

Alan Handler Interview (April 4, 2006)

Michael Aron: I'm Michael Aron of NJN News. It's Tuesday morning, April 4th, 2006. We're doing a series of interviews on the Brendan Byrne years in New Jersey. I'm about to talk to Alan Handler, retired State Supreme Court Justice and a counsel to the Governor during the Seventies. Alan, pretend I know nothing about New Jersey and tell me who Brendan Byrne is and was.

Alan B. Handler: Brendan Byrne, I think foremost at least in the minds of New Jerseyans was a distinctive and a distinguished governor. He, in his terms in office, I think set a tone for setting the right goals, pursuing them with a consistency and a strength that was unusual, and that he left a legacy from his tenure in governor in terms of accomplishments. In my lifelong exposure with Brendan, I would have to say that his commitment to what he thought was right and in the public interest was the most enduring and unswerving aspect of his personality. And I think that you know, the legacy that he left and the benchmarks that he reached, I think have served as examples in the years succeeding. On a personal level, he enjoyed friendships, he was loyal to friends. Again, his abiding sense of the right would not deter him if he felt that even a close friend had done something wrong. But in the overall, he's just- because of these qualities, I think he has made a stamp as a very unique and a distinctive individual in New Jersey.

Q: You don't think other governors have been goal-oriented and seen what they wanted to do and worked hard to accomplish it?

Handler: I think our governors, you know, for the most part have had their agendas and have had goals that they sought to accomplish and have accomplished and Brendan, perhaps because of my proximity to him and the closeness of our relationship, I've been impressed to an extent that I haven't had the opportunity with others to see what was entailed in these challenges, and the strength and the consistency with which he met these challenges.

Q: Listening to you talk about him and how consistent he was in pursuing what he thought was right, one can take away from the description either the idea of someone who is stubborn and pigheaded or visionary. Do either of those words apply?

Handler: I think it would probably be closest to visionary. Some of his goals and ideals were difficult to attain. They were not universally popular. In many respects, difficult to explain and to sell to the legislature and to the people, and he had an abiding sense of what he believed was in the welfare of the state with respect to so many of these enterprises that they've made an indelible impression on me.

Q: I sense you talking about the income tax when you're making some of these statements. Did he come into office wanting to institute and income tax in New Jersey?

Handler: Well I never had that sense. Of course when he came into office, I was a spectator, a bystander. I was on the Superior Court and basically would be following the news and keeping abreast of the events in Trenton as any other citizen.

Q: What county were you a judge in?

Handler: Well, when I was appointed, I sat first in Essex County on the trial bench for about five years, and then I was elevated to the appellate division and I had known Brendan over the years somewhat. Not too closely, even in earlier days when I was with the Attorney General, he was a prosecutor in Essex County. He became, I believe, Chairman of the Public Utilities Commission and the like.

Q: And what did you do for the Attorney General?

Handler: Well I had become the First Assistant Attorney General initially under Dave Furman and then Arthur Sills, and that was during the administration of Dick Hughes.

Q: So you knew Byrne. You were a judge in Essex County, he was the prosecutor when you were a judge?

Handler: No. No. He was the prosecutor before I became a judge, but our paths crossed. We would play squash at every opportunity from time to time.

Q: Who won?

Handler: I'll let him answer that question.

Q: Well continue the story of how you and Brendan Byrne came to work in the State House together.

Handler: Well, it's a story that hardly has a theme or a plot because our earlier days, as I said, didn't have a lot of close contacts. Our paths did not cross often. When I was in the Attorney General's Office, I did a fair amount of work for the Division of Taxation. And among those responsibilities was the representation of County Boards of Taxation, which despite his name, they're really state agencies and if memory serves, I think Brendan's father sat on the Essex County Board of Taxation and I think in arguing cases before the County Board of Taxation, or it might have been the Division of Tax Appeals, I'm not totally clear on that now. But I think anecdotes would get exchanged in terms of those experiences and Brendan.

Q: But how did you become to be his counsel and when?

Handler: It was something that was totally fortuitous. I had no- my furthest imaginings, the remotest idea that I would eventuate as a counsel to the governor. Like anyone else, I followed the history of his administration with a great deal of interest and curiosity and I shared with so many others what appeared to be his growing political misfortunes and malaise towards the end of his first administration. Being a good friend and loyal supporter, I would read and wince, you know, hearing the repeat of you know, one-term Byrne and things of that nature. I never assumed though that in any way this was an immediate interest of mine or anything that would be more than just a concern that any citizen might have. But towards the end of his first administration, I got a call with a surprising request, would I consider becoming his counsel? To me, the idea was almost outlandish. I was ensconced as it were as a Superior Court Judge. I think by this time, I had been on the bench eight years.

Q: You were Superior or you were in the Appellate Division?

Handler: Yeah, the Appellate Division you know, of the Superior Court, and--

Q: Chambers were where?

Handler: I think my chambers moved. I think I started out in Newark at the Mutual Benefit Life building where members of the court had chambers, the Supreme Court, Chief Justice Weintraub and Jacobs and Frances and some appellate divisions had chambers there as well, and then some year or two later, my chambers were moved to Somerset. I took over the chambers of Fred Hall.

Q: How old were you at the time?

Handler: Well, I think I was then forty-four.

Q: Who called you?

Handler: I got a call from a mutual friend. A person who was very, very loyal to Brendan, knew Brendan, supported him in every way he could, Senator Greenberg.

