

Oral History Interview
Of Ninth Circuit Judge Carlos Bea
by Ben Feuer, Esq.
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Ben Feuer

We are now recording the oral history of Carlos Tiburcio Bea, a Circuit Judge on the US Court of Appeals for the Ninth Circuit. Today is Tuesday, October 15, 2019, and the time is approximately 4:15pm in San Francisco. So, let me begin by thanking you on behalf of the Ninth Judicial Circuit Historical Society for taking your time to give us a description and an oral recollection of the life and times of Carlos Tiburcio Bea.

Judge Bea

It's a pleasure.

Ben Feuer

Excellent. For the future listeners and readers of this oral history, Judge Bea was described in an article by the Los Angeles Daily Journal recently as the most interesting man on the Ninth Circuit, referencing a contemporary advertising campaign, so we hope to explore what about Judge Bea's life has made him so interesting. Or is it just that the other Ninth Circuit judges are so boring? We'll find out. Stay tuned for the next few hours to learn more.

So thank you Judge Bea. Let's start this oral history at the beginning, as Lewis Carroll wrote. Where and when were you born?

Judge Bea

I was born in San Sebastian, Spain on April 18, 1934. My father and mother and older brother were living in a house in San Sebastian, a house we still have, and I visit every year.

Ben Feuer

What kind of work did your father engage in?

Judge Bea

My father was privileged, he didn't work. His father had worked.

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Ben Feuer

What kind of work did your grandfather do?

Judge Bea

My grandfather was a farmer from the environs of a town called Oquendo in our county, or Alava province in the Basque Country. And he was born in 1850. And when he was 15 years of age, he decided that the life of a farmer was not too promising. So he decided to go from Spain to Cuba to work as an assistant for his uncle, who had a hardware store in the provincial capital of Matanzas province in Cuba. Matanzas is a 100 kilometers east of Havana. The hardware store was right on the bay. There's a plaque that still exists today on the column where the hardware store was.

So, he went to work there as an assistant in the hardware store of his uncle, Manuel Bea. Well, what happened when he arrived in 1865 was the way of manufacturing sugar had become much more technologically advanced by some French machinery which came into Cuba. And sugar, which had been a substance of the privileged classes, became very cheap and Matanzas province was the province of Cuba that had the most sugar cane. The port of Matanzas was where the sugar was shipped overseas, and to other parts of Cuba, and all over the place. And Manuel Bea, his uncle, and Tiburcio, my grandfather hit on a scheme of doing business with sugar growers. Sugar growers couldn't get crop loans to plant the crop specifically. . .

Ben Feuer

Particularly sugar growers in Cuba?

Judge Bea

Yes, because the Bank of Spain was very conservative, and would only loan on mortgages and wouldn't take a crop as security for the repayment of the debt. I learned this all from Professor Barger of New York University, who wrote a book about this. I think I have the book somewhere here, and later he actually taught my son Dominic at Stanford. In the history class, Barger told me that since there wasn't any crop financing, commercial houses like the house we call Casa Bea, the Bea House, started making crop loans and the crop loans were, I think he said they were 1% or 2% a month, with an option to buy at a certain price. So if the value of sugar went up, the loan lender could satisfy his debt by taking the sugar crop and selling it himself.

Ben Feuer

Clever scheme.

Judge Bea

And so it was. It was a clever, creative scheme and it went very well. And they prospered, and ended up in 1894 as a very prosperous business and had several warehouses in Matanzas. A big office building. They were doing, I remember from an old advertisement that Casa Bea put out- they were doing annual sales of \$20 million, which in 1894 was a lot of money.

Ben Feuer

Some money today, in some parts, maybe not San Francisco, but . . .

Judge Bea

\$20 million, then would be about two and a half billion a year, right? We two had ships that travelled from Matanzas to New York with sugar. A painting of one of those ships is behind me. That's the first of those ships, which was called Bea, Bellido and Compania. Bea was the principal owner, Bellido was a partner who was Cuban. They did good business until after the Revolutionary War. In 1901, Cuba became an independent country. And my grandfather, who was 51 at the time, decided to retire and move to Spain. He decided to move not back to the old farmhouse, which later became mine, but to San Sebastian. San Sebastian at that time was the summer capital of Spain. In the 1880s -1890s there was no air conditioning, and Madrid was dreadfully hot in the summertime, and the weather was described to be "nueve meses de invierno", "invierno" being winter and "tres meses de infierno," which is hell. So, three months of hell and nine months of winter, but the three months of hell were very hot. So, the Queen at that time, Maria Christina, a Hapsburg. She decided to go to San Sebastian and build a summer palace at San Sebastian. And the whole government would decamp from July to September, up to San Sebastian, because the weather was much nicer up there. And then you have all the ministers and all the government people were in San Sebastian, of course, the government was less important in those days. So that's, that's where my grandfather went back to. And then he died in 1908. And my grandmother survived until 1914. And my father and his brother, Pedro, grew up in San Sebastian. And so, my father, Tiburcio, also the name of my grandfather, decided to get married and build a house in San Sebastian. And getting back to your first question. I was born some eight years after the marriage.

Ben Feuer

So your father didn't pick up the business?

Judge Bea

No, he had an opportunity to pick up the business. His brother Pedro went back and ran the business for four years from 1914 to 1918. But at that point, there were some family squabbles with some cousins. So Pedro decided to cash out. When he cashed out his split he got with his younger brother, that was plenty of money, so he did not have to work. So, in 1918, if you didn't have to work, you didn't work. Right. That's not bad. Maybe today if you didn't have to work you might not want to work. Nothing bad about that.

Ben Feuer

What was your youth like? What are some of your memories of youth in San Sebastian?

Judge Bea

We left San Sebastian when I was four years old.

Ben Feuer

So not too many memories?

Judge Bea

Well, the Civil War broke out in Spain in 1936. My father died in 1937. In 1938, my mother decided to take my brother and me to Paris to live. And my brother was put in school in Switzerland. And I was allowed to stay in Paris, which was grand.

Ben Feuer

What are some of your memories of your time in Paris?

Judge Bea

In Paris, we were always going to some picnic or some fun event. I had a wonderful time in Paris, and I ate a lot of strawberries. I can remember thinking, "give me small strawberries" because then I got more strawberries than if I got big strawberries.

Ben Feuer

Right, you can see the strategic mind already

Judge Bea

[Laughs] France in the summer of 1939, we went down to Biarritz to live in the summertime. And then the war broke out on September 1, 1939. And my mother thought that Germans would eat the French up in six weeks. And she was absolutely correct.

Ben Feuer

It's about what happened.

Judge Bea

And so she said, next thing they'll do is try to invade Spain. And we'll have a war here, as we had for the last three years, right. So she said, now's the time to get out of here and go to Cuba. And why Cuba? Well, my father been born in Cuba. My grandfather had been in business in Cuba. One of the partners of my grandfather was my mother's grandfather whose name was Zabala y Bea

Ben Feuer

And you're saying Bea was a name that comes from your mother's side of the family?

Judge Bea

His patronymic was Zabala and his matronymic was Bea.

Ben Feuer

Because our listeners may not recognize that in the Spanish culture names come down from the mother's side as well as the father's.

Judge Bea

The father's first, mother's second, but you always have two names. That's why in every immigration case you see with a Hispanic you always see two names. The proper use is to use the first name, not the second name, but the Anglos don't get that.

Ben Feuer

Interesting, so would you be technically be a Tiburcio, rather than a Bea if we're going to do it correctly.

Judge Bea

Tiburcio is the Christian, baptismal name. Bea is my patronymic name, and my matronymic name is Blanes.

Ben Feuer

Oh, I see.

Judge Bea

So, anyway, the war broke out, and mother grabbed us, my brother, me and the nanny, and we got in the car and drove immediately from Biarritz, on the first of September into Spain, and went to the house in San Sebastian. And then she got the idea that maybe the war would affect Spain. So she said, now let's go to Cuba. So we drove to Portugal, to Lisbon. And we caught a ship. Not a very big ship, not a luxurious ship. It had been the private yacht of the dictator of Portugal, Salazar, but it was now a commercial ship, 16,000 tons. It wasn't a very big ship. And we went up to Cuba.

Ben Feuer

That must have been a time of tremendous stress and turbulence for you personally as a young child.

Judge Bea

Yes, it was because the war had broken out, and the Germans had submarines all over the Atlantic.

Ben Feuer

And how old were you?

Judge Bea

Five.

Ben Feuer

And were you somewhat aware at least?

Judge Bea

Yes. Working from photographs, it all comes back. But I remember we had to wear life jackets the whole time because we might get torpedoed anywhere.

Ben Feuer

Not for insurance requirements.

Judge Bea

And I remember the smokestacks on ship were painted with the Portuguese flag and a bright light was on it all night long, so the Germans would realize that this was a neutral ship.

Ben Feuer

Portugal was neutral at the time.

Judge Bea

It was friendly toward the Brits but it was neutral. So it took us about two weeks to go across to Cuba. Very slow ship. We got to Havana, and mother looked around, and she didn't really like Havana. She said it was hot. Anybody could have told her that. And there were a lot of mosquitoes. Anybody could have told her that. And it wasn't filled with Spaniards, anybody could have told her that. But she didn't know that.

So, she said let's go to the United States. But we all had Cuban passports, and at that time Cuban passports entitled you to Western Hemisphere preference as far as residency is concerned. So you could get a tourist visa and then get a resident visa very easily. And there was no waiting or no anything.

Ben Feuer

No lottery, nothing like that?

Judge Bea

So anyway, we went to Miami and in Miami mother again said, "Nobody here speaks Spanish," and in the United States in those days nobody in Miami did speak Spanish.

Ben Feuer

She'd fit in well today.

Judge Bea

So she said, let's go to California because in California, everybody has to speak Spanish because all the cities have Spanish names.

Ben Feuer

At least a little Spanish.

Judge Bea

Still Sacramento, Fresno, they're all Spanish names. So she went out and she bought a 1938 used Buick.

Ben Feuer

She didn't know anyone in California? And she didn't have a job lined up, she'd never been to California?

Judge Bea

She just decided that she was 29 years old and she . . .

Ben Feuer

She must have been a headstrong person.

Judge Bea

She was a very decisive person. Not quite an Auntie Mame, but . . .

Ben Feuer

Your father had passed away, so it was the two of you boys?

Judge Bea

And the nanny. And the nanny who was Canadian, who taught us English, and French. So we spoke English, French and Spanish. And mother spoke Spanish.

Ben Feuer

Very polyglot.

Judge Bea

So we were translators in the United States. We drove from Florida to California and it took about two months.

Ben Feuer

There was no translating that the man at the sweet shop had said you must buy two sweets and not one.

Judge Bea

No. None of that. We didn't have any trouble. We always got what we wanted. So we go out to California . . .

Ben Feuer

Your mom drove?

Judge Bea

My mom and the nanny. And we got to California.

Ben Feuer

Do you have memories from that drive?

Judge Bea

We stopped at the Grand Canyon for a few days. There were no freeways in those days, right? So you just drove along country roads until you got to the next place and you spent two days to three days in a motor camp relaxing and then you go down after a while and drive some more.

Ben Feuer

Right because the interstate system was a World War II invention later on. Makes sense.

Judge Bea

Even Route 66 didn't exist. So anyway, so we got to California. And I thought it was grand. Los Angeles had great weather. We rented a house in a sort of middle class neighborhood, a bungalow, it had a backyard. Kids lived on the street. We played all day with the kids, and they had a library a half a block away and you'd go to the library.

Ben Feuer

And your mom had been able to bring her family, the family's wealth or enough of the family's wealth out of Spain to support you?

Judge Bea

Well, my uncle was really keeping us alive.

Ben Feuer

Okay, this is your Uncle Pedro?

Judge Bea

My Uncle Pedro, who had taken his money out of Cuba and had put it in the Chase Manhattan Bank.

Ben Feuer

So he had already come to the United States, or was he still living abroad?

Judge Bea

He didn't like the United States.

Ben Feuer

So was he in Spain or Cuba at that point?

Judge Bea

In 1939, he was in Spain. My uncle was one of the few persons in the world who was imprisoned by both the Communists and by the Nationalists in the Spanish Civil War.

Ben Feuer

He made enemies wherever he went.

Judge Bea

Well, he, he didn't really make . . . you want to hear about that?

Ben Feuer

Yeah, sure yeah.

Judge Bea

Okay, well, Pedro was living well, in the summer of 1936 like he always did. He had an apartment in San Sebastian, and a very superb car, a Mercedes 500 K, a 1933 Mercedes 500 K with superchargers coming out. He had a very good-looking blonde girlfriend. He wasn't married. He was just fine. He was 48 years old. So he was arrested by, there wasn't very much difference between the anarcho-syndicalists and the communists. We called them all Reds. He was arrested by the Reds because he wore a tie and coat and he was driving a superb car with a good-looking girlfriend. He was very bourgeois.

Ben Feuer

Sounds very bourgeois.

Judge Bea

So he was arrested and taken in a truck to the jail and on the way that to jail, they told him to stand down, they're going to shoot him. And another man says, "No, no, no, we don't shoot them now, we are going to shoot them at the jail." So they put them back in. They took them to the jail. And the jail was on the beach in Ondarreta, which is just 200 meters from where our house is now.

They put them in jail, a lot of people there he knew, they were good people, good families in San Sebastian, had all been arrested because they were bourgeois. So, a jailer came up to him and said, "weren't you the goalie on the town soccer team that won the national championship in 1909." And



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Pedro said, Yeah, I am. And he said, "Well, you are in a very bad place here." And Pedro said, "I know I'm in a bad place" and [the jailer] said, "Come with me."

And he took Pedro to the psychiatric ward. He said, you're in the psychiatric ward. "But I'm not crazy." You're better off staying here. And sure enough, everybody who was down there with Pedro in the meeting room, the rally room, was machine gunned the next day. Their names were put up on a tablet on the beach to commemorate the massacre by the Reds, and that stayed up until Franco died and then the tablet came down.

So anyway, so he was in jail under the Communists. And then one day, one of the leaders of the anarcho-syndicalists, which was probably to the left of the Communists at the time, came along and said, if you give me 25,000 pesetas, which was then about \$5,000 I'll get you out. So Pedro said, well, I gotta go see my banker to see if I've got that kind of money. So they took him down to the bank, and the bank said, you don't have that kind of money, but write the check. You'll get out and then you can get somewhere else.

Ben Feuer

Good advice from the bankers.

Judge Bea

Pedro said, I can't do that. The banker said, don't worry. We'll cover the check. Write the check. So he wrote the check. And they let him out. Within a few days Franco's troops took San Sebastian and the Nationalist troops, the Fascist troops took San Sebastian, and they went to the bank. They found Pedro's check made out to the anarcho-syndicalists for 25,000 [pesetas].

So that made him a collaborator with the Reds. They arrested him and put him back in the same jail. So there he was. My father learned about it. My father had some friends in the Nationalist Army. And they said, okay, Pedro, you can get out, but you got to go to France right away.

Ben Feuer

Yeah, it's time to get out. Yeah, that's a fair deal.

Judge Bea

So Pedro stayed in Spain, and in France, until 1941. And then he went to Spain and took a Spanish ship to Cuba. Then he started living in Cuba. But by that time, we were back in California. And it was grand, and I was going to nursery school there and it was a great place.

Ben Feuer

This is in the Los Angeles area, in Los Angeles proper?



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Judge Bea

In Los Angeles proper, in Hancock Park. And it was terrific. And my brother was going to military school. Everything was fine. Until my mother decided we had to go back to Cuba. I've never understood quite why. Several possibilities. But anyway, we drove all the way back to Cuba in a 1942 Pontiac and arrived in Cuba in November, December of 1941.

Ben Feuer

Fewer mosquitoes this time?

Judge Bea

No. None of us, my brother and I didn't want to go back to Cuba. But mother was ... from time to time, she tells us we have to go back to Cuba to arrange our residency papers. That may not have been true. But in any case, we thought we were going to be there for a very short time in Cuba. It didn't work out that way. We were in Cuba for two years. We were put in a boarding school, which was sort of Dickensian.

Ben Feuer

So what sort of memories do you have of this?

Judge Bea

Terrible memories, best not to recall. So we were in school for two years in Havana and then we kept saying, we'd like to go back to California. And mother was very ill. But she finally relented and said, all right, you guys can go back to California. But I'm going to stay in Havana because I am ill and I want treatment here. So the nanny, who had reappeared by that time, was quite a character. She was a Canadian lady.

Ben Feuer

Do you remember her name?

Judge Bea

Oh, sure. May Adams Deroy. She took care of us. And she got us a plane to fly over to Miami because you couldn't take a ship because of the German submarines. This was 1943. And then we got on one train after the other until we got back to California. Traveling during the war was very difficult.

Ben Feuer

Even internally?

