

**THE HISTORICAL SOCIETY
OF THE NEW YORK COURTS**

ORAL HISTORY PROGRAM

**Hon. Judith S. Kaye
Former Chief Judge of the State of New York**

**Part I: Childhood and Education
Part II: Law School and Firm Life
Part III: Court of Appeals Years
&
Part IV: Court of Appeals Years Continued
Chief Judge of the State of New York: Administering the
Court System
Life After The Court Years**



Found on exterior entrance to New York Court of Appeals

KAYE

**THE HISTORICAL SOCIETY
OF THE NEW YORK COURTS**

**140 Grand Street, Suite 701
White Plains, New York 10601
914.824.5717
History@nycourts.gov
www.nycourts.gov/history**

ORAL HISTORY

Subject:

**Hon. Judith S. Kaye
Former Chief Judge of the State of New York**

An Interview Conducted by:

Anne C. Reddy and Hon. Robert M. Mandelbaum

Dates of Interview:

September 26, 28, 2011; October 19, 20, 2011

Location of interview:

**Skadden Arps Slate Meagher & Flom LLP
4 Times Square, New York, New York 10036**

KAYE

In 2005, *The Historical Society of the New York Courts* (the Society) established an oral history program to document the recollections of retired Judges of the New York State Court of Appeals (New York's highest court), retired judges and justices from other courts in the State, and prominent New York lawyers (Subjects). Starting in 2009, all interviews were videotaped. Interviews prior to that time were either audio or video taped. Interviews were conducted by informed interviewers, familiar with both the Subject and New York jurisprudence (Interviewers). The transcripts of the record are reviewed by Subjects and Interviewers for clarity and accuracy, corrected, and deposited in the Society's archives. An oral history transcript is not intended to present the complete, verified description of events. It is rather a spoken personal account by a Subject given in response to questions. It is intended to transmit the Subject's thoughts, perceptions, and reflections. It is unique and irreplaceable.

All uses of this transcript are covered by a signed agreement between Subject, Interviewers, and the Society. The information is thereby made available for purposes deemed suitable by the Society, including research and education. All copyrights and literary rights in the transcript, including the right to publish, are reserved to the Society. No part of the transcript may be quoted for publication without the written permission of the Society.

Requests for permission should be emailed to the Society at History@nycourts.gov or mailed to the Society at the address appearing on page one. The request should identify (i) the user, (ii) the intended use of the materials, and (iii) the passages to be quoted.

It is recommended that this oral history be cited as "An Oral History of Hon. Judith S. Kaye, conducted on September 26, 28, 2011 and October 19, 20, 2011 by Anne C. Reddy and Hon. Robert M. Mandelbaum, at Skadden Arps Slate Meagher & Flom LLP by The Historical Society of the New York Courts."

**FROM FARM, TO FIRM, TO LAWYER HEAVEN:
THE STORY OF NEW YORK'S FIRST FEMALE CHIEF JUDGE**

Acknowledgements	ii
Introduction	iv
Chapter 1. Childhood through College	1
Chapter 2. From Law School to Law Practice	28
A. Law School	31
B. Forays into Law Firms	41
C. The Hunt Goes On: Just Hanging In	58
D. The Olwine Years	65
Chapter 3. My Life in Lawyer Heaven	72
A. Arrival in a New World	72
B. Getting Down to Business	92
C. Confronting Our State Constitution and Press Issues	106
D. Family Law Issues	114
E. Assorted Other Writings	124
Chapter 4. The Transition to Chief	129
Chapter 5. My Judicial Role	144
Chapter 6. My CEO Role	182
A. An Unforgettable Introduction	182
B. Jury Reform	185
C. Problem-Solving Courts	199
D. The Commercial Division	208
E. Family Reforms, etc.	211
F. And Everything Under the Sun	215
G. September 11, 2001	217
Chapter 7. Courthouse Renovations and Other Innovations	225
Chapter 8. Judicial Salaries: A Punch in the Gut	246
Chapter 9. The After-Life	253

From Farm, to Firm, to Lawyer Heaven:
The Story of New York's First Female Chief Judge

Acknowledgements

Having now celebrated my 25th anniversary as a Judge of New York State's high court (the Court of Appeals), my 50th as a member of the Bar, and my 75th as a female, I have begun thinking it presumptuous to wait another quarter-century to tell my life story. The catalyst for this writing was my Oral History, conducted by two former Law Clerks, Anne Reddy and (now-Judge) Robert Mandelbaum, under the auspices of the Historical Society of the Courts of the State of New York.

Frankly, I had from time to time toyed with the idea of writing my life story, and learned about the process for getting it published (if even possible, other than privately). I would, for example, first need to formulate a full book proposal—with an attention-grabbing introduction—and then hopefully a publisher would direct me to a person who would hear my stories and help shape a compelling manuscript. Indeed, I started down that pathway and, with the assistance of Nan Gatwood Satter, produced part of the Introduction that follows. But having studied the Oral History transcript handed to me for proofreading, I cannot imagine doing a better job of telling my story than Anne and Robert evoked, and that discovery for me became determinative. Thanks as well to Marilyn Marcus, the Society's Executive Director (who patiently sat through it all), to her Assistant, Michael Benowitz, to videographer Nick Ullo; to the Clerk of the Court of Appeals Andy Klein, and to the State Reporter Bill Hooks (who furnished

KAYE

the footnotes).

Some of the delays along the way—this was, after all, recorded in September and October 2011—are significant, and I have supplemented the transcript a bit. What accounts for the delay? For a time, parts of the video had gone astray, but fortunately were found. Also, during my post-Chief Judge years I was diagnosed with stage-four lung cancer (never having been a smoker) and for a substantial period endured loss of voice and hair, unsuccessful surgery, chemotherapy and other treatment, which I have tried to keep private. With life at the Skadden firm filling my day, I had little taste for adding active pursuit of my biography. Daunting new scans, along with the discovery of the lost video, seemed a signal to me to dust off the transcript and get going. I am grateful to the court system, particularly Chief Judge Jonathan Lippman, for allowing me to amplify and use my Oral History in this fashion, hopefully to help raise public awareness about our justice system in general, and the great Court of Appeals in particular, and by my story encourage women—and nonwomen—to dream large and hang in. You can do it! You can do it! I am supplementing my Oral History with an Introduction and a final chapter on “After-Life.”

No acknowledgement would be complete without expressing thanks to my fantastic, loving family—my children and grandchildren, and my professional family.

Introduction

Very early one cold and snowy morning in December of 1992 at Court of Appeals Hall in Albany, New York, I picked up the phone to hear Warren Christopher, soon to be sworn in as newly-elected Bill Clinton's Secretary of State, on the other end of the line: "Judge Kaye, the President-elect would like to see you in Little Rock tomorrow. Just call back and give us your arrival time. We'll have someone at the airport to meet you." Click.

There it was. The call about possible nomination to the position of United States Attorney General, a call that I had been sort of expecting, sort of not expecting, having out-of-the-blue one day appeared on the front page of the *New York Times* as one of the four finalists for the position.

I had been serving on the Court of Appeals, New York State's highest court, for almost a decade, and for me it was truly a dream job. I spent two weeks out of every five at Court of Appeals Hall in Albany, hearing cases that involved novel law issues of broad significance, and three weeks of every five in home chambers (for me, New York City) studying upcoming cases, reviewing motions for leave to appeal, and drafting decisions on cases already heard. Working with my six Court of Appeals colleagues and our remarkable staff was an honor and a pleasure beyond description.

As my staff began filtering into my chambers that December morning, I shared the news of the call, as well as my reluctance to go. I had never thought of myself as Attorney General, and besides, our hard-working court was in an uncharacteristic state of turmoil. Just one month earlier, on Saturday, November 7, we had been shocked by the arrest of Chief Judge Sol

KAYE

Wachtler, our beloved court leader, on criminal charges. As implausible as it may sound, none of us had seen this coming.

Now New York's Court of Appeals needed a new Chief Judge, and I was one of the candidates under consideration. No, I decided, most definitely I would not go to Little Rock, despite my staff's importuning. My law clerk Joe Matalon even insisted that it was "unpatriotic" for me not to go. The matter was quickly resolved: when I tried to get Warren Christopher on the phone to tell him I wasn't coming, I was told that he *made* calls in the early morning, but would not *take* calls until late afternoon. What a sensible thing to do.

By the conclusion of the morning conference (where the Judges discuss and decide cases argued the previous afternoon), word was out about the call, and by the end of the day, three notable things had happened. First, I called back Warren Christopher with my flight information. Second, I spoke with the Fordham Law School librarian (frequently I worked in the stacks there and came to know her well), who located a doctoral thesis on the position of Attorney General, which she was prepared to let me borrow overnight. I wanted to know much more about what the job entailed. And finally, when I hugged Judge Joseph Bellacosa farewell, he observed that we might never again see one another as Court colleagues. The office of Attorney General would obviously take me from Court of Appeals Hall to a whole new world, and soon. I took the train back to the City, picked up the volume at Fordham, read late into the night, and the next morning flew off to Little Rock.

Every detail of that day is forever etched in my mind—the preliminary exchange with Warren Christopher at Transition Headquarters, during which I told him I wasn't sure I wanted to be Attorney General, to which he responded, "Don't worry, you won't be the first to turn us

KAYE

down”; the pre-Christmas bustle at the Governor’s Mansion, with holiday gifts being logged in; the wait for the President-elect in the library, with the sun pouring in over a round table with a legal pad positioned exactly for handwriting by a(nother) left-handed person—likely his Inaugural Address. Within minutes a strikingly tall, handsome gentleman entered the room, held out his right hand, and said, “Hi, I’m Bill.”

We chatted at the round table for surely an hour—with Bill Clinton that’s not hard to do—mostly talking about the Supreme Court of the United States, which was a great mutual interest of ours. (Every summer my husband, Stephen, and I took with us on our vacation the entire Supreme Court term, which makes great conversation for two lawyers in the Alps.) Somewhere in our exchange, I complimented on his commitment to appointing a female Attorney General, but added definitively, “I’m not your man.” On my return to New York City late that night, Stephen told me those words would assure my choice even though it’s not at all what I had intended.

I knew we were going on too long because I could see someone anxiously pacing back and forth outside the door, concerned about getting me to the airport in time for my flight. The President-elect, however, had one more stop in mind: the kitchen, spread with fabric samples, where Hillary was making choices for the upcoming Inaugural. Our friendship had flowered around the American Bar Association Commission on Women in the Profession, which she chaired and I later joined. Frankly, I didn’t need an airplane to get me back to New York City—I was flying on my own.

First thing the next morning, I called Warren Christopher to withdraw my name. On the one hand, I could not imagine a more challenging or fulfilling job than the one I had. On the

KAYE

other hand, I could not see myself as Attorney General. I think the President made a great choice in Janet Reno, and I've never had a moment's regret about my decision. The tragedy at the Branch Davidian compound outside of Waco, Texas would have wiped me out.

Meanwhile, the selection process for the new Chief Judge was going forward. The list of seven candidates that went from the Commission on Judicial Nomination to Governor Mario Cuomo was otherwise all male: Will Hellerstein, Lewis Kaplan, Howard Levine, Leo Milonas, Dick Simons, and Joe Sullivan. Dick and I were plainly the frontrunners. We had been well-regarded Associate Judges together on the Court of Appeals since our appointments eight months apart in 1983, and now Dick was Acting Chief Judge. (The remaining four Associate Judges saw it the same way—none of them applied.) Hard as I tried to be level-headed, I could not imagine Governor Mario Cuomo picking Dick—a Republican, 11 years my senior, four years short of mandatory retirement—over me. Just to heighten the anxiety, however, on Sunday evening February 21, Governor Cuomo's office called us both to inform us that he would announce his choice the following morning. Despite a snowstorm, Stephen and I went out to see "Chinatown," a movie we didn't love, but it sure was a good distraction. At 7:20 a.m. the following day, I received Mario's call, and we were off to Albany. It did not escape notice that the *New York Times* story announcing my selection included the line "after Wachtler's resignation, a steady hand is sought."

Four weeks later, on March 23, 1993 (my daughter Luisa's birthday), Acting Chief Judge Dick Simons (incredibly, it was his birthday, too) swore me in as the 22nd Chief Judge of the Court of Appeals and Chief Judge of the State of New York (Chief Judge in New York includes both titles). Seemingly minutes earlier, Byron White had announced his resignation

KAYE

from the United States Supreme Court, and now I was in the press again not only for my appointment to the top judicial position in the State of New York, but as a potential Supreme Court Justice as well.

Two weeks later, Mario Cuomo and I were described in the papers as Supreme Court candidates identified by Administration officials; also mentioned was the fact that President Clinton openly preferred a woman for the position. By Thursday, the papers announced that Mario had withdrawn his name from consideration. Immensely concerned about the impact of all the fuss on my treasured Court of Appeals, and my own new role as its Chief, late that morning I phoned Stephen at his office and asked him to meet to talk this through with me. Over coffee at what was then Barclays Hotel on 49th Street, now the Intercontinental, we hashed it out. Stephen's words crystallized it all for me: "Do you really want this? Whether you do is a question of strategy. If yes, then the rest is tactics."

Strategy? Tactics? For the brand new Chief Judge? Only 16 days earlier, in Court of Appeals Hall, I had taken an oath to perform the duties of my extraordinary State office to the best of my ability, and now, at the very moment when the tremendous upheaval in our court might be settling down—when indeed I might be a force in helping to settle it down—I was thinking about strategy and tactics for personal advancement? No. I walked back to Chambers, phoned Bernie Nussbaum, a long-time friend and President Clinton's Counsel, and withdrew my name. Bernie fussed a bit: "What is it with you New York people? First Mario and now you. It must be something in the water."

Over the course of my 10 years as a Judge of the Court of Appeals, my views on the role of the state judiciary as a force for positive social change, in addition to the cases ruled on,

KAYE

had evolved in important and unexpected ways. At the time of my conversation with Bernie, along with my judicial role, I served as Chair of the Permanent Judicial Commission on Justice for Children; I saw several effective reforms introduced by Sol; and I saw how, as New York's Chief Judge, I could spearhead initiatives that would measurably improve both the efficacy of the state courts and the experience of New Yorkers. Community Courts, Drug Treatment Courts, Jury Reform, a Commercial Division—all of these were possibilities waiting to happen. I found myself excited and energized by this enormous potential for change, and as I reflected on my conversation with Bernie, I had to agree with him that the stars *were* indeed perfectly aligned for me at that moment. It's just that they were pointing me in a direction that was not the one that Bernie or others might have taken. I was ready to follow that direction and get to work.

* * *

Just a word about the universe I will be describing—the world of law and courts, especially state courts, the center of my professional life.

Our great democracy rests on three branches of government: Executive, Legislative, and Judicial. The first two branches are popularly elected to serve the will of the people, unlike the third branch, which by design independently checks the other two, to assure adherence to our nation's fundamental values. At the federal, or national, level—defined by the United States Constitution—the President heads the Executive branch, Congress the Legislative branch, and the Supreme Court of the United States the Judicial branch. There is as well a completely separate, parallel system of government in each of the 50 states, starting with 50 State Constitutions. In New York, the Governor heads the Executive branch, the State Senate and Assembly the Legislative branch, and the Court of Appeals of the State of New York (called the

State Supreme Court in most other states) the Judicial branch. Though critically important to our nation and our lives, the Judicial branch—for a whole host of reasons, good and bad (such as remoteness from the public in order to retain independence, and obscure writing)—is the least familiar to the public. Despite their huge dockets, touching the everyday lives of our citizenry, the state courts are even more unknown. “The courts,” in the eyes of the press and the public, largely start and stop with the Supreme Court of the United States.

Hopefully my story, focused on the high court of the State of New York, will offer a bit of illumination.

The Court’s home is nestled between the County Courthouse and City Hall in Albany, diagonally across from the State Capitol, with a small park in between. Now known as Court of Appeals Hall, the building—a white marble Greek Revival structure—was originally known as State Hall, and was completed in 1842 to house State offices. The Court of Appeals itself officially began in 1847—the State Constitution of 1846 declares that “there shall be a Court of Appeals”—and it was originally located on the third floor of the Capitol. Interestingly, an apparent contest between two leading architects of the day—H.H. Richardson and Leopold Eidlitz—as to who would design the Capitol was resolved by “dividing the baby” between them. The space occupied by the Court of Appeals thankfully fell to Richardson. In 1917, when the Court moved from the Capitol to occupy State Hall, Richardson’s courtroom—including the floor-to-ceiling hand-carved oak paneling, the furniture, and the Mexican onyx (nonworking) fireplace (what a treat it is to sit in the courtroom’s fireplace!) was—except for the ceiling—fully dismantled and moved to what has ever since been known as Court of Appeals Hall. The ceiling was “mocked in” to match. The courtroom is not the largest, grandest, or most ornate I have ever

KAYE

seen, but there is none more beautiful.

That aside, it is truly the people of the Court—the Judges and staff—who make it such an extraordinary institution. The dedication of the staff—many of whom have served for decades—can only be described as genetic. It’s a family I joined back in September 1983, knowing that I could ask anything of anyone and it would be done; the tradition endures. We share one another’s personal joys and tragedies and delight in the work of the Court, whether keeping the interior staircase rails polished, or cleaning Chambers (which begins before 5 a.m., anticipating the Judges’ early arrival), or assuring that the public’s needs and questions are answered promptly and courteously, or handling difficult dockets superbly. They never disappoint.

As for the Judges, of the 111 Judges who have been privileged to sit on the Court of Appeals from 1847 to date, I have worked alongside 20—roughly 20% of the Judges over the past 167 years—and have known several more of them personally. My testimony based on centuries of firsthand experience, I submit, is therefore unimpeachable: they are phenomenal.

Being a nonresident court I think also helps. The Court—meaning all seven Judges, the only way the Court of Appeals officially convenes—gathers in Albany for sessions of oral argument generally two weeks of every five. The Judges return to their home Chambers to write and study for the three weeks in between. When we were together in Albany, it was dawn to dusk (and beyond) together. The weeks between we exchanged tons of paper but generally did not often see or speak to one another. Always I looked forward to gathering with my colleagues in Albany, and always after two weeks of lively dinners and debate I looked forward to leaving them. And yes, there are immense personal differences among the Judges—some are genuine

“buddies,” some less so. But at the core I encountered quality human beings at the peak of their careers in law, dedicated to the work of the Court.

In the design of the New York State court system, there are trial courts, with case filings of every imaginable variety, civil and criminal—from small claims, to evictions, to property damage and personal injury, to family disruption, to mammoth commercial and constitutional issues—each year numbering in the four million range (more than all the federal courts nationwide), and intermediate appellate courts (the Appellate Division), with cases numbering in the tens of thousands. In New York State, everyone basically has a right to bring a case to a trial court, and (unlike the federal court system) a right to full review of the decision once, generally by the Appellate Division, which has broad “interests of justice” jurisdiction and can address even factual disputes. The New York State Court of Appeals offers a second layer of appeal, but the road to the Court has obstacles, consistent with the objective that the opportunity for yet a second appeal should be more sparingly available. To this end, cases reaching the Court generally must present only law questions, not factual differences between the parties, and the issues must have significance beyond the parties, so that in a relatively few cases the Court can settle legal questions having broad impact.

Before 1986, many cases came to the Court “as of right”—for example, even the opinion of a single dissenting Appellate Division judge was a ticket to the Court of Appeals. In my initial years on the Court, we heard approximately 800 appeals annually, arriving at the courthouse Sunday afternoons for two packed weeks of argument, at least seven a day. That changed radically, for the better, when the Court became basically a “cert” (or certiorari) court, meaning that the Court of Appeals judges largely get to select the Court’s docket, much like the

KAYE

Supreme Court of the United States. The result has been that the Court of Appeals hears roughly 200 cases annually, and I assure you that it's a very full-time job done right, as it is. The nine Justices of the United States Supreme Court hear approximately 75 appeals annually.

One further general observation: civil and criminal cases travel different pathways to the Court. Civil cases since 1986 get to the Court by application, or motion for leave to appeal from a decision of the intermediate appellate court. There are roughly one thousand motions for leave to appeal annually. Motions for leave to appeal are conferenced every morning the Court is in Session—typically they top the daily Conference agenda. It takes the vote of two Judges to grant leave. Criminal cases come not by formal motion but by letter application to the Court—more than double the number of civil motions for leave to appeal. Each criminal leave application is assigned for review to a single Judge in order of seniority, and that Judge alone decides whether leave should be granted.

While cases overwhelmingly arrive on the calendar by grant of leave, in 1985, the New York State Constitution was amended to open yet another significant avenue to the Court: certified questions. These are requests for leave to appeal made not by the parties, but by another court—a federal appellate court or high court of our sister states—and reflect the line between our parallel state-federal court systems. While federal courts and other state courts can opine on issues of New York State law, it's our own state courts that have the ultimate authority to speak to New York State law issues. If, for example, the meaning of a state statute is at issue before the federal courts, they can go ahead and interpret the statute, but the state courts can in later cases overrule them (and have done so). Embarrassing and inefficient. The certification process offers these courts an opportunity to put solely the state law issue to the state court for resolution,

KAYE

retaining the case for application of the law to the facts. Now nearing its twentieth anniversary, the process has worked remarkably well, both efficiently resolving state law issues that find their way into federal courts and personally helping bridge the separation between the two court systems. A good development.

For 25 years, three months, 19 days, and 12 hours—from September 12, 1983 to December 31, 2008, the date of mandatory retirement at age 70, when the doors slam shut—the Court was my professional home. For me, it was Lawyer Heaven.

KAYE

THE HISTORICAL SOCIETY
OF THE NEW YORK COURTS

Oral History Project

SUBJECT: Hon. Judith S. Kaye

INTERVIEWERS: Anne C. Reddy and Hon. Robert M. Mandelbaum

DATES: September 26, 28, 2011; October 19, 20, 2011

Chapter 1: Childhood through College

RM: I'm Robert Mandelbaum, a Judge of the Criminal Court of the City of New York. I'm here with Anne Reddy, an attorney at Proskauer Rose. We both had the great, good fortune to be law clerks to Chief Judge Judith S. Kaye, retired Chief Judge of the State of New York, and we are here today in Judge Kaye's offices at Skadden Arps, to embark on her oral history as part of the oral history project of the Historical Society of the Courts of the State of New York.

ACR: My name is Anne Reddy. I'm here today with Honorable Judith S. Kaye, former Chief Judge of the New York Court of Appeals. We are going to start our session with chapter 1 of Judge Kaye's oral history, which is childhood and education.

JSK: Ready.

ACR: Ready? All right, so the big question is where to begin. Judge, would you like to begin with your grandparents? Would you like to go as far back as -- ?

JSK: I think I'll begin with my parents, both of them immigrants to the United States. My mother arrived as a young child, from a town in Poland called Stavisk, and my father, oh my goodness, my father's arrival in the United States was much more -- what is the word? -- exciting, interesting, intricate, nuanced. My father left his family as a teenager, as an adult

almost, a town called Drohiczyn, which is in what is now Belarus, and was sometimes Russia, sometimes Poland, sometimes Germany, depending on who occupied it. This is something neither of my parents ever talked about, their background in Europe. They both obviously left because life was hardly luxurious and was in fact very difficult, and it was painful for them to talk about these subjects. [0:02:09.4]

You know, since my growing up years and since *Roots*,¹ the publication of *Roots* and everyone's attention to their origins, I just feel so sad that we never pursued this chapter. I wish I knew more about my parents' background.

Now my mother was young when she arrived with her mother and her sisters. My grandfather had come earlier. He became a tailor here. I guess he had to save some money to bring his family. They lived on the Lower East Side and the instant they were able to go to work, they went to work, never finished school. My grandfather died a young man and I know life was difficult. And maybe the one thing I would mention that does stand out for me is that their name was Morris, their last name was Morris. I have the ship's documents on their arrival here, my mother and her sisters. I know the name was Morris and when they arrived here in the United States, the immigration officer told them they could not have their last name because in this country, Morris is a first name, it's not a last name. Imagine that, they just took away somebody's name. Our names are so important to us, for saying who we are. And they gave my grandmother the name Cohen, because my grandfather was a member of the ancient priestly tribe of Jews, Cohanim, so they gave them the name Cohen. More likely, I believe it was to brand them

¹ Alex Haley, *Roots: The Saga of an American Family* (1976).

KAYE

as Jews. The irony is that when my grandfather's brother arrived in the United States he got to keep the name Morris. So a large part of our family is named Morris and a large part of our family is named Cohen. The immigration people took their name away, I remember that. [0:03:59.2]

Now my dad, I don't know where to begin with my dad. I was born in the year 1938, in Monticello, New York. Actually, we lived in Maplewood, New York, outside of Monticello, and it was a long time later that I learned that, my birth and my father being a farmer, these were factors that contributed to his remaining in the United States, because my father had come to the United States illegally. I guess I had seen every now and then, in the family album, photos of my father in Havana, Cuba, selling ties. I didn't ask the questions; I knew they never wanted to talk about it. But apparently, he was deported, caught and deported. I don't have one of those ship's manifests about my father's arrival in the United States. He was apparently caught and deported to Havana, Cuba, which tells me that he arrived from Havana, Cuba, as many Jewish people did back then, in the early thirties. So he spent a number of years in Havana. I'm very eager to go to Havana, I just want to.

I feel no attachment to Poland, which is where both of my parents were born. Poland, I don't feel any connection to Poland, because my parents essentially were driven from Poland. My brother went back there once and took some photographs, both of Stavisk and of Drohiczyn. There are the mass plots where Jews were shot, all of them in one place, and I'm confident many members of my family are there. But my father lived several years in Havana, Cuba, then succeeded in coming back to the United States. I

KAYE

thought he came directly from Havana but years later, when we were going to do something relating to naturalization at the Court of Appeals, I called the County Clerk in Sullivan County (George Cooke), to ask for a copy of my parents' naturalization papers.

[0:06:05.6]

George got them out, and asked me, "Do you know what your father's last country of residence was?" I said, "Sure, Cuba." He said, "Wrong, Panama." So apparently, my father had more difficulties even than I knew. But somehow, years after my birth, again he must have been found. This time he was a farmer, this time he had an American child, that was me, and lo and behold, he became a naturalized citizen of the United States. So that's a very long answer to your question Anne, but that tells you, at least something about my parents, about their passion for the United States of America, especially my father. Both ardent citizens of this great country and believers, above all, in democracy and education and working hard. I think those words would characterize them.

ACR: So your mother arrived quite a bit earlier than your father, with her four sisters, is that correct?

JSK: Yes.

ACR: And then, I think there's an interesting story as to how they eventually met. Is that right?

JSK: Yes, I think so. Well again, I don't have a lot of facts. We just didn't hang around talking about the good old days. My father and his brother, at the time he had two brothers who made it to the United States. Actually, he had a third brother who made it to the United States, and that was a photograph we had in our little family album. I never recognized him, didn't know who he was. It turned out, there's a photograph of him with a young

girl in our family album. He was in fact deported and sent back to Drohiczyn and he was exterminated by the Nazis, so I never did get to meet him. But my father and his two brothers went up to the Monticello area. I think probably there were health reasons, because this was known as “The Mountains.” Honest, I never saw a mountain in the area of Monticello. [0:08:04.4]

But they got up to Maplewood, which is a couple of miles out of Monticello. You go up one hill and then you go up another hill and then you go up a third hill, and there they had a farm called Smith Brothers Farm. It was a real farm. It had a huge barn with cows, it had chicken coops, it had vegetable gardens, and it had a few what we called bungalows, which I, in later life came to understand to be cottages in the fancier places. In the summer, meaning July and August, people would come up and a lot of people from Drohiczyn and Stavisk would come up and rent those bungalows. And actually, I think somehow that’s how my mother and father came to know one another. I think my mother’s family somehow found its way to that bungalow colony and my mother met my father there. And so she came from New York City, where she was working, as I’ve said earlier, from the time she was old enough to look like she was allowed to work. I think the age maybe was 12 or something.

I never knew anybody’s ages or birthdays. That’s another tradition, we never, never, marked birthdays, and I think that probably goes back to the fact that they were sneaking in as employable. You know, it was important for all of them to work the instant they could work because they needed the money, so nobody marked a birthday. I can hardly remember having -- I had a birthday party when I was one year old, and I had a birthday

KAYE

party when I was 15. But it wasn't until I married my husband, Stephen, that I recognized birthdays as a time people celebrate, and that we are truthful about our age, although when I reached 70, I was sorry I didn't kind of cheat a little bit, get a couple of extra years. [0:10:01.7]

ACR: So your mother, and your mother's name was?

JSK: My mother's name was Lena, they called her Lee, and my father's name was Ben -- coincidentally also, and it brings tears to my eyes, my grandson's name.

ACR: And what year -- so they met up in Maplewood.

JSK: Yes.

ACR: In the bungalow community.

JSK: In the summer, at the bungalow colony, right.

ACR: Around what year was that, do you recall?

JSK: I was born in 1938, so I would think not too far before that.

ACR: And your father was occupied at that point as a farmer?

JSK: My father was a genuine farmer and my father absolutely loved the soil. That was the life that he loved and that's how I remember my father, at the farm, although those years didn't last all that long. I think it was a very marginal sort of existence where we eked out our lives. What's interesting is that my brother is four years younger than I, and I discovered only a few years ago that each of us separately had made our way to the farm many times, thinking that maybe we would have it back, because we both felt such a bond to the place, the place of our origin.

ACR: Did either of your parents finish high school?

KAYE

JSK: No, no, not at all. Neither of them finished school.

ACR: So at the time you were born, your mother and father were both working on the farm, and then your brother came along and that was four years after you were born?

JSK: That's correct.

ACR: And what year? Can you give us some dates for your birthday?

JSK: My birthday is August 4, the same day as President Barack Obama, and my brother was born June 21st, four years later.

ACR: And after he was born, how long did you stay on the farm? [0:11:58.9]

JSK: Well, the thing that marks it for me and enables me to tell the story accurately is my birthday, as you've heard, August 4. I started school when I was five years old, so that would have been probably late August, early September, 1943 -- that would have been kindergarten. I've gone to great schools -- the Monticello High School, Barnard College, New York University School of Law. Unquestionably, the finest year of my entire educational life was spent at a one-room schoolhouse in Maplewood, New York. I entered when I was five years old. I remember the teacher, Ms. Kitz. I remember her ringing the school bell every morning, and we had certainly a dozen, or maybe a little more than a dozen kids in that school, of every imaginable age. I can hardly remember the day-to-day, I don't purport to, but the thing that stands out for me is that at the end of that year, probably August, my parents decided no longer to be farmers, that they would move into the "Big Apple," Monticello, New York. They opened a store in Monticello called Smith's General Dry Goods Store.

I remember being tested at the time, after one year at the one-room schoolhouse in

KAYE

Maplewood, New York, and I was placed in the third grade. So it's clear that that one year at the one-room schoolhouse, it was definitely my best school year ever. Obviously, I learned everything that a third grader needs to know, in just one year. So when I was six years old, I entered the third grade at the local Monticello school. That's how I remember when we moved into town and into Smith's General Dry Goods Store. We lived over the store, in an apartment. [0:14:06.5]

ACR: So before we leave the farm for the city of Monticello, do you have any recollection of your parents socializing or your having any leisure activity whatsoever?

JSK: I'll carry it forward, all the way to the end. I never have any recollection of my parents socializing or having any leisure activity whatever. I remember in our entire lives, having one vacation together, the four of us. My parents, my brother and I went off to Atlantic City. I don't know why Atlantic City, but that's the only vacation I remember. Not that we didn't have a great life, I had a great life. It just -- I hope I'm giving you the flavor of what it was like. It was very, very work oriented. I learned the ethic of work and family, we were a close family. My grandmother and my mother's two sisters would come up to Monticello; I told you, the Stavisk and Drohiczyn people. In fact, one family I remember very well was Ralph Lauren and his family. They were from Drohiczyn, the town that my father came from. After my parents' farm was sold, when we were still young, we would be sent, my brother and I, with my grandmother, to a bungalow colony, and very often with the family of Ralph, then Lifshitz, and his mother and father and brothers and sister. So there wasn't any leisure, there weren't any vacations, but I had a very, very good life.

KAYE

ACR: So again, before we leave the farm, I must go back to -- I guess fast forward to a ceremony that was held.

JSK: Oh yes, that was absolutely terrific. [0:16:00.3]

I told you what the farm means in my life, it's home. But some years ago, the wonderful people in Sullivan County decided that they would put up a road sign at the farm, and that was pretty great. I have to share a secret that I've never revealed before, which is that I wrote the stuff that's on the road sign, about my mother and father. It's about my mother and father and my brother, who became senior vice president of Sony Music Corporation, which is a story in itself. He was a musician and although a serious musician, he went off the charts for some years, but fortunately he came back and rose from his artist management company to CBS Records, and then to Sony Music. I think we're both examples of the American dream, absolutely.

But that ceremony was so terrific. People came from the Court of Appeals, the local legislators came, Senator Bonacic² was there, the high school chorus actually sang. It was the best -- it was so schmaltzy, so wonderful. And I have photographs of my grandchildren playing in front of the barn, and the barn is the barn my father built. It still stands there. Regrettably now, there were so many bungalows, that it became impossible, neither my brother nor I could see purchasing that place, with all those bungalows on it. But the house, the house that we lived in still stands, the barn still stands, the chicken coop still stands, and it was so great to see all my family and my friends and my colleagues assembled on what will always be our farm.

² John J. Bonacic, New York State Senator, 1998-___.

KAYE

ACR: I know that you had received some kind of a token of -- [0:18:03.5]

JSK: Oh yes, that's right, thank you for reminding me Anne. A lady gave me the school bell. Can you believe that? Is that wonderful? I cherish that school bell. In fact, it probably needs to be polished but I'm not touching it. I'm leaving it exactly as it is and it's very proudly displayed in my home. I remember Ms. Kitz ringing the school bell, I do, I do.

ACR: So you went from how many students in the one-room school?

JSK: Oh, I think the whole school couldn't have had more than a dozen of them. I went to a huge school, which probably had 20 kids in the class, in the one class, in the third grade. And I remember at the time we had these two sets of -- we had the A class and the B class, and I was put into 3B. I can understand that they were worried about me being just six years old in the third grade, but from then on I went into the A class, to 4A and onward, at the Monticello school.

ACR: So one year of kindergarten.

JSK: One year of kindergarten.

ACR: Reading at the third grade level.

JSK: And math, and just think of all the things you need at the third grade level.

ACR: I think I recall you telling me that your grandmother used to speak Yiddish.

JSK: Oh yes, and that's something I would enjoy telling you, about those summers, something very precious about those summers. Now you have to understand that as soon as I was tall enough to reach the countertop, I would be conscripted for work at the store. And you know that I am five feet, nine inches tall, so it didn't take all that long for me to become tall enough to reach the countertop at the store. There weren't that many

KAYE

summers away, but when we went for the summer, my brother and I, so that my parents could work without any responsibilities for us, it was my grandmother who took us. My grandmother essentially was Yiddish speaking. [0:20:01.1]

She never learned to read or write English, but she did speak some English. And with my grandmother, I came to know the joys of Yiddish. My grandmother and my Aunt Libby would come up there. She was from Drohiczyn too, with my cousin Marty, and that's when I learned whatever Yiddish I did learn. It's just such a joy to speak it and you know, it always is in there. And especially, the need to learn Yiddish became mandatory for me, because whenever my parents didn't want us to understand what they were saying to one another, they spoke Yiddish. Now I don't understand why my brother never learned Yiddish, but as far as I was concerned, it was absolutely necessary to know everything they were saying to one another.

Just a couple of months ago, in the mail I received an announcement about the Yiddish theater, which I really haven't kept up with. There was a production down at 25th Street I think, and Second Avenue, and it started like at 10:00 or 10:30 p.m. I went. It was fantastic. A little sad because -- well for two reasons. First of all, I discovered I was understanding only about 50 percent. They did do simultaneous translation. And second of all, I worry that this is a dying language. There was a very nice young man who, for about a half hour before the production, gave a little Yiddish class, and there were maybe, 20 people there, and he took us through a little bit of Yiddish. But I'm worried that it's quickly disappearing and it's really a pity.

ACR: So you had relatively miraculous verbal and language skills at a very, very early age, and

KAYE

you took that from the one-room schoolhouse. Did you continue at the Maplewood school and Maplewood High School? [0:22:05.6]

JSK: Oh you mean the Monticello.

ACR: Monticello.

JSK: Let's call it just the Big Apple.

ACR: The Big Apple.

JSK: OK? Because it was a village, which meant that we were about 4,000 people. Now this is big compared to Maplewood, so I was in "the city" when we moved to Monticello.

ACR: So it was Monticello grammar school and then Monticello high school?

JSK: Yes.

ACR: And you continued to develop those skills.

JSK: I guess so. I somehow was drawn to journalism. Everything of course, it's so personal isn't it? It's always one human being who changes your life, and I guess I would have to say that the one person at the Monticello school -- Dr. Stuart Erwin Gay -- probably picked his people, I became his homeroom student. I became an addicted Latin student, loved Latin, he was the Latin teacher. And I became a ferocious debater, because he was also the debate coach. So that was very important in my life, but somehow I gravitated to the newspaper. It was called the Monti Printz, P-r-i-n-t-z. I wonder what it's called today. But I began to love journalism and I remember having my own column at the time, which -- you're not going to go back and look for this are you? Which was interviews with people.

I really enjoyed doing that. I did regular interviews with people and lo and behold, I

KAYE

became the editor in chief of the *Monti Printz*, which -- not bad. At the same time, I was debating, studying Latin, and I also took Spanish, which I enjoyed very much. And you're right, I never associated my love of language and skill in language and love of words with that year with Ms. Kitz at the one-room schoolhouse in Maplewood, New York. [0:24:00.3]

ACR: Well, it is pretty miraculous to go from kindergarten to reading at a third grade level. So during this time, I know that your parents had no leisure time. Did you have any time to devote to outside interests?

JSK: Well I don't know what would be outside interests. I remember being interviewed recently on a program which is about to come up soon, called *Mad About Music*, and I was told to pick some opera pieces, which I did, and the wonderful interviewer, Gilbert Kaplan is his name -- a great program, QXR, just love to listen to it -- asked me whether that's where I got my love of opera. No, absolutely there was not a lot of opera in Monticello. So I don't know what you consider outside interests, because if you think of debating, the debate team traveled. We went to big cities like Liberty, New York and Roscoe, New York and Fallsburgh, New York, you know we were on the road. Of course basketball. I didn't play basketball. No, I'm not much of a sports person. I like it but I don't play it. So that took up a lot of my time, but I don't remember anything beyond that.

ACR: Did religion play a part in your family life?

JSK: Yes, in a sense, we were distinctly Jewish people. What was very interesting about Monticello, in all my growing up years, is that in the summers, and by summer I mean from the July 4th weekend to the Labor Day weekend, basically two months, July and

August, Monticello was very much a Jewish town in a sense that the hotels, the Concord, Grossinger's, all of those places, drew so many Jewish people. It had a distinctly Jewish flavor and I will never forget, never, when I was working in the store, seeing many customers who would come to the store with numbers tattooed on their arms, people who had survived the concentration camps. [0:26:14.1]

There were just a lot of Jewish people in Monticello in the summer. Once Labor Day passed, it became the ultimate Christian community. I just have the picture of the main street and the churches at either end and snow banks. The Jews were definitely a minority community in Monticello, New York. We always belonged to an orthodox congregation. I have to say, my mother kept a kosher home, that's how I grew up, and I did that myself after I was married. We belonged to an orthodox congregation, which meant the women sat upstairs. And what I especially remember is the day of fasting, Yom Kippur, all the women sat upstairs and just talked about cooking and food.

Religion -- I always was very conscious of being a Jewish person growing up. We had certain rules, I call it the modified American plan. For example, our store was open on Saturday, the Sabbath, which meant we worked on the Sabbath, but I was not allowed to knit on the Sabbath. So some rules, we tried -- I was aware of the difference of being a Jewish person. And now that you -- you know, once you start down memory lane it's hard to come off it. Another most unforgettable moment of my life since we had a store, and I always loved Christmas. Christmas is just so wonderful. [0:27:58.3]

I remember starting Hebrew school and the Rabbi asking what our favorite holiday was and yes, I did it, I did it. So I get reward points for being honest and I guess I get a little

KAYE

demoted for being kind of insensitive, stupid. Anyway, I did say Christmas, and it is. I love Christmas, love, love, love Christmas.

ACR: So what else sticks out about your high school memories? Anything, before we get to your senior prom?

JSK: I can't remember in particular. I'm sure that tonight on reflection I'll remember a lot of things, but my senior prom, all I remember about that, and it really tells you things more about my father and mother than about me. The thing that stands out for me most about my senior prom is that here was my father, a refugee from Europe, a very heavy Jewish accent. He had been left-handed, born left-handed and forced to become a right-handed person. Back then they did it. When I was in school, it was not a great thing to be a left-handed person. It was sort of a tiny, tiny, tiny disability. We used to have penmanship class, and it was really bad in penmanship class because my hand would go over everything I had just written, and so I messed up those little circles that you used to have to make. And also, I always remember at exam time having to sit at the back of the class, because when I write I always slant my paper out, and that was obviously not a thing to do when you're taking exams, for other people to see. So I used to have to sit at the back of the room. It was still different to be left-handed.

But here was my father, he was a very tall man, and just wonderful. I've told you about my dad. But he was an Eastern European immigrant, he was, in his heart and soul a farmer, loved being a farmer, a person of the soil. [0:30:01.4]

When it was time for me to go to the senior prom -- and by the way, our Smith's General Dry Goods Store morphed into Smith's Apparel, a ladies store. I don't think in my entire

KAYE

life I was ever allowed to buy anything retail, so long as we had the store. Everything had to be wholesale or gotten through the store. My father would -- well, a lot of salespeople would come to Monticello and they would buy things at the store, or we would come into New York City and go to the Lower East Side and buy merchandise, fill up the car with merchandise. But the store also was stocked in large part by my father coming to New York City and buying all the clothes that were sold in the store. How on earth did he do that? I just can't believe he had any -- where did he get a fashion sense? There was the senior prom coming up in June, and my father came from New York City back with a dress that fit me perfectly and was one of the most beautiful dresses I ever owned in my entire life. How did he do that, I don't know, but that's what I wore to the senior prom, and that's what I most remember about the senior prom.

ACR: And he surprised you with that dress.

JSK: He did, and it was so beautiful. I remember it in great detail.

ACR: Blue organza.

JSK: Blue organza, you see word has gotten out.

ACR: So, during those last years of high school, obviously you were thinking to the next step, thinking probably bigger than Monticello at that point.

JSK: Definitely. Out of Monticello is what I was thinking basically, yes. I think we were about 60 people in my high school graduating class. A large number of people -- now we're talking about the year 1954, the year of *Brown v Board of Education*,³ and I would say of my classmates, a good percentage did not go to college. [0:32:02.7]

³ 347 US 483 (1954).

Many of them stayed in Monticello. That would have been an acceptable option, working in the phone company, working for Con Edison. That's not what my parents hoped I would do, but many of my classmates and friends did that. Then a very large number of them went to what was then called State Teacher's College. I would say probably those who went to college mostly went to State Teacher's College. And after that, everybody went either to Syracuse or to Cornell. Those were the two schools that Monticello High School people went to. So, while I applied to Cornell and Syracuse, I knew that because everybody was doing it, that I was not going to do that.

I guess I had come -- I told you I was, by this time a committed journalist. In fact, given my love of Spanish, I kind of thought maybe I'd go to South America or something that would really upset my parents. I didn't want to be mean to them, this is just part of growing up I think. I came to a conference at Columbia School of Journalism, probably during my junior year, and I thought, "My goodness, this is just the perfect place for me to be, at the Columbia School of Journalism," which of course was a graduate school. But right across the street from Columbia School of Journalism was Barnard College. I don't think anybody from Monticello had ever gone to Barnard College. I haven't researched that. But that made Barnard College very attractive. Now mind you, when I graduated from high school I was 15 years old, thanks to the one-room schoolhouse in Maplewood. I was 15 but I was always so tall. You know people always thought I was much older, even when I tried to get into the movies at a child's rate. I used to have to carry my birth certificate. [0:34:00.3]

But anyway, I applied to Barnard College and I also applied to Syracuse. I'd say honestly,

I think I made plans to go to Syracuse, but I just was determined to go to Barnard College, which was upsetting to my parents, for the reason that living on campus in New York City was not their idea. Now I did turn 16 in August, but that was not their idea for a 16- year-old person, living in the wilds of New York City, so we made a deal. We struck a deal that I would come to Barnard College but I would live -- my grandmother lived in the Bronx with her two daughters and the deal we struck was that I would come to New York City, to Barnard College, but I would live with my grandmother in the Bronx. When you think about that today, the idea that instead of the security and safety of a dormitory and the rules of a dormitory, I would be commuting by subway, up to the Bronx. I don't know, but I did it for a year, I lived with my grandmother. I determined, at the end of that year, that I would live in the dormitory. So much in life is coincidental, synchronicity, serendipity, whatever you call it -- my grandmother died that year, and I never had to tell her that I was not going to continue living with her.

But I did enter my second year at Barnard College living at Johnson Hall, which gave me a reward no one had contemplated, because when you lived at the dormitory at Barnard College, there were rules; there were a lot of rules. Johnson Hall was a place where graduate students lived, women, and transfer students and you know, a kind of older, mixed crowd. Two floors of Johnson Hall. I passed it just recently -- I always look at it and think lovingly back to those days. [0:36:04.9]

Two floors, the seventh and eighth floors, were reserved for Barnard College students. In fact, Rena Uviller,⁴ a judge of the Unified Court System, she was Rena Katz, and she was living there too. But the rules at Johnson Hall were nothing compared to the rules at

⁴ Rena K. Uviller, Justice of the New York State Supreme Court, 2000-___.

