THE HISTORICAL SOCIETY OF THE
TENTH JUDICIAL CIRCUIT

ORAL HISTORY
OF THE
HONORABLE JOHN L. KANE
United States District Judge, District of Colorado

Interviewed by Harold A. Haddon
May 19 – May 22, 2019

Table of Contents

Chapters

Photographs

May 19, 2019 Interview of U.S. District Judge John L. Kane

CHAPTER ONE - EARLY YEARS THROUGH HIGH SCHOOL

Hal Haddon: Good morning Judge Kane.

Judge Kane: Good morning.

Hal Haddon: The voice that you hear behind the camera is Hal Haddon. My name is Hal Haddon and I am here this morning with the Honorable John L Kane Jr., who is a senior United States District Court Judge for the District of Colorado, if I got all that title right.

Judge Kane: Senior and junior in the right order, you got that.

Hal Haddon: Judge Kane has been kind enough to sit for an oral history interview with the Tenth Circuit Historical Society, which is doing these histories for a number of the distinguished jurists for the Circuit and so we're very honored that you've agreed to do this.

Judge Kane: I am flattered.

Hal Haddon: Let's get started if you're ready.

Male Speaker: Sure.

Hal Haddon: And I'm going to go chronologically. Could you tell us when and where you were born?

Judge Kane: Yes. I was born on February 14, 1937 in Tucumcari, New Mexico and I hasten to point out I was conceived in Denver, so--

Hal Haddon: Do you have a recollection of that?

Judge Kane: I don't have a recollection of that, but my sister and mother were both born in Denver. My father was born in Bloomington, Indiana and

came out here when he was about three. So the family has been in the Denver area except for the two-year period of time that we were in Tucumcari during the Depression.

Hal Haddon: Is your immediate family a mother and father and one sister?

Judge Kane: Yes.

Hal Haddon: Tell us about your mother and your father.

Judge Kane: Okay. My father was the grandson of a Civil War veteran--Irish immigrant, and his father was raised in an orphanage in Anderson, Indiana for the orphans of Union soldiers. He had his brothers and sister there and at that orphanage my grandfather learned a trade. That's what they did with these orphans; they went there and they learned trades. He had a brother who was a tinsmith, another brother was a plumber, another was a pattern maker and he was a nursery man.

When my grandfather was old enough to leave the orphanage, he was hired by the University of Indiana in Bloomington, Indiana. He was there working in the nursery, the botanical laboratory. My dad was one of seven sons and one daughter and my grandfather was one of seven sons. The Irish have a superstition that that's some magical thing to be the seventh son of the seventh son. But anyway my grandfather got another position in Vermejo Park, New Mexico, which is right across the line from Trinidad, Colorado.

He moved his family to Trinidad and he had more children there and then they moved from Trinidad to Denver. My dad was born in 1910, so the move to Denver was right before the United States went into World War I in 1917. He lived here and he went to school here. The family did not have a lot of money. He sold newspapers, he worked in drug stores, and he became an apprentice pharmacist.

Then, he went to Pharmacy College in Denver at a school called the Capitol College of Pharmacy. He had a very famous classmate, Hubert Horatio Humphrey. My dad worked as a pharmacist during the Depression. My mother had my sister who is three and a half years older than me. Dad received a job offer in Tucumcari, which was an incredible offer at that time. I think he was earning in Denver $15 a week, working six-and-a-half days a week. He went down to Tucumcari where he earned $30 a week and only had to work six days a week. So he did that. My mother did not like Tucumcari, New Mexico. She wanted to be closer to her family, so they moved back here.

My dad had some kind of dispute with the woman who owned the store where he worked. Her husband had been a pharmacist and died. She couldn't manage the drugstore. She had to have a licensed pharmacist as manager. So she hired my dad, but then she wanted to tell him what to do all the time, so he quit and came back here.

My dad enlisted in the Navy in 1942. He was 32 years old and didn't have to go. He was married and had two children, but he enlisted and he spent the duration of the war in the Navy. He was in the medical corps as a pharmacist and he was first assigned to the Marines and then he was wounded slightly and was transferred to a ship. It was a tanker that carried aviation gas. He was the only person on this tanker who was a medical person, so he was the ship's doctor even though he wasn't a doctor. He spent the rest of the war--it was at Okinawa, Iwo Jima, and Tarawa--on this tanker.

When he was with the Marines, he had been very slightly wounded and I think it's an illustration of his character that his commanding officer tried to give him a Purple Heart, but he refused it. He was wounded by a piece of shrapnel and he said, "The Purple Heart is for people that are injured. I wasn't that seriously injured," and he just wouldn't accept it. He thought it was demeaning to the medal to do that.

He finished World War II. His rank at that point was Chief Petty Officer and rather than discharge him, he was assigned to accompany sailors who would receive their discharge but had to be discharged at the location where they had gone overseas. A lot of them were--the ships would come into San Diego and then he would take train loads of sailors to Texas where they had originally embarked and then he

would come back with another load of sailors to San Diego where they were being discharged.

He did that for about six months after the war and that didn't please my mother. When he came back they didn't live together; they separated. They were separated during the war and they never reunited. After about a year of living separately, they divorced. We were a Catholic family and that was, in those days, catastrophic. It was scandalous in the Catholic community to divorce, but they did.

Then, he worked for the AFL-CIO organizing the pharmacists and retail clerks. Then he opened up a firecracker stand for the 4th of July, with another Navy buddy of his. Firecrackers were legal then in Colorado and his firecracker stand was right near Cherry Creek on Colorado Boulevard. He opened this firecracker stand and tripled his money.

He stayed there, slept in this little wooden shack that they had built. Then he went out to the Rocky Mountain Arsenal. The Army was closing it down and selling surplus material. My dad bought a barracks building and the Army trucked it from the arsenal two miles down to the railroad tracks at a place called Derby. It's now encapsulated by Commerce City, but in those days it was a community with a railroad station, a roller rink and a lumber yard. Dad put that store in. He slept

in the back of the store and ran it and turned it into a very profitable business.

He eventually owned three drugstores. He would take a pharmacist and have him manage one of his stores and they would treat it as a 50-50 ownership until the amount that was owed was paid off and when my father's interest was paid, the other person would own the store. He did that three times. In the process he became very well-known in his community. When Colorado created a new state representative district in Adams County, he was elected, literally by acclamation. There were very few Republicans in Adams County in those days and so he was elected without opposition. He served for 10 years. For a number of years he was Chairman of the Health and Welfare Committee and a member of the Joint Budget Committee.

He was also on the Thornton City Council, the Tri-County Health Board and the Adams County Mental Health Board. When he was serving on the Joint Budget Committee, it was literally a job for 12 months out of the year. He did that until the corner drugstore went the way of the dinosaur and doctors started having medical buildings with their own pharmacies in them and then supermarkets started including pharmacies, and he went out of business.

But again go back to--like the Purple Heart issue. His lawyer advised him to take bankruptcy, because the corner drugstores just weren't

doing any good. He refused and went back to his drugstore until he paid all his bills. Then he was broke and he was out of the legislature. He got a real estate license and became a real estate salesman and a part-time pharmacist for some other druggist he knew. He did that until he died at age 79. He had a brain tumor--the same kind that Teddy Kennedy had, and he died in 1979.

Hal Haddon: What path did your mother take?

Judge Kane: My mother is a totally different story. My mother grew up in Denver in a very large family. She was the youngest daughter. She had one brother who was younger. At the time she was born, there was a diphtheria epidemic and her mother, sisters and brothers were quarantined in this small house. Her father had to go and get groceries and leave them on the porch because he couldn't enter the house. So my mother was born in that house with her older sister assisting her mother in the delivery. Then the sister next to her in age died of diphtheria and so, as was the custom then, my mother--that sister's name was Helen and her parents named my mother Dorothy Helen to honor the recently deceased sister.

My mom grew up in Denver. Her father was an interesting fellow who was very, very talented. He was a musician. He made a lot of money in Reading, Pennsylvania in the real estate business but there was a depression or a panic in 1893 and he got wiped out. And so he first went to Detroit with the Detroit Symphony, and then to Galveston

Texas just in time for the Galveston flood. A lot of the wealthy Texans said they needed musicians in Colorado Springs for their summer enjoyment, so he went to Colorado Springs and conducted an orchestra there. When the season was over there wasn't anything to do except come to Denver. So he did and he worked as a musician. He was ambidextrous and he would also work as a scrivener for law firms drafting pen and ink deeds and he could do two of them at the same time. He used to work for some of the law firms that are in Denver today. He drafted these beautiful copperplate handwritten documents.

Then he taught music and played in the orchestra pit at the Orpheum Theater. He also was with the Denver Symphony and the Colorado Municipal Band. He had a very famous student who went to East High School by the name of Paul Whiteman, who in the twenties was dubbed the Jazz King.

My mother was from a Catholic family. Her mother was Irish and her father was Austrian. She went to Cathedral Grade School and High School and she never got anything less than an A in any subject she took. She received a scholarship to Columbia, but her mother wouldn't let her accept it because she said that it was inappropriate for a young lady to travel alone across country on the train. So she had to decline that scholarship and went to Loretta Heights College, which was a Catholic women's college in Denver. She majored in Mathematics and

minored in Latin and French. When she got out of college, she applied for jobs and she couldn't get one. A business friend of her father's went to him and said Dorothy is not going to get a job. There are only certain things women can do. This would have been 1927. He said they can become nuns or nurses or clerks or teachers or housewives and that was what was available for them. So he said if she wants a job, she can't tell people she went to college.

That did not sit well with my mother, but she lied on her application. She went to work for the Great Western Sugar Company originally. The company took these young women along the railroad line from Denver into Nebraska, to these small towns where the Great Western Sugar Company had beet dumps. The farmers were raising sugar beets and would come to the dumps with their wagons. The wagons would be weighed with the sugar beets and then they would dump the sugar beets. Then the sugar content was tested and that's how they were paid. Those calculations had to be done by somebody. My mother did those.

These young ladies had to be housed. At each one of these towns along the railroad, Great Western owned a house and there was a chaperone. The young women had to stay in the house. They couldn't go out--except on Sundays to go to church and on Saturday afternoons as long as there were at least two of them to go out together. The interesting thing is that the company sent most of their wages to their parents and

they had just a little bit of spending money to go see a movie or something. My mother did that and then after the campaign Great Western asked her to stay on. She stayed until she married my dad and had a baby and then she went to New Mexico as I've said and came back to Denver. When my father went in the Navy in 1942, she went to work for the Colorado and Southern Railroad. She started as a payroll clerk. She worked there until retirement. This played a role in my life later.

At the end of the war, IBM had these key punch cards. It was the beginning of the computer age and people would key punch these cards so that the IBM machine could compute. Well they needed programs and they had to figure out how to do this. The Colorado and Southern Railway was owned by what later became the Burlington Northern--it was Chicago, Burlington and Quincy and the Great Northern Railroad--they merged, but the Colorado and Southern was used as a pilot program for this IBM key punch project to their accounting. The treasurer of the Colorado and Southern went to my mother and said we want you to do this. She did, but he took the credit for it. You know the old curse; may your fondest wish be granted. The railroad in Chicago thought he did such a splendid job they promoted him and moved him to Chicago. He didn't know a damned thing about how to do this so he didn't last there very long, but he had begged my mother to go along with him and she wouldn't.

Then the offices gave her a cash bonus. I don't know how much it was, but this is the early--in the late '40s or early '50s. I think the late '40s, but they offered her a cash bonus and she asked, "Why don't you just pay me? Raise my pay. I'm doing the work anyway." They said, "Well then you'd earn as much as a man; we can't do that." That episode played later with me in a case I had. I'll tell you about it in a little bit. She worked there until her retirement. She figured out all these complex things about how much energy and fuel it takes to take an empty train up to Wyoming and how much a full train full of coal uses back down to Dallas, Texas, about where the crews had to stop and the regulations that affect where people can work and for how long and so forth and how much it costs. She did all that kind of work until she retired.

After my parents divorced well, let me back up, when my dad went into the service my mother and sister and I moved in with my grandmother into a house with three bachelor uncles, two aunts, three cousins all living there. There was a housing shortage in the War. My mother was working, my sister and I were pretty much raised by my grandmother and uncles. We went to Catholic schools and then when the divorce hit we became pariahs. My mother moved out to South Denver with my sister and me and then a few years later she remarried.

She and my stepfather lived there until he died in the house that my mother had originally purchased.

I went to Byers Junior High and South High School. That's where I lived with them when I was at that age.

Hal Haddon: When your parents were separated how did they share custody?

Judge Kane: My mother had custody and my dad had visitation. I used to take the bus from near DU to 46th and York. Derby was 2.5 miles away and I would walk there to the drugstore. Then in the summertime I started working when I was very, very young. By the time I was 10, I was working there cleaning out the drugstore, working as a soda jerk. I also worked for some greyhound kennels, cleaning out the greyhound pens and so forth.

Hal Haddon: And so, when you would have visitations with your father it would be working visitations?

Judge Kane: That's right, and I still don't get very excited about holidays. I spent a lot of Christmas afternoons at that store. One of things he would do--which I admire greatly--is he would open his drugstore on Christmas Day, his employees did not have to work. He was such a union man that he required all of his employees to join the union, so I did when I was like 12. My dad paid the dues for everybody. On Christmas Day and Easter Sunday as well, he would go to his drugstore. There were emergency prescriptions and so on. He would fill the prescriptions and then in the afternoon he delivered them. We'd get into his DeSoto and

drive out into the countryside and deliver these medications. Frequently, the customer didn't have any money and he would tell them pay when you can and they would. It was a different world.

Hal Haddon: You described your early life as somewhat of an outsider.

Judge Kane: Yes.

Hal Haddon: You are left-handed, you're younger than most of your classmates, can you tell us little bit about that, and how it affected your attitude towards life?

Judge Kane: When World War II started, and my mother was going to work, I was a year younger than I should have been to start 1st grade, but she put me in so that she could go to work. By then I could already read and that's what the first graders were doing, so I was promoted half a grade, a semester up from 1A to 1B which made me a year and half younger than my classmates. You're right, if you're left-handed, everything is built backwards, the writing desks and toothbrushes and everything else is backwards. In those days there was great effort to try and change you to make you right-handed and it failed miserably, but I suffered the slings and arrows of outrageous fortune because of that. I also was an outsider, I was younger and I was also precocious. In the schools I attended special ed for children with learning disabilities or gifted children did not exist. We were all in the same row or in a separate classroom and that's where I went.

I'd spent the first six years in Catholic schools trying to figure out why I was different. It had its effects. It made me definitely feel like an outsider. Then I went to public junior high school and that was a real surprise to me. Among other things they were teaching seventh graders in the public school subjects we had learned in the third or fourth grade in the Catholic schools and so it was very boring. I'm sure I was a discipline problem and a pain in the butt to the teachers.

I had one teacher I really liked in junior high, Mrs. Boyer, and that was about it. I didn't have any problems with her, she had a great way of treating me. I'd get bored and she said what are you thinking about and I'd tell her. The class could be doing something else, but she'd say well let's have a look at it. She'd get a book for me and I would just read and enjoyed it greatly. But being younger, the opportunities for sports and things were not there. I started working very early, set pins in a bowling alley, caddied at a country club, delivered prescriptions for a drugstore in Denver, not my father's, and then as time went on I was old enough to get a job sacking groceries in a Safeway store. By the time I was in a high school, I was working four or five hours a day.

I'd go to school until about 1:00 in the afternoon and then I worked for an insurance company in downtown Denver, photo-stating documents as an office boy, and I worked in a veterinarian's clinic, cleaning out the pens and also giving haircuts to French poodles. I had my own

bank account and bought my own car. I didn't do too much in school other than get out of it as fast as I could until I went to the University of Colorado.

CHAPTER TWO – EARLY LEGAL INFLUENCES

Hal Haddon: When's the first time, prior to going to the University of Colorado, that you developed an interest in being a lawyer?

Judge Kane: It's a sort of a congeries of influences involving that. One thing was when I was just a little kid during the war. On Sundays we'd go to Mass and the monsignor was a real authoritarian kind of guy. People were visibly intimidated by him. They would come to Mass and everyone would bow their heads to this monsignor. We'd all sit down and after everybody was there this one man would come in. He had long white lion-esque hair, black suit with a black string tie and he'd come right down the middle of the aisle up to the front pew. He'd sit down and then he'd nod his head and then the priest would start. At the end of the Mass when everybody was walking out, the monsignor would be there at the door and people would again bow towards him. Then this man would be the last to walk out and the priest would bow his head. I noticed that and I said who is that? My mother said that's Judge Walsh! I didn't know anything more about it than that.

Later I learned he was a Denver District Court Judge, but I knew right then I wanted to be a judge someday. That really impressed the hell out of me. Also, on the block where we lived, Walter Appel, who was

a lawyer lived there with his son Bob. They had a firm called Rothgerber & Appel. Later it became Rothgerber Appel & Powers and then through its various transformations became what it is now, Lewis Roca and Rothgerber. Mr. Appel was a lawyer in that block and very much a person that kids were aware of. He had a lot of prestige. He would get off the streetcar with another lawyer named Phil Hornbein and the two of them would walk up the block. They would be arguing all of the time and as they came by the kids, they would pat us on the heads and keep on with their spirited discussions. So that, too, was an influence.

Then when I was in high school I had a psychology teacher I liked a lot. I did very well in his classes. I wrote a term paper on insanity based on "The Human Mind" which was written by Karl Menninger, founder of The Menninger Clinic in Wichita, Kansas. My teacher gave me an "A" and suggested I might be interested in going to law school. "You seem to have an aptitude for this." So I had that in mind when I went to the University of Colorado at Boulder. I wasn't too sure what I wanted to do, but I was attracted to the English Literature Department and the Philosophy Department.

CHAPTER THREE - UNDERGRADUATE SCHOOL – UNIVERSITY OF COLORADO AND MARRIAGE

I think I have mentioned this to you earlier, but it was right after the Korean War and so there were a lot of veterans from the Korean War

who were in school at the same time I was. I was a year-and-a-half younger than my peer group and then these were old guys in their 20s who had come back to school. They had a considerable influence on me and I took some classes they suggested. As I moved to upper division classes, I wanted to go to Graduate School at North Carolina, Chapel Hill, and get a PhD. I thought I wanted to become a drama critic. The professor who had more of an influence on me than any other was my dramatic literature professor.

He said, "You know, there are three people in the United States that earn a living being drama critics, and one of them has a father who owns the paper. A bright boy like you might do well in the law."

That's what finally did it. He is the one that turned on the light bulb in my head and so I went to law school, but that's another story.

Hal Haddon: What was his name?

Judge Kane: Jack Crouch. He was the founder of the Shakespeare Festival there.

Hal Haddon: Did you have to work in college as you did in high school?

Judge Kane: I did. I did. I worked as the house boy in a sorority house. I was a hasher which means waiting tables in another sorority house, and there was a beer joint--very close to campus called Tulagi's and one of the Korean vets I knew, one of my buddies, had the janitorial contract. He hired me and I would go in at night to help, clean up Tulagi's, sweep floors, mop them and so on. Then in the summers, I worked a lot of jobs, worked at a training track for greyhounds, that started at five in

the morning, running the rabbit. I cleaned out kennels and then I worked in the evenings as a groom at Mile High Kennel Club. We'd march out the greyhounds and put them in the starting box and then get them after the race.

I finished at 11 at night at the dog track. Then one summer, I hurt my knee and I had surgery. That spelled out two things for me: one of them was I couldn't work at the dog track anymore. I got a job as the night auditor at the Teller House Hotel in Central City. When the bars would close at 2:00 a.m., people would have run up a tab. It was before computers and so I would prepare the billings so that when they checked out later that morning their restaurant, bar, and hotel bills would all be there. I had to run up the balances and prepare the final bills. That was a great job. I'd start work at midnight and get off at seven in the morning. All the other college students were eating in a cafeteria that was operated by the hotel, but I couldn't because I wasn't working the same hours, so I ate in the restaurant and I got to meet some very famous people.

I got very well acquainted with Tammy Grimes, who was an actress, and Julie Harris another actress, Leo Ciceri, a well-known Canadian actor and some of the opera singers who were there. I got to know a lot about acting and about the theatre. The other aspect about the knee is that I turned 18 and registered for the draft. I was classified as 1-Y,

which meant that I would not be drafted, except in a national emergency and only then for a non-combatant position. So, I never took a student deferment and I never received a draft notice. I was basically a year too young for Korea and a year too old for Vietnam.

Hal Haddon: So, did you meet your first wife in college, University of Colorado?

Judge Kane: Yes, yes, I did. I was active in the student theatre and they were doing, with Professor Crouch directing, a performance of Romeo and Juliet. I was also on the college fencing team. Professor Crouch asked me to coach and direct the fencing that goes on in Romeo and Juliet. There were also ballroom scenes with medieval dances in it. Professor Crouch had called in the dance group from the Women's Physical Education Department. There was a modern dance group there called Orchesis and my future wife was a member. They came over and that's how I met her. Eventually we married and had four children; three girls and a boy.

Hal Haddon: Did you marry while you were in college?

Judge Kane: We got married way too young, we were 18 or 19 I think.

Hal Haddon: And you were both students at the University of Colorado.

Judge Kane: Yes. I was a year ahead. Her major was in medical technology and so she had to come down to Denver to the medical school for her senior year of labs and so forth to become certified as a medical technologist. We came to Denver and I was still thinking about taking a year off and then going to North Carolina. But I got a job I just absolutely hated as

a bill collector for General Motors Acceptance Corporation. I was given a company car to use. One day in September 1958, I was driving down the street, at Court Place and I saw a bunch of people, some of whom I knew. They were mostly about my age, standing around on the sidewalk and I pulled over and said, "What are you doing here?" One of them said, "We're going to law school."

CHAPTER FOUR - UNIVERSITY OF DENVER COLLEGE OF LAW

Hal Haddon: This is 1958?

Judge Kane: This is 1958, September 1958. My wife was pregnant and going to school and I was working as a bill collector. The guy on the side street who said they were going to law school, was somebody I'd known all my life, gone to grade school and college with and he said, "Why aren't you doing this? You should be doing this." I said, "You're right I should." So I pulled over and went in the admissions office. I hadn't taken the LSATs, I hadn't done anything. There was a woman there. The staff was so small they had an acting dean and this one woman assisting and a secretary.

Hal Haddon: This is the University of Denver, College of Law?

Judge Kane: University of Denver College of Law. The law school dean's office was in the business college facility across the alley. I went in there and I said, "I think I want to go." She said, "Well classes have already started." Then, she asked, "Who are you?" In those days you only needed three years of undergraduate school to get in to law school.

But, I had a degree and she said, well what was your degree and I said in English Lit and Philosophy and she said well just a minute. She went in and talked to the dean and he said give him a provisional admittance. So, after I was there for two weeks then I got called back to that office and the dean said I had to take the LSAT because that was an admission requirement.

I didn't know really what was going on too much, but on my first day one of the students asked this professor a question and the professor's answer, as law school professors are wont to do, was very clever. He said, "Well I don't know, and I can prove it." I heard that and I thought, this is basic epistemology, I can do this and just prove what you know and what you don't know, so the law school mystery never fazed me. I enjoyed some of it and I disliked some of it. But, I had various part-time jobs. I was the editor of what later became the University of Denver Law Review. In those days it was a bi-monthly called Dicta. Also I won both the all-University Oratorical contest and the law school Oratorical contest. I was very good in the classes I liked and not good at all in classes I didn't like.

Hal Haddon: What classes did you like?

Judge Kane: I liked jurisprudence, comparative law, international law, constitutional law, and criminal law. And for some reason or other, I got attracted to legal accounting, I don't know why, but maybe it was the experience I had working up in Central City. That was a fun

course. There must have been six or seven CPAs who were going to law school to get combined degrees. They were in the same class and I got an A and they didn't. I think it's probably because they knew too much and I didn't know enough; but at any rate those were the classes I liked. I also liked Agency for some reason, I don't know, I think it was because of the professor whom I greatly admired.

Hal Haddon: Who was the professor?

Judge Kane: Francis Jamieson. He was a judge at the same time he was teaching as an adjunct. I liked him and then I had another professor who taught Con Law who I was very fond of, Ted Borillo. He was a published poet and I think that's one of the reasons I liked him. He approached the teaching of law with a very heavy emphasis on the literary aspects of it. But courses in property, torts and contracts, I thought, were like cooking classes with a recipe book.

Hal Haddon: And, as I recall it, the University of Denver College of Law at that time was located at the confluence of Fourteenth Street and Bannock Street--right across from the Denver District Court at the City and County Building.

Judge Kane: That was the City and County Building across the street, and across the other street--Court Place, was Sullivan's Bar, which was our student union.

Hal Haddon: Did you occasionally stray from law class and go across the street to the Denver District Court?

Judge Kane: Lots of times. We'd hear that there were good lawyers trying a case and we'd go over there rather than staying at the law school and watch the really fine trial lawyers who existed in those days.

CHAPTER FIVE – IRVING ANDREWS, PART ONE

Hal Haddon: One of the great trial lawyers, in my view, in the last century was an African American named Irving Andrews.

Judge Kane: Yes indeed.

Hal Haddon: You have a long and wonderful history with Irving, but did it start when you went over across the street to watch him try a case?

Judge Kane: Actually, I knew who he was and I went over there and saw him, but the way that we met was a little bit different. I was living in an apartment with my wife and during the first quarter--the law school was on a quarter system--and we had this apartment across the street from a Unitarian Church. The sign there on the roadside--is that what they call it?--the roadside pulpit or something to show what they were doing and it said he was giving a series of sermons on capital punishment.

Hal Haddon: Irving was?

Judge Kane: No. The minister was a guy named Richard Henry. So I went over there on the following Sunday to hear his sermon on capital punishment. Irving was there and I went up and introduced myself. I said, "Are you a Unitarian?" He said, "No, are you?" I said, "No, I'm interested in capital punishment." And so we chatted awhile. Then

when I'd go back down into the City and County Building when he would be trying a case, I would always stop and say hello to him. This was 1958-59, and the civil rights movement was just starting to boil up. There was a lot of activity in Denver with civil rights groups, the Congress of Racial Equality, the N.A.A.C.P. and this is before the big breakup when the Weathermen and the Black Panthers started. The N.A.A.C.P. and CORE espoused the non-violent Ghandian approach of Martin Luther King. Irving was very active in the N.A.A.C.P. In fact, along with quite a few other lawyers, when the N.A.A.C.P. Legal Defense Fund was preparing its briefs on *Brown v. School Board*, he was sent the briefs for comment. He was, at that time, I think the National Board Representative for Colorado, Wyoming.

Irving suggested that I join the N.A.A.C.P. I did and then after a while--well, I graduated and I went up to Brighton, Colorado. I was with a firm there and I was still coming into Denver and working as a volunteer on civil rights matters. At one point while I was there, I was also a part-time Deputy District Attorney in Brighton. This was 1961. I had gone straight through law school, so I graduated from college in '58 and then because D.U. was on the quarter system, I went summers as well. I started in September 1958 and graduated in December, 1960. Then I took the bar in February, 1961 and was admitted to practice in April of 1961. Shortly after the bar results came out I went to Brighton. I had been up there about a year, so that must have been '62

and I got a call from Irving's then wife, Evelyn, saying that his partner, Bob Rhone, had died. I went immediately to their office in Denver to see if I could do something to help.

It was a very busy practice with--they were more of the Legal Aid Society than the Legal Aid Society was and there was no public defender. They were talking to 65, 70 clients a day and long lines would come out onto the stairway to their office. Some--a lot of the matters were very minor problems that poor people encounter, traffic violations, petty misdemeanors, debt collections, support issues, et cetera, but every now and then there was a felony. There were also some divorces and personal injury cases. The majority of the clients were African-American, but there were Caucasians, there were Hispanics and Asians as well. I just started in on that day talking to these people one at a time and writing down what they said, found out when they had to go to court et cetera. I went back to the firm in Brighton the next day and said, "I want to take two weeks' vacation" and the senior partner there said, "Oh, great, where do you want to go?" I said, "Well my friend Bob Rhone died and I want to go down and help Irving with their practice." He said, "Well you can't do that, tell them to get one of their own" and--

Hal Haddon: What did that mean to you? What did you take that to mean?

Judge Kane: Well, I think I didn't take it so much as being racist as I did a Denver lawyer handling criminal cases because the firm in Brighton, we did

real estate work and represented irrigation companies and school districts. So, I don't think he meant it as a racist thing; but he just said tell them to get one of their own; and so I just said, "Well I am one of their own and I quit" and I went down with Irving. After about, I don't know six, eight weeks, we decided to form a partnership and so we formed Andrews and Kane, which was incidentally the first racially integrated law practice in the State of Colorado.

Hal Haddon: This is 1962?

CHAPTER SIX – ADAMS COUNTY PUBLIC DEFENDERS

Judge Kane: 1963. So I stayed there. At that time there were Supreme Court developments on the right to counsel. The mistake most people make about this is thinking that the case of *Gideon v. Wainright* is what started the public defender system. That's not true. There were public defender offices--elective offices, in San Francisco and Los Angeles; New York had the Legal Aid Society, which had originally been the German Immigrant Legal Aid Society, and Chicago had a public defender at that time, Gerald Getty. *Gideon* started in Florida where the only appointed counsel at that time was for capital cases, death penalty cases. Clarence Earl Gideon was charged with burglary and wanted an appointed lawyer, but his request was denied. Eventually he got to the Supreme Court. It's a very famous story, they made a movie of it called Gideon's Trumpet; and Henry Fonda starred--all that sort of thing, but Abe Fortas was the great hero. What *Gideon* did was hold

that the right to appointed counsel existed for felonies, all felonies, not just death penalty cases. Later another case said the right to appointed counsel also applied to misdemeanors.

But, what started the public defender system and made it go nationwide was another case named *Escobedo v. Illinois.* In that case the Supreme Court said that an attorney--the right to counsel, and the requirement to advise somebody of their right to counsel--occurred whenever a person was arrested and restrained of his liberty. This meant, in all practical terms, at the precinct or station house, where police would arrest somebody and take them in. There was no way that a person who wanted an appointed lawyer, could get one until he was in court, which may be three, four weeks later after the prosecutor had decided whether to file charges or not. The accused would go before a court magistrate who would set bond and at that time advise him of his constitutional rights. Counties and states were trying to accommodate the need to provide counsel earlier as required by *Escobedo* and the public defender system was the most obvious way to do it. So, Colorado passed a statute, saying it was a local option for counties or judicial districts to set up systems to provide counsel for the indigent before there was any case filed. Adams County was set up as the first such program.

Hal Haddon: This is 1964?

Judge Kane: ’64. I was with Irving at the time, but a friend of mine and still in Adams County said I ought to apply for this. It’s a great opportunity for me to do what I wanted to do. I applied and was appointed. It was the only 60-hour week part-time job I ever had.

Hal Haddon: Did you have a separate job?

Judge Kane: I was supposedly able to have clients in civil matters, but I didn’t because I just didn’t have time. It was quite an experience to set up a public defender office where none had existed before in the entire state--and thereby hangs a tale. I became acquainted with the National Legal Aid & Defender Association; they read about the Adams County project in the paper and contacted me.

Hal Haddon: They are based in New York?

Judge Kane: Chicago, part of the ABA empire. The Ford Foundation had donated a large amount of money to the National Legal Aid & Defender Association and called it the National Defender Project. The association hired a wonderful man who was the very recently retired Judge Advocate General of the Army to head up the National Defender Project. They were making grants to different places throughout the United States to set up public defender offices. I applied for a grant and I was originally turned down.

At the same time, the University of Colorado Law School had a legal clinic program that was headed by a professor who had been my professor at DU. He had since gone to CU. His name was Jim

Carrigan. And I like to think we were good friends. He certainly was an excellent professor. Carrigan had hired a Former Assistant U.S. Attorney named, Don Macdonald, who also was the son-in-law of Senator John Carroll. When I was turned down on my application, I went to see Ira Rothgerber. I had known him because I worked on the JFK campaign under him. Ira said, "Well, I happen to know Bethuel M. Webster." I didn't know who he was, but anybody that was in the silk-stocking law practice knew he was a Wall Street lawyer and he was on the board of directors of the Ford Foundation. Ira called him and the next thing I know I got a call from General Decker, the Head of the National Defender Project, and he said, "Son, you really know who to ring when you want to call on the phone don't you?"

General Decker advised I was getting a grant after all, but he said it has to be conditioned on my working with the University of Colorado because the University was receiving a grant too. The condition was that I was to hire an intern from the University of Colorado. I had asked for the funds for an investigator, and another part-time assistant public defender. With the grant, I was able to organize a staff of four.

The first student who came to work on that grant was a young man, very eager, by the name of Michael Bender. He eventually became the Chief Justice of the Colorado Supreme Court. He worked very hard and soon developed the nickname of Defender Bender. When he

graduated, he went to Georgetown in Washington, DC, to get a master's degree in criminal law and he recommended Morgan Smith as his replacement. Morgan came to the office during his senior year and then when he graduated I hired him as a deputy public defender. By 1967, I was ready to leave and when I did, Morgan Smith replaced me as the Public Defender of Adams County.

Hal Haddon: Let me look back to when you first became the Adams County Public Defender, which was the pilot program for the state public defender system.

Judge Kane: Right.

Hal Haddon: How did you structure the office and how did it change the way that criminal defense was practiced?

Judge Kane: Well, we--a number of things, and it's not the same--the public defender system isn't the same as what we did. We represented virtually anyone in custody who was indigent long before this was true anywhere else in the country. We represented people charged with felonies, misdemeanors, municipal code violations, domestic contempt of court, criminal non-support, the mentally ill; any indigent person who was confined in any way at all, we represented. Also, in fairness, I have to say compared to present day circumstances this was before all the drug cases. This was before informants became the standard way of operating and prosecuting drug cases.

I think at the time we had maybe one or two marijuana cases; that the plat du jour for a public defender in those days, was aggravated robbery and an occasional murder. Then there were burglaries; we had those, quite a few of those and then a lot of check forgery that sort of thing, but also, as I said, we handled traffic and mentally ill and all these other people. So, another thing that happened, is that Adams County was the judicial district, but there were cities within it: Commerce City, Thornton, Aurora, and they didn't have their own jails so they housed their prisoners in the county jail. We covered those as well and we did habeas corpus proceedings in the District Courts. Municipal courts wouldn't allow us to appear; so we filed habeas proceedings in the District Court. There was lot of activity there.

The other thing we did was set up manuals. I guess the best way to describe it--forms to be used in various cases; motions and other pleadings. We'd had a manual of what was necessary for a motion to dismiss, or to suppress, or for habeas corpus, et cetera. The law was changing at the time. You may remember when *Mapp v. Ohio* came out saying that state courts were bound by the Fourth Amendment. Before that it was *Wolf v. Colorado* and they were not, so that was a whole new area of law on motions to suppress that came in. We prepared forms and check sheets and sample briefs. We distributed them to the bar. So that we were doing it with--I was doing it--with

Machiavellian intent. That was to get the support of the bar for our program. We also would have lawyers in Denver who had a case in Brighton and they would call us and say would you mind handling this arraignment for me. We would do that and the local judges in Brighton would permit that, so I would enter an appearance for another lawyer and say he's going to be here but we wanted to save him a trip to reduce costs. The court liked it because it kept the docket flowing; so we provided those kinds of services in addition to the representation of clients.

Hal Haddon: And there's something that at the time that was very controversial and not just in Adams County, but around the state and that is instituting daily jail checks for lawyers to go to jails.

Judge Kane: That was the first thing we did. That's where Defender Bender got his nickname. He would do a daily jail check and so would my part-time guy; one time he was Phil Roan and at another point was a guy named Don Marshall, and then I did them on weekends. They did during the week, but I was in court literally from eight o'clock in the morning until sometimes, with the municipalities, until nine or ten at night; not just in my office. When I wasn't in court, I was working, getting ready and going through cases. It was a very, very demanding job and there were some people who were opposed to it.

Hal Haddon: Why?

Judge Kane: Well, I think there are some people who are opposed to any kind of innovation. There were also people opposed to it, I surmise, because they felt this might be an intrusion into the ability of lawyers to make money if they weren't getting court appointments to the extent that they were before. Somebody would be in the jail checking with prisoners and making a determination as to whether they were indigent or not. We did that. If we found that they weren't indigent, we gave them a list of lawyers who would handle cases. We gave the prisoners phone numbers and would make a phone call for them if they wanted. We were trying to do everything we could to avoid being threatening to the bar.

The law enforcement people didn't like it at all that we were checking because, of course, the first thing you do when you meet somebody in custody is to tell them to keep their mouth shut; but it changed the nature of--I think it was a little bit of a, sort of another Machiavellian approach to things; but the Sheriff there had graduated from the FBI National Academy, and he was very proud of it, as he should be. I met with him and his investigators who, for the most of part, were opposed to a public defender. There was an investigator, however, who had been a career Office of Special Investigations officer with the Air Force. He had retired and was working in the sheriff's investigation department. He saw the advantages to a public defender system that the rest of them didn't. We worked with the cooperation of the Sheriff

and this one particular investigator to get the others to understand they needed to do something besides just extract a confession, that they needed to get cases they could prove whether the defendant was silent or not. That was an enormous thing in those days because I would venture to say that 90-95% of the prosecutions were based on confessions or inculpatory admissions. Then they had to shift and start getting statements from witnesses and building a case. I would tell the Sheriff the way the FBI does it, that raised their own sense of worth and professional image. It helped.

The other thing that we did, and as I say, it couldn't be done now; but there weren't many drug cases. But we had a very firm rule when I was the public defender, that no one would be represented who was an informant--

Hal Haddon: Why?

Judge Kane: Because all that you needed was to have one person in the jail who flips, becomes an informant, and no one will trust the public defender after that--representing some snitch and we didn't want to lose trust with people who needed our representation. The old story, was, "I don't want a public defender, I want a real lawyer." So we had this trust problem, and we just wouldn't do it. If somebody was an informant, we would notify the court. The judges at first balked at this, but they saw what we were trying to do and they said okay; so if

somebody did want to become an informant, they would and we would withdraw, and the court would assign a lawyer to represent them.

Hal Haddon: Another thing that you did in the Adams County Public Defender's Office, which was unique, at least in terms of lawyers who represented indigents, was that you had a full-time investigator to investigate cases.

Judge Kane: Yes.

Hal Haddon: Was that controversial?

Judge Kane: He was, the idea wasn't. I couldn't hire the fellow I just mentioned from the Air Force OSI; I offered him the job and he said no he didn't want to do that. I kept looking around, but police officers didn't want to do it. They didn't want to work that side of the fence, and so somebody mentioned to me that there was a retired detective lieutenant from the New York Police Department, whose wife had developed cancer and he had taken her out to the Eleanor Roosevelt Institute. He was living in Lakewood Colorado on his New York detective pension and he was looking for something to do. He went to the Adams County DA's Office and I think it was the DA at the time, Floyd Marks, who said he was not interested. There was a resentment, because local law enforcement officers didn't want somebody who was from New York telling them they were a bunch of rubes and didn't know what they're doing. That's exactly the way he was so he was difficult to handle; but

at any rate, he was recommended to me and I hired him. He had a tremendous talent for finding people.

Things that lawyers just don't learn in law school. He would go into the bars. He would go to the junkyards, and trailer parks, he could find witnesses and defendants like nobody I ever met before or since and that really helped us. The other problem with him was that he had a very, very active fantasy life in which he considered himself to be an expert in everything; but he wasn't. For instance, he kept bringing these brochures of airplanes and wanting me, as a public defender, to order the county to buy an airplane so he could fly it around in his investigations--a real fanciful approach to things. He would say that he was a fingerprint expert and I'd say show me your credentials; show me your certificates and he couldn't. During that time, if you wanted to introduce a photograph into evidence you had to do more than just hand it to somebody; you had to identify the focal length and the speed of the film and the lighting conditions and so forth and lay a foundation.