Judge Bea

Because soldiers and anybody in the defense industry had priority over everybody else. So you'd buy a ticket. And you'd say go to New Orleans from Miami. And we got bounced in Jacksonville. And so we'd have to wait until there was a non-priority seat available, then we'd get to New Orleans. The nanny was



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a very sophisticated woman. She had been married to a French gunrunner in the 1920s, ran guns for Arabs in Morocco in the Rif War. So she was pretty savvy. And she found out that a \$20 bill to the conductor got us a drawing room on the train. And we didn't get bounced at all. We got to California. In those days, in 1943, there was a lot of people coming to Los Angeles to work in the defense industry. And so there wasn't any place to live. We had we ended up living in sort of a residence hotel on Third Street in Los Angeles for a long time.

Ben Feuer

Private bathroom?

Judge Bea

No

Ben Feuer

Shared bath?

Judge Bea

Yeah, it was, it was not the Ritz. But that's all right. We were in California. And then I started going to the military school and now my brother went to Loyola High School. So that was fine. And then, Mrs. Deroy found a house to rent. She told us we're renting this house. We later learned that she wasn't renting the house. She was taking our rent money and using it on a mortgage to buy the house in her name. Which became a lawsuit. And so there we were, in Hancock Park, in this nice house, two story house with a garage. And I was going to Grammar School at St. John's Military Academy. My brother was going to high school at Loyola. After school, we both worked at a market called Balzers. He would be stocking the aisles and I was a box boy, and Mrs. Deroy was a cashier. So the great thing about that was we knew that there wasn't a grocery store that didn't ration at that time. So we were able to get all sorts of good stuff that Americans usually don't eat such as liver and kidneys, and heart and all these things. And Mrs. Deroy, who had lived in France, knew how to cook it. So we lived marvelously. So then . . .

Ben Feuer

Was the family religious at this point? You mentioned Loyola High School.

Judge Bea

We were going to religious schools, I went to St. John's Military Academy, which was the Sisters of Mercy, somewhat ill-named.

Ben Feuer

Not so merciful? A lot of knuckles with a ruler?

Judge Bea

They ran a great school because they had a great sports program, and it's a good academic school. So then, after I finished there, I went to Loyola for high school for one semester, and then to Bellarmine in San Jose, because Mrs. Deroy, we found out about the house, and she got fired. And so my brother and I . . .

Ben Feuer

What happened with the lawsuit eventually? Did you get the house back?

Judge Bea

She was penniless.

Ben Feuer

So you ended up going to school in San Jose up in Northern California?

Judge Bea

Because my brother was going to Menlo JC, junior college.

Ben Feuer

And you wanted to be close by? So, at that point, you'd had a falling out with the nanny, but you were high school age. Were you living on your own, you and your brother? Mother was still in Cuba?

Judge Bea

No. Mother had died in 1943, shortly after we got to California. So we were orphans. And the nanny was taking care of us and then the nanny got fired. And my brother was a little bit concerned that 13 year old and 19 year old Cuban citizens, Child Protective services might come around.

Ben Feuer

So, and you weren't American nationals at least yet, there's none of that? You are still being taken care of by Pedro from Cuba?

Judge Bea

He was sending the checks every month, we weren't living stupendously, but we were getting along. So then my brother and I both had some difficulties in the schools we were in.

Ben Feuer

So has it been long enough that we can elaborate on the kind of difficulty you had?

Judge Bea

Oh, well - "Oh, well Spanish it is "corramos, un tupido velo," let us let us pull an opaque veil over the matter.

Ben Feuer

But for listeners of the future, you can have trouble in school, still turn out okay.

Judge Bea

I was not allowed to go back to Loyola. My brother and I wanted to go back to LA where we had all our friends and he couldn't go back to the Menlo JC and I couldn't go back to Loyola. So I had to go to public high school. And he went first to Santa Monica JC and then to USC.

Ben Feuer

And what was the transition like from private sort of religious school to public school?

Judge Bea

Well, first of all, I went to University High School, which happened to be the school from which Judge Stephen Reinhardt and Judge Ray Fisher graduated. So there were three Ninth Circuit Court judges from that school. So then the Jesuits did me a great favor by not allowing me back into Loyola, because Loyola, of course, was all boys. University High School was co-ed and so that made all the difference in the world.

Ben Feuer

But it wasn't a public school?

Judge Bea

It was public school.

Ben Feuer

But today University High School is a private school.

Judge Bea

In San Francisco, this was University High School in Los Angeles.

Ben Feuer

So you're back in LA, I see.

Judge Bea

So, I'm living in Westwood. My brother and I rented an apartment in Westwood. He was going to USC and I was going to school at University High School on the West Side. I graduated from University High School. I had started playing basketball in my senior year at University High School. And then I thought, I don't know where I want to go to college. But I was only 16. I graduated two years early because I skipped a couple of grades at St. John's, so I thought I'd go to Menlo JC, were Al had been, for a year and play basketball and see what school I want to go to. So I did. I went to Menlo JC and I had a good

season. And I got on the All League team, and I set a one-game scoring record for Menlo -- 38 points-- which was a lot in those days.

Ben Feuer

That's pretty good. Then what did you study at junior college? Or was it just basketball? Just basketball and girls?

Judge Bea

Basketball, and History, and Biology. My brother had gone to see Uncle Pedro in the winter of 1951-52. And he came back from that trip, and I had been sending him all these clippings of games I was playing and I was having a good year. So he said what you ought to do... I was 17 at the time, what you ought to do is try out for the Cuban Olympic basketball team. He says, you know, you're a Cuban citizen, you can try out for the Cuban Olympic basketball team.

Ben Feuer

At this point were you just a US permanent resident?

Judge Bea

Yeah. LPR, we were legal permanent residents. So I said great and I wrote to the Cuban basketball team. And I don't know how I got the address, but I got the address, and I wrote them a letter and put in all my clippings about what, and how many I had scored and what I had done. And I got a letter back saying, don't worry about trying out for the team, you're on the team.

Ben Feuer

That's a great try out --that worked out well.

Judge Bea

Yeah. And then, since I had a good year as a freshman at Menlo JC, I was recruited by USC.

Ben Feuer

So you've been accepted back to Cuba, but hadn't yet gone back to Cuba.

Judge Bea

I had to decide where I was going to go for my sophomore year of college, because I wasn't going to go to Cuba until March of 1952. So I would play another season in California. So I had to decide where to go to school. And I was recruited by Forrest Twogood at USC and Nibs Price at Cal and Johnny Wooden at UCLA and also Bob Burnett at Stanford. I was really impressed with Johnny Wooden. He was a great, great man. And I knew his daughter because she had been a colleague in high school with me at Uni High. But when I went to Stanford, the coaches there said, you really ought to come to Stanford instead of going to UCLA. And I said, Why? They said, well, because you get a better education at Stanford than you will at UCLA. And you'll play more here.

Ben Feuer

There's an upside. That's a good point. There's something about being a bigger fish in a smaller pond. Right?

Judge Bea

Yeah. So I said, Okay. So, I went to Stanford. I started in 1951, at Stanford, as a sophomore. I'm 17. And I went out for the varsity. And the coach said, look, you're only 17 years old. We have a good team; you're not gonna play much. So instead of playing second string, why don't you play for an AAU team as a Red Shirt and get some experience, and then come back next year when you've got some experience playing in the AAU, which I did.

Ben Feuer

What's a red shirt? Tell us.

Judge Bea

A red shirt is somebody who's eligible to play a college sport, but sits out a year and doesn't use his year of eligibility. Those days, you had three years of eligibility. So you don't use your year of eligibility, because you play for another team. Okay, so you don't play for Stanford. I played for the Young Men's Institute at 50 Oak Street here in San Francisco with some players who played at Cal and USF, and then it was a lot of fun. So then, when that was over with, I went down to Cuba. And I drove down to Cuba. I drove my brother's car.

Ben Feuer

This was Spring 1942, sorry 1952.

Judge Bea

So while I was driving down to Cuba, Batista, who was a senator at that time, had been president of Cuba, effected a coup d'etat and overthrew the elected president. He took over. When I got down, there, I learned that the Olympic Committee had \$400,000 to take the whole Cuban Olympic team to Helsinki. And when Bautista took over, since they were all political appointees of the prior president, they took the \$400,000 to Miami and there wasn't a bean in the till to send us to Helsinki. So we had to get some financing to go to Helsinki. And we had the telecast, which was totally a disaster. Who would give us any money?

Ben Feuer

This is on TV? Where you on TV for this telecast?

Judge Bea

Nobody sent any money, nothing. Okay. We went to Bacardi Rum and H Upmann cigars, and they said we will give you money to go to, but you gotta wear Bacardi Rum or H Upmann cigars on your T shirts.

Ben Feuer

Drink Bacardi Rum on the court, and smoke cigars while you're on the court?

Judge Bea

We couldn't do that. But then finally, we found another way which is another one of those stories over which we will pull the veil over that one.

Ben Feuer

Okay.

Judge Bea

We found a way and we went to Helsinki, and we played, and we won two out of our first three games, so we qualified for the final round. And then we lost the next four games.

Ben Feuer

What do you remember about Helsinki? This is 1952 summer.

Judge Bea

All my memories are beautiful about Helsinki. Helsinki was a town with a city that had not been devastated by the war. Somehow it had been preserved. It was European. Nobody spoke anything but Finnish and Swedish, very few people spoke English. Nobody spoke Spanish. But the people were very friendly, and a lot of fun. And that's probably why we lost four games because we found a bunch of joints that were more fun than playing basketball.

Ben Feuer

Bacardi Rum and H Uppman cigars in Helsinki. Something like that.

Judge Bea

Yeah. So then after the games were over with . . .

Ben Feuer

You didn't win a medal?

Judge Bea

No, you I got a participant's medal. Everybody who plays the games gets a participation medal. But that's a little bit unusual. So then after the games, I was set to spend the last part of summer with my uncle who came to the games. He said he wanted to see me play. And he said, come on down to France with me. And we have a house ready in St. Jean de Luz, which is a small town near the Spanish frontier in the Basque Country, so that's fine. I'll spend the month of August on the beach in France. Sounds great to me. Lovely. And so then he said, what we ought to do is to go down to Madrid,

and Granada and you can meet your relatives who you don't remember because you left when you were four. And now you're 18 and they've never seen you. So we had to go down there and see them.

I thought, okay, so we drove down to Madrid, and saw a bunch of relatives and I was really impressed with Madrid being a beautiful city. I thought it would look like Tijuana, but it turned out it looked like Paris. So it was beautiful. And while I was there I don't know how I made the contact, but somebody said, Pedro said, "Why don't you study for a year here and perfect your Spanish. You're two years ahead of yourself. You don't have to go back to Stanford for any reason. You'll be here with relatives here who speak Spanish. And you'll become a little bit more civilized." Because they thought that people in California were not very civilized.

Ben Feuer

They're not necessarily far off.

Judge Bea

I said, but what am I gonna do? So what do you study at the University? There's a course for foreigners at the University in the Faculty of Philosophy and Letters, and you can play basketball. I said, what do you mean? Real Madrid has a team and they play basketball. So I went over to Real Madrid, and of course, you're 18, six four and a half, just played the Olympic Games. I made the starting team right away. So they said, you should play for us, we are the national champions and we play all over the place. So I said, fine, that sounds great. So I found a swell apartment, right in front of the Palace Hotel and it had a terrace and very nice. And I started living in Madrid. This was a time when you could buy a custom-made suit for \$35.

Ben Feuer

And you're getting paid a salary, you're earning an income? Or no, not from this?

Judge Bea

No, but father, my father had not succeeded in completely ruining himself. Came close. So I had some funds with which to manage, I was living in Madrid, and we played basketball under sort of heroic circumstances. In all of Spain, there was absolutely only one floor made out of wood on which to play basketball. It was a parquet floor, that was put together in the bullring in Barcelona. Every place else, if you were lucky, you played on concrete. If you were not that lucky you played on jai alai frontons which were two thirds concrete, and one third cork, which made a difference when you're dribbling the ball. It didn't come up that much. And then sometimes you play outdoors a lot. You played outdoors. You played in snowstorms. And you played on gravel. And you played on courts that were inclined, so not flat.

Ben Feuer

Not ideal circumstances for basketball. Not for an Olympian like yourself.

Judge Bea

It wasn't a high scoring game. So after that, after the season was over, that's when I got in trouble with the immigration people.

Ben Feuer

Okay, so let's get from point A to point B. So, you're living in Madrid, you played a season, and then you're practicing your Spanish, you have a little money from Dad, you're living the life and then the season wound up and you decided to return back to the United States.

Judge Bea

I was ready to go back to Stanford. So I went to the embassy, and I produced my Cuban passport. And I say, I want to go back to the States. And the consular officer said, what's your purpose in going to the States. I said I'm a sophomore at Stanford, I want to continue my career. I mean, I want to finish Stanford. So he gave me an F-1 visa, which was a student visa.

Ben Feuer

Okay.

Judge Bea

That broke the continuity of my resident status. So I lost my resident status, and became a non-resident.

Ben Feuer

And you weren't sophisticated enough to know the difference.

Judge Bea

I was 19. I wasn't a lawyer yet. And so, so, jolly, jolly, I'm off to Stanford. And I went to Stanford and then at Stanford, I played for my sophomore and junior year on the varsity, second string on the varsity. At Stanford, you could take your fourth year of school of undergraduate and your first year of law school at the same time, so they would give you credit in undergraduate for the courses you took in law school.

Ben Feuer

Okay, so at this point, you were still in Stanford, you had your F-1 visa and it wasn't a problem—yet—but you just had an F-1 visa, and have you thought about practicing law after you decided that basketball was not going to be the answer. Where did you get the idea of practicing law?

Judge Bea

I was thinking about practicing law from an early age. Maybe the first time I thought about practicing law was when I was 14. Because we were in that lawsuit with our governess because she had broken her

fiduciary duties, and the lawyer was a guy named John Froelich, who was a very funny guy. He said, you know, you ought to become a lawyer, Carlos. And I said why should I become a lawyer? He said, Look, every time that door opens a new life walks in, and it's very interesting. A very interesting life. So I said gee, that sounds really interesting.

Ben Feuer

And did your brother Al become a lawyer?

Judge Bea

No, he wanted to be a historian, he wanted to be an academic.

Ben Feuer

Oh, at this stage, I guess, he was out of school?

Judge Bea

No he was going to USC.

Ben Feuer

So you are you are at Stanford and he was at USC.

Judge Bea

So I went back to Stanford, and got into law school in my senior year [of undergraduate, which was also] my senior year of [basketball] eligibility. That was my first year in law school. I took a look at the agenda of law school, the curriculum, and it was a little bit more intense than the undergraduate Poli Sci, so I said, I'm not going to play [basketball].

Ben Feuer

And you didn't have to take exams the way folks do today, before they get into law school?

Judge Bea

I took the LSAT, but nobody paid any attention to those things. I took the LSAT, one Saturday when we were playing against USC and we're down at the Ambassador Hotel and I had to go take this test and I went over and took the test, I did no preparation for the test and I didn't pay any attention to it, but I had pretty good grades at Stanford, and so they let me in.

Ben Feuer

What did you major in at Stanford?

Judge Bea

Poli Sci -- that was political science and history. So, there I am in law school. And I decided I'm not going to play basketball in my senior year, because studies are important and more intensive. So, first



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day of November, which is when you go out for basketball in those days, the coach came over and said to me wait a minute you didn't come out for practice today, and I said to Howie Dallmar, he's a smart guy, I said, look Howie, I've been in law school for a month now. This is a lot more difficult than undergraduate, and I just, I don't have the time to play basketball. So he said, you've got to come out. You're going to be my starting center. And I said, starting center? I'm six-four. I got white man's legs, I can't dunk, and you want me to be the starting center on a PAC 10 basketball team -- get real. So he said, no we're gonna have a real fast team. We're gonna press all over the place. We're going to run their butts off. We're going to have a wonderful time. So I said Howie, Howie, Howie. Can't you possibly get somebody other than me? He looked at me said, if I could, would I be here? So I played basketball.

Ben Feuer

In addition to your senior year of college, in addition to your first year of law school, that's no joke.

Judge Bea

So I played basketball and I was on the first string team til I got injured.

Ben Feuer

What kind of injury did you get?

Judge Bea

I probably damaged the disc coming down on a rebound in the first couple of games against Washington, which we won very easily. And one of the guys playing for Washington is today Judge Robert Bryan, who's a district court judge in Seattle.

Ben Feuer

So, was it a season ending injury?

Judge Bea

No, I played for a while longer, but it got worse and worse and worse. And finally I had to quit. So I went through law school and about this time, I decided, well, now I'm 21. And I should become an American citizen, right? So we had a family attorney. And he said, we'll take you to an immigration specialist. We went to the immigration specialist, and the immigration specialist said that I gave up residency. You can't become an American citizen. You've got to have five years of continuous residency before you apply, and you gave it up back in '53. By this time it was 1955. I said, but I didn't know I gave up anything, and he said that doesn't matter, you gave it up. So I told him the whole story. And he said, well, there's a chance. We're gonna have to start a deportation proceeding to deport you. And we're going to have to get some sort of discretionary review.

Ben Feuer

This sounds like a risky maneuver.

