David Knight: Tell me your name, please.

Macklin Fleming: Macklin Fleming, M-A-C-K-L-I-N F-L-E-M-I-N-G.

David Knight: And your title when you were a justice?

Macklin Fleming: Court of Appeal.

David Knight: Okay, and the interviewers are?

Paul Boland: Paul Boland, and I am a justice on the Court of Appeal, Division Eight of the Second Appellate District.

Laurence Rubin: I'm Larry Rubin, also a justice on the Court of Appeal, Division Eight, Second Appellate District.

David Knight: All right, we are ready to go. Cell phones are off?

Paul Boland: Justice Fleming, Justice Rubin and I want to thank you so much for permitting us to join you in your home to talk about your life and your career in the law. You've had a remarkable career dedicated to the law, to public service, as both a lawyer and a judge; and also had a career that's been dedicated to improving the interest of justice. Tell us if you would, at the outset, a little bit about the people, the events, and other factors which helped shape your life and career, just in a general way.

Macklin Fleming: My father was a lawyer and a judge in Hawaii. He ended up as governor for nine years, but he held judicial office, so I always wanted to be a lawyer as I was growing up.

Paul Boland: He was a governor while Hawaii was still a territory, is that right?

Macklin Fleming: Yes, that's right; back in the wartime, in '42 to '51. He had been a judge before and a judge after on various courts, so I was also aiming to be a judge.

Paul Boland: Your father served as a justice on the Hawaiian Supreme Court for some years, is that right?

Macklin Fleming: Yes, and he was governor for nine years, from '42 to '51.

Paul Boland: You were born in Chicago.

Macklin Fleming: Born in Chicago.

Paul Boland: And were you raised in Chicago? You mentioned a few moments ago that you had lived in Cleveland; tell us where you were—

Macklin Fleming: Well, I was born in Chicago. My parents went to Hawaii after my father finished law school. At the age of six they separated and at the age of seven I ended up when my mother remarried a businessman from Cleveland. So I grew up in Cleveland, was away at boarding school for a number of years.

Paul Boland: What school was that, Justice Fleming?

Macklin Fleming: Well, I was three years in England and then I went to Taft School in Connecticut and to Yale for seven years.

Paul Boland: You graduated from Yale University in 1934 and then from Yale Law School three years later, and you have remained very closely associated with your alma mater throughout your life. Tell us about your years at Yale, both as an undergraduate and as a law student, and how your Yale experience influenced your life.

Macklin Fleming: Well, I entered Yale in 1930 as a full-paying student, and in '31 was a depression, when finances collapsed; but with Yale's help on scholarship work programs and other matters, I was able to stay there another six years. So I've always felt very grateful to Yale for that opportunity.

Paul Boland: What was your major as an undergraduate at Yale?

Macklin Fleming: History.

Paul Boland: And with a particular focus on American history, European history, world history, or what?

Macklin Fleming: Well, maybe European history as much as anything.

Paul Boland: And how did you happen to choose Yale Law School?

Macklin Fleming: Because I was there and could get financial help easier. From there I went in to see an advisory officer who advises juniors and seniors about future programs, and I said, "Well, I'd like to go to Harvard." That was the name school at the time. And she said, "Well, why don't you go to Yale? You need support and you're more likely to get it there." That seemed an irresistible argument too.

Laurence Rubin: Absolutely; really terrific.

Laurence Rubin: What classmates did you have in Yale Law School? Are there any of them you remained friendly with over the years?

(00:05:02)

Macklin Fleming: Well, one called Oscar Reubhausen, who lived . . . was a New York practicing lawyer. Others, too; I don't recall the circumstances, but I started in New York and about half or two-

thirds of my class started in with—as I did—with one of the big firms in New York.

Paul Boland: When you were an undergraduate at Yale, what were some of the activities that you engaged in as an undergraduate?

Macklin Fleming: Well, I played soccer. I was on the freshman soccer team.

Paul Boland: Any particular clubs that you belonged to?

Macklin Fleming: No. No, I think I was pretty much engaged in making sure that I would have the finances to stay there.

Paul Boland: And when you went to Yale Law School, what activities were you involved in there? Were you on law review, moot court, any other activities?

Macklin Fleming: I might have been on moot court; I know I wasn't on law review.

Paul Boland: While you were at the law school were there some professors and courses that particularly interested you and influenced your career?

Macklin Fleming: Well, Abe Fortas was teaching there, and I was very admiring of him. And after I started work . . . I worked in New York, a large law firm, for two years, and then I went down to work for Abe Fortas—most disappointing experience of my life. He was undersecretary, I think, of the Department of the Interior, and I found working in a government bureau to be ghastly.

