Randall Kester: An Oral History

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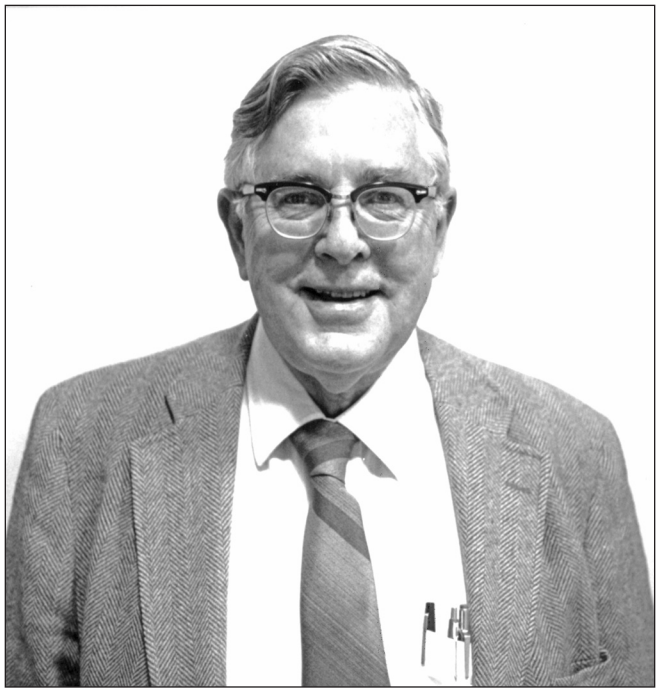

FOREWORD BY JUDGE OWEN PANNER

US District Court of Oregon Historical Society
Oral History Project
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PROJECT STAFF
Donna Sinclair, Project Manager & Interviewer
Janice Dilg, Auditor & Designer
Barbara Jo Ivey, Transcriber

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FOREWORD

The Oral History Project of the District Court of Oregon Historical Society began in 1983. Through the efforts of Judge James Burns and his wife Helen, a gathering of lawyers, judges, and historians took place at the Society's inception. The Honorable Robert F. Peckham, District Judge for the Northern District of California, discussed the Northern District Historical Society and the inspiration was born for Oregon's District Court Historical Society, the second such organization in the country. The original Board of Directors of the Society was composed of twenty-one members with bylaws including the Presiding Judge of the Court, the Chief Justice of the Oregon Supreme Court, and the President and a representative of the Oregon State Bar. The original officers and directors included outstanding judges and lawyers – Judge John Kilkenny, Honorary Chair, Judge James Burns, Chairman, Randall Kester, President, Manley Strayer, Vice President, Elizabeth Buehler, Treasurer, Susan Graber, Corporate Secretary, and Robert M. Christ, Executive Secretary, along with many other top names in Oregon's legal history.

The Society decided to collect, study, preserve, analyze, and disseminate information concerning the history, development, character, operations, and accomplishments of the United States District Court for the District Court of Oregon. It was therefore logical that the Oral History Project should be established to preserve the histories of the judges, law firms, and lawyers who actively practice in the Court. With the assistance of Rick Harmon and James Strassmaier, the Oregon Historical Society held seminars to educate volunteers in taking oral histories with a biographical and Court-oriented focus. The Oregon Historical Society has been most

cooperative in agreeing to maintain these histories in their permanent collection for study by scholars and other interested parties.

These oral history interviews have been taken by recording devices, and are either transcribed or transcription is underway. A transcript reproduces, as faithfully as possible, the original sound recording that reflects the special value of oral history, namely its free and personal expressiveness. Most of the transcripts in the District Court Collection have been lightly edited and reviewed for clarity and accuracy by the narrators. That process continues. It is through these wonderful oral histories that the story of the Court is told. We now have recorded nearly 120 individuals since the project began. The goal is to record the individual histories of all the judges of the Court, as well as those of participating lawyers. The Court has a rich tradition reflected in the activities of the judges and lawyers of the Court. The recording has been done not only by professional historians, but also by dedicated volunteers. As one such volunteer said, "The opportunity to interview someone that you always admired is truly an exciting experience."

The history of the Court is being created by the men and women who have participated in its collection and activities. The Society's goals are to collect as much of that history as possible, because is it the history of the law and those who make it that constitutes the moral development of humanity. All of us who are students of the law venerate it. We are also interested in the people who make it.

Judge Owen Panner
February 28, 2006

INTRODUCTION

Randall B. Kester, lawyer, gentleman, civic leader, and Oregon Supreme Court Justice, was born to Bruce B. and Mabel Judd Kester in Vale, Oregon on October 20, 1916. He grew up in Ontario, Oregon, where his father first practiced law, and became its district attorney in 1928. After Bruce Kester's death in 1932, Randall's mother, a suffragist who had also passed the Oregon State Bar, moved the family to her hometown of Bloomington, Wisconsin. Kester completed public school there, and met his future wife, Rachael L. Woodhouse. He returned to Salem, Oregon in 1933 to attend Willamette University (AB, 1937). In 1940, Kester received his JD from Columbia University Law School.

Shortly after graduation Randall and Rachael married, returned to Oregon for good and began a family. They have three daughters—Laura Kester, Dr. Sylvia Oboler, and Lynne Kester-Meyer. Kester was admitted to the State Bar in 1940 and began to practice in Portland at the firm of Maguire Shields & Morrison. He later became a partner in the firm, which eventually became Cosgrave Vergeer Kester. During the early years, he served as General Attorney for Union Pacific Railroad Company, and as an instructor at Northwestern College of Law. Kester was admitted to practice before the United States District Court for Oregon, the United States Court of Appeals for the Ninth Circuit, the U.S. Supreme Court, and before the Washington Supreme Court *pro hac vice*.

Randall Kester succeeded Walter Tooze as associate justice of the Oregon Supreme Court in January 1957. While on Oregon's Supreme Court, he participated in the Seminar for Appellate Judges at New York University Law School, was a member of the Oregon Legislative Interim Committee on Judicial Administration, and chairman of its subcommittee on appellate courts.

On March 1, 1958, Kester resigned from the Oregon Supreme Court to become General Solicitor for Union Pacific Railroad Company, Northwestern District. At that time, he resumed partnership in his former law firm. He became Senior Counsel for Union Pacific before retiring from that position in 1980 and resuming a full-time general law practice.

Mr. Kester's professional activities could fill yet another page. To name a few, he served as president of the Multnomah Bar Association (1956), treasurer of the Oregon State Bar (1965-66), and as a member of the Judicial Council of Oregon (1970-71). Kester served on several state bar committees, has been an active in the American Bar Association and the Ninth Circuit Judicial Conference, and belongs to many legal associations. He has published several articles in legal publications and helped establish the Continuing Legal Education (CLE) program in Oregon. In addition, Kester helped found, and served as the first president of, the U.S. District Court of Oregon Historical Society. He contributed regularly to *Oregon Benchmarks*, the District Court's newsletter, and was one of the coauthors of *The First Duty, a History of the U.S. District Court of Oregon*.

Mr. Kester's civic involvement is equally impressive. Some highlights include serving as president and chairman of the board of the Portland Chamber of Commerce (1973-74), sitting on the City Club of Portland's Board of Governors and serving a term as president of that organization, 1986-87. He has been active in and has served on the boards of many other organizations and conservancy agencies, including serving as long-time president of the Mazamas. He has also been a member of the Arlington and University Clubs, the Multnomah Athletic Club, and the West Hills Unitarian Universalist Fellowship.

This interview, which complements a 1992 interview by Tom Stoel, includes Randall Kester discussing family history, marriage and children, the Mazamas, work in the Forest Service Reserves during World War II, his early legal career, and railroad law. Other significant subjects include appointment to the Oregon Supreme Court, changes in federal practice, development of Continuing Legal Education, teaching at Northwestern School of Law, and formation of the U.S. District Court of Oregon Historical Society.

Donna Sinclair
May 2006

Family History

DS: This is Donna Sinclair and today is the twenty-first of February 2005. I'm interviewing Randall Kester in his office in the Fox Tower in Portland, Oregon. This is tape one, side one.

When I was looking at your oral history before, I was really interested in hearing a little more about your mother. So, that's why I said you didn't really need to review anything because what you remember is what you remember.

RK: Well, she came from Wisconsin, and she was in a teacher's college in Wisconsin—Normal School they called it then. A friend of hers, a classmate, invited her to come out to Oregon and visit her on her ranch, which is over in Eastern Oregon in Malheur County near a town called Ironside. And so Mother came out and visited that summer, and while she was there the local school board asked her to stay and be a schoolteacher in the little town of Vale. So she did. She taught school there for at least one year and at the same time my father, who was working for the General Land Office and had been sent out to Oregon to work on the timber fraud cases in the early part of that century, was stationed in Vale opening the land office for homesteading. He had worked down in the western part of the state on the timber fraud cases and then they sent him to Eastern Oregon. He opened the General Land Office in Vale when they were taking homestead applications under the Federal Homestead Act, and he and mother got acquainted at that time and fell in love and got married, which I think, was in 1912. They went back to Wisconsin to be married and then came back to Oregon again.

My father left the land office to practice law. He had previously gone to law school in Washington, D.C. at George Washington University. They had originally sent him to South Dakota, and he'd worked in the land office there before he came out to Oregon. Anyway, he left the land office and started to practice law, and practiced law in Vale for several years. In about 1922, I think, the family moved to Ontario, which is a small town in Eastern Oregon about eighteen miles east of Vale. He practiced law in Ontario and was elected District Attorney and I suppose that would have been in 1928. We lived several different places in Ontario and my father died in 1932. I was then fifteen years old, I believe.

Mother wanted to go back to her hometown in Wisconsin, so she and my younger sister and I drove back to Wisconsin taking all the family belongings in the car with us. It was an old Studebaker car. We spent a year, or most of a year, in Wisconsin, which was then my final year in high school. At that time I met Rachael who had grown up in Wisconsin. After graduating from high school in the little town of Bloomington we came back to Oregon and came to Portland.

My older sister, in the meantime, had been in college at Willamette University in Salem. She dropped out of school when my father died and went to work in the state treasurer's office in Salem. She had arranged for an apartment for us in Portland, so when my mother and younger sister and I came back to Oregon we went to Portland and stayed in an apartment there for a while. Mother had, sort of as a hobby, originally studied life insurance and acquired a license to sell life insurance as an underwriter for the Equitable Life Assurance Society, and so when we came back to Portland she started in business as a life insurance agent. And, starting from nothing, she then built up a clientele for several years. She died in 1964, if I remember correctly. But she was the principal support for the family.

DS: You mentioned at one point that she was a suffragist.

RK: Yes.

DS: Can you tell me about that?

RK: Well, when she was in Wisconsin she had been pretty active in the woman's suffrage movement and then, when she came back to Oregon after being married, they were having a big campaign in Wisconsin at the time—I think it was unsuccessful—but at least they were trying to get state suffrage, women's suffrage. And they asked her to come back and help, so she did. For a while she went back to Wisconsin and went around making speeches and so on. But, as I say, they were not successful at that time and it was sometime later, of course, that Oregon allowed women's suffrage.[1] I don't know how long she spent at that time, but I guess it was probably several months in that campaign. Then she came back to Oregon and she was always, I guess what you'd call a pretty strong suffragist, although I don't think she did any active campaigning in Oregon. She did take the Oregon Bar Exam. She'd studied law by correspondence school and, of course, my father being a lawyer, she always said she only did it because she wanted to find out what he was talking about. And so she took it by correspondence and passed the Oregon bar—but had never practiced law—but it was probably of some value to her to have that background.

DS: What was her personality like?

RK: [*pause*] Well, I don't know how you would describe personality. She was pretty strong-willed. She served for quite a long time on the YWCA board here in Portland. She was quite competent; she ran the household while selling life insurance after she started that. She was in her eighties when she died and she got rather frail towards the end, but up until then she was always very strong and active. In Ontario, she had been pretty active in the so-called women's club there. I don't know anything about it except that it was something that she attended meetings and so on. I think she belonged, at one time, to the organization for women lawyers here, which is called the Queens Bench, but I don't know if she was ever very active in it. I don't know what more I could say.

DS: Well, that's what I was looking for was just kind of a description of her. Because it sounds like you grew up in a household where your mother was pretty active in the community and your father was the district attorney. And so I was curious about what that was like for you and how it influenced you.

RK: Well, it's pretty hard to tell. I think while I was in Ontario, and up until I was in my teens, I don't think I ever seriously considered becoming a lawyer, probably never thought much about it at all. But when I was in high school one of my teachers in senior high school back in Wisconsin told me he thought I had a logical mind and that I ought to be a lawyer, so I guess that's probably what made me think maybe I should try that. So when I came back to Oregon and went to Willamette University I majored in political science. At that time I was kind of steering myself towards a legal training and I managed to get a scholarship to Columbia University in New York, so that's where I started. The rest is history, as they say. [*chuckles*]

DS: I knew you went to Willamette and then to Columbia and I was curious about what it was like when you were at Columbia. You talked about that a little bit before but not in great detail. I think you talked about the fraternity a little bit and you talked about some of your professors. So the things that I was wondering about were what—your brother in-law [Carl Marcy] and sister [Mildred Kester Marcy] where there at the time, so what kind of, maybe political associations you had while you there because of their involvement in the community.

RK: Well, I didn't have any political associations at the time. They were kind of a refuge since they were already there. They had an apartment. Carl was going to Columbia. He first finished in political science and got a Ph.D. in political science, and then went to law school and got a legal degree as well. So he was pretty well established, and Mildred was working as a secretary for one of the utility companies for a while. Then she went over to Barnard [College] and finished at Barnard, which is sort of an affiliate of Columbia. Later, it became more closely affiliated. I was with them quite a bit, and especially with Carl when he got a boat, and we did some boating together and also went on hiking trips together. I never really got into any political activism at all. At that time Carl wasn't active politically, although he later went to work for the State Department and then for the Senate Foreign Relations Committee. That was after I was back here.

DS: I wondered when he was working for the Senate Foreign Relations Committee? Under what administration?

RK: Well, I'd have to count back. I graduated in '40. Was Franklin Roosevelt still president then? I think he was. Yes. Well, then he was in the State Department while Roosevelt was president and then he went to the Senate Foreign Relations Committee on the staff and became,

eventually chief of staff there,[2] under the senator from Arkansas [J. William Fulbright]. They got to be quite good friends, both socially and professionally. Anyway, they moved to Washington when he started working for the State Department. They lived over in Arlington, Virginia and Mildred started working with the U.S. Information Service, they called it. I think Edward R. Murrow, at the time, was a big shot in that. She had several different positions. I don't remember all the names of them, but eventually she was sort of in charge of the women's division so she had the job of entertaining visiting dignitaries—women who came from other countries. She became active in the [League of Women Voters].

Anyway, Carl died and Mildred retired and she's in her eighties now. She recently moved to a senior center, of some kind, in Maryland. They lived in Annapolis, Maryland for quite awhile and had a place on Chesapeake Bay. He still had a boat and was very active in boating all of his life, I guess. She still kept that place on Chesapeake Bay, but recently moved into a senior home sometime. Their son, Eric, was working for the United States Attorney in Washington, D.C. and he's now retired. It's hard to think of him being retired and I'm still working. [*chuckles*] Anyway, I guess I'm rambling a little bit.

DS: Oh, that's okay. You mentioned that he had worked under FDR and that was actually one of my questions on the list, was, I guess starting with whether politics was an issue in your household when you were growing up or not?

RK: Hardly ever. Well, we discussed current events, but it was never any subject of controversy, no.

DS: What about the New Deal and FDR? What did your family think of that? I always like to ask people about that because you get a picture from the history books of the way that was, but when you talk to people—I know that there was some conflict about the New Deal, too—so I'm just curious about what you thought of it.

Growing Up

RK: Well, I'd have to try to keep my chronology straight. Of course we were in the midst of the so-called Depression, which was in '29 and the early '30s. That hit our town of Ontario rather hard. The banks closed. For a while my father was city attorney for Ontario and the city didn't have money in which to pay, and so they gave warrants, which were kind of like promissory notes. But then they couldn't pay the warrants, so they would have to take them to the bank and get them discounted. But then the banks closed and the times were rather tough there for several years. I was working at various jobs while I was still in high school in Ontario. In fact, I wrote about one of them in the Historical Quarterly [*Oregon Historical Quarterly*, Spring 1998]. Did you read that one?

DS: I haven't read that one. I noted it though, about working at the Ontario *Argus*?

RK: *Argus*. The newspaper. That was one. Then I worked in a grocery store and then field work on the neighboring farms and so on. I think it was just something you had to buckle down and bear as best you could. We lived through it.

DS: Well, it must have been difficult for your mother to have your father pass away right at, I mean in 1932 that—

RK: Well, that was right in the middle of it, and it was tough. But we scraped by somehow. She started to sell insurance in a small way while we were still in Ontario, but she didn't have any business to speak of. It wasn't until after we came back and went to Portland that she got into where she was really making an income out of it. It was never really very much but it was enough to live on. I was working in college and my younger sister worked. Well, she was in college, but—

DS: So all three of you went to college?

RK: Oh, yes. Yes. [*pause*] Mildred finished at Barnard and Barbara, my younger sister, finished at, I think it was, University of Illinois at Urbana-Champaign. Her husband, John Laughlin, was a physics major and got into the nuclear physics business—the medical side of it—at Chicago. They finally moved to New York and John became head of the physics branch at the Memorial Sloan Kettering Cancer Institute in New York. He retired from that and just recently died, but he gained some fame, I guess you'd call it, as a nuclear medicine expert. He wasn't a medical doctor, but he was a doctor in physics working in medicine, and he became head of the department that administers x-rays and nuclear treatments for cancer and so on. I don't know much about it, but it sounded impressive.

My younger sister died quite a long time ago, when her kids were still in school, I believe. One of her daughters is now here in Portland, married to Bill Tucker, who works for the Internal Revenue Service, or did. I guess he's retired now. She had three daughters. We had three daughters. We're getting to be the last outpost of the family.

DS: Well, that might be a good place to go next, to ask you about. You met Rachael when you were in Wisconsin?

RK: Yes.

Marriage & Children

DS: I wondered as I was reading your oral history before, you met Rachael and the next thing I knew you were married, and the kids didn't come up, so I thought maybe you could just talk a little bit about that. It's a good thing to have in an oral history.

RK: Well, I met Rachael in Wisconsin, of course, when I was in high school, but we weren't particularly going together. In fact, such dating as I did in high school was with her sister rather than Rachael. After I was out here, and started going back to New York to law school, I stopped

several times to visit them in Wisconsin as I went by. I usually rode on the bus, and we got reacquainted, and it was on one of those trips back after graduating from law school that we decided to get married. So, while I was still living out here, I went back to Wisconsin to get married at her folk's place. They had a farm that was outside of the little town of Bloomington where we used to live. And we came out here in 1940. That was the fall after I had graduated from law school—in the spring in 1940—and came back here and then the fall of 1940 we were married. Later this year we'll have our sixty-fifth wedding anniversary.

