along well. There were a few little frictions but nothing very major. I had trouble when I was chief justice with one justice that was having trouble getting his opinions out on time. I remember going to his chambers on an opinion that was overdue, and just saying let's take it out and we'll both work on it together, and we worked on it together and finalized the draft. But we did not have any real feuds as such, where there was one group that was against the

other group or anything like that. We'd have some heated arguments, but they were on issues and not on personalities.

TS: You were working with a group of five on the Alaska Supreme Court, is it much different in working with the panels of the 9th Circuit.

RB: It is to a degree. Our court is so big on the 9th Circuit. I think we have 28 active judges authorized now and we have senior judges beside. There is a rotation for the judges that one sits with and the places where one sits, so that ideally each judge sits with all the other judges and at all the court's locations an equal time. As a result, you're working with different groups of people all the time, with different combinations.

TS: So it isn't the intimacy in some ways that you found on the Alaska Court.

RB: Not the same intimacy but there's a surprising amount of collegiality despite the divergent backgrounds of the judges and some rather strongly opposed political views. The judges generally get along quite well on the panels, although I would certainly say that it makes a difference on what panel you're on and who the other judges are on the panel.

TS: I don't want to go too much on the 9th Circuit at this point because we're going to dwell on that later. Comparing it with your state supreme court experience.

RB: There's a little more of a stagnant situation in the state supreme court because you're dealing with the same people. You become a little more used to their ideas, they become used to your ideas. There isn't the occasional spark one gets from somebody who has an entirely different viewpoint. But we had some very bright conscientious judges on the Alaska Court.

TS: What kind of experience did you have on the state supreme court in securing, evaluating, hiring law clerks and working with law clerks.

RB: We had a system where two justices went outside, as we call it in Alaska when one goes to the lower states, each year to interview law clerk applicants. One went to the east coast, one went to the west coast. They came back with the names and resumes of the ones they thought were the best. All five of us sat down, went over them and then took turns choosing from the group. The interview process was handled by two justices for the whole court, because it was too expensive for law clerks to come to Alaska to be interviewed.

TS: Did that work out pretty well?

RB: I thought it did. I certainly was very pleased with almost all of my clerks. The court itself didn't get into any fights over this in my time. So it didn't cause any friction. I think it's a unique system. I'm sure there isn't any other state supreme court that gets its clerks that same way.

TS: What qualifications did you look for in the clerks that you hired.

RB: The primary qualities were scholarship and character. Also the ability to get along in an office, willingness to have an open mind on questions. I would be looking for someone who is willing to argue his or her point with the judge and then when the judge reaches the decision wholeheartedly help develop that position once the argument is over.

TS: Do you continue to have contacts with these people.

RB: Yes, in most case I have some contact with them. As you know from your experience with law clerks, it's a very close relationship. In fact I think one of the most rewarding aspects of an appellate judgeship certainly is having these bright, young lawyers that come to work with you. Their enthusiasm is great. I find they're very smart, and most of them are very idealistic. It's stimulating to be around people like that.

TS: I think we might touch a little bit on any of the state cases, you mentioned some already, that might have been of special interest when you were on the supreme court. You mentioned the case involving the primary elections, a case involving the capital move where you recused. Are there other particularly interesting cases in the Alaska Supreme Court.

RB: One that I had early in my career there. A case of Fruit v. Shriener which involved the issue of respondeat superior. It was a case where a life insurance association had all the agents from Alaska meet in Homer, and one of the agents went out in the evening from where they were staying at Land's End to meet with some of the out-of-state agents. They weren't at the place he thought they were. He came back. He had had quite a bit to drink, and he collided with a person who was working on his car, severally injuring that person. The question was whether the life insurance company should be held liable under respondeat superior. I was able to go into the background of respondeat superior from its development centuries ago and traced it to an enterprise theory where it was conceived better for the enterprise to stand the loss when an employee had negligently harmed someone than for the person who was harmed. The enterprise can insure against the risk and add the cost to the price of the product. I shouldn't go into this much detail in opinions because ------

TS: No I think it helps to expound on your judicial philosophy.

RB: It does to an extent. But the reason that I'm hesitant is speaking off the cuff one doesn't get the exactitude that an opinion does, and to get an opinion out one spends a lot of time on it. One goes over one draft and then another draft and it's all worked out. To try to discuss it - I should really more or less just state what the case is about is more to the point.

TS: I think so. It probably derives from your experience on both appellate benches, but from the Supreme Court did you have a view as to whether an appellate judge should be an activist or should have a very conservative judicial philosophy. There is a lot of concern in the public about which direction a judge takes.

RB: I believe that the main thing is to decide the case before me. In the Alaska Supreme Court we also had to be very concerned about the rule of law that we were establishing, as I mentioned, because we were establishing the common law for the state. There were close questions that would come up as to whether we should decide an issue as a rule of common law or whether we should not decide the issue and leave it for the legislature to decide. That is the type of area that you're speaking of, and they created close questions. I don't think that I ever felt that I was particularly an activist, or on the other side particularly a conservative. I tried to treat, maybe more in a pragmatic manner,

each case individually that came before me. I think as I sat on the bench longer, and particularly in the 9th circuit, I feel there is more of a need for restraint to limit what I am deciding to the exact issues that I'm deciding. I've developed more of a philosophy along those lines the longer I have sat on the court. I can see the mischief that occurs occasionally when a court goes off on something that is really not directly before it. They say it is an aside and even though it's dictum it comes back to plague later on.

I do believe strongly that judges are charged with the duty of protecting the constitutional rights of individuals. At times this will run against the wishes of the majority, but one of the great things about our constitution is the preservation of those rights, even if they are unpopular at the time. Our judicial system also affords equal rights to those who have no influence on the political system.

Often one has an intuitive feeling concerning the just result of a case. Usually one finds valid legal authority and logical reasons which one can state to justify that result. If not, however, it is necessary to follow the language of a statute or prior case law, even if it is not the result one would prefer. We all have different values, and cases cannot be decided arbitrarily based on the individual judge's feelings if we are to have a rule of law. I remember when I was in college, and the Nazis came in power, how distressing it was to see so many Germans carried away by convictions of nationalistic and racist views diametrically

opposed to mine. Yet I could not doubt that many strongly believed that their views were correct. It has made me distrust deciding cases on gut reactions, although I must say that it is the unusual case in which logic and authority does not support one's intuitive judgment.

TS: Maybe we're about to where we should conclude, unless you have any other thoughts on interesting state cases that you dealt with.

RB: There were so many, it's hard to recall them all.

TS: Perhaps we should leave it at this point, and include some of those cases the next time we meet. We have one more session, and we could talk off the record about the time to do that. And in the last session we would focus on your career on the 9th Circuit more and look at some cases.

RB: I might just get in quickly two cases that were very controversial. When I first came on the Alaska Supreme Court there was the Raven case which involved the use of marijuana in the home. I did not author the case, it was authored by Chief Justice Rabinowitz. The evidence that was presented was that marijuana was of negligible harm. We of course, were basing our decision on the evidence presented. The record on the case did not indicate any significant impairment due to use of marijuana.

The record also failed to show that the use of marijuana led to use of other more harmful drugs. The question then was whether one had the right to use marijuana in the privacy of the own home. In view of the Alaska constitutional provision that the right of privacy shall not be abridged, the decision was that the right of privacy prevailed in that situation. It did not okay the purchase of marijuana or the use of it for more than personal use. That was a very controversial case. I think it depended a great deal on the record, what had been established in the court below, and I'm not at all sure it would come out the same way with a different type of record

TS: With more knowledge about the possible harmful consequences?

RB: Yes. Then later I had a case on cocaine in which the Raven case was used as an example, and they wanted the right to use cocaine in the home. This was in the mid 1970s. It was the case of Erickson v. State. I did a great deal of research on cocaine at the time, and it was amazing to see the difference that we know now about cocaine from what the prevailing opinion was then. The prevailing opinion was that it was not very harmful, but there was evidence that overdoses could cause death. The general view was that it was not habit forming at that time. This was the literature. But there was enough evidence of harmful effects that I concluded that the right of privacy did not take precedent over the state interest in controlling it. I've often looked back at

that decision and been glad I came out that way because I've seen such terrible things that cocaine has done and cocaine addiction has done since then. But that wasn't the prevailing view back fifteen, eighteen years ago.

TS: Well, unless you have some other case in mind I think we should wind it up and be prepared to turn to your 9th Circuit career in our next session.

RB: I may have a view more Alaska cases.

TS: That would be fine. I'm sure it can be done then.

TS: Today is Tuesday, August 14, about 2:00 p.m. in the afternoon and Tom Stewart is taking up again the interview of Judge Boochever where we left off last week. At the conclusion of the last session, Bob, we had been discussing your tenure on the Supreme Court of Alaska, and your career there as chief justice and otherwise, and some of the cases. I think you might have some other cases that you want to mention but I think we agreed that you would do that at the same time you discuss cases that you have handled in the federal system. Is that right?

RB: It was my understanding we would do it now but it doesn't matter whatever way you want to do it.

TS: Which ever way you want to do it.

RB: Well, I think while we're doing the Alaska court it would be more appropriate to wind that up.

TS: That's fine. Before we turn to those cases, I don't remember that we had as much detail as might be desirable with respect to the process of your appointment to the supreme court. You were appointed to fill the seat vacated when Justice Dimond retired.

RB: That is correct.

TS: I think it might be of interest to know something, as it were, of the politics of that appointment. How many candidates were there and what did you have to do along the way to ultimately secure the appointment. These things obviously don't just happen.

RB: My recollection is that Jim Fitzgerald was one of the candidates at that time. That was before he was appointed as United States District Judge.

TS: He did have a tenure on the supreme court. Was he appointed after you?

RB: Let's go off the record a minute here, Tom.

TS: We've been off the record for just a moment. Bob, again on the circumstances surrounding your appointment to the supreme court, I think you told me previously that that was in 1972. Justice Dimond had retired. Who were the applicants then?

RB: I don't recall all the applicants, but I think it got down to a choice between Jim Fitzgerald and me.

TS: You were nominated by the judicial council?

RB: Yes, we were both nominated by the judicial council. The Governor was Bill Eagan, and Jim had served as his commissioner of public safety and also have been appointed as a Superior Court Judge by Governor Eagan. He was a very well respected and popular Superior Court Judge.

TS: Was it a tight circumstance for the appointment. Was there distinct competition between you and Judge Fitzgerald, or do you recall?

RB: I didn't feel it as such at the time. In other words I didn't feel that we were fighting each other or anything of that nature. I do know that it was tough for some people in making endorsements, whether they would endorse Jim or would endorse me because we had a lot of common friends and associates. I don't know what entered into Bill Eagan's final decision. I think it

probably was a difficult decision for him because he had had such a long and close relationship with Jim. I had always gotten along well with Bill Eagan but I had never been a member of his cabinet. As a matter of fact at one time he had offered me a position as Commissioner of Administration in his cabinet. I wasn't interested in that and did not accept it.

TS: I suppose one factor could have been that Judge Fitzgerald was widely respected and liked as a trial judge, and the governor might have felt that it was wise for him to stay in that circumstance.

RB: That's conceivable. I think that one factor that came into play was the fact that I lived in Juneau and Justice Dimond had lived in Juneau. There was a tendency or a friction between Juneau and Anchorage with Anchorage wanting the whole court there. Or least some people in Anchorage, particularly the Anchorage Times, I believe wanting the whole court there. In fact I think there was an editorial or something from the Times that regional location should have nothing to do with the selection process. I don't know whether it did have anything to do with it, but it certainly didn't hurt me to be from the same area that Justice Dimond had been.

TS: As I recollect, at that time the seat was viewed somewhat as a Juneau seat.

RB: I think that was mostly by Juneau. I don't think it was by anyone else.