Paul Boland: What course did he teach you at Yale?

Macklin Fleming: Oh, some civil law course; I don't remember. I don't remember the title, but each professor uses his own course to give you his thoughts and approach to law, and it doesn't make too much difference what the subject matter is.

Laurence Rubin: Any other professors who you remember from that time?

Macklin Fleming: Well, Thurman Arnold was very flamboyant, and Corbin on contracts was going strong. Did either of you go to law school there?

Paul Boland: We did not, no.

Macklin Fleming: Well, he was professor there for about 50 years or something.

Paul Boland: What did Thurman Arnold teach? Because he was—

Macklin Fleming: Oh, the art of advocacy. I've forgotten the title of it.

Paul Boland: My wife, before she went on the bench, was a partner at Arnold & Porter.

Macklin Fleming: Well, a very successful firm. He was a man who threw rocks and stones at the traditional legal establishment. And he was the man who popularized the idea, I think, that law is only an argumentative technique—there really is no such thing as a set of laws; it's just what a lawyer can make stick in court.

Paul Boland: How interesting.

Laurence Rubin: Always fluid, he would say. The law would always be fluid?

Macklin Fleming: Yes, yes, so that was quite a valuable part of my education there.

Paul Boland: Absolutely. Now, after graduating from Yale Law School you became an associate at Arnold . . . at Sullivan & Cromwell, in New York. What led you to join Sullivan & Cromwell?

Macklin Fleming: I needed a job.

Laurence Rubin: Anything strike you from hindsight as to what was particularly attractive at Sullivan & Cromwell as opposed to some of the other firms?

Macklin Fleming: Well, they offered me a job; that's all I can say. Jobs were hard to get in those days. A lawyer didn't have the choice; the firms had the choices.

Paul Boland: What type of practice did you engage in when you were at Sullivan & Cromwell?

Macklin Fleming: Oh, clerking in corporate law. Partner would say, "Look up what the law is on such and such a fact situation."

Paul Boland: Did you make any court appearances in New York during the time that you were at Sullivan & Cromwell?

Macklin Fleming: Relatively few, but I think for two summers I was signed up for four weeks or so to work in the Legal Aid Society in New York where we were in court every day. So that was a good balancing.

(00:10:08)

Laurence Rubin: Was that why you were at Yale, or was that as part of the—

Macklin Fleming: At Sullivan & Cromwell.

Laurence Rubin: And that was a program they had?

Macklin Fleming: That was a program that I think had just gone into existence. So each of the big law firms would contribute a lawyer for four weeks or three weeks, and they would man additional public service.

Paul Boland: That's impressive. I don't know that we were aware of that pro bono activity that began at such an early part of history. That's very interesting. Tell us about . . . later on in your career you wrote a lot about the profession and the practice of law. We'll talk about that in a few minutes. Tell us what it was like to practice law in New York, in the late '30s. Tell us about the collegiality in the firm, tell us about dealing with judges, and tell us about the legal community a little bit in New York during that time.

Macklin Fleming: Well, the firm that I went with had about seven, eight lawyers altogether. There were 3 or 4 other firms about the same size, and then they ranged down to about 20 or 25. And the idea in law school, if you wanted to go to New York, is to get a job with one of those firms. They were very pleasant places to work for. They did corporate law—Sullivan & Cromwell had some international law and even offices overseas, which was fairly rare at that time. The young lawyers were assigned to particular judges or happened to work out with particular judges, and they would help with the research and maybe some of the preliminaries, and that was about it.

Paul Boland: Did the young lawyers have much client contact at that time, Justice Fleming?

Macklin Fleming: Not much, no.

Laurence Rubin: What about the court appearances—were rare, if any, on the part of a young lawyer?

Macklin Fleming: Oh, on routine matters, I think rare. Maybe twice a month or something you might set up there to handle a motion or get a continuance or something of that nature.

Paul Boland: You mentioned a few moments ago, when we were setting up, that after two years you left Sullivan & Cromwell to serve in the Bituminous Coal Division—and as I understand it, served as a counsel at administrative hearings that dealt with the regulation of prices. Is that correct?

Macklin Fleming: Yes, that's correct.

Paul Boland: What led you to take that position?

Macklin Fleming: Well, I had always been very much impressed with Abe Fortas, and I wanted to go down and work for him. It was a mistake as it led out; I didn't know the powers of government bureaucracy at the time, but I quickly found out.

Paul Boland: Tell us a little bit about your work at the Bituminous Coal Division.