Q: Of Essex County?

Handler: Of Essex County.

Q: Marty Greenberg?

Handler: Marty Greenberg, and Marty was a very good friend of mine as well. We had known each other over the years. He told me he was calling at Brendan's behest and was wondering whether I would consider becoming counsel, and I said,

"This is really a rhetorical question because I know the answer. You wouldn't be asking me unless Brendan really wanted this to happen." He says, "Of course." He says, "He's very much enthused about the prospect." And I said, "Well, I'm confounded by it, because I basically have no ambition other than continuing as a judge." I said, "I enjoy it. I think it's where I belong and what I want to do and I'm really content to follow this out as my career. I wouldn't have opted to go on the court unless I were prepared to make that commitment," and Senator Greenberg said, both facetiously and astutely, "Well, maybe you could consider this as a sabbatical." I said, "In what sense?" He said, "Well, it may not be in the cards that Brendan is going to be reelected, but in any event, there's every reason to believe that if you wanted to be reappointed to the court, that would be a fair prospect." I said, "Well I can't gauge the you know, political likelihood of you know, of that sort of thing happening."

Q: Do you recall how much before the election this discussion took place?

Handler: Well, this would have been in the late spring of '76. So that's almost a year before.

Q: Before the election?

Handler: Before the election cycle, _____.

Q: And why was Byrne needing a new counsel?

Handler: Well his counsel, who was Lew Kaden, apparently had opted to resign and Lou Kaden had been his counsel for, I think, the first three years and I knew him to be an extraordinarily able and effective individual, and I don't know what the circumstances were that were prompting Lou to resign at that point. So, I gulped hard and agreed. I thought it would be an extraordinary change of pace. I thought it would be terrifically invigorating and stimulating and I also felt that it would give me an opportunity to really work with Brendan and do whatever I could in my capacity as counsel to help him in his administration, and I have to confess that when I agreed to do it and came down to familiarize myself with my new office and so forth and so on, I encountered Bill Kirschner in the halls of the statehouse and he said to me, with his hands palms out, "Why? Tell me why?"

Q: Who was Bill Kirschner?

Handler: I don't know whether Bill was- I may be underestimating his role. I can't quite remember whether he was Chief of Staff or some-- He had some major, major position in the administration and in fact, I think his words of greeting were, "Hello, dummy." And then I encountered Dick Leone, who was then I think the

Treasurer and he was the one that said, "Do you know something that we don't know?"

Q: How difficult was it to come in at that time and adjust to the counsel's job?

Handler: It was-- I found it a little bit awkward and unfamiliar. I was very unpracticed in terms of the kind of administration that the position would entail. I had to familiarize myself with staff, I had to get on top of different issues and problems, the agenda, the basic way of handling things in counsel's office. There was a period of adjustment and it went pretty quickly.

Q: You used the phrase, you expected a change of pace and you expected something invigorating and stimulating. Did you get that?

Handler: Yes. The difference between judicial work and executive work is like night and day.

Q: What is the difference?

Handler: Well, with judicial work, it's structured. It's very deliberative. You're handling issues which have been very managed and clarified, presented with an accepted format for purposes of decision. You can render your decisions without any pressure aside from the challenge of the difficulty of the case itself. It's intense work, but it's not hectic and to a great extent, it's very manageable and it's somewhat predictable. Working with the governor in the executive branch was the total opposite. Problems would arise unexpectedly, quickly, they were both problems of substance, problems of personality, problems of politics, and so the entire working environment was very, very different.

Q: What does the counsel do?

Handler: The counsel basically responds to the governor, and the governor's immediate office in terms of issues that require- real or imagined- but require the advice or the input of a lawyer, of a person who would understand you know, the legal ramifications of problems as well.

Q: What percentage of that means reviewing legislation and what percentage falls into other areas?

Handler: Reviewing legislation is a constant part of counsel's responsibility and that very much turns on the legislative flow. All legislation is reviewed, it's analyzed, it's summarized, the pros and cons, other implications that appear from that review are expressed and shared, you know, within counsel's office by counsel and with the governor and the governor's staff. His policy people, his chief of staff and you know, the governor himself and that constitutes a very significant part of

the work of counsel's office. Aside from that, or overlaying that are the many unpredictable questions that will come up you know, in the course of a day or a week.

Q: Such as?

Handler: Well, problems with handling legislation that's in progress. Issues involving not only legislators, but other persons in government, be it county, municipal, where the administration is seeking to achieve something or deal with something and others have interests in it and the issue is crystallized in some way, that it comes to the governor's attention or the governor wants it reviewed or handled by counsel's office, issues with independent authorities and things of that nature which really are very hard to you know, to predict and very hard to anticipate.

Q: Did you become an advisor to the governor in the process?

Handler: Very much so. The governor-- The counsel basically counsels the governor. We'll advise the governor, we'll give the governor the benefit of reactions and help the governor evaluate. The ultimate decision of course will always be the governor's.

Q: Do you suggest to the governor that he file a lawsuit? Does the governor file suits, does the counsel get involved in that or is that a minor aspect?

Handler: No, no, no. Well those things don't happen often, but they do occur and in most respects, litigation by the state would be handled by the Attorney General, but it would be rare in which the Attorney General would be pursuing a piece of litigation that touches the administration as it were. As opposed to something that would be more expected more routinely involving administrative agencies and issues before administrative agencies. But anything that really touches the administration of great importance where it may be controversial or there may be some differences of opinion as to the necessity or wisdom, you know, of a lawsuit or other types of legal action, that would almost invariably be shared with the counsel.

