THE CALIFORNIA SUPREME COURT
Historical Society
NEWSLETTER · AUTUMN/WINTER 2006

Chief Justice Phil Gibson and the justices of the California Supreme Court in 1963, just before Gibson's retirement.
Seated, left to right: Roger J. Traynor, Phil Gibson, and B. Rey Schauer.
Standing, left to right: Mathew O. Tobriner, Marshall F. McComb, Raymond E. Peters and Paul Peek.

An Interview with Phil Gibson

BY EDWARD L. LASCHER

EDITOR'S NOTE: AT THE HEIGHT OF THEIR CAREERS, CHIEF JUSTICE PHIL GIBSON AND LAWYER-COLUMNIST ED LASCHER OF THE *STATE BAR JOURNAL* WERE THE DOMINANT VOICES OF THEIR TIME. HERE WE ARE DELIGHTED TO SHARE A NEVER-BEFORE PUBLISHED INTERVIEW OF THE CHIEF JUSTICE BY LASCHER IN 1963, PROVIDED COURTESY OF WENDY C. LASCHER OF LASCHER & LASCHER IN VENTURA.

During his introduction to the second edition of his much-noted *California Courts and Judges Handbook,* lawyer-author Kenneth James Arnolds observed:

"Among the giants who loom large in recent history is a remarkable man who spent a quarter of a century on the California Supreme Court — 24 years as chief justice. Judicial reform was his personal crusade. He was the driving force of the court reorganization program. He fathered pre-trial procedure and non-publication of judicial opinions. He regenerated the Judicial Council and improved the administration of justice in countless ways. His long and fervent advocacy of penal reform is hopefully nearing fruition. Judged by his accomplishments, he must be 208 years old; judged by his vigor, Phil S. Gibson may outlive us all."

True words, indeed, about the man who personified the title: "The Chief." In view of current interest in judicial reform, particularly at the level where Chief Justice Gibson's impact was most immediately felt, the *State Bar Journal* sought his views on some aspects of the contemporary appellate scene.

The Chief's response to our request for an interview was negative, for a characteristic reason: "Nobody wants to hear what I've got to say; talk to those who are on the scene." Perhaps the *Journal* never convinced him, but we did wear down his resistance, and our interviewer spent as delightful a

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PENDING AND IMPENDING ISSUES

A look at the court's docket and beyond suggests other interesting issues that may well produce decisions of interest to courts of other states. On docket presently are, among other issues, whether the proprietor of a mobile home park can be required to provide security guards or take other security measures to prevent gang-related violence on the premises (*Castaneda v. Olsher,* S138104); whether a physician has a constitutional right to refuse on religious grounds to perform a medical procedure (in vitro fertilization) for a patient because of the patient's sexual orientation (*North Coast Women's Care Med. v. Superior Ct.,* S142892); whether federal law preempts and precludes a state from prohibiting importation and trade of wildlife that has been delisted under the federal Endangered Species Act and thus is not currently regulated by federal law (*Viva! Intl. Voice for Animals v. Adidas,* S140064); whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable (*Gentry v. Superior Ct.,* S141502); and whether an inventor is entitled only to contract damages (and not tort damages, including punitive damages) following another's breach of an arrangement to develop or commercially exploit an invention (*City of Hope National Med. Center v. Genentech,* S129463).

Other issues and themes on the horizon for the California Supreme Court and other state high courts (in addition to the obvious one of same-sex marriage) include: use of eminent domain and zoning for social goals; mandatory identity card/ security issues; drug and related testing of student and professional athletes; jurisdictional issues relating to suits against Internet sites and service providers; liability of Internet sites for defamation and other torts; animal rights; cloning and biotech issues; use of genetic predisposition information as evidence in civil and criminal trials; and legal problems related to immigration and changing demographics.

CONCLUSION

Over several decades, many decisions of the California Supreme Court have been followed by the appellate courts of other states. That trend continues today, and will continue in the near future. At the same time, a number of other states, most notably Washington, have produced similar cases of importance to other jurisdictions. A full review of the complete data that we have collected would be interesting and useful. Specifically, we would like to see a more focused analysis of trends over decades and within other states, and whether the types of cases that have been followed differ significantly from one state to another. We hope that such studies will be undertaken in the near future, using our data or similar data.