Macklin Fleming: Well, there's not much to tell. They gave opinions on specific applications of the Coal Act, to what the price should be in Mississippi and what it should be in Pittsburgh; and we worked out the legal problems to authorize them and drafted the orders that would regulate coal. The regulation of coal itself was a disaster, and as far as I could see accomplished nothing. So it was a little disheartening to work for an entity that was going nowhere.

Laurence Rubin: Did you maintain a relationship with Justice Fortas beyond your time in—

Macklin Fleming: Well, I don't know; I was just one of a number of people . . . oh, oh, after?

Laurence Rubin: Yeah, afterwards, did you?

Macklin Fleming: No, afterwards came about, I was drafted in early '41 and spent five years in the army.

Paul Boland: You began as a private in the artillery, correct?

Macklin Fleming: Yes.

(00:15:00)

Paul Boland: And then you . . . when you left the service five years later, you had risen to the rank of captain and had been decorated for your service at France, Germany, and Austria.

Macklin Fleming: Yes.

Paul Boland: Tell us about those five years of the service—what you did and how that experience shaped your life and your career.

Macklin Fleming: Well, first it gave me a pretty good idea of how big organizations work and how the chain of command operates, whether it's in a civil bureau or a—in a sense it's a military bureau. It gave me some indication of how even in the lower ranks you can manipulate the system to your advantage. It gave me a five-year experience of serving under orders, which I don't think I would have gotten in civilian life, and it gave me combat experience overseas for six months.

Paul Boland: After the war concluded, you moved to San Francisco, correct?

Macklin Fleming: Yes.

Paul Boland: What led to that move, Justice Fleming?

Macklin Fleming: I didn't want to go back to New York or Washington, and San Francisco—West Coast—sounded like a good place to go. So I went looking for a job at the West Coast at the end of the war—but so were 100,000 other soldiers, and I never got one. So I was finally offered one in San Francisco, so I said yes, I'll do it. And then just as I was leaving to bring my wife back, I got a call that said the offer was off. So I decided, well, I had made all the arrangements, I'd come to San Francisco, starve to death for four years; but worked in 1948 at the Truman administration and got a job as assistant U.S. attorney.

Paul Boland: In San Francisco?

Macklin Fleming: In San Francisco.

Paul Boland: Were you doing . . . in the U.S. attorney's office, were you doing civil work or criminal work at that time?

Macklin Fleming: Oh, something of both, but I got somewhat of a reputation there, and so I became known as a trial lawyer. And then eventually in '54 I came down and decided to do trial work for Mitchell Silverberg & Knupp when Knupp had had a heart attack and they had a series of antitrust cases going on.

Paul Boland: While you were in San Francisco you served as counsel for the ACLU in several cases; one of them challenged the constitutionality of the church loyalty oath requirement. Is that correct?

Macklin Fleming: I have a vague memory of that, but I've forgotten it. Did you find something in the books or—

Paul Boland: It was listed in your bio, that you had done that. Can you recall anything about that, about that case?

Macklin Fleming: Well, I think I won it, probably.

Paul Boland: That's what I was going to ask.

Macklin Fleming: That's probably why I listed it. I've forgotten . . . I think some county had passed a law that regulated the required loyalty oath, so I successfully contested it.

Paul Boland: Now, in order to prevail, how high did the litigation have to go? Did it have to go to the appellate level or to the Supreme Court level, do you recall, or was it resolved?

Macklin Fleming: I think it went to the appellate level, but I'm not sure.

Paul Boland: You were somewhat active in the ACLU in Northern California, weren't you?

Macklin Fleming: I guess so.

Paul Boland: Has your view regarding the ACLU changed in the years since that early involvement?

Macklin Fleming: Well, I think they get overly concerned sometimes. It's a useful organization to have around, but you can't follow them blindly in everything they do.

Laurence Rubin: Do you recall how you first got started with the ACLU?

Macklin Fleming: Well, I was active with a similar organization in New York while I was there. I guess every town had one, and it was an offshoot from the practice of corporate law.

(00:20:06)

Laurence Rubin: You moved from Sullivan & Cromwell, where you were doing corporate law, and then at least part of your work in the U.S. attorney's office is criminal law. What was your reaction to doing some of the criminal law cases?

Macklin Fleming: Very exciting type of work. I was just there on assignment from my firm, I think; the firm had all agreed to help out the U.S. attorney's office there, by sending some of their younger lawyers up to the courthouse to help with their workload.

Paul Boland: You mentioned that in about 1954, you moved from San Francisco to Los Angeles to join Mitchell Silverberg & Knupp. And was Justice Rubin's father there at that point?