We had three daughters, one of whom turned out to be handicapped so we've had her in a series of institutions for most of her life. Our second daughter became a medical doctor and she's now in the hospital at Denver, Colorado in charge of, I guess they call it geriatrics, doing full-time work as an MD in Denver. My youngest daughter, Lynne, was a lawyer. She married a lawyer from Colorado, and they went back to Colorado, and she went to law school at the University of Colorado and graduated and started to practice law in Boulder, where they were living. She has a daughter, our only grandchild. After she had a daughter she found that it was more than she wanted to do to keep up her law practice and all and be a mother; so she closed her law office and started being a full-time mother. She had, meantime, been divorced from her first husband. She married Will Meyer in Boulder. I've forgotten the year, but I can get it for you if it's important. He worked for the state of Colorado in the legislative research office and he died rather suddenly—unexpectedly—on a trip to Europe. That was about three years ago now. I'll check on the dates in a minute. Instead of going back to the practice of law, which she had sort of gotten away from, she's teaching school in Boulder now, in one of the high schools there—

DS: What are your two oldest daughter's names?

RK: The oldest one is Laura and she's still dependent. The next one is Sylvia Oboler and she's the doctor. And Lynne Kester-Meyer has her law degree—but is no longer practicing law—but now is a schoolteacher.

DS: And what about Rachael? Did she stay home with the kids?

RK: She stayed home all the time. She's sort of an artist. She does a lot of fiber arts, spinning, weaving, dyeing, and knitting. She's had exhibitions of her textile compositions, I guess you'd call them. She got quite interested in Northwest Indian art and made a lot of petroglyph rubbings. She's kind of given that up now. We're getting too old for that sort of thing, but she was quite active in outdoor activities with me and climbed a few mountains.

DS: Let me turn this over.

[End of Tape One, Side One]

The Mazamas

DS: One of the things I wanted to ask you about was outdoor activities, and I said this to you on the phone, I could tell when I got all the pictures of you to put that CD together that outdoor activities were really important to you and you were involved in clubs. I know that you came back and did some hiking when you were in school, but do you want to talk about that? Because this place is important, I think.

RK: Well, as a matter of fact, I once did an oral history project for the Mazamas when they were putting together some of the stuff, and I do have a transcript of that. Maybe that would be of some help to you.

DS: That would be great… [*loans DS a copy of his Mazamas oral history*]

RK: But that does have most of my activities with the Mazamas when I came back after law school in 1940. Well, maybe I should go back earlier than that. When I was in college in Salem, I used to go with the Salem Chemeketans, which is a hiking club. I made a couple of climbs of Mt. Hood with them and one of Mt. Jefferson, and also spent a week by myself hiking in the Jefferson Park area, which—they called it a "primitive area" then. They now call it a wilderness, but it's an area north of Mt. Jefferson, which you can only reach by foot or horseback, and I went in there and spent about a week hiking around.

While I was back in law school I had several hiking trips back there. One of them into the White Mountains of New Hampshire on the Appalachian Trail and that was a solo trip by myself. Then another time Carl Marcy and I took a hiking trip on what they called the Long Trail in Vermont, the southern end of Vermont. We spent two or three days hiking there, and this was in the early spring when there was still snow on the ground. In fact, that was true in New Hampshire also. It was a chance to get out into the open, which I had always liked.

Then when I came back to Oregon, I started hiking and climbing with the Mazamas. When we were married in the fall of 1940, one of the first things that Rachael and I did together was to get her a pair of hiking boots, and we went on a lot of Mazama hikes and climbs for several years. I had several committee posts for the Mazamas. I was chairman of the Lodge Committee for a while and chairman of the Climbing Committee for a while and eventually became president of the club. I was on their board two different times, and the last time I was president. While I was on the Climbing Committee we started what became a climbing school. We didn't call it that at the time, but we started having educational sessions and it eventually developed into a school. That was a pretty important part of our lives for several years.

In 1957, when I was appointed to the Supreme Court we moved to Salem, and that kind of put an end to our activity of that kind. Of course, since then I'm not

physically able to do it anymore. We've always been inclined toward outdoor activity as long as we were physically able to. We used to do a lot of canoeing trips and bicycling. We did a lot of camping, car camping, as well as backpacking. I don't know how much detail you want.

DS: When you graduated from school, from Columbia, you decided to come to the West Coast, so I was curious what your aspirations were at the time?

RK: Just get a job and earn a living! [*laughs*] I didn't have any grand plan in mind, but I didn't want to stay in New York. I didn't care for that. I wanted to get back where I could more easily get into the outdoor activities. There was sort of a tradition your last year in law school, you're expected to make the rounds of the Wall Street law offices and be interviewed. I made some of those interviews, but I wasn't at all impressed by the law offices in New York. They're too big and too impersonal, and I knew I wanted to get back, so I never seriously considered staying in New York. I did take the exam for the F.B.I. because none of us knew at that time whether we would be able to get a job. So a bunch of us took the exam and I got a rating, passed the exam, so I could have applied for the F.B.I. but decided not to—came back here instead.

Then, of course, the war came along and I wasn't taken into the service because my eyes weren't good enough—both the Army and the Navy turned me down—so I stayed and got started in the practice of law. Well, I guess you know, my firm was Maguire, Shields and Morrison at that time. I was on the Multnomah Bar Association board for a number of years. I was president of the Multnomah Bar Association when I was appointed to the vacancy on the Supreme Court.

DS: That's what I read, and that was one of the areas that you didn't talk about in the other oral history—your association with Multnomah Bar. So I was wondering if you could talk about that, or if that is something you'd rather think some more about and talk about the next time—that's fine too.

Multnomah Bar Association

RK: The bar association wasn't as much of an organization then as it is now. I think I was on the board there for probably five years and some committee posts, I guess, before that. I probably said this in the previous history, but I thought it was kind of interesting the way the appointment came about. We had a committee of the bar association, which made recommendations on judicial appointments, and I was president of the association at the time when Walter Tooze died. He was a justice on the Supreme Court.[3] He died, I think it was, in December of '56, and Elmo Smith was the governor at the time and his counsel was Hugh Barzee, who was an attorney here in Portland. So when Tooze died I called Hugh Barzee and offered the services of our committee—said that we would be glad to help them if the governor wanted

any help in making recommendations—and his response was, "Why don't we submit your name?"

I was kind of taken aback, but couldn't say no, so he submitted my name to the governor and the governor made the appointment. I don't know who else he might have been considering, but, anyway, I served there for a little over a year.

Then in March of '58, Roy Shields, who had been a partner in this firm at the time, had been general solicitor for the Union Pacific Railroad. He retired from the railroad and so they offered me the job that he had held. At that time it paid much better than the Supreme Court, which was not paying very much. So, I resigned from the Supreme Court and took the job with Union Pacific Railroad as general solicitor and stayed there for twenty-some years, I guess. Eventually became senior counsel and retired from that in 1980, I believe it was, and came back to the firm. In the meantime, I had still been a member of this firm while I had been working for the railroad. So when I retired from the railroad I just resumed full-time practice here in the firm and have been there ever since.

DS: Are you working full-time still? I know you're working.

RK: Well, I show up. I don't do all the things that I used to do. I don't go into court anymore, and most of my work now is just consulting with other lawyers here on cases that they may be working on. Like this morning, I worked on a matter that one of the other lawyers had a question about. I worked on it and gave him what I thought about it, but that was this morning. That sort of thing goes on.

DS: So you still do a lot of advisory kinds of things.

RK: Sort of. Yes.

DS: Was that typical with the bar association making recommendations for judges?

RK: Yes, I think the Multnomah Bar still has a committee and the State Bar also has a committee. In fact, the State Bar sometimes conducts a written poll of the active lawyers to get their view on judicial appointments. But that was pretty standard practice, yes.

Early Career

DS: Well, what was the legal community like, generally, when you started in law? I know that Tom Stoel asked you the question about what a young lawyer does—and that was a great question—because you talked a lot about kind of running around and face-to-face contact and paperwork, but it was right before World War II that you started.

RK: Yes.

DS: And in your oral history it sort of jumps from that description of what it was like in 1940 to 1956, so I'm curious about

what kinds of organizations were here and just generally what things were like.

RK: Well, of course, the bar was much smaller then. I think when I started to practice in 1940 there were only about 2,000 lawyers in the state. Now there's something like 13,000 or so. With that small a bar, you knew most of them, at least those who were in or around the courts all the time. Because our practice was mostly in litigation work in and around the courthouse you get acquainted with practically everybody who's active in that sort of practice.

I guess to start with, a young lawyer just getting started then—and it's pretty much still true now—his first type of work would be to research legal questions for other people. That was my initial experience, doing legal research and preparing memoranda on legal questions that came up in cases that other lawyers were handling, and within a rather short time I was going to court on small matters, like arguing motions. There are a lot of preliminary motions in some kinds of litigation and you get your first experience in the court by going up and arguing motions. Usually they're not dispositive, that means they don't dispose of the case, but they help clear the air for later proceedings. So you start taking on more and more responsible work as you get more experience. Finally, you start getting to try cases, smaller cases that aren't too consequential if you lose them, but you get experience and then gradually get working into more complex cases, ones that have more serious questions. Nowadays there's not as much litigation over small matters because those mostly go to arbitration now. Things that a young lawyer, nowadays, gets started in are usually arbitrations rather than trials. After you've had experience in arbitrating the smaller cases, then you get experience in trying the larger cases, so it's sort of a progression. As you get more experience you take on more responsibility.

It happens that in my start I not only got experience in trying cases but I had some experience in arguing appellate cases. In those days they didn't have an intermediate appellate court, just had the Supreme Court—appeals went from the circuit court to the Supreme Court. And I had enough experience in that so that when the opportunity came to serve on the Supreme Court I was already pretty well experienced in appellate matters.

DS: Is that partly because of the lack of staff? One of the things I read was that during World War II there was sort of a "skeleton crew"—is how it was put?—in the law office, so you ended up doing more trial work than you might have otherwise in the early years because of that.

RK: That's probably true. Yes. I probably got both trial and appellate experience at an earlier stage than if we had not been short-handed because of the war. Of course, I didn't serve very

long but I guess they said—I don't know if this is correct or not—but some of them said when I went down there that I was the youngest person to ever serve on the Supreme Court. I'm not sure if that's true, but that's what was said. But, nowadays, I'm the oldest practicing lawyer [*laughing*] left, they tell me. So I've sort of spanned the years.

So, let's see. Our practice has changed quite a bit. Instead of being mostly oriented towards litigation we do a lot more business-type work now—what they call transactional work and probate work. I did quite a few probate matters while I was getting started and now we have, oh, thirty-one lawyers here and two or three of them do mostly probate and business-type work. We still do a lot of litigation.

DS: In terms of what was going on in the '40s, there are a number of cases. I think what I'll do is give you the oral history to look at and then I'll send you a note saying which things I'd want to discuss for the next time so that you have some time to think about it before we do that. But in terms of the 1940's, and what things were like then, what were you most interested in pursuing, or were you just kind of doing what you needed to do?

RK: It's mostly doing whatever came along. I haven't specialized in anything—except when I got working with the railroad I, naturally, specialized in transportation law. But I always enjoyed whatever part of the law I was in and didn't consciously exclude anything. Did you happen to see the article I wrote for the D.C. Historical Society about the federal practice, changes in the federal practice?

DS: Oh, yes. Yes. I did. I saw that.

RK: Well, that was an attempt to summarize some of the changes in the federal court system.

DS: And that's something I want to follow up on, but I guess I feel like I want to look at it more closely so I can ask decent questions because if I piece all that together, I'll ask better questions.

RK: That's okay.

DS: I wanted to get a sense of your personal experience during that time.

RK: Oh well, I think I'd have to say that I've enjoyed everything I've done in the practice of law, no matter what field it's in. I guess maybe the intellectual exercise of getting into a new problem or a different field has always appealed to me. [*pause*]

DS: What kind of associations might there have been with other lawyers? You said that it was a smaller legal community and so you were working for the Union Pacific, doing a lot of work for the Union Pacific Railroad.

RK: Yes.

Lawyer for the Railroads

DS: So there were lawyers for the Southern Pacific and somebody's name came up this morning. I went to a meeting this morning—it wasn't about you it just happened to come up—and the person's name was Oge Young.

RK: Oge Young, yes. He and I worked together a lot. He represented the Southern Pacific while I represented the Union Pacific. He's retired now, I believe. I think he's still alive, yes. We had what was called the Oregon Railroad Association, which was lawyers for each of the major railroads. I was chairman of it. Oge Young represented the Southern Pacific. There were the northern lines, then the Great Northern and the Northern Pacific. A lawyer named Woodrow Taylor from Seattle was representing the Great Northern and Roger Crosby represented the Northern Pacific. At one point, the Northern Pacific set up it's own law department here in Portland, and Roger Crosby was the vice president and legal counsel for the Northern Pacific. We came down to Portland and opened their office here. They didn't keep it here more than a few years, then they closed it again, and when they closed it we did a lot of work for the Burlington Northern. Both the Northern Pacific and Great Northern became part of the Burlington Northern and also the Spokane, Portland & Seattle railroad. And Hugh Biggs had represented the SP&S Railroad here.

Anyway, after the Burlington Northern merger they closed the Northern Pacific office here in Portland, then we did a lot of the work for the Burlington Northern as well as the Union Pacific. Occasionally they'd be on different sides of some question and then we had an arrangement with them that we would handle the Union Pacific rather than the Burlington Northern. Later on they got another firm in Seattle that was doing most of their work and they gradually absorbed that as well. Our firm has always represented the Union Pacific ever since it started in 1934. [*hands DS a history of the firm*]

DS: I was curious about exploring it a little bit further to find out what kinds of questions did you face with the Union Pacific, with the railroad? So you had the railroad association, but what kinds of things were going on here that you had to deal with at the time?

RK: Everything under the sun. In the Union Pacific law department we had several lawyers who were Union Pacific lawyers, but not firm lawyers. I was in both, but we also had a staff of full-time railroad lawyers and handled everything, contracts and property matters and rate and tariff matters, some company and interstate commerce questions, and matters before the Public Utility Commission. The Interstate Commerce Commission is now abolished and they have a Department of Transportation in

Washington, D.C. instead of the old ICC Department of Surface Transportation they call it. But when I started, it was still the Interstate Commerce Commission, and we had a number of matters before them.

One of the matters that I remember being personally involved in was about some of the Rivergate property out in North Portland here. There was a little railroad to the stockyards in what is now part of Rivergate. It was the Peninsula Terminal Company. It was just set up to service the stockyards, but it had a track, which went into the area that the Port of Portland wanted to develop in the Rivergate area. They thought maybe the Peninsula Terminal Company would provide a useful access to that land, so the Union Pacific and the SP&S proposed acquiring the Peninsula Terminal Company jointly and extending our service into that area to serve Rivergate as it was developing.

Well, the Southern Pacific thought they wanted in on it, too, so they applied to join the purchase, and the Milwaukee Road—which didn't come to Portland then but which ended up at Longview, Washington—wanted to get in on the deal, so there was a big proceeding before the ICC as to who should be allowed to buy the Peninsula Terminal Company. Eventually, it went to the Supreme Court of the United States. I had to go back on that, although I didn't have to argue it because the lawyer for the Interstate Commerce Commission did most of the arguing. But anyway, the upshot of it all was that the Supreme Court sent it back to the ICC to consider the anti-competitive effects if two of the railroads were allowed in but not all four of them.

By that time—this had been over several years—Rivergate development had proceeded far enough that everybody could see that the Peninsula Terminal Company wasn't the key to it anyway. So we all gave up on it and decided not to buy it. The line-haul railroads accessed the Rivergate territory through their own lines by absorbing switching charges from the other lines so that, in effect, anybody can serve who wants to now, but without having to buy that little railroad that started it all. Maybe that doesn't make much sense.

DS: No, that's really interesting.

RK: But, anyway, that was one kind of a procedure that we were involved in. Then, of course, we had all the litigation, the accidents that happened—both employee accidents and crossing accidents of automobiles, and so on—which fortunately are not as frequent now as they used to be because so many places now have over-crossings instead of grade crossings. Where they don't have over-crossings they usually have gates, automatic gates, so that you don't have so many unprotected crossings as they used to have. It used to be that accidents between trains and cars were more common than they are now and were always resulting in litigation.

DS: So you would defend the railroad?

RK: Yes, that would be the typical case. [*pause*] There have been cases where the railroads have sued vehicles that got in their way, but those aren't very often because juries would not be sympathetic.

DS: So that's one of those interesting shifts, sort of, in railroad law because there are more safety laws, so now you do have all those gates and everything. Everything's regulated so much more.

RK: Unfortunately, sometimes people try to go around the gates and they still get hit. There was a bad one down in California just recently. Another thing that occurs to me that might be of some interest was up in Spokane, Washington. The Union Pacific served Spokane, up from Eastern Oregon and the northern lines, the Northern Pacific and the Great Northern did on their main line and the Milwaukee Road also, and—

[End of Tape One, Side Two]

Lawyer for the Railroads

RK: Railroads have a great maze of joint-facility contracts, where they agree to use each other's lines for various purposes. And they get very complex at times. And up in Spokane we had a whole bunch of joint-facility contracts, so that the main track through Spokane, Washington was used by all four railroads, five railroads, actually. They had contracts which determined who could do what and how it would be paid for and all that. Anyway, the city of Spokane wanted to have a World's Fair up there. They wanted to get the railroads out of the way so they could use that area in downtown Spokane that was taken up by the railroad station and use it for their World's Fair grounds. So that was kind of the precipitating cause for some litigation over the interpretation of those contracts. The main track through the downtown Spokane area was removed and the Union Pacific and the Milwaukee Road had a big dispute over whether the Milwaukee should continue to pay the rental that they had previously agreed to pay to use a part of the Union Pacific tracks to get access there. The Union Pacific took the position that under the contracts as they existed, the Milwaukee had to continue making payments even though it was no longer using the tracks, because that's what the contract said. But when they got in litigation in the federal court here, Judge Belloni decided that the Milwaukee shouldn't have to pay because of the situation that developed. So that case took quite a while. I don't remember how long, more than a year, at least, before it was finally resolved.

Another case involved a similar problem. The Seattle Union Passenger Station, which was jointly used by both the Union Pacific and the Milwaukee Road, and there was litigation over—see the Milwaukee Road went into bankruptcy and ceased using the Seattle Passenger Station—and so there was litigation over that contract. So it wasn't all cases of accidents. A lot of it was contractual litigation.

Eminent domain—condemnation cases—up in Eastern Oregon when they were building the rail hub at Hinkle, which is just outside of Hermiston near Pendleton. We had to acquire a lot of property up there for that purpose and that involved some litigation. The railroad was in court quite a bit.

DS: That's kind of around the time that there was the development around McNary Dam, wasn't it?

RK: Yes. The Port of Umatilla and the Port of Morrow had litigation over some of the industrial locations there and that all involved rail service to those areas.

DS: This is a really broad question but, how has railroad litigation changed in the last, [*laughing*] in the last fifty years? Like I said, that's a broad question, but the railroads don't have the same position that they did in the 1940's and 1950's.

RK: That's true. Certainly the passenger business fell off completely and was taken over by Amtrak, which is a federal corporation and now they're talking about discontinuing that in this current budget in Congress. It doesn't make any provisions for continuing Amtrak, but the freight business is still strong. The railroads and the truck lines have always been competing for a lot of the same business, and some of that has dissolved because nowadays a lot of the trucks are put on rail cars and you see a lot of trailers going by on rail flatcars, which formerly went on the highway. And now a lot of the overseas shipping comes in on containers, which are transferred from the ships to the rail cars and a lot of that goes on in the Port of Portland and Rivergate. And, a lot of the automobile traffic comes in overseas; the Japanese cars come in and they're loaded onto rail cars at Terminal Six out in Rivergate.