Judge Bea

Yeah. But that was the only thing to do. The only other option was to get a private bill through Congress. But I didn't have enough juice, then or now (chuckles). So we started this. I made a declaration under penalty of perjury that I intended to stay in the country even after I graduated from Stanford, and that made me ineligible to stay as a student. They started deportation proceedings, and I had a hearing, and the issue was did I always intend to come back to Stanford. I had the Stanford coach, the Stanford players and all my pals testified. And the immigration officer said you presented a terrific case, but I don't buy it. I think that you changed your status in order to avoid the draft, because non-residents don't have to go to the draft and residents do.

Ben Feuer

And in the early 1950s, the Korean War . . .? What was the, what conflict was the draft for?

Judge Bea

Well that was over. So I said to him as soon . . . It was peacetime draft. So I said, Look, I'm still 21 you can still draft me. And he said, Yeah, but the Korean War is over with in 1953. And there'll never will be another war. So he ruled against me.

Ben Feuer

On the theory that you weren't really off playing ball and learning Spanish in Spain, you are really trying to get out of the Korean War draft, or the peacetime draft, some drafts or military service.

Judge Bea

So, I'm now a first year law student at Stanford, and then I took an appeal to the Board of Immigration Appeals, and all during the time I was at Stanford I was on voluntary departure. So I couldn't leave the country. I couldn't go to the 1956 games in Melbourne with the Cuban team, but I had been injured so I wasn't able to anyway, so there I was . . .

Ben Feuer

So did he order you deported, did he say your visa ends . . . ?

Judge Bea

You were under removal, it wasn't called deportation. And I took an appeal to the Board of Immigration Appeals. So there I am at the Board of Immigration Appeals. And we have a hearing before the Board in Washington. My brother and I went there. We stayed at the Mayflower Hotel.

Ben Feuer

Same lawyers representing you?

Judge Bea

Same lawyer. Marshall Kidder was his name. Terrific guy. Very common sensical a former immigration officer who has studied law at night. The law, he knew it backwards and forwards. So he made his pitch that I was mistaken, that I didn't know what I was doing. I was 19 years of age and always intended to come back home, always intended to be an American citizen, that this is a great injustice. But as you know, findings of fact, by the immigration officer, by the immigration judge, usually carry the day, right? He made his pitch to the five members of the Board of Immigration Appeals -- they sat together at that time. And the Chief Judge was a man named Thomas Finucane. And as we were, after the argument ended, Finucane leaned across the bench, and looked at my attorney and said, Would you mind if I ask your client a couple of questions? Put yourself in the position of Marshall Kidder, the lawyer. He hadn't prepared me for any interrogation, there was no taking of evidence at that point. The only thing I could do would be to admit something, which was terrible. But he couldn't say no.

Ben Feuer

What are you gonna say?

Judge Bea

So he said, of course, yes. You can ask him any questions. So the Chief Judge of the Board of Immigration Appeals leans across, looks at me and he says: at Stanford what position did you play on the basketball team? I said well I played forward my sophomore and junior year, then I played center, strange enough as that seems, in my senior year. So he says, Did you ever know John Wooden? I said, yeah, John Wooden recruited me for UCLA, he's a swell guy. I really admired him. Well, why didn't you go there? I told the story about going to Stanford. And he asked a couple more questions and he said, thanks. And as we walked out, Marshall Kidder, my attorney, had a smile on from ear to ear, and I said, why are you smiling? He said, "that son of a bitch ain't gonna deport you." Some months later at Stanford, I got the opinion. Get this one. You've done immigration cases. The Board of Immigration Appeals found that the immigration judge had discretion to accept my plea of mistake and had abused his discretion by not exercising that discretion, which between you and me is a big stretch!

Ben Feuer

You don't see that very often.

Judge Bea

You don't see that very often. As a matter of fact, it would be against immigration regulations now for the Board of Immigration Appeals to make a factual finding. But it wasn't then. So I got my residency back by order of the Board of Immigration Appeals.

And in a week, I got my draft notice. Here's a photo of the draft notice. And I went to Letterman Hospital here in San Francisco.

Ben Feuer

Within a week, they sent you the draft notice, a peacetime draft.

Judge Bea

I went to the Oakland rallying point. Then they took a look at some medical records that I carry with me regarding my back and they said well, you've got to get a special examination at Letterman Hospital. They set up an examination for me there, and I was examined, and the doctor said, [because of] your back, you're 4F. So I got out of the draft, medically unable to do service.

Ben Feuer

Interesting circle that that all went in.

Judge Bea

So then now I had to study for the Bar. I studied for the Bar, passed the Bar and went to Spain to do some family business. And when I got back, I went to Stanford Law School, and I told the Stanford recruiting office, I'm looking for a job. I'd like to live in San Francisco.

Ben Feuer

Had you taken the Bar?

Judge Bea

Yeah, passed the Bar. And they said, there's a firm on Montgomery Street, who's looking for a lawyer. So go interview with them. So I went to San Francisco, interviewed with a firm called Dunne Dunne and Phelps, on Montgomery Street And I remember the senior partner Arthur Dunne said to me, he says I gotta make this disclaimer, a disclosure. I mean, this firm is, you ought to know this before you accept any position here, he said we have a woman lawyer here. In 1959 that was a pretty unusual, but I said that's fine with me, and so they offered me a job. And I started learning to try FELA, Federal Employee Liability Act Cases, and defending the Southern Pacific Company, Western Pacific Railroad Company, the Tidewater Southern, whatever railroad was involved in state and federal court and I'd tried my first case alone, not as a second chair, within a year.

Ben Feuer

And these were mostly tort and contract cases?

Judge Bea

Tort cases, the FELA Act imposes liability on the railroad if there is negligence in the production of the workplace injury. So I started trying cases in San Francisco. It was very rare that you ever get a defense verdict in San Francisco defending the Southern Pacific Company against an injured worker. You can give all the instructions you want to that it is not a workman's comp, but the jury is sympathetic. That's why they were all trying them there. So, once in a while, I can remember this courthouse. I tried a case ...

Ben Feuer

This is the Ninth Circuit's Court House?

Judge Bea

Yeah, but it was then, the courthouse was the District Court. 1962. I tried the case here. I was second chair in that case, because it was a big case. And I remember trying the case here. The plaintiff was a phony. He says he was stiff and he couldn't do any work because of the accident. And we get about 2000 feet of film of him working perfectly well for a good-looking woman who happened to be an operative for the Southern Pacific Company. Who'd roped him into the job, right? And so when the lights came on again after the movie, the jury wouldn't look at this plaintiff, and we won that case.

Ben Feuer

So once in a while you got a defense verdict.

Judge Bea

Once in a while. So then I was trying cases, it was really fun. I loved it. I love trying cases.

Ben Feuer

Was a trial practice a little more kind of flexible or free-flowing than you might find in trial practice today?

Judge Bea

I'll tell you how free-flowing it was. One day, one of the senior partners said, Carlos, I want you to go down to the federal courthouse, the Ninth Circuit, which was then the district courthouse. And I said, what am I doing down there? And he said, you're going to a trial setting conference. I said what is a trial setting conference? He said, just tell the clerk that Mr. Phelps is going on vacation these two weeks, and this date is ok to try the case. I said okay.

So I came down, went to the clerk's office, and there were a bunch of attorneys sitting around. And the clerk of the district court here would say, All right, we're going to start calling cases for October. Who'd like to try a case in October? Some plaintiffs...some defendants said, yeah, okay, we'll try it then. What's your name? Okay. And how about for next week.

They turned to me and they said, what about you? I said Mr. Phelps has his vacation for these weeks and he's okay for this day is just fine. That's when you get your trial date. That's how trial dates were done. I mean, they might have been 15-20 lawyers in the room, plaintiffs and defendants, they've been called by the clerk saying we gotta fill up the trial calendar. In those days, the District Court was on a master calendar. So, the judge you got to try the case had never seen anything about the case until the day of trial, because law and motion was all done by another judge. George Harris in courtroom five,

where I was sworn in as an American citizen. So it was all done that way. So then I started practicing law. Now, let's take a break.

Ben Feuer

Okay, well, we're taking a break at one hour, seven minutes.

Ben Feuer

This is part two of the recording of the oral history of Judge Carlos Bea of the Ninth Circuit Court of Appeals. The interviewer is former clerk Ben Feuer. Before we broke, we were talking a little bit about your life coming out of law school and in the late 1950s. And so I want to kind of go back to that period of time and talk a little bit about what life was like for you and in general. At that point in time you were working for a law firm you said when you got out of school, called Dunne, Dunne & Phelps. You had just been deferred or exempted from military service. Did you obtain your American citizenship around that time?

Judge Bea

Yeah, because it was 1958, my last year in law school. I took the bar in '58. I passed it in '59 and started working in Spring of '59.

Ben Feuer

And how did you do in law school? Were you Law Review?

Judge Bea

I wasn't on the Law Review, but I was on the Moot Court Board. And my partner and I, Peter Hoss, won the moot court competition.

Ben Feuer

So a little bit of an appellate part of your life even then.

Judge Bea

We represented Stanford in moot court competitions, [at] the Bar Association of New York, and the State Bar of California. We would travel around and that's where in the state finals in 1958 it was Stanford against Berkeley, then known as Boalt.

Ben Feuer

Well, now known again as Berkeley, they got rid of Boalt.

Judge Bea

And across the table from us, we had three appellate court judges and the final case involved a union. They were seeking an injunction, I guess it was the employer was seeking an injunction against the union picketing, and the union was saying, you can't seek an injunction because that's the kind of thing

that goes to the NLRB. That was case. On the union side was a short, stocky Berkeley student named Edwin Meese.

Ben Feuer

A name that one would hear again as the 20th century went on.

Judge Bea

Later, a very important cog in the Reagan administration. Attorney General. Who I see every year, at one time or another and we always laugh about it: I say, you started off your practice representing a union.

Ben Feuer

Do you remember who won that moot court competition?

Judge Bea

Cal won the oral and we won the brief, but the oral is more important than the brief.

Ben Feuer

Unlike appellate practice today. So then, you came out of law school, you just obtained your American citizenship, you've done fine there, you've made friends, you have this new job with Dunne, Dunne & Phelps

Judge Bea

At \$450 a month

Ben Feuer

\$450 a month, and was that, that was, I assume, enough to rent an apartment?

Judge Bea

I rented an apartment on Green Street on Telegraph Hill and I could walk to work. No car, no parking. I just walked down to the Trieste coffee shop, got a cafe latte and walk to work.

Ben Feuer

That sounds lovely. So what was it like living and practicing in San Francisco at the beginning of the sixties. You're a young guy, you're a lawyer. You're what? Twenty? How old are you?

Judge Bea

25 years old.

Ben Feuer

So relatively young in some ways.

Judge Bea

I was having a wonderful time, you know? I really enjoyed practicing law with the people I was working with. There were some great attorneys. We had lots of laughs. They would say, if you stay in this evening, they fed you dinner.

Ben Feuer

Oh, that's very nice. And you still worked long hours and that's tough.

Judge Bea

We worked long hours. If you stayed in, on Saturdays, they'd take you to lunch at Jack's on Sacramento Street. It was okay. And I really enjoyed the practice of law. You know, jury trials --we knew we were going to lose most of them. It was a win if you brought the case in for less than your offer. That was a big win. And if you got a defense verdict . . .

Ben Feuer

You could make partner after a defense verdict. (chuckles)

Judge Bea

Yeah. So I practiced law with them for about three years, four years. Then my brother and I had inherited some property in Spain. And there was rent control.

Ben Feuer

Was this from your father or from Pedro?

Judge Bea

From my father. And there was rent control. The family house was rented to the daughter of a former dictator of Venezuela. There were dictators even then, and she lived there in the house alone at a very, very low rent, which has been fixed in 1941 or '42. And with a peseta being devalued. I think we were getting about \$500 a year.

Ben Feuer

It's hardly worth it.

Judge Bea

And we couldn't go to our house. It was our home. So, the only way to get her out was owner move-in. And I was an owner, and my brother was an owner, but he was married, and he had kids, and he was in the construction business in Los Angeles. And I was a bachelor. So I said, okay, I'll leave the firm and go to Spain. And, I'll simply sue her on owner move-in. So, I did, I took off.



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Before I left, I put an ad in the ABA journal saying I was going to go live in Spain for two or three years. And if anybody wanted any work done by a California lawyer, I was in the practice, and I'd be glad to help out, right? I didn't know what I was going to do. So I got to Spain, and within a short time, the lady realized that I had her beat. We started to talk settlement, and it was only a question of when she would leave. But in the meantime, my brother had a very serious case develop with a job that he had with the LA County Flood Control. And he wanted me back in California to represent him. And I had to make a decision at that point, because I had been talking to Baker, McKenzie when I got to Madrid. My ad the ABA journal had been picked up by them.

Ben Feuer

And tell me, what ad did you have in the ABA Journal?

Judge Bea

It was an ad that I put in saying, I'm going to Spain, I'm going to be living there for two or three years. If you want to do any American legal work, I'll be glad to help you out. So the what's that a big firm in Chicago? Baker McKenzie and Hightower?

Ben Feuer

There are a few of them. Baker McKenzie?

Judge Bea

Baker McKenzie got ahold of me and contacted me when I was in Madrid. And Mr. Baker, of Baker McKenzie wanted to talk to me. So he came down to Madrid, and we talked and he had the habit of using a Mohammedan rosary--worry beads. I remember he talked to me about he wanted to start a firm in Madrid.

Ben Feuer

Baker McKenzie was one of the first global law firms.

Judge Bea

Right. Yeah. And I said, it's time to start one in Madrid. Spain has just come out of a period of very restrictive international trade and devalued the peseta and opened up to commerce in 1959. So he said, come on up to Milan and talk to the Board of Governors, the Board of Directors of my firm and we will talk about you starting a firm in Madrid. Which wasn't the worst thing in the world.

But at that point, my brother called me and said, I've had a disaster. And I need you to represent me because if I don't win this battle, I'll be bankrupt. So I told Baker I had to go back to California. And I picked up and went back to California and spent five months of my life on Al's case.

Ben Feuer

How did it go?

Judge Bea

My fee was a Rolls Royce convertible!

Ben Feuer

Okay, so tell me about that, so you won?

Judge Bea

We settled the case on terms which were better because of the disaster. That's when he said he wanted to pay the bill and I said, you're my brother, I am not gonna send you a bill. So he said, I'll buy you a car. So I said, just make sure it's a convertible, because I was 28 years old in California. That's when I got the word to go to London and pick up the Rolls convertible, which I drove off the showroom floor.

Ben Feuer

And then shipped it back to the United States? What kind of convertible was it, was it modern, or antique?

Judge Bea

I didn't know it was a Rolls. All I knew was I was looking for was a convertible, I didn't know if it was going to be an Austin Healey, or maybe if I got lucky, a Jaguar. So he gave me the address of the place to go in London to pick it up. My only requirement was, Al you don't have to tell me what kind of car you got me, you know the best okay, but just make sure I don't get red leather seats. I think I'd much rather have some other color.

Ben Feuer

So you flew all the way to London from San Francisco?

Judge Bea

Well, I was in Spain.

Ben Feuer

You're still in Madrid. Okay.

Judge Bea

I had gone back after the eviction suit was finished to complete the eviction process.

Ben Feuer

And that had occurred?

Judge Bea

But it hadn't occurred yet. I got back to Madrid and he said go to London to pick up your car. And so I went to London and I went to this address in Mayfair. And outside this Royal Marine, in full uniform, is a guard to the door, and he's taller than I am.

Ben Feuer

And you're a tall guy.

Judge Bea

And he looked down at me and he said, what's your business here? And I pulled out a card and said, I'm here to pick up a car, and he said "we've been waiting for you". So he took me in and the next man I came across was a man who looked very much like the figure in the Batman comic strips called the Penguin. A chubby little fellow, striped pants, cutaway coat, a handkerchief stuffed in his sleeve. A very fancy, very fancy guy. And he said your car will be ready for you in a moment, will you please sit here in this showroom. Okay, I sat down, and he pushed the button and the floor went down. And he pushed the button again, the floor came back up. And there was the car, a Rolls Royce convertible. Silver, Silver Cloud, silver color. And I didn't know what to say. But I had to say something.

Ben Feuer

That's a nice present from your brother.

Judge Bea

And I said, are you sure the top works? He'd never seen a convertible before. We had to take out the instruction book and find out where the button was to make the top work. The top worked.

Ben Feuer

London weather

Judge Bea

It was really raining, it was terrible. It was just before the Kennedy assassination. So I got into the car and drove off, and then took the car back to Spain. By that time we had gotten the house back. So I told my brother, we got the house back. The outside --there's a lot of work to be done here. He flew over, and we started refurbishing the house.

Ben Feuer

And then he wanted to see the car, too?

Judge Bea

And then we learned about the Kennedy assassination and that was terrible.

Ben Feuer

And what was that? So you were abroad? 1963. And you were in Spain at the time, right? And you mentioned, you must remember kind of when the news, how the news came across.

Judge Bea

My brother, his wife, a friend of mine, and myself, we went to a movie and then we went to a bar. And we're having a drink before dinner. And somebody at the bar, a guy who was in his cups said, Well, how do you feel about your president getting shot? I said, "No, don't kid around. What are you talking about?" That's when we first learned that Kennedy had been shot and killed.

Ben Feuer

Had you been involved in politics at that point?