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mid-day as one is likely to encounter, chatting with The Chief and the vivacious Mrs. Gibson (herself a lawyer) in their lovely Carmel home. It provided a heady brew of good company, good conversation, pointed insight, vintage anecdote and fine Champagne — all of it too much for the recollective and reportorial capacities of an awed lawyer. The *Journal* must therefore, apologize for the shortcomings of its recounting of the provocative and evocative conversation.

CHIEF: Well, it certainly is an important subject you're working on, something I'm glad to see people thinking about. It takes real talent and effort to do a good job of handling an appeal.

JOURNAL: I think there are a lot of us who think that if you're a good trial lawyer, you're automatically going to be a good appellate lawyer.

CHIEF: No, that's not true. You take Jerry Giesler, for example. He was one of the best trial lawyers I ever knew, specialized in criminal practice and studied the whole law, but he wasn't an outstanding appellate lawyer. He didn't present his points on appeal nearly as well as he did in trial practice.

One of the best appellate lawyers in my experience, in the criminal field, was a deputy attorney general in Los Angeles some years ago. He was particularly good in oral argument. He never tried to kid the court; he laid it right on the line. If the case was against him, he said so; if he thought it could be distinguished, he tried to distinguish it, and if he didn't do that, he said it should be overruled because it was wrong — and he told us why. He never tried to fool the court by presenting a tricky argument and the court appreciated it. Time after time, I remember the members of the court leaving the bench after an argument and complimenting that man.

JOURNAL: That reminds me of one of the things I wanted to ask you about. There's been a lot of talk and writing lately about whether we should even have

oral argument on appeals. I wanted to ask you about it — the usefulness of argument.

CHIEF: I think it's important; with some judges it's very important. Of course, it may not be quite as much so as it was at one time because the judges are better prepared at the time of oral argument now than they used to be. The fellow that I think is entitled to as much credit for that as any other man in California is Ray Peters. When he went on the District Court of Appeal, about the same time I went on the Supreme Court, he had two older men for associates, who were both good judges, but after all they had been on the court for some time while Peters had hardly any trial experience at all — he had been working for the Supreme Court as a research attorney. He was well known among lawyers, of course, as being able, but he was completely new to the District Court of Appeal.

Still, he immediately set up what he called a "conference system" which was something entirely new. It required the judges to hold a conference among themselves before oral argument. Before then, sometimes judges went out on the bench without knowing a damn thing about what was in the briefs.

In fact, when I went on the Supreme Court, the situation was much the same on that court. I was shocked at how little some of the members of the court knew about cases before they heard oral argument. So I set up a policy that's still practiced on the Supreme Court. Immediately on acquiring a case, we'd set up a conference and when we were in the conference I would assign the case to a member of the court to prepare what we called the Conference Memorandum on every case that came before our court on petition. So, when we were passing out petitions, we'd have this memorandum prepared by a judge and his staff setting up both sides of the argument in the petition for hearing.

Then, if it was decided at the conference to take the case over, I would assign the case to a judge. They follow a practice on the Supreme Court now which is much better in the long run, of assigning it in rotation, but I assigned it going around the table for a man to prepare the memorandum who had voted to hear the case. Anyway, the judge who was assigned would prepare it and have a memorandum which had to be circulated two weeks before our calendar. That way, every judge, when he went on the bench for oral argument, would have had an opportunity to study this calendar memorandum setting forth the arguments on both sides and sometimes with some original research of his own, or by his staff — quite frequently so, in fact.

When we went on the bench we knew pretty much what the case was about or at least most of us did. Some judges are just more industrious than others, as you know. But, we were pretty well informed, so we could ask questions of attorneys. By and large, we all thought oral arguments were very important. I know I did. I do like for attorneys to disclose all the facts, so I think I had a reputation of making it a little tough at times and, as I look back on it now, I think I was too tough on lawyers — probably scared some of them. If I had it to do over again — and I've told some members of the court this — I think I'd be a little more considerate of the fellow out in front.

At any rate, after the argument we'd go into conference and sometimes the oral arguments would have changed our views, some of us, at least. I don't think it did that very often, but it helped us, some members of the court. I always thought oral argument was useful — valuable — but only when it was well presented.

JOURNAL: There is a view we hear a lot about nowadays, to the effect that the court should only hear oral argument on certain, selected cases. What do you think of that idea?