So wherever you have competing services you're likely to get litigation over contesting claims. For a long time the railroads and the barge lines competed on the waterway on the Columbia River and there was sort of a rate war going on. Under federal law the barge rates were not subject to federal regulation, but the railroads were. So, when the railroads would try to lower their rates in order to get the business back the barge lines would object to the lowering of the rail rates because that would take business away from the barges. But the railroads could not object to the barge lines when they lowered their rates because the barge lines were not subject to regulation. It sounds kind of complicated, but there was a series of cases over a number of years before that was finally ironed out. Each one has a certain amount of the traffic, but it's not so much rate competition anymore.

DS: Were you involved in those cases?

RK: Some, yes. Actually most of that was coming to a head before I became a full-time lawyer for the railroad. Roy Shields had a lot of that.

DS: Because that would have been going on in the '50s, right?

RK: Yes. Some of it was even in the '40s. I can get you the dates if it's important. It probably isn't significant.

DS: I think generally it's fine. Well, one of the things I see is that there aren't the small railroad lines anymore.

RK: Well, that's—

DS: Or is that not true?

RK: That's changing. The main line railroads went through a period where they were getting rid of their small branch lines that didn't have much traffic. Like the Union Pacific up in Eastern Oregon got rid of several branch lines. But then, a number of short line railroads developed to take them over and now there are some short lines that didn't exist back then, which have taken over some of the branch line services for the main line railroads. Like the Willamette & Pacific Railroad now has part of the line out through Beaverton down to the coast, and there's one of them that has a branch line down near Klamath Falls that

used to be part of one of the main lines. It's now a separate small "short line," they call them. I wrote an article for the [Oregon] Historical Society about the attempt to put a line across Central Oregon. Did you happen to see that?

DS: Mm-hmm.

RK: Well, that was part of the same general problem of having a main line servicing an area that can't really support it but might able to support a smaller branch line. Railroads always have had a very interesting set of legal problems.

DS: And, what region did you cover?

RK: I had what they called the Northwest District, which is Oregon, Washington, and part of Idaho.

DS: So there was plenty of work, I would imagine [*laughing*] with the railroads.

RK: Yes. I can even remember when we had some problems involving international service down from Canada into Northern Idaho, customs problems and so on, which we had to work our way through, eventually.

DS: Yes, a lot of it sounds like it's working through creating the transportation system and its operation—I mean on a contractual basis—things like the river and the rail lines that changed as the dams came in and barge traffic became more significant.

RK: Yes, that's true. Of course, the creation of the railroad lines all predated me by a long way. [*both laugh*]

DS: Right. [*laughs*]

RK: But they're in a more or less constant state of flux. A lot of it changed when they abolished the Interstate Commerce Commission and transferred most of its rail functions over to the Service Transportation Board. When they built the new Columbia River highway—the freeway [I-84]—a lot of that was put on what was formerly a railroad right-of-way. It involved a lot of contracts and negotiations between the railroad and the highway commission—or what's now the Department of Transportation—with the state. We have a whole series of contracts between the Union Pacific and the state of Oregon covering the right-of-way alongside the Columbia River there where there isn't very much room. The old Columbia River Highway was up on the side of the hill, narrow and winding and so on, and they wanted to put the new freeway down at water level where there wasn't very much room in some places so they made a deal with the railroads to use some of the railroad property for that.

DS: Well, that's interesting because obviously the railroads would have had a pretty big right-of-way.

RK: Well, most of the way they had a hundred-foot-wide right-of-way. Some of it was only fifty feet wide, depending on the topography. And, of course, in the old days, before I came along, they had the controversy over the railroad land grants back in the nineteenth century. Some railroads were given some federal land grants to induce them to build trackage that they couldn't otherwise afford to build

on their own. A lot of people have regarded that as just a gratuity, but the fact is that the railroads paid for it by being required to give reduced rates on government shipments for many, many years, up until the '40s at least. And so they actually paid many times what the land was actually worth, but that's usually not remembered by the high school history books and so on.

DS: Are there still reduced rates for government shipping?

RK: No, I think most of those were evened up in the 1940's, but up until then they had preferred rates on government shipments and, of course, when they got into shipping war material that was pretty heavy business. There was some of the war material they still had to give government rates, reduced rates. I think nowadays most of those are gone.

DS: Well, that's kind of interesting in light of what you said earlier about Amtrak not being subsidized anymore.

RK: Yes.

DS: It gets into that whole public, private transportation issue and who's supposed to pay for what.

RK: There's always been an interplay between public and private. Well, like we were talking about gated crossings and they come to the expense of building an over-crossing highway over the railroad or even to put highway gates at rail crossings. There's some federal money available for those but it isn't always the entire cost, so there's a lot of negotiation that goes on as to who's going to do what in order to permit those improvements.

DS: And that's part of what your firm has been involved in is those kinds of questions.

RK: Yes. Well, the railroad law department. The firm didn't get into as much of that as a firm but I had to as a railroad lawyer. I had to get into a lot of that.

[*Discussion of stopping for the day. Tape off momentarily, then restarted*]

RK: —involving the Port of Umatilla, I think it was, that acquired some property. A fellow named Richmond, I believe, owned the property and he wanted to develop it for industrial purposes when he saw what was coming. And the port wanted to develop it, so they condemned some of his property. Then, later, they wanted to sell some of it, or lease it, to private industry to go in there. And the question was whether the state could use its—or if the port could use its eminent domain power to acquire property and then put it into private use. Eminent domain is only for public use and was it a public use to turn it over to a private enterprise to develop? So there was at least one case that I know of on that, which said, in that instance at least the Port was allowed to do it. I've noticed that the same question comes up all over the country in other places, whether the city or the state or whoever can condemn property to turn

it over to private industry. It's not entirely settled everywhere.

DS: It seems to me it would have to be settled on a case-by-case basis.

RK: That's probably [correct], but there are some underlying principles about what amounts to a public use that are still being litigated.

DS: And what would you have to say about those?

RK: Well, in the case I speak of, the Port of Umatilla, we did not take an active part in it. But I consulted with George Corey, who's the attorney up in Pendleton who handled the case for the port. The railroad was interested in getting the rail service in there regardless of who did it. I guess on a philosophical basis, probably, the railroads would be more inclined to have it developed private rather that public, but that's not always the way it comes up. The philosophy is not all settled on it.

DS: So how do you deal with that as a lawyer, when you're?

RK: Well, you represent your client.

DS: Right, you represent your client, but does that ever cause you any inner conflict when you're representing your client?

RK: Well, it can, but I've been fortunate. I've never had to do anything for my clients that I personally disapproved of, but every once in a while that does happen alright. One of the ethical problems that the lawyers have to deal with all the time is whether to let your personal feelings interfere with the representation of your clients. Sometimes it might be strong enough that you'd feel you couldn't take a certain case. But there's no magic formula to it as far as I know. And, of course, the profession has rules on the subject. You can't take inconsistent positions in the same case or for different people, different clients. But, as I say, I've never had to face that dilemma.

DS: Well, the whole question of public versus private is obviously something the railroads would be pretty deeply involved in.

RK: Yes.

DS: Because they attain the right-of-way through those public land grants that give them a different status than say a private company that starts a transportation company or something.

RK: Oh, that's undoubtedly one of the factors of the historical background at least. But when the question comes up nowadays it rarely goes back to the land grant problem. It's just a question of who can do it best, or most economically, and, in the long run, who's to benefit by it.

DS: Well, I think that's the question—who's to benefit by it? Because when you look at taking something through eminent domain and turning it over to private ownership, I guess, with what questions are posed in terms of who's going to benefit?

RK: Yes, and the same thing happens on a smaller scale. The gated crossings that we were talking about, it's obviously a public benefit to stop accidents, but the public can't always afford to do it and sometimes the industry can't afford to do it either. You have to negotiate those things out as best you can.

DS: That's what I find really interesting. People typically think of transportation being public or private because they drive private cars or because they're taking public transportation. But really when you think about the way the roads are created and the rail lines and all those things have some sort of public subsidy and I just think that's really fascinating.

RK: Well, that's always been a source of contention when it comes to setting rates. The railroads have a much heavier expense because they have to own the property and build the rails and so on, and the barge lines using the river are pretty much using it for nothing and those are factors which enter into the rate-making proposition. Whenever there's a suggestion that the barge lines ought to pay a toll, for example, for going through the locks at a dam, it's a big question because [*chuckles*] way back in history the Northwest Ordinance—it was really the Midwest—said that the use of the waters shall be forever free. So the barge lines always said, "We're entitled to use them free, forever," even though they didn't have any expense involved in maintaining them, like dredging and putting in navigation markers and all that sort of thing. There's quite an expense to maintaining a waterway. Now they're talking about dredging the Columbia down to forty-five feet instead of forty feet and so on. Well, there's a big expense there and who should pay for that?

DS: What do you think?

RK: Well, [*pause*] I've kind of refrained from taking a position on it because the practical side is that you know you can't get the waterway users to pay the cost anyway, so why stew around about it. And, even if the water carriers get the primary advantage there's a rubbing-off advantage to the land carriers because sometimes the barge traffic is transported to the land carriers also. So, it's not all black and white either side, not when it comes to the benefit analysis. I'm pretty well to the point that I don't have to worry about those things anymore. [*chuckles*]

DS: Just watch them happen, huh? And understand where they're coming from.

RK: Yes, well, I don't have much longer to worry about it. Time's catching up with me.

DS: You seem to be doing pretty well.

RK: Well, so far, but you never know.

DS: Okay, well let's go ahead and stop this for now.

[End of Tape Two, Side One]
[Side Two, blank]

Forest Service Reserves

DS: This is Donna Sinclair. Today is March 31, 2005. I'm interviewing Randall Kester in his office at the Fox Tower on Broadway and Taylor. His office is on the eighth floor and today we will be talking about issues of constitutional law, among other things. This is tape three, side one.

Why don't you just go ahead and tell me about the Forest Service Reserves. [*laughing*] I know that's not what we were going to focus on but since we were talking about that and you have more to share about it.

RK: Well, during World War II, the Forest Service was, of course, very short on manpower because many of their people were in the service. So they set up what was called the Forest Service Reserves, where volunteers—mostly from the outdoor clubs like the Mazamas and the Trails Club and the other outdoor clubs—worked for the Forest Service, mostly during what would be their vacation time doing volunteer work for the Forest Service while their regular people were gone. The Mazamas, which we were active in at the time—my wife and I—were assigned the task of manning the Tilly Jane Guard Station, which was on the north side of Mount Hood at what was called the Tilly Jane Campground. There's a guard station and normally there'd be a guard there who would patrol the trails and look for any fires and report them and do maintenance work on the camp and the trails. Just generally be available to do whatever needs to be done from the standpoint of the Forest Service. So various people in the club took different portions of the season and a couple of times my wife and I were assigned to take care of the Tilly Jane Guard Station during what would have been our normal vacation, a couple weeks at a time. We had just completed one of those sessions when the accident involving Helen Lowry developed, which was on Labor Day of 1942.

It was the Labor Day weekend anyway. Rachael and I had been on duty at that camp the week prior to that and then another couple, Al Maas and his wife—that's M-A-A-S—had the station over the Labor Day weekend. Several of us in the Mazamas wanted to make a mountain climb, which during the war we didn't have much chance to climb because of gas rationing and some places were closed for security reasons. But we wanted to make a climb on the north side of Mt. Hood and that seemed like a good opportunity. So, there were about a half a dozen of us that got together and were having a climb on the Cooper's Spur route on Mt. Hood. We were up near the top of the route just below a series of rocky outcroppings above a long snow field and Helen Lowry, who was one of the party and a very active climber, happened to fall and slid down the long slope, which is part of the Cooper's Spur route, and went over the edge onto Elliot Glacier, which

is immediately west of the Cooper's Spur route. There is a rock wall, or a series of walls, several hundred feet high, I guess, down onto Elliot Glacier, which is on the northwest side of Mt. Hood. Mostly on the north side I guess you'd say. And she fell over the cliff and ended up in a *bergschrund* at the foot of the cliff and was killed.

When she fell I happened to be just below her in the line of climbers, so I started down to try to see if I could help. Of course, she was sliding, going much faster than I could go, and so I didn't get there in time to be of any help to her, but I was able to scramble down the rock face and find her body there and was able to drag her up out of the *bergschrund* onto the snowfield at the edge of the glacier. I waited there while the others who were in the party immediately turned around and went back down and then came up, as I recall it, from the lower end of Elliot Glacier. Let's see, there was Lu Norene and his wife Peggy Norene. She didn't come back up, but went on down to call the Forest Service for additional help. There were a couple of other people on the mountain at the time. Boyd French, who was sort of a caretaker at the Cloud Cap Inn on the north side of Mt. Hood, came up and brought with him some bamboo poles that had been used up there for ski races and we used those to help make a stretcher to carry Helen's body down.

In the meantime, Peggy had gone down to the Tilly Jane Guard Station and called the Forest Service at Parkdale and they were sending people up. Al Maas, who was then at the guard station, came back up, and there was another fellow, Harold Roberts, who was a part of the climbing party and the Norenes—Lu Norene, not Peggy. And another fellow, I think was Harold Bonebrake, who had been hiking there and was not a part of the climbing party but we knew him and he knew us. He came up to help, so with about half a dozen people we were able to get Helen's body down to where, meantime, the regular Forest Service personnel had brought up a regular stretcher and they took over carrying her down. I guess the coroner had been called and he came up and took charge of the body. Anyway, it was a rather disturbing experience, naturally, for everybody.

I guess I didn't tell you much about the Forest Service Reserves itself. They had an organization that put on classes to train people to do the Forest Service work and among those they had classes in finding your way in the woods using a map and compass, what was called orienteering, which was sort of a sport of finding your location in the woods by using a map and compass and measuring with the length of your stride and so on. They had a number of classes. I helped teach some of those classes on the use of a map and a compass and so on.

DS: Where were they held?

RK: Well, [*pause*] I've kind of forgotten. They rented a room somewhere in the downtown Portland area. I've forgotten just what building it was in, but they had rented a conference room and they had maybe twenty-five or fifty people in the class to learn some of the rudiments

of doing the work they might be called upon to do if they were working with the Forest Service. Some of the others, I remember Dale Cowen, who's dead now, was one of the instructors. We had some mimeographed materials that the Forest Service had used in their regular training classes that we were able to use. And they had some practice trips over in the West Hills, part of what's now Forest Park. They somehow had permission to use part of it to start some fires and then practice putting them out, because that's the kind of thing a forest guard would be called upon to do, using a shovel and grubbing hoe, or what they called a Pulaski, which was a tool—a combination axe and hoe—which the Forest Service used in trail maintenance work. So, we had some actual practice in putting out fires in case we were called upon to do that.

I don't think I was ever called on to do any actual fire suppression work while in the Forest Service Reserves, but one year, before we went to Tilly Jane, I was assigned to a station that they had then at Government Camp, or that summit just east of Government Camp. While there we were called on to trace down a report on a fire on one of the hills east of Government Camp and south of the highway. I've forgotten the name of the landmark there—it was a small mountain or foothill that we had a report of a smoke and we had to go in and try to find it, and it didn't turn out to be anything significant, but it was an experience anyway.

But the Forest Service Reserves only lasted for the span of World War II, and then as soon as the regular people came back, then the reserves were not called upon. They just disintegrated, I guess, and the organization—I never saw anything written up about it, so maybe it didn't get into the history books.

DS: I've never seen anything about it and I know Forest Service history pretty well. So, it might be out there, but I really appreciate you talking about it.

RK: It was kind of an irregular operation. Maybe they didn't want to make it public, I don't know.

DS: There are things like that with the Forest Service. They have work crews and things that they have relationships with, say the prisons, where they bring people out in the woods and have camps. And I think they do want to document it, but, like you said, it's not something that's written up in their administrative histories. There are informal relationships that develop.

RK: Well, we were regular—during the time we were on duty we were government employees. I remember we had to sign documents and we were under some kind of a medical plan, I don't know what it was. We weren't paid anything but if we had been hurt we would have been entitled to some kind of compensation for the medical bills.

DS: So, you weren't paid at all?

RK: No; it was a volunteer service.

DS: Was it men and women?

RK: Yes.

DS: Because I know they had women who were forest lookouts during the war, and that was the first time—men and women would go as couples to forest lookouts—but during the war, women actually went out there and were lookouts on their own.

RK: Yes, we knew some of the people who did some of that. I've forgotten now who they were but there's a lookout just southeast of Government Camp. Abbot Butte, or something like that, which had a lookout on it. There were some friends of ours that were on that for a while. That was just an aside

DS: Well, thanks for sharing that with me. Something that occurred to me when you were telling me about that accident was, you were the first one to scramble down the side of the hill. I just wondered if that's sort of typical for you to take charge in crisis? I mean, it occurred to me as you were telling the story, because I read the story, part of it last night, a little bit differently.

RK: Well, maybe my memory is at fault but if you're asking if I was leading, no we didn't have a leader on that particular trip. It was just a group of people going together and we had all climbed together previously. We were all members of the Mazama Climbing Committee and we'd been together enough that we didn't need anybody to tell us what do. There wasn't any assigned task or anything like that. I just happened to be the one who was nearest to Helen when she fell and so it was natural that I go down and try to help. But there wasn't anything assigned about it.

DS: Was Rachael there too?

RK: No. She didn't go. We had been at the guard station the previous week and gone back and she had, oh I think we had one child at the time and she was with the baby at home. In fact she was quite disturbed because the first she heard about it was a radio announcement that there had been an accident on Mt. Hood. She knew, of course, where we were. I remember Fred McNeil, who was then one of the editors at the *Oregon Journal* newspaper, called Rachael and wanted to ask her a lot of questions about it, and of course she didn't know anything about it. It irritated Rachael to be queried about something that she had just then heard for the first time.

DS: She was probably very worried.

RK: Yes, indeed.

DS: That's why I wondered if she was there. I could just sort of picture her there and if you're scrambling down into the glacier that would be kind of scary.

RK: No, she was at home, but it was probably more scary being at home and worrying about it than if she'd been

there. Because she had done quite a bit of climbing, too, and so she knew what it was all about.

Constitutional Issues

DS: We're talking about World War II and you mentioned that you wanted to talk about constitutional issues last time we talked and if there's anything you want to bring up that's fine. Otherwise, I can just launch into some questions; it's up to you.

RK: Well, our firm has had a number of cases which involved constitutional questions of some seriousness, and I was involved in some of them, not all of them. One of them, for example, is the free textbook case. Back in the '40s the legislature passed a law for free textbooks for public schools, or all schools, public and private. I suppose you know that Oregon has had a history of religious controversy. The Ku Klux Klan was quite prominent here at one stage. The question came up as to why the public free textbooks should be given to parochial schools of the Catholic Church, which was kind of anathema to the Ku Klux Klan people.

The question didn't come up immediately. At the time the law was passed it was referred to the public as a referendum measure, and there was a ballot title question, and was one of the first things that I did when I started to practice law in 1940. Shortly thereafter we got involved in the ballot title case and I wrote the brief questioning the ballot title, which had been supplied. And the Oregon Supreme Court rewrote the ballot title, and then the bill was passed by the public. Later on—I guess it would have been in the '60s probably—there was a challenge brought to the constitutionality of furnishing free textbooks to parochial schools. We represented the ones who were defending the measure, and I wrote the brief and made part of the argument to the Supreme Court on that.