It was a very time-consuming process; but he would come in with these photos and they were, as I remember them, they were Polaroid and so I simply asked, "Can you describe the camera, the film and room?." Well, I found out he was having somebody else do the photography. He was not the photographer so I said, "I can't put you

on the stand to do that," I said, "You have to bring this other guy in" and so we did. It cost a little bit of money but not much; we had a budget for that but that was this guy, this investigator. He had been in New York and clearly felt he could get away with this sort of thing.

He had been on a police launch in the East River and would fish out fetuses and dead babies. He became a certified expert in infant footprint identification. That much I knew because he brought in his certificates and showed them to me, but I never had use for them. We didn't have any dead babies to look at; but that was the one thing he could do. But he claimed he was a certified Jiu Jitsu instructor; that he was a pilot and he had done all kinds of things that he talked about. I was able to deal with him and keep him from lying on the stand; but as an example, he'd go out and he'd find somebody--get a witness statement and come back and hand it to me. It would be written on yellow legal pad and allegedly by somebody who could barely read and write. The statement would say, "I exited the vehicle at 0:300 hours." Obviously, he had written the whole thing. I would say, "I can't use this." And so, he would go out and get the guy and bring him in, and then we would take another statement. He wanted to be efficient, but the local cops did not like him at all. He considered them to be real rubes.

Hal Haddon: You mentioned the U.S. Supreme Court decision in *Mapp v. Ohio*--

Judge Kane: Mm hmm.

Hal Haddon: --which, as I recall, came out in 1966. What was gist of that decision and how did that affect the public defender's office?

Judge Kane: Well, that was a very interesting decision, Dolly Mapp was a madam in Ohio and police raided her brothel without a warrant. In the search they found pornographic material, so they had her charged with pornography. She moved to suppress on the grounds it was an illegal search and seizure. At that time the law said that under its supervisory authority, the Supreme Court of United States had not permitted the fruits of illegal search and seizure to be used in Federal Court, but they also had the *Wolf v. Colorado* case. Wolf, by the way, I think was charged with abortion. In that case the Supreme Court said that the illegal search and seizure was not a substantive right of the Fourth Amendment that was incorporated into the due process clause; so therefore the states could use or develop whatever tests they wanted for admitting evidence. But with *Mapp* the Warren Court said, "No, from now on you have to comply with the Fourth Amendment." The Court suppressed that evidence and The Chief District Judge in Adams County is a good example. He was a man, a very good man and he had practiced law; he was a kind of country lawyer, and he had been a part-time prosecutor. In those days most of the prosecutors were part-time.

Hal Haddon: This is Judge Jacobucci?

Judge Kane: No, this was Clifford J. Gobble, and Judge Gobble had been a prosecutor for his career until he was appointed to the District Court when the Adams County judicial district was created at the same time that I graduated from law school. Judge Gobble came out of his chambers and he still had his robe on. He'd been on the bench and he'd come out and somebody had given him the newspaper clipping showing *Mapp v. Ohio*. He literally had to sit down. He turned red and he couldn't breathe. He said this is the end of law and order in the United States. He was just totally against it. About two days later I was in front of him with the first motion to suppress citing *Mapp v. Ohio*. He looked at it and he said well it's not retroactive--denied. We got a reversal on that, but that was the attitude. It was like a brick wall that had been knocked down by the Supreme Court and that applied throughout the United States, so it was a very, very, important traumatic event for law enforcement and for prosecutors and judges.

Hal Haddon: And, is it correct that it was a traumatic event ultimately for you in terms of the district attorney's attitude towards the public defender's office? Can you tell us about that?

Judge Kane: Well, it's somewhat complicated because the district attorney, you know, district attorneys are elected officials so they are politicians first and lawyers second; but they have staffs of highly professional people who are lawyers and prosecutors first. Floyd Marks was the Adams County District Attorney and he needed, I'm sure, to have the support

of the sheriffs and the police chiefs and the law enforcement community in order to be reelected and to run his office. He had some really excellent staff people. One of them was a lawyer named Harlan Bockman. I dealt with Harlan, who later became a judge in Adams County. I dealt with him all the time and we were on opposite sides in many, many, cases, but I always had the highest respect for him and I think it was mutual; but when I filed these motions to suppress, and I remember Harlan and I joking about it; and he said, “Well this is a whole new world isn’t it--giving you something to deal with from now on.” But Marks, on the other hand, just went ballistic and made statements that he was going to shut down the public defender's office. He was going to do everything he could--that this was against law and order, He cited all these federal cases and for the first time I think I ever heard the word liberal, as a pejorative term said, “You know the public defenders are liberal,” which is analytical nonsense. There’s nobody more conservative than a criminal defense attorney, but that’s what he said and so he called a grand jury and wanted the grand jury to indict me.

Hal Haddon: On what grounds?

Judge Kane: I never did figure that out. It was because of filing these motions and so on, obstructing justice; something like that and the chief judge at that time was Judge Jacobucci. He was a brilliant, memorable person in my life. I've been lucky to have some mentors and he was one of

them. Judge Jacobucci had been a social worker before World War II; then he'd been a Navy officer and then he had gone to law school. He still thought of law as a social worker would. He wasn't too interested in the refinements of legal theory; but he was very practical and so he went to the grand jury and he just told the DA--he said, "I'm going in and talk to them," and he did. I don't know precisely what he said there but I know what he said publicly later. He said, "The DA's lucky if he can get a conviction at all. The highest quality of law is practiced by our public defender." I don't think that was necessarily true, but it sure sounded good. I didn't take a vacation throughout the three years that I was the public defender and my marriage went down the tubes with that.

Hal Haddon: How many children did you have then?

Judge Kane: I had two when I became public defender and then had two more. Three girls and then a boy in 1965. My oldest was born in 1958, the next in 1960, and the next one in 1963. I do vividly remember coming home one day when we lived in Brighton and my then three-year-old daughter was sitting on a step on the front sidewalk. I said, "Gussie how are you?" And she said, "Who are you?" and stood up and turned around and walked away. I can't begin to tell you how I felt about that. At any rate, what I was doing at the time in the office was handling murder cases and they were being set to show that we couldn't handle them. I tried three murder cases back-to-back-to-back. If you take any

case that a lawyer works on and then you add to it that it's the charge of murder it's like putting an exponent on a number--just the amount of work that goes into it is just much, much, higher; the standards that you hold yourself to and the stress. You have to survey the jury and there's a lot more to it than the, dare I say, garden variety burglary case. That's just not what happens; but in a murder case, it's a lot of work.

Hal Haddon: Is this death-qualified murder cases?

Judge Kane: No, no, we didn't have the death penalty then, but it was life with no parole. There was first degree murder, second degree, voluntary manslaughter, and then involuntary. Involuntary was a misdemeanor. Voluntary was, I think, a maximum of 10 years. Second degree murder was any term up to life imprisonment and first degree was life with no parole. So we had these cases and they were almost always, as best I can remember, tried for first degree murder. We were defending, not for acquittals, but for verdicts to the lower charges. In the third one that I tried, I just couldn't remember my client's name in my closing argument. I was just shot. I drew a blank--

Hal Haddon: Do you remember it now?

Judge Kane: I remember it now, his name was Pete Bueno. I'll never forget. I think about it every day, but during my closing argument I just got to this point. I was trying to argue and the name of the previous guy kept coming up. But that was not a Hispanic name and I knew that that

wasn’t the defendant but I kept thinking of the guy in the previous case. So I got home and I'd just I said I can’t do this anymore.

CHAPTER SEVEN – PEACE CORPS

At that point my wife really wasn’t speaking to me. We were civil but that was about it. The National Defender Project had a meeting and I was, by that time, on the board of the Project. The meeting was in Washington, DC, so I went there and I stopped in to see a lawyer I knew from Denver. He was a longtime friend who had been a lobbyist when my dad was in the legislature and that's how I had met him. He was a wonderful man named Dick Schmidt. At that time he was General Counsel for the U.S. Information Agency. So I stopped by to see him and he said, “How are you doing?” In fact, when I had graduated from law school, he had offered me a job in his firm. I had wanted to go to Brighton instead, so I didn't accept.

But I said, “do you have any positions overseas? I'd like to take my wife and children and go overseas for a while.” That was certainly a strongly motivating factor, to try and get my family back together again and reestablish some kind of communication with my wife, but it was also a more altruistic thing--of wanting the children to have an opportunity to live in a different culture and see what it was like. It was also part of the idealism I had about foreign service and living overseas.

So I asked Schmidt if he had a position and he said, “No, but you ought to do the Peace Corps” and I said, “I can't. If I could, I would but I'm married with four kids. I can't be a volunteer.” Schmidt looked at me and said, “You idiot, I mean on the staff.” I had never considered--it just hadn’t dawned on me that a government agency had to have a staff. I didn't think--I just thought if someone wanted to be a volunteer, you know, they sent a letter to Washington. They’d send him a backpack and a plane ticket. I didn't know anything more about it. Well, I soon found out--that very, very involved kind of structure, but anyway and I'll never forget what Schmidt said. The U.S. Information Agency--it was before they merged with the State Department and he said, “The USIA is a very wise organization. It doesn’t allow lawyers outside the limits of the United States. Those are diplomats.” But then he said, “You might try the Peace Corps,” and that’s when I confessed my ignorance, so he called this wonderful woman on the Peace Corps staff named Peggy Conroy and he said, “I’ve got somebody here I want you to talk to.” And she said--I couldn’t hear it but his response to her was, “I know you’ve got--I know you don’t want any lawyers over there, but this isn’t that kind of a lawyer.” He said, “he’s a public defender,” so she wanted to talk to me and I went over there and eventually was interviewed by different people and assigned to India.

Hal Haddon: So this is 1967 now?

Judge Kane: This was 1967, no, ’66, excuse me.

Hal Haddon: All right, so you were married, you had four children and you’re leaving the Public Defender’s Office for India?

Judge Kane: Yes.

Hal Haddon: What was your family’s attitude about that?

Judge Kane: Well, the children were all excited and so was my wife. She wanted to get out of where we were because it was, you know, it really was hell for her. I just wasn’t around and she was raising our children. I’d come in and collapse, go to sleep and get up before anybody else did and was gone. That’s not what she had counted on, I’m sure, as a married life. I was working on Saturday and Sunday too. I vividly remember one of the comments she made was that she saw more of her father than she did of me during that time.

So they were all excited about going. I was offered different positions: one in Africa, one in Latin America, one in Thailand, and then I was offered the job in India. The one in India sounded best to me. They wanted somebody with a criminal law background because Peace Corps volunteers do not have diplomatic immunity. If one of them got in trouble, they needed to have somebody who could go in, see that they got a counsel, see that they got out on bond, see that they got out of the country--that sort of thing.

I went to the University of Kentucky to high intensity language training in Hindi and then when that six weeks was over I got the

family and jumped on the plane and went to New Delhi, stopping in Athens along the way. When we got there, the guy that met me, said don't unpack, you're going to Calcutta and I said, "Oh, is there a case there?" thinking that I was going right back into the compulsive work I had done as a public defender. The guy said, "No, No. We're sending you there because we have just removed the Deputy Director for Eastern India and you are it now. Washington should have told you before you left."

That person I was replacing had gone around to volunteers' living quarters and rifled through their private belongings looking to see if any of them had any marijuana. All the 350 volunteers were really upset. So I was in Calcutta and I was the Deputy Director charged with two things: the first and primary thing was to develop new volunteer programs and negotiate with the governments of West Bengal and Bihar and Orissa--Indian States that were in the Eastern region of India, and meet with their various ministers: Minister of Agriculture, Minister of Health, and so on. I would draw up new proposed programs, get approval from the state government and then get approval from our central office in New Delhi. Following that process, the proposed program would go to Washington. If the program was approved, it would come back and we would implement it. The second job was to supervise two associate representatives whose job was to go around in the countryside where the volunteers were and see that they

were okay, that they were working and assist them in their assignments.

The associate reps really didn't need supervision. In fact, the associates were the people who brought into the office the ideas for new programs. In the process, however, I got to know quite a few of the volunteers. So I did that until I got dengue fever--

Hal Haddon: D-E-N-G-U-E?

Judge Kane: Something like that. It has the same kind of symptoms as malaria, only it can be treated. It's not permanent. But I got dengue fever and so I had leave from the tropics. I went back to Washington.

When I got back, I had three or more months on my enlistment contract and became the desk officer for Peace Corps operations in Turkey. The Peace Corps Country Director of Turkey was stationed in Ankara. He developed some kind of illness, hepatitis I think it was, and had been moved to Weisbaden, Germany to a U.S. hospital for treatment. I was sent to Turkey at the same time in order to become familiar with the programs, staff and Turkish officials. So I went over there and that, incidentally, is when my wife moved from the D.C. area back to Denver and we got divorced.

Hal Haddon: So your family did not follow you to Turkey?

Judge Kane: They were not there. I got to Turkey and this is--say part of this outsider thing comes up--they had a Deputy Director of Turkey, who was a former volunteer, a former Air Force, a guy who was fluent in

Turkish and had a master's degree in Near East studies. He had been there for all this time, ten years or so with the Peace Corps and with the military. He knew more about Turkey than the Turks did. So when I got off the plane and went to Peace Corps headquarters, I could see things were chilly. Why in the world did they send this mutt from Washington out here? I sized it up; I just went in and said can I talk to you? We went into his office--or I guess it was the Country Director's Office--and I said, "look, this is silly. Get me a Jeep and a driver and I will go around the country and talk to the volunteers and the people they work with." From my previous experience I knew about new programs and what's going on, so that I'll be better as a desk officer when I get back to Washington. He seemed relieved and everybody on the staff did as well. I travelled all over Western Turkey. When I returned to Washington, I was the Turkey desk officer. I set up contracts for more training programs at various colleges and universities around the country, kept current on Turkish affairs and implemented requests from the overseas staff till my time was up.

CHAPTER EIGHT – RETURN TO DENVER AND PRIVATE LAW PRACTICE

When I finished my contract, I came back to Denver.

Hal Haddon: Are we in 1969 now?

Judge Kane: That was 1968.

Hal Haddon: 1968?

Judge Kane: Yes, December of 1968.

Hal Haddon: And you mentioned that your marriage broke up.

Judge Kane: Yes.

Hal Haddon: About the time that you left for Turkey?

Judge Kane: Right.

Hal Haddon: Where did your wife and your four children go?

Judge Kane: Well, they lived in Denver for a short period of time. When we were divorced, she moved to Salida, Colorado. My oldest daughter was a gifted child and was going to a private school for gifted children in Denver. When she ended up in Salida she was extremely unhappy with school. So she moved back with me.

Hal Haddon: What is her name?

Judge Kane: Molly. And then I remarried and my ex-wife remarried. And then Meghan, my second daughter, moved back into Denver with me. It wasn't a question of fighting over visitation or custody or anything like that. The children wanted better schooling and my ex-wife agreed. She then moved to Paonia on the Western slope. She took the two younger ones and went there. Meghan went to Paonia, but left high school in the 11th grade and gained early admission to college. Molly stayed with me until she went to college. Then Sally, my youngest daughter, was in Paonia and her mother moved to Mexico. Sally was staying with somebody else. When I found out, I said, "No that can't be." I took Sally and my son, Pat, and they lived with us and went to

school here in Denver until it was time for them to go away to school. So--

Hal Haddon: So, eventually all four of your children were living with you in Denver until it was time for them to go to college?

Judge Kane: Not quite. Well, my son went to prep school. He went to Fountain Valley. So during that period of time I guess it would have been ages nine, ten, eleven and twelve, he was living with me and going to school in Denver. When he got to the ninth grade, he went to Fountain Valley, near Colorado Springs.

Hal Haddon: So, you left the Peace Corps in 1968 and came back to Denver. What did you do?

Judge Kane: There was a lawyer in Denver I knew by the name of John Barnard, who had been in the Colorado Attorney General's Office. He was from Granby, Colorado where his father had a law practice. John Barnard was a water lawyer. He had been appointed to the District Court in Boulder and a mutual friend said Barnard's looking for somebody to take over some of his practice. So I went up to Boulder and I met with him. There was some water rights litigation and I took that on for about six months.

It renewed the belief I had developed in Brighton, Colorado that I did not want to be a lawyer examining abstracts and doing that kind of work. So I developed an idea to be something along the lines of a barrister in England. I knew two lawyers who had very, very, good

private practices: one in Lakewood and one in South Denver. They were business lawyers, solo practitioners, who did not want to go to court because if they were in trials they fell behind in all their other work. I knew that they didn't like going to court. I knew what their feelings were, so I went to them separately and I said, "I'll make a deal with you, I will take whatever trial work you send me and I will promise you that I will never accept anything from that client except through you and you set the fee."

They both agreed to that and then I thought well this isn't enough to keep me going. I needed to have six or seven lawyers like that; but I figured I could get it going and then I would be a solo practitioner doing nothing but trial work on behalf of clients who were actually the clients of these other lawyers. But I needed something to tide me over financially--I had child support payments and other obligations. I contacted another mentor of mine, a wonderful man by the name of Bob Kingsley. He was Chief Judge of the Criminal Division of the Denver District Court. I went to see him and asked if he had any criminal appointments. I was back from the Peace Corps and getting restarted. He said, "Oh, hell yes." He turned to his division clerk and said, (my nick name is Buddy) "Give Buddy a copy of the names of those clowns out on Smith Road." That's where the county jail was and so she went to her files and brought back two slips of paper. I told Judge Kingsley what my plan was and he thought it was a great idea.

"I wish I would have thought of it," and he said, "That'd be wonderful--just try cases and not worry about all the other things."

So his division clerk handed me the slips of paper with these two defendants' names on them. I got up to leave and drive out to Smith Road to introduce myself to my new clients. As I was walking out in the hallway, I didn't know at the time, but a lawyer named Peter Holme--very tall distinguished guy who was past President of the Colorado Bar Association--walked passed me. It turned out that Pete Holme and Bob Kingsley had been Deputy District Attorneys together in Denver right after World War II. They were good friends. Holme went in to see Kingsley and said, "I'm in terrible shape, I've got a big, big, case and it involves construction law and generation plant reservoirs." He said, "Our firm is very busy and I can't just take a kid right out of school and put him to work on this. I need somebody with extensive court experience. Do you know anybody?" Kingsley said, "Yes, Buddy was just here and he knows all about water law." So Pete went back to Holme Roberts and asked his litigation partners if anyone knew a lawyer named Buddy Kane? Don McKinlay was a partner and he asked, "Is that John Kane?" Pete confirmed.

On the day that President Kennedy was assassinated, I was the Chairman of a Real Estate Condemnation Commission in Brighton and McKinlay was there representing a sand and gravel company. He told

Pete that I had showed a lot of poise and common sense when it was announced that Kennedy has been wounded by telling the lawyers it was our case and if we wanted to go ahead we could, but he thought it was better that we recess. McKinlay said, "I have always thought that was wonderful." He said, "We also won."

McKinlay said, "Yes, get him right away." Shortly thereafter I was called by Pete Holme and went over to their offices. He discussed my idea of what I was trying to do and asked if I would put that aside for a while. I said, "Well, I've got a few cases now." He said, "Well, but you're not fully occupied with that are you?" I said, "No." And he said, "Well, we'd like you come in and work on this complex civil case. I said, "Okay."

Hal Haddon: His law firm was then called Holme, Roberts and Owen, was probably the premiere, what I call white-collar civil law firm in Denver.

Judge Kane: Represented Midwest Oil Company and represented the United Banks of Colorado. It was a true high quality, silk-stocking firm.

Hal Haddon: Was that a cultural shock for you.

Judge Kane: Yes, yes it was. I knew a couple of lawyers in there very vaguely, but I knew them from seeing them in court in the past, but--

Hal Haddon: What was this case that he wanted you to spend full-time on?

Judge Kane: It was a fascinating three-party case, Public Service Company of Colorado, which later became Xcel, an international engineering firm named Stone & Webster and then a joint venture construction

company of two construction companies, one in Canada and the other in North Carolina. They had bid on the job. It was on Argentine Pass right near Georgetown, Colorado. The constructed facility would take water from a reservoir above timberline and run it through turbines down to the main road on Guanella Pass where it would generate electricity during the peak hours of Denver's need. Then at night when the demand for electricity wasn't so much, the water would be pumped back up the mountain to be released the next day. It was a unique, prize winning concept--a pump-storage project. What happened is that the geologists from Stone & Webster did soil samples and because it's mountainous turf, there were about, I don't know, a couple of million cubic yards of dirt that they didn't count on. In fact, they thought they were going to bedrock and they just hit high points on the bedrock and missed the rest of it, so the construction company moved for a change order, the engineering firm denied it and Public Service wouldn't agree to change the order.

So there was a three-way suit. We represented the joint venture. I started in on that case and read 50 or 60 depositions and a lot more. I was going through voluminous details and learning the law on how to deal with it. After about six months, during which Pete and I had been to court and done further discovery, he asked, "Well, now that you've been here, you have done all of this, what do you think of the case?" I said, "I think it ought to be settled." Pete scoffed and said, "Well,

that's the dumbest thing I ever heard, of course it ought to be settled. All suits ought to be settled. This one especially ought to be settled. The question is how do you do that?" I said, "Well I know how to settle it. The President of Public Service Company is a golfer; the head of Stone & Webster is a golfer, and one of our two joint ventures is not only a golfer, but he belongs to the Augusta National Golf Club in Georgia. He belongs there, so we'll have them go there and invite these two guys down with no lawyers present." I said, "We'll coach him, and get him ready for it and then he can settle the case down there, on the theory that lawyers don't have anything to do with this." This was done and the case settled quite favorably for our clients. When the case concluded, Pete said, "We'd like you to stay." Then in another six months I was made a partner.

Hal Haddon: So this--we're now in 1971?

Judge Kane: Yes, 1971.

Hal Haddon: Judge Kane, we were talking about the time you spent in civil practice with the law firm Holme, Roberts & Owen in the 1970s before you became a Federal Judge and we discussed the turbine power litigation that brought you to that firm. What other kinds of litigation did you do there?

Judge Kane: Well, I did general litigation, but the things I tended to focus on were--one was construction law. We did a number of very large complex cases involving utilities and hydroelectric plants, things of that nature. I did those with Pete Holme and Ed Benton. Then, I did some work with Dick Schrepferman, another partner, for the Colorado Milk Producers Association. There were some, not Sherman Act, but there were some commercial price cases, that involved the Colorado milk producers.

But the thing that I did the most--that I liked the most--was representing Channel 4 TV station. Davis Graham & Stubbs represented the Mullen Broadcasting Company which operated Channel 9. Because there was a possible conflict, I represented the CEO and the Chief Operating Officer at Mullen. Al Flanagan was the CEO and Charlie Leisure was the chief operations officer at Channel 9. There was a very lengthy high-profile case involving a guy who had a TV show that Mullen cancelled. He sued Mullen Broadcasting

Company and Flanagan and Leisure personally. That case plus representing Channel 4 got me involved with defending motions against a lot of criminal defense attorneys who were trying to subpoena the outtakes from television camera news coverage, and the local tapes from radio coverage of some high-profile cases.

Outtakes are the things that the cameraman photographs and then are edited out before public screening. The criminal case defense lawyers wanted to see the outtakes to see if there was prejudicial press coverage and that sort of thing. The media fought that, because it was an intrusion into the artist's work--the photographer or the journalist. We had a lot of these gag orders that I handled. I did those and I would be opposed in some cases by my former employer Walter Gerash. We would move for protective orders to quash a subpoena, that sort of thing.

That led me to represent a newspaper in Colorado Springs, the Colorado Springs *Sun*. This was a libel case. I tried that case and the jury returned a verdict for the plaintiffs. We took it up on appeal to the Colorado Supreme Court. It's kind of a funny thing, but I was arguing a specific point of law that when a private individual becomes involved in a matter of public importance, *New York Times v. Sullivan* applies. That hadn't been the law in Colorado at the time, so I argued that point. The Colorado Supreme Court agreed, but there were seven

justices on that court and it was a 4-to-3 decision. Because some of the justices wanted the plaintiffs--this man's wife had an antique store and they thought they should recover, so the judgement was affirmed. I was pretty upset, and I was going in to file a petition for rehearing when I saw then Chief Justice Eddie Pringle. He said, "John, you won! We adopted the rule of law that you wanted. It took heaven and hell for me to get that. But that's the rule of law in Colorado now, you won." I said, "My clients don't think I did." He said, "Well, sometimes when a lawyer wins a case, the client loses."

From that case, I started getting some daily newsroom advice with the Colorado Springs *Sun* and then I think there was one matter, as memory serves, with the Pueblo *Chieftain*. They had a lawyer in Pueblo and he called me and I came in on something. And then I got to meet with--it came into play much later, but--Morley Ballantine who was the owner of The Durango *Herald*. I represented The Durango *Herald* on--again a minor matter--but from there I became one of the attorneys who occasionally represented the Colorado Press Association and the Colorado Broadcasters Association.

There wasn't a lot of legal work, but I developed some great contacts. As it happened I was --along with Tom Kelley, who represented the *Denver Post*--in the courtroom in Aspen on the day that the celebrated-- serial killer, Ted Bundy jumped out the window and escaped. We were there arguing on a gag order in front of the district judge, George

Lohr, who later became a Colorado Supreme Court Justice. The United States Supreme Court had just come out, at that time, with the decision of *Nebraska Press Association v. Stuart*. There was all the follow-up from *Shepherd v. Maxwell*, excessive news coverage, and *Nebraska Press v. Stuart* allowed for gag orders, but set restrictive criteria for them. The Supreme Court said that *Shepherd v. Maxwell* had caused courts to restrain the press too much and so we were arguing for more access in the Bundy case. When I cited *Nebraska Press v. Stuart*, Judge Lohr said, "Well, I haven't read it yet," and, as a good judge should, he declared a recess so he could go into his chambers and read the opinion. While we were waiting for him to read the opinion, we went out in the hall to have a cigarette and Bundy jumped out of the window of the court room.

Hal Haddon: He exercised his First Amendment right.

Judge Kane: He exercised his paratrooper amendment rights. He jumped out of the second floor. That's kind of funny because a guy who was clearly Australian came in--it was in the summertime--and he had cutoffs at his knee, and one of those hats--like a cowboy hat only part of it is folded up on one side. He came up the stairs to where we were on the second floor and said, "I say, mates, is it usual for someone to exit this facility by the second-story window?" At that the sheriff's deputy went, "Oh my god!" and ran out. Bundy was gone for about three days. He broke into a cabin on the road going up to Independence

Pass. There was a liquor cabinet there, so rather than escape, he got drunk and took a car out of the garage. He was arrested back in Aspen for drunk driving. My great love was the First Amendment and handling that stuff. I really enjoyed that a lot.

Hal Haddon: So your First Amendment practice at Holmes-Roberts was essentially 1970-1977?

Judge Kane: 1970-1977. Then the other thing I did was I handled a couple of criminal cases, criminal defense work. One of them was a guy named Tony Mulligan, who was a labor organizer charged with arson for burning down a number of apartment houses under construction. I received some, I wouldn't say ill feeling, but negative reaction from some of the lawyers in the firm who did real estate work and disliked publicity about our firm representing an arsonist, but the people I worked with in litigation thought it was great.

Hal Haddon: That sort of takes us to late-1970s to when you applied for and became a United States District Judge.

Judge Kane: Right.

CHAPTER NINE – JAMES BRESNAHAN

Hal Haddon: There is a person who spans your public defender history and your civil practice and to this day is an important person and friend in your life. His name is James Bresnahan, and his story and your story in helping him and defending him is extraordinary. I would like to talk about him now if that's all right.

Judge Kane: Sure. By the way, I did talk to him and told him that this might come up and he said by all means for the purpose for which it's done, he's fine. He has in the past turned down opportunities for movie screenplays and for a book to be written about him. He would not have anything to do with those proposals, but he said this was fine.

Hal Haddon: James Bresnahan's legal story starts in 1964, can you--?

Judge Kane: It actually starts earlier than that.

Hal Haddon: It probably starts when he was born.

Judge Kane: Yes, almost. Probably when he was about nine.

Hal Haddon: Tell us in narrative form who James Bresnahan was and who he is today.

Judge Kane: Okay. James Bresnahan is a man who when he was a boy at age 15 killed his mother and father. He was convicted on pleas of guilty to two counts of first-degree murder. He was represented by a lawyer hired by his maternal grandfather. He was sent to state prison for life at age 15.

I will get back to some of the details in a moment, but I was a public defender and wasn't allowed to handle any other criminal cases. What happened is that his father was a physician who had quite a bit of life insurance. He had listed his wife as the principal beneficiary, and as secondary beneficiaries, his children--James/Jim being the oldest, and then a brother and two sisters who were toddlers. Prudential Insurance Company had this money. Its lawyers looked at the proceedings that

had caused Jimmy to go to the state prison and felt that it wasn't an airtight case. Under the law, if somebody murders an insured he cannot recover the proceeds.

So, if Jimmy was guilty of murder he would not receive this money, but he would if the conviction were set aside. Even if he were convicted of manslaughter he would have a legitimate claim to it. The Prudential Insurance Company did what insurance companies frequently do in situations like that. It filed what's called an interpleader action and deposited the proceeds of the insurance in the court registry. The interpleader complaint advised the court that this father, the doctor, was murdered, the mother was murdered, the oldest son at age 15 was convicted and there are three other siblings, a son and two daughters who are much younger. The company considered it possible the convictions could be set aside, and it would have to pay twice, so, it wanted the court to decide who gets the money. That's what an interpleader action is.

The judge in this case, Hatfield Chilson, appointed a lawyer named Ted Wood, who was the recently retired senior partner of an insurance law firm, Wood Ris & Hames. Judge Chilson knew him quite well and asked Ted to take up the interpleader as an officer of the court. Judge Chilson told Ted, "There's no fee in it. There's an interpleader action, but I'd like you to be the guardian for this boy, who's in prison and file

a report." Judge Chilson continued, "It will take you undoubtedly on a trip to Breckenridge, where the court records are and to Cañon City to interview him and then come back and file a report." And so, Ted Wood said he would do it. The first thing he did was go to Breckenridge, but the state judge, William Luby, wouldn't allow him to see the file.

Hal Haddon: Why not?

Judge Kane: Because Judge Luby said he didn't care what the federal court wanted. Ted wasn't an attorney in the state case and he couldn't see it. That judge didn't like lawyers from Denver under any circumstance. Even so Ted went to Cañon City to see the boy and Jimmy wouldn't talk to him either.

Hal Haddon: This is James Bresnahan?

Judge Kane: This is Jimmy Bresnahan. So he came back to Denver and he reported to Judge Chilson that he couldn't do anything about this because the state judge wouldn't let him see the records and the boy wouldn't talk to him. Judge Chilson asked Ted to try one more time.

At the same time that he was talking to Jimmy in the prison, there was another prisoner there who I had represented as public defender, a guy by the name of George Robert Gorski. Gorski was a great character. I can tell you more about him later, but Gorski--I had been successful in getting his sentence cut from 16 years down to 8. So, he thought I was a miracle worker and told Jimmy, "You need to call John Kane. Write

him a postcard." Jimmy said, "I don't want to talk to anybody." Gorski said, "This guy can help you." He added, "I'll even pay the dime for the stamp for the postcard." Ted Wood went back down again to Cañon City to see Jimmy, and Jimmy said the only person he would talk to is John Kane. Ted came back and asked around if anybody knew who I was, et cetera, and some lawyers in his office knew about me being a public defender.

Ted called and asked me to come down to the Denver Club, where I had never been, for lunch, and I did. He asked me if I would come in on the case, and I said, "Well, I can't. I'm public defender; I'm not allowed to have any criminal cases." He said, "Well, can you try? I want you to represent me as the guardian ad litem so you know arguably it's not a criminal case, it's a habeas corpus, which technically is a civil case." I said, "Well, I need to talk to the county commissioners." I went back to Brighton and I asked for a meeting with the county commissioners. I told them what the situation was. And I was very surprised. They thought it was the greatest thing in the world. They were flattered that Adams County was looking so good that a federal judge would want somebody from Adams County working on this case, so they said by all means do. I agreed to represent Ted Wood. We went down to Cañon City and talked with Jimmy and started an investigation. Judge Luby wouldn't allow us to see anything.

After filing an application for a writ in the Colorado Supreme Court, we finally were allowed to see the court files and then we asked to see the probation report. Judge Luby wouldn't let us so I initiated another mandamus proceeding in the Colorado Supreme Court. We got an order that we could see the probation report. We did that and then we filed a motion. It was very difficult to do. The judge was very angry. Ted was trying to argue as the older person there. Judge Luby at one point threatened him with sanctions and said you are interfering with justice. Ted kept saying, "I'm not, I'm doing what Judge Chilson wants." "Well this isn't the federal court." Ted got a lot of that kind of parochialism and we had to go back to the Supreme Court again and get another mandamus. Then we tried to get a hearing and Luby kept denying us a hearing. He would do things like, say, "You didn't file a Notice to Set." We'd have to be in Denver, mail a Notice to Set to Breckenridge and then drive up, at which point, the clerk would then give us a hearing on a later date. Then we'd go before the judge. It was a concerted effort to make everything as difficult as possible.

Shortly after the murders, the district attorney up there, a man named Gene Lorig, was concerned enough that a 15-year-old boy was charged with murdering his parents that he had called the Colorado Psychiatric Hospital. Two residents in psychiatry were sent to Breckenridge or to Leadville where the jail was, where he was being held. They interviewed Jimmy before he had pled guilty. The two

residents filed a report. They said they felt that an insanity plea was viable because of the battered child syndrome. That sent the tenured faculty--in charge of forensic psychiatry--into orbit. The Director of Forensic Psychiatry, John MacDonald, M.D., was incensed that these residents would say this.

The battered child syndrome was not at that point an accepted theory in the medical science community. C. Henry Kempe, M.D., a pediatrician, had started an investigation and research into battered children. He had cooperated with Brandt Steele, M.D., a psychoanalyst on the faculty. They had formulated a theory about battered children. Basically what had happened is that the pediatrician had looked at numerous x-rays of injured children and saw old fracture lines. That made him wonder how they can have that many fractures. He continued his investigation and found these children were repeatedly battered, often by their parents. Then the psychoanalyst looked at the psychoanalytic aspects of battered children and those who battered them. The two formulated this syndrome. At the same time as the Bresnahan case was proceeding, this theory was being circulated at various medical conventions and seminars and was being published in peer reviewed journals. It had not yet been accepted as a valid doctrine in the general medical community or recognized medical associations.

At that time the Department of Psychiatry at CU was notably in disagreement over Freud. There were the psychoanalytic psychiatrists and there were the pre-Freudian classification types who did not believe in the Freudian approach or theory. The two sides disagreed all the time. The Director of Forensic Psychiatry, Dr. John Macdonald, was identified with the old school that rejected Freud. Dr. Brandt Steele was of the Freudian school and in fact had known Freud. As a consequence, Dr. Macdonald confronted these two residents and warned that if they insisted on pursuing this diagnosis he would recommend their residencies be terminated.

So Ted and I had evidence that we couldn't use. Evidence that in effect had been withdrawn and that was not part of an acceptable recognized medical doctrine. Our plan was to say, "Look he was insane, he pled guilty, the guilty pleas have to be set aside, and he has to be re-arraigned and we can enter the not guilty by reason of insanity plea." That was our plan, so we reported back to Judge Chilson. Interestingly, Ted Wood said, "Well. this is not insurance law." He added, "John's doing the job. I don't really need to be there anymore." And Judge Chilson said, "Oh no, I want you there, I want you. I want John to continue to be representing you as the guardian ad litem." Until the day he died, Ted was working on that case with me. His last words to me, the day before he died were, "Take care of the boy."

At about this time, I was heading to the Peace Corps. We had not been given a hearing in the Bresnahan case. Don Macdonald, who I mentioned earlier, was at CU. He had gone into practice in Denver and so I asked him to come in on the case, and he did. And then Macdonald and I worked together until I went to the Peace Corps. Macdonald went to Ted Wood and said, "I need help and another lawyer, Dale Tooley, is going to run for District Attorney, but he doesn't have any criminal law background and he wants to come in on this case." Ted Wood agreed. So for the two years I was gone, they were dealing with this case. They had to make another trip to the Colorado Supreme Court. I can't recall what that one was about. But eventually they had the hearing. When I came back from my Peace Corps tour, I contacted Macdonald and Ted Wood and they said, "Well, we had a hearing, but Judge Luby has never reached a verdict."

Hal Haddon: This was a hearing on whether or not the guilty plea should be withdrawn and he should be allowed to plead insanity?

Judge Kane: Right, right and he had never ruled. The basis of the motion was that Jimmy had been denied competent counsel because his lawyer should have seen to it that a 15-year-old with a battered child syndrome could plead not guilty by reason of insanity. This lawyer was from Cheyenne. Jimmy's maternal father-in-law had hired him. My recollection is that this lawyer told Jimmy that if he wanted to, there was a possibility of his entering insanity pleas, but if he did, he would

spend the rest of his life in an insane asylum. Plus he advised that even if he was found not guilty by reason of insanity, his grandparents would have to sell their house, and lose all their money in order to pay for it. So Jimmy said he didn't want any of that and he pled guilty. There was a serious question about the method used to extract a plea from him. At any rate they had the hearing. Judge Luby never decided, so I said, "Well, mandamus again." I proffered a petition based on a Colorado statute which provides that if a judge has held a case under advisement for--I can't remember the time--but X number of months and doesn't decide it, you can upon complaint have his pay withheld.

Hal Haddon: It's 12 months.

Judge Kane: Okay, so, I said, "Let's file that." I prepared the mandamus petition and I went to the Supreme Court office in the state capitol building--this was before the judicial building was built. I was walking through the coffee shop in the ground floor. Chief Justice Pringle was there, and he asked me, "Oh, when did you get back?" I told him, a couple of months or something. "What are you doing now? What have you got there?" I said Bresnahan's mandamus petition. He looked at me and he said, "Let me see it." I handed it to him and he said, "You know, we don't need all of this bad publicity." He said, "Let me call Luby. Can you withhold filing it for a week or so? I will call him and tell him that he has to decide the case." So I said, "Sure." I left and Chief Justice Pringle contacted Judge Luby. I think it was Pringle's assistant Harry

Lawson who called me and said the Chief talked to Luby and gave him 30 days to come out with his decision or he would impose the salary thing. So on the 29th day Luby retired from office without issuing a decision. The state court people took the file, the transcriptions of everything and gave it to another judge. The other judge was Dan Shannon, who was a very good judge who lived in Jefferson County. But all he had was the record and Luby wouldn't allow any information to come in, so the record was one that wasn't probative of the issues. Judge Shannon denied the motion on the basis of this record. But he included in his opinion that he thought his decision should be appealed because the record was inadequate. So, we said okay, we filed a notice of appeal and went to the Colorado Supreme Court one more time. Relief was denied and so we filed a habeas corpus case in federal court. This all had taken 10 years, so Jimmy was now no longer a 15-year-old kid, he was 25 or 26. I'll tell you about his background and what he did later.

When we appeared in front of federal judge Fred Winner, Winner was fascinated with the case and said, "Well, it still isn't the law that battered child syndrome is recognized and accepted within the medical community." He said, "That's right, it isn't? But it's not rejected either. It's being deliberated at this stage. You are going to have to take this matter to the Court of Appeals." So he denied it. I turned to Jimmy who was present in the court and said, "Looks like we're going

up to the Tenth Circuit Court of Appeals." He replied, "Wait a minute, can I talk to you?" I said, "Yes."