KAYE

the Barnard College dormitory, I mean curfew was maybe 11:00 p.m. or something like that.

Back then, you know you could really just pretty much write your own ticket, so I'm grateful to my parents for not letting me live at the Barnard dormitory for a year.

ACR: So when you first came to Barnard, did you have any kind of orientation?

JSK: Yes, oh yes, yes. Back then -- I wonder if they still do it -- we had posture, we were tested for posture. Do they do things like that anymore? I don't know. It would have been a good thing for me, because given how tall I got so early in life, I always tended to slouch down, just try to look like everybody else. But anyway, I do remember the posture test, but even more, I remember what was called a Rorschach test, which was given to all entering students. I remember being seated next to a person, and I always had this very curly hair and I couldn't control it, yearned for that kind of very intellectual, cultural look of just letting your hair hang loose, parted down the center, sort of hunched over a book or something, and that was what the person was sitting right next to me. And they show, this thing comes up on a screen, which I didn't have to agonize over, I knew it was a rooster and I wrote rooster. And then I looked over at the paper next to me -- this was not a competitive examination -- and that person had written Dante's *Inferno*. So I didn't think I would last long at Barnard College, because that's what a lot of people looked like. I guess I knew what Dante's *Inferno* referred to, but I had no idea what it looked like. [0:38:02.6]

And you know something, I still don't know what Dante's *Inferno* looked like, but I did know that was a rooster. I worried a lot about what life was going to be like at Barnard College, which in fact they complicated it a little bit for me by allowing me, in my choice

KAYE

of electives, to take philosophy. Now why on earth did some guidance person let a 16-year-old from Monticello, New York, sign up first semester, for a course in philosophy? That was ludicrous, just ludicrous. I had other -- I guess there were a couple of required courses, and I spent a long time agonizing over whether I would follow the path of Latin, which I loved, or whether I would follow the path of Spanish, which I loved. The Spanish Department at Barnard College utterly captivated me. That was not just a language department, that was a way of life. There was so much outreach and they were so welcoming and all, and so I went down the path of Spanish and took Spanish all my years in college.

But a great thing happened to me. I would have flunked out of Barnard that first semester, no question about it. I could never have survived an exam in philosophy. But I got the mumps during exam week. Just amazing how these things happen. I definitely would have been back in Monticello, New York, but for the mumps. The mumps were a little embarrassing, but definitely, you had only to look at me to have proof beyond all doubt. And so I missed all the exams. Most especially, I didn't have to take that philosophy exam for, I think, two years. I took some other exams and then we just parceled them out over exam periods, over the next couple of years. I never would have made it through philosophy in 1954. [0:40:07.9]

ACR: And Barnard is an all-women's college.

JSK: Yes.

ACR: Did you have any recollections of enjoying being at a school with only women? Did you have mainly women instructors?

KAYE

JSK: Well, mostly I look back and I just can't know what I was feeling at the time, but when I look back it is only with enormous, enormous gratitude to Barnard College. What a mistake it would have been for me to go to Syracuse University, given my age and utter lack of sophistication. I can't imagine being placed in a huge campus like that, or Cornell. But at Barnard, I think the fact that it was a single-sex college, the fact that it was relatively small, very high standards, very individual oriented, was critical. I told you about my adoption by the Spanish Department. I just fit right in and I hope I had those thoughts when I was there. I think I had a very enjoyable time at Barnard College.

ACR: What was the social or political environment like during those years?

JSK: Well see, I was a newspaper person and I only remember growing more radicalized as I got closer to graduation and was writing for the paper and all that. I graduated in 1958. I remember going to see Fidel Castro at the Hotel Teresa. He was up here being celebrated at the time for overthrowing Batista and I actually walked across the park and went to see him. I remember writing -- I got to be the editor in chief of the newspaper and remember writing editorials to upset the administration. I mean I was hardly a barn burner, but I just was having my consciousness raised. [0:42:03.0]

And I remember the terrible ruckus when I recommended abolishing the mandatory food plan at Barnard, which didn't make any sense to me. I think it's gone now but I haven't checked lately. But I think I did OK at Barnard, four very good years.

ACR: So at this point your family was well aware that you were pursuing journalism.

JSK: Absolutely. Not happy about it at all, but it was a lot better than what my brother was doing.

KAYE

ACR: And what was that?

JSK: Nothing good. I think he was with Blood, Sweat & Tears.

ACR: Oh, really?

JSK: Yes.

ACR: Wow, that's pretty interesting. At that point, you were envisioning graduating, and I assume you thought you were going to get out into the real world and take it by storm?

JSK: Absolutely, you know it. I was going to be a major -- I thought, because of my love of Spanish and actually, the major that I chose at Barnard College was not Spanish but close to Spanish, and it was called Latin American Civilizations or Latin American Areas, I don't remember which, and it had a particular allure for me because it enabled me also to take courses at Columbia. Remember, Barnard was, as it remains to this day, a women's college, and there was Columbia across the street. When I became a Latin American Areas major, I could take courses at Columbia as well as Barnard, and I studied Portuguese. I studied things about the Latin American civilizations that would not have been given at Barnard, and that just sharpened my desire to be a journalist, maybe traveling in Latin America. There were all kinds of interesting things going on in Latin America. I think I applied for a Fulbright. [0:44:01.6]

And you know, I never got an answer, which leads me to think that it came to Monticello and that my parents destroyed it. That's the only explanation. You can't apply for a Fulbright and never get an answer, right? I think I applied to go to Peru, which was a special interest of mine because of the ancient civilizations that I had studied a lot. But there I was with no Fulbright and no job. I went looking for a job as a newspaper

reporter, so that was a pretty distressing time in my life. And ultimately, I traveled a lot around the eastern part of the United States, in search of a job as a newspaper reporter. I had been what they called a stringer, for the *New York Herald Tribune* at the time, which meant that I reported campus news to the *Herald Tribune*. I used to go there every week and have a desk at the *Herald Tribune*, where I wrote about things on campus, but they did not offer me permanent employment. It was very hard to get permanent employment as a journalist back in the year 1958.

So I tried a lot and got a lot of rejections, and was miserable for a while, until I finally took a job with the *Hudson Dispatch* of Union City, New Jersey, and that was right across the river. The job I ultimately took was not as a world shaper of opinion, writing about Latin American revolutions and ancient civilizations in Peru. The job I took was as a social reporter for the *Hudson Dispatch* of Union City, New Jersey, which was not what I had intended for myself.

ACR: So at this time, were you living in the city?

JSK: At this time, I was living in the city with my aunt. I made very little money, it was hard.

[0:46:01.3]

She had, by this time, moved into Manhattan. My grandmother had passed, and so we lived together in Manhattan. And I would take the bus over from Port Authority, over across the river to the *Hudson Dispatch* of Union City, New Jersey -- I guess I remember a couple of positive things and I've searched my mind hard to remember positive things. Maybe best of all about the daily trip was that the newspaper was in the shadow of the burlesque theater. I don't know that everybody knows any more what a burlesque theater

is, but it was a very nice thought that people -- I would imagine people on the bus thought I was going to work at the burlesque theater. I kind of enjoyed that, that was fun, I made a lot out of that. And the other thing I remember and it's funny how these things stay in your mind, because how many -- this is 1958. I remember having to go to these women's club meetings. I reported weddings and church socials and all sorts of women's events, and I remember that they started every meeting, every women's club meeting with what they called the club collect, which goes this way: "Please God, keep us from pettiness. Let us be large in thought, in word and in deed." That's how every meeting started. And you know, they never succeeded in doing that.

But it got to be pretty grim, going to the *Hudson Dispatch* in Union City, New Jersey, and reporting on all of these events. So I got the idea that I would go to law school. And I think actually, I got the idea from reading about Tony Lewis or reading even some of his pieces, and learning that he never went -- he went to the Yale Law School but he never went to law school intending to be a lawyer and he never completed law school.

[0:48:02.8]

He just went to sharpen his skills as a journalist and to expose himself to legal things and my goodness, he got to be reporting on the Supreme Court of the United States, writing for the *New York Times*. I thought, "Gee, I could do that," so I applied to the NYU Law School at night -- at the time, they had an evening division, I was accepted. I'm sorry they've done away with the evening division, because we had such an interesting class of engineers and accountants, people who wanted to be patent lawyers, tax lawyers. We had police officers, a really interesting mixture of people, and I did that. I then left the

KAYE

Hudson Dispatch of Union City, New Jersey and took a job with a feature syndicate here in Manhattan, to make it easier for me to attend law school, instead of commuting over to New Jersey.

And so I took a job as an editor with a feature syndicate (General Features, at 250 Park Avenue, second floor), which was a lot of fun. I got to edit a bridge column, which I remember with crystal clarity, since I have no idea how to play bridge and no interest in playing bridge. But I got to be very friendly with the guy who was writing the column, Sheinwold was his last name, and I think he was a big name in bridge. And he was always calling to thank me because if he said somebody played a card and the person didn't have that card in his hand, or if somebody was supposed to have X number of cards and had Y number of cards, I could always point that out to him. And then there was somebody who wrote a fashion column, who didn't know how to speak English, and so I could translate what he sent up from Mexico or someplace like that. It was a general feature syndicate.

So that was kind of fun and I started law school at night, at NYU Law School. I don't know -- remember how many women; we were very, very few. Gee, suddenly that got to be -- the nights were far more interesting than the days and ultimately, you know the switch. [0:50:08.2]

ACR: Well, I was just going to say, let's save law school for chapter 2, and let me ask you just a few more things about how your family was perceiving this choice to attend law school at the time.

JSK: Well, it was definitely not their most favorite thing that I could do. I told you it would

have been acceptable even if I stayed in Monticello, but that was lower on the list, that was definitely not their intention. It was acceptable, but barely so, if I married the young Monticello man to whom I became engaged after my first year at Barnard -- I broke that off on returning for my sophomore year. Probably, my parents' number one priority would have been for me to be a teacher. They viewed that as God's work. I do too. They would have been so proud if I had become a teacher. The journalism thing, that was not something that had any interest for them at all, and as it turned out, I was not making any great success of it either. Law school was very hard for them to swallow that, and the reason was that -- I remember their saying to me, "Nobody will marry you." That was a big thing on the list at the time, you know in a small town where my high school classmates, who stayed in Monticello, they were married and having babies, and the idea that I would be going to law school, I mean it was pretty preposterous in many circles at that time.

And I have to tell you, in Monticello, the lawyers, they were held in very high esteem and I remember in particular one lawyer, Bernard Weiss, I know his son came ultimately to New York City to practice law. He used to be called Lawyer Weiss. That's what people thought about him in Monticello, it was like Dr. Breakey and Lawyer Weiss. They were really valued individuals. But not for a woman. [0:52:05.0]

So the idea of my going to law school and my practicing law was, you know, not really high on their list. They would have preferred that I married and became a teacher in Monticello.

ACR: So, we'll conclude with you were pursuing law in furtherance of journalism.

KAYE

JSK: Absolutely. Never with the intention of finishing law school or being a lawyer, never. I think there was one lady lawyer in Monticello maybe. I don't think I had ever met her. I didn't know any lady lawyers.

ACR: You had experienced a little bit of difficulty finding a job in journalism. Did you attribute that to gender or at that point was it merely that you wanted to increase your skills through the law?

JSK: Well, I think it's just hard to get a job as a journalist, that's always been true and I think it's true to this day. It's definitely a profession that's hard to break into. It was particularly so for me as a woman, undoubtedly. A man would have had less difficulty than I did.

ACR: All right, well thank you, and I look forward to continuing with law school.

Chapter 2: From Law School to Law Practice

ACR: My name is Anne Reddy. I'm here with the Honorable Judith S. Kaye, former Chief Judge of the New York Court of Appeals. We're about to embark on chapter 2 of Judge Kaye's oral history, which will address law school and early law firm life. But first Judge Kaye, would you like to address the context of where we are now?

JSK: Yes, absolutely. I'd just like to spend a moment on ambience. We are sitting here in my Skadden office. This is my afterlife, my after Chief Judge life, and we're high up on the 47th floor of 4 Times Square, looking out on the Hudson River. But I wanted to point out particularly, two things in my office that are so much a part of my life, and the first is that behind me are photographs of the Court of Appeals. I will surround myself as much as possible, in every conceivable way, with the Court of Appeals of the State of New York, which was my life for more than 25 years and always will be.

And the second is that at my door, the doorstep, is a red shoe, and that for me is symbolic. In fact, I'm wearing red, I love the color red, I'm associated with the color red, but red shoes in particular. The significance of red shoes, and I have lots and lots of red shoes that I wear, red shoes that I display, red shoes that people give me, little souvenir, knick-knack kind of things, but that originated with my thought, and I think it was part of a speech one day, that we need more people wearing red shoes on the bench. [0:02:12.6] That is the symbolic meaning of the red shoe. We have to kick open doors. I mean men can wear red shoes with high heels, that's OK with me, but I really have in mind women, and I think we need more women kicking open doors, kicking open doors to partnerships

in law firms like this, to positions of importance in whatever it is that they do. And in particular, since we have the nerve to call ourselves the justice system, we need more people at the helm, more women at the helm of the justice system, more people wearing red shoes on the bench. And that's the significance, the symbolic significance of the red shoes.

But as long as I've paused and taken Anne off course, I want to mention one more thing that's very, very dear to me, and that's the Historical Society of the Courts of the State of New York. I can't tell you exactly the moment that the Historical Society originated. I know that it had its true development when Marilyn Marcus came with us, and that would have been late 2004, but the seeds of it, as with most good ideas, were much earlier. It takes a while to nurture and grow good ideas. And maybe it was the arrival of Albert Rosenblatt,⁵ Al Rosenblatt, on the bench of the Court of Appeals of the State of New York. I wondered for all the time I was there, I was always curious, and I was there since 1983, at the Court of Appeals. I was always curious about who inhabited my chambers before I was in them. It was impossible even to know that. The Court of Appeals, we're very precedent bound, but in terms of our own history, the history of our own court, the history of the courts of the State of New York, we were just not really good about keeping it for ourselves and for future generations. [0:04:07.0]

And so, Al Rosenblatt, wonderfully curious, endlessly, boundlessly curious person that he is, he and I would often talk about these things. I remember once asking our Public

⁵ Albert M. Rosenblatt, Associate Judge of the New York State Court of Appeals, 1999-2006.

Information Officer for some sort of history of our building, of the people who occupied the building. Who used the books? There were handwritten marks in some of the books that were in my chambers. Whose handwriting is that? And the Public Information Officer at the time had started keeping little folders of the Judges, just really not much, not even an inch thick, but Judge Rosenblatt became interested in that.

Once Judge Rosenblatt is interested in something beware, because he will take it to its very depths. Over the years, over the next years, he began enlarging those little folders, learning more and more and more about the Judges. Eventually of course, there was that wonderful book published, more than a thousand pages on Judges of the Court of Appeals. I think it's wonderful that we have this chronicle and this description of the Court of Appeals. What I love even more about the book is that it brought the whole court together. Each of us wrote chapters. I wrote a chapter. I wrote the chapter on Cardozo.⁶ We all wrote chapters and there we were, digging into the history of the Court of Appeals, and then the interest broadened and broadened and broadened, as justifiably it should have, to the court system in general in the State of New York. We have a great court system in the State of New York. We have a great history and a great heritage, and so with our extraordinary -- I don't know what to call her, librarian, another person boundlessly curious and very scholarly and marvelous at research and everything else, Frances Murray, she joined forces with Judge Rosenblatt and me, and we were sort of rolling along until we hit Marilyn, found Marilyn and got structure and organization and

⁶ Benjamin Nathan Cardozo, Chief Judge of the New York State Court of Appeals, 1927-1932; Associate Judge, 1914-1926.

KAYE

boy, has this ever taken off. [0:06:20.9]

So, I've diverted you long enough Anne, but I couldn't resist giving a little history, because now we have a genuine organization, we have a genuine publication, for which people compete to appear in, unless I brush them aside and put one of my own articles in. It's so exciting to have finally, at long last, this absolutely first rate Historical Society of the Courts of the State of New York, which puts on programs, has publications, has these oral histories. It's so exciting. It's taken us so long but we are here and that's what's important. Now, where were we?

A. Law School

ACR: Well Judge, we'll have to go back to 1959.

JSK: Nineteen fifty-nine, OK. That's a long time ago.

ACR: You had recently left the *Hudson Dispatch*, you were working as a copy editor by day and you had entered the New York University Law School night program.

JSK: Right.

ACR: For your first year of law school. Do you recall what that first year of law school, which is daunting to so many students, was like for you?

JSK: Well, I think utterly terrifying. As I've told you, I didn't really intend to be a lawyer. I intended simply to get off the social page of the *Hudson Dispatch* or the copy editor job that I had, and suddenly I was in a very serious place where -- and maybe the night school, even more serious. There were I don't know how many, a couple of hundred maybe, maybe a hundred. I can't remember the number. Overwhelmingly, accountants,

engineers and police, who -- and now these people coming to night law school, they were dead serious about what they were doing. These people really, really were committed to being great lawyers, they put themselves out a lot to be there. [0:08:19.0]

So it was kind of a terrifying atmosphere but you know, I swallowed hard and squared my shoulders and just went about my business. I do remember, and I know you're going to come back to this Anne, about raising hands and participating in class and that sort of thing, it's an inevitable question. I never did. I just sort of shrunk and hoped nobody would call on me or notice me. But that was, it was a critical moment there, that first year. You know, there are these life changing moments and there was one that very first semester, because we had only a couple of exams at midterm. The big courses, for example contract law, which was totally bedeviling to me, the exam wasn't until the end of the year. But there was a course in civil procedure where the exam was at the midterm. Now here I was going to be found out. We must have been seated alphabetically, I think so. I was seated next to somebody named Kurt Shaffert, who was an engineer and brilliant and older also, significantly older, and Kurt always said great things in every class. He understood contracts, he really got it, and civil procedure and everything. But the first exam period rolled around and as I say, I was mummified by that point, just terrified that I was going to be flunked out. At the NYU Law School at the time, I don't know whether this is true to this day, there was anonymous exam-taking, anonymous grading, so we had numbers. [0:10:02.2]

When the grades came back, I got something close to perfect and Kurt got something

close to 60, and he knew and I knew that our numbers had gotten switched. There was no other explanation for it. And I put among the most terrifying days of my life, the day that Kurt went to see his exam paper, because I knew it was going to be mine and not his, and lo and behold it wasn't. I genuinely earned that grade, and the way I earned it was that I thought about the subject matter, which was civil procedure, I read the question very carefully, which was about credibility of witnesses and some procedural mechanism. It was in the context of a contract law question that's true, and guess what? Kurt wrote about contract law. I wrote about civil procedure. So I say, I learned a really valuable lesson, apart from not being totally negative about oneself. I learned that if you're about to address a subject, consider what the subject is and speak to it and not something else that you happen to know better. And that was really an invaluable lesson in law school. What happened to me is I was soaring. There may have been one other grade, one other exam, I don't remember, but I was really way at the top of the class and that, it starched me up. I did OK in contracts at the end of the year too, but getting a near perfect grade in civil procedure -- We used to have number grades at the time. I don't know what they do today. But having a number like that really boosted everything up. The additional thing that happened is that there -- I can't remember whether it was a class in legal writing. By the way, I have a lot of views about classes and legal writing at law school, which should not be taught by an adjunct who comes for two hours a week to the law school, but should be equivalent in stature to contracts and everything else, it's really important. [0:12:12.3] But I did -- there was a note, a paper I wrote that first year, and I did it, not surprisingly,

KAYE

advocating for a testimonial privilege for journalists. I wanted to write about journalism and I wrote it on the journalist testimonial privilege and guess what? It got published in something called the *Intramural Law Review*. Now, I didn't know about the *Intramural Law Review* going in, I don't know what's happened to it. You know, it actually got picked up by other law reviews too. I remember finding the article in some foreign translation. But here I had suddenly great grades and I had my note, my first writing, published in the *Intramural Law Review*. Not bad. So entering my second year of law school, I was in a considerably better state than my first year of law school. And in fact during that year, I made the decision to seek scholarship aid and to transfer into the day division, which I did. I even had the good sense/nerve to approach the editor in chief of the *NYU Law Review*, to suggest that I be made a member of the *Law Review*.

ACR: So Judge, that early success with your civil procedure exam must have given you some confidence. However, you were one of how many women at the law school?

JSK: Well, I do remember in my graduating class, which got to be the class of 1962, we were about 10 women out of 300. How many were in the night school, honest I can't remember. Very, very, very few, that's for sure. [0:14:02.8]

I didn't spend a lot of time thinking about that in particular. I certainly noticed it but my grief and my anxiety went beyond my gender. It included my gender, and it went beyond my gender. I've already told you that I wasn't the person who shot my hand up all the time, but suddenly I was doing better than they were, so that was a bit spur to going onward, upward and onward.

KAYE

ACR: Was there the Socratic Method at your law school?

JSK: Meaning -- ? Which particular?

ACR: Well for me, meaning that you would be asked a particular question that you really couldn't avoid.

JSK: I guess some of that for sure, and the one time I think I got it right between the eyes was in some kind of tax class, where I was really thrown for a loop and called on. To this day, I say it's another one of those unforgettable moments, that I answered the professor's question just dying on the inside and in turmoil. He had asked me what I was basing my answer on, which I think he meant which sections of the Internal Revenue Code, and I said well just my common sense. And it worked, everybody laughed and he let me alone. So I think by then I was more than squeaking by, I was flourishing.

ACR: Did you have any women professors or teaching assistants or anything?

JSK: I remember zero women professors, and I remember no teaching assistants of any sort back in the late fifties and early sixties. There were a couple of women who are very close friends and stand out in my mind to this day and they're still good friends. Eleanor Fox, who then made her life teaching at the NYU Law School. She was a year or two ahead of me. [0:16:05.8]

Roberta Karmel, I remember she became a Commissioner of the Securities and Exchange Commission, and we became good friends. She was one year ahead of me. No, I think we finished together, because I did move into the daytime class full-time. Nancy Stagg, Helaine Barnett and Phyllis Bamberger. I remember a couple of women and we did

KAYE

network and bond with one another, not about women's -- it was never a matter of gender. I had very good male friends too. I'd say just gender was not at the top of my list at that time, as it shortly got to be.

ACR: So one of your first year successes was the *Law Review*.

JSK: Correct.

ACR: How did you join the *Law Review*?

JSK: Well, I think it occurred to me, I think I kind of instigated it and once I successfully moved into the day division that meant getting a scholarship, because my parents, well first of all, I don't think they could readily have afforded it, and second of all because this wasn't -- they were not the most eager advocates for my becoming a lawyer. I'm not sure at that point that I was yet set on being a lawyer. I got a scholarship. I was living downtown at the time, I got a place to live, so suddenly it all came together for me. And I remember going to meet the editor in chief of the *NYU Law Review*, his name was Bill Williams, William Williams. And he, just a nice coincidence, he went to Sullivan & Cromwell -- but I'm jumping ahead of myself. We got to be associates at Sullivan & Cromwell together. But I went to see Bill about the possibility of my coming on to the *Law Review*. I notice now that law reviews are more open in the sense that grades are one way to get on them generally, writing ability and grades, you know some combination.

[0:18:05.9]

At the time, they were pretty strict about grades entitling people to be on the *Law Review*, and the whole atmosphere was a lot hazier about night law students transitioning into the

day division. I don't know how many we were anyway, but it was definitely out of the rulebook. I went to see Bill, I said I thought I should be on the *Law Review*, because my grades were good enough, and he said, "Do you have a writing sample?" I opened whatever I was carrying and I pulled out the *Intramural Law Review* and I just remember Bill laughing, because he didn't anticipate that now, in my second year of law school, I already would have published a note. I think that cinched it, to give him my writing sample in the form of a published *Law Review* article, and so I did get on to the *NYU Law Review* and I enjoyed it, it was good. I wrote a note that second year, a case note. You know of my interest in Spanish and it was about the Act of State Doctrine and it was a case called -- oh gee, I haven't thought about this in years. It was the *National Bank of Cuba v Sabbatino*,⁷ and it was a very big case in international law. The Act of State Doctrine, if I can divert for just a moment and of course you can't say no.

I remember calling one of the lawyers as I was preparing my case note for the *Law Review*. I identified myself, I said I'm Judy Smith and I'm on the *NYU Law Review*. He said, "Goody for you." Now, that's another -- that goes in the unforgettable comment too, but I guess I deserved it. But my note got published in the *NYU Law Review* and in the third year, I did my big note, and that got published too, because my interest was very much in the area of trademarks and copyrights. [0:20:09.8]

There was a fabulous law professor at the law school, Walter Derenburg, who captured me completely into the field of intellectual property. I just really loved it and maybe that

⁷ *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

also related to my love of the press and journalism, and it all kind of went together. But I did my note on copyright misuse and that got published in the *NYU Law Review*. So I think if you thought, Anne, that there was anything thematic about my love of language, then I think there's something thematic about my love of writing and it certainly -- I think it was the key to whatever success I had in law school and I'm back to my plea to law schools, to have more legal writing.

I think legal writing is so critical to the practice of law and it just does tend to get so sidelined in law school, and here it's so important. And for me, the ability to see a problem, just like a reporter, formulating the lead paragraph, you don't look for the least important things, you look for the most important things, you look for the heart of the problem, the crux of the issue. You want to get it right up there; you want to say what you want to say as efficiently as possible. You don't want long, run-on sentences, you don't want Latin, you don't want semicolons. I mean I think those were very good things that I brought with me to law school, and I think that undoubtedly is what helped me get through the initial period and then get ahead in the later period.

ACR: So Judge, you brought a love of language and a writing ability to law school. Did law school change you or did it develop those skills in a way that you hadn't foreseen as a journalist? [0:22:01.9]

JSK: I think I would have to answer yes, *res ipsa loquitur*, the thing speaks for itself in the sense that writing has always been a great love of mine, a passion of mine, and so has the law. And so has government, and so has our great democracy and political issues and

KAYE

everything just kind of came together for me in law school and through writing. I've told you how important it was all through my career in law school and you certainly know how important it was because you were there, Anne, during my years at the Court of Appeals. And I can assure you, in all the in-between years, the same thing was true, I've always loved to write. It helps my thought process. I'm an extreme note-taker, not a verbatim note-taker but an organizing note-taker. If the speaker hasn't organized what he or she is saying, I do. You know, the written word to me is really important. I'm still a journalist.

ACR: Before we move on to the daunting task of finding a job after law school, was there anything else that stood out about your law school years, either politically, socially, mentors, friends?

JSK: Oh goodness. Again, I think I was really blessed in law school and I regret that I didn't notice even yet, how much in the minority I was, how different my life was as a woman from that of -- all of the people around me had very, very good male friends, very, very good male professors, all male professors. Why didn't I notice? That, as I look back, while I look back on my law school years with great pleasure, I just kick myself every now and then for not having awakened sooner to what should have been evident to me. I did, in law school, have two part-time jobs -- one at the then Dewey Ballantine firm, in the "blue sky department" (an adjunct to federal securities law) and a second, summer, job at Matthew Bender publishers, updating a workers' (then workmen's) compensation treatise. I do recall because I had to synopsise one case about a forest ranger found dead

KAYE

in the back of his vehicle, on the job parked at his work site, suffocated overnight, with his naked girlfriend. Was he entitled to benefits? Yes. [0:24:10.3]

I was very keyed in on getting through, that was always important to me, but I can't think of anything in particular that stands out and -- maybe as we go on.

ACR: Sure.

JSK: After our last session together, you know that night, it's like making an argument in court. You prepare so diligently and you have that kind of mock argument, then you have the real argument, and then you have the night, you know that haunts you in your sleep. So you keep thinking of things, but offhand, I can't think of anything in particular that stands out.

ACR: So you were set to graduate in, I believe it was August of 1962.

JSK: Yes. It had to be August, because I had a year and a half at night and here I was graduating. I was going to be considered a member of the class of 1962. I had had a year and a half of day school, so I had to make up some credits and I did take -- I went in the summer of 1961 and I went in the summer of 1962. So I didn't complete my law school requirements until August of 1962.

ACR: And you began to look for a job prior to graduation.

JSK: I did. By that time, I was one of the crowd of the class of '62, and so I was considered by the employment office to be somebody out looking for a job when they all were. Clearly by this time, I knew I was not going back to the world of journalism, that I was going to seek employment in a law firm. I didn't do that the first year, 1961. I didn't look for -- I

don't think it was as common as it is today, about second year law students having summer employment in law firms, but as mentioned I did work for a publishing company, Matthew Bender, as a summer job, when I finished that second year of law school, the second semester, full-time. [0:26:11.7]

B. Forays into Law Firms

There in the third year I was in the swim, yes. I was in the swim with my classmates who were looking for employment. A member of the *Law Review*, high place in the class, all doors closed to me, everything closed. There was a wonderful lady in the employment office, Dorothy -- I don't remember her last name. And I remember her saying to me, it will be "interesting" to see how you do. I thought it would be interesting to see how I did also.

ACR: Did you have any interviews prior to the doors closing?

JSK: Well, the fact that I -- I think I did not have any interviews, and I sent out letters. Poor Dorothy would try to get people to see me, and I had pretty much solid, closed door rejection. If anybody even answered my letter it would be, "our quota of women is filled." That was a common expression big firms used back then. That meant either that they had one woman or their quota was zero. I can hardly think of an interview that I had. I doubt that there were on-campus interviews back then, I surely do not remember that, and trying to get interviews at firms was really impossible. I did apply to the Federal Trade Commission in Washington, D.C., because I've told you about my interest in intellectual property, particularly copyrights, trademarks, all things of that nature, and I

did have an offer from the FTC. But I had decided and maybe the theme of all this is perverseness, I don't know, but the more I got rejected, the more it became absolutely imperative that I get into one of those Wall Street, you know, white shoe law firms. I mean I just wasn't going to take no for answer and that's all I was getting, was no for an answer, so that made life interesting. [0:28:14.8]

So here I am, back at the firm of Casey, Lane & Mittendorf, for my second interview, the only second interview that was offered to me by anyone. The person who greeted me was a very wonderful gentleman, a friend to this day, a distinguished federal judge, a Judge of the United States District Court for the Southern District of New York, Robert Sweet.⁸ In fact, he was a member of this law firm, such a small world. But when I came into Bob Sweet's office and he said his partners insisted that he make this offer to me, of employment, which sounded already nice to me, I didn't know what the negative was. He said he genuinely hoped I would turn down the offer, he found it offensive. The offer was that they would pay the going rate for a man, for one of my male classmates. I think at the time it was like \$7,200 a year, that's what it was, but they would pay me \$6,400. I turned that down. That was the first -- I must say, that was the first real arrow that I felt. I was dealing with everything else, you know the fact that I didn't feel comfortable raising my hand in class, the fact that I thought I was failing, the fact that nobody would give me an interview. Somehow, I was absorbing everything but that was an arrow that really stung and I did not feel that I deserved to be treated like a second-class citizen. I did fulfill

⁸ Robert W. Sweet, Judge of the United States District Court for the Southern District of New York, 1978-__.

Judge Sweet's wish and turned the offer down right then and there. [0:30:04.1]

But what they didn't know, and was just unimaginable to me, was that very same day, I had an interview at Sullivan & Cromwell, which was down the street, still on Wall Street. I was still intent to get that utterly impossible offer from one of those what they called white shoe law firms. I went to Sullivan & Cromwell. I don't recall how many people I saw. I do remember the last person who saw me made me an offer of employment at the same salary as everybody else was getting. I mean where did this come from, this was just unbelievable. I refer to it as a miracle and what really astounds me more than anything else is my response. I must have been nuts, I said, "I'd like to think it over." Now, why did I do that, I don't know. And I've repeated that story to people over the years and the last person I told it to said, if he were the one in that seat, he would have said, if you have to think it over, never mind. But fortunately John, whatever his name was, the managing partner at Sullivan & Cromwell at the time, was far more gracious than that and he said, "Fine, just let us know when you've made up your mind." I sailed out of 48 Wall Street; I was on air. I knew, of course, that I would accept that offer, and I did accept that offer.

ACR: Were there any other women at Sullivan & Cromwell?

JSK: Yes. There were two women, and what was acceptable and traditional and OK back at that time was to have a woman in the estates department, trusts and estates, and at Sullivan & Cromwell there were two women. There was Shirley O'Neill and Lorene Jorgensen. But I didn't want to be in trusts and estates. I wanted to be a litigator and, of

KAYE

course, in litigation there were no women. [0:32:05.6]

So my answer to your question is yes and no. Yes, there were women at Sullivan & Cromwell at the time and no, there were no other women in litigation or in corporate, or I don't remember what other departments they had, but I made clear that I wanted to be in the litigation department, and I was hired for the litigation department. They didn't have one of these revolving spots for new associates, so I went right into the litigation department.

ACR: At the time that you began at Sullivan & Cromwell, had you taken the bar exam?

JSK: No, I had not taken the bar exam. This was one consequence of my kind of different schedule, because I had to be in law school the summer, when my classmates, whose graduation was May or June or whatever the date was that year, 1962, while they were graduating, having a little vacation and studying for the bar exam, I was still taking courses to complete my study at the law school. And maybe it was really fortunate. I remember that summer, taking the course in civil practice, the practice course, then taught by a legendary character at the law school, Herbert Peterfreund.

I have to tell you, as much as I loved trademarks and intellectual property, another area that I really loved was all the intricacies of civil practice, New York civil practice. I just loved it and here I was spending the summer with him, learning all of this, instead of preparing for the bar exam, but gee I was in a sense wasn't I? But I started at Sullivan & Cromwell in September, I think September 4th but I'd check that out, it was a Tuesday, of 1962, and I had the bar exam ahead of me. [0:33:58.4]

KAYE

I think the bar exam was probably in November or something like that and that was a little difficult, because I remember going to the head of the litigation department at Sullivan & Cromwell at the time, Bill Willis, and asking him for a couple of weeks off to prepare for the bar exam. Another unforgettable moment, a direct quote from Bill Willis, "You don't need two or three weeks off to study for the bar exam." Unforgettable line, that meant no. I did get a little bit of time, but what was so vexing to me was if I didn't pass the bar exam, then I wasn't the person he thought I was. He said, "There are pass people and there are fail people. You're a pass person, you don't need the time." So if I failed, then I was not the person Bill Willis thought I was. That weighed on me too. But guess what? I passed the bar exam and it all worked out fine.

ACR: What were your early experiences as a first or second year associate at Sullivan & Cromwell?

JSK: Well I remember first of all, the first time my telephone rang at Sullivan & Cromwell, it was Robert MacCrate on the phone. He and I arrived at 48 Wall Street on the same day. He had just been counsel to Governor Rockefeller and of course I had just come from the NYU Law School, and the phone rang. I was in, by the way, in a four-person office, which was not uncommon back then, kind of interesting. I don't think firms do it any more, do they?

ACR: Two.

JSK: Two people is the most. Around here at Skadden, two would be the most, but we were four in an office, probably even a little smaller than the office I'm in right now. Pluses

and minuses. We got to know each other really, really well. Now I'm a person who listens to other people's conversations. If I'm in a restaurant, I listen to all the tables around me.

[0:36:00.3]

So these three men who were with me, they just -- you know, I knew everything about their lives, all their telephone conversations, and it was really nice. They were very good company and only one of the four stayed on to be a partner at Sullivan & Cromwell. One of them left before I did. But anyway, back to Bob MacCrate. The phone rang and he said, "Miss Smith, this is Mr. MacCrate, would you come to my office?" And I did, I went to his office and as I said, it was his first day back and it was my first day there, and he picked up a piece of litigation. I don't remember exactly what it was, but it was a litigation that was still there when I left the firm and Bob and I were very, very actively engaged in it. Now isn't that a great way to start as a young lawyer, to have as a mentor, one of the great mentors of all time, a future President of the American Bar Association, the author of the MacCrate Report of 1992, so pivotal to legal education.

And one particular thing Bob told also, is a forever lesson, when we went one day to a neighboring law firm. We were out on the street together, going for a meeting with co-counsel at Carter Ledyard, and again, I remember a young associate, my contemporary, was now long-time United States District Judge, Lou Stanton.⁹ But as we were walking up Wall Street, Bob said to me, "Now some partners, some people don't like young associates speaking up at meetings. I don't feel that way. If you have something to say,

⁹ Louis L. Stanton, Judge of the United States District Court for the Southern District of New York, 1985-__.

you say it." Those words echo in my mind a lot. If you remember, I've described to you my feeling about law school and not speaking out at all. How nice it was for Bob to say that to me and I think very often of those words when I'm wondering, should I say something or shouldn't I. And if I've thought it through and I think it's right, I say it, and I thank Bob for that. [0:38:05.8]

So we had that. That went on for a long time. And the other memorable thing is that at Sullivan & Cromwell, in the litigation department, they used to give their young associates these small matters, very small matters for major clients. It was almost like a service, I'm sure they weren't billing at the normal rate. And I had two of those, one in the Civil Court in New York County and the second in Queens County. Unforgettable, both of them. The one in New York County involved a huge client, General Tire, and a woman had her turquoise convertible parked out on a city street and her hugely expensive tires were stolen, so naturally she sued the tire company, OK? Is that a great case? And that went on in the small claims part, but she was a lawyer and she was representing herself and determined to recover, I don't know how many -- not millions, thousands of dollars. They were expensive tires, but she had a whole story that went with it, about the serial numbers and the fact that they failed to give her the serial numbers of the tires. This is something that she was able to use to connect the tire company with liability. Well, I won, I won. I defeated that on -- I made some kind of motion to dismiss based on the fact that the Police Department had recovered *no* General Tire tires. Serial numbers were irrelevant. But she would come to court with her witnesses and all. It was just, that just, it

KAYE

was a very good education.

The second case out in Queens County was for American Motors, and it was a lawsuit brought by a person who owned a Rambler that he claimed was a lemon. I made a motion to dismiss the case against American Motors on jurisdictional grounds, and this upset the judge violently, you know that we would have the nerve to make such a motion. He moved us from the night division into the day division and that went on for some time too. [0:40:16.7]

But I'll tell a ludicrous story about myself and hope nobody ever watches this, and that is that the salesman, the car salesman would come to the court, you know we were going to have a real trial. And one night he offered to drive me back from the Queens Civil Court. I accepted the ride and on the way he asked if I'd ever seen submarine races and I said no. Submarine races? Now, I'm not going to continue the story, but I wound up walking back from where that was and never, never again taking a ride like that.

ACR: So you did have some courtroom experience during those first --

JSK: I had some courtroom experience yes, and other experience too.

ACR: What was the majority of the work that you did at the time at Sullivan & Cromwell? Was it writing and research otherwise?

JSK: I remember writing and research and I used to have -- you know, so much of my life has been lost, given the change, and I went through a lot of -- we'll skip ahead to the post-December 31, 2008 weeks, when I had to decide what to do with my papers. Every day I regret a lot of things that I threw away, but I was pretty vicious about those shredding bins.

They delivered a lot of shredding bins to 230 Park Avenue, where 25-plus years of my life resided and I, every day just threw things away. Now I used to have a big stack of memos that I kept, from Judith A. Smith to various people, about really interesting subjects. I'm sorry I didn't keep them. [0:42:00.2]

For example, I had a memorandum, under 10 pages, on the entire law of 10B-5 of the Securities Exchange Act of 1934. You know, people have written multi-volume treatises on that section. I had it in under 10 pages. Imagine what that would be worth today. But I did a lot of memo writing and I know that there were other cases, like the one that Bob and I were on, and I distinctly remember one involving a chemical fertilizer plant that malfunctioned. I don't know if that's the one Bob and I were on, I don't think so, I think that was another partner. But I just really enjoyed what I was doing as a litigator and I've always loved this about being a litigator. First of all, a litigator really creates the universe of facts. There are a million of facts from which you distill a certain number of facts and it's kind of interesting to do that and to figure out, you know you're honest and you have the adversary, but you want to make the best picture for your client, so you really, really learn the business. I really knew the business of building a chemical fertilizer plant, so that stands out for me in the time that I was at Sullivan & Cromwell. So not a bad mixture, and they were just wonderful to me.

I remember somebody once saying that one of the reasons I was hired was that they thought I would be good for morale. I never confirmed that. I never confirmed that they thought that, and I never confirmed that I was good for morale, but obviously I had a

KAYE

good time.

ACR: What was firm life like? Was there a social aspect?

JSK: I think the social aspect of firm life was largely around the dinner table at Massoletti's, which was a restaurant kind of diagonally across the street and in some major building down there, because that's what most of us did every night, which is have dinner together and go back to the office. [0:44:11.1]

And now that you turned my attention to Massoletti's, I can tell you of an early experience with one of the lawyers at the dinner table. They would all be men but it was not a gendered situation, you know it was not social in that sense. But I remember one night, hearing one of the young associates, he was maybe a year or two ahead of me, say to the waiter as he was ordering his dinner, he said, "I see they brought their 1952 reds up to market." Now he was referring to the wine and I thought, "Oh my goodness, this is a group I'm going to have trouble keeping up with," you know these wine connoisseurs at the table. But the social life was focused on the office and I really did OK. I remember moving, ultimately, from my four-person office. There was one person who remained on and became a partner and that was John Cannon. John and I moved from the four-person office, our two fellow colleagues had gone, we moved to a three-person office, and our third person was Paul Grand, who is a very distinguished criminal lawyer. He's founded a firm with Bob Morvillo and I think Elkan Abramowitz, and we continue to be friends to this day. I remember Paul's unhappiness at being on this massive antitrust case and he vowed the day that case ended, he was out of the firm, and that's exactly what happened.

KAYE

But we got to be good friends, all of us.

ACR: So during this time --

JSK: In fact, right behind me, there's a picture of Benjamin Nathan Cardozo, a drawing, and it was one day when I was in my chambers at 230 Park Avenue that John Cannon called from Sullivan & Cromwell. He said, "Judith, they're de-accessioning some art here and I have something I think you would enjoy having." So that's a link to Sullivan & Cromwell. John came up and brought me this beautiful picture of Benjamin Nathan Cardozo, which I haven't seen anywhere else. I think it is a real treasure, and I'm happy to have it. It's a beautiful picture of Benjamin Nathan Cardozo; it reminds me of John and it's a gift from Sullivan & Cromwell. [0:46:35.9]

ACR: So during this time, you remained the only woman in the litigation department?

JSK: Yes, yes.

ACR: And did you remember that having any significance?

JSK: Oh well, I say I again, after the arrow of Casey, Lane & Mittendorf, I think I settled down once I was at Sullivan & Cromwell. I certainly noticed, always noticed that I was different, that never escaped notice. And particularly, I remember firm meetings, not firm meetings but litigation department meetings. If there were things like firm outings I'm not sure, I don't remember. I remember in a later chapter of my life, I was the only person not invited to the firm outing because I was a woman, but I don't remember that at Sullivan & Cromwell. But I do remember the lunch club that many of the lawyers went to, which had a special women's entrance and I walked through the women's entrance without thinking

KAYE

that I should have staged a protest and walked through the men's entrance, probably would do that today. These days I'd walk into a men's room if there's a line outside the women's room. But anyway that aside, I do remember litigation department meetings, starting with "Gentlemen and Judy," that was how they began. So yes, they noticed, I noticed, and we did OK. [0:48:02.5]

ACR: Were there any effects based on religion at the time?

JSK: Well, there was. You've really reminded me of the fact that I think Jewish, in the evolution of society, the progress of society, there was a time when it was very difficult for Jewish lawyers in these white shoe law firms, hard for them to get employment. I do remember one vestige, even in the year 1962, which was some athletic club, one of like the Downtown Athletic Club or one of those athletic clubs, not that I sought membership, but the person who later became my husband did. He was Jewish and he -- it was kindly suggested to him that he withdraw his application, which he did. I'll never forget too, one of the associates at the firm, one day I was drafting an affidavit for one of the partners, Marvin Schwartz, a very distinguished, wonderful lawyer, and this associate who had a bit of an English accent, I think he spent about 20 minutes abroad. He picked up the draft one day, and he said, "Marvin Schwartz, do we *really* have a Marvin Schwartz in this firm?" So I noticed that too. But I think we were at the tail end of that and what we've seen in the great evolution of our profession, I don't know why it takes us so long. I say we, we call ourselves the justice system, with diversity in our profession and most certainly coming through that now, but there are these eras and episodes, right? You can't

KAYE

forget them ever because it's so important that we keep our doors open and that we, of all people, in the justice system, that there be genuine equal opportunity, and it's been a long struggle. [0:50:03.6]

ACR: You mentioned your husband.

JSK: Yes.

ACR: Did you meet your husband, Stephen, at Sullivan & Cromwell?

JSK: I met Stephen, my husband, at Sullivan & Cromwell, my late husband. We had 43 glorious years of marriage and I know Anne, you cherish him too. Actually, we met at a firm function. Arthur Dean at the time was the managing partner, and he had some party where the whole firm was invited and I met Stephen that night. Of course I had seen him around the firm for months, although he was not there a lot because he did a lot of work for El Paso, the company, and spent a lot of time in Texas and other parts of the United States. So I did see Stephen but I didn't get to know him until that night when we really met, at Arthur Dean's. And from that point on, Stephen and I had a clandestine relationship. It would not have been a good thing for me, given what it was to arrive in a law firm like that, to be perceived as looking for social opportunities, and Stephen felt it too, that just for us to be openly seeing one another. And this is another evolution in organizational life. We have partners in this law firm who are married but back then, you just wouldn't have done it. I remember one couple where the woman left, where they were seeing each other. So we had this secret romance and I have to tell you, having a secret romance around the City of New York, when you're in a big law firm, it was easy

KAYE

because nobody ever went anywhere but like to Massoletti's and back to the office.