TS: While we're still talking about your tenure on the State Supreme Court this might be an opportune time to take up your recollection of some interesting cases that you had during that time.

RB: Didn't we discuss a little bit about the lack of precedent on the court at the time. So we had more opportunities to try to figure out a rule of law for Alaska that we thought would be appropriate. We had the opportunity to review law review articles and theoretical considerations that often go into the decisional process. Usually there is such a great deal of precedent that a large part of the decision making is just determining what precedent applies. So there was a difference there. Did I discuss the case of Fruit v. Shriener?

TS: Yes.

RB: Another case - I'm going to do these in a thumbnail sketch because we have no time to discuss in length. Also the opinions are usually thought out very carefully, a lot of work goes into them and in just giving an off the cuff comment about them I can't

give the real reasoning behind the opinion and the opinions have to speak for themselves.

TS: This might be a moment for me to relate to you a comment that I heard quite recently, as a matter of fact a couple of days ago, on a hike with a young lawyer who is working in Washington, D. C. and going to American University Law School. He told me that in his law school, the Alaska cases are frequently referred to, not only in their law journal, but in discussing cases. The reason ostensibly being, according to his comment, just exactly what you said took place. Since there was no precedent, Alaska looked to other states for the best reasoning and then analyzed that reasoning in adopting common law for the State of Alaska. So in a sense, the Alaska cases might represent a modern up-to-date view of the best reasoning in frontiers of the law. I thought I would relate that to you to see if it accords with your

End of Tape 3, Side B

Tape 4, SIDE A, Tuesday, August 14, 1990

TS: At the conclusion of the last tape, Bob, I had asked you if you wanted to remark on a comment that I heard about the use of Alaska cases nationally quite frequently.

RB: I think probably that's generally true. I know I've had young lawyers comment to me on a number of occasions that they had several of my cases in their textbooks. I think that the professors have looked to Alaska as one of the states in selecting cases that went into the reasoning for some of the rules, some of which are rather old in origin, but in which we gave them sort of a fresh look to see whether they met the present needs. For example, the case of Fruit v. Schreiner 502 P.2d 133 (1972) which I discussed before, which went back into the doctrine of respondeat superior and looked into the reasons behind it and what should be the modern thinking, or at least what we thought should be the modern thinking, on how it should be applied. Another case I had was Malvo v. Penny, it appears in 512 P.2d 575 (1973) in that case three black teenage girls were picked up for alleged shoplifting, which they hadn't done. They brought suit against the company and the interesting aspect of the case was on jury selection. There were a number of jurors who belonged to organizations which at that time were Caucasian only, such as the Elks and other lodges. The question was whether they could have a preemptory challenge for those jurors or whether they had to exercise a challenge for cause. We explained in it that there could be people in those organizations who were actually in there to try to change the organizations and had no bias at all. But that in looking at the answers, the court would have to be very suspect and very careful to grant the challenge if there were any inferences at all that there was a bias, because people don't come

out and say, oh yes, I'm prejudiced against such and such type of people.

Another case was Bush v.Reid, 516 P.2d 1215 (1974), which was construing a statute which suspended the civil rights of parolees. Bush had brought a civil suit. The question was whether he should be able to bring a suit while he was on parole and his civil rights were suspended. We concluded that there was no basis for the rule in a situation when a person was out on parole. There was no advantage in suspending the rights to bring a suit, and that it did not apply.

Another case I recall, which has been in some of the textbooks is Apuchuk v. Mongtomery Ward, 520 P.2d 1352 (1974). In that case a person who lived in one of the outlying bush communities of Alaska, that had no regular means of transportation other than by airplane, bought a refrigerator and some other property from Montgomery Ward. Montgomery Ward sued in the small claims court in Anchorage serving Apuchuk with summons in his Eskimo village. The form of summons merely stated if you don't appear within so many days a default will be taken against you. We held that that violated the Alaska due process clause because it did not give adequate notice that there was the right to a change of venue and that the person could file a written response under the Small Claims Act. We attempted to give a form of summons that would exlain in simple layman's language so as to advise a person without very much formal education as to just what his or her rights were under those circumstances. We also

examined the question of the importance of credit to the Alaska economy, and that our laws should not make it too difficult for a creditor that had a just debt to collect. We had to balance those considerations in the opinion. I could go on with quite a few others, but I don't want to take too much time.

One case I think I should mention, State v. Glass, 583 P.2d 872. In that case, we held that warrantless, electronic monitoring of a conversation between a police informant and a defendant violated the defendant's right of privacy under the Alaska constitution and the right to be free from unreasonable search and seizure under the Alaska constitution. There had been a 9th circuit case which came out the other way under the Federal constitution. Judge Shirley Hufstedler had dissented and I quoted from her dissent quite a bit in the Glass opinion. By coincidence a number of years later, after she was Secretary of Health, Education, and Welfare and had left the 9th circuit, I was appointed to fill her vacancy.

Another case was Bonjour v. Bonjour, 592 P.2d 1233 in which the question was whether the religious practices of the parents should be a consideration in the custody of a child. We held that under some circumstances it was proper to consider religion, particularly where say a child was fifteen years old and had firm religious beliefs or had firm feelings against organized religion. But this case was the case of a three and a half year old and we held that it was improper to base the decision on the formal

church adherence of one parent as opposed to the other parent not being associated with a formal church.

Those are just a few samplings of the type of cases we had. I think there were a lot of interesting issues. As we've repeated, we were able to look at them in a fresh manner.

TS: Very good, I think that will be interesting to have on record. Unless you have something else about your time on the supreme court, I think we can turn now to your tenure on the Federal Court of Appeals for the Ninth Circuit beginning with your process of your appointment to the court. Something on the order of what we discussed this afternoon in the process of your appointment to the supreme court, what were the general circumstances surrounding your move from the state supreme court to the federal appellate court.

RB: The time was under President Carter's administration. He appointed commissions to look for appropriate judicial candidates and to select from possible applicants those that should be interviewed by the commission. The commission would send the names in, to I believe the Attorney General's office, which would make its recommendations to the President for the appointment.

TS: Am I not correct that up to this time there had never been a resident Alaskan chosen to sit on the 9th Circuit Court of Appeals?

RB: That is correct. In fact, I'm still the only one from Alaska, as far as I know, that's ever been on the court of appeals. Going on with the process that occurred, I submitted an application and was asked to go for an interview before the commission, which occurred in Portland. I went down there, and it was a rather pleasant interview. They asked me a number of questions, and it was stimulating. Later, my name was submitted along with a small number of others to the Attorney General's office. At that point, political considerations came in. It was decided that all of the vacancies would be filled by other states. This was a place where the senators took quite a bit of action on it. I think they made an agreement that the next vacancy on the 9th Circuit would go to an Alaskan in exchange for Alaska not fighting to get one of the seats at that time. This was the time of expansion of the courts. There was a judgeship act that had substantially increased the number of judges on the courts of appeal as well as on the district courts. The result was that I did not get appointed and I more or less gave it up. I was getting on the upper edge of the age the President wanted to consider for appointments.

TS: Were there other Alaskan candidates at that time?

RB: Yes. Again, Jim Fitzgerald was a candidate. I think he was the only other one that was interviewed from Alaska.

TS: I think I recall his telling me one time that, in his view, no Alaskan would ever be selected for the 9th Circuit.

RB: I didn't have that dim a view, but in any event, no Alaskan was selected in the first go around. Subsequently, in 1980, I was on vacation in Hawaii. While there a write up came out in the paper that I had been appointed to the 9th Circuit Court of Appeals. That was the first we'd heard of it. It was really quite a mistake because those announcements are not made, as a rule, until there is a complete investigation and so forth. In this instance, someway the announcement got out ahead of the investigation.

TS: From the U. S. Attorney General's Office, or do you know?

RB: I'm not sure whether it came out from the U.S. Attorney General's Office or one of the senator's offices. The senators were Stevens and Gravel at the time. In any event, we were visited by an F.B.I. agent while we were in Hawaii who interviewed both my wife and me at some length. Then they proceeded with the other parts of the investigations that go on. The American Bar Association, and the process of getting letters in and the types of thing that normally goes before the announcement. It might have been very embarrassing for me if they turned it down at that

point, but it did go through. I was appointed formally in June of 1980. It was February of 1980 when we were on vacation.

TS: The formal appointment by the President was in June. Did you move rapidly to the new seat?

RB: Yes. I moved reasonably fast. I had to finish up my work on the Alaska Supreme Court. But I think in July I was able to start functioning with the 9th Circuit.

TS: If my recollection is correct, Bob, in the earlier stages of your tenure on the 9th Circuit you retained your primary residence in Juneau.

RB: That's correct. In fact, this office on the ninth floor of the federal building was designated as my official chambers, and I worked out of here. It was not too much different at first from the experience I'd had with the Alaska Supreme Court, where I would fly to the hearings and then go back to do the rest of the work in my chambers. As time went on, the trip requirements became more frequent, I was on a Rules Committee. We had court meetings. I would go down for a week of hearings and come back and have to go down again, come back. The travel time became too demanding.

TS: Was San Francisco your usual destination.

RB: Not necessarily. We would go to Los Angeles, San Francisco, Seattle, and Portland. There were two panels for a week each that sat in Hawaii, I went over there on one occasion.

TS: Sounds as if you were traveling every week or every other week.

RB: It became that heavy, yes. The travel from Juneau was a fairly long and tiring trip. Eventually, we decided that the wise thing was to move down where I was in a more central location for it. It happened at that time that the court was establishing a court house in Pasadena. It had been an old hotel at one time, and then it was taken over by the Army during World War II. For many years it was abandoned. Former Chief Judge Chambers got the idea of having that building as the place for central California to have its headquarters there instead of holding court in the same building as the district court, particularly as the district court was very pressed for space and needed the additional space. There was quite a battle inside the 9th Circuit on it. A number of the judges from the Los Angeles area did not like the idea of moving to the Pasadena Courthouse. In any event, from my standpoint, they were anxious to get some bodies there since some of the other judges did not want to move to the Pasadena Courthouse. It fit in with my desire to lessen my travel burdens. It also turned out to be a very handsome, very pleasant court

building in which to work, and we were able to find a place to live fairly close by, in fact within walking distance. So I didn't have to fight the freeways with which I wasn't at all familiar.

TS: While you were still in Alaska, did you have a full compliment of staff in terms of law clerks and secretarial help in your quarters here in Juneau.

RB: Yes I did. I had the same as the other judges. I might say that shortly after I came on the court, the workload of the court increased tremendously. Over fifty percent. We were trying to get out more cases and get current. We did that under the direction of Chief Judge Browning. Each active judge had three law clerks and two secretaries.

TS: So you had that full staff here for about how many years?

RB: Till approximately 1986.

TS: Then you moved to Pasadena. That move, did it change your personal life,your family life distinctly?

RB: It did affect it to a considerable extent. We had lived over forty years in Juneau, a small very friendly community. We felt we knew most people that we'd see. Although Juneau had increased

in size, you didn't know everyone, but you did know a large number of people. If you went to the store you saw any number of friends and would stop and chat. If you went to a theatre production - they had a lot of little theatre here and traveling shows that came through, concerts - you always ran into crowds of people who were acquaintances and with whom you would discuss the performances.

TS: Your wife had a long history of active participation in the local theatre world. Did this sort of bring an end to that kind of interest for her.

RB: It did. She worked a little bit with the Pasadena Playhouse, but she felt that she had put in her time on volunteer work in a number of different ways and that it was time to be more of a spectator. But to get to the difference, if we would go to an opera or a play in the Pasadena, Los Angeles area, we'd never see anyone we knew. We'd just be by ourselves as it were. It was a little hard to get acquainted with people there. Fortunately, we found a small informal tennis and golf club that we joined, and through that means found a number of people to be friendly with.

TS: So your social life surrounded such a group?