The Oregon Supreme Court held that the bill was constitutional—was not a violation of the church-state separation—and the important principle that was involved was that the Oregon Supreme Court did not rely on the federal cases. There had been a lot of similar cases in the federal courts under the U.S. Constitution, most of which had held that such legislation was not valid under the federal Constitution because of the separation of church and state. The federal cases had upheld such legislation as *not* violating the church and state separation, but the Oregon court held that this law *did* because the Oregon Constitution was more stringent than the federal. That started a string of cases on state constitutional principles where the Oregon court has not felt bound by the federal cases in construing the Oregon Constitution. So they still are following the idea that the Oregon Constitution does not have to be construed in a parallel fashion to the federal Constitution. That was just one of the cases.[4]

We had another case that involved the validity of the appointment of temp-

orary judges to sit on the courts. There was a period of time when the courts were very seriously behind; the backlog of cases sometimes went a year or more without being heard or decided. So the legislature passed a law allowing the appointment of temporary judges—judges *pro-tem*, they were called—to sit on the courts. But there were serious questions whether that was valid because the state Constitution had various provisions about the election of judges and this didn't quite fit in. There had to be a test case to decide that and we were asked to participate in that case. The Supreme Court appointed Judge Crawford, who was a circuit judge in Multnomah County, to sit on one of the cases before the State Supreme Court, which happened to be a case that we had on the merits before the State Supreme Court. So we took the side that this was an unconstitutional appointment and the court decided with us and held that it was not valid. And then at the next opportunity the legislature passed an amendment to the Constitution, which of course had to be referred to the people—which was adopted—which allowed the appointment of temporary judges in both the State Supreme Court and the circuit courts. And so that helped over the years in relieving some of that congestion in the court dockets.

Another case that I remember involved the validity of the Oregon Investment Council, which very recently has been in the news because of the decision about the Public Employees Retirement System. I've forgotten the dates on it but it would have been back in the '60s or '70s maybe. They set up the Investment Council which allowed the investment of some of the state accident funds and some of the public employee's retirement funds in the stock market. There's a constitutional provision against investing public funds in the stock market and everybody questioned whether this was a valid investment and we were involved in that case.

The principal plaintiff was ex-governor [Charles] Sprague who always had a watchful eye on state finances ever since. He was editor of the Salem *Statesman* [*Journal*] newspaper, and when he was governor he was very conscious of state finances. And after he left the governorship he continued to be interested, so he was a nominal plaintiff to challenge the validity of the Investment Council's investment of funds in the stock market. We represented the side that challenged that, and the court got around it by saying the funds, the accident fund and the retirement fund, were not public funds. They were trust funds for that particular purpose and they were not subject to the state prohibition against investing public funds in corporate stocks.

DS: That sounds very familiar. I mean it sounds exactly like what—I just heard a discussion about the Social Security issue this morning that talked about exactly that. The former Interstate Commerce Commission director under Clinton was being interviewed and he was saying that the whole idea of a trust fund for Social Security is basically bogus. That that's not

really what that is. What do you think of that, in light of this?

RK: I hadn't heard about this today, but we were a little nonplussed by it, because we always thought that trust funds, you had to be more careful of them than you would of other funds and investing trust funds in the stock market seemed even worse than investing public funds. But the court didn't see it that way. And, of course, when the stock market is up why it made quite a windfall for the funds that were invested there and that enabled, I guess, the legislature to promise the enlargement of the retirement system. One of the problems in the current system, or was up until the decision here recently, was that the public employees had in effect given up their demand for a raise in salary for the promise that in the future they'd get a good retirement system. And the court has held that amounted to a contract and the legislature couldn't go back and change that so as to reduce the percentage taken from the retirement fund. So it's all involved in the finances. Of course, the state is having all kinds of budgetary problems and this is just one aspect of it.

DS: So it's the Oregon State Constitution that prohibits investment of public funds in the stock market?

RK: In the stock market.

DS: And there's nothing like that in the national Constitution?

RK: No, this is purely a state problem.

DS: I guess I need to look at the Oregon State Constitution a little more closely, but I wonder when that was written in there? Not when it was created?

RK: It was from the very beginning, as I recall. I could look it up for you but I think the original Constitution in 1859 had that because—yes I'm sure of that. Because in construing it the court referred to some of the decisions from, I think it was the Iowa Constitution, from which the Oregon was copied.

DS: I think I better turn this over.

[End of Tape Three, Side One]

The *Yasui* Case

RK: Well, those are the cases that particularly come to mind, involving the State Constitution. We had a lot of other cases, but I didn't personally participate in them. Roy Shields, who was our former senior partner, [and] one of the founders of the firm, was involved in a case involving when they first passed the income tax in Oregon. It wasn't the first time, because the first one was way back, but in more recent times, they revived—I think it was in 1929—the state income tax was passed as a means of offsetting the property tax. It was a property tax relief act, and the public was sold on the income tax as a means of keeping down the property tax. Various questions came up about the

administration of the new income tax, and Roy Shields was involved in that litigation. It was one of the major decisions of that time. I think it was over a hundred pages of reports, in the *Oregon Reports* on that case. It set the stage for the reliance of the state on the income tax as its principal means of state finances.

DS: I have read about *Yasui* and I know you talked about that before. I just wondered, I guess in terms of the constitutional issues that were involved, I understand that there were four different cases that were involved, and you were –

RK: *Amicus curiae*.

DS: *Amicus curiae*. I know that you were *Amicus curiae* on that, along with Gus Solomon, and then it said Earl Warren and a number of other people as well, and it was tried before Judge Fee. And so I wanted you to talk a little bit about, [not] so much what happened, because that's been documented pretty well, but what was it *like* to work on that case. What the tenor of things was at the time, because Japanese exclusion was—I mean the exclusion order [Executive Order 9066]—I'm wondering what people in the legal community were saying about it. Not so much what happened in terms of the outcome.[5]

RK: Have you read the articles about Earl Bernard? Going back to the first part of your question about my participation in it—it was very minor because I was very young at the bar then. This was right at the beginning of this country's involvement in World War II, which would have been '41 or '42, somewhere along in there. Forty-one, I guess, and I had just started to practice in 1940. When Judge Fee appointed, maybe, eight or ten of us as *Amici curiae*. I was the youngest one, and very much the inexperienced one in the crowd, and so I didn't speak up very much. But the few times that the *Amicus curiae* met—or *Amici curiae* using the plural—[*chuckles*] I didn't have much to say because these were all much more experienced lawyers. Manley Strayer was one of them and Gus Solomon, and I've forgotten now. If it's important I could get the names for you. It would be in the report of the case. Anyway, we all agreed that the exclusion was probably not valid as it applies to citizens, although it could be as applied to aliens.

The normal practice for an *Amicus curiae* would be to file a brief with the court saying what their opinion was. But before we could do that, prepare a recommendation, Judge Fee went ahead and decided it without waiting for our advice. He held that it was invalid as to citizens, but valid as to aliens, but that Minoru Yasui had forfeited his citizenship because he had worked for awhile for the Japanese consulate. Fee thought that was inconsistent with American citizenship so he said that it was valid as to Yasui, even though not as to citizens generally, which I think took us all rather by surprise. When it got to the U.S. Supreme Court they said it was valid as to citizens as well as to aliens and so they sent it back to permit Fee to change his opinion because he based it on

the lack of citizenship. So, Judge Fee did revise his opinion and imposed a rather minor sentence—I've forgotten now what it was. It wasn't a very severe sentence.[6]

But, along with it the U.S. Supreme Court decided several other cases, one from Washington and one from California that went the same way.[7] Later on those decisions of the U.S. Supreme Court were severely criticized and quite recently—or during World War II at least—there was another case down in California in which the district court, federal district court, indicated that the doctrine of the Japanese exclusion cases was rather shameful and should not be followed and issued a warning against being carried away by the emotionalism of the war hysteria. So at least it's a warning sign to some of the current activities under the U.S. so-called Patriot Act, which allows the government to do a lot of things which some people disagree with. But anyway the *Yasui* case was one of those that kind of laid the foundation for some of the criticism now being made.

DS: I read the article that you have on the Web site—the Cosgrave, Vergeer, Kester Web site—and in that you referred to *Korematsu*, and you wrote: "Such actions as surveillance without probable cause, arrest on mere suspicion, detention incommunicado and without charge, denial of counsel and trial by executive fiat," are basically dangerous. That seemed to me sort of the core of what you were saying.

RK: I didn't re-state it very well, but my oral remarks now are not as well prepared as that was.

DS: [*laughs*] Well, that's never the case when we're talking versus writing, because we get to revise and revise and revise.

RK: Yes.

Current Constitutional Issues

DS: That's actually on my list. I wanted to ask you about what constitutional issues you see at stake in the Patriot Act?

RK: Well, I guess those are the ones. I haven't followed all the recent decisions closely but the cases that came of out of the Guantanamo Bay detainment have indicated that some of the practices are at least questionable. Of course, when we read about the atrocities in the prisons over in Iraq at Abu Ghraib—everybody is trying to avoid responsibility for what happened there and I don't know what the final result of it all will be. But, certainly there have been a lot of things happen that can be attributed to the emotionalism and the war and the—I guess you could call it hysteria—that followed the September 11th tragedy in New York and Washington.

Everybody is very emotional about what to do about it and there's not an awful lot that can be done, I guess, because so much of it is based on intelligence failure, and so much of the intelligence is difficult when you're in a foreign country and you can't speak the language and it's

hard to have—I'm not really prepared to comment on all the current issues that have come up under the Patriot Act. But there was a program, I guess the District Court Historical Society had a program over at the federal courthouse on the subject awhile back. There are people who know a lot more about it than I do.

DS: I just wondered what you thought about it because when I started reading what you had said about, you know, in *The First Duty* and then referring to that, I thought maybe you had some strong feelings about it.

RK: Well, I'm rather cynical about it, I guess. I think that, well the incident with the Portland lawyer here, [Brandon] Mayfield,[8] certainly points up the hazard. I hope that people will look rather severely on the surveillance practices and so on. Of course, the City of Portland right now is involved in whether to go along with the so-called task force [FBI Joint Terrorism Task Force] and I don't really have any strong opinions about it, but [*pause*] I'm afraid that the zeal for security will be pretty hazardous to what we think of as our normal civil rights. But I haven't gotten involved in any of the current controversies over it.

DS: The kinds of discussions that are taking place around that today, I wondered if there were any of those kinds of discussions going on during World War II, about Japanese exclusion. Or whether, you know sometimes you read the history books and they seem pretty straightforward. You know, the exclusion act, Executive Order 9066 was issued, and then Japanese were removed and you hear about dissent from Japanese people, but were there other people who were saying we need to watch out for our civil rights?

RK: Well, Charles Davis wrote a couple of articles in the state bar magazine about Earl Bernard, who was defending Yasui, and he had some pretty strong comments about it. Of course, the public sentiment, as I recall here, was pretty strong against the Japanese. Up in Hood River, for example, where I think Yasui's parents were at the time, they almost ran everybody out of town, I guess. And, of course, when they were all relocated their businesses were closed and forfeited and all the families suffered very severely being confined to what were in effect concentration camps.

Eventually Congress recognized it and apologized and appropriated some money to compensate them, but they were very minor amounts as I recall. There was a limit of, oh, I don't know, $20,000 or something like that on the compensation that was provided to them. But at least Congress acknowledged, on the record, that it was a mistake. Of course, you probably know they built a park down on the waterfront here in Portland with some monuments to the memory of the people who were incarcerated.

DS: I noticed in the book, you also wrote about the naturalization cases and Judge Fee. And so you wrote "that the opinions in *Scheurer* and *Oppenheimer* cases and the first *Yasui* case reveal the importance

Judge Fee attached to the obligations of citizenship and his willingness to deny or cancel citizenship when he felt those obligations had been violated. This attitude may have been influenced by his own service in World War I." I wondered if you could talk a little bit about Judge Fee and why his attitudes might have been influenced?

Judge Fee

RK: Well, I guess it's pretty much guess work on everybody's part because Fee isn't around to defend himself. He was an aviator, as I recall, in World War I. I think, well I probably shouldn't guess at it. My recollection is he ended up as colonel or something like that in the Air Force and he was a very strict martinet, sort of, in his courtroom and a lot of lawyers were kind of afraid of him because he was so strict. But for some reason I got along with him pretty well. He was a Columbia Law School grad, as I was. A friend of mine in law school, Bob Graham, dated Fee's daughter Louise, and one time we were on a vacation trip together and afterwards we had dinner in Judge Fee's home with his first wife, who died. And I got to know Judge Fee on a little more personal level than just in the courtroom, so we got along pretty well. As long as you toed the mark he was okay, but he could be pretty severe if a lawyer got out of bounds in anything he did in court.

DS: I've heard he had pretty stringent rules in his courtroom, rules of behavior.

RK: I remember one incident, well, a couple of incidents. One time I was in court on a case, and I've forgotten what brought it up, but somebody sitting in the back of the courtroom was so intent on listening to what was going on he absentmindedly lit a cigarette in the courtroom. Judge Fee jumped on him very severely. I guess the guy was lucky he didn't have to go to jail, but it was just a momentary lapse.

But another time, we were in the court and there was some sort of a construction project going on in the street outside the courtroom on Broadway and they had a jackhammer going that made a lot of noise, which was kind of disturbing in the courtroom, and Judge Fee sent his bailiff down to tell them to cut out the jackhammer work while the case was going on. And the jackhammer operator wouldn't be told; he had his job to do and he wasn't going to quit just because somebody told him it was too noisy. The bailiff came back with that word and Fee sent the U.S. Marshall down there and the guy shut up then. I think I put that in the—did you see the article I wrote about the federal court practices?

DS: Yes, I have actually some notes from that I wanted to ask you about a few things in terms of changes—

RK: It's one of the things that sticks in one's mind.

DS: Well, you had also mentioned that, McCullough, is it McCulluck? Is that how you say his name?

RK: Claude McCullough, yes.

DS: At one point you wrote that he was more for the underdog and I thought, I mean both of them, they were the two judges on the court in the '40s.

RK: That's right.

DS: And so, what were some of the differences between them?

RK: Well, I wouldn't say that they're necessarily differences because I don't think it would be fair to Judge Fee to say that he was not for the underdog, but McCullough was very frankly that way. For example, McCullough had most of the OPA cases, the government Office of Price Administration, and he thought the entire OPA legislation was unconstitutional and he said so frequently, and when people were brought up before him for violation of some of the OPA regulations he was very lenient towards them. One of the things that I recall, and I think probably I mentioned it in that article, was that the OPA had its own staff of attorneys and when they came to court, McCullough insisted that they also have a U.S. Attorney along with them because he didn't recognize the OPA as a valid representative of the government. One of the OPA attorneys was Cecilia Gallagher, you hear her name anywhere?

DS: No.

RK: Well, I don't suppose she's alive now. But, she was a local attorney for the OPA and would come into court and McCullough would insist that she get one of the Assistant U.S. Attorneys, all of whom had other things to do and it was quite an inconvenience, I suppose, to the U.S. Attorney's office to have to send one of their people up to be in court along with the OPA attorney, but that was just one of his characteristics. We had a series of cases before Judge McCullough, so-called Hop cases. Have you encountered that?

DS: Mm-hmm. You talked about that in your other oral history.

RK: Yes, probably. At the time they were quite significant. The local farmers were in conflict with the hop buyers, who were mostly Eastern merchants. Their practice was to advance funds to the farmers to help them grow their crops and then have a contract to buy the crops when they were harvested at the end of the season. And if the hops weren't of the quality that the buyers thought they ought to be, why there'd be a big controversy over them. We had several of those cases and the test of quality was—they'd have a sample of the hops taken out of each bale of dried hops and wrapped in a paper package about a foot or so square. The witnesses would take a sample of the hops and smell them, rub them between their hands and smell them, and say if they were either good or bad. And so there were many of these hop samples, hundreds of them, in the clerk's office as exhibits during the trials. They got quite a bit of attention because they were rather pungent in their odor. The clerk was glad to get rid of them, I think ,when the cases were over. But McCullough held in favor of the farmers on all of those cases.

And I think correctly so, based on what the evidence showed, that the hops were better than the—it was just a case where the market had gone down and the buyers didn't want to pay the price that the contract called for. But McCullough held in favor of the farmers on those.

DS: What was his argument about the OPA, in terms of it being unconstitutional?

RK: Well, I don't know if I can reconstruct all the constitutional issues. We didn't have any of those cases ourselves but there was a delegation of power to the administrative agency that made some very severe rules about running a business and what could be done. And not only that the delegation of power was excessive, but the only way you could challenge the validity of it was to go to a special court that was set up back in Washington, D.C., which is way out of reach of most of the people who were under the thumb of the OPA out here. He thought that was a denial of their legitimate right to question the constitutionality of the legislation in the first place. But, I think it was mostly on the question of delegation of power.

DS: Yes, the issue of separation of power between the state and the federal district courts and the U.S. Supreme Court is something that I wanted to ask you about too. Actually it goes from the district court to the circuit court and then to the Supreme Court when there are appellate cases.

RK: Yes.

DS: So I wondered what those relationships are like, because it sounds like in this case that Judge McCullough had a different view of things, perhaps, than some of the other courts, or other judges. I don't know.

RK: Well, I don't know that. I don't recall if Fee had any rulings with respect to the OPA legislation, for example. I just don't know. Maybe he did, but I think they more or less assigned all those cases to Judge McCullough, and whether, because of his feeling about it; or whether his feeling came because of the cases being assigned to him, I don't know what's cause and effect. But as far as separation of powers, I'm not sure that would have been an issue. That's the issue right now in the case involving the feeding tube in the Terri Schiavo case where Congress undertook to direct the federal district court in what—I don't know the exact language of what they passed, I've never seen the actual bill—but apparently it authorized her parents to bring the case in federal court, which the federal court had previously not taken, or had dismissed.

That raises the question of whether the Congress has the power over the federal courts. Obviously they do have some power because the federal courts use legislation that's passed by Congress in determining their jurisdiction and so on. The federal Constitution sets up the U.S. Supreme Court then it leaves it up to Congress to set up the intermediate courts and define their jurisdictions. So there's always been some latent question of who's boss. I don't suppose it will ever

be solved to everybody's satisfaction because it all depends on who's ox is being gored at the time. I think, as I recall, the current attitude of the majority of the U.S. Supreme Court seems to be a little more in favor of state's rights than some of their predecessors have been, but whether that pendulum will swing back and forth I have no way of knowing.

DS: I think that's one of the interesting things in looking back at the last forty years and the interpretation of the Constitution, in terms of environmental law and civil rights especially, because the federal government has in a sense created structures that the states have had to respond to.

RK: Yes.

DS: And so, I mean I've thought about that whole pendulum issue.

RK: It goes back, well when I was in law school in the '30s and '40s, or late '30s and graduated in '40, the Supreme Court was holding a lot of the New Deal legislation unconstitutional—the Franklin Roosevelt New Deal. And later on, partly because of changing personnel and partly because of changing attitudes, a lot of that legislation was upheld that previously would have been held invalid. There's been a swing back and forth between what they called substantive due process and procedural due process. The Fourteenth Amendment, which prohibits the states from denying anybody due process of law, and it was later made applicable to the states as a result of court decisions. On the substantive side it deals with what's fair and reasonable and on the procedural side it's whether you've had a hearing in court and all the procedures that go along with that. For a while legislation was being invalidated on grounds of substantive due process.