Poor old Ted Wood was there and died a month later. Jimmy said. "I just want to talk to you alone." So Ted left, and two lawyers from the Colorado Attorney General's Office left. I was at the counsel table, with Jimmy and I think the guard was over at the corner watching. But Jimmy looked at me and said, "I have been in there for 10 years. I have taken every single course that's available to me while a prisoner." He said, "I have worked in the lab doing hematology. I have received an A in every course I have taken. I can't do anything more." Then he said, "Can you get me a commutation?" He looked at me and said, "You know, even if you win this, all it means is that the money that was on deposit with the Court would go to me--or a fourth of it would go to me instead of to my brother and sisters." He says, "I wouldn't accept it anyway. It should all go to them. I'm over 21 and I'm willing to sign whatever it is to let them have it. But can you get me a commutation?" I said, "Well, I can't guarantee it, but I can try." So rather than appeal, I prepared a petition for the governor to commute his sentence. John Vanderhoof, a Republican, was the lame duck governor. He had been defeated by Dick Lamm and I worked in order to get this in front of Vanderhoof.

I finally got an appointment with him. I went in, and he looked at it. I knew him, because my dad had served with him in the legislature and I had also contacted my partner Ted Stockmar, who was an influential Republican, who knew Vanderhoof quite well, and Stockmar secured the appointment for me. So Governor Vanderhoof looked at my petition and said, "Yeah, yeah, yeah. I am not going to have my last official act being one where I free some murderer. We'll just leave that on the desk and let little Dicky Lamm take care of it when he gets sworn in tomorrow." So that's what he did.

Well, I knew Lamm and have always liked and admired him. We passed the bar about the same time and I knew him as a lawyer. I filed the Petition for Commutation again. This time Governor Lamm was getting organized in his office. He had a person helping him who I would refer to, I don't know if this is true or not, but I would call a dollar-a-year man, a guy who was helping him out, his name was Jeremy Shamos. I don't think Shamos was on the payroll, because he didn't need to be, but at any rate, he was helping out and so Governor Lamm had given this commutation petition to him to look into. Shamos came to see me and said he had to review the files. Shamos advised that Governor Lamm recalled that Dale Tooley had something to do with this case.

By this time, Tooley was District Attorney. I said, “Yes, he did. At one time he represented Jimmy. If you are going to see him, tell him I’ve got all the files and whatever he needs I will be happy to bring to him.” A couple of days later, Shamos called me, said, “Well, I’ve seen Tooley, I have some bad news for you.” I said, “What are you talking about? He hasn’t called and he hasn’t asked for anything.” Shamos said, “Well, Tooley said that it’s not a good idea for Lamm, being a brand new governor, it’s politically unwise, to take on a controversy like this at the beginning of his administration, and he should at least wait a while before he decides it.” I said, “Okay. That’s what Tooley told you?” He said, “Yeah.” I said, “Well, will you deliver a message to Lamm for me?” He said, “Sure.” I said “You tell him that Jimmy Bresnahan has been in prison 10 years under very unjust circumstances and I have spent the last 10 years trying to get him out, but if necessary I will spend the next 50 years to see that Dale Tooley is disbarred. He was this man’s lawyer and he has just said that to you.” I said, “That’s grounds, in my view, for disbarment. “

So as Shamos told me later, he laughed about it, but he said, “Well, okay.” He went in to see Governor Lamm and told him what Tooley had said, and then added, “Oh, by the way, Kane is really angry and this is what he said, I don’t place much stock in it.” Governor Lamm said, “You don’t know him, I do.” He said, “You tell John that I will grant the commutation on one condition, this is the end of it. No

more." Shamos told me and I told him that my client comes first so that's the end of it. That was the end. Governor Lamm, who I've known to be always true to his word, signed the commutation.

Jimmy was transferred to the Pueblo State Hospital. He was commuted to a term of 12 years to life, which made him automatically eligible for release after the 12 years. He was still serving a sentence but was transferred because he had already done the minimum. He was eligible to be a trustee by the state regulations. He went to Pueblo where he worked in the lab doing blood tests. Somehow he got some old bicycle parts and put them together and he enrolled at what was then called the University of Southern Colorado, and now it's Colorado State University at Pueblo.

He went there and, again, he got straight A's. He took every course he could that would fit into his schedule. He even had courses such as Introduction to Children's Literature in the Education Department, because that's all he could fit in on his schedule. After he graduated, he was released on parole and came to Denver where he lived with my wife, children and me. The two older ones were living there at the time.

Hal Haddon: So he was paroled after his commutation?

Judge Kane: He was paroled after the commutation. He was in Denver. During all of his education in the state prison and at the state hospital, he was

unable to take courses in physics or calculus. So, he enrolled at Regis University. He went across town. We lived in East Denver, but he went to North Denver every day and took courses in calculus and physics.

At the time, I had a client--I was at Holme Roberts--I was representing a very famous and wonderful transplant surgeon by the name of Thomas Starzl. At that time, Dr. Starzl was the leading surgeon in the world on kidney transplants. He later started doing total heart and lung transplants, but at that point, he was doing kidney transplants.
I called Dr. Starzl on the phone and told him about Jimmy, that he works in a lab and he knows blood tests and all that. I asked Dr. Starzl if he had a place for him, and he said, sure. He used a term I never heard before. He said, "We always need a 'diener." Diener is a word used in the lab for the people who move the test tubes around and clean things up, that sort of thing. I always thought it was like Igor in the Frankenstein movie. At any rate, Jimmy got that job and I told Dr. Starzl that Brandt Steele and Henry Kempe knew all about him. He contacted Brandt Steele and Steele said, "Well if he wants to I'll be happy to treat him and give him some therapy while he is trying to readjust." Jimmy saw Steele and he worked for Starzl.

Jimmy applied for med school and was admitted with the strong backing of Dr. Steele and Dr. Starzl. He financed that by signing up

with the U.S. Public Health Service. Like the military, the Public Health Service will pay for somebody to go to med school. For every year of med school, the graduate spends a year in service. When he graduated, now Dr. Bresnahan, he did his internship in upstate New York and then residency in internal medicine at St. Joseph Hospital in Denver. Then he went to work for the Public Health Service--to try to abbreviate this is so difficult--but when he was in prison, it was the Spanish speaking, the Hispanics in the prison, who protected him as a 15-year-old boy so that he wouldn't be raped and molested by other inmates. He learned to speak Spanish and swore that if he ever got out, he was going to devote his life to helping Hispanics because those inmates had saved his life.

Dr. Bresnahan went to the Public Health Service. He went to the San Joaquin County Hospital in the Stockton, California and spent his career treating migrant farm workers. While doing so, he realized that their principal medical problem was gastrointestinal, a lot from alcohol and the kind of diet they had. They were getting ulcers and stomach cancers and other gastrointestinal problems. So he applied for a fellowship at Long Island College Hospital in Brooklyn in gastroenterology and was admitted for this program. But New York would not give him a medical license because he had a felony conviction. Apparently, he didn't need the license when he did his internship. By that time I was on the bench, I couldn't do anything

about that because doing so would constitute practicing law. So I called my friend Mike Canges, who was very familiar with all that had occurred.

Hal Haddon: We're in probably 1979 now.

Judge Kane: I think it was a little later. Roy Romer was Governor and Mike got a pardon for Dr. Bresnahan. Governor Romer made some marvelous statements about Dr. Bresnahan, that at 15, he's a convicted murderer, sentenced to life, and now at this age he's a highly respected specialist in medicine and wants to go further and become further specialized. Governor Romer said he deserves it; Dr. Bresnahan is an example for all of us and he granted the pardon. Dr. Bresnahan went to Long Island and got his postdoctoral certification in gastroenterology. Then he went back to the San Joaquin County Hospital and practiced there until he retired just a couple of years ago.

Hal Haddon: You and your current wife and he and his wife are friends to this day?

Judge Kane: Oh, very, very much so.

Hal Haddon: Now you were sworn in as a federal judge in I think late 1977?

Judge Kane: Yes. Actually, commissioned in December and took the oath in January, 1978.

Hal Haddon: He was living in your house as I recall.

Judge Kane: Yes, he was.

Hal Haddon: And did that become the subject of some press notoriety at the time?

Judge Kane: There was a well-known New York Times reporter named Molly Ivins, who is from Texas. She's the one who called George W. Bush "Shrub" and coined that phrase for him. Molly Ivins was very well-known. She has passed away as well. She wrote an article in the New York Times. It said something about President Jimmy Carter has appointed a judge and no other judge can make this statement--he has a convicted first-degree murderer living in his house. There was quite a bit of publicity about it

Hal Haddon: His story is profound and your experience with him is profound. We'll talk about sentencing practices more when we get into your judicial career, but I wonder whether--do you have any observations about how that experience shaped your sentencing philosophy?

Judge Kane: Yes, it shaped a lot of things with me. First of all, that case was badly handled at the beginning and the law at that time has since changed. An expert can now testify in court whether his opinion is accepted or not by the scientific community. He or she can say, "I've done the research and this is what I say." But in those days he couldn't. In order to be admissible it had to be considered orthodox science. One of the things I paid attention to, and I think I got a lot of this from my conversations with Dr. Brandt Steele, the psychoanalyst, is that when people are dealing with what is technically referred to as parenticide they have--almost everyone has--a deep seated fear. It's related to the Oedipus complex and the Electra complex. Parenticide is one of these

unspoken deeply subconscious fears that people have. They hear of a child killing a parent and there is just horror attached to it. Well, if you pursue it and you understand why all of that is, the effect on my sentencing approach is, it's consistent with my thought, that you can't simply look at a statute and look at a report and put your thumb on it and say "That's the sentence."

You have to look at a possible prison sentence from every perspective and that includes the victims and the fears that they might have or what the victims may have done that unintentionally has or intentionally has helped to create this terrible situation. You have to look at the defendant and the friends, the education, the health, physical and mental, of all these people and you have to look at society at large and see what's going on with the publicity which surrounds these things. There are no simple or automatic sentences that are morally justifiable.

The Bresnahan case was highly-highly publicized and that did not help him. People would read it and say "Oh. Why aren't they executing him? Oh, you can't execute anybody under the age of 18. Well, then he should spend rest of his life in prison, end of story." But it isn't the end of the story and we needed to learn as much as we could and not hide it all under a basket of secrecy.

I learned a tremendous amount about the battered child syndrome. I learned about the struggle that scientists had at that time, and I think still do to some extent, to get their findings and their theories accepted. They are advancing knowledge, but to get those things accepted is very, very difficult. People are entrenched in prejudgments and parenticide is one of them. It affects judges just as much as it does anybody else. So when you talk about it, there's an immediate response. Even if it isn't an identifiable response, there's a subconscious reaction to the idea of parenticide. That had a big effect on me. The other effect is when it's a triumph of the human spirit when one person with Jim Bresnahan's intelligence and his drive and dedication is able to overcome tremendous brutality. He suffered such psychological battering and physical battering as a child that he was driven to that point and then to come out of it and to dedicate his life to helping others is a triumph. Rehabilitation is always a possibility. The other thing you have to look at as a judge is to recognize the abject failure of our punitive prison system. What was Jimmy doing there in the first place? He should never have been there.

Hal Haddon: As a 15-year-old?

Judge Kane: As a 15-year-old, he should never have been there. He should have been taken over to the state hospital, he should have received the therapy he needed in one or two years and been out. I know that for a fact because I had another case with a 15-year-old boy who killed a 9-

year-old girl, only this time he was found not guilty by reason of insanity and went to Pueblo. That had something to do with my appointment as a judge too, because that particular case became the Colorado Press Association's story of the year. It just inundated the news everywhere. That's when I was a public defender--when we got the boy down to Pueblo and he spent about a year. He received needed therapy and got out, went back home and was able to build a life again. That kind of thing I think is what we need to look at. I'll say one other thing and then I'll answer your question, but the idea--you hear all the time people saying. "I want justice for somebody. I want justice for whoever was killed." That's not justice; that's vengeance. Justice is balancing. That's what justice means, to balance, to restore. When people are talking about they want justice what they really mean is they want revenge. They want a legitimate way of expressing their pain and outrage.

CHAPTER TEN – 1979 - FEDERAL JUDICIAL NOMINATION AND CONFIRMATION

Hal Haddon: Let me do a time progression.

Judge Kane: Okay.

Hal Haddon: Because your experience of Dr. James Bresnahan spans 1964 to the present--2020 and in 1977 there was a vacancy on the district bench for the United States District Court for the District of Colorado when Judge Arraj I think took senior status.

Judge Kane: That's correct.

Hal Haddon: And you applied for that.

Judge Kane: Yes.

Hal Haddon: Why were you interested in being a judge at that point?

Judge Kane: Well, lots of things, clear back to being a kid and seeing Judge Walsh for one thing, it goes to the psychology teacher in high school, who said I think you would be good at this sort of thing. Then when I got out of law school, I took the bar, but there was a six-month period from December until April when I worked as a law clerk for the two Adams County judges. It was a brand-new district and I put together the law library for them, because there wasn't one before. It was part of the old First Judicial District, so this was a brand-new court. That's what I did until the bar results came out. I knew those judges and they were very good to me. And then Judge Kingsley I knew as a practicing lawyer and then he became a judge. I had a very high opinion of him. I think I was more interested in representing people. I didn't particularly like representing corporations. There was too much of a dollar sign attached to everything and how many billable hours can you do this and what needs to be done here and that sort of thing. I'm not saying it is unethical. I don't mean that. It's just that I didn't like to have to keep track of all that. I wanted to spend more time thinking, "What can we do to reach a just decision?" And that's not necessarily what a lawyer is supposed to do. So I think that while I enjoyed practicing law and I particularly enjoyed the theatre involved in trial

law, I just had this gnawing sense that I ought to be doing something else--something more.

I did not think I was going to get appointed when I applied. It was 1977 and Jimmy Carter had been president for about a year. I had to go back before that--before Jimmy Carter was president, Gerald Ford was. Judge Arraj had taken senior status in order to have his vacancy filled by President Ford, a Republican. President Ford had nominated a lawyer who had been a Congressman named Don Brotzman who had been previously the U.S. attorney here and had been Lieutenant Governor of Colorado, but Don Brotzman, had, if not an enemy, somebody who didn't like him—who was the senior senator from Colorado.

Hal Haddon: That was Floyd Haskell?

Judge Kane: That was Floyd Haskell. The Senate has this thing called a blue slip, where I don't know if they still use it or not, but the Judiciary Committee sends out a slip of paper with the judge's name on it to the senators. If the senators return the blue slips of paper it means approved, but if a slip isn't sent back, the Senate doesn't process the nomination. That's what happened to Brotzman. Senator Haskell blue-slipped him and then Ford lost in the election and Carter was elected President. Gary Hart was the junior senator. Now, I'm not privy to these conversations, so I don't know exactly what happened, but I

know that Haskell had somebody else in mind, then the newspapers said it was going to be merit selection system--

Hal Haddon: And that was new in Colorado and nationwide.

Judge Kane: --nationwide it was new. I did not know Jimmy Carter, by the way. I had met Lillian Carter, his mother, once, casually, when she was a Peace Corps volunteer in India and I was on staff, but that was a, "Hello this is our oldest volunteer. How do you do, nice to meet you." I didn't really know her that well. I had met her, but I've never met President Carter. When Carter was Governor of Georgia, that state had a terribly corrupt system and he cleaned it up. The way he did was to set up a merit selection commission and the judges who were appointed by him had to go through this merit selection process. Before, the custom was that the Senator--first senior and then junior--but the Senator of the same political party as the President, got the choice of who became a district judge and the *quid pro quo* was that the Senators would support his choice for the circuit judges he appointed.

My understanding is that when Carter became President, he set up a similar merit selection system to the one he had in Georgia for the circuit courts. The press was enthusiastic about it. The American Judicature Society was ebullient over this merit selection system that he was using. Now, I don't know this for a fact. My understanding is that--Senator Haskell wanted to get away from the bad feeling and the

animosity of the Republicans in Colorado because he had blue-slipped Brotzman, so he set up a merit selection commission. Senator Gary Hart chose five people for the merit selection commission, Senator Haskell chose five and then Dan Hoffman, who at that time was the President of the Colorado Bar Association chose the other five. I believe that of the 15 there was some sort of a rule that only seven or eight could be lawyers. There had to be non-lawyer representation on the commission. Among others, they selected Morley Ballantine. She was really good to me and we were friendly, I knew her well.

Hal Haddon: She was the publisher of *The Durango Herald*.

Judge Kane: Publisher of *The Durango Herald*. A roommate of mine in college was working for The Durango Herald and so we stayed current on one another. We were good friends. And the other, I think Eddie Pringle was responsible for this, but Chester Alter, a non-lawyer, a PhD in chemistry was appointed the chairman of the commission. Dr. Alter, at Chief Justice Pringle's urging earlier, had joined and become active in the American Judicature Society. He had just finished stepping down as President of the American Judicature Society. He had helped to implement the merit selection panel for President Carter, spreading the word around the country to have these merit selection panels. He was the chairman and he was gung-ho. He had all of the data from the American Judicature Society as to how to conduct the meetings and the application forms, et cetera.

A form was used on the application. It was prepared by Chester Alter from the forms he developed at the American Judicature Society. These were 15-20 page forms you had to fill out. It had, not just your name and education and usual sort of thing, but it also required the applicant to provide a list of the five most important cases he or she had tried and who were the opposing attorneys and the judges on those cases.

This is what I understand happened--this other man, who was Senator Haskell's preference had to go through the merit selection process, the *Denver Post* reported the fix was in and he would get the appointment. A police officer in a mountain community saw this and went to Chester Alter, who was the epitome of propriety, and said "I can't talk to you about it. This is *sui juris*. I can't do it." The police officer handed him an envelope and said, "Just read this." It revealed that this applicant had been arrested and the file was missing. The police officer who had arrested him thought that might happen, so he had xeroxed copies of the arrest record including photographs.

There were about 85 people who had applied and the list was cut down to 15. Then on a Sunday the interviews took place in a room at what was then the University of Denver Law School. There was a big horseshoe table where the members of commission sat and then one chair in the middle--the hotspot. When I went in, Dr. Alter said, "You

made this application and it was under oath, right?" and I said yes and he said, "and everything you said in there is true?" I was puzzled. I couldn't figure out what was he talking about. And then I said, "Well, you asked for the five most important cases I've tried and the names of those lawyers and judges I appeared before. Since then I've tried another case, which is far more important than those so I should probably disclose that." And he said, "No that's all right. That's all right, that doesn't matter, okay. It was correct when you put it down, right?" and I said, "Well, yes." Don Macdonald was one of the members of the committee. He turned to me when I looked so puzzled about why he is asking about this and he said, "He's asking all the applicants that same question, John, don't worry about it."

So, I left. I went home. I had no idea what would ensue. I didn't think I was going to get it, but my thought was if I apply now then I can apply later, I can apply for a state judgeship and I can apply for a federal judgeship, but this is getting my hat into the ring. Apparently this other lawyer came in after my interview and Dr. Alter asked the same question: "Is there anything you want to change?" I'm told when he said "No, I don't have anything to change." Alter stood and said, "You, sir, are a liar. You, sir, are a perjurer. You, sir, are not worthy of applying. You said under oath--you were never arrested." This applicant said something like, "But that was expunged." It didn't matter, he was finished. So there they were. They had to select three

names to go to the White House. Mine was one and two other people who I think were very, very highly qualified; one was Jim Carrigan, who had been my law school professor and the other was a lawyer and former Colorado State Supreme Court Justice, Bill Neighbors. My selection, I believe, was an unintended consequence. He is a first-rate guy. I didn't think I had much of a chance, but I had been very active with the National Defender Project and I had been active with the Litigation Section of the ABA. I had written a number of articles, I can't begin to tell you how many articles I've written, but in excess of 40 and probably a dozen of them are in the ABA Litigation Section Journal, so I knew the editor-in-chief and the publisher of that magazine.

I got a call from Dr. Alter who said, "You're one of three names and this is totally confidential. We don't want you to tell anybody." I said, "Fine." I didn't say a word, but Carrigan did. Carrigan had an interview in the *Rocky Mountain News* and said he was very eager to compete because Bill Neighbors and John Kane were both students of his and they were excellent students. That comment motivated me to push forward.

The three names went to the White House. My friend was the editor of *Litigation Journal*. He was a partner at Williams and Connolly, a very famous law firm headed by Edward Bennett Williams and Paul

Connolly. My friend, Charlie Wilson, had been a law clerk to Supreme Court Justice William Douglas before he had gone into this firm. He was also a former newspaper reporter and he specialized in First Amendment, particularly freedom of the press and freedom of religion. I knew him from all these ABA meetings we'd attended, I called and said, "Charlie, my name's one of three names in the White House. Can you do anything to help me?" Charlie said, "Well, I can't, but Connolly can." Paul Connolly was the Chairman of the Litigation Section. So Charlie went into Connelly's office and said, "You know, this guy, John Kane, he's the Chairman of our long-range planning committee," and Connelly said, "He's the kid that writes all those articles." Wilson said, "Yeah." Connelly said, "Okay, I'll see what I can do."

Carrigan made a strategic blunder. He solicited the support of the American Trial Lawyers Association. The name is changed now; it's called Trial Lawyers for Justice. Its members represented primarily plaintiffs in personal injury cases. The Attorney General, Griffin Bell, had been an insurance defense lawyer and did not think highly of the American Trial Lawyers Association. Carrigan got all of those ATLA folks to lobby for him and that caused a negative response from Griffin Bell and his number one guy, who he brought with him from his Atlanta law firm. What happened is that Connolly took Attorney General Bell out to play golf. At the end of the golf game when they're

having a drink, Connolly handed Bell a matchbook from the Burning Tree Club with my name written inside it and said “This guy’s with our Section and it would really help, because we’re new, to get somebody from the ABA Litigation Section appointed to the bench.”

Bell took the matchbook and said, “Well, I’ll check it out.” The story I heard from Charlie was that the next day he tossed the matchbook cover to his assistant, who he’d brought with him from Sidley and Austin, and said, “They’re looking at this guy for a district judgeship in Colorado. Check him out.”

This assistant’s primary job was to do the due diligence on judicial nominations. The way he did it was he had gone to Yale and he would get out his alumni directory. He’d look to see who he knew from Yale who might know something about the applicant. He’d call that person and say, “What about this person?” And he looked at his directory for alumni in Colorado. Bruce Rockwell had been a Denver banker and a classmate of this assistant. Bruce Rockwell, who I didn’t really know, said “Oh, I’ve heard of him, but ask our classmate Jay Tracey, Jay was a lawyer at Holland and Hart. So the assistant called Jay Tracey-- I knew Jay very well. We’d been involved in a couple of cases together. We were as lawyers should be--good friends--and so he said “Oh, yeah, yeah. He’s terrific, he’d be great. But I will tell you, call his partner, Jim Owen.” Jim was another classmate. Owen gave me the

best endorsement one could receive. He said to this lawyer from the Justice Department, "Oh, pick somebody else. Why would you take him from us? We want him. We're grooming him to be head of our litigation department." It's that kind of negative endorsement that did it, I think. At any rate, I was nominated and so I came over here and began my career. I was--my commission was dated December 16, 1977 and I was sworn in on January 8, 1978.

Hal Haddon: Who swore you in?

Judge Kane: Fred Winner was Chief Judge and the court met *en banc*. I had Bob Kingsley put the robe on me and Pete Holme, my other mentor presented me to the court.

Hal Haddon: And at that time, how many district judges were there, both senior and active?

Judge Kane: Well, I have to name them because I can't total it otherwise. Hatfield Chilson was a senior judge. Al Arraj was a senior judge. Bill Doyle had just been elevated to the Court of Appeals, Fred Winner was the Chief Judge, Sherman Finesilver and Richard Matsch.

Hal Haddon: That would be five?

Judge Kane: Five and we didn't have magistrates in those days. Not magistrate judges anyway.

Hal Haddon: When you're confirmed, what kind of mentoring was there other than on the job?

Judge Kane: Well, it has been my--I say this just genuinely. It has been one of the great privileges in my life. I went back to Washington and Dick Schmidt, who I'd mentioned regarding my Peace Corps experience called me and invited me to stay at his house while there for this hearing. He said, "I want to be there when you're testifying before the Senate sub-committee." So I flew in and had to go to the Senate office building. That was the first time I met Gary Hart. He was the junior senator. I never did meet Haskell. Haskell never showed up for any of these meetings or votes. But I met Hart and we went to this committee meeting room. There were a number of nominees to go through and one of them was Jim Logan, another was Monroe McKay and the other was Stephanie Seymour all for the Tenth Circuit and then me.

Hal Haddon: This is all in 1977?

Judge Kane: This is all 1977, I guess it was November or October, but the commission signed by President Carter--I wouldn't receive until December. At any rate, they went through and big item of interest was Monroe McKay because his brother was a Congressman--Gunnar McKay--and the two senators from Utah, were both Republicans and so they weren't going to have a choice or oppose him. They were also Mormons and they weren't about to blue-slip somebody because he happened to be nominated by Carter. They couldn't do that so they were there and Gunn McKay was there with his brother. I think Gunn was the ranking Democrat from Utah, so the Carter administration

would listen to him on these Circuit appointments. Anyway that was the interest from the press, that McKay was presented, they did that, and they presented Seymour and then they presented Logan. When they finished I was sitting there next to Gary Hart and the committee members all got up to leave. Hart looked at me and I looked at him and he said, "Just a minute." Then he went out in the hallway and he said, "Senators, Senators, we have one more--a district judge here," and they all looked around. There was a Senator from Alabama, who was older then than I am now, Senator Allen, he said, "Oh, I'll take care of it, you boys go ahead," so he came back in and sat down. That morning in the *Washington Post* newspaper was a story that two federal judges in Louisiana had sued the federal government on the theory that inflation had caused a reduction in their income in violation of Article III of the Constitution. Senator Allen looked at me and said, with that heavy Alabama accent, and as though he could have cared less, looked at me and said "Well young man, if you become a United States District Judge, are you going to join those two judges down there in New Orleans who are suing their own government for a raise?" That was the only question he asked. I said, "Senator, I'm told I'm not allowed to say what I will do once I become a judge, but I'm a trial lawyer now and I can smell a loser a mile away." He looked at me and said, "You'll do all right, boy." He closed the file and walked out. So that was my Senate hearing.

Hal Haddon: He was the only vote for confirmation in the judiciary committee--

Judge Kane: It was the only vote in that sub-committee and then it went to the Judiciary Committee and then the Senate passed it unanimously. So, in fact, they did all of the votes that day unanimously.

Hal Haddon: There weren't any objections from any of them? So that was a different day, wasn't it?

Judge Kane: That was a different day. But that's when I met Hart. We have become friends and I treasure my friendship with him. He's one of the most marvelous people I know.

CHAPTER ELEVEN – JUDGE ARRAJ, OFFICE PARTIES AND WRITTEN OPINIONS

Hal Haddon: You became friends with Judge Arraj after you replaced him as an active judge as well, as I understand it.

Judge Kane: Yeah, I knew him, before, but I was a lawyer appearing in front him and he liked me, I think as a lawyer, but we became very close after I was appointed. I think it became that way because as soon as I was appointed--as soon as I had a commission, I made an appointment to see him and I asked him, "I know you don't have to do this, but I would like your advice. I'd like some guidance from you, about what I do and how I do it." And I'll never forget the first thing he said. "Well, the most important thing that a trial judge can learn, and you better learn it now, is never pass up an opportunity to pee."

But he gave some really good advice later on and it leads to something else we need to talk about. Between that December 16 and January the

8th, Christmas time, lawyers had a lot of Christmas office parties and they invite other lawyers, plus their clients--

Hal Haddon: Now we're between when you received your commission in '77 and when you're sworn in.

Judge Kane: Yes, I had previously received invitations to go to different law firm Christmas parties and one of them was from my friend who was on the committee, Dan Hoffman--well he wasn't on the committee--he put five on it, but Dan was in a law firm at the time and they were having a Christmas party. So I went to it and didn't think much about it, just went to his party and then the next night there was another party at a firm that does insurance defense work. I was invited to that firm party, but I didn't go and to this day I couldn't tell you why I didn't go. I'd just been to one the night before and whatever it was I had something else to do, but I just didn't go. The following day I got calls from lawyers all over the place telling me that this law firm was spreading comments that I was not a good candidate for the bench because I hang around with plaintiffs' lawyers and I'm going to be a plaintiffs' judge.

Hal Haddon: Because you didn't go to the party--

Judge Kane: --because I didn't go to the insurance defense firm's party and the fact is I didn't do personal injury work--well, libel, I guess but, I mean, I never did that kind of work, so I'd represented an insurance company, but not in a personal injury matter. I didn't have any skin in that game.

I just went to one party, I didn't go to the next and then all of the sudden this happened, so I was very, very disturbed by it. I went to see Judge Arraj and I told him what had happened. He looked at me and this was the first time he ever said this to me, but he called me "son" which I treasure to this day. He said--and it meant a lot to me that he did, "Son, you're going to have to learn something and you going to have to understand this. You either go to all of those parties or you go to none of them because, sure as hell, you go to one and you don't go to the other, this is what happens." So I took that to heart and then there were very, very few times I went to any lawyer's party after that. Very few times because that was what he had told me. The other thing at the time I was appointed, and my mentor at the law firm, Pete Holme, had said "Whatever you do when you become a judge," he said, "don't be one of those judges who just rules and never tells anybody why. Whenever you rule, the lawyers and their clients and the public deserve to know what the basis for your ruling is." I mentioned that to Judge Arraj and he said "He's absolutely right. That's what you have to do. There is nothing worse than some judge who sits up there and thinks that he can just act like Caesar and put thumbs up or thumbs down. You have to explain and justify what you're doing." I took those lessons to heart and I have tried, and I think I have succeeded in doing that. I haven't had a case that I just said, "Well that's the way I

rule, you know, tough agates fellow, that's the way it is." I've never done that.

Hal Haddon: It's a good segue to how prolific you have been as a judicial writer since 1978, by my count you published more than 1,600 written opinions and the unpublished opinions number over 1,000 and many of them extraordinarily detailed and deal with very complex issues. Do you have, sort of, a generic writing philosophy that governs the way you approach a case or you're more eclectic?

Judge Kane: I think, I'm not sure. I'm not sure, because of different modalities of writing I like. When I have an opportunity to write a humorous opinion, I like to do that. That's totally different from writing another one. That's word play that you get involved in with that, but I've had some very serious ones that I have written with the foremost thought in mind that I'm covering my ass with the Court of Appeals. I want to make sure that the judges on that court know what I did and why I did it. That's a different kind of thing than writing one that you want the general public to be aware of or the bar to be aware of.

So there are different ways that you write, but I would say that the main thing is I really like to write, and I relax and enjoy it. My lifelong experiences growing up in that kind of a house with all those aunts and uncles and cousins, the cardinal rule was that you don't make noise. It was before television, I would get a book. I started reading when I was maybe four years old and I've never stopped. I love to read, so then I

took all these courses in college, in English Lit, creative writing, dramatic literature, and I also took a lot of philosophy courses and a couple of political science courses as well. Jurisprudence was taught by a magnificent teacher. I loved him. His name was Henry Ehrmann. He taught at CU and then went to Dartmouth where he taught for the rest of his career. I took constitutional law and constitutional history. I took philosophy courses and honors seminars. When you take honors courses or at least in those days, you got one-hour credit. It was not based on an exam, but based on a paper, so I wrote a lot and then by the time I was a senior, I was taking independent studies with professors one-on-one and writing papers for those. I enjoyed it a great deal. I did some creative writing as well, so by the time I got to law school, writing was really just second nature to me. That's what I enjoyed doing the most and those oratorical contests I was in, actually I wrote those out in advance. It was the writing of them that made them good enough to win. I think it comes naturally to me or at least I like to do it. It's the same thing in the courtroom as it is when writing an opinion, you have to size it up from not just one perspective, you have to look at it from different viewpoints.

We'll get more into Irving Andrews later, but I want you to know that Irving primarily represented defendants, he represented a few plaintiffs. But when his clients were served, he always looked at the complaint first and then he went immediately from there to the jury

instructions before he even ever thought about an answer. That's a perspective that you pick up on, if you're a trial judge you have to see things from the viewpoint of the prosecutor, from the viewpoint of the defendant, and from defense counsel, and then from the witnesses. You have to size up the jury and see who you're communicating with. I've had three PhDs and two grade school graduates on the same jury. How do you talk to them? How do you explain things to them? You take all these different things and then come out with a certain way of writing. So all the opinions are not the same. They're not. There is no key punch to them, each one is different, but each one I try to start out with a so-called hook, how do you begin the opinion so somebody wants to read it and how do you finish it. I want the reader to understand that I enjoyed writing it.

CHAPTER TWELVE – *RAMOS v. LAMM* PRISON LITIGATION

Hal Haddon: When you first went on the bench in 1978, one of the most significant cases assigned to you, which took you about 10 years to work through, was a case involving the prison conditions in the Colorado State Penitentiary, the case was called *Ramos v. Lamm* and you are a brand new judge, you have a controversial case, which over the course of it not only generated a lot of press but great consternation in the Colorado legislature. Can you discuss it?

Judge Kane: Sure.

Hal Haddon: What that case was about and what the rulings were?

Judge Kane: It had some national significance to it, too. It has an oft-quoted opinion regarding attorney fees and how you calculate them. Well, this is a very good example of what we are talking about. First of all, when you become a new judge, the other judges on the bench take a percentage of their cases and reassign them to you and the idea is that, for instance, if you have five judges and another one comes on the bench then each one of them takes a fifth of their cases and transfers to you so that each one gives the new judge an equal number of cases. Some judges will say there is a new guy on the block, I'm going to get rid of this junk I don't want. Other judges are absolutely saintly in saying I'm going to give him stuff that a brand-new judge can handle without too much problem. Then there are others who are just mechanics and send every fifth case whatever it is, send it out, and they don't think twice about it.

There are different variations of how you do that, but the consequence when I became a judge was I had a little bit of that from all of them. One of them would give me some fairly easy cases, another one gave me some dogs, and the dogs for the most part for a judge are pro se cases. You're trying to find out what the person wants and they are not trained in the law, so pro se (for himself) and you try to figure out what it is. You can't be an advocate for them, but at the same time, you can't just be the Queen of Hearts and say off with their heads. It really creates a problem. Judges are not particularly fond of getting pro

se cases, they also tend to be cases that are emotionally squishy if I can use that term. They are not the cut and dried stuff that has gone through a lawyer's trained mind and comes out in objective language. They have a lot of adverbs and they suffer a lot when they put stuff in. They lose their temper and they say things they can't prove. They lack the objectivity that lawyers are trained to use.

Anyway, I got some good cases and I got some of these clunkers. At that time forty years ago, we did not have pro se lawyers screening the cases. We didn't have magistrate judges who would handle those cases and we didn't have, as we do now, senior judges who review all of these pro se dismissals that are recommended by the staff counsel. We didn't have that in those days. Each judge just got cases, whatever they were. So even though I had done a lot of criminal defense work and criminal appeals, I had done civil rights work as a volunteer, but I'd never ever gotten into prisoner rights or representing prisoners on conditions in jails. I just didn't know anything about this.

It's called Section 1983 under the Civil Rights Act, and I just never had any of those cases, so I was looking first at how many cases I had. I had two law clerks to start with, so I said, what I want to do is go through all these cases that are assigned to me and do a kind of triage to see which ones we need to pay more attention to. I gave the law clerks that assignment and of course all the pro ses end up in one

stack. This one law clerk I had, Carolyn Carrasco, came into my office. She was all excited and said, "Judge, this is a pro se case, but it's not a case to be dismissed. The prisoner says he is confined in a 60 square foot cell, and the Tenth Circuit has a case that says that 72 square feet is the minimum. So here's the square footage." He states a claim for relief--that was Fidel Ramos--and I told to Carolyn to draft an order deny the motion to dismiss. She did a one-pager saying he states a claim for relief, the State of Colorado's Motion to Dismiss is denied, file an answer in 20 days.

I didn't think any more about it. Well, somebody thought more about it, because in New York City, the American Civil Liberties Union had set up within the previous three to four months a huge program called the National Prison Project and they saw that case. I don't know how they did, but whatever it was, maybe the local ACLU got it, sent it to them, whatever, but in those days also we had a press that actually covered the courts, so the daily orders of federal judges were published in the *Denver Post* and *Rocky Mountain News*. Somebody could easily have picked it up and said, you know, motion to dismiss pro se prisoner case, *Ramos v. Lamm* denied or something like that. At any rate, within a week I had the National Defender Prison Project in here and they moved to enter an appearance on behalf of Fidel Ramos. The next thing they did was file a motion to amend to make it a class action

and that's how the case developed. I literally had no idea then, it took, you say 10 years. I've learned an awful lot about prisoners--

Hal Haddon: This was your first year on the bench?

Judge Kane: Yes, my first year, one of my first cases.

Hal Haddon: And how did that case progress? What happened?

Judge Kane: Well, it was hotly contested, and the lawyers in the case were all a pleasure to have, both the ACLU lawyers and the assistant state attorneys general. They worked like lawyers and as Shakespeare says, they strived mightily, and then ate and drank as friends. They were cordial and civil. To this day I occasionally will get a birth announcement from one of the women lawyers who was on that case. She had a daughter and that daughter has now sent me a birth announcement. It goes back a long time. Jim Hartley, he may be retired now, he was a partner at Holland & Hart, was one of the lawyers on that case. The assistant attorney general in charge was Joe de Raismes who moved up to Boulder and I think was city attorney. His number two person was Richard Goldberg, who is the younger brother of my friend Chuck Goldberg, who just retired.

Hal Haddon: Tarquin Bromley was an Assistant Attorney General; he was my former investigator on that case.

Judge Kane: I remember Tarquin Bromley. So anyway, they were great, but the Attorney General at that time was J. D. MacFarlane and he was confronted with a very hostile state legislature. He was a Democrat

and the Senate was controlled by Republicans. Dick Lamm was the Governor and MacFarlane was dealing primarily with a Republican Senator named Ralph Cole. There was a whole line of hard feeling and vitriol, so I'm not too critical of MacFarlane when I say what I have to say, but those lawyers would be in court and they would say things to me, then MacFarlane would have to appear in front of the Senate and he would go in there and tell Senator Cole they were doing everything they could to fight the case, but I was driving it. Senator Cole came over and sat in the back of the courtroom when we had hearings. He made some noises about trying to get me impeached and things like that. But I think MacFarlane said things that were not accurate about what was going on in the court. Certainly, his appraisal of me was his opinion, but it wasn't based on anything I was doing.

Hal Haddon: So the core issue was the various conditions of confinement at the Colorado penitentiary system writ large?

Judge Kane: It was health, safety, the safety of the officers, as well as of the prisoners. The process they were using to handle complaints, certainly about the medical care and the complete lack of mental health care that was going on. It was a totality of circumstances case in one dilapidated facility called Cellhouse Seven. I think it had been built about the same time that the Last Supper occurred. It was old, dirty and dingy, but they kept people in there. Even their own expert prison architect said that Cellhouse Seven was not fit for human habitation. One of my

first orders was that that building had to be demolished. Nobody should have to stay there. I went down to the prison, took my buddy and former client Gorsky with me as an expert adviser.

Hal Haddon: Gorsky had been an inmate?

Judge Kane: Yes, he certainly knew that prison well. We went down and visited the prison and we had, I think, five weeks of expert testimony. There were tons and tons of briefs, books, and articles that were filed and I went through them all.