RB: Yes, but it was a far cry, and still is, from the active social life that we were more involved in here in Juneau.

TS: If I'm not mistaken you left three of your four daughters in Juneau, and one had moved to Anchorage. So this kind of took you away from your immediate family life with your children. They were grown then.

RB: Our children were grown, and we had grandchildren so it was somewhat of a tear to leave them. We have been fortunate in being able to come back in the summers and work here. So we do get to get back with them. Incidentally, on coming back, like I'm here this summer for two months, I don't charge per diem or travel time or anything because I consider it at least equally for my benefit. I do think there is some value for all of the judges in our widely dispersed court to keep connections with their state and try to have some feeling for what the state's views are on different issues.

TS: In your assignments to panels and the cases that you hear, are you selected particularly for Alaska cases or do they make it an effort to avoid doing that, or does it make a difference?

RB: It makes no difference. It's all done by lot, without geographical locations considered, other than the fact they try to

have all the judges sit at the different locations where the court sits an equal number of times.

TS: So you would rotate amongst Idaho, Montana, and California?

RB: No because the court sits primarily in four locations. Seattle, Portland, San Francisco and Pasadena. Then as I said there are two panels that will sit for a week each in Hawaii, and one panel that sits for one week in Alaska usually in August.

TS: This pattern of two months in the summer in Juneau, did that work when you made the move to Pasadena and were still full time or after you took senior status?

RB: I did it in both capacities, but it so happened that I took senior status very shortly after I moved to Pasadena in early 1986.

TS: What does that mean to your professional life, taking senior status?

RB: Maybe I ought to back up and explain how I happened to take senior status because if was a little unusual. In June 1985, I had heart bypass surgery. I had always been very active in sports and exercise and had watched my eating habits quite closely because my mother and father had had coronary difficulties and

passed away at relatively young ages. But despite this fact, Dr. Akiyama, here in Juneau, who was monitoring my condition, spotted that my electrocardiogram was not normal and sent me up to Anchorage where an angiogram revealed I had an eighty percent blockage of the anterior main artery from the heart. I had surgery there in Anchorage. After the surgery I went back to work fairly fast and started going to the hearings again. The doctor was concerned that I would get back into the same condition of having difficulty with my arteries.

TS: With the stress pattern like that?

RB: Yes, he could eliminate most of the other normal reasons. I didn't smoke. There weren't many other reasons for my developing this process other than genes and stress. He thought that I should reduce the level of my work. I might say a little bit about my work habits, Tom. I tried a number of cases before you. You were always considered one of the great judges down here, and it was a privilege to participate in those trails. But whenever I tried a case I always became very engrossed in it. I would work nights and weekends. I never felt I could just casually go into court and depend upon my native wit, such as it was, to carry me through. I more or less adopted the same procedure when I went on the Alaska Supreme Court and on the 9th Circuit. I always felt that I should read all of the briefs in advance of hearings, that I should read the leading cases and the bench memos, and be

thoroughly prepared before sitting and hearing the cases. When the workload increased on the 9th Circuit, this would involve maybe two thousand pages of reading to get ready for a week's hearing - reading the briefs in twenty-five cases and going over them. There was a lot of night work, and before the hearings particularly was when I would feel pressure. I'd stay up late. I enjoyed it, but at the same time I was feeling a considerable amount of pressure.

TS: Tense to be adjusted and ready.

RB: I guess that would be one way of describing it. The doctor said I just had to slow down. The only way to slow down was to cut back on the amount of the case load. I talked to Chief Judge Browning and he thought I could just take a lesser load, or the second way that he said could be done was to have the judicial council meet and decide that I was physically unfit to do the work in which case they could order me a lesser amount and I could still have my full salary. I didn't feel right about either of those proposals. It didn't seem right to me that I should be doing a lesser amount of work than my brothers and sisters on the court and getting the same salary. There was another means which was an early retirement after five years and one receives 50% salary if one had to retire for physical reasons at that time. I applied under that provision. It was accepted, and my salary was cut to 50%, my retirement is also cut similarly. But I didn't

feel I was sluffing as far as doing my share of the work, and I have carried on a 60% caseload since that time and I still am.

TS: Do you plan to continue that for some period of time? You're now age 72, coming up 73?

RB: That's correct. And as long as I'm physically and mentally able to do it, I'm very comfortable with this workload. It gives me plenty to do. I enjoy the stimulation of the work. I particularly enjoy working with the bright, young law clerks that we have. It's a nice type of life and at the same time I don't feel I have to do anything so it makes a pretty good situation.

TS: I think except for some dwelling on interesting cases in your 9th Circuit tenure, we've probably covered what is sought in one of these interviews. Your personal life now - I know you're able, at least on one occasion, to go fishing because you and I have had just had a nice long weekend as it were of fishing in the wilderness. How about other aspects of your social and personal life. The tennis and bridge and those sorts of things.

RB: In Pasadena, I still play some tennis, and I play a little bit of golf. I play very little bridge there. I play a little social bridge with my wife once in a while. But I haven't joined an active bridge group. Here in Juneau I still play with at least

one of the persons that I played with for forty years and we have some pretty keen games.

TS: I think there's an incident in your personal life of which I know, you might want to make some mention. You said you were living in an apartment within walking distance of your work there. If I'm not mistaken you and your wife suffered from the effects of a severe fire in those quarters.

RB: On December 6 of last year, I was just going to bed and my wife was awakened by a loud explosion - it was 11:20 because I looked at my watch. At first we didn't know what it was and then shortly we heard people running around and saw the sky lighting up. People knocked at the door and said, "Get out just the way you are - there's no time - run." We grabbed our bathrobes and ran out in the street. There was a new condominium building being constructed next to ours. It had three floors of wood framing. Apparently it was done by arson ---
End of Tape 4, Side A

TAPE 4, SIDE B

RB: The flaming debris floated over and caught our building on fire. We got out with just our bathrobes but fortunately most of our art work, letters, records and that type of thing were not

destroyed. Our furniture was pretty badly damaged. The top floor was burned severely and there was a lot of water and smoke damage on the rest of it. They still haven't completed the rebuilding.

TS: Were there other judges of the 9th Circuit living in this building?

RB: No, we were the only ones. So we're renting temporary quarters in the meantime.

TS: I think we're probably ready to turn to cases of interest during your tenure on the 9th Circuit, if you have notes on any of those.

RB: I might make one other comment on the 9th Circuit. I mentioned the huge size of the circuit, and we have a very interesting mix of judges. We have all political parties. We have different religions, different races, and we have an amazing degree of collegiality on the court. One of the pleasures on it is working with people with different views and yet respectfully discussing those different views, and it's very rare that it gets involved in personalities. Once or twice I've seen this happen and it can be very disruptive. I can say truthfully of the other judges that I find them very able, very conscientious and I respect just about every one of them. There are now 27 active judges as well as ten senior judges.

TS: And your system of assignment is that each of you works at one time or another with all the others.

RB: That's correct, so you don't just sit with same two judges each time.

TS: What about en banc, is that a nine member or eleven member panel?

RB: That's an eleven member panel. They draw them by lot. They have approximately six in a year. As a senior judge that's one place where you fall out. You are not automatically eligible for an en banc. In the event that it's a case that one sat on originally, the senior judge may request placement in the pool.

TS: Is that a process of any unusual distinction from the usual panels worthy of comment?

RB: Obviously trying to get an opinion through eleven judges is quite a bit harder than trying to get one through two other judges. Frequently there will be splits where you'll have maybe three different opinions, the majority opinion, the concurring opinion, another concurring opinion, and maybe a dissent. There's more apt to be divergence and it takes a longer time to get them finalized as a rule.

TS: What gives rise to a case going to an en banc procedure?

RB: There are two main criteria. One is if there is an intra-circuit conflict. With as many cases as our circuit decides, we have to be very careful that one panel doesn't go off on one direction on an issue while another panel is going off in the opposite direction. Once in a while that happens and to resolve an intra-circuit conflict we go en banc to decide what the rule is. Another criterion is that the case is of extreme importance. This is one of the things one has to learn on a big court. There are going to be panels that are going to decide cases differently from the way that I would decide them. One has to live with those cases. It's only if it's a matter of really major importance that it justifies the time and effort to go en banc. You can live with some other one's views even if one doesn't happen to agree.

TS: Perhaps you're ready to turn to some cases of particular interest that you've worked on during your 9th Circuit tenure.

RB: One would be Lawson v. Kolender, 658 F.2d 1362 (1981). There was a statute requiring that a person provide a reliable identification when requested by a police officer who had reasonable suspicion of criminal activity. We held that that statute was unconstitutional. It had been applied to a young black man. He had been arrested ten different times, I think,

under this same statute. He'd be walking through a neighborhood, and they would just pick him up, question him, and he would refuse to give them an I.D. and they would arrest him. We held that it violated due process, and that it was encouraging arbitrary and discriminatory enforcement because it left it up to the police officer on the beat just to decide who he thought was suspicious of criminal activity merely by being in the neighborhood. The case went up to the United States Supreme Court, and the Supreme Court affirmed it.

Another case was Norris v. Risely, 878 F.2d 1178 (1989), a very recent one involving a person who was accused of rape in Montana. During the course of his trial his attorney objected to the fact that there a number of women in the courtroom with large buttons saying "Women Against Rape." The state judge refused to consider the objection and then it came up to us on habeas corpus. We remanded it to the trial court to determine whether there were such women in the court and if there were a large number then we held it would violate his right to a fair trial. If there were a lesser number, the court was to consider the impact on the trial.

TS: Are these cases in which you wrote the majority opinion or participated on the panel, or are you talking about the 9th Circuit generally?

RB: These are cases in which I wrote the majority opinion. Another one was Rodgers v. Watt, 722 F.2d 456 which was an en banc

case in 1983. It was a question of what constituted excusable neglect for failing to file an appeal within thirty days. In that case, the majority of the original three-judge panel held that it was not excusable neglect. I dissented, and the case was heard en banc. I wrote the opinion for the en banc court which was unanimous, holding that it was excusable under the particular circumstance. I've always felt that time limits have to be viewed reasonably so that, whenever possible cases are decided on their merits, although I realize that it is necessary to have rules to run a court and to run it efficiently.

Another case that is a very recent case, that has just gone out, is Sohappy v. Hodel, which involved going back to the Indian treaties of 1855 granting fishing rights to the Indians on the Columbia River and granting them the right to maintain certain structures on their fishing grounds. When the Bonneville Dam was constructed they flooded these areas and gave some in lieu lands to the Indians. Eventually the Department of the Interior ordered that there by no year-round structures on those lands. The suit was brought by the Indians to prohibit enforcement of that regulation. In a split decision, I authored the majority, holding that an Act of 1945 which said that the in lieu lands would be maintained under the same conditions as the prior treaty lands controlled. Based on the fact that there was evidence of year-round structures on the prior treaty lands, in fact going back to the Lewis and Clark expedition where mention is made of such structures on the land, the majority held that the regulation was

unenforceable. There was a very strong dissent by Judge Kozinski in that case. One other case that I might mention is Sierra Club v. Marsh, 816 F.2d 1376 (1987) requiring compliance with the Endangered Species Act in the construction of large highway project in San Diego. I think probably there is more heat on the 9th Circuit because of the Endangered Species Act than almost anything else. The decision in regard to the enforcement of the act as applied to the Spotted Owl in Oregon timberlands has created a great deal of dissension.

TS: Has that come to your court?

RB: Yes, it has. I did not sit on that case, however. But that is one of the arguments that is made for trying to split the 9th Circuit. The contention is made that judges that aren't familiar with local conditions are making decisions. It so happened that on the Spotted Owl case, I don't remember the name of the case, Judge Goodwin, who is from Oregon and sat on the Oregon court before he sat on the Federal court, was one of the judges.

TS: Are there other cases that you wanted to mention.