[0:52:00.5]

So we were able to go to the opera and the theater and just everything, and never meet anybody except once, when we ran into a partner of the firm having dinner with a woman who was not his wife. She was a paralegal at the firm. So our secret was safe with him. And Stephen and I, the relationship just grew and grew. Then Stephen left the firm. He went to Proskauer, where Anne is currently at, and he remained on at Proskauer for 45 years. But we began to plan our marriage, which eventually took place, in February of 1964, and I left the firm too.

ACR: So during this time, just to step back to your family, had they changed their early apprehension about your becoming a lawyer?

JSK: My family had come around to my being a lawyer. They were pretty proud I think, they felt really good. First of all, I was earning \$7,200, and I think there was a bonus. I remember it got to be \$9,000 that first year. In Monticello, New York, that was pretty good and they were proud. I remember my mother coming from Monticello to my admission to the bar, in the First Department. They both couldn't come because the store had to be kept open, but my mother came and she was clearly really, really pleased. And the other thing I remember about that event, which didn't dawn on me -- boy, I was dense, I really was dense. I was seated in the front row in the beautiful Appellate Division courtroom on 25th Street. It didn't occur to me until years later that there were probably three or four other women, and we were all put in the front row. But you know, I thought

KAYE

it was kind of nice to be seated in the front row and I realized I was placed there just because there was so few of us, they were singling us out. [0:54:05.4]

Yes, my parents were pleased and it was very nice. I'm sure Lawyer Weiss congratulated them, so things were OK.

ACR: Did you ever discuss the law, your experiences learning about it, with your family?

JSK: No, no, we never talked about the law. Politics, yes. So I guess you'd have to go back and redefine "the law," but I think I understand the thrust of your question. And no, we never sat around like my daughter is -- of course Stephen, my late husband, was a lawyer, our daughter is a lawyer. The nicest thing, absolutely the nicest thing that happened to me was that my daughter became a lawyer. I'm proud that she's a lawyer, that's not the reason. The reason is she would not have become a lawyer unless -- and she has three children -- unless her life growing up was OK in retrospect. That was kind of a seal of approval that I was really happy to have, because as we all know, the practice of law is very demanding and I was fortunate enough to have three fantastic children and a very great married life, and I have seven wonderful grandchildren. But you worry all the time, there are a lot of tensions and a lot of stresses, and I think especially for women, and we can come back to that at any time you like. But when my daughter became a lawyer, wow, and I think my parents felt the same. They were pretty pleased even though, regrettably, they weren't able to show people in Monticello pictures of their grandchildren, because they died before the grandchildren were born.

ACR: And at this time, you were no longer living with your grandmother or your aunt.

KAYE

JSK: Yes, that evolved.

ACR: You had your own apartment.

JSK: That evolved too and I'll just spend a moment telling you about my residence during law school, because I moved down to the Village, love the Village, the Village is great, although I don't live there. I live on the Upper West Side now. [0:56:06.8]

During my law school years, it was just more convenient, especially, you know going to night law school, working in Midtown, to travel up to -- well, it wouldn't have been the Bronx, it would have been the Upper West Side. It was just much easier to live in the area of the law school. I was lucky to find a room. I pass the building often, at 43 Fifth Avenue, 11th Street and Fifth Avenue. If you look way up to the top, it's a beautiful building, it's a Stanford White building. But way up to the top you see these little garret windows and those must have been rooms for service people in the old days. I wonder what they do with that space today. But I learned, during my law school years, that there was a woman who had a large apartment and I could rent a room from her, which I did, at 43 Fifth Avenue. But as soon as I got there, I discovered these garret rooms on the top floor. So I didn't have to have a room in her apartment, I could have a room of my own. And believe me, a room of my own was just tiny, it had virtually nothing in it, but it was great during law school, to live there. There was a common bathroom. I have no idea who else lived in those rooms but I did keep that little room all through law school, and it worked beautifully. But as soon as I got a job, I was determined to continue living in the Village. In fact, when I lived in the Village and worked at Sullivan & Cromwell, I would

KAYE

consider going to 14th Street uptown. I never went above 14th Street. You can have a whole life below 14th Street in the City of New York. But I got an apartment at 3 Sheridan Square, which was a brand new building and again, when I pass 43 Fifth Avenue and I pass 3 Sheridan Square, I just have all those wonderful memories of my time there. [0:58:00.3]

But Stephen and I moved after we were married, to the East Side, 34th Street. We were there only a short time. We're genuine West Siders, and that's where we've been.

ACR: So you were planning your wedding and at the same time planning your departure from Sullivan & Cromwell?

JSK: Well, I was planning my wedding, I was not planning my departure. I knew I would leave Sullivan & Cromwell, but I didn't plan it. I guess that's another theme of my life, that sometimes I just stumble into things, and I've been awfully lucky. I was planning the wedding, and I remember the day I picked up my wedding invitations. I say Stephen and I had a clandestine romance. I didn't tell anybody, even after Stephen left, about our relationship, but I picked up my wedding invitations one day and when I got back to the firm there was a young lawyer named John Clark, who had worked a lot with Stephen, traveled to Texas a lot with Stephen, knew Stephen really, really well. And I said, "John, I've just picked up my wedding invitations." And he said, "How great, I didn't know you were going to get married. Are you marrying a lawyer?" And I said, "Yes" and he said, "What firm is he with?" And I said, "He's with the Proskauer firm." He said, "You know Steve Kaye just went with the Proskauer firm." And I said, "Yes John, that's

the person I'm marrying." Well you know, poor John, he just slipped under the table.

C. The Hunt Goes On: Just Hanging In

So I did plan the wedding, Stephen and I planned the wedding and we had a lovely wedding, but I decided I would leave Sullivan & Cromwell. It was just healthier all around, since Stephen had spent a number of years there, and it just seemed like a better choice to do that. I knew I would work immediately someplace, but I never gave a moment's thought to where. And as I was making the rounds saying goodbye to people at the firm, somebody said, "Where are you going next?" and, oh my goodness, that was a really good question. He said, "You know, you should call Ken Seggerman. He just left, and he went to IBM. Maybe that would be of interest." [1:00:10.3]

I never thought of going to IBM, but I called Ken Seggerman. He arranged for me to come up to 57th Street and Madison Avenue to meet the legal people at IBM, and I met one of the zaniest, most wonderful lawyers I've ever known, H. Bartow Farr, Junior. I think his father was a cofounder of the firm of Willkie Farr, but Bartow was marvelous. And here he was, the head of the lawyers there at IBM. I mean like he had an Actors Equity card and would be on Divorce Court every now and then. He hated fluorescent lights, he would remove them every night from his ceiling and they would put them back. There were things like that I remember about Bartow, but he was a great lawyer and just a terrific fellow, and he made me an offer that very first time we were together. But he said, "There's something I have to tell you, IBM is moving up to Armonk, New York. Before you accept an offer here, you should drive up to Armonk and just see what you think of

the commute, because we're only going to be here for another six months or so."

That night, Stephen and I drove up to Armonk, or what we thought was Armonk. It seemed fine. The next day I called and accepted the job. Imagine my surprise when six months later I discovered we had not been to Armonk, we had been to Harrison, to the IBM facility in Harrison, Armonk was another half an hour away. Would I have accepted the job? Probably, I think so, but that was kind of a shock. Anyway, another great, lucky incident befell me and we had a car, but there was this really nice fellow there, Howard something or other, who had no car, lived a block away from me, another person who was going to be commuting up to Armonk. I remember he had one blue eye and one brown eye. He said, "I've got an idea," or I said, "I have an idea, why don't you come every day, Howie, and let's drive together in our car." And that's what we did. [1:02:16.8]

So it was never -- I could just sit and read or do anything and he would drive and that's how I got back and forth every single day. Not bad. And I had a great time at IBM, a great time. First of all, there was Bartow. Then they were on the cusp of a couple of really interesting things I remember, like simultaneous translations, which had copyright implications. They were getting into the photocopy business, which they ultimately did, and I think got out of it as well. I wasn't there for the getting out, but I got to do some really interesting stuff at IBM and genuinely enjoyed the little slice of life I had on house counsel staff. Really interesting.

The first day I was there, when my phone rang, it was somebody from IBM, asking me about the law on taking the flag in, in bad weather. That was just so dazzling to me,

KAYE

because you wouldn't call Sullivan & Cromwell and ask a lawyer at Sullivan & Cromwell what the law was on taking the flag in, in bad weather. But house counsel, yes, you would ask house counsel that. I went to the library, discovered a volume of the U.S. Code Annotated called Flag, I think it was volume 14 or something like that, and I answered his question. But it was a different experience and one that I treasure, as I do the time that I had at Sullivan & Cromwell.

ACR: What was the answer to the question?

JSK: You take the flag in when the weather is bad. [1:04:00.2]

Now here's a difference from my tax law class experience at NYU Law School. I was not prepared to give him the common sense answer. Fortunately, the law provided the common sense answer.

ACR: And how long did you remain at IBM?

JSK: I stayed there about a year, because they had a policy that required departure by the seventh month of a pregnancy, and I became pregnant, shortly after Stephen and I were married. I think I pretty much stayed through like the eighth month. I didn't tell anyone for a long time, but then I had to leave. They were very generous with benefits and again, what's interesting here, Anne, is that nobody -- these are things nobody was ever ashamed about. You weren't ashamed to say our quota of women is filled. You weren't ashamed to have separate entrances for women, if you got into the place at all. And you weren't ashamed to say you have to leave if you're pregnant. I mean these are things that would be illegal today. We're talking about a long time ago and a big evolution, but

KAYE

nobody -- you know that was just the policy. They were very generous with their benefits, please come back the day you're ready to come back, we're ready to have you come back, but you're out of here. If you're pregnant you're out of here.

ACR: And these policies didn't surprise you at the time either, I'm assuming.

JSK: No, not at all, that was just the normal corporate policy, probably in the book that I read when I went to the corporation. But I knew I had to go, it was evident that I had to go. I went down to the NYU Law School to see if there was a little project I could pick up, because I didn't want to sit at home. I was going to do a volunteer kind of thing and just anything to bridge the couple of months. But the dean at the time, Russell Niles, was looking for an assistant. He was a real property law teacher and he had a casebook on real property. He wanted someone to update it, and I said I would do it. [1:06:17.8]

That never has been one of my all-time favorite subjects. I like it but the idea of just immersing myself in updating a real property law casebook was not at the top of my list. I accepted the job. Let's see, my daughter was born in March and so it must have been, I think the elections at the City Bar Association are like May, but maybe a little earlier, the swearing in is in May. Almost at the moment that I accepted Dean Niles' offer, he was elected the president of what was then called Association of the Bar of the City of New York, today the City Bar Association. A great, wonderful bar association on 44th Street, between Fifth and Sixth Avenues. And instead of updating his real property casebook, which I never had to touch, I got a little office at the City Bar Association and was right alongside Dean Niles in the myriad of wonderful issues that come to the City Bar

KAYE

Association. Fantastic, we had such a good time. We turned out a couple of articles. I remember he was very interested in judicial selection methods. I don't remember what else we wrote. He spoke and I always was at his side and helped him get prepared for things. That's a two-year term, so I stayed on for his whole two years and had two babies. You know it worked so well with one -- Luisa was born in March of that year and then a year and a half later I had Jonathan. And, as the term of his presidency was coming to an end he never noticed that I never touched his real property casebook. [1:08:05.8]

He asked me -- he was going to leave as dean, and Professor de Capriles, who taught corporate finance, was coming on. But he had a big booking in Sweden, some massive conference on corporate finance, and he really needed some help, and with his course as well, so for the third year, I stayed with Dean de Capriles, and I had another baby. So that all worked really well. The three kids arrived in those "pregnancy years" and I was kept very gainfully occupied by NYU Law School. Gordie was about six months old when I was thinking, hmm, you know I had the three- year-old, the two- year-old and the newborn. I was thinking I really should start to look for a return to the world of law firms.

ACR: How was it being a young mother and a working mother? What were the years?

JSK: Well let's see, Luisa was born in March of 1965, Jonathan in September of '66 and Gordie in September of '68. I was with Dean Niles and Dean de Capriles. I don't think I ever missed a paycheck, although I say that was never my objective. It worked out fine with the hours I could be at the City Bar, and at the law school. I remember once asking Dean Niles for a raise. I was an independent contractor. I asked him for a raise and I remember

his saying it was hard to get more money and he said just work less. That was interesting but it was great, those were very satisfactory years. [1:10:00.5]

So the part about being a mother and a wife and a lawyer, that worked out OK. But when Gordie was six months old, I wanted to return to the world of law firms and it was actually Stephen who called the firm, somebody he knew at the firm of Olwine, Connelly, Chase, O'Donnell & Weyher. We had decided, Stephen and I, that maybe I could manage part-time employment as a litigator. Such a thing, I don't know how we came upon it, it was certainly not on the mainstream, it was not normal. Law firms still were not hiring women, so now to sign on with three tiny children and part time, hmm. I think later they called it the mommy track, because I got lambasted when I wrote a piece supporting this kind of arrangement, but I've got to tell you, for me it worked really well. So Stephen called his friend at Olwine, Connelly and suggested this part-time arrangement and that's what I did. I remember the salary. I think for Olwine what was really attractive was whatever the salary was, they were going to pay me half, which I say I think really appealed to them. Always I had somebody full-time in the house, so I always had the option, if I had to go -- remain late, if I had to go in at night, there was always somebody there in the house, which was -- this was the day before daycare, a time before daycare, there were no daycare facilities. But I had a good at-home living arrangement. So Olwine took me on part-time and what always brings tears to my eyes and probably will now as I say these words is -- I don't think I can say them. I'll try to say them, that the day I left for the Court of Appeals, Jack O'Donnell, the head of the litigation department at Olwine,

KAYE

Connelly, called Stephen and said, "We're losing our part-time lawyer." I was going on the Court of Appeals. He said, "Could you recommend another one for us?" It was just very sweet. But I stayed at Olwine for 15 years.

[1:12:16.2]

ACR: Judge, before we continue with your return to litigation, did you -- I just want to close the chapter on IBM or at least continue the chapter on IBM.

JSK: Yes.

ACR: Did you see Bartow Farr after that time?

JSK: Oh goodness, yes I saw Bartow. In fact, Bartow, I think he passed away not that long ago, and I believe his son is a major, like United States Supreme Court litigator in Washington, D.C. Bartow was phenomenal, really phenomenal. We kept up our friendship, but we did have one particularly memorable meeting. Just to tell you how -- I used the word zany to describe Bartow, meaning it only in the most highly complimentary form. He turned in Singer or IBM, you know he would turn in -- if he saw things that were illegal, he would report misconduct to the Justice Department. He was just so profoundly ethical and wonderful and I say in all the years afterwards, we maintained our relationship.

But I remember one time in particular, he became the chief counsel for IBM abroad and then he returned to at least the Singer Company, because I remember his sending some matters to me. He wound up living in the south someplace for his employer. But whenever he was in New York, we would always meet at least for lunch and there was

KAYE

one time, it was a club, we were meeting at his club on Park Avenue. I don't remember the name of the club but I was to show up there for lunch to meet him, or at least to meet him there. It was around lunchtime. [1:14:02.7]

I got there a little early and said to the person at the desk that I'm Judith Kaye, I'm here to meet Bartow Farr. I think he's in the dining room, he told me he's going to be in the dining room, could you just show me which way it is, and the fellow at the desk said, "I'm sorry, but no women are permitted in the dining room." Well, I got Bartow out of the dining room and I said, "Bartow, they don't permit women in the dining room." He withdrew from the club that day. We went out and had lunch someplace else and he withdrew from the club and, actually, I think that got to be a little publicity too, which was very nice. So by now, my consciousness was definitely raised to these gender issues.

D. The Olwine Years

ACR: So you returned to your life as a commercial litigator part-time at Olwine. How long did you continue part-time?

JSK: Well again, it's hard to define part-time when you're a litigator. I started three days a week, which kind of morphed into four and five and six, and I can't tell you exactly when the lines were drawn, but it seemed to be OK. The critical thing was having some stable household situation, which I was fortunate to have, and it worked. I did, in I believe it was the late seventies -- ? Let's see, I would have gone there in -- Gordie was born in September of '68, so he was just a few months old when I went to Olwine. That would have been early '69, and in a few years, I became a partner, but that's its own story too

KAYE

because I didn't think -- there were no other women at the firm -- and the prospects of my becoming a partner, I thought were very bleak as I looked at the masthead after a couple of years. [1:16:06.9]

There were like eight or nine people ahead of me and, wonderful as the firm was, they were successful in keeping the partnership very small and the associate rank very large. So I decided one day that I was never going to be a partner at the firm and I contacted a headhunter and began looking for some other employment. At the time, Exxon was looking. Suddenly it became -- it went from women being excluded to suddenly the desire to have one. Now there was a quota of women that maybe was one or two but finally, someone, and Exxon then, on Sixth Avenue and 51st Street, location is relevant too, they were very eager to have a woman in the firm. I remember having a couple of interviews there, being made an offer while I was at Olwine, accepting the offer. I was determined that I would go to Exxon. I say that location is relevant because not many years later, Exxon moved out of New York to Texas. I don't know what I would have done.

But I did accept the offer, fully intending to leave Olwine, Connelly and go to Exxon. It was a good opportunity that maybe I would be general counsel. That's what I was thinking. But when I went back to Olwine and told them that I was leaving and they said, "Why?" and I said, "Well, you know I'm never going to be a partner here; I don't think I want to stay." They said, "No, no, no, don't go, don't go, you'll be a partner; we'll make you a partner right away." And I said, "Well I don't think you're really serious about my being a partner." "No, we're really serious about you being a partner; stay, you have to

KAYE

stay." I became a partner at Olwine, that's how it happened, that's really how it happened.

[1:18:04.6]

ACR: Were you the only woman partner?

JSK: Oh, yes. I'm not sure there were many women by the time that happened, in the firm at all, certainly no other women partners. And there's just an interesting little sideline here Anne, that you've reminded me of, and that was you see the kind of person I am, and I think I've always been this kind of person. I remember this one woman, poor thing really, Mary Jo. I wonder where she is today, but she was the blustery, cussing kind of woman. She came into my office one day, closed the door and she said, "You make me sick; you're just so prissy." That was just incredible really, because Mary Jo did not become a partner at the Olwine firm and I did, and I guess the moral here, the tale here is just be the person you are. I don't think her cussing is what disqualified her. I think she was just not deemed to be worthy of being a partner, but the fact is being the other kind of person, if that's the other kind of person you are, just be yourself.

ACR: On that note, do you have any advice for women?

JSK: Well, the only advice I ever give -- well, I do have. I jokingly say, I always advise, especially women lawyers, never to buy a wrap skirt, and I mean that -- well of course seriously, it's very uncomfortable when you're in court and have to be worrying about a wrap skirt. But I guess the serious note is that I'm very reluctant to give advice to people, because it's such a personal thing, your life is so personal and you just have to figure things out minute to minute and day by day and month by month and year by year and

KAYE

make the best judgments that you can. [1:20:03.3]

But as I've grown older in this profession, I'm bold enough now to give some advice and especially to women, and that is just to never give up, to just persevere and keep coming back, whatever you do. If you close yourself out of it then everybody else will too. So I do urge that on especially women today, and I think things are kind of tough for women today, that's my observation as I travel around the law firm world. Very different from 1960 -- whatever it was that I was in the firms, but still a challenge for the women. And I think that word about perseverance and persistence and just never giving up and never letting people talk you out of what you really know in your heart that you want to do, I think that's important.

ACR: This seems a good place to pause, but I would like to ask you, because we're approaching a big change in your life, leaving the law firm of Olwine. You were there for more than 10 years.

JSK: I think I was there for more than 15 years.

ACR: And over that time, I know you had mentors and you had some significant cases. What are your recollections of that period of time that stand out?

JSK: Hmm, what stands out? OK, well first when you use the word mentor. In the litigation department, I was very fortunate to have some very caring people. Just the other night, I was over at a celebration for the Feerick Center and ran into the gentleman who I was so close to, Jim Tolan, and so we exchanged a few greetings. Jim was a staunch advocate and at my side always and there he is, still working and great. [1:22:14.6]

And I say, I was well treated at Olwine and persevered, but on my wall here in this office and something I've always hung onto. When you ask for things that stand out in my mind, there's something in a small frame, because I had a litigation before Judge Edward Weinfeld.¹⁰ The irony is the person right next door to me is a lawyer named Barry Garfinkel, who was a law clerk to Edward Weinfeld. I had this matter, a very large matter that was referred to me by Bartow Farr, so it was an extremely important and very adversarial litigation. It was important in and of itself to the company. But it was important to me because Bartow put it into my hands and I needed to make it perfect. It was a suit against the client I was representing; we were the defendants. I was the lead counsel for the defendant, and it was before Edward Weinfeld. I was mostly in the federal courts. Edward Weinfeld was a Southern District Judge, and the other Judge I appeared before in a hotly contested litigation over a long period was Milton Pollack.¹¹ And the joke I make was that I was a much different person before I met those two people. They really gave me a bruising lesson in being a trial lawyer, for which I am eternally grateful to them. I really learned how to be a good trial lawyer in the skirmishes that went on for years and years in both of those litigations. [1:24:00.5]

But the litigation in particular, where Bartow was my client and this major corporation, and we made some good law that's in the books. But at the end of the trial -- it was a jury trial that went on for weeks. Judge Weinfeld called us both up to the bench, my adversary and me, and he said that he thought we did a terrific job, both of us. He apologized for

¹⁰ Edward Weinfeld, Judge of the United States District Court for the Southern District of New York, 1950-1988.

¹¹ Milton Pollack, Judge of the United States District Court for the Southern District of New York, 1967-2004.

letting go every once in a while, and believe me, he did. But he said he thought we both did an excellent job. Now, getting a compliment like that from Edward Weinfeld, I mean I would put that on my resume if I were circulating my resume. But instead of that, I that day ordered that page out of the transcript and I had it framed for myself and for my adversary, who I had grown to hate. I sent it over to him. He has it on his wall to this day, and I have it on my wall to this day, and we are friends. So, when you've driven me back to my years of practice at Olwine, Connelly, I remember that too. Lots of bar association work, Legal Aid, I was on the board of the Legal Aid Society. It was a pretty nice life and, if I ever thought of being a judge, and I did from time to time. I mean how can you be a litigator and in the courts all the time and not think about being a judge, it would have been the federal bench.

One day in the early eighties, Arthur Liman -- he was a good friend, head of the Legal Aid Society Board and just generally a litigation star -- called me. This was a moment in time when being a woman was not only not a bad thing but even was a good thing, because people suddenly realized that yes, Eve is still alive, there is another gender in this profession. Arthur called one day and said that they're desperately looking for women with trial experience for the Southern District of New York. Again, I remember the direct quote, "Get your papers in right away." Those were Arthur's words. I think I could have had that, but at the same time, I got on my desk one day, the application from the Commission on Judicial Nomination for the Court of Appeals of the State of New York. Wow, I mean that was something I really couldn't, in my wildest imagination, think I

KAYE

would ever be considered for. The Court of Appeals of the State of New York.

[1:26:45.7]

You've taken me to the next chapter I think.

Chapter 3: My Life in Lawyer Heaven

A. Arrival in a New World

RM: Judge, at some point when you were at Olwine, you decided to apply for the Court of Appeals. Can you tell us about that process and coming to that decision?

JSK: Well, I guess that takes us to the early 1980s. I had become a partner at the firm of Olwine, Connelly, and by that time had a really nice practice. I was on the Board of the Legal Aid Society. I was on the Executive Committee of the City Bar Association, innumerable other activities that really enriched my professional life. We've spoken earlier about the early sixties, when I became a lawyer, and that, I would have to say, was a moment in time for a woman lawyer. Dreadful.

By the early 1980s, people had awakened to the fact that there was more than one gender for high positions within the bar and maybe even the Judiciary. You know, you can't be a litigator for a long time without sometimes yearning to be on the other side of the bench, although I say, my professional life was quite satisfactory.

And I can't remember what the first call was; there were two. One was from my then-friend Arthur Liman, a great New York City trial lawyer, great public servant, just great, great, great. Arthur called me one day, because my practice had been a lot in the federal courts. Arthur called one day, and this must be 1982, 1983. He was on a panel, looking for judges for the Southern District, and he called one day and said, "Get your papers in right away." They were looking for women to appoint to the federal bench. That was one call I remember. [0:02:25]

KAYE

The other, I had said “a call”; it wasn’t quite a call. I came back from lunch one day and found on my desk an application form from the Commission on Judicial Nomination to the Court of Appeals. I remember opening that envelope and thinking, “Wow!” Governor Mario Cuomo,¹² newly elected Governor Cuomo, Governor Cuomo the first, had said that he would like to appoint a woman to the state’s high court. There was that moment in time when it became extremely desirable for there to be a woman on the state high court. I was just astounded to find that on my desk and the more I thought about it, the more desirable it became.

Now, I think I completed the Southern District application. I think I did, and submitted it, although I never went through the interview process, because the Court of Appeals option, possibility, dream, came along before that time. I completed the application and I submitted it and, what do they say, the rest is history.

RM: Well, tell us a bit about that history.

JSK: Well, it had great moments and it had dreadful moments. Let me tell you about the dreadful moments first, just to get those out of the way, because they’re so far in the recesses of my mind that I don’t want them to be a large part of my oral history. They’re not a large part of my life, or any part of my life. And that is, I went through the process, the interview process. You know, there are bar group interviews after the Commission issues its list of seven nominees -- I was one of the seven. There was only one other woman on the list of seven, and you know the Governor must appoint from the list of

¹² Mario M. Cuomo, Governor of the State of New York, 1983-1994.

seven. There was one other woman on the list of seven. I remember going through the interviews before the State Bar Association Judiciary Committee, which was really kind of the pinnacle of -- I mean these are the people who appear and know the most about the Court of Appeals. I was found highly qualified. I was feeling okay until I got word from the Women's Bar Association that they had found me unqualified. Unqualified. So I'd say that's a definite low point in the whole process, and I did seek reargument and they denied my application for reargument. So I want to just mention that and lay it aside. As long as I've raised the subject, I'll complete the thought: thank goodness for our Governor, who was a smart man and looked beyond that -- and behind it, I might say.

[0:05:14]

After I was seated on the Court of Appeals, so this would have been September of 1983, I had a call from the President of the Women's Bar Association, who was a resident of the City of Albany, asking if she could come visit me. I thought, "How nice, she wants to say something kind of conciliatory." I welcomed her to my chambers and, good grief, the woman came to tell me that there was nothing malicious about their assessment; they really did think I was unqualified. I said, "Well, thank you so much, I'm so pleased to hear that from you." So with that, if you don't mind, I'd like to set that whole chapter aside, because I think -- I've just come back from a weekend where I've been honored by the National Association of Women Judges. I've certainly been honored enough by the women lawyers, I'd just as soon pass that over, because that was the nadir of the entire process, beyond question, nothing close to it. Nefarious and a nadir.

The rest of it, just -- I remember a really fine process, and all of the various interviews, and learning, ultimately, that I was to be the Governor's choice -- that was just off-the-charts great, absolutely great. I can't imagine any better news. It so thoroughly obscured the Southern District of New York opportunity. I never thought about it again until the day I had to leave the Court of Appeals, when I thought, "Hmm, there are some people considerably older than I am still sitting on the Southern District of New York." But no, I don't have a single regret about the 25 years, 3 months, 19 days and 12 hours that I spent at the Court of Appeals of the State of New York.

RM: Do you remember when and where you were when you learned that you'd been selected?

JSK: Absolutely. Unforgettable. I was at my office. I was in the office of one of the heads of the firm, senior litigating partner, my beloved late partner Jack O'Donnell, and the phone rang. It was for me; it was the Governor's office. I'm going to tear up. They said, "Be down here at noon" -- this was in the morning -- "you're the candidate. The Governor is going to announce his nomination of you, and don't tell a soul." I remember those words, because I hung up the phone and I called back, like when I regained consciousness, and I said, "Can I call my husband and my children," because I just didn't want -- especially after what had gone on, I just didn't want anything to jeopardize this appointment, and they told me not to tell a soul. But the woman at the other end -- maybe Ronnie Eldridge? -- I think so. She said, "Of course, you can tell your husband and children."

[0:08:16]

Can I just go on a bit about the day? It was so unforgettable. This was in August of 1983.

My husband was in charge of gathering our three children. Now, my daughter was no problem. She was working downtown at a brokerage firm. I think she had just finished high school and was on her way to Amherst College. Yes, I think so. My two sons were at a day camp. They were counselors at a day camp somewhere in New Jersey. So Stephen's job was to collect them and be at the World Trade Center at noon for this announcement. He got both boys, he got appropriate clothing for them -- you know, suits and ties and all of the above, and was down -- now I wasn't there at that moment, so this is hearsay testimony. But they got into the elevator at the World Trade Center and started rapidly changing the boys' clothes from their camp clothes, and discovered at that moment that they had lost the tie that Stephen had taken out for Gordie. There was no tie. And Stephen looked around the elevator and there was a man there and Stephen pointed to him and said, "Quick, I'll give you twenty dollars for that tie." And the guy started taking off his tie and said, "This must be Candid Camera." And I have that tie, and I think the guy made a \$19 profit.

But that's how they showed up on the whatever -- top floor, where the Governor maintained his office at the time. I seem to recall he was involved with some rabbinical group and they were negotiating something about the get law or, you know, something like that, but then all that got interrupted and the Governor made his announcement of my selection. So it was a joyous, totally joyous day, and just a beautiful story in the *Times*, with one thing that turned out to be unfortunate, and that is the reporter heard me tell my husband when the lights died down, "I'm not cooking dinner tonight." I thought that was

a funny thing to say, but he put it in the paper, which really upset the lady at home who did cook dinner. She said, "How can you say this? You never cook dinner." [0:10:39]

But anyway, I do remember that about the day, too. But everything went so beautifully. After the nomination, I had, let's see, I guess, two events I would tell you about. Of course there was the Senate confirmation. It was glorious. I don't think Senate confirmations -- and I'm not just talking about the federal ones -- are the same any more these days. Even in Albany, there seem to be divided votes today. But when I first came up for the Court of Appeals, I remember sitting up in the Senate Chamber and there was nothing but praiseworthy remarks from everybody and a unanimous vote of confirmation, and it was another glorious day.

And the second thing I was going to tell you about was my first visit to the Court of Appeals, probably right around that time. We were in Albany and the then Clerk was Joseph Bellacosa,¹³ who later became my colleague. He showed me through the building. He showed me the Conference Room, where I would be sitting, so I got my introduction to the court. I then had to find a place in New York City. You know, the Court -- the seven judges maintain home chambers and then travel to Albany for the court sessions (basically two weeks out of every five). I was determined to have my home chambers somewhere near Park Avenue and 48th Street. My Olwine office was at 299 Park Avenue. My late husband, with the Proskauer firm, had his office at 300 Park Avenue, and very frequently, we would meet and walk home together for dinner. And very frequently, we would each

¹³ Joseph W. Bellacosa, Associate Judge of the New York State Court of Appeals, 1987-2000.

cross the street and miss each other. But the objective was that we would walk home together, have dinner with the children, and then go back to the office in the evening. That was kind of a pattern of our life.

So I went out looking for chambers, a place to establish my chambers. The statute provided that a Judge of the Court of Appeals shall have “commodious chambers of his choice.” Today now, I’m sure that’s gender neutralized. I went looking around Park Avenue and 49th or 50th, which is where Stephen and I -- I was at 299 Park Avenue, he was at 300 Park Avenue. And of course, everything was out of sight pricey. A wonderful gentleman, Prakash Yerawedeker, from the court system was with me and consulting with me about my chambers and what space I would need. Fortunately, the Olwine firm allowed me to -- they had some expansion space at 299 Park Avenue. The firm was located on the 17th floor. They had expansion space on the 16th floor, and they allowed me to sublease that from them for a while, until I found my own chambers and had them furnished. [0:13:32]

This is all what was going on in August and September, and I did locate an affordable space at 230 Park Avenue, right near Grand Central Station -- today called the Helmsley Building. I found some space there. At the time, the World Trade Center had just been completed and the State was moving into it from the Helmsley Building. The State occupied half of the space at the World Trade Center, so they were busily trying to unload that space at 230 Park Avenue, which is where many, many of the agencies had been located. And I was able to take over space of some energy agency. One thing I remember

KAYE

was that every single light bulb had its own turn on and turn off -- its own switch. But that was affordable space. In fact, at the time, back in 1983, it was, I remember, \$17 a foot. So there I was, at 230 Park Avenue, and they were saying -- the State just wanted me to take huge, huge, huge amounts of space, because they had to get rid of it as they relocated themselves down at the World Trade Center.

Now, I kept those chambers -- they were just beautiful -- 230 Park Avenue, Suite 826, kept them all of my Court of Appeals years. When I became Chief Judge, I did get a little of that extra space that they wanted me to take at the beginning and didn't take, and to this day the Chief Judge occupies those chambers. They're beautifully situated, because the Chief Judge, as chief executive officer of the court system, gets a lot of visitors. It's very nice to have a space that's located so as to be easily accessible for people, and it was very comfortable and it all worked out beautifully. So I had those chambers to the very end. Moved my furniture from what I had as a partner at the law firm. I still have some of it, I left some of it, and we matched the rest of it, because I wanted it to look like a woman's chambers and not like a man's chambers. So I went for light oak instead of English banker. And there were very happy years in those chambers. [0:15:54]

So the day came, September 12, 1983, I was sworn in as the first woman Judge of the Court of Appeals of the State of New York.

RM: Do you have any memories of the ceremony?

JSK: Oh, my goodness, yes, I have so many memories of the ceremony. It was Chief Judge

Cooke¹⁴ who swore me in. Now, I grew up, I was born right outside of Monticello, on a farm, and grew up basically there, and moved into Monticello, New York, and of course Judge Cooke was a hero. From the time I was born, he and his family were heroes of Monticello, New York, so the first thing I had to do -- I didn't call him anything for a long time. I couldn't call him Larry. It took a long time to get adjusted to that, but he did swear me in and it was just a really, truly happy day at Court of Appeals Hall.

The one memory, and I've told this story before, but it is so emblazoned, especially now that my portrait has just been installed at the Court. I remember after being sworn in, getting a lot of hugs and congratulations and just wandering around the courtroom, which was packed with people. We did have a little reception, a big reception, at the State Bar Association. But before that, wandering around the courtroom, and my Uncle Charlie was there. It was the first time he had been there, the first time any members of my family had been there. And he was struck by the portraits -- the Chief Judges' portraits on the top rung, and the Associate Judges' portraits on the lower rung. My Uncle Charlie pulled me aside and said, "I have one piece of advice for you: Get your portrait painted right away." So, I reflected on that the other day, when my portrait was put up, that of course had I -- that would have been very presumptuous of me to do, or very negative, because you don't get your portrait up there until after you leave. So if I had gotten it done right away, I could either have assumed that I was leaving right away or that I would stay a long time but would never change. Also, I would have gotten the smaller portrait. I never could

¹⁴ Lawrence H. Cooke, Chief Judge of the New York State Court of Appeals, 1979-1984; Associate Judge, 1974-1979.

have anticipated that I would be the Chief Judge. So, all told, it was wise to ignore Uncle Charlie's advice. [0:18:22]

My first day on the bench the place was packed. Every seat in the courtroom was taken as I walked out -- the first woman -- walked out for the first time on the bench of the great Court of Appeals of the State of New York.

The first case, unforgettable, *People v Cofresi*,¹⁵ a criminal case, and of course I had just come from a background of -- gulp -- just total commercial cases. I was on the Board of Legal Aid, I had volunteered for the criminal panel in the Eastern District, but I was hardly a criminal-law lawyer, and there it was, the first case. And I studied very, very hard. I have to tell you, I studied very hard to the very end. I remember the courtroom being packed until I asked a couple of questions, which didn't take a long time. Once I asked a couple of questions, I kind of settled back in my chair and we went on from there. A lot of the courtroom cleared out, and I rolled up my sleeves and it was time for business.

You know, we're sitting right under the -- we're sitting in my office, of course, at Skadden, Arps, and we're sitting under two framed pictures that I have. The top one is the first day I served on the Court of Appeals -- that's September 12, 1983 -- and the bottom one is November of 2008 -- the last day I heard argument in the Court of Appeals. Both days are so dear to me, but since you've asked me about that first day, I just want to tell you about the photograph, because there I am, number seven, you know the Court sits

¹⁵ *People v Cofresi*, 60 NY2d 728 (1983).

strictly in order of number. There's the Chief Judge in the center, number one. To the right of the Chief Judge is the Senior Associate Judge (Judge Jasen¹⁶), number two. To the left of the Chief Judge is the next most senior Judge (Judge Jones¹⁷), and then on and on and on. So the number seven gets the window seat, which is a great seat. Any seat on the Court of Appeals is a great seat.

But I remember they came and took photographs that first day or the day after -- the photographer took a picture. Periodically when the Court changes, or maybe even more often when it doesn't change, they take an official court photograph, and they came that day and took that official court photograph. I remember getting a bunch of them to give to my family, because it was a very precious moment. My parents had long been deceased. The only one left of my own biological family, my mother or father's family, around was my Uncle George. He lived out in Chicago and I just couldn't wait to get that to him. Every time I looked at the photograph, I would just fill up with tears. My uncle, I remember giving him that photograph and just, I couldn't wait to hear what he said, assuming he would be as choked up as I was. My Uncle George looked at the picture and he said, "How come you never sit up straight?" So I remember that, too. I mean there are just -- I have to tell you, if you look at the Court pictures from that point on, I am sitting up straight. I didn't want to run that risk again. [0:21:58]

Those are just a few of my memories, but it was -- I say, we rolled up our sleeves, all of us, and I remember it. I remember everything about the day. Anything else you'd like to

¹⁶ Matthew J. Jasen, Associate Judge of the New York State Court of Appeals, 1968-1985.

¹⁷ Hugh R. Jones, Associate Judge of the New York State Court of Appeals, 1972-1984.

KAYE

know, or any of the days in between?

RM: You, of course, were the first woman to sit on the Court. You also were one of the few Judges not to have been a judge when you took the bench. What was going through your mind as you sat for the first time?

JSK: Well, I think for anybody, any first woman, anybody, it would have been a terrifying experience, period, even for the most experienced, seasoned lawyer. The truth is, at the time, there was one other Judge who really underscored for me the fact that I had not come up in the traditional fashion. The traditional fashion for the Court of Appeals is trial court service -- distinguished trial court service, distinguished intermediate appellate court (Appellate Division) service, and then Court of Appeals. So a very lengthy term of really outstanding judicial service, as all but one colleague had. That was Hugh R. Jones, a great, great model for me.

Hugh R. Jones had been appointed directly from trial practice, and he's the one who greeted me with way over-the-top enthusiasm and said, "We're the only two who haven't come up through the black shroud." Which I took to mean judicial service, and did mean judicial service. But just to linger for a moment -- of course, being the first woman, I was really terrified not to -- you know, I was being judged as a woman. I was very concerned that my conduct and my performance should reflect only the greatest things about women and that there should never be a single doubt that we were anything less than -- all of us, totally equal to the task. So that was a concern and that did cross my mind many, many times. [0:24:19]

Then there was the fact that I didn't come up through the traditional route. In fact, probably, if I listed all my cases, while I did have some experience in the state court system -- considerable experience in the state court system -- my trial experience was more in the federal courts than in the state courts. I did find, however, comfort in the experience that I had as a litigator. And the point I want to underscore here is that I think the high court is very well served by diversity of all sorts. We should reflect society; we should reflect the practice. It's very good to have people who have been lawyers, long-time lawyers. Very good to have academics. Very good to have people who have come through different channels of the profession to reach the state's high court.

Now, for me, I said it bore on me that I was a woman and I wanted to distinguish myself as a woman. I thought as a litigator, too, I had a special perspective. I found comfort in -- my goodness, I've written a million briefs as a lawyer, and writing briefs, structuring arguments and all, you know, I had a little different exposure from my colleagues. But one thing I swore and lived true to the end was, I know what it's like to stand in the well and make argument to a court. It's terrifying, and I vowed that I just was never going to embarrass a lawyer, or just kind of wring a lawyer's neck, or cut anyone off, or anything like that, because I know what it's like to be standing there and it's scary. I do remember in all my years on the Court, just one time when I asked a question and it just stopped a lawyer dead cold, and all I wanted to do was get off my seat and go down there and hug him and say, "I didn't mean it; I didn't mean it." So I think I brought, on the plus side, the experience of having been a litigator, having been in the battle. I think that was a very,

very fine experience, and the Court benefits from diversity. [0:26:31]

Right now, Judge Smith¹⁸ came directly from private practice. Judge Read¹⁹ had been a Judge and then Presiding Judge of the Court of Claims. But I guess Judge Smith is the one who -- and in fact, I knew him very well in private practice -- we had a long litigation together. So, I had at least those two things, burdens, on my mind, starting September 12, 1983. One, that I should do women proud, and second, that I should do litigators proud, and maybe first above all, that I should do myself proud, because I try to hold myself to a high standard.

RM: How were you received when you got there?

JSK: How was I received? I was 45 years old, first woman on the Court. Those gentlemen -- I say, if there's any advantage, I didn't take of them, I regret it, because they were so nice to me; they were so wonderful to me. They just went out of their way to be kind and accepting and enthusiastic. I should break the group down a tiny bit because I came on the Court at an unusual time. We may be heading for it again; I haven't done the calculation. But when I came on the Court -- you know, the retirement age is 70 -- there were four Judges about to be 70. Within a year after I was on the Court, I was number three; I was seated to the left of the Chief Judge -- a year, maybe two years at the most. But Judge Cooke, Judge Jasen, Judge Jones, and Judge Meyer,²⁰ in that order, were either 69 or 70. They were about to go off the Court. Could they have been more gallant? Could

¹⁸ Robert S. Smith, Associate Judge of the New York State Court of Appeals, 2004-2014.

¹⁹ Susan Phillips Read, Associate Judge of the New York State Court of Appeals, 2003-2015.

²⁰ Bernard S. Meyer, Associate Judge of the New York State Court of Appeals, 1979-1986.

they have been kinder, more loving, more attentive to me? Absolutely not. [0:28:38]

And so now that I've used the word "loving" and talked about Judge Jones a couple of times. He, of course, was a great mentor for the additional reason that he came to the court via the litigation route, as I did. We had dinners together, the seven Judges, and back then you just never missed dinner, never, never, never missed dinner. I think that's loosened up quite a bit now, especially given the -- I think there are at least two Judges who come from the Albany area. At the time, we all came from other places, so everybody had to have dinner out and we were together every night we were there. And by the way, every night, at the time started on Sunday, because at that time it was before certiorari jurisdiction and so my first year, two years, we had 800 cases. We would arrive on Sunday and have arguments Monday, Tuesday, Wednesday, Thursday, and Friday of two weeks.

So we'd have dinner together every night, and that first night, September 12, 1983, we went to the University Club. Very often, we did go to the University Club at the time. When Judge Wachtler²¹ became Chief Judge, we became a little more adventuresome and went to different restaurants, but with Chief Judge Cooke, we always went to the University Club, and we were seated at a round table, much like the table I'm seated at right now, and chatting away. This is my first day as a Court of Appeals Judge. I had splurged on a ludicrously expensive light-colored suit. You know, now I'm -- and I tend to wear red and black all through this process, either my red suit and black blouse or my

²¹ Sol Wachtler, Chief Judge of the New York State Court of Appeals, 1985-1992; Associate Judge, 1973-1984.

KAYE

black suit and red blouse, because red is my color. But back then I had gotten a very pale, taupey kind of suit and shoes to match that I -- they were just the most expensive shoes I've ever owned. We were seated around the table, eating and chatting away, and I was eating salad, and I had crossed my legs, and a lettuce leaf that was filled with salad dressing went on to the tip of my shoe. That was bad enough, because, I say, that would have broken my heart; I thought that was the end of those shoes. But, most embarrassing of all, everybody noticed. My six brand-new colleagues noticed. Judge Jones, seated across the table said, "Judith, if you bring that shoe to my chambers tonight, I'll remove the stain for you." Now, that's pretty humiliating, isn't it? [0:31:16]

But, you know, when I finished my work that evening -- we, of course, always returned to the Court, except for Judge Cooke. Judge Cooke used to go to his room. He maintained a room at the DeWitt Clinton at the time and he would come into the Court at 3:30 or 4:00 in the morning. The rest of us would just work as late as we could at night and come in at a reasonable hour of the morning -- like 6:30. So I went to his chambers. I remember Judge Jones had this can of Goddard's Spray. I always keep it from that point on. He took my shoe, he sprayed it with this white kind of stuff; it made a white -- I say, he couldn't have known what that shoe cost. Then he blew it and then he just wiped it gently and the stain was gone; it was just amazing. That's how September 12, 1983, ended for me. I went back to the hotel; I had my beautiful shoes and an absolutely great life ahead of me.

RM: You've mentioned Judge Jones quite a bit. Do you want to say a bit about each of your original colleagues?