Hal Haddon: Ultimately, your ruling was what?

Judge Kane: Ultimately, my ruling was that the State of Colorado was violating the Eighth Amendment to the U.S. Constitution by imposing cruel and unusual punishment on inmates at designated institutions. I identified those, and that there were violations consisting of a denial of adequate medical care, a denial of space, a denial of safety, and a denial of safety for the guards as well. That's pretty much what I recall. It was on the conditions themselves, so I ordered that one cellhouse be shut down permanently, and then the remedy I gave was to give the state a certain period of time to come forward with plans as to how to change the rules and conditions of confinement. If they didn't, then I would do it myself, and they did. They went out and got experts and came back and they redesigned the system.

Irony of ironies, they had a warden down there at one time named Harry Tinsley and the Colorado Correction Officers Association has an award they give out every year called the Harry Tinsley Award. About 10 to 15 years after the *Ramos v. Lamm* case, I received the Tinsley award from the guards. It took a long time for them to understand that the lack of safety was, among other things, a product of the poor conditions. Looked at quantitatively--the suicide rate of prisoners, for example, the self-mutilation rate is higher than suicide; one looks at the numbers of diagnosed psychosis compared with its rate in the free community. Another thing to look at is the health of the guards as revealed by sick leave, furloughs and turnover notes. Is there an increase in brutality? There is a correlation between that and how the guards themselves are treated; they get angry and take their anger out on somebody else. So there are a whole lot of complicating factors that go into it, but the guards finally realized that the requirements I was making were for their benefit as well as for the inmates. They had far, far fewer assaults on guards after the *Ramos* case, far fewer.

Hal Haddon: One of the interesting postscripts, it's not really a postscript of that litigation is that at the end of it, you wrote a very comprehensive opinion regarding attorney fees for the lawyers for the prisoners. All of them volunteered for the duty, and I think you mentioned earlier that that has had some precedential ramifications --

Judge Kane: Yes they had.

Hal Haddon: --nationwide to this day.

Judge Kane: I'll tell you something funny about it, too. I wrote that opinion and we used to have these judges' meetings, not like the ones that are taking place now. In the old days we had these meetings where we discussed law and we would discuss each other's opinions and what the Tenth Circuit was doing, the Supreme Court, et cetera. The meetings were more like a seminar. I wrote that opinion and circulated it for the next meeting. Judge Arraj said, "Well son, that's a lot of money you just awarded those plaintiffs in that prison case. That's a lot more money than I awarded." I said, "Well judge, it went to the Supreme Court of the United States and got appealed twice, I had a five-week long trial. There were six lawyers involved. I don't remember whatever it was, a million two or something?"

Hal Haddon: At my last read it was $898,000.

Judge Kane: Well, I think it went over a million, but at any rate Judge Arraj said, "No, no. I am not talking about that case." He said, "That's more attorney fees than I awarded in my entire career." Winner just looked up and said, "Welcome to the big time. Everybody in town is going to call you easy money from that one." The significance of it that I looked at, rather than a mathematical formula, of just taking in the number of hours spent and the hourly rate, and coming out with what is called the capstone or lodestar--and I junked that and held we're going to look at the fundamental good that they did in the individual

cases, the challenges, the unusual aspects of the law and so on. I put all of that together and I found they're spending more time on research than would normally be done. There is another case that I followed, *Georgia Highway Express*, I think is the name of it that deals with attorney fees, but it uses the lodestar. I held we were not looking at how much a legal aid lawyer gets for handling something; we're going to look and see what this is worth on a general economic basis. That's essentially what happened. I did it in such a systematic way, that that's what followed. The Tenth Circuit basically accepted everything I did. Logan wrote that opinion and I think he disapproved of one or two things I said. Then it went to the Supreme Court and the Supreme Court affirmed.

CHAPTER THIRTEEN – KILPATRICK LITIGATION AND GRAND JURY PROCESS

Hal Haddon: That's a good segue to a case where you get reversed by the United States Supreme Court--a matter that was pretty profound in terms of adjudicating what kind of grand jury practices will be tolerated by the judiciary. The case I refer to is the *Bank of Nova Scotia* case--*Kilpatrick*. That's the case that you had fairly early on in your judicial career in the 1980s. Could you describe that? What were the issues and how did it all come out?

Judge Kane: Well, it's, you know when you get reversed by the Supreme Court and by the Tenth Circuit Court of Appeals it's somewhat humbling and you think maybe you were wrong, but I really don't think I was in that

case. But I was outvoted significantly. Kilpatrick was an extraordinarily difficult kind of person to have in court. He was a tax protester, tax evader and he was part of a national movement to avoid paying income taxes and to encourage other people not to pay their income taxes. Not the local U.S. attorney, but the attorneys at what they euphemistically refer to as Main Justice had that case. Their conduct in preparing that case was in my view, and in the view of others as well including Judge Winner, who had something to do with *Kilpatrick* later on, was unconscionable.

As an example, there was a PhD in taxation from I believe the University of Washington, who came before the grand jury and testified. He disagreed with the theory that this main justice prosecutor had. This prosecutor told him that he would never testify again; that he was going to destroy his credibility and if he didn't change his opinion, he was going to recommend his removal from the faculty and all of this kind of stuff attacking this witness. He had hearings in which he was insulting to the witnesses. He had people who were to be called and could say something favorable about Kilpatrick and he wouldn't call them. I was just--I can't even begin to think now, it has been so long, but it wasn't just one act of misconduct, it was a--I think I used the term that he had converted the grand jury into a rubber stamp and that the grand jury couldn't fulfill its obligation under the statutes and the Constitution given the way it was done, and so I

dismissed the case without prejudice on the grounds of prosecutorial misconduct before the grand jury.

My ruling was appealed and Tenth Circuit Judge Holloway wrote the opinion reversing me. He didn't challenge my findings of misconduct, but he held that any misconduct performed in front of a grand jury was absolved by having a petit jury hear the evidence at trial. He ruled it was beyond the authority of a trial judge to dismiss a case on the basis of misconduct by the prosecution in front of the grand jury. A trial judge could dismiss for prosecutorial misconduct in front of a petit jury, but not the grand jury. I had ruled that I thought it was a part of my supervisory responsibilities as a judge to control the conduct of the government before the grand jury, but Judge Holloway ruled that a trial judge has that obligation, but not the authority to dismiss the case. I can't recall exactly how the bank in Nova Scotia came into the case, but it was the bank that Kilpatrick was using and it had lawyers who were here in the court at the time. I think the bank settled eventually.

Hal Haddon: I think they were co-defendants in the original prosecution.

Judge Kane: I think that's right. And so then Kilpatrick went to trial and I think he went to prison.

Hal Haddon: How did the United States--

Judge Kane: He wrote a book, by the way. I know, I was mentioned in his book, but I don't know where it is now. Fred Winner and I were both mentioned in Kilpatrick's book, "Kilpatrick."

Hal Haddon: How did the United States Supreme Court take that up? Was it after his conviction?

Judge Kane: Well, they took it up with the Bank of Nova Scotia. I don't know exactly how that happened. I know that the court's opinion was written by Justice Scalia, holding it doesn't matter what happens in front of the grand jury because once you have a petit jury only the conviction on the basis of what was done at the trial is subject to review.

Hal Haddon: The effect of those appellate opinions appears to be to this day that federal grand jury practices, no matter how abusive can't be reviewed by the judiciary. Is that your read?

Judge Kane: That's right. That's the way I read it. I don't like the decision. I think it encourages a police state, but we are bound by these decisions whether or not we agree with them. It's the essence of what is called the Rule of Law.

CHAPTER FOURTEEN – *U.S. v. O'DRISCOLL* - SENTENCING DANGEROUS OFFENDERS

Hal Haddon: One other case of significance that I want to ask you about occurred doing your first 10 years after you were sworn in. I sort of segmented your career into 10-year increments.

Male Speaker: Decades.

Judge Kane: Yes.

Hal Haddon: Pretty soon we'll have a rosary. We'll get to the decades starting in 1988 tomorrow, but this case involves a criminal defendant named O'Driscoll. He's someone who you sentenced to 325 years in prison

and that case was controversial not only because of the term, but because of the circumstances. Could you describe it?

Judge Kane: Sure. It was a particularly horrid crime spree that O'Driscoll was on. Among other things, he went into a gun store in Lakewood with a gun he wanted to pawn. The owner of the store said he didn't have a pawn license and O'Driscoll took this 44 Magnum Revolver and pistol whipped this guy, to such an extent that his fingers were splayed. In other words, they were so broken that they came together, they just turned into mush. O'Driscoll then left the gun store. He had a go-go dancer with him, and they went to a shopping center in Lakewood, the JCRS Shopping Center. There was a guy, a Vietnam veteran of the Navy who sold window sashes, window frames and such. He had a little van and he would take his samples around like Pella windows that people can install in home construction. On this day, he had stopped working and went into Joslins Department Store to get his wife a birthday present.

I point this out because Joslins was a very low priced, economy place that people with limited incomes would frequent. It was not one of the fancy places in the Cherry Creek Mall, it was a Walmart kind of clothing store. This guy was buying his wife a present at a store he could afford to go to. When he came back out to his van, O'Driscoll was inside a stolen car with his go-go dancer and with the firearms and the booty he had taken out of the store where he had just beaten this

poor owner into insensibility. He grabbed this salesman and threw him into the van, put the rest of his stuff in the van and took off. He drove across the state line into Kansas. He went to a small town in Kansas and told his girlfriend to go into this drive-by, whatever, some hamburger joint. She asked O'Driscoll what he was going to do with the salesman. The salesman had been saying look just leave me alone, you can have the van, just leave me alone. The go-go dancer testified to all that.

O'Driscoll said, "I'll take care of it. I'm going to drop him off out of town." So the dancer went into the restaurant and O'Driscoll took the salesman out to the outskirt of this small town in Kansas. The salesman was crawling on the ground, O'Driscoll shot him seven or eight times. The last wound was a contact wound in the back of his head. The bullet came out through his face. So, O'Driscoll returned to the van and picked up the dancer. She asked, "Where is he?" O'Driscoll replied, "I let him go." The two drive on to Connecticut where he robbed a bank and then a savings and loan. Then he got rid of the van. He cleaned it all up, except he forgot that he had adjusted the rear-view mirror and his fingerprints were on the backside of it.

So O'Driscoll stole another car and drove further into Connecticut. He went into a small town, robbed another savings and loan and went to a motel where he took the sashes from the window shades. He went to

another savings and loan where he kidnapped an older woman. He took her to this motel room, tied her up and he left her for dead. She happened to live but he left her to die. Then he continued on his crime spree, robbing banks and savings and loans. He ended up in Oregon, where he was trying to buy thousands of dollars' worth of marijuana. When he was arrested he had automatic weapons and a whole display of the marijuana. He had a photograph of weapons and a huge basket of marijuana and a sign that said public enemy number one.

When he was arrested, the local law enforcement officials planned to prosecute him. But he was already awaiting trial here in Colorado. He was extradited and I drew the case. The state prosecutor in Kansas, advised the federal prosecutor in Colorado that he was not going to prosecute him. It cost too much money for a murder case when the victim wasn't a resident, nor was the defendant, so why should they bother about it as long as he was being prosecuted here. In a way, O'Driscoll was getting away with murder, attempted murder along the way, and then I found after he was found guilty that he was suspected of having killed somebody else. He had beaten up his father. He had committed a whole string of other crimes. He made threats to his victims that when he got out, he was going to do more things to them.

So he went to trial in my court. He had a court appointed lawyer, he was found guilty of several counts, including kidnapping and armed

robbery. The evidence was overwhelming. I remember the owner of the gun store coming in and testifying with his hands mangled the way they would be for the rest of his life. The go-go girl testified. He was charged with kidnapping, but not murder in my court because the murder occurred in Kansas.

The penalty for kidnapping at that time was any term of years or life. The practice of the U.S. Bureau of Prisons was the same as with the Bresnahan case. If a prisoner served 10 years of a life sentence, he became eligible to be considered for parole. I wanted to make damn sure that this guy wasn't out in 10 years' time.

I looked at the statute and it said any term of years *or* life. There was another statute that said the judge can fix the minimum term of imprisonment as long as it doesn't exceed one-third of the maximum sentence. That's the way the statute read at that time. I sentenced him to 325 years because that meant that he would have to serve 108 years before he would be eligible for release on parole. What I intended was in effect to impose a life sentence without parole that related to the murder case, the bank robbery, the maiming and all these other things that he had done. As expected, the case was appealed. Tenth Circuit Judge Barrett wrote the opinion affirming everything and O'Driscoll petitioned for certiorari. I have to interrupt myself to tell you one funny thing that happened. When I sentenced him to the 325 years, his

court appointment lawyer was a guy named Ike Kaiser. Ike looked at me and he said, “325 years? Judge, my client can’t do 325 years.” and I said, “Just tell him to do what he can.”

The case went to the U.S. Supreme Court on petition for cert. We had, at that time, a splendid U.S. Attorney, one of the best I’ve ever known, Bob Miller. Miller was in Washington visiting Main Justice, going around and seeing how his cases from Colorado were doing and so forth. He went into the Solicitor General’s Office, and I think it was a professor from Harvard named Charles Fried, who was the Solicitor General. Miller introduced himself and said he was from Colorado. He asked General Fried what was happening on his Colorado cases. The Solicitor General said, “We’re just getting ready to confess the petition for cert on this O’Driscoll case.” Miller said, “Come again?” The Solicitor General said, “Well, yes. That judge has just usurped the authority of the Bureau of Prisons and they’re mad as hell. They think the statute gives them the discretion as to when to release people and they ought to be able to decide when O’Driscoll leaves, but by setting it up the way this judge did, he is going to do at least 108 years before he is eligible for release. So we want a confess error or confess the certiorari petition and asked them to reverse it because the judge has abused his discretion.”

Miller said, “Stop right there.” He turned around and walked directly to Attorney General Meese’s office. He walked in and Attorney General Meese was busy on other stuff. “What do you want?” Miller said, “I just want you to know that a Carter appointee has sentenced a murdering bank robber to 325 years and your Solicitor General from Harvard wants to confess the petition and admit error.” Attorney General Meese looked at him and said, “Jesus H. Christ!” He yelled at his secretary, “Get me Fried on the phone.” Miller reports only half of the conversation, “Don’t, wrong, no.” So cert was denied, but it came that close, not because of the merits, but because the bureaucrats in the Bureau of Prisons didn’t like some judge interfering with their discretion and tying their hands.

Hal Haddon: And, as I recall, your judgment had a tragic verification when O’Driscoll murdered someone else in prison.

Judge Kane: That’s right. I said in the opinion that he was likely to kill again. I sent a letter to the Bureau of Prisons saying this man was one of the most dangerous I have ever encountered. He was assigned to a prison in Pennsylvania, where they make baseball bats--Kingsport--and he killed a prisoner there. I’ll tell you about that. He joined a gang in prison, an Aryan Nation gang. The prison had “no smoking” rules on the first tier of a cell house. There was a guy who was on the first tier who had asthma. He had a single cell and somebody in the Aryan Nation wanted that cell.

So the gang leader sent O'Driscoll into the cell to tell this prisoner with asthma that he had to give up his cell. The other prisoner said, "Look, I'm going to be released in two weeks and I can't live up there with all that smoke. I've got asthma." O'Driscoll took out a knife and killed him. He was charged with murder and the prosecutors sought the death penalty because he had murdered before. I was subpoenaed, and I went back and testified. I related the story of the trial and events in Colorado. O'Driscoll was found guilty of that murder. The jury was qualified for the death penalty and deliberated for two weeks. Finally, the jury returned to court and reported they could not agree. It was 11-to-1 for the death penalty. One person held out. The reason she gave was because O'Driscoll's daughter who he'd never met had sent letters to him. And so that's why he wasn't executed. O'Driscoll was transferred to Florence, Colorado and I believe he's still in the Supermax.

Hal Haddon: In Florence?

Judge Kane: In Florence, Colorado. I was told at one time when he was either in Levenworth or the maximum security unit they had in Ohio, near Terre Haute, the prison officials met with him and asked what he would do if he was released. He was not eligible for release, but what would happen if he got out? O'Driscoll said, "I'd get a bus ticket and I'd go to Denver and I'd go to the courthouse and I'd kill Judge Kane."

Hal Haddon: So, well, it's good thing you got 325 years. We're at 3:30, so let me call it.

Judge Kane: So that's O'Driscoll.

Hal Haddon: That's an extraordinary story, too.

Judge Kane: Oh, there's one other thing on there: Dick Spriggs--he was a career prosecutor and later a judge--and a good friend came up to me after the O'Driscoll case was over with and said, "Talk about hitting a high hanging curve ball out of the ball park." He said, "That one was really just handed to you." And I said, "Come on," I said, "That was a tough thing to do." And he says, "Well, it's certainly gotten rid of your reputation of being soft on crime."

Hal Haddon: All right. Thank you. We'll adjourn again until 10 tomorrow morning.

CHAPTER FIFTEEN – JUDGE RICHARD P. MATSCH

Hal Haddon: All right let's start, Judge Kane today is May 21, 2019 and we're back again discussing your career. We were in the 1980's when we adjourned yesterday, and I thought I'd pick it up there. I have couple of questions about your relationships and your early judicial career with a couple of your colleagues and Judge Richard Matsch in particular. Could you describe that?

Judge Kane: Well, yes that's the deepest judicial relationship I have. Dick was in the same law firm, Holme, Roberts & Owen, that I was, but he left before I arrived and went to the Bankruptcy Court at the behest of Judge Arraj. He also belonged to a club that I did at the time, the Cactus Club—it was a men's luncheon club. So I knew him as a former partner of the firm I was a partner in and as a fellow who also went to the same club I did for lunch. Then when I came here, he was on the District Court bench. He was very helpful to me in getting started. He went over my docket of cases and suggested ways of handling different kinds of cases. Our friendship developed over the years. I would say that of all the judges that I've known over my lifetime, he was my closest friend. He was a senior judge. He sat and presided over chambers situated in the Byron White Building, cater-corner from us in the Arraj Building. Traditionally, and this is typical of Matsch, the District Court held the courtroom on the north side of the Bryon White building on the second floor. When the Tenth Circuit

Court of Appeals expanded and that court wanted the space. Matsch said absolutely not, this is a district courtroom and so he moved into it. The Post Office had taken over the old building and then had built a new post office building and moved out. The Tenth Circuit wanted to expand and so Matsch went back into the courtroom and chambers behind it. That combination and chambers were originally occupied by Judge Moses Hallett, the first federal district judge in the District of Colorado. Because it's across the street south of here, we jokingly refer to it as the Southern District of Colorado.

Hal Haddon: Judge Matsch was a fan of your judicial writing. And I recall a note that he penned to you where he decried his "Prussian prose." Do you remember that note?

Judge Kane: I do vividly, I still have it. He wrote a note which says, "I would trade a volume of my Prussian profundity for a page of your Irish lyricism."

Hal Haddon: Did you exchange opinions with Judge Matsch?

Judge Kane: Oh! All the time. In fact until these damn computers came in, we used to circulate our opinions in writing. Each judge would write opinions and circulate them to the other judges. We had judges' meetings in which we would discuss law, we would discuss the opinions that each one of us had written. We discussed what the Tenth Circuit was up to and what changes they had made in precedents. And then we would discuss U.S. Supreme Court cases as well. That stopped with the computer, people thinking that they didn't need to meet and discuss, I guess. So during that time we

exchanged with all the judges. Matsch was and I remain Luddites when it comes to all these computers. So we still exchange. But what happens basically is I will call him and say can you send me a copy of your opinion? And if I think I have written something that he might like I send it over to him. Occasionally, my law clerks will go beyond these machines and say, "Oh Matsch wrote an order." Or his law clerk will say, " Kane wrote one." And we will read it and then we'll contact one another. He has made some extraordinary decisions, marvelous decisions over his career and not all of them go noticed, because a lot of times the decisions that we judges think are important are not necessarily of economic or commercial importance. So they don't get much attention. But we think of them. For instance, he wrote an opinion in the last year or so about the terrible prolonged effects of solitary confinement on prisoners. He said that it was cruel and unusual punishment. He wrote a marvelous opinion. I think it's pending in front of the Tenth Circuit now.

Hal Haddon: I heard you once say that you thought Judge Matsch had really restored respect for the judicial process.

Judge Kane: Without a doubt.

Hal Haddon: In the Oklahoma City bombing trial.

Judge Kane: Without a doubt.

Hal Haddon: Could you explain that?

Judge Kane: Sure, I think you have to go back into the 1950's or 60's with the *Sheppard v. Maxwell* case dealing with cameras in the courtroom. The

Supreme Court, in *Sheppard v. Maxwell*, said that trial had turned into a circus. Following that decision the courts shut down T.V. and camera coverage in the courtroom. The press (now called "*The Media*") was really dead set against it. Then the murder case against the football player O. J. Simpson created a reprise of the *Sheppard v. Maxwell* circus, with the press dominating the courtroom and the lawyers and the judge all preening in front of the cameras and trying the case to the press rather than doing what they were supposed to do. O.J. was acquitted and there was a lot of public discussion and complaints about what a fiasco the trial had been. A lot of columnists were talking about the court system, saying it cannot exist with today's communications and so forth. And then the Oklahoma City bombing occurred. The case began in Oklahoma City. The grand jury issued its indictment. The feeling there understandably was so strong that the defendants wanted to change the venue to some other place to try the case.

Each of the judges there was personally affected by the explosion and destruction of the building and the deaths of many people they knew. The Chief Judge of the Tenth Circuit was Stephanie Seymour, who was likewise in Oklahoma. She appointed Judge Matsch to preside over that case. He went to Oklahoma and looked the situation over. He considered the motions for change of venue and decided to try the case in Colorado. He did and he handled it with no cameras in the courtroom and no public statements by himself. He had, in effect, the Clerk of the Court, Jim

Manspeaker, effectively function throughout the Oklahoma City bombing case as the court's press agent. Manspeaker coordinated the reporting. The case had international coverage. It was very interesting to see how the media would cover it.

The dignity with which Judge Matsch handled the case and the stern yet compassionate control he had over the courtroom, was unquestionably one of the finest demonstrations of what a judge should do under the most arduous of circumstances. McVeigh was the first defendant to be tried. He was convicted and then sentenced to death. Because people in Oklahoma City were deeply interested in what was happening, Matsch had a large auditorium, perhaps a courtroom in Oklahoma City, opened to allow the citizens of Oklahoma City to watch the trial proceedings. There was a closed-circuit television that televised the trial in the courtroom here in Colorado and sent it down to Oklahoma City. Judge Matsch had a friend of his, a longstanding friend of mine as well, Gaspar Perricone, who was a retired state district judge in Colorado, go down to Oklahoma City and preside over that auditorium.

The case is unique in American jurisprudence for at least one other reason. According to law, Judge Matsch wouldn't allow any television cameras and other such equipment in the courtroom. Congress passed a special statute while the case was pending ordering the televising of that case from Denver to Oklahoma City. So Judge Matsch was the only trial judge

in the history of American jurisprudence who was reversed during the course of a trial by an Act of Congress. But the public pressure was so great that it happened.

The courtroom was specially designed. He did a wonderful job of protecting jurors, who were concerned as everyone was with the safety of the lawyers and the jury in this courthouse because the other one had been blown up. Judge Matsch had the courtroom designed so that people could sit in the spectator section, but they would not be able to see the jurors. And the jurors could see everything in the courtroom, but not the spectator section. Then, of course, there were extra security measures taken, and he supervised all that. He made sure everything was safe without going into the vaudevillian nature that some courts have of showing the defendant in manacles and an orange jumpsuit. He did not do any of that and the guards kept their distance, so that the case was tried without being under the point of a gun and that sort of thing.

He created special procedures for the security of the jury: the jury would meet at different locations throughout Denver rather than have them all be confined in a hotel and marched in "sequestered." They could go home at night, but they would come in vans into the courthouse through a private entrance and then into the courtroom and the jury room adjoining it. At night, they would all get back into vans and the marshals would take them. Because they were fearful of being followed by somebody, the marshals

would change the location each night of where the jurors would meet. So they would meet at a shopping center out in East Denver. Then they would meet in a shopping center in West Denver then in a parking lot in another part of town. They would park their cars and come in via vans to avoid any sort of contact with anyone.

We were all concerned because McVeigh and his cohort had blown up an entire building. Lots of people were killed. There were fellow travelers of his who had made similar threats. So there was a lot of pressure, but Matsch handled that whole thing with grace and with dignity. My favorite word for him is “rectitude.” When it came to the sentencing, the jury returned a verdict of death, which was perfectly understandable. I asked Matsch afterwards when he pronounced the death sentence (it was the only time he ever did or had to) what was it like to be a judge and pronounce a death sentence. And his answer, typical Matsch, very brief, he said, and this is an exact quote, “It was stark.” That was all he would say about it.

Hal Haddon: I recall McVeigh. I was present at the sentencing, I recall McVeigh, when Judge Matsch sentenced him, stood ramrod straight and nodded towards him with great respect. It was extraordinary.

Judge Kane: I am sure it is the case that McVeigh, I can't remember where I learned this, but I learned that he had great respect for the way that Judge Matsch conducted the trial and the way he was treated. There was some difficulty at the very beginning of the case with one of the lawyers who had come in

to represent McVeigh. He was trying to become world famous at the expense of the trial. I don't remember what his name was, but I remember that Matsch called the attorneys into his chambers and said this is how we're going to try this case and that was the end of the press statements.

Hal Haddon: His name was Steven Jones.

Judge Kane: Okay.

Hal Haddon: When you--

Judge Kane: I was being gracious.

CHAPTER SIXTEEN – CHIEF JUDGE FRED WINNER

Hal Haddon: I outed him. At the time you were first sworn in as a district judge, Fred Winner was the Chief Judge.

Judge Kane: Yeah.

Hal Haddon: What was your relationship with him?

Judge Kane: We had a very stormy beginning. It's kind of a fun story really because we ended up as very close friends. I have never been politically active. The last time I was politically active was with the J. F. Kennedy Campaign in 1959. I was the Colorado State Chairman of Students for Kennedy. After that I got into law and I never really became active in partisan politics. But my father was a Democrat, as well as my mother, as well as everybody else in my family, and I registered as a Democrat and voted that way. But I was not a political junkie and hanger-on, or anything like that. So when former Congressman Brotzman was blue-slipped, President Ford had nominated him. I think it was Senator Gordon Allott, who had been

advocating for Brotzman's appointment, who was also a Republican. And Fred Winner had been a lifelong Republican. He had been appointed by Richard Nixon to the bench. So when Jimmy Carter came in and I was appointed, I can understand why people thought well here is a Democrat and this is politics and they are putting in a Democrat. I am not sure of this, but frankly I don't know if that Merit Selection Commission even knew whether I was a Democrat or not. I just don't know. It was never brought up. But I didn't have any political connections. But that's not what Judge Winner assumed when I was appointed. So he made some kind of comment after I was appointed, "Well, we'll just see if we can deal with one of these liberal Democrats coming over here." Something to that effect.

When I first got here he wasn't unfair, but he was very strict and very distant with me. I went into see him and he said, "Well these are your cases and you handle them as best you can." That sort of thing. And he did offer me at the very first meeting a piece of advice. He said, "You're accustomed to practicing in state courts. And they have the same rules, but they don't enforce them and we do." And he said, "Summary judgment is a big thing over here in federal court. It's not in the State Court. You are going to have to get used to that." So, I had my chambers and the Clerk treated me well and I didn't have much other contact with Winner at first.

I had appeared in front of him and he'd always treated me very well. I didn't have any animosity, but it was somewhat strained when I got here. That was in January. So things went along and in March, St. Patrick's Day came up and I sent green carnations to all of the clerk's office employees and to my staff and the judges' staffs. And I said that I would not be available. It was on Friday that year. I said I will not be available on March 17. He called me, or his secretary did, and said, "Winner wants to see you now." And so I went into see him. He had his commission on the wall. All Article III federal judges get a commission signed by the President. So I came in and Winner said, "Who do you think you are? You can't declare a holiday, holidays are declared by Congress. This court isn't open for everybody but the Irish." He really was nailing me for this. I just had enough of his guff, so I pointed to his certificate and I said, "You see that certificate on the wall." He said, "Yes what of it?" I said, "I have exactly the same thing, only mine isn't signed by a felon." Fred looked at me, gritted his teeth, and then all of the sudden he started to smile and then he laughed. And he said, "You are going to do okay." And that was the change. As soon as I had stood up to him, that was it. Then we became very close friends.

By the time he retired, the poor guy; he was living in Grand Junction where his daughter lived and his wife had passed away. He had a very close, devoted relationship with his wife and it took a lot out of him when

she passed away. He was losing his eyesight and his hearing. So I'd go over to visit with him at that time and spend as much time as I could.

We have a courthouse over there. He was instrumental in having it remodeled and doing his best to get federal cases heard in Grand Junction. If they occurred on the Western Slope, he wanted them heard in Grand Junction. So, I had cases that I was able to have over there with local counsel. When I could I'd go over, I would always spend the night, have dinner and visit with him. By the time he passed away, we were very close friends.

I'll tell you one funny story about Judge Winner that I didn't have anything to do with. It was said of him that he was the best trial lawyer the State of Colorado ever had but he never changed when he became a judge. He didn't have a quintessential judicial temperament. He would seize on the issues immediately. That's the way things went with him. But he also exercised. He was in his 70's and he was a slow jogger. But he would jog. One time when he was over in Grand Junction, the clerk, Jim Manspeaker, was with him. Winner was notorious for getting up at 4:00 in the morning, exercising and then being in his chambers by 5:30 every morning. If he didn't like a lawyer, he set hearings at 5:30 for them. He was in Grand Junction and staying in a hotel. At about 4:30 in the morning he got up and put on his sweatpants, sweatshirt and sneakers, and went out jogging. A Grand Junction policeman on patrol pulled over. Seeing this guy in his

70's, jogging along the side of the road he shined a light on him. Of course, Winner didn't have any identification, because he was in his exercise clothes. The police officer, so the story goes, said: "Who are you and what do you think you are doing?" Fred said: "Well I'm Fred Winner and I'm a United States District Judge and I'm exercising before I go to court, but I will be in the Federal Court here in about one hour." And the policeman said, "Sure, you're a federal judge and I'm Eliot Ness. Get in the car." He took Fred to the police station and Winner asked, "Do I get a phone call?" So he called the hotel for Manspeaker and said, "Go get my wallet and come down here." Manspeaker went to the police station. I guess that police officer was totally embarrassed. As Winner was leaving he said, "Mr. Ness, thank you very much." But that was Fred.

CHAPTER SEVENTEEN – FEDERAL SENTENCING GUIDELINES

Hal Haddon: I am still in the first decade of your time on the bench and in the middle of 1980's, 1984 I think, the United States Congress passed and the President signed a bill which created the United States Sentencing Commission and mandatory guidelines were created.

Judge Kane: The Sentence Reform Act.

Hal Haddon: Yes. And you have had your disagreements with that statute from the beginning. And you've written on the subject many times. When the guidelines first came out, they weren't immediately effective. Do you recall the first time you had to deal with them and what you did about it?

Judge Kane: Yes. The law was enacted in 1984, what Washington hardly needs, another bureaucracy was created with the formation of the Sentencing Commission. And then the commission issued what were called "mandatory guidelines." If you have any respect for language at all, you recognize "mandatory guidelines" to be an oxymoron. You can't have a mandatory guideline, but that's what they were called. And they were voluminous. Among other things the Sentencing Commission staff claimed it had reviewed 10,000 sentences throughout the Federal Courts of the United States and they came out with these arithmetic guidelines that scored certain points for certain kinds of offenses and then other arithmetic calculations, they are not calculations, they are just arbitrary numbers attached to characteristics of the individual. So that you had two "axes" going: one was the nature of the offense, and the other was the nature of the defendant. These were interposed on a graph and totaled up. That total would set the range for the sentence. There was a provision that the sentencing judge could vary. As best I recall a maximum of 15%, which meant 7.5% one way and 7.5% the other way. For example, if the sentence was 10 years, the judge could go slightly below or slightly above. But it was mandatory. I had a case, very involved, as I remember there were 18 defendants, and they were all members of the same extended family. They were smuggling heroin into the Colorado State Prison using their young daughters as vehicles to transport the drugs into the prison and to transfer them from these young ladies and little girls to the prisoners

who they were visiting. It was disgusting the way they were doing it, but nevertheless that's how they were getting the drugs in. The family was notorious in the criminal environment with police. Anyone involved in criminal law, police, prosecutors, probation officers, et cetera knew this family. Almost all the men were either in prison or on parole or had been there. It was a very tough case. I had among the other things the alleged leader of the family who tried to disrupt the trial and I had to put him into a room with a television camera away from the trial because he would not conduct himself appropriately. At the end of that particular day his lawyer came to me and said, "My client wants to know how long he has to stay there." And I said, "I don't know, I'm appointed for life." So the next day he conveyed to his lawyer that he was ready to behave. And he did after that until he was through the trial. But it was the first case that I had where these mandatory guidelines were to apply and I refused to do it.

I wrote an opinion that said these were clearly a violation of Article III of the Constitution of the United States and a violation of judicial independence by attempting to have a committee or a commission substitute its judgment for that of a judge who had been appointed by the President with the advice and consent of the Senate in accordance with Article III. This was a jurisdictional matter. I thought, still do, this is deeply a matter of principle. So I wrote this opinion declaring it unconstitutional. Judge Matsch at the same time wrote an opinion declaring it unconstitutional. Judge Carrigan, who was also on our bench,

wrote a similar opinion. There were maybe 30 opinions around the country by district judges who agreed with this position that the Sentencing Reform Act, because of the mandatory guidelines was unconstitutional. We had a judge here, Sherman Finesilver, who wrote an opinion that said it was constitutional and frankly it wasn't a very good opinion, wasn't well-reasoned at all. At any rate, the Department of Justice did not appeal any of these decisions around the country except one. They took the case of *Mistretta v. United States* and that had to be one of the most casual rulings by a district judge declaring something unconstitutional. It was just sort of the judge off the cuff saying well it is unconstitutional. So the Justice Department picked that very weak reed and appealed it directly to the Supreme Court. The Supreme Court held that the mandatory guidelines were constitutional. The government did not appeal any of these other sentences. So, my last sentence was one using the established law under Section 3553 with the criteria that are used there. I made sentences for all these different defendants ranging from probation to very heavy sentences. I was just thoroughly disgusted with the idea that they would reduce the judicial function to filling out a form. I remember that one of the assistant U.S. attorneys said, "This is the statute and you have to go along with this." And I said "Why should I." I said "It's not a judicial act. Why don't you have the Clerk of the Court impose sentence since all he has to do is fill out the form." At any rate that happened. And I

am told there are no coincidences in life, but coincidentally, I was being treated for a chronic disorder called obstructive sleep apnea.

Hal Haddon: This is 1988 when *Mistretta* was decided?

CHAPTER EIGHTEEN – 1988 - MEDICAL DISABILITY

Judge Kane: 1988. I started to have what are called in the medical trade "micro sleeps." They are really blackouts. But they last for maybe five seconds up to 20 seconds. What happens is that when obstructive sleep apnea, and they still to this day don't know the cause of it, but you go to sleep and you don't get the REM stage of sleep, you just barely are asleep, almost awake. They measure these lapses and oxygen deprivations with gadget by plugging you into a machine that measures brain activity and so forth in sleep studies. With sleep apnea you wake up as many as 700 times a night, so you don't get to the REM stage. The result is that you have these micro-sleeps. At that time the medical understanding of obstructive sleep apnea was just in the beginning stages. In fact the disorder was frequently misdiagnosed as narcolepsy. Mr. Pickwick, a Dickens character who falls asleep all the time inspired a name for the disorder. It is sometimes called "Pickwickian Syndrome." I went to a friend of mine who was a psychiatrist and ran a clinic, by the name of Henry Frey. I told him what my problem was. He said that when he had done his residency at the University of Colorado there had been another resident who had gone to Stanford and had become an expert in Sleep Disturbance Medicine. He said let's do some tests here and send them to him. So I went to a clinic,

and overnight had a sleep study. It's called polysomnography. We mailed the test results to this. This is pre-computer, right at the verge of it, so we didn't email. We sent it snail mail. But it got to him. I had been invited to the University of California at Berkley to give a talk at the law school. I had gone to San Francisco and my plan was to go down to Palo Alto and see this doctor. I was in the hotel in San Francisco and I called him and said, "Well, I'm ready. Do you have time to see me and go over this?" And he said, "Don't come here." He said, "we're doing research." He said, "I've got a lot of research assistants and they're dealing with chimpanzees." He said, "If you come here, you are just going to be put into a study and you may be treated or you may be in a blind study" and all that. He said, "We have graduates who are at the National Jewish Hospital in Denver, who are treating physicians. They are experts in this field." He said, "Go back to Denver, you do have obstructive sleep apnea." So I returned to Denver and I had more sleep studies. That was a time before there were continuous positive air pressure machines, they're called CPAP machines. It's a machine that fastens on to your nose or your mouth and then it keeps the air passages open so that you can actually get the kind of REM stage sleep you need. Since that time to the very present I have used one of these machines. I have a portable one if I travel. But at that time the CPAP machine was built by hand by somebody in the lab at National Jewish. The comparison to be made is it was a Model T compared to a Ferrari, to today's kind of CPAP machine. But in those

days you would try to go to sleep and hear this thing sliding back and forth, "click clack-click clack." Eventually, I got that machine and I came back to the bench. But in April 1988, I had gone to see the Chief Judge of the Circuit. I said I can't preside at trials. I am having blackouts, micro-sleeps. And so he talked to some doctors about it. I gave him written medical reports. The result was I took senior status under medical disability. I was gone for a year.

CHAPTER NINETEEN – 1989 – SENIOR JUDGE STATUS AND ADMINISTRATIVE LAW OPINIONS

Hal Haddon: At the age of 51, you took senior status?

Judge Kane: It was a very hard decision to take senior status, but I did. I have been a senior judge since then. It took a full year to get to the point where I was no longer having these micro-sleeps. So during that time, I had a law clerk from Ireland, and he said why don't you come over here. Trinity College would like to have you give a few lectures. So I went to Ireland. In addition to doing research and making a few lectures at Trinity College, I also met some members of the medical faculty. They knew a lot about apnea and they were instrumental in helping me.

When I came back I felt ready to judge again, but I was cautious and so was Chief Judge Holloway. I started out just doing non-trials, doing appeals from administrative agencies. I handled a lot of Social Security appeals and lot of administrative agency appeals.

At one point when I was doing all these appeals I was designated by the Tenth Circuit to sit with that court hearing appeals. I wrote an opinion on administrative law, which to this day is considered one of the key cases in the area of what a district judge has to do in handling an appeal. The reason why it has an importance is not because of me, but because district courts are essentially trial courts with juries finding facts. That's what the essence of the trial court is. But Congress has given us jurisdiction as well over appeals from some administrative agencies. And the appeal is done without a trial, it's done by having briefs, oral argument if you want them, and reading and studying the record. How that's done is set by certain legal standards.

Trial judges don't identify themselves as appellate judges. The natural tendency, when a district judge gets an appeal, is to put it on the back burner and say I've got to be in the courtroom. There are lawyers there, there are juries there, I have got all of these people I have to work with. I will get to that appeal later when I have some quiet time.

Well, quiet time is rare. What that means is that these cases get stuck and backlogged. I was trying to come out with this case on the Tenth Circuit and with this work I was doing here at the district court level, to do things that would improve the speed and the efficiency of district judges handling these administrative appeals. It became an opinion about what you must do and how you do it. Because judges were all over the map on it before

and the one that I happened to have in that case was really, really confused.