RB: I think that's a good sampling. In the case of Hill v. INS, I wrote the opinion holding that the INS had impermissibly refused admittance to an Englishman, who had been invited to address a

meeting in San Francisco, because he admitted to being a homosexual.

In another case which I authored, Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989), we held that the Republic of China (Taiwan) could be subject to suit in California for the murder of an American Chinese critic of the leaders of that country It was established that the murder was ordered by the Republic's chief of security, although it was contended that he did so without authority.

I had an important antitrust case involving an agreement among movie exhibitors to exclude a competitor, and the question of participation by the large movie distributors. Harkins v. Nace, 850 F.2d 477 (9th Cir. 1988).

There are so many cases, unless one goes and looks at them again, it's hard to keep them all in mind. They all are tremendously important when one's working them up and getting them out, but they tend to blend after the years to a certain extent.

TS: With relation to the issue of splitting the circuit, as a judge on the 9th Circuit are you involved in that controversy.

RB: Not actively. From time to time I'm asked my opinion on it, and I certainly have no hesitancy in stating it.

TS: Why don't you go ahead and do that.

RB: When I first came on the court and the court had expanded, I thought maybe it was too large and maybe we should split. But on seeing how the court has been able to manage its caseload and manage reasonably to keep its cases from going off on tangents, that is creating intra-circuit conflicts, and principally because I think that the large circuit is the only solution to prevent increasing the layers of courts. I oppose splitting the court. If all circuits were confined to say thirteen judges, which was at one time thought to be the maximum that should be on a circuit, you would have probably double the number of circuits you have now, and there is no way but it's going to keep increasing. As the caseloads go up, population goes up, you have to have more judges to handle them.

TS: So your current view is that it's not necessary to spit the circuit.

RB: That's correct. More from an administration of justice setup, I don't think that once you have a district court decision, you have a court of appeals decision, and then you have the Supreme Court to decide circuit conflicts and to decide the really important constitutional issues. If you increase the numbers of circuits - in fact its already been suggested to have another court to handle inter-circuit conflicts before the Supreme Court receives them - you'd have another layer of courts between the

courts of appeal and the Supreme Court, and I think that's the last thing we need.

TS: You've been through the tenure now of two of the distinguished Chief Judges of the circuit. Judge Browning was there when you first went on the court, and now Judge Goodwin. Is there an appreciable, noticeable difference in the working circumstances of the judges with the change in chief judgeships.

RB: I don't notice any marked difference. Both Judge Browning and Judge Goodwin are workaholics. They work tremendously hard. They're both very devoted to seeing that the circuit does as good a job as is feasible. I have a great deal of admiration for both of them. Their styles are a little bit different. They have a very difficult job in handling all the different judges - keeping their feathers from getting ruffled - and in administering a very large and complex machinery. They're in charge of the administration, not only of the court of appeals, the district courts, the bankruptcy courts, the magistrates, all down the line. It's a huge machinery. I just have a great deal of admiration for both of them on the amount of work and the amount of intelligence they put into keeping this machinery working smoothly.

TS: I think we've about covered the ground, Bob, unless you have some concluding comments that you might want to offer about your

experience - your life experiences generally and particularly as a judge, and a judge of the 9th Circuit.

RB: I think, Tom, that we've probably covered it all very adequately. The one aspect that we haven't really covered at any great length, and I don't think there is any way of doing it in this type of a discussion, are the trial cases I had as a lawyer. Those are the ones that stand out in my mind.

TS: A lot of rich history there.

RB: There is. And a lot of them had humorous incidents as well as many of them involving substantial issues.

TS: Maybe you can save that for published autobiographical notes.

RB: In any event, I don't think it's appropriate to lengthen this one. I think we've probably given a more lengthy history than they may want.

TS: Well, they asked for it, Bob, so they've got it.

RB: I do want to thank you so much, Tom, for taking your time in doing this.

TS: It's been a real pleasure, I've thoroughly enjoyed it. I'll send along these tapes to Chet Orloff, and I'm sure that you will have the opportunity either to supplement them or to correct where you think something has not been properly expressed, and especially when they are transcribed, I think you'll have the opportunity to edit and correct as need be. All right, if there's nothing else then, we'll close the interview at this point. Thanks so much.

End of tape 4, side B (19.07)

CASE RECOLLECTIONS OF ROBERT BOOCHEVER

TAPE marked #1 -Side A

This is Bob Boochever, and the date is August 17, 1990. I am going to attempt to tell about some of the trials I was involved in during twenty-five years that I was a trial lawyer in Juneau, Alaska. That was the period between 1947 through 1972. In fact I can add a year and a half to that because that was while I was in the United States Attorney's Office in Juneau. I first came to Juneau as Assistant United States Attorney in January 1946. The former U.S. Attorney had left, and Patrick Gilmore had been appointed as the U.S. Attorney. He was leaving from service in the navy to come back to Juneau. I arrived a day before him, although my trip was somewhat delayed itself in that we could not get into Juneau because of a blinding snowstorm and had to spend the night in White Horse at a temperature of minus fifteen degrees. The next day we did manage to get in to Juneau.

The first case on the desk of the U.S. Attorney when we both got to work, in the then territorial Capitol building, was the Meeks case. A man had been found murdered, in what was then the nicest residential district, in Juneau and was found with his throat cut from ear to ear. At first the police were unable even to identify who the victim was. He was wearing a Hickey Freeman suit, which was a very good name of suit at that time, and I guess still is, and there was only one store in Juneau that sold that

type of suit. The B. M. Behrends store. It's manager, John Doyle Bishop, was the one that had to identify the body. He identified the person as a man name Campbell who had recently come to Juneau from the Indian Village of Hounah, where he had been engaged in shingling roofs on a housing project. He had been seen flashing two thousand dollars in hundred dollar bills. When his body was found his pockets were inside out and he had no money on him. At that time, the F.B.I. assisted the U.S. Attorney's Office in the investigation of major crimes because Alaska was a territory. A man named Bill Didelias was the local agent in charge of the investigation, and he did a tremendous job. He worked down on South Franklin Street with a number of the characters who were down there. At that time there was a red light district down there. He traced all leads on the case. At one time there was a fight in one of the boarding houses on lower Franklin Street, and the police went to investigate. A man name Meeks was involved in the fight. The police found nineteen hundred and sixty dollars under the pillow on his bed. Nineteen hundred dollars were in hundred dollar bills. Meeks had been broke shortly before that. In any event, there were a whole number of minor little steps that linked Meeks to the crime, although there was no eye witness. There were people who saw Meeks and Campbell, or people that appeared to answer their description, heading up the hill on the night of the murder. We pieced together the facts that Meeks had lured Campbell up the hill to the site of a house that was being built there by Harold Foss, who was a leading architect of Juneau.

Meeks had probably told Campbell that there was an opportunity for a good shingling job there. By coincidence later on, we bought that house and lived there very happily for a number of years. Going back to the case, one of the key items in it was a man named Skinner reporting after the murder that he had swapped watches with Meeks. The F.B.I., on the chance that they might be able to trace the watch that Meeks had swapped to Campbell, had all of the pawn shops checked in Seattle, which had been Campbell's residence. Lo and behold, in three of the pawn shops the records showed that a watch bearing the same number as the swapped watch had been pawned by Campbell. When we had the trial, we brought those pawn brokers up to Juneau. They had their big pawn books with them to show the record where they had this watch indicated as being pawned by Campbell. It was admitted under the exception to the hearsay rule called the book entry rule. There were a number of other links of similar nature, although not quite that damaging in the case. The case was tried before a jury and it lasted for three weeks to bring in all of this circumstantial evidence. At that time there was capital punishment in Alaska, and the jury was required, in a first degree murder case, to come in with a verdict of guilty or not guilty, and there was a third verdict, guilty with leniency. If the verdict was guilty and did not have the "with leniency", then capital punishment was mandatory. The punishment at that time was by hanging. In this case, the jury stayed out overnight on the decision whether or not

to come in with leniency, and finally came in with first degree murder with leniency.

An odd incident occurred during the trial. There was a man who was delivering telegrams for the Alaska Communication System, which was in charge of all telegram messages at that time. He went around in sneakers, and he frequently came into the court and was paying attention to the trial. Then he got in touch with the defense attorneys, who were Bill Paul and Henry Roden. Henry Roden was a former territorial attorney general and a very distinguished old lawyer who had a lot of wit and humor. The man whom I am speaking about, who had been delivering telegrams, it turned out had been a famous trial lawyer and had participated in the teapot domes cases in Washington, D. C. He had hit the skids, had been an alcoholic, but he had straightened himself out and he decided that he wanted to make a comeback and that this would be an appropriate case. He had never been disbarred and upon request of the defense attorneys, he was admitted to help try this case. Well he turned out to be a very skilled, trial lawyer. The judge was Judge Joseph Kehoe, who had come down to try the case. We had no judge sitting at that time in Juneau. Judge Kehoe was a good judge, but he had a low boiling point. The attorney, J. J. O'Leary, to whom I referred a minute ago, baited Judge Kehoe. At one point, Judge Kehoe told him, "If you ask that question again, Mr. O'Leary I'm going to hold you in contempt of court." In a few minutes, O'Leary had asked the question in a different way. Judge Kehoe blew up. He said, "You're in contempt of court, you're

ordered out of this court room and you're not to participate in the trial any further." This was done in front of the jury. After the case was all finished and the verdict had come in, an appeal was taken to the United States Court of Appeals for the Ninth Circuit, the court on which I now sit. After due course, the opinion came out reversing the guilty verdict and ordering a retrial because of the holding of Mr. O'Leary in contempt. The court also held that O'Leary's question had been proper. Incidentally, I had objected to that question. So, it was necessary then to retry the case. It was two years later by that time, and I was then in private practice with Bert Faulkner and Norman Banfield in Juneau. I was called to come back to retry the case as a special assistant to the United States Attorney General. The retrial took three weeks just as the former trial had taken. In this case, one of the witnesses was in Japan and had to be brought back - another was in Germany. We got all of the witnesses back, and the case went through again the second time. I might add that this time, Mr. O'Leary was not participating because he had died in a plane crash. The second time, the jury stayed out overnight on whether to come in with first degree murder or first degree murder with leniency, and the result was exactly the same. First degree murder with leniency.

One of the early cases that I had when I was in private practice, was a case involving a fur coat that had been placed in storage in the Goldstein Building in Juneau, Alaska. Charlie

Goldstein was a member of a pioneer family. His father and mother and Charlie had arrived when he was a young boy in the early 1880s, shortly after Juneau was discovered. They had a general store and later Charlie engaged in the fur trade. He would go up into the interior of Alaska, learned to speak the Tlinket language and had many years of working with the Indians in the fur trade. His store became quite successful and eventually he built a substantial structure in downtown Juneau known as the Goldstein Building. He continued his fur trade to a certain extent and also kept a cold storage place to store furs over the summer period for people who wished to store their furs. A lady, Mrs. Brown, stored her fur coat there and when she got it back she thought that she had been given a coat that was inferior to the one that she had stored and that it no longer fit her. It was too tight. She, therefore, insisted that this was so, despite the fact that Charlie Goldstein swore that it was the same coat and there was no way that it could be a mistaken coat. She brought suit, and the trial took place. During the course of the trial I remembered that I measured Mrs. Brown bust, which was quite expansive, to show that she had increased in girth during the summer months. Charlie had had a paper tracing made of each coat that was stored. In other words, he took it and had it outlined on paper so that there was a record of the coat as it was presented to him. I was able to show that the measurements of the coat were the same as they were when presented by Mrs. Brown. The real key to the case, however, was when a witness testified for Mrs. Brown that there

had been a snag in the coat that had been repaired. One could not see any evidence of the repair to the coat on looking at it and on looking at the lining. We obtained the court's permission, however, to open up the lining of the coat. When that was done, there were the repair marks clearly shown on the shoulder of the coat. Needless to say, that case was an easy victory.