KAYE

JSK: Well, let's see, I could start with Judge Cooke, Chief Judge Cooke. Ultimately, I did get to call him Larry -- I guess I did do that. Just, as I say, I've known him my whole life, I had known him my whole life. He was legendary in the Village of Monticello, especially at the Monticello Diner. Often shopped in my parents' store, would come with his wife. And so, goodness, that was just wonderful, to be his colleague, such a kind and dear man. I've told you a little bit about Judge Jones, former President of the State Bar Association, a math wizard, had taught math in Egypt or some place like that. One thing that stands out for me, I don't know whether we'll get back to this, but it happened very early in my time at the Court. Maybe not the first time I was there, maybe the following session or one after that. The habit is to conference a case. The Judges prepare astutely and acutely before traveling to Albany. The briefs are all received a month in advance, they're read cover to cover, and Robert, I think you can affirm that, and there's very high preparation. This is how the Court functions and that is essential to the performance of the Court of Appeals as it is structured. You study the briefs very hard; you go up to hear the oral argument.

The oral argument is the first time you hear concerns that your colleagues have about the case, but otherwise, it's a totally in-chambers-with-your-law-clerks process. But when you go to Albany, you're more or less prepared to vote on a case. There may be a few open questions; there were times that I wasn't a hundred percent sure. But you do prepare intensively for those oral arguments up in Albany, because being prepared means that you can have an intelligent exchange with the lawyers. And being able to vote the next

morning means that the Court will be able to get its writing out, the case decided, by the very next session. I can't think there's another court like that, where the court hears cases one session, and gets the decision out the next session. But you can see how inherent, how intrinsic it is to the process, that the judges be prepared, ready to vote the case, and then be very, very diligent the weeks between sessions, in preparing their decisions. [0:35:04]

So it was one of our first times there and, I say, my head was swimming, given all this criminal jurisdiction, which was really new to me; a lot of administrative law. I remember a restitution case and Judge Jones -- we're talking about Judge Jones -- he was on the American Law Institute Committee drafting a Restatement on Restitution, a pretty oblique subject. We voted the case the next day after it was argued and it scared me to death that I was on one side, with a good, substantial number of the Judges, but Judge Jones was on the other side and reported very persuasively for the other view. But I held the Court; I held the majority. Now when you are the reporting Judge and you hold the majority, you get to write the decision. So I went home from that session in Albany prepared to write the decision in that restitution case. We came back from Albany, like on a Friday. I told you, we'd go up on Sunday and come back home Friday evening. And on Monday -- you know, we didn't have the Internet at that time but I guess we had some quick transit but I think probably the mail or fax machine -- I had Judge Jones's dissent. It broke my heart to think that he would not have had the courtesy to have awaited my majority writing before he sent out a dissent. I think I probably reached for the phone to call him. I can't remember how it happened, how I came to know this, but he said, "Oh

no, Judith, that's not a dissent." He said, "It is the dissenting view, but I didn't write it intending that it should be published. I wrote it intending to assist you in formulating a unanimous opinion, an opinion that will be able to garner the entire Court." He did that a lot. He was an extremely facile writer. And he dissented when he had to dissent. In fact, he dissented in a case of mine that went to the Supreme Court of the United States and got reversed on his dissent. [0:37:26]

But first and foremost, Hugh Jones would, as all the Judges, attempt to reach a consensus. And a very good building block, since he was such a facile writer, was for him to draft the dissent and say, "See what you can do. You know what the arguments well-articulated on the other side are. See what you can do and I'm happy to look."

Interesting, just the other day I heard Justice Ginsburg²² speaking about dissents, and I learned for the first time -- I guess I knew it -- that Justice Brandeis²³ has a whole book of his unpublished dissents. Not so uncommon on a high court, where you do make extra, extra efforts to reach a unanimous opinion, and one way to do that -- an intelligent, informed unanimous opinion, not a compromise -- is to really take in the other view and build around it and build on it.

So I've told you about Judge Cooke; I've told you about Judge Jones. I'm sorry, I skipped Judge Jasen. I should have gone to him next, because he sat right next to Chief Judge Cooke. He was the Senior Associate Judge, from Buffalo. Again, phenomenal. I don't know where to start, whether I should start with the fact that five of us used to eat muffins

²² Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, 1993-___.

²³ Louis Brandeis, Associate Justice of the Supreme Court of the United States, 1916-1939.

for breakfast, but he ate shredded wheat, because we used to eat breakfast together at the time, too. Just kind and considerate and a wonderful Judge. I remember his military service, and I remember his hand gestures when he voted to affirm a conviction, saying “good police work.” I think he was just terrific.

Judge Meyer, from Long Island -- we were also terrific buddies. Judge Meyer, interestingly, didn't ask a lot of questions from the bench -- he was a very quiet kind of fellow. He wasn't one to pepper attorneys with questions. Judge Jones did, but Judge Meyer was just highly prepared all the time. I used to tease him -- because I had spent several years as a copy editor -- about the length of the sentences in his opinions, which sometimes got to be quite long. [0:39:52]

But to have the four of them, oh, my goodness, as greeters, as the people who introduced me to my life on the Court of Appeals, what an unimaginably good fortune. And then, then I had Sol Wachtler and Richard Simons²⁴ as the two junior Judges -- more or less my contemporaries, just a little bit older than I was. But they also -- there's nothing anybody could think of that they could do for me, to make my transition, my orientation, an easy one, that they didn't do. But things went well, things went really well. When I've reflected on those first weeks on the Court, I pick up volume 60 of the New York 2d Reports and think that it has so many of my writings in it, my writings from my first day on the bench. It just really -- it was a good transition by virtue of my experience and by virtue of all the staff people and Judges at the Court. Definitely.

²⁴ Richard D. Simons, Associate Judge of the New York State Court of Appeals, 1983-1997.

B. Getting Down to Business

RM: What was your first writing?

JSK: I think it was *Humphrey*. Was it *Humphrey v State of New York*?²⁵ Yes. I'll tell you about my -- I had two law clerks at the time, and one of them was Gary Hoppe. Gary had worked with me at the Olwine firm. Gary was a Harvard Law School graduate, full of fun. I just loved him and still do. I remember, he was about a sixth-year associate at the firm when I went on the bench, and I think in the ordinary course, would have become a partner in a year or two years.

Oh, it was Arthur actually, Arthur Liman, who called, after my confirmation, to say, "You better get some good law clerks. You're going to need them." Which I thought was a very ominous thing to say. But as soon as I hung up the phone I realized that you do need them, everybody needs them, the brilliantest and the least brilliant, every Judge needs phenomenal law clerks, and I always had them. I called Gary in. We had been through trials, we had been through appeals together, and I just held my breath and said, "Gary, would you come with me, you know, just for one year, please?" And I remember Gary's answer. He said, "You've got to be joking." Which I thought meant no, and I think Gary thought it meant no, too. But he came back the next day and he said, "You know, if you are really serious, I'll do it for a year," which was just so joyous. [0:42:51]

Gary came with me, and my secretary at the firm told me she'd come with me, too, so there we were, a team, and we had to find one more law clerk. Well, here it was, already

²⁵ 60 NY2d 742 (1983).

September, so I wouldn't find -- well, I guess, I couldn't have entered into that fray of law-school applicants and all that stuff that especially the federal judges go through -- which over the 25 years, I have to tell you, I never went through it, never. I always hired lawyers. I was so fortunate to hire lawyers from practice, either out of the firms or out of an organization like the Legal Aid Society or the District Attorney's office, people with experience, people who not only had distinctive academic records, but also had a reputation for conviviality, for doing a good work product. I thought that was more important than academic performance, just to know the person who I was going to be really living my life with for two years. It worked out very well for me for the whole 25 years.

Gary and I sat down together and we thought, "Okay, we'd better get somebody with some criminal law background, because here are the two of us, out of these big law firms. We're going to be hit with all these criminal cases. We ought to find somebody with some criminal experience." I was on the Board of Legal Aid at the time and I probably called Will Hellerstein, who was the head of the Appeals Bureau, to ask for some recommendations, and he sent me Darren O'Connor. And Darren, I remember, had a little bit of an unusual background that really appealed to Gary, and to me, which is that Darren had been a movie actor. Essential for a law clerk, right? [0:44:55]

I remember Will telling me he just thought Darren was totally spectacular and that would be his choice. I think Darren actually had gone to night law school at Fordham. So he was not out of the mold, but neither was Gary and neither was I. We interviewed Darren and

we thought he had a great sense of humor. So we got Darren; he signed on with us, and those were my first law clerks. So there we were, up at the Court of Appeals on day one, September 12, 1983, and, at the time -- I've told you this was before 1986 and the introduction of certiorari jurisdiction, so there were at least seven cases a day on the calendar. And you'd come off the bench after argument, into what was called the Red Room -- it still is called the Red Room -- although it's configured differently, and there would be seven index cards turned face down, each one bearing the name of the case, and then, in order of seniority, we would pick. And the case I picked was *Humphrey v State of New York*. So that was my first pick and that got to be my first writing. It was an unsigned memorandum. I am giving up a confidence of the Court to tell you, since it's an unsigned writing, that I wrote that, Gary and I wrote that.

But Gary tells a great story and I believe it. He said I came up from the bench that day, I had this card that said *Humphrey v State of New York*. Gary says I showed him the card and said, "Gary, I have absolutely no idea what I'm supposed to do here, do you?" I think I said it, and I think I was joking -- and to some extent it was true. But Gary and I -- when there's a memorandum opinion, just a little thing that isn't controversial and all that, I've told you that the person who has the card, the next day reports the case at the conference, and I think I reported it to affirm, and I had a unanimous Court, and it wasn't a big deal; the case wasn't a big deal. [0:47:14]

So what Gary and I decided we would do would be to circulate a draft memorandum among the seven colleagues and see how it went. It didn't seem to be a very controversial

proposition, so we got our memorandum out, and lo and behold, it was received with great applause and it was marked TD (Tentatively Down). My first writing for the State high court.

There are various things that can happen to a writing when you're in Albany. If something approved around the table is written so closely to the time that it was argued, it will be marked Tentatively Down and held over to the next session. The Court would not, unless there was some enormous emergency, put a decision out to the public immediately. We would want the chance for a last look, just a bit of time. It's going to be in the books for a long time. TD means tentatively down, which means, we think it's okay, but we'll hold it to take another look. So at my very first session, my very first case was immediately marked tentatively down. It is probably my most cited writing for the Court of Appeals, standing for the utterly unsurprising proposition that findings of fact that are supported by the record and affirmed by the intermediate appellate court are beyond the power of review of the Court of Appeals. The Court of Appeals, if it's an affirmed finding of fact with support in the record, is just, you know, we're not going there. I think *Humphrey* has been cited hundreds of times. The following session, in October, it went down, but others did, as well, because we took home with us several cases to write opinions on.

I will never forget coming home. I've told you what the general design was -- to study hard, be prepared to vote, vote the cases, come home with writings, prepare drafts, get them circulated. Next time we're together, get those opinions down. That's what you're there to do. I came home probably with eight writings for the Court of Appeals, and I just

remember, like, retching in the bathroom, thinking, “How on earth am I going to be able to do this?” and my sweet, dear husband said to me, “Don’t get yourself so upset.” He said, “What you don’t do this month, you’ll do next month.” Well -- no. That’s just not the way the Court of Appeals works. Cases argued one session are generally decided, with opinions handed down the next session. Everybody does it at the Court. Regrettably, I don’t think it’s well enough known to the public, what an extraordinary place the Court of Appeals is. [0:50:00]

But I did have certainly at least three other opinions -- one of them a criminal opinion; one, a contracts opinion; and one, a preemption opinion -- that went down the following month. And so there I was, in the swim, doing what I love to do, work.

RM: And, of course, you’ve written hundreds and hundreds of important opinions. One of your very first major opinions was in a criminal case -- *People v Lemuel Smith*.²⁶ Can you tell us a bit about that?

JSK: Yes. Well, I came on the Court in September of 1983, as I’ve told you, and I guess it was -- New York State had a death penalty at the time. We had, in fact, it was in the statute books, and it had been eroded a little bit, and the Supreme Court at the time -- the Supreme Court of the United States -- was nipping away at the death penalty as cruel and unusual punishment or finding statutory problems in the death penalty. But New York was left with a vestige of the death penalty in 1983, under the law, the federal law and the state law, for first-degree murder. I mean, the guy, Lemuel Smith, had murdered a prison

²⁶ 63 NY2d 41 (1984).

guard. He was in prison, having murdered like five other women, or maybe even six, and he then murdered a prison guard. And under the New York statute, that was a condition -- murdering a prison guard when you're a life-term inmate, or murdering anyone when you're a life-term inmate -- there was a mandatory death penalty for that act. He had been sentenced to death, of all people, by my later colleague, Judge Albert Rosenblatt, and that case came to us in April 1984, when I had been on the Court just a few months. [0:52:17] So there I was in hot water at the beginning, right? With a death penalty case. Death is different, and this was very, very serious. There were 14 volumes of the trial transcript, which I kept in my chambers until the very day I left the bench. That case certainly stands out in my mind a lot. So it was argued in April and we were divided, the Court was divided, but this time I knew that I would not vote to uphold a mandatory death penalty. Mandatory death penalty means that if you are found guilty of the crime, the sentence is mandated, the death sentence is mandated. There are no human considerations that a court was to take into account and that just didn't seem right to me under our justice system. I would have been the fourth vote either way, there were three and three, but I had no hesitation in voting to strike down the death penalty.

The only concern that I had, and it was really a very serious concern for me, was that in the decisions of the Supreme Court of the United States at the time, striking down a death penalty from time to time, they had reserved, sometimes in a footnote, sometimes in parentheses, "except possibly a mandatory death penalty for a life-term inmate who murders somebody." Maybe a mandatory death penalty is okay in those circumstances;

otherwise, not okay. That was my concern -- that maybe the Supreme Court would take certiorari and reverse if I provided the fourth vote to strike down the death penalty. So it weighed on my mind. Nonetheless, I thought it was the right thing to do. I voted that way -- we were four-three. And it was also a concern to me that Chief Judge Cooke was the other way, because I knew what a caring and humane person he was, and a Catholic person, too -- not that that entered into his decision making -- but it was a concern to me that he, a caring person, as I'd find in so many cases, would have voted to uphold the death sentence. But it was Judges Cooke and Simons and Jasen who were to uphold the death penalty, and the rest of us were to strike it down. And so that went out. [0:54:59] Actually, within chambers, Gary and Darren and I split the work three ways. There was enough for three of us to do, and we had a lot of other cases to do, too. But we split up *People v Lemuel Smith*. Gary dug into the facts and, in fact, the illustration in the casebook -- I think Gary actually drew it or perfected it; Darren just honed in on the law; and I was hovering over both parts. And we got it out, we got it out. It was argued in the April session, so it went over the May session. Sometimes cases get held over. I say, the tradition, the effort, huge effort is made to have a case that's argued one session, handed down the next, but you can certainly understand that this was one that had a little more, that required a little more, and especially given the closeness of the Court, and then maybe, maybe, maybe it was headed for the Supreme Court of the United States. So we held that over until Decision Days in June, and it was released at the time to a great public furor, clamor. Not popular.

KAYE

I remember Mayor Koch²⁷ did not care for that decision, and neither did the press, or many members of the public. But the Court, I think, did absolutely the right thing in striking that down. And then I just worried profoundly for the months afterwards, until I knew whether the Supreme Court was going to take certiorari to reverse the decision. Miraculously, it didn't, it didn't, so I got by and survived. Except the one story where my poor Aunt Libby -- she was crushed by the decision. Not the decision -- she was just crushed by all the public criticism of me and the clamor. But I got over that, too. It was the right decision and I think the Court did a good job. I've reread that now and I think we did a really good job. [0:57:11]

Can we take a bit of a break?

RM: Judge, we're talking about what's going to be just a few, a small sampling, of your many seminal cases, but we started with *Lemuel Smith*, and let's talk about just a few other criminal cases. But first the death penalty generally. There came a time when you had to deal with a succession of other death-penalty cases later. Do you have any insights on those?

JSK: Yes. I might say, just generally, that we spoke about *People v Lemuel Smith* in my very first year on the Court -- actually it was June or July 1, 1984, that the opinion came down -- and until just about my very last year, I think 2007, that was *People v Taylor*,²⁸ the last of the death-penalty cases. I would just say generally, I am pleased and relieved that we never had to put anyone to death.

²⁷ Edward I. Koch, Mayor of the City of New York, 1978-1989.

²⁸ 9 NY3d 129 (2007).

After *Lemuel Smith*, which was the last vestige of the statute, as I've described earlier, for a little while we had no death-penalty statute. That was the last scrap of it. But it became an issue in the gubernatorial campaign. Mario Cuomo openly was against the death penalty, and George Pataki,²⁹ who became his successor, was openly in favor of the death penalty, and actually, that probably was a factor in the campaign. Not surprisingly, after his election, George Pataki was successful in restoring a death penalty to the statute books of the State of New York. [0:02:27]

So, over the next years, we had, I believe, five or possibly six cases under the new death-penalty statute. The first thing that happened -- you know, it's a terribly serious thing to be putting someone to death, and the Court geared up so that we could do it right, meaning that we could give full consideration to all of the issues, but that was the atmosphere in general. A Capital Defender Office was organized to assure that the defense would be properly represented. The District Attorney's offices geared up; the Court of Appeals adopted special rules -- capital rules -- and we each hired an extra law clerk, knowing that the papers would be huge, as they were -- in each case, the papers were huge. Every time a death-penalty case was argued, a full day was set aside at the Court of Appeals, and it was a day that was unusual in its somberness. They were distinctly different days, when we had death-penalty arguments. We had excellent counsel, and very, very good attention given at the Court of Appeals to each of these cases.

²⁹ George E. Pataki, Governor of the State of New York, 1995-2006.

KAYE

After *Taylor* in 2007 -- that was the last one -- they were all split decisions, by the way, after *Taylor*, where we struck down the statute on the basis of the deadlock instruction to the jury, I think the Legislature lost interest. Had it been interested in amending the statute to cure that defect, it could have. Would that then have survived court scrutiny in the next case? I don't know, but there was an identifiable constitutional defect in the statute and the Legislature chose not to tinker with what you call the machinery of death any more. Let's see, that was 2007. I think I witnessed a change over the years in the State of New York. I like to think it's nationwide. [0:05:12]

My late husband used to accuse me of "east of the Mississippi thinking" -- that was what he would say, but I've seen, from time to time, states like Ohio and New Jersey and Illinois, where -- Ohio was the most recent one I remember, just in August of 2011, where the Governor said, "I've had enough." I think in the State of New York, back in 2007, there was a climate indicating that the people of the State of New York had had enough in the mammoth expense, and maybe most of all, the evidence that sometimes innocent people were put to death. Are we a society like that? Are those our values?

So I think by the time of *Taylor*, in the State of New York, and maybe other parts of the United States, over the ensuing years, there's been a shift in attitude. Then I see Rick Perry cheered in Texas and I see someone put to death where there's evidence of his innocence, and I think maybe that is "east of the Mississippi thinking." But I'm proud to live east of the Mississippi.

RM: Judge, the issue of the death penalty was unique in many ways, but one way it was not

KAYE

unique was that the Court continued to wrestle with it for a very long time. Another case, another issue that the Court grappled with over a long time, starting in your very first session -- *People v Register*.³⁰

JSK: I knew you were going to say that, yes. Oh, my goodness. That was, as you say, argued in my very first session, in the week of September 18. And it was a case of statutory interpretation. The Court has a lot of statutory interpretation cases, where we look at the words of the statute, and seek to implement the will of the Legislature. There are also common-law cases -- of judge-made law -- and then there are constitutional cases.

[0:07:30]

This was a case of statutory interpretation, and the statute was about the crime of depraved indifference murder. It was the first time in my life I had encountered that statute. There's intentional murder, which is at the top of the list of intentional acts of homicide, and then there's depraved indifference murder, which is at the top of the list of non-intentional acts of homicide, reckless kind of acts of homicide. So we were, for the first time in a very long time, being called upon to construe the words of that statute. Now, it's really an interesting exercise in taking the words drafted in the abstract by the legislators and giving them meaning over the years in cases, sometimes decades later. When this came up, I say, the Court hadn't considered it in some time, and I was really -- I just didn't know what to -- I didn't know how to come out on it. And again, it was one of those three-three divided Courts -- heavily three-three divided Courts -- except this was a

³⁰ 60 NY2d 270 (1983).

time when I just didn't know which way to go. This was certainly a reckless shooting and the defendant had been drinking. To me, I mean I just thought that -- if anything was reckless depraved indifference murder, that that would be it. And meanwhile, there was a healthy difference between two of the Judges who were pretty strict in criminal cases -- Judge Simons on one side and Judge Jasen on the other side -- and the discussion went on.

[0:09:27]

I've told you the ideal case. For example, I've given you the case of *Humphrey*, where the Court hears the argument one day, we convene for conference the next day, there's a unanimous Court, and then the issues are clear and simple enough so that one of the Judges can draft a writing and the writing gets handed down. *Register* was at the other end of the spectrum in the sense that the day after the argument; we were split three-three, and I was on the fence. I just didn't know which way to go. So when that happens, the case gets put over another day. I don't remember which day of the week *Register* was argued, but it would get put over another day and another day. *Register* went over, actually, another session, because of my inability to decide whether the conviction should be affirmed or reversed. And I was in the midst of some pretty heady discussions about mens rea and actus reus and really things that were not right at my fingertips.

So the case went over to October. I think it may have not been handed down until November, if I remember correctly, as the argument went on and on. I remember Judge Simons -- I've told you everybody was just wonderful to me, but he was growing decidedly short-tempered with me and it probably was the October session that he said,

“Judith, I don’t care whether I’m writing to reverse or I’m writing to affirm, but I just want to know, before we leave Albany, which one I’m doing.” Not unreasonable. So ultimately, I did make up my mind to uphold the conviction, because, as I said a moment ago, as I read the facts and I read the statute again and again and again, it seemed to me this was the very embodiment of depraved indifference murder. And for a long time, that was it at the Court of Appeals. We didn’t have another depraved indifference murder case for a long time. [0:11:27]

The Court of Appeals is a law court. In the design of our system, we have the trial courts; we have the intermediate appellate courts with fact jurisdiction, interest-of-justice jurisdiction. Cases that go to the Court of Appeals raise law issues of statewide significance, the idea being that the Court will settle the law and parties will know.

Parties will know whether their conduct -- which side of the fence their conduct is on; they know how to guide themselves and how to behave. What I’ve discovered, and I saw this many times in my tenure on the Court of Appeals, is, whichever side wins, then hair by hair, carries out the proposition just a little bit further and further and further. I’ve seen it in the Court of Appeals on the *Rosario*³¹ cases. I’ve seen it on the post-release supervision cases. I’ve seen it on defendant’s right to counsel; in courtroom sidebars. I see you nodding your head, knowing exactly what I mean. What was maybe not an unreasonable thing to begin with -- it just gets carried out further and further. *Register* is one of them.

I think it was not until Judge Rosenblatt came on the Court many years later when we got

³¹ *People v Rosario*, 9 NY2d 286 (1961).

another depraved indifference case, that the Court began to feel differently about the statute, and ultimately *Register* was reversed,³² which is a real hard swallow. And in fact, I wound up dissenting and standing by my critical fourth vote in *People v Register*. But we did determine that what had become the crime of depraved indifference murder over the years was just not at all what the Legislature had in mind, and at least a majority of the Court so concluded. [0:13:36]

But the interesting thing about *Register* is that I was at some reception the other day where there were some federal judges and, apparently, the case continues to be a vexing issue. So I guess the bottom line out of all of this is our business is very serious business -- decisions at the Court of Appeals. You have to really think very hard and reach a good result and a good proposition and articulate it wisely and well, because what I call sequelae can be haunting to the law -- to the justice system. And *Register* is my Exhibit A. (Indeed, practically 30 years to the day, the Court again divided over the meaning of depraved indifference murder, one dissenter noting that the majority sounded like it was back to *Register* [see *People v Heidgen*³³].)

RM: You mentioned as among your Exhibit Bs, the right to counsel. Can you say a bit about *People v Bing*?³⁴

³² *People v Feingold*, 7 NY3d 288 (2006) (Kaye, Ch. J., dissenting).

³³ 22 NY3d 259 (2013).

³⁴ 76 NY2d 331 (1990). *Bing* overruled *People v Bartolomeo* (53 NY2d 225 [1981]), which had recognized a derivative right to counsel under the New York State Constitution for a suspect with respect to new unrelated criminal charges, arising from the suspect's representation on prior pending charges. The *Bing* majority held that the right to counsel under the State Constitution is not violated where a suspect, in the absence of counsel, waives his *Miranda* rights and is questioned by the police solely on matters unrelated to the prior pending charge.

KAYE

JSK: Oh, my goodness, only the painfulness of being the dissenter there, in what I hoped would go the other way. There was a case where Judge Simons prevailed and felt we had just run amuck with what was a perfectly sensible Court of Appeals decision, but another one that had gone over the top, and I disagreed very heartily and dissented. So, this happened, where in the midst of these cordial, convivial relationships and lots of hard work, we have very basic disagreements about the law.

C. Confronting Our State Constitution and Press Issues

RM: The criminal law was often an issue in the state constitutional cases, as to which you became a nationally renowned jurist and scholar. Can you tell us about your introduction to and involvement in dual constitutionalism?

JSK: Yes. Actually it was Judge Cooke, Chief Judge Cooke, who sent me to a conference on state constitutions. This would have been in 1983 or probably 1984. He would have left the Court December 31, 1984, and I think it was during the year 1984 that the Conference of Chief Justices, the National Center for State Courts, one of those entities, held a conference on state constitutional law. And this was kind of the aftermath of an article on state constitutional law in the *Harvard Law Review*, by United States Supreme Court Justice William Brennan,³⁵ urging state courts to dust off their constitutions and accord citizens of the states the rights that were intended for them by their own state constitutions. [0:16:21]

Every state has a constitution; I surely knew that. When I took my oath of office, I swore

³⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv L Rev 489 (1977).

KAYE

to uphold the Constitution of the United States and the Constitution of the State of New York, and I surely knew that every state had a constitution, but honestly it just wasn't really uppermost in anybody's mind for a very long time. Justice Brennan sounded the bell and there was a great outburst of scholarly interest and suddenly, state constitutions were kind of being taken out, and as he asked us to, dusted off, and we were off and running with state constitutions.

So I went to that conference in Williamsburg and immediately secured a copy of the state constitution. Came back filled with the idea, the responsibility. I mean we do have a state constitution and I had an oath of office to uphold and support it and yet, we weren't paying much attention to it. And lo and behold, in my very first year on the Court, we had a case, *People v Benigno Class*.³⁶ It was a case involving a stop, an alleged search/seizure, when a police officer trying to locate the vehicle identification number (VIN) in the car that he had stopped, reached into the open window and moved some clutter that was on the dashboard. The VIN was otherwise obscured and the defendant claimed what the police did was unlawful and, as I remember, cited both the State and Federal Constitutions, although, honest, without much of a discussion of the state constitution. [0:18:22]

And the Court, this was another divided decision, as we regularly have them. But the Court decided, I think five-two, maybe four-three. Do you remember?

RM: I don't.

³⁶ *People v Class*, 63 NY2d 491 (1984).

JSK: But I know Judge Jones wrote the dissent. I wrote for the Court, and in the very first sentence, siding with the defendant, saying it was unlawful, unconstitutional, what the police officer did, I cited both the United States Constitution and the state constitution. I think that's the first time that's been cited in a long time, and lo and behold, much to my shock and chagrin, the United States Supreme Court granted certiorari to hear that case. They don't often do that. In my years on the Court, I think not more than maybe half a dozen times did the United States Supreme Court take a decision of ours. But anyway, they reversed it and I remember being teased about it, because the opinion³⁷ was written by Sandra Day O'Connor,³⁸ Justice O'Connor, who went on the Supreme Court in the year 1981, the first woman to join the Supreme Court of the United States. I was teased because -- well, a prisoner had written to me as "Dear Mother of Justice," and I remember people in my chambers teasing me that the Grandmother of Justice had just reversed the Mother of Justice.

Well, it was painful for a lot of reasons. Being reversed is unpleasant. But what they did -- what they had to do, since we decided under the federal constitution and the state constitution, what they did was to remit the case to the Court of Appeals, or remand -- I don't remember what words they used -- to us, back to us, back to the Court of Appeals, for consideration of the state constitution. The federal constitution sets a floor of constitutional rights, but the state constitution can set a higher ceiling. So the Supreme Court sent the case back to us, since we had relied in part on the state constitution, to give

³⁷ *New York v Class*, 475 US 106 (1986).

³⁸ Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States, 1981-2006.

KAYE

us an opportunity to decide whether, in this instance, we wanted a higher ceiling than the federal constitutional floor. So the case came back to us and, lo and behold, unanimously, the Court of Appeals of the State of New York overturned the conviction and said as a matter of state constitutional law that this was an unreasonable search. We didn't go into it much but just concluded -- we said to the Supreme Court, "Hey, we told you we were relying on the state constitution, and we really, really meant it." [0:21:29]

As I'm speaking, I remember there were two dissenters, now that I'm speaking, and they joined in the opinion, too, because we may have disagreed on the underlying federal constitutional issue, but they had to acknowledge that we also relied on the state constitution, as we did -- as we said in the very first sentence of the opinion, and that was the conclusion that we reached as a matter of state constitutional law. So that was quite an introduction to the subject, both the academic introduction that I had in Williamsburg -- I began speaking and writing about state constitutions -- and then the *Class* case, the very first case that came to the Court.

RM: As you said, that first case came back and you were unanimous, but not all of the state constitutional cases were unanimous in the approach that the Judges wanted to take toward those cases. Can you speak to that?

JSK: I would say, I have not gone back and checked, but I would think that that probably is the only case under the state constitution where the Court has been unanimous. Invariably, the state constitutional cases evoke dissents. And probably either the zenith or the nadir, depending on how you feel about multiple opinions among the seven Judges, was a case

KAYE

called *Immuno AG v Moor Jankowski*,³⁹ where the Court issued four opinions in a state constitutional law case. I mean we can talk more about *Immuno*, but my point only is that invariably, the Court divided and continues to divide -- as I read the opinions since my successor has taken office -- continues to divide on matters of state constitutional law. It's really quite remarkable. Even non-criminal cases, the Court divides all the time. And there were some bruisers, as I know are on your mind. But being the optimist, good person that I am, I think of *Immuno*. [0:23:38]

RM: A non-criminal case.

JSK: A non-criminal case. That was a First Amendment case, yes. That had an interesting history, too. As you heard in the earlier sessions, my aspiration was never to be a lawyer or judge; it was to be a journalist. And along comes this case involving issues of free speech, free press. Well, this was really free speech more than press, but it was a "Letter to the Editor," so First Amendment kind of stuff -- and its counterpart under the state constitution. It was a Letter to the Editor involving some scientific research and the issue was whether there would be protection for what was essentially a statement of opinion. I got the first round in our Court on *Immuno*,³⁹ and felt that that was decidedly protected speech under the Constitution. Maybe again, I sprinkled the state constitution. Certainly, the lawyer didn't emphasize it much, and I do want to get back to that point about the bar and the performance of the bar in matters of state constitutional law.

But the case went to the Supreme Court of the United States. We upheld the right of the

³⁹ 77 NY2d 235 (1991).

letter writer to express opinion freely; that is our value, a fundamental value of our nation. I remember my late husband and I were vacationing in Switzerland, as we did in the month of July. We'd rent a house and use the house as a base and hike sometimes and travel sometimes, a real paradise kind of vacation, and read a ton. We would take, I don't know, 150 pounds of books with us -- the entire Supreme Court term, all the Law Weeks for the whole year, and I was on the phone probably every day, too, during that period. Nonetheless, it was a paradise vacation. [0:25:52] But that summer it was interrupted by a call from my then beloved law clerk -- I told you, I've always had the best law clerks -- Hank Greenberg. He called to say, "Judge, I have bad news for you. The Supreme Court has GVR'd *Immuno*." Goodness, that was so sad. I didn't even know what GVR'd was. The Supreme Court had -- in an opinion written by Chief Justice Rehnquist⁴⁰ decided -- I think it was *Milkovich*⁴¹ the case, and it bore on First Amendment issues relating to -- they kind of narrowed the protection for what I thought was unfettered expression of opinion, and there was the petition for certiorari in *Immuno*, right behind, awaiting decision.

What the Supreme Court does in a case like that, this GVR, is to grant, that means grant the certiorari application -- the person who felt he had been defamed by the letter got his application granted. But what they do is grant, vacate, and remand, GVR, meaning that they sent the case back to the Court of Appeals, so that the Court of Appeals itself could

⁴⁰ William Rehnquist, Chief Justice of the Supreme Court of the United States, 1986-2005; Associate Justice, 1972-1986.

⁴¹ *Milkovich v Lorain Journal Co.*, 497 US 1 (1990).

take *Milkovich* and apply its newly trimmed down version of the First Amendment -- could apply it to the facts of *Immuno*. So we got the case back and again, we were -- the thing about it is that everybody thought it was within some constitutional protection, this view of the letter writer. We just couldn't come together on what the ground should be, and so there are four separate writings. I have yet to see another case for a unanimous result with four separate writings. [0:27:59]

This time around the lawyer -- and I said I wanted to come back to lawyers, because the Court of Appeals, the highest state court, can raise the constitutional ceiling under the state constitution, but it's not something we go around doing on our own. These things have to be briefed and argued, and you have to show that the words are different, that they mean something different historically, traditionally, in the case law, some way -- that we're just not slaphappy and haphazard and all, about raising the ceiling above the constitutional floor set by the Supreme Court.

In this case, the second time around, the lawyers went all out on the state constitutional law and they made a fine case for *Immuno* under the state constitution. I did get three of my colleagues to join in my opinion, so it is -- you know, when you have a vote of four, it's not just the result but it's also the rationale, and four Judges voted for the rationale. But then three of my colleagues wrote separately, one thinking I had misconstrued something, and one thinking that the decision should be both federal and state, and, my goodness, the most shocking of all was Judge Titone⁴² saying that you didn't need to get

⁴² Vito J. Titone, Associate Judge of the New York State Court of Appeals, 1985-1998.

to the Constitution at all -- that this should just be decided as a matter of state common law. So that's a standout in Court of Appeals jurisprudence for many reasons.

But the state constitutional cases always evoked very lively controversy, and I notice the *People v Weaver* case,⁴³ since I've left the Court -- not part of my court history but part of my successor's court history. And I'm sure he, like many others, are waiting with bated breath to see what the Supreme Court of the United States does, because the Court of Appeals went out on the state constitution, finding that the conduct of the police was unconstitutional, unlawful, in surreptitiously installing a GPS device on the defendant's vehicle. And the Supreme Court has just heard argument under the federal constitution, so we'll see what happens. Interesting, right? [0:30:26]

RM: Very. Sometimes you had cases where the claims of civil litigants or criminal defendants were set against claims of freedom of the press. I'm thinking of cases involving the journalist privilege or the Shield Law, like *O'Neill v Oakgrove Construction*⁴⁴ or *People v Combust*.⁴⁵ How did your former career as a journalist inform your approach to those

⁴³ 12 NY3d 433 (2009).

⁴⁴ 71 NY2d 521 (1988). The Court of Appeals held that article I, § 8 of the New York State Constitution and the First Amendment of the Federal Constitution provide a reporter's privilege which extends to confidential and nonconfidential materials and which, albeit qualified, is triggered where the material sought for disclosure in a civil lawsuit was prepared or collected in the course of newsgathering. Judge Kaye concurred in the result and in the Court's opinion, except insofar as the court decided the case under the Federal Constitution. In Judge Kaye's view, the case was correctly resolved under the State Constitution alone.

⁴⁵ 4 NY3d 341 (2005). The Court of Appeals, in a majority opinion by Chief Judge Kaye, held that a criminal defendant had satisfied his burden under the Shield Law to compel production of a journalist's nonconfidential material—video and audio tapes of his police interrogation taken by a film company that was making a television documentary. The Shield Law had been enacted to codify the three-pronged test enunciated by the Court in *O'Neill v Oakgrove Construction* that a litigant must satisfy to obtain such materials. Defendant argued that a reporter's privilege in nonconfidential materials does not easily overcome a criminal defendant's fair trial rights. However, the Court was not required to decide what standard is constitutionally required in order to overcome a criminal defendant's substantial right to obtain relevant evidence because defendant had met his burden under the Shield Law.

KAYE

cases?

JSK: That's an interesting question. I knew I was writing as a judge. Was I also writing as a journalist? You've reminded me that probably a key to my success in law school was my being a journalist, having been a journalist, because I wrote my first note in law school on the journalist testimony, advocating a shield law for journalists, and it got picked up by some law review called the *Intramural Law Review*. I was using a different name, Judith Smith, so I shouldn't be saying all these things. I don't want anybody to go looking for this article. But I'd say it was career changing, because when I was interviewed for the *Law Review* and they asked me if I had a writing sample, I produced this already printed article. So was I thinking as a journalist? No, I think, in facing those opinions, I must say, it always pleased me to encounter them, probably even more than a Uniform Commercial Code opinion. But how much did my prior career as a journalist foreordain the result? I think the values of press and free speech are just the most fundamental, among the most fundamental of our values. And I always had a Court, didn't I?

RM: You did, but in both of those cases, you came out for the right of the litigant to pierce the privilege and obtain the non-confidential information. [0:32:27]

JSK: Well, that happens. It's the principle that counts.

D. Family Law Issues

RM: Throughout your career, the well-being of children and families has been a paramount concern, of course, and you've also developed a nationally recognized body of jurisprudence on those issues. Do you want to talk a bit about *Matter of Jacob and*

KAYE

Dana;⁴⁶ *Nicholson v Scoppetta*;⁴⁷ and *Hernandez v Robles*?⁴⁸

JSK: Those cases, as you might expect, are particularly meaningful to me, and maybe the most commented-on case is *Jacob*. I mean, I've been in places where people have come up to me and said, "Thank you, thank you for *Jacob*." *Jacob*, of course, is a statutory construction case, construing the adoption statute -- the Domestic Relations Law of the State of New York. The Court upheld the right of a same-sex partner to adopt a child. I hardly thought it was the end of the world -- it just seemed so right to me -- but I think you have a clue to the difficulty we had in reaching that decision if you look at the number of months that elapsed between the date that it was argued and the date that it was handed down. I haven't gone back and checked recently, but I know it went over the summer and it was probably maybe four or five or six months between the date the case was argued and the date it was handed down, ultimately a four-three decision. One Judge was plainly holding open the door.

RM: I think it was May to November.

⁴⁶ *Matter of Jacob*, 86 NY2d 651 (1995).

⁴⁷ 3 NY3d 351 (2004). In a class action centered on New York's statutory scheme for child protective proceedings, the Court of Appeals answered questions certified by the United States Court of Appeals for the Second Circuit as follows. In a neglect proceeding, evidence that the respondent parent has been the victim of domestic violence, and that the child has been exposed to that violence, without more, is insufficient to find that the child has been neglected as defined in Family Court Act § 1012 (f); emotional harm suffered by a child exposed to domestic violence, where shown, may warrant removal of the child pursuant to Family Court Act § 1021 by court order after a petition is filed, but there is no blanket presumption favoring removal; and emotional harm suffered by a child exposed to domestic violence, where shown, may warrant ex parte removal of the child by court order pursuant to Family Court Act § 1022 if the agency believes there is insufficient time to file a petition and three factors are met: the parent is absent or refused to consent to temporary removal of the child and was informed of an intent to apply for an order; the child appears to suffer from abuse or neglect of a parent to the extent that immediate removal is necessary to avoid imminent danger to the child's life or health; and there is insufficient time to file a petition and hold a preliminary hearing.

⁴⁸ 1 NY3d 338 (2006) (Kaye, Ch. J., dissenting). The Court of Appeals held that New York's Domestic Relations Law limits marriage to opposite-sex couples, and this limitation is valid under the due process and equal protection provisions of the New York Constitution.

KAYE

JSK: Yes. For the Court of Appeals, that's a very unusual time difference. I'm proud of the Court; it was absolutely the right thing to do. I say, it pleases me so much to have a continued affirmance of the case. It helped to give me your son, Robert, my own godson, right? [0:34:28]

RM: Absolutely.

JSK: *Nicholson* raises a little different question and I'm glad you brought it up, because I did want to address that, too. *Nicholson* concerned domestic violence and you're right, that has been a great interest of mine. The *Nicholson* case -- another good statutory interpretation that brought fairness and justice to the statute.

Nicholson was a case of domestic violence where the issue was certified to us by the Second Circuit,⁴⁹ and that had very special significance, because when we get a case in the Court of Appeals, facts and law, often the facts will circumscribe the articulation of the law a little bit. When a case comes to us from the Second Circuit, what they're doing is certifying to us a question of New York law, which we decide in the abstract. There are facts, of course, but the Second Circuit wants to know, from the Court of Appeals, what the answer is on the law, and then send the case back to them and they will apply the law as we have stated, to the facts that are before them.

So what *Nicholson* enabled us to do, by just having that abstract question of law, was to articulate a principle of law, proposition of law, regarding domestic violence cases that had very, very widespread impact, probably more so than had we decided it ourselves, had

⁴⁹ 344 F3d 154 (2003).

we applied it to the facts ourselves. It's had a really good life I think; it's a very good proposition. [0:36:34]

And now *Hernandez*. *Hernandez* is my constant heartbreak, because I thought the State of New York, by the time the case came to us -- it was unthinkable to me that we would not approve, uphold, as a matter of constitutional law, the right to marriage; it's so fundamental. I watched the Massachusetts court and then a few others, and I thought, surely, New York, New York State, that by the time it got to us, that we would issue a decision that would be a fortification of the proposition that would turn the issue decisively. And it was just incredible to me that it didn't and that I had to dissent.

So, you've touched on a subject that's very, very dear to me, when you've talked about the *Hernandez* decision, you talked about *Jacob*, you've talked about *Nicholson*. I want to step back -- a couple of decades, in fact -- to the mid-eighties, when Sol Wachtler -- well, not quite a couple of decades. When he became the Chief Judge, replacing Larry Cooke, his idea was to have a commission, he called it the Permanent Judicial Commission on Justice for Children. And he told me, I remember at the time, that when word went out that this commission was being organized, he had more people submitting their names, wanting to be part of this than for anything else he had done. And for, I guess, a couple of years, the commission sort of stumbled along. It never really got going well, and he would talk to me about it from time to time, until once he said to me -- I think it had to be around 1988 -- he said, "Why don't you take over this commission? I think you'd really enjoy it." And I said, "That's ridiculous, you know, I've spent my life in commercial subjects; I

don't know anything about this area of the law, that everything is in acronyms that I can't figure out, and I think it would be a mistake." But he persisted and ultimately, I stepped into the role as co-chair, with Ellen Schall as my -- now the Dean of the Wagner School of Public Policy at New York University -- as my co-chair. [0:39:14]

So together we co-chaired that commission for a couple of years, until Ellen one day told me that she was going to leave me; she felt I could do it on my own. And to this day, I chair the Permanent Judicial Commission on Justice for Children. It is a centerpiece of my life. But it opened my mind to all of these issues that are in my heart, all these family issues. You know, the acronyms don't matter; the kids do and the families do, and I just got so into these issues. And it was, I think, long before -- well, I don't know the exact dates of some of these cases -- *Hernandez*, I remember. But I did become very involved, through the Commission first, and then when I became Chief Judge, through my chief executive officer authority, responsibility, in trying to make life better for kids and families.

So the children's issues, my goodness, I remember so many of them. I can't, in particular, give you the citations, but they were always tremendously important and moving for me, and then to have them in my chief executive officer capacity. To this very day, I am very actively involved in the Commission. We've done a lot to at first focus on issues involving children zero-to-three, like the Children's Centers in courts and focusing on expediting adoptions and permanency for children, which is so important in their lives. We spent the first 10 or so years of the Commission devoted to zero-to-three. By then I was the Chief

Judge and [0:41:16] the Commission moved to adolescents. Today my interest is in keeping kids in school and out of courts, and in fact, yesterday and today, I've been running in and out -- we're preparing for a summit, a nationwide summit that will bring together judges and child advocates and school officials, education people, to try to find ways to keep kids from getting to court, because once they get into court -- and I don't mean to approve their adoption -- I mean when they're arrested, when they're charged, when they're juvenile delinquents, it usually spells the end of their productive and happy lives and threatens everyone else, too. So if we can do something to intervene constructively in their lives. It surely isn't the end of the situation to say, "Keep kids in school," because there's so much else we have to do. But the truth, the fact statistically proven beyond all doubt, is when kids are expelled, suspended, when they leave school, that really is a path to disaster. So if we can keep them in school and out of courts and find ways to do that, I think that's a very worthwhile thing to do. And that all got started for me the day I became co-chair of the Permanent Judicial Commission on Justice for Children.

RM: And if we can make their schools good -- which brings me to the last case I wanted to discuss -- *Campaign for Fiscal Equity v State of New York* [CFE].⁵⁰

JSK: Ah, *CFE*. That's hardly a case; that's like a chapter, right?

RM: Yes.

⁵⁰ *Campaign for Fiscal Equity, Inc. v State of New York*, 100 NY2d 893 (2003). Construing the Education Article of the New York State Constitution, the Court of Appeals, in an opinion by Chief Judge Kaye, held that the State violated the constitutional mandate to make available a "sound basic education" to all the children of the state (NY Const, art XI, § 1) by establishing an education financing system that failed to afford New York City's public schoolchildren the opportunity for a meaningful high school education. The Court demarcated standards that must be met to satisfy the constitutional mandate, but left it to defendants to come into compliance.