CHIEF: Well, the problem is that you never know; you never know. I would say that lawyers would be surprised at the number of times judges change their views on the merits of the case before argument, and after for that matter. I've certainly changed my view on important cases, at least sometimes.

I remember times that I had a majority of the court with me — only one or two members raising any questions about the decision — then, the more I started working on the case, the more I became concerned and worried about it. So I'd circulate the memorandum to the members of the court, saying I was doubtful about my position. Then, I remember at least one rather important case where that happened and I got a unanimous opinion exactly *opposite* from what I started on.

So it happens, and I would say there is no reason why they shouldn't have oral argument. How are you going to tell? You can't tell whether — what case is it going to be useful in? It may not affect many cases, but you can't always tell beforehand what your views are going to be or what's going to happen to them.

JOURNAL: Of course, from a lawyer's standpoint, I think most of us feel shortchanged if we don't have oral argument.

CHIEF: Well, I think your clients do too.

JOURNAL: They certainly do.

CHIEF: So I think that's important, too. One thing I always argued with our court was that the public had to be taken into consideration — what their rights were and what they thought about the court. It's important that the people you're deciding cases for feel that they've had the proper amount of attention and work. That's all got to be taken into consideration. The record is for the people and they are entitled to a shot. I think it's rather important in the administration of justice, for everyone to at least feel he had a fair hearing.

JOURNAL: You mentioned lawyers fudging on the facts and misrepresenting them…

CHIEF: Well, not so much misrepresenting them as this: the facts have been determined already when they get to the appellate court, as you well know, but instead of accepting the facts found by the trial court — rightly or wrongly — we're bound by them unless they are just shocking — lawyers (and young lawyers, particularly) want to reargue the facts. One experience I regret was jumping all over a young lawyer who was trying to argue the facts to us. I should have been a little more considerate with him and explained the thing that some inexperienced lawyers don't realize — and that disturbs the court — that the lawyer can't reargue the facts. Unless, of course, he has a case where he says that you have no evidence at all to support the findings or the findings of the court are shocking in view of the evidence. There's nothing wrong with saying that, if it's really there in the case.

JOURNAL: What did you find — as opposed to ignoring the facts or trying to relitigate them — what did you find about the level of preparation of lawyers for oral argument? Was it satisfactory?

CHIEF: Oh, there's some difference. Some of them come in well prepared, are helpful, and impress the court. Time after time, I've heard judges say, as we've left the bench, "That was an argument; that was a job well done." Well now, that judge is influenced by that good argument; he's going to think some more. He may have been a little on the other side of the fence, but after a good argument he may want to have some second thought he didn't have before.

You know, most judges in all my experience on our court — and I've served with a lot of them (every judge that held a seat on that court when I became a member was dead when I left, so there was a turnover) — while they differed, all of them I served with tried to do a good job, tried to be objective.

You take a fellow like Jesse Carter, who was an excellent lawyer. Carter had his mind made up on so many damn things, it was awfully hard for him to change, but Carter certainly just *wanted* to be objective — he just was such a man of beliefs. I once told a meeting of chief justices from all over the country who were there in San Francisco that I sat with Jesse Carter, who was probably one of the most distinguished *advocates* on any bench anywhere in the United States. He was an advocate all the time he was on the bench, but he was *able*. You know, a lot of the things he advocated then are the law today, including things he wrote in his dissenting opinions. We were good friends; we went on the court at the same time.

He used to say that he was the only member of the court who had been judicially determined to be qualified. Once before that they had an argument over a very able lawyer from Marysville, a state senator, who almost got an appointment to the court, but then somebody raised the question whether he was qualified because he couldn't hold another elective office — while he was a senator, he couldn't be a justice of the Supreme Court since that was an elected position. The old gentleman, Chief Justice Waste, didn't think he could, so that man didn't get the appointment. And they raised the same question with Carter, because he was a state senator, but the court held he was qualified for appointment. So he used to say he had a judgment saying he was fit for the court and the rest of us didn't.

JOURNAL: That brings up another area of considerable concern or controversy around the appellate world, I guess: the selection or, in particular, the confirmation of judges of the Supreme Court and the Courts of Appeal.

CHIEF: Well, I guess I happen to know more about that than any other man in California. A lot of the information that's going around isn't authentic. They say that Radin was the only man ever turned down for a court appointment; it isn't true. The others they just never knew about. Governors withdrew appointments, or learned in advance that the appointment might not be confirmed, so they never even made the appointment.