[End of Tape Three, Side Two]

Changing Judicial Climate

DS: Okay, so they decided to discard that.

RK: And rely mostly on the procedural aspects of whether parties had a fair hearing. Now, I think they're probably swinging back more on the substantive side, that legislation has to be reasonable and within a fair reading of the powers of the branch of government that's been involved. I don't claim to be an expert on such matters but you can't help but be aware of the pendulum swing back and forth, which is probably going to be increased if President Bush gets to appoint more justices to the Supreme Court. Everybody assumes that will strengthen the so-called Right Wing or conservative side of the Supreme Court, and to some extent people are holding their breath to see what's going to happen next.

DS: Is that not the case in the district level too?

RK: Not so much so. And certainly it's true in all appointments, but in the district courts and courts of appeal it isn't quite so prominent as on the Supreme Court. Although, certainly in the courts of appeal, they've had a lot of appointments that have been filibustered and rejected on doctrinal grounds. District judges don't have an opportunity to make as much history as the appellate courts do, so they don't have a record that lends itself to challenging quite so much in the appointment process.

DS: Well, in the administrative state that we live in, though, don't district court judges actually have quite a bit of influence?

RK: Oh, yes. They have a lot of influence because a lot of things are never appealed beyond the district level. But they don't get quite the publicity that the appellate courts get. For example, when Judge Solomon was appointed to the district court here he had been very active as a civil rights lawyer in practice. When he was appointed, there were some who opposed his appointment because they thought—well, he was called a Communist and so on—but that was an extreme version of it. But several Portland lawyers went back to Washington to testify at his hearing, both for and against Judge Solomon, on the basis of his record as a very vigorous civil rights lawyer. Well, when he was appointed he was, I think, generally regarded as a pretty good trial lawyer, and trial judge. And, in fact, served about as long, or maybe longer, than any other district judge, at least in this district. They all had idiosyncrasies, and he certainly had his own characteristics. Somebody is writing, or has written, a biography of Solomon. Have you seen that?

DS: Yes, Harry Stein wrote it and it's going to be published by O.H.S. Press.[9]

RK: Good.

DS: He had been looking for a publisher for the last couple of years and they finally agreed to do it. I haven't read it but I want to read it for a number of reasons. For this project, and others, and I think it will be really interesting. I know Harry. And I know someone who's reviewed it too.

RK: Well, I haven't seen the book but he called me several times during the process of writing and asked me questions, which I tried to answer just mostly over the telephone. I'd be interested to see what the final result looks like.

DS: I don't know what the timeline is but I imagine it will be in the next year that it should be coming out. I know that Judge Panner's been really pushing it and Harry's done with it.

RK: Judge Panner's on the history society board now isn't he?

DS: Mm-hmm.

RK: Yes. Well, everybody's interested in history now. The Multnomah Bar is having their hundredth anniversary. In fact, I went to a meeting just yesterday of the past presidents of the Multnomah Bar Association who were importuned to get on the ball to help with the anniversary celebration next year, I think '06, I believe, is their hundredth anniversary. And, of course, the State Bar book, which you see there.

DS: Mm-hmm, it looks very nice. I wanted to ask you also about—you were involved in a selective service case that ended being dismissed, and he was from Klamath Falls, and I just wondered if you could tell me a little more about that?

RK: Well, again, that was way back when I was just starting to practice. Before they had a public defender's office, which we now have both in the state and the federal, the courts made a practice of appointing lawyers to defend defendants who couldn't afford a lawyer, and you served without compensation. It was part of the obligation of becoming a lawyer and it always went to the newest members of bar and one of the first cases that I had, Judge McCullough appointed me to defend a fellow, a Jehovah's Witness who was charged with draft evasion, who came up from Klamath Falls area. And it happened that in Klamath Falls they had a very vigorous American Legion bunch that was dominating the draft board at the time and they were pretty severe on people who didn't respond to the selective service call. And the Jehovah's Witnesses were, according to their religion, pacifists and opposed to war in any form. This fellow had been called in the draft and had declined because of his religious background, claiming conscientious objector status. Anyway, when he was charged with a criminal violation it came to federal court before Judge McCullough, who appointed me to defend him. I didn't have any experience at the time, didn't know much about such things but tried to make a defense on the case that the draft board was arbitrary and discriminatory in failing to give him a conscientious objector status. And Judge McCullough said, "Well, that's not a good defense."

And later on, in a different case that was upheld, the U.S. Supreme Court held that was not a ground for objecting to the selective service. Anyway, McCullough said, "You can't make that defense, but you better look into the possibility of getting a *writ of habeas corpus* and, maybe, in that kind of a case, you might be able to raise that question." So this was all new to me, and so I went back to the office to try to figure out how to apply for a *writ of habeas corpus*, which is an old common law writ that challenged an imprisonment or detention. And while I was trying to figure out how to do it the government dismissed the case, apparently recognizing that if they continued with it and we had a *writ of habeas corpus*, McCullough might turn the guy loose. So they just dismissed it and then it never came to trial, and that is my one experience with a *writ of habeas corpus*.

DS: That was your one experience with a *writ of habeas corpus*?

RK: Yes.

DS: So did you figure out how to do it? [*laughs*]

RK: Well, I thought I'd figured it out, but I never had to try it.

DS: So was he sent to a camp or was he just let go?

RK: I think they just let him go, but I don't know, I never followed that. I don't know what happened to him. I can't even remember his name now.

DS: That was one of my questions, because I didn't see his name.

RK: No.

DS: I'm sure it's there somewhere.

RK: It was a very minor incident in the overall scheme of things.

DS: Well, see that's one of those histories that's not documented as well, is the history of conscientious objectors.

RK: That's right.

DS: And a lot of it is through oral history interviews—kind of like the Forest Service Reserves, because it's just not something you see in the history books so much.

RK: Yes.

DS: You might have one line and that's it. So I was going to ask you if you were aware of the camps at Cascade Locks? And, there was one at Waldport, or if that was just sort of on the periphery and people weren't thinking about it?

RK: Well, I guess I'd heard of them, but I didn't know anything about them, so I just can't supply information. And, of course, this is getting to be an awful long time ago and my memory's not too good.

DS: I think your memory is pretty good [*laughing*] actually. It's better than mine. Let's see, can we talk for maybe another fifteen or twenty minutes?

RK: Sure.

Changes in Federal Practice

DS: Okay. I'll go ahead and go to the changes in federal practices. You had asked me if I looked at that article, and I have some questions that I got from the article. One of them was, you mentioned that now there are six-person juries and that there used to be twelve-person juries. Can you tell me how that came about? [*pause*] Or is that specific to the state of Oregon?

RK: No, it's in the federal court and I think the state still uses twelve-person juries, but I've forgotten now if it was a result of legislation or court rule, but it's permissible. I guess it's within the court's discretion. It can call a full jury if they want to but I think the use of six-person juries now is quite standard in the federal court and is just one of those changes in the law.

DS: You also said that it's hard to justify peremptory challenges if the opposing party asserts the challenge is due to race or gender, now, and so I wondered if there were other kinds of changes that you've seen that were associated with race and gender?

RK: Well, the one on race came about as a result of a Supreme Court decision. I don't remember the name of the case. In the selection of a jury, each side is permitted to make challenges, if a juror is called, if for some reason, if it develops that they have a preconceived notion for example, they can be challenged for cause. And a peremptory challenge, you're allowed so many. I think each side gets three peremptory challenges where you don't have to assign a reason, and you just don't like the looks of them, or think they might be prejudiced, you can challenge them and they'll be excused.

A case went up to the Supreme Court where a person had exercised a peremptory challenge, apparently because of a person's race. He was, I suppose, Colored. And the Supreme Court said that was not a valid basis for a peremptory challenge. It was quite a landmark decision because up until then you didn't have to give a reason for a peremptory challenge. This opened up a whole new field of inquiry, where if a party wanted a juror and the other party wanted to excuse them and used a peremptory challenge, the party who wanted the juror could say that the party challenging is doing it for an improper reason. Then it opens up a whole new field of inquiry that didn't exist before and raises the question of, how do you prove what's the reason for your dislike of a particular juror to sit on your case? I don't know that it's ever gone beyond the question of race, but if you once adopt the principle that you cannot challenge a juror if your challenge is based on race, then where do you stop? Can you use the same argument challenging a woman or a person of a different nationality? It opens up a whole field. As far as I know it hasn't gone that far, but it's a potential that somebody might take advantage of sometime and you wonder what might happen. I haven't personally been trying jury cases for several years so I'm not really up to date on all that.

DS: Let's see. Oh, you said now that you list witnesses in advance and provide summaries of expected testimony, which was "unheard of." You said that was unheard of in 1940.

RK: Yes, that's right.

DS: So, I guess, why did it change? It sounds like in 1940 that's where you could do the surprise witness, right?

RK: Yes.

DS: But you can't do that anymore.

RK: That's my understanding. As I say, I haven't gone into court lately on a jury case but the discovery practices in the federal court are quite broad. There's a lot of different things—you submit written interrogatories, you take depositions, you demand the production of documents—all as a part of the pretrial discovery procedure so that in theory each side will know pretty well what the other side has before you actually get into court. And listing witnesses is something that's just part of the court rules now.

It started with expert witnesses. If you're going to call an expert—a doctor or an engineer or somebody to testify on a scientific subject—you had to identify them so that the other side can look up their qualifications and you had to give a summary of what you expect them to say so that the other side can be prepared to counteract it if they want to. And I think it started with expert witnesses, but then spread now to where you have to list all of your witnesses and give at least a brief summary of what you expect them to say so that the other side can be prepared to counteract it if they want to. I think that's still limited to the federal court. You don't have to go that far in the state court anymore, or still.

DS: That would be one of the differences between operating in the federal court and operating in the state court.

RK: Yes. State practice here, at least in Oregon, the discovery procedures are much more limited than they are in the federal court. A lot of states have adopted the federal rules for their state procedure, but Oregon has not gone that far. Oregon has adopted rules of procedure, but they don't go as far as the federal rules. In fact, when the federal rules first came in, which was, I guess, in the '30s, '37 maybe, there was a great concern that the state might adopt them. A lot of people didn't want them so they opposed legislation within the state that would permit the courts to adopt rules of practice for fear that they might adopt the federal rules. Later that was somewhat diminished and the legislature did authorize the courts to make the rules of practice, but the rules have not been as comprehensive as the federal rules, at least in the discovery process. So there is that basic difference.

DS: You had written that there were greater sanctions under Rule 11 recently and that the court had power before but it didn't use it. I guess I don't know what Rule 11 is.

RK Well, it permits a court to, in effect, impose a fine on a lawyer for bringing a frivolous case. I guess there's currently some agitation now. President Bush is urging on Congress to limit certain kinds of cases, like malpractice cases and tort cases. There's been a lot of talk about frivolous lawsuits, because that's a politically popular thing to say, but there aren't nearly as many frivolous cases as they make it sound like. But anyway, the courts had power for a long time to impose penalties for bringing a frivolous case, but the court was not inclined to use it very much. They wanted to give people opportunities to be heard if they thought they had a case, even if it wasn't very good. Currently there's all the talk about tort reform in the federal system. They talk about frivolous lawsuits and make it sound as though it's more of a problem than it really is.

DS: From my perspective, that seems to be pretty common, in terms of the way that public policy is created. You have this sort of media binge about something like tort reform, and *then* it goes to the legislature.

RK: If somebody gets a big verdict, a million dollar verdict in a damage case, why it gets a lot of publicity. And, people assume that those are commonplace. Well, they're not; they're pretty rare. But the publicity that goes along with them tends to build up a lot of public comment that may not have much real support.

DS: I get a little confused sometimes, but wouldn't most of those kinds of court cases be tried in the state courts, rather than the federal courts, in Oregon?

RK: Well, that's true. The federal jurisdiction is limited. There are only certain kinds of cases that you can bring to federal court, like cases of diverse citizenship, citizens of different states suing and there's a monetary limit. In a diversity case, it has to be at least $75,000. It used to be $10,000 and they keep raising it now so it tends to limit the cases that can be brought into federal court. One of the things that President Bush proposes is to require certain types of cases, like class actions, to be brought in federal court rather than state court, whereas state courts, I guess, have probably been more generous than some of the federal courts have been. But, again, there's a lot of political hyperbole that is more for political purposes than having a real factual basis. But, you're right, that most of the garden-variety tort cases, automobile accidents and so on, are in state court rather than federal court.

DS: I wonder what kind of impact that would have on the federal courts if all class action suits had to go to federal courts.

RK: Well, it would increase their caseload quite a bit. Of course, a lot of class actions are brought to federal court anyway because of the diverse citizenship. And a few years ago the federal courts adopted what they call a whole set of rules for multi-district litigation, where they have cases brought in different districts which involve the same principle or sometimes

the same parties, are consolidated into a so-called multi-district case. For example, in the so-called WPPSS litigation, the Washington Public Power Supply System cases out here. There were cases in Oregon and Washington about the failure of the Washington Public Power Supply bond issue. We were involved on the fringe of those because we had to render opinions on a lot of insurance questions that came up in those cases. But, anyway, those cases were eventually consolidated into a multi-district case, because it involved cases from several different districts. Some of the cases involving manufactured products, some of the products cases, where a manufacturer like Ford Motor Company might be sued in any number of different states or federal districts for some mechanical defect in the car. Those cases can now, if they're in federal court, be consolidated into a single proceeding. And, no doubt, if the same thing is applied to all class actions it would increase the caseload in the federal courts a lot. That runs into budgetary problems then, whether they're going to have enough cases and have enough judges, and then that means you have to have more courtrooms and more personnel to handle them. There are all kinds of problems that go along with it.

DS: And that's one of the big changes that you noted also is going from the two judges when you started to, how many is it now, six?

RK: Well, five or six now.

DS: Six, yes.

RK: And they can go on senior status now, so they can have another appointee take their place and still be available, like Judge Frye. Well, she's kind of disabled now, but she was senior status for a while when she was still sitting.

DS: Panner and Redden are both on senior status.

RK: Redden and Panner, yes, they're both senior status. And I guess Malcolm Marsh, I'm not sure whether—is he senior now?

DS: Yes, his oral history's being done right now, as a matter of fact. Not by me, but by my colleague.

RK: Well, that means there is a vacancy that they can appoint somebody to, but the senior judge is still available if he's willing to serve and can be appointed to—

DS: So a little extra staff just in case you get overloaded or if that's the most appropriate person to deal with an area because of expertise.

RK: Well, I don't think it's much done on the basis of expertise as it's availability and willingness. Judge Leavy, on the Court of Appeals, is senior status, but he still sits quite regularly.

DS: Yes, he does, doesn't he? He just had his history done last year too. Well, you were at the dinner, of course, because that's where we had your CD and he gave that interesting talk at the District Court dinner.

RK: Yes, yes.

DS: I was curious about the *Wards* case, and I know you've written about it a lot so you don't need to tell me all about it because I read about it. But in light of what you were saying about the pre-trial work, you know, what was it, seven years of pre-trial work, and then nine days of trial? You also mentioned that things are done a lot of times with settlement conferences and summary judgments today, so if you could just comment on the shifts and the way that law is practiced, that would be helpful—

[End of Tape Four, Side One]

Arbitration & Settlement

DS: Okay. So the settlement practice—

RK: Judge Fee was very firmly of the belief that settlement was not his business. He said, "Courts are to try cases, not settle them. If you want to settle them you go ahead and do it but don't ask me to participate in it." Well, about that time there was a judge back East, Bolitha Laws, I believe—the name sticks in my mind—who wrote quite extensively on the practice of facilitating settlements in the federal court and Judge Fee said, "That's not our business, we shouldn't be doing that." And he wouldn't participate. But nowadays the federal judges regularly assist in settlement conferences, not in the cases that they are going to try, but in the cases that somebody else is going to try, they'll sit in as a facilitator to settlement. Judge Leavy, for example, has got quite a reputation as being an excellent facilitator, or as a mediator for settlement conferences, where he's not going to be the trial judge because he's on the appellate level and doesn't try cases in the trial court anymore, as far as I know.

Anyway, the whole business of what they call alternative dispute resolution, which involves arbitration and mediation, has taken quite a—well it's a growth industry, I guess, in the last several years. There are several arbitration groups, the American Arbitration Association, for example. And there are others that have a staff of arbitrators that they will assign to arbitrate cases in lieu of court trials or provide a mediator to assist in the settlement conference. On the state level, all cases below a certain amount, I've forgotten what it is, maybe it's $50,000 now, are assigned to a compulsory arbitration, which is some kind of a pre-trial. If the arbitrator makes an award, which is satisfactory, then that's the end of it. But either side can appeal an arbitrator's award to the circuit court and then it's tried over again.

It's cut down a lot on the number of cases that are actually tried in the circuit courts, which has a subsidiary effect as far as law firms are concerned, because it used to be that you could send a young lawyer in to try a case that was not very important and get a little experience trying cases with not too serious consequences. Now they don't have that because those cases usually end up in arbitration. The only cases that go to full trial now are the ones that are

pretty serious and you don't want to send a beginning lawyer in to try it without experience, so it's hard for a beginning lawyer now to get trial experience because of the advent of arbitration and mediation. That's just one of the things that we have to learn to live with.

DS: How do you decide who's going to try a case, here, in this law firm?

RK: Well, we're not so large that we're departmentalized the way some of them are. We have practice groups, which handle certain kinds of cases like railroad cases, where certain lawyers are experienced there and insurance cases, where you have certain lawyers that have more experience and they just naturally gravitate to them, those cases are assigned to those people.

In our firm we have an assignment committee. When a new case comes in, first they have to check and make sure there are no conflicts so that they're not on the wrong side of it, in case we represent somebody else on the other side. Then each week our assignment committee takes all the cases that have come in the previous week and gives us sort of a preliminary look at them to see what it's all about and what kind of issues are involved, and then they decide who shall get assigned to a case, and that's partly based on a person's experience and ability and partly on the case load. You don't want to give too many cases to a person and not enough to somebody else.

So the assignment committee has a lot of responsibility in apportioning the work. Sometimes the assignment has to be changed because of workload or something like that. And then of course it has to be satisfactory to the client also. Some companies are accustomed to having a certain lawyer do their work, and to have a different lawyer means you have to get them reacquainted and that may present a problem, but that's just one of the aspects of having a law firm.

DS: Does the firm have any aspirations to get really big or just kind of stay at this kind of medium size?

RK: Well, I think we've always been reluctant to grow. In fact, going back in, oh about in the mid 60s I guess it was, our firm went through quite a change. We had twenty-some lawyers at the time and there were some personality conflicts within the firm, so some of them split off. We ended up with a core here, with I think about four or five lawyers, to restart the firm. Our thought then was that we thought six was about the right size for a firm. We were not able to stay that small because you have to have lawyers to handle the business, and when the business comes in you have to take care of it, so you have to hire more people, so over the years we've gradually increased. We now have, I think, thirty-one lawyers but we don't have any aspirations to become a hundred-lawyer firm like many firms are.

DS: Like Stoel Rives, for example is pretty—

RK: Yes Stoel Rives has, I think maybe a couple hundred.

DS: I think they have about 200, which just boggles my mind.

RK: Well, ours too. We're not prepared to go that route. In fact one of the problems is if you get that big you have to have several floors of office space and you can't be as congenial and collegial if you're spread out too much. We kind of hope to stay on one floor of a building, as long as we can.

