Tape 6

Wang No. 7646L, Tape No. 6

Continuation of an oral interview of Senior Circuit Judge Luther M. Swygert as interviewed by Ray Solomon, Director of the Court History Project and Collins Fitzpatrick, Circuit Executive on Wednesday, June 19, 1985.

CF: Judge when we were last interviewing you we talked a little about the role of the chief judge in administration and a lot of the innovations that you had brought forth. We didn't cover a number of them and I think this might be a good time to do it.

LS: Do you have any particular one that we ought to talk about first?

CF: There are a lot of interesting ones. You had on occasion brought in law professors to talk to the judges about a particular area of the law. That was sort of a semi-success. People enjoyed it when it was here but they didn't look forward necessarily to the scheduling of the next one if I might say.

LS: I think that is right. I thought it would be some help both to the academic legal world probably in a minor way, important but not extensive and also to the judges to have some of the professors sit down and have an informal discussion with the judges of our court. My theory was that the law professor sees the whole field of his subject in a rather broad way. He not only is acquainted with all aspects of a particular subject that he is teaching while the judges only see it in special instances or individual

cases. We don't see the whole panorama of a subject area of the law. It is like using the hackneyed metaphor, i.e. judges are apt to look at the trees individually and not see the forest. A professor sees the forest as well as the individual trees. It was my idea that both of us would benefit from some of our observations. I think we started off with Gerhard Casper from the University of Chicago who is now dean and Richard Epstein, as I recall it. I have forgotten exactly what we discussed. I think it was something that had to do with the Fourteenth Amendment area. I am not sure about Section 1983. I will give you the details i.e. we would invite the professors in usually on a Friday at noon and we would have lunch here in my chambers or in the cafeteria. In any event, we would have lunch and then we would come to my chambers. We would sit around in an informal way and conduct this discussion for a couple of hours.

RS: They wouldn't prepare a talk?

LS: No. It was not formal. They didn't even have a paper. It was just a given type of discussion. There was no formality. The next session as I recall was that we had two professors from Northwestern, i.e. Harry Reese and Victor Rosenblum. We had one professor from Wisconsin. I don't remember if it was Willard Hurst or was it the man who headed habeas corpus.

CF: Frank Remington?

LS: Remington. I am not sure if he brought anybody with him. I don't know if there were any others or not. We tried. I tried to get someone from Indiana. Unfortunately, I didn't get it started soon enough to catch on. I don't think it was ever continued.

CF: No it was not.

RS: Did the judges seem to get something out of it?

LS: They said they did. I thought they did. I thought it was very profitable.

RS: In general there was not much interchange between the law schools and the court here or at least at that time? Was there anything other than being invited to judge a moot court or something? In general there wasn't much give and take?

LS: It seemed to me that there was a lot of cross-fertilization possibly. Later on, after I left the chief judgeship I tried to continue it in a minor way not with the judges but with the law clerks. I invited Judge Ripple, he was a professor at Notre Dame to come up one day and talk to some of the law clerks. Jeffrey Stone was here one time. Judge Easterbrook talked to the law clerks when he was a professor. I am sure there were others too. I can't remember who they were.

CF: There is one thing that I should point out before we go on. It is interesting that that idea should die because if I remember correctly the judges did enjoy it but they were too busy to take the time to do that. That is maybe

one of the institutional problems of courts in general. Maybe this would be a good time to ask you about that. As the workload has increased, your ability to be a thinker and a reader on a lot of other subjects has obviously had to decrease as you had been more enmeshed in the research for a particular case and the large amount of reading of briefs.

LS: There is no question about it. I, of course, was in a different time of my life and also I was on the district court. I had time in the early days when I was on the district court to read a lot of legal treatises that I had wanted to read and was too busy when I was a lawyer and an Assistant United States Attorney. Although, I am sure I read some at that time too. Particularly in my early days as a district judge I read a lot of treatises. I remember I plowed through Thayer On Evidence. It is an enormous book. Holzworth. Jerome Frank's Modern Mind and the Law. I think I read that in 1937 and that was before I became a judge. I read Pound and all of Cardozo's books. When I got on the court of appeals and particularly the last ten or fifteen years I had hardly read anything. And also little of anything else in a way.

CF: How do you know that you read that book in 1937?

LS: I have made a note of it. I looked at it recently.

RS: Do you keep a diary?

LS: Not a diary but I started in 1946 to keep a journal of sorts and now I keep one much more extensive. I think

that that is a great habit to get into. I have bought a lot of journals. I gave them as gifts to people hoping that they would adopt my habit but I am not sure that they did.

RS: Do you tend to do that at night or at a certain time?

LS: It depends. Then there were long periods of time that I didn't do anything.

CF: I would like to come back again to this idea of whether or not the institution of judges changing just because of the amount of the workload. We have traditionally looked back on the days of the Greeks and maybe before then as the judge being the wise man, a person who is knowledgeable about a lot of things and who is fair and just and has time to reflect and make the correct decision. How much do you think that the press of business is taking us away from that concept?

LS: Considerable. I think judges ought to have a lot of time to reflect and to just think and not think. That is good too. Just let things develop, walk or do anything to get the subconscious and the unconscious into operation and it seems to me that there is pressure that defeats that very process and we are apt to just get into a mechanical kind of routine sort of way of thinking. I deplore it myself. I think judges should have a lot of time. I also think that judges should have a sabbatical every so often. I talked to Chief Justice Burger and he agreed with me. He said that he thought it was a good idea.

CF: How often would you provide a sabbatical to a judge?

LS: I hadn't thought of that but I would think six months. A sabbatical every two or three years, at least, I doubt if we could do it every two years.

RS: A teaching sabbatical?

LS: It depends. Maybe just have no program at all. Just decide that you are going to read books and think.

CF: What about walking the Appalachian trail.

LS: That's right. I read where Wadsworth would take a whole week about every six weeks and go to his home in southern England and not do anything. He wouldn't even read. He would just sit there and look up at the sky.

CF: Along that same vein, you had suggested to the judges a retreat. Do you want to describe what your proposal or ideas where?

LS: I thought it would be a good idea at the beginning of each term year in the fall to take maybe three or four days and go somewhere and just be brotherly and not even have a program just sit around and talk and visit and take walks individually or collectively and just be together. Out of that I hoped that there would be generated ideas and getting better acquainted and having a better appreciation of our brother judges. I think that some of the faculties of some of the law schools do that. I think that it is also now becoming somewhat popular, I don't know how frequent that some law firms are doing that.

RS: It was never acted on?

LS: No, unfortunately. Judge Kiley and I tried to work it out. We had it pretty set but unfortunately there was some opposition.

CF: Although the general idea of an intellectual retreat or just a retreat from the court didn't sell to all the members, in your own way, you have done it to lesser extent by your trips to Gethsemane by inviting different circuit judges to go down there and each time it seems like the number of people who are going is growing. Do you want to tell us a little bit about that?

LS: Yes, of course, I have been going to the Trappist monastery at Gethsemane, Kentucky for many years. I think my initial retreat was in 1957. Then there was a long time when I didn't make retreats there. Then I began again over the last fifteen years I would say I have been going every year and sometimes two times a year. I may have gone three times I am not sure, at least two. The last individually I would go and spend two, three, four and sometimes even five or six days at the retreat. Judge Wood a couple of years ago evidenced a lot of interest and I invited him and then I talked to Judge Cudahy and as a result the three of us made a retreat. That was about two years. Last year Judge Wood couldn't go but Judge Cudahy and I did go together. We spent about three days there. Now, this October we got another retreat lined up for the first week of October in which Judge Cudahy, Judge Wood and Judge Flaum and I will make a retreat. Hopefully all

of us will be there. We already have all the arrangements made.

CF: What have the retreats been like?

LS: The retreats at Gethsemane are very unstructured. Originally they used to have lectures and that sort of thing but they don't any more. It depends on how much you want to enter into the religious aspects. You are not required, of course, and the Trappist as you may know or maybe you don't know have a very rigid routine of Catholic terminology of what is called offices of which the monks gather in a church at least the choir does and chant songs and give prayers as well as readings and there are about six or seven of these offices beginning at three-fifteen in the morning, that's vigils. At six o'clock there are vows and then mass, except for Sunday at six-thirty and then there is breakfast at seven and at noon there is what is called sext and that is about fifteen or twenty minutes of office where the choir chants or sings and there are readings and so on and public prayer and then in the afternoon there is nones which is at two-thirty and then at five-thirty there are vespers. Just before the monks go to bed there is what is called compline at eight-thirty. Supper is at six, right after vespers. You can attend all of these or none. You can do anything you want. I got acquainted with many of the monks and fathers, lay monks and priests and many times we would take long walks in woods around the Gethsemane monastery.

We can do anything we want to i.e. read, sit-down in the shade or whatever.

CF: What are your days like at the monastery?

LS: I usually go to the vigils in the morning, not always. I don't ordinarily because I don't happen to be a Roman Catholic. I don't go to mass everyday. I don't always go to the offices. A lot of times I go to the compline because it is a very beautiful ceremony and sometimes they turn off all the lights during the day and in the spring-time it is very beautiful in the church. It is dark in the church and there is a lot of Gregorian singing and chanting.

RS: Are there usually other non-Trappists there other than your group? Are there other visitors there?

LS: There are usually about twenty-five, i.e. individuals, a lot of priests. I am sure there are a lot of non-Catholics. I know one Episcopalian bishop that comes very frequently and makes a retreat.

CF: How did you get attracted to the Trappist? Although you went to a Catholic university when it was very Catholic at the time, you are not a Catholic. Why did you pick-out the Trappist?

LS: I had a law clerk, a law clerk by the name of Bill Grief who was from Notre Dame in the fifties. He asked me if I had ever read Thomas Merton's <u>Seven Story Mountain</u>. I said no and he said I recommend it. I think it would be very helpful to you. I was somewhat in a depressed state

of mind. He told me about Merton's connection with Gethsemane and finally I wrote to Gethsemane and asked them if I could make a retreat. They said they would be very happy to. I went there for the first time in 1957. There was a young priest there from Notre Dame, Father Francis. He is no longer there. He is a parish priest down in one of the southern states. He was very helpful. We had a lot of visits together. Our connection with Notre Dame was also helpful. I also got acquainted at that time with Brother Patrick Hart who is a Notre Dame graduate of 1946. He was the secretary to Thomas Merton. I had a good initiation. I thought it was very helpful.