For example, I remember one judge who was appointed to the Superior Court in Los Angeles County and did fine, but when there was talk about raising him to the District Court of Appeal, the Attorney General and another member of the commission came to see me and they said that they didn't want to hurt the young man, but he had been connected with somebody who was in danger of winding up making license plates in the penitentiary, so it looked like there might be two votes against him if the appointment were made. So the Governor withdrew the name and somebody else was appointed at the time. The judge went on to a long, fine career where he was.

There were two or three other occasions when men were proposed but not actually presented to the commission and the commission was doubtful, and there were a number of challenges and votes against appointments after they were made public. I know of one man who got a vote against him for the District Court of Appeal and he later went on the Supreme Court and had an outstanding record. Then there were several bad appointments, too.

There's a lot of talk now about the qualifications commission, the part of the old commission they named the Commission on Judicial Appointments. There's talk about enlarging that commission. Well, very soon after I became chief justice, I talked to members of the Board

of Governors of the State Bar about getting the State Bar into the Constitution, getting it statutory status. I thought it should be in the Constitution and I appeared in a meeting in San Francisco and urged them to get behind that, but they were afraid that if the State Bar presented that issue to the people and got turned down, the bar would lose prestige. I didn't think so, but they waited and eventually it was tied in with other constitutional provisions and got passed without any problems.

But what I proposed was a broadening of the membership of the qualifications commission. One fellow I talked to was O. D. Hamlin, who was president of the State Bar. You know Hamlin?

JOURNAL: The judge of the 9th Circuit now?

CHIEF: Yes, Hamlin was then bar president. He was from Oakland and I arranged a lunch with Homer Spence, who was very close to him, and urged his help in broadening of the base of the Commission on Judicial Appointments. I think I talked about it to him and other bar governors and people in state government for 10 to 12 years, urging that idea until finally we divided the old commission into two: the one on judicial appointments and a Commission on Judicial Qualifications. The one on judicial qualifications had the broadened bases that I recommended and they're doing some fine things now.

They should do a lot the same with the Commission on Judicial Appointments and it should be divided into regional bases. That is, not all of the appointments should come before the same commission with all the same members. If the Court of Appeal appointments are for the Los Angeles district, you should have a different commission than for a Court of Appeal appointment for San Francisco, for example. After all, they've got the interest and the information. I think the same fellow should be at the top all the time, the Chief Justice, and maybe certain other members should be on all the commissions.

We made that kind of proposal to the Legislature so long ago I've forgotten and they turned us down. One problem was we never got a hell of a lot of support out of the State Bar. Two fellows who always supported it were Herman Selvin and the other was, he was president of the State Bar when Selvin was on the board, Joe Ball from Long Beach. They were for it. I made a speech here in Monterey during the meeting of California bar executives and they were both present and really helped a lot on it, but still nothing came out of it.

I suppose some of the problem goes back to around the time when we got the State Bar into the Constitution. There was a lot of opposition then, probably because, you see, when I became Chief Justice, the Chief Justice absolutely ran the Judicial Council. He appointed all the members and he was it. And I didn't like that. I thought there should be changes. Of course, I thought the council should have more authority; I wanted to make rules. As you know, the courts had lost the rule-making power before that — had given it back to the legislature — and I wanted to get back into the rule-making business. As a matter of fact, that was the first speech I made after I became Chief Justice.

Broadening the base of the Judicial Council and getting members of the legislature and lawyers into it was one of the healthiest things that we ever had, and it was important to making the Judicial Council into what it's become. It couldn't do the things it does without the membership. The same thing should happen when it comes to judicial appointments. You could stop all of the agitation that's going on now — that happened over some of these appointments — if you had a broader base and more representation on the Commission on Judicial Appointments, give it the power to get some things done, too.