Hal Haddon: That case is called *Olenhouse*.

Judge Kane: Yes.

Hal Haddon: As I recall, it involved some farm subsidies.

Judge Kane: It did. The Department of Agriculture was involved and these farmers had lost their crops due to, as I remember it, it has been so long, but due to storms and rain rather than drought. But they lost their crops and so they had gone before the Agricultural Adjustment Board to get compensation and it was denied them. So they appealed to the District Court in Kansas. The trial judge there just did things that are hard to imagine really. But he demonstrated no familiarity with an appellate process at all. He treated them as though they were summary judgment motions. He had the government file what he invented and called a "motion to affirm," and then the appellants had to file a response to the "motion to affirm" then the government filed a reply. Well that shifts the entire nature of it because the appellant is supposed to have the right to file the opening brief and identify the issues and then the appellee, the government, files a response and then the appellant files a reply. This just totally reversed that process. Then he did not look at the record. He just looked at the motion and did not examine the record. Then he had the government almost in a cavalier fashion, "draw up the findings affirming the action of the agency." It went from there to the Tenth Circuit Court of Appeals.

I happened to be sitting with Judge Logan, who was presiding. He was from Kansas. The way that appeals work is that the judge who is the presiding judge after the oral argument decides who is going to write the opinion. If you have three judges, at least two must agree. Inevitably in my experience the most junior judge speaks first. If you're a district judge you're more junior than the junior appellate judge. You're sitting there by pure grace. Judge Logan said something to the effect of well, this happened in Kansas. He said, "I know too many of these people, I know the judge, and I know the lawyers" and all that. He said, "It seems pretty cut and dry." He turned to me and said, "Would you take this?" And I said, "Sure." So we're all in agreement that there should be a reversal. But Judge Logan, when I turned in my draft, said, "I never imagined it would be this much work." He said, "I thought this was just one of these order and judgment things, where we'd reverse because he didn't make the findings himself. And that would be the end of it." And I said, "that was just the beginning." And so he went along with it, so did the other judge. And *Olenhouse* became law. The government petitioned for an *en banc* review with the Tenth Circuit, and that was denied. So *Olenhouse* became precedent by the Court of Appeals even though it was written by a mere district judge.

Hal Haddon: And it is now today the standard of review for administrative appeals?

Judge Kane: It is cited frequently not only in the Tenth Circuit, but elsewhere. And I'm told, I don't know this for fact, but I'm told that when somebody is

appointed to the district court bench, the Federal Judicial Center provides an orientation program, a judge's program. It is colloquially referred to as "going to baby judge school." I'm told that they use that case in their materials when training new judges how to handle appeals. So, yes, I am very proud of that. And I had an absolutely splendid law clerk working on it with me.

Hal Haddon: In the mid-1990's after you became a senior judge and you are doing one of these administrative appeals of federal agency actions, you adjudicated and decided a very important and controversial case called *Saum v. Widnall*. Sheila Widnall was the Secretary of the Air Force.

Judge Kane: That's right.

Hal Haddon: Could you walk us through that case and its importance?

Judge Kane: Yes, I can. I begin by saying I think that the plaintiff's lawyer in that case was Doris Besikof. I haven't seen her since then as a lawyer. But she was unquestionably one of the best lawyers I've ever met in my life considering her representation in that case. If people think that lawyers don't make a difference, they should look at that case, because her genius and her dedication were present throughout. I think I contributed something to it, but she was inspiring in the way she handled it.

When the military is involved in a case, there are various doctrines, the *Feres* doctrine being the primary one, that says that the civilian court should not interfere. That is repeated time and time again, certainly from the time of the Civil War all the way to the present, that civilian courts

don't have the wherewithal, the knowledge to handle review of military decisions. When the military finds itself in a civilian court like the U.S. District Court, it's very rare. Frequently, the military comes in with its military lawyers and moves to dismiss. I would say more often than not these cases are dismissed, but this one wasn't. It came very close. For one thing you cannot get a money judgment against the military in a U.S. District Court.

The Federal Tort Claims Act doesn't apply to the military, but under certain circumstances you can get equitable relief. The distinction is that an action at law results in money damages and an equitable judgment is one that compels somebody to either do or not do certain things. It regulates behavior and performance rather than assessing damages and paying money. It's possible to issue an injunction involving the military. Doris Besikof recognized this special treatment from the get-go. She came in not asking for money damages, but for equitable relief on a theory of unjust enrichment, which in the long run amounts to money.

Hal Haddon: What were the extraordinary facts of that case?

Judge Kane: These are the facts of the case. Elizabeth Saum was a high school girl in I believe, Toledo, Ohio. She was from a fairly large Catholic family and went to a Catholic school. She was a highly talented diver. She was on the school diving team and she won state contests. She also was, I think, in some kind of national high school tournament where she was a medal winner. The recruiting and appointment period for the military academies

for the ensuing year had stopped. But the people in the Athletic Department at the Air Force Academy were aware of Elizabeth Saum. They somehow or other discovered her.

The admission of women into the military academies was very new at that time. The military academics were trying to build up the women's athletic department. They sent two people from their athletic department to visit Elizabeth and her family. I frankly don't recall whether the two were military officers or civilian employees. But they went to Ohio and they met with Elizabeth. She was a small young woman. She barely made the minimum height requirement for the Air Force Academy. I think she was 5'1." She weighed about 100 pounds. These academy reps talked with her and her family. She said she didn't want to become a pilot, she wanted to go to med school. They told her if she went to the Air Force Academy, and completed her studies, the Air Force would send her to medical school and pay for it and then she would only have to do so many years as a medical officer in the Air Force, in payment for having had all this education. They advised that as an undergraduate cadet, she would receive room, board, tuition, books and an allowance. She had already been admitted to a different school. I don't recall which one, I think it was Davidson, but whatever it was, she withdrew her application and went to the Air Force Academy.

When she went there, they didn't call it hazing, but all the new cadets were put through miserable conditions. Part of what they were doing at that time was simulating a cadet being an Air Force officer who is captured by an enemy and being tortured. Elizabeth went through all other kinds of hazing. She was a very pretty young woman. They called her the "Prom Queen" and the other cadets would say "You're too little, you're just here to get a man, you're too pretty." The upperclassmen were constantly putting her down. But then they did some truly atrocious things to her. They simulated a rape, videotaped it and showed it to the entire cadet wing. She went through severe trauma. By the end of, I think it was, the first year, she couldn't eat. She went down to 85 pounds, and so she was furloughed for medical reasons, because she didn't meet the minimum weight requirement. She went back home and didn't want to return to the Air Force Academy. Eventually she found this lawyer, Doris Besikof. They filed suit. Her life had essentially been ruined by this action.

The Air Force moved to dismiss and I denied the motion. Then it developed in the course of the pre-trial proceedings that Elizabeth and her mother had gone to Washington and had met personally with the Secretary of the Air Force, Sheila Widnall. It was Dr. Sheila Widnall, I don't know what her Ph. D. was in, but she was the Secretary of the Air Force. Elizabeth and her mom talked with her for a while. Then they went back to Ohio and filed suit.

I learned that Sheila Widnall was a personal witness and Doris Besikof wanted to take her deposition. The Air Force refused and said Dr. Widnall wouldn't be there, that this was harassment and the Secretary was too important to be deposed. I said under normal circumstances just because she is the Secretary I would not permit her deposition, but she is a "percipient witness," the term we use in law. She was there and she had conversations and she could be deposed. And so the defense lawyer said, "Well she won't come out here." I said, "She doesn't have to. Take the deposition there and make it as convenient as possible." Then these government lawyers came back and said she won't do it at the Pentagon. I said, "That's all right. I'll have a U.S. Marshal arrest her and hold her in contempt of court. And she can have her deposition taken in the jail in Washington." They heard that and decided maybe she should have her deposition taken at the Pentagon.

Doris Besikof went to Washington and took her deposition. That was the end of that recalcitrance by the Secretary. Then we started to have hearings, there was a motion to dismiss, and I wrote an opinion denying that. In one of the hearings this overly emotional major in the Air Force JAG stood up, it was during the Bosnia war or Bosnian campaign. He said, "These people want you to determine the conduct of the first Air Force pilot who is shot down over Bosnia and how he should respond to torture. And that's what this program is for." And I recall vividly I just looked at him and I said, "First of all we know this young lady was heading towards

medicine not towards being a pilot." But I also knew the Air Force Academy graduates all graduate as navigators. They have to go into pilot training after the Air Force Academy. They have an engineering degree, but the essence is navigation. So I turned to him and I said "How many graduates in her class are combat pilots? How many are training to be combat pilots? What is the percentage of your graduates who become combat pilots?" And he said: "Well I don't have that information available." And I said, "It isn't all of them and she wasn't one of them." So he sat down and I wrote the opinion.

I believe this to be the case. I think I mentioned it in the opinion. I think I did just a footnote or something like that, but I wrote that what happened to Elizabeth was illegal recruiting according to NCAA rules after she'd already committed to another school. The recruiting period for the Air Force Academy was over and done with, and they went out and cajoled her into coming in. So I said, "It's not only what the court does, but the NCAA may want to take a look at this as well." I think that's what settled the case.

Hal Haddon: The case ultimately settled?

Judge Kane: It settled fast. She got her records cleared. She got a certain sum of money. I don't even know what it was.

Hal Haddon: Did she get to medical school?

Judge Kane: No, she didn't as a matter of fact. I found out later. I used to get a Christmas card almost every year from Doris Besikof. She had moved to

San Diego and in one of them she said that Elizabeth had graduated from college, but she decided not to go to medical school. She was married and had a baby. That was end of that, but she was headed for med school at the time.

CHAPTER TWENTY – COMPLEX CASE DOCKET

Hal Haddon: When you returned in 1989, were on senior status but when you returned to the bench, my understanding is that by agreement with Judge Holloway of the Tenth Circuit, you were only going to take civil matters and administrative matters.

Judge Kane: Just appeals at that time.

Hal Haddon: Just appeals? You eventually started taking very complicated civil matters.

Judge Kane: Yes, there are two aspects to that. One is that as a senior judge you have the right to decline to take a case that is assigned. You don't get to pick which cases you're going to have. But if one is assigned and you don't want it you can just exercise the senior judge prerogative and not take it. When I came back I would not handle criminal cases because I still thought guideline sentencing was unconstitutional and it was a violation of my oath to sentence according to mandatory guidelines. As long as they were mandatory, I never handled another criminal case. When the Supreme Court of the United States decided, there were series of cases, but the main one was *Booker v. Washington*, and when that case came out and Justice Alito said that the guidelines were advisory, then I felt that I could sentence, and consider the guidelines, but I would still be the one

making the decision in accordance with the requirements of Article III. So I went back on the criminal draw. But in the meantime, that was about 10 years ago or so, I first started with the appeals. I left in April 1988 and I came back in June 1989 and by about probably December I started handling a few jury trials, very short brief ones, one or two day jury trials. To make sure that I could do it when I wasn't having blackouts anymore. I did that and I felt ready by February 1990. I just wanted back on a full civil draw, but not a criminal draw.

I met with, I think it was Matsch who was Chief Judge at the time. I looked at the situation and the problem with all kinds of statistics which make no distinction between individual units. The old expression that I learned when I was in India, a fellow said, "I have a friend and my friend has an elephant and they both drowned in a river having an average depth of 5 inches." And so if you look at that, what happens with a case is that it could be a student loan foreclosure, which takes about 5 minutes. It's just whether the promissory note is there. The payments haven't been made. End of case. It takes more than 5 minutes, but not much. And that's one case. But you can have a toxic tort case that will take 20 years, a class action, and that counts as one case. What happens with active judges who have to take whatever is assigned to them is they can handle cases, but they get one of these monster cases and it destroys their ability to handle the others. I looked at that and thought my experience on these administrative appeals is that I have been taking those from other judges

who never got around to them. Because I felt medically able to go into regular trials and rather than just be on the draw, I should take cases that are reassigned by the Chief Judge, that are highly complex, that take up more time. I would be on a reduced case load, but the cases I had would be highly complicated ones. That would free up the active judges from having to have their dockets vandalized or destroyed by these real heavy cases. One of these cases, as an example, was a habeas corpus proceeding involving a defendant named Nathan Dunlap.

Hal Haddon: Nathan Dunlap?

Judge Kane: Nathan Dunlap. He had murdered four people and severely wounded another. He was tried in the state court, convicted and sentenced to death. His case went before the Colorado Supreme Court, the Colorado Court of Appeals, back to the trial court and on, and on. Each time his lawyers would petition the Supreme Court of the United States for certiorari review. It was always denied. But finally all of these proceedings were exhausted and the lawyers came over to Federal Court with what is called a "2254." It's essentially habeas corpus.

The complaint in federal court asserted that Dunlap had been denied competent counsel in the state court. The relief requested was to set aside the death penalty. That requires a judge to look at well over 10,000 pages of transcripts, briefs and judicial opinions that had been written over a lengthy period of time. This habeas case was assigned to one of our newest judges and that judge came to me and said, "Would you take it? I

will spend all year long on nothing but this." So I did. I remember I did that particular case almost to the exclusion of all the other work I had to do, reading through June, July, and August. Following the hearing I came out with an opinion that September upholding the competency of counsel and therefore the death penalty. Then the case went on with more appeals. It was a monster case for more reasons than one.

Hal Haddon: Was that a difficult decision for you because you have dealt with and have questions about the death penalty in the past?

Judge Kane: No, it really wasn't. I was concerned with whether the lawyers had been competent or not. I had to examine each and every decision that had been made by the two lawyers. The law under *Strickland v. Washington* is very clear that there is a distinction between strategic decisions and tactical ones. A lawyer can be incompetent for making tactical errors, but not for strategic errors. The review requires a very heavy analysis to see what the lawyers were doing.

I had private feelings about the death penalty, and I still do. I think when I had Dunlap's case it was already 20 years old and one of my objections to the death penalty is that it's never done on time. To have somebody on death row for 20 years to me is a recognition that the system does not function the way it should. The system doesn't function the way it should because there is no evidence at all that the imposition of the death penalty operates as a deterrent. Murder rates in comparable states, one having the death penalty and the other not having it show no difference. It does not

do what it's asserted purpose is, of operating as a deterrent. It doesn't operate as matter of justice for the victims, the survivors.

Three of the victims were teenagers, working in this restaurant and their parents lost their children, 17 and 18-year-old kids working part time in a restaurant. And I remember, I never met these people, but I remember when I came out with my decision, it was covered by the local press and the father of one of these young ladies, a 17-year-old girl, said they didn't care what happened. It was too long, they had been living with it every day. Whether Dunlap was sentenced to life in prison or death meant nothing to them at that point.

Hal Haddon: Your decision came out in 2006, we are now in 2019, Mr. Dunlap is still on death row but he hasn't been executed.

Judge Kane: That's right. Apparently there is a contradiction in the public view of the death penalty. On the one hand politicians all say they are in favor of law and order, they want the death penalty and the killer should be punished accordingly. But when push comes to shove and they have to actually do that, they don't want to do it.

CHAPTER TWENTY-ONE – ROCKY FLATS CIVIL LITIGATION

Hal Haddon: Another career case that came your way right after coming back on senior status, I think in 1989, was this case involving Rocky Flats. It's called *Cook v. Rockwell International*. It was filed in 1989, and it was finally resolved in this court in 2018 almost 29 years later.

Judge Kane: Right.

Hal Haddon: Can you describe it?

Judge Kane: Sure.

Hal Haddon: I wouldn't call it the arc of that case, but the slog of that case.

Judge Kane: Yeah, well said. That case was handled by three other judges before I got to it. The reason I got to it was what I have just previously explained, a very complex case takes all of one's time to do and the other judges had said , "You want a complex case we will give you one."

Cook v. Rockwell was a class action. It started out before I got the case, meaning before it came to my court. I always think of it before I got there because it's in a universe of its own. Before *Cook v. Rockwell* was assigned to me, the claims were for a class of people of about 30,000 or 20,000, who had been exposed to plutonium because of the negligent way in which plutonium was being handled at the Rocky Flats Nuclear Facility. Contractors for the U.S. Department of Energy were making plutonium triggers for nuclear weapons. The contractors were storing the refuse material, which was radioactive, in boxes out on the open plain. There had been rainstorms and other things causing a lot of this refuse to escape. Then there was a fire in the main factory that caused further pollution. The winds spread it around. Rodents and other animals and birds spread the contaminated refuse materials even further. The claims were for property damage. Who wanted to buy property that was contaminated by radioactive material? There were also health claims for endangering the health of the people surrounding the facility. Before I got to the case, the

State of Colorado, Jefferson County Health Department and the U.S. Department of Public Health, did studies. They said the pollution wasn't sufficient to cause disease, so right at the time I got the case, the plaintiff's lawyers dropped that aspect of the case. That left the property damage. There was something in the neighborhood of 8,000 homes and other properties that were in the sphere, the shadow of Rocky Flats, which had been polluted. Technicians tested the air, tested the ground, tested the water, and tested some of the building materials. They found there was radioactive pollution.

The structure of the facility's organization was that the U.S. Department of Energy had contracted at different times with two different companies, Rockwell being one of them and that's why the case is called *Cook v. Rockwell*. There was another company at another time. Both companies were manufacturing the plutonium triggers. They were in charge of that facility. It was a cost-plus contract. Rocky Flats is northwest of Denver, between Denver and Boulder. We had battles over the class, how to identify the members of the class, who they would be. Then we had battles over how do you determine the damage caused by pollution as compared with the fluctuations of the economy, with housing shortages and gluts on the market et cetera. And so there were highly technical issues involving nuclear physics and radiation, and there were also complicated issues involving real estate appraisals. There were many, many depositions.

Eventually we had a trial. As best I recall there were 45 expert witnesses who testified in that trial. But getting to trial was like trying to pull teeth. Everything the plaintiffs tried to discover Rockwell and the other company would say, "You have to go to the Department of Energy." The plaintiff's lawyers would go to the Department of Energy and be told, "That is classified and we won't let you have it." So we would have hearings and I would have to decide those issues. At one point, I held the Department of Energy in contempt for not providing the material I ordered to be produced.

Hal Haddon: Did you have to review classified information to decide whether it was discoverable?

Judge Kane: No, I did not. There really wasn't that much the plaintiffs wanted that was classified information other than volumes of how much plutonium was there. I remember one of the experts in that case, who would ever forget this? This guy had a Ph.D., and spent his entire life doing this. I don't remember the name of the specialty now. But he examined critters—mice, field mice, gophers, and prairie dogs who would burrow into this land at Rocky Flats. The animals would come to the surface and part of the dirt on them from burrowing would have plutonium in it. Then these little creatures would be looking around at the sun or whatever these rodents do, and hawks and eagles would come by and grab them and fly 20-25 miles away, eat them and then digest them. The scat from the eagle or hawk or whatever would have the radioactive material in it. This expert, according

to his scientific studies, could trace from where the scat was found to where it came from. The particular identifying marks of the plutonium molecule were such that he could testify as to the degree of pollution that existed and even that it came from Rocky Flats! Not only was I fascinated with his testimony, but everybody, the jury, all the lawyers, the press and other spectators, were all spellbound, listening to it. One would think how can anybody spend his life doing that? I can't think of the name of his specialty. He taught at universities. Even today whenever I see a prairie dog, I think of that guy. With all these experts and arcane subjects, the trial took five-and-a-half months.

Hal Haddon: A jury trial?

Judge Kane: A jury trial. We had a wonderful jury. We can get into that later, but that case had a significant influence on how I handle juries. The jury deliberated for 21 days. And then they came back with their verdict. The verdict was close to three quarters of a billion dollars. It was by far the largest verdict in any case I've had. It was appealed, and it was reversed once and then appealed and then affirmed. By the time it came back again from the second appeal, the Supreme Court had denied certiorari and the countless decisions and the verdict withstood intense appellate scrutiny. After the final verdict the parties settled the case for a lesser amount. But something, I just don't recall, something like $350 million was the final payout.

Hal Haddon: And this was in 2018, some 29 years after the case was filed.

Judge Kane: Right. Right. Right. And then of course other problems followed. Because the members of the class had to file claims, we had to have a company that specializes in distributing class action awards. Because people would own a house and then sell it. Who was entitled to the damages? The case was so old that some people had died and their heirs took it. It was a very complicated process for distributing the money and then we had fights over the attorney fees.

Hal Haddon: So I recall that when the case finally settled, you had a humorous ceremony and gave one of the lead plaintiffs lawyers a book called *Bleak House* by Charles Dickens.

Judge Kane: Yes, I did.

Hal Haddon: What was the significance of that?

Judge Kane: Well, Charles Dickens' *Bleak House* is a huge thick book. Dickens hated the legal system in England. He wrote a satire about a mythical case of *Jarndyce v. Jarndyce* which was so old and in the courts for so long that none of the lawyers or even the judge could remember how it started or what it was about. They just kept on coming back into court every term with more of *Jarndyce v Jarndyce***.** It is a scathing comment about the law's delay. Incidentally, when Hamlet is giving his "To Be or Not To Be" soliloquy, he is deciding whether or not to commit suicide. He sets up different reasons that might make a person want to live and others that might want to make a person commit suicide. On the suicide side, one of

the first things he mentions is the law's delay. Dickens just does a great job with *Jarndyce*.

This lawyer who had been with the Rocky Flats case from the very beginning, was an especially good lawyer, but he was also the kind of guy ,who in order to say something, was exceedingly loquacious-like me. It would take him maybe three times as long to say something as another lawyer would and his briefs were sort of the same way. A very gifted guy, but very, very loquacious. He had done a great job and when the case was all over with, I wanted him to have a memento. We were all very well acquainted with one another and giving him *Bleak House* was really a friendly sign of affection.

Hal Haddon: It was a good joke.

Judge Kane: Yes, and so intended.

Hal Haddon: You talked about the Rocky Flats case dealing with objections to discovery on the basis of classified information. One of the more recent cases and another very protracted matter that you handled involved charges against three defendants in Colorado for terrorism-related activity.

Judge Kane: Two defendants.

Hal Haddon: Two defendants?

Judge Kane: They were from Uzbekistan. That case took six-and-a-half years from the time of arrest until the time of trials for both of them.

Hal Haddon: And what were they charged with?

Judge Kane: They were charged under one of the terrorist statutes, with providing material assistance to a terrorist organization. The material assistance consisted of money. One of the defendants was trying to get over to join in jihad. The other one had been a friend of his and given him a check of $300, as well as encouraging him all along. The two of them were charged together, but I separated their trials. Each trial took seven weeks. Both are on appeal now, which kind of surprises me because the one with the $300 check, I sentenced to time served. He had already spent six-and-a-half years in custody. I sentenced the other defendant who was more culpable, to 11 years. By the time their cases are decided by the Court of Appeals, both defendants will have served their sentences. So I can't figure out why in the world they appealed, but they have.

Hal Haddon: Why did it take essentially six years to get it to a trial?

CHAPTER TWENTY-TWO – CLASSIFIED INFORMATION JURISPRUDENCE

Judge Kane; It was like trying to pull teeth with a pair of broken tweezers. The law is governed by some very complicating factors. One of them is called CIPA, the Classified Information Protection Act. What essentially presents in a terrorism trial is an axis if you will. On one end of the axis is due process of law and a fair trial. On the other end is state security. The toughest question is where along that axis do you draw the line between what needs to be protected for state security and what needs to be disclosed for fairness and having a just trial and verdict.

There is admittedly, I'm not editorializing about this, a recognized proclivity of the intelligence agencies of the United States to over-classify. The case precedents have discussed this. So have high-ranking intelligence officials who have a working rule "when in doubt, classify." If you're having a public trial and you need to disclose what's classified information, you simply can't. The judge has to look at all of the evidence on an item by item, sheet by sheet, basis and decide whether the classified information might be helpful to the defense.

Hal Haddon: Do you have to have a security clearance to do that?

Judge Kane: Yes, a U.S. District Judge has a top-secret security clearance, because he has already been investigated and certified at the time of the appointment. But anybody else, my law clerks, had to have a security clearance to work on the case. My secretary refused it, so we never gave her access to classified documents.

There is a thing called a SCIF, which is a special room or other area for housing the classified documents. There is a SCIF in the subbasement of this courthouse. Sometime ago, I spent a summer in that SCIF going over classified documents. A Saudi citizen was represented by John Richilano in the Arapahoe County District Court. Mr. Richilano subpoenaed FBI information under the Freedom of Information Act. I had to go through the classified file and I was in that SCIF. I learned what it's like to be in a cell with no windows or ventilation.

Hal Haddon: So when you're required to review classified information, you had to go to a secure facility?

Judge Kane: Yes, I did. “Brady material” is any information that is in the possession of the prosecution that might be favorable to the defense and therefore must be disclosed in advance of trial as part of discovery. There are a number of cases other than *Brady*, but that’s the generic term for it. I had had this previous experience in the subbasement with no air-conditioning. The guardians lock you into the room. Finally I called the lawyers in on the terrorism case and said, “I’m not doing this anymore.” I said, “I’m going to make my chambers a SCIF,” and so we did. The security people did a thorough job. The Department of Justice sent in a team. There are these little tiny gadgets, I don’t know what they are, like microphone detectors or something, the security experts used to inspect all the paintings and furnishings in my chambers. Whenever I was going to look at classified material I had to close the blinds, because there's actually intelligence gathering information that can pick up conversation from the vibration of a window. All kinds of spooky things involved.

Hal Haddon: And so the Department of Defense came in here and—

Judge Kane: It wasn’t the Department of Defense, it was the office of OSI or DSI, something like that. It was the FBI and then one of their agents came in and gave a final inspection. One of the complications was—it wasn't always the same person. Usually it was a young woman, who would leave Washington with a briefcase, leather and canvas, which was handcuffed to

her. I'm not sure whether she had a marshal accompanying her or not. She would come to these chambers and make sure that the inspection was done, all the doors locked and so on. Then she would bring in this canvas briefcase with the classified information. I would sit at my desk and go through it page by page by page, lots and lots of work. When I finished, or if I left to go to lunch, she would come in and take the documents back. If I saw something that was Brady material, I couldn't give it to the defense. I noted what it was and gave it back to the prosecution, to the Assistant United States Attorney and said, "This is discoverable material." The Justice Department would take that material back to Washington with the rest of the secured material. I don't know the mechanics of it, because it was never disclosed to me, but the security agencies have people who would decide whether to declassify each particular document or not. I would be told, "We think it's still classified and it shouldn't be disclosed." And I would say, "The case is over, thank you very much." So they always managed to declassify. A couple of times, and under the statute this is permissible, a document or recording can be paraphrased or redacted. What I learned in this six-and-a-half years is that the substantive information couldn't have amounted to more than 5% of what they were protecting. The security experts were protecting the means. There's another phrase included in the criteria.

Hal Haddon: "Method and means."

Judge Kane: Method and means of gathering this information. If you have an iPhone and you called me and we're sitting six feet apart that message could go bounce up to a satellite and over to another one and above Pakistan and down to Australia and then back over here before it even hits me. It goes into the cloud and then comes back out. So the means of extracting this information is highly classified. The security agencies didn't want the means and methods disclosed.

I'm trying to change this process with the Federal Judicial Center, but the way the law works now, the Department of Justice decides whether defense counsel can receive top security clearances so that the defendants' lawyers can go through the material themselves. This was another case I took from another judge. When I got it, the Department of Justice said it was not necessary to get security clearances for counsel. I think the law should be changed. I think the judge should make that decision whether the defense counsel needs to receive top security clearance. In death penalty cases we have what's called a death penalty panel consisting of defense attorneys who have additional training and experience in handling capital cases. If we have a capital case, appointed counsel come from that list. I think that we need a terrorism panel where potential court appointed defense attorneys will already have security clearances in addition to the experience and training necessary. These are very special cases. In addition to the Classified Information Protection Act, there is also another act, a court that is called the FISA, that issues warrants.

Hal Haddon: FISA?

Judge Kane: FISA

Hal Haddon: F-I-S-A

Judge Kane: The Foreign Intelligence Security Act (FISA) has been amended. When law enforcement agencies want to get a warrant they go to the FISA Court. It sits in Washington. It's a secret proceeding. The judges issue orders, but they don't disclose any of the information presented in order to get a warrant. It's very complicated, but basically it's this: A U.S. citizen or a resident alien, somebody who is legally in the United States, is entitled to the protection of the Fourth Amendment against unreasonable searches and seizures. If a government agency needs a warrant but doesn't want to disclose any of the information, it can go to the FISA Court. Under the Foreign Intelligence Security Act and its amendments the agency can get a warrant. The big issue, to get back to that axis: when does intelligence gathering focus on someone who is protected? At that point, a warrant is required. So when an agency is doing surveillance, somebody's name can pop up, yours, mine, anybody's, and we're not subject to the investigation. But at some point a person becomes a suspect and that's when the warrant has to be issued.

The Supreme Court hasn't decided the precise issue. I decided it, as a matter of first impression. I think there are other courts, District Courts around the country that have too, but that issue is bound to go to the Supreme Court. What test does a court use to make the determination of

where on the axis a warrant is required? Naturally the intelligence agencies want the least room for disclosure and defense attorneys want as much as possible. Where should the line be drawn, what does the judge do? I wrote an opinion on that, which itself is classified. I had to give a redacted copy to defense counsel.

Another interesting aspect in the case, is that it started out with two defendants. The primary defendant was at the airport in Chicago with money and various iPhones, satellite phones and gadgets in his possession, ready to get on a plane go to Ankara, Turkey when he was arrested. That's why the F.B.I. had to arrest him. Otherwise he was leaving and going to join in jihad.

The other defendant was in Philadelphia. He had to be picked up because he would learn that his buddy was arrested. The F.B.I. wanted to keep this investigation going to get more contacts and see how pervasive was this particular terrorist endeavor for Uzbeks trying to engage in jihad. There had been activity in Germany and in Turkey and I'll get to that. But I want to return to this point--that when the attorneys started out, the number one defendant was represented by Deputy Federal Public Defenders. There was no cost to the courts because the public defender has a separate budget. That office has very experienced people. Three assistant public defenders immediately began representing this defendant. Because there was a probability of conflict of interest, the court had to appoint two other

lawyers to represent the defendant from Philadelphia. They were appointed. Later, two of the public defenders left that office and went into private practice.

I had to decide whether to send in new public defenders. After 3-4 years these people had a college education on this case. To have somebody start all over didn't make any sense. So under the Criminal Justice Act, I appointed these two former Federal Public Defenders to continue in the case. We then had five lawyers, four of them were under the Criminal Justice Act. One was still with the Federal Public Defender. None of them had a security clearance. I had to handle all of that declassification stuff alone. In the meantime we had a lot of legal research that had to be done, so I had to have my law clerk obtain classified security clearance in order to help me.

Hal Haddon: How did you deal with giving the jury Brady information that is classified?

Judge Kane: I never did. All the information that was Brady was declassified or redacted. So that problem didn't arise. But one of the big problems we had was when we had to deal with Central Asia. In Uzbekistan, people don't speak one language. There isn't anyone who speaks only Uzbek. There are at least three dialects. Tashkent and the other main cities use separate dialects of Uzbek. In addition, some of them speak Kyrgyz with neighboring Kyrgyzstan, some speak Tajik from neighboring Tajikistan. They all speak some degree of Russian, because they were part of the

Soviet Union and the schools were all taught in Russian and the official public language was Russian. Because they're Islamic, they also had contact with Turkey.

There are a number of immigrants from Turkey and Uzbekistan living in Germany. On top of the different languages in the declassified information, there were communications with the jihadists in Syria and Pakistan. we had to deal with Uzbek, Kyrgyz, Tajik, Russian, Turkish, German, Arabic, Urdu, and English. There were nine languages being used. It was a Tower of Babel when we had hearings and trials. We almost always had three interpreters for the defense. The defendants were not capable of understanding all the communications and proceedings in English. We had to translate for them, and then we had all the documents that required translation. So the mechanics and the complexities of translation took up an enormous amount of time.

Fortunately we had a woman working in the court named Donnie Bush, who was in charge of interpreters. I don't know how she did it, but she could find people who could get a top security clearance, who spoke Urdu, Tajik, and Kyrgyz. Try to do that sometime. It's not an easy task, but she was able to do it, but it took arduous effort and considerable time.

CHAPTER TWENTY-THREE – UNIQUE JURY PRACTICES

Hal Haddon: You mentioned that you developed some jury practices that you used.

Judge Kane: Yes.

Hal Haddon: In Rocky Flats and. . .

Judge Kane: And I used them in this case too.

Hal Haddon: Could you describe what unique jury practices you developed and follow?

Judge Kane: I do this in all cases now by the way, but it started with Rocky Flats. When you have a case that's going to go on for months, first of all you have to select people in the jury panel who can spend that kind of time and not be, you know, 12 homeless people that you're giving a new job to. How do you find people who can do that? We had a special venire, that is a summonsing of jurors from the voter registration list and the property and automobile license registers, et cetera, who are all put together. Then culled the list to get a jury panel. Then the court staff sent the jury panel questionnaires. Those who had hardships, those who said prolonged jury service would be an unreasonable hardship such as, I'm a single mother with three children and I barely earn a living. I can't do it. Someone would be from the border near Nebraska with a farm and say, "I can't spend that time." I'd have to go through each and every one of these responses to see who should be excused for cause. That exercise reduced the panel down to a more workable number.

Then I went through a shortened list and the clerk drew names. We sent those whose names were drawn an order to report at a certain time. They came in. My law clerk and I, with some help from the lawyers, refined the list looking for the most unbiased ones. We used an 8-page questionnaire. It had a lot of questions used in regular trials: where do you live, how long

have you lived there, how many children do you have, how much schooling et cetera? We did all that, I consulted with a psychologist to ask questions that would elicit more revealing answers than a simple yes or no. It wasn't a fill-in-the-blank kind of thing. We wanted to get people expressing their reactions and get them in the habit of talking about what they think rather than clamming up and just saying yes, no, answer above, that kind of thing. We did that, and the jurors had to fill out the questionnaires.

Then we made copies and gave them to counsel. This was all done on a Thursday and the attorneys had Friday, Saturday, and Sunday to go over the completed questionnaires. Then the jury panel came back. A few who were excused for cause after what they had said in their answers to the questionnaire. Then we drew names to come to the courtroom. We estimated the number of people, the total number of peremptory challenges, and a couple more for hardship challenges and then we put those people in the courtroom.

Before they were sworn in, I had already completed my jury instructions. So I recited to them about half of the jury instructions: what the case was about, the statement of the case, what the jury's responsibilities are, what evidence is, what circumstantial evidence is, what credibility is, et cetera. Then we drew names and went through a voir dire exam.

I conducted the first voir dire. My main purpose was twofold: one was to recognize that for jurors, the courtroom is not their usual environment. They are not accustomed to being in court the way judges and lawyers are. I wanted them to relax as much as possible and so I was very conversational with them. I did not say, "State your name." Rather I would say, "Let's get acquainted" and I would tell them a little about me such as, I'm a Broncos fan. My disclosers would get people talking about different things. The other purpose I had, and still do, is to get the jurors to understand, especially with these iPhones and other gadgets that people have, that they have to put them away, turn them off and decide the case solely on what happens in the courtroom, decide the case solely on the law, whether they like the law or not. It takes some time to get people to appreciate that and tell them why all these precautions are being taken. When I finish, I turn over the voir dire to the lawyers. Most of the needed information is in the questionnaire, so the lawyers don't have to go through it again.

Hal Haddon: But you let lawyers do some questioning of jurors?

Judge Kane: Oh yes, they do. They question them. The only restriction I have is they can't ask whether they agree with a law or not because that is something they are going to follow whether they like it or not. I also explain to the jury if they don't like the law they can write their Congressman about it and change it, but right now we are going to use this. I try to explain this is the Rule of Law in a way that is easy to understand. For instance, an

example I use all the time is this, “Consider a parent with young children. Your kids are out in the yard and one of them comes screaming and crying that the other one did something. You don’t go out and whack that other kid. You try to find out what happened. You don’t just act on the accusations that are made when somebody wasn’t even present to hear it. That’s what a courtroom is like. We want the witness here and we don’t want jurors trying to decide until all the testimony is received.”

I give them a couple of horrible examples of people using their iPhones and causing a mistrial. Then the lawyers can get up and can ask them questions. “Well, you’ve already said you travelled in certain countries. What did you think of Russia when you visited there?” Or, “What were your thoughts when you were in India?” The lawyers ask questions to get more expression from them. They have children and some children are going to college. “Did you notice any difference when they came home?” They ask questions to get them to talk more. Once the voir dire is done and we have the jury, I give the jurors copies of the instructions. We have settled them in the final trial prep conference about two weeks before.

Hal Haddon: Copies of all the jury instructions?

Judge Kane: All, the total set of jury instructions.

Hal Haddon: You do that at the beginning of the trial?

Judge Kane: I do that as soon as the jury is sworn in. And the next thing I do is provide them with a clipboard and writing materials, a pen and paper. I tell them if they have any questions, “write them down and at the break give them to

the courtroom deputy. She will make copies and give them to counsel and me. We will figure out what the answer is. Or if I can't answer it, I'll tell you why I can't." When the recess is over we bring the jury in, I read the question, verify that's what was asked, then I give the answer that we made a record on.

The more important thing that happens is that once I read these instructions at the beginning, the lawyers can use the instructions and the forms of verdict and include them in their opening statements. As an example they can say, "we have to prove x, y, z, we are going to call witness Jones, he is going to testify to x, we are going to call witness Brown, he is going to testify to z" and et cetera. So they can explain to the jury, and the jury can look at the instructions and what the elements are that have to be proved. They are hearing it for the second time, because I have gone through it. They are also seeing it.

I have consulted with educational psychologists who tell me people never really learn anything the first time you say something. It's the "rule of threes." You have to tell somebody what you're going to tell them, then you tell them and then thirdly you tell them what it is you told them. That's the standard I'm trying to set. We go through these instructions, the attorneys go through them, and then during the trial an attorney can just stop at any given time and say, "Judge I'm switching subjects. I'm going from the substantive offense to—well, in a civil case to damages". Or a

lawyer could say, “In a criminal case, I’m leaving count 1 and going to count 2. There are different elements in it, would you please read the instruction on conspiracy?” If it’s a civil case, “I’m going from liability to damages, would you please read the instructions on damages?” I will stop the proceedings, tell the jurors what the instruction numbers are. They get out their copies and they read it through while I go over it with them. I always ask them, “Do you understand that?” Sometime somebody will say, “I don’t quite understand. What does this mean?” And I explain it to them. What I’m trying to do is to make the instructions an integral part of the trial and the jurors’ decisional process.

The popular word is “bond.” I want the jury to bond with one another, and I want them to bond with the instructions as well. The end of the case when all the testimony is in, is the traditional time at which lawyers and judges declare a recess, go back into chambers, and play 52-card pickup with a lot of stock instructions. The judge puts them together, the lawyers make a record and then the judge reads the instructions to the jury at a fast clip. Most of the time the jury doesn’t get copies of the instructions to read. I’ve sat as a juror. Some judges are careful, others just mumble them. That’s the end of the instructions. In the federal system the lawyers are supposed to make their closing arguments before the jury is instructed, because the judge supposedly doesn’t know what the instructions are going to be until he hears everything.

Well, studies show the greatest dissatisfaction people have with jury service is delay. Sitting around doing nothing and waiting. Of those delays the one they dislike the most is when all the testimony is in and they have to wait until they get the closing arguments and the instructions. I have reduced that delay to an absolute minimum. When we declare a recess, everybody goes to the water closet and comes back. I always ask the attorneys, "Do you have any other changes to the instructions, any additions or subtractions?" and then bring the jury in. I'm trying to cut down on that delay, so the jury is still interested. Then we have closings and then finally I get out the instructions read them to the jury again. These are the instructions. The jurors take the instructions with them to the jury room and use them. That's something I learned especially in a prolonged trial.