Judge Bea

Oh, yes. I started when I first came to San Francisco. I started off as being a deputy registrar, registering voters for the Republican Party. And I worked in local politics, in doing whatever I could do on phone banks, or calling people up, knocking on doors and doing whatever. And San Francisco in those days, there were actual people elected who were Republicans, there were Republicans! They were Republican Assemblymen in San Francisco. Willie Brown hadn't run for office yet.

Ben Feuer

Do you recall what at the time drew you to the Republican party, as opposed to the Democratic party or some other party? Did it have anything to do with your upbringing in Spain, or your experience with the Reds?

Judge Bea

It had more to do with what I thought was good economic models. And, I was a great admirer of Eisenhower. And I thought he was a great president. And so I voted Republican as soon as I could.

Ben Feuer

And was that your first American vote?

Judge Bea

1956, no 1960. No wait a minute, I voted for Nixon in 1960. And so, and then in 1962, I was part of the governorship campaign. And they had sort of, they called it, it was an ethnic group of people, diverse. There were Slovenians and Russians and Cubans, etc, etc. Minorities who were backing Nixon. There's a photograph of me and Nixon, somewhere in the past.



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So then when I came back from Spain with the Rolls Royce, I went back up to Telegraph Hill and I found another apartment there, bigger place, nice place. And I lived on Telegraph Hill again. It was great, but I still walked to work.

Then I bought a duplex, my brother and I salvaged something from my father's estate. And my brother was very adept in the stock market in the 50s and 60s. And so we invested in the stock market, and it went well, so I had some backing I could, I could afford to live a little bit better than \$450 a month. Which was very helpful.

My brother was a contractor. And we, I wasn't, I didn't own any of his contracting business. But he and I were both in the stock market and we were investing in the stock market. And it went well. So then I practiced law in San Francisco, with Dunne, Dunne & Phelps, which then became Dunne, Phelps and Mills, we moved from Montgomery Street to California street, the corner of California and Kearney, a big building there. And I kept trying cases, mostly for the railroads.

Ben Feuer

This is all throughout the 1960s, a tumultuous time in American history and in San Francisco in particular. Do you remember anything about that period of time? They had, not just notable assassinations, but you had kind of a social upheaval, and you had more women for example, practicing law and careers.

Judge Bea

There weren't too many women practicing law in the 1960s. They were in San Francisco, the people I'd see trying cases, there might have been half dozen -- it was all, it was mostly a male crowd. But it was a lot of fun for me, I was having a grand time. And then I kept doing that in the 1970s. Until I got to a point, I was now a partner in Dunne, Phelps & Mills. But the management of the firm was not to my liking. I didn't like partnership meetings. I didn't like administrative tasks. So in 1974, I decided late 1974 inside to make two big moves. Number one was to leave Dunne Phelps & Mills, and start my own firm, which became Carlos Bea, a law corporation.

Ben Feuer

That's very exciting.

Judge Bea

And I got an office on Front Street right above MacArthur Park, with a park right in front of us.

Ben Feuer

Lovely. Did you have an actual shingle that you hung or no? A sign on the door.

Judge Bea

And I met my wife, Louise Rubey and decided to get married. So two decisions in 1974 and '75.

Ben Feuer

You met her in the same year that you decided to get married?

Judge Bea

So then I started practicing law at that address. And I took on some employees.

Ben Feuer

What kind of cases? Were they still railroad cases?

Judge Bea

I did a couple of plaintiffs' cases against the Southern Pacific. I knew all the inside business, they were very good cases. And then I started doing construction cases because my brother was a contractor. I represented him and I had other contractors, and just run of the mill, personal injury defense and plaintiff. I represented some insurance companies, and the railroad from time to time, and just whatever walked in the door.

Ben Feuer

How big did the practice get?

Judge Bea

I think I got three associates, maybe three or four.

Ben Feuer

So that's a pretty decent sized practice for a solo.

Judge Bea

On Front Street. And then we moved to Union Street in the Levi Plaza, with a great office. By that time I was married, and had the two big boys born in the 70s. And the twins were born in 1986.

Ben Feuer

You have four children total?

Judge Bea

Four boys. All of them out of the house, financially solvent, and unindicted.

Ben Feuer

Oh, good. The three things every father hopes for . . .

Judge Bea

We have six grandchildren. Then in 1989, I was having lunch with . . .

Ben Feuer

So now, we've gone through the 60s, the 70s. You've opened your own practice, got married and had kids. Before we get to the late 80s, let's stick with your practice just a little bit longer. You took all kinds of cases, did any go up on appeal?

Judge Bea

Well, a first case that I argued on appeal was back in 1959. A *pro bono* case in the Ninth Circuit

Ben Feuer

Oh, what was that about?

Judge Bea

I'll tell you how long ago it was --Alaska was a territory. A man named Vernon Burke had been a partner with another man named Homethko in a bar in Anchorage, and they'd fallen out and Homethko kicked my client out, Vernon Burke, and Burke was miffed and got a snootful and went back to the bar and shot up the bottles behind the bar with a pistol. Didn't hurt anybody, but it knocked down a bunch of them. So he was prosecuted for assault with a deadly weapon. And convicted. And I got the case on appeal. I didn't know anything about the case on appeal. I didn't know anything about the Ninth Circuit.

Ben Feuer

How did the case even come to you?

Judge Bea

Because the senior partner, Arthur Dunne, called me in and he said the clerk of the court of the Ninth Circuit has called him up and said he needed a "volunteer" *pro bono* counsel. Mr Dunne then told me, "you're volunteering for a *pro bono* case."

Ben Feuer

That's how it was done in those days.

Judge Bea

So I had "volunteered" for a *pro bono* case. And I came down in the Ninth Circuit and I didn't know anything, anything about appellate court work at all. Right, and so I went to the clerk, who was a nice gentleman, I can't remember his name. And I said, I don't know anything about this. He said well, there are the books. We will give you a place to sit and read in the Clerk's office downstairs, with a fireplace that worked. So I started looking at the books and figuring out what the charge was, and what I could do. And I didn't have a record, all I had was the record of conviction.



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And I timely appealed . . .that's first thing I did. And then I didn't have a record. So I thought how do I get a record of what happened with the trial? And he said, I don't know, look in the books. And so I went to the books and I started looking for *in forma pauperis* petitions, right? And I read all that stuff. And I drafted a petition for *in forma pauperis*, and it was granted. And the Clerk was very impressed, and he said, boy, you got this granted. And he said, do you mind if we copy your papers and pass them out as a model to our other *pro bono* people?

Ben Feuer

Great, it's a nice compliment.

Judge Bea

So, I became an author. But the only argument I had was that he shouldn't have been prosecuted for assault with a deadly weapon because he didn't intend to kill anybody or hurt anybody.

Ben Feuer

Just shoot some bottles.

Judge Bea

Just shooting bottles. And they should have given an instruction that an element of assault with a deadly weapon, a criminal element, was an intent to harm, not just an intent to shoot the place up. And there was some states that had that element. So I went to the City Hall library in those days and went through all the different state reports; we didn't have research methods we do now. You had to go actually look every 10 years through the books.

Then I argued the case here before three judges, and I said, this is clear error, this instruction should have been given. But they found there was no specific intent requirement, that general intent was enough and I lost the argument. But I tried and then I argued my first case in the Ninth Circuit, in 1959 or 1960 in Courtroom 2, just down the hall. So then getting back to the practice.

Ben Feuer

So you had a appeals going up occasionally for your paying clients too, I hope?

Judge Bea

I had a couple of appeals go up for my brother's construction company. We had got into the business of pipe manufacturing. We had a case that the National Labor Relations Board brought a complaint against our company, and they were right except they were wrong as to one individual. And I attempted to convince them that this person shouldn't get back pay because he had retired on full workmen's compensation appeal payments before the period of the back pay, and he was retired, so he couldn't claim. And the National Labor Relations Board, then probably as now, does whatever the union tells them to do. At least, the General Counsel did. And they said, baloney, I had to go to the Ninth Circuit.

And I won. Well, I won at the National Labor Relations Board, and then I filed an Equal Access to Justice Act claim for fees.

And because I won and it was a substantial dispute but the National Labor Relations Board took the position that our company didn't qualify for Equal Access to Justice, because our net worth was too high. It was over \$5 million. And I said, I'm really happy that our net worth is over \$5 million. But how did you figure this, right? Our books show much less. Way below.

Ben Feuer

And if its less than \$5 million pay up, right?

Judge Bea

Well, if it is \$5 million, you're not eligible. They said, we don't discount depreciation.

Ben Feuer

So they have their own way of value, their own magical NLRB way.

Judge Bea

So I got to the Ninth Circuit, the case was argued in Los Angeles on Spring Street And on the panel was Cliff Wallace, who's still on the Court. And Proctor Hug, who'd been in my class at Stanford. So I got up to argue, and the week before my argument, in the Seventh Circuit, who's that famous judge in the Seventh Circuit in Chicago?

Ben Feuer

Posner

Judge Bea

Posner had written an opinion in identical case to mine, saying the government's, the NLRB's argument not to reduce the value of assets by depreciation, is at first blush, ridiculous. And on second blush too. So I got up to argue, and I said, the government's argument to not take depreciation is it first blush . . . and Hug had read the same case, and he said, at first blush, it's ridiculous, and at second blush too. And he said, do you have any more to say? I said, Not a word.

Ben Feuer

Quotable Posner is all you need.

Judge Bea

That case went well. So I had that. And then I had another couple of cases involving the NLRB, because in those days, the NLRB was doing whatever the union wanted and sometimes beyond what the union wanted. We had a case with the teamsters, where the union sat in on the settlement agreement for a backpay dispute, and signed the settlement agreement along with us and the Union,

and the Union attorney. And the NLRB said we don't recognize that settlement, because we are in *parens patriae* to the worker.

So I had very few cases on appeal, and some in the state court, but mostly trial cases. Okay.

So then 1989 I'm sitting around jolly, jolly, and one of my law school classmates, a very good friend of the Republican governor, Deukmejian, he calls me up and says, let's go have lunch. "I want to talk about people who want to be Superior Court judges." So we had lunch and he pulls out a list of people who they are considering to be Superior Court judges, and he said so what do you think of these guys, and I said well look, Dick, I'm sure when they get home at night, the dog recognizes who it is, but nobody else has ever heard of these bozos. Who are these guys?

So he laughed and he said, well, what about you, wise guy? Do you want to be a Superior Court judge? I'd been trying a lot of cases in Superior Court, so yeah, put your name in. So I called my wife and I said, Dick Wall says he is going to put my name in to Governor Deukmejian for Superior Court. What do you think? She asked whether Superior Court judges work on Saturdays and Sundays? And I said no. She said, take the job.

Ben Feuer

Good job, get you home on weekends.

Judge Bea

You've got to see a lot of little league games. A lot of kids to bring up. Take the job, which I did. But before I took it, I went to Sacramento and I asked the appointment secretary, if I take this job, can somebody run against me? This was in 1989, and an election in 1990. So, yes, you're eligible to be run against? Do you want the job? I've got to consult with a friend, right, before I take it.

Ben Feuer

Because you could wrap up your whole practice, have a job for a year . . .

Judge Bea

And then he says, what do you mean consult? He says, I've got the authority to offer you this job. But I said, no I've got to consult. He says who are you going to consult with? Deukmejian's the governor, Republican. I said, Willie Brown, the Speaker. He said Willie Brown's our enemy. He may be your enemy in Sacramento, but he's my friend in San Francisco.

Ben Feuer

How did you and Willie Brown become friends?

Judge Bea

Willie Brown and Jack Berman were great friends of mine.

Ben Feuer

Jack Berman was the chair of the Democratic Party?

Judge Bea

No, No. Berman was the first husband of Dianne Feinstein, and he was a pal of mine. And when Berman became a Superior Court judge, he gave his practice to me and some of the cases he had were with Willie. So I had to get along with Willie. And Willie was very questioning because I was a Republican. How am I gonna do business with a Republican? So I sat down and we had dinner together. We talked about great many things. We got along fine. We became pals.

Ben Feuer

Long before he was Mayor?

Judge Bea

Willie spoke at my investiture in 2004 here. So, he was Speaker of the Assembly.

Ben Feuer

And then he didn't get singed by the holy water of the Republican folks in attendance.

Judge Bea

So then, what happened was, eight days after I'd been sworn in as a judge and cleaned up my law practice and given it away. I got a call from the county clerk that somebody was going to run against me. There was a woman, she was on the Democratic Central Committee, and she claimed to be a lesbian, in San Francisco.

Ben Feuer

So you had the job and you had consulted with Willie Brown.

Judge Bea

But he said he would back me up against the field.

Ben Feuer

He said, do it, and I'll back you in the election. So even if someone runs against you, because you're Republican in San Francisco

Judge Bea

Regardless who, he said, he'd back me against the field.

Ben Feuer

And had San Francisco at this point swung as far left as today?

Judge Bea

Not quite, but it was pretty far. It was completely Democratic, there were no Republican officeholders. So, I found myself in an election campaign. And I had to raise money and I had to organize a campaign, I had to get staff. And so for four months, I ran as a candidate for Superior Court judge.

Ben Feuer

And your opponent was a lesbian lawyer?

Judge Bea

Lawyer and member of the Democratic Central Committee.

Ben Feuer

Okay, that's the juice that will usually get you pretty far in San Francisco.

Judge Bea

So I went to work on my campaign and did a lot of campaigning. I did a lot of campaigning with the kids and my wife. We'd go to bingo games all over the city. There were Catholic Bingo Nights, Protestant Bingo Nights, Jewish Bingo Nights, Greek Bingo Nights, and Serbian Bingo Nights. We'd go to all these bingos and I would take the kids, who are wearing short pants. Hold them up, say vote for me, and I'd put \$10 in the pot and then pass out cards.

Ben Feuer

And the folks who play bingo are of an age where they would likely vote right? Older folks tend to vote.

Judge Bea

And then I was on radio and television, doing whatever I could.

Ben Feuer

Sounds like a hard-fought campaign. Expensive?

Judge Bea

It cost about \$100,000. It cost me about \$750.

Ben Feuer

You raised the rest?

Judge Bea

I raised the rest. And I had some good people besides, besides Willie. Willie got John Burton to help me.

Ben Feuer

John Burton, he was the majority, the democratic senator. Okay, and a powerful Senator?

Judge Bea

And Joe Alioto helped me.

Ben Feuer

Another former Democratic mayor.

Judge Bea

Joe Alioto, who as soon as I announced that I was running a campaign, he called me up and he said, Carlos, I'm behind you 100% Tell me, should I publicly endorse you or attack you?

Ben Feuer

That's funny.

Judge Bea

So then election night, I won 59 to 41.

Ben Feuer

It's a pretty impressive victory in San Francisco for a Republican.

Judge Bea

And the other guy who was appointed the same day I was, who also got challenged by a lesbian, lost his position. Jerry Benson.

Ben Feuer

So it really was kind of a personal and not an identity thing.

Judge Bea

Oh yeah, I spent a lot of time politicking all over the place. And so then I became Superior Court Judge. And I sat, and at that time, we were in City Hall. And we were in City Hall until the earthquake. Well, thankfully enough, actually the earthquake didn't close down the court. But it gave us for some reason, an opportunity to build, to buy the spot right across from City Hall on McAllister Street, McAllister and Polk, which was occupied by the Society of California Pioneers. And to buy that and there was a gas station there too, and to build a building. But in the meantime, while that was all taking place, we moved down to Folsom Street. The judges moved down to Folsom street, and I was down at Folsom Street for some years. Then we moved back to 400 McAllister Street, which is where the civil courts are now. And I was practicing there, I mean I was judging there. And I did a lot of asbestos cases. I did some Special Assignments, insurance coverage cases, for the London market insurers.

Ben Feuer

How'd you like the job?

Judge Bea

I liked it very much. Everything got along fine.

Ben Feuer

Did you have your Saturdays and Sundays?

Judge Bea

I didn't work on Saturday or Sundays.

Ben Feuer

Did you have law clerks working for you?

Judge Bea

When I got the special assignment of the PG & E versus London Market insurers, which was excess policies from 1933 to 1965, to see if there was coverage for CERCLA remediation for the lamp black that they had dumped in the ground. It was very complicated. And I told the attorneys for the plaintiffs and defendants, I'll never be able to handle this case without a law clerk. So I want to hire one and you've got to pay for it. And they said fine.

Ben Feuer

I think they still do that today sometimes when a very complicated business case . . .

Judge Bea

Back then it was \$80,000 which was a pretty good salary. And the guy worked for me, and did nothing else than this case.

Ben Feuer

More than a law clerk in the Ninth Circuit makes today when they're getting right out of law school.

Judge Bea

So then I was eligible to retire. And I was getting ready to retire in 2002, I guess.

Ben Feuer

Do you have any sense before you reach the retirement, or potential retirement how many cases you tried over the course of your judicial career?

Judge Bea

In 13 years . . .

Ben Feuer

There are a lot of trials.

Judge Bea

A lot of trials. I think I sat in the Law and Motion for a short time. I was always in civil trials. And also criminal. I was down at the Hall of Justice for a couple of years.