CF: I am aware of the depression at a time when you were on the district bench and I know you have had bouts of depression at different times, what do you attribute that to?

LS: I think each person has his own mental make-up and some people are prone to be sort of a manic depressive type. I don't think that it is something to be ashamed about. Unfortunately, I have it. It is a very unpleasant thing to have. I wasn't aware that other people ever had it when I was going through some of my experiences in that kind of situation but as you probably know, Lincoln had some very severe depressive experiences, depression, i.e. which Churchill called black moods and so I am not trying to compare myself with those two illuminaries but it is

not an uncommon situation. Fortunately, they are not fatal ordinarily.

CF: Did the reading of Merton help bring you out of some of the depression moods or the going to Gethsemane?

LS: I am not sure. It helped, of course. Anything helps, of course, with religious experiences I think or spiritual inspirational works but I don't know how much I could say it really contributed. I think time is one of the factors involved. Some people have more severe types of manic depressive states than others. Of course, it doesn't last all of their lifetime either.

CF: You mentioned that you first went to Gethsemane in 1957 and that you didn't go back for quite awhile and so I have two questions, one is why didn't you go back and what got you to start going back on a regular basis?

LS: That is not an easy question. I think I look back on it. In the first place, I got on the court of appeals and I guess I was busy and I don't know why and I am not sure why but I look back on it with a great deal of nostalgia and pleasure. I always thought I wanted to go back. Somewhere along the line, maybe it was because I felt I needed some spiritual restoration. I started to go back again and then I have been very regular about it since then.

CF: Have you ever thought of being a monk?

LS: I don't know--that's two things. In the first place, I have two answers to that, one is I wouldn't mind given if

I had no other connections, i.e. family by going to Gethsemane if they would have me and and just staying there for the rest of my life. I might not last too long there. I am not sure. I might want to get out. As monks do, of course, there is quite a bit of attrition there with the young novitiates. They come there and stay a couple of years and then they leave. It is a very solitary way of life. They don't get to travel. They don't ever get back to their home. They are very firmly situated at the monastery. The other thing is that I think this is gratuitous on my part. I have often said that I think there is some relationship between monastic life, it ought to be, and judges. While judges can't be of course cooped up in a monastery behind cloisters, I think that there ought to be sort of a kind of devotion and a commitment to their job. It seems to me that there should be some relationship between monastic kind of existence and attitude and judging.

RS: That is partly in the aspects of contemplation as well. It is not just the separation from the real world as such and the devotion to the job but it is also the ability to think through and devote your life to trying to resolve questions.

LS: Exactly. Not even think, just let your mind develop without any particular program in mind.

CF: Getting back to the innovations that you talked about. One of the things that changed was that under your chief

judgeship, it went from a system in which oral arguments seemed to be either twenty or thirty minutes to a much greater gradient of the times. Originally as I understand it the times were even greater at one time and all arguments in the court of appeals were forty-five minutes per side. Maybe you might want to tell us a little bit about the development of that?

LS: When I first came on and I suppose it happened I imagine for a long time before that when I used to appear before the court of appeals as an Assistant United States Attorney. That was in the thirties and at that time there were two cases a day to be heard. Each side would get forty-five minutes per case, that is an hour and a half. Sometimes they didn't use it, of course, but that was the standard amount of time involved. I think somewhere along the line, I am not sure if it is when I came in as chief judge or before, in any event, we started to hear more cases. I think we must have started with Judge Hastings.

RS: Would that be two a day and would you sit constantly from October to May?

LS: No. The same pattern. As you know, Collins we went to four, five and finally six cases a day.

CF: When I came here we had three cases a day and I think the timing was set by Mr. Carrick coming in with the briefs and to some extent eyeballing the size of the briefs to come up with a time allocation. It was generally three cases although sometimes there would be a fourth case

which would just be submitted on the briefs. The times were I think almost always twenty or thirty minutes.

LS: I think that is right and you were with me at that time?

CF: I was with Judge Kiley at that time.

LS: In any event, I think we went to five cases.

CF: We went to four with oral argument but that was after you had me start. Then I was with you and you had me look at the briefs and give you an estimated time. I talked to you as to what the estimated time would be.

LS: We would discuss it case by case.

CF: Right.

LS: We would try to work-out. I don't think we started with ten minute cases at the start.

CF: There were some though. In fact, I think we probably had some arguments over that where I thought it was only worth ten minutes and you thought well the attorneys are going to come from a long distance, they ought to have a longer time to argue when they get here.

RS: At that time, all the cases which didn't get either settled or dismissed for some procedural reason were argued?

LS: I am not sure. I don't know. I think most of them were argued. I think when it was a prisoner case, we heard those on briefs as we couldn't get the prisoner here.

RS: There wasn't a staff?

LS: No staff.

CF: When I came, the way that those cases were heard is really that Mr. Carrick, the clerk, would come up to me and give me a record and the docket sheet and it would show that the last thing done was a year ago. He would say that this is getting a little old maybe you ought to take a look at it. I would look at it and then work up a memorandum to go to the court with or appoint counsel if that is what ought to be done. The case would be resolved in that way.

RS: It was a sitting panel on the day of oral argument?

CF: It would be a motions panel that would handle it. It would be a linear type of decision making.

LS: I think Judge Hastings would assign them. When I came on, I think we had the motions panel system rotating, or shortly after I came in and I recall it as chief judge. Whoever the motion judge was, he would get it and then he would look over the memorandum and then the judge would give his view. I don't know whether he would write anything or not. He might make a notation and then he would go to the other judge and then finally to the third judge. I felt, and maybe you did too and maybe other judges felt that this was not the way to handle those kind of cases because there was some danger that judge A would look it over and then it goes to B and he says well judge A must have looked at this pretty carefully I don't know why I should spend so much time with it and finally if it

gets to C and both A and B agree C is apt not to give it very much attention.

CF: Often C would come along and say, "What, should I dissent?"

LS: Yes.

RS: These were mostly prisoner cases?

LS: Yes, originally. After that we got into other cases, i.e. pro se and frivolous sort of things.

RS: In the early or mid-sixties when you first came to the court of appeals any two parties that had resources to have attorneys could get oral argument?

LS: I think so. I recall it pretty much regular. I think we almost always gave them oral argument in those days.

CF: I am not sure of this Ray but I think it really isn't until probably the mid to late sixties that you had the explosion of access to the court of appeals. Prior to that you got a fairly rigid bar of appellate lawyers who practiced up there and many other attorneys were sort of afraid to come up. I have gotten that impression over the years.

LS: I think that is right. Also the increase of business was there. Every year there was a dramatic increase of business. When I came on in 1961 I think the total number of appeals was around three hundred.

CF: By 1971 it was a thousand and today it is around two-thousand-four hundred.

LS: There had to be some kind of acceleration, both in the sense of not hearing all appeals for oral argument and

also having more cases heard each day. That is where Collins and I finally developed this idea of ten, fifteen, twenty, thirty even forty-five minutes.

RS: In the early days, did you ever give opinions from the bench?

LS: No. We didn't give any per curiams either. We had one judge, Judge Schnackenberg who was very much against any kind of an order.

RS: Was that the feeling of the attorney who had come a long distance and that they ought to have more than five minutes to argue?

LS: I don't know what the thinking was really. It was also uncommon too to have many per curiams, if any. More importantly I think was the fact that there were no unpublished orders. Judge Schnackenberg was very much against that. Then when we finally adopted it at a court meeting and we decided we would have to do something to keep from writing opinions in every case, he liked it so much that he was very much converted to the idea of orders. It appealed to him very much.

CF: Was Schnackenberg here when we started using orders?

LS: Yes. I remember this very definitely because he was against it adamantly.

CF: Was that prior to the adoption of the publication plan that we started using orders?

LS: Kerner followed him so it would have to be.

RS: Schnackenberg died in 1968.

LS: We had orders before that so it was under Judge Hastings.

RS: Was the circuit following other circuits in the adoption i.e. publication?

LS: There was a lot of controversy. The Fifth Circuit had a rule that they only said that we affirm by Rule 15 or something. Other courts were using very truncate kind of language on orders and then there was a big controversy as to whether or not there should be publication and citation. We had a lot of discussion at least somewhere along the line while I was chief judge.

CF: You chaired a committee for the judicial conference too that looked into the study of publication.

LS: I had forgotten that. In any event, there was a great amount of discussion and we had opposition on our court. Judge Fairchild and I think Judge Stevens, in particular, both felt that there ought not to have a no citation rule. I took a very adamant view and I think Phil Tone agreed with me, I believe Judge Sprecher did too, that we should have a non-publication system of orders. We ought also have a non-citation otherwise it would be unfair to the litigants. A big law firm or the United States Attorney would have access to all the orders where as a lone practioner down at Evansville, Indiana would have very little knowledge of the orders that were around and he would be at a disadvantage. It would be unfair for the United States Attorney for example to cite orders in support of their position and the other side not have

equal access to the orders to cite orders that might be supporting his position.

RS: There was an opposition to the no publication rule?

LS: There was in the beginning but it seemed as if when we got into the orders then we almost had to have no publication. The big controversy was when it should be cited.

CF: By not citing, you wipe out the incentive to publish.

RS: Did West Publishing ever put pressure on one way or the other?

LS: No. I know we had discussions with Mr. Nelson. Collins, you have as good or better memory then I do about the West Publishing Company.

CF: We had discussions with Charles Nelson.

LS: He came here and also a man by the name of Nowell. He is still around by the way. They both are. Then I talked to the head of West Publishing Company at Washington. I think as you pointed out Collins, you probably have better recollection as to their views then I do. How do you remember it?

CF: They really sat on the sidelines. They didn't want to exercise a heavy hand one way or the other. They were very concerned that if there were decisions of this court that were of precedential value they thought they would have to publish them regardless of what form they were in because other publishers would publish them and the

lawyers would want a complete set of the decisions of the court.

LS: I think we also developed the idea that the orders would be sent in so there would be a record as to the appeal. I think that still goes on?

CF: That is correct. We send them in and they have a page in F.2d that will say "summary of affirmances and reversals," whatever, and gives the date of the decision.

LS: One thing that we thought is that if the district court had written an opinion and that we disagreed with it, then we ought to publish the order and/or opinion, whatever we did to dispose of it. Otherwise, the district court opinion would be citeable and the Seventh Circuit's disagreement would not be available.