KAYE

JSK: Because we had it a couple of times. We talked earlier about state constitutional law, a subject of enormous interest to me. You know, I love to write articles. Does this go back to the journalism days or is this just being the Chief Judge or Judge? But I've written articles on the state constitution and the really, really tough issues are the issues where our constitutional language is identical to the language of the United States Constitution. And there we have a tougher case raising the ceiling. I think it's still our responsibility to do it when a case is made out for doing it. I have to be frank and tell you, when the language of both charters is identical, that you have to make a case for a different rule. And I'm satisfied that the case is made from time to time. [0:44:03]

But when it comes to public education, that is our very own -- that is unique in our state constitution. The people who wrote our Constitution -- our Constitution was written in the year 1777. That's not the Constitution we have today. It's been amended several times, the last time in the year 1938 (coincidentally the year of my birth). But it's a tough thing to get a constitution. People spend a lot of time poring over it, being sure that it says exactly what they want it to say. And then it gets voted on -- when you amend the Constitution -- by two successive Legislatures, and then by a vote of the people, and that's what we have in our Constitution of 1938. We not only have the affirmative desire to have the words as they are, but in the years since, there have been many efforts to change the Constitution -- to revise, to amend the Constitution -- and they have not succeeded. And as recently as 1967, there was an effort to amend -- a proposed new constitution, and that failed at the polls.

KAYE

I'm giving you all of that to tell you that I think we really have to respect what our framers wrote in our state constitution, and they wanted to guarantee the right to every child in the State of New York to a free and fine public school education. They said that and it is our responsibility. However you may feel about identically worded clauses, this is ours, this is our own, and this is something we are, by oath, obliged to enforce and pay very serious heed to, as we did initially in *CFE*. I cannot say the second time it came around, that I was entirely happy. I believe I dissented, didn't I?⁵¹ [0:46:07]

RM: You did.

JSK: Yes.

RM: You wanted to talk about domestic violence?

JSK: Yes, I wanted to talk about domestic violence, because you know, life really changed for me when I became the Chief Judge. I had a very busy, active, happy life as a Judge of the Court of Appeals. As you've heard, I was actively involved with the Permanent Judicial Commission on Justice for Children, focusing on the zero-to-three population. I've always been a prolific writer of articles. I've given a fair number of speeches. I don't especially like to give speeches, except that they then furnish an opportunity for me to make the speech more serious and make it into an article. So there I was, quite happy, and then one day in 1993, I became the Chief Judge, and I'm sure you're going to get to that

⁵¹ 8 NY3d 14 (2006). The Court of Appeals concluded that the State's estimate of a minimum of \$1.93 billion, in 2004 dollars, as the cost of providing children in New York City's public schools with a sound basic education as mandated in *Campaign for Fiscal Equity, Inc. v State of New York*, 100 NY2d 893 (2003) was reasonable and that the courts should defer to this estimate, appropriately updated. Chief Judge Kaye dissented, in part, writing that the majority did not resolve the inadequate funding of the New York City public schools and reached a result that was well below what the governmental actors themselves had concluded was required.

so I won't divert too much, except to say that one of the first events, and it was definitely in the year 1993 -- I became Chief Judge in March, March 23, 1993 -- there was a horrible tragedy, probably in late 1992, in the County of Westchester, where a woman was murdered by her husband, who then committed suicide. I was the brand new Chief Judge. I was absolutely descended on by the domestic violence community. They were outraged by a proceeding that had taken place in court, when the woman, a very literate, articulate woman, came to the Family Court to get an order of protection. She came herself and she asked the judge for an order of protection, and the judge interrupted her proceeding and listened to the woman as she explained her circumstances, and gave her an order of protection, and this woman left the courthouse with an order of protection. And within two weeks, she was dead, murdered, and her husband had committed suicide. [0:48:17] And so the question was, why didn't the court do something about that? Why don't the courts do something about this? Because I then learned from this outbreak of outrage that this murder-suicide was not entirely atypical. And I remember getting the transcript and thinking, "What did the court do wrong?" The court gave her everything that she wanted. Well, I learned, I learned. I studied and I listened and I learned an awful lot, and today, we don't do things that way.

I could get to the domestic violence courts, but I'll start as a first step, before I get to the domestic violence courts, that you don't just listen to somebody saying, "I need an order of protection," and issue an order of protection. However articulate the person may be requesting an order of protection, you need to know a lot more things and, in fact, the

person who is making the request needs to know a lot more things, and there needs to be somebody who does some interviewing, investigating. There need to be some resources, there needs to be some inquiry of prior violence and whether there are weapons in the house, and just a whole raft of subjects. You don't just hand somebody an order of protection, because then it's just a piece of paper.

Fortunately, because I listened and got some very good teaching on the subject, I think we've come a long way in the state courts of the State of New York. I think we're just much more sophisticated generally about the scourge of domestic violence. We have tens of thousands of cases. You'd be amazed to know about the numbers of cases of intimate partner violence, but today we have domestic violence courts. Because of our fractured court system, you could have a case of, for example, if there were some act of violence or an assault, you could have a case in Criminal Court. You could have a case -- the same parties simultaneously -- in the Family Court, if there was some issue concerning the children. And simultaneously, you could have a separate case in the Supreme Court, if there was some issue relating to the marriage. That serves people who want to subvert the system and agonize the litigant, because what you need -- I think always it's good, but particularly in domestic violence cases, what the judge needs is very comprehensive information. You really need to know everything about the parties involved and their situation, and when you have a single, integrated domestic violence court which is supported by the resources and the people -- I mean, like, where is a person going to live if she has to leave home, or what about the children going to school, or where's the next

meal going to come from? You need people who take these matters very seriously and very comprehensively, and address the situation. And that ties us back to *Nicholson* and cases where domestic violence victims -- their children were being removed from them. How outrageous is that, as if being a victim of domestic violence isn't enough, you get your kids taken away? [0:51:58]

So I think we have learned as a court system and as a society, we have learned a great deal more about domestic violence -- not that it doesn't still go on and that we don't have a lot more to learn. But fortunately, I think our consciousness was really awakened by events back in 1993.

E. Assorted Other Writings

RM: Judge, you've published, as you said, many, many law review articles and other writings. What are among your favorites or those that are most meaningful to you?

JSK: Well, I think my favorite article appeared in the *Green Bag*. It's one page, and I wrote it -- do you know the *Green Bag*? It's such a delightful publication.

RM: I came to know it only because of Alton B. Parker. He's published in it, as well.

JSK: Yes. Well, it's a one-page article called, "The Best Oral Argument I (N)ever Made."⁵² And that was about an argument -- I'm being facetious now -- argument as a litigator to the Second Circuit, where they affirmed from the bench. I was the respondent and the appellant made his argument, and my family was in the court. I was just getting up to make the argument and they said -- Tom Clark was sitting, a retired Supreme Court Justice, and he

⁵² *The Best Oral Argument I (N)ever Made*, 7 *Journal of Appellate Practice and Process* 191 (Fall 2005) (selected by *The Green Bag Almanac* for publication in 2006 Exemplary Writing).

conferred with each of the judges and he said, “There would be no need to hear from respondent.” I thought, “No fair, I want to make my argument.” So my whole argument was, “May it please the Court. Thank you, Your Honor.”

But seriously, I was treated, the other day, to something that took off the top of my head. I was at the Court of Appeals for the dedication of my portrait, which was a proud enough moment to begin with, but it was enhanced by a program in the afternoon by the Capital District Women’s Bar Association, a super, super, super program. There was one hour on my jurisprudence that Professor Susan Herman of the Brooklyn Law School delivered -- approximately an hour -- and approximately an hour on my administrative initiatives by Judge/Dean Juanita Bing Newton. But what just thrilled me was Professor Herman’s discussion of my article in the NYU Law Review, which I think -- yes, it was on dual constitutionalism. And I can’t wait. Nick videotaped it. I can’t wait to get the videotape. Everybody should have the pleasure of having his or her work done that way and videoed that way. (Professor Herman’s article has been published in the *Albany Law Review*.⁵³)

[0:54:36]

But she unearthed a theory of mine on the Ninth Amendment. It was just so exciting to listen to her, about how active state constitutional interpretation feeds into the federal constitution. Yes, absolutely, absolutely. So having heard Professor Herman, I would have to put that at the top of the list. It’s not something I would send to my grandchildren. I don’t know -- favorite article is kind of hard to say. I have an article right now that’s

⁵³ *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 Alb L Rev 1977 (2011-2012).

going to be published in the *Indiana Law Review*, on legal education. And the last major one I published, maybe I would put that at the top of the list, is an article on *Matter of Gault*, which is in the *Supreme Court Historical Society Journal*.⁵⁴ I do like to write, I do. It genuinely gives me pleasure to peel away the layers. Even this piece on legal education. It apparently was an obligation I had undertaken when I was still Chief Judge, to deliver this lecture. I forgot all about it, but the University of Indiana Law School didn't, and so they insisted that I come out there, which I did, and I was just all cross and crotchety about it until I started getting into it. And you know, it's really an enormously interesting and important subject, especially today -- legal education.

It's hard to think of something I would not enjoy getting into. It's just the process of getting into something, figuring it out, and then writing it up. I enjoy that.

RM: And how about your Brennan Lecture⁵⁵ on the role of state courts? [0:56:27]

JSK: Yes, right. I can't -- picking a favorite is like picking a favorite child. It is. I couldn't do that.

RM: Before we leave the subject of your jurisprudence, you mentioned how unpleasant it is to be reversed by the United States Supreme Court. But you've also had the opposite experience -- of having your dissent eventually become the law.

JSK: Yes, there was one⁵⁶ -- and written by Antonin Scalia,⁵⁷ no less.

RM: I meant within the Court of Appeals, but sure, why don't you talk about that, as well?

⁵⁴ *The Supreme Court and Juvenile Justice*, 36 J Sup Ct Hist 62 (2011)

⁵⁵ *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 NYU L Rev 1 (1995).

⁵⁶ *Cruz v New York*, 481 US 186 (1987), *rev'd* *People v Cruz*, 66 NY2d 61 (1985, Kaye, J., dissenting).

⁵⁷ Antonin Scalia, Associate Justice of the Supreme Court of the United States, 1986-2016.

KAYE

JSK: Oh, within -- oh, yes, yes. I say, I feel for all the judges who work so hard on their opinions and then get reversed. Very nice to be affirmed. Not just affirmed, but to have the court say, "in a thoughtful and comprehensive writing," right?

So I have had that happen to me once. I mentioned earlier that the Supreme Court of the United States has not often taken cases from the New York State Court of Appeals.

Overwhelmingly, their docket is from the federal courts. They've taken a few of ours and in one case -- I don't know why the name *Butler* is ringing in my head. I didn't go back to look. I don't think that's the right name, but there was one where I dissented. I think Judge Meyer and I dissented and the Supreme Court reversed, so we prevailed on that one.

I guess what you worry about, especially as the days go by and you see a little more kind of -- well, I don't know how you want to characterize it, so I'm not going to use a word to characterize it -- let's say, activity at the Court of Appeals. You have to worry about Court of Appeals opinions you really care about getting reversed by the Court of Appeals itself, as the law progresses. In my time on the Court, the one out-and-out reversal was a case called *Tebbutt v Virostek*,⁵⁸ where we -- the Court of Appeals had denied the right of a pregnant woman to sue for malpractice, for a botched amniocentesis that really injured, if not destroyed, the fetus. But the Court of Appeals said the fetus is not a person, and the mother was not injured -- the fetus was injured -- so get out of here. And I dissented in that case (along with Judge Jasen), and a couple of decades later had the pleasure of

⁵⁸ 65 NY2d 931 (1985).

KAYE

seeing that reversed in *Broadnax v Gonzalez*.⁵⁹ But I would not like to see any of my current decisions reversed. That would not be a happy day. [0:59:11]

RM: And you had another dissent -- and perhaps it wouldn't be characterized as an out-and-out reversal -- but I would say that your dissent in *People v Mooney*⁶⁰ -- its view was adopted in *People v Lee*⁶¹ and later cases, regarding the issue of eyewitness identification testimony.

JSK: I guess, I guess. I'm also thinking about the DNA case. Now, I haven't gone back and looked or thought about it, but I've seen my concurrence in *Wesley*⁶² cited a number of times, too. I'm reading forward, not backward.

⁵⁹ 2 NY3d 148 (2004). The Court of Appeals held that medical malpractice resulting in miscarriage or stillbirth, even in the absence of an independent injury to the expectant mother, is a violation of a duty of care to the expectant mother entitling her to damages for emotional distress.

⁶⁰ 76 NY2d 827 (1990). The Court of Appeals affirmed defendant's criminal conviction on grounds that obviated the need to decide whether the expert testimony concerning factors that may influence a witness's perception and memory and affect the reliability of identification testimony was of the type that could, as a matter of law, properly be admitted. Judge Kaye dissented, writing that the Court's cursory treatment of defendant's claim had two undesirable effects, including that of sanctioning an unwillingness to deal realistically with the concerns engendered by the growing body of research concerning the reliability of eyewitness identifications.

⁶¹ 96 NY2d 157 (2001). Reaching the issue that had been left unanswered in *People v Mooney*, the Court of Appeals held that expert testimony proffered on the issue of the reliability of eyewitness identification is not inadmissible per se, and the decision to admit it rests in the sound discretion of the trial court.

⁶² *People v Wesley*, 83 NY2d 417 (1994). The Court of Appeals held that the standard to be used in determining whether novel DNA profiling evidence was properly admissible at defendant's trial is whether the reliability of DNA evidence was generally accepted by the relevant scientific community at the time of the proceedings and concluded that DNA profiling evidence was generally accepted as reliable by the relevant scientific community. Chief Judge Kaye concurred in result. She did not agree that the eight steps of forensic analysis, then in its infancy, were shown to have been accepted as reliable within the scientific community, but concluded that, in the unusual circumstances of the case, the erroneous admission of the DNA evidence was harmless beyond a reasonable doubt. She wrote separately out of concern, for future cases, that the principles governing admission of novel scientific evidence be correctly articulated and applied.

Chapter 4: The Transition to Chief

RM: Let me take you back to November, 1992. Can you tell us about that series of events?

JSK: Yes, of course. You don't have to even finish the sentence there. I've told you how very satisfactory my life was as an Associate Judge of the Court of Appeals. I had great colleagues, I was treated superbly, had great work that I loved, a husband that I loved, and wonderful children, and I said, everything was just perfect. It was in November, 1992 that as the Court was leaving Albany, that I was getting an award at the State Bar Association the next day -- Saturday -- the Court was leaving on Friday. And I learned that Judge Wachtler, Chief Judge Wachtler, was going to be speaking that Friday night at the Fort Orange Club, meaning that he would be staying overnight, and I invited him to come to see me get this award at the State Bar Association. He was very nice and said he had to get down early in the morning, regrettably he couldn't stay, and that was kind of the end of that.

And so the next day, Saturday, Stephen had driven up from New York City, and Hope Engel and Hank -- I think they were married by then -- Hank Greenberg. The four of us went to the State Bar; they watched me get the award, it was really nice. We went to Jack's for lunch, we had a great celebration, and then we drove down to New York City. I'll never forget that Saturday. [1:01:29]

Drove down to New York City, stopped at a movie, and arrived home after 11:00 p.m., with the phone ringing furiously, and it was Stephen's Uncle Leonard. I've told you about Uncle Charlie and "Get your portrait done right away." Uncle Leonard is Charlie's

KAYE

brother, and Uncle Leonard then was about 70-something. He was on the phone saying, “Judge Wachtler has just been arrested, turn on your TV.” And I remember turning to Stephen and saying, “Maybe it’s time to consider some care for Uncle Leonard.” I mean, this was so absurd. I was even reluctant to turn on the TV; it was just so ridiculous. But, of course, we all know what happened, and that day, then Chief Judge Wachtler, on his way down to Long Island, as he told me he had to be that morning, was stopped by a cadre of federal police and he was arrested. That tragedy has been very extensively written about, including by Sol. It resulted in great chaos and sadness at the Court of Appeals.

I remember Dick Simons became the Acting Chief Judge and he convened us in Albany, the six of us. Sol was in detention and Dick convened the six of us in Albany to try to figure out what to do, and we ultimately decided that we should permit Sol to retire, which as I recall, evoked a bad editorial someplace. But it was a day of tremendous -- a time of tremendous sadness. Fortunately, it was Dick, and not I, who had to address the Court about this. Everyone was very, very upset. And so there were then these days and weeks and months of great tragedy for Sol and his family, and we’re part of his family, and for the Court. Let’s see, that would have been November, and I was sworn in March. So those were months of kind of uncertainty. [1:03:55]

RM: Chief Judge Wachtler was quite beloved by the staff.

JSK: Absolutely. It was devastating, just devastating, and I say, it fell to Dick Simons. He did such a beautiful job trying to console people in their great grief. We watched this story

KAYE

unfold, which came as just an enormous shock to all of us, that this sort of thing was happening, and we were so close, we were so close, all of us. I've told you about the dinners every night. So it really hit the Court very, very hard.

RM: And how did you decide to apply to be Chief Judge during that time?

JSK: How did I decide to do that? I think it was just a natural sort of thing to do, Judge Simons and I. It just seemed natural to do that.

RM: You were the two most senior.

JSK: Yes, being the two most -- we were to the right and to the left of the Chief Judge, and without question, there had to be a new Chief Judge. So we just, I think, seemed like the most logical, natural candidates for the office. None of the others on the Court even applied.

RM: And do you remember learning that time around that you had been selected? Anything about the nomination process?

JSK: That time around, I think everything went really well. I don't remember. I got "highly qualified" all around and I don't remember anything relating to the Chief Judge process at that time. There were a lot of other things going on, but my selection as Chief Judge -- I was perfectly happy as an Associate Judge but somebody had to step into those shoes and I thought I would be a good candidate.

RM: Any memories of that swearing in, that ceremony? [1:05:55]

JSK: Let's see, it would have been Judge Simons swearing me in. Nothing that comes to mind in particular. What am I missing?

KAYE

RM: No, I'm just wondering if there was any -- was it a more somber occasion because of the circumstances?

JSK: No, I think by March of 1993, we had pretty well adjusted to the situation. There were a lot of other things that went on in my life between November of 1992 and March of 1993, but as far as the Court went, that was just a solid pathway, I think, and I got very good support from the Senate and the Governor. I think it went really well.

RM: During that same period, you were under consideration for some other jobs, too.

JSK: I guess it must have started right after the presidential election, the election of President Clinton, that one day in the *New York Times* -- which we would read at the breakfast table, Stephen and I. But one day, I was on the front page of the *New York Times*, along with three other women -- Judge Patricia Wald, Brooksley Born, and Amalya Kears. The four of us were pictured in the *New York Times*, on the front page, as the four finalists for the Office of Attorney General. That came as a real shock to me, because nobody had said a word to me about being the Attorney General. It was surprising, upsetting, whatever word, but there it was on the front page of the *New York Times*. And to make it even more interesting, that very day -- I was at the time, on the Council of the American Law Institute, and the Council was meeting down at NYU Law School. I went down for the meeting and Pat Wald was down there, and she called me out of the room and she said, "It's not me." She said, "I was in Little Rock, and for personal reasons, I'm withdrawing my name, so I know it's not me." So that made me even a little more uncomfortable and I called my friend Amalya Kears and she said, "It's not me, either."

And with that, I remember going to Albany and nothing more was said of the whole issue.

[1:08:35]

I went up to Albany. I was in my chambers. I can't remember which session that would have been, in late 1992. I don't think it was -- no, it was before the inauguration, so it was still late 1992, and early -- very early in the morning, I had a call from Warren Christopher, who was then heading President, Governor, President-Elect Clinton's transition team, and he said either the Governor or the President-Elect -- I don't remember which term he used -- "would like to see you tomorrow in Little Rock. Just let us know when your plane arrives. Click." And that was on a Thursday and the Court was finishing up in Albany. I say, that was very, very early in the morning. I said nothing, hung up the phone, when it dawned on me that I had no desire to be the Attorney General. I tried to get Warren Christopher back on the telephone and learned that he doesn't take calls -- he only *makes* calls in the morning -- he *takes* calls in the late afternoon, which is a very, very good thing to do, because you get your whole day loused up with these -- especially with email now. You get the whole day just reconfigured.

So I was unable to reach Warren Christopher until the late afternoon. In the interim, word got out around the courthouse and people were abuzz, including Hank, who came running over. My law clerk, Joe Matalon, I remember saying that it would be unpatriotic for me not to go to Little Rock, that I just had to go to Little Rock. Well, anyway, by the time the late afternoon arrived and I could reach Warren Christopher, I did indeed call him back to tell him that I would come to Little Rock the next day, and I went. I stopped by the

Fordham Law Library and picked up a doctoral thesis on the Office of the Attorney General. I was a good friend of the librarian, because I used to work in the stacks a lot there. She let me take it overnight and I went down to Little Rock and met with President-Elect Clinton, and it was pretty fabulous. But I told him, "I'm not your man." We talked a lot about the Supreme Court of the United States. [1:11:09]

So the next day -- I came back. Oh, and we stopped in the kitchen, President-Elect Clinton took me into the kitchen, where Hillary was picking fabrics -- I mean, who could ever forget those days -- for the Inaugural Ball. And we chatted a bit. Hillary and I had been on an American Bar Association Commission on Women in the Profession. And the next day, early in the morning, I called Warren Christopher and told him that I was withdrawing my name.

So that kind of ended that for a while, until the next episode, which was, like, the week after I was sworn in as Chief Judge, when the buzz started again, and another article in the *New York Times*, because Byron White⁶³ resigned and I was on the front -- I'm not sure it was the front page but it could have been -- as a leading candidate for the United States Supreme Court. This time, I talked to my husband. It was shortly after I was sworn in as Chief Judge, and my husband said, "You really have to decide what you want to do and if you decide you want to do this, there's strategy and there's tactics." I thought a lot about that and that just didn't seem like I wanted to do that -- strategy and tactics -- given the state of things in Albany. No, didn't think so.

⁶³ Byron R. White, Associate Justice of the Supreme Court of the United States, 1962-1993.

KAYE

So, I called my friend Bernie Nussbaum, withdrew my name from consideration, and his line has lived with me forever, which is, “Is there something about the water in New York, Mario and you?” He said, “The stars will never be aligned for you as well as they are today.” That’s what he said to me, and he was absolutely right. As Chief Judge of the State of New York, the stars could never be aligned for me as well as they were. [1:13:12]

RM: You served under two different Chief Judges before you became Chief yourself. Were there things you particularly tried to emulate or to change?

JSK: Interesting. I don’t know. Well, I guess I got the idea from Sol, about appointing Commissions. Is there anything that’s truly unique? I don’t know.

RM: How would you say the Court differed under the two Chief Judges that you served under?

JSK: Oh, I see. I was thinking of the CEO office. I continued -- I inherited a culture of long conferences, promoting collegialities, seeking coherent, just, unanimous opinion. We’d gather in the Conference Room at 9:30 or 10:00 in the morning and sit there until 12:30, in a very collegial atmosphere. That was what I inherited. I can’t think that anything different I did as Chief Judge of the Court of Appeals -- we maybe tweaked a couple of little things. For example, it used to be that if the reporting Judge didn’t carry the Court, the writing would fall to the junior Judge, which seemed kind of silly, especially since Judge Bellacosa was the junior Judge for like six years. So I did change that, so that if the reporting Judge doesn’t carry the majority, then the Judge seated immediately to the right of the reporting Judge who is in the majority gets to write the opinion. Little things like that, but these are hardly catastrophic things. I think I found a very just excellent system

KAYE

in place and perpetuated it at the Conference Table.

Of course, we had the massive renovation in the years that I was there -- 2002 to 2004, in many parts of the Court. We took it down to brick, and that's pretty unforgettable. But as far as the operation of the Court itself, there's no place on earth like the Court of Appeals. I mean the staff, everybody there, just phenomenal, devoted so singularly to the work of the Court. [1:15:30]

I thought of it the other day when I was up there, as I've mentioned, for the portrait hanging. I deliberately came down the interior stairs, instead of using the elevator, to see if they still keep the stair rails polished the way they did when I was there, and you bet they do. They are polished. In the anteroom to the courtroom, the remarkable Frances Murray had put together an exhibit about me that is -- I mean, turn Frances on to something. If you want some medieval text, or just give her an idea or something and she'll research it into the ground and come back with an extraordinary product. But that's true of everybody there. The Clerk of the Court, it was Stuart Cohen. I don't want to go on this way because I'm going to neglect to talk about somebody and I don't mean to. Everybody -- Andy Klein, our Consultation Clerk. That's what I inherited when I came on the Court in September of 1983 and that atmosphere of everybody working so cohesively and so dedicated to the work of the Court just continued in all the years I was there.

RM: How about leadership style? Was there any difference between Chief Judge Cooke and Chief Judge Wachtler, when you served under them?

KAYE

JSK: I can't think of anything in particular. I say, under Chief Judge Cooke, we had these very long days, because we had 800 cases, as opposed now to 200. Do they have 200, something around 200? If you think of quadrupling the docket. But even so, I just remember two very dedicated human beings, as the Chief Judge predecessors that I had.
[1:17:30]

RM: Now fairly early in your tenure as Chief, the Court came under some political attack. Can you tell us about that time?

JSK: I've always meant to go back and look, but I do remember very unpleasant times. Certainly it was the *New York Post*, in whose favor I never was, for reasons unbeknownst to me. But I'll reserve comment on what the *New York Post* thinks of me or thought of me, and by the same token, what I think of the *New York Post*. But anyway, that aside, I think they had the idea that I was kind of like a criminal-loving liberal or something absurd, but once they got on the case there was nothing I could do.
I remember trying to meet with -- it's an important part of the Chief Judge's function, to meet with the press. I mean it's our voice to the public. I made rounds at the time, when I was the Chief Judge especially, at the *Times* and the *News* -- the *Daily News* -- and the *Post* and the *Times Union*. I remember one day even meeting with Rupert Murdoch, and it was the day after that that I just got the worst slam I've ever gotten, and totally, totally uncalled for, really. But so be it.

RM: It was only after you were already Chief and in fact, had been on the Court for 11 years

KAYE

that you were joined by the second woman, Judge Ciparick.⁶⁴

JSK: Ah yes, yes.

RM: And then by the time you left the Court, women formed a majority. Can you tell us about how you felt when those milestones were reached?

JSK: Well, I felt great. In fact, I was with Justice Ginsburg over the weekend, at the National Association of Women Judges conference, and commented on -- we observed that Justice O'Connor had been sworn in in 1981, and then Justice Ginsburg followed in 1993, and it does make a difference when there's another woman, another woman. It just really starts to feel better. [1:19:45]

Now, nothing happened. I think the one change when I went on the Court, when I came on the Court, was that they put a lock on the bathroom that's right off the Robing Room. They didn't need to do that. I wouldn't have used it anyway. But to have a second woman there, it just is an indescribable feeling and a wonderful feeling. And then, of course, you start to see justice when you see women, people, diverse people of merit, rise to the position.

I think there was one time -- yes, there was one time in our time together when we were -I think we must have been only three women and not four. I'm just trying to think if there was a time when the women ever came together in an opinion, as opposed to the men, and there was one time and it related to fees in shareholder derivative litigation -- just to show you gender kind of issues, right? And the really sad thing about that is the three of us

⁶⁴ Carmen Beauchamp Ciparick, Associate Judge of the New York State Court of Appeals, 1994-2012.

KAYE

were right. We needed to get Judge Read (our fourth woman). We turned out to be right, because we were reading a Delaware court decision, and the four men prevailed and the three women dissented. And then shortly after that, the Delaware court made clear that the dissenting opinion was the correct opinion. That's the closest gender issue I can remember. I can't remember any other case where the three of us were together, with the four men on the other side, or the four of us were together, with the three men on the other side. But so nice, so nice to have a diverse representation on the Court, so that when people walk in the room, they see people of every variety, you know, not just a single stereotype, right? [1:21:48]

RM: Absolutely. Do you remember the day that Judge Ciparick arrived? You got to swear her in, right?

JSK: Well, I remember, even more than the day she arrived, the day before she was sworn in, which was the day she arrived. Poor Judge Ciparick kept missing the exit. I waited for her in chambers until she got there, but she didn't get there until like 10:00. She passed the exit like three or four times and kept calling to tell me. Not again! But she did finally arrive and it was just an absolute joy to welcome her. I wanted to be there to welcome her, so I would have stayed however long it took, but she just kept missing the exit. Or maybe, you know, it's when you come down off the road, then you find yourself on the way to Troy if you're not careful, to get into downtown Albany. But she missed it many times and the last time I was there, I missed it, too.

RM: Well, if it were only as late as 10:00, you would have been there anyway; you weren't

KAYE

waiting just for that.

JSK: That's true, that's true, but it did add to the excitement -- each time she missed the exit.

RM: How about the day women took the majority in the Court, do you remember that?

Anything that drew particular notice?

JSK: Well, drew notice, of course, but you know, it was just a great day of celebration, really.

RM: Do you think it changed the Court in any way? Had any effect on the Court in any way?

JSK: Do you?

RM: At a minimum, I think it made for a wonderful optic.

JSK: I will affirm that, definitely a beautiful optic.

RM: The symbolism of it was great.

JSK: Absolutely. "You can be there." Mm-hmm, absolutely.

RM: Sometimes you had the experience of having some of your former judicial colleagues argue before you as litigators.

JSK: I remember that a few times, I do. I remember Judge Stewart Hancock.⁶⁵ He argued a couple -- what a loveable character he is. He was just always wonderful. I remember our years together on the Court and I remember that he would stand on his head every day. I remember that after he left the Court at age 70, he went bungee jumping in New Zealand. And it did not at all surprise me that Judge Hancock would be back, and in fact, I saw him just the other day, still doing pro bono cases, still very actively involved in pro bono cases. [1:24:19]

⁶⁵ Stewart F. Hancock, Jr., Associate Judge of the New York State Court of Appeals, 1986-1993.

KAYE

Now I don't think -- I know Judge Levine⁶⁶ has argued, I believe he has. Did he argue before me?

RM: I think he did.

JSK: Really?

RM: Mm-hmm. You served a full 14-year term as Chief Judge and then a bit of another term afterward.

JSK: Yes, and I want to just pause for a moment on the 14-year term, which has a very interesting history. Federal judges have life tenure and life tenure is important when you talk about judges, because the most important thing you want in a judge -- I mean you want all the good qualities of intelligence, sense of justice and all, but above all, you want complete independence. You never want to have to worry about the independence of a judge in considering a case and reaching a decision, so on the federal side there is life tenure. A judge never has to worry about being reappointed or, horrors, being reelected, standing for retention election, none of those things. They enjoy life tenure and there are many federal judges now who, goodness, Judge Weinstein.⁶⁷ There are some well into their eighties and maybe even 90. Judge Wexler⁶⁸ is 87. I haven't researched at all, but I know they're well up there and they're continuing to make a great contribution.

On the state side, there was a dispute, and it was in connection with one of our constitutions. I've mentioned to you that the constitution was amended several times. It

⁶⁶ Howard A. Levine, Associate Judge of the New York State Court of Appeals, 1993-2003.

⁶⁷ Jack B. Weinstein, Judge of the United States District Court for the Eastern District of New York, 1967 - ___.

⁶⁸ Leonard D. Wexler, Judge of the United States District Court for the Eastern District of New York, 1983 - ___.

was amended, I think the year 1846 is the one that I'm thinking of, where it's kind of the people's constitution. I think that was the one where the length of service was fixed, because there was a dispute. On the one hand, everybody recognized the value of life tenure and judicial independence. On the other hand, they feared giving too much power to an individual, and giving life tenure was just giving too much authority, too much power. So they wanted to strike a compromise and the way they struck the compromise was to study the statistics on life tenure, for judges who had life tenure, and the average number of years actually served at that time, by judges who had life tenure, was 14, and that's how we got the peculiar number 14 in our state constitution, for a term of office for so many of our judges. [1:27:06]

I had the good fortune to fill out my 14-year term. It started in the year 1993, as I've told you, March 23, 1993 I became Chief Judge, and as 2007 was on the horizon, I was seeing the end of my term. To me, just unthinkable that I would have to leave the Court. I guess I was 68 and so there's one limitation on the term of office for term of years; one limitation for age -- 70. You hope to live to that point, you don't want to not reach that point. I was coming to that point, where my 14-year term was ending, but there still was a year and a half or so before I got to be 70, and actually it was Governor Spitzer⁶⁹ who encouraged me to reapply. I say, I would be serving to the end of my life if I had the opportunity to do that. So I reapplied and Governor Spitzer appointed me, and I got sworn in again and had the distinction -- I have to tell you, I didn't know at the time that I

⁶⁹ Eliot Spitzer, Governor of the State of New York, 2007-2008.

KAYE

became Chief Judge that no person lived out a full 14-year term. That would have been very disheartening, wouldn't it, back in 1993, if I knew that no Chief Judge ever lived out a full term? Would I want that? It's just like you're condemning yourself to an early death. Fortunately, I lived out the 14-year term and I got an extra year and a half, and I got to have the longest tenure of any Chief Judge in the history of the Court of Appeals, and I hope I filled it well. [1:28:53]

RM: By almost 60 percent longer than the next-longest-serving Chief.

JSK: Yes -- well, maybe they're just appointed older or whatever.

RM: I think Sanford Church⁷⁰ was 10 years and a couple of days, back in the 1870s.

JSK: Goodness.

RM: You were almost 16 years.

JSK: Wow, interesting. So are we finished for today?

⁷⁰ Sanford Elias Church, Chief Judge of the New York State Court of Appeals, 1870-1880.

Chapter 5: My Judicial Role

JSK: I want to start with an opening statement. Our wonderful videographer, Nick Ullo, has pointed out that the lighting may be a little different in each session, because we are sitting in my office at the firm of Skadden, Arps. It's on the 47th Floor of 4 Times Square, magnificently located with a view of the Hudson River, and the ball that drops down on New Year's Eve, but one wall is practically all windows. As we sat together yesterday, it was dark and gloomy and rainy. Today, we have a bright and happy day. So that does affect the color of the video.

And while I'm on the subject of color, I'll mention again what I said yesterday -- that I was intending to wear the same thing all the time. Frankly, it slipped my mind, what I had on yesterday, and so I'm back to what I was wearing before, because I did want to make my life one seamless web and this talk of my life as one seamless web. But at least I haven't deviated from the core value of red and black. I've just kind of intertwined it a little differently.

So that's my opening statement, and now we turn to serious business with Judge Mandelbaum. Robert, good morning.

RM: Good morning, Judge. Let's talk first about the process of judging. How would you describe your judicial philosophy? [0:02:01]

JSK: Well the truth is, I don't think of my judicial philosophy. It's kind of something other people will define and do define when they read my writings. Every now and then, I used to be scandalized to see some attack in the press, which happened consistently, as I

remember, after the election of Governor Pataki, that I was, you know, such a liberal-loving person and very bent on having every criminal defendant prevail. That would be a philosophy that absolutely is not my philosophy.

I've seen a philosophy more recently -- that I imposed a requirement of single, unanimous opinions; that sounds like I bound and handcuffed my six colleagues on the Court of Appeals. Yes, I think we've referred to this a bit; we can come back to it. I did see a value in having a unanimous expression of the law when that was possible. Never hesitated to dissent. My colleagues never hesitated to dissent. That's a bit of a philosophy, I think, but I want to take a moment to disavow that bit of press, as well. This is the stuff of easy headlines, even in the *New York Times*, for which I have great respect. But the idea that one of us was liberal and the other one of us was not liberal -- ludicrous.

So, this matter of judicial philosophy, that's a really hard thing for me to define myself. I think it's fair to say -- and you were there for a couple of years -- that I studied everything very carefully. I recognize that relatively few cases come to us, and by that I mean relative to a trial judge in the State of New York -- you know, just unbelievable dockets, as you well know. The Appellate Division, as well -- huge dockets. [0:04:14]

The Court of Appeals, when I first came on the Court, had 800 cases, about 800 annually. Far too much. Fortunately, the number hovers somewhere around 200. Everybody works very hard. So I would say as a first principle, reading, studying the cases, the facts, learning the law, and I was learning the law every minute of my time on the Court. Sometimes I would scratch my head and say, "This is such a fundamental issue; hasn't

this been decided like decades ago?” Or, you know, “Surely we’ve taken care of this years and years ago.” But cases, by definition, get to the Court of Appeals when they raise novel issues, law issues, of statewide significance. So even to the end of my 25th year, whatever -- all those additional months and days -- every brief I picked up, I was learning something new. Is that philosophy? I don’t know how we define philosophy.

I hope that I brought intelligence and dedication and diligence, because that is definitely at the top of my list for what’s required of a judge. Fairness. We talk about having a rule of law that’s stable and reliable and predictable. Very important when you sit on the Court of Appeals. You don’t want a decision one way one day and the next way the next day.

The Court of Appeals is a second layer of review in the State of New York. That’s kind of a luxury, to have a second layer of appeal and then maybe even a third if you get to the Supreme Court of the United States -- it’s rare. [0:05:59]

But we have a system where there’s built-in fairness and excellent trial judges and trial courts, and then a right to appeal to the intermediate appellate court, which has very broad jurisdiction to correct errors of fact as well as errors of law that the trial court may have made, and, in addition, interest-of-justice jurisdiction. So there’s a very broad layer of appellate review that is a matter of right in the State of New York.

Now add to that, that you can get to the Court of Appeals of the State of New York. So obviously something different is intended in the design of our docket and our court system, and I had that very much in mind. Is that philosophy? I don’t know, because I would have to put at the top of my list reaching a correct, just result in every case.

Certainly, that is always the top of the list. But I also had to keep in mind that the function of the Court of Appeals, as opposed to other courts in our own State, is to -- I think these are Cardozo's words at some point -- settle and declare the law. These are legal questions that come to us and so we have to have in mind -- the just result, the fair result, yes -- but we also have to have in mind the sequelae -- we talked about that the other day. The fact that this discussion is going to get carried, hair by hair, whatever we say, to the next case and the next case and the next case and the next case.

And we have to have in mind articulating a good, sound rule that will work, whether it's in the criminal context or the civil context, where parties can look to that as the law when they're planting their trees and planning their buildings and their contracts and their mergers. You know, we want to know what the law is. We're not there to have the law one day one way and the next day, the next.

So are these judicial philosophy? I don't know. I think of judicial philosophy probably the way the headline writers think of it. Is this a liberal, is this an activist, is this a conservative? Well, I'm none of those. I bring no political predilection. I did not bring any political predilection to the cases in the Court, but I have told you some of the things that were on my mind as I faced each case and I must say, from my perspective, I was so perfectly situated at the Court of Appeals, doing the work of a Judge of the Court of Appeals. I mean, I just loved doing that but always with the same sense of discovery. In every case, I was learning something new, studying very hard, attempting to reach what is

KAYE

both a fair result for the parties and for society going forward. So is that a philosophy? I don't know. [0:09:04]

RM: You mentioned the care and attention that was paid to every case, and I actually had the joy and privilege of being with you for three and a half years.

JSK: Wow.

RM: Different chambers obviously had different methods and approaches to their work. Do you want to say a little bit about how your chambers operated and how you used your law clerks?

JSK: I do. I'd like to say that in two respects. The first -- what I say is just about my chambers. I've talked about how close we are; we're physically close. But you know, what a great design, to have the Court in Albany basically two weeks out of every five. So that means you're together like crazy for two weeks. I've told you about our dinners together? Maybe I haven't, but yes, and when I first came on the Court we had breakfast together early in the morning. That kind of went by the boards, but we're very, very close when we're there in Albany.

And then we disperse around the state. Diversity is a high priority for appointment of Judges of the Court. Diversity means not only race, gender, ethnicity; it also means geography, because you want representative views when you're considering cases, and so there was always a desire to have geographical diversity. But we would come together in Albany, basically for two weeks out of every five, and then we would disperse around

the state, basically for three weeks out of every five. That's how the Court worked.

Now some people viewed the Albany session as when we were working, and then we're home and kind of luxuriating for three weeks. No, no, no. When you're home, that's the time you draft the opinions, and I've told you the seriousness with which we took that responsibility, in order to meet a self-imposed but very important schedule of hearing cases one session, deciding them the next and handing out an opinion. [0:11:11]

It was furiously, furiously busy in chambers for those three weeks, both working on writings on the cases we just heard and studiously preparing for the upcoming cases that would be argued the next session, and handling the innumerable other responsibilities.

Reading and writing motion reports for cases where we had discretion to bring them to the Court, and considering criminal leave applications. Those were the basic fundamentals of home, of being at home.

During the two weeks that the Court was in session in Albany, we were very close to one another. During the three weeks that we were at home, we would exchange a lot of drafts. You'd get your draft out on a writing and you'd hear from your colleague with a markup or a phone call, but very little communication in the three weeks. And so I say the design was kind of inspired for a really good collegial Court, because I could never wait to see them, I was so excited to see them.

I had a sofa in my chambers at 230 Park Avenue, and the day I arrived back from Albany, I would begin accumulating things to take up to Albany for the next session --

KAYE

always looking forward to being with them. And the day I arrived in Albany, I began accumulating things on the sofa to take home, because I knew after two weeks together, arguing every single day about cases and points of law and motions and things like that, that I would be very eager to give them a hug and say farewell. That's really how it worked. I look at the Supreme Court of the United States, where they're together all the time, and I'm thinking maybe it's kind of nice to have those little breaks, because I think it does encourage that personal -- that very great personal warmth that we enjoy.

[0:13:06] But to get back to your question, and I'm taking a very long route around answering your question, what took place in my chambers took place in my chambers. While we enjoyed the personal collegiality and all that, I honestly have no idea how the other Judges prepared their cases. We just never talked about that; it was to each his own. The expectation was a very high level of preparation. How you got there, I don't know. And indeed, one of the delights of oral argument, and let me tell you -- are we going to get to oral argument?

RM: Yes.

JSK: Because I don't know whether it's my particular bent as a litigator or whatever -- but we'll get to that -- that oral argument, I regarded as a particularly pleasurable occasion. But for the moment, it underscores what I'm telling you about the operation of chambers, because until the case would be called for oral argument, and the attorney would stand at the podium and say, "May it please the Court," and then the

bombardment of questions would come from the other Judges, I had no idea what was on the mind of my colleagues about a particular case. We never talked about a case before we went on the bench. There was no internal substructure Court document that came from somebody. I think probably some benches have that, where you get some kind of bench memo that takes a particular position. We would get a report from our Consultation Clerk and the report was valuable in one sense. It essentially just repeated the points that were in the brief -- the major headings in the brief. It was completely free of any view of the case, but there was one really important thing that those reports did, that came from the Court's Consultation Clerk. And that is there would be a footnote, sometimes a very substantial footnote, if there was some technical impediment in the case, some jurisdictional impediment, because there are a lot of statutes and rules concerning jurisdiction. [0:15:31]

To give you an easy one, a case has to be finally decided by the court below, usually, I say, the Appellate Division. Maybe there would be a time where somehow the case got to us -- maybe on two dissents at the Appellate Division, where a case automatically comes to the Court of Appeals. Maybe for some reason the lack of finality eluded the parties in the briefing -- eluded somebody -- and so we would always check those reports to be sure that there was not some technical impediment to the case being before us. But other than that, each chambers operated separately, got our own sets of the briefs, and in my chambers this is what we did. My law clerks, it was originally two law clerks. Then

when I became Chief Judge, three law clerks, and then with the advent of the death penalty, adding substantially to the calendar, it became four law clerks.

My law clerks would divide the cases among themselves and I honestly don't know how they did it. But we'd get back from an Albany session with these, like, bankers' boxes of briefs, which would be the briefs for the next session a month later. My clerks would arrange them on shelves -- this is the first thing we did when we got back from Albany -- and they would, among themselves, divide up the briefs and the cases in a way that they thought best. And then they would do, each of them, intensive investigation and preparation, and prepare a very thorough memorandum for me. And in addition to my studying the memorandum, I made it a habit to take briefs with me wherever I went. You know, maybe you'd get a long red light some day; maybe you'd get stuck in an elevator. Always good to have a brief. You know, I still do that. I don't, unfortunately, have those wonderful briefs to take with me, but for me it's necessary always to have some important reading material just in case, in case, in case. [0:17:40]

So, I would then begin working with that law clerk in particular, on that case, getting ready for the upcoming argument. And in addition, I had the wonderful tradition in my chambers of, almost every day, lunching with my law clerks. Now I just loved that, because we would sit around the table in the Conference Room that I had and I'd say, "Let's do a case," and so whoever had a case -- led the discussion. This would be with the other law clerks who had really little prior exposure to the case -- and we would

KAYE

pretty well hash out the cases. So by the time I got to Albany, I think I was quite well prepared. But that's how I did it in my chambers, the intensive preparation -- individually, with one law clerk, and then with the law clerks together.