The other thing in cases that last for longer than two weeks, in a one-week trial you don't need to do this, but what I usually do is try a case on Monday, Tuesday, Wednesday, and Thursday and then on Friday the jury comes in in the morning and the lawyers make mini-summations about what took place that week and what to expect the following week. The lawyers tend to sum up and then give a forecast. The jurors come back the next Monday, Tuesday, Wednesday, Thursday, and Friday, to do the same thing.

If you have a trial that lasts for more than a month, the *Cook v. Rockwell* trial was five-and-a-half months-- I talked to the jurors afterward. They said they couldn't have gotten through without those mini-closings, to help them to put things into a framework.

When the jurors go to deliberate, I have a special instruction I again drafted with a consulting psychologist called an "advisory instruction." They are told they are not bound to do this, but this is what other juries have done, and you may find it helpful. How do you go about electing a presiding juror, how do you vote, by voice vote or written ballots? What are the advantages and disadvantages of each and what happens when you get to a hard spot where people aren't agreeing to something? It's best to pass that by and go on and then come back to it later. Also I try to encourage them never to get involved in personality conflicts, to get angry with one another. That from time to time it's not a bad idea to resolve that they are all there for one purpose. That advisory instruction has been adopted by other judges. Some judges in the state system will edit my instruction because they say it is too long, it's about three-and-a-half or four pages long. But I will tell you what happens with it. I have had only one hung jury.

Hal Haddon: Actually, I remember that one that you did have recently, it's called *SEC v. Parker*.

Judge Kane: I did. I did have that. That's the only one. And I don't think it could have been avoided.

I think the arrogance of government counsel caused the hung jury in that case. But we tried it again and using the same instructions and the jury didn't hang. So, you're right, but I did have that one.

Hal Haddon: We have been going for over two hours, you want to take a break?

Judge Kane: If you want to.

Male Speaker: Yeah.

Judge Kane: You want to?

Hal Haddon: Sure.

Judge Kane: Okay.

CHAPTER TWENTY-FOUR – THE "VANISHING" JURY TRIAL

Hal Haddon: We were talking about your practices with juries that are fairly unique and hopefully will get exported.

Judge Kane: Yes.

Hal Haddon: There is contemporary debate about what is referred to as the vanishing jury trial and--

Judge Kane: It's not so much a debate as it is a recognition of the obvious, I think.

Hal Haddon: What is the obvious, and what are your thoughts about prescriptions, if any?

Judge Kane: Jury trials have gone down to, in civil cases, less than 2 percent of cases filed, and in criminal cases even less than that. You have to separate the demise of the civil jury trial from the exsanguination of the criminal jury trial. But I will try to do that.

I have to point out, I don't know the judge's name, but I read in one of these legal newsletters of a federal judge who was in the State of Washington attending some gathering, and he said he had tried different things to have more jury trials, but he just didn't understand why we were not having them. I felt like writing him, but I didn't, I didn't calm down enough. It seems to me to be fairly obvious why civil jury trials are no longer held.

The first thing is not the most important, but for a great many years, when Congress would pass a statute, whatever kind of statute, it might be relating to private causes of action, the Rehabilitation Act being one of them, and Title VII another, they would always put in the legislation that the parties could have a jury trial. The right to jury trial in a statutorily created cause of action would obtain. Recent legislation does not have that language in it.

So the courts, by implication or by inference, have said, since it's not specifically mentioned, there is no right to a jury trial. I think that's wrong, but that's nevertheless what some courts have done.

That's just a minor point but it shows the courts share the blame for killing the jury trial. The major point is this: The Federal Rules of Civil Procedure were worked on for a period of about five to six years in the 1930s. The Chief Justice appointed a so-called Blue Ribbon Committee--experts, practicing lawyers, law professors, and federal judges with all the kind of assistance that might be needed from other disciplines to come up with a new set of rules of civil procedure.

The historic background is very, very important and critical because we had gone from common law pleadings which were so strict that if you pled the wrong form of action with the wrong Latin adjective or verb involved in it, your case was dismissed. It was ultra-formalism. That was changed in the United States by states coming up with their

own rules of civil procedure and modifying them by statute. We had the federal courts applying the rules of civil procedure in the state in which the federal court was located. So, if in those days there were 36 states, there would be 36 different sets of procedure.

The states would modify their procedures, but the federal courts would keep what was on the books when they had adopted them. That became even more bewildering and chaotic. Federal practice became a genuine specialty where lawyers had to learn these arcane rules of procedure in the specific district in which they were located in order to practice. Most lawyers practicing in the state courts had neither the time nor the clients to do that. The result in the 19th Century was a great deal of concern and activity to reform and unify the rules of civil procedure.

We had one set called the Field Code, and the author of the Field Code, the brother of a Supreme Court justice, drafted a code for New York, which was adopted in most states. This was a code of procedure that provided a specific way of pleading a specific kind of case. It was similar to the common law pleading, but it wasn't as stringent or as formal as the common law pleading, and it could be amended.

Again, each state was changing it as it went along, and the federal courts were changing sometimes and sometimes not. So by the turn of the century into the 1900s, Dean Roscoe Pound delivered an address to

a convention of the American Bar Association. He described the utter chaos and failings of the legal system and why the public did not support the courts.

Also existing at that time, was a distinction between actions at law, which provide for money damages, and actions in equity. There were different rules for equity, and different rules for actions at law. In some states--the state of Delaware still has the remnants of it-were Courts of Chancery that handled equity and separate courts of law. Law and equity courts merged, but the judges had to use separate rules for each. In equitable proceedings, litigants are not entitled to a jury, only in actions at law.

The firmament was such that the need for reform continued until the 1930s when this committee was organized. As you would expect from lawyers, judges, and law school professors, they looked at the history that I've just summarized to correct the historical problems. There wasn't a single one of them that looked at the future. I happened to be masochistic enough to have read their proceedings.

Hal Haddon: This is the history of the Federal Rules of Civil Procedure?

Judge Kane: They were published in 1937 and became effective and applied in 1938, which is 81 years ago. At any rate, there was no reference to technology at all, even though, at the time, television was in the experimental stage. Jet engines were being toyed with just prior to

World War II. Airlines were starting commercial travel, the telegraph had been replaced by long-distance telephones to a great extent. There was no xerography, there were no computers, yet anyone who would have consulted an MIT professor of engineering would have been told that these things were all being worked on and this is what the near future was going to unfold. Well, this committee didn't do that, they made no reference to technology or change at all.

Why are we having an alarming decrease in jury trials? Well, for one thing, the rules of civil procedure, as they exist now, even with minor amendments to them, are essentially a Conestoga wagon on the information highway. This has created a situation in which civil litigation is literally too expensive to pursue.

Lawyers are obligated, instead of, as an example, 40 years ago when I tried a personal injury case, it would be tried in three or four days, and we might have as many as 50 exhibits. A personal injury case today has 1,000 exhibits and takes two to three weeks to try. In those days, an expert witness would be called in, and would look at the x-rays, show them to the jury, explain a diagnosis and how he treated somebody. You would have one physician for the plaintiff, and perhaps one or two for the defense.

Today, you have a radiologist, a diagnostician, and a hospitalist--a specialty which didn't even exist in those days. You've got the

primary care physician, and then you have one or two others. Those are just for the plaintiff. All these experts come in. The shift has been because of technology, which our present system doesn't take into account.

The same thing is true because of the computer and the internet, that we now have gigabytes and terabytes of data available. Lawyers are still under an obligation to do due diligence and to sift through and find all of this data. We have not created a system of procedure that accommodates this glut of information. What we've done is create a situation in which using antiquated methods makes it too expensive to try cases. As a consequence, cases are settling.

We used to have a distinction between office lawyers and trial lawyers. We now have transactional lawyers, general practitioners, litigators, and trial lawyers. There are lawyers now who never go to court, who are called litigators. They spend all their time in discovery, retrieving this information and coming up with so much data that nobody can really absorb it.

That's the principal reason why we're having a decrease in civil jury trials.

I think the other is that there's been a de-emphasis on jury trials because we promote a great deal of secrecy in our courts. The courts

are no longer totally public institutions. Lawyers file things under seal, settlements are made confidentially, and judges are participating in that process. I don't, but some do. They will have a confidential settlement and the public knows nothing about it. That's because, to a great extent, corporations are concerned not so much about the money as they are about the moral judgment which takes place with a jury verdict and the significant increase in the probability that stockholders can sue for mismanagement. So they like to keep these things secret; they don't like to have public judgments.

The next thing is that, largely because of the changes in technology, we don't have daily newspapers anymore. Denver used to have three daily newspapers, The *Denver Post*, The *Rocky Mountain News*, and *Cervi's Journal*. When I became a judge 41 years ago, the *Denver Post* had two full-time reporters covering the federal courts, the *Rocky Mountain News* had two and sometimes three, and *Cervi's Journal* had one. In addition, the business pages of those papers also had reporters who would cover commercial cases and come to the courts.

Do you know how many reporters we have today? None. There isn't a single assigned reporter to report in the daily press what goes on here. Of course, the soft media, TV, only shows up outside with their cameras on photographing somebody. That's not journalism. They don't cover what's going on.

So, that's led to the court system being isolated from the public. It has led to considerable public indifference about what happens in the courts. A friend of mine who is a reporter told me that today he covers the assignments that years ago five reporters handled. He says, "All I can do is stay at my computer and receive press releases from PR agents. I take their information and report it as news." So we've lost journalism, we've lost public access. People don't pay that much attention to it.

Law firms are now engaged, for the most part, in settlement of cases not on the basis of what's right and wrong, but of how much it costs, and that has caused further diminishment.

If we wanted to have a public system, what we would do is to have a new blue ribbon committee that was comprised of some engineers, some computer specialists, some linguists, as well as some lawyers and law professors and judges, and we would throw out our entire rules of civil procedure and come out with brand new ones that are designed to handle this glut of data. But we don't have that now, and that's what I think is the reason for the failure.

I have had things happen in this court that really just shatter my imagination. I've had a lawyer in a very, very extensive, expensive case, who when an opposing witness was called to the stand, objected

on the grounds that he hadn't taken the witness's deposition. I said, "Have you ever tried a drunk-diving case? We get along quite well without," but he said he felt his client had a constitutional right in a civil case for the lawyer to have deposed anyone who was going to testify. He actually argued that. I overruled it, and it didn't go up on appeal. But that's just one of the instances to show you the dependence that we've had on all these gadgets and collecting information without analyzing it.

Hal Haddon: What have we lost as a legal system, and really as a country, because we have so few jury trials?

Judge Kane: What we've lost is a third of our government, as expressed in the Gettysburg Address. We have lost government by the people. We have government of the people and allegedly government for the people. It's more government for the lobbyists, not government by the people. The biggest incidence of government by the people is people sitting on a jury and rendering a moral, as well as legal, judgment. We don't do that. It's practically non-existent, and--I'm sad to say, but I think in my lifetime we just won't have any jury trials.

The other thing that we've had, which is, again--the Supreme Court says it's wonderful and it's--I have the feeling that sometimes when the Supreme Court decides a case, it reminds me of a guy I knew who had an extraordinarily ugly sister that he tried to fix up with dates all

the time, and the Supreme Court comes out with some really ugly decisions on occasion that we have to live with.

The decisions on arbitration and alternative dispute resolution have ruined our system, even aside from everything else I've said. If you have mandatory arbitration by contract--and what that means is, that you have somebody in an hourly wage with no formal education and maybe English as a second language, and they sign a contract drafted by lawyers for a company. It includes in some very small print that any dispute has to be handled by arbitration. The Supreme Court says that's fine. Conscionability has been removed from it. Freedom of contract, the illusion of--there's no freedom there, but that's what the Supreme Court has said.

So we have arbitrators, we have privatized the litigation process. The concept was sold to the public, that it would be cheaper and faster. However, arbitration is more expensive than going to court now. According to the rules of the American Arbitration Association there are three arbitrators. It's created a job opportunity for judges to retire or resign from the bench and go into the rent-a-judge business. And all of their decisions are private. That's the essential wrong with it.

So the public has no idea. Unless you subscribe, for example, to some service and pay a good sum for it. If you are just a person on the street and your car was hit and you have a ruptured cervical disc, you have

no idea what it is worth. None. That's because we don't have newspapers, we don't have jury verdicts announced, and we don't have jury trials making those verdicts.

Hal Haddon: We do have lawyers on billboards.

Judge Kane: We have lawyers on billboards, and that's another matter that, you haven't asked, but I'd be happy to elocute for quite some time on the utter disaster of lawyer advertising.

CHAPTER TWENTY-FIVE - SENTENCING

But, to go back to your original question on criminal law, you can look at the sentencing guidelines as to why we don't have criminal trials anymore.

Sentencing without the guidelines is the province and function of an independent judge appointed for life who, without fear, favor, risk of loss of employment, et cetera, can make a decision. In a given case, such a judge can make rulings in cases and sentence people justly. But what has happened is that we had mandatory guidelines, and during that period of time, 14 years or so, an entire generation of judges, from 1987 forward, never sentenced people without the guidelines. So, even though now the guidelines are merely advisory, they're still used by these judges. The guidelines were formulated and developed with the intense effort of the Department of Justice. So the prosecution has, in effect, taken control of sentencing and transferred it from the courts to the Department of Justice. Prosecutors make charging decisions that

judges are not allowed to interfere with, and they can routinely charge five or six separate violations. Then defense counsel comes in, and they have to bargain. Plea bargaining rather than trial has taken place and the prosecution holds all the bargaining chips.

What happens is that the defense attorney looks at the charges, and he looks at the guidelines, and he says the judge is likely to give a guideline sentence. The law includes the shibboleth of saying that pleading guilty constitutes acceptance of responsibility. What that means is, if the defendant informs on his mother, his father, his brother, his sister, his wife, then he has accepted responsibility. He cooperated and, therefore, receives a lesser sentence. So whatever integrity the person had is destroyed in order to get him to cooperate, he receives the benefit of a lesser sentence, and what is done is it damages him for the rest of his life.

Hal Haddon: There are lots of judges who take the position that, if you go to trial, you have automatically not accepted responsibility--

Judge Kane: Yes.

Hal Haddon: --and therefore you are penalized at least three points, or 18 to 24 months under the guidelines.

Judge Kane: I say in every single case I have--that that's reprehensible. That's what's called, in the back halls of justice, the trial tax. The prisons are filled with people who will tell other prisoners that, if they go to trial,

the judge is going to give you a heavier sentence than if you plead guilty.

In every criminal case I have, I will not advise just the lawyer, I require the defendant to be present before me. When the defendant appears in front of the magistrate, bond is set and the magistrate makes sure that the defendant has a lawyer and receives preliminary Miranda warnings. I have a hearing right after that. The defendant and his lawyer come to my courtroom, and I talk to the defendant directly and personally. I tell him about the trial tax, and I tell him, he is going to hear about the so-called trial tax. I advise the defendant not to listen to others in the jail and point out that if they're so smart, why are they in prison?

The second thing I tell the defendant is he has to understand that what they say is true with some judges, but it has never been true with me and it never will.

I think an accurate analysis of acceptance of responsibility, is that the person accepts responsibility when he requires the government to prove its case. Trial makes our system vibrant, fair and honest. That's responsibility, that is civic awareness to require the government to come in and prove it. And if the government fails, the person goes free. If the government succeeds, the defendant should be punished the same for the offence and not for asserting the rights provided by law.

Hal Haddon: You have written several articles about sentencing.

Judge Kane: Yes.

Hal Haddon: One in particular, it's fairly recently, called Robe-itis, where you explain how your sentencing practice has evolved, and a couple of painful lessons you learned along the way. Could you expound on that a little bit?

Judge Kane: Sure. That article was about the most humbling experience I've ever had as a judge. It certainly ranks up there with any others I can't even remember right now. It's the most shameful thing I've ever done in my life.

I have to give a little bit of background. Denver, Colorado is a large metropolitan area that attracts a great many young people from Eastern Colorado, Western Kansas, Nebraska, Wyoming, and some from elsewhere. They are from small towns and farms. They come here, quite a few of them, to get jobs. They will go to a secretarial school or some kind of a technical school and get some sort of training in order to get a job. They then will live together because our rents are so high. You'll see a two-bedroom apartment that will have as many as six young people living in it, sharing the rent. So that's a background.

The other bit of background is that when I started practicing law and clear until this particular event, I had learned that, when I had a client and the judge was going to grant probation, the judge would usually

give a Sunday school lecture from the bench and rant and rave telling this person how bad they've been and how they've humiliated their family and all the bad things they've done, and then at the end say something like, "Well, I'm going to place you on probation, but don't you ever come back into this courtroom again."

The judge would scare the hell out of the defendant and then put him or her on probation. And the same judge, if he was sentencing somebody to prison, would just say, "I've read the whole report, five years or whatever it might be." There would be no hell, fire and brimstone speech.

So I picked that up. I had a case, a young woman from western Nebraska. She came to Denver and went to some kind of a commercial school. She learned to become a bank teller. She got a job with one of the big banks in Denver. She was given a polyester blazer and told that she was now a professional. She met other young people, and together they leased an apartment. They're all starting off on their adult lives at age 19, 20 years old, maybe 21.

The bank managers in this case sent her a notice that said she had successfully completed probation and was now a professional working for this bank. After another pay period her supervisors tell her that because she is a valued employee of the bank, it will finance 100

percent for her to buy a brand-new car from one of the bank's customers.

She thinks, "Gee, I get a brand-new car and the bank deducts the payment from my paycheck and I still have enough money to pay the rent and to go out with my friends a little bit." So she buys the car. She could hardly wait to drive back in her new car, with her new clothes to her hometown in Nebraska and show all of her friends how she has made it and how well things are going for her.

As luck would have it, within four or five months, one of her roommates left, for what reason I don't recall, but she had to share more of the rent. Instead of 1/6th, she had 1/5th to pay and then another left so she had to pay 1/4th of the rent. She couldn't afford that and her car payment and the other obligations she had, including the beauty appointment so that she would maintain her professional appearance, so she finagled the computers where she was working as a teller to show a payment had been made on her car when it hadn't. She did that four or five times. It was picked up by the bank and she was indicted.

Hal Haddon: Federally?

Judge Kane: Federal indictment for bank fraud and theft from a federally insured bank and related charges. She gets a public defender who plea bargains. The prosecutors drop everything except one count to which

she pleads guilty. When her case came up for sentencing, the courtroom was filled with her relatives and friends. She sat at counsel table with her public defender. She had no record of any kind--I was going to give her probation. A bank officer had shown up for the plea of guilty but no one from the bank appeared for the sentencing. I was going to issue an order that to the extent she could afford it, she would make restitution payments, but there wasn't anybody from the bank there to establish the amount due.

I knew I was going to sentence her to probation, but I had to follow procedure and hear first from the prosecutor and then the defense attorney who stood up and said, "Oh what a wonderful person" and the usual sort of catechism that defense lawyers say about their clients. Then I said I would like to hear from the defendant. She stood up at the lectern. She was a nice young woman, dressed in her best. She was shaking when I started in:

"Before you did this people trusted you, your parents trusted you, everybody else did, your employer did, and now you can never work for a bank again. You have committed this crime, shown you're not trustworthy" and I ranted on. And she was just standing there frozen and then I said "Well, I'm going to give you probation for--three years of probation" and she starts in crying and thanked me and her parents

get up and come and act like I'm Jesus or something, you know, thank you judge, oh! you're so kind, thank you so much and all this.

I looked down and the young lady had urinated on the courtroom floor. I declared a recess and went back into my chambers where I hit the wall with my fist, lucky I didn't break it. I was really upset and so ashamed of what I had done. I swore I would never ever do that again. That anybody who was ever sentenced was a human being and the mere fact that they are being punished is all that need be said. A judge doesn't need to add anything to it and I have never done that again, but I--there's hardly a case that I have that I don't remember what a jackass I was.

Hal Haddon: When you prepare to do a sentencing and when you actually have to sentence someone, what are the critical factors that you weigh?

Judge Kane: Depends on the case, because they're all different, but the analysis of the individual defendant is, I would say, the primary factor. And that could mean a lot of things. You think about what can be done psychiatrically to help somebody so they don't continue with their life of misery.

A lot of these people involved have drug habits. Some are addicted. I look at that, I look at what can be done to help them, but some of them are psychopaths, some of them were just anti-social, some of them society needs to be protected from, not nearly as many in that category

as there are in the category of those who are never going to harm anybody. These in the last category shouldn't be going to prison to protect the public because they never will.

We have more people in prison now than should be there. But those who are dangerous, such as Mr. O'Driscoll, need to be put away so that society is protected. I look at the mental status and the background of psychiatric or psychological history, I look at the economic vitality. If somebody has had a job and worked and knows how to get up in the morning and go to work, and knows about paychecks and knows enough to have a bank account and pay bills, he is a step ahead of the one that dropped out of school in 6th grade, joined a gang and cannot add, much less read or hold a job. So I have to see what can be done, given the abilities and talent of the person in front of me.

There are other certain categories of crime that attract people--that have a very high incidence of recidivism, for instance embezzlers have a very high incidence of recidivism. They know--they're clever, they know how to cover up, they hide what they have stolen, they take it from other people with no qualms at all and they do not receive, in our system, the degree of punishment that they should, because of these damn guidelines. There was no gun involved. There is no prior conviction. The embezzler has an income and a college education.

They’re the ones treated lightly who I think need more time, more than the ones who never had a chance.

Another consideration is statistics and what the guidelines say, but for the most part I find the guidelines are a mindless construction of numbers that have no qualitative character. From my own experience sentencing people, I sometimes let the guidelines have an effect. An important development is occurring since the guidelines were declared advisory rather than mandatory. Within the last two to three years, lawyers have started paying attention to sentencing.

In the past, lawyers spent little time on sentencing. Mostly they said virtually the same things, like a catalogue for every kind of case. But now we’re getting lawyers paying attention and filing written sentencing statements that go into detail. One of the best examples of that I can think of was our Federal Public Defender Ginny Grady. She had a case involving a former guard at the Federal Correctional Institute in Englewood, who was charged with the possession and distribution of child pornography. Ms. Grady went to experts in that field. She filed written reports, I did an estimate and she had over 200 pages of information in the presentencing statement presented.

Among the many factors was that he was on dialysis and needed a kidney replacement. She detailed the lack of facilities the Federal Bureau of Prisons had. She presented a viable alternative of what

could be done by having him in home confinement rather than in prison. In another case, another lawyer who I'm very fond of, was in the Public Defender's Office and is now in private practice. What she did on a case shows the differences between routine spouting of generalities and effective advocacy in the sentencing phase of a case. She was then in the Public Defender's Office. Her client was a Hispanic-American from the San Luis Valley. The San Luis Valley has Spanish speaking people who have been there since before the Mayflower. They are not recent immigrants.

This defendant lived in a little village on the border between Colorado and New Mexico. It's an area I'm somewhat familiar with. He had been in Vietnam and was injured. When he came back to his village, he couldn't farm anymore, because of his injury, so he had taken this barn right on the outskirts of town and set up a repair shop for farm machinery, tractors, reapers, and all these other gadgets that farmers use, plus doing some automobile repair as well. He was working and living in the town.

Some of his buddies from Vietnam had gone into the marijuana business. They were bringing marijuana from Mexico to Denver for use, sale, and transfer to other places like Chicago. They needed a place where they could exchange their big truck full of marijuana to smaller vehicles for further distribution. They asked the defendant to

use his garage. He agreed and they paid him, not a lot, but a small share each time they used his shop.

The Drug Enforcement Administration caught on and arrested everybody involved. This defendant was charged as part of the conspiracy. He had no record--no criminal record, but he was clearly guilty. After he pled guilty and before the sentencing his lawyer got into her SUV with a video camera and an air mattress. She drove all the way from Denver to this little town on the New Mexico border. She interviewed the Deputy Sheriff who lived there. She interviewed the man who ran the general store and post office and other people in the town. People, including the Deputy Sheriff, said the defendant is a good guy, he helped everybody, there was no reason for him to go to prison, we can help him and he won't be in trouble anymore. I don't know how many hours she had of this, but she condensed it to about a 25-minute film and presented it for sentencing in lieu of the usual sort of chatter one hears. I put him on probation. Her effort produced one of the best jobs I have ever seen.

Since that time, we've had lawyers in the Public Defender's Office and the Criminal Justice Act Standing Committee, start filing sentencing statements and going into detail about their clients, who they are and what's the ripple effect of having committed a crime and been caught.

Hal Haddon: Have you seen more sentencing videos and do you find them effective?

Judge Kane: Absolutely. Even if it's not in video, I find it very effective to have a detailed sentencing statement in writing. It's so different from what used to take place. Usually the lawyer would stand up and say something about his client and the next case that he had he would be saying essentially the same thing. That has changed. There has been an individualization process taking place. I think, pure supposition on my part, but from my experience I think it's because more women are practicing law today and they look at these complex events and communicate something that male lawyers never did before. Now, I'm getting male lawyers who are paying attention to sentencing statements, but I really think it's because of women getting into the law that that's happened.

Hal Haddon: I was on a sentencing panel in California two to three years ago. We were talking about sentencing videos and there was a male federal judge who said that he routinely discounts them because he thinks that he is being essentially treated to a Hollywood product and my sense was that he didn't really want to see the human being in that person's environment.

Judge Kane: I can say this: I have never been in Hollywood. I have no intention of going, but I have been on the Colorado and New Mexico border and I'm familiar with that village. I know damn good and well that what I

saw was authentic. It wasn't some construct. Let me give you another insight into this. I have a real soft spot in my heart for bank robbers. I just do.

Hal Haddon: Is it a Bonnie and Clyde kind of affection?

Judge Kane: No, these are people who come in and they are just so dumb that you wonder how they tie their shoes in the morning. I had one of them, who just stood up and said, "Judge, this ain't no whodunit. I done it. Just don't hit me hard." They feel just as comfortable going to prison as they do out. They just do their time. They don't complain, they don't file writs. That's just the way they are. I had another one, I've told this to people and they think I made this up when I tell them.

This is a true story. On Arapahoe Road or County Line Road, there were three small branch banks in shopping centers or shopettes. This guy goes into one with his own car with the license plate on it. He has a rubber Bozo the Clown mask, kind of total rubber thing with the red fringe around the bald pate. He puts this mask on and enters the bank. He hands a teller a note with misspelled words, indicating he wants money. The teller gives him, I don't even remember what--$800 or $900 with a packet in it to explode when he leaves. He leaves and gets in the car, and she of course tells the manager who calls the sheriff's office. The sheriff's officer reports to the scene as the robber is going to the next bank. He does the same with his Bozo the Clown mask. He gets the money and leaves in his car. While he's driving down the

street, the deputy sheriff pulls him over and the robber says, his question is, “How did you know it was me?” And the deputy sheriff said, “You forgot to take your mask off.” How can you get angry with somebody that’s just that dumb?

I had one other bank robber who gave the demand note to the teller which was written on a deposit slip from his girlfriend’s bank account. By the time he got back to her house, the police were waiting for him and he said, “How did you know it was me?” They just have no concept of what they’re doing. So, you know, I sentence and they get time but it’s pretty hard to be upset by somebody like that. I’ll tell them, “Well you had a gun,” and they’ll say, “Oh, I never would have used that. I don’t want to hurt anybody.” You look at their police record and indeed they never *have* hurt anybody. They’re not violent people. There are other bank robbers who are, but I mean that particular genre of bank robbers is my favorite. They have an expression they say all the time to me: “Judge, if you can’t do the time, don’t commit the crime.”

Hal Haddon: They say that to you?

Judge Kane: They say that to me. They will frequently say, “Just don’t hit me too hard.”

CHAPTER TWENTY-SIX – COPYRIGHT LITIGATION

Hal Haddon: One of the things that you really dislike is a practice among lawyers that consists basically of filing nuisance suits to collect fees and

you've written on that subject several times. One case I'd like to ask you about is a case called *Righthaven v. Wolfe*, can you discuss that a little bit?

Judge Kane: Sure, and I hasten to point out, you said I dislike things and I do. I have a romantic notion that I still think of the law as an honorable profession. When lawyers dishonor it, I get angry. It upsets me considerably. I think in terms of the Lion, and King Henry V, when he is walking around the field of battle before it begins and says that, "Whosoever sheds blood with me is my brother. We are a band of brothers." I have that feeling of what lawyers, as a profession, should be like. The legal profession can be and it usually is noble. It's difficult work and it's primarily a service for other people. When that ideal gets bypassed and the practice of law becomes nothing but a matter of greed and avarice, I have real problems. Dealing with lawyers like that makes me think they're contemptible.

So to go to this case, as I mentioned earlier, when I came back from my year off as a senior judge and I started taking cases from others, in addition to the lengthy complex ones, there are also cases that can be processed together because they involve at least one party common to all of them and the same issue of law. The best example of that is our court once handled over 500 trespass on federal property cases with a protest that took place at Rocky Flats. Chief Judge Winner divided up the defendants with his own whimsical sense of humor. We tried these

cases in groups of 20 or 25. Also some lawyers will file a whole bunch of cases at once. Right now I have 35 cases assigned to me against a company that manufactures and administers dialysis machines. These are all employee suits and we've consolidated, not for trial, but pre-trial. I'm handling them with a magistrate judge. We're handling all of them at once.

The one you mentioned was similar to that. There were, I think 35 cases. These two lawyers in Las Vegas went to newspapers and said, "We want you to assign your copyright to us. We will sue anybody under the copyright act who violates your copyright." There is a statutory penalty. I think it's $1,000 per violation, so the plaintiff doesn't have to prove damages. The newspapers would not agree to assign copyrights. So these lawyers proposed that the newspapers only assign the right to sue but retain all other aspects of the copyrights and let the lawyers' company hold title to the copyrights. Then the lawyers would sue these people who were violating the copyrights. The lawyers dumped these 35 cases here in our court. The deputy court clerks received these cases and recognized they were all by the same plaintiff. The clerk's supervisor notified the Chief Judge and asked for guidance. The Chief notified the rest of the judges and I suggested assigning all of them to me.

The pretrial discovery is the same; the motions are going to be the same; they're all from the same form of pleading, et cetera. But the defendants are different in each case, so they would have to be tried separately. We could combine them for pretrial purposes. So they came in and I looked at the very first case which was based on this: a *Denver Post* photographer, had photographed a T.S.A. guard giving a pat-down search to someone. It was very humorous--let's just put it that way--it looked like he was doing more than simply a pat-down search. So the photo was published in the *Denver Post* and was copyrighted. There was this kid in Longmont, Colorado, who was, I think 19 or 20. He lived with his parents and, as I recall, suffered to some degree from autism. The only thing he could do was use the internet. The autism did not affect his ability to communicate on the computer. He saw this photograph, and thought it was funny so he sent it out to some other people. These lawyers sued him for violation of the copyright.

Hal Haddon: These Las Vegas lawyers sued him?

Judge Kane: These Las Vegas lawyers. The family of this kid was an ordinary law-abiding family with a handicapped son. They had a lawyer, who was local. He was a general practitioner. I had never heard of him before--he had never been in the Federal Court he told me. In fact he didn't do very much trial work at all but he told me that he represented this family. The parents went to see him. He was going to refer this case to

somebody--he doesn't handle federal cases--but he looked at it and saw what was being done. It made him so damn mad that he filed a motion to dismiss the case which was in front of me.

The grounds he had in the motion were not really that strong, but I looked at it, I looked at all these other cases and it got my Irish up. When I saw what these lawyers were doing, I set the motion for oral argument. These two lawyers in Las Vegas wanted to handle it by phone. I frequently do that, but I wasn't going to do it with them. They were putting a lot of other people to great expense in defending these suits. I made them appear in court--this lawyer appears and he is very pompous saying we have these cases in our company, that the two lawyers owned the company, and they were suing for $1,000 penalty and then they would pay the *Denver Post* so much money and go on with all these other lawsuits. I turned to the Longmont lawyer, "I'm going to rule on your motion to dismiss." I turned to the other side and said, "You had better file a brief." The Las Vegas lawyer said, "We are on very solid ground." I said I want a brief. I'm making them work. They filed a brief and it wasn't worth a damn. I told the Longmont lawyer representing this kid that he didn't need to file a reply and then I wrote an opinion.

My opinion was not based on the motion. My opinion was based on the essence of what copyright law is; that you cannot simply transfer a

chose in action--a right to sue--and retain all the artistic benefit--that the purpose of copyright law is to protect the artist. There was no protection with the purported assignment and therefore it was invalid. I assessed attorney fees against the Las Vegas lawyers and within very short order they dismissed those other 34 cases.

Hal Haddon: Your ruling that they didn't have standing, was considered to be pretty novel and contrary to a lot of other Circuits. Has your ruling essentially swept the land and been adopted by other Circuits?

Judge Kane: Yes. There are no more of these people, that I know of savaging around the country trying to take assignments of copyrights, suing for damages and leave the copyrights with the creator--as far as I know they're put to rest.

CHAPTER TWENTY-SEVEN – PATENT LITIGATION

Hal Haddon: Another case you handled that I was involved in involves not the flip side but another face of avarice and that's a case that took about 13 years to resolve in your court. *University of Colorado Foundation v. American Cyanamid*.

Judge Kane: Yes.

Hal Haddon: And you've told me that, you thought that there was--that case had public significance beyond just the lawyers wrangling and the jurisprudence--could you explain that?

Judge Kane: Yes. You did a good job, by the way.

Hal Haddon: After 13 years, thank you.

Judge Kane: The case involved this--there was a vitamin called Materna that was produced by American Cyanamid. Materna was a prenatal vitamin, meaning it was to be taken by pregnant women to keep them well-nourished et cetera and also it contained iron in the formula, because pregnant women have difficulty if there is an iron shortage in their blood supply. It can lead to serious problems with the infant, phenylketonuria I think it's called. Iron is essential for pregnant women, and so this vitamin was marketed. Cyanamid and a number of other pharmaceutical companies produced it. Each such company has what they call, a detail man, who visits doctor's offices and gives them free samples, saying ours is the best product so please prescribe this particular brand.

A rival company's detail men were saying tests showed the iron in the Materna vitamin was not being absorbed by women even though it was in the ingredients. Therefore, the vitamin was not meeting its purpose. Without being absorbed it was just being eliminated by the patient. These detail men urged the doctors to use their vitamin instead. American Cyanamid saw a downswing in its sales of the Materna vitamin and sent its detail men to investigate. Moreover, there were advertisements by a rival company showing that Materna iron was not being absorbed. Cyanamid directed the person in charge of research to recruit scientists at a research institution to conduct research into this allegation. This corporate employee contacted the

Colorado Medical School at the Anschutz Center where there were two physician scientists who did hematology and retained them to test the Materna vitamin and see if it was failing to achieve absorption.

These two CU researchers did the tests and got paid for them. They reported to the Cyanamid employee that Materna was not achieving the absorption rate that women should have, but neither was the rival company's competing product. None of these prenatal vitamins were providing women with the iron nourishment they needed. The Cyanamid employee thanked them and Cyanamid put out an advertisement stating that scientific tests from an independent research institution shows that its absorption rate is no different than any other. The two doctors at the University of Colorado were concerned that no efforts to correct the malabsorption problem were being made. They contacted Cyanamid and informed its research director that they could pursue and create a reformulation to improve the absorption rate. And Cyanamid's researcher advised that the company was not interested and that it got the result it wanted.

The doctors, on their own dime, did further research and made a discovery that improved iron absorption in prenatal vitamins for expectant mothers. They notified Cyanamid of this discovery and revealed the needed reformulation formula. Cyanamid had this huge public advertising campaign called "the New Materna," and they

advertised that this brand-new formulation improved the absorption rate. The CU doctors thought they had accomplished a worthwhile change. Cyanamid didn't pay them more money because they had done this research on their own dime. Even so, the doctors were pretty happy that they'd come out with this discovery that was useful and improved prenatal health in women.

I'm vague on the details now, it happened a long time ago, but at some point, two things happened: Cyanamid requested the two doctors to test the reformulated product and the product was sent to them for testing. The head of Cyanamid's research had taken labels and covered up the commercial label, which showed the patent pending or patent granted. When the samples arrived in Denver, the doctors (the inventors) looked at a bottle with a label that said, "For laboratory use only." There was no indication that Cyanamid or its research director had obtained a patent or even that a patent application was pending. One of the doctor-inventors went to San Francisco to attend a conference of some kind and somebody out there told him that Materna had obtained a patent on their invention. His comment at the time was, "We've been sleazed."

They did the tests and when the doctor returned from San Francisco they removed the research only labels and discovered the patent language. The head of research for Cyanamid had taken credit for the

invention and had received a cash bonus for his great invention. As best I recall, the trial showed he'd done the same kind of thing and stolen other items in the past as well. The doctors were suing, but so was the University of Colorado Foundation, which had provided money for the research projects et cetera, and part of the research went to the Foundation and some of it went to the University itself.

In my decision I ordered actual damages and punitive damages, but I said it's the doctors whose careers had been damaged. It's the doctors whose integrity has been affronted. The punitive damages were awarded to the doctors, not to the University. So, that was that case.

Hal Haddon: And it took 13 years and several appeals-

Judge Kane: Yes.

Hal Haddon: -to reach that resolution.

Judge Kane: That's exactly right. That's another example of death of the jury trial. Why should it have taken that long? But it did.

CHAPTER TWENTY-EIGHT – HUMOR IN JUDICIAL OPINIONS

Hal Haddon: I want to flip back to a subject that we've woven in and out of, and that's your writing and how prolific you've been. One of the things that you've done that a lot of judges--many judges, if not most, avoid is some deliberately humorous writings and I want to talk about a couple of the cases that gave you some favorable notoriety.

Judge Kane: Okay.

Hal Haddon: People like columnist George Will and others.

Judge Kane: And I got an unofficial award from the University of Wisconsin English Department, for one of them.

Hal Haddon: Talk a little bit in generality about why many other judges choose not to use humor on occasion and then we'll talk about some of the other specific cases.

Judge Kane: First of all, I think you have to have a sense of humor and some people don't. Those who major in accounting and finance and then go to law school are not a whole lot of giggles. Maybe they don't recognize funny situations or maybe they're just not interested. But judging is hard work. When you work and you're dealing with human suffering and with the success or failure of business enterprises, you can get depressed if you don't try to look at things more philosophically. Every now and then, some case comes in, and it's just so totally absurd that I say I can't let this go by. I've got to point out that not everything we do around here is of the utmost seriousness. I think the case you're referring to with George Will is a perfect example. The lawyer that did this-- I didn't know him that well, but I liked him a lot. He was ebullient and always cheerful. He is a Hispanic guy, who had mainly a criminal practice and not much of a commercial one, but he was always creative and I enjoyed having him in court.

So he had this client named Maestas who was a young guy working and playing softball in his off hours. His ambition was to become a Denver police officer. He and a teammate on the softball team went to

a bar after the game. The other guy began teasing Maestas about wanting to be a cop. Why would you want to be a cop? Are you a traitor to your people? They had too much to drink and they got into a fight in the bar . The bartender grabbed them by the scruffs of their necks and threw them out into the parking lot. They continued their fight in the parking lot. While this other guy is down, Maestas jumps on top of him and bites his ears and his nose off.

Hal Haddon: Both ears?

Judge Kane: Both ears and his nose. So the cops came and Maestas is arrested. He was sent to prison and the other guy sues Maestas.

Hal Haddon: Maestas had homeowners' insurance.

Judge Kane: He had homeowners' insurance. He was the guy who did the biting.