You shouldn't have to depend on pleasant surprises — although I've had a lot of them in my lifetime — with appointments. Maybe I gave a few surprises, too. I remember one time, just after I was appointed as an associate justice, two fellows in San Francisco took me out to dinner because my family was still packing up in Beverly Hills and I was living in a hotel. Two San Francisco judges that I had tried cases before wanted to make me feel a little comfortable in the city and they took me out to dinner in a place called John's Rendezvous. John had been in my outfit in France; he was a cook when I was a second lieutenant, both of us at the front, and by this time he had a good restaurant there in San Francisco. He put on quite a dinner for us. I guess he was proud that one of his old comrades had made good, or something of the sort, and so he really treated us. Anyway, after that we walked into the Bohemian Club and in the lobby we ran into a lawyer who had a great reputation around San Francisco, quite a guy. He said to one of the judges I was with: "I see where the Governor has just appointed a damn Communist onto the Supreme Court." And Dick Allen said: "Yes, I'll introduce you to him; here he is." That's OK, the lawyer and I got to be pretty good friends later on; he was an Irishman and he found out I was a little Irish. Anyway, people get surprised on appointments that aren't always so popular.

JOURNAL: I don't know that I'd want this printed, but I think there were some lawyers who were a little uneasy about the present Chief Justice, but they all think he's turning out to be a great surprise.

CHIEF: Wright? Well, he was popular with me! When he was on the municipal court in Pasadena I assigned him to the Superior Court because of the recommendation of some of the judges in the area. I put him in

a spot that he didn't like very much, too; not in Pasadena, but he had to travel clear across the county to San Fernando. He did a good job. And I know what kind of a job he did on the Superior Court, later. He wasn't the kind that always was popular with all of his fellows, but he was a good man who got things done, and after people got to know him he had plenty of friends among his associates, from what I hear. He's a good Chief Justice, doing a good job, an excellent job.

JOURNAL: He's become a great favorite among the lawyers of the state in very short order.

CHIEF: Well he's doing a good job. I thought he would when he was appointed, and I was very happy — I've been enthusiastic about him. Now, the fellow I was concerned about was probably my closest associate, Roger Traynor, because Traynor didn't like that kind of work. He was bored to death with a lot of the jobs the Chief Justice has to do which are not very much fun, not very exciting, and there's hours and hours of labor that don't get you anywhere much. Traynor would rather spend that time writing opinions — and there's never been anybody better than Traynor at that. What an able man! There certainly were able men on the court when I sat on it.

All the difference is, is that they're different jobs. In the first place, a Chief Justice has to run his court; he's got to have them happy. He's got to sit down around a conference table and be able to discuss the case objectively. The Chief Justice is the fellow who's got to walk up and down the hall and get the fellows to work together. You take this: There never were two men farther apart on any court in their personalities and attitudes than Traynor and Carter. They were just as far apart as night from day, and yet I had to get them to work together. The funny thing is, they were both so-called "liberals", and they were both real friends of mine, but they worked so differently. That's the kind of thing the chief has to work on. Of course, it helps to have men like those two and the others; they really gave me 100 percent support. Even when they're individualists.

I think it's become real clear to a lot of people, even the Chief Justice of the United States — very clear — there's so much else you have to do. The Chief Justice may not be as able as some of the other members of the court, but that doesn't really make any difference. He's got to give leadership and be able to get the most out of his court — whether he is all that able himself or not. That's absolutely essential. And it's a lot different job.

JOURNAL: To change the subject a bit, something just reminded me. What do you think about publishing opinions?

CHIEF: Well, I think they should be cutting down on the length on the opinions. A lot of the opinions are way too long, but I think the Supreme Court should publish an opinion in each case. A cut-down on all that length would be helpful, but that's a personal thing for the judge.

JOURNAL: You know, they're still writing opinions at the Court of Appeal level on every case, but they're only publishing 30 percent of them.

CHIEF: Well, they shouldn't have to publish them. Thirty percent of them published is all right, but five percent would be better. Actually, they shouldn't have to write so many opinions.

JOURNAL: Would you like to see them go to memorandum opinions?

CHIEF: Yes, in some cases. You know, there's an awful lot of those criminal cases, particularly, where it isn't necessary; there's nothing to them. A lawyer appeals them because he feels he has to go as far as he can for his client, but a memorandum of opinion should take care of it. Of course, I think we all approve of having opinions, in publishing them, when they are true law.

JOURNAL: Coming back to the subject of selection and so on, and some of the things you said a few years ago about the merit plan that was around then. You remember that stir?

CHIEF: Yes, they got pretty upset with me when I said I thought they should stay with the California system.

JOURNAL: There's some talk about it right now — talk about just adopting it for the Court of Appeal.