Macklin Fleming: Oh, yes, he had the office next door to me, and about once every two months he'd come by with two little boys.

Paul Boland: One of whom was Justice Rubin?

Macklin Fleming: I guess so; I don't recognize him though. *[laughing]*

Paul Boland: That was long past. Tell us what it was like. Mitchell—that firm always had enormously talented lawyers. Tell us what it was like to practice law at Mitchell in those days and tell us about some of the lawyers that you practiced with at Mitchell.

Macklin Fleming: Well, they had a regular business practice and also which included litigation; and I was mostly involved in litigation. There were about 30 lawyers there, I guess, and maybe 10 partners and 20 associates.

Paul Boland: You were involved in antitrust litigation as well as civil business litigation?

Macklin Fleming: Yes, the first years I went there they were heavily involved in defending motion picture antitrust cases, and that took about

two and a half or two years; and then I was involved in general litigation for the firm.

Paul Boland: What are the motion picture cases? Was it antitrust as it related to ownership of movie houses by the studios?

Macklin Fleming: Yes, precisely. And there was a long-standing suit going on; I spent about a year and a half at one court on this one suit. Finally that was—

Paul Boland: Which case was that, Justice Fleming? Do you recall who the parties were in that case, and who the judge was in the court?

Macklin Fleming: Well, I remember Homer Mitchell of O'Melveny & Myers was there, and he had an assistant who later became secretary of state.

Paul Boland: Warren Christopher?

Macklin Fleming: Warren Christopher was there, and we represented Columbia, the Little Three: Columbia at that time . . . Columbia . . . United Artists, and one other—

Paul Boland: RKO?

Macklin Fleming: Yes, RKO.

Paul Boland: Was this litigated in federal court?

Macklin Fleming: Yes.

Paul Boland: Do you remember who the judge was?

Macklin Fleming: I remember the judge, but I can't remember the name.

Paul Boland: Tell us anything else you can remember about Mitchell Silverberg in those days during the 10 years that you practiced there.

Macklin Fleming: Well, it was six years—five or six. Well, it was mostly a transactional firm, and litigation was a relatively small part. The antitrust just happened to be against our clients. I did a lot of work for Columbia Pictures and became very friendly with the head of Columbia Pictures, Harry Cohn, who took an admiration to my work. So even after the antitrust business left, I was still doing a lot of work for Columbia Pictures.

Paul Boland: He was a man known for having strong views.

Macklin Fleming: Yes, and supposedly quite disagreeable. But the first time I went to see him, I got all the papers together relevant to the point I was going to talk to him and sent them to him a day in advance, and also an outline of what the papers revealed.

(00:25:08)

He became my friend for life. He said that's the first time anyone had ever done that to him; and so I was the main man. *[laughing]*

Paul Boland: Tell us about . . . we're going back some 50 years. Tell us what the practice of law was in the Los Angeles community during that period of time. It was a much smaller legal community. What can you recall?

Macklin Fleming: There were two or three or four big firms, and the rest were individuals of one, two, or three, or something like that. The big law firms controlled all the major motion picture business, and that meant that the smaller, individual firms were sort of mostly anti-firms, always stirring up trouble—as I saw it representing the big ones.

As far as I know, the practice was not too different from what it is. A few large firms dominated the practice and there were scattered individual firms. Some did trial work, some did certain types of defense work; and I doubt that it's changed very much since then.

Paul Boland: During the time that you were practicing at Mitchell you also became involved in Democratic Party politics.

Macklin Fleming: Yes, well, I had been involved before—yes, up in San Francisco.

Paul Boland: You served as an alternate delegate to the 1956 Democratic Convention that nominated Adlai Stevenson and Estes Kefauver. You were chair of the lawyers committee for Stevenson that year in the second run for the presidency and then later on you chaired Edmund G. Brown's policy advisory committee. Tell us what led to you becoming involved in Democratic politics originally and what caused you to become remain involved during that time period.

Macklin Fleming: Well, I always wanted to be a judge. My father had been a judge, was a judge, so the way to become a judge was to get involved in politics, on the winning side. *[laughing]* So I had some sympathy with the Democrats. So I got my first job as assistant U.S. attorney by actively campaigning for Truman, when Truman seemed like a certain loser in '48, and then I came down here. I remained active in politics, particularly in the cause of Edmund G. Brown, who I first knew as Attorney General in San Francisco; and then he got elected Governor, and eventually he appointed me to the Supreme Court down here in 1960.

Paul Boland: Did you get to know him personally?

Macklin Fleming: Oh, yes.