While I lived in Juneau, there was a large apartment building, at least large for Juneau, that was constructed on Fourth Street that was a short distance from the territorial capitol. This involved a fairly substantial excavation before the foundation was poured. Adjoining the apartment building was the house of J. Gerald Williams, who was then the territorial attorney general. Jerry was a very flamboyant person with a deep voice, who would shout across the room so that everyone within a block could hear him. Everyone could hear him from one end of the room to the other no matter how many people were in it. In any event, we attempted to settle the case. He claimed that his house had been substantially damaged - that it had cracked open - and that it was very drafty as a result of the blasting for the foundation for the Mendenhall Apartment Building. One of the key features in the trial, I remember, is that I had located a witness who had rented a couple of downstairs rooms and bathroom in the Jerry Williams house prior to the apartment's excavation. This lady testified that she recalled during the winter that one night she had left a wet wash cloth on the floor of the bathroom. When she

came in the next morning the wash cloth had frozen to the floor. This illustrated that there had been quite a bit of draft before the blasting had occurred. The case was tried before Judge Folta, and he came up with a reasonable verdict of damages, but Jerry felt that it had not been as much as he thought he should have received. For a number of years, he was quite antagonistic towards me and we had a rather cool relationship. Though after some time, I think that it no longer rankled.

Another case, which I had, involved the editor of the Sitka newspaper. She was a lady and quite a talkative one, who had been at a Rotary luncheon in Sitka at a local restaurant. While she was getting ready to eat, the waiter came up with the blue plate special and started to bring it in by the side of her head. The Lady, Mrs. Veach, turned her head sharply at that time and her jaw struck the plate. She had all sorts of difficulties with the jaw after that. It involved as I recall the zigomatic joint. She went to one doctor after another, and huge medical bills for that time were accrued. We discussed settlement, but there was no chance for settlement in the case. She bought suit which went to trial in Juneau. I remember that we had a psychiatrist who examined Mrs. Veach, and we were lucky enough to have that examination during the course of the trial. The psychiatrist testified that most of her injuries were in her head, although that may not be the right term to use when the claim is a jaw injury. In any event, the jury was not impressed with her

testimony, and I think they believed that she exaggerated her symptoms. As a result they came in with a verdict for the defendant. Later I was in Sitka and I went to eat in that restaurant. They had the plate hanging on the wall with a little note relating that this was the famous plate that had caused the law suit.

I defended another Sitka case. That of Tuengel v. Board of National Missions of the Presbyterian Church. Mr. Tuengel was a barber in Sitka. He had some kind of an illness and had gone to the hospital that was operated by the Board of National Missions in one of the old buildings in Sitka. The hospital had a door that opened over the steps going down to the basement. There was a small sign on the door saying "No Admittance Basement Steps." One day, Mr. Tuengel walked down the hall of the hospital and he came to this door, opened it, walked in over the dark steps, fell down and broke his arm. He brought suit against the Board of National Missions. Our first defense was that of charitable immunity. Judge Foulta, our judge at that time, outlawed that defense in a rather novel case at that time for Alaska. I think he reached a correct decision, but prior to then there had been a substantial amount of authority that you could not sue charitable institutions for negligence. Then the case went on to trial. During the course of trial, there were a number of factors that came into it. I was able to show that Mr. Tuengel's injuries, as far as his shoulder was concerned, were nowhere nearly as severe

as he indicated. I was successful in the old gambit of asking Mr. Tuengel - after he showed that he could only lift his arm shoulder high - how high he could lift it before the injury. He raised his arm above his head. It also appeared that he wore glasses as a rule, but I secured an admission that he did not have his glasses on on the occasion of the incident where he opened the door and walked through it. I was able to show, by taking off his glasses in court, that he was unable to read a sign of fairly large letters from a fairly short distance without his glasses. Again, we were fortunate in getting a defense verdict in that case.

In the early days of my private practice, there were two large firms in Juneau. Each consisting of three attorneys. One was our firm, Faulkner, Banfield and Boochever, and the other was the firm of Robertson, Monogle and Easthaugh. At one time, Bert Faulkner, who was a very distinguished and able attorney, was trying a case, and I sat in on it. One of the key witnesses on the other side was a native woman who had a long history of convictions for drunkenness. Mr. Faulkner took the most of his opportunity to impeach her by use of those convictions. He asked "Were you the Minnie [I don't remember her last name] who was convicted on August 1, 1943 of drunk and disorderly conduct on South Franklin Street in Juneau, Alaska?" She admitted it. He then went through five other convictions for drunkenness. Each time she admitted that she was the person who had been convicted. Then after giving the last admission, she said, "But you know Mr.

Faulkner, it was all your fault." He was so taken aback that he did the one thing that a trial attorney should not do. He asked her, "Why did you say that?" Her response was that "Quite a while ago, you and Mrs. Faulkner had a party at your house, and I was asked to help in the kitchen. You served wine, and for the first time, when no one was looking, I tried the wine. I liked it, and I became an alcoholic as a result of drinking wine at your house." There wasn't much Mr. Faulkner could do after having asked the question, "Why?", so he didn't say anything more. She was excused. At the end of the day, he was leaving the courthouse and came through the door at the same time that she was leaving. It had bothered Mr. Faulkner because he couldn't remember her ever having worked for him. So he turned to Minnie, and he said, "Minnie you know you told about having helped us at our house and having drunk wine there, but I can't remember your working for us." She looked at him a little more closely and said, "Oh, that's a good joke on you Mr. Faulkner, it was Mr. Robertson that I worked for."

Two close friends of mine, Keith Wildes and Walter Fields went on a caribou hunt in the area near Tok, in the interior of Alaska. Keith had multiple sclerosis at the time, and thus was unable to walk very far. The two of them, however, had parked their car and they had left the road by the requisite one quarter mile when they spotted a herd of magnificent caribou coming up to a hill. The hunters hid behind a rock, and soon a caribou came up

to the top of the hill and Keith fired. He didn't see the caribou fall and thought he had missed. A minute later another caribou came up. He fired again, and this time he saw the caribou go down. They only wanted one animal so Walt didn't shoot. At that time the limit was one each. They got up to the top of the hill, and lo and behold there were two huge caribou that had been killed. Apparently the first one had gone down immediately and Keith had not seen that he had shot him. They were able to take the hind quarters of each of the caribou and by much hard work got them to the highway. They left the front quarters, which would have been pretty tough eating anyway but still had lots of meat on them. The fish and wildlife representatives at Tok discovered the front quarters and charged them with wanton waste of a game animal. I received an emergency telephone call to get up to Tok in order to defend them. I was also asked to bring Dr. Bill Whitehead, who was Keith's physician, to testify about his physical condition. It was a long trip to Tok. There was no way of flying in there at the time. We had to go by ferry to Haines and drive up the highway, so it was a two-day trip. We got there and shortly thereafter, we prepared for the jury trial in the very small town of Tok with a couple of hundred residents. Of those residents the fish and wildlife representative and his wife were probably the most popular. It was not the most auspicious of circumstances to try a jury case. We tried the case, and I thought we were doing reasonably well in explaining how this had occurred by accident, that they had done all they could to take

out the good part of the caribou, and Keith's condition. I also called Dr. Whitehead as an expert witness about his condition, but unfortunately, Dr. Whitehead decided that the best way to act in this circumstance was to be very country and homey. He sort of gave a corn pone imitation of a doctor, that I could see was going over like a lead balloon. In any event, we were still doing all right when the defense started their case. The fish and game people had somehow managed to bring the front quarters of these huge beasts including the heads and magnificant antlers into a cold storage. They brought out the frozen front quarters and placed them in front of the jurors. They were immense. There was no way that you could look at them and not think that there was a lot of meat on those front quarters. It didn't look very good at all for the defendants. We gave our arguments to the jury. I did my best on it, but I thought we sure had a loser. The jury stayed out a long time. Finally they told the judge there was no way they could reach an agreement. The case was ruled a mistrial, and I just couldn't understand how we had persuaded one of the jurors. It was after the case was all over that I found out that one of the jurors also had multiple sclerosis, and he sympathized with Keith's position in the case.

That wasn't the end of that case. The district attorney's office decided to retry it. This time I had time for some legal research. I filed motions and argued the legal point that the territorial legislature did not have authority under the Organic Act for the Territory of Alaska to pass that law for Fish and

Game. After a long, long time the judge in Fairbanks upheld my motion to dismiss the case. So that ended the matter.

Another trial that I had involved a young man named Monte Wilkins. Monte was a tall, nice looking young man who had been a star basketball player, but he was also quite a partygoer. One night he was at the Pamaray Bar, named after Pa and Ma Ray who were the former owners. Their son, Bill Ray succeeded to the ownership of the bar and he was, for many years, a territorial and state senator from the Juneau area, and a very prominent person in the area. Monte was having a good time at the bar, and he went behind the bar to mix himself a drink. The bartender told him to get out from behind the bar. Monte didn't respond right away. The bartender took a 357 magnum revolver, which was kept behind the bar, and which the bartender believed to be unloaded, pointed it at Monte and pulled the trigger. As in so many cases when people think that the weapon is unloaded this had a bullet in it. A huge bang occurred and the bullet went through Monte's abdomen sending him to the hospital in pretty serious condition. He was a strong young man, however, and after some time he recovered. He came to me to bring a lawsuit against the bar owners for the shooting. It seemed to be a pretty easy case. There was an argument of contributory negligence which was a defense at that time, but there could hardly be any doubt that the sole cause was the negligence of the bartender in shooting Monte. One defense that was raised was under the old Alaska code that no one had a

right behind the bar but the bartender. I didn't think that defense was going to be too successful. Well I had what looked like a very good case when Monte got out of the hospital. He then got drunk again and got engaged in a fist fight with another person on the dock. During the course of the fist fight the other person lost his ear, which was found on the dock, and then was knocked into the water where he drowned. Now Monte was charged with murder. Since I was already representing him, I was burdened with the task of defending him on the murder case. The best we could do was to get it reduced to manslaughter and a relatively short term in prison. He was given I think five years, and with good behavior he got out in about two and a half years. So at that time we could try the bar case. We eventually tried the case and were reasonably successful in it, but the value had gone down a great deal after that fight on the dock.

The winters in Juneau could be quite mild for periods of time and then would get really severe with winds that were called the Taku Winds because they came off the Taku Glacier and the Canadian areas of great icecaps behind it. These winds could reach tremendous velocity, and it usually occurred when the temperature was at its coldest - minus zero. There were some new apartments being built on Douglas Island. They were constructed with an overhanging roof. A "Taku" came up the winter after their completion with gusts up to one hundred miles an hour. It took the roof completely off the apartment building and blew it over

where it landed on the mayor of Douglas' house, and also on his new car. The mayor was Guy Russo. I first represented the insurance company, and we arranged a settlement with the Russos. Then I took the subrogation claim against the owner and builder of the apartment building. The defense was that it was an act of God to have a wind of that velocity. We were able to show that the roof had not been properly secured - that there were accepted methods for securing a roof which would have withstood even the Taku winds of that date. We also showed from weather records that Taku winds of that speed were known to have occurred repeatedly over the years, with intervals of three to five years. So we were successful in that case.

I guess old attorneys like to tell about their successful cases and try to forget about the ones they lost. I'm not pretending that I didn't lose a certain number of cases. I can remember one of those cases in which they were painting the Juneau-Douglas Bridge. At that time the bridge had a superstructure above the roadway portion of the bridge. The painters were up there spray painting the bridge. They had long narrow hoses which dropped down from the painters' platform. A man named Balog, who was the clerk of the City of Douglas, was returning to the city in a pickup truck while working for the city. The tail of the pickup truck hooked the trailing paint hoses and, without the knowledge of the driver, pulled the two men who were painting the bridge from the scaffold. Each received

fairly substantial injuries and they brought suit against the City of Douglas. I was asked to defend. I tried to defend on the basis that there was contributory negligence in having the hoses hanging down in front of the truck as it approached. One of the key items of the case was that when Mr. Balog, who didn't know that anything had happened at all, arrived in Douglas there were the hoses draped over the stern of his pickup truck. I lost that case.