Q: Do you remember what a typical day was like as counsel?

Handler: The typical day was one that couldn't be planned. There would be no such thing as believing that you could commit to be home for dinner and keep that commitment. The remarkable thing about the office, I would say, were it's exigencies. Just simply the inability to really control the docket as it were, the issues that would be crossing your desk. The difficulty of maintaining a structured schedule, it's not as though there wasn't a day without emergencies or things that

were coming up that weren't anticipated or couldn't be anticipated. But so frequently, that was part of the routine.

Q: Who were the key legislative personalities of your time in the statehouse?

Handler: Names escape me really. Merlino.

Q: Joe Merlino of Trenton?

Handler: Joe Merlino, I guess--

Q: He was Senate President for a time.

Handler: Yes, and I think while I was there, he was. I think there was some Republican heavyweights. I guess it was- Sandman, I guess was--

Q: Charles Sandman, Cape May?

Handler: Sandman, Cape May was certainly to be reckoned with and--

Q: He ran for governor in the primary in '73, the same year that Byrne won the Democratic primary.

Handler: I think that's right, yeah. In the house, I guess Billy Musto. Who? Oh, yes, Alan Karcher, I guess he was there then as well.

Q: Alan Karcher, Middlesex County.

Handler: Yeah.

Q: Billy Musto of Hudson County.

Handler: Hudson County, yeah.

Q: Were you comfortable dealing with these guys?

Handler: Not entirely. It had been you know, quite a few years, if ever, I'd been a hell fellow well met but it never really was a problem. I would wrap myself in the issues that I had to deal with and always felt comfortable doing that.

Q: What were the big issues of your time as counsel?

Handler: Well, I think the most notable and most notorious of course was the school funding litigation, which was very critical, very paramount, both divisive and galvanizing. It was a momentous issue and at the time, it was very much coming to a head, and when I say a head, it was an issue that over the years, would have many heads. But at this time, the confrontations I think were sharper and were

deeper. The series of court cases was making it less tenable on the part of those who were resisting the implications for the first Robinson case.

Q: Which were what?

Handler: Well that in some meaningful way, educational opportunities had to be enhanced in the state's poorest school districts, that they had to be improved and in the first Robinson cases, the court I think very astutely said this is not a matter of equal protection as such, that school districts throughout the state aren't entitled to the same level of education. But that they are entitled to an education that is thorough and efficient, which means that it has to be an adequate education. It has to be an education that's going to give students and opportunity to succeed in life and compete in life. So it was a broad standard that implied that something had to be done on a concrete basis to improve and advance and enhance education in the lower schools and quite clearly, it was going to be costly, and it would entail, you know, a major shift in resources in the state in one fashion or another. And the resistance came from those that basically were inured you know, to the status quo.

Q: Who would those people be?

Handler: Well they were certainly representatives of wealthier school districts, even mid-range school districts who were very much dependent upon their current means of financing, public education which was essentially through the property tax and a certain amount of state aid and the like and I think the resistance was born not so much from any resentment or feeling that something didn't have to be done for the poor school districts, but from the fact that they didn't want to detract from their own educational regiments.

Q: So how did the state income tax fit into this fight?

Handler: Well, I think that when it was perceived that ultimately there would have to be a legislative as well as an administrative solution to these problems, the difficulty was to find a lever to generate that kind of action on the part of the legislature and administrators.

Q: The funding source needed to be found?

Handler: Primarily it would be a funding source. I mean--

Q: There was no state income tax measures?

Handler: There was no state income tax, no broad base of- broad revenue source.

Q: It was a sales tax.

Handler: There was a sales tax, yeah.

Q: And do you recall what it was in those days?

Handler: As a matter of fact, I don't.

Q: Three percent? No, okay.

Handler: But it appeared that you know, that an income tax would have to be devised.

Q: In retrospect, how critical was the Supreme Court's order in getting the income tax and school reform enacted?

Handler: The--

Q: Wouldn't it have happened eventually?

Handler: It's hard to say only because my own sense was that the resistance was very, very strong. It was abetted by you know, a perception that maybe the court had misread the constitution, overreaching and so forth. If you go back to the history of the thorough and efficient clause, which I had done, you come to learn that it was originally conceived of as a rudimentary education and somewhere in its evolution, it became a thorough and efficient education and that had never been carefully analyzed or defined until the Robinson cases and so there may have been a feeling on the part of some that the court had misread the constitution. Or that its own interpretation was not the inevitable one. But I think the problem basically was an institutional one and political one, where with our strong divisions of home rule, the notion is that you know, we take care of our own. We make sure that our systems work and are effective and if other school districts can't cut it, so to speak, that's really their problem. Not our problem.

Q: Would it have been better for the court to stay out of the issue and let the legislature act?

Handler: I don't think so. I mean I believe that the result is a sound result, I think it's a constitutional result. I think it's a result that comports with good government and you know, in the public welfare. I think the result you know, has been vindicated, not only in our own state but even nationally. Not very long ago, anticipating the anniversary of Brown vs. Board of Education, The New York Times had stated in its editorials that the second most important school case was our New Jersey case of Abbott vs. Burke, which came some years later. But it's the sequel of all of these pieces of litigation and the stance that the governor had taken and the courts had taken.