RS: In normal circumstances wouldn't that justify a published opinion by this court?

LS: That is what I am saying.

CF: We never adopted that as a formal requirement although that is one of the criteria. There were three criteria that we considered. Another one was, anytime we reversed, that it ought to be published. I can't remember what the third situation was.

RS: Disagreeing with a Supreme Court precedent?

CF: No, but in those two cases i.e. there were reversals and a published decision. There was a debate and it was decided that they wouldn't be automatically published. If there was strong indication that it ought to be published but

they would leave it up to the panel to make the decision and that is why the rule doesn't cover that.

LS: I remember that we had a lot of discussions. I believe you will recall too, Collins, in our council meetings about the publication rule and as I recall it, Judge Sprecher and I don't know who else helped develop it but I know Judge Sprecher spent a lot of time working on what was Rule 35 at that time. I think we developed a very sophisticated standard. I don't know how well it has been adhered to.

RS: Can we take just an example, I don't know how this would be the best example of just how an innovation will come into being. I am curious of various things i.e. how much would the Council consider something like that? How much did you rely on input from the district court judges because obviously the non-publication policy effects them.

LS: I don't think there was contact or input. I do know that we had a lot of open discussion among ourselves.

RS: Of course, many of them were ex-district court judges.

LS: In fact, I tried to sell the idea to one of the judicial conference committees to do away with Federal Supplement and to have the court of appeals adopt if they felt that should be done by the district court opinion and publish it as an appendix even though the district judge had not sent it in for publication. I felt that this would dignify or reward the district judge giving him an incentive to write a good opinion and secondly, it saved a

lot of time on our part. Sometimes it was embellished or we would say that there would be some introductory comments about his opinion or whether we disagreed with all of it or not and so on. It saved a lot of duplication.

RS: To follow that up, I wondered whether you had any discussion while the policy was being made or before the policy was being made i.e. with the bar?

LS: I kind of think so. I believe I don't know if it was a committee or what. Do you remember Collins?

CF: I think this was discussed at one of the Seventh Circuit conferences. There were individuals among the bar who didn't like the practice and I know that Judge Doyle was very eloquent in his basic attack against the no citation rule on the basis that any time a court makes a decision, it's precedent. Saying that it is not precedent is to go against the history of the common law.

LS: He felt that it was kind of a subterranean way of handling cases. That's not a very happy phrase but he felt that it was not open and above board.

CF: You could deal with the hard case.

LS: Of course, that's a potential abuse, I wouldn't say temptation. I mean a temptation that leads to abuse.

RS: After a panel has issued an unpublished order, isn't it right that there can be either a motion for the parties subsequently to have it published or can't other judges?

CF: Anybody can write in to ask the panel to publish it.

RS: I see. Do fellow judges ever suggest?

LS: Which ones?

RS: I mean on your court.

LS: Lawyers who are usually successful want to see that their opinions are published because they would get their name in Federal Reporter Second especially if they were the winning side. The United States Attorney was also quite persistent sometimes with frequent requests.

RS: It doesn't happen by a judge who is not on the panel who thinks that something is being done that shouldn't be?

LS: I think that there were some instances as I recall now, one or two that there was some feeling that we had either made a mistake or that it was against other cases. There was an intracircuit conflict.

CF: I think that I can tell you that I have found a couple of times over the years a case that ought to be published and I have gone to the presiding judge of the panel and would suggest that it be published and give my reasons and every time it has been published.

LS: Frankly, I think we have been a little lax about it. I think more often than not the request has been granted. I know in the beginning, we would deny it. There were frequent denials, particularly if we thought that the lawyer was trying to get his name in F.2d.

CF: I think there are still denials. I think you have to give the reason as to why and the reason has to be that it meets the criteria for publication.

LS: Right.

RS: This again might not be a good example, I was trying to get to how innovation takes place but when the Council was discussing this would you go to either the Administrative Office or was there an attempt to see whether there were studies that were done to get the plans of other circuits and so on. Would Washington facilitate that at all?

LS: I think some of the judicial conference committees had some studies and some reports as I recall it and also there was quite a bit of discussion in ABA Journal articles and Judicature Society articles. I am sure that there was quite a bit of discussion going on. So when you say it was innovation, I think it was a general problem all over the country.

CF: I think the thought came from the individual allowing this innovation to come from individual circuits and that the Administrative Office and the Judicial Conferences have filled the role of communicating those ideas to other locations rather than being the origin.

LS: Or even the protagonist.

RS: I guess I was wondering partly whether this is a general matter. Do you find that when you were thinking of something of a change i.e. whether it would be this or having the judges reside here, would you tend to at a judicial conference take aside the chief judge of one of the other circuits and say this is what I am thinking, what do you think or would you sort of rely on personal

contacts with other circuits or tend to just view your circuit in isolation?

LS: I suppose it was in essence both. I can't recall specifically. Getting back to the publication rule on the question, and then I'll get back to your question Ray. I think there was quite a bit of opposition among the lawyers and the bar against a non-publication rule as I recall it. Don't you think so Collins?

CF: Yes.

LS: I think it was generally pretty much against it. The lawyers more so.

CF: But individually, not as a bar association.

RS: They didn't go to friends of the bar?

LS: No. I think we adopted this Rule 35 without any formal consultation with the bar as I recall it.

CF: This was before the institutionalizing of the Advisory Committee on Circuit Rules.

LS: Ray, in getting back to your question, I think those ideas just sort of developed maybe. I think Collins and I developed somethings in just talking around.

RS: Would other judges write or talk to you at meetings?

LS: Yes, I am sure when we started the random draw of panels, I know I talked to Skelly Wright about what is going on in Washington because they had a problem there. The chief judge there, I think his name was Eggleton/Edgerton. I believe he was the one who opposed the idea of a random draw and the other judges forced him and he was very upset

and hardly would talk to them afterwards. I spent sometime I remember at a judicial conference committee meeting with Judge Wright out in Palo Alto, I think at a summer meeting and discussed at great length with Skelly Wright as to what was going on there because I had in mind wanting to do something like that here. There are these inter-judgeship contacts.

CF: Getting back to the oral argument calendar, you mentioned about going to six cases a day. I think that when you proposed going to six cases a day, you proposed some other possible solutions too which included seven cases a day four days a week and there were a variety of different calendaring ideas that you could use in order to handle more cases but there seemed to be one basic principal that stuck through this period and that is that the judges did not want to sit more than the number of weeks that they were already sitting i.e. the twenty-two weeks a year.

LS: I think that is right. It became sort of a habit at that time in our circuit to have March for example free and to have a summer recess.

RS: When you first came, the first several years, was it routine that when you started in September you had written all the opinions for the previous year by the end of the summer?

LS: I think so. In fact, Judge Hastings had a discipline of his own on that. He would finish up all his cases by June 15th or no later than July 1st. Then he would go to his

summer home up in Georgian Bay, Canada. He would take no cases to write and he didn't want any motions either sent up to him. I had several occasions where I had no cases over the summer. It depended on the judge. There were some judges that never did finish until the new session came in.

RS: Of course, if you were on the panel you had to wait until Judge Hastings approved?

LS: Yes. Hastings had some coming up there that he had to approve.

RS: That was his way? You knew you were disturbing him?

LS: I think that is right. I think he was hoping everybody else would adopt his demands on himself.

CF: As chief judge, you had to deal a number of times with the problems of circuit judges who weren't able to get out opinions and the court used to have an internal rule which provided that if you had so many opinions under advisement for a certain amount of time then you weren't going to sit. Most of the time that was not followed but there were occasions when it was followed. Do you want to talk about that?

LS: Yes. I have forgotten exactly the genesis of the rule but there was a time when one particular judge had so many cases behind and so we met with him and discussed the situation and decided that we, each of us, would take a certain number of cases that he had to write and we would write them. We would also add them to our list. Some of

the judges didn't like that of course. I did it twice. I think we then adopted this rule. It was either if you were fifteen down or six months behind that you couldn't sit. It seemed to have some effect but not all the time. It was applied on one occasion. That again was not too happily received both by the judge that was involved and also by the other judges because they weren't getting the benefit of his sitting.

CF: Do you see any rule or way to deal with that problem as it is a recurring problem in the trial courts and the courts of appeal across this country? Do you see any solution to that?

LS: I think the other judges have to bear down. If they bear down, I think you will get some results. I don't think you will get a complete cure. It is just like this rule, I think it was helpful. I think in the district courts there have been some very severe situations. I remember there was one judge I believe either in Kentucky or Tennessee where he was ordered not to hear any cases for a year in order to get caught up. I think there was one judge, Judge Murphy, over in Pennsylvania had the same kind of problem and the council ordered him not to hear any cases until he got caught up with his backlog of decisions and motions and so on. I think if the judge can't discipline himself he has got to have some sort of peer pressure. I don't know what else you can do about it.

RS: It shouldn't be public?

LS: I don't know.

RS: When we were talking with Judge Campbell, he talked about how he would call newspaper reporters and would say here is our list of who is up-to-date and who is not.

LS: I never did it and I am not sure if that is a good practice. I think that can be an extreme remedy if it had to come to that. I think that it should be handled and not necessarily secretly but it certainly is not a matter of public discussion. I think it is an internal problem that should be handled internally by the judges. I think that the judges are a little too soft on their brothers.

RS: Do you think it is a problem of internal discipline?

LS: Do you mean the cure or the problem?

RS: The problem.

LS: I think it is a matter of personality. My feeling is and I have thought of this a great deal that there are some very conscientious judges who either want to do a very good job or else they have a high standard and they want to be very thorough. That is one aspect and the other is they have problems in writing, and maybe that is the second aspect and the third is that they have a difficulty of making up their mind. I think that is the greatest cause. That's my feeling about it. There are certain judges that the more they think about it, they get into sort of a paralysis. The longer you think of it and then you put it away and then you come back to it you have to go all through it again. It prolongs the decision. Once

the judge makes a decision and forgets he gets sort of like a Catharsis but as long as he has the problem and he is dealing back and forth with it in his mind, the problem gets bigger and bigger.

RS: This might not be a bad time to ask you what your patterns are? Do you tend to work on one thing?

LS: I have drifted into the idea that it is better to do one thing at a time and get it over with. Otherwise, you have to come back and then you have to redo a lot of things. Pressure does interfere. Sometimes an active judge does have to get into something else. He can't just hide away with the one case and get it over with. That is the ideal.