A major case which I tried involved the question of the location of the capital of Alaska in Juneau. When Alaska became a state, the constitution provided that the capital shall be at Juneau Alaska. The provision, however, was in the transitional provisions of the constitution and not part of the main body of the constitution. The question then arose whether the provision could be amended by law including by initiative, either of which was a rather simple means of changing it, or whether it required the much more complicated and difficult procedure of a constitutional amendment. There were good legal authorities for both sides of this question. We had already had one capital initiative immediately after statehood. I had participated very actively in the fight to keep the capital in Juneau. It was a most difficult one because the main advocate for the move was the Anchorage Times, the largest newspaper in the state. It had a great deal of influence particularly in the Anchorage area which had about half the population in the state. In the first capital

fight, I participated in debates and gave talks throughout the state, even up to Nome, and we won the election by about a ten percent margin. Two years later, they started another initiative. This time we brought a court challenge contending that they had to change the constitution by amendment. The case was finally heard by the Alaska Supreme Court, which at that time consisted of three judges, Justice Ahrend, Chief Justice Nesbit, and Justice John Dimond. I can remember the argument well. Joined with me in making the argument was a state senator from Fairbanks, Bob McNeeley. It was decided to have Senator McNeeley participate so that there would be representation in the case from other areas of Alaska than Juneau. Senator McNeeley said that the whole point of putting it in the transitional part was that it was the type of compromise that the legislature always makes. It didn't actually help us a great deal on the legal point that it was part of the constitution. I was away from the state when the decision came out, and I remembered how disheartened I was when I heard that by two to one the court had held that it was permissible to amend the constitutional provision pertaining to the capital by initiative. The decision was by Chief Justice Nesbit and Justice Dimond with Justice Ahrend, dissenting. The case also was very difficult for Justice Dimond, a resident of Douglas, Juneau's neighboring city. He had been an associate of mine when I was in the firm of Faulkner, Banfield, and Boochever, and later when I was on the Alaska Supreme Court, I filled his seat. He had retired for health reasons. He still, however, came back and sat with us from

time to time. He was a very fine individual who tried very hard to be fair in that case and tried to overlook his own inclinations which would have been to have the provision require a constitutional amendment.

End of #1

Tape #2 (Side B)

He had a considerable amount of difficulty after that case when some of his old friends in Douglas refused to talk to him. But Justice Dimond was a very fine individual, and I respected him a great deal although I didn't agree with him on that case.

One of my clients in Juneau was Tom Morgan, who was President of Columbia Lumber Company and ran a sawmill at Juneau, and later he also organized and ran a plywood mill, the Alaska Plywood Corporation. I defended a case for him that was brought by a man named Agostino in Anchorage. The case involved an argument concerning a logging contract. We were successful and the case was appealed to the United States Court of Appeals for the Ninth Circuit. An old - now he wouldn't be old but at that time I thought he was rather elderly - attorney from the South named Bailey Bell represented Agostino. When we argued the case before the U.S. Court of Appeals - I believe the panel consisted of Judges Healy, Bone, and Lindley - Bailey Bell started his argument

by stating, "My client, Mr. Bruno Agostino, is on the shady side of life." Judge Healy interupted him and said, "How old did you say your client was, Mr. Bell?" Bailey said, "Sixty-eight years old your Honors." Judge Healy responded, "We on this court don't consider that very old." The judges were all considerably older than Agostino!

Another more serious case involving Mr. Morgan occurred when he was president of the plywood mill. At that time during the winter, his wife had been involved in a serious automobile accident while on a trip to Seattle. He had to stay down there with her for a number of months while she was hospitalized and was recuperating. The plywood mill had been under financed to start with, and they had a great deal of difficulty in meeting payrolls and in paying the quarterly installments of income tax withheld from the employees' payroll. The government brought a case against Tom for willful failure to pay the income tax withheld. This involved a hundred percent penalty against him, which could have amounted to hundreds of thousands of dollars and would have been absolutely devastating. One means of defending such a case was to pay the amount due for one individual for one calendar quarter, and then bring a jury trial to secure a refund. So we followed this procedure and had the trial in Juneau. Gerald Van Hoomissen, who was then an Assistant U.S. Attorney, came to Juneau to prosecute the case. I defended. It was a bitter fight, and the jury finally came out on Mr. Morgan's side based primarily on

the fact that he was not in Juneau during the quarters when the payments were not made because he was necessarily involved in taking care of his wife in Seattle. Later, Mr. Van Hoomissen wrote a book about his many trials and included that case. He so materially altered the facts that it was almost unrecognizable. He claimed, in his book, that Mr. Morgan's defense was that his wife insisted on going to Hawaii for a vacation or she would not let him enjoy conjugal rights, and that that was the reason he claimed Mr. Morgan did not make the quarterly payments when due. I believe that I am the only opposing attorney mentioned by name in the book. He also had in this book that Van Hoomissen had won the case rather than having lost the case. I hope I'm not taking any such poetic license with the cases that I'm recalling. I am giving them to the best of my recollection, but many of the incidents occurred some forty-five years or so ago, and I have not been able to check records. I'm just giving it from the top of my head.

Another case I had involved a local man named Whitey Thorpe, who had been involved in construction work at Excursion Inlet, where there used to be an army base during World War II. One of the buildings was being converted to a cold storage as I recall. The suit involved monies that a contractor claimed were owed by Mr. Thorpe, and we picked a jury at Juneau. Every one of the jurors said he or she knew Mr. Thorpe, liked him, but could be a fair and impartial juror. In order to have a jury trial one of

the sides had to request a jury. If the plaintiff requested the jury trial, then the defendant did not have to request it. At least that was my view at the time. Thorpe was the defendant in this case, and the plaintiff had requested the jury trial. After we had picked the jury in this case, consisting of "impartial" friends of my client, the attorney for the other side stated: "We now waive the jury." Judge Folta was the trial judge, and he usually was very good on all such rulings. This caught him a little by surprise, however, and since the defendant had been the one that had requested the jury trial, he then allowed the waiver of the jury, excused this wonderful jury that I had and let them go. We then took a recess, and he had the opportunity of looking up the law on it and found that I had been correct, and that as long as one side requested the jury, both sides were entitled to it. Upon coming back after the recess, he advised that he had been incorrect in his ruling and that we could have a jury trial, but that we would have to wait a year until the next jury sat and he had time to schedule the case. Under those circumstances we felt we had no choice but to go ahead on a non-jury trial. It worked out all right in the end, however, as we prevailed.

I had several cases involving a Juneau owner of a mobile home business named, Tom George. Tom was a long-time resident of Juneau, and in fact he is still in Juneau, and I saw him recently. He is now in his nineties. He was a fine man but when he appeared as a witness he almost always gave the impression that he was not

telling the truth. As a result he was a much easier person to have on the other side than to represent. I first was successful in a case against him and then he used to come to me and ask me to represent him on various cases. One case involved a person who had come to Juneau to assist in assembling the mobile homes for Mr. George. He had put some homes together on the big plain left by the retreating Mendenhall Glacier. After assembling a large mobile home, the man left Juneau. That night a strong wind blew the roof off the mobile home. We brought suit on it to recover the damages resulting from it. I can remember we took the deposition of the contractor who had put the homes together. The question was asked, "And what did you say when they told you the roof had blown off the mobile home?" His response was, "Oh shit!"

Because Alaska southeastern communities are not connected by road, the only means of ingress and egress was by plane or by boat. In fact it still is in most cases. The state developed a very fine marine highway system with ferries stopping at each of the communities transporting passengers and cars. One time, Mr. George and his wife were on the ferry. They were leaving the dining room going across an area that had been freshly waxed when Mrs. George slipped, falling and breaking her ankle. We brought that suit against the state and were able to show that they had not used a nonslip wax and that there were no appropriate signs posted to advise the passengers that the area was dangerous and

slippery. I think that it helped to improve the safety conditions thereafter on the ferries.

I had a number of aviation cases during the course of my time as a trial attorney. One involved a helicopter crash at Snetisham where the Corps of Engineers was constructing a hydroelectric power plant to supply electricity for the Juneau area. During the course of the work, they contracted with Livingston Helicopters of Juneau to transport equipment and personnel to and from the mountainous site. On one occasion, late in the fall when there was a wet snow falling, the helicopter took off and shortly later crashed killing the fine pilot named Gisel. We handled first the worker's compensation portion of the case, and then we represented Livingston and the heirs of Gisel in a suit against Fairchild Hiller, who were the manufacturers of the helicopter. The helicopter was one of the first that used a jet engine manufactured by General Motors. This was the first winter in which helicopters of this type had been used. We were able to find out, by discovery and by examining the records of the corporation, that there had been some four or five crashes early in the winter, all occurring during wet snowfalls. By making some tests, we also were able to show that by throwing wet snow into the intake of the jet engine it could cause a flameout stopping the engine entirely. The cases were very difficult because the defense was that the helicopter pilot had flown too low and gone into the trees. It was therefore necessary to reconstruct whether

the helicopter had crashed because of flying into the trees or the engine had flamed out first, causing the helicopter to go into the trees. By developing the flameout theory and proving that there had been a number of such incidents, we were able to settle that case successfully. It involved taking depositions as far as in New York and Pennsylvania.

Another helicopter case involved a crash in the Ketchikan area. The helicopter had fallen into the trees and burned. The pilot was killed and the passenger Fred Wyller of Juneau was severely burned and injured. He was unconscious for a long period of time but he recovered. We brought suit in that case against the manufacturer of the helicopter on the basis that there was a defective part which had broken causing the failure of the rotor blades to function properly. There, the contention again was that the breakage had occurred in the crash and that it was not due to any defect in the equipment. We had a metallurgist who testified and showed detailed blowups to indicate that there was metal fatigue which had caused the breakage and that it was not due to impact. Of course there was a battle of experts in that regard. A good deal of the case depended on Fred Wyller's testimony as to whether the engine had stopped prior to going into the trees or whether the pilot had just flown too low and gone into the trees. Fred was unable to recall anything immediately prior or immediately after the crash when first questioned about it. Later we obtained a hypnotist, and under hypnosis Fred remembered the

incident and remembered that the plane had had the motor trouble before the crash. I did all the preparatory work for the case but was appointed to the Alaska Supreme Court before the trial actually commenced. Av Gross, who was later Attorney General for the State of Alaska and was a member of our firm at the time, tried the case successfully using the hypnotist as a witness. I very much doubt if the testimony would be admissible today, although at that time they did permit the testimony on the basis of the witness' memory being refreshed by the hypnotism.

About that time I had another case that I think would only happen in Alaska involving Alaska Airlines. An Alaska Airline plane was landing at Yakutak when a moose ran out on the runway. The pilot attempted to avoid the moose but the moose was struck by the wheels of the plane, taking the wheels right off the plane. The plane landed on its belly, fortunately without anyone being severely injured except the moose who departed this earth. We were able to establish that there was a moose path leading up to one side of the runway and traversing it, and contended that it was negligence on the part of the state not to have constructed fencing to prevent moose from running across the runway. Again, I had to leave this case because of my appointment to the Alaska Supreme Court, and Av Gross successfully settled the case after depositions were taken.