Hal Haddon: That's right.

Judge Kane: And so the other guy, the victim goes to this lawyer who looks at it and says, "You know, neither one of these mutts has any money. They couldn't even afford the beer that they were drinking. So if I sue, what'll I get from it?" Then the light goes on and he says, "Aha!" He knows Maestas owns a home so he checks and sees that Maestas has a homeowner's liability policy. Then he decides, well, liability insurance policies cover negligence, but they don't cover intentional torts--intentional wrongs.

So this lawyer prepares a complaint and files it in the state court. He alleges that Maestas has *negligently* bitten the ears and nose off of this

other guy and therefore West American Insurance Company which is the insurer is notified it must defend this lawsuit. Instead, West American filed an action in Federal Court, which was assigned to me: *West American Insurance v. Maestas* and asked for a declaratory judgment holding the company is not obligated to defend this case. I looked at the complaint. It was sad that the guy lost his ears and nose, and you have to take that seriously, but this case is so far out in left field that it's funny. So I wrote this opinion. I poked a little fun at the lawyer saying, "I'm going to fashion a brand-new rule of law and it is that three bites do not a negligence case make. You may have been able to bite one ear off negligently, but you can't bite off both ears and his nose--it takes three bites and that's not negligence." So I granted the declaratory judgment for the insurance company. I just had a whole lot of fun writing it. Then the lawyer who filed the state lawsuit for the victim came to me and said, "I didn't think I'd get away with it, but what the hell, you try."

That was a lot of fun. And George Will somehow got ahold of that case and he wrote to me and asked, "That really happened? Somebody bit the nose and ears off of somebody else?" And I said, "It certainly did." That's the case.

Hal Haddon: And I quote from it. Quote: "I think the third bite pretty clearly elevates the activity to an intentional tort, however mindless it might seem."

Judge Kane: That was a lot of fun. You see, dealing with all these other cases: prisoners' rights, *Ramos v. Lamm*, stolen patents and predatory lawyers dealing with copyright and then also you get something like this and, you know, so what if the insurance company has to come in and spend a few bucks to get out of the case. I looked at the complaint and thought, "I am never going to forget this in my life. I don't want anybody else to forget it either."

Hal Haddon: Another humorous opinion, which won you an award is called *Tuggle v. Evans*, John Evans was the warden of the Colorado State Reformatory. That's a case you decided in 1978, tell us about that one.

Judge Kane: Well, '78, was my first year as a judge and as I said I got a whole lot of these prisoner pro se cases assigned to me. I am a new kid on the block. So my clerks and I are going through them and seeing things that were in *Ramos v. Lamm*, people being beaten up, not getting adequate medical care, suicide rate higher than the national average, self-mutilation rate's very high--all this kind of stuff. It's very serious business and the prisons were not doing a good job—the state prison. Out of all these, after I did a certified class action. Mr. Tuggle who was a resident at the Colorado State Reformatory in Buena Vista filed his pro se action. My clerk brought it to me and said, "You won't believe this."

Tuggle was alleging that the Civil Rights Act Section 1983 was violated by the State of Colorado because when he was going through

the cafeteria line, he was served a bowl of soup with a hair in it. Tuggle wanted damages for cruel and unusual punishment because there was a hair in the soup. I looked at that and I thought, we have people dying and suffering severe injuries and this jackass is fretting about a hair in his soup. I pondered, "I wonder what William F. Buckley Jr. would do with this case?" So I went to my dictionary and every time I needed a word, I'd look in the dictionary to find a more complicated, arcane, unusual one to substitute for it. I wrote this opinion as I thought William F. Buckley would write a review if during an evening at an unpleasant restaurant he found a hair in his vichyssoise. So that's how I wrote that opinion. It was mainly a diversion because we don't really have enough time to deal with somebody who gets a hair in his soup. I think one of the things I said in there, was the only difference between him and somebody in a public restaurant who gets hair in his soup, is that the other person has to pay for it, this was free.

Hal Haddon: You also said, and I quote, "I'm not called upon to give a Michelin rating to the cuisine at the state reformatory." As I recall, you won some humorous writing awards for that and you sent it to William F. Buckley.

Judge Kane: Right.

Hal Haddon: Did you ever hear back from Mr. Buckley?

Judge Kane: I did. He wrote back and he liked it. "Good chortle," is I think the phrase he used and he said splendid job. The award I got is not a real award, but I really treasure it. The English Department at the University of Wisconsin, I think in Madison, looks around every year at various things that have been written and gives pseudo awards for the dumbest opening line in a novel or for the longest run-on sentence. Someone discovered this opinion and thought the rarest form of writing is a humorous judicial opinion. Consequently, I received the very unofficial University of Wisconsin Award for the most humorous judicial opinion of the year.

Hal Haddon: A third one that attracted a lot of public notice for its humor involves the Denver Bears, which was a minor league baseball team before we acquired the Colorado Rockies. It's a 1984 opinion you wrote in a case called *King v. Burris*. What was that case about and why did you resort to humor to decide?

Judge Kane: Oh, it was about baseball. The manager of the Denver Bears had gone to a meeting with these other minor league teams. The way they schedule where they're going to be is critical for the finances of these minor league teams. They want schedules that reduce travel costs. For example, the Denver Bears would prefer to play three days in Wichita and then go down to Oklahoma City which is close and play three games there. They try to economize on their route travel more than the

major league teams that fly anywhere and everywhere. But Mr. Burris was the manager for the minor league team here, the Bears, wasn't it?

Hal Haddon: Yeah, Denver Bears.

Judge Kane: Denver Bears and so there was a guy named King, who was the equivalent general manager or something in Wichita.

Hal Haddon: Wichita Aeros.

Judge Kane: And so they're at this meeting and they make an agreement that they are going to schedule the games, so that Burris can get his team to Wichita and then on to some place close by, I think Oklahoma, and then when they had the meeting King engages in what Judge Winner used to refer to as "retromingent activity." He went back on his word and Burris just went berserk. The meeting took place in Florida and if you've seen baseball, you've seen the manager come out and swear at the umpire and keep going till finally the umpire rips off his mask and points and sends the manager to the locker room. The manager stomps off and the fans boo. We also know in baseball that as soon as the hitter comes up, the catcher says something to get the hitter distracted, "You know, for example, you know who you're wife's sleeping with right now?" It is always something to jar the other player. Baseball's filled with that. It's also filled with great wonderful quotations from people like Yogi Berra. I like baseball and I saw this case and I thought what a ridiculous thing this is.

Hal Haddon: What was the lawsuit about and why was it federal?

Judge Kane: Intentional infliction of mental suffering because he had called him, among other things, “a fag.”

Hal Haddon: Burris called King a fag?

Judge Kane: Burris called King a fag as well as all these other things he called him, but that was the one that stuck in King’s head. He was humiliated and he despised gay people—homosexuals, he said in his pleading, he just couldn’t stand that so I looked at it and I thought, you know, this is really dumb. Legally I did not see it as intentional infliction of mental suffering and practically speaking I thought, it’s about baseball and I need to relax. So, I wrote the opinion as though I was describing baseball. For example, I think it says in there something about the case or the complaint is “dismissed without prejudice” and I put a footnote and said, or as Yogi Berra would say “The game ain’t over until it’s over.” Each time I said something I used a quotation from baseball and baseball fans around the country--somebody that has a baseball magazine got ahold of it, printed it. I think I got more mail on that opinion than any other I ever wrote.

Hal Haddon: One of the claims is--that King made against Burris is that Burris had threatened him with a Sprite bottle and he hadn’t hit him or anything--

Judge Kane: Yeah.

Hal Haddon: Somehow brandished--

Judge Kane: --shaken a Sprite bottle in his face.

Hal Haddon: You noted that the complaint was unclear as to whether Burris' intended delivery was overhand, sidearm or submarine style. This is a wonderful, wonderful baseball metaphor.

Judge Kane: It was a lot of fun. But, you know, why does a judge write humorous opinions? First of all, because he can, and secondly because occasionally the facts warrant it and thirdly it's mental relief from the stress of dealing with truly serious cases.

Hal Haddon: Did any of these cases get appealed?

Judge Kane: No. No. Not a one of them.

CHAPTER TWENTY-NINE – LAW CLERKS

Hal Haddon: That gave you some sense of their substance to begin with? I want to kind of pivot to some more philosophical questions and one has to do with law clerks. You have hired law clerks since you have been a federal judge starting in 1978.

Judge Kane: 41 years.

Hal Haddon: And some of your hires or many of your hires had been pretty unique. What is your philosophy, sort of writ large in terms of law clerks that you want to hire and how have you gone about that?

Judge Kane: Premise one is I don't take anybody else's word for evaluating somebody. I do it myself. Premise two is that I don't have any confidence at all in the standard orthodox way that law clerks are manufactured through the law school, law firm, and court's hiring system. I just don't do them that way. The typical sort of thing that

happens is that some people go to law school, they want to become law clerks, the law schools pride themselves on how many of their graduates they can get to these coveted positions, the lowest one being the District court, then the Court of Appeals and then the Supreme Court. What happens frequently is that a Circuit Judge will hire somebody as a law clerk, who will spend a year or two with that Circuit Judge and then that Circuit Judge recommends him or her for appointment as a law clerk to one of the Supreme Court Justices. It's a pyramid because, you know, people who are offered District Court clerkships--there are more of them because there are more district courts than people are offered Court of Appeals clerkships, but there's only one Supreme Court. There are nine justices. I don't know the exact number, but I think each of them could probably have as many law clerks as they want, but I don't know the precise numbers.

However many there are, it's less than 50 of all the lawyers graduating in the United States so it's a very coveted position. Many of them who get that far will go into academic law and become professors and instructors.

Justice Eid--Alison Eid on the Tenth Circuit started, after having been a Supreme Court clerk, she taught law at CU Law School and then went to the Colorado Supreme Court and then to the Tenth Circuit Court of Appeals. She was, I think, a clerk for Justice Thomas. That's

not an unusual thing to do. Justice Gorsuch graduated from Harvard Law School and earned a doctorate as well at Oxford. He clerked in the D.C. Court of Appeals, then he clerked first for Justice Kennedy, then for Justice White and then again for Justice Kennedy. Then, after private practice he took a position at a very high level with the Department of Justice. Then he was appointed to the Tenth Circuit and from there to the Supreme Court. So that's a path for very select groups. But I'm not interested in who has the highest grades in the class.

We're dealing with cases at the trial level. I want to know how people think and feel about the cases we have. That's what I'm most concerned about. Another thing is that the customary process places great emphasis on law school faculty recommendations, and on writing samples. The problems with those, that I see, are twofold. One: if you don't know who the professor is, what difference does it make what that professor says? You might be dealing with a Timothy Leary on the law school faculty or Oliver Wendell Holmes. If you don't know who that person is, what difference does it make what the recommendation is?

The second thing is, when it comes to their writing sample, it's not theirs. They may have drafted it and then the draft goes to their legal writing professor or maybe to a professor of some subject that the

paper is about, and then it goes usually through a law review editing process. By the time a judge gets it, it's been processed more than peanut butter. There is little there that reflects the author--the student. So I don't use those. I just don't. Why do it?

Here's the thing: as with my Luddite attitude, there is a national bureaucratic plan to take care of the problems involving hiring law clerks. The law schools want it all done at once--the judges all want it done at once. The law students are caught betwixt and between. They can apply for different positions and they may get an offer, but they want to go somewhere else and they haven't heard from that particular judge yet. The law schools and the federal judicial conference put together this plan and it has some sort of an acronym--I think it's called OSCAR. The plan sets up a deadline as to when law students must apply. Then they have a suggested form for the letters of reference from faculty and others, a writing sample, and what kind of information should go into the application. That all goes in before a certain deadline and then it goes to the judges who have been designated by the law student. The judges have until a certain date--September 12, let's say, and they're supposed to make a decision, but not say anything to anybody until that date so that the student isn't whipsawed by having an offer from one and wanting to hear from another and then the one who makes the offer says well you've 24 hours to decide. So the OSCAR plan was intended to stop that kind of

pressure on the applicant. The law professors wanted to have it all done at the same time, so they could write their letters of reference all at once and not be plagued by having to do it upon request throughout the academic year.

The fact is that the appellate judges--some of them--do not honor this program. They make their offers to students ahead of time. They always want the number one class ranking at Harvard, the number one at Yale, the number one at Columbia, going for these prestige law schools with somebody with super grades. I think the reason is because they've had tie-ins with certain Justices and they want to get that person when he or she goes to the Supreme Court; that Circuit judge can say, "Oh, my former clerk was a clerk on the Supreme Court," et cetera. It also helps the Supreme Court clerk to get a judgeship on a Circuit Court later, or a professorship or an offer from a prestige firm, so that jumping the gun permeates the process.

District judges are in a different kettle. A lot of times it's the location that interests the applicant. A lot of applications here in Colorado come from students in the Midwest who want to ski--they are usually smart enough not to put that on their applications, but there is that. Then there are the local law schools--people have their homes and contacts nearby. Many of them want that job because they know it's an entrée to a local law firm that they're interested in. And then there are

those from other places who come here because they are interested in the kind of law that they're going to practice. (Colorado is big on environmental cases.) Or they apply to a different state because they think they want to be there. The law clerk position provides an entrée to the legal community.

There are lots of motivations to become a law clerk. I don't want to be a part of that process and I'm not. What I do, first of all I have an internship program. During the academic year from September to the end of May, I take students from either the University of Colorado or the University of Denver and they work here as interns for academic credit. I give them assignments, they work with my law clerks, they work with me. We get acquainted with them--we see what they're doing and so forth and from that cadre of interns there are sometimes people we would like to select to be a clerk.

Hal Haddon: They get law school credit for being your intern?

Judge Kane: Yes, it's a pass/fail course and they agree to so many hours and then the law school calls and says well, what did they do and I say, well he or she drafted an order on summary judgement and I can send the draft and my final order if you want to see what was done, but they did a good job. The interns are also able to watch jury trials and do other things where they're exposed to court practices. They get some training, the law schools give them credit. In the summer months, there are students from all over the United States who couldn't be interns

during the academic year, so we confine our selection of summer clerks to people from different law schools outside of Colorado. I've had them from virtually all over.

Hal Haddon: Do other judges here do that?

Judge Kane: I don't know. I don't think they do the summer thing. I know that some of them do internships with either the University of Denver or the University of Colorado. But I don't know if they do what I do for the summer or not. I have a law clerk now, who is a Vanderbilt graduate and she worked as an intern here before she graduated from law school. I had a vacancy and I thought she was super. In fact the law clerk whom she replaced was moving to Portland and he said that about her. I said great, I already knew her. I didn't have to do anything else.

The other thing is I don't look at law school grades beyond a certain basic level. If it's a four-point system and I've got a student applicant with a 3.2 GPA and another one with 3.4, I'm certainly not going to hire the one with a 3.4 because of two tenths of a point spread. One of my law clerks was actually marvelous, but I didn't hire him for the usual reasons. He graduated from Harvard Law School magna cum laude. He is utterly brilliant, but that's not why I hired him. It certainly didn't hurt him. He could easily have gone to any one of the Circuits--

Hal Haddon: Why'd you hire him?

Judge Kane: I hired him because I liked him, because he had gone to Princeton undergraduate school where he had written his undergraduate honors thesis on a history of the diplomatic relations between Great Britain and the Iroquois Nations. Princeton had published it and I thought, this guy is an undergraduate, writes a book and is published by Princeton. I read it and saw clearly he could write exceedingly well. He also was a harrier--a long distance runner. He played French horn. The other thing--the critical factor--is that whenever anybody applies like this and I narrow down the list, I write to them and say I don't want a law review article or a case note and I don't want a term paper. I want something you wrote as an undergraduate or I want you to answer this question: why do you want to work for me and why should I want you to work for me? It's amazing how different the submissions are. What I'm looking for is an answer that says, "I looked you up and I read your opinions. I know what you're doing. I know your jurisprudence and I like it. I want to be a part of it." If somebody says, "Well, I've got a 92% GPA. I was number three in my class. I wrote these articles and here is a letter from the dean (who I've never met) telling you all about me." Well, I don't care about that.

Hal Haddon: When you first became a Federal judge in 1978, there were very few women who were members of the legal profession. Your first two clerks were women.

Judge Kane: That's correct.

Hal Haddon: Was that a conscious decision?

Judge Kane: Yes. It definitely was.

Hal Haddon: And who were they and how did they turn out?

Judge Kane: The first one was--her name is--she's still a good friend--Debbie Wittman. She went to the University of Denver and her undergraduate major was in finance. She went to D.U. law school and she was a first-rate student, but I don't know what her grades were. I don't recall, but she did a good job. More important to me, she worked her way through school at a clothing store selling primarily, interestingly enough, suits to 13-year-old boys who were about to make their bar mitzvah. The other thing is, when I interviewed her, she was extraordinarily positive and ebullient about the opportunities this position provided. She didn't come in here, saying, "Oh, I know all about that." She said "Oh, what a great opportunity to learn. I don't know anything about federal practice. What should I do?" It was that kind of enthusiasm, plus reading and knowing that she could write and also--I have to say this in all candor--I never handled any securities law cases as a lawyer and I knew I was going to have them here. She had done securities work and had a degree in finance, so I knew that I could have her teach me while she was here. She was--still is--delightfully daffy and brilliant as can be, so it was great to have her and I treasure her friendship to this very day.

The other was a young woman from the University of California at Berkeley. She is a Chicana from Southern California. She had gone to undergraduate school at one of the University of California campuses, Bakersfield or someplace like that. She had majored in library science. She was very into the whole system of libraries and filing systems and that sort of thing plus she was bilingual. I wanted to have that and there were no Latinos or Latinas here at the court. I hired her on that basis and she was great. She was terrific. She was married to a young associate lawyer at a large Denver firm, so we had to declare a conflict on any case that firm appeared in. Eventually she left here. That was before Reagan had killed the Legal Services Corporation. She worked just down the street at a legal aid office. Eventually she moved back to California. She provided many insights--especially about ethnicity—that have withstood the test of time.

The second round of clerks brought me Ken Scott who had a B.A. from the University of Colorado and J.D. from Harvard. The other was Tim Davis, an African-American undergraduate of Stanford and law school at the University of California at Berkley. He is now a Professor of Law at Wake Forest. There weren't any other African-American law clerks. I went to Judge Winner and asked, "Why aren't there any African-American law clerks around here?" He said "Oh, you can't find them. The ones that are any good, the firms are just grabbing right away and we can't get any good ones, so we don't get

them." So I had a friend of mine who was a lawyer I know--a professor at NYU--a very famous law professor named Tony Amsterdam. I called him on the phone, and I said, "Do you have any African-Americans that might be interested in coming out to Denver Colorado and being a law clerk for me?" His response was, "How many do you want?" and so the next two I hired were from NYU--African-Americans. They worked here, and then I had a couple more from NYU. One of them was a Colombian, named Carlos Rodriguez and--

Hal Haddon: From the country of Columbia?

Judge Kane: From the country of Columbia. His father was an U.N. official or something in New York and he was Hollywood star-handsome. My secretary used to get calls from all these women wanting to talk to him on the phone. She cussed like a sailor and she'd say, "God dammit Carlos get your own phone." We didn't have cellphones in those days. That was funny. But he was good. I also enjoyed him because he would come in after a weekend, and he would have tears in his eyes. he would be logy and say, "I'm so in love and she doesn't love me. She has moved away," and he was just broken-hearted.. But the next day, he'd find another girl and he was in love again. But he was serious--NYU is an excellent law school and my clerks who came from there were really good. Two of them are now tenured professors.

Hal Haddon: One of your notable law clerks came from an Irish Law School, which is not a traditional law clerk hire. Tell us about him?

Judge Kane: His name is Brian Murray. Today his is a judge on the Irish Court of Appeals. I had visited Ireland for the first time when I met a lecturer at Trinity College. His name is Gerard Hogan. I met him through a speech and debate professor in Denver. I remember saying to him , "You know, we can appoint a law clerk from any country in the world if it's a common law country." Ireland, India, England, Australia, Canada, and other common law countries qualified. I said I would like to have an Irish clerk and he said, "Well, let me see who I can find." Hogan contacted me and said, "One of our best students is very interested in doing this." Trinity College has as its highest prize, the History Award. It has nothing to do with history. It's the best speaker they have and Brian won the competition. It's a highly prestigious thing at Trinity College. He graduated with honors, so he came over and worked for me for two years. Then he went back to Ireland. Later, when I got sick with apnea, I had written to him and explained what was going on. He wrote to me, and said, "Well, if you feel up to it, why don't you come here?"

Because it was at the same time, the Court of Human Rights was growing in its influence in Strasbourg and applying human rights decisions to European Community countries including Ireland. There is also the Irish Supreme Court. Ireland has a written constitution.

Because Ireland had formerly been part of the United Kingdom and the United Kingdom doesn't have a written constitution, Ireland's legal establishment looked to American precedents, as well as other sources, to interpret the Irish Constitution. It made perfect sense, but it was Ireland and it was during the "Troubles" with Northern Ireland. There were real problems trying to decide how to handle such things as freedom of religion.

Ireland had compulsory Catholic education at that time and other things which the Court of Human Rights wouldn't tolerate. The abortion issue--in those days it was totally prohibited in Ireland--was complicated because of the conflict between the two systems. Trinity College was very interested in the development of American civil rights doctrines, particularly regarding freedom of religion. So Brian wrote, "Why don't you come over and talk about that with our students?" I was given an honorary lectureship at Trinity College for a term. I prepared a few lectures and gave those while I was there, then I came back to Colorado and went to work. But Brian Murray was the person who had arranged that for me.

Hal Haddon: And he was a full-time law clerk for you in Denver, Colorado for two years?

Judge Kane: He was here and he was great. He was funny too. We had a lot of fun.

Hal Haddon: You had a South African law clerk as well didn't you?

Judge Kane: I did. She came to me from Justice Erickson on the Colorado Supreme Court. He called and said that he had received a call from a friend of his, who was at the Lewis & Roca firm in Phoenix. There was a woman from South Africa with a master's degree from the University of London and she had been in Phoenix. Her husband was a specialist in intensive care medicine and was coming to Denver. She had applied to Justice Erickson through this friend of his, who incidentally had been the Clerk of the U.S. Supreme Court. Erickson didn't have an open spot for her so he called me and said, "I think you would like this person." He said, "She is going to be here. Would you talk with her?" and I said sure.

She came to see me. In addition to everything else, she was an expert in immigration law. We had quite a few immigration cases at that time,. I read some of her articles and I interviewed her. I liked her so from the start. She came to work as a law clerk for me and she was here for about two years. Then her husband received an appointment to be head of Intensive Care Medicine at the University of Alabama in Birmingham. They moved and I had to hire somebody else. He is now the Dean of the Medical School of Wake Forest. She is there and one of her colleagues is the former clerk of mine, Tim Davis, who's a professor and assistant dean.

Hal Haddon: Tim Davis?

Judge Kane: Yes.

Hal Haddon: And he was a one-year law clerk?

Judge Kane: Yes. He is a nationally recognized authority on sports law. I've got a couple of his books here.

CHAPTER THIRTY – LAW SCHOOL TEACHING CRITIQUE

Hal Haddon: You've been critical and more than critical in a 2015, article--actually a speech you gave called "Swan Song." You've been critical of the contemporary law school way of teaching and I wondered if you could expand a little bit on that, especially in the context of the kinds of law clerks that you look for?

Judge Kane: I'm looking for precisely the kind of law clerk who was not ruined by a law school and that's sort of the test. I think it's been a problem with law schools since their very beginning, since Christopher Columbus Langdell at Harvard set up the case method system. It has been a very bad way to learn law and in addition to that with cybernetics coming into play, and the sentencing guidelines, our method of thinking has been dominated by quantitative rather than qualitative analysis. It's what I talked about earlier about one case is one case, no matter if it takes 20 years or 10 minutes, a statistic. We do that with guideline sentencing which effectively puts people in pigeonholes and disregards the unique characteristics of individuals. I think pretty much the same thing has affected law schools.

They've become overly concerned with computers and with quantitative reasoning and so-called artificial intelligence. Add to that,

when the academic law schools began in the latter part of the 19th century, the heaviest influence was a philosophic school called positivism in which it said in denial of natural law that there are certain rights that people have which are posited. Consider the word “deposit” in a bank is what is “posited”--meaning to place and so the idea of positive law, is that law has no extrinsic value—it’s only what the law is. It's neither good nor bad; it’s just the law. There's a spot, a very tiny spot in legal education, where new people studying law for the first time need to understand that one has to think objectively and not subjectively. Positivist law is a way of expressing things without any extrinsic values. Law students are taught never to say, “Well I feel it should be this way,” or “That isn't right, that’s not justice.” The law school professor will pound into the students, “What does the law say? What is the black letter law?” The student learns to analyze in that way. The student learns to analyze in what would be referred to in philosophy as categorical classifications rather than emanations and intuition.

Law schools also teach courses without teaching history. In order to help a client see what consequences will ensue in the future, the lawyer must know what has happened in the past. It is not sensible to predict without knowing the past, but gradually over the years, history has become ignored in legal education. There are law schools where

courses in jurisprudence and legal history are not even offered, much less required courses.

I've taught legal history at both of our local law schools and it's an elective. Law is not regarded as a liberal art. Part of the reason is Langdell's theory that law is science. I could go on about him and how nuts he was, but the real reason he did that is because the law school wasn't respected by the rest of Harvard University. He wanted his professors and teachers to receive the same status that the physics professors and the botanists did, so he came out with this idiotic statement that law is a science. He asserted a lawyer in the library is just as much a scientist as the botanist in the nursery or the physicist with his telescope. That's crazy. Law is not even a social science.

Hal Haddon: How has that affected the legal profession today?

Judge Kane: Lawyers come into court and cannot explain how this particular problem fits into the entire area of jurisprudence. They can't trace its development.

Hal Haddon: They just say this is a majority rule and if you don't rule this way, you're going to be reversed.

Judge Kane: That kind of stuff, it's kind of a *in terrorem* approach, but they don't recognize the organicity of law--that it grows; that it has a relationship to other disciplines, principally philosophy; that it is essentially applied philosophy, and advocacy is a highly developed form of rhetoric. Let me give you another example: As a freshman at DU Law

School, another law student asked, “What is the law in Colorado on this point?” And the professor said, “I don’t know and I can prove it.” As soon as he said that I thought, “My god. This is freshman epistemology. I studied this four years ago, this is easy to prove what you know and what you don’t know.” Well history plays a part of that, the human aspect. It’s like that shameful thing with the young girl where I just followed what other people had done and humiliated her because I was not thinking. I was not treating her as a human being. I think this problem permeates our society today.

There is an excellent professor at the University of Chicago, Martha Nussbaum, who’s written upon this subject in great detail. You hear people talk about what’s the law of animal rights and 99/100 lawyers will say, it’s ridiculous; why in the world would you do that? If you read Nussbaum, you can understand why, because it is the value of judgment. Now that doesn’t mean that, Seabiscuit files a tort action in the district court, but there are reasons why we have to consider endangered species, the suffering of farm animals, the puppy factories that exist--all of these other things--the whole area of human failing that we don’t pay much attention to. Health officials do, but not the law. So, Nussbaum writes about that, among other things.

There is a generally accepted assumption that the American economy is based upon the ideas of Adam Smith and utilitarianism. Free

enterprise and the free market are myths. They're ideas which are serious and need to be studied, but they are not the sum total of our knowledge. Yet they become almost religious orthodoxy. If you don't agree you are condemned as a socialist. If you're a socialist, you're bad. "Socialism" is another myth--a construct-- you can look around and see a lot of socialism. Nobody complains about it, but the minute you call it "socialism," people condemn it. The same thing is true of the so-called free market. Merely saying free market doesn't make something right.

Hal Haddon: So are there model law schools that--

Judge Kane: They don't teach that in law school.

Hal Haddon: Are there model law schools that you think point in a more positive direction?

Judge Kane: I'm not an authority on that subject, but frankly every law school I have any idea about is in great need of revision and improvement.

Hal Haddon: Do you think clinical programs at law schools have improved since you and I walked that path?

Judge Kane: I think that clinical training is an excellent experience for a law student to have. I do not think that clinical legal education as it is presently run is excellent, by any means. I think there are reasons for that. One reason is that the so-called doctrinal faculty--the tenured professors of contracts, torts, property, et cetera, look down on clinical training. The people who were first hired to become clinical instructors were not on

the tenured track. They weren't hired or paid the same. What happened to a great extent is a lot of these people had worked in public defender offices or legal aid societies or perhaps as prosecutors or city attorneys. They had some experience--not much, but they had some and were hired as clinical instructors --and the other cadre were retired--I knew of more than a few who were retired JAG officers from the Army or the Air Force who became clinical professors. They didn't have the bio and gravitas to become part of the doctrinal faculty, but they knew enough about organization et cetera to supervise clinics. Let me put it this way, I don't think that clinical legal education comes anywhere near the value or the quality of medical clinical education.

I think physicians, medical educators, have truly refined clinical education to the point where it's splendid. Cost is obviously a big problem, but that's never stopped the medical profession from doing anything it set out to do. When I was a freshman at DU Law School, they had something called Justice Court Practice. The student could go to a Justice of the Peace court and be assigned a case. but I never had a faculty member watch me or give me pointers or anything like that. You just tried the case and watched other lawyers and acted like Charlie McCarthy to their Edgar Bergen. It wasn't much.

Hal Haddon: We have been going at it for another 2 hours 15 minutes. Probably time to stop.

Judge Kane: Had enough of me for a while?

Hal Haddon: Well. Can you do one more morning?

Judge Kane: I can, sure.

CHAPTER THIRTY-ONE – STATE OF THE JUDICIARY

Hal Haddon: Good morning, Judge Kane.

Judge Kane: Good morning.

Hal Haddon: We talked a lot yesterday about your views of law school training and your employment of law clerks and I wonder if you can spend some time giving your views about the state of the judiciary today? I know it is a pretty general topic, but you have a lot of views about it.

Judge Kane: At the present time with what's going on with persistent ignoring of the rule of law, a lot of issues involving judicial independence have come before different judges around the country. So far, I have been very proud of my fellow judges for the rulings they've made. They haven't slipped into the political muck as have the executive and legislative branches. They've ruled according to law and I think that they've done an excellent job of it. I think these heavy challenges facing the judiciary right now are being met correctly by judges. The obligation is to adhere to the law. Judges are accused one way or another, but I think that it's utterly senseless to talk about somebody being a liberal or a conservative judge.

What it boils down to is calling a judge something that you think is pejorative if you don't like the judge or that you think is complimentary if you do. So somebody who is politically liberal, will say that some judge is liberal and that's meant as a compliment, and he

will say that some judge is conservative and that's meant as a criticism and the other side of the coin is that a conservative, will say liberal as a pejorative term and conservative as a compliment, but there is no substance to either one of them. These terms have been used for so long they are devoid of their historic meaning. I don't use those terms, and I don't think it's meaningful to say that somebody is a liberal or a conservative judge.

The main questions are, is the judge a scholar and is the judge active in applying the law? I'm not referring to the Supreme Court because they're not bound by precedent, but appellate judges are, and so are trial judges. I think overall the judicial branch of the government does a very good job. I think that the selection process is not what it should be. It depends too much on political considerations rather than examining what the judge has done in the past and the quality of the judge's work. I think public opinion polls show the judicial branch is the most respected branch of government.

There's always the pejorative term of an "activist judge" or "judicial activism." If that means the judge thinks ahead of time of the result that he wants to get to, because of some social or economic significance, that's bad. There are judges who have done, who apparently have an agenda, but the other problem is just as bad and that's judicial timidity. Sometimes the law requires a judge to take a stand that isn't necessarily popular. I know we've talked about *Ramos*

v. Lamm, the prisoner rights case. I got a lot of hate mail over that, but I also got mail from members of the public, who said thank you, it's about time. Now, I can't let those things interfere with what I'm doing, but I think, it was the author of "Mr. Dooley"--Peter Dunne, who wrote, "Even the Supreme Court follows the election returns."

I think judges know what's going on in our society, but we can't be controlled by that. What I don't like but it happens all too often that federal judges are selected on the basis of some political preference. The point is that when you get to the bench, you have to stop politics anyway, but that's the criterion. I'm surprised, frankly, that the quality of judges is as good as it is considering the selection process being so dominated by politics.

Now, magistrate judges—a totally different thing, they are selected in a way that is very similar to the way I was with the merit selection panel. By statute, there is a panel in the local district and people apply to become a magistrate judge. The panel is required to be constituted of some lawyers, but not all, some non-lawyers, and it sifts through the applications and conducts interviews. Then it submits a short-list of names to the District Court and the judges then vote on those who have been nominated by this process. I think the judges are looking for people who are good at law; for people who have demonstrated success, who are respected by the legal profession. They become

magistrate judges and while I disagree emphatically with what's happened with magistrate judges, I think that the individual magistrate judges we have are really excellent.

Hal Haddon: Let's talk about your views of the role of Magistrate Judges, which you share with Judge Matsch. I know you have declined to use magistrate judges on sort of a routine basis and I think you have some views about whether or not under the Constitution, they should be allowed to do jury trials.

Judge Kane: I do. I do.

Hal Haddon: Could you tell us what your views are?

Judge Kane: Right, my views coincide with Judge Matsch's, which is very reassuring. Whenever I find my views the same as his, I have a lot of confidence. The Magistrate Judges evolved from a position called the United States Commissioner. The Commissioner was placed in areas where no judge was available, such as national parks and distant areas. Colorado is one federal judicial district and it can take a long time to get across the continental divide to Grand Junction or all the way to Durango, which is about, in good weather, a six-hour drive. So these areas had Commissioners who would try petty offense cases such as, somebody speeding in the national forest or having a tent in a place where a permit was required that sort of thing. And they also would handle the initial arrests of people.

For instance in proximity to Durango are two Ute reservations. When a crime is committed on an Indian reservation, the state doesn't have jurisdiction but the federal government does. The magistrate would handle preliminary criminal proceedings. The office changed from a Commissioner by the time I became a judge, to magistrate and the magistrates handled these same petty offenses. They also handled the initial bond setting and arraignments for district court criminal cases. I believe they had the authority, at that time as well, to issue search warrants.

So, they were busy and they were performing these judicial tasks under the supervision of a judge. There was pressure, a great deal of political pressure exerted, by the administrators of the court system in Washington as well as the magistrates who had organized and wanted to increase their scope of authority. The law was changed to call them "magistrate judges." Eventually the magistrate part from the most part was ignored by many, and they were called "judge." Their duties were expanded to the point that in civil cases, the district judges were referring matters to magistrate judges, who would hear motions if they were not dispositive of the case. They would hear dispositive motions and make recommendations to the district judge, who would then either accept and approve the recommendation or reject it. The magistrate judges were hearing non-dispositive matters such as discovery disputes. The original concept of this expansion was to

make magistrate judges case managers. As judges interviewed the applicants, I can tell you that without exception, in my experience every single applicant would say, “Oh! I don’t want to try cases. I want to be a case manager. I want to settle cases and keep cases managed on an efficient basis.” Every one of them said that, and within a week after taking office, he or she started to campaign for the authority to try cases.

The present situation is they do not have the authority to try criminal cases, but in civil cases, the courts have authorized cases to be referred to magistrates for trial, including jury trials. Judge Matsch and I and a few others around the country, believe that’s a violation of Article III of the United States Constitution. Article III is the part of the Constitution dealing with the creation and organization of the judicial branch of government. It provides, specifically, that cases tried in the federal courts shall be tried by judges appointed under Article III. The magistrate judges are not so appointed. The most significant aspect is that Article III judges such as I, Judge Matsch and others, are appointed for life during our good behavior and that gives us the essential independence to rule without political pressure. It has been very rare throughout U.S. history for a federal district judge to be impeached.

There have been a few Article III judges who have engaged in some misconduct and were confronted with the threat of impeachment. They resigned from the bench rather than face disgrace, but magistrate judges are appointed for a limited term of years. They're good people and I'm not, definitely not, trying to criticize any of these people, their personalities or character.

It's the structure I object to. The reason for that is that the present system for selecting Article III judges is that the President nominates and the Senate gives its advice and consent. In that nomination process, the Department of Justice gives its approval or disapproval to the White House. So if a person doesn't receive the approval of the Department of Justice, or the Attorney General, that person is not going to be nominated by the President. Here is the dilemma: you have somebody who is appointed to a judicial capacity as a magistrate judge, and that person. however well intentioned, wants to become an Article III judge, and have the independence, the very core of being a judge which lifetime appointment gives you. Decisions such as *Ramos v. Lamm* would be extremely difficult for a state judge, who must stand for election to make the same decision I did and in the next election risk being voted out of office because of the political processes involved.

To come back to magistrate judges, they know that the Justice Department has to approve their nomination if they're going to be made an Article III judge. They can, with all their effort and integrity, say that doesn't make a difference to them, but they know that if they rule against the government they run the risk of not getting approval from the Department of Justice. The more politically oriented the Attorney General of the United States is, whoever it might be, the greater the danger of having people approved by the Department of Justice for nomination on the basis of their having ruled in the past in the favor of the government. I think it affects the very nature of judicial independence, but more importantly it's clearly spelled out in the Constitution.

If you read the Federalist Papers, Alexander Hamilton wrote on this point specifically: Article III was to give judges independence, so they would not be subject to this sort of control at the time of the American Revolution, colonial judges appointed by the King of England, and did what they were told or were removed from office. That's one of the main abuses the Founding Fathers wanted to be rid of and is one of the many things that Madison and Hamilton agreed upon and wrote about in the Federalist Papers. The need for judicial independence is essential so that the judge can rule according to law irrespective of fear or favor from the public and politicians..

I think judicial independence is the most essential aspect of the federal judicial office. More importantly, it's what the Constitution requires. But our court system has engaged in what I believe to be unconscionable sophistry to get around this constitutional mandate.

What has occurred is that some incidental language from an opinion, written by Justice Kennedy when he was on the Ninth Circuit, states that a magistrate could do things as long as he or she was under the direction and supervision of an Article III Judge. I believe, as I remember that case, an Article III judge had asked a magistrate to select the jury for a trial. He did and then after the jury was selected, the Article III judge tried the case. Judge Kennedy of the Ninth Circuit said that jury selection was permissible because if anything went wrong, the Article III judge could correct it.

This principle of being under the direction of an Article III judge was extended through unconscionable sophistry to authorize entire cases to be drawn to magistrate judges. Magistrate judges' names are drawn just like Article III judges. The rubric is to say these cases are assigned to the Chief Judge of the district, and the Chief Judge of the district supervises these magistrate judges. Therefore, the argument is that this procedure doesn't violate Article III. We had that fight in our court, a very serious one, and Judge Matsch and three others of us lost the vote. Judge Matsch and I believe that our court is violating the

Constitution. In practical terms what that means for me is I rarely refer matters to magistrate judges, with one exception, and that is if the parties want to engage in settlement and mediation, I will send them to a magistrate judge. I instruct all concerned, I don't want to know what goes on in settlement negotiations because the statements made can interfere with my judgment in deciding issues presented at trial or on pretrial motions.

If I know who is being greedy, who is being unreasonable, and who is being obstreperous in the negotiation process, my judgment can be affected. When a case is assigned to me for trial, I do not engage in the settlement efforts, but other than that, there are only a few occasions when I will ask a magistrate judge to assist me on a case management matter. For instance, just recently I had 35 cases filed against the same company. These cases have to be put together to consolidate the discovery process, and all the pretrial processes. I called on a magistrate judge in whom I have the greatest confidence to meet with these lawyers and get them to agree on a common case management plan, which will then be submitted to me for approval, but that's a rare circumstance. I will not refer a case for trial to a magistrate judge. I do not agree with the practice of this court in doing so.