Paul Boland: What was he like?

Macklin Fleming: Oh, he was a wonderful man. He could have been president with some other luck in the way the political chips scatter around. So he was really a first-rate man; I never had the same respect for his son, who's a different sort of person.

Paul Boland: Well, during the first year of the Brown administration you were appointed to the Los Angeles Superior Court.

Macklin Fleming: Yes.

Paul Boland: And were you one of Governor Brown's first appointments to the superior court?

Macklin Fleming: Pretty much, yes. I think he had increased the court to about the size of 12, and I was among those. I had organized the lawyers committee down here for Brown when he was running, and I guess one of my claims to fame is that I recruited a man to my committee to help Brown who later became secretary of state of the United States.

Laurence Rubin: Warren Christopher?

Macklin Fleming: Yes, I got him interested; he was working for a big downtown law firm.

Paul Boland: Was he working for O'Melveny?

Macklin Fleming: Yes, and I got him active in the Democratic cause.

(00:30:00)

Laurence Rubin: What was the political process, if you recall, for appointment to the court, back in the '50s?

Macklin Fleming: Friend of the Governor, period.

Paul Boland: At that time you did not have to go through a State Bar evaluation process—is that correct?

Macklin Fleming: No, no.

Paul Boland: Was there any kind of screening that occurred?

Macklin Fleming: Not that I remember, but there may have been some perfunctory screening to see that you hadn't been indicted or something like that. But I don't recall screening as a big factor. Is it now? They turn a lot of them down or . . .?

Laurence Rubin: Yes, both informally and formally. The State Bar has a formal screening.

Macklin Fleming: No, no, they didn't have anything like that. What . . . do they actually turn people down that the Governor . . . or does he clear it in advance?

Laurence Rubin: It's for that—clearing it in advance, getting their input before he makes his final decision. The Governor's Office may send a number of names to the State Bar . . .

Macklin Fleming: Yeah.

Paul Boland: . . . for an investigation, and the State Bar then conducts its evaluation and decides who to recommend to the Governor and who not to recommend, and the Governor usually follows those recommendations.

Macklin Fleming: Is the job eagerly sought these days?

Paul Boland: Yes, I think so.

Macklin Fleming: So the pay is relatively all right.

Paul Boland: I think that there is a greater pay differential between private practice and the bench now than there probably was when you joined the court. What did the superior court judgeship pay when you joined in 1959? Do you recall?

Macklin Fleming: It was $20,000 or $25,000, which is exactly the same as I was getting working for the law firm.

Paul Boland: Oh, that's remarkable.

Macklin Fleming: Congressmen were getting $10,000 a year at about that time or so. Maybe they'd gone up a little, but that was the prevailing—

Paul Boland: Because now almost anybody who joins the bench takes a significant salary cut.

Macklin Fleming: But they still get the people they want to get or . . .?

Paul Boland: Oh, I think so; I hope so.

Macklin Fleming: Well, you have a fine pension.

Paul Boland: We do?

Macklin Fleming: Your wife gets a pension.

Laurence Rubin: Who were some of your early colleagues on the superior court that you were close with, might have been appointed around the same time you were or you got to know?

Macklin Fleming: When was Eddie Rubin appointed?

Paul Boland: Was Otto Kaus?

Macklin Fleming: Yeah, yeah, he was a contemporary; maybe one of the same batch at the same time when I was appointed.

Paul Boland: Tell us about some of the judicial assignments that you had on the superior court. Where did you sit—criminal, civil, other assignments?

Macklin Fleming: Always in civil.

Paul Boland: Always in civil? You never served in criminal?

Macklin Fleming: No. I might have had an occasional criminal case or so which overflowed from them, but no. That was not considered a desirable assignment. Is that still true?

Laurence Rubin: Well, I think that there's such a mix of people on the superior court; some would prefer criminal, others would prefer civil.

Paul Boland: But I think now, even an attorney who had been a civil practitioner now is likely to spend a couple of years, at least, hearing criminal cases or juvenile cases or family law cases before he or she moves to a civil assignment. But if somebody has been an active civil practitioner, he or she will probably get to civil eventually.

Macklin Fleming: Well, the criminal time I was on the bench, the criminal bench was considered a step down, for the slowpokes.

Paul Boland: Were there any cases that during the five years that you sat in the trial court . . . were there any cases that were particularly memorable that you had?

Macklin Fleming: Well *[laughing]*, not memorable; I can't think of any now.

Paul Boland: Did your judicial philosophy or your views . . . were your views regarding judicial administration shaped at all? To what extent were they shaped by your trial court experience?