The oral arguments go on at 2:00 every day. Generally, you are back from conference by 12:30, getting ready for oral argument, which wonderful Cedric, who was our Court Crier at one point, called "show time," and I started to think of it as "show time." But I would sit with my law clerks, the one who had the case, or happily the four, if they would sit with us, to go back and forth. The point of the discussion was, what things do we really, really need to find out? That's what you're doing at oral argument. What do we really, really need to know? What questions do I need to ask? And as I said a few moments ago, it would be the first time I would hear from my judicial colleagues, and sometimes there would be that aha moment, you know, where something I hadn't thought of, that I'd hear from somebody else. Occasionally, if you watch the arguments, you'll sometimes see the Judges going back and forth between themselves, where they each have a little different view and they're taking it out on the lawyer. So that's generally how cases proceeded before they got to the Conference Room. Do you want -- how do you want to continue this? [0:20:07]

RM: We'll get to the Conference Room in a moment but let's talk about arguments while we're there. What was your questioning style?

JSK: Well, a couple of things. First of all, I've told you that for 21 years, I was a litigator, so I

think that usually my questions were unobjectionable in form. I always kept that in mind, to ask -- you know, there are a lot of rules about not asking compound questions and all sorts of things. Sometimes I hear judges asking these convoluted questions and I want to say, "That question is improper in form, would you restate the question?" Which of course I would never do. (That's a joke.) But there's a reason for the kind of rules that we have and the truth is, when you ask a simply phrased, non-compound question, you get the answer, rather than the furrowed brow and a look of confusion from the lawyer. So I did not believe in using oral argument for interesting exchanges with lawyers about things I've always wanted to know. I tried to keep the questions relevant. I also didn't feel it was necessary for me to take over or to ask the first question. I thought, "We're seven equals up there, and anybody who wanted to ask the first question was free to ask the first question."

I told you that I had never argued a case at the Court of Appeals. I had some that were summarily decided on the summary procedure that the Court of Appeals had. I have to tell you, the first thing I did as a Judge was to go to the file and get the reports on those cases. They were wrong! I really treasured, we all did, oral argument, and I want to linger a moment on counsel standing there, because I say I very much felt the burden of counsel, especially if the client is sitting there. You know what your night before and after are going to be like anyway. There's the story about the three arguments you make: one the night before, one the argument you make, and one the night after. So you know, I

know how you torture yourself. [0:22:28]

And the other thing that to me was extremely important was the courtesy. I've talked about the collegiality. The courtesy toward counsel, and between counsel. Don't think I didn't notice when lawyers shook hands at the end of their argument. I did. They're not there to just punch each other into the earth. And there should be the same kind of courtesy from the Court. I can't imagine cutting a lawyer off. I think it's important to keep within time limits. The time limits are very carefully set. The Chief Judge reviews the calendar with the Clerk of the Court. You start doing that a month before, figuring out which cases are going to be on which day. You may need to pair a couple where the issues are similar. There are a whole lot of fine points that go into setting the calendar and then setting argument time and, honest, you do the best you can.

I remember in an earlier time, 10 minutes for an argument would have been kind of the -- you know, when we were dealing with hundreds more cases and we'd have seven or eight cases a day on the calendar and sit there until 6:00. So 10 minutes was average -- I think about 15 minutes is sort of average now, and sometimes you give 20 or 25. It's very important that counsel be mindful of time limitations, but the Court, too, and not cut people off. I just can't think that the Court of Appeals ever would do that, because of what it takes to get there -- I mean in terms of the money that's spent to get there, the time and effort that are spent to get there on both ends. [0:24:19]

Now you have to be careful, and this was something that particularly falls to the Chief

Judge, because the Chief Judge sits there with the opportunity to say, "Enough," and you want to not have the privilege abused, that's very important. There should be respect for the Court and for the other parties who are going to follow, and you shouldn't abuse it. If you have 15 minutes, you should plan 15 minutes of argument and be sure you use them all well, and if you don't have 15 minutes' worth but 13 minutes, don't stand there to say "and as I said before." But the same is true for the Court. If counsel is in the middle of a sentence -- I couldn't think of anyone cutting off a person in the middle of a sentence -- but even if you're at the end of a sentence and you say, "Your Honor, might I just have a moment to complete the thought?" Especially when there's been lively questioning, because when there's been lively questioning, it means counsel has been taken off the points that counsel thinks are the most important points. Nonetheless, a fair and reasonable opportunity for counsel to complete a sentence, complete the paragraph, I think that just signifies -- that gives the message of the kind of place the Court of Appeals is. That's what I think of oral argument.

RM: You mentioned something quite interesting with respect to oral argument, and I'll ask you a compound question about it. You said that sometimes the parties were there. How frequent was that and how did the Judges feel about that when that happened?

JSK: Well, I guess we couldn't tell; first of all, you can't tell. I used to joke that sometimes - you know, there's the counsel table, which is the closest to the bench, and by the way, something very significant at the Court of Appeals, which you don't see in other

courtrooms, is that attorneys, when they argue, are at eye level with the Judges. What a statement that makes, doesn't it? But there are counsel table at each side, in front of the bench, and there are three or four seats on each side -- to the right of the bench, the appellant; to the left of the bench, the respondent. [0:26:45]

I used to joke, when it was just one lawyer arguing, that the other three would come up to tell the person on the way back from Albany, home, that they did a really great job. That was the purpose of the companion people. So I assumed, always assumed that they would be the more junior attorneys and really, they're there not just to tell the person that he or she did a great job, but what if something comes up that's unexpected? What if the Court asks, "Where in the record can I find that?" These are things that happen. You want to know that you have somebody there to give a ready answer, to underscore your credibility as counsel and the credibility of your position.

The audience. We usually had a reasonably full audience. It pained me always to think that the only people who came to the Court were the lawyers making argument and perhaps the parties but that, for example, Albany Law School students, oh, my goodness, or students from the area, why they wouldn't come to watch? What a bafflement, really. They should be there. Members of the public, I think they should come a little more often, too, to be involved in more ways than as critics. If there's a decision that's not "popular," then you'll hear flack about it, but people don't come really to learn and I would think to understand and appreciate the justice system and the Court. So we

wouldn't see a lot of people in the courtroom, we would not see, and that I think was sad because oral arguments were always something that the Judges looked forward to, and I think the public should more, too. [0:28:50]

And I will say in this connection that for a while -- all of the arguments of the Court were televised. That was never an issue for us, as it is for the Supreme Court of the United States, which I cannot for the life of me, understand. Technology is such today that you're completely unaware of the cameras; they don't interfere at all. There may be some very sound objections to, and there are, to televising trial proceedings, but I cannot for the life of me understand why there is any objection to televising the proceedings of an appellate court. And for a while, our proceedings were not only televised but also broadcast within the City of Albany.

I remember one treasured evening, going into a restaurant in the City of Albany and having a woman come up to me and just clasp my arm and say, "I watch your arguments every day. I put up my ironing board and I do all my ironing in front of the arguments of the Court of Appeals." Pretty nice. That's a lot of ironing. But I can understand why it might not be everybody's favorite daytime TV, because the Court of Appeals is a law court. We exist to determine issues of law, and when people get sidetracked into the facts, then one of the Judges, usually the Chief Judge, will say, "We're familiar with the facts, would you stay with the law?" And I always said that one day I would (and I didn't) say, which is more likely true, "We're familiar with the law, would you just stay

with the facts,” because the facts are almost invariably more interesting than the public would find the law. But the show got dropped, so the public can’t remotely watch the Court of Appeals.⁷¹ [0:30:53]

The public in the Albany area can, however, come in any old time and, in fact, when school groups are there we always know and we’re informed ahead of time, and a Judge from the Court will go down in advance of the argument and spend a few minutes. I always loved to do that. That was a favorite time for me, to answer questions that people had about the Court. But I come back to the point: Not enough people do that; not enough of the public learns and they should. They really should know more about the courts.

RM: You’ve reminded me of something else that you always said you wanted to try to do, but which you were never able to manage to do, which was to write an opinion without any citation to a case. Do you want to talk about your writing style a bit?

JSK: Okay. My writing. You know, first of all, the premium that I place on writing, and especially as a Judge writing an opinion. I think you have to be very -- well, I’ll say careful, although careful was not the first thing on my list. The first thing on my list was to state articulately what the decision of the Court was. That’s really the most important thing -- to articulate the law clearly and correctly. I got to be, I think, the president of the first-paragraph club at the Court of Appeals. Maybe that goes back to the training as a

⁷¹ Oral arguments can now be watched on the Court of Appeals website every day live and webcasts are archived. Go to <http://www.courts.state.ny.us/ctapps/>.

KAYE

journalist and the importance of the lead paragraph. I tried to put the issue, the holding, the result, in the first paragraph when that was possible, but never -- you know, I mean not make a fetish of it. That was not the most important thing to do.

I always thought that opinions should be readable and understandable, comprehensible -- and I aimed for that without rhetoric and flourishes and the kind of pepper you sometimes see. I think some judges maybe go back and pepper their writings with things that will make them famous. I think what makes you famous is to -- if that's what you want to be -- is to do a good job articulating the law. [0:33:14]

You've reminded me that there were times that I thought maybe to achieve that objective, it would be nice to have an opinion in plain English, with no case citations. But that never was possible, because the Court is very -- you know, what you're there to decide are issues of law and invariably they have precedents, they have roots in the law, so you have to get into those. And they have sequelae, so you have to get into that. So a court opinion from the Court of Appeals is necessarily not your everyday reading. It's everyday reading for lawyers and judges. At the other end, when I talk about making it readable for the public, I've seen some judges who have written decisions in poetry and, you know, I think it's -- and I've told you -- I also don't believe in using salt and pepper to make opinions distinguishable that way. So I don't know, what do you say is the bottom line?

RM: For your writing style?

KAYE

JSK: Yes.

RM: Certainly clarity. No Latinisms.

JSK: No Latinisms. As few semicolons as possible, as little punctuation as possible. I think sentences should carry their own weight and you should use your words carefully and sparingly, and not need to dress them up with a lot of punctuation and a lot of rhetoric.

RM: And certainly you paid attention to every single word that went into your writing.

JSK: Yes, absolutely, because words, even commas, can come to haunt you in later cases. It wasn't just for the vanity of having a well-structured opinion. It's because you can get hurt -- the Court -- by opinions that are not really very diligently crafted -- every sentence, every word, every comma. [0:35:21]

RM: The Conference Room.

JSK: The Conference Room. So I've taken you through the oral argument and assume that we've just heard arguments on Tuesday. And forgive me, I keep using the word "we." I'm never going to get that out of my system. But there's one little step before the Conference Room, and that is when the Judges leave the bench, that day they go to the Red Room, which is a small room behind the courtroom, and on a table in the Red Room will be index cards turned face down. In order of seniority, each Judge will pick one index card, which will contain the name of a case that was argued that day, and that makes the person who picked that card the reporting Judge. The reporting Judge takes principal responsibility for that case, at that moment, and that means a difficult evening,

because you go back to chambers very late in the afternoon, before dinner, and sit with the -- and again, I'm telling you what I did in my chambers. I don't know what the other Judges do.

I would have to prepare a vote on every case, because every case was going to be conferenced the next morning. But I would have to be particularly careful about the case where I was the reporting Judge and held the card. For me, until the last day I was on the bench, I would try to write out, in outline form, what I intended to report. The discussion would start at the Conference Table, when that case was called the next morning, with the reporting Judge's recommended result -- affirm, reverse, dismiss, maybe other things, too -- in a memorandum or an opinion, which would mean a signed opinion or an unsigned per curiam or memorandum. Opinions go in front of the book, the Court of Appeals Reports. A per curiam opinion, or a memorandum, generally goes at the back of the Court of Appeals Reports. [0:37:46]

So you start your report with the recommended result, form and reasoning, starting with a bit of the facts, and then a detailed report on the law. "This is what I would write in my opinion, if you all agreed, or at least three of you agreed with me." And so I'd complete my report as the reporting Judge and go next to the junior Judge. We start the discussion in inverse order of seniority and work around to the most senior Judge.

That was the system when I got there and, so far as I know, it continues to be the system -- the idea being that the junior Judge, the newest Judge on the bench, should not feel

somehow cowed, although, believe me, nobody ever does, by the more senior Judges. So, in inverse order of seniority, each Judge casts a vote. If there are seven easy votes to affirm, as recommended by the reporting Judge, the case is put over for a writing, but that's after a quite full discussion. Each Judge adds something to the discussion -- for example, "I agree with Judge Kaye, but these are the things I would add," or, "this is where I think we should not go because we're going to get into trouble with X, Y, Z body of case law." You know, a very informed discussion.

By the way, you may hear the echo of a phone every now and then. I've told you I'm seated in my office, and we've turned off the phone, but there are echoes every now and then. [0:39:40]

So there's a very full discussion of the cases. It goes around the table and if, on a good day, if everybody is to affirm essentially for the reasons that had been reported, the case is then put over for a writing and that's the last you'll hear of that session. Most cases have somebody who's got some difficulty, problem, which may be resolved by going around the table a few times. It may not. It may have to go over another day or another day after that. The court conferences every morning, from either 10:00 or 9:30 in the morning, until 12:30, until it's time to start preparing for the 2:00 oral arguments.

So then take the other example, where I, the reporting Judge, go through my careful and well-reasoned report and the Judge seated immediately to my right, the junior Judge, is the other way -- always starting with the words "with due respect" -- and we all know

KAYE

what that means; it means I think you're wrong. So the Judge will give a very detailed explanation, with a little extra burden, knowing that now, there's disagreement, and the Judge -- everybody is an advocate, in addition to being a Judge, because you've worked hard to develop your recommendation, you want to prevail, but you want to be reasonable, too. And the case again proceeds around the table in inverse order of seniority. If the junior Judge carries the Court, the junior Judge is going to get the writing. And then I would have the option to dissent, to say that I'm going to dissent, or to say that I'm going to wait and see the junior Judge's writing before I make that decision. Essentially that's in brief how the conference goes, and that occupies every morning, a full morning. [0:41:51]

The Clerk of the Court, a Consultation Clerk and an Assistant Consultation Clerk sit in on these discussions. They are there to keep very careful track of the discussions. They are not part of the case resolution, but there are many, many technical rules at the Court of Appeals. I've already told you about the requirement of finality. Sometimes things get by that even the most careful readers have not seen, and the Consultation Clerk may say, you know, that we're overlooking something -- "this can't be first degree; this has to be second degree" or, you know, some technical observation. But mainly, the Consultation Clerk keeps track of the flow of the discussion.

RM: You mentioned advocacy. How did your experience as a litigator help you or come into play in the Conference Room?

KAYE

JSK: Well, I always saw my case report as my 10 or 15 minutes of oral argument before the bench. I mean, here I was advocating for a position, surely in a different role from the lawyer. The lawyer says, “This is the law of the State of New York, or should be the law of the State of New York,” but here’s a Judge saying, “This is the law of the State of New York.” It has a little more force, a little more power, authority, but basically, you’re making the argument that the advocate has made -- hopefully in a very convincing way, that you’ve diligently persuaded yourself that that’s the correct result and that’s what you’re urging on the Court. You’re advocating that for the Court.

RM: You mentioned that you wouldn’t know what your colleagues were thinking before argument. What about after argument? What was the interaction like between chambers? Did the Judges discuss the cases out of the Conference Room? [0:43:58]

JSK: There’s a very interesting history here and I’ll just spend a minute on that. I came on the Court in 1983 and I can never forget the first day I was there and I was in my chambers when Judge Jones came into my chambers and said, “You know, you’d better get a lock put on your desk.” I thought, “Oh, my goodness, a lock put on my desk at the Court of Appeals?” Unbelievable. I couldn’t have imagined that. So there must have been a kind of feeling. I don’t know whether there had been an incident. I never investigated that. That just indicates a certain level of intensity about privacy.

The other rule that they very strictly made known to me was there is to be absolutely no discussion of a case outside the Conference Room. There must have been some Judge

who just talked a little too much, I don't know, but even at dinner we never talked about the cases. We talked about the lawyers; we talked about our personal lives. Essentially, the place where the case discussion takes place is at the conference table, in the presence of everybody. That is the goal, the aim, the aspiration. [0:45:59]

Now, if you had to put labels on us you probably would have said that Judge Simons was more pro-prosecution, and I was more pro-defendant. I really resist that label and I'm sorry to put it on myself, but I remember when Judge Simons left the bench at age 70. We were very dear, and remain, close friends. I remember his quote in the Law Journal that he and I probably battled more -- that was his word, "battled" more -- than any other two Judges. And we did battle a fair amount about the cases. You mentioned *Bing* the other day. He prevailed on that one, but there were others where I prevailed, and they were the most serious -- informed arguments. However, we just often didn't quite see eye to eye on these cases, but we had enormous respect for one another.

But we developed this sneaky little procedure. We both had chambers on the third floor at Court of Appeals Hall, and maybe it was just to get a little bit of exercise, although I have to tell you, I started early morning runs when I was -- Judge Wesley⁷² and I especially ran three or four miles every morning. We'd get there at 5:00 in the morning. But that's for another day.

But anyway, Judge Simons and I began walking up the stairs after oral argument, and

⁷² Richard C. Wesley, Associate Judge of the New York State Court of Appeals, 1997-2003; Judge of the United States Court of Appeals for the Second Circuit, 2003-__.

guess what we talked about? Not that it made any difference to us. It was just nice to know going into the Conference Room the next morning, I would know. If I was going to report to reverse a criminal conviction, I would know already that Judge Simons was going to affirm it. And I guess I could have told, just from listening on the bench, but we did talk about the cases on the way up the stairs. And you can have no better evidence that this didn't influence anyone's vote than to look at the times that Judge Simons and I publicly disagreed about cases. But the rule, and it's really quite well and strictly observed, is that the cases are discussed only in the Conference Room. [0:48:35]

Now, one of the recognized exceptions is a case I wish I could remember, but it was a very important commercial-law case, and I'm using this to typify what I'm about to tell you. It's a case I think of as "shuttle diplomacy." It was a case where it was especially important that there be a unanimous Court. It's a big principle, there was a sharp division -- wouldn't have done the law any good -- and there were one or two Judges who undertook "shuttle diplomacy" to achieve what eventually became a unanimous opinion. And I note, from time to time -- continues to be well cited and has not caused any difficulty. So, while the overriding climate is one of decisions only around the Conference Table, there are times when it's desirable to take a couple of extra steps.

And we all knew this was going on. I knew it was going on. I was not part of it, but one or two Judges saw that there were possibilities that we could reach a single result, and it was desirable to do it and we did it. So that's my statement of the overriding proposition

KAYE

and the every-now-and-then exception.

RM: You mentioned that case being a particularly important one in which to reach a unanimous result. Can you talk about the Court's approach to in which categories of cases there was a particular striving for unanimity when possible, and why those categories -- cases of statutory interpretation -- and which cases made more sense for there to be a divide when necessary and not, and Judge Jones's article?

[0:50:35]

JSK: Well, I'm not sure that I can state categories, but you've just used the words "Judge Jones's article," so naturally you've reminded me of the article. It was his Cardozo Lecture, called *Cogitations on Appellate Decision-Making*.⁷³ And he does express the view that dissents should be cautiously used, and when you're going to dissent, let it all out, but just use them wisely, intelligently, and cautiously.

Now, what categories? I can't think of any particular categories of cases. I guess the overriding objective was a sound result in the particular case, and a clear articulation of the law, hopefully in an opinion that represented the views of all of the Judges.

And yes, something does occur to me that I do want to say, and that is, generally, there are three kinds of cases that get to the Court of Appeals, and today the overwhelming category is the category of statutory interpretation, where we consider a statute enacted by the Legislature. We talked about *Register*. The statute maybe was adopted in 1900 or

⁷³ The article is available on the website of the Historical Society of the Courts of the State of New York at: http://nycourts.gov/history/legal-history-new-york/documents/History_Jones-Appellate-Decision-Making.pdf

1925, or maybe it's just lay fallow for decades. Suddenly, in modern life somebody's wondering what on earth this means in the tech age, or, you know, it's got a whole new application and we work hard to figure out the intention of the Legislature. We say all the time, and we really mean it, we want to implement the will of the Legislature. We want to interpret, apply the will of the Legislature. That's what we're doing in issues of statutory interpretation. Hopefully we can reach one view. We try to reach one view. It's not the end of the world so much if we don't reach one view, in the sense that if we've gotten it dead wrong, if that's not the intent of the Legislature in the year 2011 or whatever, the Legislature can rewrite the statute. That's, I say, not the end of the world.

[0:53:17]

The second category of cases we have at the Court of Appeals are what's known as the common law. This is what I referred to earlier as judge-made law. These are cases where the judges themselves, and typically the Judges of the high court, the Court of Appeals, will say what the law is. The most common examples are in the tort cases, personal injury and property damage cases, where the Court will set limits on what's proper and what's not proper, and draw the lines on what the duty is. That tells the public what the duty of the building owner is with respect to sidewalks. That would be the most familiar sort of thing. The Court says what the duty is or what the law is in the common-law tort area. And maybe, as time goes on, or circumstances arise, it doesn't quite fit any more. I had a powerful lesson, a very early lesson in that from Judge Jones, in a case involving

damages for personal injury, where a mother was seated in an automobile and there was just a terrible accident.⁷⁴ She had her infant in her lap and the infant, I believe, died, was very seriously injured, but there was absolutely no physical injury to the mother. The mother was totally unharmed. The lawsuit included claims on behalf of the mother and, I'm sure, other parties as well, but the question was whether she could recover for emotional harm -- that is, the horror of having her infant so severely damaged and maybe even killed, whether she could recover damages when there was emotional injury but no physical injury. There was no physical injury to her. [0:55:32]

The Court of Appeals had been very articulate and very clear over the years that you needed some physical injury in order to recover for emotional injury, and I think that was a way of just limiting the universe. Otherwise, for people to just say, "I get bad dreams at night because I watched some terrible accident," you know, you'd worry that then there would be runaway damages. I researched the law pretty carefully and I thought, sad as it was, tragic as it was, that that claim had to be rejected, because there was no physical injury, and so we couldn't just allow emotional injury.

And I remember when that case came to the Court, in my early months as a Judge, and the reporting Judge was Judge Jones, who was either 69 or 70 years old and about to leave the bench and enormously respected, as every one of those gentlemen was at the conference table. And Judge Jones just knocked my socks off when he reported to

⁷⁴ *Bovsun v Sanperi*, 61 NY2d 219 (1984).

overturn the lower court and allow the claim to proceed. I was aghast; it took my breath away, because I studied all of the cases so carefully, including the cases of the Court of Appeals, and clearly that claim was not allowable, just not allowable. I listened to his report and actually, what he was proposing was that the claim should be allowed for what's called "bystander emotional injury" -- that is, a bystander to an accident -- only when it is a close family member. He drew the line on close family members. But even so, I thought this is just outrageous. [0:57:33]

And so he made his report, a very fine report, and when it came my turn -- I was the next to speak, the junior Judge -- I just collected myself. I couldn't believe what I had just heard, and as I've told you, it came as a shock to me. We didn't know ahead of time, any of us, what the others were going to vote, except I knew that Judge Simons was with me, which was to say, "Uh-uh, no way." I knew that from our walk upstairs. See, it gave me a little more confidence in my report, knowing that there was one other Judge with me, but neither of us figured on Judge Jones.

So it came my turn and I gave the report of a lifetime. I had it all written out, I knew all the cases, and I think that was another instance where Judge Jones, when he had the opportunity to respond, began, "With due respect, Judith." He began by saying, in as nice a way as possible, "I know the law of the State of New York." And wow, I don't think there was anybody who knew it better. He said, "But I think the time has come to adjust that rule just a little bit, and what I'm proposing is a very modest change. It's not going to

open the floodgates, because it just would be limited to close family members.” He recognized the possibility, if the Court suddenly said, “We don’t care; just emotional harm is enough,” that there could be a run on the courts for anyone walking through Times Square who saw some injury to a person, and claimed, “Now I’m suffering mentally for the rest of my life.” Could you believe it -- the four oldest Judges went for the new rule? Unbelievable. And I wrote the dissent, joined in by Judge Simons and Judge Wachtler. You know, the three junior Judges turned out to be the old fogies on the Court, and the four seniors took the law into a new chapter -- very cautiously and, I might say in retrospect, correctly. So that’s my second example of the common law, where again, like statutory law, you can make change over time to accommodate societal change and new problems. [0:59:58]

So in the first instance, it’s the Legislature that “corrects” an error, or at least better expresses its intent. In the second case, the common law, it’s the judges themselves who adjust the law. And, of course, we have so many instances of that, and my great hero, Benjamin Nathan Cardozo, I mean, when you just think of the times he did that. Just to give you one tiny example, the *MacPherson v Buick Motor Co.* case.⁷⁵ These are all cases that law students know so well, where it took Judge Cardozo to observe that an automobile could be a dangerous instrument on the highway, and to adjust the duty principle to allow recovery for negligence in -- I think it was tires, or some part of the

⁷⁵ 217 NY 382 (1916).

automobile, so that plaintiffs could recover against manufacturers for negligence, whereas under the rule before *MacPherson*, they couldn't. Kind of analogous to the case I've given you -- *Bovsun v Sanperi*. That's the second category of cases before the Court.

The third category of cases is the category of constitutional law cases. Yesterday, we talked about state constitutional law cases and federal constitutional law cases. Here it's hardest for change. In the one sense, we have a lot of undefined concepts to deal with. Our Framers particularly used those phrases -- due process of law, equal protection of law. You can't give a dictionary definition of those phrases. It depends on the case and the time and the circumstances and the situation. You know, even some of the very explicit language over the years evolved. The Framers didn't intend for us to apply circumstances as they existed in the year 1777 or 1789 or '91 or 1938. No. They intended for us to give meaning to those principles for living people in the modern world. That's what we're there for, not to go back to 1777. [1:02:32]

But here, in this third category, what gives greater pause, although it should be clear from everything that I've said that we give a lot of pause in every category, but in this third category change is very hard. You can rewrite the statute; you can rewrite the common-law principle. Much harder to rewrite the constitution or to go back on something you've said when you want stability and rationality and predictability in the law. So in that third category of cases, I'd say there's that extra pause to just be sure that

KAYE

you get it absolutely right.

RM: Are there any cases you'd identify as among the most difficult you dealt with? Any that you're most proud of? Any regrets?

JSK: Oh, my goodness. Oh, my goodness. Well, first of all, I learned not to have regrets. You have to be bold and do what you think is right. That's what you're there to do. That's your responsibility and you can't just relive and be regretful. So I'm taking that off the list. And to say "most proud," I would have to be picking one of my children. Every one of these cases is very dear to me.

I'll tell you just a couple of little stories. I told you the other day how thrilled I am when someone comes up to tell me what a change in his or her life the same-sex adoption decision meant. That just makes me feel very pleased. If the dissent in *Hernandez* budged by even a millimeter public consciousness about issues concerning same-sex marriage, that pleases me very much, too. [1:04:40]

But just on another plane entirely, I live on the Upper West Side and one of the early cases that we had concerned something that makes law students just nauseous, and that's called the Rule against Perpetuities. It's really just weird and odd and very difficult, concerning succession to land and use of land. Basically, the idea is, we shouldn't be unnecessarily tying up property, and so there's this Rule against Perpetuities. In my early years on the Court, we had one of those cases involving a property called

Symphony Space, which is on the Upper West Side.⁷⁶ I pass it very often. Lots of great things happen at Symphony Space. But back in the nineties, we had a case involving the Rule against Perpetuities as it applied to Symphony Space. Someone was claiming a right to take over that space, which -- owing to a Court of Appeals decision I wrote on the Rule against Perpetuities -- stopped them from taking over that space. Today we have Symphony Space. And the manager of that space, whenever I see him, never fails to say thank you.

And I have the same feeling on the few occasions that I go to the Four Seasons, the restaurant -- a very fancy restaurant in the City of New York. We had a case that involved the landmarking of the interior of the restaurant.⁷⁷ Just think of that. I mean, we have so many cases involving exteriors of buildings, and you can see where you would landmark the exterior of a building -- that's hardly the end of the world. But imagine landmarking interior space -- you know, "Don't move that vase or you're going to violate the law." Well, we didn't get down to that sort of thing, but it was just the basic design of the interior space at the Four Seasons Restaurant. So when I'm there I think about that, too. [1:07:01]

And so, I say, what pops to mind are some little things, because the Court of Appeals plainly -- we have cases involving, you know, the adoption of a child. And that reminds me of another. See, we'll just go on and on like this, because I refuse to pick out a

⁷⁶ *Symphony Space v Pergola Props.*, 88 NY2d 466 (1996).

⁷⁷ *Matter of Teachers Ins. & Annuity Assn. of Am. v City of New York*, 82 NY2d 35 (1993).

favorite case or a most significant case. But I can tell you one that caused me the most tears, maybe.⁷⁸ Maybe not the most, but a lot -- involved the adoption of a child whose biological parents both were mentally impaired. The case we got in the Court of Appeals was only one of the children. There was another child, too.

Shortly after the children were born, there was a proceeding to take them from the parents, which failed, and the reason it failed was that a pediatrician, psychiatrist -- I can't exactly remember -- testified that he thought these people, with significant assistance, could manage the care of their children. And the case that came to the Court of Appeals some years later, which still is making my spine chill, was another case to take the child from the parents. The other child had already been taken, because that same pediatrician, psychiatrist, testified that even with huge supplemental resources, these people were just unable to care for their children. And I remember having the transcript, having everything about the case, and going into one of my rooms and closing the doors, with a huge box of Kleenex, because we upheld that decision. And I can only think how painful that was for those people -- like, it had to be the end of their lives to have their children taken from them. But the doctor testified that after five or six years it was clear that the parents would just never be competent with however much help they had. [1:09:20]

And I do remember adding one footnote that was kind of in the none-of-my-business

⁷⁸ *Matter of Joyce T*, 65 NY2d 39 (1985).

category, which was to underscore that the effort should be made to keep those parents, and especially to keep the brother or sister -- I can't remember which one was the subject of the prior proceeding -- attached, to keep them attached. And you know, we don't do that, or at least we didn't, and I don't know whether it's different now. It just shows you the range of things that come to us, that come to the Court of Appeals. But that case certainly stands out for me in terms of emotional drain, and not to say it didn't happen many times.

You asked me before about regrets, and I told you I don't live with regrets. I don't think you can have a thick skin and be a judge. You have to have a thick skin in the sense that you shouldn't live with regrets -- what you've done, you've done. But you have to be thin skinned to understand that you're affecting the lives of human beings very profoundly.

So, I'm not going further than that with favorite cases.

RM: Did your approach to judging change at all over the 25 years of your experience?

JSK: Again, I think we're kind of in the area of other people's evaluation. I remember the time I was attacked at the outset of the Pataki Administration. I've gotten those articles and I remember how painful that all was. That was so unfair and wrong and painful, being attacked as the "criminal-loving liberal." I just had to bite my tongue and go on. I was neither a criminal-loving liberal nor, as people have said of my later years, evolved by reason of all of those attacks into a conservative, right-wing kind of thing. I think both of

KAYE

those are utterly ridiculous. I think I am what I am, and I don't think I've changed. I think I've tried to reach a fair result in every case, from the beginning to the end, and I don't think it's fair to put me at either of those absurd ends of the spectrum. [1:12:05]

RM: Are there any other reactions -- public or private reactions to your cases -- that stand out, besides Aunt Libby's that you mentioned yesterday?

JSK: I'm not sure I gave you my whole Aunt Libby reaction, but this tiny, heavily Jewish-accented lady whose life was so overturned by all the press about the *Lemuel Smith* case. She came up to me and said, "Judith [her nickname for me], how could you have done such a thing?" It upset her so much, but that was just because of all the press. And at the time I told her I was sorry, but I wasn't sorry, really. I just tried to make her feel better. I have to tell you, I just want to spend a minute on the *Hernandez* dissent, because I have gotten a few -- every now and then I get something about that, and if I went to the drawer in my office, I could find this lovely message from a same-sex couple that had married and quoted my dissent in *Hernandez* in their wedding ceremony. What I want to tell you is not about the time people have said that to me, but rather that first paragraph, and Robert, you were there. I don't know if you know all of this -- that Megan, our clerk, was going to be married, and I did Megan's wedding. She was marrying David, her very long-term boyfriend. Before I do a wedding ceremony, I spend time with the couple, because I try not to do many. I want each one to be personal and meaningful to me and to them, to the couple.

When I sat with Megan and David -- after they had been together for a blissful decade or so, asking why were they doing this, each of them told me what it meant to them to stand up before their family, their friends, an officiant of the State of New York, and to proclaim their lifelong devotion to one another. They said words like that, which just really touched me so much, and I tried to capture that in that first paragraph of the *Hernandez* dissent. So that's kind of a personal standout, I guess. There have, from time to time, been things, but they don't come immediately to mind. [1:14:49]

RM: What's your view of the proper role of courts vis-a-vis the other branches?

JSK: Well, that's a very difficult question. You know, we've touched on so many issues that are really profound issues. Profound societal issues, profound jurisprudential issues. When we talked about unanimous courts and divided courts, that's one of them. There's so much literature. Yes, well, I was going to sidetrack a bit and tell you that I just encountered yet another article. There are a lot of articles on the subject, especially the issue about where the line should be drawn in our tripartite form of government -- that's a hard issue to answer in a few sentences. You know, we have the three branches of government. We have the Executive in the State of New York, represented by the Governor. We have the Legislature -- the two Houses, the Senate and the Assembly, each with its leaders. And then we have the Judiciary. The two branches, the Executive and the Legislative, are political branches; they are elected by the people of the State of New York. They represent the popular will; that's what they're there for. And that is distinctly

what the third branch of government, the Judiciary, is not there for -- not just simply to discern and reflect the will of the people and respond to the will of the people.

The third branch of government, the Judiciary, is an independent branch of government, not linked to the other two, and it is there to guarantee the rights and privileges that we have as people. It is so essential that the judicial branch be independent of the other two.

From time to time the Judicial Branch is called upon to rule on things that are done by the other two branches. And all the time the Judicial Branch is called upon to assure that our rights and privileges are secured and our laws are enforced. That's why we stand separate and apart. [1:17:01]

So how specifically do we draw the lines among us? You know, I've thought so much about that and I wish I could come up with one single answer that under A, we do this; under B, we do that; and under C, we do that. I've struggled a lot with it and I can't tell you.

We'll take the issue of same-sex marriage, since that's the one we just had in the State of New York, where my heart was broken, as I told you, that New York could not be one of the leaders in the enforcement and recognition of rights, which to my mind are secured by the Constitution of the State of New York. And I wrote that; that case came to us.

And by the way, I should preface this by saying that Judges -- it's not as if we sit around up at the Court and figure out, "Maybe we should reach out for a particular issue so that we can pitch in on the discussion." We don't invent issues just so that we can express the

will of the Judges. Parties bring cases under the law to the Court.

So we had that case and the parties made all of their arguments and they were very, very seriously considered. And I told you how sad I was that to my mind, as I expressed publicly in that writing, we did not reach the right result. Fortunately, some years later, in fact just this past -- in the year 2011, the Legislature saw fit to adopt a law recognizing the right to same-sex marriage. Now there's a very good place to posit the question, Where is the line between the Judiciary and the Executive or the Legislature? Where do you put the line? If the Court had gone the other way, was it transgressing the line? Yes, in the mind of critics. Critics would have said, "Oh, that's an activist Court; the judges are just there to do their personal inclination." But no, I didn't see it that way. I think we have separate responsibilities. [1:19:20]

I cannot answer your question decisively by telling you exactly where the line is drawn. I can only tell you that having spent 25 years on the Court, I kept in mind my own responsibilities. I think I had a very good take on what my responsibilities were as a jurist -- to protect rights and enforce the law -- and I just did the best I could to discharge my own responsibilities, recognizing where the Judiciary stands in the design of our government. I've really spent a lot of time thinking about this and I can't think of a more definitive answer other than we have to do it. We have to do what we think we have to do, period.

Chapter 6: My CEO Role

A. An Unforgettable Introduction

RM: You've talked about your work on the Court of Appeals, both as Associate Judge and as Chief Judge, but when you became Chief Judge, you had to take on, effectively, a second full-time job. We're going to talk about the specifics of all of the tremendous innovations you brought into effect, but first, thinking about, all of a sudden, having that job thrust upon you, having that responsibility, what was that like? How did you know what to do to run a massive court system?

JSK: Well, that's a really good question. It's hard to know exactly what to do. I do remember very painful instruction by our then Chief Administrator. The Chief Judge, the CEO of the state court system, gets to appoint a COO -- chief operating officer -- known as the Chief Administrator or Chief Administrative Judge if it happens to be a judge. I just want to say, I was very fortunate that I had three fabulous Chief Administrative Judges during my tenure as Chief Judge -- definitely the right-hand person. I had Judge Leo Milonas⁷⁹ as the first Chief Administrative Judge. He left after a little over two years, and I think that was about the normal tenure for -- usually they stay about two, two and a half years. Then I had the blessing of Chief Administrative Judge Jonathan Lippman⁸⁰ -- today the Chief Judge of the State of New York -- who stayed with me for 12 years. And after him,

⁷⁹ E. Leo Milonas, Chief Administrative Judge of the Courts of the State of New York, 1993-1995.

⁸⁰ Jonathan Lippman, Chief Administrative Judge of the Courts of the State of New York, 1996-2007.

I had Chief Administrative Judge Ann Pfau,⁸¹ who just yesterday announced that she's going to move on to another position. [1:21:53]

So let me tell you, I was very fortunate once the dust settled a bit and I did get Judge Milonas as my -- you definitely need that chief administrative person there to do the chief executive officer role. But in addition, the then Chief Administrator, Matt Crosson,⁸² who died recently, he spent quite a bit of time with me. He came up for my daily instruction. I remember we would sit around until I would hold my head and finally say, "Matt, I just can't take it anymore." That was how we did it. Sometimes we'd sit for an hour, sometimes two hours. I kept a notebook someplace, I got daily instruction from him on just all the ins and outs of this very complicated court system. He was a terrific teacher.

So there was that as one part -- Matt's instruction.

There was finding Judge Milonas as another part, which I did as quickly as I could. And the third part, which was a great help to me, was that Chief Judge Wachtler, in his last days, had -- there was a huge ruckus about matrimonial cases. There still is. We just can't seem to do it without huge amounts of pain. But he had appointed a commission to study Lawyering and Matrimonial Cases. That's not the right name but it's something like that. Judge Milonas, then a Judge of the Appellate Division, First Department, was the Chair, and Chief Judge Wachtler had put me on that group. I was a member of that group and

⁸¹ Ann T. Pfau, Chief Administrative Judge of the Courts of the State of New York, 2007-2011.

⁸² Matthew T. Crosson, Chief Administrator of the Courts of the State of New York, 1989-1993.

that group was going gung-ho, as some of these other events were going on.

So I had the benefit of being on that commission and I guess we were nearing the end of our work and it was a very enlightening experience to be part of a commission. I think that was probably, literally, the first of the reforms that were announced in my tenure as Chief Judge. We announced the matrimonial rules. We had a whole body of rules -- a very good lesson for people in what can be done administratively. So I got the twofold lesson from that commission; I got the lesson in administrative powers. I wasn't really as astute about the NYCRR -- New York Code of Rules and Regulations -- when I began. There's a lot of administrative authority. And I also got a very good lesson in process, of what could be done through a commission. [1:24:43]

I got a third lesson, too, once we announced our reforms, which is the word "pushback." People hollered and screamed and carried on when we announced what the reforms were, and hollering and carrying on and screaming is the typical reaction to everything you try to change. I call it "pushback." I became very familiar with pushback and even more familiar with "push forward," because the change was necessary -- change was good. It was just tough. I shouldn't be too arrogant in saying that, because it's very easy to advocate for change when you are the person imposing change. It's a lot harder to advocate for change when you are the person who has to do the changing.

But I got those early lessons in being the chief executive officer, and a little tiny footnote there on that last part, too. I learned later on, in fact after the death of a very dear friend,

Presiding Justice Dolores Denman⁸³ in Buffalo, that when those rules were announced -- you just didn't, you didn't mess with Presiding Justice Dolores Denman. She was a person who knew the right thing, and did the right thing, and just an absolutely fabulous human being. But later on -- it may have been at her funeral, it may have been later -- I learned from a matrimonial lawyer in Buffalo that when the stink began in Buffalo over the new matrimonial rules, Dolores Denman put her foot down and said, "I'll have none of that." And she got in her car. She took some matrimonial lawyers with her, and she traveled all through the Fourth Department and said, "You are going to do these things; you are going to make this happen." And that's how it happened. And the truth, that's what you need to do when you try to change things. You just can't proclaim rules and go about your business. You have to be there on the scene to make them happen. [1:26:44] So that was a little touch of my very, very early introduction to the role of Chief Judge of the State of New York -- that second box of stationery that comes with Chief Judge of the Court of Appeals.

B. Jury Reform

RM: And then throughout your tenure as Chief, you sought to innovate and improve in really all areas of court administration, often, as you've just said, overcoming substantial initial opposition to change, and became a national leader in so many areas of court and justice reform. So let's talk about some of them in particular. First of course, jury reform.

⁸³ M. Dolores Denman, Presiding Justice of the Appellate Division of the Supreme Court in the Fourth Department, 1991-2000.

KAYE

JSK: Well, jury reform. There's a tiny little paragraph that belongs before jury reform, because chronologically, part of the pushback from the matrimonial lawyers was, "Why just us? What about the rest of the bar? The rest of the bar is -- you know, you can't just take this tiny percent of matrimonial lawyers and heap all the blame on us and impose these rules on us. Do the rest of the bar, too." Well, they were right about that and you have to recognize, when they're right, they're right. So that was another little commission. After the commission on the matrimonial lawyers, we did a commission on the bar, headed by Lou Craco. That was where continuing legal education got started -- that was one of Lou's recommendations. So now even I have to get continuing legal education credit. Is there continuing legal education credit for this session? No, no, no, I don't mean it. But anyway, you used a word that is just music to my ears in the sense that one of the things I brought with me as a litigator was acute sensitivity to the need to do something about the jury system in the state courts in New York. As I recall, I had even written something to Chief Judge Cooke about that years earlier, because you couldn't go down there and be proud and pleased to see what was going on. So here at last, I had the opportunity in my own hands. Something needed to be done. And I mean this on a couple of levels. [1:29:05]

I'll start with the one that's really the responsibility of the Chief Judge, and that is operational -- the Chief Judge of the State of New York. And -- the jury system didn't seem to be operating optimally from the court system's point of view. But then there's

the other aspect, which is the public point of view. Here is an opportunity to bring people in directly, probably the first time ever in their lives that people come into the courts.

They read these dreadful things -- you know, press is, by definition, poisonous. So they read these dreadful things in the papers about juries gone amuck, awry; they read novels about

jurors who are corrupt and do terrible things. But why not bring them into the court system and show them a court system that works well and show them a justice system that is really a justice system that operates for them? Why not maximize the opportunity, through the jury system, to change public opinion about the courts, which generally, if you stop people on the street, they'll tell you, "Eh, it's not much."

And then as a litigator, you know, I had run into the jury system in unfavorable ways. I mean, things were ultimately okay, but let me tell you, it's a real sword over the head of corporate clients that they might have to endure a jury trial in the state courts of the State of New York. I remember one corporate executive saying to me one day that he was able to settle a case with a stipulation with his adversary that he would never again have to appear in the State Supreme Court of the State of New York. Now that should never be.

[1:31:12]

So I would say that was my first self-aware initiative, in the sense that I was on the matrimonial-lawyer commission and the next one was the natural outgrowth of it and terrific. They did a great job -- Lou Craco -- a great job chairing that and we put together

a great commission and everything they recommended, we did. We were able to do all of those things, including, as I've mentioned, the requirement of continuing legal education, which I know bothers some people. But by now it's really inborn and I think a very good thing -- and all done by administrative change by the Chief Judge.

Now this jury thing -- the challenge when you're putting together a commission is to get a great, really dedicated chair. And somebody popped to mind for me immediately and that was a person I met, I think, while she was still in college or certainly law school. I met her through the general counsel of a client of a company that I represented, and her name is Colleen McMahon. She was with a law firm called Paul Weiss, in the City of New York (today a revered Judge of the United States District Court for the Southern District of New York⁸⁴). I knew Colleen was great from the time I met her. I really watched her grow up. Colleen was the natural choice and she was thrilled to do this. So she became the chair of the commission. I asked her; she accepted enthusiastically; and together -- the next challenge, after you get the chair, the next challenge is to find really a zingo perfect group for the commission, and we wound up with like 30 people, I think.

Colleen and I worked very hard on this. [1:33:10]

She brought with her from the firm a young lawyer named Roberta Kaplan. The first time I met Robbie, I drew Colleen aside and said, "I want her as my law clerk." And Colleen said, "Keep your hands off her until this is finished." Which I did, and then

⁸⁴ Colleen McMahon, Judge of the United States District Court for the Southern District of New York, 1998-__.

Robbie became my law clerk. Just tells you about Colleen and Robbie.