CHIEF: Oh, I think they should go all up and down the line, but using the California system. I've advocated it for years, at least 35 or 40 years. The selection of judges under the California system is much better than the one proposed by the State Bar, which I didn't think would work. I thought that proposal of the State Bar was taking the responsibility away from the governor and putting it nowhere. Under the traditional system in this country, there should be an executive appointment with a check on it and the check should be the Commission on Judicial Appointments — broadened and properly prepared. I argued that for years.

When they had that proposal to change the system a few years ago, I was advocating a broader base on the Commission and the fellow who was the president of the State Bar — who was it?

JOURNAL: John Finger?

CHIEF: Yes. He thought I had changed my mind and was kind of unhappy with me. I just told them off the cuff, but really it was what I always advocated, and that is: Let's stay with the California system and make it work.

JOURNAL: To put a blunt question, do you think it works with the commission the way it is now?

CHIEF: Well, it works fairly well, but not nearly as well as it should, without broadening the basis of the qualifications commission.

JOURNAL: What do you think of the idea of Senate confirmation as an alternative?

CHIEF: I'm absolutely opposed to it. I've had too much experience with it, and it is not good. Senate confirmation is throwing it right into the political heap. That's just not good. The best thing to do would be to stay with the California system, but improve it, broaden the base of the commission, give it a chance to do the job. That's the best thing they can do on judicial selection in California. That's been my opinion for over 40 years now — and it still is.

JOURNAL: Well, that's a pretty solid answer.

CHIEF: What you've got to do, besides changing the membership of the commission and having different commissions for appointments in the different areas, is give the commission a budget and a staff. The way it's been done, with some phone calls and private talks, doesn't work — and it isn't right, it isn't what the public is entitled to. There should be a staff that works, something like the staff of the Commission on Judicial Qualifications which deals with complaints against judges. The staff should get information on people who might be up for confirmation, or the Chief Justice or the Commission should be able to ask them to go out and gather information. The State Bar helps a lot when it's asked, but it doesn't really have the skill or time or ability to do that, or to keep consistent records or all the things you need if you're going to investigate something decently and make a sensible decision. You need, first, a commission with more people on it and the legislature and the lawyers represented, and, second, a place that can get its information and somebody it can send out to gather information. Then you get an intelligent decision on confirmation.

JOURNAL: May I switch to a different subject? I mentioned to you on the phone that I wanted to ask you for your view on the proposal to restructure the appellate levels — like the Court of Review.

CHIEF: You mean putting something in between the Supreme Court and the Court of Appeal? Like that national court they're talking about in Washington? Well, Professor Freund's a good friend of mine; a good personal friend, and a great lawyer, has been for a great many years, one of the ablest fellows in the country. But I think he's all wrong. I don't think you need it.

No, what you need — we've got part of it — what you need is a good intermediate appellate court, good Courts of Appeal. Work more on confirming their appointments, get rid of having to write an opinion for publication on every case (like we said) just to take a lot of room on the shelf, and that kind of thing. Give them the help they need, and we've got the courts we need to get the job done.

JOURNAL: One idea along that line I wanted to ask about was this: Many people are talking about the idea of eliminating divisions in the California Court of Appeal — go more to the federal system of one court with a lot of judges and rotating panels.

CHIEF: Well, that idea's got a lot to recommend it — if you have a good presiding justice! Everything depends on that. Just like one of the big Superior Courts, Los Angeles, San Francisco, those; everything depends on a good presiding justice.

I remember one of the bitterest personal attacks I ever had on me was over the proposal that the presiding judges of the Superior Court should be appointed by the Chief Justice. Any man that sat in that job as Chief Justice knows that the only way a Superior Court can operate efficiently is with a good administrator as presiding judge. And the Chief Justice, because of his assignment powers — and his assignment responsibilities — knows how a court operates, how every court in the state operates. He knows that, when there's a good man in the position of presiding judge, he can make his court operate, function more efficiently and more justly too.

Take for example Burke, when he was on the Superior Court, presiding judge in Los Angeles; he did an outstanding job, because he knew how to run a court. A lot of fellows thought he was stepping on toes, but there wasn't a court run like that one at the time. Where you have bad examples in the Superior Court is where the judges elect a presiding judge on a popularity basis or, worse, where they make the senior one presiding judge in turn, the way they do it in so many counties. It just doesn't work. You need someone who's good at that kind of thing, has a knack for it, and that's got nothing to do with how good a judge he is — it's just something different.