(00:35:06)

Macklin Fleming: Well, in those days every trial judge was pretty much on his own, ran his own ship. I don't know how it is now, but I suspect it's much more regimented now. And there were some loafers

on the job, but usually they ended up in the criminal courts where . . .

Paul Boland: You were not one of those loafers?

Macklin Fleming: *[laughing]* I was never assigned to the criminal court, no. I suspect things haven't changed too much.

Laurence Rubin: The criminal courts were in the old building at the time, where the jail is?

Macklin Fleming: The criminal courts were in a separate building, and even the building was a little rundown, so . . .

Paul Boland: When you sat in civil, you sat in the existing county courthouse—is that correct? Which was a relatively new courthouse at that point—is that correct?

Macklin Fleming: Well, I think a new one was being built, and there was a period of time when we occupied office space in the mid-Wilshire district, where the courts were—the appellate courts, that is.

Paul Boland: Now, after five years on the trial court, the Governor appointed you to Division Two of the Court of Appeal, where you had served for 17 years until your retirement in 1981. What led you to accept an appointment to the Court of Appeal after five years on the trial court?

Macklin Fleming: Oh, it was a step up, and maybe a path to the Supreme Court or a path to the federal court. Federal court had a great deal more prestige then, than the state court; I guess it still does, doesn't it? Or has that gap narrowed a little?

Paul Boland: My wife is a federal judge. I think that that gap has narrowed somewhat.

Macklin Fleming: Is the pay the same?

Paul Boland: The pay is comparable, but the caseloads in federal court now are discouraging a number of people who might ordinarily have applied to the federal bench.

Macklin Fleming: It's no place for an easy, early retirement.

Paul Boland: It is not an easy place; you are absolutely right.

Laurence Rubin: Did you take any affirmative steps to consider the federal court?

Macklin Fleming: Well, my connections were all statewide, and when it came to federal, I didn't have much going for me. I took what steps I could, because at that time the federal court had a great deal more prestige; but I was never successful. At that time it was

almost exclusively a senatorial appointment. He could appoint almost—he or she—could appoint almost anyone they wanted to the bench and they would be confirmed. So I didn't happen to know any senators. *[laughing]* I never got very far on that line.

Laurence Rubin: More recently the confirmation hearings for federal judges, for example, have become acrimonious and very political. Do you have a sense of the impact that that has had on the judiciary?

Macklin Fleming: No, I don't, because I've been retired now for—completely retired—for five years. After I retired from the bench I maintained the law office and did some—kept some—contact, but no more; so I can't help you on that at all.

Paul Boland: Let us ask you, if we can, about your 17 years on the Court of Appeal. You published hundreds of opinions. Did any of those opinions stand out from your perspective, as you look back?

Macklin Fleming: None of them come to mind readily; but that's some time ago, and the world moves on.

Paul Boland: How did the . . . during your 17 years of Division Two, there were some justices left, some new justices came. How did the character of Division Two change during that period in terms of, say, judicial philosophy, personality, work ethic, collegiality?

(00:40:05)

Macklin Fleming: I don't recall anything specific on that subject. The character of the Supreme Court changed quite a bit during those years.

Paul Boland: *[Inaudible]*

Macklin Fleming: Yes, I think it's almost a necessity *[laughing],* and particularly a point in which the Supreme Court, which tend to be . . . sometimes come from outer space.

Laurence Rubin: You mentioned a few moments ago the Supreme Court and how that had changed a lot. Did you ever express an interest in a Supreme Court appointment?

Macklin Fleming: Yes. Did I ever get any results? No. *[laughing]* Well, I sat there probably for a total of four, five, or six months over the course of the years since there were vacancies. And then there was some sort of turmoil in the Governor's Office; I think I sat there for three, four months in one period.

Interviewer: How was that experience, sitting on the Supreme Court?

Macklin Fleming: Oh, fine! It's not all that different from sitting on the appellate court.

Paul Boland: Who was Chief Justice during that time period? Roger Traynor?

Macklin Fleming: A part of the time, yes. Who was his successor? I don't know.

Paul Boland: Donald Wright, I think, was his successor. Is that right?

Macklin Fleming: Yeah, he was there; both of them.

Paul Boland: Tell us a little bit about your relationship with some of your colleagues on the Court of Appeal. We know that you were . . . as a member of Division Two, you worked with Justice Roth, Justice Roy Herndon, Justice Lynn Compton, Justice Edwin Beach, and perhaps others; and there were justices in other divisions. Did you have close relationships with other justices in the Court of Appeal, either in your division or in Los Angeles during that time?