Q: You say that you were approached about becoming counsel in the spring of 1976, was it the summer of 1976 when the court ordered the schools shut unless and until the other branches of government addressed this problem?

Handler: It was. As a matter of fact, I think I joined the Governor's Office just when that case was ready to be presented to the Supreme Court.

Q: So what was it like in the Governor's Office when the Supreme Court said let's shut the schools?

Handler: I think everybody swallowed hard. I think it was--

Q: It was July. There was no school. So it didn't really matter. It was a hollow threat. What--

Handler: Well, it wasn't hollow, it was like you know, the drum beat from across the river, you know? Threatening, you know, the--

Q: We won't allow schools to open in September unless you do something before September?

Handler: Yeah, I think in many ways it was-- I don't know that it was a tactical move at all. I don't recall that. But tactically it was a very sagacious development because--

Q: On the part of the court?

Handler: Yeah on the part of the court and on the part of the state to try to seek that relief. I think there was an understanding that the court could not readily fashion affirmative relief. In other words, telling school districts what do to and how to do it, or to compel certainly the legislature to appropriate funds. The strongest weapon in the courts arsenal would be the so-called negative injunction and that's what the administration asked the court.

Q: So this was a victory for Governor Byrne? Yes? I mean when this decision came down, this vindicated his position on this issue? Yes?

Handler: I would say so, yes. Very much so.

Q: And then how long after that did it take to get the legislature to enact an income tax?

Handler: The timeframe, you know, eludes me, but I think the process started pretty quickly and pretty directly following the court's injunction and the decision to ultimately to reopen the school.

Q: And then began the reelection year of so called one-term Byrne?

Handler: Yeah.

Q: He was way down in the polls to Ray Bateman, the Republican nominee.

Handler: Yeah.

Q: What's your recollection of that year leading up to the reelection?

Handler: I was taken aback by the intensity of the feelings of how vociferous you know, the negative criticism was. My perception was that others had perceived that Byrne had gone one step too far. He was you know, over the top, you know, so to speak and I think there were those who felt that well, if he took this stand and it was a heroic stand, then you know, let him fall on his own sword. We don't have to like him for it, and I think he was, to my way of think, somewhat, you know, philosophical about it. I never had the sense that he was resentful in the sense that you know, people didn't understand him and so on. I think he understood the stakes that this was going to be very, very unpopular and a lot of this unpopularity was raining down on him.

Handler: I think he did it because he had no alternative. The policy was right, he felt the courts were right. He felt that this was clearly in the public welfare and in the public interest and it was something that as governor, he just had to see through.

Q: Let's take a two three minute break and then let's talk about some other issues and aspects of being counsel.

Handler: Very good.

Q: Alan, we all know today that Brendan Byrne has a second career really as the great after dinner speaking in New Jersey and the funniest man in New Jersey, public life. It's been suggested that he really wasn't that funny back in the days when he was governor, that this was some appendage he's grown over the years. What can you tell us about whether he was a funny man in those days?

Handler: I think that he always exhibited this, I think, extraordinarily droll streak and unusual way of looking at things and his associations were really amazing. But they were manifested for the most part in you know, small personal exchanges. I hope he doesn't take offense at this observation, but when I joined his administration and had the opportunity to be with him on a more or less continuing basis, and in settings aside from office settings, but in larger meetings or situations where he'd be giving remarks or talks, I found his deliveries painful.

Q: How so?

Handler: Well, his delivery, not his thought process, but his delivery appeared to me disjointed, very uneven, the pauses came unexpectedly. Frequently they were too long. He didn't bother a great deal with enunciation.

Q: He mumbled a little bit, yes?

Handler: That's what one could say, and I can remember since I now fancied myself becoming an astute politician that something ought to be done about it and I remember talking to Senator Greenberg you know, with the remarkable insight. You know, you might want to have someone sit down you know, with the governor and really concentrate on speaking and delivery and stuff.

Q: Did you mean getting him some professional speaking coaching?

Handler: I wasn't that specific, but I really felt that there was not only room for improvement, but improvement was imperative. Notwithstanding, you know, that overall perception and I wasn't a good judge of this sort of thing as to what effective public speaking and when you know, a politician has a genuine need for it or when its absence is a real detriment. But none of this detracted from my firm impression that he was intellectually acute, very, very quick, with a strong sense of you know, what was on-point and material and as well as my overall impression of Brendan when he had been you know, a lawyer and holding different offices and so forth. That he basically you know, could handle himself extremely well you know, in the particular context. That's why I had felt that, for example, in the political sphere, if he were to engage in a debate, he would be well equipped to do that, although I continued to think that his delivery could improve.

Q: So he was sharp, he just wasn't a good orator, is that what you mean?

Handler: I think that's a fair way to put it.

Q: What was his management style? Did he get involved in a lot of the details of decision-making? Was he one of these delegators who was hands-off, or how would you describe that?

Handler: Not being a managerial type myself or one with a strong administrative skills or background, I didn't have a good sense of how effective Brendan was as a manager. He gave me the impression that he would be very content to delegate. He had a great deal of confidence in the people around him, and I think--

Q: Rightly so?