Ben Feuer

Do you remember, other than the general big cases, the asbestos cases, that you worked on, any specific cases that kind of stands out in your mind?

Judge Bea

Well, of course the insurance coverage case stands out in my mind because we had 45 attorneys and we had to build a courtroom for them in 400 McAllister Street and a disability ramp. I didn't need a disability ramp, but they had to build a disability ramp.

Ben Feuer

Sure, you're not disabled.

Judge Bea

But yeah, if you're going to build the courtroom, we got to build it up. So the one case stands out in my mind is the MTBE case.

Ben Feuer

Tell me about that.

Judge Bea

MBTE is a gasoline additive. California requires an additive to gasoline called MBTE, which is some sort of an ecological thing which is fine. But when a spill happens at the gas stations it gets into the ground and goes down to groundwater and it follows the groundwater. So South Lake Tahoe had a suit against all the big companies to remediate the groundwater situation, which was very costly. And we were talking about lots of millions of dollars. And it was very well tried. I thought the plaintiff's attorney was superb, I can't remember his name now. And that was an interesting case. Then I had some case involving . . .

Ben Feuer

You had one involving Avis rent a car?

Judge Bea

Oh, yeah, that case was at City Hall. That case was interesting because the facts were these. The drivers for Avis were all Latin Americans. Or as Stanford Law School now calls them Latinx, not Latinos, that would be sexist. Not Latinas. That would be sexist, but Latinx? It's like calling a person, they instead of he or she, it's gender neutral. The word doesn't exist, but they invented it. Next. This is part of the political correctness, which is endemic these days, and I continue. . . So what happened here was, the drivers for Avis, when you drop a car off for Avis at the airport, you get a driver who drives it back up to the lot, to get it washed up and cleaned up. And then he picks up a car and drives another one back. So, these guys are getting paid five bucks an hour, and they're all Latinos. And there was a straw boss who was the leader of the Teamsters Union who was not Latino. He was Irish or English or some other ethnicity and he would berate these Latinos with all sorts of diatribes . . . "MF", wetbacks, greasers.

Ben Feuer

He went after them.

Judge Bea

So they brought suit under California law for harassment in the workplace and sought damages. And some of them recovered and some of them didn't. Some of them made better witnesses than others. The straw boss made a terrible witness. So the jury found for plaintiffs an award of damages. Then the plaintiffs sought an injunction against the straw boss and against Avis to stop him from calling these people by these harassing and insulting names, or adjectives or adverbs. And I granted the injunction and enjoined Avis and the straw boss from using racially harassing language. Avis took an appeal saying this is a violation of freedom of speech. My position was freedom of speech is where you're saying whatever you want to say, for the purpose of convincing someone of the truth of what you're saying. That is not the purpose of these diatribes. The purpose of these diatribes is plain and simple to harass the individual. You're not going to convince him that he is a motherfucker. You're not going to convince him that he's a wetback. That's not why you're saying that. So the Court of Appeal, California sustained me 2-1. And the California Supreme Court affirmed me 4-3.

Ben Feuer

Oh, it went all the way up to the Supreme Court?

Judge Bea

And a *cert* petition was filed. *Ceritiorari* was denied. And two Supreme Court justices dissented from the denial of the *cert* petition, saying that I had violated their freedom of speech. And it was a close question. I was convinced that this did not involve speech, it involved action, it involved conduct, it involved diatribes for the purpose of denigrating the worker, and I wasn't going to put up with it.

Ben Feuer

Interesting, fascinating, and I wonder, since then the Supreme Court has adopted a more aggressive First Amendment doctrine, then I wonder if that decision would survive today?

Judge Bea

Probably wouldn't. They would say you can get damages but you can't get an injunction.

Ben Feuer

That might be what they would say, right? What an interesting case. And then did you do a case involving the taxicab companies in San Francisco?

Judge Bea

That was the case that got me into the Wall Street Journal. Here was the case. A taxi cab driver on Market Street was picking up a fare. And it was an Englishman who's getting in the cab, I remember this. And the driver looked out saw a young man who ripped the purse away from a woman and started running down Hayes Street. So the cab driver volunteers, he says to the fare, you don't have to get into my cab if you don't want to. I'm going to chase that guy. The guy from England says, this will make a hell of a story. So they take off. And the felon is running, due West for the projects on Hayes. The cab starts following. And as it gets to the corner of Hayes and Franklin, where there's an auditorium with a garage door, the cab driver does a left turn and pins the felon to the wall with the bumper of his cab. But so delicately did he do it, that the only injury to the felon was a hairline fracture of the patella. Which didn't require an operation and healed by itself. At that point the police came, took the felon away, the guy gets 10 years. An attorney sues the cab driver for excessive force.

Ben Feuer

An attorney for the felon.

Judge Bea

Yeah, on behalf of the felon. The felon has just gotten out of some prison, and has been lifting weights. 25 years old, and he is completely in great athletic shape. The cab driver is an overweight 50 year old guy. And the plaintiff argues that the cab driver should have gotten out and confronted this man, rather than pin him with a car with excessive force. The jury comes back and awards the plaintiff \$25,000. Motion for new trial. I set it aside. And I said --this was quoted in the Wall Street Journal, which I have somewhere around here-- "The law is not, nor has it ever been that a fleeing felon is entitled to a fair fist fight."

Ben Feuer

So you set it aside and granted a new trial?

Judge Bea

A new trial and some other attorney came in for the defense and got a defense verdict. See what happened was in California, about this time there had been a burglar who'd gone up on a skylight and fell through the skylight. And he sued the landowner for not having a reasonably safe skylight. And he won.

Ben Feuer

Sure -- foreseeability of an injury to a potential burglar running through a skylight.

Judge Bea

I've got to get going.

Ben Feuer

Sure. So let's stop for today.

Ben Feuer

We are back on the record with Judge Carlos Bea. This is Ben Feuer, his former clerk. It is around 3:20 in the afternoon on November 8, 2019 So when we were speaking last, we had just discussed your time as a Superior Court judge in California, you had run for re-election, and we were talking about a few of the interesting cases that you recall presiding over as a Superior Court judge. And one case that I wanted to talk about a little bit was one involving there was a sex toy and a sexual harassment claim. So why don't you tell us a little bit about that case, and what that was all about.

Judge Bea

As I recall, the plaintiff was a young man who brought an action for employment harassment against his boss, who was the managing director of Winterland, the place where there's a lot of rock concerts. And this young man brought a claim saying that the boss used sexually explicit language and allusions that made his life as a clerical worker impossible, and he was harassed by his boss' incessant, crude, vulgar, sexually explicit language. And this caused him a great deal of emotional distress. And I don't know if he'd been fired, but if he had been fired, he was also claiming unjust termination and wrongful discharge. And he wanted damages. So the case came on for trial.

Ben Feuer

A jury trial?

Judge Bea

The case came on for trial before me and a jury. And I thought in retrospect, that one of the unusual things about the case was that the plaintiff's attorney allowed two members of the jury to stay in the box, which may not have worked to his advantage. One was a Catholic nun in robes, obviously I don't know that she was Dominican or Benedictine, but she was a nun. And the other happened to be a very orthodox Jesuit priest, Father Joseph Tessio, who is a publisher of Ignatius Press, and was found to be



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so orthodox that his association with the University of San Francisco was terminated. So this was a really Orthodox priest, right. And Tessio turned out to be the foreman on this jury.

So that's the background of the case. The plaintiff took the stand. He was a very good-looking young man. Not particularly tall but young, and he showed up with a red sweater and a bow tie. And he looked the embodiment of Andy Rooney in his movies with Judy Garland making, putting together shows in the neighborhood, and he was the embodiment of Mr. Clean, right?

Ben Feuer

Very American virtue.

Judge Bea

Absolutely, yeah. And he was shocked, shocked at the horrible language that was used by his boss. In opening statements, the opening statement of the defendant was very clear. The opening statement was there was no question that my defendant is an extremely rude and sexually abusive man, and that he makes all sorts of statements which you and I would be very upset about, and he does this as a normal matter. He has always done this, and it's a character defect, but his bosses don't mind because he produces good results. And this is just one of the things that he does at work. But as the evidence will show, the plaintiff's claim of damages is illusory and much exaggerated. That was the defense.

So the plaintiff took the stand and as I told you he gave the appearance of being Mister Clean, the ingenu on the block. He was in every way terribly convincing as being a person who had high moral values and was shocked by the language used by the defendant. And after he testified, for purposes of cross examination, the defendant made a motion to display to the jury a video of the plaintiff at his deposition. And there was an objection to it. And I said to the defense attorney, why are you doing this? You've got the plaintiff in the courtroom. You can call him to the stand and take him under [California Evidence Code section] 2055 and cross examine him. Why are you playing the video? He said for purposes of illustrating the plaintiff's demeanor. Everybody's seen what he was like on the stand. He says, yes. They see what he's like on the stand today, but perhaps they'd like to see how he was before he was so prepared to take the witness stand.

At which point I decided it's allowed to see the deposition. The deposition showed the plaintiff be attired in a totally different manner. He was sort of a heavy metal rock individual who had piercings in his ears and his nose and strange hair, and a stranger-yet-get-up, and very much a hip person, right. Who on examination-- he was clerical person-- it turned out that the spindle on which he put invoices on his desk, which normally you see a spike, a silver colored metal spike, the normal spindle, you put the invoices there to deal with, right? In his case, his spike was unusual. It was the cast phallus of one of the members of a rock band that had been taken of the member during oral copulation. This evidence came out and he would use this to put his invoices on.

Ben Feuer

So our Jesuit Priest and our nun on the jury. . .

Judge Bea

Looked askance. Yes.

Ben Feuer

Probably surprised?

Judge Bea

So it was the paradigm case of what demeanor does to a witness. The jury went out and the jury stayed out and stayed out and stay out. And there was an offer of \$250,000 to settle. Plaintiff turned it down. They jury came back and rendered a verdict for the defendant. Zero, right? This kind of case occurs only in San Francisco.

Ben Feuer

Well, that's fascinating, a kind of peek into the life of a trial judge and sort of the culture of San Francisco and practicing law and sort of existing in San Francisco. You were, as I think you mentioned earlier, when you were talking about your re-election campaign, and your younger life, you were, at least before becoming a federal judge, you were a Republican, a member of the Republican party.

Judge Bea

I was a registered Republican. I worked in Republican political campaigns. I was an associate member of the Republican State Central Committee.

Ben Feuer

Ah, and that was even in the 1980s.

Judge Bea

Notwithstanding that, I won my re-election by 59 to 41%.

Ben Feuer

Even a centrist these days in San Francisco can't win by those kinds of margins. That's an interesting dichotomy. San Francisco has long been identified with leftist politics that has only increased, I think, in recent years and decades, but it certainly was very much a left-leaning city at the time that you were a judge. Did you or do you find tensions in that? Do you find sort of, in some ways, perhaps enjoyment in recognizing how perhaps radical everyone, many members of the body politic are? What are your feelings on being a Republican, or having been a Republican, because now you're a very non-partisan judge in San Francisco.

Judge Bea

First of all, I've always gotten along pretty well with Democrats. At my investiture I had three speakers. The master of ceremonies, this . . .

Ben Feuer

Your investiture as a federal judge, which we'll talk about chronologically. . .

Judge Bea

One of them was the master of ceremonies was Judge Larry Kay, Justice Larry Kay, of the First District Court of Appeals, the presiding justice, lifelong Democrat, who got into politics by flying Jerry Brown around, in Judge Kay's private airplane in the 1974 campaign and has been a life-long Democrat. The second one was Kevin Starr, who was the State Librarian and was always a Democrat appointed to his position by Democrats and also by Republicans, Governor Pete Wilson. And the third one was somebody I think you recognize as a Democrat, which is Willie Brown.

Ben Feuer

Heard of him . . . think he's a Democrat, yeah.

Judge Bea

So I've always got along well with Democrats. I get along well with Democrats and Democratic appointees today. I keep my political thoughts and feelings and analysis to myself. I don't go to any fundraising dinners. I don't go to any political events anymore because we're not supposed to under the rules, the Judicial Council Rules of Conduct. But in a facetious manner people ask me, how can you, knowing that my political feelings are Republican and conservative, how can you, do you, live in San Francisco?

And so two rules are very important to consider, and to keep in mind. First is that you never, never allow yourself to learn the names of any of the members of the Board of Supervisors. Secondly, eliminate taking the San Francisco Chronicle. With that you can live in sort of a cocoon, which makes life pleasant.

Ben Feuer

Gotta find a way, right? We adapt. So okay, so you're a Republican in San Francisco. Now, at this point, you've been a trial judge, say we're around maybe the year 2000 or so.

Judge Bea

No in 1990 I became a trial judge.

Ben Feuer

In 1990 you became a trial judge, you won re-election.

Judge Bea

After I won re-election, nobody ever filed against me.

Ben Feuer

No one ever tried again. They've learned their lesson. And so you're a judge for a decade or so, 2000, 2001. And then at any point in time, had you thought about, what about some other judgeships? At one point you were considered for a district court judgeship.

Judge Bea

I was nominated.

Ben Feuer

You were nominated.

Judge Bea

I was nominated by President George H.W. Bush in 1991 to the Northern District of California.

Ben Feuer

So just after you become a Superior Court judge.

Judge Bea

A year after, but I never got a hearing from the Senate Judiciary Committee, the chairman of which was Joseph Biden. And although I talked to Senator Biden on the Senate floor one time, asked him to give me a hearing, but it just didn't work. So that nomination was never acted upon. I had a lot of people writing. Joe Alioto wrote to Senator Kennedy for me, but it didn't help.

Ben Feuer

Do you have any sense of why you never got a hearing, or anything you want to discuss about that?

Judge Bea

Well, the Democrats controlled the Senate, and they were interested that year in, it was 1992, before the election, and they were interested in approving only women candidates. It was the year of the woman. And so other Republican nominees who weren't male were given hearings, for instance, Sandra Armstrong, and a couple of others in Southern California, but not me. So then I continued on the Superior Court bench and then I was getting ready to retire and . . .

Ben Feuer

This was around 2001?



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Judge Bea

In 2001, I was getting ready to retire, and I was considering working going to work as an arbitrator and mediator, either at ADR or JAMS. And then, so a series of circumstances. I received a telephone call from the White House, asking if I would drop by some afternoon to discuss judicial appointments.

Ben Feuer

Drop by from San Francisco at 1600 Pennsylvania Avenue?

Judge Bea

The person who called me was somebody of whom you may have heard, Brett Kavanaugh, of the White House Counsel's office, and he said, would you like to drop by and discuss judicial appointments? And I guess I said I misunderstood what he was talking about, [because] I said, Mr. Kavanaugh, the streetcars from San Francisco to Washington don't run very often, so dropping by is not in the cards. So he said, No, no, we're talking about nominating you to the Ninth Circuit Court of Appeals. And I said, well, that changes the water on the beans. When's your next appointment? It's Wednesday at 3:45, I said I'll be there. So then I went up to Washington and was interviewed by three deputy White House counsel in the White House, and White House Counsel [Alberto] Gonzalez.

Ben Feuer

This is during the George W. Bush administration?

Judge Bea

And that was in 2002. And so I was interviewed then, which was the fastest hour I've ever spent my life. It went by so quickly,

Ben Feuer

Because the conversation flowed so well?

Judge Bea

It went very well, and then a month later I got a call again from Mr. Kavanaugh, now Justice Kavanaugh, saying that they are ready to go forward on my nomination, but that I should get clearance by calling Senator Feinstein and Senator Boxer. And so I was able to do that.

Ben Feuer

And what kind of reaction of the very left-leaning Congresspersons from California?

Judge Bea

Can you stall that for us?

Ben Feuer

Of course

Ben Feuer

Back on the record with Carlos Bea and Ben Feuer, we were talking about the Senators when you were the nominee, when the Bush administration wanted to put you on the Ninth Circuit.

Judge Bea

I thought I wouldn't have too much difficulty with Senator Feinstein because I'd known Senator Feinstein very tangentially ever since Stanford, and she had been married to a man who was my best friend for many years, Jack Berman, that was her first husband. And, I knew her daughter, Katherine, who later became a colleague of mine on the Superior Court bench, so I didn't think there would be any difficulty with that. So Senator Feinstein did ask me to send her copies of all the opinions I'd written as a Superior Court Judge and I told her that there weren't many opinions other than for statements, for the Clerk to enter the jury's verdict.

Ben Feuer

It worked out well that way that you weren't assigned to motions and hot topics.

Judge Bea

Senator Feinstein is not a lawyer, so maybe she thought Superior Court judges wrote opinions. And then Senator Boxer, I was very happily surprised that former Congressman and State Senator, John Burton, who I'd known for years, a Democrat, I got along with fine, although we disagreed about everything, had gone to bat for me with Senator Boxer. And to bowdlerise, one of his typically colorful statements, he had said that he had backed me because I was about as good as anything a Republican president would give them, and because of my age, I had one foot in the grave, so they'd get the seat back soon.

Ben Feuer

And how old were you at the time?

Judge Bea

I was 69

Ben Feuer

I don't know what it was like in 2001, but these days you don't think of that as really that old necessarily.