Macklin Fleming: Well, I know I had close relations with the members of my division, I always had a great respect for Justice Roth, who had a distinguished career as a trial judge himself; and Herndon was a good lawyer. As you know, the appellate judge sort of sits there in his office all alone most of the time reading papers and writing opinions. So I don't think "collegial" is quite the same as lawyers who practice and maybe appear to court together.

Paul Boland: Do the judges ever get together socially—the justices ever get together socially—on the court at that time at all?

Macklin Fleming: Not much, no.

Paul Boland: Did they meet to discuss policy issues? Did the entire court meet to discuss administrative issues?

Macklin Fleming: No, I don't remember any such meetings. It would have been very unwieldy because of the number of judges involved and their scattered locations.

Paul Boland: As you know, we now have 32 justices in the Second Appellate District, and we have an administrative presiding justice, who happens to be Roger Boren. Before that it was Charles Vogel. Was there an administrative presiding justice in Los Angeles when you were on the appellate court?

Macklin Fleming: I don't recall one.

Laurence Rubin: In your division would you meet prior to oral argument, to discuss your cases?

Macklin Fleming: Well, we would get the briefs and read them. No, I think we'd wait for oral argument and then we'd meet after that; might have been some exceptions to that.

Paul Boland: At that time did you prepare draft opinions prior to oral argument and circulate them to your colleagues?

Macklin Fleming: Before oral argument?

Paul Boland: Yes.

Macklin Fleming: No. We might have had law clerks who prepared—

Paul Boland: A bench memo of some sort?

Macklin Fleming: Memo. And it's possible that in prominent cases, sometimes those would be exchanged.

Paul Boland: Now we're required to . . . after oral argument, we're required to file the case within 90 days. If we don't do that, we don't get paid. Is that true?

(00:45:08)

Macklin Fleming: I think that was true. Maybe it was 60 days or something. *[laughing]* Anyhow, I always got paid, so—

Laurence Rubin: That's a good sign. Any memorable dissent or disagreement in a case that comes to mind?

Macklin Fleming: Well, one or two. But I can't remember them. Occasionally I remember a case that went up to the United States Supreme Court and my opinion was affirmed over the opinion of the Supreme Court. But I can't remember the facts; I just remember the vindication. *[laughing]*

Paul Boland: One of the articles of yours that we read was a 1975 *Judicature* article entitled "The Price of Perfect Justice."

Macklin Fleming: Yes, and I wrote a book—

Paul Boland: We know that. And in "The Price of Perfect Justice," you argued that the criminal justice system was being paralyzed by proliferation of procedural safeguards. To what extent did that frustration with and those concerns about notions of perfect justice influence your judicial decisions as a member of the Court of Appeal?

Macklin Fleming: I decided to determine properly every case that was submitted to me. I think that was about all. That sort of argument is like a voice in the wilderness. It makes a faint way along the distance; nothing changes. I imagine that's still true today, isn't it?

Laurence Rubin: One of your other books was *Of Crimes and Justice*, where you spent a lot of time with theories of punishment. Any reflections on that as you sit here today?

Macklin Fleming: Well, I've lost touch with that area of the law, so I really don't know what's going on these days. Is there a more balanced view these days?

Laurence Rubin: I would say, since you retired, there was more of an emphasis on punishment. In the last two or three years, it's swung back a little bit more into rehabilitation.

Macklin Fleming: Switches from one to the other. Are you both judges on the same division?

Laurence Rubin: Same division.

Macklin Fleming: And how is the state Supreme Court doing these days? Is the Governor making pretty good appointments?

Paul Boland: Oh, I think so.

Laurence Rubin: Yes.

Macklin Fleming: We had some wild appointments while I was on the bench. *[laughing]*

Paul Boland: We have both—as you did—we have both sat on the Supreme Court by assignment. And I think we have been struck by how centrist that court is by and large, but also struck by how collegial a bench it is; and I think for each of us it's been a very pleasant experience.

Laurence Rubin: Very positive experience; it really was. Good discussions among justices.

Paul Boland: You wrote another *Judicature* article back in 1969 in which you said that the litigation explosion threatens to overwhelm existing institutions and cripple the business of the courts and you argued that increasing the number of judges and courts does not provide an adequate solution. Instead, you proposed a reorganization of the courts. You proposed the routine handling of certain kinds of matters, and you also argued in favor of the elimination of certain procedures. As you know, in the years since that article was written, seeing the continued expansion of the number of courts and the number of judges, we've also seen the introduction of ADR and complex litigation courts.

(00:50:06)

Do you have any sense that the expansion of ADR and the creation of the specialized courts has responded to some of the concerns that you expressed four decades ago?