Handler: I think yes, and I think it revealed itself as a style in which one would think that he was being casual, somewhat indifferent and so on. But I think he was just being economical, you know, in what he would want done or what he might be referring to. He would only use you know, one or two words rather than a half a dozen and I think he had a biding sense that the people he was asking to do something would do it and he had, I think, a good sense of what he was asking them to do, and what the problems or complications might be. And I think his follow-up was always impressive.

Q: How so?

Handler: Well in terms of you know, a day or two later, what happened or did it go this way or that way.

Q: So how could was he at communicating what he wanted done?

Handler: I think he was very effective and he was surrounded by people who really picked up on what he wanted done and they didn't require you know, enormous elaboration or detailed instructions.

Q: Let me run through some of the other issue areas that are often associated with Brendan Byrne and get you to give us your thoughts on them. Let me start with casino gambling in Atlantic City. You refer to that in your resignation letter. Were you involved in that issue? How do you see him in relation to that issue?

Handler: At that time, the issue was a dramatic issue and it was controversial. I think both arose because of the inevitable moral discourse that organized gambling or state sanctioned gambling you know, would occasion and there were many who felt that those implications or drawbacks as they saw them had to be given weight and really were perhaps more important than seeing this as an activity that would become an important revenue source, an economic benefit to the state. I never felt that Brendan had a serious problem with it in any personal sense, and this is just my total speculation. I never had a long talk with Brendan about it because I think the commitment was pretty much in place. But Brendan, I think, has always been a very open, tolerant person. And I don't think while he might not personally approve of gambling and the like, I don't think he was you know, judgmental about people who gambled or wanted to gamble. He figured that was an aspect, a dimension of human nature and you know, so be it. So he didn't approach the problem as though he really had to square any real moral complications, but he was very much concerned about some of the implications. The practical, real implications that gambling might engender. The most obvious one, of course, would be it's attraction to you know, criminal activity and other unsavory activity and the like, and he felt that that could be addressed and had to be addressed in terms of how the gambling was structured and supervised.

Q: So we set up a system much more strict than what they had in Las Vegas at the time.

Handler: I think so, yes. Yeah.

Q: And I guess we've relaxed it somewhat over the years. Something-- It's overly restrictive? Do you have a view on that?

Handler: I'm not sure. I think it was needed.

Q: You set up the Casino Control Commission, but we also set up a Division of Gaming Enforcement.

Handler: Enforcement, yes.

Q: That would bring cases before the Casino Control Commission.

Handler: Yeah.

Q: We were real careful.

Handler: I think it was born of the fact that no one could fully predict or fully analyze the extent of the threat of you know, of criminality creeping into gambling and I think in the Governor's mind that was the foremost vulnerability to the proposition for gambling. And therefore, he thought that at the very outset, it was something that had to be addressed and could be addressed.

Q: And was the reason for promoting it to get some more revenue into the state coffers or to salvage Atlantic City and renovate Atlantic City?

Handler: My own view was that it was-- The primary goal or objective was to rehabilitate Atlantic City. I think that was more or less what was expressed as the reason for it. In other words, there would be other benefits to the state in terms of increased tourism and perhaps some you know, revenue realized by the state. But the dedication of you know, funds to Atlantic City highways was paramount. As a matter of fact, I think that was included in the referendum for the approval of casino gambling. Interestingly enough, that question came before the New Jersey Supreme Court some years later. I think it was in terms of whether the redevelopment authority, the Atlantic City redevelopment authority could use its funds elsewhere and it had regularly used funds statewide, the funds that were realized from casino gambling and the Supreme Court held that that comported with the constitutional referendum. I disagreed with Justice Pollock.

Q: You thought the funding had to stay in Atlantic City?

Handler: I thought it was part of the question that was authorized by the vote to approve casino gambling.

Q: What else is part of the Byrne legacy issue-wise?

Handler: Well, you know, I assume that under the very broad heading of you know, basically a good government and sound government. He very much brought his own interests to bear in passing a model criminal code, which resulted in a fundamental revision of our criminal laws. Clearly needed revising and redefining basic you know, criminal provisions. Providing for sentencing improvements and the like, and I think he was very proud and reasonably so for that passage. He also I think put his support behind the Administrative Procedure Act. Again, that was a signal improvement I think in state government, or state like all states has you know, many administrative agencies and they handle an extraordinary number of issues and problems and cases that you know, are within their respective areas of jurisdiction. It could be public utilities, environmental protection, health services, labor and so on. There's just an extraordinary gambit of public agency action and historically and traditionally, these cases would be heard by the agency itself, by persons who were designated as hearing officers, and the hearing officers were agency employees and the sense was that institutionally, people who had matters before administrative agencies couldn't always get an objective review or a fair shake because the hearing offices were basically you know, agency employees and might be reflecting agency approaches or points of view or biases and the like. One of the things that the Administrative Procedure Act was to set up an independent Office of Administrative Law with independent authority to establish regulations with independent administrative law judges who have many of the qualifications and characteristics of Superior Court Judges who are beholden only to the Office of Administrative Law, not to the Administrative Agencies and that they hear contested cases and those cases then ultimately go up to the head of the agency for final decision before they could be appealed to the court. So it was a very signal improvement in state government.

Q: You didn't serve that long as counsel, did you?

Handler: No as it turned out.

Q: Tell us the story of your appointment to the Supreme Court.

Handler: Well I was fully anticipating serving out the governor's term and probably witnessing his election at the end of the term and then hoping that the fates would be able to put me back on the court.