DS: That's how you limit yourselves if you can stay within those boundaries? [*laughing*]

RK: Well, you can't hire a person if you don't have a place to put them, but the time may come when we'll have to get more space in order to have more people in order to take care of more business. But, as I say, we're kind of reluctant to grow.

DS: So you prefer the kind of culture that you have in the firm to what you would have with the 200-person firm?

RK: I think we're all more comfortable to know each other better. Even so, I have difficulty keeping track of the staff sometimes. With the changes in personnel it's hard to keep track of everybody. That's partly because I'm getting old I guess.

DS: Well, how about if we wrap it up for today? Is that okay? Can we schedule another meeting?

[End of Tape Four, Side Two]

Continuing Legal Education

DS: I'm going to start by announcing that today is the eleventh of May 2005 and this is Donna Sinclair. I'm interviewing Randall Kester in his office in Portland, Oregon and we're in the Fox Tower. This is tape five, side one. Good morning Mr. Kester.

RK: Good morning.

DS: I wanted to start by asking you about the first formal CLE [Continuing Legal Education] session of the Oregon State Bar. I noticed that you were involved in that and you wrote an article about it.

RK: Yes.

DS: How did that come about?

RK: Well, I think it was largely the idea of Herb Hardy, who was an attorney then and is now deceased. This was toward the end of World War II, the latter part of 1945. People were starting to come back from the service and lawyers who had their practice interrupted by their war service were naturally at a disadvantage, not having been able to keep up on what's been going on in the legal field. So Herb thought it would be a good idea to have some sessions to refresh, primarily the returning soldiers, on current developments in the law and the present status of various subjects of law. So he organized, through the help of the Multnomah Bar Association, a session to be held in the county courthouse.

And several people were enlisted to deliver lectures on subjects. Some of us had been teaching at the Northwestern College of Law, which was then a downtown night law school, before it became affiliated with Lewis and Clark College. Herb had been one of those teachers himself, so he knew pretty well who the faculty were at Northwestern and he recruited some of us to give talks. For example, Kenneth O'Connell, who was then a professor at the University of Oregon Law School, talked on the subject of mortgages and trusts, I believe. I talked on the subject of wrongful death litigation, under the Oregon statute then in force. And then Ralph Bailey and Tom Stoel talked about taxation subjects. I think Judge Crawford talked on some matters of practice before his court. I think he was presiding judge at the time in the circuit court. If I remember correctly, I think Bob Leady talked about law office administration.

Anyway, we had a session at the county courthouse and I think it was divided, actually, into two sessions. It was quite popular. Everybody thought it was a good idea so the state bar decided to have a similar session at the fall convention down at Gearhart. Some of the same people were recruited for some of the same subjects since we had already prepared material for it. And we gave a program, I think, one afternoon at the state bar convention and it was well received. People thought it was a good idea, so the state bar decided to make a permanent committee out of it and try to do it periodically. I believe, if I remember correctly, we had a session the following spring and then again the following fall,

which would have been in 1946, I believe. It was generally well received, and so the state bar made it a permanent committee with a permanent assignment to put on continuing education programs. And has, regularly, from then on, which has been fifty years or more. It's over sixty years, I guess.

Originally we had handout materials, which were just mimeographed, and, later, after the state bar had taken it over, they got to printing up loose-leaf notebooks. The state bar set up, in its office, a person who was charged with the details of administration. I've forgotten the name of the woman who was the first director of it, but she was an employee of the state bar and the rest of us were just volunteers. Under her supervision they started publishing these loose-leaf notebooks. Each year there's been a new volume, or sometimes more than one volume that comes out with materials printed. And they're so voluminous now that they're practically an entire law library, which has been another problem for the practice of law because the reports of decided cases have become so lengthy and voluminous that it's quite a financial burden for anyone to maintain a law library unless they're a large firm. So the practice of having continuing legal education sessions twice a year has become a tradition and eventually it became a nationwide movement. I think practically every state now has some sort of continuing education program.

At one point the legislature adopted—well, now I'm not sure that the legislature got into it at that stage—but the state bar made it a mandatory requirement that lawyers had to have a certain amount of continuing legal education in order to maintain their license to practice. That has been gradually modified. I think, presently, every lawyer's required to have at least fifteen hours per year of continuing education. At first we had to report them every year but then they modified the practice so that we report in three-year increments. So every third year we have to have a total of at least forty-five hours of continuing education. The state bar has a method of approving the courses that are to be given, so that when you sign up for a course you know that you're going to get a credit for so many hours, for whatever that subject is. That's continued until it's become an established part of the law practice. And I think, as I said, it's quite similar to the one that goes on all over the country in each state.

DS: But it sounds like it wasn't happening all over the country when you started.

RK: Well, I don't know when the rest of the country started to do it. I don't have any dates and so on, but I have a feeling that we were one of the first states to start it and quite a few other states have sort of followed the lead, or maybe copied the practice of Oregon. I don't know to what extent that's true, but that's my speculation. And the state bar has a continuing committee—Herb Hardy was the chairman when it was first started, and served at least two years as chairman. Then I was chairman for a couple of years and various others. Tom Tongue was chairman once, Tom Stoel,

and John Bledsoe. I don't remember who all have had it, but after awhile I ceased to participate in it because I had other responsibilities. But it's a regular feature of the Oregon State Bar Convention in the fall and then usually a session in the spring also.

DS: There was some concern—you wrote about this in the CLE article—that lawyers would be concerned about sharing the tricks of the trade. I'm wondering about legal culture and whether that's common.

RK: Well, I think it's one of the illustrations of the fact that lawyers can be public citizens as well as selfish in their own interest. Initially, we weren't sure how well the practicing lawyers would receive or would respond to the notion that they were to help their competitors. But I think it's a credit to the bar that they have not been unwilling to help. And I think that's probably true around the country as well. Of course, Oregon is different from some of the more populous places where the practice of law is a good deal more hard-nosed, shall we say, than it is here. When the practicing bar is small enough that you know most of your people engaged in the practice, you can be a good deal more trusting and friendly with people you run into in court all the time. I understand back in New York and other places, they're not always on such a friendly basis.

DS: There was also a committee that put on "A Day in Federal Court" skit. You talked about that.

"A Day in Federal Court"

RK: Oh, yes. The practice in the federal court was a little different than practice in the state court. The rules are different and some of the customs and practices are different, so at one point the state bar committee felt it was wise to put on something dealing with federal practice as distinct from state practice. So we organized a program, which typified a day in federal court.

Judge Fee was then the presiding judge for the District of Oregon. He had a practice of every Monday morning he would hold sort of a convocation in his courtroom and they would call all of the cases on the active docket that were then pending and have the lawyers report to the judge on the status of the case, and then he would have a place in the program for the argument of motions. If there were motions that could be handled in a brief span, he'd set them all for Monday morning and then they would have a session for pretrial conferences, which was just pretty new in the practice then. Later it became part of the state practice, also, but they would have a pretrial conference where the lawyers for the parties would discuss with the court whatever problems there might be so as to try to resolve them before the actual trial occurred. And if there were matters of discovery, like taking depositions and requesting documents, any problems that could be ironed out before the trial. So he would have a pretrial calendar as well as a motion calendar and a call calendar. This was kind of foreign to lawyers who didn't

get into federal court very often and the idea was to put on sort of a skit for them, a typical day.

We arranged for lawyers to participate just as if they were actors in a play. Ralph King, who was then one of the senior members of the bar, acted as the presiding judge. I was sort of a narrator that explained what was going on and then various other lawyers took part in explaining what the status was on their particular hypothetical case. Well, anyway, Judge Fee thought this was a great idea and he liked it so well that he had us put it on several times, once at the Ninth Circuit Judicial Conference down in California and then once when they had the National Judicial Conference held over in Yellowstone Park. Oregon lawyers put on pretty much the same program that we put on before. Then also they had a Western conference—the state bar associations held a convention here in Portland—and we put it on for them. Of course, by that time it was getting to be old hat and that particular part of it was discontinued, wasn't put on anymore, as far as I know. But at least it was well received when it was going on.

DS: Did the state bar put on any other kind of theatrical performances? I hear things about theatricals here and there—the Queens Bench, the [Oregon] Women Lawyers Association.

RK: At the state bar conventions they had a developing custom of a Saturday evening program just for entertainment, not for education. Walter Cosgrave, who was a former partner in this firm, he's now deceased, was the director for, probably, ten years. He organized and put on what they call a tent show, which I'll tell you about how they got that name for it, but it was amateur theatricals, songs and skits, all in a humorous vein. Initially, they were all acted out by lawyers and judges. Later on they eventually got some outside talent, but initially it was all lawyers and judges who participated. That started also when we had a bar convention down in Gearhart, which was then one of the popular places for the state bar convention, because it was kind of remote and isolated and they had a hotel there that had room for some of the activities. Anyway, they had planned to have the first entertainment of this type in a big circus-type tent outside the Gearhart Hotel, but the weather was bad and just as we were approaching the time for performance a big storm came and blew down the tent that had been set up so they had to hastily move inside and put the show on indoors instead of out in the tent. Then afterwards they were always referred to as the tent show even though it was no longer put on outdoors. The tent shows were an outstanding feature of the state bar meeting for, I think, at least ten years.

Then Walter Cosgrave, who was getting along in years then, ceased producing them and they didn't have them for several years. Now they've started trying to revive it a little bit, although the bar conventions are not held as often as they used to be—an annual event—but now I think they're

only every two years. The type of entertainment is not quite the same as they used to have because of the variety of people who have charge of it. But it's beginning take hold as a regular feature of the semi-annual conventions.

DS: Was the "Day in Federal Court" humorous at all, or was it—?

RK: Well, it was in a light-hearted vein, and we tried to work some humor into it but it wasn't always possible [to do that] and still maintain its purpose. But it was enjoyed as an entertainment as well as educational. I think some of the material that Walter Cosgrave used, he sort of adapted from some amateur theatricals put on by the Bohemian Club down in San Francisco, which are quite a tradition in its own name, but they weren't at all legal performances. They were just straight theatricals. But some of the style and manner of presenting them, I think Walter sort of emulated in arranging the programs for the Oregon Bar.

DS: Were there any scripts that you knew of?

RK: Yes, in fact I had some of them from Walter, which I turned over to the state bar and I am not sure whether they still have them in their archives or not, but there were scripts. In fact, in the book that the state bar put out recently, just last fall, entitled *Serving Justice*, has a section in it which quotes some of the lines from some of the scripts in those tent shows.

DS: Sounds like it was fun.

RK: Yes they were.

DS: You said that you talked about wrongful deaths cases in the first CLE. Do you recall what your take was on that or what you were presenting?

RK: Well, it was published as an article in the *Oregon Law Review* afterwards. Oregon statutes provide for a cause of action for somebody who is killed or loses his life as a result of somebody else's conduct, either negligent or even intentional. But the rules of procedure for that kind of a case are a little different from other aspects of tort litigation, so it was worthwhile to have a session devoted to that kind of procedure. The rules of damage are a little different from ordinary tort cases, and since it's purely a statutory cause of action and not a common law action, it has its own rules. It's useful for lawyers to know. As I said, my particular talk on that subject was published in the law review. And, of course, that was a long time ago and it's changed a lot since then but that was an attempt.

DS: Actually, I wanted to ask you about being a CLE chairman, if you were involved in putting any of the CLE policies in place or anything like that?

RK: Well, at the time, yes, but that was a long time ago. I'm not up to date on all of their current policies and practices. I think I was the second chairman,

following Herb Hardy. It was all new at the time, so we had to kind of feel our way along as to what we could do, what was practical to attempt to do, and try to keep it timely with respect to the subjects that were covered, and make sure that the speakers and authors that we used were producing quality material. At the time it was a fairly significant effort. I think probably now the nature of it is different because the publication is different so there's more editing, probably, now in the written materials that are handed out. Recently there are now later editions. Some of the first editions are no longer timely so they've been modified. For example, I was one of those speakers on the subject of appellate practice and we put out a handout and then some years later there had been enough changes so it required an entirely different edition of that material in order to keep up to date.

Oregon Supreme Court

DS: Well, that sounds like a good segue into talking about being on the Oregon Supreme Court.

RK: Well, that was a very interesting episode in my life, although a short one. In the latter part of 1957, I think in December of '57, Judge Tooze, Walter Tooze, who was then on the State Supreme Court, died, and the governor had to make an appointment to fill that place until the next election. It happened that I was then the president of Multnomah Bar Association and we had a committee on judicial selection, which traditionally evaluated candidates for judgeships. When the governor wanted a recommendation, why this committee would make a recommendation. Well, when Walter Tooze died I was president of Multnomah Bar. Hugh Barzee was then the governor's counsel. He was a lawyer here in Portland, and is now deceased. I called Hugh Barzee to offer the services of our bar committee if the governor wanted. The governor then was Elmo Smith and I reminded Hugh that we had the committee and asked him if he wanted us to make a recommendation. Hugh's response was, "Why don't we submit your name?"

I was kind of taken aback by it, not expecting anything like that, but couldn't very well decline it. So, Hugh submitted my name to Governor Smith and he appointed me to fill the vacancy caused by Walter's death. That took effect the first of January in 1957. Tooze died—the fall of '56 that would have been. My appointment took effect the first of January in '57, and I served there a little over a year. Then in March of '58, a position opened up here in Portland. Roy Shields, who had been a former founding partner of this firm was a general solicitor for the Union Pacific Railroad for the Northwest at the time, and he was retiring so there was a vacancy there and he recommended me to the Union Pacific officers who were then in Omaha, Nebraska. His recommendation

was followed and I was offered the job as general solicitor here in Portland for the Union Pacific. So I resigned from the Oregon Supreme Court and came back to practice in Portland as general solicitor for the Union Pacific, and also became a partner in this firm at the time. So I had two hats for awhile until, eventually, I retired from Union Pacific, in 1982 I guess it was. But I've continued as a member of this firm, and we've gone through various changes in the firm. But my service on the State Supreme Court was only for about fourteen months, I believe. So I didn't amass a long history of appellate decisions, although I had always done quite a bit of appellate practice as a lawyer.

DS: When you called Hugh Barzee did you have anyone else in mind?

RK: I did not at the time, no. We had a committee, and I was not on the committee, although I guess I would have appointed the committee. But we didn't assemble a committee and go through all the work of evaluating candidates unless we knew that the governor wanted our assistance. If the governor didn't want it, why we didn't bother to organize it. Nowadays they have a judicial poll and have a written ballot among the lawyers for recommendations for vacancies, instead of just a committee recommendation. But even those are not conducted unless—

[End of Tape Five, Side One]

Choosing Judges

DS: I was going to ask was about the Multnomah Bar Association and the Oregon State Bar because you said the Multnomah Bar Association would compile a committee I'm just wondering why it would be the Multnomah Bar Association and not the state bar?

RK: Well, of course, some judicial vacancies are in circuit court, where a particular county would be most involved. And for statewide judicial vacancies, the state bar has a similar practice. Judge Tooze came from Portland, originally, and was well known to the Portland bar, so I think it was for the Multnomah Bar to be willing to help if the governor wanted any advice from people who were familiar. Of course, with Tooze being dead it didn't make a difference as far as he was concerned, but it was a practice that I think has grown. This was a long time ago—well '56—and the state bar didn't have its processes quite as well formulated as they are now.

DS: So things were a little more informal, but it was an offer of assistance.

RK: Yes.

DS: And what were your feelings about becoming a judge when you first found out?

RK: Well, I was [*chuckling*] thrilled by it because I was quite young at the time, and while the judicial position didn't

pay very much then—that was one factor why I eventually resigned—but I thought it would be a great thing to do and I enjoyed it very much. I had always liked the appellate practice as a lawyer and I thought it would be very interesting to be on the other side of the bench, and it was. I liked it very much.

DS: What was it that you liked about the appellate practice? I'm interested in hearing about the difference between being an appellate lawyer or operating in appellate court and other courts.

RK: Well, I don't know if I can put it into words very effectively, but in the trial court it's kind of like putting on a stage performance. You call witnesses and examine and cross-examine them and make arguments to a jury, which are factual arguments. You're arguing the facts trying to persuade a jury with whatever factual problem you have. It's an adversarial process, so each side is trying to present its version of the facts as persuasively as possible. In the appellate court you're arguing questions of law instead of questions of fact, for the most part. There are some times when the appellate court has to decide factual questions, but for the most part the appellate courts take the facts as they are decided in the trial court and then applies law to them when you have disputed questions of law that are appealed. So it's more of an intellectual exercise, of trying to persuade the court of what the law is, or ought to be. In the trial courts you're trying to persuade the jury what the facts were in, say, an automobile accident or anything else. A breach of contract case you're trying to persuade the jury of your version of whatever the facts are. But in the appellate court you're mainly arguing questions of law and that's more of an intellectual exercise. And I always found it very interesting.

DS: Doesn't it require more writing, in the appellate process, as an attorney?

RK: Oh, yes. You have to submit written briefs, and depending on the nature of the case and what resources you have available, sometimes the appellate lawyer has to do all the legal research as well as preparing the briefs. Sometimes he or she can have somebody help him and that's true, of course, as a law firm gets larger and has more aspects to its practice and gets more people involved in the appellate side of the case, you sometimes have assistance. But the person who's arguing the case usually has to have a major part in writing the briefs because he has to have the briefs outlined, or support the line of argument that he wants to make on the questions of law. So it's a—well it's not a solo operation—but sometimes it's very nearly that.

DS: When you become a Supreme Court judge, is there any sort of ceremony or do you just walk into the office one day and start work? How does that work?

RK: Well, you have to be sworn in and, usually, that's done by the presiding judge or justice, depending on what court

it is. The governor issues a certificate, sort of a proclamation: "So-and-So's hereby appointed." And then, sometimes, there's a little ceremony connected with presenting that to the person who's being selected, but it's not like crowning a pope for example. [*laughs*] It's a much simpler process. As I recall, when I was sworn in it was in the governor's office and the governor presented the certificate and the presiding judge administered the oath of office and that was it.

DS: So what makes someone want to be a judge?

RK: I suppose it's just your personal temperament, whether you like the intellectual process of deciding what the law is, or ought to be, or finding out if it's a difficult legal question, going through the mental process of deciding what law should apply and what the law means, and many times you have to go into the history of the law in order to get the rationale behind it. Some people wouldn't care for that type of exercise, other people do, and I don't think I can define it other than to say it's a matter of personal preference. And, maybe, your own background of what your practice has been, whether you've had experience on appellate matters. Some lawyers never go into court at all. It's all office practice. But others like the give and take of the adversarial process.

DS: And weren't you, as you said before, one of the youngest Supreme Court judges?

Supreme Court Appointment

RK: At the time, it was said that I was the youngest. I don't know; I never tried to find out for sure, but at least I was one of the youngest who had ever served. Later on I think there may have been others. I think maybe when Ted Goodwin went on he was quite young, and I think Ken O'Connell was quite young when he went on.[10] I don't know what their age was at the time. At least, I was fairly young.

DS: You had been in practice for about fifteen years at that point.

RK: I started in 1940.

DS: So what kind of orientation did you get to the actual work of being on the Supreme Court?