So if you have a Court of Appeal with all of the judges lumped together, you'd have to have a fellow at the head who is not just presiding justice by seniority or that kind of thing, but by his administrative ability. What happens otherwise is that the court can get so far behind that it's just not justice.

There was one time that one of the divisions of one of the courts was three and a half years behind and another division of that court only one year behind. If a lawyer won a case in Superior Court and it went up to the District Court of Appeal, as it was then called, if he hit one division he could have the case over with in a year, but if he hit another one he'd be stuck for three years before he had his judgment, and he had no choice about it — and no chance. And the difference was largely because of the men who happened to be

presiding in those two divisions. Of course, we moved in on the picture with Superior Court judges pro tem and cleaned it up within about two years or less. We even transferred cases from one district to another. They'd have to consent to it on both sides, but if lawyers wanted to get their cases over with, that was the only way they could get it done. There was one time, after we'd gotten so far behind, I wound up with six or seven judges on each three-judge division, and we were knocking the back log down fast — had them up to date in less than two years.

So when you talk about throwing the Court of Appeal judges all together, instead of in a division, it would be a good idea if you let the Chief Justice designate the presiding justice of that whole court. He'd do it on the basis of which one could be the best administrator.

JOURNAL: The one thing we've heard against the whole idea — and I understand it's actually something that this Judicial Council has hinted it might be in favor of — is the idea that the Presiding Justice, by hand-picking the panel, could pretty well predetermine the outcome of the case.

CHIEF: Oh, I suppose it's possible that you might get a bad Chief Justice someday, and that he'd put in a bad presiding justice, but I just don't think that's a real danger. The chief has a staff of his own and they know what's going on, and they all want to make their courts work. I think very few of them would play any kind of personal politics, none that I've ever known. I never did, and Traynor never did and I can't imagine Wright ever doing that.

The crucial thing is picking the presiding justice, but I don't think stacking a panel to decide a case is very likely; I don't think it would work. My father, who was a lawyer, told me you could never be sure who a woman would marry or what a judge would decide — and now, I guess there's something to that. Even just trying to figure out in advance people like Carter who had a slant, a really strong philosophy, but in many cases he surprised me.

They're all men of strong opinions, of course, or they wouldn't be there, but when judges get on the appellate court they surprise you with their independence and they surely try to be objective.

You take the United States Supreme Court, of course you know something about the attitudes of Brennan and Douglas and Marshall, because of the cases they participated in over the past, but there are two or three others you never can tell about. And you can never tell about any of them all of the time. When you've got a good court — like our present Supreme Court in San Francisco, we've got a good court there — nobody can tell in advance what any one judge is going to do on any one case. It depends on the record, the issues, the precedents, too many things, No, you can't worry too much about that.

One thing people don't realize is what hard work it is. Being on the appellate court, especially the Supreme Court, that's a full time job. This is one of the few courts in this country, you know, that is in session all the year round. I took one vacation, myself, and I was on the court 25 years or a little over. Most of the others were the same way. For instance, Shenk; he'd take a couple of weeks up in the country most years, but he always took his briefcase and cases right along with him. He used to call me up at home at night about the cases, too. Mentioning Shenk reminds me, sometimes we'd call him "the greatest distinguisher" because he hated to overrule a case; he'd distinguish it and distinguish it. Of course, a lot of the time we'd all go along with him if he came up with the right result in the end.

Another man you didn't hear much about but while I served with him was one of the ablest men on the Court, was Houser. A very able man, and the amazing thing is that he was sick — he had migraine headaches. How he suffered! He told me that he'd walk for miles and miles just trying to get hold of himself when he'd have that kind of headache, and yet the work he did, he was an able judge. We sure did have a lot of able judges that I served with, and a lot of able lawyers that I saw trying cases — that I tried cases with and against, too, for that matter.

I remember one fellow who used to try a lot of cases in Los Angeles, and he had this one against Bill Gilbert, the great trial man, a jury case. Anyway, all through the trial he kept referring to Gilbert as "Uncle Will;" every time he'd have some reason to mention him or turn to him, he'd call him "Uncle Will." And when Gilbert got up to make his argument to the jury he said: "You know, I had a brother who came up to this country many years ago," and he said, "He never married, but the rumor was that he had a son — and, by God, I finally found out who he is!"

Say, how about a glass of wine or something now?

JOURNAL: It would be a pleasure.

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And it was. A pleasure and an honor.

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