Q: On the appellate?

Handler: On the Superior Court. At the time, the governor had designated Steve Wiley as the appointee to the Supreme Court.

Q: Wiley was a Democratic Senator from Mars County?

Handler: Yes, he was, and among the prominent names that I failed to mention before, and I take it that the vacancy on the court had been a vacancy that was created by Justice Hall's retirement and that had been filled on a temporary basis by Judge Conford from the appellate division. And during the time I was with Brendan, he was very committed to the Wiley appointment and I think he was- Not only did he admire Steve Wiley as a totally qualified individual, a person of great ability and integrity, but he was very grateful to Senator Wiley because of his leadership and support, particularly in trying to usher in the gross income tax. During the time I was there though, there had been a challenge to Wiley's appointment, a constitutional challenge and it resulted in a case called Freidland vs. Byrne.

Q: Freidland was also a state senator. So this was a partisan challenge, was it?

Handler: Well, it was brought by a Republican senator and you know, to that extent one might say it was a partisan challenge, but it was a challenge that was a serious challenge and it was predicated on the notion that a state senator would be ineligible for an appointment to an office. The salary or emoluments of which had been increased by the legislature during the term of that state senator, and it so happened that while Senator Wiley was in the Senate during his term, judicial salaries had been increased and it was perceived that this constitutional prohibition or stricture against an appointment of such a senator would apply to Senator Wiley. The legislature, anticipating that that challenge had some teeth to it, then amended the Judicial Salary Bill and specifically exempted, I don't know whether they exempted Senator Wiley by name, but they exempted any person who was appointed during the term to the Supreme Court from taking the salary increase. So their notion was that as long as the appointee couldn't get the benefit of the increase in salary, that that would obviate the disqualification and that was the case before the Supreme Court. And the Supreme Court obviously struggled mightily over the issue because it took almost a year for them to hand down a decision, and I think the decision came down in the spring of '77 and the court was sharply divided, it voted 4-3 ruling that the Wiley appointment was not constitutional, that he was disqualified. In the meantime, although there wasn't much to do while the case was pending, I had done everything I could to support and further Senator Wiley's appointment. I had been an editor on the New Jersey Law Journal and you know, contributed an editorial supporting it and he was, as I said, he was a really estimable appointment. But when the opinion came down, the governor called me and asked me whether I'd read the opinion, I said, "I'm in the middle of it" and he

says "Well, come on down to the office when you finished" and I read the opinion. As I said, it was a 4 to 3 decision and the court said you know, quite starkly and quite plainly that this amendment that exempted Wiley from the emolument didn't overcome the disqualification. It was a broader disqualification based upon emoluments occurring to the office during the legislator's term. I'm not sure of this, but I think Wiley may have even recused himself from voting. And I think the court said that didn't obviate the disqualification. It occurred during his term. So the Governor asked me, he said, "Well is there anything we can do to overcome this decision?" Nothing occurred to me, I said, "It doesn't raise a federal question" so there's no basis for going into federal court, for example, and advancing some kind of a federal ground or a federal constitution basis for trying to overcome the decision. I said "I don't think that there's anything we can do in state court. The only possibility would be to ask the court to reconsider its decision, but I think it would be pointless and it would be viewed as being futile because the court took almost a year to decide this. It's resulted in a divided court with two very complete opinions, you know, on the issue." I said, "The court has considered this as intensely and as exhaustively as one could expect, so I don't think anything is going to come of that." And he agreed. I don't think I had to tell him this, and I thought that was basically the end of it, and a short while later, I think the same day, he called me back into his office and broached the subject of my joining the court.

Q: How did he broach you?

Handler: He said, "Well, the Wiley appointment, you tell me is not viable anymore. Would you consider being a member of the court?"

Q: What did you say?

Handler: I said, "I'm taken aback, but I don't have to think about it. I said I would be delighted and overwhelmed.

Q: You left his office, and leaving his office you wrote a long letter to him urging him to run for reelection and having read the letter today, it now looks quite prescient on your part. You said don't run from the income tax, campaign on the income tax. Stand up for what you've done and don't be afraid to debate your Republican opponent and so on and on. Do you recall that and take pride in having predicted properly?

Handler: Well, I take a lot of satisfaction you know, in his reelection, and I don't ascribe any credit to myself. I just felt that Brendan, I had always believed, was a person of enormous integrity, and that impression was reinforced, you know, when I served with him, and I just had a sense that as difficult as that quality is to identify and define, that people who would be exposed to someone like Brendan

would have a sense of that aspect of his character, which I think is-- In a way, I think it's not only distinctive, it's unique because he had been tested you know, so many times in the course of his term and his consistency and his commitment, what I would call his integrity I think had been constantly tested and constantly revealed. And I thought really that that was his only shot so to speak.

Q: Show yourself.

Handler: That he's not going to come across as a charismatic person. He's not going to come across as someone with any kind of flamboyance. He will only come across as someone who is you know, singular in his commitment to what he thought would be right and good and that in the course of a campaign, that could come across, that the people ultimately would have a sense that they are dealing with a person who is, how can I say, was the real goods.

Q: Did you want to take a break?

<crew talk>

Q: So you accepted this appointment, apparently according to your letter, with a tremendous sense of fulfillment, like you had arrived at the place you always wanted to get. Is that true?