RK: I was going to say there wasn't much, but there was actually because that summer—it was the summer of '57—Bill McAllister, who was also a justice, and I were sent back to New York University Law School on an appellate judge's seminar, which I think took a couple of weeks. We had sort of an educational session with judges from all over the country. I think a total of maybe a couple of dozen judges from around the country. We met at New York University Law School and discussed the process of deciding cases and the techniques of writing opinions and the administration of court systems, and at the time it was a new program. I don't know how long it had been going but it was still

quite new. There was a professor from a law school in Arkansas, I believe it was, who was chairman of the group that organized the seminar and they had a pretty good curriculum of things that would be useful for a beginning judge to know.

Aside from that, we didn't have any formal indoctrination. Anybody who became an appellate judge, presumably, had already had enough practice as an appellate lawyer so he knew pretty well what was expected and just had to step in and start working. The practice was, and I guess it still probably is at the present time, the cases that are argued—usually about one week a month is set aside for oral arguments before the Supreme Court. Immediately following the argument, judges meet in a closed session with nobody else around and discuss what the arguments were that they just heard and make tentative decisions and then the chief justice will assign the writing of an opinion to one of them, some judge. He has pretty much discretion as to whom to assign the decision, and then a judge works on the preparation of an opinion. When he has it ready, the opinions that are ready in any given week come for a conference, which in those days were held on Tuesdays. I don't know if it still is or not, but every Tuesday the court would have a session at which they would consider and vote on the opinion that had been written by the judge to whom the case was assigned. If everybody agreed on it then it would be handed down publicly on the following day, which was Wednesday. If there was disagreement, and somebody felt strongly enough to want to write a dissenting opinion, then the matter would just be put over until the dissenting opinion was ready and then be brought up at a subsequent conference. The judges would vote on what would become the majority opinion and anyone who wanted to change their mind and switch to the minority position could do so. So when the opinion is handed down it would have the majority opinion and a minority opinion, if there was one.

Also, some cases would be assigned to departments. There might be seven judges, there might be three judges, sitting in a panel to hear the case and decide it, or, in some cases, would be held *en banc* where the entire seven judges would hear the case and participate in writing the decision. Even if they were not on the panel that heard the case argued, they could participate in the discussion and vote on the final opinion as it came out. I think those practices are fairly common among all appellate courts, as far as I know.

DS: What would determine whether a case was heard *en banc* or by a panel?

RK: Largely on how important the case was and how difficult it might turn out to be. The chief justice would usually make that decision, decide that this could go to that panel or another panel or it should be heard *en banc*. In some courts, if a case is decided by a panel and one of the parties asks for a rehearing, and a rehearing is granted, then it might be reargued before the entire court and then there might be an *en banc* opinion that would supersede the panel's opinion. Those are all determined by the particular court that happens to be sitting.

DS: You mentioned techniques of opinion writing. What's different about opinion writing? Or what did you need to learn about that?

RK: Well, I guess every judge has his or her own characteristics. Justice Rossman,[11] when he was on the Supreme Court, was known for very lengthy opinions, discussing the facts in great detail even if it was not a factual matter that was the ultimate question to be decided. But his opinions were well known for their length. Other judges prefer to be more succinct and write shorter opinions. There are different approaches to the structure of an opinion. Usually it will start with a summary of the facts and then a discussion of the applicable law and then a final conclusion and how you arrived at the conclusion, but they don't all follow that same pattern.

One of the things when I was there, I started using footnotes on opinions when it had not been the practice of the court to use footnotes but rather to incorporate the material that might be in a footnote into the text of the opinion itself. I remember there was a little consternation. The state printer—the opinions are all printed by the state printer in Salem—didn't have a type font set up to handle footnotes, so when I came out with some footnotes they had a little trouble deciding how to handle them. Eventually, that worked around and it was kind of a joke there, I guess, and the use of footnotes became much more common after the printer got a type font that would handle them. I remember, when I resigned, the court had a little dinner in my honor and they made quite a joke about [how] I was the one who started using footnotes in court opinions. I'm not sure how technically accurate that was but at least they made a joke out of it.

DS: What is your general writing process like? I'm curious about that because you've done a lot of writing. I've seen a lot of things that you've written.

RK: [*laughs*] I don't know if I can characterize my own efforts. When you're deciding a case, usually, you've got the briefs of the parties to read and study and the arguments that are made in open court to think about. Then, I guess, the steps to follow are, after you've read the briefs and heard the arguments you think about how right or wrong they might be, or how persuasive they are, and you come to sort of a mental conclusion as to how you think the case is going to go and you sit down and start to write. And, as I say, the usual opinions start with a discussion of the facts or an outline of what the issues are to be decided. I noticed in the opinions of the Supreme Court of the United States they usually start out with the issue presented is thus and so. Sometimes that's also the case of the state court opinions but not always. Usually you start out an opinion by outlining how it got to the court in the first place. What the lower court decided and why that question is before the court. Like if the lower court granted a summary judgment, or there was a verdict based on the verdict of a jury, or a case in what we used to call an equity case, whether the facts are within equitable jurisdiction. And then you would outline the facts and then

outline the law that you think applies to it or the statutes that may be involved, and then a discussion of the various arguments that have been made on either side of the question and then your own conclusion. I think the general pattern of appellate court opinions is fairly well standardized, although there are a lot of individual characteristics to it.

DS: For you it's a matter of compiling the information and just viewing it, not—some people get up really early in the morning, or they have a long thought process and—

RK: Well, I'm sure that everybody that has to write an opinion has a long thought process about it, because you have to analyze the various arguments and decide which arguments you think are good and which ones are not good. And sometimes there's occasion to overrule a previous decision of the court and that takes quite a bit of thought, because that's a pretty important step if the court is going to change its mind on something. You have to be prepared to explain why and justify it to people who might disagree.

DS: One of the things I looked at was the *Report on the Legislative Interim Committee on Judicial Administration*—and weren't opinions being written on every single case at that time?

RK: I think more so than is presently true. Nowadays they decide some cases without writing a full opinion. That's especially true since we have a court of appeals now, an intermediate court, which we didn't have in those days. In fact, that was one of the subjects of the interim committee report. The intermediate court of appeals frequently decides cases now without written opinion and that's sometimes controversial because the parties always like to know why the court decided a certain way, and if a case is decided without an opinion, why? Somebody's going to be irritated by not knowing what the reason for it was. Nowadays the court of appeals decides many cases without a formal opinion because the volume of appellate cases is so great that they just couldn't physically turn them out for everything. So in the weekly publications that come out from the court of appeals and the Supreme Court, usually, there's a long list of cases that are decided without opinion. And then, as it's presently set up, the Supreme Court now has a lot of discretion as to which cases it will accept on review from the court of appeals. And sometimes the list of cases that the Supreme Court decides not to re-hear is fairly substantial. But if they decide to hear the case—and then it's briefed and argued before the Supreme Court—there will always be a written opinion about it.

DS: Sometimes they have direct review without the case having gone through the—

RK: There are some cases that are appealed directly without going through the court of appeals. And there are some cases that have an automatic review. I think murder cases, for example, on the criminal side, are automatically reviewed by the Supreme Court because they are important enough to deserve that treatment. But

there are a lot of cases where the Supreme Court review is discretionary and they can decide for themselves how big a docket of cases they'll have. That was one of the problems that was discussed in the interim committee report, was the volume of cases and what could be done to speed up the process. And at that time, as I recall, we did not recommend an intermediate court because we thought that the problem could be handled by having a couple more judges on the Supreme Court. Instead of having seven, to have nine, and use the departments more, but the legislature didn't go for that. They kept the seven-member court. Later on, about ten years later, there was enough of a backlog that they finally did go to an intermediate court of appeals, which we had not recommended when the interim committee report came out. But I think it was about ten years later the legislature did present the intermediate court.

During the interim committee proceedings the committee was divided up into various subcommittees. I was on the subcommittee for the appellate courts and we considered problems that pertained only to the appellate courts and there were other subcommittees dealing with the criminal law and juvenile law and other subjects. When the final report was prepared, it was a report of the full committee, but it was actually prepared by a series of subcommittees.

DS: As you know, I looked at it pretty closely and have some questions about it. One was, it said that there were allegations of corruption and malfeasance. Do you recall that? Do you know what they were talking about? It doesn't explain that.

RK: I don't recall now just what that was. At least it didn't come before the subcommittee that I was working on. I'm not aware of any serious allegation of corruption at the appellate level. There might have been some disgruntled litigant who accused a judge of being corrupt, but I don't know of any cases where that exactly happened.

DS: And it also said that a majority of cases were equity cases that were being tried? What kinds of cases did you try when you were on the Supreme Court?

RK: Well, quite a variety. I think they tried not to have any one judge become too restricted to a particular case. We all had to have a murder case to write and I wrote a case dealing with Indian law, law on an Indian reservation. I had a case involving the taxation of a corporation that involved questions in their accounting. I wrote a case on a family law case involving a prenuptial contract, which was not very common at that time. I had cases involving automobile accidents. One case I remember involved an insurance question that depended on the construction of part of the statutes dealing with insurance policies. So there's quite a variety. I remember a case involving an adoption proceeding, which followed an equitable-type procedure. I haven't gone back to review them all, but I think I can say it had quite a variety of subjects.

DS: Are there any opinions that you wrote that have had long-lasting effects?

[End of Tape Five, Side Two]

Kester's Legacy

DS: Here we go. The tape is in and we were talking about whether there are cases of lasting impact.

RK: Well, one case that I remember was an insurance case. The majority opinion was written by Judge Rossman, I believe. I wrote a concurring opinion, which came to the same result but for a different reason. I thought that in Judge Rossman's opinion they had misapplied an Oregon statute dealing with insurance policies—so I disagreed with him on his reasoning, although I came to the same result. But then, later on, the legislature amended the statute to adopt the reasoning that I had presented and so I felt somewhat vindicated that the legislature, at least, felt that's the way the law ought to be.

The case I wrote on an Indian matter, I think, had some lasting effect. It involved whether a crime committed on an Indian reservation had to be handled by the tribal courts or by the state courts and involved construction of the Indian treaty and the federal statutes which apportioned off the jurisdiction. Later on, the federal statute, which dealt with the tribal organization, dealt with that problem. So, the question no longer was important as it affected that particular tribe.

There was a case involving a family law question, a prenuptial contract, which was not very common in Oregon at the time. And I wrote an opinion, which has been referred to a number of times since then, since that problem has become more frequent. I don't know that I can claim any world-shaking effects—there were some cases that I handled as a lawyer before going on the Supreme Court that had some major effects.

One case, for example, involved the validity of appointing temporary judges during the time when the docket of the Supreme Court was quite backlogged and slow. The court attempted to solve the problem by appointing circuit judges to sit temporarily on the Supreme Court to give them additional manpower, but there was a serious question as to whether that was valid under the state constitution, so a case was brought attacking the validity of the temporary appointments. Roy Shields and I represented the side that said it was not valid under the then-constitutional provision. And the court held I was correct, but then the succeeding legislature proposed a constitutional amendment, which was adopted by the people, and so they can now have *pro-tem* judges sitting on the Supreme Court when they need it to help relieve the docket.

DS: Wasn't that, also, one of the recommendations in the committee report?

RK: Yes, it was. There was another one, a case involving the Public Employees Retirement System [PERS], which was

important for a while. But the legislature set up the Investment Council to invest a portion of the Public Employees Retirement System funds and a portion of the State Accident Commission [SAIF] funds, in the stock market. And there's a provision in the state constitution that says the state could not invest in corporate stock, which is what it amounts to. Of course, it's a little different now. So ex-governor [Charles] Sprague, who was the editor of the Salem *Statesman* [*Journal*] newspaper, always kept a watchful eye on state finances, and he wanted a case brought to challenge the validity of investing the retirement funds in the stock market. We brought that case, and the Supreme Court held that the constitutional provision did not apply because these were not state funds they were trust funds that were earmarked for a particular purpose, and, therefore, were not subject to the constitutional provision, which prevented states funds from being invested in corporate stocks. So that decision was fairly important, although we were on the losing side of it.

Another case that I recall involved the free textbooks in parochial schools. Oregon had a chapter in its history where there was a lot of anti-Catholic feeling here; Ku Klux Klan activity, and so on, back in the earlier days. Some of that carried over and when the legislature passed a state statute providing for free textbooks for schools—for all schools—public and parochial, and all kinds of schools. Some people challenged that on the grounds that if they gave free textbooks to the parochial schools that it would be an affront to the doctrine of separation of church and state, which is still being kicked around a lot.

But, anyway, our firm was brought in to defend the statute, which was taking the side of the Catholic schools at the time. We relied, largely, on federal cases, which dealt with the provision in the federal Constitution about separation of church and state. But the State Supreme Court held that the Oregon constitutional provision was stricter than that of the federal constitution, so that even though this free textbook law would have been valid under the federal Constitution, it was not valid under the state constitution as applied to religious schools. So that was one of the early cases in which the court has differed the state constitution from the federal on a similar provision. So that case—although I was not in the court that decided it—we were on the side that lost the case in the Supreme Court. It has had a lot of effect since then, because the standard practice now is for the court to look at the state constitution provision before it looks to the federal. And if it can be decided on the state level they won't even refer to the federal Constitution, even though it might deal with the same kind of a problem.

DS: How does that work in terms of federal legislation like, say the Clean Water Act, or the Clean Air Act? I mean do states' rights come first?

RK: Well, if it's a question that can be decided on a state level, then they'll do it without resorting to the federal level. But if it's a question of the application of the federal statute then it would have to be decided as a federal question. But the standard practice

in constitutional questions is to avoid them when you can. And if you can avoid going into a federal Constitutional question by deciding the case on a state level, they'll do so, which is a very common practice nowadays. Even though many of the state constitutional provisions are very similar to federal provisions, if there's any difference between them, they'll use the state rather than the federal.

State versus Federal Jurisdiction

DS: I'm curious about how that works for example in terms of, I'm thinking of the exclusion of Blacks up until 1926 in the state constitution, if that would take precedence over—of course that did not overlap with the Civil Rights Act—so I'm curious how those kinds of things might work.

RK: Well, a lot of it would depend on how the case is brought in the first instance in the trial court. If they claim that a state action violates the federal Constitution then you can't very well avoid the question, but if they claim that it violates both the state constitution and the federal Constitution, and the court can decide that it violates the state constitution, then they don't have to decide the federal one.

DS: So in the textbook case they were able to decide that it did not violate the state—or that it did violate the state constitution, although it did violate the federal Constitution?

RK: Well, it did *not* violate the federal Constitution but it did violate the state constitution.

DS: Okay, I've got it backwards.

RK: Yes.

DS: Is there anything more you wanted to say about that, or I can ask another question?

RK: Sure, go ahead.

DS: Okay. That was interesting to hear what you had to say about that. One of the things that the committee report talked about was making district courts the court of record.

District & County Courts

RK: The legislature did that. Formerly, the district court was kind of like a Justice of the Peace Court. It was very informal and its decisions were not considered as significant, I guess would be the word, as the circuit court decisions. But the committee felt that was outmoded and that, therefore, the district courts were made actually on a par with the circuit courts, except for the amount involved. But the decisions of the district courts are now considered to be decisions of a court record.

A similar question was in respect to the county courts. The county courts—as opposed to the circuit courts—were largely concerned with the administration of county business, roads and such as that, on

a county level. But some judicial functions, such as probate matters, originally were in the county courts. But many of the county commissioners, as they were called, were not legally trained and so the actions of the county courts in probate matters could be reviewed by appeal to the circuit court. Well, that was kind of outmoded and the interim committee recommended that the probate jurisdiction be given to the circuit courts [and] taken away from the county courts. And I think, mostly, that was done. There might be a few courts still left where the county court has probate jurisdiction but I think practically all of it's in the circuit courts.

DS: And do county commissioners still act as county court—

RK: Well, they still administer county business, principally roads, I think, county roads. And, well, I can't think of any very good illustrations. I don't suppose the counties have property anymore, but there might have been times when the county held property in its own name. But counties are merely an arm of the state and don't have all the same legislative power that the state legislature does. I'm a little fuzzy right now on what the county courts do besides road building and maintenance, but that's a least one thing that they do.

DS: I'm curious about the district court status, how that compared to the status of the state courts. I mean it sounds—the district court judges made less money.

RK: Yes.

DS: And apparently the district courts were administered on the county level and this report changed that. Or, actually, the legislation following the report changed that. So what did that mean for the district court status?

RK: Well, the main difference is that the district courts have a limited jurisdiction. I've forgotten now. I think it's cases up to $5,000.00. It used to be that the district courts only handled cases up to amounts involving $1,000.00. But I guess that's the result of inflation.

DS: Isn't it $75,000 now?

RK: I think it's five, but I'm not really sure because I haven't had occasion recently to check [that] out. But the main difference is in the size of the cases to be heard. And, of course, nowadays they have mandatory arbitration in certain cases up to a certain amount. But the district courts, otherwise, are pretty much an equivalent of the circuit courts, except that their decisions can be appealed to the circuit court. But I'm getting into an area now that I'm not up to date on. I haven't had occasion to follow closely what those changes are.

DS: And in terms of creating the intermediate courts, that happened about ten years later, you said?

RK: Yes.

DS: The recommendation at the time was that the state wasn't ready.

RK: We didn't think it was necessary at the time. We thought that the problem of congested dockets could be handled by increasing the size of the Supreme Court without setting up a whole new intermediate court. But even with the use of *pro-tem* judges, which is what I mentioned earlier, they still fell behind, and by the time ten years had gone by it was a serious enough problem that they set up the intermediate system.

DS: And that would be creating the tax court and court of appeals?

Changing Role of Court of Appeals

RK: Well, the tax court was separate but the court of appeals was an entirely new level of courts. From the trial court you go to the court of appeals and then from the court of appeals you can apply for hearing in the Supreme Court. But the Supreme Court mostly had discretion whether to take it or not. Many times they did not take it, so the decision of the court of appeals became the final one as far as the state system was concerned.

DS: And you had recommended, or the committee recommended, that there be nine judges rather than seven but that didn't happen?

RK: That did not happen. That's right.

DS: And then, eventually, the court of appeals was created because the backlog continued.

RK: Well, it's been up and down. Even now it's quite a while before you can get a—in some cases being handed down now it may have been argued almost a year ago. But that fluctuates.

DS: Well, it was interesting, because it also talked about appeals declining, in terms of the number per 10,000 people because of administrative agencies and safety regulations, which you had brought up before as being significant.

RK: Yes, and it fluctuates because every time the legislature gets into it they create some new problem. For example, when they went to the—and this was a voter approved initiative, what they called Measure 11 several years ago—some offenses were given much more serious penalties. That's increased the load of appellate work as well as in the trial courts. So a lot of things affect the volume of litigation, even just the way the economy is at the moment. But certain types of litigation seems to go in cycles or waves depending on—well right now there's going to be a lot of litigation over this property rights, Measure 37, which they're still trying to figure out what to do about the voter-approved initiative on compensation for regulatory takings, they're called. I noticed that just within the last few days they've come up with some proposed legislation on how to handle those cases. But there's bound to be more litigation over compensation.

DS: What are your thoughts on how that should be handled? People who

are talking about it knew that this was going to create a big mess, even before it happened.

RK: Oh, yes. But I've not taken any public position on it. I think it's unfortunate that if the result of it all is to diminish our land-use program. I think Oregon's land-use legislation—starting in '73, when I happened to be president of the Chamber of Commerce and testified before the legislature on what they called Senate Bill 100—led to the establishment of the Land Conservation Development Commission and the statewide plans with standards for the kind of use that could be permitted for use of land. That was quite a bold step for Oregon to take, and a lot of states since then, I think, have sort of patterned their activity after what Oregon did.