In another case involving Alaska Airlines, I represented Northwest Airlines which had operated the runway at Shemya, Alaska. Shemya is an island in the Aleutian chain at which planes stopped to refuel on the way to Japan. Alaska Airlines was engaged in a flight to Japan carrying cargo. There were six crewman aboard the plane, which I believe was a DC-6. The plane had been flying for a long time when it approached Shemya to land. The plane hit short of the runway and all of the personnel were killed and the plane was demolished. After the accident, the approach lights leading to the runway were not operative as were the first two lights on either side of the runway itself. The contention of Alaska Airlines was that the lights were inoperable prior to the accident and that the pilot became disorientated because the lights weren't where he anticipated them to be and as a result had crashed. Of course one of the arguments against this theory was that it would seem more logical that the pilot would have overshot the runway instead of hitting short. It was a bitterly and closely fought case, and a very difficult trial involving a lot of complex technical evidence in regard to radar, the lighting system, and the ground control approach system at Shemya. There were a number of expert witnesses. The case was tried in the United States District Court before Judge von der Heydt at Juneau and lasted quite a substantial period of time. At the commencement of the case we had moved to dismiss on the grounds that Alaska had signed an agreement that they would indemnify and hold harmless Northwest Airlines for permission to

use the airport. An initial appeal was taken to the 9th Circuit Court of Appeals on that issue. I did not argue the legal argument before the 9th Circuit. An attorney from the New Jersey firm of Shanley and Fisher argued it. The 9th Circuit held that the agreement to indemnify and hold harmless, as applied to indemnifying against Northwest Airlines' own negligence, was against public policy and unenforceable. As a result we had to try the case. I tried it, assisted by William Becker, an attorney from Shanley and Fisher, although he did not participate in the trial. We were successful in defending Northwest Airlines in that trial. Alaska Airlines appealed to the 9th Circuit. I went to Portland and argued the appeal, and we were successful in having the judgment which was in favor of Northwest Airlines, affirmed.

One case I had involved the defense of a young man at the Tlinket Indian village of Kake, Alaska who was accused of shooting his wife. The wife was found dead in her bed, and the defendant had shot himself by putting a revolver under his chin and pulling the trigger. The bullet had gone through his chin and exited through the bridge of his nose. By some miracle, he had survived and thus was the defendant in the case. I went to Kake and spent several days investigating the case. There had been a great deal of drinking involved. I think there was some slight question as to whether, based on the angle at which the bullet had gone into the wife, that the defendant had shot her, but there wasn't really much doubt about it. We ended by pleading guilty to the offense

of manslaughter, and he received a five-year sentence, which seemed to be what was customary for that type of offense at that time. He was released in less than three years.

I had another similar case at Petersburg involving a man named Churchill, a part native man of a very good family, who had become extremely drunk and gone home and shot his wife. Again, there wasn't much that one could do in that case except work out the best type of plea bargaining available.

There was a young Irish immigrant in Juneau named Patrick McHugh. Patrick was engaged in some construction work and was doing fairly well. One day he came to the National Bank of Alaska building and went up to the second floor to see an accountant. He came down the stairs, and at the foot of the stairs there was a glass door and glass panel windows going from the floor to the ceiling. Patrick mistook the window for the door and went through it. A jagged edge of the broken glass fell and severely injured his knee. We brought suit against the bank, and in the course of the suit we were able to develop that the window washer had just completed washing those windows so that they were all transparent and looked just as though there was nothing there between Patrick and the outside. We were successful in that case, and Patrick very shrewdly invested his money in real estate in the Juneau area, and at one point was quite wealthy.

Another aviation case that I defended involved the Cessna Company. The Cessna plane was flying in southeastern Alaska when the pilot gave a message, May Day, May Day, May Day, Helm Bay. May Day of course is the emergency message that would be sent in time of peril. The plane was later found crashed near Helm Bay, and the pilot was killed. There was an autopsy performed on his body. It indicated very high levels of carbon monoxide. Suit was brought against the Cessna Corporation, contending that the muffler on the plane had broken open through metal fatigue allowing the escape of the carbon monoxide, thus asphyxiating the pilot. We had a metal expert who indicated that the rupture of the muffler had been caused by the crash instead of by metal fatigue. This was almost the opposite of the case I talked about earlier. We also had a very fine pathologist from the University of Washington medical school who testified in his deposition that carbon monoxide could develop in the blood system after a body had decayed for a certain period of time. Further the doctor indicated that it would have been impossible for the pilot to have given the May Day call with the amount of carbon monoxide found in his blood. I defended Cessna in the trial in Ketchikan. I had Bob Ziegler, who was an attorney and later a state senator from Ketchikan, assist me in picking the jury there. But after the jury was selected, we had a settlement conference and the case was settled.

This is August 18, 1990, and I am going to attempt to conclude my recitation of memories of cases that I tried.

I discussed a case in which the pilot had called out May Day, May Day, May Day, Helm Bay, and the suit was brought against Cessna alleging a defect in the muffler of the airplane. There were two incidents connected with that case that I didn't mention. One, there were some eagle feathers found in the wreckage of the plane. So, one of our theories of the case was that the plane had struck an eagle in flight, severely damaging the Cessna, so that it crashed. There were a number of cases that had occurred in which bird strikes damaged planes. We had an expert pilot out of Juneau, Dean Goodwin, who was a bush pilot for many, many years, who had once run into an eagle and severely damaged the wing of his plane but managed to come down safely. The plaintiff's side in that case contended that the pilot of the plane had landed previously before taking off on the final, fatal part of his flight, and that he frequently picked up souvenirs from the beach and around the places where he stopped, so that he might have picked up the eagle feathers while stopping. We had an argument over that point as well. There's one other little aside that occurred in that case. The Cessna Company, as I mentioned, had several different cases involving contentions that the muffler was defective and causing carbon monoxide problems. We had a meeting in Wichita City in Kansas of the various attorneys. We went through the Cessna plant and studied the way they assembled the

planes, and particularly the care with which the mufflers were constructed. We also discussed strategy of the cases. One attorney from a big firm in San Francisco, whose name I shall not mention, suggested that in my case we secure a private detective to trail the plaintiff's attorney because the San Francisco attorney had a suspicion that he was a homosexual. He thought that if we could secure evidence of this we could get a cheap settlement of the case. I was outraged and would have nothing to do with such a tactic, and I am pleased to say that the person in charge of the insurance company investigation, who was taking care of the defense of Cessna in this matter, backed me up, so that no such investigation was authorized.

I also wanted to make some further reference to the Taku wind, and the Taku wind cases that I mentioned where roofs blew off. In the early days of my practice with Mr. Faulkner and Mr. Banfield, we had offices that were above a grocery store that was run by a man named Harold Bates. I can remember on one occasion going down to my office. At lunch I came out and my wife had come down to meet me with my little daughter, Ann, who at that time was three years old. I was on one side of the street and they were on the other when the Taku wind hit. It knocked my wife down, knocked her coat and her dress up over her head, and my little daughter Ann just rolled along the ground as the wind blew her down the street. I ran across, grabbed Ann, picked up my wife, whose knees were bloody, and got them back on the other side of

the street where an interested group of men were spectators. Fortunately, no one was seriously hurt but it gives some idea of the strength of the wind. At that same time there were pieces of a metal roof that were blowing around that could have been very dangerous. On another occasion, I had walked to work and had not realized that the Taku was blowing downtown. I had on a hat with a brim - not a good hat for the Taku weather, which would be one with ear flaps that tie under the chin. When I got to the corner by my office, the wind hit and blew my hat off my head. I chased it at a brisk speed down Front Street. The hat turned the corner and went on down South Franklin. I continued the chase until it disappeared from view.

Speaking of Harold Bates reminds me of a case in which he was defendant being sued in Juneau. Norman Banfield, my partner, was called as a witness for Harold Bates. In cross- examining Norman, the attorney for the other side asked if he did not have an attorney-client relationship with Harold Bates. Norman said, "I guess you could call it that." The attorney made that fatal mistake in cross-examination by asking, "What do you mean by that?" Norman said, "Well, when Harold needs some legal advice he sometimes comes upstairs to see me, and when I want an apple I go downstairs and get one from the store."

Another, not so humorous incident occurred with Harold Bates. The person in charge of his meat market had a CB airplane. This

man, Elroy Fleek, was a very careful pilot but he had limited experience. He invited Keith Wildes, a good friend of mine, Harold Bates, and me to go on a fishing trip at Thayer Lake. It was pretty weather, and I was eagerly looking forward to the trip. On the day before we were to take off, a friend of ours, Don Marquardt, a good friend of Keith and mine who was an optometrist and had been in Juneau for many years, came back to Juneau for a visit. He was anxious to go on the fishing trip, and since I had many other opportunities to take such trips I let him go in my stead. They had a nice time, and then they took off from the lake. In taking off, Fleek made a number of errors that an experienced pilot would not have done. He took off from the center of the lake instead of from the side of the lake so that he had a limited area to turn at the end of the lake. When he started to turn, he did not have enough altitude to get all the way around, and he headed back for the lake. He could have turned to the other side and gone on down the valley but he continued in attempting to get over the trees back to the lake, and the CB smacked right into a huge spruce tree. Fleek, who was the pilot, and Harold Bates, who was diagonally in the rear of the plane, were both killed instantly. The bubble which the CB plane had in its front, it had a pusher engine, split open and Keith and Don Marquardt flew out, and both were badly shaken and injured landing on the ground in an area approximately a hundred miles from Juneau where there were no people anywhere around. Keith was quite severely injured with a broken collarbone and arm, and Don had

lesser injuries. Don managed to get on his feet and somehow worked his way across the Thayer River, which was the outlet of the lake, to where there was the only cabin anywhere within miles. That cabin happened to have a two-way radio in it, and Don was smart enough to know how to operate it and called in an emergency message to Juneau. In short time a plane arrived at Thayer Lake and rescued them, or else I am sure that at least Keith would never have survived. If it hadn't been for my having decided not to go on the trip, I don't know whether I'd be giving this recitation today.

Getting back to some of the other earlier cases. I had a case in which I represented a man from Petersburg who had a large fishing boat. At that time there had been a Coast Guard structure marking the boundary of the Wrangel-Narrows which ran past Petersburg. This was a narrow passageway between the mainland and an island. The structure had been hit by an iceberg and knocked down, and the Coast Guard had endeavored to find it and made draggings down the channel without locating it. They put out a message to all mariners that there was nothing obstructing the passageway. Subsequently, Nels Otness and his fishing boat struck something which drove a big hole in the bow of their vessel. They attempted to beach it, but it sank. Subsequently it was discovered that this huge structure was partially in the channel but couldn't be observed because it was below the surface. Otness and some friends from Petersburg located it and dragged it back up

where it could be observed. We had tests run on the hole in Otness' vessle and found that there were materials that were imbedded in the side of the hole that matched the material of which the structure was made, and we also found that there was paint on the structure, that we had chemically analyzed, that matched the paint on Otness' vessel. It was still a very tough case because the Federal Torts Claims Act had a provision that if damage occurred as the result of a discretionary function of an agent of the United States then there could be no liability. We contended that once the Coast Guard had exercised its discretion in dredging the channel, and attempting to locate the structure, and in giving out the warning, there was no longer a discretionary function but the case was one of negligence in carrying out the function. This was one of the early cases on that point. At that time, the judge for the Territory of Alaska in Juneau, was Judge Kelley. He was a former commander of the American Legion and was very pro-military. I was concerned that he would have sympathies for the Coast Guard and that we would not fair very well in this trial before him. The case went to trial and there were admirals of the Coast Guard in full regalia who were sitting in the audience during most of the trial. To Judge Kelley's credit, he did not let any sympathies for the military influence him and he gave an award in favor of Otness

Alaska, like many states, has from time to time enacted legislation favoring their local citizens, "local boy"

legislation. At one time, they passed an act which discriminated against nonresident commercial fisherman. I had the case, and we challenged the law and it was tried before three judges of the federal court, which was the practice of that time when there was a challenge to the constitutionality of a state law. I remember that Judge Walter Ely of the 9th Circuit presided at the trial, and Judge Bone of the 9th Circuit with Judge von der Heydt of the district court were the other members of the panel. It was a hard-fought case in which we prevailed.