Handler: Well, I never had any you know, crystallized idea that my career would eventuate on the Supreme Court. I always felt that there's no way one can appropriately or properly seek an office like that. That it was a matter of enormous coincidence and luck when it happens to people and it was never an active idea or thought as far as I was concerned. I was very fulfilled in being a judge and fully hoped you know, to go back to the judiciary.

Q: How did it compare with the year as counsel? How does it compare? What's the difference?

Handler: Well, it was, for me, it was an enormous challenge. It left me again with you know, a sense of really, really being humbled. I was impressed to the point of being overwhelmed by the responsibility you know, of the work on the court, and I just really set about it in terms of trying- paying attention to detail, preparing myself as thoroughly and as carefully as I could.

Q: It's an even more burdensome responsibility than being Chief Counsel to the Governor, am I right?

Handler: There is a sense that your actions, your decisions are going to have an impact, that they're going to affect people, that they will resonate. As counsel to the governor, you're a lawyer. You're trying to help your governor resolve

problems, take you know, a sound and good and correct course of action and you're part of a process, and to that extent, your own responsibility is not you know, always readily perceived, doesn't stand out and so it's quite different from being on the court and rendering decisions that affect the interests of parties and others.

Q: What doesn't the public understand about the decision-making process of the court? What should people know about how the court goes about making its decisions?

Handler: It's a very hard question and I think it's a question that really addresses a real interest and concern. And it's one that has been asked forever really in terms of the public's relationship to the court's and the court's relationship to the public, and I think our system reflects a tension which is born of trying to deal with factors that can't easily be reconciled or integrated. In our system, and I think our system is a paradigm, judicial independence is an extraordinarily important feature you know, of our judicial branch. And for judges to be independent, to a great extent they must be divorced from public pressure and public sentiment and the like. At the same time, they have to be fully aware of the public interest and the question is how do courts become aware and responsive, you know, to the public interest? Well, it's only through the vehicle of cases that come before the court and our judicial system has structures whereby the court becomes informed as to what is at issue, what the legal standards are, how they should be applied, to what extent the public interest factors into those things. So I think within the judicial structure, the court has to very conscientiously use its own structures and its own traditions to be certain that it is performing its function in the public interest. My own feeling is that to the extent possible, courts should be responsive to that and courts should be accountable and to that end, I think one of the things a judge or justice can do is basically explain his position. This leads to, in my case, the very long opinions and my former employer, the Governor Byrne would sometimes complain as to why can't the opinions be short? That's a very legitimate complaint and a very legitimate point of view. I serve with Justice Sullivan, and his idea was that when you write an opinion, just say it. You know, explain what the case is about, explain the issue, explain what standards you're using and how you're applying the standards and the result and that's all you have to do, and you can't quarrel with that to a great extent. But my own feeling is that you know, issues are often very controversial, very nuanced, and that even if a court you know, may be challenged, there's a duty to really expose your reasoning, you know, for good or for ill so that again, those who are affected and impacted by the opinion can say well I disagree with that reasoning. I think it's a wrong result and try to do what you can to alter it or to modify it if it's possible.

Q: You spoke of judicial independence. When you joined the court, you joined two other ex-counsels to Governor Byrne on the high court and you were soon joined by

Tom Kean's policy director and there are four of you up there out of seven, all beholden to the executive branch. Three of you to Governor Byrne, one of you to Governor Kean, how independent can you really be?

Handler: Well, two other counsel joined me, I didn't join them.

Q: Forgive me for getting my talking points wrong.

Handler: No, not at all. It raises an interesting and difficult issue, because everybody comes to the court with a background, and that background plays out really in how that member of the court discharges you know, his or her own responsibilities. The institutional wisdom or understanding is that a conflict that is simply born of experience, but that doesn't engender anything more direct or more personal is the type of conflict that the judge should be able to overcome and to neutralize and to deal with. So that the judge basically assimilates his or her experience, uses it and sometimes it will be reflected in decisions that appear to be consistent with what the judge has done before, sometimes it does not. So it calls for a certain amount of intellectual honesty and fortitude on the part of the judge in dealing with that. One of the early cases that I had was a case called Camden County vs. Byrne and for some reason I have an impression of the Governor arguing a case, and it might have been that case, but maybe not.

Q: Did Governor Kean argue a case before the Supreme Court?

Handler: I think so, but at any rate, the case involved a difficult budgetary question and it may have been the line item veto, and I didn't feel that there was anything in my experience as governor's counsel that would serve to disqualify me from determining the issues, including the constitutionality you know, of that problem. I felt my experience helped me understand the issues, but it didn't leave me with any preconceived notion or any even subliminal feeling that somehow or other you know, the governor ought to be vindicated if at all possible.

Q: So we have a kind of honor system with the justices. We accept your own understanding of whether you have a conflict or not. It makes me think of the instance at the National Level of Justice Scalia going hunting with Vice President Cheney and then ruling on the energy case in which Cheney was involved. We relied on Scalia to decide that he didn't need to recuse himself on that matter and I guess by implication, can we really rely on four former members of administrations to take a truly impartial view on a case that pits the executive branch against some other entity?

Q: Alan, we were in the middle of something about judging, but as we were changing tapes you had a thought about looking back on the administration and a couple of things the governor did. You wanna share those?