I think the impetus for Measure 37 was—I don't know quite how to express this—but it was promoted by a group that were unhappy with the land use program in the first place. I'm afraid that unless the present legislature can show a lot more statesmanship than they have up to this point they won't be able to head off the disaster of wiping out our land use program. So I think it is potentially very serious and I'm kind of holding my breath to see what the legislature does with it. Maybe they'll come up with a method of administering it so that it will preserve at least the outlines of our land use program.

[End of Tape Six, Side One]

Initiative and Referendum

DS: Well, it certainly is one of the dangers of having an initiative process.

RK: That's a whole other subject. I was on a City Club committee a few years ago, when it studied the initiative process and we recommended some changes in the initiative process but the legislature didn't go for it. I think the initiative has been somewhat abused here lately by various interest groups that feel strongly enough about their position that they've been able to get stuff, for example, put into the state constitution that probably shouldn't be in the constitution, but should be, if at all, in legislation rather than constitutional provision. It's going to be pretty tough to diminish the power of the initiative process, even though it has a lot of troubles associated with it.

DS: Well, that's a difficult question because it's a balance of civil liberties and having a voice in shaping the process.

RK: Well, it's a whole subject of quite a philosophical discussion over representative government, whether the people should have such a direct influence by bypassing the legislature, which is supposed to be representative of the people and supposed to do things for the welfare of the state, but is frequently influenced by particular groups. If the legislative process can be bypassed by an initiative procedure that doesn't have

the consideration that legislation has, it's potentially pretty dangerous. A bill in the legislature gets discussed and has hearings and testimony and a chance to revise it and point out problems with it and get it amended, none of which can happen when you have initiative process. So, while the initiative is a good safety valve it shouldn't be overworked, as I think we're probably doing nowadays.

DS: What were the City Club recommendations to deal with that issue that didn't get adopted?

RK: Well, let's see.

DS: By the way, the camera is off now too. It goes for one hour.

RK: This was the City Club report. [*paper shuffling*]

DS: Oh. I'll write that down.

RK: This is probably a little off the subject here.

DS: Well, it's an oral history about your life and what you were involved in, so it's okay to be a little bit off the subject if it's significant to the history of Oregon.

RK: I think it could well be. The report is several years old now. I don't remember just what the date was.

DS: Well, I'll just write that down.

RK: You can probably get a copy of that from the City Club, if you want to.

DS: It's in the *City Club Bulletin*, dated March 1, 1996. Okay. Well, I suppose we should get back on track then, but that was very interesting.

RK: Well, it was quite a process. We did a lot of work on it. I wrote, I think, an appendix there outlining the history of the initiative process in Oregon since it was adopted back in the early part of the twentieth century. Basically, our recommendation was that the use of an initiative should be reserved for questions that really affected the basic structure of government and not things that could be handled better by legislation where they could have a process for considering what the initiative doesn't present. For example, an initiative can require expenditures of money that the public has no way of evaluating, and put a problem in the hands of the legislature to come up with money to pay for something that is the result of an initiative process without any consideration to the other demands on public funds, which the legislature has to consider. I think one of our recommendations was that an initiative should not be used for—

DS: Nothing that will require an appropriation of public funds beyond a certain amount.

RK: I think, also, one of our recommendations was that when an initiative

measure is proposed that it should be submitted to the legislature first, before it's then submitted to the public, so that the legislature has a chance to improve the language of it if it's faulty, as many of them have been. I don't remember all of our recommendations, but if you get a copy of that—

DS: That is an interesting question and discussion, I think.

RK: At the time it came out it had some notoriety around the country. I think the City Club had to furnish copies all over the county to people who wanted to get copies of it. So you might find it interesting, if you can get to it.

DS: In relation to what we were talking about before, one of the things that the report said was that they talked about long opinions. It was interesting; it said, "Let's state it bluntly. The court appears to be retrying cases."

RK: Well, in some cases they had to. This goes back to the history of our legal system, whether with both the legal side and equitable side, a different branch of the law entirely. Traditionally, cases that were on the equity side, the Supreme Court reviewed them *de novo*. That is, they started fresh and had to consider the entire factual record and make a decision on the facts as well as on the law. Whereas, in a case on the law side, theoretically, the court took the facts as decided by the trial court and then just applied the law to it. So equity cases were frequently voluminous because of the need to re-examine all the facts. Well, subsequently, I don't remember the date of it, but they adopted a provision, which, in effect, merged the two branches of the law. Law and equity are now no longer separate branches. They still are governed by a lot of equitable principles, but they don't have to retry all the facts the way they used to do.

DS: So when there were equity cases going to the Supreme Court they had to be retried?

RK: Yes.

DS: Okay, because it did say that half the cases in the past ten years were equity. So they were spending a lot of time hearing the facts.

RK: That's correct; and there were other changes made. They used to have a Bill of exceptions in the trial court, which was an excerpt from the proceedings in the trial court that the appellant wanted to bring up. But you didn't have to bring the entire transcript of all the proceedings, just those parts of it that he wanted to argue on appeal. Well, the upshot of that was that they usually sent up the entire transcript, but just designated portions of it. As a result of our interim committee report, they did away with the Bill of exceptions so that the trial court transcript is automatically a part of the record on appeal. It doesn't have to be duplicated or excerpted for a Bill of exceptions. I don't know if that had any effect on the volume of litigation, but it's changed the basis for appeals anyway.

DS: That makes sense. Those are some of the things I was going to ask you about. They said that, "The committees decided that Oregon will be well-advised to adopt the *certiorari* system rather than an intermediate appellate court." What is a *certiorari* system?

RK: Well, a *certiorari* is a means by which an appellate court can agree to review the decision of a lower court. In the Supreme Court of the United States, for example, most of the cases that they hear, nowadays, are on a *writ of certiorari*, which means that you petition the court and ask them to hear the case. If the court decides it will hear it then they issue what's called a *writ of certiorari*, which is an ancient English term, I suppose, Latin or law Latin or law French. But it requires that the lower court send up to the Supreme Court its proceedings to be reviewed, which is quite similar to what we now have as petition for review with our court of appeals, intermediate court of appeals. If you're dissatisfied with the decision you petition the Supreme Court to review it and the Supreme Court has the discretion then to decide whether it will, or will not, review it. Which is very similar to a *certiorari* proceeding in the U.S. Supreme Court. That's part of an effort to streamline the proceedings.

DS: You said when you left the Supreme Court, part of the reason that you did that was you weren't making enough money there. [*laughing*]

RK: That's right.

DS: Well, you wanted to make more money and you had this opportunity as well, right?

RK: At that time I think they only paid $13,500.00 a year when I first was appointed. I think they raised it to $16,000 maybe in the next year or so. Now it's up around eighty-something. I don't what it is now. But I had kids to put through college and so on. While I would have been very happy to stay there indefinitely, if I could have afforded it, I just couldn't afford to turn down an offer that was one I couldn't refuse. [*chuckles*]

So I resigned, which surprised a lot of people because people don't ordinarily resign from the Supreme Court. You think that's a pedestal that you try to get to and once you get there you've got it made, but since then there have been others that have resigned. I think Jake Tanzer resigned and Betty Roberts, I think, resigned but you've got to live so—

DS: Did that influence how people treated you in the legal community, your having been a judge?

RK: Oh, for a while it did. Now they've all forgotten it [*laughs*], or, maybe more accurately, the ones who would have known it are no longer around. Occasionally somebody remembers that I was a judge at one time.

DS: Because, typically in my experience, there's quite a bit of deference to judges. They're on a par with, I guess, doctors, God [*laughing*], I mean that's kind of—

RK: Oh, there's a distinction to it all right, but it wears off. I don't feel like I'm being treated any differently nowadays than I would be had I not been [a judge]. Did you see that *Portland Monthly* magazine? Well, they had an issue here, I think it was in March of this year, where they interviewed several present-day lawyers and I was one of them. They published quite a section in their magazine describing those interviews, and then a lot of people who have seen that remembered that I was once a judge, but they probably wouldn't have remembered it otherwise.

DS: Is there anything else you want to say about your time on the Supreme Court before we change topics?

RK: Oh, I don't think of anything.

DS: Okay.

RK: We've been kind of rambling.

DS: Right, well kind of going off the track and then coming back. The other thing I wanted to talk to you about that was on our list was the organization of the District Court Historical Society.

RK: Well, I guess it all started with sort of a picnic out at Judge Burns' place on the Willamette River down by Wilsonville. I don't remember now just what the occasion was for calling the meeting but, anyway, Jim Burns invited a bunch of people down to his place and he had there a judge from San Francisco. I think his name was Judge Peckham, who was a federal judge from San Francisco and he made a little talk about forming a historical society for the federal court at San Francisco. There was something else that went on about the same time, and I don't know quite how it started. I remember Judge Solomon once asked me to give him a list of cases that I thought were of some significance in the federal court in Oregon and I wrote a letter to him with a bunch of cases including the Montgomery Ward case and Judge Deady's will case—or Lucy, his widow's will—and some others. About the same time, Judge Burns had this picnic down at his home and we listened to Judge Peckham talk about the society they'd started in San Francisco. Then somebody proposed—why don't we start one here? That seemed to be a popular idea at the time, so we did.

It was formed and I guess I was the first president of it. I believe the secretary was Susan Graber ,who later became a judge and now is on the Ninth Circuit.[12] Caroline Stoel, I think, probably was the first editor of a newsletter of some kind. We started having meetings and it has sort of grown, developed its own program. Nowadays they're having these famous cases' talks every so often. There's one coming up in a couple of weeks. Unfortunately I won't be able to go to it because we have another function at the same time.

DS: I can't go to it either. I'm disappointed too.

RK: I guess it all appears, probably, in the newsletters pretty much.

DS: How did you end up being the first president?

RK: I don't know. [*laughs*] Somebody nominated me. Probably Judge Solomon, because he'd asked me for some of these cases that he thought were worth preserving something about and maybe it was for that reason that I got involved, but I don't really remember just how it all happened.

DS: Well, you seem to be pretty interested in history. When did your interest in history start? Because you worked on the book *The First Duty*, you did a lot of historical kinds of articles.

RK: Yes, I have been working on the history of our firm, which I haven't finished yet. I don't know if it's when I wrote an article for the Oregon Historical Society on when I was a kid I had a job as a printer's devil, which I found very interesting. I wrote an article, which they published in the [*Oregon Historical] Quarterly*. I can't say, other than I am kind of interested in history. And my work in the railroad, for awhile I accumulated a bunch of stuff on railroad history, which I've never done much with.

DS: So you're writing the history of the firm now?

RK: Yes.

DS: One of the one things I was wondering about was when women actually started coming into this firm, your firm?

RK: Well, [*pauses*].

DS: You forgot the answer to that there.

RK: I don't know what to tell you.

DS: Well, I'm curious because I've been working on the Arlington Club history project.

RK: Yes.

DS: And, of course, women weren't allowed in the Arlington Club until 1991. I don't know if you are, or you were, a member.

RK: I am still.

DS: You are still a member. I didn't know if you were active or—

RK: I'm not very active, but I still belong. I have an appendix to the firm history, which lists all the people, let's see. [*long pause*] I guess the first woman we had was in 1983. Leah Shearin, but she only stayed here for a year or so and then she left.

DS: How do you spell her name?

RK: Leah, L-E-A-H, Shearin, S-H-E-A-R-I-N. We had one in '86 and another one in '87, two in '87, one in '89, three in '93, one in '95, one in '96, three in '98, two in 2000, one in 2001. I don't know whether you want all this.

DS: Yes, I think it's interesting. And when you get the transcript you'll have it all listed too.

RK: Another one in 2002. I think I haven't gone beyond that because that's about where the history stops, as far as my efforts are concerned so far.

DS: The reason I wondered about that is because I was thinking about what happened with the Arlington Club. People stopped holding meetings there, and such, because there were more and more women attorneys. That was one of the things that happened there and that became a problem for them.

RK: Well, as you probably know, there were women attorneys much earlier than that. My mother was admitted to the bar. She never practiced but she was admitted back in the '20s. There was a famous woman attorney early in the century. She's probably listed in the state bar book, if you've seen that. I've forgotten her name.

DS: I can't remember it either.

RK: There have been women attorneys certainly ever since—it was quite common by the time I was admitted in 1940, there were a number of women lawyers.

DS: There were many firms that didn't have women attorneys attached to them, as far as I know.

RK: Yes. I think Caroline Stoel said that when she—have you see their history? The history of the Stoel Rives firm?

DS: Stoel Rives? I haven't looked at it closely. I should.

RK: Well, here, I haven't finished it myself; I just got part way. [*shows document to DS*]

DS: Oh no, I haven't seen that. Oh my goodness. When did this come out?

RK: Just recently.

DS: All I got was; you know they sent some of the short firm histories to the Oregon Historical Society when I was there. They're just ten-page documents for the most part. And we have one of those with your oral history there.

RK: Yes, well, Tom Stoel and George Fraser have been working on this for quite a long time, and we've sort of compared notes from time to time, so when they got it finally published they sent me a copy. It's very well written and very good. I haven't finished reading it yet.

DS: Yes this looks interesting. I'll have to get a copy of this and I'm sure it will be helpful in the work that I'm doing.

RK: I suspect they'll put a copy with the historical society, although I don't know for sure.

DS: I would imagine. So are you planning to do something this ambitious?

RK: I don't know. I haven't finished it yet. When I get it in final shape, then we'll have to decide what to do with it. We'll probably have to pay to have it printed because I don't suppose everybody would

be interested in buying enough of them to pay for the printing of it. We'll just have to decide that when we get something to work on.

DS: Well, one of the goals of the District Court Historical Society, from what I understand, was to really encourage the firm histories to be written.

RK: Yes, that's right.

DS: You've been engaged in that process haven't you?

RK: I was. I haven't been active in that society for quite awhile. I guess I'm still on the board but I haven't been to any of the board meetings for a long time.

DS: Well, I'm sure you have other things to do today so is there anything that you want to add?

RK: Well, no I guess we've pretty well covered it.

DS: Okay.

RK: What with what you've got, and Tom Stoel took the earlier parts of it.

DS: Yes, one of the portions that was missing, as you know, is all of the audio for the Supreme Court, and so you had written a two or three page section, but it wasn't as reflective, I think, as what you talked about today.

RK: Well, I think the process of discussion tends to bring up things that you don't think of when you're trying to write it separately.

DS: I think you've done a great job.

RK: We've probably pretty well covered everything.

DS: Okay, well, thank you very much for all of your time. I really appreciate it.

RK: Oh, I enjoyed talking.

DS: I've really enjoyed it, too, and if there's anything else that you think you'd like to have recorded, you just let me know and I'll come and bring my tape recorder.

RK: If we ever get this firm history done, why I think maybe I'll have something more to talk about.

DS: I'll go ahead and turn this off.

[End of interview]

Endnotes

1. After a struggle to gain the vote that began in 1846, Wisconsin became the first state to ratify the Nineteenth Amendment, granting national suffrage to women on June 10, 1919. Wisconsin women did not gain the right to vote in state elections until the state constitution was finally amended in 1934. Through a grassroots campaign movement, women in Oregon won the right to vote in 1912. The Nineteenth Amendment passed in Oregon in 1920.

2. Carl M. Marcy, Chief of Staff, Foreign Relations Committee, 1955-1973, was married to Randall Kester's sister, Mildred. Marcy's oral history is available from the Senate Oral History Office; www.senate.gov/arthistory/history/oral_history/CarlMarcy.htm.

3. Walter L. Tooze served on the Oregon Supreme Court from 1950 until his death on December 21, 1956. He had been appointed on November 16, 1950 to succeed John O. Bailey, and was elected in 1956.

4. *Dickman v. School Dist. No. 62C*, 919 P.2d 334 (Or. 1961). The Oregon Supreme Court later adopted the federal *Lemon* test as the proper mechanism by which to analyze programs under its state constitution, undercutting the relevance of *Dickman*. *Eugene Sand & Gravel v. City of Eugene*, 558 P.2d 338, 342 (Or. 1976).

5. *Minori Yasui v. United States.* Decided 21 June 1943. Issues discussed: racial discrimination and due process. Legal question presented: Is appellant's citizenship relevant in his conviction for violating a curfew order applicable to all persons of Japanese ancestry residing in military areas, pursuant to the Act of Congress of March 21, 1942 [Executive Order 9066]? Yasui challenged the constitutionality of curfew laws against Japanese Americans. According to the American Civil Liberties Union (ACLU) "The district court ruled that the Act of March 21, 1942, was unconstitutional as applied to American citizens, but held that appellant, by reason of his course of conduct, must be deemed to have renounced his American citizenship." The U.S. Supreme Court sustained the conviction, but held that the curfew order could apply to citizens and that citizenship was not relevant to the conviction. The Supreme Court vacated the judgment and remanded the case to the district court for Yasui's re-sentencing. The ACLU acted as *amicus curiae* and viewed this test case as a civil rights loss.

In the 1980s, Yasui was party to a successful set of lawsuits that overturned the World War II convictions and helped lay the groundwork for a federal apology and reparations

payments to internment camp survivors. Yasui died in 1986. www.acluprocon.org/SupCtCases/16Yasui.html, and National Asian Pacific Bar Association: www.napaba.org/napaba/showpage.asp?code=NewsArchives

6. Judge Fee originally fined Minori Yasui $5,000 and sent him to jail for one year. His sentence was later reduced to eight months and ten days, after which he was sent to Minidoka Internment Camp. "Min" Yausi received his law degree from the University of Oregon Law School in 1939, and was the first Japanese American graduate of the UO School of Law, and then the only practicing attorney of Japanese ancestry in Oregon. He deliberately turned himself in after the 8:00 P.M. curfew in Portland, in order to test the constitutionality of curfew laws imposed during WWII. Jeffrey R. Blair, "Fighting the Japanese Internment in Court," www.aichi-gakuin.ac.jp/~jeffreyb/research/ACLU.two.TextA.html; www.napaba.org/napaba/showpage.asp?code=NewsArchives

7. *Hirabayashi v. United States* (1943) and *Korematsu v. United States* (1944).

8. Brandon Mayfield, a Muslim American lawyer from Portland, wrongly arrested under a material-witness warrant for his alleged participation in the March 11, 2004 train bombings in Madrid, Spain. Mayfield was released two weeks after his arrest when the Justice Department acknowledged the fingerprint evidence used against him was erroneous. The Justice Department subsequently apologized to Mayfield, but he has filed a lawsuit arguing the US government singled him out as a suspect because of his faith.

9. Harry H. Stein. Gus J. Solomon: Liberal Politics, Jews, and the Federal Courts. Portland: Oregon Historical Society Press, 2006.

10. Kenneth J. O'Connell was appointed to the Oregon Supreme Court on July 1, 1958 and served until the end of his term in 1977. He was re-elected in 1964 and 1970, and served as chief justice from 1970-1976.

11. Judge George Rossman was appointed to the Oregon Supreme Court on September 13, 1927 to succeed George H. Burnett. He was elected in 1928, re-elected 1934, 1940, 1946, 1952, 1958, and his term ended in 1965. He acted as chief justice from 1947-1949.

12. Susan Graber was appointed to the Oregon Supreme Court on May 2, 1990 and January 7, 1991, to succeed Robert E. Jones. Elected in 1992, Graber resigned April 1, 1998.