Judge Bea

I didn't think of that as old.

Ben Feuer

it's a decade under all of our presidential candidates in 2020.

Judge Bea

And what happened, both Senator Boxer and Senator Feinstein sent in their blue slips, so I got a hearing in due form. And I was introduced at the hearing to the Senate Judiciary Committee by Senator Boxer. She introduced me, so I sailed through 86-nothing. And then took a seat.

Ben Feuer

This was back in the age, for future historians listening, to this that was at a time when the minority parties still had a filibuster?

Judge Bea

That's right.

Ben Feuer

If they didn't like the judicial nomination, right.

Judge Bea

So I took the seat in 2003; there was some opposition by printed material at the Senate Judiciary Committee. I don't remember exactly what basis it was, some opposition on a political basis, but the issue never came up. The only questioning I underwent was by the Chairman Senator Hatch. And the only questions he asked me was to tell him a little bit about what I had done to be awarded three medals by the King of Spain, which had to do with my work as a *pro bono* Attorney for the Consul General of Spain in San Francisco.

Ben Feuer

For which you were appointed at one point to a post by the King?

Judge Bea

I was the Honorary Vice-Consul.

Ben Feuer

Vice-Consul, with an official title of "Excellency," correct?

Judge Bea

Right! And a little pass which gave me diplomatic recognition when I went to Cuba on a trip and got me into the stores for diplomats in Cuba, where you can buy everything you want as long as you pay in dollars. But of course, the Communist regime does not let ordinary Cubans in there.

Ben Feuer

No, certainly not.

Judge Bea

Because it wouldn't be good for them.

Ben Feuer

Right. And did you have to give that posting up when you . . .

Judge Bea

Well, eventually after I became a Superior Court judge, it was sort of conflict of interest. I mean, you couldn't be an employee of one government and an employee of another government.

Ben Feuer

Makes sense.

Judge Bea

You might be able to hold dual citizenship, but you can't serve two masters.

Ben Feuer

Not without getting some strange looks from the FBI perhaps?

Judge Bea

They never came around (chuckling).

Ben Feuer

So then you became a Ninth Circuit judge, a Court that certainly at the time, and certainly for decades, had a reputation as a very left wing court. Would you say that's correct?

Judge Bea

Yes. Although there are some courts that rival it.

Ben Feuer

Now, but historically, back then in the 90s and it was the early 2000's?

Judge Bea

There wasn't any other court I can think of that adopted positions on the political left as often and as radically as the Ninth Circuit.

Ben Feuer

Right. So when you came onto the Court, did you have a hope to change some of the Court's precedents and some of the jurisprudence, or were you not really thinking about that yet?



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Judge Bea

Well, it took me some time to get up to speed with what was going on in the Court because my experience had been all trial law, and trial practice. So I had to learn quite a bit about . . . I'd had some cases as a lawyer in the Ninth Circuit, but maybe only three or four, maybe, so I wasn't really that familiar with what went on the Ninth Circuit. I thought that the political coloration of the decisions, to the extent that there was coloration . . .

Ben Feuer

Because most decisions, as anyone who practices in appellate courts knows, 90% or more of the decisions the courts issue really have no political element at all, right?

Judge Bea

Yes, they come through without any dissents. But I thought that there was an inclination in the Ninth Circuit to indulge in some political sentimentalism and feeling in benefit of certain parties. And this was evident, because . . .

Ben Feuer

And you don't mean political parties, you mean on certain types of litigants?

Judge Bea

Parties in actions. And this was evident, most evident in the amount of cases in which the Supreme Court reversed the Ninth Circuit summarily without great argument, and without, sometimes without any argument at all, in anti-terrorism and death penalty, ineffective death penalty advocate cases. I mean, over and over and over again, naming the Ninth Circuit and saying, we've told you before, and we're telling you again.

Ben Feuer

Especially death penalty case, and you say that even as a lifelong Catholic, who has no particular perhaps personal love of the death penalty, at least to the extent it comes from your religion?

Judge Bea

Well, I'll leave that to one side. But so I thought, you know, this Court has to start eschewing its sentimental political feelings and become more of a court enforcing the law. And one of the things that was in my mind in 2005, when there was a bill to split the Court, and a lot of conservative politicians and judges who had been seen as conservative were in favor of the splitting of the Court, putting California and Hawaii in the Ninth Circuit, and having all the other states in the new 12th Circuit. I was against it, and I testified against it in Congress at least twice. And when I was asked by Senators, why I was against it, a lot of conservative judges were for it, not a lot, but some, several, three were for it, I said you have to take a look at how the court functions and works, and forget about the results. The results will change over time. There was a time when the Ninth Circuit was considered very conservative in the 1960s. And that changed, and it'll change again. The political coloration of the

decisions of the court should not be a basis for splitting the court if it's functioning well. And I said besides that, it's a good idea to have a uniform body of law that is applicable in Washington state where Microsoft is, and in California, where Apple is. I mean, we're in the 21st century. And we have ports, for instance, in Seattle, and San Francisco, Oakland, and Los Angeles and we ought to have one maritime law that fits all three ports and Hawaii too.

So it doesn't make much sense to split us up and have more courts. You'd have more conflicts, and you have more cases, going to the Supreme Court because of conflicts between circuits. So all those reasons, which I thought were on the one hand, in the short term, were are functioning well. And in the long term, the political coloration of the decisions of court should not be the basis of splitting the court because that coloration will change and it is changing.

Ben Feuer

Right. And what you predicted, it seems like 15 years later or so is coming true.

Judge Bea

It took longer than I thought it would, but it's taking place.

Ben Feuer

But you're still on the Court in a way that John Burton didn't realize that you would be.

Judge Bea

Yes, right.

Ben Feuer

So you went from being a trial judge to an appellate judge? Obviously, of course, there are innumerable differences in the roles. Is there anything you miss about being involved in trial court practice that you don't have in an appellate practice?

Judge Bea

Very much so. First of all, there's a lot more action in the trial court than there is in the Court of Appeal. Things happen when the case is being tried, decisions are being made, positions are being taken. You can see that the way that the case is coming out, for instance, the case just related about the sexual toy case. Besides being interesting cases, very amusing. And the interplay between the judge and counsel is quite different than at trial. Because at trial you're there for a week with the same attorneys, a week or more. And you get to know the attorneys and you get to know what's going on and how they're putting on their case. And you can either admire them or tear your hair out. So that's a different dynamic than the 10 minutes that we have on oral argument on the Court of Appeals. Also, you hear witnesses. To me, one of the most interesting things about trial was listening to expert witnesses, not only their qualifications etc, but how they arrived at their opinions and the methodology by which they came to their opinions. And that was always a requirement. We didn't apply *Daubert*, we applied other

rules. I had to keep my mind on saying and seeing whether the predicate proof was sufficient for them to be able to proffer. And then juries, impaneling the jury, you get to know a lot of people on the jury, and the witnesses, and the parties and the settlement negotiations. All that doesn't happen in the Court of Appeal.

Now, a lot of other things do happen on the Court of Appeals, which make this job very interesting. It's quite different. It's different between being on the stock market floor, as a trial judge, and be an investment advisor, being Bloomberg.

Ben Feuer

Were you surprised at how much you enjoyed being an appellate judge?

Judge Bea

Yeah, but I had been on the appellate department of the Superior Court, so I had done a little bit of it. The appellate department in Superior Court used to be appeals from municipal court cases.

Ben Feuer

Misdemeanors, maybe?

Judge Bea

Misdemeanors and cases under \$25,000. So we get appeals from misdemeanor convictions and civil judgments under \$25,000. And we would have an appellate hearing just like we do here. The briefs are really much shorter, much briefer.

Ben Feuer

Blessedly so.

Judge Bea

And we didn't have any, I guess we had one clerk, to help us maybe two. Severely understaffed compared to what we are here.

Ben Feuer

Yeah. And as I understand, it's even kind of worse today in terms of the funding and the staffing for the state trial courts.

Judge Bea

So, do I miss trial practice? Yes. And I've volunteered to be a district court judge on a couple of occasions. Though I've never really sat as a district court judge to a trial. I had one case, where there was a motion to dismiss, which I granted in favor of the government. And another case, I was all set to try a case, but it was settled on the day of trial.

Ben Feuer

Too bad. So let's now talk a little bit about your time here on the Ninth Circuit, and we'll talk about some of your approaches, some of the cases that you've worked on and some of your kind of judicial philosophy. I think we've gone through most of the history leading up to this period of time in your life. And obviously, if there's anything that we haven't talked about, that you can think of, let me know and we can always go back and talk about it, but I think we've covered most of the things that I had thought of from your past. Now let's move to the present.

Is there a particular approach to judging at the appellate stage that you identify with? And by that I'm thinking of an originalist, a textualist, a pragmatist, a living constitutionalist, a deceased constitutionalist - not you -- the Constitution. Out of those kinds of buzzwords, are there any that grab you, or that you grab onto or do you approach it somewhat differently?

Judge Bea

I think the struggle is, the idea that there are, the judiciary is a separate branch of government from the legislative or the executive. And so, we three branches of government have a very different situation. We're not elected and we have life tenure. That tells me that the power that we have is on one hand remarkable because the legislature and the executive follow what we order. We don't have a budget. We don't have an army. We don't have police. What can we do except issue decisions?

But such is the respect in which the judiciary is held, that there's a great deal of responsibility to exercising that power. And I am loath to exercise power unless I see that I'm doing so in accordance with the law. And so, yes, I tend to read texts very carefully, especially Congressional enactments, on the supposition that with that tremendous panoply of resources, which the Congress has and all those assistants and all those councils and all those attorneys and all those interns, that they put a lot of time into drafting exactly the language they want. They say what they mean and they mean what they say, neither more nor less.

So if it would make sense to graft onto something they say, to adopt a new rule. . . .it may make sense, and I think the people who argue that it makes sense should go to Capitol Hill, and tell them, but that's not something we should do. If the Congressional enactment without the engraftment of what makes sense, doesn't make sense, then you don't enforce it. You say it doesn't make sense. So it's as simple as that.

Ben Feuer

Go back and give us something that makes sense?

Judge Bea

Congress is in session every year, they can change the law. Right? If that works an injustice in a particular case, that person should go to Congress and tell them that.

Ben Feuer

Right. As you mentioned, the reality is the judiciary doesn't have money of its own. It doesn't have an army of its own to enforce its views, that it's really that its views are simply taken with such respect that leads to its views being followed or its conclusions being followed. Do you get concerned when you see the political branches attacking the judiciary in very public or active ways? This has happened in a number of presidential administrations, certainly congressional races, where you know, the judiciary may issue decisions that are unpopular, or unpopular with certain groups, and then the judiciary itself gets attacked. Is that something that worries you?

Judge Bea

That's a good concern. I don't get concerned and I don't equate the use of the word concerned with worry. When politicians do that, they're doing it for a purpose. They want to shift responsibility for the result from themselves to somebody else. That's understandable. They've got to run for, I mean, it's not admirable, but it's the way politicians have operated since the time of the Roman Senate. So it doesn't surprise me. Yeah, it's water off of my back. It doesn't bother me.

Ben Feuer

You were talking about your textual, text-focused approach to legislative and constitutional interpretations. Are there judges or justices, or sort of law givers, from all of history, from any point history, either American jurists or biblical jurists or other perhaps Spanish jurists, that you look at with admiration or that something about their approach to law is the kind of approach that you recognize and respect?

Judge Bea

Well, yes. I suppose I have to confess that when I was a trial judge and trial attorney. I wasn't too concerned with great jurisprudential questions; I was more concerned with getting the right witnesses on the stand and making the proper points to the jury. So don't get me confused with, as a trial lawyer, with being a judicial scholar. Now that I've had a chance to reflect on who's a good judge and who's not a good judge. . .

Ben Feuer

You've been an appellate judge for 15 years or more . . .

Judge Bea

There are judges on our Court and other courts that I admire and pay a great deal of attention to what they write. Some who agree with me, and some who normally do not agree with me, but I pay great attention to how they write, and what they say. Because I think that they think very well. And that's also true of the Justices on the Supreme Court. There are some Justices who I take more seriously than others, that are consistent in their views, whether they are seen as liberals or whether they are seen as conservatives. For instance, on our Court, I pay a great deal of attention to what Judge Graber writes.



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Judge Graber does not always agree with me. But she has a great institutional memory and she has a very good jurisprudential analysis of issues. Another one who I paid a great deal of attention to was Alex Kozinski, who also had great institutional memory and could see the effects of adopting certain rules, of certain holdings, and, frankly, I very much miss Judge Kozinski not being on the bench. I was very much opposed to him retiring, although I understand some of the reasons why he did retire. So those two sort of stand out in my mind as paradigms of good thinking and good writing. There are others I could name, but I think those two sort of stand out.

Ben Feuer

And on the US Supreme Court?

Judge Bea

Well, I think that Justice Ginsburg writes very carefully, and very precisely. And so I follow what she says. I don't often agree with her results, but I think that on the whole, she thinks carefully and she's to be read with some ponderation. I think Justice Alito is worthy of consideration. I think Justice Thomas is much more original than people give him credit for, much more his own man.

Ben Feuer

For a long time, people sort of thought of him as a follower of Justice Scalia, but it's probably not true?

Judge Bea

That's what the New York Times says, but the New York Times, in my view, is not the paper of record.

Ben Feuer

You have a nickname for the New York Times that you would want to share?

Judge Bea

No.

Ben Feuer

No? Okay.

Judge Bea

And I don't know enough about, we still don't know enough about Justice Kavanaugh yet.

Ben Feuer

Or I suppose Justice Gorsuch really, who's also rather new.

Judge Bea

Justice Gorsuch, I particularly admire justice Gorsuch, his view of the need to modify or eliminate the *Chevron* doctrine, which he wrote about in *Brizuelas v. Lynch* when he was on the 10th Circuit. It's

really a separation of powers issue, and I think that the *Chevron* doctrine was a mistake. It should never have been adopted and was adopted in a case in which the Supreme Court notes of the justices indicate that nobody really understood the case, except Justice Stevens who raised his hand and out-rifled them.

Ben Feuer

I am going to pause our recording for one moment.

Ben Feuer

Back on the record with Judge Carlos Bea and Ben Feuer. So we were talking about the *Chevron* doctrine and administrative law, let's use that as an opportunity to talk about a few areas of law that we just want to explore whether you have any established views about these areas of law that you want to muse about a little bit. Obviously, nothing that would suggest that you have pre-decided any issues that may ever come before you. We're not looking to do that. But just to see what you think about different areas of law.

Judge Bea

Well, I'm on record, I gave a speech in 2015 in Washington DC, at the Heritage Foundation, in which I in substance said that I thought *Chevron* should be reconsidered because it seemed to be inconsistent with our concept of separation of powers and then see where the administrative state should be interpreting statutes enacted by Congress. Congress can't do it; they can't just have a resolution saying, we meant to say something else in this act, and that should pass as an act to amend it. Where does the administrative state get off? Unelected individuals saying this is what Congress meant.

Ben Feuer

And the judiciary says what the law is right?

Judge Bea

Marbury vs. Madison.

Ben Feuer

And the administrative agencies are essentially parts of the executive not the judiciary. So . . .

Judge Bea

I think that's an area that will be developed in the near future.

Ben Feuer

Okay, so some just very broad areas of the legal world that I'd just be interested to hear what your initial thoughts or reactions are. Executive power and the power of the presidency sort of ties in with the scope of the administrative state. But do you have any views on executive power and the President?

Judge Bea

Well, it's all tied in, it's so complicated now by the extent to which the executive power is spread through the administrative system. And the requirements of the Administrative Procedures Act as to the exercise of the power of administrative, executive state. We seem to be increasingly granting power to persons who are not elected, and they make decisions, other than judges. Brand new policy powers to people who are not elected. I don't think that's entirely consistent with the Constitution. The Constitution is a marvelous document. It's lasted over 200 years. It's been amended 27 times.

Ben Feuer

Other than judges? I think I read somewhere that there are only five presidential democracies that have lasted more than 100 years in terms of a constitution and it's such a, it's a very difficult balance to strike to have a presidential as opposed to parliamentary democracy.

Judge Bea

So the executive has the power to invade the citizen's life more frequently and to a greater extent than any other branch of government. Practically anything you want to get done these days requires a permit.

Ben Feuer

Sure, this morning I had an architect at my house to look at putting on some sort of attachment, or some sort of change in the permit, the months that we will require to wait for permits . . .

Judge Bea

Even such a liberal politician as Wille Brown often says, it's better to ask forgiveness than ask permission. I see that as a problem that invades everybody's life. And we've got to be constantly on guard, because as President Reagan used to say, the most frightening statement that a government official can make is: I'm from the IRS and I'm here to help you.

Ben Feuer

How about your thoughts on the First Amendment?

Judge Bea

Well, you know, I follow along the First Amendment, I think there has been a great deal of development of the First Amendment recently, and the last 20 years.

Ben Feuer

Many people would say that the First Amendment has expanded in its protection of different kinds of speech.

Judge Bea

I think that's correct and an example of that is campaign finance: *Citizens United*.

Ben Feuer

Campaign finance?