Handler: Well, I- I was always impressed by his- his range of thinking and reactions. He- he could go from the lofty to the mundane with little difficulty. And I'm not certain whether this occurred while I was there or at some time thereafter, but for example, during the gasoline crisis of that- of that period-- and there were just horrendous lines of traffic of people queuing up for-- to get gasoline. And it was an enormous- enormous problem. And the governor issued an executive order saying that there would be odd days and even days, referring to the numbers on the license plate. And he- and he solved the problem. I mean the lines were cut in half, and it no longer was an issue. And then again, I think sometime later-- I think he was the first or one of the first to authorize a right turn on red. I think both of these things ultimately became national patterns, but--

Q: What does it say about him?

Handler: Well, it- it says a lot about his- his range of mind and interests and his- and his ability to, I think, pay attention to everything that's- that's going on.

Q: We were talking about your tenure on the court, and we could talk about that for a very long time. Let me just pick the thing I think you're most remembered for on the court and ask you to talk about it. And that is your opposition to the death penalty. Were you the lone dissenter on the Supreme Court in upholding the reinstatement of the death penalty in New Jersey?

Handler: Yes. You know, since that time there have been others who have dissented. But during- during my tenure on the court, I was- I was the only- only dissenter-- although, there were some cases in which there were dissents and others- others joined the dissents. But in terms of dissents based on the fundamental unconstitutionality of the death penalty, I didn't have much company.

Q: The legislature and the executive at the time, I guess it was Cane, enacted the death penalty in 1982-- I believe.

Handler: I think it was about then. Yes.

Q: Why do you think it's unconstitutional? Which constitution does it violate?

Handler: Well, it-- I- I think I could only say, from my standpoint, that it's violative of the- of the state constitution. And it's- it's difficult to summarize or state, you know, quickly or- or easily the grounds upon which I very strongly feel that the death penalty is unconstitutional.

Q: There's not a phrase like "cruel and unusual" that you could point to?

Handler: Well, I- I would-- this construct, I think, has helped clarify my own thinking. For a number of reasons, I think that in resurrecting the death penalty

and assuming that there are viable, realistic, practical procedures by which a capital case can be fairly and sensibly prosecuted, I think the state basically has set an impossible goal. I think it's just simply not possible to try a death penalty case and accommodate the several different constitutional interests that are implicated in a death penalty prosecution. If you look at due process, you can debate endlessly the kind of-- what kind of process is due in a particular case. And in case after case, you will find anomalies in- in the procedures that have been used. And I think the courts are basically temporizing in terms of whether that due process was adequate. For example, we have said in criminal cases that what a lawyer tells a jury in summation is not evidence-- you shouldn't consider it as evidence. You get your instructions from the court, and the court will comment on the evidence if it sees fit. In capital cases, we've had lawyers, for example, tell jurors, "Well, if this defendant is sentenced to life, he won't see the light of day." The judge doesn't say a word about that. Later on, the case is appealed and the defendant is saying, "Well, the jury was never instructed carefully and adequately as to what an alternative penalty might be." And the court would say, "Well, they heard it from the lawyer." They wouldn't do that in a run-of-the-mill criminal case; yet, in a capital case the court has done it. So I think the bar is- is high, and it's, you know, you might say it's too high-- but it's got- it's got to be high. So I don't think these cases-- and- and you can find it in so many different areas of that _____, of counsel, jury or voir dire. We've now said that grand juries have to be presented with capital-- be death-qualified and so forth. And when you come to the end of these- these cases, there's- there's no way you can find that it has been tried with the level of procedural strictness and fairness that- that a death penalty case requires. The upshot of it is that if a defendant is convicted and sentenced to die as a- as a result of a case like that-- that becomes automatically, I would say, a cruel and unusual punishment. And we also are insistent here that the death penalty should be meted out with a sufficient degree of uniformity and consistency. And yet, we find that it is impossible to reconcile death penalties within the state from county to county and from the profile of different defendants and the like. So I just- I just think that, regardless of one's moral or perhaps religious feelings about the state being able to exact the death penalty as an ultimate punishment, in our system of jurisprudence, I don't it's- I don't it's possible.

Q: Which is perhaps why we haven't executed anybody in 25 years. Finally, let's ask a little bit about you life. Where were you born? What your parents-- who were your parents?

Handler: I was born in Newark, raised in Newark. My father was a- a long-time Newark practitioner-- a lawyer. And I-- when I came out of law school, I started practicing in Newark and practiced in Newark for- for a few years and then--

Q: Where'd you go to college, and where'd you go to law school?

Handler: I went to Princeton and then went to Harvard.

Q: Harvard Law School?

Handler: Harvard Law School. Brendan was several years ahead of me, and I remember at one of our Harvard Law School Association dinners-- we had one of our professors down, Professor Casner, and he took great pains to tell us all how-- what a- what a commendable student Governor Byrne was. I practiced in Newark for- for several years and then--

Q: Not with your father?

Handler: With- with my father.

Q: Oh, with your father.

Handler: With my father.

Q: What was the name of the firm?

Handler: Charles Handler. And it was a- it was a general practice. I- I got a- a wonderful exposure to-- it was just a cross-section of law. And thereafter, I joined the Attorney General's office.

Q: First Assistant?

Handler: Oh, I was-- I became First Assistant after several years and remained in the Attorney General's office for about six or seven years.

Q: And then what governor put you on the bench first time?

Handler: Governor Hughes.

Q: And I think the rest-- I think the rest we have filled in along the way.

Handler: I hope so.

Q: Thank you very much Justice Alan Handler