RS: Yes. So the clerks might be doing research or background work on other cases while you are wrestling with one particular case. You try to keep the flow going.

LS: The thing to do is to try to get it over with. The longer it gets and particularly if you don't get at it you just don't want to. Just to pickup the file is sometimes very difficult. Once you move into it then it becomes interesting and concrete and you move. There is a lot of resistance and particularly when you get through one case and you have been through a lot of turmoil with yourself and getting into a great amount of study, writing the opinion and revising it and so forth. It is very difficult. There is a psychological block for awhile to get into the next one.

RS: Most often when you have read the briefs, then you go to oral argument and then you go into conference and you vote do you generally have some idea on how you will probably vote before you go to the bench to hear oral argument or do you quite often think you really are going there being ready to be convinced one way or the other?

LS: More often then not I think I have a pretty good idea on how the case ought to be decided before I go to the oral argument but that doesn't mean that I won't change. I have changed many many times after hearing oral argument or even after discussion. Not so much after discussion. I wouldn't do away with oral argument at all. I do think that if the judge hasn't read the briefs and I have heard judges say that they don't make up their mind even if they have read the briefs. I think you can't because the human mind doesn't work that way. You get an impression and the same thing and I tested it at times with my law clerks and I get their ideas although I don't agree with them at times but I think it helps to get as much advance feeling about the case before oral argument otherwise, oral argument doesn't mean so much. I had the experience once of reading the wrong set of briefs and I came into oral argument and I didn't know what was going on. I don't how you could hear oral argument without reading the briefs.

RS: How long into the first argument did it take for you to realize that you had read the wrong set of briefs?

LS: I knew what the case was about after I heard the argument.

CF: I take it that is one of the times when you didn't ask a lot of questions?

LS: Yes. I was very quiet.

RS: Even you say you have your mind made-up as to the outcome and you have been assigned a case or have taken the case to write, will you set out the facts and the issues even though you may not be sure what arguments you want to make in your opinion or do you usually work it through completely before you put pen to paper?

LS: You mean outline?

RS: Outline.

LS: Generally speaking you have an outline in your mind. I think the briefs help. In fact, to write an opinion you have to refer a lot to the briefs and the issues and development. Many times, a good argument and a good brief, you don't feel that there is too much need for outside research in the first place. I have never had much time for outside research. My law clerks at times go and do independent research of course. One thing, of course, that happens and I know has happened to me and I am sure has happened to a lot of other appeals judges is that once you start to write and get into it you change your mind. I think the possibility of the writer of the opinion to change his mind, the ratio is high. Much higher than the other two people if they are in

agreement. They tend not to get into the depth as the writer of the opinion does.

RS: I have heard that referred to as the opinion won't write itself. You struggle with it and then you say that I am not able to write this in part because I no longer believe.

LS: Well, Holmes had a colloquialism he would say, "That if he gagged on it, he knew that he couldn't write it that way."

CF: How do you use your law clerks?

LS: That all depends on who they are and how competent they are. I have changed I think somewhat in how they work with me. They always read the briefs. Not all of them. I mean those that are going to be in the courtroom with me. I never encouraged memos but the last few years I feel that memos are very good if they have the time to do them.

RS: Before the argument?

LS: Yes. A lot of times we discuss the case at length before oral argument. After argument, again it depends on the law clerk. At first, I came on the court I was writing a lot more myself individually. I had more time. Then pressure came on and I depended more on the law clerks for first drafts. There was a time when I would say you write a draft and I will write a draft to the law clerk. After awhile I felt that was a waste of time. Also, I felt that you can't mesh two kinds of writing very well. I either adopted his or hers or else I took it over. I felt that was a waste of time and also not very good opinion

writing. It depends on the law clerks. There are sometimes that a law clerk will write a draft that I will approve. There were times when many of my law clerks were much better writers than I am. I certainly don't think that I am abdicating my role as a judge by letting my law clerks write the draft.

CF: Law clerks often think when they are law clerks that they really influence the judge. Judges say that the law clerks don't influence them at all. What are your thoughts about that?

LS: I think that they influence the judge. I think if they have a good relationship with judge, why not? Of course, if the judge doesn't think and get into it in depth, that is wrong but not to permit the law clerk to argue with the judge and to say, "I think you are wrong" or, "I think this is the way I think it should be." I don't see anything wrong with that and I think it is very helpful.

CF: Now that we are done with that let me move into another area which we started to get into and that was the cases that are submitted without oral argument and the difference between what I think you later started to call linear decision making and dynamic decision making and trying to establish a focal point at which there will be a meeting of the minds. How did the judges take to that innovation.

LS: I think they realize that it was not good judicial decision making for a so-called linear type of decision.

I recall that there was no opposition at all. You were around when it developed.

CF: Do you think that part of that is because the judges at the time were all here?

LS: Of course. We would get together and each judge had read the briefs or at least the memos on the briefs.

CF: You have always advocated a strong position that it is best to have the circuit judges having their chambers in the place where the court is held and not have non-resident judges and you were fairly successful with that and I think you may have picked that up from Judge Hastings. Maybe you could talk about that.

LS: I didn't know very much anything about the workings of the court of appeals before I got here although I realize that there was a time when most of the judges didn't live in Chicago. Judge Evans came from Wisconsin and he was a widower and he lived at the Lake Shore Club. Judge Finnegan lived here. Judge Major lived in Hillsboro. Swaim lived in Indianapolis. Judge Duffy lived in Milwaukee. That had been the custom. They would come in at various times and sit in sessions and then would go home. I doubt whether they had chambers. In fact, even Judge Major didn't have chambers at Hillsboro. He rented his old office and paid for it out of his own pocket. The government didn't have to pay anything for his quarters there. Judge Hastings, I always remember and he has told this to me many times as he had told others, of course, I

think he made a public statement about it that as soon as he was appointed he decided he would come to Chicago. I don't know what motivated him to do that. I think it was maybe because he felt that he was going to be the chief judge sometime. Whatever did prompt him to do it, he came right to Chicago from Washington, Indiana. I guess everybody was here at that time. Judge Castle, Judge Schnackenberg. In any event, when I came here he appointed GSA to make chambers for me in Hammond and I said that I didn't want that. I believe Judge Hastings talked to me about that. I saw no reason why I should because I only lived fifty miles from Chicago, i.e. Dune Acres. I saw no reason why I shouldn't commute to Chicago. I could begin to see the advantages of this and Judge Hastings thought this was very important. Then when Judge Pell came, I was chief judge. Judge Hastings at that time was a senior and I discussed the situation of Judge Pell and he was very agreeable to the idea and we both told how it would be helpful to him and also to the court if he would move immediately. Judge Hastings felt that if you didn't move right away, you would get into the habit and it would be harder to move. This was only through his own experience. He moved immediately upon his appointment and he advocated that kind of habit or practice. Then Judge Wood was appointed. I don't think I talked to Judge Wood but Judge Bauer did. I think the ABA people did.

CF: You had talked to Senator Percy.

LS: I think so.

RS: Had Judge Fairchild moved?

LS: He hadn't moved yet although I was trying to prevail on him to move.

CF: Did Judge Hastings talk to Judge Fairchild when he came on?

LS: I don't know. Judge Fairchild came on in 1966. He was chief judge. When Judge Cudahy came, I know he would have liked to have stayed in Milwaukee but he talked to Judge Fairchild and he said, "I hear that there is a sort of a requirement to live in Chicago." Judge Fairchild said that it is not a "requirement but it is kind of expected." I then talked with Judge Cudahy and it was decided that Judge Cudahy would come to Chicago. I don't know if there was anybody else involved or not.

RS: Did you ever bring that up in the U.S. Judicial Conference and try to get it mandatory?

LS: I think I did when I was on a couple of committees. We had a set agenda in Washington from the chief justice. There was never any kicking around of ideas. I think there was a Saturday morning kind of affair at a meeting of the chief judges. I don't know if we talked about it or not.

RS: You wrote an article for the ABA Journal about that?

LS: Yes.

RS: Did you get a lot of response?

LS: Not much, mostly adverse. I did try to sell it to Senator Kennedy. I talked to his special assistant Pete Velding. I did a lot of missionary work but it never took.

RS: I imagine that some of the geographically big circuits would be the hardest against that?

LS: Not necessarily. The ninth circuit seems to be very . . . . I was assigned to San Francisco and I met a number of the judges there and they were talking about this and at one time the Ninth Circuit most of the time had to sit in San Francisco. Then when Judge Chambers came along he said, "Well, you don't have to live in San Francisco." This was because he wanted to live in Tucson, I guess. In any event, they broke it up. Now, there are a lot of judges who would like to. I know Judge Wright, who just sat here. I think he is very much in favor of the idea that there ought to be a central place. Judge Kilkenny didn't like it. He and I are good friends, Notre Dame graduates. John came here a lot of times to sit. By the way, he is very ill. He wrote me a rather severe critical comment and he ended it up by saying, "By the way when are you going to take your retirement?" He said that he felt that if all the judges of the Ninth Circuit would come to San Francisco, they wouldn't talk to each other anymore, which I think is the other way around.

CF: To get back to the innovations that you instituted as chief judge, I think that there are others, I am sure that you may want to talk about?

LS: By the way, did we talk about Rule 18?

CF: I think we did, if we didn't, we will talk about it.

CF: You used to regularly convene the chief district judges several times a year to discuss matters of mutual concern and that has been used in some other circuits and has been institutionalized in some other circuits after you started doing it. But in your own circuit, it has been discontinued.

LS: Regretfully, I am sorry that it hasn't.

Tape 7

Wang No. 7762L, Tape No. 7

Continuation of an oral interview of Senior Circuit Judge Luther M. Swygert as interviewed by Ray Solomon, Director of the Court History Project and Collins Fitzpatrick, Circuit Executive on Wednesday, June 19, 1985.