Judge Bea

The idea that the government's regulation of the expenditure of money in political campaigns can infringe on the individual's right to express himself. And there are, I think, there were 45 Senators who recently signed a resolution to amend the First Amendment and get rid of *Citizens United*.

Ben Feuer

And not just *Citizens United* but, broadly speaking, all or many limits on the Congress' ability to regulate financing of elections. Right financing elections on the theory that speech and financing are essentially equivalent.

Judge Bea

I think they have got to tread very carefully there. The First Amendment is a very important part of our Constitution. And the idea that government can regulate the expression of thought is a bad idea. I don't think . . . it's one of the things that Justice Holmes got right.

Ben Feuer

Sure. Do you agree with the underlying premise in much of this area of law, that speech and financing, that financing of elections, or the expenditure of money in elections, is essentially an expression of thought?

Judge Bea

Well, it's a necessary means of expressing thought. I mean, freedom of thought exists everywhere, even in Communist China and the Soviet Union and Nazi Germany. You can think what you please, but you can't say it.

Ben Feuer

Sure. And to take that example of it further maybe you could whisper it to a confidant. So you could say it, but you certainly couldn't publish, well that's taking a risk, but you certainly couldn't publish it out there for people to hear it and publishing would take money, right.

Judge Bea

I think that we've got to be constantly aware of liberty, which is given to us by the First Amendment. Congress shall enact no law.

Ben Feuer

And do you think, I mean, just to follow up on that a little bit, you described the liberty as given to us by the First Amendment, but do you think I mean, the Thomas Jefferson Declaration of Independence perhaps theoretically sees that liberty as coming from a divine sort of innate type of liberty.

Judge Bea

That's the argument behind natural law.

Ben Feuer

What do you think of natural law?

Judge Bea

Well, I don't know too much about it. There is sort of, if you dig down far enough, you come to the conclusion that, yes, perhaps a human being does have a right to things before the government gives them that right. And the Constitution respects, the sort of the Burkean idea that human beings have rights and government exists to protect those rights. I agree with that. The contrary idea which is sold in Cuba at the present time, and before that in Russia, and is installed in Communist China, is that the government determines what rights everybody has. You should be a supplicant to government to get whatever rights you wish to exercise. And government represents all of us. We're all in this together. You didn't build your business. That all the source of rights is the consensual and consensus view of government. I happen to think that's an abysmal idea and I think the Constitution thinks it's an abysmal idea.

Ben Feuer

How about government involvement in religion? Do you think that they should be very separate? Do you think they should be permitted to be involved in some ways? What are your thoughts, as a constitutionalist?

Judge Bea

Well, I think my opinion is in *Newdow vs. Rio Vista* is pretty clear. I think that the . . .

Ben Feuer

Do you want to take a moment to explain what that opinion was?

Judge Bea

It's called the Pledge of Allegiance opinion. I think that the invocation of deity to emphasize the patriotic fervor with which a pledge of allegiance is made does not make the pledge unconstitutional, because our traditions from earliest times have not required a strict separation of church and state. That was a letter which was written by Thomas Jefferson as private correspondence; it was not a decision of the Constitutional Convention, and it was never a decision of the Supreme Court. And I think that Justice Rehnquist had a better idea, and to a certain extent, Justice Kennedy had a better idea, which is that



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religion is something to be accommodated consistent with our history and traditions, and not to be repelled as a slicker repels water and rain.

Ben Feuer

So there's kind of a balance or at least a co-existence between government and religion?

Judge Bea

It certainly should be. Religion should be given an equal role, along with any other philosophical idea. So I don't see any danger of religion compelling action which is inimical to liberty. I think Justice Kennedy's opinion in the *Town of Greece* brought home a good distinction. There have been a lot of cases saying that government actually should not endorse, not seem to endorse any religious action. And say, wait a minute, whether the government endorses or doesn't endorse, the First Amendment, what it does is protect you from the government coercion, coercing you to do something religiously. So coercion rather than endorsement is what counts in *Town of Greece*, I think was a real step forward to accommodate religious feeling. And then I also have my own idea, and it's not a serious idea, of how to predict the result of cases involving religious symbols in the public square. Do you know this one?

Ben Feuer

I don't think I do.

Judge Bea

Oh, well it takes a moment. In *Donnelly vs Lynch*, there was a creche that was put up by a local government in a park in Rhode Island. And there was objection to it being establishment of religion. It was found not to be an establishment of religion, and it was allowed to remain. Now, a couple of years later, in *ACLU vs. Allegheny*, there was a creche, nativity scene, same as in *Donnelly*, but this one was in a courthouse in Allegheny County, was found to be an establishment of religion and had to be removed. Years later an obelisk outside the library in Texas had the 10 Commandments on it was found not to be establishment of religion and was allowed to remain. The text which was on an obelisk, the 10 Commandments, was on a parchment inside a Kentucky courthouse and was found to be an establishment of religion. So when the cross of Bladensburg, New Jersey came up for litigation, people said, well, I wonder if this is going to be held to be an the establishment of religion? And I said it's not going to be held to be an establishment of religion and it wasn't. And they said, so how can you be so sure? And I said, it's very simple. Look, in Rhode Island, the creche was rained on, but the creche in Allegheny County had a roof over it. In Texas, the obelisk of the 10 Commandments was rained on, but the text in the Kentucky courthouse had a roof over it. Rain versus roof. If it rains on it, it's okay. If there's a roof over it, it's not okay. That is the answer.

Ben Feuer

The rain-roof doctrine, as they will one day call it, that sounds exactly right.



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Judge Bea

Well, but that's a jocular explanation. But what it underlines is the inconsistency of the Supreme Court. I mean how can you find that the text of the Ten Commandments, the questions may be different, there may be different symbols around them, etc., but the Ten Commandments--one text outdoors and one text indoors, they're both put there on government land by government entities, right? How can you possibly find that this is okay, and that one is not?

Ben Feuer

Seems very idiosyncratic.

Judge Bea

So, what it shows is that we need a new way of thinking about religion in the public square. And I think that Justice Alito's opinion in *American Legion*, which is the Bladensburg cross case, starts grappling with that, talking about old and traditional symbols, not of coercion, coercing anybody to do anything. And it's offensive only if you want to make it offensive. You can walk away from it. That's what Kennedy said, Justice Kennedy said in *Town of Greece*. Americans are strong enough in their convictions that if they don't like the prayer that is being said in the *Town of Greece*, they can pick up and walk out. And that's what I did with the Pledge of Allegiance. In the Pledge of Allegiance case, the children are not obligated to recite the Pledge of Allegiance. They're not even obligated to listen to the Pledge of Allegiance.

Ben Feuer

And as I recall, there was an open question about why the language "under God" was even in the Pledge of Allegiance, and whether it really had to do with God or had more to do with Communism.

Judge Bea

It was . . . Justice Brennan wrote a concurring opinion one time saying a reference to religious fervor is simply an example of dedication and emphasis on what you're doing, right? Now with my opinion, in *Newdow vs. Rio Vista*, there is a 153 page dissent by the late and lamented Judge Reinhardt, who went on for many pages and 44 footnotes, taking the opposite view.

Ben Feuer

Okay, how about substantive due process? What are your thoughts on the doctrine that's you know, been . . .

Judge Bea

The easy answer is, that it's an oxymoron. It can't be substantive and process, right? But after the Slaughterhouse Cases in which the privileges and immunities, which citizens of the United States enjoy, were held to mean nothing other than very limited rights to travel and things like that. Then if you believe in some rights of individuals that existed before government and weren't given to them by government, you have to have some basis by which to say what's the fundamental right, which is being

transgressed by this legislation about this action. And as unwieldy as it is, substantive due process, or some form or some rethinking of privileges and immunities, which is a hobbyhorse of Justice Clarence Thomas, has to be done. Because there are things that our history and tradition recognize are sort of innate in human nature which we prize, and maybe they're not written down somewhere in the Constitution, but we have come to recognize them. Now, the idea of the right to same-sex marriage is part of substantive due process, I think it's a recent invention. And I think that it takes a great deal of thought to come to that conclusion. But it's the law for now.

Ben Feuer

And I mean, in some ways, it sounds, I mean, it ties in with a couple of things you've said earlier, the idea of substantive due process, as you've described it. One is, if you accept that there is some natural law outside of positive law, that substantive due process is a method of incorporating that natural law into the legal system.

Judge Bea

But the system, the problem with substantive due process is that it's a malleable concept.

Ben Feuer

And anti-democratic, apparently, right?

Judge Bea

Anti-democratic doesn't bother me all that much because the Constitution is anti-democratic.

Ben Feuer

Sure, inherently and deeply.

Judge Bea

And there can be excesses of democracy, such as the French Revolution. And we don't want that.

Ben Feuer

Hitler got elected.

Judge Bea

That's right. One man, one vote, one time.

Ben Feuer

Right. But it also sounds like it ties in with another tension you mentioned earlier, which is the need for judges to recognize a limited role for themselves, since they're not elected.

Judge Bea

And for the law, and for the government. In Spain, when something is intruding upon you all the time by government, they say "we have this even into our soup." We don't want government even into our soup.

Ben Feuer

No, probably not. Not a tasty soup, I fear. Okay, so let's talk about some of the more prominent Ninth Circuit decisions that you've authored so far in your tenure, which of course is not over.

Judge Bea

This may be a case of mistaken identity, because I usually write dissents.

Ben Feuer

You are in the Ninth Circuit Court of Appeals--that's a very good point! But you have written some rather prominent and well cited opinions. You mentioned the case of *Newdow* against the United States.

Judge Bea

Versus *Rio Vista*.

Ben Feuer

Rio Vista, right, not against United States. Right versus the local school district, which was compelling this fellow's kids to say the Pledge of Allegiance or saying the Pledge of Allegiance even without compelling them.

Judge Bea

You've got to understand, the California law required a patriotic exercise during the school day. They could be raising the flag. It could be a pledge of allegiance. It could be a history lesson, whatever, a patriotic exercise. As to the Pledge of Allegiance, the rules are very clear. No child had to attend the Pledge of Allegiance. He or she could stand aside and not be involved with it. No child was compelled to recite the Pledge of Allegiance. We know that from *Burnette vs. West Virginia*, 1943. So, the question was, is it a violation of the First Amendment to have a child exposed to the words "under God" and is it a violation of First Amendment to force him to say I don't want to be exposed? And I found that the inclusion of the words under God, was to underline them to reinforce the patriotic sentiment behind the Pledge of Allegiance, that this was a patriotic exercise and was not a religious obligation or religious immersion. That became the rule of the Ninth Circuit. It was already the rule in the Seventh Circuit, it was already the rule in the Fourth Circuit. And the Supreme Court has never had the issue brought up again, because Mr. *Newdow* dismissed his petition for *certiorari* to my opinion. And he had another case in the First Circuit, which he lost. So the Seventh, the Ninth, First and Fourth Circuits all agree that the Pledge of Allegiance is not the establishment of religion. On slightly different grounds, but not that much different.

Ben Feuer

And the Ninth Circuit was set to go the other way, or had gone the other way around the time you came on the court, I think.

Judge Bea

Had gone the other way.

Ben Feuer

In 2003 or so?

Judge Bea

Originally, Mr. Newdow had his case heard by a three judge panel of Judge Goodwin, Judge Reinhardt and Judge Fernandez. And in a 2-1 opinion, Judge Goodwin wrote the opinion saying the Pledge of Allegiance violates the First Amendment, establishment of religion. That case was remanded and vacated because Newdow was found not have standing to represent his daughter because he didn't have custody of the daughter. Newdow went out and got somebody else as the plaintiff. In the meantime, Dr. Newdow became an attorney--he's a very intelligent guy. And so the second case came to me. And the panel was made up of Judge Dorothy Nelson, Judge Reinhardt, again . . .

Ben Feuer

. . .again-- interesting. . .

Judge Bea

The odds of math have to be very high, but it happened that Judge Reinhardt was again assigned to the panel. I wrote for the majority. The Pledge of Allegiance has sort of faded in the background. It's been validated as against the First Amendment challenge in four Circuits. It hasn't gone to the Supreme Court. I don't see it going up to the Supreme Court again, so that's dead.

Ben Feuer

Okay, there's another case that got a lot of attention that you authored, a prosecutorial misconduct case called *United States v. Lopez Avila*, do you want to tell us a little bit about that?

Judge Bea

Well, I don't remember the facts of the case. But what I do remember is that the prosecutor deliberately misrepresented to the court an essential fact. I don't know whether it was in trial or in sentencing. But he knew better. It had to do with him quoting something. And he quoted only partially and didn't quote the whole thing. And I found that to be outrageous.

Ben Feuer

He left out material elements?



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Judge Bea

The core. An essential fact. And I thought that was outrageous for any attorney to do, but maximum when it's done by the prosecutor, who's got the tremendous power of the administrative state. I wrote an opinion, excoriating the action of this man. And the US Attorney, the Department of Justice, made a motion to excise the portion of the of the opinion that excoriated him and I was very happy to get unanimous consent by my panelists to deny that motion and it stayed on the books.

Ben Feuer

You identified him by name, which is frequently not done.

Judge Bea

Yeah, because this was such an egregious misrepresentation, but I don't remember the exact facts of the case.

Ben Feuer

There's another case that you authored an *en banc* opinion, a case called *United States v. Hinkson*. Tell us a little bit about this case.

Judge Bea

Well, this was a very convoluted case. But what it came down to was a determination of what was the power of a trial judge in weighing evidence as to whether there should be a grant of a new trial or not. And what was the power of an appellate court in reviewing that decision.

Ben Feuer

Which is discretionary whether to grant a new trial?

Judge Bea

"Abuse of discretion" --- and what do we mean by abuse of discretion? Up until *Hinkson*, we had a series of cases that say if the appellate court was of a definite and firm conviction that an error had been made, then it could reverse the trial court finding of fact.

Ben Feuer

Very squishy standard.

Judge Bea

Well, it was very subjective. And some of our esteemed judges were quicker to form firm, definite convictions of error than the others. So, this case was a very difficult case to use as a vehicle, because it involves some outrageous conduct by a witness. But, the way it came about, the defendant had played, taken a risk not to raise the issue. And on the record, the trial judge who happened to be one of my colleagues sitting as a district court judge, in that case . . .

Ben Feuer

By designation?

Judge Bea

By designation, Judge Tallman, his finding was, within his discretion, I thought, so we put together a rule saying that an abuse of discretion means number one, there is an abuse of discretion if, number one, the trial judge has picked the wrong law or seen or misinterpreted the law, as a plain legal question, and it's a material issue. And secondly, as to issues of fact, the appellate court should defer to the decision of the trial judge, unless the decision of the trial judge was illogical, implausible, or could not be inferred from the facts on the record. So it became more objective as to whether the trial judge's action was correct or not. And that was consistent with my overall thought and being a trial attorney, and a trial judge for many years, that the trial judge was a better person, in a better place to make a decision on an issue of fact, because he had seen the witnesses, the demeanor, the timing, a lot of things. . .

Ben Feuer

Context, the whole gestalt of the case, right?

Judge Bea

A lot of things don't get into the record for the appellate court to review. And the trial judges are in a better situation to weigh the evidence and weigh the importance of the evidence than is the Court of Appeals. That judge, that case, *Hinkson*, I think I asked one of my clerks the other day, how often has it been cited, and this was a month or so ago, it had been cited 583 times.

Ben Feuer

This is your most cited decision. Well, you must have had a really smart clerk who worked on that one.

Judge Bea

Yeah, I think it may have been Ben Feuer.

Ben Feuer

I don't know him, but boy, what a sharp guy (laughing). Let's talk about another case you worked on. Just a couple more. You wrote, I believe, the opinion in a case called United States against Arizona involving the Arizona Senate Bill 1070. This was, I believe, an immigration related case.

Judge Bea

I dissented in that one.

Ben Feuer

You dissented, so tell us a little about the dissent. I wanted to actually talk about your dissents.

Judge Bea

Well, I dissented on the ground that I thought that the Arizona bill was not preempted. Arizona had required the Arizona police to report, to cooperate with federal immigration officials. And the majority opinion said that the state had no role in immigration matters, and painted a broad brush. And I said that's not quite right because section 1373 of the Immigration and Naturalization Act allows states to deputize their policemen, as immigration officers, and the Supreme Court agreed with me and reversed on that ground. On another ground, I dissented, but that was not adopted by the Supreme Court. So, 50-50.

Ben Feuer

Okay, let's talk about some of the other dissents from denial of rehearing *en banc*. That was just a dissent of a three- judge panel. But some of your dissents from denial of rehearing *en banc*, these, some have referred to as letters to the Supreme Court. But these are when the Ninth Circuit doesn't take a case in its *en banc* procedures, the practice has come about perhaps over the last two decades or so, decade or so, where especially a number of judges think it should have gone *en banc* where they'll write a separate dissent from the denial of the hearing. And you wrote right one, in a case called Parents Involved in Community Schools against Seattle School District Number One. Tell us a little bit about what that is, what that case is, and your dissent.