Macklin Fleming: Well, it sounds like it; but since I closed my office five years ago I'm completely out of touch with the legal world and I don't

have much of a development of what's going on. I've always felt that the Court of Appeal was sort of a fifth leg and that the state should try and work towards development of a two-court system instead of a three-tier system, which takes a lot, much, time. I think New York's appellate division disposes of matters quicker than the Court of Appeal does, because it's easier access and makes things more easy to get up to the Supreme Court. So that would be a continuing . . . you say there are 64 appellate judges just in Southern California?

Laurence Rubin: Thirty-two in the greater Los Angeles area and nearly 100 statewide, Court of Appeal justices.

Macklin Fleming: Well, the ideal system in my mind would just be to have a two-court system. You have your trial in the supreme court and it issues its judgment and then you have . . . a superior court . . . and then you have a review in a superior court and then the other could take it quickly. But I haven't heard any great outcome for that. *[laughing]* So I guess we're . . . we still have this three-tier court—which, statewide, how many appellate judges are there?

Laurence Rubin: About 100.

Macklin Fleming: Well, I think a system could be worked out where the trial court would have an immediate appellate rehearing or something, and that would be it.

Laurence Rubin: Have a trial division of the court and an appellate division of the same?

Macklin Fleming: Well, judges would do both, back and forth. It would be an elaborate rehearing, I think; but printed briefs and all that would—

Paul Boland: So it would not be a full-blown appeal.

Macklin Fleming: No, particularly with all the apparatus that goes with a full-blown appeal; but that's for you gentlemen to work out in your spare time. *[laughing]*

Paul Boland: We'll try to work on it. As one who . . . you served for 22 years as a member of the trial and appellate benches. What would you like the judiciary, the legal community, and the general public to remember about you and your role as a judge—your work as a judge—during that time period? What do you think stands out as most significant?

Macklin Fleming: Well, judicial restraint I think was . . . at that time the judges tended to decide everything that anybody brought up to them. And I don't know how it is today, but the lack of judicial restraint was the most—as I saw it—the most worrisome problem in my time.

Paul Boland: What led you, do you think, to develop that judicial philosophy?

Macklin Fleming: Oh, the lack of that in a lot of the cases I saw.

Paul Boland: You retired from the bench in 1981, just about the time we came on the benches—and thanks for making room for us.

Macklin Fleming: So you are preparing a booklet or a memo or . . . and it will be circulated to all the incoming judges, as to what is expected in the courts and what they've—

Laurence Rubin: And also be kept as a permanent record in the Supreme Court library as well.

Macklin Fleming: How are the appointments in the last 10 years in the Supreme Court? Have they been up to snuff or—

(00:55:05)

Laurence Rubin: I sure hope so.

Paul Boland: I think so, I think so.

Macklin Fleming: Good.

Laurence Rubin: We have both sat pro tem on the Supreme Court, and we're very impressed with their collegiality, their centrist, their dedication.

Macklin Fleming: They went through a rough time at one period or another when some—

Paul Boland: During the Rose Bird period.

Macklin Fleming: Yes, when some not very competent judges sat on there.

Laurence Rubin: We do not have anything like that.

Macklin Fleming: Well, good.

Laurence Rubin: Since your retirement, what have you been doing outside of the law? I hear you play tennis.

Macklin Fleming: I play tennis. For a while I just did some gardening; I don't do much of that anymore. Sleep about 12 hours a day; stay alive. *[laughing]*

Paul Boland: During your long, distinguished career, you also maintained a full and active family and personal life, and as we understand it from your biography, you and Ms. Fleming have been married almost 65 years and you raised a family of three children.

Macklin Fleming: Yes.

Paul Boland: Tell us about your life, a little about your life away from the law office and off the bench.

Macklin Fleming: It's been very happy. I married a wonderful wife. I hope everyone else can do the same.

Paul Boland: What have been some of your activities off the bench besides tennis?

Macklin Fleming: Well, almost for 30 or 40 years, I think, we took a month's vacation and traveled to Europe, Australia, Far East, all over the world. We'd routinely go overseas for about four weeks.

Paul Boland: Have you been involved in the arts or theater or music at all?

Macklin Fleming: My wife has been very active in that. Yes, there've been several social organizations in which I once was active.

Paul Boland: Anything else that you'd like to tell us?

Macklin Fleming: Well, I wish you both good luck in your professional career and your personal lives.

Paul Boland: Thank you very, very much.

Laurence Rubin: Thank you very much.

*Duration: 58 minutes*
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