LS: I have forgotten the origin of the idea, but at least two things occurred to me: (1) that the judicial conference is not serving what I thought probably was the original purpose of the conference as sort of a legislative, deliberative body of adopting policies and that sort of thing. There was some of that at some point in our judicial conferences, but it had lost some of its original ideas I think, and less and less policy was talked about and action taken. As I recall, I think there were some policy actions taken while I was chief judge during the judicial conferences. Maybe there still are. In any event, it also occurred to me that since we had the judicial conference composed of the chief judges of the circuits and it was a policy setting quasi-legislative body that I termed it a mini-judicial conference concept where we did inaugurate a use of (as I recall, I think about three times a year, maybe four, but at least every four months) a meeting of the chief judges of the different districts and myself. I may have invited some of the other circuit judges in, but I am not sure. I know we had a lunch where all of the other judges came in. Primarily, I think it was you, Collins, myself, and the

chief judges, and then we usually had someone from Washington. Bill Foley came in once and I think Joe Spaniol and I believe Carl Imlay, General Counsel, attended once. In any event, we had an agenda and you and I worked it out, Collins, of the day sessions. We took up various common problems of the circuit (the district court), and we adopted certain policies (I still have those minutes) and I don't think they were called rules. We deliberated and discussed common problems having to do with district judges. Then we took the notes-minutes that were taken and transcribed by Nellie Pitts, secretary, (Nellie is now Justice Stevens' secretary. She was one of my secretaries at the time.) and I think the chief judges then were instructed to discuss or to convey these discussions, particularly the results to their various district judges in their respective districts and I thought it was an excellent idea. It had a result of a kind of discussion of common problems and also a unifying aspect of the uniformity of policy and solving various problems that would come up with the district judges in the district courts. I don't know what your reaction was, but is that generally what you thought, Collins?

CF: Yes, very much. You would put together an agenda, we would go over it and talk about common problems district courts had. Probably one of the important aspects of those meetings was at the time the judicial council did not have district judge representatives on it, and so, it

was sort of institutionalizing a forum where the chief district judges met. With the exception to the metropolitan chiefs, of which there is only one in this circuit, none of the other chiefs are ever brought in to talk about administrative problems that they may have in the districts.

LS: And then, of course, one of the things that we have the benefit of is the representative from the Administrative Office and they could enlighten us on fiscal and other problems that were, at that time, current throughout the system. Then we had the benefit of their views, which was very helpful, and also, we furnished them with our views.

RS: Was there also an occasion where if they had particular gripes about the way the Court of Appeals was handling certain things that would come up. Was this mainly discussed.

LS: I don't recall any problems or any discussion on that line.

CF: I think there were discussions brought up about setting up a mechanism whereby they could be alerted to important decisions coming down that they should read. The standard answer being that the district judges should read all decisions, but in reality, as the caseloads go, they may not be able to read them all, so they wanted certain ones flagged.

LS: We did do that.

CF: We have done that and continued that. And out of that also, I think the Digest originated from that and several other ideas.

LS: As I recall, we had pretty good attendance. It was, generally, well attended. Of course, it was not required, but it was well attended.

CF: I think we always had everyone.

RS: How did they determine which ones were to be flagged?

CF: For example, a lot of them dealt with instructions. This instruction shall be given. This instruction shall not be given.

LS: Or a certain kind of administrative one that has to do with certain disclosure of presentence reports.

RS: That is, if the opinion stated that the jury should be taken out of the room before such and such discussion or something to that effect?

LS: Yes, important problems were reoccurring that would be particularly necessary for a district judge to know that there had been a change in the procedure.

RS: Did these stop in part because the district judges started to sit with the judicial council?

LS: No, I think it just died.

CF: Judge Fairchild took over.

LS: I think he conducted one, didn't he?

CF: He conducted one and he polled the chief judges. Three of them said they thought the meetings were very beneficial, three of them said they weren't and one of them sat on the

fence on the issue. Because there wasn't enough support, they were dropped.

LS: Judge Wallace of the Ninth Circuit was very interested and I sent him all of the minutes. (We still have them, by the way.)

CF: The Ninth Circuit has regularly had meetings and the chief judges of the 11th and the 5th also.

LS: Let me ask you--it may sound like I am immodest, but do you think they picked it up from here?

CF: I think you were the first one to have it and those were publicized in The Third Branch, and I have talked to other Circuit Executives about this. We, since then have had a meeting that was a development of that at Pheasant Run following a district judges' work shop predominantly of the chief district judges and the clerks, sort of the administrative people of each court, and we did that in conjunction with the Eighth Circuit. Since we have done that, that idea has been picked up in other parts of the country.

LS: By the way, you or I or the combination also had meetings of the clerks at the time of the judicial conference and also the secretaries.

CF: We had one or two meetings with the secretaries.

RS: You were saying that in part the emphasis for having the chief judges get together to discuss this was the feeling that circuit conference didn't have--you weren't able to have the same kind of policy discussions that have gone on

in the past--I just wondered if you thought that was, in part, just because it had gotten larger in the number of judges who would attend and it is harder to have some deliberate policy making body when you get too many people or whether it had to do with the presence of the attorneys or it was just thought that it could be more of a social event.

LS: Well, all of those. The smaller the group, the better the result. If you have a small committee, you get more done than you do usually if you have a large committee because there is too much talk and not very much action. I think that by just bringing in just the chief judges and not having the other judges, although they were advised and there was not a question of exclusion but it was a question of efficiency, and it resulted in more topics to discuss, more time to discuss them and more action. But you are right, it was a social aspect that interfered--the Bar participation--and the larger and larger numbers of district judges--and with only one day for this, it was hard to set up an agenda.

RS: During your years with the district court, did you feel that the circuit conference was a place that you could discuss your concerns?

LS: Informally, it was very good. You could talk with different judges. It seems to be that at the beginning there was some deliberative aspects in policy setting. I think under Hastings a more legislative type of aspect was

developed, and I think I developed some too, but I think it was a feeling that for some reason it was not answering the purpose it was designed to be.

CF: The initial circuit conference meetings didn't have the Bar in attendance, did they?

LS: No. This is sort of an interesting story. I am sure other people know about it, but not too many. It has a humorous aspect. Judge Major was the chief judge and maybe he was in congress when it went through and it was enacted in the law that required participation in the Bar. He probably didn't remember it or had not read the statute, and when he was chief judge there had been a couple of conferences in which there was no Bar representation. Someone called the statute to his attention. He then realized that he had not followed the mandates of the statute. (This was 1950.) He talked to Bill Campbell, Judge Duffy, and me and he said Baltzell wasn't a very cooperative person in these conferences to start with. He may have talked to Pat Stone. In any event, Major asked each of us to appoint two representatives of the Bar (invite them to the conference). I got a man named Kurt Panzer from Indianapolis and also a man from Elkhart who had been the president of the Indiana Bar, Vern Cawley as my two representatives. Bill Campbell had George Haight and someone else. Judge Duffy had a man named Andrees, some prominent lawyer in Milwaukee, and I believe someone from

the western district, the former United States District Attorney by the name of Doyle. There were two from each state, but I don't think there was anyone from the two southern Illinois districts and only one from northern Indiana. There were about ten lawyers that came to our conference for only one day. They sat in and the judges took the lawyers to lunch and paid for their lunch. This was the first and only time that that happened, I think. It's always been the Bar entertaining the judges. Out of that meeting evolved the Seventh Circuit Bar Association. Kurt Panzer and George Haight were the prime movers. They drafted a constitution and set up the beginnings of the Seventh Circuit Bar Association.

RS: That is still fairly unique in bar participation, isn't it?

LS: I don't think there is any other.

CF: The Fifth Circuit has been talking about it, and is sort of committed to follow the lead of the Seventh on that, but I don't know if they have got it off the ground yet.

LS: A lot are by invitation. The first one was by invitation too, but from there on, everyone could come who had paid their dues.

CF: An area that comes to mind in which some would say the circuit lagged behind the rest of the country was in the filling of the position of Circuit Executive which was created in 1971. You were not enthusiastic about the position. Maybe you could talk a little bit about that.

LS: I talked to Ed Lumbard about it a great deal and some of the other judges. I guess while I was on the judicial conference committee, the court administration committee met along with the committee for the revision of the laws of which I was a member. Judge Biggs was the chairman of the court administration committee and his colleague, Judge Albert Maris of the Third Circuit, was the chairman of our committee. We met together in places like Estes Park or Colorado Springs in Colorado or Salt Lake City, Utah, and we commented on each other's meetings. They would attend our meetings. It was sort of a combined affair because the two judges, Maris and Biggs were very close friends although they were entirely different personalities. Judge Biggs was a flamboyant, outgoing extrovert and Judge Maris is an introverted type of person, not silent, but more deliberative and more of a subdued type of a personality, but they got along well. At these meetings, there developed the idea of a court executive. I think Lumbard was the prime mover. I don't remember all of the details, but in any event, there was a discussion concerning what a court executive was going to do, and how independent he was going to be, and what actual functions would he have, who would appoint him, etc. The idea was that he would be a manager. That manager would take some of the load of administrative duties off the chief judge. This idea developed, and finally, a bill to have a court executive was passed.

Lumbard was the prime architect. The bill was introduced by Sam Ervin who was the head of the Senate Judiciary Committee. The bill was finally enacted into a law which permitted the circuits to hire or appoint a court executive. Also, a board that would interview and pick qualified people. Then the Court of Appeals judges, the councils would appoint a court executive from the list. I was cold about the idea. In particular, I thought the name "court executive" was wrong to start with. I thought there ought to be more of a connection with the chief judge. The chief judge should run the show with the assistance of the court executive rather than the court executive having too much of an independent office. I am not sure I am right, but that was my view. So, I opposed the bill and I ran into difficulties as Chief Justice Burger was very much for it. I am sure he was not very happy with my opposition. The bill was enacted into law. The question then was whether or not we should have a court executive, and I didn't like the idea of appointing a person from this board because most of them were not lawyers. They were usually someone from the military or navy, retired captains and so on with very little experience in court work. They were probably intelligent, and they had, administrative expertise, but I didn't think they qualified from the standpoint of knowing very much about the legal system. So, I opposed the idea much to the chagrin of the chief justice. It then got into a

stalemate. At one judicial conference we had a real showdown. Judge Al Murrah was there and Rowland Kirks, the head of the Administrative Office. We had a long session about it at one of the judicial conferences in Indianapolis when I opposed it and they tried to sell the judges the idea. I had the full support of the judges. We wouldn't accept anyone from the board. I doubt that we even needed one at that time, but I knew we needed an assistant. I felt it was more of an understudy of the chief judges' administrative duties rather than an independent, autonomous office. There was a stalemate and we didn't appoint anybody as the chief's executive, but then Collins was here and of anybody, I wanted him to be the circuit executive. I felt that Collins already acted as court executive, de facto, and I was not very happy to think that we would have to get somebody from this board, so we didn't have a court executive much to the displeasure of the chief justice, but finally, through Bill Campbell primarily and after I had left as chief judge, Collins was appointed as court executive. Now there was some precedent to that. The Sixth Circuit had the same problem. They wanted their clerk, Jim Higgins to be appointed as the court executive and the board wouldn't certify him, so they got into an impasse. Somebody finally broke the impasse and they appointed Higgins. So, we had some precedent to hold out for Collins. Finally,

Collins was appointed, but it took a long time and it was a hard road to get him in.