END OF TAPE #2 (Side B)

TAPE #3 (Side A)

RB: It is August 18, 1990. I'm continuing with the wrap-up of cases that I tried as a trial lawyer. I had just referred to the case of Grant v. Brown, which was a three-judge federal case.

Another case that involved somewhat similar legislation provided for limited entry to the fisheries. Licenses were issued solely to those who had fished in the areas for specified years. The case was a very tough one, and involved close issues on equal protection grounds, and the privilege and immunities clause. There was also an Alaska constitutional provision which prohibited giving exclusive rights to the fisheries. We tried the case in federal court and eventually it worked its way up to the United States Supreme Court. I was assisted in that case by Seth Morrison of Seattle who represented some of the cannery clients who were challenging the litigation, although I made all of the

arguments in the case. We finally went back to the Supreme Court, and Seth, who is known as Si, and I spent most of the night going over possible questions that the Court could ask me on the following day. It was somewhat of a frightening experience to go before the nine justices. I remember that Justice Douglas, recently had some type of surgery, and I think he had a tracheotomy. In any event, there was a whistling note to be heard whenever he breathed. During the course of the argument there were times when two or three of the justices would be asking questions at the same time. It was a very lively argument, and I must say it was an awesome experience for a young attorney. Justice Douglas left the argument about halfway through. I think he was having some trouble with his health apparatus. He was the one that wrote the opinion in the Bosanovich case, and it was a decision abstaining from deciding the case until the Alaska Court decided the issue of the Alaska constitution. As a result, we had to file a new case in the Alaska court, we argued before the Superior Court, and prevailed on the grounds that the law violated the Alaska constitution. The state decided not to appeal the case, but instead went through the procedures for securing an amendment to the Alaska constitution. The amendment passed allowing such limited entry laws, and there was no further challenge to that law, so it now exists today in a modified form.

One of the last cases in which I became involved before going on the bench was a case involving a terrible crash of an Alaska Airlines plane approximately ten miles from Juneau. During a

storm, they had crashed into the mountain apparently believing that they were at the airport when they were some distance away. There was not much question that there was some pilot error, and in addition that there was some error and negligence in the part of the FAA in the maintenance of their ground control approach facilities at Juneau. We represented families of four of the deceased passengers. I remember going to Seattle with Frank Doogan, one of my partners, in order to negotiate a settlement for the heirs of two of the passengers. They were a very attractive young couple, both of whom were stellar students and had great careers ahead of them. We had prepared a loose leaf booklet, complete with pictures, economic analysis, and statements on the law briefing our side of the case. We had an extensive conference with the attorneys for the insurance company, and then each side retired to rooms we had reserved, before attempting to finalize a settlement. I can remember that Frank Doogan was so suspicious that he would not discuss the case with me when we went back to the room to which we were assigned until we went into the bathroom and turned on the water in the faucet so that our whispered conversation could not be heard in case there were any microphones that had been planted in the room. I have no indication that that was the case, but Frank was very cautious. We settled the cases, primarily because the families were very anxious to have it completed and not have further wounds from their tragic experience. At the time of the crash, I was disturbed by the manner in which specialists in air flight cases descended on

Juneau and scurried to secure clients from the estates of the victims of the crash. It was almost like a bunch of vultures descending on a carcass, and it somewhat sickened me. I felt that I'd really had enough of trial work and it was time to go into some new career. It was at that time that a number of openings arose for the United States Court of Appeals. I put my hat in the ring. When finally an Alaskan was selected I was lucky enough to be chosen.

This completes the recollection of cases at this time, and I will close at this point.

It is Tuesday, October 30, 1990. I have just finished completing a portion of my early history which was somehow not recorded in the original interview session. I am now going to dictate on some additional cases from my days as a trial lawyer.

When I was serving as district attorney in Juneau, Alaska, during the year 1946, there was one week when Pat Gilmore, the district attorney, was out of town and I was the only person in the office. During that week, we had three murders in the small town of Juneau. One was the murder of a liquor store owner, Jim Ellen, who was found with his throat cut and his safe robbed. Eventually two black men, Eugene LaMore and Austin Nelson, were accused of the murder. Each admitted to participating in the robbery but each accused the other of actually killing Ellen. The cases went to trial, and in both instances the jury found the

defendants guilty of first degree murder, and did not request that there be leniency. Both defendants were hanged. They were the last defendants to be executed in Alaska, as later the legislature did away with the death penalty.

I am convinced that a white jury had less reluctance to impose capital punishment in these cases because of the race of the defendants. It is difficult, otherwise, to see why the jury in the Meeks case found reason for leniency but not in the LaMore and Nelson cases. Both cases involved identical types of killing motivated by financial gain, and in both the evidence of guilt was overwhelming. People who commit violent crimes and are likely to do so again must be kept locked up to protect society. But because I believe there is practically no deterrent factor to the death penalty and that there is always the possibility of executing an innocent person, I do not believe in the death penalty. Nevertheless, as a judge I am obliged to follow the law and I have voted on appeals to affirm the death penalty when I could see no legal obstacle to its imposition that had not been rejected by the United States Supreme Court.

Going back to the week when the three murders occurred. The second murder involved a man named, Prince, who was what was known at that time in Alaska as a "commission man." There were a certain number of people from prominent families who for one reason or another could not get along in society, usually it was a matter of a drinking problem. The family would send the outcast

to Alaska and would mail monthly checks for living expenses. Prince was the brother of a partner in one of the largest law firms in San Francisco. He was a piano player and had a drinking problem. He lived with a lady who was also an entertainer and came from a prominent family in California. She was found choked to death with a stocking wrapped around her neck. I had the grizzly job of going with the FBI to the small apartment where her body was found.

In a number of cases, a defendant who has been drinking will testify as to all the facts just prior to the actual commission of the crime and then state that he or she blacked out. Prince was just the opposite. He couldn't remember anything that had happened on the night but had a clear recollection of wrapping the stocking around the victim's neck and choking her. The case was eventually settled by a guilty plea to either manslaughter or second degree murder, I cannot recall which. Prince served a certain amount of time at McNeal Island Penitentiary and was eventually released. As far as I know he was not involved with the law again.

The third murder was almost as bizarre. One of Juneau's city councilmen was walking home at night when he passed the small house owned by a Mr. Ashby, one of the oldest residents of Juneau, both in age and length of residency. He heard someone in the house say, "If you come any closer, I'm going to shoot." This was followed by a gunshot and the councilman called the police. They

found that Mr. Ashby had shot a man to death in the living room of his house. Ashby had a son known as "Chick" Ashby, who was an alcoholic. He had brought a drinking buddy home with him, and apparently Mr. Ashby had awakened and ordered the man out of the house threatening him with a revolver. When the man stepped towards Ashby, he shot the victim in the stomach. I was the district attorney who tried the case. It was a most difficult one as Mr. Ashby had an unblemished record. I remember that we had the police officer, Officer Homme, testify as to the dying declaration of the deceased. After relating how he was shot, the victim indicated he was dying and his last words were calling to his mother. The officer was able to testify under the dying declaration exception to the hearsay rule. The jury found Mr. Ashby not guilty on the basis of self defense. That was one case that I did not regret losing.

When I first was in Juneau we used to have a weekly bar meeting at Percy's restaurant. At those meetings, the old timers would recount tales of their trials. A few of those stories, which they swear were true, have become Alaskan classics. One involved a trial at Juneau in which a young woman who lived in the Tlinget Indian village of Hoonah was subpoenaed as a witness. At that time the only means of getting between Juneau and Hoonah was by the mail boat, Estebeth. At the trial, the attorney who had subpoenaed the witness wanted to make sure that the jury knew she was attending the trial because of the subpoena and not because

she voluntarily wished to assist that side. He asked the witness, "Were you subpoenaed by the marshall?" She asked to have the question repeated. The attorney said, "Did the marshall subpoena you?" The answer was, "Yes once on the Estebeth on the way to Juneau and twice in the Gastineau Hotel after we arrived."

In the territorial days, Alaska had six-person jury trials to determine if a person was insane and had to be confined. There was a man named Boltz in the Nome area who had acted in a strange manner and was brought before a jury for a determination of whether he was mentally ill. He elected to represent himself and went on the witness stand. He got up from the witness chair, turned to the chair and said, "Are you nuts?" He then took the witness seat and answered, "No, I'm Boltz." He was not found to be insane.

I had a case in Ketchikan involving a woman who was walking on one of the docks when a plank gave way and she fell to the beach below breaking her leg. I felt it was a pretty solid case. The defendant contended that the dock was really in good shape. He asked that the jury take a view of the scene. When the jury went out on the dock, one of the jurors fell through.

Doug Gregg, an attorney in Juneau, asked me to assist him in trying a case involving the death of a young native man who was driving his boat with his wife and two children in Gastineau

Channel when the boat suddenly swerved, flipping over. The wife and children were rescued, but the man, whose name was Garcia, was drowned. We found that a pulley over which the steering cable ran had pulled loose, causing the motor to turn sharply and flip the boat. We had a Juneau boat mechanic duplicate the conditions leading to the accident by driving a motor boat and then pulling a line so that the simulated pulley was disconnected. The boat swerved sharply, and if it had been going faster would have flipped over. We took a movie of this experiment and had it available to show to the jury. We started the trial against a Florida company that manufactured the pulley, and I gave the opening statement. After the opening statement, the defense asked for a recess and for the first time engaged in serious settlement discussions resulting in a favorable settlement for our client. Doug Gregg told me afterwards that the defense decided to settle when they noted one of the female jurors weeping during my opening statement describing the loss to the family.

I was asked to try another tragic case involving two young boys about thirteen years old who walked up a road along Gold Creek in Juneau. There were what appeared to be abandoned towers for electrical lines, and one of the young men climbed a tower to secure a glass insulator. The lines, however, were high-powered electrical conduits, and he received a severe shock throwing him on to the line. Each time he tried to move he would receive further electrical burns. The other boy ran for help and

eventually the power was shut off and the injured boy was brought down. As a result of the electrical shocks, he lost a leg at the hip, and an arm, as well as having a huge hole in his side that looked as though a shark had bitten him. The young man had a lot of grit, however, and recovered. A question was presented whether the electrical company had taken proper precautions and further as to whether the young man was contributorially negligent. Again, the case was settled, this time after the case went to the jury but before the jury rendered a verdict.

November 1, 1990

I'm going to continue on some of my cases.

We had a case in our office that was handled by Bert Faulkner. A woman came in seeking a divorce. In Alaska there were fairly liberal grounds for divorce including incompatibility of temperament, but it was still necessary to present sufficient reasons so that the judge could find that the parties temperaments were so incompatible that it was not likely that the marriage could survive. A lady came in to see Mr. Faulkner about a divorce. He explained that she would have to show grounds for the divorce, and she said that there was an incompatibility of temperament. He asked her what the reasons were that she felt that there was such an incompatibility. She said, "Recently I was in the hospital and he didn't send me any flowers." Mr. Faulkner responded that that didn't seem very thoughtful on the part of her

husband but he had some doubts as to whether the judge would find that adequate grounds for a divorce. He added, "By the way, what were you in the hospital for?" She responded, "That was when he beat me up."

Another divorce occurred when an attorney from Ketchikan sent a client to Juneau to appear in court and a Juneau attorney was to represent her. The attorney met the client outside the courtroom door just prior to the judge calling the case. I was in court on that day waiting for a case of mine to be called. The attorney went through the usual routine of asking the witness her name, when they were married, and similar facts. He then got down to the important question of, "Why do you want a divorce?" Her response was, "So that I can marry the man I'm living with." The attorney hastily called for a recess and after conferring with his client at some length in the hall, they came back in and she gave more adequate reasons for incombatibility.