I remember being criticized -- you know, you get criticized for everything. And I remember some starchy letter from a judge. I think he wrote it to some paper but they didn't publish it. "It just shows how ridiculous our new Chief Judge is -- a 30-person commission, that's just absurd; you'll never get anything done." But of course this was a big job, all over the State. What we had at the time was about two dozen automatic exemptions from jury service. So if you got a jury notice and you checked the box for, say, a lawyer, a doctor, a Christian Science nurse, a person who wore a prosthetic device, a person who made a prosthetic device, took care of children under five -- you just checked the box and then you were automatically exempt from jury service. So that depleted the list so much -- the poor people who were left on the list! What we developed was something called a "Permanent Qualified List." People who weren't wearing or making prosthetic devices, or serving as Christian science nurses, or doctors or lawyers, or firefighters or police, or on and on. Those people would be called automatically, every two years, because we've got a huge court system and we need a lot of people available for jury service. So they would be called automatically every two years, and they would have to serve a minimum of two weeks. I say "a minimum," because if they got on a trial that lasted longer than two weeks, they were stuck. But this was so unfair. It was unfair to the people on the list, and it was unfair to the people off the list. [1:35:25]

There were two amazing things about the project, and I say, I think having Colleen, having Robbie, having 30 excellent people -- those were utterly essential. The two amazing things were that Colleen produced a report within six months, which is just breathtaking. And the second thing is that they produced a report called a blueprint for jury reform with a bright blue cover. And indeed it was an absolute blueprint for jury reform. We followed that blueprint like the architect of some major building and the construction people. We had a brilliant architect and brilliant construction people, who followed to really make a very profound change. And maybe most key -- but everything is key, so I don't want to diminish anything. Then head of the Senate Judiciary Committee was Jim Lack, now Judge Lack,⁸⁵ and of course getting rid of those automatic exemptions was completely key to anything we were going to do, to get rid of the permanent qualified list and open jury service to the public, as it was supposed to be. Jim, at the time, was very impressed by the report and he began Senate hearings on these automatic exemptions, and, much to his shock, nobody came. Nobody came. None of the groups that were automatically excluded, who had lobbied to get those statutory exclusions -- none of them showed up to defend the statutory exclusions, believing, as in the past, that they were untouchable. But in Jim's mind, that led to the other conclusion -- that if nobody cared, the Senate was going to abolish them. Talk about breathtaking. The Senate wiped out all of the automatic statutory exemptions, including the automatic

⁸⁵ James J. Lack, Judge of the New York State Court of Claims, 2002-2011; New York State Senator, 1978-2002.

statutory exemption for judges. [1:37:36]

Now Colleen's committee had recommended wiping them all out but one -- for judges. But Senator Lack -- gee, I wonder how he now feels as Judge Lack -- the Senate wiped the slate clean, all automatic exemptions -- abolished, which was in a sense exhilarating and in a sense terrifying. We suddenly had more than a million really angry people that we had to show we knew what to do with and that we had a good system in place that valued them and their time. That was a real challenge; that was a challenge. It worked.

RM: And you were called for jury service yourself as Chief Judge after reform.

JSK: I have been from time to time, called for jury service, but I have not made it on to a jury.

My daughter has. My daughter -- recognizing that her mother was the Chief Judge -- my daughter has served on a jury, and I love to tell this story. Well, there are two things.

First of all, I was not her favorite female judge, and it's not because she didn't value me as a judge. It's because the trial she sat through, from jury selection to verdict, was presided over by Judge Juanita Bing Newton,⁸⁶ and my daughter developed an undying respect for Judge Newton -- the way she handled that case and that jury.

The second thing, the story I just cherish, is that I was in Albany at the time when my daughter called and, you know, we had just abolished all of the automatic exemptions, so we had all these professionals and a wide variety of people. My daughter called and said, "This is a great place to meet guys." And so I really -- I just thought that was terrific, too.

⁸⁶ Juanita Bing Newton, Judge of the New York State Court of Claims, 1987-2013.

Honest, I hadn't calculated that in advocating for the abolition of the exemptions.

[1:39:36]

But, you know, there were so many other things that were done, a million other things that were done, and just to give you one other little example, which is serious. The jury notices would go out and, I don't know, like three-quarters of them would be returned and they would be just accumulated, the envelopes, in a large room, just sitting there in a large room, that people just wouldn't -- it says "Jury Summons" on the front of the envelope so they knew what to do is just ignore it, and nothing ever happened, period, that was the end. That was an easy way to get out of jury service -- just don't answer. Nobody ever did anything, which is pretty remarkable in this age of technology.

Another development was the idea of re-sending the summonses, re-sending the notices. These were notices and not the second step. They would be re-sent. It's so easy, with the computers and all, to figure out a lot of things, and so they were re-sent a second time, they were re-sent a third time and maybe even a fourth time, and the lack of response kept diminishing, because we had a few very well-publicized instances where somebody who ignored a summons paid a price for it. You got called down there, you had to answer why -- it's a violation of the law not to respond to the notice -- and you paid a penalty for it. I think maybe a couple of hundred dollars, I don't know that exactly, but I do know that what would happen when you got called down there before a judge for ignoring your summons was that you got put on jury service. And these were publicized stories. So in

KAYE

addition to constantly re-sending the notices, we had some public awakening to the fact that you can't just throw them away. [1:41:41]

I remember one story where a woman who didn't have any money asked -- she was an opera student -- and asked the judge if she could sing an aria from *Carmen* and then go on to her jury service, which he allowed her to do. But I say, that was another way, just to get people into the courthouse. Hard to do -- get them into the courtroom, but now that we've got them into the courthouse and the courtroom, what do we do to earn their respect?

That was a big challenge. Big.

RM: And you did a lot of things. What were some of the things that you did?

JSK: What were some of the things? Well, I remember one day getting a call from my friend who's an editorial writer at the *New York Times*, saying, "Judith, you can't believe this, but I was down there for jury service, went to the bathroom -- there's no door on the bathroom and there's bar soap. You don't have that today." So, I went down there and she was indeed right. There were a lot of bathrooms that had no doors, and there was bar soap. I'm just going to the ludicrous extreme, to tell you. We began public-awareness training of our wonderful court employees, wonderful. And in fact, the letters that I would get after some of these measures overwhelmingly were praising the jury personnel, for their personal interactions and their caring -- just showing some interest in these people.

Having a judge show up to welcome the jury pool, to show somebody cares about you: “We’re happy that you’re here.” The insistence that we bring people in for the shortest time possible, hopefully one day or one trial. Not always possible -- two days or one trial -- we try that. Assuring that jurors -- some of the ones who sat for two weeks, they never would get questioned for a case even -- that everybody who goes, it should be relevant and important that you’re there, that there’s a prospect of your getting on a jury. Things like that. It just was raising the level of public awareness. [1:44:02]

Work space, Internet connections, more comfortable facilities. Some group put plants in the jury room. Somebody became attentive to painting the jury room, and little by little, just changing attitudes. Changing public attitudes, staff attitudes, judge attitudes, everybody’s attitudes. I think, still, people stop and tell me -- oh, you know it’s changed so much, but I think it’s something we constantly have to be attentive to.

I used to tell the Kissimmee River story. I don’t think I ever told you the Kissimmee River story, which was about a case I had as a lawyer, where a client dredged the Kissimmee River to straighten it out for the Army Corps of Engineers, and then there was trouble getting paid, because the Kissimmee River just went back to its banks, to its ordinary curvy banks. I always am fearful of the analogy to the Kissimmee River, because if you don’t watch all the time, things go back to the way they were.

So it’s not only a matter of having better rules in place, and it’s not only a matter of seeing that the rules are put into action, but it’s also a matter of being out there all the

KAYE

time, seeing that the Kissimmee River doesn't go back to its curlicues instead of the straight line to which it was dredged. So that's the challenge for the Chief Judge -- great job, and we now have a great Chief Judge.

RM: You talked about the difficulty of eliminating the exemptions. Sequestration was another major piece of that, too.

JSK: Yes, sequestration. There were just so many different pockets of resistance and one came from court officers. And again, we have great court officers. When I talk about staff, I think of the terrific job that the court officers did and do, continue to do -- how vital they are to the court system. But we had, in addition to this poor permanent qualified list, we had automatic sequestration for sitting jurors. If you were on a case where deliberations had begun, you were automatically sequestered, meaning you were taken to a hotel and kept overnight -- not allowed out of the jury confine until you reached a verdict, which might sometimes make sense. You know, there might be a need for it sometimes, maybe, rarely, where the judge's instruction not to listen to anything or consider anything or hear anything or talk about the case at all would be not sufficient. I think in the modern age it is sufficient, and overwhelmingly that's what courts do. But here we had a tradition where by statute a deliberating jury had to be sequestered. Now that was a huge burden for people. Imagine if you had a family at home and you're on a jury that's deliberating and you have to be away from your home and your family for days. Why? And coincidentally, an enormous expense for the court system. Hotel and meal expense and

KAYE

overtime court-officer expense. Big, big expense. So that was another issue that got worked out, very happily got worked out, so that that automatic sequestration was eliminated, done away with. [1:47:52]

But as I say, there were a lot of things like that along the way. I was so energized and so excited to be able to do that, for the reasons that I've told you. But the principal reason, well, it's hard to say one versus the other -- you know, to have a great court system operationally, but just to get a much better public view of the court system. And coincidentally, to educate the public a bit about what it is we do. We don't have enough of that in our schools or in our lives.

RM: We'll talk about other innovations you instituted as Chief Judge, but before we leave the subject of the jury, do you want to talk about the ABA and the Postal Service?

JSK: Oh, absolutely, yes. That was one of the little side perks that was so terrific. As a lawyer, I used to be tremendously involved in bar association activities. The slate got wiped a little clean when I went on the Court, and you can understand why, since there's not a lot of time to -- like, you can't be on the Executive Committee of the City Bar Association or the Board of the Legal Aid Society -- for conflict reasons but for time reasons, too. But the President of the American Bar Association, which is an association of lawyers and judges -- I think there are probably a half a million or so members of the American Bar Association. There's a new president every year -- the incoming president spends a long time thinking about what his or her major initiative is going to be, and I got a call

one day from this wonderful friend named Robert Grey from Virginia. He came to see me and was thinking of making the jury his initiative. What a great idea, a really great idea. And he asked me to co-chair the initiative. Yes, there were co-chairs, right, two lawyers, and with Sandra Day O'Connor as the honorary chair. I just thought that was a great idea and I accepted that and had a wonderful time doing that -- chairing that group.

[1:50:17]

Jeff Toobin was on that commission, too, and I remember asking Jeff, "How do we really get some traction for what we're doing? How do we make it big and significant?" And Jeff Toobin said, "You have to get Justice O'Connor to do something." Justice O'Connor was so great; she was willing to do anything to help. So we went to Washington, D.C., and she spoke to a grand jury panel. But the amazing thing -- what I remember is there were nine television cameras, this was just all over the place, and the bottom line message is that our Supreme Court Justices are rock stars. Nobody can get publicity like our United States Supreme Court Justices.

But anyway, there were lots and lots of issues and, in fact the jury issues continue to be special ABA issues. But in the course of the work that I did for the American Bar Association, I became conscious of an effort to get a stamp honoring jury service. People had tried from time to time to get a stamp from the U.S. Postal Service. They were brushed off, ignored totally and the more we were ignored, the more important it became for me to get it. I remember seeing the stamp of the Muppets. Now, I love the Muppets,

but we can get the Muppets stamp and we can't get a stamp honoring jury service?

So I unleashed a flood of letters from Chief Judges all around the country; they all wrote to the Postal Service. Every now and then the Postal Service would answer somebody.

Most of the time they just ignored us totally. And finally, I got this one terrific lawyer in the City of New York; in fact, he headed up one of my commissions for a while, on lawyers as jurors, because that got to be an issue, too. Everything gets to be an issue. His name is Greg Joseph -- really just a terrific lawyer. I put in his hands the task of helping us get a stamp, because I was now determined to get a stamp honoring jury service, and Greg did a fabulous thing. He filed a Freedom of Information Act request under the federal law. Now, I think that cost him about five hundred or more dollars, because you have to pay for whatever documents it is that they're going to give you. But I didn't realize how powerful that was until I saw Linn's Stamp Catalog for the year 2007, where the Postmaster General is quoted as saying, "The Freedom of Information Act request -- that was the last straw. I couldn't take it anymore and we were going to give them the stamp, period." So we got the stamp and it's a beautiful stamp. And in fact, regrettably my husband died when there was a nationwide ceremony in Houston, I had to miss issuing the stamp, inaugurating the stamp. They had a five-by-five-foot poster of the stamp, which they gave me, which now hangs at 60 Centre Street. [1:53:32]

It is an absolutely beautiful stamp, but we no longer are paying 41 cents for a stamp and I understand we're about to pay even more for a stamp. But there is no more beautiful

stamp than that one. Don't you agree? Everyone in the room, Nick and Marilyn Marcus and Judge Mandelbaum, Robert, they're all shaking their heads yes -- a really beautiful stamp, which I would think at this point is rather rare. If you can get it, hang on to it. I don't have it. Hard to get.

C. Problem-Solving Courts

RM: Problem-solving courts.

JSK: Problem-solving courts, yes. Now, Robert has put on the table the words "problem solving courts." I know exactly what he's talking about. I'm not sure we ever hit on the absolute perfect nomenclature. Is "problem-solving courts" -- the absolutely perfect descriptive name? I don't know, but I know what you're talking about, so I'm going to go ahead and talk about them. Yesterday, we touched on domestic violence courts, when we were talking about some of the cases like *Nicholson*, and some of the things that raised my own awareness to the need for essential reform in how we handle the scourge of domestic violence in the state court system.

Maybe the problem being solved is the problem of the court structure, you know, the splintered court system. But I know what we mean by problem-solving courts and I think some states -- in some places they're called, like, therapeutic justice, which I say, "No, no, we don't -- we're not therapeutic." There's a kind of struggle for nomenclature. But let's lay that aside, and what I know you are talking about and what I will address are the instances where we don't just take in a case and manage it to disposition. That's hard

enough to do and that's overwhelmingly what the courts do; they try. They have step one, step two, step three, step four, dispositions. We count dispositions -- four million or more cases a year. We count them in, we count them out, and we move them along standards and goals, and that's traditionally what judges do, you know -- when we dispose of the cases we've done what we're supposed to do. [1:56:12]

The problem-solving courts are a different avenue. The cases come in -- again, courts don't go out and find cases. Police arrest people, people get indicted and then they get criminal cases; or lawyers bring cases and we get civil cases. Courts don't go out to discover problems, but courts have to deal with the problems. And I say, the traditional way is to deal with them by taking the case in and managing it to disposition. The problem-solving courts are a different route, and it's turning the prism just a little bit to figure out whether the interventions -- the court intervention, the time the court spends on the case, can be more constructively utilized than simply disposing of the case, the issue. Probably the most typical example would be a young drug offender, somebody -- and I'll take the easiest case. Not easy, but most easily demonstrates what I'm trying to say would be a repeat drug user, possessor, drug offender under the laws of the State of New York, who could be arrested and prosecuted and in the end, maybe, because the process takes so long, would be held, incarcerated, in jail. The sentence could be nothing more than time served. Then the offender goes back, right to the same place, and gets arrested again and the process begins again and goes to the same conclusion, until there's a sheet,

called a rap sheet, which is the sheet of the defendant's encounters with the court system, that is six feet long. [1:58:22]

So problem-solving courts are an effort, really, to intercept, to try to reroute the person, take them off that pathway back to the Port Authority Bus Terminal, or prostitution, or graffiti, or illegal vending.

I had my first exposure -- this is still back in the year 1993, the year I became Chief Judge, when we were in the development of the Midtown Community Court, which is a structure on 54th Street, between Eighth and Ninth Avenues, in the City of New York. In fact, it's a building that on the front says, "Municipal Dist Court." I think originally, we had courthouses around places, local places, until the dockets got so huge that it made sense only to centralize them. The only way dockets could be handled and court business could be handled was to centralize the courts, which we did. But there was that vestige on 54th Street and it was, at the time I became Chief Judge -- there was an effort to make that a Community Court. And it was the pressure from the community that was driving this initiative -- the theater owners, the business owners, who felt that the Times Square area -- (basically the outer fringe of the Times Square area). Right next door to a police precinct. They felt the quality of life was so unnecessarily eroded by the way the courts were handling this. They just saw an opportunity for the courts, with the community support and community assistance financially and in every way, to make a more positive intervention -- it's what I call turning the prism and making a more positive intervention.

And that was the origin of the Midtown Community Court, which was the first of the “problem-solving courts.” [2:00:59]

I distinctly remember -- I can fix a time, that it was October of 1993, that there was a ceremony with Mayor Dinkins,⁸⁷ where he handed me the keys to the court. That was, you know, the figurative, symbolic gesture that opened the Midtown Community Court. But in so many ways, it was so different. First of all, it's a little six-story structure owned by the City, previously occupied by a theater company, which now is on only one floor. They're still there, but they're on only one floor, and the Midtown Community Court has all the other floors. The court itself was vitally restructured, reorganized, rebuilt, and there are so many things about it that signaled how different it was, starting with the fact that it was a really dignified looking structure. There was computer technology evident, so that you would know -- somebody being called would know when the case was being called, unlike just gathering in a room of how many hundreds. There were fewer people; you'd know when your case was being called. That was just the surface. The holding areas were glass instead of iron or steel -- or whatever it is -- bars. But when I mentioned the technology, really the key is that the judge, specially chosen and specially assigned -- the supervising judge of the court had enormous information about the person, more than any of the judges, the wonderful judges in our criminal parts, where these cases would normally come, would have, so that the perspective was different on trying to intervene. Not just to dispose of a case, but trying to use this moment of intervention as a positive,

⁸⁷ David N. Dinkins, Mayor of the City of New York, 1990-1993.

constructive intervention, to see that the person had the support and the services. A person who was willing to own up to this illegal activity and illegal life would have an opportunity to be connected -- this is really the essence of it -- to be connected to people who could help the person turn his or her life around: family members, friends, caseworkers. If it was drug treatment that was needed, under court supervision there would be drug treatment. The prostitution cases were handled differently. [2:03:47]

So the ground floor, as soon as you walked into that building, and to this day, as soon as you walk into that building, you see a difference. See, by contrast, the Criminal Courts of the City of New York in Lower Manhattan. There was a floor -- I think it's the fifth floor -- for services. You know, you'd be signed up for drug treatment if that's what you needed, pick up your welfare check if that's what you needed, courses in English if that's what you needed, connections to job training, connections to interviewing skills and places you could go to apply for a job. I mean, just a really quite different approach that over the years has proved to be a very successful one.

I've talked about rerouting a person's life and I've ignored the point I should put equally at the top of the list, which is when you do something that violates the law, you have to pay a price for it. You have to be accountable for violating the law, and so accountability is also highest on the list of the judge. The Community Court -- and I see it, since I live in this area and work in this area -- I often see people wearing Midtown Community Court vests and all, who are working on cleaning the streets and removing graffiti, because very often, the punishment, instead of time served, the punishment is a real punishment and it's

KAYE

service to the community, and that is very assiduously watched and people do their service to the community. And I've seen so many instances and remember so many instances of sitting with people, because I used to visit there often, when I needed a lift. I don't mean in an automobile -- an emotional lift. I would go up there to have a look and see people whose lives were genuinely being changed by a positive, constructive court intervention. And that was day one.

JSK: Well, Robert got me onto the subject of problem-solving courts, and putting to one side the domestic violence courts, which I raised yesterday, I was on the subject of the community courts, which began at 54th Street. And I watched them over the years proliferate around New York State and migrate to other parts of the world, most notably England. In Beatle country, they just are so excited about their community court; in Africa, there are community courts. They're all around the United States as well. And over the years, the way this became possible, both in New York and in other places was through a formation of something called the Center for Court Innovation, a public-private partnership. At the time, the leader was John Feinblatt, a leader in this whole organization of problem-solving courts, and particularly the formalization and growth, and then of course the funding. Essentially, this became the R&D, research and development, arm of the court system. Shouldn't every large organization have a research and development arm? What a privilege for us to begin thinking about how we could do things differently and better with some innovators -- people who would think of places to test new ideas and actually watch them and see them grow, and that's what's happened at

KAYE

the Center for Court Innovation. [0:02:00]

I want to move to kind of step -- it's not step two, it's step one and a half, it's the drug courts. I have to stop.

(Pause in recording.)⁸⁸

JSK: We're on the problem-solving courts. We broke a moment ago because I had a cookie crumb stuck in my throat, and as I came back to this desk -- I say, I'm in the Skadden office -- I realize I have this scarf spread on my desk, which I should mention to you, because it relates not to problem-solving courts but to jury service. That idea got some traction, too -- juries and expanding jury service -- and we had all kinds of programs, jury summits and all, and this wonderful young Japanese lawyer came to them, and he would send me articles that he was writing. There was no jury system in Japan, but he wrote articles, in Japanese. I think they were okay; they'd usually have my picture. But he once came to the United States, not all that long ago, and he brought me this, so what you see here on the table is a gift from him. Ultimately, they did start some experimental jury program in Japan, and you've reminded me that I really should check back with him to see how he's doing.

So back to the Community Court. I told you about its growth and its spread throughout the State of New York and the United States and to other countries, and then one and one-half steps, not a whole two steps beyond that came the drug courts. It was at the

Community Court one day that one of the judges, a Rochester judge, came up to me and

⁸⁸ It can only be the break caused by a cookie stuck in my throat that intercepted the praise I wish to express for the Red Hook Community Justice Center. Plainly I was thrown off subject.

said what became my absolute four favorite words. Now you know my most unfavorable word is “pushback,” and I certainly heard that a lot and saw that a lot. But my four favorite words, especially from judges but from anybody, were, “I have an idea.”

[0:04:05]

I just loved hearing that. One day, I was at the Community Court and Judge John Schwartz⁸⁹ from Rochester, who was visiting the Community Court, drew me aside and said, “I have an idea.” And the idea that John had was not a brand new idea. I mean, first of all, are there any really new ideas in the world, and second of all, do we need a *new* idea? We just have to take something and make it work. And John’s idea was drug courts. I don’t know whether he had gotten on to this through the work that was being done in Florida through Attorney General Reno,⁹⁰ who really pushed this in Dade County. But Florida -- but John had gotten into his head the notion of drug courts.

When you think about it -- we were dealing with prostitution, we were dealing with chain snatching, we were dealing with fare-beating in the Community Court, but essentially it was often drug addiction. So these drug courts were not a whole step away from the community courts, but they were a little bit of a step away from the community courts, and so drug courts, my goodness, those are now just all over the place.

The federal government was extremely supportive at the beginning in getting us off the ground with our drug courts, but I had the privilege just this year of visiting John up in Rochester. It’s amazing, the year 2011, he’s still doing it with just an enormous sense of

⁸⁹ John R. Schwartz, Judge of the Rochester City Court, 1984-2013.

⁹⁰ Janet Wood Reno, Attorney General of the United States, 1993-2001.

satisfaction, and he's attached onto these up in Rochester, and so have many other places, mental health courts, another variety of problem-solving courts, where the problem in this instance that needs to be solved is that there's a need for mental health services. [0:06:03] There's a need for mental health services, but the person and the life of the person and the family of the person suggest that these mental health services would be better administered in a home setting and not in a prison setting. The person doesn't need to be incarcerated in order to get mental health services. So the mental health courts are yet another step in this process of turning the prism a bit to see when court interventions, working collaboratively with domestic violence advocates, with the psychiatric community, the social workers -- when can the court intervention be a moment of positive, constructive time in the life of a person, to reroute a person from prison? Do we really need to grow our prison statistics? Our prison statistics are really pretty shameful for the United States of America. We're incarcerating huge numbers of people at great expense -- human expense and financial expense. Isn't it a much better idea to put our time and efforts into thinking collaboratively with other people about how we can possibly make a positive change in a person's life -- that incarceration is not the answer, and for many people incarceration is a very bad answer, because they emerge lifelong criminals rather than rehabilitated human beings.

So that is the general area of problem-solving justice, and that, Robert, is the idea that drives problem-solving justice. The idea to me made so much sense and I've seen very good statistics. The Center for Court Innovation is very careful about learning from

KAYE

success and learning from failure. Both are very good proving grounds, although you'd rather have the former than the latter. [0:08:09]

But maybe best of all is when I visit somebody like John Schwartz and I sit in his courtroom and I watch what he's doing and I say, "Bravo, bravo." But that takes a very special judge, one who doesn't just fold his arms across his chest and say, "Not my job," which some people do, and those are not the right judges for these courts. But fortunately, there are a lot of others who say, "Yes, this is my job. This is my responsibility, too, and my opportunity." And that, in short, is the story of the problem-solving courts.

RM: In your discussion of the jury, you alluded to another innovation when you mentioned the reluctance of businesses to appear in the state courts. How did you solve that problem?

JSK: The reluctance of -- ?

RM: I'm thinking of the Commercial Division.

D. The Commercial Division

JSK: Oh, yes, okay. Well that's a whole other chapter and again, very much connected to my former life. I spent 21 years as a commercial litigator. I say, fortunately, my life was enriched by a lot of public service activities, a lot of bar association involvement, but the core of my professional life was as a lawyer for big companies. I think I told you the story -- I know I did earlier -- of the corporate executive who resolved a case with a stipulation that he'd never have to come with that party, ever appear in the New York State Supreme Court again. Clearly, there was a call, a cry for some kind of change. I told you earlier that I spent the larger part of my trial advocacy time in the federal courts. [0:10:00]

The federal courts were the logical place to go with complex business disputes. If you got pulled into the state court, the first thing you would do as the defendant's lawyer is get out your papers to remove to the federal court, because you didn't want to get stuck in the state court system, not because of any -- nothing about the judges, fine judges and staff. The facilities, regrettably -- the feds are far ahead of us. They have much more beautiful facilities generally than we do. But the problem is the size of the dockets in the state courts -- huge. I mentioned more than four million new filings a year. Huge, huge, huge dockets of every imaginable kind of case.

Now these commercial cases are very demanding on their own. It's not just the numbers. I used to think, like, a million dollars was a lot -- ten million. Now I see at this law firm we're into billions, we're into hundreds of millions -- you know, the numbers are very large. The numbers are large, the papers are huge, and they're very pretrial oriented. Very often these cases settle. I think the numbers are probably high into the 90 percents that they settle. But before the moment of settling, there's a lot of anxiety, a lot of tension, and a ton of paper. A lot of motions, a lot of discovery, depositions, document requests. To drop a few of those cases into the midst of a judge's docket that maybe has several hundred cases on it already, that's a really difficult balancing act. And so that was on the one hand very discouraging to the corporate community, as I gave you that one example. On the other hand, for me as the brand new Chief Judge, that was a real challenge and something that was very high on my list. [0:12:06]

Again, fortunately, you don't need new ideas. Just take the ideas around and wring

everything out of them that you can. Chief Judge Wachtler had initiated four commercial parts in the Supreme Court of the State of New York that would be devoted to these big commercial cases. Talk about pushback -- wow! "These people should get special treatment? Give me a break. *We* should get special treatment -- the disfavored, the people who had more difficult lives, the poverty-stricken people, the children. You don't need to put more resources into helping companies. That's just wrongheaded." Surely true -- both sides.

But the special commercial courts had gotten a little lift and we built on that -- the example of the commissions and task forces or whatever they're called -- and organized a bench-bar group, and actually Judge Milonas was there and had a big hand in it. But many of the leading great corporate litigators of this city and state stepped up to bat and within a short time had introduced the idea of a Commercial Division of the Supreme Court of the State of New York. If you see today, I have right on my bookshelf there, I have an eight-volume treatise that Robert Haig edits and oversees and we all contribute to. Eight volumes on commercial law, and overwhelmingly in the state courts of the State of New York. Pretty breathtaking when you think about just the state of things in 1993. Again, a good idea, very cautiously, wisely, circumspectly built on. [0:14:02]

I've told you a little bit about pushback, and would like to mention one unforgettable day to me -- I think there was an Administrative Board meeting at the time. This is the way the court system is organized, by the way -- the Chief Judge as the chief executive officer; the Chief Administrator or Administrative Judge as the chief operating officer; and then the

Administrative Board, which consists of the Presiding Justices of the four Appellate Divisions throughout the State of New York.

I think we were in a meeting the day, I got a message from a group -- I'm not going to identify what part of the state they came from. It was a petition signed by all of the Supreme Court judges of that particular area saying they had heard about this Commercial Division and they wanted me to know they would have no part of it; that they thought that more attention should be given to other things. They simply would not be part of it, period, thank you, signed by every single one of them.

Now, the Presiding Justice of the Department where those judges were located was there at the time. I said, "I'm going there immediately; I'm going there tomorrow," and he or she said, "I will accompany you," and I said, "No, you will not; this is between me and them." I went. We had our meeting the next morning and I think we got things cooled down. But this will just give you some sense of what it's like to get things off the ground in the State of New York for the Chief Judge -- in good times. And they were.

E. Family Reforms, etc.

RM: Well, speaking of good times and successes, we've talked about your decades-long interest in children. Tell us about your work with adoptions.

JSK: It's so interesting that you should raise this today. I know you plan to get back to this, but one of the great things about my being at this law firm -- at Skadden, Arps -- is the support they give me in every conceivable way, including facilities, to pursue my interest in children. [0:16:13]

The past two days, part of the day has been consumed with meetings of groups associated with my current endeavor, which is to keep kids in school and out of courts. I may have mentioned earlier, we're working toward a nationwide summit, March 11 to 13. This centers on education, and it centers on adolescents. Our commission has evolved into the belief that -- while we could intercept at every moment in a child's life going back to conception, because you need good prenatal care -- we've kind of centered on adolescents. It's what I describe as a last clear chance to keep kids from falling into the abyss of prison, lifetime incarceration, and all sorts of terrible things.

So I've been convening these groups, and I have to tell you that coming to Skadden, Arps for these meetings, where the facilities are beautiful, where there's lunch and cookies and all that, it lends a dignity to the entire undertaking that I could not replicate if I were, for example, down at 25 Beaver Street. Kind of nice to have this. People come and they give their attention and they know that this is a very serious endeavor, because of what it is and who they are, but the facilities help too. [0:18:06]

Here we are talking about keeping kids in school and out of courts, just yesterday the discussion got started around social security numbers. Many of these kids don't have social security numbers, they don't have birth certificates, they don't have citizenship papers. They don't have essential things that they need to have and I said, "Wait a minute. You know, we were talking about this 10 years ago, 15 years ago, in little groups. We called it "Adoption Now," and I remember these very subjects -- you see the same subjects. Regrettably, they just keep recurring and recurring, and you never can turn your

KAYE

back on anything. But they reminded me, and you now remind me, of the focus back then on getting kids early permanency, in establishing deadlines, when things should be done, not letting things drift.

I remember we accumulated all the statistics on the time that it would take to move adoptions along. In fact, one of these pieces of glass here is an Adoption Excellence Award, because of the fact that did indeed speed up permanency in adoptions. [0:20:00]

RM: As I recall, the Adoption Now effort reduced the number of children awaiting adoption and awaiting permanency by a tremendous factor.

JSK: Absolutely. We really put the spotlight on doing these things and, as I recall, as we had those graphs and timelines and all that, it was getting something to court, where that was just interminably long, and then dealing with the court issues separately. But the real problems were behind the courts, and as I'm looking at the little award, it's the Department of Health and Human Services, and it's that greenish-colored thing there, which I probably should give back.

RM: You established a research and development arm of the courts, as you mentioned. A judicial education arm?

JSK: Yes, and that, of course, is another huge problem for judges -- just to keep up with a radically changed world. Since we're talking about children and youth, just to give you a specific example to illustrate the importance of training, I am just flabbergasted -- talking about adolescents and all -- in the science of brain development, adolescent brain development. Unbelievable. I just stumble into it in almost everything I pick up these

days, because it's tremendous. I know the Second Circuit, the federal judicial system, had its annual conference, in June, and it was focused on the new brain development research.

[0:22:12]

Now, I'll linger there for a moment to tell you why judicial training is so important. It's great the scientists are doing adolescent brain development research; I think it's just wonderful. What we draw from it is that -- I mean my grandmother could have told you anyway -- is that kids' brain development is different. Adolescents are different, right? So I'm thrilled that we have all these scientists now and all this funding, all this wonderful, great brain development research. But isn't the key issue, what are we going to do with it? How do we put it to use for the adolescents, and especially these very deeply troubled adolescents on the skids to lifetime incarceration? How do we put that brain development research to use?

I was thrilled when I read recent Supreme Court opinions -- Supreme Court of the United States -- the juvenile death penalty case, the juvenile life without parole case; there was a juvenile *Miranda* case just a few months ago. I was thrilled to see them citing the new research. What are *we* doing with it? How does it affect the, I don't know, hundreds of thousands of adolescents we are seeing in the courts? How do you connect one and two? I'm just dealing with the issue you put on the table of judicial training. How do the judges -- the judges have to be brought up to snuff on the existence of the science, all this behavioral science, which is a problem in and of itself. It's not in the *Law Journal* every day. [0:24:00]

And second of all, how do we find the ways to connect all of this knowledge to what's actually going on in society and in the court system? We were lucky enough several years ago -- we worked hard to get it, but in the end it was very good fortune to have a Judicial Institute on the campus of Pace University Law School up in White Plains, where we can bring people to have forums -- we can bring people to have educational forums. Just staying with the brain science, we can bring scientists and judges from other states who are figuring out how to deal usefully with all the research, to show judges what can be done. And we can have a forum simply for our own judges to convene on a regular basis, on an irregular basis, to exchange their experiences and to learn what new things they're doing. So I think the Judicial Institute was an enormous step forward in the history of the court system and I feel really good about it.

RM: You mentioned a few of your commissions. Are there other commissions?

F. And Everything Under the Sun

JSK: Oh, my goodness, over the years that I was Chief Judge it was the way to accomplish reform, and there were just so many commissions. Probation, I guess would -- Probation with Senator John R. Dunne,⁹¹ and I think that branched off into Juvenile Probation. Indigent Defense, co-chaired by Judge Burton B. Roberts⁹² and Professor William E. Hellerstein.⁹³ There are just so many of them. I loved the work. Well, the drug courts, of course, we had Bob Fiske heading the -- I think we called it a task force. And so long as

⁹¹ John R. Dunne, New York State Senator, 1966-1989; Chair of the Task Force on the Future of Probation in New York State, 2006-2008.

⁹² Burton B. Roberts, Justice of the New York State Supreme Court, 1973-1998.

⁹³ William E. Hellerstein, Professor of Law, Brooklyn Law School, 1985-__.

KAYE

I'm focusing on the firm of Davis Polk, where Bob Fiske is located, it makes me think of Carey Dunne, who is also a partner there, and he headed a commission on the structure and organization of the state courts. Were you on it? [0:26:07]

RM: No, Indigent Defense.

JSK: Indigent Defense -- also a great group. But when the commission that Carey Dunne was chairing completed its work -- as I've just told you with John Dunne's commission -- he asked if they could please continue to look at the subject of Town and Village Justice Courts. So instead of just handing me a fabulous report for which I could say thank you, they asked if they could please continue to study yet another problem -- Town and Village Justice Courts. Not as much a problem as an opportunity to do better, to reorganize, to save money, to have a much better system, and they handed me that report, too. And we had a terrific commission on small firm and solo practitioners chaired by June Castellano.

RM: The Feerick Commission.

JSK: Oh, my goodness, the Feerick Commission on judicial elections -- yes, great commissions. But what I want to say generally about all of them is that they all yielded reforms that we were able to implement in the court system. But even more, every one of those reports is a resource of incalculable value. There's no way, for example, that Carey Dunne's commission has finished its work, even though the commission may have turned in its report, because the problem of the structure of the New York State court system continues to be such a vexing one. The fact that we have this ludicrously splintered trial-level system, it just makes no sense at all. [0:28:00]

I come back to the Town and Village Justice Court Report. So many of those courts could easily be consolidated, which would be an enormous source of savings. So I emphasize not just the past, for what reforms these commissions have enabled, but also the future about what a gold mine they are for future Chief Judges.

G. September 11, 2001

RM: On a more somber note, you were Chief Judge when the planes hit on September 11th. Tell us about that.

JSK: Yes. Well, that, of course, was -- I would put that among the most tragic times that I had as Chief Judge, as judge, as human being. I was in Albany. The court was in session on September 11, 2001, Tuesday, and we were having a nationwide -- certainly statewide -- Access to Justice conference that was scheduled for that evening at the Desmond Hotel in Albany. I was the speaker -- to be the speaker. I was in my chambers that morning when we got the news. In fact, it was my law clerk Jennifer Schecter -- now Judge Schecter,⁹⁴ I'm so proud to say -- she came rushing into the room. I had a little, tiny TV set; she turned it on to show me it. [0:30:01]

The first plane had just gone into the tower, and then the second and, my goodness, the world changed. That is an unforgettable day in the City of Albany, that moment, that day, that evening, when we went ahead with the Access to Justice conference. Everybody just wanted to be together. And what on earth I said that evening, I'll never know. It certainly was not a speech that I had prepared. I mumbled and stumbled about something, but

⁹⁴ Jennifer Schecter, Judge of the Civil Court of the City of New York, 2010-__.

everybody wanted to be together. They all came and stayed for the conference and then dispersed and we went home, but with the resolution that the courts would stay open -- the Courts of the State of New York. It was important for us to make the point that though we had one facility demolished at the World Trade Center -- the Court of Claims -- though we lost three court officers, valiant court officers who rushed to the scene, though many, many of our family members -- meaning our court staff, court officers -- that they had so many of their own family members who were unaccounted for in a time of great sadness; that so many papers were lost -- there were 1300 lawyers who had their business address listed as the World Trade Center -- so many people just devastated. It was an important statement for us to make -- that the court system of the State of New York, right in the shadow of the World Trade Center, was open for business and would remain open for business. It was important to say that the justice system continues and the terrorists are not closing us down. And it was an especially important time for so many of the families and survivors of the victims who were totally at sea. They needed death certificates, they needed access to insurance, they needed all sorts of help. [0:32:12]

There were emergency applications -- they needed all sorts of help -- that they looked to and trusted the court system of the State of New York to give them, and we determined to give it to them. Not just the judges in the courts, although that was a decision Judge Lippman and I made together, but the Bar of the State of New York -- just incredible, incredible. They just stepped right up with "What can we do?" The bars of our neighboring states -- Connecticut, New Jersey, Pennsylvania. I remember meeting with

them at the time, and the forever unforgettable meeting at the City Bar Association, when I was there to meet with our neighbor states representatives. A call had gone out to the bar for training, because, I mean, we don't really know what to do in terms of getting the necessary papers for people and rendering whatever pro bono assistance we can to people who are so devastated and need court help.

So a call went out for training at the City Bar Association and while I was in a meeting with representatives of our neighboring states, I was called out of the meeting by Maria Imperiale. I just remember this so well. Maria came into the room and said, "Could you come out for a moment and just say a few words to the people who have come from the training session?" Well, I couldn't. I was totally speechless, because they filled the meeting room; they filled the stairwell all the way down to the outside of the City Bar Association; they filled the street outside the City Bar Association. It was just an unbelievable, an unbelievable showing of the character of the Bar of the State of New York, and that went on; that went on. [0:34:00]

There were all kinds of rules that needed to be changed and statutes of limitations had to be extended. There were emergency applications; there were all kinds of papers. There was so much court-based work that needed to be done. And at one point a facility was set up at the pier, right on the Hudson River, which was open probably around the clock. It was a place to grieve and there was a place to consult an attorney. I mean, it just was an utterly comprehensive response -- every kind of information you needed you could get there. I remember visiting there every now and then and just being, on the one hand, so

KAYE

utterly, personally devastated, and, on the other hand, being so utterly, personally proud of what I saw in the way of public service. Why can't we replicate that today? But that's for another day.

It just was an amazing turnout, to see the Bar of the State of New York, and, of course, the judges -- everybody doing everything they could. The court officers -- everybody wearing black armbands for the loss of their beloved colleagues. It was really quite a time in the history of our court system. The amazing thing was that I was speaking that -- there was a conference that met here -- incredible that there were two organizations that were scheduled to hold their nationwide conferences here that week of September 11, or shortly after that. Imagine, all that was going on here and, in addition, the danger. It was not as if the horror was all that we had. We also had continuing danger, and they both decided that we're coming anyway. [0:36:06]

One was the National Association of Women Judges, and the other was the Appellate Judges Conference. I remember addressing them and, you know, just having a lot of trouble getting through my remarks, but that's probably the most published article I've ever done. Everybody wanted a copy of it. Everybody wanted to be part of what was going on here, part of helping to make things better. So I'll never want the subject to pass without mentioning Tommy and Mitch and Harry, who were our three court officers who raced to the scene. I remember Mitch was just coming out of the subway to report to work -- he raced to the scene and those three court officers were never found. Sgt. Mitchel Wallace, Sgt. Thomas Jurgens and Capt. Harry Thompson. Really, really tragic.

KAYE

RM: As Chief Judge, you came to know all the other Chief Judges from around the country, and Chief Justices. You were part of the Conference of Chief Justices, and ultimately its president. What are your memories of those experiences?

JSK: Well, this will tell a whole tale, if I tell you about the Conference of Chief Justices, and I hope some time you will allow me to say a word or two about women generally. We talked about my being the first woman on the Court of Appeals, and I guess with Anne, prior to this, we talked a little bit about women and women lawyers and all, but when I reached the Chief Judgeship on the national scene, it's another re-creation of the women's issue all over again. [0:38:04]

That was the year 1993, when there were very few women Chief Justices. The top judge is called Chief Justice every other place but Maryland, the District of Columbia and New York, where they are called Chief Judges. It was kind of a re-creation again, because there were possibly one or two other women Chiefs at the time. I remember Ellen Ash Peters⁹⁵ in the State of Connecticut. We may have been the only two. And I'll say as a footnote that here I am back in what I call the real world of lawyering, and doing some international arbitration. You know it's almost like a juncture again for women, and we are in the year 2011, so I don't want to finish this without saying something about women, but I will stay with the subject of your question because it's a very good question.

The Conference of Chief Justices is a nationwide organization of the state Chief Justices.

I think we actually count 56, because we count not just the 50 states, but also the District

⁹⁵ Ellen Ash Peters, Chief Justice of the Connecticut Supreme Court, 1984-1996; Justice, 1978-1983.

of Columbia, Puerto Rico, Guam and the Northern Mariana Islands and the Virgin Islands. (I'm missing one.⁹⁶) Fifty-six in all and I say, back in 1993 maybe there were one or two other women; it was all male. They meet in person twice a year. They meet at a mid-year meeting, which is in November, usually in D.C. or at the headquarters of the National Center for State Courts, which is in Williamsburg, Virginia, and once in the summer they're hosted by one of the states. We've hosted them here once, in New York City, and that was a great experience to have them here -- all the Chief Justices in New York. It's a great organization. [0:39:56]

But if we go back to those first days when I was among the only women there and it was an overwhelmingly male organization, I will never forget, maybe it was -- it was not the first year, so it wouldn't have been the 1994 meeting; it was probably the 1995 meeting. I had gotten to know them a little bit. My late husband Stephen and I customarily went in the month of July, I've told you earlier, to Europe, to Switzerland, rented a house, and read and worked and hiked and traveled and toured, so it was paradise. I've called it paradise. And when we would come back, usually on a Friday or a Saturday, the very next day I would leave New York City for the summer conference of the Conference of Chief Justices, when all these people would assemble -- overwhelmingly male people, usually with their wives. My late husband and I had just had a lovely vacation and he was a very busy trial lawyer. He would not accompany me when I went out to the Conference of Chief Justices, which I assumed was a work experience. I looked upon it as social and

⁹⁶ American Samoa.

pleasurable, spending time with the Chief Justices, learning about things they were doing.

But essentially this was a business conference with a business agenda.

I kind of got a little bit of a shock. My initial years in that organization were not really pleasant years, because I guess the first time I earned some kind of negative was at a meeting when we were doing a business part and I was looking at the financials. We always paid our dues and the dues are stiff. But I looked down the list of all the states and some of the states -- you know, states get assessed dues based on their population. Some of them were not paying their dues. And I remember raising my hand in a meeting and saying, "Could this be true, that only some of the states pay their dues and not all of the states?" -- and that started a bit of a fuss. [0:42:11]

In retrospect, I guess I could have handled that a bit more collegially, but it just hit me as I sat there that it couldn't be true; I must be misreading the financial statements. But I wasn't. And today everybody pays their dues. It was in retrospect a very good step -- but it didn't earn me popular points at the time. I remember an outcry from some of the states -- "Our legislature won't let us do it" -- and I said, "Well, neither would ours if they knew that there was an option not to pay." I never thought there was an option not to pay. So that was one great "plus" for me. And the other one was that I got upset that these people would take time in the middle of the week to do a lot of touring. No, that's not what we were there for. I thought we should start the meetings early in the morning and get our business done. Again, in retrospect, I am not proud of how I handled this.

I remember the then President of the Conference of Chief Justices -- I remember his name

KAYE

but I won't repeat it, the Chief Justice of New Hampshire. He, in a rather public place, told me off and said that you have to learn how to relax and you know -- it was like "pushy New Yorker kind of person." So it took a couple of years to get through that and I ultimately got to be the president of the organization, so all of those things we worked out. I think about at least a third of the organization today is female Chief Justices. So I think a lot of the change in the conference is the men and a lot of change in the conference is the women. But I can tell you, my first years, I didn't look forward to being with them, and my last years, I greatly looked forward to being with them -- greatly. [0:44:05]

We had just enormous benefit from the organization, from the National Center for State Courts, but it took time. It took time. As I look back the good things totally overwhelm the bad things. But unforgettable for me are those first years as one of the very few female Chief Judges.

Chapter 7: Courthouse Renovations and Other Innovations

RM: And I know that also unforgettable for you, Judge, was the renovation at the Court of Appeals.