CF: Part of it was Stevens going to the Supreme Court.

LS: I think so, yes.

CF: He talked to the Chief Justice.

LS: Bill Campbell, had the ear of the Chief Justice too, so finally, we got that through, but it was nip and tuck for awhile.

CF: What do you think is a proper role for the chief judge and the circuit executive? Different chief judges have different administrative abilities. Some are more interested in that than others.

LS: It depends on the chief judge. If a chief judge wants to get into the administrative aspects, then he has to work closely with the court executive and he probably ought to overrule him if he has a mind to do it. Maybe he can anyway, although it would be the council who would actually take any action if there was a real confrontation, but I think that if a chief judge is not geared to the administrative aspects of the office the court executive has more of a role. I am not sure how it is working out in other circuits. I think they have had problems in circuits with court executives and I don't know whether it's the court executive or the chief judge. I don't know much of what has happened in the circuits. I think we have been very happy with Collins, and I am sure

it wouldn't have been very happy if we had somebody from this board. I don't think I could have worked with him.

RS: Also, doesn't it serve a function too of allowing the circuit executive to do much of the contact with the district courts which is somewhat ticklish for a chief judge?

LS: Yes, I think there is that aspect, but I think now with the proliferation of judges and bankruptcy judges and magistrates, I have changed my mind. I would have to say that I was wrong as far as the need for a court executive. I don't want to hang up on a name, but I think an administrative assistant is a more appropriate kind of role that that office ought to have. In other words, he ought to have a lot of autonomy, but he ought not to be completely autonomous. I don't think it is, but the name itself seems to imply that. I don't know how you feel about it, Collins.

CF: I think it worked out well here because, in effect, you have apprenticed me into the position. One of the things I think I can do because I have been around here is talk to all of the judges, and I also serve as a focal point for getting their ideas back to the chief judge, and I am frequently a focal point between two judges that want to get a message across, but don't want to do it directly, whether it be between the court of appeals and the district court or the district court and the court of appeals or between a couple of court of appeals judges.

That is one of the aspects. I think it's an evolving position and the more authority you give it, the less work there is going to be of the administrative nature on the judges. It seems to me that, just like we have made many decisions in this court, trying to separate out judicial from non-judicial decision making, there is going to be more of that, and when you use a judge in a non-judicial decision making capacity, you use up his time and there is a finite amount. We range in chief judge situations from here, for example, where a chief judge carries a full load of everything to the Ninth Circuit where Judge Browning who has the largest circuit spends, I think, only twenty percent of the time of the circuit judge on judicial decision making. The other time is used on the administrative side. Judge Feinberg just wrote an article, I think that appeared in the Brooklyn Law Review, where he stressed the importance of the chief judge taking a full caseload and not becoming an administrator as opposed to a colleague in the court.

LS: I would agree. I don't think the chief judge ought to give way. He ought to be one of the judges. That is what he is appointed for. Of course, in the early days the chief judge's administrative role was much less than it is today, and if it weren't for the court executives, I think he would be swamped. But on the other hand, it seems to me that as between being an administrator and being a judge, the judge should come first. One of the things,

however, it seems to me--for example, if you recall--I think you were here when we changed the location of holding court from Freeport to Rockford. I don't know what role you played, but I know that I appointed myself and Judge Tone and I believe Judge Sprecher. We went to Freeport and talked to the Bar. Were you along?

CF: No.

LS: Then we went over to Rockford, and we talked to the Bar over there. I think that there are times when the judges have to get involved. Despite my great admiration for Collins' talent (and I am not trying to flatter him), and his abilities and his know-how, it seems to me that there are times when the judges, or chief judges have to get into it. I think that was a kind of an example where it was helpful for the judges to go over there and talk to the Bar, rather than send a court executive. I don't want to depreciate the role.

CF: No, but in my view, that is one of the situations that the district court really should have handled.

LS: I know.

CF: I mean that it is just because they didn't that you got involved, but that is something that they should have addressed.

LS: I agree, but my point was that it was the kind of a situation where I think the judges had a role to play.

CF: In your list of innovations one project that never got off the ground, so to speak, was the idea of using the roof as

a sort of a sun deck reading area, a place to relax and go up and read in the sun. Do you want to comment on that?

LS: There were two aspects. I think that was rather a "far out" idea to start with, maybe a little eccentric, and also, it was classified as my colossal failure. It got no support.

RS: Inside.

LS: Inside. It never got outside. That was the point. I think part of it. I talked to Collins, but I don't know how enthusiastic he was for it, but he went along with my ideas to help to get the plans worked out. So, we went to the GSA, and they were a little skeptical for a while as I remember.

CF: They were very skeptical. I thought it was a good idea.

LS: Anyway, we decided we wanted to put the--we were all on the twenty-seventh floor and two floors up is the roof. I don't think the elevator goes up that far, but at least you can walk up easily. So, the idea we had worked out is that we would not have all of the roof, but part of the roof in the center enclosed so people couldn't walk out and fall twenty-seven floors down into Adams Street or Jackson Boulevard. We worked it out with the GSA and got an estimate of the cost, and I don't know whether GSA was going to finance it or not. I can't remember that, but I don't think so. We were going to use some of the Lawyers Fund, as I recall it. We had the plans worked out and the GSA was agreeable, finally.

CF: I don't think they ever really agreed. That was one of the real problems.

LS: But anyway, we had an idea that we would have lounge chairs up there, some umbrellas maybe, and people could walk up there at noon or any other time and sun if they wanted to in the free air, and read, socialize, or whatever. It would have been kind of a outdoor recreation place, a retreat for the judges and the staffs.

RS: Was it going to be both the circuit and the district, or just the circuit court?

LS: Well, we hadn't got that far. I think we were just talking about our own court. I don't think we ever consulted the district judges. I suppose they would have had their own patio, maybe, if that had gone through, but I brought it up to the . . . after these plans had been developed to the council, and it received a very cold reception. One of the points I think was well taken was that there would be nothing secret about it, and of course, the Sun Times and the Tribune would be delighted to talk about the judges sitting on the roof of the federal building sunning themselves. But of course, sometimes great ideas fail initially, but then, look, they picked it up at the MCC.

CF: That's true. The MCC has a gym up on the top where the prisoners play basketball. It's a recreational area for the prisoners. One could come back and say if it's good

enough for the prisoners, it should be good enough for the judges.

LS: Exactly. In any event, the project aborted.

CF: One of the more amusing arguments the GSA used against it was that they couldn't protect the judges in case someone in one of these building got a high-powered rifle out and started to pick them off up on the roof. Of course, now if you watch them, they go right out the door on the street level and walk to the trains, so it might be a little easier to get them with a snub-nose revolver.

When you were in the district court you also used new ideas and put them into effect. Maybe you want to tell us a little bit about that, such as the jury tapes.

LS: I hate to, as I said this morning, blow my own horn on these things, because I am sure that I wasn't the only one that got new ideas and tried to put them into effect. I don't know where I got them. I don't think that I probably originated the ideas. I am sure most of the ideas that did develop were not necessarily originals, but anyway, I developed a practice of having the jury instructions taped. One other reason is because I ad-libbed a great deal. I didn't use written--I used some notes in my instructions. I had some written out, but I used those as a kind of a foundation and transposed and so forth--not transposed, but the transitions between instructions I ad-libbed a great deal. So it was difficult if the juries wanted to be re-instructed--for

the court reporter either had to read them, which I had them do a couple of times, or transcribe them, which is even more time consuming, of course. The court reporter was Mrs. Bretch. So, I got the idea of using the tape to record my instructions and then making the tape available. We had a recorder for the jury. That practice developed and there were times when the tapes were used--I found out later through inquiry from the jury that they played these instructions back. I thought it was a good idea because it particularly helpful when the judge doesn't read from stereotype written instructions and uses off-the-cuff remarks. He makes up the instructions as he goes. Also, it helps because the judge's inflection and emphasis is on the tape, and you wouldn't get it from a cold typewritten transcript. For a long time the district judges of the Northern District of Indiana followed my lead. I don't know whether they do any more or not. Grant did and Beamer did, and I think maybe McNagny, I am not sure.

RS: Do any of the judges here in the Northern District of Illinois follow that procedure?

LS: I don't know.

CF: Some do. There are variances to it. Some of them have written instructions, and they give the jury a copy--maybe one copy to the whole jury and some of them, I know, follow a practice of giving each a copy so that when they instruct them, the jurors can read along with the judge.

LS: There is an article which I wrote--or was authored one way or another, maybe ghost written--I am not sure in Judicature Societis magazine, maybe 20 or 30 years ago.

RS: On that subject.

LS: (No audio response.)

RS: Do you want to tell us a little bit about when you were with the district court and you participated in the Chicago Law School jury study? Did they spend a summer in there?

LS: I am trying to think who contacted me. I had fairly good contacts with the University of Chicago Law School, but I don't know whether it was Harry Calvin or Dean Levy, or whether it was one of my former law clerks, Walter Roth. He was the first law clerk that I had from University of Chicago. Anyway, I was contacted and Professor Harry Calvin and Professor Zeisel wanted to solicit my aid and cooperation, so I said I would be glad to act in that capacity. I was introduced to a young man who is dead now, Dale Broder, and the format was as follows: He would come out to Hammond, South Bend or Fort Wayne, for example, when I was having a jury trial. He would get acquainted with the pleadings and the case. He would sit in during the voir dire and the trial from beginning to end. Then, at the end of the trial when the jury rendered it's verdict, I would tell the jury about this project, and I would say to them that they did not have to cooperate, but it would be very helpful because this study

was to find out more about the jury system. It is an unknown subject as to how jurors deliberate. They wouldn't tell us in advance, of course, but after they tried the case. They were told that it would contribute a great deal to the court system if they would cooperate, and I think almost to a single person, they did. Broder would then go to the homes of these jurors and talk to them at length. He would spend a lot of time with each juror, listen to what they said and how they reacted to each other, what they did at lunch, (women would go one direction sometimes, men would go another way, there was always a division between women and men, naturally, of course) and how they reacted, who led off, and not necessarily what they said, but how they reacted to each other, how they reacted to the judge, how they reacted to the behavior of the lawyers, what they were impressed by in the arguments, all the aspects of their reaction to their role as a juror. He would write this up. It's available in the archives.