Judge Bea

In that case, as I remember the facts, the Seattle School District was allocating admission in their high schools on a racially balanced basis. They're making children go outside of the neighborhood together, other neighborhoods and importing children into the first neighborhood in order to achieve racial balancing. I found that, I was of the opinion, that was racial discrimination, and not allowed by the cases in the Supreme Court. And so I dissented from denial of rehearing, I said the case should get a rehearing, and I guess I was right because the Supreme Court reversed. And I ended my opinion by saying the way to end racial discrimination is to stop discriminating. Stop racial discrimination.

Ben Feuer

Stop discriminating on the basis of race?

Judge Bea

No, but the Chief Justice said, "The way to end racial discrimination is to stop discriminating on the basis of race" and didn't attribute the line to me. But Justice Breyer, in his dissent said, wait a minute, Bea said this first.

Ben Feuer

So your knight in shining armor was Stephen Breyer.

Judge Bea

Then later, Linda Greenhouse wrote an article for the Green Bag, in which she pointed out the Chief Justice's phrase bore a certain resemblance.

Ben Feuer

I see. Did the Chief Justice ever mention anything about it to you?

Judge Bea

No, but I was appointed to the International Justice Relations Committee, that allows you to travel all over the world.

Ben Feuer

An offer of amends, perhaps. But you weren't able to take that up, as I know.

Judge Bea

No, I did.

Ben Feuer

Oh, you did? Oh, good. Oh, okay, glad you were able to do that. And one of your other, just of several, one other of your dissents from denial for hearing *en banc*. There was a case called *Trunk against City of San Diego* involving the Mount Soledad cross.

Judge Bea

Yeah, the Mount Soledad cross was sort of a precursor of the Bladensburg cross, and the American Legion, and I took very much the position which Justice Alito later took, which is, yes, the cross is a religious symbol, but it also is a symbol which evokes the memory of fallen soldiers. Because it's, over the centuries, had taken on that connotation in our culture.

Ben Feuer

That it's not there to tell passers-by that they must or shouldn't believe in Jesus Christ and the Christian faith, but rather symbolize something else?

Judge Bea

This symbolized a memorial to fallen soldiers. That case was never taken up by the Supreme Court, but the federal government sold the plot of land on which the cross stood to a private entity and so the case became moot.

Ben Feuer

Eliminated the problem. And how about a case called *Styers against Ryan*, this is a death penalty case. We haven't talked too much about that. And also post-traumatic stress disorder was in there.

Judge Bea

Styers was, I don't think that that case is finished.

Ben Feuer

Okay, so maybe we shouldn't talk about it, it might come back on remand.

Judge Bea

There may still be a petition to the Supreme Court.

Ben Feuer

Okay. Well, let's leave it aside and we won't discuss it. And then finally, just to come back to one of your opinions that got a perhaps more press than any of the other opinions you've written, although perhaps less precedential value in the long run, a case called *Naruto* against Slater. What was this case about?

Judge Bea

Well, David Slater is an Australian or was an Australian journalist. And he found himself going to a natural game reserve in Indonesia. And he wanted to photograph animals in the game reserve. So he set up his camera and he was taking photographs of animals. And he found that there was a macaque monkey who later was named *Naruto*. I don't know what, who named him *Naruto*, how he got the name, [but *Naruto*] who was hanging around looking curious as to Slater and Slater's camera. So, Slater had the idea that he'd leave his cameras set up. As he was taking photographs, the monkey was watching the button he was pressing. And so he left the camera out overnight. And when he came back the next day, it turns out that *Naruto* had gone to look at the camera and had pressed the button and had taken selfies.

Ben Feuer

Smart monkey, right? Millennial, right?

Judge Bea

The photos are in color and they are stupendous. Photographs in color, and they're riotously funny. You can't look at *Naruto*'s photographs of himself, itself without bringing a smile to your face. So Slater thought, this is terrific. And he published a book called *The Naruto Selfies* or something like that. And he started selling it on the internet and everything was going on fine. A German primatologist, whose name I can't remember but obviously very Germanic, and People for the Ethical Treatment of Animals brought a lawsuit in the Northern District of California, the site of many *avant garde* litigants, suing on behalf of *Naruto*, as the next friend of *Naruto*, under Rule 17 of the Federal Rules of Civil Procedure, on behalf of *Naruto*, for copyright infringement on the claim that the copyright to the photographs belong to *Naruto*, and *Naruto* should be getting the royalties and everything else.



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Judge Orrick in the Northern District looked at the statute, the copyright statute, which gave rights, copyright to persons and said Naruto ain't a person. We were faced with an Article III standing issue. Can an animal have standing to bring a lawsuit? We were barred from considering that as a three judge panel because some years before one of our judges had found in a lawsuit called *Cetacean Society vs US Navy*, that whales and dolphins had standing to sue to enjoin the Navy from conducting sonar tests because it hurt their ears or their auditory apparatus. So we had to, at least I thought we had to bow down to our prior opinion under *Miller v. Gammie*, that the monkey Naruto had standing. But then the issue was that, was he covered, did he get rights under the Copyright Act? And I agreed with Judge Orrick that he didn't. Judge N.R Smith wrote a concurring opinion thinking that Naruto didn't have standing at all. I thought that issue was foreclosed.

Ben Feuer

Despite the existing precedent, he had some way to distinguish it?

Judge Bea

He thought that under under Rule 17, Naruto didn't have standing. So we heard argument and we had conference and I started writing the opinion because I was the presumptive writing judge, and I was in the majority. And we got notice that the case had been settled between (the German primatologist had moved out of the case with everybody's agreement, so he was no longer in the case) between PETA, People for the Ethical Treatment of Animals, and Slater, and Slater's publisher had been settled, and we should dismiss the case. But, the motion for settlement said that PETA has settled with Slater, but PETA was not foreclosing, releasing the rights of Naruto, whatever his rights might be. So I took that to allow Naruto to sue again.

Ben Feuer

Naruto might find a new next friend to sue Slater again?

Judge Bea

Infringement is a continuing violation.

Ben Feuer

Sure, every copy of the book he sells conceivably.

Judge Bea

So, the majority refused to dismiss the appeal, it was a motion to dismiss the appeal, on the ground that it was moot, because it's not moot: Naruto might have some rights, you don't know if he does, and besides that I saw the settlement as an attempt to manipulate precedent.

Ben Feuer

And avoid a perhaps and unfavorable published decision.

Judge Bea

Right, so that was . . .

Ben Feuer

So you published? So you ended up going ahead and publishing the opinion?

Judge Bea

And it got all sorts of publicity. And people kidded me for a long time with, you're making monkeys out of us.

Ben Feuer

Oh, that's right. Monkey see, monkey sue! I think somebody said was the case.

Judge Bea

That was very amusing.

Ben Feuer

Do you like writing majority opinions or dissents better?

Judge Bea

Doesn't make any difference.

Ben Feuer

Doesn't make any difference. I mean, the majority opinion I guess you're happier in a way?

Judge Bea

Today I was writing an opinion in an *en banc* case, and then we've gone over it a dozen times. And I like writing. I like writing one or the other.

Ben Feuer

Do you have a particular philosophy or approach to opinion writing? Something you try to accomplish? You try to be funny? You try to be direct?

Judge Bea

I like to write an opinion that is understandable. At least in the introductory portion, which tells you all about the case, before you get into the fine strokes later on, but at least in the introduction, I like to write the lede what I call the lede in a way so that it's understandable, not just to the lawyers in the case or to lawyers or to judges, but to an intelligent man on the street, who's not a lawyer, who can read this and say, well, that makes sense. So rule number one, get it right. Rule number two, write it right.



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Ben Feuer

Excellent. That's it sounds like a good philosophy. We talked about a few dissents from denial of rehearing *en banc* where you are on the *en banc* panel. You are a judge who is particularly active in the *en banc* process. I think you enjoy the *en banc* process. How did you get interested in the *en banc* process? And, what do you think, as a matter of policy and practice of the somewhat controversial limited *en banc* process that the Ninth Circuit uses having eleven Judges hear *en banc* decisions, at least most of the time?

Judge Bea

The *en banc* process, I think, is important. These days the Supreme Court takes 70 to 80 cases a year. It can't correct all the cases that have gone wrong. And I think it's an obligation of the Circuits to, on the three judge panel decision that's gone wrong, to correct it. Not in every case. But in a case that has some exceptional importance, because it is a recurring matter, or it's in conflict with another Circuit. And I got interested in it, I guess the first case, I can't remember the facts, I guess it was *Rice v. Collins*. It was a criminal case where I think the convict had gotten ineffective assistance of counsel. And instead of pleading guilty and getting nine months or a year, he'd been told to go to trial and got nine years or so, and I thought, this is so wrong. And the Supreme Court eventually agreed with me and reversed and I got interested. And so I have been active in the *en banc* process. And when I go senior later this year and Patrick Bumatay takes my place, I can still call cases *en banc*. I can still write suggestions, but I can't vote. But I could write statements regarding if the *en banc* case doesn't go *en banc*.

Ben Feuer

So you still can participate in these sort of letters to the Supreme Court?

Judge Bea

What I can't do is serve on the *en banc* court or vote on the *en banc*.

Ben Feuer

Will you miss that vote?

Judge Bea

Yeah, but you know, there's a time for everything. And I've been here for 16 years. And it's time to let somebody younger come on the Court.

Ben Feuer

To the extent you hoped, during at least your tenure as an active judge, to perhaps shift some of, help shift some of the most liberal Ninth Circuit precedents more towards at least the middle through the *en banc* process. Do you think that that's been successful that you've been able to accomplish any goals?

Judge Bea

You know, *Rice v. Collins*.

Ben Feuer

Hinkson and abuse of discretion?

Judge Bea

I think it's been a worthwhile task. I can't quantify any amount of success. *Parents Involved* . . .

Ben Feuer

Parents Involved, that's a great example. And that did succeed in getting to the Supreme Court, and getting attention, that dissent.

Judge Bea

And then Texas case came along, and Justice Kennedy found for the first time some constitutional admissibility to racial allocations.

Ben Feuer

The Ninth Circuit as an institution. We've talked about whether the Ninth Circuit should be split. You take the view that it's more effective as a cohesive circuit rather than being split, in addition to the probably many other reasons not to split the Ninth Circuit. But other aspects of the Court as an institution. Do you think it's working well, as a court? Do you think there are things that should be changed or that that the powers that be and court administrators or the Congress should think about changing?

Judge Bea

We work harder on the Ninth Circuit than any other circuit in United States. When we get visiting judges, they are shocked at the amount of work they have to do while they're here. Other circuits have maybe three cases a day for hearing. We have six or seven. We just do more work. If there's anything that can be done as to getting more judges, so we can parse out the work and not work as hard as we do.

Ben Feuer

The Judicial Council has requested 5 new judges for the Ninth Circuit. For years, it's been requesting that.

Judge Bea

But it's a political issue that it won't give, one party doesn't want to give the other party the naming rights. So, no, I think Judge Wallace had a very good idea which was, we ought to have fewer circuits not more circuits.

Ben Feuer

It's an idea I personally agree with and have written about.

Judge Bea

There's no reason the world why the First and Second Circuits can't be one circuit.

Ben Feuer

Or the Fourth and the DC Circuit, or the Fourth and the Third Circuit could easily be merged, it seems.

Judge Bea

Because the more circuits there are, the more of an opportunity for a conflict between circuits. And you don't know what the law is.

Ben Feuer

And the Ninth Circuit has certainly shown that even a large circuit can be run very efficiently.

Judge Bea

Yeah, well, we're a little slower in our determinations than most other Circuits, but we're not the slowest court. I think it was the third slowest court. But we have so many more cases. When you talk to any of the other circuit courts, six judges on the First Circuit, they don't have anywhere near the volume we have.

Ben Feuer

And splitting the court doesn't make the case the total cases any less, it just means you have more bureaucracy in some ways and more administrators that way.

Judge Bea

The idea of separate circuits you know, in the old days, stage coaches, railroad tracks, was to allow judges to be close to their decision-making offices, etc. But with airplanes and with computers, and with email, you don't have to be in any particular place.

Ben Feuer

So let's talk a little bit about your personal life as it is today. You are married to the same woman now for how many years?

Judge Bea

It was 44 years in August.

Ben Feuer

Louise, and you have some kids.

Judge Bea

Four boys.

Ben Feuer

Tell us about your kids.

Judge Bea

Well, the oldest is Sebastian, and he's 42 years old and he is a managing director for BlackRock in New York City on Park Avenue.

Ben Feuer

He was also a successful athlete, following after his father.

Judge Bea

He was he was a national championship rower at Cal, and his boat won the national championship. He was a world championship rower for the United States in 1997, in France, and he won a silver medal for himself in the 2000 Olympics. So he was a great, great athlete, and he's still rowing at age 42. A couple of weeks ago, he was in the head of the Charles race in a boat for the California Rowing Club. And he's fit. And he's married to a lawyer from Stanford Law School, who doesn't practice now. They live in Connecticut and they have two daughters, and everything's hunky dory. And we're going to spend Thanksgiving with them.

So then, son number two, Alex, who was also a rower in high school at St. Ignatius in San Francisco, where he was a State champ along with Sebastian in 1995 and a Nationals champ in 1997. And then he rowed for Georgetown, on the Varsity at Georgetown, and then he went into banking, at JP Morgan, and he is the head of JP Morgan's high yield bond market, in other words, junk bonds, on Park Avenue, and now he lives in Rye, New York. And we'll be seeing him for Thanksgiving too hopefully.

And then son number three is Nicholas, who was married over a year ago, and he married a delightful woman who works at UCSF, and they have a little girl, one of my granddaughters. Alex has two boys and one girl living in Rye. And then Nick lives here in San Francisco. He is a manager, Project Manager, for an outfit called Epsilon. But he's been seconded out as they say, in England, to Google doing whatever Google does. And then there's Dominic, who is the youngest by 14 minutes, He's a twin brother of Nicolas, and Dominic is chief of staff to the Chief Financial Officer of Guggenheim Partners in Santa Monica. And he's in investment banking. And he took time out in his career to join the Marines. He volunteered for the Officer Candidate School. He became an officer in the Corps. He was in for over four years. He left as a captain. And we have to congratulate him on Sunday, because November 10th is the birthday of the Marine Corps. So we have to send him a piece of cake.

Ben Feuer

And you have a Marine flag, one of the two flags on your desk, the flag of the United States and the flag of the Marine Corps. You return to Spain annually. Where do you go and what is that like and what has it been like to do that over time?

Judge Bea

My brother and I are very lucky in that we inherited the home in which I was born. I was not born in the hospital, I was born at home.

Ben Feuer

In a bed?

Judge Bea

In a clinical bed, which is still there. So we have this house in San Sebastian, which is a delightful city. It's on the northern coast of Spain, it's 19 kilometers from the French frontier. And my wife and I go there very often with the plans to make trips throughout Spain. But we get to San Sebastian and the house is so comfortable, it's only 100 meters from the beach. So we just stay there, and it's lovely. San Sebastian has very good weather. It's very similar to San Francisco. A little bit warmer in the summer time, and the water is warmer. The beach is configured in sort of a half moon, and there's an island in the middle of the bay and on the island if you swim out there's a bar, you can get a beer. It's very well located, so we stay out there. With a computer with internet I can work there as well as I can work here. So if I don't have hearings, I can keep up with all my cases and deal with the clerks and everything else.

Ben Feuer

Very nice. You're known for using Spanish proverbs in your writing.

Judge Bea

I told you one before about la sopa.

Ben Feuer

Are there any favorite Spanish proverbs that you find yourself coming back to time and time again?

Judge Bea

Well, whenever I'd see an opinion, which is self-contradictory and comes out with the judge's preference, as a result, right, but is contradictory, I think of the Spanish proverb or criticism: "camino ancho para mi, camino estrecho para ti," a wide path for me but narrow for you.

Ben Feuer

Seems to be a truism of our world, right?

Judge Bea

Happens all the time.

Ben Feuer

Right. And I think for any listeners who are curious for other such phrases, they can sort of search through your opinions and those phrases are really splattered throughout, and add some color to the writing, I think. Okay, so final question. As you look back, now that you're becoming a senior judge, you're 85 years old, young, 85 years young, what do you wish you had done differently? If anything, and what are you most proud of having done?

Judge Bea

Well done differently, I think I should have gotten started on a judicial career earlier. I was trying a lot of cases. I was having a lot of fun, trying cases are interesting. But I should have tried earlier to become a judge.

Ben Feuer

Because you enjoy it so much?

Judge Bea

Yeah, I do enjoy it. So that's what I would do if I could do something different. I would pursue the judicial career earlier. And what was the other question?

Ben Feuer

What are you most proud of? What do you look back on with really great joy and pride?

Judge Bea

My family. Number one, that's easy. And, you know, my family and providing for them, and providing for my nephews because my brother died in 1993 and left five boys. So keeping the family together. We all of us go to Spain in the summertime. One time or another. They own half the house, and we divide up the house and keep it going and its sort of a place to meet and have family again.

Ben Feuer

Isn't that wonderful? Well Judge Bea, unless there is something else that we have not addressed, at the time, on behalf of the Ninth Judicial Circuit Historical Society and the future historians of the Ninth Circuit and myself, thank you so much for coming.