JSK: The renovation, yes, yes. Well, I guess it was Judge Wesley who one day placed on the table at the Conference Room -- this is Richard C. Wesley I'm talking about, a Judge -- much-loved Judge of the Court of Appeals, who left us for the United States Court of Appeals for the Second Circuit, the federal court, but permanently we all are bonded together, forever bonded together. [0:46:03]

The Judges of the Court of Appeals are not really heavily involved in the day-to-day administration of the courts. Their focus is the judicial piece of the business of the court system. The Chief Judge reports regularly to the Judges; that's a separate agenda item, where the Chief Judge will bring them up to date on major initiatives in the court system -- just informational. Some of the Judges are appointed to important task forces and commissions. I've told you about mine on children, appointed by Chief Judge Wachtler. Judge Graffeo⁹⁷ spends enormous amounts of time on the bar admission activity, which is a responsibility of the court system. Judge Ciparick was the head of the State-Federal Judicial Council, appointed by the Chief Judge. Judge Jones⁹⁸ is working on a just wonderful diversity initiative. Judge Read -- I remember all of our court lectures that we had at the Court of Appeals, that was really Judge Read who led that.

⁹⁷ Victoria A. Graffeo, Associate Judge of the New York State Court of Appeals, 2000-2014.

⁹⁸ Theodore T. Jones, Jr., Associate Judge of the New York State Court of Appeals, 2007-2012. Judge Jones passed away in November 2012.

So they have some individual responsibilities but they're not responsible really for the day-to-day court administration. But one day, when we were mired in administrative items -- and maybe I was reporting on statewide court construction, I can't remember, because that's high on the list of the Chief Judge and the Chief Administrative Judge -- Judge Wesley said, "You know, somebody ought to take a look at *this* facility, because we are sorely in need of some help here at the Court of Appeals." [0:48:08]

And wow, that bell went off in my head, because the last time the Court of Appeals -- anything was touched there was in the 1950's. Think of just the new technology demands and how we would even accommodate those, let alone staff and space demands. It was really time to take a look at spiffing up this great Court of Appeals of the State of New York. So this became a serious project and the first difficulty was definitely we needed more space. Originally, when I arrived at the Court of Appeals in 1983, the top floor of the building -- the building has three floors and a basement -- the top floor of the building was occupied by the State Reporter. We moved the State Reporter out years and years earlier and filled the top floor with library space and Central Staff court space and all sorts of other things that the Court needed, but still we were really cramped. We were not being able to comfortably do what we had to do.

So we found an architect and decided that we would seek permission to enlarge the building. The building itself is magnificent. Everybody should go to see it. It was constructed in the nineteenth century, probably about 1835, '37, something like that.⁹⁹

⁹⁹ 1842.

It's a Greek revival form of architecture, but an absolutely beautiful building, constructed as a state office building. [0:50:07]

The Court of Appeals began in the year 1847. I've told you about the Constitution of 1846, which said, "There Shall Be a Court of Appeals," but the Court of Appeals didn't move into that building until 1917.

So here we are on one of my all-time favorite subjects: the Court of Appeals generally, of course, but the Court of Appeals Hall, which is at 20 Eagle Street in the City of Albany. It's absolutely the most beautiful courtroom anywhere, and I've been to courtrooms in many states and in many countries. Ours is not the biggest, it's not the most ornate. But it is the most beautiful, absolutely the most beautiful.

We had some architects up; we had -- you know, I started a public lecture series, because you've heard me say, from time to time, how sad I am that the public doesn't know more about our great court system. And after the renovation -- and I'm going to get back to the question that Robert has posed to me about the renovation. When the construction was complete and we had more space, I looked around one day and thought, "Wow, we can invite the public in, and we should invite them in -- not just lawyers who have cases to argue, but the public should come see this place." And so we started a lecture series, which regrettably has run into hard times given the budget situation. One of my absolute favorite lectures was called "The Shape of Justice: Court Architecture." We had two great architects, Paul Bayard and Harry Cobb. Harry, in particular, but Paul, too -- Harry came

up to Albany and he spent weeks researching the courtroom and everything about it and its history. [0:52:08]

Harry described courtrooms as a balance between humanitarianism and authoritarianism. You want both. You want the courtroom to project the authority of the law -- I mean, after all, we are human beings sitting in judgment of human beings, and so why should anybody listen to us? What we project in our courtrooms -- it's such an important part of our message and yet it has to have a humanity to it, as well. We don't want something huge and overpowering and all gold and marble. We don't want to be overpowering in that sense. I know no better place, no better balance of both of those elements than our courtroom. Harry's words just captured it all, and he used the word "modest" when he described our courtroom.

Now, if you looked at the size of it, good grief, it's certainly large enough, but the truth is, it's modest. The Court of Appeals began in the year 1847, under the Constitution -- the People's Constitution of 1846 -- but it didn't start at Court of Appeals Hall. It started -- the sessions of the court started in the State Capitol. It was part of the State Capitol, which houses other branches of our state government. And it was a room -- just a single large room. And the question became how that room should be decorated; who should the architect be? [0:54:00]

There were two leading architects of the day. One was Leopold Eidlitz, and the other was H. H. Richardson, and there was a battle between them as to who should be the architect for the State Capitol. They ultimately divided the baby, and Richardson got part and

Eidlitz got part. I am so grateful that Richardson got the part that houses the courtroom of the New York State Court of Appeals. Now I'm talking 1840 -- you know, going back to the beginnings, because it was just a room in the Capitol that was the Court of Appeals room, but what Richardson did was so beautiful. It's all hand-carved oak from floor to ceiling, and the ceiling, too, and an ornately carved bench that circles around the advocate. The Judges are on the bench and it kind of circles around the advocate a little bit -- the lawyer making argument. The lawyer stands, as I said before, eye level to the Judges, and it's all this beautifully carved oak.

The Court of Appeals didn't move into Court of Appeals Hall until 1917. That's when it went to its current building at 20 Eagle Street, which was erected decades earlier, as I've told you, as a state office building. But in the year 1917, the keys were handed over to the Chief Judge and it became Court of Appeals Hall. What's so wonderful is that the great Richardson courtroom that was located across the street in the Capitol, was disassembled and carried over to Court of Appeals Hall and completely replicated at Court of Appeals Hall. So we have that beautiful courtroom that Richardson designed. Now the ceiling stayed behind in the State Capitol but was mocked in, so what we now have is a plaster ceiling, but it looks just like the oak walls. [0:56:01]

It's got a fireplace -- what's called an inglenook. It's not a working fireplace, but you can sit in it and every now and then I did sit in it. There's a certain intimacy and warmth, and it's not a working fireplace as I've mentioned, so there's no warmth coming from the fireplace. A beautiful floor-to-ceiling, almost, clock. "Modest" is the word. It's large

enough, it's grand enough, it's all of those things, but it's overwhelmingly beautiful and modest, and that is the courtroom.

Now Robert has asked me about the renovation, and I told you that Judge Wesley laid the idea on the table, which immediately, around the table, made enormous good sense, and fortunately we were in a time when we were able to do the renovation. It would be sad -- had that come up today, I think automatically the answer would be, "No, we can't do it; we don't have funds for our business, let alone to bring our facilities up to snuff." But, my goodness, if you can't have a beautiful facility -- and I mean "beautiful" in the sense of modest and well maintained -- at the highest court of the state -- I mean, you should.

So we embarked, in the year 2002, on the renovation of the courthouse. It had a slow start, because definitely we needed to enlarge the building, and that ran into pushback. I mean is there anything -- there is nothing -- there is not a single thing I can remember during all my years as Chief Judge that didn't have pushback. But there was very serious pushback from the historic-preservation people about enlarging a building erected in the 1830s -- a beautiful white marble building. Not so much matching the marble, which I'm sure was a concern of theirs, but the building, as I've told you, is this Greek revival style of architecture and it is a perfectly symmetrical building, and what we were proposing was to make it asymmetrical, and that did not meet with favor from the historic-preservation people. [0:58:19]

Now, I was told that we could go back and pursue it and overcome their resistance and on and on and on, and I did not want to start the renovation project over the goodwill of the

historic preservationists; I have enormous respect for them. And so we didn't push them and we didn't sue them and we didn't do all kinds of things, but ultimately they came around and they said they would approve an asymmetrical structure. So we went ahead and in many places -- talk about nightmares. There were many sleepless nights -- seeing this building taken down to brick, it was really scary. We moved the Court off premises, which was a great decision, and by that I mean the everyday working part of the Court -- we found an off-site facility where the Judges could have offices and the staff could have offices. We did keep the courtroom open the whole time, because our thought was never to interfere heavily with the courtroom itself -- to keep it as beautiful as it was, to update the carpet from 1958 to 2002. I mean, that was a long time for that carpet; it got a lot of wear and tear. The draperies were looking pretty sad. It needed to be spiffed up. The chandeliers -- the truth is it was hard to see. We had 12 chandeliers, small chandeliers, and still it was pretty dim in the courtroom, so we did need to give a little attention to the courtroom itself, but it wasn't as frightening as taking the rest of the building down to brick. [1:00:08]

What we did in some parts is simply add to the structure. We added one-third to the structure of Court of Appeals Hall -- one-third -- I think about 30,000 or more square feet. So the building became asymmetrical, and some of the exterior parts of the building actually became interior parts -- what are now people's offices. They have some pretty interesting walls that for all the decades between the time the building was built and 2002, 2003, was the outside of the building -- that became the inside of the building, and we

have a new outside structure. Matching marble was found. In fact, the historic preservationists -- the message that I got back from them was that they preferred to see differences, and this, I think, is a shift in thinking among historic preservationists, too -- that rather than hide differences and try to meld things, let's just be bold about it. So the framework of the windows is different, if you look closely. The color of marble, we pretty well matched. If you go by quickly, you won't know the difference.

But let me tell you, it was something, and it was something I really enjoyed. And if I skip to the bottom line, I'll tell you, when people come to visit the Court who have long connections with the Court of Appeals, they say, "Nothing has changed, everything is the same," and that to me is the ultimate compliment. It means that we preserved intact that really breathtakingly beautiful court building, but there were lots of aggravations along the way -- lots of aggravations along the way. [1:02:00]

One thing I wanted to do absolutely, because I noticed from the first time I got there -- I don't know if it relates to my gender or not -- all different wild colors all over the place -- I wanted there to be a coordination of all the colors. Oh, and the most important thing, and what I really hungered for -- instead of having five Judges' chambers on the second floor and two Judges' chambers on the third floor, I wanted all seven Judges' chambers to be on one floor -- to encourage the free flow among chambers, clerks and all of it -- just instead of -- you know, there was a little isolating factor being up on the third floor. I kind of felt like I had graduated when I moved down to the second floor. We're seven equals -- nice to be on the same floor.

We coordinated the colors -- ivory, red, navy blue, and green -- and the remarkable thing was, we got color packets and let the Judges pick which color packet they wanted. Two picked red, two picked navy blue, and two picked green -- fantastic! -- so we had that full array in chambers, but some of the things are unforgettable.

I will never forget, since we did get new draperies after 50-some odd years, I'll never forget receiving a package at home on the weekend -- like, FedEx or something like that, which contained several different drapery fabrics. I was to choose the texture. I was to choose how tight the texture was to be -- the texture of the fabric that they were weaving with the seal of the State of New York. If I picked a very tight weave, then I'd get a nice sheen on the draperies, which I wanted, and it was very nice. If I picked a loose weave for the fabric, then I would get a very nice swag -- you know, the drape would fold very nicely. That was one of the hardest decisions I had to make. [1:04:06]

I remember the light fixtures -- we had an issue about the light fixtures. Not the ones in the courtroom so much, because they are very beautiful, and what we did was returned to the original style of the light fixtures. There was originally one central light fixture in the original courtroom that was located in the Capitol Building, and we now have six of them, and the courtroom is decidedly brighter for lawyers, for the Judges, for the public. So that was a very good thing to do. And by the way, we threw nothing away. Only 11 of the 12 old fixtures could be reused. One of them became feeder for some of the things that needed to be replaced.

We threw nothing away, unlike the 1958 revision, where, regrettably, they discarded the

beautiful Richardson desks. They had somebody carry them away -- I don't understand how that happened -- and so instead of all seven Judges having them, I think one or two or possibly -- two of them, I think, remained -- maybe three. Can you imagine carting off those desks? I can't imagine carting off anything. We kept everything; we kept everything. But in the other rooms, the architects had picked some light fixtures. When I went through and saw them one day, my heart broke. I thought they were just not suitable. They were fine, they were beautiful, but not for the Court of Appeals. I remember the architect who came with me -- the unforgettable line he said, as I was just going on and on about how we couldn't keep those. His line was, "They only look cheap." I thought that was just an amazing line. They definitely did look cheap, but we had the luxury of their not only looking cheap but also being expensive. [1:06:00]

Fortunately, we were able to utilize them in other courtrooms. They were perfectly beautiful fixtures, but they were ultramodern fixtures and they just didn't fit in Court of Appeals Hall. But this just gives you a small idea -- you asked about the renovation -- of some of the trials and tribulations between 2002 and 2004. Titanium roof or steel roof? I mean, these are things that became important for the Chief Judge -- to get into the various pluses and minuses. I've told you about the draperies. Even picking the form of the seal that we put there -- I was involved in all of those things -- very happily.

RM: You mentioned the Judges' desks and it reminds me, in your own chambers as Chief Judge, your desk had some history.

JSK: Yes, my desk has some history. Everything you've asked me is evoking a day-long

answer from me, for which I apologize, but as you can see, these subjects are all very, very dear to my heart. The sidetrack you've taken me down now is that I wondered, when I sat in my original chambers, which of the Judges had preceded me there. When I moved into the Chief Judge's chambers, I wondered which Judges -- I knew Judge Wachtler had been there, I knew Judge Cooke had been there, but just wanting to know some of the history of the Court of Appeals. The remarkable thing is that we're so bound to precedent, we look to precedents. We want to keep the law within the precedents and stable and progressive and all of those things, but we never did anything about our own history, not our Court of Appeals history, not our state court history. From time to time, I would pick the books off my shelf and they would have notations in them; they'd have handwriting in them. Whose is it? I mean, I would never dream of putting a mark in a book, but there were markings in the books. [1:08:07]

Fortunately, I had Judge Rosenblatt there with me for some years, and one thing led to another thing led to another thing, and we celebrate today the Court of Appeals -- the Historical Society of the Courts of the State of New York. And I have wonderful Marilyn Marcus right here alongside me, and this is a project of the Historical Society, but we for so long just ignored our own history and knew nothing of our own history.

So I'll get back to the question you've just asked me about my own chambers and the furniture in my chambers. I've told you, I never have resolved the question of whose handwriting is in some of those books, and I think I did see the name Cardozo on some of the books, and I think probably I had the books that he had. The story that comes to mind,

KAYE

and I think the one that's probably on your mind, too, is actually Judge Wachtler's story, which is such a wonderful story, because surely the desk that I had in my chambers -- that's one of the Richardson desks that was not carried away. It just breaks my heart to think that somebody carried those desks away.

I'll tell you the Sol Wachtler story first, and then I'll add one other thing. The Sol Wachtler story is that -- I think it was his wife who walked into the room shortly after he was sworn in as Chief Judge, and he said to her, "Can you believe fifty years ago this was the desk of Benjamin Nathan Cardozo?" And she said, "And 50 years from now it still will be the desk of Benjamin Nathan Cardozo." Which, of course, is absolutely the truth. But the little story I want to add is the touch that I added as a woman, and that is that I put three bottles of red nail polish into the top left-hand drawer, and that I am sure Benjamin Nathan Cardozo did not have. Everything else in that desk, yes, he probably had analogues to them. [1:10:01]

RM: You mentioned, as Chief Judge, having the responsibility for courthouse facilities throughout the state. Do you want to speak about that a bit?

JSK: Well, that was another function -- the facilities throughout the State of New York -- with huge pluses and minuses. I spent a lot of time on this. I've told you my theory, my idea, that our courthouses should not be palatial -- they shouldn't be -- but they should be dignified, they should be clean, they should be in good repair, because what we're really reflecting is the dignity that the process deserves and the dignity that the people deserve who come into the courthouses. If you have a shabby, neglected courthouse, what are you

saying about what the process is, and what are you saying about the people who come into the courthouse seeking justice? Regrettably, too often, our courthouses just don't get the attention that they deserve. We did a pretty good job of maintaining our facilities. When I became Chief Judge -- I may not have the date exactly right, because this is not one of my achievements, although I think probably Judge Lippman had a big part in this, but it could have gone back to Judge Wachtler. I can't exactly fix the date, but there was a time when the counties not only owned the buildings, the courthouse buildings, but also had the responsibility for maintaining them. Yes, I think this was during my tenure as Chief Judge, when we were finally successful in transferring the responsibility for maintaining the courthouses from the local counties to the State. The State took over responsibility.

[1:12:03]

And again, to give you one tiny example, in the courthouse at 60 Centre Street, which probably has thousands of people a day, I think we got maybe once-a-week maintenance when this was under the care of the City and there were hard times. Always there are hard times, but what comes first when you strike the list? You know, just take a building like the courthouse. So there would be garbage around and what a pity to see that. That building was erected in the year 1927, so neglect from 1927 -- that showed very, very seriously in what should be one of the splendid buildings. Again, not ornate, not palatial, but just a building that tells you that we respect and care about the law and justice. So that underwent, first of all, a massive change when the State rather than the City of New York took control of the day-to-day maintenance of the building. But then we did undertake a

significant repair project there and at various places around the State of New York, and maybe what gladdened my heart the most was to see some of the Family Courts, where, you know, we had really degraded facilities. Queens, New York County, and some places upstate, we began to get some traction on our arguments that we needed to improve our facilities, our courthouse facilities. And so we had a very rigorous program for grading up the courthouse facilities and, thank goodness, it came a few years before the really major hit. Maybe the most spectacular one we have is the Jay Street building in Brooklyn.

[1:14:02]

Again, you know, just enormous pushback. I think it was actually our neighbors. I haven't been out there lately to visit. I do remember one session, now that I think about it. It's interesting how one thing leads to another. Rudolph Giuliani¹⁰⁰ was the Mayor at the time and for years we had planned this beautiful facility -- again, not palatial, but really something that would accommodate the tremendous business in the courts of the County of Kings. We were to have close to a million feet of new space, so this is not trifling. As things got closer -- we had everything planned and everything ready to go, when the business community rose up in arms. The business community, over the years, had taken a huge interest in -- and you see the change there, in the area of the Jay Street Courthouse. They just gathered forces and appealed to the Mayor of the City of New York not to allow the courthouse to be put there, because the traffic in and out of the building would be Family Court and criminal stuff, and that was just inconsistent with the upgrading of the

¹⁰⁰ Rudolph W. Giuliani, Mayor of the City of New York, 1994-2001.

neighborhood.

What they did was to put together a plan. This was really very well thought through. They found one dozen alternative sites out of that neighborhood to locate that courthouse, and they put the plan to the Mayor. Judge Lippman and I went down there for a meeting with the Mayor. We sat at a round table much like the table we're at now, and they presented their alternative sites. This was a powerful community of business interests -- bankers -- and much to the credit of Mayor Giuliani, he listened very carefully and he said, "I promised. They had my word." So we got the building, and that was scary. But I'm proud of the maintenance of our courthouse facilities to date.

JSK: I'm just going to tell three little building stories and then we're going to move off courthouse renovations and constructions, because, honest, we could spend forever. It's a subject very dear to my heart.

I'll tell you first about -- well, you know of my interest in children and families and Family Courts, so two of the three buildings I'm going to tell you about are Family Courts, although all three relate to families and children. The first is the story of the Queens County Family Court, which was an unusually shabby building -- unusually shabby -- and we have many shabby buildings. But this one was really bad, and I remember we were planning a renovation of the Family Court in Queens, when one day I visited with the then Borough President, Claire Shulman. We were riding up in the elevator and the elevator got stuck. We ultimately obviously got out, but it was sort of symbolic of the building. I think it's one of the courthouses that was not originally a

courthouse -- that was, like, a library that the court system took over, which is not a good start. And we have other facilities like that that we could talk about, like the Civil Court in Kings County, but let's stay with the Family Court in Queens County. [0:02:03]

We completed our tour, Claire Shulman and I, and Claire Shulman said to me, "Honest, Judith, why are you renovating this building? This building is awful. Why don't you get a new building?" Well, okay. I can't remember any other executive saying that to me, but it didn't take more than a minute to accept that offer, and we proceeded with the Queens County Family Courthouse, which is very, very beautiful. But I want to linger a moment on that, because I remember so well our time building it and dedicating it and all of the above and again, dealing with the architect. I remember the words he said to me that forever stung and stuck in my mind, as he was so excitedly taking me through the building and showing me that the central concept of that building: the building is organized around "beautiful waiting areas." I will never, never forget that. To me that was such a challenge. They are beautiful, and they are full, as the waiting areas always are in our Family Courts, regrettably, because the calendars are so huge.

That seemed so sad and so tragic. I was happy that he did it. There are windows that look out on park areas and there's commodious space -- families can gather there while they're waiting for the interminable calendars. But it saddens me to think that a courthouse has to be designed around waiting areas. I just wish that were not so, that our backlogs were not so great, that the needs of the families were not so great. Waiting is not what you should be doing in a courthouse. So I'll just mention that because it's sad. [0:04:00]

On a happier note, the courthouse in Manhattan, 60 Lafayette, the Family Court -- it had sort of a fortress, if you wanted to be kind, prison-like look. I cannot imagine whatever led people to do that for a Family Court, so off-putting, this dark kind of marble façade with tiny windows -- really, really prison-like. And I was thrilled when the day came that we could do a major renovation down there. Obviously, we weren't going to take down the building. But the look of the building was not a good message for a Family Court, which should be open and inviting to the families that have to be there. Today, 60 Lafayette looks a lot better than it did before the renovation. I could go on and on, but I said I was going to tell you a final story.

So I've told one kind of sad -- they're all happy, because we have better buildings, but the third one is kind of a mixed note, and that is what's called the Tweed Courthouse, which does bother me every time I go down to City Hall. The Tweed Courthouse was erected as a courthouse. Now, I've told you about a Family Court building that was put up as a library, and then we occupied it, and the Brooklyn Civil Court, which was an office building, and then we occupied it. It's just not as good. A courthouse has special design needs, and functions best when a courthouse is designed as a courthouse. The Tweed Courthouse is a courthouse. The Tweed Courthouse was designed as a courthouse. It stands as a courthouse. Regrettably, Mayor Bloomberg¹⁰¹ decided not to allow us to house the Commercial Division of the Supreme Court there, as I had hoped he would, but to put his very top priority there, and that was the Department of Education. So today,

¹⁰¹ Michael R. Bloomberg, Mayor of the City of New York, 2002-2012.

KAYE

what is genuinely a courthouse, and is designed as a beautiful courthouse, functions as the situs of the New York City Department of Education. [0:06:11]

I'll end on that note, because otherwise we could be here for days. Already, so many other facilities have cropped up in my mind, so I encourage you strongly, please, to ask me another question, before I go off on one of those.

RM: There are so many projects you started or were involved with, Judge. I'm going to mention just a couple and maybe you can tell us a bit about what they are and your involvement with them: Fair Trial/Free Press.

JSK: That was started by one of my predecessors, Stanley Fuld.¹⁰² That would have been many decades ago. An excellent project -- appealed to me tremendously, especially as a journalist. I've talked to you and mentioned my sadness that there is not greater public consciousness about the courts, so if I've described that as a disappointment and a sadness you can imagine how utterly devastating it is that we can't get the interest of the press in really knowledgeable reporting of our courts. [0:07:12]

If you break your leg, you can get an article. I once had a tattoo that somebody put on me, just at a Liberty game -- something you could wash off. And that got in the paper. It has to be something kind of absurd or something that really hurts people. And if it's really hurtful, you can even get on the front page. At one point in the *Times*, David Margolick did a column called, "At the Bar." Really good, really good, but we never got that kind of sustained coverage. Yes, the Supreme Court of the United States, the rock stars, yes, they

¹⁰² Stanley H. Fuld, Chief Judge of the New York State Court of Appeals, 1967-1973; Associate Judge, 1946-1966.

do get coverage. But overwhelmingly, the business of the people is carried on in other courts and it's just not important enough for the press, unless somebody breaks a leg, or commits a gaffe.

But anyway, this idea, started by Stanley Fuld, was to bring together journalists, judges and lawyers around issues of free press, and it was a very successful enterprise. We did it once a year; we had a great symposium, very actively endorsed by Harry Rosenfeld, who was at the *Albany Times Union*. Harry really -- goodness, I even remember his telephone number (518-454-5450). So that was going for a long time, with the very active support of the *Albany Times Union*, and then Rex Smith, who stepped in for Harry Rosenfeld.

Rex stepped in as the editor. And so we, every year, would gather around a hypothetical, and we even got to holding these sessions at a beautiful center at NYU Law School.

Judge Rosenblatt and I would kind of conspire and work these things out, and at the end of each one we would say, "Yeah, I think that gets maybe a B-plus, maybe an A-minus."

They were good, lively discussions. [0:09:15]

Then too, I traveled to the Constitution Center, in Philadelphia, where the Annenberg Foundation supported a program for journalists in constitutional law. I think it was a very good idea to do this program -- it honored my friend Peter Jennings. It took a lot of effort and somehow we've sort of slipped in the past year or so. But we should go back to it, we should, because it was a very nice opportunity to exchange views with journalists and while we would do it in New York City, we even had thought for a while of branching out to other parts of the state and ran a counterpart in Syracuse once with the help of the

KAYE

Syracuse paper. So each thing like this takes a lot of effort and in a time when the courts are so stressed, putting the effort into something that isn't related to the disposition of the dockets of cases -- it's very hard to get that going.

RM: I'm sorry to move completely off track, but you mentioned Fair Trial/Free Press traveling around the state, and you've reminded me of the few occasions when the Court of Appeals went on the road.

JSK: Absolutely, and that was a real treat, because the Court of Appeals has its beautiful home in Albany and traditionally has sat only there. The Court, as a court, gathers only there and the official business of the Court is done only there, but if you're just thinking parts of the state, they -- I've told you that even Albany Law School students don't come to the Court.¹⁰³ You can imagine in other parts of the state, in Buffalo, out on Long Island, you know, and all around the state, that the Court would be unfamiliar except for the few special cases that would impact them. So at one point, we made a decision that we would go on the road. Once a year, we would go on the road, and that met with enormous success. [0:11:23]

I'll never forget the time we were in Brooklyn, at the Borough Hall, and I remember the line to get in went all the way down the stairs and out the door. We've never had that in the City of Albany, but we've always had a tremendous reception when we come. We try to pick the cases that relate particularly to that part of the State. The Court visited each of the Departments, even when I was the Chief Judge. I don't know whether they're

¹⁰³ Albany Law School now has a course through which students attend arguments at the Court of Appeals.

KAYE

still traveling. This is just another one of those instances where the impact of the budget, it just hits so hard that you stop thinking of things that in any way add to the expense. And it was an expense to go. I don't mean travel expense. I mean moving the business of the Court someplace else -- that was an effort. So anything that adds pennies these days, when people are losing their jobs, and when people have to clear out at 4:30 and finish their business. There's just a disinclination and it's so -- I guess the word is dispiriting; it's very dispiriting. And if you're on the dispiriting subject, and I know you're planning to ask me about it, it's salaries. Talk about dispiriting and talk about tragedies. I mean, there you've got something that was a real punch in the gut for the New York State Court System, the salary issue, and for the Chief Judge.

Chapter 8: Judicial Salaries: A Punch in the Gut

I've spent a good deal of time describing the design of our system of government, the importance of the independence of the Judiciary. I cannot imagine that the founders, the framers, the drafters of the Constitution, could ever have conceived that things would go so awry in the State of New York with respect to its regard for its own Judiciary, to have what happened happen. Let's see, I was Chief Judge 15 years -- overwhelmingly, the years I was Chief Judge were clouded, scarred, deteriorated by the salary issue, really so sad that we were treated with such disdain by our partners in government. [0:13:57]

Just to give you the nub of it and not to -- well, maybe the best thing I could do is to tell you about the *New York Times* on July 20, 2007. This will kind of capture the whole situation. Here we are, supposed to be an independent branch of government, treated fairly, treated with respect -- nobody goes on the bench to be rich, but you do have family; you have to eat and live and family to support. That day, I forget the day of the week it was, but July 20, 2007, engraved in my mind, because we battled all through the 12 Pataki years and with Governor Spitzer, as well. The issue didn't arise with Governor Cuomo because, periodically, the judges had received raises. What would happen is that every few years, the Legislature would give the judges a raise, which was cover for their getting a raise, and we did get one in those early years with Governor Cuomo. But there was that solid, locked-in linkage, and that newspaper that day says it all. It's the front page; it's the right-hand lead, and you don't need to be a journalist to know that that's the news of the day. The right-hand lead of the newspaper July 20, 2007 announced that a

KAYE

deal had been struck between Governor Spitzer and the Legislature of the State of New York -- that was the lead paragraph -- for the most comprehensive ethics reform since the end of Watergate. And the article went on and on and on to describe the great success of Governor Spitzer in achieving this ethics reform. Still on the front page, toward the bottom of the column, was a quote from Governor Spitzer saying now that he's gotten from the Legislature the most comprehensive ethics reform ever, he's prepared to consider raises for the Legislature. [0:15:55]

Now the subtext of that is that if the Legislature could get a raise at last -- the Legislature couldn't get a raise from Governor Pataki, couldn't get a raise from Governor Spitzer unless, unless, unless, unless -- but if the Legislature would get a raise, then the judges could have a raise, too. Is that any kind of sensible system? Does that make a bit of sense? Robert, does that make a bit of sense to you?

RM: No.

JSK: Well, needless to say, though it was the right-hand lead of the newspaper, announcing that a deal had been struck, and though I did in fact receive telephone calls the day before, both from Governor Spitzer and from the Speaker of the Assembly, Shelly Silver,¹⁰⁴ saying, "See, we got you the raises," it didn't in fact happen. Finally, you know, all that complaining and all that. And Shelly Silver said to me, "I told you I wasn't going to let him leave the room without a handshake on the raises. We got the raises." So the deal was, the Governor got campaign ethics reform; the Legislature got its raises; and yes, you

¹⁰⁴ Sheldon Silver, Speaker of the New York State Assembly, 1994-2015.

judges, down there in the pits, you can have one, too. Well, needless to say, maybe it escaped notice, but the Legislature wasn't in session in Albany on July 20, 2007, and the Legislature never voted the ethics reform that Governor Spitzer was celebrating on July 20. And therefore, the Legislature couldn't get its raises, and therefore, the judges couldn't get their raises. End of story.

And I think that kind of encapsulates what went on for the 12 years before when, on innumerable occasions, Governor Pataki would bring the house down -- of judges, you know, applauding wildly -- how great, how great, how great -- because he always was for raises for the judges. But there was a dot-dot-dot that wasn't part of his formal speech, which was, ". . . but no raises for the Legislature." And as long as there would be no raises for the Legislature, there would never be any raises for the judges. So that's what happened to us for 12, 13 years, with an absolutely frozen salary. Judicial salaries were hardly the end of the world to begin with. [0:18:14]

And I must say, in the holiday season of 2011, there was what I celebrated as a miracle. It was the final days of Governor David Paterson.¹⁰⁵ We had proposed a commission. Judge Lippman and I had proposed a commission. That was obviously the sensible thing to do -- to take this out of the hands of the Legislature. It can't be that you get raises only if we get raises. It can't be.

RM: You just said 2011.

JSK: Yes, in the closing days -- oh, 2010, I'm so sorry, the end of 2010 -- just in the final days

¹⁰⁵ David Alexander Paterson, Governor of the State of New York, 2008-2010.

of Governor David Paterson, when this commission system went into effect. So now, we have the structure. There was the first round. There's now a commission every four years, an independent commission, there's provision for an independent commission that will meet every four years to consider the issue of salaries for the judges, independent of issues for the raises for the Legislature. And what they decide will be the law -- what that commission decides will be the law -- unless it is affirmatively overridden by the Legislature. So, I say, I celebrated it as a miracle of the holiday season and I hope that in fact it proves to be one. But at least we have the prospect -- we have a ray of sunshine -- that we are released from the horrors that the judges had to endure for all these years. And I want to be certain not to end this story without giving enormous credit to Bernie Nussbaum and the firm of Wachtell Lipton which represented us pro bono in fierce and effective litigation that helped achieve this result.

RM: Do you want to mention JALBCA?

JSK: I'll mention JALBCA, because we are in the month of October of 2011, and October, among other things, is Breast Cancer Awareness Month. JALBCA stands for Judges and Lawyers Breast Cancer Alert. And maybe this just shows the total range of amazing opportunities one can have as the Chief Judge of the State of New York. We were terribly distressed, at some point many years ago, by news that seemed to be gaining momentum of so many of our colleagues diagnosed with breast cancer. And the question -- and it was Judge Sondra Miller¹⁰⁶ who raised it with me one day: Isn't there something we can do to

¹⁰⁶ Sondra Miller, Associate Justice of the Appellate Division of the Supreme Court in the Second Judicial Department, 1990-2006.

raise awareness of breast cancer? [0:20:40]

We convened at the Harvard Club, about a dozen of us, and that was the start of JALBCA. Today, my goodness, it would take me another hour to tell you about JALBCA. We're meeting at the end of this month -- always in October we meet. We have a symposium, sometimes at the City Bar Association. Last year we had it at Sloan Kettering. We've had it at both places, focused on a law issue. It's a panel of judges and, whatever the subject is, experts. It could be insurance law, it could be environmental law, it could be privacy law, employment issues. These are all legal issues and the judges question the experts about these issues. Dr. Larry Norton and I preside over the panel, as I expect to do on October 31st, at the City Bar Association, for which continuing legal education credit is given, because it is a legal education subject, although people come not to hear me or the panel. They come to hear Dr. Larry Norton, one of the great physicians and great breast cancer specialists who does State of the Medicine. It's kind of State of the Medicine and State of the Law.

But I think, in order to be thematic about this, Robert, there is something thematic about this -- all of the things that you're asking me, and especially, outrageous as it may seem, to be talking about breast cancer when you're talking about the history of the Court of Appeals and the tenure of the Chief Judge of the Court and of the State of New York, I think one thing that the Chief Judge is able to do is to convene people around a good idea, to convene good people around a good idea, serious people, any sort of reform. I know you yourself are involved -- you're an appointee to the Criminal Procedure Law

KAYE

Committee. Whether it's courthouse construction or whether it's a Family Court task force or -- you know, or whether it's how we can be instrumental, as we are, in raising awareness of breast cancer, including, I might say, having mammogram vans at the courthouses during the month of October, where we have thousands of people every single day. We now have mammogram vans that are paid for as a result of these JALBCA dinners and other contributions from private citizens. [0:23:39]

Or we can convene around adoption or -- how many subjects have we discussed? It's the power to think hard and convene people around issues that need attention. I think that is probably the thematic and unique quality for the chief executive officer of the state court system.

RM: Before we leave the subject of the Court of Appeals and the tenure of the Chief Judge, obviously judging is a very serious business, but can you tell us a little bit of the lighter side of life at the Court?

JSK: Oh, goodness. Well, I've told you there was always such good spirit and good humor, and I'm sure you've gotten a taste of it as we've gone through these various subjects. I'll just give you one story. I guess we could do hundreds of stories, but the one that pops immediately to mind, which is the one I'll stay with, is that at these -- you know that we would have dinner together every night, the seven Judges of the Court of Appeals, and when there was a birthday, sometimes we'd get a little cupcake or something and everybody would sing, "Happy Birthday." But Judge Titone -- and there are any number of wonderful, funny stories that could be told about Judge Vito Titone -- Judge Titone

KAYE

discerned that at Jack's -- and we frequently went to Jack's -- they would bring a whole birthday cake if it was somebody's birthday. So you just never knew, you were always at risk -- and they must have gotten onto it at Jack's -- but I mean there were years that I had five or six surprise birthdays at Jack's. We all did -- you know, you'd have to look surprised as the cake was brought over and everybody, the waiters and all, would sing, "Happy Birthday." But they had to have known that we were getting more than one birthday a year. That's just one tiny story and there are so many I could tell, because I've told you about the joy of it and I think I will leave it at that. [0:26:02]

Chapter 9: The After-Life

RM: What have you been doing since you left the Court?

JSK: Well, here's what happened to me. I made a conscious decision that I was not going to spend one minute of my time as Chief Judge thinking about what I would do when I was no longer Chief Judge. Does that make any sense? Because also, it was important for me, given the death of my husband, that I leave no time between the end of my tenure and the start of anything else I was going to do. I think had Stephen been alive -- obviously, we would have traveled. I didn't want to travel alone. I would have consulted with people about next steps. I can't say I didn't spend any time talking to people, because I did reach out to maybe one or two people, but I didn't want to make it a big deal. I wanted to be Chief Judge to the very last minute. If I had any alternative, I thought maybe it would have been the Obama Administration. I certainly thought of something in public service, which was the natural next step. I did put out a couple of feelers through my friend Marian Wright Edelman, but I don't think the Administration was up to children in its first days. They've certainly gotten into those issues now, more than two years later. Also, my friend Ellen Schall put me in touch with a foundation lady, a very nice lady in her seventies, and I only mention her age because she said to me, "You're too old, forget it." Those are her exact words and she was a foundation headhunter, so that was a pretty credible evaluation.

Meanwhile, I had lived in law firms for 21 years before the bench, and I reached the point as Chief Judge when every time I picked up the phone and it was a law firm, they said,

“And by the way, don’t do anything without talking to us.” So I knew, I just knew there would be lots of law-firm opportunities, although I didn’t imagine that as my life. And I did speak to one or two that were especially dear to me, either because I had been there before or because my late husband had been there. But Skadden said, in effect, “Come here and do what you want to do,” and boy, that was powerful -- that was a really powerful invitation. Not that I really knew what I wanted to do. The only thing I was sure of is that I didn’t want one minute to lapse between the time I closed the doors behind me at my chambers and started work the very next day. That was just to be the formula -- no downtime. [0:28:56]

So I showed up at Skadden I guess, it’s just about a little over two years ago. They’ve been very welcoming and very nice to me and I’m now living in the law-firm world, which I have to tell you surprises a lot of people, as it surprises me. I said, had I thought more about it, I’m not sure this is what I would have done. I think it was a very fortunate thing for me to come here, for a place in the universe. When you’re a Justice of the Supreme Court of the United States, you get stationery that says, “Retired”; you have your chambers at the courthouse; you have your staff; you can sit at other courts. I read about Justice Souter¹⁰⁷ sitting all over the place, and Justice O’Connor is fantastic. I’ve just read Justice Stevens’s¹⁰⁸ book. I mean, it’s just a whole different thing. When you leave as Chief Judge of the Court of Appeals of the State of New York, boom, it’s over.

¹⁰⁷ David H. Souter, Associate Justice of the Supreme Court of the United States, 1990-2009.

¹⁰⁸ John Paul Stevens, Associate Justice of the Supreme Court of the United States, 1975-2010; Judge of the United States Court of Appeals for the Seventh District, 1970-1975.

And, as I have used the expression several times, the slate is wiped clean. All those wonderful bar association and Legal Aid activities and all that stuff I did before I went on the Court, when I was Chief Judge, I wasn't about to do any of those things. So you arrive in a firm like day of birth, right? In a new universe. Today, it's not like you can wander down the corridor, go in to your neighbor's office, and put your feet up on the desk and talk about the Rule against Perpetuities (or some such issue), like I used to do in my old life. That's not how law firms work today. Everybody is on the computer and so everything is much more technical.

So how has it worked out? The line that I use, and think about a lot, is when I call to ask the Skadden firm how much I owe them, which I do frequently because of private car service or postage or things like that, I think the correct answer is, a lot, a lot, a huge amount. Because while it's taken me a long time to find and fully get into this new life, it's okay. Better than that, it's good. I'm in the world of arbitration, and there's a lot to do in arbitration, especially for women in the new world of international arbitration.

Remember I told you about where I was in 1962, when I entered the profession, and in 1993, when I became Chief Judge. I think in the world of international arbitration, women are kind of a new entity there too in many ways. I've been very fortunate also to have been called upon by officials to help in investigations that have gotten some publicity, some you know about and some you don't know about. [0:32:09]

But what I really want to tell you about, what to me has made such a huge difference and makes me so especially happy, is that Skadden has enabled me to pursue my interests in

KAYE

children and education and adolescents, the things I really thought in the abstract that I would do, in a place -- Skadden, Arps -- that is immensely supportive of pro bono and pro bono initiatives. And I have been very happily working on a number of projects in the field. And I have to tell you that being in this place, bringing people here, it adds a dignity -- I think I mentioned this before -- to the project that I'm very happy to have. You know, I have wholehearted support of the firm -- firm support in every respect. So while there's been a bit of reflection and waffling and the ups and downs of being in a new universe and a new life, and knowing, absolutely knowing that there can never be anything on earth to replicate my years as a Judge of the Court of Appeals, let alone my years as Chief Judge of the State of New York, please be assured that I have a real good life. And I am very grateful for it.

RM: You mentioned the arbitration; you've mentioned a little bit about the school justice initiative you're working on. I don't know if you want to say a little bit more about what that is and how that's working.

JSK: Well, I think what I feel good about right now is that first of all, this has been a tremendous interest of mine through the Permanent Judicial Commission on Justice for Children. I told you we changed our lens from zero-to-three to adolescents, as a kind of a last clear chance, and the Commission has been working on projects around adolescents. And lo and behold, the sea has changed around us. I think it's just so terrific that I pick up the paper every day and I see a task force on out-of-state placements for young children and how damaging that is. I see the State of Texas, which has 900,000 pieces of data on

KAYE

children from the seventh grade through graduation and beyond about the effects of school discipline on children. I see this with brain research on adolescent children. It seems to me that the air is alive with interest in reaching out to adolescents to keep them out of our prisons, out of our courts. You know, the only way you get to prison is through the court, so when I say keep them out of prison -- nobody goes voluntarily. So keep them out of the courts; keep them in their schools. Let's figure out what to do with them after that, but keep them in their schools. And it's very exciting to me that as we have been pursuing this path, that it's just bubbling all around us, to the point where a foundation actually reached out to me. I still am not comfortable raising money -- it's something I never had to do as a judge -- and they came to me to say that they would fund a nationwide summit. And I think they see what I've told you I see about my life as Chief Judge, which is my ability to convene the most knowledgeable people, dedicated people, to do something really important about this issue. [0:36:00]

And I've just thought of something else about my life today which is immensely pleasurable for me, and that is I am a Director of several institutions, maybe most notably Lincoln Center, which is in my neighborhood and in my heart. And what fun it is to go up to Lincoln Center and be part of the very exciting atmosphere up there.

RM: Do you want to say a bit about the investigations that are known?

JSK: I guess there are three investigations that are known. The most recent was the investigation concerning the domestic violence incident that surrounded the last days and months of Governor Paterson's tenure. It was then Attorney General Cuomo, now, of

KAYE

course, Governor Cuomo,¹⁰⁹ who asked me to head up that investigation, which I did with his office.

Before that, I think the investigation was on behalf of the Working Families Party, which was under some difficult scrutiny, even to the point of some involvement of the U.S.

Attorney's Office, but all of that ended well for the Working Families Party, or at least for the moment has ended well for the Working Families Party. You never know what lies ahead.

And then maybe what consumed the most time of the three, and the first public one that I can talk about, was the investigation on behalf of State University at Binghamton, involving the basketball crisis -- the basketball team. So those are three that I was pleased -- to be helpful. In fact, ironically, that took me into the world of adolescents, or at least older adolescents. But those are three that I did. [0:38:12]

RM: So you're doing arbitrations, you're doing investigations, you're setting up justice initiatives, and you're also doing litigation.

JSK: Yes, some of that as well.

RM: And an interesting case in Nassau County?

JSK: Oh, that is an interesting case in Nassau County, yes, which involves the -- that's been in the press, so again I'm not revealing anything private -- but it involves a financial control board that was established by law. So if your point is, life is full, I guess so. But when you think that I described my old life as 80 percent Chief Judge of the Court of Appeals and 80 percent Chief Judge of the State of New York, I need to fill 160 percent of the day.

¹⁰⁹ Andrew M. Cuomo, Governor of the State of New York, 2011-__; Attorney General of the State of New York, 2006-2010.

KAYE

And I'm getting close.

RM: Judge, you identified your children in the last session. Do you want to take this opportunity to immortalize your grandchildren in the historical record?

JSK: Yes, I want to immortalize my children and grandchildren in the historical record. My daughter Luisa is a lawyer. In fact, if I alerted her right now -- we sometimes can move our shades up and down, because she's in an office with similar shades, diagonally across the street. She's a litigator, and she's on four committees, too, and leading a hectic life with her three children.

My granddaughter Sonja's 19th birthday is October 23rd, and I want to be sure to send off something today, because she's at Colby College in Maine; she's just started there. Today is the 20th, so if I put something in the mail it will get to Sonja in time for her birthday. Her younger sister, Andrea, is 17, and she's at the Hill School in Pottstown -- looking at colleges right now. And her brother, my one grandson -- the Prince, I call him -- he's here in New York City. He goes to the Calhoun School and we just celebrated his Bar Mitzvah in Israel. [0:40:15]

RM: That's Ben.

JSK: That's Ben. And then two daughters of my son Jonathan and his wife Nielufar -- Shirin and Shayna. They live in Philadelphia. In fact, the two little girls call me every morning: just the home phone, then the cell, then the office, until they reach me. Then there are the two in Illinois -- Amelia and Stella -- daughters of my son Gordie and his wife Anna. They are all the absolute light of my life.

RM: Thank you, Judge, for taking the time to share your memories with us. Yet another

KAYE

contribution to the many, many, many contributions you've made, and continue to make, throughout your spectacular and illustrious career.

JSK: Please let the last thanks be mine -- both for your patience, and for the extraordinary good fortune I have been privileged to enjoy.