RS: Right, but they taped some jury deliberations, but not in your court room.

LS: No, that was in Kansas. That was when some trouble developed.

RS: Were you one of the judges that they would give a questionnaire to the judge?

LS: They didn't give me a questionnaire, but they would ask me how I would have decided this, etc.

RS: You did participate in that?

LS: I didn't do it here, but I think in Chicago they had a simulated jury sitting out in the courtroom. They would compare the "pick up" jury with the actual jury. He wrote up these reports, and that went into the material that developed into the jury study of Zeisel and Calvin, Broder published some of this on his own, so the material and some of the aspects of this study were in articles and journals.

CF: Did you change any of your practices based on the information that was found at this study?

LS: No, I don't think so. I doubt it. Maybe I did, but I can't think of anything drastic. Of course, I have always thought that the judge played a very vital role in jury trial, and it was his fault if the jury didn't understand the instructions for example. That is the reason I ad libbed a great deal. I felt that if the jury understood the instructions, they would follow them.

CF: Did you ever allow the attorneys to conduct the voir dire?

LS: Yes, that was standard practice from the beginning. Then I developed a short circuited voir dire, and I would ask the questions, but always never cut off the lawyers. They could have supplemental questions. I think it is a mistake not to permit lawyers to do so. Some judges have the lawyers hand up the written questions to the judge. I think I tried that. I tried a lot of things, but I thought the lawyers ought to have some say as to the

selection. In fact on instructions, I got the idea--I never did it--to stand in front of the jury to review the instructions rather than to sit on the bench. But I did compromise. I sat in the witness box so that I could look them in the eye and be closer to them.

CF: Speaking of being closer to them, you also told me about the informal system. I can't remember if you were on the bench or if you were an Assistant U.S. Attorney and Judge Slick was on the bench, but it would basically be the judge, the defense counsel and the prosecutor would after the jury retired to the deliberation room go to the bathroom right below or right next to the jury room where one could stand and listen to the jury.

LS: Not the judge, but the lawyers sometimes did. I think that is standard practice in Indiana. They can listen through the keyhole or somewhere to know what is going on.

CF: I can't remember if it was Fort Wayne.

LS: Yes, Fort Wayne. They were able to put their ear to the outside door to listen to what was going on. I didn't encourage that, needless to say.

CF: Getting back to your time as chief judge, during that time there was a situation where the council had persuaded Judge Foreman to move his headquarters to East St. Louis. Do you want to tell us a little bit about that?

LS: Generally, some of it is not too happy to recall. Do you want it somewhat in detail?

CF: Yes.

LS: Judge Foreman was very affable and not an antagonistic type of person, but he lived in Metropolis, close to Cairo and he would have liked to have his posted duty in Cairo and then come to East St. Louis where almost all of the business was located. I tried to persuade him, and in fact, the Director of the Administrative Office, Bill Foley, talked to him too at my insistence, I guess about it, and we thought Judge Foreman was going to move to East St. Louis. In fact, I think he indicated that he would at the time of his appointment or shortly thereafter, but time went on and he didn't and it became a source of some concern on my part. We had various discussions. In fact, I went to East St. Louis and talked to Judge Foreman about it. Finally, it came to sort of a head and we brought it to the council. We became acquainted with the problem, and as I recall, finally through the Administrative Office, we cut off his per diem as I recall it.

CF: We moved his headquarters to East St. Louis so there was no per diem for the travel.

LS: But in any event, we had Judge Foreman come to the council and see if he would be persuaded to move to East St. Louis. He said that he would do it in a year or so or something like that. He never really gave us an actual date when he would move. As I recall, he finally got an apartment in St. Louis, and he stayed there. I don't know what happened. He never did move, did he?

CF: Well, he never sold his house in Metropolis. He splits his time, about half the time between Benton and half the time . . .

LS: Benton has developed.

CF: Yes, Benton has developed.

LS: I don't think we ever held district court in Benton. I had never heard of Benton during that period of time, and I think they had about ten cases--trials a year in Cairo. So, it was one of the unhappy situations, and as a result, (I don't know how well it worked), I tried to get the department of justice to have the new judges make a commitment to move before they are appointed, and I think that did happen. I think Sharp--was it Sharp--did he move?--I believe he did.

CF: Yes, he did.

LS: And Beamer moved from South Bend to Hammond. That was one of the problems that chief judges have sometimes. I recall I had full support of the council. I am right about that.

CF: Yes, full support. Everybody saw that the business was in East St. Louis, and you had to have a judge there. At that time, that was the old Eastern District of Illinois and Judge Wise was in Danville. That is about two hundred some miles from East St. Louis and there had been a lot of mining work stoppages where there was a need to get a judge on a short notice.

LS: I think the happy ending of this is that with Judge Foreman no real personal animosities developed. There was maybe a little hard feeling at times, but nothing that became permanent. Wouldn't you say so?

CF: I think that is right. I don't think he has any hard feelings whatsoever, and I think he understands the issue very well. In fact, it's interesting to note that with the new courthouse, the contemplation is that the new judge plus Judge Beatty, who is in Alton, and himself will have headquarters in East St. Louis. He sees the benefit in having the judges all there.

During your tenure as chief judge probably one of the most difficult situations to deal with was the indictment of Otto Kerner, then Judge Kerner. Do you want to talk about that?

LS: Yes, I will talk about it as far as anything that is pertinent and I certainly don't want to violate confidences. When Judge Kerner was indicted, the United States Attorney came up that morning and told me that they had indicted Judge Kerner. Rumors had been publicized, I think, at that time. In any event, I was notified by the United States Attorney, now Governor Thompson, and I immediately went to Judge Kerner. He already knew it. We discussed it briefly. I told him that I thought I ought to call the other members of the council, the judges, and talk to them, but then I thought that maybe he ought not to do any more judicial work from that time on and he

agreed. Then I talked to the other judges that day, and that was the understanding that he would absolutely quit and terminated any further judicial activity. He obeyed that mandate. We all worked under that arrangement. He absolutely had no further contact with the court on judicial matters, nor did we consult him in any way on judicial matters. He had no further use for his law clerks. As I recall it, (and you know this too, Collins) we found other judges who took his law clerks under their wing and continued their employment because they had been employed for one year. We didn't feel that they ought to be turned out. It was through no fault of their own. So we provided further employment for them through that means to keep their tenure going for the time they were employed for. Kerner kept his office here. There was some criticism about that. We had some discussions about that.

RS: Criticism from the outside?

LS: I am not sure about the outside, but certainly inside.

CF: Certainly inside.

LS: We had many meetings of this sort on various problems of that kind, and I took a definite view that as long as I had no control over the Administrative Office views of him occupying a place in the building, I took the view that as far as I was concerned, he was only under indictment and he had the right to be treated, as the law provides, innocent until proven guilty, and that I was not about to take any punitive measures under the circumstances. I had

at least the majority of the judges with me on that and followed right straight through treating him that way until the very end after he had been convicted. He appealed to the Court of Appeals, which of course, was a special assignment of outside judges. Judge Taylor tried him. He was an outside judge, of course, and was appointed by the Chief Justice and also the special Court of Appeals panel that heard his appeal was appointed by the Chief Justice.

CF: Was there a formal motion or formal suggestion from Judge Robson that none of the judges wanted to try Judge Kerner?

LS: I think I discussed it with Judge Robson, yes. But, I think nobody wanted it. That was understood, of course. I have talked as far as I want to go with my confidences, my conversations with the Chief Justice. The facts speak for themselves. He didn't go through the inter-circuit assignment committee. He felt that it was a highly important deed and that he would do it himself, and certainly no one from the district court should be in either the trial or the court of appeals. I think I could say this without violating his confidence or any statement of the Chief Justice. I remember at a chief judges meeting, he said that he felt--and--that I handled it strictly the proper way because as soon as I knew we had to have a judge, I didn't go through the inter-circuit assignment committee. I called the Chief Justice directly about it.

CF: It's interesting to note that when you called him, I was putting through a call from the clerk's office and I realized quickly that I had tapped into your call to the chief justice, and I thought "holy cow," but I don't know what had happened to the phones. I was just calling around. I don't remember who I was calling, but I remember Burger getting on the line and hearing you and thinking, "uh-oo."

RS: You testified as a character witness.

LS: Yes, Judge Kiley and I both did.

RS: That was an individual decision, I take it?

LS: Well, no. I didn't volunteer. Mr. Conley came to me and said that he would like to have me to appear as a character witness, and I talked to Judge Kiley too and again, I called the Chief Justice. I felt that I owed him that courtesy and maybe get his advice. The Chief said that Kerner had a right to my testimony, and he said, "I think you ought to consult the Ethics Committee about it." Judge Tuttle was the head of the Ethics Committee. When I called Albert Tuttle (the former Chief Judge of the Fifth Circuit) he said too that he felt that if I was subpoenaed, I ought to testify. I had no choice really, but he polled the committee, and they all agreed that Kerner was entitled to my testimony and to Judge Kiley's testimony as character witnesses. I think there suggestion that either I bring it out and Judge Kiley

bring it out or by Judge Kerner's counsel that I was under subpoena and not a volunteer.

RS: Did you talk with the Judicial Council at all?

LS: I don't think I did.

CF: No, I am pretty sure you did not. During that time you had given Judge Kerner some non-judicial decision making projects including working on the comments on the proposed revision to the criminal code which was an earlier version of the revised criminal code which was passed last year, in fact. So, it's fourteen years later. I know he did a lot of work on that, and he did some other work which I always thought was very compassionate on your part to give him--to make sure he had something to do.

LS: It also justified his staying in his chambers. Of course eventually, as I recall, his secretary was moved off and Judge Marshall took Mary Banzoff.

CF: So, it was just a question of chambers and we didn't have anybody else to use it anyway.

LS: No.

RS: Did you use to correspond with him when he was in Kentucky, when he was in prison?

LS: I did. I know I did, but I don't know how often.

CF: You visited him down there.