Hal Haddon: It appears to me that throughout the country most discovery disputes in civil matters, and some in criminal matters including classified

information review, get referred to magistrate judges, but not many district judges.

Judge Kane: That's true, that's true.

Hal Haddon: Just to avoid the volume of paper that--

Judge Kane: Well, it would look nice if the courts were an MBA program. It would make a lot of sense that there is a certain administrative efficiency to doing it this way. Also Congress has been sold the idea. It's a matter of record, not speculation on my part--Congress likes the idea that it's less expensive to maintain the facilities and support staff necessary for a magistrate judge than it is for an Article III judge.

Congress also recognizes opinion polls showing the judicial branch's Article III judges are held in very high regard. The Congress of the United States is not. So, there is a resentment on the part of some politicians that Article III judges do not have to participate in politics or run for re-election, and so they feel there is a lack of accountability. That's totally wrong.

No one has a job in which there is greater accountability than a United States District Judge. Every single decision we make has at least two sides to it, and frequently with multi-party cases, more than that. We have a Court of Appeals perched across the street to review every single decision. That's not true with Congressman or with executive branch people. They don't have to read the regulations that govern

their agencies, but when we have a case, we have to explain in detail the basis for the decision, and we're held accountable for it. I think the accountability argument to criticize judges is fallacious. We are accountable.

Hal Haddon: Let me ask you another general question on which I know you have strong views. What you think the most effective traits are of lawyers who appeared before you?

Judge Kane: Well, I do have strong views about that. The most effective lawyers I think recognize and believe especially in jury trials, but likewise just appearing in front of a judge that the lawyer is an officer of the court. There are many seminars sponsored by different bar organizations and private profit-making organizations for continuing legal education. Most of them natter on about how to establish rapport with the jury. That's utter nonsense.

I have spent 41 years talking to jurors after the verdicts. What they're looking for is somebody they can respect and trust. The lawyer who comes in and tries to be pals and friendly and establish this kind of rapport is ineffective. Jurors want somebody they can believe in. The way they find that is when the lawyer makes an objection, the judge maybe rules against him or for him, but they see, that the lawyer's making an argument, that the lawyer has training and discipline, and that's what makes a very effective lawyer in front of a jury. Like it or not in our permissive society, the lawyer is in a position of

considerable authority. Jurors believe that lawyers are “officers of the court.” If a lawyer does not prepare and fumbles around, he or she loses credibility. Occasionally some lawyers intentionally try to mislead the court, but that’s very rare. More often than not, what you get is a lawyer who searches for a case that supports his or her position and reads into the case something which isn’t there or leaves out something which is.

That’s why lawyers get questions from the bench such as, “How does the case you cite apply to the case in front of me?” If the lawyer hasn’t read the case and just cites it anyway then his or her effectiveness as an advocate has been reduced to zero. That’s one thing. Another is to see lawyers who engage in ad hominem attacks upon the opposing counsel as though it’s some kind of a barroom brawl. That conduct diminishes the persuasive power of the attorney. An attorney who acts with dignity and integrity and treats other people--witnesses, and opposing counsel in the court with respect, is going to get respect back and be effective in persuading people. The other thing I see is a lot of sarcasm in briefs. I confess when I was a lawyer, I did this myself sometimes, but fortunately I had some mentors who told me to knock it off. Sarcasm and attacks upon opposing counsel in a brief are counterproductive. The opposing counsel’s not on trial and gratuitous insults are distracting.

I'd say the most effective lawyers are the ones who are resourceful, well-prepared and conduct themselves with a sense of dignity and integrity. The idea that they are zealous is demonstrated by the quality of their representation, not by the volume of it. That's why I mentioned earlier, one of the best lawyers I ever had in my court was Doris Besikof with the *Saum v. Air Force* case. She was totally dignified, one lawyer, a solo practitioner, in the remote state of Denver, Colorado taking on the entire Defense Department, the Secretary of the Air Force, and all of the resources that could be brought to bear. She did it with grace and dignity and with considerable analytic ability.

CHAPTER THIRTY-TWO – IRVING ANDREWS, PART TWO

Hal Haddon: One of the lawyers in Colorado who really is iconic, and has been for the last century, is your former law partner, Irving Andrews. And I know we talked a bit about Irving earlier, but could you expand on what made him as great as he was?

Judge Kane: Yes. Irving was an African American. His father was in World War I and suffered from mustard gas. He got out of the service and married Irving's mother. They had Irving. The father's name was Irving Piper. Irving's original name was Irving Piper Jr.. His father died and when Irving was a tiny child, 2 or 3 years old, his mother married a man named Holman Andrews. Irving was adopted by Holman and so his name became Irving Piper Andrews. I am not going to call him his

stepfather anymore, because he was the adoptive father. Holman Andrews worked in Pueblo, at the Colorado Fuel and Iron Company. He had a job that was somewhat characteristic for black employees in those days. After the smelter crew melted all the ore to make the metal, there had to be a cleanup crew. Holman was part of the cleanup crew. The cleanup crew was paid less than the white workers who were doing the work in front of the ovens, but it was an unfair situation. Especially in the ’20s and ’30s, black people did menial jobs. So the Andrews family lived in Pueblo near the steel mill.

Holman Andrews and Irving’s mother did not have any more children. In their neighborhood there were some people who didn’t like the idea that black people were in their neighborhood. To the extent that, not all of them certainly, but some, wouldn’t allow their children to play with Irving. His mother’s response was to send Irving to a branch library at the end of the block to read. He started reading before he went to grade school. It became an essential part of his life more so than with other people, because of the kind of isolation he experienced. He was highly intelligent. When he went to high school, he had friends and he excelled academically. Then World War II came and he enlisted in the United States Navy. In those days the Navy was segregated. Almost all black sailors--there were no black officers--almost all black sailors worked as stewards in the galleys onboard ship, in the various naval bases, and did food and janitorial service, but Irving could type and

read very well so he was made a yeoman, which is navy language as I understand it from the old days for a sailor, who could read and write. Not all of them could, so yeoman as I understand it, was a clerical worker doing typing, filing and record keeping.

Irving was sent to the South Pacific where he worked in a Navy Intelligence Unit as a yeoman. He lived with the other black sailors.

For reason that are unclear to me, Irving couldn't associate with the stewards or the other black enlisted people. So, the Navy constructed a separate room in another Quonset hut for Irving to live in. His constant companion was reading. By the time the War was over and he received a scholarship to Colorado College, where he majored in Economics, he was thoroughly familiar with Shakespeare, the Greek writers, the classics, and a great deal of philosophic works and more contemporary literature. He excelled in debate, and a former partner of mine at Holme, Roberts and Owen, Edgar Benton was his classmate. The two of them were debaters at Colorado College. They won lots of competitive debates.

Irving graduated from Colorado College, very high in his class, with honors and went to Denver where he enrolled to the University of Denver Law School. In those days, the bar examiners posted the results according to the score. The public could tell who was number one on the bar, number two, number three, in terms of the scores they

received. Irving was number one. There were other very high-profile lawyers who were 2, 3, and 4 at that time. But Irving was working and on the GI Bill. He was working as a janitor at the Glenarm Branch of the YMCA, which was in the black section of Denver. The membership was--I don't think it was exclusive, but almost exclusively African-American.

When he was admitted to the bar, the African-American Councilman on the Denver City Council went to the Mayor and said, "You haven't hired any of our people at any positions and here's this lawyer, he is a military veteran and number one on the bar. My constituency has always supported you and we want you to get him a job." The Mayor notified the City Attorney there was somebody coming over who wanted to be appointed as an Assistant City Attorney. Irving sent in his application. It went to the then City Attorney whose name I recall was Henry Banks.

When this black man walked into his office for an interview, Banks took the file and tossed it in the outbox . He turned in his chair, put his feet on the radiator, stared out the window and over his shoulder said, "Somebody will be in touch with you. Somebody will give you a call." As Irving said in a speech once, "I have been waiting 45 years and that phone hasn't rung yet."

So, Irving didn't get the job. The Denver law firms weren't hiring African-Americans. He started a solo practice for clients in the African-American community. He was a lawyer and if they had a traffic case or anything else they would see him. Gradually he built up a practice of almost exclusively African-American clients. Eventually he was able to have a more diverse clientele. He did a lot of criminal work. His work was never ever office practice, drafting, wills and estates, or forming corporations or doing that kind of transactional work. He was a trial lawyer, and he was in trial every single day. He would have maybe seven or eight different clients with different cases in the County Court and the District Court that he would handle in a day and then he'd come back to his office.

Well, after a few years there were a great many people, of all races, who wanted him to represent them and there was no public defender system at the time. He took on another lawyer, as a partner, a man named Bob Rhone, also an African-American. They formed the firm of Andrews and Rhone. Irving excelled at gaining an immediate grasp of legal issues. He understood the law almost by osmosis. He had an immediate grasp of what was going on, he had this phenomenal memory; I keep hearing people say photographic memory, I think that's an exaggeration, but he had a phenomenal memory. He would read something and he would remember it. He would see something or hear something and he would remember it.

Unlike most lawyers he did not take notes when he was in trial. He listened. I will give one example of how he did this. It was tremendous. He had a client, an African-American who was successful in developing a business where he had these trash hauling trucks with the hydraulic thing in the back and people would put their trash barrels out. These trucks would come around and pick them up. He was indicted for income tax evasion and his case was before Judge Arraj.

The prosecution put on their witnesses and one of them--the key witness--was this defendant's CPA. In the parlance of the trade, he flipped on his client and testified for the government, "Of course, he gave me all this information, I relied upon it. I didn't do an audit because you don't do those in the normal sort of tax return. I just honestly put down everything he gave me so the false information came from him not from me." That's what this CPA testified to.

Judge Arraj ran a very regulated prompt court. He started at 9 o'clock, not at 9:01. He took a recess at 10:15, not at 10:16. When he recessed for lunch, the gavel fell right at noon. He resumed promptly at 1:15. So, the prosecution put this CPA on the stand on direct examination and finished the exam at about 10 minutes before 12. Judge Arraj was the sort of fellow who would say, "You have 10 minutes then we'll be recessing during your cross-examination, you will come back and finish it this afternoon." Irving stood up and said, "Your Honor, I have

a special request." Judge Arraj liked Irving because Irving was a very good lawyer and that's what Judge Arraj liked. So he said, "What is it?" Irving replied, "I know you want to go until noon. My request is that this witness go back to his office and retrieve his diploma and bring it back to court with him, so that I can cross-examine him and I want to have his diploma here." Judge Arraj said, "Well, all right Irving." He reluctantly recessed 10 minutes early and sure enough when court reconvened this CPA had his diploma with him. In those days--before computers--x-rays films would be used in court, so almost every court had one of these illuminating screens to put x-rays films on. Irving took this diploma and put it up on this screen where it could be seen that it had been altered. Then Irving started to cross-examine him. The witness had testified that he was a CPA and he had graduated from the University of Denver with a "B.A. in Accounting."

Irving started cross-examining him. He said, "You didn't go to DU, did you? You altered the certificate, didn't you?" This witness had to admit that he had never graduated, was not really a CPA, did not have any other licenses; that he had falsely testified and had conducted his business without a degree. The jury was not out for a very long time. They acquitted Irving's client. When the verdict came in Judge Arraj said, "Mr. Andrews, I'd like to see you in chambers."

At that time, I was the public defender in Adams County, but I had come down to see Irving and watch his closing argument. So, Irving asked Judge Arraj, if I could join him and the judge said, "Sure." So I was there when this happened. We came into the judge's chambers and he said, "Irving, I have never seen anything like that happen before in my entire career. How did you know that that witness was lying?" Irving said, "Because I listened, he said he had a B.A. in Accounting from the University of Denver, and the University of Denver gives a Bachelor of Science, not a Bachelor of Arts, in accounting." That one little tiny detail. He had been listening without taking notes. He knew it and that's what he used.

Irving did phenomenal things. When I was a law student, I saw him give an argument on a murder case and there were jurors crying in the jury box during his closing. He could go from the flow of the articulate quality of his arguments, quoting Shakespeare and then he'd say, "As Thucydides said . . .," and he would quote from Thucydides. It was awe inspiring. How could anybody know all this? But he was articulate, he was fluent and very intimidating too.

Hal Haddon: He mesmerized jurors of all ethnicities.

Judge Kane: Oh, yes. Yes.

Hal Haddon: White, Black, Red, Brown. At a time when there was enormous racial tension in this country.

Judge Kane: And one of the things I think it's fair to say is I never recalled him playing the race card ever. He just didn't try cases that way, appealing to the guilt of people with racial prejudice or appealing to people who were pro-minorities. He just didn't do that. He stayed within the structure and the analysis of the case. I will give you one other example: He had a marvelous characteristic. Mostly when a lawyer makes objection, the lawyer will say, "I object, that's hearsay." The attorney on the other will say, "This is an exception to the hearsay rule," and make an argument. The judge listens to both, then sustains or overrules the objection. Well, Irving didn't do that. When he made an objection, especially in the state courts, he would say, "Objection!" and then he'd cite the case such as, "Objection, *Smith v. People*, 77 Colorado 204," and then he'd sit down.

He would look with this great expression he had, "I've said it all." In one case Judge Edward J. Keating was presiding. I was with Irving. We were trying a murder case and Irving made his usual kind of objection. Judge Keating looked at the jury and said, "All right, all right, all right Captain, I'm calling you on that." The judge turned to the jury, sort of preening, and said, "Ladies and gentlemen of the jury, Mr. Andrews has just said that he knows the specific case. We're going to find out about it, so you go back to the jury room and we're going to go to chambers." We all trudged into chambers. The judge looked at the court reporter and said, "What's that case, what's that

citation?" She looked at her notes and gave the citation to the judge. He walked over to--before the computers, judges had books in their chambers--and he went to the Colorado Reports and he pulled the volume out, opened it up and said, "Well, I'll be damned Irving, you're right," and he said, "I'm sorry." Irving looked at the judge and said, "Oh no you're not. You dressed me down in front of that jury, you dress me up in front of that jury." We went back out and the Judge sheepishly apologized to the jury and said, "Mr. Andrews was right."

Irving had a withering wit and ability to cross-examine. When he started out, there was no public defender system, and he represented people with no money or very, very little. In a civil case for instance, even though the rules provide for taking depositions and for written interrogatories, his clients couldn't afford that. In his high-volume practice, he couldn't spend any time doing that, so he tried cases in court without having had depositions or other discovery. When I went to work for him, he came into my office and asked, "What are you doing?" I said, "I'm sending out a notice to take depositions in this case." He said, "Oh, no, you're not, not in this office." He said, "Why would you take depositions and tell the other side everything about what you're going to do in trial?" And I said, "Well, I need to find out what he says." Irving said, "You find that out when he testifies; you listen." That's how he cross-examined, intense concentration, but he was so well read, he could write a brief without looking at law books.

He cited case law in the brief, but he also had quotations from outside of the law. Marshall McLuhan for instance, was one of the people who Irving admired. He would quote McLuhan in briefs--he had that ability and tenaciousness too. We also had a lot of laughs.

Hal Haddon: Let me shift gears and talk about your family?

Judge Kane: Can I go back to Irving for one more time?

Hal Haddon: You can go back to Irving as many times as you want.

Judge Kane: Well, this is another story about Irving--I said we had a lot of laughs and it was fun too. Irving had a client, an African-American man, who was somewhere over 6 foot 3 inches. He was very tall and I doubt that he weighed 130 pounds. He was very easily identifiable because he was so tall and so skinny, and he liked to rob banks. On one occasion he went to the Silver State Savings and Loan at Colfax and Grant Street. He went in and he held up the bank. The teller gave him one of those canvas bags with money in it, and he left. The alarm went on as soon as he left and he started running. The police were chasing him and he ran into Irving's office.

As I tried to describe earlier, we had so many clients. The office was on the second floor of an old renovated mansion and on every step would be a client. When Irving talked to somebody or I would, the person would leave and everyone would take one step up the stairs, eventually coming into the office and moving along the sofa until he or she got in to see one or the other of us. Irving handled maybe five

times as many people as I did, but he'd listen carefully. He was in his office with some client and this bank robber runs in with the police not far behind.

It was somewhat characteristic of African-Americans to say "Attorney" rather than "Mister" to a lawyer and so the robber rushed in and said, "Attorney Andrews, Attorney Andrews, I just robbed the bank and the police are chasing me." Irving looked over and said, "Do you have an appointment?" The guy is standing there and Irving said, "Fool, you have no idea whether you robbed a bank or not. You're not smart enough to know the constituent elements of the offense." At that moment Detective J.C. Tyus and the other cops entered and put the handcuffs on this guy.

Hal Haddon: In Irving's office?

Judge Kane: In Irving's office. And as he's walking out he says, "Attorney Andrews thinks I might be innocent."

CHAPTER THIRTY-THREE – JUDGE KANE'S CHILDREN

Hal Haddon: I want to totally shift gears to matters personal. We talked about in the early part of our discussion how you grew up and we briefly talked about your children. I'd like to sort of play that forward and I know you have four children. Could you discuss each one of them and what their paths have been?

Judge Kane: I will. I'll give you the summary first, but I have three daughters and one son and I have 11 grandchildren and three-great grandchildren. To

go back as I mentioned earlier, the custody was such that my oldest daughter and the other two eventually came and lived with me while they were in high school. My son came in grade school and then for high school, he went away to prep school.

The oldest girl, Molly, was a gifted child. When we lived in Brighton and she went to kindergarten, the teacher came to the house, and she said, “I will be fired if the school hears I said this,” but she said, “you have to get your daughter out of this school. We don’t have the facilities or equipment or the training or people to deal with a gifted child and she is already reading at an eighth-grade level. She is 5 years old. She needs to go to a special school.” There wasn’t any place nearby so we had to come to Denver. My ex-wife’s parents lived in Denver and we made arrangements for Molly to go to Graland Country Day School, which had an ability to handle gifted children. Before we moved to Denver, I would take her in Monday morning and then she would spend Monday and Tuesday nights with her grandparents, and on Wednesday I’d picked her up and bring her home, and then on Thursday take her back to the school. She’d spend Thursday night with her grandparents, and then on Friday I picked her up, and she would be back with us. Then when we went to India, she went to an international school there, and that was a marvelous experience for her.

From the time she was in the first grade, she had taken French, and then she went to this international school in Calcutta. She also continued with French, so by the time she was in the eighth grade, she was fluent in French as well as English. The Rotary International had, I think they still do, a student exchange program, where they give a scholarship to an American student to go and spend a year overseas in a different country and go to school. Molly applied for and was selected by the Denver Rotary, and so for ninth grade she went to the Philippines. She spent a year in this Philippine town outside of Manila, I think it was, if memory serves, called Pagsanjan. She lived with a family who spoke Tagalog and English so she picked up some Tagalog as well. The school was taught in English, but she kept up with these three languages. When Molly returned after a year in the Philippines, she went to East High School. She took all accelerated advance placement courses.

In her senior year, we were considering what college she should go to. She looked at various handbooks, she talked to the high school counselors and a friend who had been active in Ted Kennedy's campaign travelling all over the United States to organize college-age students. The friend was familiar with all these various colleges. When Molly was talking to her, the friend would describe each school, what kind of programs were offered, and whether it was worth her applying or not. I sat there thinking "cha-ching, cha-ching, cha-ching"--the cash

registers—"how much is this going to cost?" and they weren't looking at local schools. They were looking at places like Vassar and Middlebury--that was before Harvard and Yale were co-ed.

Quite unexpectedly, Molly mentioned McGill, which is in Montreal. This friend said, "Well if you could get in, it's the best school there is." That's all Molly had to hear. She applied. At the time U.S. students could gain admission to McGill if they spoke French as well as English. As best I recall, it was less expensive, including the airfare, for me to send her to McGill than it would have been to the University of Colorado at Boulder. It was remarkable. McGill had very low tuition. Room and board and incidentals were also less expensive than at U.S. colleges. McGill was and is an outstanding institution. Molly majored in Asian studies—I think that choice a lot to do with her having been in the Philippines and India. She studied Mandarin and worked part-time for the YMCA.

Canada does not have government agencies for everything; it frequently contracts with private organizations. For example, the Canadian equivalent of Fulbright scholarships are administered by the YMCA. The Salvation Army has a contract to work in the Inuit country around Hudson Bay. The Canadian government is not restricted as we are by constitutional provisions dealing with separation of church and state. These organizations can contract with

the government. Perhaps Molly's job was authorized by the University, I don't know. Her job was to take young people from different countries under her wing and help them get adjusted to living on campus, what kind of classes to take and what sort of rules and regulations applied.

That's what she did in her freshman year. I remember her telling me, "I'm just telling them what I had to learn the hard way. There wasn't anybody around to help me, but this is what I do." So the next year, she supervised other McGill students who were doing what she had done the previous year. She became very active in student politics and feminism. This young man, who was the editor of the student newspaper at McGill wrote a column about the feminist movement and how silly it was, and they shouldn't be doing whatever the women students were doing. Molly grabbed hold of a copy of this paper and marched right into the editorial offices. She was trembling with rage. She told this young man that he didn't know anything about it and scolded him for belittling the women's movement--he should be helping. She finally finished her outburst and ran out of breath. He replied, "Would you like to have dinner?"

They married. That was how they met, then she worked, I think, for a year with the YMCA. After that in the course of her marriage they had two children, a boy and a girl. She worked for different non-profits,

and she spent her entire career with these non-profits very similar to organizations similar to the Peace Corps and Amnesty International. The focus of her attention was, and still is, in sub-Saharan Africa. She has spent quite a bit of time in Congo, and in other African countries helping to organize social programs.

Today there is an organization in Canada called the Council of Canadians. It's very similar to an organization we have in the United States called Common Cause. The organization has chapters around the Canadian provinces the way Common Cause has chapters throughout the United States. The Council of Canadians deals with issues such as equal and fair voting and helping those whom Canadians call "First Americans" as we in the U.S. refer to the Native American population. Molly is the executive director or CEO of this organization.

Hal Haddon: And she lives in Canada?

Judge Kane: She lives in Ottawa. She and her first husband divorced. I might add it is the most civilized divorce I've ever encountered. Molly has since remarried to Dr. Firoze Manji. They live in Ontario and he teaches at a university there. Her son is an engineer, who went to Queen's College in Kingston, Ontario and her daughter, Claire, is married and is a lawyer in Ottawa. Claire went to McGill to Law School. She went to Chapel Hill in the United States to undergraduate school. Claire is fluent in English, French, Mandarin, and Spanish. She too has been an

exchange student. She spent time in Nicaragua. She and her husband have a baby girl. Her brother, Jasper has two children, a boy and a girl. Those are my three great-grandchildren.

Hal Haddon: Tell us about your second daughter?

Judge Kane: Meghan is, and always has been, a very good artist. She draws and paints. She did not go to her senior year in high school, but instead went right into college after the 11th grade. She went to a small college in Salem Oregon--Willamette College. She studied, I think, fine arts there, and then, two years or so later, returned to Colorado, and went to the University of Colorado at Boulder. Meghan became very interested in child psychology. She became involved with the Montessori system and graduated from college. While she was an undergraduate, she did an internship at a Montessori school. She had met this young man at Willamette who was a lacrosse player. He came to Colorado for a lacrosse tournament at Vail and met Meghan. They ended up getting married. She lives on Bainbridge Island, which is right across Puget Sound from Seattle. The Montessori schools do not refer to the heads of schools as "principals." They call the person who is the principal "the head." Meghan is the head of a Montessori school that starts with nursery school and goes all the way through high school. They had merged three or four different Montessori schools and established a main campus. To get to that point, and that's what she does, she has a husband, two boys and a daughter. The boys were

both captains of their college lacrosse teams. The oldest son majored in biology, and now works for a company on the Olympic Peninsula developing new hybrid species of trees. The youngest boy graduated last year. He is in graduate school getting a master's degree in engineering. Their younger sister is in undergraduate school studying biology. She spent a year in Germany.

Hal Haddon: Sally's your third daughter?

Judge Kane: Sally is my third daughter. Sally is the one I mentioned earlier when I was working all these murder cases and I came home one day while she was sitting on the front steps and said, "Who are you?"

Hal Haddon: When she was three years old she did not recognize you?

Judge Kane: I think she was being subtle. Of all my children Sally is the most dynamic. She is full of energy and I would say charismatic. She is a very determined person. When she graduated from college, and she doesn't like me to say this, but I said that "she majored in dramatics and minored in hysteria." She was in college at the same time as the Iran Contra controversy was going on. She headed up the students at Colorado State University who were protesting U.S. involvement with the Contras in Central America. Later, Sally was married. She is divorced now. She has two children. When she was married, she and her husband had a small ranch near Crawford, Colorado. There was a local community-owned radio station in that vicinity, and it was going broke. Some friends asked Sally to join in efforts to save the station.

She did. She led a community effort to refinance it and built a new station. She set up a volunteer system for people to come in and operate this community-owned radio station. This local association belonged to or joined a national organization of community-owned radio stations. Sally went to its annual conventions and ended up being on the board. After a few years she became, and is presently, the Executive Director of the National Association of Community-Owned Radio Stations.

Hal Haddon: Are they affiliated with NPR?

Judge Kane: Yes, and she sits on the advisory board of NPR. She travels to all these local stations all over the United States, Alaska included, and helps the people get organized and properly financed. She helps organize the volunteer support system that a community-owned radio station needs. She helps with the programing. She has two children. Her son has a master's degree in architecture and is in his first year of practice. Her daughter is Tara. Tara went to, I should say both of them were home schooled in the Paonia/Crawford area with about a dozen other kids because the parents didn't like the school system. The area had a lot of retired people, so she learned science from a retired physicist who had been with Lockheed and had settled there, and his wife was a librarian and taught literature and English and library science to these kids; another was an orthopedic surgeon, and he was retired and taught. So that was their home schooling and when she was in the 11th grade, she

learned of this organization called United World Colleges. They have campuses all over the world. They take 50 students from a home country and 50 students from around the world and put them all together into a class and it lasts for two years, so there are 200 students. It is the International Baccalaureate program.

So, she went to that United World College. There's one in Wales; they name them after famous people and so the Aneurin Bevan United World College is in Wales and there is another one, the Dag Hammarskjöld United World College. These different countries in the world have them and Claire, Molly's daughter, who is a year older than Tara, had gone to Pearson United World College in British Columbia; so they get their senior high school and their freshman year of college, and they get at the end of it the International Baccalaureate and then from there they can go on to University. So Tara graduated from United World College in Las Vegas, New Mexico and she got a scholarship. She graduated from Brown. Then while her brother was getting his master's in architecture at the University of New Mexico, she went there and got a master's in public policy. She works for a think tank here in Denver. She has a boyfriend whom she met at the United World College, who is a Ph.D. in mechanical engineering, and he's teaching at the University of Arizona in Tucson. Tara went to her employers at this think tank in Denver and said, "I have to quit, because I'm moving to Tucson, where my boyfriend is." The response

was, “You don’t have to quit, this is the computer age. You can work from Tucson.” Tara is an employee of the Denver think tank, but she lives in Tucson and writes policy papers.

Hal Haddon: And your youngest child is a son?

Judge Kane: My youngest is my son Pat. He is a practicing Buddhist and lives in Crestone, Colorado. He is the owner and principal of a small construction company named Paragon Contractors. He builds churches and dormitories and motels--things of that nature, in Southern Colorado. He’s also a certified E.M.T. The Sangre de Cristo Mountains are right there where his company is. As an Emergency Medical Technician, he goes out with rescue groups. The way he ended up in Crestone is interesting. This Outward Bound program had a regional headquarters in Crestone. Pat went to it and stayed there. There is a Buddhist Retreat Center and Temple there, and Pat built a facility for them. In that process he became acquainted with the head Buddhist. He was married and he is divorced now. The woman he married had a small daughter, very young. Pat adopted her and then the two of them had three boys, so the four children are part of my 11 grandchildren.

Hal Haddon: When you have your family reunions, they must be eclectic.

Judge Kane: It’s an interesting thing. My daughters decided when they were girls in high school--maybe even younger, that when they each got married and had children, they wanted them to know each other and to be

together. So every year the cousins and parents get together, sometimes in Paonia, Colorado, sometimes in Washington or Canada. They haven't convened in Crestone yet, but Pat's boys and his daughter attend all these gatherings. They are very close.

When Claire got married to another McGill lawyer, her maid of honor was Tara, her cousin. The best man when Molly's son Jasper got married, was one of Meghan's sons. They are extremely close. I have been to these family gatherings, but I'm sort of the senior citizen. They are very nice to me, they called me Grampy and they always come over and say "Grampy."

Hal Haddon: They don't call you "Your Honor?"

Judge Kane: No, no, they call me "Grampy" and they say, "Can we get something for you Grampy?" and I say, "Well, can I play catch with somebody?" And they say, "No, you sit here." But they're doing very well, all of them are. I'm very proud of them and I attribute their achievements to their parents, not to me.

CHAPTER THIRTY-FOUR – STEPHANIE SHAFER KANE

Hal Haddon: This oral history would not be worthy of publication if I didn't ask you to talk about your marriage of 26 years to Stephanie Shafer, who is a very accomplished lawyer and an extraordinary journalist and writer.

Judge Kane: Yes.

Hal Haddon: I will ask you a general question, but with a little focus. You both have contributed very much to each other's professional lives as well as

your home lives. Let's talk about your marriage and touch on how it has affected both your careers.

Judge Kane: Stephanie is the most essential part of me. She is extremely talented, a lot smarter than I am and she would be angry with me telling you this, but I will.

Hal Haddon: This is for publication.

Judge Kane: Yes, I know. She graduated in Italian studies at the University of Colorado with honors and Phi Beta Kappa. She also, at that time, when she did the same sort of thing I did at 18--far too young, she got married. She met this young man at a karate studio. Her sister recommended karate for protection walking around the campus at night and so forth. Stephanie went and ended up as a black belt second degree in karate. She met this young man there and they got married. After undergraduate school, they operated a karate school in Boulder. Then he applied for medical school and was admitted. Stephanie went to law school. She graduated Order of the Coif and editor in chief of the University of Colorado Law Review.

When her then husband went to med school and graduated, he did a residency in Denver. They divorced and she was single. She became a law clerk to our mutual friend Joe Quinn, who was Chief Justice of the Colorado Supreme Court. Then, because of this divorce, she was left with all kinds of bills. She became an associate at Holme, Roberts and Owen. I had left the firm by then.

She stayed at that firm doing banking and corporate law. Her mentor was Jim Owen, who was the son of one of the firm's founders, Churchill Owen. My mentor there had been Pete Holme, hers was Jim Owen. She did bank regulatory work and then was made a partner. About a year later, she took a leave of absence and went to the University of Colorado at Denver to take premed courses. She had never taken any science courses before. She took chemistry, physics, and advanced math courses. She then took the MCAT and, as typical of her, got A's in everything. She scored very high on the MCAT. Then she was on the waitlist at Tufts Medical School, but she wanted to go to CU Medical School. One of the interviewers said she had a law degree and he wasn't about to give a medical degree to some lawyer to go out and sue doctors. She had an opportunity to sue, but she decided not to.

She went from there back to the practice of law. She returned back to Holme Roberts for some time where she worked in litigation. At one time (I'm confused about the sequence), she was one of co-counsel representing the man who was the Chief Executive Officer of Silverado.

Hal Haddon: Michael Wise?

Judge Kane: Michael Wise. They went to trial in front of Judge Carrigan. I know from Judge Carrigan that Stephanie cross-examined this F.B.I. bank

expert. He had to admit on her cross-examination that he wasn't competent to give the opinions that he did. Michael Wise was acquitted, largely because of what, according to Judge Carrigan, Stephanie did. She also handled a couple of murder cases. When I met her after the Michael Wise case, I'd been single for about five years. She had been single for about 10 years. We met at a mutual friend's house and within a year we got married. She practiced law until she wrote her first novel. She left the practice of law and became a full-time novelist. She has had five novels. Two were published by Bantam, another two by Scribner. Her latest novel was recently published so she is very busy promoting it while writing a sequel to the fifth novel.

Hal Haddon: Facebook?

Judge Kane: Facebook, and other promotions. I really don't know that much about promotion but, I have helped her as best I can. In three of her books, her heroine is a woman criminal defense attorney in Denver, who is dyslexic. She's a better lawyer because she is dyslexic. To go back to what I was saying about Irving Andrews not taking notes, this is sort of the inspiration for her heroine. Dyslexic people tend to be better at listening because they don't read much and they retain stuff aurally, rather than reading it. I think Irving's talent was part of her developing the heroine. Another part was her experience as a criminal defense attorney.

One novel was about a psychiatrist who is a sociopath. That story came about when the subject came up—"What do you do when the psychiatrist is a psychopath?" That's what that novel is about. A few years ago, we went to Paris and Amsterdam on a vacation. In Amsterdam, both of us fell in love with that city and the museums there. Right across a park from the state museum is the Van Gogh museum. We spent most of our time in Amsterdam going to art museums, looking and enjoying the art.

On the airplane on the way back to Denver--I can't sleep on planes and she can. I thought she was sleeping when all of a sudden she turned to me and she said, "I'm going to write another novel and this one is going to be about art." So, her heroine in this recently published novel is a woman, who is a paintings conservator. She solves the murder mystery by examining paintings and the techniques of artists, identifying eventually, who the artist is that committed this horrible murder.

Hal Haddon: Does she critique and edit any of your judicial opinions?

Judge Kane: Yes. She certainly does. If I have an opinion of any length at all, I bring it home. She has improved my writing tenfold. In all candor; she never has ever suggested to me how I should rule. She just doesn't do that. I think that's a good habit she picked up working for Chief Justice

Quinn. She will ask why I want a put this part of this opinion here, why doesn't it go in here and she'll do things like that.

Stephanie has an interesting history. She was born in Brooklyn, New York. Her parents were secular Jews. Her father was an international merchant. When she went to high school she crossed the Brooklyn Bridge to the Elizabeth Irwin School, which is known to New Yorkers as the high school to the Little Red School House. It was started by teachers in the New York Public School system during the McCarthy era who were fired because they had belonged to pinko organizations during the Depression and refused to sign loyalty oaths. They set up the school, and that's where she went to high school. She was fluent in French before she graduated from high school. Then she studied Italian in college as well as French. She is very good in English, French, Italian and Spanish.

When her mother passed away and her father was living alone and not doing well in their family home in Brooklyn, we inveigled him to move out to Denver. He lived here. He did not live with us, but he lived in an assisted living place, whatever the euphemism is, about a mile and half away from where we live. We took care of him during his final five years of his life, Stephanie was very devoted to him, very good to him. My mother was a widow and Stephanie was very helpful with her as well.

I used to take my mom out before out I met Stephanie. I'd have dinner with her at least once a week and take her shopping and to her doctor's appointments. Then Stephanie helped with that after we got married. I would still go and take her to the doctors until I was diagnosed with cancer.

Hal Haddon: When was that?

Judge Kane: That was in 2003.

Hal Haddon: 2003, you're right.

Judge Kane: It was breast cancer, very unusual for men to have it, but I did. When I was diagnosed, I went within a week to have surgery. It was a mastectomy and then I went through chemo. Chemotherapy is, especially then, it's not as bad now; but, the reactions to the chemotherapy are bad, it's like having severe flu only it lasts for six months and you're just sick as a dog. I couldn't continue taking care of my mom, so I called my sister, who lives in Monterey, California. She came out and she said, "You've been taking care of mom for ten years, it's my turn." The two of them went back to Monterey and that's where my mother was for the last four years of her life.

Before I was diagnosed with cancer, Judge Matsch was afflicted with a strange kind of disorder. If I remember this right it started in the gallbladder and went from there into the liver. There are these ducts and they started to harden and close. It required him to have a liver

transplant. He had a liver transplant at the University of Colorado. In doing so--I won't go into the rest of it because it's his business; but, what he did when he was diagnosed and knew he was is going to be out for a while--the only time in his life he ever did this--he scheduled a press conference. I told him at the time, "This is so unlike you to have a press conference." He replied, "I don't like it, but if I don't do this the rumors are going to spread throughout the whole legal community and every place else that I'm dying. It's going to be a lot of misinformation and rumors so I think the best thing that I can do, if one is at all a public figure, is to disclose what it is." He had a press conference and he stated publicly that he'd been diagnosed, what it was, and that he was going to have a liver transplant. He did not, I don't think, go into great detail; but, one detail is essential. In a liver transplant, the pancreas is also removed, so you become a surgically induced diabetic.

When I was diagnosed with breast cancer, I vividly remembered what he had done. So I had a press conference and said, "I've got breast cancer and I'm going to have surgery. Then I'm going to be in chemo for six months and then I plan on coming back." That's what I did. I've been under treatment since 2003. My cancer went into remission until October or November of 2017 and it flared up again. Rather than have chemotherapy, the techniques for treating it had changed, but the metastasis had spread into the lymph system and one vertebra. So I

was back on regular treatments and I am to this day. The cancer is once again in remission. I take medication every day and once a month I have an injection and once every three months I have an infusion. The infusion makes me stick as a dog for about four or five hours and then I'm back to what is normal for me.

CHAPTER THIRTY-FIVE - CONCLUSIONS

Hal Haddon: I have to ask my concluding question but because you're still a sitting judge, you can have a last word. My concluding question is this: you've had all of these physical issues that caused you to take senior status in 1988 and you've had these issues with cancer since 2003, yet you continue to sit very actively as a Senior United States District Judge, why--why do you do that?

Judge Kane: The choice was, I suppose, I could be medically retired and not have any judicial duties; but, fortunately I can remain as a Senior Judge and work; and I'm very grateful that I can; but to put it into a nutshell, Article III of the Constitution appoints a judge for life and I think that's a two-way street. When I took the oath of office, I was fully aware of the fact that I was becoming a judge for the rest of my life. Other judges can retire if they want to, but I'm not going to. Again, my--I wish he could be cloned--but my dear friend Judge Matsch felt the same way about it. It's a two-way street, you're appointed for life--we're going to serve for life. Judge Matsch did and so will I. Unless

dementia gets to the point where I can't do anything or I'm drooling in my soup, I plan on doing judging until I'm carted out.

Hal Haddon: You've enjoyed going to work and being a judge?

Judge Kane: I do. I'm very grateful. I think I'm one of the luckiest people who ever lived. I think one of luckiest people living. It certainly doesn't happen all the time; but when you have a case, and it's over either by an opinion or by a jury verdict, and you have the sense that justice has been done--there is no feeling that can compare with that and I have seen justice done. It is not done in every case but that's the ambition, that's the target--to try and reach justice in every case. That is why I think I'm extraordinarily lucky. I was lucky to have been appointed. I have been lucky to live with the various medical problems I've had. I'm lucky to have a wife who is very supportive and I have abiding admiration and affection for lawyers who practice law with ethics and with dedication to their clients. As a branch of philosophy, I think jurisprudence is the thing that interests me more than anything else, so why wouldn't I be doing what I like to do?

Hal Haddon: We civilians are very lucky to have your public service. Those are all my questions, but you do--by the power vested in you--have the right to a last word.

Judge Kane: Well, I think, I just gave you that. I appreciate Chief Judge Tymkovich, wanting this done. I appreciate the Historical Society for doing it and knowing how many demands are on your time, I am

gratefully, really, truly appreciative of the effort and time you've spent and the staff of the court system who are videotaping this. Going through this experience has been great. I like the special treatment I've received.

Hal Haddon: It's been our honor and our privilege. Thank you very much.

Judge Kane: Thank you. So, I guess we're done.

Hal Haddon: I think we're done.

Judge Kane: Okay.

END OF TRANSCRIPT