LS: I was going to. I was just ready to go, and he got sick and came back. I didn't go.

CF: That was in connection with a trip to Gethsemane if I remember.

LS: That's right. I saw him afterwards several times when he was sick.

CF: Did you ever form an impression as to his guilt or innocence.

LS: I would rather not comment on that.

RS: Was he a broken man? What was his attitude after the conviction? I know he was sick.

LS: Well, I think Judge Kerner felt that he was not guilty, and he had been convicted wrongfully. I think he felt that way. I think he felt that way up to the end. That is my impression.

RS: I know in doing the Circuit's history, for instance, I got actually no cooperation with, it was very hard to deal with his son, Tony.

LS: Tony, not Tony Junior.

RS: Tony, that's right. I just never could reach him.

LS: You mean you couldn't contact him.

RS: Well, I contacted him once, but he had no interest in helping. His mother, who was still alive at the time I started, was quite helpful about Judge Kerner Senior, but Tony was never able to--I took it just from the fact that Judge Kerner had continued to have contact with you that that sort of bitterness wasn't . . . .

LS: You mean the bitterness between him and Tony?

RS: No, no, I am sorry. The bitterness that his son felt towards the prosecution and towards allowing anybody to do anything even though I was not inclined to work on the

case or anything, but I just didn't know whether it also carried over to the court at all--the feelings about the court--whether the son's attitude--.

LS: I don't know. I never discussed that with Judge Kerner that I know of, but I think that he felt that he was fairly dealt with by the court itself.

RS: By the court itself.

LS: I am not talking about the prosecution.

RS: No, no, I am not talking about the prosecution or anything, . . . just.

LS: That poor guy a couple of times, as you know Collins,--we had meetings--various things came up like the chambers and so forth--we had Judge Kerner in to express his views. If you recall--I don't know whether you were in the meeting itself.

CF: No, but I knew that he consulted you.

LS: So, I think that he felt that he had been, as far as the court, dealt fairly with under the very trying circumstances because it was a very sensitive situation. There was no question about it, and it called for very strict lines of decision, of attitudes.

CF: He was upset at the selection of the judges for trial and for purposes of the appeal, I believe.

LS: I don't know. Well, I think I know, but I would rather not comment on that. I mean I want to be honest about that, but I would rather not comment. I think that would be a violation. I don't think it would be good.

CF: During this time, you just sat on a case and you, Judge Sprecher, and Judge Fairchild dissented called U.S. v. Irali, involved a policeman who had been charged with taking bribes in a bowling alley for providing, basically, extra services to that bowling alley which meant extra police protection, and having been called before the grand jury, he had denied that he had taken the bribe, and they charged him then with a false declaration count as well as the substantive count. In the decision in which you wrote, which was later reversed by the Court of Appeals en banc, you held that it was really unfair for the government to call somebody before the grand jury, ask them if they did it, and if they said no, to prosecute them for both the substantive crime and saying that "I didn't do it." That is a simplification, but I think that is basically what it comes down to. Since I was a law clerk at the time, I knew that before that case was written that it would impact the Kerner decision, the Kerner appeal because a similar thing had occurred. Do you want to talk about that case at all?

LS: Well, my only thinking is that it certainly didn't enter the idea that it was written for the sake of Kerner. That certainly is a fair statement, I think. I decided the case on what I thought, and I don't know that I even related it to Kerner at the time. I am not sure. I certainly didn't decide it on the basis of--and I don't

think the judge--it was a split circuit. It was a split decision, but I don't know who the other judges were.

CF: I think it was you and Sprecher in the majority and Fairchild I think dissented.

LS: I have forgotten, but it was just another case.

CF: It was interesting because, if I recall correctly, you decided it and just knew that that was the right decision in the Irali case, and regardless of how it impacted, one way or the other, it was going to be decided within the four corners of the Irali decision.

LS: And in fact, it's an interesting aspect that the judge who tried John Conley used the precedent, the case that you are talking about, as I recall it, as the precedent to dismiss the indictment against John Conley.

CF: Do you mean to sever the counts or dismiss--?

LS: He dismissed the false declaration.

RS: You said that the en banc vacated. You had decided that it was--.

LS: There ought not to be a double . . . it was prejudicial to the defendant to have substantive and a false statement combined.

CF: That is correct.

RS: That is what you did when the en banc vacated?

CF: But, the reasoning was still good. It doesn't matter what the court did later en banc, the reasoning was still good. In fact, the argument made was to let the petit jurors know that the grand jurors thought that the person

was lying when they denied it is where the real prejudice occurred.

LS: I don't know. You can't be a judge without being criticized. I don't know how much criticism there was, if any. There was some, I suppose. Maybe some--not criticism, but I don't know what you would term it--but anyway, judges can't let that bother them much. They need to stand on their feet and be independent.

CF: I don't think there was any criticism. I mean there was criticism of the decision itself, but not of the fact that it affected the Kerner case. I don't think anybody ever has challenged your integrity, except Owen.

LS: Yes.

CF: And Milton, right. Owen and Milton.

LS: That's right Owen Crumpacker and Milton Margoles.

CF: We should probably point out that the Irali decision that we are talking about came down actually after Judge Kerner's conviction at trial and before his case had been decided on appeal.

RS: Let's talk a little bit about some of the judges who you knew, starting at the time of your being U.S. Attorney, working in the office, coming to Chicago. At that time, Judge Evans was chief judge--senior judge I guess is what they called it at that time.

LS: That's right.

RS: What was your general impression of him. I guess one of the things I am curious about is I had various impressions

of him from people around, from say Mr. Carrick who I think was quite fond of him, but also recognized that Evans was a very austere man and could be intimidating, but was also warm one on one basis, but in court he could be very intimidating. I got a different impression, I think, when--and I may have misinterpreted Judge Campbell--but, I thought when we were talking with him that he was not as kindly disposed to Judge Evans, and I don't know whether that also fit in with an impression that I had that he may have been rather imperious to the district court judges and that may have been part of it. I just wondered whether that makes any sense to you.

LS: Well, I think that is a fair statement. I don't know how he treated other district court judges. He certainly didn't treat me in that fashion. I felt that I could talk with him as a district judge very intimately, and he was very helpful. He gave me, I thought, some very good advice from the start.

RS: I should also add that I have in his correspondences a letter in 42 or so, maybe to Judge Stone (I can't remember) saying that you have just come up for the day and he really thought you were working out quite splendidly.

LS: Stone?

RS: No, he said he was talking about you to Judge Stone saying that he was really quite pleased with your work and that he thought it was a very good appointment. I guess it was

very soon, maybe within the first twelve months after you were on the bench.

LS: He made some--I don't know if you would call them enemies. He and Barnes didn't get along at all. It was very embarrassing at the judicial conferences when just a handful of judges, twenty maybe, and of the district and court of appeals judges, twenty-five at the most. All of them didn't attend. Baltzell didn't attend hardly at all. Barnes usually sat in the back up at 1212 in the conference room, and he would, to put it rather bluntly, sort of bait Evans. Barnes, himself, was a very hard bitten guy in a way, although again, very personable on a one-to-one basis. I never practiced before him, but he was very dictatorial and had kind of a mean disposition, really, from the bench, and of course, Evans had the same kind of disposition in a way on the bench, but there was always sort of a "back-biting" situation at our conferences between him and Barnes for some reason. I don't know what generated it. Evans and Sparks were very close friends. I think he got along well with the other judges too.

RS: From the correspondence and all that, that was my impression.

LS: I certainly had a very fine relationship with him. I remember one of the things he told me. He said, "if I were you--I think judges make a mistake by not giving reasons for their final decisions," and he said it is very

helpful, particularly, if you dismiss a case. You ought to tell them why. Did that rule go through finally?

CF: It looks like it is going to go through. It has gone through the Advisory Committee on the Circuit Rules, and we are just really waiting for the death penalty habeas corpus rules to come back from the Advisory Committee and then all but to go to the Court of Appeals, but I expect it will. I don't see any problem.

LS: In any event, that was one of the things, but many other things. I think maybe I told you that I came to Chicago, and he would keep me for long stretches just visiting with me, relating antidotes and just talking.

CF: Let me just interrupt so that whoever reads this transcript will understand. The rule Judge Swygert is referring to is another one of his innovations, although he is not the chief judge. He is still always trying to help out, and this is a rule that requires that the district judge gives reasons when granting a motion to dismiss or when granting a motion for summary judgment. In other words, anytime that they are finally disposing of a case, they have to give reasons as to why they are doing that.

LS: Many times a complaint, for example,--the defense will have two or three reasons why the complaint is bad, and the judge says, "I dismiss the case." You don't know why. So, then it comes here, and we don't know on what basis the decision was made.

RS: Going back to Judge Evans, I take it there was some feeling when we were talking with Judge Campbell that he may have interferred in bankruptcy appointments. Does that ever--?

LS: I don't know a thing about that.

RS: That may have been the Northern District.

LS: I know nothing about that.

RS: That may have been because of Judge Barnes or whatever.

LS: He certainly never interferred with any of my administrative duties or certainly any decisions. The only thing that I remember is that he came out--he assigned himself sometimes to district three judge cases, so I had a case out in Indiana on a beer distributing statute. I have forgotten who the other judge was--I think two judges on the court of appeals came out, maybe only one. Evans presided, and we voted. I didn't know that I was supposed to go first. That was the first thing that I learned that a junior voices his views--first. I was hoping that I would wait and see how my seniors felt about the case. I got my initiation right there. Evans said, "Well, how do you feel about it." So, I had to lead off, but then I also learned something about three judge cases that if the district judge was in the majority, he wrote the decision. I thought that we were all in agreement. I thought that maybe Judge Evans or somebody else would write the decision, but he said, will you write

this decision? So, I learned fast. Later on I followed his example.

RS: Some people have the impression that the Seventh Circuit was not a very dynamic court before the sixties. I have always tried to argue that the period in the thirties and forties really was a very intellectually active court. You had Judge Treanor who was a law professor and Judge Evans who was quite scholarly.

LS: And certainly Lindley did.

RS: Lindley did. Sparks may have been somewhat conservative, but I think he was very intelligent. I haven't read as many opinions of Judge Kerner, but he seemed to be certainly . . . .

LS: Well, I think Judge Kerner had more of a--I wouldn't say more of a soft personality. He wasn't abrasive at all. I don't know about his opinions, but he certainly was a . . . .